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**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

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Tracie K. Lindeman  
Clerk of Supreme Court

Appeal

From the Eighth Judicial District Court

The Honorable Nancy L. Allf, District Judge

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**APPELLANTS' REPLY BRIEF**

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**TABLE OF AUTHORITIES**

**State Cases**

*Bielar v. Washoe Health Sys., Inc.*, 129 Nev. Adv. Op. 49, 306 P.3d 360 (2013)..6

*LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015).....7

**Federal Cases**

*N. A. A. C. P. v. Wilmington Med. Ctr., Inc.*, 689 F.2d 1161 (3d Cir. 1982).....7

I.

Introduction

Appellants appeal must be granted because attorney's fees should not be awarded when the District Court dismissed the matter based on judicial estoppel, and a "prevailing party" must succeed on an underlying claim related to the agreement at issue.<sup>1</sup> Respondents' arguments confuse cause, with effect. The case was dismissed based on judicial estoppel because the claims were not brought forward in the bankruptcy court.<sup>2</sup> *Id.*; *see also* Respondent's Motion for Summary Judgment, App. Vol. 1, pp. 70-87 (only arguing for dismissal based on judicial estoppel and claim preclusion, but not arguing that the case should be dismissed on any contractual defenses). The effect was the inability to prosecute

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<sup>1</sup> Respondents concede at several points in their own brief that the dismissal was based on judicial estoppel, and not because the district court found that the agreement was not entitled to enforcement by citing this conclusion from the District Court. "[t]his is a case that's very ripe for judicial estoppels and under applicable case law the motion [for summary judgment] is granted. App. at 133:23-25." Answering Brief, p. 8:2-5; *see also Id.* at 1:10-12 ("Summary judgment was granted to Rogich on the ground of judicial estoppel.")

<sup>2</sup> At multiple occasions Respondents claim that the failure to specifically disclose the nearly \$3 million claim against Rogich was fraud, yet point to no finding of the District Court evidencing this claim. The District Court actually believed that the claim had not been preserved by the preservation of rights clause in the disclosure statement. App. Vol. 1, pp. 72:1-73:19. Ironically, both counsel and Rogich were provided notice of Go Global and Carlos Huerta's bankruptcy filing from the outset of that matter or entered personal appearances. *Id.* at 89:24-90:9

1 their claims related to the agreement. Thus, the District Court did not have to  
2 interpret the agreement. When the case was dismissed based on estoppel that did  
3 not mean the District Court interpreted the agreement. Appellants agree that all  
4 contractual provision at issue must be given effect. In so doing, effect must be  
5 given to the phrase “prevailing party.” Since Respondents’ were not a prevailing  
6 party under the law, the award of attorney’s fees should be reversed.<sup>3</sup>  
7

## 8 II.

### 9 Supplemental Legal Argument

#### 10 11 **A. A “Prevailing Party” Under Nevada Law, Entitled to an Award of** 12 **Attorney’s Fees, is a Party That Prevails on a Claim or Defense, Not a** 13 **Party That Succeeds in Dismissing a Case on Judicial Estoppel.**

14 Rather than argue what is a “prevailing party” is under the law,  
15 Respondents erroneously argue that only initiation, intent and dismissal based on  
16 judicial estoppel are enough to trigger the fee shifting provisions under the  
17 agreement.<sup>4</sup> This Court has repeatedly held that contracts should be reviewed in a  
18

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19  
20 <sup>3</sup> In regards to footnote 1 of Respondents’, Nanyah Vegas’s appeal was granted by  
21 this Court, by the Order of Reversal and Remand. Order dated February 12, 2016,  
22 Case No. 66823. Thus, Nanyah’s claims still must be adjudicated, and the matter  
23 rendered to a final judgment.

24 <sup>4</sup> As previously mentioned, the fee shifting provision, provides that fees may be  
25 awarded if the contract is interpreted or enforced:

26 (d) Attorneys' Fees. Unless otherwise specifically provided for  
27 herein, each party hereto shall bear its own attorneys' fees  
28

1 legal context giving effect to every word:

2 “Contract interpretation is subject to a de novo standard of review.”  
3 *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). “A  
4 basic rule of contract interpretation is that ‘[e]very word must be  
5 given effect if at all possible.’ ” *Musser v. Bank of Am.*, 114 Nev. 945,  
6 949, 964 P.2d 51, 54 (1998) (alteration in original) (quoting *Royal*  
7 *Indem. Co. v. Special Serv. Supply Co.*, 82 Nev. 148, 150, 413 P.2d  
8 500, 502 (1966)). “ ‘A court should not interpret a contract so as to  
9 make meaningless its provisions.’ ” *Id.* (quoting *Phillips v. Mercer*, 94  
10 Nev. 279, 282, 579 P.2d 174, 176 (1978)).

11 *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. Adv. Op. 49, 306 P.3d 360, 364  
12 (2013).

13 A “prevailing party” is one that prevails at least on some of the merits of the  
14 case. As this Court has recently noted, a prevailing party succeeds on at least some  
15 of it claims:

16 A party prevails “if it succeeds on *any significant issue* in litigation

17 \_\_\_\_\_  
18 incurred in the negotiation and preparation of this Agreement  
19 and any related documents. In the event that any action or  
20 proceeding is instituted to interpret or enforce the terms and  
21 provisions of this Agreement, however, the prevailing party  
22 shall be entitled to its costs and attorneys' fees, in addition to  
23 any other relief it may obtain or to which it may be entitled.

24 App Vol. I., p. 17. [Emphasis added].

25 The language of this clause indicates that attorney’s fees should be awarded only  
26 if: 1) A party starts an action in regards to the Agreement, and 2) One of the  
27 parties is deemed to be a “prevailing party.” It is undisputed that an action was  
28 started but Respondents were not a “prevailing party” under any noted case law,  
nor has Respondent cited any favorable case for itself in this regards (but for the  
dictionary term). *See generally*, Answering Brief.

1 which achieves some of the benefit it sought in bringing suit.” *Valley*  
2 *Elec. Ass’n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)  
3 (emphasis added) (internal quotations omitted). To be a prevailing  
4 party, a party need not succeed on every issue. *See Hensley v.*  
5 *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”).

6 *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015),  
7 reh'g denied (May 29, 2015), reconsideration en banc denied (July 6, 2015).<sup>5</sup>

8 Other courts are in accord that a procedural victor is not a prevailing party “A  
9 party who prevails on a purely procedural issue, however, after *Hanrahan v.*  
10 *Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980), is not considered  
11 a prevailing party.” *N. A. A. C. P. v. Wilmington Med. Ctr., Inc.*, 689 F.2d 1161,  
12 1165 (3d Cir. 1982).

13  
14 While emphasizing the word “instituted” and not “prevailing party”

15  
16 Respondents make this phrase meaningless, just as the District Court previously  
17 erred. A “prevailing party” prevails on at least some of the merits of the claims.  
18  
19

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20 <sup>5</sup> Respondents have taken issue with this and several other which Blackjack  
21 Bonding court likewise referenced to make its decision, by providing a brief  
22 summary of the facts; presumably in an attempt to disclaim similarity. Answering  
23 Brief, pp. 10:11-11:19. This attempt to distinguish is unavailing. The general  
24 principles as set forth in these several cases were nearly identical despite the  
25 factual scenario. If anything is to be gleaned, it is the fact that these principles  
26 should be applied in the same manner in this case, and find that dismissal based on  
27 judicial estoppels does not make a defendant a “prevailing party.” Yet again  
28 though, Respondents only offer a dictionary interpretation of this legal phrase,  
without finding any supportive case law to offer a counter-argument.

1 *Blackjack Bonding*, 343 P.3d at 615. The “prevailing party is not simply a  
2 procedural victor like the Respondents. *Wilmington Med. Ctr., Inc.*, 689 F.2d at  
3 1165 (3d Cir. 1982). These points along with the many other prerequisites cited  
4 by Appellants in their Opening Brief, are lacking by the Respondents. Surely,  
5 Appellants did not intend to be bound by Respondents subjective interpretation of  
6 “prevailing party” nor have Respondents presented any evidence that Appellants  
7 did not intend to use the phrase as held by this Court and several others.<sup>6</sup>  
8  
9

10 **B. Respondent’s Claim that the Fees Awarded Were Not Challenged is**  
11 **Not Accurate as This Appeal’s Object Was to Dispute Any Fees**  
12 **Awarded Because This Was Error.**

13 It is unknown why argument was submitted as to why the specific charges  
14 were not disputed, when Appellants already challenged the award in its entirety.  
15 The Opening Brief at length argued that the District Court erred and that it  
16 erroneously found that the Respondents were entitled to attorney’s fees. *See*  
17 *generally*, Appellants’ Opening Brief. Appellants remain steadfast in their  
18  
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20  
21 <sup>6</sup> While Respondents argue that the Court must look to the intent of the parties,  
22 this argument “cuts” both ways. Answering Brief, pp. 5:25-6:13. There is no  
23 evidence that either party intended to define “prevailing party” by anything but  
24 what the phrase meant under Nevada law. The parties agreed that Nevada law  
25 would govern the interpretation of the agreement. App. Vol 1, p. 17 “(b)  
26 Governing Law. The laws of the State of Nevada applicable to contracts made in  
27 that State, without giving effect to its conflict of law rules, shall govern the  
28 validity, construction, performance and effect of this Agreement.” The intent of  
the parties was to have Nevada law interpret “prevailing party.”



arguments that an award of attorney's fees should not have been awarded.<sup>7</sup>

### III.

#### Conclusion

Wherefore based on foregoing briefs of the Appellants, the District Court erred in granting an award of attorneys' fees. The Defendants were not prevailing parties predicated upon the District Court's dismissal based on judicial estoppel. Therefore, the award of fees should be stricken and the judgment deemed void.

Dated this 7<sup>th</sup> day of March, 2016.

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<sup>7</sup> Along with the other errors wherein the District Court identified parties that should not have been identified as being liable for the award or reverse alter-ego being acknowledged as a viable legal theory in these circumstances, as discussed in the Opening Brief, this appeal should be granted.

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:

☒ 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

☒ Does not exceed 15 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

1 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires  
2 every assertion in the brief regarding matters in the record to be supported by a  
3 reference to the page and volume number, if any, of the transcript or appendix where  
4 the matter relied on is to be found. I understand that I may be subject to sanctions  
5 in the event that the accompanying brief is not in conformity with the requirements  
6 of the Nevada Rules of Appellate Procedure.  
7

8  
9 Dated this 7<sup>th</sup> day of March, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I hereby certify that on this 7<sup>th</sup> day of March, 2016, service of the foregoing **APPELLANTS' REPLY 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 Cohen-Johnson, LLC