IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG MUELLER, Appellant, Vs. CHRISTINA HINDS. Respondent,	)))))))))))	No. 83412 Related Dist. Court Case: 8th Jud. Dist. Ct. Case No. D-18-571065-D Dept. C

APPELLANT'S REPLY BRIEF

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I. PLAINTIFF TOOK DEFENDANT'S SOLE PROPERTY IN BREACH OF THE EQUAL DIVISION OF COMMUNITY PROPERTY TERMS OF THE MSA.

The parties agree that "'the purpose of the MSA was to divide the parties' community property equally.'" *See* Pltf's Resp., at 30. Plaintiff then misrepresents that "an equal division of community property is what *has* been done here." *Id.* Plaintiff's position is contradicted by the District Court's ("DC") finding that "Cristina promised to equally divide the parties' savings accounts with Craig…But before Craig tried to access his half…Cristina withdrew all of the monies from the Joint Meadows Bank Account, including the sum of $36,871 assigned to Craig, and closed the account." *See* MUELLER-V1-APPDX. at 020. The DC ruled that equal division of the cash assets was not done in this matter, which is why it had to order an offset. *Id.*

Plaintiff's position is that despite breaching the express written equal division terms of the MSA Defendant was still required to provide specific performance of the $427,500.00 equalization payment. *Id.* Plaintiff's argument relies on the premise that because the DC ordered an offset that somehow negates her fraud and breach of the MSA.

Plaintiff asserts that "Craig's entire brief is posited on the false assertion that a specific bank account balance had to be physically divided in order for the DC to properly divide the community property." *See* Pltf's Resp., at 31-32. Contrary to Plaintiff's argument the MSA did expressly required the money in the specific bank accounts be equally divided. *See* MUELLER-V1-APPDX. at 195. Those terms required each party to facilitate equal division of the cash accounts. The parties specifically agreed to what portions of that equally divided cash would be awarded to the respective parties and what portion of Defendant's cash would be used to offset payments due to Plaintiff. *Id.* at 197:15-19. Plaintiff breached the MSA by taking Defendant's half of the cash assets, and Defendant still has not received his equal share. *Id.* When Plaintiff took Defendant's $36,871 from Meadows Bank she materially breached the equal distribution "balancing and offsetting" terms of the MSA. *See* Pltf's Resp., at 31.

The DC abused its direction by refusing to enforce the clear written terms of the MSA. "Generally, when a contract is clear on its face, it 'will be construed from the written language and enforced as written.' The court has no authority to alter the terms of an unambiguous contract."

Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 776 (2005). The DC did not find that the written terms of the MSA were ambiguous. *See* MUELLER-V1-APPDX. at 018, 020. As such, the DC had no authority to alter the terms of the MSA to provide Defendant an offset of the $36,871.00 instead of the cash he was entitled to receive from the Meadows Bank unless the parties agreed in writing, which they did not. *See* MUELLER-V1-207:18-23. As such, the DC's abused its discretion by refusing to construe and enforce the clear terms of the MSA as written if the contract was not void.

II. THE DC COMMITTED CLEAR ERROR IN THE APPLICATION OF LAW WHEN IT FOUND THAT A VALID CONTRACT EXISTED.

Plaintiff does not dispute that Nevada contract law cited by Defendant applies to the MSA in this case. *See* Pltf's Resp., at 32. To be an enforceable contract there must be "an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672 (2005). "[A] stipulated settlement agreement requires mutual assent…or a 'meeting of the minds…on 'the contract's essential terms.'" *Grisham v. Grisham*, 128 Nev. 679, 685 (2012). The contract terms must be clear and definite and be free of mistake or fraud. *Waltz v. Waltz*, 110 Nev. 605, 609

(1994).

Plaintiff argues that Defendant cannot dispute the June 20, 2019 deposition, rather than the written MSA, is the binding settlement between the parties "pursuant to EDCR 7.50." *See* Pltf's Resp., at 32-33. Defendant does dispute that he entered into any binding and enforceable contract or agreement on June 20th. As noted in Defendant's Opening brief, the deposition transcript constitutes parol evidence, and not a binding contract. *See* Def's Op. Brief, at 31-32. In fact, the deposition itself indicates that a condition precedent to the settlement was a commitment letter from a bank on the loan, "[o]therwise, we're going to proceed to trial," making the agreement non-binding until the commitment letter was provided. *See* MUELLER-V1-APPDX. at 045.

Plaintiff relies heavily on the DC's conclusion that EDCR 7.50 somehow renders the oral negotiations on the record at Plaintiff's deposition a binding contract that supersedes the later written MSA. *See* Pltf's Resp., at 32-33. EDCR 7.50 provides that "No agreement or stipulation between the parties or their attorneys will be effective unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same is in writing subscribed by the party." *See* Nev.

EDCR 7.50. This Court has already interpreted the plain language of this rule as requiring a binding settlement agreement to be entered into the record via an order, or otherwise be in writing signed by the party to be bound. *Power Co. v. Henry*, 130 Nev. 182, 187 (2014); *Humana, Inc. v. Nguyen*, 102 Nev. 507, 509 (1986).

Here, the alleged stipulation was not entered into the record of the case via an order nor was it reduced to writing and signed. *See* MUELLER-V1-APPDX. at 043-52. Further, the only party that was under oath at the deposition was Plaintiff. *Id.* Because the deposition transcript does not constitute entry of an order, nor is it a signed written instrument, the deposition transcript is not a binding agreement. The deposition transcript is parol evidence admissible only to interpret ambiguous terms. *See* Def's Op. Brief, at 31-32.

The binding agreement is the written MSA entered into the record of this case on July 29, 2019, and the DC was required to confine its analysis to the clear terms of the written MSA and enforce the terms as written. *Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 304 (2017). Plaintiff highlights to their detriment that the discussion on June 20th did not include correct amounts of cash in the parties accounts, further

proving that the terms were not definite on June 20th making it not the binding settlement agreement, the written MSA is binding. *See* Pltf's Resp., at 33-34.

Plaintiff proceeds to misrepresent that her theft of Defendant's share of the cash was an error and "[o]nce it was noticed, Cristina conceded at the May 28, 2020 hearing." *Id.* Defendant noticed that Plaintiff had stolen his share when he went to obtain the equalization payment loan only to find out that the Meadows Bank Account had been closed before the MSA was entered. *See* MUELLER-V3-APPDX. at 520:7-26. The issue was brought to the Court and Plaintiff's attention on November 20, 2019. *Id.* at 514. Plaintiff maintained and repeatedly argued in bad faith in her pleadings that she had taken no money from Defendant and sought to enforce the full equalization payment. *Id.* at 528-529. Plaintiff finally conceded her breach six months later. *See* Pltf's Resp., at 34. Plaintiff's concession is irrelevant to determining if a valid contract existed.

Plaintiff argues that Defendant "went forward anyway, and proved absolutely nothing else than the offset that had been agreed to a year earlier." *Id.* at 35. Again, Plaintiff misrepresents the facts of the case.

First, there was no agreement to an offset at the May 28th hearing. Plaintiff's concession demonstrated that at the very least, at the conclusion of the case Defendant would be entitled to an offset of the stolen funds. No agreement to modify the MSA was ever executed.

Plaintiff then asserts that Defendant's "claim of error…that because the MSA lists accounts totaling about $190,000, the settlement…was 'void for fraud or mistake' because the totals agreed to on June 20 were not 'true or accurate.'" *Id.* at 35. Plaintiff again asserts that despite the final written agreement's terms being undisputedly unclear, uncertain, and loaded with mistakes about the parties' property distribution because of Plaintiff's theft of Defendant's share, those mistakes don't matter because the they argue the June 20th settlement was binding. *Id.*

The written MSA is the binding settlement agreement, and it is undisputed that the terms of the written MSA were not clear, definite, or free of mistake at the time of its entry making the contract void. *Grisham*, 128 Nev. at 685. All the provisions regarding what cash amounts were, what bank accounts existed, what amounts from those accounts went to each party, and the amount of the equalization payment owed were all incorrect after Plaintiff stole the $36,871.00 of Defendant's

cash from the Meadows bank account. *See* Def's Op. Brief, at 19. The DC had to invalidate Defendant's entitlement to the $36,871.00 cash and offset the equalization payment because of Plaintiff's theft. *Id.*

Plaintiff argues that the MSA equally divided the party's assets and that "Craig received the full benefit of his half of the extra money." *See* Pltf's Resp., at 35. Defendant receiving an offset of the equalization payment via court order altering the terms of the MSA, which is expressly barred by the terms of the MSA itself and Nevada law, is not the same as equal division pursuant to the MSA. *See* MUELLER-V1-APPDX. at 207:18-22.

The law is clear, for a contract to be binding the terms must be clear and free of mistake or fraud. Here, the terms were not free of mistake or fraud because Plaintiff took Defendant's sole property before she signed the contract rendering the terms false. *See* MUELLER-V1-APPDX. at 196, 210. Plaintiff also verified that she read the MSA and affirmed its correctness under penalty of perjury. *Id.* Plaintiff was the only party that knew she stole the money from the Meadows Bank and signed the MSA anyway, constituting fraud. At the very least, Plaintiff has conceded that the taking of those funds was an "error," which means the MSA was not

free of mistake voiding the contract. *Grisham*, 128 Nev. at 685; *Waltz*, 110 Nev. at 609.

Plaintiff argues that this Court has noted that "'imprecision' of amounts does not constitute 'ambiguity.'" *Id.* at 37. Plaintiff's argument fails for two reasons. First, the case law cited is irrelevant to the issue here because in those cases a specific valuation was actually ordered, or otherwise involved future payments of expenses, like tuition for children. *See Gemma v. Gemma*, 105 Nev. 458 (1989); *Kilgore v. Kilgore*, 449 P. 3d 843, 847 (2019); *Love v. Love*, 114 Nev. 572, 581 (1998). None of these cases involved the issue that this Court is presented with here, where the parties had specific amounts of cash in specific savings accounts and one party took the other parties' share. This Court is dealing with quite specific division of property terms in the MSA identifying the exact amount of cash assets in specific bank accounts, and specifically distributing those assets to the parties. *See* MUELLER-V1-APPDX. at 195.

Second, Defendant is not arguing ambiguity in the terms at all. Defendant is arguing that the terms were clear but ultimately rendered false by fraud or mistake because Plaintiff's took of Defendant's share

and closed the Meadows account before signing the MSA. Plaintiff goes on to argue that because the value of Defendant's specific performance under the MSA, a cash equalization payment of $427,500.00, far exceeded the value of Plaintiff's performance that Defendant receive the $36,871.00 in cash assets from the Meadows Bank account, the breach and errors are irrelevant to whether a contract existed. *See* Pltf's Resp., at 37-38.

In support of this position, Plaintiff argues that "It should be sufficient to note that 'money is fungible,'" and argues that "there was nothing whatsoever special about that particular $36,000 that could not be dealt with by offset on the balance sheet of what Craig continued (and continues) to owe Cristina." *Id.* This argument fails for several reasons. First, to obtain the offset to begin with, Defendant was required to file suit and Plaintiff disputed the issue in bad faith. *Id.* Second, if money is "fungible," why did Plaintiff negotiate to receive $427,000.00 in cash? *See* MUELLER-V1-APPDX. at 195. Why does the MSA specifically outline how the cash assets were to be distributed? *Id.* Why does the MSA have specific offset terms that awarded Plaintiff some, but not all of Defendant's share of the cash? *Id.* at 197. Clearly, money was not fungible when the parties entered into the MSA. Cash and debt are not

the same thing. Here, the Court altered the terms of the MSA to permit Plaintiff taking of Defendant's cash by offsetting debt. Plaintiff cites to no authority that held that cash and debt is fungible.

It is important to note that the Decree states that the MSA was entered into between the parties on July 28, 2019, and that "each party shall comply with each and every provision set forth in the MSA." *See* MUELLER-V1-APPDX. at 162. Similarly, the written MSA expressly states that it "supersedes all prior oral or written agreements" and precludes any changes to the MSA unless in writing signed by the parties. *Id.* at 206-207. Thus, even if the Court were to accept the DC's position that the June 20th deposition was a binding and enforceable settlement agreement pursuant to EDCR 7.50, it was still voided and superseded by the written MSA. *Id.* Finally, even if the June 20th discussion was a binding settlement agreement, it is still undisputed that Defendant did not receive his fifty (50) percent of the cash assets.

Plaintiff has failed entirely to address the actual legal issue in this section and does not dispute that her breach of the MSA before Defendant signed it rendering the specific written property distribution terms of the MSA false, requiring of modification. If the terms of the MSA had to be

modified, which they were, the MSA was not free of fraud or mistake and therefore void. *Grisham*, 128 Nev. at 685; *Waltz*, 110 Nev. at 609. The DC abused its discretion concluding otherwise.

III. THE DC COMMITTED CLEAR ERROR IN THE APPLICATION OF LAW WHEN RULING PLAINTIFF'S BREACH OF THE MSA WAS NOT A MATERIAL BREACH.

Plaintiff does not dispute the applicability of the law cited in Defendant's Brief on the issue of materiality. *See* Pltf's Resp., at 40-44. Plaintiff also does not endeavor to explain why the law cited by Defendant does not apply to Plaintiff's breach rendering it material. Parties have a "responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." *See Maresca v. State*, 103 Nev. 669, 673 (1987); *see also Theil v. State*, 480 P.3d 834 (Nev. 2021). Plaintiff's failure to actually respond to the issue of materiality with any cogent argument or citations to authority for why that law does not apply here is a sufficient reason to reject their position and grant Defendant's appeal.

Should the Court reach Plaintiff's incoherent argument on materiality the Court should flatly reject Plaintiff's invitation to adopt the DC's novel approach for determining materiality. *See* Pltf's Resp., at 40.

Here, the DC committed three errors of law when analyzing materiality, which are discussed in detail below.

A. The DC Abused Its Discretion When Concluding Only The Terms Of The Prior Oral Agreement Were Binding And Material.

First, as explained above, the DC refused to enforce the clear terms of the written MSA and instead holding that only the terms stated on the record of the deposition on June 20th were material. *See* MUELLER-V1-APPDX. at 018. This ruling is clear error in the application of law and an abuse of discretion. EDCR 7.50 requires an order of the court or a written instrument signed by the parties to be binding. *Henry*, 130 Nev. at 187.

The DC's use of the June 20th transcript to contradict the clear written terms of the MSA was and abuse of discretion because it was impermissible consideration of parol evidence. *See* Def's Op. Brief, at 30-32; *Frei v. Goodsell*, 129 Nev. 403, 409 (2013). The DC's conclusion that only the terms from the oral agreement were material was also an abuse of discretion because the DC used that finding as a basis for refusing to enforce the clear written terms of the MSA and to permit modification of the written terms by ordering the offset. *See Canfora*, 121 Nev. at 776; *see also* MUELLER-V1-APPDX. at 018. The DC abused its discretion by

using June 20th deposition to contradict the clear written terms of the MSA, finding that Defendant was not entitled to his 50% share of the cash assets as the parties had agreed because the specifics of the property distribution were "transitional in nature, not material." *Id.* at 017. This Court should reverse the DC and find Plaintiff's breach material.

B. The DC Abused Its Discretion By Determining Materiality Based On Balancing The Value Of Condition Precedent And Future Performance.

"A material breach of a contract occurs when there is a breach of an essential and inducing feature of the contract." *Gamage v. Bd. of Regents of the Nev. Sys. of Higher Educ.*, Case No. 2:12-cv-00290-GMN-VCF, 2013 U.S. Dist. LEXIS 184162, 2014 WL 250245 at *12 (D. Nev. Jan. 21, 2014). "Although defined in various ways, material breach has been expressed as 'a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.'" *Raiter v. Khosh*, 2021 Nev. App. Unpub. LEXIS 425, *3, 491 P.3d 29, 2021 WL 3089279. This analysis does not involve balancing the value of present and future performance. This Court has consistently held that where one party breaches a clear written term of a contract, that

breach is material and excuses the other party's performance. *Myers v. Miller*, 495 P.3d 120 n.3 (Nev. 2021); *Young Elec. Sign Co. v. Fohrman*, 86 Nev. 185, 187 (1970); *Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 304 (2017); *Jones v. Jones*, 132 Nev. 994 (2016).

This Court "will enforce a clear and unambiguous contract as written" finding such terms material. *Id.* This Court has consistently held that a lower court has discretion in determining materiality only when the written terms of the contract are not clear or are ambiguous. *Id.* When terms are ambiguous, this Court applies the principles in the Restatement 2nd of Contracts. *Cain v. Price*, 134 Nev. 193, 196–97 (2018).

Here, the written terms were clear and unambiguous that the cash would be divided equally, and that some, but not all of Defendant's share of the cash would be used to offset payments to Plaintiff. *See* MUELLER-V1-APPDX. at 195-200. After the offsets, Defendant was supposed to receive "$36,871 from Meadows Bank." *Id.* "One of the material terms was that the parties would equally divide their savings accounts." *Id.* at 018:8-12. Defendant was supposed to get a "50% share" of the cash in the accounts, and that "Cristina took $36,871 of that cash." *Id.* at 016, 018:8-12, 023:1-4. Plaintiff promised to divide the saving accounts equally "But

before Craig tried to access his half…Cristina withdrew all of the monies from the Joint Meadows Bank Account, including the sum of $36,871 assigned to Craig, and closed the account." *See* APPDX. at 20:12-19. "Craig expected to have immediate access to the funds…[and] Cristina breached the *MSA*." *Id.*

When determining the breach was not material the DC abused its discretion by ignoring the written terms of the MSA and instead balancing the value of Plaintiff's breach of the equal division of property condition precedent terms with the value of the future performance equalization payment term. The court held that Plaintiff taking Defendant's half of the cash, $36,871, in breach of the clear written and oral terms of the MSA was not material because it was less than "the much larger amount of $427,500" (*id.*) that Defendant was required to pay "to Cristina in cash on or before September 20, 2019." *Id.* at 199:19-27. The Court's decision on why Plaintiff's breach of the MSA was not material has nothing to do with the material oral or written terms of the MSA, the effect of Plaintiff's breach on the other terms of the MSA, or the purpose of the MSA. *Id. Irish v. Ghadyan*, No. NV-18-1219-KuLB, 2019 Bankr. LEXIS 3046, at *12 (B.A.P. 9th Cir. Sep. 27, 2019).

Instead, the DC determined that because the value of Plaintiff's initial breach of an equal division condition precedent term was far less than the amount due pursuant to the equalization payment term, Defendant performance by paying Plaintiff the $427,500.00 in cash was not excused despite Plaintiff's breach. A perfect example of the problem with such analysis is highlighted by this Court's ruling in *Cain v. Price*. 134 Nev. at 196–97. In *Cain*, after litigation stemming from a breach of contract commenced the parties entered into a settlement agreement to release C4's officers from liability if C4 paid the Cains "$20,000,000;no later than 90 days from February 25, 2010.'" *Id.*

The Cains subsequently sued to rescind and for damages and secured a $20,000,000.00 judgment against C4 and its CEO. *Id.* After the judgment was entered, the officers who were covered by the settlement's release provision sought summary judgment alleging that the provision was still binding despite C4's breach and the DC agreed, awarding the officers $100,000.00 in attorney's fees despite C4's breach of the agreement. *Id.* This Court correctly acknowledged that after C4's material breach of the agreement the Cains were no longer bound by the release provision, and despite the Cains obtaining a $20,000,000

judgment against C4 they could still sue the officers because the release term was not enforceable. *Id.* Despite the fact that the Cains obtained a judicial remedy after the breach, the $20,000,000 default judgment that had no bearing on the enforceability of the other settlement terms. *Id.* The material breach permitted the Cains to withhold performance, rescind and sue for damages.

Like in *Cain*, here, the DC correctly concluded "that Cristina promised to equally divide the parties' savings accounts with Craig as part of the global resolution of their divorce case" and breached the MSA by taking Defendant's share. *See* MUELLER-V1-APPDX. at 020:12-19. Defendant sued to rescind and for damages. *Id.* at 021:4-20. However, after concluding that Plaintiff breached the clear and unambiguous terms of the MSA, the DC abused its discretion in finding that the breach was not material because the future performance due to Plaintiff was greater than the amount of Plaintiff's breach. *Id.* Like the default judgment in *Cain*, Plaintiff's admission of guilt does not alter the character of Plaintiff's breach nor does it render the rest of the contract enforceable because a judicial remedy, the offset, was obtained. *Id.*

By anchoring the determination of the issue of materiality on the value of the breach compared to the value of the non-breaching party's future

performance under the contract, the DC penalized Defendant, who did not breach the contract because he chose to exercise his legal right to withhold performance and sue for the remedies available for breach of contract. *Id.* The DC's materiality analysis would set a dangerous precedent that would subject non-breaching parties to protracted losses and attorney fee awards while encouraging breach of contract by parties whose future performance due is more valuable.

Here, it is undisputed that the essential purpose of a MSA is the division of the parties' community property. *Doucettperry v. Doucettperry*, 2020 Nev. App. Unpub. LEXIS 849, *8, 475 P.3d 63, 2020 WL 6445845; *see also* Pltf's Resp., at 5. Plaintiff even argues herself that interpretation of the terms of the MSA is unnecessary because the terms were clear: "everyone agrees what was required on both sides, and the DC properly and accurately recited that Cristina should not have removed the money from Meadows Bank that should have been left for Craig." *See* Pltf's Resp., at 41. It is, therefore, undisputed that Plaintiff promised and was required to equally divide the party's assets and breached the essence of the MSA by taking Defendant's share. *Id.*

This Court should evaluate the DC's materiality decision as if

Defendant had specifically performed by paying Christina the $427,500.00 equalization payment under the terms of the MSA. Under that circumstance, would Plaintiff's breach of the MSA by taking Defendant's $36,871.00 be considered a material breach? If the answer to that question is yes, permitting him to file suit, rescind, to recover the funds and seek damages, than Defendant's performance was excused by the material breach in this case. To hold otherwise punishes a non-breaching party for exercising their right to sue for breach of contract and rewards the non-breaching party for their breach by granting them attorney's fees.

This is because terms that are not material are not actionable without serious risk. That is, a party cannot sue for specific performance of a term that is not material to a contract without risking being accountable for attorneys fees, nor can they withhold performance or seek damages. For example, absent a time is of the essence clause, a party cannot sue for specific performance after a specified time and risks attorney fees as a penalty if they do. *Mayfield*, 124 Nev. at 349. The non-breaching party also cannot rescind the contract nor withhold performance. *Id. see also Cain*, 134 Nev. at 198.

The lower Court's determination that Plaintiff's theft of Defendant's $36,871.00 was not material is a ruling that Defendant had no right to sue to recover the $36,871.00 taken from him even if he had performed by paying Plaintiff the $427,500.00. This is because if materiality is determined by the value of present and future performance, the fact that Plaintiff took Defendant's $36,871.00 can still never be considered material because Plaintiff was owed more via the equalization payment. In other words, the DC found that the equalization payment term was material, and the equal division of the cash assets term was not, because $427,500.00 is a much larger amount. *See* MUELLER-V1-APPDX. at 021.

This novel way of determining materiality by the balancing the value of condition precedent and future performance ignores the terms of the contract and encourages parties to breach. The DC's application of law was clear error and an abuse of discretion because it is squarely in conflict with this Court's consistent precedent that courts "will enforce a clear and unambiguous contract as written." *White*, 133 Nev. at 304; *Myers*, 495 P.3d 120 n.3. The DC's decision is also at odds with this Court's precedent that materiality be determined by analyzing whether the breach was of a term essential to the purpose of the contract. *Raiter v.*

Khosh, 2021 Nev. App. Unpub. LEXIS 425, *3, 491 P.3d 29, 2021 WL 3089279.

Here, there is no dispute regarding the clear terms of the written MSA. *See* Pltf's Resp., at 41. There is no dispute that the "the purpose of the MSA was to divide the parties' community property equally." *Id.* at 30. There is no dispute that Defendant did not receive his 50% share of the cash in the savings accounts because Plaintiff breached the MSA by taking Defendant's half. *See* MUELLER-V1-020:12-19. Plaintiff even argued before the trial court that "[a] court abuses its discretion by relieving a party of its obligation under a stipulation and, in doing so, effectively imposing upon the other party the harm resulting from the reneging party's dereliction." *See* HINDS-V4-RA000589. On appeal, Plaintiff changes course entirely, asserting that it was not improper for the DC relieve Plaintiff of her obligation to divide the cash accounts equally. That argument is untenable.

The DC abused its discretion by refusing to enforce the terms of the MSA as written in complete disregard of Nevada law. As such, this Court should reverse finding the breach material and Defendant's performance excused.

C. The DC Clearly Erred By Considering Plaintiff's Post-Litigation Admission When Determining Materiality.

The DC also appears to have considered Plaintiff's concession to breaching the MSA as a matter relevant to the issue of materiality. *See* MUELLER-V1-APPDX. at 021:1-3. The DC cites to Plaintiff's admission in the material breach section of the order. *Id.* at 020-21. The DC also cites to the concession repeatedly throughout the order. *Id.* at 021, 23, 35. Similarly, Plaintiff repeatedly cites her admission that she breached the MSA throughout her brief. *See* Pltf's Resp., at 14, 22, 34, 54, 55.

Plaintiff fails to cite any authority and Defendant could not find any that has ever concluded that a party's admission that they breached a contract halfway through litigation is a relevant consideration for determining materiality. Ultimately, the DC's consideration of Plaintiff's admission to breach of contract after disputing it for months and suing for full specific performance on the $427,500.00 equalization payment encourages breach of contract by rewarding the breaching party for their breach. A party can breach the terms of their contract, demand specific performance, dispute that they breached during litigation, then before trial admit to it and if a court uses that admission as a factor in determining materiality the non-breaching party could be found to be the

prevailing party and awarded attorney's fees despite their bad faith. This is what happened in this case.

As a matter of public policy, this Court avoids issuing and affirming rulings that "encourage unlawful conduct." *Allum v. Valley Bank*, 114 Nev. 1313, 1323 (1998). As such, consideration of Plaintiff's admission to breaching the MSA in determining materiality was an abuse of discretion because it encourages parties to breach and this Court should reverse finding the breach material.

IV. PLAINTIFF COMMITTED FRAUD.

Plaintiff's section addressing the issue of fraud does not include a single citation to any authority. Plaintiff's argument is that she could not be found to have committed fraud in the inducement because "on the date of the deposition/settlement, the funds were in the account, and their later removal could not have induced anyone to do anything on an earlier date." *See* Pltf's Resp., at 45. This argument relies on the incorrect presumption that the June 20th deposition is the binding settlement agreement.

Because the written MSA is the contract, the appropriate question is whether Plaintiff fraudulently induced Defendant to enter into the

written MSA by verifying that his 50% of the cash in the savings accounts would be distributed to him pursuant to the clear terms of the MSA? The answer to that question is yes. Plaintiff took Defendant's share of the cash, closed the Meadows account and then signed the MSA verifying the money was in the account. *See* MUELLER-V1-APPDX. at 020, 210.

Plaintiff is an attorney and cannot feign ignorance or mistake. *Id. see also* Pltf's Resp., at 3, 11. Plaintiff initialed every page of the MSA including the pages that included the savings account distribution and offset terms. *Id.* at 195-200. Plaintiff liquidated all the remaining funds in the Meadows Bank Account and closed the account on July 16th less than two weeks before verifying that the money was in the account, that the account existed, and that Defendant would receive his share.

According to the DC it was not a false representation to take almost $84,000.00 in community property funds she agreed to split equally at the June 20th deposition and when signing the MSA on July 28th, nor when she lied about taking those funds in filings in this matter. The only way that this position makes any logical sense is if the June 20th deposition supersedes the written MSA, which it does not. *See* MUELLER-V1-APPDX. at 018:1-12. The DC held that "the $36,871 was not 'missing' it

was accounted for but taken by Cristina when she withdrew all of the funds and closed the Joint Meadows Bank Account." *Id.* at 019:11-20. Such is not the case. Defendant has no idea where the money Plaintiff took went. That money remains missing and likely spent by Plaintiff.

The DC abused its discretion by holding that because the binding the June 20th deposition was the contract and because Plaintiff stole the money from the account afterwards there was no fraud in the inducement. *Id.* Plaintiff repeats this very same argument on appeal asserting that "the allegation makes no temporal sense." *See* Pltf's Resp., at 45.

Regardless of whether the June 20th deposition could be considered a binding settlement agreement at the time, the written MSA expressly states that it supersedes all other prior agreements. *See* MUELLER-V1-APPDX. at 206:25-207:1. As such, it is the written MSA that matters for the purpose of analyzing the fraud claim. It is the date the written MSA agreement was signed by the parties that is relevant to ascertaining whether Plaintiff committed fraud in the inducement. It is undisputed that Plaintiff took the funds from the Meadows bank account before signing the MSA constituting fraud.

Plaintiff repeatedly argues that "the detail of the dollars in that specific account were a trivial detail of the overall settlement to divide the community property." *See* Pltf's Resp., at 45. This Court has never found a clear written contract term to be a trivial detail, or a "transitional" term. Plaintiff cites no relevant authority for this position and the fact remains that Defendant has never received his half of the cash. Instead, the DC abused its discretion by altering the terms of the written MSA ordering Defendant's share of the cash be offset from the amount owed via the equalization payment, sanctioning Plaintiff's material breach and fraud. *Havas v. Alger*, 85 Nev. 627, 632 (1969).

In *Havas*, this Court made clear that a party "is entitled to rescind if he does not get what he bargained for because of the [other party's] fraud. Substantial compliance does not apply when the seller fraudulently represents he is giving 100 percent compliance with the agreement between them." *Id.* at 633. Here, it is undisputed that Plaintiff "promised to equally divide the parties' savings accounts with Craig as part of the global resolution of their divorce case." *See* MUELLER-V1-APPDX. at 020:12-19. It is undisputed that Plaintiff took Defendant's share before the contract was signed by both parties. It is undisputed that

"Craig expected to have immediate access to the funds awarded to him pursuant to the parties' agreement." *Id.* Receiving the benefit of one's bargain means receiving what was expected when the contract was entered into. *Magnum Opes Constr. v. Sanpete Steel Corp.*, No. 60016, 2013 Nev. Unpub. LEXIS 1655, at *6 (Nov. 1, 2013) *citing Dynalectric Co. of Nev., Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 484 (2011). The DC held Defendant did not receive the expectation of his bargain because Plaintiff took Defendant's share, but still ruled in Plaintiff's favor. The DC abused its discretion in concluding that Plaintiff did not commit fraud and this Court should reverse.

V. THE DC ABUSED ITS DISCRETION BY FINDING THAT THE WAIVER CLAUSE IN THE WRITTEN MSA PREVENTED DEFENDANT FROM BRINGING A MOTION PURSUANT TO NRS 125.150(3).

Once again Plaintiff fails to cite any relevant case law on the issue. *See* Pltf's Resp., at 46-49. Instead, Plaintiff's counsel cites an article he wrote and a case that is wholly irrelevant to whether Defendant had a right to challenge the decree over missing assets. According to Plaintiff "[t]he main problem with his argument is that no such thing happened; no finding of any kind of 'waiver of right to file a motion' ever occurred." *Id.* at 46. In the very next paragraph Plaintiff acknowledges that the DC

refused to address the NRS 125.150(3) claim by holding that the Defendant "waived any claims to any sums not identified in the MSA." *Id.* at 47.

Indeed, in the section of the DC's order addressing the NRS 125.150(3) claim the Court expressly ruled that the claim was "waived by the express terms of the *Decree* and the *MSA*." *See* MUELLER-V1-APPDX. at 018:16-19:20. The DC used the waiver clause of the MSA to justify refusing to address the $105,842.96 in missing assets that Plaintiff undisputedly took and concealed or expended between entry of the JPI and the MSA. *See* Def's Op. Brief, at 10-11.

Defendant proved prior to, at the evidentiary hearing, and after that Plaintiff withdrew "$129,891.00 from the community property funds in the Meadows bank account in 2019 and expended over $100,000.00 of those funds." *See* Def's Op. Brief, at 9. It was undisputed that the money was taken from the Meadows account and expended by Plaintiff. All the transactions argued by Defendant were identified using the Meadows bank account statements and the Citi Bank Statements that Plaintiff did not disclosed to Defendant during the divorce proceedings, which were stipulated to be authentic. *See* MUELLER-V1-APPDX. at 066-76, 078-1-

5, 127-129. Plaintiff does not even dispute that she took that money on appeal, and, in fact, concedes that she took it. *See* Pltf's Resp., at 48-49. Plaintiff's only defense to the claim is and was that Defendant was not paying attention to her taking the money and waived further discovery, so her theft of that money should be excused.

Defendant proved that Plaintiff disclosed only the "the June 2019 CitiBank Account statement to Defendant, failing to disclose the February-May 2019 CitiBank statements that showed Plaintiff's deposit of the Meadows account money and its subsequent expenditure." *See* Def's Op. Brief, at 9. As such, Plaintiff breached the full disclosure provision of the MSA and concealed her expending of $105,842.96 of community property over and above what she was supposed to be spending for living expenses pursuant to the JPI. *Id.* at 9-10. Because the money taken from the Meadows account by Plaintiff and expended was missing from the final accounting, the DC abused its discretion by concluding that Defendant waived his NRS 125.125 claim.

VI. THE DC'S ORDERING OF AN OFFSET ESTABLISHES THAT DEFENDANT'S PERFORMANCE WAS IMPOSSIBLE.

This Court has long held that Nevada courts "will enforce a clear and unambiguous contract as written." *White*, 133 Nev. at 304. The DC's

order itself establishes that the terms of the MSA as they were written could not be enforced as they were written because Plaintiff stole $36,871 of Defendant's sole property and never returned the money. The terms of the written MSA were clear and unambiguous. The parties had $190,317.39 in community property funds in various bank accounts as of June 20, 2019. *See* MUELLER-V1-APPDX. at 195.

There was $29,087.70 in the joint Bank of Nevada account and there was supposed to be $86,039.61 in the joint Meadows Bank account to be equally divided. *Id.* The MSA clearly states that some but not all of the "$66,071 from the Meadows Bank savings account" would be "used to satisfy certain obligations of Craig to Cristina." *Id.* at 197. Specifically, the written MSA stated that $29,200.00 from the Meadows Bank account would be used to satisfy obligations to Plaintiff "which then leave Craig $36,871 from Meadows Bank." *Id.* at 200.

The DC acknowledged that Plaintiff breached the MSA by taking the $36,871. *Id.* at 020:12-19. The DC did not order specific performance of the clear written terms of the MSA. Instead, the DC impermissibly modified the terms by ordering an offset. *Id.* at 021. The offset order itself indicates that the clear written terms were impossible to enforce. The DC

simply refused to interpret the MSA as written, instead altering the terms to excuse Plaintiff's breach.

Plaintiff's theft of Defendant's cash also prevented him from getting a loan for several reasons. First, it is patently unreasonable for the DC to conclude that Defendant needed to take out a $427,500.00 loan and incur interest when it ordered a $36,871.00 offset. The injury to Defendant of having to pay interest on an additional $36,871.00 that was not actually due to Plaintiff after she took Defendant's cash is greater than the harm to Plaintiff for having to wait until the issue was resolved. Plaintiff also sued Defendant for the full amount of the equalization payment and denied taking the money. *See* HINDS-V1-RA000055-60, RA000203-224. The DC ultimately was required to order the dollar for dollar offset. *See* MUELLER-V1-APPDX. at 035:1-7. The dollar for dollar credit had to be awarded first before obtaining any loan to pay the equalization payment.

Third, the June 20th deposition transcript made the settlement conditioned on a commitment letter for the loan, undermining the notion that the June 20th discussion was actually a binding settlement. *See* MUELLER-V1-045 (6:1-19). Thus, the DC's ruling that "Craig's ability to obtain the loan was not a condition" of the agreement was contradicted by

the June 20th deposition transcript. *Id.* It was impossible to enforce the MSA as it was written and Defendant's performance was rendered impossible. The DC abused its discretion by ruling otherwise and this Court should reverse.

VII. SANCTIONS ARE NOT APPROPRIATE.

Plaintiff argues that Defendant should be sanctioned. *See* Pltf's Resp., at 57. When Defendant requested the case be removed from the fast track program Plaintiff agreed that this case was not appropriate for the fast track program because it did not involve child custody. The Nevada Rules of Appellate Procedure do not appear to permit removal from the fast track program without regular briefing. *See* NRAP 3E(g)(1); *see also* NRAP 3E(g)(2).

The second complaint Plaintiff makes is that NRAP 3E(2)(E) states that the Court does not accept audio or video of the proceedings in lieu of transcripts. *Id.* While this is technically correct, this Court expressly granted Defendant permission to submit the audio/video files of the proceedings as part of the appendix. *See* Order, 9/21/2021, at 1. Defendant supplied the Court with the audio/video files of the proceedings as expressly permitted by the Court. More importantly,

however, is the fact that the videos of the proceedings and/or the transcripts are not necessary for resolution of Defendant's claims on appeal.

CONCLUSION

For the foregoing reason, Appellant requests that this Court gant his appeal and reverse the District Court's rulings.

CERTIFICATE PURSUANT TO NRAP 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

> [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook; or
>
> [ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

> [X] Proportionately spaced, has a typeface of 14 points or more, and contains 6,982 words, less than the 7,000 word limit; or
>
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>
> [ ] Does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, 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 brief complies with all applicable Nevada.

Dated this **4th** day of **May 2022**.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 4th day of May, 2022. Electronic service of the foregoing document was made in accordance with the Master Service List as follows:

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