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.

Electronically Filed
Jan 15 2021 03:56 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

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

WEISER'S REPLY BRIEF

Matthew B. Hippler
Nevada Bar No. 7015
Frank Z. LaForge
Nevada Bar No. 12246
Joshua M. Halen
Nevada Bar No. 13885
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
(775) 327-3000
mhippler@hollandhart.com
fzlaforge@hollandhart.com
jmhalen@hollandhart.com

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The District Court's award of the Disputed Stock to Skarpelos

Three points are critical to this Court's determination as to whether the award of the Disputed Stock to Skarpelos was erroneous:

- The District Court found that Skarpelos sold the Disputed Stock through WAM—which held Certificate 753—in April 2013 and received $250,000 in return.
- Skarpelos does not appeal that finding, much less claim that it was unsupported by substantial evidence.
- But for Skarpelos's fraudulent cancellation of Certificate 753, WAM would have dematerialized that certificate and passed the Disputed Stock to the ultimate WAM client–buyers, negating any prospect of this lawsuit.

The question is thus: What evidence or legal authority supports the District Court's ruling that the Disputed Stock reverted to Skarpelos after he sold it and received the proceeds? The Answering Brief provides neither. At best, it points to evidence showing that Skarpelos owned the Disputed Stock *before* the April 2013 sale. Nor does Skarpelos dispute the well-worn legal principal that an interpleader claimant cannot prevail by disproving other claimants' ownership. Thus, the Disputed Stock judgment rewards Skarpelos for wrongfully cancelling Certificate 753 and should not be affirmed on appeal.

As a corollary, WAM demonstrated its own right to the Disputed Stock evidentiarily, legally, and equitably. As detailed in Weiser's Opening Brief, Livadas testified that the April 2013 sale was really two separate sales transactions with separate obligations in which (1) Skarpelos sold 3,316,666 Anavex shares to WAM

who then (2) credited the same amount of stock to the WAM client–buyers' accounts with the intent of later substantiating those credits with the dematerialized stock from Certificate 753. Such transactions seemingly happen almost instantaneously, giving the appearance of a direct sale between the seller and third-party buyers. But, here, because Skarpelos cancelled Certificate 753, WAM could not transfer the shares as intended and was left with the legal right to the stock.

Skarpelos presents two primary arguments against WAM's ownership. First, he repeatedly claims that WAM admitted that it did not own the Disputed Stock based on a relentlessly myopic view of Livadas's testimony. This is like concluding that the original Star Wars trilogy is about a love affair between Luke and Leia based on a single scene in the first film. In truth, Livadas consistently asserted WAM's right to the stock and twice reiterated under cross-examination that WAM owned or should own the stock. Second, Skarpelos claims that an opinion letter was necessary to register the transaction with NATCO. But the District Court found that Skarpelos sold the Disputed Stock in April 2013 notwithstanding any such letter. Nor is there any evidence that such registration requirements voided the sale itself or could not be satisfied afterward.

The District Court's award of attorney's fees.

Putting aside the foregoing, the fees award is not supported by evidence or law. The merit of WAM's participation in this case is demonstrated by the $245,464.64 restitution award, which was directly relevant to the overarching interpleader action as well as WAM's affirmative defenses and breach of contract crossclaims. Further, under the "reasonable ground" standard, Weiser presented

credible evidence in support of its own claim to the Disputed Stock. Skarpelos, however, continues to claim that Weiser changed its theory at trial based on his belief that the performance and attempted memorialization of the April 2013 sale somehow represent two unrelated legal theories. Among other problems, he never denies that, even if true, such a changed theory does not support a fees award under NRS 18.010(2)(b).

Accordingly, as explained in Weiser's Opening Brief and elaborated upon in this brief, Weiser 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.

ARGUMENT

1. The District Court's award of the Disputed Stock to Skarpelos should be vacated.

1.1. Skarpelos fails to show how he still owns the same Disputed Stock that the District Court found he sold in April 2013.

Weiser's Combined Opening and Answering Brief (the "Opening Brief") argues that there is no evidence supporting the District Court's ruling that Skarpelos owns the Disputed Stock given two critical findings:

1. Skarpelos sold the Disputed Stock in April 2013 through WAM in exchange for $250,000. 11 JA2158(¶8); 11 JA2162(¶28); 10 JA1919.

2. As part of that sale, Skarpelos received $250,000 in his WAM account and withdrew 98.4% of it in cash. 11 JA2158 (¶¶6, 8); 11 JA2162(¶28).

Opening Brief ("OB") at 23. Even if the third-party WAM clients–buyers ("WAM client–buyers) were the ultimate intended recipients in the April 2013 sale, Weiser reasoned that there is no evidence or legal authority showing that the Disputed Stock somehow returned to Skarpelos after he sold it in April 2013. *Id*.

Skarpelos does not claim that the District Court's finding that Skarpelos sold the Disputed Stock in April 2013 lacked substantial evidence. As previously and not disputed by Skarpelos, the District Court rejected Skarpelos's entire theory of ownership at trial. It rejected his claim that he never opened a WAM account. 8 JA1590–91; 11 JA2158 (¶5). It rejected his claim that he never sold the Disputed Stock (8 JA1610), finding that he did so through WAM for $250,000. 11 JA2158(¶8); 11 JA2162(¶28); 10 JA1919. And where Skarpelos claimed that he never received any money through WAM (8 JA1491), the District Court found that he received and withdrew $245,464.64 from his WAM account, which represents 98.4% of the $250,000 for the Disputed Stock. 11 JA2158 (¶¶6, 8); 11 JA2162(¶28). In other words, however the District Court reasoned that Skarpelos gets to keep the Disputed Stock after he sold it and received the benefits of that sale, it was not connected to Skarpelos's actual claims.

Given the foregoing, the Opening Brief argued that there is no evidence or legal theory supporting the District Court's finding that the Disputed Stock returned to Skarpelos after he sold it and received the proceeds in April 2013. OB at 23–24. Nor does Skarpelos offer one.

Instead, Skarpelos produces a quantity of bullet points purporting to demonstrate his own right to the Disputed Stock. Appellant's Combined Reply Brief

and Answering Brief on Cross-Appeal ("Answering Brief" or "AB") at 11–14. But the Court will find no evidence or legal authority supporting the proposition that the Disputed Stock returned to Skarpelos after he sold it and received the proceeds among these bullet points. Instead, Skarpelos's bullet points can be grouped into three categories, none of which demonstrate his right to post-sale ownership.

First, most of Skarpelos's bullet points attempt to disprove WAM's right to the Disputed Stock. *Id*. But Skarpelos does not deny that in interpleader "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); OB at 22. So even if WAM failed to prove its own right to the Disputed Stock, that failure "does not mean that the other claimant [here, Skarpelos] automatically wins." *Id*.

Second, Skarpelos notes that Anavex issued the Certificates to him in 2009. AB at 11. But, at best, this shows that he owned the Disputed Stock *before the April 2013 sale*. It does not explain how Skarpelos could sell the stock, pocket the proceeds, and yet still keep that same stock.

Third, Skarpelos claims that his cancellation of Certificate 753 (half of which constituted the Disputed Stock) prevented any sale in April 2013. AB at 12. But the District Court found that Skarpelos cancelled the Certificates on false pretenses. 11 JA2158(¶7); 10 JA1918–19. And, despite that cancellation, the District Court found that Skarpelos nevertheless sold 3,316,666 Anavex shares a month later. 11 JA2158(¶8); 11 JA2162(¶28); 10 JA1919. Moreover, Skarpelos never informed WAM of his cancellation even though the Certificates secured his WAM account

and were the subject of the April 2013 sale. OB at 13–14. Accordingly, Skarpelos was obligated to produce the 3,316,666 Anavex shares he promised, whatever their provenance. In sum, whatever Skarpelos believes he accomplished by fraudulently cancelling the Certificates and then entering into a sale concerning them a month later, it does not void the April 2013 sale, much less establish his legal right to the Disputed Stock.

Because this case arises in interpleader, the Court may ask whether there might be an equitable explanation for the District Court's award? The answer is emphatically no. As explained in Weiser's Opening Brief and not disputed by Skarpelos, this case would not exist had Skarpelos not furtively cancelled Certificate 753. OB at 14, 24, 29, 53, 54. But for that cancellation, WAM would have dematerialized the Disputed Stock from Certificate 753 six months after the April 2013 sale and used it to substantiate its prior credit to the WAM client–buyers' accounts. *Id*. The District Court's award of the Disputed Stock thus not only lacks an equitable basis, it affirmatively rewards Skarpelos for his duplicity.

Because there is no evidentiary, legal, or equitable basis for the District Court's award of the Disputed Stock to Skarpelos, the Court should vacate that award.

1.2. The District Court erred by not awarding the Disputed Stock to WAM.

1.2.1 The evidence shows that WAM acquired the Disputed Stock in the April 2013 sale but was unable to transfer it due to Skarpelos's fraud.

In the Opening Brief, Weiser showed that the District Court misunderstood Livadas's testimony on the mechanics of the April 2013 sale, which it believed to be a direct sale from Skarpelos to the WAM client–buyers in which WAM merely played the part of a kind of escrow agent. OB at 24–30. Specifically, Weiser comprehensively cited and quoted from Livadas's testimony, which demonstrated that that the sale was really two separate but related transactions. OB at 5–6, 25–29.

Skarpelos sold the stock to WAM who credited the same amount to the WAM client–buyers' accounts with the intention of substantiating such credits from the dematerialized Certificate 753 six months later. *Id*. Critically, while there are obligations between (a) WAM and Skarpelos and (b) WAM and the WAM client–buyers, there (c) are no direct obligations between Skarpelos and the WAM client–buyers. *Id*. Thus, if Skarpelos did not receive the promised $250,000 from the April 2013 sale, his contractual recourse was directly against WAM, not the WAM client–buyers whose identities he did not know and with whom he never communicated. *Id*. And if the WAM client–buyers never received the promised 3,316,666 Anavex shares, their recourse was directly against WAM, not Skarpelos. *Id*. at 25–28. Thus, when WAM and Skarpelos consummated the April 2013 sale, WAM did the following:

1. WAM credited Skarpelos's account with $250,000 (minus the $420 processing fee) and, in exchange, debited his account 3,316,666 Anavex shares from Certificate 753, which Skarpelos physically deposited with WAM two years earlier.

2. WAM debited the WAM client–buyers' accounts for $250,000 and, in exchange, credited the buyers' accounts with the 3,316,666 Anavex shares it promised.

And, but for Skarpelos's cancellation, WAM would have dematerialized Certificate 753 so that half of its 6,633,332 shares were accounted to the WAM client–buyers. OB at 14, 24, 29, 53. Because WAM could not dematerialize Certificate 753, it had to procure replacement stock to cover its obligations to those buyers. *Id*.

Accordingly, by stymying WAM's ability to dematerialize Certificate 753, Skarpelos breached his obligation to deliver the 3,316,666 Anavex shares to WAM, not the WAM client–buyers. When Skarpelos sold the Disputed Stock in April 2013, the legal right to that stock went to WAM who retained it when it could not pass it on to the WAM client–buyers as intended.

The District Court, however, simply reasoned that WAM should not get the Disputed Stock because WAM was never intended to be its ultimate recipient in the April 2013 sale, which ignores the realities and mechanics of that sale. 9 JA1771. *Id*. The District Court misconstrued the April 2013 sale to involve a more orthodox direct sale from Skarpelos to the WAM client–buyers despite Livadas's testimony.

Skarpelos does not claim that Weiser misquoted Livadas's testimony concerning the mechanics of the sale. Nor does Skarpelos attempt to demonstrate that the obligations of the April 2013 sale ran directly between himself and the WAM

client–buyers. (Recall that Skarpelos's entire case was premised on denying everything.) Instead, he raises three arguments, none of which have merit.

1.2.2 Livadas repeatedly testified that WAM should own the Disputed Stock.

Skarpelos really, really wants the Court to believe that WAM abandoned its ownership claim to the Disputed Stock at trial, asserting this point no fewer than ten times in his Answering Brief. AB at 2, 4, 5, 8–9, 12, 15–16, 17, 48, 49, 56. His sole basis is the following two-sentence exchange with Livadas during cross-examination:

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

7 JA1326. Skarpelos, however, presents this exchange in isolation and without any regard for the rest of Livadas's testimony. Putting aside the ambiguous nature of what was meant by "own" in the exchange above,[1] Livadas repeatedly asserted WAM's right to own the Disputed Stock throughout his testimony.

After the block-quoted exchange above, Livadas clarified that WAM "owns" the stock later in the same cross-examination:

[1] WAM did not "own" the stock in the sense that it merely possessed the canceled Certificates, which is different from its claim that it should own the stock. Recycling the Opening Brief's truck analogy, if Skarpelos sells his truck to WAM, takes the proceeds, but then repossesses physical custody of the truck and refuses to execute title documents at the DMV, WAM does not "own" the truck, but it nevertheless has a strong legal claim that it *should* own the truck.

> A. . . . Because I'm missing the legalities of it, but I guess I can only explain it by process, and in the process WAM was in the middle of the buy and sell transaction. That transaction closed, and it's WAM that's responsible to close the process in that transaction, and so to close the process in that transaction, it needs to dematerialize that certificate. So in my view where the issue lies is WAM is stuck with dematerializing the certificate, so it would be making the claim to those shares.
>
> Q. *So WAM is the owner of the shares?*
>
> A. *Yes.*
>
> Q. Okay.
>
> A. Yes.
>
> Q. *Not Weiser Capital.*
>
> A. *No. WAM.*

7 JA1342 (emphasis added). Conspicuously, the Answering Brief never mentions this exchange. Nor does it mention that Livadas *again* reiterated WAM's claim to the Disputed Shares on re-cross-examination:

> Q. Okay. *And here at trial you're claiming WAM is the owner; is that correct?*
>
> A. I'm claiming that WAM needs to end up with the position to settle its accounts. And my understanding is that it needs to become ultimately the owner of it.

7 JA1467 (emphasis added). Thus, Skarpelos clearly understood that WAM claimed it should own the Disputed Stock at trial, even if he seems to have forgotten it on appeal.

Further, Livadas's assertion of WAM's right to ownership is consistent with his repeated explanation that, while the April 2013 sale was supposed to go through WAM in such a manner that the WAM client–buyers would be the ultimate recipients of the Disputed Stock, Skarpelos thwarted the process by cancelling Certificate 753. OB at 25–29; 7 JA1283; 7 JA1331–33; 7 JA1455. WAM was obligated to cover the 3,316,666 Anavex shares it had credited to the WAM client–buyers and was left holding the legal right to the Disputed Stock promised from Skarpelos. *Id*. Indeed, this was Livadas's testimony during direct (7 JA1283), cross (7 JA1331–33), redirect (7 JA1455), and re-cross examination. 7 JA1467.

1.2.3 The April 2013 sale contained the essential terms to constitute a meeting of the minds.

Weiser's Opening Brief explained that the District Court erred in concluding that there was no "meeting of the minds" sufficient to show that WAM was the intended recipient of the Disputed Stock in the April 2013 sale. OB at 28, 30–31. Weiser cited to Livadas's testimony and the circumstances of the sale to show that the essential terms were (1) how many shares was Skarpelos liquidating and (2) for how much money? *Id*. at 28–30 (citing 7 JA1303). Livadas further testified that WAM could not disclose the identity of the buyers in transactions like the April 2013 sale. *Id*. at 29 (citing 7 JA1332). Thus, Weiser cited authorities showing that the essential terms were established as a matter of law for a meeting of the minds and cited supporting legal authority. *Id*. at 30–31 (citing *Tipton v. Woodbury*, 616 F.2d 170, 177 (5th Cir. 1980); *Cattin v. Gen. Motors Corp.*, 955 F.2d 416, 430 (6th Cir.

1992); *Raymond G. Schreiber Revocable Trust v. Estate of Knievel*, 984 F. Supp. 2d 1099, 1106 (D. Nev. 2013)).

Skarpelos does not dispute that, as a matter of law, in such circumstances the price and quantity of the shares sold may comprise sufficient terms for a meeting of the minds. And, again, Skarpelos does not dispute that his obligations in the April 2013 sale ran directly through WAM and that there were no contractual obligations between him and the WAM client–buyers. Instead, Skarpelos claims that "there is no evidence Skarpelos ever intended to sell the Disputed Stock to WAM." OB at 17.

This is untrue. Again, Livadas testified that Skarpelos agreed to liquidate 3,316,666 shares of the Anavex stock he previously deposited with WAM and that Skarpelos only cared about receiving the $250,000 in exchange. *Id*. at 28–30 (7 JA1303). That is all that is needed under contract law. OB 30–31. Indeed, while the District Court found that Skarpelos sold the Disputed Stock in April 2013, the identities of the WAM client–buyers were never known to Skarpelos. 7 JA1332. This is additional proof that the ultimate recipients of the Disputed Stock were immaterial to the sale. Further, evidence of Skarpelos's intent to sell the stock to WAM includes the following facts: (a) his negotiation of the sale was exclusively with WAM, (b) he deposited Certificate 753 with WAM and previously withdrew cash against it, (c) he told WAM to sell the Disputed Stock, and (d) he received the sale proceeds directly from his WAM account. These circumstances show that Skarpelos was simply liquidating Anavex stock already in WAM's possession without regard for how WAM disposed of the stock afterward. 11 JA2158(¶¶5, 6, 7) 11 JA2162(¶28).

1.2.4 Whatever the restricted nature of the Disputed Stock, it does not prevent an award to WAM.

Another oft-repeated theme in Skarpelos's Answering Brief is his argument that the Disputed Stock constituted "restricted shares" and that a sale could not be consummated without complying with certain requirements. E.g., AB at 11–12, 16, 53. As shown below, such requirements apply to the registration of stock transfers with NATCO; they do not void the transfers themselves.

As a threshold issue, this seems to be an argument against the District Court's finding that Skarpelos sold the Disputed Stock in the April 2013 sale. In other words, Skarpelos seems to argue that no sale whatsoever could have taken place because of the purported requirements for registration of restricted stock. But, again, Skarpelos does not claim that the District Court's finding was unsupported by substantial evidence, much less directly challenge it on appeal. And the District Court never mentioned the stock restrictions in its oral or written findings of fact. 10 JA1974–2021; 11 JA2157–63. Thus, whatever the effect of the restrictions, they did not prevent the District Court from concluding that Skarpelos sold the Disputed Stock in April 2013. Moreover, as shown below, the District Court had good reason to reject Skarpelos's arguments about such restrictions' effect on the April 2013 sale.

Skarpelos claims that WAM never submitted a legal opinion letter to NATCO as required to register the transfer, which he believes shows that WAM never attempted to complete the registration. AB at 11–12. But Walker, NATCO's representative, testified to the requirements to register transfers of Anavex stock with NATCO. 8 JA1567. At no point, however, did Walker testify that the April 2013

sale itself was somehow voided without an opinion letter. Indeed, he did not and could not testify to the legal efficacy of the underlying sale, as Skarpelos suggests, without offering inadmissible expert and opinion testimony. 8 JA1533. And while Skarpelos suggests that the sale would have violated securities law, he never cites those laws. Rather, Walker testified that WAM reached out to him to dematerialize the Certificate 753, which directly lead to NATCO's interpleader. 8 JA1572; 6 JA1148; 8 JA1584. Nor did Walker ever testify that any procedural requirements to register the stock could not be satisfied after the sale.

Skarpelos also repeatedly claims that the buyer must be identified to transfer the shares based solely on the following terse, foggy exchange with NATCO's representative:

> Q. Would it have been a necessity of understanding who the purchaser is?
>
> A. Yes.

9 JA1574; AB at 11–12, 16. Again, while the identity of the recipient of the stock may be needed to register it with NATCO, Walker never testified such a requirement cannot be satisfied after the sale. In any event, even if the testimony supported such a requirement, it did not prevent the District Court from finding that Skarpelos sold the Disputed Stock in April 2013. 11 JA2162(¶28). Similarly, whatever restrictions pertained to transferring the Certificates, they did not prevent Skarpelos from funding his WAM account with them and drawing substantial sums of cash against them. 11 JA2158(¶¶5–8).

Finally, Weiser's Opening Brief analogized the April 2013 sale with the sale of a Ford F-150 truck to a used car lot (WAM) that already had physical custody of the truck, but not title, and planned to immediately resell the truck to a third-party buyer (the WAM client–buyers). OB at 29–30. Despite paying the seller (Skarpelos) the purchase price and promising the truck to the third party, the seller secretly repossesses the truck under cover of night, forcing the used car lot to procure another F-150 to satisfy its promise to the third party. *Id*. Skarpelos retorts that the analogy is inapt because "there is no evidence that Skarpelos ever intended to sell a Ford-150 to WAM." AB at 17. But, like the sale of a used truck through a used car lot, the circumstances show that the sale is with the car lot itself and the identity of the ultimate intended buyer of the truck is irrelevant. Section 1.2.3, *supra*. Nor do the sellers of used trucks care in such circumstances so long as they receive the proceeds. *Id*. Skarpelos also claims the April 2013 sale is different because the Disputed Stock restrictions require an opinion letter to formally register the transfer with NATCO. AB at 17–18. Weiser disagrees. Again, there is no evidence that the parties to the April 2013 sale could not have subsequently satisfied any such registration requirements with NATCO, much less that such restrictions void the underlying sale. Similarly, the fully performed sale of a used F-150 is not invalidated just because the parties must resolve title and registration issues with the DMV afterward.[2]

[2] Skarpelos claims without citation that the Disputed Stock (the truck in the analogy) "could only be acquired by certain buyers." AB at 18. But there is no evidence that only certain people or entities could buy the stock.

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

Even if the Court does not vacate the award of the Disputed Stock to Skarpelos, Weiser provided four reasons why its claims before the District Court were far from frivolous so as to justify the District Court's $216,950.50 fees award to Skarpelos.

2.1. The $245,464.64 restitution award demonstrates that Weiser's claims in the interpleader action were not frivolous.

NRS 18.010(2)(b) provides as follows:

> [T]he 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.

(Emphasis added). Under this standard, the $245,464.64 restitution award demonstrates that Weiser's participation in this action was far from frivolous.

First, *but for its participation in the interpleader action brought by NATCO, WAM would have never recovered the $245,464.64 in restitution.* OB at 55. This point is indisputable. Nor does Skarpelos try. Yet he and the District Court incorrectly promote Weiser's crossclaims over the underlying interpleader action in their fees analysis, reasoning that fees were warranted because the restitution award does not relate to Weiser's crossclaims (breach of contract). 13 JA2551; AB at 45. This puts form well ahead of the function of interpleader. Nevada holds that the equitable issues at heart in interpleader take precedence over any ancillary legal claims. *See Seaborn v. First Judicial Dist. Ct.*, 29 P.2d 500, 505 (Nev. 1934)

(holding that "if a court of equity obtains jurisdiction of a controversy on any ground and for any purpose, it will retain jurisdiction for the purpose of administering complete relief"); *Awada v. Shuffle Master, Inc.*, 173 P.3d 707, 712 (Nev. 2007) (holding that district courts may hear equitable issues by bench trial before any legal claims, even though the factfinding in the former may supplant the right to a jury trial in the latter). Indeed, while both Skarpelos and the District Court concentrate solely on Weiser's crossclaims in applying NRS 18.010(2)(b), such crossclaims are not even necessary in an interpleader action, where the claimant need only file an answer asserting its right to the interpleaded object. NRCP 22; *see*, *e.g.*, 44B AM. JUR. 2D INTERPLEADER §55 ("Generally, one claimant is not required to cross-claim against another claimant in order to preserve a right to the stake."). Accordingly, the restitution award represents the merit of Weiser's participation in the underlying interpleader action, regardless of the form of its pleadings.

Second, as explained in the Opening Brief, the restitution award was directly related to Weiser's affirmative defenses of unjust enrichment, unclean hands, fraud, and estoppel under NRS 18.010(2)(b). OB at 35–37, 54. Without elaboration or analysis, Skarpelos summarily responds that Weiser's affirmative defenses were unsuccessful. AB at 46. Yet Skarpelos acknowledges that the award was based on unjust enrichment:

> 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.

Id. at 38 (emphasis in original; citing 11 JA2163). The District Court's "unjust enrichment" ruling unequivocally demonstrates that Weiser's "unjust enrichment" affirmative defense was not frivolous. *See* 1 JA0073. Moreover, NRS 18.010(2)(b) does not turn on whether a party actually succeeds on its claims, as Skarpelos suggests; it only considers whether they were groundless.

Skarpelos also argues that Weiser's affirmative defenses were based on the July 2013 PSA. AB at 45. This is news to Weiser. Skarpelos fails to provide any citation or elaboration for his claim. And none of Weiser's affirmative defenses mention the July 2013 PSA. Further, as elaborated on below and in the Opening Brief, the April 2013 sale and July 2013 PSA concerned *the same sale*, the latter merely representing an attempt to memorialize the former. Section 2.4, *infra*; OB at 60.

Skarpelos next argues that WAM cannot obtain affirmative relief by means of an affirmative defense and that Weiser never sought such relief in its prayer. AB at 47. But the restitution award did not award "damages" but was equitably predicated on avoiding the unfair windfall that Skarpelos would receive if he got both the Disputed Stock and the $245,464.64 he withdrew from his WAM account. *See* 11 JA2163(¶28). In other words, it was an equitable reduction of Skarpelos's award, which is particularly applicable in interpleader where the court may not be able to simply award one party full custody of the disputed item without promoting an injustice. As explained in the Opening Brief and never disputed by Skarpelos, this is how restitution operates and such relief is part of a district court's inherent power to fashion equitable remedies. OB at 34–35, citing, e.g., *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."); *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1115 n.7 (Nev. 2016).

Third, it is difficult to understand how the restitution award was unrelated to Weiser's crossclaims, as asserted by Skarpelos and the District Court. In addition to seeking declaratory judgment for the Disputed Stock, Weiser asserted two cross-claims for breach of contract and breach of the covenant of good faith and fair dealing, both of which assert "damages in excess of $10,000." 1 JA0068; *see also* 1 JA0069 (praying for relief including "an award for damages in excess of $10,000.00"). The $245,464.64 was not an arbitrary amount of spare change found between Skarpelos's sofa cushions; it represented the withdrawn proceeds in Weiser's claim of an April 2013 sale, which the District Court accepted in all regards except WAM being the intended buyer. Although Weiser advocated for its right to the Disputed Stock, the fact that the District Court issued the restitution award nevertheless constitutes a form of success "without regard to the recovery sought" under NRS 18.010(2)(b). Paradoxically, the District Court's judgment bears little relation to Skarpelos's actual claims at trial, all of which it rejected.

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

Even if the Court were to conclude that Weiser did not prevail in the interpleader by obtaining the quarter-million-dollar restitution award, it should still vacate the District Court's fee award because Weiser produced credible evidence in

support of its claim to the Disputed Stock. In this regard, Weiser's Opening Brief provided the litany of evidence supporting this claim. OB at 55–56. In particular, WAM submitted the testimony of Livadas, who repeatedly explained that Skarpelos's cancellation of Certificate 753 meant that WAM was left with the right to the Disputed Stock. Section 1.2.1, *supra*. 7 JA1283; 7 JA1331–32; 7 JA1342; 7 JA1467.

Skarpelos's primary argument in response is that WAM, through Livadas, abandoned its ownership claim at trial. AB at 48–50. As explained above, however, this is a gross mischaracterization of the testimony of Livadas, who repeatedly reiterated WAM's claim to the Disputed Stock. Section 1.2.2, *supra*. Skarpelos also argues that Livadas "testified that WAM as a broker was merely facilitating the sale of stock to another WAM customer." AB at 48, 49–50 (emphasis added). To be sure, WAM's role was like a broker in that the stock was *ultimately* intended to go from Skarpelos to the WAM client–buyers. But Livadas testified that the stock necessarily had to pass directly through WAM—who, if things went as plan, would only own it for a "nanosecond"—and that, unlike a traditional brokered sale, the obligations in the April 2013 sale ran directly through WAM such that Skarpelos and the WAM client–buyers had no direct obligations to one another. 7 JA1283; 7 JA1305; 7 JA1331–32.

Last, Skarpelos suggests that "credible evidence" under NRS 18.010(2)(b)'s "groundless" standard means evidence that a factfinder ultimately adopts as true. OB at 7–8, 40. This is incorrect. "Credible" means only that which is "capable" of being believed, as opposed to "credited," which means accepted. *In re Estate of Shimizu*,

411 P.3d 211, 216 (Colo. App. 2016); *Bergmann v. Boyce*, 856 P.2d 560, 564 (Nev. 1993) (relying on Colorado law in interpreting NRS 18.010(2)(b)'s groundless standard). Here, while the District Court may not have adopted Livadas's explanation as to why WAM was left with the legal right to the Disputed Stock in the aftermath of the April 2013 sale, Skarpelos never claims that this explanation is incapable of being believed.

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

Skarpelos does not dispute that colorable theories do not warrant fees under NRS 18.010(2)(b) even if they are novel and unsupported by current Nevada law. OB at 57 (citing, e.g., *Frederic & Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 113 (Nev. 2018)). In the Opening Brief, Weiser argued that even accepting the District Court's finding that there was no intent that WAM should receive the Disputed Stock in the April 2013 sale, Weiser still presented a colorable theory as to why it should have been awarded the Disputed Stock out of the three potential claimants. OB at 56–59. Because Skarpelos believes this theory "is not easily deciphered," Weiser will reiterate. Among the three potential claimants to the Disputed Stock—(1) the WAM client–buyers, (2) Skarpelos, and (3)WAM—WAM has the best claim, particularly given the equitable nature of interpleader. *Id*. at 56–59.

Skarpelos should not get the Disputed Stock because (a) he sold that stock in April 2013, (b) he received the proceeds from that sale, and (c) it was his fraudulent cancellation of Certificate 753 that prevented WAM from dematerializing and

delivering the stock therein to the WAM client–buyers. *Id*. at 58. Skarpelos never responds to this point.

Nor, Weiser argued, should *the WAM client–buyers* in the April 2013 sale get the Disputed Stock because they have been made whole by WAM and were never even aware of this dispute. *Id*. Skarpelos does not deny this either.

That leaves *WAM*, who satisfied its obligations to both the WAM client–buyers (providing the stock) and Skarpelos (providing the proceeds). Skarpelos repeatedly claims that WAM could have sought damages for its short positions. AB at 53. Perhaps WAM could have done so as an alternative claim, but Skarpelos consistently avoids the equitable nature of WAM's claim: Why should he get to keep the Disputed Stock that he previously sold when the only reason WAM could not dematerialize and transfer the stock was Skarpelos's act of fraud? As noted previously, awarding Skarpelos the Disputed Stock rewards him for his bad act. Thus, even if WAM was not the intended recipient in the District Court's estimation, it still has a better claim to the Disputed Stock than Skarpelos.

While Skarpelos claims that this a new theory never presented before the District Court (AB at 51–52), he never explains what is "new" about it. WAM has always claimed that it, not Skarpelos, should get the Disputed Stock. Nor—in articulating its equitable claim to the Disputed Stock under the District Court's understanding of the April 2013 sale—does WAM rely on any new facts or legal doctrines.

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

In the Opening Brief, Weiser showed that the District Court's fees award was not supported by the misguided notion that Weiser changed its legal theory at trial. OB at 59–62.

First, Weiser demonstrated that there is nothing in NRS 18.010(2)(b) that authorizes a fee award for a putative change of legal theory, which would undermine the well-established right of litigants to advocate alternative claims. *Id*. at 59–60 (citing several Nevada authorities). Weiser made the same point before the District Court. 12 JA2506. Skarpelos, however, never disputes this, much less provided contrary authority. Accordingly, *Skarpelos concedes that the District Court's fee award cannot be justified by claiming that Weiser changed its legal theory at trial*, which by itself should end the Court's consideration of this alleged basis for fees.

Second, as set forth in the Opening Brief, Weiser emphatically disagrees with the claim that it changed its "legal theory" at trial. That claim is premised on the belief that the April 2013 sale and the July 2013 PSA represent two completely different "legal theories." OB at 40–42, 60. Skarpelos claims he believed that Weiser's entire case relied exclusively on the July 2013 PSA. AB at 31–35, 55–57. But Weiser consistently explained that the July 2013 PSA was intended to memorialize the April 2013 sale, which was fully performed just three months earlier. 3 JA0473; 3 JA0468; 3 JA0471–73. The idea that the performance and memorialization of the same contract are two different "legal theories" is preposterous. They are two parts of *the same transaction*. *See*, *e.g.*, *Tropicana Hotel*

Corp. v. Speer, 692 P.2d 499, 502 (Nev. 1985) ("Generally, performance by a party after agreement has been reached but before a writing has been prepared is regarded as some evidence that the writing was only a memorial of a binding agreement."). Nor has Skarpelos ever disputed that any written memorialization of the April 2013 sale was legally unnecessary. OB at 56; 7 JA1304, JA1308–09.

While Skarpelos claims surprise that WAM asserted its right to the Disputed Stock at trial, WAM did so throughout the case. WAM answered NATCO's interpleader (1 JA0058), filed crossclaims against Skarpelos (1 JA0067), answered Skarpelos's crossclaims with denials and affirmative defenses (1 JA0071), and why it was a party throughout the proceedings. Nor does Skarpelos ever deny that parties have a right to plead and try alternative theories of relief. OB at 60.

Third, Skarpelos's claim of surprise represents an ostrich-like act of burying one's head in the sand. The District Court found that Skarpelos sold the Disputed Stock through WAM in April 2013 and subsequently withdrew the proceeds from his account. It is no great leap to infer that Skarpelos was thus aware of the April 2013 sale and should have reasonably understood that it was a critical part of this case. Indeed, Weiser produced Skarpelos's WAM Account Statement—which showed a sale for 3,316,666 Anavex shares (i.e., the Disputed Stock) in exchange for $250,000 (minus the $420 processing fee) in April 2013—at the beginning of the case. 9 JA1769; 6 JA1219–21. Weiser also unequivocally explained well before trial in summary judgment and discovery briefs that the July 2013 PSA was merely a memorialization of the April 2013 sale, and a legally unnecessary one at that. 3 JA0473; 3 JA0468; 3 JA0471–73.

Responding to Skarpelos's single-sentence prejudice claim in the Opening Brief that he could have "demanded a jury trial and would have conducted discovery differently" had he better understood Weiser's claims (Skarpelos's Opening Brief at 35), Weiser noted that Skarpelos could have sought a jury trial anyway and failed to explain what additional discovery he would have conducted given that the April 2013 sale and his WAM withdrawals were already at issue. OB at 42–43, 60–61. Shaking his rhetorical fist in the air, Skarpelos accuses Weiser of "trivializing the constitutional right to a jury trial and the right to conduct appropriate discovery" and devotes four full pages of his Answering Brief to a subject on which he proffered 26 total words in his opening brief. *Id*. at 35–39.

Skarpelos also cites *Awada v. Shuffle Master, Inc.*, 173 P.3d 707 (Nev. 2007) for the proposition that he could not have sought a jury trial because "this was an interpleader action." AB at 36. But the District Court's restitution award, as explained above, was an equitable determination, not a "damages award" on a legal issue, for which Skarpelos could have sought a jury. Moreover, because Weiser sought damages in its crossclaims for breach of contract, Skarpelos could have sought a jury trial anyway. 1 JA0068–69.

Skarpelos next claims that he could have sought discovery on WAM's "true" damages in having to take short positions to cover the clients to whom it promised the Disputed Stock, which Skarpelos characterizes as WAM's "true claim." AB at 37. In other words, Skarpelos claims to have been prejudiced because he did not conduct discovery on a claim that WAM never brought and concerning damages that

it never recovered. Weiser is unaware of any authority providing that such hypothetical prejudice warrants a fees award.

Fourth, Weiser further explained that a trial was going to be necessary in this case no matter what because Skarpelos claimed that he never opened a WAM account, sold the Disputed Stock, or received any funds from his WAM account, all of which were necessary to WAM's recovery of the $245,464.64 restitution award. OB at 61–62. Skarpelos does not appear to dispute this. Instead, he claims that Weiser should have sought damages from the short positions it took to cover the WAM client–buyers (a hypothetical claim that Skarpelos shadowboxes throughout his brief). AB at 37–38. In other words, Skarpelos concedes that, given the District Court's findings, WAM had meritorious and non-frivolous claims in this case, it just did not *present* those claims properly, which is an improper basis for a fees award.

CONCLUSION

As set forth in its Opening Brief, Weiser asks that the Court vacate and reverse both the District Court's judgment awarding the Disputed Stock to Skarpelos and its award of fees.

DATED this 15th day of January, 2021

Holland & Hart LLP

/s/Frank Z. LaForge

Matthew B. Hippler
Nevada Bar No. 7015
Frank Z. LaForge
Nevada Bar No. 12246
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
(775) 327-3000

Attorneys for Respondents

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 6913 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 15th day of January, 2021.

Holland & Hart LLP

/s/Frank Z. LaForge

Matthew B. Hippler
Nevada Bar No. 7015
Frank Z. LaForge
Nevada Bar No. 12246
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
(775) 327-3000

Attorneys for Respondents

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(e), I hereby certify that on the 15th day of January, 2021, I electronically filed the foregoing **WEISER'S REPLY 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.

John F. Murtha
Dane W. Anderson
Seth J. Adams
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Reno, Nevada 89505
jmurtha@woodburnandwedge.com
danderson@woodburnandwedge.com
sadams@woodburnandwedge.com

/s/ Martha Hauser
An Employee of Holland & Hart LLP