IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST 100, LLC, a Nevada limited liability company; 1st ONE HUNDRED HOLDINGS, LLC, a Nevada limited liability company, Appellants vs. TGC/FARKAS FUNDING, LLC, Respondent.	Case No. 83177

APPEAL
from a decision in favor of Respondent
entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Mark R. Denton, District Court Judge
District Court Case No. A-20-822273-C

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

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 so the judges of this court may evaluate possible disqualification or recusal. 1st One Hundred Holdings, LLC is the single member of and parent company to First 100, LLC. As of this date, 1st One Hundred Holdings, LLC does not have a parent corporation and no publicly held corporation owns more than 10 percent of stock in 1st One Hundred Holdings, LLC. At all times, Appellants have been represented by Jason R, Maier, Esq., Joseph A. Gutierrez, Esq., and Danielle J. Barraza, Esq. of Maier Gutierrez & Associates.

JURISDICTIONAL STATEMENT

This is an appeal from the district court's post-judgment Order Awarding Attorneys' Fees and Costs ("Fees and Costs Order") entered on June 11, 2021, with notice of entry thereof also filed on June 11, 2021. On July 2, 2011, Appellants filed their notice of appeal. AA1345-1351.[1] Thus, this appeal is timely pursuant to NRAP 4(a) and is an appeal from a special order entered after final judgment pursuant to NRAP 3A(b)(8).

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[1] "AA" refers to Appellants' Appendix.

ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals under NRAP 17(b)(7), which covers "appeals from postjudgment orders in civil cases." Following the judgment order, further motions followed, resulting in an evidentiary hearing, FFLC, and an order awarding attorneys' fees and costs as to the postjudgment issues.

Respondent has indicated that it believes this matter should be retained by the Nevada Supreme Court because it "originated in business court." *See* 6/30/2021 Respondent's Response to Appellants' Docketing Statement. To the contrary, this matter did not originate in business court, as shown by the case number (A-20-822273-C) ending in "C" and not "B," which notes this is a "civil" case and not a "business" case. No party filed a motion for a business court setting, and while the matter was heard before the Honorable Mark Denton, who has a separate business court docket, it was not placed in the business court docket, and has remained a "C" case from its inception.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court erred in determining that the fees and costs "must be paid by [First 100, LLC and 1st One Hundred Holdings, LLC] and/or [non-party] Jay Bloom as a condition of purging the contempt," when Jay Bloom was a non-party in the underlying action and was not put on notice of any alter ego claims in

the underlying action.

Whether the district court erred in awarding $151,535.81 in fees and costs to TGC/Farkas Funding, LLC for approximately four (4) months of attorney work, amounting to three motions, limited discovery, and a two-day evidentiary hearing.

STATEMENT OF THE CASE

This dispute involved a company books and records request, with respondent TGC/Farkas Funding, LLC demanding access to First 100, LLC and 1st One Hundred, LLC's (collectively "First 100") business records, arguing that its status as a purported member of First 100 substantiated the right to examine First 100's company records. The matter was initiated in arbitration through the American Arbitration Association, where the Arbitration Panel determined that First 100 is required to "make all the requested documents and information available from both companies to [Plaintiff] for inspection and copying." AA0010. The arbitration award was later confirmed by the district court, resulting in a judgment in favor of TGC/Farkas Funding, LLC in the amount of $23,975.00.[2] AA0053-59.

Thereafter, a dispute arose as to whether the parties had settled the matter, which resulted in various motions being filed, including a motion to enforce settlement filed by First 100, and a motion for an order to show cause filed by

[2] TGC/Farkas Funding, LLC was subsequently awarded another $9,060.20 in additional fees and costs related to the arbitration proceedings. AA0354.

TGC/Farkas Funding, LLC. AA0156-208; AA0330-351; AA0362-492. The district court conducted an evidentiary hearing as to the motions in March 2021, and issued its Findings of Fact, Conclusions of Law, and Order ("FFCL") on April 7, 2021, with notice of entry thereof also filed on April 7, 2021. AA0903-942.

In the FFCL, the district court ordered that the motion to enforce settlement was denied, ordered immediate compliance of the books and records request which was the subject of the arbitration award confirmed by the district court, and ordered reimbursement of plaintiff TGC/Farkas Funding, LLC's fees and costs, with First 100 and non-party Jay Bloom being "jointly and severally responsible" for payment of such fees and costs. AA0939.

Thereafter, briefing followed as to the amount of fees and costs to be awarded to TGC/Farkas Funding, LLC. AA0943-1336. Without taking a hearing on the matter, the district court ultimately awarded TGC/Farkas Funding, LLC $151,525.81 in fees and costs. AA1337-1339.

This appeal follows, with Appellants contending that the district court erred in (1) holding that the $151,525.81 in fees and costs "must be paid by [First 100] and/or Jay Bloom as a condition of purging the contempt," despite the fact that Jay Bloom was a non-party to the action, no alter ego cause of action was alleged, and the evidence presented did not support an alter ego finding with respect to Mr. Bloom and First 100; and (2) holding that $151,521,82 in fees and costs was a reasonable

figure under *Brunzell v. Golden Gate National Bank*, 95 Nev. 345, 349 (1969).

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

First 100 was in the business of purchasing the beneficial interest in delinquent HOA receivables and then buying the real properties at foreclosure sales. AA0695-696. Jay Bloom served as the Director of First 100. AA0696.

The members of TGC/Farkas Funding, LLC are Matthew Farkas and TGC 100 Investor, LLC, who each share a 50% membership interest. AA0186-208. In the original "Limited Liability Company Agreement of TGC/Farkas Funding LLC," Section 4.1 identified Mr. Farkas as the "Administrative Member" of TGC/Farkas Funding, LLC, meaning that he served as a "manager" of the company and was responsible for making "all business and managerial decisions for the company." AA0196. Further, Section 4.4 of the original "Limited Liability Company Agreement of TGC/Farkas Funding LLC" states that persons dealing with TGC/Farkas Funding, LLC "are entitled to rely conclusively upon the power and authority of the Administrative Member." AA0198.

On or around 2013, TGC/Farkas Funding, LLC invested $1 million into First 100's business in exchange for a one percent membership interest, which was later parlayed into a three percent total interest. AA0007. In October 2013, signing as the CEO of TGC/Farkas Funding, LLC, Matthew Farkas executed the subscription

booklet on behalf of TGC/Farkas Funding, LLC, which set forth the company's membership interest in First 100. AA0391-409.

Thereafter, in April 2017, First 100 circulated to its members a Membership Interest Redemption Agreement which provided for the redemption or buy back of the member's interest at $1.5 million per percentage of ownership interest, or a fraction thereof on a pro rata basis. On or around April 15, 2017, Matthew Farkas executed a redemption agreement, once again on behalf of TGC/Farkas Funding, LLC. AA0411-416. *See also*, AA0008 ("It was not clear from the initial briefs and exhibits whether Matthew Farkas signed a Redemption Agreement for [TGC/Farkas Funding, LLC]. However, the additional evidence clarified that he actually did sign such an agreement.").

A dispute arose as to whether Matthew Farkas had authority to bind TGC/Farkas Funding, LLC, and in June of 2017, TGC/Farkas Funding, LLC's counsel sent a request to inspect the company records of First 100. AA0007.

First 100 initially refused to provide its business records to TGC/Farkas Funding, LLC for numerous reasons, among them that First 100 had not received evidence that Matthew Farkas, who is Mr. Bloom's brother-in-law and a 50% member of TGC/Farkas Funding, LLC, had actually approved of TGC/Farkas Funding, LLC retaining Garner Turner Gordon and making such a demand upon First 100. AA0161. The demand was particularly odd, as First 100 has not been

operational since about 2017, has no office, no employees, no cash, and only a single asset in the form of a substantial judgment against an individual that breached a funding commitment to the company. AA0697.

Thereafter, in January 2020, TGC/Farkas Funding, LLC initiated arbitration proceedings against First 100 regarding the inspection of First 100's business records. In the arbitration proceedings, TGC/Farkas Funding, LLC produced an engagement letter, which purportedly proved that Matthew Farkas did approve of TGC/Farkas Funding, LLC retaining Garman Turner Gordon to resolve the dispute with First 100. AA0171-173. That engagement letter has a handwritten condition that "the matter shall not include any litigation against First 100, LLC." AA0172.

The arbitration panel ruled in favor of TGC/Farkas Funding, LLC, which was later confirmed by the district court, resulting in a ruling that First 100 "make all the requested documents and information available . . . for inspection and copying," and a judgment against First 100 and in favor of TGC/Farkas Funding, LLC in the amount of $23,975.00 for fees and costs. AA0055. The district court then granted TGC/Farkas Funding, LLC's subsequent motion for additional attorneys' fees on top of the fees already awarded by the Arbitrator. AA0352-355.

TGC/Farkas Funding, LLC thereafter moved forward with post-judgment discovery. AA0131-150.

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Appellants contend that in January 2021, Mr. Bloom and Mr. Farkas engaged in discussions about the counterproductive nature of TGC/Farkas Funding, LLC continuing with litigation against First 100 in light of the fact that there is currently no cash in the company. AA0701. Mr. Bloom had also previously discussed with Adam Flatto (CEO of TGC 100 Investor, LLC, a member of TGC/Farkas Funding, LLC) the fact that TGC/Farkas Funding, LLC wanted its money back, plus six percent. AA0701. Mr. Farkas particularly "did not want to sue" either Mr. Bloom or [First 100] because of his familial relationship with Mr. Bloom, and admittedly wanted to "be away from it." AA0626.

Based on those conversations, Mr. Bloom on behalf of First 100 and Mr. Farkas on behalf of TGC/Farkas Funding, LLC came to a settlement, and Mr. Bloom drafted a settlement agreement. AA0702. The terms involved TGC/Farkas Funding, LLC receiving its million-dollar investment back, plus six percent, in exchange for TGC/Farkas Funding, LLC ending its litigation against First 100. AA0703; AA0167-169.

At the evidentiary hearing, Mr. Farkas testified that he "mistakenly" signed the Settlement Agreement too quickly and thought he was signing documents to retain a lawyer. AA0637. Despite that, it is undisputed that Matthew Farkas did in fact execute the Settlement Agreement on behalf of TGC/Farkas Funding, LLC on January 7, 2021. AA0637. Further, in Section 14 of the Settlement Agreement, Mr.

Farkas represented and warranted that he had "full power and authority to enter into this Agreement." AA0168.

Mr. Farkas also testified that he signed the Settlement Agreement on his own at a UPS store, not in the presence of Mr. Bloom, and that nobody was threatening him to sign the Settlement Agreement. AA0636. Mr. Farkas admitted that his decision not to read the Settlement Agreement before signing it was his own choice, not something that Jay Bloom told him to do. AA0637. Mr. Farkas also testified that he could have contacted Adam Flatto of TGC/Farkas Funding, LLC and consulted with him before signing the Settlement Agreement – he just chose not to. AA0638. Mr. Farkas also testified that he could have crossed out terms in the Settlement Agreement if he so desired. AA0638. Put simply, Mr. Farkas admitted "[i]t's my fault" that he did not read the Settlement Agreement before signing it. AA0637.

At some point after the parties had executed the Settlement Agreement, Mr. Bloom learned that Mr. Farkas had executed a document on September 17, 2020 purporting to amend the Limited Liability Company Agreement of TGC/Farkas Funding, LLC in which TGC Investor (acting solely through Adam Flatto) was replaced as the Administrative Member of TGC/Farkas Funding, LLC. AA0699.

However, prior to entering into the Settlement Agreement, Mr. Farkas "insisted that he was still the manager" of TGC/Farkas Funding, LLC. AA0699.

Mr. Bloom also testified that the last he had heard from Mr. Flatto was in the August 2020 declaration in which he reiterated that Mr. Farkas remained the Administrative Member and manager of TGC/Farkas Funding, LLC. AA0699-700.

Mr. Bloom also testified that the primary way he communicated to TGC/Farkas Funding, LLC was through Mr. Farkas. AA0700. Finally, Mr. Bloom testified that the reason he attempted to resolve the dispute directly with Mr. Farkas instead of through counsel was because he had prior bad experiences with law firms wanting to continue litigation for economic reasons. AA0704.

As such, Appellants contend Farkas exercised his apparent authority as 50% member and Administrative Manager of TGC/Farkas Funding, LLC to settle the case. In light of Garman Turner Gordon subsequently claiming that there was no settlement, First 100 filed a motion to enforce the settlement agreement executed by the parties and to vacate post-judgment discovery proceedings. AA0156-208. That motion was fully briefed by the parties. AA0156-208; AA0330-351; AA0362-492.

Around that same time, following an *ex parte* motion from TGC/Farkas Funding, LLC, the district court issued an order to show cause as to why First 100 and non-party Jay Bloom should not be held in contempt for failing to abide by the order confirming the Arbitration Award. AA0151-155. The parties also submitted briefing on that order to show cause. AA0123-130; AA0209-214; AA0215-322.

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At a hearing on January 28, 2021, the district court determined that "there are material questions of fact that prevent the Court from granting the Motion to Enforce," and elected to set an evidentiary hearing on both the Order to Show Cause and the Motion to Enforce and Countermotion for Sanctions. AA0514.

Notably, not included in the district court's order setting the evidentiary hearing was any indication that the parties would need to put on evidence with respect to an analysis as to whether non-party Jay Bloom is the alter ego of First 100. At no point, either in the arbitration proceedings or in the district court proceedings did TGC/Farkas Funding, LLC bring a cause of action for alter ego against non-party Jay Bloom or First 100.

At no point was evidence submitted indicating that Mr. Bloom obtained and withheld potentially responsive documents related to First 100's books and records that should have been disclosed to TGC/Farkas Funding. No evidence could have been submitted, as that never happened.

II. PROCEDURAL BACKGROUND

On October 1, 2020, TGC/Farkas Funding, LLC filed its motion to confirm the arbitration award, which had previously (1) compelled the production of First 100's company records; and (2) ordered the reimbursement of TGC/Farkas Funding, LLC's fees and costs. AA0001-40. The arbitration award made it clear that only the "Respondents," meaning First 100 and 1st One Hundred Holdings, were

responsible for paying the arbitration fees. AA0010. No ruling was issued against Jay Bloom personally by the arbitration panel. AA010.

The motion to confirm the arbitration award was fully briefed, with First 100 setting forth a limited opposition and seeking clarification that pursuant to the plain language of First 100's Operating Agreement, TGC/Farkas Funding, LLC would have to pay the reasonable cost of obtaining and furnishing First 100's records. AA0041-46.

On November 17, 2020, the district court granted TGC/Farkas Funding, LLC's motion to confirm the arbitration award, and denied First 100's countermotion to modify the award with respect to requiring TGC/Farkas Funding, LLC to pay for the books and records production pursuant to both NRS 86.243(3) and First 100's Operating Agreement. AA0053-59. The district court's order specifically entered a judgment against only First 100 and 1st One Hundred Holdings (not non-party Jay Bloom) in the amount of $23,975.00 for the fees and costs. *Id.*

On November 17, 2020, TGC/Farkas Funding, LLC filed a motion for attorneys' fees and costs, seeking additional fees and costs on top of what the arbitration panel already awarded. AA0069-110. That motion was fully briefed, and on January 27, 2021, the district court issued its order granting TGC/Farkas Funding, LLC's motion for additional attorneys' fees and costs. AA0352-355. That order imposed a judgment against only First 100 and 1st One Hundred Holdings (not

non-party Jay Bloom) in the amount of $9,060.20. *Id.*

At no point did TGC/Farkas Funding seek to amend either judgment in order to add non-party Jay Bloom as a judgment debtor. Despite that, on December 18, 2021, TGC/Farkas Funding, LLC filed an *ex parte* application for an order to show cause why First 100 and non-party Jay Bloom should not be held in contempt of court for failure to comply with the order confirming the Arbitration Award. AA0123-130. The district court granted the *ex parte* application that same day. AA0151-155.

Thereafter, TGC/Farkas Funding, LLC moved forward with post-judgment discovery. AA0131-150. TGC/Farkas Funding, LLC was dissatisfied with the discovery responses received, and on January 20, 2021 filed a supplement to its *ex parte* application for an order to show cause. AA0215-0322.

On January 19, 2021, First 100 filed its motion to enforce the Settlement Agreement and vacate post-judgment proceedings. AA0156-208. That motion attached the settlement agreement that Jay Bloom executed on behalf of First 100, and that Matthew Farkas executed on behalf of TGC/Farkas Funding, LLC. AA0167-168. That motion was fully briefed, with TGC/Farkas Funding, LLC opposing and filing a countermotion for sanctions. AA0330-351.

On January 20, 2021, First 100 and non-party Jay Bloom filed a response to the order to show cause, which noted that, aside from First 100 taking the position

that the show-cause hearing is moot because the case settled, (1) First 100 has no financial ability to comply with the arbitration order; and (2) non-party Jay Bloom has not violated the order confirming the Arbitration Award to which he was not personally subjected. AA0209-214. Mr. Bloom specifically cited to NRS 86.371, which states that "[u]nless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company." AA0211. Mr. Bloom also noted that no alter ego findings were made, or even sought in the arbitration action nor before the district court. *Id.*

The district court vacated the original show-cause hearing set for January 21, 2021, and elected to hear both the motion to enforce the Settlement Agreement, the countermotion for sanctions, and the show-cause hearing together on January 28, 2021. AA0513-515. At that hearing, the district court found that there are "material questions of fact that prevent the Court from granting the motion to enforce," and set an evidentiary hearing for March 3, 2021 on both the show-cause order, the motion to enforce the Settlement Agreement and the countermotion for sanctions. AA0514.

The evidentiary hearing took place on March 3, 2021 and March 10, 2021. AA0537-902. Following the evidentiary hearing, on April 7, 2021, the district court

issued its Findings of Fact, Conclusions of Law, and Order. AA0903-942. The district court adopted TGC/Farkas Funding, LLC's proposed FFCL in its entirety, and (1) denied the motion to enforce the Settlement Agreement; (2) found that First 100 and Mr. Bloom "disobeyed and resisted" the order confirming the Arbitration Award, and ordered First 100 to take all reasonable steps to comply with the order confirming the Arbitration Award; and (3) found that First 100 "and Bloom are jointly and severally responsible for the payment of all the reasonable fees and costs incurred by [TGC/Farkas Funding, LLC] since entry of the [order confirming the Arbitration Award] for the purpose of coercing compliance with that order in order to make them whole . . . ." AA0939. Notice of entry of the FFCL was entered on April 7, 2021. AA0903-942. That FFCL is the subject of a separate appeal, with Supreme Court Case No. 82794.

On April 9, 2021, TGC/Farkas Funding, LLC's counsel filed a declaration in support of an award of fees of costs. AA0943-986. First 100 filed an opposition to that declaration, and TGC/Farkas Funding, LLC filed a reply. AA0987-1336. On June 11, 2021, the district court issued a separate order on the exact amount of fees and costs awarded to TGC/Farkas Funding, LLC, which totaled $151,353.81 for less than four months' of attorney work. AA1337-1339. Notice of entry was entered that same day. AA1340-1344. That Fees and Costs Order specifically states that the amount "must be paid by Defendants and/or Jay Bloom as a condition of purging

the contempt." AA1338. That Fees and Costs Order is the subject of this instant appeal, with Notice of Appeal filed on July 2, 2021. AA1345-1351.

SUMMARY OF ARGUMENT

The district court committed two clear errors in issuing its Fees and Costs Order.

First, the district court legally erred in determining that Mr. Bloom, who has never been a party in the underlying proceedings, should be responsible for paying the Fees and Costs Order, which relates to contempt for failure to abide by an order confirming an arbitration award that (again) Mr. Bloom was never a party to. There was never an alter ego cause of action set forth against Mr. Bloom, which constitutes a violation of his due process rights. Even if the merits of the subsequent alter ego findings are considered, those were also made in error, as no evidence was presented as to the commingling of funds and assets, or the unauthorized diversion and/or use of funds and assets with respect to First 100.

Second, and in the alternative, the district court erred in awarding $151,535.81 in fees and costs to TGC/Farkas Funding, LLC for approximately four (4) months of attorney work, which amounted to three motions, limited discovery, and a two-day evidentiary hearing. This was an abuse of the district court's discretion, and a reduction in fees and costs (as requested by First 100 in the underlying proceedings) was clearly warranted.

ARGUMENT

I. STANDARD OF REVIEW FOR APPEAL OF AN ORDER ON FEES

"The decision whether to award attorney's fees is within the sound discretion of the district court." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). Generally, decisions awarding or denying attorney fees are reviewed for "a manifest abuse of discretion." *Id.* at 90. However, when the attorney fees matter implicates questions of law, the proper review is *de novo*. *Id.* at 90.

Here, First 100 is presenting a legal question as to whether the district court erred in holding that non-party Jay Bloom should have been ordered to pay the Fees and Costs order, when no alter ego claim was ever brought in the underlying proceedings, which presents due process issues for Jay Bloom. This should be reviewed *de novo*. First 100 is also presenting a straightforward question as to whether the district court properly followed the *Brunzell v. Golden Gate National Bank* framework in determining the amount of fees to award, which should be reviewed for abuse of discretion.

II. THE DISTRICT COURT ERRED IN FINDING THAT MR. BLOOM IS RESPONSIBLE FOR FEES AND COSTS AS THE ALTER EGO OF FIRST 100, WHICH WAS A VIOLATION OF MR. BLOOM'S DUE PROCESS RIGHTS

In its FFCL, the district court held that Mr. Bloom "is the alter ego of

Defendants [First 100 and 1st One Hundred Holdings]." AA0936. The facts that the district court cited to in support of that conclusion of law are: (1) First 100 is in "default" status with the Nevada Secretary of State; (2) First 100 has no continued operations, no employees, no bank accounts, and is no longer maintaining records as it has no active governance of any kind; and (3) there are no writings to reflect that any director or office of First 100 has any authority to bind First 100 instead of Jay Bloom. AA0936. Accordingly, the district court concluded that "equity must be applied such that Bloom will not be immune from consequences for his intentional conduct for the purpose of disobeying and/or resisting the [order confirming the Arbitration Award]." AA0936-937.

Thus, Mr. Bloom, who was never a party in the underlying action, was found to be responsible for "disobeying and/or resisting" the order confirming the Arbitration Award that he was never a party to, subjecting him *personally* to contempt sanctions solely under an alter ego theory.

That was followed up with the order determining the amount of fees and costs for the contempt sanctions: $151,535.81, in which the district court reiterated that the amount "must be paid by Defendants and/or Jay Bloom as a condition of purging the contempt. AA1338.

This course of action violated Mr. Bloom's due process rights. Both the United States Constitution and the Nevada Constitution guarantee that a person must

receive due process before the government may deprive him of his property. This Court has recognized that procedural due process "requires notice and an opportunity to be heard." *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

Here, there was never an independent alter ego action against Mr. Bloom. There was no cause of action whatsoever against Mr. Bloom personally, but according to TGC/Farkas Funding, LLC, Mr. Bloom should have assumed that an alter ego proceeding was taking place at the evidentiary hearing, simply because TGC/Farkas Funding, LLC managed to add Jay Bloom's name to the order to show cause as to why First 100 should not be held in contempt of Court. AA0151-155. This is nonsensical, and no different to the *Callie* matter referenced above.

In *Callie*, a judgment creditor who domesticated a foreign judgment in Nevada attempted to add a nonparty to its final judgment using the alter ego doctrine simply by seeking to amend the judgment. *Id.* at 182-83. Similarly, here, even though Mr. Bloom was never a party, TGC/Farkas Funding, LLC attempted to add him to the proceedings not by filing a motion to amend the underlying order confirming the arbitration award, but by placing his name in the proposed order to show cause as to why First 100 should not be found in contempt of Court for allegedly violating that order. AA00123-130; AA0151-155. This is actually even worse than what took place in *Callie*, as no alter ego doctrine analysis was set forth,

but rather it was just assumed that Mr. Bloom should be ordered to show cause as to why he should not be held in contempt for failing to abide by an order that he was never subjected to simply because of his relationship with First 100.

Similar to *Callie*, in this case, Mr. Bloom was not individually named as a party in any of the underlying proceedings (either in AAA or before the district court) and was not served with a summons or complaint in an individual capacity. *Id.* at 183. Thus, Mr. Bloom was deprived of the opportunity to be heard before he would potentially personally be subjected to a fees and costs order under the alter ego doctrine, which constitutes a violation of his due process rights.

As held in *Callie*, "the only method by which Bowling could have asserted her alter ego claim without jeopardizing Callie's due process rights was through an independent action against Callie with the appropriate notice." *Id.* at 184. In *Magliarditi v. TransFirst Grp., Inc.*, 450 P.3d 911 (Nev. 2019), this Court again confirmed that a "separate claim [for alter ego] would be required to assure the nonparty is afforded due process." But that never happened here. No cause of action for alter ego was ever lodged against Mr. Bloom, yet surprisingly alter ego findings were made stemming from the evidentiary hearing, which served as a basis for Mr. Bloom being held "responsible" for paying the Fees and Costs Order.

Accordingly, because Mr. Bloom's due process rights were violated (as a result of TGC/Farkas Funding, LLC successfully "sneaking" Mr. Bloom's name into

its application for an order to show cause on the contempt issue instead of following the rules and seeking to amend the underlying order confirming arbitration, this Court hold that the district court erred in ordering that Mr. Bloom is *personally* responsible for paying the Fees and Costs Order.

As set forth below, even if it was somehow proper for Mr. Bloom to be added to an order to show cause related to an order that he was never a party to, the alter ego findings that were made in the FFCL are unjustified, and therefore do not serve as a proper basis to hold Mr. Bloom responsible for the Fees and Costs Order.

A. The Corporate Cloak is Not Lightly Thrown Aside

Nevada applies the following requirements for the application of the alter ego doctrine: (1) the limited liability company must be influenced and governed by the person asserted to be its alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice." NRS 86.376; *N. Arlington Med. Bldg., Inc. v. Sanchez Const. Co.*, 86 Nev. 515, 520, 471 P.2d 240, 243 (1970). "Each of these requirements must be present before the alter ego doctrine can be applied." *Id.* at 520, 243. Whether each requirement is present is a matter of law to be determined by the court. *See* NRS 86.376 (stating "[t]he question of whether a person acts as the alter ego of a limited-liability company must be determined by the court as a matter of law.").

Further, the following factors, though not conclusive, may indicate the existence of an alter ego relationship: (1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate formalities."). *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000).

Although the alter ego doctrine is frequently asserted, its success is "rare," and the "corporate cloak is not [to be] lightly thrown aside." *N. Arlington Med. Bldg., Inc. v. Sanchez Const. Co.*, 86 Nev. 515, 471 P.2d 240 (1970); *see also In re Giampietro*, 317 B.R. 841, 846 (Bkrtcy. D. Nev. 2004).

Factual evidence is an essential part of obtaining relief under the alter ego doctrine in Nevada. *See, e.g., LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000) (". . . [W]e conclude that reverse piercing is appropriate in those limited instances where the particular facts and equities show the existence of an alter ego relationship and require that the corporate fiction be ignored so that justice may be promoted.") (emphasis added).

B. No Independent Alter Ego Action Was Ever Set Forth

A party who wishes to assert an alter ego claim must do so in an independent action against the alleged alter ego with the requisite notice, service of process, and other attributes of due process. *Callie v. Bowling*, 123 Nev. 181, 185, 160 P.3d 878, 881 (2007).

Here, there is no question that TGC/Farkas Funding, LLC never initiated an independent alter ego action against Jay Bloom. There is also no question that the evidentiary hearing was limited to two distinct issues: (1) the motion to enforce the Settlement Agreement, and (2) the show-cause hearing. AA0514. As such, the alter ego ruling raises separate due process questions as Mr. Bloom was not entitled to put on evidence on behalf of himself during the evidentiary hearing, or to conduct discovery during the discovery period prior to the hearing, nor was he on notice that he would potentially be subjected to an alter ego finding and personally liable for a fees and costs. Mr. Bloom was not able to take depositions or file dispositive motions as to himself personally, and was therefore precluded from exercising his right to due process under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

TGC/Farkas Funding, LLC's failure to initiate a separate alter ego claim should result in the reversal of the district court's Fees and Costs Order as it relates to Mr. Bloom personally.

C. The Alter Ego Elements Were Never Met in This Case

Generally speaking, the Nevada Supreme Court has been extremely reluctant to recognize situations where a corporate veil may be pierced or determine that an alter ego situation exists. This has been so even when certain corporate formalities are not maintained. In *N. Arlington Med. Bldg., Inc. v. Sanchez Const. Co.,* 86 Nev.

515, 522, 471 P.2d 240, 244 (1970), this Court held that undercapitalization, where it is clearly shown, is an important factor in determining whether the doctrine of alter ego should be applied. "However, in the absence of fraud or injustice to the aggrieved party, it is not an absolute ground for disregarding a corporate entity. In any event it is incumbent upon the one seeking to pierce the corporate veil, to show by a preponderance of the evidence, that the financial setup of the corporation is only a sham and caused an injustice." *Id.* at 522; 244 (1970).

In *N. Arlington Med. Bldg*, the Nevada Supreme Court held that although a corporation ultimately defaulted on its obligations, it cannot be inferred from that fact that it was initially inadequately financed, as there needs to be a showing of how the default sanctioned a fraud or promoted an injustice. *Id.* at 522; 244. The Court also held that although stock certificates were not delivered and formal meetings were not held, those are factors to be considered by the trial court, but the record still needs to reveal "in what manner they sanctioned a fraud or promoted an injustice towards the respondent." *Id.* at 522-523; 244-245. The Court also held that while ultimately the respondent's decision to sell real property to the corporation "resulted in a very unprofitable venture," the Court found "nothing in the record that would indicate that adherence to the fiction of the separate entity of North Arlington would sanction a fraud or promote injustice." *Id.* at 523; 245.

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Similarly, in this case, no evidence was presented indicating that First 100 was initially or thereafter inadequately financed. It should go without saying that First 100's business model of purchasing the beneficial interest in delinquent HOA receivables and then buying the real properties at foreclosure sales was profitable for a period of time following the 2008 recession and subsequent foreclosure boom, and then business was not as active as the economy recovered and the Nevada legislature instituted various amendments to NRS 116 which limited HOA's ability to extinguish a lender's interest in a property resulting from a borrower's delinquency in HOA assessments, such as the right of redemption period codified in 2015 as NRS 116.31166(3)-(6). The mere fact that the business has not been operational since about 2017, and therefore has no office, no employees, no active bank accounts, no cash, does not in and of itself signal the sanctioning of a fraud or promotion of injustice. AA0919. *See also*, *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 377, 566 P.2d 819, 823 (1977) ("It is not reasonable to conclude that [the parent organization] undercapitalized [the subsidiary organization] in order to frustrate the payment of its obligation.").

Finally, the district court's finding that there were "no writings to reflect that any director or officer had any authority to bind First 100 instead of Bloom" (AA0936) is misplaced, as that also does evidence the sanctioning of a fraud or promotion of injustice, especially where zero evidence was presented as to the

commingling of funds and assets, or the unauthorized diversion and/or use of funds and assets. *See N. Arlington Med. Bldg*., 86 Nev. at 521; 471 P.2d at 244 (1970) ("Although John W. Isbell influenced and governed North Arlington, there is no such unity of interest and ownership between him and the corporation that their identities are inseparable."). At no point was evidence introduced indicating that Jay Bloom treated First 100's corporate assets as his own.

In another analogous case, *Rowland v. Lepire*, 99 Nev. 308, 317, 662 P.2d 1332, 1338 (1983), the corporation did not ever hold a formal directors or shareholders meeting, did not have a minute book, and never provided evidence that minutes were even kept. Even still, the Nevada Supreme Court held that "Although the evidence does show that the corporation was undercapitalized and that there was little existence separate and apart from Martin and Glen Rowland, we conclude that the evidence was insufficient to support a finding that appellants were the alter ego of the Rowland Corporation." *Id.* at 318; 1338 (1983).

Similarly, here, Mr. Bloom testified that when it was operational, First 100 did have separate financial records, which were managed not by Mr. Bloom personally but by a controller, Michael Henriksen. AA0778. Crucially, no evidence was presented showing that the financial setup of First 100 was only a sham and caused an injustice.

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This is not a case where there is evidence of withdrawals of corporate funds for Mr. Bloom's personal use, nor would such evidence exist. And even if such evidence did exist, those actions would need to be the cause of TGC/Farkas Funding, LLC's injury and must have sanctioned a fraud or promoted an injustice before the corporate veil can be pierced. *See Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 602, 747 P.2d 884, 887 (1987). ("The record does not reflect how failure to issue stock or keep proper corporate minutes sanctioned a fraud or promoted an injustice to Polaris. It also does not establish that an injustice necessarily resulted from the corporation's payment of Kaplan's personal debts. Kaplan testified the payments were in lieu of salary. We also note the district court did not specifically find that the corporations were undercapitalized."). Similarly, here, the district court did not specifically find that First 100 was undercapitalized, and no causal link was presented showing how First 100 going into "default" status with the Nevada Secretary of State and no longer continuing operations specifically sanctioned a fraud or promoted an injustice to TGC/Farkas Funding, LLC.

Accordingly, there is not substantial evidence in the record to support the district court's determination that Mr. Bloom is the alter ego of First 100. As such, there is no basis to hold Mr. Bloom personally, along with First 100, "jointly and severally responsible for the payment of all the reasonable fees and costs incurred by [TGC/Farkas Funding, LLC] since entry of the [order confirming the Arbitration

Award] for the purpose of coercing compliance with that order in order to make them whole . . . ." AA0939.

D. The District Court Erred in Finding Mr. Bloom in Contempt Under the Federal Common Law "Responsible Party" Rule

In addition to ruling that Mr. Bloom is the "alter ego" of First 100, the district court also held that the "responsible party" rule applies to contempt proceedings and Mr. Bloom "could not delegate" the responsibility for performance of providing First 100's books and records, which makes him personally subject to contempt proceedings. AA0934. Respectfully, the common law cited in support of this "rule" is all from non-binding federal court cases which are not factually analogous to this case.

For example, in *Luv N' Care, Ltd. v. Laurain*, a subpoena was issued to a nonparty company, and the issuing party argued that the nonparty company's managing member should be held in contempt, because he allegedly communicated that he "possessed potentially responsive documents, but failed to review and produce them by the deadline." No. 218CV02224JADEJY, 2019 WL 4279028, at *2 (D. Nev. Sept. 10, 2019). The U.S. Magistrate Judge for the District of Nevada held that It is undisputed that the nonparty company's managing member "did not take any reasonable steps to comply with this Court's Order, and therefore, should be held jointly and severally liable with Blue Basin for contempt on this basis alone,"

as the evidence showed that he "looked for and found potentially responsive Blue Basin documents before the Court issued its Order, but did not turn them over for review or seek a deadline extension." *Id.* at *5. The Court also cited to *United States v. Laurins*, 857 F.2d 529, 535 (9th Cir. 1988), in which the Ninth Circuit affirmed a managing director's conviction of obstruction of justice and aiding, abetting, and causing contempt of court, based on the fact that the managing director had "taken up the task of locating documents potentially responsive to the subpoena" and failed to do so.

Here, the facts are different, as Mr. Bloom explicitly testified that when First 100 wound up its operations in 2017, "Michael Henriksen, the [former First 100] financial controller . . . did take the . . . accounting computer to safeguard the information. And has that in his possession. The documents that they requested would need to be reconstructed by Michael Henriksen." AA0778-779. Far from obstructing the district court's order confirming the Arbitration Award, Mr. Bloom testified that he conferred with Mr. Henriksen about compiling the business records, and Mr. Henriksen prepared an outline as to what would need to be collected and sought further clarification from TGC/Farkas Funding, LLC's counsel as to funding and the timeline for such production. AA0720-721.

Ultimately, TGC/Farkas Funding, LLC refused to make any payment despite the fact that no court order says TGC/Farkas Funding, LLC is absolved from having

to pay for the production of books and records pursuant to First 100's Operating Agreement. AA0032-33. Mr. Bloom testified that First 100 "never denied [TGC/Farkas Funding, LLC] access" to the books and records documents from the time of the arbitration award and forward, it simply clarified that the company does not have bank accounts, much less any capital to pay the third-party (Mr. Henriksen) to compile the records. AA0720. There were no records being withheld whatsoever, especially not by Mr. Bloom who has no access to such records anyway. *Id.*

Further, the federal court "responsible party" rule cannot be taken in a vacuum, it must be read in conjunction with NRS 86.371, which states that "[u]nless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company."

It is particularly inappropriate to disregard NRS 86.371, while at the same time relying on federal common law which does not apply because the evidence shows that the books and records are not in Mr. Bloom's possession, and Mr. Bloom made an effort to comply with the district court's order by conferring with First 100's former Controller regarding the records and seeking his assistance.

As such, the district court's underlying findings related to Mr. Bloom being the "responsible party" and personally subjecting himself to contempt sanctions

(which ultimately ended up in excess of $150,000) were made in error.

III. THE DISTRICT COURT ERRED IN DETERMINING THE AMOUNT OF FEES

The district court also erred in awarding TGC/Farkas Funding, LLC $151,535.81 in fees and costs for approximately four (4) months of attorney work, amounting to three motions, limited discovery, and a two-day evidentiary hearing.

In considering a request for attorney's fees, the district court must analyze the factors set forth in *Brunzell v. Golden Gate National Bank*, 95 Nev. 345, 349 (1969), namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result. The Nevada Supreme Court further enumerated the *Brunzell* factors in *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 786 (1985). The four factors that the district court was required to consider in determining the reasonableness of attorney's fees are:

> (1) *the qualities of the advocate*: his or her ability, training, education, experience, professional standing and skill;
> (2) *the character of the work to be done*: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;
> (3) *the work actually performed by the lawyer*: the skill, time and attention given to the work; and
> (4) *the result*: whether the attorney was successful and what benefits were derived.

See id.

At the district court level, with respect to the first factor (qualities of the advocate) First 100 did not dispute that both Ms. Erika Pike Turner, Esq. and Mr.

Dylan Ciciliano, Esq. of Garman Turner Gordon are qualified legal advocates in terms of education background and experience, with each representing that they have over ten years of litigation experience. However, that only underscored why it was unreasonable for both of them to be so heavily involved in the underlying case, especially with Ms. Pike Turner's hourly rate (as a partner) being so high at $550 per hour in 2021 (an increase from $535 per hour last year), and Mr. Ciciliano's hourly rate (as an associate) jumping dramatically from $345 in 2020 to $385 in 2021 without any explanation. Respectfully, in light of the lack of any supporting documentation or citations to other decisions affirming the reasonableness of Mr. Ciciliano's newly increased rate of $385 per hour (which is on par with partner-level rates), First 100 requested that any fees attributed to work completed by Mr. Ciciliano be billed at $345 per hour, not $385 per hour. This request was denied by the district court, and no specific findings were made as to the reasonableness of the hourly rates.

Additionally, while First 100 did dispute not the competence of the work performed by paralegals at Garman Turner Gordon, the $215.00 hourly paralegal rate was not in line with standard paralegal rates in this region with commensurate levels of experience. First 100 requested that the paralegal rate be reduced to $115 per hour. Again, that request was denied, and the district court did not make any findings as to whether the paralegal hourly rate was reasonable.

With respect to the character of the work done, there were three standard motions filed in a straightforward business matter (motion to compel, motion to enforce settlement, and motion for an order to show cause) that resulted in a two day evidentiary hearing. These are commonplace motions that are frequently litigated in business matters and should not have required extensive research on the part of TGC/Farkas Funding, LLC's attorneys.

With respect to the work actually performed, much of the work performed by Garman Turner Gordon was excessive and double-worked. This should go without saying, as $161,655.81 in attorneys' fees (the amount actually billed), for less than four months of work, signals the overworking of a case, especially when the end result was a simple two day evidentiary hearing.

Examples of the inappropriate and overbilling include but are not limited to:

- The inclusion of $3,825.50 for activities that had nothing to do with the motion to compel, motion to enforce settlement agreement, or the motion for an order to show cause. This included fees associated with the first order granting fees/costs, drafting writs of execution on the first judgment, finalizing "collection" documents, briefing the first motion for fees and costs, and locating Mr. Bloom's address. AA0971-973 None of these fees should have been included in the fee award;

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- The excessive amount of time spent on preparing the opposition to the motion to enforce settlement agreement. Ms. Pike Turner and Mr. Ciciliano billed a combined $14,514.50 for this opposition brief, which is beyond excessive. AA0966-969. This amount should be reduced to at least $3,500 to account for a more reasonable amount of time spent on an opposition brief on a straightforward motion;
- The double billing for work performed related to depositions. This includes the separate billings associated with two different attorneys preparing for the deposition of Matthew Farkas (the excessive $500.50 billed by Mr. Ciciliano should be deducted from the fee award, *see* AA0956 This also includes the excessive amount of time spent on the deposition of non-party Jay Bloom, which went nearly 7 hours. Ms. Pike Turner and Mr. Ciciliano billed 20.4 hours and $10,807.50 on fees for the preparation and attendance of a *single* deposition. *See* AA0948-973. This should have been reduced to $2,500. This also includes both Ms. Pike Turner and Mr. Ciciliano needlessly appearing for the deposition of non-party Raffi Nahabedian, which resulted in 11.6 hours and $5,588 being billed just for attending that deposition. AA0960. This amount should have been reduced to $2,500. Moreover, both Ms. Pike Turner and Mr. Ciciliano billed excessively just for preparing for

Mr. Nahabedian's deposition, with the billing coming to $5,423. AA0961. This amount should have been reduced to $1,000 to account for the standard amount of time spent preparing for a non-party deposition, especially a non-party like Mr. Nahabedian who had little to no relevant information. This also includes the $1,347.50 spent on "investigating" the dockets associated with Mr. Nahabedian, as such information had no relevance to this case. The district court should have such fees from the fee award;

- The unnecessary billing for communicating with Joshua Gilmore, Esq. of Bailey Kennedy for purported "violations" of NRPC, none of which were actually found by the Court. As such, the $231.00 charged for such communications on 2/12/2021 should have been rejected by the district. AA0960. Similarly, the $962.00 charged for such communications on 2/2/2021 should been rejected by the district court. AA0963;
- The excessive billing related to attending the evidentiary hearing. Respectfully, there was no need for a paralegal of Garman Turner Gordon to attend the evidentiary hearing. The 7 hours billed by paralegal Michele Pori on 3/3/2021 for the first day of the evidentiary hearing, and the 6 hours billed by paralegal Michele Pori on 3/10/2020

for the second day of the evidentiary hearing, which accumulated to $2,795, should have been deducted from the district court's fee award. AA0949-AA0951;

- Additionally, the $1,232.00 billed for a "motion to strike arguments with no admissible evidence" should have been disregarded by the Court, as no such motion was granted by the Court. AA0950;
- The excessive billing for preparation of the FFCL, which accumulated to 19.8 hours and $10,890 in billed fees. There should be no more than five (5) hours billed for preparing FFCL for this straightforward case. Thus, it was an abuse of discretion to account for $2,750 for this billing activity, not $10,890;

These were some of the most glaring examples of excessive billing, as common sense indicates that over $160,000 billed as attorneys' fees for less than 4 months of work (that should have been spent on 3 motions and a 2-day evidentiary hearing) was beyond excessive. Notably, the district court did not make any specific findings as to any of the discrepancies that First 100 pointed out in the underlying briefing with respect to the unreasonableness of the billing entries and associated fees. A conclusory finding that the fees satisfied the *Brunzell* factors was all that was included in the Fees and Costs Order. AA1338.

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It should therefore follow that significant reductions should have been made to the ultimate fee award of $151,535.81.

CONCLUSION

Based on the foregoing, this Court should find that the district court erred in (1) holding non-party Mr. Bloom responsible for the Fees and Costs Award, when no separate alter ego claim was ever brought in the underlying action; and (2) determining awarding TGC/Farkas Funding, LLC $151,535.81 in fees and for approximately four (4) months of attorney work, amounting to three motions, limited discovery, and a two-day evidentiary hearing.

DATED this 18th day of November, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this opening brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Rules of Appellate Procedure, and in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman. I certify that this brief complies with the page limitations of NRAP 32(a)(7) because it contains 9,445 words.

I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 18th day of November, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of November, 2021, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: **APPELLANTS' OPENING BRIEF** and **VOLUMES I – VI** of the **APPENDIX** shall be made in accordance with the Master Service List as follows:

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