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

APPELLANT'S REPLY BRIEF

APPEAL FROM THE EIGHTH JUDICIAL COURT

Robert Kern, Esq.
Nevada State Bar No.10104
KERN LAW Ltd.
601 S. 6th Street
Las Vegas, Nevada 89101
Tele: 702-518-4529
Fax: 702-825-5872
Email: Robert@Kernlawoffices.com
Admin@Kernlawoffices.com
Attorney for Appellant

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 25th day of July, 2022.

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/s/ Robert Kern
Robert Kern, Esq.
Nevada Bar No. 10104
601 S. 6th Street
Las Vegas, Nevada 89101
Attorney for Appellant

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I.
STATEMENT OF DISPUTED FACTS

Although the Statement of Facts contained in the Opening Brief adequately covered the relevant facts of this matter, Appellants Muney and Chef Exec Suppliers, LLC (hereinafter, "CES" and collectively referred to as "Muney") include a brief reference to statements of fact from the Answering Brief that are not in fact, factual.

First, despite Arnould's argument that Muney's opposition to the motion for summary judgment might be insufficient, it is disingenuous to state that "Mr. Muney failed oppose Mr. Arnould's summary judgment motion." Answering Brief p.28. Failure to oppose a motion is an objective fact, and has specific legal consequences. Unless Arnould is suggesting that the Opposition to the Motion for Summary Judgment contained in the record is a forgery, then he should not be saying that the motion was unopposed.

Likewise, while Arnould is entitled to dispute whether his actions constituted discovery abuses, it is a matter of record that his counsel promised to supplement the majority of their discovery responses, then delayed providing the supplements, over and over, all the while promising that they would be provided, until the discovery deadline. At which time they stated that they were no longer required to provide the supplement promised. Whether this constitutes discovery abuse is not a

question before this Court, however it is clear that such behavior negatively affected Muney's ability to gather evidence in discovery. Opening Brief p.7-8. *See* Mtn to Compel, Appx.pp.0722-0752.

Despite reference to the objectively clear language in the February 26 Stipulation, Arnould continues to allege that Muney's stipulation to pay half the Receiver fees, as had been previously ordered by the Court, constituted stipulating to the Receiver's Report. The language of the stipulation is extremely clear in what it is agreeing to: "Muney is to pay the amount of $22,712.56 to the Receiver within ten (10) days of entry of this Stipulation, which will be used to pay the professional fees of the Receiver and his counsel." *See* Fees Order, Appx.p.0644.

II.
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. The Receiver's Report was Explicitly and Appropriately Disputed, No Matter how Many Times Arnould Repeats Otherwise.

The Answering Brief repeats over and over that the Receiver's Report was undisputed, apparently in the hope that it will thus become true. Arnould's position

appears to be that, by retroactively declaring the Receiver's Report to be their expert report, on the day before the discovery deadline, that any dispute of the report or its conclusions that does not come from an expert, equates to the Report being "undisputed"[1]. The District Court used the same reasoning to reach its conclusions:

> 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] *See* FFCL, Appx.p.0839. Unfortunately for Arnould, the law does not agree. As detailed in the Opening Brief, there are many areas in which an expert can be challenged by an attorney, or a lay witness, or the presentation of evidence. Muney was entitled to challenge the Receiver's qualifications to make determinations of the reasonable rental value of Las Vegas commercial real estate, his exceeding of the authority granted to him by the District Court, the underlying facts and data used to reach his conclusions, his methods of determination, and his determinations on the veracity of witnesses with conflicting testimony. All of these areas are appropriate to be raised by a non-expert, and challenges to those areas would have raised serious questions about a

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1 "[I]t was undisputed by Mr. Muney because he failed dispute any of the accounting evidence presented by the Receiver in his Final Report. In oral argument, Mr. Muney's counsel further admitted that Mr. Muney had no expert to rebut the Receiver's accounting." Answering Brief p.32-33.

large portion of the Receiver's Report and its conclusions[2]. Muney's objection to the Receivers Report likewise included significant documentary evidence[3]. *See* Objection, Appx. p.0575-0618.

Outside the objection, Muney had already disclosed significant evidence to challenge the Receiver's conclusions. Regarding the largest item, the Las Vegas warehouse rent, Muney had disclosed two different written communications in

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2 The affected areas of the Receiver's Report would include (but not be limited to):
-Qualifications to determine the fair market value of the Las Vegas Warehouse rent;
-Qualifications to determine the appropriate rent per square foot for the Los Angeles warehouse;
-Authority to make a legal determination as to fault regarding payment of the Las Vegas Warehouse rent;
-Authority to include the Las Vegas Warehouse rent in the Report, after the Court specifically ordered him not to;
-The data relied upon to determine that Muney's billed charges were improper;
-The data relied upon to determine the Las Vegas Warehouse rent;
-The data relied upon to determine the appropriate rent per square foot for the Los Angeles warehouse;
-The data relied upon to determine the fair rental value for the Los Angeles truck;
-The methodology used to calculate the appropriate rent per square foot for the Los Angeles warehouse;
-The determination as to which witnesses to believe in determining how much of the Los Angeles warehouse was being used by Arnould's separate companies.

3 The exhibits included:
-Invoices showing the amount actualy paid for the Las Vegas Warehouse space;
-Documentation of unauthorized discounts Arnould gave to his own company;
-Verification that purchases listed as improper in the report were business-related;
-Invoices showing amount wasted by Arnould by moving company inventory to warehouse only he had access to;
-Cost of shipping container that was not included in calculations;
-Cost of Truck deliveries that should have been allocated to Arnould's other companies;

which Arnould suggested that Muney lease the Las Vegas warehouse with a separate company and sub-lease it to CES (the only act that Arnould has alleged as wrongdoing). *See* Appx. p.0029-0032. He had also disclosed Gene Proctor as a lay witness, as the Las Vegas commercial real estate agent upon whose advice Muney had determined the rental rate charged to CES. As Proctor had personal knowledge of the transaction, and could testify to the conditions and property that he personally observed, as well as to the fact that Muney had sought his advice as to fair market value, he was a lay witness. Pursuant to NRCP 16.1(2)(A), lay witnesses are not required to provide expert disclosures. Further, NRS 50.265 allows for a lay witness to offer opinion testimony as long as it is relevant and based upon his own perceptions. Proctor's original email detailing his opinion on the fair market value of the Property (given to Muney as advice about the rent to charge) was also disclosed. *See* Appx. p.0034-0035.

While Arnould argues that Muney failed to present sufficient evidence to establish the fair rental value of the Las Vegas warehouse, he ignores the fact that, for his claim, and within his motion for summary judgment, the burden to establish that the rent charged was improper, was upon Arnould, not Muney. While Muney had listed Proctor as a lay witness, who was capable of testifying about the fair value of that Property, and disclosed Proctor's email that stated his opinion of the fair rental value, Arnould presented no evidence on the issue whatsoever. Arnould's

sole claim is that the Receiver set the value, despite the Receiver having no qualification to make such a determination. The Court's shifting of the burden of proof on that issue, without any showing of evidence on Arnould's side, was improper.

In light of those questions and evidence, none of which required retention of an expert, the District Court's holding that Muney was not entitled to challenge the Receiver's Report was improper. Likewise, the District Court's grant of summary judgment on all claims, based upon its belief that Muney was barred from disputing the Receiver's Report, was improper, and directly conflicted with the NRCP 56 standard for summary judgment.

b. The Answering Brief Fails to Explain how Arnould Met the Threshold for an Accounting to be Ordered.

The sole explanation from Arnould, as to how he met the requirements for an order of accounting, was that he "clearly established his claim for accounting through the undisputed accounting of the Receiver." Answering Brief p.31-32. This is clearly circular. The issue is that no accounting was ever ordered, and neither of the legal requirements to issue such an order existed in this case. Without the Court ever ordering an accounting, Arnould seeks to retroactively declare the Receiver's Report as an accounting, without an order for accounting, and then argues it is

justified because it was performed[4].

The Answering Brief incorrectly suggests that the *Foster* case establishing the requirement to show wrongdoing before an accounting could be ordered, was overruled by *Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (2021). *Foster v. Arata*, 74 Nev. 143, 154, 325 P.2d 759, 764 (1958). The cited portion of Foster was its discussion of the requirement of a showing of wrongdoing before an accounting could be ordered. *Id*.at 764. Guzman overruled the "inherent fairness standard" which is unrelated to the portion cited; more importantly, that overruling was based solely upon the passage of NRS 78.138; however that chapter does not govern LLC's, and Chapter 86 contains no equivalent sections. Likewise, Arnould's attempt to distinguish is meaningless; Arnould himself alleges that the Receiver's Report was an accounting, and if it was, it would be an interlocutory order for accounting, just as in *Foster*. While Arnould cites plenty of law generally discussing an accounting, none of it contradicts Foster's requirement to establish wrongdoing before an accounting is ordered.

Further, Arnould does not dispute the requirement that in the absence of a fiduciary relationship, he had to establish that Muney was in possession of his

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4 It is worth noting that the Court and the parties initially agreed that any disputes with the conclusions of the Receiver's Report would be resolved through evidentiary hearings. This does not reconcile with the argument that the Receiver's Report was an adjudication of the claims of the case. *See* Transcript, Appx.pp.0324-0325, 0328.

property. *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."). Arnould's suggestion that the Receiver's division of assets upon dissolution between the owners of CES, somehow equates to evidence that Muney is wrongfully in possession of Arnould's property, is preposterous. First, any property held before the division was property of CES, not Arnould, and prior to the division, all such property was held by CES, not by Arnould and Muney personally. By either standard, Arnould was not entitled to have an accounting ordered, much less have the Receiver's Report retroactively declared as an accounting.

Lastly, the Receiver's Report was not capable of being an accounting. Arnould's own definition of an accounting proves this; he defines an accounting as "a proceeding in equity for the purpose of obtaining a judicial settlement of the accounts of the parties in which proceeding the court will adjudicate the amount due, administer full relief and render complete justice." *Verdier v. Superior Court*, 88 Cal.App.2d 527, 530, 199 P.2d 325 (Cal.1948). By this definition of an accounting, it must adjudicate all amounts claimed, and resolve all disputes contained within the accounting. However the Receiver's Report explicitly states that the Receiver elected not to consider items and disputes outside the year

previous to litigation, and in response to the objection admitted there were issues he did not consider, and would need to examine to make a finding. ("The Receiver considered any transaction occurring prior to January 1, 2020 as being accepted by each Partner. Therefore, the Receiver did not explore prior years." "In order to properly account for this order and determine if it necessitates an adjustment to the Receiver's Final Report, the appropriate documents must be made available to the Receiver."). *See* Receiver's Response, Appx. p.0620, 0622. The Report also explicitly stated that it was a report on the company's viability (*Id.*); nowhere did it represent itself to be an accounting of all claims. The Receiver's election to exclude review of all claims and disputes prior to 2020 makes clear that the Report did not meet the definition of an accounting.

Arnould still holds that the Receiver's Report is a valid accounting, despite the report itself disclaiming to cover the entire dispute, despite the Receiver reviewing areas he had no authority to review, despite the fact that Arnould did not identify wrongdoing by Muney, or a fiduciary duty, or possession of Arnould's property, which would be a prerequisite to ordering an accounting in the first place. While the Receiver's Report might have been helpful in performing an actual accounting, it was not legally capable of being one on its own.

c. Muney's Objection to the Receiver's Report was not an Accounting.

The Answering Brief incorrectly states that Muney has argued that his

objection to the Receover's Report is an admissible accounting. Answering Brief p.36. As the citation points to six pages of the Opening Brief, it is impossible to determine what language gave Arnould this idea. None of Muney's claims or defenses require the objection to be considered an accounting; as the Receiver's Report was not an accounting, Muney was not required to provide a competing accounting. Arnould's argument rests upon reference to the District Court's determination that the objection was not admissible ("While Mr. Muney objected to the Receiver's accounting, his objections are not admissible evidence at trial." FFCL, Appx p.0839). However the District Court's statement is not a supported legal finding – it is rather a collection of legally incorrect conclusory statements without analysis or citation to legal authority. The fact that the report was objected to is admissible evidence. The disputes raised are disputes that can be raised on summary judgment and at trial, and the exhibits contained therein are part of the record, and whether they are admissible at trial will depend on evaluation of each individual piece of evidence so contained.

CONCLUSION

In summary, the District Court erred by shifting the burden of proof to Muney, in Arnould's motion for summary judgment, without requiring Arnould to make any of the factual showings required to shift the burden. Arnould presented no evidence whatsoever that the Las Vegas warehouse rent was unreasonable,

despite it being his burden to do so; he presented no evidence of wrongdoing, or a fiduciary relationship, or of Muney possessing Arnould's property, despite at least one of those being required to order an accounting. In response to Muney's counterclaims, Arnould argued that Muney lacked standing to raise some of them, which was a legal, not a factual argument. Arnould also argued that the fact that CES was an LLC proved that no duties existed between Muney and Arnould, and that this disposed of the remaining counterclaims; this was likewise a purely legal argument, and Arnould cited to no factual evidence in support. *See* MSJ, Appx.pp.0663-0682. None of these arguments required Muney to provide evidence in opposition, in fact there simply were no factual arguments made for Muney to oppose; the entirety of the exhibits attached to Arnould's motion for summary judgment consisted of filed documents in the case. *See* MSJ, Appx.pp.0684-0710. The grant of summary judgment was entirely inappropriate, and failed to meet the standards of NRCP 56.

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. The Court Erred by Dismissing Muney's Duty-Based Claims Without Considering the Special Relationship Between Muney and Arnould.

Arnould's Answering Brief essentially relies upon the argument that the existence of a special duty as an issue of fact, as enunciated in *Yerington Ford, Inc. v. General Motors Acceptance Corp.*, 359 F. Supp. 2d 1075 (D. NV 2004) was overruled by *Giles v. General Motors Acceptance Corp.*, 494 F. 3d 865 (9th Cir. 2007). This is a misstatement of the law. First, Yerington's holding that existence of a special duty is an issue of fact was based upon a Nevada Supreme Court case, *Mackintosh v. CALIFORNIA SAV. FED.*, which has not been overruled. 935 P. 2d 1154 (1997) ("[T]he existence of the special relationship is a factual question ..."). Further, *Giles* only overruled *Yerington* to the extent that it misapplied the economic loss doctrine; it did not relate to the holding regarding a special relationship being an issue of fact. *Giles*, Id. at 869 ("In the Yerington Ford case, we hold that the district court misapplied Nevada's economic loss doctrine.").

b. Arnould can not Avoid Application of Judicial Estoppel by Arguing that he Changed his Mind.

In the Answering Brief, Arnould's arguments against application of judicial estoppel are that 1) his change of position was based on an unpublished decision that did not discuss his reasons for alleging a fiduciary relationship, and 2) that he gained no benefit from his change of position. Neither should be persuasive. Arnould's change in position likely arises entirely from the fact that since Arnould initially survived summary judgment by arguing for the existence of a fiduciary duty, the Receiver's Report awarded everything he sought in that claim, so he then

opposed it for Muney because he no longer needed the claim. The decision he alleges changes his mind, *Israyelyan v. Chavez*, 466 P.3d 939 (Nev. 2020) was an unpublished decision by this Court, that primarily held that there were no implied duties that arise from the existence of an LLC ("Israyelyan's appellate arguments fails as he does not show NRS Chapter 86 implicitly creates fiduciary duties."). Arnould's argument however, was based entirely on statutory duties directly referenced in Chapter 86, specifically rights to distributions upon a dissolution (NRS 86.521), profit distributions (NRS 86.341), and a duty to hold the manager's contributions in trust NRS 86.391(2). Whether the position is convincing or not is immaterial; all that matters is that the Israyelyan decision had no bearing upon the arguments made by Arnould in his opposition to Muney's motion for summary judgment, thus there is no reasonable interpretation for Muney's 180 degree change, other than opportunism. Such a circumstance appropriately invokes judicial estoppel.

Arnould's argument that he gained no benefit is likewise without merit. Based upon Arnould's argument, the District Court denied summary judgment on the claim. *See* 2019 MSJ Order, Appx.p.0131. Arnould argues that he gained no benefit from prevailing at summary judgment, because the District Court later found the claim moot. However this is based upon Arnould himself arguing that his claim was moot, after he had gained everything requested from the claim through

the Receiver's Report. However the claim was before the Receiver because it had not been dismissed at summary judgment. Arnould ultimately got the full benefit of the claim, and now seeks to reverse his position now that it will not affect him. This is the exact situation the doctrine of judicial estoppel was designed for, and the doctrine should be applied in this 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 Muney'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. Both Muney and CES are Appellants.

Arnould's suggestion that this Court dismissed CES from the present appeal is disingenuous, and clearly incorrect. The Order Arnould references stating that Clement Muney would be the sole appellant was from appeal #83869, which was an appeal of the grant of the motion for attorneys fees, and thus did not affect CES. *See* Order Dismissing Appeal in Part (Supreme Court Case No. 83869). That order was filed immediately prior to the consolidation of the present appeals, thus that language had no effect upon CES as appellant in appeal # 83641 (appealing the grant of summary judgment). Further, the order of consolidation references "parties" plural, and the caption was accordingly adjusted with CES removed as appellant for 83869, but remaining in the caption for 83641. *See* Order Granting Consolidation (Supreme Court Case No. 83641). The argument that this was a dismissal of CES as appellant with regard to the entire appeal is disingenuous, and a waste of this Court's time.

b. Arnould Failed to Otherwise Dispute This Issue on Appeal.

The above was the sole argument raised by Arnould against Appellants having standing to bring their counterclaims, other than a bare statement incorporating arguments made in previous filings before the District Court. Answering Brief p.52-53. As Respondent has failed to effectively dispute this issue, it should be deemed admitted. *Moore v. State,* 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on

appeal, it failed to supply any analysis, legal or otherwise, to support its position which constituted confession of error), *overruled on other grounds by Miller v. State*, 121 Nev. 92, 95-96, 110 P.3d 53, 56 (2005); *See Bates v. Chronister,* 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error).

CONCLUSION

As this Court did not dismiss CES as an appellant for case number 83641, and Arnould otherwise failed to argue or dispute any part of this issue on appeal, this Court should overturn the District Court's dismissal of Muney's 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)

a. Arnould Fails to Explain how the Ordered Capital Adjustment Constituted Money Damages.

Arnould's Answering Brief offers no authority or explanation as to why the "capital adjustment" ordered by the Receiver's Report to complete the split of the assets of CES, should be considered "money damages". Literally the only argument made is a statement that none of Muneys cited cases involved a money judgment, and then the statement "[a]s such, attorney's fees were justified under

NRS 18.010(2)(a).” It is accurate to say that none of the cases Muney cited resulted in a money judgment, because they were all cited for the authority that the judgments in those cases, even the ones that resulted in money for the prevailing party, were not “money judgments” for purposes of NRS 18.010(2)(a). The Legal Information Institute's law dictionary defines “money damages” as: “A type of relief that awards money as compensation for some injury. Law Dictionary, *Legal Information Institute*, https://www.law.cornell.edu/wex/money_damages#:~:text=A%20type%20of%20relief%20that,by%20the%20trier%20of%20fact. Accessed 7/14/2022. This explains why the Court found no money damages in cases involving a money award for back pay, or recovery of $50,000 in seized cash. *See McCracken v. Cory*, 664 P. 2d 349 - Nev: Supreme Court 1983 (Seeking money from employment agency -was for back wages. Was awarded money, but was not an action for “money damages”); *STATE, DEPT. OF HUMAN RESOURCES v. Fowler*, 858 P. 2d 375 (1993) (Award of back pay and benefits was not “money damages” for purpose of NRS 18.010(2)(a)); *In Re 12067 OAKLAND HILLS, LAS VEGAS, NV 89141*, 435 P. 3d 672 (Ct. of Appeals 2018) (Recovery of seized assets including $50,000 in cash was not “money damages” for purpose of NRS 18.010(2)(a)). As in those cases, the only money transferred from the judgment was a payment that Arnould's own brief referred to as an “equalizing payment” p.12 and stated that the payment of

$6,303.93 was for "unsettled amounts due under the Receiver's undisputed accounting and not Mr. Arnould's breach of duty claim." p.51. The Receiver's Report made clear that the $6,303.93 was a capital adjustment meant to balance the division of assets between the partners, and not an award for any damage suffered, or any sort of compensation for a legal or physical injury. As the funds awarded were not "money damages", attorneys fees could not be awarded under NRS 18.010(2)(a).

b. Neither the Record nor the Answering Brief Contain Support for a Finding That Muney's Claims and Defenses Were Frivolous Under NRS 18.010(2)(b).

An award of attorneys fees under NRS 18.010(2)(b) requires a determination that the "claims were unreasonable and made solely to harass." *Chowdhry v. NLVH, INC.*, 851 P. 2d 459 (1993). Further, this Court has held that even an action that was unreasonable by the end, if it was reasonable when filed, is not subject to sanctions under 18.010(2)(b). *Allianz Ins. Co. v. Gagnon*, 860 P. 2d 720 (1993). Even if this Court were to agree with the District Court's grant of summary judgment, Muney's claims and defenses were at the least, reasonably brought.

Arnould's sole argument for application of NRS 18.010(2)(b) is that fees were warranted because "Mr. Muney failed to provide ***any*** evidence in support of his counterclaims and defenses." Answering Brief p.57. This is of course grossly

inaccurate. As discussed, Muney did not attach exhibits to the opposition to summary judgment because Arnould had not raised any fact-based arguments that required refuting. However even if this Court believes that was wrong, that does not equate to having no evidence throughout the litigation supporting the claims and defenses. Muney's disclosures alone contained enough evidence to go to trial on most of the claims and defenses; he rightfully expected his discovery requests to further supplement that, and Muney's motion to compel was not denied until after summary judgment was granted (at the same hearing). Simply put, Arnould's argument that Muney provided no evidence at summary judgment, even if true, has no bearing on whether Muney's claims and defenses were supported by evidence in general. A review of the motions and transcript will show that the District Court did not at any time examine the issue of whether Muney had evidence supporting his claims outside the motion for summary judgment. *See* Fees Transcript, Appx.pp.0912-0929, Mtn for Fees, Appx.p.0851.

Arnould's only other statement to support an award uner 18.010(2)(b), was a false allegation in the statement of the case, where he accused that Muney "brought and maintained groundless claims and defenses for years, and did so to avoid paying his business partner a total of $6,303.93." Answering Brief p.15. This is explicitly and provably false; Muney initially fought to keep his business from being involutarily dissolved, and once the business was dissolved, fought for an

equitable split of assets; Arnould's $6,303.93 capital adjustment was only due to him because over $100,000 of Muney's claims were excluded from consideration in the Receiver's Report, and because over $50,000 was credited to Arnould from the Receiver improperly including adjudication of the Las Vegas Warehouse rent issue in his Report. *See* Objection to Report, Appx.p.0575; Receiver's Response, Appx.pp.0620-0621. This of course does not even include amounts claimed from Muney's counterclaims. Finally, Muney will point out that he made a binding settlement agreement to settle this entire matter in February 2020, and that it was Arnould who broke the settlement agreement (The District Court's failure to enforce the agreement was the subject of a previous appeal). *See* Mtn to Enforce, Appx.p.0135, 5-12-22 Transcript, pp.0280, 0284. There is simply nothing in the record to suggest that Muney brought or maintained his claims and defenses in bad faith, nor that there was no reasonable grounds for them. As it is the burden of the moving party to establish this, the absence precludes award of fees under this section. *Chowdhry v. NLVH, INC.*, 851 P. 2d 459 (1993) (“Since attorney's fees were granted pursuant to NRS 18.010(2)(b), there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party.”).

CONCLUSION

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.

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. Application of the Common Fund Rule Does not Require the Rule to Be Contained in the Statute.

As was made clear in the Opening Brief, the Common Fund Rule only allows payment of fees and costs from a derivative claim, *from the funds that were won* and does not allow for a separate award of fees and costs. *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). As Arnould did not win any funds whatsoever for CES, the rule precludes him from receiving fees and

costs under NRS 86.489. Arnould does not cite to any authority to argue against application of the Common Fund Rule, and his only analysis is the statement that "the statute does not limit recovery to only common "funds or assets,"". A bare conclusory statement is generally not considered an argument on appeal, and generally justifies an admission of error. *Moore v. State,* 93 Nev. 645, 647, 572 P.2d 216, 217 (1977), *overruled on other grounds by Miller v. State,* 121 Nev. 92, 95-96, 110 P.3d 53, 56 (2005); *See Bates v. Chronister,* 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984). If Arnould's position was that the rule can not apply because it is not contained in the text of the statute, it is a faulty position, as the law is full of statutes that are governed by rules the statutes don't contain (the 'money judgment' rule for NRS 18.010(2)(a) is a relevant example). As Arnould has failed to make argument against application of the Common Fund Rule, the rule necessarily precludes any separate award of costs and fees pursuant to NRS 86.489.

b. Arnould Failed to Meet the Standard for a Derivative Suit Regardless.

Even if the Common Fund Rule did not preclude an award, Arnould's suit does not meet the requirements of NRS 86.489 because it was not derivative. First, it is important to remember that only the action for dissolution was alleged to be derivative, and thus that is the sole cause of action to consider. The Answering Brief concedes that for their suit to be derivative, they must show both that CES rather than Arnould suffered the alleged harm, and that CES rather than Arnould

gained the benefit of the suit. Answering Brief pp.58-59; *Parametric Sound v. EIGHTH JUD. DIST. COURT*, 401 P. 3d 1100 (NV S.Ct. 2017).

Arnould's argument that the suit benefited CES is that, because the dissolution statute says that the "company" can no longer operate, then it must be for the benefit of the company. Answering Brief p.58; NRS 86.495. By this argument, all dissolutions under the statute would be deemed beneficial, without ever examining the facts. The facts in this case show us that Arnould's dissolution claim first made the company insolvent (through payment of Receiver fees), and then made it cease to exist. *See* Fees Order, Appx.p.0644. Arnould's only reference to an actual result of the suit is his argument that the stipulated payment of the Receiver's fees (incurred solely because of Arnould's demand to appoint a Receiver) of $22,712.56 was a recovery on behalf of CES. Answering Brief p.59; *See* Fees Order, Appx.p.0644. Considering that this payment was made to the Receiver directly, and that it was made five months after CES ceased to exist, it was clearly not made to CES. Moreover, the record shows that this stipulated payment was made to pay the remaining Receiver bills *after the entirety of CES's assets had been exhauste*d paying the previous Receiver fees[5]. These facts do not support a benefit to CES.

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5 -*See* 8-12 Transcript, Appx.p.337 ("[I]f there isn't sufficient cash in the business, the parties individually will have to each pay the one half.").
-*Also See* Fees Order, Appx.p.644-645 (Ordering each party to pay $22,712.56, representing half of remaining funds owed to Receiver.)

Nor did Arnould's suit address a harm against CES. The Answering Brief argues that CES "suffered direct harm from Mr. Muney's misallocation of assets and refusal to dissolve." Answering Brief p.59. However there was never any finding that Muney misallocated assets, nor evidence presented on the issue. Further, the refusal to dissolve the company can not be a harm to the company without any explanation (other than the word "company" in NRS 86.495) as to how that harm may have occurred, or how seeking to continue the company's existence was more harmful than ending it. Without any convincing argument that the claim for dissolution benefited CES, or that it served to fight a harm against CES, the claim can not be deemed derivative, and no award of fees and costs would be allowed by NRS 86.489, even absent the Common Fund Rule.

c. Arnould may not Invalidate Filing Deadlines by Failing to File an Entry of his own Order.

Arnould raises the novel argument that, since Arnould did not file the notice of entry for his Order granting dissolution, that he can thus avoid application of the time deadline in NRCP 54(d)(2)(B)(i) indefinitely through his own actions. While the statute does not specifically address such a circumstance, interpreting the rule to allow a party to entirely escape a filing deadline by simply failing to file a document they were tasked with filing, seems counter-intuitive.

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. *See* Fees Order, Appx.p.0933. 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.

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?

a. Satisfaction of Brunzell Does not Waive the Requirement that Taxed Fees Must be Reasonable.

Again, the Answering Brief's argument against applying the Lodestar standard is a bare conclusory statement that "the District Court was not required to use *Lodestar* as Mr. Muney suggests." There is no authority cited, nor analysis or explanation of Arnould's reasoning. This should be treated, again, as an admission of error.

Arnould's entire argument appears to be that the Brunzell factors, which apply only to reviewing the reasonableness of the billing rates, are the sole test for whether attorneys fees are reasonable. It is not. *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) ("[W]e state the wellknown basic elements to be considered in determining the *reasonable value of an attorney's services.*"). Arnould has done nothing to explain why this Court's decision in *Cuzze* should be disregarded, when it stated a presumption that the Lodestar figure represents the reasonable fee. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 172 P. 3d 131 (NVS.Ct. 2007) ("...it has "established a `strong presumption' that the lodestar represents the `reasonable' fee."). Rather than show that his fees met this standard of reasonableness, Arnould instead suggested that Muney pointing out inappropriate billings was "cherry-picking". Arnould failed to respond to the egregious number of hours billed for daily client calls and frequent attorney conferences, or that two pages of their billing covered time before the litigation was filed, or the large number of entries that make determination of the work performed impossible. Answering Brief p.61-63. Arnould has provided no explanation as to why his billing should be deemed reasonable.

b. Arnould can not Bill Time to Muney That was Spent Defending a Claim by a Different Party.

In the Answering Brief, Arnould apparently stands by his choice to seek fees

from Muney for his defense against a copyright claim by a separate party. Regardless of whether intellectual property of the company was in dispute at one point, the hours referred to were incurred in Arnould defending against a copyright claim by the owner of images that Arnould put on his new company's website (after CES's dissolution). That owner was not a party to this suit. There is absolutely no basis to claim attorneys fees for defending a separate matter from a separate party, in a fee award for this case. Counsel for Muney honestly feels that taking such a position is an insult to this Court. Muney would suggest that any determination of whether the billing was calculated in bad faith, take this position into account.

CONCLUSION

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, and 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. Any fees awarded must be adjusted to remove all inappropriate or questionable billing.

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 6,418 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 25th day of July, 2022.

KERN LAW

By: /s/ Robert Kern

Robert Kern, Esq.
NV Bar #10104
601 S. 6th Street
Las Vegas, NV 89101
(702) 518-4529

CERTIFICATE OF SERVICE

I certify that on the 25th day of July, 2022, a true and correct copy of the foregoing Appellant's Reply 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.