IN THE SUPREME COURT OF THE

STATE OF NEVADA

CARLOS A. HUERTA, an individual; CARLOS A. HUERTA as Trustee of THE ALEXANDER CHRISTOPHER TRUST, a Trust established in Nevada as assignee of interests of GO GLOBAL, INC., a Nevada corporation; Appellants, v. SIG ROGICH aka SIGMUND ROGICH as Trustee of The Rogich Family Irrevocable Trust; ELDORADO HILLS, LLC, a Nevada limited liability company; DOES I-X; and/or ROE CORPORATIONS I-X, inclusive, Respondents.	Case No.: 67595 District Court Case No.: A-13-686303-C Dept. No.: XXVII

Appeal
From the Eighth Judicial District Court
The Honorable Nancy L. Allf, District Judge

APPELLANTS' OPENING BRIEF

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CERTIFICATION PURSUANT TO NEV. R. APP. P. 26.1

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

[NOT APPLICABLE].

Dated this 23rd day of November, 2015.

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I. JURISDICTIONAL STATEMENT

Appellants (also referred to as "Plaintiff"), appeals the district court's grant of a Motion for Award of Attorneys' Fees on February 10, 2015, and noticed through electronic service on February 11, 2015. Appendix ("APP"), Vol. II pp. 224-229. An appeal was filed on March 13, 2015 from this Order. APP, Vol. II pp. 235-236.

This is an appeal of a special order following judgment. "A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final judgment, pursuant to NRAP 3A(b)(2). *See Smith v. Crown Financial Services,* 111 Nev. 277, 280 n. 2, 890 P.2d 769, 771 n. 2 (1995)."

II. STATEMENT OF ISSUES PRESENTED

1. Whether the Court erred when it granted an award to of attorney's fees to the Defendants when it found that they were the prevailing party, though the Court did not adjudicate the underlying contract but dismissed the case based on judicial estoppel?

III. STANDARD OF APPELLATE REVIEW

Generally, this Court reviews decisions awarding or denying attorney fees with an abuse of discretion standard. *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000). However, when the attorney fees matter implicates questions of law, the proper review is de novo. *Trs. of the Plumbers and Pipefitters Union Local 525 Health and Welfare Trust Plan v. Developers Sur. &*

Indem. Co., 120 Nev. 56, 59, 84 P.3d 59, 61 (2004) (citations omitted); *see also Crestline Inv. Group v. Lewis*, 119 Nev. 365, 368, 75 P.3d 363, 365 (2003).

IV. STATEMENT OF THE CASE

On December 27, 2011, Plaintiffs filed their Complaint. APP, Vol. I, pp. 1-6. On April 30, 2012, Plaintiffs filed their Amended Complaint. *Id.* at pp. 7-10. On October 8, 2014 Judge Allf heard Defendant Eldorado Hills, LLC's Motion for Partial Summary Judgment. APP, Vol. I, pp. 131-134. The motion sought to dismiss Plaintiffs' amended complaint because "claim preclusion precludes Huerta Plaintiffs from asserting claims in this litigation and Defendant should be awarded summary judgment. *Id.* at 86:11-12. Judge Allf believing that the confirmed chapter 11 plan of the Carlos Huerta and Go Global precluded the instant lawsuit dismissed the case. *Id.* at 138-142. There was no mention of the underlying contract between the parties in the order or that it had been adjudicated. *See Id.*

On November 19, 2014 Defendant file his Motion for Award of Attorneys' Fees erroneously claiming that the he was a prevailing party under the underlying agreement, though it was not adjudicated or interpreted. *Id.* at 143-148. Despite opposition, Judge Allf equated the dismissal of claims as the definition of a "prevailing party" and granted the award of fees. *Id.* at 219:8-9. Judge Allf in attempting to correct counsel's argument that the merits of the contract were not

decided, and conceding that she did not adjudicate the contract and dismissed the case because of the claims had been waived in bankruptcy stated "I determined that the plaintiff had waived its cause of action in the bankruptcy case. It was determined on the merits." *Id.* at 213:14-15. Notwithstanding the admission that the case was dismissed because the claims "had been waived in bankruptcy" the Court entered an order awarding fees and asserting that the basis Paragraph 7(d) of the Purchase Agreement." *Id.* at 228. This appeal followed. *Id.* at 235.

V. STATEMENT OF FACTS

1. On October 8, 2014 this Court heard arguments in regards to The Rogich Irrevocable Trust's Motion for Partial Summary Judgment. *Id.* at 131. The summary judgment sought dismissal based on preclusion because Defendant claimed that the lawsuit should have been brought before the bankruptcy court in Mr. Huerta's and Go Global's chapter 11. *Id.* at 71:1-6. Defendant's own presentment of the relief requested also affirms that they did not seek a contractual interpretation; they wanted to have the case dismissed because they believed that the Plaintiffs' claims should have been brought before the before bankruptcy court and the plan and disclosure statement did not preserve those rights. *Id.* at 72:1-73:19. Defendant articulated this point by stating:

> The Rogich Family Irrevocable Trust (the "Rogich Trust") moves the Court for an order granting partial summary judgment against Plaintiffs Carlos A. Huerta ("Huerta") and the

> Alexander Christopher Trust (the "Christopher Trust") (together, "Huerta Plaintiffs") on the grounds that as purported assignees to certain interests assigned by Go Global, Inc. ("Go Global") ~a recently reorganized Chapter 11 debtor~ the Huerta Plaintiffs' claims are barred under the claim preclusion and judicial estoppel doctrines….
>
> **Instead of concealing the Litigation Claims, Go Global should have brought a bankruptcy adversary proceeding. Indeed, Go Global knew it could have filed an adversary proceeding**, because it had already done so in Case 10-01334 an adversary proceeding within the Bankruptcy Proceedings filed against a business associate of Huerta (the "Paulson Adversary Action"). Go Global, however, elected to not pursue the Litigation Claims….
>
> In addition, Go Global could have specifically preserved in its Confirmed Plan the purported Litigation Claims against Defendants by including the potential defendants' identity and the facts on which the lawsuit would be based. …
>
> Go Global has demonstrated that it had more than "adequate knowledge of the litigation claims' existence well before the Confirmation Order's entry and well before Go Global purported to assign those litigation claims to the Christopher Trust. **As a consequence, claim preclusion precludes the Huerta Plaintiffs from asserting their claims in this litigation and Defendant should be awarded summary judgment.**

Id. at pp. 71:1-6; 85:11-18; 86:8-12. [Emphasis added].

2. At the hearing, the Court agreed with the assessment the claims mentioned in the bankruptcy case were not preserved in the confirmed plan, and dismissed the case:

> And here are the salient dates in this case: a bankruptcy was filed on or about March 23 of 2010 by Go Global and on June 4 of 2010 it

admits that it has a receivable. I do find that the listing of the receivable from Sig Rogich is sufficient to establish they have told their creditors that they have this receivable but it's after that that the problem begins to me. In the first disclosure statement filed on April 4 of 2011 it talks about avoidance of transfer; it mentions Paulson but never this transaction. When it talks about payments to creditors it's only from sale of assets. This receivable is never identified; litigation is never identified. There's no recovery of what might still at that point be a fraudulent transfer. And in page 18 of the first disclosure statement the liquidation analysis identifying assets only lists real estate
and no receivables…

And the reason that it matters is that in the Chapter 11 process you have the listing of the assets then you have a disclosure statement that tells creditors how they will get paid and then the plan really just says how much they'll get paid and when. It's that disclosure statement that's operative and what the creditors use to vote whether or not to accept the plan….

This is a case that's very ripe for judicial estoppel and under the applicable case law the motion is granted…

Id. at 132:15-25; 133:13-17, 23-24. [Emphasis added].

The case was dismissed based on judicial estoppel – which was unrelated to the contract between the parties. *Id.*

3. The Court's findings articulate that the rationale for the dismissal was based on preclusion or in this precise context judicial estoppel:

LEGAL DETERMINATION

1. On November 7, 2012, Huerta and Go Global were aware that they had a claim against the Rogich Trust.

2. The said claim was not disclosed in Huerta's and Go Global's First Amended, Second Amended or Third Amended

> Disclosure Statements.
>
> 3. The said claim was not disclosed in Huerta's and Go Global's Plan, or in their first, second or third Amendments to the Plan.
>
> WHEREFORE IT IS ORDERED that The Rogich Family Irrevocable Trust's Motion for Partial Summary Judgment be, and is hereby granted and the First, Second and Third claims for relief of Carlos A. Huerta, individually and as Trustee of the Alexander Christopher Trust are dismissed.

Id. at 140:16-26.

4. The Court's minutes also confirm that summary judgment was granted based on preclusion, and no comments were made in reference to interpreting or enforcing the contract:

> …Mr. Lionel argued in support of his motion stating Defendant had made misrepresentations before the bankruptcy court that they had no claim and now they are before this Court saying there is a claim, and that calls for judicial estoppel. Mr. Lionel argued regarding what judicial estoppel is intended for. Mr. Lionel further argued case law and cited several cases in open court. Lastly, Mr. Lionel argued regarding the requirement of a debtor to file a schedule of assets under oath, and stated the filed document omitted any claim against Rogich Trust.

Id. at 136.

5. Thus, the Order granting partial summary judgment, the Court Minutes, as well as the motion for partial summary judgment did not seek to enforce or interpret the contract. Further, the Order of November 5, 2014 was without prejudice as the matter was simply "dismissed" and not dismissed with

prejudice[1].

6. On November 19, 2014 the Defendant filed a Motion for Award of Attorneys' Fees claiming that since the case was dismissed and the underlying contract, (which was not adjudicated), had a fee shifting provision[2], that an award of fees should follow. *Id.* at 145-190.

7. Plaintiffs argued in their opposition that a "prevailing party" under Nevada law is one that succeeds in a case taken to judgment upon the terms of the underlying contract, not a party that succeeds in getting the case dismissed based on judicial estoppel. *Id.* at 197-199.

8. In reply Defendants did not argue that the Court dismissed the case based on judicial estoppel, they simply argued that "prevailing party" is "The 'literal diction' is exactly what applies." *Id.* at 208:12-13. Defendants further claimed that the Court did interpret the contract but could point to no statements which contradicted the Court's own words which stated that dismissal of the case

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[1] NRCP 41(a)(2) states that a dismissal, unless otherwise designated is without prejudice.

[2] The fee shifting provision, provides that fees may be awarded if the contract is interpreted or enforced:

> (d) Attorneys' Fees. Unless otherwise specifically provided for herein, each party hereto shall bear its own attorneys' fees incurred in the negotiation and preparation of this Agreement and any related documents. In the event that any action or proceeding is instituted to interpret or enforce the terms and provisions of this Agreement, however, the prevailing party shall be entitled to its costs and attorneys' fees, in addition to any other relief it may obtain or to which it may be entitled.

Id. at 17.

"was ripe for judicial estoppel." *Id.* at 205-210.

9. After hearing arguments of the parties, the Court granted the award of fees and cost against all Plaintiffs and even parties that were not before the Court, though again there was no finding that the contract had been interpreted or enforced previously by the Court:

> This is the defendant's motion for award of attorney's fees. The motion will be granted for the following reasons.
>
> One, the order for summary judgment did dispose of all of the causes of action, and in a 5-page written order that incorporated Findings of Fact and Conclusions of Law. The award will be joint and several as to all named plaintiffs in the complaint, which are Carlos A. Huerta, an individual; Carlos A. Huerta as trustee of the Alexander Christopher Trust, a trust established in Nevada as assignee of interests of Go Global, Inc., a Nevada corporation, and Nanyah Vegas, LLC, a Nevada limited liability company.

Id. at 221:8-16.

Thus the Court granted an award against all of the named Plaintiffs, including those who were not before the Court like Go Global, and Nanyah Vegas, who was not a named party to the contract. *Id.* at 221, 17. The award was against "All named plaintiffs—." *Id.* at 222:12-14.

7. Though litigation ensued over the contract as the Court discussed at the attorney fee hearing, the dismissal was not based on the contract. Yet because the summary judgment disposed of all the causes of action, the Court awarded of attorneys' fees. *Id.* at 221:10-12.

8. The Court failed to define "prevailing party" under Nevada law, and erroneously determined that since all the causes of action had been dismissed, that an award of fees had to be awarded under the uninterpreted contract.

VI. SUMMARY OF THE ARGUMENT

Only a party that has "prevailed" in a matter can be granted an award of attorney's fees under a contract that allows for fee shifting; and the Court specifically determined that the case was dismissed based on judicial estoppel. Defendant did not obtain a money judgment or prevail on a significant legal issue that was the basis for the claims in the Complaint. Additionally, Defendant could have raised the judicial estoppel argument the moment the Complaint was filed, but waited until the eve of trial to bring the motion for fees. Though the award was in error, it was unreasonable to allow an award for a motion that could have been even before the Defendant answered the Complaint. The award also should not have been levied against the assignee, not only because Defendant was not the prevailing party, but also because it was not an alter-ego or had liability stemming from the assignment. Nevada law does not support the imposition of an award of attorneys' to parties that are not prevailing parties under its well established precedents.

VII. LEGAL ARGUMENT

A. THE DISMISSAL BASED ON JUDICIAL ESTOPPEL PREVENTED DEFENDANT FROM BEING DEEMED A "PREVAILING PARTY" WHEN THE COURT DID NOT INTERPRET OR ENFORCE THE CONTRACT.

Only a party that has actually "prevailed" in a matter can be granted an award of attorney's fees under the contract; and thus Defendant's were not entitled to an award of attorneys' fees and costs. In Nevada, a court "cannot award attorney fees unless authorized by statute, rule, or contract." *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 197 P.3d 1051,1059 (Nev.2008). "Whether to award attorney's fees is within the discretion of the district court; its decision will not be reversed absent manifest abuse of that discretion. *County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982)." *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995).

Nevada statutes have been interpreted to construe that a "prevailing party" as one that succeeds on a significant issue for which the litigation was brought and is monetary in nature. *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (applying Nevada's fee shifting provision in NRS 18.010 and holding that lower court did not error in granting fees when defendant had prevailed and received monetary reward); *see also Smith v. Crown Fin. Servs. of*

Am., 111 Nev. 277, 285, 890 P.2d 769, 774 (1995) (holding that monetary judgment is a prerequisite to apply fee shifting provisions in NRS 18.010(2)). In *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) the trial court's decision to not grant fees to either party as both parties had prevailed on some issues and lost on others, the decision to not decide a "prevailing party" (and consequently deny fees) was upheld. *Id.* at 909.

Nevada again affirmed the decision that a prevailing party is one that prevails on issues raised in the complaint. In *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590-91, 836 P.2d 67, 69-70 (1992) the parties disputed the incorporation of a city on statutory grounds. *Id.* Though the court never reached the merits of the claims a motion for costs was made. *Id.* The court concluded that because the merits had not been reached that neither party could be considered the prevailing party, and subsequently could not obtain a reward:

> We have held that a party cannot be considered a prevailing party in an action that has not proceeded to judgment. *See Works v. Kuhn,* 103 Nev. 65, 68, 732 P.2d 1373, 1376 (1987); *Sun Realty v. District Court,* 91 Nev. 774, 755 n. 2, 542 P.2d 1072, 1073 (1975). In this case, respondents sought to prevent the incorporation of the specific proposed new city primarily on statutory grounds, and also raised a constitutional challenge to the entire statutory scheme for incorporating cities in general. The district court never ruled on the statutory challenges to the new city, but ruled only on the legal issue of the constitutionality of the statutory scheme. Appellants were then deprived by an act of the legislature of their opportunity to test the district court's purely legal conclusions in this court. In our opinion, under these peculiar circumstances, neither party prevailed in this action; the action was terminated by the legislature. Thus, the district

> **70 court erred in awarding expert witness fees and costs to respondents. *591 Accordingly, we reverse the order of the district court granting expert witness fees and costs to respondents.

Id.

The legal concept that a party must prevail on at least some of the issues between the parties has been affirmed by the Nevada Supreme Court this year in *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015), reh'g denied (May 29, 2015), reconsideration en banc denied (July 6, 2015). As the court noted, a prevailing party succeeds on at least some of it claims:

> A party prevails "if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Valley Elec. Ass'n v. Overfield,* 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (emphasis added) (internal quotations omitted). To be a prevailing party, a party need not succeed on every issue. *See Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on only some of his claims for relief").

Id.

In that case this Court overturned the lower court when it determined that fees should issue when the party had prevailed "on a significant issue and achieved at least some of the benefit that it sought." *Id.*; *see also Foley v. Kennedy*, 110 Nev. 1295, 1304, 885 P.2d 583, 588 (1994) (holding that University regent who was target of recall petition was "prevailing party" under statute mandating award of costs when petition was declared invalid due to inadequate number of signatures required for valid recall petition). Similarly, the court *In re USA Commercial*

Mortgage Co., 802 F. Supp. 2d 1147, 1181 (D. Nev. 2011), after explaining that the operative contract contained a fee shifting provision and the three significant issues plaintiffs prevailed upon, agreed that the plaintiffs were in fact prevailing parties allowed to recover their attorneys' fees. *Id.* Thus, in Nevada, a "prevailing party" must have won on a significant issue, which it brought to bear and received a monetary award.

Nevada's interpretation that fee shifting may be triggered by a party that actually prevails on the merits, also identifies with neighboring jurisdictions. As the Court in *Karuk Tribe of N. California v. California Reg'l Water Quality Control Bd., N. Coast Region*, 183 Cal. App. 4th 330, 364, 108 Cal. Rptr. 3d 40, 68 (2010) described:

> " ' "The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." ' [Citations.] ... ' "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." ' [Citations.]" (*Maria P., supra,* 43 Cal.3d 1281, 1291–1292, 240 Cal.Rptr. 872, 743 P.2d 932.)

Id.

Courts in Utah similarly use a balancing test and look to several factors to determine whether a contractual provision allowing "prevailing party" fees will be granted:

> Relevant factors for the trial court's consideration include, but are not limited to (1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims.

Smith v. Simas, 2014 UT App 78, ¶ 29, 324 P.3d 667, 677.

"The prevailing party is the party that succeeds on the merits of the claim and has affirmative judgment rendered in its favor." *BP Am. Prod. Co. v. Chesapeake Exploration, LLC*, 747 F.3d 1253, 1262 (10th Cir. 2014); *see also Uhrhahn Const. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 32, 179 P.3d 808, 819 (quoting "To be a prevailing party, a party 'must obtain at least some relief on the merits' of the party's claim or claims." Citing *Ault v. Holden,* 2002 UT 33, ¶ 48, 44 P.3d 781 (citation omitted)). "[P]rocedural success during the course of litigation is insufficient to justify attorneys' fees where the ruling is later vacated or reversed on the merits." *Miller v. California Com. On Status of Women*, 176 Cal. App. 3d 454, 458, 222 Cal. Rptr. 225, 228 (Ct. App. 1985);

Defendant was not the prevailing party under Nevada law. The court dismissed the case because of judicial estoppel, not for a significant reason arising under the contract, nor did Defendant obtain a money judgment. *See Valley Elec. Ass'n*, 121 Nev. at 10 (holding that lower court did not error in granting fees when defendant had prevailed and received monetary reward); *Smith*, 111 Nev. at 285

(holding that monetary judgment is a prerequisite to apply fee shifting provisions in NRS 18.010(2)). Contrary to the court's award Nevada law holds that for the court to have awarded fees it would have to adjudicate at least some of the contract between and determine an issue in favor of either party, that the merits of the causes of action be reached or at least some significant issue is determined in the litigation which achieves some of the benefit it sought in bringing suit. *See Eberle*, 108 Nev. at 590-91; *LVMPD*, 131 Nev. Adv. Op. 10; *Foley*, 110 Nev. at 1304; *BP Am. Prod. Co.*, 747 F.3d at 1262; *Uhrhahn Const. & Design, Inc.*, 2008 UT App 41, ¶ 32; *Miller v. California Com. On Status of Women*, 176 Cal. App. 3d at 458. Defendant had no money judgment, no decision on the merits of the contract nor prevailed on any significant for which the complaint or counter-claim were raised – thus under Nevada law they were not a prevailing party.

Defendant has not prevailed in this matter like the plaintiff in *USA Commercial*, wherein that court discussed the claims which they had been prevailed upon. *Id.* at 1147. The court's November 5th, 2014 Order simply determined that the claims were precluded and therefore dismissed. Nothing during the course of litigation aided Defendant, as all the facts were based on circumstances which occurred prior to this matter even being filed. *See Karuk Tribe of N. California*, 183 Cal. App. 4th at 364 (explaining that a "prevailing party benchmarks" are circumstances that occurred during litigation which

assisted that party). Due to the fact that this case was dismissed because of preclusion, there are no factors to consider in identifying whom is the prevailing party, such as contractual language, successful claims, importance of claims and an amount of the monetary judgment. *Smith*, 2014 UT App 78, ¶ 29.

Additionally, it was not reasonable for fees be shifted to Plaintiffs, when Defendant could have filed this matter at the outset, rather than wait to file their motion on the eve of trial. Due to the extended time, where no litigation or discovery, aided the dismissal based on preclusion, the request for $237,954.50 cannot be reasonable. *See Tallman,* No. 2:09-CV-00944-PMP, 2014 WL 2485820, at *10 (D. Nev. June 3, 2014) (holding that prevailing party bears burden to prove fees are reasonable).

Therefore, as the court erred when it determined that Defendant was a prevailing party and awarding attorneys' fees under the contract, when it dismissed the case because of judicial estoppel, Defendant had not obtained a money judgment and Defendant failed to prevail on a significant issue for which the complaint was brought. Procedural success, or dismissal of all the causes of action as Judge Allf noted, was not a basis to justify an award of attorneys' fees.

1. The Court's Unfounded Determination that "All Named Plaintiffs" Were Jointly and Severally Liable for the Award of Attorneys' Fees Though All Parties Were Not Before the Court or Even a Party to the Contract Was Error.

The Court articulated no basis for determining that all of the Plaintiffs would be subject to the award of fees, and presumably agreed with Defendants arguments of alter-ego or agency. In any event though the order for fees only named Carlos Huerta and The Alexander Christopher Trust[3]. APP. Vol. II at 145-190. But even if the award was proper, the award should not have been assessed against either party.

Defendant, even though he is not a prevailing party under Nevada law, claimed that Go Global remains liable for the claimed attorney's fees because Go Global's obligations, under the assignment, continued thereafter. APP. Vol. I, pp. 73:26 – 4:6. A critical distinction to accentuate is that, in *Mt. Wheeler Power, Inc. v. Gallagher*, 98 Nev. 479, 483, 653 P.2d 1212, 1214 (1982). , the case cited for the preposition by Defendant that an assignor is liable for attorney's fees if the assignee fails, is that the trial court's denial of the plaintiffs claim left them without remedy "Under the circumstances recited above, we see no basis for utilizing the legal fiction 'separating' the debtor-in-possession from Diamond as a proper rationale for leaving Wheeler Power without remedy." *Mt. Wheeler Power, Inc.*, 98 Nev. at 483. In this matter, Defendant had a remedy and there is no compelling reason to "separating the legal fiction" of the entities before or not

[3] Notwithstanding these arguments are submitted in an abundance of caution to ensure that the order allowing fees is not later modified to include all the plaintiffs as the Court's determination expressed; and to preserve the arguments for reply.

before this Court. Also, in *Mt. Wheeler* the question of whether the assignor was liable was presented to the state court only because the bankruptcy proceedings had been closed. *Id.* Go Global's bankruptcy case, as articulated to the court, had not been closed previously. Thus, Defendant had the ability to seek fees against Go Global in its bankruptcy case, but that time has no lapsed. *See Davidsohn v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996) (stating "A motion for attorney's fees should be made reasonably promptly after entry of judgment because a losing party may decide whether to appeal based on the amount of an award of attorney's fees against it.").

2. Defendant's Arguments of "Reverse Alter Ego" Implicating the Trust as Assignee Should Also Be Subject to the Award of Fees Was Likewise Not a Basis to Award Fees.

Defendant failed to show why or what circumstances would justify the application of a reverse alter-ego that would render a reward of fees against the Trust. While *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 847 (2000) does discuss the use of the alter ego doctrine to perfect justice – it was not without analyzing any pertinent factors. Defendant did discuss those factors, if at all. The application of the alter-ego must be supported by substantial evidence and not by sole ownership alone. *Mosa v. Wilson-Bates Furniture Co.*, 94 Nev. 521, 523, 583 P.2d 453, 454 (1978) (discussing several factors which identified alter-ego allegations at trial along with sole corporate ownership). In *Truck Ins.*

Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 635, 189 P.3d 656, 660 (2008), that court denied a request by the plaintiff to apply alter-ego to a Nevada firm and California firm though "the firms were one and the same." *Id.* Quoting *LFC Marketing*, the *Truck Ins. Exch.* went to affirm that the corporate cloak is not lightly thrown aside" and that applying alter ego is an exception to the rule of corporate independence. *Id.* A noted factor in *Truck Ins. Exch.* was the fact that the firms had separate identities, held "independent federal tax identification numbers, operated under its own bylaws, was supervised by a licensed Nevada attorney, and possessed an independent business license, tax license, part-time staff, phone lines, insurance coverage, and office sublease agreement." *Id.*

Defendant's application of the alter-ego is unsupported by substantial evidence. *See Mosa v.*, 94 Nev. at 523. Ownership is only one factor out of several under *LFC Mktg. Grp., Inc.* All of the Plaintiff and non-plaintiff parties have their own identity just as in *Truck Ins. Exch.*, though they may have owners in common. Also, Defendant has not addressed what the ownership of the Alexander Christopher Trust is, which would be necessary to determine whether alter-ego would be applicable. The corporate shield cannot be "lightly thrown aside," by Defendant's scant purported evidence, and the application of alter-ego must be denied. Thus an award of fees should not have been levied against all parties, or at all, and specifically not the Trust.

VII. CONCLUSION

Wherefore based on foregoing, the District Court erred in granting an award of attorneys' fees because Defendants were not a prevailing party when the District Court determined that the case should be dismissed because of judicial estoppel. Therefore the award of fees should be stricken and the judgment deemed void.

Dated this 23rd day of November, 2015.

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CERTIFICATION PURSUANT TO NEV. R. APP. P. 28.2

1. I hereby certify that this 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14 in Times New Roman with a font size of 14; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[X] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate 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 this 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 sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of November, 2015.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I hereby certify that on this 23rd day of November, 2015, service of the foregoing **APPELLANTS' OPENING BRIEF** was made by submission to the electronic filing service for the Nevada Supreme Court upon the following registered users to the email addresses on file:

Samuel Lionel
Brandon McDonald

/s/ C.J. Barnabi
An employee of McDonald Law Offices, PLLC