Case No. 80950

In the Supreme Court 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.

MOTION TO RECALL REMITTITUR AND REINSTATE APPEAL

Appellants Paul Lagudi and William Todd Ponder move to reinstate this appeal. As necessary, appellants ask that this Court recall the remittitur to enable this Court to effectuate this reinstatement.

This Court dismissed the appeal on September 4, 2020, due to a bankruptcy petition that automatically stayed all other litigation. (Doc. No. 20-32730.) The Court's order of dismissal also stated:

> This dismissal is without prejudice to appellants' right to move for reinstatement of this appeal within 60 days of either the lifting of the bankruptcy stay or final resolution of the bankruptcy proceedings, if appellant deems such a motion appropriate at that time.

(*Id.* at 2.)

The bankruptcy court recently approved a lift of the stay by entry of its "Order Approving Stipulation for Relief from the Automatic Stay to Allow Parties to Proceed with State Court and Arbitration Proceedings" on February 16, 2022.[1] (Exhibit A.) Therefore, per this Court's order of dismissal, this appeal may now be reinstated.

Dated this 15th day of April, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

MARK J. CONNOT (SBN 10010)
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, #700
Las Vegas, Nevada 89135
(702) 262-6899

Attorneys for Appellant

[1] To be cautious, appellants have also filed a "Renewed Notice of Appeal" in the underlying district court case, as well. (Exhibit B.) Appellants understand that this renewed notice is likely redundant and can be docketed as part of this Case No. 80950.

CERTIFICATE OF SERVICE

I certify that on April 15, 2022, I submitted the foregoing "*Motion to Recall Remittitur and Reinstate Appeal*" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Frank M. Flansburg, III
Adam K. Bult
Eric D. Walther
Travis F. Chance
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600 Las Vegas, NV 89106-4614

Attorneys for Respondent Get Fresh Sales, Inc.

Jason A. Imes
SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Blvd., Suite 1
Las Vegas NV 89146-5308

Attorneys for Lenard E. Schwartzer, Ch. 7 Trustee for the bankruptcy estate of Fresh Mix, LLC

/s/ Cynthia Kelley
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT A

EXHIBIT A

Honorable Gary Spraker
United States Bankruptcy Judge

Entered on Docket
February 16, 2022

Jason A. Imes, Esq., NV Bar No. 7030
Schwartzer & McPherson Law Firm
2850 South Jones Blvd., Suite 1
Las Vegas NV 89146-5308
Telephone: (702) 228-7590
Facsimile: (702) 892-0122
E-Mail: bkfilings@s-mlaw.com
Counsel for Lenard E. Schwartzer, Trustee

SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:	Case No. BK-S-20-12051-GS
FRESH MIX LLC,	Chapter 7
Debtor(s).	**ORDER APPROVING STIPULATION FOR RELIEF FROM THE AUTOMATIC STAY TO ALLOW PARTIES TO PROCEED WITH STATE COURT AND ARBITRATION PROCEEDINGS**
	Hearing Date: N/A Hearing Time: N/A

The Court having considered the *Stipulation for Relief from the Automatic Stay to Allow Parties to Proceed with State Court and Arbitration Proceedings* (the "Stipulation") by and between GET FRESH SALES, INC. ("GFSI"), PAUL LAGUDI ("Lagudi") and WILLIAM TODD PONDER ("Ponder") (Lagudi and Ponder collectively referred to as the "Minority"), and LENARD E. SCHWARTZER, CHAPTER 7 TRUSTEE (the "Trustee"), finding that the relief requested in the Stipulation is appropriate and that sufficient cause exists to grant relief, and good cause appearing,

IT IS HEREBY ORDERED that the Stipulation attached to this Order as **Exhibit "1"** is

APPROVED; and

IT IS FURTHER ORDERED that the automatic stay under 11 USC §362(a) is hereby modified and vacated to permit the State Court Litigation[1] and Arbitration matters (as identified in the Stipulation) to resume, continue, and proceed forward to final judgment; and

IT IS FURTHER ORDERED that the Stipulation and this Order do not authorize the collection of any fees or awards against the Bankruptcy Estate; and

IT IS FURTHER ORDERED that the Stipulation and this Order do not modify or otherwise affect this Court's authority to hear or determine any matters within the Court's jurisdiction; and,

IT IS FURTHER ORDERED that this Court retains jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: February 15, 2022

/s/ Jason A. Imes
Jason A. Imes, Esq.
SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Blvd., Suite 1
Las Vegas, Nevada 89146
Attorneys for Lenard E. Schwartzer, Trustee

Dated: February 15, 2022

/s/ Samuel A. Schwartz
Samuel A. Schwartz, Esq.
SCHWARTZ LAW, PLLC
601 East Bridger Avenue
Las Vegas, Nevada 89101
Attorneys forGet Fresh Sales, Inc.

Dated: February 15, 2022

/s/ F. Thomas Edwards
F. Thomas Edwards, Esq.
Mary Langsner, Ph. D.
HOLLEY DRIGGS LAW FIRM
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Paul Lagudi and William Todd Ponder

Dated: February 15, 2022

/s/ Zachariah Larson
Zachariah Larson, Esq.
LARSON & ZIRZOW, LLC
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
Attorneys for Debtor, Fresh Mix, LLC

[1] The State Court Litigation includes any appellate matters arising during pendency of the State Court Litigation.

SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

EXHIBIT “1”

Jason A. Imes, Esq., NV Bar No. 7030
Schwartzer & McPherson Law Firm
2850 South Jones Blvd., Suite 1
Las Vegas NV 89146-5308
Telephone: (702) 228-7590
Facsimile: (702) 892-0122
E-Mail: bkfilings@s-mlaw.com
Counsel for Lenard E. Schwartzer, Trustee

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re: FRESH MIX LLC, Debtor(s).	Case No. BK-S-20-12051-GS Chapter 7 **STIPULATION FOR RELIEF FROM THE AUTOMATIC STAY TO ALLOW PARTIES TO PROCEED WITH STATE COURT AND ARBITRATION PROCEEDINGS** Hearing Date: N/A Hearing Time: N/A

And now, the parties, Get Fresh Sales, Inc. ("GFSI") having appeared through its counsel, Schwartz Law, PLLC, and Paul Lagudi ("Lagudi") and William Todd Ponder ("Ponder") (Lagudi and Ponder collectively referred to as the "Minority") having appeared through their counsel, Holly Driggs Law Firm, and Lenard E. Schwartzer (the "Trustee"), as Chapter 7 Trustee for the Bankruptcy Estate of Fresh Mix LLC (the "Bankruptcy Estate"), by and through his counsel, Schwartzer & McPherson Law Firm, having been directed by the Court during the October 29, 2021 hearing to present an agreed order/stipulation granting relief from the automatic stay to be presented for consideration by this Court to allow the parties to proceed with the pending State Court Proceeding (District Court, Clark County Nevada, Case No. A-18-785391-B) ("State Court Litigation"), as well as, the pending Arbitration Proceeding (AAA Commercial Arbitration No. 01-19-0000-4904) ("Arbitration") and the parties, having agreed to the terms contained herein, submit this Stipulation for due consideration by this Court.

/ / /

/ / /

SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

RECITALS

A. That this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and,

B. That modification of the automatic stay is appropriate for the parties to be able to proceed with the State Court Litigation and Arbitration; and,

C. That on October 29, 2021, this Court determined that all relevant parties to a motion for relief were present at those hearings before this Court, and those parties agreed that relief from the automatic stay is appropriate to proceed in the State Court Litigation and Arbitration; and

D. The parties have reached this Stipulation as required by the Court.

STIPULATION

The undersigned parties hereby agree and stipulate to entry of an Order that:

1. The automatic stay under 11 USC §362(a) is hereby modified and vacated to permit the State Court Litigation[1] and Arbitration matters to proceed forward to final judgment; and,

2. This Stipulation and related Order do not authorize the collection of any fees or awards against the Bankruptcy Estate; and

3. This Stipulation and related Order do not modify or otherwise affect this Court's authority to hear or determine any matters within the Court's jurisdiction; and,

4. This Court retains jurisdiction to hear and determine all matters arising from the implementation of this Order.

/ / /

/ / /

/ / /

/ / /

/ / /

[1] The State Court Litigation includes any appellate matters arising during pendency of the State Court Litigation.

The undersigned Parties hereby approve the form and content of this Stipulation.

Dated: February 15, 2022

/s/ Jason A. Imes
Jason A. Imes, Esq.
SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Blvd., Suite 1
Las Vegas, Nevada 89146
Attorneys for Lenard E. Schwartzer, Trustee

Dated: February 15, 2022

/s/ Samuel A. Schwartz
Samuel A. Schwartz, Esq.
SCHWARTZ LAW, PLLC
601 East Bridger Avenue
Las Vegas, Nevada 89101
Attorneys for Get Fresh Sales, Inc.

Dated: February 15, 2022

/s/ F. Thomas Edwards
F. Thomas Edwards, Esq.
Mary Langsner, Ph. D.
HOLLEY DRIGGS LAW FIRM
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Paul Lagudi and William Todd Ponder

Dated: February 15, 2022

/s/ Zachariah Larson
Zachariah Larson, Esq.
LARSON & ZIRZOW, LLC
850 E. Bonneville Ave.,
Las Vegas, Nevada 89101
Attorneys for Debtor, Fresh Mix, LLC

SCHWARTZER & MCPHERSON LAW FIRM
2850 South Jones Boulevard, Suite 1
Las Vegas, Nevada 89146-5308
Tel: (702) 228-7590 · Fax: (702) 892-0122

EXHIBIT B

EXHIBIT B

NOAS

MARK J. CONNOT (SBN 10,010)
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, #700
Las Vegas, Nevada 89135
(702) 262-6899
(702) 597-5503(Fax)
MConnot@RoxRothschild.com

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
(702) 949-8398 (Fax)
DPolsenberg@LewisRoca.com
JHenriod@LewisRoca.com
ASmith@LewisRoca.com

Attorneys for Plaintiffs Paul Lagudi and William Todd Ponder

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. XXII **RENEWED 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;

LEWIS ROCA

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.

This is a renewal of the appeal docketed as Case No. 80950 in the Supreme Court, which was provisionally dismissed due to Fresh Mix, LLC's bankruptcy with the right to reinstate that appeal following the lifting of the bankruptcy stay.

Dated this 15th day of April, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

MARK J. CONNOT (SBN 10010)
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, #700
Las Vegas, Nevada 89135
(702) 262-6899

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that this 15th day of April, 2022, I served the foregoing "Renewed Notice of Appeal" through the Court's electronic filing system upon all parties on the master e-file and serve list.

Frank M. Flansburg, III
Adam K. Bult
Eric D. Walther
Travis F. Chance
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614

Attorneys for Defendant Get Fresh Sales, Inc.

Jason A. Imes
SCHWARTZER & MCPHERSON
LAW FIRM
2850 South Jones Blvd., Suite 1
Las Vegas NV 89146-5308

Attorneys for Lenard E. Schwartzer, Ch. 7 Trustee for the bankruptcy estate of Fresh Mix, LLC

/s/ Cynthia Kelley
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT 1

EXHIBIT 1

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 **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

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Electronically Filed
3/2/2020 12:30 PM
Steven D. Grierson
CLERK OF THE COURT

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. A Dispute Arises Between Get Fresh and Plaintiffs Lagudi and Ponder.

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.

---

[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.

---

[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.

---

[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.