IN THE SUPREME COURT OF THE STATE OF NEVADA

JDD, LLC; TCS PARTNERS, LLC; JOHN SAUNDERS; and TREVOR SCHMIDT,

Petitioners,

vs.

THE HONORABLE TIMOTHY C. WILLIAMS, EIGHTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF CLARK,

Respondent,

-and-

ITEM 9 LABS CORP. f/k/a Airware Labs Corp. and Crown Dynamics Corp.; ITEM 9 PROPERTIES, LLC; STRIVE MANAGEMENT, LLC f/k/a Strive Life; VIRIDIS GROUP I9 CAPITAL, LLC; VIRIDIS GROUP HOLDINGS, LLC; SNOWELL HOLDINGS, LLC; ANDREW BOWDEN; DOUGLAS BOWDEN; BRYCE SKALLA; and CHASE HERSCHMAN,

Real Parties in Interest.

Case No.:

District Court Case No. A-20-811232-C

PETITION FOR A WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of the Court may evaluable possible disqualifications or recusal.

JDD, LLC is owned by private individuals, and does not have a parent corporation, nor any publicly held entity that has more than a 10% interest in JDD, LLC.

TCS, LLC is owned by private individuals, and does not have a parent corporation, nor any publicly held entity that has more than a 10% interest in JDD, LLC.

Petitioners John Saunders and Trevor Schmidt are individuals, and are not an entity.

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All Petitioners were represented by retained counsel Lee Igoldy, Esq. before the District Court. The undersigned counsel and Mr. Igoldy, Esq. expect to appear on behalf of petitioners in these original proceedings.

Dated this 9th day of August, 2021.

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NRAP 17 ROUTING STATEMENT

This matter involves an issue of first impression that is directly related to a matter upon which the Nevada Supreme Court issued an opinion in *145 East Harmon Trust II Trust v. Residences at MGM Grand – Tower A Owner's Assoc.,* 136 Nev. 115, 460 P.3d 455 (Nev. 2020). In *145 East Harmon*, the Nevada Supreme Court addressed the question of whether a defendant who obtained a dismissal ***with*** prejudice qualifies as "prevailing party" for the purposes of an attorney fee award. *See id.* This writ petition raises the opposite question of first impression, i.e., whether a defendant who obtains a dismissal ***without*** prejudice is a "prevailing party." Accordingly, this petition could fall within NRAP 17(a)(12), as a matter presumptively retained by the Supreme Court.

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The issues raised in this writ petition do not presumptively fall within any categories assigned to the Nevada Court of Appeals. While this is an pretrial writ petition, it does not involve a discovery order or a motion in limine. *See* NRAP 17(b)(13). Because the underlying dismissals were without prejudice and did not proceed to judgment, this petition does not concern a "postjudgment order." *See* NRAP 17(b)(7).

Dated this 9th day of August, 2021.

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INTRODUCTION

This writ petition raises the corollary issue to the one recently decided by this Court in *145 East Harmon II Trust v. Residences at MGM Grand – Tower A Owners' Association,* 136 Nev. 115, 460 P.3d 455 (2020). In *145 East Harmon,* this Court held that a party who is dismissed ***with*** prejudice is generally a "prevailing party" for purposes of NRS 18.010(2)(b). *Id.* at 120, 460 P.3d at 459. This writ petition asks this Court to clarify whether parties who are dismissed ***without*** prejudice qualify as a "prevailing party" under NRS 18.010(2)(b).

The line of federal authority relied upon by this Court in *145 East Harmon II Trust* also holds that parties who are dismissed without prejudice are not prevailing parties for purposes of attorney fee awards. *See Oscar v. Alaska Dep't of Educ. & Early Dev.,* 541 F.3d 978 (9th Cir. 2008); *Cadkin v. Loose,* 569 F.3d 1142 (9th Cir. 2009). These authorities are in conformity with existing principles of Nevada law, and Petitioners respectfully request that this Court entertain its discretion to clarify this important issue of Nevada law.

STATEMENT OF THE ISSUES

Whether the District Court abused its discretion in awarding attorneys fees to real parties in interest since parties who are dismissed without prejudice are not "prevailing parties" for purposes of fee awards under NRS 18.010(2)(b)?

STATEMENT OF THE FACTS

I. THE PARTIES

A. PETITIONERS

Petitioners JDD, LLC ("JDD") and TCS Partners, LLC ("TCS") are entities that invested approximately $741, 250 into defendant Harvest Foundation, LLC ("Harvest"), which engages in cannabis cultivation and distribution in Nevada. 1 Petitioners' Appendix ("PA") 1-9. Petitioner John Saunders ("Saunders") manages JDD, and petitioner Trevor Schmidt ("Schmidt") manages TCS (collectively, these parties are referred to as "Petitioners"). *Id.* at 3.

B. DEFENDANTS WHO ARE NOT REAL PARTIES IN INTEREST TO THIS PETITION AT THIS TIME.

Harvest is managed by defendants and members Donald Burton and Larry Lemons, and initially had Jeffrey Yokiel and Jerome Yokiel as additional members. *Id.* at 5. These are collectively referred to as the "Harvest Parties." This litigation arose after the Harvest Parties conspired with additional defendant and/or real parties in interest to deprive Petitioners of their rights and interests in Harvest. *Id.* at 14-17.

Specifically, in 2019, Petitioners discovered that the Harvest Parties had entered into a Membership Interest Purchase Agreement with defendant MariMed, Inc., in which the Harvest Parties misrepresented that they owned 100% of Harvest, and that JDD and TCS were not owners. *Id.* at 14. MariMed, Inc. is managed by defendants Robert Fireman and Jon Levine, who have had actual knowledge since

2016 of TCS' and JDD's interests. *Id.* These parties are referred to as the "MariMed Parties." Not only did this agreement deprive JDD and TCS of their interests in Harvest, it also breached the provisions of JDD's and TCS's agreements with the Harvest Parties which granted JDD and TCS a right of first refusal to purchase the other member's interests. *Id.* at 14-15.

Another provision of JDD's and TCS's agreements with Harvest provided that Harvest would not enter into any additional ventures regarding cannabis operations in Nevada without JDD's and TCS's express authorization. *Id.* at 10. To circumvent this explicit promise, the individual Harvest Parties formed two new entities separate from Harvest to conduct cannabis operations in Nevada. These entities were formed with defendant Sarah Gullickson ("Gullickson"). *Id.* at 15-17. Two of the entities that were formed by the individual Harvest Parties are Strive Wellness of Nevada, LLC and Strive Wellness of Nevada 2, LLC (collectively, the "Strive Parties"). *See id.*

C. REAL PARTIES IN INTEREST

Petitioners discovered that the Harvest Parties and Gullickson created the Strive Parties to facilitate a cannabis joint venture between Harvest and real parties in interest Strive Management, LLC, Item 9 Labs Corp. and Item 9 Properties, LLC. *Id.* at 15-17. Real parties in interest Viridis Group I9 Capital, LLC Viridis Group Holdings, LLC, Andrew Bowden, Douglas Bowden, Bryce Skalla, Jeffrey Rassas

and Chase Herschman are additional investors. *Id.* at 3-7. These parties are referred to as the "Item 9 Parties." Because Petitioners did not approve this joint venture, it violated the terms of their agreements with Harvest. *Id.* at 17.

Petitioners also discovered that, at some point, defendant Larry Lemons may have transferred his interest to real party in interest Snowell Holdings, LLC ("Snowell"), which is wholly owned by him, in order to obscure his misdeeds. *Id.* at 4.

II. THE LITIGATION

A. THE MOTIONS TO DISMISS

Petitioners filed a complaint asserting multiple claims for relief against the Harvest Parties, the MariMed Parties, Gullickson, the Strive Parties, the Item 9 Parties and Snowell. *Id.* at 1-33. In response, the MariMed Parties, Gullickson, the Item 9 Parties, and Snowell all separately moved to dismiss Petitioners' claims. *Id.* at 64-123; 2 PA 173, 224.

Important for purposes of this writ petition, the Item 9 Parties moved to dismiss Petitioners' claim for lack of personal jurisdiction over the Bowdens, Rassas, Skalla, Viridis Group I9 Capital, LLC, and Viridis Group Holdings, LLC.[1]

[1] Item 9 Labs Corp., Item 9 Properties, LLC, Herschman and Strive Management, LLC did not move for dismissal on the basis of jurisdiction. 1 PA 84-87.

1 PA 84-87. The Item 9 Parties further argued that Petitioners lacked standing to assert a claim against the Item 9 Parties because Petitioners purportedly were never transferred an interest for failing to comply with Nevada's cannabis licensing requirements. *Id.* at 87. Finally, the Item 9 Parties argued that Petitioners' complaint failed to state a claim against any of the Item 9 Parties under NRCP 12(b)(6). *Id.* at 89-96.

In their opposition, Petitioners agreed to ***voluntarily*** dismiss ***without prejudice*** all claims against Andrew Bowden, Douglas Bowden, Rassas, Skalla, and Herschman. *Id.* at 143. However, Petitioners argued that Viridis Group I9 Capital, LLC, and Viridis Group Holdings, LLC were subject to specific jurisdiction by reason of their contacts and business dealings in the State of Nevada. *Id.*

Petitioners also agreed to ***voluntarily*** dismiss ***without prejudice*** their claims for alter ego, intentional interference with contractual relations, intentional interference with prospective economic advantage, equitable relief claims and attorneys fees claims against the Item 9 Parties. *Id.* at 146, 149, 150. Petitioners argued, however, that their remaining claims were viable claims against all remaining Item 9 Parties. *Id.*

Also important for purposes of this writ petition is the fact that Snowell moved to dismiss for lack of personal jurisdiction. *Id.* at 64-70. Snowell did not raise any

other arguments in its motion. *Id.* Petitioners opposed, and argued that the District Court had specific personal jurisdiction over Snowell Holdings. *Id.* at 124-26.

B. THE DISTRICT COURT GRANTS THE ITEM 9 PARTIES' AND SNOWELL'S MOTIONS TO DISMISS WITHOUT PREJUDICE[2]

After hearing arguments on Snowell's motion to dismiss, the District Court stated that it would grant the motion to dismiss, as follows:

> The dismissal will be ***without prejudice***, and if something happens down the road. But for the purposes of today, I'm going to grant the motion.

Id. at 195-96 (emphasis added).

After hearing arguments on the Item 9 Parties' motion to dismiss, the District Court stated that it would grant the motion to dismiss, as follows:

> As far as the Viridis defendants are concerned and that includes Viridis Group Holdings and also Viridis Group I9 Capital, LLC, as it pertains to personal jurisdiction in this matter, I'm going to grant the motion in regards to that issue.

Id. at 218-19. The District Court further stated that it would grant the motion to dismiss on the claims asserted against Item 9 Labs Corp., Item 9 Properties and Strive Management, but specifically stated: "last, but not least, the dismissal at this stage will be ***without prejudice***." *Id.* (Emphasis added).

[2] The District Court also granted the MariMed Parties' and Gullickson's motion to dismiss without prejudice.

The District Court then entered written orders granting Snowell's and the Item 9 Parties' motions to dismiss. 2 PA 265-78, 368-83. In its order granting the Item 9 Parties' motion to dismiss, the District Court found that Petitioners "have voluntarily dismissed without prejudice" the individual Item 9 Parties, and voluntarily dismissed without prejudice their claims for alter ego, intentional interference with contractual relations, intentional interference with prospective economic advantage, equitable relief claims and attorneys fees claims against all of the Item 9 Parties. *Id.* at 370 . The District Court then granted Viridis Group Holdings, and Viridis Group I9, LLC's motion to dismiss for lack of personal jurisdiction. *Id.* at 374 . Finally, the District Court granted Item 9 Labs Corp., Item 9 Properties and Strive Management's motion to dismiss for failure to state a claim for relief ***without prejudice.*** *Id.* at 375 . The District Court also entered a written order granting Snowell Holding's motion to dismiss for lack of personal jurisdiction. *Id.* at 265-66.

C. THE MOTIONS FOR ATTORNEY FEES

Following entry of the orders granting the motions to dismiss without prejudice, both Snowell and the Item 9 Parties moved for attorney fees under NRS 18.010(2)(b), arguing that they are "prevailing parties" entitled to attorney fees

because Petitioners' complaint was brought in bad faith.[3] 2 PA 248-64, 410-94. In opposing both motions, Petitioners argued that neither Snowell nor the Item 9 Parties were "prevailing parties" because the District Court's dismissals were all without prejudice. *Id.* at 303; 3 PA 503. Petitioners cited to this Court's opinion in *145 E. Harmon II Trust v. Residences at MGM Grand- Tower A Homeowner's Assoc.,* 136 Nev. 115, 460 P.3d 455 (Nev. 2020) in support of their argument. *See* 2 PA 303; 3 PA 503. Neither Snowell nor the Item 9 Parties cited, distinguished, or addressed this Court's holding in *145 E. Harmon* in their reply briefs. 2 PA 405-09; 4 PA 884-895.

The District Court granted both motions for attorney fees.[4] 4 PA 883, 897-911. In its order granting the Item 9 Parties' motion for fees, the District Court did not make any finding regarding whether the Item 9 Parties are "prevailing parties;" instead, it simply found that Petitioners' claims were groundless and, therefore, granted fees. *Id.* at 897-911 . The District Court awarded the Item 9 Parties $79,984.83 in attorney fees and costs, *see id.* and, in a minute order, awarded Snowell $15,620.00 in attorney fees and costs. 4 PA 883. This writ petition follows.

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[3] As of the date of this writ petition, the MariMed Parties and Gullickson have not yet moved for attorney fees.

[4] Currently, the District Court has only issued a minute order granting Snowell Holdings' motion for attorney fees and no written order has been entered. 4 PA 883.

BASIS FOR WRIT RELIEF

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO ENTERTAIN PETITIONERS' WRIT OF MANDAMUS.

Petitioners seek a writ of mandamus from this Court reversing the District Court's award of fees under NRS 18.010(2)(b) to the real parties in interest because parties who are dismissed without prejudice, either voluntarily or involuntarily, are not a "prevailing party" under Nevada law. This Court has discretion to entertain a writ petition. *Matter of William J. Raggio Fam. Tr.,* 136 Nev. 172, 175, 460 P.3d 969, 972 (Nev. 2020). "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." *Martinez Guzman v. Second Jud. Dist. Ct.,* 136 Nev. 103, 105, 460 P.3d 443, 446 (Nev. 2020) (internal quotations omitted); *see also* NRS 34.160. Petitioners request that this Court exercise its discretion to entertain this writ because (1) mandamus relief is appropriate, and (2) this petition involves an important issue of law that needs clarification and judicial economy favors consideration of this writ.

A. MANDAMUS RELIEF IS APPROPRIATE

Mandamus relief is appropriate because petitioners do not have a speedy or adequate legal remedy. Unlike attorney fee awards following judgment, interlocutory fee awards like the kind challenged in this writ petition do not have a

direct right of appeal. *See* NRAP 3A(b)(8) (allowing appeals for special orders entered ***after*** judgment). This Court has previously recognized that prejudgment district court orders awarding attorney fees are proper subjects of mandamus relief. *See Hawkins v. Eighth Jud. Dist. Ct.,* 133 Nev. 900, 902, 407 P.3d 766, 769 (Nev. 2017) (granting a writ of mandamus to clarify the factors a district court must consider when awarding attorney fees as a sanction); *Sun Realty v. Eighth Jud. Dist. Ct.,* 91 Nev. 774, 775, 542 P.2d 1072, 1073 (1975) (granting a writ of certiorari to review a prejudgment award of attorney fees).

Mandamus, rather than prohibition, is the proper remedy. Attorney fee awards are subject to the district court's discretion, *Berkson v. LePome,* 126 Nev. 492, 504, 245 P.3d 560, 568 (2010), and mandamus is the proper remedy to challenges of decisions involving discretionary rulings by the district courts. *City of Sparks v. Second Jud. Dist. Ct.,* 112 Nev. 952, 953 n.1, 920 P.2d 1014, 1015 n.1 (1996).

Finally, although "the availability of an [eventual] appeal may be taken into consideration in determining the propriety of granting a writ of mandamus, it is not jurisdictional." *LaGue v. Second Jud. Dist. Ct.,* 68 Nev. 131, 133, 229 P.2d 162, 163 (1951). This is because an eventual appeal may not be a speedy or adequate legal remedy. *Id.* This case is in its infancy, and if the real parties in interest collect on

their attorney fee awards, Petitioners stand to lose approximately $100,000 which they may not be able to recover should they ultimately prevail in an eventual appeal.

B. THIS PETITION INVOLVES AN IMPORTANT ISSUE OF LAW THAT NEEDS CLARIFICATION AND JUDICIAL ECONOMY FAVORS GRANTING THE PETITION.

This Court will entertain its discretion to consider a writ of mandamus "even where there is an adequate legal remedy at law . . . when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the writ petition." *Hawkins,* 133 Nev. at 902, 407 P.3d at 769 (internal quotations omitted). Both of these considerations are present.

1. Whether a Party Who is Dismissed Without Prejudice is a 'Prevailing Party' is an Important Issue of Law Requiring Clarification.

Whether a party who is dismissed ***without prejudice*** prior to judgment is a "prevailing party" for purposes of attorney fee awards under NRS 18.010(2)(b) is an important issue of first impression that requires clarification form this Court. This Court recently issued a published opinion in *145 East Harmon II Trust v. Residences at MGM Grand – Tower A Owners' Assoc.*, 136 Nev. 115, 460 P.3d 455 (2020)[5] addressing the corollary argument, i.e., whether a party who is dismissed ***with*** prejudice prior to judgment is a "prevailing party" under NRS 18.010(2)(b). Accordingly, this Court has indicated that the interpretation of "prevailing party"

[5] A copy of *145 East Harmon II Trust v. Residences at MGM Grand – Tower A Owners' Association* is attached to this brief in the Addendum.

under NRS 18.010(2)(b) as it pertains to prejudgment fee awards is an "issue of first impression," requires clarification of a rule of law previously announced by this Court, and/or is "an issue of public importance that has application beyond the parties." NRAP 36(c)(1).

In *145 East Harmon*, this Court held that a defendant who is dismissed ***with*** prejudice prior to judgment qualifies as a "prevailing party" under NRS 18.010(2)(b) for purposes of awarding attorney fees. 136 Nev. at 120, 460 P.3d at 459. In reaching this holding, this Court analyzed the federal authority which distinguishes between dismissals ***with*** prejudice and dismissals ***without*** prejudice for purposes of "prevailing party" determinations in fee disputes. *See id. at* 118-120, 460 P.3d at 458-59. These federal authorities, cited to with approval by this Court, generally hold that while dismissals with prejudice convey "prevailing party" status, dismissals ***without*** prejudice do not. *See id.; see also Cadkin v. Loose,* 569 F.3d 1142, 1148-49 (9th Cir. 2009); *Szabo Food Serv., Inc. v. Canteen Corp.,* 823 F.2d 1073, 1076-77 (7th Cir. 1987).

Since *145 East Harmon* solely concerned a defendant that was dismissed with prejudice prior to judgment, this Court left open the question of whether a defendant who is dismissed without prejudice is a "prevailing party." *See* 136 Nev. at 120, 460 P.3d at 459. This Court has not yet addressed this issue in any published opinion, despite the frequency with which it arises. For example, this Court previously issued

an unpublished order finding that a party who was dismissed without prejudice is not a prevailing party entitled to an attorney fee award. *See Azzarello v. Humboldt River Ranch Assoc.,* No. 68147, 2016 WL6072420 (Nev. Oct. 14, 2016). Because *Azzarello* is not published, however, it is not "mandatory precedent," and may only be cited to as "persuasive authority." NRAP 36(c)(2)-(3).

Because there is no published Nevada case directly addressing this specific factual context, the District Court found that the Item 9 Parties and Snowell Holdings were "prevailing parties" for purposes of NRS 18.010(2)(b). This Court should exercise its discretion to entertain this writ petition and clarify this important issue of Nevada law.[6]

2. Judicial Economy Favors Entertaining this Writ.

Entertaining this writ petition will also further interests of judicial economy.

[6] Similarly, although this Court has issued unpublished opinions finding that a dismissal for lack of jurisdiction is without prejudice, there is no published authority from this Court clarifying that issue. *See, e.g., Smaellie v. City of Mesquite,* No. 69741, 2017 WL1397400 at *2 (Nev. Apr. 17, 2017). While NRCP 41(b) dictates that dismissals for lack of jurisdiction are not "adjudication on the merits" for purposes of res judicata, NRCP 41(b) is similarly silent as to when and whether a dismissal for lack of jurisdiction may be with prejudice. This Court's clarification of this important issue would be beneficial as courts routinely dismiss complaints for lack of jurisdiction with prejudice. *See Smaellie,* 2017 WL1397400 at *2 (reversing the portion of a district court's order that dismissed with prejudice because the basis for dismissal was lack of jurisdiction); *see also Nev. Trading Co., LLC v. Karpel,* No. 75317-COA, 2019 WL 6974768 (Nev. App., Dec. 18, 2019) (reversing a district court's dismissal with prejudice on the basis of jurisdictional grounds).

This writ petition presents similar judicial economy issues found by this Court in *Hawkins.* In *Hawkins,* this Court noted that the petition raised an important issue of law and the writ petition involved an issue that was "isolat[ed] from the merits of the claims below." 133 Nev. at 902-03, 407 P.3d at 769. Similarly, here, the important issue of law raised in this petition is isolated from the merits of the claims below.

Furthermore, this Court has also recognized that judicial economy favors entertaining writ petitions if the issue is capable of being relitigated since this Court's "extraordinary intervention at this time will prevent district courts from expending judicial resources on relitigating matters . . . and, additionally, will save petitioners the unnecessary costs of relitigation." *Nalder v. Eighth Jud. Dist. Ct.,* 136 Nev. 200, 203, 462 P.3d 677, 682 (Nev. 2020); *see also Eureka Cnty. v. Seventh Jud. Dist. Ct.,* 134 Nev. 275, 279, 417 P.3d 1121, 1124 (Nev. 2018) (entertaining a writ petition because of the foreseeable risk of future litigation over similar issues).

There is a concrete risk of relitigation of this identical issue. In addition to Snowell and the Item 9 Parties, Gullickson and the MariMed Parties were also dismissed without prejudice. Those parties have not filed a motion for attorney fees under NRS 18.010(2)(b), but are likely to do so. Furthermore, motions for attorney fees accompany almost every successful motion in litigation practice. This Court implicitly recognized the prevalence of these motions when it issued its published

opinion in 2020, *see 145 East Harmon,* 136 Nev. 115, 460 P.3d 455, and this Court has already been faced with appeals challenging fee awards to parties who are dismissed without prejudice. *See Azzarello,* 2016 WL6072420 at *2. Dismissals without prejudice are common in light of Nevada's well-established notice pleading standards, NRCP(a), Nevada's right to amend deficient complaints, NRCP 15(a), and Nevada's long-standing policy that "[d]ismissal with prejudice is a harsh remedy which should be utilized only in extreme situations." *Esworthy v. Williams,* 100 Nev. 212, 214, 678 P.2d 1149, 1150 (1984). Accordingly, judicial economy also warrants this Court's discretion to entertain this writ petition.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING FEES BECAUSE A PARTY WHO IS DISMISSED WITHOUT PREJUDICE IS NOT A "PREVAILING PARTY."

A. STANDARD OF REVIEW

This Court reviews a district court order awarding attorney fees for an abuse of discretion. *Berkson,* 126 Nev. at 504, 245 P.3d at 568. However, when an attorney fee award implicates a question of law such as statutory interpretation, this Court reviews the district court's order de novo. *145 East Harmon,* 136 Nev. at 118, 460 P.3d at 457.

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B. DISMISSALS WITHOUT PREJUDICE DO NOT CONVEY PREVAILING PARTY STATUS UNDER NRS 18.010(2)(b).

Under NRS 18.010(2)(b), "the court may make an allowance of attorney's fees to a ***prevailing party***" if "the court finds that the claim . . . of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." (Emphasis added). Thus, unless a party is a "prevailing party," a fee award is not proper. *See Williams v. United Parcel Servs.,* 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013) (holding that statutes are enforced as written with effect given to each word and phrase).

"A party prevails under NRS 18.010 if it succeeds on any significant issue in litigation . . . ." *MB Am., Inc. v. Alaska Pac. Leasing,* 132 Nev. 78, 88, 367 P.3d 1286, 1292 (Nev. 2016) (internal quotations and alterations omitted). However, "the action must proceed to judgment" in order for a party to "prevail." *Sun Realty v. Eighth Jud. Dist. Ct.,* 91 Nev. 774, 775 n.2, 542 P.2d 1072, 1074 n.2 (1975).

In *145 East Harmon,* this Court clarified that the "judgment" contemplated by NRS 18.010 is any decision which prevents a subsequent adjudication on the merits of the claims at issue. 136 Nev. at 120, 460 P.3d at 459. *145 East Harmon* concerned parties who settled and agreed to dismiss the claims ***with*** prejudice while a dispositive motion was pending. 136 Nev. at 118, 460 P.3d at 458. This Court found that "[t]he weight of federal authority is that a voluntary dismissal ***with*** prejudice

confers prevailing party status on the defendant" because dismissals with prejudice "equate[] to a judgment on the merits." *Id.* (Emphasis added).

To reach its holding, this Court analyzed federal authorities which distinguish between dismissals ***with*** prejudice and dismissals ***without*** prejudice. *See id. at* 118-120, 460 P.3d at 458-59; *see also Cadkin,* 569 F.3d at 1148-49; *Szabo Food Serv.,* 823 F.2d at 1076-77. These authorities hold that a dismissal ***without*** prejudice does not confer prevailing party status "'because the defendant remains subject to the risk of re-filing.'" *145 E. Harmon,* 136 Nev. at 120, 460 P.3d at 459 (quoting *Cadkin,* 569 F.3d at 1148).

This line of federal authority arises from *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598 (2001), in which the United States Supreme Court held that a voluntary dismissal without prejudice did not permit an award of attorney fees under a federal "prevailing party" fee shifting statute. *Id.* at 600. Reasoning that the plain meaning of "prevailing party" was "'[a] party in whose favor judgment is rendered,'"[7] the Supreme Court held that "prevailing party" status requires both (1) a judgment or its equivalent effect, and (2) "a material alteration of the legal relationship of the

[7] *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598, 600 (2001) (quoting *Blacks Law Dictionary* 1145 (7th ed. 1999)). The definition of "prevailing party" has not changed. *See* Party, *Black's Law Dictionary* (11th ed. 2019).

parties." *Id.* at 603-04 (citing to *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792 (1989)).

The *Buckhannon* Court's "material alteration" prong is the "significant issue test" adopted by the Supreme Court in *Texas State Teachers Assoc.,* 489 U.S. 782.[8] As the Supreme Court in *Texas State Teachers Assoc.,* explained:

> If the [party] has succeeded on any significant issue in the litigation which achieved some of the benefit of the parties sought in bringing suit, the [party] has crossed the threshold to a fee award of some kind. The floor in this regard is provided by our decision in *Hewitt v. Helms,* 482 U.S. 755, 107 S. Ct. 2672, 96 L.E.2d 654 (1987). As we noted there, '[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.' Thus, at a minimum, to be considered a prevailing party within the meaning of [federal fee shifting statutes], the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.

Id. 792-93 (first and third internal quotations omitted, internal citations and alterations omitted) (quoting *Hewitt,* 482 U.S. at 760-61).

Since *Buckhannon,* the federal courts hold that dismissal without prejudice does not convey "prevailing party status." As these courts explain, "[a] dismissal without prejudice means no one has prevailed; the litigation is just postponed with the possibility of the winner being decided in a different arena." *Dunster Live, LLC v. LoneStar Logos Mgmt. Co.,* 908 F.3d 948, 951 (5th Cir. 2018).

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[8] Since *Buckhannon,* federal courts have used this definition synonymously with the "significant issue" test for prevailing party status under federal fee shifting statutes. *See, e.g., Nat'l Amusements, Inc. v. Borough of Palmyra,* 716 F.3d 57, 64-65 (3d Cir. 2013); *Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.,* 374 F.3d 66, 79 (2d Cir. 2004).

Thus, in *Oscar v. Alaska Department of Education and Early Development,* 541 F.3d 978 (2008), the Ninth Circuit Court of Appeals found that an ***involuntary*** dismissal without prejudice pursuant to a motion to dismiss did not confer prevailing party status because (1) "dismissal without prejudice is not a decision on the merits" sufficient to support a judgment, and (2) involuntary "dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing." *Id.* at 981-82 (internal quotations omitted). One year later, the Ninth Circuit Court of Appeals relied upon *Oscar* to find that a ***voluntary*** dismissal without prejudice similarly does not convey prevailing party status. *Cadkin,* 569 F.3d at 1148-49.

This petition raises the same factual pattern addressed by the Ninth Circuit Court of Appeals in *Oscar,* i.e., involuntary dismissal without prejudice pursuant to a motion to dismiss, and *Cadkin,* i.e., voluntary dismissal without prejudice at a later stage in litigation. For the reasons this Court adopted the reasoning in *Cadkin* for voluntary dismissals ***with*** prejudice, so too should it adopt the reasoning in *Oscar* and *Cadkin* for voluntary and involuntary dismissals ***without*** prejudice.

Oscar and *Cadkin*, and the line of authority from which they arise, align with existing Nevada law. Nevada law is clear that dismissals without prejudice do not have a preclusive effect sufficient to support a judgment on the merits. *See Clark v. Columbia/HCA Info Servs., Inc.,* 117 Nev. 468, 481, 25 P.3d 215, 224 (2001)

("However, a dismissal without prejudice is not a final adjudication on the merits."); *see also* NRCP 41(a)-(b). And, Nevada has long applied the "significant issue" test to determine prevailing party status for purposes of fee awards. *MB Am., Inc.* 132 Nev. at 88, 367 P.3d at 1292. The "material alteration" requirement discussed in *Oscar* and *Cadkin* is the "significant issue test." *See Texas State Teachers Assoc.,* 489 U.S. at 792-93. This Court has now twice applied the "material alteration" standard to determine whether a party succeeded on a significant issue such that they were prevailing party entitled to a fee award. *See 145 East Harmon,* 136 Nev. at 120, 460 P.3d at 459; *see also Azzarello,* 2016 WL6072420 at *1 (citing to *Buckhannon* for the proposition that a prevailing party must obtain a legal alteration of their relationships to justify a fee award). Accordingly, this Court should adopt the reasoning of *Oscar* and *Cadkin,* and hold that both involuntary and voluntary dismissals without prejudice do not confer prevailing party status.

C. THE DISTRICT COURT ABUSED ITS DISCRETION AWARDING FEES TO THE ITEM 9 PARTIES AND SNOWELL, AS THEY ARE NOT PREVAILING PARTIES.

The District Court abused its discretion when it awarded fees to the Item 9 Parties and Snowell because they were all dismissed without prejudice and are, therefore, not prevailing parties for purposes of NRS 18.010(2)(b). A district court abuses its discretion when its decision contravenes the law. *LVMPD v. Blackjack Bonding,* 131 Nev. 80, 89, 343 P.3d 608, 614 (Nev. 2015).

The District Court dismissed Snowell, Viridis Group I9 Capital, LLC, Viridis Group Holdings, LLC and Strive Management for lack of personal jurisdiction. 2 PA 265-78, 368-83. While this Court has not explicitly addressed this issue, dismissals for lack of jurisdiction are always without prejudice,[9] *see Freeman v. Oakland Unified Sch. Dist.,* 179 F.3d 846, 847 (9th Cir. 1999), and the District Court did specify that its dismissals of these parties were without prejudice. 2 PA 368-83. Because Snowell, Viridis Group I9 Capital, LLC, Viridis Group Holdings, LLC and Strive Management were dismissed without prejudice, they are not "prevailing parties" for purposes of NRS 18.010(2)(b). In addition to the fact that the litigation may be refiled against them in another forum, these dismissals were not merit based and did not involve any "significant issue."

Petitioners voluntarily agreed to dismiss without prejudice Andrew Bowden, Douglas Bowden, Rassas, Skalla, and Herschman. 2 PA 368-83. Petitioners also voluntarily dismissed multiple claims against the remaining remaining Item 9 Parties. *Id.* Voluntary dismissals without prejudice do not convey prevailing party status. *Cadkin,* 569 F.3d at 1148-49; *see also U.S. v. $70,670.00 in U.S. Currency,*

[9] If a court lacks jurisdiction over the subject matter or the persons, it cannot enter a valid judgment on the merits. *C.H.A. Venture v. G.C. Wallace Consulting Eng'rs, Inc.*, 106 Nev. 381, 383, 794 P.2d 707, 708 (1990). Therefore, "[a] suit dismissed for lack of jurisdiction cannot *also* be dismissed 'with prejudice;' that's a disposition on the merits, which only a court with jurisdiction may render . . . 'No jurisdiction' and 'with prejudice' are mutually exclusive." *Frederiksen v. City of Lockport,* 384 F.3d 437, 438 (7th Cir. 2004).

929 F.3d 1293, 1303 (11th Cir. 2019); *Szabo Food Serv., Inc. v. Canteen Corp.,* 823 F.2d 1073, 1076 (7th Cir. 1987). Accordingly, the District Court abused its discretion when it awarded fees to these voluntarily dismissed parties.

Finally, the District Court involuntarily dismissed without prejudice Petitioners' remaining claims against the Item 9 Parties. 2 PA 368-83. Again, this does not convey prevailing party status. *See Oscar,* 541 F.3d at 981-82. Accordingly, this Court should grant Petitioner's writ of mandamus and reverse the District Court's awards of attorney fees.

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CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court entertain its discretion to grant Petitioners' writ of mandamus, and reverse the District Court's order awarding fees to the real parties in interest.

Dated this 9th day of August, 2021.

FENNEMORE CRAIG, P.C.

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VERIFICATION

Therese M. Shanks, being first duly sworn, deposes and says under penalty of perjury:

That she is the attorney for JDD, LLC, TCS Partners, LLC, John Saunders and Trevor Schmidt named in the above-captioned matter; that she has read the attached PETITION FOR A WRIT OF MANDAMUS and knows the contents thereof or believes based upon her information and belief that the facts stated therein are true and correct.

Dated this 9th day of August, 2021.

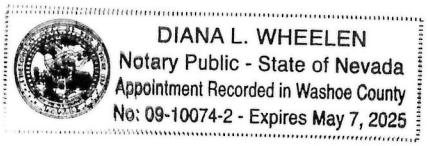
Therese Shanks

Therese M. Shanks
Attorney for Petitioners

Subscribed and sworn before me
This 9th day of August, 2021.

Diana L. Wheelen

NOTARY PUBLIC



CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petitioners' Writ of Mandamus 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 Writ has been prepared in a proportionally spaced typeface using Microsoft Word 16 in 14 font and Times New Roman type.

2. I further certify that this Writ complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Writ exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,199 words.

3. Finally, I hereby certify that I have read this Writ of Mandamus, 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 Writ 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 9th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 9th day of August, 2021, I caused service of a true and correct copy of the foregoing **PETITIONERS' WRIT OF MANDAMUS** by the following means:

X BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

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