IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD N. DETWILER, an individual,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CLARK COUNTY; THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE, DEPT. 2,

Respondent,

and

BAKER BOYER NATIONAL BANK, a Washington corporation,

Real Party in Interest.

Supreme Court Case No.: 81220

District Court Case No.: A-17-760779-F

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. CORRECTED STATEMENT OF FACTS

A. Factual Allegations in BBNB's Answer

BBNB makes several inaccurate statements in its Statement of Facts. While it is not possible to correct all factual inaccuracies by BBNB, several of the most egregiously inaccurate statements are addressed below.

1. BBNB'S FALSE STATEMENT NO. 1

> The Fraudulent Transferee retained separate counsel and formally intervened in the action on March 2, 2018…

Answer, p. 7, § D(2).

THE TRUTH:

While Harry Hildibrand, LLC ("HH") moved to intervene in the Underlying Case because it alleged that it had an interest in the Motorcoach, on April 16, 2018, an order was entered denying HH's motion to intervene. Appx. Vol. I, PA00187-PA00192.

2. BBNB'S FALSE STATEMENT NO. 2

> No one besides Detwiler ever represented the company, leading the lower court to find that Detwiler "was the sole agent and mouth-piece for the [Fraudulent Transferee] during the years this Court has presided over this lawsuit."

Answer, p. 9, § G.

THE TRUTH:

Foust was a manager and/or member of an entity known as Harry Hildibrand,

LLC, a Montana limited liability company (referred to herein as "HH"). Appx. Vol. I, PA00099. The Trial Court made several findings that Foust represented HH and controlled the vehicles, including that Foust was "the sole member and/or manager for Harry Hildibrand, LLC" and Foust controlled the Subject Vehicles because he owns HH and StarDust Classic. Appx. Vol. I, PA00203-PA00206.

3. BBNB'S FALSE STATEMENT NO. 3

> "Detwiler's demeanor," in particular, "was untrustworthy," the district court found, because he was "willing to say whatever seemed convenient at the moment, without regard for established or incontrovertible facts." He "especially" perjured himself by contradicting his own prior, sworn testimony concerning the same subject matter.

Answer, p. 9, § H(2).

THE TRUTH:

There was no finding that Detwiler perjured himself.

4. BBNB'S FALSE STATEMENT NO. 4

> When the defendants continued to refuse to turn over the vehicles, the district court held two contempt trials, one for Debtor and one for Detwiler and the Fraudulent Transferee, over four days in the spring of 2019. Under the exclusionary rule, he did not listen to Debtor's testimony during Debtor's trial, to which Detwiler was not a party and in which Detwiler's contempt was not at issue; Debtor later called him as a friendly witness.

Answer, p. 10, § I.

THE TRUTH:

BBNB offers nothing to show that there were two contempt trials in this matter, and all evidence demonstrates this self-serving assertion by BBNB is demonstrably false. In fact, the "Order to Appear and Show Cause Why Defendants Should Not Be Held in Civil Contempt" **references only one contempt proceeding, at a single date and time**, and was addressed to all three persons – Foust, HH, and Detwiler. Appx. Vol. I, PA00239-240.

5. BBNB'S FALSE STATEMENT NO. 5

> The district court considered the evidence of Detwiler's contempt as clear and convincing and even surpassing reasonable doubt.

Answer, p. 12, § K(2).

THE TRUTH:

Before issuing its ruling on the 60(b) Motion on February 18, 2020, the Trial Court stated that even though Detwiler could not comply with the January 2019 Order, it found that he could have complied and intended to punish him for his contempt, based upon application of a standard that was "higher than a preponderance of the evidence, but it doesn't rise to a level of beyond a reasonable doubt, but a clear and convincing evidence standard." Appx. Vol. IV, PA00836, ll. 20-23. 107. Despite this clear finding, when BBNB drafted the Order for Sanctions, it included that the contempt finding was "beyond a reasonable doubt", further

confirming the criminal character of the Sanctions Order. Appx. Vol. IV, PA00875-PA00882, at 6:16-18.

6. BBNB'S FALSE STATEMENT NO. 6

> During the post-trial motions, it became clear that Detwiler had, beginning in 2018, fabricated a person that did not exist."

Answer, p. 20, § Q.

THE TRUTH:

This is false. The only "evidence" offered by BBNB is a Declaration that BBNB itself proffered. This Declaration, however, is meritless. First, the declarant is a paralegal employed by BBNB's counsel. An employee of BBNB's counsel is not competent to testify as to whether Detwiler fabricated a person that does not exist because she has no personal knowledge of such matters. *Catrone v. 105 Casino Corp*., 82 Nev. 166, 414 P.2d 106 (1966); NRS 50.025. In addition, the declarant's statements are based upon her "belief" rather than personal knowledge. Appx. Vol. IV, PA00966. Because BBNB's counsel's paralegal is incompetent to testify as to whether Detwiler "fabricated a person that does not exist," the statements contained in her declaration are hearsay and are stricken under Nevada law. NRS 51.035.

Second, the paralegal only states in the Declaration that she conducted an online search and could not find the person she was looking for. From this fact alone, the declarant concludes that she does "not believe that there is such a person

as Harry Hildibrand, Jr." Appx. Vol. V, PA00966. Clearly, it is illogical to conclude from failing to locate somebody that they do not exist.

7. BBNB'S FALSE STATEMENT NO. 7

> One of this State's largest private law firms, Holland & Hart, represented Detwiler from the time of the Fraudulent Transferee's intervention (1 App. 136-57), at multiple hearings (1 R. App. 9-12), at his pretrial deposition (1 R. App. 448-450), and finally at the NRS 31.070 hearing that resulted in the Turn-Over Order (1 App. 193)."

Answer, p. 37. This statement is blatantly false.

THE TRUTH:

This is false. BBNB purposely fails to distinguish between Holland & Hart's representation of the company HH and representation of Detwiler personally. All of the documents referenced by BBNB to support this false claim in fact prove the opposite: Document ranges 1 App. 136-57 and 1 R. App. 9-12 consist of pleadings which show Holland & Hart only representing HH, and not Detwiler personally (e.g. "…and HH appeared through its counsel Joseph G Went of the Holland & Hart LLP law firm" 1 R. App. 11); Document range 1 R. App. 448-450 shows that when Detwiler appeared on behalf of HH as an officer of the company, the phrase "your attorney" only referred to the discovery responses provided to BBNB by Holland & Hart, and not to any personal attorney representing Detwiler; and document 1 App. 193 shows further that Holland & Hart only represented HH and not Detwiler personally (e.g. "HH having been represented by Joseph Went of Holland & Hart,

LLP", 1 App. 193). As a result, none of the documents referenced by BBNB prove or even suggest that Detwiler was personally represented by counsel at any of the relevant proceedings.

III. ARGUMENT

B. The Sanctions Order was criminal in nature.

This matter largely hinges on whether, as Detwiler argues, the Detwiler Sanctions Order[1] was punitive, if, as BBNB argues, the Sanction Order was civil. BBNB acknowledges that "[c]riminal contempt requires criminal protections." Answer at 29. BBNB's argument is that "the district court ordered Detwiler to compensate for the actual financial loss he caused BBNB" and that therefore the Sanctions Order is civil. *Id*. This assertion is false for multiple reasons.

First, there were two sanctions imposed against Detwiler by the Sanctions Order: a fine in the amount of $100,000, and BBNB's attorneys' fees/costs in the amount of $218,855.52. Appx. Vol. IV, PA00875-882 and PA00950-952. There is no good faith dispute the Trial Court imposed sanctions on Detwiler – both attorneys' fees and the $100,000 fine – pursuant to the Trial Court's finding that Detwiler had disobeyed a court order.

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[1] Any reference to Sanctions Order shall refer to Order Awarding Sanctions against Detwiler and HH, filed on March 12, 2020 (Appx. Vol. IV, PA00875-882) and any reference to the Detwiler Contempt Order shall refer to Order for Punishment of Contempt by HH and Detwiler, filed on January 30, 2020 (Appx. Vol. III, PA000688-707).

In fact, the Trial Court was unequivocal in stating the sanctions at issue, including the $100,000 fine, were imposed pursuant to EDCR 7.60 for Detwiler's perceived violation of a court order:

> For the reasons given in the Contempt Order and the further findings in this order, the Court levies a sanction against Mr. Detwiler and HH, on a joint and several liability basis, in the amount of $100,000, to be paid to BBNB in immediately available funds upon notice of entry of this order. **The Court imposes this sanction pursuant to EDCR 7.60 and its inherent powers**, NRS 1.210(2) (providing that the district court has the power to "**enforce order in the proceedings before it**"); *In re Water Rights of the Humboldt River*, 118 Nev. 901, 906-07, 59 P.3d 1226, 1229030 (2002) (explaining that the district court has "**inherent power to protect dignity and decency in its proceedings, and to enforce its decrees**" and because it has particular knowledge of whether contemptible conduct occurred, its contempt decisions are reviewed for an abuse of discretion).

Appx. Vol. IV, PA00880. This is consistent with the Trial Court's statements at the hearing on May 6, 2020 – at which the Trial Court imposed the $100,000 and attorney's fee sanctions against Detwiler – where the Trial Court made clear that the $100,000 fine was imposed pursuant to EDCR 7.60(b)(5):

> THE COURT: The Court is expunging and recalling the warrant, returning his passport. **But the Court, under the circumstances, is also going to impose a fine of $100,000.** That is less than one-fifth of the total value of the cars. At least those values at the time Mr. Detwiler was ordered to turn them over. I know he had control from everything I've seen.
>
> Now, someone might disagree with me, but I believe, based upon the standard I've indicated that he had control from his own admissions as to the title he held and some other comments that he made in various pleadings. **And that sanction is pursuant to 7.60(b)(5), which allows**

this Court in a civil context to impose a fine for violation of a court order.

Appx. Vol. IV, PA000839 (emphasis added). BBNB correctly points out that the Trial Court acknowledged that the $100,000 fine was "less than one-fifth of the total value of the cars." However, that acknowledgment does not, as BBNB argues, convert the $100,000 sanction into a compensatory fine. In fact, EDCR 7.60(b)(5) – expressly acknowledged by the Trial Court as the basis for the $100,000 fine – provides as follows:

> (b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:
>
> …
>
> (5) Fails or refuses to comply with any order of a judge of the court.

EDCR 7.60. Thus, BBNB's assertion that the $100,000 sanction was compensatory is false, as the Trial Court expressly acknowledge the fine was imposed pursuant to EDCR 7.60(b)(5) as punishment for Detwiler's perceived violation of a court order.

Moreover, as noted above, despite its self-serving position now that the sanctions against Detwiler were "compensatory" in nature, it was BBNB who drafted and submitted the Sanctions Order. Appx. Vol. IV, PA00875-882 (noting the order was prepared and submitted by BBNB's counsel). At that time, when BBNB had no motive to misrepresent the Trial Court's ruling, BBNB made crystal

clear that the basis for the sanctions was to punish Detwiler for a perceived violation of a court order, and to "protect dignity and decency in its proceedings." Appx. Vol. IV, PA00880. This further demonstrates the punitive and criminal nature of the sanctions against Detwiler, as this Court has noted on multiple occasions:

> Whether a contempt proceeding is classified as criminal or civil in nature depends on whether it is directed to punish the contemnor or, instead, coerce his compliance with a court directive. **Criminal sanctions are punitive in that they serve the purpose of preserving the dignity and authority of the court by punishing a party for offensive behavior.**

Lewis v. Lewis, 132 Nev. 453, 457, 373 P.3d 878, 880 (2016); *Rodriguez v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 798, 805, 102 P.3d 41, 46 (2004) (same).[2]

Regarding the attorneys' fees and costs, the Trial Court also made clear they were imposed for Detwiler's perceived violation of the Court's order, noting specifically that the Trial Court believed payment of the attorney's fees and costs was "[a]n appropriate sanction **for violating the Court's order**" as the Trial Court

[2] *In Re Hughes*, 136 Nev. Adv. Op. 46 (2020) ("Contempt may not issue absent the protections owed to criminal proceedings for criminal contempt…"); *Alper v. Eighth Jud. Dist. Ct.*, 352 P. 3d 28, 30 (2015) (Criminal sanctions punish a party for past offensive behavior and are "unconditional or determinate, intended as punishment for a party's past…"); *Matt v. Dillwith*, 2017 WL 4225866 ("The district court's labeling of the contempt orders as civil is problematic in light of the excessive sanctions and the court's failure to include purge clauses."), *citing Lewis*, 373 P.3d at 881 and NRS 22.100.

perceived Detwiler had done based upon the Constitutionally defective Contempt Trial. Appx. Vol. IV, PA00837. Further, the Sanctions Order also makes clear these sanctions were imposed as punishment for the Trial Court's belief that Detwiler had violated the Turnover Order. The Trial Court noted up front that it was punishing Detwiler for perceived disobedience:

> If a company officer has notice of a court order and fails to obey it, **a resignation will not exempt the officer from punishment for disobedience**.

Appx. Vol. IV, PA00876.

The Sanctions Order further reiterates this fact as follows:

> 21. The Court also orders Mr. Detwiler and HH to pay BBNB's reasonable expenses, including attorney fees and costs, from the time that HH intervened as a party in this action pursuant to NRS Chapter 31, and the Court further orders that both Mr. Detwiler and HH be jointly and severally liable for such. NRS 22.100(3) ("In addition to the penalties provided in subsection 2, **if a person is found guilty of contempt pursuant to subsection 3 of NRS 22.010**, the court may require the person to pay the party seeking to enforce the writ, order, rule or process the reasonable expenses, including, without limitation, attorney's fees, incurred by the party as a result of the contempt."); EDCR 7.60(b) (allowing for the imposition of sanctions, including costs and attorney fees for multiplying proceedings in a case to increase costs unreasonably and vexatiously **and for failing or refusing to comply with any order**).

Appx. Vol. IV, PA00881.

NRS 22.010(3), cited above in the Sanctions Order as a basis for the award of attorney's fees, provides that "The following acts or omissions shall be deemed

contempts: … (3) **Disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers**."

Tellingly, BBNB, in its Answer, outright admits that the sanctions were punitive and not compensatory. ("The Final Contempt Order . . . **reduced the punishment** from imprisonment to an order to pay $100,000, along with attorney fees and court costs in the amount of $218,855.52."). Answer at pp. 19-20. This is consistent with the Trial Court's ruling that the sanction was "for violation of a court order." Appx. Vol. 4, PA00839, line 24 to PA00840, line 1. Under Nevada case law (i.e., *Warner*, *Lewis*, et al.), as the Sanctions Order punishes Detwiler for alleged past misconduct and it does not contain a purge clause, the sanctions issued were criminal in nature. *Warner v. District Court*, 906 P.2d 707, 709, 111 Nev. 1379 (1995), *citing City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 893-94, 784 P.2d 974, 979 (1989) ("because the punishment was punitive … rather than coercive, **we view the proceeding to be criminal in nature**."); *Lewis v. Lewis*, 132 Nev. 453, 455, 373 P.3d 878, 879 (2016) ("**We hold that a contempt order that does not contain a purge clause is criminal in nature.**").

There is no legitimate dispute that the Trial Court's sanctions contained in the Sanctions Order were imposed as a punishment upon Detwiler for perceived violation of a court order. The imposition of a criminal punishment required the Trial Court to provide Detwiler the protections of both the United States and Nevada

Constitutions. Indeed, the imposition of the $100,000 fine alone converted the proceedings to criminal in nature, irreparably tainting the underlying Contempt Trial due to the Trial Court's failure to provide the constitutionally required protections.

B. There is no dispute the Sanctions Order does not contain a purge clause and is therefore criminal in nature.

BBNB cannot and does not deny that the Sanctions Order "unconditionally fined [Detwiler] $100,000 and contained no purge clause." *Id*. at p. 30. BBNB also acknowledges this Court's holding in *Lewis v. Lewis*[3], but only admits that the holding in *Lewis* merely identified the existence of a purge clause as "an additional factor" indicating criminal contempt. Answer, p. 30.

In reality, however, BBNB ignores the requirement under Nevada law that a contempt order must contain a purge clause to be considered civil. For example, in *Lewis* this Court unequivocally held:

> **If a contempt order does not contain a purge clause, it is criminal in nature** and the Sixth Amendment right to counsel applies. Because the contempt order in this case did not contain a purge clause, we hold that Wesley's constitutional rights were violated when the contempt order was entered against him when he was unrepresented by counsel at the contempt proceedings.

Lewis, 132 Nev. at 461, 373 P.3d at 883. Further, this Court recognized both in *Lewis* and in *Rodriguez v. Dist. Ct.*[4] the following:

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[3] 132 Nev. 453, 457, 373 P.3d 878, 880-81 (2016).
[4] 120 Nev. 798, 102 P.3d 41 (2004).

> [T]he Sixth Amendment guarantee of the right to counsel applies only in criminal prosecutions. **Whether a contempt proceeding is classified as criminal or civil in nature depends on whether it is directed to punish the contemnor or, instead, coerce his compliance with a court directive. Criminal sanctions are punitive in that they serve the purpose of preserving the dignity and authority of the court by punishing a party for offensive behavior. In contrast, civil contempt is said to be remedial in nature, as the sanctions are intended to benefit a party by coercing or compelling the contemnor's future compliance, not punishing them for past bad acts.**

Lewis, 132 Nev. at 457, 373 P.3d at 880 (*citing Rodriguez* 120 Nev. at 804–05, 102 P.3d at 45–46 (2004)).

BBNB cites no precedent from this Court supporting its assertion that order which impose unconditional, compensatory fines with no purge clause are civil. However, BBNB cites to *Int'l Union, United Mine Workers of Am. v. Bagwell.*[5] Answer, p. 33. However, the *United Mine* case does not help BBNB. As noted above, the Trial Court expressly held that its sanctions against Detwiler were imposed as a punishment for Detwiler's perceived violation of a court order. Yet, even if the sanctions imposed by the Sanctions Order were not punitive, and therefore criminal, they were clearly not compensatory. As the Trial Court itself acknowledged, while the sanctions were unconditional, there was a coercive element to the Trial Court's ruling:

> THE COURT: And it's not a conditional amount, but – you know, the

[5] 512 U.S. 821, 829, 114 S. Ct. 2552, 2558, 129 L. Ed. 2d 642 (1994)

> 100,000 is not conditional, **but, of course, if the cars were to be turned over, I wouldn't be adverse to a motion for reconsideration**.

Appx. Vol. IV, PA00840. Thus, the unconditional fine was, at best, coercive. Notably, however, this was not included in the actual order, rendering it criminal regardless. To be sure, a fine cannot be both compensatory and coercive. However, the Trial Court's willingness to entertain a motion for reconsideration suggests that even if the fine were intended to be civil, it would be coercive: it was meant to compel Detwiler to turn over the Subject Vehicles. Never once did the Trial Court state that the sanctions imposed were meant to be compensatory.

This leads to the application of *United Mine*, to the extent it applies. In *United Mine*, the U.S. Supreme Court recognized the dichotomy between the nature of sanctions imposed pursuant to contempt findings, noting that a punishment cannot be both civil and criminal, nor compensatory and coercive:

> This dichotomy between coercive and punitive imprisonment has been extended to the fine context. A contempt fine accordingly is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] ... compensate[s] the complainant for losses sustained." *United States v. Mine Workers* .... **Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge**. *Penfield Co. of Cal. v. SEC*…). Thus, a "flat, unconditional fine" totaling even as little as $50 announced after a finding of contempt is criminal **if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance**. *Id*., at 588, 67 S.Ct., at 920.

United Mine, 512 U.S. at 829 (emphasis added). Here, even if BBNB were accurate in its assessment of applicable Nevada law, the sanctions imposed against Detwiler

were at best coercive, and therefore the Sanctions Order must contain a purge clause for the sanctions to retain any civil character. Because it does not contain such a clause, the Sanctions Order is criminal in nature.

Finally, even if the sanctions imposed by the Sanctions Order were "quasi-criminal," constitutional due process protections apply. This Court and others have recognized that when a contempt proceeding is quasi-criminal the defendant is entitled to constitutional protections. *Kellar v. Eighth Judicial Dist. Court*, 86 Nev. 445, 448, 470 P.2d 434, 436–37 (1970) (holding that where a contempt proceeding was "quasi-criminal" in nature it required the respondent to prove the contempt "beyond a reasonable doubt"); *Gompers v. Bucks Stove & Range Co*., 221 US 418,447-448 (1911) ("The complainant made each of the defendants a witness for the company, and, as such, each was required to testify against himself … because the provision of the Constitution that "no person shall be compelled in any criminal case to be a witness against himself" is applicable, not only to crimes, but also to quasi-criminal and penal proceedings")

The Trial Court's failure to provide Detwiler with criminal protections afforded under the U.S. and Nevada Constitutions requires issuance of the writ.

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C. The Trial Court failed to afford Detwiler Constitutional protections.

1. The U.S. Constitution requires a jury trial where "serious contempt fines" are at issue.

BBNB asserts that even if the sanctions against Detwiler were criminal "Detwiler had criminal protections anyway." Answer, p. 36. This is false.

The United States Constitution requires a jury trial where "serious contempt fines" are involved. *United Mine Workers*, 512 U.S. at 837 (concluding that "the serious contempt fines imposed here were criminal and constitutionally could not be imposed absent a jury trial."). While the Court did not determine where the line between petty and serious contempt fines should be drawn, the Court noted that under 18 U.S.C. § 1(3) (1982 ed., Supp. V, repealed in 1984, "petty offenses" were defined as crimes "the penalty for which ... does not exceed imprisonment for a period of six months or a fine of not more than $5,000 for an individual and $10,000 for a person other than an individual, or both." *Id*. In this case, Detwiler was sanctioned a total of $318,855.52, hardly a "petty" amount, especially considering this is over 1/3 the amount awarded against the Debtor Foust – the party that actually owed the underlying debt – and in Nevada this is over six (6) times the threshold limit for mandatory arbitration. Moreover, at no point did Detwiler waive his jury trial right.

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2. Detwiler could not have waived his right to plead the Fifth Amendment.

BBNB asserts that Detwiler waived his right to plead the Fifth Amendment. Answer, p. 36. This is inaccurate. This Court has recognized that the Fifth Amendment privilege against self-incrimination may be asserted "only if contempt charges are considered criminal prosecutions." *Warner v. Second Judicial Dist. Court In & For Cty. of Washoe*, 111 Nev. 1379, 1382, 906 P.2d 707, 709 (1995). In fact, the "Order to Appear and Show Cause Why Defendants Should Not Be Held in Civil Contempt" ("Show Cause Order") specifically references "civil contempt" only. Thus, Detwiler could only have been on notice of "civil contempt" sanctions, not criminal sanctions. Further, BBNB does not, and cannot, deny that at no point was Detwiler informed that the proceeding against him was criminal in nature, despite the Trial Court's imposition of criminal sanctions. Accordingly, Detwiler could not have waived his Fifth Amendment rights.

3. BBNB falsely claims Detwiler was represented by counsel.

BBNB states that "one of this State's largest private law firms, Holland & Hart, represented Detwiler from the time of the Fraudulent Transferee's intervention, at multiple hearings, at his pretrial deposition, and finally at the NRS 31.070 hearing that resulted in the Turn-Over Order." Answer, p. 37 (citations removed). As noted above, this statement is false. *section* I(A)(7), *supra*.

4. BBNB's mistake, or deliberate misrepresentation, regarding the standard employed by the Trial Court cannot retroactively afford Detwiler due process.

BBNB asserts that the Sanctions Order "employed the reasonable doubt standard." Answer, p. 38. However, BBNB cannot deny that in pronouncing his ruling Judge Scotti specifically stated that "it doesn't rise to the level of beyond a reasonable doubt," (Appx. Vol., IV, PA00836), and that counsel for BBNB included language in the Sanctions Order directly contradicting Judge Scotti's ruling. But, BBNB tries to use this to its advantage by arguing that somehow this means that Detwiler was afforded the required constitutional protections. Answer, p. 38. This argument is absurd. BBNB's counsel drafted the Sanctions Order and either deliberately or unintentionally included language about the standard employed by the Trial Court that was inaccurate at best, and disingenuous at worst. The Trial Court apparently did not catch the inaccuracy, and signed the order. While the original error by BBNB may have been unintentional, for BBNB to argue that its own mistake, or surreptitious deception, somehow retroactively affords Detwiler due process is disingenuous at best.

5. The Trial Court did sentence Detwiler to prison and only later vacated that portion of the January 30, 2020 order.

BBNB misleadingly claims that "Detwiler was not sentenced to imprisonment" and therefore he had no constitutional right to counsel. Answer, p. 36. This is misleading. In fact, in the January 30, 2020, order the Trial Court

specifically ordered "that Mr. Detwiler shall be imprisoned until he complies with the Order …" Appx. Vol. III, PA00704. Only later, once Detwiler retained counsel, did the Trial Court vacate this portion of the order.

D. The Trial Court violated the exclusionary rule.

BBNB now pretends that there were two separate contempt trials in this matter: one for Detwiler and a completely separate trial for Foust. Answer, p. 10. From this assertion, BBNB claims that therefore Detwiler had no right to cross-examine Foust – or to even be present when Foust was testifying and casting all blame on Detwiler – and that therefore the Trial Court's exclusion of Detwiler from "Foust's trial" was permissible. *Id*. at 39. BBNB also claims that under Foust's purported separate trial, "Detwiler's contempt was not at issue." *Id*. at p. 11. These assertions by BBNB are false.

BBNB offers nothing to show that there were two contempt trials in this matter, and all evidence demonstrates this self-serving assertion by BBNB is demonstrably false. In fact, the Show Cause Order **references only one contempt proceeding, at a single date and time**, and was addressed to all three persons – Foust, HH, and Detwiler. Appx. Vol. I, PA00239-240. BBNB does not and cannot point to any language in any order, transcript or communication stating that the single proceeding referenced in the OSC is somehow going to be multiple trials, because this is an untrue assertion by BBNB to attempt to get around Nevada's

exclusionary rule.

Moreover, the facts of the trial itself demonstrate that it was a single proceeding. No separate trial or hearing was ever noticed. In fact, the language of BBNB's counsel and the Trial Court make clear it was a single hearing:

- MR. BRAGONJE: So, we're here today, Your Honor, on **a [sic] Order to Show Cause**. [Appx. Vol. I, PA00245]
- THE COURT: All right. So, it looks like we're able to proceed, then, with **an** evidentiary hearing, Mr. Bragonje. PA00247.

In addition, these were not two "separate" proceedings in any sense of the word. In fact, the Trial Court began the proceedings on May 17, 2019 by taking testimony from Detwiler (as Foust was unavailable), then, before Detwiler was finished, the Trial Court took testimony from Foust on May 21, 2019. Then on May 21, 2019, the Trial Court went back to Detwiler. Appx. Vol. II/III, PA00335-520. This was a single proceeding, noticed as such, confirmed to be such by both BBNB's counsel and the Trial Court, and conducted as such.

Finally, the assertion that "Detwiler's [alleged] contempt was not at issue in Debtor's [i.e. Foust's] trial" is false. In fact, the Trial Court's basis for imposing sanctions against Detwiler was based on Foust's testimony that HH, not Foust himself, had possession of the Subject Vehicles. Appx Vol. II, PA00311-317 (Foust's Declaration indicating that vehicles were transferred to HH), Appx. Vol. II, PA00421-468 (Foust provides additional substantive testimony related to his

Declaration), and Appx. Vol. III, PA000690, ll. 9-10 (Detwiler Contempt Order finds that "[t]hroughout the proceedings, Mr. Foust claimed to have transferred many of these vehicles to HH"). Further, in issuing the Detwiler Contempt Order, the Trial Court incorporated the "evidentiary findings in…the [Foust Contempt Order] to support Mr. Detwiler's control of HH and its assets and his cooperation with Mr. Foust to defy the Order." Appx. Vol. III, PA00698, ll. 2-5.

Detwiler was excluded from hearing or cross-examining witnesses whose testimony was later used against him to support the Trial Court's finding of Detwiler's contempt. Nor was Detwiler afforded the opportunity to Foust's Declaration (Appx Vol. II, PA00311-317) prior to Foust testifying and was not aware of its existence until obtaining counsel in late January of 2020. *Id*.

E. BBNB does not deny judicial estoppel applies.

As noted in the Petition, (Table at ¶ 95), the Trial Court found on numerous occasions – prior to finding Detwiler had committed any contemptuous conduct – that Foust, not Detwiler, owned the Subject Vehicles, including that Foust "owned and controlled" the Subject Vehicles,[6] and that "Foust owns and controls HH."[7] Further, in the January 2019 Order the Trial Court found, on no fewer than five (5) occasions, that Foust owned and controlled all of the Subject Vehicles.[8] These findings

[6] Appx. Vol. III, PA00526-PA00527.
[7] Appx. Vol. I, PA00205-206.
[8] Appx. Vol. I, PA00213, ¶¶ 17-21.

were reiterated and incorporated into the June 2019 Order, after the 2019 evidentiary hearings comprising the vast majority of the Contempt Trial.[9] Yet, despite these clear findings, the Trial Court subsequently ordered that "Foust and HH and any of their respective agents, employees, or affiliates (including without limitation Detwiler and StarDust Classic and any of its agents) are ordered on penalty of contempt, … to turn over to the Plaintiff promptly [the Vehicles]…"[10] Moreover, the Detwiler Contempt Order required Detwiler to do something the Trial Court had already found he could not: turn over the Subject Vehicles including the Motorcoach which BBNB had already repossessed.[11]

Thus, BBNB – who does not dispute the application of judicial estoppel – successfully prevailed on its theory that Foust owned and controlled the Subject Vehicles. It was not until BBNB struggled to locate Foust that it suddenly changed its tune and pretended that Detwiler, not Foust, somehow owned and controlled the Subject Vehicles. This is exactly the type of situation judicial estoppel was designed to prevent, and BBNB's silence on this issue is deafening.

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[9] Appx. Vol. III, PA00521-PA00537.
[10] Appx. Vol. I, PA00214, ¶ 29.
[11] Appx. Vol. III, PA00688-PA00707.

F. The Award of Fees and Costs (the "Fee Award") must be vacated.

2. The Fee Award is based upon constitutionally defective proceedings and therefore must be vacated.

The Sanctions Order against Detwiler is criminal in nature as it is unconditional and determinate, contains no purge clause and intended to punish Detwiler for alleged violation of a Court Order. Detwiler was not afforded the required Constitutional protections in the Contempt Trial, upon which the Fee Award was based. Thus, the Fee Award arises out of the constitutionally defective proceedings and must be vacated. *See, e.g., Warner* and *Lewis*, *supra.*

2. This Court determined Detwiler was not a party.

In conjunction with issuing the $100,000 sanction, the Trial Court awarded fees incurred from the time Detwiler "was officially a party in this action." Appx. Vol. IV, PA00837, ll. 7-8. After BBNB filed its Affidavit in support of its fees and costs, Detwiler provided his Response, which included, amongst other arguments, that he "is not now, and has not been, a party". Appx. Vol. IV, PA00859-861. The Trial Court determined that "Detwiler had the actual ability to comply with this Court's Order of January 9, 2019. From [January 9, 2019] forward, he certainly was a party." Appx. Vol. IV, PA00883. As this Court has already determined in Detwiler's appeal, Detwiler was not a party. Appx. Vol. IV, PA00996. *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994). Thus, the

Trial Court's determination of Detwiler being a party and the awarding of fees and costs from the time he became one are invalid.

3. HH never successfully intervened

Egregiously, when BBNB submitted its proposed Fee Award Order, it unilaterally changed the language of the Trial Court's Fee Award from "the time when [Detwiler] was officially a party in this action" to "since the time HH intervened in this action". *Compare* Appx. Vol. IV, PA00837, ll. 7-8 with Appx. Vol. IV, PA00876.

Putting aside the inappropriate changes of the Trial Court's rulings by BBNB, even if the Trial Court had ruled that the fees and costs were to be incurred from the time HH intervened, no such intervention took place. The Trial Court specifically denied HH's Motion to Intervene, wherein it rejected HH's NRCP 24 arguments and exercised "its discretion not to permit [HH] to intervene pursuant to NRCP 24(b) because its rights, to the extent they exist, are protected under NRS 31.070." Appx. Vol 1, PA00191, ll. 18-24. BBNB attempts to use HH's Application for Hearing on Third Party Claim under NRS 31.070 as HH's formal intervention and even cites to *Elliot v. Denton & Denton*, 109 Nev. 979, 980, 860 P.2d 725, 726 (1993) and *Cooper v. Liebert*, 81 Nev. 341, 344, 402 P.2d 989, 991 (1965) as supposed support for such a position. Response, at p. 7. This position fails as a matter of law for following reasons: (1) NRS 31.070 does not provide for intervention; (2) the *Elliot* and *Cooper*

cases do not provide for intervention and do not even mention intervention (or any variation thereof); and (3) NRCP 24 provides for the sole procedure for a third-party to intervene and the Court specifically denied HH's intervention under NRCP 24. As HH never intervened, the Fee Award is likewise invalid and must be vacated.

4. The Fee Award is unsubstantiated

NRS 22.100(3) allows an award of only those attorneys' fees and costs "incurred by the party as a result of the contempt." The Order that Detwiler allegedly violated was entered on January 9, 2019. Appx. Vol. 1, PA00193-220. Despite this Trial Court having determined Detwiler to be a party (albeit wrongfully) from January 9, 2019 forward (Appx. Vol. IV, PA00883), the Trial Court awarded fees and cost from March 2018 onward, totaling **$218,855.52**. Appx. Vol. IV, PA00950-952. A significantly egregious, unfair portion of the Fee Award is that more than half of the fees and costs - **$118,036.72** – were incurred p*rior to Detwiler having any order directing him to do anything in this matter*. Appx. Vol. IV, PA000861.

a. The *Brunzell* Factors

The Fee Award contains absolutely no findings to show that the *Brunzell* Factors have been satisfied. Appx. Vol. IV, PA00950-952. *See Brunzell v. Golden Gate Nat.* Bank, 85 Nev. 345, 455 P.2d 31 (1969) (listing factors that must be considered). No consideration of these factors was included in the Fee Award. Appx. Vol. IV, PA00950-952.

b. EDCR 7.60

The Trial Court awarded fees and costs against Detwiler pursuant to EDCR 7.60(b). Appx. Vol. IV, PA00881, ll. 8-10. Fees and costs under EDCR 7.60(b) may only be "…impose[d] upon an attorney or a party…." While the Trial Court determined Detwiler is a party, as explained above, this Court already found Detwiler not to be a party. If this Court were to allow fees and costs, let alone sanctions, against Detwiler under EDCR 7.60(b), it would be a grave miscarriage of justice as this Court dismissed Detwiler's appeal due to his non-party status. Justice requires that this Court maintain consistency in its decisions and, if Detwiler is not a party for appeal purposes, then this Court should also determine Detwiler is not a party for fees, costs or sanctions under EDCR 7.60(b).

The Fee Award is not substantiated under the requirements of NRS 22.100(3), the *Brunzell* factors or EDCR 7.60. As such, this Court must reverse the Fee Award in its entirety.

G. Detwiler's NRS 22.030(3) Objection was Timely

Before the Detwiler Contempt Order was entered, Detwiler timely filed his NRS 22.030(3) Objection. Appx. Vol. III, PA00676-PA00677.

Despite recusal being mandatory and automatic under NRS 22.030(3), the Trial Court judge refused to recuse himself and continued to preside over the contempt proceedings, including entering the Detwiler Contempt Order, Sanctions

Order, and related Judgment over Detwiler's Objection. Further, after the Objection, the Trial Court converted the sanctions from civil to criminal, without proper notice or opportunity to be heard. Such action only affirms the timeliness of the Objection, and renders the Trial Court's refusal to rescue himself all the more egregious.

Next, BBNB attempts to say that Detwiler was found in contempt because he allegedly lied under oath. This is patently untrue. The Trial Court's ruling for issuing the sanction was "for violation of a court order", not because of any alleged lie. Appx. Vol. 4, PA00839, line 24 to PA00840, l. 1. The alleged contempt was not committed in the immediate view of the Court as BBNB was seeking to enforce surrendering of Subject Vehicles outside the presence of the Trial Court.

Finally, this Court found strong indications of a bias against the alleged contemnor in *Awad* when the Trial Court Judge sanctioned the party at issue $2,000.00 for the alleged contempt – four (4) times the allowable limit in NRS 22.100. *Awad v. Wright*, 106 Nev. 407, 715, 794 P.2d 713, ____ (1990). NRS 21.100(3)("…if a person is found guilty of contempt, a fine may be imposed on the person not exceeding $500…). Here the Trial Court sanctioned Detwiler $100,000.00 – 200 times the allowable limit, indicating bias against Detwiler.

H. The Sanction issued was in excess of NRS 22.100(2).

The maximum allowable fine under NRS 22.100(2) is $500.00. The Trial Court exceed this amount by issuing a sanction 200 times this amount. Although

unlawful and erroneous, the Trial Court relied upon EDCR 7.60(b)(5) to issue a fine against Detwiler for allegedly refusing to comply with a Court order. The Trial Court's utilization of EDCR 7.60(b)(5) proves this sanction was intended to punish Detwiler, but is misplaced as Detwiler is not a party and, in order for the Trial Court to impose a fine under EDCR 7.60, Detwiler must be a party. This Court already determined Detwiler was not a party. Appx. Vol. IV, PA00995-PA00998.

I. The Trial Court's finding that Detwiler was an alter ego violated Due Process

BBNB's specious argument that the term "*alter ego*" was used in a generic sense and not as a legal conclusion underscores both BBNB's and the Trial Court's total disregard of its responsibility to afford Detwiler his due process rights which in Nevada require an independent action to assert an *alter ego* claim. *Callie v. Bowling*, 123 Nev. 181, 160 P.3d 878 (2007). It is undisputed that the Trial Court found in the Detwiler Contempt Order that an alter ego relationship existed between various parties, and then used this finding to hold Detwiler in contempt. As a result, Detwiler was denied his due process rights to "requisite notice, service of process, and other attributes of due process." Detwiler never claims that *Callie v. Bowling* bans the generic use of the term *alter ego*, only that in order to reach a legal conclusion that an *alter ego* relationship exists, the required elements of due process must first be adhered to. This was never provided to Detwiler, and as a result the

Detwiler Contempt Order which was based upon the Trial Court's finding of an *alter ego* relationship was improperly issued against Detwiler.

III. CONCLUSION

For all the reasons set forth in Detwiler's Petition and herein, Detwiler respectfully requests that this Court grant the Petition to correct the irreparable and substantial harm caused by the numerous Constitutional and other errors committed below, order the Trial Court to vacate the Detwiler Contempt Order, Sanctions Order and resulting Judgments, as well as the resulting charging order,[12] and grant such other and further relief as the Court deems appropriate.

DATED: September 23, 2020. **HUTCHISON & STEFFEN**

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[12] After entering the Detwiler Contempt Order and Judgments, the Trial Court improperly issued a Charging Order. While the subject of the Charging Order is currently pending appellate review (Docket No. 81594), if this Court vacates the Detwiler Contempt Order and Judgments, Detwiler requests it vacate the Charging Order as well.

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter is to be found. Further, this Petition complies with Nev. R. App. P. 21(d) and 32(a)(7)(A)(ii) as it contains no more than 7,000 words. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: September 23, 2020. **HUTCHISON & STEFFEN**

By */s/ Brenoch Wirthlin, Esq.*

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VERIFICATION

I, Brenoch Wirthlin, Esq., declare as follows:

1. I am an attorney with Hutchison & Steffen, counsel of record for Petitioner/Non-Party, Edward N. Detwiler.

2. I verify that I have read the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**; that the same is true to my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.

I declare under the penalty of perjury the statements herein are true and correct.

Executed on September 23, 2020 in Clark County, Nevada.

By: /s/ Brenoch Wirthlin, Esq.
Brenoch Wirthlin, Esq.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to NRAP Rule 25(d), I served the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** on the following parties, via the manner of service indicated below, on September 23, 2020:

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Dated: September 23, 2020.

By: /s/ Daniel Maul
An Employee of
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