

**Case No. 80950**

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

PAUL LAGUDI, an individual; WILLIAM TODD PONDER, an individual

*Appellants,*

v.

FRESH MIX, LLC, a Delaware limited liability company; and GET FRESH  
SALES, INC., a Nevada corporation,

*Respondents.*

Electronically Filed  
May 20 2022 08:30 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

---

**MOTION TO DISMISS APPEAL**

---

Frank M. Flansburg, III, Esq. (Nevada Bar No. 6974)  
Adam K. Bult, Esq. (Nevada Bar No. 9332)  
Eric D. Walther, Esq. (Nevada Bar No. 13611)  
Travis F. Chance, Esq. (Nevada Bar No. 13800)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
100 North City Parkway, Suite 1600  
Las Vegas, NV 89106-4614  
Tel: 702.382.2101 / Fax: 702.382.8135

*Attorneys for Get Fresh Sales, Inc.*

## **RULE 26.1 DISCLOSURE**

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

Get Fresh Sales, Inc. has no parent companies and no public companies own 10% or more of its stock.

DATED this 20<sup>th</sup> day of May, 2022.

**BROWNSTEIN HYATT FARBER SCHRECK, LLP**

*/s/ Adam K. Bult*

---

FRANK M. FLANSBURG, III, ESQ. Bar No. 6974

ADAM K. BULT, ESQ., Bar No. 9332

ERIC D. WALTHER, ESQ., Bar No. 13611

TRAVIS F. CHANCE, ESQ., Bar No. 13800

100 N. City Parkway, Suite 1600, Las Vegas, NV  
89106

Telephone: 702.382-2101

Facsimile: 702.382.8135

*Attorneys for Get Fresh Sales, Inc.*

## I. INTRODUCTION

An appeal must be dismissed as premature if a tolling motion is still pending in the district court, including one filed under NRCP 52(b), 59(e), or 60(b). NRAP 4(a)(6). Here, Appellants openly admit that this appeal is premature because they filed a tolling motion in the district court that has not been resolved:

In candor, this appeal probably is premature because appellants also filed a timely motion under NRCP 52(b), 59(e), and 60(b).

*See* April 29, 2020 Docketing Statement, at p. 7. In fact, the parties have not even finished briefing Appellants' tolling motion in the district court. Because a tolling motion is still pending in the district court, this appeal must be dismissed as premature.

In addition to being premature, this appeal must also be dismissed because Appellants are appealing from a sanctions order that is not final. NRAP 3A(b)(1). Indeed, **all** of the parties' substantive claims are still pending below. As such, this Court lacks jurisdiction to consider this appeal.

Finally, NRS 38.247 – which authorizes appeals from certain arbitration orders – does not provide this Court with jurisdiction. As an initial matter, Appellants are appealing from an interlocutory sanctions order that is not enumerated in NRS 38.247. As such, the plain language of the statute does not provide this Court with jurisdiction. Moreover, even if the sanctions order was

included in NRS 38.247 – which it is not – this Court still lacks jurisdiction because the matter was sent back to arbitration for additional proceedings. In other words, there is not “a sufficient degree of finality to the arbitration proceedings” for this Court to have jurisdiction. *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 115, 204 P.3d 1262, 1264 (2009). For these reasons, this appeal should be dismissed.

## **II. PROCEDURAL HISTORY**

1. This case involves a business divorce between the owners of a company called Fresh Mix, LLC (“Fresh Mix”). Respondent Get Fresh Sales, Inc. (“GFSI”) owns 60% of Fresh Mix and Appellants Paul Lagudi and William Todd Ponder (collectively, “L&P”) own the remaining 40% of Fresh Mix.

2. On February 1, 2019, the district court stayed the case and ordered the parties into binding arbitration on their non-equitable claims pursuant to Fresh Mix’s operating agreement. *See* Order Compelling Arbitration, attached as **Ex. 1**. The parties’ equitable claims would then be resolved by the district court following the arbitration. *Id.*

### **A. The district court sanctions L&P and their counsel for their improper use of a privileged memorandum belonging to GFSI.**

3. While the arbitration was pending, L&P filed a motion in the district court that attached a privileged memorandum belonging to GFSI. Thereafter, GFSI

moved the district court for sanctions based on L&P's improper use of the privileged memorandum.

4. Following a three-day evidentiary hearing, the district court sanctioned L&P and their counsel for their improper use of the privileged memorandum ("Sanctions Order"). *See* Sanctions Order, attached as **Ex. 2**. The district court also disqualified one of L&P's attorneys for his role in the misconduct. *Id.* at p. 29. Moreover, because L&P had improperly used the privileged memorandum so extensively in the arbitration, including quoting from it in arbitration filings, the district court ordered the parties to start the arbitration over with a new panel of arbitrators. *Id.*

**B. L&P files a Motion to Vacate, Alter, or Amend the Sanctions Order and a premature Notice of Appeal.**

5. On March 30, 2020, L&P filed a Motion to Vacate, Alter, or Amend the Sanctions Order pursuant to NRCP 52(b), 59(e), and 60(b) ("Motion to Vacate"). *See* Motion to Vacate, attached as **Ex. 3**.

6. The following day, L&P filed this appeal, which also challenges the Sanctions Order. *See* Notice of Appeal, attached as **Ex. 4**.

7. In their subsequent docketing statement, L&P admitted that this appeal is premature because of the pending Motion to Vacate:

In candor, this appeal probably is premature because appellants also filed a timely motion under NRCP 52(b), 59(e), and 60(b).

*See* April 29, 2020 Docketing Statement, at p. 7.

**C. The proceedings were stayed because of a pending bankruptcy.**

8. On April 24, 2020, a notice of bankruptcy was filed in the district court indicating that Fresh Mix had been placed into an involuntary Chapter 7 bankruptcy.

*See* Notice of Bankruptcy, attached as **Ex. 5**.

9. Due to the pending bankruptcy, briefing on the Motion to Vacate was stayed until the bankruptcy stay was lifted. *See* Stipulation and Order Regarding Stay, attached as **Ex. 6**.

10. On August 24, 2020, L&P filed a notice of bankruptcy in this appeal.

11. On September 4, 2020, this Court dismissed this appeal without prejudice. This Court further ordered that L&P could move to reinstate this appeal within 60 days of the bankruptcy stay being lifted.

**D. After the bankruptcy stay is lifted, L&P move to reinstate their premature appeal.**

12. On February 16, 2022, the bankruptcy stay was partially lifted so that the parties could proceed with this case and the accompanying arbitration. *See* Order Approving Stipulation for Relief from Automatic Stay, attached as **Ex. 7**.

13. Because the bankruptcy stay was lifted, the parties are free to proceed with briefing on L&P's Motion to Vacate in the district court.

14. Indeed, L&P has represented to the district court both before and after the bankruptcy stay was lifted that they intend to move forward with their Motion to Vacate. *See* November 16, 202 Status Report, attached as **Ex. 8** (“Plaintiffs ask that this briefing schedule [on the Motion to Vacate] be set as soon as possible, and the motion reset for hearing, after the bankruptcy court grants relief from the automatic stay.”); *see also* April 14, 2022 Hearing Transcript Excerpts, attached as **Ex. 9**, at 20:3-6 (“Again, we’re -- our clients -- our primary objective is to get the -- the motion to vacate and for reconsideration in front of Your Honor so that you can actually start to look at the -- at the merits of the case and actually reconsider the sanctions order.”).

15. Despite repeatedly representing to the district court that they intend to move forward with their pending Motion to Vacate as soon as possible, L&P has made no actual efforts to resolve the motion. Indeed, L&P’s counsel has completely ignored GFSI’s attempts to establish a briefing schedule and set a hearing date on the pending Motion to Vacate. *See* April 18, 2022 Letter from A. Bult, attached as **Ex. 10** (“[T]o avoid any additional delay, we are amenable to moving forward with briefing on the Plaintiffs’ [Motion to Vacate] as Plaintiffs have requested in their recent court filings.... At your earliest convenience, please provide us with your proposed briefing schedule and possible hearing dates for the Motion to Vacate.”).

16. Despite the fact that their Motion to Vacate is still pending in the district court – thereby making an appeal premature – L&P moved to reinstate this appeal on April 15, 2022 (“Motion to Reinstate Appeal”).

17. On May 13, 2022, this Court granted L&P’s Motion to Reinstate Appeal and established a briefing schedule.

### **III. LEGAL ARGUMENT**

L&P’s appeal must be dismissed for three independent reasons: (1) the appeal is premature; (2) the Sanctions Order is not final and appealable; and (3) NRS 38.247 does not apply.

#### **A. The appeal is premature.**

An appeal is premature if a tolling motion is still pending in the district court, including one filed under NRCP 52(b), 59(e), or 60(b). NRAP 4(a)(6); *see also Silver v. Wolfson*, 497 P.3d 632, 2021 WL 5176860, Docket No. 83537 (Nev. Nov. 5, 2021) (unpublished disposition) (dismissing an appeal as premature because a tolling motion was still pending in the district court); *Gibson v. Gibson*, 132 Nev. 971, 2016 WL 2956348, Docket No. 68467, (Nev. May 18, 2016) (unpublished disposition) (dismissing an appeal as premature because a tolling motion was still pending in the district court). Importantly, “[a] premature notice of appeal does not divest the district court of jurisdiction.” NRAP 4(a)(6). As such, a premature appeal



must be dismissed because this Court lacks jurisdiction until the tolling motion is fully resolved. *Id.*

Here, L&P's appeal is premature because the Motion to Vacate – which was brought pursuant to NRCP 52(b), 59(e), or 60(b)<sup>1</sup> – is still pending in the district court. In fact, L&P openly admitted in their docketing statement that this appeal is premature. *See* April 29, 2020 Docketing Statement, at p. 7 (“In candor, this appeal probably is premature because appellants also filed a timely motion under NRCP 52(b), 59(e), and 60(b).”). Because the Motion to Vacate has not been fully resolved – or even fully briefed – L&P's appeal must be dismissed at premature.

**B. The Sanctions Order is not final and appealable.**

NRAP 3A(b)(1) allows a party to appeal from a “final” order. “To be final, an order or judgment must dispose of all the issues presented in the case, and leave nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs.” *Brown v. MHC Stagecoach*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). Importantly, the appellant bears the burden of establishing that a district court order is final and appealable. *See Moran v. Bonneville Square Associates*, 117 Nev. 525, 527, 25 P.3d 898, 899 (2001) (“the

---

<sup>1</sup> The Motion to Vacate is not properly brought under either NRCP 52(b) or NRCP 59(e), as each relates to final judgments after trial.

burden rests squarely upon the shoulders of a party seeking to invoke our jurisdiction to establish, to our satisfaction, that this court does in fact have jurisdiction.”).

Here, L&P’s docketing statement indicates that they are appealing from a final order pursuant to NRAP 3A(b)(1). *See* April 29, 2020 Docketing Statement, at p. 7. The Sanctions Order, however, is not final and appealable because **all** of the parties’ substantive claims are still pending below. Because L&P cannot meet their burden of demonstrating that the Sanctions Order is final, this Court lacks jurisdiction to consider this appeal.

**C. NRS 38.247 does not apply.**

NRS 38.247(1) allows for appeals from certain enumerated arbitration orders:

An appeal may be taken from:

- (a) An order denying a motion to compel arbitration
- (b) An order granting a motion to stay arbitration;
- (c) An order confirming or denying confirmation of an award
- (d) An order modifying or correcting an award;
- (e) An order vacating an award without directing a rehearing; or
- (f) A final judgment entered pursuant to NRS 38.206 to 38.248, inclusive.

Importantly, an appeal may not be taken from an arbitration order that is not enumerated in NRS 38.247(1)(a)-(f). *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 112, 204 P.3d 1262, 1263 (2009). Moreover, even

if an arbitration order is enumerated in NRS 38.247(1)(a)-(f), this Court still lacks jurisdiction on appeal if the matter was remanded back to the arbitration for additional proceedings. *Id.* In such cases, an appeal is improper because there is not “a sufficient degree of finality to the arbitration proceedings” for this Court to have jurisdiction. *Id.* at 115, 204 P.3d at 1264.

Here, L&P’s docketing statement indicates that they are appealing pursuant to NRS 38.247. *See* April 29, 2020 Docketing Statement, at p. 7. However, the interlocutory Sanctions Order – which required the parties to start the arbitration over with a new panel – is not one of the orders enumerated in NRS 38.247(1)(a)-(f). **Ex. 2.** As such, NRS 38.247 does not provide this Court with jurisdiction. Moreover, even if the Sanctions Order was enumerated in NRS 38.247(1)(a)-(f) – which it is not – this Court still lacks jurisdiction because the district court remanded the matter back to arbitration for additional proceedings. *Id.* As such, there is not “a sufficient degree of finality to the arbitration proceedings” for this Court to have jurisdiction on appeal. *Karcher*, 125 Nev. at 115, 204 P.3d at 1264.

///

///

///

///

///

#### IV. CONCLUSION

L&P's appeal must be dismissed for three independent reasons: (1) the appeal is premature; (2) the Sanctions Order is not final and appealable; and (3) NRS 38.247 does not apply.

DATED this 20<sup>th</sup> day of May, 2022.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

*/s/ Adam K. Bult*

---

FRANK M. FLANSBURG, III, ESQ. Bar No. 6974

ADAM K. BULT, ESQ., Bar No. 9332

ERIC D. WALTHER, ESQ., Bar No. 13611

TRAVIS F. CHANCE, ESQ., Bar No. 13800

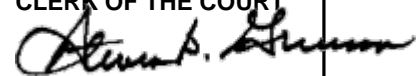
*Attorneys for Get Fresh Sales, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I electronically filed and served the foregoing **MOTION TO DISMISS APPEAL** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on May 20, 2022.

/s/ Wendy Cosby  
an employee of Brownstein Hyatt Farber Schreck,  
LLP

# **EXHIBIT 1**



1 James J. Pisanelli, Esq., Bar No. 4027  
JJP@pisanellibice.com  
2 Debra L. Spinelli, Esq., Bar No. 9695  
DLS@pisanellibice.com  
3 Ava M. Schaefer, Esq., Bar No. 12698  
AMS@pisanellibice.com  
4 PISANELLI BICE PLLC  
400 South 7th Street, Suite 300  
5 Las Vegas, Nevada 89101  
Telephone: 702.214.2100

6  
7 *Attorneys for Fresh Mix, LLC and  
Get Fresh Sales, Inc.*

8  
9 **EIGHTH JUDICIAL DISTRICT COURT**  
10 **CLARK COUNTY, NEVADA**

11 PAUL LAGUDI, an Individual; and a  
12 WILLIAM TODD PONDER, an Individual,

13 Plaintiffs,

14 v.

15 FRESH MIX, LLC, a Delaware Limited  
Liability Company; GET FRESH SALES,  
16 INC., a Nevada corporation; DOES I  
through 25; and ROE BUSINESS ENTITIES  
I through X, inclusive,

17 Defendants.  
18

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.

19 Defendants Fresh Mix, LLC ("Fresh Mix") and Get Fresh Sales, Inc.'s ("Get Fresh")  
20 (collectively, the "Defendants") Motion to Dismiss or Stay and to Compel Arbitration (filed on  
21 December 13, 2018), having come on for hearing on January 16, 2019, in Department XI of the  
22 above-titled Court, with the Honorable Elizabeth Gonzalez presiding. James Pisanelli, Esq.,  
23 Debra L. Spinelli, Esq., and Ava M. Schaefer, Esq., of PISANELLI BICE PLLC, having appeared  
24 on behalf of Defendants. Jeffery A. Bendavid, Esq., of MORAN BRANDON BENDAVID  
25 MORAN, having appeared on behalf of Plaintiffs Paul Lagudi and William Todd Ponder  
26 (collectively, the "Plaintiffs"). This Court, having reviewed and considered Motion, the Opposition  
27  
28

1 filed by Plaintiffs on January 9, 2019, the Reply filed by Defendants on January 15, 2019, the  
2 arguments of counsel presented at the hearing, and good cause appearing therefore,

3 The Court HEREBY FINDS as follows:

- 4 1. Plaintiffs are parties to the Limited Liability Company Agreement (the Operating  
5 Agreement") for Defendant Fresh Mix, dated January 11, 2010;
- 6 2. The terms and conditions of the Operating Agreement were adopted to govern the  
7 respective rights and obligations of the members and managers of Defendant  
8 Fresh Mix;
- 9 3. This Court is obligated pursuant to NRS 38.219 and other applicable law to  
10 determine whether a valid agreement to arbitrate exists between Plaintiffs and  
11 Defendants concerning Plaintiffs' claims arising from the terms and conditions of  
12 the Operating Agreement;
- 13 4. The Operating Agreement contains several provisions determining the methodology  
14 for resolving any disputes arising from the Operating Agreement;
- 15 5. With the exception of equitable remedies sought, Section 14.7 of the  
16 Operating Agreement obligates Plaintiffs and Defendants to arbitrate any claims or  
17 disputes arising from the Operating Agreement;
- 18 6. Section 14.8 of the Operating Agreement expressly entitles any party subject to the  
19 Operating Agreement to equitable relief in the event of an actual or prospective  
20 breach or default of the Operating Agreement; and
- 21 7. Plaintiffs' remaining claims relating to the Operating Agreement are subject to  
22 arbitration pursuant to Section 14.7 of the Operating Agreement.

23 In light of the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

24 ///



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:

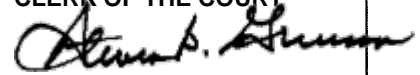
PISANELLI BICE PLLC

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.*

# **EXHIBIT 2**



1 FFCL

2  
3  
4 **EIGHTH JUDICIAL DISTRICT COURT**  
5 **CLARK COUNTY, NEVADA**

6 PAUL LAGUDI, an Individual; and a  
7 WILLIAM TODD PONDER, an Individual,

8 Plaintiffs,

9 v.

10 FRESH MIX, LLC, a Delaware Limited  
11 Liability Company; GET FRESH SALES,  
12 INC., a Nevada corporation; DOES 1  
13 through 25; and ROE BUSINESS ENTITIES  
14 I through X, inclusive,

15 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.

16 On January 21 and 22, 2020, and February 14, 2020, this Court conducted an evidentiary  
17 hearing on Get Fresh Sales, Inc. ("Get Fresh") and Fresh Mix, LLC's ("Fresh Mix") (Get Fresh  
18 and Fresh Mix, together "Defendants") (1) Motion for Sanctions filed on August 26, 2019, (the  
19 "Motion for Sanctions") and (2) Motion to Disqualify Fox Rothschild LLP filed on August 23,  
20 2019 (the "Motion to Disqualify"). Based on the evidence presented, the briefs before the Court  
21 and the arguments of counsel, the Court enters the following findings of fact and conclusions of  
22 law.

23 **FINDINGS OF FACT**

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

25 1. Fresh Mix is owned by Get Fresh (60%), Plaintiff Paul Lagudi ("Lagudi") (30%),  
26 and Plaintiff William Todd Ponder ("Ponder") (10%), each of which is Member of Fresh Mix.  
27 Get Fresh, in turn, is owned by Dominic Caldara, Scott Goldberg, and John Wise. Caldara,  
28 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.

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

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

10           **B.       The Creation of the Confidential and Privileged Memorandum.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26           37.     Upon retention, Fox Rothschild subsequently received the case file. Berkley did  
27 not recall whether the file transfer was in electronic or paper form, nor did he recall whether the  
28

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

25  
26  
27           <sup>1</sup>     Plaintiffs filed a Motion to Associate Counsel, seeking an order permitting Berkley to  
28 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25           66. Berkley and Connot each claim that they did not review the Memorandum when  
26 working on the Response, but the exact language of the Memorandum had been part of their  
27 institutional knowledge. Specifically, Berkley and Connot each submitted declarations stating  
28

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

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

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

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

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

---

18 <sup>2</sup> The final excerpt, 131:1-20 from the third day of the evidentiary hearing is as follows:

19 THE COURT: Okay. So explain to me why the terms from the memo appear less  
20 than a week later in the reply you filed in the arbitration.

21 THE WITNESS [BERKLEY]: Because those terms were fresh in my mind at that  
22 time because I had written those terms in multiple filings prior to the August 5th  
23 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.

24 THE COURT: So the words were embedded in your mind because you'd  
25 previously quoted from the memo and used it in the reply brief?

26 THE WITNESS: At that time they were, yes.

27 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??

28 THE WITNESS: At that time, yes.

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

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

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

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

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

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

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

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

28           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

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

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

5           The Court *previously* made a decision that the memorandum  
6 identified as Exhibit T to Plaintiffs' Motion to Lift Stay and Amend  
7 Complaint ("The Memorandum") is facially privileged based upon  
8 the information that was provided to the Court.

9           Plaintiffs *shall continue* to sequester the Memorandum, and may  
10 not quote, summarize, or discuss the content of the Memorandum.

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

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

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

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

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

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

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

28           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

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

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

7 87. On September 25, 2019, the Court granted Get Fresh and Fresh Mix's request for  
8 discovery related to Plaintiffs' and their counsel's improper possession and use of the  
9 Memorandum and other privileged and confidential information. (See Order, dated Sept. 25,  
10 2019.)

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

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

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

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

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

25 93. Rather than provide copies of the documents to Get Fresh, Lagudi provided these  
26 documents to his attorneys to determine how best to use them in the pending dispute with  
27 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.



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

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

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

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

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

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

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

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

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

26          15.       Despite Bendavid's admissions regarding the general subject matters of the  
27 contents of the privileged Memorandum, its suspicious receipt, and his communications with  
28

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

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

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

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

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

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

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

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

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

24 23. Fox Rothschild associated with Bendavid as counsel for Plaintiffs on May 16,  
25 2019. Stern & Eisenberg is counsel for Plaintiffs in the arbitration (compelled by this Court).  
26 Both Fox Rothschild and Stern & Eisenberg took over as counsel for Plaintiffs in Bendavid's  
27 stead in or around March 2019. Bendavid's formal notice of withdrawal was filed on July 3,  
28 2019.

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

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

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

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

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

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

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

4           31. Having received the Memorandum under suspicious circumstances in December 4,  
5 2018 (by Bendavid) and the spring 2018 (by Stern & Eisenberg and Fox Rothschild), yet not  
6 providing any notice until affirmatively using the Memorandum in a Reply brief on  
7 August 1, 2019, Plaintiffs' counsel did "lie in wait" to provide notice only when it worked for  
8 them in the dispute against their adversary, and denied Get Fresh of any opportunity to object,  
9 demand return of the document, and non-use of the document. This is the exact type of behavior  
10 the Nevada Supreme Court criticized in *Merits Incentives*. 127 Nev. at 699, 262 P.3d at 727.

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

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

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

21           34. Nevada's work-product doctrine is set forth in NRCP 26(b)(3). It "protects  
22 documents with two characteristics: (1) they must be prepared in anticipation of litigation or for  
23 trial, and (2) they must be prepared by or for another party or by or for that other party's  
24 representative." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 383, 399 P.3d 334,  
25 347 (2017) (citing *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004)) (internal  
26 quotation marks omitted).

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

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

5 36. The party claiming privilege bears the burden of establishing the privilege, and  
6 does so by serving a privilege log. *See Rogers v. State*, 127 Nev. 323, 330, 255 P.3d 1264, 1268  
7 (2011) (the proponent of privilege bears the burden of establishing the privilege); *Albourn v. Koe*,  
8 *M.D., et al.*, Discovery Commissioner Opinion #10, 15 (Nov. 2001) (a party provides a factual  
9 basis for its claims of privilege by producing a privilege log); *In re Grand Jury Investigation*, 974  
10 F.2d 1068, 1071 (9th Cir. 1992) ("In essence, the party asserting the privilege must make a *prima*  
11 *facie* showing that the privilege protects the information the party intends to withhold. We have  
12 previously recognized a number of means of sufficiently establishing the privilege, one of which  
13 is the privilege log approach." (citations omitted).

14 37. "The party asserting the privilege has the burden of proving its applicability,  
15 including that the party has not waived it." *United States v. SDI Future Health, Inc.*, 464 F. Supp.  
16 2d 1027, 1040 (D. Nev. 2006) (citing *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d  
17 18, 25 (9th Cir. 1981)).

18 38. "[A] corporation's current management controls the [attorney-client privilege] 'to  
19 refuse to disclose, and to prevent any other person from disclosing, confidential  
20 communications.'" *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 643, 656, 331 P.3d 905,  
21 914 (2014).

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

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

5           41.     The Memorandum is facially and substantively privileged.

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

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

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

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

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

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

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

23  
24           **D.     Plaintiffs' Counsel Did Not Return or Sequester the Memorandum as**  
25           **Required By NRCP 26(b)(5)(B).**

26          49.     Once a party is placed on notice that information is subject to a claim of privilege  
27 or protection, NRCP 26(b)(5)(B) enumerates an affirmative obligation upon a party and their  
28

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

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

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

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

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

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

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

27 56. Plaintiffs continued to use and rely upon the Memorandum, as stated above.  
28

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

6           **E. Limited Disqualification is Necessary.**

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

10          59. "Where the 'asserted course of conduct by counsel threatens to affect the integrity  
11 of the adversarial process, [the court] should take appropriate measures, including  
12 disqualification, to eliminate such taint.'" *Richards v. Jain*, 168 F. Supp. 2d 1195, 1200 (W.D.  
13 Wash. 2001) (modifications in original) (quoting *MMR/Wallace Power & Indus., Inc. v. Thames*  
14 *Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991)); *cf. Clark v. Superior Court*, 196 Cal. App. 4th  
15 37, 55 (Cal. App. 2011) (describing disqualification "as a prophylactic measure to prevent future  
16 prejudice to the opposing party from information the attorney should not have possessed").

17          60. Where privilege information has been disclosed and misused, doubts should  
18 generally be resolved in favor of disqualification. *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200,  
19 1205, 14 P.3d 1266, 1269 (2000).

20          61. The Nevada Supreme Court has found that "there are situations where a lawyer  
21 who has been privy to privileged information improperly obtained from the other side must be  
22 disqualified." *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 698, 262 P.3d 720,  
23 726 (2011).

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

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



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

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

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

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

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

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

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

28 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

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

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

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

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

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

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

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

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

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

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

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

10  
11           **iii.   *Merits Incentives Factor 4: Plaintiffs elected to employ the Memorandum as a***  
12           ***playbook for their conduct in this action and the arbitration***

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

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

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

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

25           81.    Once Defendants became aware that Plaintiffs possessed the Memorandum on  
26 August 1, 2019, Defendants took immediate action to protect their privilege and keep it out of the  
27 Court's record.  
28

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

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

5           83.   The inability of counsel to extricate privileged information from his or her mind  
6 supports disqualification. *See, e.g., Matter of Beiny*, 129 A.D. 2d 126, 141-44 (N.Y. App. 1987)  
7 (explaining that use of privileged material warrants disqualification: "While documents may be  
8 effectively suppressed, the information gathered from them cannot be so easily contained. We  
9 simply do not know whether the information acquired from the [privileged] files will  
10 subsequently be used by [counsel], for even if [counsel] attempts to abide by the . . . suppression  
11 order, there is no way of assuring that the tainted knowledge will not subtly influence its future  
12 conduct of the litigation."); *McDermott Will & Emery LLP v. Superior Court*, 10 Cal. App. 5th  
13 1083, 1124-25 (Cal. App. 2017) ("But the court's order could not prevent Gibson Dunn from  
14 using the knowledge it acquired by carefully reviewing and analyzing the e-mail even if the e-  
15 mail itself is no longer available to the firm. Even after a trial court has taken remedial action to  
16 protect the privilege, 'disqualification still serves the useful purpose of eliminating from the case  
17 the attorney who could most effectively exploit the unfair advantage [acquired through the earlier  
18 review and use of the inadvertently disclosed, privileged materials].'"); *Clark*, 196 Cal. App. 4th  
19 at 54-55 (noting that counsel's review of the privileged material would lead to "inevitable  
20 questions about the sources of [counsel's] knowledge (even if [counsel] in fact obtained such  
21 knowledge from legitimate sources) could undermine the public trust and confidence in the  
22 integrity of the adjudicatory process"); *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092 (Cal.  
23 2007) (affirming disqualification where counsel's use of the privileged information was so  
24 extensive, "the damage caused by [the] use and dissemination of the notes was irreversible").

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

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

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

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

7 **F. Sanctions are Necessary.**

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

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

13 [1] [T]he degree of willfulness of the offending party[;]

14 [2] [T]he extent to which the non-offending party would be prejudiced by a  
15 lesser sanction[;]

16 [3] [T]he severity of the sanction of dismissal relative to the severity of the  
discovery abuse[;]

17 [4] [W]hether any evidence has been irreparably lost[;]

18 [5] [T]he feasibility and fairness of alternative, less severe sanctions, such as  
19 an order deeming facts relating to improperly withheld or destroyed  
evidence to be admitted by the offending party[;]

20 [6] [T]he policy favoring adjudication on the merits[;]

21 [7] [W]hether sanctions unfairly operate to penalize a party for the misconduct  
22 of his or her attorney[;] and

23 [8] [T]he need to deter both the parties and future litigants from similar abuses.

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

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

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

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

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

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

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

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

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

1 ORDER

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

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

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

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

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

24  
25  
26 <sup>3</sup> Plaintiffs offered to submit declarations from the other members of Plaintiffs' litigation  
27 team regarding their use of the Memorandum. (See Feb. 14, 2020 Hr'g Tr. 203:16-20.) The Court  
28 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.)

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

3 IT IS SO ORDERED.

4 DATED: 2 Mar 2020

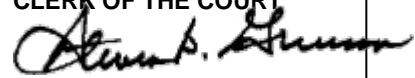
5   
6 ELIZABETH GONZALEZ  
7 EIGHTH JUDICIAL DISTRICT COURT  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

---

<sup>4</sup> This stay includes a stay of the deadline for Get Fresh and Fresh Mix to file their application for attorneys' fees and costs.



# **EXHIBIT 3**



**MAMJ**

MARK J. CONNOT (SBN 10010)

LUCY C. CROW (SBN 15,203)

FOX ROTHSCHILD LLP

1980 Festival Plaza Drive, #700

Las Vegas, Nevada 89135

(702) 262-6899

(702) 597-5503(Fax)

[MConnot@RoxRothschild.com](mailto:MConnot@RoxRothschild.com)

[LCrow@FoxRothschild.com](mailto:LCrow@FoxRothschild.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@LRRC.com](mailto:DPolsenberg@LRRC.com)

[JHenriod@LRRC.com](mailto:JHenriod@LRRC.com)

[ASmith@LRRC.com](mailto:ASmith@LRRC.com)

*Attorneys for Plaintiffs Paul Lagudi and William Todd Ponder*

DISTRICT COURT  
CLARK COUNTY, NEVADA

PAUL LAGUDI, an individual; and  
WILLIAM TODD PONDER, an individ-  
ual,

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 dissolu-  
tion of the parties' ongoing arbitration proceeding. NRCP 52(b), 59(e), 60(b). The

1 portion of the order interfering in the arbitration exceeds the Court's jurisdic-  
2 tion and is void. NRCP 60(b)(4).

3 Dated this 30th day of March, 2020.

4 LEWIS ROCA ROTHGERBER CHRISTIE LLP

5 By: /s/ Abraham G. Smith

6 DANIEL F. POLSENBERG (SBN 2376)  
7 JOEL D. HENRIOD (SBN 8492)  
8 ABRAHAM G. SMITH (SBN 13,250)  
9 3993 Howard Hughes Parkway,  
Suite 600  
Las Vegas, Nevada 89169

10 MARK J. CONNOT (SBN 10010)  
11 LUCY C. CROW (SBN 15,203)  
12 FOX ROTHSCHILD LLP  
1980 Festival Plaza Drive, #700  
Las Vegas, Nevada 89135  
(702) 262-6899

13 *Attorneys for Plaintiffs*

14 **POINTS AND AUTHORITIES**

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

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

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

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

4 3. The sanctions here were disproportionate to the alleged privilege vi-  
5 olation.

#### 6 **BACKGROUND**

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

14 Defendants ultimately delivered plaintiffs' things to their former counsel,  
15 Jeffrey Bendavid. (1/22/20 Hr'g Tr., at 119:10-25, Ex. 2.) He saw a piece of paper  
16 sticking out of one of the boxes and later read it. (1/22/20 Hr'g Tr., at 60:2-25,  
17 126:3-23, Ex. 2.)

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

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

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

## 6 ARGUMENT

### 7 I.

#### 8 STANDARD FOR RELIEF

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

10 First, under Rule 59(e) this Court may alter or amend an appealable or-  
11 der<sup>1</sup> "to correct a clear error of law or prevent manifest injustice." *Munafo v.*  
12 *Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (citation and internal quo-  
13 tation marks omitted) (collecting cases). This same relief obtains under Rule  
14 60(b)(1). *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir.  
15 1966) ("[W]hy should not the trial court have the power to correct its own judi-  
16 cial error under 60(b)(1) within a reasonable time . . . and thus avoid the incon-  
17 venience and expense of an appeal by the party which the trial court is now con-  
18 vinced should prevail?" (quoting 7 MOORE, FEDERAL PRACTICE § 60.22(3), at  
19 235–38)).

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

---

27 <sup>1</sup> Although Rule 59(e) uses the word "judgment," the Supreme Court has clari-  
28 fied that the rule includes any appealable order. *Lytle v. Rosemere Estates Prop.*  
*Owners*, 129 Nev. 923, 926, 314 P.3d 946, 948 (2013).

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

3 Third, this Court may review its findings—including evidentiary findings  
4 not previously objected to—any time within 28 days after service of written no-  
5 tice of entry of the Court’s order. NRCP 52(a)(5), (b).

6 Finally, even if the Court’s order is not a final judgment, the Court re-  
7 tains broad inherent authority to reflect on and reconsider such orders, not just  
8 on a motion under EDCR 2.24, but at “*any time* prior to the entry of final judg-  
9 ment.” *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466 n.4, 134 P.3d 698,  
10 705 n.4 (2006) (Maupin, J., concurring) (emphasis added).<sup>2</sup>

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

## 14 II.

### 15 **THIS COURT LACKED JURISDICTION TO INTERFERE IN THE ARBITRATION**

16 When this Court was considering defendants’ motion for disqualification  
17 and sanctions, the parties disagreed over the proper sanction: defendants be-  
18 lieved that the entire complaint could be dismissed, while plaintiffs thought no  
19 sanction—or, at most, a monetary penalty—was warranted. This Court picked  
20 what it likely thought was a middle ground: based on alleged taint in the arbi-  
21 tration, this Court purported to terminate that proceeding and dissolve the ar-  
22 bitration panel before it ever entered a final award.

---

23  
24 <sup>2</sup> See also *Div. of Child and Family Servs. v. Eighth Judicial Dist. Court*  
25 (*J.M.R.*), 120 Nev. 445, 453 & n.27, 92 P.3d 1239, 1244 & n.27 (2004); *State v.*  
26 *Kay*, 4 P.2d 498, 500 (Wash. 1931) (noting that oral announcement was not  
27 binding where a trial judge announced his ruling for the plaintiff but died be-  
28 fore 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).

1 But that course is jurisdictionally forbidden.

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

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

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

17 [A] party who wants to have such an option should not (and  
18 of course need not) consent to arbitration, which generally  
19 and here does not have an appellate component. The choice of  
20 arbitration is a choice to trade off certain procedural safe-  
guards, 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 dif-  
ferently constituted tribunal.

21 *Id.*

22 Courts across the country have recognized “a liberal federal policy favor-  
23 ing arbitration agreements . . . . The point of affording parties discretion in de-  
24 signing arbitration processes is to allow for efficient, streamlined procedures  
25 tailored to the type of dispute.” *Savers Prop.*, 748 F.3d at 717 (internal quota-  
26 tions omitted). If the parties are able to obtain interlocutory review of the deci-  
27 sions of arbitrators, “[t]hat would be the end of arbitration as a speedy and (rel-  
28 atively low-cost alternative to litigation.” *Trustmark Ins. Co. v. John Hancock*

1 *Life Ins. Co.*, 631 F.3d 869, 874 (7th Cir. 2011). Furthermore, “a prime objective  
2 of arbitration law is to permit a just and expeditious result with a minimum  
3 amount of judicial interference . . . any other such rule could spawn endless ap-  
4 plications to the courts and indefinite delay . . .” *Gulf Guar. Life Ins.*, 304 F.3d  
5 at 492. “[A] district court should not hold itself open as an appellate tribunal  
6 during an ongoing arbitration proceeding, since applications for interlocutory  
7 relief result only in a waste of time, the interruption of the arbitration proceed-  
8 ing, and delaying tactics in a proceeding that is supposed to produce a speedy  
9 decision.” *Michaels*, 624 F.2d at 414. Arbitration is designed “to conserve the  
10 time and resources of both the courts and the parties; thus, ‘for the court to en-  
11 tertain review of intermediary arbitration decisions involving procedure or  
12 other interlocutory matter, would disjoint and unduly delay the proceedings,  
13 thereby thwarting the very purpose of conservation.” *Michaels*, 624 F.2d at 414  
14 (citing to *Mobil Oil Indonesia v. Asamera Oil (Indonesia) Ltd.*, 372 N.E.2d 21,  
15 23 (N.Y. 1977)).

16  
17 **B. A District Court Cannot Interfere**  
18 **in an Ongoing Arbitration or Vacate**  
**the Panel and Chair’s Orders**

19 Applying these principles, a district court has statutory authority to re-  
20 view a final arbitration award, but *no* authority to interfere with an incomplete  
21 arbitration.

22 This conclusion is the same no matter the governing law: There is no stat-  
23 utory authority allowing judicial interference in an ongoing arbitration in Ne-  
24 vada’s Uniform Arbitration Act, Delaware’s Uniform Arbitration Act, or the  
25 Federal Arbitration Act.<sup>3</sup> To the contrary, authority from around the country

26  
27 <sup>3</sup> While the operating agreement states that any arbitration shall be held in Las  
28 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



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

3                   **1.     *The Uniform Arbitration Act Forbids***  
4                   ***Judicial Interference in Arbitration***

5           If applicable, the Uniform Arbitration Act does not give this Court author-  
6 ity to interfere with an ongoing arbitration.

7                   a.     NEVADA’S UNIFORM ARBITRATION ACT  
8                            CONTEMPLATES JUDICIAL REVIEW OF A FINAL  
9                            AWARD, NOT A MID-ARBITRATION JUDICIAL  
                              TAKEOVER

10          The Nevada Uniform Arbitration Act provides no basis for the district  
11 court to exercise jurisdiction over the arbitration. Nothing in the act grants  
12 courts jurisdiction over interim awards, orders, pleadings, or decisions by arbi-  
13 trators.

14          Instead, the act contemplates a role for courts only at the beginning and  
15 the end: NRS 38.244 states that a court may enforce an agreement to arbitrate,  
16 and that an agreement to arbitrate that provides for arbitration in Nevada con-  
17 fers exclusive jurisdiction on the court to enter judgment on any arbitration  
18 award. Once arbitration commences, a court loses its authority to interfere until  
19 the arbitrator issues a final award, and the scope of any judicial review of a fi-  
20 nal award is limited. *New Shy Clown Casino, Inc. v. Baldwin*, 103 Nev. 269,  
21 271, 737 P.2d 524, 525 (1987).

22          There is no statutory provision granting the district court authority to  
23 hold an evidentiary hearing or to modify the arbitration award where there has  
24

---

25 must make this clear and specific. *See Mastrobuono v. Shearson Lehman Hut-*  
26 *ton*, 514 U.S. 52, 58-60 (1995). There is no language excluding application of the  
27 FAA. Fresh Mix is a Delaware limited liability company doing business in mul-  
28 tiple 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).

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

4                   b.       DELAWARE’S UNIFORM ACT LIKEWISE PROVIDES NO  
5                               INTERLOCUTORY JUDICIAL SUPERVISION

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

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

12           Case law under the uniform act is limited because few courts have at-  
13 tempted to intercede in ongoing arbitrations. But in Pennsylvania, one court did  
14 so and was found to have exceeded its jurisdiction: a trial court lacks the inher-  
15 ent authority to terminate an arbitration before there has been a final award.  
16 *Fastuca v. L.W. Molnar & Assocs.*, 10 A.3d 1230 (Pa. 2011). There, the trial  
17 court attempted to terminate a common-law arbitration proceeding after the ar-  
18 bitrator had entered certain “findings” but had not resolved all of the outstand-  
19 ing issues between the parties. The Pennsylvania Supreme Court, interpreting  
20 language similar to the uniform acts adopted in Nevada and Delaware, held  
21 that these interim “findings” were not a final award within the meaning of the  
22 arbitration act “and, thus, that the trial court had no authority under that sec-  
23 tion to review such findings.” *Id.* at 1232. The court further held that a trial  
24 court does not have the inherent authority to terminate arbitration proceedings  
25 before a final award is issued. *Id.* One party’s dissatisfaction with the arbitrator  
26 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.”<sup>4</sup>

---

<sup>4</sup> *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*

1 a. COURTS CANNOT VACATE INTERLOCUTORY  
2 RULINGS BEFORE A FINAL AWARD

3 The Eleventh Circuit's decision in *Schatt v. Aventura Limousine & Trans-*  
4 *portation Service, Inc.* illustrates the rule. There, after the arbitration had pro-  
5 ceeded to a hearing, but before any order, the defendant Aventura filed a mo-  
6 tion in district court seeking to disqualify the plaintiff Schatt's counsel for,  
7 among other things, *ex parte* contact with the defendant. 603 Fed. App'x at 882-  
8 83. While the disqualification motion was pending, the arbitrator issued an in-  
9 terim award on liability but deferred a final award on damages. *Id.* at 883. The  
10 district court stayed the arbitration pending resolution of the disqualification  
11 motion. Ultimately, Schatt's counsel moved to withdraw and lift the stay of ar-  
12 bitration. *Id.* at 884. Aventura opposed and asked the district court to instead  
13 vacate the interim award on liability, and reassign the case to a different arbi-  
14 trator. *Id.* at 885. The district court granted Aventura's request, vacating the  
15 interim award and directing the parties to a new arbitration before a new arbi-  
16 trator. *Id.* at 885.

17  
18 

---

19 *Life Ins. Co. v. Emp'rs Reassurance Corp.*, 2016 WL 3460316, at \*3 (D. Mass.  
20 June 21, 2016) ("The FAA contains no provision expressly granting courts the  
21 authority to remove a party-appointed arbitrator prior to the conclusion of the  
22 arbitration."); *Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, 2010 WL 431592,  
23 at \*3 (N.D. Ill. Feb. 1, 2010) (refusing to disqualify allegedly biased arbitrator,  
24 even though the arbitration agreement required disinterested arbitrators, be-  
25 cause issues of bias or qualification can only be challenged post-award); *Certain*  
26 *Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 935  
27 (N.D. Cal. 2003) ("[C]ourts have consistently held that courts do not have the  
28 power under the FAA to disqualify an arbitrator while proceedings are pend-  
ing."); *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.").

1 The Eleventh Circuit reversed, holding that “the district court was with-  
2 out jurisdiction to vacate the Interim Award” as it was not a final arbitration  
3 award. *Id.* at 886. Courts have held that the language of the FAA “allows review  
4 of final arbitral awards only, but not of interim or partial rulings . . . . This lim-  
5 ited review is consistent with the long-held principle that review of arbitral  
6 awards is among the narrowest known to the law.” *Id.* at 887 (internal quota-  
7 tions omitted). The Eleventh Circuit held that “the Interim Award on Liability  
8 clearly established that the arbitrator’s work was not complete”; thus, it was  
9 not final. *Id.* at 887-88. “Because the Interim Award was not a final arbitral  
10 award, it was not properly under review by the district court.” *Id.* at 888.

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

### 17 **3. The FAA Rule Applies in State Court**

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

1 The Sixth Circuit reiterated the district court’s limited role in arbitra-  
2 tion—at the beginning (to see whether the parties agreed to it) and at the end,  
3 but not the middle: “[i]f parties could take full-bore legal and evidentiary ap-  
4 peals, arbitration would become merely a prelude to a more cumbersome and  
5 time-consuming judicial review process.” *Savers Prop.*, 748 F.3d at 717 (quoting  
6 *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568-69 (2013)). Judicial re-  
7 view prior to the issuance of a final arbitration award is improper, and “the dis-  
8 trict court erred by prematurely injecting itself into this private dispute.” *Sav-*  
9 *ers Prop.*, 748 F.3d at 716.

10 **C. This Court Lacked Jurisdiction**  
11 **to Take Over the Arbitration**

12 In most of these cases, the district court was at least reviewing an arbi-  
13 trator’s decision. Here, however, this Court purported to vacate interim orders  
14 and dismiss the panel before such a remedy had even been presented to the ar-  
15 bitrators. That was jurisdictional error.

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

18 As the Fourth Circuit has noted, “Generally, objections to the nature of  
19 arbitral proceedings are for the arbitrator to decide in the first instance. Only  
20 after arbitration may a party then raise such challenges if they meet the nar-  
21 row grounds set out in 9 U.S.C. § 10 for vacating an arbitral award. . . [F]air-  
22 ness objections should generally be made to the arbitrator, subject only to lim-  
23 ited post-arbitration judicial review as set forth in section 10 of the FAA.” *Hoot-*  
24 *ers of Am.*, 173 F.3d at 941.

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



1 noting an exception only if the agreement to arbitrate is itself “subject to attack  
2 under general contract principles as exist at law or in equity” (internal quota-  
3 tion marks omitted)).

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

6 This Court has no jurisdiction to vacate the arbitration panel’s orders, to  
7 terminate the arbitration, or to dismiss the panel. The panel’s interlocutory rul-  
8 ings were not “final arbitral awards” as they do not resolve all (or even nearly  
9 all) of the disputed issues. Moreover, as in *Schatt*, one side’s claim that an arbi-  
10 trator has been tainted cannot be raised to the district court until after a final  
11 award.

12 It is doubtful that any case would justify a judicial exception to the statu-  
13 tory limits on the court’s jurisdiction. The Ninth Circuit assumed for argument  
14 that such an “extreme case[]” might exist, *Aerojet-Gen. Corp. v. Am. Arbitration*  
15 *Ass’n*, 478 F.2d 248, 251 (9th Cir. 1973), but recently it affirmed that it has  
16 never found cause to disqualify an arbitrator mid-arbitration.<sup>5</sup> *In re Sussex*, 781  
17 F.3d 1065, 1073 (9th Cir. 2015). In *In re Sussex*, the Ninth Circuit granted ex-  
18 traordinary mandamus relief to stop a district court from ordering an arbitra-  
19 tor’s disqualification: even if the arbitrator’s impartiality could be questioned,  
20 the district court needed to await the final award to decide that issue. *Id.* at  
21 1075.

---

23 <sup>5</sup> Indeed, even under the Ninth Circuit’s outlier approach of allowing a district  
24 court to intervene in the “most extreme cases,” a case cannot fall within the ex-  
25 ception unless the circumstances “could cause severe irreparable injury from an  
26 error that cannot effectively be remedied on appeal from the final judgment and  
27 that would result in manifest injustice.” *In re Sussex*, 781 F.3d 1065, 1073 (9th  
28 Cir. 2015) (internal citations omitted). As discussed immediately below, reme-  
dies 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.”

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

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

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

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



1 9 U.S.C. §§ 9–11, 16; NRS 38.241. While waiting until the resolution of the arbi-  
2 tration would cost additional fees and time, the “equitable concern that delays  
3 and expenses would result if an arbitration award were vacated is manifestly  
4 inadequate to justify a mid-arbitration intervention, regardless of the size and  
5 early stage of the arbitration.” *Sussex*, 781 F.3d at 1075.

6  
7 **4. *Defendants Did Not Give the Arbitrators***  
8 ***a Chance to Evaluate their Claim of***  
9 ***Privilege and Any Remedy for Alleged Taint***

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

14 **D. The Jurisdictional Defect Renders**  
15 **this Part of the Court’s Order Void**

16 Because this Court lacked jurisdiction to interfere in the ongoing arbitra-  
17 tion, the portion of this Court’s order purporting to do so is void. *Rawson v.*  
18 *Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4  
19 (2017); *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). This  
20 Court should vacate it. NRCP 60(b)(4).

21 **III.**

22 **THIS COURT ERRED IN SUSTAINING DEFENDANTS’ CLAIM OF PRIVILEGE**

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

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

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

5                 If information produced in discovery is subject to a claim of  
6                 privilege or of protection as trial-preparation material, the  
7                 party making the claim may notify any party that received  
8                 the information of the claim and the basis for it. ***After being***  
9                 ***notified, a party must promptly return, sequester, or de-***  
10                ***stroy the specified information and any copies it has;***  
11                must not use or disclose the information until the claim is re-  
12                solved; must take reasonable steps to retrieve the information  
13                if the party disclosed it before being notified; ***and may***  
14                ***promptly present the information to the court under***  
15                ***seal for a determination of the claim.*** The producing party  
16                must preserve the information until the claim is resolved.

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

19           And cases applying Rule 26's language confirm that in presenting the in-  
20           formation to the Court, plaintiffs may rely on the content of a document to ar-  
21           gue, under seal, that it is not privileged. *See, e.g., Diamond X Ranch LLC v. At-*  
22           *lantic Richfield Co.*, 2016 WL 3176577, at \*4 (D. Nev. June 3, 2016) (interpret-  
23           ing federal version of Rule 26(b)(5)(B) and finding the receiving party may pre-  
24           sent the information claimed to be privileged in briefing); *Great-West Life & An-*  
25           *nuity Ins. Co. v. Am. Econ. Ins. Co.*, 2013 WL 5332410, at \*1 (D. Nev. Sept. 23,  
26           2013) (applying Rule 26's language in a protective order and relying on the  
27           "parties' description of the documents" to determine if the documents are privi-  
28           leged); *LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 600 (D. Nev.  
2012) (considering arguments concerning the content of documents and examin-  
ing 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).

1 In *Diamond X Ranch LLC*, the court discussed whether Federal Rule  
2 26(b)(5)(B)<sup>6</sup> requires a party to file a brief under seal that discusses information  
3 that is subject to a claim of privilege or protection. *See Diamond X Ranch LLC*,  
4 2016 WL 3176577, at \*4. But there is no question the party receiving the pur-  
5 portedly privileged document may make arguments that it is not privileged us-  
6 ing the content of the document.

7 In *Great-West Life*, the plaintiffs received many documents in discovery  
8 that the defendants later claimed were privileged. *See Great-West Life & Annu-*  
9 *ity*, 2013 WL 5332410, at \*1. Consistent with language similar to Rule  
10 26(b)(5)(B), plaintiffs presented certain documents to the court for consideration  
11 and argued based on the content that they were not privileged. *See id.* at \*1-2,  
12 6-8. The court entertained these arguments without issue. *See id.* For other doc-  
13 uments that defendants had claimed were privileged, however, the plaintiffs  
14 failed to present those documents to the court for consideration. *See id.* at \*9. As  
15 a result, the court found plaintiffs had failed to meet their obligation to  
16 “promptly present” the information for the court to determine the claim of privi-  
17 lege and therefore the court found the plaintiffs lost their ability to argue the  
18 documents were not privileged. *See id.*

19  
20 **B. Plaintiffs Properly Presented the**  
21 **Memo to the Court under Seal;**  
22 **the Court Improperly Disregarded It**

23 Defendants provided<sup>7</sup> the memo to plaintiffs, and on August 2, 2019, de-  
24 fendants gave notice that they claimed attorney-client privilege. (2/14/20 Hr’g

25  
26 <sup>6</sup> Federal Rule 26(b)(5)(B) is identical to NRCP 26(b)(5)(B).

27 <sup>7</sup> The memo was delivered just before the commencement of litigation rather  
28 than produced in response to a discovery request. This Court’s order neverthe-  
less 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.)

1 Tr., at 168:22-169:9, Ex. 3.) As Rule 26’s express language shows, upon receiv-  
2 ing such notice, plaintiffs had the obligation to “promptly present the infor-  
3 mation to the court under seal for a determination of the claim.” Rule 26 directs  
4 plaintiffs, not defendants, to present the “information” claimed privileged—here  
5 the memo—to the Court.

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

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

16 But that content is critically important. If considered, it could have pro-  
17 vided evidence that

- 18 • the subject matter was not that of an attorney-client communica-  
19 tion;
- 20 • the memo was *not* prepared at the direction of retained counsel; but
- 21 • the memo instead was created before counsel was retained.

22  
23 This violation of plaintiffs’ rights under NRCP 26(b)(5)(B) caused severe  
24 prejudice and constitutes reversible error.  
25  
26  
27  
28

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

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

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

14          The leading case on the good-cause standard to be employed when deter-  
15          mining whether there is privilege is *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th  
16          Cir. 1970).<sup>8</sup> There, minority stockholders brought a class action against a corpo-  
17          ration alleging violations of federal and state security laws, as well as common  
18          law fraud. The court determined that a

19                   corporation is not barred from asserting [attorney-client priv-  
20                   ilege] merely because those demanding information enjoy the  
21                   status of stockholders. But where the corporation is in suit

---

22          <sup>8</sup> The Operating Agreement includes a choice of law provision selecting Dela-  
23          ware law. (Plaintiffs' Motion to Compel Books and Records, at 11:21-28.) A de-  
24          termination regarding whether the majority members can assert privilege at  
25          the expense of Plaintiffs must be considered under the law of Delaware based  
26          on the choice of law provision. *See Wellin v. Wellin*, 2016 WL 123066, at \*3  
27          (D.S.C. Jan. 8, 2016) (choice of law provision in trust agreement governed ques-  
28          tions relating to privilege). When examining issues of privilege, courts look to  
29          the choice of law rules of the forum state. *See Wolpin v. Philip Morris Inc.*, 189  
30          F.R.D. 418, 423 (C.D. Cal. 1999). Under Nevada choice of law rules, courts en-  
31          force a contractual choice of law provision. *Engel v. Ernst*, 102 Nev. 390, 724  
32          P.2d 215 (1986). Therefore, based on the choice of law provision contained  
33          within the Operating Agreement, the privilege law of Delaware applies to this  
34          analysis.

1 against its stockholders on charges of acting inimically to  
2 stockholder interests, protection of those interests as well as  
3 those of the corporation and of the public require that the  
4 availability of the privilege be subject to the right of the stock-  
holders to show cause why it should not be invoked in the par-  
ticular instance.

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

- 7 1. Number of shareholders and the percentage of stock  
they represent;
- 8 2. Bona fides of the shareholders;
- 9 3. Nature of the shareholders' claim and whether it is  
10 obviously colorable;
- 11 4. Apparent necessity or desirability of the sharehold-  
ers having the information and the availability of it from  
12 other sources;
- 13 5. Whether, if the shareholders' claim is of wrongful ac-  
tion by the corporation, it is of action criminal, or illegal but  
14 not criminal, or of doubtful legality;
- 15 6. Whether the communication related to past or to pro-  
spective actions;
- 16 7. Whether the communication is of advice concerning  
the litigation itself;
- 17 8. The extent to which the shareholders are blindly fish-  
ing;
- 18 9. The risk of revelation of trade secrets or other infor-  
mation in whose confidentiality the corporation has an inter-  
est for independent reasons.

19 *Id.* at 1104.

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



1 368. The Court further held that “[i]t is no longer open to question that a major-  
2 ity shareholder who controls a corporation must not use his position to the un-  
3 due disadvantage of the minority; his obligation is to the corporation and not  
4 simply to himself.” *Id.* at 369. That included letting the minority shareholders  
5 view PepsiCo documents that touched upon the interests of the minority mem-  
6 bers of Wilson:

7           Where the fiduciary has conflicting interests of its own, to al-  
8 low the attorney-client privilege to block access to the infor-  
9 mation and bases of its decisions as to the persons to whom  
10 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.

11 *Id.* at 369-70.

12           Similarly, in *Deutsch v. Cogan*, 580 A.2d 100 (Del. Ch. 1990), the Court  
13 used the standards articulated by both *Valente* and *Garner* to compel produc-  
14 tion of allegedly privileged material. General Felt was a controlling entity of  
15 GFI Nevada, which in turn was Knoll International’s majority shareholder. The  
16 law firm Akin Gump represented both Knoll and General Felt in a transaction  
17 later disputed by Knoll’s minority shareholders. The Court held that discovery  
18 of attorney-client privilege communications is not automatic in shareholder  
19 suits, but because GFI Nevada owed fiduciary duties to Knoll’s minority share-  
20 holders, and those obligations run “necessarily to protect the interests of the mi-  
21 nority from domination and overreaching by the controlling shareholder.” *Id.* at  
22 107. Moreover, “[w]here a fiduciary has conflicting interests, to allow the law-  
23 yer-client privilege to block access to the information and basis of its decisions  
24 as to the persons to whom the obligations are owed might allow the perpetra-  
25 tion of frauds.” *Id.* at 108.





1 IV.

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

4 Even ignoring the jurisdictional defect and the improper privilege deter-  
5 mination, the sanctions are disproportionate to any alleged violation of the priv-  
6 ilege.

7 **A. Sanctions Are Reserved for Willful Noncompliance**

8 In Nevada, “[t]he general rule in the imposing of sanctions is that they be  
9 applied only in extreme circumstances where willful noncompliance of a court’s  
10 order is shown by the record.” *Finkelman v. Clover Jewelers Blvd., Inc.*, 91 Nev.  
11 146, 147, 532 P.2d 608, 609 (1975); *see also Stubli v. Big D Int’l Trucks, Inc.*,  
12 107 Nev. 309, 313, 810 P.2d 785, 787 (1991) (same). Courts will also consider  
13 the degree of harm caused by the alleged misconduct. *See, e.g., Stubli*, 107 Nev.  
14 at 313; *see also Rish v. Simao*, 132 Nev. 189, 200, 368 P.3d 1203, 1212 (2016)  
15 (same).

16 The party seeking sanctions bears the burden of proving the facts to sup-  
17 port their imposition. *Practice Mgmt. Sols., LLC v. Eighth Judicial Dist. Court*,  
18 No. 68901, 2016 WL 2757512, at \*3 (Nev. May 10, 2016) (unpublished disposi-  
19 tion). The same burden exists under California law, where the Court of Appeal,  
20 in another “privileged document in a box” case, held that the burden was on the  
21 party seeking sanctions to “persuasively demonstrate” that including the docu-  
22 ment in the box was the result of inadvertence in order to obtain sanctions:

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

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

1 And even after that burden is met, Nevada courts are not to award sanc-  
2 tions beyond a curative measure that would remove the harm. *See, e.g., Rish*,  
3 132 Nev. at 200 (noting that a violation must be “so extreme that it cannot be  
4 eliminated through an objection and admonition.”).

5 **B. Plaintiffs’ Counsel Did Not Willfully**  
6 **Disregard this Court’s Sealing Order**

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

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

24 Plaintiffs did not violate NRCP 26(b)(5)(B) and did not engage in any will-  
25 ful misconduct, and the allegedly “privileged” nature of the memo has not been  
26 conclusively established when its content has not been considered. The order  
27 and its attendant sanctions should be vacated.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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*

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)  
LUCY C. CROW (SBN 15,203)  
FOX ROTHSCHILD LLP  
1980 Festival Plaza Drive, #700  
Las Vegas, Nevada 89135  
(702) 262-6899

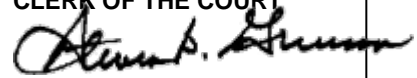
*Attorneys for Plaintiffs*

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

JAMES J. PISANELLI  
DEBRA L. SPINELLI  
AVA M. SCHAEFER  
PISANELLI BICE PLLC  
400 South 7<sup>th</sup> Street, Suite 300  
Las Vegas, Nevada 89101  
[JJP@PisanelliBice.com](mailto:JJP@PisanelliBice.com)  
[DLS@PisanelliBice.com](mailto:DLS@PisanelliBice.com)  
[AMS@PisanelliBice.com](mailto:AMS@PisanelliBice.com)

/s/ Lisa M. Noltie  
An Employee of Lewis Roca Rothgerber Christie LLP

# **EXHIBIT 4**



NOAS  
MARK J. CONNOT (SBN 10010)  
LUCY C. CROW (SBN 15,203)  
FOX ROTHSCHILD LLP  
1980 Festival Plaza Drive, #700  
Las Vegas, Nevada 89135  
(702) 262-6899  
(702) 597-5503(Fax)  
[MConnot@RoxRothschild.com](mailto:MConnot@RoxRothschild.com)  
[LCrow@FoxRothschild.com](mailto:LCrow@FoxRothschild.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@LRRC.com](mailto:DPolsenberg@LRRC.com)  
[JHenriod@LRRC.com](mailto:JHenriod@LRRC.com)  
[ASmith@LRRC.com](mailto:ASmith@LRRC.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. 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

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

BREMER WHYTE BROWN & O'MEARA LLP  
PETER C. BROWN (SBN 5887)  
JEFFREY W. SAAB (SBN 11,261)  
DEVIN R. GIFFORD (SBN 14,055)  
CYRUS S. WHITTAKER (SBN 14,965)  
1160 N. Town Center Drive,  
Suite 250  
Las Vegas, Nevada 89144

*Attorneys for Plaintiffs*

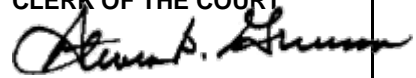
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

JAMES J. PISANELLI  
DEBRA L. SPINELLI  
AVA M. SCHAEFER  
PISANELLI BICE PLLC  
400 South 7<sup>th</sup> Street, Suite 300  
Las Vegas, Nevada 89101  
[JJP@PisanelliBice.com](mailto:JJP@PisanelliBice.com)  
[DLS@PisanelliBice.com](mailto:DLS@PisanelliBice.com)  
[AMS@PisanelliBice.com](mailto:AMS@PisanelliBice.com)

/s/ Lisa M. Noltie  
An Employee of Lewis Roca Rothgerber Christie LLP



# **EXHIBIT 5**



James J. Pisanelli, Esq., Bar No. 4027  
[JJP@pisanellibice.com](mailto:JJP@pisanellibice.com)  
Debra L. Spinelli, Esq., Bar No. 9695  
[DLS@pisanellibice.com](mailto:DLS@pisanellibice.com)  
Ava M. Schaefer, Esq., Bar No. 12698  
[AMS@pisanellibice.com](mailto: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 BANKRUPTCY**

PLEASE BE ADVISED that on April 23, 2020, a Chapter 7 Involuntary Bankruptcy  
Petition was filed as to Defendant Fresh Mix, LLC in the United States Bankruptcy Court for the  
District of Nevada, Case No. 20-12051. This matter is now subject to the automatic stay of  
11 U.S.C. § 362.

DATED this 24th day of April 2020.

PISANELLI BICE PLLC

By: /s/ Debra L. Spinelli  
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 24th day of April 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 BANKRUPTCY** to the following:

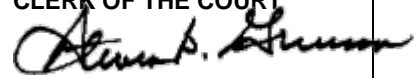
Mark J. Connot, Esq.  
Lucy C. Crow, Esq.  
FOX ROTHSCHILD LLP  
1980 Festival Plaza Drive, #700  
Las Vegas, NV 89135

Daniel J. Polsenberg, Esq.  
Joel D. Henriod, Esq.  
Abraham G. Smith, Esq.  
LEWIS ROCA ROTHGERBER CHRISTIE LLP  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169-5996

*Attorneys for Plaintiffs*

/s/ Kimberly Peets  
An employee of PISANELLI BICE PLLC

# **EXHIBIT 6**



James J. Pisanelli, Esq., Bar No. 4027  
[JJP@pisanellibice.com](mailto:JJP@pisanellibice.com)  
Debra L. Spinelli, Esq., Bar No. 9695  
[DLS@pisanellibice.com](mailto:DLS@pisanellibice.com)  
Ava M. Schaefer, Esq., Bar No. 12698  
[AMS@pisanellibice.com](mailto: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,

Case No.: A-18-785391-B  
Dept. No.: XI

Plaintiffs,

v.

**STIPULATION AND ORDER  
REGARDING STAY AND PLAINTIFFS'  
MOTION TO VACATE, ALTER, OR  
AMEND SANCTIONS ORDER**

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.

Defendants Fresh Mix, LLC ("Fresh Mix") and Get Fresh Sales, Inc. ("Get Fresh") (together, the "Defendants"), by and through their counsel of record, the law firm PISANELLI BICE PLLC, and Plaintiffs Paul Lagudi and William Todd Ponder (together, the "Plaintiffs") (collectively, with the Defendants, the "Parties"), by and through their counsel of record, the law firms LEWIS ROCA ROTHGERBER CHRISTIE LLP and FOX ROTHSCHILD LLP, hereby stipulate and agree follows:

1. Plaintiffs' Motion to Vacate, Alter, or Amend Sanctions Order, filed on March 30, 2020 (the "Motion"), is currently set to be heard on June 1, 2020, at 9:00 a.m.

2. On May 6, 2020, the Parties submitted a joint status report related to the Chapter 7 Involuntary Bankruptcy Petition as to Fresh Mix, LLC filed on April 23, 2020, in the United

1 States Bankruptcy Court for the District of Nevada, and its effect on the above-captioned matter.  
2 In the status report, the Parties stated their agreement that the above-captioned matter remain  
3 stayed until the Bankruptcy Court's notice of entry of an order on a motion related to the  
4 automatic stay under 11 U.S.C. § 362. The Parties also proposed to submit a status report to this  
5 Court on June 10, 2020, to apprise the Court of the status of the Bankruptcy proceeding, and its  
6 relationship to and effect on this action.

7 3. The Parties hereby agree that the above-captioned matter remains stayed until  
8 further order from the Bankruptcy Court.

9 4. The Parties further agree to vacate the hearing on the Motion currently set to be  
10 heard on June 1, 2020, at 9:00 a.m., to be reset once the stay is lifted. Upon lifting the stay, the  
11 Parties will submit a proposed briefing schedule for the Motion.

12 IT IS SO STIPULATED.

13 Dated this 27th day of May, 2020.

Dated this 27th day of May, 2020.

14 PISANELLI BICE PLLC

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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

By: /s/ Abraham G. Smith  
Joel D. Henriod, Esq., Bar No. 8492  
Daniel F. Polsenberg, Esq., Bar No. 2376  
Abraham G. Smith, Esq., Bar No. 13250  
3993 Howard Hughes Pkwy, Suite 600  
Las Vegas, Nevada 89169

19 *Attorneys for Fresh Mix, LLC and*  
20 *Get Fresh Sales, Inc.*

Mark J. Connot, Esq., Bar No. 10010  
Lucy C. Crow, Esq., Bar No. 15203  
FOX ROTHSCHILD LLP  
1980 Festival Plaza Drive, #700  
Las Vegas, Nevada 89135

21  
22 *Attorneys for Plaintiffs Paul Lagudi*  
23 *and William Todd Ponder*  
24  
25  
26  
27  
28

**ORDER**

Pursuant to the stipulation of the Parties above, and for good cause appearing,  
IT IS HEREBY ORDERED as follows:

1. This action shall continue to be stayed pending further order from the Bankruptcy Court.
2. The hearing on the Motion currently set for June 1, 2020, at 9:00 a.m. is hereby vacated.
3. Upon lifting the stay of this action, the Parties shall submit a proposed briefing schedule for the Motion.

IT IS SO ORDERED.

DATED: May 28, 2020

  
\_\_\_\_\_  
THE HONORABLE ELIZABETH GONZALEZ  
EIGHTH JUDICIAL DISTRICT COURT

Respectfully submitted by:

PISANELLI BICE PLLC

By: /s/ Debra L. Spinelli  
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.*

# **EXHIBIT 7**



*Gary Spraker*

Honorable Gary Spraker  
United States Bankruptcy Judge



Entered on Docket  
February 16, 2022

SCHWARTZER & MCPHERSON LAW FIRM

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

Jason A. Imes, Esq., NV Bar No. 7030  
Schwartzter & 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](mailto:bkfilings@s-mlaw.com)  
*Counsel for Lenard E. Schwartzter, Trustee*

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re:

FRESH MIX LLC,

Debtor(s).

Case No. BK-S-20-12051-GS

Chapter 7

**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<sup>1</sup> 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

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*

/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

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*

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

<sup>1</sup> The State Court Litigation includes any appellate matters arising during pendency of the State Court Litigation.

# **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](mailto:bkfilings@s-mlaw.com)  
*Counsel for Lenard E. Schwartzer, Trustee*

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

In re: Case No. BK-S-20-12051-GS

FRESH MIX LLC, Chapter 7

Debtor(s). **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

**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<sup>1</sup> 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.

///

///

///

///

///

\_\_\_\_\_

<sup>1</sup> 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

Dated: February 15, 2022

/s/ Jason A. Imes

/s/ Samuel A. Schwartz

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

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

Dated: February 15, 2022

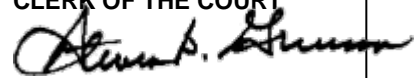
/s/ F. Thomas Edwards

/s/ Zachariah Larson

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*

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

# **EXHIBIT 8**



1 **SR**  
2 MARK J. CONNOT (SBN 10010)  
3 FOX ROTHSCHILD LLP  
4 1980 Festival Plaza Drive, #700  
5 Las Vegas, Nevada 89135  
6 (702) 262-6899  
7 (702) 597-5503(Fax)  
8 [MConnot@RoxRothschild.com](mailto:MConnot@RoxRothschild.com)

9 DANIEL F. POLSENBERG (SBN 2376)  
10 JOEL D. HENRIOD (SBN 8492)  
11 ABRAHAM G. SMITH (SBN 13250)  
12 LEWIS ROCA ROTHGERBER CHRISTIE LLP  
13 3993 Howard Hughes Parkway, Suite 600  
14 Las Vegas, Nevada 89169-5996  
15 (702) 949-8200  
16 (702) 949-8398 (Fax)  
17 [DPolsenberg@LewisRoca.com](mailto:DPolsenberg@LewisRoca.com)  
18 [JHenriod@LewisRoca.com](mailto:JHenriod@LewisRoca.com)  
19 [ASmith@LewisRoca.com](mailto:ASmith@LewisRoca.com)

20 *Attorneys for Plaintiffs Paul Lagudi and William Todd Ponder*

21 DISTRICT COURT  
22 CLARK COUNTY, NEVADA

23 PAUL LAGUDI, an individual; and  
24 WILLIAM TODD PONDER, an individual,  
25  
26 Plaintiffs,

27 vs.

28 FRESH MIX, LLC, a Delaware limited li-  
ability 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

Dep't No. 22

**PLAINTIFFS' STATUS REPORT**

Hearing Date: November 17, 2021  
Hearing Time: 8:30 a.m.

Plaintiffs ask this Court to take notice of developments in this case that are likely to affect the proceedings going forward.

**A. Relief from Bankruptcy Stay**

On April 23, 2020, defendant Get Fresh Sales, Inc. filed an involuntary petition under Chapter 7 of the Bankruptcy Code against co-defendant Fresh Mix, LLC. Proceedings in this state-court action were stayed under 11 U.S.C.



1 § 362.

2 The Chapter 7 trustee for the bankruptcy estate of Fresh Mix has deter-  
3 mined that the assets of the bankruptcy estate include potential claims against  
4 Get Fresh, its managers and members, and other affiliates. The trustee has  
5 asked the bankruptcy court for authorization to employ special counsel to pur-  
6 sue those claims, including in this state-court litigation.

7 The bankruptcy court has set a hearing for November 29, 2021. In antici-  
8 pation of that hearing, the parties in that bankruptcy proceeding expect to file a  
9 stipulation for relief from the automatic stay. If that stipulation is approved,  
10 this Court will resume jurisdiction over the claims involving Fresh Mix.

11 **B. Issues Upon Resuming Jurisdiction**

12 Once the stay is lifted, plaintiffs want to move this case forward as expe-  
13 ditiously as possible so they can obtain relief on their claims. Accordingly, this  
14 Court should be aware of the issues that will likely arise, including questions of  
15 who will represent Get Fresh, how the landscape has changed with regard to  
16 claims by Fresh Mix against Get Fresh, and when to reset the pending motion  
17 to vacate, alter, or amend the Court's sanctions order.

18 **1. *Who Will Represent Get Fresh***

19 While Fresh Mix is now represented by the bankruptcy trustee (and likely  
20 to represented by special counsel for this proceeding), still unresolved is the  
21 question of who will represent Get Fresh in this litigation. Get Fresh and Fresh  
22 Mix have been jointly represented by their current counsel. The Chapter 7  
23 trustee, however, has asserted a conflict based on Get Fresh's adversity to  
24 Fresh Mix. (**Ex. 1**, J. Imes May 28, 2021 Letter, at 1-2.) Because the estate of  
25 Fresh Mix does not waive the conflict, the trustee has asked counsel to "termi-  
26 nate your conflicted involvement in any matter between Fresh Mix and [Get  
27 Fresh]" and any affiliates. (*Id.* at 2.)  
28

1 The question of current counsel's continued representation must be re-  
2 solved in some forum, whether by voluntary withdrawal or by proceedings in  
3 this Court or the bankruptcy court.

## 4 **2. Fresh Mix's Position vis-à-vis Get Fresh**

5 As noted, Fresh Mix and Get Fresh previously proceeded under a joint de-  
6 fense. When Get Fresh forced Fresh Mix into an involuntary bankruptcy, how-  
7 ever, the Chapter 7 trustee reevaluated Fresh Mix's position and determined  
8 that in fact, Fresh Mix's position is adverse to Get Fresh. Like plaintiffs, the  
9 trustee has determined that it is in Fresh Mix's best interest to pursue claims  
10 against Get Fresh and has asked the bankruptcy court for authorization to em-  
11 ploy special counsel to do so.

12 This realignment has particular relevance to the questions presented in  
13 the motion for relief under Rules 59(e) and 60(b) that plaintiffs filed on March  
14 30, 2020—before Fresh Mix's bankruptcy—including whether the trustee and  
15 plaintiffs have a right to materials previously designated as privileged.

## 16 **3. Resetting the Hearing on** 17 **Rule 59(e) and Rule 60(b) Relief**

18 Plaintiffs have been aggrieved by a sanctions order since March 2, 2021.  
19 They want relief from that order as soon as possible. The landscape has  
20 changed, however—not just in light of Get Fresh's conduct in forcing Fresh Mix  
21 into bankruptcy, but also in light of additional clarification from the Supreme  
22 Court. *See, e.g., Direct Grading & Paving, LLC v. Eighth Judicial Dist. Court*,  
23 137 Nev., Adv. Op. 31, 491 P.3d 13, 19 (2021) (confirming that district court  
24 lacks authority to enter sanctions based on misconduct before a pending arbi-  
25 tration).

26 Plaintiffs therefore seek a reasonable opportunity to supplement the mo-  
27 tion, as well as for the bankruptcy estate of Fresh Mix through special counsel  
28 to assert its position. Plaintiffs ask that this briefing schedule be set as soon as

1 possible, and the motion reset for hearing, after the bankruptcy court grants re-  
2 lief from the automatic stay.

3 Dated this 16th day of November, 2021.

4 LEWIS ROCA ROTHGERBER CHRISTIE LLP

5 By: /s/ Abraham G. Smith

6 DANIEL F. POLSENBERG (SBN 2376)  
7 JOEL D. HENRIOD (SBN 8492)  
8 ABRAHAM G. SMITH (SBN 13250)  
9 3993 Howard Hughes Parkway,  
Suite 600  
Las Vegas, Nevada 89169

10 MARK J. CONNOT (SBN 10010)  
11 FOX ROTHSCHILD LLP  
12 1980 Festival Plaza Drive, #700  
Las Vegas, Nevada 89135  
(702) 262-6899

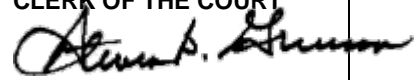
13 *Attorneys for Plaintiffs*  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

JAMES J. PISANELLI  
DEBRA L. SPINELLI  
AVA M. SCHAEFER  
PISANELLI BICE PLLC  
400 South 7<sup>th</sup> Street, Suite 300  
Las Vegas, Nevada 89101  
[JJP@PisanelliBice.com](mailto:JJP@PisanelliBice.com)  
[DLS@PisanelliBice.com](mailto:DLS@PisanelliBice.com)  
[AMS@PisanelliBice.com](mailto:AMS@PisanelliBice.com)

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

# **EXHIBIT 9**



1 FTRAN

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA  
5

6  
7 PAUL LAGUDI

8 Plaintiff,

9 vs.

10 FRESH MIX, LLC

11 Defendant.  
12

CASE NO. A-18-785391-B

DEPT. XXII

13 BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

14 **APRIL 14, 2022**

15 **RECORDER'S TRANSCRIPT OF HEARING RE**

16 ***MOTION FOR PREIMINARY INJUNCTION ON ORDER SHORTENING TIME***

17 **APPEARANCES:**

18 For the Plaintiff:

MARK J. CONNOT, ESQ.  
ABRAHAM G. SMITH, ESQ.

19  
20 For the Defendant:

FRANK M. FLANSBURG, ESQ.  
ADAM K. BULT, ESQ.  
SAMUEL A. SCHWARTZ, ESQ.

21  
22 For Lenard Schwartzer:

JASON A. IMES, ESQ.

23  
24 Special Counsel:

STEVEN EISENBERG, ESQ.

25 RECORDED BY: NORMA RAMIREZ, COURT RECORDER

1 THURSDAY, APRIL 14, 2022 AT 9:42 A.M.

2  
3 THE COURT: Lagudi versus Fresh Mix, LLC, case number A18-785391-B.

4 MR. BULT: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. BULT: Adam Bult and Frank Flansburg here. We also have clients here.  
7 Are you okay with them sitting up here at --

8 THE COURT: Absolutely.

9 MR. BULT: -- the table with us? Okay. And with us here the owners of Get  
10 Fresh, Dominic Caldera, Scott Goldberg and John Wise.

11 MR. SCHWARTZ: Good morning, Your Honor. Sam Schwartz also  
12 appearing on behalf of Get Fresh Sales.

13 THE COURT: Could you get by a microphone, counsel?

14 MR. SCHWARTZ: Yeah. Certainly. Good morning. Sam Schwartz on behalf  
15 of Get Fresh Sales.

16 MR. IMES: Good morning, Your Honor. Jason Imes, counsel for Lenard  
17 Schwartzer, Chapter 7 Trustee of Fresh Mix, LLC. Mr. Schwartzer is present this  
18 morning as well.

19 MR. EISENBERG: Good morning, Your Honor. Steven Eisenberg, special  
20 counsel approved by the bankruptcy court, Your Honor. My motion for pro hac vice  
21 has been filed in this court. It has not yet been granted so I'm not licensed and  
22 barred in Nevada but I'm appearing here today.

23 THE COURT: Okay. Thank you.

24 MR. CONNOT: Good morning, Your Honor. Mark Connot appearing on  
25 behalf of Paul Lagudi and Todd Ponder.

1 MR. SMITH: Good morning. Abe Smith also for the Plaintiffs.

2 THE COURT: Okay. Do we have everybody? Okay.

3 We're here for the Motion for Preliminary Injunction.

4 MR. BULT: So, Your Honor, I will be brief because I can tell that you are very  
5 busy and have been in trial it sounds like for several weeks also.

6 THE COURT: Yeah. One right after another. We start another one this  
7 afternoon.

8 MR. BULT: I hear. My partner -- my partner will be here so --

9 THE COURT: What, this afternoon?

10 MR. BULT: Yes.

11 THE COURT: Okay.

12 MR. BULT: I think for -- All Net I think is what you got. So, I will be brief. But  
13 there are some things that we need to unpack and go over today because it is a  
14 significant issue and it's one that you don't often see with cases like this.

15 You know, as an initial matter, when a Court inherits a case like this  
16 that's been going on for three or four years the temptation of all the lawyers is to tell  
17 you what's happened since the beginning of time and why this is the way this is and  
18 this is the way this is, Judge, and at this is what you do and that's a temptation that  
19 you're probably gonna hear from the other side but I wanted to dis-sway you of that  
20 and the reason I do is actually from personal experience. You and I are -- we're the  
21 newest members to this case. I've spared you the burden a little bit and got you  
22 through a fair bit of that record. And I tell you that, Your Honor, because the record  
23 makes this a simple motion for you and it makes it a simple motion for you because  
24 the factual record is already developed and it's an ample record as it relates to the  
25 appropriateness of Stern and Eisenberg appearing in front of this Court on this case.



1 put on their evidence, we can discuss this, etcetera, but instead they want to try and  
2 brush this through on an emergency because they're hoping that they can get more  
3 traction by throwing out all these other bits; oh, look at this, Your Honor, look at this,  
4 Your Honor. You know, don't worry about the fact that we really don't have a basis  
5 for a preliminary injunction against the trustee.

6           The March 20<sup>th</sup> order is troubling, I'm not gonna deny that, but that was  
7 all before the trustee came in and that was before Get Fresh decided to reshuffle all  
8 the parties in this case. They've alleged he's disqualified under the March 2<sup>nd</sup> order  
9 which is not true; they've alleged that the Court found Mr. Eisenberg committed  
10 misconduct. Not true. Get Fresh has offered a confusing and a conclusory set of  
11 allegations and arguments that the eminent irreparable harm could never actually  
12 explain how that would happen, how they would be harmed if he's simply appointed  
13 because they say that's all they're trying to block today. So, without actual  
14 articulated irreparable harm you don't advance to the other elements. Same thing for  
15 the likelihood of success, they'd like him to be disqualified but that doesn't mean he  
16 will be disqualified and he hasn't been disqualified.

17           So, with that, Your Honor. I'll go ahead and wrap up. They haven't met  
18 their evidentiary burden for extraordinary relief. It should be granted. You know, I  
19 think we all understand what they're trying to do here but this isn't the appropriate  
20 way to do it. Thank you.

21           THE COURT: Thank you.

22           MR. SMITH: Good morning, Your Honor.

23           THE COURT: Good morning.

24           MR. SMITH: Abe Smith for the Plaintiffs. And I will be brief. I know we've got  
25 the accusation that everyone is trying to tell you what's going on from -- since the

1 beginning of time, but I will have you know that our -- our response brief was all of  
2 four pages. So, I hope we've spared you some of that torture.

3           Again, we're -- our clients -- our primary objective is to get the -- the  
4 motion to vacate and for reconsideration in front of Your Honor so that you can  
5 actually start to look at the -- at the merits of the case and actually reconsider the  
6 sanctions order. So, you know, we don't have too much of a dog in this fight but I do  
7 have to point out that -- that -- Mr. Bult pointed out that -- that, yeah, this is not the  
8 normal process. It's not the normal process, as far as I know the only authority that  
9 they cited for doing this in the form of a preliminary injunction as opposed to an  
10 opposition to a motion for a pro hac vice is a case from 1950 and the Supreme  
11 Court Rule 42 wouldn't have been enacted until after 1953 when they adopted the  
12 Supreme Court rules. But regardless, I guess I still don't understand why this  
13 wouldn't be able to be addressed in that context in the normal course. We had  
14 some kind of elusion to the fact there might be a different standard although I don't  
15 understand what -- what that -- I understand why that standard would be different.  
16 You have the *Imperial Credit* case that talks about the qualifications that an attorney  
17 has to demonstrate under Rule 42 and there the issue was that Judge Walsh -- what  
18 Judge Walsh has said, you know, I don't see why you need, you know, outside  
19 counsel, your local counsel seems to be serving you perfectly well and the Supreme  
20 Court said, well no, a party has -- has the opportunity to choose their choice of  
21 counsel. So, I guess I didn't understand. If there -- if there really is an issue with  
22 the disqualification that would have certainly come up in the context of the motion to  
23 associate counsel and of course if there needs to be additional factual findings  
24 made then of course the Court would need to set some kind of evidentiary hearing  
25 to actually enter factual findings, take testimony, whatever -- whatever that means.

1           At this point as Mr. Imes pointed out, there is not a finding of  
2       disqualification and I don't -- I don't see what -- I understand that additional findings  
3       would have to be made in order to make that determination. But, the bottom line is  
4       whatever the Court decides we -- our goal is just that the Court does not pre-judge  
5       the outcome of our pending motion to vacate under Rule 59(e) and Rule 60(b).  
6       because that's really concern here is that by coming in on this emergency  
7       preliminary relief there's been an effort to put the cart before the horse and  
8       potentially, you know, entrench Your Honor in the findings with regard to the -- the  
9       memo yet I don't have any interest in seeing the memo but there were sanctions  
10      entered as a result of that. I do have an interest in seeing those sanctions  
11      overturned so I would hope that whatever Your Honor decides with respect to this  
12      preliminary injunction that Your Honor will still keep an open mind with respect to  
13      reevaluating the sanctions and the propriety in light of both the changed  
14      circumstances and in light of case law that came out shortly after the order in 2020  
15      came down. Thank you, Your Honor.

16           THE COURT: Thank you.

17           MR. BULT: Your Honor, again, I'll be brief because I know -- I know there's  
18      been a lot here. Unless you have any questions I want to touch on a few points.

19           THE COURT: Well, the burning question looking at all this stuff, from what  
20      I'm understanding, there -- I know that Judge Gonzalez made a comment in  
21      paragraph 70 that neither the Fox, Rothschild nor Stern and Eisenberg sequestered  
22      the memorandum or notified the Defendants of their possession of it. I didn't get a  
23      sense though that Mr. Eisenberg had even seen the memo.

24           MR. BULT: Well -- so, that -- that's the curious part, right? I mean, because  
25      -- and let's get right to it. She does two things there. She says she doesn't know.

1 THE COURT: Any problem about that?

2 MR. SCHWARTZER: Just where because I don't want the expense of flying  
3 Mr. Eisenberg back again.

4 MR. BULT: Well, again, that's Mr. Schwartzer's decision to employ a bounty  
5 of lawyer for a Nevada action, but we're happy to do it virtually.

6 THE COURT: Okay.

7 MR. BULT: Okay. We'll work with all parties on that.

8 THE COURT: Okay.

9 MR. BULT: Thank you, Your Honor.

10 THE COURT: All right. Thank you. And I'll see you on May 12<sup>th</sup>.

11

12 [Proceedings concluded at 10:32 a.m.]

13 \* \* \* \* \*

14

15

16

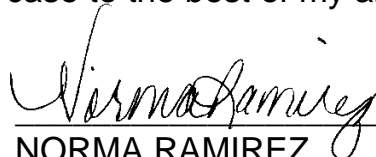
17

18

ATTEST: I do hereby certify that I have truly and correctly transcribed the  
audio/video recording in the above-entitled case to the best of my ability.

19

20



21

NORMA RAMIREZ  
Court Recorder  
District Court Dept. XXII  
702 671-0572

22

23

24

25

# **EXHIBIT 10**



**Brownstein Hyatt Farber Schreck, LLP**

702.382.2101 main  
100 North City Parkway, Suite 1600  
Las Vegas, Nevada 89106

April 18, 2022

Adam K. Bult  
Attorney at Law  
702.464.7077 direct  
abult@bhfs.com

**VIA E-SERVICE**

Jason A. Imes, Esq.  
Schwartz & McPherson Law Firm  
2850 South Jones Blvd., Ste. 1  
Las Vegas, NV 89146  
[jimes@s-mlaw.com](mailto:jimes@s-mlaw.com)

Abraham G. Smith, Esq.  
Lewis Roca Rothgerber Christie LLP  
3993 Howard Hughes Parkway, Ste. 600  
Las Vegas, NV 89169  
[ASmith@LewisRoca.com](mailto:ASmith@LewisRoca.com)

Mark J. Connot, Esq.  
Fox Rothschild LLP  
1980 Festival Plaza Drive, #700  
Las Vegas, NV 89135  
[mconnot@foxrothschild.com](mailto:mconnot@foxrothschild.com)

**RE: Lagudi, et. al. vs. Fresh Mix LLC, et al. – Limited Discovery and Briefing Schedule**  
**Clark County Case No. A-18-785391-B**

Dear Jason and Abe:

As you know, the Court is permitting limited discovery related to the Trustee's Motion to Associate Steven Eisenberg as special counsel for Fresh Mix LLC ("Motion to Associate"). At your earliest convenience, please provide us with available dates for the deposition of Mr. Eisenberg.

In addition, we believe it is necessary to also depose Mr. Evan Barenbaum given: (i) Judge Gonzalez' findings in connection with his conduct vis a vis Get Fresh Sales, Inc's privileged memorandum; (ii) the lack of any testimony or appearance from Mr. Barenbaum in the prior evidentiary hearing; and (iii) to fully evaluate the scope of Mr. Eisenberg's exposure to the memorandum and/or its content.

Please advise if you will voluntarily produce Mr. Barenbaum for deposition and, if so, available dates for the same. Alternatively, if you will not so stipulate, please advise of your availability this week for a meet and confer telephone conference per EDCR 2.34.

Once the above deposition dates are established, we will also need to revise the briefing schedule and hearing date for the Motion to Associate.

April 18, 2022

Page 2

Moreover, to avoid any additional delay, we are amenable to moving forward with briefing on the Plaintiffs' Motion to Vacate, Alter, or Amend Sanctions Order ("Motion to Vacate"), as Plaintiffs have requested in their recent court filings. As a result, Plaintiffs' counsel is copied on this letter as well. At your earliest convenience, please provide us with your proposed briefing schedule and possible hearing dates for the Motion to Vacate.

Our clients reserve all rights and none are waived.

Sincerely,

A handwritten signature in blue ink, appearing to read 'A. Bult', with a stylized flourish at the end.

Adam K. Bult

24050166