IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEMENT MUNEY; CHEF EXEC SUPPLIERS, LLC., Appellants, vs. DOMINIQUE ARNOULD, Respondent.	Supreme Court Case No. 81354, 81355, 81356

APPELLENT'S OPENING BRIEF

APPEAL FROM THE EIGHTH JUDICIAL COURT

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CLEMENT MUNEY; CHEF EXEC SUPPLIERS, LLC., Appellants, vs. DOMINIQUE ARNOULD, Respondent.	Supreme Court Case No: 81354, 81355, 81356 **NRAP Rule 26.1 Disclosure**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal. Appellant Clement Muney, Chef Exec Suppliers has no parent corporations, no stock, no corporate affiliation, and is present under his true name. He is represented by Robert Kern, Esq., and has been, and expects to be, represented by no other counsel in this matter.

DATED this 29 day of March, 2021.

/s/ Robert Kern

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I.

JURISDICTIONAL STATEMENT

This appeal arises from two orders of the Eighth Judicial District Court, in and for Clark County, State of Nevada, the Honorable Nancy Allf , Presiding. The first order was entered on the 8th day of June, 2020, (Appendix, p.412). That order denied a motion for preliminary injunction, granted a motion to appoint a receiver, and denied a motion to enforce a settlement agreement. The order is appealable under NRAP 3A(b)(3) as an order refusing to grant injunctive relief, and under NRAP 3A(b)(4) as an order appointing a receiver. The denial of the motion to enforce the settlement agreement is appealable under ancillary jurisdiction, as it is contained in an order that is otherwise independently appealable. *Vaile v. Vaile*, 396 P. 3d 791 (NV S.Ct. 2017); *Yu v. Yu*, 405 P. 3d 639 (NV S.Ct. 2017).

The second order was entered on the 12th day of June, 2020, (Appendix, p.442). That order granted a motion for preliminary injunction, appointed a receiver, and imposed sanctions. The order is appealable under NRAP 3A(b)(3) as an order granting injunctive relief, and under NRAP 3A(b)(4) as an order appointing a receiver. The order imposing sanctions is appealable under ancillary jurisdiction, as it is contained in an order that is otherwise independently appealable. *Vaile v. Vaile*, 396 P. 3d 791 (NV S.Ct. 2017); *Yu v. Yu*, 405 P. 3d 639 (NV S.Ct. 2017).

II.

ROUTING STATEMENT

The routing of this matter does not clearly fall into one category or the other; Routing to the Supreme Court is supported by the fact that it involves attorney discipline (NRAP 17(a)(4)), and that it is a contract dispute in excess of $75,000 (NRAP 17(b)(6)). Routing to the Court of Appeals is supported by the fact that this appeal challenges the grant or denial of injunctive relief (NRAP 17(b)(12)). Appellant thus believes it is in the Court's discretion as to where to route the present appeal.

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in denying the motion to enforce the settlement agreement, without notice of when the matter would be heard, without holding an evidentiary hearing, and based upon disputed issues of fact for which no evidence was offered?
2. Did the District Court err in appointing a receiver, without notice of when the matter would be heard, without holding an evidentiary hearing, and based upon disputed issues of fact for which no evidence was offered?
3. Did the District Court err by imposing sanctions on Muney's counsel for being unable to attend an emergency hearing due to his obligations to a client in a different matter?

IV.

STATEMENT OF THE CASE

This case comes as a consolidated appeal from two District Court orders; the first order dissolved Appellant Muney's Temporary Restraining Order, denied Muney's Motion for Preliminary Injunction, granted Respondent Arnould's Motion to Appoint Receiver, and denied Muney's Motion to Enforce Settlement. The second order granted Arnould's motion for preliminary injunction, appointed a receiver, and issued sanctions against Muney's counsel.

On October 11, 2019, Respondent Dominique Arnould (hereinafter, "Arnould"), filed a complaint in the Eighth Judicial District Court for Dissolution, Appointment of a Receiver, and Breach of Fiduciary Duty, against Appellants Clement Muney (hereinafter, "Muney") and Chef Exec Suppliers, LLC (hereinafter, "Chef Exec", or the "Company"). (See Complaint, Appendix p.001). Defendants/Appellants Muney and Chef Exec filed an answer and counterclaims on November 7, 2019. On February 7, 2020, the parties attended a court-ordered settlement conference, at which settlement of all claims and all essential terms was reached, and was entered into the minutes. (See Settlement Minutes, Appendix p.128). Despite the settlement agreement of all claims, on March 13, 2020, Arnould filed a motion for partial summary judgment, seeking dissolution of the

Company and appointment of a Receiver. Muney opposed the motion and filed a counter-motion for enforcement of the settlement agreement. On May 18, 2020, the Court issued a minute order re-scheduling the hearing of the motion and counter-motion for June 24, 2020. (See Scheduling Minute Order, Appendix, p.230). On May 20, 2020, Muney filed an application for a Temporary Restraining Order and a Motion for Preliminary Injunction, which was heard in a noticed hearing on May 22, 2020. At the May 22 hearing, the Court, without notice to either party, decided to make determinations on the motion for appointment of a receiver, and the motion to enforce settlement agreement, which were scheduled to be heard on June 24, over a month afterward. The Court did not hold an evidentiary hearing, however nonetheless granted the motion to appoint receiver, denied the motion to enforce the settlement agreement, dissolved the temporary restraining order, and denied the motion for preliminary injunction (the Order was entered on June 8). (See 5/22 Transcript & 5/22 Order, Appendix p.382 & p.412). On the morning of June 10, 2020, Arnould filed an emergency motion for appointment of receiver, and a preliminary injunction, seeking a hearing the same day. Counsel for Muney informed the parties and the Court that he was unable to attend a hearing that afternoon, as he had unavoidable schedule conflicts. The Court nonetheless scheduled the hearing for the same day, over Muney's protest, and then continued the hearing to June 12, two days later, when Muney's counsel

was not able to appear. On June 12, 2020, a hearing was held on Arnould's motion. At that hearing the Court granted Arnould's emergency motion for preliminary injunction, granted the motion to select a receiver, and issued sanctions against counsel for Muney, because of his failure to attend the hearing on June 10, 2020. On June 15, 2020, Appellants timely appealed the orders of May 22 and June 12, and those appeals were consolidated by order of the Supreme Court.

V.

STATEMENT OF FACTS

Appellant Muney and Respondent Arnould formed the company Chef Exec in 2007, for the purpose of selling food-service products to restaurants and other food-service businesses. Muney managed the Las Vegas portion of the business, and Arnould handled the Los Angeles side of the business. (See Answer, Appendix p.006). Chefexec has no operating agreement in place. (See Complaint, Appendix p.001). Chefexec operated smoothly and profitably for its entire existence until Arnould announced that he wished to retire, at which point the parties' failure to reach agreement for a buyout of Arnould's share led to conflict. (See Muney MSJ, Appendix p.018). During the time that a buyout of Arnould was being discussed, the lease on the Las Vegas warehouse came up for renewal, and the renewal

required a personal guarantee by both owners of the company. Muney asked for Arnould's permission to renew the lease, and Arnould refused. Arnould, through his attorney at the time, suggested that Muney lease the warehouse with a company that he owned entirely (so that he would be the only owner required to guarantee the warehouse), and have that company sub-lease the space to Chefexec (See Muney MSJ, Appendix p.018). Muney followed that advice, and with a separate company, leased the space, and sub-leased it to Chefexec, at a rate that Muney was advised was the standard rate for such storage in the area (See Muney MSJ, Appendix p.018). Arnould then complained that the rent of the Las Vegas warehouse was higher than before, and filed the present suit for dissolution.

Company records show that even despite the dispute between the owners, the Company was still operating and profitable up until the COVID-19 pandemic began. (See Muney MSJ, Appendix p.018).

On February 7, 2020, the parties attended a court-ordered settlement conference, at which settlement of all claims and all essential terms was reached, and was entered into the minutes. (See Settlement Minutes, Appendix p.128). The minutes explicitly stated that the agreement resolved all claims, and that the entire matter would be dismissed as a result. The written settlement agreement stated that it included all material terms, and was signed by both parties. (See Muney MSJ, Appendix p.018). Under the agreement, Arnould would pay Muney $700,000 for

Muney's share of the company, and both parties released all claims. The agreement also stated that it was contingent upon Arnould acquiring financing sufficient to pay the purchase price, and required Arnould to make all reasonable efforts to acquire such financing. (See Agreement, Appendix p.125). A few weeks later, counsel for Arnould emailed Muney stating that they were having trouble getting financing, but might be able to get such financing if Muney was willing to accept payments over time. Muney responded that he was willing to accept payments over time, and was willing to discuss anything that would make acquiring financing easier, though he was unwilling to alter the sales price.

Without further discussion, and despite the settlement agreement, on March 13, 2020, Arnould filed a motion for partial summary judgment, seeking dissolution of the Company and appointment of a Receiver, with no mention of why they were going forward with litigation in the presence of a settlement agreement. Muney opposed the motion and filed a counter-motion for enforcement of the settlement agreement. (See Mtn to Enforce, Appendix p.129). On May 18, 2020, the Court issued a minute order re-scheduling the hearing of the motion to appoint receiver, and counter-motion for enforcement of settlement agreement, for June 24, 2020. (See Scheduling Minute Order, Appendix, p.230). On May 20, 2020, after Muney discovered that Arnould had funneled all company income into a new bank account, which was in his name only, Muney filed an application for a

Temporary Restraining Order and a Motion for Preliminary Injunction, seeking access to the Company funds, which was heard in a noticed hearing on May 22, 2020. At the May 22 hearing, the Court, without notice to either party, decided to make determinations on the motion for appointment of a receiver, and the motion to enforce settlement agreement, which were scheduled to be heard on June 24, over a month afterward. The Court did not hold an evidentiary hearing, however nonetheless granted the motion to appoint receiver, denied the motion to enforce the settlement agreement, dissolved the temporary restraining order, and denied the motion for preliminary injunction. (See 5/22 Transcript & 5/22 Order, Appendix p.382 & p.412). Arnould's defense to the enforcement of the settlement agreement was based on his arguments that: 1) he had been unable to acquire financing and 2) invoked the defense of "impossibility" due to the COVID-19 pandemic. (See 5/22 Order, Appendix p.412). With regard to his efforts to obtain financing, Arnould showed emails with four lenders asking about a loan. Only one showed that an actual loan application had been made, none showed an outright denial, and two indicated that he would have to put up collateral in order to be approved for a loan. (See Mtn to Enforce, Appendix p.129). To support the argument that compliance with the settlement agreement was impossible, Arnould cited the COVID-19 pandemic, despite the fact that the financing was all sought prior to the pandemic affecting the US. No evidence was provided to support that argument that the

pandemic affected the agreement. The Court issued an order denying the motion to enforce settlement, approving the motion to appoint a receiver, and denying the motion for preliminary injunction to regain control of company funds.

On the morning of June 10, 2020, Arnould filed an emergency motion for appointment of receiver, and a preliminary injunction, seeking a hearing the same day. Arnould claimed that he had, without notice to Muney, driven to the Las Vegas warehouse, and found it locked, and wanted entry. Neither Muney nor his counsel were informed that Arnould was driving to Las Vegas prior to the filing of the emergency motion, and no other explanation of the emergency nature of the motion was provided. Counsel for Muney was scheduled for a Nevada Supreme Court oral argument the following day, and had scheduled six other appellate attorneys to do a practice argument with him, at the same time as the requested hearing. As the oral argument was for the following day, the moot argument could not be rescheduled, and a very significant amount of client resources had been invested in setting it up. Counsel for Muney informed the parties and the Court that he was unable to attend a hearing that afternoon and explained why, and also drafted a quick opposition that morning pointing out that no irreparable harm or emergency had been alleged[1]. (See 6/10 Opp & Emails, Appendix p.432 & p.439).

[1] The emergency motion, which failed to explain why any element of it was an actual emergency, was filed at 9:57am. Counsel for Muney filed an opposition at 10:38am, 41 minutes

The Court nonetheless scheduled the hearing for the same day, over Muney's protest, and then continued the hearing to June 12, two days later, when Muney's counsel was not able to appear. On June 12, 2020, a hearing was held on Arnould's motion. At that hearing the Court granted Arnould's emergency motion for preliminary injunction, granted the motion to select a receiver, and issued sanctions against counsel for Muney, alleging that his failure to attend the same day hearing, despite his conflict, showed disrespect to the Court. (See 6/12 Transcript & 6/12 Order, Appendix p.564 & p.442). This appeal followed.

VI.

SUMMARY OF ARGUMENT

The present matter is a case in which full terms of settlement were reached and agreed to by both parties, and the failure to enforce, or even allow an evidentiary

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later, explaining that he was unable to attend a hearing that afternoon, and pointing out that no emergency or irreparable harm had been alleged. At 10:42am, Muney's counsel emailed Arnould and the District Court informing them that his Supreme Court argument prevented him from being able to attend a hearing that day. At 11:16am, the Court emailed the parties announcing that the hearing would occur that day at 1:30pm, just over two hours after the email. At 11:21am, Muney's counsel emailed the Court and parties protesting that a hearing be held without Muney being represented, and re-iterated that he was unable to attend a hearing that day. (See Hearing Emails, Appendix p.439). Despite knowing he could not attend, the Court scheduled the hearing, and then continued it to Friday so that Muney's counsel could participate. At the Friday hearing, the District Court demanded that Muney's counsel explain his failure to attend the previous hearing. He explained the circumstances, however the Court elected to sanction him for being unable to attend. (See Sanctions Order & 6/12 Transcript, Appendix pp.442 & 564).

hearing on that settlement, has led to a massive amount of wasted court and party resources.

The District Court's act of holding a hearing on the motion to appoint a receiver, and the motion to enforce settlement, over a month before their scheduled hearings, without notice, was improper, and deprived the parties of the process of preparing for the hearing. Further the denial of the motion to enforce, without holding an evidentiary hearing, was outside the District Court's discretion. The District Court further made findings of fact without an evidentiary hearing[2], and reached conclusions of law that were clearly erroneous[3]. Likewise, the granting of the motion to appoint a receiver, an extreme remedy, was granted without a noticed hearing, and without taking evidence on the issue. The Court's failures on these issues caused a case that had been fully settled to have to undergo years more litigation.

The Court's order imposing sanctions on counsel for Muney, for failing to attend a hearing with less than three hours' notice, when doing so would have been

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[2] Findings of Fact
- Finding that Arnould's efforts at financing were reasonable;
- Finding that COVID-19 impacted the parties' ability to perform the agreement;
- Finding that allowing both partners access to company accounts would not preserve the status quo.

[3] Conclusions of Law
- Conclusion that appointment of a Receiver is necessary;
- Conclusion that COVID-19 caused the settlement agreement to be unenforceable;
- Conclusion that COVID-19 destroyed the purpose of the settlement agreement;
- Conclusion that the purpose of the settlement agreement was frustrated, thus discharging any duties under the agreement.

malpractice against a different client, was improper, and was an abuse of the District Court's discretion.

As the failure to provide a noticed evidentiary hearing on the motions to enforce settlement, and to appoint a receiver were abuses of the District Court's discretion, the orders must be reversed. As the order for sanctions failed to allege any impropriety by Muney's counsel, that Order should be reversed as well.

VII.

ARGUMENT

I.

DID THE DISTRICT COURT ERR IN DENYING THE MOTION TO ENFORCE THE SETTLEMENT AGREEMENT, WITHOUT NOTICE OF WHEN THE MATTER WOULD BE HEARD, WITHOUT HOLDING AN EVIDENTIARY HEARING, AND BASED UPON AN AFFIRMATIVE DEFENSE UNSUPPORTED BY ANY EVIDENCE?

Muney's motion to enforce the settlement agreement was set for hearing on June 24, 2020. At the conclusion of the May 22 hearing on Muney's motion for preliminary injunction, the District Court elected to deny the motion to enforce the settlement agreement, without any notice that the issue would be determined at that hearing, and without holding an evidentiary hearing on the issue. The parties only discovered that the matter would be decided that day when the hearing concluded, and the Court announced that it would be denying the motion to enforce.

a. Standard of Review

All questions of law are reviewed de novo. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). A district court's interpretation of a settlement agreement is subject to de novo review. *Dalaimo v. Dalaimo*, 390 P.3d 166 (Nev. 2017). A district court's application of law to facts is reviewed de novo. *24/7 Ltd v. Schoen*, 399 P.3d 916 (Nev. 2017) (citing *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)). Although a district court's determination of good faith settlement is generally reviewed for abuse of discretion, in the present case, the District Court's order makes clear that it made no determination of good faith in the settlement. As resolution of this issue rests primarily on interpreting the legal notice and hearing requirements to resolve a motion to enforce a settlement agreement, and to a lesser extent, in interpreting the settlement agreement, review is properly *de novo*.

b. **A motion to enforce a settlement agreement, involving disputes of fact and law, requires an evidentiary hearing, notice of the hearing, and evidence to support the issues of fact to be determined.**

As a matter of public policy, enforcement of settlement agreements is strongly favored. This common sense policy is reflected in the decisions of courts around the country, and was explained well by the Arkansas Supreme Court:

> Courts should, and do, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable, but highly meritorious. Because they promote peace, voluntary settlements. . . must stand and be enforced if intended by the parties to be final, notwithstanding the settlement made might not be that which the court would have decreed if the controversy had been brought before it for decision.

Ragland v. Davis, 301 Ark. 102, 106-107, 782 S.W.2d 560, 562 (1990) (citation omitted, emphasis added). The Supreme Court of Hawai'i agreed, holding:

> We acknowledge the well-settled rule that the law favors the resolution of controversies through compromise or settlement rather than by litigation. Such alternative to court litigation not only brings finality to the uncertainties of the parties, but is consistent with this court's policy to foster amicable, efficient, and inexpensive resolutions of disputes. In turn, it is advantageous to judicial administration and thus to government and its citizens as a whole.

State Farm Fire v. Pacific Rent-All, Inc., 978 P. 2d 753 (Haw: Supreme Court 1999) (citation omitted); *See also*: *Matter of Estates of Thompson*, 226 Kan. 437, 440, 601 P.2d 1105, 1108 (1979) ("It is an elemental rule that the law favors compromise and settlement of disputes and generally, in the absence of bad faith or

fraud, when parties enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it."); *Haller v. Wallis*, 89 Wash.2d 539, 544, 573 P.2d 1302, 1305 (1978) ("The law favors settlements and consequently it must favor their finality.").

In the present case, the parties and the settlement judge spent most of a day carefully negotiating an agreement that they intended to be fully enforceable, and to fully resolve the entirety of the claims in the case. The decision to disregard that settlement led to over a year (and counting) of additional litigation, and the expenditure of significant party and court resources. Such a decision should not have been made without full notice of when the matter would be heard, and not without holding an evidentiary hearing to take evidence to determine whether the settlement agreement was enforceable.

1. An evidentiary hearing is required to determine disputed issues of fact.

The Nevada Supreme Court, as well as others, have clearly held that a motion to enforce a settlement agreement requires an evidentiary hearing on the disputed issues. *Resnick v. Valente*, 637 P. 2d 1205 (Nev: Supreme Court 1981) ("The issue presented is whether an alleged oral settlement made by counsel may summarily be reduced to judgment upon the motion of one party without an evidentiary hearing. We hold that it may not."); *Callie v. Near*, 829 F.2d 888, 890

(9th Cir. 1987) ("Where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing.").

Despite the requirement of an evidentiary hearing, the District Court essentially avoided any hearing whatsoever, by announcing a ruling on the motion to enforce the settlement at the end of a hearing on a different motion, over a month prior to the scheduled hearing, taking the parties by surprise[4]. (See 5/22 Transcript, Appendix p.382). In the District Court's own order, it admits that the determination on the enforceability of the settlement agreement requires making a finding of fact that Arnould had made reasonable efforts to secure financing. However the District Court's order states that it considers a finding on that issue of fact to be unnecessary because the COVID-19 pandemic reduced the value of the Company, and that the pandemic made securing of financing "essentially impossible". (See 5/22 Order, Appendix p.412). The District Court took no evidence indicating the effect of the pandemic on Arnould's ability to get

[4] "I'll be honest, I did not think that we were arguing the Motion to Enforce Settlement Agreement or Motion for a Receiver today. I thought that was going to be argued in June." – Counsel for Muney.

"I understand your concerns that I jumped the gun on this one. But given the circumstances of the world and the business world, I feel like I need to give both sides more stability with regard to the future." – The Court. (the two quotes are not consecutive).

financing, and neither party presented any such evidence. In the Court's order, it appeared to intend to replace a proper evidentiary hearing with the taking of judicial notice of all the issues in dispute[5]. Absent a proper hearing on the matter, and findings supporting the determination, the Court's order denying the motion to enforce was reversible error.

2. Notice of when the matter will be heard is a necessary element of the hearing.

Proper notice that a matter will be heard is an essential element of jurisprudence. "[T]he giving of notice is part of the process due litigants. fundamental fairness to the parties before the court requires notice of proceedings; notice is an essential part of the adjudicatory process.", 297 F. 3d 940 (Court of Appeals, 9th Circuit 2002). The District Court's surprise decision to resolve the motion to enforce the settlement agreement at the end of the May 22 hearing of

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[5] Matters which may be recognized by judicial notice are delineated by NRS 47.130, which allows for judicial notice to be taken of factual issues that are:

> (a) Generally known within the territorial jurisdiction of the trial court; or
> (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.

The question of whether COVID-19 affected the parties' ability to perform under the agreement was an issue in direct dispute, and thus was an issue for determination in an evidentiary hearing, and not capable of being judicially noticed.

another matter, without prior notice, and over a month before the hearing on the motion to enforce was scheduled, was clear error.

Nevada law has made clear that "notice" of a hearing does not exist unless there is notice of what will be adjudicated at the hearing. *Wiese v. Granata*, 887 P. 2d 744 (NV S.Ct. 1994) ("First, due process requires that notice be given before a party's substantial rights are affected. The notice of hearing Wiese received does not mention or even hint that child custody is at issue."); *Washoe County Dist. Attorney v. Dist. Ct.*, 5 P. 3d 562 (NV S.Ct. 2000) ("The notice of hearing stated that the purpose of the hearing was only for a "[f]inancial review to determine a payment on arrears," and did not state that the amount of arrears would be adjudicated."). It is thus clear that holding a hearing on a potentially case-resolving motion, without notice to the parties, was error, and deprived the parties of the ability to prepare evidence and arguments for the matter that was being decided.

3. Accepting an affirmative defense based on a disputed issue of fact requires the presentation of evidence supporting that issue of fact.

The Court's order and its findings of fact and conclusions of law make clear that the Court did not deny enforcement of the settlement agreement based upon an actual finding that a condition precedent was not satisfied, but rather upon its sua

sponte determination, made without evidence, that the affirmative defense of impossibility/frustration relieved Arnould of any duties under the agreement, because of the COVID pandemic. (See 5/22 Order, Appendix p.412).

It is well established law that the defense of impossibility/frustration of purpose is an affirmative defense. *Cashman Equip. Co. v. WEST EDNA ASSOCIATES*, 380 P. 3d 844 (Nev: Supreme Court 2016); *Nebaco, Inc. v. Riverview Realty Co.*, 482 P. 2d 305 (Nev: Supreme Court 1971). It is further clear that the burden of proving all elements of an affirmative defense fall upon the party raising the defense. *Schwartz v. Schwartz*, 95 Nev. 202, 206 n. 2, 591 P.2d 1137, 1140 n. 2 (1979) (stating that a defendant bears the burden of proving each element of an affirmative defense). *See also Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 955, 338 P.3d 1250, 1254 (2014) (stating that the party asserting an affirmative defense bears the burden of proof); *Turner v. SOUTHERN NEVADA REGIONAL HOUSING AUTHORITY* (Nev: Court of Appeals 2019). Despite these requirements, the District Court denied enforcement of the negotiated settlement agreement based upon the affirmative defense of impossibility/frustration of purpose, despite the party raising that defense having offered no evidence whatsoever that 1) a slowdown in business such as that caused by COVID was unforeseen, or that 2) COVID had caused the securing of financing to become impossible. Likewise the Court did not allow testimony on these

questions, nor take argument on them at the hearing. Both of those elements must be clearly established to support the affirmative defense; the District Court's acceptance of the affirmative defense without evidence supporting the essential elements was reversible error. *See Cashman Equip. Co. v. WEST EDNA ASSOCIATES*, 380 P. 3d 844 (Nev: Supreme Court 2016).

II.
DID THE DISTRICT COURT ERR IN IMPOSING THE EXTREME REMEDY OF APPOINTING A RECEIVER, WITHOUT THE DUE PROCESS OF NOTICE AND A HEARING, AND BASED UPON DISPUTED ISSUES OF FACT FOR WHICH NO EVIDENCE WAS OFFERED?

Respondent Arnould's motion to appoint a receiver was set for hearing on June 24, 2020. At the conclusion of the May 22 hearing on Muney's motion for preliminary injunction, the District Court announced it was granting the motion to appoint a receiver, without any notice that the issue would be determined at that hearing, and without holding an evidentiary hearing on the issue. The parties only discovered that the matter would be decided that day when the hearing concluded, and the Court announced that it would be granting the motion to appoint a receiver.

a. Standard of Review

All questions of law are reviewed de novo. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). An order on a motion for summary judgment is reviewed de novo. *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). A district court's application of law to facts is reviewed de novo. *24/7 Ltd v. Schoen*, 399 P.3d 916 (Nev. 2017) (citing *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)). "The appointment of a receiver is an action within the trial court's sound discretion and will not be disturbed absent a clear abuse." *Nishon's, Inc. v. Kendigian*, 91 Nev. 504, 505, 538 P.2d 580, 581 (1975). As the motion for appointment of a receiver was a motion for partial summary judgment, the order granting the motion would be an order for summary judgment, and thus be reviewed *de novo*. The questions of whether the receiver could be appointed without an evidentiary hearing, or without notice of the hearing on the matter would likewise be reviewed *de novo* as questions of law. Although a District Court's decision to appoint a receiver is reviewed for abuse of discretion, questions of whether a noticed hearing or evidence were required for such appointment are questions of law.

b. A motion to appoint a receiver, involving disputes of fact and law, requires hearing, notice of the hearing, and evidence to support the issues of fact to be determined.

Under both Nevada and Delaware LLC law, judicial dissolution and receivership are remedies of last resort, and only available in the absence of any other legal remedy. *Bedore v. Familian*, 125 P. 3d 1168 (Nev: Supreme Court 2006) ("We have noted that the appointment of a receiver or the dissolution of a corporation is "a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it." . . . Thus, if another remedy is available to achieve the same outcome, the district court should not resort to dissolution or the appointment of a receiver."); *Matter of Arrow Inv. Advisors, LLC*, 2009 WL 1101682, *2 (Del. Ch. 2009). That court went on to explain that as a remedy of last resort, judicial dissolution and receivership is not appropriate as a response to allegations of breaches of fiduciary duty (Respondent Arnould's justification), and was so deficient as to warrant dismissal:

> Here, Hamman has failed to allege that Arrow is not operating in accordance with the broad purposes set forth in its LLC agreement. Moreover, I will not entertain a claim for dissolution premised on unproven breaches of fiduciary duty. Dissolution is an extreme remedy to be applied only when it is no longer reasonably practicable for the company to operate in accordance with its founding documents, not as a response to fiduciary or contractual violations for which more appropriate and proportional relief is available.

Id. Just as in that case, Arnould's request for appointment of a receiver pled a pretextual breach of fiduciary duty, and demanded an extreme remedy of last resort from this Court. *Bedore v. Familian*, 125 P. 3d 1168 (Nev: Supreme Court 2006); (Where taking excess salary and usurping corporate opportunity was alleged, receivership and dissolution not warranted); *Gottier's Furniture, LLC v. La Pointe*, No. CV040084606S, 2007 WL 1600021 (Conn. Super. May 16, 2007); (declining defendant member's request to appoint receiver to wind up affairs of LLC inasmuch as defendant member had misappropriated LLC funds and had unclean hands, and, alternatively, because dissolution receivership is extraordinary remedy that is not warranted merely based on dissension of members or financial difficulty). The District Court's granting of such an extreme remedy without even examining whether the remedy met the statutory requirements was error.

1. Granting the extreme remedy of appointment of a receiver without notice or a hearing was a violation of procedural due process

Procedural due process requires that a state actor may not deprive a person of a property interest without process that provided proper notice of the issues to be determined, and an opportunity to be heard and present evidence in his defense. In the present case, it meant that the District Court could not appoint a receiver, and thus take control of his own business out of his hands, without holding a noticed hearing where he could present evidence and argue whether appointment

of a receiver was justified. As the due process clauses of the Nevada and Federal constitutions are identical, they will be referred to here collectively as the Due Process Clause. A violation of procedural due process requires a showing that there was 1 – a deprivation of a property interest, 2 – under color of state law, and 3 - the procedure used for such deprivation did not provide the constitutionally mandated level of notice and opportunity to be heard.

The U.S. Supreme Court has defined a property interest as an interest with a reasonable expectation of continuing to receive a benefit. *Board of Regents of State Colleges Et. al. v. Roth*, 408 U.S. 564 (1972). This Court has also adopted this position, citing that decision in *Tarkanian v. NAT. COLL. ATHLETIC ASS'N* "property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 741 P. 2d 1345 (1987)(citing *Roth*, Id.).Ownership and control of a company is a clear and significant property interest, and a mechanism that infringes upon that ownership or control is a "taking" for due process purposes. *J.D. Construction v. IBEX Int'l Group*, 240 P.3d 1033 (Nev. 2010) ("A mechanic's lien is a "taking" in that the property owner is deprived of a significant property interest, which entitles the property owner to federal and state due process."). As

the receiver in the present case was given full control of Muney's (but not Arnould's) warehouse and inventory, and allowed actual physical property to be transferred to Arnould against Muney's wishes. Muney's interest was the control entitled to a 50% owner and manager of the company; rights granted by NRS Chapter 86. Entitlement to the benefit of managing his side of the company was thus expected, legal, and created by state law, and thus it is clear that the appointment of a receiver involved a taking of Muney's property interest. As the taking was ordered by a state court judge, it occurred directly under color of state law, thus the only question is whether the process afforded to Muney for the taking, satisfied due process requirements.

A. The Process Provided was Constitutionally Insufficient.

The most significant portion of the procedural due process analysis is the determination of what process was due, and whether the process provided was sufficient. If a person has been deprived of a property interest by state action, then the process provided must be analyzed. The District Court's authority to appoint a receiver could have only come from either NRS 86.5415 or NRS 32.010. Under NRS 86.5415(d)(3), a hearing with a minimum of five (5) days notice is required before a receiver can be appointed. A Court appointing a receiver pursuant to NRS Chapter 32 can do so, "only after notice and opportunity for a hearing". NRS

32.250(1). That statute allows for waiver of the notice in special circumstances, however the only special circumstances alleged at the May 22 hearing were those alleged by Muney, which were explicitly rejected by the Court. (*See* 5/22 Order, Appendix p.412). In the present case, a hearing was scheduled on the matter for June 24, 2020, and then the determination on the appointment of a receiver was announced at the end of the May 22 hearing (and named at the June 12 hearing), without any notice (even in that hearing) that the issue would be decided that day. The process that was clearly due was that which is required by statute, as well as by the basic principles of jurisprudence; notice and a fair hearing.

The U.S. Supreme Court, in *Mathews v. Eldridge*, provided a three-part balancing test for evaluating whether additional process should be due. 424 U.S. 319 (1976). This test balanced: 1 - the importance of the interest to the individual, 2 - the ability of additional procedures to increase the accuracy of the fact finding, and 3 - the government's interest in administrative efficiency. *Id.*

i. Importance of the Interest.

The interest at stake here is Muney maintaining control of his own business interests, and retaining the ability to operate his side of the business without interference, as well as prevent his physical inventory from being transferred to his opponent’s possession. Procedural due process jurisprudence has consistently held

rights affecting ownership of property to be extremely important interests. *Fuentes v. Shevin*, 407 US 67 (U.S. S.Ct. 1972) (the loss of kitchen appliances and household furniture is significant enough to warrant a pre-deprivation hearing.); *Connecticut* v. *Doehr*, 501 U. S. 1 (U.S. S.Ct. 1991) (held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds).

Ultimately the loss of control of his business and inventory is a loss of significance and impact.

ii. Effectiveness of Additional Procedure

In order to evaluate the cost versus benefit of requiring a certain procedure, the second element of the balancing test calls for analyzing how beneficial a requirement of additional procedure would be on the process. In the present case, the only procedure demanded is the procedure already mandated by statute. As the process already required by statute has been in place for a significant period of time, it can be no significant burden to require the District Court to follow the statutory requirements.

iii. Government Interest in Administrative Efficiency

The final prong of the *Matthews* test considers the burden of the procedures considered. However as stated above, the requested process is simply that which is already required by statute. While the District Court may have saved some time by skipping the hearing for appointing a receiver, there is no significant impact to administrative efficiency in requiring the Court to follow the existing requirements of holding a noticed hearing. If this is to be considered an administrative burden at all, it is a de minimis one.

Depriving Muney of control of his business management, finances, and inventory without allowing providing the opportunity to present evidence at a noticed hearing was a violation of procedural due process under both the Nevada and United States Constitutions, and must be reversed.

2. If the facts that NRS 86.5415(1) requires to be established are in dispute, sufficient evidence supporting those facts must be presented before a receiver may be appointed.

It is clear from the law that in order to demand receivership and dissolution, Arnould must plead and prove that the business is no longer able to effectively operate. Plaintiff has not pled facts to support such an allegation, nor can he. Business records of the company show that this year, the year of the present

dispute, Chef Exec is making 73% more profit than it did the previous year. *See* Exhibit 3. This is possible despite disagreements because Muney and Arnould have always each run their own city's branch of the company. Thus while they may disagree, and such disagreements may cause issues, they do not prevent the company from operating. More importantly, there was no determination as to the ability of the company to operate whatsoever. This is not an issue of an incorrect determination of fact, but rather the failure to make any determination whatsoever prior to imposing an extreme remedy.

3. Notice of when the matter will be heard is a necessary element of the hearing.

Proper notice that a matter will be heard is an essential element of jurisprudence. "[T]he giving of notice is part of the process due litigants. fundamental fairness to the parties before the court requires notice of proceedings; notice is an essential part of the adjudicatory process." *In re Castillo*, 297 F. 3d 940 (Court of Appeals, 9th Circuit 2002). The District Court's surprise decision to resolve the motion to enforce the settlement agreement at the end of the May 22 hearing of another matter, without prior notice, and over a month before the hearing on the motion to enforce was scheduled, was clear error.

Nevada law has made clear that "notice" of a hearing does not exist unless there is notice of what will be adjudicated at the hearing. *Wiese v. Granata*, 887 P.

2d 744 (NV S.Ct. 1994) (“First, due process requires that notice be given before a party's substantial rights are affected. The notice of hearing Wiese received does not mention or even hint that child custody is at issue.”); *Washoe County Dist. Attorney v. Dist. Ct.*, 5 P. 3d 562 (NV S.Ct. 2000) (“The notice of hearing stated that the purpose of the hearing was only for a "[f]inancial review to determine a payment on arrears," and did not state that the amount of arrears would be adjudicated.”). It is thus clear that holding a hearing on a potentially case-resolving motion, without notice to the parties, was error, and deprived the parties of the ability to prepare evidence and arguments for the matter that was being decided. Failure to at least inform the parties of when the matter would be decided was error.

With no determination of whether the circumstances met the statutory requirements of appointment of a receiver, no evidence taken, and no notice or hearing on the matter, the appointment of a receiver in these circumstances was error.

III.
DID THE DISTRICT COURT ERR BY IMPOSING SANCTIONS ON MUNEY’S COUNSEL FOR CONDUCT THAT DOES NOT CONSTITUTE MISCONDUCT, AND WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE MATTER?

On the morning of June 10, 2020, Respondent Arnould filed an "Emergency Motion" and requested a same-day hearing. Forty-five minutes after the emergency motion was filed, Counsel for Muney Robert Kern (hereinafter, "Kern") filed a brief response arguing that no urgency or irreparable harm had been alleged, and explaining that he would be unable to attend a hearing that afternoon, as he had an oral argument before the Nevada Supreme Court the following day, and had expended significant resources to arrange a moot argument with multiple other attorneys that day, starting prior to the scheduled hearing. (See Response, Appendix p.432).

The Court later emailed Kern to ask if he would be able to attend a hearing at 1pm that day; Kern re-iterated that it would be impossible for him to attend. The Court nonetheless elected to schedule the hearing for that day, and then continued it two days when Kern did not attend.

At the continued hearing, without being informed that sanctions were being considered, the Court asked Kern to explain his absence, which he did. At the end of the hearing the Court announced that it would be imposing sanctions against Kern for his failure to attend the emergency hearing. (See Transcript & Sanctions Order, Appendix p.564 &442).

a. Standard of Review

Issuance of sanctions within a Court's authority are reviewed for an abuse of discretion. *Young v. Johnny Ribeiro Bldg., Inc*., 787 P. 2d 777 (Nev: Supreme Court 1990). Determination of whether a sanction was within the Court's authority is a question of law, and all questions of law are reviewed de novo. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017).

b. Sanctions are Only Appropriate in Cases of Significant Misconduct.

"[C]ourts have inherent equitable powers to dismiss actions or enter default judgments for ... abusive litigation practices." (Internal citations omitted); *Young v. Johnny Ribeiro Bldg., Inc*., 787 P. 2d 777 (Nev: Supreme Court 1990). However, the discretion to impose sanctions is not unlimited. The Nevada Supreme Court explained one such limit in its decision in *Emerson*, holding that ""[a] district court may only impose sanctions that are reasonably proportionate to the litigant's misconduct." *Emerson v. Eighth Judicial Dist. Court*, 263 P. 3d 224 (Nev: Supreme Court 2011). In the present case, there is no clear indication of any misconduct whatsoever.

As explained above, the only misconduct alleged was the failure to attend a hearing with two hours' notice, for which Kern had an unavoidable conflict, and

fully advised the Court of his inability to attend, both before the hearing was scheduled, and after. (See Emails, Appendix p.439). Kern had scheduled a moot argument to prepare for the Nevada Supreme Court oral argument that was occurring less than 24 hours after the scheduled hearing. Kern had arranged for six experienced appellate attorneys to conduct the moot with him and act as judges. To miss the moot argument would have left him unprepared for the oral argument, and wasted a vast amount of client resources from that case. As the oral argument was scheduled for the next day, rescheduling the moot was impossible, and would not have avoided the immense waste of client resources. Kern believed that attending the emergency hearing rather than preparing for the Supreme Court oral argument would have constituted malpractice against the client whose case was being argued. Despite review of the order for sanctions, Kern still has no idea what about the conduct constituted any sort of malfeasance, nor what course of conduct might have been more appropriate to have taken.

If neither the hearing transcript, nor the order for sanctions is capable of explaining what acts might have constituted misconduct, then it seems unlikely that the conduct warranted personal sanctions against the attorney pursuant to the "reasonably proportional" standard from *Emerson*. 263 P. 3d 224 (Nev: Supreme Court 2011).

The Nevada Supreme Court has further explained that the imposition of personal sanctions against an attorney are only warranted in "extreme cases". With no identifiable misconduct, this case can not be considered an extreme case by any standard. McGuire v. State, 677 P. 2d 1060 (Nev: Supreme Court 1984). Because Kern committed no conduct that was clearly misconduct of any kind, the imposition of sanctions was improper, and should be reversed.

c. Issuance of Sanctions Requires Notice and an Opportunity to be Heard.

Finally, pursuant to the Court's decision in Lioce, the imposition of sanctions against an attorney is authorized only if the offending party is given "notice and an opportunity to respond." *Lioce v. Cohen*, 174 P. 3d 970 (Nev: Supreme Court 2008) (Cited in Sanctions Order as justifying authority) ("[T]he district court may, on a party's motion or sua sponte, impose sanctions for professional misconduct at trial, after providing the offending party with *notice and an opportunity to respond*.") (emphasis added). In the present case, Kern was given no notice that sanctions, or any other form of discipline were being considered until the Court announced that it was imposing sanctions. Kern was given no notice that he would be defending himself from sanctions, and once he was told the Court was considering sanctions, the order was made, and no further

opportunity to defend himself was provided. As this violated the requirement for imposition of professional sanctions, it was procedurally improper, and should be reversed.

VIII.

CONCLUSION

The District Court's orders refusing to enforce a global settlement of the entire matter, and appointing a receiver over the company, both without notice or a hearing, was an abuse of discretion, and violated the longstanding public policy favoring voluntary settlement of contested matters. The underlying litigation is still ongoing, and continues to burn party and court resources as a direct result of the failure to honor the negotiated and agreed settlement of this matter.

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 97 in Times New Roman 14pt type.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7,749 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 31st day of March, 2021.

KERN LAW

By: /s/ Robert Kern

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VERIFICATION

I, ROBERT KERN, declare as follows:

1. I am an attorney at Kern Law LTD. and represent Appellants, Clement Muney; Chef Exec Suppliers, LLC., in this matter.
2. I verify that I have read this Appellant's Opening Brief, and that it is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, for those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct

Dated this 31st day of March, 2021

/s/ Robert Kern
Robert Kern Esq.

CERTIFICATE OF SERVICE

I certify that on the 31st day of March, 2021, a true and correct copy of the foregoing Appellant's Opening Brief, was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system.

I further certify that the following participants in this case are registered with the Nevada Supreme Court of Nevada's E-Filing System, and that the service of the Opening Brief has been accomplished to the following individuals via electronic service.

Alexander Calaway
Phil Aurbach
Attorneys for Respondent

/S/ Melissa Milroy
An employee of Kern Law, Ltd.