IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEMENT MUNEY; CHEF EXEC SUPPLIERS, LLC., Appellants, vs. DOMINIQUE ARNOULD, Respondent.	Supreme Court Case No. 83641, 83869

APPELLENT'S OPENING BRIEF

APPEAL FROM THE EIGHTH JUDICIAL COURT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEMENT MUNEY; CHEF EXEC SUPPLIERS, LLC., Appellants, vs. DOMINIQUE ARNOULD, Respondent.	Supreme Court Case No: 83641, 83869 **NRAP Rule 26.1 Disclosure**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal. Appellant Clement Muney and Chef Exec Suppliers have no parent corporations, no stock, no corporate affiliation, and is present under their true names. They are represented by Robert Kern, Esq., and have been, and expect to be, represented by no other counsel in this matter.

DATED this 14 day of April, 2022.

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/s/ Robert Kern
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I.
JURISDICTIONAL STATEMENT

This appeal arises from two orders of the Eighth Judicial District Court, in and for Clark County, State of Nevada, the Honorable Nancy Allf, Presiding. The first order was entered on the 13th day of September, 2021, (Appx, p.0823). That order was a grant of summary judgment on all claims and defenses in the case. The order is appealable under NRAP 3A(b)(1) as a final order resolving all matters.

The second order was entered on the 16th day of November, 2021, (Appx, p.0935). That order granted a motion for attorney's fees. The order is appealable under NRAP 3A(b)(8) as a special order after final judgment.

II.

ROUTING STATEMENT

As an appeal arising from Business Court, it would be presumably routed to the Supreme Court under NRAP 17(a)(9).

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. COULD THE REPORT OF A LIMITED-PURPOSE RECEIVER, FOR WHICH NO BRIEFING WAS ORDERED OR TESTIMONY TAKEN, WHO WAS ORDERED TO MAKE A

REPORT ON THE VIABILITY OF THE COMPANY, BE DEEMED A FULL ADJUDICATION IN FAVOR OF ALL PLAINTIFF'S CLAIMS ON SUMMARY JUDGMENT, ALLOWING NO EVIDENCE IN OPPOSITION BY DEFENDANT?

2. WAS THE FACT THAT CES WAS AN LLC WITHOUT AN OPERATING AGREEMENT, BY ITSELF, DISPOSITIVE OF THE QUESTION OF WHETHER A FIDUCIARY OR SPECIAL RELATIONSHIP COULD EXIST BETWEEN ARNOULD AND MUNEY?
3. DID THE DEFENDANTS' FAILURE TO FILE THEIR COUNTERCLAIMS AS DERIVATIVE CLAIMS, MEAN THAT BOTH THE DEFENDANT MEMBER AND THE DEFENDANT COMPANY WERE PRECLUDED FROM PLEADING COUNTERCLAIMS THAT AFFECTED DEFENDANT COMPANY'S PRE-DISSOLUTION RIGHTS, AND DEFENDANT MEMBER'S POST DISSOLUTION RIGHTS?
4. DOES A NON-MONETARY JUDGMENT AGAINST MERITORIOUS CLAIMS JUSTIFY AN AWARD OF FEES UNDER NRS 18.010(2)?

5. DID THE COURT ERR BY MAKING A SEPARATE AWARD OF FEES PURSUANT TO NRS 86.489, ON AN ACTION FOR JUDICIAL DISSOLUTION AND APPOINTMENT OF A RECEIVER WHERE THE COMPANY DID NOT WIN ANY MONEY JUDGMENT IN THE ACTION?

6. IS A MEMBER FILING SUIT TO DISSOLVE HIS COMPANY ENTITLED TO ATTORNEYS FEES OF NEARLY $200,000 INCLUDING WORK ON UNRELATED LITIGATIONS, AND SIGNIFICANT WORK OUTSIDE THE LODESTAR STANDARD OF REASONABILITY?

IV.
STATEMENT OF THE CASE

This case comes as a consolidated appeal from a District Court grant of summary judgment on all claims and defenses, and a post-judgment order granting a motion for attorneys fees.

On October 11, 2019, Respondent Dominique Arnould (hereinafter, "Arnould"), filed a complaint in the Eighth Judicial District Court for Dissolution, Appointment of a Receiver, and Breach of Fiduciary Duty, against Appellants Clement Muney (hereinafter, "Muney") and Chef Exec Suppliers, LLC (hereinafter, "CES", or the "Company"). (See Complaint, Appendix p.0001). Defendants/Appellants Muney and CES filed an answer and counterclaims on November 7, 2019. On June 8, 2020, the Court entered an Order appointing a Receiver with limited powers. (Rec'r Order, Appx.p.0289). On August 21, 2020, the Court entered an order to dissolve the Company, effective September 30. (Diss Order, Appx.p.0340). On December 7, 2020 the Receiver filed his final report, including recommendations for division of Company assets. (Rec'r Report, Appx.p.0363). On January 29, 2021, Muney filed a timely objection to the Receiver's Report, including documentary exhibits detailing the issues with the report's conclusions and methods. (Obj to RR, Appx.p.0575). The Court accepted the Report and the Objections after hearing. On June 14, 2021 Arnould filed a motion for summary judgment on all claims. (MSJ, Appx.p.0656). The motion was

heard in a hearing on July 29, 2021, and was granted by the Court in its entirety. (MSJ Tran, Appx.p.0803). Thereafter Arnould filed a motion for attorney's fees on September 28, 2021, which was heard on November 16, 2021. (Fees Mtn, Appx.p.0851). The Court granted the motion in its entirety with no deductions or adjustments. (Fees Order, Appx.p.0823). Appellants timely appealed the grant of summary judgment and the grant of attorneys fees, and those appeals were consolidated by order of the Supreme Court.

V.
STATEMENT OF FACTS

Plaintiff Arnould and Defendant Muney were long-time friends and 50-50 owners of Defendant Company Chef Exec Suppliers, LLC (CES), which was a distributor of foodservice supplies. The Company consisted of two largely autonomous branches, one in Los Angeles run by Arnould, and one in Las Vegas run by Muney. In 2019, Arnould sought to retire and be bought out of his share, however the parties disagreed on the value of his share. (2019 MSJ, Appx.p.0058). When the lease for the Las Vegas warehouse required both owners to sign for the renewal, Arnould refused to sign, and suggested in two separate writings, that Muney sign the lease with a separate company Muney owned solely, and sub-lease to CES. Muney did so, binding his company with a lease, and rented the warehouse to CES at a rate that he was advised by his real estate agent was fair market price

for those terms. (2019 MSJ, Appx.p.0029,0037,0053). Thereafter Arnould filed suit, arguing that Muney's charging above cost on the sub-lease was a breach of fiduciary duty, and demanding an accounting, a judicial dissolution of the company and appointment of a Receiver. (Complaint, Appx.p.0001). Muney filed an answer and counterclaims alleging that Arnould had converted Company funds and property to his own use and possession, and had used his position as bookkeeper to give himself and his separately owned companies benefits, at CES's cost. (Answer, Appx.p.0006). Muney filed a motion for partial summary judgment, seeking dismissal of Arnould's claims, on the basis that there was no duty owed between members of an LLC, and no breach regardless, as well as that the circumstances could not justify such an extreme remedy as a judicial dissolution of a still-profitable company. (2019 MSJ, Appx.p.0018). At the same time, Arnould filed a motion for trustee, seeking to have himself named as trustee for the company, and thus be in 100% control of the company. (Trustee Mtn, Appx.p.0060). The Motion for Summary Judgment was denied, with the Court holding that determination of whether there were duties owed between Muney and Arnould required determinations of fact; the Motion for Trustee was taken off calendar by Arnould. (2019 MSJ Order, Appx.p.0131).

On February 7, 2020, the parties attended a court-ordered settlement conference, at which settlement of all claims and all essential terms was reached,

and was entered into the minutes. Despite the settlement agreement of all claims, while Muney waited for Arnould to secure financing to complete the settlement, on March 13, 2020, Arnould filed a motion for partial summary judgment, seeking dissolution of the Company and appointment of a Receiver, only thereafter declaring that he was unable to find financing to complete the settlement; Muney responded with a motion to enforce settlement agreement, which was eventually scheduled to be heard on June 24, 2020. (Mtn to Enforce, Appx.p.0135). On May 20, 2020, Muney, after discovering that Arnould had started depositing all Company funds into a new account he had opened, that only he had access to, filed an application for a Temporary Restraining Order and a Motion for Preliminary Injunction, which was heard in a noticed hearing on May 22, 2020. At the May 22 hearing, the Court denied Muney's motion, stating that it was not an actual emergency. Unexpectedly, without notice to either party or taking argument, the Court also decided to grant the motion for appointment of a receiver, and deny the motion to enforce settlement agreement, which were scheduled to be heard on June 24, over a month afterward. The denial of the motion to enforce was based upon the Court taking judicial notice of Arnould's unsupported argument that the Covid pandemic had made acquiring financing impossible. (5-22 Trans, Appx.p.0259). Also at that hearing the Court ordered appointment of a limited-purpose receiver, who was empowered only to supervise company operations, and prepare a report

about the viability of the company. (Rec'r Order, Appx.p.0289). Just over two weeks later, on June 10, 2020, Arnould filed an emergency motion for appointment of receiver, and a preliminary injunction, seeking a hearing the same day. Arnould claimed that he had, without notice to Muney, driven to the Las Vegas warehouse, and found it locked, and wanted entry. Neither Muney nor his counsel were informed that Arnould was driving to Las Vegas prior to the filing of the emergency motion, and no other explanation of the emergency nature of the motion was provided. Muney's counsel was unable to attend, explaining that he had oral argument before the Nevada Supreme Court the following day, and had scheduled a moot argument with an entire panel of appellate lawyers during the time that Arnould wished to hold the hearing. The Court nonetheless scheduled the hearing, and sanctioned Muney's counsel for not appearing[1]. At the following hearing two days later, the Court granted Arnould's emergency motion, not addressing the argument that the issue was not an emergency at all, and ordered that Muney grant Arnould full access to the Vegas warehouse, despite Muney having no access to the LA warehouse[2]. (6-12 Trans, Appx.p.0297). In selecting the Receiver, the Court

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1 This is the subject of a current writ application to the Supreme Court, case 83636

2 Muney had alleged that since the beginning of litigation, Arnould had repeatedly taken inventory belonging to the Las Vegas branch without permission, outside

chose the sole receiver proposed by Arnould, over Muney's objection.

On August 12, 2020, upon Arnould's motion, the Court held a hearing on final dissolution of the Company. Despite his previous opposition, Muney consented, as operation of the company without the Court imposing any limitations on Arnould's actions had become impossible. At the hearing Muney raised the issue that the Receiver had been including the legally-contested issue of Las Vegas warehouse rent in his report, and the Court ordered the Receiver, over the Receiver's objection, not to include those amounts, as the responsibility for those amounts was a legal determination that would not be resolved until trial of the issue. (8-12 Trans, Diss Order, Appx.p.0318, 0340). On August 21, 2020 the Court entered an order of dissolution of the Company, which became Effective on September 30, 2020. (Diss Order, Appx.p.0340).

On December 7, 2020 the Receiver filed his final report, including recommendations for division of Company assets, which also included assigning the disputed Las Vegas rents, despite the Court ordering otherwise. (Rec'r Report, Appx.p.0363). On January 29, 2021, Muney filed a timely objection to the Receiver's Report, including documentary exhibits detailing the issues with the report's conclusions and methods. The objections included making a determination

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of the regular method for the rare transfers of inventory between branches. Thus he wished to keep the locks so that Arnould would not be able to continue to take inventory without notice. (6-12 Trans, Appx.p.0297).

on the Las Vegas rents, despite such being outside the assigned scope, and requiring legal and factual determinations outside the Receiver's expertise, acceptance of Arnould's allegations of improper spending without bringing them to Muney to address them, the decision to only consider nine months of data, rather than the entire relationship, thus excluding most of Muney's claims against Arnould, and the decision to believe Arnould's testimony over his warehouse manager 's testimony regarding Arnould's improper use of the LA warehouse. (Obj to RR, Appx.p.0575). The Court accepted the Report and the Objections after hearing.

In fall 2020, Muney had properly served Arnould with discovery requests, which, after extensions, Arnould responded to on December 7. Due to a large number of non-responses from inappropriate objections, a meet and confer was held on February 12, 2021. At the meet and confer Arnould's counsel agreed to fully supplement the deficient responses. When counsel for Muney requested status on the supplemental responses (on April 12, 2021), and provided an email with the requested clarified wording on April 14, 2021, Arnould's counsel responded (on April 16) that he would require the wording of the requests to be amended prior to providing the agreed-upon supplementation (“please amend for clarity the following requests and we will subsequently amend our responses in pleading form”). This email from Arnould was written less than 30 days prior to the close of

discovery, set for May 14. Prior to the discovery deadline, counsel for Muney responded by emailing restated wording of the requests to assuage Arnould's concerns. Arnould had only requested changed wording on two of the twelve requests for production, however Muney assumed Arnould was waiting to provide all supplements at the same time. As Arnould had promised to supplement once he received the clarified wording, Muney waited for the supplemental responses to be provided. After hearing nothing from Arnould, Muney inquired on June 23 when the supplemental responses would be provided. At that time, Arnould's counsel stated that since the requests were not received more than 30 days prior to the close of discovery (despite their promise to supplement occurring less than 30 days before the close of discovery), that Arnould no longer had a duty to supplement. (Mtn Compel, Appx.p.0722). On the day before the expiration of discovery, Arnould named the Receiver as an expert witness. (Exp.Decl., Appx.p.0653).

On June 14, 2021 Arnould filed a motion for summary judgment on all claims, arguing 1) that the previous year's issuance of an order of dissolution constituted success on a derivative claim, and thus claimed costs and fees under NRS 86.489, 2) That the Receiver's Report constituted an accounting, of all claims and amounts, and thus the Court should simply adopt it as a judgment because the Receiver was an expert, and Muney could not dispute any of it because he had not retained an expert, 3) that his claim for breach of fiduciary duty was already

covered, as the Receiver's Report awarded Arnould all amounts claimed for that, 4) that all of Muney's counterclaims must be dismissed for lack of standing, since they belonged to CES, 5) that Muney's counterclaims for Breach of fiduciary duty and for fraud failed because there was no duty owed between Muney and Arnould, and 6) that most of Muney's counterclaims also failed because the Receiver was an expert, and thus without an expert, Muney could not present evidence against his conclusions. (MSJ, Appx.p.0656). Muney fully opposed the arguments in a written opposition. (MSJ Opp, Appx.p.0699). At hearing, the Court held that Arnould prevailed on all claims because Muney could not dispute Arnould's expert, and all of Muney's claims failed for lack of evidence for the same reason. The Court further held that Arnould had prevailed derivatively by dissolving the Company, and that he was thus entitled to costs and fees. Arnould received $6,303.93 as a capital distribution, and no money damages. (MSJ Trans, Fees Order, Appx.p.0803, 0823).

After the hearing, Arnould subpoenaed Muney's counsel for his entire client file, as he argued that it would provide support for the reasonability of any future motion for fees that he might file; Muney's counsel filed an immediate motion for protective order against such disclosure. (Mtn Prot Order, Appx.p.0182). Thereafter Arnould filed a motion for attorney's fees on September 28, 2021, seeking $199,985.00 in fees, which included two months of pre-litigation billing,

billing on a copyright dispute with a different party, almost daily calls and conferences with Arnould over two years, as well as a vast amount of other charges. (Fees Mtn, Fees Opp, Appx.p.0851, 0894). At hearing, the Court granted the motion in its entirety, declining to reduce the amount in any way, even the portions from other litigations. (Fees Order, Appx.p0823). The motion for protective order was rendered moot by the motion for fees being granted in full prior to a hearing on the protective order. Muney appealed both the grant of summary judgment, and the Order granting fees, which were consolidated into the present appeal.

VI.
SUMMARY OF ARGUMENT

This matter was initially brought with only one claim of wrongdoing; that after Arnould refused to sign a new lease, and twice advised Muney to just sign the lease with a separate company and sub-lease to CES (as evidenced in two emails), Muney did as suggested, and charged CES the fair market rate for the rent, rather than renting it at cost, despite having had to bind himself personally to a lease while having no enforceable lease with CES. This claim was never briefed, argued, nor had evidence taken, yet the entire case has now been litigated, finding against Muney in every count, despite no actual findings of wrongdoing.

The Court granted summary judgment in Arnould's favor on all claims and

defenses, primarily based on the fact that Arnould named the Receiver his expert the day before discovery closed, and then claimed that Muney could not dispute an expert with a non-expert, and claimed that this meant the case was essentially over. This ignored the fact that the Receiver was appointed as a limited-power, limited-purpose receiver, solely authorized to supervise operation of the Company, and make a report on the viability of the Company. The Receiver was never authorized to adjudicate any claims, never accepted any briefing on any legal issues, and was specifically ordered by the Court not to make any determinations on the Las Vegas Warehouse rent issue. Despite this, the Receiver's Report explicitly claimed to adjudicate the Las Vegas warehouse rent issue, awarding the entirety to Arnould, as well as electing to only consider allegations between the parties for disputed expenses from the previous nine months, which excluded almost all Muney's claims against Arnould.

Muney was entitled to challenge the Receiver's methods, the information the Receiver relied upon, the fact that the Receiver elected not to include determination of most of Muney's claims, and most importantly the fact that the largest determination was one the Receiver was directly ordered not to make. The Court's determination that Muney could not maintain any defense or counterclaim, simply because Arnould named the Receiver as an expert, was without any legal or logical basis. Granting summary judgment on all claims and defenses solely based

on the blanket assumption that Muney could not challenge the expert on anything at all, and that the expert's report was somehow dispositive of all issues, was likewise without basis.

The Court erred further, by holding that Arnould's year-old judgment dissolving the company was somehow a derivative action, and entitled Arnould to a grant of costs and fees, with the application coming almost a year after the judgment. An application for fees is required to be filed within 21 days of the judgment, and the action that both bankrupted and dissolved the company, could not in any way be held to be an action done for the company's benefit.

Arnould's motion for fees had no basis in law. The sole judgment was explicitly a capital adjustment, and thus not a monetary judgment for purposes of NRS 18.010(2)(a). Further, the fact that Muney's claims and defenses did not require a competing expert, did not automatically make all of Muney's claims and defenses frivolous, and thus justify fees under NRS 18.010(2)(b). Even if an award of fees had been justified and authorized by statute, Arnould's bad faith inclusion of large amounts of improper billing, billing for other matters, and billing for costs, should have been rejected.

VII.
ARGUMENT

I.
COULD THE REPORT OF A LIMITED-PURPOSE RECEIVER, FOR WHICH NO BRIEFING WAS ORDERED OR TESTIMONY TAKEN, WHO WAS ORDERED TO MAKE A REPORT ON THE VIABILITY OF THE COMPANY, BE DEEMED A FULL ADJUDICATION IN FAVOR OF ALL PLAINTIFF'S CLAIMS ON SUMMARY JUDGMENT, ALLOWING NO EVIDENCE IN OPPOSITION BY DEFENDANT?

a. Standard of Review

All questions of law are reviewed de novo. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). An order on a motion for summary judgment is reviewed de novo. *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). A district court's interpretation of the Nevada Rules of Civil Procedure is reviewed de novo. *Ford v. Branch Banking & Tr. Co.*, 131 Nev. Adv. Op. 53, 353 P.3d 1200, 1202 (2015) (citing *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008). To the extent an evidentiary ruling rests on a legal interpretation of the evidence code, de novo review is appropriate. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012); *Stephans v. State*, 127 Nev. ——, ——, 262 P.3d 727, 730 (2011). A district

court's evidentiary rulings are reviewed for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Review of the grant of summary judgment is appropriately de novo, as is review of the requirements of NRCP 56, in determining what evidence can be considered in ruling on a motion for summary judgment. The question of whether evidence presented to oppose summary judgment must be authenticated, as a legal interpretation of the evidence code, review is also de novo. The Court's decision not to compel Respondent to comply with discovery requests is an evidentiary ruling, and thus would be reviewed for abuse of discretion.

b. The Court Erred by Transferring the Rule 56 Evidentiary Burden to the Non-moving Party Without First Requiring the Moving Party to Meet Their Initial Burden of Production.

In *Cuzze*, the Nevada Supreme Court enunciated the burden of proof for motions for summary judgment in Nevada. "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." *Cuzze v. University and Community College System of Nevada,* 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). In the present case, Respondent Arnould sought summary judgment on his claims for an accounting, and breach of fiduciary duty, as well as dismissal of all Muney's counterclaims. (MSJ, Appx.

p.0656).

Although Arnould states that he seeks an "equitable accounting", it appears that the only form of accounting discussed in Nevada Courts is that referred to by the Nevada Supreme Court in *Foster*. Under *Foster* the claim requires that the moving party make a showing of waste of assets, mismanagement, fraud or official misconduct on behalf of the other party:

> The record is devoid of evidence showing any waste of assets, mismanagement, fraud or official misconduct during this period. Under such circumstances plaintiffs were not entitled to an interlocutory order for an accounting. On a record showing a complete absence of wrongdoing there can be no judgment for an accounting. The misconduct is not to be presumed. Indeed the law is to the contrary. `The directors of a company still are the agents and trustees of a corporation, and have the control and management of its affairs for the benefit of the stockholders and the reasonable service of the public, and until it is shown otherwise there is a presumption that their acts were honest and in the best interests of the company.

Foster v. Arata, 325 P. 2d 759 (NV S.Ct.1958) (Internal citations omitted). Arnould has established no wrongdoing by Muney to justify such a claim. Even if the Court were inclined to adopt the equitable accounting theory used in federal court, Arnould was still deficient, as that version required him to establish the existence of a fiduciary relationship between himself and Muney (something he specifically disclaimed in the motion). (MSJ, Appx.p0673), *Leonard v. Optimal Payments Ltd.* (*In re Nat'l Audit Def. Network*), 332 B.R. 896, 918–19 (Bankr. D. Nev. 2005) ("[T]he defendant's possession of property belonging to the

complaining party is essential if the parties are not in a fiduciary relationship."3). Arnould notes that there has been a rare exception which allows an accounting without a fiduciary relationship (though this has never been recognized in Nevada); however under that theory, the claimant is only allowed to bring the claim if he has established that the other party is in possession of Property for which the claimant has legal title. Arnould's motion made no such showing, and at no time alleged that Muney was in possession of property belonging to Arnould. Either type of accounting has elements required before it can be ordered, and Arnould failed to establish the most basic showing of either one.

Instead of making a showing of the elements required before an accounting may be ordered, Arnould's motion simply stated that the Receiver's Report could be deemed an accounting, and asked that it be accepted, without even alleging the elements necessary before an accounting could be ordered. ("In this case, the Receiver completed a full accounting of CES that satisfies the requirements for an accounting under Nevada law and NRS Chapter 86.52 Thus, this Court should enter judgment in favor of the Receiver's equitable accounting of CES...") (MSJ, Appx. P.0667). At no time prior did the Court order an accounting, nor make a finding of wrongdoing on Muney's part, nor that Muney was in possession of Arnould's property, nor did it ever hold an evidentiary hearing on the issue, nor

3 This case is the sole case cited by Arnould to support the ability to seek an accounting without a fiduciary relationship.

was the Receiver instructed or authorized to make such a finding. (Rec. Order, Appx. P.0289). Instead of making the showing required for an order for an accounting, Arnould simply asked the Court to presume an accounting was justified, without evidence or allegation, and then to retroactively declare that the accounting had already been completed by the explicitly limited purpose and limited authority Receiver4. The Court not only granted this retroactive authority to adjudicate the claims, but also held that because Arnould had retroactively declared the Receiver his expert5, Muney was not entitled to present evidence or arguments to dispute any of the Receiver's conclusions. (FFCL, Appx.p.0839). Despite not a single allegation or piece of evidence showing wrongdoing or possession of Arnould's property to support ordering an accounting, and no previous findings on the issue, the District Court improperly shifted the burden of production to Muney, in violation of the *Cuzze/Celo-Tex* rule.

With regard to Arnould's claim for breach of fiduciary duty, Arnould pointed out (correctly) that the Reciever had elected to adjudicate the breach of fiduciary

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4 "It is further ordered that Plaintiff's Motion for Appointment of Trustee or Receiver is GRANTED to the extent that a receiver ("Receiver") with limited powers as defined below ("Limited Powers").

It is further ordered that the Receiver's role will be to supervise the operations of the Company in consultation with Arnould and Muney, to allow them to continue operations of the Company, and prepare a report about the viability of the Company." (Rec'r Order, Appx.p.0289).

5 Also because the evidence and exhibits presented by Muney were not "authenticated."

duty claim in the Receiver's Report, and thus argued that accepting the Receiver's Report as an accounting would automatically win their claim of breach of fiduciary duty, by accepting the Receiver's adjudication. (MSJ, Appx.p.0671). Arnould thus equally failed to even allege the elements of breach of fiduciary duty, much less make any showing that there were no issues of fact to be resolved. By accepting Arnould's argument and shifting the burden of production to Muney without any showing by Arnould, the District Court again improperly shifted the burden of production to Muney, in violation of the *Cuzze/Celo-Tex* rule.

c. The Court Erred by Refusing to Consider Evidence that Disputed the Receiver's Report.

The District Court justified its grant of summary judgment by stating that none of Muney's evidence could be considered, because the Receiver's Report adjudicated all issues, the Receiver was an expert, and Muney had not retained an expert (as well as that Muney's documentary evidence was unauthenticated). (Fees Order, Appx.p.0839). The Court explained as follows:

> Mr. Muney cannot defeat Mr. Arnould's motion for summary judgment because he failed to "set out facts that would be admissible in evidence." NRCP 56(c)(4).
> Each of the issues Mr. Muney raised in his written objection on the record require specialized and technical knowledge in accounting, which are subjects reserved for experts pursuant to NRS 50.275[6].

6 NRS 50.275 Specifies that expert testimony is admissible. It contains no language restricting testimony by regular witnesses.

> ...
> The Receiver's Final Report and his accounting therein are undisputed because Mr. Muney failed to produce an expert report or any other admissible accounting of profits for CES.
> Because Mr. Muney failed to produce an expert report, he is barred from attempting to proffer expert testimony at trial. Since Mr. Muney cannot present expert testimony at trial, the Final Report and Receiver's accounting of profits are undisputed.

[Internal paragraph numbering omitted] (Fees Order, Appx p.0823). First, it is important to note that the Court did not make determinations on the admissibility of each piece of evidence, but rather made a blanket determination that none of Muney's evidence could be considered on the basis that a non-expert could not dispute an expert's testimony. (Transcript, Appx.p.0903, FFCL, Appx. p.0839). There are multiple other issues with the Court's reasoning, the most glaring being that there is a well-recognized right to challenge and dispute the conclusions of an expert, especially in areas in which the expert exceeded the scope of his expertise, used questionable methodology, made final legal determinations of claims not before him, and made judgments of the veracity of witnesses. NRS 50.035 (" The expert may in any event be required to disclose the underlying facts or data on cross-examination."); *Hallmark v. Eldridge*, 189 P. 3d 646 (NV S.Ct. 2008) ("(1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in

issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement)"); *Higgs v. State*, 222 P. 3d 648 (NV S.Ct. 2010) (Finding report limited to exact specialty was within scope); *Williams v. Eighth Judicial Dist. Court*, 262 P. 3d 360 (NV S.Ct. 2011) (Finding breach of scope where a nurse with expertise in sterilization testified that unsterilized equipment caused Hepatitis C transmission.); *Perez v. State*, 313 P. 3d 862 (NV S.Ct. 2013) ("[T]estimony about neurological development was outside the scope of his proposed testimony and that the State failed to show that he had received neurological training.") ("A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness"). Despite Muney's well-settled right to dispute and challenge an expert report used against him, the Court excluded consideration of the entirety of Muney's evidence and arguments against the Receiver's Report, and declared the Report undisputed. As shown beow, the disputes were legitimate, and none of the issues raised were required to be brought by an expert.

1. The Las Vegas Warehouse Rent Dispute

The largest dispute in the case, and the issue that caused Arnould to bring suit, after Arnould refused to sign an extension of the Las Vegas Warehouse lease (required by landlord to be personally guaranteed by both owners), Arnould twice suggested that Muney lease the warehouse with his own company (CMJJ, LLC),

and sub-lease the warehouse back to CES. (2019 MSJ, Appx p.0018). Muney's other company bound itself to the lease, and sub-leased it to CES at a rate that Muney was advised was below market rate for such a property on a month-to-month lease. Arnould filed suit alleging Muney's choice to charge above cost was a breach of fiduciary duty. The key elements in dispute were whether the letters consituted consent by CES for Muney to sub-lease the property to CES, and whether the amount of rent charged was reasonable.

As the dispute required a legal determination of the appropriate standard, and the key issues were issues of fact, this determination was outside the limited scope given to the Receiver. This was made explicitly clear when the Receiver initially included the disputed amounts in his accounting, and the Court instructed him that the issue was one for the finder of fact, and outside his scope of review:

> THE COURT: I understand. No, I understand. You're saying that they overpaid so they're -- the company shouldn't have to pay. They were overpaid because they paid the full amount of the lease --
> MR. BERTSCH: I'm amortizing it -- I'm amortizing what was paid at the rate they're paying; that takes me through about November 30th. Then they would need to pay the rent again, if they're paying the minimum amount.
> THE COURT: Right. But that issue with regard to the lease is still in dispute in this case, and we have an immediate issue with regard to July and August. So what I'm going to suggest is that you leave that aside for now, because it's an accounting issue, subject to evening that between the parties at final resolution.

(8/12 Transcript, Appx.p.0036). This was re-iterated in the Court's Order of

Dissolution following that hearing, in which the order directly stated, "The Receiver's initial suggestion that Mr. Muney has overpaid the rent shall be deferred until Trial of this matter." (Dissolution Order, Appx.p.0341). Despite the Court's instruction, the Receiver nonetheless included the entirety of the disputed rent, awarding it to Arnould. (Receiver Report, Appx.p.0363). The Receiver was appointed as an accounting expert; he has no identified expertise in adjudicating legal questions, such as the legal standard and elements of a breach of fiduciary duty claim, nor does he claim expertise in determination of fair rental values in the Las Vegas commercial real estate market, nor did he take or request any evidence or briefing on these issues whatsoever. No matter how great the Receiver's accounting expertise, he was not an expert on the issues related to resolution of the Las Vegas warehouse rent issue, and not only could his conclusions be disputed, but they were also inadmissible, as they were opinions on an issue for which he had no expertise, nor personal knowledge, nor authority. While the District Court is given great discretion in many things, it does not have the discretion to decide that a Receiver's report ordered to evaluate the viability of a company, can retroactively be turned into a judgment on disputed legal and factual issues, without briefing, or an evidentiary hearing, or a trial. Muney thus had every right to present his evidence and arguments against the Receiver's determination on this issue.

2. The Los AngelesWarehouse Rent Dispute

The dispute regarding the Los Angeles warehouse was that Arnould improperly gifted his separately owned company free storage in the CES warehouse in Los Angeles. The warehouse manager testified by affidavit that Arnould's company used 35% of the warehouse space, however once CES split, and Arnould became the sole boss of the warehouse manager, the manager stated that the space used was less than 35%, while Arnould himself, in an unsworn letter, told the Receiver that his company used only 8.86% of the warehouse space. Rather than confirm the space used, the Receiver decided to split the difference between the amounts claimed by Arnould, versus Arnould's warehouse manager. This choice was both methodologically flawed, as the Receiver had the power and authority to actually determine the space used, and it was also a choice to assign equal veracity to the conflicting testimony of two witnesses. Both resulted in a grossly reduced liability on Arnould's part. As both a dispute of methodology, and a dispute from the Receiver determining veracity of a witness, Muney was authorized to dispute this determination, and his evidence and arguments should have been considered.

1. Disputed Amounts

Both Arnould and Muney alleged improper spending of company funds against each other. However in resolving those alleged amounts, the Receiver included allegations from Arnould as charges against Muney, without giving

Muney an opportunity to present evidence or explain the charges in question. Muney included the evidence showing the charges to be legitimate in his objection. However the vast majority of charges claimed by Muney were excluded, as the Receiver had arbitratily decided that he would only consider items occuring within the year before litigation, and no others. Further, the Receiver charged Muney for discounts given in sales to his own company, but declined to charge Arnould for the same discounts to his companies. (Rec'r Report, Appx.p.0367). All of these are factual disputes, that are raised, not to convince this Court of their truth, but rather to show that they are disputes that do not require an accounting degree to understand. They are entirely a question of the Receiver's methodology, and the evidence that he based his conclusions on. Muney was entitled to challenge these, and his evidence should have been considered.

For brevity's sake, Muney will not detail every issue in dispute, but will note that there are other issues disputed, which are all contained in Muney's objection to the Receiver's Report.

d. The Excluded Evidence Is More than Sufficient to Establish Disputed Issues of Material Fact for Each Claim and Defense.

1. Accounting

Arnould was required to establish either a fiduciary relationship, Muney's possession of Arnould's property, or significant wrongdoing on Muney's part in

order to be entitled to an order for an accounting. No such showing was made, no findings supporting such elements have been made previously in the case, and no evidence has been taken on the issue. As such the burden of production never shifted to Muney, and Arnould was thus not entitled to summary judgment on the issue.

Even if an accounting were ordered, it would be improper for the District Court to retroactively delcare that a Receiver's Report that was ordered for the purpose of determining “the viability of the company”, was in fact a full adjudication of all Arnould's claims, without evidence or tetimony being taken on the most central claim, and without notice to the parties that the “viability report” was in fact an adjudication of the entire claim.

Without even an allegation of the elements to justify an accounting, there are unquestionable issues of fact that would have to be resolved before Arnould could prevail on such a claim.

2. Breach of Fiduciary Duty

As the Receiver's inclusion of a determination on the issue of Las Vegas Warehouse rent was against the instructions of the Court, and far outside the Receiver's scope of expertise or authority, his conclusions on the issue can not be determined to be a final adjudication of that issue.

3. Counterclaims

At the hearing, the District Court stated that all counterclaims "have failed for lack of evidence". (Transcript, Appx.p.0820). However, as argued at the hearing, and as shown in the motion for summary judgment, the only arguments Arnould raised against the counterclaims were lack of standing (because they belonged to CES) or absence of duty (for the fiduciary duty claim). Arnould had raised no issues of fact or evidence on the counterclaims for Muney to refute, other than purely legal arguments regarding standing and existence of duty. Muney had directly referenced significant documentary evidence on the record, as contained and detailed in Muney's objection to the Receiver's report. The Receiver himself admitted that his review was limited, and did not cover many of the issues claimed by Muney:

> The Opposition has considered the past 27 months, while the Receiver only dealt with 9 months, only making adjustments for the period from 1/1/2020 to 9/30/2020. . . . The Receiver was not instructed to audit all the accounting records going back to the inception of the Company and did not do so.

(Receiver's Response, Appx.p.0619). The Court's refusal to consider any evidence because the Receiver had been declared an expert was error, especially in light of the fact that the Receiver did not even purport to review most of the disputes contained in the counterclaims.

e. Additional Matters.

1. Evidence at Summary Judgment Does Not Require Authentication.

Both Arnould and the District Court also suggested that Muney's objection was unsupported because the documentary evidence it contained was "unauthenticated". (Fees Order, Appx.p.0838). Authentication of documents is only required at an evidentiary hearing, or trial; summary judgment requires only that the evidence presented "would be" admissible at trial. NRCP 56(c)(2). Further, witness testimony to authenticate exhibits would be impossible, both in the objection, and at the summary judgment hearing, as neither hearing allowed witness testimony. The suggestion that Muney's exhibits were "unauthenticated" is meaningless.

2. Arnould's Discovery Abuses Prevented Muney's Access to Evidence

As described in more detail in the Statement of Facts, in response to Muney's initial requests for Production, in Arnould's responses, more than half of the requests for production were essentially unanswered, based upon grossly improper objections. At the meet and confer, Arnould's counsel accepted the impropriety of the objections and promised to supplement, but repeatedly delayed their supplementation, pretended to misunderstand which responses required supplementation (despite having the breakdown in writing), and then made demands that they would only supplement if the requests were refiled as new requests, less than 30 days from the discovery deadline (and thus unenforceable). These delays lasted for nearly four months after the meet and confer. (Compel Mtn,

Appx.p.0722).

This resulted in 12 of Muney's 15 requests for production being unanswered, and four of Muney's 19 interrogatories being unanswered. Muney brought a motion to compel on the matter, however the District Court elected not to hear the motion until after granting Arnould's Motion for Summary Judgment on all claims and defenses, stating only that the discovery deadline had passed, without addressing Arnould's bad faith in promising the supplementation until the deadline had passed. (MSJ Tran, Appx.p.0820-0821). As the bad faith avoidance of producing the requested documents and information was directly related to the documentary support Muney had available to defend against summary judgment, that bad faith must be taken into account when evaluating the Court's decision to grant summary judgment on all claims and defenses for lack of evidence.

3. Muney Did Not Stipulate to the Receiver's Determination.

Despite repeated objection, Arnould continues to repeat the explicitly false statement that Muney stipulated to the Receiver's division of assets. The stipulation Arnould refers to is a stipulation for both parties to pay half of the Receiver's fees, as originally ordered in the order appointing the Receiver. Likewise, the statment that Muney refused to pay the $6,303.93 is disingenuous, as that figure was from the Receiver's Report, and was explicitly disputed; there was no order to pay that

amount prior to the order granting summary judgment. (Fees Order, Appx.p.0839).

4. Muney Challenged the Facts and Data Relied upon by the Receiver.

Despite the statement in the FFCL stating, "No evidentiary challenge was made by either party as to the facts or data relied upon by the Receiver in his Final Report," Muney directly challenged the facts and data relied upon by the Receiver in his objection. (FFCL, Appx.p.0838, Objection, Appx.p.0575).

CONCLUSION

Despite no showing whatsoever of the basic elements of his claims, the District Court improperly shifted the burden of production to Muney. Muney presented significant arguments and documentary evidence in support of his claims and defenses, which were more than sufficient to establish disputed issues of fact, and all of which were admissible despite the presence of an expert report. The Court's grant of summary judgment without even considering Muney's evidence was error, and the matter should be reversed and remanded to a different department of the District Court.

II.

WAS THE FACT THAT CES WAS AN LLC WITHOUT AN OPERATING AGREEMENT, BY ITSELF, DISPOSITIVE OF THE QUESTION OF WHETHER A FIDUCIARY OR SPECIAL RELATIONSHIP COULD EXIST BETWEEN ARNOULD AND MUNEY?

a. Standard of Review

All questions of law are reviewed *de novo*. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). An order on a motion for summary judgment is reviewed *de novo*. *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). A district court's interpretation of the Nevada Rules of Civil Procedure is reviewed *de novo*. *Ford v. Branch Banking & Tr. Co.*, 131 Nev. Adv. Op. 53, 353 P.3d 1200, 1202 (2015) (citing *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008). Review of the grant of summary judgment is appropriately *de novo*, as is review of the requirements of NRCP 56, in determining what evidence can be considered in ruling on a motion for summary judgment. The question of whether judicial estoppel applies is a question of law, and also reviewed *de novo*.

b. The Court Erred by Dismissing Muney's Claims for Breach of Fiduciary Duty, Constructive Fraud, and Fraudulent Concealment Without Considering the Special Relationship Between Muney and Arnould.

The District Court dismissed Muney's counterclaims for Breach of Fiduciary Duty, stating, "I do find that there -- in this LLC, there was no fiduciary duty, because there was no operating agreement and one does not arise as a matter of law." (MSJ Trans, Appx.p.0820). Likewise, the Court held that the same finding

justified summary judgment on the Counterclaims for Constructive Fraud and Fradulent Concealment. (FFCL, Appx.p.0841, 0843). Although Nevada law generally treats an LLC relationship as one that does not automatically create a fiduciary duty, that does not mean that no fiduciary or special relationship can exist between Arnould and Muney, simply because they are members of an LLC. Nevada law recognizes many non-formal bases for fiduciary and special relationships. In *Yerrington*, the District of Nevada summarized:

> Under Nevada law, "[a] fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another. Nevada courts also recognize the existence of a "confidential relationship," which may arise by reason of kinship or professional, business, or social relationships between the parties. Such a relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of friendship. …Whether such a relationship exists appears to be a question of fact.

(Internal citations omitted) *Yerington Ford, Inc. v. General Motors Acceptance Corp.*, 359 F. Supp. 2d 1075 (Dist. Court, D. Nev 2004). Muney and Arnould formed CES after years of friendship, and after forming the Company, Arnould held the trusted position of managing the Company's books. (Answer, Appx.p.0009). As the Court had previously held that the existence of a fiduciary duty in this case was an issue of fact, the question of whether the Parties' non-LLC relationships created a fiduciary or special relationship had not yet been examined.

(2019 MSJ Order, Appx.p.0133).

As argued on summary judgment, the fact that the Parties were members of an LLC is not dispositive of whether a fiduciary or special duty is owed. NRS Chapter 84, and NRS Chapter 86 both contain statutory duties owed between members of an LLC, such as the duty to make promised contributions to the LLC, or to hold in trust any property promised to the LLC. (MSJ Opp, Appx.p.0706). In addition, any of the other relationships that existed between the Parties could create a fiduciary or special relationship as well. As determination of the existence of such a relationship is a question of fact, it was inappropriate to resolve on summary judgment. *Mackintosh v. CALIFORNIA SAV. FED.*, 935 P. 2d 1154 (NV S.Ct.1997) ("[T]he existence of a special relationship is a factual question[;] ... all of the facts must be considered in order to determine if the relationship was created."); *Yerington Ford, Inc. v. General Motors Acceptance Corp.*, 359 F. Supp. 2d 1075 (Dist. Court, D. Nev 2004). As both the findings of fact and the hearing transcript indicate that the Court looked no further than the fact that the Parties were members of an LLC, it was error to hold that there were no other issues of fact that could establish a fiduciary or special relationship.

c. **Judicial Estoppel Precludes Arnould From Arguing That There is No Possible Fiduciary Relationship Among Members of an LLC.**

Arnould's motion for summary judgment argued that there was no fiduciary relationship between Arnould and Muney, as a matter of law. Yet Arnould had

survived a motion for summary judgment against his own claim for breach of fiduciary duty by arguing the exact opposite, a practice barred under judicial estoppel. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 US 742 (U.S. Supreme Court 2001); quoting *Pegram* v. *Herdrich*, 530 U. S. 211, 227, n. 8 (U.S. Supreme Court 2000). Under the doctrine of judicial estoppel, a party may be estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding the contrary of the assertion sought to be made." *Breliant v. Preferred Equities Corp.*, 918 P. 2d 314 (NV S.Ct 1996); quoting *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 549, 396 P.2d 850, 854 (1964). In the present case, Arnould survived Muney's motion for summary judgment by arguing the exact opposite of his position in this motion:

> In Nevada, in the absence of an operating agreement, managing members of a limited liability company generally have authority to prescribe the management of the company. *See* NRS § 86.291. However, this does not vest in a manager the unfettered power to do whatever he or she pleases with respect to LLC assets. *See id.* Under Nevada's limited liability company statutes, a member or manager of an LLC can receive income from an LLC through fixed compensation (NRS 86.281(9)), distributions upon a dissolution (NRS 86.521), or profit distributions (NRS 86.341). Here, Chef Exec compensated its managers by fixing a commission on sales made by the managers, and by distributing profits equally between the Managers. Never did Chef Exec nor Arnould agree to compensate Muney an addition $5,088.00 for simply renewing a lease. 51 As such he violated the statutory fiduciary duties pertaining to member compensation in NRS Chapter 84 *et seq.* Similarly, Muney had a

> duty created by statute to hold the manager's contributions in trust. *See* NRS 86.391(2). Just as Defendants point out in their Motion, Muney's acts potentially "constitute a violation of a duty to make promised contributions to the LLC, or to hold in trust any property promised to the LLC."

(Arnould 2019 MSJ Opp, Appx.p.0083). The US Supreme Court has held that "a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *New Hampshire v. Maine, Id., citing* 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981)), the Nevada Supreme Court has adopted this doctrine, with the requirement that some benefit be realized from the prior position, and indicated that a favorable decision on the particular issue constitutes such a benefit. *Breliant v. Preferred Equities Corp.*, 918 P. 2d 314 (NV S.Ct 1996) ("...a favorable judgment is not always a necessary element of judicial estoppel, so long as the party against whom the estoppel is sought has been successful in arguing its original position against the party asserting the estoppel.(Internal quotes removed). If Arnould had not prevailed on the issue of whether a fiduciary duty could exist between members of an LLC, he would necessarily have lost that claim on summary judgment, thus his prevailing on this issue, and the Court's acceptance of the argument, was necessary for the denial of summary judgment that was ordered. As Arnould's argument was in explicit and direct contradiction to the position that it took to successfully defeat summary judgment by Muney, he should be judicially estopped from reversing his position

to succeed later in the same case.

CONCLUSION

It was undisputed that the Parties were members of an LLC without an operating agreement. It was improper for the Court to grant summary judgment on Muney's counterclaims for fiduciary duty and constructive fraud solely based on the fact that the parties were LLC members, without considering the factual issues related to other bases upon which a special relationship may have existed. Further, the Court should have declined to hear Arnould's argument on the issue under the doctrine of judicial estoppel.

III.

DID THE DEFENDANTS' FAILURE TO FILE THEIR COUNTERCLAIMS AS DERIVATIVE CLAIMS, MEAN THAT BOTH THE DEFENDANT MEMBER AND THE DEFENDANT COMPANY WERE PRECLUDED FROM PLEADING COUNTERCLAIMS THAT AFFECTED DEFENDANT COMPANY'S PRE-DISSOLUTION RIGHTS, AND DEFENDANT MEMBER'S POST DISSOLUTION RIGHTS?

a. Standard of Review

All questions of law are reviewed *de novo*. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). An order on a motion for summary judgment is reviewed de novo. *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). Review of the grant of summary judgment is appropriately *de novo.*

b. Defendants Muney and CES Jointly Filed the Counterclaims.

In the present case, the Answer and Counterclaim was filed jointly by Defendants Muney and CES. (Answer, Appx.p.0006). Thus both Muney and CES were counter-plaintiffs in the counterclaims. In his Reply in support of summary judgment, Arnould admits that CES had the right to bring claims in its own name without a derivative claim[7]. (MSJ Reply, Appx.p.0719). Despite CES litigating as a

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7 "Muney focuses on the fact that a company may bring an action without a

co-defendant and counter-plaintiff for over two years of litigation, the Court pretended that Muney was the only party filing the counterclaims, and granted summary judgment on all of Muney's non-fraud counterclaims, because none of the counterclaims were pled as derivative, entirely failing to even address Defendants' argument that CES was not required to bring its own claims derivatively:

> Mr. Muney's Counter-Complaint provides no allegations that would support a derivative claim. . . .
> Accordingly, Mr. Muney lacks standing to derivatively bring his first, second, third, fourth, fifth, and sixth causes of action on behalf CES. Therefore, Mr. Arnould prevails against Mr. Muney on all of his Counter-Claims allegedly brought by Mr. Muney on behalf of CES.

(Fees Order, Appx.p.0845-0846). As it is universally accepted that an LLC may litigate and bring claims in its own name, and indisputable that the counterclaims were brought by both CES and Muney, there can be no question that Defendants had standing to bring their counterclaims.

c. The 'One Good Plaintiff' Rule Allows the Claims to Be Brought Jointly.

Under Nevada law, good standing of one plaintiff is sufficient to sustain the standing of co-plaintiffs (or in this case, co-counter-defendants). This is pursuant to Nevada's 'One Good Plaintiff' rule. *Citizens for Pub. Train Trench Vote v. City of Reno*, 53 P.3d 387, 394 (Nev. 2002) ("We also need not reach the question whether the nongovernmental respondents have standing to challenge the

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derivative claim."

initiative's validity, because the City's standing was clearly sufficient to sustain the action."); *See also In re Ballot Title 1999-2000 No. 215*, 3 P.3d 11, 14 (Colo.2000) (choosing not to address an association's standing when its arguments were identical to those of a registered elector with standing); *Mazzone v. Attorney General*, 432 Mass. 515, 736 N.E.2d 358, 363 n. 4 (2000) (noting that it had often chosen not to reach the question of organizational or official standing when the standing of the individual voters was sufficient to sustain the action). Under this rule, Defendants both had standing to bring the counterclaims, through CES's standing.

d. When CES Was Dissolved, 50% of Its Interests Became Muney's Direct Interests.

In August 2021, the District Court entered an Order of Dissolution, dissolving CES. (Diss.Order, Appx.p.0340). At that time CES ceased to exist as an independent entity, and any interests or assets not specifically divided were owned by Arnould and Muney 50-50 thereafter. Thus after the date of dissolution, Muney continued to have standing to pursue the counterclaims, as he had a direct 50% interest in any undivided interests and assets of CES. NRS 86.521(2). As the counterclaims regarded monies that had not been addressed or distributed in the Receiver's Report, or had been addressed or distributed erroneously, they are not moot; they have simply become claims of Muney personally, against Arnould

personally.

CONCLUSION

As Defendants had clear standing to raise their counterclaims, and Muney retains clear standing to maintain the counterclaims, the District Court erred in granting summary judgment against Defendants' counterclaims for lack of standing.

IV.
A NON-MONETARY JUDGMENT AGAINST MERITORIOUS CLAIMS DOES NOT JUSTIFY AN AWARD OF FEES UNDER NRS 18.010(2)

The clearly established rule in Nevada is that attorneys fees may not be awarded unless authorized by statute. *STATE, DEPT. OF HUMAN RESOURCES v. Fowler*, 858 P. 2d 375 (NV S.Ct. 1993); *Nevada Bd. Osteopathic Med. v. Graham*, 98 Nev. 174, 175, 643 P.2d 1222, 1223 (1982); *State ex rel. List v. Courtesy Motors*, 95 Nev. 103, 108, 590 P.2d 163, 166 (1979). The District Court awarded attorneys fees, based on NRS 18.010(2)(a), 18.010(2)(b), and NRS 86.489. The award of fees was not justified by any of those three statutes, and was thus improper[8].

a. Standard of Review

All questions of law are reviewed *de novo*. *Franchise Tax Bd. of State of*

8 The award of fees under NRS 86.489 will be addressed in Issue 5.

California v. Hyatt, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). A district court's decision on an award of attorney fees and costs is reviewed for abuse of discretion. *Gunderson v. D.R. Norton, Inc.*, 130 Nev. ——, ——, 319 P.3d 606, 615 (2014). However, a court may not award attorney's fees unless authorized by statute, rule or contract. *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). Thus review of whether attorneys fees were available by statute is reviewed de novo, whereas the decision of whether or not to award available attorneys fees is under an abuse of discretion standard. Review of the Court's determination of a frivolous defense is also reviewed under an abuse of discretion standard.

b. A Judgment Consisting Solely of a Capital Adjustment in the Division of Company Assets Does Not Constitute a Money Judgment for Purposes of NRS 18.010(2)(a).

Plaintiff's claim to fees through NRS 18.010(2)(a) is based upon being the prevailing party and being awarded less than $20,000. However Nevada courts have been consistent and clear that this does not apply when the party does not win a money judgment. *Smith v. CROWN FINANCIAL SERV. OF AMERICA*, 890 P. 2d 769 (NV S. Ct. 1995); ("[T]his court has held that a party may recover attorney fees pursuant to NRS 18.010(2)(a) only if that party received a money judgment at

trial."); *Key Bank of Alaska v. Donnels*, 787 P. 2d 382 (NV S. Ct. 1990); ("When attorney's fees are based on the provisions in subsection (a), we have held that an award of a money judgment is a prerequisite to an award of attorney's fees "); *STATE, DEPT. OF HUMAN RESOURCES v. Fowler*, 858 P. 2d 375 (NV S. Ct. 1993). In this context, simply receiving funds as part of the judgment does not qualify a judgment as a 'money judgment'. *STATE, DEPT. OF HUMAN RESOURCES v. Fowler*, Id. ("The instant case involved reinstatement and full back pay and benefits. Therefore, because Fowler did not request money damages in the judicial review proceedings below, the district court did not have any authority to award attorney's fees under NRS 18.010"). The present case resulted in a total of $6,303.93 being awarded to Arnould, as part of the "Receiver's equitable accounting and capital account adjustment." (Fees Order, Appx.p.0840). This reflects the relief requested by Arnould in his Motion for Summary Judgment, as he claimed that he was entitled to the funds through an "equitable accounting," not as damages of any sort ("[J]udgment in favor of the Receiver's undisputed equitable accounting should be reduced to judgment in favor of Arnould and entered in the amount of $6,303.93 as a matter of law."). (MSJ, Appx.p.0671). The FFCL made clear that the claim for breach of fiduciary duty was determined to be moot. (Fees Order, Appx.p.0840). Further, Arnould claimed the funds solely through his action for an accounting. Under Nevada law, an action for accounting

is not capable of awarding damages:

> [O]ne must keep in mind that as a restitutionary remedy, accounting does not yield a judgment for damages; rather, it seeks to restore to the plaintiff what is rightfully his or hers. "Accounting holds the defendant liable for his profits, not for damages."

In re National Audit Defense Network, 332 BR 896, 919 (Bankr. Court, D. Nevada 2005), *quoting* 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES* § 4.3(5) at 611 (1993). As the funds awarded were solely a capital adjustment for the division of the Company, there was no money judgment, and Arnould was not entitled to fees under NRS 18.010(2)(a).

c. Muney's Election Not to Retain an Expert Does Not Render All Claims and Defenses Frivolous Under NRS 18.010(2)(b).

As discussed in the previous issues in this brief, the District Court made errors in its determinations regarding Muney's claims and defenses. The Nevada Supreme Court has held that if the relevant law is sufficiently complex that the Court made errors interpreting or applying it, that the legal questions are not sufficiently free from doubt to justify an award under NRS 18.010(2)(b).

> Contrary to respondents' contention, however, the law in this case was not free from doubt, as is evident from the fact that the district court erred in applying the Alaska statute. We believe that appellant's complaint presented complex legal questions concerning statutory interpretation and legislative intent, raised on reasonable grounds and without any purpose to harass. Accordingly, we hold that the district court abused its discretion in awarding attorney's fees to respondents on the basis of NRS 18.010(2)(b).

Key Bank of Alaska v. Donnels, 787 P. 2d 382 (NV S.Ct.1990). In the present case, Muney's defenses consisted of defending against dissolution of a profitable company, and defending against a claim of Breach of Fiduciary Duty, while Arnould himself now argues that there is no Fiduciary Duty between the Parties. (MSJ, Appx.p.0673)[9]. Muney's counterclaims were:

-Breach of Fiduciary Duty/Unjust Enrichment – Claim that Arnould used position as bookkeeper and Muney's personal trust to improperly benefit his own companies, and to improperly steal commissions from sales staff. Supported by disclosed witness, as well as significant documentary evidence contained in supplemental disclosures, bates #s MUN00060-61, & MUN00071-92.

-Conversion/ Money had and Received– based on allegation that Arnould took company property and funds out of company possession and into his sole possession. Arnould admitted to all elements of this in discovery responses, and in open court. (5-22 Trans, Appx.p.0259), *See* Arnould's Responses to Interrogatory #s 10, 13, 17, &18.

-Constructive Fraud/Fraudulent Concealment - This claim alleged that Arnould misused his position as company accountant to give himself extra commissions and funds, among other things. Muney had disclosed a witness

9 The claim for appointment of a receiver was incidental to the claim for dissolution, and the claim for an accounting was not a claim Muney specifically defended against.

(Michelle Giffen) to testify on this issue, as well as written company records. *See* Bates #s MUN00060-61, & MUN00071-92.

Even if Muney did not prevail on the claims or defenses, none were brought without legal basis, and there was no showing whatsoever of bad faith. By the standards discussed in *Key Bank of Alaska*, the award of attorneys fees under NRS 18.010(2)(b) for maintaining Muney's claims and defenses was an abuse of discretion.

CONCLUSION

Right or wrong, Muney's claims were at the very least, based on legitimate legal arguments, and thus were not appropriate for an award of fees under NRS 18.010(2(b). Further, the absence of a money judgment in the case made award of fees under NRS 18.010(2)(a) improper.

V.
DID THE COURT ERR BY MAKING A SEPARATE AWARD OF FEES PURSUANT TO NRS 86.489, ON AN ACTION FOR JUDICIAL DISSOLUTION AND APPOINTMENT OF A RECEIVER WHERE THE COMPANY DID NOT WIN ANY MONEY JUDGMENT IN THE ACTION?

a. Standard of Review

All questions of law are reviewed *de novo*. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom.

Franchise Tax Bd. of California v. Hyatt, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). A district court's decision on an award of attorney fees and costs is reviewed for abuse of discretion. *Gunderson v. D.R. Norton, Inc.*, 130 Nev. ——, ——, 319 P.3d 606, 615 (2014). However, a court may not award attorney's fees unless authorized by statute, rule or contract. *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993). Thus review of whether attorneys fees were available by statute is reviewed de novo, whereas the decision of whether or not to award available attorneys fees is under an abuse of discretion standard.

b. An Award of Fees and Costs on a Derivative Claim Comes Solely Out of the Funds the Derivative Claim has Won on Behalf of the Company.

The costs and fees authorized under NRS 86.489 are a codification of Nevada's Common Fund rule; this rule authorizes a Court to award fees and costs to a prevailing derivative litigant, because they have presumably expended resources for the benefit of the Company, thus any costs or fees awarded under the rule, can only come out of the amounts won for the Company derivatively. The Nevada Supreme Court approved the rule by adopting the *Boeing* decision from the US Supreme Court:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. ...

> It noted that lawyers for the class would receive their fees from the amount for which Boeing has *already* been held liable. There is no 'surcharge' on the defeated litigant.

(Emphasis in original)(internal quotations omitted) *Boeing Co. v. Van Gemert*, 444 US 472 (US S.Ct.1980); adopted by *STATE, DEPT. OF HUMAN RESOURCES v. Elcano*, 794 P. 2d 725 (NV S.Ct. 1990). The Supreme Court of Virginia, whose statute is identical[10], explained that the statute's reference to the "remainder" makes clear that such fees and costs are only payable from the common fund, and not as an additional award against a defendant:

> The Defendants claim that "the trial court erred by awarding Attorneys' Fees in addition to the other damages awarded, rather than award fees to the derivative suit [Limited Partners] from the `common fund' recovered for the Partnership." We agree. …
>
> The operative language of Code § 50-73.65 is found in the first sentence directing a successful plaintiff who has received an award of reasonable attorneys' fees and expenses "to remit to the limited partnership the remainder of those proceeds received by him." The General Assembly's use of the word "remainder" indicates its intent for the award of reasonable attorneys' fees and expenses to be subtracted from the total amount "received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim," with the "remainder" being remitted to the limited partnership. Our view of the statute is consistent with what is known as the "common fund" exception to the "American Rule."

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10 "If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, except as hereinafter provided, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him." VA Code § 50-73.65

Little v. Cooke, 652 SE 2d 129 (VA S.Ct. 2007). Under the Common fund rule, the award of fees for a derivative action may only come from amounts won on behalf of the Company; a separate award of fees is not allowed. *Id.* In the present case, the Company was awarded no funds or assets whatsoever as a result of the action, thus Arnould was not entitled to be paid costs and fees whatsoever. Further, there was no authority for the Court to make a separate judgment against Muney for fees outside of amounts already awarded under any derivative judgment; "There is no 'surcharge' on the defeated litigant." *Boeing Co. v. Van Gemert*, supra.

c. Arnould's Action Was Not Derivative.

NRS 86.489 only authorizes an award of fees and costs on a successful *derivative* suit. In the Motion for Summary Judgment, Arnould's sole argument for the action being derivative is the repeated conclusory statement that the action "was brought derivatively." (MSJ, Appx.p.0665). The District Court, in finding the action to be derivative, instead of applying the test adopted by the Nevada Supreme Court in *Parametric Sound*, simply observed that Arnould's pleading contained the required allegations, and that it benefited CES by dissolving the Company, and preserving its assets[11]. (Fees Order, Appx.p.0835-0836.

In *Parametric Sound*, the Nevada Supreme Court enunciated the test for a derivative claim, holding that whether a claim is direct or derivative turns on the

11 Such a finding would be a finding of fact.

following two questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually). *Parametric Sound v. EIGHTH JUD. DIST. COURT*, 401 P. 3d 1100 (NV S.Ct. 2017). In applying that test to the present case, we must first note that in the Motion for Summary Judgment, Arnould abandoned the breach of fiduciary duty claim, which was the only claim he had brought which alleged wrongdoing or harm. Arnould claimed only that the first cause of action was derivative, which was the action for judicial dissolution of the Company, and appointment of a receiver to divide the Company. (FFCL, Appx.p.0835). While both parties' complaints contained plenty of allegations against the other, the grant of judgment on the first cause of action, contained in the two orders entered in the summer of 2020, contained no findings of specific wrongdoing by either party, nor any findings of any specific harm to the Company, other than the required finding that it had become "impracticable" to continue to operate the business. (Rec'r Order, Diss.Order, Appx.pp.0289, 0340). Arnould claims to have entirely prevailed on his claims, yet the result of that success was causing the Company to cease to exist, and to burn through the entirety of the Company's funds paying for the Receiver[12]. (SAO, Appx.p.0644). At the outset of litigation, Muney presented the Court with

12 The February 26, 2021 Stipulation on professional fees shows that the Company funds were exhausted and that the remainder of the Receiver's fees had to be paid directly by the Parties, assessed as $22,712.56 each.

evidence from the Company books showing that despite the dispute, the Company was earning record profits; the result of Arnould's successful suit resulted in the Company becoming insolvent, and then ceasing to exist. Although the FFCL alleges that this was a benefit that the Company received, it is hard to imagine under what standard that would qualify as a 'benefit'. (2019 MSJ, Appx.p.0056).

Applying the two-prong test for a derivative suit, the first prong, whether the harm alleged affected the company or the person, the answer is essentially neither, as the action for dissolution and appointment of a receiver did not involve any finding of a harm, or defending a harm against the Company, but rather allowing the owners to end the Company and cash out. This leaves the second prong; who would receive the benefit of the action? In this case it is clear that Arnould gained more benefit than the Company; Arnould got half of the Company. The Company on the other hand, was bankrupted by the receiver costs, and then destroyed through dissolution. At no time whatsoever were any funds awarded to the Company, nor any valuable assets assigned to it. It is simply indisputable that Arnould gained a greater benefit than CES from the dissolution and appointment of receiver. By the Parametric test, Arnould's action can not be deemed a derivative action at all, and would thus not entitle Arnould to any award of costs or fees under NRS 86.489, even if there had been funds to award it from.

e. The Motion for Fees Was Untimely.

Finally, NRCP 54(d)(2)(B)(i) requires a motion for fees to be brought within 21 days after the entry of the judgment. As the order of dissolution was entered on August 21, 2020, the motion for summary judgment was filed June 14, 2021, which was 297 days after the order of dissolution. As the language of the rule is mandatory ("...the motion ***must*** be filed no later than 21 days after ..." Id. {emphasis added}), the grossly untimely motion for fees should have been denied.

CONCLUSION

Arnould was awarded fees and costs, as a separate award, for prevailing in his action for dissolution and appointment of a receiver, pursuant to NRS 86.489, in an amount over thirty (30) times the amount of the judgment. (Fees Order, Appx.p.0935). This was error first because the action for dissolution and appointment of a receiver was not a derivative action, and second, because even if it were, the statute would only authorize disbursement of such fees and costs from the common funds that the action had won on behalf of the Company. As Arnould won nothing for the Company whatsoever, there were no funds from which he could have been awarded. Finally, even if he had been entitled to fees, NRCP 54 has a strict limit of 21 days after entry of judgment to bring a motion for fees; Arnould's motion for fees 297 days after entry of judgment was time-barred.

VI.
IS A MEMBER FILING SUIT TO DISSOLVE HIS COMPANY ENTITLED TO ATTORNEYS FEES OF NEARLY $200,000 INCLUDING WORK ON UNRELATED LITIGATIONS, AND SIGNIFICANT WORK OUTSIDE THE LODESTAR STANDARD OF REASONABILITY?

In granting Arnould's motion for attorneys fees, the Court granted the motion in its entirety, with no subtractions or adjustments whatsoever, despite the amounts claimed clearly including costs (after a separate motion for costs had already been adjudicated), work on an unrelated litigation against a party who was not a party to the present action, large amounts of hours billed for multiple attorneys to repeatedly discuss the case, and vast amounts of time spent in phone calls with the client.

a. Standard of Review

All questions of law are reviewed *de novo*. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017). A district court's decision on an award of attorney fees and costs is reviewed for abuse of discretion. *Gunderson v. D.R. Norton, Inc.*, 130 Nev. ——, ——, 319 P.3d 606, 615 (2014). However, a court may not award attorney's fees unless authorized by statute, rule or contract. *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375,

376 (1993). The decision of whether or not to award available attorneys fees is under an abuse of discretion standard.

b. Fees Incurred in Defending Against Other Litigations Are Not Taxable to Muney.

Arnould included amounts billed for defending Copyright claims made by Muney's son, for a dispute that was not part of the litigation. It was error for the Court not to remove these entries:

> 10/13/20 AKC Discuss copyright issues with PSA; exchange emails with client regarding XXXX 1.20 300.00
> 10/28/20 AKC Assess, analyze and review DMCA complaint. 0.80 200.00
> 10/28/20 AKC Draft response Go Daddy; phone call with client. 0.60 150.00
> 10/29/20 AKC Assess, analyze and review DMCA violations and copyright issues; legal research regarding same; discuss the same with client and PSA; begin drafting demand letter; draft letter apprising receiver. 2.90 725.00
> 10/30/20 AKC Phone call with receiver regarding copyright issue to be included in
> report. 0.60 150.00

(Emphasis added)(Fees Mtn, Appx.pp.0885). Further, Arnould included entries that refer to meeting with "clients" plural, when there was clearly only a single client in this matter, suggesting that they incorporated billing from other cases:

> 06/10/20 AKC Exchange emails with **clients** regarding phone call with client regarding discuss hearing with Phil; phone call with Dominique; phone call with Victor; hearing with court regarding warehouse entry. 2.10 525.00
> 09/17/20 AKC Attend mediation; discuss mediation with **clients**. 5.90 1,475.00

(Emphasis added)(Fees Mtn, Appx.pp.0877,0883). The greater concern with these

entries is the doubt they cast on all the entries in which it is impossible to determine the matter worked on:

> 10/01/19 JBP Attention to correspondence from client regarding xxxxx telephone conference with client regarding xxxxx 0.30 91.50
> 01/20/20 AKC Attention to matter. 0.30 75.00
> 01/24/20 AKC Attention to matter. 0.10 25.00
> 06/11/20 AKC Exchange emails with client regarding xxxx 0.20 50.00
> 10/01/20 AKC Exchange emails with client regarding xxxxx . 0.30 75.00

Considering that Arnould's counsel, either negligently, or intentionally included billing for other matters, all the billing must be reviewed to ensure that remaining billing is appropriately limited to amounts reasonably incurred to achieve success in the present matter.

c. Arnould May Not Include Costs When He Already Has a Separate Judgment for Costs.

Arnould's billing records included a significant section entitled "disbursements" which was entirely devoted to costs, rather than fees. This includes amounts for copies, scanning, postage, parking, filing fees, a lunch, and legal research, among other things, totaling $6,108.24. (Fees Mtn, Appx.pp.0893). Arnould had already filed a statement of costs wich included much of the same charges, and been awarded his costs in a judgment entered on December 15, 2021, in the amount of $5,984.46. (Costs Judgment, Appx.p.0951). These included costs constitute either a double award, if they are the same six thousand in costs that was awarded previously, or they constitute an amount Arnould forfeited a claim for, by

not including them in his previous costs. It was error to allow Arnould to include costs in his motion for fees.

d. The Lodestar Standard Excludes Cumulative and Unnecessary Work.

Nevada has largely adopted the Lodestar standard for calculation of reasonable attorneys fees:

> [T]he "lodestar" figure, which represents the number of reasonable attorney hours times a reasonable hourly rate, has "become the guiding light of [its] fee-shifting jurisprudence" and that it has "established a `strong presumption' that the lodestar represents the `reasonable' fee."

Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 172 P. 3d 131 (NVS.Ct. 2007). Under Lodestar, the appropriate starting point of a fee award is determination of the hours reasonably expended in achieving the judgment. 'Reasonably expended' is not the same as 'all hours expended'. *Cimini v. White*, Dist. Court, 2:19-cv-01027-JCM-NJK D. Nevada January 21, 2020) ("In reviewing the hours claimed, the Court may exclude hours related to overstaffing, duplication, and excessiveness, or that are otherwise unnecessary."); *Hensley v. Eckerhart*, 461 US 424 (US Supreme Court 1983) ("Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."). The District of Nevada gave some guidance on what kinds of work might be reasonable under Lodestar, and which would not:

> Sutherland Global seeks to recover for the time expended strategizing about the potential that disclosures would be made before an

> opposition was filed and in preparing to file a notice of non-opposition. Neither of these tasks was reasonably necessary. Spending time formulating a strategy based on speculation of a litigation opponent's potential filing (which was never made) is not reasonable for purposes of the lodestar analysis. The filing of a notice of non-opposition is also unnecessary under the rules, as the Court can enforce its deadlines without any such filing, so that time is also not reasonable for purposes of the lodestar analysis

Cimini v. White, supra. In the present case, Arnould's billing includes extremely large amounts of hours billed for almost daily phone calls and emails to, and conferences with the client over the course of more than two years. While Arnould may have been a Client that required a great deal of attention, Arnould's need for attention from his attorneys does not constitute a fee that was reasonably necessary to obtain the judgment. (Fees Mtn, Appx.pp.0867-0893). The billing also included a large number of hours in which three attorneys billed at the same time for "conferences" on mostly unknown subjects, despite only two attorneys of record representing Arnould[13]. None of these occasions were during a time of particular need, such as the filing of an appellate brief, or trial preparation; absent a specific need that one attorney would not be sufficient for, such duplicative work was not reasonably necessary to obtain a judgment in this matter. Further, the entirety of the first two pages of billing provided are for time and work done pre-litigation, before

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13 E.g.: 02/07/20 AKC Discuss settlement terms with JBP and PSA. 0.60 150.00
02/07/20 DGA Discuss and assess scope of settlement terms with Jordan Peel, as well as applicable documents to preserve rights under the equity purchase component. 0.50 212.50
02/07/20 AKC Discuss settlement terms with JBP and PSA. 0.60 150.00

the suit was even filed. While time needed to draft the complaint might be appropriate, two months of pre-litigation discussions are not reasonably necessary for obtaining the judgment. (Fees Mtn, Appx.pp.0867-0868). Overall, Arnould provided twenty-six (26) pages of billing records, including items that were costs rather than fees, items involving different clients, items for separate litigations, two months of pre-litigation billing, as well as clearly including literally ever hour billed in the matter, regardless of whether it was reasonably necessary for the judgment or not. While a certain number of the listed hours are surely reasonable, Arnould failed to provide enough information on most to make that determination. In light of Arnould's abject failure to self-regulate the hours included, and the amounts whose addition can only be considered either negligent or bad faith, Arnould should be given the benefit of the doubt on none of them.

CONCLUSION

Even if the award of fees was justified, Arnould's billing, which was approved without a single edit or adjustment by the Court, contains vast amounts of grossly inappropriate material, much of which strongly suggests bad faith. As such, all of Arnould's billing should be reviewed, with the burden shifted to Arnould to justify which are appropriate.

As review of the record shows, this matter has involved an unfortunate pattern of favorable treatment to Arnould by the Court, whether unconsciously or

otherwise. Muney thus respectfully makes the unusual request that this matter be assigned to a different department if remanded.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 97 in Times New Roman 14pt type.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,587 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of April, 2022.

KERN LAW

By: /s/ Robert Kern

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VERIFICATION

I, ROBERT KERN, declare as follows:

1. I am an attorney at Kern Law LTD. and represent Appellants, Clement Muney; Chef Exec Suppliers, LLC., in this matter.
2. I verify that I have read this Appellant's Opening Brief, and that it is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, for those matters, I believe them to be true.

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

Dated this 14th day of April, 2022

/s/ Robert Kern
Robert Kern Esq.

CERTIFICATE OF SERVICE

I certify that on the 14th day of April, 2022, a true and correct copy of the foregoing Appellant's Opening Brief, was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system.

I further certify that the following participants in this case are registered with the Nevada Supreme Court of Nevada's E-Filing System, and that the service of the Opening Brief has been accomplished to the following individuals via electronic service.

Alexander Calaway
Phil Aurbach
Attorneys for Respondent

/S/ Melissa Milroy
An employee of Kern Law, Ltd.