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' REPLY BRIEF

JASON R. MAIER, ESQ.
Nevada Bar No. 8557
jrm@mglaw.com
Joseph A. Gutierrez, Esq.
Nevada Bar No. 9046
jag@mgalaw.com
Danielle J. Barraza, Esq.
Nevada Bar No. 13822
djb@mgalaw.com
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Telephone: (702) 629-7900
Facsimile: (702) 629-7925
Attorneys for Appellants

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INTRODUCTION

In its Answering Brief (AB), Respondent TGC/Farkas Funding, LLC contends that non-party individual Jay Bloom (who is not bringing this appeal) "lacks standing" to bring this appeal. *See* AB at p. 4. That argument is a red herring, as this appeal is being brought by the only defendants in the underlying case: First 100, LLC and 1st One Hundred Holdings, LLC (collectively referred to as "First 100"), not by any non-parties.

TGC/Farkas Funding, LLC also fails to acknowledge that this Court has jurisdiction to review *de novo* an attorney fees matter that implicates questions of law. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). As set forth in the Opening Brief, 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 legal 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.

First 100 is a party to the underlying case. As such, First 100 clearly has standing to appeal the district court's orders in the underlying case, including the

"Order Awarding Attorneys' Fees and Costs" which states that $151,535.81 "must be paid by Defendants [First 100] and/or Jay Bloom." AA1338.

TGC/Farkas Funding, LLC also fails to acknowledge the legal errors made in the district court's analysis of the *Brunzell v. Golden Gate National Bank*, which should be reviewed for abuse of discretion.

ARGUMENT

I. FIRST 100 HAS LEGAL STANDING TO CHALLENGE THE FEES AND COSTS ORDER

To be clear, the only parties to the underlying action were TGC/Farkas Funding, LLC and First 100. It therefore follows that First 100 has standing to appeal the district court's Order Awarding Attorneys' Fees and Costs.

Nevertheless, TGC/Farkas Funding, LLC insists that First 100 is not the real party in interest because Mr. Bloom (who was never a party in the underlying action) did not file his own case appeal statement or Opening Brief. AB at p. 30. This argument is faulty and tellingly unsupported by any actual legal authority with a similar fact pattern. NRCP 17(a) provides that every "action must be prosecuted in the name of the real party in interest." "A real party in interest is one who possesses the right to enforce the claim and has a significant interest in the litigation. The inquiry into whether a party is a real party in interest overlaps with the question of standing." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d, 206 208

(2011) (internal citation and quotation marks omitted).

Here, First 100 has a significant interest in the entirety of the fees and costs order, as First 100 is jointly and severally responsible for that fees and costs order. The entirety of that fees and costs order materially affects First 100 as it relates to the financial burden to purge the contempt.

There is simply no support for TGC/Farkas Funding, LLC's argument that "First 100 has not been aggrieved by the finding that Bloom is liable for attorneys' fees and costs caused by the contempt." AB at p. 30. First 100 has been aggrieved, as any "joint and several" ruling affecting First 100 gives First 100 a significant interest and a basis to appeal, as it has done here.

The *Detwiler* case that TGC/Farkas Funding, LLC relies on is not applicable. In *Detwiler v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 137 Nev. Adv. Op. 18, 486 P.3d 710, 718 (2021), the district court specifically ordered Detwiler (who was a non-party but an agent of third-party claimant Harry Hildibrand, LLC ("HH") who voluntarily entered the litigation) to turn over vehicles "on penalty of contempt." *Id.* at 714 (2021). Detwiler and HH then violated that order that he was specifically subjected to, and thereafter were held in civil contempt of court for refusing to turn the vehicles over. *Id.* at 714 (2021).

The district court then ordered Detwiler to "pay the Bank's attorney fees incurred since HH filed its NRS Chapter 31 third-party claim to the Motorcoach in

March 2018." Further, the district court imposed an additional fine of $100,000 payable to the Bank, which it explained was a fraction of the cars' value. *Id.* at 715 (2021). This Court ultimately held that the time-frame for the fees was improper, as well as the additional $100,000 sanction, but upheld the remainder of the contempt ruling. *Id.* at 721-722 (2021).

Detwiler was apparently the only one who ultimately opted to file a writ petition to request review of that contempt order. However, and crucially, that writ petition in *Detwiler* did not involve the question of whether Detwiler was the proper party to pursue that writ. No legal authority has been submitted by TGC/Farkas Funding, LLC indicating that Mr. Bloom was required to file a writ petition to request review of the FFCL.

Indeed, there is actually an argument to be made that because he was never a party to the underlying litigation, Mr. Bloom would *not* be able to pursue his own appeal. *See Jones v. Terra Contracting, Inc.*, 126 Nev. 729, 367 P.3d 788 (2010) ("Appellants were never parties to the action below as trustees of the dissolved corporation. Therefore, they are not "aggrieved parties" under NRAP 3A(a) and do not have standing to challenge the final judgment.").

It is also worth looking at this Court's analysis in *Detwiler* on whether an alter ego relationship was properly found between HH and an individual party to the action without any alter ego independent action being made. *Detwiler*. at 718

(2021). This Court ruled that "Even if the district court did make an alter-ego finding—which is far from clear—due process would not be violated because HH entered this lawsuit of its own volition." *Id.* at 718 (2021). This case is different, as Mr. Bloom did not enter this lawsuit at all of his own volition. He was never a party or an attempted intervenor.

As such, this Court's ruling in *Detwiler* only provides further support for the argument that the alter ego finding was made in error.

II. MR. BLOOM'S CONTEMPT ORDER WAS BASED ON THE ALTER EGO FINDING

Respondent TGC/Farkas Funding, LLC also implies that the district court's alter ego finding has nothing to do with the contempt order. AB at p. 31. This is improper. In the FFCL, the district court ordered that Mr. Bloom was the "responsible party" for complying with the Arbitration Order on behalf of First 100, which the district court ruled applies particularly here "***when there are no formalities being followed*** and, at least at this juncture, Bloom is the alter ego of [First 100]." AA0936 (emphasis added). The following of formalities refers to the alter ego analysis. The district court then went into its alter ego analysis (which generally involved the finding that First 100 is influenced and governed by the same person but no other findings as to the other alter ego factors), and ordered 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."

AA0936-0937.

Time and again, this Court has held that a "mere showing that one corporation is owned by another, or that the two share interlocking officers or directors is insufficient to support a finding of alter ego." *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2,* 95 Nev. 463, 466, 596 P.2d 227, 229 (1979).

Despite that, the district court ruled that "in addition to the 'responsible party' rule that applies to contempt, there should be no immunity for liability when, as here, Bloom is [First 100's] alter ego." AA0937.

Accordingly, the district court did in fact base its contempt ruling on an improper alter ego finding that should have never been made because Mr. Bloom was not put on notice of any alter ego cause of action. *See Callie v. Bowling*, 123 Nev. 181, 183, 185, 160 P.3d 878, 880–81 (2007) (holding that a motion to amend a judgment was not the correct procedure to allege an alter ego claim when the defendant who is subject to the alter ego claim was not part of the original complaint, as procedural due process safeguards required notice and an opportunity to be heard).

The district court also based its contempt order to Mr. Bloom on its "responsible party" analysis, which as detailed in the Opening Brief was improper, as that reasoning came from non-binding federal court cases which are not factually analogous to this case.

Further, 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 stating 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) in possession of and responsible for compiling the records. AA0720.

Respondent TGC/Farkas Funding, LLC has proven unable or unwilling to accept the fact that the district court relied on both its "responsible party" analysis

and its "alter ego" analysis in finding First 100 in contempt, choosing to improperly merge the two concepts in arguing that courts can "reach through the corporate veil" in making a "responsible party" finding, which is legally untenable and only serves to conflate these issues. AB at p. 33.

Contrary to TGC/Farkas Funding, LLC's arguments otherwise, the district court did abuse its discretion in finding Mr. Bloom in contempt, especially as Mr. Bloom had no real "authority" or "power" to obtain corporate documents not in his possession, as the First 100 business has not been operational since about 2017, and therefore has no office, no employees, no active bank accounts, 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. This is a unique situation where the controller, Michael Henriksen was in a position of having sole possession of and the ability to produce responsive records – not Mr. Bloom himself. AA0778.

Finally, First 100 is not arguing that NRS 86.371 "shields" Mr. Bloom from contempt, as TGC/Farkas Funding, LLC argues (AB at p. 37), but rather that NRS 86.371 needs to be considered in conjunction with any "responsible party" analysis that this Court determines applies (if any applies). A hardline rule on the ability to arbitrarily designate a company's member or manager as the "responsible party" and make that member of manager subject to persona contempt proceedings for failures or deficiencies on the part of the company would eviscerate the purpose of 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."

Accordingly, the district court erred in both (1) its alter ego analysis; and (2) its responsible party analysis, which led to the error of finding Mr. Bloom in contempt and deeming him financially responsible for TGC/Farkas Funding, LLC's attorneys' fees and costs.

III. MR. BLOOM WAS DENIED DUE PROCESS

TGC/Farkas Funding, LLC argues that Mr. Bloom "failed" to argue that he was wrongfully part of the contempt proceedings and being denied due process rights. AB at p. 40. This is false.

In its response to the motion for an order to show cause, First 100 adamantly argued that Mr. Bloom should not and is not even part of the underlying litigation:

> No judgment was obtained against Mr. Bloom in this action, therefore Mr. Bloom has zero personal liability for the judgment obtained against First 100, LLC and First One Hundred Holdings, LLC. Further, no alter ego findings were made in the action as it relates to Mr. Bloom and First 100, LLC and First One Hundred Holdings, LLC, and Mr. Bloom obviously would have made arguments establishing the lack of any alter ego relationship had he been put on notice of any such allegation which was never made.
>
> Nevertheless, Plaintiff is attempting to unilaterally pierce the corporate veil without having ever successfully obtained an alter ego

> finding, and without ever lodging an alter ego claim where Plaintiff would have been required to prove the existence of an alter ego relationship pursuant to the factors set forth in *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000).

AA0211. There was no waiver of the argument, as it has always been clear in the underlying litigation that Mr. Bloom took issue with the lack of due process being afforded to him, especially as it related to the rogue alter ego arguments that were being made despite the lack of any corresponding alter ego cause of action.

While he put on evidence on behalf of First 100, 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. The district court only allowed the "parties" to conduct up to four depositions each – not the parties *and* Mr. Bloom. AA0519. Had Mr. Bloom been permitted to conduct his own discovery, he would have questioned TGC/Farkas Funding, LLC's members on the basis of their alter ego arguments and assumptions with respect to First 100 and Mr. Bloom.

Mr. Bloom's denial of his due process rights should not be overlooked, as

every step of the way he was "treated" as a defendant (being served, being ordered to show cause why he should not be found in contempt) without being given the evidentiary and procedural due process rights of an actual party.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING THE AMOUNT OF FEES AND COSTS

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 its Answering Brief, TGC/Farkas Funding, LLC contends that the amount awarded by the district court was "less than the amount sought by TGC/Farkas [Funding, LLC]." AB at p. 42. The only reason the amount awarded was "less" than what was sought is because TGC/Farkas Funding, LLC tried to claim fees of a different attorney who was not even representing TGC/Farkas Funding, LLC. *See* AA0999 (TGC/Farkas Funding, LLC admitting that it included the fees and costs incurred by Ken Hogan, Esq. even though he "did not represent [TGC/Farkas Funding, LLC]).

The district court subtracted the $10,120 being sought on behalf of Ken Hogan, Esq., and awarded TGC/Farkas Funding, LLC the remainder of its fees and costs sought in its entirety, which included all of the fees and costs being sought by Garman Turner Gordon without any offset whatsoever.

Notably, TGC/Farkas Funding, LLC does not dispute that the district court failed to make any specific findings as to the billing rates of Garman Turner Gordon, which goes to the first factor as to whether the billing rates match the qualities of the advocate. This includes the lack of any findings as to why attorney Dylan Ciciliano's billing rates increased dramatically without explanation from $345 in 2020 to $385 in 2021. Contrary to TGC/Farkas Funding, LLC's implications otherwise, First 100 was not required to put on "evidence" showing that the increase was unreasonable – the increase and the lack of any corresponding explanation or findings on the increase speaks for itself.

Similarly, TGC/Farkas Funding, LLC also does not dispute that the district court failed to make any specific findings as to the $215 hourly billing rate for paralegal work performed on behalf of Garman Turner Gordon. Nor are there any findings as to whether it was reasonable for a paralegal to bill 13 hours for simply attending an evidentiary hearing.

Similarly, TGC/Farkas Funding, LLC does not dispute that the district court failed to make findings as to the reasonableness of the fees incurred on the three standard motions that were filed in this matter (a motion to compel, motion to enforce settlement, and motion for an order to show cause), nor did the district court make specific findings as to the reasonableness of the fees incurred in preparing for and appearing at the evidentiary hearing.

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.

Nor does TGC/Farkas Funding, LLC dispute that the fee award includes $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. *See Detwiler v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 137 Nev. Adv. Op. 18, 486 P.3d 710, 713 (2021) ("An attorney fee award must not include fees that were incurred before the contemptuous conduct began, and an award of other damages must be based on evidence of an actual loss.").

Nor does TGC/Farkas Funding, LLC dispute that the district court failed to make any findings as to the reasonableness of the work performed related to depositions. TGC/Farkas Funding, LLC's main argument in opposition to First 100's appeal is that the district court was "well within its discretion in ignoring First

100's . . . objections to respondent's fee request." AB at p. 46. But that is not the issue. The issue is whether the minimal findings that were made and set forth in the district court's Order Awarding Fees and Costs were sufficient and included a proper analysis of the *Brunzell* factors. First 100 contends that the order is defective in that respect, as the district court made a conclusory finding that the fees satisfied the *Brunzell* factors without making any findings as to how that was the case. AA1338. This was an abuse of discretion.

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

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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 16th day of February 2022.

Respectfully submitted,

MAIER GUTIERREZ & ASSOCIATES

/s/ Danielle J. Barraza
JASON R. MAIER, ESQ.
Nevada Bar No. 8557
JOSEPH A. GUTIERREZ, ESQ.
Nevada Bar No. 9046
DANIELLE J. BARRAZA, ESQ.
Nevada Bar No. 13822
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for First 100, LLC and 1st One Hundred Holdings, LLC

CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this reply 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 4,211 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 16th day of February 2022.

Respectfully submitted,

MAIER GUTIERREZ & ASSOCIATES

/s/ Danielle J. Barraza
JASON R. MAIER, ESQ., NV Bar No. 8557
JOSEPH A. GUTIERREZ, ESQ., NV Bar No. 9046
DANIELLE J. BARRAZA, ESQ., NV Bar No. 13822
8816 Spanish Ridge Ave., Las Vegas, NV 89148
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that on the 16th day of February 2022, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: **APPELLANTS' REPLY BRIEF** shall be made in accordance with the Master Service List as follows:

Erika P. Turner, Esq.
Dylan T. Ciciliano, Esq.
GARMAN TURNER GORDON, LLP
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
Attorneys for TGC Farkas Funding LLC

/s/ Brandon Lopipero
An Employee of MAIER GUTIERREZ & ASSOCIATES