

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 79425 AND 79526

ATHANASIOS SKARPELOS, AN INDIVIDUAL

Appellant

v.

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,

v.

ATHANASIOS SKARPELOS, AN INDIVIDUAL,

Respondent.

Appeal from Findings of Fact, Conclusions of Law, and Judgment and Order
Denying Motion to Alter or Amend Judgment
District Court Case No.: CV15-02259
Second Judicial District Court of the State of Nevada
In and For the County of Washoe
Honorable Elliott Sattler, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Appellant Athanasios Skarpelos is an individual. However, this case involved a dispute over ownership of certain shares of stock in Anavex Life Sciences Corp., a Nevada corporation the stock of which is publicly traded on the Nasdaq Stock Market.

In the proceedings leading up to the filing of this brief, Skarpelos has been represented by the following firms and/or lawyers:

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These representations are made so the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Dated: July 1, 2020.

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STATEMENT OF JURISDICTION

Athanasios “Tom” Skarpelos (“Skarpelos”) appeals from a final judgment after trial. NRAP 3A(b)(1). The District Court entered its Findings of Fact, Conclusions of Law and Judgment on April 22, 2019 and written notice of its entry was served the same day. 6 JA 2156-2164. On April 25, 2019, Skarpelos filed a Motion to Alter or Amend Judgment pursuant to NRCP 59(e). 6 JA 2183-2248. On August 6, 2019, the District Court entered an order denying that motion. 8 JA 2539. Written notice of the entry of that order was served on August 9, 2019. 8 JA 2572-2582. Skarpelos filed his notice of appeal on August 15, 2019. 8 JA 2596-2615.

ROUTING STATEMENT

This matter is not included among the categories of cases to be retained by the Supreme Court pursuant to NRAP 17(a) nor is it presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

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ISSUES PRESENTED FOR REVIEW

This was a civil interpleader action involving competing claims to ownership of certain shares of stock (“the Disputed Stock”) in Anavex Life Sciences Corp. (“Anavex”). There is no dispute that, prior to 2013, Skarpelos owned the Disputed Stock.

Respondents Weiser Asset Management (“WAM”) and Weiser (Bahamas) Ltd. (“Weiser Capital”) (referring to themselves collectively as “Weiser”), alleged that Skarpelos agreed to sell the Disputed Stock to “Weiser” in a July 2013 contract.

During this dispute, but at separate times, both WAM and Weiser Capital claimed to own the Disputed Stock based on the July 2013 contract. At trial, Weiser abandoned this position and admitted that, contrary to its position throughout the case, neither WAM nor Weiser Capital owned the Disputed Stock by virtue of the alleged July 2013 contract or any other contract.

Instead, Weiser surprisingly took the position that the July 2013 contract was “meaningless” and that the actual basis of its claim was one for damages, not ownership of the Disputed Stock.¹

Specifically, WAM asserted it had incurred liability as the broker in an April 2013 transaction in which Skarpelos, a WAM client, agreed to sell the Disputed Stock to another WAM customer but did not perform. WAM asserts it credited Skarpelos’ account \$250,000 from the buyer’s WAM account, but Skarpelos prevented WAM, as broker, from delivering the Disputed Stock to the buyer. WAM claimed it then had to “make it right” with the buyer. This claim was not included in any of Weiser’s pleadings. In other words, at trial WAM asserted for the first time a breach of contract claim for damages based on its customer account agreement with Skarpelos.

Following trial, the District Court ruled that Skarpelos was the owner of the Disputed Stock and dismissed all of Weiser’s claims, finding no credible evidence that Skarpelos ever agreed to sell the Disputed Stock to WAM or Weiser Capital. However, citing its equitable jurisdiction, the District Court awarded WAM \$245,464.64 in “restitution.” The District

¹ Weiser’s confusing course of conduct is discussed in more detail below.

Court found Skarpelos had been unjustly enriched by the purported April 2013 credit to his account in the amount of \$250,000 and that Skarpelos had withdrawn substantial sums of money from his account.² The District Court based the award almost entirely on a WAM “Statement of Account” it admitted in evidence over Skarpelos’ hearsay objection.

These facts give rise to the following issues on appeal:

1. Did the District Court lack subject matter jurisdiction to award WAM equitable relief where WAM had adequate legal remedies it did not pursue—that Skarpelos breached his customer account agreement with WAM by failing to perform the April 2013 agreement to sell the Disputed Stock to another WAM customer, thereby requiring WAM to “make it right” with the other customer?

2. Did the District Court deny Skarpelos constitutional due process by awarding WAM monetary relief based on a claim WAM did not plead and

² As discussed below, Skarpelos disputed that his WAM account was ever opened or that he received any money from that account. He also disputed the April 2013 transaction. However, the District Court found against him on these issues.

asserted for the first time at trial, and of which Skarpelos did not have “fair notice” even under Nevada’s liberal notice pleading requirements?

3. Did the District Court abuse its discretion in admitting the WAM Statement of Account under the “business records exception” to the hearsay rule where the witness presented by Weiser was neither the custodian of records nor a qualified person under NRS 51.135 and otherwise failed to establish the requirements of that statute?

STATEMENT OF THE CASE

As discussed above, this is an appeal of a civil interpleader case involving Skarpelos' and Weiser's competing claims to ownership of the "Disputed Stock."

On November 18, 2015, Nevada Agency and Transfer Company ("NATCO") filed a complaint against Skarpelos and WAM seeking to interplead the Disputed Stock. 1 JA 0001-0012. NATCO subsequently filed an amended complaint naming Weiser Capital as an additional defendant. 1 JA 0030-0042. Skarpelos answered and asserted a cross-claim against WAM and Weiser Capital seeking a judicial declaration that he is the owner of the Disputed Stock and that neither WAM nor Weiser Capital have a claim of ownership to the Disputed Stock. 1 JA 0046-0057.

WAM and Weiser Capital, referring to themselves collectively as Weiser, answered and asserted a cross-claim for declaratory relief that Weiser was the owner of the Disputed Stock based on a July 2013 contract in which Skarpelos allegedly agreed to sell the Disputed Stock to Weiser.³ 1 JA 0058-

³ Weiser did not allege whether WAM or Weiser Capital was the purchaser of the Disputed Stock under the July 2013 contract.

0070. Weiser also asserted claims against Skarpelos for breach of contract and breach of the covenant of good faith and fair dealing based on the same July 2013 contract. *Id.*

Following close of written discovery, Skarpelos filed a motion for summary judgment which the District Court denied. 1 JA 0160 – 2 JA 0248; 3 JA 0608-0615. Shortly before trial, NATCO sought and obtained a discharge based on its interpleader claim. 4 JA 0714-0716.

The case proceeded to a bench trial on January 28, 2019. 7 JA 1270. The District Court orally pronounced its ruling on February 6, 2019 and entered its written judgment on April 22, 2019. 10 JA 1914-1927, 1951; 11 JA 2156-2164. The District Court found Skarpelos is the owner of the Disputed Stock and that neither WAM nor Weiser Capital have any ownership interest in the Disputed Stock. 11 JA 2162. The District Court concluded that Weiser failed to establish any of its claims and dismissed the same. *Id.*

However, the District Court—citing its equitable jurisdiction—awarded WAM \$245,464.64 based on its finding that WAM had credited \$250,000 to Skarpelos' account in April 2013 as part of a purported sale of the Disputed

Stock to another WAM customer. The District Court, *sua sponte*, awarded Weiser these damages even though Weiser failed to plead any such claim for relief. 11 JA 2162-2163.

Following entry of judgment, Skarpelos moved to alter or amend the judgment pursuant to NRCP 59(e), seeking removal of the monetary award to WAM. 11 JA 2183-2248. The District Court denied the motion and Skarpelos appealed. 13 JA 2539-2544; 13 JA 2595-2615.

Skarpelos also sought and was awarded attorney fees in the amount of \$216,900.50 pursuant to NRS 18.010(2)(b), and costs in the amount of \$25,752.60. 11 JA 2252-12 JA 2338; 13 JA 2527-2538; 13 JA 2548-2554. On August 29, 2019, Weiser filed a notice of cross-appeal of the District Court's judgment and the order awarding Skarpelos attorney fees. 13 JA 2634-2655. This Court subsequently consolidated the two appellate cases.

STATEMENT OF FACTS

Introduction

“What are you suing for?”

The District Court asked Weiser's owner, Christos Livadas (“Livadas”), this question on the first day of trial after he essentially

abandoned Weiser's pleadings by testifying that there was no July 2013 contract and that neither WAM nor Weiser Capital were the owners of the Disputed Stock. 7 JA 1326, 1331. The District Court rightfully was confused about the relief Weiser sought because Livadas' testimony was so contradictory to the position Weiser had taken during the previous three years of litigation.

“WAM as the broker/dealer was exposed to liability and covered.”

This was, effectively, Weiser's answer to that question. 9 JA 1771-1772. Livadas testified that Skarpelos sold the Disputed Stock to another WAM customer in April 2013 and that the latter was therefore the intended “owner” of the Disputed Stock. 7 JA 1326. Livadas further testified that, WAM, as the broker in that transaction, was “damaged” as a result of Skarpelos' failure to deliver the Disputed Stock. 7 JA 1315, 1467.

This was a dramatic departure from Weiser's position throughout this case. Nevertheless, the District Court imposed against Skarpelos a substantial equitable award beyond its subject matter jurisdiction and the boundaries of constitutional due process. Skarpelos seeks the reversal of that award.

The Parties

NATCO is a Nevada corporation with its principal place of business in Reno. 1 JA 0030. NATCO provides stock transfer agent and registrar services for corporations, including tracking stock ownership and issuing and canceling stock certificates to reflect changes in ownership. 1 JA 0031-0032; 8 JA 1567. NATCO effectively acts as a corporation's "bookkeeper with respect to its stock register." *Id.* NATCO is the stock transfer agent and registrar for Anavex. 1 JA 0032.

Anavex is a Nevada corporation in the business of developing pharmaceuticals. 8 JA 1471. Anavex stock has been publicly traded on the Nasdaq Stock Market since October 26, 2015. 8 JA 1489.

Skarpelos is one of the founders of Anavex and is currently a director. 8 JA 1471. In October 2009, Anavex issued Skarpelos share Certificate No. 753 by which Skarpelos received 6,633,332 restricted shares of Anavex stock. 6 JA 1135; 8 JA 1471. The Disputed Stock is one-half of the shares represented by Certificate No. 753, or 3,316,666 shares of Anavex Stock. 6 JA 1135. It is undisputed that, prior to April 2013, Skarpelos was the owner

of the Disputed Stock. 4 JA 639. Skarpelos' position throughout the lawsuit is that he was never divested of ownership. 4 JA 0662.

Livadas and Skarpelos are both of Greek heritage and have known each other since the early 1990s. 7 JA 1285. Livadas introduced Skarpelos to WAM in 2011 for the purpose of encouraging Skarpelos to open a brokerage account with WAM. 7 JA 1291.

WAM is a Class 1 broker-dealer registered with the Bahamian Securities Commission. 4 JA 638. WAM is a financial institution that has custody of its customers' assets, typically cash and securities, and executes trades on those assets. 7 JA 1280. Skarpelos applied for a brokerage account with WAM in 2011. 10 JA 2158. Livadas acquired ownership of WAM in December 2014. 3 JA 0482. As discussed below, at times during this dispute, WAM claimed to be the owner of the Disputed Stock.

Weiser Capital is a Bahamian company and an affiliate of WAM. 3 JA 483. Livadas founded Weiser Capital in 2011. 3 JA 0482. Weiser Capital provided client referral services to WAM, for which it was paid a percentage of commissions received by WAM from those referrals. 7 JA 1278. As

discussed below, at times in this litigation, Weiser Capital also claimed to be the owner of the Disputed Stock.

WAM and Weiser Capital are both owned by Weiser Holdings, Ltd. (“Weiser Holdings”), a company owned and controlled by Livadas. 4 JA 638; 7 JA 1278. Weiser Holdings was not a party to this action.

Skarpelos Applies for a Brokerage Account with WAM

In May 2011, Skarpelos applied for a brokerage account with WAM. 6 JA 1137-1147. As part of this process, Skarpelos “deposited” Certificate 753 with WAM as security for opening the account by delivering to WAM the original stock certificate for it to hold in its custody. 11 JA 2158.⁴ Skarpelos testified that he was never notified that the account had been approved and opened. 8 JA 1478-1479, 1492-1493. However, the District Court found Skarpelos’ testimony unpersuasive and found that the account had been opened. 10 JA 1918; 11 JA 2158.

⁴ Skarpelos also deposited another Anavex stock certificate, No. 660 that is not at issue in this case.

As such, Skarpelos' account was governed by WAM's "Account Agreement Terms And Conditions." 3 JA 0510. With respect to sale transactions, the agreement provides that the customer agrees to "reimburse 'WAM' for all loss, damage, cost or expense suffered or incurred by 'WAM' through [the customer's] failure to make delivery." *Id.*

The agreement further provided that, in addition to WAM's common law rights, WAM has a general and specific lien over securities held in a customer's account. 3 JA 0512. There is no evidence that WAM notified NATCO, as the transfer agent and registrar of Anavex stock, of its lien rights to Skarpelos' stock or otherwise took any legal action to perfect its lien over Certificate 753.

In March 2013, Skarpelos contacted NATCO and reported Certificate 753 as "lost." 6 JA 1160-1168. NATCO canceled the certificate. *Id.* At trial, Skarpelos testified that he cancelled that certificate because WAM had not communicated with him for some period of time, but the District Court did not find his testimony persuasive. 8 JA 1479-1481; 10 JA 1918-1919.

WAM asserted that, in early April 2013, it brokered the sale of the Disputed Stock from Skarpelos to another WAM customer for \$250,000. 7

JA 1304-1305. Skarpelos disputed that he authorized WAM to sell any of his Anavex stock prior to June or July 2013 and thus disputed the validity of the alleged April 2013 sale to another WAM customer. 8 JA 1482. However, the District Court impliedly found that Skarpelos authorized the April 2013 sale of the Disputed Stock to another WAM customer and that his account was credited \$249,580 (after WAM took a \$420 commission) based on that sale. 10 JA 1923; 11 JA 2158.

Weiser also alleged that Skarpelos withdrew money from his WAM account both before and after the alleged April 2013 sale. 7 JA 1317, 1441. This was based on a Statement of Account admitted into evidence over Skarpelos' hearsay objection. 7 JA 1317. Skarpelos testified that he never received any money from WAM, but the District Court found otherwise. 8 JA 1479.

In July 2013, Skarpelos delivered paperwork to Livadas for a potential sale of Skarpelos' Anavex stock to an unknown third party, but he never heard anything back. 8 JA 1485, 1488. Livadas admitted he later completed that paperwork—including the purported July 2013 contract—for a purpose unrelated to that which was intended. 7 JA 1308-1309, 1314, 1431, 1458.

The District Court found Livadas' conduct in that regard "extremely troubling." 13 JA 2252.

WAM Claims Ownership of the Disputed Stock

Livadas testified that WAM learned in late 2013 that there was a "hold" on Certificate 753. 7 JA1434. Livadas testified that, when this occurs in a transaction like the April 2013 stock sale from Skarpelos to another WAM customer, it exposes WAM to liability to the disappointed party and WAM has to cover that liability. 7 JA 1284. However, there is no evidence WAM took any meaningful action to address the situation at that time. Instead, WAM waited nearly two years after learning there was a problem regarding Certificate 753 before it took any action. 6 JA 1148-1149.

Then, on October 30, 2015, just four days after Anavex stock was listed on Nasdaq, WAM sent a letter to NATCO claiming it had purchased the Disputed Stock from Skarpelos in July 2013. *Id.* WAM demanded, among other things, that NATCO register the Disputed Stock in WAM's name as the owner. *Id.* In subsequent correspondence WAM repeated its claim that it was the owner of the Disputed Stock by virtue of the alleged July 2013 contract in which Skarpelos sold the Disputed Stock to WAM. 6 JA 1239-1240, 1241-

1242, 1252-1253. WAM made no mention of the alleged April 2013 transaction in its demands to NATCO—only that WAM was the owner of the Disputed Stock by way of the July 2013 contract.

Skarpelos disputed WAM's claim of ownership. 6 JA 1233-1234. As a result of this dispute, NATCO filed an interpleader lawsuit against WAM and Skarpelos. 1 JA 0001-0012. After NATCO filed its interpleader complaint, WAM's counsel notified NATCO that Weiser Capital may claim ownership of the Disputed Stock and suggested NATCO amend its complaint to add Weiser Capital as party. 8 JA 1578-1579.

NATCO filed its amended complaint naming Skarpelos, WAM and Weiser Capital as defendants who may claim ownership of the Disputed Stock. 1 JA 0030-0042. The only claim NATCO asserted was interpleader of *ownership* of the Disputed Stock. 1 JA 0040-0041.

Skarpelos' and Weiser's Cross-Claims

Skarpelos asserted a cross-claim against WAM and Weiser Capital for declaratory relief. 1 JA 0053-0056. Skarpelos sought a declaration that he is the owner of the Disputed Stock and that neither WAM nor Weiser Capital have any interest in the Disputed Stock. *Id.*

WAM and Weiser Capital, referring to themselves collectively as Weiser, asserted a cross-claim against Skarpelos with three claims for relief: (1) declaratory relief that Weiser is the owner of the Disputed Stock based on the July 2013 contract; (2) breach of contract based on the July 2013 contract; and (3) breach of the implied covenant of good faith and fair dealing based on the July 2013 contract. 1 JA 0067-0069.

All of Weiser's claims were based squarely on the following allegation: "In July 2013, Weiser and Skarpelos entered into a contract for the sale of a certain amount of stock. Skarpelos, the former owner of the stock, agreed to sell it to Weiser." 1 JA 0067-0068. This cross-claim was Weiser's operative pleading throughout the case. Thus, Weiser chose to lead the District Court and Skarpelos to believe that the July 2013 contract was the sole basis for both its claim of ownership *and* its claim for damages. At no time before, during or after trial did Weiser ever move to amend its pleadings.

While it was clear from its cross-claim that Weiser was basing its entire case on the alleged July 2013 contract, it was entirely unclear which Weiser entity—either WAM or Weiser Capital—claimed to be the actual owner of the Disputed Stock.

Eventually, Weiser Capital Claims Ownership of Disputed Stock

As discussed above, prior to the lawsuit being filed, WAM had sent demand letters to NATCO claiming it was the owner of the Disputed Stock based on the alleged July 2013 contract. However, after Weiser's counsel notified NATCO that Weiser Capital also may claim ownership, it was entirely unclear which Weiser entity was the would-be owner of the Disputed Stock. This uncertainty continued for almost two years of litigation.

In March 2018, Skarpelos filed a motion for summary judgment arguing that there was no evidence that either WAM or Weiser Capital had *paid* the purchase price pursuant to the terms of July 2013 contract, which required payment by September 30, 2013 "or such other date as the parties hereto may agree." 1 JA 0172-0173.⁵ Skarpelos also argued that WAM was not a party to the July 2013 contract. 1 JA 0174; 6 JA 1193.

In its opposition brief filed in April 2018, Weiser took the position that Skarpelos sold the Disputed Stock to Weiser Capital on April 2, 2013, which transaction was documented by the July 2013 contract upon which all of

⁵ Skarpelos disputed the validity of the July 2013 contract but did not challenge that issue on summary judgment. 1 JA 0171.

Weiser's claims were based. 3 JA 0468, 0471, 0484. At his deposition six months later, Livadas would affirm this position—that Skarpelos sold the Disputed Stock to Weiser Capital on April 2, 2013, and the July 2013 contract was intended to document that transaction. 5 JA 0945, 7 JA 1428.

This, of course, differed from WAM's pretrial demands to NATCO that precipitated this lawsuit. But it remained Weiser's position up until the first day of trial. In its Trial Statement filed a few days before trial, Weiser reiterated its position that Skarpelos sold the Disputed Stock to Weiser Capital on April 2, 2013, which transaction was documented by the July 2013 contract. 4 JA 0639-0640. In its Trial Statement, Weiser also emphasized that the July 2013 contract was a "critical document" supporting its claims. 4 JA 0636-0637.

However, Weiser's long-standing position that the July 2013 contract was the basis for its claim that Weiser Capital (and prior to that, WAM) was the owner of the Disputed Stock was, surprisingly, abandoned on the first day of trial.

Weiser Abandons Its Pleadings At Trial

Trial commenced on January 28, 2019. 7 JA 1272. On the first day, Weiser called Livadas as its first and only witness. Livadas testified—contrary to Weiser’s position since October 2015—that neither WAM nor Weiser Capital owned the Disputed Stock. 7 JA 1326. Instead, he testified that another WAM client, which he would not identify, owned the Disputed Stock. *Id.*; 7 JA 1333; 9 JA 1772.

Livadas also testified that the July 2013 contract was intended for a transaction that never happened. 7 JA 1326-1327. Shockingly, Weiser took the position that the July 2013 contract had nothing to do with any sale of stock and was a “meaningless” document used for an entirely different purpose than was originally intended. 7 JA 1308-1309, 1314, 1431, 1458. Following trial, the Court found Livadas’ testimony in this regard to be “extremely troubling.” 13 JA 2252.

At trial Weiser abandoned its claim to ownership of the Disputed Stock based on the July 2013 contract upon which it had relied for the entirety of this dispute. Instead, Weiser claimed it had been “damaged” by Skarpelos’ failure to perform the April 2013 sale of the Disputed Stock to another WAM

customer. 7 JA 1315, 1467. Livadas testified that WAM “covered” Skarpelos’ failure to perform and “made it right” with the other WAM customer by providing “some sort of substitute” for the Disputed Stock, which included buying other shares and “shorting” Anavex stock in the market and paying the buyer cash. 7 JA 1315-1316, 1333. WAM supposedly has records of these efforts but did not produce them. 7 JA 1334.

After the close of evidence and during the course of Skarpelos’ motion pursuant to NRCP 52(c), the District Court observed that WAM was actually asserting a claim for damages based on Skarpelos’ failure to deliver the Disputed Stock to WAM’s other customer, the actual intended purchaser. 9 JA 1771-1772. The District Court also correctly observed that there had been “zero testimony” about the amount of the alleged damages. 9 JA 1772.

With respect to Weiser’s claims in this case, the District Court stated that, “at best, [t]here arguably could be some level of damages but I don’t even know what those damages are.” *Id.* The reason the District Court did not know is because Weiser never pleaded—and failed to produce or present any evidence supporting—its *actual* (but unasserted) claim for damages arising from the customer account agreement.

Skarpelos objected to Weiser’s new, unpled theory for damages arising from the customer account agreement early in the trial and after the close of evidence. 7 JA 1426-1427, 1459; 9 JA 1765, 1864. Nevertheless, the District Court granted WAM substantial “equitable” relief even though WAM had adequate legal remedies—contractual claims and lien rights—it failed to pursue.

**WAM’s “Statement of Account” Is Admitted
Over Skarpelos’ Objection**

At trial Weiser offered a “Statement of Account” that purported to reflect the status of, and certain transactions on, Skarpelos’ brokerage account with WAM for the period of February 2013 to December 2013. 7 JA 1317.⁶

Specifically, it purportedly showed that (1) Skarpelos had a substantial negative balance on his account in February 2013; (2) Skarpelos was credited

⁶ Weiser offered two copies of the Statement of Account as Exhibits 43 and 44, which are identical in content but differ as to copy quality. They will be referred to hereafter collectively as either “Exhibit 43/44” or “Statement of Account.”

\$250,000 on April 2, 2013 for the alleged sale of the Disputed Stock to another WAM customer; and (3) that Skarpelos withdrew substantial sums of money subsequent to that sale. 6 JA 1224.

Skarpelos denied that he had ever been notified that his WAM account had been opened. 8 JA 1478-1479. Skarpelos therefore also denied that he had ever withdrawn money from that account or that he had received any money from WAM. 8 JA 1479. Therefore, he disputed the validity of the Statement of Account and the transactions it purports to reflect. 8 JA 1492-1493.

Skarpelos objected to Exhibit 43/44 as hearsay. 7 JA 1318, 1324. Weiser contended it was admissible under NRS 51.135 as a “record of a regularly conducted activity,” commonly referred to as the “business records exception” to the hearsay rule. *Id.*

The only witness to testify in support of this document was Livadas. His testimony is summarized as follows:

- Prior to December 2014, Livadas had no involvement with WAM other than introducing customers through Weiser Capital. 7 JA 1319. As such, he was not involved in any way in the compilation of data or

production of account statements during that time. 7 JA 1322. Nor was he familiar with WAM's computer system. 7 JA 1322-1323.

- Livadas does not know how WAM kept its records or how it tracked and reported client transactions prior to December 2014. 7 JA 1319-1320.

- Livadas has not participated in audits of WAM or in audits of WAM's record keeping system. 7 JA 1280.

- WAM does not regularly produce account statements. 7 JA 1320, 1322. The Statement of Account that is Exhibit 43/44 was generated only because of the sale of WAM to Livadas. 7 JA 1320, 1463.

Livadas received Exhibit 43/44 when he acquired WAM: "My staff pulled this from the records. I didn't go into the boxes or whatever they are." 7 JA 1317.

- WAM does not have any Statements of Account for Skarpelos' account for the years 2011, 2012, 2014, 2015, 2016, 2017 or 2018. 7 JA 1320-1321. WAM only has a Statement of Account for Skarpelos' account for the period of February 2013 to December 2013.

- If a client requests a statement, WAM must produce one. 7 JA 1320. Statements are generated from transaction records. 7 JA 1452. WAM should have in its possession records for all client transactions. 7 JA 1320-1321. This would include records of the April 2013 stock sale as well as Skarpelos' alleged withdrawals of funds from his account in 2011 and 2012 that created the purported large negative "Opening Balance" on Exhibit 43/44. 7 JA 1322. Even if WAM does not produce an account statement, there should still be records of the transactions that occurred. 7 JA 1322.

- But all WAM produced in this case was the Statement of Account. 7 JA 1322. It produced none of the transaction records which should have been in its possession and from which Exhibit 43/44 supposedly was generated. 7 JA 1452.

Livadas' testimony indicates a lack of trustworthiness. What he did not testify about is even more problematic: **Livadas did *not* testify that the Statement of Account was made "at or near the time" of the events it purports to reflect, nor did he testify that it was prepared by—or from**

information transmitted by—a person with knowledge in the course of a regularly conducted activity at WAM.

In fact, Livadas later admitted that he has no idea who prepared Exhibit 43/44 and how the information contained therein was transmitted or by whom. 7 JA 1336. He admitted that he should have been able to find the transaction records in WAM's files but could not. 7 JA 1336. Livadas admitted that Exhibit 43/44 is the only record of the April 2013 stock sale. 7 JA 1337.

Despite Livadas' testimony as outlined above, the District Court admitted the Statement of Account over Skarpelos' hearsay objection, finding that the Statement of Account was admissible as a business record under NRS 51.135. 7 JA 1324. The District Court found Livadas to be a "qualified person" and that "there is an indicia of reliability regarding the information contained in the document...." 7 JA 1324.

The District Court based its equitable award to WAM almost entirely, if not solely, on the Statement of Account. 7 JA 1332; 10 JA 1916, 1918, 1919, 1923; 11 JA 2158, 2162. Had the Statement of Account not been admitted, there would have been no admissible evidence of the April 2013

transaction and Skarpelos' alleged withdrawal of funds from his WAM account—and thus no evidence upon which to base the award to WAM.

**The District Court Rules That Skarpelos Owns
the Disputed Stock And Dismisses Weiser's Claims**

Following trial, the District Court orally pronounced its findings and judgment, and later entered the same in writing. 10 JA 1914-1927; 11 JA 2156-2164. It found that no contract was formed for the sale of Anavex stock from Skarpelos to either WAM or Weiser Capital at any time. 11 JA 2159. Therefore, the District Court concluded that all of Weiser's claims failed and dismissed the same. 11 JA 2159, 2162. It granted Skarpelos' claim for declaratory relief that he is the owner of the Disputed Stock and that neither WAM nor Weiser Capital, nor anyone claiming through them, has any ownership interest in any Anavex stock owned by Skarpelos. 11 JA 2162.

However, based on Exhibit 43/44, the District Court found Skarpelos had withdrawn money from his WAM account such that he had a negative balance of \$153,679.54 as of March 2013. 10 JA 1918; 11 JA 2158. The District Court also found that, on April 2, 2013, Skarpelos sold the Disputed Stock to “an unidentified third party,” pursuant to which WAM credited

Skarpelos' account \$249,580 (after taking a \$420 commission), taking it to a positive balance of \$95,775.46. 11 JA 2158. The District Court further found that Skarpelos thereafter withdrew a substantial portion of that money, leaving a balance of \$4,115.36. *Id.*

Based on these findings, which were based almost entirely on Exhibit 43/44, the District Court concluded:

Therefore, despite Weiser's failure to plead this claim for relief, the Court concludes it has equitable jurisdiction to enter judgment against Skarpelos and in favor of WAM in the total amount of \$245,464.64. Allowing Skarpelos to retain ownership of the Disputed Stock and the funds he received would result in a windfall. This is an obligation that is separate from and independent of Skarpelos' ownership of stock in Anavex and has no bearing on his ownership.

11 JA 2162-2163. The District Court described this award as "restitution" based on its equity jurisdiction. 10 JA 1922, 1923. Skarpelos disputes the validity of this award on several grounds discussed below.

**After Entry of Judgment, Weiser Is Sanctioned
For Its Frivolous Claims**

Following entry of judgment, Skarpelos moved for an award of attorney fees pursuant to NRS 18.010(2)(b). 11 JA 2252 – 12 JA 2338. Skarpelos argued that Weiser's claims and defenses as pled and maintained

throughout the case were brought without reasonable grounds and were unsupported by any credible evidence at trial. 11 JA 2257.

The District Court agreed, awarding Skarpelos \$216,900.50 in attorney fees. 13 JA 2539-2554. The District Court found that (1) Weiser unreasonably maintained its claim to ownership of the Disputed Stock by virtue of the July 2013 contract; (2) at trial Weiser abandoned its theory that its claim of ownership was based on the July 2013 contract and instead claimed that the July 2013 contract was meaningless; and (3) although it awarded WAM equitable relief, “the award was unrelated to Weiser’s claims for relief” in the lawsuit; 13 JA 2551-2552. The District Court found Weiser’s sudden about-face at trial to be “extremely troubling.” 13 JA 2252.

SUMMARY OF ARGUMENT

There are three reasons this Court must reverse the District Court’s decision to award WAM equitable relief.

First, the District Court lacked subject matter jurisdiction to award WAM equitable relief because (1) WAM had adequate legal remedies it neglected to pursue and (2) the “restitution” award is unrelated to and

independent of any party's claim to ownership of the Disputed Stock—the only issue in this interpleader action.

Second, in awarding equitable relief based on a claim WAM failed to plead or otherwise assert until trial, the District Court denied Skarpelos his constitutional right to due process.

Third, the District Court abused its discretion in admitting into evidence the Statement of Account upon which its award to WAM was based because Weiser failed to establish that it was a “record of a regularly conducted activity” under NRS 51.135.

ARGUMENT

- 1. The District Court lacked subject matter jurisdiction to award WAM equitable relief.**
 - a. The District Court lacked equity jurisdiction because WAM had adequate legal remedies it failed to pursue.**

WAM had adequate legal remedies by means of a lien and a claim for breach of the Account Agreement that it either neglected or intentionally chose not to pursue. Therefore, the District Court lacked subject matter jurisdiction to award WAM equitable relief.

Where remedies are available at law, courts lack equity jurisdiction. *Wells, Fargo & Co. v. Dayton*, 11 Nev. 161 (1876); *Ex Rel. Nenzel v. Dist. Ct.*, 49 Nev. 145, 159, 241 P. 317, 322 (1925) (a court of equity acquires no jurisdiction unless the plaintiff has no adequate remedy at law); *see also Penrose v. Whitacre*, 62 Nev. 239, 147 P.2d 887 (1994). Subject matter jurisdiction is a question of law reviewed de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

Here, the District Court found that Skarpelos had opened a brokerage account with WAM and deposited his Anavex stock certificates to fund the account. 11 JA 2158. In opposing summary judgment, Weiser submitted the “Weiser Asset Management Ltd. (“WAM”) Account Agreement Terms And Conditions” that governed its relationship with Skarpelos. 3 JA 0510. The first paragraph of that document provides: “In opening and operating this investment account (“Account”) with Weiser Asset Management Limited (“WAM”) the Customer and “WAM” hereby agree to the terms and conditions within this Agreement, as follows....” *Id.*

With respect to sale transactions, the Account Agreement provides that the customer agrees to “reimburse ‘WAM’ for all loss, damage, cost or

expense suffered or incurred by ‘WAM’ through [the customer’s] failure to make delivery.” *Id.* That is the exact situation WAM claims occurred in this case—that Skarpelos failed to make delivery of the Disputed Stock to another WAM customer as required by the April 2013 transaction, and as a result WAM was damaged in having to “make it right” with that third party. In other words, WAM was asserting that Skarpelos breached the Account Agreement and caused WAM damages. This was an adequate and available legal remedy that WAM failed to pursue.

The Account Agreement further provides that, in addition to WAM’s common law rights, WAM has a general and specific lien over securities held in a customer’s account. 3 JA 0512. This contractual lien secured “all claims and money owing by the Customer to ‘WAM’ in respect to operation of the Account and for any and all indebtedness to ‘WAM’ howsoever arising and in whatever Account appearing, including any liability arising by reason of any guarantee by the Customer of the Account.” 3 JA 0512.

However, the legal protections of a lien can be lost through neglect, which appears to be the case here. There is no evidence that WAM, upon the opening and funding of Skarpelos’ account or at any other time, notified

NATCO, as the transfer agent and registrar of Anavex stock, that WAM claimed a lien on Skarpelos' stock by virtue of the Account Agreement. Had WAM done so, NATCO would have notified WAM when it received Skarpelos' Affidavit of Lost Certificate. 6 JA 1162. But WAM did not do this, even when Skarpelos allegedly was running up a large negative balance on his account. There simply is no evidence that WAM took any action whatsoever to perfect and maintain its lien over Certificate 753.

WAM clearly had legal remedies available to it that it lost through neglect or inaction. WAM never pleaded a claim against Skarpelos for breach of the Account Agreement. Rather, Weiser specifically alleged and maintained throughout this case that Skarpelos breached a July 2013 contract Weiser would later admit never existed. Weiser's confusing course of conduct does not excuse its failure to pursue its available legal remedies.

The District Court's equitable award against Skarpelos was based on its finding that Skarpelos would be unjustly enriched if he were allowed to retain both the Disputed Stock and the \$250,000 the Court found had been credited to his WAM account in April 2013. 11 JA 2163. However, "no action for unjust enrichment lies where a contract governs the parties' relationship to

each other.” *Kizer v. PTP, Inc.*, 129 F.Supp.3d 1000, 1005 (D. Nev. 2015) (citing *McKesson HBOC, Inc. v. N.Y. State Common Retirement Fund, Inc.*, 339 F.3d 1085, 1091 (9th Cir. 2003)). Here, because the District Court found that Skarpelos had opened a brokerage account with WAM, the Account Agreement governed the parties’ relationship to each other.

The availability of these legal remedies precluded an award based in equity. WAM’s neglect or purposeful conduct in failing to pursue its legal remedies does not somehow make those remedies inadequate. Equity is not intended to relieve parties that have neglected to exercise diligence or have purposefully failed to avail themselves of their legal remedies. *Hendrickson v. Hinckley*, 58 U.S. 443, 446, 15 L. Ed. 123 (1854); *Chiatovich v. Mercer*, 48 Nev. 344, 351 (1925) (holding a defendant is prevented from seeking equitable relief from a judgment if a legal remedy existed and he failed to avail himself to it); *Wilkison v. Wiederkehr*, 101 Cal. App. 4th 822, 835, 124 Cal. Rptr. 2d 631, 640-641 (2002) (“[I]f the plaintiff’s cause of action is one for which the legal remedy of damages is generally deemed adequate, it does not become inadequate and justify a decree of specific performance merely because the legal remedy has been lost through neglect.”).

The District Court lacked subject matter jurisdiction to award equitable relief, and its award to WAM should be reversed.

- b. The District Court lacked jurisdiction to impose the award of “restitution” because it was unrelated to any party’s claim to ownership of the Disputed Stock.**

The District Court lacked subject matter jurisdiction to impose equitable “restitution” against Skarpelos because that award was unrelated to and independent of the issue of *ownership* of the Disputed Stock, which was the only issue in this case and the only basis for the District Court’s equitable interpleader jurisdiction.

In imposing this award, the District Court specifically stated that “[t]his is an obligation that is separate from and independent of Skarpelos’ ownership of stock in Anavex and has no bearing on his ownership.” 11 JA 2162-2163. In its order awarding Skarpelos attorney fees, the District Court noted that, although it had awarded WAM equitable relief, “the award was unrelated to Weiser’s claims for relief” in the lawsuit. 13 JA 2551-2552. Nevertheless, in its order denying Skarpelos’ motion to amend the judgment, the District Court stated that “the judgment of restitution was directly related, and not ancillary, to the shares at issue in this case.” 13 JA 2542.

While the restitution may have derived from the fact that the Disputed Stock was on deposit with WAM, the award has no relationship to any party's claim to *ownership* of the Disputed Stock and therefore no relationship to the Court's equitable interpleader jurisdiction. In reality, the restitution award was based on an alleged sale of stock to a third party that never asserted a claim of ownership in this case, and WAM's role as broker in that transaction had nothing to do with the claims of ownership Weiser asserted throughout this interpleader case.

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

Here, the “essential element” of the District Court’s interpleader jurisdiction was the competing claims of Skarpelos and Weiser to *ownership* of the Disputed Stock. As such, the District Court’s equity jurisdiction extended only to the purpose of NATCO’s interpleader-to resolve the competing claims to *ownership*. However, Weiser’s claim to ownership of the Disputed Stock was abandoned at trial. The District Court’s award had nothing to do with any party’s claim to ownership. Rather, it was based on the customer-broker relationship between Skarpelos and WAM. The April 2013 transaction upon which the award is based is an entirely separate issue that, as the District Court found, did not involve any party’s claim to ownership of the Disputed Stock upon which its equity jurisdiction was based.

While Nevada courts have broad powers in equity, they may consider only the circumstances that bear upon the “equities.” *Shadow Wood HOA v. N.Y. Cmty Bancorp.*, 132 Nev. Adv. Op. 5, 366 P.2d 1105, 1114 (2016). Here, the District Court’s equitable jurisdiction was limited to the sole question presented by this lawsuit: “Who owns the stock?” Weiser’s claim to ownership was based solely on the July 2013 contract. Thus, the

circumstances that bear upon the “equities” are limited to the validity, terms and performance of the July 2013 contract. Weiser abandoned that contract at trial and the District Court dismissed all of Weiser’s claims, finding Skarpelos owned the Disputed Stock.

The basis of the District Court’s equitable interpleader jurisdiction was limited to Skarpelos’ and Weisers’ competing claims of *ownership* of the Disputed Stock. Weiser’s admission that it did not own the Dispute Stock completely resolved the dispute. Thus, as the District Court correctly admitted, the restitution award is, “unrelated to” and “independent of” the ownership of the Disputed Stock.

As such, the District Court lacked subject matter jurisdiction to make that award, and it should be reversed.

2. The District Court denied Skarpelos due process by imposing “restitution” based on a claim of which Skarpelos was not given fair notice.

The Nevada Constitution prohibits the deprivation of property without due process of law. Nev. Const. art. 1, 8(2). Procedural due process requires that parties receive “notice and an opportunity to be heard.” *Eureka Cty. v. Seventh Judicial Dist. Court in & for Cty. of Eureka*, 134 Nev. 275, 279, 417

P.3d 1121, 1124 (2018). The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18 (1976). Constitutional challenges are reviewed de novo. *Grupo Famsa v. Dist. Ct.*, 132 Nev. 334, 337, 371 P.3d 1048, 1050 (2016).

Nevada is a notice pleading state in which courts “liberally construe pleadings to ‘place into issue matters which are *fairly noticed* to the adverse party.’” *Western States Const. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) (quoting *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984)) (emphasis added).

“Fair notice” means a complaint must set forth sufficient facts to demonstrate the necessary elements of a claim so that the defending party has adequate notice of the nature of the claim and the relief sought. *Id.* Although the notice pleading standard allows courts to liberally construe pleadings, a pleading is insufficient if is misleading or otherwise inadequate. *Peterson v. Volkswagen of Am., Inc.*, 272 Wis. 2d 676, 695, 679 N.W.2d 840, 848 (Wis. App. 2004) (J. Snyder dissenting).

Further, NRCP 8(a) requires a pleading to contain a demand for judgment for the relief to which the complaining party deems himself entitled. Allowing parties to rely on unpled factual theories impermissibly permits “trial by ambush.”

As discussed above, Skarpelos had no notice that the District Court would award WAM “restitution” for damages arising from WAM’s role as broker in the April 2013 transaction between Skarpelos and another WAM customer. Skarpelos was denied constitutional due process by the imposition of this award. Had WAM properly pleaded its actual claim for breach of the Account Agreement, Skarpelos could have demanded a jury trial and would have conducted discovery differently. Skarpelos was significantly prejudiced by WAM’s misleading pleadings and the Court’s imposition of an award based on a claim WAM never, at any time, properly asserted. The District Court’s award to WAM should be reversed.

3. The District Court abused its discretion in finding that the Statement of Account is a “record of a regularly conducted activity” under NRS 51.135.

A district court’s decision to admit evidence is reviewed for an abuse of discretion. *Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 232, 445 P.3d

846, 848 (2019). An abuse of discretion occurs when a trial court exercises its discretion in clear disregard of guiding legal principles or where it fails to apply the full, applicable legal analysis. *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016); *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014).

Here, the District Court abused its discretion in admitting Exhibit 43/44 because it exercised its discretion in clear disregard of the language of NRS 51.135 and failed to apply the full legal analysis applicable to the “business records exception.”

NRS 51.135 is entitled “Record of regularly conducted activity” and provides:

A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

As applicable to this case, NRS 51.135 can be broken down into the following elements: (1) a record or compilation of data of acts or events *made at or near the time*; (2) by, or from information transmitted by, *a person with*

knowledge; (3) all in the course of a regularly conducted activity; (4) these elements are shown by the testimony of the custodian or other qualified person; and (5) the method or circumstances of preparation do not indicate a lack of trustworthiness.

- (1) There is no evidence that the Statement of Account was made “at or near the time” of the events it depicts.

Livadas did not testify that Exhibit 43/44 was made at or near the time of the transactions it purports to depict, nor was there any other evidence to support that finding. In fact, Livadas testified that he only was aware of this document because “[m]y staff pulled this from the records. I didn’t go into the boxes or whatever they are.” 7 JA 1317. “Whatever they are” demonstrates he has no idea how this document was prepared or maintained.

Livadas testified that the Statement of Account was prepared for the purpose of facilitating the sale of WAM to Livadas, which occurred in December 2014. But the record is devoid as to when it was prepared. As such, Weiser failed to establish this element of NRS 51.135.

- (2) There is no evidence the Statement of Account was made by, or from information transmitted by, a person with knowledge.

There is no evidence in the record as to which person at WAM prepared the Statement of Account (if indeed a person at WAM did create the document). As discussed above, Livadas had no involvement whatsoever in WAM's record-keeping process prior to January 2014. Further, he testified that he has no idea who prepared Exhibit 43/44 or how it was produced. 7 JA 1319-1320, 1322-1323. As such, there is no evidence to support this element of NRS 51.135.

- (3) There is no evidence the Statement of Account was made at or near the time of the events it depicts by or from information transmitted by a person with knowledge, all in the course of a regularly conducted activity.

Weiser's failure to establish the first two elements is compounded when the third element is considered. The first two elements must be established "all in the course of a regularly conducted activity." The Ninth Circuit has made clear that, "[w]hen reports are not prepared in the regular course of business, they are not admissible as business records." *Colvin v. U.S.*, 479 F.2d 998, 1003 (9th Cir. 1973).

In order for a record to qualify as one "made in the regular course of business," it must be made "pursuant to established company procedures for the systematic or routine and timely making and preserving of company

records, and relied upon by the business in the performance of its functions.” *Clark v. City of Los Angeles*, 650 F.2d 1033, 1037 (9th Cir. 1981). When the “maker of the records relies on the record in the ordinary course of business activities,” there is an added element of accuracy and trustworthiness to the record, which is the basis of the exception. *Id.*; see *A.L.M.N., Inc. v. Rosoff*, 104 Nev. 274, 285, 757 P.2d 1319, 1326 (1988).

The Statement of Account is not a document WAM relied on in the ordinary course of its business activities. WAM does not prepare account statements as part of its regular course of business. 7 JA 1320, 1322.

Indeed, Livadas testified that WAM has no record of any Statements of Account for Skarpelos’ account for the years 2011-2012, 2014-2018. JA 1320-1321. Exhibit 43/44 was prepared only to facilitate the sale of WAM to Livadas in December 2014, a one-time event. 7 JA 1320, 1463. Further, Weiser does not have any of the transactional records from which Exhibit 43/44 supposedly was generated. 7 JA 1336, 1444.

Therefore, this Statement of Account is a far cry from documents typically found to fall within the business records exception. See *U.S. v. Childs*, 5 F.3d 1328, 1333-34 (9th Cir. 1993) (purchase orders and certificates

of title qualified as business records because the documents in question were kept in the regular course of business at the dealerships and the dealerships *relied* on the documents' identification of individual cars in keeping track of their inventory); *City of Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1038 (9th Cir. 1983) (documents pertaining to mechanical work were documents considered to be kept in the regular course of business because "a document was produced each time an employee worked on a project" and "it was regular practice to keep such documents.").

Unlike these cases, Weiser did not produce documents such as the Statement of Account as part of its regular business activities. Further, there is no evidence WAM relied on the Statement of Account in its ordinary course of business activities. Indeed, Livadas made it clear that producing account statements is not part of WAM's ordinary business activities. 7 JA 1320, 1322.

It cannot be said that a single account statement for a partial year of Skarpelos' eight years of account ownership with WAM, generated for a purpose unrelated to servicing Skarpelos' account and supposedly based on transactional records WAM does not have, qualifies as a document "made in

the regular course of business” or one “relied upon by the business in the performance of its functions.” *Clark*, 650 F.2d at 1037. As such, this element of NRS 51.135 is not met.

- (4) Livadas is neither the custodian of records nor a “qualified person” to establish the elements of NRS 51.135.

There is no evidence Livadas was the custodian of records for WAM at any point in time. Thus, Weiser had to show Livadas was a “qualified person” to establish the requirements of NRS 51.135.

Daisy Tr. v. Wells Fargo Bank, N.A., supra, provides that NRS 51.135 does not require that the custodian or qualified person personally enter the information contained in the business records. In support of its decision, the *Daisy* Court cited 30B Charles Alan Wright & Jeffrey Bellin, *Federal Practice and Procedure* § 6863 (2017) as follows:

The question of the sufficiency of the foundation witness’ knowledge centers on the witness’ familiarity with the organization’s record keeping practices, not any particular record.

Id. This is consistent with Ninth Circuit case law interpreting the business records exception—that a qualified person is broadly interpreted as “anyone who understands the record-keeping system involved.” *United States v. Ray*,

930 F.2d 1368, 1370 (9th Cir.1990) (cited in *Greco v. State*, No. 67973, 2016 WL 937117, at *3 (Nev. App. Mar. 9, 2016)).

As discussed above, Livadas clearly has no understanding of, or familiarity with, WAM's record-keeping system and practices before he acquired ownership of WAM in December 2014. 7 JA 1319-20, 1322-1323. As such, he is far from a "qualified person" to testify as to the elements of NRS 51.135. As such, this element of NRS 51.135 is not satisfied

- (5) Livadas lacked requisite knowledge as to the method or circumstances of the preparation of the Statement of Account, and his testimony about WAM's records demonstrated an extreme lack of trustworthiness.

Livadas had no idea how the Statement of Account was prepared. 7 JA 1319-1320, 1322-1323. And while he testified it was prepared for a purpose outside of WAM's regularly conducted business activities, he does not know the circumstances of the preparation of the document. *Id.*

Even more concerning is that WAM has none of the transactional records from which the Statement of Account supposedly was generated. 7 JA 1336, 1444. Livadas testified that there should be a "contract note" reflecting the April 2013 transaction and transaction records for Skarpelos' alleged withdrawals of money from his account, but he could not find them

in WAM's files. 7 JA 1336, 1444. Therefore, both the source of the information in Exhibit 43/44 and the circumstances of preparation indicate a lack of trustworthiness. As such, this element of NRS 51.135 is not satisfied.

For all of these reasons, the District Court abused its discretion in admitting Exhibit 43/44 over Skarpelos' hearsay objection.

CONCLUSION

The District Court lacked subject matter jurisdiction to impose an equitable award against Skarpelos. The District Court, by acting *sua sponte*, denied Skarpelos' constitutional right to due process. Further, the District Court abused its discretion in admitting into evidence the Statement of Account upon which its award was based. For any one of these reasons, the District Court's award of \$245,464.64 to WAM should be reversed.

Dated: July 1, 2020.

WOODBURN AND WEDGE

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CERTIFICATE OF COMPLIANCE

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). This brief has been prepared in 14- point font, Times New Roman style, a proportionally spaced typeface, using Microsoft Word. I further certify that this brief complies with the page-or type-volume limitations of NRAP32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,463 words.

Pursuant to NRAP 28.2, 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.

Affirmation pursuant to NRS 239B.030

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

DATED: July 1, 2020.

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CERTIFICATE OF SERVICE

I am an employee of the law offices of Woodburn and Wedge, 6100 Neil Road, Suite 500, Reno, Nevada 89511, and that on this date, I caused to be sent via electronic service through the Court's e-filing system, a true and correct copy of the **APPELLANT'S OPENING BRIEF AND APPELLANT'S APPENDIX (Volumes 1 – 14)** to:

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Dated: July 1, 2020.

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