

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 79425 AND 79526

ATHANASIOS SKARPELOS, AN INDIVIDUAL Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court
Appellant/Cross-Appellant

vs.

WEISER ASSET MANAGEMENT, LTD., A BAHAMAS COMPANY, AND
WEISER (BAHAMAS) LTD. A BAHAMAS COMPANY,

Respondents/Cross-Appellants.

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

**APPELLANT'S COMBINED REPLY BRIEF AND ANSWERING BRIEF
ON CROSS-APPEAL**

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

Woodburn and Wedge

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

Dated: October 26, 2020.

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INTRODUCTION

WAM represents itself as a highly sophisticated “Class I” fiduciary securities broker-dealer, heavily regulated both in the Bahamas and Canada. WAM claims it is responsible for over \$250 million in customer assets and that it annually engages the renowned international accounting firm Grant Thornton to audit its books and records.

Yet despite this self-described sophistication, WAM would have this Court believe it somehow was the unwitting, helpless victim in an elaborate, duplicitous scheme concocted by Skarpelos to *pretend* to sell the Disputed Stock to an unidentified third-party WAM customer, only to fraudulently cancel his shares at the last minute in an effort to collect \$250,000 while retaining the Disputed Stock. Weiser’s brief suggests that Skarpelos (1) admits he agreed to sell the Disputed Stock in April 2013; (2) admits he withdrew nearly \$250,000 from his WAM account; and (3) believed he could keep both the Disputed Stock and the \$250,000.

However, Skarpelos disputed throughout this case that he ever agreed to sell the Disputed Stock (to WAM, Weiser Capital or anyone else). Skarpelos testified he was never notified that his WAM account was approved and opened and denied that he withdrew any money from his alleged WAM

account. There was substantial evidence at trial supporting Skarpelos' position, including testimony regarding the astonishing lack of records WAM (as a supposed "Class I" broker) has regarding alleged transactions giving rise to Weiser's arguments on appeal.

The only evidence WAM presented that these transactions occurred is the highly suspicious and unreliable Statement of Account that was Exhibit 43/44 at trial ("Account Statement") and testimony based on that document. As discussed below, this is the only record WAM has of any of the alleged transactions on Skarpelos' alleged account. WAM has *no records* for any of the underlying transactions upon which the Account Statement supposedly is based, including records demonstrating Skarpelos had a large negative balance prior to February 1, 2013—the beginning of the Account Statement period—and records corroborating the alleged April 2013 stock sale.

Skarpelos objected to the Account Statement at trial based on foundation and hearsay. Despite Livadas' complete lack of knowledge as to the circumstances of the Account Statement's preparation and WAM's recordkeeping practices, the District Court admitted the Account Statement and awarded WAM \$245,464.64 based entirely on that document and testimony as to its contents (i.e., fruit of the poisonous tree). The District

Court imposed this award against Skarpelos even though at trial Weiser abandoned its pleadings and notwithstanding Livadas’ “extremely troubling” testimony that the July 2013 contract—the centerpiece of Weiser’s case—was a “meaningless” document.

As discussed below, the District Court’s judgment that Skarpelos is the owner of the Disputed Stock is supported by substantial evidence (including Livadas’ admission that neither WAM nor Weiser Capital owns the stock) and should be affirmed. However, the District Court’s monetary award to WAM should be vacated because (1) it was based entirely upon the improperly admitted Account Statement; and (2) the District Court denied Skarpelos due process and exceeded its equity jurisdiction by awarding WAM damages it did not incur based on legal claims it did not assert. Finally, because Weiser abandoned its pleadings and ownership claim at trial and ambushed Skarpelos with an entirely new theory, the District Court was well within its discretion to award Skarpelos attorney fees under NRS 18.010(2)(b). That award should be affirmed.

STATEMENT OF THE CASE

Skarpelos incorporates by reference his Statement of the Case at pages 1-3 of his Opening Brief (“OB”) (references to Weiser’s brief will be “RB”).

Skarpelos particularly emphasizes that, on the first day of trial, Weiser abandoned its pleadings and its longstanding position that Skarpelos sold the Disputed Stock to *Weiser Capital* in April 2013, as memorialized by the “critical” July 2013 contract. 7 JA 1308-1309, 1314, 1326-1327, 1431, 1438. Instead, Weiser’s position at trial was that the July 2013 contract is a “meaningless” document WAM used for a purpose entirely different than what the parties intended, and that WAM’s true claim was for “cover” damages incurred in “making it right” with the alleged buyer in the April 2013 transaction. *Id.*; 7 JA 1315-1316, 1333-1334, 1467.

Critically, Livadas admitted at trial that neither WAM nor Weiser Capital was the owner of the Disputed Stock:

Q. Okay. So Weiser Asset Management does not own the stock that’s at issue in this lawsuit, correct?

A. Correct.

Q. And Weiser Capital also does not own the stock that’s at issue in this lawsuit, correct?

A. Correct.

7 JA 1326.

This stunning reversal of Weiser’s position throughout the case caused the District Court to ask Livadas “What are you suing for?” and eventually

led to its conclusion that Weiser's claims to ownership of the Dispute Stock were supported by no credible evidence at trial. 7 JA 1331, 10 JA 1919 13 JA 2551-2552, 13 JA 2667. The District Court found Livadas' testimony to be contradictory to Weiser's position throughout the case, specifically finding that Livadas testified at trial that neither WAM nor Weiser Capital were the owners of the Disputed Stock. 10 JA 1919-1920. Indeed, the District Court found that "Livadas and WAM abandoned that claim at trial and instead relied on a new theory that WAM is the owner of the stock by virtue of the April 2, 2013 transaction." 11 JA 2159.

The District Court found there was no evidence of a contract between Skarpelos and WAM (or Weiser Capital) for the sale of the Disputed Stock—no offer, no acceptance, no meeting of the minds. 10 JA 1997. After listening to Livadas testify for two days, the District Court still was unclear whether WAM or Weiser Capital allegedly purchased the stock. 10 JA 2002. In other words, the District Court found Livadas' testimony regarding WAM's (and Weiser Capital's) ownership claim lacking in credibility, clarity and sufficiency, and that it was directly contrary to WAM's claims throughout the lawsuit.

STATEMENT OF FACTS

Skarpelos incorporates by reference his Statement of Facts set forth at pages 3-25 of his opening brief. Specific facts responsive to Weiser's arguments are set forth in the applicable sections below.

STATEMENT OF THE ISSUES

1. Is there substantial evidence supporting the District Court's finding that Skarpelos is the owner of the Disputed Stock, considering Livadas' admission at trial that neither WAM nor Weiser Capital—the only other claimants in this case—own the stock?
2. Did the District Court abuse its discretion in admitting the Account Statement under the "business records exception" to the hearsay rule where Livadas' testimony failed to satisfy the requirements of NRS 51.135?
3. Did the District Court deny Skarpelos due process and exceed its equity jurisdiction by awarding WAM damages based on a legal claim WAM failed to assert and of which Skarpelos was not given fair notice?
4. Did the District Court abuse its discretion in awarding Skarpelos fees pursuant to NRS 18.010(2)(b) where it found Weiser's claims were unreasonably brought and maintained and were supported by no credible evidence at trial, particularly where Weiser abandoned its pleadings at trial?

The above issues include those Skarpelos raised in his opening brief (issues 2 and 3) and those Weiser raised on cross-appeal (issues 1 and 4). Weiser argues the District Court should have found that WAM owns the Disputed Stock and, in any event, the District Court should not have awarded Skarpelos attorney fees because Weiser's claims for *ownership* of the Disputed Stock were not frivolous. Both of Weiser's issues depend almost entirely on the District Court's view of the credibility of Livadas' testimony as to Weiser's claims to *ownership* of the Disputed Stock. The District Court listened to (and at times questioned) Livadas over two days of testimony and found his testimony regarding Weiser's claims to *ownership* of the Disputed Stock to be confusing, troubling and lacking credibility.¹

In announcing its ruling from the bench, the District Court noted how important the credibility of the witnesses was in this case, and that it found the testimony of all witnesses except Alex Walker (NATCO's attorney) to suffer from credibility issues. 10 JA 1976-1977. As discussed below, the District Court is in the best position to adjudge the credibility of witnesses

¹ Skarpelos acknowledges the District Court found Livadas to be credible (and Skarpelos not credible) on other disputed issues unrelated to Weiser's ownership claims, as acknowledged in Skarpelos' opening brief.

and evidence and should not be second-guessed unless this Court has a definite and firm conviction that a mistake has been committed.

On the other hand, Skarpelos' issues on appeal involve legal arguments that do not require second-guessing the District Court's findings of fact based on the evidence at trial: (1) did Livadas' testimony regarding the Account Statement satisfy the requirements of "the business records exception" under NRS 51.135; (2) was Skarpelos given fair notice that the District Court would award WAM damages based upon Skarpelos' alleged breach of his 2011 Account Agreement² with WAM; and (3) did WAM have adequate legal remedies under the 2011 Account Agreement it failed to pursue for damages incurred as a result of Skarpelos' failure to deliver the Disputed Stock to WAM's other customer under the alleged April 2013 transaction?

SUMMARY OF ARGUMENT

There is substantial evidence supporting the District Court's finding that Skarpelos owns the Disputed Stock and that WAM has no ownership interest in the Disputed stock.³ This includes Livadas' admission that WAM

² The account the District Court found was opened despite Skarpelos testimony to the contrary.

³ The District Court also found that Weiser Capital has no ownership interest in the Disputed Stock, but Weiser does not challenge that finding on appeal.

does not own the stock and instead incurred damages (in its role as broker) as a result of Skarpelos' failure to deliver the Disputed Stock to a third party WAM customer pursuant to the April 2013 transaction. Because WAM abandoned its ownership claims at trial, the District Court was well within its discretion in finding Weiser's claims were frivolous and therefore properly awarded Skarpelos attorney fees.

However, the District Court erred in basing its award to WAM on the Account Statement, which was admitted over Skarpelos' evidentiary objections. Livadas failed to establish the elements required under NRS 51.135, the "business records" exception, and otherwise failed to lay an appropriate foundation for the document. He did not know when the Account Statement was generated, how it was generated, or by whom. He testified that such account statements are *not* made as part of WAM's regularly conducted business activities and admitted the Account Statement was the only account statement WAM had for Skarpelos' account.

Significantly, Livadas testified WAM has *no* underlying records for the alleged transaction reflected in the Account Statement. Further, Livadas' lack of knowledge of WAM's record keeping practices prior to his ownership demonstrates he is not a "qualified person" to establish the elements of NRS

51.135. This lack of knowledge, coupled with WAM's shocking lack of records as to underlying transactions, demonstrates that the Account Statement suffers from a serious lack of trustworthiness. The District Court's "equitable" award to WAM was based almost entirely on the improperly admitted Account Statement and should therefore be reversed.

Further, because WAM's legal position throughout the case was that it *owned* the Disputed Stock based on the July 2013 contract (which supposedly "memorialized" the April 2013 transaction), Skarpelos was not given fair notice that the District Court would award WAM *damages* for Skarpelos' alleged breach of the 2011 Account Agreement, a claim that WAM and Weiser never pleaded. In doing so, the District Court exceeded its equitable jurisdiction because WAM had legal claims it failed to pursue.

ARGUMENT

I. THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE DISTRICT COURT'S FINDING THAT SKARPELOS OWNS THE DISPUTED STOCK, WHILE THERE IS NO CREDIBLE EVIDENCE SUPPORTING WAM'S OWNERSHIP CLAIM.

Weiser appeals the District Court's finding that Skarpelos is the owner of the Disputed Stock. RB at 22. A district court's findings of fact must be upheld on appeal if supported by substantial evidence and may not be set

aside unless clearly erroneous. *Clark County v. Sun State Properties, Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424–25 (1993).

Basic contract principles require an offer and acceptance, meeting of the minds, and consideration. *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012). Whether a contract exists is a question of fact, requiring this Court to defer to the District Court’s findings unless they are clearly erroneous or not based on substantial evidence. *Id.*

The following evidence supports the District Court’s finding that Skarpelos is the owner of the Disputed Stock and that WAM has no ownership interest in that stock:

- In October 2009, Avanex issued Certificate No. 753 (including the Disputed Stock) to Skarpelos. 6 JA 1135; 8 JA 1471. There is no dispute he was the owner of the stock until April 2013.
- The Disputed Stock are “restricted shares” because Skarpelos, as a director, is an “insider” of Anavex. 8 JA 1471.
- The process for selling restricted shares is complicated. 8 JA 1574. The contracting parties must comply with applicable exemptions under U.S. securities laws. 8 JA 1572. The documentation WAM submitted to NATCO was insufficient for

a transfer—among other things, a legal opinion letter is required. 8 JA 1584. The buyer must be identified and, in this case, WAM refused to identify the buyer. 8 JA 1574. There is no evidence WAM ever attempted to complete the “complicated” process to acquire the Disputed Stock.

- In March 2013, Skarpelos canceled Certificate No. 753 and caused Anavex to issue a new certificate that included the Disputed Stock. 6 JA 1160-1168. Therefore, WAM could not facilitate a sale of the Disputed Stock. RB at 9.
- In April 2013, WAM, as broker, arranged a purported sale of the Disputed Stock from Skarpelos to another WAM customer. 7 JA 1304-1305. WAM received a \$420 commission for arranging this sale. 7 JA 1339. WAM credited \$250,000 to Skarpelos’ account but could not complete the transaction as broker because WAM “didn’t own it for that nanosecond to pass it through.” 7 JA 1331; 10 JA 1923; 11 JA 2158.
- As a result, WAM was exposed to “liability” to the other WAM customer because it could not deliver the Disputed Stock, so WAM “made it right” by shorting shares and paying the disappointed buyer cash. 7 JA 1315-1316, 1332-1333. The District Court correctly observed that WAM may have incurred *damages*, but it was not really claiming *ownership* of the stock. 9 JA 1771-1772.
- **Indeed, Livadas expressly testified that neither WAM nor Weiser Capital owned the Disputed Stock.** 7 JA 1326.
- Weiser admitted the July 2013 contract was a meaningless document. 7 JA 1458. Despite relying upon the July 2013 contract as the basis of its ownership throughout the case, Livadas testified at trial that the July 2013 contract was not related to *any* sale and was used for an entirely different purpose than was intended. 7 JA 1309, 1327; 7 JA 1431, 1458. The

District Court found this testimony to be extremely troubling. 10 JA 1978.

- Skarpelos never intended to sell the Disputed Stock to WAM or Weiser Capital. 8 JA 1492. There is no evidence Skarpelos offered to sell the Disputed Stock to WAM (or Weiser Capital), and therefore no evidence of an acceptance. There is no evidence of a “meeting of the minds” that WAM or Weiser Capital would be the buyer under any sale of the Disputed Stock. The District Court found there was no evidence from which it could find there was a contract for the sale of stock to WAM (or Weiser Capital), especially in light of Livadas’ testimony that WAM was not the owner of the stock. 10 JA 1919.
- Weiser admitted that if the District Court dismissed all of its claims, Skarpelos would be the owner of the Disputed Stock. 9 JA 1769. That is exactly what happened. 11 JA 2162.
- Livadas admitted that his testimony at trial was different than his deposition testimony and his affidavit in opposition to Skarpelos’ motion for summary judgment. 7 JA 1350.
- Livadas admitted at trial that WAM is really claiming it was damaged by Skarpelos’ failure to transfer the Disputed Stock to the buyer. 7 JA 1467.⁴ He testified WAM was exposed to liability when the buyer wanted to sell “shares that aren’t there.” 7 JA 1315. WAM made it right with its customer by “giving some sort of substitute” for the Disputed Stock. 7 JA 1333. To do this, Weiser mostly “shorted” Anavex stock and paid the buyer the cash Weiser received from those “short” transactions. 7 JA 1334. The District Court acknowledged that, at best,

⁴ Weiser objected to the next question asked at trial concerning whether Weiser is claiming damages instead of ownership. *Id.* Weiser’s objection was sustained. *Id.* However, the District Court subsequently noted that the true nature of Weiser’s claim was for damages. 9 JA 1772.

WAM's claim was truly one for damages, but that there had been "zero testimony" about the monetary amount of WAM's damages. 9 JA 1772. The District Court noted that awarding WAM the Disputed Stock as "compensation" for those damages could result in a substantial windfall. 9 JA 1773.

- Skarpelos objected early at trial (and subsequently throughout) to WAM's new claim that WAM (not Weiser Capital) was the owner of the stock by virtue of the April 2013 transaction as a standalone deal, unrelated to the previously "critical" July 2013 contract. 7 JA 1426-1427. The District Court later noted that, even if it did look at just the April 2013 transaction, there was no evidence that WAM (or Weiser Capital) was ever the intended purchaser or owner of the Disputed Stock. 9 JA 1772.

This is substantial evidence supporting the District Court's finding that Skarpelos owns the Disputed Stock. He has been the owner since 2009 and was never divested of ownership, and certainly not to WAM.

A reasonable mind might accept the above evidence as adequate to support the District Court's findings that: (1) Skarpelos never intended to sell the Disputed Stock to WAM and never offered to do so; (2) WAM therefore never accepted any offer and indeed admitted it is not the owner of the Disputed Stock; (3) there was no meeting of the minds that WAM would acquire ownership of the Disputed Stock; and (4) that WAM was simply acting as a broker in the April 2013 transaction, facilitating the transfer of stock from one WAM customer to another, and allegedly may have been

damaged by Skarpelos' nonperformance. 10 JA 1921-1922. The District Court's finding that there is no contract between Skarpelos and WAM for the sale of the Disputed Stock is supported by substantial evidence and is not clearly erroneous; therefore this Court must defer to the District Court's findings.

Despite the above evidence, and particularly ignoring Livadas' admission that WAM is not the owner of the Disputed Stock, WAM now asks this Court to award it the Disputed Stock. RB at 22-32. WAM claims the District Court "misunderstood" Livadas' testimony about the mechanics of the April 2013 transaction and that "WAM was necessarily the buyer" in that transaction. *Id.* at 22. Specifically, WAM argues (1) there is no evidence the stock "reverted" back to Skareplos after the April 2013 transaction (*Id.* at 23); and (2) the evidence shows WAM was the recipient of the Disputed Stock in that transaction (*Id.* at 24).

However, the District Court understood Livadas' testimony perfectly. Livadas unequivocally testified that WAM does not own the Disputed Stock (7 JA 1326):

Q Okay. So Weiser Asset Management does not own the stock that's at issue in this lawsuit, correct?

A. Correct.

Q. And Weiser Capital also does not own the stock that's at issue in this lawsuit, correct?

A. Correct.

Livadas admitted WAM's role in the April 2013 transaction was simply as a broker to facilitate the transaction between Skarpelos and the unidentified buyer. 7 JA 1350. Livadas admitted WAM simply "debited" and "credited" the respective accounts. 7 JA 1304-1305, 1332, 1455. He testified WAM in fact did not own the stock in order to "pass it through" to the buyer because Certificate 753 had been canceled. 7 JA 1331; 10 JA 1923; 11 JA 2158.

Further, Alex Walker testified about the very complicated nature of effecting a transfer of the restricted shares of Disputed Stock. 8 JA 1572, 1574, 1584. In order to transfer those restricted shares, the buyer must have been identified and the parties must have complied with U.S. securities law exemption requirements, including a legal opinion letter. *Id.* None of that happened. To the extent Livadas' testimony differs from Alex Walker's, the District Court apparently found Livadas' version not credible and specifically found Alex Walker's testimony credible. 13 JA 2667 (Weiser's claims were

not supported by credible evidence). Because Skarpelos was never divested of ownership of the Disputed Stock, no “reversion” was necessary.

Nor was WAM “necessarily” the buyer in the April 2013 transaction. The District Court found unpersuasive WAM’s argument that it was ever intended to be the owner of the Disputed Stock. Aside from the fact that Weiser abandoned its pleadings and legal theories at trial, the District Court specifically found that, even just looking at the April 2013 transaction alone, “Livadas testified WAM was not the purchaser of the stock in April 2013.” 13 JA 2667.

Thus, Weiser’s new argument on appeal that this sale involved two separate, parallel transactions in which WAM was both buyer and seller fails because there is no evidence Skarpelos ever intended to sell the Disputed Stock to WAM. Indeed, Livadas’ own testimony that WAM does not own the Disputed Stock belies this new argument, as does his testimony that the stock transfer through WAM as broker was “simultaneous.” RB at 25. Weiser’s resort to a used-car analogy is of no assistance. Under that analogy, there is no evidence that Skarpelos ever intended to sell a Ford F-150 to WAM, nor is there any evidence that the transfer of title would require compliance with

securities regulations and legal opinion letters because the truck was “restricted” and could only be acquired by certain buyers.

Weiser half-heartedly acknowledges that its abandonment of its pleadings on the first day of trial was problematic. RB at 31. Despite offering up Weiser Capital as the owner of the stock for the better part of a year of this litigation, Weiser then ambushed Skarpelos at trial with an entirely new theory to which Skarpelos timely objected. 7 JA 1426-1427.⁵ For this reason alone, this Court should not entertain WAM’s latest version of why it should be the owner. Weiser’s unsupported citations as to why Weiser Capital was involved do not justify its conduct at trial.

Skarpelos acknowledges that the District Court found he canceled the Disputed Stock for reasons other than he stated, and that the District Court found he agreed to sell the Disputed Stock to another WAM customer in April 2013. (As already noted, Skarpelos testified that WAM never notified him that his account had been opened.) He denied any transactions on that account, including the alleged April 2013 transaction and the alleged

⁵ The District Court noted Skarpelos’ objection would be preserved throughout the trial and that Skarpelos was not consenting to an amendment of Weiser’s pleadings pursuant to NRCP 15(b). *Id.*

withdrawals. He also testified that he canceled Certificate 753 as “lost” because he was having doubts about WAM, having received no written communications from WAM and was losing faith in Livadas, who was not a WAM employee at that time. 8 JA 1480-1481.

As discussed below, while the District Court did not accept Skarpelos testimony, its award to WAM was improper because it was based on the suspicious Account Statement, because WAM presented no evidence of its true damages, because Skarpelos was never given notice of this claim and because Weiser failed to pursue its legal remedies for these damages.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING THE ACCOUNT STATEMENT UPON WHICH ITS DAMAGES AWARD TO WAM WAS BASED.

Weiser incorrectly states that the thrust of Skarpelos’ argument is that Livadas did not own WAM when the Account Statement supposedly “was produced from its database.” RB at 43.

First, there is no evidence the Account Statement was “produced from [WAM’s] database.” To the contrary, Livadas admitted he had no idea how this document was produced or by whom. 7 JA 1336. Livadas even testified that he believes WAM did not even prepare the Account Statement; rather, he

believes it may “have been generated by the bank that owned WAM at the time.” 7 JA 1463.

The true thrust of Skarpelos’ argument is that Livadas failed to establish the elements of NRS 51.135. As discussed in detail in Skarpelos’ Opening Brief: (1) there is no evidence the Account Statement was made at or near the time of the events it depicts; (2) there is no evidence the Account Statement was made by, or from information transmitted by, a person with knowledge; (3) there is no evidence the Account Statement was made in the course of a regularly conducted business activity; (4) Livadas is not a qualified person to establish the elements of NRS 51.135; and (5) the lack of evidence regarding the method and circumstances of the preparation of the Account Statement demonstrated a lack of trustworthiness. OB at 37-42.

In response, Weiser fails to analyze the elements of NRS 51.135 and instead simply cites to the District Court’s broad discretion in determining the admissibility of evidence and argues the Account Statement was admissible because (1) Livadas was “intimately” involved with WAM’s record-keeping process prior to his acquisition of WAM, and (2) Livadas relied on the accuracy of the Account Statement when he acquired WAM, and therefore is a “qualified person” under NRS 51.135. RB at 46-48.

As discussed in Skarpelos' opening brief and further below, the record is replete with evidence that Livadas was not intimately involved with WAM's record-keeping process prior to taking ownership. Further, Livadas did not testify that he relied on the accuracy of the Account Statement.

The bullet points on pages 46-47 of Weiser's brief do not establish Livadas was "intimately" involved with WAM prior to his acquiring ownership. Rather, Livadas clearly testified that, prior to acquiring ownership of WAM, he really had no idea how they kept records:

- With respect to the transactions on the Account Statement, Livadas testified there should be transaction records from which the Account Statement was generated but he did not find any. 7 JA 1336; 7 JA 1452. With respect to these transactions, he admitted: "Again, I know how we do it now. **I don't know how it was done then . . . I can only reference to how I know things are done now.**" *Id.* (emphasis added).
- Prior to becoming owner, Livadas had very limited access to WAM information. He could not access WAM's transaction records. 7 JA 1279. The information he could obtain appears to have been limited to how many shares of stock his client may have or how much cash they had on hand. *Id.* Typically, this information was transmitted through a phone call. *Id.*
- Prior to his ownership, WAM had a computer system, but Livadas was not familiar with it. 7 JA 1323, 1336. He had no access to WAM's computer system. 7 JA 1279, 1337. With respect to the Account Statement, he does not know if a person or a computer generated it. 7 JA 1337.

- Livadas' testimony that WAM monitors its account or accounts statements "almost hourly" refers to its current practice. As he testified numerous times, he is not familiar with WAM's practices prior to his ownership when the Account Statement was generated.
- Livadas has no real understanding of or familiarity with WAM's record keeping system or practices prior to acquiring ownership in December 2014. 7 JA 1319-1320, 1322-1323.
- Livadas acknowledged that Bahamian securities regulations impose significant obligations on "Class 1" brokers in terms of keeping records of transactions, including sales transactions such as the alleged April 2013 transaction. 7 JA 1443-1444.
- Livadas admitted that, under Bahamian law, WAM should have a contract note for the alleged April 2013 sale but does not, nor does it have any records reflecting it notified Skarpelos of this sale. *Id.*
- Livadas testified he is unaware of Bahamian securities regulations requiring broker-dealers to send clients statements at least once every three months showing any debit or credit balance and the details of securities held or owned by the client. *Id.* There is no evidence WAM ever sent such statements to Skarpelos.

Based on the above and the evidence cited in Skarpelos' opening brief, it is clear Livadas is not a qualified person to satisfy the requirements of NRS 51.135 for the Account Statement.

Further, the cases Weiser cites for the proposition that a third party who relies on the accuracy of a business record may authenticate it are not

factually analogous. In those cases, there apparently was evidence that the third party relied upon the accuracy of the records in taking specific actions. *Bank of America, N.A. v. Arlington West Homeowners Association*, 2020 WL 1076109 (2020) (account statement provided in response to offer to pay superpriority lien on one transaction); *MRT Const. Inc. v. Hardrives, Inc.*, 158 F.3d 478 (9th Cir. 1998) (Hardrives maintained the bills in its own files and relied upon the bills as statements of fees owed to the law firm); *Bank of America, N.A. v. SFR Investment Pool 1, LLC*, 2009 WL 5963929 (2019) (testimony that third party relied upon business record in a business transaction related solely to that record).

Citing to 7 JA 1320-1321 and 1323, Weiser states that “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. RB at 48 (emphasis added). Livadas did *not* testify that he “relied” on the accuracy of this particular Account Statement among the 100 or more that were supposedly prepared when he acquired WAM. 7 JA 1281.

Rather, he testified the Account Statement was just a document “[m]y staff pulled . . . from the records. I didn’t go into the boxes **or whatever they**

are.” 7 JA 1317 (emphasis added). Livadas admitted he did not review all the files acquired from WAM as part of his acquisition and was only generally familiar with the types of files received. 7 JA 1280.

The District Court’s monetary award to WAM was based almost entirely on the Account Statement. 7 JA 1332; 10 JA 2077, 2081, 2098; 11 JA 2158, 2162. This exhibit purported to show transactions upon Skarpelos’ brokerage account from February 2013 to December 2013 (why January was not included was never explained).

Here, the District Court abused its discretion in admitting the Account Statement because it exercised its discretion in clear disregard of the language of NRS 51.135 and failed to apply the full legal analysis applicable to the “business records exception.” To briefly remind this Court of the analysis in the opening brief (OB at 37-43): (1) there is no evidence the Account Statement was made “at or near the time” of the events it depicts; (2) there is no evidence the Account Statement was made by, or from information transmitted by, a person with knowledge—Livadas does not know who prepared the Account Statement or how it was produced (7 JA 1319-1320, 1322-1323); (3) there is no evidence the Account Statement was made in the course of a regularly conducted activity—Livadas testified that WAM does

not prepare account statements in the regular course of business, and the fact that only one statement for a partial year was produced for Skarpelos' account corroborates this testimony (7 JA 1320-132, 1322), WAM does not even have the underlying transactional records supposedly kept in the ordinary course of business (7 JA 1336, 1444); (4) Livadas is not a qualified person, as discussed above; (5) the circumstances of the preparation of the Account Statement demonstrate a lack of trustworthiness because there is no evidence about the method or circumstances of its preparation—Livadas' testimony was void in this respect and, considering WAM's utter lack of records and Weiser's course of conduct in this case, the Account Statement is anything but trustworthy.

Weiser's alternative argument that the Account Statement would have been admissible under the "catch all" provisions of NRS 51.075 and 51.315 lacks merit. RB at 49-50. There is no evidence whatsoever of the "special circumstances under which it was made" because Livadas does not know who made it, when it was made, or how it was prepared. 7 JA 1319-1320, 1322-1323, 1336. Further, there are almost no assurances of accuracy, let alone "strong" ones. Livadas admitted WAM should have records for the transactions reflected in the Account Statement, but he could not find them. 7

JA 1336-1336. Livadas admitted WAM does not follow Bahamian securities regulations governing the preparation and maintenance of records, including the transmitting a notice of the alleged April 2013 transaction to Skarpelos. 7 JA 1443-1444. He further admitted the audits supposedly performed by Grant Thornton did *not* involve the alleged transactions at issue in the Account Statement. 7 JA 1464. He also admitted he had no involvement in these audits or any audits of WAM's recordkeeping system. 7 JA 1280.

Further, while Weiser claims Livadas testified he "independently verified" the transactions in the Account Statement, it provides no supporting citation so Skarpelos cannot confirm this alleged testimony. Livadas testified he "tried" to request records from the "prime broker" to verify the transactions, but never testified that he received those records or actually confirmed the transactions. 7 JA 1326. Further, his testimony that he was "*pretty much* involved" in these transactions, considered in light of Weiser's shoddy record-keeping practices and its misleading and baffling approach to its claims in this litigation, is far from the reliability necessary for the Account Statement to be admissible. 7 JA 1325 (emphasis added).

In short, for all of Weiser's self-aggrandizing and claimed sophistication, it produced not a single sheet of paper reflecting the alleged

transactions upon which the very suspicious Account Statement supposedly was based. WAM has no records of the alleged April 2013 transaction. It has no transaction records of the alleged withdrawals by Skarpelos. It has no records of the alleged account either before or after the purported Account Statement. It could not make up its mind throughout the case who owned the stock. Its reliance upon and then abandonment of the July 2013 contract disturbed the District Court. Again, not a single sheet of paper supporting its case. So much for “Class I” sophistication.

For all of these reasons, the District Court abused its discretion in admitting the Account Statement over Skarpelos’ objection. Because the District Court’s award to WAM was based almost entirely on this highly suspect document, that portion of the judgment should be vacated or reversed.

III. THE DISTRICT COURT DENIED SKARPELOS DUE PROCESS BY AWARDING WAM DAMAGES BASED ON A CLAIM WAM DID NOT PLEAD AND OF WHICH SKARPELOS WAS NOT GIVEN FAIR NOTICE, AND BY AWARDING WAM EQUITABLE RELIEF WHEN WAM HAD LEGAL REMEDIES IT FAILED TO PURSUE.

Nevada law requires that pleadings give “fair notice” to the adverse party of the claims that are at issue. *Western States Const. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) (quoting *Hay v. Hay*, 100 Nev.

196, 198, 678 P.2d 672, 674 (1984)). The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 909, 47 L. Ed. 2d 18 (1976).

Here, Skarpelos was denied due process because the District Court awarded WAM damages arising from a legal claim WAM never pleaded but used to ambush Skarpelos at trial. Not only did WAM fail to plead this claim, it actively misled Skarpelos and the District Court as to the nature and basis of its claims through the litigation up to the first day of trial. Constitutional challenges are reviewed de novo. *Grupo Famsa v. Dist. Ct.*, 132 Nev. 334, 337, 371 P.3d 1048, 1050 (2016).

As argued in Skarpelos' opening brief, he had no notice the District Court would award WAM "restitution" as a substitute for "cover" damages arising from Skarpelos' alleged breach of the 2011 Account Agreement. Skarpelos was denied constitutional due process by the imposition of this "equitable" award as a substitute for an unasserted legal claim, including his right to conduct discovery related to that claim.

Weiser argues Skarpelos had notice "or should have reasonably anticipated" that the District Court might enter this award for four reasons: (1)

courts sitting in equity have broad powers and Skarpelos requested in *his* cross-claim “such other and further relief as to [sic] the Court seems [sic] just and equitable under the circumstances; (2) Skarpelos was put on fair notice by Weiser’s pleadings; (3) as a matter of “common sense,” Skarpelos should have known he might not walk away from the case with both the Disputed Stock and the money WAM allegedly credited to his account as evidenced by the suspect Account Statement; and (4) Skarpelos’ assertion that he was denied his right to a jury trial on WAM’s unasserted claim for breach of contract damages arising from the Account Agreement and his assertion that he would have conducted discovery differently if those claims had been asserted are “empty makeweight.”⁶ RB at 40-43. Each is addressed in turn.

- (1) **The award to WAM was not reasonably within the scope of Skarpelos’ prayer for relief and was outside the scope of the District Court’s equity jurisdiction.**

Skarpelos filed his cross-claim on May 23, 2016, asserting he owned the Disputed Stock and that neither WAM nor Weiser Capital had any ownership interest. 1 JA 0046. At the time Skarpelos filed his cross-claim,

⁶ Apparently “empty makeweight” means “something of little independent value thrown in to fill a gap.” Merriam-Webster (2020).

WAM asserted it was the owner of the Disputed Stock by virtue of the July 2013 contract. 6 JA 1148, 1241. There is no evidence that, at that point in time, WAM was claiming damages arising from the purported April 2013 transaction or that Skarpelos was even aware of that alleged transaction. Therefore, the suggestion that his request for “such other and further” relief would include an award *against* him based on an alleged transaction of which he was unaware, of which no evidence had been provided, and which WAM never pleaded, is absurd.

Further, Skarpelos’ prayer was for “relief,” not for burden, and the prayer was for his recovery, not for WAM’s. 1 JA 0055. Weiser’s cross-claim does not mention the April 2013 transaction and its prayer for relief contained no specific request for monetary damages in its favor, only a declaration that it is the owner of the Disputed Stock, attorney fees and costs, and such other and further relief that the District Court found to be just and equitable under the circumstances. 1 JA 0069. At that time, as discussed above, the only circumstance was that WAM alleged it had purchased the Disputed Stock from Skarpelos by virtue of a July 2013 contract.

Considering Weiser’s pleadings and the positions throughout the case were abandoned at trial so WAM could ambush Skarpelos with a new theory, the

“equitable” award to WAM was far from that. Even under the District Court’s broad equitable powers, the award to WAM was unfair to Skarpelos.

(2) **Weiser’s pleadings did not give Skarpelos fair notice of WAM’s damages claim based on the April 2013 transaction.**

Weiser argues its pleadings put Skarpelos on fair notice of WAM’s damages claim arising from the April 2013 transaction. RB at 41. Weiser cites to paragraphs 3 and 4 of its cross-claim as follows: “Weiser performed under *the contract*,” meaning Skarpelos received the \$250,000 in consideration (but failed to deliver the stock in exchange).” RB at 41 (emphasis added). Thus, it appears Weiser would have this Court believe that its cross-claim defined the April 2013 transaction as “the contract,” and also alleged that Weiser paid Skarpelos \$250,000 for the Disputed Stock.

This is inaccurate and misleading. In reality, Weiser’s cross-claim alleges *only* that Weiser and Skarpelos entered into a contract for the sale of stock in July 2013 (which is “the contract” Weiser references) in which Skarpelos agreed to sell the stock to “Weiser.” 1 JA 0067-0068. All of Weiser’s claims are based on the “binding” July 2013 contract. *Id.* Weiser’s cross-claim makes no mention of the April 2013 transaction, the \$250,000 allegedly credited to Skarpelos’ account, or that WAM sustained damages as

the result of the purported April 2013 transaction. Thus, Weiser's suggestion that its pleadings put Skarpelos on notice that WAM was entitled to damages under an alleged April 2013 transaction is false. 13 JA 2666.

Weiser goes on to argue that its opposition to summary judgment put Skarpelos on notice that WAM was seeking damages arising from the alleged April 2013 transaction. RB at 41. In support of this argument, Weiser inserts a photographic image of the table of contents from its opposition brief, highlighting an "alternative" argument that Skarpelos should be *liable* for the \$245,464.64 he allegedly withdrew from WAM, but offers no discussion beyond this cut-and-past. RB at 42. A closer look, however, "disabuses" Weiser's argument.

It should be remembered that Weiser's opposition to summary judgment in April 2018 is the first time it advanced the theory that *Weiser Capital*, not WAM, was the owner of the Disputed Stock. 3 JA 0468, 0471, 0484. Significantly, Weiser represented that Skarpelos sold the stock to Weiser Capital in April 2013, not another WAM customer. *Id.* The opposition states that "WAM and Weiser performed their part by *crediting* Skarpelos' account . . . in April 2013. 3 JA 0468 (emphasis added). Livadas' declaration in support of that brief states: "*Weiser Capital*, through WAM,

attributed \$249,580 to [Skarpelos'] account balance.” 3 JA 0486 (emphasis added). Thus, to the extent the word “attributed” was intended to mean “paid,” Weiser’s position in April 2018 was that Weiser Capital, not WAM, paid for the Disputed Stock.

However, it is now clear that the words “attributed” and “credited” were carefully selected. While Weiser asks this Court to believe WAM paid Skarpelos \$250,000, Livadas admitted at trial that the unidentified WAM customer paid the \$250,000, and WAM simply “credited” or “attributed” that amount to Skarpelos’ alleged account (less the \$420 commission WAM took). 7 JA 1304-1305, 1332, 1449, 1455. He further admitted that WAM’s claim was not really based upon the \$250,000 Skarpelos received, but rather the unspecified damages WAM incurred in “making it right” with the other WAM customer. 7 JA 1315-1316, 1333.

Weiser’s opposition to summary judgment represented that Weiser Capital, as the alleged buyer of the Dispute Stock, paid the \$250,000. 3 JA 0486. The opposition does not state that WAM paid this money and Livadas admitted at trial that WAM did not pay this money. However, based on the opposition, Skarpelos went to trial believing it was Weiser’s position that Weiser Capital had paid the money and claimed ownership of the stock.

At trial, it was made clear that WAM's damages were of a different nature—expenses incurred in “making it right” with the unidentified WAM customer, although Weiser offered no evidence of those expenses at any time. Weiser did acknowledge in its opposition that those alleged damages, if any, were the result of Skarpelos' 2011 Account Agreement with WAM, not the July 2013 contract alleged in Weiser's pleadings. 3 JA 0477. WAM never sought to amend its pleadings to pursue this claim and never produced any evidence of its cover damages.

Thus, neither Weiser's pleadings nor Weiser's other filings in this case put Skarpelos on fair notice of the award the District Court ultimately imposed.

- (3) **As a matter of “common sense,” WAM should have pleaded and pursued its true claim for breach of contract damages, not a fabricated claim for ownership.**

Weiser argues that, “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 received from WAM for selling that same stock.” RB at 42. Weiser forgets Skarpelos disputed that he sold any stock and also disputes he ever received any money from the alleged WAM account. 8 JA 1489, 1493. WAM's highly questionable records (or lack

thereof) and Weiser's course of conduct in this case certainly supports Skarpelos' position. WAM further ignores its failure to follow the Nevada Rules of Civil Procedure and obligation to plead the true nature and basis of its claims. Had WAM asserted from inception that Skarpelos had breached the 2011 Account Agreement and that WAM had sustained "cover" damages to a third party as a result, and had WAM actually produced evidence to support that claim, Skarpelos truly would not have been surprised by any award based on that claim.

Regarding Weiser's student loan analogy, Skarpelos does not doubt the federal government wants Weiser's counsel to repay his student loans. RB at 42. However, Skarpelos doubts the government would engage in the bizarre course of conduct Weiser has in this case, unable to identify which party is the actual claimant, offering confusing testimony about the nature of the contract, and ultimately abandoning its case at trial.

(4) **Skarpelos' constitutional right to a jury trial and his right to appropriate discovery are not "empty makeweight."**

Weiser argues Skarpelos could have demanded a jury trial on the "factual issues in this case anyway," and that he has failed to specify how he would have conducted discovery differently had Weiser not deliberately

misled Skarpelos and the District Court as to the true nature and basis of its claims. RB at 42. Weiser calls Skarpelos' claims in this regard "empty makeweight," trivializing the constitutional right to a jury trial and the right to conduct appropriate discovery.

This Court has held that the right to a jury trial does not extend to equitable matters. *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 710 (2007).⁷ This was an equitable interpleader action in which the only issue was ownership of the Disputed Stock. Had WAM actually asserted its true claim for breach of contract based on the 2011 Account Agreement, as opposed to Weiser's frivolous claim for ownership based on the July 2013 contract, Skarpelos could have exercised his constitutional right to a jury trial on that legal claim, and the District Court could have bifurcated the equitable and legal trials. However, because Weiser asserted only that it was the owner of the stock by virtue of the July 2013 contract, but nevertheless was awarded damages for its unasserted claim, Skarpelos was denied that right.

⁷ Weiser cites no authority for the proposition that Skarpelos could have demanded a jury in this equitable interpleader case, when *Awada* clearly provides otherwise.

The same is true for Skarpelos' right to conduct discovery on WAM's unasserted claim for damages based on the 2011 Account Agreement. In *Yount v. Criswell Radovan, LLC*, 136 Nev. Adv. Op. 47, 469 P.3d 167 (2019), this Court recognized that, when an unasserted claim has *not* been tried by implied consent (as was the case here), the defending party is robbed of its entitlement, through normal pretrial discovery, to explore that unasserted claim. "The absence of any opportunity to do so constitutes sufficient prejudice to warrant reversal of that part of the district court's order" *Id.*

Because Weiser never asserted its true claim for "cover" damages, Skarpelos was robbed of his right to explore WAM's claim that it supposedly "shorted" stock to pay cash to the WAM buyer to "make it right." WAM produced no evidence of the amount of those damages at trial. The District Court awarded WAM "restitution" of \$250,000 (that WAM did not pay) because Weiser failed to assert the proper claim in this case. Skarpelos was severely prejudiced as a result, and that portion of the District Court's judgment should be vacated.

Moreover, the District Court denied Skarpelos due process and exceeded its equity jurisdiction by awarding WAM "equitable" damages where WAM failed to pursue its legal remedies. In Weiser's opposition to

summary judgment, in which it represented that Weiser Capital owned the Disputed Stock because *Weiser Capital* paid the \$250,000, WAM admitted *its* damages, if any, arose from Skarpelos' breach of the 2011 Account Agreement. 3 JA 0476. Restitution for unjust enrichment is unavailable where a contract governs the parties' relationship to each other. *Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000, 1005 (D. Nev. 2015).

The District Court's award against Skarpelos was based on its finding that Skarpelos would be *unjustly enriched* if he were allowed to retain both the Disputed Stock and the \$250,000 allegedly credited to his account. 11 JA 2163. But because the District Court found that Skarpelos' account had been opened with WAM, the 2011 Account Agreement governs that relationship and unjust enrichment was unavailable as a remedy.

Had WAM pleaded its actual claim, instead of "Weiser" frivolously pursuing a bogus *ownership* claim, the District Court could have bifurcated equitable and legal claims as the court did in *Yount*. That case demonstrates that the District Court's equity jurisdiction does not encompass legal claims arising from the same transaction. In imposing this award, the District Court specifically stated that "[t]his is an obligation that is separate from and independent of Skarpelos' ownership of stock in Anavex and has no bearing

on his ownership.” 11 JA 2162-2163. In its order awarding Skarpelos attorney fees, the District Court noted that, although it had awarded WAM equitable relief, “the award was unrelated to Weiser’s claims for relief” in the lawsuit. 13 JA 2551-2552.

Therefore, as in *Yount*, Skarpelos should have had the right to a jury trial and to conduct discovery on WAM’s damages claim. He was denied those rights and the District Court unfairly imposed a judgment against him for an amount WAM admits it did not pay. Skarpelos was denied due process and the District Court exceeded its equity jurisdiction by awarding WAM \$245,464.64 in “equitable” damages for a legal claim WAM admits it failed to pursue. That portion of the judgment should be vacated.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES TO SKARPELOS

This court reviews a district court's award of attorney fees for a “manifest abuse of discretion.” *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 801, 435 P.3d 672, 675 (2018). An abuse of discretion can occur when the district court bases its decision on factual findings that are clearly erroneous or not supported by substantial evidence, or where the district court disregards controlling law. *MB America, Inc. v.*

Alaska Pac. Leasing, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). In the context of an attorney fees award, this Court has previously held that a district court abuses its discretion by making such an award without including in its order sufficient reasoning and findings in support of its ultimate determination. *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 133 Nev. 126, 136, 393 P.3d 673, 682 (2017).

NRS 18.010(2)(b) permits a district court to award attorney fees to a prevailing party when the district court determines that a claim or defense of the opposing party was brought or maintained without reasonable grounds or to harass the prevailing party. *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 133 Nev. 126, 135, 393 P.3d 673, 682 (2017). The statute requires courts to liberally construe its provisions in favor of awarding attorney fees in all appropriate situations.

For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it. *Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018). This Court has recognized that the District Court is in the best position to adjudge the credibility of the witnesses and the evidence. *State v. Rincon*, 122 Nev. 1170, 1117, 147 P.3d 233, 238 (2006).

Unless this Court is left with the definite and firm conviction that a mistake has been committed, it will not second-guess the trier of fact. *Id.*

Here, the District Court's order awarding attorney fees and its order denying Weiser's motion for reconsideration include sufficient reasoning and findings in support of its award of \$215,900.50 to Skarpelos. 13 JA 2548-2553, 2663-2669. The District Court found: (1) that Weiser's pleaded claims throughout the litigation were based solely on the July 2013 contract and do not mention the April 2013 transaction; (2) that Weiser *never* sought leave to amend its pleadings to include the April 2013 transaction; (3) that Weiser abandoned its pleadings at trial; (4) Livadas' trial testimony that the July 2013 contract was meaningless and used for a purpose other than what Weiser had claimed all along in this case was "extremely troubling"; (5) that Weiser's claims were not supported by credible evidence and were brought and maintained without reasonable grounds; (6) that there was no evidence of a contract between Skarpelos and either WAM or Weiser Capital for the sale of Anavex stock *at any time* (emphasis in original); (7) that Weiser asserted a "new theory" at trial that WAM was the owner of the stock by virtue of the April 2013 transaction, but Livadas admitted WAM was not the purchaser under that transaction; (8) that a comparison of Weiser's pleadings with

Livadas’ trial testimony “reveals the frivolity” of Weiser’s claims; (9) that Weiser caused Skarpelos to unnecessarily incur fees in this matter due to its frivolous claims; and (10) that the amount of fees awarded were reasonable and necessarily incurred, fully analyzing the *Brunzell* factors.⁸ 13 JA 2551-2552, 2666.

As discussed throughout this brief, these findings are supported by substantial evidence and are not clearly erroneous. The District Court provided sufficient findings and reasoning to support its decision.

Despite this overwhelming evidence, Weiser argues the District Court abused its discretion in awarding Skarpelos attorney fees because: (1) even though all of Weiser’s claims were dismissed, the District Court *sua sponte* awarded WAM \$245,464.64 in equitable relief; (2) Weiser produced credible evidence in support of its claims to ownership of the Disputed Stock; (3) Weiser presented an “alternative” colorable legal theory to ownership of the Disputed stock; and (4) “Weiser” never changed its legal theory in this case. Each argument is addressed in turn.

⁸ Weiser does not challenge the amount of the award.

(1) **The District Court's sua sponte monetary award to Weiser was unrelated to Weiser's frivolous claims to ownership of the Disputed Stock.**

Weiser argues its claims were not frivolous because the District Court awarded WAM \$245,464.64. RB at 53. However, Weiser ignores that all of its claims were dismissed. Therefore, the District Court's award was not based on Weiser's claims and Weiser was not a prevailing party. In order to be considered a prevailing party, a party must win on at least one of its claims. *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev 416, 373 P.3d 103, 107 (2014). In *Golightly*, also an interpleader action, *Golightly & Vannah* did not prevail on its sole claim of lien priority and thus was not a prevailing party even though it received some of the interpleaded money. Here, all of Weiser's claims were dismissed and Weiser received *none* of the interpleaded stock.

Weiser cites *Frantz v. Johnson*, 116 Nev. 455, 999 P.2d 351 (2000) and *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 851 P.2d 459 (1993) in arguing that its claims were not frivolous because it "actually prevailed on them." RB at 53. Again, all of Weiser's claims were dismissed for complete lack of evidentiary support, so Weiser did not prevail on any of its claims. Further,

while the District Court *sua sponte* awarded WAM money, Weiser Capital recovered nothing despite Weiser's longstanding position until trial that Weiser Capital was the owner of the stock.

Frantz and *Chowdhry* are inapposite. In *Frantz*, Johnson Business Machines ("JBM") asserted various tort claims and was awarded a substantial judgment. *Frantz* had asserted a counterclaim for lost wages against JBM and Plastic Graphics, Inc. ("Plastic") had asserted a counterclaim seeking satisfaction of a California judgment against JBM. The judgment in favor of JBM was reduced to satisfy the counterclaims upon which *Frantz* and Plastic prevailed. The difference between *Frantz* and this case is that Weiser did not prevail on *any* of its claims and did not plead any claim that was the basis for the award it received.

Chowdhry is distinguishable because the jury found that the defendants were 30% negligent, and therefore plaintiff *Chowdhry* had reasonable grounds to bring his claims. However, in that case, *Chowdhry* actually asserted the claims that the jury decided. Here, Weiser never asserted a claim for the damages the District Court awarded based on the April 2013 transaction. All of Weiser's claims were based on the July 2013 contract in which Skarpelos allegedly agreed to sell stock to "Weiser." 1 JA 0067-0068.

Weiser's operative pleadings do not mention the April 2013 transaction. The District Court found no evidence to support any of Weiser's claims and dismissed all of them. 11 JA 2158-2163.

Thus, the District Court's *sua sponte* award to WAM was not based at all on any claim Weiser asserted. Weiser's claims, and its affirmative defenses, were all based on Weiser's allegation that Skarpelos sold the Disputed Stock to "Weiser" by way of the July 2013 contract. Weiser abandoned that theory on the first day of trial, demonstrating it had no reasonable grounds to bring those claims and pursue them for several years of costly litigation.

The District Court found that Weiser's claims were not supported by any credible evidence. 13 JA 2667. It found that Weiser abandoned its pleadings at trial and relied on a new theory that WAM was the owner of the stock by virtue of the April 2013 transaction, but also found that "Livadas also testified that *WAM was not even the purchaser of the stock under [that transaction].*" *Id.* (emphasis in original). The District Court found that "[a] comparison of [Weiser's pleadings] with the trial testimony in this matter reveals the frivolity of [Weiser's claims]." *Id.* The District Court found that its monetary award to WAM was unrelated to Weiser's claims for relief—as

it must have been, considering all of Weiser's claims were dismissed. 13 JA 2551.

Weiser argues that this finding is inconsistent with the District Court's statement in its order denying Skarpelos' motion to alter or amend the judgment that "the judgment of restitution was directly related, and not ancillary, to the *shares at issue* in this case." 13 JA 2542 (emphasis added). There is no inconsistency. The District Court was careful to distinguish that its monetary award to WAM was related to the Disputed Stock in the sense that the court found Skarpelos was credited \$250,000 for the alleged sale of those shares to a third party, not that the award was related to Weiser's claim to *ownership* of the shares. Essentially, the District Court was awarding WAM damages for having to "make it right" with the disappointed buyer in the April 2013 transaction.

This in no way validates Weiser's frivolous claims to ownership of the Disputed Stock. Nor do Weiser's equitable *defenses*, which were asserted in response to Skarpelos' claim for declaratory relief that he owns the Disputed Stock. None of these defenses were successful, as Skarpelos was declared to be the owner of the Disputed Stock.

Further, Weiser's defenses are not valid claims for monetary recovery. *Yount v. Criswell Radovan, LLC*, 136 Nev. Adv. Op. 47, 469 P.3d 167 (2019) (affirmative defenses do not entitle a party to affirmative relief unless that party proves they "mistakenly designated a counterclaim as an affirmative defense"). Here, there is no evidence Weiser made any such good faith mistake. Indeed, Weiser does not request a monetary recovery in any of these defenses or in its prayer for relief. 1 JA 0072-0073. Even if it had, there is "zero evidence" of any damages. 9 JA 1772.

Weiser suggests Skarpelos has mischaracterized its claims. RB at 55. Skarpelos has not "characterized" Weiser's claims in any way. A simple review of Weiser's pleadings reveals it relied solely on the July 2013 contract as the basis of its claims. 1 JA 0067-0068. No characterization is necessary. As the District Court found, a simple review of these pleadings compared to Livadas' trial testimony reveals the frivolity of Weiser's claims. 13 JA 2667. Weiser's assertion that it would not have recovered monetary damages but for asserting its frivolous ownership claims in this case is without merit. As discussed above, WAM had every opportunity to pursue a claim against Skarpelos for breach of the Account Agreement but chose not to do so.

(2) **Weiser admitted at trial that it does not own the Disputed Stock and presented no evidence that contradicted this admission.**

“Weiser” argues it produced credible evidence at trial that “it” is the owner of the Disputed Stock. RB at 55. However, Livadas admitted that neither WAM nor Weiser Capital owns the Disputed Stock. 7 JA 1326.

Livadas did *not* testify that Skarpelos sold the stock to WAM in April 2013; rather, he testified that WAM as a broker was merely facilitating the sale of stock to another WAM customer—thus, the sale was from Skarpelos to a third party *through* WAM’s ledger as broker, not a sale of stock *to* WAM. 7 JA 1333, 1338, 1350. Further, WAM’s suggested “corroborating” evidence does not negate Livadas’ admissions (RB at 55):

- WAM had physical custody of Certificate 753 as a broker under a fiduciary duty to Skarpelos. 7 JA 1443. This does not equate to *ownership* of the stock. Rather, the alleged 2011 Account Agreement pursuant to which that certificate was deposited with WAM established WAM’s lien rights, not ownership rights. 3 JA 0512-0513. As discussed above, WAM never attempted to enforce that lien. Thus, its “physical possession” of Certificate 753 is not evidence of ownership.
- The highly suspect Account Statement purportedly showing a sale of shares in April 2013 but not identifying any third-party buyers does not support WAM’s ownership claim. First, Livadas admitted the April 2013 transaction was a sale to another WAM customer and that

WAM does not own the stock. 7 JA 1304-1305, 1326. Livadas further admitted there should be “transaction records” for this purported sale but he could not find them even though WAM had a duty under Bahamian law to maintain such records. 7 JA 1335-1336; 1443-1444. Notably, the Account Statement also does not identify WAM as the buyer of the stock but does indicate that WAM took a commission—an unusual circumstance and a conflict of interest.

- That money purportedly was withdrawn from Skarpelos’ account (which Skarpelos disputes) does not equate to WAM’s ownership of the Disputed Stock. Again, WAM had lien rights and legal claims arising from the Account Agreement it failed to pursue. Much like a deed of trust, a lender does not take title to a borrower’s property unless it forecloses. That never happened in this case.
- Mere *discussion* of a possible sale of stock in March 2013 does not equate to WAM’s ownership thereof. Again, WAM admitted the April 2013 sale was to another WAM customer. 7 JA 1304-1305.
- The parties’ history of selling Skarpelos’ Anavex shares to third parties in 2007 (six years prior to the events at issue), not to Livadas himself or any entity he controlled or any entity that owed Skarpelos a fiduciary duty, does not “corroborate” Weiser’s ownership claims in this case.

Again, Weiser argues the District Court “misunderstood” Livadas’ testimony. It is difficult to understand how Livadas’ testimony that neither WAM nor Weiser Capital owned the Disputed Stock could be misconstrued. This is especially true when Livadas admitted WAM, as a broker, was just

facilitating the sale of stock between two of its customers and that the real nature of its claim in this case was for damages WAM supposedly incurred in “making it right” with the disappointed customer. 7 JA 1333.

If the District Court misunderstood the “complex nature of the April 2013 sale,” it was because Livadas’ testimony directly contradicted Weiser’s pleadings as well as the argument Weiser now presents for the first time on appeal. RB at 56. Livadas’ testimony that the “critical” July 2013 contract was meaningless and used for completely unrelated purposes should cast doubt on WAM’s business practices in general and its record keeping in particular, including the suspect Account Statement.

Weiser claims it “previously believed” the July 2013 contract supported its claims for ownership. However, Livadas *is* Weiser. He owns and controls both companies. Thus, there was no “downstream confusion” about Weiser’s ownership claims because Livadas is the upstream and the downstream. RB at 12. As the District Court found, Livadas’ testimony at trial was entirely unclear about who owned the stock. 9 JA 1859. Therefore, if WAM’s “primary evidence” was Livadas’ testimony—which the District Court found incredible as to Weiser’s ownership claim—the District Court was well within its discretion in awarding Skarpelos attorney fees.³

- (3) **Weiser did not argue its alleged “colorable” theory to the District Court and, in any event, this newly asserted theory does not demonstrate the District Court abused its discretion in awarding Skarpelos attorney fees.**

Weiser argues its legal theory that WAM is the owner of the Disputed Stock by virtue of the April 2013 transaction, a theory raised for the first time on the first day of trial after three years of litigation during which Weiser advanced different and contradictory theories, was not groundless and therefore the District Court should not have awarded Skarpelos attorney fees. RB at 56-59. Weiser argues its ownership claim was valid even though it was really just pursuing damages for having to “make it right” with the buyer. RB at 57.

Weiser offers three bullet points in support of its proposition the District Court should have awarded WAM the Disputed Stock “among the three potential claimants” (presumably this includes Weiser Capital). RB at 58. While the new theory is not easily deciphered from these three bullet points, it appears Weiser is now arguing WAM should own the Disputed Stock because: (1) Skarpelos agreed to sell the Disputed Stock to another WAM customer but the sale was not performed because Skarpelos canceled Certificate 753; (2) the purported buyer did not know Skarpelos was the

purported seller and those buyers received other shares of Anavex stock from WAM and have since sold those shares; and (3) WAM paid Skarpelos for the Disputed Stock, and had to procure “replacement stock” in the market for the buyers by taking “short” positions. RB at 58.

Initially, Weiser did not raise this argument to the District Court either in opposing Skarpelos’ motion for fees or in briefing on its unsuccessful motion for reconsideration. 12 JA 2502-2507; 13 JA 2616-2622, 2656-2661. An argument or issue not raised before the district court is deemed waived and cannot be advanced on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). A party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below. *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989).

Further, it is unclear how these facts, even if true, constitute a colorable basis for WAM to claim ownership. First, WAM admits the sale was to a third party WAM client, not WAM itself. 7 JA 1304-1305. Second, WAM did *not* pay Skarpelos for the stock; rather, WAM supposedly debited the purported buyer’s account \$250,000, although no documentary evidence supports Livadas’ testimony in that regard. 7 JA 1332. Rather, the alleged buyer supposedly paid the money. 7 JA 1339, 1449.

Third, there is no evidence of what amount WAM “paid” to settle the purported buyer’s account. 9 JA 1772. While Weiser’s brief suggests WAM satisfied the purported buyer by procuring replacement stock, Livadas testified WAM satisfied the purported buyer mostly by giving it cash generated by short sales—but produced no documents to prove this. 7 JA 1334. Fourth, that the buyer did not know Skarpelos was the seller does not make Weiser’s new theory “colorable.” As Alex Walker testified, the identity of both the seller and the buyer would be required, among other things, to effect a transfer of these restricted shares under SEC regulations. 8 JA 1572, 1574, 1584. Finally, whatever the alleged buyer did with any “replacement shares” (of which there is no evidence) does not make WAM the owner of the Disputed Stock.

If the District Court had awarded WAM the Disputed Stock for whatever damages it supposedly incurred as a result of the April 2013 transaction, it would have been an abuse of discretion. WAM has no legitimate claim to ownership. *At best*, it sustained damages but presented no evidence as to the amount of those alleged damages. *At most*, those damages arguably would be \$250,000 compared to the current value of the Disputed

Stock at \$4,742,832.38 (829,166.5 shares multiplied by \$5.72 per share as of this writing).

However, WAM admits it did not pay Skarpelos \$250,000; the purported buyer did. 7 JA 1339, 1455. WAM should have, but did not, assert a claim against Skarpelos for breach of the Account Agreement and present evidence of its alleged “cover” damages. Instead, it spent three years pursuing a frivolous claim for ownership based on the July 2013 contract, wasting judicial resources and causing Skarpelos to incur substantial attorney fees.

As the District Court properly found, there was no evidence supporting Weiser’s ownership claim. Essentially, Weiser’s argument improperly asks this Court to create a new contract between Skarpelos and WAM that they themselves did not create. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (it is well settled that a court has no power to create a new contract for the parties that they have not created or intended themselves). Thus, Weiser’s argument that it presented evidence of a colorable theory of ownership (which it did not argue at trial or in post-judgment proceedings) is belied by the evidence and has no merit.

(4) **Weiser abandoned its pleadings and legal theories on the first day of trial, significantly prejudicing Skarpelos.**

Weiser argues it never changed its legal theory in this case. RB at 59-60. That is simply not true. Weiser's vague assertion that its claim to ownership "was always predicated on a 2013 sale is misleading. RB at 60 (emphasis added). Weiser also asserts that "its theory was always that Skarpelos actually sold his stock to *Weiser* in April 2013." *Id.* (emphasis added). That is simply not true either.

As detailed in Skarpelos' opening brief, Weiser's ownership claim was a moving target: (1) at the beginning of the dispute in November 2015, WAM claimed that Skarpelos had sold the Disputed Stock to WAM on July 12, 2013. 6 JA 1227, 1239, 1241, 1252. Soon thereafter, Weiser's counsel notified NATCO that Weiser Capital may have an ownership interest in the Disputed Stock. 8 JA 1578-1579. When Weiser filed its cross-claim in May 2016, it referred to WAM and Weiser Capital collectively as "Weiser" and alleged that Weiser owned the Disputed Stock by virtue of a July 2013 contract. 1 JA 0067-0069.

For nearly two years, Weiser refused to designate which "Weiser" entity owned the Disputed Stock until Skarpelos filed a motion for summary

judgment. In its opposition brief filed in April 2018, Weiser (relying on Livadas’s declaration) represented that Skarpelos sold the stock to Weiser Capital (not WAM as previously represented) by way of an April 2013 transaction memorialized by the July 2013 contract that was the centerpiece of Weiser’s claims. 3 JA 00468, 0471, 0484. This remained Weiser’s position until the first day of trial—Livadas confirmed it at his deposition in October 2018, and Weiser confirmed it in its Trial Statement on the eve of trial, referring to the July 2013 contract as a “critical” document. 4 JA 0636-0637; 5 JA 0945; 7 JA 1428.

Then, on the first day of trial, Livadas and Weiser switched course yet again. Livadas testified that neither WAM nor Weiser Capital owned the Disputed Stock. 7 JA 1326. Rather, Livadas testified that an unidentified WAM customer owned the stock. *Id.*, 7 JA 1333, 9 JA 1772. Livadas testified that the “critical” July 2013 contract, the basis of WAM’s claims all along, had nothing to do with the sale of any stock and was a meaningless document. 7 JA 1308-1309, 1314, 1431, 1458.⁹

⁹ Then, notwithstanding this testimony, Weiser tried to resurrect the July 2013 contract in post-trial briefing, again arguing that its purpose was to memorialize the April 2013 transaction. 12 JA 2505; 13 JA 2617-18.

Thus, Weiser's assertion that it never changed its theory of ownership is false. It abandoned the July 2013 contract on the first day of trial and, contrary to Weiser's contention, Skarpelos *did* object at length to WAM's evidence that contradicted its pleadings. RB at 60; 7 JA 1426-1427. WAM never sought to amend its pleadings, either before or after trial. It is highly unlikely the District Court would have granted a post-trial motion to amend pursuant to NRC 15(b). RB at 60.

The District Court was well within its discretion in awarding Skarpelos fees because Weiser brought and maintained its ownership claims without reasonable grounds and then completely abandoned them at trial for a theory it never pleaded and of which Skarpelos was not given fair notice.

CONCLUSION

There is substantial evidence supporting the District Court's findings that Skarpelos is the owner of the Disputed Stock and that Weiser brought and maintained its claims of ownership without reasonable grounds and presented no credible evidence to support those claims, justifying the award of attorney fees to Skarpelos. Thus, the District Court's judgment declaring Skarpelos the owner of the Disputed Stock and its order awarding him attorney fees should be affirmed.

The District Court's award of damages to WAM should be reversed. The District Court based this award on the erroneously admitted Account Statement and, in making this award, the District Court denied Skarpelos due process and exceeded its equity jurisdiction.

Dated: October 26, 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). This brief has been prepared in 14- point font, Times New Roman style, a proportionally spaced typeface, using Microsoft Word. I further certify that this brief complies with the page-or type-volume limitations of NRAP32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **12,517** words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Affirmation pursuant to NRS 239B.030

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

DATED: October 26, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(e), I hereby certify that on the 26th day of October, 2020, I electronically filed the foregoing **APPELLANT’S COMBINED REPLY BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL**, 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 as follows:

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