Case No. 62357

IN THE SUPREME COURT
OF THE STATE OF NEVADA

BRYAN FERGASON, an individual,

Appellant,

vs.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a political subdivision of the State of Nevada,

Respondent.

District Court Case No. A537416

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Las Vegas Metropolitan Police Department's ("LVMPD") Answering Brief attempts to shift the burden of proof onto Appellant Bryan Fergason ("Mr. Fergason") to demonstrate that the funds contained in his bank account were not the proceeds of criminal activity. Nothing in Nevada's statutory forfeiture scheme places such a burden on Mr. Fergason. Instead, it was LVMPD's burden to demonstrate—by clear and convincing evidence—that the funds at issue were the proceeds of criminal activity. LMVPD failed to meet its burden.

Below, both LVMPD and the District Court relied solely upon Mr. Fergason's criminal convictions to find that the funds in Mr. Fergason's account were subject to forfeiture and to justify the imposition of summary judgment. However, the fact that an individual was convicted of a crime, standing alone, is not clear and convincing evidence that money in that individual's bank account was derived directly or indirectly from criminal activity. In fact, this Court has already held—under a less onerous preponderance of the evidence standard[1]—that forfeiture is not appropriate where the party seeking forfeiture adduces no evidence linking (i.e. tracing) funds in a bank account to criminal activity.[2]

On appeal, LVMPD makes numerous arguments that it failed to raise below and improperly attempts to interject new evidence in this appeal that is outside the

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[1] NRS 179.1173 was amended in 2001 to increase the State's burden of proof from preponderance of the evidence to clear and convincing evidence. 2001 Nev. Stat., ch. 176, § 1(3), at 750.

[2] *Schoka v. Sheriff, Washoe Cnty.*, 108 Nev. 89, 91, 824 P.2d 290, 291-92 (1992).

record of this matter. As detailed below, LVMPD's arguments fail. First, Mr. Fergason has standing to pursue this matter. Second, LVMPD failed to adduce sufficient evidence to meet its burden under Nevada Rule of Civil Procedure ("NRCP") 56(e) to show the absence of a genuine issue of material fact with respect to whether the funds contained in Mr. Fergason's account were proceeds of criminal activity. Third, because LVMPD failed to meet its initial burden, the burden of production never shifted to Mr. Fergason and he was not required to attach any evidence to his Opposition to LVMPD's Motion for Summary Judgment. Fourth, LVMPD's contention that this Court is bound by its decision in Mr. Fergason's criminal appeal under the law-of-the-case doctrine is misplaced; the law-of-the-case doctrine does not apply to different cases.

In sum, because LVMPD failed to meet its initial burden of production under NRCP 56(e), the District Court erred in granting summary judgment. Specifically, LVMPD did not adduce clear and convincing evidence linking the money in his bank account and his criminal convictions.

II. ARGUMENT

A. Mr. Fergason has Standing to Pursue this Appeal.

LVMPD contends, for the first time on appeal, that Mr. Fergason lacks standing to pursue this matter due to a purported pleading deficiency. (Ans. Br. at 18:2 – 22:3.) Specifically, LVMPD contends that Mr. Fergason failed to describe his interest in the money in his Answer pursuant to NRS 179.1171(5). (*Id.* at 18:10 – 20:9.)

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Where standing is challenged for the first time on appeal—where "there is no opportunity to cure a pleading defect"—an appellate court is not constrained to the pleadings and may "look to the entire record to determine whether any evidence supports" a party's standing. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *accord League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 529-30 (6th Cir. 2007) ("Now, as the argument is raised first on appeal, it would not serve justice to dismiss the appeal at this point because of a technical pleading deficiency, in the face of undisputed record facts confirming that plaintiffs actually do have standing and did have standing to prosecute their claims when the complaint was filed."). Moreover, the appellate court is to construe the pleading in favor of the party whose standing has been challenged. *In re A.C.F.H.*, 373 S.W.3d 148, 150 (Tex. Ct. App. 2012).

Here, the Court need not look further than Mr. Fergason's Opposition to LVMPD's Motion for Summary Judgment to determine that he has standing to pursue this matter. Specifically, in his Opposition, Mr. Fergason indicated that the funds in his bank account were from legitimate sources, including "the proceeds, and depository for the D & B Power Washing Company, and the capital used to fund and operate the company, as well as the proceeds of gambling, and also legitimate income, gifts and other monies in the lawful possession of [Mr. Fergason]." (Record on Appeal ["ROA"], Vol. 3, 665.)[3] On remand, Mr. Fergason could easily amend his Answer to include similar language to comply

[3] Hereinafter, citations to the Record on Appeal will immediately be preceded by the volume number (e.g., "3ROA").

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with NRS 179.1171(5). *See, e.g., Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1243 (11th Cir. 2000) (reversing district court's refusal to grant party leave to amend pleading to correct pleading deficiency with respect to standing).

In sum, where standing is challenged for the first time on appeal, courts may look to the entire record to determine if a party has standing; here, the record demonstrates that Mr. Fergason has standing and could easily comply with NRS 179.1171(5) on remand. *See League of United Latin Am. Citizens v. Bredesen*, 500 F.3d at 529 (rejecting standing argument based on pleading deficiency that "was not made below, at a time when plaintiffs could have moved for and been freely granted leave to amend their complaint to cure the defect."); *In re A.C.F.H.*, 373 S.W.3d at 150 (rejecting standing argument, based on pleading deficiency, which was raised for the first time on appeal). Moreover, where a challenge to standing is based on a technical pleading deficiency, a court should give a party leave to correct the deficiency. *See Stevens*, 215 F.3d at 1243.

B. Because LVMPD Failed to Meet its Burden Under NRCP 56(e) to Demonstrate the Absence of a Genuine Issue of Material Fact, Summary Judgment was not Appropriate.

As explained in the Opening Brief, "[s]ummary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (quoting NRCP 56(c)). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031. The Court

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must construe "the evidence, and any reasonable inferences drawn from it . . . in a light most favorable to the nonmoving party." *Id.* at 729, 121 P.3d at 1029.

The purpose of summary judgment is "not to cut litigants off from their right of trial by jury if they really have issues to try." *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993) (internal quotation marks omitted). The moving party "bears the initial burden of production to show the absence of a genuine issue of material fact." *Cuzze v. Univ. & Cmty. College Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). "The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial." *Id.* "If the moving party will bear the burden of persuasion [at trial], that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Id.*

Here, because LVMPD bore the burden of persuasion, it was required to "present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence" in order to obtain summary judgment. *Id.* As "[t]he plaintiff in a proceeding for forfeiture," LVMPD had to "establish proof by ***clear and convincing evidence*** that the property [was] subject to forfeiture." NRS 179.1173(3). Accordingly, LVMPD had to prove, by ***clear and convincing evidence***, that the funds in Mr. Fergason's bank account were "proceeds attributable to the commission or the attempted commission of any felony." *See* NRS 179.1164(1)(a) (enumerating property that is subject to forfeiture).

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In the context of bank accounts, this Court has held that a party seeking forfeiture must adduce evidence tracing the funds in the account to criminal activity. *Schoka v. Sheriff, Washoe Cnty.*, 108 Nev. 89, 91, 824 P.2d 290, 291-92 (1992). In *Schoka*, that state filed a complaint for forfeiture of a car and a bank account in the amount of $23,643.38. *Id.*, 108 Nev. at 90, 824 P.2d at 291. The state contended that the funds in the account were the proceeds of Mr. Schoka's "pattern of real estate fraud" whereby he would buy properties with assumable loans, collect the rent on those properties, and then fail to make the monthly mortgage payments." *Id.*

Although the "state called several witnesses who testified to fraudulent conduct on the part of Schoka[,] . . . [t]he testimony concerning the car and the account was . . . very limited." *Id.*, 108 Nev. at 91, 824 P.2d at 291. With respect to the account, the state did not produce any evidence that the "account was an instrumentality of a crime" or any "evidence which traced any of the funds in the account to any criminal activity . . . ." *Id.*, 108 Nev. at 91, 824 P.2d at 291-92.

Because the state failed to adduce evidence linking the funds in the account to criminal activity, this Court could not "conclude that the account was forfeitable as the proceeds of crime." *Id.* (reversing district court's order forfeiting property). Notably, the state's burden of proof in *Schoka* was a preponderance of the evidence as NRS 179.1173 was not amended until 2001 to elevate the state's burden of proof to ***clear and convincing evidence***—the hurdle which LVMPD must clear to prevail in this matter. 2001 Nev. Stat., ch. 176, § 1(3), at 750.

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Here, like the state in *Schoka*, although LVMPD produced evidence regarding Mr. Fergason's criminal activities, it presented virtually no evidence regarding Mr. Fergason's bank account. More importantly, like the state in *Schoka*, LVMPD produced "***no evidence which traced any of the funds in the account to any criminal activity*** . . . ." 108 Nev. at 91, 824 P.2d at 291-92 (emphasis added). Thus, LVMPD failed to meet its initial burden under NRCP 56(e) to establish—by clear and convincing evidence—the absence of a genuine issue of material fact as to whether the funds in Mr. Fergason's account were the proceeds of criminal activity. *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134.

As detailed below, LVMPD's attempts to justify the District Court's imposition of summary judgment fail. First, the District Court misapplied NRS 179.1173(5)—its sole basis for granting summary judgment—because none of Mr. Fergason's convictions were premised upon the funds in his bank account being the proceeds of criminal activity. Second, the vast majority of the evidence relied upon by LVMPD in its Answering Brief is ***outside the record***, irrelevant, and inadmissible.

1. The District Court Misapplied NRS 179.1173(5)—Mr. Fergason's Convictions do not Establish that the Funds Contained in Mr. Fergason's Bank Account were the Proceeds of Criminal Activity.

As explained in the Opening Brief, NRS 179.1173(5) provides that a party seeking forfeiture "is not required to plead or prove that a claimant has been charged with or convicted of any criminal offense" but that "[i]f proof of such a conviction is made, and it is shown that the judgment of conviction has become

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final, the proof is, as against any claimant, conclusive evidence of all facts necessary to sustain the conviction."

Below, rather than presenting clear and convincing evidence linking the funds in Mr. Fergason's bank account with criminal activity, LVMPD contended that Mr. Fergason's criminal convictions were presumptive proof under NRS 179.1173(5) that the funds contained in his bank account were the proceeds of criminal activity. (2ROA at 334-35.) In essence, LVMPD's logic under NRS 179.1173(5) is as follows:

> Mr. Fergason was convicted of felonies.
>
> Mr. Fergason had funds in a bank account.
>
> Therefore, the funds in Mr. Fergason's bank account are the proceeds of criminal activity.

LVMPD's syllogism is missing a crucial proposition necessary for its conclusion: any evidence tying the funds in Mr. Fergason's bank account to his convictions. *See Schoka*, 108 Nev. at 91, 824 P.2d at 291-92.

Moreover, the District Court granted the summary judgment *solely* as a result of Mr. Fergason's convictions:

> The Judgments of Conviction in the criminal cases have become final. The proof of the facts necessary to sustain the conviction are, therefore, conclusive evidence in this forfeiture action against . . . BRYAN M. FERGASON . . . and satisfy all elements of the forfeiture complaint.

(4ROA at 709.) The District Court's Order makes no other legal or factual finding to support its bare conclusion that the funds contained in Mr. Fergason's bank account were proceeds from illegal activity. (3ROA at 699-703.) Simply put, Mr.

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Fergason's convictions do not constitute "conclusive evidence" that LVMPD satisfied all elements of the forfeiture complaint because none of the convictions are linked with the funds in Mr. Fergason's bank account.

NRS 179.1173(5) provides that Mr. Fergason's convictions are "conclusive evidence of all facts necessary to sustain the conviction[s]." As detailed in the Opening Brief,[4] none of Mr. Fergason's convictions required the jury to find that the funds in Mr. Fergason's bank account were the proceeds of criminal activity. (*See* Op. Br. at 2-4.) LVMPD concedes that not one of Mr. Fergason's twenty-five counts for possession of stolen property involves the funds in Mr. Fergason's bank account—all the counts consisted of ***tangible goods*** like camping equipment, artwork, spa chemicals, and computers. (*See* Appellent's Appendix ["AA"], at 1-12.)

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[4] LVMPD misapprehends Mr. Fergason's arguments regarding NRS 179.1173(5) and issue preclusion—incorrectly contending that Mr. Fergason failed to raise such arguments below. (Ans. Br. at 22:4 – 24:2.) In essence, LVMPD is attempting to use NRS 179.1173(5) as a form of issue preclusion to contend that convictions establish that the funds in Mr. Fergason's bank account were the proceeds of criminal activity. (*See* Ans. Br. at 33:6 – 34:15.) The purpose of Mr. Fergason's comparison of NRS 179.1173(5) with the doctrine of issue preclusion is to demonstrate that LVMPD cannot rely upon Mr. Fergason's convictions to establish that the funds contained in his bank account were the "proceeds attributable to the commission or the attempted commission of any felony." *See* NRS 179.1164(1)(a) (enumerating property that is subject to forfeiture). Mr. Fergason raised this argument below in his Opposition to Motion for Summary Judgment and Other Relief ("Opposition") as follows: "None of the cited to allegations in the Complaint or Motion for Summary Judgment indicate that the amounts seized from Fergason's account were attributable to felonies allegedly committed by Fergason." (3ROA at 664.)

Thus, issue of whether the funds in Mr. Fergason's bank account were the proceeds of criminal activity was not relevant to any of his convictions—let alone a "fact[] necessary to sustain the conviction." *See* NRS 179.1173(5). Stated differently, none of Mr. Fergason's convictions required the State to prove that the funds in his bank account were the proceeds of criminal activity. As a result, LVMPD cannot rely upon Mr. Fergason's convictions as conclusive evidence that the funds in his bank account were subject to forfeiture.

In sum, the District Court misapplied NRS 179.1173(5). None of Mr. Fergason's convictions operate as "conclusive evidence" that the funds in his bank account are proceeds of criminal activity. What was necessary to sustain Mr. Fergason's criminal convictions and what is necessary to demonstrate that the funds contained in his bank account are proceeds of criminal activities are two separate propositions.

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a. LVMPD's Attempt to Rely on the Definition of "Willful Blindness" in NRS 179.11635 is Misplaced—it is Part of the "Innocent Owner" Defense.

NRS 179.1164, which enumerates the types of property that are subject to forfeiture, provides that "[p]roperty may not, to the extent of the interest of any claimant, be declared forfeited ***by reason of an act or omission shown to have been committed or omitted without the knowledge, consent or willful blindness of the claimant***." NRS 179.1164(2) (emphasis added). This provision provides a defense to innocent property owners who were unaware of (and not willfully blind to) the fact that their property is subject to forfeiture (e.g. the property is the

proceeds of criminal activity).[5] NRS 179.11635, in turn, defines "willful blindness" as "the intentional disregard of objective facts which would lead a reasonable person to conclude that the property was derived from unlawful activity or would be used for an unlawful purpose." Thus, the "innocent owner" defense is not available to someone who is willfully blind of facts that demonstrate the property at issue was used in, or is the proceeds of, criminal activity. *Compare* NRS 179.11635 *with* NRS 179.1164(2).

LVMPD attempts to turn the "innocent owner" defense into a sword, contending that the "District Court would have had to intentionally disregard [the facts highlighted in the Answering Brief] to side with Fergason's position." (Ans Br. at 35:13-16.) In essence, LVMPD is attempting to shift its onerous burden of clear and convincing evidence onto Mr. Fergason and make him prove the funds in his account are not subject to forfeiture. This argument fails.

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[5] NRS 179.1164 is modeled on The Anti-Drug Abuse Act of 1988, which amended federal forfeiture laws to provide that "[n]o conveyance shall be forfeited under this subparagraph to the extent of an interest of an owner, ***by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner***." *United States v. One 1983 Mercedes Benz 380SL*, No. 89-3123, 1991 WL 276262, at *2 (6th Cir. 1991) (emphasis added). This provision, which was subsequently amended, *see* 18 U.S.C. § 983(d), is commonly referred to as the "innocent owner" defense. *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 799 (3d Cir. 1994). Congress enacted the "innocent owner" defense to limit the government's "power to seize property that by all appearances was legitimate." *Id.* "For example, a landlord might forfeit an apartment complex if a tenant was caught dealing drugs from an apartment, or a father who had loaned his son the family car might lose it if the son were caught transporting drugs therein." *Id.*

Neither NRS 179.11635 nor NRS 179.1164(2) modify the burden of the party seeking forfeiture to prove—by clear and convincing evidence—that the property is subject to forfeiture under NRS 179.1164(1). *See* NRS 179.1173(3). Instead, if—and only if—the party seeking forfeiture ***first*** meets it burden demonstrating the property is subject to forfeiture, ***then*** a claimant may contest forfeiture on the basis that he or she is an innocent owner pursuant to NRS 179.1164(2). The definition of "willful blindness" has no bearing upon the fact-finder's decision as to whether the party seeking forfeiture has met its burden of proof to demonstrate, by clear and convincing evidence, that the property is subject to forfeiture. *See* NRS 179.1173(3).

Here, NRS 179.1164(2) is inapplicable to this matter. Mr. Fergason is not relying upon the "innocent owner" defense. Instead, Mr. Fergason contends that LVMPD failed to meet its burden to demonstrate—by clear and convincing evidence—that the funds in his account are subject to forfeiture. *See* NRS 179.1173(3).

2. LVMPD Cannot Rely—for the First Time on Appeal—on Facts that are Outside the Record, Inadmissible, Irrelevant, and do not Support the District Court's Imposition of Summary Judgment.

LVMPD's Answering Brief lists six "facts" which it contends constitute clear and convincing evidence that the funds in Mr. Fergason's bank account were the proceeds of criminal activity:

(A) LVMPD executed search warrants which led to the discovery of receipts showing Mr. Fergason's bank account;

(B) LVMPD seized various items from Mr. Fergason's Bank of America safe deposit box;

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(C) Mr. Fergason only had a job with a moving company for a few months;

(D) Mr. Fergason asked Ms. Trevarthen for advice about where to store cash and the types of accounts to use;

(E) This Court affirmed Mr. Fergason's criminal convictions; and

(F) Ms. Trevarthen would deposit cash into her bank account.

(Ans. Br. at 25:14 – 27:14.) LVMPD's attempt to rely on these "facts" to support the District Court's grant of summary judgment fails.

First, the vast majority of the evidence cited by LVMPD are excerpts of trial transcripts which LVMPD failed to adduce below. Accordingly, the newly-presented transcript excerpts are ***outside the record*** of this matter and LVMPD may not introduce them for the first time on appeal. Second, the newly-presented transcript excerpts are irrelevant. They primarily involve testimony regarding the actions of Mr. Fergason's co-defendants Tonya Issa (née Trevarthen)[6] ("Ms. Trevarthen") and Damon Monroe ("Mr. Monroe"). As such, the testimony is irrelevant and inadmissible with respect LVMPD's attempt to prove that the funds contained in Mr. Fergason's bank account are the proceeds of criminal activity.

a. This Court should Reject LVMPD's Attempt to Interject Evidence into this Appeal that Was Not Presented Below and is Thus Outside the Record of this Matter.

"Matters outside the record on appeal may not be considered by an appellate court and reference to such matters is improper." *Peke Res., Inc. v. Dist. Ct.*, 113

[6] *See* Respondent's Suppl. Appendix ["SA"], Vol. 2, at 385-86. Hereinafter, citations to Respondent's Supplemental Appendix will immediately be preceded by the volume number (e.g., "2SA").

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Nev. 1062, 1068 n.5, 944 P.2d 843, 848 n.5 (1997). Moreover, facts contained "in the briefs of counsel will not supply a deficiency in the record." *Jernigan v. Sheriff, Clark Cnty.*, 86 Nev. 387, 389, 469 P.2d 64, 65 (1970).

Here, the vast majority of the evidence cited by LVMPD is not part of the record of this matter. Specifically, the citations to trial testimony regarding subparts (A), (B), (C), (D), and (E) are all based on evidence that is outside the record with one exception. (*Compare* 1SA at 173-74 *with* 2ROA at 417-29; *compare* 3SA at 469-470, 474-75 *with* 2ROA at 415-16; *compare* 2SA at 394 *with* 2ROA at 415-16; *compare* 1SA at 77-78 *with* 2ROA at 417-29; *compare* 3SA at 430 *with* 2ROA at 415-16.) The one exception—the one citation of trial testimony that is in the record—is completely unrelated to Mr. Fergason: "Trevarthen testified that Monroe did not have a job and that her earnings did not cover the monthly bills for their household." (*Compare* 1SA at 71 *with* 2ROA at 421.)

Accordingly, this Court should reject LVMPD's attempt to introduce evidence for the first time on appeal. *Peke Res., Inc.*, 113 Nev. at 1068 n.5, 944 P.2d at 848 n.5; *Jernigan*, 86 Nev. at 389, 469 P.2d at 65.[7]

b. Even Assuming this Court Considers LVMPD's New Evidence Presented for the First Time on Appeal, the "Evidence" is Irrelevant and Inadmissible.

Even if this Court evaluates the new evidence cited presented by LVMPD for the first time on appeal, the evidence utterly fails to establish a link between the

[7] Similarly, this Court should reject the vast majority of LVMPD's statement of the facts, as it is also primarily composed of evidence that is outside the record. (*See* Ans. Br. at 8:3 – 13:11.)

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funds in Mr. Fergason's bank account and any criminal activities. Accordingly, it is not clear and convincing evidence that the funds in Mr. Fergason's bank account are the proceeds of criminal activities. *See Schoka*, 108 Nev. at 91, 824 P.2d at 291-92.

First, LVMPD's contention that it located receipts showing Mr. Fergason's bank account is irrelevant. Even assuming[8] LVMPD located Mr. Fergason's bank account through receipts obtained while executing a search warrant, there is no evidence connecting the receipts to criminal activity. *See id.*, 108 Nev. at 91, 824 P.2d at 291-92.

Second, LVMPD's assertion that it seized particular items in a safety deposit box at a ***different*** bank location does not demonstrate that the funds in his bank account are the proceeds of criminal activity. (*See* 3RA 474-75 (indicating that officer executed search warrant for safety deposit box at different bank location than the bank location where search warrant was executed for funds).)

Third, even assuming Mr. Fergason only had one job for a short period of time—which the trial transcript of Ms. Trevarthen's testimony fails to establish[9]—such a fact would not demonstrate that the funds in Mr. Fergason's bank account were proceeds from criminal activity. Moreover, even if Ms. Trevarthen's

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[8] Notably, the trial transcript cited by LVMPD does not establish who was identified on the bank account receipts or the purpose of the receipts (i.e. whether the unnamed account holder was making a deposit or a withdrawal). (3RSA at 469-70.)

[9] Ms. Trevarthen's testimony is that she only knew of one job Mr. Fergason held, not that she knew his complete work history. (*See* 2RSA at 394.)

testimony of Mr. Fergason's work history was as conclusive as LVMPD suggests, it would be inadmissible speculation. *See* NRS 50.025 ("A witness may not testify to a matter unless . . . [e]vidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

Fourth, LVMPD's assertion that Ms. Trevarthen had given advice to Mr. Fergason "about where to store cash and the types of accounts to use" after assisting him with moving stolen property is not supported by LVMPD's own citation (which is outside the record). Ms. Trevarthen's testimony is that Mr. Monroe and possibly[10] Mr. Fergason had asked for her advice about Certificates of Deposit (a "CD")—there is no connection to stolen property or any other criminal activity in Ms. Trevarthen's testimony. (2SA at 430-33.) Moreover, Ms. Trevarthen had previously testified before a grand jury that she did not have anything to do with setting up Mr. Fergason's bank account. (*Id.*)

Fifth,[11] LVMPD's citation of Ms. Trevarthen's testimony regarding what she did with her own bank accounts is irrelevant as what Mr. Fergason did with his bank account. Moreover, whether Mr. Monroe had access to Ms. Trevarthen's bank accounts is not relevant to Mr. Fergason's bank account.

[10] Ms. Trevarthen's testimony is unclear. She states "I had worked at a bank before, so [Mr. Monroe] had asked for my advice about the CD's, as well as Bryan. When they were all there we'd had converstation." (2RSA at 430.) It is unclear whether Ms. Trevarthen's testimony is that Mr. Fergason also asked for her advice on CDs or that he was merely present when Mr. Monroe did so. (*See id.*)

[11] LVMPD's contentions regarding this Court's order affirming Mr. Fergason's conviction are addressed below. *See* § III.D, *infra*.

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In sum, this Court should reject LVMPD's attempt to introduce evidence for the first time on appeal. *Peke Res., Inc.*, 113 Nev. at 1068 n.5, 944 P.2d at 848 n.5; *Jernigan*, 86 Nev. at 389, 469 P.2d at 65. Even if this Court considers LVMPD's new evidence, the evidence fails to prove, by clear and convincing evidence, that the funds in Mr. Fergason's bank account are the proceeds of criminal activities. *See Schoka*, 108 Nev. at 91, 824 P.2d at 291-92.

C. LVMPD's Contention that Mr. Fergason Failed to Present Evidence in his Opposition to the Motion for Summary Judgment is Misplaced; LVMPD Failed to Meet its Initial Burden Under NRCP 56.

For the first time in its Answering Brief, LVMPD contends that the District Court properly granted LVMPD's Motion for Summary Judgment because Mr. Fergason did not attach evidence to his Opposition. (Ans. Br. at 28:3 – 31:13.) Below, LVMPD did make any such contention. (AA at 131-32.) Nor was it the basis of the District Court's decision to grant summary judgment. (3ROA at 702.)

Regardless, LVMPD's new argument fails for two primary reasons. First, because LVMPD failed to meet its initial burden to demonstrate the absence of a genuine issue of material fact, the burden of production never shifted to Mr. Fergason. Second, assuming, *arguendo*, that LVMPD met its initial burden, the District Court erred in refusing to give Mr. Fergason the opportunity to conduct discovery pursuant to NRCP 56(f).

1. Because LVMPD Failed to Meet Its Initial Burden to Prove the Absence of a Genuine Issue of Material Fact, the Burden of Production Never Shifted to Mr. Fergason.

As explained above, under NRCP 56, "[t]he party moving for summary judgment bears the initial burden of production to show the absence of a genuine

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issue of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).[12] If the party moving for summary judgment satisfies its initial burden, the nonmoving party must produce evidence to demonstrate that there is a genuine issue for trial—the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading." NRCP 56(e).

However, if the moving party does not satisfy its initial burden, the nonmoving party does not have an obligation to produce anything. *See Maine v. Stewart*, 109 Nev. 721, 728, 857 P.2d 755, 759 (1993). As explained by this Court in reversing a district court's decision to grant summary judgment on fraud claims:

> We conclude that [the moving party] did not meet his burden under NRCP 56(e) and, therefore, ***the burden of production never shifted to the*** [***nonmoving parties***]. . . . Stated differently, since [the moving party] did not demonstrate the absence of fraud, the [nonmoving parties] were under no obligation to produce evidence of fraud. Their factual allegations of fraud must be presumed to be correct.

Id. (emphasis added); *accord Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970) ("Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was not required to come forward with suitable opposing affidavits.");[13] *Nissan Fire & Marine Ins. Co. v.*

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[12] Because LVMPD bore the burden of persuasion at trial, it had to "present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence" to obtain summary judgment. *Id.*

[13] The Nevada Supreme Court has adopted the federal standard applied to a motion for summary judgment as set forth by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1985), as well as in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986). *See Wood*, 121 Nev. at 730-31, 121 P.3d at 1030-31. Moreover, federal cases interpreting the Federal Rules of Civil Procedure "are

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Fritz Companies, Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000) ("If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything.") (citations omitted).

Here, as demonstrated above, LVMPD failed to meet its initial burden to demonstrate the absence of a genuine issue of material fact. Specifically, LVMPD adduced no evidence—let alone clear and convincing evidence—that "traced any of the funds in the account to any criminal activity . . . ." *See Schoka*, 108 Nev. at 91, 824 P.2d at 291-92. Instead, LVMPD and the District Court relied solely upon Mr. Fergason's criminal convictions—which did not pertain to the money in Mr. Fergason's bank account. (*See* 2ROA at 334-35; 3ROA at 702.) Because LVMPD did not meet its initial burden under NRCP 56(e), Mr. Fergason was under no obligation to produce evidence to oppose the Motion for Summary Judgment. *See Maine v. Stewart*, 109 Nev. at 728, 857 P.2d at 759.

2. ***Even Assuming this Court Finds that the Burden of Production Shifted to Mr. Fergason, the District Court Abused its Discretion in Denying Mr. Fergason's Request for NRCP 56(f) Discovery.***

Under NRCP 56(f), a court may deny or continue a motion for summary judgment where "[s]hould it appear from the affidavits of a party opposing the

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strong persuasive authority" in interpreting the Nevada Rules of Civil Procedure "because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002); *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

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motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition . . . ." "A district court's decision to refuse such a continuance is reviewed for abuse of discretion." *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005).

So long as "no dilatory motive is shown," a district court abuses its discretion by refusing a request for NRCP 56(f) discovery where the party opposing summary judgment "seeks additional time to conduct discovery to compile facts to oppose the motion." *Id.*; *see also Ameritrade, Inc. v. First Interstate Bank of Nevada*, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989) (finding district court abused its discretion by denying party's request for NRCP 56(f) discovery where the party had not been dilatory in conducting discovery); *Halimi v. Blacketor*, 105 Nev. 105, 106, 770 P.2d 531, 531-32 (1989) (same).

Here, Mr. Fergason made a proper application for NRCP 56(f) discovery in his Opposition to the Motion for Summary Judgment. (*See* 3ROA at 665-66.) Mr. Fergason detailed the information that he would seek in order to demonstrate that the funds in his bank account were not the proceeds of criminal activity. (*See id.*) Mr. Fergason listed certain documents he would seek and certain individuals he would depose. (*See id.*) Mr. Fergason included a supporting affidavit—as required by NRCP 56(f). (*Id.* at 656.) LVMPD did not address Mr. Fergaon's request for NRCP 56(f) discovery in a reply brief[14] or at oral argument. (AA at

[14] LVMPD failed to file a reply brief to Mr. Fergason's Opposition. (AA at 131-32.)

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131-32.) The District Court did not address Mr. Fergason's request for NRCP 56(f)—neither at oral argument nor in its Order. (*Id.*; 3ROA at 699-703.)[15]

LVMPD also contends that the District Court "likely"[16] denied Mr. Fergason's request for discovery because it purportedly "failed to satisfy the strict requirements of NRCP 56(f)." (Ans. Br. at 31:4-6.) However, LVMPD provides no reasoning behind its bare assertion that Mr. Fergason failed to comply with NRCP 56(f). (*Id.*)

To obtain relief under NRCP 56(f), a nonmoving party must "provide an affidavit giving the reasons why the party cannot present facts essential to justify the party's opposition." *Choy v. Ameristar Casinos, Inc.*, 127 Nev. __, __, 265

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[15] In its Answering Brief, LVMPD contends that Mr. Fergason has "waived" his ability to "ask for additional discovery" because he did not make such a request in his Opening Brief. (Ans. Br. at 28:9-11, 31:6-10.) However, Mr. Fergason may now raise the District Court's error with respect to the denial of his request for NRCP 56(f) discovery because LVMPD argues—***for the first time in its Answering Brief***—that summary judgment was proper because Mr. Fergason did not attach any evidence to his Opposition to the Motion for Summary Judgment. *See* NRAP 30(b)(5); *cf. Moon v. McDonald, Carano & Wilson LLP*, 129 Nev. __, __ n.3, 306 P.3d 406, 410 n.3 (2013) (finding that moving party had not waived issue it did not raise in initial brief where argument was made in response to contention made in opposition). Regardless, this Court may elect to address arguments raised for the first time in a reply brief. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. __, __ n.3, 252 P.3d 668, 672 n.3 (2011) ("[I]t is our prerogative to consider issues a party raises in its reply brief, and we will address those issues if consideration of them is in the interests of justice."); *Berrum v. Georgetta*, 60 Nev. 1, 98 P.2d 479, 480 (1940) (electing to address issue raised for first time in reply brief).

[16] Notably, LVMPD is unable to analyze the District Court's reasoning because no basis exists to do so—neither LVMPD nor the District Court addressed Mr. Fergason's request for NRCP 56(f) discovery.

P.3d 698, 700 (2011) (internal quotation marks omitted). Mr. Fergason provided an affidavit giving the reasons why he was unable to present evidence to oppose the Motion for Summary Judgment. (3ROA at 666.) Mr. Fergason stated that he needed to "conduct discovery in the form of subpoenas that are outlined in the Opposition and that those records will create genuine issues of material fact as to the source of the funds that were seized by [LVMPD]." (*Id.*) Mr. Fergason noted that the "records will allow him to dispute that the monies were obtained as a result of the commission of any alleged crime" and that the "tax records and bank records will show [the] legitimate sources of the funds in the seized account . . . ." (*Id.*)

In sum, this Court should reject LVMPD's contention—raised for the first time in its Answering Brief—that summary judgment is proper because Mr. Fergason did not attach any evidence to his Opposition. Mr. Fergason was not required to adduce any evidence because LVMPD failed to meet its initial burden to "show the absence of a genuine issue of material fact." *Cuzze*, 123 Nev. at 602, 172 P.3d at 134. Assuming, *arguendo*, this Court finds that LVMPD met its initial burden under NRCP 56(e), then the District Court abused its discretion by failing to allow Mr. Fergason to conduct NRCP 56(f) discovery. *See Aviation Ventures, Inc*, 121 Nev. at 118, 110 P.3d at 62; *Ameritrade, Inc.*, 105 Nev. at 700, 782 P.2d at 1320; *Halimi*, 105 Nev. at 106, 770 P.2d at 531-32.

D. The Law-of-the-Case Doctrine is Inapplicable; the Forfeiture Matter and the Criminal Matter are Two Different Proceedings.

Simply put, the law-of-the-case doctrine does not apply to different cases, even if they are related. *See Jewish War Veterans of the U.S. of Am., Inc. v. Gates*,

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506 F. Supp. 2d 30, 39 (D.D.C. 2007) (holding law-of-the-case doctrine did not apply to ancillary litigation); *see also Sheet Metal Workers' Int'l Ass'n Local 15, AFL-CIO v. Law Fabrication, LLC*, 237 F. App'x 543, 549 (11th Cir. 2007) ("[T]he law of the case doctrine does not apply because, *inter alia,* it was a different case."). Here, the forfeiture matter and the criminal matter are separate cases. Accordingly, the law-of-the-case doctrine does not apply. *See Jewish War Veterans of the U.S. of Am., Inc.*, 506 F. Supp. 2d at 39; *see also Sheet Metal Workers' Int'l Ass'n Local 15, AFL-CIO*, 237 F. App'x at 549.[17]

Regardless, LVMPD's contention that this Court previously decided that the funds contained in Mr. Fergason's bank account were the proceeds of criminal activities is nothing more than linguistic gymnastics. (Ans. Br. at 38:12 – 38:13.) Mr. Fergason appealed his conviction, contending, in part, that the evidence presented at his trial was "impermissibly based on uncorroborated accomplice testimony." (3SA at 680.) This Court rejected Mr. Fergason's argument based upon the fact that the officer's testimony corroborated Ms. Trevarthan's testimony. (*Id.*) This Court did not find that the officer's testimony had linked the money in Mr. Fergason's bank account with any criminal activity. (*Id.*) In fact, the only

[17] LVMPD's selective quotation of *White v. United States*, 371 F.3d 900 (7th Cir. 2004) is unavailing. There, the Court found that a prisoner was barred from collaterally attacking his conviction through a writ of habeas corpus based upon language contained in 28 U.S.C. § 2244(b)(3) because he had presented the same arguments in his direct appeal, which were flatly rejected as frivolous. *Id.* at 902-03. Put differently, the collateral attack in *White* was the same case—his criminal case. *See id.*

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items of evidence discussed by this Court were "stolen items in Fergason's storage unit and gallery tags linking Fergason to stolen artwork in his home." (*Id.*)

In sum, the law-of-the-case doctrine is inapplicable to this matter because it is a different case. *See Jewish War Veterans of the U.S. of Am., Inc.*, 506 F. Supp. 2d at 39; *see also Sheet Metal Workers' Int'l Ass'n Local 15, AFL-CIO*, 237 F. App'x at 549. Even if it were, this Court did not find that the funds contained in Mr. Fergason's bank account were the proceeds of criminal activity when it affirmed Mr. Fergason's convictions. (3SA at 678-85.)

III. CONCLUSION

Because LVMPD failed to meet its initial burden under NRCP 56(e) to establish—by clear and convincing evidence—the absence of a genuine issue of material fact as to whether the funds in Mr. Fergason's account were the proceeds of criminal activity, this Court should reverse the District Court's imposition of summary judgment. *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134. Much like the state in *Schoka*, LVMPD has produced "no evidence which traced any of the funds in the account to any criminal activity" and thus did not establish that the funds were subject to forfeiture. 108 Nev. at 91, 824 P.2d at 291-92.

DATED this 2nd day of March, 2015.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing Appellant's Reply Brief (the "Brief") complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because the Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that the Brief complies with the type-volume limitations of 32(a)(7)(A)(ii) because, excluding the parts of the Brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 6,865 words.

3. Finally, I hereby certify that I have read the Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that the Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found I understand that I may be subject to

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sanctions in the event that the Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Bailey❖Kennedy and that on the 2nd day of March, 2015, I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court by using the ECF system, and that Notice of Electronic Filing will be transmitted via the ECF system to the following parties electronically and/or by U.S. Mail, postage prepaid, to the last known address, as follows:

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