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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**  
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9 MB AMERICA, INC., A NEVADA  
10 CORPORATION,

Case No.: 66860

11 Appellant,

12 vs.

13 ALASKA PACIFIC LEASING  
14 COMPANY, A ALASKA BUSINESS  
15 CORPORATION,

16 Respondent.

17  
18 MB AMERICA, INC., A NEVADA  
19 CORPORATION,

Case No.: 67329

20 Appellant,

21 vs.

22 ALASKA PACIFIC LEASING  
23 COMPANY, A ALASKA BUSINESS  
24 CORPORATION,

25 Respondent.

26  
27 **APPELLANT'S OPENING BRIEF**  
28

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Appellant MB AMERICA, INC. is a Nevada corporation. Its parent corporation is MB SpA, Via Costa 64, 36030 Fara Vicentino, Italy.

The undersigned counsel plans to appear on behalf of MB America, Inc. in this proceeding and was its counsel in the action before the district court.

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1 As background, Appellant MB America, Inc. ("MB America") and  
2 respondent Alaska Pacific Leasing Company ("Alaska Pacific") entered into a  
3 distributorship agreement which contained a specific provision requiring the  
4 parties to mediate any dispute arising under the agreement in Reno, Nevada. MB  
5 America cancelled the distributorship agreement as allowed under the term of the  
6 contract. Alaska Pacific then threatened legal action against MB America in  
7 Alaska alleging MB America's conduct was a breach of the agreement. When MB  
8 America requested Alaska Pacific mediate the dispute in Reno, Nevada, as  
9 required under the terms of the parties' agreement, Alaska Pacific verbally refused  
10 to do so and stated in writing that it did not believe the mediation provision of the  
11 parties' agreement applied to the current dispute.  
12

13  
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15  
16 MB America then filed a complaint before the District Court (which is the  
17 appropriate venue under the distributorship agreement) that sought (1) declaratory  
18 relief that the distributorship agreement was valid and binding on the parties and  
19 that MB America had not breached that agreement, and (2) sought specific  
20 performance of the mediation provision of the distributorship agreement.  
21  
22 Essentially, MB America sought either a declaration that it owed no further legal  
23 obligations to Alaska Pacific under the distributorship agreement in light of its  
24 cancellation of that agreement or, alternatively, that if there was a dispute under the  
25 contract, that Alaska Pacific be ordered to mediate the dispute in Reno, Nevada as  
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1 required per the terms of the distributorship agreement.

2 Alaska Pacific then moved for summary judgment on the ground that MB  
3 America's complaint was premature *because the parties were required to mediate*  
4 *any dispute under the terms of the distributorship agreement.* In its opposition,  
5 MB America repeatedly advised the District Court that it should stay the  
6 underlying litigation and order the parties to mediation in the event that that  
7 District Court found a legal dispute to exist. The District Court did find that a legal  
8 dispute arising from the terms of the distributorship agreement existed between the  
9 parties, and that the parties were required to mediate that dispute. However, rather  
10 than staying the litigation and ordering Alaska Pacific to mediate the dispute in  
11 Reno, Nevada in accordance with the terms of the agreement, the District Court  
12 simply granted Alaska Pacific's motion for summary judgment and dismissed MB  
13 America's complaint without prejudice. This appeal follows.

## 14 STATEMENT OF THE FACTS

### 15 I. RELEVANT FACTUAL BACKGROUND

#### 16 A. MB America and Alaska Pacific Entered Into a Valid and Binding 17 Distributorship Agreement.

18 MB America is a Nevada corporation that manufactures rock crushing  
19 machines. Appellant's Appendix ("AA") at 2. Alaska Pacific is an Alaska  
20 corporation that distributes these machines. *Id.*

21 ///

1 On August 1, 2012, MB America and Alaska Pacific entered into an  
2 agreement (the “Distributorship Agreement”) in which Alaska Pacific agreed to be  
3 the distributor of MB America’s rock crushing machines in the state of Alaska. *Id.*  
4 at 7-10. That agreement contained the following notable provisions: First, it  
5 could be terminated for cause upon 30 days’ notice, and at any time without cause  
6 upon 90 days’ notice to the other party. *Id.* at 8. Second, the agreement is to be  
7 construed in accordance with Nevada law. *Id.* at 9. Third, and most importantly  
8 for this appeal, it contained the following mediation provision:

12 **13. DISPUTES AND MEDIATION:** The parties agree that any disputes  
13 or questions arising hereunder, including the construction or application of  
14 this Agreement, shall be submitted to mediation between MB and [Alaska  
15 Pacific] with the rules of the America Arbitration Association, of which any  
16 hearing or mediation should be conducted in Reno, NV.

16 . . .  
17 If mediation between the parties does not result in a mutual satisfying  
18 settlement within 180 days after submission to mediation, then each party  
19 shall have the right to enforce the obligations of this Agreement in the court  
20 of law of Reno, Nevada with all reasonable attorney fees, court costs and  
21 expenses incurred by the prevailing party in such litigation to be paid by the  
22 other party.

21 *Id.*

22 **B. Alaska Pacific Threatened MB America with Legal Action in**  
23 **Alaska After MB America Properly Terminated the**  
24 **Distributorship Agreement.**

25 In December 2013, MB America properly terminated the Distributorship  
26 Agreement pursuant to its provisions. *Id.* at 2. Two months later, Alaska Pacific  
27 demanded that MB America reimburse it for rock crusher buckets that it had  
28

1 purchased from MB America in December 2012. *Id.* at 145-46.

2       On February 27, 2014, MB America responded to Alaska Pacific and noted  
3 that MB America had no legal obligation to reimburse Alaska Pacific because it  
4 had properly terminated the Distributorship Agreement one year after Alaska  
5 Pacific purchased the rock crusher buckets. *Id.* MB America further informed  
6 Alaska Pacific that “under paragraphs 12 and 13 of the Agreement, any disputes or  
7 questions arising under the application of the Agreement shall be submitted to  
8 mediation pursuant to the rules of the American Arbitration Association and the  
9 hearing shall be conducted in Reno, Nevada.” *Id.* at 145.  
10

11       Following this letter, MB America verbally informed Alaska Pacific that  
12 MB America was willing to mediate any dispute in Reno, Nevada, in accordance  
13 with the terms of the Distributorship Agreement. *Id.* at 141. MB America’s  
14 requests were refused, and Alaska Pacific continued to threaten to file a legal  
15 action in Alaska against MB America. *Id.*  
16

17       **C. Alaska Pacific Refused to Mediate.**  
18

19       Alaska Pacific continued to press for reimbursement. On June 30, 2014, it  
20 informed MB America that it had been attempting “to mitigate our damages  
21 resulting from MB America’s cancellation of our dealership agreement” by trying  
22 to sell the rock crusher buckets. *Id.* at 137. It again requested reimbursement for  
23 the remaining rock crusher baskets, and threatened pursuing legal action. *Id.*  
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1 Alaska Pacific then stated that it did not dispute that MB America had a  
2 right to cancel the Distributorship Agreement, and, therefore, did not breach its  
3 obligations. *Id.* at 138. This statement completely contradicts Alaska Pacific's  
4 earlier statement in the same letter that it was attempting to mitigate damage  
5 caused by MB America's cancellation of the Distributorship Agreement. *Id.* at  
6 137.  
7

8  
9 Alaska Pacific then refused to mediate this dispute, as follows:

10  
11 Please note that Paragraph 13 ("Disputes and Mediation") of the Agreement  
12 does not apply in this matter because we do not contest MB America's right  
13 to cancel the agreement, but rather take issue with the fact that MB America  
14 acted in bad faith by accepting our payment for units which we were not  
15 obligated to purchase and then cancelling the Agreement less than eleven  
16 (11) months later.

17 *Id.* at 138.

18 Thus, despite the fact that Alaska Pacific admitted its damages arose from  
19 MB America's conduct in cancelling the Distributorship Agreement, and despite  
20 the fact that Alaska Pacific threatened to seek legal action, Alaska Pacific refused  
21 to mediate the matter under the premise that Paragraph 13 does not apply to the  
22 parties' current dispute.  
23

## 24 **II. RELEVANT PROCEDURAL HISTORY**

### 25 **A. MB America was Forced to File its Complaint for Declaratory** 26 **Relief and Specific Performance.**

27 Facing imminent litigation in Alaska contrary to the terms of the  
28 Distributorship Agreement, MB America filed a complaint in the District Court

1 asserting claims for (1) declaratory relief, pursuant to NRS 30.030 and NRS 30.040  
2 that the distributorship agreement was valid and binding on the parties and that MB  
3 America had not breached that agreement, and (2) specific performance of the  
4 mediation provision of the distributorship agreement.<sup>1</sup> *Id.* at 1-4. MB America  
5 sought either a declaration that it owed no further legal obligations to Alaska  
6 Pacific under the distributorship agreement in light of its cancellation of that  
7 agreement so that Alaska Pacific could not institute legal action against it, or,  
8 alternatively, that if there was a dispute under the contract, that Alaska Pacific be  
9 ordered to mediate the dispute in Reno, Nevada in accordance with the terms of the  
10 distributorship agreement. *Id.*

11  
12 In its prayer for relief in the Answer to MB America's complaint, Alaska  
13 Pacific specifically requested that the District Court interpret and construe the  
14 terms of the Distributorship Agreement, as follows: "For a declaration and  
15 judgment that the distributorship agreement is subject to the laws of the State of  
16 Alaska." *Id.* at 21.

17  
18  
19 **B. Alaska Pacific Capitalizes on Its Refusal to Mediate By Moving**  
20 **for Summary Judgment on the Ground that the Parties Must**  
21 **Mediate Before Initiating Legal Action.**

22  
23 Before MB America was able to file a motion to compel mediation, Alaska  
24 Pacific moved for summary judgment on the ground that the District Court could

25  
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27 <sup>1</sup> MB America's complaint was filed on June 6, 2014. *Id.* at 1. Up until that date,  
28 Alaska Pacific's refusals to mediate were all verbally communicated. However,  
shortly after MB America filed its complaint, Alaska Pacific sent its June 30, 2014  
letter refusing to mediate the dispute. *Id.* at 137-38.

1 not interpret or construe the Distributorship Agreement in light of the mediation  
2 provision. *Id.* at 24-30. This motion was made despite Alaska Pacific's prior  
3 refusal to mediate, and despite Alaska Pacific's prior request that the District Court  
4 ***interpret and construe*** the Distributorship Agreement to apply Alaska law. *Id.* at  
5 21, 137-38. Now adopting the inconsistent argument that the District Court ***could***  
6 ***not*** interpret or construe the Distributorship Agreement until the parties mediated,  
7 Alaska Pacific argued that summary judgment in its favor was warranted on MB  
8 America's claim for declaratory relief that the Distributorship Agreement was  
9 valid and binding because MB America must mediate this issue first. *Id.* at 29.

13 Continuing with its theme of inconsistency, Alaska Pacific further argued  
14 that Paragraph 13 ***now applied to the dispute*** and that the parties were required to  
15 proceed to mediation before seeking judicial relief. *Id.* at 28-31. Thus, Alaska  
16 Pacific contended that summary judgment in Alaska Pacific's favor was warranted  
17 because MB America's complaint was prematurely filed since the parties had not  
18 yet proceeded to mediation. *Id.*

21 Alaska Pacific represented that it had not refused to mediate this dispute  
22 because MB America had not made a formal demand for mediation in accordance  
23 with the American Arbitration Association's ("AAA") rules. *Id.* at 28-31. In  
24 making this representation, Alaska Pacific conveniently omitted to mention that  
25 Alaska Pacific had previously verbally refused to mediate the dispute in Reno, had  
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28

1 threatened to institute legal action in Alaska multiple times, and had informed MB  
2 America that it was not required to mediate this dispute because Paragraph 13 did  
3 not apply. *Id.* Demonstrating that Alaska Pacific had no real intention of  
4 mediating this dispute in accordance with the parties' agreement is the fact that  
5 Alaska Pacific attached as an exhibit to its motion a demand it sent to AAA *in*  
6 *Alaska*, not Reno as required by the parties' agreement. *Id.* at 97-100. This  
7 demand was a ploy, and not an attempt to mediate in good faith, because the  
8 demand would not be considered by AAA given that the Distributorship  
9 Agreement required mediation in Reno, and Alaska Pacific did not obtain MB  
10 America's consent to mediate in Alaska with a AAA mediator. *Id.* at 142-43, 151.

11  
12 In its opposition, MB America pointed out that it had not gone to the time  
13 and expense of filing a formal demand for mediation with AAA because Alaska  
14 Pacific had repeatedly refused to mediate this matter in Reno, and had instead  
15 repeatedly threaten to sue MB America in Alaska for damages associated with MB  
16 America's cancellation of the Distributorship Agreement. *Id.* at 120-26.  
17 Therefore, any formal demand would likely have been futile. *Id.*

18  
19 MB America further repeatedly stated that, should the District Court  
20 determine that a legal dispute arising under the terms of the Distributorship  
21 Agreement existed, the District Court should stay the matter and order the parties  
22 to mediation in Reno, Nevada. *Id.* In fact, MB America raised this argument *six*  
23 times in its opposition, as follows:

- 1 • “Plaintiff filed this dispute to confirm that no legal dispute exists – or  
2 alternatively – **to have this Court order Defendant to participate in  
3 mediation in Reno, Nevada.**” *Id.* at 121.
- 4 • “The sole reason that this lawsuit was filed was either to confirm that  
5 there is no legal dispute between these parties or alternatively to **ask  
6 this Court to refer the matter to non-binding mediation in Reno,  
7 Nevada using the American Arbitration Association rules.**” *Id.* at  
8 122.
- 9 • “If such a dispute does exist, i.e., the Defendant believes it is entitled  
10 to a refund of a purchase it made two years ago, **then that matter  
11 must be referred to mediation using the AAA rules.**” *Id.* at 123.
- 12 • “Second, if this Court determines that there is a dispute, **then this  
13 Court should order the parties to mediation in Reno, Nevada with  
14 a qualified mediator who shall use the AAA rules. . . If this Court  
15 determines that mediation is appropriate, then the Court should  
16 stay the litigation of this matter so as to avoid unnecessary costs to  
17 both sides.**” *Id.* at 124.
- 18 • “Alternatively, this Court **should stay the matter and order the  
19 parties to mediate** with any qualified mediator in Reno.” *Id.* at 125.
- 20 • “The purpose of Plaintiff’s Complaint is to compel the parties to  
21 attend mediation which Defendant has refused.” *Id.*
- 22 • “Because the parties are at an impasse on where the mediation should  
23 occur (if at all) this Court is requested to deny Defendant’s Motion,  
24 **stay this case and order the parties to select a Reno mediator . . .  
25 and order the parties to conduct the mediation in Reno** as soon as  
26 possible.” *Id.* at 126.

27 Unfortunately, the District Court granted Alaska Pacific’s motion for  
28 summary judgment. *Id.* at 163-65. In so doing, the District Court found that the  
parties were required to mediate under the terms of the Distributorship Agreement.  
*Id.* at 165. The District Court further found “that a legal dispute between the



1 parties appears to exist” and that “[t]he dispute also appears to arise from the”  
2 Distributorship Agreement. *Id.*

3  
4 However, instead of staying the matter and ordering the parties to proceed to  
5 mediation, since litigation would proceed if the mediation failed, the District Court  
6 simply dismissed MB America’s complaint without prejudice. *Id.* The District  
7 Court’s decision bizarrely left MB America in the same position it was when it  
8 filed the complaint in the first place – unable to obtain a Court Order requiring the  
9 parties’ mediate the dispute pursuant to the terms of the Distributorship  
10 Agreement, and unable to seek declaratory relief of its rights under the  
11 Distributorship Agreement.  
12  
13

14  
15 Further, the District Court’s decision ignored the provisions of NRS 30.030  
16 and NRS 30.040 regarding a parties’ right to obtain declaratory relief from a  
17 District Court. Essentially, the District Court abstained from granting MB  
18 America any relief and then punished MB America for seeking judicial assistance  
19 in resolving its dispute with Alaska Pacific by, as will be shown below, awarding  
20 attorney fees against MB America. MB America contends in this appeal that the  
21 District Court’s conduct violates Nevada law.  
22  
23

24 **C. The District Court Improperly Awarded Attorney Fees.**

25  
26 Alaska Pacific then moved for an award of attorney fees on the ground that  
27 it was the “prevailing party.” *Id.* at 188-94. Over MB America’s opposition, the  
28 District Court found that Alaska Pacific was the prevailing party despite the fact

1 that *no resolution of the parties' legal dispute was ever reached* since the District  
2 Court did not order Alaska Pacific to mediation and simply dismissed MB  
3 America's complaint without prejudice. *Id.* at 249-51. Therefore, it awarded  
4 Alaska Pacific attorney fees in the amount of \$5,000.00, and costs in the amount of  
5 \$649.75. *Id.* at 251. These consolidated appeals follow.  
6  
7

### 8 SUMMARY OF THE ARGUMENT

9 This Court should reverse and remand the District Court's order granting  
10 summary judgment and dismissing MB America's complaint with instructions to  
11 enter a stay of the litigation and order the parties to mediation in accordance with  
12 the terms of the Distributorship Agreement in Reno, Nevada. The District Court  
13 should be further instructed that if such mediation fails, then the stay should be  
14 lifted and the litigation proceed on MB America's declaratory relief claim. This  
15 Court should also reverse the District Court's award of attorneys' fees to Alaska  
16 Pacific.  
17  
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20 The District Court's decision has left MB America in a catch-22 situation:  
21 MB America cannot get Alaska Pacific to agree to mediate in Reno, Nevada as the  
22 parties' contract requires, and MB America cannot obtain judicial relief forcing  
23 Alaska Pacific to mediate the dispute in accordance with the terms of the  
24 Distributorship Agreement. Accordingly, the District Court erred by dismissing  
25 MB America's complaint without prejudice instead of staying the litigation and  
26 ordering the parties to mediation as MB America requested. Under Nevada law, a  
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1 stay, rather than dismissal, is the appropriate procedural mechanism when  
2 mediation is determined to be a pre-requisite to litigation.  
3

4 Finally, the District Court abused its discretion by awarding attorney fees  
5 and costs because Alaska Pacific is not a “prevailing party.” Nevada law defines  
6 “prevailing party” as any party who achieves success on a significant issue in the  
7 litigation. All that Alaska Pacific obtained was a dismissal without prejudice;  
8 thus, it did not succeed on any significant issue and should not have been awarded  
9 attorney fees and costs. The District Court’s order must be reversed as requested.  
10  
11

## 12 ARGUMENT

### 13 **I. THE DISTRICT COURT ERRED IN GRANTING ALASKA** 14 **PACIFIC’S MOTION FOR SUMMARY JUDGMENT AND** 15 **DISMISSING MB AMERICA’S COMPLAINT.**

16 This appeal involves a simple issue: Should the District Court have stayed  
17 the underlying litigation and ordered the parties to mediation in accordance with  
18 the terms of their agreement, instead of dismissing MB America’s complaint  
19 without ordering the parties to mediate? Although this issue frequently arises on  
20 appeal, this Court has yet to publish an opinion addressing this Court’s position on  
21 such issue. MB America believes a published opinion on this issue is necessary in  
22 Nevada to advise both litigants and the district courts on how to handle litigation  
23 that may be subject to an initial alternative dispute resolution mechanism before  
24 the district courts invoke their power to resolve disputes.  
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1           **A.     Standard of Review**

2           This Court “reviews the district court’s grant of summary judgment de  
3           novo, without deference to the findings of the lower court.” *Schettler v. RalRon*  
4           *Capital Corp.*, 128 Nev. \_\_\_, \_\_\_, 275 P.3d 933, 936 (2012) (quoting *Wood v.*  
5           *Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). “Summary  
6           judgment is appropriate when the record, viewed in the light most favorable to the  
7           non-moving party, indicates there is no genuine issue of material fact and the party  
8           is entitled to judgment as a matter of law.” *Borgerson v. Scanlon*, 117 Nev. 216,  
9           219-20, 19 P.3d 236, 238 (2001); *see also* NRCP 56(c). Further, issues of law are  
10          reviewed de novo by this Court. *The Power Co. v. Henry*, 321 P.3d 858, 860-861  
11          (Nev. 2014).

12                           **B.     The District Court Erred in Granting Summary Judgment**  
13                           **Because a Genuine Issue of Material Fact Exists.**

14          The District Court’s order granting Alaska Pacific’s motion for summary  
15          judgment should be reversed because: (1) there is a genuine issue of material fact  
16          whether Alaska Pacific refused to participate in mediation as required by the  
17          parties’ agreement; and (2) Alaska Pacific’s prior refusal to mediate rendered any  
18          further attempt by MB America to mediate the dispute futile such that mediation is  
19          not an “administrative” remedy that must be exhausted prior to court intervention.

20          ///

21          ///

1                               **1.     The Parties’ Dispute Over Whether Alaska Pacific Refused**  
2                               **Mediation is a Genuine Issue of Material Fact.**

3               MB America and Alaska Pacific disagree over whether Alaska Pacific  
4               previously refused to mediate the parties’ dispute. This disagreement creates a  
5               material issue of fact precluding summary judgment. An issue of fact is material if  
6               its resolution affects the outcome of the dispute. *Arpin v. Santa Clara Valley*  
7               *Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).<sup>2</sup> Clearly, Alaska Pacific’s  
8               prior refusals to mediate directly affected the relief MB America sought in its  
9               complaint.

10              Alaska Pacific argued that summary judgment was proper because MB  
11              America’s complaint was “premature” since MB America never submitted a  
12              formal a mediation demand to AAA to initiate mediation, as required by AAA  
13              Rule M-2.<sup>3</sup> AA 28-31. However, MB America did not submit a formal mediation  
14              demand to AAA because any demand would have been futile due to Alaska  
15              Pacific’s prior refusal to comply with the terms of the parties’ agreement. In fact,  
16              Alaska Pacific confirmed in writing that it would not mediate the dispute pursuant

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17              2 “Federal cases interpreting the Federal Rules of Civil Procedure ‘are strong  
18              persuasive authority, because the Nevada Rules of Civil Procedure are based in  
19              large part upon their federal counterparts.’” *Executive Mgmt., Ltd. v. Ticor Title*  
20              *Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting *Las Vegas Novelty,*  
21              *Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

22              3 AAA Rule M-1 states that whenever “the parties have provided for mediation”  
23              under AAA’s rules, the parties “shall be deemed to have made [AAA’s] procedural  
24              guidelines . . . a part of their agreement.” AA 88. AAA Rule M-2 requires that  
25              mediation be initiated by submission of a formal demand to AAA’s regional  
26              offices, with notification to all opposing parties. *Id.*

1 to Paragraph 13 of the Distributorship Agreement. *Id.* at 138. Accordingly, a  
2 genuine issue of material fact existed as to whether Alaska Pacific's prior refusals  
3 of MB America's informal mediation demands constituted a refusal to mediate  
4 such that declaratory relief was warranted.  
5

6  
7 **2. MB America Was Not Required to "Exhaust" Mediation**  
8 **Before Seeking Judicial Relief Compelling Alaska Pacific to**  
9 **Mediate.**

10 Given Alaska Pacific's prior rejections of MB America's informal mediation  
11 requests, MB America was not required to first formally exhaust mediation with  
12 the AAA before filing its complaint. The District Court found that summary  
13 judgment was proper because MB America did not "exhaust" its "administrative  
14 remedy before submitting the[] dispute to" the District Court. *Id.* at 165.  
15

16 However, The District Court failed to understand that MB America sought  
17 an order declaring the parties' obligations under the Distributor Agreement "**to**  
18 **participate in mediation in Reno, Nevada.**" *Id.* at 126. Thus, the District  
19 Court's order dismissing MB America's complaint because mediation had not yet  
20 occurred is nonsensical given MB America's request for an order compelling  
21 mediation in Reno, Nevada pursuant to the parties' agreement. In response, the  
22 District Court improperly ruled that MB America could not seek judicial relief to  
23 compel mediation until mediation had taken place.  
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1 Further, MB America cannot find any legal support that a mediation  
2 provision in a contract is an “administrative” remedy. Administrative remedies are  
3 remedies available pursuant to state and federal agencies, not disputes between  
4 private individuals. Even if mediation could be considered an administrative  
5 remedy, it is well established that “the exhaustion doctrine only applies to  
6 available administrative remedies.” *Abarra v. State*, 131 Nev. \_\_\_, \_\_\_, 342 P.3d  
7 994, 996 (2015). Thus, “exhaustion is not required when a resort to administrative  
8 remedies would be futile.” *Malecon Tobacco, LLC v. State, Dep’t of Taxation*, 118  
9 Nev. 837, 839, 59 P.3d 474, 476 (2002).

13 As shown above, MB America did not submit a formal mediation demand to  
14 AAA because any demand was futile in light of Alaska Pacific’s prior refusals to  
15 mediate the dispute in Reno. *Id.* at 121-126. Demonstrating the futility of filing a  
16 formal AAA is Alaska Pacific’s refusal to mediate this dispute in its letter dated  
17 June 30, 2014, which was sent *after* MB America filed its complaint seeking  
18 specific performance of the mediation provision of the Distributorship Agreement.  
19 *Id.* at 137-38.

23 Accordingly, MB America was not required to “exhaust” any  
24 “administrative” remedies prior to filing its complaint before the District Court  
25 because (1) MB America was entitled to seek judicial relief to assist in ordering  
26 Alaska Pacific to mediate according to the terms of the parties’ agreement, and (2)  
27 trying to mediate prior to filing the complaint was futile due to Alaska Pacific’s  
28

1 refusal to mediate according to the terms of the parties' agreement. Therefore,  
2 summary judgment was not appropriate and the District Court's order must be  
3 reversed.  
4

5 **C. The District Court Erred in Ignoring the Purpose and Scope of**  
6 **Declaratory Relief Claims in Nevada.**

7 MB America's first claim for relief was a claim for declaratory relief under  
8 Nevada law. MB America did not have to submit a claim for mediation prior to  
9 seeking declaratory relief under NRS 30.030 and NRS 30.040. Instead, Nevada  
10 law is clear that a party may petition a court to "declare" rights a party may hold in  
11 such things as a "contract." Specifically, NRS 30.030 states:  
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14 Courts of record within their respective jurisdictions shall have  
15 power to declare rights, status and other legal relations whether or not  
16 further relief is or could be claimed. **No action or proceeding shall**  
17 **be open to objection on the ground that a declaratory judgment**  
18 **or decree is prayed for.** The declaration may be either affirmative or  
19 negative in form and effect; and such declarations shall have the force  
20 and effect of a final judgment or decree.

21 *Id.* (Emphasis added). NRS 30.040(1) also states:

22 Any person interested under a deed, **written contract or other**  
23 **writings constituting a contract . . . or whose rights, status or**  
24 **other legal relations are affected by a . . . contract . . . may have**  
25 **determined any question of construction or validity arising under**  
26 **the . . . contract . . . and obtain a declaration of rights, status or**  
27 **other legal relations thereunder.**

28 *Id.* (Emphasis added).

Accordingly, under NRS 30.030 and 30.040, MB America was entitled to  
pursue a declaratory relief claim against Alaska Pacific and seek an order of the



1 Court declaring that the parties were obligated to mediate in Reno, Nevada under  
2 the Distributorship Agreement. Under NRS 30.030, MB America's claim for  
3 declaratory relief was not subject to challenge by merely because declaratory relief  
4 was sought.  
5

6 When MB America sought judicial assistance to "declare" the obligations of  
7 the parties to complete mediation in Reno, Nevada, MB America was acting in full  
8 conformance with Nevada law. The relief sought was allowed pursuant to clear  
9 legal authority, which the District Court ignored in rendering its decision. The  
10 District Court instead ruled that it was refusing to address any rights and  
11 obligations under the Distributorship Agreement until mediation had occurred. AA  
12 165. Such ruling ignores the purpose and scope of MB America's claim for  
13 declaratory relief and the relief sought by MB America. The District Court's order  
14 must be reversed.  
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19 **D. The District Court Erred in Not Ordering the Parties to**  
20 **Mediation.**

21 Alternatively, if this Court determines that the District Court properly  
22 granted summary judgment, the District Court's order nevertheless should be  
23 reversed and remanded to the District Court with instructions to stay all  
24 proceedings and to order the parties to mediation. The District Court erred when it  
25 dismissed MB America's complaint without also ordering the parties to mediation  
26 because the District Court also specifically found that the parties were required to  
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1 mediate this dispute. AA 165. MB America only filed the complaint because  
2 Alaska Pacific refused to mediate. MB America sought relief from the District  
3 Court declaring that Alaska Pacific had to specifically perform under the  
4 Distributorship Agreement and mediate the parties' dispute in Reno, Nevada. *Id.*  
5 at 3-4.  
6

7  
8 Given the District Court's order, Alaska Pacific has successfully avoided  
9 the District Court considering the declaratory relief sought by MB America and  
10 has managed to obtain dismissal of MB America's complaint without any order  
11 compelling Alaska Pacific to abide by or comply by the terms of the  
12 Distributorship Agreement. This result is illogical. Therefore, if this Court  
13 determines that summary judgment was properly granted, this matter should be  
14 reversed and remanded with instructions for the District Court to specifically order  
15 the parties to mediation in Reno, Nevada in compliance with the terms of the  
16 Distributorship Agreement.  
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20 **E. The District Court Erred in Dismissing MB America's Complaint,**  
21 **Rather than Staying the Action.**

22 Stays, rather than dismissal, are the appropriate and favored procedural  
23 mechanism when a party seeks to compel mediation. Under Nevada's Uniform  
24 Arbitration Act, whenever a party seeks to compel mediation or arbitration, "the  
25 court on just terms *shall stay* any judicial proceeding that involves a claim alleged  
26 to be subject to the arbitration." NRS 38.221(6) (emphasis added). Furthermore,  
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1 “[i]f the court orders arbitration, the court on just terms **shall stay** any judicial  
2 proceeding that involves a claim subject to the arbitration.” NRS 38.221(7)  
3 (emphasis added). When interpreting statutes, the Legislature’s use of the word  
4 “shall” indicates a mandatory requirement. *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129  
5 Nev. \_\_\_, \_\_\_, 310 P.3d 560, 566 (2013) (“It is a well-settled principal of statutory  
6 construction that statutes using the word ‘may’ are generally directory and  
7 permissive in nature, while those that employ the term ‘shall’ are presumptively  
8 mandatory.” (Internal quotations omitted)).

9  
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12 Thus, whenever a party moves to compel arbitration or mediation, and the  
13 district court grants that request, Nevada’s Uniform Arbitration Act requires the  
14 district court to **stay**, rather than dismiss, the underlying litigation. Here, MB  
15 America’s complaint sought an order compelling mediation. AA 3-4. However,  
16 MB America was never given the opportunity to make a specific motion to compel  
17 mediation because Alaska Pacific filed its motion for summary judgment seeking  
18 dismissal of the complaint. *Id.* at 24-31. The effect of Alaska Pacific’s motion  
19 resulted in MB America requesting **six** times in its opposition for an order  
20 compelling mediation and staying the litigation. *Id.* at 121-126. Rather than  
21 staying this matter as required by NRS 38.221, however, the District Court  
22 dismissed the action without prejudice and left MB America in the same position it  
23 was in before – unable to mediate, and unable to obtain judicial relief.<sup>4</sup> AA 165.  
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4 In an unpublished, non-precedential order concerning a case with substantially

1           The District Court should have simply stayed the matter and ordered the  
2 parties to mediation rather than dismissing MB America's complaint. There is no  
3 question of jurisdiction. Pursuant to NRS 38.244(1), the District Court has  
4 jurisdiction to order the parties to mediation. *See id.* ("A court of this state having  
5 jurisdiction over the controversy and the parties may enforce an agreement to  
6 arbitrate."). Furthermore, the District Court is the appropriate venue for any legal  
7 disputes that mediation cannot resolve under the terms of the Distributorship  
8 Agreement. AA 37. Finally, by filing an answer, Alaska Pacific submitted to  
9 personal jurisdiction in Nevada. *See* NRCP 12(h) (stating that the defense of lack  
10 of personal jurisdiction is waived if not presented in a Rule 12(b) motion prior to  
11 filing an answer). Accordingly, this Court should reverse the District Court's  
12 order and remand with instructions to stay this litigation, order the parties' to  
13 comply with mediating the dispute in Reno, Nevada, and if mediation fails, then  
14 the stay will be lifted and the litigation can proceed.  
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23       similar facts to this present appeal, this Court reversed an order granting a motion  
24 to compel arbitration and dismissing a complaint without prejudice because  
25 Nevada's Uniform Arbitration Act requires that judicial proceedings be *stayed*, and  
26 not dismissed. *AJS Constr. Inc. v. Pankopf*, No. 60729, 2013 WL 5445188 at \*1  
27 (Sept. 25, 2013). In that case, this Court determined "that dismissal was  
28 improper," "reverse[d] the district court's order insofar as it dismissed appellant's  
complaint," and "remand[ed] th[e] matter to the district court with instructions to  
the court that it enter an amended order staying the underlying proceedings."  
Although this is not a precedential opinion, Justice Hardesty noted the need for a  
published opinion in his concurrence. *Id.* at \*2.

1 **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN**  
2 **GRANTING ALASKA PACIFIC’S MOTION FOR ATTORNEY**  
3 **FEES.**

4 The District Court abused its discretion in granting Alaska Pacific’s motion  
5 for attorney fees because Alaska Pacific was not a “prevailing party.” Under the  
6 Distributorship Agreement, the “prevailing party” in any litigation may recover  
7 reasonable attorney fees and costs. AA 37. However, since Alaska Pacific only  
8 obtained a dismissal without prejudice, it was not a prevailing party because it did  
9 not succeed on any significant issue of the case. *See Valley Elec. Ass’n v.*  
10 *Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (stating that parties  
11 “prevail” for purposes of attorney fee awards if they succeed “on any significant  
12 issue” of the case). Accordingly, the District Court abused its discretion, and its  
13 order awarding fees and costs must be reversed.  
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17 **A. Standard of Review**  
18

19 “This Court reviews a district court’s award of attorney fees and costs . . .  
20 for an abuse of discretion.” *Berkson v. LePome*, 126 Nev. \_\_\_, \_\_\_, 245 P.3d 560,  
21 568 (2010). “An abuse of discretion can occur when the district court bases its  
22 decision on a clearly erroneous factual determination or disregards controlling  
23 law.” *LVMPD v. Blackjack Bonding*, 131 Nev. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_, \_\_\_  
24 (Nev. Adv. Op. 10, March 5, 2015); *see also Bergmann v. Boyce*, 109 Nev. 670,  
25 674, 856 P.2d 560, 563 (1993) (holding that an abuse of discretion occurs when the  
26 district court makes a decision “in clear disregard of the guiding legal principles”).  
27  
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1           **B.     Alaska Pacific was not a “Prevailing Party.”**

2           Under Nevada law, a party is a “prevailing party” for purposes of an  
3 attorney fee award if they have succeeded “on any substantial aspect of the case.”  
4 *Davis v. Beling*, 128 Nev. \_\_\_, \_\_\_, 278 P.3d 501, 515 (2012); *see also Valley*  
5 *Elec. Ass’n*, 121 Nev. at 10, 106 P.3d at 1200 (holding that a party is considering to  
6 be a prevailing party “if it succeeds on any significant issue in litigation which  
7 achieves some of the benefit it sought in bringing suit” (quoting *Women’s Fed.*  
8 *Sav. & Loan Ass’n v. Nev. Nat’l Bank*, 623 F. Supp. 469, 470 (D. Nev. 1985) )).  
9 Nevada’s definition of “prevailing party” was adopted from federal Ninth Circuit  
10 Court of Appeals precedent. *See Valley Elec. Ass’n*, 121 Nev. at 10, 106 P.3d at  
11 1200 (citing to *Women’s Fed. Sav. & Loan Ass’n*, 623 F. Supp. at 470).

12           As the Ninth Circuit Court of Appeals explains, success on a “significant  
13 issue in litigation” requires that the party seeking the award of fees obtain relief on  
14 the merits that “create[s] the material alteration of the legal relationship of the  
15 parties.”” *Oscar v. Alaska Dep’t of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th  
16 Cir. 2008) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health*  
17 *& Human Res.*, 532 U.S. 598, 604 (2001)). Thus, “a plaintiff is not the prevailing  
18 party if his or her success is purely technical or de minimis.” *Shapiro v. Paradise*  
19 *Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 865 (9th Cir. 2004). And, “[t]he  
20 moral satisfaction that results from any favorable statement of law does not bring  
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1 with it the status of a prevailing party.” *Shaw v. City of Sacramento*, 250 F.3d  
2 1289, 1294-95 (9th Cir. 2001) (internal quotations and alterations omitted).  
3

4 Alaska Pacific did not prevail on any issue that materially altered the legal  
5 relationship of the parties because it only achieved a dismissal without prejudice.  
6 An involuntary “dismissal without prejudice does not alter the legal relationship of  
7 the parties because the defendant remains subject to the risk of re-filing.” *Oscar*,  
8 541 F.3d at 981. Here, despite the catch-22 that the District Court’s dismissal and  
9 failure to order mediation placed MB America in, MB America can still re-file its  
10 complaint against Alaska Pacific. Furthermore, in light of Alaska Pacific’s  
11 insistence that MB America strictly comply with AAA’s mediation demand  
12 requirements, MB America can also file a formal demand for mediation in Reno  
13 with AAA to litigate the *exact claims* it asserted in its complaint. Thus, there has  
14 been no alteration of the parties’ legal relationship because there has been no  
15 decision regarding the parties’ substantive legal rights. Accordingly, Alaska  
16 Pacific is not a prevailing party simply because it won a motion, which motion did  
17 not address any legal rights or obligations between the parties. Therefore, the  
18 District Court abused its discretion in awarding attorney fees and costs.  
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## 24 CONCLUSION

25  
26 MB America respectfully requests that this Court reverse the District Court’s  
27 order granting Alaska Pacific’s motion for summary judgment, and remand with  
28 instructions to stay the litigation and order the parties to mediation in Reno,

1 Nevada, in accordance with the terms of the Distributorship Agreement. MB  
2  
3 America further requests that this Court reverse the District Court's award of  
4 attorney fees and costs to Alaska Pacific as Alaska Pacific is not a prevailing party.

5 DATED this 7<sup>th</sup> day of April, 2015.

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**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO RULES 40 AND 40A**

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2  
3       1.     I hereby certify that this Appellant's Opening Brief complies with the  
4 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP  
5 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

6  
7           This brief has been prepared in a proportionally spaced typeface using  
8 Microsoft Word 10 in 14 font and Times New Roman type.  
9

10       2.     I further certify that this brief complies with the page- or type-volume  
11 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by  
12 NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or  
13 more, and contains 6,188 words.  
14

15       3.     Finally, I hereby certify that I have read this appellate brief, and to the  
16 best of my knowledge, information, and belief, it is not frivolous or interposed for  
17 any improper purpose. I further certify that this brief complies with all applicable  
18 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires  
19 every assertion in the brief regarding matters in the record to be supported by a  
20 reference to the page and volume number, if any, of the transcript or appendix  
21 where the matter relied on is to be found. I understand that I may be subject to  
22 sanctions in the event that the accompanying brief is not in conformity with the  
23  
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28

1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 7<sup>th</sup> day of April, 2015.

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✓ by placing an original of true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

DATED this 7<sup>th</sup> day of April, 2015.

Merna Meier  
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