

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\*\*\*\*

DAVID P. BIESINGER, DPM, an individual,  
Appellant,  
v  
ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation,  
Respondent.

**CASE NO. 83544** Electronically Filed  
Nov 02 2021 11:34 a.m.  
(Appeal of Eighth Judicial District Court case no. A-17-754423-B)  
Elizabeth A. Brown  
Clerk of Supreme Court

**DOCKETING STATEMENT  
CIVIL APPEALS**

1. Eighth Judicial District Court, Department XIII  
  
County of Clark, the Honorable Mark R. Denton  
  
District Ct. Case No. A-17-754423-B

**2. Attorneys filing this docketing statement:**

Attorney: Zachary P. Takos, Esq.  
Telephone: (702) 856-4629  
Firm: Takos Law Group, Ltd.  
Address: 1980 Festival Plaza Drive, Suite 300  
Las Vegas, Nevada 89135  
Client: David P. Biesinger

Attorney: Steven R. Hart, Esq.  
Telephone: (702) 856-4629  
Firm: Takos Law Group, Ltd.  
Address: 1980 Festival Plaza Drive, Suite 300  
Las Vegas, Nevada 89135  
Client: David P. Biesinger

**3. Attorney(s) representing respondent(s):**

Attorneys: John R. Bailey, Esq., Nevada Bar No. 0137  
Joshua M. Dickey, Esq., Nevada Bar No. 6621  
Paul C. Williams, Esq., Nevada Bar No. 12524  
Telephone: (702) 562-8820 (Main)  
(702) 789-4552 (Direct)  
(702) 562-8821 (Fax)  
Firm: BAILEY KENNEDY  
Address: 8984 Spanish Ridge Avenue  
Las Vegas, NV 89148  
Client: Absolute Foot Care Specialists

**4. Nature of disposition below (check all that apply):**

- |   |   |
|---|---|
| <input type="checkbox"/> Judgment after bench trial         | <input type="checkbox"/> Dismissal:                                     |
| <input type="checkbox"/> Judgment after jury verdict        | <input type="checkbox"/> Lack of jurisdiction                           |
| <input checked="" type="checkbox"/> Summary judgment        | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                   | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief  | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction         | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination     | <input type="checkbox"/> Other disposition                              |
|   | (specify): _____  |

**5. Does this appeal raise issues concerning any of the following? No**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This is a civil action involving claims for breach of contract, and counterclaims for breach of contract, among other things. This case culminated in a motion for summary judgment by Respondent on its cause of action for breach of contract and against Appellant's counterclaims, on which the district court issued a Findings of Fact, Conclusions of Law, and Order Granting Plaintiff/Counterdefendant Absolute Foot Care Specialists' Motion for Summary Judgment on: (1) Its Breach of Contract Claims; and (2) Defendant/Counterclaimant David P. Biesinger, DPM's Counterclaims and a Judgment, from which Appellant now appeals.

9. **Issues on appeal.** State concisely the principal issues(s) in this appeal (attach separate sheets as necessary):

1. Did the District Court err in granting the Respondent's Motion for Summary Judgment when it held that the parties' Employment Agreement automatically renewed for successive one-year periods unless otherwise terminated it in accordance with Section VIII.B of the Employment Agreement?
2. Did the District Court err in finding that Dr. Noah Levine's text communications did not confirm that the Employment Agreement had expired and did not modify the Employment Agreement?

3. Did the District Court err in finding that even if the Extension had abrogated the Evergreen Clause, the Employment Agreement renewed by operation of law pursuant to *Ringle v. Bruton*, 120 Nev. 82, 86 P.3d 1032 (2004)?
4. Did the District Court err in not allowing Dr. Biesinger to raise the affirmative defense of breach of the Employment Agreement pursuant to the Court's sanction of Dr. Biesinger under NRCP 37(b)?

- 10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issue raised:

Respondent is unaware of any such proceedings.

- 11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

- 12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issues arising under the United States and/or Nevada Constitutions

- ☐ A substantial issue of first impression
- ☐ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain: N/A

**13. Assignment to the Court of Appeals or retention in the Supreme Court.**

NRAP 17(b)(6) indicates that the Court of Appeals should hear “cases involving a contract dispute where the amount in controversy is less than \$75,000.” Respondent believes the case should be retained by the Supreme Court because Respondent was awarded a monetary judgment in the amount of six hundred fifty thousand dollars (\$650,000.00).

**14. Trial.** If this action proceeded to trial, how many days did the trial last?

N/A

Was it bench or jury trial?

N/A

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

**TIMELINESS OF NOTICE OF APPEAL**

**16. Date of entry of written judgment or order appealed from:**

Notice of Entry of the Court's Decision and Order: August 18, 2021

And

Notice of Entry of the Judgment: August 18, 2021.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: N/A

**17. Date written notice of entry of judgment or order was served:**

Notice of Entry of the Court's Decision and Order: August 18, 2021

And

Notice of Entry of the Judgment: August 18, 2021.

Was service by:

☐

Delivery

☒

Mail/electronic/fax

**18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59):** Not applicable

(a) Specify the type of motion, the date and method of service the motion, and date of filing.

☐

NRCP 50(b)

Date of filing \_\_\_\_\_

☐

NRCP 52(b)

Date of filing \_\_\_\_\_

☐

NRCP 59

Date of filing:

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date of written notice of entry of order resolving tolling motion was served

\_\_\_\_\_

Was Service by:

☐

Delivery

☐

Mail

**19. Date of notice of appeal filed:** Notice of Appeal filed September 28, 2021.

20. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other: NRAP 4(a)(1)**

### **SUBSTANTIVE APPEALABILITY**

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify)

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) permits an appeal from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered. Appellant's action was commenced in the court in which Respondent's Motion for Summary Judgment and Motion for Entry of Judgment were granted. The district court's notice of entry of its Decision and Order and the notice of entry of the judgment was a final judgment.

22. **List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Appellants (Defendant): David P. Biesinger

Respondent (Plaintiff): Absolute Foot Care Specialists

Defendant in district court: Lorraine Pallanti

- (b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

Lorraine Pallanti was formally dismissed from the district court action after reaching a settlement with Absolute Foot Care Specialists.

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Respondent's claims against Appellant

(1) Breach of Contract - Summary Judgment- granted August 18, 2021

(2) Breach of Implied Covenant of Good Faith and Fair Dealing - Summary Judgment - dismissed as moot August 18, 2021

(3) Unjust Enrichment - In the Alternative - Summary Judgment - dismissed as moot August 18, 2021

(4) Breach of Fiduciary Duty - Summary Judgment - dismissed as moot August 18, 2021

(5) Conversion - Summary Judgment - dismissed as moot August 18, 2021

(6) Intentional Interference - Summary Judgment - dismissed as moot August 18, 2021

(7) Civil Conspiracy - Summary Judgment - dismissed as moot August 18, 2021



Appellant's claims against Respondent

(1) Declaratory Relief - Summary Judgment denied August 18, 2021

(2) Breach of Contract - Summary Judgment denied August 18, 2021

(3) Breach of the Covenant of Good Faith and Fair Dealing - Summary Judgment denied August 18, 2021

(4) Unjust Enrichment - Summary Judgment denied August 18, 2021

(5) NRS 608.040–Waiting Time Penalties - Summary Judgment denied August 18, 2021

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**25. If you answered “No” to question 23, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCp 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRC 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**26. If you answered “No” to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

N/A

**27. Attached file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaim, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims, and/or third-party claims asserted in the action or consolidation action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

**VERIFICATION**

**I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.**

David P. Biesinger  
Name of Appellant

Zachary P. Takos  
Name of counsel of record

October 28, 2021  
Date

/s/ Zachary P. Takos  
Signature of counsel of record

Clark County, Nevada  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 28<sup>th</sup> day of October, 2021, I served a copy of this completed docketing statement upon all counsel of record:

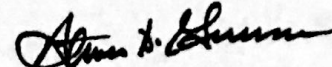
- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

PAUL C. WILLIAMS  
BAILEY KENNEDY  
8984 Spanish Ridge Avenue  
Las Vegas, Nevada 89148-1302  
PWilliams@BaileyKennedy.com

/s/ Steven Hart  
Employee of Takos Law Group, Ltd.

Exhibit 1

Exhibit 1

  
CLERK OF THE COURT

1 **COMPB**  
2 **JOHN R. BAILEY**  
3 **Nevada Bar No. 0137**  
4 **JOSHUA M. DICKEY**  
5 **Nevada Bar No. 6621**  
6 **PAUL C. WILLIAMS**  
7 **Nevada Bar No. 12524**  
8 **BAILEY ♦ KENNEDY**  
9 **8984 Spanish Ridge Avenue**  
10 **Las Vegas, Nevada 89148-1302**  
11 **Telephone: 702.562.8820**  
12 **Facsimile: 702.562.8821**  
13 **JBailey@BaileyKennedy.com**  
14 **JDickey@BaileyKennedy.com**  
15 **PWilliams@BaileyKennedy.com**  
16 *Attorneys for Plaintiff Absolute*  
17 *Foot Care Specialists*

DISTRICT COURT  
CLARK COUNTY, NEVADA

A-17-754423-B

13 **ABSOLUTE FOOT CARE SPECIALISTS, a**  
14 **Nevada Corporation,**

Plaintiff,

vs.

16 **DAVID P. BIESINGER, DPM, an individual; and**  
17 **LORRAINE PALLANTI, an individual,**

Defendants.

Case No.  
Dept. No.

XIII

**COMPLAINT**

Exempt from Arbitration  
(NAR 3(A) – Equitable Relief Sought)

Business Court Assignment Requested  
(EDCR 1.61(a)(2)(II) – Business Torts)

20 Plaintiff Absolute Foot Care Specialists (“Absolute Foot Care” or “Plaintiff”) complains and  
21 alleges against David Biesinger, DPM (“Dr. Biesinger”) and Lorraine Pallanti (“Ms. Pallanti”)  
22 (jointly, “Defendants”) as follows:

**THE PARTIES**

24 1. Plaintiff Absolute Foot Care is, and at all times material hereto was, a Nevada  
25 corporation duly licensed and authorized to conduct business in the State of Nevada.

26 2. Dr. Biesinger is a Doctor of Podiatric Medicine and was an employee of Absolute  
27 Foot Care. Dr. Biesinger is a resident of Clark County, Nevada.



1 14. As a consequence of her employment with Absolute Foot Care, Ms. Pallanti was  
2 provided access to Absolute Foot Care's confidential information, including confidential information  
3 relating to patients.

4 15. Absolute Foot Care's policies and procedures also provided that Absolute Foot Care's  
5 confidential information was only to be utilized as authorized by Absolute Foot Care and/or as  
6 necessary to provide medical care.

7 16. For example, Absolute Foot Care's Employee Handbook provides:

8 Information about patients, their illnesses, or their personal lives must be kept  
9 completely confidential. . . . Case histories, confidential papers, business  
10 records, and even the appointment book should be kept where passing patients  
11 will not see them. . . . All information regarding patients (i.e. personal  
12 information, office notes, medical documents, etc.) is the property of Absolute  
13 Foot Care Specialists and will not be released to any entity without a signed  
14 release of information by the patient. *Staff are forbidden from taking, selling  
15 or copying any information regarding any patient for personal or nefarious  
16 purposes or for profit.*

13 (emphasis added.)

14 17. Defendants received training with respect to Absolute Foot Care's policies and  
15 procedures on its confidential information.

16 18. Further, Dr. Biesinger agreed (in the Employment Agreement) not to disclose or  
17 utilize any of Absolute Foot Care's confidential information except as authorized by Absolute Foot  
18 Care and/or as necessary to provide medical care.

19 19. Dr. Biesinger's Employment Agreement also contains a Restrictive Covenant,  
20 wherein Dr. Biesinger agreed, among other things, not to do the following for two years following  
21 termination of his association with Absolute Foot Care: (i) practice podiatric medicine within eight  
22 miles of the Centennial Office for a period of two years following termination; (ii) solicit patients or  
23 other customers of Absolute Foot Care; and (iii) solicit employees of Absolute Foot Care.

24 20. Dr. Biesinger expressly acknowledged that the Restrictive Covenant is narrowly  
25 tailored and reasonably necessary to protect Absolute Foot Care's legitimate interests.

26 21. Dr. Biesinger further acknowledged that the Restrictive Covenant is of significant  
27 value to Absolute Foot Care and was a material inducement for Absolute Foot Care to enter into the  
28 Employment Agreement and grant Dr. Biesinger access to its patients, employees, and business.



1           22.     Dr. Biesinger also acknowledged that Absolute Foot Care would suffer irreparable  
2 harm in the event Dr. Biesinger violated the Restrictive Covenant.

3           23.     For many years, the relationship between Absolute Foot Care and Dr. Biesinger  
4 flourished, and Dr. Levine grew to trust Dr. Biesinger so much that he contemplated having Dr.  
5 Biesinger take over the practice upon his retirement.

6           24.     On April 3, 2017, Ms. Pallanti abruptly provided Absolute Foot Care with notice that  
7 she was resigning on April 12, 2017.

8           25.     On April 5, 2017, Absolute Foot Care received a call from an insurer that appeared to  
9 indicate Dr. Biesinger was potentially leaving his employment with Absolute Foot Care.

10          26.     Upon further investigation, Absolute Foot Care discovered Dr. Biesinger had  
11 purchased property and was building out a medical suite located at 6200 North Durango, Las Vegas,  
12 Nevada—approximately *one mile* away from Absolute Foot Care's Centennial Office.

13          27.     Dr. Levine immediately went to Dr. Biesinger, asked him about the information  
14 indicating Dr. Biesinger was leaving, and asked why Dr. Biesinger had not spoken with him (Dr.  
15 Levine) about it.

16          28.     Dr. Biesinger became pale and did not immediately answer.

17          29.     When he finally did answer, he stated that he "was going to get around to telling" Dr.  
18 Levine and advised that his departure date was "indeterminate."

19          30.     Dr. Biesinger then stated that he was not being paid enough and represented that he  
20 was entertaining a job offer from another group.

21          31.     However, Dr. Biesinger refused to disclose the group, representing that he was under  
22 a confidentiality agreement.

23          32.     Dr. Biesinger indicated to Dr. Levine that he was exploring his options—including  
24 remaining employed by Absolute Foot Care or becoming employed by a competing group—and did  
25 not give any indication that he was intending to resign in the near future.

26          33.     Notably, Dr. Biesinger did not disclose that he had purchased and was building out a  
27 medical suite one mile down the street from Absolute Foot Care.  
28

1           34.     Although Dr. Biesinger represented to Dr. Levine that he was exploring his options  
2 and that his departure date was indeterminate, he waited until Dr. Levine and the Practice  
3 Administrator of Absolute Foot Care were away from the office on a long-planned vacation and, on  
4 April 20, 2017, advised staff members that he was resigning and provided his key to the office to a  
5 staff member.

6           35.     Dr. Biesinger did not provide any notice to Absolute Foot Care that he was resigning,  
7 let alone the ninety-day written notice required by his Employment Agreement.

8           36.     Furthermore, Dr. Biesinger planted a resignation letter fraudulently backdated to  
9 March 10, 2017—a date which still would not have complied with the ninety-day written notice  
10 requirement—on Dr. Levine’s desk.

11          37.     Upon information and belief, Dr. Biesinger, while an employee of Absolute Foot  
12 Care, solicited and caused at least one of Absolute Foot Care’s employees—Ms. Pallanti—to leave,  
13 and otherwise began competing with Absolute Foot Care while still an employee of Absolute Foot  
14 Care.

15          38.     Upon information and belief, Defendants have taken or copied records, patient  
16 information, and other confidential information of Absolute Foot Care. Moreover, although Dr.  
17 Biesinger knew he was leaving, Dr. Biesinger caused Absolute Foot Care to pay for and benefit Dr.  
18 Biesinger beyond his employment with Absolute Foot Care.

19          39.     On April 21, 2017, Absolute Foot Care began experiencing a disproportionate amount  
20 of appointment cancellations from patients.

21          40.     Indeed, on April 21, 2017, Absolute Foot Care learned Defendants had solicited  
22 multiple patients of Absolute Foot Care and Dr. Levine on April 20, 2017.

23          41.     For example, Ms. Pallanti—acting on behalf of Dr. Biesinger—left a voicemail for a  
24 patient of Dr. Levine’s on April 20, 2017, stating, in pertinent part:

25               [T]his is Lori, Dr. Biesinger’s office. You have an appointment scheduled for  
26 8:00 a.m. I just want to let you know that Dr. Biesinger is no longer with  
27 Absolute Foot Care. He has opened his new practice, his own new practice,  
28 which is Centennial Foot and Ankle on 6200 North Durango, Suite 110. If you  
need to be seen tomorrow, you can certainly keep your appointment and you  
can see Dr. Levine. Or if you want to schedule with us, some scheduling for  
next week, and actually starting the week of May 1. Please give me a call back.”

1           42.     Upon information and belief, Defendants have made numerous similar solicitations to  
2 patients of Absolute Foot Care, including other patients of Dr. Levine.

3                               **FIRST CAUSE OF ACTION**

4                               **(Breach of Contract – Dr. Biesinger)**

5           43.     Absolute Foot Care repeats and realleges the above allegations as though fully set  
6 forth herein.

7           44.     Absolute Foot Care and Dr. Biesinger entered into a valid and binding contract.

8           45.     Absolute Foot Care performed under the contract and/or was excused from  
9 performing.

10          46.     Dr. Biesinger breached the contract by, among other things, competing with Absolute  
11 Foot Care within the Restricted Area, soliciting patients and employees, and misappropriating  
12 Absolute Foot Care's confidential information.

13          47.     As a result of Dr. Biesinger's breaches, Absolute Foot Care has been damaged in an  
14 amount in excess of \$15,000.

15          48.     As a further result of Dr. Biesinger's breach, Absolute Foot Care has been forced to  
16 incur attorney's fees and legal expenses and has suffered damages associated with such fees and  
17 expenses, which Absolute Foot Care is entitled to recover under the Employment Agreement and as  
18 special damages.

19                               **SECOND CAUSE OF ACTION**

20                               **(Breach of the Implied Covenant of Good Faith and Fair Dealing – Dr. Biesinger)**

21          49.     Absolute Foot Care repeats and realleges the above allegations as though fully set  
22 forth herein.

23          50.     As a result of the contract, Dr. Biesinger owed Absolute Foot Care a duty of good  
24 faith and fair dealing.

25          51.     Through his actions, Dr. Biesinger breached this duty, thereby depriving Absolute  
26 Foot Care of its justified expectations.

27          52.     As a result of Dr. Biesinger's breach, Absolute Foot Care has been damaged in an  
28 amount in excess of \$15,000.

1           53.     As a further result of Dr. Biesinger's breach, Absolute Foot Care has been forced to  
2 incur attorney's fees and legal expenses and has suffered damages associated with such fees and  
3 expenses, which Absolute Foot Care is entitled to recover under the Employment Agreement and as  
4 special damages.

5                               **THIRD CAUSE OF ACTION**

6                               **(Unjust Enrichment – Dr. Biesinger)**

7           54.     Absolute Foot Care repeats and realleges the above allegations as though fully set  
8 forth herein.

9           55.     Dr. Biesinger has received benefits conferred upon him by Absolute Foot Care  
10 separate and apart of the Employment.

11          56.     Dr. Biesinger's failure to pay Absolute Foot Care for such benefits is against  
12 fundamental principles of justice or equity and good conscience.

13          57.     As a result of Dr. Biesinger's unjust enrichment, Absolute Foot Care has sustained  
14 damages in an amount in excess of \$15,000.

15          58.     As a further result of Dr. Biesinger's unjust enrichment, Absolute Foot Care has been  
16 forced to incur attorney's fees and legal expenses and has suffered damages associated with such  
17 fees and expenses, which Absolute Foot Care is entitled to recover under the Employment  
18 Agreement and as special damages.

19                               **FOURTH CAUSE OF ACTION**

20                               **(Breach of Fiduciary Duty – Defendants)**

21          59.     Absolute Foot Care repeats and realleges the above allegations as though fully set  
22 forth herein.

23          60.     Defendants owed a fiduciary duty to Absolute Foot Care.

24          61.     Defendants breached that duty to Absolute Foot Care by, among other things,  
25 competing with Absolute Foot Care while still employed, soliciting patients and employees of  
26 Absolute Foot Care, and misappropriating Absolute Foot Care's confidential information

27          62.     As a result of Defendants' breach of fiduciary duty, Absolute Foot Care has sustained  
28 damages in excess of \$15,000 as a proximate cause of the breach.

63. Defendants are guilty of oppression, fraud, or malice, express or implied, as well as a conscious disregard for Absolute Foot Care's rights. Therefore, Absolute Foot Care is entitled to recover punitive damages.

64. As a further result of Defendants' breach, Absolute Foot Care has been forced to incur attorney's fees and legal expenses and has suffered damages associated with such fees and expenses, which Absolute Foot Care is entitled to recover under the Employment Agreement (as to Dr. Biesinger) and as special damages (as to Defendants).

### **FIFTH CAUSE OF ACTION**

**(Conversion – Defendants)**

65. Absolute Foot Care repeats and realleges the above allegations as though fully set forth herein.

66. Defendants have wrongfully exerted dominion and control over Absolute Foot Care's property, including Absolute Foot Care's confidential information.

67. Defendants wrongfully exerted Absolute Foot Care property in denial of, or inconsistent with, Absolute Foot Care's title or rights, in derogation, exclusion, or defiance of its title or rights.

68. Absolute Foot Care has been harmed as a direct and proximate result of Defendants' actions.

69. As a result of Defendants' conversion, Absolute Foot Care has sustained damages in an amount in excess of \$15,000.

70. As a further result of Defendants' conversion, Absolute Foot Care has been forced to incur attorney's fees and legal expenses and has suffered damages associated with such fees and expenses, which Absolute Foot Care is entitled to recover under the Employment Agreement (as to Dr. Biesinger) and as special damages (as to Defendants).

71. Defendants are guilty of oppression, fraud, or malice, express or implied, as well as a conscious disregard for Absolute Foot Care's rights. Therefore, Absolute Foot Care is entitled to recover punitive damages.

**SIXTH CAUSE OF ACTION**

**(Intentional Interference – Defendants)**

72. Absolute Foot Care repeats and realleges the above allegations as though fully set forth herein.

73. Actual and prospective contractual relationships exist or existed between Absolute Foot Care and third parties, including patients.

74. Defendants knew of these actual and prospective contractual relationships.

75. Defendants engaged in intentional acts to disrupt these relationships.

76. Defendants actually disrupted these relationships and did so without privilege or justification.

77. As a result of Defendants' intentional acts, Absolute Foot Care has sustained damages in an amount in excess of \$15,000.

78. As a further result of Defendants' intentional acts, Absolute Foot Care has been forced to incur attorney's fees and legal expenses and has suffered damages associated with such fees and expenses, which Absolute Foot Care is entitled to recover under the Employment Agreement (as to Dr. Biesinger) and as special damages (as to Defendants).

79. Defendants are guilty of oppression, fraud, or malice, express or implied, as well as a conscious disregard for Absolute Foot Care's rights. Therefore, Absolute Foot Care is entitled to recover punitive damages.

**SEVENTH CAUSE OF ACTION**

**(Civil Conspiracy – Defendants)**

80. Absolute Foot Care repeats and realleges the above allegations as though fully set forth herein.

81. Defendants, and each of them, agreed and intended to accomplish an unlawful objective for the improper purpose of harming Absolute Foot Care.

82. Defendants acted in concert taking on the form of a civil conspiracy to commit specific wrongful acts and/or torts, including, but not limited to, breaching Dr. Biesinger's Employment Agreement, breaching the implied covenant of good faith and fair dealing arising from

1 Dr. Biesinger's Employment Agreement, converting Absolute Foot Care's confidential information,  
2 and intentionally interfering with Absolute Foot Care's existing and prospective contractual  
3 relationships.

4 83. As a further result of Defendants' conspiracy, Absolute Foot Care has been forced to  
5 incur attorney's fees and legal expenses and has suffered damages associated with such fees and  
6 expenses, which Absolute Foot Care is entitled to recover under the Employment Agreement (as to  
7 Dr. Biesinger) and as special damages (as to Defendants).

8 84. Defendants are guilty of oppression, fraud, or malice, express or implied, as well as a  
9 conscious disregard for Absolute Foot Care's rights. Therefore, Absolute Foot Care is entitled to  
10 recover punitive damages.

11 WHEREFORE, Absolute Foot Care prays for relief as follows:

12 1. For temporary, preliminary, and permanent injunctive relief restraining Dr. Biesinger  
13 from engaging in conduct in violation of the Restrictive Covenant in the Employment Agreement.

14 2. For temporary, preliminary, and permanent injunctive relief prohibiting Defendants  
15 from using, and requiring them to return, all of Absolute Foot Care's property, including confidential  
16 information.

17 3. For judgment for damages in excess of \$15,000.

18 4. For judgment for punitive damages according to proof.

19 5. For an award interest and costs as provided by law.

20 6. For an award of reasonable attorney's fees and costs as provided by the Employment  
21 Agreement.

22 7. For an award of reasonable attorney's fees and costs as special damages.

23 8. For an award of reasonable attorney's fees and costs on any other grounds authorized  
24 by law.

25 ///

26 ///

27 ///

28 ///

1 9. For such other and further relief that the Court may deem just and proper.

2 DATED this 24<sup>th</sup> day of April, 2017.

3 BAILEY ♦ KENNEDY

4 By: /s/ Joshua M. Dickey

5 JOHN R. BAILEY

6 JOSHUA M. DICKEY

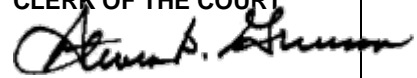
7 PAUL C. WILLIAMS

8 *Attorneys for Plaintiff Absolute*  
9 *Foot Care Specialists*



Exhibit 2

Exhibit 2



**AACC**  
Dustin L. Clark, Bar # 10548  
**CLARK LAW COUNSEL PLLC**  
10161 Park Run Drive, Suite 150  
Las Vegas, NV 89145  
Telephone: 702.748.8600  
E-mail: dustin@clarklawcounsel.com

Puonyarat K. Premsrirut, Bar # 7141  
**BROWN BROWN & PREMSRIRUT**  
520 S. Fourth Street, Second Floor  
Las Vegas, NV 89101  
Telephone: 702.384.5563  
E-mail: Puoy@brownlawlv.com

*Attorneys for Defendant/Counter-Claimant*  
*David P. Biesinger, DPM*

**EIGHTH JUDICIAL DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ABSOLUTE FOOT CARE SPECIALIST, a  
Nevada Corporation,

Plaintiff,

v.

DAVID P. BIESINGER, DPM, an individual;  
and LORRAINE PALLANTI, an individual,

Defendants.

Case No. A-17-754423-B  
Dept. No. XIII

**DEFENDANT/COUNTERCLAIMANT**  
**DAVID P. BIESINGER'S ANSWER**  
**AND COUNTERCLAIM**

DAVID P. BIESINGER, DPM, an individual,

Counterclaimant,

v.

ABSOLUTE FOOT CARE SPECIALIST, a  
Nevada Corporation; DOES I through X; and  
ROE ENTITIES I through X,

Counter-Defendant.

**ANSWER**

Defendant/Counterclaimant David P. Biesinger, DPM ("Dr. Biesinger") hereby answers the  
Complaint filed by Plaintiff/Counter-Defendant Absolute Foot Care Specialist ("Absolute Foot Care")  
in the above-captioned matter as follows:

1           1.       Dr. Biesinger admits the allegation of paragraph 1 of the Complaint that Absolute Foot  
2 Care is, and at all times material hereto was, a Nevada corporation. Dr. Biesinger denies all remaining  
3 allegations of paragraph 1 of the Complaint.

4           2.       Dr. Biesinger admits the allegations of paragraphs 2 and 3 of the Complaint.

5           3.       Dr. Biesinger admits the allegation of paragraph 4 of the Complaint that the Court has  
6 personal jurisdiction over Defendants. Dr. Biesinger denies all remaining allegations of paragraph 4  
7 of the Complaint.

8           4.       Dr. Biesinger admits the allegations of paragraph 5 of the Complaint that the Court has  
9 subject matter jurisdiction over this matter. Dr. Biesinger denies all remaining allegations of  
10 paragraph 5 of the Complaint, including, but not limited to, any averment that he violated the law or  
11 infringed on any of Plaintiff's rights.

12          5.       Dr. Biesinger admits the allegation of paragraph 6 of the Complaint that venue is proper  
13 in the Eighth Judicial District Court for the State of Nevada because Defendants reside in Clark  
14 County. Dr. Biesinger denies all remaining allegations of paragraph 6 of the Complaint.

15          6.       Dr. Biesinger admits the allegation of paragraph 7 of the Complaint that Absolute Foot  
16 Care is a podiatric medical practice. Dr. Biesinger is without knowledge or information sufficient to  
17 form a belief as to the truth of the remaining averments of paragraph 7 of the Complaint, which  
18 statement has the effect of a denial.

19          7.       Dr. Biesinger is without knowledge or information sufficient to form a belief as to the  
20 truth of the averments of paragraph 8 of the Complaint, which statement has the effect of a denial.

21          8.       Dr. Biesinger admits the allegations of paragraphs 9, 10, and 11 of the Complaint.

22          9.       Dr. Biesinger denies the allegations of paragraph 12 of the Complaint.

23          10.       Dr. Biesinger is without knowledge or information sufficient to form a belief as to the  
24 truth of the averments of paragraphs 13, 14, 15, 16, and 17 of the Complaint, which statement has the  
25 effect of a denial of the averments of those paragraphs.

26          11.       Dr. Biesinger denies the allegations of paragraphs 18, 19, 20, 21, and 22 of the  
27 Complaint.  
28

12. Dr. Biesinger is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 23 of the Complaint, which statement has the effect of a denial of the averments of that paragraph.

13. Dr. Biesinger denies the allegations of paragraphs 24, 25, and 26 of the Complaint.

14. Dr. Biesinger denies the allegations of paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 of the Complaint.

15. Dr. Biesinger is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 39 of the Complaint, which statement has the effect of a denial of the averments of that paragraph.

16. Dr. Biesinger denies the allegations of paragraph 40 of the Complaint.

17. Dr. Biesinger is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 41 of the Complaint, which statement has the effect of a denial of the averments of that paragraph.

18. Dr. Biesinger denies the allegations of paragraph 42 of the Complaint.

19. Answering paragraph 43 of the Complaint, Dr. Biesinger repeats his answers contained in Paragraphs 1 through 42 above as though fully set forth herein.

20. Dr. Biesinger admits the allegations of paragraph 44 of the Complaint.

21. Dr. Biesinger denies the allegations of paragraphs 45, 46, 47 and 48 of the Complaint.

22. Answering paragraph 49 of the Complaint, Dr. Biesinger repeats his answers contained in Paragraphs 1 through 48 above as though fully set forth herein.

23. Dr. Biesinger admits the allegations of paragraph 50 of the Complaint.

24. Dr. Biesinger denies the allegations of paragraphs 51, 52, and 53 of the Complaint.

25. Answering paragraph 54 of the Complaint, Dr. Biesinger repeats his answers contained in Paragraphs 1 through 53 above as though fully set forth herein.

26. Dr. Biesinger denies the allegations of paragraphs 55, 56, 57, and 58 of the Complaint.

27. Answering paragraph 59 of the Complaint, Dr. Biesinger repeats his answers contained in Paragraphs 1 through 58 above as though fully set forth herein.

28. Dr. Biesinger admits the allegations of paragraph 60 of the Complaint.

29. Dr. Biesinger denies the allegations of paragraphs 61, 62, 63, and 64 of the Complaint.

30. Answering paragraph 65 of the Complaint, Dr. Biesinger repeats his answers contained in Paragraphs 1 through 64 above as though fully set forth herein.

31. Dr. Biesinger denies the allegations of paragraphs 66, 67, 68, 69, 70, and 71 of the Complaint.

32. Answering paragraph 72 of the Complaint, Dr. Biesinger repeats his answers contained in Paragraphs 1 through 71 above as though fully set forth herein.

33. Dr. Biesinger denies the allegations of paragraphs 73, 74, 75, 76, 77, 78, and 79 of the Complaint.

34. Answering paragraph 80 of the Complaint, Dr. Biesinger repeats his answers contained in Paragraphs 1 through 79 above as though fully set forth herein.

35. Dr. Biesinger denies the allegations of paragraphs 81, 82, 83, and 84 of the Complaint.

36. Dr. Biesinger denies any and all allegations set forth in the section of the Complaint beginning with the words “WHEREFORE, Absolute Foot Care prays for relief as follows” on pages 10 and 11 of the Complaint, and Dr. Biesinger further denies that Plaintiffs are entitled to any damages whatsoever.

37. Dr. Biesinger denies each and every allegation of the Complaint not expressly admitted above.

#### **AFFIRMATIVE DEFENSES**

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. Plaintiff’s claims are barred, in whole or in part, by the doctrine of unclean hands.

3. Plaintiff’s claims are barred, in whole or in part, by the doctrine of waiver.

4. Plaintiff’s claims are barred, in whole or in part, by the doctrine of estoppel.

5. Plaintiff’s claims are barred, in whole or in part, by illegality because Plaintiff could not lawfully practice medicine or have patients.

6. Plaintiff’s claims are barred, in whole or in part, because Dr. Biesinger’s actions, if any, were privileged.

7. Plaintiff’s claims are barred, in whole or in part, for lack of consideration.

8. Plaintiff's claims are barred, in whole or in part, by the statute of frauds.

9. Plaintiff's claims are barred, in whole or in part, by NRS 613.200.

10. Plaintiff's tort and restitutionary claims are preempted and precluded by NRS 600A.090 to the extent such claims are based on alleged misappropriation of a trade secret.

11. Plaintiff's claims are barred, in whole or in part, because Plaintiff's prior material breach of the Employment Agreement discharged Dr. Biesinger of his contractual obligations, if any, under the Employment Agreement.

12. Dr. Biesinger did not act with malice or reckless disregard, so punitive damages may not be awarded against Dr. Biesinger.

13. All possible affirmative defenses may not have been alleged herein in so far as sufficient facts are not available after reasonable inquiry upon the filing of this Answer; Dr. Biesinger, therefore, reserves the right to amend this Answer to allege additional affirmative defenses as subsequent investigation warrants.

WHEREFORE, Defendant Biesinger prays for judgment as follows:

A. That Plaintiff take nothing by virtue of its Complaint and that the same be dismissed with prejudice;

B. That judgment be entered in favor of Defendant Biesinger and against Plaintiff;

C. That Defendant Biesinger be awarded his reasonable attorneys' fees and costs; and

D. For such other and further relief as the Court deems just and proper.

### **COUNTERCLAIM**

Pursuant to Nevada Rule of Civil Procedure 13, Defendant/Counterclaimant David P. Biesinger, DPM hereby alleges and complains against Plaintiff/Counter-Defendant Absolute Foot Care Specialist as follows:

### **PARTIES, JURISDICTION, AND VENUE**

1. Defendant/Counterclaimant David P. Biesinger, DPM ("Dr. Biesinger" or "Counterclaimant") is an individual who at all times relevant to this action has resided in Clark County, Nevada.

2. Plaintiff/Counter-Defendant Absolute Foot Care Specialist (“Absolute Foot Care,” “Company,” or Counter-Defendant) is, at all times relevant to this action has been, a corporation organized and existing pursuant to Chapter 78 of Nevada Revised Statutes (“NRS”) with its principal place of business in Clark County, Nevada.

3. Counterclaimant does not know the true names of the individuals, corporations, partnerships and entities sued and identified in fictitious names as DOES I through X, ROE ENTITIES I through X. Counterclaimant will request leave of this Honorable Court to amend this Counterclaim to allege the true names and capacities of each fictitious Counter-Defendant when Counter-Claimant discovers the information.

4. As the party who initiated the above-captioned action, Absolute Foot Care, a domestic corporation of Nevada, formed and existing pursuant to NRS Chapter 78, has submitted to the personal jurisdiction of the Court.

5. This Court has subject-matter jurisdiction over Dr. Biesinger’s Counterclaim because he seeks damages in excess of \$15,000 as well as declaratory relief.

6. Venue is proper in this Court because Dr. Biesinger is a resident of Clark County, Nevada, Absolute Foot Care’s principal place of business is Clark County, Nevada, and the events or omissions giving rise to the Counterclaim occurred in Clark County, Nevada.

#### **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

##### ***Dr. Biesinger’s Medical Practice***

7. Dr. Biesinger is a Doctor of Podiatric Medicine licensed to practice in Michigan, North Carolina, and Nevada.

8. Dr. Biesinger graduated from the Pennsylvania College of Podiatric Medicine in 1997 and did his residency in foot and ankle reconstructive surgery from 1997 to 2000 at St. John North Shores Hospital in Harrison Township, Michigan where he served as Chief Resident during his last year.

9. Dr. Biesinger has been Chief of Podiatric Medicine and Surgery at Centennial Hills Hospital Medical Center (the “Centennial Hills Hospital”) in Las Vegas, Nevada since December

2011. Dr. Biesinger is currently the *only* foot and ankle surgeon at Centennial Hills Hospital who does consults for inpatients.

10. Dr. Biesinger has performed thousands of surgical procedures, including, but not limited to: ORIF forefoot, rearfoot, and ankle fractures; tendoachilles repair and lengthening; tibial and fibular osteotomies; ankle arthroscopy; primary ankle ligament repair; lateral ankle stabilizations; forefoot and rearfoot/ankle arthrodesis; flatfoot, cavus, and charcot reconstructions; hallux abducto valgus; rheumatoid foot reconstruction, tarsal tunnel, osseous and soft tissue benign and malignant tumors; and microsurgical nerve repair.

11. Dr. Biesinger has received certifications from numerous medical professional boards, including the American Board of Foot and Ankle Surgery. According to the American Board of Foot and Ankle Surgery's online database, Dr. Biesinger is one of only fourteen medical professionals in Las Vegas, Nevada, and one of only six medical professionals within eight miles of Centennial Hills Hospital certified by the American Board of Foot and Ankle Surgery.

#### ***Employment With Absolute Foot Care***

12. In the spring of 2010, Dr. Biesinger responded to a posting for a job with Absolute Foot Care located in Las Vegas, Nevada, the Plaintiff in the above-referenced legal proceeding. Dr. Biesinger flew to Las Vegas and met with the Absolute Foot Care's President, Noah Levine, DPM.

13. After the meeting, Dr. Levine offered Dr. Biesinger employment with Absolute Foot Care with the promise that Dr. Biesinger would be eligible for partnership and an equity interest in the Company upon meeting certain financial benchmarks after faithful completion of the first two years of employment. The ability to become an owner in a practice, given his credentials, was of extreme importance to Dr. Biesinger.

14. In reliance upon the prospect of obtaining a partnership and equity interest, Dr. Biesinger accepted employment with Absolute Foot Care and executed an Employment Agreement for Professional Services effective June 7, 2010 (the "Employment Agreement").

15. Absolute Foot Care, however, failed to honor the Employment Agreement's provision regarding equity ownership.



***The First Proposed Stock Purchase & Shareholder Agreement***

16. In or about December 2012, after two-and-a-half years of employment and surpassing the contractual benchmarks for partnership, Dr. Levine offered Dr. Biesinger a 20% equity interest in Absolute Foot Care for a total buy-in price of \$25,000.

17. Although the December 2012 Stock Purchase and Shareholder Agreement was presented six months past the time in which it was supposed to be provided, Dr. Biesinger still proceeded in good faith in an effort to evaluate the buy-in proposal.

18. One of his first concerns were the inconsistencies in the corporate documentation. In particular, the 2012 Stock Purchase and Shareholder Agreement affirmatively represented that Dr. Levine owned 1,000 shares of the Company, yet Absolute Foot Care's Articles of Incorporation on file with the Nevada Secretary of State showed that the Company was only authorized by its charter to issue 100 shares of stock, raising concerns regarding the corporate governance of Absolute Foot Care, and acts committed without authority.

19. Absolute Foot Care's Articles of Incorporation also indicated that the Company was formed pursuant to NRS Chapter 78 and did not reveal any amendments as of 2012. To date, no amendment to the Articles of Incorporation has been filed. (A true and correct copy of the Nevada Secretary of State's Entity Actions for Absolute Foot Care Specialist is publicly available at <http://nvsos.gov/sosentitysearch/corpActions.aspx?lx8nvq=TtUUOUAJm2t1Mzq0YXwzjQ%253d%253d&CorpName=ABSOLUTE+FOOT+CARE+SPECIALIST> (last visited June 2, 2017)).

20. Absolute Foot Care's Annual List of Officers and Directors filed December 14, 2012 identified Noah Levine, DPM as President, Lauren B. Mallow-Levine as Secretary, Irwin I. Levine as Treasurer, and Roberta B. Levine as a Director, illustrating the "Levine" family dominance of the Absolute Foot Care's affairs.

21. Article II.B of the proposed 2012 Stock Purchase and Shareholder Agreement required Dr. Biesinger to expressly acknowledge that he "had access to all of the information that [Dr. Biesinger] consider[] necessary or appropriate to make an informed decision regarding [Dr. Levine's offer to purchase shares]." Despite Dr. Biesinger's multiple requests and execution of a non-disclosure agreement, neither Dr. Levine nor his attorney representatives furnished the financial information that

1 Dr. Biesinger considered necessary for him and his attorney to evaluate fully Absolute Foot Care, its  
2 financial condition, including its assets and liabilities, and the overall equity offer.

3 22. Dr. Biesinger's attempts to obtain the necessary financial information from Dr. Levine  
4 continued through mid-2013 and ultimately proved futile. Dr. Levine failed to provide financial data  
5 sufficient to allow Dr. Biesinger and his attorney to make an informed decision regarding whether to  
6 accept the December 2012 partnership offer.

7 *Expiration Of The Employment Agreement*

8 23. During the same time that Dr. Levine was "stonewalling" the buy-in transaction, Dr.  
9 Levine declared that the Employment Agreement had expired and asked Dr. Biesinger to sign an  
10 extension.

11 24. Given Dr. Levine's failure to follow through on the equity offer and Dr. Biesinger's  
12 feelings of uncertainty regarding his future with Absolute Foot Care, Dr. Biesinger was reluctant to  
13 continue under the Employment Agreement's original terms.

14 25. On January 25, 2013, Dr. Levine and Dr. Biesinger signed an Extension of Employment  
15 Agreement for Professional Services (the "Extension") that set January 22, 2015 as the contract's  
16 termination date and supplanted the Employment Agreement's automatic-renewal language.

17 26. While Dr. Levine informed Dr. Biesinger that the Employment Agreement was expired  
18 and an extension was necessary to maintain eligibility of any buy in, Dr. Biesinger was insistent that  
19 the termination of the contractual relationship with Absolute Foot Care conclude January 22, 2015,  
20 giving Dr. Biesinger sufficient time to try to consummate the equity transaction that Dr. Biesinger  
21 initially sought to achieve.

22 27. While Dr. Biesinger had no part in actually drafting the Extension, Dr. Biesinger was  
23 in agreement that the termination date of January 22, 2015 be inserted.

24 28. The Extension that Dr. Levine and Dr. Biesinger signed on January 25, 2013 constitutes  
25 the only agreement that Absolute Foot Care and Dr. Biesinger ever executed to extend the Employment  
26 Agreement.

1           29.     Dr. Levine on behalf of Absolute Foot Care and Dr. Biesinger did not execute any  
2 document, or orally agree, to continue the Employment Agreement beyond January 22, 2015—the  
3 termination date set forth in the January 25, 2013 Extension.

4                           *Another Attempt To Negotiate An Ownership Interest*

5           30.     After the 2012-2013 attempts to consummate the buy-in failed, Dr. Biesinger mustered  
6 the temperament to re-visit the partnership transaction with Dr. Levine. Dr. Biesinger was prepared  
7 to set aside his prior frustrations to obtain the information and financials necessary to make an  
8 informed decision.

9           31.     In response, Dr. Levine directed Dr. Biesinger to call his attorney, John Bailey, to  
10 obtain the financial information that Dr. Biesinger felt he needed to evaluate the equity offer.

11           32.     Dr. Biesinger called Mr. Bailey to request the financials. Instead of receiving due  
12 diligence materials, Dr. Biesinger received a proposed Stock Purchase and Shareholder Agreement  
13 that differed dramatically and unreasonably from the first partnership offer.

14           33.     As set forth in the 2015 Second Proposed Shareholder Agreement, Dr. Levine offered  
15 a 20% equity interest in exchange for \$25,000 per share, resulting in a total subscription price of  
16 \$500,000—a \$475,000 increase from his first offer.

17           34.     This offer was shocking, offensive, and beyond unreasonable. It defied any and all  
18 expectations that Dr. Biesinger had to become an equity owner in the practice, especially since Dr.  
19 Biesinger was the sole capable and credentialed surgeon who had spent nearly six years of his life  
20 servicing patients to build the very practice that Dr. Biesinger was being precluded from joining,  
21 economically.

22           35.     A Doctor of Podiatric Medicine must be certified by the American Board of Foot and  
23 Ankle Surgery to be eligible for privileges at Centennials Hills Hospital. Dr. Levine is *not* certified  
24 by the American Board of Foot and Ankle Surgery and does *not* have privileges at Centennials Hills  
25 Hospital. He does not perform total ankle replacements, ankle arthroscopy surgeries, complex foot  
26 and ankle surgery like arthroscopic repair of talus fractures, or biocartilage repair of OCD lesions.  
27 Because Dr. Levine is not trained as a surgeon, he cannot become board certified as one.  
28

1           36.     Dr. Biesinger was frustrated that Dr. Levine had dangled the prospect of a partnership  
2 in front of Dr. Biesinger for so long, only to realize that he had no intention of honoring the buy-in or  
3 the conditions precedent to doing so.

4           37.     As the contractual termination date was expressly amended to January 22, 2015, Dr.  
5 Biesinger was confronted with a decision on what to do during the two-year noncompetition period.  
6 While Dr. Biesinger felt the ban of surgical practice to be unreasonable (since Dr. Levine himself is  
7 not even qualified to do such), Dr. Biesinger opted to remain at Absolute Foot Care during the two-  
8 year post-contract termination period. It was not pleasant, as Dr. Levine and Dr. Biesinger failed to  
9 mesh personally, but Dr. Biesinger opted to serve out his two-year “sentence” to avoid further conflict.

10                           ***Dr. Biesinger Learns Of Compensation Irregularities***

11           38.     In late-spring or early-summer of 2016, through discussions with Absolute Foot Care  
12 staff members, Dr. Biesinger discovered that Dr. Levine had altered his compensation, which during  
13 the contract period was thirty-percent (30%) of the revenue Dr. Biesinger generated. As a change  
14 from when the Employment Agreement was in effect, Dr. Biesinger was no longer given credit for  
15 products that he sold.

16           39.     Dr. Biesinger was precluded from seeing the records that Absolute Foot Care used to  
17 calculate the revenue he generated and, in turn, his compensation.

18           40.     Neither Dr. Levine nor any other representative of Absolute Foot Care provided written  
19 notice to Dr. Biesinger of any change to how his compensation would be calculated.

20                           ***Termination Of Employment***

21           41.     As the Employment Agreement expired on January 22, 2015, the restrictive  
22 employment covenants were no longer in force and effect as of late-January 2017.

23           42.     After the expiration of the non-compete, Dr. Biesinger began to explore starting his  
24 own practice. During or about the first week of April 2017, Dr. Biesinger disclosed to Dr. Levine that  
25 Dr. Biesinger was considering starting his own practice. In response, Dr. Levine stated that he would  
26 like to retire in maybe five years and raised the prospect of selling Dr. Biesinger the practice. Dr.  
27 Levine was not sure, however, if he wanted to sell it all at once or over several years. He spoke only  
28

1 in generalities about selling the Company, which Dr. Biesinger interpreted as yet another attempt to  
2 dupe Dr. Biesinger into staying with his office.

3 43. As a result of Dr. Levine's vague, noncommittal comments about possibly selling the  
4 Practice, along with his previous failures to follow through on the partnership offer by not furnishing  
5 financial information, Dr. Biesinger decided on Monday, April 10, 2017 to resign from employment  
6 with Absolute Foot Care.

7 44. During the morning of April 4, 2017, Dr. Biesinger sent a text to Dr. Noah Levine  
8 noting that the Employment Agreement had expired. Dr. Levine did not dispute Dr. Biesinger's  
9 statement in the text message that the Employment Agreement had expired. Although Dr. Levine's  
10 text in response referenced the possibility of signing an extension, the parties did not sign an extension.  
11 The only extension to the Employment Agreement that the parties ever signed was executed on  
12 January 25, 2013 and set January 22, 2015 as the contract's termination date.

13 45. On April 11, 2017, Dr. Biesinger placed a resignation letter, mistakenly and not  
14 intentionally dated March 10 rather than April 10, on Dr. Levine's desk, informing him that his last  
15 day of employment would be April 20, 2017, which in fact it was.

16 46. On Friday, April 28, 2017, Dr. Biesinger opened his practice based on the  
17 determination that the Employment Agreement expired January 22, 2015, and the restrictive  
18 employment covenants were no longer in effect as of late-January 2017.

### 19 **FIRST CLAIM FOR RELIEF**

#### 20 **(Declaratory Relief)**

21 47. Dr. Biesinger hereby incorporates and re-alleges the allegations set forth in paragraphs  
22 1-46 above, as if set forth fully herein.

23 48. Nevada has adopted the Uniform Declaratory Judgments Act (the "Act").

24 49. The Act permits persons interested under a deed, written contract or other writings  
25 constituting a contract, or whose rights, status or other legal relations are affected by a statute,  
26 municipal ordinance, contract or franchise, may have determined any question of construction or  
27 validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration  
28 of rights, status or other legal relations thereunder.

1           50.     Counterclaimant Biesinger’s rights, status and legal relations are affected by the

2           51.     Counterclaimant seeks the following declaratory relief:

- 3           a.     The “Non-Compete” provisions in the Employment Agreement defines the  
4                   “Restricted Period” as the term of the employment and a period of two (2) years  
5                   after thus Agreement expires or is terminated (whether terminated with or  
6                   without cause regardless of who initiated such termination).
- 7           b.     The initial Term of the Employment Agreement was for two years, which had  
8                   expired on June 7, 2012.
- 9           c.     The Extension Amendment to the Employment Agreement declared that the  
10                  Term of the Agreement had expired, and that the Employer and Employee  
11                  desire to continue their contractual relationship *up to* the point of the Extension.
- 12           d.     The Extension Amendment provided that the Term of the Contract shall be  
13                  extended until January 22, 2015.
- 14           e.     Because the termination date of the Employment Agreement was amended  
15                  pursuant to the Extension Agreement to the date of January 22, 2015, the  
16                  contractual relationship expired non-competition period expired two (2) years  
17                  after, on January 22, 2017.

18           52.     Counterclaimant seeks all remedies available under NRS Chapter 30.

19           53.     As a direct result of the aforementioned conduct on the part of the Counter-Defendant,  
20     Counterclaimant has been forced to retain the services of the undersigned counsel to defend and  
21     prosecute this matter and is thus entitled to an award of its reasonable attorneys' fees and costs  
22     associated herewith from Counter-Defendant as supplemental relief pursuant to NRS 30.100.

23                                   **SECOND CLAIM FOR RELIEF**

24                                   **(Breach of Contract)**

25           54.     Dr. Biesinger hereby incorporates and re-alleges the allegations set forth in paragraphs  
26     1-53 above, as if set forth fully herein.

27           55.     Counterclaimant incorporates the preceding paragraphs of this Counterclaim by  
28     reference as though fully set forth herein and further alleges as follows.







73. Counter-Defendant's unjust retention of this aforementioned benefit is against the fundamental principles of justice, as the parties bargained for the agreement, and then Counter-Defendant breached its obligations thereto for the reasons set forth above.

74. Counter-Defendant has conferred a benefit upon Counterclaimant through his 7 years service, even though Counter-Defendant breached its obligations to permit the equity stock purchase, and to pay full compensation to Dr. Biesinger.

75. Counter-Defendant has appreciated this benefit, as well as accepted and retained this benefit.

76. As a direct and proximate result of Counter-Defendant's aforementioned conduct, Counterclaimant has been damaged in a substantial sum in excess of \$15,000.00, the exact amount of which will be set forth at the time of trial in this matter.

77. As a direct result of the aforementioned conduct on the part of the Counter-Defendant, Counterclaimant has been forced to retain the services of the undersigned counsel to defend and prosecute this matter and is thus entitled to an award of its reasonable attorneys' fees and costs associated herewith from Counter-Defendant.

#### **FIFTH CLAIM FOR RELIEF**

#### **(NRS 608.040 – Waiting Time Penalties)**

78. Dr. Biesinger hereby incorporates and re-alleges the allegations set forth in paragraphs 1-77 above, as if set forth fully herein.

79. Under NRS 608.040(1)(b): "If an employer fails to pay . . . [o]n the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less."

80. Pursuant to NRS 608.040, Dr. Biesinger seeks waiting time penalties in addition to wages due.

WHEREFORE, Counterclaimant Dr. Biesinger prays for judgment against Counter-Defendant as follows:

1           A.     With respect to the First Claim for Relief (Declaratory Relief), judgment in an amount  
2 in excess of \$15,000.00;

3           B.     With respect to the Second Claim for Relief (Breach of Contract), judgment in an  
4 amount in excess of \$15,000.00;

5           C.     With respect to the Third Claim for Relief (Breach of the Implied Covenant of Good  
6 Fair and Fair Dealing) judgment in an amount in excess of \$15,000.00;

7           D.     With respect to the Fourth Claim for Relief (Unjust Enrichment), judgment in an  
8 amount in excess of \$15,000.00;

9           E.     With respect to the Fifth Claim for Relief (NRS 608.040 – Waiting Time Penalties),  
10 judgment in an amount in excess of \$15,000.00;

11          F.     For pre-judgment and post-judgment interest;

12          G.     For all costs and expenses incurred by David P. Biesinger, DPM in enforcing its rights  
13 under the Agreement, including, but not limited to, reasonable attorneys' fees and costs incurred in  
14 defending and prosecuting this action; and

15          H.     For such other and further relief as the Court deems just and proper.

16          DATED: June 2, 2017

17                               Respectfully submitted,

18                               CLARK LAW COUNSEL PLLC

19                               \_\_\_\_\_  
20                               /s/ Dustin L. Clark

21                               Dustin L. Clark

22                               Attorney for Defendant/Counterclaimant

23                               David P. Biesinger, DPM  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5 and EDCR 8.05, I hereby certify that I served a true and correct copy of the above and foregoing **DEFENDANT/COUNTERCLAIMANT DAVID P. BIESINGER'S ANSWER AND COUNTERCLAIM** upon the following via the Eighth Judicial District Court's E-Filing System:

John R. Bailey  
Joshua M. Dickey  
Paul C. Williams  
BAILEY KENNEDY  
8984 Spanish Ridge Avenue  
Las Vegas, NV 89148-1302  
JBailey@BaileyKennedy.com  
JDickey@BaileyKennedy.com  
PWilliams@BaileyKennedy.com  
Attorneys for Plaintiff

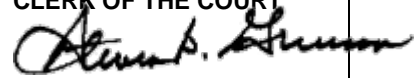
I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 2, 2017

/s/ Dustin L. Clark  
Dustin L. Clark

Exhibit 3

Exhibit 3



**ORDR (CIV)**

JOHN R. BAILEY

Nevada Bar No. 0137

JOSHUA M. DICKEY

Nevada Bar No. 6621

PAUL C. WILLIAMS

Nevada Bar No. 12524

**BAILEY ♦ KENNEDY**

8984 Spanish Ridge Avenue

Las Vegas, Nevada 89148-1302

Telephone: 702.562.8820

Facsimile: 702.562.8821

JBailey@BaileyKennedy.com

JDickey@BaileyKennedy.com

PWilliams@BaileyKennedy.com

*Attorneys for Plaintiff Absolute Foot Care Specialists*

DISTRICT COURT

CLARK COUNTY, NEVADA

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation,

Plaintiff,

vs.

DAVID P. BIESINGER, DPM, an individual; and  
LORRAINE PALLANTI, an individual,

Defendants.

DAVID P. BIESINGER, DPM, an individual,

Counterclaimant,

vs.

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation; DOES I through X; and  
ROE ENTITIES I through X,

Counter-Defendant.

Case No. A-17-754423-B

Dept. No. XIII

**ORDER GRANTING, IN PART, RENEWED  
MOTION FOR NRCP 37(B) SANCTIONS**

This matter came before the Court (the Honorable Mark R. Denton presiding) on a Status  
Check on the 5<sup>th</sup> day of November, 2020, at 9:00 a.m., in Department XIII for a hearing on  
Plaintiff/Counterdefendant Absolute Foot Care Specialists' Renewed Motion for NRCP 37(b)

Sanctions Against David P. Biesinger, DPM, for Failure to Comply with Order Granting Motion to Compel (the “Renewed Motion for Sanctions”).

### APPEARANCES

- Paul C. Williams, Esq. of Bailey ♦ Kennedy on behalf of Plaintiff Absolute Foot Care (“Absolute Foot Care” or “Plaintiff”);
- Zachary P. Takos, Esq. of Takos Law Group, Ltd. on behalf of Defendant David P. Biesinger, DPM (“Dr. Biesinger”); and
- Jeffrey Gronich, Esq. of Jeffrey Gronich, Attorney at Law, P.C. on behalf of Defendant Lorraine Pallanti (“Ms. Pallanti”).

The Court, having examined the briefs of the parties, the records, the documents on file, having heard argument of counsel, being fully advised of the premises, and good cause appearing, hereby makes the following Findings of Fact, Conclusions of Law, and Order with regard to the Renewed Motion for Sanctions.

### FINDINGS OF FACT

1. On April 18, 2018, Absolute Foot Care served its First Set of Requests for Production of Documents to Dr. Biesinger (the “Biesinger RFPs”).
2. On July 3, 2018, Dr. Biesinger served his Objections and Responses to the Biesinger RFPs.
3. After engaging in the meet-and-confer process, which began in December 2019, Absolute Foot Care filed its Motion to Compel Defendants’ Responses to Plaintiff’s First Set of Requests for Production on February 21, 2020 (the “Motion to Compel”).
4. The Court entered an Order granting the Motion to Compel on May 1, 2020 (the “MTC Order”).
5. In the MTC Order, the Court compelled Dr. Biesinger “to produce all documents responsive to Biesinger RFP Nos. 7, 15, 16, 17, 18, 19, 20 and 25” and to “produce his 2017, 2018, and 2019 Federal tax returns” (the “Compelled Documents”). (MTC Order at 5:5-9.) The Court compelled Dr. Biesinger to “produce the documents within fourteen (14) days of entry of th[e] Order.” (*Id.* at 5:8-9.)

1           6.       On May 19, 2020, Dr. Biesinger submitted his Second Supplemental Responses to  
2 the Biesinger RFPs (the “Biesinger Second Supplemental Responses”). The Biesinger Second  
3 Supplemental Responses provided telephone records (the subject of Request Nos. 18 and 19), but  
4 did not include telephone records from January 1, 2017, through March 21, 2018, as the Court had  
5 compelled in the MTC Order. The Biesinger Second Supplemental Responses did not supplement  
6 his responses to Biesinger Request Nos. 15, 16, and 17.

7           7.       On June 1, 2020, Absolute Foot Care filed a Countermotion for Sanctions pursuant to  
8 NRCP 37(b) (the “Initial Motion for Sanctions”).

9           8.       On June 17, 2020, Dr. Biesinger served his Third Supplemental Responses to the  
10 Biesinger RFPs (the “Biesinger Third Supplemental Responses”). The Biesinger Third  
11 Supplemental Responses purportedly supplemented Dr. Biesinger’s responses to Request Nos. 7  
12 (invoices for medical equipment) and 15 (lists of patients). The additional patient list in the  
13 Biesinger Third Supplemental Responses was a list of “Patients by CPT Code” (which did not  
14 contain any CPT codes) and did not contain pertinent patient information such as dates of birth,  
15 addresses, telephone numbers, dates when patients were seen, etc.

16           9.       On July 9, 2020, this Court entered an order denying the Initial Motion for Sanctions  
17 “without prejudice as to renewal if Biesinger has not complied with the MTC Order within a  
18 reasonable time.” (Order: (1) Denying Motions to Reconsider; and (2) Denying Countermotion for  
19 Sanctions, filed on July 9, 2020, at 3:6-8.)

20           10.      On August 14, 2020, Dr. Biesinger supplemented his response to Request No. 15  
21 (lists of patients) to identify certain documents he produced in response to Absolute Foot Care’s  
22 Second Set of Requests for Production on August 12, 2020. However, the additional documents  
23 were financial records—e.g., insurance adjustments and payments.

24           11.      If any of the foregoing findings of fact are properly construed to be conclusions of  
25 law, they shall be so deemed.

**CONCLUSIONS OF LAW**

12. Where a party “fails to obey an order to provide or permit discovery . . . the court may issue” sanctions including:

- (A) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (B) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (C) striking pleadings in whole or in part;
- (D) staying further proceedings until the order is obeyed;
- (E) dismissing the action or proceeding in whole or in part;
- (F) rendering a default judgment against the disobedient party; or
- (G) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

NRCP 37(b)(1).

13. “Nevada jurisprudence does not follow the federal model of requiring progressive sanctions against a party for failing to comply with a discovery order or for failing to attend their deposition.” *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 610, 245 P.3d 1182, 1184-85 (2010).

14. The Court finds Dr. Biesinger has failed to fully comply with the MTC Order; specifically, by failing to adequately respond to Request Nos. 15, 16, 17, 18, 19, and 20.

15. The Court finds that sanctions are appropriate based on Dr. Biesinger’s failure to comply with the MTC Order, but not to the extent sought by Absolute Foot Care (the striking of Biesinger’s Answer as to liability only).

16. Instead, the Court finds that the appropriate sanction is to strike all of the affirmative defenses asserted by Dr. Biesinger, leaving any and all denials and the Counterclaim intact, but not permitting evidence to be adduced that should have been provided.

17. If any of the foregoing conclusions of law are properly construed to be findings of fact, they shall be so deemed.



**ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, and good cause appearing,

**IT IS HEREBY ORDERED** that the Renewed Motion for Sanctions is GRANTED IN PART, as follows: All of the affirmative defenses asserted by Dr. Biesinger are hereby STRICKEN, leaving any and all denials and the Counterclaim intact, but not permitting evidence to be adduced that should have been provided.



December 08, 2020.

Respectfully Submitted By:

BAILEY ♦ KENNEDY

By: /s/ Paul C. Williams

JOHN R. BAILEY

JOSHUA M. DICKEY

PAUL C. WILLIAMS

*Attorneys for Plaintiff*

*Absolute Foot Care Specialists*

~~Approved as to Form:~~

~~TAKOS LAW GROUP, LTD.~~

By: \_\_\_\_\_

~~ZACHARY P. TAKOS~~

~~Nevada Bar No. 11293~~

~~1980 Festival Plaza Drive, Suite 300~~

~~Las Vegas, Nevada 89135~~

~~zach@takoslaw.com~~

~~Telephone (702) 856-4629~~

~~Facsimile: (702) 9324-4422~~

~~*Attorney for Defendant*~~

~~*David P. Biesinger, DPM*~~

Approved as to Form:

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.

By: /s/ Jeffrey Gronich

JEFFREY GRONICH

Nevada Bar No. 13136

1810 East Sahara Avenue, Suite 109

Las Vegas, Nevada 89104

Telephone: (702) 430-6896

Facsimile: (702) 369-1290

jgronich@gronichlaw.com

*Attorney for Defendant Lorraine Pallanti*

## Paul Williams

---

**From:** Jeffrey Gronich <jgronich@gronichlaw.com>  
**Sent:** Friday, December 4, 2020 2:45 PM  
**To:** Paul Williams  
**Cc:** Steven Hart; Zachary Takos; Joshua Dickey; Sharon Murnane; Karen Rodman  
**Subject:** Re: AFC v. Biesinger - Order on Renewed Motion for Sanctions

You may affix my signature, thank you.

Jeffrey Gronich, Esq.  
Jeffrey Gronich, Attorney at Law, P.C.  
1810 E. Sahara Ave  
Suite 109  
Las Vegas, NV 89104  
702-430-6896

On Fri, Dec 4, 2020 at 2:31 PM Paul Williams <[PWilliams@baileykennedy.com](mailto:PWilliams@baileykennedy.com)> wrote:

Hi all,

Following up on the draft Order. Please let me know if I may affix your electronic signature and submit to the Court. I will submit it to the Court on Monday—if I do not have approval, I will apply a strike-through on your respective signature blocks.

Thank you,

Paul C. Williams

Bailey Kennedy, LLP

8984 Spanish Ridge Avenue

Las Vegas, Nevada 89148-1302

(702) 562-8820 (Main)

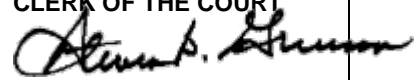
(702) 789-4552 (Direct)

(702) 301-2725 (Cell)

(702) 562-8821 (Fax)

Exhibit 4

Exhibit 4



**NEOJ**  
JOHN R. BAILEY  
Nevada Bar No. 0137  
JOSHUA M. DICKEY  
Nevada Bar No. 6621  
PAUL C. WILLIAMS  
Nevada Bar No. 12524  
**BAILEY ♦ KENNEDY**  
8984 Spanish Ridge Avenue  
Las Vegas, Nevada 89148-1302  
Telephone: 702.562.8820  
Facsimile: 702.562.8821  
JBailey@BaileyKennedy.com  
JDickey@BaileyKennedy.com  
PWilliams@BaileyKennedy.com

*Attorneys for Plaintiff*  
*Absolute Foot Care Specialists*

DISTRICT COURT  
CLARK COUNTY, NEVADA

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation,

Plaintiff,

vs.

DAVID P. BIESINGER, DPM, an individual; and  
LORRAINE PALLANTI, an individual,

Defendants.

DAVID P. BIESINGER, DPM, an individual,

Counterclaimant,

vs.

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation; DOES I through X; and  
ROE ENTITIES I through X,

Counter-Defendant.

Case No. A-17-754423-B  
Dept. No. XIII

**NOTICE OF ENTRY OF ORDER GRANTING,  
IN PART, RENEWED MOTION FOR NRCP  
37(B) SANCTIONS**

PLEASE TAKE NOTICE that an Order Granting, in Part, Renewed Motion for NRCP 37(b)  
Sanctions was entered in the above-entitled action on December 8, 2020, a true and correct copy of

///

///

which is attached hereto.

DATED this 10th day of December, 2020.

BAILEY ♦ KENNEDY

By: /s/ Paul C. Williams

JOHN R. BAILEY

JOSHUA M. DICKEY

PAUL C. WILLIAMS

*Attorneys for Plaintiff Absolute  
Foot Care Specialists*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of BAILEY ♦ KENNEDY and that on the 10th day of December, 2020, service of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING, IN PART, RENEWED MOTION FOR NRCP 37(B) SANCTIONS** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

ZACHARY P. TAKOS  
**TAKOS LAW GROUP, LTD.**  
1980 Festival Plaza Drive, Suite 300  
Las Vegas, Nevada 89135

Email: zach@takoslaw.com

*Attorney for Defendant*  
DAVID BIESINGER, DPM

JEFFREY GRONICH  
**JEFFREY GRONICH,  
ATTORNEY AT LAW, P.C.**  
1810 East Sahara Avenue, Suite 109  
Las Vegas, Nevada 89104

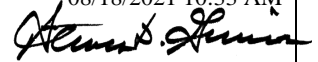
Email: jgronich@gronichlaw.com

*Attorneys for Defendant*  
LORRAINE PALLANTI

/s/ Stephanie M Kishi  
Employee of BAILEY ♦ KENNEDY

Exhibit 5

Exhibit 5

  
CLERK OF THE COURT

**FFCO (CIV)**  
JOHN R. BAILEY  
Nevada Bar No. 0137  
JOSHUA M. DICKEY  
Nevada Bar No. 6621  
PAUL C. WILLIAMS  
Nevada Bar No. 12524  
**BAILEY ♦ KENNEDY**  
8984 Spanish Ridge Avenue  
Las Vegas, Nevada 89148-1302  
Telephone: 702.562.8820  
Facsimile: 702.562.8821  
JBailey@BaileyKennedy.com  
JDickey@BaileyKennedy.com  
PWilliams@BaileyKennedy.com

*Attorneys for Plaintiff/Counterdefendant  
Absolute Foot Care Specialists*

DISTRICT COURT  
CLARK COUNTY, NEVADA

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation,

Plaintiff,

vs.

DAVID P. BIESINGER, DPM, an individual; and  
LORRAINE PALLANTI, an individual,

Defendants.

DAVID P. BIESINGER, DPM, an individual,

Counterclaimant,

vs.

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation; DOES I through X; and  
ROE ENTITIES I through X,

Counter-Defendant.

Case No. A-17-754423-B  
Dept. No. XIII

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER GRANTING  
PLAINTIFF/COUNTERDEFENDANT  
ABSOLUTE FOOT CARE SPECIALISTS'  
MOTION FOR SUMMARY JUDGMENT ON:  
(1) ITS BREACH OF CONTRACT CLAIMS;  
AND (2) DEFENDANT/COUNTERCLAIMANT  
DAVID P. BIESINGER, DPM'S  
COUNTERCLAIMS**

This matter came before this Court on June 28, 2021, at 9:00 a.m., for a hearing regarding  
Plaintiff Absolute Foot Care Specialists' ("Absolute Foot Care" or "Plaintiff") Motion for  
Summary Judgment on: (1) Its Breach of Contract Claims; and (2) Defendant/

Counterclaimant David P. Biesinger, DPM’s Counterclaims (the “Motion for Summary Judgment”).

### **APPEARANCES**

- Paul C. Williams, Esq. of Bailey ♦ Kennedy on behalf of Plaintiff Absolute Foot Care;
- Zachary P. Takos, Esq. of Takos Law Group, Ltd. on behalf of Defendant David P. Biesinger, DPM (“Dr. Biesinger”); and
- Jeffrey Gronich, Esq. of Jeffrey Gronich, Attorney at Law, P.C. on behalf of former Defendant Lorraine Pallanti (“Ms. Pallanti”).<sup>1</sup>

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, being fully advised of the premises, and good cause appearing, makes the following findings of fact, conclusions of law, and order:

### **FINDINGS OF FACT**

1. Absolute Foot Care is a Nevada corporation whose business is the practice of podiatric medicine in Clark County, Nevada.
2. Absolute Foot Care operates a podiatry office at 7125 Grand Montecito Parkway, #110, Las Vegas, Nevada 89149 (the “Centennial Office”).
3. Absolute Foot Care’s principal, Noah Levine, DPM (“Dr. Levine”), is the President of Absolute Foot Care and is a Doctor of Podiatric Medicine licensed to practice podiatry in Nevada since 2001.
4. Dr. Biesinger is a Doctor of Podiatric Medicine and, prior to his resignation on April 20, 2017, was an employee of Absolute Foot Care.
5. On June 7, 2010, Absolute Foot Care and Dr. Biesinger entered into the Employment Agreement pursuant to which Dr. Biesinger became an employee of Absolute Foot Care and agreed to perform certain duties and undertake certain responsibilities.

---

<sup>1</sup> Based on a Stipulation and Order for Dismissal with Prejudice entered on July 6, 2021, Ms. Pallanti was dismissed from this case.



1           6.       The Employment Agreement contained restrictive covenants wherein Dr. Biesinger  
2 agreed, among other things, not to do the following for two years following the termination of his  
3 association with Absolute Foot Care: (a) practice podiatric medicine within eight miles of Absolute  
4 Foot Care's Centennial Office; (b) solicit patients or other customers of Absolute Foot Care; or (c)  
5 solicit employees of Absolute Foot Care (the "Restrictive Covenants").

6           7.       Dr. Biesinger agreed that Absolute Foot Care would be entitled to \$650,000.00 in  
7 liquidated damages if he breached any one or more of the Restrictive Covenants.

8           8.       The Employment Agreement specified that it had an initial term of two years (the  
9 "Initial Term"), but also contained an "evergreen" clause (the "Evergreen Clause")—which  
10 provided that the Employment Agreement automatically renewed for successive one-year periods  
11 unless otherwise terminated it in accordance with Section VIII.B of the Employment Agreement.

12           9.       The Employment Agreement also provided that, at the end of the Initial Term, Dr.  
13 Biesinger would become eligible to become an equity owner in Absolute Foot Care "at and subject  
14 to the reasonable discretion of the Employer" if certain conditions were met. Specifically, the  
15 Employment Agreement stated that such a future agreement would need to be "memorialized in a  
16 separate agreement" under which Dr. Biesinger would become "eligible to acquire between ten  
17 percent (10%) and twenty percent (20%) of equity in" Absolute Foot Care for "an appropriate buy-  
18 in amount." The Employment Agreement stated that Dr. Biesinger's potential buy-in would require  
19 "a majority consensus and approval."

20           10.      The Employment Agreement provided Dr. Biesinger with a monthly salary and two  
21 types of incentive pay. Under the first type of incentive pay, Absolute Foot Care paid Dr. Biesinger  
22 thirty percent (30%) of net revenue (minus his salary) directly attributable to his work. Under the  
23 second type of incentive pay, Dr. Biesinger was paid ten percent (10%) of the net amount collected  
24 (amount collected minus cost of product) from the sale of cosmetic products to patients treated by  
25 Dr. Biesinger.

26           11.      Shortly after the Initial Term, Dr. Biesinger and Absolute Foot Care began  
27 discussions regarding his potential purchase of an equity interest in Absolute Foot Care.  
28

12. On or about July 6, 2012, Dr. Biesinger and Absolute Foot Care executed a Letter of Intent (the “Letter of Intent”). The Letter of Intent states that it is an “expression of interest in allowing [Dr. Biesinger] to acquire an equity interest in [Absolute Foot Care] in accordance with Section VIII(A) of [the] Employment Agreement . . . .” The financial terms agreed upon in the Letter of Intent were: (a) Dr. Levine would sell up to 20 percent of his equity interest (20 of his 100 shares) in Absolute Foot Care to Dr. Biesinger; (b) “[t]he purchase price per percentage interest in the company shall be \$25,000.00 per share;” and (c) Dr. Biesinger could acquire the shares either all at once or over time.

13. On July 8, 2013, Absolute Foot Care and Dr. Biesinger entered into a Non-Disclosure Agreement (the “Non-Disclosure Agreement”) governing Dr. Biesinger’s access to Absolute Foot Care’s confidential financial information.

14. On January 25, 2013, Absolute Foot Care and Dr. Biesinger executed an Extension of Employment Agreement for Professional Services (the “Extension”). A recital of the Extension states that “the term of the [Employment] Agreement has expired and upon expiration, Employee and Employer agreed to continue their contractual relationship up to the point of this Extension, and adhered to all terms and conditions under the [Employment] Agreement.”

15. The Extension further provides, in pertinent part: “All terms and conditions of the [Employment] Agreement shall remain in full force and effect” except that the “term of the Contract shall be extended until January 22, 2015.”

16. From January 23, 2015—the date which Dr. Biesinger contends the Employment Agreement expired—to April 20, 2017, Dr. Biesinger remained employed with Absolute Foot Care under the terms and conditions of the Employment Agreement. Specifically, Absolute Foot Care continued to: (i) pay Dr. Biesinger a salary in accordance with the terms of the Employment Agreement; (ii) pay Dr. Biesinger incentive bonuses pursuant to formulas detailed in the Employment Agreement (irrespective of whether the incentive bonuses were correctly calculated); (iii) provide Dr. Biesinger with benefits (*e.g.* malpractice insurance) in accordance with the Employment Agreement; and (iv) perform in accordance with the Employment Agreement.

1           17.     In 2015, Dr. Biesinger and Absolute Foot Care resumed discussions regarding his  
2 potential purchase of an equity interest in Absolute Foot Care. The terms of the potential purchase  
3 were materially similar to those contained in the Letter of Intent—Dr. Biesinger could purchase up  
4 to a twenty percent (20%) interest for \$25,000.00 per share.

5           18.     While still employed at Absolute Foot Care, Dr. Biesinger purchased real property  
6 and was building out a medical suite located at 6200 North Durango, Las Vegas, Nevada (the  
7 “Durango Office”)—which is approximately one mile away from Absolute Foot Care’s Centennial  
8 Office.

9           19.     On April 20, 2017—when Dr. Levine and Absolute Foot Care’s Practice  
10 Administrator (Dr. Levine’s wife Lauren Levine) were away on vacation—Dr. Biesinger advised  
11 staff members that he was resigning from Absolute Foot Care and provided his key to the office to a  
12 staff member. Dr. Biesinger also placed a resignation letter on Dr. Levine’s desk, which was dated  
13 March 10, 2017.

14           20.     On April 21, 2017, Absolute Foot Care began experiencing a disproportionate  
15 amount of appointment cancellations from its patients.

16           21.     Absolute Foot Care learned that Dr. Biesinger and two former Absolute Foot Care  
17 employees had solicited multiple patients of Absolute Foot Care—including patients with which  
18 Dr. Biesinger had no prior relationship (*i.e.* patients that had only seen Dr. Levine)—to Dr.  
19 Biesinger’s new podiatry practice at his Durango Office, located within one mile of Absolute Foot  
20 Care’s Centennial Office. Specifically, Absolute Foot Care’s patients revealed that they had  
21 received phone calls from someone, purporting to act on Dr. Biesinger’s behalf, indicating: (a) that  
22 they had an appointment with Absolute Foot Care in the near future; (b) that Dr. Biesinger was no  
23 longer with Absolute Foot Care; (c) that Dr. Biesinger was starting his own practice (Centennial  
24 Foot & Ankle); and (d) to call Dr. Biesinger if they wanted to cancel their appointment with  
25 Absolute Foot Care and instead schedule an appointment with Dr. Biesinger at his new office.

26           22.     Additionally, Absolute Foot Care learned that Dr. Biesinger and his agents elected  
27 not to contact certain patients that Dr. Biesinger treated at Absolute Foot Care—although they were  
28

1 still in need of medical care—that were not likely to result in significant reimbursements; primarily,  
2 patients needing post-operative care.

3 23. On May 22, 2017, this Court entered a Preliminary Injunction, enjoining Dr.  
4 Biesinger from violating the Restrictive Covenants.

5 24. Despite the Preliminary Injunction, Dr. Biesinger continued to operate a podiatry  
6 practice (Centennial Foot & Ankle) at his Durango Office until July 21, 2017.

7 25. This Court ultimately held Dr. Biesinger in contempt for violating the Preliminary  
8 Injunction and awarded Absolute Foot Care a significant portion of its reasonable attorney’s fees  
9 and costs.

10 26. On December 8, 2020, this Court sanctioned Dr. Biesinger due to his failure to  
11 comply with this Court’s order compelling him to produce certain documents—after having given  
12 Dr. Biesinger numerous opportunities to comply. Specifically, this Court struck Biesinger’s  
13 affirmative defenses as a sanction pursuant to NRCP 37(b). Subsequently, on Biesinger’s Motion  
14 for Reconsideration, this Court amended its order to “Any of the affirmative defenses asserted by  
15 Biesinger that relate to performance/breach/damages issues shall be disallowed, leaving any and all  
16 denials and the Counterclaim intact, but not permitting evidence to be adduced that should have  
17 been provided.” (Order on Motion to Reconsider the Order Granting, in Part, Renewed Motion for  
18 NRCP 37(b) Sanctions, filed March 4, 2021, at 3:1-9.)

19 27. Absolute Foot Care’s expert opined that it suffered damages in excess of \$1 million  
20 due to Dr. Biesinger’s impermissible conduct. Dr. Biesinger disclosed a rebuttal expert that  
21 criticized Absolute Foot Care’s expert’s methodology.

22 28. Any findings of fact that are more appropriately considered conclusions of law shall  
23 be treated as such.

#### 24 **CONCLUSIONS OF LAW**

25 29. “A party may move for summary judgment, identifying each claim or defense — or  
26 the part of each claim or defense — on which summary judgment is sought.” NRCP 56(a). “The  
27 court shall grant summary judgment if the movant shows that there is no genuine dispute as to any  
28 material fact and the movant is entitled to judgment as a matter of law.” *Id.*

1           30.     “Summary judgment is an important procedural tool by which ‘factually insufficient  
2 claims or defenses [may] be isolated and prevented from going to trial with the attendant  
3 unwarranted consumption of public and private resources.’” *Boesiger v. Desert Appraisals, LLC*,  
4 135 Nev. 192, 194, 444 P.3d 436, 438-39 (2019) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317,  
5 327 (1986)).

6           31.     “Summary judgment is appropriate and shall be rendered forthwith when the  
7 pleadings and other evidence on file demonstrate that no genuine issue as to any material fact  
8 [remains] and that the moving party is entitled to a judgment as a matter of law.” *Wood v. Safeway*,  
9 *Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotation marks omitted). “The  
10 substantive law controls which factual disputes are material and will preclude summary  
11 judgment.” *Id.* at 731, 121 P.3d at 1031. “A factual dispute is genuine when the evidence is such  
12 that a rational trier of fact could return a verdict for the nonmoving party.” *Id.* The Court must  
13 construe “the evidence, and any reasonable inferences drawn from it, . . . in a light most favorable  
14 to the nonmoving party.” *Id.* at 729, 121 P.3d at 1029.

15           32.     The party moving for summary judgment “bears the initial burden of production to  
16 show the absence of a genuine issue of material fact.” *Cuzze v. Univ. & Comm. Coll. Sys. of Nev.*,  
17 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (*citing Celotex Corp.*, 477 U.S. at 323). “[I]f the  
18 nonmoving party will bear the burden of persuasion at trial, the party moving for summary  
19 judgment may satisfy the burden of production by either (1) submitting evidence that negates an  
20 essential element of the nonmoving party’s claim, or (2) ‘pointing out . . . that there is an absence  
21 of evidence to support the nonmoving party’s case.’” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*,  
22 123 Nev. 598, 602–03, 172 P.3d 131, 134 (2007) (quoting *Celotex Corp.*, 477 U.S. at 323); *accord*  
23 *NRCP 56(c)(1)(B)*. Assuming the moving party meets its initial burden of production in moving  
24 for summary judgment, the nonmoving party is then required to set forth those facts demonstrating  
25 the existence of a genuine issue for trial. *See Torrealba v. Kesmetis*, 124 Nev. 95, 100, 178 P.3d  
26 716, 720 (2008).

***Absolute Foot Care's Breach of Contract Claim***

33. Absolute Foot Care, for purposes of its Motion for Summary Judgment, elected its breach of contract claim and liquidated damages of \$650,000.00 as its sole remedy—*i.e.* Absolute Foot Care agreed to forego its other claims for relief<sup>2</sup> if the Motion for Summary Judgment was granted.

34. Under Nevada law, a breach of contract claim requires the following: “(1) formation of a valid contract; (2) performance or excuse of performance by the plaintiff; (3) material breach by the defendant; and (4) damages.” *Laguerre v. Nevada Sys. of Higher Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011) (citing *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987)).

35. The Court concludes that: (i) the Employment Agreement was a valid contract; (ii) Absolute Foot Care performed its obligations under the Employment Agreement; (iii) Dr. Biesinger breached the Employment Agreement by violating the Restrictive Covenants; and (iv) Absolute Foot Care sustained damages as a result of Dr. Biesinger's breaches.

***The Evergreen Clause and the Extension***

36. Dr. Biesinger argues that the Employment Agreement expired on January 22, 2015 (and thus the Restrictive Covenants expired two years later on January 22, 2017) based on his contention that the Extension removed the Evergreen Clause from the Employment Agreement. The Court rejects this argument and finds that the Evergreen Clause remained in effect until Dr. Biesinger's departure from Absolute Foot Care on April 20, 2017.

37. Under Nevada law, unambiguous contracts are construed according to their plain language. *United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 678, 289 P.3d 221, 229 (2012).

38. ***First***, the Court finds that the plain language of the Extension demonstrates that it was not intended to remove the Evergreen Provision from the Employment Agreement. The

---

<sup>2</sup> In addition to its breach of contract claim, Absolute Foot Care asserted the following claims for relief: (i) breach of the implied covenant of good faith and fair dealing; (ii) unjust enrichment; (iii) breach of fiduciary duty; (iv) conversion; (v) intentional interference; and (vi) civil conspiracy.

1 Extension expressly provides that “the term of the [Employment] Agreement has expired and upon  
2 expiration, Employee and Employer agreed to continue their contractual relationship up to the point  
3 of this Extension, and adhered to all terms and conditions under the [Employment] Agreement.” At  
4 that time, the only term in the Employment Agreement that had expired was the Initial Term.

5 39. The Extension then states that “by and through this Extension, Employee and  
6 Employer agree to formally extend the [Employment] Agreement for an additional two (2) years  
7 from the date of the execution of this Extension.”

8 40. The Extension then provides that “[a]ll terms and conditions of the [Employment]  
9 Agreement shall remain in full force and effect” except that the term (*i.e.* the Initial Term), “shall be  
10 extended until January 22, 2015.”

11 41. Dr. Biesinger’s argument that the Extension’s statement that the “term” had expired  
12 references the Employment Agreement generally (and not just the Initial Term) is contradicted by  
13 his own testimony. At his deposition, Dr. Biesinger conceded that, from June 7, 2012 (when the  
14 Initial Term expired), to January 2013 (when the Extension was signed) he was working for  
15 Absolute Foot Care pursuant to the Employment Agreement (*i.e.*, it had not expired).

16 42. The Court finds that the plain language of the Extension does not express an intent  
17 by the parties to remove the Evergreen Clause from the Employment Agreement. To the contrary,  
18 the parties expressed an intent that all terms and conditions of the Employment Agreement were to  
19 “remain in full force and effect,” and the Evergreen Clause is a term and condition of the  
20 Employment Agreement.

21 43. In essence, Dr. Biesinger argues that the Extension was intended to fully supplant  
22 the provisions contained in Section VII(A) of the Employment Agreement. However, the  
23 Extension does not express any such intent. Moreover, Section VII(A) contained other provisions  
24 in addition to the Initial Term and the Evergreen Clause. For example, Section VII(A) also  
25 included, among other things, Dr. Biesinger’s entitlement to be considered for purchasing an  
26 ownership interest in Absolute Foot Care (subject to certain conditions and the reasonable  
27 discretion of Absolute Foot Care). While Dr. Biesinger contends that the Extension removed the  
28 Evergreen Clause, he nonetheless argued that he was entitled to purchase an ownership interest in

1 Absolute Foot Care pursuant to Section VII(A). Dr. Biesinger’s attempt to have it both ways (*i.e.*  
2 the Extension removing the Evergreen Clause but not his entitlement to purchase an ownership  
3 interest) is unavailing—he cannot accept the benefits of the Employment Agreement and, at the  
4 same time, reject its corresponding burdens. *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854  
5 P.2d 860, 861 (1993) (“He cannot at the same time affirm the contract by retaining its benefits and  
6 rescind it by repudiating its burdens.”) (quoting CORBIN ON CONTRACTS § 1114).

7 44. **Second**, assuming, *arguendo*, the Extension was ambiguous as to whether the parties  
8 intended to have the Evergreen Clause remain in full force and effect, the parties’ course of conduct  
9 confirms that the Evergreen Clause remained in place and that the Employment Agreement  
10 persisted through Dr. Biesinger’s departure from Absolute Foot Care.

11 45. Dr. Biesinger does not dispute that from January 22, 2015—the date Dr. Biesinger  
12 contends the Employment Agreement expired—until his departure, he was: (i) paid a salary in  
13 accordance with the terms of the Employment Agreement; (ii) paid incentive bonuses pursuant to  
14 formulas detailed in his Employment Agreement (irrespective of whether the incentive bonuses  
15 were correctly calculated); and (iii) provided with benefits (*e.g.* malpractice insurance, cell phone  
16 allowance, etc.).

17 46. Indeed, Dr. Biesinger’s Counterclaims are based upon the existence of the  
18 Employment Agreement through the time of his departure—he contends that Absolute Foot Care  
19 did not pay him incentive pay pursuant to the specific terms of the Employment Agreement and did  
20 not give him an opportunity to purchase an ownership interest in Absolute Foot Care pursuant to the  
21 Employment Agreement.

22 47. Moreover, the Court finds Dr. Biesinger’s arguments regarding an unauthenticated  
23 text message exchange are not persuasive. Even assuming the text message exchange was  
24 admissible, Dr. Levine’s alleged communications did not confirm that the Employment Agreement  
25 had expired and did not modify the Employment Agreement. Rather, Dr. Levine’s communications  
26 indicated that he believed that the formality of an extension was important to Dr. Biesinger,  
27 consistent with his deposition testimony.  
28



1           48.     **Third**, assuming, *arguendo*, that the Extension had removed the Evergreen  
2 Provision, under Nevada law, “when an employee and employer continue an employment  
3 relationship after the term of duration contained in a written contract, the original contract is  
4 presumed to renew automatically under the same terms and conditions until either party terminates  
5 the contract.” *Ringle v. Bruton*, 120 Nev. 82, 89, 86 P.3d 1032, 1037 (2004). Any terms of  
6 duration do not renew (*i.e.*, a two-year contract does not renew for two years); rather, the contract  
7 simply continues until either party terminates it. *See id.*

8           49.     Under *Ringle*, assuming, *arguendo*, Dr. Biesinger is correct and the Extension  
9 removed the Evergreen Clause, then the parties were subject to an amended Employment  
10 Agreement with the same terms and conditions, excepting the Evergreen Clause, for a term of two  
11 years. It is this amended Employment Agreement (without the Evergreen Clause) that would have  
12 extended by operation of law pursuant to *Ringle*—not the original Employment Agreement (with  
13 the Evergreen Clause).

14           50.     Thus, under Dr. Biesinger’s theory, the amended Employment Agreement (without  
15 the Evergreen Clause) would have ended, pursuant to its terms, on January 22, 2015. However, the  
16 amended Employment Agreement presumptively renewed by operation of law because Dr.  
17 Biesinger and Absolute Foot Care “continue[d] an employment relationship after the term of  
18 duration contained in” the amended Employment Agreement. *Ringle*, 120 Nev. at 89, 86 P.3d at  
19 1037. The amended Employment Agreement continued indefinitely—without any term as to  
20 duration—until Dr. Biesinger resigned on April 20, 2017. *See id.*

21           51.     In sum, because the Court finds the Evergreen Clause persisted after the Extension  
22 was executed, the Employment Agreement automatically renewed for one-year terms on January  
23 23, 2015, January 23, 2016, and January 23, 2017, and remained in effect until Dr. Biesinger’s  
24 departure from Absolute Foot Care on April 20, 2017. Alternatively, even if the Extension had  
25 abrogated the Evergreen Clause, the Court finds that the Employment Agreement renewed by  
26 operation of law pursuant to *Ringle*.

***Absolute Foot Care Performed Its Obligations Under the Employment Agreement***

52. The Court concludes that Absolute Foot Care performed its obligations under the Employment Agreement.

53. As detailed below, Dr. Biesinger contends that Absolute Foot Care breached the Employment Agreement and/or the implied covenant of good faith and fair dealing by failing to compensate him according to the Employment Agreement and by failing to provide him with an opportunity to purchase an ownership interest in Absolute Foot Care. Dr. Biesinger has asserted, as an affirmative defense, that Absolute Foot Care's alleged breaches of the Employment Agreement excused his performance.

54. However, this Court has stricken, as a sanction under NRCP 37(b), "the affirmative defenses asserted by Dr. Biesinger that relate to *performance/breach*/damages issues." (*See* Order Granting, in Part, Renewed Motion for NRCP 37(b) Sanctions, filed on Dec. 8, 2020, at 4; *see also* Order on Motion to Reconsider the Order Granting, in Part, Renewed Motion for NRCP 37(b) Sanctions, filed March 4, 2021, at 3:1-9 (emphasis added).)

55. Accordingly, Dr. Biesinger may not raise Absolute Foot Care's alleged breaches of the Employment Agreement as an affirmative defense to Absolute Foot Care's breach of contract claim.

***Dr. Biesinger Breached the Employment Agreement***

56. The Court concludes that Dr. Biesinger breached the Employment Agreement by violating the Restrictive Covenants. Specifically, Dr. Biesinger violated the Restrictive Covenants by: (i) operating a competing podiatry practice approximately one mile from Absolute Foot Care's Centennial Office; and (ii) soliciting Absolute Foot Care patients.

57. Dr. Biesinger contends that he "had a professional responsibility to inform patients of his departure" and thus his conduct did not constitute solicitation under the Restrictive Covenants. The Court is not persuaded by this argument.

58. ***First***, Dr. Biesinger's argument does not address the fact that he operated a competing podiatry practice approximately one mile from Absolute Foot Care's Centennial Office, which is a material breach of the Restrictive Covenants.

60. ***Third***, Dr. Biesinger and his agents called patients with which he had no relationship. Moreover, Dr. Biesinger and his agents elected not to contact patients that Dr. Biesinger treated at Absolute Foot Care that—although they were still in need of medical care—were not likely to result in significant reimbursements; primarily, patients needing post-operative care.

61. ***Fourth***, Absolute Foot Care’s patients would not have been abandoned if Dr. Biesinger had not solicited them. Absolute Foot Care (*i.e.* Dr. Levine) could have provided the requisite care for its patients.

Damages

### *Damages*

62. The Court concludes that Absolute Foot Care is entitled to \$650,000.00 in liquidated damages pursuant to the Employment Agreement.

63. Dr. Biesinger argues that the liquidated damages provision constitutes an unenforceable penalty. The Court finds that Dr. Biesinger may not raise this argument and, even if he could, Dr. Biesinger failed to meet his burden to demonstrate that there is a genuine issue of material fact as to the enforceability of the liquidated damages provision.

64. **First**, Dr. Biesinger did not raise this argument as an affirmative defense and it is therefore waived. *See Paulos v. FCHI, Ltd. Liab. Co.*, 136 Nev. Adv. Op. 2, 456 P.3d 589, 596 n.4 (2020) (“An affirmative defense that is not pleaded in the answer is waived.”); *In re Snelson*, 305 B.R. 255, 262–63 (Bankr. N.D. Tex. 2003) (“Courts have held that a contention that a liquidated damages provision is unenforceable because it is a penalty is an affirmative defense that the contending party must plead and prove.”) (collecting cases); *Pace Commun., Inc. v. Moonlight Design, Inc.*, 31 F.3d 587, 594 (7th Cir. 1994) (holding argument that a liquidated damages provision is an unenforceable penalty as an affirmative defense).

65. **Second**, even if Dr. Biesinger had raised this argument as an affirmative defense, this Court has stricken it, as a sanction under NRCP 37(b): “the affirmative defenses asserted by Dr. Biesinger that relate to performance/breach/**damages** issues.” (See Order Granting, in Part, Renewed Motion for NRCP 37(b) Sanctions, filed on Dec. 8, 2020, at 4; see also Order on Motion to Reconsider the Order Granting, in Part, Renewed Motion for NRCP 37(b) Sanctions, filed March 4, 2021, at 3:1-9 (emphasis added).)

66. **Third**, even if Dr. Biesinger could raise this argument as an affirmative defense, the Court finds that Dr. Biesinger has failed to establish the existence of a genuine issue of material fact as to whether the liquidated damages provision constitutes an unenforceable penalty. Under Nevada law, liquidated damages provisions “are *prima facie valid*” and the burden is on the party challenging the liquidated damages provision to “establish that its application amounts to a penalty.” *Haromy v. Sawyer*, 98 Nev. 544, 546-47, 654 P.2d 1022, 1023 (1982) (emphasis added). “In order to prove a liquidated damage clause constitutes a penalty, the challenging party must persuade the court that the liquidated damages are disproportionate to the actual damages sustained by the injured party.” *Id.* at 547, 654 P.2d at 1023.

67. Many courts have held that liquidated damages provisions are appropriate for non-competition provisions given the difficulties in calculating actual damages. See, e.g., *Wichita Clinic, P.A. v. Louis*, 185 P.3d 946, 957–59 (Kan. App. 2008); *Geisinger Clinic v. Di Cuccio*, 606 A.2d 509, 518 (Pa. Super. 1992).

68. Dr. Biesinger argues that his rebuttal expert’s criticism of Absolute Foot Care’s damages expert demonstrates that there is a genuine issue of material fact as to whether the liquidated damages constitute an unenforceable penalty. However, Absolute Foot Care has no obligation or burden to demonstrate that the liquidated damages are valid and enforceable—they are presumed so under Nevada law. See *Haromy*, 98 Nev. at 546-47, 654 P.2d at 1023. Instead, it is Dr. Biesinger’s burden to demonstrate that the liquidated damages are an unenforceable penalty. See *id.*

69. Dr. Biesinger’s rebuttal expert does not express any opinions concerning the liquidated damages or Absolute Foot Care’s actual damages; he only critiques Absolute Foot Care’s

expert's methodology. Further, Dr. Biesinger's rebuttal expert does not opine that Absolute Foot Care has not suffered any damages.

70. Thus, Dr. Biesinger's criticisms of Absolute Foot Care's expert are immaterial because Dr. Biesinger has failed to adduce any competent evidence (*i.e.* a damages calculation) that shows that the liquidated damages (*i.e.* \$650,000.00) are disproportionate to Absolute Foot Care's actual damages.

### *Advice of Counsel Defense*

71. Dr. Biesinger contends that he relied upon advice of counsel and alleged opinions from unidentified loan providers that he was not subject to the Restrictive Covenants. Dr. Biesinger's contention is immaterial.

72. **First**, Dr. Biesinger failed to raise advice of counsel as an affirmative defense and has thus waived it. *See* Ammondson v. N.W. Corp., 220 P.3d 1, 14–15 (Mont. 2009); *see also Bd. of Supervisors of LSU and A&M College v. Smack Apparel*, CV-04-1593, 2005 WL 8169213, at \*1 (E.D. La. Mar. 21, 2005) (holding “advice of counsel is an affirmative defense which must be asserted in an answer under Fed. R. Civ. P. 8(c), or it is waived.”); *Gause v. First Bank of Marianna*, 457 So. 2d 582, 585 (Fla. 1st Dist. App. 1984); *accord Paulos*, 136 Nev. Adv. Op. 2, 456 P.3d at 596 n.4.

73. **Second**, even if Dr. Biesinger had pled advice of counsel as an affirmative defense, it is not a defense to a breach of contract claim. Dr. Biesinger's motives, willfulness, and state of mind are irrelevant in deciding whether he breached the Employment Agreement. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 461 (Cal. 1994) (“[T]he law generally does not distinguish between good and bad motives for breaching a contract.”). Thus, even if Dr. Biesinger relied on legal advice, it would not shield him from liability for his breaches of the Restrictive Covenants.

74. **Third**, Dr. Biesinger did not present any component evidence concerning the legal advice he allegedly received from unidentified counsel and determinations allegedly made by unidentified loan providers—the advice/opinions are inadmissible hearsay. *See* NRS 51.065;

1 accord U.S. v. Haisten, 790 Fed. Appx. 374, 378 (3d Cir. 2019) (finding statement from party that  
2 he received advice from counsel that his conduct was legal constituted hearsay).

3 75. In sum, the Court finds that there are no genuine issues as to any material facts  
4 concerning Absolute Foot Care's Breach of Contract claim and that Absolute Foot Care is entitled  
5 to judgment as a matter of law.

6 ***Dr. Biesinger's Counterclaims***

7 76. Dr. Biesinger has pled five counterclaims: (1) declaratory relief; (2) breach of  
8 contract; (3) breach of implied covenant of good faith and fair dealing; (4) unjust enrichment; and  
9 (5) NRS 608.040.

10 77. Dr. Biesinger's Declaratory Relief claim seeks a declaratory judgment that the  
11 Employment Agreement expired on January 22, 2015, and, as a result, the Restrictive Period ended  
12 on January 22, 2017.

13 78. Dr. Biesinger's four coercive counterclaims—breach of contract, breach of the  
14 implied covenant of good faith and fair dealing, unjust enrichment, and NRS 608.040—are based  
15 on allegations that Absolute Foot Care breached the Employment Agreement by failing to provide  
16 Dr. Biesinger with an opportunity to purchase an ownership interest in Absolute Foot Care and by  
17 failing to compensate him according to the Employment Agreement.

18 ***Dr. Biesinger Failed to Disclose a Damages Calculation***

19 79. Dr. Biesinger must adduce evidence of legally cognizable damages on his four  
20 coercive counterclaims to survive summary judgment because damages is an essential element of  
21 each claim. *See Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008)  
22 (breach of contract); *Reborn v. Univ. of Phx.*, No. 2:13-cv-00864-RFB-VCF, 2015 U.S. Dist.  
23 LEXIS 103250, at \*15 (D. Nev. Aug. 5, 2015) (breach of the implied covenant of good faith and  
24 fair dealing); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-CV-01975-KJD-  
25 NJK, 2019 U.S. Dist. LEXIS 142090, at \*5-6 (D. Nev. Aug. 19, 2019) (unjust enrichment); NRS  
26 608.040 (providing penalty for unpaid wages).

27 80. Dr. Biesinger not only failed to provide a damages calculation for any of his  
28 counterclaims, but he also failed to adduce any evidence that he has been damaged. Dr. Biesinger's

1 failure to disclose a calculation of damages (either his own calculation or through an expert)  
2 prohibits him from seeking damages. *See* NRCP 37(c)(1) (providing that where “a party fails to  
3 provide information or identify a witness as required by Rule 16.1(a)(1) ..., the party is not allowed  
4 to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless  
5 the failure was substantially justified or is harmless.”); *see also* NRCP 16.1(a)(1)(A)(iv) (requiring  
6 parties to disclose “a computation of each category of damages claimed by the disclosing  
7 party ....”).

8 81. Because Dr. Biesinger failed to identify evidence that he has been damaged or a  
9 calculation of damages for any of his four coercive counterclaims for relief, Absolute Foot Care is  
10 entitled to summary judgment in its favor. *See Hoffman v. Impact Confections, Inc.*, 544 F. Supp.  
11 2d 1121, 1128 (S.D. Cal. 2008) (granting summary judgment where plaintiff failed to provide any  
12 evidence or computation of damages).

13 ***Dr. Biesinger has Not Adduced Competent Evidence Indicating***  
14 ***Absolute Foot Care Breached the Employment Agreement***

15 82. Dr. Biesinger, in his contract-based counterclaims—breach of contract, breach of the  
16 implied covenant of good faith and fair dealing, and NRS 608.040—contends that Absolute Foot  
17 Care breached the Employment Agreement and/or the implied covenant of good faith and fair  
18 dealing by failing to compensate him according to the Employment Agreement and by failing to  
19 provide him with an opportunity to purchase an ownership interest in Absolute Foot Care.

20 83. The Court finds that Dr. Biesinger has failed to demonstrate the existence of a  
21 genuine issue of material fact as to whether Absolute Foot Care breached the Employment  
22 Agreement.

23 84. ***First***, Dr. Biesinger has not adduced any competent evidence that Absolute Foot  
24 Care failed to pay him in accordance with the terms of the Employment Agreement.

25 85. ***Second***, the Court concludes that no rational fact-finder could determine that  
26 Absolute Foot Care failed to provide Dr. Biesinger with an opportunity to purchase an ownership  
27 interest in Absolute Foot Care pursuant to the Employment Agreement. The uncontroverted  
28 evidence demonstrates that Absolute Foot Care: (i) had a financial evaluation performed; (ii)

1 entered into the Letter of Intent with Dr. Biesinger shortly after the Initial Term expired; (iii) agreed  
2 with Dr. Biesinger on the purchase price (\$25,000.00 per share) based on the financial evaluation;  
3 (iv) offered to provide Dr. Biesinger with information he needed to evaluate the potential purchase;  
4 (v) entered into a Non-Disclosure Agreement with Dr. Biesinger to enable him to view Absolute  
5 Foot Care’s sensitive financial information; and (vi) presented Dr. Biesinger with a draft purchase  
6 agreement for his review.

7 86. While Dr. Biesinger argues that he needed additional information to determine  
8 whether he wanted to purchase an ownership interest in Absolute Foot Care, he failed to present  
9 any competent evidence that he told Absolute Foot Care he needed additional information or that  
10 information had not been provided to him.

11 87. Further, Dr. Biesinger’s contention that Absolute Foot Care changed the financial  
12 terms of the potential purchase (from \$25,000.00 for 20% of Absolute Foot Care’s shares to  
13 \$25,000.00 per share) is contradicted by the Letter of Intent—which was signed by both parties and  
14 demonstrates that the contemplated purchase price was \$25,000.00 per share.

15 ***Dr. Biesinger’s Unjust Enrichment Claim Fails as a Matter of Law***

16 88. Dr. Biesinger asserts, through his Unjust Enrichment counterclaim, that Absolute  
17 Foot Care: (i) “unjustly retained the financial benefit of Dr. Biesinger’s medical and surgical  
18 services, and sales of medical supplies, without payment of full compensation to Dr. Biesinger;”  
19 and (ii) “retained the added benefit of Dr. Biesinger’s physician services to its practice, without ever  
20 having afforded Dr. Biesinger any meaningful opportunity to become an equity partner . . . .”

21 89. The Court finds that Dr. Biesinger’s Unjust Enrichment claim fails as a matter of  
22 law.

23 90. ***First***, because there is an express written agreement (the Employment Agreement),  
24 Dr. Biesinger may not assert a claim for unjust enrichment. See *Rockstar, Inc. v. Original Good*  
25 *Brand Corp.*, No. 09-cv-1499, 2010 WL 3154120, at \*5 (D. Nev. Aug. 9, 2010) (holding the “law  
26 of Nevada is clear—where there is an express written agreement, a party may not assert a claim for  
27 unjust enrichment.”); accord *Leasepartners Corp. v. Robert L. Brooks Tr. Dated November 12,*  
28 *1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (“An action based on a theory of unjust



1 enrichment is not available when there is an express, written contract, because no agreement can be  
2 implied when there is an express agreement.”).

3 91. **Second**, Dr. Biesinger has not adduced any competent evidence to demonstrate  
4 Absolute Foot Care was unjustly enriched. Outside of a contractual agreement, a party is not  
5 entitled to obtain an ownership interest or bonus compensation simply by virtue of his or her labor.  
6 *See Erickson v. Brown*, 813 N.W.2d 531, 539 (N.D. 2012).

7 92. Further, Dr. Biesinger has not adduced any evidence that his compensation from  
8 Absolute Foot Care was inadequate or otherwise different from that which was required under the  
9 Employment Agreement. *See id.*

10 ***Dr. Biesinger’s Declaratory Relief Counterclaim***

11 93. Dr. Biesinger’s Declaratory Relief counterclaim seeks a declaratory judgment that  
12 the Employment Agreement expired on January 22, 2015, and, as a result, the Restrictive Period  
13 ended on January 22, 2017.

14 94. “The Declaratory Judgment Act does not grant litigants an absolute right to a legal  
15 determination.” *United States v. State of Wash.*, 759 F.2d 1353, 1356 (9th Cir. 1985). In deciding  
16 whether declaratory relief is proper, courts “consider both the circumstances of the parties and the  
17 sound jurisprudence of the court.” *Id.* at 1357. “Declaratory relief should be denied when it will  
18 neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the  
19 proceedings and afford relief from the uncertainty and controversy faced by the parties.” *Id.*

20 95. While the existence of other adequate remedies is not necessarily a bar to declaratory  
21 relief, “[w]here determination of [a] breach of contract claim [will] resolve any question regarding  
22 interpretation of the contract, there is no need for declaratory relief, and dismissal of a companion  
23 declaratory relief claim is appropriate.” *StreamCast Networks, Inc. v. IBIS LLC*, No. CV 05-04239  
24 MMM (Ex), 2006 U.S. Dist. LEXIS 97607, at \*11 (C.D. Cal. May 1, 2006) (internal quotation  
25 marks omitted) (alterations in original) (collecting cases); *accord Tevis v. Hoseit (In re Tevis)*, Nos.  
26 EC-10-1318-JuKiD, EC-10-1319-JuKiD, EC-10-1320-JuKiD, EC-10-1321-JuKiD, 2011 Bankr.  
27 LEXIS 5307, at \*42 (B.A.P. 9th Cir. Dec. 9, 2011) (“Where there is an accrued cause of action for  
28 a past breach of contract or other wrong, declaratory relief is inappropriate.”).

98. Any conclusions of law that are more appropriately considered findings of fact shall be treated as such.

Based on the foregoing findings of fact and conclusions of law, and good cause appearing,

IT IS HEREBY ORDERED that Absolute Foot Care's Motion for Summary Judgment is

GRANTED.

IT IS FURTHER ORDERED that summary judgment is entered in favor of Absolute Foot Care and against Dr. Biesinger with respect to: (i) Absolute Foot Care's breach of contract claim; and (ii) Dr. Biesinger's counterclaims.

IT IS FURTHER ORDERED that a monetary judgment—in the amount of six hundred fifty thousand dollars (\$650,000.00) and any applicable prejudgment interest—consistent with this Order will be entered in favor of Absolute Foot Care and against Dr. Biesinger through a separate written judgment.

IT IS FURTHER ORDERED that Absolute Foot Care’s remaining claims—breach of the implied covenant of good faith and fair dealing; unjust enrichment; breach of fiduciary duty; conversion; intentional interference; and civil conspiracy—are hereby DISMISSED, without prejudice, as MOOT.

IT IS FURTHER ORDERED that the Preliminary Injunction entered on June 15, 2017, is hereby DISSOLVED.

///

IT IS FURTHER ORDERED that the Court Clerk shall immediately release to Absolute Foot Care Specialists the security posted by Absolute Foot Care Specialists: (i) for the Temporary Restraining Order (in the amount of \$500.00) on or about May 3, 2017; and (ii) for the Preliminary Injunction (in the amount of \$25,000.00) on or about June 15, 2017.

Dated this 18th day of August, 2021



ABG

9AA 054 216F B326  
Mark R. Denton  
District Court Judge

Respectfully submitted by:

BAILEY ♦ KENNEDY

By: /s/ Paul C. Williams

JOHN R. BAILEY

JOSHUA M. DICKEY

PAUL C. WILLIAMS

*Attorneys for Plaintiff/Counterdefendant  
Absolute Foot Care Specialists*

Approved as to Form:

TAKOS LAW GROUP, LTD.

By: /s/ Steven R. Hart

ZACHARY P. TAKOS

NEVADA BAR NO. 11293

STEVEN R. HART

NEVADA BAR NO. 15418

1980 FESTIVAL PLAZA DRIVE, SUITE 300

LAS VEGAS, NEVADA 89135

ZACH@TAKOSLAW.COM

STEVEN@TAKOSLAW.COM

TELEPHONE (702) 856-4629

FACSIMILE: (702) 9324-4422

*Attorney for Defendant David P. Biesinger, DPM*

## Sharon Murnane

---

**From:** Steven Hart <steven@takoslaw.com>  
**Sent:** Tuesday, August 10, 2021 5:02 PM  
**To:** Paul Williams  
**Cc:** Zachary Takos; Joshua Dickey; Karen Rodman; Sharon Murnane  
**Subject:** Re: Absolute Foot Care v. Biesinger - Order & Judgment

Thanks Paul. I have reviewed and you may affix my e-signature to both the FFCL & Order and the Judgment.

Sincerely,

Steven R. Hart, Esq.

**TakosLawGroup, Ltd.**

1980 Festival Plaza Drive, Suite 300

Las Vegas, Nevada 89135

O: 702.856.4629

C: 801.380.8950

F: 702.924.4422

CONFIDENTIALITY NOTICE: This email may contain information which is privileged, confidential, and protected by the attorney-client privilege and/or the attorney work product doctrine. If you are not the addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this communication in error, please destroy it and notify me immediately.

IRS CIRCULAR 230 NOTICE: To ensure compliance with Internal Revenue Service requirements, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or tax-related matter(s) addressed herein.

---

**From:** Paul Williams <PWilliams@baileykennedy.com>  
**Date:** Friday, August 6, 2021 at 10:10 AM  
**To:** Steven Hart <steven@takoslaw.com>  
**Cc:** Zachary Takos <zach@takoslaw.com>, Joshua Dickey <JDickey@baileykennedy.com>, Karen Rodman <KRodman@baileykennedy.com>, Sharon Murnane <SMurnane@baileykennedy.com>  
**Subject:** RE: Absolute Foot Care v. Biesinger - Order & Judgment

Hi Steven,

Attached are revisions to your redline of the FFCL & Order (i.e. I accepted your revisions, and then edited from that version) in both clean and redline versions. We assume you have no revisions to the Judgment.

If the revisions to the FFCL & Order are acceptable, please confirm that I may affix your electronic signature to the same and the Judgment.

Thank you,

Paul C. Williams  
Bailey Kennedy, LLP  
8984 Spanish Ridge Avenue  
Las Vegas, Nevada 89148-1302  
(702) 562-8820 (Main)

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Absolute Foot Care Specialists,  
7 Plaintiff(s)

CASE NO: A-17-754423-B

8 vs.

DEPT. NO. Department 13

9 David Biesinger, DPM,  
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12  
13 This automated certificate of service was generated by the Eighth Judicial District  
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the  
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled  
16 case as listed below:

17 Service Date: 8/18/2021

18 Zachary Takos zach@takoslaw.com

19 Bailey Kennedy . bkfederaldownloads@baileykennedy.com

20 John Bailey . jbailey@baileykennedy.com

21 Joshua Dickey . jdickey@baileykennedy.com

22 Karen Rodman . KRodman@baileykennedy.com

23 Paul C. Williams . pwilliams@baileykennedy.com

24 Sharon Murnane . smurnane@baileykennedy.com

25 Jeffrey Gronich jgronich@gronichlaw.com

26 Katie Erickson katie@takoslaw.com

27 Steven Hart steven@takoslaw.com

28

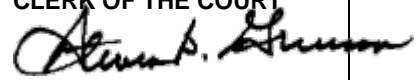
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dustin Clark

dclark@nevadafirm.com

Exhibit 6

Exhibit 6



**NEO (CIV)**  
JOHN R. BAILEY  
Nevada Bar No. 0137  
JOSHUA M. DICKEY  
Nevada Bar No. 6621  
PAUL C. WILLIAMS  
Nevada Bar No. 12524  
**BAILEY ♦ KENNEDY**  
8984 Spanish Ridge Avenue  
Las Vegas, Nevada 89148-1302  
Telephone: 702.562.8820  
Facsimile: 702.562.8821  
JBailey@BaileyKennedy.com  
JDickey@BaileyKennedy.com  
PWilliams@BaileyKennedy.com

*Attorneys for Plaintiff*  
*Absolute Foot Care Specialists*

DISTRICT COURT  
CLARK COUNTY, NEVADA

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation,

Plaintiff,

vs.

DAVID P. BIESINGER, DPM, an individual; and  
LORRAINE PALLANTI, an individual,

Defendants.

DAVID P. BIESINGER, DPM, an individual,

Counterclaimant,

vs.

ABSOLUTE FOOT CARE SPECIALISTS, a  
Nevada Corporation; DOES I through X; and  
ROE ENTITIES I through X,

Counter-Defendant.

Case No. A-17-754423-B  
Dept. No. XIII

**NOTICE OF ENTRY OF FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER  
GRANTING PLAINTIFF/  
COUNTERDEFENDANT ABSOLUTE FOOT  
CARE SPECIALISTS' MOTION FOR  
SUMMARY JUDGMENT ON: (1) ITS  
BREACH OF CONTRACT CLAIMS; AND (2)  
DEFENDANT/COUNTERCLAIMANT DAVID  
P. BIESINGER, DPM'S COUNTERCLAIMS**

TO: ALL INTERESTED PARTIES

PLEASE TAKE NOTICE that Findings of Fact, Conclusions of Law, and Order Granting  
Plaintiff/Counterdefendant Absolute Foot Care Specialists' Motion for Summary Judgment on: (1)  
Its Breach of Contract Claims; and (2) Defendant/Counterclaimant David P. Biesinger, DPM's



Counterclaims was entered in the above-entitled action on August 18, 2021, a true and correct copy of which is attached hereto.

DATED this 18<sup>th</sup> day of August, 2021.

BAILEY ♦ KENNEDY

By: /s/ Paul C. Williams  
JOHN R. BAILEY  
JOSHUA M. DICKEY  
PAUL C. WILLIAMS  
*Attorneys for Plaintiff Absolute  
Foot Care Specialists*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of BAILEY ♦ KENNEDY and that on the 18<sup>th</sup> day of August, 2021, service of the foregoing was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

ZACHARY P. TAKOS  
STEVEN R. HART, ESQ.  
**TAKOS LAW GROUP, LTD.**  
1980 Festival Plaza Drive, Suite 300  
Las Vegas, Nevada 89135

Email: zach@takoslaw.com  
steven@takoslaw.com  
*Attorney for Defendant*  
DAVID BIESINGER, DPM

JEFFREY GRONICH  
**JEFFREY GRONICH,  
ATTORNEY AT LAW, P.C.**  
1810 East Sahara Avenue, Suite 109  
Las Vegas, Nevada 89104

Email: jgronich@gronichlaw.com  
*Attorneys for Defendant*  
LORRAINE PALLANTI

/s/ Sharon Murnane  
Employee of BAILEY ♦ KENNEDY