IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL LAGUDI, an individual; and WILLIAM TODD PONDER, an individual, Appellants, *vs.* FRESH MIX, LLC, a Delaware limited liability company; and GET FRESH SALES, INC., a Nevada corporation, Respondents.	No. 80950

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id*. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District County Eighth Department 11

County Clark Judge Elizabeth G. Gonzalez

District Ct. Case No. A-18-785391-B

2. Attorney filing this docketing statement:

Attorney Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith

Telephone 702-949-8200

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Address 3993 Howard Hughes Parkway, Suite 600
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Attorney Mark J. Connot and Lucy C. Crow Telephone 702-262-6899

Firm FOX ROTHSCHILD LLP

Address 1980 Festival Plaza Drive, #700
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Client(s) Paul Lagudi and William Todd Ponder

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney James J. Pisanelli, Debra L. Spinelli, and Ava M. Schaefer

Telephone 702-214-2100

Firm PISANELLI BICE PLLC

Address 400 S. Seventh Street, Suite 300
Las Vegas, Nevada 89101

Client(s) Fresh Mix, LLC and Get Fresh Sales, Inc.

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify)
- ☐ Divorce Decree:
  - ☐ Original
  - ☐ Modification
- ☒ Other disposition (specify): Order granting sanctions

5. Does this appeal raise issues concerning any of the following? No.

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

This action stems from a dispute over the operation and revenue sharing of two intertwined produce companies. The district court sent the matter to arbitration and stayed the litigation. Defendants initiated arbitration proceedings and hired Fox Rothschild as counsel.

Plaintiffs then moved to amend the complaint and lift the stay, and defendants opposed plaintiffs' motion. On August 1, 2019, plaintiffs filed their Reply Brief in Support of Motion to Lift Stay and Amend Complaint in the court action pending before Judge Gonzalez, which attached a document referenced by both parties as the "Memo." The Court partially granted and partially denied plaintiffs' Motion to Amend the Complaint and Lift the Stay, permitting plaintiffs to file the Amended Complaint, but retaining jurisdiction over the books and records and receivership issues only, and compelling the remaining claims to arbitration.

Following the alleged termination of plaintiffs, defendants delivered in boxes items from plaintiffs' offices at Fresh Mix. Plaintiffs' former counsel saw on top of those items a memo, which contained what counsel viewed as an intentional threat to plaintiffs. When transitioning the case to Fox Rothschild LLP, former counsel described the circumstances of the delivery of the memo as well as his impressions of the document. Plaintiffs later attached the memo to a motion to amend the complaint. Defendants asserted attorney-client privilege and asked for sanctions related to plaintiffs' possession and use of the memo. After an evidentiary hearing, the district court sustained the privilege and imposed sanctions, including striking counsel's pro hac vice admission, ordering the destruction of the memo and all references to it, and dissolving the arbitration panel and vacating all of its orders, forcing the parties to begin arbitration anew before a different panel. Plaintiffs-appellants appeal from these orders.
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9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

1. Under the Uniform Arbitration Act (NRS 38.206 et seq.) or the Federal Arbitration Act (9 U.S.C. § 1 et seq.), does a district court have jurisdiction to interfere in an ongoing arbitration—dissolving the arbitration panel for perceived taint and vacating all of its orders—before the entry of a final arbitration award?

2. Did the district court err in sustaining defendants' claim of privilege over a memo that, under governing Delaware law, cannot be concealed from plaintiffs as minority shareholders?

3. In assessing a claim of privilege, may a district court consider the allegedly privileged document's content if the recipient of that document "promptly present[s] the information to the court under seal for a determination of the claim"?

4. Did the district court's sanctions for alleged privilege violations, including dissolution of the arbitration proceedings, exceed the district court's discretion?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised: N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues? N/A

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

This matter raises the important issue of whether a district court can interfere in an ongoing arbitration—including to dissolve the arbitration panel and to vacate all of its interlocutory orders—before the panel issues its final arbitration award. The federal circuit courts have addressed this issue, but this Court has not.

This appeal also raises the significant question of how to assess a claim of privilege when the allegedly privilege document is given to minority shareholders of the party asserting the privilege, and whether Rule 26's requirement to sequester or destroy purportedly privileged information prohibits a district court's review of the document under seal. Here, as required, plaintiffs-appellants presented the claimed privileged information to the district court under seal to determine whether or not it was privileged. The district court, rather than allowing appellants to present argument on it, rejected the evidence and held that appellants committed misconduct. It is important that this Court determine the uniform application of NRCP 26(b)(5)(B).

13. Assignment to the Court of Appeals or Retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court under NRAP 17(a)(9), (11), and (12).

14. Trial. If this action proceeded to trial, how many days did the trial last?

N/A

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 3/2/20 (Exhibit A)

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

In candor, this appeal probably is premature because appellants also filed a timely motion under NRCP 52(b), 59(e), and 60(b). Appellants appeal from the order sustaining defendants' privilege and imposing sanctions, including dissolving the arbitration panel and vacating all of its orders, forcing the parties to begin arbitration anew before a different panel.

Pursuant to NRAP 4(a)(6), this notice of appeal will be deemed timely upon entry of the order resolving the pending tolling motion.

17. Date written notice of entry of judgment or order was served 3/2/20 (Exhibit A)

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☒ NRCP 52(b) Date of filing 3/30/20 (Exhibit B)

☒ NRCP 59 Date of filing 3/30/20 (Exhibit B)

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. __, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion.

The motion remains pending.

(c) Date written notice of entry of order resolving tolling motion was served

Was service by: N/A

☐ Delivery

☐ Mail/Electronic/Fax

19. Date notice of appeal filed 3/31/20 (Exhibit C)

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

The time limit for filing the notice of appeal from a final judgment or an order under the Uniform Arbitration Act (NRS 38.247(2)) is governed by NRAP 4(a)(1).

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)
- ☒ NRAP 3A(b)(1)
- ☐ NRAP 3A(b)(2)
- ☐ NRAP 3A(b)(3)
- ☒ Other (specify) NRS 38.247
- ☐ NRS 38.205
- ☐ NRS 233B.150
- ☐ NRS 703.376

(b) Explain how each authority provides a basis for appeal from the judgment or order:

Appellants believe that the district court's order is appealable under NRAP 3A(b)(1) or NRS 38.247(1). Although the district court did not resolve all issues in the complaint, the order effectively dismisses the complaint in the arbitration. This is akin to the denial of a motion to compel arbitration (NRS 38.247(1)(a)) or the vacatur of the arbitration panel's order (NRS 38.247(1)(e)). Because a district court's intervention in ongoing arbitration proceedings is so unusual, however, no rule or statute squarely addresses the question of appealability.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Paul Lagudi
William Todd Ponder
Fresh Mix, LLC
Get Fresh Sales, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

N/A.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiffs filed their "Verified Amended Complaint and Derivative Action" for breach of contract, breach of fiduciary duty (Get Fresh), declaratory judgment, accounting, tortious interference, unjust enrichment, breach of fiduciary duty (Caldara, Goldberg, and Wise), aiding and abetting breach of fiduciary duty, books and records demand, breach of fiduciary duty and aiding and abetting such breach, breach of duties of implied good faith and fair dealing and aiding and abetting such breach, waste and aiding and abetting such waste, breach of implied covenant of good faith and fair dealing, tortious breach of implied covenant of good faith and fair dealing, and appointment of custodian or receiver on September 19, 2019 (Exhibit D).

The district court ordered arbitration of certain issues but ordered the arbitration proceedings stricken on March 2, 2020 (Exhibit E). The remaining claims for equitable relief are pending in district court.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

See answers to Questions 16 and 21(b) above.

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

As discussed in the answer to Question 21(b), appellants believe that the district court's order is appealable under NRS 38.247 as an order striking arbitration proceedings.

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Paul Lagudi and William Todd Ponder
Name of appellants

Abraham G. Smith
Name of counsel of record

/s/ Abraham G. Smith
Signature of counsel of record

April 29, 2020
Date

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I hereby certify that this "Docketing Statement" was filed electronically with the Nevada Supreme Court on the 29th day of April, 2020. Electronic service of the foregoing "Docketing Statement" shall be made in accordance with the Master Service List as follows:

James J. Pisanelli
Debra L. Spinelli
Ava M. Schaefer
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Respondents

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

JOHN WALTER BOYER
5345 Golden Gossamer
Las Vegas, Nevada 89149

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT A TO DOCKETING STATEMENT

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **NOTICE OF ENTRY OF DECISION AND ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW** Hearing Date: January 21-22, 2020 and February 14, 2020

PLEASE TAKE NOTICE that a Decision and Order; Findings of Fact and Conclusions of Law was entered in the above-captioned matter on March 2, 2020, a true and correct copy of which is attached hereto.

DATED this 2nd day of March 2020.

PISANELLI BICE PLLC

By: _____
James J. Pisanelli, Esq., Bar No. 4027
Debra L. Spinelli, Esq., Bar No. 9695
Ava M. Schaefer, Esq., Bar No. 12698
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 2nd day of March 2020, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF DECISION AND ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following:

Mark J. Connot, Esq.
Lucy C. Crow, Esq.
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An employee of PISANELLI BICE PLLC

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FFCL

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **DECISION AND ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW** Date of Hearing: January 21-22, 2020 and February 14, 2020 Time of Hearing: 9:30 a.m. / 9:00 a.m.

On January 21 and 22, 2020, and February 14, 2020, this Court conducted an evidentiary hearing on Get Fresh Sales, Inc. ("Get Fresh") and Fresh Mix, LLC's ("Fresh Mix") (Get Fresh and Fresh Mix, together "Defendants") (1) Motion for Sanctions filed on August 26, 2019, (the "Motion for Sanctions") and (2) Motion to Disqualify Fox Rothschild LLP filed on August 23, 2019 (the "Motion to Disqualify"). Based on the evidence presented, the briefs before the Court and the arguments of counsel, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. <u>A Dispute Arises Between Get Fresh and Plaintiffs Lagudi and Ponder.</u>

1. Fresh Mix is owned by Get Fresh (60%), Plaintiff Paul Lagudi ("Lagudi") (30%), and Plaintiff William Todd Ponder ("Ponder") (10%), each of which is Member of Fresh Mix. Get Fresh, in turn, is owned by Dominic Caldara, Scott Goldberg, and John Wise. Caldara, Goldberg, Wise, Lagudi, and Ponder are all Managers of Fresh Mix.

2. Beginning on January 11, 2010, Lagudi and Ponder were employees of Fresh Mix.

3. In late 2017/early 2018, disputes arose between Get Fresh and Plaintiffs Lagudi and Ponder (Lagudi and Ponder, together "Plaintiffs") concerning Fresh Mix. Although the parties endeavored to resolve their disputes without litigation, the prospect of litigation remained throughout 2018. By the spring of 2018, all parties had retained counsel to guide and advise them through these disputes, but also in anticipation of the arbitration mandated by Fresh Mix's Operating Agreement.

4. In April 2018, Get Fresh retained Bruce A. Leslie, Esq. for legal advice and representation related to its disputes with Plaintiffs related to Fresh Mix. Plaintiffs had already retained Jeffrey Bendavid, Esq.

B. <u>The Creation of the Confidential and Privileged Memorandum.</u>

5. Near the outset of Get Fresh's retention of Leslie, Goldberg prepared a memorandum at Leslie's request and for the purpose of seeking legal advice relating to the on-going disputes that Get Fresh was having with Lagudi and Ponder (the "Memorandum").

6. Goldberg began drafting the Memorandum on his secured drive at Get Fresh. The secured drive is only accessible via Goldberg's password-protected account, that of the Get Fresh Senior Vice President of Finance (Mary Supchak), and the members of the IT administrator group. Goldberg saved a partial draft of the Memorandum to the secured drive, and then emailed the partial draft as an attachment from his password protected Get Fresh email address to his non-Get Fresh business email address.

7. Goldberg's non-Get Fresh business email address is also password protected.

8. Goldberg finished drafting the Memorandum on his password-protected personal desktop computer and then emailed it as an attachment from his non-Get Fresh business email address to his Get Fresh email address.

9. On May 2, 2018, in anticipation of a May 3, 2018 meeting with Leslie and Get Fresh partners, Caldara and Wise, Goldberg sent an email to Leslie with the Memorandum attached, copying Caldara and Wise.

10. The Memorandum contains an assessment of Get Fresh's strengths and weaknesses regarding its dispute with Plaintiffs concerning Fresh Mix. It also contains legal strategies and a decision tree regarding potential resolution and plans.

11. Goldberg, Caldara, and Wise never printed the Memorandum or disseminated the document outside of the privileged sphere.

C. Fresh Mix Terminates Lagudi and Ponder's Employment and Get Fresh Delivers Lagudi and Ponder's Personal Effects to them via their Attorney, Bendavid.

12. Fresh Mix sent letters terminating Lagudi and Ponder's employment on November 26, 2018.

13. Supchak packed up Plaintiffs' personal items from their offices, separating personal and company documents.

14. Supchak testified that the Memorandum was not in any of the boxes of documents that she packed up when assembling the boxes of Plaintiffs' personal items.

15. On December 3, 2018, Leslie emailed Bendavid about the return of Plaintiffs' personal items from their offices at Get Fresh. Bendavid testified that he intentionally refused to respond to Leslie about where to deliver the boxes.

16. The same day, December 3, 2018, Plaintiffs initiated this action by filing the Complaint.

17. On December 4, 2018, the boxes of Plaintiffs' personal effects were delivered to Bendavid's office by Get Fresh employees Scott Putske and Marcus Sutton. A receipt of the boxes was executed by an employee at Bendavid's office and returned to Get Fresh.

18. Bendavid did not see the boxes being delivered and he did not know how long the boxes were in his office before he saw them.

19. Bendavid testified that the Memorandum was purportedly sticking up out of one of the boxes of Plaintiffs' personal items, rolled in half but without a crease.

20. Bendavid testified that he did not see anyone place the Memorandum into one of the boxes.

21. Both Putske and Sutton testified that neither of them saw a piece of paper sticking out of any of the boxes they delivered, no one asked them to deliver any paper/memorandum, and no one asked them to place a piece of paper such that it was sticking out of any of the boxes when they were delivered.

22. Ponder was at Bendavid's office reviewing documents and meeting with one of Bendavid's associates the day the boxes were delivered, *i.e.*, December 4, 2018.

23. Bendavid testified that he did not and could not see if Ponder had access to the boxes prior to Bendavid seeing the boxes after they were delivered to his office.

24. At Bendavid's request, Ponder took all of the boxes home with him that same day, and went through each one, including the boxes containing Lagudi's personal items.

25. Ponder testified that the boxes he took home with him did not contain the Memorandum. According to Plaintiffs, Bendavid had taken it out of a box and not provided it to Ponder.

26. Bendavid testified that he removed the Memorandum from the box, initially thinking it was an inventory or receipt, but did not look at the document at that time. Instead, he read and digested the Memorandum either later that same day, on December 4, 2018, or the following day, December 5, 2018.

27. Bendavid testified that, upon his review of the Memorandum, (a) he recognized the Memorandum was a document belonging to his adversaries about what they wanted to do in this dispute against Plaintiffs; (b) he understood that the Memorandum contained concepts of litigation strategy of his adversaries; and (c) he understood the Memorandum contained strengths and weaknesses of Defendants' case.

28. Bendavid testified that he did not know, when he read the Memorandum, who drafted it, although he knew it was not drafted by his clients, Lagudi or Ponder.

29. Bendavid testified that both the drafter and the source of the Memorandum were anonymous to him.

30. Nevertheless, Bendavid said that he assumed the Memorandum was voluntarily and intentionally sent by an authorized Get Fresh representative and stated also his belief that it was not privileged because it was a threat.

31. Although he had interacted with Leslie regarding Plaintiffs' personal items in their office, Bendavid did not alert Leslie nor did he alert any other counsel for Defendants to his receipt of the Memorandum.

32. Bendavid submitted a declaration in which he stated that "had [he] had the Memo [while drafting the Complaint and TRO], we would have referred to it in the Complaint and attached it to the Motion for Preliminary Injunction and TRO." (Ex. 1 to Pls.' Second Suppl. Opp'n, Feb. 3, 2020, Bendavid Decl. ¶ 23.)

33. Bendavid testified that he did not inform his clients, Lagudi and Ponder, of the Memorandum for weeks. During a meeting at his office weeks after receipt, Bendavid told Plaintiffs about the Memorandum, and read them excerpts from the Memorandum, but did not provide them copies. Lagudi and Ponder did not ask for copies of the Memorandum.

D. Bendavid Transitions Out of the Case and Sends the Memorandum to Stern & Eisenberg and Fox Rothschild.

34. Plaintiffs retained Stern & Eisenberg in or around March of 2019. On March 1, 2019, Evan Barenbaum, Esq., of Stern & Eisenberg, first appeared in the arbitration compelled by this Court, pending before the American Arbitration Association.

35. Berkley testified that Barenbaum contacted Fox Rothschild LLP about representing the Plaintiffs. Brian Berkley, Esq., and Mark Connot, Esq., both of Fox Rothschild LLP, subsequently interviewed to represent Plaintiffs.

36. Plaintiffs retained Fox Rothschild in March of 2019. Fox Rothschild attorneys Berkley and Connot testified that they were co-lead counsel for Plaintiffs in this litigation and the arbitration.

37. Upon retention, Fox Rothschild subsequently received the case file. Berkley did not recall whether the file transfer was in electronic or paper form, nor did he recall whether the

files came directly from Bendavid, or went through Barenbaum. Connot testified that to the best of his recollection, the bulk, if not the entirety, of the file came in an electronic format.

38. Fox Rothschild admits to learning of the Memorandum upon its retention, *i.e.*, in March of 2019. Berkley testified that he first received the Memorandum from Barenbaum in March 2019 as an attachment to an email. Fox Rothschild did not log this communication on the privilege log ordered by this Court as part of the sanctions discovery.

39. Stern & Eisenberg's redacted billing records reveal that it, too, received the Memorandum upon retention. Specifically, the billing records reveal that, on March 13, 2019, Barenbaum spoke to "Mr. Bendavid re delivery of Get Fresh document."

40. Despite multiple interactions with Defendants' counsel, including interactions directly related to the contents of the boxes delivered to Plaintiffs on December, 4, 2018 and an inspection of another set of boxes in the spring of 2019, neither Fox Rothschild nor Stern & Eisenberg notified Get Fresh or their counsel of their receipt or possession of the Memorandum.

41. Berkley testified that, prior to him reading the Memorandum, he asked Barenbaum about the circumstances regarding the delivery of the Memorandum to Bendavid. Berkley and Connot testified that Barenbaum told them that the Memorandum was delivered with a box of documents when Lagudi and Ponder's employment was terminated, and that the Memorandum was viewed as a threat. Barenbaum, as well as Lagudi and Ponder, told Berkley that the Memorandum came from Get Fresh.

42. Connot testified that there was no specific knowledge or evidence of how the Memorandum ended up in Plaintiffs' boxes; Bendavid did not have any direct knowledge regarding who put the Memorandum in the boxes.

43. Prior to reading the Memorandum, Berkley knew that it was not Lagudi or Ponder's document, and that neither of them had written it. Around the time he read the Memorandum, or shortly thereafter, Connot assumed that it was Defendants' record, and that it was Defendants' document.

E. Plaintiffs Weaponize the Memorandum, and Refuse to Return, Sequester, or Destroy It, Notwithstanding Multiple Court Orders.

44. On July 17, 2019, Plaintiffs filed a motion to lift the stay that this Court entered pending the arbitration, and to amend their complaint.

45. Get Fresh and Fresh Mix filed their opposition on July 25, 2019.

46. In preparation of their reply in support of their motion to stay (the "Reply"), on July 31, 2019, Plaintiffs attorney, Barenbaum, emailed his clients Lagudi and Ponder, as well as his Fox Rothschild co-counsel, Connot, Berkley,[1] and Emily Bridges, Esq., and a colleague at his own firm, Thomas Shea, Esq., attaching the Memorandum to his email.

47. Plaintiffs logged this July 31, 2019 email communication on their December 13, 2019 privilege log, and identified the Memorandum attached thereto as a Word document.

48. Fox Rothschild attorney Berkley was the lead drafter of the Reply. Fox Rothschild attorney Connot was involved in editing and revising the Reply. Berkley and Connot conferred about the strategy to use the Memorandum in connection with the Reply, and agreed to do so. Berkley further testified that Barenbaum participated in the decision to put the Memorandum into the public record.

49. Plaintiffs filed their Reply on Thursday, August 1, 2019. The Reply contained arguments based upon the Memorandum, including quotations from the Memorandum and paraphrases of its content. Plaintiffs also attached the Memorandum to the Reply as Exhibit T. Despite filing a motion to seal and redact associated with their Reply and certain exhibits thereto, Plaintiffs filed the Memorandum in the public record.

50. Plaintiffs' Reply was the first notice Defendants received of Plaintiffs' possession of the privileged Memorandum.

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[1] Plaintiffs filed a Motion to Associate Counsel, seeking an order permitting Berkley to practice in Nevada pursuant to SCR 42 on August 20, 2019. Defendants filed a Response thereto on August 30, 2019, and the Court subsequently granted the Motion to Associate Counsel on October 4, 2019.

51. Upon receipt and review of the Reply, Get Fresh's counsel immediately took action to protect Get Fresh's privileges.

52. On Friday, August 2, 2019, James J. Pisanelli, counsel for Get Fresh and Fresh Mix, called and spoke to Plaintiffs' counsel, Connot, asserted Get Fresh's privilege claim over the Memorandum, asked how Plaintiffs acquired the Memorandum, and stated that Get Fresh would be seeking Court relief. Connot stated that he did not know that the Memorandum was privileged because it "seems to be internal" and references getting litigation counsel.

53. Get Fresh moved promptly and, that same day, submitted an Emergency Motion to Strike the Reply and Exhibit T, unequivocally asserting its privilege claim over the Memorandum, asking that the offending Reply and Exhibit T be struck, and that Plaintiffs be directed to sequester the Reply, the Memorandum, and any related notes or memos from use and review.

54. Fox Rothschild claimed that they sequestered the Memorandum once Get Fresh alerted them of its privilege claim.

55. Connot submitted a declaration in which he stated that "While I disagreed with whether the document was privileged, I immediately sequestered the Memo and advised by co-counsel at Fox Rothschild and Stern Eisenberg, as well as my clients, to sequester the Memo."

56. Similarly, Berkley submitted a declaration stating that "[u]pon receipt of the notice of privilege, I stopped review of the Memo . . . ."

57. Despite sequestration, Fox Rothschild took the position that it was permitted to review and use the Memorandum (including reference to its substance) to argue that it was not privileged.

58. The next business day, Monday, August 5, 2019, Get Fresh and Fresh Mix served its privilege log related to the Memorandum. (*See* Ex. J5, Defs. Fresh Mix & Get Fresh's Initial Privilege Log, Aug, 5, 2019.)

59. Rather than sequester the Memorandum upon notice of Get Fresh's privilege assertion, on Sunday, August 4, 2019, Plaintiffs again reviewed and digested the Memorandum to prepare and file their Opposition to the Emergency Motion. Throughout this Opposition, Plaintiffs ***again*** refer to, discuss, quote, and paraphrase the privileged Memorandum.

60. Berkley was the lead drafter of the August 4, 2019 Opposition to the Emergency Motion. Connot edited the Opposition.

61. At the hearing on Plaintiffs' Motion to Lift Stay and Amend the Complaint held on Monday, August 5, 2019, the Court struck Exhibit T (the Memorandum) from the record and permitted Get Fresh and Fresh Mix to move to redact both Plaintiffs' August 1, 2019 Reply and August 4, 2019 Opposition. The Court stated:

> I am not going to impede any efforts you make to obtain the ability to use Exhibit T in whatever format. And you guys are going to fight, and at that point I assume I'll do an in-camera review of Exhibit T and then make a decision . . . But I'm not there. . . . I'm going to mark the emergency motion, which I did not set for hearing, and the opposition to the emergency motion which I did not set for hearing as Court's Exhibit 1. I'm going to place them in a sealed envelope, because they have some reference to the document that I'm granting the striking of.

62. The Court's order was entered on August 22, 2019. Get Fresh and Fresh Mix subsequently moved to redact the briefs, and such relief was granted.

63. Notwithstanding the Court's order and statements during the August 5, 2019 hearing, Fox Rothschild took the position that it could nevertheless use the substance of the Memorandum to argue that it was not privileged or otherwise subject to protection.

64. Thus undeterred, Plaintiffs continued to use and paraphrase the Memorandum. Plaintiffs' August 12, 2019 Response to Amended Demand for Arbitration and Counterclaims (the "Response") submitted to the AAA in the arbitration compelled by this Court, paraphrases and uses exact words and phrases from the Memorandum (just omitting the quotation marks). (*See* Ex. J6, admitted under seal, ¶¶ 243, 244, 245, 300, 305, and p. 46:13-14.)

65. Berkley was the lead drafter of the Response. Connot was involved in analyzing, editing, and revising the Response. Other attorneys at Fox Rothschild (*e.g.*, Emily Bridges) worked on the Response, as did attorneys at Stern & Eisenberg.

66. Berkley and Connot each claim that they did not review the Memorandum when working on the Response, but the exact language of the Memorandum had been part of their institutional knowledge. Specifically, Berkley and Connot each submitted declarations stating

that they did not "have any intent to include references to the Memo or language from the Memo in the Arbitration Response."

67. Berkley testified that he did not intentionally incorporate direct language from the Memorandum into the Response. "That language was at that time in my head because I had written that multiple times during that one week." (Feb. 14, 2020 Hr'g Tr. 89:12-14; *see also id.* at 126:1-3 ("Those – those words were in my mind at that time, and the concepts and the actions that were being taken in real time by the defendants was also fresh in my mind.") and 131:1-20.[2])

68. Plaintiffs attached or relied upon their August 12, 2019 Response in briefs they filed both in the arbitration and this action.

69. Plaintiffs cited to and relied upon the Response within a Rule 37 Motion for Advancement of Indemnification under the Operating Agreement, filed on September 11, 2019. In their Motion for Advancement, Plaintiffs directed the arbitration panel to the very section of the Response that parroted the Memorandum.

70. Plaintiffs later attached the Response as Exhibit A to their Motion to Compel Production of Books and Records, filed on September 30, 2019 with this Court. Plaintiffs again directed the Court to the very section of the Response that parroted the Memorandum.

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[2] The final excerpt, 131:1-20 from the third day of the evidentiary hearing is as follows:

> THE COURT: Okay. So explain to me why the terms from the memo appear less than a week later in the reply you filed in the arbitration.
>
> THE WITNESS [BERKLEY]: Because those terms were fresh in my mind at that time because I had written those terms in multiple filings prior to the August 5th hearing and . . . and the concepts were fresh in my mind, as well, because both the writing of that as well as independently I had – you know, those actions were being taken by the plaintiffs – or the defendants. Excuse me.
>
> THE COURT: So the words were embedded in your mind because you'd previously quoted from the memo and used it in the reply brief?
>
> THE WITNESS: At that time they were, yes.
>
> THE COURT: So you couldn't forget what was in the memo and not use it as I directed because it was so fresh in your mind??
>
> THE WITNESS: At that time, yes.

71. Trying to bolster their argument that facts that independently supported the offending allegations in their Response, Plaintiffs again draw from the Memorandum in their February 3, 2020 Supplemental Brief.

72. On August, 23, 2019, Get Fresh and Fresh Mix filed the Motion to Disqualify Fox Rothschild LLP.

73. On August 26, 2019, because of Plaintiffs' continued use of the Memorandum and refusal to sequester it, Get Fresh and Fresh Mix filed a Motion for Claw Back, Discovery, and Sanctions Related to Plaintiffs and Their Counsel's Improper Possession and Use of Exhibit T and Other Privileged and Confidential Information.

74. On September 5, 2019, Plaintiffs filed their Opposition to the Motion for Claw Back and Counter-Motion, ***again*** referring to and discussing the Memorandum, and ***again*** attaching the Memorandum as an exhibit (Exhibit A).

75. Get Fresh and Fresh Mix moved to strike the Memorandum and all references to and discussion of the Memorandum in the brief, and this Court granted the requested relief via its order entered on September 25, 2019. Specifically, this Court ordered:

> Defendants' request for claw back is GRANTED in that Plaintiffs shall sequester the memorandum identified as Exhibit T to Plaintiffs' Reply in Support of Motion to Lift Stay and Amend Complaint from review and/or use. Plaintiffs may not quote, or discuss the content of the memorandum in any further pleadings or other papers other than in an evidentiary hearing or otherwise relating to the privileged nature of the document or the motion for disqualification.

76. Get Fresh and Fresh Mix subsequently moved to redact Plaintiffs' Opposition, and this Court granted the requested relief.

77. Plaintiffs filed another brief seeking to inject the Memorandum into the record, despite court orders and multiple filings and hearings.

78. In their September 19, 2019 motion, Plaintiffs moved to have the Court accept its offending Opposition to the Motion to Strike under seal and the Memorandum. The Court denied Plaintiffs' request in an October 8, 2019 order:

> ***The Court previously ordered the memorandum*** identified as Exhibit T to Plaintiffs' Motion to Lift Stay and Amend Complaint

> ***sequestered***. As a result, Plaintiffs shall not quote or summarize Exhibit T in any briefing until further order of the Court.

79. Despite this history, Plaintiffs tried again, filing a Motion to Clarify the Procedure related to this evidentiary hearing. In response, the Court reiterated its prior rulings:

> The Court ***previously*** made a decision that the memorandum identified as Exhibit T to Plaintiffs' Motion to Lift Stay and Amend Complaint ("The Memorandum") is facially privileged based upon the information that was provided to the Court.
>
> . . .
>
> Plaintiffs ***shall continue*** to sequester the Memorandum, and may not quote, summarize, or discuss the content of the Memorandum.

(Order on Pls.' Mot. to Clarify the Procedure re: Privilege Determination, dated January 8, 2020.)

80. Plaintiffs' counsel held, read, reviewed, and referred to the Memorandum throughout the evidentiary hearing on January 21 and 22, 2020.

81. Connot used the Memorandum during the examination of Scott Goldberg, while Berkley read along to assist Connot in the cross-examination.

82. Berkley and Connot each submitted declarations testifying that, after reviewing their billing records, they estimated to have spent less than two hours reviewing the Memorandum since being retained by Plaintiffs.

83. Although Berkley had access to Stern & Eisenberg and Fox Rothschild's full billing records regarding Plaintiffs' representation, he testified that he did not review these records for purposes of determining the full scope of the Memorandum's circulation and digestion. Berkley also testified that he did not ask his colleagues, other than Connot, how broadly the Memorandum had been circulated and digested.

84. Connot also reviewed billing records, reading in detail his time entries relating to the Memorandum.

85. Fox Rothschild did not take any action to remove the language from the Memorandum from the arbitration. The information is presently in the arbitration record.

86. Following the first two days of the evidentiary hearing on January 21 and 22, 2020, Berkley directed Bridges, an associate with Fox Rothschild, to run searches of the words

located in paragraphs 243 - 245 of the Response that are from the Memorandum against the other filings in the Arbitration. Berkley testified that Bridges emailed him the result of those searches and that there were no hits. The search was limited to the exact words from the Memorandum that were used in the Response, and did not capture themes derived from the Memorandum.

F. Plaintiffs Received Other Get Fresh Documents from Third Parties and Did Not Disclose Their Receipt to Defendants.

87. On September 25, 2019, the Court granted Get Fresh and Fresh Mix's request for discovery related to Plaintiffs' and their counsel's improper possession and use of the Memorandum and other privileged and confidential information. (*See* Order, dated Sept. 25, 2019.)

88. While conducting the Court-ordered discovery, Plaintiffs revealed, for the first time, that they had received documents from third parties unrelated to the litigation. Specifically, Plaintiffs revealed that they received documents from two disgruntled former Get Fresh employees.

89. Plaintiffs received confidential documents from David Heinrich, Get Fresh's former IT director. Heinrich left Get Fresh in 2014.

90. Ponder testified that in August of 2018, Heinrich informed him that he was in possession of certain Get Fresh purchase orders.

91. Later, in 2019, Heinrich gave copies of confidential Get Fresh records, specifically purchase orders ("POs"), to Lagudi. Some of these POs bear print dates ***years after*** Heinrich separated from Get Fresh, e.g., from September 2018.

92. Lagudi testified that in September of 2019, Matthew McClure emailed him confidential Get Fresh documents and records related to a recall from 2016. McClure had previously worked as a food safety consultant for Get Fresh, and left Get Fresh in 2017.

93. Rather than provide copies of the documents to Get Fresh, Lagudi provided these documents to his attorneys to determine how best to use them in the pending dispute with Defendants.

94. Plaintiffs made allegations in the arbitration related to these documents, Plaintiffs did not provide any notice to Defendants of their receipt of confidential company records outside of the ordinary discovery process from either a third party unrelated to the litigation or a person unauthorized to access or provide confidential company records.

95. Plaintiffs also did not provide Defendants' counsel with the particular details about how, when, and from whom they obtained the documents.

96. Any finding of fact stated above that is more appropriately deemed a conclusion of law shall be so deemed.

CONCLUSIONS OF LAW

A. Plaintiffs Were Required to Give Prompt Notice of Their Receipt of Their Adversary's Confidential and Privileged Document.

1. Under Nevada law, an attorney who receives confidential or privileged documents of its adversary regarding a case from an anonymous source or a third party unrelated to the litigation must promptly notify opposing counsel. *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 697, 262 P.3d 720, 725 (2011).

2. The required notice "must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery and describe, with particularity, the facts and circumstances that explain how the document or evidence came into counsel's or his or her client's possession." *Id.*

3. This notice requirement is designed to prevent parties from receiving an adversary's confidential or privileged documents outside the normal course of discovery and process, and "lying in wait" to announce their procurement and use the document against their adversary.

4. The notice requirement provides the owner of the document(s) an "opportunity . . . to register an objection and demand return and non-use. . . ." *Id.* at 694, 262 P.3d at 723.

5. If an attorney fails to comply with this notice requirement, the attorney "risk[s] being in violation of his or her ethical duties and/or being disqualified a counsel." *Id.* at 697, 262 P.3d at 725.

6. Plaintiffs testified that they first received the Memorandum in boxes of Plaintiffs' personal items from their offices at Get Fresh delivered to Bendavid in early December 2018.

7. Bendavid discussed the delivery of those boxes over email with Leslie, counsel for Defendants, but intentionally refused to respond to Leslie about where to deliver the boxes.

8. The boxes were delivered on December 4, 2018, the day after Plaintiffs filed a complaint in this action and the very day Plaintiffs submitted their application for temporary restraining order to this Court in this action.

9. Discovery had not yet commenced, and therefore documents received were received outside the normal course of discovery.

10. According to Bendavid, the Memorandum was purportedly sticking up out of one of the boxes of Plaintiffs' personal items. While he initially set it aside thinking it was an inventory, he read and digested the Memorandum later that same day, December 4, 2018, or the following day, December 5, 2018.

11. Bendavid testified that (a) he recognized the Memorandum was a document belonging to his adversaries about what they wanted to do in this dispute against Plaintiffs; (b) he understood that the Memorandum contained concepts of litigation strategy of his adversaries; and (c) he understood the Memorandum contained strengths and weaknesses of Defendants' case.

12. While Plaintiffs and Bendavid testified that they "believe" the Memorandum was "voluntarily" or "intentionally" provided to Bendavid by Goldberg, Plaintiffs failed to offer evidence, only supposition, to support this theory.

13. Bendavid testified that he did not see the boxes being delivered, he did not see anyone place the document in a manner sticking up out of one of the boxes, and he did not know how long the boxes were in his office before he saw them.

14. Plaintiffs themselves recognized that the Memorandum was not an item that had been in their offices and therefore should not have been in boxes that were delivered to them.

15. Despite Bendavid's admissions regarding the general subject matters of the contents of the privileged Memorandum, its suspicious receipt, and his communications with

Leslie about delivery of personal items but no company documents, Bendavid assumed that the Memorandum was voluntarily or intentionally sent by an authorized Get Fresh representative.

16. Nevada law requires more than an "assumption" to avoid the prompt notice obligation upon receipt of an adversary's confidential or privileged document outside the normal course of discovery. If an assumption were sufficient, the rule would be set aside merely by one's claim, without more, that their opponent gave it to them for any reason one can conjure.

17. It is not credible that Plaintiffs believed the Memorandum was a threat delivered to them, because it revealed not only Get Fresh's strengths and weaknesses, but also the options for potential resolution and plans.

18. Both the drafter and the source of the Memorandum were anonymous.

19. The notice requirement established by the Nevada Supreme Court in *Merits Incentives* was triggered.

B. Plaintiffs Failed to Give Prompt Notice of Their Receipt of Their Adversary's Confidential and Privileged Document.

20. Bendavid testified that he did not provide notice to Leslie or any other counsel for Defendants of either his receipt of the Memorandum or provide with any particularity the facts and circumstances that explain how the document or evidence came into his possession.

21. It is undisputed that neither Fox Rothschild nor Stern & Eisenberg provided notice to Leslie or any other counsel for Defendants of either their receipt of the Memorandum or any facts and circumstances that explain how the document or evidence came into their possession.

22. Failure to comply with the notice requirement and related ethical obligations may result in counsel's disqualification, even when the receipt of the privileged information was through no fault of their own. *Merits Incentives*, 127 Nev. at 697, 262 P.3d 725.

23. Fox Rothschild associated with Bendavid as counsel for Plaintiffs on May 16, 2019. Stern & Eisenberg is counsel for Plaintiffs in the arbitration (compelled by this Court). Both Fox Rothschild and Stern & Eisenberg took over as counsel for Plaintiffs in Bendavid's stead in or around March 2019. Bendavid's formal notice of withdrawal was filed on July 3, 2019.

24. Bendavid testified to transferring his file to Fox Rothschild. Bendavid's billing records confirm this copying, as well as receipt and review of the files by both Fox Rothschild and Stern & Eisenberg.

25. The Stern & Eisenberg billing records reflect that on March 13, 2019, Barenbaum spoke to "Mr. Bendavid re delivery of Get Fresh document."

26. Fox Rothschild represented, and it is in the record, that Bendavid imputed his knowledge concerning the Memorandum to Fox Rothschild. (*See* Pls.' First Suppl. Opp'n, 9:6-11 ("When Mr. Bendavid provided the Fresh Mix Memo to Fox Rothschild, he imputed this knowledge. Accordingly, Fox Rothschild, after considering whether the Fresh Mix Memo was a 'corporate work document,' and the circumstance between the parties at the time, had no reason to identify or suspect the Fresh Mix Memo to be privileged." (internal citation omitted).)

27. Fox Rothschild also represented, and it also is in the record, that they, too, reviewed and digested the Memorandum. (*See, e.g., id.* at 3:23-25 ("Upon being retained by Plaintiffs, Fox Rothschild learned of the Fresh Mix Memo and, like Mr. Bendavid, recognized that the Fresh Mix Memo was not privileged."), 10:6-9 ("Fox Rothschild abided by its ethical obligations at all times and reviewed the Fresh Mix Memo before Defendants ever claimed privilege. Mr. Bendavid knew upon reading the document that it was not privileged. Fox Rothschild attorneys reached the same conclusion.").)

28. It is undisputed that the first time Plaintiffs or any of their counsel provided notice to Defendants and their counsel of their possession of the Memorandum was on August 1, 2019, when Plaintiffs filed their Reply in Support of their Motion for Leave to Amend, attached the Memorandum to the Reply as an exhibit, and quoted extensively from the Memorandum.

29. According to Plaintiffs' testimony and argument in the record, they possessed the Memorandum without providing notice to Defendants or their counsel from December 4, 2018 to August 1, 2019, when they affirmatively used it, quoted from it, and attached it to a public filing in support of a motion they filed to advance their position.

30. Each and all of Plaintiffs' counsel, Bendavid, Fox Rothschild, and Stern & Eisenberg (via his representation of Plaintiffs in the arbitration this Court compelled) failed to comply with the notice requirement set forth in *Merits Incentives*.

31. Having received the Memorandum under suspicious circumstances in December 4, 2018 (by Bendavid) and the spring 2018 (by Stern & Eisenberg and Fox Rothschild), yet not providing any notice until affirmatively using the Memorandum in a Reply brief on August 1, 2019, Plaintiffs' counsel did "lie in wait" to provide notice only when it worked for them in the dispute against their adversary, and denied Get Fresh of any opportunity to object, demand return of the document, and non-use of the document. This is the exact type of behavior the Nevada Supreme Court criticized in *Merits Incentives*. 127 Nev. at 699, 262 P.3d at 727.

C. The Memorandum and Related Communications are Protected by the Attorney-Client Privilege and Work Product.

32. The attorney-client privilege protects the disclosure of a confidential communication "[b]etween the client or the client's representative and the client's lawyer or the representative of the lawyer" "for the purpose of facilitating the rendition of professional services." NRS 49.095.

33. "A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the client or those reasonably necessary for the transmission of the communication. NRS 49.055.

34. Nevada's work-product doctrine is set forth in NRCP 26(b)(3). It "protects documents with two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 383, 399 P.3d 334, 347 (2017) (citing *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004)) (internal quotation marks omitted).

35. The Nevada Supreme Court adopted the "because of" test to determine whether material was prepared in anticipation of litigation, and thereby satisfy the first requirement for

work-product protection. "The anticipation of litigation must be the *sine qua non* for the creation of the document – but for the prospect of that litigation, the document would not exist." *Wynn Resorts*, 133 Nev. at 383-84, 399 P.3d at 347-48 (internal quotation marks and citation omitted).

36. The party claiming privilege bears the burden of establishing the privilege, and does so by serving a privilege log. *See Rogers v. State*, 127 Nev. 323, 330, 255 P.3d 1264, 1268 (2011) (the proponent of privilege bears the burden of establishing the privilege); *Alboum v. Koe, M.D., et al.,* Discovery Commissioner Opinion #10, 15 (Nov. 2001) (a party provides a factual basis for its claims of privilege by producing a privilege log); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) ("In essence, the party asserting the privilege must make a *prima facie* showing that the privilege protects the information the party intends to withhold. We have previously recognized a number of means of sufficiently establishing the privilege, one of which is the privilege log approach." (citations omitted).

37. "The party asserting the privilege has the burden of proving its applicability, including that the party has not waived it." *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1040 (D. Nev. 2006) (citing *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981)).

38. "[A] corporation's current management controls the [attorney-client privilege] 'to refuse to disclose, and to prevent any other person from disclosing, confidential communications.'" *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 643, 656, 331 P.3d 905, 914 (2014).

39. "Courts in the Ninth Circuit consider the circumstances surrounding the disclosure when deciding if an inadvertent disclosure has waived the privilege. These courts typically apply a five-factor test to determine the waiver issue. These factors include: (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness." *IGT v. All. Gaming Corp.*, 2-04-CV-1676-RJC RJJ, 2006 WL 8071393, at *6 (D. Nev. Sept. 28, 2006) (quotation marks and citations omitted).

40. The Memorandum was prepared by Goldberg, owner and Chief Financial Officer for Get Fresh in April/May 2018, at the request of counsel, Leslie, providing confidential information for the purpose of seeking legal advice relating to the on-going dispute between the parties.

41. The Memorandum is facially and substantively privileged.

42. Get Fresh has maintained the confidentiality of the Memorandum since its creation.

43. Get Fresh has ensured the password protected nature and secured access to email and the related server.

44. None of the individuals on the email (Goldberg, Caldara, Wise, and Leslie) printed the Memorandum. None of them have ever disseminated the Memorandum outside of the privileged sphere.

45. Get Fresh did not voluntarily disclose the Memorandum to Plaintiffs or their counsel.

46. There is no indication that Get Fresh waived its claim to privilege or protection over the Memorandum. Any assumption as to how the document got into Plaintiffs or their counsel's possession is not controlling in a determination of waiver.

47. Upon learning that Plaintiffs possessed the Memorandum, Get Fresh alerted Plaintiffs and their counsel to its claim of privilege fewer than 24 hours later, repeatedly sought (and obtained) relief from the Court in order to keep the Memorandum out of the public record.

48. Get Fresh served a privilege log on August 5, 2019, in which Get Fresh asserted privilege over the Memorandum and communications related thereto.

D. Plaintiffs' Counsel Did Not Return or Sequester the Memorandum as Required By NRCP 26(b)(5)(B).

49. Once a party is placed on notice that information is subject to a claim of privilege or protection, NRCP 26(b)(5)(B) enumerates an affirmative obligation upon a party and their

counsel to "promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved."

50. Get Fresh informed Plaintiffs, through their counsel, of their claims of privilege and protection over the Memorandum on August 2, 2019. This was fewer than twenty-four hours after learning that Plaintiffs were in possession of the Memorandum.

51. Get Fresh served a privilege log asserting their claims of privilege and protection over the Memorandum and communications related thereto on August 5, 2019.

52. Plaintiffs admit that they did not "return, sequester, or destroy" the Memorandum after Get Fresh notified them of their claims of privilege and protection August 2, 2019.

53. Plaintiffs admit that they relied upon the Memorandum and its substance to argue that it was not privileged after they were put on notice of Get Fresh's claims.

54. It is "not [the receiving party's] prerogative to unilaterally determine whether the information received anonymously was truly proprietary, confidential, privileged, or some combination of those labels, and use the information it deem[s] appropriate." *Raymond v. Spirit AeroSystems Holdings, Inc.,* No. 16-1282-JTM-GEB, 2017 WL 2831485, at *15 (D. Kan. June 30, 2017) (discussing the analogous FRCP 26(b)(5)(B)).

55. "Rule 26(b)(5)(B) could not be more clear. Once a producing party claims a privilege in materials that have been produced, no further use is to be made of the information until the claim of privilege is resolved. As far as Rule 26(b)(5)(B) is concerned, it is immaterial if [the receiving parties] disagree with the claim of privilege. [The receiving parties] were prohibited from making any use of the information, period." *Mafille v. Kaiser-Francis Oil Co.*, 18-cv-586-TCK-FHM, 2019 WL 3219151, at *1 (N.D. Okla. July 17, 2019) (discussing the analogous FRCP 26(b)(5)(B); *Jensen v. Indianapolis Public Schools*, No. 1:16-cv-02047-TWP-DLP, 2019 WL 911241, at *3 (S.D. Ind. Feb. 22, 2019) (while attaching a cover letter and filing a motion for the court to make a privilege determination is consistent with FRCP 26, weaponizing the documents by referencing its contents violates the rule).

56. Plaintiffs continued to use and rely upon the Memorandum, as stated above.

57. Plaintiffs and their counsel continued to use the Memorandum in conjunction with the arbitration, using exact words and phrases from the Memorandum (just absent the quotation marks) and paraphrasing information from it in their Response to Amended Demand for Arbitration for Counterclaims. Plaintiffs and their counsel referred to and attached their Response to briefing both in the arbitration and this action.

E. Limited Disqualification is Necessary.

58. Disqualification may be necessary to prevent disclosure of confidential information that may be used to an adverse party's disadvantage. *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 53, 152 P.3d 717, 743 (2007).

59. "Where the 'asserted course of conduct by counsel threatens to affect the integrity of the adversarial process, [the court] should take appropriate measures, including disqualification, to eliminate such taint.'" *Richards v. Jain*, 168 F. Supp. 2d 1195, 1200 (W.D. Wash. 2001) (modifications in original) (quoting *MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991)); *cf. Clark v. Superior Court*, 196 Cal. App. 4th 37, 55 (Cal. App. 2011) (describing disqualification "as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed").

60. Where privilege information has been disclosed and misused, doubts should generally be resolved in favor of disqualification. *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000).

61. The Nevada Supreme Court has found that "there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified." *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 698, 262 P.3d 720, 726 (2011).

62. The Court "has the power, under appropriate circumstances, to disqualify an attorney even though he or she has not violated a specific disciplinary rule." *In re Meador*, 968 S.W. 2d 346, 351 (Tex. 1998).

63. When determining whether to disqualify an attorney who received an opponent's privileged information outside the course of discovery, the trial court should consider, in addition

to "all the facts and circumstances to determine whether the interests of justice require disqualification," the following non-exclusive factors:

> 1) Whether the attorney knew or should have known that the material was privileged;
>
> 2) The promptness with which the attorney notifies the other side that he or she has received its privileged information;
>
> 3) The extent to which the attorney reviews and digests the privileged information;
>
> 4) The significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> 5) The extent to which movant may be at fault for the unauthorized disclosure; [and]
>
> 6) The extent to which the nonomovant will suffer prejudice from the disqualification of his or her attorneys.

Merits Incentives, 127 Nev. at 699, 262 P.3d at 726-27 (citations and quotation marks omitted).

64. While it is unclear how the Memorandum came to be in the boxes of Plaintiffs' personal effects delivered to Bendavid's office on December 4, 2018, it is apparent that the Memorandum was not from Plaintiffs' offices and that it was not Plaintiffs' document. Therefore, *Merits Incentives* applies.

65. Considering the *Merits Incentives* factors, the Court concludes that Berkley's pro hac shall be revoked.

i. ***Merits Incentives Factors 1 & 2: Plaintiffs knew or should have known that the Memorandum was privileged; Plaintiffs failed to notify Get Fresh.***

66. The Court initially determined that the Memorandum is facially privileged. (*See* Order on Pls.' Mot. to Clarify the Procedure Re: Privilege Determination, Jan. 7, 2020 (based upon Dec. 9, 2019 hearing) ¶ 1.)

67. Following an *in camera* review on January 21, 2020, the Court confirmed that the Memorandum is privileged.

68. Given the way the Memorandum appeared in Plaintiffs' possession, it was appropriate for counsel at the time to have either sequestered the Memorandum or made a

notification. Plaintiffs did not sequester or notify Defendants of their receipt of the Memorandum in December 2018, as required under *Merits Incentives*.

69. It is not credible that the Plaintiffs believed the Memorandum was a threat delivered to them, because it revealed not only Get Fresh's strengths and weaknesses, but also the options for potential resolution and plans. (Jan. 22, 2020 Hr'g Tr. 240:19-22.)

70. Counsel for Plaintiffs, Fox Rothschild and Stern & Eisenberg, became involved in March of 2019, and Plaintiffs' case file, including the Memorandum, was transferred to Fox Rothschild and Stern & Eisenberg at that time. Neither Fox Rothschild nor Stern & Eisenberg sequestered the Memorandum or notified Defendants of their possession of the Memorandum in March 2019.

71. Plaintiffs did not sequester the Memorandum or notify Defendants of their possession of the Memorandum prior to discussing, quoting, and attaching it to their Reply in Support of Motion to Lift Stay and Amend the Complaint on August 1, 2019.

72. Once Get Fresh notified Plaintiffs of their claims of privilege and protection concerning the Memorandum on August 2, 2019, the Memorandum should have been sequestered and not used for any purpose.

ii. Merits Incentives Factor 3: Plaintiffs' counsel extensively reviewed and digested the privileged Memorandum, even after Get Fresh asserted privilege and protection and after the Court struck the Memorandum.

73. On August 5, 2019, the Court struck Exhibit T to Plaintiffs' Reply in Support of Motion to Lift Stay and Amend the Complaint, *i.e.*, the Memorandum. The Court also directed Plaintiffs to not use the Memorandum for any purpose until Get Fresh's claims of privilege and protection was resolved. The Court tried to be clear that it would rule on Get Fresh's claims of privilege and protection during an *in camera* review, as opposed to counsel filing the document with the Court's electronic filing system.

74. Rather than sequester the Memorandum, Plaintiffs repeatedly relied upon the Memorandum to argue that it was not subject to privilege or protection.

75. There is no credible explanation for Plaintiffs' use of the Memorandum in the Response filed in the arbitration on August 12, 2019, utilizing exact language from the Memorandum which the Court has determined is privileged.

76. The explanation by counsel Berkley and Connot that the quotes from the Memorandum were quoted and embedded in their minds because of the briefing filed in this Court on August 1, 2019 and August 4, 2019 after notification by the Defendants of the claims of privilege and protection is of deep concern to the Court and militates in favor of disqualification.

77. Based upon the information that has been provided to the Court, it appears that the only person in whom the Memorandum is embedded in the brain of is Berkley.

iii. ***Merits Incentives Factor 4: Plaintiffs elected to employ the Memorandum as a playbook for their conduct in this action and the arbitration***

78. Plaintiffs' August 12, 2019 Response is their operating pleading in the arbitration. Plaintiffs' possession and use of the Memorandum has, and continues to, prejudice Get Fresh.

79. Plaintiffs incorporated the Memorandum into their pleading and have used it to prosecute their claims (including, as the basis for their extensive discovery requests and motions for advancement and summary judgment in the arbitration). As a result, the return of the Memorandum to Get Fresh would not mitigate the prejudice to Get Fresh or excise the taint permeating throughout the arbitration from Plaintiffs' improper use of the content of the privileged Memorandum.

iv. Merits Incentives Factor 5: There is no evidence that Get Fresh is at fault for the unauthorized disclosure of the Memorandum

80. The Court is not commenting on how the Memorandum came to be in Plaintiffs' possession because it is not of import in making a determination for disqualification.

81. Once Defendants became aware that Plaintiffs possessed the Memorandum on August 1, 2019, Defendants took immediate action to protect their privilege and keep it out of the Court's record.

v. Merits Incentives Factor 6: Plaintiffs' prejudice from disqualification is limited

82. Fox Rothschild's entire representation of Plaintiffs is tainted by Plaintiffs' possession and use of the Memorandum. Plaintiffs wove the Memorandum into their operative pleading in the arbitration.

83. The inability of counsel to extricate privileged information from his or her mind supports disqualification. *See, e.g.*, *Matter of Beiny*, 129 A.D. 2d 126, 141-44 (N.Y. App. 1987) (explaining that use of privileged material warrants disqualification: "While documents may be effectively suppressed, the information gathered from them cannot be so easily contained. We simply do not know whether the information acquired from the [privileged] files will subsequently be used by [counsel], for even if [counsel] attempts to abide by the . . . suppression order, there is no way of assuring that the tainted knowledge will not subtly influence its future conduct of the litigation."); *McDermott Will & Emery LLP v. Superior Court*, 10 Cal. App. 5th 1083, 1124-25 (Cal. App. 2017) ("But the court's order could not prevent Gibson Dunn from using the knowledge it acquired by carefully reviewing and analyzing the e-mail even if the e-mail itself is no longer available to the firm. Even after a trial court has taken remedial action to protect the privilege, 'disqualification still serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage [acquired through the earlier review and use of the inadvertently disclosed, privileged materials].'"); *Clark*, 196 Cal. App. 4th at 54-55 (noting that counsel's review of the privileged material would lead to "inevitable questions about the sources of [counsel's] knowledge (even if [counsel] in fact obtained such knowledge from legitimate sources) could undermine the public trust and confidence in the integrity of the adjudicatory process"); *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092 (Cal. 2007) (affirming disqualification where counsel's use of the privileged information was so extensive, "the damage caused by [the] use and dissemination of the notes was irreversible").

84. Based upon Berkley's testimony and the evidence presented, the Memorandum is embedded in his mind such that he is unable to extricate it from his knowledge of the case.

85. Although Connot's examination of Goldberg during the evidentiary hearing utilized the Memorandum, such use was limited and not a wholesale use of the Memorandum.

Accordingly, Connot's mere use of the document in examining Goldberg does not rise to the level of Connot's disqualification.

86. Based upon the evidence presented, including Even Barenbaum's circulation of the Memorandum to Plaintiffs and counsel on July 31, 2019, it would be better if Stern & Eisenberg, including, but not limited to, Barenbaum, did not participate in this action or any related actions going forward.

F. Sanctions are Necessary.

87. This Court has broad discretion to enter sanctions for litigation misconduct. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93,787 P.2d 777, 780 (1990).

88. The Nevada Supreme Court identified the pertinent, non-exclusive factors for the district court to consider when considering the ultimate sanction, dismissal with prejudice, in *Young v. Johnny Ribeiro Building, Inc.* (the "*Ribeiro* factors"):

> [1] [T]he degree of willfulness of the offending party[;]
>
> [2] [T]he extent to which the non-offending party would be prejudiced by a lesser sanction[;]
>
> [3] [T]he severity of the sanction of dismissal relative to the severity of the discovery abuse[;]
>
> [4] [W]hether any evidence has been irreparably lost[;]
>
> [5] [T]he feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party[;]
>
> [6] [T]he policy favoring adjudication on the merits[;]
>
> [7] [W]hether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney[;] and
>
> [8] [T]he need to deter both the parties and future litigants from similar abuses.

Id. at 93, 787 P.2d at 780.

89. Sanctions are necessary here to "'deter and punish those who abuse the judicial process.'" *Emerson v. Eighth Jud. Dist. Ct.*, 127 Nev. 672, 678, 263 P.3d 224, 228 (2011) (quoting *Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006)).

90. Considering the *Ribeiro* factors, the Court concludes that sanctions are appropriate.

91. Plaintiffs willfully disregarded Get Fresh's claims of privilege and protection on August 2, 2019, and this Court's subsequent orders that the Memorandum be sequestered and not used for any purpose, by incorporating the exact language from the Memorandum into their Response in the arbitration, as well as relying upon the substance of the Memorandum to argue that it was not privileged in this action.

92. While this Court declines to strike Plaintiffs' pleadings filed in this action, it is necessary to discharge the arbitration panel, strike all documents in the arbitration, and order the refiling of all documents in the arbitration. Plaintiffs and their counsel used the Memorandum in their foundational pleading in the arbitration: their Response and Counterclaims. Plaintiffs utilized information contained in the Memorandum since the beginning of the substantive arbitration, including to support their broad discovery requests and claim for advancement.

93. "It is well settled that dismissal is warranted where, as here, a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings: 'courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.'" *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (quoting *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir. 1983)).

94. When Plaintiffs found out about the Memorandum in late January or early February 2019, they recognized the Memorandum was not theirs, had not been in their offices, and should not have been in the boxes that were delivered to their counsel. Plaintiffs did nothing to stop their attorneys from utilizing the Memorandum in this action and the arbitration.

95. There is a significant need to deter Plaintiffs and future litigants from similar abuse and misuse of an adversary's privileged information. Plaintiffs and their counsel acted in contravention of *Merits Incentives*, this Court's orders, and Get Fresh's claims of privilege and protection.

96. Any conclusion of law stated above that is more appropriately deemed a finding of fact shall be so deemed.

ORDER

Based upon the foregoing, the Court grants the Motion for Sanctions and the Motion to Disqualify for the reasons set forth in these Findings of Fact and Conclusions of Law. The Court hereby orders the following relief:

1. Based upon the information that has been provided to this Court it appears that the only person in whom the Memorandum is embedded in the brain of is Brian Berkley of Fox Rothschild LLP. For that reason, Berkley is no longer permitted to participate in any form in this litigation, including, but not limited to, this action and the arbitration. Berkley's pro hac vice status is hereby STRICKEN.

2. Each of Plaintiffs' attorneys (including former attorneys) and Plaintiffs shall provide all copies of the Memorandum, electronic and print, to Defendants. Each of Plaintiffs' attorneys must provide a certification that all versions of the Memorandum have been destroyed and/or provided to Defendants' counsel. This Court is concerned about the number of people have who touched the Memorandum.[3]

3. The current arbitration panel shall be discharged of its duties. A new arbitration shall be initiated and a new arbitration panel shall be appointed. All filings and related proceedings or orders in the arbitration are hereby STRICKEN. The parties are ordered to refile all documents in the arbitration, with Plaintiffs to remove all direct and indirect references to the Memorandum.

4. An award of reasonable attorneys' fees and costs incurred related to this contest of the Plaintiffs' improper possession and use of the Memorandum, and the activities after the August 2, 2019 notification occurred. Get Fresh and Fresh Mix shall file their application for those fees and costs within twenty (20) days of the entry of this Decision and Order.

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[3] Plaintiffs offered to submit declarations from the other members of Plaintiffs' litigation team regarding their use of the Memorandum. (*See* Feb. 14, 2020 Hr'g Tr. 203:16-20.) The Court then provided that "If there is a particular time keeper besides Mr. Berkley that [Defendants] have concerns for, I will have a brief hearing with [Defendants] and [Plaintiffs] related to that after you've had the opportunity to have a declaration and decide if I need more information to make a judgment call." (*Id.* at 203:24-204:3.)

5. This Decision and Order; Findings of Fact and Conclusions of Law is hereby STAYED for fifteen (15) days of its entry, as requested by Plaintiffs on February 14, 2020.[4]

IT IS SO ORDERED.

DATED: 2 Mar 2020

ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

[4] This stay includes a stay of the deadline for Get Fresh and Fresh Mix to file their application for attorneys' fees and costs.

EXHIBIT B TO DOCKETING STATEMENT

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DISTRICT COURT
CLARK COUNTY, NEVADA

PAUL LAGUDI, an individual; and WILLIAM TODD PONDER, an individual, Plaintiff, vs. FRESH MIX, LLC, a Delaware limited liability company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No. A-18-785391-B Dept. No. XI Hearing Requested **MOTION TO VACATE, ALTER, OR AMEND SANCTIONS ORDER** Hearing Date: Hearing Time:

Plaintiffs ask this Court to vacate—or, alternatively, to alter and amend—its March 2, 2020 order that imposes sanctions, including the dissolution of the parties' ongoing arbitration proceeding. NRCP 52(b), 59(e), 60(b). The

portion of the order interfering in the arbitration exceeds the Court's jurisdiction and is void. NRCP 60(b)(4).

Dated this 30th day of March, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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POINTS AND AUTHORITIES

This Court should vacate the sanctions order for three principal reasons:

1. Under the Uniform Arbitration Act (NRS 38.206 *et seq.*) or the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*), a district court lacks jurisdiction to interfere in an ongoing arbitration, including by dissolving the arbitration panel for perceived taint and vacating all of its orders. Such relief must be sought in the first instance in the arbitration and reviewed only upon a motion to vacate a final arbitration award.

2. This Court erred in sustaining defendants' claim of privilege. Because NRCP 26(b)(5)(B) allows the recipient of an allegedly privileged document to "promptly present the information to the court under seal for a determination of the claim," this Court was not barred from considering the allegedly privileged information, and plaintiffs as the recipients of the memo were not subject to sanctions for providing the information to the Court in a filing under seal. Moreover, under controlling Delaware law, Fresh Mix's attorney who allegedly

requested the memo owed fiduciary obligations to plaintiffs as Fresh Mix's minority shareholders. Under the circumstances, plaintiffs were entitled to see the memo, and it could not be withheld on the basis of attorney-client privilege.

3. The sanctions here were disproportionate to the alleged privilege violation.

BACKGROUND

This case arises from a falling out over a produce company. Plaintiffs and defendant Get Fresh Sales, Inc. worked together to form defendant Fresh Mix, LLC in 2010. (1/21/20 Hr'g Tr., at 26:11-13, Ex. 1; 1/22/20 Hr'g Tr., at 155:8-18, Ex. 2.) Plaintiffs collectively own 40%; Get Fresh owns the remaining 60%. (1/21/20 Hr'g Tr., at 27:9-10.) In 2019, following a failed sale of the companies, the relationship deteriorated and defendants locked plaintiffs out of the company. (1/22/20 Hr'g Tr., at 104:17-22, 112:22-113:7, Ex. 2.)

Defendants ultimately delivered plaintiffs' things to their former counsel, Jeffrey Bendavid. (1/22/20 Hr'g Tr., at 119:10-25, Ex. 2.) He saw a piece of paper sticking out of one of the boxes and later read it. (1/22/20 Hr'g Tr., at 60:2-25, 126:3-23, Ex. 2.)

Believing the memo to be an intentionally included threat, plaintiffs attached it to a filing in this Court. (Reply Brief on Motion to Amend Compl.) Defendants asserted attorney-client privilege, asked for the memo to be clawed back, sought plaintiffs' counsel's disqualification, and demanded sanctions.

This Court agreed. Citing the district court's inherent authority to impose sanctions, this Court (1) struck *pro hac vice* status of Fox Rothschild attorney Brian Berkley and prohibited him from participating in either the court or arbitration proceedings; (2) ordered plaintiffs and their counsel to return all copies of the memo to defendants and to certify the return or destruction of all copies; and (3) ordered plaintiffs to pay defendants' attorneys' fees and costs. (3/2/20 Decision and Order 29:5-23.).

But citing that same authority, this Court went farther, inserting itself into the pending arbitration: The Court dissolved the panel and vacated all of the panel's orders. (*Id.*) The Court also struck all of the pleadings in the arbitration, directing that they be re-filed before a new arbitration panel removing "direct and indirect references" to the memo. (*Id.*)

ARGUMENT

I.

STANDARD FOR RELIEF

This Court has several avenues to review an order for legal error.

First, under Rule 59(e) this Court may alter or amend an appealable order[1] "to correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (citation and internal quotation marks omitted) (collecting cases). This same relief obtains under Rule 60(b)(1). *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966) ("[W]hy should not the trial court have the power to correct its own judicial error under 60(b)(1) within a reasonable time . . . and thus avoid the inconvenience and expense of an appeal by the party which the trial court is now convinced should prevail?" (quoting 7 MOORE, FEDERAL PRACTICE § 60.22(3), at 235–38)).

Second, an order that exceeds the Court's powers is void. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (citing *State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984)). Such an order is a nullity that may be vacated under NRCP 60(b)(4) at any time, including by the court on its own motion. *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017); *Pickett v. Comanche Const., Inc.*, 108

[1] Although Rule 59(e) uses the word "judgment," the Supreme Court has clarified that the rule includes any appealable order. *Lytle v. Rosemere Estates Prop. Owners*, 129 Nev. 923, 926, 314 P.3d 946, 948 (2013).

Nev. 422, 428, 836 P.2d 42, 46 (1992) (judgment vacated for absence of jurisdiction was properly construed as void under Rule 60(b)(4)).

Third, this Court may review its findings—including evidentiary findings not previously objected to—any time within 28 days after service of written notice of entry of the Court's order. NRCP 52(a)(5), (b).

Finally, even if the Court's order is not a final judgment, the Court retains broad inherent authority to reflect on and reconsider such orders, not just on a motion under EDCR 2.24, but at "*any time* prior to the entry of final judgment." *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466 n.4, 134 P.3d 698, 705 n.4 (2006) (Maupin, J., concurring) (emphasis added).[2]

At this juncture, this Court has considerable discretion to revisit the March 2 sanctions order. And if the sanction exceeds the Court's jurisdiction, the Court must grant relief.

II.

THIS COURT LACKED JURISDICTION TO INTERFERE IN THE ARBITRATION

When this Court was considering defendants' motion for disqualification and sanctions, the parties disagreed over the proper sanction: defendants believed that the entire complaint could be dismissed, while plaintiffs thought no sanction—or, at most, a monetary penalty—was warranted. This Court picked what it likely thought was a middle ground: based on alleged taint in the arbitration, this Court purported to terminate that proceeding and dissolve the arbitration panel before it ever entered a final award.

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[2] *See also Div. of Child and Family Servs. v. Eighth Judicial Dist. Court (J.M.R.)*, 120 Nev. 445, 453 & n.27, 92 P.3d 1239, 1244 & n.27 (2004); *State v. Kay*, 4 P.2d 498, 500 (Wash. 1931) (noting that oral announcement was not binding where a trial judge announced his ruling for the plaintiff but died before findings of fact and conclusions of law were presented to him for signature); EDCR 2.24(b) (recognizing that motions may also be brought under NRCP 50(b), 52(b), 59 or 60).

But that course is jurisdictionally forbidden.

A. Arbitration Is a Contractual Choice to Eliminate Interlocutory Judicial Action

"The basic purpose of arbitration is the speedy disposition of disputes without the expense and delay of extended court proceedings." *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973). "The Supreme Court has made clear that courts have only a limited role to play when the parties have agreed to arbitration." *In re Sussex*, 781 F.3d 1065, 1072 (9th Cir. 2015).

That is because arbitration is a contractual election to forgo the judicial apparatus. Even in a jury trial, this Court does not supervise or commandeer the district court: if the district court errs in, say, rejecting a *Batson* objection, "the disappointed litigant cannot bring a suit to enjoin the litigation." *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 506 (7th Cir. 2000). To the extent an appellate court can exercise limited mandamus review of interlocutory rulings, that is a perk of litigation—not arbitration:

> [A] party who wants to have such an option should not (and of course need not) consent to arbitration, which generally and here does not have an appellate component. The choice of arbitration is a choice to trade off certain procedural safeguards, such as appellate review, against hoped-for savings in time and expense (other than the expense of the tribunal), a measure of procedural simplicity and informality, and a differently constituted tribunal.

Id.

Courts across the country have recognized "a liberal federal policy favoring arbitration agreements . . . . The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Savers Prop.*, 748 F.3d at 717 (internal quotations omitted). If the parties are able to obtain interlocutory review of the decisions of arbitrators, "[t]hat would be the end of arbitration as a speedy and (relatively low-cost alternative to litigation." *Trustmark Ins. Co. v. John Hancock*

Life Ins. Co., 631 F.3d 869, 874 (7th Cir. 2011). Furthermore, "a prime objective of arbitration law is to permit a just and expeditious result with a minimum amount of judicial interference . . . any other such rule could spawn endless applications to the courts and indefinite delay . . . ." *Gulf Guar. Life Ins.*, 304 F.3d at 492. "[A] district court should not hold itself open as an appellate tribunal during an ongoing arbitration proceeding, since applications for interlocutory relief result only in a waste of time, the interruption of the arbitration proceeding, and delaying tactics in a proceeding that is supposed to produce a speedy decision." *Michaels*, 624 F.2d at 414. Arbitration is designed "to conserve the time and resources of both the courts and the parties; thus, 'for the court to entertain review of intermediary arbitration decisions involving procedure or other interlocutory matter, would disjoint and unduly delay the proceedings, thereby thwarting the very purpose of conservation.'" *Michaels*, 624 F.2d at 414 (citing to *Mobil Oil Indonesia v. Asamera Oil (Indonesia) Ltd.*, 372 N.E.2d 21, 23 (N.Y. 1977)).

B. A District Court Cannot Interfere in an Ongoing Arbitration or Vacate the Panel and Chair's Orders

Applying these principles, a district court has statutory authority to review a final arbitration award, but *no* authority to interfere with an incomplete arbitration.

This conclusion is the same no matter the governing law: There is no statutory authority allowing judicial interference in an ongoing arbitration in Nevada's Uniform Arbitration Act, Delaware's Uniform Arbitration Act, or the Federal Arbitration Act.[3] To the contrary, authority from around the country

[3] While the operating agreement states that any arbitration shall be held in Las Vegas, Nevada, it does not exclude the application of the Federal Arbitration Act. (Plaintiffs' Motion to Compel Books and Records 11:21-28.) The Supreme Court has held that, in order to avoid the requirements of the FAA, the parties

confirms that courts lack the power to vacate orders and dismiss an arbitration panel midstream.

1. The Uniform Arbitration Act Forbids Judicial Interference in Arbitration

If applicable, the Uniform Arbitration Act does not give this Court authority to interfere with an ongoing arbitration.

a. NEVADA'S UNIFORM ARBITRATION ACT CONTEMPLATES JUDICIAL REVIEW OF A FINAL AWARD, NOT A MID-ARBITRATION JUDICIAL TAKEOVER

The Nevada Uniform Arbitration Act provides no basis for the district court to exercise jurisdiction over the arbitration. Nothing in the act grants courts jurisdiction over interim awards, orders, pleadings, or decisions by arbitrators.

Instead, the act contemplates a role for courts only at the beginning and the end: NRS 38.244 states that a court may enforce an agreement to arbitrate, and that an agreement to arbitrate that provides for arbitration in Nevada confers exclusive jurisdiction on the court to enter judgment on any arbitration award. Once arbitration commences, a court loses its authority to interfere until the arbitrator issues a final award, and the scope of any judicial review of a final award is limited. *New Shy Clown Casino, Inc. v. Baldwin*, 103 Nev. 269, 271, 737 P.2d 524, 525 (1987).

There is no statutory provision granting the district court authority to hold an evidentiary hearing or to modify the arbitration award where there has

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must make this clear and specific. *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 58-60 (1995). There is no language excluding application of the FAA. Fresh Mix is a Delaware limited liability company doing business in multiple states. (Amended Complaint ¶¶ 97-99.) Accordingly, the FAA applies. *U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 186–87, 415 P.3d 32, 38 (2018) (citations omitted).

not been a ruling regarding to the validity of the award (NRS 38.145) or the form of the award (NRS 38.155). *Richardson v. Harris*, 107 Nev. 763, 766, 818 P.2d 1209, 1211 (1991).

b. DELAWARE'S UNIFORM ACT LIKEWISE PROVIDES NO INTERLOCUTORY JUDICIAL SUPERVISION

To the extent applicable, the Delaware Uniform Arbitration Act similarly gives courts no jurisdiction over interim awards or over an ongoing arbitration. Instead, a Delaware court may only modify, correct, or vacate a final award under specific circumstances. *See* DEL. CODE ANN. tit. 10, §§ 5701-5725.

c. CASE LAW UNDER THE UNIFORM ACT CONFIRMS THE IMPROPRIETY OF JUDICIAL INTERFERENCE

Case law under the uniform act is limited because few courts have attempted to intercede in ongoing arbitrations. But in Pennsylvania, one court did so and was found to have exceeded its jurisdiction: a trial court lacks the inherent authority to terminate an arbitration before there has been a final award. *Fastuca v. L.W. Molnar & Assocs.*, 10 A.3d 1230 (Pa. 2011). There, the trial court attempted to terminate a common-law arbitration proceeding after the arbitrator had entered certain "findings" but had not resolved all of the outstanding issues between the parties. The Pennsylvania Supreme Court, interpreting language similar to the uniform acts adopted in Nevada and Delaware, held that these interim "findings" were not a final award within the meaning of the arbitration act "and, thus, that the trial court had no authority under that section to review such findings." *Id.* at 1232. The court further held that a trial court does not have the inherent authority to terminate arbitration proceedings before a final award is issued. *Id.* One party's dissatisfaction with the arbitrator was not enough to give the court any form of equitable jurisdiction. *Id.*

2. The Federal Arbitration Act Forbids Judicial Interference in Arbitration

Cases applying the FAA, with its very similar limitation on the jurisdiction of judges to attempt to interfere in ongoing arbitrations, are numerous—and consistent. Time and time again, the federal circuit courts have held that until a final arbitration award issues, trial courts do not have jurisdiction to interfere in the arbitration. Circuit court decisions in the Ninth, Second, Third, Fourth, Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits all hold that the silence and structure of the FAA "preclude[s] interlocutory review of arbitration proceedings and decisions."[4]

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[4] *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 748 F.3d 708, 717-18 (**6th** Cir. 2014); *see also Gulf Guar. Life Ins. Co. v. Conn. Gen Life Ins. Co.*, 304 F.3d 476, 488, 490 (**5th** Cir. 2002) ([T]here is no authorization under the FAA's express terms for a court to remove an arbitrator from service. Rather, even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award."); *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 506 (**7th** Cir. 2000) ("The time to challenge an arbitration, on whatever grounds, including bias, is when the arbitration is completed and an award rendered."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (**4th** Cir. 1999) (any objections on the basis of fairness should typically be made to the arbitrator, subject only to limited judicial review after the end of the arbitration); *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 & n.4 (**2d** Cir. 1980) (a district court does not have the authority to review an interlocutory ruling by an arbitration panel); *Travelers Ins. Co. v. Davis*, 490 F.2d 536, 541-42 (**3d** Cir. 1974) (same); *Schatt v. Aventura Limousine & Transp. Serv., Inc.*, 603 Fed. App'x 881, 887-88 (**11th** Cir. 2015) (interim award is not properly reviewable by a district court); *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899, 903 (**D.C.** Cir. 1998) ("The Arbitration Act contemplates that courts should not interfere with arbitrations by making interlocutory rulings . . . ."); *Cox v. Piper, Jaffray & Hopwood, Inc.*, 848 F.2d 842, 843-44 (**8th** Cir. 1988) ("Appellants cannot obtain judicial review of the arbitrators' decisions about the qualifications of the arbitrators or other matters prior to the making of an award.").

District courts overwhelmingly agree. *See, e.g.*, *Queen's Med. Ctr. v. Travelers Cas. & Sur. Co. of Am.*, No. CV 17-00361 JMS-RLP, 2018 WL 1719703, at *6 (D. Haw. Apr. 9, 2018) (surveying the "consistent[] precedent); *John Hancock*

a. COURTS CANNOT VACATE INTERLOCUTORY RULINGS BEFORE A FINAL AWARD

The Eleventh Circuit's decision in *Schatt v. Aventura Limousine & Transportation Service, Inc.* illustrates the rule. There, after the arbitration had proceeded to a hearing, but before any order, the defendant Aventura filed a motion in district court seeking to disqualify the plaintiff Schatt's counsel for, among other things, *ex parte* contact with the defendant. 603 Fed. App'x at 882-83. While the disqualification motion was pending, the arbitrator issued an interim award on liability but deferred a final award on damages. *Id.* at 883. The district court stayed the arbitration pending resolution of the disqualification motion. Ultimately, Schatt's counsel moved to withdraw and lift the stay of arbitration. *Id.* at 884. Aventura opposed and asked the district court to instead vacate the interim award on liability, and reassign the case to a different arbitrator. *Id.* at 885. The district court granted Aventura's request, vacating the interim award and directing the parties to a new arbitration before a new arbitrator. *Id.* at 885.

Life Ins. Co. v. Emp'rs Reassurance Corp., 2016 WL 3460316, at *3 (D. Mass. June 21, 2016) ("The FAA contains no provision expressly granting courts the authority to remove a party-appointed arbitrator prior to the conclusion of the arbitration."); *Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, 2010 WL 431592, at *3 (N.D. Ill. Feb. 1, 2010) (refusing to disqualify allegedly biased arbitrator, even though the arbitration agreement required disinterested arbitrators, because issues of bias or qualification can only be challenged post-award); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 935 (N.D. Cal. 2003) ("[C]ourts have consistently held that courts do not have the power under the FAA to disqualify an arbitrator while proceedings are pending."); *Crim v. Pepperidge Farm, Inc.*, 32 F. Supp. 2d 326, 331 (D. Md. 1999) ("Absent extraordinary circumstances under which the Court's equitable powers could be invoked, such as overt misconduct on the part of the arbitrator, the remedy available to a party who suspects that an arbitrator will be impartial is to seek to vacate the award after it is rendered.").

The Eleventh Circuit reversed, holding that "the district court was without jurisdiction to vacate the Interim Award" as it was not a final arbitration award. *Id.* at 886. Courts have held that the language of the FAA "allows review of final arbitral awards only, but not of interim or partial rulings . . . . This limited review is consistent with the long-held principle that review of arbitral awards is among the narrowest known to the law." *Id.* at 887 (internal quotations omitted). The Eleventh Circuit held that "the Interim Award on Liability clearly established that the arbitrator's work was not complete"; thus, it was not final. *Id.* at 887-88. "Because the Interim Award was not a final arbitral award, it was not properly under review by the district court." *Id.* at 888.

Similarly, the Seventh Circuit held that a district court did not have the authority to block the consolidation of several arbitration proceedings: "judges must not intervene in pending arbitration to direct arbitrators to resolve an issue one way rather than another. Review comes at the beginning or the end, but not in the middle." *Blue Cross Blue Shield of Mass. Inc. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011).

3. The FAA Rule Applies in State Court

Because the language of state uniform arbitration acts (like Nevada's) is similar in material respects to that of the FAA, the same reasoning applies to an arbitration ordered by a state court. *See Savers Prop.*, 748 F.3d at 716. In *Savers Property*, a party brought a court action to vacate an interim arbitration award. The district court issued a preliminary injunction halting the arbitration to avoid irreparable harm to the plaintiff. *Savers Prop.*, 748 F.3d at 715. The Sixth Circuit reversed, holding that judicial review before a final arbitration award is categorically improper. Initially, although Michigan's uniform act governed, that act (and Nevada's) is similar to the FAA, so it was proper to rely on cases interpreting the FAA. *Savers Prop.*, 748 F.3d at 716.

The Sixth Circuit reiterated the district court's limited role in arbitration—at the beginning (to see whether the parties agreed to it) and at the end, but not the middle: "[i]f parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process." *Savers Prop.*, 748 F.3d at 717 (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568-69 (2013)). Judicial review prior to the issuance of a final arbitration award is improper, and "the district court erred by prematurely injecting itself into this private dispute." *Savers Prop.*, 748 F.3d at 716.

C. This Court Lacked Jurisdiction to Take Over the Arbitration

In most of these cases, the district court was at least reviewing an arbitrator's decision. Here, however, this Court purported to vacate interim orders and dismiss the panel before such a remedy had even been presented to the arbitrators. That was jurisdictional error.

1. Issues Affecting the Arbitration Must First Be Presented to the Arbitrators, Not the District Court

As the Fourth Circuit has noted, "Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance. Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award. . . [F]airness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA." *Hooters of Am.,* 173 F.3d at 941.

Thus, while, partiality or corruption may justify vacating a final arbitration award, that post-award protection "does not provide for pre-award removal of an arbitrator" that the parties have contractually selected. *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (citing 9 U.S.C. § 10(a)(2) and

noting an exception only if the agreement to arbitrate is itself "subject to attack under general contract principles as exist at law or in equity" (internal quotation marks omitted)).

2. This Court Improperly Struck the Arbitration Panel and its Orders

This Court has no jurisdiction to vacate the arbitration panel's orders, to terminate the arbitration, or to dismiss the panel. The panel's interlocutory rulings were not "final arbitral awards" as they do not resolve all (or even nearly all) of the disputed issues. Moreover, as in *Schatt*, one side's claim that an arbitrator has been tainted cannot be raised to the district court until after a final award.

It is doubtful that any case would justify a judicial exception to the statutory limits on the court's jurisdiction. The Ninth Circuit assumed for argument that such an "extreme case[]" might exist, *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973), but recently it affirmed that it has never found cause to disqualify an arbitrator mid-arbitration.[5] *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015). In *In re Sussex*, the Ninth Circuit granted extraordinary mandamus relief to stop a district court from ordering an arbitrator's disqualification: even if the arbitrator's impartiality could be questioned, the district court needed to await the final award to decide that issue. *Id.* at 1075.

[5] Indeed, even under the Ninth Circuit's outlier approach of allowing a district court to intervene in the "most extreme cases," a case cannot fall within the exception unless the circumstances "could cause severe irreparable injury from an error that cannot effectively be remedied on appeal from the final judgment and that would result in manifest injustice." *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015) (internal citations omitted). As discussed immediately below, remedies for taint arising from privilege violations exist both before the arbitrators and in this Court at the proper juncture, on a motion to vacate the final arbitral award. This is not the mythical "extreme case."

So, too, here. A court only has jurisdiction at the outset and conclusion of an arbitration—not the in the middle of it. Neither the statutes of Nevada or Delaware, nor the FAA, confer jurisdiction on the court to interfere with the arbitration proceeding until its conclusion. Defendants' claim that the panel was tainted could have been presented to the arbitrators and, if they disagreed, to the district court on a motion to vacate any final award. This Court lacked jurisdiction to determine that issue now.

3. Defendants Could Have Sought this Remedy in the Arbitration, or Following a Final Arbitral Award

This makes sense because any taint from the arbitrators' exposure to language from the memorandum can be remedied through the American Arbitration Association's ("AAA") procedures. The AAA's rules permit a party to appeal directly to the AAA when seeking the disqualification of an arbitrator or panel. AAA Comm'l Arb. R. 18(c). The AAA is entitled to then "determine whether the arbitrator should be disqualified." *Id.* The arbitration panel also retains its own authority to rule on privilege disputes and provide the appropriate remedy. AAA Comm'l Arb. R. 34(c), 18(c); cf. NRS 38.233(5); *see Odfjell Asa v. Celanese AG*, 348 F. Supp. 2d 283, 287–88 (S.D.N.Y. 2004), *aff'd sub nom. Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005) ("[S]ection 7 [of the FAA] would make no sense if it provided the arbitrators with the power to subpoena witnesses and documents but did not provide them the power to determine related privilege issues."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) ("[F]airness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA.").

But direct appeal to the AAA or the arbitrator was not defendants' only avenue of relief from the purported misuse of the memorandum. Defendants could have ultimately appealed the *final* arbitration award to the district court.

9 U.S.C. §§ 9–11, 16; NRS 38.241. While waiting until the resolution of the arbitration would cost additional fees and time, the "equitable concern that delays and expenses would result if an arbitration award were vacated is manifestly inadequate to justify a mid-arbitration intervention, regardless of the size and early stage of the arbitration." *Sussex*, 781 F.3d at 1075.

4. Defendants Did Not Give the Arbitrators a Chance to Evaluate their Claim of Privilege and Any Remedy for Alleged Taint

Defendants asked this Court to leapfrog all that, however. At defendants' invitation, the Court decided for itself in the first instance the authority of the arbitrators to determine whether events surrounding the memo have affected the proceedings and what remedial measures, if any, should be taken.

D. The Jurisdictional Defect Renders this Part of the Court's Order Void

Because this Court lacked jurisdiction to interfere in the ongoing arbitration, the portion of this Court's order purporting to do so is void. *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017); *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). This Court should vacate it. NRCP 60(b)(4).

III.

THIS COURT ERRED IN SUSTAINING DEFENDANTS' CLAIM OF PRIVILEGE

This Court's sanction stems from its conclusion that the memo was subject to attorney-client privilege. But this is error: this Court ought not to have disregarded the content of the memo, or punished plaintiffs for seeking to promptly present it to the Court. And under controlling Delaware law, plaintiffs are minority shareholders with a right to view and use the memo, regardless of any privilege.

A. A Party Receiving Allegedly Privileged Information Can Promptly Challenge the Privilege Using that Information under Seal

Nevada Rule of Civil Procedure 26(b)(5)(B) states as follows:

> If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. ***After being notified***, ***a party must promptly return, sequester, or destroy the specified information and any copies it has***; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; ***and may promptly present the information to the court under seal for a determination of the claim***. The producing party must preserve the information until the claim is resolved.

(Emphasis added.) The requirement to sequester or destroy the allegedly privileged information does not prohibit the Court's review of it under seal.

And cases applying Rule 26's language confirm that in presenting the information to the Court, plaintiffs may rely on the content of a document to argue, under seal, that it is not privileged. *See, e.g., Diamond X Ranch LLC v. Atlantic Richfield Co.*, 2016 WL 3176577, at *4 (D. Nev. June 3, 2016) (interpreting federal version of Rule 26(b)(5)(B) and finding the receiving party may present the information claimed to be privileged in briefing); *Great-West Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, 2013 WL 5332410, at *1 (D. Nev. Sept. 23, 2013) (applying Rule 26's language in a protective order and relying on the "parties' description of the documents" to determine if the documents are privileged); *LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 600 (D. Nev. 2012) (considering arguments concerning the content of documents and examining each document at issue to determine whether they were privileged); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 626 (D. Nev. 2013) (same); *see also Smith v. Life Investors Ins. Co. of Am.*, 2009 WL 2045197, at *3 (W.D. Penn. July 9, 2009) (accepting arguments by receiving party that the content of the document is not privileged).

In *Diamond X Ranch LLC*, the court discussed whether Federal Rule 26(b)(5)(B)[6] requires a party to file a brief under seal that discusses information that is subject to a claim of privilege or protection. *See Diamond X Ranch LLC*, 2016 WL 3176577, at *4. But there is no question the party receiving the purportedly privileged document may make arguments that it is not privileged using the content of the document.

In *Great-West Life*, the plaintiffs received many documents in discovery that the defendants later claimed were privileged. *See Great-West Life & Annuity*, 2013 WL 5332410, at *1. Consistent with language similar to Rule 26(b)(5)(B), plaintiffs presented certain documents to the court for consideration and argued based on the content that they were not privileged. *See id*. at *1-2, 6-8. The court entertained these arguments without issue. *See id.* For other documents that defendants had claimed were privileged, however, the plaintiffs failed to present those documents to the court for consideration. *See id*. at *9. As a result, the court found plaintiffs had failed to meet their obligation to "promptly present" the information for the court to determine the claim of privilege and therefore the court found the plaintiffs lost their ability to argue the documents were not privileged. *See id.*

B. Plaintiffs Properly Presented the Memo to the Court under Seal; the Court Improperly Disregarded It

Defendants provided[7] the memo to plaintiffs, and on August 2, 2019, defendants gave notice that they claimed attorney-client privilege. (2/14/20 Hr'g

[6] Federal Rule 26(b)(5)(B) is identical to NRCP 26(b)(5)(B).

[7] The memo was delivered just before the commencement of litigation rather than produced in response to a discovery request. This Court's order nevertheless presumes that Rule 26(b)(5)(B) applies and imposes sanctions apparently on the basis that it was violated. (3/2/20 Decision and Order, at 20-21.)

Tr., at 168:22-169:9, Ex. 3.) As Rule 26's express language shows, upon receiving such notice, plaintiffs had the obligation to "promptly present the information to the court under seal for a determination of the claim." Rule 26 directs plaintiffs, not defendants, to present the "information" claimed privileged—here the memo—to the Court.

That is precisely what the plaintiffs did. They presented the memo to the Court under seal so that the Court could consider the "four corners" of the memo to determine whether or not it is privileged. *See LightGuard Sys., Inc. v. Spot Devises, Inc.*, 281 F.R.D. 593, 600 (D. Nev. 2012).

The Court should have considered the content of the memo and allowed plaintiffs, in a nonpublic setting, to present argument based on it. Instead, this Court rejected that evidence and held that plaintiffs committed misconduct, in part for their attempt to have the Court consider the memo's contents. (Order on Plaintiffs' Motion to Clarify Procedure Regarding Privilege Determination, at 2:9-12.)

But that content is critically important. If considered, it could have provided evidence that

- the subject matter was not that of an attorney-client communication;
- the memo was *not* prepared at the direction of retained counsel; but
- the memo instead was created before counsel was retained.

This violation of plaintiffs' rights under NRCP 26(b)(5)(B) caused severe prejudice and constitutes reversible error.

C. Under Delaware Law, Communications Cannot Be Shielded from Minority Shareholders Under the Guise of Privilege

1. A Minority Stakeholder Can Defeat Claims of Privilege that Seek to Hide Majority Oppression

Delaware law does not grant business entities an absolute privilege if the entity is being sued by its minority owners. Under long-established Delaware law, attorneys retained by entities owe fiduciary duties to all shareholders, not just the majority owners. *Opdyke v. Kent Liquor Mart, Inc.*, 181 A.2d 579 (Del. Ch. 1962) (attorney owed fiduciary duty to minority shareholder and breached his duty when purchasing majority stock). As a consequence, a claim of attorney-client privilege does not block a minority shareholder from receiving documents if the minority shareholder demonstrates good cause. Good cause can be shown if there is an issue related to conflict of interest.

The leading case on the good-cause standard to be employed when determining whether there is privilege is *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).[8] There, minority stockholders brought a class action against a corporation alleging violations of federal and state security laws, as well as common law fraud. The court determined that a

> corporation is not barred from asserting [attorney-client privilege] merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit

[8] The Operating Agreement includes a choice of law provision selecting Delaware law. (Plaintiffs' Motion to Compel Books and Records, at 11:21-28.) A determination regarding whether the majority members can assert privilege at the expense of Plaintiffs must be considered under the law of Delaware based on the choice of law provision. *See Wellin v. Wellin*, 2016 WL 123066, at *3 (D.S.C. Jan. 8, 2016) (choice of law provision in trust agreement governed questions relating to privilege). When examining issues of privilege, courts look to the choice of law rules of the forum state. *See Wolpin v. Philip Morris Inc.*, 189 F.R.D. 418, 423 (C.D. Cal. 1999). Under Nevada choice of law rules, courts enforce a contractual choice of law provision. *Engel v. Ernst*, 102 Nev. 390, 724 P.2d 215 (1986). Therefore, based on the choice of law provision contained within the Operating Agreement, the privilege law of Delaware applies to this analysis.

> against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

Id. at 1103-04. *Garner* sets forth a list of non-exhaustive factors that could demonstrate such good cause:

> 1. Number of shareholders and the percentage of stock they represent;
> 2. Bona fides of the shareholders;
> 3. Nature of the shareholders' claim and whether it is obviously colorable;
> 4. Apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
> 5. Whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;
> 6. Whether the communication related to past or to prospective actions;
> 7. Whether the communication is of advice concerning the litigation itself;
> 8. The extent to which the shareholders are blindly fishing;
> 9. The risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 1104.

Valente v. PepsiCo, Inc., 68 F.R.D. 361 (D. Del. 1975) illustrates the limits of the privilege when a majority shareholder is in conflict with the minority. There, PepsiCo was the majority shareholder of Wilson Sporting Goods Co. In that role, it considered various merger strategies, eventually merging Wilson into PepsiCo. Wilson's minority shareholders protested the arrangement. The court held that because the general counsel of PepsiCo also sat on the board of Wilson, he owed dual fiduciary obligations to both entities and his documents written for PepsiCo were discoverable by Wilson. *Id.* at 364. The court discussed the recognized exception that "where an attorney serves two clients having common interests and each party communicates to the attorney, the communications are not privileged in a subsequent controversy between the two." *Id.* at

368. The Court further held that "[i]t is no longer open to question that a majority shareholder who controls a corporation must not use his position to the undue disadvantage of the minority; his obligation is to the corporation and not simply to himself." *Id.* at 369. That included letting the minority shareholders view PepsiCo documents that touched upon the interests of the minority members of Wilson:

> Where the fiduciary has conflicting interests of its own, to allow the attorney-client privilege to block access to the information and bases of its decisions as to the persons to whom the obligation is owed would allow the perpetration of frauds. A fiduciary owes the obligation to his beneficiaries to go about his duties without obscuring his reasons from the legitimate inquiries of the beneficiaries.

Id. at 369-70.

Similarly, in *Deutsch v. Cogan*, 580 A.2d 100 (Del. Ch. 1990), the Court used the standards articulated by both *Valente* and *Garner* to compel production of allegedly privileged material. General Felt was a controlling entity of GFI Nevada, which in turn was Knoll International's majority shareholder. The law firm Akin Gump represented both Knoll and General Felt in a transaction later disputed by Knoll's minority shareholders. The Court held that discovery of attorney-client privilege communications is not automatic in shareholder suits, but because GFI Nevada owed fiduciary duties to Knoll's minority shareholders, and those obligations run "necessarily to protect the interests of the minority from domination and overreaching by the controlling shareholder." *Id.* at 107. Moreover, "[w]here a fiduciary has conflicting interests, to allow the lawyer-client privilege to block access to the information and basis of its decisions as to the persons to whom the obligations are owed might allow the perpetration of frauds." *Id.* at 108.

2. The "Client" to Whom the Privilege Belonged Was Fresh Mix, in Which Plaintiffs Have a Stake

Here, Get Fresh owner Scott Goldberg testified he prepared the memo at the direction of attorney Bruce Leslie. (1/21/20 Hr'g Tr., at 42:2-8, Ex. 1.) He has also testified that Mr. Leslie was retained as an attorney for *Fresh Mix*, the entity in which plaintiffs are minority members. (Scott Goldberg Dep., at 38:8-10, Ex. 1 to Plaintiffs' Supplemental Briefing in Opposition to Defendants' Motion for Claw-Back.)

3. The Memo Cannot Be Withheld from Fresh Mix's Minority Shareholders on the Basis of Privilege

Under controlling Delaware law, Mr. Leslie owed fiduciary obligations to plaintiffs as Fresh Mix's minority shareholders. They were entitled to see the memo, and it could not be withheld on the basis of attorney-client privilege.

Here, the content of the memo must be considered to assess whether it provides evidence that the majority members of Fresh Mix were oppressing plaintiffs, the minority members, and thus cannot be treated as privileged. By refusing to review the contents of the memo and permit the parties to make substantive arguments related to any statements contained within the memo, this Court made no determination of whether any action was being taken to disadvantage or oppress the minority. If this was occurring, then defendants could not withhold the memo from the minority shareholders, and no privilege exists.

* * *

The order and the procedure that led to it are unlawful. Plaintiffs should have been permitted to present and make arguments based on the text of the memo to establish that it was not entitled to treatment as an attorney-client privileged document or that it was not actually created at the direction of attorney Bruce Leslie. Instead, the Court barred that critically relevant testimony and ignored Delaware law. These legal determinations constitute reversible error.

IV.

EVEN IF THE MEMO IS PRIVILEGED, THE SANCTIONS ARE OVERLY PUNITIVE AND DISPROPORTIONATE

Even ignoring the jurisdictional defect and the improper privilege determination, the sanctions are disproportionate to any alleged violation of the privilege.

A. Sanctions Are Reserved for Willful Noncompliance

In Nevada, "[t]he general rule in the imposing of sanctions is that they be applied only in extreme circumstances where willful noncompliance of a court's order is shown by the record." *Finkelman v. Clover Jewelers Blvd., Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609 (1975); *see also Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 313, 810 P.2d 785, 787 (1991) (same). Courts will also consider the degree of harm caused by the alleged misconduct. *See, e.g.*, *Stubli*, 107 Nev. at 313; *see also Rish v. Simao*, 132 Nev. 189, 200, 368 P.3d 1203, 1212 (2016) (same).

The party seeking sanctions bears the burden of proving the facts to support their imposition. *Practice Mgmt. Sols., LLC v. Eighth Judicial Dist. Court*, No. 68901, 2016 WL 2757512, at *3 (Nev. May 10, 2016) (unpublished disposition). The same burden exists under California law, where the Court of Appeal, in another "privileged document in a box" case, held that the burden was on the party seeking sanctions to "persuasively demonstrate" that including the document in the box was the result of inadvertence in order to obtain sanctions:

> We note that whenever a lawyer seeks to hold another lawyer accountable for misuse of inadvertently received confidential materials, the burden must rest on the complaining lawyer to persuasively demonstrate inadvertence. Otherwise, a lawyer might attempt to gain an advantage over his or her opponent by intentionally sending confidential material and then bringing a motion to disqualify the receiving lawyer.

State Compensation Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 657 (1988).

And even after that burden is met, Nevada courts are not to award sanctions beyond a curative measure that would remove the harm. *See, e.g.*, *Rish*, 132 Nev. at 200 (noting that a violation must be "so extreme that it cannot be eliminated through an objection and admonition.").

B. Plaintiffs' Counsel Did Not Willfully Disregard this Court's Sealing Order

The unrebutted testimony from Messrs. Berkley and Connot demonstrates that there was no willfulness or intentional disregard of this Court's orders. (2/14/20 Hr'g Tr., at 88:23-89:1; 174:16-177:2, Ex. 3.) *See Finkleman*, 91 Nev. at 147 (noting that counsel's "explanation for their failure to fully comply" with a court order "of course, negates willfulness."). This Court itself admitted that it was not faulting plaintiffs for the memo's placement in the box delivered to plaintiffs' former counsel: "[t]he Court is not commenting on how the memo came to be in the Plaintiffs' possession." (1/22/20 Hr'g Tr., at 240:14-15.) Rather, it appears that this Court relied on plaintiffs' presenting the memo to the Court under seal, which the court misinterpreted as a violation of NRCP 26(b)(5)(B), as discussed in Section III.B.

But even if defendants had met their burden, the sanctions imposed by this Court greatly outweigh any alleged harm that has occurred. Defendants never presented evidence on how the brief references in one response have irreparably tainted the arbitration panel or warrant striking the entire proceeding. The order betrays a desire to severely punish plaintiffs and their counsel for what at most are inadvertent or curable violations.

Plaintiffs did not violate NRCP 26(b)(5)(B) and did not engage in any willful misconduct, and the allegedly "privileged" nature of the memo has not been conclusively established when its content has not been considered. The order and its attendant sanctions should be vacated.

CONCLUSION

This Court's sanction authority is customarily broad. But in the context of arbitration, the Court's inherent authority runs up against a statutory preference for arbitration, where the parties have elected it. Once this Court determined that the parties have committed a portion of their dispute to arbitration, this Court cannot simply arrest *that* proceeding for reasons that might otherwise cause the Court to arrest its own proceedings—as when it declares a mistrial or strikes an answer. The Court's authority instead reattaches only at the conclusion of arbitration, on a motion to confirm or vacate the arbitral award.

For the foregoing reasons, this Court should vacate its order on sanctions and allow the parties to resume their proceedings in arbitration.

Dated this 30th day of March, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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I certify that on March 30, 2020, I served the foregoing brief through the Court's electronic filing system and by courtesy e-mail to the following counsel:

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EXHIBIT 1

EXHIBIT 1

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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

PAUL LAGUDI, et al.	.	
	.	
Plaintiffs	.	CASE NO. A-18-785391-B
	.	
vs.	.	
	.	DEPT. NO. XI
FRESH MIX LLC, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**
. . . . .	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 1

TUESDAY, JANUARY 21, 2020

APPEARANCES:

FOR THE PLAINTIFFS:	MARK J. CONNOT, ESQ. LUCY CROW, ESQ. BRIAN BERKLEY, ESQ.
FOR THE DEFENDANTS:	JAMES J. PISANELLI, ESQ. DEBRA L. SPINELLI, ESQ. AVA SCHAEFER, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

THE COURT: All right. Mr. Pisanelli, you're up.

MR. PISANELLI: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. PISANELLI:

Q Good morning, Mr. Goldberg.

A Good morning.

Q So, as you know, Mr. Goldberg, the two defendants in this case, Fresh Mix LLC and Get Fresh Sales Inc. -- let's start with just an introduction of you to Her Honor and tell us what your relationship is to those two parties.

A I'm the CFO of Get Fresh Sales and of Fresh Mix, one of the founding owners of Get Fresh and we formed Fresh Mix in 2010.

Q What is the relationship between the two defendants, Fresh Mix and Get Fresh Sales?

A Get Fresh Sales is an operational wholesale distributor and pretty much performs every function to buy and sell fresh produce. Fresh Mix is a -- I would call it a sales and marketing company put together to provide equity for Mr. Lagudi and Mr. Ponder and Get Fresh.

Q So by function what do you mean that Fresh Mix is a sales and marketing company?

A Well, Fresh Mix would get allocated sales and cost of goods for the accounts or stock quotes that they had either brought with them in the formation of the company or obtained

A Near the end of April or maybe very early May.
Q Okay. Now, did you do anything to help prepare Mr. Leslie to provide legal service to the companies in anticipation of his meetings with your other partners?
A Yeah. In our discussions Mr. Leslie asked me if I could prepare an outline summary of the disputes.
Q Okay. And did you do that?
A I did.
Q Okay. Now, in preparing this outline summary of disputes, again talking subject matters, right, what type of broad subject matter of things were you trying to give him in order to facilitate his service and to get his advice?
A Well, besides the relationship, which was not the simplest way to describe how the businesses function, kind of a decision-tree type of scenario where I was trying to describe the problems and the possible solutions, outcomes.
Q Okay. Did you try and present him with what you thought were important facts for him to know?
A Absolutely.
Q Okay. Did you try and propose to him litigation strategies?
A I did.
Q Okay. These were all in anticipation of a full meeting the following day of that memo with your other partners; is that right?

Next witness.

MR. PISANELLI: So next witness, Your Honor, the next three all are --

THE COURT: Who is less than a half hour?

MR. PISANELLI: None of them.

THE COURT: All right. So 'bye. Go eat lunch.

MR. PISANELLI: Great. Thank you.

THE COURT: See you guys at 9:15 tomorrow. We're going to handle your motions at 9:15, rather than 9:00 o'clock. I'm down to two things on the 9:00 o'clock calendar. Unfortunately, one is Steve Peek and Don Campbell. Whether they show up or send associates will determine how long it takes.

(Court recessed at 12:55 p.m. until the following day, Wednesday, January 22, 2020 at 9:15 a.m.)

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EXHIBITS

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EXHIBIT 2

EXHIBIT 2

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

PAUL LAGUDI, et al. Plaintiffs vs. FRESH MIX LLC, et al. Defendants	.	CASE NO. A-18-785391-B DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 2

WEDNESDAY, JANUARY 22, 2020

APPEARANCES:

FOR THE PLAINTIFFS:	MARK J. CONNOT, ESQ. LUCY CROW, ESQ.
FOR THE DEFENDANTS:	JAMES J. PISANELLI, ESQ. DEBRA L. SPINELLI, ESQ. AVA SCHAEFER, ESQ. BRUCE A. LESLIE, ESQ.

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

THE COURT: Trying to get the TRO --

THE WITNESS: We were trying to get it to -- on an OST to the court. We were trying to -- we were moving. So I literally saw it sitting there, grabbed it, and then either I heard them out there or someone -- like he said, someone may have told me the boxes were delivered, so I went to go see it. I don't recall, but I did walk out there, see it, I grabbed it, I'm like, okay, whatever. And, you know, inventory, I'll deal with that other receipt later or whatever, let them figure out what's in there, and I set it down on my desk. And I didn't look at it -- I don't think I looked at it until -- I don't even know if I looked at it that night. I don't think I did. I think it was like the next day, because what I would have done is say, here, to my assistant, scan this and send it to them, this is their inventory, this the receipt or whatever. If it was just a receipt, I don't think I would have sent it to them, but --

THE COURT: So did you read it --

THE WITNESS: I did.

THE COURT: -- before you had your assistant scan it and send it?

THE WITNESS: No, I read it first.

THE COURT: Okay.

THE WITNESS: But I don't recall -- I don't think I read it that night. I think it was like the next day.

September, October or early November where it was just we're not going to be able to resolve this; walk away and figure out what options or figure out what we're going to do?

A Yeah. I would say the settlement discussions broke down sometime in November.

Q Okay.

A Because it wasn't -- and I don't have the date -- it was not long after the letters were sent. When the settlement discussions broke down, those letters were sent pretty close to that.

THE COURT: And the letters were the J1, the termination letter you got?

THE WITNESS: Correct.

THE COURT: Okay.

THE WITNESS: The two letters. Yeah.

BY MR. CONNOT:

Q Okay. Had the animosity or contentiousness between the parties lessened, stayed the same, increased?

A Increased, probably.

Q Okay. So now we get to the termination letters and Mr. Lagudi and Mr. Ponder had been locked out of the offices?

A Correct.

Q And then you draft a complaint?

A Yeah.

Q And that complaint -- November 26th is a Monday and

didn't object.

THE COURT: He has in the past objected to my questions.

MR. PISANELLI: And it was overruled.

THE COURT: I usually overrule it, although there has been once I sustained it. I sustained his objection once and rephrased my question.

MR. CONNOT: I had a jury trial one time when the judge asked a witness a question --

THE COURT: No, not in front of a jury.

MR. CONNOT: -- after the parties had finished, and opposing counsel stood up and said if you're asking my question on my behalf, I withdraw it. If you're asking that question on Mr. Connot's behalf, I object. It didn't work very well.

THE COURT: Yeah, I don't do that in front of a jury.

All right. Did you have more questions for Mr. Bendavid?

MR. CONNOT: Yes, very briefly. Well, I say that, but.

BY MR. CONNOT:

Q So let's then fast-forward to -- you discussed this issue of the personal property and that once termination occurred on November 26th and they're locked out, you had discussions with Mr. Leslie about the personal property and

it was your position that they should remain at the company. Was that sort of -- the daylight between you and Mr. Leslie was they wanted to return the possessions or the materials from Mr. Lagudi and Mr. Ponder's office and you were taking the position that, no, leave it there because they're members and managers?

A Yes.

Q That pretty much sums up that issue regarding the possessions?

A Yeah. And you've got to keep in mind these conversations Bruce and I or emails about the personal property were half a percent of the discussions we were having. It wasn't these long conversations about the personal property.

Q Yes. So December 3rd the complaint is filed a week after the termination. December 4th -- and I assume even leading up to December 3rd you and your team were working on the TRO?

A We were working on the TRO and the complaint together at the same time. Literally, we started working on it the same day we got the letters.

Q Okay. And the email that was referred to earlier from Mr. Leslie, the one on December 3rd where he had said we're going to be delivering this, do you recall if you had read that email prior to the time you were made aware the

A Yeah. There's like four chairs, a little table set up and then they're in front of that -- outside, down the hall from my office but before you get in -- so it's like there's even double doors, so someone had to bring them there and set them down there.

Q And for these double doors that go down this hallway to your office, is that a place that clients just go through without being accompanied by somebody?

A I mean, they can.

Q Okay. So you have -- you come out and you see the boxes. Describe what you see there. I mean, are the boxes neatly stacked with lids on them and labeled, or what was the condition that you observed?

A They were stacked up. I don't know. I'm picturing two or three rows. I didn't count them, but, you know, of boxes. And, you know, there were some miscellaneous things that didn't fit, kind of all kind of stuck together in a pile. You know, and there were boxes that were stacked up high and some of them were not as high as the others. That's about it.

Q Did they have lids?

A Some of them did, some of them didn't. The top ones didn't have lids and they were taped.

Q What do you mean by taped?

A Like if you took packing tape and went across the top of the box, that's how they were. So it had like -- if

planted in the boxes because of a posturing thing.

THE WITNESS: Yes.

THE COURT: Can you explain that to me?

THE WITNESS: Yeah. It seemed as -- in my opinion it seemed as they put it there to -- not to me necessarily, but to Paul and Todd to say, look, this is how far ahead we are of you. We've already thought all this out, we've made our plan, we know what we're going to do. If you don't resolve it with us, you know, we're ready to do all this and here's our positions, we're not afraid of it.

THE COURT: So you thought it was there just to intimidate him or piss him off?

THE WITNESS: I think it was there to intimidate. Yeah, to an extent intimidate him and to let him know that's how far ahead we are of you. We've all thought all these issues out; we're ready to do this.

THE COURT: All right.

THE WITNESS: I'm not sure it was -- you know, I think I said that in my deposition, I don't recall. You know, we keep saying it was like -- you know, in other words, it was sticking out for me. I don't think it was sticking out for me. I think it was sticking out for them and I just grabbed it.

THE COURT: Okay.

MR. CONNOT: I don't have anything else.

and I remember starting thinking, what the hell have we just done? And fortunately for us each month just got better and better and better. We became a kitchen to the hotels.

Q How successful was the business?

A Extremely successful. It changed my life. I say thank you to Circus Circus every time I go past it. It really changed my life.

Q Did you have any interactions with Get Fresh? I mean, were they in the same business that you were in, the same sphere, or did you guys operate in different sectors?

A No, they were competitors. They were full on number one competitors. But I didn't know them. I never knew them individually. And to be quite honest with you, I was always taught just focus on your business and that's what I did, but I was very aware of them. I mean, they were big.

Q Were you successful in obtaining any of their market share?

A Absolutely.

Q So at some point in time do you become acquainted with any of the principals of Get Fresh, Mr. Caldara, Mr. Wise or Mr. Goldberg?

A Yes. Mr. Caldara was the first.

Q And when was that?

A Oh, I would like to say -- well, I will say this. In 2006 or 7 there was a big MGM corporate contract and we got

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EXHIBITS

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt — 1/25/20

FLORENCE HOYT, TRANSCRIBER — DATE

EXHIBIT 3

EXHIBIT 3

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

PAUL LAGUDI, et al.	.	
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Plaintiffs	.	CASE NO. A-18-785391-B
	.	
vs.	.	
	.	DEPT. NO. XI
FRESH MIX LLC, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**
. . . . .	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 3

FRIDAY, FEBRUARY 14, 2020

APPEARANCES:

FOR THE PLAINTIFFS:	MARK J. CONNOT, ESQ. LUCY CROW, ESQ. BRIAN BERKLEY, ESQ.
FOR THE DEFENDANTS:	JAMES J. PISANELLI, ESQ. DEBRA L. SPINELLI, ESQ. AVA SCHAEFER, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

was privileged; right?

A I'm aware that you provided notice of privilege on August 2nd.

Q Right. You were aware that we filed emergency motions to strike?

A Correct.

Q You were aware the Court granted the emergecny motion?

A Yes.

Q You were aware she told you she didn't want to read it?

A Granted in part, yes.

Q And you're also aware that the Court said she was not going to read it in that from?

A At that hearing she was not going to read it. She testified -- I believe she said that we were going to have a fight over privilege and at some point she would.

Q All right. And with that knowledge you granted yourself license to take privileged information and incorporate it into yet another legal document, this time counterclaims in the arbitration.

A That's not correct.

Q You didn't have all that knowledge?

A I did not do that intentionally.

Q Oh. You accidently did it?

A It was a mistake, as I put in my declaration.

Q Ah. So you had read this memo so many times while you were sitting drafting the counterclaims you couldn't distinguish what you knew, what was your own knowledge and what was being lifted from a privileged memo. Is that what you're saying?

A No. At that time I had, as I put in the declaration, understood different -- independent knowledge of facts that were consistent with what's in those paragraphs --

Q We're talking about exact language.

A -- but that the language was something I -- please let me answer. That language was at that time in my head because I had written that multiple times during that one week.

Q So what did you ever do -- and take as much time as you need to answer this question. When you realized you had accidently taken privileged information you were never supposed to have and now you have infected the arbitration with it tell Her Honor what you did to cleanse the arbitration of that poison that you would have inserted.

A We -- we submitted a supplemental brief with a recommendation to the Court on how to cleanse it.

Q That's it?

A Yeah, that's --

Q So the answer is nothing.

part of the concepts, it didn't trigger anything on August 12th.

Q So then why are you now so confident that the same process with terms and phrases were not also used in the mediation brief when you didn't recognize them in the counterclaim?

A Because we went back and looked at everything, including the mediation brief, to make sure that those terms didn't appear.

Q Okay.

A And, quite frankly, for the mediation brief, I mean, I'm not sure that would have convinced the mediator much. We tried to give the mediator, here's our position, you know, and here is why we should prevail and here's what the damages are.

Q Are you -- do you have personal knowledge, enough personal knowledge to tell Her Honor that you know that the search done by your team went through the mediation brief, as well?

A I don't have personal knowledge of that. I mean, I couldn't say with personal knowledge that I know specifically that was done.

Q Okay. So let's get us back to August 2nd. I call you, tell you, what the heck, or words to that effect. Remember what you told me?

A I think the substance of the conversation was you

asserted the privilege and something about clawback, and I said, I don't consider it privileged but I hear what you're saying. And --

Q You told me to the effect that you'd look into it, something like that.

A Could have been.

Q But you're pretty clear that it is your position that it was not privileged?

A Yes.

Q And within days of that phone call the privileged memo was quoted for a second time; right?

A So you're talking about the opposition that was drafted over that weekend?

Q Yeah.

A Yeah. In fact, I think it was within like 48 hours.

Q Okay.

A Because I believe this is the timeline.

Q Yep.

A You contacted me the afternoon of August 2nd, which was a Friday. The hearing on the motion to amend and lift the stay was Monday, the 5th. Your office filed an emergency motion the evening of the 2nd, and we drafted an opposition over the weekend and unfortunately neglected to have that filed under seal.

Q Okay.

it?

A Absolutely.

Q Okay. But no one told you they were doing it?

A No.

Q All right. But it didn't end there. And again, Mr. Connot, that's how I find myself scratching my head about this. Now we have actual words, phrases lifted from the privileged document, put into the counterclaims and now the virus spreads by putting the counterclaims in multiple different briefs. Why didn't you step up and say, stop this reckless behavior?

A I did not look at -- after -- I believe I looked at the memo over the weekend of August 4th, 3rd and 4th, solely for purposes of that privilege issue.

Q Uh-huh.

A I did not look at the memo again after that. The concepts that -- where those terms appear in those paragraphs included words that were from the memo, but also were concepts from what Mr. Bendavid had drafted in large part. And that's why standing at -- you know, when I was handed those documents a few weeks ago towards the conclusion of that hearing, when I looked and went -- those -- that's when suddenly this light went off that those are the words from the memo. But, once again, in all the subsequent filings there certainly was no reference to those. I realized that you've pointed out where

a paragraph may have been close to it or otherwise. But certainly no intent. And had that become apparent to me, I would have immediately taken action.

Q So whether it be attaching it to the motion for advancement, attaching it to a motion here for books and records, is it fair for us to say you trusted Mr. Berkley to conduct himself appropriately for those documents?

A Well, yes. But there's more context than that, if I can.

Q I'd rather you not, but I suspect that Your Honor will let you.

THE COURT: Yep, I'm going to let him.

THE WITNESS: So, yes, did I trust him? Absolutely. At the same time, did I review the submissions, did I review the attachments? And going back to it, if I would have realized that those terms were included in those paragraphs with those concepts, something would have changed, absolutely positively at that point would have changed, whether we needed to redact versions in the arbitration, submitted a -- whatever. But those two never connected with me that those were terms from the memo, because we haven't went back and looked at it. And after August 12th they never appeared again, except to the extent that that response might have been attached to another pleading or submission.

//

BY MR. PISANELLI:

Q I will tell you, Mr. Connot, here's where I have a problem with that. Okay. Again, respectfully, with all the activity of multiple orders from Her Honor, phone calls from us, outrage in our papers, right, we had some pretty heated hearings, you, nonetheless, as I said, pushed all the chips to the middle. In this hearing you had the memo in your hand, not sealed. I'm sitting right there, so I can't help but know what you're using to examine Mr. Goldberg. You used it, you were reading it, you were trying to carefully craft questions from it without disclosing our confidentiality, right. My point is even Her Honor told you, that's a dangerous move, you better be right that it's not privileged. And you did it anyway. Right?

A Yes.

Q You knew that if Her Honor found that that was a privileged document and it had not been waived, your using it at this podium could be the final straw for you?

A Could be? Yes.

Q Okay. But you took that risk?

A Yes. Calculated risk.

MR. PISANELLI: Thank you, Your Honor.

THE COURT: Cross-examination?

MR. BERKLEY: No questions, Your Honor.

THE COURT: Thank you.

Mr. Connot, you can step down. I don't have any questions for you. Thank you for providing the explanation.

Mr. Pisanelli, you have no additional witnesses; right?

MR. PISANELLI: Correct, Your Honor.

THE COURT: Did you want to make a brief closing argument?

MR. PISANELLI: Yes, Your Honor.

THE COURT: You got the word "brief" in there?

MR. PISANELLI: It's all relative.

THE COURT: Yes, it is. There's no timer in an evidentiary hearing, so I just try and send the message.

MR. PISANELLI: Do we not have a clock in here?

THE COURT: There is not a clock in here. There is a clock right here that I watch to try and keep you on track.

MR. CONNOT: So I missed that. Is this a 10-minute limit?

THE COURT: No, there's no limit.

MR. CONNOT: Okay. I just wanted to make sure.

THE COURT: I was just trying to encourage him on a Friday afternoon not to do what he sometimes does, which is to go on and on and on and on.

MR. CONNOT: Oh, no. Not him.

THE COURT: And then Ms. Spinelli has to come bring him a note to say, you know, you should really wrap up now.

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EXHIBITS

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt — 2/18/20

FLORENCE HOYT, TRANSCRIBER — DATE

EXHIBIT C TO DOCKETING STATEMENT

NOAS

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DISTRICT COURT
CLARK COUNTY, NEVADA

PAUL LAGUDI, an individual; and WILLIAM TODD PONDER, an individual., Plaintiffs, *vs.* FRESH MIX, LLC, a Delaware limited liability company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No. A-18-785391-B Dept. No. XI **NOTICE OF APPEAL**

Please take notice that plaintiffs Paul Lagudi and William Todd Ponder hereby appeal to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Decision and Order; Findings of Fact and Conclusions of Law," filed March 2, 2020, notice of entry of which was served electronically on March 2, 2020 (Exhibit 1); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.

Dated this 31st day of March, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on March 31, 2020, I served the foregoing "Notice of Appeal" through the Court's electronic filing system upon all parties on the master e-file and serve list.

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EXHIBIT 1

EXHIBIT 1

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **NOTICE OF ENTRY OF DECISION AND ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW** Hearing Date: January 21-22, 2020 and February 14, 2020

PLEASE TAKE NOTICE that a Decision and Order; Findings of Fact and Conclusions of Law was entered in the above-captioned matter on March 2, 2020, a true and correct copy of which is attached hereto.

DATED this 2nd day of March 2020.

PISANELLI BICE PLLC

By: _____
James J. Pisanelli, Esq., Bar No. 4027
Debra L. Spinelli, Esq., Bar No. 9695
Ava M. Schaefer, Esq., Bar No. 12698
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 2nd day of March 2020, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF DECISION AND ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following:

Mark J. Connot, Esq.
Lucy C. Crow, Esq.
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, #700
Las Vegas, NV 89135

Attorneys for Plaintiffs

An employee of PISANELLI BICE PLLC

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FFCL

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **DECISION AND ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW** Date of Hearing: January 21-22, 2020 and February 14, 2020 Time of Hearing: 9:30 a.m. / 9:00 a.m.

On January 21 and 22, 2020, and February 14, 2020, this Court conducted an evidentiary hearing on Get Fresh Sales, Inc. ("Get Fresh") and Fresh Mix, LLC's ("Fresh Mix") (Get Fresh and Fresh Mix, together "Defendants") (1) Motion for Sanctions filed on August 26, 2019, (the "Motion for Sanctions") and (2) Motion to Disqualify Fox Rothschild LLP filed on August 23, 2019 (the "Motion to Disqualify"). Based on the evidence presented, the briefs before the Court and the arguments of counsel, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. <u>A Dispute Arises Between Get Fresh and Plaintiffs Lagudi and Ponder.</u>

1. Fresh Mix is owned by Get Fresh (60%), Plaintiff Paul Lagudi ("Lagudi") (30%), and Plaintiff William Todd Ponder ("Ponder") (10%), each of which is Member of Fresh Mix. Get Fresh, in turn, is owned by Dominic Caldara, Scott Goldberg, and John Wise. Caldara, Goldberg, Wise, Lagudi, and Ponder are all Managers of Fresh Mix.

2. Beginning on January 11, 2010, Lagudi and Ponder were employees of Fresh Mix.

3. In late 2017/early 2018, disputes arose between Get Fresh and Plaintiffs Lagudi and Ponder (Lagudi and Ponder, together "Plaintiffs") concerning Fresh Mix. Although the parties endeavored to resolve their disputes without litigation, the prospect of litigation remained throughout 2018. By the spring of 2018, all parties had retained counsel to guide and advise them through these disputes, but also in anticipation of the arbitration mandated by Fresh Mix's Operating Agreement.

4. In April 2018, Get Fresh retained Bruce A. Leslie, Esq. for legal advice and representation related to its disputes with Plaintiffs related to Fresh Mix. Plaintiffs had already retained Jeffrey Bendavid, Esq.

B. <u>The Creation of the Confidential and Privileged Memorandum.</u>

5. Near the outset of Get Fresh's retention of Leslie, Goldberg prepared a memorandum at Leslie's request and for the purpose of seeking legal advice relating to the on-going disputes that Get Fresh was having with Lagudi and Ponder (the "Memorandum").

6. Goldberg began drafting the Memorandum on his secured drive at Get Fresh. The secured drive is only accessible via Goldberg's password-protected account, that of the Get Fresh Senior Vice President of Finance (Mary Supchak), and the members of the IT administrator group. Goldberg saved a partial draft of the Memorandum to the secured drive, and then emailed the partial draft as an attachment from his password protected Get Fresh email address to his non-Get Fresh business email address.

7. Goldberg's non-Get Fresh business email address is also password protected.

8. Goldberg finished drafting the Memorandum on his password-protected personal desktop computer and then emailed it as an attachment from his non-Get Fresh business email address to his Get Fresh email address.

9. On May 2, 2018, in anticipation of a May 3, 2018 meeting with Leslie and Get Fresh partners, Caldara and Wise, Goldberg sent an email to Leslie with the Memorandum attached, copying Caldara and Wise.

10. The Memorandum contains an assessment of Get Fresh's strengths and weaknesses regarding its dispute with Plaintiffs concerning Fresh Mix. It also contains legal strategies and a decision tree regarding potential resolution and plans.

11. Goldberg, Caldara, and Wise never printed the Memorandum or disseminated the document outside of the privileged sphere.

C. Fresh Mix Terminates Lagudi and Ponder's Employment and Get Fresh Delivers Lagudi and Ponder's Personal Effects to them via their Attorney, Bendavid.

12. Fresh Mix sent letters terminating Lagudi and Ponder's employment on November 26, 2018.

13. Supchak packed up Plaintiffs' personal items from their offices, separating personal and company documents.

14. Supchak testified that the Memorandum was not in any of the boxes of documents that she packed up when assembling the boxes of Plaintiffs' personal items.

15. On December 3, 2018, Leslie emailed Bendavid about the return of Plaintiffs' personal items from their offices at Get Fresh. Bendavid testified that he intentionally refused to respond to Leslie about where to deliver the boxes.

16. The same day, December 3, 2018, Plaintiffs initiated this action by filing the Complaint.

17. On December 4, 2018, the boxes of Plaintiffs' personal effects were delivered to Bendavid's office by Get Fresh employees Scott Putske and Marcus Sutton. A receipt of the boxes was executed by an employee at Bendavid's office and returned to Get Fresh.

18. Bendavid did not see the boxes being delivered and he did not know how long the boxes were in his office before he saw them.

19. Bendavid testified that the Memorandum was purportedly sticking up out of one of the boxes of Plaintiffs' personal items, rolled in half but without a crease.

20. Bendavid testified that he did not see anyone place the Memorandum into one of the boxes.

21. Both Putske and Sutton testified that neither of them saw a piece of paper sticking out of any of the boxes they delivered, no one asked them to deliver any paper/memorandum, and no one asked them to place a piece of paper such that it was sticking out of any of the boxes when they were delivered.

22. Ponder was at Bendavid's office reviewing documents and meeting with one of Bendavid's associates the day the boxes were delivered, *i.e.*, December 4, 2018.

23. Bendavid testified that he did not and could not see if Ponder had access to the boxes prior to Bendavid seeing the boxes after they were delivered to his office.

24. At Bendavid's request, Ponder took all of the boxes home with him that same day, and went through each one, including the boxes containing Lagudi's personal items.

25. Ponder testified that the boxes he took home with him did not contain the Memorandum. According to Plaintiffs, Bendavid had taken it out of a box and not provided it to Ponder.

26. Bendavid testified that he removed the Memorandum from the box, initially thinking it was an inventory or receipt, but did not look at the document at that time. Instead, he read and digested the Memorandum either later that same day, on December 4, 2018, or the following day, December 5, 2018.

27. Bendavid testified that, upon his review of the Memorandum, (a) he recognized the Memorandum was a document belonging to his adversaries about what they wanted to do in this dispute against Plaintiffs; (b) he understood that the Memorandum contained concepts of litigation strategy of his adversaries; and (c) he understood the Memorandum contained strengths and weaknesses of Defendants' case.

28. Bendavid testified that he did not know, when he read the Memorandum, who drafted it, although he knew it was not drafted by his clients, Lagudi or Ponder.

29. Bendavid testified that both the drafter and the source of the Memorandum were anonymous to him.

30. Nevertheless, Bendavid said that he assumed the Memorandum was voluntarily and intentionally sent by an authorized Get Fresh representative and stated also his belief that it was not privileged because it was a threat.

31. Although he had interacted with Leslie regarding Plaintiffs' personal items in their office, Bendavid did not alert Leslie nor did he alert any other counsel for Defendants to his receipt of the Memorandum.

32. Bendavid submitted a declaration in which he stated that "had [he] had the Memo [while drafting the Complaint and TRO], we would have referred to it in the Complaint and attached it to the Motion for Preliminary Injunction and TRO." (Ex. 1 to Pls.' Second Suppl. Opp'n, Feb. 3, 2020, Bendavid Decl. ¶ 23.)

33. Bendavid testified that he did not inform his clients, Lagudi and Ponder, of the Memorandum for weeks. During a meeting at his office weeks after receipt, Bendavid told Plaintiffs about the Memorandum, and read them excerpts from the Memorandum, but did not provide them copies. Lagudi and Ponder did not ask for copies of the Memorandum.

D. Bendavid Transitions Out of the Case and Sends the Memorandum to Stern & Eisenberg and Fox Rothschild.

34. Plaintiffs retained Stern & Eisenberg in or around March of 2019. On March 1, 2019, Evan Barenbaum, Esq., of Stern & Eisenberg, first appeared in the arbitration compelled by this Court, pending before the American Arbitration Association.

35. Berkley testified that Barenbaum contacted Fox Rothschild LLP about representing the Plaintiffs. Brian Berkley, Esq., and Mark Connot, Esq., both of Fox Rothschild LLP, subsequently interviewed to represent Plaintiffs.

36. Plaintiffs retained Fox Rothschild in March of 2019. Fox Rothschild attorneys Berkley and Connot testified that they were co-lead counsel for Plaintiffs in this litigation and the arbitration.

37. Upon retention, Fox Rothschild subsequently received the case file. Berkley did not recall whether the file transfer was in electronic or paper form, nor did he recall whether the

files came directly from Bendavid, or went through Barenbaum. Connot testified that to the best of his recollection, the bulk, if not the entirety, of the file came in an electronic format.

38. Fox Rothschild admits to learning of the Memorandum upon its retention, *i.e.*, in March of 2019. Berkley testified that he first received the Memorandum from Barenbaum in March 2019 as an attachment to an email. Fox Rothschild did not log this communication on the privilege log ordered by this Court as part of the sanctions discovery.

39. Stern & Eisenberg's redacted billing records reveal that it, too, received the Memorandum upon retention. Specifically, the billing records reveal that, on March 13, 2019, Barenbaum spoke to "Mr. Bendavid re delivery of Get Fresh document."

40. Despite multiple interactions with Defendants' counsel, including interactions directly related to the contents of the boxes delivered to Plaintiffs on December, 4, 2018 and an inspection of another set of boxes in the spring of 2019, neither Fox Rothschild nor Stern & Eisenberg notified Get Fresh or their counsel of their receipt or possession of the Memorandum.

41. Berkley testified that, prior to him reading the Memorandum, he asked Barenbaum about the circumstances regarding the delivery of the Memorandum to Bendavid. Berkley and Connot testified that Barenbaum told them that the Memorandum was delivered with a box of documents when Lagudi and Ponder's employment was terminated, and that the Memorandum was viewed as a threat. Barenbaum, as well as Lagudi and Ponder, told Berkley that the Memorandum came from Get Fresh.

42. Connot testified that there was no specific knowledge or evidence of how the Memorandum ended up in Plaintiffs' boxes; Bendavid did not have any direct knowledge regarding who put the Memorandum in the boxes.

43. Prior to reading the Memorandum, Berkley knew that it was not Lagudi or Ponder's document, and that neither of them had written it. Around the time he read the Memorandum, or shortly thereafter, Connot assumed that it was Defendants' record, and that it was Defendants' document.

E. Plaintiffs Weaponize the Memorandum, and Refuse to Return, Sequester, or Destroy It, Notwithstanding Multiple Court Orders.

44. On July 17, 2019, Plaintiffs filed a motion to lift the stay that this Court entered pending the arbitration, and to amend their complaint.

45. Get Fresh and Fresh Mix filed their opposition on July 25, 2019.

46. In preparation of their reply in support of their motion to stay (the "Reply"), on July 31, 2019, Plaintiffs attorney, Barenbaum, emailed his clients Lagudi and Ponder, as well as his Fox Rothschild co-counsel, Connot, Berkley,[1] and Emily Bridges, Esq., and a colleague at his own firm, Thomas Shea, Esq., attaching the Memorandum to his email.

47. Plaintiffs logged this July 31, 2019 email communication on their December 13, 2019 privilege log, and identified the Memorandum attached thereto as a Word document.

48. Fox Rothschild attorney Berkley was the lead drafter of the Reply. Fox Rothschild attorney Connot was involved in editing and revising the Reply. Berkley and Connot conferred about the strategy to use the Memorandum in connection with the Reply, and agreed to do so. Berkley further testified that Barenbaum participated in the decision to put the Memorandum into the public record.

49. Plaintiffs filed their Reply on Thursday, August 1, 2019. The Reply contained arguments based upon the Memorandum, including quotations from the Memorandum and paraphrases of its content. Plaintiffs also attached the Memorandum to the Reply as Exhibit T. Despite filing a motion to seal and redact associated with their Reply and certain exhibits thereto, Plaintiffs filed the Memorandum in the public record.

50. Plaintiffs' Reply was the first notice Defendants received of Plaintiffs' possession of the privileged Memorandum.

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[1] Plaintiffs filed a Motion to Associate Counsel, seeking an order permitting Berkley to practice in Nevada pursuant to SCR 42 on August 20, 2019. Defendants filed a Response thereto on August 30, 2019, and the Court subsequently granted the Motion to Associate Counsel on October 4, 2019.

51. Upon receipt and review of the Reply, Get Fresh's counsel immediately took action to protect Get Fresh's privileges.

52. On Friday, August 2, 2019, James J. Pisanelli, counsel for Get Fresh and Fresh Mix, called and spoke to Plaintiffs' counsel, Connot, asserted Get Fresh's privilege claim over the Memorandum, asked how Plaintiffs acquired the Memorandum, and stated that Get Fresh would be seeking Court relief. Connot stated that he did not know that the Memorandum was privileged because it "seems to be internal" and references getting litigation counsel.

53. Get Fresh moved promptly and, that same day, submitted an Emergency Motion to Strike the Reply and Exhibit T, unequivocally asserting its privilege claim over the Memorandum, asking that the offending Reply and Exhibit T be struck, and that Plaintiffs be directed to sequester the Reply, the Memorandum, and any related notes or memos from use and review.

54. Fox Rothschild claimed that they sequestered the Memorandum once Get Fresh alerted them of its privilege claim.

55. Connot submitted a declaration in which he stated that "While I disagreed with whether the document was privileged, I immediately sequestered the Memo and advised by co-counsel at Fox Rothschild and Stern Eisenberg, as well as my clients, to sequester the Memo."

56. Similarly, Berkley submitted a declaration stating that "[u]pon receipt of the notice of privilege, I stopped review of the Memo . . . ."

57. Despite sequestration, Fox Rothschild took the position that it was permitted to review and use the Memorandum (including reference to its substance) to argue that it was not privileged.

58. The next business day, Monday, August 5, 2019, Get Fresh and Fresh Mix served its privilege log related to the Memorandum. (*See* Ex. J5, Defs. Fresh Mix & Get Fresh's Initial Privilege Log, Aug, 5, 2019.)

59. Rather than sequester the Memorandum upon notice of Get Fresh's privilege assertion, on Sunday, August 4, 2019, Plaintiffs again reviewed and digested the Memorandum to prepare and file their Opposition to the Emergency Motion. Throughout this Opposition, Plaintiffs ***again*** refer to, discuss, quote, and paraphrase the privileged Memorandum.

60. Berkley was the lead drafter of the August 4, 2019 Opposition to the Emergency Motion. Connot edited the Opposition.

61. At the hearing on Plaintiffs' Motion to Lift Stay and Amend the Complaint held on Monday, August 5, 2019, the Court struck Exhibit T (the Memorandum) from the record and permitted Get Fresh and Fresh Mix to move to redact both Plaintiffs' August 1, 2019 Reply and August 4, 2019 Opposition. The Court stated:

> I am not going to impede any efforts you make to obtain the ability to use Exhibit T in whatever format. And you guys are going to fight, and at that point I assume I'll do an in-camera review of Exhibit T and then make a decision . . . But I'm not there. . . . I'm going to mark the emergency motion, which I did not set for hearing, and the opposition to the emergency motion which I did not set for hearing as Court's Exhibit 1. I'm going to place them in a sealed envelope, because they have some reference to the document that I'm granting the striking of.

62. The Court's order was entered on August 22, 2019. Get Fresh and Fresh Mix subsequently moved to redact the briefs, and such relief was granted.

63. Notwithstanding the Court's order and statements during the August 5, 2019 hearing, Fox Rothschild took the position that it could nevertheless use the substance of the Memorandum to argue that it was not privileged or otherwise subject to protection.

64. Thus undeterred, Plaintiffs continued to use and paraphrase the Memorandum. Plaintiffs' August 12, 2019 Response to Amended Demand for Arbitration and Counterclaims (the "Response") submitted to the AAA in the arbitration compelled by this Court, paraphrases and uses exact words and phrases from the Memorandum (just omitting the quotation marks). (*See* Ex. J6, admitted under seal, ¶¶ 243, 244, 245, 300, 305, and p. 46:13-14.)

65. Berkley was the lead drafter of the Response. Connot was involved in analyzing, editing, and revising the Response. Other attorneys at Fox Rothschild (*e.g.*, Emily Bridges) worked on the Response, as did attorneys at Stern & Eisenberg.

66. Berkley and Connot each claim that they did not review the Memorandum when working on the Response, but the exact language of the Memorandum had been part of their institutional knowledge. Specifically, Berkley and Connot each submitted declarations stating

that they did not "have any intent to include references to the Memo or language from the Memo in the Arbitration Response."

67. Berkley testified that he did not intentionally incorporate direct language from the Memorandum into the Response. "That language was at that time in my head because I had written that multiple times during that one week." (Feb. 14, 2020 Hr'g Tr. 89:12-14; *see also id.* at 126:1-3 ("Those – those words were in my mind at that time, and the concepts and the actions that were being taken in real time by the defendants was also fresh in my mind.") and 131:1-20.[2])

68. Plaintiffs attached or relied upon their August 12, 2019 Response in briefs they filed both in the arbitration and this action.

69. Plaintiffs cited to and relied upon the Response within a Rule 37 Motion for Advancement of Indemnification under the Operating Agreement, filed on September 11, 2019. In their Motion for Advancement, Plaintiffs directed the arbitration panel to the very section of the Response that parroted the Memorandum.

70. Plaintiffs later attached the Response as Exhibit A to their Motion to Compel Production of Books and Records, filed on September 30, 2019 with this Court. Plaintiffs again directed the Court to the very section of the Response that parroted the Memorandum.

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[2] The final excerpt, 131:1-20 from the third day of the evidentiary hearing is as follows:

> THE COURT: Okay. So explain to me why the terms from the memo appear less than a week later in the reply you filed in the arbitration.
>
> THE WITNESS [BERKLEY]: Because those terms were fresh in my mind at that time because I had written those terms in multiple filings prior to the August 5th hearing and . . . and the concepts were fresh in my mind, as well, because both the writing of that as well as independently I had – you know, those actions were being taken by the plaintiffs – or the defendants. Excuse me.
>
> THE COURT: So the words were embedded in your mind because you'd previously quoted from the memo and used it in the reply brief?
>
> THE WITNESS: At that time they were, yes.
>
> THE COURT: So you couldn't forget what was in the memo and not use it as I directed because it was so fresh in your mind??
>
> THE WITNESS: At that time, yes.

71. Trying to bolster their argument that facts that independently supported the offending allegations in their Response, Plaintiffs again draw from the Memorandum in their February 3, 2020 Supplemental Brief.

72. On August, 23, 2019, Get Fresh and Fresh Mix filed the Motion to Disqualify Fox Rothschild LLP.

73. On August 26, 2019, because of Plaintiffs' continued use of the Memorandum and refusal to sequester it, Get Fresh and Fresh Mix filed a Motion for Claw Back, Discovery, and Sanctions Related to Plaintiffs and Their Counsel's Improper Possession and Use of Exhibit T and Other Privileged and Confidential Information.

74. On September 5, 2019, Plaintiffs filed their Opposition to the Motion for Claw Back and Counter-Motion, ***again*** referring to and discussing the Memorandum, and ***again*** attaching the Memorandum as an exhibit (Exhibit A).

75. Get Fresh and Fresh Mix moved to strike the Memorandum and all references to and discussion of the Memorandum in the brief, and this Court granted the requested relief via its order entered on September 25, 2019. Specifically, this Court ordered:

> Defendants' request for claw back is GRANTED in that Plaintiffs shall sequester the memorandum identified as Exhibit T to Plaintiffs' Reply in Support of Motion to Lift Stay and Amend Complaint from review and/or use. Plaintiffs may not quote, or discuss the content of the memorandum in any further pleadings or other papers other than in an evidentiary hearing or otherwise relating to the privileged nature of the document or the motion for disqualification.

76. Get Fresh and Fresh Mix subsequently moved to redact Plaintiffs' Opposition, and this Court granted the requested relief.

77. Plaintiffs filed another brief seeking to inject the Memorandum into the record, despite court orders and multiple filings and hearings.

78. In their September 19, 2019 motion, Plaintiffs moved to have the Court accept its offending Opposition to the Motion to Strike under seal and the Memorandum. The Court denied Plaintiffs' request in an October 8, 2019 order:

> ***The Court previously ordered the memorandum*** identified as Exhibit T to Plaintiffs' Motion to Lift Stay and Amend Complaint

> ***sequestered***. As a result, Plaintiffs shall not quote or summarize Exhibit T in any briefing until further order of the Court.

79. Despite this history, Plaintiffs tried again, filing a Motion to Clarify the Procedure related to this evidentiary hearing. In response, the Court reiterated its prior rulings:

> The Court ***previously*** made a decision that the memorandum identified as Exhibit T to Plaintiffs' Motion to Lift Stay and Amend Complaint ("The Memorandum") is facially privileged based upon the information that was provided to the Court.
>
> . . .
>
> Plaintiffs ***shall continue*** to sequester the Memorandum, and may not quote, summarize, or discuss the content of the Memorandum.

(Order on Pls.' Mot. to Clarify the Procedure re: Privilege Determination, dated January 8, 2020.)

80. Plaintiffs' counsel held, read, reviewed, and referred to the Memorandum throughout the evidentiary hearing on January 21 and 22, 2020.

81. Connot used the Memorandum during the examination of Scott Goldberg, while Berkley read along to assist Connot in the cross-examination.

82. Berkley and Connot each submitted declarations testifying that, after reviewing their billing records, they estimated to have spent less than two hours reviewing the Memorandum since being retained by Plaintiffs.

83. Although Berkley had access to Stern & Eisenberg and Fox Rothschild's full billing records regarding Plaintiffs' representation, he testified that he did not review these records for purposes of determining the full scope of the Memorandum's circulation and digestion. Berkley also testified that he did not ask his colleagues, other than Connot, how broadly the Memorandum had been circulated and digested.

84. Connot also reviewed billing records, reading in detail his time entries relating to the Memorandum.

85. Fox Rothschild did not take any action to remove the language from the Memorandum from the arbitration. The information is presently in the arbitration record.

86. Following the first two days of the evidentiary hearing on January 21 and 22, 2020, Berkley directed Bridges, an associate with Fox Rothschild, to run searches of the words

located in paragraphs 243 - 245 of the Response that are from the Memorandum against the other filings in the Arbitration. Berkley testified that Bridges emailed him the result of those searches and that there were no hits. The search was limited to the exact words from the Memorandum that were used in the Response, and did not capture themes derived from the Memorandum.

F. Plaintiffs Received Other Get Fresh Documents from Third Parties and Did Not Disclose Their Receipt to Defendants.

87. On September 25, 2019, the Court granted Get Fresh and Fresh Mix's request for discovery related to Plaintiffs' and their counsel's improper possession and use of the Memorandum and other privileged and confidential information. (*See* Order, dated Sept. 25, 2019.)

88. While conducting the Court-ordered discovery, Plaintiffs revealed, for the first time, that they had received documents from third parties unrelated to the litigation. Specifically, Plaintiffs revealed that they received documents from two disgruntled former Get Fresh employees.

89. Plaintiffs received confidential documents from David Heinrich, Get Fresh's former IT director. Heinrich left Get Fresh in 2014.

90. Ponder testified that in August of 2018, Heinrich informed him that he was in possession of certain Get Fresh purchase orders.

91. Later, in 2019, Heinrich gave copies of confidential Get Fresh records, specifically purchase orders ("POs"), to Lagudi. Some of these POs bear print dates ***years after*** Heinrich separated from Get Fresh, e.g., from September 2018.

92. Lagudi testified that in September of 2019, Matthew McClure emailed him confidential Get Fresh documents and records related to a recall from 2016. McClure had previously worked as a food safety consultant for Get Fresh, and left Get Fresh in 2017.

93. Rather than provide copies of the documents to Get Fresh, Lagudi provided these documents to his attorneys to determine how best to use them in the pending dispute with Defendants.

94. Plaintiffs made allegations in the arbitration related to these documents, Plaintiffs did not provide any notice to Defendants of their receipt of confidential company records outside of the ordinary discovery process from either a third party unrelated to the litigation or a person unauthorized to access or provide confidential company records.

95. Plaintiffs also did not provide Defendants' counsel with the particular details about how, when, and from whom they obtained the documents.

96. Any finding of fact stated above that is more appropriately deemed a conclusion of law shall be so deemed.

CONCLUSIONS OF LAW

A. Plaintiffs Were Required to Give Prompt Notice of Their Receipt of Their Adversary's Confidential and Privileged Document.

1. Under Nevada law, an attorney who receives confidential or privileged documents of its adversary regarding a case from an anonymous source or a third party unrelated to the litigation must promptly notify opposing counsel. *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 697, 262 P.3d 720, 725 (2011).

2. The required notice "must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery and describe, with particularity, the facts and circumstances that explain how the document or evidence came into counsel's or his or her client's possession." *Id.*

3. This notice requirement is designed to prevent parties from receiving an adversary's confidential or privileged documents outside the normal course of discovery and process, and "lying in wait" to announce their procurement and use the document against their adversary.

4. The notice requirement provides the owner of the document(s) an "opportunity . . . to register an objection and demand return and non-use. . . ." *Id.* at 694, 262 P.3d at 723.

5. If an attorney fails to comply with this notice requirement, the attorney "risk[s] being in violation of his or her ethical duties and/or being disqualified a counsel." *Id.* at 697, 262 P.3d at 725.

6. Plaintiffs testified that they first received the Memorandum in boxes of Plaintiffs' personal items from their offices at Get Fresh delivered to Bendavid in early December 2018.

7. Bendavid discussed the delivery of those boxes over email with Leslie, counsel for Defendants, but intentionally refused to respond to Leslie about where to deliver the boxes.

8. The boxes were delivered on December 4, 2018, the day after Plaintiffs filed a complaint in this action and the very day Plaintiffs submitted their application for temporary restraining order to this Court in this action.

9. Discovery had not yet commenced, and therefore documents received were received outside the normal course of discovery.

10. According to Bendavid, the Memorandum was purportedly sticking up out of one of the boxes of Plaintiffs' personal items. While he initially set it aside thinking it was an inventory, he read and digested the Memorandum later that same day, December 4, 2018, or the following day, December 5, 2018.

11. Bendavid testified that (a) he recognized the Memorandum was a document belonging to his adversaries about what they wanted to do in this dispute against Plaintiffs; (b) he understood that the Memorandum contained concepts of litigation strategy of his adversaries; and (c) he understood the Memorandum contained strengths and weaknesses of Defendants' case.

12. While Plaintiffs and Bendavid testified that they "believe" the Memorandum was "voluntarily" or "intentionally" provided to Bendavid by Goldberg, Plaintiffs failed to offer evidence, only supposition, to support this theory.

13. Bendavid testified that he did not see the boxes being delivered, he did not see anyone place the document in a manner sticking up out of one of the boxes, and he did not know how long the boxes were in his office before he saw them.

14. Plaintiffs themselves recognized that the Memorandum was not an item that had been in their offices and therefore should not have been in boxes that were delivered to them.

15. Despite Bendavid's admissions regarding the general subject matters of the contents of the privileged Memorandum, its suspicious receipt, and his communications with

Leslie about delivery of personal items but no company documents, Bendavid assumed that the Memorandum was voluntarily or intentionally sent by an authorized Get Fresh representative.

16. Nevada law requires more than an "assumption" to avoid the prompt notice obligation upon receipt of an adversary's confidential or privileged document outside the normal course of discovery. If an assumption were sufficient, the rule would be set aside merely by one's claim, without more, that their opponent gave it to them for any reason one can conjure.

17. It is not credible that Plaintiffs believed the Memorandum was a threat delivered to them, because it revealed not only Get Fresh's strengths and weaknesses, but also the options for potential resolution and plans.

18. Both the drafter and the source of the Memorandum were anonymous.

19. The notice requirement established by the Nevada Supreme Court in *Merits Incentives* was triggered.

B. Plaintiffs Failed to Give Prompt Notice of Their Receipt of Their Adversary's Confidential and Privileged Document.

20. Bendavid testified that he did not provide notice to Leslie or any other counsel for Defendants of either his receipt of the Memorandum or provide with any particularity the facts and circumstances that explain how the document or evidence came into his possession.

21. It is undisputed that neither Fox Rothschild nor Stern & Eisenberg provided notice to Leslie or any other counsel for Defendants of either their receipt of the Memorandum or any facts and circumstances that explain how the document or evidence came into their possession.

22. Failure to comply with the notice requirement and related ethical obligations may result in counsel's disqualification, even when the receipt of the privileged information was through no fault of their own. *Merits Incentives*, 127 Nev. at 697, 262 P.3d 725.

23. Fox Rothschild associated with Bendavid as counsel for Plaintiffs on May 16, 2019. Stern & Eisenberg is counsel for Plaintiffs in the arbitration (compelled by this Court). Both Fox Rothschild and Stern & Eisenberg took over as counsel for Plaintiffs in Bendavid's stead in or around March 2019. Bendavid's formal notice of withdrawal was filed on July 3, 2019.

24. Bendavid testified to transferring his file to Fox Rothschild. Bendavid's billing records confirm this copying, as well as receipt and review of the files by both Fox Rothschild and Stern & Eisenberg.

25. The Stern & Eisenberg billing records reflect that on March 13, 2019, Barenbaum spoke to "Mr. Bendavid re delivery of Get Fresh document."

26. Fox Rothschild represented, and it is in the record, that Bendavid imputed his knowledge concerning the Memorandum to Fox Rothschild. (*See* Pls.' First Suppl. Opp'n, 9:6-11 ("When Mr. Bendavid provided the Fresh Mix Memo to Fox Rothschild, he imputed this knowledge. Accordingly, Fox Rothschild, after considering whether the Fresh Mix Memo was a 'corporate work document,' and the circumstance between the parties at the time, had no reason to identify or suspect the Fresh Mix Memo to be privileged." (internal citation omitted).)

27. Fox Rothschild also represented, and it also is in the record, that they, too, reviewed and digested the Memorandum. (*See, e.g., id.* at 3:23-25 ("Upon being retained by Plaintiffs, Fox Rothschild learned of the Fresh Mix Memo and, like Mr. Bendavid, recognized that the Fresh Mix Memo was not privileged."), 10:6-9 ("Fox Rothschild abided by its ethical obligations at all times and reviewed the Fresh Mix Memo before Defendants ever claimed privilege. Mr. Bendavid knew upon reading the document that it was not privileged. Fox Rothschild attorneys reached the same conclusion.").)

28. It is undisputed that the first time Plaintiffs or any of their counsel provided notice to Defendants and their counsel of their possession of the Memorandum was on August 1, 2019, when Plaintiffs filed their Reply in Support of their Motion for Leave to Amend, attached the Memorandum to the Reply as an exhibit, and quoted extensively from the Memorandum.

29. According to Plaintiffs' testimony and argument in the record, they possessed the Memorandum without providing notice to Defendants or their counsel from December 4, 2018 to August 1, 2019, when they affirmatively used it, quoted from it, and attached it to a public filing in support of a motion they filed to advance their position.

30. Each and all of Plaintiffs' counsel, Bendavid, Fox Rothschild, and Stern & Eisenberg (via his representation of Plaintiffs in the arbitration this Court compelled) failed to comply with the notice requirement set forth in *Merits Incentives*.

31. Having received the Memorandum under suspicious circumstances in December 4, 2018 (by Bendavid) and the spring 2018 (by Stern & Eisenberg and Fox Rothschild), yet not providing any notice until affirmatively using the Memorandum in a Reply brief on August 1, 2019, Plaintiffs' counsel did "lie in wait" to provide notice only when it worked for them in the dispute against their adversary, and denied Get Fresh of any opportunity to object, demand return of the document, and non-use of the document. This is the exact type of behavior the Nevada Supreme Court criticized in *Merits Incentives*. 127 Nev. at 699, 262 P.3d at 727.

C. The Memorandum and Related Communications are Protected by the Attorney-Client Privilege and Work Product.

32. The attorney-client privilege protects the disclosure of a confidential communication "[b]etween the client or the client's representative and the client's lawyer or the representative of the lawyer" "for the purpose of facilitating the rendition of professional services." NRS 49.095.

33. "A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the client or those reasonably necessary for the transmission of the communication. NRS 49.055.

34. Nevada's work-product doctrine is set forth in NRCP 26(b)(3). It "protects documents with two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 383, 399 P.3d 334, 347 (2017) (citing *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004)) (internal quotation marks omitted).

35. The Nevada Supreme Court adopted the "because of" test to determine whether material was prepared in anticipation of litigation, and thereby satisfy the first requirement for

work-product protection. "The anticipation of litigation must be the *sine qua non* for the creation of the document – but for the prospect of that litigation, the document would not exist." *Wynn Resorts*, 133 Nev. at 383-84, 399 P.3d at 347-48 (internal quotation marks and citation omitted).

36. The party claiming privilege bears the burden of establishing the privilege, and does so by serving a privilege log. *See Rogers v. State*, 127 Nev. 323, 330, 255 P.3d 1264, 1268 (2011) (the proponent of privilege bears the burden of establishing the privilege); *Alboum v. Koe, M.D., et al.,* Discovery Commissioner Opinion #10, 15 (Nov. 2001) (a party provides a factual basis for its claims of privilege by producing a privilege log); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) ("In essence, the party asserting the privilege must make a *prima facie* showing that the privilege protects the information the party intends to withhold. We have previously recognized a number of means of sufficiently establishing the privilege, one of which is the privilege log approach." (citations omitted).

37. "The party asserting the privilege has the burden of proving its applicability, including that the party has not waived it." *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1040 (D. Nev. 2006) (citing *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981)).

38. "[A] corporation's current management controls the [attorney-client privilege] 'to refuse to disclose, and to prevent any other person from disclosing, confidential communications.'" *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 643, 656, 331 P.3d 905, 914 (2014).

39. "Courts in the Ninth Circuit consider the circumstances surrounding the disclosure when deciding if an inadvertent disclosure has waived the privilege. These courts typically apply a five-factor test to determine the waiver issue. These factors include: (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness." *IGT v. All. Gaming Corp.*, 2-04-CV-1676-RJC RJJ, 2006 WL 8071393, at *6 (D. Nev. Sept. 28, 2006) (quotation marks and citations omitted).

40. The Memorandum was prepared by Goldberg, owner and Chief Financial Officer for Get Fresh in April/May 2018, at the request of counsel, Leslie, providing confidential information for the purpose of seeking legal advice relating to the on-going dispute between the parties.

41. The Memorandum is facially and substantively privileged.

42. Get Fresh has maintained the confidentiality of the Memorandum since its creation.

43. Get Fresh has ensured the password protected nature and secured access to email and the related server.

44. None of the individuals on the email (Goldberg, Caldara, Wise, and Leslie) printed the Memorandum. None of them have ever disseminated the Memorandum outside of the privileged sphere.

45. Get Fresh did not voluntarily disclose the Memorandum to Plaintiffs or their counsel.

46. There is no indication that Get Fresh waived its claim to privilege or protection over the Memorandum. Any assumption as to how the document got into Plaintiffs or their counsel's possession is not controlling in a determination of waiver.

47. Upon learning that Plaintiffs possessed the Memorandum, Get Fresh alerted Plaintiffs and their counsel to its claim of privilege fewer than 24 hours later, repeatedly sought (and obtained) relief from the Court in order to keep the Memorandum out of the public record.

48. Get Fresh served a privilege log on August 5, 2019, in which Get Fresh asserted privilege over the Memorandum and communications related thereto.

D. Plaintiffs' Counsel Did Not Return or Sequester the Memorandum as Required By NRCP 26(b)(5)(B).

49. Once a party is placed on notice that information is subject to a claim of privilege or protection, NRCP 26(b)(5)(B) enumerates an affirmative obligation upon a party and their

counsel to "promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved."

50. Get Fresh informed Plaintiffs, through their counsel, of their claims of privilege and protection over the Memorandum on August 2, 2019. This was fewer than twenty-four hours after learning that Plaintiffs were in possession of the Memorandum.

51. Get Fresh served a privilege log asserting their claims of privilege and protection over the Memorandum and communications related thereto on August 5, 2019.

52. Plaintiffs admit that they did not "return, sequester, or destroy" the Memorandum after Get Fresh notified them of their claims of privilege and protection August 2, 2019.

53. Plaintiffs admit that they relied upon the Memorandum and its substance to argue that it was not privileged after they were put on notice of Get Fresh's claims.

54. It is "not [the receiving party's] prerogative to unilaterally determine whether the information received anonymously was truly proprietary, confidential, privileged, or some combination of those labels, and use the information it deem[s] appropriate." *Raymond v. Spirit AeroSystems Holdings, Inc.,* No. 16-1282-JTM-GEB, 2017 WL 2831485, at *15 (D. Kan. June 30, 2017) (discussing the analogous FRCP 26(b)(5)(B)).

55. "Rule 26(b)(5)(B) could not be more clear. Once a producing party claims a privilege in materials that have been produced, no further use is to be made of the information until the claim of privilege is resolved. As far as Rule 26(b)(5)(B) is concerned, it is immaterial if [the receiving parties] disagree with the claim of privilege. [The receiving parties] were prohibited from making any use of the information, period." *Mafille v. Kaiser-Francis Oil Co.*, 18-cv-586-TCK-FHM, 2019 WL 3219151, at *1 (N.D. Okla. July 17, 2019) (discussing the analogous FRCP 26(b)(5)(B); *Jensen v. Indianapolis Public Schools*, No. 1:16-cv-02047-TWP-DLP, 2019 WL 911241, at *3 (S.D. Ind. Feb. 22, 2019) (while attaching a cover letter and filing a motion for the court to make a privilege determination is consistent with FRCP 26, weaponizing the documents by referencing its contents violates the rule).

56. Plaintiffs continued to use and rely upon the Memorandum, as stated above.

57. Plaintiffs and their counsel continued to use the Memorandum in conjunction with the arbitration, using exact words and phrases from the Memorandum (just absent the quotation marks) and paraphrasing information from it in their Response to Amended Demand for Arbitration for Counterclaims. Plaintiffs and their counsel referred to and attached their Response to briefing both in the arbitration and this action.

E. Limited Disqualification is Necessary.

58. Disqualification may be necessary to prevent disclosure of confidential information that may be used to an adverse party's disadvantage. *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 53, 152 P.3d 717, 743 (2007).

59. "Where the 'asserted course of conduct by counsel threatens to affect the integrity of the adversarial process, [the court] should take appropriate measures, including disqualification, to eliminate such taint.'" *Richards v. Jain*, 168 F. Supp. 2d 1195, 1200 (W.D. Wash. 2001) (modifications in original) (quoting *MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991)); *cf. Clark v. Superior Court*, 196 Cal. App. 4th 37, 55 (Cal. App. 2011) (describing disqualification "as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed").

60. Where privilege information has been disclosed and misused, doubts should generally be resolved in favor of disqualification. *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000).

61. The Nevada Supreme Court has found that "there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified." *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 698, 262 P.3d 720, 726 (2011).

62. The Court "has the power, under appropriate circumstances, to disqualify an attorney even though he or she has not violated a specific disciplinary rule." *In re Meador*, 968 S.W. 2d 346, 351 (Tex. 1998).

63. When determining whether to disqualify an attorney who received an opponent's privileged information outside the course of discovery, the trial court should consider, in addition

to "all the facts and circumstances to determine whether the interests of justice require disqualification," the following non-exclusive factors:

> 1) Whether the attorney knew or should have known that the material was privileged;
>
> 2) The promptness with which the attorney notifies the other side that he or she has received its privileged information;
>
> 3) The extent to which the attorney reviews and digests the privileged information;
>
> 4) The significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> 5) The extent to which movant may be at fault for the unauthorized disclosure; [and]
>
> 6) The extent to which the nonomovant will suffer prejudice from the disqualification of his or her attorneys.

Merits Incentives, 127 Nev. at 699, 262 P.3d at 726-27 (citations and quotation marks omitted).

64. While it is unclear how the Memorandum came to be in the boxes of Plaintiffs' personal effects delivered to Bendavid's office on December 4, 2018, it is apparent that the Memorandum was not from Plaintiffs' offices and that it was not Plaintiffs' document. Therefore, *Merits Incentives* applies.

65. Considering the *Merits Incentives* factors, the Court concludes that Berkley's pro hac shall be revoked.

i. ***Merits Incentives Factors 1 & 2: Plaintiffs knew or should have known that the Memorandum was privileged; Plaintiffs failed to notify Get Fresh.***

66. The Court initially determined that the Memorandum is facially privileged. (*See* Order on Pls.' Mot. to Clarify the Procedure Re: Privilege Determination, Jan. 7, 2020 (based upon Dec. 9, 2019 hearing) ¶ 1.)

67. Following an *in camera* review on January 21, 2020, the Court confirmed that the Memorandum is privileged.

68. Given the way the Memorandum appeared in Plaintiffs' possession, it was appropriate for counsel at the time to have either sequestered the Memorandum or made a

notification. Plaintiffs did not sequester or notify Defendants of their receipt of the Memorandum in December 2018, as required under *Merits Incentives*.

69. It is not credible that the Plaintiffs believed the Memorandum was a threat delivered to them, because it revealed not only Get Fresh's strengths and weaknesses, but also the options for potential resolution and plans. (Jan. 22, 2020 Hr'g Tr. 240:19-22.)

70. Counsel for Plaintiffs, Fox Rothschild and Stern & Eisenberg, became involved in March of 2019, and Plaintiffs' case file, including the Memorandum, was transferred to Fox Rothschild and Stern & Eisenberg at that time. Neither Fox Rothschild nor Stern & Eisenberg sequestered the Memorandum or notified Defendants of their possession of the Memorandum in March 2019.

71. Plaintiffs did not sequester the Memorandum or notify Defendants of their possession of the Memorandum prior to discussing, quoting, and attaching it to their Reply in Support of Motion to Lift Stay and Amend the Complaint on August 1, 2019.

72. Once Get Fresh notified Plaintiffs of their claims of privilege and protection concerning the Memorandum on August 2, 2019, the Memorandum should have been sequestered and not used for any purpose.

ii. Merits Incentives Factor 3: Plaintiffs' counsel extensively reviewed and digested the privileged Memorandum, even after Get Fresh asserted privilege and protection and after the Court struck the Memorandum.

73. On August 5, 2019, the Court struck Exhibit T to Plaintiffs' Reply in Support of Motion to Lift Stay and Amend the Complaint, *i.e.*, the Memorandum. The Court also directed Plaintiffs to not use the Memorandum for any purpose until Get Fresh's claims of privilege and protection was resolved. The Court tried to be clear that it would rule on Get Fresh's claims of privilege and protection during an *in camera* review, as opposed to counsel filing the document with the Court's electronic filing system.

74. Rather than sequester the Memorandum, Plaintiffs repeatedly relied upon the Memorandum to argue that it was not subject to privilege or protection.

75. There is no credible explanation for Plaintiffs' use of the Memorandum in the Response filed in the arbitration on August 12, 2019, utilizing exact language from the Memorandum which the Court has determined is privileged.

76. The explanation by counsel Berkley and Connot that the quotes from the Memorandum were quoted and embedded in their minds because of the briefing filed in this Court on August 1, 2019 and August 4, 2019 after notification by the Defendants of the claims of privilege and protection is of deep concern to the Court and militates in favor of disqualification.

77. Based upon the information that has been provided to the Court, it appears that the only person in whom the Memorandum is embedded in the brain of is Berkley.

iii. ***Merits Incentives Factor 4: Plaintiffs elected to employ the Memorandum as a playbook for their conduct in this action and the arbitration***

78. Plaintiffs' August 12, 2019 Response is their operating pleading in the arbitration. Plaintiffs' possession and use of the Memorandum has, and continues to, prejudice Get Fresh.

79. Plaintiffs incorporated the Memorandum into their pleading and have used it to prosecute their claims (including, as the basis for their extensive discovery requests and motions for advancement and summary judgment in the arbitration). As a result, the return of the Memorandum to Get Fresh would not mitigate the prejudice to Get Fresh or excise the taint permeating throughout the arbitration from Plaintiffs' improper use of the content of the privileged Memorandum.

iv. Merits Incentives Factor 5: There is no evidence that Get Fresh is at fault for the unauthorized disclosure of the Memorandum

80. The Court is not commenting on how the Memorandum came to be in Plaintiffs' possession because it is not of import in making a determination for disqualification.

81. Once Defendants became aware that Plaintiffs possessed the Memorandum on August 1, 2019, Defendants took immediate action to protect their privilege and keep it out of the Court's record.

v. Merits Incentives Factor 6: Plaintiffs' prejudice from disqualification is limited

82. Fox Rothschild's entire representation of Plaintiffs is tainted by Plaintiffs' possession and use of the Memorandum. Plaintiffs wove the Memorandum into their operative pleading in the arbitration.

83. The inability of counsel to extricate privileged information from his or her mind supports disqualification. *See, e.g.*, *Matter of Beiny*, 129 A.D. 2d 126, 141-44 (N.Y. App. 1987) (explaining that use of privileged material warrants disqualification: "While documents may be effectively suppressed, the information gathered from them cannot be so easily contained. We simply do not know whether the information acquired from the [privileged] files will subsequently be used by [counsel], for even if [counsel] attempts to abide by the . . . suppression order, there is no way of assuring that the tainted knowledge will not subtly influence its future conduct of the litigation."); *McDermott Will & Emery LLP v. Superior Court*, 10 Cal. App. 5th 1083, 1124-25 (Cal. App. 2017) ("But the court's order could not prevent Gibson Dunn from using the knowledge it acquired by carefully reviewing and analyzing the e-mail even if the e-mail itself is no longer available to the firm. Even after a trial court has taken remedial action to protect the privilege, 'disqualification still serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage [acquired through the earlier review and use of the inadvertently disclosed, privileged materials].'"); *Clark*, 196 Cal. App. 4th at 54-55 (noting that counsel's review of the privileged material would lead to "inevitable questions about the sources of [counsel's] knowledge (even if [counsel] in fact obtained such knowledge from legitimate sources) could undermine the public trust and confidence in the integrity of the adjudicatory process"); *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092 (Cal. 2007) (affirming disqualification where counsel's use of the privileged information was so extensive, "the damage caused by [the] use and dissemination of the notes was irreversible").

84. Based upon Berkley's testimony and the evidence presented, the Memorandum is embedded in his mind such that he is unable to extricate it from his knowledge of the case.

85. Although Connot's examination of Goldberg during the evidentiary hearing utilized the Memorandum, such use was limited and not a wholesale use of the Memorandum.

Accordingly, Connot's mere use of the document in examining Goldberg does not rise to the level of Connot's disqualification.

86. Based upon the evidence presented, including Even Barenbaum's circulation of the Memorandum to Plaintiffs and counsel on July 31, 2019, it would be better if Stern & Eisenberg, including, but not limited to, Barenbaum, did not participate in this action or any related actions going forward.

F. Sanctions are Necessary.

87. This Court has broad discretion to enter sanctions for litigation misconduct. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93,787 P.2d 777, 780 (1990).

88. The Nevada Supreme Court identified the pertinent, non-exclusive factors for the district court to consider when considering the ultimate sanction, dismissal with prejudice, in *Young v. Johnny Ribeiro Building, Inc.* (the "*Ribeiro* factors"):

> [1] [T]he degree of willfulness of the offending party[;]
>
> [2] [T]he extent to which the non-offending party would be prejudiced by a lesser sanction[;]
>
> [3] [T]he severity of the sanction of dismissal relative to the severity of the discovery abuse[;]
>
> [4] [W]hether any evidence has been irreparably lost[;]
>
> [5] [T]he feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party[;]
>
> [6] [T]he policy favoring adjudication on the merits[;]
>
> [7] [W]hether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney[;] and
>
> [8] [T]he need to deter both the parties and future litigants from similar abuses.

Id. at 93, 787 P.2d at 780.

89. Sanctions are necessary here to "'deter and punish those who abuse the judicial process.'" *Emerson v. Eighth Jud. Dist. Ct.*, 127 Nev. 672, 678, 263 P.3d 224, 228 (2011) (quoting *Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006)).

90. Considering the *Ribeiro* factors, the Court concludes that sanctions are appropriate.

91. Plaintiffs willfully disregarded Get Fresh's claims of privilege and protection on August 2, 2019, and this Court's subsequent orders that the Memorandum be sequestered and not used for any purpose, by incorporating the exact language from the Memorandum into their Response in the arbitration, as well as relying upon the substance of the Memorandum to argue that it was not privileged in this action.

92. While this Court declines to strike Plaintiffs' pleadings filed in this action, it is necessary to discharge the arbitration panel, strike all documents in the arbitration, and order the refiling of all documents in the arbitration. Plaintiffs and their counsel used the Memorandum in their foundational pleading in the arbitration: their Response and Counterclaims. Plaintiffs utilized information contained in the Memorandum since the beginning of the substantive arbitration, including to support their broad discovery requests and claim for advancement.

93. "It is well settled that dismissal is warranted where, as here, a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings: 'courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.'" *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (quoting *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir. 1983)).

94. When Plaintiffs found out about the Memorandum in late January or early February 2019, they recognized the Memorandum was not theirs, had not been in their offices, and should not have been in the boxes that were delivered to their counsel. Plaintiffs did nothing to stop their attorneys from utilizing the Memorandum in this action and the arbitration.

95. There is a significant need to deter Plaintiffs and future litigants from similar abuse and misuse of an adversary's privileged information. Plaintiffs and their counsel acted in contravention of *Merits Incentives*, this Court's orders, and Get Fresh's claims of privilege and protection.

96. Any conclusion of law stated above that is more appropriately deemed a finding of fact shall be so deemed.

ORDER

Based upon the foregoing, the Court grants the Motion for Sanctions and the Motion to Disqualify for the reasons set forth in these Findings of Fact and Conclusions of Law. The Court hereby orders the following relief:

1. Based upon the information that has been provided to this Court it appears that the only person in whom the Memorandum is embedded in the brain of is Brian Berkley of Fox Rothschild LLP. For that reason, Berkley is no longer permitted to participate in any form in this litigation, including, but not limited to, this action and the arbitration. Berkley's pro hac vice status is hereby STRICKEN.

2. Each of Plaintiffs' attorneys (including former attorneys) and Plaintiffs shall provide all copies of the Memorandum, electronic and print, to Defendants. Each of Plaintiffs' attorneys must provide a certification that all versions of the Memorandum have been destroyed and/or provided to Defendants' counsel. This Court is concerned about the number of people have who touched the Memorandum.[3]

3. The current arbitration panel shall be discharged of its duties. A new arbitration shall be initiated and a new arbitration panel shall be appointed. All filings and related proceedings or orders in the arbitration are hereby STRICKEN. The parties are ordered to refile all documents in the arbitration, with Plaintiffs to remove all direct and indirect references to the Memorandum.

4. An award of reasonable attorneys' fees and costs incurred related to this contest of the Plaintiffs' improper possession and use of the Memorandum, and the activities after the August 2, 2019 notification occurred. Get Fresh and Fresh Mix shall file their application for those fees and costs within twenty (20) days of the entry of this Decision and Order.

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[3] Plaintiffs offered to submit declarations from the other members of Plaintiffs' litigation team regarding their use of the Memorandum. (*See* Feb. 14, 2020 Hr'g Tr. 203:16-20.) The Court then provided that "If there is a particular time keeper besides Mr. Berkley that [Defendants] have concerns for, I will have a brief hearing with [Defendants] and [Plaintiffs] related to that after you've had the opportunity to have a declaration and decide if I need more information to make a judgment call." (*Id.* at 203:24-204:3.)

5. This Decision and Order; Findings of Fact and Conclusions of Law is hereby STAYED for fifteen (15) days of its entry, as requested by Plaintiffs on February 14, 2020.[4]

IT IS SO ORDERED.

DATED: 2 Mar 2020

ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

[4] This stay includes a stay of the deadline for Get Fresh and Fresh Mix to file their application for attorneys' fees and costs.

EXHIBIT D TO DOCKETING STATEMENT

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DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC., a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No. A-18-785391-B Dept. No. XI **VERIFIED AMENDED COMPLAINT AND DERIVATIVE ACTION**

COMES NOW, Plaintiffs, PAUL LAGUDI, an individual, and WILLIAM TODD PONDER, an individual (together, the "Plaintiffs"), by and through their attorney of record, MARK CONNOT of FOX ROTHSCHILD LLP, and hereby submit their Amended Complaint on their own behalf and derivatively on behalf of FRESH MIX, LLC, a Delaware limited liability company, against Defendants, GET FRESH SALES, INC., a Nevada corporation; GET FRESH KITCHEN, LLC, a Nevada limited liability company; DOMINIC CALDARA, an individual; SCOTT GOLDBERG, an individual; JOHN WISE, an individual; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, and alleges the following:

GENERAL ALLEGATIONS

1. This case concerns the oppressive actions taken by a majority shareholder and related defendants designed to harm two minority shareholders. The Defendants have employed

these actions as part of a grand scheme intended to weaken the Plaintiffs and devalue their shares. In the process, Defendants have violated their contractual, fiduciary, and tort duties owed to the Plaintiffs.

2. In 2001, the Plaintiffs began their company in the produce business. Through their hard work, it thrived. Within just a few years, the business was generating millions in revenue.

3. In 2010, they decided [redacted] As part of the deal, the parties executed an Operating Agreement, which sets forth the parties' rights and obligations. Many of those rights had built in protections for the minority shareholders. Plaintiffs' company was renamed Fresh Mix, LLC.

4. Going forward, Get Fresh was supposed to provide the materials, certain labor, and back-office support, while Plaintiffs continued to grow sales and customers.

5. Shortly after closing the deal, Plaintiffs noticed that Defendants were overcharging Fresh Mix, LLC and misallocating its revenue. Through the documents Defendants received as members and managers of Fresh Mix, LLC, they pointed out these errors, and Defendants admitted they made such mistakes. Nevertheless, the overcharging and misallocating of revenues continues to this day.

6. Defendants also used the resources of Fresh Mix, LLC to develop new business opportunities, but did not permit Fresh Mix, LLC to share in the revenues and profits of such new business, despite promises to the contrary.

7. As a result of Defendants' constant mistreatment of the Plaintiffs, the parties tried to negotiate a sale of Plaintiffs' interest in Fresh Mix, LLC. The parties were unable to reach a deal.

8. As a result of not getting what they wanted, Defendants have decided to execute on a different negotiating strategy. Starting in November 2018, Defendants have:

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(a) removed Lagudi and Ponder from the business and shut them out from receiving any further work communications and falsely informed employees and customers that Lagudi and Ponder are no longer with Fresh Mix;

(b) initiated a costly arbitration, against not only Lagudi and Ponder but also their spouses with baseless claims;

(c) threatened to sue Lagudi and Ponder should they choose to work;

(d) refused to indemnify Lagudi and Ponder in violation of the Operating Agreement;

(e) stopped providing full distributions to Lagudi and Ponder;

(f) stopped providing documents and information about the business that Lagudi and Ponder received for years, and frustrated the book and records rights of Lagudi and Ponder;

(g) purposely stopped adequately servicing Fresh Mix customers; and

(h) ignored voting procedures set forth in the Operating Agreement.

9. In taking these actions, Defendants violated multiple contractual, fiduciary, and tort duties they owe to the Plaintiffs. Defendants' actions have significantly decreased the revenue generated by Fresh Mix, LLC.

10. Plaintiffs seek monetary, equitable, and other relief to which they are entitled.

PARTIES

11. Plaintiff, PAUL LAGUDI ("Lagudi"), is an individual residing in Clark County, Nevada.

12. Plaintiff, WILLIAM TODD PONDER ("Ponder"), is an individual residing in Clark County, Nevada.

13. FRESH MIX, LLC ("Fresh Mix"), is a Delaware limited liability company registered with the Nevada Secretary of State as a foreign entity authorized to conduct business in the State of Nevada.

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14. Plaintiffs are informed and believe and thereupon allege that Defendant, GET FRESH SALES, INC. ("Get Fresh"), is a Nevada corporation conducting business in Clark County, Nevada.

15. Plaintiffs are informed and believe and thereupon allege that Defendant, GET FRESH KITCHEN, LLC ("Get Fresh Kitchen"), is a Nevada limited liability company conducting business in Clark County, Nevada.

16. Plaintiffs are informed and believe and thereupon allege that Defendant Dominic Caldara is a Nevada resident and citizen and the President/CEO of Get Fresh.

17. Plaintiffs are informed and believe and thereupon allege that Defendant Scott Goldberg is an Arizona resident and citizen and principal of Get Fresh.

18. Plaintiffs are informed and believe and thereupon allege that Defendant John Wise is a Nevada resident and citizen and principal/founder of Get Fresh.

19. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as DOES 1 through 25, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, and each of them, are unknown to Plaintiffs who therefore sue such Defendants by such fictitious names. Plaintiffs are informed, believe and thereon allege that each of the Defendants designated herein as a "DOE" or "ROE BUSINESS ENTITY" are agents, employees, servants and representatives of the named Defendants or persons and entities answering in concert with the named Defendants with respect to the agreement herein pled, who are liable to Plaintiffs by reason thereof, and Plaintiffs pray leave to amend this Complaint to insert their true names or identities with appropriate allegations when same become known.

20. This Court maintains jurisdiction over this matter since Plaintiffs allege damages in excess of $15,000, and seek injunctive relief. Venue is proper in this Court pursuant to NRS §§ 13.010 and 13.040, in that this is the county in which Defendant resides, and the obligations of the parties hereto were to be performed or occurred.

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FACTUAL BACKGROUND

Paul Lagudi and Todd Ponder Build Lagudi Enterprises Into A Multi-Million Dollar Business In The Produce Industry

21. In 2001, Paul Lagudi formed Lagudi Enterprises, which, based on a hand-shake deal, was owned by Lagudi and Ponder, 75% and 25%, respectively. The company was built on honesty and integrity.

22. Lagudi Enterprises initially focused on providing fresh fruits and vegetables to commercial customers. It became known as the "kitchen to the hotels." Lagudi Enterprises would cut and prepare all fresh cut fruits and vegetables for hotel and casino clients. It built its reputation with a keen focus on building customer relationships by servicing every customer need efficiently and effectively.

23. Ever responsive to the industry's needs, Lagudi Enterprises expanded to include "table ready," prepared fruits and vegetables, allowing for its commercial customers to serve and utilize the fruits and vegetables absent additional cleaning, cutting, and preparation.

24. Lagudi and Ponder grew Lagudi Enterprises by working hard, providing a high-quality product, and solidifying strong personal relationships with its suppliers and customers built on trust.

25. Through these efforts, Lagudi Enterprises began growing its client roster, which included Mandalay Bay, Bellagio, MGM Grand, Venetian, Mirage, Luxor, Excalibur, Circus Circus, and Monte Carlo, just to name a few.

26. Within 3 years, Lagudi and Ponder grew Lagudi Enterprises into a business with gross revenues in the multi-millions. It became the primary fresh cut supplier to both the MGM Mirage and the Mandalay Bay Group.

27. Lagudi Enterprises continued to grow its client roster. In 2005, Mandalay Bay Group merged with MGM Mirage (collectively, "***MGM***"). MGM expanded the business Mandalay Bay had done with Lagudi Enterprises.

28. In that same year, Lagudi and Ponder landed another desired and sought out customer for Lagudi Enterprises, Trader Joe's.

29. By 2005, Lagudi Enterprises had established itself as a leading supplier to MGM/Mirage, Inc. and Mandalay Bay Group and continued to grow revenues by even more millions of dollars.

Lagudi Enterprises Becomes A Competitive Threat To Get Fresh

30. With the growth of Lagudi Enterprises, it started to take market share from one of its competitors, Get Fresh.

31. For instance, in 2006, Get Fresh, Lagudi Enterprises, and another competitor had bid on an exclusive contract on continuing business for MGM for cut produce.

32. Lagudi Enterprises beat out Get Fresh and the other competitor for the MGM business. It did so despite the fact that Get Fresh had a much larger facility. Lagudi Enterprise's honor, integrity, attention to detail, and twenty-four hours/seven days a week service mentality gave it the edge it needed to win MGM's ongoing business.

33. Lagudi Enterprises continued to obtain business for which Get Fresh had either bid on or serviced. For instance, Lagudi Enterprises attracted new clients Caesars Entertainment, Stations, and Boyd Group.

Get Fresh Decides To Purchase Lagudi Enterprises

34. Get Fresh began to recognize the significant competitive threat posed by Lagudi Enterprises. In 2008, Dominic Caldara encountered Ponder at a social event, and began "planting the seeds" for a deal with Lagudi Enterprises.

35. In 2009, Caldara reached out to Lagudi and Ponder, requested a meeting, and suggested that he was interested in purchasing Lagudi Enterprises as a going concern, as long as Lagudi and Ponder remained involved in the business.

36. On information and belief, Caldara wanted Lagudi and Ponder to stay involved because he knew the value of Lagudi Enterprises lie with the reputation and network of Lagudi and Ponder.

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37. Get Fresh was focused on sharing in Lagudi Enterprises' business, in part to recapture the clients it had lost to Lagudi and Ponder. Caldara claimed there was no downside of the deal for Lagudi and Ponder. He emphasized that all operations would be taken care of by Get Fresh. Caldara even committed to ensuring that Lagudi and Ponder received a guaranteed payment each month, irrespective of whether the profit generated from the business called for distributions.

The Parties Form Fresh Mix Out Of Lagudi Enterprises With Important Protections In Place For The Founders Lagudi and Ponder

38. Ultimately, they struck a deal. Lagudi and Ponder divested their interest in Lagudi Enterprises, [redacted]

39. Generally, Lagudi and Ponder would continue to grow revenue by servicing existing customers and attracting new ones. Get Fresh would provide the "back-office" operational support.

40. As part of the formation of Fresh Mix, the parties executed an Operating Agreement.

41. As set forth in the Operating Agreement, the primary purpose of Fresh Mix is to [redacted] Section 2.4 of Operating Agreement.

42. Given that primary purpose, Fresh Mix is in direct competition with Get Fresh and its other businesses, affiliated entities, trade names, and product channels, including Get Fresh Market, Get Fresh Harvest, Fresh Cuts, and Get Fresh Kitchen. Specifically, these businesses provide the following similar services:

(a) Get Fresh Market is a Get Fresh trade name and product channel producing gourmet grocery items.

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(b) Get Fresh Harvest is another trade name and product channel that provides produce to customers.

(c) Fresh Cuts was originally formed in 1996, and is a related company 100% owned by Caldara, Goldberg and Wise. It provides custom produce processing.

(d) Get Fresh Kitchen was formed in 2017 and is 100% owned by Caldara, Goldberg, and Wise. It provides USDA products to Kroger, Associated Foods, and others, and Get Fresh competes in the same geographic region as Fresh Mix.

43. In part because of this dynamic, the Operating Agreement [redacted]

Management Rights

44. Pursuant to the Operating Agreement, [redacted] *See id.* at Section 5.2(a)-(b).

45. [redacted] *Id.* at Section 5.1.

46. Section 5.1(c) states that [redacted]

47. Section 5.1(c) further gives [redacted]

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[redacted]

48. [redacted] the Operating Agreement [redacted] *Id.* at Section 1.67. For instance, only a [redacted] *Id.* at Section 7.1.

49. Similarly, certain decisions must be approved by a [redacted] *Id.* at Section 1.66.

[redacted] Section 5.3(a)-(j) [redacted]

Business Protection Rights

51. The Operating Agreement also [redacted].

52. Section 4.4, [redacted] Section 2.4 [redacted]

53. Section 5.4(d), [redacted]

[redacted]

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[redacted]

54. The Operating Agreement also [redacted]

55. Section 5.4(b), [redacted]

56. Section 5.4(c), [redacted]

Distribution Rights

57. The Operating Agreement [redacted] A few are particularly relevant to this dispute.

58. Section 1.22 [redacted]

59. [redacted]

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[redacted]

60. Section 7.1 [redacted]

Books And Records, And Accounting Rights

61. The Operating Agreement [redacted]

62. Section 9.1 [redacted]

63. Section 9.1 [redacted]

64. Section 9.3 [redacted]

65. Section 9.2, [redacted]

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66. Section 9.7, [redacted]

Employment Rights

67. The Defendants recognized that separate and apart from Lagudi Enterprises, as individuals, both Lagudi and Ponder brought significant value to Fresh Mix and wanted to employ them.

68. Accordingly, Section 5.5 of the Operating Agreement, [redacted]

69. Section 5.6 of the Operating Agreement [redacted]

70. The Employment Agreements state that "[t]he Company hereby employs Employee and Employee accepts such employment commencing effective as of January 11, 2010, and unless sooner terminated as hereinafter provided, terminating three years (3) from thereof (the "Term"). At the end of the Term, the parties may agree to renew this Agreement and thereby extend the Term; provided, however, that if either party wished to renew this Agreement, such party must provide written notice to the other party not later than one hundred twenty (120) days prior to the expiration of the Term." Section 1 of Employment Agreement.

71. Accordingly, if the parties did not provide prior written notice of renewal, the Employment Agreements terminated on January 11, 2013.

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72. The Employment Agreements contain a non-compete provision. That provision, however, expires two years after expiration of the Term. *See* Section 5.1 of Employment Agreement.

73. The Operating Agreement, as compared to the Employment Agreements, [redacted]

74. Section 4.4 [redacted]

75. Section 5.7, [redacted]

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[redacted]

76. The Employment Agreements expired in January 2013 and Plaintiffs' non-compete obligations expired two years later, in January 2015.

77. Accordingly, only the rights and obligations set forth in the Operating Agreement control.

Purchase Rights And Protections

78. Lagudi and Ponder also enjoy certain rights and protections should the majority member seek to sell its ownership interests or the assets of Fresh Mix.

79. For instance, Lagudi and Ponder [redacted] Section 8.4(c) of the Operating Agreement [redacted]

80. Section 8.3(b), [redacted]

Limitation of Liability And Indemnification Rights

81. Multiple sections of the Operating Agreement protect Lagudi and Ponder [redacted]

82. Section 12.1, [redacted]

83. Section 12.2, [redacted]

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[redacted]

84. Lagudi and Ponder also enjoy [redacted]

[redacted]

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[redacted]

85. Section 12.4, [redacted]

[redacted]

86. As is typical for Members and Managers like Lagudi and Ponder, [redacted]

Injunctive Rights And Arbitration Rights

87. Sections 14.7 and 14.8 of the Operating Agreement [redacted]

88. [redacted]

89. Section 14.7 [redacted]

90. Section 14.8 [redacted]

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91. Thus, Plaintiffs may [redacted]

Lagudi and Ponder Continue To Grow The Business

92. As a result of the formation of Fresh Mix, Lagudi and Ponder brought multiple new customers and new business to Fresh Mix. These included Trader Joe's, Sysco, and bulk and cut fruit produce for MGM Resorts, among others.

93. After the formation of Fresh Mix, Lagudi and Ponder continue to do what they had done before – work hard to grow business from their existing customers while bringing in new customers.

94. With regard to MGM, Lagudi and Ponder expanded their existing relationship to include supplying tomatoes. This was an exclusive arrangement to supply MGM on a corporate basis.

95. In 2012, Lagudi successfully and significantly grew the amount of Walmart business being serviced by Fresh Mix. In that year, Fresh Mix, through Get Fresh, as per the Operating Agreement, began supplying Walmart with fruits and vegetables whenever any of its Nevada stores were short a particular produce product. It also supplied Walmart with certain special orders.

96. In 2014, Fresh Mix lost the business because Walmart stopped purchasing from any local vendors in Nevada while Walmart went through certain personnel changes. However, through his tireless efforts, Lagudi succeeded in bringing Walmart back as a client for Fresh Mix, which it continues to be today.

97. In 2015, Lagudi and Ponder brought in Ralphs (i.e. Kroger) as a new client. Fresh Mix began supplying Ralphs with portion control vegetables for its retail deli market. Fresh Mix also launched a retail portion control organic salad line for Ralphs.

98. Also in 2015, Lagudi negotiated a new contract with MGM Resorts, which is part of a joint venture that owns the T-Mobile Arena in Las Vegas. Lagudi secured a six-year contract to supply the arena and MGM Resorts properties in southern Nevada with their produce needs.

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99. In 2016, Lagudi and Ponder launched the "straight from the root" sous vide vegetable product line for all major retailers, including but not limited to, Publix, Kroger, Whole Foods, and Walmart. It is a fully cooked vegetable line that is always fresh, but has a multiple month shelf life.

100. From 2017 through 2019, Lagudi and Ponder continued to grow these customers, as well other existing customers, while also working to secure more new business.

101. Like they did starting with their handshake deal in 2001, Lagudi and Ponder worked around the clock devoting themselves to servicing their clients at the highest level. Through their efforts, they continued to grow the business. By 2016, Fresh Mix had gross revenues of more than $26 million annually.

Given The Competitive Dynamic Between Get Fresh And Fresh Mix, Lagudi And Ponder Must Continually Monitor Get Fresh's Operational Support

102. Since Get Fresh provides the operational support, Fresh Mix must reimburse Get Fresh the costs associated with that support.

103. Further, Get Fresh performs the reporting function for Fresh Mix and controls the information concerning costs, revenues, etc.

104. Given this dynamic, Lagudi and Ponder have been forced to repeatedly monitor and audit the information Get Fresh has provided to ensure Get Fresh does not overcharge Fresh Mix for the operational support Get Fresh provides. Lagudi and Ponder have also had to make sure Fresh Mix receives the proper recognition of the revenue it generates. Ponder has been the primary person responsible for such monitoring and auditing.

105. To do this, Ponder requested and received access to certain information. He received "Margin and Analysis Reports," which provide detailed information concerning gross revenue, profits and costs associated with each product line. Up until November 2018, he received these reports on a daily basis, as did other Managers of Fresh Mix.

106. Ponder, like the other Managers for Fresh Mix, also received the following reports: (i) "Daily Usage Reports" (which he received until November 2018), (ii) "Value Add Analysis

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Reports" (which he received until July 2018), and (iii) "Internal New Item Request Forms" (which he received until May 2018). These reports included even more detailed information concerning the produce items that were attributable to Fresh Mix as compared to Get Fresh and its affiliates.

107. Based on his knowledge of the business, Ponder would compare the reports identified above against the Margin and Analysis Reports to ensure Fresh Mix received credit for the items it sold to its customers.

108. Often, these reports showed Fresh Mix was not receiving proper credit for the items it sold. Instead, that credit went to Get Fresh and/or its affiliates.

109. From 2010 through 2018, Ponder would on a weekly basis inform Get Fresh of these discrepancies. Get Fresh admitted Ponder was correct.

110. Upon information and belief, these errors in allocating revenue continue to this day.

111. As a result of the misconduct of Get Fresh, Caldara, Goldberg, and Wise, upon information and belief, Fresh Mix is owed millions of dollars in misallocated revenue.

Get Fresh Admits Overcharging Fresh Mix in Breach Of Operating Agreement

112. Lagudi and Ponder also would audit the cost-side of the business.

113. At the formation of Fresh Mix, the parties agreed that, consistent with Section 5.4(b) of the Operating Agreement, Get Fresh would charge Fresh Mix the actual costs for the services and goods Fresh Mix received from Get Fresh.

114. Yet, since the formation, Lagudi and Ponder repeatedly learned Get Fresh overcharged Fresh Mix.

115. In reviewing information received from Get Fresh regarding the costs that Get Fresh charged Fresh Mix, Ponder and Lagudi discovered that Get Fresh repeatedly overcharged Fresh Mix.

116. Get Fresh overcharged Fresh Mix for, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs.

117. After being confronted, Get Fresh admitted that it overcharged Fresh Mix over $1 million in 2010 alone.

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118. Nevertheless, it continued to overcharge Fresh Mix for the operational support it provided.

119. For instance, Get Fresh is part of a consortium called "PRO*ACT" that allows it to obtain rebates for certain produce it purchases through the consortium.

120. Notwithstanding its obligation to charge Fresh Mix its actual costs, Get Fresh has pocketed and refused to pass its cost savings on to Fresh Mix, as it is required to do.

Get Fresh Uses Fresh Mix To Develop New Business Opportunities But Does Not Share Profits With Fresh Mix

121. In 2014, Get Fresh sales performance was particularly poor. As a result, it brought in a consultant to assist.

122. One of the consultant's recommendations was to obtain a larger presence in the retail category. Since Lagudi and Ponder had already done that very successfully through their deli vegetable and organic salad kit program, Get Fresh asked Fresh Mix to provide resources and services to assist in expanding further in the retail category so that Get Fresh could follow the success Fresh Mix was having in the retail market.

123. Ponder, on behalf of Fresh Mix, agreed to assist in building the sector together with Get Fresh in a shared capacity with Fresh Mix.

124. Starting in 2015, Ponder worked to create an organic "grab n' go" fruit and vegetable line to be placed in all Smiths grocery stores located in Nevada and Utah. Ponder was instrumental in convincing Smiths' owner, Kroger, to accept the fruit and vegetable program. He was also instrumental in setting up the USDA kitchen requested by Smiths for purposes of supplying the Smiths' grocery stores.

125. This introduced a new, highly profitable revenue stream to Defendants called "Kroger Fresh Kitchen."

126. For the next several years, Ponder worked tirelessly to get the Kroger Fresh Kitchen business off the ground and running. He hired the key employees, purchased the necessary equipment to process the Kroger Fresh Kitchen line of products, and pushed sales until they were in over forty stores in Nevada.

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127. In 2016, through Ponder's efforts, the Kroger Fresh Kitchen business was consistently among the most profitable businesses within Get Fresh (along with Fresh Mix). Ponder pushed its growth further, with Smiths expanding the business from forty stores to one hundred fourteen.

128. Based on his success, in 2017, Ponder met with Kroger corporate officers and succeeded in getting Smiths' entire "grab n' go" deli line.

129. At all times, Ponder was paid by Fresh Mix, including 50% of his expenses.

130. Defendants Get Fresh, Caldara, Goldberg, and Wise informed Ponder and Lagudi that Fresh Mix would be provided its share of the profits from the Kroger Fresh Kitchen business.

131. That, however, never happened.

132. Instead, Defendants Get Fresh, Caldara, Goldberg, and Wise have moved the business under Get Fresh affiliate, Defendant Get Fresh Kitchen, which is 100% owned by Defendants Caldara, Goldberg, and Wise.

133. In 2017, Ponder successfully secured a new line of business on behalf of Fresh Mix called "Purple Carrot." Purple Carrot is a one hundred percent (100%) vegetarian meal kit, which includes all the components needed to make a complete, nutritious meal at home. Ponder saw an opportunity to expand into this new line of business, and after months of hard work and effort, successfully secured it.

134. Notwithstanding Ponder's efforts, Get Fresh has not provided Fresh Mix with the appropriate credit for bringing this new line of lucrative business.

135. As noted above, Walmart for a period of time ceased being a customer of Fresh Mix. At that time, it was a customer of both Get Fresh and Fresh Mix separately. Under the arrangement at that time, Get Fresh received the first $25,000 of monthly profit.

136. Under Get Fresh's practice, once a customer stopped doing business with Get Fresh for four months, it then became available to Fresh Mix to attempt to secure as a new customer.

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137. After more than four months passed, Fresh Mix successfully brought Walmart back as a customer. Pursuant to that agreement, Fresh Mix was entitled to keep all the profits generated by the Walmart business.

138. In violation of its agreement with Fresh Mix, Get Fresh insisted on receiving the first $25,000 in monthly profit.

As The Relationship Worsens, Get Fresh Unsuccessfully Seeks To Sell Fresh Mix

139. Throughout the years, Lagudi and Ponder would complain about Defendants' mistreatment. This led to mistrust between the parties, and the relationship deteriorated.

140. In November 2017, Defendants Caldara, Goldberg, and Wise communicated to Lagudi and Ponder that they had an opportunity to sell Get Fresh and its affiliates, including Fresh Mix.

141. Defendants Caldara, Goldberg, and Wise informed Plaintiffs that the potential buyer, however, required that all owners of any Get Fresh affiliate sign representations and warranties for all the businesses.

142. As a result, Defendants Get Fresh, Caldara, Goldberg, and Wise demanded Lagudi and Ponder sign representations and warranties confirming the accuracy of the information concerning **all** of the Get Fresh businesses.

143. Lagudi and Ponder, however, have no ownership interest in any Get Fresh business except Fresh Mix. Further, they do not control the information relating to Fresh Mix, as that is controlled by Get Fresh. Additionally, throughout the years they had challenged the accuracy of that information.

144. Accordingly, Lagudi and Ponder would not agree to sign the representations and warranties in the form proposed, even assuming Lagudi and Ponder agreed to accept a sum certain for their interests in Fresh Mix.

145. Defendant Get Fresh then sought to buy out Lagudi and Ponder. Yet, because the information from Get Fresh had repeatedly been wrong, Lagudi and Ponder reasonably required

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that valuation of their collective forty percent interest should be based on actual correct financial information.

146. On or before November 14, 2018, Lagudi, on behalf of Ponder and himself, met with Goldberg to negotiate a buy-out of Plaintiffs' interests in Fresh Mix. The parties were unable to reach a deal.

147. As a result, Defendants Get Fresh, Caldara, Goldberg, and Wise decided they would pursue another "negotiation" tactic. They began to execute on a plan designed to artificially drive down the value of Fresh Mix and force Plaintiffs back to the negotiating table in a much weaker position.

Get Fresh Retaliates Against Lagudi And Ponder As Part Of Grand Scheme To Drive Down The Value Of Fresh Mix And Bring Lagudi And Ponder To The Bargaining Table

148. On November 26, 2018, the Monday after Thanksgiving, Defendants Get Fresh, Caldara, Goldberg, and Wise began executing on a new multi-prong scorched earth strategy designed to harm and oppress Lagudi and Ponder and Fresh Mix.

149. The strategy includes the following:

(a) remove Lagudi and Ponder from the business and shut them out from receiving any further work communications and falsely inform employees and customers that Lagudi and Ponder are no longer with Fresh Mix;

(b) initiate a costly arbitration against not only Lagudi and Ponder but also their spouses with baseless claims;

(c) threaten to sue Lagudi and Ponder should they choose to work;

(d) refuse to indemnify Lagudi and Ponder in violation of the Operating Agreement;

(e) stop providing full distributions to Lagudi and Ponder;

(f) stop providing documents and information about the business that Lagudi and Ponder received for years and frustrate the book and records rights of Lagudi and Ponder;

(g) purposely stop adequately servicing Fresh Mix customers; and

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(h) ignore voting procedures set forth in the Operating Agreement.

150. This scheme has at least three goals. *First*, Defendants Get Fresh, Caldara, Goldberg, and Wise seek to increase the legal expenses and costs of Lagudi and Ponder. *Second*, these Defendants want to starve off the funds Lagudi and Ponder need to pay for those legal expenses and costs. *Third*, these Defendants intend to devalue the shares of Lagudi and Ponder in Fresh Mix by reducing its revenue while continuing to artificially inflate its costs.

151. Defendants Get Fresh, Caldara, Goldberg, and Wise anticipate that if they succeed in obtaining these goals, they will force Lagudi and Ponder to the negotiating table in a weakened position and be able to purchase their shares at a *de minimus* value.

152. By employing this strategy, however, Defendants Get Fresh, Caldara, Goldberg, and Wise have breached the Operating Agreement and violated their fiduciary duties.

Defendants Wrongfully Remove Lagudi And Ponder From Fresh Mix

153. On November 26, 2018, Get Fresh sent a letter to Lagudi and Ponder informing them that the letter "serves as notice of termination of your employment with Fresh Mix, effective immediately." Ex. A. The letter suggested Get Fresh had also chosen not to renew the Employment Agreements of Lagudi and Ponder, thereby ending the term of those agreements as of January 2019.

154. Further, notwithstanding that Lagudi and Ponder were Managers and Members of Fresh Mix, the letter informed Lagudi and Ponder that "[i]n light of your termination, please cease all work on Fresh Mix matters, cease use of all Fresh Mix property or data, and do not hold yourself out as a Fresh Mix employee." *Id.*

155. It also stated Lagudi and Ponder were "prohibited from entering [Fresh Mix] property. We will arrange for your personal items, if any, located at Fresh Mix to be delivered to you."

156. The letter also "remind[s]" Lagudi and Ponder of their purported "continuing obligations, including your confidentiality and two year non-compete obligations, as detailed in your Fresh Mix Employment Agreement."

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157. Get Fresh took the position that the Employment Agreements were still in effect, even though it had admitted for years that those agreements terminated under their respective terms, in 2013. It did so, in part, to threaten Lagudi and Ponder with non-existent non-compete obligations under those Agreements.

158. Get Fresh claimed the termination was "for cause," and pointed to a separate "Notice of Dispute" that it served on Lagudi and Ponder that same day.

159. That "notice," which is attached hereto as Exhibit B, purported to provide a list of seven (7) "disputes."

160. It provided, however, no facts or support. Indeed, it was a concoction.

161. For instance, for a dispute titled "Breach of Contract (Operating Agreement)," the "notice" states: "Costco, Disclosure of Confidential Information, Failure to Perform under the Operating Agreement." The other entries similarly suffered from the same lack of facts or notice of the actual dispute. Ex. B.

162. The "notice" demonstrates the pretextual nature of Defendants' termination of Lagudi and Ponder.

163. On that same day, Get Fresh also fired the executive assistant working with Lagudi and Ponder at Fresh Mix.

164. By removing Lagudi, Ponder, and their assistant, Get Fresh removed all employees working for Fresh Mix at the time.

165. To make matters worse, Get Fresh also falsely informed the employees of Get Fresh and Fresh Mix's customers that "both Paul Lagudi and Todd Ponder have left the company to pursue other career endeavors."

166. These actions were without cause, pretextual, and designed to harm Lagudi, Ponder, and Fresh Mix.

167. As a result of these actions, Lagudi and Ponder were forced to initiate this action and seek a temporary restraining order.

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168. The Court granted the application for a temporary restraining order, finding that Lagudi and Ponder showed a likelihood of success on the merits and that irreparable harm could result. *See* Ex. C.

169. Specifically, the Court ordered Defendants Fresh Mix, Get Fresh, and the Doe and Roe entities to reinstate Lagudi and Ponder as "Managers of Fresh Mix having all rights, interests, and obligations as Managers of Fresh Mix." *See* Ex. C.

170. The Court further stated that those Defendants were to return to Plaintiffs access to their previously used email accounts as well as return any personal property to Plaintiffs. *See* Ex. C.

171. Finally, the Court ordered that those Defendants could not make any further statements that Lagudi and Ponder were no longer associated with Fresh Mix. *See* Ex. C.

Get Fresh Brings A Baseless Arbitration Against Not Only Lagudi And Ponder, But Also Their Spouses

172. As part of the Court's hearing on December 11, 2018, the Court stated the following in connection with Get Fresh's contention that the Employment Agreements did not terminate (emphasis added):

> I am concerned, counsel, related to the employment status. However, ***at this point it appears that they were at-will employees because of the expiration of the agreement, and I am not going to grant any other relief related to the employment contracts***.

Ex. D.

173. On January 16, 2019, the Court ruled as follows (emphasis added):

> Based upon the information currently before me it appears the employment agreement expired long ago. ***Therefore, no arbitration provision in the employment agreement survives for purposes of this dispute***.

Ex. E.

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174. Notwithstanding this clear direction from the Court, on February 13, 2019, Get Fresh filed a Notice of Arbitration with the American Arbitration Association ("AAA") bringing arbitration claims under the Employment Agreements. *See* Ex. F.

175. Specifically, it states:

> This Demand for Arbitration is further made pursuant to the January 11, 2010 Employment Agreements between Fresh Mix and Messrs. Lagudi and Ponder. The Employment Agreements require that any disputes "arising out of, relating to or concerning" the Employment Agreements, their breach, or the termination of Messrs. Lagudi and Ponder's employment, "shall be settled by arbitration in Las Vegas, Nevada, in accordance with the Commercial Arbitration Rules of the [AAA]."

176. In defiance of the Court, Get Fresh brought its arbitration under the Employment Agreements and alleges Lagudi and Ponder breached those Agreements.

177. It did so because under the Operating Agreement, [redacted]

178. The Arbitration sets forth baseless claims against Lagudi and Ponder.

179. To make matters worse, without any legal or factual basis Get Fresh also sued the spouses of Lagudi and Ponder.

180. It did so without having any claims against either spouse and for the sole purpose of attempting to intimidate Lagudi and Ponder.

181. Despite Plaintiffs' requests, Get Fresh refused to remove or dismiss the spouses from the arbitration. The spouses of Lagudi and Ponder were forced to file a motion to intervene with this Court.

182. Only after forcing the spouses of Lagudi and Ponder to incur expenses associated with such filing did Get Fresh agree to remove the spouses from the arbitration.

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183. Get Fresh's actions in the arbitration are designed to further its scheme to harm Plaintiffs.

Get Fresh Threatens To Sue Lagudi and Ponder Should They Choose To Work

184. Get Fresh stopped making payments to Lagudi and Ponder, which they received since 2010, after Get Fresh sent notice of terminating their employment.

185. Get Fresh has used the Employment Agreements to stop Lagudi and Ponder from obtaining earnings from anywhere else.

186. Specifically, on February 19, 2019, Defendant Caldara sent a letter to Mr. Ponder stating that Defendant Goldberg "told us that you might be considering employment at MGM Resorts. Presumably, your involvement is in the purchasing of produce." *See* Ex. G.

187. It further states "your Employment Agreement provides for a period of non-competition for two years after termination. We believe that provision prevents you being employed, or assisting in any manner, an entity that engages in the business of purchasing food products. The company intends to enforce this restrictive covenant." *Id*.

188. It also notes "the Employment Agreement also prohibits you from disclosing or using for personal gain and benefit any of the company's trade secrets. The company does not envision any circumstance where you could avoid violating this provision in the performance of your anticipated duties for MGM Resorts. Please refer to the provisions of your Employment Agreement regarding the company's remedies to prevent such misuse." *Id.*

189. On April 24, 2019, counsel for Get Fresh sent a letter demanding Ponder disclose his intentions for further employment, threatening again to enforce the Employment Agreement. Counsel did so, despite knowing that the Court had already stated the Employment Agreements had "expired long ago." Ex. H.

190. When pressed to provide a basis for Get Fresh's threats, counsel for Get Fresh refused to provide any. Ex. I.

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191. Get Fresh seeks to threaten non-compete obligations it knows expired "long ago" for the sole purpose of intimidating Lagudi and Ponder and prevent them from gainful employment.

Defendants Refuse To Indemnify Lagudi and Ponder

192. As set forth in Section 12.3 of the Operating Agreement, Lagudi and Ponder are entitled to [redacted] Section 12.3 [redacted]

193. Section 12.4 [redacted]

194. On March 13, 2019, Lagudi and Ponder sought to exercise their rights and requested [redacted], consistent with Sections 12.3 and 12.4 of the Operating Agreement. Ex. J.

195. On March 15, 2019, Defendants responded and [redacted] in violation of Sections 12.3 and 12.4 of the Operating Agreement. Ex. K.

196. Upon information and belief, Defendant Get Fresh also failed [redacted] in violation of Section 12.3.

197. Defendant Get Fresh breached the Operating Agreement as part of its overall scheme to deny Lagudi and Ponder the resources necessary to defend themselves against all Defendants.

Defendants Stop Making Full Distributions To Lagudi And Ponder

198. Incredibly, at the same time Defendants Get Fresh, Caldara, Goldberg, and Wise were refusing to indemnify Lagudi and Ponder, they purportedly used Plaintiffs' request for indemnification as justification to stop making full distributions to Lagudi and Ponder.

199. On April 8, 2019, Defendant Goldberg sent a letter to Lagudi and Ponder stating that the April 2019 Distributions were "affected by [Fresh Mix's] responsibility to establish

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Reserves to account for contingent liabilities relating to the pending and threatened disputes between and among [Fresh Mix]." Ex. L.

200. It then listed the following contingent liabilities (emphasis added):

- [Fresh Mix's] anticipated costs and expenses in connection with the Disputes.
- The impact on [Fresh Mix], including its obligation to materially adjust prior years' tax forms and prior distributions of Distributable Cash to its Members, if the arbitrators (or a Court) presiding over the Disputes confirm that Messrs. Lagudi and Ponder were not [Fresh Mix] employees after 2013.
- ***Messrs. Lagudi and Ponder's demand for indemnification and advancement of costs and expenses relating to the Disputes.***
- The anticipated demand for indemnification and advancement of costs and expenses incurred by Get Fresh Sales, Inc. and Messrs. Caldara, Goldberg and Wise in connection with the Disputes, assuming indemnification or advancement is ultimately ordered or provided to Messrs. Lagudi and Ponder.

201. Defendants Get Fresh, Caldara, Goldberg, and Wise admit that this is the first time ever that Fresh Mix has set a reserve.

202. Defendants failed to comply with the voting procedures set forth in the Operating Agreement that would permit the distributions to not be paid.

203. Plaintiffs have requested, but Defendants Get Fresh, Caldara, Goldberg, and Wise have refused to provide any further information concerning the reserve, including information

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relating to the analysis and amount of exposure these Defendants anticipate for the contingent liabilities.

204. Defendant Get Fresh purposely has not provided full distributions to Lagudi and Ponder for no legitimate reason. Instead, it represents yet another tactic designed to deny Lagudi and Ponder resources necessary to defend themselves and prosecute their rights.

205. Defendants Get Fresh, Caldara, Goldberg, and Wise are in breach of the Operating Agreement and their fiduciary duties.

Defendants Refuse To Provide Lagudi And Ponder With Books And Records

206. Starting in May 2018, Defendants Get Fresh, Caldara, Goldberg, and Wise began to stop providing Lagudi and Ponder with documents that they, along with the other Managers, had received for years. Those documents include, but are not limited to, Margin and Analysis Reports, Daily Usage Reports, Value Add Analysis Reports, and Internal New Item Request Forms.

207. On April 26, 2019, Lagudi and Ponder, in their capacity as Members and Managers, requested certain books and records consistent with Section 9.1 of the Operating Agreement and Section 18-305 of the Delaware Limited Liability Act. Ex. M.

208. Specifically, Lagudi and Ponder requested the following:

(a) Margin and Analysis Reports from November 1, 2018 through the present;

(b) Books of Account, as referenced in Section 9.2 of the Operating Agreement;

(c) The Reserve (as defined in the Operating Agreement), including any analysis conducted by Fresh Mix (or any of its agents) in connection with setting the Reserve, from January 1, 2017 through the present;

(d) Daily Usage Reports from November 1, 2018 through the present;

(e) Value Add Analysis Reports from July 1, 2018 through the present;

(f) Internal New Item Request Forms from May 1, 2018 through the present;

(g) Check ledger from November 1, 2018 through the present;

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(h) Documentation relating to the accounting adjustment in the amount of approximately $108,000 made in 2018 relating to Sous Vide Packaging and Product;

(i) Schedule A costs and the supporting information for each cost, from January 1, 2017 to the present;

(j) Customer listing and Revenue from April 1, 2018 to the present;

(k) Spoilage Report from April 1, 2018 to the present;

(l) Warehouse Expense Back-up from January 1, 2017 to the present;

(m) Expenditures relating to marketing, brokerage, and sales promotion from January 1, 2018 to the present;

(n) G&A expenditures, including back-up documentation, from January 1, 2017 to the present; and

(o) Fresh Mix processing, inventory, and labor analysis reports from January 1, 2018 to the present. *See* Ex. M.

209. On May 3, 2019, Defendant Get Fresh responded. *See* Ex. N. Initially, Get Fresh offered to produce a small subset of the documents requested. On May 21, 2019, Plaintiffs responded providing additional detail as to why Plaintiffs were entitled to all the documents. Plaintiffs also offered to inspect and collect the few documents that Get Fresh agreed to produce on Wednesday, May 22, 2019. Ex. O.

210. On May 21, 2019, just one day before the scheduled pick-up, Defendants Get Fresh, Caldara, Goldberg, and Wise insisted that Plaintiffs agree to a Non-Disclosure Agreement before Defendants would release the few documents it agreed to provide. *See* Ex. P.

211. The NDA was onerous and included one-sided provisions that severely limited the rights of Plaintiffs.

212. Further, and more fundamentally, the NDA was wholly unnecessary. Section 9.7 of the Operating Agreement [redacted]

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213. Accordingly, Plaintiffs declined to sign the NDA, but reaffirmed their commitment to abide by their obligations under Section 9.7 of the Operating Agreement. *See* Ex. Q.

214. Defendants Get Fresh, Caldara, Goldberg, and Wise refused to produce *any* of the books and records, including those they had previously committed to provide. *See* Ex. R.

215. These Defendants had no intention of providing any books and records to Plaintiffs. Instead, they purposely insisted Plaintiffs sign a superfluous and onerous NDA as an impermissible roadblock to Plaintiffs' books and records rights, in breach of the Operating Agreement.

Defendants Stop Adequately Servicing Fresh Mix Clients

216. Perhaps most importantly, since the removal of Lagudi and Ponder, Defendants Get Fresh, Caldara, Goldberg, and Wise have purposely stopped providing the service and value that Fresh Mix's customers have received for years during Plaintiffs' tenure and have diverted customers away from Fresh Mix.

217. In December 2018, Get Fresh blocked Plaintiffs from meeting with Associated Food Services, which is a customer Plaintiffs brought to Fresh Mix. Instead, Get Fresh took Associated Food Services for itself and diverted it away from Fresh Mix.

218. Also in December 2018, Walmart expressed interest in Fresh Mix providing retail product to it. As a result of Defendants Get Fresh, Caldara, Goldberg, and Wise removing Plaintiffs from Fresh Mix, it fell on Get Fresh to develop this business. It refused.

219. In January 2019, Kroger reached out to meet with Lagudi to pursue a nationwide sous vide program, a steamable organic vegetable program, and a full line sous vide ready meal program, which Lagudi had been pitching for some time. Due to the actions of Defendants Get Fresh, Caldara, Goldberg, and Wise, Lagudi was forced to pass the opportunity to Get Fresh to pursue on behalf of Fresh Mix. Months have passed and Get Fresh has not pursued the sous vide program, or any other aspects of the program, let alone secure the business, which has a potential value of millions of dollars to Fresh Mix.

220. On May 21, 2019, Get Fresh received the following email from MGM Grand, which is Fresh Mix's biggest customer:

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> I hope that this email finds you well. I am emailing you in regards to the quality of the produce that your company has been delivering here to the Conference Center over these past few months. Just say that it has not been up to the standards that we uphold here at the MGM Grand or for the fact of the standards that I have personally set forth for my team and it is getting progressively worse and unacceptable moving forward. Today my team intercepted an order of fresh cut fruit that was labeled 5/21 yet the contents of the vessel was all labeled 5/17 & 5/18. How does this happen? These types of issues or oversights does not sit well with me as an operator. What if this product reached our guests? It affects everyone internally and externally. Think of all of the labor that went into correcting this. How are you holding your team accountable? How does this affect the reputation of MGM Grand? I'm at a loss right now and trying to understand the sudden decline with your services. If you see below as an example of the type of efforts that your team is discussing to rectify certain situations.

221. The service issues identified in this email typify the problems Fresh Mix's customers have faced since Defendants Get Fresh, Caldara, Goldberg, and Wise purposely removed Lagudi and Ponder.

222. Defendants Get Fresh, Caldara, Goldberg, and Wise are purposely not properly servicing Fresh Mix's customers in order to drive down the value of Fresh Mix, in violation of their fiduciary, contractual, and tort duties.

223. For example, since Ponder and Lagudi were forcibly removed: (1) average sales have decreased by approximately thirteen percent; (2) average gross margins have decreased by over twenty-one percent; and (3) the average net margin has decreased by nearly twenty-eight percent.

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224. Further, despite acknowledging and agreeing to meet with Kroger in order to develop a nationwide strategy for the sous vide program developed by Lagudi and Ponder, Get Fresh refused this meeting and, instead, stated the equipment for this program was no longer needed.

225. Additionally, upon information and belief, since Lagudi and Ponder were removed, no representatives of Fresh Mix or Get Fresh have visited with Ralphs to maintain, innovate, or grow this business. Ralphs is a major customer of Fresh Mix, and business from Ralphs has dramatically decreased.

226. As a result of these and other actions, Fresh Mix's revenues and profits have significantly decreased since these Defendants removed Lagudi and Ponder.

Lagudi and Ponder Demand Fresh Mix Act

227. Based on all of the actions of Defendants Get Fresh, Caldara, Goldberg, and Wise, Ponder and Lagudi became concerned about the status of Fresh Mix and its operations.

228. As such, on or about March 26, 2019, counsel for Ponder and Lagudi sent a letter to the individual Defendants requesting a meet and confer pursuant to the terms of the Operating Agreement and setting forth in detail and with particularity the claims Ponder and Lagudi had against Get Fresh. *See* Ex. S.

229. Get Fresh failed to act on these concerns.

230. Alternatively, should this court find the demand was improper, any demand on Fresh Mix's current board to bring the causes of action alleged herein would be futile, and, therefore, is excused because Get Fresh and its shareholders, Caldara, Goldberg, and Wise (the "Individual Defendants"), who constitute the majority of the board, were in a position to and did dominate the board during the relevant time period and are interested in the wrongdoing alleged herein and/or are incapable of exercising independent business judgment.

231. Get Fresh has a sixty percent (60%) interest in Fresh Mix. Get Fresh is controlled one hundred percent by the Individual Defendants.

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232. These Defendants, who currently constitute a majority of the board, are incapable of exercising independent business judgment because: (a) they engaged in the wrongful conduct alleged herein; (b) they possess other entangling financial relationships with other board members; (c) they are interested in the actions and transactions challenged herein; and (d) they exhibited a willful and reckless refusal to consider the information made available to them by Plaintiffs.

233. The board's inability to exercise its independent business judgment is further demonstrated by its refusal to permit Plaintiffs a full, adequate, and transparent examination of Fresh Mix's books and records, despite due and proper demand having been made pursuant to the terms of the Operating Agreement.

COUNT I

BREACH OF CONTRACT

(Against Get Fresh)

234. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

235. The duties and obligations of the Operating Agreement are binding upon Defendant Get Fresh.

236. Get Fresh breached the Operating Agreement, including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

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(f) Get Fresh wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) Get Fresh wrongfully refused to provide to Ponder and Lagudi the distributions to which they were entitled;

(h) Get Fresh failed to comply with the voting procedures to deny distributions and indemnification;

(i) Get Fresh refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) Get Fresh failed to properly service ongoing customers of Fresh Mix.

237. Ponder and Lagudi are informed and believe that Get Fresh has breached additional provisions of the Operating Agreement in addition to those set forth above, and reserve the right to assert all such breaches herein.

238. Get Fresh's breaches of the Operating Agreement have caused and continue to cause injury and damage to Ponder and Lagudi. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

239. Get Fresh's breaches of the Operating Agreement are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi. These immediate and irreparable injuries are continuing and will continue so long as Get Fresh's conduct persists.

240. Ponder and Lagudi are entitled to recover damages from Get Fresh, in amounts to be determined. However, Ponder and Lagudi are further entitled to specific performance of certain terms of the contract, including, but not limited to, specific performance of the indemnification and advancement of costs (Sections 12.3 and 12.4 of the Operating Agreement); specific performance of the proper procedure for paying distributions (Sections 1.22 and 7.1 of the Operating Agreement); and specific performance of complying with the demand for books and records (Sections 9.1, 9.2, and 9.3 of the Operating Agreement).

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COUNT II

BREACH OF FIDUCIARY DUTY

(Against Get Fresh)

241. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

242. As a manager of Fresh Mix, Get Fresh owes fiduciary duties to Ponder and Lagudi, the other managers of the limited liability company.

243. The Operating Agreement does not remove all fiduciary duties owed by the managers.

244. In fact, Section 4.4 of the Operating Agreement specifically states that the members and managers owe fiduciary duties to Fresh Mix as it relates to the business of distributing food products of every kind and nature, and diversion of customers to a new business enterprise.

245. Get Fresh has breached the fiduciary duties it owes in multiple ways, including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue of Fresh Mix;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) Get Fresh wrongfully refused to provide the distributions to which they were entitled to Ponder and Lagudi;

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(h) Get Fresh failed to comply with the voting procedures to deny distributions and indemnification;

(i) Get Fresh refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) Get Fresh failed to properly service ongoing customers of Fresh Mix.

246. Ponder and Lagudi are informed and believe that Get Fresh has continued to act in a manner that violates the fiduciary duties owed to them, and reserve the right to assert all such breaches herein.

247. Get Fresh's breaches of its fiduciary duties have caused and continue to cause injury and damage to Ponder and Lagudi. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

248. Get Fresh's breaches of its fiduciary duties are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi. These immediate and irreparable injuries are continuing and will continue so long as Get Fresh's conduct persists.

249. Ponder and Lagudi are entitled to recover damages from Get Fresh, in amounts to be determined.

COUNT III

DECLARATORY JUDGMENT

(Against Get Fresh)

250. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

251. An actual controversy exists regarding the enforceability of the non-competition clauses included in the Employment Agreements.

252. Ponder and Lagudi seek a declaration that, under applicable Nevada law, the non-competition clauses contained within the Employment Agreements are unenforceable.

253. The Employment Agreements expired as of January 11, 2013, and no further consideration has been provided to Ponder and Lagudi in support of the non-competition terms.

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254. Therefore, Plaintiffs respectfully request that this Court declare that the non-competition clauses contained within the Employment Agreements are unenforceable.

COUNT IV

ACCOUNTING

(Against Get Fresh)

255. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

256. As members of Fresh Mix, all managers have a fiduciary relationship to the company founded on trust and confidence.

257. Plaintiffs are entitled under Nevada common law to recover any amounts that are attributable to Get Fresh's wrongful acts.

258. The amount of money due from Get Fresh to Ponder and Lagudi is unknown to them and cannot be ascertained without an accounting of the amounts attributable to Get Fresh's wrongful acts.

259. Accordingly, Ponder and Lagudi are entitled to an accounting of all funds and information received and retained by Get Fresh.

COUNT V

TORTIOUS INTERFERENCE

(Against Get Fresh Kitchen)

260. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

261. Get Fresh Kitchen was and remains aware of the continuing contractual obligations of Get Fresh and Ponder and Lagudi to Fresh Mix.

262. In spite of the above, Get Fresh Kitchen has intentionally interfered with the contractual relationships of Fresh Mix, including inducing breaches of the obligations for improper purposes and by improper methods.

263. At all relevant times, Get Fresh Kitchen has known and remains aware of the contractual relationship between Get Fresh and Ponder and Lagudi to operate Fresh Mix in order to seek new customers and business.

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264. In spite of the above, Get Fresh Kitchen intentionally sought out and took for itself certain customers and business Ponder and Lagudi had developed on behalf of Fresh Mix.

265. Get Fresh Kitchen's misconduct in that regard was and continues to be wanton, willful, intentional, and in reckless disregard of Fresh Mix's rights.

266. Fresh Mix, and specifically Lagudi and Ponder, have been damaged as a result of Get Fresh Kitchen's tortious interference with its contractual relations.

COUNT VI

UNJUST ENRICHMENT

(Against all Defendants)

267. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

268. Defendants have wrongfully taken business opportunities that rightfully belong to Ponder and Lagudi as managers of Fresh Mix.

269. Permitting these Defendants to retain the benefit of these opportunities would be inequitable.

270. Defendants have been unjustly enriched and should pay restitution such that Ponder and Lagudi are returned to the status quo.

271. Ponder and Lagudi are entitled to recover the full amounts of the profits made by Defendants related to these wrongful actions.

COUNT VII

BREACH OF FIDUCIARY DUTY

(Against Caldara, Goldberg, and Wise)

272. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

273. Caldara, Goldberg, and Wise, as managers of Get Fresh and signatories to the Operating Agreement in this capacity, owe fiduciary duties to Fresh Mix and the other managers, including Ponder and Lagudi.

274. The Operating Agreement does not remove all fiduciary duties owed by the managers.

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275. In fact, Section 4.4 of the Operating Agreement specifically states that the members and managers owe fiduciary duties to Fresh Mix as it relates to the business of distributing food products of every kind and nature, and diversion of customers.

276. These Individual Defendants have breached the fiduciary duties they owe to Fresh Mix in multiple ways, including, without limitation, as follows:

(a) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(b) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix; and

(c) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds.

277. Ponder and Lagudi are informed and believe that Caldara, Goldberg, and Wise have continued to act in a manner that violates the fiduciary duties owed to Fresh Mix via their roles as managers of Get Fresh, and reserve the right to assert all such breaches herein.

278. The Individual Defendants' breaches of their fiduciary duties have caused and continue to cause injury and damage to Ponder and Lagudi and Fresh Mix. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

279. The Individual Defendants' breaches of their fiduciary duties are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi, and Fresh Mix. These immediate and irreparable injuries are continuing and will continue so long as their conduct persists.

COUNT VIII

AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

(Against Caldara, Goldberg, and Wise)

280. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

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281. Get Fresh and the Individual Defendants owed fiduciary duties to Lagudi and Ponder.

282. Get Fresh and the Individual Defendants breached their fiduciary duties to Lagudi and Ponder as articulated in more detail above.

283. Caldara, Goldberg, and Wise were aware of the Operating Agreement between Get Fresh and Lagudi and Ponder as they signed it in their capacity as managers of Get Fresh.

284. These Individual Defendants were aware of the fiduciary duties Get Fresh and each other owe to Fresh Mix and Lagudi and Ponder.

285. Despite this knowledge, Caldara, Goldberg, and Wise knowingly assisted Get Fresh and each other in violating these duties in numerous ways, including, without limitations, as follows:

(a) failed to properly allocate revenue;

(b) wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) wrongfully refused to provide to Ponder and Lagudi the distributions to which they were entitled;

(h) failed to comply with the voting procedures to deny distributions and indemnification;

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(i) refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) failed to properly service ongoing customers of Fresh Mix.

286. Fresh Mix, Lagudi, and Ponder were directly damaged by these actions.

COUNT IX

BOOKS AND RECORDS DEMAND

(*Against Fresh Mix)*

287. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

288. Section 18-305 of the Delaware Limited Liability Act provides that each member and manager of the entity are entitled to inspect the books and records.

289. Plaintiffs have made such a demand for the books and records on Fresh Mix on or about April 26, 2019, including the items listed above in Paragraph 208.

290. Fresh Mix refused to provide the books and records as mandated by the statute.

291. Pursuant to 8 Del. C. Section 220, Plaintiffs demand Fresh Mix produce the requested books and records.

COUNT X

BREACH OF FIDUCIARY DUTY AND AIDING AND ABETTING SUCH BREACH

(Against Get Fresh Derivatively)

292. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

293. This claim is asserted derivatively on behalf of Fresh Mix against Get Fresh.

294. Get Fresh has breached its fiduciary duty to Fresh Mix including, without limitations, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

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(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh failed to properly service ongoing customers of Fresh Mix.

295. Get Fresh has rendered substantial assistance in the accomplishment of the wrongdoing asserted in this complaint. In so doing, Get Fresh acted with awareness of its wrongdoing, realized that its conduct would substantially assist and/or directly affect the accomplishment of wrongdoing, and were aware of their overall contribution to the common scheme and course of wrongful conduct alleged herein.

296. By reason of the foregoing, Fresh Mix has sustained and will continue to sustain serious damages and irreparable injury, for which relief is sought herein.

COUNT XI

BREACH OF DUTIES OF IMPLIED GOOD FAITH AND FAIR DEALING AND AIDING AND ABETTING SUCH BREACH

(Against Get Fresh derivatively)

297. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

298. This claim is asserted derivatively on behalf of Fresh Mix against Get Fresh.

299. Get Fresh has breached its duties of good faith and fair dealing to Fresh Mix including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

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(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh failed to properly service ongoing customers of Fresh Mix.

300. Get Fresh has rendered substantial assistance in the accomplishment of the wrongdoing asserted in this complaint. In so doing, Get Fresh acted with awareness of its wrongdoing, realized that its conduct would substantially assist and/or directly affect the accomplishment of wrongdoing, and were aware of their overall contribution to the common scheme and course of wrongful conduct alleged herein.

301. By reason of the foregoing, Fresh Mix has sustained and will continue to sustain serious damage and irreparable injury, for which relief is sought herein.

COUNT XII

WASTE AND AIDING AND ABETTING SUCH WASTE

(Against Get Fresh derivatively)

302. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

303. This claim is asserted derivatively on behalf of Fresh Mix against Get Fresh.

304. Get Fresh has wasted Fresh Mix's assets, including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

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(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh failed to properly service ongoing customers of Fresh Mix.

305. Get Fresh has rendered substantial assistance in the accomplishment of the wrongdoing asserted in this complaint. In so doing, Get Fresh acted with awareness of its wrongdoing, realized that its conduct would substantially assist and/or directly affect the accomplishment of wrongdoing, and were aware of their overall contribution to the common scheme and course of wrongful conduct alleged herein.

306. By reason of the foregoing, Fresh Mix has sustained and will continue to sustain serious damage and irreparable injury, for which relief is sought herein.

COUNT XIII

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(Against Get Fresh and Individual Defendants)

307. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

308. As a contract, the Operating Agreement includes an implied covenant of good faith and fair dealing.

309. As a manager of Fresh Mix, Get Fresh is subject to the implied covenant of good faith and fair dealing in its interactions with Ponder and Lagudi, the other managers of the limited liability company.

310. The Individual Defendants, as managers of Get Fresh and signatories to the Operating Agreement in this capacity, are subject to the implied covenant of good faith and fair dealing in their interactions with Fresh Mix and the other managers, including Ponder and Lagudi.

311. The Individual Defendants and Get Fresh have breached this covenant in multiple ways, including, without limitation, as follows:

(a) failed to properly allocate revenue;

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(b) wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) wrongfully refused to provide to Ponder and Lagudi the distributions to which they were entitled;

(h) failed to comply with the voting procedures to deny distributions and indemnification;

(i) refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) failed to properly service ongoing customers of Fresh Mix.

312. Ponder and Lagudi are informed and believe that the Individual Defendants and Get Fresh have continued to act in a manner that violates the implied covenant of good faith and fair dealing, and reserve the right to assert all such breaches herein.

313. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty have caused and continue to cause injury and damage to Ponder and Lagudi and Fresh Mix. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

314. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty are material, ongoing, and serious. They have caused immediate and irreparable

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injury to Ponder and Lagudi, and Fresh Mix. These immediate and irreparable injuries are continuing and will continue so long as their conduct persists.

COUNT XIV

TORTIOUS BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(Against Get Fresh and Individual Defendants)

315. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

316. Get Fresh and the Individual Defendants owe fiduciary duties to Fresh Mix and Lagudi and Ponder, the other managers of Fresh Mix.

317. Get Fresh owns the majority of Fresh Mix, with the Individual Defendants as the owners of Get Fresh.

318. Based on the fiduciary nature of the relationship, Get Fresh and the Individual Defendants have a special relationship with Lagudi and Ponder.

319. As such, Lagudi and Ponder were entitled to rely on, and expected, Get Fresh and the Individual Defendants, to comply with the implied covenant of good faith and fair dealing.

320. However, the Individual Defendants and Get Fresh have breached this covenant in multiple ways, including, without limitation, as follows:

(a) failed to properly allocate revenue;

(b) wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds; and

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(f) failed to properly service ongoing customers of Fresh Mix.

321. Ponder and Lagudi are informed and believe that the Individual Defendants and Get Fresh have continued to act in a manner that violates the implied covenant of good faith and fair dealing, and reserve the right to assert all such breaches herein.

322. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty have caused and continue to cause injury and damage to Ponder and Lagudi and Fresh Mix. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

323. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi, and Fresh Mix. These immediate and irreparable injuries are continuing and will continue so long as their conduct persists.

XV

APPOINTMENT OF CUSTODIAN OR RECEIVER

324. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

325. The parties are have been unable to agree on acceptable price and terms for any buyout of Plaintiffs' membership interests.

326. Fresh Mix is suffering because of the failure of the parties to make business decisions on behalf of Fresh Mix.

327. Fresh Mix has lost business opportunities because of its failures to respond to requests.

328. Fresh Mix has lost revenues because of the ongoing dispute among the managers.

329. The managers are unable to terminate the Operating Agreement in compliance with its terms.

330. Therefore, Plaintiffs request this Court order the appointment of one or more persons to serve as custodian or receiver for Fresh Mix during the pendency of this lawsuit and any required arbitration.

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CONCLUSION

WHEREFORE, Plaintiffs respectfully demand judgment in their favor and in favor of Fresh Mix against the Defendants as follows:

A. Providing immediate advancement of expenses to Lagudi and Ponder pursuant to the indemnification requirements;

B. Declaring that Get Fresh is in breach of the Operating Agreement and awarding damages related thereto, including but not limited to the equitable relief demanded;

C. Declaring that Get Fresh has breached its fiduciary duties to Plaintiffs and awarding damages related thereto, including but not limited to the equitable relief demanded;

D. Compelling Get Fresh to specifically perform its obligations under the Operating Agreement;

E. Declaring the alleged Employment Agreements have ended and are no longer enforceable;

F. Authorizing an accounting;

G. Declaring that Get Fresh Kitchen has tortuously interfered with the contractual relations and awarding damages related thereto;

H. Declaring the Individual Defendants have breached their fiduciary duties to Plaintiffs and awarding damages related thereto;

I. Declaring the Individual Defendants have aided and abetted the breach of fiduciary duty by Get Fresh and awarding damages related thereto;

J. Declaring that Get Fresh has breached its fiduciary duties to Fresh Mix and awarding damages related thereto;

K. Declaring that Get Fresh has breached its duty of good faith and fair dealing to Fresh Mix and awarding damages related thereto;

L. Declaring that Get Fresh has engaged in waste and awarding damages related thereto;

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M. Declaring that Get Fresh and the Individual Defendants have breached the contractually implied duty of good faith and fair dealing and awarding damages related thereto;

N. Declaring that Get Fresh and the Individual Defendants have tortuously breached the implied duty of good faith and fair dealing and awarding damages related thereto;

O. Appointing one or more persons to serve as custodian or receiver for Fresh Mix;

P. Awarding Plaintiffs their attorneys' fees and costs in this action;

Q. Awarding Plaintiffs and Fresh Mix pre- and post-judgment interest on all sums sought herein; and

R. Granting such other and further relief as the Court deems just and proper.

DATED this 19th day of September, 2019.

FOX ROTHSCHILD LLP

/s/Mark J. Connot
MARK J. CONNOT (SBN 10010)
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Attorneys for Plaintiffs Paul Lagudi and William Todd Ponder

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Las Vegas, Nevada 89135

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on the 19th day of September, 2019, I served the above and foregoing **VERIFIED AMENDED COMPLAINT AND DERIVATIVE ACTION** via the Court's electronic service system to the parties listed below:

James J. Pisanelli, Esq.
Debra L. Spinelli, Esq.
Eva M. Schaefer, Esq.
Pisanelli Bice PLLC
400 South 7th Street, Ste. 300
Las Vegas, Nevada 89101
Attorneys for Defendants Fresh Mix, LLC and Get Fresh Sales, Inc.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 19th day of September, 2019.

/s/ Doreen Loffredo
An employee of Fox Rothschild LLP

FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135

EXHIBIT A

CONFIDENTIAL

FILED UNDER SEAL

EXHIBIT B

November 26, 2018

VIA HAND-DELIVERY AND ELECTRONIC MAIL

Paul Lagudi
10996 Tranquil Waters Court
Las Vegas, Nevada 89135

William Todd Ponder
10824 Willow Heights Drive
Las Vegas, Nevada 89135

Re: Notice of Disputes Pursuant to Section 14.7(a) of the Limited Liability Company Agreement of Fresh Mix, LLC

Dear Mr. Lagudi and Mr. Ponder:

Pursuant to Section 14.7(a) of the Limited Liability Company Agreement of Fresh Mix, LLC ("Operating Agreement"), this serves as Get Fresh Sales, Inc.'s Managers and Members' (Messers. Caldara, Goldberg and Wise) notice of the following disputes.[1] And, in accordance with Section 14.7(a), Get Fresh demands that the meeting process promptly begin to attempt to resolve these disputes.[2]

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[1] Get Fresh Sales, Inc.'s Managers and Member are referred to collectively as "Get Fresh."

[2] The Operating Agreement requires the Members and Managers of Fresh Mix, LLC ("Fresh Mix") to meet to discuss in good faith the basis for any disputes prior to initiation of arbitration. Specifically, Section 14.7(a) states only after the parties meet and their disputes remain unresolved for 30 days, may a party file a Demand for Arbitration with the American Arbitration Association. Although Mr. Goldberg and Mr. Lagudi have recently met to discuss the potential sale of your ownership interest in Fresh Mix, the parties have not met to discuss the disputes Get Fresh intends to assert as arbitration claims if not resolved during the meeting process and 30 day period required under Section 14.7(a).

Get Fresh Disputes:

1. **Breach of Fiduciary Duty**: Costco, Disclosure of Confidential Information, Walmart;

2. **Breach of Contract (Operating Agreement)**: Costco, Disclosure of Confidential Information, Failure to Perform under the Operating Agreement;

3. **Breach of Contract (Employment Agreements)**: Disclosure of Confidential Information, Diversion of Fresh Mix Customers, Failure to Perform under the Employment Agreements, Failure to Provide Exclusive Services to Fresh Mix, Solicitation of Get Fresh Employees, Violation of Applicable Human Resource Policies;

4. **Breach of the Implied Covenant of Good Faith and Fair Dealing (Employment Agreements)**: Disclosure of Confidential Information, Diversion of Fresh Mix Customers, Failure to Perform under the Employment Agreements, Failure to Provide Exclusive Services to Fresh Mix, Solicitation of Get Fresh Employees, Violation of Applicable Human Resource Policies;

5. **Termination for Cause (Employment Agreements)**: Whether Messrs. Lagudi and Ponder's Conduct Entitles Fresh Mix to Terminate their Employment for Cause;

6. **Unjust Enrichment**: Failure to Perform under the Operating and Employment Agreements, Get Fresh's Management of Fresh Mix's Accounts and Payment of Fresh Mix's Overhead and Fixed Costs; and

7. **Breach of Confidentiality Agreement**: Whether Messrs. Lagudi and Ponder and their Agents Acted in Bad Faith During the Term of, and in Connection with the Termination of, the Confidentiality Agreement. [3]

[3] Get Fresh reserves the right to supplement the above disputes based on discovery of new facts and circumstances.

We look forward to your prompt and professional response to initiate the meeting process in accordance with Section 14.7(a) and attempt to resolve Get Fresh's disputes.

Sincerely,

Get Fresh Sales, Inc.'s Managers and Members
Dominic Caldara
Scott Goldberg
John Wise

cc (via electronic mail):

Bruce Leslie
Bruce A. Leslie, Chtd.
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

Ronald Jay Cohen
Daniel P. Quigley
Betsy J. Lamm
Jenna L. Brownlee
Cohen Dowd Quigley P.C.
2425 E. Camelback Road, Suite 1100
Phoenix, AZ 85016

James J. Pisanelli
Pisanelli Bice, PLLC
400 S. 7th Street, Suite 300
Las Vegas, NV 89101

EXHIBIT C

TRO
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
STEPHANIE J. SMITH, ESQ.
Nevada Bar No. 11280
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, Nevada 89101
(702) 384-8424
j.bendavid@moranlawfirm.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC., a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X; inclusive, Defendants.	CASE NO: A-18-785391-B DEPT. NO: 11 **BUSINESS COURT**

TEMPORARY RESTRAINING ORDER

That Plaintiffs' Paul Lagudi's and William Todd Ponder's (the "Plaintiffs"), Ex Parte Application for a Temporary Restraining Order and Motion for a Preliminary Injunction against Defendants, FRESH MIX, LLC, a Delaware limited liability company ("Fresh Mix"); GET FRESH SALES, INC. ("Get Fresh"), a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, (collectively, the "Defendants"), having come before this Court, having reviewed all of the documents submitted to it, having heard the evidence of the parties, and good cause appearing therefore, based upon the papers and pleadings on file herein:

MORAN BRANDON BENDAVID MORAN
ATTORNEYS AT LAW
630 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101
PHONE:(702) 384-8424
FAX: (702) 384-6568

THE COURT HEREBY ORDERS that Plaintiffs' Ex Parte Application for a Temporary Restraining Order with notice to Defendants is granted as Pltfs have shown a likelihood of success on the merits and irreperable harm

THE COURT FURTHER ORDERS that Defendants and their respective Members, shareholders, managers, directors, officers, employees, contractors, representatives, agents, and affiliates are hereby temporarily restrained and enjoined and shall reinstate Plaintiffs as Managers of Fresh Mix having all rights, interests, and obligations as Managers of Fresh Mix ~~operating and managing the ordinary, day-to-day business and affairs of Fresh Mix~~.

THE COURT FURTHER ORDERS that Defendants and their respective Members, shareholders, managers, directors, officers, employees, contractors, representatives, agents, and affiliates shall immediately return or otherwise, grant Plaintiffs access to their previously utilized email accounts ~~and physical, digital, and electronic access to Fresh Mix's real and personal property, including, but not limited to, Fresh Mix's offices, customer and customer accounts, keys, cell phones, security key fobs, computers credit cards, files, documents, data, and equipment~~, and any personal property of Plaintiffs located therein or thereon.

THE COURT FURTHER ORDERS that Defendants and their respective Members, shareholders, managers, directors, officers, employees, contractors, representatives, agents, and affiliates shall not make any further statements declaring that Plaintiffs ~~have been terminated, removed, or~~ are no longer with Fresh Mix.

THE COURT FURTHER ORDERS that Defendants and their respective Members, shareholders, managers, directors, officers, employees, contractors, representatives, agents, and affiliates shall not in any manner suspend, terminate, alter, or cause such suspension, termination, or alteration of Plaintiffs' health insurance.

THE COURT FURTHER ORDERS that Defendants and their respective Members, shareholders, managers, directors, officers, employees, contractors, representatives, agents, and

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ORAN BRANDON
ENDAVID MORAN
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0 SOUTH 4TH STREET
S VEGAS, NEVADA 89101
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X: (702) 384-6568

affiliates shall immediately reinstate Plaintiffs' health insurance if such already has been suspended, terminated, or altered in any manner.

THE COURT FURTHER ORDERS that Defendants and their respective Members, shareholders, managers, directors, officers, employees, contractors, representatives, agents, and affiliates shall immediately identify to Plaintiffs each email sent to the email accounts of Plaintiffs to which Plaintiffs were denied access and further identify each individual who has received, read, or reviewed each of the identified emails.

redirected.

THE COURT FURTHER ORDERS the Plaintiffs are required to post a bond in the amount of $ 500.

THE COURT FURTHER ORDERS that Defendants and their respective Members, shareholders, managers, directors, officers, employees, contractors, representatives, agents, and affiliates shall be temporarily restrained in the manner provided above until such time as a hearing for Plaintiffs' Motion for a Preliminary Injunction is heard on 27 Dec 6pm.

THE COURT FURTHER ORDERS that Plaintiffs shall serve Defendants with their Ex Parte Application and Motion for Preliminary Injunction on an Order Shortening Time and this Temporary Restraining Order within _____ days from the entry of this Temporary Restraining Order and Defendants shall enter all pleadings, affidavits, and briefs in opposition to Plaintiffs' Motion for a Preliminary Injunction at least _____ days prior to the scheduled hearing for Plaintiffs Motion for a Preliminary Injunction currently scheduled for _____, and Plaintiffs shall enter a Reply any filed Opposition not later than ___ _ days prior to the scheduled hearing.

IT IS SO ORDERED this 11 day of December, 2018.

DISTRICT COURT JUDGE

MORAN BRANDON BENDAVID MORAN
ATTORNEYS AT LAW
630 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101
PHONE: (702) 384-8424
FAX: (702) 384-6568

Respectfully Submitted By:

MORAN BRANDON BENDAVID MORAN

/s/Jeffery A. Bendavid, Esq.
JEFFERY A. BENDAVID, ESQ.
Nevada Bar No. 6220
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EXHIBIT D

Electronically Filed
12/17/2018 8:14 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

PAUL LAGUDI, et al.	.	
	.	
Plaintiffs	.	CASE NO. A-18-785391-B
	.	
vs.	.	
	.	DEPT. NO. XI
FRESH MIX LLC, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**
. . . . .		

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFFS' MOTION FOR TRO
AND PRELIMINARY INJUNCTION AND
MOTION TO SEAL EXHIBIT 1 TO MOTION FOR TRO

TUESDAY, DECEMBER 11, 2018

APPEARANCES:

FOR THE PLAINTIFFS:	JEFFREY A. BENDAVID, ESQ.
FOR THE DEFENDANTS:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ. LESLIE BRUCE, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, TUESDAY, DECEMBER 11, 2018, 9:13 A.M.

(Court was called to order)

THE COURT: If I could go to Lagudi v. Fresh Mix.

MR. PISANELLI: Good morning.

(Off-record colloquy)

THE COURT: All right. So I got the opposition. Did you get a chance to review it, Mr. Bendavid?

MR. BENDAVID: I did, Your Honor.

THE COURT: It's your motion. For the record, I do not review in-camera documents unless I've requested them ahead of time, so I am going to return to you unreviewed your Exhibit 1 submitted for in-camera review.

All right. Let's go.

Can I get appearances, please.

MR. BENDAVID: Good morning, Your Honor. Jeff Bendavid appearing on behalf of plaintiffs. I'm also here with Paul Lagudi and Todd Ponder.

THE COURT: 'Morning.

MR. PISANELLI: Good morning, Your Honor. James Pisanelli on behalf of Fresh Mix LLC and Get Fresh Sales Inc.

MR. LESLIE: Bruce Leslie. Ditto.

MS. SPINELLI: Debra Spinelli, Your Honor. Same.

THE COURT: Thank you for sending over a courtesy copy. Not everyone realizes I actually read the courtesy copies when I get in before your calendar when you file

something late.

MR. PISANELLI: Your Honor, behind us is our client representative, Scott Goldberg.

THE COURT: Good morning.

MR. GOLDBERG: Good morning.

THE COURT: Mr. Bendavid, it's your motion.

Any objection to his motion to file under seal?

MR. PISANELLI: No.

THE COURT: Okay. So your motion to file under seal is granted.

MR. BENDAVID: Thank you, Your Honor.

THE COURT: All right. Next?

MR. BENDAVID: Your Honor, I'm going to start with how we got here. Your Honor, the parties have been negotiating for a year on the purchase and sale of their membership interests. So there is a company -- there's a long history that was provided in the opposition. The motion -- the motion we filed, Your Honor, was asking for a TRO today and then asking you to set for a motion for preliminary injunction. Your Honor, we got here because Fresh Mix, which is owned 40 percent by my clients and 60 percent by Get Fresh entered into negotiations over the last year to purchase those shares of my clients'. And they are correct in their opposition, that it was as a result of certain disputes that arose between my client and issues they had with Get Fresh.

Now, for the first time in the opposition we received last night first time they actually stated that there was a dispute with them. There's never been claim for a dispute against my clients. There's never been a letter, a memo, an email saying, here is a list of disputes we have with you as members, managers, or, years go, employees of the company. This is new. They've now created these issues. And why?

Your Honor, I'm going to start with -- Your Honor, you have -- our motion to seal has been granted. You have the operating agreement for the company for Fresh Mix.

THE COURT: Well, no. I gave it back to you, because I don't do in-camera reviews when I -- if you want to give it back to me now that it's been sealed, I guess I can. But you've got to file it under seal.

Is it okay if I look at it now, Mr. Pisanelli?

MR. PISANELLI: Of course, Your Honor.

THE COURT: All right.

MR. BENDAVID: Both parties, Your Honor, refer to the operating agreement and sections of the operating agreement.

THE COURT: And both of you quote out of it.

MR. BENDAVID: We do both quote out of it.

THE COURT: And I have a section marked to talk to Mr. Pisanelli about. I'm not going to tell you ahead of time. I'm going to make --

MR. PISANELLI: I was just going to say that I can guess.

THE COURT: Yeah. You knew that.

MR. BENDAVID: I think he knows which section.

Your Honor, if you take a look at 8.3 on page 20 of the operating agreement, Your Honor, like I said, we got here when negotiations broke down between the parties to purchase their shares. That's where we are today. Now, as a result of those actions, if you take a look at 8.3, it says, "Repurchase events. The occurrence of any of the following events with respect to a member shall trigger certain repurchase rights of the company and other members upon the terms and conditions set forth in 8.4 and 8.5."

Turn the page, subsection (c) says "Termination with cause. Prior to the expiration of the term as the same may be extended by mutual agreement of his employment agreement," prior to the expiration of the term of the employment agreement, "Termination by the company of either Paul Lagudi or William Todd Ponder's employment with cause as defined in his employment agreement."

Those repurchase rights, if you take a look at the repurchase price, 8.4(c) says, "Under 8.3(b) or (c) the purchase price of the interest shall be 25 percent of the then fair market value." Like I said, how did we get here? That's how we got here. It's that paragraph, Your Honor. Because

what happened after the negotiations broke down and the parties decided, well, just go on with the operation of the company, they went on a different path. Their path was to now create a notice of termination of an employment agreement that expired five years ago. Defendants Get Fresh, its managers of Get Fresh not only admitted but freely stated repeatedly that that employment agreement had expired, not terminated, but expired years ago and was never renewed. So why do they want to now claim it? Well, they've looked at it with their new three law firms that they've brought in after the negotiations broke down and said, oh, wait a minute, here's an idea, let's go to Section 8.3 of the operating agreement that gives us the right to try to repurchase them for 25 percent of the fair market value and now force a termination of an employment agreement that expired five years ago.

Now, Section 1 of the term of the employment, Your Honor, it says, "At the end of the term --" it's on page 1, Section 1 of the employment agreement, and it's Exhibit 4 to our motion. "At the end of the term the parties may agree to renew this agreement and thereby extend the term, provided, however, that if either party wishes to renew this agreement such party must provide written notice to the other party not later than 120 days prior to the expiration of the term." So 119 days prior to January 10th, 2013, this agreement was going to expire, and then expired on January 11th, 2013.

Now, what rights do they want from there? Your Honor, the rights that they want from that employment agreement are, one, that they can now terminate it for cause and then try to insert that repurchase option in 8.3 and reduce the purchase price of my clients' shares by 75 percent. An action that was never noticed, provided for in the years they've been together all of a sudden now they want to try to use that provision.

What else do they want to use? There's a two-year noncompete that is from the expiration date. Also not doable, because it expired in January 2015. They want to invoke that. They want to invoke the rights termination that says, "Upon termination we can remove you from your offices, take your keys, take your data, all the actions they took immediately after Thanksgiving, all those actions that they took they want to invoke them from this expired employment agreement.

Now, Your Honor, it is not in dispute that it was not renewed. They don't een dispute that in their opposition. They don't say, oh, no, we did extend it 120 prior to the termination in 2013. Because keep in mind they would have had to extend it again prior to 2016.

Now, the notice of termination, Your Honor, which is attached as Exhibit 5, says, we are not renewing your termination and you're provided notice that the extension of the term will not exceed past January 2019. Now, the

agreement calls for the opposite. You need the affirmative. You must actually notice the intent to renew it. There is no notice required to not renew it. Which is what they did.

And then the next paragraph says, "In light of your termination cease all work on Fresh Mix matters." Cease all work on Fresh Mix matters. "Cease use of Fresh Mix property or data. Do not hold yourself as a Fresh Mix employee." And then it goes on. That day, Your Honor, they emailed them the notice of termination. Now, this was on the Monday following Thanksgiving. Emailed it to my knowledge. Immediately after emailing to them they disconnected their emails and rerouted it to themselves. Now, we originally thought that they actually just terminated the emails. But they actually rerouted them. Now, what rights do they have under the operating agreement to take over my clients' emails? Now, they freely admit that, because Bruce Leslie sent me an email, who's counsel here today, that his client Dominic received our bill. Our bill goes to our clients to their email address. He received our bill and then forwarded it to Bruce, and Bruce says, you might want to redirect it, it went to Dominic. So he redirected and took over my clients' emails. What right does he have to their emails? They are co-managers of the company, Your Honor. In fact, the board has -- the board -- the company Fresh Mix is operated by a member -- by five members. It's owned by three members, Get Fresh and then my

clients. It has a board of five managers. Get Fresh gets to appoint three, and my clients get appoint two and cannot be removed. And we'll get into that removal in a second Your Honor.

In terms of the employment, though, what they've actually done is created this instance where this employment agreement now exists. And their argument for that is, well, the course and conduct of the parties was the same after it expired until the present. We kept paying them the same amount of money, and they kept doing their jobs. Your Honor, this agreement doesn't allow for course of conduct; because what it specifically says is you have to renew it in writing. And, in fact, Your Honor, the agreement contemplates the fact that if the parties do not renew, then 11.8 of the employment agreement states, "Any continuance of employee's employment by the company after the term shall be deemed a hiring at will unless such continuance is subject to a new written agreement and shall be subject to termination by the company with or without cause, by employee with or without good reason upon delivery of notice." The employment agreement contemplates that if you don't renew it, then you're just an at-will employee. But you are not under this employment agreement, because it's expired. There's only way to renew it, and that was to actually in writing renew it 120 days prior to expiration. Which means on January 11th, 2013, it expired and

the two-year noncompete began.

Now, they want to come in here and literally straight face that their still employees, that they've been employees. Yet to the IRS they tell the IRS they're not employees. They're not W-2s. They don't get served with W-2s every year. They receive an actual preferred -- under their K1s they get a partner distribution from Fresh Mix, and under their K1s they're provided a guaranteed bonus, is how it's described in their K1s. In addition to that they file in their general ledger and their filings for the company as professional consultants and are paid as a professional consultant by the company.

Now, they can't for one purpose say to the IRS and in any public filing saying they are not employees of this company, we don't pay them as employees of this company, but we do like these rights we get under this employment agreement, so they're employees again. And now we're terminating an agreement that expired five years ago. And that's what they're doing.

Now, are they going to come up here and say, okay, yeah, we're going to fix the tax returns because we've been committing fraud on the IRS? Is that what they're going to say? Or are they just using whatever argument they have in front of them to try to gain some strategic advantage? Your Honor, their plan all along was to attempt to isolate my

clients, make them so flustered, so aggravated by working there that they would just sell for a lesser amount. That has been the goal. In fact, Mr. Ponder gets to his office and sees an IT guy there and says, Dominic, one of the general managers of Fresh Mix, the CEO of Fresh Mix, in fact one of the owners of Get Fresh told the IT guy to go to his office and remove his belongings and put them into Paul's office, who has a small office in Fresh Mix.

Now, why? His office, he's had it all along. Had him remove it just so he could frustrate Todd. There's an open office next door that was unoccupied. Told him to stick into Paul's office. After my client got involved they said, okay, yeah, move it next door to the empty office. These are all little attempts. There's been an attempt at yelling at him for wearing shorts because he's got a prosthetic leg and lost his leg and he didn't want him wearing shorts, and screamed at him and said, I'm your boss, you do what I say, you don't get to wear shorts. Your Honor, there's stories and stories and stories of how these disputes occurred and their actions to isolate them and make them so miserable that they'll just sell.

In addition to that, Your Honor, in their K1s they identify their health insurance that they get taxed on. In other words, they get a distribution for their health insurance in those K1s. They also identify them as being self

employed. They call it self-employment insurance, not employee insurance, not employee package, but they actually received a self insurance -- self-health insurance from the company that's identified on their K1s as self employed. Which is how you pay a consultant.

So to come here and say that they're employees and they were able to terminate them is only a basis of strategy. It's only a basis to gain an advantage to force them to sell at the reduced 25 percent price of the fair market value and to create these termination of causes and try to act as if they haven't terminated them and removed them from the company. Your Honor, they are members of the company, they are managers on the board of managers that cannot be removed.

Which we'll talk about that now. In the operating agreement 5.1 says the company is operated by a board of managers. Get Fresh gets three members, and my clients get two members. They cannot be removed. All five. My clients can't vote to remove them, they can't vote to remove them. That was made as a safeguard to keep the board active and to keep [unintelligible]. What they've effectively done is removed them. Because we know they're not employees. You can't terminate somebody that's not an employee, you can't remove them from the building, take their emails, take their data. Your Honor, I ask you this. What they've stated in their opposition is that they're not really integral to this

company, we don't really need them. Well, the reason they're trying to say that, Your Honor, is that 5.3(c) -- well, actually 5.3 lists out a number of items that require a super majority for any action of the board to be taken. If we take a look at (c), subsection (c), which is on page 15, Your Honor, it says, "Any act which would make it impossible to carry on the ordinary business of the company...." Now, it doesn't say the actual operating of the company, it says the ordinary business of the company.

So what cannot be disputed, since January 2010, when the company was created, when Fresh Mix was created -- and, yes, they're correct, it is a small portion of Get Fresh. Get Fresh is a very large company that owns 60 percent of Fresh Mix and is a small portion of what Get Fresh does. There's no dispute. It's quite a large company. But to ordinarily operate the business of the company you need a super majority vote if an act is going to remove the ability of the company to act in its ordinary course. Now, to say that the company's been operating for the last eight-plus years, going on nine this January, that is the ordinary course. And what they've done is removed the two managers.

And let me make sure the Court understands the size of Fresh Mix. Fresh Mix has one actual W-2 employee, an administrative assistant. One. She was also fired. She was also removed from the company that same day. And its two

managers, Paul and Todd. That's it. Fresh Mix does not have -- Fresh Mix does not have any other employees or operators. They exclusively operated this small branch of Get Fresh, which they go through and explain in their opposition that this is just a tiny part of their company. Which they're right. And that's why they operated it exclusively. One hundred percent of all new clients and sales are brought in by my clients, not by Get Fresh or its managers or Get Fresh's employees. Pursuant to the operating agreement, Your Honor, they are to provide administrative support. That is their contribution -- Get Fresh's contribution to the operating agreement to Fresh Mix is to provide the administrative support, offices, and so forth. That is part of their contribution to the company. They have to provide that administrative support. So all they're doing is providing the administrative support. Which they do. But now what they're saying is, well, we don't need them. Why don't we need them? All of a sudden from one day to the next you're going to change 100 percent the ordinary course of the business? And to change that ordinary course of the business and how it's run on a day-to-day operation they needed a super majority vote. Not only did they not get a super majority vote, they didn't hold a board meeting, they didn't provide notice that they were going to take action, they didn't take a vote, they didn't do anything except send out those notices of

termination and then terminate their emails and take them over.

Your Honor, they could not do that action without a super majority vote, because the entire ordinary operation of the company, which has been demonstrated over almost nine years, has actually just stopped and now being run by different persons having to scramble to run it all on a day's notice or who knows how long they were planning. But you understand that behind the tactic here is strategy. This is all a strategic action when the talks broke down to then try to repurchase those shares and take actions on an expired agreement that is by its own definition expired. They trying to remove them as managers and then come to this Court and say, well, we're not removing them as managers, they're still managers, except we've taken everything away. There's only two offices for Fresh Mix. They've taken both. Now they're not providing an office for Fresh Mix. They are providing the administrative support, but they're not providing offices. They've taken away emails, key pads, and in fact hired guards to stand outside and say they can't come into the building. Took all their belongings out of their offices and delivered them to mine, Your Honor. And, of course, excluded certain items that I'd like to discuss that they didn't return.

So were asking Your Honor to enter a TRO, stop them from this removal of managers, which they're going to stand up

and say, we didn't remove them as managers, and then they can still have a right to their company, they still have a right to their emails, they still have a right to their offices, they still have a right to deal with tracking orders and make sure that Fresh Mix is operating.

THE COURT: Why do you think anybody who's a manager has an office? Managers don't always have offices, Mr. Bendavid.

MR. BENDAVID: Fresh Mix has offices. They've taken the only offices that Fresh Mix has.

THE COURT: Managers of LLCs -- Mr. Bendavid, managers of LLCs do not usually have an office.

MR. BENDAVID: These managers are the only two managers who operate the company.

THE COURT: Oh, I understand that.

MR. BENDAVID: Okay.

THE COURT: But that's a different issue. Management and offices and IT and keys are all different things, Mr. Bendavid.

MR. BENDAVID: They are.

THE COURT: Okay. So what else do you want to ask me? Because you've been going on a long time.

MR. BENDAVID: No problem.

THE COURT: Okay.

MR. BENDAVID: I'll let him go, and then I can

respond.

THE COURT: All right. Mr. Pisanelli, can you explain to me why you think under Section 5.2(b) what your client did was right? That's the removal provision of the membership agreement.

MR. PISANELLI: No 10-minute rule, huh?

THE COURT: Apparently not. It's Tuesday.

MR. PISANELLI: Gotta tell you I'm going to grow to like Tuesdays.

THE COURT: Yeah. We're not going to let you come on Tuesdays.

MR. PISANELLI: So, Your Honor, the first and the most simple answer, Mr. Bendavid is correct, we did not remove them as managers. There's something very important to distinguish here, and that is whatever the duties and responsibilities were of the two plaintiffs here, if they are going to say that post termination by express terms of the employment agreement that they some had managerial responsibilities, we don't believe they did. They think they were nothing more than in sales. But I'll get to that in a minute.

But if they did, they need to point to the operating agreement that somehow distinguishes from the other members, the other managers of the board. There's five; right? Three of them come from Get Fresh, and then the two plaintiffs here.

Everything that they're complaining about, exactly as you just pointed out a moment ago, offices, emails, authority, ability to go in and out, the day-to-day operations, those don't smack of LLC membership or LLC manager responsibilities. Those sounds awfully similar to the expected duties and responsibilities of an officer of the company. Remember, the plaintiffs were the president and the COO respectively, and from the day they came into the company we know that those duties and responsibilities emanated from their employment agreement. Their employment agreement by the express terms continued at will, as Nevada law says it does, and Counsel even, if I understood him correctly, conceded that they continued as at-will employees. Nevada law tells us under those circumstances that as at-will employees they are continuing their role subject to and pursuant to the same terms of the employment agreement.

So going full circle what I can tell you is they were never removed as managers, they are still managers. Whatever duty all managers have, including fiduciary obligations, they all still have. Whatever responsibilities they had they all still have. Interesting point, Your Honor. Managers under this company don't get paid. Managers under this company don't have offices. Managers under this company don't have emails, and managers in this company don't have any of the things that they want you to enter a mandatory

injunction on. If we were to hold a board meeting or a consent in lieu of a board meeting or all those things that Mr. Leslie and those with his expertise in corporate governance --

THE COURT: Waiver of notice of board meetings, yeah.

MR. PISANELLI: Yeah, all that stuff that corporate governance experts do and under those circumstances these two managers were excluded or because the board under the operating agreement has to be with five people, let's say hypothetically that two new people came in instead of what are characterized as the LE managers, then we have a discussion of what happened and did we follow the corporate governance contract, the operating agreement to do that. But that's all hypothetical, because none of it ever happened.

The only things they lost were the authorities and duties and compensation as employees. The things that they had that the other three member managers did not have they now are in the exact same status as all other member managers. So my answer to you is we didn't -- we don't get to the 5.2 analysis, because that's not what we ever did. It was never our intent to the remove them as managers. Our intent was to end their employment.

THE COURT: Okay. Anything else you want to tell me?

MR. PISANELLI: Yes. First of all I want to back up just to thank you and Mr. Bendavid for the extra day in preparing our position. It made for what I'll call a not so fun weekend, but there's some complicated issues here. It wasn't, you know, just a casual exercise to put our papers together. So I thank you for that.

I also thank the Court for your standing rule against ex parte applications. It was --

THE COURT: Oh, I allow ex parte applications, but then we try and get the other side on the phone. And that just didn't work out in this case.

MR. PISANELLI: Well, this case is a classic example of why those ex parte applications can be so dangerous, and we're thankful for the opportunity to shed some light on what really is going on here.

So, Your Honor, we have, as you have seen in our papers, prepared and I'm prepared to argue today the traditional analysis for injunctive relief, the --

THE COURT: I am well familiar with that analysis.

MR. PISANELLI: Yeah. And I'm not going to give you the standards that I've prepared. But I think the Court's function, gatekeeper function doesn't get us there for two very important reasons. The first is the very contracts that plaintiffs complain of, the operating agreement and the employment agreements, both contain mandatory arbitration

clauses.

THE COURT: But you will note that equitable stuff is excluded from that.

MR. PISANELLI: Yeah. And I'm getting to that. First of all, in the operating agreement equitable stuff is not -- the employment agreement, arbitration clause is far broader, it has very limited exemptions, none of which are at play here, and Count 4 of their complaint is a declaration they ask that the employment agreement terminated. Apparently I think part of that declaration they want is that the employment agreement terms do not govern their at-will employment status, which was conceded to today. In other words, we have to analyze the facts and circumstances of how the employment agreement came about and how the employment agreement terminated, if it ever did, and how those terms extended into their at-will employment if that's what happened. There is no question as it relates to their Count 4 that the claim is subject to arbitration.

Now, on the operating agreement it gets a little more complicated, but we end up with the same result. And here's why. The arbitration clause --

THE COURT: 14.7(a).

MR. PISANELLI: -- found on page 39, 14.7 -- I'm sorry, Your Honor. I spoke over you.

THE COURT: It's okay. 14.7(a).

MR. PISANELLI: (a), yes. So it starts -- and you're making the point that it says "except with respect to any court proceeding otherwise expressly permitted pursuant to the terms of this agreement and except where specific performance and other equitable remedies are referenced -- specifically referenced therein. So we now know from the complaint and the application that all of these claims stem in essence from Article 5, 5.1, 5.2, 5.3, and 5.5 is what they're complaining about in their claims under the operating agreement. And we also know, Your Honor, that none of those sections in Article 5, as 14.7(a) says, specifically references injunctive relief, specific performance, or equitable remedies. So if we stop the analysis there, we know just like the employment agreement this is a slam dunk, this is arbitrable, and it doesn't belong here.

But your point, and I assume that was the one you told me you were going to ask me a question about, goes then to 14.8. So 14.8 appears to -- well, they're relying upon it as an exception to the entire clause. They're saying, this is an exception to 14.7(a) that swallows the rule. Because 14.7(a) says any breach you can argue or ask for specific performance, any breach under any term of this agreement you can ask for equitable relief. But if we read the rest of the provision, the rest of the provision makes the point about the -- whether it's enforceable under Nevada law or not, another

question, of whether a bond would be required, and whether there's a pre agreement of irreparable harm. My point is this. You can't allow the interpretation of 14.7(a) to basically be an eraser that there is no longer an arbitration clause so long as any breach you say, now I want specific performance, and come to court.

THE COURT: So I'm going to wait to the side whether I'm going to compel arbitration until you actually file that motion.

MR. PISANELLI: Okay. That is -- was either done last night or done this morning.

THE COURT: It's okay. Right now I'm trying to do an injunctive relief --

MR. PISANELLI: Fair enough.

THE COURT: -- which appears arguably excluded from 14.7(a).

MR. PISANELLI: Okay. That's a fair point. I understand that we have fully briefed it, and we'll have nothing but argument on arbitration.

THE COURT: You have. And we'll have a motion soon, and then we'll have a decision, and maybe you'll go someplace else.

MR. PISANELLI: Very good. So the other gatekeeper function that I think stops this analysis before it gets to the injunctive relief analysis is the fact that these claims

are derivative. If you look, Your Honor -- and I've tabbed -- I got to the point where I stopped tabbing them.

THE COURT: The removal is not derivative, though. The removal's a direct.

MR. PISANELLI: It cannot be a direct without taking into -- well, you have to take into context the nature of the damage. They're not coming in here and saying, notwithstanding Article 5 of the operating agreement that prohibits payment to managers we are being denied our pay and therefore we want damages. That would -- they have to overcome the operating agreement, but it would be a personal claim for what is characterized as guaranteed payments, not guaranteed bonuses, right. That would be an individual claim. But if you look -- and I won't go through all of them, just a couple -- starting at page 10 of their application, and I quote, "Without plaintiffs managing the daily affairs of Fresh Mix customers would be lost, then profits will be lost, and finally the value of Fresh Mix will decrease accordingly." Customers lost? That's a company interest, not an individual's interest. Profits lost --

THE COURT: It's also a valuation of shares interest, which is direct.

MR. PISANELLI: I'm getting to that.

THE COURT: It's blended.

MR. PISANELLI: But I'm getting to that. There is

no transaction in place where we are -- we're not litigating today over a transaction, the purchase of their interest. Plus let me just throw this point out about that argument. If you do the math of their argument, Your Honor, that we are devaluing this company for a better purchase price, that means necessarily by doing the math of the 60 percent ownership and the 40 percent ownership and the 25 percent interest of their 40 percent, that we -- for every dollar we devalue --

THE COURT: You and I know that there are some --

MR. PISANELLI: -- we gain 12 cents.

THE COURT: -- people in cases who sometimes will do actions that may cause an immediate devaluation of their own interest to achieve a purpose other than financial decisions.

MR. PISANELLI: Sure. But you would need evidence --

THE COURT: You've never -- you've never had that experience, have you, Mr. Pisanelli?

MR. PISANELLI: I can't think of one.

THE COURT: Yeah.

MR. PISANELLI: I certainly can't think of one under circumstances like this without evidence where the allegation is that we will spend a dollar to get 12 cents in value back. That is the logic of their -- 12-1/2 cents, to be exact. We will lose a dollar -- or spend a dollar to gain 12 cents. Doesn't make a lot of sense, does it? Anyway --

THE COURT: I understand.

MR. PISANELLI: -- where is the evidence of this other than the argument that it is a devaluation of the company and lost profits. The comment of lost profits for the company I tabbed like six or seven different times. And I know you'll lose patience with me if I start reading every one of them into the record. But they're in the application. You can see it.

THE COURT: I got it. I understand.

MR. PISANELLI: So with that said, Your Honor, with the arbitration clause and with the derivative nature of these claims we don't think we ever get to the preliminary injunction. But were here to discuss it, so let me make my record.

On the likelihood of success on the merits I've already made the point that they are not removed as managers and that this really does come down to the debate of what was the source of their employment authority. In order to gain this Court's equitable powers and relief it's their burden to show that they're likely to succeed on the merits on that claim. In order to do that don't they have to show a lot more than this hypothetical theory that we're spending a dollar to make 12-1/2 cents? For instance, did somebody take their place? Remember they said that they're the only ones running it but then conceded to Your Honor that every aspect of this

company is run by Get Fresh. There is not even -- with the exception of cheesecake sales, which amounts to about 13 percent of its business, there is not even any brand identification with what Fresh Mix does. Everything is gone by Get Fresh in its administrative matters, in its operations, its invoicing, its customer service, its accounting, its inventory, the office space, the delivery, every single thing is done by Get Fresh. Yet in an application for an injunction they come in and say they are the only ones running the company. Well, it sounds to me that they are the only ones with a title, but everything was being done -- everything, with exception of some client contact on joint clients, by these two gentlemen. And you won't hear -- you haven't heard them talk about just how much time they commit to this company anymore. They don't even live here. When they are here it's sporadic. And what do we know, Your Honor, from Mr. Pedrosa's declaration and an email that attached to it? By their own words before they came into this court the company is running just fine and they have, at least by these initial measures, fulfilled their fiduciary responsibilities as managers by continuing to support Mr. Pedrosa and the company to make sure that we're not spending a dollar and devaluing in order to gain 12-1/2 cents. He's complimentary to Mr. Pedrosa, plaintiff is, about how well the company is operating. Point is this. Everything about this company is run without them,

and everything about this company continues to run without them. If, as they have argued under Article 5, that it took a super majority to move them because it would be impossible, their words, to run this company without them, sure, Your Honor, the operating agreement would have made their employment agreements mandatory and surely it would not have allowed a simple majority, i.e., three fifths, to terminate those employment agreements even without cause. Yet that's what the operating agreement provides. So how can we say -- I'll use Counsel's phrase -- with a straight face that this company was set up so that it would be impossible for Fresh Mix to run without these plaintiffs when all parties came together at the beginning of the deal and created the contract, the operating agreement that says that they could be removed as employees and that they would be put in the exact same position as all of the managers at the whim of the majority with or without cause and with or without cause like any other employment dispute would trigger what the company's responsibilities, if any, would be to those employees once they were asked to leave the company.

So we cannot say that there is any irreparable harm from plaintiffs' perspective, because they always were in the position that they could be terminated. They have to come in here and show some duty tied to the operating agreement, some authority tied to the operating agreement that has been

stripped of them through the termination. And they can't do that, because that was never done. They are in the same exact position as all other members, which means there's no harm.

What is the flip side of that coin, however, in the balance of hardships? What does it do now, the optics of a TRO with this Court's order sending people back into the company? What does it do to this company on such a thin -- and that's probably being generous -- evidentiary showing? It puts our operations at risk with them coming back in with the authority of this Court. We have employees, as you've seen from our declarations from Mr. Goldberg, that have threatened to leave the company because of the abusive nature of the plaintiffs and how they have treated people while they were there. That's what led -- that's what got us here, among other things, not this ridiculous concept that we are spending our own money to devalue the company.

What does it do in the marketplace? Because we do have joint customers. Keep this in mind, Your Honor. Fifty percent of Fresh Mix's business comes from one client, one institutional client. We share that client, we being Get Fresh. We have allocated eight employees to round-the-clock service to that client. And having these gentlemen come back in with the authority of this Court saying somehow that they are in charge of something that they've never been in charge of puts that relationship and others at risk and in jeopardy.

And with such a thin showing in particular as it relates to their employment status I don't think that it's a fair thing to say that they are harmed and we are not. If anything, by putting them back in we are the party that is harmed.

So at the end of the day I think what we need to look at, Your Honor, is what got the parties here. Employment status got them here, not manager status. The employment status is gone, and we can have a debate whether that should be arbitrated or not, and we can have a debate of whether they are, as the contract says, at-will employees and whether somehow the removal of those responsibilities caused them any personal financial harm, be it their guaranteed payments or otherwise. But what we can't do is have the tail wag this dog. Counsel conceded, as he must, it was a fair statement by him that this is a very small fraction of the overall business. If we're just looking at sales of cases of product, we're talking six and a half million from the entire family of companies versus half a million of sales from just this Fresh Mix company. Having them come in with the authority of this Court disrupting the client relationships will cause far more harm than what they're trying to avoid simply because they don't like that they're not employees anymore.

So I would ask Your Honor not to enter any relief today for sure. And if Your Honor wants to entertain a more fulsome evidentiary debate on their employment status in a

preliminary injunction hearing, I would ask Your Honor to delay that proceeding until after you have analyzed whether the claim is arbitrable. And I'll note for whatever it's worth, Your Honor, there's a little bit of a conflict of authority here where Nevada law specifically says that Your Honor will decide arbitrability, but the parties attempted to contract around that, at least in an employment agreement which says that the arbitrator will decide arbitrability.

So, in any event, we can debate that later, but I'd ask Your Honor to not disrupt this business with any form of order yet. There just isn't an evidentiary showing for that. Let's get to the issue of arbitrability first, and then we can decide how do we handle what is at the end of the day really an employment dispute. I think once we start putting witnesses before you or an arbitrator, we're going to see that this is not as complicated as both sides have made it so far with arguments over derivative claims, et cetera. This is an executive employment dispute, and we're confident that both the operating agreement and the employment agreements will show that the majority members of this board acted within their powers.

THE COURT: Thank you.

Mr. Bendavid briefly.

MR. BENDAVID: Yes, Your Honor.

Your Honor, 14.8 of the operating agreement states,

"In the event of an actual prospective breach or default by any party the other party shall be entitled to equitable relief, including the remedies in the nature of --" sorry --

THE COURT: You won that part of the argument.

MR. BENDAVID: Okay. I'll move on.

THE COURT: Okay.

MR. BENDAVID: All right. Your Honor, what they don't -- what they don't state is -- they try to make it seem as if they are just members, investors in this company, they don't do anything. We handled it, the company, Get Fresh does everything, they don't do anything, whether they were removed or not makes no difference, Fresh Mix has continued going, nobody even skips a beat. That's what's being tried to sold here, which is not true. As I identify, Fresh Mix had one employee who was terminated. She was an administrative assistant. Get Fresh provides what they are contractually obligated to provide, which is the administrative support. They don't do it because they're great guys and everyone -- and my clients are great guys. They do it because all the parties are contractually obligated to perform what they agreed to perform. Fresh Mix is a small part of that company. And that's what I think is important to understand, is they don't care. If the Fresh Mix business -- Your Honor, so you understand, and obviously we have the ability, because we've been dealing with this for a while, is that the only reason

Fresh Mix exists is because Get Fresh purchased that company from my clients. And instead of putting it into the big company, into Get Fresh, they wanted to keep the accounting separate of what the Fresh Mix would and then that 60-40 split of those profits. So technically Fresh Mix doesn't exist anymore. It doesn't matter. Those customers could all just be Get Fresh customers, and my clients would get zero.

So would they spend a dollar to get 100 percent? What they keep saying is why would they spend a dollar to get 12 cents. Well, they'd spend a dollar to a hundred.

THE COURT: Well, that's called control.

MR. BENDAVID: Correct.

THE COURT: Okay. Keep going.

MR. BENDAVID: If they're so not integral -- he just talked about having one client that takes up at least 50 percent of their business. After they were falsely terminated from an agreement that expired five years ago what's their first action they do? They go see that client. They go to his offices, an executive's office, and sit down and say that Paul and Todd have been terminated and removed from Fresh Mix and are no longer with Fresh Mix, you'll be dealing with us from now on. That's their very first action they do. Well, second action after they took over their emails, rerouted them to themselves. But why do that? Because they need to now adapt to try to take over the ordinary course of the company.

Now, what did they say? He actually sat here and said that they didn't bring somebody else in to bring. Well, you have this declaration, Your Honor. It was filed with it. Nick Pedrosa, who's never operated Fresh Mix before. He was handed Fresh Mix the day they were terminated and said, deal with him. What did Nick do? He started contacting my clients, what do I do with this client, how do I get this deliveries to these people, Dominic is getting your emails of orders, we don't know what to do with them, can you help out. Nick. And my client got on conference calls with them and sent him emails and said, here's what you need to do, you need to call this guy, you need to do this. They didn't even know how to take care of certain clients. In fact, they agreed, will you still help handle this product line that Fresh Mix created on their own. Because they don't have anyone to step in.

Which means, Your Honor, back to 5.3(c), which they did not address, which is the super majority. An act by the board -- an act that stops the ordinary operation of the company, ordinary operation, it does not mean stop the company, it doesn't mean remove managers. It says ordinary operation. If they take and actually need a super majority vote of the managers. That was a clause that was there to protect the ordinary operation of Fresh Mix, because Fresh Mix could easily be swallowed up by Get Fresh. That's obvious. They're there to make sure that it doesn't. And so it's an

issue of control. They could swallow up the company, and Fresh Mix could be gone.

On top of that they didn't even address the fact that the reason they're trying to use this employment agreement is for the simple fact that they want to try to now force a sale on their shares at 25 percent of value.

What they also didn't address is that they're not paid by W-2 employees, so how could they still be under an employment agreement if they're not even paid as employees? They didn't address that. The actual ledger of the company identifies them as professional consultants and are paid that way. They don't address that. They don't address the super majority issues, Your Honor. But what they do address is this is a small part of our company, we're not going to do anything to it. Sure they [unintelligible]. If they get a hundred percent, they do, Your Honor. So my clients were the only parties that were operating it. They're the only parties that are advancing Fresh Mix and bringing customers to Fresh Mix. They're the only parties obtaining sales for Fresh Mix. When they've been denied not only their access, but their ability to ensure that Fresh Mix stays in existence, that Fresh Mix customers stay with Fresh Mix and that Fresh Mix orders are filled and obtained and continue on advancing are done by my clients. And the fact that they -- that my client spends half the time here and half the time in California and Todd spends

all his time here, by the way, and have offices here and operate shows the fact that they're not employees, they're not simple employees that just show up for work and have to clock in and clock out. They come and go when they want to. And they operate their business that way. They go and meet with their customers, they take care of those customers. But the fact is they couldn't even handle it for the first couple weeks and had to continue calling and saying, what do we do with these orders, what do we do with this. It showed that they could not operate in the ordinary course and they needed a super majority decision to do that.

THE COURT: Thank you. I understand your position.

MR. BENDAVID: Thank you, Your Honor.

THE COURT: The Court is going to grant the TRO in a limited aspect. To the extent that there is an attempt to remove the plaintiffs as managers, that is enjoined under Section 5.2(b).

However, the issues related to employment are denied.

With respect to the issue of the email accounts, those will be reinstituted, and the Court is granting injunctive relief related to the email accounts and personal property of the defendants.

In addition, the defendants and their respective members, shareholders, managers, directors, officers,

employees, contractors, representatives, agents, and officers shall identify to plaintiffs each email sent to the email accounts of plaintiffs which were redirected and denied access and identify each individual who has received, read, or reviewed each of the identified emails. Hold on a second.

In addition, the defendants will no longer tell anyone that the plaintiffs are no longer with Fresh Mix, since they remain as managers.

The issue of the employment status is not an issue the Court is forced to deal with. The individuals are managers of the company, and as managers they have certain rights and responsibilities, which do not include keys, cell phones, offices, necessarily health insurance. But it does include the email accounts, as many managers of LLCs operate with email accounts to assist with the information needed to perform their duties.

I am concerned, counsel, related to the employment status. However, at this point it appears that they were at-will employees because of the expiration of the agreement, and I am not going to grant any other relief related to the employment contracts.

Do you want to talk about a bond?

MR. BENDAVID: Yes, Your Honor. 14.8 actually provides that no bond is required as security as contractually provided by the parties. It literally says without being

required to post a bond or other security. There's literally no -- they are managers of the company --

THE COURT: Mr. Pisanelli?

MR. PISANELLI: Nevada law tells us that you cannot contract around the obligations for the Court's exercise of its equitable power. I don't envision that the sky is going to fall from a damage perspective if they have an email account, and so I'm not going to overstate my position.

THE COURT: $500 for the bond?

MR. PISANELLI: Well, here's my only point, Your Honor. If we're going to have -- well, we have already had substantial attorneys' fees incurred as it relates to this briefing. If we're going to have a preliminary injunction hearing, it's going to grow exponentially. And we are limited under Nevada law not to some judgment later, but what that bond is for the recovery of our fees if the TRO is later dissolved as an appropriate --

THE COURT: Seeking dissolution of the TRO.

MR. PISANELLI: Yeah. Right.

THE COURT: I understand.

MR. PISANELLI: And so we would ask at a minimum in order to cover the attorneys' fees for $50,000.

THE COURT: I'm going to set the bond at $500.

Do you want to talk to me about efforts, if any, that you want to make prior to a preliminary injunction

hearing, discovery issues for the briefing that you want to do?

MR. PISANELLI: Sure. I would like to depose the two plaintiffs

THE COURT: Okay.

MR. PISANELLI: And to be safe, I would like to get a document production, too. And it won't be overbearing and overly voluminous. I'll even limit them to, you know, a certain number of categories if you want to, but I wouldn't want to find myself examining the plaintiffs realizing that there's a collection of documents that would have helped the examinations of those two.

THE COURT: Ten requests for production would be enough?

MR. PISANELLI: Yes.

THE COURT: Okay. Anything else you think you want to do?

MR. PISANELLI: That's all I can think of now.

Debbie, Bruce?

THE COURT: Ms. Spinelli, Mr. Leslie?

MS. SPINELLI: Not for discovery, Your Honor. I do have a clarification request.

THE COURT: I'm not there yet.

Mr. Bendavid, what discovery, if any, do you want to do prior to the preliminary injunction hearing?

MR. BENDAVID: I think the depositions would be --

THE COURT: So you want to do the deposition of one or two? How many representatives?

MR. BENDAVID: I would think three. There's three managers.

THE COURT: Okay.

MR. BENDAVID: And some limited requests.

THE COURT: Is ten requests for production enough?

MR. BENDAVID: That's fine.

THE COURT: Anything else that you guys want to do?

MR. BENDAVID: Yes, Your Honor. In terms of requests for production of documents there's certain things, though, that he should not have to request as a request for production. In other words, my client has asked for the company Fresh Mix tax returns, the managers' and members' filed tax returns. Their response now is, since there's litigation, you need to go through the discover process to obtain them.

THE COURT: Litigation does not prevent the managers from obtaining the information they're otherwise entitled to as managers. And if you want me to do a books and records case, I can do that, too.

MR. BENDAVID: I would like that as [unintelligible].

THE COURT: The only exception is when there is a

belief that a competing business is going to be started and it's going to be used for an improper purpose. But nobody's said that yet to me in this case.

MR. BENDAVID: No.

MR. PISANELLI: I think we'll cross this bridge when we get to it.

THE COURT: If you get to it. Maybe you won't get there today.

All right. What else do you want to do before I go to Ms. Spinelli's clarification, and then I try to do scheduling.

MR. BENDAVID: That's it. I would just like that part of the order, that they're entitled to books and records.

MS. SPINELLI: Your Honor, I just had a clarification, and I think it's because you spoke quickly.

THE COURT: I actually took the TRO Mr. Bendavid gave me.

MS. SPINELLI: That's what I thought.

THE COURT: I crossed out a lot of places, and I initialled it, and I handwrote in a couple other things.

MS. SPINELLI: Oh. Awesome. So that should clarify it.

THE COURT: I'm going to copy it and give it to you before you leave, because I'm going to sign it.

MS. SPINELLI: That's it, Your Honor. Thank you.

THE COURT: Okay. Because I know you don't keep up with me when I do that.

MS. SPINELLI: I try so hard, but --

THE COURT: When do you want me to schedule the preliminary injunction hearing? You've got five depos to take, you've got a couple of requests for productions. What response time do you need with your requests for productions? It's the holiday season. Do you want to go typical 30, or do you want to go shorter?

MR. PISANELLI: Let's go -- I would recommend that we cut the response time in half.

THE COURT: Fifteen okay?

MR. BENDAVID: Fifteen days?

MR. PISANELLI: For production.

THE COURT: Response time.

MR. BENDAVID: That's fine.

MR. PISANELLI: And we'll do our best --

THE COURT: And what about the depo notice?

MR. PISANELLI: The depo notice, I don't have any doubt that we're going to be able to cooperate our way through that. But, you know, just in case we can't, 10 days' notice.

THE COURT: And are you limiting yourself to the seven-hour depositions at this point?

MR. PISANELLI: Yes.

THE COURT: And these depositions are not preclusive

of you taking other depositions in your case in chief once you get by the preliminary injunction. So if you take a deposition now, you don't bar yourself from taking a deposition in the case when we get past the preliminary injunction stage.

MR. PISANELLI: Well, my only request, Your Honor, is, unless you want to foreshadow where you're going with this, but it would seem before we start going down this path of discovery we fully address and create our record on arbitrability, because if you do agree with us, I suspect an arbitrator or panel of arbitrators is going to want to manage the discovery themselves.

THE COURT: Well, I'm not on that part. I'm only on the --

MR. PISANELLI: I'm just talking about the delay of when it starts.

THE COURT: I'm on the preliminary injunction part right now, and I was making a record that just because you take a depo now you don't waive your right to take a depo later.

MR. PISANELLI: Fair enough.

THE COURT: Okay.

MR. BENDAVID: Your Honor, can I have a second?

THE COURT: Yes.

(Pause in the proceedings)

MR. PISANELLI: So I think what we seem to be moving towards an agreement on, Your Honor, is if we put the preliminary injunction hearing call it in January --

And disagree at any moment.

THE COURT: Hold on. When was the motion to compel arbitration and motion to dismiss set or to stay?

THE CLERK: [Inaudible].

THE COURT: Do you see it in there?

It's not posted yet, so --

MR. PISANELLI: We'll make sure you get it today.

And so if we put a preliminary injunction hearing sometime in January and we will file our motion on an OST on the arbitrability issue, hopefully we can get that resolved before either party launches their discovery against the other. Perhaps we can give the document requests to each other, because you don't really have to go and start producing immediately. Does that make sense to Your Honor?

And please disagree --

THE COURT: Okay. So here's my personal problem, and I don't get personal problems very often. But I do occasionally. I will be out of the jurisdiction from February 3rd to February 16th. I have two jury trials that both claim to be a week long -- two weeks long that I am trying to compress into the month of January before I get on an airplane to go to Australia. And so asking me to set aside two days to

do a preliminary injunction hearing in January is tough.

MR. PISANELLI: Okay.

THE COURT: If you want me to advance the date of your motion to dismiss, to compel arbitration, and to stay, I can do that in December, no problem. I can also do it in January. I would not be able to set your motion -- or your preliminary injunction hearing until after February 19th, though.

MR. PISANELLI: Okay. So can we do this?

THE COURT: So I either have to do it on Friday, the 4th of January, or I have to do it after I get back on February 19th.

MR. PISANELLI: All right. Can we do this? We --

THE COURT: Unless a case settles.

MR. PISANELLI: Right.

THE COURT: Yeah.

MR. PISANELLI: Will you permit us not to create the schedule today, give us an opportunity to meet and confer, propose a schedule to you, and if we disagree, just ask for a telephonic conference of where our debate is?

THE COURT: Are you going to stipulate to leave the injunction in place until after the conclusion of the preliminary injunction hearing?

MR. PISANELLI: Well, I don't know that I need to stipulate to that just yet until we have the meet and confer.

Maybe we're going to have it quickly enough; right?

THE COURT: So -- yeah. Then I'm going to set a date today.

MR. PISANELLI: Okay.

THE COURT: I'm probably going to set January 4th.

MR. BENDAVID: Well, I -- Your Honor, I'm not in town that whole first week of January. I don't get back till the 8th.

THE COURT: So you're screwing up my schedule even worse.

MR. BENDAVID: I know.

THE COURT: When do you leave?

MR. BENDAVID: I leave on the 2nd, and I get back on the 7th or 8th.

THE COURT: So I can set it for December 27th.

MR. BENDAVID: That won't give us enough time to do this discovery, Your Honor.

MR. PISANELLI: Sure it will. We're not going to be happy about it, but we'll get it done.

So if you put that schedule that everybody hates, you have set an incentive to agree with something.

THE COURT: Then you guys are going to agree. Have I sent the message that you either need to stipulate to agree to extend it beyond the -- to the conclusion of the preliminary injunction or I'm going to set it? And you guys

can stipulate around the date and get a different date. You can give me a --

MR. BENDAVID: How about we set it after the February 19th. That way it's set.

MR. PISANELLI: You can set the preliminary injunction, but the TRO will have expired.

THE COURT: So I'm going to set the preliminary injunction hearing for December 27th at 9:00 o'clock. You are welcome to stipulate around that date and pick a new one.

MR. BENDAVID: Okay. My clients --

THE COURT: Here is the TRO.

MR. BENDAVID: Sorry. My client just told me he is in Australia from the 27th through the 14th. He's from Australia. He's going home.

THE COURT: So he can appear by video.

MR. BENDAVID: Be interesting.

THE COURT: It's not interesting. It happens all the time in Department 11. He will be in his jammies, and the rest of us will be here in the court.

MR. BENDAVID: Could be in the Outback. I'm not sure.

THE COURT: Yes, Mr. Leslie?

MR. LESLIE: Your Honor, I have a question about the TRO. If I can --

THE COURT: You can.

MR. LESLIE: Okay. So you were referencing continued access to the emails. I think we all agreed today that there is a distinction between being a member and a manager and being an employee.

THE COURT: Yes, there is a distinction.

MR. LESLIE: And I think we -- and I would offer to you that probably 95 percent of the traffic under that email was on the basis of their role as employees operating the company.

THE COURT: That's probably true, Mr. Leslie.

MR. LESLIE: So I'm trying to understand how we open up the email accounts and have effectively put them back in as employees, which is something that I think you've agreed not to have happen.

THE COURT: Email accounts -- email accounts do not necessarily limited to employees. Frequently members of LLCs, managers of LLCs have company email accounts.

MR. LESLIE: Not [inaudible].

THE COURT: Each of the members and managers has fiduciary duties, as we have discussed here today. I know that the plaintiffs are going to comply with their fiduciary duties or you guys are going to say bad things about them which may adversely affect them in the future. So I am not going to limit the quality or type of emails that went to their email addresses before or come to their email addresses

now. I am certain that Mr. Bendavid is going to have a discussion with them of how important it is on sales emails to make sure those sales emails get to whomever the company has decided is managing that function. Because as a member or manager they have a fiduciary duty to make sure the company keeps going.

MR. LESLIE: Thank you, Your Honor.

THE COURT: How was that speech? Can you tell I've given that speech before?

MR. LESLIE: Great clarification. Thank you.

THE COURT: Okay.

MR. PISANELLI: Your Honor, is it fair for us to understand that it is your expectation on the manner in which all parties, not just defendants, but all parties communicate to the marketplace is to be measured? We are not to say that they have nothing to with the company, because they are managers and members --

THE COURT: Correct.

MR. PISANELLI: -- and they are not to say, I assume, that they are anything other than managers and members.

THE COURT: Well, I don't know how you say you're involved in the company. You're still involved in the company because you are involved in the company as a manager. But you are not the persons who are handling the day-to-day

responsibility, because other people are handling those functions now.

MR. PISANELLI: Fair enough. Thank you.

THE COURT: So I assume everyone is going to give to the marketplace a good front, because your goal, all of you, is to keep the company going so that all of you when you finish this dispute will be able to walk their own paths.

MR. PISANELLI: Can you predict for me, Your Honor, just how much of a waste of time it would be for me to put a brief before you about the bond, because we're going to be left with no remedy on attorney's fees recovery?

THE COURT: The reason I set the bond so low, and you can decide if you want to file the brief or not, because I always consider whether you want to increase the bond, is given the contractual language I certainly understand Nevada law requires me to post a bond whenever I issue a TRO. Given the contractual language, it appears the parties had agreed to no bond. In order to comply with Nevada law I've required a minimal bond. And I certainly understand your position, because we've been down that path on how to collect our bonds before, and I understand how complex it is.

MR. PISANELLI: Yeah.

THE COURT: But given the contractual agreement, I have limited the bond to a nominal amount.

MR. PISANELLI: Okay. Thank you.

THE COURT: But you can file a motion if you want.

Anything else?

MR. BENDAVID: Your Honor, I would clarify one thing, too, in terms --

THE COURT: And you are free to stipulate around the preliminary injunction date I have set. But if you're going to do so, you've got to extend the TRO or agree among yourselves it's going to expire. Anything else?

MR. PISANELLI: We'll meet and confer, Your Honor.

THE COURT: I know you will. Because you don't want to come on December 28th.

Anything else?

MR. BENDAVID: Your Honor, if they have to attend -- if they set a meeting with operators or administrators of the company --

THE COURT: That is not a manager job.

Anything else?

Managers is top of the trees, guys. Top of the trees.

MR. PISANELLI: We will contact you, Your Honor, if we come to an agreement on a new schedule.

THE COURT: Okay. 'Bye. I know you're going to reach one, because you don't want to come on December 27th or 28th or whatever it is. All right. Goodbye.

THE PROCEEDINGS CONCLUDED AT 10:17 A.M.

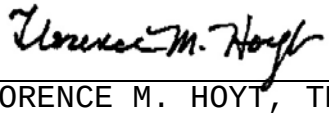
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

12/14/18

DATE

EXHIBIT E

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

PAUL LAGUDI, et al.	.	
	.	
Plaintiffs	.	CASE NO. A-18-785391-B
	.	
vs.	.	
	.	DEPT. NO. XI
FRESH MIX LLC, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**
. . . . .	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON DEFENDANTS' MOTION TO DISMISS OR STAY AND TO COMPEL ARBITRATION

WEDNESDAY, JANUARY 16, 2019

APPEARANCES:

FOR THE PLAINTIFFS:	JEFFREY A. BENDAVID, ESQ.
FOR THE DEFENDANTS:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ. AVA SCHAEFER, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 16, 2019, 9:18 A.M.

(Court was called to order)

THE COURT: All right. If I could go to Lagudi versus Fresh Mix.

Mr. Bendavid, you feeling better?

MR. BENDAVID: Yes, thank you.

THE COURT: I had flashbacks to Jacobs when they were trying to get me to take relativity. And I said no. I know you guys like it, but I am not tech savvy.

MS. SPINELLI: Like it? You know, I mean, I don't know if anybody really likes it.

THE COURT: All right. If we could all identify ourselves for purposes of the record, starting over here.

MR. BENDAVID: Good morning, Your Honor. Jeff Bendavid appearing on behalf of plaintiffs. With me is Todd Hunter for the plaintiffs.

MR. PISANELLI: Good morning, Your Honor. James Pisanelli on behalf of the defendants.

MS. SPINELLI: Good morning, Your Honor. Debra Spinelli on behalf of defendants.

MS. SCHAEFER: Good morning, Your Honor. Ava Schaefer on behalf of the defendants.

THE COURT: Good morning. This is your motion to dismiss.

MR. PISANELLI: Thank you, Your Honor.

Your Honor, our motion is based on what I'll characterize as the rather unremarkable proposition that the parties should honor the covenants and the agreements that they make, in particular, after they've reaped the benefits of those agreements.

THE COURT: So it's your position this is a continuing covenant that survives the termination of the agreement?

MR. PISANELLI: Right. It's a collection of contracts, three, really, because the two employment contracts and the operating agreement. But, as Your Honor knows, the operating agreement is no different of employment agreement or any contract. It governs the parties' relationships.

Long before this dispute arose both in the employment context and in the management and ownership context of the LLC. The parties agreed to a lot of things, one of which was the fast, efficient, inexpensive resolution of their disputes. The employment agreement is the clearest of the two different analyses. I will concede that the operating agreement is more complicated but gets us to the same spot.

We have, as in any dispute, various sources of authority of how we handle this. First and foremost, I think you'd agree with me, is the contract itself, whether the parties agreed to statutory authority that may govern the relationship, common law that has given us rules on how to

govern ourselves under these circumstances, and public policy. Doesn't matter where you start on that list of authority, we keep coming back because in particular this covenant deals with arbitration, with the same conclusion, that arbitration is compelled under these circumstances.

When we came before you last I was hopeful to use that defense as part of the TRO debate, Your Honor. I recognize that they're two different things. Whenever you're coming in an emergency TRO there might be something urgent that was more important than this policy, but it's not that the policy was set aside or that it was resolved. Your Honor rightly said, let's have a full briefing on that, right now let's just talk about the alleged important emergency circumstances that that TRO brought to your attention. That's been resolved. We don't have to relitigate that.

But this is the new debate that, Your Honor, I had foreshadowed for you. So in dealing with the employment agreement we, as we should, start Section 9 and see if it was intended to be restrictive abroad. And I would suggest, Your Honor, I'm hard pressed to think that if I were drafting this clause how would I make it any broader than it already is. The parties agreed any claim or controversy arising out of, relating to, or concerning this agreement, that's lawyer words designed to catch it all, relating to any claim concerning this agreement. So, as the masters of their complaint

plaintiffs came to this Court asking in Count 4 for a declaration from this Court that the employment agreement is no longer binding on them, has no effect between the parties, not the arbitration clause, nothing succeeds what they have characterized either as its expiration or termination, the debate that we don't have today.

But the elephant in the room is if you drafted that complaint, plaintiffs, you wanted an adjudication of whether the agreement has any binding effect on these parties anymore, then the burden, of course, is on them to try and come to this Court and explain how does that not fall under the language of any claim concerning this agreement. This is a claim that goes to the heart of the agreement, doesn't even exist. And so we look to find what excuse they can find; is it public policy, is it contract, language, what is it? And the answer is really that there's nothing there.

We know from a lot of different sources we have a broad contract. That's clear. We know the policy of this state is that all ambiguities to the extent there even is one are resolved in favor of arbitration. There is a strong public policy to enforce claims of that sort.

And so what do we have left? I guess it's the simple issue, the sole issue, I should say, of survival, does it survive. There's different ways we get to the same conclusion here. The Pacific Care case that we cited to you

in furtherance of Nevada's public policy to enforce arbitration clause tells us that if you're going to have an agreement or take a position, then an arbitration clause is not going to survive the expiration of the agreement, you have to expressly -- they didn't use these words, but this is the concept -- you have to expressly opt out of it, you have to expressly say that at the expiration of our term so, too, will the expiration of the arbitration clause go away and have no longer binding effect.

Of course that's not here. We have the exact opposite here. We have contractual language that says it actually will survive. We also have an analysis from Ringle case in an employment context. And this happens every day in every company across the land. An employment contract expires, but the relationship doesn't. What does that court tell us? Tells us that the parties have implicitly agreed that the relationship will continue forward notwithstanding the expiration of the term, so therefore the term will on a moving forward basis be at will, but the terms that the parties had agreed to would continue to govern their relationship.

Again, we don't need to drill down on what the parties did or didn't do. We just continue to look, be it the contract survival clause in the contract, the express language, the failure to opt out, and the Ringle analysis that

tells us under all these circumstances these parties agreed at the beginning of their relationship to arbitrate their disputes this party, these claimants came to this Court looking to declare that contract null and void or nonexistent, and therefore under any analysis we end up in the same spot, they have to arbitrate.

Now, as I said earlier and I touched upon just for a few minutes at the TRO hearing, the operating agreement's a little more challenging. The operating agreement in general terms tells us same thing, you're going to arbitrate all your disputes unless, unless you specifically carve it out in other provisions.

THE COURT: This is not a catch-all provision.

MR. PISANELLI: No, it's not. But it's intended -- it expresses --

THE COURT: And it's not like they didn't know how to do a catch-all, because the employment agreement is much more of a catch-all than this one.

MR. PISANELLI: 20/20 hindsight is perfect for sure, and we're all --

THE COURT: That's why commercial litigators are busy.

MR. PISANELLI: Yeah. That's why we're always for that and the apparent inherent instinct of human beings to fight over money for sure.

But what does it say, Your Honor? I'm not going to overstate my position and say it's the same type of clear catch-all. It's not. But what the parties did in the operating agreement is say this, that there are provisions that we expressly agree inside this contract that are carved out. And you can go through them, and we've cited some of them in our papers that are expressly carved out where you find the language that specific performance and equity can be sought in a court and. And therefore you can see how the drafters of the agreement are tying the different exceptions throughout the contract to the arbitration clause exception.

Plaintiff's, however, take that the provision that says that any, their argument, any request for specific performance for any breach wipes out the arbitration clause. And our position is that would swallow the arbitration clause. What we're obligated to do is harmonize these, if we can. And if we set forth a structure in the contract that says, everything unless expressly exempted. And we have exemptions through the contract. You can't then say, well, but then this provision erases all of that and there is no arbitration clause, because all you have do say is, default, and specifically perform the original deal, and now you're out of the arbitration clause. That could not have been the intent. Because we can see and recognize the pattern, the only way to harmonize these provisions is to read that last clause that

they're relying upon --

THE COURT: 14.8?

MR. PISANELLI: -- yes -- to say that it is in harmony with those provisions that are expressed throughout the agreement as exemptions to arbitration. Otherwise we just don't have an arbitration clause. And that seems to run afoul of the public policy, run afoul of the contract construction cases that tell us to resolve ambiguities in favor of arbitration, and run afoul of what appears to be the intent of the parties. There's a lot of energy put into these provisions and there was, I will concede, an ambiguity mistake here, but certainly not a mistake that was designed to say all you really have to do is say specific performance and you're outside of the arbitration clause.

So, you know, I don't need and mean to overstate our position. I recognize that it's unclear in the operating agreement, certainly not as clear as the employment agreements are. And so where does that leave us? An unambiguous employment agreement clause that is inextricably intertwined with all of the allegations here that overlaps into the operating agreement claims. And so should we separate them out and have two different cases, or should we honor what clearly was the intent of the parties, the spirit of both agreements, that arbitration should govern and send them all for one resolution in one place? And I think public policy --

THE COURT: Thank you, Mr. Pisanelli.

MR. PISANELLI: Yes. Thank you.

THE COURT: Mr. Bendavid.

MR. BENDAVID: 'Morning, Your Honor. Let me address the [inaudible]. What was left out of any discussion we just heard was why are we here in terms of enforcement of an employment agreement. Their whole intent here was to try use an expired agreement that expired five years ago, that they acknowledge expired, represented expired, made statements that it expired and they were no longer an employment agreement, Why? So they could try to take a benefit that they realized later on after a dispute arose that they could try to use that benefit against them. That's why we're here. They've automatically claimed that this agreement was extended. What you didn't hear was -- in their motion to dismiss was based entirely on -- mostly on Ringle, saying that, oh, it extended, it extended automatically, extended automatically, extended automatically. Well, they're not really arguing anymore, apparently, that it extended automatically, because it's kind of a ridiculous argument considering Section 1 specifically states that it doesn't extend automatically. What Ringle addressed was the presumption that if you continue on it can extend.

But the rebuttal presumption is what does the agreement say. Well, the agreement says -- Section 1 says at

the end of the term the parties may renew the agreement and thereby extend the term, "provided, however, that if either party wishes to renew the agreement such party must provide written notice to the other party not less than 120 days prior to the expiration of the term." That means 120 days prior to January of 2013 that notice had to come. It is undisputable neither party claims that that occurred. In fact, they both admit it didn't. What they're trying to argue is that is it automatically extended.

And in fact they actually concede -- if you continue to read, they actually conceded, well, at the end of the day they're still at will employees because Section 11 says that if it's not renewed and you continue on your employment you become an employee at will. It literally has a hiring at will, 11.8. Says, "Any continuance of employee's employment by the company after the term shall be deemed a hiring at will unless such continuance is subject to a new written agreement," which it was not, "and shall be subject to termination by the company with or without cause."

So we don't need to get to Ringle, because this agreement already covers that. It already protects the automatic extension, it already protects what happens when it expires. So this agreement expires. Their only goal was to try to force them to sell their shares at a discounted value -- because the operating agreement says if you terminate the

employment agreement, the written employment agreement, for cause, you can then force them to sell for 75 percent less value.

And that's why we're here. That's why they're doing it. And in fact, Your Honor, their letter said it. The letter they sent that we attached to our original motion said, "We're terminating you for cause," even though they knew it expired. They're trying to use that basis to force a sale at a reduced price. And that's why we're even having this discussion.

Now, Your Honor, the language is clear. They make no real argument at all in the reply brief that it extended, that somehow it's still in existence. What they're now arguing is the survival clause and say, well, that it survived that provision. And if it survived, what they're saying is that any claim or controversy arising out of the employment agreement survives. Well, Your Honor, this isn't claim or controversy. A claim or controversy would be, you didn't me my benefits, you didn't pay me what you owed me, you violated the noncompete. Which, interestingly enough, Your Honor, on the noncompete language that's in the agreement that exists only for two years from termination, which they're actually trying to extend to today, saying, oh, now it's expires, the two years starts, as well.

Section 5.6.1 says, "To the right and remedy to have

the restricted covenants specifically enforced by any court having equitable jurisdiction, all without need to post a bond." It actually provides a provision right in the employment agreement. They're arguing that every single claim and controversy arising out of that employment agreement has to go through arbitration, yet there's a provision right in the employment agreement that says for restrictive covenants you can go to court.

Your Honor, to argue that it survived -- we're not arguing whether there's a claim or not. We're not arguing whether there's a breach for cause or not. We're not arguing whether they've been terminated or not. We're arguing, Your Honor, we ask for dec relief saying that it expired five years ago. Because this Court has the power to make that equitable decision and state, yes, it expired, there is no employment agreement.

In addition to that, Your Honor, what they move away from is the fact that the company every year files its tax returns, makes the specific statement to the IRS that they r not employees. They don't pay them W-2, they pay them in fact guaranteed bonuses. In fact, Your Honor, I've brought their K1s with me. Their K1s specifically call them self-employed employees and charge them $328,000. Not 300,000, like the employment agreement says, but they are actually paid $328,000 in 2016, and then a remark, self-employed health insurance was

grossed up to pay. Declared that in their K1 that they were self employed. And you can't look at the IRS, file your IRS forms and say they are not employees, they are self-employed owners of the company and not employees, and they come to this Court and say they are employees. You can't have it both ways.

The survival clause survives if there was a claim by my clients that we filed in this court saying, oh, no, we're owed money still, we're owed this. They could have tried to enforce their restrictive covenant in this court. They could do that. But to argue that the arbitration clause requires my clients to go to an arbitrator to say that it expired five years ago, that's a declaratory claim that this Court has inherent power to do. And that survival claim no applicability in terms of it's not a claim or controversy regarding the arbitration between the claims that are within the employment agreement. It's not within those claims.

As to the offering agreement, it's -- their position is that we are taking the position that the operating agreement says that any claim or actual breach or prospective breach can be brought under an equitable claim for specific performance to this Court. They're saying that is the position we are creating. Well, Your Honor, we're not creating it. The operating agreement itself says, "In the event of any actual or prospective breach or default by any

party the other party shall be entitled to equitable relief, including remedies in the nature of specific performance." That's 14.8. To argue that it doesn't say that and argue that that's the position we're taking is ludicrous. It actually states it. What they're actually saying is that this Court in its motion to dismiss should rewrite the operating agreement, should throw out that section and say, well, even though it says "any claim or controversy --" I'm sorry, any actual or prospective breach, any. Any. It doesn't say, well, some of them, some of them not.

Now, if you take a look at 14.7, Your Honor, 14.7 makes clear -- it says, "As explicitly permitted by Section 14.8," and then it goes into the arbitration clause. It specifically references, Your Honor, "Except with respect to any court proceeding otherwise expressly permitted pursuant to the terms of this agreement and except where specific performance and other equitable remedies are specifically referenced herein, in which case the suit may be brought before any court of competent jurisdiction."

So in 14.7 there's no exception swallowing up the rule. It was the intent of the parties in drafting its operating agreement that specifically stated that if there's an equitable or specific performance of any -- of any breach or prospective breach of the operating agreement can be brought. And it can't be any more specific than that. It is

a hundred percent clear, it's not ambiguous, and, no, they can't come in here and ask the Court to rewrite operating agreement and remove that exception.

Your Honor, the Court has the ability under a declaratory relief claim to rule that the employment agreements expired five years ago as they expired in their natural course in the actual black language of this agreement. They did not automatically renew, they're not employees. This is why we came to this Court. Thank you.

THE COURT: Mr. Pisanelli, two minutes or less.

MR. PISANELLI: Less. Your Honor, the parties in this case specifically opted out of Nevada's Uniform Arbitration Act by saying, while you normally would decide issues of arbitrability, the contracts here, the employment contracts in particular, said that the arbitrator would. In Pierson our Supreme Court, following the United States Supreme Court, Ninth Circuit, and other law says very specifically, and I'm quoting, that the Court is, quote, "prohibited from considering the merits of the underlying disputes in making the more limited threshold determination of arbitrability."

So Counsel's entire argument on the employment contracts and the K1s and all these things that go outside of the complaint have no place in this debate. This is a debate simply about what did these parties agree to and what does Nevada law mandate. Nevada law mandates that they arbitrate,

and even in the context of the operating agreement it is the alleged breach of the employment agreement that is tied into why they claim the operating agreement was not honored. So it is all tied into one and has to go to the arbitrator to decide is it arbitrable in the first place.

THE COURT: Thank you.

Based upon the information currently before me it appears the employment agreement expired long ago. Therefore, no arbitration provision in the employment agreement survives for purposes of this dispute.

The equitable remedies that are sought in the complaint are excluded from arbitration in paragraph 14.8 of the operating agreement, but the remaining claims and the basis of those claims are subject to arbitration.

Given your agreement to extend the applicability of the temporary restraining order until the preliminary injunction hearing, do you want to discuss with me the scheduling of the preliminary injunction hearing before I decide what the stay is?

MR. PISANELLI: I'm trying to figure out what the right answer to that is.

THE COURT: Yes, Judge, I'd like to discuss it with you.

MR. PISANELLI: Yes, Judge.

THE COURT: Because in the order I said we would

agree on the scheduling of the preliminary injunction hearing at hearing.

MR. PISANELLI: Yeah.

THE COURT: You all have stipulated that the TRO entered on December 11, 2018, remains in full force and effect until the preliminary injunction hearing. If you tell me that means the TRO's going to remain in effect until whenever the preliminary injunction hearing is, I am likely to stay everything until the arbitration concludes, because the stipulation would need that preliminary injunction in place.

MR. PISANELLI: That makes sense to me.

THE COURT: So, I mean -- and then I'll set a status check in 120 days and see how you're doing. But in the meantime the injunctive relief that has been previously issued would remain place pursuant to your stipulation.

Mr. Bendavid.

MR. BENDAVID: That's fine with us.

THE COURT: Okay. So that's what we're going to do.

MR. PISANELLI: I --

THE COURT: So you won sort of.

MR. PISANELLI: Yeah. That's the part I'm trying to figure out. What part did I win, and what part did I lose?

THE COURT: So, except for the request for injunctive relief related to their possessions, their position as members of the LLC, you're going to go to arbitration right

now and deal with that.

MR. PISANELLI: Deal with all of the rest of the claims.

THE COURT: Deal with everything else. And my injunction that I issued, which was limited in nature, will remain in place until you all come became and tell me what happened.

MR. PISANELLI: Great.

THE COURT: Unless you decide you need to dissolve it or modify it for some reason. And the only thing I will deal with until you're done with arbitration is injunctive relief.

MR. PISANELLI: Perfect.

THE COURT: Okay.

MR. PISANELLI: Thanks.

MR. BENDAVID: And, Your Honor, in terms of the order and so forth that have been entered I just want to make sure. There was a discussion at the end of the last hearing regarding books and records and being given things. My clients haven't been --

THE COURT: You're going to deal with the arbitrator on that.

MR. BENDAVID: On whether they've received their books and records or not?

THE COURT: If they received them.

Now, you have a right under Nevada statutes to file a separate books and records case or to amend your complaint to add a books and records portion. You haven't done that yet --

MR. BENDAVID: True.

THE COURT: -- but that is typically not something that goes to arbitration. But as it as part of your discovery in arbitration, that may be the easiest way for you all to deal with it.

MR. PISANELLI: So, Your Honor, just so our record's clear and we don't relitigate once we're in arbitration, your ruling that this dispute short of injunction is arbitrable, that doesn't need to be relitigated to the arbitrator?

THE COURT: I'm not going to tell the arbitrator what to do right now.

MR. PISANELLI: All right.

THE COURT: I will tell the arbitrator what to do if they screw it up.

MR. PISANELLI: All right. Fair enough.

THE COURT: Hundred and twenty days on the chambers calendar.

THE CLERK: May 17th chambers, and then --

THE COURT: All I'm going to look is for a status report, hey, Judge, our arbitration is scheduled, our arbitration is done, Judge, it's all screwed up, whatever.

Have a great day. 'Bye.

Oh. Dulce wants to talk to you.

THE CLERK: The motion to redact --

THE COURT: The motion to redact today is granted because it deals with commercially sensitive information.

THE CLERK: [Inaudible] the motion to redact [inaudible] which is on the --

THE COURT: Yes, I would love to do that and also grant that for commercially sensitive.

Anything else?

MR. PISANELLI: As soon as I walk out the door I'll think of something, but it'll be too late then.

MR. BENDAVID: I was thinking the same thing.

THE COURT: But, see, I didn't yell at you guys, because I got it all out of my system before you got here. I got those Fontainebleau guys to deal with instead.

MR. BENDAVID: I'm still [inaudible], Your Honor, [inaudible].

MR. PISANELLI: Thank you, Your Honor.

THE COURT: 'Bye. Have a nice day.

MR. BENDAVID: Thank you, Your Honor.

THE PROCEEDINGS CONCLUDED AT 9:45 A.M.

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

1/23/19

DATE

EXHIBIT F

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

*For Consumer or Employment cases, please visit **www.adr.org** for appropriate forms.*

You are hereby notified that a copy of our arbitration agreement and this demand are being filed with the American Arbitration Association with a request that it commence administration of the arbitration. The AAA will provide notice of your opportunity to file an answering statement.		
Name of Respondent: Paul and Kelley Lagudi; William Todd and Stephanie Ponder (please see Service List, attached as Exhibit A).		
Address: (Please see Service List, attached as Exhibit A).		
City:	State: Select...	Zip Code:
Phone No.:	Fax No.:	
Email Address:		
Name of Representative (if known): Jeffery Bendavid		
Name of Firm (if applicable): Moran Brandon Bendavid Moran		
Representative's Address: 630 South 4th Street		
City: Las Vegas	State: Nevada	Zip Code: 89101
Phone No.: 702.384.8424	Fax No.: 702.384.6568	
Email Address: J.Bendavid@moranlawfirm.com		
The named claimant, a party to an arbitration agreement which provides for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration.		
Brief Description of the Dispute: Please see Demand for Arbitration; Statement of Claims, attached as Exhibit B (with Exhibits 1-3 attached thereto).		
Dollar Amount of Claim: $ Estimate of claim: in excess of $500,000		
Other Relief Sought: ☑ Attorneys Fees ☑ Interest ☑ Arbitration Costs ☐ Punitive/Exemplary ☐ Other:		
Amount enclosed: $ 7,700.00 In accordance with Fee Schedule: ☐ Flexible Fee Schedule ☑ Standard Fee Schedule		
Please describe the qualifications you seek for arbitrator(s) to be appointed to hear this dispute: Arbitrators from the AAA Large, Complex Commercial Panel.		
Hearing locale: Las Vegas, Nevada *(check one)* ☐ Requested by Claimant ☑ Locale provision included in the contract		
Estimated time needed for hearings overall:	hours or (to be determined)	days

Please visit our website at www.adr.org if you would like to file this case online.
AAA Case Filing Services can be reached at 877-495-4185.

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

Type of Business: Claimant: Nevada Corporation; Delaware Limited Liability Company Respondent: Individuals		
Are any parties to this arbitration, or their controlling shareholder or parent company, from different countries than each other? No		
Signature (may be signed by a representative): Betsy Lamm	Date: 2/13/2019	
Name of Claimant: Get Fresh Sales, Inc. and Fresh Mix, LLC		
Address (to be used in connection with this case): 6745 S. Escondido Street		
City: Las Vegas	State: Nevada	Zip Code: 89119
Phone No.: 702.897.8522	Fax No.: 702.897.8525	
Email Address: c/o Representative		
Name of Representative: Ronald Jay Cohen, Daniel P. Quigley, Betsy J. Lamm		
Name of Firm (if applicable): Cohen Dowd Quigley P.C.		
Representative's Address: 2425 East Camelback Road, Suite 1100		
City: Phoenix	State: Arizona	Zip Code: 85016
Phone No.: 602.252.8400	Fax No.: 602.252.5339	
Email Address: RCohen @CDQLaw.com; DQuigley@CDQLaw.com; BLamm@CDQLaw.com		
To begin proceedings, please send a copy of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to: American Arbitration Association, Case Filing Services, 1101 Laurel Oak Road, Suite 100 Voorhees, NJ 08043. At the same time, send the original Demand to the Respondent.		

Please visit our website at www.adr.org if you would like to file this case online.
AAA Case Filing Services can be reached at 877-495-4185.

EXHIBIT A

GET FRESH SALES, INC. AND FRESH MIX, LLC VS. PAUL LAGUDI, ET AL.

SERVICE LIST

Party Type	Party Name	Representative
Claimant	Get Fresh Sales, Inc. 6745 S. Escondido Street Las Vegas, NV 89119 (702) 897-8522 (702) 897-8525 (fax)	Ronald Jay Cohen (RCohen@CDQLaw.com) Daniel P. Quigley (DQuigley@CDQLaw.com) Betsy J. Lamm (BLamm@CDQLaw.com) Jenna L. Brownlee (JBrownlee@CDQLaw.com) **Cohen Dowd Quigley PC** 2425 E. Camelback Rd., Suite 1100 Phoenix, AZ 85016 (602) 252-8400 (602) 252-5339 (fax) James J. Pisanelli (jjp@pisanellibice.com) Debra L. Spinelli(dls@pisanellibice.com) **Pisanelli Bice PLLC** 400 S. 7th Street, Suite 300 Las Vegas, NV 89101 (702) 214-2100 (702) 214-2101 (fax)
Claimant	Fresh Mix, LLC 6745 S. Escondido Street Las Vegas, NV 89119 (702) 897-8522 (702) 897-8525 (fax)	Ronald Jay Cohen (RCohen@CDQLaw.com) Daniel P. Quigley (DQuigley@CDQLaw.com) Betsy J. Lamm (BLamm@CDQLaw.com) Jenna L. Brownlee (JBrownlee@CDQLaw.com) **Cohen Dowd Quigley PC** 2425 E. Camelback Rd., Suite 1100 Phoenix, AZ 85016 (602) 252-8400 (602) 252-5339 (fax) James J. Pisanelli (jjp@pisanellibice.com) Debra L. Spinelli(dls@pisanellibice.com) **Pisanelli Bice PLLC** 400 S. 7th Street, Suite 300 Las Vegas, NV 89101 (702) 214-2100 (702) 214-2101 (fax)

Party Type	Party Name	Representative
Respondent	Paul Lagudi (paullagudi@aol.com) 7809 Coconut Grove Ct. San Diego, CA 92127 (702) 240-0906 (fax) and/or 10996 Tranquil Waters Ct. Las Vegas, NV 89135	Jeffery Bendavid (J.Bendavid@moranlawfirm.com) **Moran Brandon Bendavid Moran** 630 S. 4th Street Las Vegas, NV 89101 (702) 384-8424 (702) 384-6568 (fax)
Respondent	Kelley Lagudi 7809 Coconut Grove Ct. San Diego, CA 92127 (702) 240-0906 (fax) and/or 10996 Tranquil Waters Ct. Las Vegas, NV 89135	Jeffery Bendavid (J.Bendavid@moranlawfirm.com) **Moran Brandon Bendavid Moran** 630 S. 4th Street Las Vegas, NV 89101 (702) 384-8424 (702) 384-6568 (fax)
Respondent	William Todd Ponder (tponder7721@gmail.com) 4640 North Tomsik Street Las Vegas, NV 89129-4816 (702) 240-0906 (fax) and/or 10824 Willow Heights Dr. Las Vegas, NV 89135	Jeffery Bendavid (J.Bendavid@moranlawfirm.com) **Moran Brandon Bendavid Moran** 630 S. 4th Street Las Vegas, NV 89101 (702) 384-8424 (702) 384-6568 (fax)
Respondent	Stephanie Ponder 4640 North Tomsik Street Las Vegas, NV 89129-4816 (702) 240-0906 (fax) and/or 10824 Willow Heights Dr. Las Vegas, NV 89135	Jeffery Bendavid (J.Bendavid@moranlawfirm.com) **Moran Brandon Bendavid Moran** 630 S. 4th Street Las Vegas, NV 89101 (702) 384-8424 (702) 384-6568 (fax)

EXHIBIT B

COHEN DOWD QUIGLEY
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Telephone 602•252•8400

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Las Vegas, Nevada 89101
Telephone: 702.214.2100

Attorneys for Claimants

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION

GET FRESH SALES, INC., a Nevada corporation, and FRESH MIX, LLC, a Delaware Limited Liability Company, Claimants, vs. PAUL LAGUDI AND KELLEY LAGUDI husband and wife; and WILLIAM TODD PONDER STEPHANIE PONDER, husband and wife, Respondents.	No: _____ Case Manager: _____ **DEMAND FOR ARBITRATION; STATEMENT OF CLAIMS** **(Breach of Fiduciary Duty; Breach of Contract; Unjust Enrichment; Declaratory Relief)**

Pursuant to Rule R-4 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures and by party agreement, Claimants Get Fresh Sales, Inc. ("Get Fresh")

and Fresh Mix, LLC ("Fresh Mix") (collectively, "Claimants") demand that the claims set forth herein against Paul and Kelley Lagudi and William Todd and Stephanie Ponder (collectively, "Respondents") be referred to arbitration and adjudicated before the American Arbitration Association ("AAA") at a dispute resolution center or AAA regional office in Las Vegas, Nevada.

NATURE OF THE DISPUTE

1. This Arbitration arises out of the prolonged, willful misconduct of Fresh Mix's managers and Get Fresh's partners in the fresh produce wholesale distribution business, serving Nevada and the Southwest.

2. As Get Fresh and Fresh Mix recently discovered, over at least the past several years, Messrs. Lagudi and Ponder have consistently acted to further their own perceived best interests, without regard for the interests of, or their fiduciary duties to, Fresh Mix and Get Fresh. They have failed to fulfill – and effectively abandoned – even the most basic duties owed under the documents governing the parties' business relationship: a January 11, 2010 Limited Liability Company Agreement of Fresh Mix ("Operating Agreement") and their respective Employment Agreements with Fresh Mix. Their conduct has breached their obligations to Fresh Mix and Get Fresh, trampled their fiduciary duties, and jeopardized both Fresh Mix and Get Fresh's goodwill and customer relationships.

3. Moreover, when presented with the opportunity to profit from the sale of the business in which they have exhibited no meaningful interest in fully and actively participating, Messrs. Lagudi and Ponder refused to cooperate in good faith and, instead, intentionally interfered with the transaction, transparently demanding millions of dollars to which they are not entitled in exchange for the cooperation that they were already obligated to provide. Their actions have disrupted the businesses of Fresh Mix and Get Fresh and caused the businesses substantial damage.

4. By this action, Get Fresh and Fresh Mix seek a declaration of the parties' respective rights, responsibilities, status and obligations under the Operating Agreement and Employment Agreements, and an award of damages for the injuries Messrs. Lagudi and Ponder have caused.

. . .

. . .

THE PARTIES AND JURISDICTION

5. Claimant Fresh Mix, LLC is a limited liability company organized under the laws of the State of Delaware, with its principal place of business in Las Vegas, Nevada.

6. Claimant Get Fresh Sales, Inc. is a Nevada corporation with its principal place of business in Las Vegas, Nevada. Get Fresh holds a 60% membership interest in Fresh Mix and controls the right to appoint three of five managers of Fresh Mix.

7. Upon information and belief, Respondents Paul and Kelley Lagudi are a married couple who reside in San Diego, California. The Lagudis own real property in Las Vegas, Nevada. Mr. Lagudi is a manager of Fresh Mix and holds a 30% membership interest in Fresh Mix. In committing the acts set forth in this Demand for Arbitration, Mr. Lagudi acted for his own individual benefit and interest, as well as for the benefit and interest of his marital community.

8. Respondents William Todd and Stephanie Ponder are a married couple who reside in Clark County, Nevada. Mr. Ponder is a manager of Fresh Mix and holds a 10% membership interest in Fresh Mix. In committing the acts set forth in this Demand, Mr. Ponder acted for his own individual benefit and interest, as well as for the benefit and interest of his marital community.

9. This Demand for Arbitration is made pursuant to the Operating Agreement between Fresh Mix, Get Fresh, and Messrs. Lagudi and Ponder. The Operating Agreement requires the parties to "submit any dispute, Claim or controversy . . . arising out of or relating to this Agreement, or any alleged breach thereof" to binding arbitration in Las Vegas, Nevada before a panel of three arbitrators pursuant to the Commercial Arbitration Rules established by the AAA. A true and accurate copy of the Operating Agreement is attached to this Demand for Arbitration as **Exhibit 1**.

10. This Demand for Arbitration is further made pursuant to the January 11, 2010 Employment Agreements between Fresh Mix and Messrs. Lagudi and Ponder. The Employment Agreements require that any disputes "arising out of, relating to or concerning" the Employment Agreements, their breach, or the termination of Messrs. Lagudi or Ponder's employment, "shall be settled by arbitration in Las Vegas, Nevada, in accordance with the Commercial Arbitration Rules of the [AAA]."[1] Copies of the Employment Agreements are attached as **Exhibit 2**.

[1] The Employment Agreements provide for a single arbitrator to preside over the proceeding.

ALLEGATIONS COMMON TO ALL CLAIMS

A BRIEF FACTUAL HISTORY: THE BIRTH AND GROWTH OF GET FRESH SALES

11. In 1989, equipped with two delivery trucks, some rented cooler space, vision and entrepreneurial spirit, Dominic Caldara and John Wise founded Get Fresh Companies. Their goal – and the philosophy upon which they founded Get Fresh Companies – was to supply a complete line of the highest quality, freshest products available to grocery retailers, foodservice operators, food processors and wholesalers, at competitive pricing and with exceptional customer service.

12. Soon thereafter, and inspired by the vision of Messrs. Caldara and Wise and the tremendous opportunity it presented, Scott Goldberg joined Messrs. Caldara and Wise in the Get Fresh business venture. In 1991, Get Fresh was formally organized as a Nevada corporation.

13. In an environment where many companies have failed to thrive, Get Fresh has had a positive trajectory, in large part due to its focus on building customer relationships, operating with integrity and consistency, and earning the trust of their customers.

14. Within two years of its formal organization, Get Fresh completed a state-of-the-art 20,000 square feet distribution facility in the Hughes Airport Center to better service its growing customer base. Within three years, Get Fresh began establishing exclusive partner accounts and sold more than one million cases of product.

15. Today, almost 30 years since Messrs. Caldara and Wise brought their vision to life with two trucks and rental space, Get Fresh has a modern distribution fleet of 45 fully refrigerated trailers and bob tail trucks, employs over 550 employees, and operates out of a nearly 140,000 square feet distribution center on Escondido Street, complete with a cold chain management system, a fully sealed dock, 12 separate coolers, a 3,800 square foot freezer, four ripening rooms, a tomato processing repack operation, a 20,000 square-foot fresh cut processing facility and Get Fresh's in-house food safety and quality assurance laboratory.

16. Get Fresh inventories and distributes 2,500 line items of bulk and fresh cut fruits and vegetables. "Bulk" processing refers to the repackaging of large quantities of delivered packaged produce into smaller quantities and containers for individual customer use. During that process product tracing markers are added, and quality control sorting is applied. "Fresh cut" produce

refers to produce that is physically processed (e.g., cut) but remains in a "fresh" state, and is then repackaged into containers for individual customer use, to save customers inconvenience and expense of preparing bulk products.

17. In 2018 alone, Get Fresh companies delivered more than 6.5 million cases of product to customers. Get Fresh's principal geographic markets are southern Nevada, California, Arizona and Utah.

18. Over the past several decades, Get Fresh's customer base has expanded and now spans several industry segments, including (i) retailers, supermarkets, specialty and health-food retailers, mass retailers, independent grocery stores; (ii) hotel-casinos, predominately located in Las Vegas; (iii) restaurants, including both fine-dining as well as casual and family dining; (iv) corporate customers and private clubs; and (v) food distributors, airline caterers and other wholesalers that do not sell directly to consumers.

19. To meet the needs of its growing customer base, Get Fresh and its founders and managers have developed a number of key, complementary businesses and product channels, including Get Fresh Market, Get Fresh Harvest, Fresh Cuts, LLC ("Fresh Cuts"), Get Fresh Kitchen LLC ("Get Fresh Kitchen") and Fresh Mix.

20. Get Fresh Market is a Get Fresh product channel (trade name, trade mark and service mark) producing gourmet grocery items, including organic, natural, gluten-free, low glycemic and specialty grocery products for Get Fresh customers. Rather than produce, Get Fresh Market's offerings include appetizers, artisanal cheeses, cured meats and specialty desserts.

21. In 2015, Get Fresh announced Get Fresh Harvest as another product channel (trade name, trade mark and service mark). Get Fresh Harvest produces a premium line of fresh, certified local, organic, farmers market, hand-selected, hand-ripened and hand-cut produce designed to "bring the farm to [Get Fresh's] customers."

22. Fresh Cuts is a related company that is 100% owned by Messrs. Caldara, Goldberg and Wise. Fresh Cuts operates under the "Get Fresh Cuts" registered trade name, trade mark and service mark. It provides value-added custom processing, including cleaning, peeling, cutting and packaging of fresh fruits and vegetables into ready-to-use portions based on customer-specific

requirements, minimizing customer preparation time in the kitchen. Get Fresh Cuts has no customer contact or interface. Get Fresh Cuts buys from Get Fresh's extensive inventory, as well as directly from shippers and growers.

23. Get Fresh Kitchen was formed in 2017 by Messrs. Caldara, Goldberg and Wise, who own 100% of the entity. It operates out of, and recently completed a $5.5 million expansion (funded by Messrs. Caldara, Wise and Goldberg) at, a separate facility that includes a United States Department of Agriculture-certified kitchen. When fully operational, Get Fresh Kitchen will employ an additional 150 people and will expand into the "ready to eat" food product market – a market not currently being served by the Get Fresh family of companies and a market not contemplated by the Get Fresh family of companies at the time Fresh Mix was created.

24. As set forth in greater detail below, Get Fresh created Fresh Mix in 2010 to facilitate the partial acquisition of a smaller competitor, thereby expanding a segment of Get Fresh's existing retail operations. Fresh Mix's business consists principally of selling "value added" cut produce, all of which is procured, warehoused, distributed and invoiced by Get Fresh. With the exception of one, small (13% of Fresh Mix sales) non-produce business line, all Fresh Mix sales are made in Get Fresh's name and fulfilled by Get Fresh's employees and facilities.

25. Finally, a critical aspect of Get Fresh's business, which touches each of Get Fresh's product channels and affiliated companies, is the Fresh Elements Laboratories. The Fresh Elements Laboratories provide critical food safety and security, product origin traceability, and quality assurance for the Get Fresh family of companies.

26. To ensure they maintain the highest standards, the Fresh Elements Laboratories' food safety management systems are audited multiple times a year, and multiple independent third parties administer its sanitation certification. Get Fresh not only meets the health standards established by the Food and Drug Administration, but has also earned Safe Quality Food Institute ("SQF") Level II Certification – a rigorous independent food safety and quality program – among other awards and certifications.

27. Because Get Fresh exceeds contractual and regulatory compliance standards, it imposes its higher standards on its suppliers. And, in turn, Get Fresh's brand across each of its

product channels and business lines is linked to its reputation as an industry leader in food safety and compliance. In short, Get Fresh's complementary business lines and services allow it to offer comprehensive services and products to its full range of customers, while Get Fresh's reputation as a leader in food safety and compliance provide its customers with a level of trust critical to maintaining its customer relationships.

28. For 2018, the combined Get Fresh companies delivered 6,550,000 cases of product to its customers, with sales exceeding $153.8 million.

29. Of those 6,550,000 cases of product, Fresh Mix delivered only 554,000 cases of product to its customers in 2018, with less than $21 million in sales. Thus, while a valued member of the Get Fresh family of companies, Fresh Mix comprises but a small component of the overall business, customer relationships and sales.

THE FORMATION OF FRESH MIX

30. Fresh Mix was formed in January 2010, as part of an acquisition of Lagudi Enterprises, LLC ("L-E"), a smaller competing supplier of produce and specialty items to the food-service and retail market channels in Nevada.

31. To complete the acquisition, Get Fresh acquired 60% of the assets of L-E for a price of $6.125 million. Those assets, along with the remaining 40% of the assets of L-E, were contributed to Fresh Mix.

32. Get Fresh holds a 60% membership interest in Fresh Mix, with Mr. Lagudi and Mr. Ponder, the former principals of L-E, holding 30% and 10%, respectively.

33. In connection with the acquisition, on or about January 11, 2010, Fresh Mix, Get Fresh, Mr. Lagudi and Mr. Ponder entered into the Operating Agreement. On the same date, Fresh Mix entered into separate, near-identical Employment Agreements with Messrs. Lagudi and Ponder. The Operating Agreement and Employment Agreements govern the parties' relationship, duties and obligations with respect to Fresh Mix.

KEY PROVISIONS OF THE OPERATING AGREEMENT

34. The Operating Agreement establishes the framework for the management and operation of Fresh Mix, as well as the distribution of profits to the three members.

The Primary Purpose of Fresh Mix

35. As expressly defined in the Operating Agreement, the primary purpose of Fresh Mix is to "engage in the business of distributing food products of every kind and nature, including without limitation, the operation and expansion of the business of L-E as conducted as of the date of this Agreement[.]" [Operating Agreement, § 2.4.]

Management

36. Fresh Mix is to be managed "exclusively by the Managers acting through a Board of Managers (the 'Board')." [*Id.*, § 5.1(a).] Subject to certain defined exceptions, the Board has the "full, complete and exclusive authority, power and discretion to manage and control the business, property and affairs of the Company," through simple majority vote, with or without formal noticed meetings. [*See, e.g.*, *id.*, §§ 5.1(a), 5.1(e), 5.1(f).]

37. The Board consists of five managers: Mr. Lagudi and Mr. Ponder, as well as Messrs. Caldara, Goldberg and Wise, who were appointed by Get Fresh.

38. Managers of Fresh Mix are obligated to "devote such time, effort and skill as they deem appropriate for the management and operation of the Company's affairs." [*Id.* § 5.1(d).]

39. Any transaction or activity "not related to the primary purpose of the Company set forth in Section 2.4" or which "would make it impossible to carry on the ordinary business of the Company," however, requires consent of a "Super Majority" of the members. [*Id.*, § 5.3; *see also id.*, § 1.66 (defining "Super Majority of the Members" as referring to members whose collective voting interest equals or exceeds 75% of the voting interests held by all members of Fresh Mix).]

40. Managers of Fresh Mix do not receive – and are prohibited from receiving – "any management fee or other compensation for their services as Managers." [*Id.*, § 5.2(d).]

41. In addition, the Board is authorized to appoint officers to assist the managers in the "day-to-day business and affairs of [Fresh Mix.]" [*Id.*, § 5.5.] The initial officers of Fresh Mix included Mr. Caldara, who serves as Fresh Mix's Chief Executive Officer, Mr. Goldberg, who serves as its Chief Financial Officer, Mr. Wise, who serves as Executive Vice President, as well as Mr. Lagudi, who served as Fresh Mix's President, and Mr. Ponder, who served as its Chief Operating Officer. [*Id.*]

Members

42. Get Fresh, Mr. Lagudi and Mr. Ponder are the sole members of Fresh Mix.

43. Members of Fresh Mix are prohibited from acting on behalf of or in the name of Fresh Mix, or binding Fresh Mix to any commitments absent "prior written consent of all the other Members" or express authorization in the Operating Agreement. [*Id.*, § 4.1.] Members are prohibited from receiving "any interest, salary or drawing . . . for services rendered on behalf of [Fresh Mix] or otherwise in [their] capacity **as a Member**, except as otherwise specifically provided in [the Operating] Agreement." [*Id.*, § 3.8 (emphasis added).]

44. Members of Fresh Mix (along with managers) are obligated to hold in confidence "[a]ll books, records, financial statements, tax returns, budgets, business plans and projections of [Fresh Mix], all other information concerning the business, affairs and properties of [Fresh Mix] and all of the terms and provisions of [the Operating Agreement]." Members and managers are prohibited from disclosing such information to non-parties to the Operating Agreement. [*Id.*, § 9.7.]

45. Members of Fresh Mix (along with managers) are also prohibited from diverting, directly or indirectly, any customer relationships away from Fresh Mix and to any other person or entity. [*Id.*, § 5.4(d).]

Operational Support

46. In view of the breadth of Get Fresh's comprehensive operations, and the limited infrastructure of L-E, Get Fresh agreed to "provide [Fresh Mix] with such operational and administrative support as reasonably necessary in order for [Fresh Mix] to conduct the business comprising the Purchased Assets contributed by [Get Fresh] and [L-E] as of the date of this Agreement." [*Id.*, § 5.4(c).]

Dispute Resolution under the Operating Agreement

47. With the exception of specific performance and limited equitable remedies, the Operating Agreement sets forth a multi-step dispute resolution process, which requires the parties to provide notice of any disputes to the other parties, followed by a 30-day period within which the parties must meet to attempt to informally resolve the disputes. [*Id.*, § 14.7.]

48. If the parties are unable to resolve their disputes, the parties "shall submit" their claims to binding arbitration under the Commercial Arbitration Rules of the AAA. [*Id.*, § 14.7(a)(i).]

49. The prevailing party in any resulting arbitration "shall be" entitled to an award of its "costs and expenses (including expert witness fees, attorneys' fees and costs of discovery) incurred during the course of arbitration." [*Id.* § 14.7(a)(iii).]

50. The Operating Agreement "shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of Delaware, without regard to choice or conflict of law principles that would defer to the substantive laws of any other jurisdiction." [*Id.*, § 14.6.]

Employment Agreements

51. Concurrent with execution of the Operating Agreement, Fresh Mix entered into Employment Agreements with Messrs. Lagudi and Ponder. [*Id.*, § 5.6.]

52. The Employment Agreements may be extended or terminated, with or without "Cause," which termination may lead to a defined "Repurchase Event" under the Operating Agreement. [*Id.*, §§ 8.3(c)-(d), 8.7(a)-(b).]

53. Expiration or termination of the Employment Agreements, however, does not cause Fresh Mix to cease operation, nor does such action require the consent of a "Super Majority" of the members or Board of Managers.

Repurchase Events

54. The Operating Agreement sets forth certain events with respect to a member, the occurrence of which trigger the rights of Fresh Mix and other members to repurchase that member's membership interest in Fresh Mix (each a "Repurchase Event"). [*Id.*, § 8.3.]

55. A material breach of the Operating Agreement "which breach, if reasonably susceptible to cure, is not cured within thirty (30) days after written notice thereof" constitutes one Repurchase Event. [*Id.*, § 8.3(b).]

56. Termination of Messrs. Lagudi or Ponder's employment with Fresh Mix with Cause constitutes another Repurchase Event. [*Id.*, § 8.3(c).]

57. Moreover, in the event of a material breach of the Operating Agreement or termination of Messrs. Lagudi or Ponder's employment with Fresh Mix with Cause, the Operating

Agreement establishes the following purchase price for any repurchased interests: "an amount equal to twenty-five percent (25%) of the Fair Market Value of such Interest." [*Id.*, § 8.4(c).]

KEY PROVISIONS OF THE EMPLOYMENT AGREEMENTS

58. Pursuant to the Employment Agreements, Fresh Mix hired Messrs. Lagudi and Ponder to serve as its President and Chief Operating Officer. [Employment Agreements, § 2.]

59. The Employment Agreements required Messrs. Lagudi and Ponder to work out of Fresh Mix's "principal offices, or such other location within Las Vegas, Nevada, as may be designated by the Board from time to time." The Employment Agreements further required Messrs. Lagudi and Ponder to comply with "the policies and procedures generally applicable to senior executive employees of the Company[.]" [*Id.*, § 2.1.]

60. Messrs. Lagudi and Ponder committed to "at all times faithfully, industriously and to the best of [their] ability, experience and talent perform to the satisfaction of the Board all of the duties that may be assigned . . . and shall devote all of [their] productive time and efforts to the performance of such duties[.]" [*Id.*, § 2.2.]

61. In exchange for their duties, and in addition to other benefits, Mr. Lagudi received base annual compensation of $300,000, while Mr. Ponder received $200,000. [*Id.*, § 3.1.] Messrs. Lagudi and Ponder also received the opportunity to earn discretionary annual bonuses. [*Id.*, § 3.5.]

62. Under the Employment Agreements, Messrs. Lagudi and Ponder consented to serve as officers or directors of any affiliate of Fresh Mix "without any additional salary or compensation, if so requested by the Board." [*Id.*, § 2.1.]

63. The Employment Agreements provided for an initial term of three years, subject to renewal:

> At the end of the Term, the parties may agree to renew this Agreement and thereby extend the Term; provided, however, that if either party wishes to renew this Agreement, such party must provide written notice to the other party not later than one hundred twenty (120) days prior to the expiration of the Term.

[*Id.*, § 1.]

64. The Employment Agreements also recognized the inherent ability of Fresh Mix to terminate Messrs. Lagudi and Ponder's employment, with or without Cause, at which time, they

would be required to "immediately surrender" all Fresh Mix property within their possession and, if requested by Fresh Mix, immediately vacate the Fresh Mix offices. [*Id.*, §§ 8.2, 8.5.]

65. The Employment Agreements define "Cause" to include, *inter alia*, Messrs. Lagudi or Ponder's (i) "commission of an act of intentional fraud committed with actual knowledge of Employee"; (ii) "continuing repeated failures to perform [their] duties as required by this Agreement"; (iii) "gross negligence, or any other misconduct . . . having a materially adverse effect on the Company"; (iv) "commission of any act which is materially detrimental to the Company's business or goodwill and which was undertaken with the purpose of having such material detrimental effect"; and (v) material breach of the Operating Agreement. [*Id.*, § 8.2.]

66. In their Employment Agreements, Messrs. Lagudi and Ponder agreed to a two-year non-compete upon termination of their employment:

> During the Term and for a period of two years thereafter, or, if Employee is terminated with Cause . . ., then for the remainder of the Term after such termination and for a period of two years thereafter, (the "**Restricted Period**") Employee shall not have any ownership interest (of record or beneficial) in, or have any interest as an employee, salesman, consultant, officer or director in, or otherwise aid or assist in any manner, any firm, corporation, partnership, proprietorship or other entity that engages in the business of purchasing, processing, selling and/or distributing food products of any kind or nature whatsoever, in any county, city or part thereof in the United States . . . .

[*Id.*, § 5.1.]

67. The Employment Agreements prohibit Messrs. Lagudi and Ponder from soliciting business, employees or consultants during the Restricted Period. [*Id.*] In addition, irrespective of the Restricted Period, the Employment Agreements prohibit Messrs. Lagudi and Ponder from disclosing to any other person or entity, or using for their own personal gain, any Confidential Information of Fresh Mix. [*Id.*, § 5.2.] This includes, without limitation, a prohibition on disclosing or using any Fresh Mix trade secrets, inventions, documentation, marketing techniques and materials, development plans, price lists, pricing policies, business plans, contracts, customer information, supplier information, financial information and projections, and any other information of a similar nature. [*Id.*, § 5.9(b).]

. . .

68. The Employment Agreements are governed by Nevada law, with all disputes (with a limited exception not applicable here) to be settled through binding arbitration and not in a judicial proceeding. [*Id.*, §§ 9, 11.12.]

69. The prevailing party in any resulting arbitration is entitled to an award of its "reasonable attorneys' fees and other costs it incurred in that action or proceeding, in addition to any other relief to which it may be entitled." [*Id.* § 11.14.]

THE BUSINESS, MANAGEMENT, AND OPERATION OF FRESH MIX

Fresh Mix's Reliance on Get Fresh to Perform Nearly all Business Functions

70. Pursuant to the Operating Agreement, Get Fresh appointed three of the five members of Fresh Mix's Board of Managers.

71. And, for the past eight plus years, Fresh Mix has enjoyed the benefits of its relationship with and reliance on Get Fresh.

72. Following its formation in 2010, Fresh Mix has operated as part of the Get Fresh family of companies.

73. Consistent with the Operating Agreement, Get Fresh performs all administrative and operational functions of Fresh Mix, including all logistics, product procurement, customer billing and invoicing (on Get Fresh stationary), customer service functions, administration, accounting, inventorying and record-keeping.

74. Fresh Mix operates out of Get Fresh's offices and warehouse/distribution center and does not maintain separate facilities or offices. Get Fresh, in turn, supplies virtually all of Fresh Mix's products and delivers virtually all of Fresh Mix's customer orders. As a result, Fresh Mix does not have brand visibility to customers.

75. Moreover, illustrating one purpose to the acquisition of L-E, the vast majority of Fresh Mix customers are joint customers of both Fresh Mix and Get Fresh – joint customers for whom Get Fresh historically provides a significantly higher volume of sales than Fresh Mix. Get Fresh, thus, allocates members of its sales staff to service Fresh Mix accounts. Get Fresh personnel have historically performed the vast majority of day-to-day sales and customer service functions, which require daily if not hourly contact with customers to ensure their needs are being fulfilled.

Respondents' Role in the Operation of, and Employment with, Fresh Mix

76. As President and Chief Operating Officer for Fresh Mix, Messrs. Lagudi and Ponder were charged with and responsible for maintaining and growing Fresh Mix's business with existing customers (many of which were customers of L-E and Get Fresh prior to the formation of Fresh Mix). Messrs. Lagudi and Ponder were further charged with and responsible for generating new business opportunities serving new customers. The success of Fresh Mix depended on Messrs. Lagudi and Ponder embracing their roles and dedicating their efforts to fulfilling their obligations.

77. As set forth in greater detail below, Messrs. Lagudi and Ponder failed to secure any sustainable new business and failed to maintain Fresh Mix's existing business. Indeed, relying exclusively on Get Fresh to provide the vast majority of functions for Fresh Mix since its inception, Messrs. Lagudi and Ponder have effectively served in part-time sales and marketing roles as employees for Fresh Mix.

78. Aside from their performance failures, between 2010 and their terminations in November 2018, Messrs. Lagudi and Ponder's employment with Fresh Mix remained constant. Throughout that period, Messrs. Lagudi and Ponder served in the same or similar roles on behalf of Fresh Mix as its President and Chief Operating Officer.

79. The terms of Messrs. Lagudi and Ponder's employment under the Employment Agreements, and the benefits and compensation they received, also remained consistent.

80. During the entire period of their employment, Messrs. Lagudi and Ponder received the same benefits as provided for under their Employment Agreements. By way of example:

a. Beginning in 2010, Messrs. Lagudi and Ponder began receiving payment, consistent with their respective salaries defined in the Employment Agreements, in the form of wages reflected on W-2s.

b. In March 2011, Fresh Mix's accountant advised that Messrs. Lagudi and Ponder's payments must, under existing tax laws, be structured as "guaranteed payments" instead of wages. "Guaranteed payments" result in the monies received being reflected on Schedule K-1s, rather than on a W-2 form.

. . .

c. Accordingly, and with the full knowledge of Messrs. Lagudi and Ponder, beginning March 31, 2011, Fresh Mix began characterizing payments to Messrs. Lagudi and Ponder as "guaranteed payments" rather than wages.

d. Since March 31, 2011, Messrs. Lagudi and Ponder received Schedule K-1s to reflect these same guaranteed payments, consistent with their respective salaries defined in the Employment Agreements.

81. No change occurred in 2013, when the initial term of the Employment Agreements would have expired. There was similarly no change in 2014, 2015, 2016 or any year thereafter (until their termination in 2018). Rather, the parties continued to operate as if the Employment Agreements remained in full force and effect.

82. In addition to their payments as employees of Fresh Mix, Messrs. Lagudi and Ponder received distributions of profits, consistent with their respective membership interests in Fresh Mix. Get Fresh similarly received distributions reflecting its share of Fresh Mix's profits. In calculating profits for distribution, guaranteed payments are first deducted. Get Fresh does not receive an offsetting amount.

83. Get Fresh and its appointed managers and officers did not receive similar benefits as experienced by Messrs. Lagudi and Ponder under their Employment Agreements. Get Fresh did not receive compensation as a member and Messrs. Caldara, Goldberg and Wise (the Get Fresh managers and Fresh Mix officers) did not receive separate compensation, guaranteed payments, bonuses, email addresses, etc., as a function of their position as managers or officers of Fresh Mix. They simply performed their duties as managers and officers – as required under the Operating Agreement – and Get Fresh received its respective share of annual distributions of any profits Fresh Mix generated.

MESSRS. LAGUDI AND PONDER BRAZENLY VIOLATE THEIR OBLIGATIONS TO FRESH MIX AND GET FRESH

84. Following several years of complementary growth, Fresh Mix's performance began to suffer. Fresh Mix has experienced no growth since the third quarter of 2016 and, instead, its sales have dropped materially each year. From 2016 to 2017, Fresh Mix's sales declined 6.40%. From

2017 to 2018, they dropped even further – declining 14.96%. Compounding this decline, it became evident to Get Fresh and Fresh Mix that Messrs. Lagudi and Ponder were unable to satisfactorily (if at all) perform their responsibilities as the President and Chief Operating Officer of Fresh Mix. As set forth below, Messrs. Lagudi and Ponder began neglecting their duties to Fresh Mix, impairing Fresh Mix's ability to plan for the coming months and years, and violating the critical customer relationships and trust upon which Fresh Mix and Get Fresh's success depends. Disputes, in turn, arose between Get Fresh, Mr. Lagudi and Mr. Ponder.

85. As an overarching matter, Messrs. Lagudi and Ponder's reliance on Get Fresh effectively ensured Fresh Mix's inability to create or sustain independent operations. Over the past nine years, in their roles as President and Chief Operating Officer, Messrs. Lagudi and Ponder had every opportunity to grow Fresh Mix's business. Rather than diligently pursue such successes, Messrs. Lagudi and Ponder became complacent – relying heavily on Get Fresh to maintain Fresh Mix's customer accounts and business. By way of example, Messrs. Lagudi and Ponder did not build Fresh Mix's business or secure meaningful new accounts, did not invest into Fresh Mix to create additional value, and did not make any effort to establish Fresh Mix's own assets, workforce, or even offices. Messrs. Lagudi and Ponder simply failed to grow the business of Fresh Mix in any sustainable way. And, eventually, their conduct led to material declines in Fresh Mix's business.

86. In addition, after some time in Las Vegas, Messrs. Lagudi and Ponder began neglecting their duties for Fresh Mix. Without notice to Get Fresh, and despite the Employment Agreement's requirement that he work out of Fresh Mix's principal offices in Las Vegas, Mr. Lagudi moved from Las Vegas to California and ceased coming into Fresh Mix's offices on a regular basis, if at all. Although still in the Las Vegas area, Mr. Ponder similarly scaled back his appearance at Fresh Mix's/Get Fresh's offices.

87. The failure to work from Fresh Mix's offices in Las Vegas on a consistent basis – let alone "devote all of [their] productive time and efforts to the performance of [their] duties" – violated the terms of their Employment Agreements and rendered it impossible for Messrs. Lagudi and Ponder to effectively fulfill their obligations as Fresh Mix's President and Chief Operating Officer. As a result of their persistent absenteeism, Messrs. Lagudi and Ponder could not engage in

the type of interpersonal, customer-facing sales activities necessary to maintain Fresh Mix's business with existing customers and to secure new customers and business.

88. Beginning in late 2016, Fresh Mix could no longer sustain the absence and non-performance of its President and Chief Operating Officer and its business performance began to decline. During this time, Messrs. Lagudi and Ponder failed to acquire new customers and, just as important, failed to maintain the same volume of sales for preexisting Fresh Mix customers. From 2016 to 2018, Fresh Mix's sales dropped 20% from $26 million to $21 million.

89. In mid-2018, after quarter after quarter of declining sales, Get Fresh manager Mr. Caldara requested that Messrs. Lagudi and Ponder provide budget and sales projections for 2019. Such projections are necessary for proper business planning. And, particularly in view of Fresh Mix's reliance on Get Fresh to provide all necessary administrative and operational support, proper planning and projections are critical.

90. Despite their years in the business, Messrs. Lagudi and Ponder were unable to perform this fundamental assignment. In response to Mr. Caldara's request, they provided an incomplete spreadsheet of projected case sales for certain customers in 2019. The spreadsheet lacked any accounting specificity and was unusable. Whether due to sheer inability, arrogant disregard for the importance of proper budgeting and planning in a sales organization, lackadaisical refusal to dedicate sufficient time to perform the critical task, or a lack of understanding of key components of Fresh Mix's business necessary to properly create a budget, Messrs. Lagudi and Ponder's failure to submit coherent, usable projections epitomizes their abject failure to perform their duties to Fresh Mix.

91. Moreover, even when in the offices and purporting to perform their job responsibilities, Messrs. Lagudi and Ponder's conduct has been rude, demeaning, disparaging, disruptive and destructive to Get Fresh personnel providing Fresh Mix with administrative support. In view of their positions as President and Chief Operating Officer of Fresh Mix, Messrs. Lagudi and Ponder engaged in this conduct with the explicit or implicit threat to employees' job security if they did not accept the abusive tirades. Get Fresh personnel have expressed complaints and threatened to quit if forced to continue to deal with Messrs. Lagudi and Ponder's brazen behavior.

92. With respect to key Fresh Mix clients, Messrs. Lagudi and Ponder further attempted to conceal their dealings from Get Fresh in an effort to control the relationship and render the clients dependent on Messrs. Lagudi and Ponder. This secretive manner of administering client accounts has had severe negative repercussions, both with respect to the administration of the accounts – for which Fresh Mix is dependent on Get Fresh – and in handling any issues that arose with the accounts. Minor issues would explode into unnecessary emergencies because of Messrs. Lagudi and Ponder's lack of transparency and timely communication with the Get Fresh personnel responsible for supporting the account on a daily or often hourly basis.

93. In addition, after further investigation by Get Fresh, Claimants discovered concerning misconduct by Messrs. Lagudi and Ponder that jeopardized key customer accounts of both Get Fresh and Fresh Mix and violated the trust, integrity, safety and accountability on which the companies' reputation and goodwill rely.

94. For example, following an audit, a key client of Get Fresh and Fresh Mix significantly scaled back and ultimately stopped working with Get Fresh and Fresh Mix for many months. As Get Fresh discovered, the client was concerned with unethical dealings between its regional manager and Mr. Lagudi, who the client associated with Fresh Mix and Get Fresh. As a result of this conduct by Mr. Lagudi, Fresh Mix and Get Fresh lost significant sales.

95. Get Fresh also recently discovered an incident over the summer of 2018 in which Mr. Lagudi had agreed to permit a third-party manufacturer to supply product to another important Fresh Mix and Get Fresh customer under Get Fresh's name – in violation of the customer's contract requirements. This scheme, to which Mr. Lagudi agreed and then concealed, intentionally misled the customer. To the customer, it appeared that Get Fresh was sourcing the product, Get Fresh had ensured that the product meets its own high quality standards, the product had passed through the Fresh Elements Laboratories, and the product met the customer's food safety standards. In reality, Get Fresh was not manufacturing the product, had not tested it, and could not provide product origin traceability so critical to ensuring food safety and security.

96. Mr. Lagudi did not disclose this reality to the client (a very well-known large national retailer), opting instead to mislead and deceive it. Mr. Lagudi's conduct and concealment not only

jeopardized Get Fresh and Fresh Mix's relationship with this customer, but also threatens to damage Get Fresh's goodwill by placing at risk its well-earned reputation as a leader in food safety and compliance.

97. As another example of misconduct, Get Fresh recently uncovered certain product pricing improprieties by Mr. Lagudi. Mr. Lagudi's conduct – whether grossly negligent or intentionally deceptive – violated his obligations to Fresh Mix and to the customer(s). Fresh Mix and Get Fresh have not yet quantified the damage emanating from Mr. Lagudi's misconduct.

RESPONDENTS' INTERFERENCE WITH THE PROSPECTIVE SALE OF GET FRESH'S FAMILY OF COMPANIES

98. In 2017, Get Fresh began exploring a sale of its assets and complementary business lines. To that end, Get Fresh retained a financial advising company to evaluate the market and prepare a detailed Confidential Memorandum to provide to interested parties, subject to confidentiality agreements.

99. Because the sale of Get Fresh's family of companies would have impacted and included Fresh Mix, Get Fresh responsibly and in good faith involved Messrs. Lagudi and Ponder in their discussions and consideration of the transaction.

100. At the time, capital markets were strong, the market segment for fresh produce was favorable, and the parties were collectively and individually in favor of pursuing a sale. Get Fresh, thus, continued pursuit of this opportunity and received multiple indications of interest ("IOIs") from prospective purchasers.

101. During discussions regarding the transaction and IOIs, however, Messrs. Lagudi and Ponder selfishly began a plot to extract for themselves a higher percentage of the projected proceeds than they would have otherwise been entitled under the plain language of the Operating Agreement.

102. For example, Messrs. Lagudi and Ponder began making unreasonable claims regarding their entitlement to proceeds from an affiliated company owned exclusively by Messrs. Caldara, Goldberg and Wise – Get Fresh Cuts – based on Mr. Ponder's prior work for the entity,

. . .

and despite the reality that his Employment Agreement obligated him to perform any such work without separate compensation.

103. Messrs. Lagudi and Ponder further refused to cooperate in drafting the transactional documents necessary to allow Get Fresh to pursue an acquisition.

104. Upon information and belief, Messrs. Lagudi and Ponder's conduct was intentionally designed to hold the Get Fresh sale process hostage in an effort to extract for themselves a higher percentage of the projected sale price than they otherwise would have been entitled to receive.

105. As a result of Messrs. Lagudi and Ponder's conduct, Get Fresh was unable to consummate a transaction in the favorable market, causing it to potentially miss the market and suffer millions of dollars in damages.

THE PARTIES' UNSUCCESSFUL EFFORTS TO RESOLVE THEIR DISPUTES

While Get Fresh and Fresh Mix Invoke the Operating Agreement's Arbitration Procedures, Respondents Improperly Race to Court

106. For many months, the parties have endeavored to resolve their disputes to no avail. During late Fall 2018, the parties reached an impasse and discussions ceased being productive.

107. The parties entered into a Confidentiality Agreement to ensure the confidentiality of their discussions. During the duration of the Confidentiality Agreement, the parties further agreed not to take any formal action adverse to one another. On November 15, 2018, Messrs. Lagudi and Ponder unilaterally terminated the parties' Confidentiality Agreement.

108. Accordingly, on November 26, 2018, Get Fresh provided Messrs. Lagudi and Ponder with formal written notice of its disputes pursuant to Section 14.7 of the Operating Agreement and requested to begin the dispute resolution meeting process.

109. Rather than responsibly engage in the meeting process required under the Operating Agreement or discuss their purported concerns regarding the business, Messrs. Lagudi and Ponder raced to immediately file an imprudent and impermissible lawsuit, in violation of the Operating Agreement and Employment Agreements. Fresh Mix and Get Fresh moved to compel arbitration.

110. On December 5, 2018 and December 12, 2018, Get Fresh again wrote to Messrs. Lagudi and Ponder, and their counsel, requesting their participation in the dispute resolution

meeting process, as required under the Operating Agreement. Messrs. Lagudi and Ponder finally acquiesced.

111. On December 20, 2018, the parties participated in a meeting to discuss the disputes and their potential resolution, satisfying their obligations under the Operating Agreement. The meeting was productive and the parties reached a verbal agreement concerning the process they would use to resolve their disputes. Following the meeting, Messrs. Lagudi and Ponder reversed course and sought to change the parties' verbal agreement. Accordingly, more than two months following Get Fresh's written dispute notice and more than a month following the parties' meeting, the parties still have been unable to reach agreement on the terms of any resolution of their disputes.

112. On January 16, 2019, the Court granted Fresh Mix and Get Fresh's Motion to Dismiss or, in the alternative, to Stay and to Compel Arbitration. A copy of the Court's Order is attached as **Exhibit 3**.

Fresh Mix Exercises Its Right to Terminate Respondents' Employment

113. Concurrent with noticing its disputes and initiating the dispute-resolution procedures required under the Operating Agreement, Fresh Mix exercised its rights to terminate Messrs. Lagudi and Ponder's employment with Fresh Mix under the Employment Agreements. Fresh Mix and Get Fresh did not terminate their status as minority members and managers of Fresh Mix.

114. Following the termination of Messrs. Lagudi and Ponder's employment, Get Fresh and Fresh Mix immediately set up procedures to ensure that all Fresh Mix accounts would continue to be handled – as they already were primarily handled – by Get Fresh personnel.

115. No disruption occurred with respect to Fresh Mix accounts, despite Messrs. Lagudi and Ponder's refusal to cooperate in the transition. In discussions regarding the transition of customer accounts, Mr. Lagudi described the customers as "his" rather than as clients of Fresh Mix.

116. Despite their losses in Court, Messrs. Lagudi and Ponder have continued their efforts to improperly interject themselves into the day-to-day management of Fresh Mix accounts.

117. Messrs. Lagudi and Ponder have also impugned and are continuing to impugn Get Fresh's reputation by, *inter alia*, making false and wholly unsupported accusations to Get Fresh

accounting employees about purported misappropriation of funds, and implying to Get Fresh's finance executives that there are two sets of books.

118. Messrs. Lagudi and Ponder's actions, inactions and intentional misconduct has caused substantial damage to Fresh Mix and Get Fresh and, if unabated, threatens to disrupt key customer relationships, key employee relationships for Get Fresh, and could lead to a material loss of confidence in the industry, irreparably damaging both Fresh Mix and Get Fresh.

FIRST CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

119. Claimants incorporate the allegations contained in paragraphs 1 through 118 as though fully set forth herein.

120. At all times since the formal organization of Fresh Mix in January 2010, Respondents served as managers of Fresh Mix. As managers of Fresh Mix, Respondents owe fiduciary duties to Fresh Mix and Get Fresh to act with the utmost care, loyalty, honesty, good faith, objectivity, fairness and full disclosure.

121. Sections 2.4 and 5.4 of the Operating Agreement reinforce Respondents' fiduciary duties, which expressly apply to all activities of Respondents relating to the business of the Fresh Mix. [*See* Operating Agreement, § 2.4 (authorizing Fresh Mix to engage in "any lawful activity" and defining the "primary purpose of the Company" as "engag[ing] in the business of distributing food products of every kind and nature, including, without limitation, the operation and expansion of the business of L-E as conducted as of the date of this Agreement").]

122. Respondents breached their fiduciary duties to Fresh Mix and Get Fresh by engaging in the misconduct described above, including *inter alia*, (i) engaging in intentionally disruptive conduct, including in demeaning, berating and explicitly or implicitly threatening the job security of Get Fresh personnel, including personnel working on behalf of Fresh Mix to provide critical administrative support; (ii) secretively administering client accounts in an effort to control Fresh Mix's relationships with key clients, both to render such clients dependent on Respondents and to conceal the nature of their interactions from Get Fresh, despite the reality that Get Fresh provided complete administrative support for such clients; (iii) engaging in unethical conduct with the

regional manager of a key Fresh Mix and Get Fresh client, ultimately causing the client to sever its relationship with Fresh Mix and Get Fresh; (iv) entering and concealing an agreement with a third-party manufacturer to supply produce to another key Fresh Mix and Get Fresh customer, jeopardizing Fresh Mix and Get Fresh's prospective long-term relationship with the client; (v) engaging in intentional or grossly negligent product pricing improprieties, in violation of their obligations to Fresh Mix and its customer(s); (vi) intentionally interfering with Get Fresh's efforts to explore a sale of its assets for a substantial profit in an effort to extract for themselves a higher percentage than set forth in the Operating Agreement; and (vii) refusing to cooperate with Get Fresh personnel in the transition of customer accounts following termination of their employment with Fresh Mix.

123. Respondents further breached their fiduciary duties to Fresh Mix and Get Fresh by refusing to participate in good faith in the dispute resolution process outlined in Section 14.7 of the Operating Agreement and, instead, ignoring (or, at best, intentionally perverting) the Operating Agreement and initiating litigation in Nevada District Court in an effort to gain a perceived tactical advantage in connection with the parties' disputes.

124. Respondents' willful misconduct was designed at all times to further their own selfish interests without regard for the best interests of, and to the detriment of, Fresh Mix.

125. Respondents' breaches of fiduciary duty directly and proximately caused Get Fresh and Fresh Mix substantial damages in an amount to be proven at arbitration.

SECOND CLAIM FOR RELIEF

(Breach of Contract – Operating Agreement)

126. Claimants incorporate the allegations contained in paragraphs 1 through 125 as though fully set forth herein.

127. On or about January 11, 2010, Get Fresh, Fresh Mix and Respondents entered into the Operating Agreement to memorialize the parties' rights and obligations with respect to the operation and management of Fresh Mix.

128. As detailed above, Respondents materially breached the Operating Agreement by, *inter alia*, (i) neglecting their duties for Fresh Mix; (ii) engaging in unethical conduct with the regional

manager of a key Fresh Mix and Get Fresh client, ultimately causing the client to sever its relationship with Fresh Mix and Get Fresh; (iii) entering and concealing an agreement with a third-party manufacturer to supply produce to another key Fresh Mix and Get Fresh customer, jeopardizing Fresh Mix and Get Fresh's prospective long-term relationship with the client; (iv) engaging in intentional or grossly negligent product pricing improprieties, in violation of their obligations to Fresh Mix and its customer(s); (v) refusing to abide by the dispute resolution procedures requiring arbitration of the parties' disputes; and (vi) refusing to participate in good faith with Get Fresh and Fresh Mix's invocation of the dispute resolution procedures.

129. Respondents' multiple material breaches of the Operating Agreement have deprived Get Fresh and Fresh Mix of the reasonably expected benefits of their bargain, jeopardized Get Fresh's significant investment in Fresh Mix, and directly and proximately caused Get Fresh and Fresh Mix substantial damages in an amount to be proven at arbitration.

130. Respondents' breaches of the Operating Agreement are material and not reasonably susceptible to cure. Accordingly, pursuant to Section 8.4 of the Operating Agreement, Fresh Mix shall have the right and option to repurchase all or part of Respondents' interest in Fresh Mix at a purchase price equal to twenty-five percent (25%) of the fair market value of such interest.

THIRD CLAIM FOR RELIEF

(Breach of Contract – Employment Agreements)

131. Claimants incorporate the allegations contained in paragraphs 1 through 130 as though fully set forth herein.

132. On or about January 11, 2010, Respondents entered into Employment Agreements with Fresh Mix. The Employment Agreements define the rights and obligations of Respondents in their respective capacities as employees of Fresh Mix.

133. The implied covenant of good faith and fair dealing is also implied in every contract under settled Nevada law, including the Employment Agreements. The implied covenant prohibits a party from violating a contract's intention or spirit, even if complying with its literal terms.

. . .

. . .

134. The Employment Agreements renewed at the end of their initial three-year term and continued in full force and effect until the termination of Respondents' employment by Fresh Mix on November 26, 2018.

135. Respondents materially breached the Employment Agreements and/or the covenant of good faith and fair dealing by, *inter alia*, (i) neglecting their duties for Fresh Mix, including by consistently failing to devote their productive time – let alone all of their productive time – to the performance of their duties as President and Chief Operating Officer for Fresh Mix; (ii) failing to work out of Fresh Mix's offices; (iii) engaging in intentionally disruptive conduct, including refusing to follow applicable policies and procedures distributed by Get Fresh human resources; (iv) secretively administering client accounts in an effort to control Fresh Mix's relationships with key clients, both to render such clients dependent on Respondents and to conceal the nature of their interactions from Get Fresh, despite the reality that Get Fresh provided complete administrative support for such clients; (v) engaging in intentional or grossly negligent product pricing improprieties, in violation of their obligations to Fresh Mix and its customer(s); and (vi) materially breaching the Operating Agreement.

136. Respondents' material breaches of their Employment Agreements have deprived Fresh Mix of the reasonably expected benefits of its bargain, and directly and proximately caused Fresh Mix substantial damages in an amount to be proven at arbitration.

FOURTH CLAIM FOR RELIEF

(Declaratory Relief – Repurchase Event)

137. Claimants incorporate the allegations contained in paragraphs 1 through 136 as though fully set forth herein.

138. An actual controversy exists between the parties regarding the existence of a "Repurchase Event" under the Operating Agreement.

139. If Get Fresh or Fresh Mix prevails on the First, Second or Third Claims for Relief, Claimants will have established a material breach of the Operating Agreement or termination of Messrs. Lagudi and Ponder's employment for Cause, triggering a Repurchase Event thereunder.

. . .

140. Pursuant to Delaware Code Section 6501, *et seq.* and Section 14.7 of the Operating Agreement, Get Fresh and Fresh Mix are entitled to a declaration in this action that (i) the actions and misconduct of Messrs. Lagudi and Ponder, as detailed in part above, constitute a material breach of the Operating Agreement; (ii) Fresh Mix terminated Messrs. Lagudi and Ponder's employment with Fresh Mix for Cause; and, as a result, (iii) Get Fresh and Fresh Mix are entitled to repurchase any and all of the membership interests held by Messrs. Lagudi and Ponder in Fresh Mix at a purchase price equal to twenty-five percent (25%) of the fair market value of such interest, pursuant to the valuation method established by the Operating Agreement.

141. The declaratory relief sought will terminate the controversy and remove any uncertainty regarding the parties' rights and obligations under the Operating Agreement.

FIFTH CLAIM FOR RELIEF

(Declaratory Relief – Employment Agreements)

142. Claimants incorporate the allegations contained in paragraphs 1 through 141 as though fully set forth herein.

143. Actual controversies exist between the parties regarding the continuation or renewal of the Employment Agreements of Messrs. Lagudi and Ponder beyond 2013, the terms and conditions of their continued employment with Fresh Mix, and whether Fresh Mix's termination of their employment was for "Cause" as that term is defined the Employment Agreements. In particular, a controversy exists between the parties concerning the continuing enforceability of Section 5 of the Employment Agreements concerning, *inter alia*, noncompetition.

144. Pursuant to Nevada Revised Statutes 30.030 and 30.040, and Section 9 of the Employment Agreements, Fresh Mix is entitled to a declaration in this action that (i) the Employment Agreements renewed in 2013 and thereafter, such that Messrs. Lagudi and Ponder's employment continued under the same terms and conditions; (ii) the terms and conditions of the Employment Agreements, including without limitation the nonsolicitation, noncompete and confidentiality/nondisclosure provisions, continued in full force and effect through the date of their termination; and (iii) Fresh Mix's termination of Messrs. Lagudi and Ponder's employment was for "Cause" as that term is defined the Employment Agreements.

145. The declaratory relief sought will terminate the controversy and remove any uncertainty regarding the parties' rights and obligations under the Employment Agreements.

SIXTH CLAIM FOR RELIEF

(Unjust Enrichment – Alternative Claim)

146. Claimants incorporate the allegations contained in paragraphs 1 through 145 as though fully set forth herein.

147. As an alternative claim to Fresh Mix's third and fifth claims for relief concerning the Employment Agreements, Fresh Mix and Get Fresh assert a claim for unjust enrichment against Messrs. Lagudi and Ponder.

148. Between 2013 and 2018, Messrs. Lagudi and Ponder received significant compensation from Fresh Mix consistent with their Employment Agreements.

149. To the extent the Arbitration Panel determines that the Employment Agreements did not continue in full force and effect beyond their initial 2013 expiration, Messrs. Lagudi and Ponder were not entitled to receive compensation under the Employment Agreements.

150. Messrs. Lagudi and Ponder received, accepted and retained a significant benefit by accepting those payments without providing the concomitant services and obligations required under the Employment Agreements.

151. Messrs. Lagudi and Ponder were not entitled to receive compensation for their status as members of Fresh Mix or their service as managers of Fresh Mix. Indeed, Get Fresh did not receive compensation from Fresh Mix for its position as a member of Fresh Mix. Messrs. Caldara, Goldberg and Wise similarly did not receive compensation for serving as officers or managers of Fresh Mix.

152. Fresh Mix was impoverished by the amount of those payments to Messrs. Lagudi and Ponder, which exceeded $500,000 per year for each year between 2013 and 2018.

153. Moreover, Get Fresh was impoverished to the extent that its distribution of profits for each year between 2013 and 2018 did not reflect the true profits of Fresh Mix, which were erroneously underreported each year due to the deduction of Respondents' respective salaries.

. . .

154. As a direct and proximate result of Messrs. Lagudi and Ponder's conduct and retention of compensation payments between 2013 and 2018, Get Fresh and Fresh Mix have suffered significant damages. Get Fresh and Fresh Mix are entitled to recover from Respondents the value of the compensation they unjustly received from Fresh Mix from 2013 through 2018.

REQUESTED RELIEF

Claimants request an Award against Respondents Paul and Kelley Lagudi and William Todd and Stephanie Ponder jointly and severally as follows:

A. For compensatory damages in an amount to be proven at arbitration;

B. For a declaration that:

i. The actions and misconduct of Messrs. Lagudi and Ponder materially breached the Operating Agreement;

ii. Fresh Mix terminated Messrs. Lagudi and Ponder's employment for "Cause" as that term is defined the Employment Agreements; and

iii. Get Fresh and/or Fresh Mix are entitled to repurchase any and all of the membership interests held by Messrs. Lagudi and Ponder in Fresh Mix at a purchase price equal to twenty-five percent (25%) of the fair market value of such interest, pursuant to the valuation method established by the Operating Agreement.

C. For a declaration that:

i. The Employment Agreements between Fresh Mix and Messrs. Lagudi and Ponder renewed in 2013 and thereafter; and

ii. The terms and conditions of Messrs. Lagudi and Ponder's employment with Fresh Mix under the Employment Agreements, including without limitation the nonsolicitation, noncompete and nondisclosure provisions, continued in full force and effect through the date of their termination.

D. For reimbursement of Fresh Mix and Get Fresh's reasonable attorneys' fees, expenses and costs, including all arbitration expenses and costs, incurred herein

. . .

pursuant to Section 14.7(a)(iii) of the Operating Agreement and Section 11.14 of the Employment Agreements;

E. For pre- and post-award interest on the amounts awarded at the highest rate permitted by law; and,

F. For such other relief and further relief as deemed just and proper by the Panel.

DATED this 13th day of February, 2019.

COHEN DOWD QUIGLEY
The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016

By: _____
Ronald Jay Cohen
Daniel P. Quigley
Betsy J. Lamm
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Attorneys for Claimants Fresh Mix, LLC and Get Fresh Sales, Inc.

EXHIBIT 1

LIMITED LIABILITY COMPANY AGREEMENT

OF

FRESH MIX LLC

Limited Liability Company Agreement, dated as of January 11th, 2010, by and among Get Fresh Sales, Inc., a Nevada corporation ("GFS"), Paul Lagudi and William Todd Ponder (collectively, the "L-E Members"), and Fresh Mix LLC with reference to the following facts.

A. GFS has formed the Company as a limited liability company under the laws of the State of Delaware by filing a Certificate of Formation for the Company with the Delaware Secretary of State.

B. The parties hereto now desire to adopt a limited liability company agreement to govern the respective rights and obligations of the members and managers of the Company.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties hereto hereby agree that the following shall be the limited liability company agreement of the Company.

ARTICLE I
DEFINITIONS

In addition to certain other defined terms used herein, when used in this Agreement the following terms have the following meanings:

1.1 "**Act**" means the Delaware Limited Liability Company Act, 6 Del. Code § 18-101 et seq.

1.2 "**Adjusted Capital Account**" of a Member means the Capital Account of that Member, increased by that Member's share of Company Minimum Gain and Member Minimum Gain.

1.3 "**Affiliate**" of another Person means (a) a Person directly or indirectly (through one or more intermediaries) Controlling, Controlled by or under common Control with that other Person, (b) a Person owning or controlling ten percent (10%) or more of the outstanding voting securities or beneficial interests of that other Person or (c) such Person's spouse, lineal descendants or lineal ancestors.

1.4 "**Aggregate Capital Contribution**" of a Member on any date means the aggregate of such Member's Initial Capital Contribution together with all Capital Contributions of such Member made on or after such date.

1.5 "**Agreement**" means this Limited Liability Company Agreement of the Company as originally executed and as amended from time to time.

1.6 "**Arbitrators**" has the meaning set forth in Section 14.7(a)(i).

1.7 "**Asset Purchase Agreement**" means that certain Asset Purchase Agreement, dated January ___, 2010, by and between L-E, the L-E Members, and GFS.

1.8 "**Assumed Liabilities**" has the meaning specified in the Asset Purchase Agreement.

1.9 "**Bankruptcy**" of a Person means (a) the institution of any proceedings under any federal or state law for the relief of debtors, including the filing by or against that Person of a voluntary or involuntary case under the United States Bankruptcy Code, which proceedings, if involuntary, are not dismissed within sixty (60) days after their filing; (b) an assignment of the property of that Person for the benefit of creditors; (c) the appointment of a receiver, trustee or conservator of any substantial portion of the assets of that Person; which appointment, if obtained ex parte, is not dismissed within sixty (60) days thereafter; (d) the seizure by a sheriff, receiver, trustee or conservator of any substantial portion of the assets of that Person; (e) the failure by that Person generally to pay its debts as they become due within the meaning of Section 303(h)(1) of the United States Bankruptcy Code, as determined by a bankruptcy court of competent jurisdiction; or (f) that Person's admission in writing of its inability to pay its debts as they become due.

1.10 "**Board**" has the meaning set forth in Section 5.1(a).

1.11 "**Bona Fide Offeror**" has the meaning specified in Section 8.12(a).

1.12 "**Business Day**" means any day other than a Saturday, Sunday or other day when financial institutions doing business in Los Angeles, California, are authorized or required by law to be closed.

1.13 "**Capital Account**" of a Member means the capital account of that Member determined in accordance with the rules set forth in Section 1.704-1(b)(2)(iv) of the Treasury Regulations and this Section 1.13. The Capital Accounts shall be adjusted by the Managers upon an event described in Section 1.704-1(b)(2)(iv)(*f*)(*5*) of the Treasury Regulations in the manner described in Section 1.704-1(b)(2)(iv)(*g*) of the Treasury Regulations if the Managers reasonably determine that such adjustments are necessary or appropriate to reflect the relative economic interests of the Members. If any Interest is Transferred in whole or in part pursuant to the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor in whole or in part to the extent the Capital Account is attributable to the Interest (or part thereof) so Transferred.

1.14 "**Capital Contribution**" of a Member, at any particular time, means the amount of money or property, or any binding obligation to contribute money or property, which that Member has theretofore contributed to the capital of the Company.

1.15 "**Certificate of Formation**" means the Certificate of Formation of the Company filed under the Act with the Delaware Secretary of State on January 5, 2010.

1.16 "**Closing**" has the meaning set forth in Sections 8.5, 8.9 and 8.11(g).

1.17 "**Code**" means the Internal Revenue Code of 1986, as amended.

1.18 "**Company**" means Fresh Mix LLC, a Delaware limited liability company.

1.19 "**Company Minimum Gain**" with respect to any Fiscal Year means the "partnership minimum gain" of the Company computed in accordance with the principles of Sections 1.704-2(b)(2) and 1.704-2(d) of the Treasury Regulations.

1.20 "**Control**" of a Person means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

1.21 "**Co-Selling Member**" has the meaning specified in Section 8.12(b).

1.22 "**Distributable Cash**" means the amount of net cash of the Company after deducting from the sum of gross sales plus any other revenues the following amounts: (i) cost of goods, (ii) payment term discounts, (iii) customer rebates, (iv) direct operating costs (allocated on a per-pound basis), (v) indirect costs, specialty products, transportation, quality assurance and packaging, (vi) fixed expense, including, without limitation, maintenance, cleaning, labor, supplies, quality assurance, employee salaries and/or guaranteed payments, as the case may be, administration expenses, business licenses and taxes, (vii) indebtedness for money borrowed, (viii) current and reasonably projected capital expenditures and improvements, (ix) costs and expenses incurred in connection with pursuit and defense of claims, and (x) Reserves. For the avoidance of doubt, the Company has no liability for and will not fund any amounts payable pursuant to Section 4.2 of the Asset Purchase Agreement which are the sole obligation of GFS.

1.23 "**Distribution**" means the transfer of money or property by the Company to one or more Members with respect to their Interests, without separate consideration.

1.24 "**Economic Interest**" means a share, expressed as a percentage, of one or more of the Company's Net Profits, Net Losses, special allocations, Distributable Cash or Distributions, but does not include any other rights of a Member, including the right to vote or the right to information concerning the business and affairs of the Company.

1.25 "**Economic Risk of Loss**" means the economic risk of loss within the meaning of Section 1.752-2 of the Treasury Regulations.

1.26 "**Electing Members**" has the meaning specified in Section 8.13(a).

1.27 "**Election Notice**" has the meanings specified in Sections 8.11(f) and 8.12(b).

1.28 "**Eligible Members** has the meaning specified in Sections 8.11(a).

1.29 "**Employment Agreements**" means those certain Employment Agreements, dated of even date herewith, between the Company and Paul Lagudi and William Todd Ponder, respectively, in the form and substance of those attached hereto as Exhibit A-1 and A-2, respectively.

1.30 "**Fair Market Value**" means and refers to the price at which the applicable property would change hands between a willing buyer and willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of the relevant facts. In the event it becomes necessary to determine the Fair Market Value of any property (including an ownership interest in the Company), the Fair Market Value of the property shall be determined by agreement of the parties involved within thirty (30) days after the occurrence of the event which necessitates such determination, or in the absence of such agreement, by an individual appraiser or appraisal firm mutually acceptable to such parties. In the event the parties involved are unable to agree on the individual appraiser or firm to perform the valuation, each party shall select an appraiser, and such appraisers shall first attempt to jointly determine the Fair Market Value of the property by mutual agreement, but if they are unable to agree on such valuation, such appraisers shall select a third appraiser, and the Fair Market Value shall be determined by the average of the two closest appraisals. Any valuation so determined shall be binding and conclusive on the parties involved, unless it has been determined pursuant to Section 14.7 that there has been manifest error. The cost of any such appraisal(s) shall be borne equally by the parties involved. In determining the Fair Market Value of any Interest, the parties or the appraiser(s) shall, among other things, (i) value the Company on a going-concern basis, (ii) give due consideration to EBITDA and profit multiples of comparable companies, and (iii) take into account whether or not either or both of the L-E Members' services will continue to be rendered thereafter; provided however, that the parties or the appraiser(s) shall not take into account the resulting liability of the Company for the payment of the purchase price of the Interest to be acquired pursuant to Section 8.4 or 8.8, as the case may be.

1.31 "**Fiscal Year**" means the Company's taxable year, which shall be the taxable year ending each December 31, or such other taxable year as may be selected by the Managers in accordance with applicable law.

1.32 "**Formation Date**" has the meaning set forth in Section 2.2.

1.33 "**GFS Managers**" means the Managers appointed by GFS pursuant to Section 5.2. Initially, the "**GFS Managers**" means Dominic Caldara, Scott Goldberg and John Wise.

1.34 "**Indemnified Person**" has the meaning set forth in Section 12.3.

1.35 "**Initial Capital Contribution**" with respect to a Member means the initial contributions made by such Member to the Company on account of such Member's purchase of its Interest.

1.36 "**Interest**" means a Member's total interest as a Member of the Company, including the Member's interest in Net Profit, Net Loss, special allocations, Distributable Cash or other Distributions, rights to vote or participate in the management of the Company, rights to information concerning the business and affairs of the Company and any and all other rights or interests granted pursuant to this Agreement and/or the Act.

1.37 "**L-E**" means Lagudi Enterprises, LLC, a Nevada limited liability company of which the L-E Members are the sole members.

1.38 "**L-E Managers**" means the Managers appointed by the L-E Members pursuant to Section 5.2. Initially, the "**L-E Managers**" means Paul Lagudi and William Todd Ponder.

1.39 "**Lien**" shall mean any security interest, easement, mortgage, charge, lease, lien, claim, option, pledge, agreement, limitation in voting rights, restriction on transfer (other than as imposed by federal and state securities Laws), or other encumbrance of any kind or nature whatsoever.

1.40 "**Liquidity Event**" means (i) a sale, merger or consolidation, other business combination, or any other transaction involving GFS, in connection with which a Person or Persons acquires ownership or control of at least a majority of the total ownership interests in GFS, whether occurring as part of a single transaction or plan, or in a series of transactions; (ii) a direct or indirect sale or disposition of all or substantially all of GFS's assets, whether occurring as part of single transaction or plan, or in a series of transactions; or (iii) a public offering of any securities of GFS.

1.41 "**Major Decision**" has the meaning set forth in Section 5.3.

1.42 "**Majority In Interest**" of the Members means Voting Interests which, taken together, exceed fifty percent (50%) of all Voting Interests held by all Members entitled to vote or grant consent with respect to the matter in question.

1.43 "**Managers**" means the managers of the Company appointed by the Members pursuant to Section 5.2. Initially, the "**Managers**" means the GFS Managers and the L-E Managers.

1.44 "**Member**" means each Person who is an initial signatory to this Agreement, has been admitted to the Company as a Member in accordance with the Certificate of Formation of the Company or is a transferee of a Member who has become a Member in accordance with Section 8.15.

1.45 "**Member Minimum Gain**" means the "partner nonrecourse debt minimum gain" of the Company computed in accordance with the principles of Section 1.704-2(i)(3) of the Treasury Regulations.

1.46 "**Member Nonrecourse Deductions**" means the "partner nonrecourse deductions" of the Company computed in accordance with the principles of Sections 1.704-2(i)(1) and (2) of the Treasury Regulations.

1.47 "**Membership Interest Bona Fide Offer**" means an offer in writing to a Member offering to purchase all or any part of that Member's Interest or any interest therein, setting forth all of the material terms and conditions of the proposed purchase from an offeror who is ready, willing and able to consummate the purchase and who is neither the Company, nor an Affiliate of that Member, nor, unless all of the Members waive such condition, a competitor of the Company.

1.48 "**Net Profit**" and "**Net Loss**" means for each Fiscal Year the net taxable income and net taxable loss, as the case may be, of the Company for such Fiscal Year determined in

accordance with federal income tax principles, including items required to be separately stated, taking into account income that is exempt from federal income taxation, items that are neither deductible nor chargeable to a capital account and rules governing depreciation and amortization, except that in computing taxable income or taxable loss, the "book" value of an asset will be substituted for its adjusted tax basis if the two differ, in accordance with the principles of Treasury Regulations Section 1.704-1(b)(2)(iv) and any gain, income, deductions or losses specially allocated under ARTICLE VI shall be excluded from the computation.

1.49 "**Non-Electing Members**" has the meaning specified in Section 8.13(a).

1.50 "**Nonrecourse Deductions**" means the "nonrecourse deductions" of the Company computed in accordance with Section 1.704-2(b) of the Treasury Regulations.

1.51 "**Notice**" means any notice required or permitted under this Agreement. "**Notify**" and "**Notification**" have corresponding meanings.

1.52 "**Offered Interest**" has the meanings specified in Section 8.11(a).

1.53 "**Offering Member**" has the meanings specified in Section 8.11(a).

1.54 "**Percentage**" of a Member means the percentage set forth on **Schedule A** for such Member, as the same may be adjusted pursuant to this Agreement.

1.55 "**Person**" means any entity, corporation, company, association, joint venture, joint stock company, partnership (including a general partnership, limited partnership and limited liability partnership), limited liability company, trust, organization, individual, nation, state, government (including agencies, departments, bureaus, boards, divisions and instrumentalities thereof), trustee, receiver or liquidator.

1.56 "**Proceeding**" has the meaning set forth in Section 12.3(a).

1.57 "**Proxy**" means a written authorization signed or an electronic transmission authorized by a Member or Manager, or that Member's or Manager's attorney-in-fact, giving another Person the power to exercise the voting rights of that Member or Manager. A proxy may not be transmitted orally.

1.58 "**Purchased Assets**" has the meaning specified in the Asset Purchase Agreement.

1.59 "**Repurchase Events**" has the meaning set forth in Section 8.3.

1.60 "**Reserves**" means cash reserves in an amount equal to the sum of (i) ten percent (10%) of Company's accounts receivable which do not exceed Five Hundred Thousand Dollars ($500,000) in the aggregate, plus (ii) seven and one-half percent (7½%) of the Company's accounts receivable which exceed Five Hundred Thousand Dollars ($500,000) in the aggregate, which reserves may be used by the Mangers in their sole discretion to cover the Company's expenses, fees, taxes, liabilities for the payment of future contingencies, known or unknown, liquidated or unliquidated, including, but not limited to, liabilities which may be incurred in litigation and liabilities undertaken pursuant to the indemnification provisions of this Agreement.

1.61 "**Right of First Refusal Notice**" has the meaning specified in Section 8.11(a).

1.62 "**Sale**" has the meaning specified in Section 8.13(a).

1.63 "**Sale Notice**" has the meaning specified in Section 8.13(a).

1.64 "**Securities Act**" means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

1.65 "**Selling Member**" has the meaning specified in Section 8.12.

1.66 "**Super Majority In Interest**" of the Members means Voting Interests which, taken together, equal or exceed seventy-five percent (75%) of all Voting Interests held by all Members entitled to vote or grant consent with respect to the matter in question.

1.67 **"Super Majority of the Managers"** means eighty percent (80%) of the Managers.

1.68 "**Tag-Along Notice**" has the meaning specified in Section 8.12(a).

1.69 "**Tax Matters Partner**" means the Person meeting the requirements under Section 6231(a)(7) of the Code to be the tax matters partner of the Company that is designated pursuant to Section 9.6(b).

1.70 "**Term**" has the meaning specified in the Employment Agreements.

1.71 "**Transfer**" or "**Transferred**" means, with respect to all or a part of an Interest, the sale, purchase, assignment, acquisition, transfer, other disposition, pledge, hypothecation or other encumbrance, whether direct or indirect, voluntary, involuntary or by operation of law, and whether or not for value, of (a) that Interest or part thereof, or (b) a controlling interest in the Member that, directly or indirectly through one or more intermediaries, holds that Interest or part thereof. Transfer includes any transfer by gift, devise, intestate succession, sale, operation of law, upon the termination of a trust, as a result of or in connection with any property settlement or judgment incident to a divorce, dissolution of marriage or separation, by decree of distribution or other court order or otherwise.

1.72 "**Treasury Regulations**" means the regulations promulgated by the United States Treasury Department pertaining to the income tax.

1.73 "**Voting Interest**" means a Member's percentage right to vote on matters coming before the Members for action. The Voting Interest of each Member shall initially be the percentage set forth opposite the name of that Member in **Schedule A**. The combined Voting Interest of all Members shall at all times equal one hundred percent (100%).

References in this Agreement to "Articles," "Sections," "Exhibits" and "Schedules" shall be to the Articles, Sections, Exhibits and Schedules of or to this Agreement, unless otherwise specifically provided; all Exhibits and Schedules to this Agreement are incorporated herein by reference; any of the terms defined in this Agreement may, unless the context otherwise requires,

be used in the singular or the plural and in any gender or neuter depending on the reference; the words "herein", "hereof" and "hereunder" and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provision of this Agreement; the word "including" when used in this Agreement shall mean "including without limitation"; and except as otherwise specified in this Agreement, all references in this Agreement (a) to any agreement, document, certificate or other written instrument shall be a reference to such agreement, document, certificate or instrument, in each case together with all exhibits, schedules, attachments and appendices thereto, and as amended, restated, supplemented or otherwise modified from time to time in accordance with the terms thereof; and (b) to any law, statute or regulation shall be deemed references to such law, statute or regulation as the same may be supplemented, amended, consolidated, superseded or modified from time to time.

ARTICLE II
ORGANIZATIONAL MATTERS

2.1 **Name**. The name of the Company shall be "Fresh Mix LLC" or, upon compliance with applicable law, any other name that the Board may determine. The business of the Company shall be conducted under that name.

2.2 **Term**. The term of the Company's existence commenced upon the filing of its Certificate of Formation with the Secretary of State of the State of Delaware on January 5, 2010 (the "**Formation Date**"), and shall continue until such time as it is terminated pursuant to ARTICLE X. The existence of the Company as a separate legal entity shall continue until the cancellation of the Certificate of Formation.

2.3 **Office and Agent**. The principal office of the Company shall be located at 6745 S. Escondido Street, Las Vegas, Nevada 89119, or at such other place as the Managers may determine from time to time. The Company's registered office for service of process in the State of Delaware shall be located at 615 South DuPont Highway, Dover, Delaware 19901, or at such other place as the Managers may determine from time to time, in their sole and absolute discretion. The name of the Company's registered agent at such address is National Corporate Research, Ltd.

2.4 **Purposes of the Company**. The Company may engage in any lawful activity for which a limited liability company may be organized under the Act. However, the primary purpose of the Company shall be to engage in the business of distributing food products of every kind and nature, including, without limitation, the operation and expansion of the business of L-E as conducted as of the date of this Agreement, subject in all events to the terms and conditions of this Agreement.

2.5 **Intent**. It is the intent of the Members that the Company shall be treated as a "partnership" for federal income tax purposes. It also is the intent of the Members that the Company not be operated or treated as a "partnership" for purposes of Section 303 of the United States Bankruptcy Code.

2.6 **Members**. The name, address, fax number, Initial Capital Contribution and Aggregate Capital Contribution of each Member as of the date of this Agreement is set forth in

Schedule A. The Managers shall cause Schedule A as to be amended from time to time, to reflect any change in any of the foregoing with respect to any Member and the addition of those Persons who are admitted as Members after the date hereof in accordance with Section 8.15.

2.7 Qualification. The Managers shall cause the Company to qualify to do business in each jurisdiction where such qualification is required by the nature of the business of the Company.

ARTICLE III
CAPITAL CONTRIBUTIONS; FUNDING OBLIGATIONS

3.1 Initial Capital Contributions. Upon execution of this Agreement, each Member shall contribute to the capital of the Company the monies, assets, agreements and/or properties as set forth below:

(a) GFS hereby contributes to the capital of the Company GFS' undivided sixty percent (60%) interest in and to the Purchased Assets, acquired by GFS concurrently herewith pursuant to the Asset Purchase Agreement, subject to the Assumed Liabilities.

(b) At the direction and for the account of the L-E Members, L-E hereby contributes to the capital of the Company L-E's undivided forty percent (40%) interest in and to the Purchased Assets, subject to the Assumed Liabilities, 75% of such 40% interest being for the account of Paul Lagudi and 25% being for the account of William Todd Ponder.

3.2 Assumption of Liabilities. Upon the execution and delivery of this Agreement, the Company hereby assumes the Assumed Liabilities and agrees to pay and perform them when due.

3.3 Additional Capital Contributions. No Member shall be required to make any Capital Contributions not specifically referred to in Section 3.1. To the extent approved from time to time by the affirmative vote or written consent of all of the Managers, however, the Members shall be permitted to make additional Capital Contributions if and to the extent they so desire. In that event, all the Members shall have the opportunity, but not the obligation, to participate in such additional Capital Contributions on a pro rata basis in accordance with their respective Percentages. Each Member shall receive a credit to its Capital Account in the amount of any additional capital which it contributes to the Company. Immediately following any additional Capital Contribution, the Percentages of the Members shall be adjusted to reflect the new relative proportions thereof, if the Members unanimously agree that the relative proportions thereof are to be altered as a result of the additional Capital Contribution, and Schedule A shall be revised to reflect any such additional Capital Contribution.

3.4 Capital Accounts. The Company shall establish and maintain an individual Capital Account for each Member.

3.5 No Withdrawals of Capital. No Member shall have any right to withdraw or reduce its Aggregate Capital Contribution except as specifically provided herein, and no Member shall have the right to demand or receive property other than cash in return for its Capital

Contribution. No Member has any right to, interest in, or claim against any specific property of the Company.

3.6 **No Interest.** No Member shall be entitled to receive any interest on such Member's Capital Contributions or Capital Account.

3.7 **Interest Certificates.** The Managers may in their discretion cause the Company to issue certificates representing the outstanding Interests. Each certificate, if any, shall bear such legends as the Managers may determine.

3.8 **No Compensation.** No Member shall have any personal liability for the repayment of any Capital Contribution of any other Member. No Member shall receive any interest, salary or drawing with respect to its Capital Contributions or its Capital Account or for services rendered on behalf of the Company or otherwise in its capacity as a Member, except as otherwise specifically provided in this Agreement.

ARTICLE IV
MEMBERS

4.1 **Authority of Members.** No Member may, without the prior written consent of all of the other Members, take any action on behalf of or in the name of the Company, or enter into any commitment or obligation binding upon the Company, except for actions which have been expressly authorized hereunder or are within the scope of such Member's authority granted hereunder. Each Member hereby agrees to indemnify, defend, and hold wholly free and harmless the Company, the other Members and the Managers and any Affiliate of the Members and Managers, from and against any loss, liability, claim, damage, or expense (including reasonable attorneys' fees) arising out of any breach of the foregoing provisions of this Section 4.1 by such Member or such Member's Affiliates, employees, agents, representatives or Affiliates thereof.

4.2 **Withdrawals.** Except as otherwise provided in this Agreement, no Member may withdraw from the Company prior to the dissolution or liquidation of the Company. A Member that withdraws in contravention of this Agreement shall not be entitled to any consideration with respect to such Member's Interest, and shall be liable to the Company and the other Members for any damages suffered by the Company or the other Members as a result of such withdrawal.

4.3 **Action by Members.**

(a) Although it is the express intent of the Members that there shall not be any required (or regularly scheduled) meetings of the Members, meetings of the Members may be called by any Manager or, in the case of any matter on which Members may vote, upon the written request of any Member. All meetings of the Members shall be held at the principal executive office of the Company or at such other location as may be designated by the Managers upon not less than three (3) Business Days notice. If a meeting of the Members is called by any Member, written notice of the call shall be delivered to the Managers who shall give written notice of the meeting not less than two (2), or more than twenty (20) Business Days prior to the date of the meeting to all Members entitled to vote at the meeting. The notice shall state the

place, date, and hour of the meeting and the general nature of business to be transacted. No other business may be transacted at the meeting.

(b) A Majority In Interest of the Members, represented in person or by Proxy, shall constitute a quorum of the Members for the transaction of business at a meeting, and except to the extent that this Agreement expressly requires the approval of a Super Majority In Interest or all of the Members, every act or decision done or made by a Majority In Interest of the Members present, in person or by Proxy, at a meeting duly held at which a quorum is present shall be the act of the Members. At all meetings of Members, a Member may vote in person or by Proxy. Any such Proxy shall be filed with the Managers before or at the time of the meeting and may be filed by facsimile transmission to the Managers at the principal executive office of the Company or at such other address as may be given by the Managers to the Members for such purposes. Members may participate in any meeting through the use of conference telephones or similar communications equipment as long as all Members participating can hear one another. A Member so participating is deemed to be present in person at the meeting. Any action which may be taken by the Members at a meeting may also be taken without a meeting, if a consent in writing setting forth the action so taken is signed by Members having not less than the minimum votes that would be necessary to authorize that action at a meeting of the Members duly called and noticed at which all Members entitled to vote were present. A consent transmitted by electronic transmission by a Member or other Person authorized to act for that Member shall be deemed to be written and signed by that Member for these purposes, and the term "electronic transmission" means any form of communication not directly involving the physical transmission of paper that creates a record that may be retained, retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form by such a recipient through an automated process.

4.4 **Fiduciary Duties**. Except as otherwise provided in this Agreement, no Member shall have any fiduciary obligations with respect to the Company or to the other Members insofar as making any investment or other opportunity or opportunities available to the Company or to the other Members, and each Member may engage in whatever activities such Member may choose, without having or incurring any obligation to offer any interest in such activities to the Company or to the other Members. The fiduciary duties of the Members and the Managers shall be limited solely to those arising from the activities described in Sections 2.4 and 5.4(d) and elsewhere in this Agreement.

ARTICLE V
MANAGEMENT AND CONTROL OF THE COMPANY

5.1 **Management of the Company by the Board of Managers**.

(a) The business, property and affairs of the Company shall be managed exclusively by the Managers acting through a Board of Managers (the "Board") in accordance with the provisions of Sections 5.1, 5.2 and 5.3. Except for matters as to which the approval of the Members is expressly required by the Act, Section 5.3 or any other provision of this Agreement, the Board shall have full, complete and exclusive authority, power and discretion to manage and control the business, property and affairs of the Company, to make all decisions regarding those matters, to supervise, direct and control the actions of the officers of the

Company and to perform any and all other actions customary or incident to the management of the Company's business, property and affairs. The Members shall have no power to participate in the management of the Company except as expressly authorized by a specific section of this Agreement and as expressly required by any non-waivable provision of the Act. Without the written authorization of the Board to do so, no Member shall have any power or authority to bind or act on behalf of the Company in any way, to pledge its assets or to render it liable for any purpose, except to the extent the same has been expressly authorized hereunder or is within the scope of such Member's authority granted hereunder.

(b) Without limiting the generality of Section 5.1(a), the Board, without obtaining any approval from the Members, except only as required in Section 5.3 or the Act, shall have the exclusive power and authority to cause the Company:

(i) to do any act in the conduct of its business and to exercise all powers granted to a limited liability company under the Act, whether in the State of Nevada or in any other state, territory, district or possession of the United States or any foreign country, that may be necessary, convenient, desirable or incidental to the accomplishment of the business purposes of the Company;

(ii) to own, hold, operate, maintain, finance, refinance, improve, lease, sell, convey, mortgage, transfer, demolish or dispose of any asset as may be necessary, convenient, desirable or incidental to the accomplishment of the business purposes of the Company;

(iii) to enter into, perform and carry out any contracts, leases, instruments, commitments, agreements or other documents of any kind which are necessary, convenient, desirable or incidental to the accomplishment of the business purposes of the Company;

(iv) to sue and be sued, complain and defend and participate in administrative or other proceedings, in its own name;

(v) to appoint officers, employees and agents of the Company, define their duties and fix their compensation, if any, and to select attorneys, accountants, consultants and other advisors of the Company;

(vi) to indemnify any Person in accordance with the Act and to obtain any and all types of insurance;

(vii) to borrow money from any Person and issue evidences of indebtedness and to secure the same by mortgages, deeds of trust, security agreements, pledges, collateral assignments or other liens on the assets of the Company;

(viii) to negotiate, enter into, renegotiate, extend, renew, terminate, modify, amend, waive, execute, acknowledge or take any other action with respect to any loan agreement, commitment, deed of trust, mortgage, security agreement or other loan document in respect of any assets of the Company;

(ix) to pay, collect, compromise, litigate, arbitrate or otherwise adjust or settle any and all other claims or demands of or against the Company or to hold such proceeds against the payment of contingent liabilities;

(x) to make, execute, acknowledge, endorse and file any and all agreements, documents, instruments, checks, drafts or other evidences of indebtedness necessary, convenient, desirable or incidental to the accomplishment of the business purposes of the Company;

(xi) to create and make Distributions permitted by this Agreement;

(xii) to carry on any other activities necessary or incidental to, or in connection with, any of the foregoing or the accomplishment of the purposes of the Company; and

(xiii) to cause any special purpose subsidiary limited liability company wholly owned by the Company to do any of the foregoing.

(c) In making any and all decisions relating to the conduct of the Company's business or otherwise delegated to it by any provision of this Agreement, the Board shall be free to exercise its sole, absolute and unfettered discretion. Each Manager shall perform his managerial duties in good faith and in a manner he believes to be in, or not opposed to, the best interests of the Company. In performing their duties, the Managers shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, of any attorney, independent accountant or other Person as to matters which the Managers believe to be within such Person's professional or expert competence unless the Managers have actual knowledge concerning the matter in question that would cause such reliance to be unwarranted. The Board shall have no liability for taking or failing to take any action required to be taken by it under this Agreement to the extent the Members, pursuant to Section 5.3 or otherwise, direct that such action be taken or not taken, as the case may be.

(d) The Managers shall not be obligated to devote all of their time or business efforts to the affairs of the Company; however, they shall devote such time, effort and skill as they deem appropriate for the management and operation of the Company's affairs.

(e) Nothing in this Agreement is intended to require that meetings of the Board be held, it being the intent of the Members that meetings of the Board are not required. Notwithstanding the foregoing, meetings of the Board may be called by any Manager. All such meetings shall be held upon at least two (2) Business Days prior Notice by facsimile and electronic mail. Each Notice of any meeting of the Board must specify the purpose of such meeting. Notice of a meeting need not be given to any Manager if such Manager signs a waiver of notice, a consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting the lack of notice prior to the commencement of the meeting. All such waivers, consents and approvals shall be filed with the Company records or made a part of the minutes of the meeting. A majority of the authorized and then serving number of Managers constitutes a quorum of the Board for the transaction of business. Every act or decision done or made by a majority of the Managers present at the

meeting duly held at which a quorum is present shall be the act of the Board except for matters requiring a Super Majority of the Managers. In that regard, any decision or action to be taken by a Manager may be taken verbally or in writing, in person or by proxy, and whether or not at a formal meeting called pursuant to this Section. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of Managers if any action taken is approved by at least a majority of the required quorum for the meeting. Managers may participate in any meeting of the Board of Managers by means of conference telephones or similar communications equipment so long as all Managers participating can hear one another. A Manager so participating is deemed to be present at the meeting.

(f) Any action which may be taken by the Board at a meeting may also be taken without a meeting, if a consent in writing setting forth the action so taken is signed by Managers having not less than the minimum votes that would be necessary to authorize that action at a meeting of the Managers duly called and noticed at which all Managers entitled to vote were present. A consent transmitted by electronic transmission by a Manager or other Person authorized to act for that Manager shall be deemed to be written and signed by that Manager for these purposes, and the term "electronic transmission" means any form of communication not directly involving the physical transmission of paper that creates a record that may be retained, retrieved and reviewed by a recipient thereof and that may be directly reproduced in paper form by such a recipient through an automated process.

5.2 **Appointment of Board of Managers.**

(a) **Number and Term**. The Board shall consist of five (5) Managers, three (3) of whom shall be the GFS Managers and two (2) of whom shall be the L-E Managers. Unless a Manager so appointed resigns, dies or is removed, such Manager shall hold office indefinitely.

(b) **Removal**. GFS shall have the sole and exclusive right to remove or to change the identity of the GFS Managers, and each of the L-E Members shall have the sole and exclusive right to remove or to change the identity of one of the L-E Managers. Notwithstanding the foregoing, so long as Paul Lagudi is a Member of the Company, Paul Lagudi shall be an L-E Manager, and so long as William Todd Ponder is a Member of the Company, William Todd Ponder shall be an L-E Manager.

(c) **Vacancies**. Any vacancy occurring for any reason with respect to the GFS Managers may be filled only by GFS and, any vacancy occurring for any reason with respect to the L-E Managers may be filled only by the L-E Members. If either of the L-E Managers ceases to be a Member he shall resign as Manager.

(d) **No Management Fee**. The Managers shall not be entitled to receive any management fee or other compensation for their services as Managers.

5.3 **Approval Required for Certain Matters**. Notwithstanding anything to the contrary contained herein, no Manager may, without the affirmative vote or unanimous written consent of a Super Majority In Interest of the Members, cause the Company to engage in any of the following activities (each, a "Major Decision"):

(a) the sale, exchange or other disposition of all, or substantially all, of the Company's assets occurring as part of a single transaction or plan, or in a series of transactions, except in the orderly liquidation and winding up of the business of the Company upon its duly authorized dissolution;

(b) any transaction or business activity which is not related to the primary purpose of the Company set forth in Section 2.4;

(c) any act which would make it impossible to carry on the ordinary business of the Company;

(d) any decision to compromise the obligation of a Member to a make a Capital Contribution or to return money or property paid or distributed in violation of the Act;

(e) any decision to admit a Person as a Member of the Company or to issue Interests or Economic Interests;

(f) except as set forth in Section 5.4(b), any transaction between the Company and a Member or any Affiliate of a Member, or any transaction in which a Member or any Affiliate of a Member has a material financial interest, including any material amendment to the arrangements set forth in Section 5.4(b);

(g) any confession of a judgment against the Company;

(h) any decision to place the Company into Bankruptcy or otherwise liquidate or dissolve the Company;

(i) except as set forth in ARTICLE VIII, any redemption by the Company of any Member's Interest; and

(j) any amendment to, or waiver or termination of, the Certificate of Formation or this Agreement.

5.4 **Transactions between the Company and the Members or their Affiliates.**

(a) **Generally.** To the fullest extent permitted by law, all principal, interest, costs and expenses owing by the Company to the Members and/or Affiliates thereof in repayment of loans and all fees, commissions and/or reimbursable amounts payable by the Company to the Members and/or Affiliates thereof shall be treated in the same manner as liabilities payable to unaffiliated creditors of the Company and shall be paid and taken into account, as such, before any Distributions of Distributable Cash are made to any Member.

(b) **Supply.** Food products bought and sold between GFS and Company shall be priced at cost, plus actual, out-of-pocket shipping costs incurred.

(c) **Operational Support.** GFS shall provide Company with such operational and administrative support as reasonably necessary in order for Company to conduct the business

comprising the Purchased Assets contributed by GFS and L-E to Company as of the date of this Agreement.

(d) **Non-Interference.** Notwithstanding anything in this Agreement to the contrary, it is the intent of the parties hereto that the Company shall succeed to all of the customer relationships of the business of LE as conducted as of the date hereof, and that none of the Company, the Members, the Managers nor any of their respective Affiliates shall divert from the Company, directly or indirectly, any of such customer relationships to any other Person.

5.5 **Officers.** The Board may, at its discretion, appoint officers of the Company at any time to conduct, or to assist the Managers in the conduct of, the day-to-day business and affairs of the Company, and the officers shall have only such powers and only perform such duties as delegated to them by the Board. Each officer shall serve at the pleasure of the Board, subject to all rights and obligations, if any, of such officer under any service, employment or other contract with the Company. Initially, there shall be a Chief Executive Officer, a President, a Chief Financial Officer, an Executive Vice President and a Chief Operating Officer of the Company. Dominic Caldara shall serve as the initial Chief Executive Officer of the Company, Paul Lagudi shall serve as the initial President of the Company, Scott Goldberg shall serve as the initial Chief Financial Officer of the Company, John Wise shall serve as the initial Executive Vice President of the Company and William Todd Ponder shall serve as the initial Chief Operating Officer of the Company.

5.6 **Employment Agreements.** Concurrently with the execution and delivery of this Agreement, the Company shall enter into the Employment Agreements with Messrs. Lagudi and Ponder, respectively.

5.7 **Competitive Activities; Company Opportunities.** Except as otherwise provided in this Agreement and subject to any provisions of the Employment Agreements, the Managers and the Members, and their respective officers, directors, shareholders, partners, members, managers, agents, employees and Affiliates, may, notwithstanding the existence of this Agreement or any fiduciary obligations that any of them may have to the others or to the Company under law, engage or invest in, independently or with others, any business activity of any type or description. Neither the Company nor any other Manager or Member shall have the right in or to such other permitted ventures or activities or to the income or proceeds derived therefrom.

5.8 **Reimbursement of Managers' Costs and Expenses.** Subject to the terms of this Agreement, the Company shall, upon request, reimburse each Manager for only those out-of-pocket costs and expenses incurred by such Manager in connection with their role as a Manager of the Company.

5.9 **Liability.** Neither any Manager or Member, nor any of such Manager's or Member's officers, directors, partners, managers, members, employees, agents, representatives and Affiliates, nor any officer or authorized representative of the Company, shall be liable or accountable in damages or otherwise to the Company or to any other Manager or Member for any error of judgment or mistake of fact or law or for anything that such Person may do or refrain from doing hereafter except in the case of willful misconduct, gross negligence, fraud or

conviction of embezzlement of funds of the Company. Furthermore, under no circumstances shall either Paul Lagudi or William Todd Ponder be required to become personally liable, by way of personal guaranty or other undertaking, for any obligation of the Company.

ARTICLE VI
ALLOCATIONS OF NET PROFITS AND NET LOSSES

6.1 **Minimum Gain Chargeback**. In the event that there is a net decrease in the Company Minimum Gain during any taxable year, the minimum gain chargeback described in Sections 1.704-2(f) and (g) of the Treasury Regulations shall apply.

6.2 **Member Minimum Gain Chargeback**. If during any taxable year there is a net decrease in Member Minimum Gain, the partner minimum gain chargeback described in Section 1.704-2(i)(4) of the Treasury Regulations shall apply.

6.3 **Qualified Income Offset**. Any Member who receives an adjustment, allocation or Distribution described in subparagraphs (4), (5) or (6) of Section 1.704-1(b)(2)(ii)(d) of the Treasury Regulations for any reason, expectedly or unexpectedly, which adjustment, allocation or distribution creates or increases a deficit balance in that Member's Capital Account, shall be allocated items of "book" income and gain in accordance with the provisions of the "qualified income offset" as described in Section 1.704-1(b)(2)(ii)(d) of the Treasury Regulations.

6.4 **Nonrecourse Deductions**. Nonrecourse Deductions shall be allocated to the Members in proportion to their respective Percentages.

6.5 **Member Nonrecourse Deductions**. Member Nonrecourse Deductions shall be allocated to the Members as required in Section 1.704-2(i)(1) of the Treasury Regulations in accordance with the manner in which the Members bear the burden of an Economic Risk of Loss corresponding to the Member Nonrecourse Deductions.

6.6 **Allocation of Net Profits and Net Losses**. The Net Profits, Net Losses, and other items of the Company's income, gain, loss, deduction and credit for each fiscal period of the Company shall be allocated to the Members in such a manner that, at the end of such fiscal period, the sum of (1) the Capital Account of each Member, (2) such Member's share of Company Minimum Gain and (3) such Member's Member Nonrecourse Debt Minimum Gain shall, to the extent possible, equal the net amount which would have been distributed to such Member pursuant to a hypothetical liquidation of the Company. For this purpose, a hypothetical liquidation shall mean that all assets of the Company are disposed of in a taxable disposition for the "book" value of such assets (but in the case of assets subject to the rules governing minimum gain chargeback or member minimum gain chargeback, such provisions would apply), the debts of the Company are paid, and the remaining amounts are distributed to the Members pursuant to Section 10.4. If for any fiscal period, such an allocation of Net Profits or Net Losses does not permit the Capital Accounts of Members to be made to equal the amount which would have been distributed to Members pursuant to a hypothetical liquidation, then instead of allocating Net Profits or Net Losses, a pro rata share of individual items of gross income, gain, loss or deduction (which were the components of Net Profits or Net Losses) shall be allocated among the Members in such a manner that, at the end of such fiscal period, the Capital Account of each

Member shall, to the extent possible, equal the amount which would have been distributed to such Member pursuant to a hypothetical liquidation.

6.7 **Tax Allocation Matters**.

(a) **Contributed or Revalued Property**. Each Member's allocable share of the taxable income or loss of the Company, depreciation, depletion, amortization and gain or loss with respect to any contributed property, or with respect to revalued property where the Company's property is revalued pursuant to Paragraph (b)(2)(iv)(f) of Section 1.704-1 of the Treasury Regulations, shall be determined in the manner (and as to revaluations, in the same manner as) provided in Section 704(c) of the Code. The allocation shall take into account, to the full extent required or permitted by the Code, the difference between the adjusted basis of the property to the Member contributing it and the Fair Market Value of the property determined by the Members at the time of its contribution or revaluation, as the case may be. The Company shall apply Section 704(c)(1)(A) by using the "traditional method" as set forth in Section 1.704-3(b) of the Treasury Regulations. Notwithstanding the foregoing, in the case of any intangible asset that is subject to an allowance for amortization under Section 197 of the Code, the Members intend that GFS receive any amortization deductions that are attributable to its purchased tax basis in such asset. To achieve such allocation, the Company may use: i) curative allocations as provided by Section 1.704-3(c) of the Treasury Regulations; ii) remedial allocations as provided by Section 1.704-3(d) of the Treasury Regulations; or iii) the undivided interests method as in effect pursuant to Section 704(c)(3) of Code prior to March 31, 1984 to the extent such method is considered a reasonable method under Section 1.704-3(a)(1) of the Treasury Regulations. GFS shall consult with the tax return preparer to determine the method to be used.

(b) **Recapture Items**. In the event that the Company has taxable income that is characterized as ordinary income under the recapture provisions of the Code, each Member's distributive share of taxable gain or loss from the sale of Company assets (to the extent possible) shall include a proportionate share of this recapture income equal to that Member's share of prior cumulative depreciation deductions with respect to the assets which gave rise to the recapture income.

(c) **Order of Application**. To the extent that any allocation, Distribution or adjustment specified in any of the preceding Sections of this ARTICLE VI or ARTICLE VII affects the results of any other allocation, Distribution or adjustment required herein, the allocations, Distributions and adjustments specified in the following Sections shall be made in the following priority: (i) Section 7.1, (ii) Section 6.1, (iii) Section 6.2, (iv) Section 6.3, (v) Section 6.4, (vi) Section 6.5, (vii) Section 6.6, and (viii) Section 10.4.

These provisions shall be applied as if all Distributions and allocations were made at the end of the Company's Fiscal Year. Where any provision depends on the Capital Account of any Member, that Capital Account shall be determined after the operation of all preceding provisions for the Fiscal Year.

6.8 **Allocation of Liabilities**. Each Member's interest in Company profits for purposes of determining that Member's share of the Nonrecourse Liabilities of the Company, as

used in Section 1.752-3(a)(3) of the Treasury Regulations, shall be equal to that Member's Percentage.

6.9 **Special Allocations in General.** Notwithstanding any other provision of this Agreement, no Net Losses or items of expense, loss or deduction shall be allocated to any Member to the extent such an allocation would cause or increase a deficit balance standing in such Member's Adjusted Capital Account.

6.10 **Withholding.** Should the Company be required, pursuant to the Code, the laws of any state or any other provision of law, to withhold any amount from amounts otherwise distributable to any Member or on the basis of income allocable to any Member, the Company shall withhold those amounts, and any amounts so withheld shall be deemed to have been loaned to that Member under this Agreement. If any sums are withheld pursuant to this provision, the Company shall remit the sums so withheld to, and file the required forms with, the Internal Revenue Service, the appropriate authority of any such state or other applicable government agency. In the event of any claimed over-withholding, a Member shall be limited to an action against the Internal Revenue Service, the appropriate authority of any such state or other applicable government agency for refund, and each Member hereby waives any claim or right of action against the Company on account of such withholding. Furthermore, the Member shall repay such loan to the Company within ten (10) Business Days after a repayment demand is made by the Company.

ARTICLE VII
DISTRIBUTIONS

7.1 **Distribution of Distributable Cash.** From time to time, as may reasonably be determined by the Managers, but no less frequently than ten (10) Business Days after the end of each Fiscal Year, the Managers shall cause the Distributable Cash to be distributed by the Company to the Members in accordance with their respective Percentages, unless a lesser amount of Distributable Cash is approved by a Super Majority of the Managers.

7.2 **Minimum Tax Distributions.** Notwithstanding Section 7.1 above, the Company shall pay to each Member within forty-five days after the end of each fiscal quarter of the Company an amount equal to the lesser of: (i) the product of: (A) the aggregate amount of taxable income allocated (or allocable) to such Member with respect to such fiscal quarter pursuant to ARTICLE VI; and (B) the highest combined United States federal, state, and local income tax rate (after taking into account deductions available for federal income tax purposes with respect to state and local income taxes) applicable to any Member during such fiscal quarter; and (ii) a pro rata share (calculated in accordance with the aggregate amount of taxable income allocated to each Member with respect to such Fiscal Year pursuant to ARTICLE VI) of all Distributable Cash as of the end of such fiscal quarter.

7.3 **In-Kind Distribution.** Assets of the Company (other than cash) shall not be distributed in kind to the Members without the prior written approval of all of the Managers.

7.4 **Limitations on Distributions.** Notwithstanding any other provision contained in this Agreement, the Company shall not make a distribution of Distributable Cash (or other

proceeds) to any Member if such distribution would violate Section 18-607 the Delaware Act or other applicable law.

ARTICLE VIII
TRANSFER OF INTERESTS

8.1 **Transfer of Interests**. Except as otherwise expressly provided in this ARTICLE VIII, no Member may Transfer all or any portion of its Interest, or retire or withdraw from the Company, without the affirmative vote or unanimous written consent of all of the Members, which consent may be withheld, conditioned or delayed in the sole and absolute discretion of the Members. Any attempted Transfer or withdrawal in violation of the restrictions set forth in this ARTICLE VIII shall be deemed null and void *ab initio* and of no force or effect. For greater certainty, the Members, in their sole and absolute discretion, shall have the right and authority to cause the involuntary withdrawal of any transferee who acquires any Interest in violation of this Agreement. After the consummation of any permitted Transfer of all or any portion of any Interest, the Interest so Transferred shall continue to be subject to the terms and provisions of this Agreement, and any further Transfers shall be required to comply with the terms and provisions of this Agreement.

8.2 **Permitted Transfers**. Subject to the provisions of this Section 8.2, the restrictions upon Transfer specified in Section 8.1 shall not apply to any Transfer by any Member of such Member's Interest or part thereof to: (i) another Member, (ii) a corporation, partnership, limited liability company or other entity or trust controlled by that Member (iii) the estate, heirs or legal representatives of a Member upon his death or permanent disability (except that in such instance, the Transferee shall acquire only an Economic Interest), or (iv) any other Person with the prior written approval of all of the other Members, which approval may be withheld, conditioned or delayed in the sole and absolute discretion of the other Members; provided, however, that such permitted transferee (other than one who is already a Member) agrees in writing to become a party to this Agreement, to be bound by all the obligations of the transferor with respect to such Transferred Interest, to pay all costs and expenses arising with respect to such Transfer, and to be subject to the terms and conditions hereof; and provided, further, that notwithstanding any other provision of this Section 8.2, no Transfer by any Member shall be permitted if the consummation of such Transfer would result in any breach or violation of any applicable law.

8.3 **Repurchase Events**. The occurrence of any of the following events (the "Repurchase Events") with respect to a Member shall trigger certain repurchase rights of the Company and the other Members upon the terms and conditions set forth in Sections 8.4 and 8.5:

(a) **Bankruptcy or Dissolution**. The Bankruptcy or dissolution of a Member.

(b) **Material Breach of Agreement**. The occurrence of a material breach of this Agreement by a Member, which breach, if reasonably susceptible to cure, is not cured within thirty (30) days after written notice thereof has been given by the Company or any other Member.

(c) **Termination with Cause**. Prior to the expiration of the Term (as the same may be extended by mutual agreement) of his Employment Agreement, termination by the Company of either Paul Lagudi's or William Todd Ponder's employment with Cause, as defined in his Employment Agreement.

(d) **Voluntary Termination Without Good Reason.** Prior to the expiration the Term (as the same may be extended by mutual agreement) of his Employment Agreement, termination by either Paul Lagudi or William Todd Ponder of his employment without Good Reason, as defined in his Employment Agreement.

(e) **Death; Permanent Disability**. The death or permanent disability of a Member or of any Person Controlling a Member.

A Repurchase Event with respect to either Paul Lagudi or William Todd Ponder shall give rise to repurchase rights only as to such L-E Member's Interest and not as to the Interest of the other L-E Member.

8.4 **Terms of Transfer Pursuant to a Repurchase Event**.

(a) **Notice of Repurchase Event**. Within thirty (30) days after the occurrence of a Repurchase Event, the Company shall Notify each Member and Manager stating when the Repurchase Event occurred, the reason therefor and the Interest so affected.

(b) **Repurchase Rights and Obligations**. Upon the occurrence of any Repurchase Event with respect to any Member, the Company shall have the right and option to purchase all or any part of such Member's Interest. In the event that the Company does not elect to purchase all of such Member's Interest within the thirty-day period described in Section 8.4(a), then the other Members shall have the right and option to purchase any of such Member's Interest in such proportion as the other Members may agree. If all other Members do not elect to purchase the entire balance of the Interest within thirty (30) days after the Notice described in Section 8.4(a), then the other Members electing to purchase shall have the right and option to purchase the balance of such Member's Interest available for purchase. If the Company and the other Members do not elect to purchase all of such Member's Interest, then such Member shall sell to the Company and/or the other Members, if applicable, only that portion so elected to be purchased and may retain the balance subject to all of the terms of this Agreement.

(c) **Purchase Price**. With respect to the Repurchase Events described in Section 8.3(a) or 8.3(e), the purchase price of any Interest purchased pursuant to this Section 8.4 shall be the Fair Market Value of such Interest. With respect to the Repurchase Events described in Section 8.3(b) and (c), the purchase price of any Interest purchased pursuant to this Section 8.4 shall be an amount equal to twenty-five percent (25%) of the Fair Market Value of such Interest. With respect to the Repurchase Events described in Section 8.3(d), the purchase price of any Interest purchased pursuant to this Section 8.4 shall be an amount equal to (i) twenty-five percent (25%) of the Fair Market Value of such Interest if the Repurchase Event occurs on or before the second anniversary of the date hereof, (ii) fifty percent (50%) of the Fair Market Value of such Interest if the Repurchase Event occurs after the second anniversary of the date hereof, but on or before the expiration of the Term (as the same may be extended by mutual

agreement) of the affected L-E Member's Employment Agreement, and (iii) the Fair Market Value of such Interest if the Repurchase Event occurs at any time after the expiration of the Term (as the same may be extended by mutual agreement) of the affected L-E Member's Employment Agreement.

(d) **Payment of Purchase Price for Repurchase Events**. The purchase price for an Interest purchased pursuant to this Section 8.4 shall be payable at the option of the Company and each purchasing Member, severally, either entirely in cash or partly in cash and partly pursuant to a promissory note, payable in twelve (12) equal calendar quarterly installments, together with interest thereon at the "prime rate" as publicly announced from time to time by Bank of America, N.A., plus two percent (2%), compounded annually, provided, however, that in the event of a Repurchase Event under Section 8.3(e) the promissory note shall be payable in twelve (12) equal monthly installments, unless prior to such Repurchase Event the Company was not able to obtain key man insurance coverage on the affected L-E Member after using commercially reasonable efforts to obtain such coverage, in which event the promissory note shall be payable in twelve (12) equal calendar quarterly installments. Such promissory note shall be in a form customary for transactions of a similar size and nature and shall be mutually acceptable to the purchaser and seller. In no event, however, shall the Company or any purchasing Member make an initial cash payment at the Closing of less than twenty-five percent (25%) of the aggregate purchase price of the purchased Interest. Any promissory note as to which GFS is not the maker shall be guaranteed by GFS.

8.5 **Consummation of Sale**. Unless the parties involved mutually agree otherwise, delivery to the Company and/or the purchasing Members of the Interest to be sold under Section 8.4 and payment of the purchase price therefor shall take place at a closing (the "**Closing**") to be held at the principal office of the Company at 10:00 a.m. within thirty (30) calendar days following the termination of the last applicable option period. At the Closing, the selling Member shall deliver to the Company and/or the purchasing Members a bill of sale and assignment effecting the transfer of the Interest to be sold, in form and substance satisfactory to the Company and/or the purchasing Members, and shall deliver, in addition, any other documents reasonably requested by the Company and/or the purchasing Members to effectuate the purposes of this Agreement. Title to such Interest shall pass to the Company and/or the purchasing Members as of the date of the Repurchase Event. For the avoidance of doubt, the L-E Member shall retain his interest in the Deferred Payment and Contingent Amount under the Asset Purchase Agreement.

8.6 **Termination of Membership Rights**. If, upon the occurrence of a Repurchase Event, the Company and/or the purchasing Members elect to purchase all of the selling Member's Interest, then the selling Member shall, effective as of the date of the applicable Repurchase Event, be deemed to have ceased to be a Member and to have relinquished any and all rights with respect to the Interest to be purchased by the Company and/or the purchasing Members, other than the right to receive the purchase price therefor at the Closing in accordance with Section 8.4.

8.7 **Put Events.** The occurrence of any of the following events (the "Put Events") with respect to a Member shall trigger certain put rights of the Member to put their Interests upon the terms and conditions set forth in Sections 8.8 and 8.9:

(a) **Termination Without Cause**. Prior to the expiration of the Term (as the same may be extended by mutual agreement) of his Employment Agreement, termination by the Company of either Paul Lagudi's or William Todd Ponder's employment without Cause, as defined in his Employment Agreement.

(b) **Voluntary Termination With Good Reason**. Prior to the expiration of the Term (as the same may be extended by mutual agreement) of his Employment Agreement, termination by either Paul Lagudi or William Todd Ponder of his employment with Good Reason, as defined in his Employment Agreement.

8.8 **Put Rights and Obligations**. Upon the occurrence of any Put Event with respect to any Member, the Member shall have the right and option to sell all or any part of such Member's Interest to the Company within thirty (30) days after receiving notice of the Put Event. To the extent that the Company does not have the available funds or is otherwise unable or prohibited from making the purchase, GFS shall either make an additional Capital Contribution to the Company sufficient to fund such purchase or purchase the Interest for its own account. Notwithstanding anything in this Agreement to the contrary, neither purchase shall be subject to approval of the Managers or Members. The Purchase Price shall be equal to the Fair Market Value of the Interest, and shall be payable in cash at the Closing.

8.9 **Consummation of Sale**. Unless the parties involved mutually agree otherwise, delivery to the Company and/or GFS of the Interest to be sold under Section 8.8 and payment of the purchase price therefor shall take place at a closing (the "**Closing**") to be held at the principal office of the Company at 10:00 a.m. within thirty (30) calendar days following the exercise of the Put Right. At the Closing, the selling Member shall deliver to the Company and/or GFS a bill of sale and assignment effecting the transfer of the Interest to be sold, in form and substance satisfactory to the Company and/or GFS, and shall deliver, in addition, any other documents reasonably requested by the Company and/or GFS to effectuate the purposes of this Agreement. Title to such Interest shall pass to the Company and/or the purchasing Members as of the date of the Closing. For the avoidance of doubt, the L-E Member shall retain his interest in the Deferred Payment and Contingent Amount under the Asset Purchase Agreement.

8.10 **Termination of Membership Rights**. If, upon the occurrence of a Put Event, the Company and/or GFS elect to purchase all of the selling Member's Interest, then the selling Member shall, effective as of the date of the Closing of the purchase, be deemed to have ceased to be a Member and to have relinquished any and all rights with respect to the Interest to be purchased by the Company and/or GFS, other than the right to receive the purchase price therefor at the Closing in accordance with Section 8.9.

8.11 **Right of First Refusal as to Transfer of Membership Interest.**

(a) **Grant of Option.** In the event a Member the "**Offering Member**") decides to Transfer all or any part of its Interest (the "**Offered Interest**") pursuant to a Membership Interest Bona Fide Offer, the Offering Member shall deliver written notice (a "**Right of First Refusal Notice**") to the Company and the other Members who are not Affiliates of the Offering Member (the "**Eligible Members**"), setting forth in full the terms of the Membership Interest Bona Fide Offer, the Interest to be sold, the identity of the offeror(s), the

ultimate controlling Person(s) of the offeror(s) and the expected closing date of the transaction. The Company (through the vote of a Majority In Interest of the other Members) shall then have the right and option, for a period ending thirty (30) calendar days following its receipt of the Right of First Refusal Notice, to elect to purchase all or any part of the Offered Interest at the purchase price and upon the terms specified in the Membership Interest Bona Fide Offer, and the Eligible Members, pro rata in accordance with the ratio of their respective Percentages, shall then have the right and option, for a period of twenty (20) calendar days thereafter, to elect to purchase all or any part of the Offered Interest not elected to be purchased by the Company at the purchase price and upon the terms specified in the Membership Interest Bona Fide Offer, except that (a) the Company and the Eligible Members shall have a period of the greater of (i) ninety (90) days or (ii) the period specified in the Right of First Refusal Notice to consummate such purchase following the delivery of the Election Notice, and (b) the Company and the Eligible Members shall not have the benefit of any term or condition included in the notice providing for a due diligence period prior to the consummation of the sale. Notwithstanding the foregoing, however, to the extent that the Company or any Eligible Member elects to purchase all or any part of the Offered Interest, that purchaser shall be entitled to set off against the purchase price otherwise payable by it hereunder the full amount of all indebtedness then owed by the Offering Member to that purchaser (without regard to whether or not such indebtedness is then due and payable in whole or in part). In the event purchaser elects to offset against the purchase price any claimed amount which has not been finally determined to be due to it from the the Offering Member, then purchaser, promptly (but in no event later than the second Business Day after the day the payment of the purchase price would otherwise be due) shall deposit such amount or claimed amount in escrow with Wells Fargo & Company, Las Vegas, Nevada, or any other mutually acceptable escrow agent, to be so held during the pendency of any proceedings to determine the merits of the claim of purchaser, or until the parties otherwise agree upon a resolution of such claim. If all Eligible Members do not elect to purchase the entire balance of the Offered Interest, then the Eligible Members electing to purchase shall have the right and option, for a period of ten (10) calendar days thereafter and pro rata in accordance with the ratio of their Percentages, to elect to purchase the balance of the Offered Interest available for purchase.

(b) **Transfer to Proposed Transferee.** Notwithstanding the foregoing, however, if the Company and/or the Eligible Members do not elect to purchase all of the Offered Interest subject to the right of first refusal pursuant to this Section 8.11, the Offering Member may, subject to the tag-along rights provided in Section 8.12, Transfer all of the Offered Interest to the original proposed transferee upon the terms set forth in the written notice provided to the Company, whereupon the original proposed transferee shall take and hold the Offered Interest subject to this Agreement and to all of the obligations and restrictions upon the Offering Member and shall observe and comply with this Agreement and with all such obligations and restrictions. Any such Transfer of the Offered Interest to the original proposed transferee must be effected within ninety (90) calendar days after the date of the termination of the Eligible Members' options provided above. If no such Transfer is effected within the ninety (90) calendar day period, then any subsequent proposed Transfer of all or any part of the Offered Interest shall once again be subject to the provisions of this Section 8.11.

(c) **Non-Cash Consideration.** For these purposes, if any consideration offered for the Offered Interest in the Membership Interest Bona Fide Offer consists of rights,

interests or property other than money or an obligation to pay money, the Eligible Members shall, in good faith, determine the Fair Market Value of that consideration in monetary terms as of the date the Membership Interest Bona Fide Offer was received by the Offering Member. The Fair Market Value of that consideration in monetary terms, as so determined, shall be included in the purchase price payable by the Company and/or the purchasing Members hereunder, but, in order to exercise their rights of first refusal granted above, neither the Company nor the purchasing Members need transfer to the Offering Member the actual rights, interests or property offered in the Membership Interest Bona Fide Offer nor afford the Offering Member the same tax treatment which would have been available to it under the Membership Interest Bona Fide Offer.

(d) **Condition Precedent.** Notwithstanding anything to the contrary in this Section 8.11, if the proposed Transfer by a Member is pursuant to a Membership Interest Bona Fide Offer and the Membership Interest Bona Fide Offer also provides for the concurrent purchase or repayment of all loans, if any, theretofore made by that Member to the Company, then it shall be a condition precedent to the exercise of an option to purchase the Offered Interest of that Member hereunder that all such loans must be purchased or repaid at the closing of such purchase and sale. If the Company or the purchasing Members elect not to satisfy the condition precedent contained in this Section 8.11(d), then all options with respect to the Offered Interest shall terminate, and that Member may Transfer the Offered Interest to a transferee in accordance with the Membership Interest Bona Fide Offer; provided, however, that any transferee who acquires the Offered Interest shall be bound by all of the terms and conditions of this Agreement.

(e) **Offer Which Is Not a Membership Interest Bona Fide Offer.** In the event that an offer to purchase the Interest of a Member does not qualify as a Membership Interest Bona Fide Offer, such Interest may not under any circumstances be transferred to the offeror(s) pursuant to the offer.

(f) **Election Notice.** The Company and/or the Member(s) electing to purchase the Offered Interest shall make that election by giving a notice (the "**Election Notice**") to the Offering Member setting forth the election. Upon the Offering Member's receipt of the Election Notice, a binding agreement for the purchase and sale of the Offered Interest to be purchased by the purchaser(s) shall arise between the purchaser(s) and the Offering Member.

(g) **Consummation of Sale.** Unless the parties involved mutually agree otherwise, the consummation of the purchase and sale of the Offered Interest to be sold shall occur at a closing (the "**Closing**") to be held at the principal office of the Company at 10:00 a.m. on a date within the time period specified in Section 8.11(a). At the Closing the purchaser(s) shall purchase, and the seller shall sell, the Offered Interest for the applicable purchase price and any cash portion of the purchase price payable at the Closing or thereafter shall be paid in immediately available funds.

(h) **No Transfer of Right of First Refusal.** The right of first refusal set forth in this Section 8.11 may not be assigned or transferred; provided that if the Company has elected to purchase the entire Offered Interest, the Company shall have the right to assign its right to purchase the Offered Interest to one or more third parties (including existing Members) who agree in writing to perform the Company's related obligations.

8.12 **Co-Sale Agreement (Tag-Along Rights).** If any Member (the "**Selling Member**") elects to sell all or any part of its Interest pursuant to a Membership Interest Bona Fide Offer in accordance with Section 8.11, in a single transaction or in a series of related transactions, that Selling Member shall comply with the following provisions:

(a) **Notice of Sale.** The Selling Member shall deliver written notice (the "**Tag Along Notice**") to the Eligible Members offering them the right to participate in the sale to the prospective transferee (the "**Bona Fide Offeror**") upon the same terms and conditions as are available to the Selling Member. Any Right of First Refusal Notice delivered to the Eligible Members pursuant to Section 8.11(a) shall likewise serve as a Tag-Along Notice.

(b) **Option to Participate.** Any Eligible Member (a "**Co-Selling Member**") receiving the Tag-Along Notice may elect to participate in the contemplated sale by delivering a written notice (an "**Election Notice**") to the Selling Member at the same time as it notifies the Selling Member that it declines the right of first refusal offered to it pursuant to Section 8.11 or, if no such written declination is given, by the end of the period within which it may exercise such right of first refusal. Each Co-Selling Member may elect to sell in the contemplated transaction up to that fraction of its Interest that is equal to the Percentage which the Selling Member proposes to sell multiplied by a fraction, the numerator of which is the Percentage owned by that Co-Selling Member, and the denominator of which is the aggregate Percentages held by all Co-Selling Members participating in the sale and by the Selling Member. To the extent that one or more Co-Selling Members exercise such right of participation in accordance with the terms and conditions of this Section 8.12, the Percentage which the Selling Member may sell shall be correspondingly reduced, and if the Bona Fide Offeror refuses to purchase Interests from any electing Co-Selling Member, the Selling Member shall not (and the Company shall not permit the Selling Member to) sell to the Bona Fide Offeror any of its Interests unless and until, simultaneously with such sale, either the Company or the Selling Member purchases the offered Interests from the electing Co-Selling Member(s) on the same terms and conditions.

(c) **No Waiver of Subsequent Rights.** The exercise or non-exercise of the rights of the Co-Selling Member(s) under this Section 8.12 to participate in one or more sales of Interests made by a Selling Member shall not affect their rights to participate in subsequent sales by Members that meet the conditions specified in this Section 8.12.

(d) **No Derogation of Rights of First Refusal.** Nothing contained in this Section 8.12 shall limit in any way the rights of any Member under Section 8.8, and any Interest which is the subject of this Section 8.8 must first have been offered to the Eligible Members pursuant to Section 8.11. To the extent that any Member elects to exercise the options so afforded to it pursuant to Section 8.11, that Member shall be considered a "Bona Fide Offeror" hereunder, and any Member who elects not to exercise its rights of first refusal pursuant to Section 8.11 may nevertheless elect to become a Co-Selling Member hereunder.

8.13 **Offer to Purchase All Membership Interests (Drag-Along Rights).**

(a) **Participation in Sale.** If (i) the Members, whether individually or as a group, receive Membership Interest Bona Fide Offers to purchase all, but not less than all, of the outstanding Interests in a single transaction or a series of related transactions, (ii) the terms and

conditions applicable to each Member in such Membership Interest Bona Fide Offers are identical in all material respects after taking into account the respective amounts each Member would receive upon a sale of all of the Company's assets and a liquidation of the Company, (iii) Members owning not less than sixty percent (60%) of the Interests (the "**Electing Members**") elect in writing to accept such Membership Interests Bona Fide Offers and to consummate the sale of the Interests contemplated therein (the "**Sale**") and so notify all other Interests (the "**Non-Electing Members**") in writing (the "**Sale Notice**"), and (iv) neither the Company nor any of the Non-Electing Members elect to purchase the Interests of the Electing Members pursuant to Section 8.7, then each and every Member shall be required to sell its Interest in the Sale; provided, however, that the Sale shall be consummated within ninety (90) days after the Membership Interest Bona Fide Offers are received; and provided, further, that no Member shall be required to consummate the Sale if, after the initial acceptance of such Membership Interest Bona Fide Offers, Members owning not less then sixty percent (60%) of the Interests elect to rescind such acceptance or otherwise to withdraw from the Sale.

(b) **Cooperation With Sale**. Following their receipt of any Sale Notice, the Non-Electing Members shall vote for, consent to, and raise no objections to, the Sale, nor shall they bring a claim against the Company, the Electing Members, their Affiliates or any of their respective officers, directors, managers, stockholders, partners or members, or contest or seek to enjoin the Sale or seek appraisal, dissenters' rights or other similar such rights with respect to the Sale. Without limiting the generality of the foregoing, if the Sale is structured as (a) a merger or consolidation, the Non-Electing Members shall waive all dissenters' rights, appraisal rights or similar rights in connection with such merger or consolidation, or (b) a sale of Membership Interests, the Non-Electing Members shall agree to sell all, but not less than all, of their Membership Interests on the terms and conditions of the Sale, but they shall only be required to provide representations and warranties that they have good title to their Membership Interests, free and clear of any liens, claims or encumbrances, and that they have the power and authority to sell such Membership Interests. In addition, they shall only be required to sign such assignments and other documents as may reasonably be requested by the Electing Members and/or the Company or the purchaser. The Company may, at its option, deposit the consideration payable for the Interests of the Non-Electing Members with any depository designated by it, and thereafter each Interest of a Non-Electing Member shall represent only the right to receive the consideration payable in connection with the Sale. The Non-Electing Members shall take such other necessary or desirable actions in connection with the consummation of the Sale as may be reasonably requested by the Electing Members or the Company.

(c) **No Derogation of Rights of First Refusal**. Nothing contained in this Section 8.13 shall limit in any way the rights of any Member under Section 8.11, and any Membership Interest which an Electing Member elects to sell in the Sale must first have been offered to the Non-Electing Members pursuant to Section 8.11.

8.14 **Further Restrictions on Transfers.** Notwithstanding anything herein to the contrary, in addition to any other restrictions on a Transfer of an Interest, no Interest may be Transferred (a) without compliance with and/or exemption from the Securities Act and any other applicable securities or "blue sky" laws, rules or regulations, (b) if, in the determination of the Members, the Transfer could result in the Company not being classified as a partnership for federal income tax purposes, or (c) the transferee is a minor or incompetent.

8.15 **Admission of Transferee as a Member.** Upon a Transfer of an Interest to a permitted transferee pursuant to Section 8.2, the permitted transferee shall be admitted as a substituted Member (in the case of a Transfer of an entire Interest) or as an additional Member (in the case of a partial Transfer of an Interest) in the place of the transferor. Except as provided in the preceding sentence, no transferee of an Interest who is not already a Member shall become a Member without (a) the prior written approval of all of the Members, which may be withheld, conditioned or delayed in the sole and absolute discretion of the Members, and (b) the transferee paying to the Company a transfer fee in cash which is sufficient, in the Members' discretion, to cover all expenses incurred by the Company in connection with the Transfer and admission of the transferee as a Member, including, without limitation, legal fees and costs, and (c) the Transferring Member and the transferee executing and acknowledging such other instruments as the other Members may deem reasonably necessary or desirable to effectuate the admission, including, without limitation, the written acceptance and adoption by the transferee of all of the terms and conditions of this Agreement as the same may have been amended.

8.16 **Restrictions on Transferees.** To the maximum extent permitted by law, any assignee of an Interest who does not become a substituted Member shall have no right to require any information or account of the Company's transactions, to inspect the Company's books and records, or to vote on any of the matters as to which a Member would be entitled to vote under this Agreement. An assignee who is not admitted as a substituted Member shall only be entitled to share in such Net Profits and Net Losses, to receive such Distributions, and to receive such allocations of income, gain, loss, deduction or credit or similar items to which the assignor was entitled under the terms of this Agreement, to the extent assigned. A Member that transfers such Member's Interest shall not cease to be a Member of the Company until the admission of the assignee as a substituted Member.

8.17 **Election.** In the event of a Transfer of the Interest of any Member or any interest in a Member, the dissolution of a Member or the distribution of any property of the Company to a Member, the Managers may cause the Company to make an election in accordance with applicable Treasury Regulations to cause the basis of the Company property to be adjusted for federal income tax purposes as provided by Sections 734 and 743 of the Code.

8.18 **Allocations Between Transferor and Transferee.** Upon the Transfer of all or any part of the Interest of a Member as hereinabove provided, Net Profits and Net Losses shall be allocated between the transferor and transferee on the basis of the computation method which in the sole and absolute discretion of the Managers is in the best interests of the Company, provided such method is in conformity with the methods prescribed by Section 706 of the Code and Treasury Regulation Section 1.706-1(c)(2)(ii). Distributions of Distributable Cash shall be made to the holder of record of the Interest on the date of distribution. Any transferee of an Interest shall succeed to the Capital Account of the transferor Member to the extent such items relate to the transferred Interest.

8.19 **Partition.** No Member shall have the right to partition any property of the Company, or any interest therein, nor shall any Member make application to any court or authority to commence or prosecute any action or proceeding for a partition thereof, and upon any breach of the provisions of this Section 8.19 by any Member, the other Members (in addition

to all rights and remedies afforded by law or equity) shall be entitled to a decree or order restraining or enjoining such application, actions or proceedings.

8.20 **Dissolution, Withdrawal or Bankruptcy of a Member.** The dissolution, withdrawal or Bankruptcy of any Member, or any other cessation of any Member to serve as a member of the Company, shall not dissolve the Company, but such Member's successor-in-interest shall have the rights, powers and obligations as such Member had, subject to all the limitations and restrictions set forth in this Agreement.

8.21 **Liquidity Event.** Upon the occurrence of a Liquidity Event, GFS shall have all of the obligations of a Selling Member under Section 8.12(a) in addition to the obligations under this Section 8.21, and each of Paul Lagudi and William Todd Ponder shall have the right, but not the obligation, to require that GFS purchase from such Member for cash the same percentage of their respective Interests as the percentage of the securities or assets being monetized by GFS; it being agreed that in such event, GFS may cause one or more other Persons (other than the Company) to consummate such purchase. The price to be paid for Paul Lagudi's and/or William Todd Ponder's Interests (if either or both elect to so require GFS) shall be calculated using the same valuation methodology and multiple, if any, used in the Liquidity Event. Any purchase and sale of an Interest pursuant to this Section 8.21 shall in all other respects be consummated in accordance with Section 8.12(b) and Section 8.5; provided however, that the purchaser shall be GFS, or one or more other Persons (other than the Company) designated by GFS, and the percentage of the respective Interests to be purchased shall be calculated pursuant to this Section 8.21.

8.22 **Enforcement.** The restrictions on Transfer contained in this Agreement are an essential element in the ownership of an Interest. Upon application to any court of competent jurisdiction, the Company shall be entitled to a decree against any Person violating or about to violate such restrictions, requiring their specific performance (to which the Members consent without the posting of any bond or other security), including those prohibiting a Transfer of all or a portion of its Interest.

ARTICLE IX
ACCOUNTING, RECORDS AND REPORTING

9.1 **Books and Records.** The Managers shall maintain (or cause to be maintained) all of the books and records of the Company. The Company shall maintain all of the following at its principal office, with copies available at all times during normal business hours for inspection and copying upon reasonable Notice by any Member or such Member's authorized representatives, at such Member's or such representatives' own expense, for any purpose reasonably related to such Member's Interest in the Company:

(a) true and full information regarding the status of the business and financial condition of the Company;

(b) a current list of the full name and last known business, residence or mailing address of each Member;

(c) promptly after becoming available, a copy of the Company's federal, state and local income tax returns, if any, for each Fiscal Year;

(d) a copy of this Agreement and any and all amendments thereto, together with executed copies of any powers of attorney pursuant to which this Agreement or any amendments thereto have been executed;

(e) a copy of the Certificate of Formation and all amendments thereto for the Company;

(f) a current list detailing the amount of cash and statement of the agreed value of any other property contributed by each Member to the capital of the Company and which each Member has agreed to contribute in the future; and

(g) the date upon which each Member became a Member of the Company.

9.2 **Accounting.** The books of account of the Company shall be kept, and the financial position and the results of its operations recorded, in accordance with such method of accounting as shall be determined by the Managers. The books and records of the Company shall reflect all the Company transactions and shall be appropriate and adequate for the Company's business.

9.3 **Reports.** The Company shall cause to be filed all documents and reports required to be filed with any governmental agency. The Company shall also cause to be prepared and duly and timely filed, at the Company's expense, all tax returns and reports required to be filed by the Company. The Company shall send or cause to be sent to each Member within ninety (90) days after the end of each Fiscal Year such information relating to the Company which is necessary for the Members to complete their federal, state and local income tax returns that include such Fiscal Year. In addition, the Company shall cause monthly financial statements and summary reports of the Company's business activities and operations to be prepared and sent to all of the Members and/or their designees via electronic transmission or any other means of delivery reasonably requested by any Member and/or any Member's designee.

9.4 **Bank Accounts**. All receipts, income and funds of the Company shall be deposited in the name of the Company, in such account or accounts (including interest bearing accounts) of the Company as may be determined by the Members in their discretion and shall not be commingled with the funds of any other Person. All withdrawals therefrom shall be made upon checks signed by, or wire transfer authorized by, such Persons and in such manner as the Members may determine.

9.5 **Tax Elections**. Except as otherwise expressly provided herein, the Company shall make such tax elections as the Tax Matters Partner may determine. No Member shall elect to treat the Company as an association taxable as a corporation, without unanimous approval of all of the Members.

9.6 **Tax Matters Partner.**

(a) The Tax Matters Partner shall have all of the powers and authority of a tax matters partner under the Code. The Tax Matters Partner shall represent the Company (at the Company's expense) in connection with all administrative and/or judicial proceedings by the Internal Revenue Service or any taxing authority involving any tax return of the Company, and may expend the Company's funds for professional services and costs associated therewith. The Tax Matters Partner shall provide to the Members prompt Notice of any communication to or from or agreements with a federal, state or local authority regarding any return of the Company, including a summary of the provisions thereof. In consideration of the services performed by the Tax Matters Partner, the Company shall pay to the Tax Matters Partner the aggregate amount of reasonable costs and expenses incurred by the Tax Matters Partner in the performance of its services for the Company.

(b) GFS shall be the Tax Matters Partner as long as GFS is a Member and does not resign from such position. If the Company does not have a Tax Matters Partner, the Member designated by the affirmative vote or unanimous written consent of all of the Members shall be the Tax Matters Partner and shall serve at the pleasure of the Members.

(c) The representation of the Company in any governmental tax audit of the Company shall be undertaken at the Company's expense. The Tax Matters Partner shall not be required to take any action or incur any expenses for the prosecution of any administrative or judicial remedies in its capacity as Tax Matters Partner unless the parties hereto agree on a method of sharing expenses incurred in connection with the prosecution of such remedies. As long as the Tax Matters Partner is not grossly negligent and acts in good faith, the Company shall indemnify and hold harmless the Tax Matters Partner from and against any and all liabilities incurred by the Tax Matters Partner in connection with any activities or undertakings taken by it in its capacity as Tax Matters Partner.

(d) The Members shall furnish the Tax Matters Partner with such information (including information specified in Section 6230(e) of the Code) as it may reasonably request to permit it to provide the Internal Revenue Service with sufficient information to allow proper notice to the Members in accordance with Section 6223 of the Code.

(e) If any Member intends to file a Notice of Inconsistent Treatment under Section 6222(b) of the Code, that Member shall, at least ten (10) Business Days prior to the filing of that notice, notify the other Members of the intent and the manner in which the Member's intended treatment of a Company item is (or may be) inconsistent with the treatment of that item by the other Members.

(f) The Tax Matters Partner shall not enter into any extension of the period of limitations for making assessments on behalf of any other Member without first securing the written consent of that Member.

(g) No Member shall file, pursuant to Section 6227 of the Code, a Request for Administrative Adjustment of Company items for any Company taxable year without first notifying all other Members. If all other Members agree with the requested adjustment, the Tax Matters Partner shall file the Request for Administrative Adjustment on behalf of the requesting Member. If unanimous consent is not obtained within thirty (30) days (or, if shorter, within the

period required to timely file the Request for Administrative Adjustment), any Member, including the Tax Matters Partner, may file a Request for Administrative Adjustment on its own behalf.

(h) The Tax Matters Partner shall not, in its capacity as Tax Matters Partner, file a petition under Sections 6226, 6228 or any other Sections of the Code with respect to any Company item, or other tax matters involving the other Members, without the unanimous consent of all the Members. Any Member intending to file a petition under Sections 6226, 6228 or any other Sections of the Code with respect to any Company item, or other tax matters involving the other Members, will notify the other Members of that intention and the nature of the contemplated proceeding. If any Member intends to seek review of any court decision rendered as a result of a proceeding instituted under the preceding part of this Section 9.6, that Member shall notify the other Members of that intended action.

(i) The Tax Matters Partner shall not bind the other Members to a settlement agreement without obtaining the written concurrence of the other Members that would be bound by that agreement. Any other Member that enters into a settlement agreement with the Secretary of the Treasury with respect to any Company items, as defined by Section 6231(a)(3) of the Code, shall notify the other Members of that settlement agreement and its terms within thirty (30) days from the date of settlement.

(j) The provisions of this Section 9.6 shall survive the termination of this Agreement or the termination of any Member's Interest in the Company and shall remain binding on the Members for a period of time necessary to resolve any and all matters regarding the federal and, if applicable, state income taxation of the Members. Each Member shall retain its records with respect to each Fiscal Year until the expiration of the period within which additional federal or state income tax may be assessed for such year.

9.7 **Confidentiality**. All books, records, financial statements, tax returns, budgets, business plans and projections of the Company, all other information concerning the business, affairs and properties of the Company and all of the terms and provisions of this Agreement including amounts pledged and invested by each Member hereunder shall be held in confidence by each Member, the Managers and their respective Affiliates, subject to any obligation to comply with (a) any applicable law, (b) any rule or regulation of any legal authority or securities exchange or (c) any subpoena or other legal process to make information available to the Persons entitled thereto; provided, however, that prior to making any such disclosure the Member or Manager shall Notify the other Members of any proposed disclosure sufficiently in advance to permit the Members to seek to limit or quash any such disclosure. Such confidentiality shall be maintained until such time, if any, as any such confidential information either is, or becomes, published or a matter of public knowledge. Notwithstanding the foregoing, any Member or Manager may disclose the foregoing information to its tax, legal and investment advisors, lenders and accountants and other persons similarly situated provided that the Member or Manager notifies such Persons of the foregoing confidentiality requirements and such Persons agree to abide by such confidentiality requirements. Each Member and Manager agrees that damages are inadequate remedy in the event of a breach of this Section 9.7 and that the Company may enforce this provision through specific performance, to which each Member and Manager consents without the obligation of the Company to post a bond or other security.

9.8 **Publicity**. No publicity release or announcement concerning this Agreement, the transactions contemplated herein or any business conducted by the Company shall be issued without the prior written approval of the form and substance thereof by all of the Members.

ARTICLE X
DISSOLUTION AND WINDING UP

10.1 **Dissolution.** The death, disability, retirement, withdrawal, bankruptcy or any other cessation of any Member to serve as a Member of the Company shall not dissolve the Company. Except as otherwise set forth herein and as may be permitted in accordance with this Section 10.1, no Member shall have the right to, and each Member hereby agrees that it shall not, seek to dissolve or cause the dissolution of the Company or seek to cause a partial or whole distribution or sale of Company assets whether by court action or otherwise, it being agreed that any actual or attempted dissolution, distribution or sale would cause a substantial hardship to the Company and the remaining Members. The Company, however, shall be dissolved, its assets disposed of and its affairs wound up upon the first to occur of the following:

(a) the expiration of the term of the Company, if any, specified in the Certificate of Formation;

(b) the affirmative vote or unanimous written consent of all of the Members; or

(c) the entry of a judicial decree of dissolution of the Company pursuant to the Act.

10.2 **Date of Dissolution.** Dissolution of the Company shall be effective on the day on which the event occurs giving rise to the dissolution, but the Company shall not terminate until the assets of the Company have been liquidated and distributed as provided herein. Notwithstanding the dissolution of the Company, prior to the termination of the Company the business of the Company and the rights and obligations of the Members, as such, shall continue to be governed by this Agreement.

10.3 **Winding Up.** Upon the occurrence of any event specified in Section 10.1, the Company shall continue solely for the purpose of winding up its affairs in an orderly manner, liquidating its assets, satisfying the claims of its creditors, and distributing any remaining assets in cash or in kind to the applicable Members. The Managers shall be responsible for overseeing the winding up and liquidation of the Company and shall cause the Company to sell or otherwise liquidate all of the Company's assets, discharge or make reasonable provision for all liabilities of the Company and all costs relating to the dissolution, winding up, and liquidation and distribution of assets, establish such Reserves as may be reasonably necessary to provide for contingent liabilities of the Company (for purposes of determining the Capital Accounts of the Members, the amounts of such Reserves shall be deemed to be an expense of the Company), and distribute the remaining assets to the Members, in the manner specified in Section 10.4. The Managers shall be allowed a reasonable time for the orderly liquidation of the Company's assets and discharge of its liabilities, so as to preserve and upon disposition maximize, to the extent possible, the value of the Company's assets.

10.4 **Liquidating Distributions.** The Company's assets, or the proceeds from the liquidation thereof, shall be applied in cash or in kind in the following order:

(a) to creditors (including Members who are creditors (other than on account of their Capital Accounts)) to the extent otherwise permitted by applicable law in satisfaction of all liabilities and obligations of the Company, including expenses of the liquidation (whether by payment of the making of reasonable provision for payment thereof), other than liabilities for which reasonable provision for payment has been made and liabilities for distribution to the Members under Section 18-601 or 18-604 of the Act;

(b) to the establishment of Reserves (other than liabilities for which reasonable provision for payment has been made and liabilities for distribution to the Members under Section 18-601 or 18-604 of the Act) for the purpose of distributing the remaining balance in accordance with subparagraph (c) and (d) below;

(c) to the Members in satisfaction of any liabilities for distributions under Section 18-601 or 18-604 of the Act; and

(d) to the Members in accordance with priorities set forth in Section 7.1 (after giving effect to all contributions, distributions, allocations and other Capital Account adjustments with respect to such investment for all Fiscal Years, including the Fiscal Year in which the liquidation occurs).

10.5 **Transfer of All of the Interests.** Upon a Transfer of all of the Interests by all of the Members to any Person other than an Affiliate of any Member, including, without limitation, a Transfer of Interests by sale, merger, reorganization or other similar transaction, the proceeds therefrom shall be distributed to the Members in accordance with the priorities set forth in Section 7.1.

10.6 **No Liability.** Notwithstanding anything herein to the contrary, no Member shall have any obligation to make any contribution to the capital of the Company on account of a negative balance in that Member's Capital Account, whether upon the liquidation of the Company or otherwise, and the negative balance of that Member's Capital Account shall not be considered a debt owned by that Member to the Company or to any other Person for any purpose whatsoever.

10.7 **Certificate of Cancellation.** Upon completion of the winding up of the Company's affairs, the Managers shall cause a Certificate of Cancellation to be filed with the Delaware Secretary of State.

ARTICLE XI
REPRESENTATIONS AND WARRANTIES

11.1 **Representations and Warranties.** Each party represents and warrants to the others and to the Company as follows:

(a) Authority and Enforceability. It has all requisite power and authority to execute and deliver this Agreement and perform its obligations hereunder. This Agreement has

been duly executed and delivered by it and, assuming due authorization, execution and delivery by the others, constitutes its legal, valid and binding agreement, enforceable against it in accordance with its terms.

(b) Non-Contravention. The execution, delivery and performance by it of this Agreement does not and will not (i) violate, conflict with, result in the breach of, require any consent under, or give to others any rights or termination, amendment or acceleration of any agreement to which it is a party, or (ii) result in the creation of any encumbrance upon any of its assets.

ARTICLE XII
LIMITATION OF LIABILITY; STANDARD OF CARE; INDEMNIFICATION

12.1 **Limitation of Liability.** The debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company, and no Member, Manager, Tax Matters Partner, officer, or employee of the Company shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Member, Manager, Tax Matters Partner and/or officer or employee.

12.2 **Standard of Care**. No Member, Manager, Tax Matters Partner or officer of the Company shall have any personal liability whatsoever to the Company, any Member, Affiliate of the Company or any Affiliate of any Member on account of such Person's status as a Member, Manager, Tax Matters Partner or officer of the Company or by reason of such Person's acts or omissions in connection with the conduct of the business of the Company, so long as such Person acts in good faith for a purpose which such Person reasonably believes to be in, or not opposed to, the best interests of the Company; provided, however, that nothing contained herein shall protect any such Person against any liability to which such Person would otherwise be subject by reason of (a) any act or omission of such Person that involves actual fraud, willful misconduct or gross negligence, or (b) any transaction from which such Person derives any improper personal benefit.

12.3 **Indemnification.** (a) The Company shall indemnify and hold harmless any Person made, or threatened to be made, a party to an action or proceeding, whether civil, criminal or investigative (a "**Proceeding**"), including an action by or in the right of the Company, by reason of the fact that such Person was or is a Member, a Manager, a Tax Matters Partner or an officer of the Company, an Affiliate of a Member, a Manager, a Tax Matters Partner or an officer of the Company, or an officer, director, shareholder, partner, member, employee, manager or agent of any of the foregoing (each such Person, an "Indemnified Person"), against all judgments, fines, amounts paid in settlement and reasonable expenses (including expert witness fees, accounting fees, attorneys' fees, investigation costs and costs of discovery) incurred as a result of such Proceeding, or any appeal therein (and including indemnification against active or passive negligence, gross negligence or breach of duty), if such Person acted in good faith, for a purpose which the Person reasonably believed to be in, or not opposed to, the best interests of the Company, and in the case of a criminal Proceeding, in addition, such Person had no reasonable cause to believe that his. her or its conduct was unlawful; provided, however, that nothing contained herein shall permit any Person to be indemnified or held harmless if and to the extent that the liability sought to be indemnified or

held harmless against results from (i) any act or omission of such Person that involved actual fraud or willful misconduct or (ii) any transaction from which such Person derived improper personal benefit. The termination of any such civil or criminal Proceeding by judgment, settlement, conviction or upon a plea of *nolo contendere*, or its equivalent, shall not in itself create a presumption that any such Person did not act in good faith or for a purpose which he reasonably believed to be in, or not opposed to, the best interests of the Company or that he had reasonable cause to believe that his conduct was unlawful.

(b) Notwithstanding the provisions of Section 12.3(a), the Company shall use its commercially reasonable efforts on behalf of an Indemnified Person to exhaust any insurance maintained by the Company, if any, prior to providing any indemnity payments pursuant to Section 12.3(a).

12.4 **Contract Right; Expenses.** The right to indemnification conferred in this ARTICLE XII shall be a contract right. The Company shall promptly reimburse each Indemnified Person for all costs and expenses referred to in Section 12.3(a) as they are incurred by an Indemnified Person in connection with investigating, preparing or defending, or providing evidence in, any pending or threatened Claim or Proceeding in respect of which indemnification may be sought hereunder (whether or not the Indemnified Person is a party to such Claim or Proceeding) or in enforcing this Agreement; provided, however that such Indemnified Person shall be required to promptly repay such costs and expenses to the Company upon a final judicial determination by a court of competent jurisdiction that such Indemnified Person is not entitled to indemnification hereunder. The Company's indemnification obligations hereunder shall survive the termination of the Company. Each Indemnified Person shall have a claim against all the assets of the Company for payment of any indemnity amounts from time to time due hereunder, which amounts shall be paid or properly reserved for prior to the making of Distributions by the Company to the Members.

12.5 **Indemnification of Employees and Agents.** The Company may, to the extent authorized from time to time by the Managers, grant rights to indemnification and to advancement of expenses to any employee or agent of the Company up to the fullest extent of the provisions of Sections 12.3 and 12.4 with respect to indemnification for the advancement of expenses by the Managers, Tax Matters Partner, Members or officers of the Company.

12.6 **Nonexclusive Right.** The right to indemnification and the payment of expenses incurred in defending a proceeding in advance of its final disposition conferred in this ARTICLE XII shall not be exclusive of any other right which any Person may have or hereafter acquire under any statute or agreement, or under any insurance policy obtained for the benefit of any Manager, Member, Tax Matters Partner and/or officer of the Company.

12.7 **Severability.** If any provision of this ARTICLE XII is determined to be unenforceable in whole or in part, such provision shall nonetheless be enforced to the fullest extent permissible, it being the intent of this ARTICLE XII to provide indemnification to all Persons eligible hereunder to the fullest extent permitted by applicable law.

12.8 **Insurance.** The Managers may cause the Company to purchase and maintain insurance on behalf of any Person (including any Manager, Member, Tax Matters Partner,

officer, employee or other agent of the Company) who is or was an agent of the Company against any liability asserted against that Person and incurred by that Person in any such capacity or arising out of that Person's status as an agent, whether or not the Company would have the power to indemnify that Person against liability under this ARTICLE XII or under applicable law. The Managers and the Members shall cooperate with the Company in all reasonable respects to enable the Company to purchase insurance on the life of any Person who is or was an agent of the Managers or the Company, including submitting to physical examinations and providing information and data required by insurance companies for the purpose of obtaining the insurance.

ARTICLE XIII
INVESTMENT REPRESENTATIONS

Each Member represents and warrants to all other Members and the Company as follows:

13.1 **Member's Experience**. By reason of the Member's business or financial experience, or by reason of the business or financial experience of the Member's financial advisor who is unaffiliated with and who is not compensated, directly or indirectly, by the Company or any Affiliate or selling agent of the Company, the Member is capable of evaluating the risks and merits of an investment in the Member's Interest and of protecting the Member's own interests in connection with the investment.

13.2 **Access to Information.** The Member has had an opportunity to review all documents, records and books pertaining to this investment and has been given the opportunity to consult with counsel of such Member's choice with respect to all aspects of this investment and the Company's proposed business activities. To the extent desired, such Member has met with representatives of the Company and has been provided with such information as may have been requested and has at all times been given the opportunity to obtain additional information necessary to verify the accuracy of the information received and the opportunity to ask questions of and receive answers concerning the terms and conditions of the investment and the nature and prospects of the Company's business.

13.3 **Economic Risk**. The Member is financially able to bear the economic risk of an investment in the Member's Interest, including the total loss thereof.

13.4 **Investment Intent.** The Member is acquiring the Member's Interest for investment purposes and for the Member's own account only and not with a view to, or for sale in connection with, any distribution of all or any part of the Member's Interest. Except for the shareholders or members of the Member, no other Person will have any direct or indirect beneficial interest in, or right to, its Interest.

13.5 **Consultation with Attorney**. The Member has been advised to consult with the Member's own attorney regarding all legal and tax matters concerning an investment in such Member's Interest.

13.6 **Interest is Restricted Security.** The Member understands that the Member's Interest is a "restricted security" under the Securities Act in that the Member's Interest will be acquired from the Company in a transaction not involving a public offering, that the Member's

Interest may be resold without registration under the Securities Act only in certain limited circumstances and that otherwise its Interest must be held indefinitely.

13.7 **No Registration of Interest.** The Member acknowledges that the Member's Interest has not been registered under the Securities Act or qualified under any state securities law in reliance, in part, upon the Member's representations, warranties and agreements herein, and that the Company has no obligation to register or qualify, or maintain any registration or qualification of, the Member's Interest.

13.8 **Accredited Investor.** The Member is an "accredited investor" as that term is defined in Rule 501(a) of Regulation D under the Securities Act.

ARTICLE XIV
MISCELLANEOUS

14.1 **Offset Right.** The Company may offset against any monetary obligation owing from the Company to any Member any monetary obligation then past due and owing from that Member to the Company.

14.2 **Notices.** Any Notice to be given to the Company or any Member in connection with this Agreement shall be in writing and shall be deemed to have been given and received (a) on the date delivered if by courier or other means of personal delivery, (b) on the date sent by telecopy with automatic confirmation by the transmitting machine showing the proper number of pages were transmitted without error, (c) on the next Business Day after being sent by a nationally recognized overnight mail service in time for and specifying next day or next Business Day delivery or (d) forty eight (48) hours after mailing by United States Post Office certified mail, in each case postage prepaid and with any other costs necessary for delivery paid by the sender. Any such Notice must be given, if to the Company, to the Company at its principal place of business, and if to any Member, to such Member at the address specified for it on **Schedule A.** Any Person may by Notice pursuant to this Section 14.2 designate any other address as the new address to which Notice to such Person must be given.

14.3 **Fees and Expenses.** Each Member shall pay its own fees and expenses incurred by it in connection with the preparation and/or negotiation of this Agreement; provided however, that all fees and expenses incurred in connection with the formation of the Company shall be paid by the Company.

14.4 **Amendments.** No amendment to this Agreement may be made without compliance with Section 5.3; provided, however, that amendments to this Agreement as provided in Section 2.6 and those to be made to Schedule A hereto in accordance with this Agreement and those required to correct errors and ambiguities may be made by the Managers without the consent of any Member; provided, further, however that no amendment may increase a Member's Aggregate Capital Contributions, pro rata Capital Contribution obligations, allocations, distributions or decrease a Member's allocations or distributions, or otherwise adversely affect such Member or discriminate against such Member without such Member's prior written consent. All amendments to this Agreement must be in writing.

14.5 **Waiver**. No course of dealing or omission or delay on the part of any party hereto in asserting or exercising any right hereunder shall constitute or operate as a waiver of any such right. No waiver of any provision hereof shall be effective, unless in writing and signed by or on behalf of the party to be charged therewith. No waiver shall be deemed a continuing waiver or waiver in respect of any other or subsequent breach or default, unless expressly so stated in writing.

14.6 **Governing Law**. This Agreement shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of Delaware, without regard to choice or conflict of law principles that would defer to the substantive laws of any other jurisdiction.

14.7 **Dispute Resolution**.

(a) Except with respect to any court proceeding otherwise expressly permitted pursuant to the terms of this Agreement and except where specific performance and other equitable remedies are specifically referenced herein, in which case suit may be brought before any court of competent jurisdiction, all disputes shall be resolved as set forth in this Section 14.7. Should any dispute (other than one referenced in the first sentence of this Section 14.7(a)) arise under this Agreement, the parties shall meet to attempt to resolve such dispute before any arbitration is commenced and no party shall seek other relief prior to such meeting. In the event such a meeting does not resolve such dispute and such dispute shall remain unresolved for a period of thirty (30) days after the dispute arose, then the following shall apply:

(i) The parties shall submit any dispute, Claim or controversy (other than one referenced in the first sentence of Section 14.7(a)) arising out of or relating to this Agreement, or any alleged breach thereof (including any action in tort, contract equity or otherwise) to binding arbitration before a panel of three (3) arbitrators (the "Arbitrators"), to be heard pursuant to the provisions of the Commercial Arbitration Rules of the American Arbitration Association. The parties agree that, except as otherwise provided in the first sentence of Section 14.7(a), binding arbitration shall be the sole means of resolving any dispute, Claim, or controversy arising out of or relating to this Agreement.

(ii) Any arbitration shall be held in Las Vegas, Nevada.

(iii) Unless and until the Arbitrators shall have awarded the prevailing party costs and attorneys' fees pursuant to the last sentence of this Section 14.7(a)(iii), the parties to the arbitration proceeding shall equally bear any arbitration fees and administrative costs associated with the arbitration. The prevailing party (as determined by the Arbitrators) shall be entitled to recover costs and expenses (including expert witness fees, attorneys' fees and costs of discovery) incurred during the course of arbitration.

(b) The Arbitrators' award may not include punitive damages and the Arbitrators shall be instructed accordingly. The arbitration award in any such arbitration shall be final and binding on the parties and may be specifically enforced by legal proceedings in any court of competent jurisdiction.

14.8 **Remedies**. In the event of any actual or prospective breach or default by any party, the other parties shall be entitled to equitable relief, including remedies in the nature of

injunction and specific performance (without being required to post a bond or other security). In this regard, the parties acknowledge that they will be irreparably damaged in the event this Agreement is not specifically enforced.

14.9 **Severability**. The provisions hereof are severable, and in the event that any provision of this Agreement shall be determined to be illegal, invalid or unenforceable in any respect by a court of competent jurisdiction, the remaining provisions hereof shall not be affected, but shall, subject to the discretion of such court, remain in full force and effect, and any illegal, invalid or unenforceable provision shall be deemed, without further action on the part of the parties hereto, amended and limited to the extent necessary to render such provision, as so amended and limited, legal, valid and enforceable, it being the intention of the parties that this Agreement and each provision hereof shall be legal, valid and enforceable to the fullest extent permitted by applicable law.

14.10 **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement. This Agreement may be executed and delivered by facsimile.

14.11 **Further Assurances**. Each party hereto shall promptly execute, deliver, file or record such agreements, instruments, certificates and other documents and take such other actions as the Members may reasonably request or as may otherwise be necessary or proper to carry out the terms and provisions of this Agreement and to consummate and perfect the transactions contemplated hereby.

14.12 **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns. This Agreement is not intended, and shall not be deemed, to create or confer any right or interest for the benefit of any Person not a party hereto.

14.13 **Titles and Captions**. The titles and captions of the Articles and Sections of this Agreement are for convenience of reference only and do not in any way define or interpret the intent of the parties or modify or otherwise affect any of the provisions hereof and shall not have any affect on the construction or interpretation of this Agreement.

14.14 **Construction.** This Agreement shall not be construed against any party by reason of such party having caused this Agreement to be drafted.

14.15 **Entire Agreement.** This Agreement together with and the Certificate of Formation constitute the entire understanding and agreement among the parties hereto with respect to their respective subject matters and supersede all prior and contemporaneous understandings and agreements relating thereto (written or oral), all of which are merged herein. No representation, warranty, statement or condition not contained in any such agreement shall be binding on any party hereto or have any force or effect whatsoever.

*[*Remainder *of this page intentionally left blank; signature page follows]*

IN WITNESS WHEREOF, the undersigned Members have executed this Agreement, effective as of the date first written above.

MEMBERS:

Get Fresh Sales, Inc.,
a Nevada corporation

By: _____
Name: _____
Title: _____

_____
Paul Lagudi

_____
William Todd Ponder

INITIAL MANAGERS:

_____
Paul Lagudi

_____
William Todd Ponder

_____
Dominic Caldara

_____
Scott Goldberg

_____
John Wise

COMPANY:

FRESH MIX LLC

By: _____
Name: _____
Title: _____

SCHEDULE A

MEMBERS, CAPITAL CONTRIBUTIONS AND PERCENTAGES

AS OF JANUARY ___, 2010

Members	Initial Capital Contribution	Aggregate Capital Contribution	Percentage	Voting Interest
Get Fresh Sales Inc. 6745 S. Escondido St. Las Vegas, Nevada 89119 Fax: 702-897-2847	A 60% undivided interest in the Purchased Assets.	A 60% undivided interest in the Purchased Assets.	60%	60%
Paul Lagudi 10996 Tranquil Waters Court Las Vegas, Nevada 89135 Fax: 702-240-0906	A 30% undivided interest in the Purchased Assets.	A 30% undivided interest in the Purchased Assets.	30%	30%
William Todd Ponder 10824 Willow Heights Drive Las Vegas, Nevada 89135 Fax : 702-240-0906	A 10% undivided interest in the Purchased Assets.	A 10% undivided interest in the Purchased Assets.	10%	10%
Total:			100%	100%

EXHIBIT 2

EMPLOYMENT AGREEMENT

This Employment Agreement (the "**Agreement**") is entered into as of January 11, 2010, between Fresh Mix LLC, a Delaware limited liability company, (the "**Company**"), and Paul Lagudi, an individual ("**Employee**"), with reference to the following:

WHEREAS, the Company is a newly formed Delaware limited liability company;

WHEREAS Employee has to the date hereof been an owner and employee of Lagudi Enterprises, LLC, a Nevada limited liability company, and the Company is now the successor in interest to the business and certain of the liabilities of Lagudi Enterprises LLC by virtue of certain transactions being consummated concurrently herewith; and

WHEREAS, the Company wishes to employ Employee, and Employee wishes to accept such employment, on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the various covenants and agreements hereinafter set forth, the parties hereto agree as follows:

1. Term of Employment; Renewal. The Company hereby employs Employee and Employee accepts such employment commencing effective as of January 11, 2010, and, unless sooner terminated as hereinafter provided, terminating three (3) years from the date thereof (the "**Term**"). At the end of the Term, the parties may agree to renew this Agreement and thereby extend the Term; provided, however, that if either party wishes to renew this Agreement, such party must provide written notice to the other party not later than one hundred twenty (120) days prior to the expiration of the Term.

2. Services to be Rendered.

2.1 Duties. Employee shall serve as a member of the Board of Managers of the Company (the "**Board**") and as President of the Company, in connection with the business of the Company (the "**Company Business**"). In the performance of such duties, Employee shall report directly to the Board and shall be subject to the direction of the Board and to such limits upon Employee's authority as the Board may from time to time impose. Employee hereby consents to serve as an officer and/or director of the Company or any subsidiary or affiliate thereof without any additional salary or compensation, if so requested by the Board. Employee's place of work hereunder shall be at the Company's principal offices, or such other location within Las Vegas, Nevada, as may be designated by the Board from time to time. Employee shall be subject to the policies and procedures generally applicable to senior executive employees of the Company to the extent the same are not inconsistent with any provision of this Agreement.

2.2 Exclusive Services. Employee shall at all times faithfully, industriously and to the best of his ability, experience and talent perform to the satisfaction of the Board all of the duties that may be assigned to Employee hereunder and shall devote all of his productive time and efforts to the performance of such duties; provided, however, that Employee may devote time to personal, charitable, and family businesses or investments to the extent that the

time so spent does not conflict with the Company Business. The existence of such a conflict shall be determined in good faith by the Board.

3. Compensation and Benefits. The Company shall pay the following compensation and benefits to Employee during the Term, and Employee shall accept the same as payment in full for all services rendered by Employee to or for the benefit of the Company:

3.1 Salary. A salary ("**Base Salary**") of Three Hundred Thousand Dollars ($300,000) per annum. The Base Salary shall accrue in equal monthly installments in arrears and shall be payable in accordance with the payroll practices of the Company in effect from time to time.

3.2 Benefits. Employee shall be entitled to participate in the benefits specified on Schedule 3.2 hereto.

3.3 Expenses. The Company shall reimburse Employee for reasonable out-of-pocket expenses incurred in connection with the Company Business and the performance of his duties hereunder, subject to (i) such policies as the Board may from time to time establish, (ii) Employee furnishing the Company with evidence in the form of receipts satisfactory to the Company substantiating the claimed expenditures, (iii) Employee receiving advance approval from the Board in the case of expenses for travel outside of the United States and (iv) Employee receiving advance approval from the Board in case of expenses (or a series of related expenses) in excess of such amount as may be determined by the Board from time to time.

3.4 Vacation. Employee shall be entitled to twenty-one (21) paid vacation days in any calendar year, not including personal days for Employee which are approved in advance by the Board.

3.5 Bonus. In addition to the Base Salary to which Employee is entitled pursuant to Section 3.1, Employee shall be entitled to be considered for an annual bonus each year during the Term. Employee acknowledges, however, that no bonus is guaranteed to Employee hereunder and that the determinations of whether any such bonus will be paid to Employee and, if so, the amount thereof will be made each year by the Board, in its sole and absolute discretion.

3.6 Withholding and other Deductions. All compensation payable to Employee hereunder shall be subject to such deductions as the Company is from time to time required to make pursuant to law, governmental regulation or order.

4. Representations and Warranties of Employee. Employee represents and warrants to the Company that (a) Employee is under no contractual or other restriction or obligation which is inconsistent with the execution of this Agreement, the performance of his duties hereunder, or the other rights of the Company hereunder, and (b) Employee is under no physical or mental disability that would hinder the performance of his duties under this Agreement.

5. Certain Covenants.

5.1 Noncompetition. During the Term and for a period of two years thereafter, or, if Employee is terminated with Cause or voluntarily terminates his employment hereunder without Good Reason prior to the end of the Term, then for the remainder of the Term after such termination and for a period of two years thereafter, (the "**Restricted Period**") Employee shall not have any ownership interest (of record or beneficial) in, or have any interest as an employee, salesman, consultant, officer or director in, or otherwise aid or assist in any manner, any firm, corporation, partnership, proprietorship or other entity that engages in the business of purchasing, processing, selling and/or distributing food products of any kind or nature whatsoever, in any county, city or part thereof in the United States and/or (except as set forth on Exhibit 5.1 hereto) any foreign country, in, to or from which the Company is engaged at the commencement of the Restricted Period, so long as the Company, or any successor in interest of the Company or to the business and goodwill of the Company, remains engaged in such business in such county, city or part thereof, but in no event beyond the Restricted Period; provided, however, that Employee may own, directly or indirectly, solely as an investment, securities of any entity which are traded on any national securities exchange if Employee (a) is not a controlling person of, or a member of a group which controls, such entity; or (b) does not, directly or indirectly, own one percent (1%) or more of any class of securities of any such entity.

5.2 Trade Secrets. Employee acknowledges that the nature of Employee's engagement by the Company is such that Employee will have access to Confidential Information (as defined herein) which has great value to the Company and that except for Employee's engagement by the Company, Employee would not otherwise have access to the Confidential Information. During the Term and at all times thereafter, Employee shall keep all of the Confidential Information in confidence and shall not disclose any of the same to any other person, except the Company's personnel entitled thereto and other persons designated in writing by the Company. Employee shall not cause, suffer or permit the Confidential Information to be used for the gain or benefit of any party outside of the Company or for Employee's personal gain or benefit outside the scope of Employee's engagement by the Company. Employee acknowledges that the unauthorized taking of any of the Company's trade secrets is a crime and may subject Employee to imprisonment and/or a fine and/or civil liability. Notwithstanding any provision to the contrary, Employee shall not be prohibited from making any disclosure or making any information available to any person to the extent required by law or court order.

5.3 Solicitation of Business. Employee shall not during the Restricted Period solicit or assist any other person to solicit any business (other than for the Company) from any present or past customer of the Company; or request or advise any present or future customer of the Company to withdraw, curtail or cancel its business dealings with the Company; or commit any other act or assist others to commit any other act which might injure the business of the Company.

5.4 Solicitation of Employees. Employee shall not during the Restricted Period, directly or indirectly, hire, solicit or encourage to leave the employment of the Company or any of its affiliates, any employee of the Company or any of its affiliates or hire any such employee who has left the employment of the Company or any of its affiliates within one year of the termination of such employee's employment with the Company or any of its affiliates.

5.5 Solicitation of Consultants. Employee shall not during the Restricted Period, directly or indirectly, hire, solicit or encourage to cease work with the Company or any of its affiliates any consultant then under contract with the Company or any of its affiliates within one year of the termination of such consultant's engagement by the Company or any of its affiliates.

5.6 Rights and Remedies Upon Breach. If Employee breaches or threatens to commit a breach of any of the provisions of this Section 5 (the "**Restrictive Covenants**"), the Company shall have the following rights and remedies, each of which rights and remedies shall be independent of the other and severally enforceable, and all of which rights and remedies shall be in addition to, and not in lieu of, any other rights and remedies available to the Company under law or in equity:

(i) Specific Performance. The right and remedy to have the Restrictive Covenants specifically enforced by any court having equity jurisdiction, all without the need to post a bond or any other security or to prove any amount of actual damage or that money damages would not provide an adequate remedy, it being acknowledged and agreed that any such breach or threatened breach will cause irreparable injury to the Company and that money damages will not provide adequate remedy to the Company; and

(ii) Accounting and Indemnification. The right and remedy to require Employee (a) to account for and pay over to the Company all compensation, profits, monies, accruals, increments or other benefits derived or received by Employee or any associated party deriving such benefits as a result of any such breach of the Restrictive Covenants; and (b) to indemnify the Company against any other losses, damages (including special and consequential damages), costs and expenses, including actual attorneys' fees and court costs, which may be incurred by them and which result from or arise out of any such breach or threatened breach of the Restrictive Covenants.

5.7 Severability of Covenants/Blue Pencilling. If any court determines that any of the Restrictive Covenants, or any part thereof, is invalid or unenforceable, the remainder of the Restrictive Covenants shall not thereby be affected and shall be given full effect, without regard to the invalid portions. If any court determines that any of the Restrictive Covenants, or any part thereof, are unenforceable because of the duration of such provision or the area covered thereby, such court shall have the power to reduce the duration or area of such provision and, in its reduced form, such provision shall then be enforceable and shall be enforced. Employee hereby waives any and all right to attack the validity of the Restrictive Covenants on the grounds of the breadth of their geographic scope or the length of their term.

5.8 Enforceability in Jurisdictions. The Company and Employee intend to and do hereby confer jurisdiction to enforce the Restrictive Covenants upon the courts of any jurisdiction within the geographical scope of such covenants. If the courts of any one or more of such jurisdictions hold the Restrictive Covenants wholly unenforceable by reason of the breadth of such scope or otherwise, it is the intention of the Company and Employee that such determination not bar or in any way affect the right of the Company to the relief provided above in the courts of any other jurisdiction within the geographical scope of such covenants, as to

breaches of such covenants in such other respective jurisdictions, such covenants as they relate to each jurisdiction being, for this purpose, severable into diverse and independent covenants.

5.9 Definitions.

(a) The term "**Company**", as used in Sections 5.1-5.9, means not only Fresh Mix LLC, but also any company, partnership or entity which, directly or indirectly, controls, is controlled by or is under common control with Fresh Mix LLC.

(b) The term "**Confidential Information**", as used herein, means all information or material not generally known by non-Company personnel or personnel of Lagudi Enterprises LLC prior to the date hereof which (i) gives the Company some competitive business advantage or the opportunity of obtaining such advantage or the disclosure of which could be detrimental to the interests of the Company; (ii) which is owned by the Company or in which the Company has an interest; and (iii) which is either (A) marked "Confidential Information," "Proprietary Information" or other similar marking, (B) known by Employee to be considered confidential and proprietary by the Company, or (C) from all the relevant circumstances should reasonably be assumed by Employee to be confidential and proprietary to the Company. Confidential Information includes, but is not limited to, the following types of information and other information of a similar nature (whether or not reduced to writing): trade secrets, inventions, drawings, file data, documentation, diagrams, specifications, know how, processes, formulas, models, flow charts, software in various stages of development, source codes, object codes, research and development procedures, research or development and test results, marketing techniques and materials, marketing, development and distribution plans, price lists, pricing policies, business plans, contracts, information relating to customers and/or suppliers' identities, characteristics and agreements, financial information and projections, and employee files. Confidential Information also includes any information described above which the Company obtains from another party and which the Company treats as proprietary or designates as Confidential Information, whether or not owned or developed by the Company. Notwithstanding the above, however, the term "Confidential Information" does not include any information that (i) at the time of disclosure to Employee or thereafter is or becomes generally available to or known by the public (other than as a result of a wrongful disclosure by Employee), (ii) was available to Employee on a non-confidential basis from a source other than the Company or its advisors, provided that such source is not and was not bound by a confidentiality agreement regarding the Company, or (iii) has been independently acquired or developed by Employee without violating any of his obligations under this Agreement.

6. Proprietary Rights.

6.1 Disclosure of Employee's Knowledge. Employee shall make available to the Company at no cost to the Company all knowledge possessed by him relating to (a) any Confidential Information of the Company or its predecessor in interest, Lagudi Enterprises LLC, or (b) any other information, trade secrets, methods, developments, inventions and/or improvements, whether patented, patentable or unpatentable, which concern in any way the Company Business and whether acquired by Employee before or during the Term, provided that nothing herein shall be construed as requiring any disclosure where any such method,

development, invention and/or improvement is lawfully protected from disclosure as a trade secret of any third party or by any other lawful bar to such disclosure.

6.2 Ownership of Confidential Information, Patent Rights, Copyrights, and Trade Secrets. To the fullest extent permitted by Nevada law, Employee shall assign, and does hereby assign, to the Company all of Employee's right, title and interest in and to all Confidential Information, inventions, improvements, developments, trade secrets, discoveries, computer software, copyrights, tradenames and trademarks conceived, improved, developed, discovered or written by Employee, alone or in collaboration with others, before or during the Term and which relate in any manner to the Company Business, whether or not the same shall be conceived, improved, developed, discovered or written during customary working hours on the Company's premises. During the Term, Employee shall promptly and fully disclose to the Company all matters within the scope of this Section 6.2, and shall, upon request of the Company, execute, acknowledge, deliver and file any and all documents necessary or useful to vest in the Company all of Employee's right, title and interest in and to all such matters. All expenses incurred in connection with the execution, acknowledgment, delivery and filing of any papers or documents within the scope of this Section 6.2 shall be borne by the Company. All matters within the scope of this Section 6.2 shall constitute trade secrets of the Company subject to the provisions of Section 5.2, until such matters cease to be trade secrets by operation of law.

7. Insurance. The Company shall have the right to take out life, health, accident, "key-man" or other insurance covering Employee, in the name of the Company and at the Company's expense in any amount deemed appropriate by the Company. Employee shall consent to and assist the Company in obtaining such insurance, including, without limitation, submitting to any required examinations and providing information and data required by insurance companies.

8. Termination.

8.1 Death or Total Disability of Employee. If Employee dies or becomes totally disabled during the Term, Employee's employment hereunder shall automatically terminate. For purposes of this Agreement, Employee shall be deemed totally disabled if Employee shall become physically or mentally incapacitated or disabled or otherwise unable to effectively discharge Employee's duties hereunder for a period of ninety (90) consecutive calendar days or for 120 calendar days in any 180 calendar-day period.

8.2 Termination by the Company; Cause. Employee's employment hereunder may be terminated by the Company with or without "Cause." The term "**Cause**" is defined as any one or more of the following occurrences:

(i) Employee's breach of any of the covenants contained in Section 5 of this Agreement;

(ii) Employee's conviction by, or entry of a plea of guilty or nolo contendere in, a court of competent and final jurisdiction for any felony involving moral turpitude or punishable by imprisonment in the jurisdiction involved;

(iii) Employee's commission of an act of intentional fraud committed with actual knowledge of Employee or embezzlement upon the Company's funds;

(iv) Employee's continuing repeated failures to perform Employee's duties as required by this Agreement (including, without limitation, Employee's inability to perform Employee's duties hereunder as a result of chronic alcoholism or drug addiction and/or as a result of any failure to comply with any laws, rules or regulations of any governmental entity with respect to Employee's employment by the Company);

(v) Employee's gross negligence, or any other misconduct on the part of Employee having a materially adverse effect on the Company;

(vi) Employee's commission of any act which is materially detrimental to the Company's business or goodwill and which was undertaken with the purpose of having such material detrimental effect;

(vii) A material breach by Employee of the Limited Liability Company Agreement of the Company; or

(viii) Employee's breach of any other provision of this Agreement, provided that termination of Employee's employment pursuant to this subsection (vii) shall not constitute valid termination with Cause unless Employee shall have first received written notice from the Board stating with specificity the nature of such breach and affording Employee fifteen (15) days to cure the breach alleged.

8.3 Termination by Employee for Good Reason. Employee may terminate his employment hereunder for "Good Reason." The term "**Good Reason**" is defined as (i) the Company's breach of any provision of this Agreement, (ii) the assignment to Employee of duties or imposing requirements inconsistent with this Agreement or his title or change in title or material change in authority, (iii) the Company's requiring the Employee to take any action which would violate any applicable law, or (iv) a material breach by the Company of the Limited Liability Company Agreement of the Company; provided that termination by Employee of his employment pursuant to this Section 8.3 shall not constitute valid termination with Good Reason unless the Board shall have first received written notice from Employee stating with specificity the nature of such breach and affording the Company fifteen (15) days to cure the breach alleged.

8.4 Severance Compensation. If a termination by Employee with Good Reason, or a termination by the Company without Cause, becomes effective, the Company shall continue to pay to Employee, as severance pay, Employee's full regularly scheduled Base Salary as provided in Section 3.1 herein for would have otherwise been the balance of the Term. During any period in which Employee receives severance pay from the Company, the Company shall not require Employee to mitigate his damages or seek new employment, but Employee's severance shall be subject to any offset or reduction as a result of any amounts Employee earns or receives from any other employer or person. Employee hereby acknowledges and agrees that, other than the severance payments described in this Section 8.4, upon termination, Employee shall not be entitled to any other severance under any of the Company's benefit plans or severance policy generally available to the Company's employees or otherwise.

8.5 Return of the Company's Property. Upon the termination of Employee's employment for any reason, Employee shall immediately surrender to the Company all lists, books and records of, or in connection with, the Company's business, and all other property belonging to the Company, it being distinctly understood that all such lists, books and records, and other documents, are the property of the Company. In addition to the foregoing, if Employee's employment is terminated by the Company with Cause, the Company shall have the right, at its option, to require Employee to immediately vacate his offices and to cease all activities on the Company's behalf.

8.6 Waiver and Release of the Company's Liability. Employee recognizes that this Agreement is subject to termination with or without Cause and therefore Employee agrees to hold the Company harmless from and against any and all liabilities, losses, damages, costs and expenses, including but not limited to, court costs and reasonable attorneys' fees, which Employee may incur as a result of the termination of this Agreement. Employee further agrees that Employee shall bring no claim or cause of action against the Company for damages or injunctive relief based on wrongful termination of employment and that any severance payments due to Employee under Section 9.4 shall be contingent upon execution by Employee (or Employee's beneficiary or estate) of a general release of all claims, relating to, in connection with or arising out of Employee's employment by the Company to the maximum extent permitted by law against the Company, its affiliates and their current and former stockholders, members, managers, directors, employees, accountants, attorneys and agents, in such form as determined by the Company in its sole discretion. . Employee agrees that the sole liability of the Company to Employee upon termination of this Agreement shall be that determined by Section 8.4 herein. In the event this covenant is more restrictive than permitted by laws of the jurisdiction in which the Company seeks enforcement thereof, this covenant shall be limited to the extent permitted by law.

9. Arbitration. Except as provided in Section 5, any claim or controversy arising out of, relating to or concerning this Agreement, the breach of this Agreement, the employment of Employee or the termination of Employee's employment including any statutory claims (including, without limitation, the arbitrability of any claim or controversy) shall be settled by arbitration in Las Vegas, Nevada, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be in writing and judgment on the award rendered by the arbitrator may be entered and enforced in any court having jurisdiction. Each party shall select an arbitrator and the two arbitrators so chosen shall select a third arbitrator who shall serve as the sole arbitrator of the claim or controversy. The arbitrator shall have the authority to grant all monetary or equitable relief, including, without limitation, ancillary costs and fees and punitive damages. The arbitrator may award attorney's fees and costs to the prevailing party where authorized by law. The fees of the arbitrators and all other costs that are unique to arbitration shall be paid by the Company. Each party shall be solely responsible for paying its own further costs and expenses of the arbitration, including, without limitation, the fees and costs of its own attorneys, the expenses of its witnesses and other expenses connected with presenting its case.

10. General Relationship. Employee shall be considered an employee of the Company within the meaning of all federal, state and local laws and regulations including, but

not limited to, laws and regulations governing unemployment insurance, workers' compensation, industrial accident, labor and taxes.

11. Miscellaneous.

11.1 Modification; Prior Claims. This Agreement sets forth the entire understanding of the parties with respect to the subject matter hereof, supersedes all existing agreements between them concerning such subject matter, and may be modified only by a written instrument duly executed by each party. Employee hereby waives any claims that may exist on the date hereof arising from his prior employment, if any, with the Company, other than for compensation payable or reimbursement of reasonable expenses, all as incurred in the ordinary course of business.

11.2 Assignment. The obligations of Employee may not be delegated and Employee may not, without the Company's written consent thereto, assign, transfer, convey, pledge, encumber, hypothecate or otherwise dispose of this Agreement or any interest herein. Any such attempted delegation or disposition shall be null and void and without effect. The Company and Employee agree that this Agreement and the Company's rights and obligations hereunder may be assigned or transferred by the Company to and may be assumed by and become binding upon and may inure to the benefit of any successor to the Company.

11.3 Compliance With Internal Revenue Code Section 409A. Unless otherwise expressly provided in writing and in a manner compliant with Section 409A of the Internal Revenue Code of 1986, as amended (the "**Code**") ("**Section 409A**"), any payment of compensation by the Company to Employee, whether pursuant to this Agreement or otherwise, shall be made as soon as administratively practicable after the date on which Employee's right to the payment vests under the principles of Section 409A, but in no event later than two and one-half (2 ½) months after the end of the calendar year in which such date occurs. All payments of amounts determined to come within the definition of "nonqualified deferred compensation" (within the meaning of Section 409A), if applicable to Employee, are intended to comply with the requirements of Section 409A, and shall be interpreted in accordance therewith. Neither party may accelerate any such deferred payment, except in compliance with Section 409A, and no amount shall be paid prior to the earliest date on which it is permitted to be paid under Section 409A. Notwithstanding anything herein to the contrary, no amendment may be made to this Agreement if it would cause this Agreement or any payment hereunder not to be in compliance with Section 409A.

11.4 Internal Revenue Code Section 280G. In the event that the severance and other benefits provided for in this Agreement or otherwise payable to Employee by the Company (i) constitute "parachute payments" within the meaning of Section 280G of the Code, and (ii) would be subject to the excise tax imposed by Section 4999 of the Code (the "**Excise Tax**"), then Employee's benefits under this Agreement shall be reduced as to such lesser extent as would result in no portion of such benefits and payments being subject to the Excise Tax. Unless the Company and Employee otherwise agree in writing, any determination required under this Section shall be made in writing by the Company's independent public accountants (the "**Accountants**"), whose determination shall be conclusive and binding upon Employee and the Company for all purposes. For purposes of making the calculations required by this Section the

Accountants may make reasonable assumptions and approximations concerning applicable taxes and may rely on reasonable, good faith interpretations concerning the application of Sections 280G and 4999 of the Code. The Company and Employee shall furnish to the Accountants such information and documents as the Accountants may reasonably request in order to make a determination under this Section, and the Company shall bear all costs the Accountants may reasonably incur in connection with any calculations contemplated by this Section.

11.5 Survival. The covenants, agreements, representations and warranties contained in or made pursuant to this Agreement shall survive Employee's termination of employment.

11.6 Third-Party Beneficiaries. This Agreement does not create, and shall not be construed as creating, any rights enforceable by any person not a party to this Agreement.

11.7 Waiver. The failure of either party hereto at any time to enforce performance by the other party of any provision of this Agreement shall in no way affect such party's rights thereafter to enforce the same, nor shall the waiver by either party of any breach of any provision hereof be deemed to be a waiver by such party of any other breach of the same or any other provision hereof.

11.8 Hiring At Will. Any continuance of Employee's employment by the Company after the Term shall be deemed a hiring at will (unless such continuance is the subject of a new written agreement) and shall be subject to termination by the Company with or without Cause or by Employee with or without Good Reason upon delivery of notice thereof.

11.9 Section Headings. The headings of the several sections in this Agreement are inserted solely for the convenience of the parties and are not a part of and are not intended to govern, limit or aid in the construction of any term or provision hereof.

11.10 Notices. All notices, requests and other communications hereunder must be given in writing and (i) delivered in person, (ii) transmitted by facsimile or electronic mail, provided that any notice so given is also mailed as provided in clause (iii), or (iii) mailed by certified or registered mail, postage prepaid, receipt requested as follows:

If to the Company:

Fresh Mix LLC
6745 S. Escondido Street
Las Vegas, Nevada 89119
Attention: Dominic Caldara

With a copy (which shall not constitute notice) to:

Loeb & Loeb LLP
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067
Attention: Harold A. Flegelman, Esq.

If to Employee:

Paul Lagudi
10996 Tranquil Waters Court
Las Vegas, Nevada 89135

With a copy (which shall not constitute notice) to:

Coppedge Emmel & Klegerman PC
5586 S. Ft. Apache, Suite 110
Las Vegas, Nevada 89148
Attention: Neal A. Klegerman, Esq.

All notices, requests and other communications shall be deemed given on the date of actual receipt or delivery as evidenced by written receipt, acknowledgement or other evidence of actual receipt or delivery to the address. In case of service by facsimile or electronic mail, a copy of such notice shall be personally delivered or sent by registered or certified mail, in the manner set forth above, within three business days thereafter. Any party hereto may from time to time by notice in writing served as set forth above designate a different address or a different or additional person to which all such notices or communications thereafter are to be given.

11.11 Severability. All Sections, clauses and covenants contained in this Agreement are severable, and in the event any of them shall be held to be invalid by any court, this Agreement shall be interpreted as if such invalid Sections, clauses or covenants were not contained herein.

11.12 Governing Law and Venue. This Agreement is to be governed by and construed in accordance with the laws of the State of Nevada applicable to contracts made and to be performed wholly within such State, and without regard to the conflicts of laws principles thereof. Any suit brought hereon shall be brought in the state or federal courts sitting in Las Vegas, Nevada, the parties hereto hereby waiving any claim or defense that such forum is not convenient or proper. Each party hereby agrees that any such court shall have in personam jurisdiction over it and consents to service of process in any manner authorized by Nevada law.

11.13 Waiver of Jury Trial. Each of the parties hereto hereby expressly waives any right to trial by jury in any dispute, whether sounding in contract, tort or otherwise, between the parties arising out of or related to the transactions contemplated by this Agreement or any related agreements, or any other instrument or document executed or delivered in connection herewith or therewith. Any party hereto may file an original counterpart or a copy of this Agreement with any court as written evidence of the consent of the parties to the waiver of their right to trial by jury.

11.14 Attorneys' Fees. The Company shall reimburse Employee for his reasonable legal fees incurred in connection with the negotiation and preparation of this Agreement, in accordance with the understanding between the Company and Employee's counsel. Subject to the provisions of Section 8.6 hereof with respect to arbitration, if any legal action, arbitration or other proceeding is brought for the enforcement of this Agreement, or

because of any alleged dispute, breach, default or misrepresentation in connection with this Agreement, the successful or prevailing party shall be entitled to recover reasonable attorneys' fees and other costs it incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

11.15 Gender. Where the context so requires, the use of the masculine gender shall include the feminine and/or neuter genders and the singular shall include the plural, and vice versa, and the word "person" shall include any corporation, firm, partnership or other form of association.

11.16 Counterparts; Electronic Signature. This Agreement may be executed in one or more counterparts by original, PDF or facsimile signature, each of which shall be deemed an original and all of which together shall constitute one and the same Agreement.

11.17 Construction. The language in all parts of this Agreement shall in all cases be construed simply, according to its fair meaning, and not strictly for or against any of the parties hereto. Without limitation, there shall be no presumption against any party on the ground that such party was responsible for drafting this Agreement or any part thereof.

[Remainder of this page intentionally left blank; signature page follows.]

IN WITNESS WHEREOF, the parties hereto have caused this Employment Agreement to be duly executed as of the date hereinabove set forth.

THE COMPANY:

FRESH MIX LLC
a Delaware limited liability company

By:_____
Its CEO

EMPLOYEE:

_____
Paul Lagudi

EXHIBIT 5.1

Employee retains an ownership interest in:

- T. Rainsford, a wholesaler of food products located in Australia, which is owned and controlled by one or more of Employee's family members; and

- Harris Markets, a retail grocery chain located in Australia, which is owned and controlled by one or more of Employee's family members.

EMPLOYMENT AGREEMENT

This Employment Agreement (the "**Agreement**") is entered into as of January 11, 2010, between Fresh Mix LLC, a Delaware limited liability company, (the "**Company**"), and William Todd Ponder, an individual ("**Employee**"), with reference to the following:

WHEREAS, the Company is a newly formed Delaware limited liability company;

WHEREAS Employee has to the date hereof been an owner and employee of Lagudi Enterprises, LLC, a Nevada limited liability company, and the Company is now the successor in interest to the business and certain of the liabilities of Lagudi Enterprises LLC by virtue of certain transactions being consummated concurrently herewith; and

WHEREAS, the Company wishes to employ Employee, and Employee wishes to accept such employment, on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the various covenants and agreements hereinafter set forth, the parties hereto agree as follows:

1. Term of Employment; Renewal. The Company hereby employs Employee and Employee accepts such employment commencing effective as of January 11, 2010, and, unless sooner terminated as hereinafter provided, terminating three (3) years from the date thereof (the "**Term**"). At the end of the Term, the parties may agree to renew this Agreement and thereby extend the Term; provided, however, that if either party wishes to renew this Agreement, such party must provide written notice to the other party not later than one hundred twenty (120) days prior to the expiration of the Term.

2. Services to be Rendered.

2.1 Duties. Employee shall serve as a member of the Board of Managers of the Company (the "**Board**") and as Chief Operating Officer of the Company, in connection with the business of the Company (the "**Company Business**"). In the performance of such duties, Employee shall report directly to the Board and shall be subject to the direction of the Board and to such limits upon Employee's authority as the Board may from time to time impose. Employee hereby consents to serve as an officer and/or director of the Company or any subsidiary or affiliate thereof without any additional salary or compensation, if so requested by the Board. Employee's place of work hereunder shall be at the Company's principal offices, or such other location within Las Vegas, Nevada, as may be designated by the Board from time to time. Employee shall be subject to the policies and procedures generally applicable to senior executive employees of the Company to the extent the same are not inconsistent with any provision of this Agreement.

2.2 Exclusive Services. Employee shall at all times faithfully, industriously and to the best of his ability, experience and talent perform to the satisfaction of the Board all of the duties that may be assigned to Employee hereunder and shall devote all of his productive time and efforts to the performance of such duties; provided, however, that Employee may devote time to personal, charitable, and family businesses or investments to the extent that the

time so spent does not conflict with the Company Business. The existence of such a conflict shall be determined in good faith by the Board.

3. Compensation and Benefits. The Company shall pay the following compensation and benefits to Employee during the Term, and Employee shall accept the same as payment in full for all services rendered by Employee to or for the benefit of the Company:

3.1 Salary. A salary ("**Base Salary**") of Two Hundred Thousand Dollars ($200,000) per annum. The Base Salary shall accrue in equal monthly installments in arrears and shall be payable in accordance with the payroll practices of the Company in effect from time to time.

3.2 Benefits. Employee shall be entitled to participate in the benefits specified on Schedule 3.2 hereto.

3.3 Expenses. The Company shall reimburse Employee for reasonable out-of-pocket expenses incurred in connection with the Company Business and the performance of his duties hereunder, subject to (i) such policies as the Board may from time to time establish, (ii) Employee furnishing the Company with evidence in the form of receipts satisfactory to the Company substantiating the claimed expenditures, (iii) Employee receiving advance approval from the Board in the case of expenses for travel outside of the United States and (iv) Employee receiving advance approval from the Board in case of expenses (or a series of related expenses) in excess of such amount as may be determined by the Board from time to time.

3.4 Vacation. Employee shall be entitled to twenty-one (21) paid vacation days in any calendar year, not including personal days for Employee which are approved in advance by the Board.

3.5 Bonus. In addition to the Base Salary to which Employee is entitled pursuant to Section 3.1, Employee shall be entitled to be considered for an annual bonus each year during the Term. Employee acknowledges, however, that no bonus is guaranteed to Employee hereunder and that the determinations of whether any such bonus will be paid to Employee and, if so, the amount thereof will be made each year by the Board, in its sole and absolute discretion.

3.6 Withholding and other Deductions. All compensation payable to Employee hereunder shall be subject to such deductions as the Company is from time to time required to make pursuant to law, governmental regulation or order.

4. Representations and Warranties of Employee. Employee represents and warrants to the Company that (a) Employee is under no contractual or other restriction or obligation which is inconsistent with the execution of this Agreement, the performance of his duties hereunder, or the other rights of the Company hereunder, and (b) Employee is under no physical or mental disability that would hinder the performance of his duties under this Agreement.

5. Certain Covenants.

5.1 Noncompetition. During the Term and for a period of two years thereafter, or, if Employee is terminated with Cause or voluntarily terminates his employment hereunder without Good Reason prior to the end of the Term, then for the remainder of the Term after such termination and for a period of two years thereafter, (the "**Restricted Period**") Employee shall not have any ownership interest (of record or beneficial) in, or have any interest as an employee, salesman, consultant, officer or director in, or otherwise aid or assist in any manner, any firm, corporation, partnership, proprietorship or other entity that engages in the business of purchasing, processing, selling and/or distributing food products of any kind or nature whatsoever, in any county, city or part thereof in the United States and/or any foreign country, in, to or from which the Company is engaged at the commencement of the Restricted Period, so long as the Company, or any successor in interest of the Company or to the business and goodwill of the Company, remains engaged in such business in such county, city or part thereof, but in no event beyond the Restricted Period; provided, however, that Employee may own, directly or indirectly, solely as an investment, securities of any entity which are traded on any national securities exchange if Employee (a) is not a controlling person of, or a member of a group which controls, such entity; or (b) does not, directly or indirectly, own one percent (1%) or more of any class of securities of any such entity.

5.2 Trade Secrets. Employee acknowledges that the nature of Employee's engagement by the Company is such that Employee will have access to Confidential Information (as defined herein) which has great value to the Company and that except for Employee's engagement by the Company, Employee would not otherwise have access to the Confidential Information. During the Term and at all times thereafter, Employee shall keep all of the Confidential Information in confidence and shall not disclose any of the same to any other person, except the Company's personnel entitled thereto and other persons designated in writing by the Company. Employee shall not cause, suffer or permit the Confidential Information to be used for the gain or benefit of any party outside of the Company or for Employee's personal gain or benefit outside the scope of Employee's engagement by the Company. Employee acknowledges that the unauthorized taking of any of the Company's trade secrets is a crime and may subject Employee to imprisonment and/or a fine and/or civil liability. Notwithstanding any provision to the contrary, Employee shall not be prohibited from making any disclosure or making any information available to any person to the extent required by law or court order.

5.3 Solicitation of Business. Employee shall not during the Restricted Period solicit or assist any other person to solicit any business (other than for the Company) from any present or past customer of the Company; or request or advise any present or future customer of the Company to withdraw, curtail or cancel its business dealings with the Company; or commit any other act or assist others to commit any other act which might injure the business of the Company.

5.4 Solicitation of Employees. Employee shall not during the Restricted Period, directly or indirectly, hire, solicit or encourage to leave the employment of the Company or any of its affiliates, any employee of the Company or any of its affiliates or hire any such employee who has left the employment of the Company or any of its affiliates within one year of the termination of such employee's employment with the Company or any of its affiliates.

5.5 Solicitation of Consultants. Employee shall not during the Restricted Period, directly or indirectly, hire, solicit or encourage to cease work with the Company or any of its affiliates any consultant then under contract with the Company or any of its affiliates within one year of the termination of such consultant's engagement by the Company or any of its affiliates.

5.6 Rights and Remedies Upon Breach. If Employee breaches or threatens to commit a breach of any of the provisions of this Section 5 (the "**Restrictive Covenants**"), the Company shall have the following rights and remedies, each of which rights and remedies shall be independent of the other and severally enforceable, and all of which rights and remedies shall be in addition to, and not in lieu of, any other rights and remedies available to the Company under law or in equity:

(i) Specific Performance. The right and remedy to have the Restrictive Covenants specifically enforced by any court having equity jurisdiction, all without the need to post a bond or any other security or to prove any amount of actual damage or that money damages would not provide an adequate remedy, it being acknowledged and agreed that any such breach or threatened breach will cause irreparable injury to the Company and that money damages will not provide adequate remedy to the Company; and

(ii) Accounting and Indemnification. The right and remedy to require Employee (a) to account for and pay over to the Company all compensation, profits, monies, accruals, increments or other benefits derived or received by Employee or any associated party deriving such benefits as a result of any such breach of the Restrictive Covenants; and (b) to indemnify the Company against any other losses, damages (including special and consequential damages), costs and expenses, including actual attorneys' fees and court costs, which may be incurred by them and which result from or arise out of any such breach or threatened breach of the Restrictive Covenants.

5.7 Severability of Covenants/Blue Pencilling. If any court determines that any of the Restrictive Covenants, or any part thereof, is invalid or unenforceable, the remainder of the Restrictive Covenants shall not thereby be affected and shall be given full effect, without regard to the invalid portions. If any court determines that any of the Restrictive Covenants, or any part thereof, are unenforceable because of the duration of such provision or the area covered thereby, such court shall have the power to reduce the duration or area of such provision and, in its reduced form, such provision shall then be enforceable and shall be enforced. Employee hereby waives any and all right to attack the validity of the Restrictive Covenants on the grounds of the breadth of their geographic scope or the length of their term.

5.8 Enforceability in Jurisdictions. The Company and Employee intend to and do hereby confer jurisdiction to enforce the Restrictive Covenants upon the courts of any jurisdiction within the geographical scope of such covenants. If the courts of any one or more of such jurisdictions hold the Restrictive Covenants wholly unenforceable by reason of the breadth of such scope or otherwise, it is the intention of the Company and Employee that such determination not bar or in any way affect the right of the Company to the relief provided above in the courts of any other jurisdiction within the geographical scope of such covenants, as to

breaches of such covenants in such other respective jurisdictions, such covenants as they relate to each jurisdiction being, for this purpose, severable into diverse and independent covenants.

5.9 Definitions.

(a) The term "**Company**", as used in Sections 5.1-5.9, means not only Fresh Mix LLC, but also any company, partnership or entity which, directly or indirectly, controls, is controlled by or is under common control with Fresh Mix LLC.

(b) The term "**Confidential Information**", as used herein, means all information or material not generally known by non-Company personnel or personnel of Lagudi Enterprises LLC prior to the date hereof which (i) gives the Company some competitive business advantage or the opportunity of obtaining such advantage or the disclosure of which could be detrimental to the interests of the Company; (ii) which is owned by the Company or in which the Company has an interest; and (iii) which is either (A) marked "Confidential Information," "Proprietary Information" or other similar marking, (B) known by Employee to be considered confidential and proprietary by the Company, or (C) from all the relevant circumstances should reasonably be assumed by Employee to be confidential and proprietary to the Company. Confidential Information includes, but is not limited to, the following types of information and other information of a similar nature (whether or not reduced to writing): trade secrets, inventions, drawings, file data, documentation, diagrams, specifications, know how, processes, formulas, models, flow charts, software in various stages of development, source codes, object codes, research and development procedures, research or development and test results, marketing techniques and materials, marketing, development and distribution plans, price lists, pricing policies, business plans, contracts, information relating to customers and/or suppliers' identities, characteristics and agreements, financial information and projections, and employee files. Confidential Information also includes any information described above which the Company obtains from another party and which the Company treats as proprietary or designates as Confidential Information, whether or not owned or developed by the Company. Notwithstanding the above, however, the term "Confidential Information" does not include any information that (i) at the time of disclosure to Employee or thereafter is or becomes generally available to or known by the public (other than as a result of a wrongful disclosure by Employee), (ii) was available to Employee on a non-confidential basis from a source other than the Company or its advisors, provided that such source is not and was not bound by a confidentiality agreement regarding the Company, or (iii) has been independently acquired or developed by Employee without violating any of his obligations under this Agreement.

6. Proprietary Rights.

6.1 Disclosure of Employee's Knowledge. Employee shall make available to the Company at no cost to the Company all knowledge possessed by him relating to (a) any Confidential Information of the Company or its predecessor in interest, Lagudi Enterprises LLC, or (b) any other information, trade secrets, methods, developments, inventions and/or improvements, whether patented, patentable or unpatentable, which concern in any way the Company Business and whether acquired by Employee before or during the Term, provided that nothing herein shall be construed as requiring any disclosure where any such method,

development, invention and/or improvement is lawfully protected from disclosure as a trade secret of any third party or by any other lawful bar to such disclosure.

6.2 Ownership of Confidential Information, Patent Rights, Copyrights, and Trade Secrets. To the fullest extent permitted by Nevada law, Employee shall assign, and does hereby assign, to the Company all of Employee's right, title and interest in and to all Confidential Information, inventions, improvements, developments, trade secrets, discoveries, computer software, copyrights, tradenames and trademarks conceived, improved, developed, discovered or written by Employee, alone or in collaboration with others, before or during the Term and which relate in any manner to the Company Business, whether or not the same shall be conceived, improved, developed, discovered or written during customary working hours on the Company's premises. During the Term, Employee shall promptly and fully disclose to the Company all matters within the scope of this Section 6.2, and shall, upon request of the Company, execute, acknowledge, deliver and file any and all documents necessary or useful to vest in the Company all of Employee's right, title and interest in and to all such matters. All expenses incurred in connection with the execution, acknowledgment, delivery and filing of any papers or documents within the scope of this Section 6.2 shall be borne by the Company. All matters within the scope of this Section 6.2 shall constitute trade secrets of the Company subject to the provisions of Section 5.2, until such matters cease to be trade secrets by operation of law.

7. Insurance. The Company shall have the right to take out life, health, accident, "key-man" or other insurance covering Employee, in the name of the Company and at the Company's expense in any amount deemed appropriate by the Company. Employee shall consent to and assist the Company in obtaining such insurance, including, without limitation, submitting to any required examinations and providing information and data required by insurance companies.

8. Termination.

8.1 Death or Total Disability of Employee. If Employee dies or becomes totally disabled during the Term, Employee's employment hereunder shall automatically terminate. For purposes of this Agreement, Employee shall be deemed totally disabled if Employee shall become physically or mentally incapacitated or disabled or otherwise unable to effectively discharge Employee's duties hereunder for a period of ninety (90) consecutive calendar days or for 120 calendar days in any 180 calendar-day period.

8.2 Termination by the Company; Cause. Employee's employment hereunder may be terminated by the Company with or without "Cause." The term "**Cause**" is defined as any one or more of the following occurrences:

(i) Employee's breach of any of the covenants contained in Section 5 of this Agreement;

(ii) Employee's conviction by, or entry of a plea of guilty or nolo contendere in, a court of competent and final jurisdiction for any felony involving moral turpitude or punishable by imprisonment in the jurisdiction involved;

(iii) Employee's commission of an act of intentional fraud committed with actual knowledge of Employee or embezzlement upon the Company's funds;

(iv) Employee's continuing repeated failures to perform Employee's duties as required by this Agreement (including, without limitation, Employee's inability to perform Employee's duties hereunder as a result of chronic alcoholism or drug addiction and/or as a result of any failure to comply with any laws, rules or regulations of any governmental entity with respect to Employee's employment by the Company);

(v) Employee's gross negligence, or any other misconduct on the part of Employee having a materially adverse effect on the Company;

(vi) Employee's commission of any act which is materially detrimental to the Company's business or goodwill and which was undertaken with the purpose of having such material detrimental effect;

(vii) A material breach by Employee of the Limited Liability Company Agreement of the Company; or

(viii) Employee's breach of any other provision of this Agreement, provided that termination of Employee's employment pursuant to this subsection (vii) shall not constitute valid termination with Cause unless Employee shall have first received written notice from the Board stating with specificity the nature of such breach and affording Employee fifteen (15) days to cure the breach alleged.

8.3 Termination by Employee for Good Reason. Employee may terminate his employment hereunder for "Good Reason." The term "**Good Reason**" is defined as (i) the Company's breach of any provision of this Agreement, (ii) the assignment to Employee of duties or imposing requirements inconsistent with this Agreement or his title or change in title or material change in authority, (iii) the Company's requiring the Employee to take any action which would violate any applicable law, or (iv) a material breach by the Company of the Limited Liability Company Agreement of the Company; provided that termination by Employee of his employment pursuant to this Section 8.3 shall not constitute valid termination with Good Reason unless the Board shall have first received written notice from Employee stating with specificity the nature of such breach and affording the Company fifteen (15) days to cure the breach alleged.

8.4 Severance Compensation. If a termination by Employee with Good Reason, or a termination by the Company without Cause, becomes effective, the Company shall continue to pay to Employee, as severance pay, Employee's full regularly scheduled Base Salary as provided in Section 3.1 herein for would have otherwise been the balance of the Term. During any period in which Employee receives severance pay from the Company, the Company shall not require Employee to mitigate his damages or seek new employment, but Employee's severance shall be subject to any offset or reduction as a result of any amounts Employee earns or receives from any other employer or person. Employee hereby acknowledges and agrees that, other than the severance payments described in this Section 8.4, upon termination, Employee shall not be entitled to any other severance under any of the Company's benefit plans or severance policy generally available to the Company's employees or otherwise.

8.5 Return of the Company's Property. Upon the termination of Employee's employment for any reason, Employee shall immediately surrender to the Company all lists, books and records of, or in connection with, the Company's business, and all other property belonging to the Company, it being distinctly understood that all such lists, books and records, and other documents, are the property of the Company. In addition to the foregoing, if Employee's employment is terminated by the Company with Cause, the Company shall have the right, at its option, to require Employee to immediately vacate his offices and to cease all activities on the Company's behalf.

8.6 Waiver and Release of the Company's Liability. Employee recognizes that this Agreement is subject to termination with or without Cause and therefore Employee agrees to hold the Company harmless from and against any and all liabilities, losses, damages, costs and expenses, including but not limited to, court costs and reasonable attorneys' fees, which Employee may incur as a result of the termination of this Agreement. Employee further agrees that Employee shall bring no claim or cause of action against the Company for damages or injunctive relief based on wrongful termination of employment and that any severance payments due to Employee under Section 9.4 shall be contingent upon execution by Employee (or Employee's beneficiary or estate) of a general release of all claims, relating to, in connection with or arising out of Employee's employment by the Company to the maximum extent permitted by law against the Company, its affiliates and their current and former stockholders, members, managers, directors, employees, accountants, attorneys and agents, in such form as determined by the Company in its sole discretion. . Employee agrees that the sole liability of the Company to Employee upon termination of this Agreement shall be that determined by Section 8.4 herein. In the event this covenant is more restrictive than permitted by laws of the jurisdiction in which the Company seeks enforcement thereof, this covenant shall be limited to the extent permitted by law.

9. Arbitration. Except as provided in Section 5, any claim or controversy arising out of, relating to or concerning this Agreement, the breach of this Agreement, the employment of Employee or the termination of Employee's employment including any statutory claims (including, without limitation, the arbitrability of any claim or controversy) shall be settled by arbitration in Las Vegas, Nevada, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be in writing and judgment on the award rendered by the arbitrator may be entered and enforced in any court having jurisdiction. Each party shall select an arbitrator and the two arbitrators so chosen shall select a third arbitrator who shall serve as the sole arbitrator of the claim or controversy. The arbitrator shall have the authority to grant all monetary or equitable relief, including, without limitation, ancillary costs and fees and punitive damages. The arbitrator may award attorney's fees and costs to the prevailing party where authorized by law. The fees of the arbitrators and all other costs that are unique to arbitration shall be paid by the Company. Each party shall be solely responsible for paying its own further costs and expenses of the arbitration, including, without limitation, the fees and costs of its own attorneys, the expenses of its witnesses and other expenses connected with presenting its case.

10. General Relationship. Employee shall be considered an employee of the Company within the meaning of all federal, state and local laws and regulations including, but

not limited to, laws and regulations governing unemployment insurance, workers' compensation, industrial accident, labor and taxes.

11. Miscellaneous.

11.1 Modification; Prior Claims. This Agreement sets forth the entire understanding of the parties with respect to the subject matter hereof, supersedes all existing agreements between them concerning such subject matter, and may be modified only by a written instrument duly executed by each party. Employee hereby waives any claims that may exist on the date hereof arising from his prior employment, if any, with the Company, other than for compensation payable or reimbursement of reasonable expenses, all as incurred in the ordinary course of business.

11.2 Assignment. The obligations of Employee may not be delegated and Employee may not, without the Company's written consent thereto, assign, transfer, convey, pledge, encumber, hypothecate or otherwise dispose of this Agreement or any interest herein. Any such attempted delegation or disposition shall be null and void and without effect. The Company and Employee agree that this Agreement and the Company's rights and obligations hereunder may be assigned or transferred by the Company to and may be assumed by and become binding upon and may inure to the benefit of any successor to the Company.

11.3 Compliance With Internal Revenue Code Section 409A. Unless otherwise expressly provided in writing and in a manner compliant with Section 409A of the Internal Revenue Code of 1986, as amended (the "**Code**") ("**Section 409A**"), any payment of compensation by the Company to Employee, whether pursuant to this Agreement or otherwise, shall be made as soon as administratively practicable after the date on which Employee's right to the payment vests under the principles of Section 409A, but in no event later than two and one-half (2 ½) months after the end of the calendar year in which such date occurs. All payments of amounts determined to come within the definition of "nonqualified deferred compensation" (within the meaning of Section 409A), if applicable to Employee, are intended to comply with the requirements of Section 409A, and shall be interpreted in accordance therewith. Neither party may accelerate any such deferred payment, except in compliance with Section 409A, and no amount shall be paid prior to the earliest date on which it is permitted to be paid under Section 409A. Notwithstanding anything herein to the contrary, no amendment may be made to this Agreement if it would cause this Agreement or any payment hereunder not to be in compliance with Section 409A.

11.4 Internal Revenue Code Section 280G. In the event that the severance and other benefits provided for in this Agreement or otherwise payable to Employee by the Company (i) constitute "parachute payments" within the meaning of Section 280G of the Code, and (ii) would be subject to the excise tax imposed by Section 4999 of the Code (the "**Excise Tax**"), then Employee's benefits under this Agreement shall be reduced as to such lesser extent as would result in no portion of such benefits and payments being subject to the Excise Tax. Unless the Company and Employee otherwise agree in writing, any determination required under this Section shall be made in writing by the Company's independent public accountants (the "**Accountants**"), whose determination shall be conclusive and binding upon Employee and the Company for all purposes. For purposes of making the calculations required by this Section the

Accountants may make reasonable assumptions and approximations concerning applicable taxes and may rely on reasonable, good faith interpretations concerning the application of Sections 280G and 4999 of the Code. The Company and Employee shall furnish to the Accountants such information and documents as the Accountants may reasonably request in order to make a determination under this Section, and the Company shall bear all costs the Accountants may reasonably incur in connection with any calculations contemplated by this Section.

11.5 Survival. The covenants, agreements, representations and warranties contained in or made pursuant to this Agreement shall survive Employee's termination of employment.

11.6 Third-Party Beneficiaries. This Agreement does not create, and shall not be construed as creating, any rights enforceable by any person not a party to this Agreement.

11.7 Waiver. The failure of either party hereto at any time to enforce performance by the other party of any provision of this Agreement shall in no way affect such party's rights thereafter to enforce the same, nor shall the waiver by either party of any breach of any provision hereof be deemed to be a waiver by such party of any other breach of the same or any other provision hereof.

11.8 Hiring At Will. Any continuance of Employee's employment by the Company after the Term shall be deemed a hiring at will (unless such continuance is the subject of a new written agreement) and shall be subject to termination by the Company with or without Cause or by Employee with or without Good Reason upon delivery of notice thereof.

11.9 Section Headings. The headings of the several sections in this Agreement are inserted solely for the convenience of the parties and are not a part of and are not intended to govern, limit or aid in the construction of any term or provision hereof.

11.10 Notices. All notices, requests and other communications hereunder must be given in writing and (i) delivered in person, (ii) transmitted by facsimile or electronic mail, provided that any notice so given is also mailed as provided in clause (iii), or (iii) mailed by certified or registered mail, postage prepaid, receipt requested as follows:

If to the Company:

Fresh Mix LLC
6745 S. Escondido Street
Las Vegas, Nevada 89119
Attention: Dominic Caldara

With a copy (which shall not constitute notice) to:

Loeb & Loeb LLP
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067
Attention: Harold A. Flegelman, Esq.

If to Employee:

William Todd Ponder
10824 Willow Heights Drive
Las Vegas, Nevada 89135

With a copy (which shall not constitute notice) to:

Coppedge Emmel & Klegerman PC
5586 S. Ft. Apache, Suite 110
Las Vegas, Nevada 89148
Attention: Neal A. Klegerman, Esq.

All notices, requests and other communications shall be deemed given on the date of actual receipt or delivery as evidenced by written receipt, acknowledgement or other evidence of actual receipt or delivery to the address. In case of service by facsimile or electronic mail, a copy of such notice shall be personally delivered or sent by registered or certified mail, in the manner set forth above, within three business days thereafter. Any party hereto may from time to time by notice in writing served as set forth above designate a different address or a different or additional person to which all such notices or communications thereafter are to be given.

11.11 Severability. All Sections, clauses and covenants contained in this Agreement are severable, and in the event any of them shall be held to be invalid by any court, this Agreement shall be interpreted as if such invalid Sections, clauses or covenants were not contained herein.

11.12 Governing Law and Venue. This Agreement is to be governed by and construed in accordance with the laws of the State of Nevada applicable to contracts made and to be performed wholly within such State, and without regard to the conflicts of laws principles thereof. Any suit brought hereon shall be brought in the state or federal courts sitting in Las Vegas, Nevada, the parties hereto hereby waiving any claim or defense that such forum is not convenient or proper. Each party hereby agrees that any such court shall have in personam jurisdiction over it and consents to service of process in any manner authorized by Nevada law.

11.13 Waiver of Jury Trial. Each of the parties hereto hereby expressly waives any right to trial by jury in any dispute, whether sounding in contract, tort or otherwise, between the parties arising out of or related to the transactions contemplated by this Agreement or any related agreements, or any other instrument or document executed or delivered in connection herewith or therewith. Any party hereto may file an original counterpart or a copy of this Agreement with any court as written evidence of the consent of the parties to the waiver of their right to trial by jury.

11.14 Attorneys' Fees. The Company shall reimburse Employee for his reasonable legal fees incurred in connection with the negotiation and preparation of this Agreement, in accordance with the understanding between the Company and Employee's counsel. Subject to the provisions of Section 8.6 hereof with respect to arbitration, if any legal action, arbitration or other proceeding is brought for the enforcement of this Agreement, or

because of any alleged dispute, breach, default or misrepresentation in connection with this Agreement, the successful or prevailing party shall be entitled to recover reasonable attorneys' fees and other costs it incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

11.15 Gender. Where the context so requires, the use of the masculine gender shall include the feminine and/or neuter genders and the singular shall include the plural, and vice versa, and the word "person" shall include any corporation, firm, partnership or other form of association.

11.16 Counterparts; Electronic Signature. This Agreement may be executed in one or more counterparts by original, PDF or facsimile signature, each of which shall be deemed an original and all of which together shall constitute one and the same Agreement.

11.17 Construction. The language in all parts of this Agreement shall in all cases be construed simply, according to its fair meaning, and not strictly for or against any of the parties hereto. Without limitation, there shall be no presumption against any party on the ground that such party was responsible for drafting this Agreement or any part thereof.

[Remainder of this page intentionally left blank; signature page follows.]

IN WITNESS WHEREOF, the parties hereto have caused this Employment Agreement to be duly executed as of the date hereinabove set forth.

THE COMPANY:

FRESH MIX LLC
a Delaware limited liability company

By: _____
Its CEO

EMPLOYEE:

William Todd Ponder

EXHIBIT 3

James J. Pisanelli, Esq., Bar No. 4027
JJP@pisanellibice.com
Debra L. Spinelli, Esq., Bar No. 9695
DLS@pisanellibice.com
Ava M. Schaefer, Esq., Bar No. 12698
AMS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **ORDER REGARDING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY AND TO COMPEL ARBITRATION** Hearing Date: January 16, 2019 Hearing Time: 9:00 a.m.

Defendants Fresh Mix, LLC ("Fresh Mix") and Get Fresh Sales, Inc.'s ("Get Fresh") (collectively, the "Defendants") Motion to Dismiss or Stay and to Compel Arbitration (filed on December 13, 2018), having come on for hearing on January 16, 2019, in Department XI of the above-titled Court, with the Honorable Elizabeth Gonzalez presiding. James Pisanelli, Esq., Debra L. Spinelli, Esq., and Ava M. Schaefer, Esq., of PISANELLI BICE PLLC, having appeared on behalf of Defendants. Jeffery A. Bendavid, Esq., of MORAN BRANDON BENDAVID MORAN, having appeared on behalf of Plaintiffs Paul Lagudi and William Todd Ponder (collectively, the "Plaintiffs"). This Court, having reviewed and considered Motion, the Opposition

filed by Plaintiffs on January 9, 2019, the Reply filed by Defendants on January 15, 2019, the arguments of counsel presented at the hearing, and good cause appearing therefore,

The Court HEREBY FINDS as follows:

1. Plaintiffs are parties to the Limited Liability Company Agreement (the Operating Agreement") for Defendant Fresh Mix, dated January 11, 2010;
2. The terms and conditions of the Operating Agreement were adopted to govern the respective rights and obligations of the members and managers of Defendant Fresh Mix;
3. This Court is obligated pursuant to NRS 38.219 and other applicable law to determine whether a valid agreement to arbitrate exists between Plaintiffs and Defendants concerning Plaintiffs' claims arising from the terms and conditions of the Operating Agreement;
4. The Operating Agreement contains several provisions determining the methodology for resolving any disputes arising from the Operating Agreement;
5. With the exception of equitable remedies sought, Section 14.7 of the Operating Agreement obligates Plaintiffs and Defendants to arbitrate any claims or disputes arising from the Operating Agreement;
6. Section 14.8 of the Operating Agreement expressly entitles any party subject to the Operating Agreement to equitable relief in the event of an actual or prospective breach or default of the Operating Agreement; and
7. Plaintiffs' remaining claims relating to the Operating Agreement are subject to arbitration pursuant to Section 14.7 of the Operating Agreement.

In light of the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

///

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Defendants' Motion to Dismiss or Stay and to Compel Arbitration is GRANTED IN PART and DENIED IN PART as follows:

1. The Motion is GRANTED as to Plaintiffs' claims concerning the Operating Agreement, to the extent they do not demand any equitable remedies, are subject to arbitration pursuant to Section 14.7 of the Operating Agreement.

2. Consistent with the *Stipulation and Order to Continue Plaintiffs' Hearing on Preliminary Injunction and Extend the Temporary Restraining Order Entered December 11, 2018*, filed on January 3, 2019, the Temporary Restraining Order entered on December 11, 2018, including the injunctive relief granted therein, remains in full force and effect until the preliminary injunction hearing.

3. This matter is hereby stayed until such time as the required arbitration, if any, is concluded.

4. A status hearing on this matter is set for May 17, 2019, in chambers, and counsel for the parties shall file with the Court a status report prior thereto.

The Motion is DENIED as to any remaining relief requested therein

DATED: February 1, 2019.

THE HONORABLE ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

Respectfully submitted by:

PISANELLI BICE PLLC

By: _____
James J. Pisanelli, Esq., Bar No. 4027
Debra L. Spinelli, Esq., Bar No. 9695
Ava M. Schaefer, Esq., Bar No. 12698
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

EXHIBIT G

FreshMix

February 19, 2019

William Todd Ponder
4640 North Tomsik Street
Las Vegas, Nevada 89129-4816

Re: MGM Employment

Dear Todd:

Mr. Goldberg told us that you might be considering employment at MGM Resorts. Presumably, your involvement is in the purchasing of produce.

First, your Employment Agreement provides for a period of non-competition for two years after termination. We believe that provision prevents you being employed, or assisting in any manner, an entity that engages in the business of purchasing food products. The company intends to enforce this restrictive covenant. Those restrictions are incorporated into the Operating Agreement, and therefore included in your obligations as a member & manager of the company.

Second, the Employment Agreement also prohibits you from disclosing or using for personal gain and benefit any of the company's trade secrets. The company does not envision any circumstance where you could avoid violating this provision in the performance of your anticipated duties for MGM Resorts. Please refer to the provisions of your Employment Agreement regarding the company's remedies to prevent such misuse.

Third, the company anticipates providing MGM Resorts with an appropriate cease and desist letter warning it about the possible misappropriation of the company's trades secrets from employing or consulting with you in such role.

Fourth, as a member and manager of the company, you are required to comply with the provisions of the Operating Agreement. Your fiduciary duties under that

agreement include continuing the purpose of the company (distribution of *its* food products), and prohibit your diversion from the company, directly or indirectly, of "any of such customer relationships to any other Person". The company will be closely monitoring its relationships with the MGM Resorts. Should you on behalf of MGM Resorts act otherwise as to the first, or engage in the second, the company stands prepared to enforce your obligations and seek other remedies.

Fifth, the Operating Agreement imposes a standard of care on its members and managers to act in good faith and not to take actions opposed to the best interests of the company. The company believes there is tremendous opportunity for a breach of these obligations in any produce related relationship you might have with MGM Resorts.

Sixth, given the breath of your requests for access to company records, and the inherent opportunities for misuse of some of that information, the company is reconsidering what records it will make available to you.

Seventh, we call to your attention that MGM Resorts has a code of ethics which requires disclosure of conflicts of interests prior to employment. Since you are but one member of the company, and what you do reflects on the company, the company is, and its members are, keenly interested in your full and complete disclosure of any possible conflicts of interest, including your receipt of distributions that include profits from sales to MGM Resorts.

Eighth, given MGM Resorts' published code of ethics, both the company and Get Fresh Sales, will be examining its supplier's code of ethics. Either or both may be required to disclose your ownership interest in the company. Given the lack of presence of the Fresh Mix brand and identity in the billing and customer fulfillment of MGM Resorts orders, and the distributions you receive, both Get Fresh and the company are considering what disclosures are necessary to their customers for full transparency on these matters.

The company and Get Fresh reserve any and all other claims or remedies that might arise from other sources, including but not limited to, MGM Resorts' policies, the company's policies and procedures, or statutory protections of trade secrets.

It would be in both the company's and your interests to avoid any confusion on MGM Resorts' part if the company, its members, or Get Fresh start communications with MGM Resorts, or other customers, based on inaccurate information. Can you please update the company of your intents with regard to employment or consulting with MGM Resorts, or any other customer of the company?

Sincerely,

Dominic Caldara, CEO

cc: James Pisanelli
Bruce Leslie
Scott Goldberg
John Wise

EXHIBIT H

COHEN
DOWD
QUIGLEY

April 24, 2019

VIA ELECTRONIC MAIL

Evan Barenbaum
STERN & EISENBERG
1581 Main Street, Suite 200
Warrington, PA 18976

Mark Connot
FOX ROTHSCHILD LLP
1980 Festival Plaza Dr. Suite 700
Las Vegas, Nevada 89135

Re: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.; American Arbitration Association Case No. 01-19-000-4904

Dear Evan and Mark:

We write to you regarding an important issue that requires your prompt attention and response. As set forth below, Mr. Ponder's repeated, inexplicable refusal to respond to legitimate and good-faith inquiries regarding his future employment and potential competition with Fresh Mix, LLC ("Fresh Mix" or the "Company") cannot continue.

In February 2019, Mr. Ponder indicated to Fresh Mix that he was considering employment opportunities with one of Fresh Mix and Get Fresh Sales, Inc.'s ("Get Fresh") customers: MGM Resorts International ("MGM"). Accordingly, on February 19, 2019 Fresh Mix sent a letter to Mr. Ponder regarding his activities and potential employment with MGM. [*See* February 19, 2019 Letter from D. Caldera to T. Ponder.] Fresh Mix reminded Mr. Ponder of the two year non-competition provision of Mr. Ponder's Employment Agreement with Fresh Mix, as well as Mr. Ponder's independent fiduciary duties to Fresh Mix under the Limited Liability

Company Agreement of Fresh Mix, LLC ("Operating Agreement"). Fresh Mix requested that Mr. Ponder "please update [Fresh Mix] of [his] intents with regard to employment or consulting with MGM resorts, or any other customer of [Fresh Mix]." Mr. Leslie further provided Mr. Bendavid with a copy of the letter on February 21, 2019. Fresh Mix received no response.

On March 12, 2019, counsel for Fresh Mix, Get Fresh and Messrs. Caldera, Goldberg and Wise followed up again with Mr. Ponder's new counsel, Mr. Barenbaum. [*See* March 12, 2019 Email from B. Leslie to E. Barenbaum.] Mr. Leslie emphasized Fresh Mix's concern that Mr. Ponder was illegally competing with Fresh Mix in violation of Mr. Ponder's fiduciary duties to the Company. Again, neither Mr. Ponder nor his counsel has provided the courtesy of a response, let alone addressed the serious unanswered questions concerning Mr. Ponder's activities.

Mr. Ponder's silence on this important issue is inexcusable and it cannot continue. It is in Fresh Mix's and your client's best interests to avoid any confusion regarding Mr. Ponder's employment activities (including the permissible scope of those activities). We look forward to receiving your immediate and responsible reply by no later than May 1, 2019.

Very truly yours,

Daniel P. Quigley

Daniel P. Quigley

cc: *via electronic mail*
Bruce Leslie (blesliechtd@gmail.com)
James J. Pisanelli (jjp@pisanellibice.com)
Debra L. Spinelli (dls@pisanellibice.com)

EXHIBIT I

Bridges, Emily

From: Daniel Quigley <DQuigley@cdqlaw.com>
Sent: Monday, April 29, 2019 5:29 PM
To: Berkley, Brian A.; 'Evan Barenbaum, Esquire'
Cc: 'blesliechtd@gmail.com'; 'jjp@pisanellibice.com'; 'dls@pisanellibice.com'; Ronald Jay Cohen; Betsy Lamm; Jenna Brownlee; Thomas E. Shea, Esquire; Connot, Mark J.
Subject: [EXT] RE: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.

Please read prior email

Daniel P. Quigley
COHEN DOWD QUIGLEY
PHONE: 602.252.3076
EMAIL: dquigley@CDQLaw.com
WEB: CDQLaw.com
The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016

PROFILE
V-CARD

From: Berkley, Brian A. [mailto:bberkley@foxrothschild.com]
Sent: Monday, April 29, 2019 1:31 PM
To: Daniel Quigley; 'Evan Barenbaum, Esquire'
Cc: 'blesliechtd@gmail.com'; 'jjp@pisanellibice.com'; 'dls@pisanellibice.com'; Ronald Jay Cohen; Betsy Lamm; Jenna Brownlee; Thomas E. Shea, Esquire; Connot, Mark J.
Subject: RE: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.

Daniel,

The record speaks for itself. We asked for specific facts and law supporting your clients' position of a breach of fiduciary duty, and your clients declined to provide any. We did not request work product, but rather information that you will have to share with either the arbitration panel or the Court. Choosing not to do so now reflects either one of two things: (i) no facts or law exist that support your clients' positions; or (ii) your clients decline to attempt to resolve any issue without adjudication.

Brian

Brian Berkley
Partner
Fox Rothschild LLP
2000 Market Street
20th Floor
Philadelphia, PA 19103-3222
(215) 299-2043 - direct
(609) 760-2309 – cell

(215) 299-2150- fax
bberkley@foxrothschild.com
www.foxrothschild.com

From: Daniel Quigley <DQuigley@cdqlaw.com>
Sent: Monday, April 29, 2019 4:13 PM
To: Berkley, Brian A. <bberkley@foxrothschild.com>; 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>
Cc: 'blesliechtd@gmail.com' <blesliechtd@gmail.com>; 'jjp@pisanellibice.com' <jjp@pisanellibice.com>; 'dls@pisanellibice.com' <dls@pisanellibice.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Betsy Lamm <BLamm@cdqlaw.com>; Jenna Brownlee <JBrownlee@cdqlaw.com>; Thomas E. Shea, Esquire <tshea@sterneisenberg.com>; Connot, Mark J. <MConnot@foxrothschild.com>
Subject: [EXT] RE: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.

Brian,
Mr. Ponder and his counsel's repeated refusals to answer simple, critical questions is now beyond plain from the exchange of correspondence. We will not engage in any further exchanges on the topic as to do so would be wasteful and pointless. Rather, the written refusals will be part of the evidence presented to and evaluated by the Panel when Get Fresh's claims are adjudicated. We decline your request for us to share our work product or to otherwise conduct legal or factual research on your client's behalf.
Dan

Daniel P. Quigley
COHEN DOWD QUIGLEY
PHONE: 602.252.3076
EMAIL: dquigley@CDQLaw.com
WEB: CDQLaw.com
The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016
PROFILE
V-CARD

From: Berkley, Brian A. [mailto:bberkley@foxrothschild.com]
Sent: Friday, April 26, 2019 2:43 PM
To: Daniel Quigley; 'Evan Barenbaum, Esquire'
Cc: 'blesliechtd@gmail.com'; 'jjp@pisanellibice.com'; 'dls@pisanellibice.com'; Ronald Jay Cohen; Betsy Lamm; Jenna Brownlee; Thomas E. Shea, Esquire; Connot, Mark J.
Subject: RE: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.

Daniel,

If you have specific facts of wrongful conduct, please provide those with us so that we can address them. Your letter simply identified unsubstantiated accusations that Mr. Ponder was "considering" other employment opportunities. Even if that is true, we fail to see how that rises to the level of a breach of Mr. Ponder's obligations to Fresh Mix. If Fresh Mix is concerned with Mr. Ponder's employment status, then it should not have fired him.

It is even less obvious how counsel's response is "likely" a breach of Mr. Ponder's fiduciary duties. Please explain with supporting case law and facts, which we will of course consider if provided.

With regard to the arbitration panel, I expect it will focus on facts and law properly presented to it, not unsubstantiated accusations untethered to actionable conduct.

I look forward to learning from you supporting facts and law for your position.

Brian Berkley
Partner
Fox Rothschild LLP
2000 Market Street
20th Floor
Philadelphia, PA 19103-3222
(215) 299-2043 - direct
(609) 760-2309 – cell
(215) 299-2150- fax
bberkley@foxrothschild.com
www.foxrothschild.com

From: Daniel Quigley <DQuigley@cdqlaw.com>
Sent: Friday, April 26, 2019 4:12 PM
To: 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>
Cc: 'blesliechtd@gmail.com' <blesliechtd@gmail.com>; 'jjp@pisanellibice.com' <jjp@pisanellibice.com>; 'dls@pisanellibice.com' <dls@pisanellibice.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Betsy Lamm <BLamm@cdqlaw.com>; Jenna Brownlee <JBrownlee@cdqlaw.com>; Berkley, Brian A. <bberkley@foxrothschild.com>; Thomas E. Shea, Esquire <tshea@sterneisenberg.com>; Connot, Mark J. <MConnot@foxrothschild.com>
Subject: [EXT] RE: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.

Evan,
Thank you for your unhelpful non-response. We are confident that your client's and his counsel's refusal to answer the simple and direct questions regarding MGM will be seen and taken by the Panel for what they are- admissions that wrongful conduct involving MGM and perhaps other customers has and continues to occur. Indeed, the refusals to answer these simple but critical questions are likely a breach of your client's fiduciary duties. We will proceed accordingly.
Dan

Daniel P. Quigley
COHEN DOWD QUIGLEY
PHONE: 602.252.3076
EMAIL: dquigley@CDQLaw.com
WEB: CDQLaw.com
The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016
PROFILE
V-CARD

From: Evan Barenbaum, Esquire [mailto:ebarenbaum@sterneisenberg.com]
Sent: Thursday, April 25, 2019 1:52 PM
To: Jennifer Wootten
Cc: 'blesliechtd@gmail.com'; 'jjp@pisanellibice.com'; 'dls@pisanellibice.com'; Ronald Jay Cohen; Daniel Quigley; Betsy Lamm; Jenna Brownlee; Brian A. Berkley - Fox Rothschild LLP (bberkley@foxrothschild.com); Thomas E. Shea, Esquire; 'mconnot@foxrothschild.com'
Subject: RE: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.

Dear Mr. Quigley,

Kindly allow us to respond to your expressed concern that Todd Ponder "was considering employment opportunities" with MGM, and your theory that his cogitations are governed by the Operating Agreement and/or the Employment Agreement. Such that you may overcome your concern, we will address your inquiry. Mr. Ponder has acted at all times and in all respects in conformance with his obligations.

Please note that, while we do not respond to each of your points, that does not mean we agree to any of them. For instance, by not responding to each point, this response does not concede that the purported obligations you identify are in fact the obligations Mr. Ponder owes to your clients. Mr. Ponder reserves all of his rights.

Very truly yours,

Evan

Evan Barenbaum, Esquire
Director of Litigation, Stern & Eisenberg
ebarenbaum@sterneisenberg.com | sterneisenberg.com
1581 Main Street, Suite 200, Warrington, PA 18976
Direct 267-620-2130 | Mobile 215-519-2868 | 215-572-8111 x1144 | Fax 215-572-5025
*Admitted to practice law in PA and NJ

Stern&Eisenberg
NY • NJ • PA • DE • MD • DC • VA • WV • NC • SC • GA • TN • AL

From: Jennifer Wootten <JWootten@cdqlaw.com>
Sent: Wednesday, April 24, 2019 6:13 PM
To: Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>; 'mconnot@foxrothschild.com' <mconnot@foxrothschild.com>
Cc: 'blesliechtd@gmail.com' <blesliechtd@gmail.com>; 'jjp@pisanellibice.com' <jjp@pisanellibice.com>; 'dls@pisanellibice.com' <dls@pisanellibice.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Daniel Quigley <DQuigley@cdqlaw.com>; Betsy Lamm <BLamm@cdqlaw.com>; Jenna Brownlee <JBrownlee@cdqlaw.com>
Subject: Fresh Mix, LLC and Get Fresh Sales, Inc. v. Paul Lagudi, et al.

Messrs. Barenbaum and Connot:

Please see the attached document in the above-referenced matter. Thank you.

Jennifer Wootten
Administrative Assistant
COHEN DOWD QUIGLEY
PHONE: 602.252.8400
EMAIL: jwootten@CDQLaw.com
WEB: CDQLaw.com

The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

EXHIBIT J

Bridges, Emily

From: Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>
Sent: Wednesday, March 13, 2019 4:32 PM
To: Betsy Lamm; Daniel Quigley; Ronald Jay Cohen; jjp@pisanellibice.com; Debra Spinelli (dls@pisanellibice.com); Bruce Leslie (blesliechtd@gmail.com); Jenna Brownlee
Cc: Connot, Mark J.; Berkley, Brian A.; Thomas E. Shea, Esquire
Subject: [EXT] Fresh Mix v. Lagudi, et al. // Indemnification Notice

Betsy,

On behalf of Paul Lagudi and Todd Ponder, we are notifying Fresh Mix LLC of their intention to exercise indemnification rights under the Operating Agreement. In this regard, please advise how and to whom the expenses should be submitted.

We look forward to hearing from you. Please contact us with any questions.

Very truly yours,

Evan

Evan Barenbaum, Esquire
Director of Litigation, Stern & Eisenberg
ebarenbaum@sterneisenberg.com | sterneisenberg.com
1581 Main Street, Suite 200, Warrington, PA 18976
Direct 267-620-2130 | Mobile 215-519-2868 | 215-572-8111 x1144 | Fax 215-572-5025
*Admitted to practice law in PA and NJ

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EXHIBIT K

Bridges, Emily

From: Betsy Lamm <BLamm@cdqlaw.com>
Sent: Friday, March 15, 2019 8:06 PM
To: 'Evan Barenbaum, Esquire'
Cc: Connot, Mark J.; Berkley, Brian A.; Thomas E. Shea, Esquire; Daniel Quigley; Ronald Jay Cohen; jjp@pisanellibice.com; Debra Spinelli (dls@pisanellibice.com); Bruce Leslie (blesliechtd@gmail.com); Jenna Brownlee; GET FRESH SALES_ INC_ _ FRESH MIX_ LLC _ 2157_001_ E_mails <{F15890}.iManage@phxindx.main.ckdqlaw.com>
Subject: [EXT] RE: Fresh Mix v. Lagudi, et al. // Indemnification Notice [IWOV-iManage.FID15890]

Evan,

Your notification and request is premised on two false assumptions. First, that Messrs. Lagudi and Ponder are entitled to indemnification in connection with the pending Arbitration and, second, that they are entitled to advancement. Neither assumption is accurate.

Delaware law does not entitle your clients to indemnification. It is clear under uniformly settled Delaware law, which governs the Operating Agreement, contracts are construed to give effect to the intention of the parties and avoid a construction that would lead to an absurd result or render any portions of the contract illusory. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1165 (Del. 1978); *Donohue v. Corning*, 949 A.2d 574, 579-81 (Del. Ch. 2008); *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986); *Cumberbatch v. Bd. of Trustees, Del. Technical. & Cmty. Coll.*, 382 A.2d 1383, 1387 (Del. Super Ct. 1978). Indemnification clauses are disfavored and indemnification will not be awarded unless the intent to indemnify the person and conduct at issue is "clear and unequivocal." *DRR, LLC v. Sears, Roebuck and Co.*, 949 F. Supp. 1132, 1143 (D. Del. 1996) (*quoting Paoli v. Dave Hall, Inc.*, 462 A.2d, 1094, 1098 (Del. Super. Ct. 1983)). As applicable here, absent a clear expression of intent to indemnify, the Operating Agreement's indemnification clause does not extend to ***inter-party claims***, including claims by Fresh Mix ("the Company") based on a breach of the Operating Agreement. [*See* Operating Agreement § 12.3.] Any other interpretation would lead to the absurd result of the Company paying itself damages after establishing at arbitration the misconduct of Messrs. Lagudi and Ponder. Such an interpretation would further conflict with and render superfluous the Operating Agreement's provisions concerning liability of managers and members, the applicable standard of care, and dispute resolution. [*See* Operating Agreement, §§ 5.9, 12.2, 14.7(a)(iii).]

Moreover, the Operating Agreement provides for indemnification of proceedings against a member or manager of Fresh Mix ("the Company") only when the individual is sued solely because of their position within the Company and not because of their own wrongful conduct. [*Id.* § 12.3] Indemnification further does not apply unless a party "acted in good faith, for a purpose which the Person reasonably believed to be in, or not opposed to, the best interests of the Company[.]" [*Id.*] Accordingly, even if, under some altered reality, indemnification could apply to inter-party claims, Messrs. Lagudi and Ponder would still not benefit from § 12.3 of the Operating Agreement since the conduct at issue in the Demand for Arbitration includes bad faith breaches of fiduciary duty, bad faith breaches of contract, and conduct that no reasonable person could construe as serving the best interests of the Company.

Finally, your suggestion that advancement of fees and costs should occur is as unsupported under Delaware law as your claim for indemnification. Your reference to the submission of expenses seeks advancement of fees and costs, which is a distinctly different concept than indemnification. As your research and review of the Operating Agreement will confirm, advancement is not available to Messrs. Lagudi and Ponder. *See Majkowski v. Am. Imaging Mgmt. Servs.*, 913 A.2d 572, 586, 590 (Del. Ch. 2006) (indemnification provision in limited liability company agreement, which does not reference advancement, does not imply any advancement rights); *Adv. Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84-85 (Del. Ch. 1992) (holding that corporate bylaws providing for indemnification did not implicate advancement obligations

by corporation); *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1008 (Del. Ch. 2007) ("[A]bsent a clearly worded bylaw or contract making advancement mandatory Delaware law leaves the decision whether to advance expenses to the business judgment of the board.").

We trust this addresses your request.

Best,

Betsy

Betsy J. Lamm
COHEN DOWD QUIGLEY
PHONE: 602.252.8191
EMAIL: blamm@CDQLaw.com
WEB: CDQLaw.com
The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016

From: Evan Barenbaum, Esquire [mailto:ebarenbaum@sterneisenberg.com]
Sent: Wednesday, March 13, 2019 1:32 PM
To: Betsy Lamm; Daniel Quigley; Ronald Jay Cohen; jjp@pisanellibice.com; Debra Spinelli (dls@pisanellibice.com); Bruce Leslie (blesliechtd@gmail.com); Jenna Brownlee
Cc: Mark J. Connot (mconnot@foxrothschild.com); Brian A. Berkley - Fox Rothschild LLP (bberkley@foxrothschild.com); Thomas E. Shea, Esquire
Subject: Fresh Mix v. Lagudi, et al. // Indemnification Notice

Betsy,

On behalf of Paul Lagudi and Todd Ponder, we are notifying Fresh Mix LLC of their intention to exercise indemnification rights under the Operating Agreement. In this regard, please advise how and to whom the expenses should be submitted.

We look forward to hearing from you. Please contact us with any questions.

Very truly yours,

Evan

Evan Barenbaum, Esquire
Director of Litigation, Stern & Eisenberg
ebarenbaum@sterneisenberg.com | sterneisenberg.com
1581 Main Street, Suite 200, Warrington, PA 18976
Direct 267-620-2130 | Mobile 215-519-2868 | 215-572-8111 x1144 | Fax 215-572-5025
*Admitted to practice law in PA and NJ

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This firm is a debt collector attempting to collect a debt. This notice is sent to you in an attempt to collect the indebtedness referred to herein and any information obtained from you will be used for that purpose. If you are currently protected by the filing of a petition in bankruptcy, the email, including attachments, if any, is for informational purposes only and should not be considered as an attempt to collect a debt. If you have received a discharge in bankruptcy (after entering into the relevant mortgage note and mortgage and have not reaffirmed the debt) then this correspondence is not and should not be construed as an attempt to collect a debt, but solely as part of the enforcement of the mortgage/lien against real property.

Wire Fraud Warning: Wire fraud and email hacking/phishing attacks are on the increase. If you have an escrow or closing transaction with us and you receive an email containing Wire Transfer Instructions, do not respond to the email. Instead, call us immediately, using previously known contact information and NOT information provided in the email, to verify the information prior to sending funds. If you have received new wiring instructions, please notify the firm immediately by phone to confirm. Stern & Eisenberg does not alter its wiring instructions.

EXHIBIT L

FreshMix

April 8, 2019

VIA ELECTRONIC MAIL

Get Fresh Sales, Inc.
6745 S. Escondido Street
Las Vegas, NV 89119

Paul Lagudi
7809 Coconut Grove Court
Rancho Santa Fe, CA 92127

William Todd Ponder
4640 North Tomsik Street
Las Vegas, NV 89129

Re: April 2019 Distributions

Dear Members:

This letter addresses the issue of distributions of Fresh Mix, LLC's (the "Company's") Distributable Cash to each of its Members for Q1 2019. The attached distribution sheet reflects the Distributable Cash to each member in accordance with his/its respective membership percentages, consistent with Section 7.1 of the Limited Liability Company Agreement of Fresh Mix, LLC ("Operating Agreement").

This quarter's distributions are affected by the Company's responsibility to establish Reserves to account for contingent liabilities relating to the pending and threatened disputes between and among the Company, its Members and its Managers (the "Disputes"). The Company is confident it will prevail in the Disputes. But, the Company has an obligation to recognize potential liabilities and expenses that may

result if the Disputes are not timely or successfully resolved. Contingent liabilities include, without limitation:

- The Company's anticipated costs and expenses in connection with the Disputes.

- The impact on the Company, including its obligation to materially adjust prior years' tax forms and prior distributions of Distributable Cash to its Members, if the arbitrators (or a Court) presiding over the Disputes confirm that Messrs. Lagudi and Ponder were not Company employees after 2013.

- Messrs. Lagudi and Ponder's demand for indemnification and advancement of costs and expenses relating to the Disputes.

- The anticipated demand for indemnification and advancement of costs and expenses incurred by Get Fresh Sales, Inc. and Messrs. Caldara, Goldberg and Wise in connection with the Disputes, assuming indemnification or advancement is ultimately ordered or provided to Messrs. Lagudi and Ponder.

In addition to being fiscally responsible, in view of the pending claims, establishment of Reserves is also mandatory under Delaware law. [*See* Del. Code § 18-607 (prohibiting the Company from making distributions if, after giving effect to the distributions, the Company's liabilities would exceed the fair value of its assets); Operating Agreement § 7.4 (requiring compliance with § 18-607).]

Please be assured that the Company will continue to make the minimum tax distributions consistent with Section 7.2 of the Operating Agreement.

Sincerely,

Scott Goldberg
Chief Financial Officer

EXHIBIT M

Fox Rothschild LLP
ATTORNEYS AT LAW

One Summerlin
1980 Festival Plaza Dr.
Suite 700
Las Vegas, NV 89135
Tel (702) 262-6899 Fax (702) 597-5503
www.foxrothschild.com

MARK J. CONNOT
Direct No: 702.699.5924
Email: MConnot@FoxRothschild.com

April 26, 2019

Via Email

Betsy J. Lamm, Esq.
Cohen Dowd Quigley
The Camelback Esplanade One
2425 East Camelback Road, Ste. 1100
Phoenix, AZ 85016
blamm@cdqlaw.com

Re: Get Fresh Sales, Inc., et al. v. Paul Lagudi and Kelley Lagudi, et al.
American Arbitration Association Case No. 01-19-0000-4904

Dear Ms. Lamm:

As you are aware, this firm represents Messrs. Paul Lagudi and Todd Ponder, both of whom are Members and Managers of Fresh Mix LLC ("Fresh Mix" or "Company"), which is a Delaware limited liability company. Messrs. Lagudi and Ponder have retained and authorized this firm to obtain from Fresh Mix certain books and records, consistent with their rights under Section 18-305 of the Delaware Limited Liability Act and Article 9 of the Company's Operating Agreement. Please find attached the appropriate authorization from Messrs. Lagudi and Ponder authorizing this firm to represent them in connection with this demand.

The purpose of this demand is threefold. *First*, my clients seek true and full information regarding the status of the business and the financial condition of the company. *Second*, my clients seek to ascertain information concerning all the Company transactions. *Third*, my clients request this information for purposes of understanding the affairs of the Company in their capacity as Managers. It has come to their attention that their ownership in the Company may have been de-valued by actions taken by the majority members of the Company. These documents will assist

Messrs. Lagudi and Ponder to discern whether there has been a diminution of ownership value, and if so, why.

Accordingly, my clients demand the following documentation:

1. Margin and Analysis Reports from November 1, 2018 through the present;

2. Books of Account, as referenced in Section 9.2 of the Operating Agreement;

3. The Reserve (as defined in the Operating Agreement), including any analysis conducted by Fresh Mix (or any of its agents) in connection with setting the Reserve, from January 1, 2017 through the present;

4. Daily Usage Reports from November 1, 2018 through the present;

5. Value Add Analysis Reports from July 1, 2018 through the present;

6. Internal New Item Request Forms from May 1, 2018 through the present;

7. Check ledger from November 1, 2018 through the present;

8. Documentation relating to the accounting adjustment in the amount of approximately $108,000 made in 2018 relating to Sous Vide Packaging and Product;

9. Schedule A costs and the supporting information for each cost, from January 1, 2017 to the present;

10. Customer listing and Revenue from April 1, 2018 to the present;

11. Spoilage Report from April 1, 2018 to the present;

12. Warehouse Expense Back-up from January 1, 2017 to the present;

13. Expenditures relating to marketing, brokerage, and sales promotion from January 1, 2018 to the present;

14. G&A expenditures, including back-up documentation, from January 1, 2017 to the present;

15. Fresh Mix processing, inventory, and labor analysis report from January 1, 2018 to the present.

Consistent with Section 18-305 of the Act, the Company is required to respond to this demand within five (5) business days of the date hereof. Accordingly, please advise counsel for Messrs. Lagudi and Ponder, Mark J. Connot of Fox Rothschild LLP, by telephone at (702) 699-5924, fax: (702) 597-5503, email: mconnot@foxrothschild.com, as promptly as practicable within the requisite timeframe, when and where the documents will be made available to Messrs. Lagudi and Ponder and their designated agents.

If the Company contends that this request is incomplete or is otherwise deficient in any respect, please notify Messrs. Lagudi and Ponder immediately in writing to Mark J. Connot of Fox Rothschild LLP, One Summerlin, 1980 Festival Plaza Drive, Suite 700, Las Vegas, NV 89135, by telephone at (702) 699-5924, fax: (702) 597-5503, email: mconnot@foxrothschild.com, setting forth the facts that the Company contends support its position and specifying any additional information believed to be required. In the absence of such prompt notice, Messrs. Lagudi and Ponder will assume that the Company agrees that this request complies in all respects with the requirements of the Act. If the Company does not respond within five (5) business days of the date of this demand, Messrs. Lagudi and Ponder will assume the Company does not intend to comply and will proceed accordingly. Messrs. Lagudi and Ponder reserve the right to withdraw or modify this demand at any time.

Very truly yours,

/s/ Mark J. Connot

Mark J. Connot

MJC:dl
Attachment

cc: Ronald Jay Cohen, Esq.
Daniel P. Quigley, Esq.
Jenna L. Brownlee, Esq.
James J. Pisanelli, Esq.
Debra L. Spinelli, Esq.

LIMITED POWER OF ATTORNEY FOR INSPECTION

I, Paul Lagudi, hereby appoints Fox Rothschild LLP and Mark Connot, Esq., with full power to act as my agent, with full power of substitution, for me and in my name, to examine the books and records of the Fresh Mix, LLC as more fully described in the books and records demand letter addressed to Betsy Lamm, Esq., as I might do if personally present.

This Limited Power of Attorney shall become effective immediately and shall not be affected by my subsequent disability or incapacity. All acts done by my agent pursuant to this power during any period of my disability or incapacity shall have the same effect and inure to my benefit and bind me and my successors in interest as if I were competent and not disabled.

Questions pertaining to the validity, construction and powers created under this instrument shall be determined in accordance with the laws of the State of Delaware.

I have signed this Limited Power of Attorney this 26 day of April 2019.

P. L. G. L.

Paul Lagudi

SWORN TO AND SUBSCRIBED before this ____ day of _____, 2019.

Notary Public

My commission expires: _____

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA COUNTY OF San Diego

Subscribed and sworn to (or affirmed) before me on this 26 day of April, 20 19 by Paul Lagudi

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

D Peacock

(Signature of Notary)

JAS1

D. PEACOCK
COMM. # 2196990
NOTARY PUBLIC • CALIFORNIA
SAN DIEGO COUNTY
My Commission Expires
MAY 26, 2021

JAS1

LIMITED POWER OF ATTORNEY FOR INSPECTION

I, William Todd Ponder, hereby appoints Fox Rothschild LLP and Mark Connot, Esq., with full power to act as my agent, with full power of substitution, for me and in my name, to examine the books and records of the Fresh Mix, LLC as more fully described in the books and records demand letter addressed to Betsy Lamm, Esq., as I might do if personally present.

This Limited Power of Attorney shall become effective immediately and shall not be affected by my subsequent disability or incapacity. All acts done by my agent pursuant to this power during any period of my disability or incapacity shall have the same effect and inure to my benefit and bind me and my successors in interest as if I were competent and not disabled.

Questions pertaining to the validity, construction and powers created under this instrument shall be determined in accordance with the laws of the State of Delaware.

I have signed this Limited Power of Attorney this 26 day of April 2019.

William Todd Ponder

SWORN TO AND SUBSCRIBED before this 26 day of April, 2019.

Notary Public

CHRISTIAN TAPIA
Notary Public, State of Nevada
Appointment No. 10-2427-1
My Appt. Expires Aug 30, 2022

My commission expires: Aug 30, 2022

EXHIBIT N

COHEN
DOWD
QUIGLEY

May 3, 2019

VIA ELECTRONIC AND UNITED STATES MAIL

Mark Connot
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135

Re: Fresh Mix, LLC

Dear Mark:

This letter responds to the books and records request you submitted to Fresh Mix, LLC ("Fresh Mix" or the "Company") on April 26, 2019 on behalf of Paul Lagudi and William Todd Ponder. For ease of reference, Messrs. Lagudi and Ponder are collectively referred to herein as "Respondents."

As a preliminary matter, your April 26, 2019 books and records request ("Request") states that it is made "consistent with [Respondents'] rights under Section 18-305 of the Delaware Limited Liability Act (the "Act") and Article 9 of the Limited Liability Company Agreement of Fresh Mix, LLC ("Operating Agreement"). As discussed in greater detail below, the Request does not comply with the Operating Agreement or Delaware law and is not "consistent" with either authority.

Respondents' Books and Records Request Does Not Comply with the Operating Agreement or Delaware Law

The Operating Agreement permits Members of Fresh Mix to inspect certain books and records of the Company "upon reasonable Notice . . ., at such Member's or such representatives' own expense, for any purpose reasonably related to such Member's

Betsy J. Lamm

602.252.8400
blamm@CDQLaw.com

CDQLaw.com

The Camelback Esplanade One
2425 East Camelback Road
Suite 1100
Phoenix, Arizona 85016

Interest in the Company[.]" [Operating Agreement, § 9.1.] In order to comply with the Operating Agreement, Respondents must (1) articulate a proper purpose for their books and records request; (2) request documents that are reasonably related to that proper purpose; and (3) provide reasonable Notice to the Company, as that term is defined in the Operating Agreement. Respondents' Request violates each of these prerequisites.

Proper Purpose

First, Respondents have not articulated a proper purpose for their Request. The requirement of stating a "purpose reasonably related to the member's interest as a member of the limited liability company" is consistent with § 18-305(a) of the Act. *See, e.g.*, *CM&M Group, Inc. v.* Carroll, 453 A.2d 788, 793 (Del. 1982) (stating that the "paramount factor" in evaluating a books and records request "is the propriety of the [requestor's] purpose in seeking such inspection"; the requesting party bears the burden of proving the proper purpose of the request); *Arbor Place, L.P. v. Encore Opp. Fund, LLC*, 2002 WL 205681, *5-6 (Del. Ch. Jan. 29, 2002) ("To establish a right to inspect records under § 18-305 of the LLC Act, a plaintiff must demonstrate a proper purpose for the inspection."); *accord, e.g.*, *Aloha Power Co., LLC v. Regenesis Power, LLC*, 2017 WL 6550429, *3 & n. 15 (Del. Ch. Dec. 22, 2017) ("Any number of purposes may be proper, depending on the context of a particular case, but a stockholder's purpose must not be adverse to the company, unrelated to a legitimate interest of the stockholder, or intended to harass the corporation."); *Southeastern Penn. Transp. Auth. v. Abbvie, Inc.*, 2015 WL 1753033, *10 (Del. Ch. April 15, 2015 (the requesting party bears "the burden of demonstrating a proper purpose by a preponderance of the evidence"). In an apparent attempt to superficially comply with this requirement, the Request states:

> The purpose of this demand is threefold. *First*, my clients seek true and full information regarding the status of the business and the financial condition of the company. *Second*, my clients seek to ascertain information concerning all the Company transactions. *Third*, my clients request this information for purposes of understanding the affairs of the Company in their capacity as Managers. It has come to their attention that their ownership in the Company may have been devalued by actions taken by the majority members of the Company. These

documents will assist Messrs. Lagudi and Ponder to discern whether there has been a diminution of ownership value, and if so, why.

[Request, pp. 1-2 (errors in original).] The first two stated "purposes," of course, are not truly articulated "purposes." Instead, they reference the scope of documents Respondents are seeking to obtain through their Request. Accepting such an overbroad articulation (essentially a regurgitation of the Operating Agreement and/or statutory language) as a "proper purpose" would entirely vitiate the requirement of articulating a proper purpose. *See, e.g.*, *Sec. First Corp. v. U.S. Die Casting And Dev. Co.*, 687 A.2d 563, (Del. 1997) ("[I]t would invite mischief to open corporate management to indiscriminate fishing expeditions.").[1]

The next articulated purpose appears to be a desire to investigate alleged misconduct by the majority members. As your review of Delaware law will confirm, bare assertions of suspected misconduct are insufficient to support a books and records request.[2] *See, e.g.*, *Aloha Power Co.*, 2017 WL 6550429 at *4 (explaining that party alleging misconduct "must present some credible basis from which the court can infer that waste or mismanagement may have occurred; denying request for books and records based on unsupported allegations); *Southeastern Penn. Transp. Auth.*, 2015 WL 1753033 at *11 (party alleging potential wrongdoing must provide more than bare allegations of misconduct and must explain why it is conducting the investigation and to what end); *Carapico v. Phil. Stock Exchange, Inc.*, 791 A.2d 787, 792 (Del. Ch. 2000) (explaining that "mere curiosity or a desire for a fishing expedition will not suffice"; finding a credible showing to support an investigation based on misconduct identified in an Order issued by the Securities and Exchange

[1] Your letter further states that Respondents seek documents as "Managers" "for purposes of understanding the affairs of the Company." This too is so overbroad that it would render moot the proper purpose requirement, which likewise applies to managers' document requests under Delaware law. *See* DEL. CODE ANN. tit. 6 § 18-305.

[2] Despite our invitation, Respondents have failed to provide any evidence, let alone any credible basis, supporting their assertion of suspected misconduct by the majority members of the Company. [*See* April 29, 2019 Correspondence from B. Lamm.]

Commission).[3] As a result, the only possible remaining proper purpose suggested in your letter is Respondents' desire to determine the value of their ownership interest. The Company will consider this "purpose" in connection with its evaluation of Respondents' Request.

Documents Reasonably Related to a Proper Purpose

Next, the books and records Respondents request must be reasonably related to the proper purpose, if any, they have articulated. This requires that Respondents narrowly tailor their requests to capture documents that would actually serve an articulated proper purpose. *See, e.g.*, *Aloha Power Co.*, 2017 WL 6550429 at *4 (upon showing a right to inspection, that right "is not open-ended; it is restriction to inspection of the books and records needed to perform the task. . . . [a]ccordingly, inspection is limited to those documents that are necessary, essential, and sufficient for the shareholders' purpose"); *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011) ("A document is 'essential' . . . if, at a minimum, it addresses the crux of the shareholder's purpose, and if the essential information the document contains is unavailable from another source"); *Sec. First Corp.*, 687 A.2d at 569 (the requesting party "bears the burden of proving that each category of books and records is essential to the accomplishment of the[ir] articulated purpose for the inspection"). As noted above, the only potential proper purpose articulated in the Request is the desire to value Respondents' ownership interest in the Company. As is evident from a review of the 15 categories of documents identified in the Request (discussed below), the records Respondents seek are, in large part, not reasonably related to this purpose.

Indeed, the manner in which the individual records requests are framed, along with the circumstances surrounding Respondents' submission of the Request, strongly

[3] Investigating claims asserted or anticipated in a separately pending action also does not constitute a proper purpose under Delaware law. Once separate litigation is instituted, the relevant discovery rules govern the exchange of information. To hold otherwise "undermines well-established discovery law." *CHC Inv. LLC v. FirstSun Capital Bancorp*, 2019 WL 328414 , *2 (Del. Ch. Jan. 24, 2019); *see also, e.g.*, *Bizzari v. Suburban Waste Servs., Inc.*, 2016 WL 4540292, *6 (Del. Ch. Aug. 30, 2016) (noting that the availability of discovery in a separate action undercuts the alleged need to obtain books and records for purposes of investigating alleged misconduct).

suggests that the purpose of the Request is to harass Fresh Mix and third-parties Get Fresh Sales, Inc. ("Get Fresh") and Fresh Cuts, LLC ("Fresh Cuts"). The Request seeks records with no logical connection to Respondents' supposed desire to value their interests in the Company. The Request randomly seeks records from seven different time periods without any explanation or basis for tethering these random time periods to any articulated proper purpose. Moreover, while simultaneously refusing to disclose their competing activities or confirm that none exist, Respondents seek a volume of confidential and proprietary records for Fresh Mix, Get Fresh and Fresh Cuts that would cause these entities serious harm if disclosed to or used by a competitor. Respondents' lack of transparency and disclosure on these important issues undermines the propriety of their requests for such sensitive information.

Requisite Notice

Third, the Operating Agreement requires reasonable Notice to the Company of the Request. Your review of the Operating Agreement will confirm that Respondents have not complied with the Notice requirements. [*See* Operating Agreement, § 14.2 (defining the means of providing Notice required under the Operating Agreement; requiring delivery to the Company at its principal place of business by courier, personal delivery, telecopy, overnight or regular United States mail).]

Additional Limitations

In addition to the requirements and limitations framed by the Operating Agreement, Delaware law imposes several additional limitations on requests for corporate books and records. Among other limitations, the Company is not required to provide Respondents with books and records that the Company has already provided to them. *See, e.g.*, *CM&M Group, Inc.*, 453 A.2d at 792. Respondents are also not entitled to receive books and records relating to third-parties and/or separate corporate entities, including books and records of the Company's other Members or Managers. *See, e.g.*, *Arbor Place, L.P.*, 2002 WL 205681 at *5-6 (holding that member of limited liability company has no right to inspect other members' books and records, as those members are "separate companies" and Delaware Courts are reluctant to ignore separate corporate existence). And, the Company is not required to disclose books and records if it in good faith determines that disclosure will harm the business or the request is made for purposes of harassment. *See, e.g.*, *id.* (noting

that, even if a prima facie "proper purpose" is demonstrated, the company "has the opportunity to establish a good faith belief that disclosure of the desired information would not be in the best interest of the entity or some other good faith defense to the production of the requested records"); *Aloha Power Co., LLC*, 2017 WL 6550429 at *3 & n. 15 ("[A] stockholder's purpose must not be adverse to the company, unrelated to a legitimate interest of the stockholder, or intended to harass the corporation.").

With respect to records the Company does provide, reasonable restrictions may be placed on Respondents' review of the records. *See* Del. Stat. § 18-305(f). This includes requiring that Respondents sign additional confidentiality agreements and/or avow that they will not misuse the records requested. *E.g.*, *Bizzari*, 2016 WL 4540292 at *8 (requiring confidentiality order prior to permitting inspection of documents). The Company may further, in appropriate circumstances, restrict Respondents from copying or recording the content of the records provided. *E.g.*, *NAMA Holdings, LLC v. World Market Center Venture, LLC*, 948 A.2d 411, 421 (Del. Ch. 2007) (upholding requirement that recipient execute confidentiality agreement and prohibition on photocopying).

Against this legal and factual framework, we address and respond to each of the 15 separately enumerated document requests set forth in the Request.

Fresh Mix's Responses to Respondents' Individual Books and Records Requests

1. **Margin and Analysis Reports from November 1, 2018 through the present.** While not entirely clear from the request description, the Company understands that Respondents are seeking production of reports that summarize the sales and margins for Fresh Mix products. Because the daily sales and margins are tied to the Company's month-end financials, they are not finalized until the close of each month. Financials for April 2019 are not yet closed. Accordingly, in response to this request, the Company will make available for inspection reports summarizing the sales and margins for Fresh Mix products from November 1, 2018 through March 31, 2019. Fresh Mix will supplement this with the reports summarizing sales and margins for April 2019 once the month-end financials are closed.

2. **Books of Account, as referenced in Section 9.2 of the Operating Agreement.** The Operating Agreement does not define "books of account." Based on the language of Section 9.2, Fresh Mix understands "books of account" to include the Company's balance sheet, income statement, general ledger and check ledger/register. Fresh Mix is already providing Respondents with the Company's balance sheet and income statement on a monthly basis and will continue to do so. If Respondents prefer that Fresh Mix forward those documents to counsel, as opposed to Respondents themselves, please let us know. With respect to the remaining books of account, Fresh Mix will make available for inspection a copy of its general ledger and check register. We note that, unlike many of Respondents' other document requests, the request for books of account does not specify a time period. Out of an abundance of caution (and to remain consistent with Respondents' additional requests discussed below), the Company will make available for inspection its general ledger and check ledger/register from January 1, 2017 through March 31, 2019.

3. **The Reserve (as defined in the Operating Agreement), including any analysis conducted by Fresh Mix (or any of its agents) in connection with setting the Reserve, from January 1, 2017 through the present.** Fresh Mix has not historically created Reserves and does not have documentation responsive to this request for the years 2017 or 2018. Documentation responding to this request for 2019 has already been provided to Respondents. [*See* April 8, 2019 Letter from S. Goldberg; April 10, 2019 Email Correspondence from S. Goldberg, with attachment.]

4. **Daily Usage Reports from November 1, 2018 through the present.** The Company does not have any such reports specifically for Fresh Mix.[4] To the extent this request is seeking daily usage reports and product analysis pertaining to Get Fresh, the request is improper and overbroad. The Company declines to provide Get Fresh records in response to Respondents' purported request for Fresh Mix books and records. In

[4] The sole exception would be a daily usage report pertaining to cheesecakes sold to Trader Joe's.

addition, even if daily usage reports existed, there is no reasonable relation between such reports and Respondents' alleged purpose (the need to value their ownership interest in the Company).

5. **Value Add Analysis Reports from July 1, 2018 through the present.** Similar to the daily usage reports, Fresh Mix does not have "value add analysis reports." As no such reports exist for Fresh Mix, it appears Respondents are improperly seeking value add analysis reports for Fresh Cuts, a separate manufacturing entity. Respondents are not entitled to Fresh Cuts books and records. Finally, even if value add analysis reports existed for Fresh Mix, there is no reasonable relation between such reports and Respondents' alleged purpose (the need to value their ownership interest in the Company).

6. **Internal New Item Request Forms from May 1, 2018 through the present.** Respondents' request for all internal New Item Request Forms for Fresh Mix for the past 12 months bears no reasonable relation to their alleged purpose for demanding inspection of the Company's books and records. Moreover, all such forms prepared on behalf of Fresh Mix between May 1, 2018 through November 25, 2018, would have been prepared and submitted by Respondents on Fresh Mix's behalf. The Company declines to engage in the extremely burdensome process of compiling the New Item Request Forms for the past 12 months without any articulation or credible evidence demonstrating a proper purpose to which these Forms relate. Moreover, the Company's New Item Request Forms contain information that could seriously damage the Company if disclosed to or used by a competitor. Respondents' refusal to confirm whether they are engaged in any actions to compete (or prepare to compete) further reveals the inappropriate nature of this document request.[5]

[5] Respondents' requests for Get Fresh and Fresh Cuts books and records is especially troubling, as the records requested contain significant confidential and proprietary information that would result in serious damage if disclosed to a competitor. Respondents' request for such confidential and proprietary information, while simultaneously refusing to explain their efforts (or disclaim any such efforts) to compete with the Company, evidences the improper purpose of their Request. To

7. **Check Ledger from November 1, 2018 through the present.** The Company will make available for inspection its check ledger/register, as set forth in the response to request no. 2.

8. **Documentation Relating to the Accounting Adjustment made in 2018 relating to Sous Vide Packaging and Product.** Documentation responding to this request for 2019 has already been provided to Respondents. [*See* February 19, 2019 Email Correspondence from B. Leslie, with attachments.]

9. **Schedule A Costs and Supporting Information for Each Cost from January 1, 2017 to the present.** Although not clear, this request appears to seek information relating to reimbursable costs set forth in the table attached at Schedule A to the January 2010 Asset Purchase and Formation Agreement between Get Fresh, Lagudi Enterprises, LLC, and Respondents. Schedule A to the Asset Purchase Agreement sets forth the methodology to which the parties agreed. Respondents are not entitled under the Asset Purchase Agreement to receive documentation addressing each and every reimbursable cost. Moreover, the underlying documentation consists of third-party records, of Get Fresh and/or Fresh Cuts, not Company records. Respondents are not entitled under the Operating Agreement or Delaware law to review the books and records of Get Fresh or Fresh Cuts. Finally, Respondents have not articulated any proper purpose for requesting such "supporting information" (whatever Respondents intended that phrase to mean). If Respondents can define "supporting information" and articulate a proper purpose for requesting such information, Fresh Mix will consider a request for "supporting information" that is narrowly tailored to particular reimbursable cost(s) at issue (if any).

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the extent Respondents can articulate a proper purpose for seeking the documents requested, the Company will reconsider their request to make further confidential Fresh Mix documents available for inspection, which production would be contingent on Respondents' entry into an acceptable confidentiality agreement.

10. **Customer Listing and Revenue from April 1, 2018 to the present.** Fresh Mix does not maintain a report or listing that identifies this information for Fresh Mix.

11. **Spoilage Report from April 1, 2018 to the present.** Fresh Mix does not maintain a report or listing that identifies this information for Fresh Mix. As no such reports exist for Fresh Mix, Respondents appear to be improperly seeking spoilage analysis for third-party Get Fresh. Respondents are not entitled to Get Fresh books and records. Moreover, even if spoilage reports existed for Fresh Mix, there is no reasonable relation between such reports and Respondents' alleged purpose (the need to value their ownership interest in the Company).

12. **Warehouse Expense Back-up from January 1, 2017 to the present.** This request overlaps with request no. 9 and seeks production of a subset of documentation relating to warehouse expenses. As set forth in response to request no. 9, Respondents have already agreed to the methodology for calculating such expenses. Respondents are not entitled to receive documentation addressing each and every underlying cost item in that calculation. Moreover, the underlying documentation consists of third-party Get Fresh records, not Company records. Respondents are not entitled under the Operating Agreement or Delaware law to review the books and records of Get Fresh. Finally, Respondents have not articulated any proper purpose for requesting such "expense back-up." If Respondents can articulate a proper purpose for requesting such information, Fresh Mix will consider a request for documentation that is narrowly tailored to particular expense(s) at issue (if any).

13. **Expenditures Relating to Marketing, Brokerage, and Sales Promotion from January 1, 2018 to the present.** All such expenditures are reflected in the Company's general ledger, which the Company will make available in response to this Request.

14. **G&A Expenditures, including Back-up Documentation, from January 1, 2017 to the present.** All such expenditures are reflected in the Company's general ledger, which the Company will make available in response to this Request. If Respondents can articulate a proper purpose

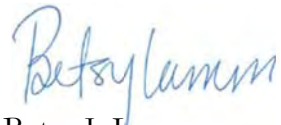
for requesting "back-up documentation" for a particular expenditure, the Company will consider a properly supported request for "back-up documentation" that is narrowly tailored to particular expenditure(s) at issue (if any).

15. **Fresh Mix Processing, Inventory, and Labor Analysis Report from January 1, 2018 to the present.** No such report exists. The Company, thus, has no documents responsive to this Request.

With respect to the items set forth above that Fresh Mix will make available in response to this Request, those records will be available for inspection by no later than **Friday, May 10, 2019**. Fresh Mix will further supplement this to include the financial documents relating to April 2019 when they are available. If you or another legal representative of Respondents will perform or attend the inspection, the records will be made available at the office of Mr. Bruce Leslie, counsel for the Company. If Respondents or their non-legal representatives only will be performing and attending the inspection, the records can be made available at the Company's principal place of business.

So that we may schedule the inspection, please let us know the following at your earliest convenience: (1) whether you or another legal representative of Respondents will perform or attend the inspection; and (2) potential dates on which Respondents or their representatives are available to conduct the inspection.[6]

Very truly yours,



Betsy J. Lamm

[6] While unclear, your letter could be read as suggesting that Fresh Mix is obligated to produce documents responsive to a books and records request within five business days. The Operating Agreement requires "reasonable Notice" to the Company before records must be made available for inspection. The relevant Delaware statute further requires only that the Company respond to the request within five business days. Despite not receiving proper Notice under the Operating Agreement, the Company has timely responded to the Request.

cc (via electronic mail):

Bruce Leslie
James J. Pisanelli
Debra L. Spinelli
Ronald J. Cohen
Daniel P. Quigley
Jenna L. Brownlee

EXHIBIT O

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May 21, 2019

Via Email

Betsy J. Lamm, Esq.
Cohen Dowd Quigley
The Camelback Esplanade One
2425 East Camelback Road, Ste. 1100
Phoenix, AZ 85016
blamm@cdqlaw.com

Re: Lagudi, et al. v. Fresh Mix, LLC, et al.

Dear Betsy:

This letter follows-up on your letter, dated May 3, 2019, our letter, dated May 8, 2019, and Mr. Leslie's response to our inquiries concerning books and records, dated May 19, 2019.

We note Defendants understate Plaintiffs' rights to Fresh Mix, LLC's ("Fresh Mix") books and records. As their requests state, Plaintiffs seek the books and records in their capacities as both Members and Managers of Fresh Mix. In those capacities, there is no question they are entitled to the documents set forth in my April 26, 2019 letter.

Delaware law treats Managers of LLCs akin to directors. *See, e.g., RED Capital Inv. L.P. v. RED Parent LLC*, 2016 WL 612772, at *4 (Del. Ch. Feb. 11, 2016). Like directors, Delaware law considers a manager's access to books and records as of "fundamental importance and a necessary concomitant to the imposition" of the manager's "fiduciary duties." *See Obeid v. Gemini Real Estate Advisors, LLC*, 2018 WL 2714784, at *3 (Del. Ch. June 5, 2018). Critically, that means Delaware law "works from the presumption that a sitting director is entitled to unfettered access to the books and records of the corporation for which he sits and he certainly is entitled to receive

whatever the other directors are given." *Intrieri v. Avatex Corp.*, 1998 WL 326608, at *1 (Del. Ch. June 12, 1998).

Defendants have the burdens confused. Plaintiffs' burden for establishing access to the books and records is minimal. They make out a prima facie case when they show they are a manager, have demanded inspection, and Defendants have refused the demand. *See, e.g., Hooldgreiwe v. Nostalgia Network, Inc.*, 19 Del. J. Corp. L. 326, 331 (Del. Ch. 1993). Plaintiffs' April 26, 2019 letter and your response confirms Plaintiffs have made a prima facie case.

Defendants carry the "rather substantial burden of proving that the plaintiff's demand to inspect books and records in his capacity as a . . . manager is not motivated by a proper purpose." *Bizzari v. Suburban Waste Servs., Inc.*, 2016 WL 4540292, at *1 (Del. Ch. Aug. 30, 2016). "[T]he mere prospect of harm to a corporate defendant" is not sufficient. *Compaq Comput. Corp. v. Horton*, 631 A.2d 1, 4 (Del. 1993). Defendants must provide "concrete evidence" that the Plaintiffs "will use privileged information to harm the Company in violation" of their fiduciary duties. *Kalisman v. Friedman*, 2013 WL 1668205, at *5 (Del. Ch. Apr. 17, 2013).[1]

Defendants have not met their substantial burden justifying denying Plaintiffs the requested information. Thus, Plaintiffs are entitled to receive every document they have requested. To assist Defendants in fulfilling their duties, we provide a response to each of your points below. Please note that unless we receive confirmation by close of business May 24, 2019 that Defendants will provide the documents first requested on April 26, 2019, we will have met and conferred on these issues and Plaintiffs will seek Court assistance, consistent with the Court's May 20, 2019 Minute Order.

1. Margin and Analysis Reports from November 1, 2018 through the present.

Your letter states that Defendants will make available "reports summarizing the sales and margins for Fresh Mix products from November 1, 2018 through March 31, 2019." We informed you that such "summaries" are not sufficient. We have provided Mr. Leslie (counsel for Defendants) twice with copies of the type of Margin and Analysis Reports Plaintiffs expect to receive. These are the same reports that all Managers have historically received. On May 19, 2019, Mr. Leslie informed us that "a form of the margin reports will be provided" but that "to be clear,

[1] In a footnote, Defendants suggest Plaintiffs have an improper purpose, but provide no substantiating evidence.

they won't contain all the information you request," which presumably means it will not be in the form that the Managers historically received them.

This is not acceptable. Please confirm that the Margin Reports from November 1, 2018 through the present will be the same in form and content as previously provided to the Managers.

2. **Books of Account**

Defendants state that they will make certain documents available on Wednesday, May 22, 2019 responsive to this request. We will review those documents and determine if what is produced is sufficient.

3. **The Reserve (as defined in the Operating Agreement), including any analysis conducted by Fresh Mix (or any of its agents) in connection with setting the Reserve, from January 1, 2017 through the present**.

Defendants suggest they have not "historically" created Reserves. Please confirm that Defendants do not consider prior entries for "working capital" for the years 2017 and 2018 as "Reserve," as that is defined in the Operating Agreement.

For 2019, Defendants suggest Mr. Goldberg's April 8, 2019 letter and April 10, 2019 letter provided sufficient information to respond to this request. It did not. Please supplement with all documents relating to the Reserve, including any discussion of the Reserve and the analysis conducted by Fresh Mix (or any of its agents) in connection with setting the Reserve.

4. **Daily Usage Reports from November 1, 2018 through the present.**

Defendants admit these documents exist as to cheesecakes sold to Trader Joe's, but refuses to produce them, nor give a reason as to the refusal to produce. Please provide these documents immediately.

This request seeks documents that Plaintiffs have previously received in their capacity as Members and Managers of Fresh Mix. Further, the other Managers of Fresh Mix continue to receive them. These reports will ensure that Fresh Mix is receiving proper credit for the items being sold by Fresh Mix. As noted above, Delaware law requires you to produce them. Please produce them immediately.

5. **Value Add Analysis Reports from July 1, 2018 through the present.**

Defendants incorrectly suggest these reports do not exist with Fresh Mix information. Mr. Ponder, along with Mr. Goldberg, Mr. Gastelum and Ms. Fickes received copies of these reports in 2018. Please provide immediately.

6. **Internal New Item Request Forms from May 1, 2018 through the present.**

Defendants suggest these documents are not relevant, would be "extremely burdensome" to produce, and "could seriously damage the Company if disclosed to or used by a competitor." Defendants provide no evidence to support these assertions. These documents are automatically generated and were sent to Mr. Ponder almost daily. The parties have historically used these documents to ensure Fresh Mix received the new items to which it was entitled. With regard to damage to a competitor, there is simply no basis for that assertion. Neither Mr. Ponder nor Mr. Lagudi currently works for or has any present intention to work for a competitor of Fresh Mix.[2] Plaintiffs reiterate their request for these documents.

7. **Check Ledger from November 1, 2018 through the present.**

Your letter suggests these documents will be made available tomorrow. Plaintiffs reserve the right to address any failure to comply with this representation.

8. **Documents Relating to the Accounting Adjustment made in 2018 relating to Sous Vide Packaging and Product.**

Defendants suggest these documents were already provided on February 19, 2019. Those documents were neither accurate nor sufficient. For instance, they were merely summary reports that did not provide complete information regarding the accounting adjustments. Further, the information it did provide was not accurate. It stated that there was product inventory in Missouri, when in fact that had not been the case. In 2017, Get Fresh admitted through its Vice President of Finance, Mary Fickes, that it had in fact over-charged Fresh Mix in connection with the whole produce category for Sous Vide. Plaintiffs request the back-up reporting, invoices and statements

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[2] Defendants incorrectly state that Plaintiffs refuse to confirm whether they are engaged in any actions to compete or prepared to compete. Defendants, for instance, suggest that MGM Resorts International ("MGM") is a competitor of Fresh Mix and that Mr. Ponder is currently considering employment with MGM. Neither assertion is correct.

that show the charges Get Fresh made to Fresh Mix and then had to correct, particularly for the whole produce category. Please provide immediately.

9. **Schedule A Costs and Supporting Information for Each Cost from January 1, 2017 to the present.**

Defendants state Plaintiffs are not entitled to receive documentation addressing each and every reimbursable cost. That is not correct, as the legal authority cited above demonstrates. In fact, Plaintiffs received such information routinely from the Vice President of Finance for Get Fresh. That information showed Get Fresh often over-billed Fresh Mix. Please provide this information immediately.

10. **Customer Listing and Revenue from April 1, 2018 to the present.**

We find it hard to believe that Fresh Mix does not maintain documents showing its customers and revenue. Please check again and produce such documents immediately.

11. **Spoilage Report from April 1, 2018 to the present.**

Defendants suggest there are no such reports. The income statements for Fresh Mix include a number for spoilage. Please provide all documents and analysis used to generate that number.

12. **Warehouse Expense Back-up from January 1, 2017 to the present.**

Defendants raise a multitude of objections, none of which has merit. This request, like request no. 9, asks for basic information. Plaintiffs request the documents that show the cost charged to Fresh Mix so that Plaintiffs, as Members and Managers of Fresh Mix, may have confidence that Fresh Mix is being properly charged. Defendants provide no supportable basis for refusing to provide this basic but important information to the Plaintiffs. Please provide immediately.

13. **Expenditures Relating to Marketing, Brokerage, and Sales Promotion from January 1, 2018 to the present.**

Your letter suggests these documents will be made available tomorrow. Plaintiffs reserve the right to address any failure to comply with this representation.

14. G&A Expenditures, including Back-up Documentation, from January 1, 2017 to the present.

Your letter suggests these documents will be made available tomorrow. Plaintiffs reserve the right to address any failure to comply with this representation. Further, Defendants argue Plaintiffs must state a proper purpose for the back-up documentation. As noted above, Plaintiffs have done so. Please provide the back-up for all G&A expenditures.

15. Fresh Mix Processing, Inventory, and Labor Analysis Report from January 1, 2018 to the present.

Defendants state no such documents exist. Yet, Defendants charge Fresh Mix costs for processing, inventory and labor. Please provide the analysis conducted for assessing such costs to Fresh Mix.

Please respond no later than close of business, May 24, 2019.

Very truly yours,

/s/ Mark J. Connot

Mark J. Connot

MJC:dl
cc: Ronald Jay Cohen, Esq.
Daniel P. Quigley, Esq.
Jenna L. Brownlee, Esq.
James J. Pisanelli, Esq.
Debra L. Spinelli, Esq.
Bruce Leslie, Esq.

EXHIBIT P

Bridges, Emily

From: Debra Spinelli <dls@pisanellibice.com>
Sent: Tuesday, May 21, 2019 10:52 PM
To: Bruce Leslie; Berkley, Brian A.
Cc: Connot, Mark J.; 'Betsy Lamm'; 'Ronald Jay Cohen'; James Pisanelli; 'Evan Barenbaum, Esquire'; 'Daniel Quigley'; Bridges, Emily
Subject: RE: [EXT] Fresh Mix
Attachments: NDA - 05212019.doc

Brian –

Following up on Bruce's email, thank you for confirming the confidentiality obligations in Section 9.7 of the Operating Agreement. However, I think we both must recognize the fact that your clients' request for books and records comes at a time when the parties are involved in contentious litigation with low levels of trust for one another. Rather than foment further contention under these circumstances, we think it necessary and prudent for the parties to execute a nondisclosure agreement that is consistent with Operating Agreement, and expressly outlines the treatment of the confidential materials. This protects both of our clients.

Reiterating a point Bruce made, because of our litigation backdrop and the various issues unresolved in the letter exchanges, we will insist on a written agreement setting forth the expected treatment of the Company's books and records before an inspection.

Attached is an NDA that we think provides standard language and terms. Please review it and let us know if there are any terms unacceptable to your clients or provisions you'd like to modify. While your clients can, of course, choose to litigate the issue of how to treat confidential company documents/information, we ask that you consider the NDA as an alternative. Confidentiality and treatment of those confidential records should not be an issue of great contention. In fact, under the circumstances of our respective clients' battles, a court is likely to allow and issue a protective order mirroring the terms in a standard NDA like the one we attach. Please let us know your thoughts. I look forward to your response.

Thanks,

Debra L. Spinelli
Managing Partner
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400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100

From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Tuesday, May 21, 2019 6:44 PM
To: 'Berkley, Brian A.' <bberkley@foxrothschild.com>
Cc: 'Connot, Mark J.' <MConnot@foxrothschild.com>; 'Betsy Lamm' <BLamm@cdqlaw.com>; 'Ronald Jay Cohen' <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; James Pisanelli <jjp@pisanellibice.com>; 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>; 'Daniel Quigley' <DQuigley@cdqlaw.com>; 'Bridges, Emily' <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Hey Brian:

My comments-

First- hahaha, I think we agree that the facts are the facts.

Third- please review my email that you responded to. I was clear that you are not getting a margin report containing all that was in the form you attached to your email. I think the reasons have been stated many times, and the questions and confirmations asked for were unanswered, so I'm not responding.

Fifth- The company emptied the contents of your clients' offices, putting everything (that would fit) into boxes. What was obviously personal was sent to Mr. Bendavid. What appeared to be company property was put in a box that wasn't sent to Bendavid. That is the "box" in question that we will review tomorrow. There is nowhere to "search" for the coin other than that box. You have said "no" to looking into that box.
Further, instead of using "you" in your narrative, which suggests you mean "me", you should be using "the company".

Sixth- Ms. Spinelli will forward to you later tonight the form of Nondisclosure Agreement that your clients will need to execute tomorrow before being given access to the books and records the company has agreed to produce.

Best
b

Bruce A. Leslie, Chtd.
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Phone: 702-990-3798
www.bleslielaw.com

From: Berkley, Brian A. <bberkley@foxrothschild.com>
Sent: Tuesday, May 21, 2019 2:30 PM
To: Bruce Leslie <blesliechtd@gmail.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>; Daniel Quigley <DQuigley@cdqlaw.com>; Bridges, Emily <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Bruce – see below.

Brian Berkley
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From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Sunday, May 19, 2019 2:44 PM
To: Berkley, Brian A. <bberkley@foxrothschild.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>; Daniel Quigley <DQuigley@cdqlaw.com>
Subject: Re: [EXT] Fresh Mix

Hey Brian:
Our responses in the order of your email.

First : I want to be clear, I am outside counsel for Fresh Mix and Get Fresh. I am not an "in-house attorney." While you can reserve any rights you'd like, your "view" of my role does not change the facts. I hope I clarified any confusion you might have had, that this was an honest mistake, and if so, let's put this issue "to bed".

We will have to agree to disagree and allow the record to speak for itself.

Second: You accepted our proposed process to allow your clients to identify from the list we provided those computer files they claim are personal files (e.g., personal photographs). We provided the file listings a week ago, and your clients have not yet identified any files from those lists. When your clients identify the files they claim are personal, since those files are conflated with Company documents, we will review the file names to determine whether Fresh Mix agrees with Paul and Todd's characterizations. If the company cannot determine that the files identified are likely to consist solely of your clients' personal matters, we will not be able to provide those files to you. For the files where we cannot reach agreement, we will have to determine another approach. We can address this if it arises when your clients elect to respond.

You provided a file listing with thousands of files. Our clients are working through them and we will provide a response as soon as possible.

Third: Do you prefer the margin reports be sent to you (or your entire team) through me, or directly from Fresh Mix to Paul and Todd? As these documents contain confidential, sensitive company information, the company expects your clients to treat them as such and not disclose this information to any third parties, including without limitation Carlos Gonzalez and John Shigley. Moreover, as you have now raised the desire to have these persons present during a review of Fresh Mix's books and records (which I'll address below), please confirm in writing that (1) previously provided financial information has not been provided to Carlos Gonzalez, John Shigley, or any other third parties; and (2) when provided in the future, the margin information will not be shared with these individuals, or any other third parties. Fresh Mix will require confirmation before sending the requested information. If we can arrive at an agreement, a form of the margin reports will be provided at our meeting. To be clear, they won't contain all the information you request.

Our clients have complied with and will continue to comply with the Confidentiality obligations set forth in Section 9.7 of the Operating Agreement. You have not answered my repeated question. Please confirm that the Margin Report you will provide will contain the same form and information set forth in the Margin Report that our clients received routinely prior to November 2018. And, if not, please explain why not.

Fourth: The plan is to bring the records being produced in electronic form. Someone will be available to assist in the review of those records and to explain the accounting methodology and conventions. We can then make electronic copies as appropriate. Wednesday between 2:00 and 5:00 pm is available, assuming we can sort out the issues herein.

Mark has confirmed 2:00 pm on Wednesday.

Fifth: Well, since you object to Mr. Goldberg looking for the coin, Mr. Connot will discover if it exists when the box is jointly reviewed. The process will be that Mr.Connot and I, by ourselves, will review each document in the box. We will sort the stuff into three piles. One, what we agree is personal or privileged. Two, what we agree belongs to the company. Three, what we don't agree upon. Your clients take pile one, the company takes pile two, and pile three remains in the box until ownership is determined in litigation, arbitration, or another method.

Regarding your threat, if you want to bring anything before the judge, I suggest you do so. It is your case and client to represent as you deem advisable. Law and logic, not threats, may change our views.

We again remind you of your ethical obligation to protect attorney-client privilege communications. We specifically requested you to inform us whether or not anyone from Defendants has reviewed the contents of the box after we informed you that the box may contain privileged communications. You still have not answered the question, which means we must assume that you have not complied with the obligation to protect such communications when informed of their existence.

Further, we did not object to Mr. Goldberg looking for the "coin." You are mixing two different things. Our concern about Mr. Goldberg looking inside the box was because you said he had to look into the box for "security" reasons, not to look for the "coin." We expressed doubt that there were any security concerns, and further reminded you of our attorney-client privilege concerns in connection with the box.

Separately, you asked for a visual of the coin, which we provided. The coin is likely in the desk and/or the desk blotter/pad used by Mr. Lagudi. It is an important piece of personal property to my client. It appears that you are playing games in connection with your obligation to look for such materials. Please confirm that you have looked for the coin and where you have looked so that we can be assured you have complied with the Court's Order in this regard.

Sixth: While the Company does not object to Paul, Todd, their counsel, or qualified public accounting professionals reviewing books and records, subject to their prior execution of a confidentiality agreement (which will be provided), Carlos Gonzalez (a former employee) and John Shigley (a recent executive of an important customer) may not participate in the review. The company cannot conceive how they would be appropriate participants. If you explain in detail the basis for your request and how they facilitate a proper purpose, it will be considered.

Plaintiffs have already agreed to confidentiality protections under Section 9.7 of the Operating Agreement. Requiring them to sign another confidentiality agreement before providing them with the books and records is an unreasonable and unnecessary roadblock to their rights and will act as further breach of the Operating Agreement

and a violation of applicable Delaware law. With regard to Messrs. Gonzalez and Shigley, you have provided no basis for your objection to their presence. Nevertheless, for purposes of tomorrow, they will not be present.

Seventh: You did not address my proposed methodology for reviewing the contents of the box. This box is the issue. See Fifth above.

Mr. Connot and you can discuss the process for reviewing the box tomorrow.

Eighth: A mother board is what you asked for, even after my asking for correction. There is one hard drive. Unless, there is another in the box. It will be provided at the meeting.

Thank you.

Ninth: I don't control Mr. Quigley, and I don't control the others.

Per Ms. Lamm's email, she requests that you include Mr. Quigley in your communications. We note he was not cc'd in your communication from May 10, 2019, to which we replied and to which Ms. Lamm took issue.

So, it would be helpful to come to closure on these issues, and receive your agreement on the process for the inspection of the box and production of the books and records before Wednesday. Do I have that conversation with you or Mr Connot?

See above.

Best

b

Bruce A. Leslie, Chtd.
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Phone: (702) 990-3798
Email: blesliechtd@gmail.com
Web: www.bleslielaw.com

On Thu, May 16, 2019 at 2:25 PM Berkley, Brian A. <bberkley@foxrothschild.com> wrote:

> Bruce,
>
> -
>
> See our responses below.
>
> -
>
> **Brian Berkley**
> Partner
> **Fox Rothschild LLP**
> 2000 Market Street

20th Floor
Philadelphia, PA 19103-3222
(215) 299-2043 - direct
(609) 760-2309 – cell

(215) 299-2150- fax
bberkley@foxrothschild.com
www.foxrothschild.com

From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Friday, May 10, 2019 1:59 PM
To: Berkley, Brian A. <bberkley@foxrothschild.com>; Connot, Mark J. <MConnot@foxrothschild.com>
Cc: Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>
Subject: [EXT] Fresh Mix

Dear Mark and Brian:

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First, can you include me in the correspondence? I get copied on some of the stuff, but not on all.

We will include you in correspondence per your request. Please note, however, that your role appears to be much more as an in-house lawyer, as opposed to outside counsel, and so we have viewed you as the opposing party. We reserve the right to continue that view downstream and preserve all arguments in that regard.

Second, I attach the forensic listings of the files on the computers used by Paul and Todd. Please indicate which files are of interest to you or your clients.

Consistent with the Court Order, we will identify the files that relate to personal property.

Third, under separate email I will send you the margin reports prepared by Scott.

We still await this margin report. Please send asap. Also, please confirm, as we requested, that this margin report will include the information included in the sample report I sent to you last week (see attached again).

Fourth, can we collectively agree on dates for the production of books and records and inspection of the "box of stuff" your clients claim may contain personal items not delivered to Mr. Bendavid? The dates you requested are not possible, both Scott and I are out of town. Can you provide some dates over the next two weeks, preferably Tuesday through Thursday?

We are available Tuesday afternoon and all of Wednesday of next week, May 21 and 22. Please confirm the date and time. With regard to the books and records, please inform us as to whether we will need to employ a third-party copying service, or whether you have copying services available.

Fifth, what is a "gold coin"? Do you have a better description? Is it numismatic, bullion, commemorative? Is it in a case or envelop, and is there documentation attached? I've asked Scott to go through the "box" for security purposes, and a description would be helpful.

See the attached photograph of a sample coin.

Despite my repeated requests, you have failed to confirm that nobody, including Scott Goldberg, will go through the box. There is no bona fide "security purpose" served by Mr. Goldberg going through the box, nor have you articulated one. As you know, we have repeatedly informed you that there may be attorney-client privilege information in the box. You have an ethical obligation to respect and not violate my client's attorney-client privilege rights. Unless you confirm today that you have respected those rights and Mr. Goldberg has not reviewed the "box," we will have no choice but to inform the Court of your unethical conduct.

Sixth, who will be present for the production of the books and records? I'd anticipate an accounting professional. The company will have the VP Finance present to walk that person through the GL and check register, the books being presented. Our team is discussing what sort of affidavit/confidentiality document will need to be signed, and when I have it, I will present it to you for review.

Mark Connot, Todd Ponder, Paul Lagudi, Carlos Gonzalez, and John Shigley.

Seventh, the "box" will be available for our joint inspection. If you prefer a different time for this review, I will accommodate. I anticipate it will be a lawyers only event, since there is debate on if there is anything of your clients in the box that could be "personal". If we can't agree on what is the business' record, I will retain it and it can be sorted out in court or arbitration. Can you confirm your clients received the prior delivery of their personal property to Mr. Bendavid?

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They are silver 5x5 inch hard drives. Please make sure both are provided to our clients at the meeting.

Ninth, I am unclear if there are specific roles or areas of responsibility within your team. Shall I copy each of you on every correspondence? When is Mr. Barenbaum included?

Include everyone I have included in this email from our side at all times. We note that David Quigley did not follow this instruction with his most recent communication, as he left me off the service list. Please inform everyone on your side to include every member of our team on all communications. Thank you.

Looking forward to your replies.

Bruce

Bruce A. Leslie, Chtd.

3960 Howard Hughes Parkway, Suite 500

Las Vegas, NV 89169

Phone: (702) 990-3798

Email: blesliechtd@gmail.com

Web: www.bleslielaw.com

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Fox Rothschild LLP by replying to this email and delete the original and reply emails. Thank you.

EXHIBIT Q

Bridges, Emily

From: Berkley, Brian A.
Sent: Wednesday, May 22, 2019 1:42 PM
To: Debra Spinelli; Bruce Leslie
Cc: Connot, Mark J.; 'Betsy Lamm'; 'Ronald Jay Cohen'; James Pisanelli; 'Evan Barenbaum, Esquire'; 'Daniel Quigley'; Bridges, Emily
Subject: RE: [EXT] Fresh Mix
Attachments: 052119 LTR B LAMM-C2-C1-C1.pdf

Debra,

We have reviewed the proposed NDA and Section 9.7 of the Operating Agreement. There simply is no basis to require execution of an NDA given the protections set forth in Section 9.7. As we already noted, our clients have complied and will continue to comply with their respective confidentiality obligations as set forth in Section 9.7, and that includes following those obligations in connection with the books and records. The proposed NDA is neither necessary nor appropriate.

As we set forth in the attached letter, Delaware law provides Managers like Plaintiffs "unfettered" access to the books and records. There is no basis to require our clients to execute an NDA, particularly in light of the protections set forth in Section 9.7 of the Operating Agreement to which all Members have agreed. Requiring Plaintiffs to execute the NDA is designed solely to frustrate Plaintiffs' rights.

We expect that Defendants will make the entirety of the books and records available today.

Brian Berkley
Partner
Fox Rothschild LLP
2000 Market Street
20th Floor
Philadelphia, PA 19103-3222
(215) 299-2043 - direct
(609) 760-2309 – cell
(215) 299-2150- fax
bberkley@foxrothschild.com
www.foxrothschild.com

From: Debra Spinelli <dls@pisanellibice.com>
Sent: Tuesday, May 21, 2019 10:52 PM
To: Bruce Leslie <blesliechtd@gmail.com>; Berkley, Brian A. <bberkley@foxrothschild.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; 'Betsy Lamm' <BLamm@cdqlaw.com>; 'Ronald Jay Cohen' <RCohen@cdqlaw.com>; James Pisanelli <jjp@pisanellibice.com>; 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>; 'Daniel Quigley' <DQuigley@cdqlaw.com>; Bridges, Emily <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Brian –

Following up on Bruce's email, thank you for confirming the confidentiality obligations in Section 9.7 of the Operating Agreement. However, I think we both must recognize the fact that your clients' request for books and records comes at

a time when the parties are involved in contentious litigation with low levels of trust for one another. Rather than foment further contention under these circumstances, we think it necessary and prudent for the parties to execute a nondisclosure agreement that is consistent with Operating Agreement, and expressly outlines the treatment of the confidential materials. This protects both of our clients.

Reiterating a point Bruce made, because of our litigation backdrop and the various issues unresolved in the letter exchanges, we will insist on a written agreement setting forth the expected treatment of the Company's books and records before an inspection.

Attached is an NDA that we think provides standard language and terms. Please review it and let us know if there are any terms unacceptable to your clients or provisions you'd like to modify. While your clients can, of course, choose to litigate the issue of how to treat confidential company documents/information, we ask that you consider the NDA as an alternative. Confidentiality and treatment of those confidential records should not be an issue of great contention. In fact, under the circumstances of our respective clients' battles, a court is likely to allow and issue a protective order mirroring the terms in a standard NDA like the one we attach. Please let us know your thoughts. I look forward to your response.

Thanks,

Debra L. Spinelli
Managing Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100

From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Tuesday, May 21, 2019 6:44 PM
To: 'Berkley, Brian A.' <bberkley@foxrothschild.com>
Cc: 'Connot, Mark J.' <MConnot@foxrothschild.com>; 'Betsy Lamm' <BLamm@cdqlaw.com>; 'Ronald Jay Cohen' <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; James Pisanelli <jjp@pisanellibice.com>; 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>; 'Daniel Quigley' <DQuigley@cdqlaw.com>; 'Bridges, Emily' <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Hey Brian:
My comments-

First- hahaha, I think we agree that the facts are the facts.

Third- please review my email that you responded to. I was clear that you are not getting a margin report containing all that was in the form you attached to your email. I think the reasons have been stated many times, and the questions and confirmations asked for were unanswered, so I'm not responding.

Fifth- The company emptied the contents of your clients' offices, putting everything (that would fit) into boxes. What was obviously personal was sent to Mr. Bendavid. What appeared to be company property was put in a box that wasn't sent to Bendavid. That is the "box" in question that we will review tomorrow. There is nowhere to "search" for the coin other than that box. You have said "no" to looking into that box.
Further, instead of using "you" in your narrative, which suggests you mean "me", you should be using "the company".

Sixth- Ms. Spinelli will forward to you later tonight the form of Nondisclosure Agreement that your clients will need to execute tomorrow before being given access to the books and records the company has agreed to produce.

Best
b

Bruce A. Leslie, Chtd.
3960 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Phone: 702-990-3798
www.bleslielaw.com

From: Berkley, Brian A. <bberkley@foxrothschild.com>
Sent: Tuesday, May 21, 2019 2:30 PM
To: Bruce Leslie <blesliechtd@gmail.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>; Daniel Quigley <DQuigley@cdqlaw.com>; Bridges, Emily <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Bruce – see below.

Brian Berkley
Partner
Fox Rothschild LLP
2000 Market Street
20th Floor
Philadelphia, PA 19103-3222
(215) 299-2043 - direct
(609) 760-2309 – cell
(215) 299-2150- fax
bberkley@foxrothschild.com
www.foxrothschild.com

From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Sunday, May 19, 2019 2:44 PM
To: Berkley, Brian A. <bberkley@foxrothschild.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>; Daniel Quigley <DQuigley@cdqlaw.com>
Subject: Re: [EXT] Fresh Mix

Hey Brian:
Our responses in the order of your email.

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We will have to agree to disagree and allow the record to speak for itself.

Second: You accepted our proposed process to allow your clients to identify from the list we provided those computer files they claim are personal files (e.g., personal photographs). We provided the file listings a week ago, and your clients have not yet identified any files from those lists. When your clients identify the files they claim are personal, since those files are conflated with Company documents, we will review the file names to determine whether Fresh Mix agrees with Paul and Todd's characterizations. If the company cannot determine that the files identified are likely to consist solely of your clients' personal matters, we will not be able to provide those files to you. For the files where we cannot reach agreement, we will have to determine another approach. We can address this if it arises when your clients elect to respond.

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They are silver 5x5 inch hard drives. Please make sure both are provided to our clients at the meeting.

Ninth, I am unclear if there are specific roles or areas of responsibility within your team. Shall I copy each of you on every correspondence? When is Mr. Barenbaum included?

Include everyone I have included in this email from our side at all times. We note that David Quigley did not follow this instruction with his most recent communication, as he left me off the service list. Please inform everyone on your side to include every member of our team on all communications. Thank you.

Looking forward to your replies.

-

-

Bruce

Bruce A. Leslie, Chtd.

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Phone: (702) 990-3798

Email: blesliechtd@gmail.com

Web: www.bleslielaw.com

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EXHIBIT R

Bridges, Emily

From: Debra Spinelli <dls@pisanellibice.com>
Sent: Wednesday, May 22, 2019 4:06 PM
To: Berkley, Brian A.; Bruce Leslie
Cc: Connot, Mark J.; 'Betsy Lamm'; 'Ronald Jay Cohen'; James Pisanelli; 'Evan Barenbaum, Esquire'; 'Daniel Quigley'; Bridges, Emily
Subject: RE: [EXT] Fresh Mix

Brian –

Thanks for your response, although it is unfortunate. As we've stated before, without an agreement on how the Company's confidential documents and information will be treated, the inspection of the documents that the Company was fully prepared to make available today cannot go forward. This is an issue that we have been proactively attempting to address with you for weeks.

We will respond separately to the letter sent yesterday, May 21, which purports to respond to the letter Ms. Lamm sent on May 3. But, as we have stated before, the Company does not believe your clients have stated a proper purpose for many of the books and records requested, as Delaware law requires whether the requests are made in your clients' capacities as members or managers. There are various exchanges among us regarding the Company's valid concerns about competition and interference, among others. And your rejection of the NDA we offered – the rejection of express terms dictating how the Company's confidential information can be used and treated – has only served to heighten those concerns.

Per the process outlined in Bruce's email, the review of the contents of the box will still proceed this afternoon.

Regards,
Debbie

Debra L. Spinelli
Managing Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100

From: Berkley, Brian A. <bberkley@foxrothschild.com>
Sent: Wednesday, May 22, 2019 10:42 AM
To: Debra Spinelli <dls@pisanellibice.com>; Bruce Leslie <blesliechtd@gmail.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; 'Betsy Lamm' <BLamm@cdqlaw.com>; 'Ronald Jay Cohen' <RCohen@cdqlaw.com>; James Pisanelli <jjp@pisanellibice.com>; 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>; 'Daniel Quigley' <DQuigley@cdqlaw.com>; Bridges, Emily <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Debra,

We have reviewed the proposed NDA and Section 9.7 of the Operating Agreement. There simply is no basis to require execution of an NDA given the protections set forth in Section 9.7. As we already noted, our clients have complied and will continue to comply with their respective confidentiality obligations as set forth in Section 9.7, and that includes following those obligations in connection with the books and records. The proposed NDA is neither necessary nor appropriate.

As we set forth in the attached letter, Delaware law provides Managers like Plaintiffs "unfettered" access to the books and records. There is no basis to require our clients to execute an NDA, particularly in light of the protections set forth in Section 9.7 of the Operating Agreement to which all Members have agreed. Requiring Plaintiffs to execute the NDA is designed solely to frustrate Plaintiffs' rights.

We expect that Defendants will make the entirety of the books and records available today.

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From: Debra Spinelli <dls@pisanellibice.com>
Sent: Tuesday, May 21, 2019 10:52 PM
To: Bruce Leslie <blesliechtd@gmail.com>; Berkley, Brian A. <bberkley@foxrothschild.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; 'Betsy Lamm' <BLamm@cdqlaw.com>; 'Ronald Jay Cohen' <RCohen@cdqlaw.com>; James Pisanelli <jjp@pisanellibice.com>; 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>; 'Daniel Quigley' <DQuigley@cdqlaw.com>; Bridges, Emily <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Brian –

Following up on Bruce's email, thank you for confirming the confidentiality obligations in Section 9.7 of the Operating Agreement. However, I think we both must recognize the fact that your clients' request for books and records comes at a time when the parties are involved in contentious litigation with low levels of trust for one another. Rather than foment further contention under these circumstances, we think it necessary and prudent for the parties to execute a nondisclosure agreement that is consistent with Operating Agreement, and expressly outlines the treatment of the confidential materials. This protects both of our clients.

Reiterating a point Bruce made, because of our litigation backdrop and the various issues unresolved in the letter exchanges, we will insist on a written agreement setting forth the expected treatment of the Company's books and records before an inspection.

Attached is an NDA that we think provides standard language and terms. Please review it and let us know if there are any terms unacceptable to your clients or provisions you'd like to modify. While your clients can, of course, choose to litigate the issue of how to treat confidential company documents/information, we ask that you consider the NDA as an alternative. Confidentiality and treatment of those confidential records should not be an issue of great contention. In fact, under the circumstances of our respective clients' battles, a court is likely to allow and issue a protective order

mirroring the terms in a standard NDA like the one we attach. Please let us know your thoughts. I look forward to your response.

Thanks,

Debra L. Spinelli
Managing Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100

From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Tuesday, May 21, 2019 6:44 PM
To: 'Berkley, Brian A.' <bberkley@foxrothschild.com>
Cc: 'Connot, Mark J.' <MConnot@foxrothschild.com>; 'Betsy Lamm' <BLamm@cdqlaw.com>; 'Ronald Jay Cohen' <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; James Pisanelli <jjp@pisanellibice.com>; 'Evan Barenbaum, Esquire' <ebarenbaum@sterneisenberg.com>; 'Daniel Quigley' <DQuigley@cdqlaw.com>; 'Bridges, Emily' <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Hey Brian:
My comments-

First- hahaha, I think we agree that the facts are the facts.

Third- please review my email that you responded to. I was clear that you are not getting a margin report containing all that was in the form you attached to your email. I think the reasons have been stated many times, and the questions and confirmations asked for were unanswered, so I'm not responding.

Fifth- The company emptied the contents of your clients' offices, putting everything (that would fit) into boxes. What was obviously personal was sent to Mr. Bendavid. What appeared to be company property was put in a box that wasn't sent to Bendavid. That is the "box" in question that we will review tomorrow. There is nowhere to "search" for the coin other than that box. You have said "no" to looking into that box.
Further, instead of using "you" in your narrative, which suggests you mean "me", you should be using "the company".

Sixth- Ms. Spinelli will forward to you later tonight the form of Nondisclosure Agreement that your clients will need to execute tomorrow before being given access to the books and records the company has agreed to produce.

Best
b

Bruce A. Leslie, Chtd.
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notify us immediately. The information contained in this electronic message may be attorney-client privileged, confidential, and exempt from disclosure under applicable law and is intended only for the use of the individual(s) to whom this electronic message is addressed. If the reader of this message is not the intended recipient, please reply to this message and delete the received message from your system.

From: Berkley, Brian A. <bberkley@foxrothschild.com>
Sent: Tuesday, May 21, 2019 2:30 PM
To: Bruce Leslie <blesliechtd@gmail.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>; Daniel Quigley <DQuigley@cdqlaw.com>; Bridges, Emily <EBridges@foxrothschild.com>
Subject: RE: [EXT] Fresh Mix

Bruce – see below.

Brian Berkley
Partner
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From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Sunday, May 19, 2019 2:44 PM
To: Berkley, Brian A. <bberkley@foxrothschild.com>
Cc: Connot, Mark J. <MConnot@foxrothschild.com>; Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>; Daniel Quigley <DQuigley@cdqlaw.com>
Subject: Re: [EXT] Fresh Mix

Hey Brian:
Our responses in the order of your email.

First : I want to be clear, I am outside counsel for Fresh Mix and Get Fresh. I am not an "in-house attorney." While you can reserve any rights you'd like, your "view" of my role does not change the facts. I hope I clarified any confusion you might have had, that this was an honest mistake, and if so, let's put this issue "to bed".

We will have to agree to disagree and allow the record to speak for itself.

Second: You accepted our proposed process to allow your clients to identify from the list we provided those computer files they claim are personal files (e.g., personal photographs). We provided the file listings a week ago, and your clients have not yet identified any files from those lists. When your clients

identify the files they claim are personal, since those files are conflated with Company documents, we will review the file names to determine whether Fresh Mix agrees with Paul and Todd's characterizations. If the company cannot determine that the files identified are likely to consist solely of your clients' personal matters, we will not be able to provide those files to you. For the files where we cannot reach agreement, we will have to determine another approach. We can address this if it arises when your clients elect to respond.

You provided a file listing with thousands of files. Our clients are working through them and we will provide a response as soon as possible.

Third: Do you prefer the margin reports be sent to you (or your entire team) through me, or directly from Fresh Mix to Paul and Todd? As these documents contain confidential, sensitive company information, the company expects your clients to treat them as such and not disclose this information to any third parties, including without limitation Carlos Gonzalez and John Shigley. Moreover, as you have now raised the desire to have these persons present during a review of Fresh Mix's books and records (which I'll address below), please confirm in writing that (1) previously provided financial information has not been provided to Carlos Gonzalez, John Shigley, or any other third parties; and (2) when provided in the future, the margin information will not be shared with these individuals, or any other third parties. Fresh Mix will require confirmation before sending the requested information. If we can arrive at an agreement, a form of the margin reports will be provided at our meeting. To be clear, they won't contain all the information you request.

Our clients have complied with and will continue to comply with the Confidentiality obligations set forth in Section 9.7 of the Operating Agreement. You have not answered my repeated question. Please confirm that the Margin Report you will provide will contain the same form and information set forth in the Margin Report that our clients received routinely prior to November 2018. And, if not, please explain why not.

Fourth: The plan is to bring the records being produced in electronic form. Someone will be available to assist in the review of those records and to explain the accounting methodology and conventions. We can then make electronic copies as appropriate. Wednesday between 2:00 and 5:00 pm is available, assuming we can sort out the issues herein.

Mark has confirmed 2:00 pm on Wednesday.

Fifth: Well, since you object to Mr. Goldberg looking for the coin, Mr. Connot will discover if it exists when the box is jointly reviewed. The process will be that Mr.Connot and I, by ourselves, will review each document in the box. We will sort the stuff into three piles. One, what we agree is personal or privileged. Two, what we agree belongs to the company. Three, what we don't agree upon. Your clients take pile one, the company takes pile two, and pile three remains in the box until ownership is determined in litigation, arbitration, or another method.

Regarding your threat, if you want to bring anything before the judge, I suggest you do so. It is your case and client to represent as you deem advisable. Law and logic, not threats, may change our views.

We again remind you of your ethical obligation to protect attorney-client privilege communications. We specifically requested you to inform us whether or not anyone from Defendants has reviewed the contents of the box after we informed you that the box may contain privileged communications. You still have not answered the question, which means we must assume that you have not complied with the obligation to protect such communications when informed of their existence.

Further, we did not object to Mr. Goldberg looking for the "coin." You are mixing two different things. Our concern about Mr. Goldberg looking inside the box was because you said he had to look into the box for "security" reasons, not to look for the "coin." We expressed doubt that there were any security concerns, and further reminded you of our attorney-client privilege concerns in connection with the box.

Separately, you asked for a visual of the coin, which we provided. The coin is likely in the desk and/or the desk blotter/pad used by Mr. Lagudi. It is an important piece of personal property to my client. It appears that you are playing games in connection with your obligation to look for such materials. Please confirm that you have looked for the coin and where you have looked so that we can be assured you have complied with the Court's Order in this regard.

Sixth: While the Company does not object to Paul, Todd, their counsel, or qualified public accounting professionals reviewing books and records, subject to their prior execution of a confidentiality agreement (which will be provided), Carlos Gonzalez (a former employee) and John Shigley (a recent executive of an important customer) may not participate in the review. The company cannot conceive how they would be appropriate participants. If you explain in detail the basis for your request and how they facilitate a proper purpose, it will be considered.

Plaintiffs have already agreed to confidentiality protections under Section 9.7 of the Operating Agreement. Requiring them to sign another confidentiality agreement before providing them with the books and records is an unreasonable and unnecessary roadblock to their rights and will act as further breach of the Operating Agreement and a violation of applicable Delaware law. With regard to Messrs. Gonzalez and Shigley, you have provided no basis for your objection to their presence. Nevertheless, for purposes of tomorrow, they will not be present.

Seventh: You did not address my proposed methodology for reviewing the contents of the box. This box is the issue. See Fifth above.

Mr. Connot and you can discuss the process for reviewing the box tomorrow.

Eighth: A mother board is what you asked for, even after my asking for correction. There is one hard drive. Unless, there is another in the box. It will be provided at the meeting.

Thank you.

Ninth: I don't control Mr. Quigley, and I don't control the others.

Per Ms. Lamm's email, she requests that you include Mr. Quigley in your communications. We note he was not cc'd in your communication from May 10, 2019, to which we replied and to which Ms. Lamm took issue.

So, it would be helpful to come to closure on these issues, and receive your agreement on the process for the inspection of the box and production of the books and records before Wednesday. Do I have that conversation with you or Mr Connot?

See above.

Best

b

Bruce A. Leslie, Chtd.
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Email: blesliechtd@gmail.com
Web: www.bleslielaw.com

On Thu, May 16, 2019 at 2:25 PM Berkley, Brian A. <bberkley@foxrothschild.com> wrote:

Bruce,

See our responses below.

Brian Berkley
Partner
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(609) 760-2309 – cell

(215) 299-2150- fax
bberkley@foxrothschild.com
www.foxrothschild.com

From: Bruce Leslie <blesliechtd@gmail.com>
Sent: Friday, May 10, 2019 1:59 PM
To: Berkley, Brian A. <bberkley@foxrothschild.com>; Connot, Mark J. <MConnot@foxrothschild.com>
Cc: Betsy Lamm <BLamm@cdqlaw.com>; Ronald Jay Cohen <RCohen@cdqlaw.com>; Debra Spinelli <dls@pisanellibice.com>; Pisanelli, James J. <jjp@pisanellibice.com>; Evan Barenbaum, Esquire <ebarenbaum@sterneisenberg.com>
Subject: [EXT] Fresh Mix

Dear Mark and Brian:

I am responding to your various letters. What I don't address will be addressed by others.

First, can you include me in the correspondence? I get copied on some of the stuff, but not on all.

We will include you in correspondence per your request. Please note, however, that your role appears to be much more as an in-house lawyer, as opposed to outside counsel, and so we have viewed you as the opposing party. We reserve the right to continue that view downstream and preserve all arguments in that regard.

Second, I attach the forensic listings of the files on the computers used by Paul and Todd. Please indicate which files are of interest to you or your clients.

Consistent with the Court Order, we will identify the files that relate to personal property.

Third, under separate email I will send you the margin reports prepared by Scott.

We still await this margin report. Please send asap. Also, please confirm, as we requested, that this margin report will include the information included in the sample report I sent to you last week (see attached again).

Fourth, can we collectively agree on dates for the production of books and records and inspection of the "box of stuff" your clients claim may contain personal items not delivered to Mr. Bendavid? The dates you requested are not possible, both Scott and I are out of town. Can you provide some dates over the next two weeks, preferably Tuesday through Thursday?

We are available Tuesday afternoon and all of Wednesday of next week, May 21 and 22. Please confirm the date and time. With regard to the books and records, please inform us as to whether we will need to employ a third-party copying service, or whether you have copying services available.

Fifth, what is a "gold coin"? Do you have a better description? Is it numismatic, bullion, commemorative? Is it in a case or envelop, and is there documentation attached? I've asked Scott to go through the "box" for security purposes, and a description would be helpful.

See the attached photograph of a sample coin.

Despite my repeated requests, you have failed to confirm that nobody, including Scott Goldberg, will go through the box. There is no bona fide "security purpose" served by Mr. Goldberg going through the box, nor have you articulated one. As you know, we have repeatedly informed you that there may be attorney-client privilege information in the box. You have an ethical obligation to respect and not violate my client's attorney-client privilege rights. Unless you confirm today that you have respected those rights and Mr. Goldberg has not reviewed the "box," we will have no choice but to inform the Court of your unethical conduct.

Sixth, who will be present for the production of the books and records? I'd anticipate an accounting professional. The company will have the VP Finance present to walk that person through the GL and check register, the books being presented. Our team is discussing what sort of affidavit/confidentiality document will need to be signed, and when I have it, I will present it to you for review.

Mark Connot, Todd Ponder, Paul Lagudi, Carlos Gonzalez, and John Shigley.

Seventh, the "box" will be available for our joint inspection. If you prefer a different time for this review, I will accommodate. I anticipate it will be a lawyers only event, since there is debate on if there is anything of your clients in the box that could be "personal". If we can't agree on what is the business' record, I will retain it and it can be sorted out in court or arbitration. Can you confirm your clients received the prior delivery of their personal property to Mr. Bendavid?

Our clients received certain property delivered by Mr. Bendavid, but that is not the property at issue here.

Eighth, I don't think you mean "motherboard". I doubt the 2 computers were custom manufactured to include old motherboards. Is your client saying that he pulled a motherboard out of an old computer and had it hanging around? Can your client be more accurate in his description of what he wants?

They are silver 5x5 inch hard drives. Please make sure both are provided to our clients at the meeting.

Ninth, I am unclear if there are specific roles or areas of responsibility within your team. Shall I copy each of you on every correspondence? When is Mr. Barenbaum included?

Include everyone I have included in this email from our side at all times. We note that David Quigley did not follow this instruction with his most recent communication, as he left me off the service list. Please inform everyone on your side to include every member of our team on all communications. Thank you.

Looking forward to your replies.

-

-

Bruce

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EXHIBIT S

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Ebarenbaum@sterneisenberg.com

March 26, 2019

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Fresh Mix, LLC
c/o Betsy Lamm, Esquire
Cohen Dowd Quigley
The Camelback Esplanade One
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Phoenix, AZ 85016

Scott Goldberg,
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c/o Betsy Lamm, Esquire
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John Wise,
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Dominic Caldera,
Manger, Fresh Mix LLC
c/o Betsy Lamm, Esquire
Cohen Dowd Quigley
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Phoenix, AZ 85016

Re: ***Demand to Meet and Confer Pursuant to §14.7 of the Fresh Mix LLC Operating Agreement***

Dear Messrs. Goldberg, Wise, and Caldera:

We represent Paul Lagudi ("***Lagudi***") and William Todd Ponder ("***Ponder***") in connection with the above-referenced matter. This communication is designed to identify our clients' claims against you, Fresh Mix LLC ("***Fresh Mix***"), and Get Fresh Sales, Inc. ("***Get Fresh***") and comply with their pre-arbitration demand to meet and confer pursuant to §14.7 of the Fresh Mix LLC Operating Agreement.[1]

Get Fresh, Scott Goldberg ("***Goldberg***"), John Wise ("***Wise***"), and Dominic Caldera ("***Caldera***") intentionally fabricated Get Fresh's costs, and it has received rebates from producers, including, for example, and without limitation, PROACT, LLC, in connection with the fulfillment of Fresh Mix orders, which offset Get Fresh's costs. In turn, Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera have engaged in an orchestrated scheme to deprive Lagudi and Ponder of their appropriate membership distributions. Along the same lines, Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera have failed to properly allocate profits derived from Kroger Fresh Kitchen, such that Lagudi and Ponder do not receive their fair share of Fresh Mix distributions.

Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera have failed to honor §12.3 of the Fresh Mix LLC Operating Agreement, which expressly contemplates that indemnification is appropriate when a Member and/or Manager is made a party to an action by or in the right of the Company. Indeed, it unambiguously states that "[t]he Company shall indemnify and hold harmless any Person made, or threatened to be made, a party to an action or proceeding . . . including an action by or in the right of the Company, by reason of the fact that such Person was or is a Member, a Manager . . . of the Company . . . ." The immediate right to indemnification is buoyed by §12.4, which indicates that the costs and expenses are to be reimbursed "as they are incurred by an Indemnified Person . . . ." To this end, such costs and expenses must be repaid to Fresh Mix "upon a final judicial determination by a court of competent jurisdiction that such Indemnified Person is not entitled to indemnification hereunder."

Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera have engaged in an orchestrated scheme to deprive Lagudi and Ponder of their Fresh Mix membership interest by concocting breaches of fiduciary duties, and even "intentional fraud", as well as other serious misconduct. For example, they claim that Lagudi and Ponder breached their fiduciary duties by interfering with a prospective sale of "Get Fresh's Family of Companies." By the very nature of the claim, Get Fresh, Goldberg, Wise, and Caldera have breached their fiduciary duties as a Member (Get Fresh) and Managers (Goldberg, Wise, and Caldera) by taking into consideration their interests in other companies, in which Lagudi and Ponder have no interest, in order to leverage a sale of those other companies to the detriment of Lagudi and Ponder, minority members of Fresh Mix.

[1] To the extent any of the claims described below may be appropriately brought before a court, neither Lagudi nor Ponder waive his right to bring any claims in any other such forum.

And, in any event, if there was an actual offer to purchase the assets of Fresh Mix, neither Lagudi nor Ponder could be forced to vote in its favor, whatever the quantum of the offer. Voting against a sale of the assets of Fresh Mix is not a breach of fiduciary duty. In any event, no actual offer was ever made to purchase the assets of Fresh Mix, and even if it was, no meeting was ever noticed that would implicate a vote of the Members to approve such a sale. Yet, however, Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera fabricated, and made it appear that Lagudi and Ponder failed to comply with their obligations under the Fresh Mix Operating Agreement, as well as their respective [expired] Employment Agreements, which they then claimed an entitlement to force the sale of Lagudi's and Ponder's Membership Interest at a 75% discount.

Assuming that Get Fresh received a Membership Interest Bona Fide Offers to purchase all, but not less than all, of the outstanding interest in Fresh Mix, then Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera failed in every respect to comply with the protocols of the Fresh Mix LLC Operating Agreement that would trigger drag-along rights. Again, Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera fabricated, and made it appear that Lagudi and Ponder failed to comply with their obligations under the Fresh Mix Operating Agreement, as well as their respective [expired] Employment Agreements, which they then claimed an entitlement to force the sale of Lagudi's and Ponder's Membership Interest at a 75% discount.

Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera even went so far as to claim that the Lagudi and Ponder Employment Agreements were current, such that they could trigger a purchase of Lagudi's and Ponder's Membership Interests [at a 75% discount], and enforce, for example, non-compete provisions contained in those agreements. Get Fresh makes these allegations in its Demand for Arbitration, Statement of Claims, dated February 13, 2019. Incredibly, it takes these positions, notwithstanding the fact that it unequivocally knew prior to the litigation that the Employment Agreements had expired, and even though the Court has already ruled during the January 16, 2019 hearing that "the employment agreement expired long ago." *See* 1/16/19 Hr. Tr. 17:8. Accordingly, Get Fresh's continued pressing of a position rejected by the Court reflects its bad faith and overall plan of minority shareholder oppression.

Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera desperately concocted a whole host of other claims to create the impression of leverage, such as blaming Lagudi and Ponder for Walmart's termination of one of its regional managers, which was an issue with the Walmart employee, not Lagudi and Ponder - indeed, the Get Fresh account was later reinstated. They also suggest that Lagudi and Ponder permitted a third-party manufacturer to supply product to Costco - who was, at all relevant times, an approved Costco manufacturer. The claims lack legitimacy and fall flat.

In addition, Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera have engaged in a variety of wrongful conduct, including, without limitation: actual fraud, willful misconduct, breach of fiduciary duty, falsification of, and marked-up charges on invoices, failure to pay appropriate distributions, wrongful termination of at-will employees, failure to pay appropriate sums with regard to the Kroger Fresh Kitchen, Purple Carrot, T-Mobile, and Walmart accounts, diversion of accounts and purchases to non-Fresh Mix entities, defamation, minority shareholder oppression, unjust enrichment, misappropriation of rebates, aiding and abetting, civil conspiracy, and at the appropriate time, abuse of process. Further, Lagudi and Ponder are entitled to an accounting.

Fresh Mix, Get Fresh, Goldberg, Wise, and Caldera, with the support, encouragement, and assistance of counsel, have engaged in a misguided and orchestrated scheme to destroy Lagudi and Ponder by alleging frivolous, concocted, and outrageous claims with no legitimate purpose other than to intimidate and bait Lagudi and Ponder into divesting their membership interest at a substantially reduced value. So there is no further misunderstanding on your part, and let us make this abundantly clear, your tactics will not work.

To the extent the above claims may fall under the Fresh Mix LLC Operating Agreement, please advise when you are available to meet and confer, or if each of the recipients waive that provision, as well as the thirty-day period before which arbitration(s) may be commenced.

Very truly yours,

/s/Evan Barenbaum

EXHIBIT E TO DOCKETING STATEMENT

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Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY AND TO COMPEL ARBITRATION** Hearing Date: January 16, 2019 Hearing Time: 9:00 a.m.

PLEASE TAKE NOTICE that an "Order Regarding Defendants' Motion to Dismiss or, in the Alternative, to Stay and to Compel Arbitration" was entered in the above-captioned matter on February 1, 2019, a true and correct copy of which is attached hereto.

DATED this 1st day of February, 2019.

PISANELLI BICE PLLC

By: /s/ Debra L. Spinelli
James J. Pisanelli, Esq., Bar No. 4027
Debra L. Spinelli, Esq., Bar No. 9695
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Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 1st day of February, 2019, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER** to the following:

Jeffery A. Bendavid, Esq.
Stephanie J. Smith, Esq.
MORAN BRANDON BENDAVID MORAN
630 South 4th Street
Las Vegas, NV 89101

/s/ Kimberly Peets
An employee of PISANELLI BICE PLLC

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **ORDER REGARDING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY AND TO COMPEL ARBITRATION** Hearing Date: January 16, 2019 Hearing Time: 9:00 a.m.

Defendants Fresh Mix, LLC ("Fresh Mix") and Get Fresh Sales, Inc.'s ("Get Fresh") (collectively, the "Defendants") Motion to Dismiss or Stay and to Compel Arbitration (filed on December 13, 2018), having come on for hearing on January 16, 2019, in Department XI of the above-titled Court, with the Honorable Elizabeth Gonzalez presiding. James Pisanelli, Esq., Debra L. Spinelli, Esq., and Ava M. Schaefer, Esq., of PISANELLI BICE PLLC, having appeared on behalf of Defendants. Jeffery A. Bendavid, Esq., of MORAN BRANDON BENDAVID MORAN, having appeared on behalf of Plaintiffs Paul Lagudi and William Todd Ponder (collectively, the "Plaintiffs"). This Court, having reviewed and considered Motion, the Opposition

filed by Plaintiffs on January 9, 2019, the Reply filed by Defendants on January 15, 2019, the arguments of counsel presented at the hearing, and good cause appearing therefore,

The Court HEREBY FINDS as follows:

1. Plaintiffs are parties to the Limited Liability Company Agreement (the Operating Agreement") for Defendant Fresh Mix, dated January 11, 2010;
2. The terms and conditions of the Operating Agreement were adopted to govern the respective rights and obligations of the members and managers of Defendant Fresh Mix;
3. This Court is obligated pursuant to NRS 38.219 and other applicable law to determine whether a valid agreement to arbitrate exists between Plaintiffs and Defendants concerning Plaintiffs' claims arising from the terms and conditions of the Operating Agreement;
4. The Operating Agreement contains several provisions determining the methodology for resolving any disputes arising from the Operating Agreement;
5. With the exception of equitable remedies sought, Section 14.7 of the Operating Agreement obligates Plaintiffs and Defendants to arbitrate any claims or disputes arising from the Operating Agreement;
6. Section 14.8 of the Operating Agreement expressly entitles any party subject to the Operating Agreement to equitable relief in the event of an actual or prospective breach or default of the Operating Agreement; and
7. Plaintiffs' remaining claims relating to the Operating Agreement are subject to arbitration pursuant to Section 14.7 of the Operating Agreement.

In light of the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

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Defendants' Motion to Dismiss or Stay and to Compel Arbitration is GRANTED IN PART and DENIED IN PART as follows:

1. The Motion is GRANTED as to Plaintiffs' claims concerning the Operating Agreement, to the extent they do not demand any equitable remedies, are subject to arbitration pursuant to Section 14.7 of the Operating Agreement.

2. Consistent with the *Stipulation and Order to Continue Plaintiffs' Hearing on Preliminary Injunction and Extend the Temporary Restraining Order Entered December 11, 2018*, filed on January 3, 2019, the Temporary Restraining Order entered on December 11, 2018, including the injunctive relief granted therein, remains in full force and effect until the preliminary injunction hearing.

3. This matter is hereby stayed until such time as the required arbitration, if any, is concluded.

4. A status hearing on this matter is set for May 17, 2019, in chambers, and counsel for the parties shall file with the Court a status report prior thereto.

The Motion is DENIED as to any remaining relief requested therein

DATED: February 1, 2019.

THE HONORABLE ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

Respectfully submitted by:

PISANELLI BICE PLLC

By: _____
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