IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN MICHAEL FERGASON, Appellant, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	Case No.: 74411 Appeal from the Eighth Judicial District Court, the Honorable Douglas E. Smith Presiding

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Respondent, Las Vegas Metropolitan Police Department ("LVMPD"), is a government entity, and it is not owned in whole or in part by any publicly traded company.

LVMPD is represented in the District Court and this Court by Marquis Aurbach Coffing and LVMPD Office of General Counsel.

Dated this 25th day of July, 2018.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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I. JURISDICTIONAL STATEMENT

Appellant, Bryan Fergason ("Fergason"), appeals from the order granting summary judgment in favor of LVMPD on the sole claim of civil forfeiture. 24 Record on Appeal ("ROA") 5153–5182. Fergason previously attempted to appeal from this same summary judgment order in Supreme Court Case Nos. 72640 and 73344, which were both dismissed as premature. Since Fergason's current appeal was timely filed following the resolution of the tolling motion of the final renewed summary judgment order, LVMPD agrees that this Court has appellate jurisdiction according to NRAP 3A(b)(1) and NRAP 4(a)(4). 24 ROA 5153–5182.

II. ROUTING STATEMENT

According to NRAP 17(a), this case does not fall into any of the categories of cases presumptively retained by the Supreme Court. By analogy to NRAP 17(b)(5), this case should be assigned to the Court of Appeals because Fergason's appeal involves $124,216.36 in funds subject to civil forfeiture. 22 ROA 4701–4709. But, due to the history of related cases in this Court, LVMPD does not object to the Supreme Court retaining this case as a matter of judicial economy.

III. ISSUES ON APPEAL

A. WHETHER THE LAW OF THE CASE DOCTRINE DOES NOT STAND AS A BAR TO THE DISTRICT COURT'S RENEWED SUMMARY JUDGMENT ORDER IN FAVOR OF LVMPD.

B. WHETHER FERGASON WAS AFFORDED PROCEDURAL DUE PROCESS THROUGH MULTIPLE FILINGS AND HEARINGS BEFORE THE ENTRY OF THE DISTRICT COURT'S RENEWED SUMMARY JUDGMENT ORDER IN FAVOR OF LVMPD.

C. WHETHER LVMPD HAS SATISFIED ITS BURDEN OF PRODUCTION IN FILING ITS RENEWED MOTION FOR SUMMARY JUDGMENT AGAINST FERGASON.

D. WHETHER FERGASON'S MISCELLANEOUS ARGUMENTS LACK MERIT AND DO NOT DISTURB THE DISTRICT COURT'S RENEWED SUMMARY JUDGMENT ORDER IN FAVOR OF LVMPD.

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is a civil forfeiture case that has been before the Court previously. In *Fergason v. Las Vegas Metro. Police Dep't*, 364 P.3d 592, 595 (Nev. 2015), this Court ruled that LVMPD had not satisfied its burden of production in moving for summary judgment against Fergason on the sole claim of civil forfeiture of $124,216.36 held in a bank account. Notably, however, the summary judgment record was very limited, and this Court elected not to review certain documents presented in the first appeal. *See id.* at 598 n.4. Upon remand to the District Court, LVMPD filed a renewed motion for summary judgment against Fergason

(6 ROA 1186–1209), and supplied the District Court with over 2,700 pages of documents to satisfy its burden of production. 5 ROA 927–1100; 6 ROA 1101–1185, 1218–1320; 7 ROA 1321–1470, 1471–1540; 8 ROA 1541–1723, 1724–1760; 9 ROA 1761–1976; 10 ROA 2004–2200; 11 ROA 2201–2257, 2258–2420; 12 ROA 2421–2510, 2511–2640; 13 ROA 2641–2763, 2764–2860; 14 ROA 2861–3016, 3017–3080; 15 ROA 3081–3269, 3270–3300; 16 ROA 3301–3520; 17 ROA 3521–3522, 3523–3740; 18 ROA 3741–3780. Accordingly, the District Court properly granted LVMPD's renewed motion for summary judgment against Fergason.

In this answering brief, LVMPD will address the following issues and urges this Court to affirm the District Court's renewed summary judgment order in favor of LVMPD:

First, the law of the case doctrine does not stand as a bar to the District Court's renewed summary judgment order in favor of LVMPD. In the first appeal, this Court concluded in *Fergason* that LVMPD had not met its burden of production for the summary judgment order to stand. However, nothing within *Fergason* suggested that LVMPD could not present a more complete record to the District Court and file a renewed motion for summary judgment. And, this Court has specifically construed NRCP 56 to allow for successive motions for summary judgment, particularly where a "case had been more fully developed as of the time

the second motion was lodged…." *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446, 956 P.2d 1382, 1386 (1998). Thus, the law of the case doctrine was not violated, especially since this Court's *Fergason* opinion allowed LVMPD to present a more complete record on remand. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010).

Second, Fergason was afforded procedural due process through multiple filings and hearings before the entry of the District Court's renewed summary judgment order in favor of LVMPD. As a general matter, procedural due process requires that parties in litigation be given notice and an opportunity to be heard. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). The District Court went to great lengths to give Fergason several opportunities to be heard. Therefore, Fergason's claim that he was not afforded procedural due process during the renewed summary judgment proceedings is without merit.

Third, LVMPD has satisfied its burden of production in filing its renewed motion for summary judgment against Fergason. Although Fergason refers to the renewed summary judgment proceedings as allegedly involving the same record, the truth is that LVMPD presented over 2,700 pages of documents to the District Court. Fergason's opposition to LVMPD's renewed motion for summary judgment relied upon the same burden of production argument discussed by this Court in the previous *Fergason* appeal. 19 ROA 4093–4115. But, Fergason did not attach any

evidence to his opposition. *Id.* As such, if the Court concludes that LVMPD, in fact, satisfied its burden of production, the District Court's renewed summary judgment order should be affirmed. LVMPD is mindful of the Court's April 12, 2018 order requesting answers to two specific questions, which will be discussed in the legal argument section of this answering brief on this third issue. In short, the tracing issue outlined in *Schoka v. Sheriff, Washoe Cnty.*, 108 Nev. 89, 91, 824 P.2d 290, 291–292 (1992) must be tempered by the burglary ring model under which Fergason operated. *See Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998); 22 ROA 4654–4661.

Fourth, Fergason's miscellaneous arguments lack merit and do not disturb the District Court's renewed summary judgment order in favor of LVMPD. Fergason's informal opening brief raises a series of miscellaneous issues that are all without merit. For example, Fergason argues that LVMPD should not have been able to file a renewed motion for summary judgment, since it allegedly violated EDCR 2.24 governing reconsideration. This Court has already rejected an identical argument in *Barmettler*, 114 Nev. at 446, 956 P.2d at 1386. Fergason also suggests that testimony from Tonya Trevarthen ("Trevarthen") was supposedly uncorroborated and, therefore, inadmissible. But, this Court previously rejected this argument in Fergason's direct appeal, Case No. 52877. 22 ROA 4654–4661. Fergason also claims that he requested additional discovery to oppose

LVMPD's renewed motion for summary judgment. Yet, he never requested NRCP 56(f) relief in the renewed summary judgment proceedings, as no affidavit from Fergason appears in the record post-remand. *See Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) ("NRCP 56(f) requires that the party opposing a motion for summary judgment and seeking a denial or continuance of the motion in order to conduct further discovery provide an affidavit giving the reasons why the party cannot present 'facts essential to justify the party's opposition.'"). Fergason finally argues that he should have received appointed counsel in this civil proceeding. But, as a matter of law, "the Sixth Amendment guarantee of the right to counsel applies only in criminal prosecutions." *Rodriguez v. Dist. Ct.*, 120 Nev. 798, 804, 102 P.3d 41, 45 (2004). Therefore, the Court should reject Fergason's miscellaneous arguments and affirm the District Court's renewed summary judgment order in favor of LVMPD.

In summary, this Court should affirm the District Court's renewed summary judgment order in favor of LVMPD because (1) the law of the case doctrine does not stand as a bar to the District Court's renewed summary judgment order; (2) Fergason was afforded procedural due process; (3) LVMPD has satisfied its burden of production; and (4) Fergason's miscellaneous arguments lack merit.

V. STANDARDS OF REVIEW

This Court reviews a district court's order resolving a motion for summary judgment de novo, without deference to the findings of the lower court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.' *Id.* The substantive law will determine which facts are material. *Id.*, 121 Nev. at 730, 121 P.3d at 1030. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Id.*, 121 Nev. at 731, 121 P.3d at 1031.

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.*, 121 Nev. at 730, 121 P.3d at 1030. Factual disputes that are irrelevant or unnecessary will not be counted. *Id.* The nonmoving party may not defeat a motion for summary judgment by relying on the gossamer threads of whimsy, speculation, and conjecture. *Id.* While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment. *Id.*

VI. FACTUAL AND PROCEDURAL BACKGROUND

A. THE BURGLARY RING.

Fergason, Trevarthen, Daimon Monroe ("Monroe"), and Robert Holmes, III ("Holmes") ("Co-conspirators" or "Defendants") were involved in a burglary ring and were adjudicated guilty between 2008 and 2011. 5 ROA 931–952. The burglaries spanned over a period of several years, and involved a sophisticated method of gaining entry to commercial businesses with doors of a particular type, which could be opened with a specially crafted tool the Co-conspirators referred to as "Matthew." 5 ROA 983–984. The Co-Conspirators were found guilty of felonies including Burglary (NRS 205.060), Grand Larceny (NRS 205.220), and/or Possession of Stolen Property (NRS 205.275).

B. THE FUNDS SEIZED.

Between November 2006 and February 2007, $281,656.73 was recovered by LVMPD from the actual or constructive possession of Fergason, Trevarthen, Monroe, Holmes, and their attorneys. The money represented proceeds attributable to the commission or the attempted commission of multiple felonies as part of a commercial burglary ring, making the money subject to forfeiture.

1. The $13,825 in Cash in the Oven Mitts and the $1,040 in Coins in the Buckets at the Cutler Drive Residence.

Monroe, Trevarthen, and their three children lived at 1504 Cutler Drive in Las Vegas, Nevada. 9 ROA 900–901. Trevarthen and Monroe lived together since 2001 (10 ROA 2120), and they lived on Cutler Drive since 2003. 9 ROA 1876–1879. Monroe did not work, beyond his "business" of selling stolen property for cash and bringing stolen cash home from burglaries. 18 ROA 3776–3777. Between 2001 and 2006, Monroe only worked for a few months in 2001 cleaning restaurants. 15 ROA 3281. At times, including at the time of Monroe and Fergason's arrest (17 ROA 3653–3655), Monroe stated he had a pressure washing business, but "pressure washing" was just a code word for the burglaries they were committing. *Id.*; 17 ROA 3658–3659, 3663. Trevarthen worked as a substitute teacher, earning around $2,000 per month, and her income did not cover the bills. 15 ROA 3277. The couple's rent alone was $1,600 per month between 2003 and 2006 (9 ROA 1876–1879), and the residence had expenses including home phone and internet through Cox, gas, water, and electricity bills as high as $500 per month during the summer. 15 ROA 3283.

Monroe kept cash in the kitchen of the home, which was stolen money from burglaries or from selling property the burglary ring had stolen. 18 ROA 3778. When police searched the home, a large sum of cash, more than $10,000, was

found inside of a vegetable-print oven mitt in a kitchen drawer, bundled where one would put a hand inside the mitten. 17 ROA 3672–3679. After officers found the money in the oven mitts, they laid the money out on the dining table and found a total of $13,825 was in the oven mitt drawer. *Id.* In addition to the money in the oven mitts, $1,040.22 in coins was found in buckets in the kitchen at 1504 Cutler. 17 ROA 3678–3679.

When Monroe and his co-defendants stole from businesses, they often took cash during the burglaries. The money found in Fergason's wallet was organized as if it had been taken out of a register, stacked in denominations and "all faced the correct way." 6 ROA 1115. A detective described it as follows: "Like you took it out of a register as far as ones, fives, twenties, and stacked it all together. That's how the money was, folded over." *Id.*

In the criminal trials of Monroe and Fergason, several victims stated cash was stolen from their businesses' cash registers or petty cash drawers during the burglaries, for which Defendants were convicted. For illustration, victims who testified at trial that cash was stolen in the burglaries of their businesses spanned over a period of several years, including the offices of plastic surgeon Dr. Stephen Gordon in June 2003 (7 ROA 1527) and obstetrician Dr. Richard Groom in May 2004 (14 ROA 3071), Global Entertainment Group in March 2005 (8 ROA 1591), and Spa Depot on June 26, 2006. 7 ROA 355.

In her voluntary statement, Trevarthen discussed the burglary tools and stated Monroe used particular tools to break into safes during or after burglarizing a business. 17 ROA 3662. "He would use like the big pry bars for getting into safes and so then he would do it there and sometimes he would just bring the safe to the garage and break into, and you know, break it open in the garage." *Id.* So, the burglary ring was not limited to stealing only property, but also routinely and historically stole cash.

Defendants conducted several of their routine financial transactions exclusively with large sums of cash. Monroe and Trevarthen's landlord testified the couple paid rent in cash, consisting of $1,600 per month, with payments which covered six months at a time. 11 ROA 1321. Defendants also paid for storage rentals holding stolen goods, with cash, sometimes two to three months ahead of time. 12 ROA 1507.

2. <u>Sums Seized From Fergason's Accounts.</u>

The sum of $124,216.36 was seized from Bryan Fergason's bank accounts in the execution of a warrant at Bank of America, which included funds from two bank accounts and two certificates of deposit. 13 ROA 2774. Like Monroe, Fergason did not have any legitimate employment in 2006. 15 ROA 3281–3282. Fergason's only job was with a moving company, and he held the job "only for a few months" during the time Trevarthen knew him, from late 2001 or early 2002 to

2006. 15 ROA 3280–3282. Trevarthen could not recall the year when Fergason held the job with a moving company, but it was not as recent as 2006. 15 ROA 3281. LVMPD Detective Nickell testified in the criminal trial that there was no evidence from phone calls, impounds from the search warrants, or other investigation that Fergason had any legitimate source of income. 16 ROA 3447–3448. Further, in a search of Fergason's apartment, storage unit, and car, no paystubs or evidence of Fergason having legitimate employment was found. *Id.* Fergason's bank records do not reflect any deposits from an employer. 17 ROA 3735–18 ROA 3749.

Like Monroe, Fergason at times said he was in the pressure washing business for D&B's Pressure Washing (presumably Daimon and Bryan's), but this pressure washing business did not exist. 17 ROA 3655, 3658–3659. For example, when they were arrested, Fergason and Monroe told officers they worked doing pressure washing, but they were carrying equipment used to conduct burglaries rather than equipment for pressure washing, including prybars, bolt cutters, and two pairs of black gloves. 17 ROA 3653–3655. On jail calls, Fergason and Monroe referred to getting back to "pressure washing," meaning a return to burglarizing. 17 ROA 3663–3664. Fergason was found guilty by a jury in Case Number C228752 for 25 counts of Possession of Stolen Property, a felony in violation of NRS 205.275, and one count of Conspiracy to Possess Stolen Property

and/or to Commit Burglary, a gross misdemeanor. 5 ROA 940–943. In a Second Amended Judgment of Conviction in Case Number C227874 on March 30, 2010, Defendant was found guilty of two counts of Burglary, Category B Felonies in violation of NRS 205.060; Grand Larceny, a Category B Felony in violation of NRS 205.220 and 205.222; and Possession of Burglary Tools, a gross misdemeanor. 5 ROA 944–945. In addition, on June 29, 2011, a Second Amended Judgment of Conviction was filed in which Fergason entered a plea of guilty to Attempted Burglary on June 29, 2011, in a separate case number, C208321. 5 ROA 946–947.

After his arrest, telephone records from the Clark County Detention Center ("CCDC") reflect that Monroe had access to and was assisting in the management of Fergason's finances. Trevarthen paid for a storage unit for Fergason's belongings. 10 ROA 2124–2125. Trevarthen and Monroe also parked Fergason's car at their home, and kept some of his items at their home and inside of his car. 10 ROA 2126–2127.

On September 26, 2006, Monroe referred to the money in Fergason's bank accounts, as Monroe and Fergason discussed the logistics of getting an attorney and planning additional burglaries for when they get Fergason out of jail:

DH [Monroe]: You got one hundred and twenty put away?

BF [Fergason]: Yeah.

> DH: Okay, you got fifteen at the house, so your bills are paid. Uh, the fifteen, I'm just gonna knock off the money that Carlos owes you. So…so then you down to eleven, okay, instead of twenty-six. Okay?
>
> BF: Yeah….
>
> DH: You know, and I'm tellin' ya, if we can get you out and I told you the best time for that one thing, you're gonna wind up getting' two or three thousand dollars that night anyway.

17 ROA 3710–3711. On another CCDC phone call on October 26, 2006, Monroe joked with Fergason, "I got all you[r] bank information anyways I just go rob you[r] bank." 17 ROA 3729. Of course, the "one hundred and twenty" referred to the $124,216.36 seized from Fergason's Bank of America accounts and forfeited.

Deposit slips obtained during the execution of search warrants reveal that Fergason had a pattern of depositing large sums of cash weekly into his accounts at Bank of America, and sometimes twice per week. 17 ROA 3732, 3735–3740; 18 ROA 3741–3746. Fergason's bank records reflect that he made large cash deposits consistently on Mondays, as well as some additional days. *Id.*; 18 ROA 3748–3749. This is consistent with Trevarthen's description of the frequency and timing of Monroe's sales of the stolen property: "Basically, ***every weekend***" to "get rid of it all before the next weekend." 18 ROA 3777 (Emphasis added). During August 2006, Fergason deposited $14,600 in cash deposits, all in amounts in excess of $1,000. *Id.* During the first 18 days of September 2006, Fergason deposited $12,100. *Id.* In less than two months in 2006, Fergason deposited

$28,000 in large cash deposits at Bank of America, ranging from $1,000 to $5,500. *Id.* He made a deposit in the branch of Bank of America with a bank teller every Monday between July 31, 2006 and September 18, with the exception of the week of September 4, which was Labor Day (a banking holiday). 17 ROA 3732, 3735–3740; 18 ROA 3741–3746. These deposits were all made during a time when Fergason did not have a job. 15 ROA 3280–3282.

C. PROCEDURAL BACKGROUND.

The underlying District Court case involved LVMPD's civil forfeiture complaint against $281,656.73, with Fergason, Trevarthen, Monroe, and Holmes as claimants. 1 ROA 1–6. Trevarthen did not appeal from the District Court's first summary judgment order entered in November 2012. 4 ROA 699–703. Fergason, Monroe, and Holmes separately appealed the District Court's summary judgment order, which were respectively docketed as Supreme Court Case Nos. 62357, 62264, and 62274. In each of these three prior appeals, this Court reversed at least a portion of the District Court's summary judgment order and remanded for further proceedings. These three prior appeals were governed by the Court's opinion in *Fergason v. Las Vegas Metro. Police Dep't*, 364 P.3d 592 (Nev. 2015).

Upon remand to the District Court, LVMPD filed a renewed motion for summary judgment based upon the evidentiary standards outlined in this Court's *Fergason* opinion. 6 ROA 1186–1209; 18 ROA 3922–19 ROA 4004. The District

Court entered three separate summary judgment orders in favor of LVMPD and against Fergason, Monroe, and Holmes. 21 ROA 4461–4469; 22 ROA 4701–4709; 24 ROA 5104–5115. Fergason, Monroe, and Holmes each separately appealed from the District Court's orders granting LVMPD's renewed motion for summary judgment. This Court affirmed the renewed summary judgment order as to Monroe in Case No. 74388. This Court also dismissed Holmes' appeals from the renewed summary judgment order and an attorney fees and costs order in Case Nos. 71680 and 72379. So, Fergason's appeal in the instant case from the renewed summary judgment order is the last of the appeals from the District Court's renewed summary judgment orders.

VII. LEGAL ARGUMENT

A. THE LAW OF THE CASE DOCTRINE DOES NOT STAND AS A BAR TO THE DISTRICT COURT'S RENEWED SUMMARY JUDGMENT ORDER IN FAVOR OF LVMPD.

The law of the case doctrine does not stand as a bar to the District Court's renewed summary judgment order in favor of LVMPD. In the first appeal, this Court concluded in *Fergason* that LVMPD had not met its burden of production for the summary judgment order to stand. However, nothing within *Fergason* suggested that LVMPD could not present a more complete record to the District Court and file a renewed motion for summary judgment. And, this Court has specifically construed NRCP 56 to allow for successive motions for summary

judgment, particularly where a "case had been more fully developed as of the time the second motion was lodged…." *Barmettler*, 114 Nev. at 446, 956 P.2d at 1386.

As a general matter, the law of the case doctrine pertains to legal issues decided by an appellate court. *See, e.g., LoBue v. State ex rel. Dep't Hwys.*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976) (explaining that where an appellate court deciding an appeal states a principle or rule of law, necessary to the decision, the principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal). In *Fergason*, this Court explicitly determined that LVMPD had not met its burden of proof in the first summary judgment proceedings. *Id.* at 600. Aside from this determination, this Court in *Fergason* acknowledged that LVMPD relied upon the presumption in NRS 179.1173(6) for Fergason's convictions to provide the basis for the forfeiture. *Id.* at 599. Yet, nothing in *Fergason* prohibited LVMPD from filing another motion for summary judgment with a more developed record, especially since this Court concluded that the presumption was insufficient. *See Barmettler*, 114 Nev. at 446, 956 P.2d at 1386. Since this Court's legal conclusions in *Fergason* were based upon a completely different factual record, they are not binding on LVMPD. And, according to NRCP 56(a), LVMPD was entitled to file a renewed motion for summary judgment. Thus, the law of the case doctrine was not violated, especially since this Court's *Fergason* opinion allowed

LVMPD to present a more complete record on remand. *See Dictor*, 126 Nev. at 44, 223 P.3d at 334.

B. FERGASON WAS AFFORDED PROCEDURAL DUE PROCESS THROUGH MULTIPLE FILINGS AND HEARINGS BEFORE THE ENTRY OF THE DISTRICT COURT'S RENEWED SUMMARY JUDGMENT ORDER IN FAVOR OF LVMPD.

Fergason was afforded procedural due process through multiple filings and hearings before the entry of the District Court's renewed summary judgment order in favor of LVMPD. As a general matter, procedural due process requires that parties in litigation be given notice and an opportunity to be heard. *Callie*, 123 Nev. at 183, 160 P.3d at 879. The District Court went to great lengths to give Fergason several opportunities to be heard.

LVMPD filed its renewed motion for summary judgment against Fergason on March 15, 2016. 6 ROA 1186–1209. Fergason was given additional time to respond in a hearing on April 19, 2016. 25 ROA 5285–5286. On May 17, 2016, the District Court extended the time for oppositions to LVMPD's renewed motion for summary judgment. 25 ROA 5287–5288. In a subsequent hearing on July 12, 2016, the District Court heard argument from all parties, but allowed supplemental briefing and set another hearing for October 18, 2016. 25 ROA 5291–5292. On October 18, 2016, the District Court again heard argument on LVMPD's renewed motion for summary judgment. 25 ROA 5295–5296. Due to pending criminal

cases, the District Court did not immediately decide LVMPD's renewed motion for summary judgment, as reflected in the January 10, 2017 court minutes. 25 ROA 5298–5299. In February 2017, the District Court once again heard argument on LVMPD's renewed motion for summary judgment against Fergason, but deferred making a decision. 25 ROA 5300–5301. On March 7, 2017, the District Court once again heard argument on the case and whether a decision needed to be deferred due to Fergason's separate criminal cases. 25 ROA 5302–5303. The District Court was not convinced that a stay was necessary and granted LVMPD's renewed motion based upon the filings and the arguments made over the course of several hearings. *Id.* Therefore, Fergason's claim that he was not afforded procedural due process during the renewed summary judgment proceedings is without merit.

C. LVMPD HAS SATISFIED ITS BURDEN OF PRODUCTION IN FILING ITS RENEWED MOTION FOR SUMMARY JUDGMENT AGAINST FERGASON.

LVMPD has satisfied its burden of production in filing its renewed motion for summary judgment against Fergason. Although Fergason refers to the renewed summary judgment proceedings as allegedly involving the same record, the truth is that LVMPD presented over 2,700 pages of documents to the District Court. Fergason's opposition to LVMPD's renewed motion for summary judgment relied upon the same burden of production argument discussed by this Court in the

previous *Fergason* appeal. 19 ROA 4093–4115. But, Fergason did not attach any evidence to his opposition. *Id.* As such, if the Court concludes that LVMPD, in fact, satisfied its burden of production, the District Court's renewed summary judgment order should be affirmed. In short, the tracing issue outlined in *Schoka*, 108 Nev. at 91, 824 P.2d at 291–292 must be tempered by the burglary ring model under which Fergason operated. *See Thomas*, 114 Nev. at 1143, 967 P.2d at 1122; 22 ROA 4654–4661.

In its April 12, 2018 order, this Court asks LVMPD to address: (1) what felony or felonies the $28,000 in deposits from July 2006 to September 2006 were attributable to; and (2) what record evidence there is to indicate that the remaining account balance accrued from large-scale cash deposits that were made while the burglary ring was active.

In responding to these two questions, LVMPD first directs the Court to NRS 179.1173(6): "The plaintiff is not required to plead or prove that a claimant has been charged with or convicted of any criminal offense." This is a true statement because NRS 179.1164(1)(a) provides that "[a]ny proceeds attributable to the commission or ***attempted commission*** of any felony" is subject to forfeiture. (Emphasis added). Further, NRS 179.121(1)(a) makes "money" subject to forfeiture for "[t]he commission of or attempted commission of the crime of murder, robbery, kidnapping, burglary, invasion of the home, grand larceny or

theft if it is punishable as a felony." As outlined, Fergason was found guilty by a jury in Case Number C228752 for 25 counts of Possession of Stolen Property, a felony in violation of NRS 205.275, and one count of Conspiracy to Possess Stolen Property and/or to Commit Burglary, a gross misdemeanor. 5 ROA 940–943. In a Second Amended Judgment of Conviction in Case Number C227874 on March 30, 2010, Fergason was found guilty of two counts of Burglary, Category B Felonies in violation of NRS 205.060; Grand Larceny, a Category B Felony in violation of NRS 205.220 and 205.222; and Possession of Burglary Tools, a gross misdemeanor. 5 ROA 944–945. In addition, on June 29, 2011, a Second Amended Judgment of Conviction was filed in which Fergason entered a plea of guilty to Attempted Burglary on June 29, 2011, in a separate case number, C208321. 5 ROA 946–947.

As to the Court's first question, LVMPD responds that all of Fergason's felonies provide the basis for forfeiture. Additionally, the very nature of the "burglary ring" (a term used in the Court's April 12, 2018 order) provides the basis for forfeiture due to the attempted commission of felonies. *See* NRS 179.121(1)(a). The Court also previously characterized Fergason as a "co-conspirator" in this burglary ring. 22 ROA 4654–4661. Aside from property, Fergason, along with the burglary ring also had a history of stealing large quantities of money. 6 ROA 1115; 7 ROA 355, 1527; 8 ROA 1591; 14 ROA 3071.

By the very nature of the crime, "[c]onspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." *Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998). Yet, this Court has previously held that "if a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement, then sufficient evidence exists to support a conspiracy conviction." *Id.* Indeed, NRS 199.490 specifically excludes this type of overt act to sustain a conspiracy conviction (and provide the necessary predicate for civil forfeiture): "In any such proceeding for violation of NRS 199.480, ***it shall not be necessary*** to prove that any overt act was done in pursuance of such unlawful conspiracy or combination." (Emphasis added). This Court's order of affirmance from Fergason's direct appeal reflects these legal principles. 22 ROA 4654–4661.

With respect to civil forfeiture, courts have considered large quantities of cash and large cash purchases, that vastly exceed a defendant's income, as suggestive of proceeds of criminal activity. *See, e.g., U.S. v. Thomas*, 913 F.2d 1111, 1117–1118 (4th Cir. 1990) (collecting cases); *Harris v. State*, 821 So.2d 177, 178 (Ala. 2001) (upholding forfeiture of $165,501 in currency where the woman who deposited the money at the bank was only employed part-time at a day care, had delinquent mortgage payments and an overdrawn checking account). Notably, the District Court's order granting LVMPD's renewed motion for summary

judgment against Fergason makes these observations. 22 ROA 4707. Fergason did not have any legitimate employment in 2006. 15 ROA 3281–3282.

With regard to the Court's second question, the burglary ring continued even after the Co-conspirators were arrested, as captured on the jail calls. Fergason and Monroe referred to getting back to "pressure washing," meaning a return to burglarizing. 17 ROA 3663–3664. On September 26, 2006, Monroe referred to the money in Fergason's bank accounts, as Monroe and Fergason discussed the logistics of getting an attorney and planning additional burglaries for when they get Fergason out of jail:

> DH [Monroe]: You got one hundred and twenty put away?
>
> BF [Fergason]: Yeah.
>
> DH: Okay, you got fifteen at the house, so your bills are paid. Uh, the fifteen, I'm just gonna knock off the money that Carlos owes you. So…so then you down to eleven, okay, instead of twenty-six. Okay?
>
> BF: Yeah….
>
> DH: You know, and I'm tellin' ya, if we can get you out and I told you the best time for that one thing, you're gonna wind up getting' two or three thousand dollars that night anyway.

17 ROA 3710–3711. This exchange makes it abundantly clear that Fergason had "put away" cash from the burglary ring based on the pattern of selling the stolen property before the next weekend. 18 ROA 3777. Monroe also reported that Fergason was owed "fifteen" from the burglary ring, which Monroe would use to

pay Fergason's bills. 17 ROA 3710–3711. Thus, LVMPD has adequately demonstrated that the $124,216.36 from Fergason's accounts was subject to forfeiture according to NRS 179.1164. Based upon the evidence now before this Court, LVMPD urges the Court to determine that the tracing requirements in *Schoka* have been satisfied. Alternatively, the Court should determine that the nature of the burglary ring does not require the strict tracing outlined in *Schoka*. *See U.S. v. Corrado*, 227 F.3d 543, 553 (6th Cir. 2000) ("The government is not required to prove the specific portion of proceeds for which each defendant is responsible. Such a requirement would allow defendants to mask the allocation of the proceeds to avoid forfeiting them altogether."). Therefore, the Court should conclude that LVMPD has satisfied its burden of production and affirm the District Court's renewed summary judgment order in favor of LVMPD.

D. FERGASON'S MISCELLANEOUS ARGUMENTS LACK MERIT AND DO NOT DISTURB THE DISTRICT COURT'S RENEWED SUMMARY JUDGMENT ORDER IN FAVOR OF LVMPD.

Fergason's miscellaneous arguments lack merit and do not disturb the District Court's renewed summary judgment order in favor of LVMPD. Fergason's informal opening brief raises a series of miscellaneous issues that are all without merit.

1. LVMPD's Renewed Motion for Summary Judgment Was Not a Motion for Reconsideration.

Fergason argues that LVMPD should not have been able to file a renewed motion for summary judgment, since it allegedly violated EDCR 2.24 governing reconsideration. This Court has already rejected an identical argument in *Barmettler*, 114 Nev. at 446, 956 P.2d at 1386. Since NRCP 56(a) specifically allowed LVMPD to file a renewed motion for summary judgment upon remand from the prior *Fergason* appeal, LVMPD's motion was procedurally proper. Fergason's claim that LVMPD's renewed motion, authorized by NRCP 56(a) and *Bermettler*, was actually a reconsideration motion is without merit.

2. Trevarthen's Testimony Presented in Support of LVMPD's Renewed Motion for Summary Judgment Was Admissible.

Fergason also suggests that Trevarthen's testimony was supposedly uncorroborated and, therefore, inadmissible. But, this Court previously rejected this argument in Fergason's direct appeal, Case No. 52877. 22 ROA 4654–4661. Additionally, since Trevarthen was a claimant and funds also included her own bank accounts and payments made by Trevarthen to bail bonds companies and attorneys, the statements made by Trevarthen to LVMPD may be offered as a voluntary statement offered against interest in this case. *See* NRS 51.035(3)(a); *Stiegler v. State*, 125 Nev. 1081, 281 P.3d 1222 (2009) (statements to law enforcement were statements of a party opponent and were not hearsay); *State v.*

Six Hundred Seventy Six Dollars $676 U.S. Currency Seized from Branch, 719 So.2d 154, 155-56 (La. App. 1998) (civil forfeiture case holding hearsay from police officers who were present when claimant was arrested were "a voluntary statement while being transported to the police station that the money had in fact come from the sale of drugs" and were not hearsay because they were admissions against interest). As an admission of a party in this case and offered by LVMPD as a party opponent, these statements are not hearsay and were, therefore, admissible according to NRS 51.035(3).

3. Fergason Never Made an NRCP 56(f) Request for Additional Discovery in the Renewed Summary Judgment Proceedings.

Fergason also claims that he requested additional discovery to oppose LVMPD's renewed motion for summary judgment. But, he never requested NRCP 56(f) relief in the renewed summary judgment proceedings, as no affidavit from Fergason appears in the record post-remand. *See Choy*, 127 Nev. at 872, 265 P.3d at 700 ("NRCP 56(f) requires that the party opposing a motion for summary judgment and seeking a denial or continuance of the motion in order to conduct further discovery provide an affidavit giving the reasons why the party cannot present 'facts essential to justify the party's opposition.'"). Additionally, Fergason has not identified what specific discovery he would have needed to oppose

LVMPD's renewed motion for summary judgment. Therefore, the Court should reject Fergason's bare claim for NRCP 56(f) relief.

4. Fergason Was Not Entitled to the Appointment of Counsel in This Civil Proceeding.

Fergason finally argues that he should have received appointed counsel in this civil proceeding. But, as a matter of law, "the Sixth Amendment guarantee of the right to counsel applies only in criminal prosecutions." *Rodriguez*, 120 Nev. at 804, 102 P.3d at 45. This forfeiture proceeding is undoubtedly civil in nature. *See U.S. v. One 1974 Porsche 911-S Veh. Identification No. 9114102550*, 682 F.2d 283, 285 (1st Cir. 1982) (a forfeiture proceeding is a civil, in rem action that is independent of any factually related criminal actions). The noted exceptions to the rule against appointment of counsel in civil cases do not apply to this case. *See Klett v. Meyers*, 126 Nev. 730, 367 P.3d 790 (2010) (child abuse and neglect proceedings or parental termination rights cases); NRS 432B.420(1) (child abuse and neglect); *Rodriguez*, 120 Nev. at 813, 102 P.3d at 51 (contempt). As such, the District Court's failure to appoint counsel for Fergason in this civil forfeiture proceeding does not amount to any level of error. Therefore, the Court should reject Fergason's miscellaneous arguments and affirm the District Court's renewed summary judgment order in favor of LVMPD.

VIII. CONCLUSION

In summary, this Court should affirm the District Court's renewed summary judgment order in favor of LVMPD because (1) the law of the case doctrine does not stand as a bar to the District Court's renewed summary judgment order; (2) Fergason was afforded procedural due process; (3) LVMPD has satisfied its burden of production; and (4) Fergason's miscellaneous arguments lack merit.

Dated this 25th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

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 2007 in 14-point Times New Roman font.

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:

☒ proportionally spaced, has a typeface of 14 points or more and contains 7,022 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this 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 25th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 25th day of July, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

N/A

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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Claimant in Proper Person

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing