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-20-81[illegible]-B

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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I. MANDAMUS RELIEF IS APPROPRIATE

A. THE ITEM 9 PARTIES CONCEDE WRIT RELIEF IS APPROPRIATE.

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 (collectively, the "Item 9 Parties") do not argue against this Court's exercise of its discretion to entertain this petition in their answering brief. *See* Item 9 Parties' Answering Brief. Accordingly, they concede that writ relief is appropriate in this matter. *See Colton v. Murphy,* 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (holding that the failure to respond to an argument in a brief "constitutes a clear concession . . . that there is merit in the [opposing party's] position").

B. SNOWELL'S ARGUMENTS

1. Petitioners do not have an adequate or speedy legal remedy.

Contrary to Snowell's argument, an eventual appeal is neither a speedy nor an adequate legal remedy for Petitioners. As this Court has repeatedly recognized, the right to an eventual appeal is not a bar to writ relief. *LaGue v. Second Jud. Dist. Ct.,*

68 Nev. 131, 133, 229 P.2d 162, 163 (1951). This case is still 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 years later.

2. This Writ Petition Raises an Important Issue of Law that Requires Clarification.

This Court will exercise 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 v. Eighth Jud. Dist. Ct.,* 133 Nev. 900, 902, 407 P.3d 766, 769 (Nev. 2017). This Court's recent publication of an opinion addressing the corollary issue to the one raised in this petition indicates that clarifying "prevailing party" status under Nevada law is, in fact, an issue of public importance that applies beyond the parties. *See 145 East Harmon II Trust v. Residences at MGM Grand – Tower A Owners' Assoc.,* 136 Nev. 115, 460 P.3d 455 (Nev. 2020); *see also* NRAP 36(c)(1) (stating that this Court issues published opinions only when the case involves "an issue of first impression," raises an issue that requires clarification of Nevada law, and/or is "an issue of public importance that has application beyond the parties").

Both the Item 9 Parties and Snowell agree that *145 East Harmon* did not address whether a defendant who is dismissed without prejudice prior to judgment is a "prevailing party" under NRS 18.010. *See* Item 9 Parties' Answering Brief, p. 2; Snowell's Answering Brief, p. 5. That is because *145 East Harmon* solely concerned a defendant who was dismissed ***with prejudice***. *See* 136 Nev. at 120, 460 P.3d at 459. This Court has not yet addressed the issue raised in this petition in any published opinion, despite the frequency with which it arises.

However, this Court has already relied upon the same line of authority as Petitioners in a prior appeal to find that a dismissal without prejudice does not confer prevailing party status. *See Azzarello v. Humboldt River Ranch Assoc.,* No. 68147, 2016 WL6072420 (Nev. Oct. 14, 2016).[1] In *Azzarello,* this Court relied upon the same line of authority cited to in *145 East Harmon,* which Petitioners urge this Court to adopt. *See Azzarello,* 2016 WL6072420 at *1 (citing to *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 605 (2001) and *Oscar v. Alaska Dep't of Educ. & Early Dev.,* 541 F.3d 978 (9th Cir. 2018)).

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[1] Snowell is incorrect when it argues that *Azzarello* does not apply to the facts of this case. Petitioners did, in fact, voluntarily dismiss without prejudice certain of their claims against the Item 9 Parties. 1 PA 143, 146, 149-50.

3. Clarifying Who is a "Prevailing Party" Will Not Create Bad Policy.

Contrary to Snowell's argument, Petitioners are not asking this Court to issue a bright line rule as to when fee awards are appropriate. Instead, Petitioners are asking this Court to clarify the appropriate statutory mechanism for seeking fee awards when a case is dismissed without prejudice prior to judgment. Both the Item 9 Parties and Snowell urge this Court to skip past the analysis of whether they are a "prevailing party," and simply consider what they contend is evidence of bad faith in the record below. However, when NRS 18.010(2)(b) is read in its entirety, it is clear that the district court must make two findings in order to award fees under that statute, i.e., that the moving party is a "prevailing party," and that the matter was brought in bad faith.

If the Item 9 Parties and Snowell are not "prevailing parties," then NRS 18.010(2) is not the appropriate mechanism by which to seek fees irrespective of any alleged bad faith. In rejecting an argument that defendants were prevailing parties for purposes of federal fee shifting statutes, the Fifth Circuit Court of Appeals explained that "Rule 11 provides a check on the behavior Defendants are concerned about," because its "sanctions can be imposed against a party litigating in bad faith even when there is no prevailing party." *Dunster Live, LLC v. LoneStar Logos Mgmt. Co.,* 908 F.3d 948, 951 (5th Cir. 2018). The Item 9 Parties and Snowell chose

not to seek fees under Rule 11, but instead under NRS 18.010(2). This writ petition simply asks this Court to clarify whether NRS 18.010 applies under these circumstances.

Clarifying when a party can seek fees under NRS 18.010(2) does not create bad policy. This Court has frequently addressed the question of whom may qualify as a "prevailing party" for purposes of NRS 18.010. For example, in *Valley Elec. Ass'n v. Overfield,* 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) this Court defined "prevailing party," as any party who "succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit" and clarified that "the term prevailing party is broadly construed so as to encompass plaintiffs, counterclaimants and defendants." (Internal quotations omitted). And, recently, in *145 East Harmon,* this Court held that a party who is dismissed with prejudice prior to judgment generally qualifies as a "prevailing party" under NRS 18.010(2)(b). 136 Nev. at 120, 460 P.3d at 459. Neither of these holdings impair a district court's discretion as to whether fees are appropriate or reasonable; conversely, these holdings simply guide a district court in its determination as to whether fees are properly sought under the appropriate statutory mechanism.

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4. Judicial Economy Favors Entertaining this Petition.

Finally, judicial economy favors entertaining this writ petition. Not only is the issue isolated from the merits of the claims raised below, *see Hawkins,* 133 Nev. at 902-03, 407 P.3d at 769, but there is a concrete risk of relitigation of this identical issue. As noted, there are parties remaining below who were dismissed without prejudice and may move for attorney fees. 2 PA 265-78, 368-83. Accordingly, this Court should exercise its discretion to entertain this writ petition.

II. ATTORNEY FEES CAN ONLY BE AWARDED TO "PREVAILING PARTIES" UNDER NRS 18.010(2)(b).

In Nevada, a district court may only award attorney fees if authorized by statute, rule or contract. *Pardee Homes of Nev. v. Wolfram,* 135 Nev. 173, 177, 444 P.3d 423, 426 (Nev. 2019). Because there is no common law right to attorney fees, statutes allowing attorney fees must be construed strictly since they are in derogation of the common law. *See Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals,* 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) (analyzing statutes awarding costs).

The Item 9 Parties and Snowell urge this Court to skip past the analysis of whether they are a "prevailing party," and simply consider what they contend is

evidence of bad faith in the record below.[2] However, this Court must construe NRS 18.010(2) as a whole, "give meaning to all of [its] parts and language," and "read each . . . phrase . . . to render it meaningful within the context of the purpose of the legislation." *Matter of Fund for Encouragement of Self Reliance,* 135 Nev. 84, 85, 440 P.3d 30, 31 (Nev. 2019).

In its entirety, NRS 18.010(2) states:

> In addition to cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a ***prevailing party***:
>
> (a) When the prevailing party has not recovered more than $20,000; or
>
> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party 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 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.

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[2] Brian Roche is not a party to this case. Although the real parties in interest focus extensively on his conduct, the record below is tenuous as to whether he had actual authority to act on behalf of the actual parties to this litigation. *See Simmons Self-Storage v. Rib Roof, Inc.,* 130 Nev. 540, 550, 331 P.3d 850, 856-57 (2014) (explaining that apparent authority is determined by the acts of the principal, and "[t]he acts of the agent in question can not be relied upon as alone enough to support" a finding of authority). Therefore, Mr. Roche's conduct is not necessarily evidence of ***Petitioner's*** bad faith.

(Emphasis added).

When NRS 18.010(2) is read in its entirety, it is clear that the determination of whether a party is a "prevailing party" is a threshold inquiry that must be made before a district court can award fees pursuant to either NRS 18.010(2)(a) or NRS 18.010(2)(b). Because NRS 18.010(2) must be strictly construed, *Bobby Berosini, Ltd.,* 114 Nev. at 1352, 971 P.2d at 385, this threshold inquiry cannot be surpassed. Since the Item 9 Parties and Snowell are not "prevailing parties," as will be shown below, this Court need not reach their arguments concerning bad faith.

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

A. PETITIONERS' DISMISSALS WITHOUT PREJUDICE DO NOT CONFER PREVAILING PARTY STATUS.

Contrary to the Item 9 Parties' and Snowell's arguments, *CRST Van Expedited Inc. v. E.E.O.C.,* 578 U.S. 419 (2016), and its progeny, actually stand for the identical legal proposition that Petitioners request this Court to adopt. *CRST* involved an award of attorney fees to a defendant who successfully obtained dismissal of Title VII charges due to the EEOC's failure to comply with Title VII's "presuit [statutory] requirements." *Id.* at 426-427. The primary issue on appeal was whether a dismissal that did not result in an adjudication on the merits was sufficient to confer prevailing party status. *Id.* at 421.

Relying on *Buckhannon Board & Care Home, Inc. v. West Virginia*, 532 U.S. 598 (2001) and *Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782 (1989) (upon which Petitioners also rely upon in their writ petition), the *CRST* Court explained that that "'touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.'" 578 U.S. at 422 (quoting *Texas State Teachers Assn.,* 489 U.S. at 792-93). "This change must be marked by 'judicial imprimatur.'" *Id.* (quoting *Buckhannon,* 532 U.S. at 605). The *CRST* Court declined to reach the issue of whether a dismissal must have a preclusive effect to confer prevailing party status, *id.* at 434, but held that some procedural victories which are not determinations on the merits may create the "judicial imprimatur" that alters the parties' legal relationship in a material enough way to convey such status. *Id.* at 433-32.

Important to this petition, the authority cited with approval in *CRST* involved procedural issues that do not trigger claim preclusion, but which nevertheless preclude a future claim from being asserted against the defendant. These include cases in which a claim is barred by a limitations period, *see Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978), or is barred by state sovereign immunity, *C.W. v. Capistrano Unified Sch. Dist.,* 784 F.3d 1237 (9th Cir. 2015), or is moot. *See EEOC v. Propak Logistics Inc.,* 746 F.3d 145 (4th Cir. 2014). In each of these instances, as in *CRST*, the controlling factor was not that a claim would be precluded

at a later date by the court's determination ***but that it could not have been brought in the first instance.*** Thus, although these non-merits decisions would not trigger claim preclusion, the claims were nevertheless precluded by other legal doctrines.

As the California Supreme Court recently explained, the key difference is whether the procedural victory is actually dispositive of the parties' dispute. *DisputeSuite.com, LLC v. Scoreinc.com,* 391 P.3d 1181, 1190 (Cal. 2017) ("The flaw in [respondent's] claim to be the prevailing party here is not that its victory in the California trial court was procedural but that it was not dispositive of the contractual dispute" because the case was "already being litigated in a Florida court"). Since *CRST,* federal courts have continued to consistently find that dismissals without prejudice do not generally confer prevailing party status when they do not prevent the plaintiff from refiling the claims. *See, e.g., Hacienda Recs., L.P. v. Ramos,* 718 Fed. App'x 223, 236 (5th Cir. 2018); *Physician's Surrogacy, Inc. v. German,* 311 F. Supp. 3d 1190, 1198 (S.D. Cal. 2018).

The other cases relied upon by the Item 9 Parties and Snowell do not support their arguments. For example, *Beach Blitz Co. v. City of Miami Beach,* 13 F.4th 1289 (2021), does not hold that a dismissal without prejudice always confers prevailing party status. In *Beach Blitz,* the trial court dismissed two claims without prejudice but also without leave to amend, and dismissed one claim without prejudice bit with leave to amend in a set time period, which the plaintiffs never

amended and refiled. *Id.* at 1293. Nothing in *Beach Blitz* held that a dismissal without prejudice automatically confers prevailing party status. *See id.* To the contrary, *Beach Blitz* cited to *U.S. v. $70,670.00 in U.S. Currency,* 929 F.3d 1293 (11th Cir. 2019), which Petitioners also cite in their brief, for the proposition that voluntary dismissals without prejudice generally do not confer prevailing party status because these dismissals do not pose a "'legal bar precluding the [party] from refiling the same forfeiture action in the future.'" 13 F.4th at 1300. However, because the trial court prohibited plaintiffs from refiling their claims, the Eleventh Circuit found that this was a material alteration significant enough to confer prevailing party status. *Id.* at 1297-98.

Similarly, *Cantrell v. International Brotherhood of Electrical Workers, AFL-CIO, Local 2021,* 69 F.3d 456 (10th Cir. 1995) does not apply to the facts of this case because *Cantrell* involved a voluntary dismissal ***with prejudice.*** *Id.* at 457. Although the *Cantrell* court held 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," the *Cantrell* court did not hold that a dismissal without prejudice always confers prevailing party status. *Id.* at 458. *Cantrell* was decided prior to *Buckhannon,* and after *Buckhannon,* the Tenth Circuit Court of Appeals held that dismissals without prejudice do not generally convey

prevailing party status. *See Lorillard Tobacco Co. v. Engida,* 611 F.3d 1209, 1215 (10th Cir. 2010).

The same is true for *First Commodity Traders, Inc. v. Heinold Commodities, Inc.,* 766 F.2d 1007 (7th Cir. 1985). *First Commodity Traders, Inc.,* involved a grant of summary judgment on six out of seven claims, which is undoubtedly a decision on the merits with prejudice. *Id.* at 1010. Furthermore, two years after *First Commodity* was issued, the Seventh Circuit Court of Appeals issued *Szabo Food Serv., Inc. v. Canteen Corp.,* 823 F.2d 1073 (1987), in which it unequivocally held that a dismissal without prejudice is "not the practical equivalent of a victory for defendant on the merits."

This case does not involve any of the types of facts involved in these cases. Petitioners' claims against the Item 9 Parties and Snowell were dismissed without prejudice pursuant to motions to dismiss. The District Court did not deny Petitioners' leave to amend, as will be shown below, nor did it find that Petitioners' claims were untimely, failed to exhaust administrative remedies, or were otherwise improper on their merits. The facts of this case simply do not fall within the case law cited by the Item 9 Parties and Snowell.

Instead, this case falls squarely within those issues decided in *Cadkin* and *Oscar*, neither of which were overruled by *CRST.* The Item 9 Parties and Snowell

overlook the fact that in *Oscar v. Alaska Department of Education and Early Development,* 541 F.3d 978 (2008), the Ninth Circuit Court of Appeals relied upon *Buckhannon* to also find that an ***involuntary*** dismissal without prejudice pursuant to a motion to dismiss did not confer prevailing party status since an 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 confer prevailing party status. *Cadkin,* 569 F.3d at 1148-49. In *Cadkin,* the Ninth Circuit again explained that it was focused primarily upon the "judicial imprimatur" that the *Buckhannon* Court considered. *See id.* Since the voluntary dismissal in *Cadkin* did not prevent the case from being refiled, the Ninth Circuit found that the defendant was not a prevailing party because there was no "judicial imprimatur" of the type considered in *Buckhannon*. *Id.* These authorities are still good law in the wake of *CRST,* which simply reiterates *Buckhannon's* requirement that some "judicial imprimatur" the precludes future litigation must be present to effect a material alteration in order to confer prevailing party status.

Buckhannon, Cadkin and *Oscar* embody the same rule followed by the majority of non-federal jurisdictions. *See, e.g., Burnette v. Perkins & Assoc.,* 33

S.W.3d 145, 149-50 (Ark. 2000) (holding that "a dismissal without prejudice" does not confer prevailing party status because of "[t]he potential for further litigation on the same issues with possibly contrary outcomes"); *Floyd v. Logisticare, Inc.,* 566 S.E.2d 424, 424-25 (Ga. Ct. App. 2002) (a dismissal without prejudice does not confer prevailing party status); *Severs v. Mira Vista Homeowners Ass'n, Inc.,* 559 S.W.3d 684, 710-11 (Tex. App. 2018) (holding that a dismissal without prejudice does not generally confer prevailing party status because it "works no such change in the parties' legal relationship" as the "plaintiff remains free to re-file the same claims" (internal quotations omitted)); *Elliott Bay Adjustment Co. v. Dacumos,* 401 P.3d 473, 476 (Wash. Ct. App. 2017) ("But a defendant is not deemed the prevailing party when . . . the action is dismissed without prejudice. . . ."). This Court, too, should hold that dismissals without prejudice, whether voluntary or involuntary, generally do not confer prevailing party status absent some material change in the parties' legal relationship.

B. THERE WAS NO MATERIAL ALTERATION IN THE PARTIES' LEGAL RELATIONSHIP

There was no material alteration in the parties' legal relationship as a result of the District Court's dismissal without prejudice of Petitioners' claims. "Generally, a dismissal without prejudice expresses that the same claims could be refiled in a new case." *Saticoy Bay, LLC, Series 9720 Hitching Rail v. Peccole Ranch Cmty.*

Ass'n, 137 Nev., Adv. Op. 52, 495 P.3d 492, 496 (Nev. 2021). When a case is dismissed without prejudice, "[n]o right or remedy of the parties is affected . . . ." 24 Am. Jur. 2d *Dismissal* § 2. When a defendant remains "subject to the risk of re-filing," there is no alteration of the parties' legal relationship sufficient to confer prevailing party status. *Oscar v. Alaska Department of Education and Early Development,* 541 F.3d at 981-82.

Here, the District Court did not deny Petitioners' leave to amend. To the contrary, it specifically contemplated that Petitioners could potentially bring their claims at a later date after conducting some discovery. *See* 1 PA 187 ("But 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."); 1 PA 196 (stating that it was dismissing Snowell without prejudice "if something happens down the road"). Nothing in the District Court's orders stated that it was denying leave to amend. 2 PA 267, 374-75. Accordingly, Petitioners can potentially refile their claims at a future date. The District Court's dismissal did not effect a material alteration in the parties' status.

Snowell does not cite any authority for its argument that a dismissal without prejudice for lack of personal jurisdiction somehow prevents Petitioners from bringing their claims against Snowell in Ohio. Snowell Answering Brief, p. 20. On this basis alone, this Court should disregard this argument. *Edwards v. Emperor's*

Garden Rest., 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006) (declining to consider arguments that were not cogently argued and supported with authority). Regardless, the law is actually quite clear that dismissals for lack of jurisdiction leave the party free to refile their claims in an appropriate forum with personal jurisdiction. *See, e.g., Wallace v. Holden,* 445 P.3d 914, 923-24 (Or. Ct. App. 2019) (holding that a case that is dismissed without prejudice for lack of personal jurisdiction can be refiled in a proper forum); *Epicous Adventure Travel, LLC v. Tateossian, Inc.,* 573 S.W.3d 375, 381 (Tex. App. 2019) ("A dismissal for want of personal jurisdiction is without prejudice to refiling the claim in a forum with proper jurisdiction."). Thus, contrary to Snowell's argument, the District Court's order did not effect a material change in the parties' status.

The Item 9 Parties misconstrue the case law which they cite to argue that dismissals for lack of jurisdiction effect a material change. In *Kendall v. Overseas Development Corp.,* 700 F.2d 536 (9th Cir. 1983), the Ninth Circuit Court of Appeals actually held that "a dismissal for lack of *in personam* jurisdiction ***is not res judicata as to the merits of the claim.***" *Id.* at 539 (emphasis added). *Kendall* involved a plaintiff who attempted to refile a claim in Idaho federal district court that was dismissed for lack of jurisdiction in Idaho state court. *See id.* Similarly, in *Sabek, Inc. v. Engelhard Corp.,* 76 Cal. Rptr. 2d 882 (Ct. App. 1998), the plaintiff attempted to bring a lawsuit against a company in the same court which had twice

previously held that it lacked personal jurisdiction over the party. *Id.* at 885. Neither of the cases stand for the proposition that Petitioners cannot refile their claims against the Item 9 Parties in an appropriate forum. In fact, the Item 9 Parties expressly concede that Petitioners may do so. *See* Item 9 Parties' Answering Brief, p. 24 ("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.***" (Emphasis added)).

Finally, *Miles v. State of California*, 320 F.3d 986 (9th Cir. 2003) actually supports and is consistent with Petitioners' arguments. *Miles* involved a federal lawsuit filed against the State of California for violation of the Americans with Disabilities Act ("ADA"). *Id.* at 988. While that case was pending, the Supreme Court issued an opinion holding that the Eleventh Amendment prohibited suits against states under the ADA, and the plaintiff's lawsuit was dismissed without prejudice for lack of jurisdiction under the Eleventh Amendment. *Id.* Upon appeal of the district court's award of costs to the State of California as a prevailing party, the Ninth Circuit held that costs are not properly awarded "where an underlying claim is dismissed for lack of subject matter jurisdiction, for in that case the dismissed party is not a 'prevailing party'. . . ." *Id.* However, because plaintiff's complaint was barred by the Eleventh Amendment, the plaintiff could never bring its federal ADA claim in any future forum, thereby effecting a material alteration in

the parties' status that conferred prevailing party status. *Id.* at 989. That is very different from the facts of this case, as Petitioners are free to refile their claims. While the Item 9 Parties and Snowell may disagree with the merits of Petitioners' claims, nothing in the District Court's order prevents Petitioners from seeking leave to amend at a future date and/or initiating litigation in an appropriate alternate forum. Accordingly, this Court should reverse the District Court's award of attorney fees because neither the Item 9 Parties nor Snowell are a "prevailing party" under NRS 18.010(2).

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CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court exercise its discretion to entertain this writ of mandamus, and reverse the District Court's finding that the real parties in interest are "prevailing parties" under NRS 18.010.

Dated this 29th day of November, 2021.

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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 4,265 words.

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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 29th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 29th day of November, 2021, I caused service of a true and correct copy of the foregoing **REPLY IN SUPPORT OF 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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