MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorney for defendant/appellant,
Ronald J. Robinson

SUPREME COURT

STATE OF NEVADA

RONALD J. ROBINSON,

Appellant,

vs.

STEVEN A. HOTCHKISS,

Respondent.

RONALD J. ROBINSON,

Appellant,

vs.

ANTHONY WHITE, ROBIN SUNTHEIMER, TROY SUNTHEIMER, STEPHENS GHESQUIERE, JACKIE STONE, GAYLE CHANY, KENDALL SMITH, GABRIELE LAVERMICOCCA, ROBERT KAISER.

Respondents.

No. 83250

APPELLANT'S OPENING BRIEF

NRAP 26.1 DISCLOSURE STATEMENT

Counsel for defendant/appellant, Ronald J. Robinson, 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.

1. Defendant/appellant is an individual who resides in Clark County, Nevada, so there are no parent corporations or any publicly held company that owns 10% of more of defendant/appellant.

2. Michael F. Bohn, Esq. of the Law Offices of Michael F. Bohn, Esq., Ltd. is representing defendant/appellant in this appeal, and Harold P. Gewerter, Esq. represented defendant/appellant in the district court.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The judgment entered in favor of plaintiffs is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The court entered the judgment in favor of plaintiffs on August 20, 2020. The court entered an order granting Robinson's motion for Rule 54(b) determination on June 15, 2021. Robinson filed his notice of appeal on July 15, 2021.

(C) The appeal is from a judgment entered after a bench trial.

/ / /

ROUTING STATEMENT

This case is involves claims for breach of contract and violation of Nevada's Uniform Securities Act. Rule 17 does not identify such claims as one of the cases to be retained by the Supreme Court. Counsel for defendant/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether plaintiffs' actions were subject to dismissal because Provident Trust Group, LLC (hereinafter "Provident Trust") was not joined as a party.

2. Whether Provident Trust's receipt of stock in Virtual Communications Corporation (hereinafter "VCC") in "full and final satisfaction" of each note prevented each plaintiff from enforcing the alleged guarantee by Ronald J. Robinson (hereinafter "Robinson") for each note.

3. Whether each promissory note needed to be registered as a "security."

4. Whether plaintiffs' claim that Robinson has civil liability under NRS 90.660 was barred by the statute of limitations in NRS 90.670.

5. Whether the amount of damages awarded to plaintiffs by the district court is consistent with the language in NRS 90.660(1).

6. Whether plaintiffs proved that Robinson was liable for fraud, misrepresentations and omissions.

7. Whether the attorneys fees awarded by the district court were authorized by agreement or statute, and whether the amount awarded is reasonable.

8. Following a trial, questions of law are reviewed de novo, but findings of fact are upheld if supported by substantial evidence and may not be set aside unless clearly

erroneous.

STATEMENT OF THE CASE

On September 28, 2017, Steven A. Hotchkiss (hereinafter "Hotchkiss") filed his complaint asserting four claims for relief: 1) fraud, misrepresentations and omissions; 2) violation of NRS 90.310, 90.460 and 90.660 in the Nevada Uniform Securities Act; 3) violation of NRS 90.570 and 90.660 in the Nevada Uniform Securities Act; and 4) breach of written contract. *See* APP000001-APP000016 in Appellant's Appendix Vol. 1 (hereinafter "AA-1").

Case No. A-17-762264-C was assigned to the complaint.

On October 25, 2017, Vernon Rodriguez (hereinafter "Rodriguez") filed an answer to the Hotchkiss complaint. (AA-1: APP000037-APP000044)

On February 5, 2018, Robinson, Alisa Davis (hereinafter "Davis"), VCC and Wintech, LLC (hereinafter "Wintech") filed an answer to the Hotchkiss complaint. (AA-1: APP000092-APP000098)

On February 5, 2018, Retire Happy, LLC (hereinafter "Retire Happy") and Josh Stoll (hereinafter "Stoll") filed an answer, affirmative defenses and cross claim. (AA-1:APP000099-APP000118)

On April 17, 2018, Robinson and VCC filed an answer to the cross claim filed

by Retire Happy and Stoll. (AA-1: APP000119-APP000122)

On October 12, 2017, Anthony White (hereinafter "White") filed a class action complaint asserting four claims for relief: 1) fraud, misrepresentations and omissions; 2) violation of NRS 90.310, 90.460 and 90.660 in the Nevada Uniform Securities Act; 3) violation of NRS 90.570 and 90.660 in the Nevada Uniform Securities Act; and 4) breach of written contract. (AA-1: APP000017-APP000036)

Case No. A-17-763003-C was assigned to the complaint.

On November 13, 2017, Rodriguez filed an answer to the White complaint. (AA-1: APP000045-APP000053)

On November 22, 2017, VCC and Wintech filed an answer to the White complaint. (AA-1: APP000054-APP000062)

On December 29, 2017, Robinson and Davis filed an answer to the White complaint and affirmative defenses. (AA-1: APP000082-APP000090)

On May 22, 2018, VCC filed a voluntary petition under Chapter 11 of the Bankruptcy Code. *See* Suggestion of Bankruptcy, filed on June 4, 2018, at AA-1: APP000123-APP000133.

On September 5, 2018, the Bankruptcy Court entered an Order confirming the First Amended Chapter 11 Plan of Reorganization filed by VCC. (AA-10:

APP001272-APP001281)

Section III(B)(3) of VCC's first amended Chapter 11 plan (AA-10: APP001297) identified Class 3 in the plan as including "all Claims held by the Unsecured Noteholders."

Section I(A) of VCC's first amended Chapter 11 (AA-10: APP001293) defined the words "Unsecured Noteholders" to be "[t]he Holders of Claims based upon or arising from any Unsecured Note or any transaction related thereto." This description includes each promissory note held by Provident Trust.

Section III(B)(3) of VCC's first amended Chapter 11 plan (AA-10: APP001297) states that "**in exchange for** and **in full and final satisfaction, compromise, release, and discharge of each Allowed Class 3 Claim,** each holder of an Allowed Class 3 Claim shall receive on the Effective Date, or as soon thereafter as reasonably practicable, (ii) its Pro Rata share of the Common Stock Distribution and (ii) its Pro Rata Share of the Series A Preferred Distribution." (emphasis added)

During the trial, Hotchkiss testified that he received 15,000 shares of VCC stock valued at $5.00 each. (AA-4: APP000600, l. 11 to APP000601, l. 3) This distribution of stock worth $75,000.00 was equal to the principal amount of the promissory note signed in favor of Provident Trust for the benefit of Hotchkiss. *See*

promissory note at AA-5: APP000821-APP000823.

Pursuant to VCC's first amended Chapter 11 plan, Provident Trust received shares of VCC stock that were equal in value to the unpaid balance owed for each promissory note included in Trial Exhibit 1. (AA-5: APP000821-APP000861)

Section XI of VCC's first amended Chapter 11 plan (AA-10: APP001311) stated in all capital letters:

> **THIS PLAN SHALL BIND ALL HOLDERS OF CLAIMS** AGAINST AND EQUITY INTERESTS AND INTERCOMPANY INTERESTS IN THE DEBTORS TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NOTWITHSTANDING **WHETHER OR NOT SUCH HOLDER** (I) WILL RECEIVE OR RETAIN ANY PROPERTY OR INTEREST IN PROPERTY UNDER THE PLAN, (II) HAS FILED A PROOF OF CLAIM OR INTEREST IN THE CHAPTER 11 CASES OR (III) FAILED TO VOTE TO ACCEPT OR REJECT THE PLAN OR **VOTED TO REJECT THE PLAN.** (emphasis added)

Section XI(A) of VCC's first amended Chapter 11 plan (AA-10: APP001311) states in part:

> **The rights afforded in the Plan** and the treatment of all Claims **shall be in exchange for and in complete satisfaction, discharge, and release of all Claims of any nature whatsoever arising prior to the Effective Date against the Debtor** and the Estate, including any interest accrued on such Claims after the Petition Date. (emphasis added)

Despite the confirmation of VCC's First Amended Chapter 11 Plan of Reorganization and the "complete satisfaction" of each promissory note, plaintiffs continued to litigate both Case No. A-17-762264-C and Case No. A-17-763003-C.

On October 4, 2018, White and eight other individual plaintiffs filed a first

amended complaint in Case No. A-17-763003-C . (AA-1: APP000134-APP000151)

On October 24, 2018, all eight of the named defendants filed an answer to first amended complaint. (AA-1: APP000152-APP000164)

On November 9, 2018, defendants Robinson, Rodriguez, VCC, Wintech and Davis filed an amended answer to first amended complaint. (AA-1: APP000218-APP000230)

On July 1, 2019, the parties filed a stipulation and order consolidating Case No. A-17-763003-C with Case No. A-17-762264-C. (AA-3: APP000422-APP000423)

On January 21, 2020, plaintiffs filed a pre-trial memorandum. (AA-3: APP000424-APP000435)

On January 27, 2020, Robinson, Rodriguez and Davis filed defendants' pre-trial memorandum. (AA-3: APP000436-APP000450)

On January 27, 2020, plaintiffs filed a trial brief. (AA-3: APP000451-APP000495)

On February 3, 2020, plaintiffs filed a statement of damages. (AA-3: APP000496-APP000499)

On February 3, 2020, plaintiffs and defendants filed a stipulation for trial. (AA-3: APP000500-APP000501)

On February 6, 2020, plaintiffs filed a notice of delegation of rights. (AA-4: APP000502-APP000503)

On February 10, 2020, plaintiffs filed an opposition to defendant's pre trial brief. (AA-4: APP000504-APP000540)

On February 22, 2020, plaintiffs filed a statement of damages NRS § 90.060. (AA-4: APP000541-APP000545)

The matter was tried before the Honorable Cristina D. Silva on February 24, 2020 and February 25, 2020. *See* transcripts of trial at AA-4:APP000546 to AA-5:APP000820.

On March 23, 2020, Robinson and Rodriguez filed defendants' post-trial memorandum. (AA-9:APP001161-APP001168)

On March 23, 2020, plaintiff filed its trial brief (closing argument). (AA-9:APP001169-APP001186)

On April 27, 2020, the court entered a written decision that directed the parties to "meet and confer and submit a proposed Findings of Fact and Conclusions of Law consistent with this Decision." (AA-9:APP001192, ll. 15-16)

On May 8, 2020, the court entered findings of fact, conclusions of law and order on defendants liability. (AA-9:APP001195-APP001199)

On May 11, 2020, plaintiffs filed a motion for damages and attorney's fees. (AA-9:APP001200-APP1247) and a declaration of David Liebrader in support of motion for damages and attorney's fees. (AA-10:APP001248-APP1250)

On May 21, 2020, Rodriguez filed an opposition to plaintiffs' motion for damages and attorneys' fees. (AA-10:APP001251-APP001318)

On May 27, 2020, Robinson filed defendants' opposition to plaintiffs' motion for damages and attorney's fees and partial joinder to defendant Vernon Rodriguez's opposition to plaintiff's motion for attorney's fees. (AA-10:APP001319-APP001327)

On May 28, 2020, plaintiff filed a reply to defendant Vernon Rodriguez' opposition to motion for attorney's fees and damages.(AA-10:APP001328-APP001345)

On May 29, 2020, Robinson filed an errata to defendants' opposition to plaintiff's motion for damages and attorney's fees and partial joinder to defendant Vernon Rodriguez's opposition to plaintiff's motion for attorney's fees. (AA-10:APP001346-APP001348)

On June 1, 2020, plaintiffs filed a reply to defendant Ron Robinson's opposition to motion for attorney's fees and damages. (AA-10:APP001349-APP001352)

On June 22, 2020, defendant Vernon Rodriguez filed a motion for reconsideration of June 8, 2020 minute order regarding plaintiffs' motion for damages and attorneys' fees. (AA-10:APP001353-APP001360)

On June 30, 2020, plaintiff filed an opposition to motion to reconsider. (AA-10:APP001361-APP001363)

On August 20, 2020, the court entered findings of fact, conclusions of law and order on motion for damages and attorney's fees. (AA-10:APP001364-APP001367)

On August 20, 2020, the court entered judgment in favor of plaintiffs against Robinson based on the statement of damages, filed on February 3, 2020, and against Rodriguez based on the statement of damages, filed on February 22, 2020. (AA-10:APP001368-APP001370)

On August 21, 2020, the court entered a duplicate judgment in favor of plaintiffs against Robinson and Rodriguez. (AA-10:APP001371-APP001373)

Notice of entry of the duplicate judgment filed on August 21, 2020 was served by mail and filed with the court on August 21, 2020. (AA-10:APP001374-APP001380)

Notice of entry of the findings of fact, conclusions of law and order on motion for damages and attorney's fees was served by mail and filed with the court on August

21, 2020. (AA-10:APP001381-APP001388)

On September 16, 2020, Rodriguez filed a first post-judgment motion for additional findings of fact and conclusions of law and to amend judgment pursuant to Nev. R. Civ. P. 52(B). (AA-10:APP001389-APP001411)

On September 16, 2020, Rodriguez filed a second post-judgment motion for a new trial, or in the alternative, further action after a nonjury trial pursuant to Nev. R. Civ. P. 52(B). (AA-10:APP001412-APP001425)

On September 16, 2020, Rodriguez filed a third post-judgment motion for stays pending disposition of post-judgment motions and appeal. (AA-10:APP001426-APP001432)

On September 16, 2020, Rodriguez filed an omnibus declaration of Vernon Rodriguez in support of post-judgment motions. (AA-10:APP001433-APP001438)

On September 16, 2020, Rodriguez filed a request for judicial notice in support of post-judgment motions. (AA-10:APP001439 to AA-11:APP001492)

On September 30, 2020, plaintiff filed separate oppositions to Rodriguez's three post-judgment motions. (AA-11:APP001493-APP001522; AA-11:APP001523-APP001528; AA-11:APP001529-APP001534)

On October 13, 2020, Rodriguez filed separate replies in support of Rodriguez's

three post-judgment motions. (AA-11:APP001535-APP001546; AA-11:APP001547-APP001553; AA-11:APP001554-APP001557)

On November 24, 2020, Rodriguez filed supplemental points and authorities in support of post-judgment motions. (AA-11:APP001562-APP001577)

On December 22, 2020, plaintiff filed a reply to Rodriguez's supplemental authorities on post judgment motions. (AA-11:APP001578-APP001608)

On March 16, 2021, Robinson filed a motion for Rule 54(b) determination. (AA-11:APP001609-APP001613)

On June 15, 2021, the court entered an order granting Robinson's motion for Rule 54(b) determination. (AA-11:APP001614-APP001621)

On June 15, 2021, the court entered an omnibus order denying Rodriguez's motion for additional findings of fact under NRCP 52(b) and for further action under NRCP 59(b). (AA-11:APP001622-APP001629)

On July 12, 2021, plaintiff filed a reply to Rodriguez's second memorandum of supplemental authorities on post judgment motions. (AA-11:APP001630-APP001654)

On July 15, 2021, Robinson filed his notice of appeal. (AA-11:APP001655-APP001656)

On August 31, 2021, the court entered an order denying Rodriguez's second post judgment motion for a new trial. (AA-11:APP001667-APP001672)

STATEMENT OF FACTS

On the dates listed below, VCC signed eleven (11) separate promissory notes in favor of Provident Trust "FBO" the following individuals and/or retirement accounts:

FBO name	Date	Amount	Bates Nos. In Vol. AA-5
Robert Kaiser	01/13/13	$ 62,000.00	APP000854 APP000856
Jackie H. Stone, Inherited IRA	01/31/13	35,000.00	APP000829 APP000831
Steven A. Hotchkiss, Solo-K	09/23/13	75,000.00	APP000821 APP000823
Robert R. Kaiser, IRA	10/08/13	42,000.00	APP000857 APP000859
Robin L. Suntheimer, Roth IRA	10/15/13	52,000.00	APP000833 APP000835
Troy Suntheimer Solo K	11/14/13	52,000.00	APP000836 APP000838
Anthony J. White, IRA	01/16/14	20,000.00	APP000840 APP000842
Stephens C. Ghesquiere; Roth acct.	04/21/14	66,000.00	APP000825 APP000827

Gayle G. Chany; IRA Acct.	09/11/14	59,000.00	APP000848 APP000850
Gabriele Lavermicocca; Solo K	09/15/14	100,000.00	APP000845 APP000847
Kendall Smith; Solo K	12/24/14	28,000.00	APP000851 APP000853

As stipulated by the parties (AA-3:APP000501), VCC made timely interest only payments on each promissory note through January, 2015.

The parties also stipulated that none of the plaintiffs ever met Robinson in person, and none of the plaintiffs ever spoke with Robinson prior to Provident Trust making the loans to VCC. (AA-3:APP000501)

SUMMARY OF THE ARGUMENT

Plaintiffs' actions were subject to dismissal because Provident Trust was an indispensable party and did not join the actions.

Provident Trust's receipt of stock in VCC in "full and final satisfaction" of each note prevents each plaintiff from enforcing Robinson's guarantee of each note.

Plaintiffs did not prove that each promissory note was a "security" as defined in NRS 90.295.

Plaintiffs' claim that Robinson has civil liability under NRS 90.660 was barred by the statute of limitations in NRS 90.670.

The amount of damages awarded to plaintiffs pursuant to NRS 90.660 is not consistent with the language in NRS 90.660(1).

Plaintiffs did not prove that they were entitled to recover judgment against Robinson for fraud, misrepresentations and omissions.

The attorneys fees awarded by the district court were not authorized by agreement or stature, and the amount awarded is not reasonable.

STANDARD OF REVIEW

Following a trial, questions of law are reviewed de novo. Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043, 1048 (2000).

Findings of fact must be upheld if supported by substantial evidence and may not be set aside unless clearly erroneous. May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

ARGUMENT

1. Plaintiffs' actions were subject to dismissal because Provident Trust was an indispensable party and did not join the actions.

At page 12 of defendants' pretrial memorandum (AA-3:APP000447), defendants quoted from Nev. R. Civ. P. 17(a), which now provides: "An action **must** be prosecuted in the name of the real party in interest." (Emphasis added)

In Pasillas v. HSBC Bank USA, 127 Nev. 462, 467, 255 P.3d 1281, 1285

(2011), this court stated that the word "'must' is a synonym of 'shall'" and that the word "'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature."

NRS 163.020(4) defines the word "trustee" as "the person holding property in trust and includes trustees, a corporate as well as a natural person and a successor or substitute trustee."

Nev. R. Civ. P. 17(a)(1)(E) provides that "a trustee of an express trust" may sue in its own name "without joining the person for whose benefit the action is brought," On the other hand, Nev. R. Civ. P. 17 does not contain any language that permits the beneficiary of an express trust to sue in his or her own name without joining the trustee of the trust.

In Back Streets, Inc. v. Campbell, 95 Nev. 651, 601 P.2d 54, 55 (1979), this court rejected the appellant's argument that the individual respondents were not proper parties to file suit for breach of a written collective bargaining agreement. This court instead stated that in their capacity as "the trustees of trust funds designated to receive the employer contributions," the respondents "are real parties in interest, under N.R.C.P. 17(a), as trustees of an express trust which is a third party beneficiary of the agreement."

Nev. R. Civ. P. 19(a)(1) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction **must be joined as a party** if:
>
> (A) **in that person's absence, the court cannot accord complete relief among existing parties**; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. (emphasis added)

Nev. R. Civ. P. 19(a)(2) provides that "[i]f a person has not been joined as required, the court **must** order that the person be made a party." (emphasis added)

Nev. R. Civ. P. 19(b) provides in relevant part:

> If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.

In Schwob v. Hemsath, 98 Nev. 293, 646 P.2d 1212 (1982), legal title to the real property in question was held by R.N.S., Inc. R.N.S., Inc., however, "was never served with process in the action" and never "appeared in the action or subjected itself to the jurisdiction of the court." This court stated that "[f]ailure to join an indispensable party is fatal to a judgment and may be raised by an appellate court *sua sponte*." Id.

Because title to the property in Schwob v. Hemsath was held by a corporation that never appeared as a party, this court reversed the judgment of the district court and remanded the case "with directions to allow the respondent the opportunity to join the party, and to grant a new trial if the party is properly joined." 98 Nev. at 195, 646 P.2d at 1213.

At page 2 of their opposition to defendant's pre trial brief (AA-4:APP000505), plaintiffs stated that "Provident has delegated any rights it has to pursue this claim to the Plaintiffs." On the other hand, Nev. R. Civ. P. 19 does not contain any language that allows the real party in interest that holds title to property to avoid joinder by signing a "notice of delegation of rights" like Exhibit "A" to plaintiffs' opposition to defendant's pre trial brief. (AA-4:APP000516-APP000518)

Plaintiffs also stated that pursuant to the "Custodial Agreement" signed by the parties, Provident Trust was "an IRA Custodian, not a Trustee, and that as a Custodian, is not under any obligation to sue on behalf of its clients." (AA-4:APP000505)

On the other hand, the first paragraph of the "Individual Retirement Custodial Account Agreement" (hereinafter "Custodial Agreement") attached as Exhibit B to plaintiffs' opposition to defendant's pre trial brief (AA-4:APP000520) states:

> The depositor named on the application is establishing a Traditional individual retirement account **under section 408(a)** to provide for his or her retirement and for the support of his or her beneficiaries after death. (emphasis added)

26 U.S.C. § 408(a) states:

> For purposes of this section, the term "individual retirement account" means **a trust created or organized in the United States** for the exclusive benefit of an individual or his beneficiaries, **but only if the written governing instrument creating the trust meets the following requirements**:
>
> * * * *
>
> (2) **The trustee is a bank (as defined in subsection (n))** or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

26 U.S.C. § 408(n) states:

> (n) Bank
>
> For purposes of subsection (a)(2), the term "bank" means—
>
> (1) any bank (as defined in section 581),
>
> (2) an insured credit union (within the meaning of paragraph (6) or (7) of section 101 of the Federal Credit Union Act), and
>
> (3) a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State.

Consequently, despite any language in the Custodial Agreement to the contrary, controlling federal law provides that the IRA Custodian is the trustee of a trust. Controlling federal law also provides that the IRA Custodian cannot be the individual owner of the IRA, but must be a "bank."

Furthermore, NRS 163.5533 appears under the subheading for "DIRECTED TRUSTS" and expressly provides:

> "Custodial account" defined. "Custodial account" means an account:
>
> 1. **Established by a person with a bank, as defined in 26 U.S.C. § 408(n)**, or with a person approved by the Internal Revenue Service as satisfying the requirements to be a nonbank trustee or nonbank passive trustee pursuant to regulations established by the United States Treasury pursuant to 26 U.S.C. § 408; and
>
> 2. Governed by an instrument concerning the establishment or maintenance of an individual retirement account, qualified retirement plan, an Archer medical savings account, health savings account, a Coverdell education savings account or any similar retirement or savings account permitted under the Internal Revenue Code of 1986. (emphasis added)

NRS Chapter 166A is titled "CUSTODIAL TRUSTS (UNIFORM ACT)," and NRS 166A.180 provides in relevant part:

> 1. **A person may create a custodial trust of property** by a written transfer of the property to another person evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary an individual who may be the transferor, in which the transferee is designated, in substance, **as custodial trustee under the Nevada Uniform Custodial Trust Act.**
>
> 2. A person may create a custodial trust of property by a written declaration, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and naming as beneficiary an individual other than the declarant, in which the declarant as titleholder is designated, in substance, as custodial trustee under the Nevada Uniform Custodial Trust Act. A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under this chapter.
>
> 3. **Title to custodial trust property is in the custodial trustee**, and the beneficial interest is in the beneficiary.
>
> 4. Except as otherwise provided in subsection 5, a transferor may not terminate a custodial trust.
>
> 5. The beneficiary, if not incapacitated, or the conservator of an incapacitated beneficiary, may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary or conservator

declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

6. Any person may augment existing custodial trust property by the addition of other property pursuant to this chapter.

7. The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

8. This chapter does not displace or restrict other means of creating trusts. A trust whose terms do not conform to this chapter may be enforceable according to its terms under other law. (emphasis added)

The language in NRS 166A.180 evidences the Nevada Legislature's intent that a "Custodial Account" creates a trust relationship and that the custodian/trustee holds legal title to any property.

Pursuant to the express language in Nev. R. Civ. P. 17(a)(1)(E), the custodian for an IRA is the real party in interest entitled to file a lawsuit on behalf of the trust. The beneficiary of the trust is not.

Consequently, plaintiffs could not file a legal action based on rights held by Provident Trust and not by the individual plaintiffs.

At page 3 of plaintiffs' opposition to defendants' pre trial brief (AA-4:APP000506), plaintiffs quoted from the unpublished order in Deem v. Baron (D. Utah 2016) 2:15-cv-00755-DS, attached as Exhibit C to their opposition. (AA-4:APP000527-APP000531)

Plaintiffs also cited Vannest v. Sage, Rutty & Co., Inc., 960 F. Supp. 651

(W.D.N.Y. 1997), and FBO David Sweet IRA v. Taylor, 4 F. Supp. 3d 1282 (M.D. Ala. 2014).

All three of these cases are not binding precedent, and all three cases have no persuasive value because they did not address the mandatory language in 26 U.S.C. § 408(a)(2) stating that the trustee of an IRA must be "a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section." The three cases also do not identify any authority that permits an investor and a custodian to contract around the mandatory language adopted by Congress in 26 U.S.C. § 408(a)(2).

Because none of the plaintiffs satisfy the mandatory language in 26 U.S.C. § 408(a), they could not act as "trustee" of the express trust created by the Custodial Agreement.

2. Provident Trust's receipt of stock in VCC in "full and final satisfaction" of each note prevents each plaintiff from enforcing Robinson's guarantee on each note.

At page 7 of their opposition to defendant's pre trial brief (AA-4:APP000510), plaintiffs stated that "Mr. Robinson argues that his personal guarantee was extinguished by the VCC Bankruptcy discharge" and that "Robinson claims that

VCC's bankruptcy discharge releases him from liability as a guarantor."

In closing arguments (AA-5:APP000807, ll. 16-23), counsel for plaintiffs also stated:

> MR. LIBRADER: So my understanding, my reading of the bankruptcy law is that a discharge – and we cited this in our brief – a discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt, and that's *In re Edgeworth*, 993 F.2d 51. Following the discharge, section 524(a)(2) enjoins an action against a debtor, which is VCC, but section 524(e) specifies the debt still exists and can be collected from any other entity that might be liable.

At page 6 of their trial brief (closing argument)(AA-9:APP001174), plaintiffs similarly stated that "Mr. Robinson argues that his personal guarantee was extinguished by the VCC Bankruptcy."

Robinson, however, did <u>not</u> base his argument regarding the elimination of his personal liability under each personal guarantee on either 11 U.S.C. § 524(a) or the "discharge injunction" provided by Section XI (A) of VCC's confirmed Chapter 11 plan. (AA-10: APP001311)

At page 12 of defendants' pretrial memorandum (AA-3:APP000448), defendants instead described the issue created by the personal guarantees as follows:

> In the present case, there is no primary liability on the part of the third party VCC on the promissory notes. As such, there is nothing to guarantee and there can be no contract of guaranty. Because there is no obligation by the debtor, VCC, on the promissory notes, there is no obligation by the alleged guarantor.

In closing arguments, counsel for defendants also stated:

> MR. GEWERTER: Your Honor, we're kind of going down the wrong rabbit hole here. The issue is not what the plan says or not. The plan only comes into bearing and to this case because the obligation of VCC is extinguished when it went from debt to equity. That's a fact. There's no question that their notes now became stock. Whether they voted for it or not is meaningless because there's an order that says you will get stock. It's signed off by the Federal Bankruptcy Court.

AA-5: APP000809, ll. 11-17.

At page 7 of their opposition to defendants' pre trial brief (AA-4:APP000510), plaintiffs cited 4 Collier on Bankruptcy, ¶ 524.05.

On the other hand, that treatise cites Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987), where "the bankruptcy court confirmed a reorganization plan (the Plan) that released a guaranty executed by the appellant, Dr. Joseph Shoaf, in favor of the creditor, now plaintiff-appellee" (Id. at 1047), and the court of appeals held that "the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization." (Id. at 1050)

4 Collier on Bankruptcy, ¶ 524.05, also cites Travelers Indemnity Co. v. Bailey, 557 U.S. 137 (2009), and Trullis v. Barton, 67 F.3d 779, 785 (9th Cir. 1995), as authority that "individual creditors who agree to such releases and do not challenge the plan **or appeal its confirmation** may not later claim that the plan provisions

providing for the releases are invalid." (emphasis added)

Moreover, at page 11 of defendants' pretrial memorandum (AA-3:APP000446), defendants quoted from Marion Properties, Ltd. v. Goff,108 Nev. 946, 948-949,840 P.2d 1230, 1231-1232 (1992), and at page 12 of defendants' pretrial memorandum (AA-3:APP000447), defendants set out a proposed jury instruction, which stated in part that "[i]f there is no obligation by the debtor, there is no obligation by the guarantor."

At page 9 of their opposition to defendants' pre trial brief (AA-4:APP000512), plaintiffs stated that Marion Properties, Ltd. v. Goff was "[t]he sole Nevada case" cited by defendants. On the other hand, as quoted at page 12 of defendants' pretrial memorandum (AA-3:APP000447), in addition to citing Marion Properties, Ltd. v. Goff, defendants' proposed jury instruction cited this court's opinion in Williams v. Crusader Discount Corp., 75 Nev. 67, 334 P.2d 843 (1959).

In Williams v. Crusader Discount Corp., this court applied the legal principle of novation that controls the outcome of the present case. In the Williams case, the first loan agreement was guaranteed by John H. Williams and Katheleen Williams, but the second loan agreement was "executed only by Crusader and Mr. Williams."

This court stated:

> The parties to the first and second loan agreements were the same, and it is clear from the terms of the second loan agreement that **they intended to substitute the second loan agreement for the first**.
>
> **The substitution of a new obligation for an existing one effects a novation, which thereby discharges the parties from all of their obligations under the former agreement** as such obligations are extinguished by the novation. 66 C.J.S., Novation, § 1, pg. 681; 39 Am. Jur., Novation, § 2,254.

75 Nev. at 70, 334 P.2d at 845. (emphasis added)

At page 10 of defendants' pretrial memorandum (AA-3:APP000445), defendants also cited 38 Am.Jur.2d, Guaranty, § 67 and 38A C.J.S.2d, Guaranty, § 89, which describe the "general rule" that "an agreement between a creditor and debtor that supersedes and replaces their prior agreement is a novation and makes a guaranty of the prior agreement unenforceable."

At page 9 of their opposition (AA-4:APP000512), plaintiffs attempted to distinguish the holding in Marion Properties, Ltd. v. Goff from the present case by stating that "a creditor voluntarily dismissed claims against the debtor with prejudice, then later tried to sue the guarantor." (emphasis by plaintiffs) Plaintiffs also stated that "Robinson cannot point to any similarities to the facts in Marion; no settlement, no dismissal with prejudice, no intent to release claims."

On the other hand, the language in Section III(B)(3) of VCC's confirmed plan expressly provides that each creditor was accepting VCC stock in "full and final

satisfaction, compromise, settlement, release, and discharge" of each promissory note. (AA-10: APP001297) This language proves a clear intent by plaintiffs "to release claims."

Furthermore, in Marion Properties, Ltd. v. Goff, this court cited Howard v. Associated Grocers, 601 P.2d 593 (Ariz. 1979), in which Donald B. Howard and Betty Lou Howard were the shareholders and officers of Howard's Markets, Inc. and executed a "Personal Continuing Guaranty" to Associated Grocers.

When Howard's Markets, Inc. filed bankruptcy, Associated Grocers agreed with the bankruptcy trustee for Howard's Markets "to set off the amount owed to it by Howard's Markets, Inc., in return for the inventory of Howard's Markets, Inc." Id. at 595.

When it was later determined that the inventory had a value that was "$122,129.14 less than the total indebtedness of Howard's Markets to Associated, Associated sued the Howards for this amount." Id. The trial court entered judgment against the Howards for $122,129.14, plus attorney's fees, but the Arizona Supreme Court reversed the judgment and found that "as between the debtor Howard's Markets, Inc., and the creditor Associated, the debt has been completely extinguished." Id.

The court also rejected an argument that specific language in the guaranty created "an independent agreement by the Howards to maintain the obligation regardless of the release of Howard's Markets." Id. at 596.

In the present case, each guarantee by Robinson only guaranteed "the payment and performance of, the entire debt evidenced by this Note." None of the guarantees include any language stating that the guarantee would continue after the "entire debt evidenced by" each note was fully and finally satisfied by Provident Trust's receipt of VCC stock.

In First Interstate Bank of Nevada v. Shields, 102 Nev. 616, 619-620, 730 P.2d 429, 431-432 (1986), this court held that even though the language in NRS 40.459 (prior to being amended in 1987) did not expressly protect a guarantor from liability where the fair market value of a property exceeded the amount secured by a deed of trust, the guarantor was nevertheless protected by the general rule that "the **payment or other satisfaction** or extinguishment **of the principal debt or obligation** by the principal or by anyone for him **discharges the guarantor**." (emphasis added)

In the present case, Section III(B)(3) of VCC's Chapter 11 Plan (AA-10:APP001297), expressly provided that each holder of an unsecured promissory note agreed to accept stock of VCC "in exchange for and in full and final satisfaction,

compromise, settlement, release, and discharge of each Allowed Class 3 Claim."

In addition, the Chapter 11 Plan does not contain any language stating that Robinson would remain liable for payment of the fully satisfied notes.

At page 7 of their opposition to defendants' pre trial brief (AA-4:APP000510), plaintiffs quoted from 11 U.S.C. § 524(e) that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." At pages 7 and 8 of their opposition (AA-4:APP000510-APP000511), plaintiffs also cited several cases that discuss the discharge provided by 11 U.S.C. § 524(e).

However, none of the cases cited by plaintiffs involved a confirmed plan of reorganization where stock (or any other form of consideration) was accepted in "full and final satisfaction, compromise, settlement, release, and discharge" of the creditor's claim.

In In re Edgeworth, 993 F.2d 51, 54 (5th Cir. 1993), for example, the court found that the discharge of the debtor's personal liability for malpractice did not prevent the creditor from collecting against the debtor's malpractice insurance "as long as the costs of defense are borne by the insurer and there is no execution on judgment against the debtor personally."

In Owaski v. Jet Florida Systems, Inc. (In re Jet Florida Systems, Inc.), 883 F.2d 970, 976 (11th Cir. 1989), the court relied solely on the language in 11 U.S.C. § 524(e) to support its conclusion that "a plaintiff may proceed against the debtor simply in order to establish liability as a prerequisite to recover from another, an insurer, who may be liable."

The court in Walker v. Wilde (In re Walker), 927 F.2d 1138, 1144 (10th Cir. 1991), found "no prejudice in allowing the Higleys to proceed against Walker for the sole purpose of establishing the Higley's entitlement to recovery from Utah's Real Estate Recovery Fund" for funds that were misappropriated by the debtor in a real estate transaction. The case did not involve a confirmed plan of reorganization where stock (or any other form of consideration) was accepted in "full and final satisfaction" of the creditor's claim.

The debtors in Hendrix v. Page (In re Hendrix), 986 F.2d 195 (7th Cir. 1993), In re Shondel, 950 F.3d 1301 (7th Cir. 1991), and In re Doar, 234 B.R. 203 (Bankr. N.D. Ga. 1999), each filed Chapter 7 petitions, so none of the cases involved a confirmed Chapter 11 Plan where each creditor accepted stock in "full and final satisfaction" of his or her personal injury claim.

At the bottom of page 8 and top of page 9 of their opposition (AA-4:

APP000511-APP000512), plaintiffs cited five (5) bankruptcy cases that discuss the scope of the automatic stay provided by 11 U.S.C. § 362. None of the cases discuss the legal effect of a confirmed Chapter 11 Plan where each unsecured creditor received stock in "full and final satisfaction" of his or her unsecured claim.

At page 10 of their opposition (AA-4:APP000513), plaintiffs quoted language found in VCC's Disclosure Statement regarding Robinson's "misuse of proceeds from the Unsecured Notes and related matters." (AA-4:APP000539)

On the other hand, plaintiffs did not explain how such an unliquidated claim held by VCC entitled plaintiffs to sue Robinson for obligations that had been fully satisfied and discharged by Provident Trust's receipt of VCC stock in place of each note. The disclosure statement also stated that "Robinson has agreed to allow WinTech to occupy and use space in a commercial building in which he holds an ownership interest on a rent free basis" and that "[t]he Debtor believes the market value of the free rent provided to WinTech by Robinson to be approximately $10,000 per month." (AA-4:APP000539)

Plaintiffs also stated that "VCC's discharge does not discharge Robinson's guarantee, and Defendants have not offered a single bankruptcy case or citation in support of their position that the guarantee is extinguished." (AA-4:APP000513-

APP000514) As set forth at pages 23 and 24 above, however, the treatise cited by plaintiffs (4 Collier on Bankruptcy, ¶ 524.05) cited three bankruptcy cases that agree with defendants' position that satisfaction of the principal debt also extinguishes any guarantee of the satisfied debt.

Moreover, the satisfaction and discharge of each guarantee is not a bankruptcy issue that is governed by the language in 11 U.S.C. § 524(e). It is a question of Nevada law that is controlled by Provident Trust's receipt of VCC stock in **full satisfaction** of the indebtedness reflected by each promissory note.

In closing arguments, counsel for defendants stated:

> But the fact is you can't hold him liable because the main obligation has gone away. And that by itself if the very reason.
>
> Secondly, if they were to get the guarantee in place you'd have a windfall. The only – the only language is that it was a fair equivalent between the debt and the – and then the stock of this case, of VCC.
>
> Therefore, they got what they bargained for, just now it's in equity; it's not in debt. **They don't get a double recovery. They don't get stock in the company for the same value, by the way, the dollar, or the dollar per share, and then collect the guarantee also.** That would be a windfall, that would be extreme unjust enrichment, and that's the purpose of the law. **You don't get double recovery and that's what the Plaintiffs are asking for in this case**, Your Honor.

AA-5:APP000811, ll. 1-13. (emphasis added)

In response to this argument, the court and counsel for defendants had the following exchange:

> THE COURT: Well, it would be double recovery if the shares

equaled the investment amount.

MR. GEWERTER: There's no evidence to the contrary and the bankruptcy court –

THE COURT: Well, there's no evidence to support your position either.

MR. GEWERTER: Yeah, there is, because there – in order –

THE COURT: What evidence?

MR. GEWERTER: – in order to get a plan approved you must have a fairness evaluation in bankruptcy court. And that gets determined and argued. And Mr. Liebrader – I was not part of the bankruptcy. I don't do that in bankruptcy – but Mr. Liebrader was there arguing about the equivalence and this is what the Court came up with. So they may not like it but that is what the Court – in order to have the plan approved you must have an equivalency hearing or equivalency argument as part of a hearing. And that's done or the plan would not be approved.

AA-5:APP000811, l. 14 to APP000812, l. 5.

In this regard, Paragraph Z at page 6 of the Bankruptcy Court's order confirming first amended Chapter 11 plan (AA10:APP001451) states that "the settlements, compromises, discharges, releases, and injunctions set forth in the Plan are approved as an integral part of the Plan, **are fair, equitable, reasonable, and in the best interest of** the Debtor, its Estate, and **the holders of Claims** and Equity Interests." (emphasis added)

Defendants' argument is also supported by Mr. Hotchkiss's testimony that Provident received 15,000 shares of VCC stock valued at $5.00 per share in full satisfaction of the VCC note drawn payable to Provident Trust Group, LLC, FBO Steven A. Hotchkiss for $75,000.00. (AA-4:APP000600, l. 17 to AA-4:APP000601,

l. 5)

The record on appeal does not contain any admissible evidence proving that any share of VCC stock received by plaintiffs had a value less than $5.00.

The record on appeal also does not contain any evidence that contradicts Mr. Robinson's testimony that on February 24, 2020, VCC was "very profitable right now" (AA-4:APP000653, l. 13) and that VCC's "technology has been improved, proved and proved to such an extent" that "a billion dollar Japanese company like Konica and Minolta that comes in as your venture partner." (AA-4:APP000675, ll. 16-21)

Furthermore, plaintiffs did not cite "a single bankruptcy case or citation" that authorized plaintiffs to obtain double recovery for their claims by receiving "full and final satisfaction" of each claim pursuant to Section III(B)(3) of VCC's confirmed plan and also obtaining judgment against Robinson for each fully satisfied claim.

At page 6 of their trial brief (closing argument) (AA-9:APP001174, 11. 10-19), plaintiffs cited the order entered by the Honorable Kent J. Dawson in Donnell v. Perpetual Investment, Inc., Case No. 2:04-cv-01172-KJD-LRL on October 11, 2006 (ECF No. 22).

At page 6 of its decision and order (AA-9:APP001192, ll. 9-11), the district

court stated that it adopted the reasoning in Donnell as support for plaintiffs' argument "that VCC's bankruptcy was a tactical, self-interested decision by Robinson to try and eliminate his responsibilities as the personal guarantor" and that Robinson's decision "constitutes as consent to the modification." Plaintiffs' argument, however, is contradicted by the corporate resolution that proves that the entire board of VCC, and not just Mr. Robinson, consented to VCC filing its Chapter 11 Petition. (AA-1:APP000131-APP000133)

The Donnell case also did not involve a confirmed bankruptcy plan where creditors accepted stock in "full and final satisfaction" of their claims. The Donnell case instead involved "a renewal, extension and/or modification agreement" that was signed by Robert E. Rippe as "sole member, stockholder and president" of Perpetual Investment, Inc., but that was not signed by Mr. Rippe as a personal guarantor.

At page 3 of the Donnell order, the district court acknowledged that in Williams v. Crusader Discount Corp., 75 Nev. 67, 334 P.2d 843 (1959), "the Nevada Supreme Court held that the substitution of a new obligation for an existing one effects a novation, which thereby discharges the parties from all their obligations under the former agreement inasmuch a such obligations are extinguished by the novation."

This is the same principle for which defendants cited Williams v. Crusader

Discount Corp. in the proposed jury instruction at page 12 of defendants' pretrial memorandum. (AA-3:APP000447)

The court in Donnell also cited Lee Tire & Rubber Co. of N.Y. v. McCarran, 56 Nev. 458, 55 P.2d 633 (1936), as authority that "an exception may exist where the guarantor consents to a change or alteration in the terms of the contract." In that case, however, the principal contract was not changed. The principal contract was terminated. This court stated that upon termination of the principal contract, "the liability of the guarantors terminated, except as to liability which had theretofore accrued." Id. at 635.

The court in Donnell also cited Nevada Bank of Commerce v. Esquire Real Estate, Inc., 86 Nev. 238, 468 P.2d 22 (1970), as authority that "[a]ssent may be inferred from conduct and other circumstances." In that case, however, the assent that was inferred proved that a revision agreement that was signed only by First Western (and not by the maker of the original promissory note or the guarantors of the note) was "received by NBC in complete satisfaction of Esquire's debt" and "constituted a novation discharging Calvin and Bette Magleby from their guarantee of Esquire's debt to appellant." 86 Nev. at 241, 468 P.2d at 23-24.

The holding in Nevada Bank of Commerce v. Esquire Real Estate, Inc. supports

Robinson's argument that plaintiffs' acceptance of VCC stock in place of the promissory notes constituted a novation that discharged Robinson from the guarantee on each promissory note.

Furthermore, in Donnell, the court found that the modification agreement in that case "does not change the terms of the original note" and "[i]t is not a novation" because the modification agreement specifically provided that "all terms and conditions of the Note and Deed of Trust shall remain in full force and effect." The court found that this language constituted "a clear and unambiguous adoption by reference of all previous terms and conditions, including the guaranty."

In the present case, on the other hand, VCC's confirmed Chapter 11 Plan does not incorporate the promissory notes or the guarantee on each promissory note "by reference." Section III(B)(3) of VCC's confirmed plan instead stated that each creditor was accepting VCC stock in "full and final satisfaction" of each promissory note. (AA-10:APP001297)

At page 6 of its decision and order (AA-9:APP001192), the district court stated that it was adopting the reasoning in Donnell and Marc Nelson Oil Products, Inc. v. Grim Logging Co., Inc., 110 P.3d 120, 125 (Or. Ct. App. 2005), "in reaching this decision," and the court cited Marc Nelson Oil Products, Inc. v. Grim Logging Co.,

Inc. to support its conclusion that Robinson "is still liable as a personal guarantor."

In that case, however, Robert Grim signed a personal guarantee of Grim Logging Co., Inc.'s contract to purchase diesel fuel from Hance Oil Company ("Hance"). Hance subsequently assigned the contract to Marc Nelson Oil Products, Inc. ("Nelson") without providing notice to Robert Grim.

The court discussed the difference between a compensated guarantor and an uncompensated guarantor and whether the modification of the agreement with Hance "materially increased" Robert Grim's risk. The court did not discuss at all a "novation" that exists when a creditor agrees to accept stock in "full and final satisfaction" of a promissory note.

Furthermore, the court of appeals reversed the summary judgment entered against Robert Grim because "the assignment changed the principal parties to the contract, which is undeniably material" and because the failure to give Robert Grim notice of the assignment increased his risk by "preventing defendant from protecting himself from personal liability on the contract." Id. at 126.

At page 8 of their trial brief (closing argument) (AA-9:APP001176), plaintiffs stated that Robinson was a "compensated guarantor" and that "Robinson wouldn't be discharged because the modification did not materially increase his risk." In the very

next sentence, however, plaintiffs stated: "Quite the contrary, the exchange of equity for debt was intended to eliminate his $4.5 million obligation."

As noted at page 28 above, Section III(B)(3) of VSS's confirmed plan (AA-10:APP001297) expressly provided that each holder of an unsecured promissory note agreed to accept stock of VCC "in exchange for and in full and final satisfaction, compromise, settlement, release, and discharge of each Allowed Class 3 Claim."

In the last paragraph at page 8 of their trial brief (closing argument) (AA-9:APP001176), plaintiffs stated that the Bankruptcy Court's order confirming the first amended plan "specifically excluded the release of third party claims against anyone other than VCC." On the other hand, the first sentence in paragraph X at page 6 of the court's order (AA-10:APP001451) focused only on whether "[t]he discharges and injunctions contained within the Plan comply with the Bankruptcy Code and the Bankruptcy Rules, including Section 524(e)."

Neither the bankruptcy court's order nor plaintiffs cited any language in the confirmed plan that supersedes or negates the novation created under Nevada law by Provident Trust's receipt of VCC stock in "full and final satisfaction" of each promissory note. Plaintiffs also did not cite any authority that would permit the Bankruptcy Court to simply ignore the novation created by the receipt of stock in

place of each promissory note.

At page 9 of their Trial Brief (closing argument) (AA-9:APP001177), plaintiffs cited 11 U.S.C. § 524(e) and In re Edgeworth, which relate only to the effect of a "discharge" in bankruptcy. As discussed at page 28 above, neither 11 U.S.C. § 524(e) nor In re Edgeworth apply to a confirmed Chapter 11 plan where stock has been exchanged in return for "full and final satisfaction" of a creditor's unsecured claim.

At pages 3 to 5 of their reply to defendant Vernon Rodriguez' memorandum of supplemental authorities on post judgment motions (AA-11:APP0001580-APP0001582), plaintiffs cited Schleicher v. Wendt, 529 F. Supp. 2d 959 (S.D. Ind. 2007), where the court found that plaintiffs had sufficiently alleged that four corporate officers were liable as "controlling persons" under Section 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78t(a)). In that case, however, the company did not confirm a Chapter 11 plan where the creditors voted to accept company stock in "full and final satisfaction" of each creditor's unsecured claim.

At pages 5 and 6 of their reply (AA-11:APP0001582-APP0001583), plaintiffs also quoted language from Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985), that only discussed discharge of the principal debtor in bankruptcy under 11 U.S.C. § 524(e) and did not discuss at all the effect of a confirmed plan that exchanged

company stock for "full and final satisfaction" of each creditor's unsecured claim. Id. at 1431. In the present case, each plaintiff received VCC stock having an agreed value equal to the full amount of each plaintiff's unsecured claim.

At page 9 of their reply (AA-11:APP001586, l. 14), plaintiffs stated that "[f]or all intents and purposes the shares have no value." Plaintiffs, however, did not produce any admissible evidence at trial proving that the VCC stock was not worth at least $5.00 per share. Morever, "[a]rguments of counsel are not evidence and do not establish the facts of the case." Jain v. McFarland, 109 Nev. 465, 475-75, 851 P.2d 450, 457 (1993).

Plaintiffs also stated that "at such time that Mr. Rodriguez pays the judgment," he could "ask for a hearing to determine the value of the shares." (AA-11:APP001586, ll. 15-17) Plaintiffs, however, did not cite any authority that would require defendants to re-litigate an issue that had already been finally determined by the Bankruptcy Court. In this regard, the Bankruptcy Court made an express finding that "the **settlements, compromises**, discharges, releases, and injunctions **set forth in the Plan** are approved as an integral part of the Plan, **are fair, equitable, reasonable, and in the best interest of** the Debtor, its Estate, and **the holders of Claims** and Equity Interests." (AA-10:APP001277, ¶ Z) (emphasis added)

Plaintiffs also stated that "they are prepared to tender their preferred shares in exchange for payment of damages under NRS § 90.660." (AA-11:APP001586, ll. 19-20) Plaintiffs, however, did not cite any authority that entitled plaintiffs to rescind the exchange of debt for equity that had already been completed.

3. Plaintiffs did not prove that each promissory note was a "security" as defined in NRS 90.295.

At page 4 of their trial brief (AA-3:APP000454), plaintiffs stated that "the VCC Note meets the 'family resemblance test' standard adopted by Nevada in State v. Friend, 40 P.3d 436, 118 Nev. 115 (2002)."

In State v. Friend, however, this court stated that "a literal, plain meaning interpretation of the word 'note' as a 'security' would lead to the absurd result of applying to nearly all notes issued in Nevada, including promissory notes issued in connection with such things as car loans or student loans." 118 Nev. at 120-121, 40 P.3d at 439.

Under the first step of a two-tiered analysis, the notes under review are compared to certain notes that are not securities. With respect to the second step, this court stated:

> The next step of the test is to compare the notes under review to the list of notes above under the following four factors: (1) the motivations prompting a reasonable seller and buyer to enter into the transaction; (2) whether the instruments are used in common trading for speculation or

> investment; (3) the expectations of a reasonable investing public; and (4) whether another regulatory scheme significantly reduces the risk of the instrument.

118 Nev. at 122, 40 P.3d at 440.

With respect to the second factor, this court stated that "[c]ommon trading occurs when the instrument is 'offered and sold to a broad segment of the public.'" 118 Nev. at 123, 40 P.3d at 440.

In the Friend case, this court noted that "MEI placed an advertisement in a regional newspaper seeking potential investors" and that "[a]s the newspaper is distributed throughout Southern Nevada, which is home to well over a million people, we conclude that this investment opportunity was offered to a broad segment of the public and that the plan of distribution involved common trading."118 Nev. at 123, 40 P.3d at 441.

In the present case, on the other hand, plaintiffs did not prove that any newspaper advertisements offered the VCC notes "to a broad segment of the public." Instead, Mr. Robinson testified that "[t]hey were dealing with Provident Trust and we were in agreement that Provident Trust was actually the lender by virtue of the fact that they represented all of the investors in our notes were essentially Provident Trust." (AA-4:APP000621, ll. 17-20)

Mr. Robinson also testified as follows:

> Q. Was Provident Trust raising the money or was Ms. – was Retire Happy?
>
> A. That's a good question, because at this point in time we've questioned whether or not Provident Trust was actually leading the investors into you said Retire Happy – yeah Retire Happy.

(AA-4:APP000621, l. 23 to APP000622, l. 2)

In addition, following plaintiffs' counsel's statement that a certificate from the Nevada Secretary of State (Trial Exhibit 11 at AA-7:APP000972) showed that "there were no exemptions or registration for VCC Securities filed with the state" (AA-4:APP000642, ll. 14-16), Mr. Robinson testified:

> A. But I reality we were not concerned with it, because we were dealing with a trust company.
>
> Q. Uh-huh.
>
> A. And as you recall, I think I testified to that effect that the trust company was exempt from the securities laws.

(AA-4:APP000642, l. 23 to AA-4:APP000643, l. 2)

With respect to the third factor regarding "the expectations of a reasonable investing public," Section 8.3 of the Custodial Agreement (AA-4:APP000522) expressly provides:

> f. *Investment Conforms to All Applicable Securities Laws.* You represent to us that **if any investment by your IRA is a security under applicable federal or state securities laws, such investment** has been registered or **is exempt from registration under federal and state**

> **securities laws**, and you release and waive all claims against us for our role in carrying out your instructions with respect to such investment. You acknowledge that the foregoing representation is being relied upon by us in accepting your investment directions and you agree to indemnify us with respect to all costs, expenses (including attorneys' fees), fines, penalties, liabilities, damages, actions, judgments and claims arising out of such investment and/or a breach of the foregoing representation, including, without limitation, claims asserted by you. (emphasis added)

Consequently, plaintiffs expressly represented to Provident Trust that each promissory note was either not a "security" that needed to be registered pursuant to NRS Chapter 90 or was "exempt from registration." This fact explains why Provident Trust could not join in plaintiffs' action as required by Nev. R. Civ. P. 17(a)(3),

In Cheqer, Inc. v. Painters and Decorators Joint Committee, Inc., 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982), this court stated:

> Equitable estoppel has been characterized as comprising four elements: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. Strong v. Santa Cruz County, 15 Cal.3d 720, 726, 125 Cal. Rptr. 896, 543 P.2d 264 (1975); City of Long Beach v. Mansell, 3 Cal.3d 462, 490, 91 Cal. Rptr. 23, 476 P.2d 423 (1970). Further, this court has noted that silence can raise an estoppel quite as effectively as can words. *See e.g.*, Goldstein v. Hanna, 97 Nev. 559, 562, 635 P.2d 290 (1981).

In the present case, the testimony by Mr. Robinson proved that because Provident Trust made the loan for each promissory note, each promissory note was exempt from any registration requirements.

Furthermore, each plaintiff received the income tax benefits associated with

using monies held in an IRA or Solo K by representing to Provident Trust that "such investment has been registered or is exempt from registration under federal and state securities laws." Because each plaintiff received the income tax benefits of representing that the loan to VCC was "exempt from registration," the doctrine of equitable estoppel prevents each plaintiff from asserting a claim against Robinson that is contradicted by each plaintiff's express representation to Provident Trust.

With respect to the third factor in the second step, plaintiffs did not prove that any plaintiff had any "expectation" that the Note signed in favor of Provident would be treated as a "security" as defined in NRS 90.295.

4. Plaintiffs' claim that Robinson has civil liability under NRS 90.660 was barred by the statute of limitations in NRS 90.670.

At page 11 of their Trial Brief (AA-3:APP000461), plaintiffs stated that Robinson and Rodriguez had civil liability pursuant to NRS 90.660(4), which states:

> **A person who directly or indirectly controls another person who is liable under subsection 1 or 3,** a partner, officer or director of the person liable, a person occupying a similar status or performing similar functions, any agent of the person liable, an employee of the person liable if the employee materially aids in the act, omission or transaction constituting the violation, and a broker-dealer or sales representative who materially aids in the act, omission or transaction constituting the violation, **are also liable jointly and severally with and to the same extent as the other person,** but it is a defense that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by which the liability is alleged to exist. (emphasis added)

Plaintiffs, however, omitted the following language that also appears in NRS

90.660(4):

> With respect to a person who directly or indirectly, controls another person who is liable under subsection 3, it is also a defense that the controlling person acted in good faith and did not, directly or indirectly, induce the act, omission or transaction constituting the violation. Contribution among the several persons liable is the same as in cases arising out of breach of contract.

With respect to liability under NRS 90.660(1), plaintiffs stated that VCC violated NRS 90.660(1)(b) because NRS 90.460 provides that "[i]t is unlawful for a person to offer to sell or sell any security in this State unless the security is registered or transaction is exempt under this chapter."

With respect to liability under NRS 90.660(3), plaintiffs did not allege or prove that Robinson or any other defendant engaged in any act or transaction that violated NRS 90.580.

At page 2 of his opposition and partial joinder filed on May 27, 2020 (AA-10:APP001320), Robinson joined in the "legal authorities and arguments as to issues regarding securities law, bankruptcy, **statute of limitations**, and damages and attorney's fees" raised by Rodriguez in his opposition to plaintiffs' motion for damages and attorneys' fees, filed on May 21, 2020. (emphasis added) (AA-10:APP001251-APP001268)

As quoted at page 10 of the Rodriguez opposition (AA-10:APP001260), NRS

90.670 expressly provides:

> A person may not sue under NRS 90.660 **unless suit is brought within the earliest of** 2 years after the discovery of the violation, **2 years after discovery should have been made by the exercise of reasonable care,** or 5 years after the act, omission or transaction constituting the violation. (emphasis added)

In Baroi v. Platinum Condominium Development, LLC, 914 F. Supp. 2d 1179 (D. Nev. 2012), plaintiffs claimed that the defendants violated NRS 90.460 because they had sold condominium units combined with a rental agreement without complying with Nevada securities law.

The district court agreed with the defendants that even if the real estate sale and rental agreement was a security, "[t]he securities' status as registered or unregistered was publicly available information capable of discovery through reasonable care. *See* Nev. Rev. Stat. § 90.730." Id. at 1199.

The district court also stated that plaintiffs "had all facts necessary to bring their registration claims at the time they signed their purchase agreements, even if they did not understand the legal significance of those facts until later." Id. at 1199.

NRS 90.215 defines the word "Administrator" to mean "the Deputy of Securities appointed pursuant to NRS 225.060."

NRS 90.730(1) expressly provides that "[e]xcept as otherwise provided in subsection 2, information and records filed with or obtained by the Administrator are

public information and are available for public examination."

Consequently, if any of the plaintiffs had in fact believed that they were purchasing a "security" as defined in NRS 90.295, they could easily have determined whether or not the "security" was registered by contacting the Administrator. Applying the "reasonable care" standard in NRS 90.670 to the facts of the present case, Provident Trust had only two (2) years from the date of lending money to VCC to file a complaint alleging that Robinson had violated NRS 90.460.

As set forth at pages 12 and 13 above, every single promissory note was signed by VCC on or before December 24, 2014. Consequently, the two (2) year statute of limitations for every claim based on an alleged violation of NRS 90.460 expired no later than December 24, 2016.

As stated at pages 2 and 3 above, however, the complaint in Case No. A-17-762264-C was not filed until September 28, 2017, and the complaint in Case No. A-17-763003-C was not filed until October 12, 2017.

Every claim asserted by plaintiffs based on NRS 90.660 was therefore time-barred and could not support entry of any judgment against Robinson.

5. The amount of damages awarded to each plaintiff pursuant to NRS 90.660 is not consistent with the language in NRS

90.660(1).

Moreover, even if Robinson was liable under NRS 90.660, the judgment entered against Robinson is inconsistent with the language in NRS 90.660(1) that expressly prevents plaintiffs from obtaining double recovery for their claims.

As discussed above, Section III(B)(3) of VCC's Chapter 11 Plan (AA-10:APP001297) required that each holder of an unsecured promissory note accept stock of VCC "in exchange for and in full and final satisfaction, compromise, settlement, release, and discharge of each Allowed Class 3 Claim."

NRS 90.660(1) states in relevant part:

> **A purchaser who no longer owns the security** may recover damages. Damages are the amount that would be recoverable upon a tender **less the value of the security when the purchaser disposed of it**, plus interest at the legal rate of this State from the date of disposition of the security, costs and reasonable attorney's fees determined by the court. (emphasis added)

With respect to the words "the amount that would be recoverable upon a tender," the immediately preceding sentence in NRS 90.660(1) states:

> **Upon tender of the security,** the purchaser may recover the consideration paid for the security and interest at the legal rate of this State from the date of payment, costs and reasonable attorney's fees, less the amount of income received on the security. (emphasis added)

In their statement of damages, filed on February 3, 2020 (AA-3:APP000496-APP000499), plaintiffs requested that damages be awarded for the principal amount of each note, plus interest at 9% per annum dating from February 2015 to February

2020, plus late fees equal to five percent (5%) of the interest charged, plus attorney's fees equal to thirty percent (30%) of each amount identified in the column named "Total Principal, Int + Late Fee."

In their statement of damages NRS § 90.660, filed on February 22, 2020 (AA-4:APP000541-APP000545), plaintiffs requested that damages be awarded for the principal amount of each note, plus statutory interest pursuant to NRS 90.660 beginning with the date of each note until February 22, 2020 (less the amount of the interest only payments made by VCC for each note as of January 15, 2015), plus attorney's fees equal to thirty percent (30%) of each amount identified in the "Total Principal and Int." column.

Plaintiffs therefore requested that damages be awarded **as if** Provident Trust had not already tendered each promissory note in return for stock in the reorganized VSS as provided by Section III(B)(3) of the Chapter 11 Plan confirmed on September 5, 2018. (AA-10:APP001297) In particular, plaintiffs' statement of damages did not include any reduction for "the value of the security when the purchaser disposed of it" as required by NRS 90.660(1).

Because each holder of an unsecured promissory note received stock of VCC "in exchange for and in full and final satisfaction" of its allowed Class 3 Claim, the

language in NRS 90.660(1) required that the damages claimed by plaintiffs be offset in full by the value of the VCC stock received by Provident Trust under the Chapter 11 Plan. Consequently, even if plaintiffs' claims were not time-barred by NRS 90.670, plaintiffs had no right to recover for a second time the principal amount of each note that had been exchanged for stock in VCC.

Likewise, the interest accrued on each promissory note prior to the exchange of VCC stock for each note would necessarily be discharged by the receipt of VCC stock "in full and final satisfaction" of each plaintiff's allowed Class 3 Claim.

Moreover, plaintiffs were not entitled to recover "interest at the legal rate of this State from the date of disposition of the security" because each plaintiff received the VCC stock "in full and final satisfaction" of its allowed Class 3 Claim on "the date of disposition" for each promissory note.

For the same reason, plaintiffs were not entitled to recover "statutory interest from the date of purchase to January 15, 2020" because the Chapter 11 Plan that fully satisfied each promissory note was confirmed on September 5, 2018. (AA-10:APP001271-APP001281) It is impossible for a promissory note that has been satisfied "in full" to continue to accrue interest at any interest rate.

At pages 3 to 5 of their reply to defendant Vernon Rodriguez' memorandum of

supplemental authorities on post judgment motions (AA-11:APP001580-APP001582), plaintiffs quoted from Schleicher v. Wendt, 529 F. Supp. 2d 959 (S.D. Ind. 2007), regarding "control person liability" under Section 20(a) of the Securities Exchange Act of 1934.

In that case, however, the plaintiffs had not received stock in exchange for "full satisfaction" of their securities fraud claims like plaintiffs did in the present case. The defendants instead based their defense solely on the fact that "Conseco was discharged in bankruptcy from any potential liability under the Exchange Act." 529 F. Supp. 2d at 980.

Plaintiffs also quoted at length from Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985), but like the court in Schleicher v. Wendt, the court in Underhill v. Royal focused only on whether the bankruptcy discharge under 11 U.S.C. § 524(e) affected the individual liability of Carlos Royal. Id. at 1432. The court did not discuss at all the legal effect of receiving stock in exchange for "full satisfaction" of the creditors' claims.

6. Plaintiffs did not prove that they were entitled to recover judgment against Robinson for fraud, misrepresentations and omissions.

In paragraph 46 at pages 9 and 10 of his complaint in Case No. A-17-762264-C (AA-1:APP000009-APP000010), Hotchkiss alleged that five different

"misrepresentations and omissions were made to the Plaintiff by unlicensed third party sales representative Stoll, and Robinson, in furtherance of acts undertaken and authorized by Defendants, and relied on by Plaintiff in making the investment." On the other hand, the complaint did not "state with particularity the circumstances constituting fraud or mistake" by Robinson as required by Nev. R. Civ. P. 9(b). Instead, paragraph 46 of the complaint only stated "with particularity" allegations relating to representations made to plaintiff by Josh Stoll, Retire Happy, LLC and Julie Minuskin.

In paragraph 53 at page 11 of their complaint in Case No. A-17-763003-C, (AA-1:APP000027), plaintiffs alleged that "Defendant Robinson mislead Plaintiffs by knowingly allowing a preprinted Promissory Note containing his guarantee to be used, which he knew Plaintiffs would be relying on in loaning money to VCC" and that "Ron Robinson was misappropriating funds from the Note offering and removing them from the company's bank account to fund his other business ventures."

On the other hand, Mr. Robinson testified that he did not intend to guarantee all of the promissory notes (AA-4:APP000614, ll. 16-18), that the Hotchkiss note did not bear his initials (AA-4:APP000616, l. 22 to APP000617, l. 4), that Julie Minuskin was not authorized to use any promissory note that did not have his initials (AA-

4:APP000622, ll. 16-20), and that his initials were not on the notes. (AA-4:APP000636, ll. 8-12)

Plaintiffs did not present any testimony by Julie Minuskin stating that she was ever authorized to use a promissory note that did not bear Mr. Robinson's actual initials.

With respect to the second claim that "Ron Robinson was misappropriating funds from the Note offering," plaintiffs presented inadmissible hearsay testimony by Frank Yoder based on a report prepared by his brother, Mike Yoder. (AA-5:APP0000742, ll. 11-25)

On cross-examination, Mr. Yoder admitted that the report admitted as Trial Exhibit 9 (AA-7:APP000961-APP000968) was never actually presented to the Board of Directors for Wintech LLC. (AA-5:APP000764, l. 24 to AA-5:APP000765, l. 4) Mr. Yoder also admitted that the consolidated financial statements for VCC as of September 30, 2014 (Trial Exhibit 12 at AA-7:APP000991-APP001003) did not reveal that any monies were misappropriated by Robinson. (AA-5:APP000799, l. 10 to AA-5:APP000800, l. 11)

In Barmettler v. Reno Air, Inc., 114 Nev. 441, 956 P.2d 1382, 1386 (1998), this court stated that in order to prove a claim for fraudulent misrepresentation, each

plaintiff had the burden to prove each of the following four (4) elements by "clear and convincing evidence" :

> (1) A false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.

In their opposition to defendant's pre trial brief (AA-4:APP000504-APP000515) and in their trial brief (closing argument) (AA-9:APP001169-APP001178), plaintiffs did not cite any authorities or identify any evidence that proved any of the four (4) required elements as relates to Robinson. At page 2 of the stipulation for trial filed on February 3, 2020 (AA-3:APP000501), plaintiffs instead stipulated that "none of the Plaintiffs ever met Mr. Robinson in person" and "none of them ever spoke to Mr. Robinson prior to investing."

Given those stipulated facts, it is impossible for Mr. Robinson to be liable to the plaintiffs for fraud and misrepresentation.

7. The attorneys fees awarded by the district court were not authorized by agreement or statute, and the amount awarded is not reasonable.

At page 3 of their motion for damages and attorney's fees (AA-9:APP001202), plaintiffs stated that "[b]oth NRS § 90.660 and the VCC Note provided for the return of principal, interest and costs and attorney's fees, while the VCC Note also allows

for late fees and a higher, fixed rate of interest."

Plaintiffs attached a copy of their statement of damages NRS § 90.660, filed on February 22, 2020, as Exhibit "A" to plaintiffs' motion (AA-9:APP001212-APP001217) to support their request for damages against Rodriguez, and plaintiffs attached a copy of their statement of damages, filed on February 3, 2020, as Exhibit "B" to plaintiffs' motion (AA-9:APP001218-APP001222) to support their request for damages against Robinson.

As noted above, however, the amounts in Exhibit "B" to plaintiffs' motion include interest charged at 9% per annum dating from February 2015 **to February of 2020** even though the Chapter 11 Plan confirmed on September 5, 2018 expressly provided that each plaintiff would receive stock in VCC "in exchange for and in full and final satisfaction" of its allowed Class 3 Claim.

At page 2 of the confirmed plan (AA-10:APP001288), the word "Claim" is defined as follows: "As defined in Bankruptcy Code section 101(5)."

11 U.S.C. § 101(5)(A) defines the word "claim" to mean "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."

As a result, the "full and final satisfaction" of each plaintiff's allowed Class 3 Claims would necessarily include all interest and late fees accrued as of the date of exchange as well as any "attorney's fees and costs" that plaintiffs had incurred as of that date.

Plaintiffs did not cite any authority that allowed them to charge interest or late fees after Provident Trust exchanged each note for VCC stock, and plaintiffs did not cite any authority that permitted them to recover "attorney's fees and costs" incurred after each promissory note was exchanged for VCC stock.

Furthermore, instead of proving the attorney's fees and costs actually incurred by the plaintiffs, plaintiffs requested that they be awarded attorney's fees equal to thirty percent (30%) of the amounts listed in the column identified as "Total Principal, Int + Late Fee" in Exhibit "B" to plaintiffs' motion. The $253,565 for attorney's fees awarded to plaintiffs in the judgment entered against Robinson is based on that calculation.

On May 27, 2020, Robinson filed a partial joinder to defendant Vernon Rodriguez's opposition to plaintiff's motion for attorney's fees, and Robinson joined in the "legal authorities and arguments" raised by Rodriguez regarding "damages and attorney's fees." (AA-10:APP001320)

This includes Rodriguez's arguments that NRS 90.660(4) expressly limits the liability of "[a] person who directly or indirectly controls another person who is liable under subsection 1 or 3" to "the same extent as the other person." (AA-10:APP001259)

Because each plaintiff received stock in VCC "in exchange for and in full and final satisfaction" of its allowed Class 3 Claim against VCC, Robinson could not be liable as a "control" person for payment of a claim that no longer existed.

In Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), this court quoted four (4) "basic elements to be considered in determining the reasonable value of an attorney's services" that were applied by the Arizona Supreme Court in Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144, 146 (1959). The third factor required that the court consider *"the work actually performed by the lawyer*: the skill, time and attention given to the work." Id.

This court also quoted the Arizona Supreme Court's statement that "good judgment would dictate that each of these factors be given consideration by the trier of fact and that no one element should predominate or be given undue weight." Id.

In Logan v. Abe, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015), this court stated:

> While it is preferable for a district court to expressly analyze each factor relating to an award of attorney fees, express findings on each factor are not necessary for a district court to properly exercise its discretion. Certified Fire Prot., Inc. v. Precision Constr., Inc., ___ Nev. ___, ___, 283 P.3d 250, 258 (2012). Instead, **the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence**. *See* Uniroyal Goodrich Tire,111 Nev. at 324, 890 P.2d at 789. (emphasis added)

In Logan v. Abe, this court also stated:

> **Although the district court's order states that it considered the attorneys' invoices, they are not included in the appellate record.** Because these invoices were omitted from the appellate record, we must presume that they support the district court's award of attorney's fees under the Bunzell factors. *See* Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

In the present case, this court cannot "presume" that plaintiffs' attorneys' invoices support the district court's award of attorney's fees because plaintiffs did not support their motion with any invoices that revealed the actual amount of "time and attention" that plaintiffs' counsel provided for the present matter.

In paragraph 5 of his declaration (AA-10:APP001249, ¶ 5), David Liebrader, Esq. stated that "[s]ince 1993 I have practiced primarily in the field of investment loss recovery," and in paragraph 6 of his declaration (AA-10:APP001249, ¶ 6), Mr. Liebrader stated that "[s]ince 1993 I have personally handled and resolved well over 1000 investment loss securities related disputes" and that "[m]any of those cases involved unregistered securities."

The first full paragraph at page 2 of the court's findings of fact, conclusions of

law and order on motion for damages and attorney's fees (AA-10:APP001365) states that the district court evaluated "the work actually performed by the lawyer" as required by Brunzell v. Golden Gate National Bank,

On the other hand, although paragraph 12 of Mr. Liebrader's declaration (AA-10:APP001250, ¶ 12) stated that "[t]he complex issues required extensive research," Mr. Liebrader did not actually identify any "complex issues" that needed to be researched given Mr. Liebrader's prior experience with "over 1000 investment loss securities related disputes."

Mr. Liebrader also stated that "depositions were noticed and taken of the key parties" (AA-10:APP001250, ¶ 12), but he did not identify the number of depositions taken for the present case or what amount of preparation was required for each deposition.

In paragraph 13 of his declaration (AA-10:APP001250, ¶ 13), Mr. Liebrader stated that "[a]s I took this case on a contingency fee basis **I did not keep strict track of my time.**" He also stated that "if I had to make **an educated guess** on the amount of time I spent on this case, I would estimate it is well over 250 hours." (emphasis added)

This court has stated that "[s]ubstantial evidence has been defined as that which

'a reasonable mind might accept as adequate to support a conclusion.'" State Employment Security Department v. Hilton Hotels Corp., 102 Nev. 606, 729 P.2d 497, 498 (1986) (*quoting* Richardson v. Perales, 402 U.S. 389 (1971), and *citing* Robertson Transp. Co. v. P.S.C., 39 Wis. 2d 653, 159 N.W.2d 636, 638 (1968)).

Mr. Liebrader's "educated guess" regarding the work he provided is not "substantial evidence" upon which the district court could base a finding of fact regarding "the work actually performed by the lawyer."

Mr. Liebrader also stated in paragraph 13 of his declaration (AA-10:APP001250, ¶ 13) that "[g]iven the extensive amount of work done for the clients, **I believe** 30% is well within the boundaries of a generally accepted fee arrangement in this field and in this community." (emphasis added)

On the other hand, because Mr. Liebrader represented ten (10) clients at the same time, if 250 hours accurately reflects the time Mr. Liebrader spent for the two consolidated cases, the award of a attorneys' fees for $253,565 represents an hourly rate of $1,014 per hour.

Plaintiffs did not produce any evidence proving that such a high hourly rate was "reasonable" in a case involving the same legal issues or the same degree of complexity as the present case.

In Schwartz v. Schwerin, 85 Ariz. 242, 246-247, 336 P.2d 144, 146-147 (1959), both parties presented expert testimony regarding the reasonable value of the services provided by plaintiff's counsel.

In the present case, plaintiffs did not produce any expert testimony regarding "the boundaries of a generally accepted fee arrangement in this field and in this community."

CONCLUSION

By reason of the foregoing, Robinson respectfully requests that this Court reverse the findings of fact and conclusions of law and judgment entered by the district court and remand this case to the district court with instructions to enter judgment in favor of Robinson.

DATED this 12th day of November, 2021.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for defendant/appellant

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)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 13,988 words.

3. 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 of the transcript or appendix where the matter relied on is to be found.

DATED this 12th day of November, 2021.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480

Henderson, Nevada 89074
Attorney for defendant/appellant

CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 12th day of November, 2021, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

David Liebrader, Esq.
LAW OFFICES OF DAVID
LIEBRADER, APC
3960 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169

/s/ /*Maurice Mazza /*
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.