IN THE SUPREME COURT OF THE STATE OF NEVADA

ATHANASIOS SKARPELOS, an individual,
Appellant/Cross-Respondent,

vs.

WEISER ASSET MANAGEMENT, LTD., a Bahamas Company; and WEISER (BAHAMAS) LTD., a Bahamas Company,
Respondents/Cross-Appellants.

Nos.: 79425 / 79526
(**Consolidated**)

Appeal from Second Judicial District Court
State of Nevada, Washoe County
The Honorable Elliott Sattler

WEISER'S COMBINED OPENING AND ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Appellee/Cross-Appellant Weiser Asset Management, Ltd. is a limited liability company organized and operated under the laws of the Bahamas. It is wholly owned by Weiser Holdings Ltd.

2. Appellee/Cross-Appellant Weiser (Bahamas) Ltd. is a limited liability company organized and operated under the laws of the Bahamas. It has no parent company and is not owned in any percentage by any publicly traded company.

3. Holland & Hart has represented both Weiser entities.

4. Appellant/Cross-Appellee Athanasios Skarpelos is an individual.

5. Woodburn and Wedge has represented Skarpelos.

DATED this 19th day of August, 2020

Holland & Hart LLP

/s/Frank Z. LaForge

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JURISDICTIONAL STATEMENT

Weiser appeals from the District Court's Findings of Fact, Conclusions of Law and Judgment entered on April 22, 2019. Skarpelos filed his Motion to Alter or Amendment Judgment Pursuant to NRCP 59(e) on April 25, 2019. The District Court entered an order denying the Motion to Alter or Amend on August 6, 2019, and written notice of the entry of the order was served on August 9, 2019. Weiser filed its Notice of Cross-Appeal on August 29, 2019.

Weiser also appeals from the District Court's Order Granting Motion for Attorney's Fees, entered on August 9, 2019. Written notice of entry of the Order Granting Motion for Attorney's fees was entered on August 9, 2019. Weiser filed its Notice of Cross-Appeal on August 29, 2019.

ROUTING STATEMENT

This matter is not presumptively retained by the Supreme Court under NRAP 17(a) and not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

INTRODUCTION

In 2011, Athanasios Skarpelos opened an account with Weiser Asset Management, Ltd. ("WAM") by funding it with two stock certificates from Anavex Life Sciences Corp. ("Anavex"), which he physically deposited with WAM. Skarpelos could withdraw cash from his account secured by that stock and also liquidate it through WAM.

In April 2013, Skarpelos sold 3,316,666 Anavex shares—exactly half of one of his certificates—through WAM, which credited his account $250,000 in return. To process this sale, WAM located other WAM client–buyers to ultimately receive the stock, but it executed it as two separate sales transactions: (1) the sale between Skarpelos and WAM and (2) the sale between WAM and the client–buyers. In these separate but related sales transactions, Skarpelos and the buyers did not owe any obligations to one another; all performance obligations ran to and from WAM. Skarpelos proceeded to withdraw 98.4% of the $250,000 he received from WAM.

Unbeknownst to WAM, however, Skarpelos cancelled the same physical certificates he had previously deposited in his account through Anavex's transfer agent, Nevada Agency and Transfer Co. ("NATCO"), around the same time as the April 2013 sale. Consequently, WAM was not able to convert Skarpelos's physical stock certificate in a manner so that it could transfer the 3,316,666 shares to the buyers of the April 2013 sale. But, because WAM independently owed its client–buyers the stock, it had to procure replacement stock from the market by taking short

positions.[1] Given the potential exposure from such positions, WAM intended that Weiser (Bahamas) Ltd. ("Weiser Capital"), a related entity, step into its position as a shield to downstream liability.

NATCO ultimately filed an interpleader action before the District Court because WAM and Weiser Capital (collectively "Weiser") and Skarpelos made competing claims on the 3,316,666 Anavex shares (the "Disputed Stock").

After a bench trial, the District Court awarded Skarpelos the Disputed Stock and WAM $245,464.64 in restitution for the money that Skarpelos received from the April 2013 sale. The court, however, further awarded Skarpelos $216.950.50 in attorney's fees under NRS 18.010(2)(b), reasoning that Weiser did not produce any credible evidence in support of its claim to the Disputed Stock. There are three major issues in the parties' appeals.

First, the District Court erred in awarding Skarpelos the Disputed Stock instead of WAM. As a threshold issue, the court found that Skarpelos sold the Disputed Stock in April 2013, and there is no evidence in the record showing how that same stock somehow reverted back to Skarpelos's possession afterward. Further, the District Court misunderstood WAM's testimony concerning the April 2013 sale, which the District Court understood to be a direct seller-to-buyer transaction with WAM merely acting as a kind of escrow agent. In fact, WAM's owner and a principal participant in the April 2013 sale explained at trial that the

[1] In a short position, a trader sells a security first in anticipation of repurchasing later at a lower price. Unlike a normal stock sale in which the buyer's risk is limited to the amount it pays to obtain the stock, a short position exposes the trader to unlimited risk connected to the stock's potential rise in value. 7 JA1315–16.

seller's (Skarpelos) and buyer's obligations did not run directly to one another but to WAM. WAM was therefore obligated to provide 3,316,666 Anavex shares to the buyers, and Skarpelos was obligated to provide the same number of shares to WAM, which WAM thought it already had in its custody.

Second, Skarpelos claims that the District Court did not have subject matter jurisdiction to award WAM the $245,464.64 in restitution because the award was not connected to Weiser's claims on the Disputed Stock and Weiser had legal remedies available to recover that money. But Skarpelos misconstrues subject matter jurisdiction, which the District Court had in this case because it exceeded the amount-in-controversy requirement for justice courts. He further misunderstands the nature of a court's power to fashion equitable remedies in equitable cases like interpleader, which does not turn on the availability of legal remedies but the fairness of the court's award. In any event, the District Court's award was directly relevant to Weiser's affirmative defenses of unjust enrichment, unclean hands, and equitable estoppel and, most importantly, Skarpelos does not dispute that he would receive an unequivocal windfall were he permitted to retain both the Disputed Stock he sold in April 2013 and the proceeds he received from that sale. The District Court therefore did not abuse its discretion in this regard.

Third, the District Court erred in awarding Skarpelos fees under NRS 18.010(2)(b). Aside from its mistake in finding that Skarpelos, not WAM, owned the Disputed Stock, WAM prevailed in the interpleader action by recovering $245,464.64. While the District Court concluded that its restitution award was unrelated to Weiser's claims, it pertained directly to the interpleader over the

Disputed Stock as well as Weiser's affirmative defenses of unjust enrichment, unclean hands, and equitable estoppel. Further, even if the District Court viewed the April 2013 sale differently, WAM nevertheless submitted credible evidence supporting its entitlement to the Disputed Stock and set forth a colorable legal theory.

Weiser therefore asks the Court to vacate the District Court's judgment and fees award and remand the case with instructions to enter an order in WAM's favor concerning the Disputed Stock.[2]

FACTUAL BACKGROUND

1. WAM is a broker–dealer authorized to hold client securities, transact cash accounts, and facilitate securities sales.

WAM is a licensed Class-1 broker–dealer that maintains custody of client assets, including stock, exceeding $250 million. 7 JA1280. WAM is registered and regulated by both the Financial Services Authority and Securities Commission of the Bahamas and the Ontario Securities Commission as a registered foreign broker–dealer in Canada. 7 JA1442; 10 JA1917. Given such regulation and its fiduciary duties, WAM is audited annually by Grant Thornton. 7 JA1317; 7 JA1464. Weiser Capital is an affiliate entity to WAM and provides investment banking advisory services and deal arrangement as an investor in principal on behalf of WAM and its

[2] If this Court finds that the District Court should award WAM ownership of the Disputed Stock, then WAM agrees that the District Court's $245,464.64 equitable award should also be vacated because it represented WAM's consideration to Skarpelos in the April 2013 sale. Further instructions should provide Skarpelos with the balance of his WAM account and the remaining sum from the $250,000 (minus processing fee): $4,115.36.

clients. 7 JA1278. These functions are segregated between WAM and Weiser Capital for risk-management purposes. 7 JA1285.

Among other services, WAM facilitates the sale of stock that its customers have deposited with WAM. 7 JA1281-85. If a WAM account–holder or client wishes to sell his or her shares, the sale process will largely turn on whether the sale is (a) between two WAM clients (private) or (b) between a WAM client and a third party (public). 7 JA1285. This determination is generally made by whether any existing WAM clients have previously requested to buy stock in a particular company. *Id*.

If there is both a WAM-client seller and a WAM-client buyer for the particular stock, then a private transaction will occur between all three parties: (a) the WAM-client seller, (b) WAM, and (c) the WAM-client buyer. 7 JA1283. In such instances, the sale of the security is executed from the seller to WAM to the buyer. 7 JA01283 7 JA1331–32. Thus, the sale is never directly between WAM clients but always made through WAM as the broker, who owns the shares temporarily as part of the transaction. *Id.* In other words, the seller and buyer have no obligations to one another; instead, the obligations exist between (a) the seller and WAM and (b) the buyer and WAM. There is no need for a sales contract for the transaction. *Id.* If there are restrictions on the certificate,[3] then the new owner of the stock cannot transfer that stock for at least six months. 7 JA1283–84. In such cases, WAM will need to "dematerialize" any physical stock certificates through the transfer agent for that stock, which means that the transfer agent will receive the original stock certificate

[3] Such restrictions mean that the stock cannot be sold on the open market until certain conditions have been met. 7 JA1283

and then either (a) issue a new physical stock certificate in the new owner's name or, much more often, (b) convert the stock into electronic form to make future transfers much easier. 7 JA1281; 7 JA1284. Both forms of dematerialization require the seller to execute a power of attorney to WAM. 7 JA1285. If there is something wrong with the certificate or dematerialization process, the transaction is still effectuated as far as WAM's clients are concerned—the seller no longer owns the stock and the buyer does. 7 JA1284. But WAM must procure replacement stock for the buyer to whom WAM has already sold the shares and whose account shows that it now owns those shares. *Id.* Once the seller's account is credited with the sale proceeds and the buyer's account is credited with the stock, it is WAM's responsibility to correct any defects in the sale. *Id.*

If the sale is a "public" sale between a WAM–client and a third party, however, the process is more complicated and necessitates the involvement of Weiser Capital as the intermediary buyer. 7 JA1285. Because it is not a broker that custodizes securities, Weiser Capital has less risk and exposure than WAM. *Id.* WAM will help broker the transactions by finding willing buyers. *Id.* Unlike a private transaction between WAM clients, a public sale will take place through an escrow agent (a "prime" broker or bank) and requires a purchase-and-sale agreement. *Id.*; 7 JA1282.

Christos Livadas, a Greek citizen, is WAM's risk advisor as well as the owner and director of Weiser Holdings Ltd., the parent company of WAM, which he acquired in late 2013 or early 2014. 7 JA1278-79. He is also the owner and director of Weiser Capital, which he founded in approximately 2012. 7 JA1278–79. Before

2014, Livadas also assisted Skarpelos in managing his financial affairs, funding his business initiatives, and sourcing buyers for sales of his assets. 7 JA01285–86; 7 JA1291.

2. Skarpelos opens an account with WAM in 2011 by depositing his Anavex stock certificates.

Skarpelos is Greek citizen and one of the founders of Anavex, a pharmaceutical company. 7 JA1469; 8 JA1471; 8JA1604. NATCO is the designated transfer agent for Anavex's stock, which makes it responsible for the management and issuance of that stock. 7 JA1314; 8 JA1567.

Livadas was the primary liaison and communication conduit between Skarpelos and WAM. 7 JA1296–1303; 7 JA1310–11. This often involved helping Skarpelos arrange for the sale of his Anavex stock. *Id.*; 7 JA1289–90. For example, in October 2007, Livadas helped Skarpelos arrange the sale of 950,000 shares of Anavex stock when Skarpelos needed money. 7 JA1290–91; 1 SA0012; 1 SA0016.

As of 2011, Skarpelos owned two Anavex stock certificates (the "Certificates"): Certificate 660 (92,500 shares) and Certificate 753 (6,633,332 shares). 6 JA1135; 1 SA0011. Both Certificates are restricted, meaning that they cannot be resold on public market for six months after the sale, after which they may be dematerialized. 7 JA1305.

At Livadas's suggestion, Skarpelos opened an account with WAM in 2011. 7 JA1292. In his application, Skarpelos indicated that he would be "funding" his account with "certificates for AVXL," the NASDAQ designation for Anavex. 6 JA1144. Under his WAM account, Skarpelos was entitled to borrow cash against the

Certificates, but if WAM called for payment, he would have to either pay WAM for the deficit or lose the equivalent value in the Certificates. 7 JA1293–94.

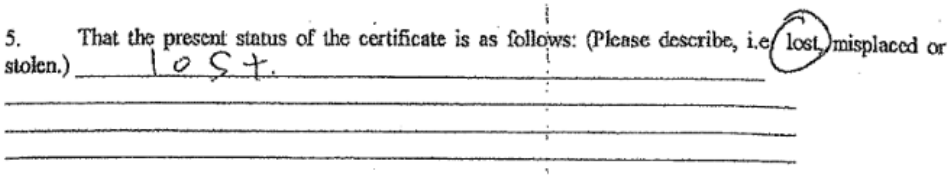
As part of this account-opening procedure, Skarpelos filled out an application, completed an identity verification form and provided a passport, utility bill from Greece, and a customer-in-good-standing letter from Alpha Bank in Greece. JA1598; 6 JA1137–46; 6 JA1153–58. Most importantly, Skarpelos deposited the original Certificates with WAM. 6 JA1060; 8 JA1594. In opening his account, Skarpelos was aided by his cousin Lambros Pedafronimos ("Lambros"), who, apparently, provided a copy of his own passport as part of the process. 8 JA1594; 8 JA1598; 9 JA1759; 7 JA1297. Despite the foregoing, Skarpelos would later claim that he never opened a WAM account. 8 JA1590.

After opening his account with WAM, Skarpelos made several withdrawals so that by February 2013 he had a negative balance of $140,288. 6 JA1224; 7 JA1324. Skarpelos often used Lambros to communicate with Livadas regarding his WAM transactions. 7 JA1299–1302. At no point, however, did Skarpelos ever ask Livadas for the return of his Anavex Certificates. 7 JA1311–12. Had he done so, he would have had to have paid off his balance since those Certificates secured his account. *Id.*; 7 JA1293.

3. Skarpelos cancels Certificates 660 and 753 by declaring them as "lost."

Even though the Certificates secured his Weiser account on which he had drawn significant sums of cash, and unknown to WAM, Skarpelos submitted an "Affidavit For Lost Stock Certificate" with NATCO seeking a replacement for

Certificate 753 in March 2013. 1 JA0032; 6 JA1162–63; JA1568. In that Affidavit, Skarpelos "declare[d] and affirm[ed]" that he had "lost" the two certificates:


5. That the present status of the certificate is as follows: (Please describe, i.e. lost, misplaced or stolen.) lost.

6 JA1162. Skarpelos further swore under oath that he had "not assigned hypothecated, pledged, or in any other way disposed of either the stock certificate or its rights as a stockholder, in whole or in part." *Id.* Skarpelos had the Affidavit For Lost Stock Certificate notarized. 6 JA1163. Skarpelos also served a notarized stop transfer order with NATCO for the Certificates on March 29, 2013, again claiming that they were "Lost." 6 JA1165. Skarpelos later claimed that he cancelled the Certificates because he was concerned that WAM was not a properly licensed broker–dealer and had tried unsuccessfully to get his Certificates back but could not reach anyone at WAM.[4] 6 JA1233.

Following Skarpelos's request, NATCO cancelled the Certificates and reissued them as Certificate Number 975 in early April 2013. JA0033; JA1167. Because Certificate 975 was not deposited in its custody, WAM could not facilitate a sale of the Anavex shares it represented. 7 JA1461. WAM, however, was unaware of Skarpelos's actions during that time. *Id*.

[4] Neither is true. WAM is a duly licensed broker-dealer (JA1280) and Skarpelos admitted at trial that he had frequent contact with Livadas, his central contact at WAM. JA1606.

Despite voiding the security on which his WAM account was founded, Skarpelos never informed WAM and nevertheless continued to withdraw cash against the Certificates by withdrawing an additional 10,000€ from WAM in March 2013, which brought the outstanding balance of his account with WAM to $153,804.54. 6 JA1224; 9 JA1750–JA1751.

4. Skarpelos sells the Disputed Stock in exchange for a $250,000 credit in his WAM account in April 2013.

At the same time that he was claiming in an affidavit that he had lost his Anavex Certificates, Skarpelos, Lambros, and Livadas began discussing liquidating some of Skarpelos's Anavex shares in late March 2013. 7 JA1302–13; 9 JA1742; 9 JA1743; 9 JA1747.

Skarpelos ordered the sale of the Disputed Stock—3,316,666 of his Anavex shares or exactly half the shares in Certificate Number 753—for $250,000. 7 JA1303–04. Livadas helped broker the deal by confirming the existence of WAM–clients willing to buy Anavex shares. 7 JA1304. From Skarpelos's perspective, this was a commodity-based transaction in which the only important terms were the amount of shares and the money he received. 7 JA1303. Who ultimately ended up with possession of the shares was immaterial so long as he received the money. *Id*; 7 JA1332. Indeed, in such circumstances, a financial institution cannot disclose the identity of its client–buyer. JA1332. From WAM's perspective, it was purchasing the shares it already held in its custody as a middleman so that it could sell them separately to another WAM client. 7 JA1283; 7 JA1303–05; 7 JA1331. The transaction occurred in early April 2013. 6 JA1224; 7 JA1304. It had the effect of

transforming Skarpelos's six-figure negative balance into a $95,775.46 positive balance. 11 JA2158(¶8).

As explained below, however, WAM sold 3,316,666 Anavex shares to its other clients not knowing that Skarpelos had cancelled the Certificates and, consequently, would thus eventually have to cover those buyers with replacement stock when it was unable to dematerialize Certificate 753 with NATCO. 7 JA1315–JA1316.

In late April, Livadas arranged for Skarpelos to withdraw 15,000€ ($20,000), which reduced his WAM account balance to $75,581.08. 6 JA1224; 7 JA1325; 7 JA1262–63. He then withdrew a further 15,000€ that month. 6 JA1224.

5. Livadas, Lambros, and Skarpelos discuss an additional sale of Anavex stock that is never consummated.

After the April 2013 sale, Livadas continued to try to source buyers for the remainder of Skarpelos's Anavex stock, eventually locating some Chinese investors. 7 JA1305. Because they were not WAM clients, a sale agreement was needed. 7 JA1285; 7 JA1305–06. Lambros therefore sent Livadas a preexisting purchase-and-sale agreement from an unrelated sale that he later transformed into an agreement for the prospective sale to the Chinese investors. 7 JA1305–07; 6 JA1179–83; 6 JA1191.

In July 2013, after an exchange of emails about the prospective sale, Lambros emailed a more formalized purchase-sale-agreement to Livadas that Skarpelos had signed and notarized. 7 JA1306–08; 6 JA1197–1201; 6 JA1205–07. Skarpelos or Lambros had filled out all the portions of these agreements that pertained to

Skarpelos but left the following parts blank: (a) the date of the contract, (b) the identity of the buyer, and (c) the closing date. 6 JA1199–1201; 6 JA1205–07. Lambros also emailed Livadas a Power of Attorney form notarized by Skarpelos concerning his Anavex shares, whose purpose was to dematerialize any stock sold by Skarpelos, including the 3,316,666 shares he sold in April 2013. 7 JA1307–08; 6 JA1203–04. Again, there were blanks for the name of the transferee and date. *Id.*

The sale to the Chinese non-WAM buyer, however, ultimately was never consummated. 7 JA1309

After the July sale fell through, WAM repurposed the purchase-and-sale agreement provided by Lambros and executed by Skarpelos to retroactively memorialize the April 2013 sale for anti-money laundering purposes. 7 JA1314. Specifically, it filled in the blanks so that "Weiser Capital" was the buyer, "3,316,666" shares was the amount of Anavex stock sold, and "$250,000" was the purchase price (the "July 2013 PSA"). 7 JA1314; 6 JA1193–95. Critically, the executed July 2013 PSA was not necessary to effectuate the April 2013 sale, which had already taken place. 7 JA1308–09; 7 JA1457. Its sole purpose was to sit in WAM's records to satisfy potential anti-laundering regulations. 7 JA1309; 7 JA1314; 7 JA1457. Unfortunately, the July 2013 PSA led to downstream confusion before it was subsequently understood that it was just a retroactive memorialization filled out by WAM for anti-money laundering purposes.

Weiser also filled out the Power of Attorney form. 7 JA1308; JA1213. Like the July 2013 PSA, the Power of Attorney was not necessary to consummate the April 2013 sale, which was fully accomplished as far as Skarpelos and the WAM

client–buyers were concerned. 7 JA1309; 7 JA1314. Its purpose, however, was to enable WAM to dematerialize the shares previously sold in that transaction so that they could be resold by the buyers after the six-month restricted period expired. *Id.*

6. Skarpelos withdraws the remainder of the $250,000 credit he received from the April 2013 sale.

Skarpelos continued to draw on the $250,000 credit he received from the April 2013 sale through Lambros that summer until he had virtually depleted his positive balance by Fall 2013:

- He withdrew 15,000€ in early July 2013.
- He withdrew 15,000€ in early August 2013.
- He withdrew 7500€ in mid-September 2013.

7 JA1325; 9 JA1751–JA1752; 6 JA1224. After these withdrawals, Skarpelos was left with $4,115.36 in his WAM account at the end of 2013. 6 JA1224. Thus, Skarpelos not only received $250,000 in proceeds for the April sale of the Disputed Stock, he also withdrew 98.4% of it.

7. Weiser discovers that Skarpelos cancelled the Certificates when it tries to dematerialize Certificate 753.

Until December 2013, Livadas and Weiser were unaware that Skarpelos cancelled the Certificates through NATCO in March 2013, which they learned while trying dematerialize Certificate 753 with NATCO. 7 JA1309. This came as a complete shock to WAM given that (a) the Certificates in WAM's custody secured Skarpelos's WAM account that he had been using throughout 2013, (b) Skarpelos had already sold and received the benefit of $250,000 from the April 2013 sale, (c)

the parties spent much time and effort discussing the sale of the remaining stock in Certificate 753 during the Summer of 2013, and (d) the parties had been in regular contact with one another throughout 2013. Despite the forgoing, neither Skarpelos nor Lambros ever informed Livadas or anyone at WAM that Skarpelos had cancelled the Certificates in WAM's custody and obtained a replacement certificate. 7 JA1310.

In 2015, Anavex's stock price started to rise. JA1315. While they had not previously sought to sell their shares, the WAM client–buyers in the April 2013 sale began to seek to sell the shares they had purchased from WAM. *Id.* Regardless of whether WAM could dematerialize the shares in Certificate 753, it still had to satisfy the buyers' sale orders and provide the requisite Anavex stock. 7 JA1314–15. To do this, WAM had to procure Anavex shares by taking short positions in the public marketplace, exposing it to great potential risk. 7 JA1315–16; 7 JA1333–34; 7 JA1456–57. To defray the exposure involved in taking short positions, WAM intended to transfer its right of ownership to Weiser Capital to deflect the potential liability, which also led to subsequent confusion as to the rightful claimant in this case. 7 JA1349–50

PROCEDURAL BACKGROUND

1. NATCO brings an interpleader action to determine the ownership of the Disputed Stock.

By 2015, both Weiser and Skarpelos were making conflicting claims to NATCO as to the ownership of the Disputed Stock. 1 JA0033–38. NATCO therefore brought an interpleader action in the Second Judicial District Court in April 2016, naming Skarpelos and Weiser as defendants. 1 JA0001; 1 JA0030. Both Skarpelos

and Weiser answered NATCO's complaint and filed cross-claims against one another seeking a declaratory judgment that each owned the Anavex stock. 1 JA0019; 1 JA0046; 1 JA0058. Weiser additionally asserted claims for breach of contract under the stock sale and breach of the covenant of good faith and fair dealing. 1 JA0067–68.

In its answer to Skarpelos's counterclaim, Weiser asserted that Skarpelos's right to the stock was barred by numerous equitable affirmative defenses such as estoppel and the doctrine of unclean hands. 1 JA0072. Critically, Weiser also asserted that Skarpelos could not recover the full amount of the Anavex stock under the equitable doctrine of unjust enrichment:

> **SEVENTH AFFIRMATIVE DEFENSE**
>
> Skarpelos is barred from retaining the full amount of the disputed stock by the doctrine of unjust enrichment.

JA0073.

In August 2016, Weiser produced a 2013 Statement of Account for Skarpelos's WAM account (the "Statement of Account") as part of its initial disclosures. 9 JA1769; 6 JA1219–21. It produced a marginally better copy of the same Account Statement again in January 2017. 9 JA1769; 6 JA1223–25. This document shows that Skarpelos received $249,580 in his WAM account in April 2013 as part of the "STOCK SALE / ANAVEX LIFE SCIENCE CORP. 3,316,666." 6 JA1224. It further shows that his prior negative balance of $153,679.54 became a positive balance of $95,775.46 and that Skarpelos, from March 2013 to September

2013, steadily spent that amount down through six withdrawals until his balance was only $4,115.36. *Id.*

2. Weiser clarifies its position that the sale of the Disputed Stock occurred in April 2013 in summary judgment.

In March 2018, almost a year before the trial in this matter, Skarpelos filed a motion for summary judgment. 1 JA0160. Skarpelos's summary-judgment motion identified the issues as "whether: (1) Skarpelos and Weiser . . . ever entered into a contract for a sale and purchase of Disputed Stock and, if yes; (2) whether Weiser . . . every performed [its] obligations under the contract to claim ownership of the Disputed Stock." 1 JA0163. Skarpelos argued that he never agreed to the sale and that Weiser never paid Skarpelos the $250,000 under the July 2013 PSA before its September 30, 2013 closing date. 1 JA0172–74.

In its April 2018 opposition brief, Weiser explained that Skarpelos misconstrued its position, which is not dependent on the July 2013 PSA. Weiser demonstrated that the sale of the Disputed Stock took place in April 2013, when Skarpelos agreed to sell his stock and WAM credited his account with $250,000:

> But Skarpelos misconstrues the PSA. It was meant to memorialize the April 2013 sale, which the parties had already performed. Indeed, given that performance, Weiser did not even need a written contract. From its perspective, it only eventually needed the power of attorney so that it could resell the Anavex stock to third parties.

3 JA0473; *see also* 3 JA0468; 3 JA0471–73. Weiser also argued, "[i]n the alternative, [that] Skarpelos is liable for the $245,464.64 he withdrew from WAM on the basis of his Anavex stock." 3 JA0475; 3 JA0476 ("Thus, excluding the

$249,580 credited to his account for the April 2013 stock sale, Skarpelos currently has a negative balance of $245,464.64, plus interest, that he owes WAM.") (emphasis in original).

The District Court denied the motion. It acknowledged Weiser's position that the actual stock sale between WAM and Skarpelos took place in April 2013 and that the July 2013 PSA was only meant to be a retroactive memorialization of that sale: "The Opposition claims Skarpelos sold the Disputed Shares to Weiser for $250,000.00 in April 2013, for which Weiser delivered $249,580 into Skarpelos's WAM Account on April 2, 2013. . . . The Opposition alleges the contract, although performed upon in April 2013, was not memorialized in writing and executed until July 2013." 3 JA0611–12. The District Court held that, among other things, genuine issues of material fact prevented summary judgment and denied Skarpelos's claim that Weiser did not plead that the July 2013 PSA "was a memorialization of an earlier agreement" previously. 3 JA0612–13.

In late 2018, counsel for both parties flew to Greece so that the parties and principal witnesses could be deposed. Livadas again clarified that the sales transaction occurred in April 2013 and that the July 2013 PSA was meant to be a retroactive memorialization of that sale. 5 JA0854–55; 5 JA0899–900; 5 JA0908–11; 5 JA0920; 5 JA0945.

3. The District Court awards (a) Skarpelos the Disputed Stock and (b) WAM $245,464.64 in restitution.

At the threshold of trial, the District Court discharged NATCO and took possession of Certificate 753 so that the action proceeded between Weiser and

Skarpelos alone. JA0714–15. It then held a four-day bench trial in which the court heard testimony from the following witnesses: (1) Livadas (7 JA1277–1351; JA1426–1468), (2) Skarpelos (7 JA1469–70; 8 JA1471–93; 8 JA1586–1628); (3) Alexander Walker, NATCO's compliance attorney (8 JA1566–86); and (3) Lambros, Skarpelos's assistant (7 JA1628–80; 9 JA1681–1761). Among other relevant parts of the trial, Livadas explained the mechanics of a WAM stock sale. 7 JA1283; 7 JA1331–32. The court also admitted the Account Statement under NRS 51.135's business records exception. 7 JA1324. Skarpelos, on the other hand, denied ever opening an account with WAM or having ever received any money from WAM. 8 JA1491; 8 JA1590; 8 JA1599. Lambros also assumed ignorance of the WAM account and transactions but admitted under cross-examination that he had requested and received four separate cash withdrawals from Livadas between March 2013 and September 2013, each of which dovetailed with the timeframe and amount of the withdrawals in the Account Statement as well as certain emails between Lambros and Livadas.[5] 9 JA1750–1752; 7 JA1262; 9 JA1754.

In its oral decision, the District Court noted that, with the exception of Walker, he found the testimony of the witnesses troubling. 10 JA1915–16. Specifically, the court was troubled by (a) Livadas's repurposing of the July 2013 PSA to serve a different purpose than it was originally intended, (b) Skarpelos's claim that he never received any money at all and his claim under oath that the Certificates were "lost," and (c) Lambros's claim that the sums he received from Livadas just coincidentally

[5] While Lambros testified that the withdrawals were for personal expenses (JA1753), the District Court found such testimony "unbelievable." JA1916.

matched the withdrawals on the Account Statement in amount and date. 10 JA1916; 10 JA1918. The District Court found that Skarpelos opened an account with WAM in 2011 funded by the Certificates and that he withdrew substantial sums from that account between 2011 and 2013. 10 JA1917-19.

Critically, the District Court found that "there was a sale of 3,316,666 shares of Anavex stock in April 2013, specifically on April 2nd of 2013." 10 JA1919. But the District Court also concluded that neither WAM nor Weiser Capital owned the Disputed Stock because there was no evidence of a meeting of the minds that Skarpelos agreed to sell the stock to either entity. 10 JA1921–22. The District Court additionally held that Skarpelos had to compensate WAM for the $245,464.64 he withdrew from his WAM account to avoid "an unreasonable windfall" to Skarpelos. 10 JA1922–24.

The District Court's oral findings were subsequently reduced, after some dispute between the parties, to written Findings of Fact, Conclusions of Law, and Judgment by Skarpelos's counsel. 11 JA2156. Judgment was entered in April 2019. 11 JA2168. Skarpelos's opening brief focuses on the Court's being troubled by Livadas's repurposing of the July 2013 PSA. Critically, however, the District Court nevertheless accepted and adopted nearly all of Livadas's testimony, particularly where it was directly contrary to Skarpelos's testimony. In this regard, it found that Skarpelos (a) opened a WAM account in 2011, (b) sold 3,316,666 Anavex shares through WAM in April 2013, and (c) withdrew $245,464.64 from that account through Livadas, all of which Livadas testified occurred and Skarpelos testified

never happened. 11 JA2158(¶¶5, 8); 11 JA2159 (¶¶10, 11). Indeed, one will find little connection between Skarpelos's testimony and the District Court's findings.

4. The District Court denies Skarpelos's motion to vacate the $245,464.64 award to Weiser under its equity jurisdiction.

Shortly after judgment was entered, Skarpelos filed a motion under NRCP 59(e) to vacate the District Court's award of $245,464.64 to WAM. 11 JA2184. Skarpelos made three arguments: (1) the award violated his right to due process because he did not have fair notice that an award could be premised on the April 2013 sale (as opposed to the July 2013 PSA); (2) the court could not premise the award on its equitable powers where WAM had adequate legal remedies available; and (3) the court lacked subject matter jurisdiction because the award did not relate to WAM's claim to ownership of the Disputed Stock. *Id.* The District Court denied Skarpelos's motion, noting, among other things, that its restitution of the $245,464.64 to WAM was squarely within the equitable subject matter and jurisdiction of a court in an interpleader action. 13 JA2542.

5. The District Court awards Skarpelos $216,950.50 in attorney fees under NRS 18.010(2)(b) on the basis that Weiser submitted no evidence supporting its claim to the Disputed Stock.

Skarpelos also moved for an award of $216,950.50 in attorney's fees under NRS 18.010(2)(b), claiming that Weiser's claims were frivolous. 11 JA2253. The motion argued that Weiser was unclear as to whether WAM or Weiser Capital had a right to the Disputed Stock and that they mislead Skarpelos to believe that their right to those shares was premised entirely on the July 2013 transaction represented by the July 2013 PSA rather than the April 2013 sale, the latter of which it claimed

was a "new theory." 11 JA2253–55. The District Court agreed with Skarpelos, finding that Weiser unreasonably maintained its claims to the Disputed Stock on the basis of the July 2013 PSA and that it changed its legal theory at trial. 13 JA2551–52. The District Court therefore awarded Skarpelos the full amount of the fees he sought. 13 JA2553. The court further denied Weiser's motion for reconsideration. 13 JA2663.

ISSUES PRESENTED FOR REVIEW

1. **Disputed Stock Award to Skarpelos.** The District Court found that Skarpelos sold the Disputed Stock in April 2013 through WAM. Skarpelos, however, presented no evidence showing that it later reverted back to him. WAM, however, showed that the obligations ran directly between it and Skarpelos in that sale, that WAM performed by paying Skarpelos, and that Skarpelos thwarted the stock's alienability through NATCO. Did the District Court err by awarding the Disputed Stock to Skarpelos?

2. **Restitution Award to WAM.** The District Court had subject matter jurisdiction because this matter exceeded the amount-in-controversy threshold for justice courts. It also had the power to fashion equitable relief associated with its interpleader determination. Did the District Court abuse its discretion by concluding that Skarpelos should not get a windfall in the form of both the Disputed Stock he sold in April 2013 and the money he received from WAM in that sale?

3. **Fees Award to Skarpelos.** But for WAM's appearance in NATCO's interpleader, it would not have recovered the $245,464.64 it paid to Skarpelos for the Disputed Stock, which directly applied to WAM's affirmative defenses of unjust enrichment, unclean hands, and equitable estoppel. WAM also presented testimony from Livadas that WAM owned that stock after

the April 2013 sale, which was corroborated by circumstantial evidence. Did the District Court abuse its discretion in awarding fees on the basis that WAM's claims were frivolous?

ARGUMENT

1. The District Court erred in awarding Skarpelos the Disputed Stock.

The District Court found that Skarpelos sold 3,316,666 shares from his WAM account in April 2013, but it also found that there was no evidence, as a matter of contract law, that WAM was the intended recipient of that sale. 11 JA2158 (¶8); 11 JA2159 (¶¶10, 12); 11 JA2161 (¶22); 11 JA2162 (¶28). As demonstrated below, the District Court misunderstood Livadas's testimony about the mechanics of the April 2013 sale, which showed that if there were any sale, *WAM was necessarily the buyer* even if it intended to ultimately transfer the shares to a third-party WAM client.

"Interpleader is an equitable proceeding to determine the rights of rival claimants to property held by a third person having no interest therein." *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 373 P.3d 103, 107 (Nev. 2016). "In such a proceeding, each claimant is treated as a plaintiff and must recover on the strength of his own right or title and not upon the weakness of his adversary's." *Balish v. Farnham*, 546 P.2d 1297, 1300 (Nev. 1976). As a corollary, one claimant's failure to "prove his claim does not mean that the other claimant automatically wins." *Id*. To affirm an interpleader award, this Court must find it is supported by the record. *Id*. Findings of fact are reversible only if clearly erroneous and must be upheld if supported by any substantial evidence. *Pandelis Const. Co. v. Jones-Viking Assocs.*, 734 P.2d 1236, 1237 (Nev. 1987). "A finding is 'clearly erroneous' when although

there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortg. & Equity Tr. v. McDonald*, 626 P.2d 1272, 1273 (Nev. 1981).

1.1. The evidence does not support the District Court's holding that the Disputed Stock reverted to Skarpelos after he sold it in April 2013.

As a threshold issue, the District Court erred in finding that Skarpelos proved his own claim to the Disputed Stock. Skarpelos's only evidence in this regard was that he originally owned the Certificates. 11 JA2158(¶5). Critically, however, the District Court also found that Skarpelos sold the Disputed Stock in April 2013. 11 JA2158(¶8). It further found that he accepted and obtained nearly the full benefit (98.4%) from that sale. 11 JA2158(¶¶6, 8); 11 JA2162(¶28). It goes without saying that when a party sells a thing and accepts the full benefits from that sale, that party is divested of ownership of the thing. So, as of April 2013, Skarpelos could not have owned the Disputed Stock that he sold.

In this regard, the District Court does not explain how Skarpelos later regained possession of the same Disputed Stock that he sold in April 2013. Neither did Skarpelos. He provided no evidence as to how that same stock somehow reverted to him after he sold it because his entire case was predicated on denying that he ever (a) opened a WAM account, (b) received any money from that account, or (c) sold the Disputed Stock in 2013, every claim of which the District Court rejected. 11 JA2158(¶¶5, 6, 8); 11 JA2159 (¶¶10, 11).

At best, Skarpelos might argue that he successfully sabotaged the full performance of the April 2013 sale by covertly cancelling the Certificates the month before. But that would not free him from his sale of the Disputed Stock in April 2013. Nor should such chicanery be rewarded by a court sitting in equity.

Thus, given that the District Court found that he sold the Disputed Stock in April 2013, Skarpelos failed to prove his own entitlement to that stock. Nor was it sufficient that the District Court found that Weiser had not proved its ownership, which, as demonstrated below, was erroneous. *See Balish*, 546 P.2d at 1300 (holding that a party does not prove its right to ownership in interpleader by disproving another party's ownership right).

1.2. The evidence shows that WAM was necessarily the recipient of the Disputed Stock in the April 2013 sale.

Because Skarpelos could not continue to own the same Disputed Stock that he sold in April 2013, the question is whether Weiser submitted evidence demonstrating that it obtained and retained ownership of the stock after that sale. As demonstrated below, the District Court misunderstood the mechanics of stock sales between WAM clients. Specifically, the District Court concluded that the April 2013 sale was a direct seller-to-buyer sale in which WAM merely acted as a kind of facilitating escrow agent between Skarpelos and the unidentified WAM client–buyers. But Livadas's testimony showed that this sale involved two separate, parallel transactions in which WAM was both buyer and seller and in which the client–buyers' and client–sellers' duties ran directly to WAM, not each other.

Livadas testified that if a WAM client like Skarpelos wishes to liquidate its deposited stock, WAM first confirms whether it has other clients who have pre-confirmed orders of the same stock. 7 JA1283; 7 JA1303. If so, Livadas explained that the stock and money are not exchanged directly between the WAM clients but are essentially purchased and sold through two separate but related actions between the seller and WAM and WAM and the ultimate buyer:

> Q. Okay. And as I understand the transaction involving two WAM customers, the stock goes from the seller to Weiser Capital to the buyer; is that correct?
>
> A. To Weiser Asset Management [WAM]. If it's a listed security—if it's a public security, *it goes through Weiser Asset Management*.
>
> Q. Okay. And how long is it held by Weiser Asset Management?
>
> A. For a microsecond, just—it's simultaneous.
>
> Q. The money and the stock is changing at approximately the same time?
>
> A. But it never goes directly client to client. It has to go through the broker.

7 JA1283 (emphasis added). Thus, when the District Court asked Livadas whether WAM was suing to get the stock back so that it could deliver it to the ultimate WAM client–buyers, Livadas explained the two-part nature of the transaction:

> THE WITNESS: There's two parts, I think, to answer your question.
>
> First, the broker does own the shares momentarily. It is only a nanosecond, but that nanosecond matters because we can't complete the transaction through. So even though

> we're showing credit of ownership to [the buyer] clients, the ownership, the process of ownership, we can't complete it as the broker because we didn't own it for that nanosecond to pass it through. So WAM or Weiser Capital [for non-WAM buyer transactions] is the buyer for that initial second, and that's—and we're stuck there . . . .

7 JA1331.

Livadas then further testified that the relationship between the seller and WAM is separate from the relationship between WAM and the buyer:

> Q. But you'd agree with me, if that person [the ultimate WAM client–buyer] is claiming ownership, they'd be an important party to have in this lawsuit?
>
> A. They claim ownership by virtue of us [WAM] giving them ownership and crediting it to their account. So as far as the [buyer] clients understand, they bought it, the transaction inferfaces with WAM, with their broker, so they have the credit to their account.
>
> Now, if WAM now has ended up going short to the [buyer] client, the client doesn't know, doesn't care, not their business. They've already received their credit, their benefit.

7 JA1332.

> THE COURT: In April the person or persons who provided the $250,000 received 3-plus-million shares of Anavex stock?
>
> THE WITNESS: Credited to their account.
>
> THE COURT: Credited to their account. Regardless of how you came up with it?
>
> THE WITNESS: Yes.

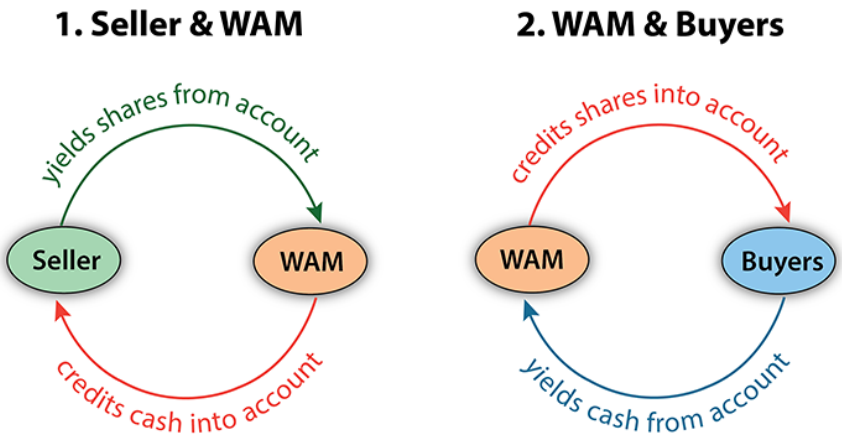
7 JA1332. Thus, after the District Court compared WAM to a kind of escrow agent, Livadas explained that, unlike an escrow agent, WAM was obligated to provide the stock directly to the buyers regardless of Skarpelos's performance:

> THE WITNESS: The ultimate owners don't have a reason to [object to Skarpelos's non-delivery of the stock] because we as the broker's intermediary, *technically we sold them the shares because we buy and then we sell them at the same time. So we've sold them the shares, we fulfilled our commitment as the broker to them*. They received their credit on it, but we're stuck still receiving the front side of the transaction, and we can't receive the front side of the transaction unless—unless the certificate is dematerialized to us in electronic form.

7 JA1331 (emphasis added); *see also Offman v. Eighth Jud. Dist. Ct.*, 523 P.2d 848, 850 (Nev. 1974) (explaining that an escrow agreement is a triangular agreement that requires a buyer and seller to agree to conditions of deposit, delivery of items for deposit to escrow agent, and agreement of agent to hold items and later deposit same).

In other words, Skarpelos's April 2013 stock sale was not a direct sale between the seller (Skarpelos) and buyers in which WAM merely acted as a kind of escrow agent between the two parties whose obligations ran directly to one another. Instead, Livadas's testimony revealed that there are two sets of obligations involving WAM as a party: (1) the obligations between the seller and WAM and (2) the obligations between the buyers and WAM. The buyers, therefore, could not bring claims against a non-performing seller or vice versa. They could only bring claims against WAM, with whom they contracted for the purchase of the stock. So while

the transactions between Skarpelos and WAM and WAM and the buyers are related, they still represent two separate transactions:



Further, the essential terms of the sale are simple and unambiguous. From the seller's end, he is simply liquidating a portion of the shares with which he has funded his WAM account and thus the only important terms are (1) how many shares and (2) how much money:

> Q. When you discussed selling the stock with Tom [Skarpelos], did it matter to Tom to whom the stock was sold?
>
> A. No, not as far as I could tell.
>
> Q. In a typical stock sale transaction, does the seller care who the buyer is?
>
> A. Not usually, no.
>
> Q. The only point is getting money for the stock; correct?
>
> A. Most of the time, yeah.
>
> Q. And did you understand that to be the case here?
>
> A. Yes.

7 JA1303. Indeed, where the end–buyer is a WAM customer, WAM cannot even disclose its identity to the seller. 7 JA1332.

Accordingly, when Skarpelos sold the Disputed Stock in April 2013, his obligations ran directly to WAM, not the ultimate buyers. Thus, when it turned out that Skarpelos failed to deliver the 3,316,666 shares of stock that he sold in April 2013, he breached his obligation to WAM, not the buyers. And those buyers could not have brought any action against Skarpelos, but they could have done so against WAM. Following the expiration of the six-month restrictive period, WAM could not dematerialize Certificate 753 due to Skapelos's surreptitious cancelation of that certificate in March 2013. 7 JA1314–7 JA1315. Weiser therefore had to procure replacement Anavex stock from the market through short positions to satisfy its direct obligations to the buyers. 7 JA1315–JA1316.

Given its heady nature, the mechanics of this transaction may be better understood through analogy. WAM is, to a limited extent, like a used car lot. And Skarpelos is like a party who sold WAM a 2015 Ford F-150 in exchange for $25,000, which he immediately pocketed and spent.[6] WAM bought Skarpelos's F-150 because it had previously lined up a buyer for such a truck, from whom it accepted $25,000 and promised ownership of a 2015 Ford F-150. But when it came near time to deliver the F-150 to the buyer, WAM discovered that Skarpelos had

[6] Naturally, this analogy has limitations. A 2015 Ford F-150 is a tangible thing, and any such truck will have attributes that make it unique (mileage, color, condition, etc.). Whereas stock shares are more like a finite commodity in that one share of stock is no different than another. A more apt, albeit less approachable analogy might involve the sale of commodities like barrels of crude oil.

surreptitiously retrieved the F-150 from WAM's lot. Because it had already promised and told the buyer that the buyer already owns a 2015 F-150, WAM had to procure a similar 2015 F-150 from the market so that when the buyer came to collect the truck, WAM could deliver on its part of the deal with the buyer. Accordingly, the buyer is satisfied because he has a 2015 Ford F-150, and Skarpelos retains both the $25,000 and the truck. WAM, however, is left without the F-150 it believed Skarpelos had previously sold to it.

The District Court, however, concluded that there was no meeting of the minds between Skarpelos and WAM as to the essential terms of the April 2013 sale, including whether WAM or Weiser Capital would be the ultimate recipient of the Disputed Stock afterward. 11 JA2160 (¶16). The sticking point for the court was that neither WAM nor Weiser Capital intended to be the ultimate owners of the stock. 9 JA1771 ("They weren't purchasing the stock to own it."). But the District Court's conclusion is clearly erroneous. If there was a sale in April 2013, based on Livadas's testimony, it was necessarily between Skarpelos and WAM, and the essential terms were only the quantity of shares and price. And what WAM's subsequent intentions with the stock or its duration of ownership does not impact on whether Skarpelos sold it to WAM. Again, from Skarpelos's perspective, what WAM ultimately did with the stock was immaterial so long as Skarpelos received the $250,000. Moreover, the essential terms of the transaction are unequivocal: Skarpelos agreed to sell 3,316,666 of the Anavex shares he deposited with WAM in exchange for $250,000. In such stock sales, this is all that is needed. *See*, *e.g.*, *Tipton v. Woodbury*, 616 F.2d 170, 177 (5th Cir. 1980) (holding under Florida law that parties agreed to

essential terms for sale of stock when contract included price, quantity, and a sufficient descript of the stock to be sold); *Cattin v. Gen. Motors Corp.*, 955 F.2d 416, 430 (6th Cir. 1992) (holding that parties entered a contract for sale of stock when the offer included the amount and price of stock); *Raymond G. Schreiber Revocable Trust v. Estate of Knievel*, 984 F. Supp. 2d 1099, 1106 (D. Nev. 2013) (explaining under Ohio law that "[t]he essential terms of a contract include the identity of the parties, the subject matter, consideration, a quantity term and a price term.").

The District Court also reasoned that there was no contract because Weiser was unclear as to whether WAM or Weiser Capital ultimately were entitled to the shares. 11 JA2161(¶22). To be sure, Weiser's alternative claims for either WAM or Weiser Capital owning the shares was not clear at the outset of this case. Its claim for Weiser Capital's entitlement were based on the short positions that had to be taken to cover the liability for the missing stock. In other words, Weiser Capital is supposed to step in such situations to protect WAM from exposure to the unlimited liability the short positions taken to cover the client–buyers. Still, a party is entitled to present alternative claims. *See*, *e.g.*, *Garibaldi Bros. Trucking Co. v. Waldren*, 321 P.2d 248, 250 (1958) (rejecting the contention that "despite the liberality of our rules of pleading, plaintiff should have been compelled to elect one of what it denominates 'three inconsistent theories' of her case); *Chavez v. Robberson Steel Co.*, 584 P.2d 159, 160 (Nev. 1978) (holding that parties "may allege alternative theories of recovery").

In sum, if Skarpelos sold the Disputed Stock in April 2013, the evidence before the District Court *necessitates* that the buyer was WAM, who was ultimately left having delivered its consideration (a $250,000 credit to Skarpelos's WAM account) without having received Skarpelos's its end of the bargain: the 3,316,666 Anavex shares. Accordingly, Weiser asks that the Court vacate the District Court's award of those shares to Skarpelos and order the District Court to award them to WAM.

2. In the alternative, the District Court did not err by awarding WAM the $245,464.64 that Skarpelos withdrew from his WAM account.

Skarpelos claims that the District Court erred by awarding WAM $245,464.64 in equitable restitution, which is the amount that Skarpelos withdrew from his WAM account. Appellant's Opening Brief ("Sk. Op. Brief") 25–35; 11 JA2162–63(¶28). Skarpelos argues that the District Court did not have jurisdiction to enter such equitable relief and claims his due process rights were violated because he had no notice that his withdrawals were at issue in this case. Sk. Op. Brief 25–35. As shown below, Skarpelos's claims are without merit and, if this Court does not reverse the District Court's award of the Disputed Stock to Skarpelos (Section 1, *supra*), it should still affirm the District Court's equitable award to WAM.

2.1. The District Court had both subject matter jurisdiction and the power to fashion equitable relief.

Skarpelos first argues that the District Court lacked subject matter jurisdiction to enter its equitable award because WAM could have brought a legal action for Skarpelos's withdrawals for breach of contract. Sk. Op. Brief 26. While Weiser

agrees that subject matter jurisdiction is generally subject to de novo review, it disagrees with Skarpelos's application here.

"Subject matter jurisdiction is the court's authority to render a judgment in a particular category of case." *Landreth v. Malik*, 251 P.3d 163, 168 (Nev. 2011) (quotation marks and citations omitted). District courts in Nevada have broad original jurisdiction over all cases outside the jurisdiction of justice courts, including interpleader actions under NRCP 22. NEV. CONST. ART. VI §6. Because the amount-in-controversy exceeded the jurisdictional requirement for justice courts, the District Court therefore had subject matter jurisdiction over NATCO's interpleader action.

Even looking beyond Skarpelos's subject matter jurisdiction argument, the District Court had broad power to fashion an equitable remedy because interpleader is an equitable proceeding. *Balish v. Farnham*, 546 P.2d 1297, 1299 (Nev. 1976). Skarpelos argues that the availability of legal remedies somehow removes a case brought in equity from its original equity jurisdiction. Sk. Op. Brief at 26, 29. But that contradicts this Court's holding that "if a court of equity obtain jurisdiction of a controversy on any ground and for any purpose, it will retain jurisdiction for the purpose of administering complete relief." *Seaborn v. First. Jud. Dist. Ct.*, 29 P.2d 500, 505 (Nev. 1934); *see also* 30A C.J.S. EQUITY §73 ("It is a general rule of equitable jurisprudence that where the court has assumed jurisdiction for one purpose it will retain it for all purposes, legal or equitable, connected with the principal controversy."). After all, "[e]quity will not suffer a wrong to be without a remedy…." *Seaborn*, 29 P.2d at 505. Thus, none of the cases cited by Skarpelos for the proposition that courts lack equity jurisdiction where a legal remedy is available

involved an action originating in interpleader. Sk. Op. Brief at 29. Also, the Court found that in *Wells Forgo & Co. v. Dayton*, 11 Nev. 161 (1876) and *State ex rel. Nenzel v. Second Jud. Ct.*, 241 P. 317 (Nev. 1925) that the underlying actions did not properly invoke the district courts' equitable jurisdiction. Whereas, there is no dispute that NATCO properly invoked the District Court's equitable jurisdiction by bringing the underlying interpleader action.

Further, while Skarpelos focuses on the claims that Weiser could have brought, the District Court's award was founded in the principle of restitution, which focuses on Skarpelos's ill-gotten gains, not Weiser's claims. Restitution is an equitable remedy founded on preventing a party from profiting from his or her conduct at the expense of another. RESTATEMENT (THIRD) OF RESTITUTION §§1, 3, 49 (2011); *U.S. Commodity Futures Trading Comm'n v. Crombie*, 914 F.3d 1208, 1216 (9th Cir. 2019) ("Where a defendant has profited from his wrongful actions, restitution can take the form of an order requiring the defendant to disgorge those wrongfully gotten profits and transfer them to the victims."). This Court has thus recognized restitution as an inherent power, ancillary to a court's equity jurisdiction. *Landex, Inc. v. State ex rel. List*, 582 P.2d 786, 791 (Nev. 1978) (citation omitted). Accordingly, the District Court had the power to enter its restitution award regardless of WAM's claims. *See Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1115 n.7 (Nev. 2016) (holding that courts sitting in equity must consider the effect of granting the desired relief regardless of whether the parties availed themselves of all available legal remedies); *Commodity Futures Trading Com'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1345 (11th Cir. 2008) ("The equitable

remedy of restitution does not take into consideration the plaintiff's losses, but only focuses on the defendant's unjust enrichment.").

Even looking beyond the District Court's equitable jurisdiction and inherent power to fashion equitable remedies, its award to WAM was nevertheless directly related to the parties' claims and requests for relief. In particular, Weiser's Answer and Cross-Claim include a request for equitable relief. *See* 1 JA0067 ("[a]ll other appropriate relief"); 1 JA0069 ("such other and further relief as the Court deems just, proper, and equitable"). And, as the District Court noted, Skarpelos's Answer and Cross-Claim asked the District Court to award him not just the Disputed Stock but also "such other and *further relief as to the Court seems just and equitable under the circumstances*." 1JA0053; 1 JA0055; 13 JA2542. In other words, Skarpelos is now claiming that the District Court lacked the power to do the very thing he asked it to do at the forefront of the case.

Moreover, although the District Court did not recognize it, the award to WAM directly related to Weiser's three equitable affirmative defenses to Skarpelos's Cross-Claim.

First, Weiser's Seventh Affirmative Defense asserted that "Skarpelos is barred from retaining the full amount of the disputed stock by the doctrine of unjust enrichment." 1 JA0073. The District Court's award was essentially grounded in unjust enrichment: It could not, in equity, give Skarpelos both the Disputed Stock as well as the $245,464.64 he received from the sale of that stock, which would have represented "an unreasonable windfall." 10 JA1922–24; *Certified Fire Prot. Inc. v. Precision Constr.*, 283 P.3d 250, 257 (Nev. 2012) ("Unjust enrichment exists when

the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof"); *Fiberchem, Inc. v. Gen. Plastics Corp*., 495 F.2d 737, 740 (9th Cir. 1974) (holding that the district court's findings that one party's prospective "windfall" left "little doubt" that the district court implicitly based his decision on the theory of unjust enrichment).

Second, Weiser's unclean hands defense is also applicable to the District Court's award. 1 JA0072. This Court holds that "[t]he unclean hands doctrine generally bars a party from receiving equitable relief because of that party's own inequitable conduct." *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 182 P.3d 764, 766 (Nev. 2008). Indeed, it "precludes a party from attaining an equitable remedy when that party's connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith." *Id*. Here, Skarpelos received the equitable remedy afforded by NATCO's interpleader by receiving ownership of the Disputed Stock. But, again, he could not in good conscious also retain the benefit of the $245,464.64 he withdrew given that (a) the District Court found that he had sold the Disputed Stock in April 2013 and (b) he had fraudulently canceled the Certificates while simultaneously selling portions of the shares therein.[7]

[7] Weiser additionally asserted a fourth equitable defense based in fraud: "Skarpelos's right to the stock is barred by his fraudulent conduct. In particular, Skarpelos represented to Weiser that the parties had a contract by which Skarpelos would

Third, Weiser's answer asserted the affirmative defenses of estoppel. 1 JA0072. The District Court's ruling was essentially that Skarpelos was estopped from keeping (a) the $245,464.64 he withdrew from his WAM account based on the Disputed Stock he sold in April 2013 and (b) the Disputed Stock itself. *In re Harrison Living Tr.*, 112 P.3d 1058, 1061–62 (Nev. 2005) ("Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct.").

Last, Skarpelos's assertion that WAM could have brought a contract claim under the account terms belies his position throughout the case. Specifically, Skarpelos cites to the terms and conditions for Skarpelos's account, noting that those terms permitted WAM to seek reimbursement from Skarpelos or assert lien rights over the Certificates. Sk. Op. Brief at 26–28. Yet Skarpelos maintained that he never opened a WAM account and thus had no contractual relationship with WAM on which such claims could be founded. 8 JA1590; Sk. Op. Brief at 7–9. Further, he objected to and successfully excluded the same terms and conditions from being admitted at trial. 3 JA0628 (identifying the terms and conditions [Deposition Ex. 9] as a trial exhibit); 4 JA0632 (objecting to the terms and conditions on the basis of "hearsay, relevance, authenticity, and foundation). This is why his brief cites to a copy of the terms and conditions produced in summary judgment, not at trial. Sk. Op. Brief at 26–27. In other words, Skarpelos asserts that WAM should have brought a contract claim that he himself disavowed and thwarted. He is therefore subject to

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transfer the disputed stock and acted consistently with that representation." 1 JA0072. This defense is also applicable to the District Court's award.

judicial estoppel for taking contrary positions. *See Marcuse v. Dell Web Communities*, 163 P.3d 462, 468–69 (Nev. 2007) (holding that judicial estoppel bars a party from asserting inconsistent positions before courts to gain unfair advantage).

In sum, the District Court had subject matter jurisdiction over the interpleader case. And with that jurisdiction, the District Court also had the broad power to fashion equitable remedies such as restitution. By itself, this was all it needed to enter its equitable award for WAM. Its award, however, was also relevant to the parties' requests for relief and Weiser's equitable affirmative defenses.

2.2. The District Court did not abuse its discretion in awarding WAM relief to avoid a windfall.

Because the District Court had subject matter jurisdiction over this action, Skarpelos's real argument is that the District Court abused its discretion in awarding Weiser equitable restitution.

As stated in the previous section, interpleader is an equitable proceeding in which the district court has broad power to fashion the appropriate remedy. *Balish*, 546 P.2d at 1299. "When sitting in equity … courts must consider the entirety of the circumstances that bear upon the equities." *Shadow Wood*, 366 P.3d at 1114. "This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." *Id*. at 1115 (citations omitted). As the District Court recognized, the "province of the courts of equity [is] to do complete justice between the parties." 13 JA2543 (quoting *MacDonald v. Krause*, 362 P.2d 724, 727 (Nev. 1961)).

Thus, this Court reviews a District Court's equitable award for abuse of discretion: "This [C]ourt has expressly stated that district courts have full discretion to fashion and grant equitable remedies, …and [this Court] will review a district court's decision granting or denying an equitable remedy for abuse of discretion." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 245 P.3d 535, 539 (Nev. 2010) (citations omitted).

Tellingly, while Skarpelos waxes over perceived legal technicalities, he never claims that the District Court's award was *unfair*. Nor could he. The District Court found that Skarpelos received $245,464.64 from WAM on the basis of the April 2013 sale of the Disputed Stock. 11 JA2162–63(¶28). It therefore concluded that its award could not give him the Disputed Stock and permit him to also retain the money, which would award him a "windfall." 11 JA2162–63(¶28). Were this Court to grant his request, Skarpelos does not and cannot dispute that he would receive an unequivocal windfall. Ironically, the only reason the Disputed Stock in the April 2013 sale did not go to WAM was because Skarpelos "falsely reported [the Certificates] as 'lost' when in fact he knew the certificates had been deposited with WAM in 2011," which prevented WAM from being able to dematerialize that stock. 11 JA2158(¶7). In other words, it would be doubly inequitable to reward Skarpelos's duplicity by letting him keep the Disputed Stock as well as the benefit of the $245,464.64 he received from selling that stock.

Skarpelos also claims that the award was not related to the interpleader over the Disputed Stock. Sk. Op. Brief at 30–33. Again, the District Court expressly found that Skarpelos received the $245,464.64 from WAM *on the basis of his sale of the*

Disputed Stock in April 2013. 11 JA2162(¶28). Even putting aside that sale, Skarpelos "funded" his WAM account with the Certificates. 11 JA2158(¶¶5, 6). The only reason he was able to withdraw any money from his WAM account were the Certificates (which include the Disputed Stock) that secured those withdrawals. 7 JA1293: *see also* 13 JA2542 ("The Court found Mr. Skarpelos had funded his WAM account with stock certificate 753 and was permitted to borrow against that account."). For both reasons, the District Court concluded that "the judgment of restitution was directly related, and not ancillary, to the shares at issue in this case. 13 JA2542. Skarpelos's main argument is his assertion that "Weiser's claim to ownership of the Disputed Stock was abandoned at trial." Sk. Op. Brief at 32. As shown in Section 1, however, this is patently untrue.

Accordingly, the District Court did not abuse its discretion in awarding Weiser restitution in the amount of $245,464.64.

2.3. Skarpelos had ample notice that the $245,464.64 he received from WAM was at issue.

Skarpelos next argues that he was deprived of due process under Nevada's Constitution because he was not given notice that the District Court's judgment as to who owned the Disputed Stock might be supplemented by any restitution. Sk. Op. Brief at 34–35. Due process requires that a party be given notice and an opportunity to be heard before a deprivation of property occurs. *Callie v. Bowling*, 160 P.3d 878, 879 (Nev. 2007).

Here, Skarpelos had notice or should have reasonably anticipated that the District Court might enter such an award for at least four reasons.

First, as explained above, a court in an interpleader action sits in equity and therefore has the power to enter equitable awards. Sections 2.1, 2.2, *supra*. Indeed, Skarpelos expressly acknowledged that possibility when he asked the District Court to award "such other and further relief as to the Court seems just and equitable under the circumstances" in his Answer and Cross-Claim. 1 JA0053; 1 JA0055; 13 JA2542. The District Court therefore correctly concluded that "[r]estitution was a foreseeable equitable ruling in an action already predicated on principles of equity." 13 JA2542.

Second, Skarpelos was put on fair notice by Weiser's pleadings. Weiser alleged that Skarpelos sold Weiser the Disputed Stock and that "Weiser performed under the contract," meaning Skarpelos received the $250,000 in consideration (but failed to deliver the stock in exchange). 1 JA0067(¶¶3, 4). *See Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 762 (9th Cir. 2015) (holding that a claim for restitution requires allegations that a party engaged in inequitable conduct and obtained a benefit as a result of that conduct). And, as set forth above, Weiser also set forth equitable affirmative defenses of unjust enrichment, unclean hands, and equitable estoppel to Skarpelos's Cross-Claim, all of which operate to equitably deny or offset the relief Skarpelos sought. And, if despite the foregoing, Skarpelos still believed that WAM had no interest in recovering the $245,464.64 it paid to Skarpelos for the Disputed Stock, WAM's opposition to his motion for summary judgment was sufficient to disabuse him of that belief:

3 JA0467.

Third, as a matter of common sense, Skarpelos should have known that he might not walk away from the case with both the Disputed Stock *and* the $245,464.64 he received from WAM for selling that same stock. He could therefore be no more surprised that a court in equity would not let him retain both the money he received for a sale and the thing he sold than the author of this brief could be surprised that the federal government wanted to be repaid for his prodigious law school loans.

Fourth, Skarpelos claims without elaboration that had he known that he might have to repay WAM, he "could have demanded a jury trial and would have conducted discovery differently." Sk. Op. Brief at 35. This is empty makeweight. He could have, of course, demanded a jury trial for the factual issues in this case anyway, and it is unclear how a potential restitution award would have changed his determination. Further, Weiser consistently claimed that it had paid Skarpelos for the Disputed Stock and that he had correspondingly withdrawn $245,464.64 from his WAM account and produced the Account Statement at the outset of the case. 3 JA0471–74. Yet Skarpelos fails to explain what additional discovery he would have

conducted or how it would have mattered given that his WAM account withdrawals were already a central issue in the case.

For each of these four reasons, the District Court did not err in either granting WAM restitution for the $245,464.64 he received from the April 2013 sale or denying Skarpelos's Rule 59(e) motion.

3. The District Court did not abuse its discretion by admitting the Account Statement.

Skarpelos argues that the District Court erred by admitting the Account Statement under NRS 51.135's business records exception. Sk. Op. Brief at 35–43. The thrust of his argument is that Livadas did not own WAM when the Account Statement was produced from its database and is therefore unqualified to testify to NRS 51.135's requirements. This Court holds that "[d]istrict courts are vested with considerable discretion in determining the relevance and admissibility of evidence," *Archanian v. State*, 145 P.3d 1008,1016 (Nev. 2006). It therefore reviews a district court's admission of evidence for an abuse of discretion. *Thomas v. State*, 967 P.2d 1111, 1125 (Nev. 1998).

NRS 51.135 provides as follows:

> 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.

The "focus" of this exception is that "the record be made in the course of and as a regular practice of a regularly conducted business activity." *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999); *see also, e.g., Thomas*, 967 P.2d at 1124 (construing NRS 51.135 by reference to Ninth Circuit case law). If so, "[t]here are circumstantial guarantees of trustworthiness in a record contemporaneously prepared by one who acts under a business duty of care and accuracy, particularly when the business entity for which the record is made relies on it." *Scholl*, 166 F.3d at 978.

Following this principle, courts are much more flexible in the admission of business records than Skarpelos suggests. Contrary to Skarpelos's assertion, the witness who lays the foundation for a business record does not need to be a custodian of records. Sk. Op. Brief at 41; *see*, *e.g.*, *Bank of Am., N.A. v. Arlington W. Twilight Homeowners Ass'n*, 2020 WL 1076109, at *3 (D. Nev. 2020) ("[T]he business records exception does not require that the custodian of record for the business that created the document authenticate that document."). Rather, NRS 51.135 provides that the foundation may be laid by "the custodian or other qualified person." The latter half gives courts significant leeway in making this determination:

> The phrase 'or other qualified witness' allows proponents to introduce business records through unorthodox foundation witnesses, an important concession to practicality where the most obvious witness, such as the records' custodian, is unwilling or unable to testify. All that is required is that the testifying witness be 'familiar with the record keeping system' of which the proffered document is a part.

30B FED. PRAC. & PROC. EVID. §6863 (2020 ed.) (construing FRE 803); *see also United States v. Franco*, 874 F.2d 1136, 1139 (7th Cir. 1989) (noting that the term "qualified witness" is liberally interpreted). It is thus also unnecessary that the witness have personally entered the information in the record. *Thomas*, 967 P.2d. at 1125. Nor need the witness even be familiar with any of the information within the record so long as he or she can explain that it was part of the business's regular practice to keep such records. *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 850 (Nev. 2019). Indeed, it is sufficient if the witness is familiar with the "type" of records. *See*, *e.g.*, *Arlington W. Twilight Homeowners Ass'n*, 2020 WL 1076109, at *3 (admitting loan documents generated by a prior bank as business records where an assignee bank's witness "stated he was familiar with the type of records maintained . . . in connection with this loan"). Further, a trial court is entitled to draw reasonable inferences from a witness's position and testimony supporting the business records exception. *See*, *e.g.*, *Franco*, 874 F.2d at 1140 ("Foundation under Rule 803(6) may . . . be established by circumstantial evidence, or by a combination of direct and circumstantial evidence."); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 693 (S.D.N.Y. 2014) (holding that a witness's testimony supported an inference that a bank "maintained [certain] records in the normal course of its business and that it was its regular course of business to do so").

Moreover, "an official from another entity who relied upon the accuracy of the business record may properly authenticate it." *Bank of Am., N.A. v. Arlington West Twilight Homeowners Ass'n*, 2020 WL 1076109, at *3 (D. Nev. 2020); *see also MRT Const. Inc. v. Hardrives, Inc.*, 158 F.3d 478, 483 (9th Cir. 1998) (holding that

a party could admit under the federal business records exception attorney bills generated in a previous matter where it "received the bills directly from the law firm and maintained the bills in its files").

Here, the District Court did not abuse its broad discretion in holding that Livadas sufficiently laid the foundation for the Account Statement. While Skarpelos characterizes Livadas as wholly ignorant of WAM's record-keeping system before he purchased WAM, this is untrue and contrary to the evidence at trial. Sk Brief at 37–42. Rather that evidence shows that Livadas actually used WAM's database of its clients' accounts and was sufficiently familiar with it to determine that the Account Statement is the result of a regularly conducted business activity:

- Before he became WAM's owner and risk adviser, Livadas worked closely with WAM for several years individually and through Weiser Capital during which time he introduced clients and coordinated stock sales for WAM customers. 7 JA1277–79;
- Indeed, Livadas was a representative and agent of WAM and withdrew money from Skarpelos's account at his request. 7 JA1459; 7 JA1437; 7 JA1299, 7 JA1302.
- He testified that WAM maintained records of customer transactions and balances on its computer database and not paper records, which WAM only produced upon a client's request. 7 JA1320; 7 JA1462–63.
- Livadas explained that WAM monitored the value of its clients' deposited stock against the cash deficits in their accounts almost "hourly" to ensure that the clients' withdrawals did not exceed the value of their securities. 7 JA1295–96.
- Before becoming its owner, Livadas "had access" to WAM's "basic records," such that he could access information on

client holdings—how much cash and shares they owned. 7 JA1279.

- He understood that WAM's database kept records of its client's accounts for seven years. 7 JA1463.
- He testified that WAM was regulated by both Bahamian and Canadian securities offices and was unaware of any violations. 7 JA1461; 11 JA2157(¶1).
- He testified that WAM's accounts were subject to annual audits by Grant Thornton, which ensured that client accounts were balanced, and that he was unaware of any discrepancies in 2013. 7 JA1317–18; 7 JA1462; 7 JA1464.
- Upon purchasing WAM near the beginning of 2014, WAM provided 2013 account statements for each of its customers, including the Account Statement for Skarpelos, on which Livadas immediately relied in his capacity as WAM's new owner. 7 JA1317; 7 JA1322–23; 7 JA1463.
- Livadas independently verified the transactions on the Account Statement, nearly all of which he was directly involved in. 7 JA1325; 7 JA1462.

Accordingly, Livadas was qualified to lay the foundation for the Account Statement as the owner of WAM and previously someone who worked intimately with WAM. *See In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000) ("Personal knowledge [can] be inferred from a [witness's] position."). He also demonstrated sufficient familiarity with WAM's recordkeeping system, both before and after he acquired it. To be sure, Livadas was forthright that he did not understand WAM's pre-acquisition system "in detail," but, as set forth above, a granular understanding is not required. Further, he demonstrated that WAM's records of its clients' balances

of securities and stock was a regularly conducted business activity. Indeed, such ledgers represent a broker–dealer's *raison d'etre*.

Livadas also testified that he relied on the accuracy of the Account Statement and the similar account statements for other WAM clients when he acquired WAM and integrated such statements into a new database system. 7 JA1320–21; 7 JA1323; *see Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 2019 WL 5963929, *2 (D. Nev. 2019) (holding that someone from another business who relies on the accuracy of a document may properly authenticate it). In other words, WAM not relied not only on the information compiled in its database before Livadas acquired it, but it relied directly on such account statements afterward. He therefore established that he was sufficiently familiar with such statements as well as the general type of database maintained by WAM before his acquisition.

Tellingly, Skarpelos has not submitted any evidence that the Account Statement is untrustworthy. Nor could he. WAM was subject to Bahamian and Canadian securities law regulation and annually audited. 11 JA2157(¶1); 7 JA1317–18; 7 JA1464. Moreover, Livadas verified many of the transactions on the Account Statement for accuracy and Skarpelos's agent, Lambros, further verified many of the withdrawals in the statement as to the amount and timeframe. 7 JA1325; 7 JA1462; 9 JA1750–1752; 7 JA1262; 9 JA1754.

Skarpelos argues that the Account Statement was not part of WAM's regularly conducted business activity because it was produced for the purpose of transitioning ownership to Livadas. Sk. Op. Brief at 40, 42. But Livadas testified that WAM kept its client information in a computer database and produced printed copies of such

account statements at its clients' request. 7 JA1320; 7 JA1462–63. Skarpelos also cavils that WAM did not produce "the transactional records from which the Statement of Account supposedly was created." Sk. Op. Brief at 42. But the business-records exception does not require any such supporting documentation and, in fact, is meant to alleviate the need for it. Further, as the District Court found, several of the entries in the Account Statement corresponded directly in amount and timeframe to Skarpelos's withdrawals through Lambros in 2013. 11 JA2158(¶8).

Even if the Account Statement were inadmissible as a business record under NRS 51.135, it still would have been admissible under the residuary hearsay exceptions of NRS 51.075 and NRS 51.375. *Wyatt v. State*, 468 P.2d 338, 341 (Nev. 1970) (holding that the Court may affirm a district court decision that reaches the correct result on a different basis than expressly found by the district court). NRS 51.075(1) states that "[a] statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though the declarant is available." *See Branch Banking & Trust Co. v. Regina Homes, LLC*, 2014 WL 3661109, at * 3 (D. Nev. 2014) (finding that the federal residual hearsay exception would still apply even if the business-records exception did not). NRS 51.315(1) provides a similar exception applicable where the witness is unavailable: "A statement is not excluded by the hearsay rule if: (a) Its nature and the special

circumstances under which it was made offer strong assurances of accuracy; and (b) The declarant is unavailable as a witness."[8]

Here, as explained above, there are several special circumstances that demonstrate strong assurances of the Account Statement's accuracy. As the District Court concluded, "The Court finds that there is [] indicia of reliability regarding the information contained in the document . . . ." 7 JA1324. Most tellingly, WAM was (and remains) a highly regulated financial entity whose records are subject to two national bodies of securities regulation as well as annual audits. Also, Livadas testified that he independently verified many of the Account Statement's entries, nearly all of which he was directly involved in. The accuracy of those entries is further demonstrated by Lambros's testimony at trial, which showed that several of the Account Statement's entries correspond directly to requests and payments to Lambros in time and amount and are further corroborated by contemporaneous email exchanges between Livadas and Lambros. Nor would a 2013 WAM custodian's testimony under NRS 51.075 likely enhance the accuracy of the Account Statement. Skarpelos, of course, denied that those entries were related to his WAM account, which he claimed was never even opened. JA1590. But the District Court rejected those contentions, finding that he opened the account and withdrew the sums

[8] Because WAM and its employees were based in the Bahamas in 2013, they were beyond the subpoena power to compel their testimony. 7 JA1278; *see also United States v. Samaniego*, 345 F.3d 1280, 1283 (11th Cir. 2003) (holding that witness who was a citizen of Panama and living there at time of trial was unavailable pursuant to FRE 804(a)(5)); *People v. Sandoval*, 87 Cal. App. 4th 1425, 1433 (2001) (holding that Mexican citizen residing in Mexico was unavailable as declarant was absent from hearing and not subject to court's subpoena power).

identified in the Account Statement. 11 JA2158(¶¶5, 6, 8); JA2162(¶28). Nor does Skarpelos's opening brief demonstrate that the Account Statement is somehow untrustworthy.

Skarpelos also claims that the Account Statement was the only admissible evidence of the April 2013 sale and Skarpelos's withdrawals from his WAM account. Sk. Op. Brief at 21–22. This is wrong. Again, Livadas testified that he was personally involved in most of those transactions and verified them through WAM's prime broker. 7 JA1325. The District Court further found it compelling that Lambros's requests for funds from Livadas in 2013 corresponded directly in amount and timeframe to a majority of the entries in the Account Statement and concluded that Lambros was actually withdrawing funds from Skarpelos's WAM account on Skarpelos's behalf. 10 JA1918–19; 11 JA2158(¶¶6, 8). While Skarpelos denied everything, it bears repeating that the District Court rejected virtually all of his testimony.

Accordingly, the District Court did not abuse its "considerable discretion" in admitting the Account Statement.

4. The District Court erred in awarding Skarpelos attorney's fees.

The District Court erred by awarding Skarpelos attorney's fees under NRS 18.010(2)(b). As demonstrated in Section 1, the District Court should have awarded the Disputed Stock to WAM and not Skarpelos, and the fees award should be reversed for that reason alone. But even were this Court to disagree, the fees award should still be reversed because Weiser won relief in the interpleader action and

presented credible evidence and colorable legal theories concerning its claim to the Disputed Stock, which shows that its claims in this case were far from frivolous.

"Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas v. City of N. Las Vegas*, 127 P.3d 1057, 1063 (Nev. 2006). Thus, "the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages." *Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n*, 35 P.3d 964, 970 (Nev. 2001).

NRS 18.010(2)(b), however, provides that "the court may make an allowance of attorney's fees to a prevailing party . . . [w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." While such a fees award is within the discretion of the trial court, "there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party." *Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 687 (Nev. 1995). A claim is groundless if it is based on allegations that are unsupported by any credible evidence at trial. *Id*. This analysis "depends upon the actual circumstances of the case." *Id*. "If an action is not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of fees." *Id*.

This Court reviews a District Court's award of fees for abuse of discretion. *Trustees of Plumbers & Pipefitters Union Local 525 Health & Welfare Tr. Plan v. Developers Sur. & Indem. Co.*, 84 P.3d 59, 61 (Nev. 2004).

4.1. Weiser's equitable claims in the Interpleader action were not frivolous, as demonstrated by the District Court's $245,464.64 award in its favor.

As a starting point, WAM won significant relief in the underlying interpleader action, which represented the heart of this case. As this Court held in *Frantz v. Johnson*, a claim "cannot be frivolous as a matter of law when the party asserting [the claim] actually prevails on [it]." 999 P.2d 351, 362 (Nev. 2000); *see also Chowdhry v. NLVH, Inc.*, 851 P.2d 459, 465 (Nev. 1993) (reversing the trial court's award of fees against the plaintiff where the plaintiff had shown some negligence on the part of the defendants and had obtained limited relief). Here, the District Court awarded WAM $245,464.64.

The District Court, however, reasoned that its award was unrelated to Weiser's claims on the Disputed Stock. 13 JA2551. This is untrue and inconsistent with the District Court's other findings. Weiser claimed that it owned the Disputed Stock because it sold the stock to Skarpelos for $250,000 in April 2013. Given the equitable nature of the interpleader, the two were fundamentally intertwined. Although it ultimately allowed him to keep the Disputed Stock, the District Court found that Skarpelos sold that stock in the April 2013 stock sale, in which WAM, in the court's view, served as a kind of intermediary escrow agent. 11 JA2158(¶8); 11 JA2159(¶10). And after it became apparent that WAM could not dematerialize the Disputed Stock due to Skarpelos's fraudulent cancellation, WAM had to cover its client–buyers by procuring replacement stock from the market. 7 JA1315–16; 7 JA1333–34; 7 JA1456–57. Additionally, Skarpelos funded his WAM account in part with the Disputed Stock in the form of the Certificates. 11 JA2158(¶5); 13 JA2542.

As the District Court put it, "the judgment of restitution was directly related, and not ancillary, to the shares at issue in this case." 13 JA2542.

Moreover, as explained above, the District Court's award directly applies to Weiser's equitable affirmative defenses to Skarpelos's Cross-Claim. Section 2.1, *supra*. The restitution award dovetailed with Weiser's "unjust enrichment" affirmative defense in that it prevented Skarpelos from keeping the proceeds from the April 2013 sale and the Disputed Stock itself. 1 JA0073; *see also* 13 JA2542–43 ("Mr. Skarpelos would have been permitted to retain ownership of the stock as well as the amount paid for it, a windfall for Mr. Skarpelos and a forfeiture for WAM."). It also sounded in Weiser's affirmative defenses of unclean hands and equitable estoppel in that it prevented Skarpelos from double-recovering through his own deceit. Specifically, but for Skarpelos's furtive cancellation of the Certificates, the April sale would have been fully consummated because Skarpelos had already received the $250,000.

Nor is there any doubt that Weiser supported these defenses with credible evidence. The District Court found that Skarpelos funded his account with the Certificates, that he sold half of Certificate 753 for $250,000 in April 2013, and that he "falsely reported [the Certificates] as 'lost' when in fact he knew the certificates had been deposited at WAM." 11 JA2158(¶7); *see also* 13 JA2542 ("The Court found Weiser had proven by a preponderance of the evidence WAM had credited Mr. Skarpelos' WAM account in April of 2013, and Mr. Skarpelos had received the benefit of this money.").

In sum, however its claims are characterized, Weiser's participation in this interpleader action was hardly *groundless* because it at least led to its recovery of the $245,464.64. But for Weiser's appearance in the case and contesting of Skarpelos's claims, *it would never have received such restitution*.

4.2. Weiser produced credible evidence in support of its right to the Disputed Stock.

Even putting aside WAM's equitable award of $245,464.64, WAM produced credible evidence in support of its right to the Disputed Stock. Specially, as explained in Section 1, Livadas testified that Skarpelos sold the stock to WAM in April 2013, which it corroborated additional evidence:

- WAM had physical possession of Certificate 753 when Skarpelos sold it in April 2013. 11 JA2158(¶5).
- The Account Statement shows the sale of 3,316,666 Anavex shares—exactly half of Certificate 753—from Skarpelos's account in April 2013 and did not identify any third-party buyers. 6 JA1224.
- The testimony of Livadas and Lambros and the Account Statement demonstrated that Skarpelos withdrew 98.4% of the $250,000. 6 JA1224; 7 JA1325; 7 JA1462; 9 JA1750–1752; 7 JA1262; 9 JA1754.
- Lambros admitted that the parties discussed a sale of Skarpelos's Anavex stock in late March 2013. 9 JA1742–43; 9 JA1747.
- The parties had a history of selling Skarpelos's Anavex shares. 7 JA1290–91.

Indeed, the District Court found that Skarpelos sold the Disputed Stock in April 2013 through WAM, but it also mistakenly found that WAM was simply a conduit for the unidentified third-party buyers. 11 JA2158(¶8); 11 JA2159(¶10).

Again, as explained in Section 1 above, the District Court misconstrued Livadas's testimony. It understood that the sole evidence that Weiser presented as to its ownership was the July 2013 PSA because the court incorrectly believed that Livadas testified that WAM was not the owner at trial. 13 JA2551; 13 JA2667. But the District Court misunderstood the complex nature of the April 2013 sale, which Livadas testified involved two separate but related sale agreements between Skarpelos and WAM and WAM and the buyers. Section 1, *supra*. Thus, while Weiser previously believed that the July 2013 PSA supported its claim under the April 2013 sale, it was neither Weiser's *sole* evidence nor even necessary evidence. 7 JA1314; *see*, *e.g.*, *Stanley v. A. Levy & J. Zentner Co.*, 112 P.2d 1047, 1052 (Nev. 1941) ("We agree that an oral contract which is capable of being fully performed within a year from its execution, is not within the statute of frauds."). Rather, WAM's primary evidence was Livadas's testimony along with the multitude of corroborating circumstantial evidence. Nor did the District Court explain how ownership of the Disputed Stock somehow reverted to Skarpelos after he sold it in April 2013.

4.3. Weiser asserted a viable legal theory under the District Court's contemplation of the April 2013 sale.

Even accepting the District Court's understanding of the April 2013 sale, WAM's legal theory for its claim to the Disputed Stock was not groundless.

This Court holds that a district court abuses discretion in imposing attorney's fees under NRS 18.010(2)(b) where the sanctioned party advanced a novel yet colorable legal theory, even if that theory is rejected by the court and is unsupported by current precedent. *See*, *e.g.*, *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 113 (Nev. 2018) (finding that the district court abused its discretion by awarding attorney's fees where a party presented a novel but colorable legal theory unsupported by current Nevada law); *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 801 (Nev. 2009) (affirming the district court's denial of attorney fees under NRS 18.010(2)(b) where the claim "presented a novel issue in Nevada law concerning the potential expansion of common law liability"). The purpose for this rule is to encourage attorneys to zealously represent their clients while leaving space for the expansion and modification of existing law through new theories: "Though we understand the Legislature's desire to deter frivolous lawsuits, this must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law." *Frederic & Barbara Rosenberg Living Tr.*, 427 P.3d at 113.

As contemplated by the District Court, WAM merely served as a kind of highly involved escrow agent in the April 2013 sale, and therefore, contractually, that sale was really between Skarpelos and the unidentified buyers. 11 JA2159(¶¶10–12). Thus, in the court's reasoning, the fact that WAM provided those buyers with replacement stock was evidence of WAM's damages, not its entitlement to the Disputed Stock.

Yet, under the foregoing factual predicates, WAM *still* had a colorable, if not strong claim that the Court should have awarded it the Disputed Stock among the three potential claimants:

- While Skarpelos originally owned the Disputed Stock, the court found that he sold it in April 2013 in return for $250,000, which he accepted. And the only reason that sale was not fully performed was that he fraudulently cancelled the Certificates.
- While the client–buyers were the original intended recipients of the Disputed Stock in the April 2013 sale, (a) they received the Anavex shares they purchased (albeit not from Certificate 753), (b) many of those buyers have since sold their shares, and (c) none of the buyers even knew Skarpelos was the original seller, much less were parties to NATCO's interpleader.
- WAM paid Skarpelos for the Disputed Stock in the April 2013 sale and, because it could not dematerialize the Disputed Stock afterward, had to procure replacement stock in the market for the buyers by taking hazardous short positions.

Given the equitable nature of interpleader and the District Court's obligation to consider the totality of the circumstances, the court would not have abused its discretion in awarding WAM the Disputed Stock under these conditions. *See Balish*, 546 P.2d at 1299 (holding that interpleader is an equitable proceeding); *Shadow Wood*, 366 P.3d at 1114 ("When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities."). In other words, it would not have been unfair. Again, but for Skarpelos's cancellation of the same stock he sold, none of the parties would have been in this mess. But the District Court

essentially rewarded Skarpelos's bad act by concluding that he retained ownership of the same stock that he sold to third parties in April 2013 in exchange for $250,000.

Thus, even under the District Court's understanding of the April 2013 sale, WAM's equitable claim to the Disputed Stock was at least sufficiently arguable or colorable to preclude a fees award under NRS 18.010(2)(b).

4.4. Weiser did not change its theory, which would not justify an award under NRS 18.010(2)(b) anyway.

The District Court justified its fees award under NRS 18.010(2)(b) in part on the basis that it believed that Weiser had changed its legal theory at trial that the July 2013 PSA established its ownership of the Disputed Stock. 13 JA2552. The court reasoned that it may have granted an earlier dispositive motion and avoided a trial had Weiser previously abandoned the July 2013 PSA as evidence for its ownership. *Id*. There are at least four problems with these conclusions.

First, even if the District Court's assessment were accurate, there is nothing in NRS 18.010(2)(b) authorizing courts to award attorney's fees based on a changed legal theory. Rather, the standard is whether the party's case was groundless—i.e., whether there is "any credible evidence" supporting the party's case. *Semenza*, 901 P.2d at 687. Moreover, it is well established that a party can present alternative claims for relief, even if inconsistent. *See*, *e.g*., *Garibaldi Bros. Trucking*, 321 P.2d at 250 (rejecting the contention that "despite the liberality of our rules of pleading, plaintiff should have been compelled to elect one of what it denominates 'three inconsistent theories' of her case); *Chavez*, 584 P.2d at 160 (holding that parties "may allege alternative theories of recovery"); *Baroi v. Platinum Condo. Dev., LLC*,

2012 WL 2847926, at *10 (D. Nev. 2012) ("Generally, a party may pursue alternative theories of recovery, even if inconsistent.").

Second, Weiser did not change its legal theory, which was always predicated on a 2013 sale. To be sure, its Cross-Claim identifies Skarpelos's sale as occurring in July 2013 (1 JA0068 (¶¶10, 13)), and Weiser, at least at the beginning of the case, believed that the July 2013 PSA was significant evidence of the April 2013 sale. But its theory was always that Skarpelos actually sold his stock to Weiser in April 2013, and it explained in summary judgment, which was filed almost a year before trial, that the July 2013 PSA was merely the retroactive memorialization of a transaction that had already been fully performed. 3 JA0471–74. Further, "Nevada is a notice-pleading jurisdiction and liberally construes pleadings to place into issue matter which is fairly noticed to the adverse party." *Chavez*, 584 P.2d at 160. If Skarpelos believed that Weiser's evidence of an April 2013 sale did not conform to its pleadings, it could have objected at trial, in which case the District Court would have been well within in discretion in permitting the pleadings to be amended to conform to such evidence under NRCP 15(b).[9]

Third, Skarpelos cannot claim to have been meaningfully prejudiced as to what sale was at issue or whether WAM or Weiser Capital ultimately ended up with the Disputed Stock. Again, Skarpelos's entire argument for ownership over the

[9] NRCP 15(b) provides in relevant part: "If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits."

Disputed Stock was that he never sold it in 2013 or even opened a WAM account, which the District Court rejected. 11 JA2158(¶¶5, 8); 11 JA2162(¶28). Skarpelos's argument for fees was nevertheless largely premised on the notion that he had been misled to believe that Weiser's entitlement to the stock was solely based on the July 2013 PSA, which identified Weiser Capital as the intended recipient. 11 JA2253–55. Again, this is untrue. Weiser explained in summary judgment that the July 2013 PSA was meant to retroactively memorialize the (already fully performed) April 2013 sale. 3 JA0471–74. While Weiser previously believed that the July 2013 PSA supported that sale, its principal evidence for the sale itself was Livadas's testimony along with the multitude of evidence demonstrating that the April 2013 sale had been fully performed. *See* Sections 1, 4.2, *supra*. And it was of no import to Skarpelos whether the Disputed Stock stayed with WAM or was ultimately transferred to Weiser Capital for risk-allocation purposes. Again, from Skarpelos's perspective, he was simply liquidating stock he had already deposited with WAM for cash. Most importantly, the District Court found that Skarpelos sold the Disputed Stock in the April 2013 sale through WAM, and withdrew virtually all of the proceeds from that sale from his WAM account. 11 JA2158(¶8); 11 2162(¶28). From these findings of fact, it can be fairly inferred that Skarpelos knew or certainly should have known that his April 2013 sale was the operative transaction for purposes of NATCO's interpleader action. He can therefore hardly claim to have lacked reasonable notice.

Fourth, the District Court's conclusion that the parties could have avoided trial had Weiser abandoned its reliance on the July 2013 PSA is misplaced. 13 JA2552. As an initial issue, one wonders how Weiser would have recovered the $245,464.64

equitable award? After all, Skarpelos denied ever opening a WAM account, much less having ever received the $245,464.64 from it through Livadas. 8 JA1491; 8 JA1590; 8 JA1599. Moreover, the District Court's conclusion is again premised on its misunderstanding that Livadas testified that WAM never owned the Disputed Stock. Instead, as explained above, Livadas testified to a complicated transaction in which the April 2013 sale was actually comprised of two related transactions involving Skarpelos and WAM and WAM and the buyers. Section 1, *supra*. Even if the District Court did not believe Livadas's testimony on this point, WAM still had the right to present that testimony at trial before any summary disposition.[10]

* * * * *

WAM presented credible evidence concerning its claim to the Disputed Stock as well as the inequity of permitting Skarpelos to retain the both the Disputed Stock he sold in April 2013 and the proceeds he received from that sale. Both were directly connected to the underlying interpleader action and Weiser's affirmative defenses to Skarpelos's Cross-Claim. The District Court therefore abused its discretion in awarding Skarpelos attorney's fees under NRS 18.010(2)(b).

CONCLUSION

Weiser asks that the Court vacate and reverse the District Court's judgment awarding the Disputed Stock to Skarpelos and remand the case and order that the District Court award the Disputed Stock to WAM. If and only if it does so, Weiser believes that the judgment awarding Weiser $245,464.64 may also be vacated

[10] The District Court gave little indication that it did not believe Livadas's testimony on the mechanics of the April 2013 sale, only that it misunderstood those mechanics.

because it was based on the equitable notion that it would be unjust for Skarpelos to recover the Disputed Stock *and* the money he received from its sale. Weiser also asks the Court to reverse and vacate the District Court's award of fees.

DATED this 19th day of August, 2020

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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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in Times New Roman 14-point font, double spaced.

I further certify that this brief complies with the type-volume limitations of NRAP 32(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, and contains 16,297 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of August, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(e), I hereby certify that on the 19th day of August, 2020, I electronically filed the foregoing **WEISER'S COMBINED OPENING AND ANSWERING BRIEF**, 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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