No. 83344

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 LAB 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 HERSHMAN,

Real Parties in Interest

ANSWER TO PETITION FOR WRIT OF MANDAMUS FOR REAL PARTIES IN INTEREST ITEM 9 LABS CORP., ITEM 9 PROPERTIES, LLC, STRIVE MANAGEMENT, LLC, VIRIDIS GROUP I9 CAPITAL, LLC, VIRIDIS GROUP HOLDINGS, LLC, ANDREW BOWDEN, DOUGLAS BOWDEN, BRYCE SKALLA, and CHASE HERSHMAN

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of record certifies the following:

Real Party in Interest Item 9 Lab Corp. f/k/a Airway Labs Corp. and Crown Dynamics Corp. is a publicly traded company, but no other publicly held entity has more than a 10% interest in Item 9 Lab Corp.

Real Party in Interest Item 9 Properties, LLC is wholly owned by Item 9 Labs Corp., which is a publicly traded company.

Real Party in Interest Strive Management, LLC f/k/a Strive Life LLC is wholly owned by Item 9 Labs Corp., which is a publicly traded company

Real Party in Interest Viridis Group Holdings, 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 Viridis Group Holdings, LLC.

Real Party in Interest Viridis Group I9 Capital, 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 Viridis Group I9 Capital, LLC.

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Real Parties in Interest Andrew Bowden, Douglas Bowden, Bryce Skalla, and Chase Hershman individuals and not entities.

RESPECTFULLY submitted this 1st day of November, 2021.

SMITH LARSEN & WIXOM

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INTRODUCTION

> You don't file a complaint to conduct discovery. Rule 11 mandates that prior to filing a lawsuit, you have to have sufficient enough facts to support claims for relief and/or jurisdictional issues. If not, it's problematic. It just is.
>
> And when I look at the history of this case, I become somewhat concerned because litigation shouldn't be utilized as a bludgeon, right? It shouldn't. Cases should -- there should be facts that support the complaint, and, hopefully, cases get decided on the merits by the factfinder at the end of the day.

The Honorable Judge Timothy C. Williams, Transcript from June 8, 2021.[1]

This is a case of egregious abuse of the judicial process to extort undeserved money from the Real Parties in Interest (RPI). In short, this type of behavior cannot stand, and the district court properly awarded the Item 9 Defendants their fees and costs. The record shows the extent of Petitioners' threats, unprofessional conduct, and blatant disregard for facts. Petitioners filed a baseless lawsuit which they characterized as a "nuke," designed to leave the Real Parties in Interest as "roadkill in [their] rearview mirror." Indeed, as Judge Williams described it, Petitioners used litigation as a "bludgeon." Despite requests to withdraw their unsupported complaint, Petitioners charged forward. First, Petitioners waited to voluntarily dismiss half of their frivolous claims until *after* the Real Parties in Interest filed a motion to dismiss. Petitioners then continued their remaining unsupported claims

[1] (Real Parties in Interest's Appendix at 14)

through a Motion to Dismiss. Having forced the Real Parties in Interest to waste their time and money, Petitioners now ask the Court to allow them to avoid the consequences of their actions simply because their dismissals were without prejudice. Essentially, Petitioners ask this Court to rule that one can threaten and harass and not face consequences as long as those claims are dismissed voluntarily or without prejudice.

While it is true that this Court has not resolved the question of whether a defendant dismissed without prejudice is a prevailing party, neither *145 East Harmon II Trust v. Residences at MGM Grand - Tower A Owners' Association*, 460 P.3d 455 (Nev. 2020), nor federal case law require this Court to ignore the wrongful conduct of a plaintiff merely because they voluntarily dismiss their claims. Real Parties in Interest were awarded fees and costs for Petitioners' frivolous filing and harassing conduct, and the principle that a plaintiff who brings a frivolous suit may be forced to repay the defendants' legal fees is uncontroversial. In keeping with the text and purpose of the relevant statutory provisions, a defendant may be declared a prevailing party even when a harassing plaintiff has dismissed their claims.

Accordingly, this Court should decline to grant Petitioners' request for discretionary relief. Nonetheless, if the Court determines that review is appropriate, this Court should hold that the district court did not err in finding the Real Parties in Interest were the prevailing parties.

RESTATEMENT OF THE ISSUES PRESENTED

1. Whether a plaintiff may avoid sanctions by voluntarily dismissing its claims after a defendant has filed a motion to dismiss.

2. Whether a defendant who obtains a dismissal without prejudice may ever be considered a "prevailing party" under NRS 18.010(2)(b) and NRS 18.020.

3. Whether a defendant that obtains a dismissal based on a lack of personal jurisdiction is a "prevailing party."

RELEVANT FACTS AND PROCEDURAL BACKGROUND

A. *Petitioners Used Unprofessional, Harassing and Threatening Conduct From the Start*

Before this lawsuit began, a man named Brian Roche sent a series of emails on behalf of JDD, LLC, TCS Partners, LLC, John Saunders, and Trevor Schmidt (collectively "Petitioners") to various employees or members of Item 9 Labs Corp., Item 9 Properties, LLC, Strive Management, LLC; Viridis Group I9 Capital, LLC, Viridis Group Holdings, LLC, including Andrew Bowden, Douglas Bowden, Bryce Skalla and Chase Hershman or their representatives (collectively, the "Item 9 Defendants" or the "RPI"). (Petitioners' Appendix ("PA") at 464–94). Mr. Roche explained that he "was hired [by Petitioners] to come in with a nuclear arsenal and blow up Item 9 Labs" and that Petitioners would be amending their lawsuit to add claims against the Item 9 Defendants unless the Item 9 Defendants assisted Petitioners in their effort to seek relief from other parties. (PA at 464–65). If Item 9

would not ally with Petitioners, Mr. Roche explained, then they would end up as "roadkill in [his] rear view mirror." (PA at 467).

Mr. Roche continually threatened and harassed the Item 9 Defendants, saying such things as:

- "You all are either friend or foe in that regard. I am reaching out to you for help to take the lead to get my guys' money back before a nuclear winter drops on Item 9 for engaging in clear fraud, interference with contract, interference with economic advantage, etc. etc. etc. blah blah blah you know the deal." (PA at 465)

- "I am the fixer. I never stop until the client is paid in full or parties are in jail. … I am the fixer and here to help you help yourself to get my guys their money back." (PA at 465)

- "If you have something meaningful to say feel free to call and please let me know if you are accepting service on the 10 persons or entities that we named to save me some time and money and save my guy from going gangster and banging on everyone's doors over the 4th of July weekend to serve them all." (PA at 475)

- "**TIME FOR TALK IS OVER LET ME KNOW IF YOU ARE ACCEPTING SERVICE YES OR NO?**" (PA at 479) (emphasis in original).

Further, Petitioners' representative, Mr. Roche, sent a series of threatening text messages to employees of the Item 9 Defendants. These messages included statements such as:

- "[I'm] [t]he guy that's suing you and your Item 9 partners be a man and let me give you the papers before we go ballistic." (PA at 462)

- "I'M THE GUY SUING YOUR [expletive] [expletive] AND YOUR WORST NIGHTMARE NOW WHERE ARE YOU HIDING TO GET SERVED THE PAPERS? Don't make me ratchet this [expletive]" (PA at 462) (emphasis in original)

- "I am the guy SUING YOUR [expletive] that's who the [expletive] I am. Now we will do it the hard way I always give people one chance to do the right thing so we are done see you soon [expletive]" (PA at 462) (emphasis in original)

B. *The Item 9 Defendants' Counsel Attempts to Reason with Petitioners' Counsel, to No Avail.*

The Item 9 Defendants' counsel reached out to Petitioners' counsel to alert them that Mr. Roche, who is not an attorney, purported to represent Petitioners. (PA at 493). As Mr. Roche was not serving as Petitioners' attorney, the Item 9 Defendants' counsel did not believe it was appropriate to communicate with Mr. Roche directly and asked Petitioners' counsel to inform Mr. Roche that any communications needed to be through the parties' attorneys. (PA at 493). In response, Petitioners' counsel stated that the Item 9 Defendants had "permission to speak directly with Mr. Roche." (PA at 492). Mr. Roche continued his abusive and threatening e-mails with the Item 9 Defendants' counsel. For example:

- "[Item 9 Counsel] **STOP CALLING** [Former Petitioners' Counsel] **HE IS OUT!!!!!! TIME FOR TALK IS OVER…EVEN LITTLE KIDS KNOW WHEN DAD SAYS NO NOT TO RUN TO MOMMY TO ASK FOR A COOKIE STOP CALLING** [Former Petitioners' Counsel] **HE IS SUBBED OUT AND LONG OVERDUE**" (PA at 479) (emphasis in original).

- "**I JUST GOT OFF WITH A BRILLIANT LAWYER IN OHIO WH IS FILING A BRAND NEW SHINEY LAWSUIT SHE**

> **ALREADY DRAFTED NAMING ITEM 9 AND ALL ITS FUGAZI PARTNERS** [. . .] **THIS IS GOING TO BE A BILLING BONANZA FOR** [Item 9's Counsel] **BATTLING US IN VEGAS AND NOW HERE IN OHIO WITH ANOTHER NEW LAWSUIT!!!!!!!**" (PA at 485) (emphasis in original).

Petitioners then obtained new counsel. All the while, Mr. Roche continued his aggressive and inappropriate messages, including the following message:

> "…I believe I conveyed to you the seriousness of the matter and that I am not someone to [expletive] around with.
>
> Make sure you give them permission to speak freely and provide docs if I get any delay or pushback or [expletive] then We will amend and name you and Item 9 for the fraud perpetrated on my guys. You seem like a really good deal and hope we can help each other and not be adverse"

(PA at 463)

C. *Petitioners File Frivolous Amended Complaint Against the Item 9 Defendants and Continue Forward Despite the Item 9 Defendants' Explanations on Lack of Merit.*

On September 9, 2020, not long after the text message copied above, Petitioners filed suit against the Item 9 Defendants, among other parties. (PA 1-33).

The Item 9 Defendants were added to this case in Petitioners' First Amended Complaint. (PA at 1-33) That pleading consisted of 244 paragraphs that leveled eight claims against the Item 9 Defendants, ranging from conspiracy to aiding and abetting breaches of fiduciary duties. (PA at 1-33). Petitioners' claims rested solely on the notion that one or more of the Item 9 Defendants was doing business with individuals that Petitioners were also conducting business with. (PA at 1-33).

The following month, the Item 9 Defendants communicated with Petitioners' counsel and explained that the First Amended Complaint was deficient in numerous ways. (PA at 458–63). In summary, the letter communicated to Petitioners that their claims against the Item 9 Defendants were without merit and that the lawsuit had been inappropriately filed for an improper purpose. (PA at 458–63). Rather than having an actual basis for the lawsuit, Petitioners' claims were really a "fishing expedition, designed to bully and extort" the Item 9 Defendants "without any legitimate basis." (PA at 458). Accordingly, the Item 9 Defendants urged Petitioners to reconsider pursuing their claims. (PA at 462–63). In response, Petitioners initially agreed to dismiss their claims against all but one Item 9 Defendant,[2] but without explanation Petitioners changed course and refused to drop any claims. (PA at 96).

D. *Item 9 Defendants Successfully Move to Dismiss on Standing, Jurisdiction, and Failure to State a Claim Against All Claims.*

Petitioners' refusal to honor the parties' agreement prompted the Item 9 Defendants to file a 19-page motion to dismiss. (PA at 79–97). That motion argued that: 1) the district court lacked personal jurisdiction over Defendants Andrew Bowden, Douglas Bowden, Jeffery Rassas, Bryce Skalla, Viridis Group I9 Capital, LLC, and Viridis Group Holdings, LLC (the "Non-Resident Defendants") (PA at

[2] Petitioners intended on maintaining their claims against Strive Management.

84–87); 2) Petitioners lacked standing to bring their claims (PA at 87–88); and, 3) the First Amended Compla

int failed to state any claim for relief against the Item 9 Defendants (PA at 88–96). The Item 9 Defendants also requested an award of attorneys' fees and costs because Petitioners' claims were not proper and their refusal to dismiss the Item 9 Defendants caused those defendants to incur unnecessary fees and costs associated with the motion to dismiss. (PA at 96).

In their response, Petitioners disputed Item 9 Defendants' arguments, but nevertheless, voluntarily dismissed their claims against Defendants Andrew Bowden, Douglas Bowden, Jeffery Rassas, Bryce Skalla, and Chase Hershman. (PA at 134–51). Further, Petitioners voluntarily dismissed half of their claims (those for alter ego, intentional interference with contractual relations, intentional interference with prospective economic advantage, equitable relief, and attorneys' fees against all remaining Item 9 Defendants). (PA at 146, 149–50). In reference to the Item 9 Defendants' request for attorneys' fees and costs, Petitioners stated that they "had no obligation to explain why they have chosen not to dismiss their claims" prior to the filing of the motion to dismiss, that any prior agreement to dismiss their claims could not be considered by the district court, and that their lawsuit was not brought to harass the Item 9 Defendants. (PA at 150–51).

The district court ultimately noted Petitioners' voluntary dismissal of certain claims, granted Viridis Group I9 Capital, LLC and Viridis Group Holdings, LLC's motion to dismiss based on the lack of personal jurisdiction, granted the remaining Item 9 Defendants' motion to dismiss, and ordered the first amended complaint dismissed without prejudice as to the Item 9 Defendants. (PA at 395–96). The court did not rule on the Item 9 Defendants' request for attorneys' fees at that time.

E. *Item 9 Defendants Successfully Move for Attorneys' Fees and Costs Because Petitioners' Amended Complaint Was Frivolous and only Meant to Harass and Extort Money.*

Following the dismissal of Petitioners' claims, the Item 9 Defendants moved for an award of attorneys' fees and costs under NRS 18.010(2)(b) and NRS 18.020. (PA at 411).

The district court granted the Item 9 Defendants' motion for attorneys' fees and costs. (PA at 898–902) In its oral pronouncement, the district court said:

> "All right. This is what I'm going to do. I just have a general comment. You don't file a complaint to conduct discovery. Rule 11 mandates that prior to filing a lawsuit, you have to have sufficient enough facts to support claims for relief and/or jurisdictional issues. If not, it's problematic. It just is.
>
> And when I look at the history of this case, I become somewhat concerned because litigation shouldn't be utilized as a bludgeon, right? It shouldn't. Cases should -- there should be facts that support the complaint, and, hopefully, cases get decided on the merits by the factfinder at the end of the day.
>
> I rarely grant motions to dismiss, I don't mind saying that. But to me, in this case, it was fairly obvious what the outcome should be."

(Real Parties in Interest's Appendix at 14).

The court ruled that the First Amended Complaint was brought without "reasonable ground or to harass the prevailing party," weighed the *Brunzell*[3] factors, found the requested fees and costs were reasonable, and awarded the Item 9 Defendants $77,878.50 in attorneys' fees and $2,106.33 in costs for a total award of $79,984.83. (PA at 899-902). Petitioners now ask this Court to issue a writ of mandamus and reverse the district court's order granting the Item 9 Defendants' motion for attorneys' fees and costs. Given Petitioners' filings and conduct, and the flexibility afforded to NRS 18.010(2)(b) and NRS 18.020, Petitioners' writ should not be reviewed, and if reviewed, should be denied.

STANDARD OF REVIEW

"When an attorney fees matter implicates questions of law, the proper review is de novo." *145 E. Harmon II Trust v. Residences at MGM Grand - Tower A Owners' Ass'n*, 460 P.3d 455, 457 (Nev. 2020) (quoting *Thomas v. City of N. Las Vegas*, 127 P.3d 1057, 1063 (2006)) (alterations omitted).

ARGUMENT

This Court should decline review because the district court correctly awarded attorneys' fees because Petitioners utilized litigation as a bludgeon to frivolously attack the Item 9 Defendants. The Item 9 Defendants prevailed below and are

[3] *Brunzell v. Golden Gate Nat'l Bank*, 455 P.2d 31 (1969).

prevailing parties under the law, regardless of whether the complaint was dismissed with or without prejudice. Further, at a minimum, the Non-Resident Defendants obtained a material alteration of their legal status by virtue of the district court's personal jurisdiction finding and, therefore, must be found to have been prevailing parties. For these reasons, the petition for writ of mandamus should be denied.

I. A DEFENDANT THAT OBTAINS A DISMISSAL WITHOUT PREJUDICE MAY BE A PREVAILING PARTY UNDER N.R.S. 18.010(2)(B) AND N.R.S. 18.020

Petitioners claim that a harassing plaintiff can prevent a defendant from becoming a prevailing party by voluntarily dismissing their claims without prejudice or having their claims involuntarily dismissed without prejudice. Petitioners are mistaken. Neither *145 East Harmon II Trust* nor federal law mandate such a result, and the district court appropriately found that the Item 9 Defendants were prevailing parties in this litigation.

The best place to begin is the text of the statutes at issue. Beginning with NRS 18.020, that provision states that "[c]osts must be allowed to the prevailing party against any adverse party against whom judgment is rendered, in" a number of circumstances. The arguments pertaining to NRS 18.010(2)(b) fully apply to NRS 18.020 and, therefore, the Item 9 Defendants focus on the attorneys' fee provision in NRS 18.010(2)(b).

N.R.S. 18.010(2)(b) reads, in relevant part, as follows:

> "[T]he court may make an allowance of attorney's fees to a prevailing party :
>
> …
>
> (b) Without regard to the recovery sought, when the court finds that the claim . . . was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."

In summary, this provision is to be liberally construed to award attorneys' fees to defendants when a plaintiff brings claims that are baseless or meant to harass the opposing party. This is to both punish the plaintiff and to deter future frivolous claims from overburdening the courts.

A. *Case Law Does Not Unequivocally Hold Dismissals Without Prejudice Preclude Prevailing Party Status*.

Petitioners do not even attempt to argue they had reasonable grounds to bring their claims or that their claims were not frivolous or vexatious. Instead, they attempt to hang their hat on a novel procedural issue raised only in three sentences in their opposition to the Item 9 Defendants' motion for attorneys' fees. (*See* PA at 503). They then failed to even mention this argument during the hearing on the Item 9 Defendants' fee motion. (*See* Real Parties in Interest's Appendix at 1–15).

Even if this was sufficient to preserve these claims for review, which the Item 9 Defendants do not concede, Petitioners' arguments are misplaced and would result in a bright line rule that would permit plaintiffs to avoid the consequences of filing vexatious claims by strategically dismissing their claims. Neither *145 East Harmon II Trust* nor federal law create the bright line rule Petitioners ask this Court to adopt.

145 East Harmon II Trust interpreted both NRS 18.010(2)(b) and NRS 18.020 and held that "a voluntary dismissal with prejudice generally equates to a judgment on the merits sufficient to confer prevailing party status upon [a] defendant." 460 P.3d at 459. In so ruling, this Court highlighted that the plaintiff in that case "would have lost had it replied to the [defendant's] dispositive motion" and found that the voluntary dismissal with prejudice was functionally equivalent to winning that dispositive motion. *Id.* at 458. Relevant for our purposes, the *145 East Harmon II Trust* Court analyzed several federal cases that it found instructive in determining what constitutes a "prevailing party." *Id.* at 458-59 (collecting cases). Those federal cases generally held that voluntary dismissals with prejudice were equivalent to judgments on the merits, and, therefore conferred prevailing-party status to defendants. *Id.* (collecting cases). Additionally, the federal cases cited distinguished between dismissals with and without prejudice, finding that the latter did not confer prevailing party status. *Id.* (collecting cases). But, notably, *145 East Harmon II Trust* did not involve a dismissal without prejudice and, therefore, did not create any rule

with regards to such dismissals. *Id.*

B. *Federal Courts Have Found that Dismissals Without Prejudice, Voluntary or Involuntary, Can Confer Prevailing Party Status*

While *145 East Harmon II Trust* and the federal cases cited therein may provide some non-binding support for Petitioners, they do not compel this Court to adopt the bright line rule Petitioners seek, particularly with the egregious circumstances of this case. None of the cases cited by Petitioners or within *145 East Harmon II Trust* involve a voluntary or involuntary dismissal without prejudice entered either to strategically avoid a dismissal on the merits after vexatious and egregious conduct by Petitioners' representatives or by the court specifically finding that the outcome of dismissal was "fairly obvious." And, furthermore, Petitioners fail to acknowledge other federal cases that run directly contrary their position.

For example, the Tenth Circuit has explained that, "in cases not involving settlement, when a party dismisses an action with or without prejudice, the district court has discretion to award costs to the prevailing party under [Federal Rule of Civil Procedure] 54(d)." *Cantrell v. Int'l Broth. Of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456, 458 (10th Cir. 1995). And the Seventh Circuit has held that "[w]here there is a dismissal of an action, even where such dismissal is *voluntary and without prejudice*, the defendant is the prevailing party." *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1015 (7th Cir 1985) (emphasis added) (citation omitted). Federal authorities do not uniformly adopt

Petitioners' suggested rule, and this Court should refrain from doing so. And, as relatively recent Supreme Court precedent reveals, whether a judgment must be preclusive for a defendant to be a "prevailing party" is an open question in federal courts.

Despite providing a discussion of federal law, Petitioners fail to cite the Supreme Court's most recent precedent on the question of what constitutes a "prevailing party." That case, *CRST Van Expedited, Inc. v. E.E.O.C.*, undercuts Petitioners claim that a dismissal without prejudice may never confer "prevailing party" status to a defendant. 578 U.S. 419 (2016). In *CRST*, the Supreme Court examined the term "prevailing party" in a fee provision contained in Title VII of the Civil Rights Act. 578 U.S. 419, 421–23 (2016). The United States Court of Appeals for the Eighth Circuit had held that the plaintiffs had not prevailed in their action because the district court's judgment "was not a ruling on the merits." *Id.* at 431. The Supreme Court disagreed. *Id.* at 431–32. As the Court explained, "[a] defendant has fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision." *Id.* at 531. And, despite the defendant's urging, the Court declined to rule that "a defendant must obtain a preclusive judgment in order to prevail." *Id.* at 434.

While the federal interpretation of the term "prevailing party" is not binding, this Court has found it instructive. *See 145 East Harmon II Trust*, 460 P.3d at 458–

59. At least one federal court has applied *CRST* and held, contrary to Petitioners' position, dismissals without prejudice are sufficient for a defendant to "prevail."

Beach Blitz Co. v. City of Miami Beach, Florida is instructive. 13 F.4th 1289 (11th Cir. 2021). There, the Eleventh Circuit dealt with whether a defendant was a prevailing party when a trial court granted a motion to dismiss "without prejudice," based on the complaint's failure to state a claim. *Id.* at 1299–1300. The *Beach Blitz* court explained that the dismissal "without prejudice" indicated the judgment was "not claim-preclusive," but nonetheless held that the involuntary dismissal was sufficient to declare the defendant a prevailing party. *Id.* at 1300. Further, Judge Newsom concurred in part and explained that "[a] defendant . . . becomes a prevailing party, 'whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision,'" even if a dismissal is without prejudice. *Id.* at 1308-09 (Newsom, J., concurring in part and concurring in judgment) (quoting *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 431).

While *Beach Blitz* involved only an involuntary dismissal, it is still analogous to the case at hand. Here, while half the claims were dismissed voluntarily, the other half were dismissed involuntarily. The district court in the present case stated that it was "fairly obvious" that Petitioners claims were without merit. (Real Parties in Interest's Appendix at 14). The court held there was "**no factual basis** as set forth in the complaint as to claims for relief against the Item 9 [D]efendants collectively."

(PA at 218) (emphasis added). So this Court is presented with defendants who substantively prevailed on their motion to dismiss but nonetheless obtained a dismissal without prejudice, effectively the same procedural posture as that presented in *Beach Blitz*. *See* 13 F.4th at 1299–1300. And, regardless of whether the judgment in this case is claim preclusive, any fair reading of the record reveals that the Item 9 Defendants "rebuffed" Petitioners' challenge and should therefore be considered prevailing parties. *See CRST*, 578 U.S. at 431.

C. *The District Court's Dismissal Had a Material Effect.*

The Item 9 Defendants note that this Court has held that a "judgment on the merits" is a prerequisite to the recovery of attorneys' fees under NRS 18.010(2)(b) and costs under NRS 18.020. *See 145 East Harmon II Trust*, 460 P.3d at 459 (finding voluntary dismissal with prejudice "equates to a judgment on the merits"). However, there is little difference between this Court's interpretation of the phrase "prevailing party" and that of federal courts. *See id.* at 458–59. Given this, it follows that a "judgment on the merits" need not be a preclusive judgment, so long as it materially alters the status of the parties in some way. *See CRST*, 578 U.S. at 422 (the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties"). Therefore, so long as the dismissals in this case had some material effect they were sufficient to alter the parties status. They did so, and so the district court did not err.

Petitioners cannot simply re-file their Amended Complaint, their complaint must be materially different to proceed. In short, any future amended complaint must actually contain facts supporting their allegations. As the district court indicated in its oral ruling on one of the various motions to dismiss in this case, "if there's a motion to amend down the road, it's going to have to be based upon facts that are learned during the course and scope of discovery." (PA at 187). Before any defendant may be re-added to the pending litigation Petitioners will need to seek leave of court. *See* NRCP 15(a)(2). And the court has made plain that Petitioners will have to use new facts to provide a prima facie basis for their claims before it will permit them to replead their allegations against the various defendants. This constitutes a material, if not claim preclusive, difference in the standing of the parties.

Separately, it bears repeating that NRS 18.010(2)(b) is to be liberally construed to punish litigants who seek to abuse the court system and harass others. In this case, Petitioners said: they would drop a "nuclear winter" on the Item 9 Defendants (PA at 465), they would "go gangster" on the Item 9 Defendants to execute service (PA at 475), that they would file claims for "blah blah blah you know the deal" (PA at 465), and that this case would be a "BILLING BONANZA" (PA at 485) (emphasis in original). They also threatened the Item 9 Defendants:

- "If you want to cooperate and hold off litigation feel free to forward the docs…Bryce don't ever try to [expletive expletive] me again I warned you

about dishonestly with me." (PA at 470)

- "[W]e have [individual defendants] dead to rights and naming them…So are you willing to accept service for all of these named Defendants or do I need to have my guy bang on [individual defendant]'s door at his [street name] home address on 4th of July weekend…"[4] (PA at 471)

Petitioners filed claims without any basis, solely for the purposes of engaging in a fishing expedition. And despite requests to withdraw their claims, Petitioners waited to voluntarily dismiss half of their frivolous claims until the Item 9 Defendants had incurred expenses defending against them and charged forward with their remaining frivolous claims. Given the express purpose of the statute, NRS 18.010(2)(b) should be construed to confer prevailing party status on defendants who obtain a voluntary dismissal that was strategically entered to avoid a ruling on the merits or an involuntary dismissal where there were no facts to support the claims.

Allowing harassing plaintiffs to avoid responsibility for their actions with strategic voluntary dismissal and dismissals without prejudice would not be in accord with the law in other jurisdictions. For instance, the Texas Supreme Court has held that "a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines . . . that the nonsuit was taken to avoid an unfavorable ruling on the merits." *Epps v. Fowler*, 351 S.W.3d 862, 870 (Tex.

[4] Mr. Roche also describes how he apparently interfered with Harvest Foundation marijuana licenses, by using his "gov't contacts" and "uncle" to "put a freeze" on "all Harvest matters and licenses". (PA at 467) ("[N]ow that my uncle has put a freeze on all [Defendant] Harvest matters and licenses nothing is going to happen anytime soon unless I say so.").

2011) (citing *Dean v. Riser*, 240 F.3d 505 (5th Cir. 2001)). And other courts have more generally held in construing prevailing party in fees provisions of statutes that a plaintiff's termination of a suit without prejudice does not preclude a finding that a defendant has prevailed. *See Dean Vincent, Inc. v. Krishelle Labs., Inc.*, 532 P.2d 237, 238 (Or. 1975) ("Even though the termination was without prejudice and plaintiff could file another case in a defendant's favor" the defendant was properly declared a "prevailing party"); *State ex rel. Marsh v. Doran*, 958 So.2d 1082 (Fla. Dist. Ct. App. 2007) (holding that defendant is a prevailing party "after the plaintiff takes a voluntary dismissal without prejudice" in False Claims Act case). These cases prove that the term "prevailing party" need not be interpreted in a manner to reward harassers for their vexatious conduct.

D. *The Item 9 Defendants' Successful Motion to Dismiss and Petitioners Wrongful and Vexatious Conduct Show the District Court's Award Should Not Be Disturbed*

Considering the text and purpose of NRS 18.010(2)(b) and NRS 18.020, the district court did not err when it found the Item 9 Defendants had prevailed in this matter. The wrongful conduct of Petitioners, who do not dispute the district court's finding that they brought this action without any basis and to harass the Item 9 Defendants, should not go unpunished due to their procedural maneuvering. This Court should deny the petition for writ of mandamus and decline to review the district court's award of attorneys' fees and costs.

II. THE DISTRICT COURT APPROPRIATELY USED ITS DISCRETION TO PUNISH FOR AND DETER FRIVOLOUS OR VEXATIOUS CLAIMS

"The Court shall liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations". NRS 18.010(2)(b). The district court's award is more than appropriate here.

Indeed, Petitioners were informed of the fatal deficiencies in their claims and refused to dismiss any claims until *after* the Item 9 Defendants had expended considerable time and money in filing a comprehensive motion to dismiss. While Petitioners shrug their shoulders and state they are not required to elaborate on the strategic reasons for this litigation tactic, the purpose of this conduct is plain. As the district court necessarily found, Petitioners had no facts and had meritless claims (Real Parties in Interest's Appendix at 14) ("You don't file a complaint to conduct discovery. Rule 11 mandates that prior to filing a lawsuit, you have to have sufficient enough facts to support claims for relief and/or jurisdictional issues. If not, it's problematic. It just is."). And while Petitioners play coy, their representative made this purpose clear when they said "THIS CASE WILL BE A BILLING BONANZA FOR [ITEM 9 DEFENDANTS' COUNSEL]." (PA at 485).

It is worth recounting Petitioners' conduct in this case. Petitioners have threatened the Item 9 Defendants with "nuclear winter" if those defendants did not act in accordance with Petitioners' wishes, sent a series of threatening emails, and

filed suit without any legitimate basis. And, despite the Item 9 Defendants' request, Petitioners declined to withdraw any of their baseless claims until the Item 9 Defendants had expended time and money drafting a motion to dismiss. The district court correctly recognized that Petitioners conduct was wrongful and that the claims brought against the Item 9 Defendants were "brought or maintained without reasonable ground or to harass the [Item 9 Defendants]." NRS 18.010(2)(b).

Accordingly, the district court had authority under N.R.S. 18.010(2)(b) and NRS 18.020 to award the Item 9 Defendants fees and such an award was appropriate under the circumstances. This Court should decline to exercise its discretion to review the properly granted award.

III. DISMISSALS BASED ON LACK OF PERSONAL JURISDICTION CONSTITUTE A MATERIAL ALTERATION

In any event, Viridis Group I9 Capital, LLC, Viridis Group Holdings, LLC and Strive Management (the "Non-Resident Defendants") are prevailing parties. As Petitioners recognize, the district court dismissed the Non-Resident Defendants for lack of personal jurisdiction. (Petition at p. 21; PA at 265-78, 368-83). The Item 9 Defendants agree with Petitioners that such dismissals are without prejudice. (Petition at p. 21 (citing *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999)). However, such dismissals still effect a material alteration in the status of Non-Resident Defendants as it relates to Petitioners – Petitioners may not file suit against these defendants in Nevada courts. Therefore, regardless of dismissal

without prejudice, the Non-Resident Defendants have prevailed within the meaning of NRS 18.010(2)(b) and NRS 18.020.

In *145 East Harmon II Trust*, this Court endorsed the view that a party prevails when they have gained a "'material alteration' of the parties' legal relationship through litigation." 460 P.3d 455, 458-59 (citing *Carter v. Inc. Vill. of Ocean Beach*, 759 F.3d 159, 165 (2d Cir. 2014)). Petitioners correctly note that a dismissal for lack of jurisdiction must necessarily be without prejudice and therefore cannot be an adjudication on the merits. *See* NRCP 41(b). However, such a dismissal still results in a material alteration of the parties' positions.

While no published case in Nevada has stated this point, "it is well settled that the principles of res judicata apply to the issue of personam jurisdiction in the same manner as any other issue." *Kendall v. Overseas Dev. Corp.*, 700 F.2d 536, 538 (9th Cir. 1983) (cleaned up); *accord Sabek, Inc. v. Engelhard Corp.*, 65 Cal.App.4th 992, 998-99 (Cal. Ct. App. 1998). It is indisputable that Petitioners are now prevented from relitigating their issues with Non-Resident Defendants absent a material change in circumstances. Such a ruling renders the Non-Resident Defendants prevailing parties.

In similar circumstances, the Ninth Circuit has held that a governmental defendant was a "prevailing party" when it achieved a dismissal in federal court that was "without prejudice to [the plaintiff's] right to seek any available relief in the

state court." *Miles v. California*, 320 F.3d 986, 989 (9th Cir. 2003). Such a situation is distinguishable from the cases cited by Petitioner, in which the same claims could be refiled in the same court. *See Oscar v. Alaska Dep't of Ed. And Early Dev.*, 541 F.3d 978, 982 (9th Cir. 2008) (distinguishing *Miles*, 320 F.3d at 989). Here, Petitioners are barred from reasserting their claims against the Non-Resident Defendants in Nevada's courts, but may attempt to do so in other judicial forums. "This disposition is a 'material alteration in the legal relationship of the parties' within the meaning of the test established by the Supreme Court." *Miles*, 320 F.3d at 989. Therefore, at a minimum, the Non-Resident Defendants were properly determined to be prevailing parties.

CONCLUSION

Petitioners have badgered, harassed, and (as the district court put it) "bludgeoned" the Item 9 Defendants with baseless litigation. Neither the text nor the purpose of NRS 18.010(2)(b) or NRS 18.020 preclude the Item 9 Defendants from being declared prevailing parties as a result of Petitioners' voluntary dismissal of their claims or the district courts dismissals without prejudice. The Item 9 Defendants ask this Court to deny the petition for writ of mandamus and refrain from

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adopting a rule that would allow plaintiffs to avoid the consequences of their bad faith pleadings and unprofessional conduct.

RESPECTFULLY submitted this 1st day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Nevada Rules of Appellate Procedure 28.2(a) and 32(a)(9), I certify that:

I have read the foregoing brief. To the best of my knowledge, information, and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The brief complies with the Nevada Rules of Appellate Procedure, including Rule 28(e)

Further, this brief complies with the type-volume limitation of Nevada Appellate Rule 32(a)(4-6) because: it contains 5959 words, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C).

This brief complies with the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013, Times New Roman 14-point font.

Date: November 1, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 1, 2021, I served the following document(s):

ANSWER TO PETITION FOR WRIT OF MANDAMUS FOR REAL PARTIES IN INTEREST ITEM 9 LABS CORP., ITEM 9 PROPERTIES, LLC, STRIVE MANAGEMENT, LLC, VIRIDIS GROUP I9 CAPITAL, LLC, VIRIDIS GROUP HOLDINGS, LLC, ANDREW BOWDEN, DOUGLAS BOWDEN, BRYCE SKALLA, and CHASE HERSHMAN

☒ **BY ELECTRONIC TRANSMISSION:** by transmitting the document to the parties identified below via the Court's E-Flex e-filing system.

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/s/ *Jana L. Rivard*
An Employee of SMITH LARSEN & WIXOM