

IN THE SUPREME COURT OF THE STATE OF NEVADA

ATHANASIOS SKARPELOS, AN
INDIVIDUAL,
Appellant,
vs.
WEISER ASSET MANAGEMENT, LTD., A
BAHAMAS COMPANY; AND WEISER
(BAHAMAS) LTD., A BAHAMAS COMPANY,
Respondents.

WEISER ASSET MANAGEMENT, LTD., A
BAHAMAS COMPANY; AND WEISER
(BAHAMAS) LTD., A BAHAMAS COMPANY,
Appellants,
vs.
ATHANASIOS SKARPELOS, AN
INDIVIDUAL,
Respondent.

No. 79425
Electronically Filed
Mar 25 2020 04:15 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

No. 79526

Appeal from Second Judicial District Court, State of Nevada,
in and for Washoe County

The Honorable Elliott Sattler

WEISER'S RESPONSE TO ORDER TO SHOW CAUSE

On February 25, 2020, the Court issued an Order to Show Cause as to why it should not dismiss the cross-appeal of appellees/cross-appellants Weiser Asset Management, Ltd and Weiser (Bahamas), Ltd (collectively “Weiser”) for untimeliness. Specifically, the Court noted that Weiser’s Notice of Appeal on August 29, 2019 was more than 30 days after the District Court’s judgment (the “Judgment”) on April 22, 2019 under NRAP 4(a).¹ Weiser wishes to clarify that appellant/cross-appellee Athanasios Skarpelos (“Skarpelos”) filed an NRCP 59 motion that sufficiently tolled that time until the District Court decided the motion in August 2019.

NRAP 4(a) provides that “[e]xcept as provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served.” When one party files an initial notice of appeal, any other party may file a cross-appeal within the same 30-day period or within 14 days of the other party’s initial notice of appeal, whichever expires later. NRAP 4(a)(2). NRAP 4(a)(4)(D) states that if a party timely files “a motion under Rule 59 to alter or amend the judgment,” “the time to file a notice of appeal runs *for all parties* from entry of an order disposing of the last such remaining motion, and the notice

¹ The Court’s Show Cause Order also suggests that Weiser’s notice of appeal was untimely with respect to an “order granting summary judgment.” There was, however, no order granting summary judgment in this case.

of appeal must be filed no later than 30 days from the date of service of written notice of entry of that order.” (Emphasis added.)

Here, Skarpelos timely filed a Motion to Alter or Amend the Judgment under NRCP 59(e) on April 25, 2019, which tolled the time for either party to file a notice of appeal until the District Court decided that motion. **Exhibit 1** is a copy of this motion (attached hereto without exhibits). The District Court decided that motion on August 6, 2019 in its Order Denying Motion to Alter or Amend Judgment. **Exhibit 2** is a copy of this order. Thus, the parties had until September 5, 2019 to file any notice of appeal of the Judgment under NRAP 4(a)(4)(D). Three days later, the District Court granted Skarpelos’s Motion for Attorney’s Fees on August 9, 2019.

Skarpelos then filed his Notice of Appeal of the Judgment on August 15, 2019. Fourteen days later, on August 29, 2019, Weiser filed its Notice of Cross-Appeal concerning both (a) the Judgment (as tolled by Skarpelos’s NRCP 59(e) motion) and (b) its August 9, 2019 order granting Skarpelos attorney’s fees.

///

Accordingly, Weiser's Notice of Cross-Appeal was timely under NRAP 4(a)(4)(D). Weiser apologizes to the extent its Docketing Statement failed to clarify these points.

DATED this March 25, 2020.

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CERTIFICATE OF SERVICE

I, Martha Hauser, certify that on March 25, 2020, I electronically filed the foregoing **WEISER’S RESPONSE TO ORDER TO SHOW CAUSE**, with the Clerk of the Nevada Supreme Court via the Court’s e-Flex system. Service will be made by e-Flex on all registered participants.

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EXHIBIT 1

EXHIBIT 1

1 **2250**

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12 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
13 IN AND FOR THE COUNTY OF WASHOE

14 NEVADA AGENCY AND TRANSFER
15 COMPANY, a Nevada corporation,

Case No. CV15-02259

Dept. No. 10

16 Plaintiff,

17 vs.

**SKARPELOS' MOTION TO ALTER
OR AMEND JUDGMENT**

18 WEISER ASSET MANAGEMENT, LTD.,
19 a Bahamas company; ATHANASIOS
20 SKARPELOS, an individual; and
DOES 1-10,

21 Defendants.

22 _____/
ATHANASIOS SKARPELOS, an individual,

23 Cross-Claimant,

24 vs.

25 WEISER ASSET MANAGEMENT, LTD., a
26 Bahamas company, and WEISER (BAHAMAS)
27 LTD., a Bahamas company.

28 Cross-Defendants.

1 WEISER ASSET MANAGEMENT, LTD.,
2 a Bahamas company, WEISER (BAHAMAS), LTD.,
3 a Bahamas company,

4 Cross-Claimants.

5 vs.

6 ATHANASIOS SKARPELOS, an individual,
7 Cross-defendant.

8 **SKARPELOS' MOTION TO ALTER OR AMEND JUDGMENT**

9 Cross-Claimant Athanasios Skarpelos ("Skarpelos") moves this Court pursuant to
10 NRCP 59(e) for an amendment of Court's judgment entered on April 22, 2019, removing
11 that portion of the judgment awarding cross-claimant Weiser Asset Management, Ltd.
12 ("WAM") the sum of \$245,464.64. This motion is based on the following memorandum
13 of points and authorities, the entire file, and the testimony and documentary evidence
14 presented at trial.

15 **I. INTRODUCTION**

16 Skarpelos asks the Court to amend its judgment to remove the award of
17 \$245,4654.54 to WAM for three reasons: (1) Skarpelos was denied due process because
18 the award was outside the scope of the pleadings and Skarpelos was never provided fair
19 notice that an award would be based on an April 2013 transaction rather than the July
20 2013 Stock Sale and Purchase Agreement ("July 2013 PSA") that was Weiser's sole basis
21 of relief throughout this lawsuit; (2) the award to WAM was based on the Court's
22 equitable powers even though WAM had an adequate legal remedy it chose not to
23 pursue—that Skarpelos breached his account agreement related to an April 2013
24 transaction involving a sale of his stock to another WAM customer; and (3) the Court
25 lacked subject matter jurisdiction to make the award to WAM because that award did not
26 involve Weiser's claim to ownership of the Disputed Stock that was the subject of this
27 equitable interpleader proceeding.

28 ///

1 Therefore, Skarpelos requests the Court amend its judgment by removing the
2 monetary award to WAM.

3 **II. RELEVANT BACKGROUND**

4 On April 22, 2019, the Court entered its judgment in this matter. The Court's
5 judgment was that Skarpelos was the owner of the Disputed Stock. The Disputed Stock
6 was the "fund" or "res" put in issue by NATCO in filing this interpleader action.
7 Interpleader of the Disputed Stock was NATCO's only claim for relief in its Amended
8 Complaint filed on April 29, 2016.

9 Both Skarpelos and WAM filed answers and cross-claims against each other, each
10 claiming to be the owner of the Disputed Stock.¹ WAM's claim to ownership was based
11 on the July 2013 PSA pursuant to which Skarpelos allegedly agreed to sell the Disputed
12 Stock to "Weiser." See Weiser's Answer and Cross-claim filed on May 24, 2016, pp. 10-
13 11, ¶¶ 3-5, 9-11, 13, 18. Indeed, all of Weiser's claims are based solely on the July 2013
14 PSA. Id. It is the only contract identified in Weiser's cross-claim and the only contract
15 Skarpelos is alleged to have breached.²

16 During this lawsuit "Weiser" rotated between WAM and Weiser Capital as the
17 claimed owner of the Disputed Stock. However, whether WAM or Weiser Capital was
18 the soup de jour, Weiser consistently maintained that the basis of ownership for both was
19 the July 2013 PSA. For instance, WAM initially claimed to be the owner pursuant to the
20 July 2013 PSA. See Trial Exhibit 3. However, in opposing summary judgment, Weiser
21 claimed that the July 2013 PSA "memorialized" a transaction that occurred in April 2013,
22 by which Weiser Capital—not WAM—became the owner of the Disputed Stock. See
23 Weiser's Opposition To Skarpelos' Motion for Summary Judgment, p. 1:6-8, and the
24 supporting Declaration of Christos Livadas, ¶ 13. Weiser claimed that WAM and Weiser
25

27 ¹ As documented in other briefs, WAM and Weiser (Bahamas) Ltd. (aka "Weiser Capital"), referring to
28 themselves collectively as "Weiser" both claimed to be the owner. See Weiser's Answer and Cross-Claim filed
on May 24, 2016 at p. 1, lines 27-28; p. 5, ¶¶ 3-5, 9-11.

² This is consistent with WAM's October 30, 2015 demand letter to NATCO, in which it claimed Skarpelos sold
the Disputed Stock to WAM "[o]n or about July 12, 2013."

1 Capital “had already performed their part by crediting Skarpelos’s [sic] account...in April
2 2013.” Weiser Opposition at 1:16-22; Livadas Declaration at ¶ 15.

3 In other words, Weiser’s position in April 2018 was that there was only one
4 transaction—the sale of the Disputed Stock to Weiser Capital—and that the July 2013
5 PSA documented that transaction. Id. at 1:18-19, 4:23-24. This continued to be Weiser’s
6 position at Livadas’ deposition in October 2018 in Athens, Greece. Livadas confirmed at
7 trial that his deposition testimony was that the July 2013 PSA (Trial Exhibit 30) was
8 intended to memorialize the April 2013 sale to Weiser Capital—not WAM. That Weiser
9 Capital was the owner of the Disputed Stock remained Weiser’s position up to the week
10 before trial, as it stated in its Trial Statement: “Skarpelos agreed to sell 3,316,666 shares
11 in WAM’s possession to Weiser Capital for \$250,000 (minus a \$420 processing fee).”
12 Weiser’s Trial Statement, filed on January 23, 2019, at 4:17-18.

13 **Nevertheless, at trial Livadas testified there were two transactions. First, the**
14 **April 2013 transaction was the sale of the Disputed Stock to WAM (not Weiser**
15 **Capital) and that the July 2013 PSA, which purports to sell the stock to Weiser**
16 **Capital, was for another transaction that never occurred and so Livadas used the**
17 **July 2013 PSA for something other than its intended purpose.** At the hearing on
18 February 6, 2019, the Court found Weiser’s use of that document to assert claims and
19 make representations to NATCO to be “very troubling.” See Transcript of Proceedings,
20 February 6, 2019, attached hereto as **Exhibit 1**, at 6:18-7:11. The Court also noted
21 Livadas’ testimony that neither WAM nor Weiser Capital was the owner of the Disputed
22 Stock and that the stock was really just to be transferred through them to somebody else.
23 Id. at 21:21-22:2; 23:11-13.

24 In other words, at trial Weiser completely abandoned its pleadings and prior
25 representations that the July 2013 PSA was the basis of its claims in this lawsuit and
26 attempted a completely new theory that WAM (not Weiser Capital) was the owner of the
27 Disputed Stock by virtue of the April 2013 transaction. Livadas testified that the July
28

1 2013 PSA that had been the basis of Weiser's claims both before trial and throughout 3
2 years of litigation was essentially a "meaningless" document.

3 After trial, the Court concluded that the July 2013 PSA "does not demonstrate a
4 sale of any type to anyone in this case" and that there was "no evidence that I can use to
5 conclude that there was in fact a contract for the sale of shares of stock to either Weiser
6 Asset Management or to Weiser Capital." Id. at pp. 19-20. Based on the absence of such
7 a contract, the Court ruled against WAM and Weiser Capital and dismissed their claims
8 for declaratory relief, breach of contract and breach of the implied covenant of good faith
9 and fair dealing. Id. at pp. 22-23, 35.

10 Nevertheless, the Court awarded WAM \$245,464.64 for money the Court found
11 WAM paid Skarpelos pursuant to the April 2013 transaction, in which Livadas claimed
12 Skarpelos sold stock to an unidentified third-party client of WAM. It appears the basis for
13 the Court's award is the account agreement it found existed between Skarpelos and
14 WAM. The Court found Skarpelos had an account with WAM, that he was in negative
15 cash position on that account, and that "something occurred" such that his account was
16 credited \$249,480, and that money presumably was given to Skarpelos. Id. at 35-36.

17 However, WAM never pleaded a claim that Skarpelos had breached the account
18 agreement related to the April 2013 transaction and therefore WAM was entitled to
19 \$249,480 in damages. Weiser's only pleaded claims were related to the July 2013 PSA.
20 While Weiser Capital at one point asserted it was the owner of the Disputed Stock by
21 virtue of the April 2013 transaction, the basis of its claim still was the July 2013 PSA that
22 "documented" that transaction. Skarpelos had no notice of any claim by Weiser that it
23 was requesting damages related to an April 2013 sale of stock to another WAM customer.
24 As the Court pointed out, WAM's theory at trial that it was the owner of the Disputed
25 Stock pursuant to the April 2013 transaction was different than the theory it had pleaded
26 and argued all along in this lawsuit. Id. at 21:6-22:5. Skarpelos objected to this claim
27 being raised for the first time at trial. Nevertheless, citing its equitable powers, the Court
28 awarded WAM substantial damages based on the April 2013 transaction.

1 As set forth below, Skarpelos respectfully submits that the award to WAM was
2 manifest error and requests that the Court amend its judgment to remove that portion
3 awarding WAM \$245,464.64.

4 **II. LAW AND ARGUMENT**

5 NRCP 59(e) provides that a motion to alter or amend a judgment must be filed no
6 later than 28 days after the entry of judgment. “Among the basic grounds for a Rule 59(e)
7 motion are correcting manifest errors of law or fact, newly discovered or previously
8 unavailable evidence, the need to prevent manifest injustice, or a change in controlling
9 law. *Id.* at 124–27, 976 P.2d 518. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578,
10 582, 245 P.3d 1190, 1193 (2010). Rule 59(e) provides an opportunity to seek correction
11 at the trial court level of an erroneous order or judgment, thereby initially avoiding the
12 time and expense of appeal. *Chiara v. Belaustegui*, 86 Nev. 856, 859, 477 P.2d 857, 858
13 (1970). Rule 59(e) provides the remedy that, where the issues have been litigated and
14 resolved, a motion may be made to alter or amend a judgment. *Id.*

15 A motion to alter or amend judgment under Rule 59(e) is “an extraordinary remedy
16 which should be used sparingly.” *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F.Supp.2d
17 1112, 1117 (D. Nev. 2013). However, “[s]ince Rule 59(e) does not itself provide
18 standards for granting or denying a motion to alter or amend, the district court enjoys
19 considerable discretion in granting or denying the motion.” *Id.*

20 For three reasons, Skarpelos believes this case presents an extraordinary
21 circumstance justifying the use of this extraordinary remedy. First, the award was outside
22 the scope of the pleadings and Skarpelos was never provided fair notice that an award
23 would be based on an April 2013 transaction as opposed to the July 2013 PSA. Second,
24 the award to WAM was based on the Court’s equitable powers even though WAM had an
25 adequate legal remedy it chose not to pursue—that Skarpelos breached his account
26 agreement with WAM and that WAM sustained damages. Third, while the Court’s
27 equitable powers are broad with respect to resolving the *equities* involved, the equity the
28 Court attempted to fashion here—awarding WAM \$245,464.64 for money the Court

1 found Skarpelos received from WAM pursuant to the April 2013 transaction—does not
2 relate to the property that was the subject of this equitable interpleader proceeding, the
3 Disputed Stock, and therefore the Court lacked subject matter jurisdiction to make the
4 award to WAM.

5 **(1) WAM never pleaded damages for breach of an April 2013 transaction.**

6 The Court found that “something occurred” in April 2013 for which Skarpelos
7 account was credited \$249,480. Exhibit 1 at 35:10. The Court also found that Skarpelos
8 then received that money. It appears the Court’s award was based on the account
9 agreement the Court found existed between Skarpelos and WAM. Yet nowhere in
10 Weiser’s pleadings is a breach of that contract alleged. The only contract Weiser alleges
11 was entered into and breached by Skarpelos is the July 2013 PSA. See Weiser’s Cross-
12 Claim at ¶¶ 3-5, 13 and 18.

13 Nevada is a notice-pleading jurisdiction and liberally construes pleadings to place
14 into issue matter which is fairly noticed to the adverse party. *Chavez v. Robberson Steel*
15 *Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978). Here, there was no fair notice of any
16 claim by WAM for damages based on its brokerage account agreement with Skarpelos.
17 Weiser’s cross-claim identifies only the July 2013 PSA, which the Court found “has little
18 to no meaning whatsoever in this case.” Exhibit 1 at 18:22-19:4.

19 There was no pleading that fairly gave Skarpelos notice that WAM was claiming
20 damages based on an alleged breach of the WAM brokerage account agreement. The only
21 notice Weiser gave was that its ownership claims were specifically and entirely based on
22 the July 2013 PSA, a theory it abandoned at trial when Livadas testified he used that
23 document for another purpose. Skarpelos was ambushed at trial with a new theory and
24 objected accordingly. Skarpelos was never given fair notice of the nature and basis of the
25 claim or the relief requested. Therefore, the award to WAM was manifest error and
26 resulted in manifest injustice to Skarpelos.

27 As the Court pointed out at trial, the true nature of Weiser’s claim is that it was
28 exposed to liability, for which the appropriate remedy would be damages—not ownership

1 of the Disputed Stock—had WAM actually pleaded that claim and produced evidence to
2 support it. That did not happen. Weiser misled Skarpelos, the Court and NATCO both
3 prior to and throughout the entirety of this litigation as to the nature of its claims. The
4 Court’s award of money damages to Weiser is inequitable given Weiser’s failure to plead
5 such a claim. Skarpelos was denied due process.

6 **(2) WAM had an adequate legal remedy it chose not to pursue.**

7 For equitable relief to be appropriate, there must generally be no adequate legal
8 remedy. *Cont’l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994),
9 *citing Orantes–Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir.1990). Here, the
10 Court’s award to WAM appears to have been based on the account agreement the Court
11 found existed between Skarpelos and WAM, and pursuant to which WAM credited
12 Skarpelos’ account. WAM had an adequate legal remedy against Skarpelos—it could
13 have and should have asserted a claim against Skarpelos’ for breach of the account
14 agreement and corresponding damages related to the April 2013 transaction. Instead,
15 Weiser’s pleadings identify only the July 2013 PSA pursuant to which Skarpelos allegedly
16 sold the Disputed Stock to Weiser.

17 Because WAM had an adequate legal remedy for breach of contract against
18 Skarpelos related to the April 2, 2013 transaction, but failed to pursue that remedy, there
19 can be no equitable relief based on that claim. Had that legal claim been asserted,
20 Skarpelos would have had the right to demand a jury trial to resolve it. But because the
21 only claims at issue dealt with ownership of the Disputed Stock pursuant to the July 2013
22 PSA—and not damages based on the WAM brokerage account agreement related to the
23 April 2013 transaction—this issue was never properly presented. Skarpelos has been
24 deprived of his constitutional right to a jury trial on that claim.

25 WAM had an adequate legal remedy but failed to properly present and pursue it.
26 Therefore, it was manifest error for the Court to award WAM equitable relief.

27 ///

28 ///

1 **(3) The award to WAM is entirely unrelated to the property that was the**
2 **subject of this equitable interpleader and therefore the Court lacked**
3 **subject matter jurisdiction to make that award.**

4 “Interpleader is an equitable proceeding to determine the rights of rival claimants
5 to property held by a third person having no interest therein.” *Balish v. Farnham*, 92 Nev.
6 133, 137, 546 P.2d 1297, 1299 (1976). It proposes to protect the stakeholder from a
7 double vexation in regard to one liability. *Id.* An essential element of the equitable basis
8 of interpleader is that two or more persons have made claims against each other for the
9 same thing. *Rutherford v. Union Land & Cattle Co.*, 47 Nev. 21, 213 P. 1045, 1047–48
10 (1923). This equitable power includes bringing in parties that may have an interest in the
11 “subject matter of the lawsuit” to achieve the “very essence of an interpleader suit” which
12 is to protect a party from double vexation in respect to one liability. *Id.*

13 Here, the “essential element” of the Court’s equitable jurisdiction in interpleader
14 was the competing claims of Skarpelos and Weiser to *ownership* of the Disputed Stock.
15 As discussed above, Weiser’s claims in this case all are centered on its allegation that, in
16 July 2013, Weiser and Skarpelos entered into a contract by which Skarpelos agreed to sell
17 the Disputed Stock to Weiser.

18 However, the Court’s award to WAM was based on its finding that something
19 occurred such that Skarpelos’ account was credited \$249,580. Exhibit 1, 35:10. It
20 appears the Court based this award on the account agreement the Court found existed
21 between Skarpelos and WAM, and that the award related to the April 2013 sale from
22 Skarpelos to another WAM customer. That April 2013 transaction is an entirely separate
23 issue that, as the Court found, did not involve WAM’s claim to ownership of the Disputed
24 Stock upon which this Court’s equity jurisdiction was based.

25 The April 2013 sale was a “pass through” transaction in which, as the Court noted,
26 Weiser did not even claim to be the owner of the Disputed Stock. *Id.* at 21:21-22:2.
27 Thus, as admitted by Mr. Livadas, that transaction had nothing to do with WAM’s claim
28

1 to ownership of the Disputed Stock and therefore was entirely unrelated to the Court's
2 equitable jurisdiction in interpleader over the Disputed Stock.

3 When sitting in equity, courts must consider the entirety of the circumstances that
4 bear upon the *equities*. *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5,
5 366 P.3d 1105, 1114 (2016) (emphasis added). Generally, a party may assert a crossclaim
6 where the claim arises out of the same transaction or occurrence that is the subject matter
7 of the original action or of a counterclaim, or if the claim relates to any property that is the
8 subject matter of the original action. NRCP 13(g).

9 Cross-claims may be asserted pursuant to Rule 13 to attack other parties' claims
10 against the common fund, "but for no other purpose." *Allstate Ins. Co. v. McNeill*, 382
11 F.2d 84, 87 (4th Cir. 1967). Interpleader "may not be used as the arena for resolution of
12 claims of the defendants inter se, except insofar as they have adversity in their demands
13 upon the fund." *Id.* Where the respective claimants' entitlement to the stake is the sole
14 the sole contested issue, "[t]he stake marks the outer limits of the controversy." *Hartford*
15 *Casualty Ins. Co. v. Lexington Ins. Co.*, 2016 WL 1267801 at *3 (S.D.N.Y. 2016), citing
16 *Lee v. W. Coast Life Ins. Co.*, 688 F.3d 1004, 1011 (9th Cir. 2012).

17 Here, the Court's award to WAM involves a transaction that, by Livadas' own
18 admission, did not relate to WAM's claim to ownership of the Disputed Stock. He
19 admitted WAM was not the owner by way of the April 2013 transaction. *Id.* at 21:21-
20 22:2. The Court's award is based on the Court's finding that Skarpelos was paid
21 \$249,480 for the April 2013 sale but did not deliver the stock to the third party WAM
22 customer, and WAM was exposed to liability and had to cover the loss. Any such breach
23 of contract by Skarpelos is a breach of an agreement that has nothing to do with WAM's
24 claim to *ownership* of the Disputed Stock. The competing claims of Skarpelos and
25 Weiser (whose claim was always based on the July 2013 PSA) to such ownership were
26 the sole contested issues in this case as framed by the pleadings. As such, ownership of
27 the Disputed Stock marked the "outer limits of the controversy."
28

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1 The Court's award of \$245,464.64 to WAM exceeded its subject matter
2 jurisdiction in this case.

3 **III. CONCLUSION**

4 Skarpelos respectfully requests that the Court amend its judgment to remove the
5 award of \$245,464.64 to WAM.

6 **AFFIRMATION**

7 The undersigned does hereby affirm that the preceding document does not contain the
8 personal information of any person.

9 DATED: April 24, 2019.

WOODBURN AND WEDGE

11 By /s/ Dane W. Anderson

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Nevada Bar No. 6883

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Nevada Bar No. 11034

Attorneys for Defendant/

Cross-Claimant

Athanasios Skarpelos

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Woodburn and Wedge and that on this date,
3 I caused to be sent via electronic delivery through the Court's E-flex system a true and correct
4 copy of ***SKARPELOS' MOTION TO ALTER OR AMEND JUDGMENT*** to:
5

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and Weiser (Bahamas), Ltd.

17 DATED: April 25th, 2019.

18 /s/ Dianne M. Kelling
19 Dianne M. Kelling, an employee of
20 Woodburn and Wedge
21
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EXHIBIT 2

EXHIBIT 2

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

NEVADA AGENCY AND TRANSFER
COMPANY, a Nevada corporation,

Plaintiff,

Case No. CV15-02259

vs.

Dept. No. 10

WEISER ASSET MANAGEMENT, LTD.,
a Bahamas company, WEISER (BAHAMAS)
LTD., a Bahamas company, ATHANASIOS
SKARPELOS, an individual, and DOES 1
through 10,

Defendants.
_____ /

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

Presently before the Court is SKARPELOS' MOTION TO ALTER OR AMEND
JUDGMENT ("the Motion") filed by Defendant ATHANASIOS SKARPELOS ("Mr. Skarpelos")
on April 25, 2019. Defendants WEISER ASSET MANAGEMENT, LTD. ("WAM") and WEISER
(BAHAMAS) LTD. ("Weiser Capital") filed DEFENDANTS/CROSS-CLAIMANTS WEISER'S
OPPOSITION TO SKARPELOS'S MOTION TO ALTER OR AMEND JUDGMENT ("the
Opposition") on May 24, 2019. Mr. Skarpelos filed the REPLY IN SUPPORT OF SKARPELOS'
MOTION TO ALTER OR AMEND JUDGMENT ("the Reply") on June 7, 2019, and
contemporaneously submitted the matter for the Court's consideration.

1 This case was initiated by Plaintiff NEVADA AGENCY AND TRANSFER COMPANY
2 (“the Plaintiff”) as an interpleader action to resolve a dispute over ownership of 3,316,666 shares of
3 stock in Anavex Life Sciences Corp.¹ The Court presided over a bench trial beginning on January
4 28, 2019, to resolve the competing claims between Weiser Capital and WAM (collectively, “the
5 Weiser Defendants”) and Mr. Skarpelos to the shares. The Court entered the FINDINGS OF
6 FACT, CONCLUSIONS OF LAW AND JUDGMENT (“the FFCLJ”) on April 22, 2019. The
7 Court determined that Mr. Skarpelos was the rightful owner of the shares. The FFCLJ 7 ¶ 25.
8 However, the Court invoked its equitable jurisdiction to require Mr. Skarpelos to make restitution
9 to WAM in the amount of \$245,464.64, for money WAM credited to his account and from which
10 Mr. Skarpelos benefitted. The FFCLJ ¶ 28.

13 Mr. Skarpelos argues the FFCLJ should be amended to remove the judgment against him
14 for \$245,464.64. The Motion 2:9-14. Mr. Skarpelos argues amendment is appropriate for three
15 reasons: 1) Mr. Skarpelos was denied due process because the award was outside of the pleadings;
16 2) the Weiser Defendants had an adequate legal remedy it chose not to pursue; and 3) the Court
17 lacked subject matter jurisdiction to make the award because the award did not relate to the
18 disputed stock. The Motion 2:16-27; 6:20-28; 7:1-4. The Weiser Defendants contend the
19 following in support of the award: 1) Mr. Skarpelos had fair notice of the potential award because
20 the money was deposited in his brokerage account; 2) the award was not manifestly unjust; and 3)
21 the award relates to the disputed stock. The Opposition 4:17-26; 6:6-11; 8:3-18. Mr. Skarpelos
22 responds by contending: 1) he did not have notice of the Weiser Defendants’ damages claim from
23 the pleadings or its trial statement; 2) equitable relief premised on unjust enrichment is unavailable

27 ¹ The Plaintiff was discharged from the action in the ORDER GRANTING MOTION FOR DISCHARGE filed on
28 January 23, 2019.

1 where a contract governs the parties' relationships; and 3) the Court lacked subject matter
2 jurisdiction to make the award because it was completely unrelated to the Weiser Defendants'
3 claim of ownership and thus unrelated to the equities of the case. The Reply 3:21-28; 4:1-3; 5:17-
4 24; 6:9-26.

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6 NRCP 59(e) permits a party to file a motion to alter or amend a judgment within ten days
7 after service of written notice of entry of the judgment.² Such a motion is permitted for any
8 appealable order; a final judgment is not required. *Lytle v. Rosemere Estate Prop. Owners*, 129
9 Nev. 923, 926, 314 P.3d 946, 948 (2013). A motion to alter or amend must be in writing and state
10 the grounds for relief with particularity and identify the relief sought. *United Pac. Ins. Co. v. St.*
11 *Denis*, 81 Nev. 103, 106, 399 P.2d 135, 137 (1956). Motions to alter or amend may be used to
12 correct manifest errors of law or fact, address newly discovered or previously unavailable
13 evidence, avoid manifest injustice or adjust to a change in controlling law. *AA Primo Builders,*
14 *LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010). A district court has
15 considerable discretion in determining whether a motion to amend or alter should be granted.
16 *Stevo Design, Inc. v. SBR Mktg. Ltd*, 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013) (explaining
17 FRCP 59 may be consulted in interpretation of NRCP 59). *See also AA Primo*, 126 Nev. at 582,
18 245 P.3d at 1193. A motion to alter or amend constitutes "an extraordinary remedy which should
19 be used sparingly." *Stevo Design*, 919 F. Supp. 2d at 1117 ("[T]he district court enjoys
20 considerable discretion in granting or denying the motion.").

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² The Motion was timely filed.

1 The Court will not amend the FFCLJ because it properly invoked its equitable jurisdiction
2 to require Mr. Skarpelos to make restitution to WAM and to prevent him from receiving a windfall
3 in this matter. First, Mr. Skarpelos was on notice of the potential for equitable relief given the
4 nature of this case and the relief requested. As an interpleader action, this matter originated in
5 equity to determine ownership of the shares. *See Balish v. Farnham*, 92 Nev. 133, 137, 546 P.2d
6 1297, 1299 (1976) (identifying interpleader as equitable proceeding). Restitution was a
7 foreseeable equitable ruling in an action already predicated on principles of equity. *See also*
8 *Landex, Inc. v. State ex rel. List*, 94 Nev. 469, 477, 582 P.2d 786, 791 (1978) (“[A] court has the
9 inherent power, ancillary to its general equity jurisdiction, to order restitution in an appropriate
10 case.”). Furthermore, Mr. Skarpelos requested “such other and further relief as to the Court seems
11 just and equitable under the circumstances.” ANSWER TO COMPLAINT AND CROSS-CLAIM
12 (Defendant Cross-Claimant Skarpelos) 9:26-27 (Feb. 18, 2016).
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15 Second, the Court properly afforded equitable relief to comprehensively resolve this matter
16 without affording Mr. Skarpelos a windfall. The Court found Weiser had proven by a
17 preponderance of the evidence WAM had credited Mr. Skarpelos’ WAM account in April of 2013,
18 and Mr. Skarpelos had received the benefit of this money. The FFCLJ ¶ 28. *See also* Tr. of Hr’g
19 36-38 (Feb. 6, 2019). As the Court stated in the FFCLJ, Mr. Skarpelos allegedly transferred the
20 stock to a third party, and his WAM account was credited \$249,580.00 to reflect the transfer. *See*
21 the FFCLJ 7:24-28; 8:1. Moreover, the judgment of restitution was directly related, and not
22 ancillary, to the shares at issue in this case. The Court found Mr. Skarpelos had funded his WAM
23 account with stock certificate 753 and was permitted to borrow against that account. *See the*
24 FFCLJ ¶ 5. *See also* Tr. of Hr’g 14-16; 17:15-19. If the Court would have refused to invoke its
25 equitable jurisdiction, Mr. Skarpelos would have been permitted to retain ownership of the stock
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1 as well as the amount paid for it, a windfall for Mr. Skarpelos and a forfeiture for WAM. *See*
2 *MacDonald v. Krause*, 77 Nev. 312, 318, 362 P.2d 724, 727 (1961) (explaining province of courts
3 of equity is “to do complete justice between the parties . . .”). For these reasons, the Court
4 properly invoked its equitable jurisdiction to order Mr. Skarpelos to make restitution to WAM.
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6 **IT IS ORDERED** that SKARPELOS’ MOTION TO ALTER OR AMEND JUDGMENT
7 is hereby **DENIED**.

8 **DATED** this 6 day of August, 2019.

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11 ELLIOTT A. SATTLER
12 District Judge
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this ____ day of August, 2019, I deposited in the
4 County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a true copy of the attached document addressed to:
6
7

8 **CERTIFICATE OF ELECTRONIC SERVICE**

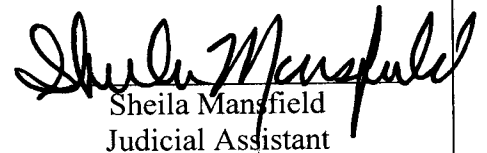
9 I hereby certify that I am an employee of the Second Judicial District Court of the State of
10 Nevada, in and for the County of Washoe; that on the 6 day of August, 2019, I electronically filed
11 the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
12 electronic filing to the following:
13

14 JOHN F. MURTHA, ESQ.

15 DANE W. ANDERSON, ESQ.

16 JEREMY J. NORK, ESQ.

17 FRANK Z. LAFORGE, ESQ.
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Sheila Mansfield
Judicial Assistant