IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEMENT MUNEY; AND CHEF EXEC SUPPLIERS, LLC, Appellants, vs. DOMINIQUE ARNOULD, Respondent.	Case Nos.: 81354, 81355, 81356 Appeal from the Eighth Judicial District Court, The Honorable Judge Nancy L. Allf Presiding.

ERRATA TO RESPONDENT DOMINIQUE ARNOULD'S ANSWERING BRIEF

Marquis Aurbach Coffing
Phillip S. Aurbach, Esq.
Nevada Bar No. 1501
Alexander K. Calaway, Esq.
Nevada Bar No. 15188
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
paurbach@maclaw.com
acalaway@maclaw.com
Attorneys for Respondent

MAC:15755-0014380920_1

NRAP 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 Justices of this Court may evaluate possible disqualification or recusal.

1. Respondent, Dominique Arnould ("Arnould"), is an individual.

2. Arnould is represented by Marquis Aurbach Coffing in the District Court and before this Court.

Dated this 3rd day of June, 2021.

MARQUIS AURBACH COFFING

By /s/ Alexander K. Calaway
Phillip S. Aurbach, Esq.
Nevada Bar No. 1501
Alexander K. Calaway, Esq.
Nevada Bar No. 15188
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

TREATISES

I. JURISDICTIONAL STATEMENT

Before the Court are Clement Muney ("Muney") and Chef Exec Suppliers, LLC's ("CES") (collectively "defendants") consolidated appeals from orders entered by the Eighth Judicial District Court for Clark County, the Honorable Nancy Allf presiding. Originally, Muney and CES sought appellate review of the district court's order denying an injunction and appointing a receiver in Docket No. 81354;[1] an order granting an injunction in Docket No. 81355;[2] and an order sanctioning their counsel of record, Robert Kern ("Kern") in Docket No. 81356.[3]

Now, however, it appears that defendants did not intend to challenge the district court's denial or granting of an injunction.[4] Remarkably, it appears that Muney and CES only argued that Docket Nos. 81354, 81355, and 81356 sought appellate review of an injunction, to avoid this Court's dismissal of the otherwise non-appealable orders.[5] *See Vaile v. Vaile*, 133 Nev. 213, 217, 396 P.3d 791, 795 (2017); *Lewis v. Lewis*, 132 Nev. 453, 456, 373 P.3d 878, 881 (2016) (considering

[1] Case Appeal Statement [Docket No. 81354], at ¶10, on file herein.

[2] Case Appeal Statement [Docket No. 81355], at ¶10, on file herein.

[3] Case Appeal Statement [Docket No. 81356], at ¶10, on file herein.

[4] Appellant's Opening Br., at vii.

[5] Appellant's Opening Br., at vii; *see also*, Muney's Resp. to Order to Show Cause (Docket No. 81354), on file herein; *see also* Opp'n to Mot. to Dismiss Appeal (Docket. No. 81355).

challenges to contempt findings and sanctions in an order that modified child custody).

Here, defendants' arguments do not raise any issue as to whether the district court properly granted or denied an injunction.[6] Indeed, none of their arguments or issues raised even remotely touch on injunctions.[7] Instead, their appeals only seek appellate review of (1) the district court's refusal to enforce a settlement agreement; (2) the district court's appointment of a receiver; and (3) the district court's imposition of sanctions on Muney's attorney of record, Kern.[8]

Thus, the only appealable order before the Court is Docket No. 81354, which seeks appellate review of the district court's appointment of a receiver pursuant to NRAP 3A(b)(4). Since defendants have failed to assert cogent arguments or provide relevant authority in support or against an injunction, this Court need not consider their challenges in Docket Nos. 83154 and 83156. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are not cogently argued or supported by relevant authority).

---

[6] *Id.* at p. ix.

[7] *Id.*

[8] Muney's Resp. to Order to Show Cause (Docket No. 81354)

Further, it appears defendants only used the injunction argument to bypass this Court's preliminary order to show cause why the appeal should not be dismissed for lack of jurisdiction.[9] Indeed, this Court relied upon these arguments when it found that it had jurisdiction over the sanction appeal, since the sanction was imposed due to Kern's failure to appear for the hearing on the injunction.[10] Now, it is readily apparent that defendants' improperly used the injunction argument as a pretext to consider independently non-appealable issues (such as the district court's denial of a motion to enforce and order issuing sanctions on Kern).

Therefore, the only appealable order before the Court is Docket No. 81354, which seeks appellate review of the district court's appointment of a receiver pursuant to NRAP 3A(b)(4). As such, Docket Nos. 81355 and 81356 should be dismissed for lack of jurisdiction.

II. ROUTING STATEMENT

While Dominque Arnould ("Arnould") defers to the Court's judgment as to routing, the presumptions in NRAP 17(a) would apply to this case, mandating the Supreme Court of Nevada's review under the Rule. NRAP 17(a)(9) applies in this case because this is an appeal from Nevada's business court; and NRAP 17(a)(4) applies because Muney is appealing the business court's decision to sanction

[9] Appellant's Resp. to Order to Show Cause, on file herein.

[10] Order Reinstating Briefing, at p. 2, on file herein.

Muney's attorney. Moreover, NRAP 17(b)(6) does not necessitate a push-down assignment to the Court of Appeals because the amount in controversy greatly exceeded $75,000. Similarly, Muney's statement that NRAP 17(b)(12) applies is misplaced since no argument challenging the business court's denial of injunctive relief was made in Muney's brief.

III. ISSUES ON APPEAL

1. Do these appeals present a justiciable controversy?

2. Did the district court err in denying the motion to enforce the settlement agreement?

3. Did the district court err in appointing a receiver?

4. Did the district court err by imposing sanctions on Kern for failing to attend an emergency hearing?

IV. STATEMENT OF THE CASE

The underlying case is a dispute between two former owners of CES which is now dissolved. Before it was dissolved, Muney owned a 50% interest in the company, and Arnould owned the other 50% interest.[11]

After Arnould discovered Muney's dissipation of CES funds, he filed his Verified Complaint on October 11, 2019.[12] Arnould's Verified Complaint seeks, among other things, the appointment of a receiver, the dissolution of CES, and an accounting of CES.[13] Arnould's asserted basis for dissolution was that it was not reasonably practicable to carry on the business.[14] Predictably, the differences between Arnould and Muney only widened as the underlying litigation ensued.[15]

On June 10, 2020, Muney delivered the coup de grace to CES by locking Arnould out from a Nevada warehouse containing approximately half of CES's inventory inside.[16] In an effort to prevent further lock-outs and ensure continuity, the district court appointed a receiver to take control of the CES warehouse and to

[11] 1 Respondent's Appendix ("RA") at 1.

[12] 1 RA at 3.

[13] 1 RA at 3-4.

[14] *Id.* at 3.

[15] 3 Appellants' Appendix ("AA") at 428.

[16] 3 AA at 428-429.

account for its assets.[17] Notably, defendants did not oppose the appointment of a receiver,[18] nor did they request a stay of proceedings during the receivership.[19]

On August 21, 2020, the district court judicially dissolved CES because it was undisputed and stipulated that it was not reasonably practicable to carry on CES.[20] The receiver issued his final report and recommendations on December 7, 2020.[21] Next, on February 17, 2021, the district court approved the receiver's report, ordered distribution of CES's assets pursuant to the recommendations of the appointed receiver, and discharged the receiver.[22] Thus, Arnould's only outstanding claims against Muney are for breach of fiduciary duty and accounting, which are still live in the district court below.[23]

Now, about a year after the receiver was appointed and four months after the receiver was discharged, defendants seek to rewrite history by undoing all that has transpired over the last year in the receivership proceedings. Defendants seek this

---

[17] 3 AA at 412-418 (the district court's reasoning is set forth in full in its findings of fact and conclusions of law).

[18] *See* 3 AA at 568; *see also* 2 AA at 401.

[19] 1 RA at 235-242 (Muney and CES requested a stay on May 6, 2021, which was approximately a year after the receiver had been appointed, and approximately four (4) months after the receiver was discharged and the assets distributed).

[20] 1 RA at 12-16.

[21] 1 RA at 218-222.

[22] *Id.*

[23] 1 RA at 3-4.

relief despite the fact that the receiver has already been discharged, CES has already been dissolved, and its assets distributed to Muney and Arnould.

In sum, the appeals do not present a justiciable controversy and should be dismissed. But even if, *arguendo*, the appeals are not moot, defendants have failed to show any error by the district court. As such, the district court's orders should be affirmed.

V. FACTUAL AND PROCEDURAL BACKGROUND

On October 11, 2019, Arnould filed a Verified Complaint seeking the judicial dissolution of CES.[24] The Verified Complaint also sought the appointment of a receiver, declaratory relief, accounting, and breach of fiduciary duty against his partner, Muney.[25]

On December 23, 2019, Arnould filed his Motion for Appointment of Trustee (or receiver) over CES, but, before the district court ruled on the motion for receiver, the parties agreed to attend a settlement conference on February 7, 2020.[26] At the settlement conference, the parties agreed to terms of a settlement, but the terms of settlement were expressly conditioned upon Arnould's ability to

[24] *Id.*

[25] *Id.*

[26] 1 AA at 128.

obtain financing.[27] Specifically, the settlement agreement contained an express condition precedent, that settlement "shall be contingent upon . . . Dominique Arnould being able to obtain financing sufficient to allow him to pay the purchase price of the Sale . . . seeking to obtain such financing from all reasonable sources."[28]

After settlement, Arnould was unable to obtain financing, and the lenders made it clear that Arnould would not be able to obtain financing under the terms of the agreement.[29] Moreover, state and national emergencies related to COVID-19 further undermined Arnould's ability to obtain financing.[30] Since Arnould was unable to obtain financing, the settlement fell through.[31]

On March 20, 2020, Muney filed his Countermotion for Enforcement of Settlement Agreement.[32] Due to the effects of the COVID-19 pandemic, however, the district court continued its consideration of the outstanding motions multiple times.[33] On the same day, Muney filed an Amended Application for Temporary

---

[27] 1 AA at 125.

[28] *Id.*

[29] 1 AA at 191-204.

[30] *Id.* at 415.

[31] *Id.*

[32] 1 AA at 176.

[33] 1 RA 8-11.

Restraining Order and Motion for Preliminary Injunction.[34] The district court preliminarily granted Muney's Temporary Restraining Order ("TRO") the same day it was filed and set a hearing to review the merits of an injunction.[35]

On May 22, 2020, Arnould filed his Opposition to Application for TRO and Countermotion to Vacate TRO,[36] presenting evidence of Muney's dissipation of CES funds, including wrongful monthly payments that Muney had been making to himself.[37] As such, circumstances did not warrant an injunction, but, rather, called for protection of CES funds from Muney.[38] At a hearing considering the motion, the district court ordered the parties to try to reach an agreement as to who the appointed receiver would be, and if no agreement was reached, to await the district court's decision on a receiver.[39]

Shortly thereafter, Muney locked Arnould out of the Company's Nevada warehouse, forcing Arnould to file an Emergency Request for Telephonic Hearing for Appointment of Receiver to Take Over the Warehouse or for Order Allowing

[34] 2 AA at 231.

[35] *Id.* at 383.

[36] *Id.* at 308.

[37] *Id.*

[38] *Id.*

[39] 2 AA at 404.

Access (the "Emergency Request").[40] The gist of Arnould's Emergency Request was for the appointed receiver to oversee access of the warehouse.[41]

On June 12, 2020, the district court heard Arnould's Emergency Request, and entered its order: (1) selecting Larry L. Bertsch as the appointed receiver; (2) that Muney immediately allow access the warehouse; (3) that Muney pay for security to monitor the warehouse; and (4) that the receiver change the locks on the warehouse and facilitate access.[42] On June 6, 2020, Muney filed his Notices of Appeal.

On May 22, 2020, the district court heard oral argument on: (1) Muney's countermotion for enforcement of settlement agreement; (2) Muney's motions for TRO and preliminary injunction; (3) Arnould's countermotion to vacate TRO; and (4) Arnould's motion to appoint a receiver.[43] In this hearing, defendants' counsel agreed with the appointment of a receiver.[44]

In a June 8, 2020 order, the district court: (1) denied Muney's countermotion to enforce settlement; (2) denied Muney's motions for TRO and preliminary injunction; (3) granted Arnould's countermotion to vacate the TRO; and

[40] 2 AA at 428.

[41] *Id.*

[42] 3 AA at 444, 487, 517.

[43] 2 AA at 382-411.

[44] 3 AA at 412-418.

(4) granted Arnould's motion to appoint a receiver over the Company.[45] It was in this June 8, 2020 order that the district court appointed a receiver, and further held that the appointed receiver would be a person stipulated to by the parties.

On August 21, 2020, CES was judicially dissolved.[46] All parties stipulated and agreed that the members did not get along and that it was not reasonably practicable to carry on CES as a business.[47]

On December 7, 2020, the receiver issued his final report and recommendations.[48] The final report recommended the filing of articles of dissolution and distribution of CES's assets, including all of its inventory, between Arnould and Muney pursuant to their membership interests in CES.[49] On February 17, 2021, the district court approved the receiver's final report and discharged the receiver.[50]

---

[45] 1 AA at 12-16.

[46] *Id.*

[47] *Id.*

[48] 1 RA at 17-217.

[49] *Id.*

[50] 1 RA at 218-222.

On May 20, 2021, almost a year after the receiver had been appointed, the defendants requested a stay of proceedings from the district court.[51] Arnould opposed the stay.[52] The motion for stay is still pending before the district court.

VI. LEGAL ARGUMENT

First, the district court's orders should not be disturbed, and these appeals should be dismissed. As a threshold issue, the appeals before the Court do not present a justiciable controversy, and they should be dismissed as moot. The defendants failed to request a stay, and allowed the proceedings with the receiver to continue in the district court for over a year. The receiver has been discharged, CES has been completely dissolved, and CES's assets have been distributed. Even reversing the district court will not undue what has transpired in the proceedings below.

Second, even if, *arguendo*, these appeals are justiciable (which they are not), the district court (1) properly denied the motion to enforce the settlement agreement based upon an express condition precedent in the agreement; and (2) properly appointed a receiver – which defendants' attorney even conceded on the record was the appropriate thing to do. Similarly, the district court did not

[51] 1 RA at 235-236.

[52] 1 RA at 237-242.

abuse or exceed its discretion by sanctioning Kern. Thus, the district court's orders should not be disturbed and should be affirmed.

A. THESE APPEALS SHOULD BE DISMISSED AS MOOT BECAUSE THE RECEIVER HAS BEEN DISCHARGED, CES HAS BEEN DISSOLVED, AND THE ASSETS ARE ALREADY DISTRIBUTED.

As a threshold issue, this Court must determine whether there is a justiciable controversy before it. As a general rule, this Court will decline to hear a moot case. *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 136 Nev. 155, 158, 460 P.3d 976, 981 (2020). That general rule comports with the Court's duty "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *Id.* (quoting *NCAA v. Univ. of Nev*., 97 Nev. 56, 57, 624 P.2d 10, 10 (1981) (internal quotations omitted)).

The question of mootness is one of justiciability. *Cashman Equip. Co. v. W. Edna Assocs., Ltd.*, 132 Nev. 689, 380 P.3d 844 (2016). "Even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). An appeal will become moot when effective relief cannot be granted by reversing

or modifying a district court's order. *See e.g. All. for Am.'s Future v. State ex rel. Miller*, 128 Nev. 878, 381 P.3d 588 (2012).

Finally, a party seeking to overcome mootness must prove "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Valdez-Jimenez*, 136 Nev. at 158, 460 P.3d at 982 (quoting *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013)) (internal quotations omitted).

Here, the receiver has already been discharged, CES was already judicially dissolved, and its assets have been distributed to Muney and Arnould in the proceedings below.[53] Notably, defendants opted not to request a stay during the receivership.[54] As such, no justiciable issue remains in these proceedings, and the appeals are moot.

1. The district court's appointment of a receiver is moot since the receiver has been discharged.

In Docket No. 81354, Muney and CES seek review of the Court's appointment of a receiver. But, on this record, it does not appear that this Court could grant Muney and CES effective relief by reversing or modifying the district

[53] 1 RA at 235-236.

[54] 1 RA at 235-242.

court's appointment of a receiver, assuming it were so inclined. Any harm allegedly caused by appointing the receiver and dissolving CES has already occurred. While legal issues remain as to whether Muney breached his fiduciary duties, those issues have yet to be resolved by the district court. The order appointing the receiver itself, however, is moot. As such, there is no justiciable controversy and the appeal should be dismissed. *See All. for Am.'s Future*, 128 Nev. 878, 381 P.3d 588 (2012).

2. <u>The district court's order denying enforcement of the settlement agreement is moot since CES is already dissolved and its assets distributed.</u>

Muney and CES request appellate review of the district court's order denying the motion to enforce settlement agreement. Once again, this request is moot. It has long been recognized that an appeal or writ of error should be dismissed when a party has conveyed all of his right, title, and interest in the matter in controversy to another. *Wedekind v. Bell*, 26 Nev. 395, 69 P. 612 (1902).

Here, under the agreement at issue, Arnould agreed to buy-out Muney's 50% interest in CES if certain conditions were met.[55] Setting aside the issue of whether the express conditions of the settlement agreement were even met (which they were not), CES was dissolved and its assets distributed to its members Muney and

[55] Appellant's Opening Br., at p. ix.

Arnould, rendering the agreement and any enforcement of it moot.[56] Since the agreement requires a sale of interest in a now dissolved and defunct company, the agreement would be impossible to enforce because there is simply no interest in CES that can be conveyed or bought.[57]

Similarly, the assets of CES have already been distributed by the receiver to Muney and Arnould according to their 50% membership interests in CES.[58] After dissolution, Muney and Arnould each formed a new entity, and a letter was sent by the receiver to each of CES's customers advising them on the dissolution.[59] In the same vein, CES's inventory assets were distributed to each partner based upon a reconciliation and physical audit performed by the receiver.[60] Thus, it would be futile to enforce a settlement agreement that expressly contemplated a split of customer lists and buy-out of inventory when both assets have already been distributed and addressed by the district court in the receivership.[61]

---

[56] 1 RA at 218-222

[57] *Id.*

[58] *Id.*

[59] 1 RA at 18.

[60] *Id.* at 20, 27.

[61] *Id.*

Therefore, after CES's dissolution and winding up, there is nothing left to appeal, nothing left to distribute (assets or interest), and nothing left to enforce. As such, the appeals are moot and should be dismissed.[62]

B. THE DISTRICT COURT DID NOT ERR IN DENYING THE MOTION TO ENFORCE SETTLEMENT.

"Contract interpretation is subject to a de novo standard of review," but "the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *Eagle Materials, Inc. v. Stiren*, 127 Nev. 1131, 373 P.3d 911 (2011) (quoting *May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005)) (internal quotations omitted). Here, the district court did not err in denying the motion to enforce settlement, as the entire settlement was based upon an express condition, and the district court relied on substantial evidence.[63]

[62] Muney re-asserts that Docket No. 81356 lacks jurisdiction as discussed above.

[63] 3 AA at 412-418.

1. The district court properly denied enforcement of the settlement agreement because it was expressly conditional upon financing.

The issue is whether the agreement can be enforced when it was expressly contingent on Arnould's ability to obtain financing for the purchase. The evidence showed that Arnould could not.[64]

A settlement agreement is a contract, and its construction and enforcement are governed by principles of contract law (offer, acceptance, consideration). *May*, 121 Nev. at 672, 119 P.3d at 1257. It is a well-established principal of Nevada contract law that, "[w]hen contracting, a promisor may incorporate into the agreement a 'condition precedent'—that is, an event that must occur before the promisor becomes obligated to perform." *Cain v. Price*, 134 Nev. 193, 415 P.3d 25 (2018) (internal quotations and citations omitted); *see, e.g.*, *NGA #2 Liab. Co. v. Rains*, 113 Nev. 1151, 1158-59, 946 P.2d 163, 168 (1997) (citing *New Orleans v. Texas & Pacific Railway*, 171 U.S. 312, 333, 18 S.Ct. 875, 883, 43 L.Ed. 178 (1897) ("A condition precedent to an obligation to perform calls for the performance of some act after a contract is entered into, upon which the corresponding obligation to perform immediately is made to depend.")); *see also* Restatement (Second) of Contracts § 224 (1981).

---

[64] *Id.*

A condition precedent can either be expressly provided for in the contract, or an implied condition precedent that is "inferred from a contract's terms and context, even when the contract does not explicitly so provide." *Las Vegas Star Taxi, Inc. v. St. Paul Fire & Marine Ins. Co*., 102 Nev. 11, 12, 714 P.2d 562, 562 (1986). Regardless of a condition's form, unless it has been excused, the non-occurrence of a condition in a contract discharges the duty when the condition can no longer occur. *Warner Bros. Int'l Television Distribution v. Golden Channels & Co*., 522 F.3d 1060 (9th Cir. 2008) (citing Restatement § 225(2)).

Here, the agreement contained an express condition precedent, that settlement "shall be contingent upon . . . Dominique Arnould being able to obtain financing sufficient to allow him to pay the purchase price of the Sale . . . seeking to obtain such financing from all reasonable sources."[65] Arnould provided evidence that he was unable to obtain financing, and the lenders have made it clear that Arnould would not be able to obtain financing under the terms of the agreement.[66] The district court properly relied upon this evidence.[67]

In addition, the district court properly took judicial notice of the state and national emergencies related to COVID-19, the severe detrimental impact it had on

[65] 1 AA at 125.

[66] 1 AA at 191-204.

[67] 3 AA at 412-415.

the outlook of CES's business prospects, and properly concluded that these events constituted an unforeseen contingency that changed the circumstances surrounding the settlement and frustrated the proposed of the settlement.[68] The district court also noted that the COVID-19 pandemic undermined Arnould's ability to obtain financing.[69] As such, the district court properly denied the motion to enforce, based upon the express condition in the settlement agreement and substantial evidence on the record.

2. Muney and CES failed to request an evidentiary hearing and, thereby, failed to preserve the issue for appeal.

The next issue is whether Muney and CES ever requested an evidentiary hearing on their motion to enforce settlement agreement. The record reveals that they did not.[70] Despite the fact that they never even requested such a hearing, they argue that the district court should have *sua sponte* provided them an evidentiary hearing before denying their motion to enforce settlement agreement. This argument lacks merit and is contrary to Nevada law.

When a party does not request an evidentiary hearing below, he may waive his right to one. *Diversified Capital Corp. v. City of N. Las Vegas*, 95 Nev. 15, 21, 590 P.2d 146, 149 (1979) (concluding that appellant's failure to request an

[68] *Id.* at 415.

[69] *Id.*

[70] 1 AA at 129-174; *Id.* at 205-229; 2 AA at 382-411.

evidentiary hearing "militate[s] against appellant's claim that the procedures below violated its right to due process."); *see also Evans v. Evans*, 133 Nev. 1007 (Nev. App. 2017). For example, in *Diversified*, the appellant never requested a formal evidentiary hearing, and the court concluded it waived its right to one. *Id*.

Here, Muney and CES never requested an evidentiary hearing before the district court, and as a result, they waived their opportunity to request one.[71] Defendants did not raise the issue in their briefing;[72] nor did they raise it orally.[73] Accordingly, defendants' argument that the district court in some way erred in denying their motion to enforce settlement agreement without *sua sponte* setting an evidentiary hearing wholly lacks merit. It is not the district court's role to advocate for plaintiff, defendants, or any party for that matter.

Even if, *arguendo*, defendants had requested an evidentiary hearing (which they did not), they failed to raise any factual issues that would warrant such a hearing.[74] The undisputed evidence before the district court was that the entire country (and world) was facing an unknown viral pandemic[75] and that, despite

---

[71] *Id*.

[72] *See id.*

[73] *See* 2 AA at 383-411.

[74] 1 AA at 129-142.

[75] *Id.*; *see also,* 3 AA at 412.

efforts by Arnould, every inquiry he made as to financing was refused.[76] Defendants seem to suggest that the district court should have (1) imagined facts on behalf of defendants; and (2) ordered an evidentiary hearing *sua sponte*. Such is not the law nor burden of a district court. As such, the district court did not err in denying defendants' motion to enforce settlement.

3. Muney and CES were provided notice of a hearing for the enforcement of the settlement agreement.

Contrary to defendants' arguments, they were absolutely provided notice of a hearing for the motion to enforce.[77] Indeed, they appeared at the hearing, fully briefed their positions, and argued their motion to enforce settlement agreement.[78] In fact, the hearing itself was 40 days overdue.[79]

Notice of a hearing must be served at least 21 days before the hearing pursuant to NRCP 6(c)(1). This rule carves out certain exceptions to the general 21-day requirement for local rules or court orders otherwise. *See* NRCP 6(c)(1)(B)-(C). Consistent with NRCP 6(c)(1)(B), the Chief Judge of the Eight Judicial District Court entered Administrative Order(s) 20-01 through 20-14;

---

[76] *Id.*

[77] 1 RA at 8-11.

[78] *Id.*

[79] *Id.* (the hearing had been set for April 15th but was continued multiple times until it was ultimately set on May 22, 2020).

20-16; 20-17; 20-22 through 20-24; 21-01; and 21-03 which allowed district courts to decide matters on the papers and mandated civil hearings to be handled remotely due to the COVID-19 pandemic.

Here, Muney and CES were provided with 60 days of advance notice of the hearing and provided notice of the hearing on four (4) different occasions before the district court heard their motion.[80]

First, on March 23, 2020, the district court provided Muney and CES with notice that a hearing for the motion to enforce settlement was set for April 15, 2020 at 10:30 a.m.[81] Second, on April 14, 2020, the district court issued a minute order vacating the April 15th hearing and continued the hearing to May 20, 2020 at 10:30 a.m.[82] The district court's minute order provided that "pursuant to Administrative Order 20-01 in response to COVID-19 concerns, all currently scheduled non-essential District Court hearings are . . . decided on the papers, or rescheduled unless otherwise directed by a District Court Judge."[83] Third, on

[80] *Id.*

[81] 1 RA at 6-7.

[82] 1 RA at 8-9.

[83] *Id.*

May 18, 2020, the district court continued the hearing again to June 24, 2020.[84] The district court's minute order reiterated the same COVID-19 concerns.[85]

Finally, on May 20, 2020, defendants filed an application for a temporary restraining order, wherein they cited and relied upon the settlement agreement and requested that aspects of it be enforced.[86] Per defendants' requests, the district court granted them a hearing on a shortened time period, set a hearing for May 22, 2020 to consider the merits of both the TRO, preliminary injunction, and motion to enforce settlement agreement.[87] Under the COVID-19 measures in place, the district court was not even required to provide a hearing, yet the district court heard defendants' motion on May 22, 2020 to help "stabilize the business" as requested by both defendants.[88] Now, defendants argue that by granting them the relief they requested on a shortened time, the district court did not provide adequate notice. As the saying goes, no good deed goes unpunished.

---

[84] 1 RA at 10-11.

[85] *Id.*

[86] 3 AA at 231-232 (arguing that keys to the warehouse were given as part of the settlement agreement, and that Arnould was in violation of the same).

[87] 2 AA at 383.

[88] *Id.*; *see also*, 2 AA at 308.

In sum, Muney and CES were provided adequate notice of a hearing at least four (4) times before their motion to enforce settlement agreement was heard.[89] Their motion was fully-briefed and well-overdue.[90] Indeed, the district court afforded them 60 days to prepare for a hearing.[91] Defendants' argument that they were in some way surprised by their motion being heard on May 22, 2020 is not only disingenuous, but it mischaracterizes the facts on the record.

C. THE DISTRICT COURT DID NOT ERR IN APPOINTING A RECEIVER.

This Court reviews issues relating to the appointment of a receiver for an abuse of discretion. *Donnelly v. Jarman*, 131 Nev. 1273 (2015); *see also Med. Device Alliance, Inc. v. Ahr*, 116 Nev. 851, 862, 8 P.3d 135, 142 (2000), abrogated on other grounds by *Costello v. Casler*, 127 Nev., Adv. Op. 36, 254 P.3d 631, 634 n.4 (2011). "The appointment of a receiver is an action within the trial court's sound discretion and will not be disturbed absent a clear abuse." *Med. Device Alliance*, 116 Nev. at 862, 8 P.3d at 142 (citing *Nishon's Inc. v. Kendigian*, 91 Nev. 504, 505, 538 P.2d 580, 581 (1975)); *see also Peri–Gil Corp. v. Sutton*, 84 Nev. 406, 411, 442 P.2d 35, 37 (1968); *see also Bowler v. Leonard*, 70 Nev. 370, 383, 269 P.2d 833, 839 (1954).

---

[89] 1 RA at 6-11.

[90] *Id.*

[91] *Id.*

1. The district court did not abuse its discretion in appointing a receiver.

The district court properly appointed a receiver in light of the circumstances facing CES. Indeed, it is well-settled that "a receiver may be appointed by the court in which an action is pending in all cases where receivers have heretofore been appointed by the usages of the courts of equity." *Bowler*, 70 Nev. at 383, 269 P.2d at 839. Appointment is a discretionary power placed in the hands of the district court who is best equipped to consider consideration of the entire circumstances of the case. *Id*.

Here, all of defendants' own reasons set forth in their motion for a temporary restraining order supported the district court's decision to appoint a receiver (as further explained below).[92] But, ultimately, it was Muney's lock-out that delivered the coup de grace.[93] Arnould and Muney are 50/50 owners and managers of CES.[94] CES has no written operating agreement.[95] On October 11, 2019, when Arnould filed his verified complaint, disputes had arisen between Arnould and Muney that were so deep that it was not reasonably practicable to

[92] 2 AA at 231-238.

[93] 3 AA at 428.

[94] 1 RA at 1-2.

[95] *Id.*

carry on the business of CES.[96] These disputes only intensified as the litigation continued.[97]

CES utilizes multiple warehouses to store its inventory in California and Nevada.[98] Naturally, because the inventory is stored in different states and warehouses, it is necessary for CES to be able to move inventory between warehouses in anticipation of customer needs, customer orders, new shipments of inventory, etc.[99] On June 10, 2020, Arnould was forced to make an emergency request that the district court appoint a receiver to take control of the warehouse that was storing CES inventory because Muney had changed the locks, and Arnould had no access.[100] Based upon these facts, the district court acted well-within its discretion in appointing a receiver over CES, and the order appointing the receiver should not be disturbed by this appeal.

2. Defendants did not oppose the appointment of a receiver and, in fact, agreed with the appointment.

Defendants, for the first time, are opposing the district court's appointment of a receiver. It is well-established that "[a] point not urged in the trial court,

---

[96] *Id.*

[97] *Id.*

[98] 3 AA at 428-433.

[99] *Id.*

[100] 3 PA at 428.

unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This Court has said on numerous occasions that it "will not consider issues raised for the first time on appeal." *State v. Wade*, 105 Nev. 206, 209, 772 P.2d 1291, 1293 (1989); *see also, Penrose v. O'Hara*, 92 Nev. 685, 686, 557 P.2d 276, 277 (1976).

Here, Muney and CES's arguments are markedly different than the arguments it advanced in the district court. On June 12, 2020, the hearing wherein the district court considered the appropriate receiver to be appointed, defendants' counsel stated on the record: "First, I'll point out that we do not oppose immediate appointment of a receiver. We believe that that would be a far more reasonable response to this dispute than an injunction."[101] Similarly, at the May 22, 2020, hearing considering the appointment of limited receiver, defendants' counsel stated: "I'm not against a receiver doing this, because, you know, we feel that it would agree with us once they reviewed the records."[102]

[101] 3 AA at 568.

[102] 2 AA at 401.

Thus, the arguments Muney and CES now advance on appeal regarding an error by the district court in appointing a receiver were not preserved in the district court and are now waived for appellate review purposes.[103] Accordingly, the district court's order appointing a receiver should not be disturbed.

D. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SANCTIONING KERN.

A district court may, on a party's motion or *sua sponte*, impose sanctions for professional misconduct. *Emerson v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011). This Court reviews a district court imposition of a sanction for an abuse of discretion. *Id.* Despite the district court's broad discretion to impose sanctions, "[a] district court may only impose sanctions that are reasonably proportionate to the litigant's misconduct." *Id.* (quoting *Heinle v. Heinle*, 777 N.W.2d 590, 602 (N.D.2010)). Here, the district court provided a well-reasoned analysis for its sanction.[104] Defendants were provided an opportunity to defend themselves at a June 10, 2020 hearing.[105] And,

---

[103] It should be noted that the defendants never requested an evidentiary hearing for the appointment, nor was one required. *See Diversified Capital Corp*., 95 Nev. at 21, 590 P.2d at 149. Thus, they also waived any evidentiary hearing.

[104] 3 AA 528-529.

[105] *Id.*

there is no indication that the district court exceeded its discretion in imposing the sanction on Kern.[106] As such, the order issuing sanction should be affirmed.

VII. CONCLUSION

As a threshold matter, the appeals before the Court do not present a justiciable controversy, and they should be dismissed as moot. The defendants failed to request a stay, and allowed the proceedings with the receiver to continue in the district court for over a year. The receiver has been discharged, CES has been completely dissolved, and CES's assets have been distributed.[107] Even reversing the district court will not undo what has transpired in the proceedings below.

But even if, *arguendo*, these appeals are justiciable (which they are not), the district court (1) properly denied the motion to enforce the settlement agreement based upon an express condition precedent in the agreement; and (2) properly appointed a receiver – which defendants' attorney even conceded on the record was the appropriate thing to do. Moreover, the district court did not abuse or

---

[106] *Id.*

[107] **The instant errata is filed solely to edit this sentence to remove one word: The receiver has ~~*not*~~ been discharged, CES has been completely dissolved, and CES's assets have been distributed.**

exceed its discretion in sanctioning Kern. Based on the foregoing, the district court's order should not be disturbed, and the same should be affirmed.

Dated this 3rd day of June, 2021.

MARQUIS AURBACH COFFING

By /s/ Alexander K. Calaway
Phillip S. Aurbach, Esq.
Nevada Bar No. 1501
Alexander K. Calaway, Esq.
Nevada Bar No. 15188
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent

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 Microsoft Word 2007 in 14-point Times New Roman font.

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 either:

☒ proportionally spaced, has a typeface of 14 points or more and contains **5,224** words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this 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 3rd day of June, 2021.

MARQUIS AURBACH COFFING

By /s/ Alexander K. Calaway
Phillip S. Aurbach, Esq.
Nevada Bar No. 1501
Alexander K. Calaway, Esq.
Nevada Bar No. 15188
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ERRATA TO RESPONDENT DOMINIQUE ARNOULD'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 3rd day of June, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Robert Kern, Esq.

/s/ Leah Dell
An employee of Marquis Aurbach Coffing