IN THE SUPREME COURT OF THE STATE OF NEVADA

LAW OFFICE OF DANIEL S. SIMON; DOES 1 through 10; and, ROE entities 1 through 10; Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TIERRA JONES Respondents, and EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Real Parties in Interest.	**SUPREME COURT CASE NO.** DISTRICT COURT CASE NO.: A-16-738444-C *Consolidated with:* DISTRICT COURT CASE NO.: A-18-767242-C

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS

VOLUME VIII OF X

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Q Did they all clear?

A Yes.

MR. GREENE: I have nothing else, Your Honor.

THE COURT: Thank you, Mr. Greene. Mr. Christiansen, do you have any follow up?

MR. CHRISTIANSEN: Just one question.

THE COURT: Okay.

RECROSS-EXAMINATION

BY MR. CHRISTIANSEN:

Q Ms. Edgeworth, on -- I showed you the first bill. If I were to show you the last line of bills 2, 3 and 4, could we agree that the word reduced is all four -- all three of those bills?

A If you say that they are, Mr. Christiansen, yes.

Q Okay.

MR. GREENE: I just have one more then.

FURTHER REDIRECT EXAMINATION

BY MR. GREENE:

Q Let's take a look at the very last line of Mr. Simon's very last bill, okay?

THE COURT: This is the superbill, Mr. Greene?

MR. GREENE: This is the superbill.

THE COURT: Okay.

MR. GREENE: This is page 79.

BY MR. GREENE:

Q Total fees at 550 per hour. Do you see that, Angela?

A I do.
Q Where does it say reduced?
A It does not.
Q Anywhere, does it?
A No.
Q That's all I have.

FURTHER RECROSS-EXAMINATION

BY MR. CHRISTIANSEN:

Q Just -- Ms. Edgeworth, do you know the date of your first bill? Just the date?
A December 6th or 16. Somewhere in December, '16.
Q Thank you, ma'am.

THE COURT: Anything else, Mr. Greene?

MR. GREENE: No, Your Honor.

THE COURT: Mr. Christiansen?

MR. CHRISTIANSEN: No, ma'am.

THE COURT: Okay. This witness may be excused. Ms. Edgeworth, thank you very much for your testimony again today.

THE WITNESS: Thank you, Your Honor.

MR. GREENE: I think your estimation of time of Mr. Vannah's was more accurate than Mr. Christensen.

THE COURT: Me and Mr. Vannah just aren't as optimistic as Mr. Christensen.

MR. CHRISTENSEN: I did use the word fantasy, and I know what it means.

MR. VANNAH: I'm outraged. I'm outraged and shocked.

THE COURT: Okay. So --

MR. GREENE: Please don't tell us how you know that.

THE COURT: -- it's 4:25. I think everybody has an understanding and nobody is going to close today.

MR. VANNAH: I'm too tired.

MR. CHRISTIANSEN: No, ma'am.

THE COURT: I understand, Mr. Vannah. So, what we're going to do is I'm going to get your closing arguments in writing. They're going to be blindly done. We're not going to do a closing and then a response and a reply. They're going to be blindly done by both parties. If you could submit those to chambers by Friday at 5:00.

MR. CHRISTIANSEN: Perfect.

MR. VANNAH: Could you give us like until Monday, so we can have the weekend?

THE COURT: Mr. Vannah. Yeah, Monday at 5:00 is fine.

MR. VANNAH: Monday at 5:00.

THE COURT: Yes.

MR. VANNAH: Yeah. That way we have a little more time.

THE COURT: Okay.

MR. CHRISTIANSEN: Thank you, Your Honor.

MR. GREENE: Thank you, Your Honor.

MR. CHRISTENSEN: Thanks for all you're accommodating me, Judge. I really appreciate it.

THE COURT: No, I appreciate it. It's fine. I just have to not

get Judge Herndon mad at me.

MR. CHRISTIANSEN: Oh, he'll take it out on me. Don't worry about it.

THE COURT: Yeah. My goal is to not get Judge Herndon mad at me. I was very nice to him when I called him.

[Proceedings concluded at 4:29 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

_____

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Eighth Judicial District Court
District of Nevada

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORTATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10; Defendants.	CASE NO.: A-18-767242-C DEPT NO.: XXVI **Consolidated with** CASE NO.: A-16-738444-C DEPT NO.: X **CLOSING ARGUMENTS OF LAW OFFICE OF DANIEL SIMON**
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	

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CLOSING ARGUMENTS OF LAW OFFICE OF DANIEL S. SIMON

Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law (jointly the "Defendants" or "Law Office" or "Mr. Simon") submits their closing arguments in support of their motion to adjudicate the attorney's lien and motions to dismiss.

I.

INTRODUCTION

Danny and Eleyna Simon were close family friends with Brian and Angela Edgeworth for many years. The families travelled abroad together, and they routinely helped each other out when needed. Angela Edgeworth agrees Eleyna Simon was a close friend who helped plan her father's funeral. However, after one discussion about attorney's fees owed, the Edgeworths, ended the friendship and personally sued Mr. Simon for punitive damages. They sued Mr. Simon before he even had the ability to deposit the settlement money solely as a tactic to avoid paying him a reasonable fee.

On April 10, 2016, a house Brian Edgeworth started building as an investment suffered a flood. Lange, the plumber, installed a defective Viking fire sprinkler that caused the flood. The flood caused about $500,000 in damage.

Mr. Edgeworth decided not to buy course of construction insurance, so he had to look to Lange to pay or repair. Lange refused to pay or repair the flood damage, blaming the defective Viking fire sprinkler.

Mr. Edgeworth first tried to resolve the claim on his own. Mr. Edgeworth got nowhere. Mr. Edgeworth soon realized that he needed an attorney.

At the outset, the Edgeworths had difficulty finding an attorney. The Edgeworths felt it would be too costly to pay an hourly lawyer full time at full rates and looked for a favor.

Given the Edgeworths self-imposed limits on what they would pay, on May 27, 2018, the Edgeworths decided to ask their friend, Mr. Simon, for a favor:

> Hey Danny:
>
> I do not want to waste your time with this hassle (other than to force you to listen me bitch about it constantly) and the insurance broker says I should hire Craig Marquiz and start moving the process forward. Should I just do that and not bother you with this? My only concern is that some goes nuclear (with billing and time) when just a bullet to the head was all that was needed to end this nightmare (and I do not know this person from Adam).
>
> …
>
> Okay, I will type up the summary with all the documents today and then get them to you somehow. I would rather pay you and get it resolved than have someone like Craig drag this in forever.

See, **Exhibit 80, SIMONEH0003557-0003558.**

Mr. Simon agreed to help his friends with the flood claim and to send a few letters. Because they were friends, Mr. Simon took the case on a friends and family basis and deferred a discussion on attorney fees. Danny specifically said "we will cross that bridge later." *See*, **Exhibit 80, SIMONEH0003557-0003558**.

There was no express written or oral agreement on fees at the "outset"[1] *of the case.* Mr. Simon took the case as a favor in the belief that the Law Office could push Lange and Lange's insurance carrier to pay the property loss claim, especially given the clear language of the contract between Lange and the Edgeworths.

In June of 2016, the Law Office filed a complaint. The case did not begin to heat up until December of 2016. While the case began as a favor, it grew into a complex products liability case with many other aspects, including breach of contract claims, contract interpretation, property damage, construction building codes, insurance coverage, engineering,

[1] See all three of Mr. Edgeworth's affidavits clearly state it was agreed to at the "outset." *See,* **Exhibits 16, 17** and **18.**

manufacturing, weather sciences and punitive damages.

The Edgeworths openly admit that the case dramatically changed from where it started as a favor and turned into a beast. There was never a meeting of the minds as to compensation. Mr. Kemp credibly testified that in his expert opinion, the email confirms there was no express or implied agreement for compensation as Mr. Edgeworth was looking for terms based on several options, including an hourly, contingency or hybrid. The email states as follows:

> "We never really had a structured discussion about how this might be done"
> …
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450k from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell."

See, **Exhibit 27.**

Mr. Edgeworth openly admitted that there was not agreement as to the punitive aspect of the case as nobody could have contemplated it at the beginning of the case that started as a favor. Mrs. Edgeworth also testified that the case changed when it became a "beast" and there was never an agreement for compensation for the new aspect of the case. Since the case became a new case, Mr. Kemp made it abundantly clear that the evidence of the August, 22, 2017 email confirms that there was no contract at all, and the lack of any other evidence supporting a different conclusion confirms that compensation for the new case was never reached.

The Court saw firsthand the excellent work of the Law Office. The original cost of construction of the house, including land acquisition was about $3 million. The cost to repair flood damage was about $500,000. The entire case settled for $6.1 million.

Mr. Will Kemp testified that the result was beyond amazing. Mr. Kemp said the settlement amount was the highest for a single home product defect in Nevada history. Mr. Kemp also testified that the case would not have gotten off the ground if Mr. Simon did not take

the case as a favor.

On December 7, 2017, the Edgeworths signed a "Consent To Settle" on the advice of the Vannah firm and against Simon's advice. *See*, **Exhibit 47**. This form was signed by both, Mr. and Mrs. Edgeworth who acknowledge "**We have been made more than whole**." *Id.* This was also re-affirmed by the Edgeworths at the hearing. The Edgeworths received $4 million cash in January of 2018. Even though they were made "more than whole" they now seek the remaining $1,977,843.80, held in the trust account. The disputed amount left in the trust account was earmarked by the mediator, Floyd Hale, as attorney's fees when Mr. Hale made the $6 million mediator's recommendation. The choice now is to grant the money earmarked for attorney's fees to the attorney that did the work with a great result; or, to give the money to the clients who have already received $4 million for a $500,000 property damage claim and "have been made more than whole."

The Edgeworth's view of the value of legal services is contrary to the law and not supported by any evidence. Mr. Edgeworth testified about what he thinks of the value of legal services. At the end of day two, Mr. Edgeworth testified he would have been interested in a deal with the Law Office in which the Law Office paid off the loans the couple took from Angela's mother and Brian's friend. At 4:42 p.m. of the video on day 2, Mr. Edgeworth testified that he thought his negotiating position improves and the value of legal services goes down as the Law Office devoted more time to the case and made the case more valuable.

This is the core of the dispute. The Edgeworths believe the money due the Law Office goes down as the hours spent by the Law Office goes up and the case is made more valuable; while the Law thinks the opposite. The Law holds that the payment due increases as time spent on the case increases and when the value of the case increase.

Mr. Simon worked on the case with the understanding that the Law Office would receive a reasonable fee at the end, in part, dependent on the result obtained. Mr. Simon's understanding was that he was due quantum meriut, per the Law. Of course, Mr. Simon also thought, incorrectly, that he could reach an agreement with his friends on what the reasonable amount would be. The facts and the law of this case support a finding by the Court of quantum meruit. If the court determines that a contract did not exist for compensation and/or Mr. Simon was constructively discharged, the court is free to determine the reasonable amount of the services rendered based on quantum meruit.

II.

CONSTRUCTIVE DISCHARGE / TERMINATION

Constructive discharge of an attorney may occur under several circumstances.

- Refusal to communicate with an attorney creates constructive discharge. *Rosenberg v. Calderon Automation*, 1986 Ohio App. LEXIS 5460 (Jan. 31, 1986).
- Refusal to pay an attorney creates constructive discharge. *Christian v. All Persons Claiming Any Right*, 962 F. Supp. 676 (U.S. Dist. V.I. 1997).
- Suing an attorney creates constructive discharge. *Tao v. Probate Court for the Northeast Dist*. #26, 2015 Conn. Super. LEXIS 3146, *13-14, (Dec. 14, 2015). See also *Maples v. Thomas*, 565 U.S. 266 (2012); *Harris v. State*, 2017 Nev. LEXIS 111; and *Guerrero v. State*, 2017 Nev. Unpubl. LEXIS 472.
- Taking actions that preventing effective representation creates constructive discharge. *McNair v. Commonwealth*, 37 Va. App. 687, 697-98 (Va. 2002).

The Edgeworths did all the above and more. Constructive discharge occurred when the Edgeworths hired a different lawyer, stopped talking to the Law Office, stopped following the advice of the Law Office, accused the Law Office of an intent to steal $6 million dollars, refused to deposit settlement proceeds in the trust account and sued the Law Office for conversion and requested punitive damages.

Mr. Simon credibly testified that when he received the letter of direction on November 30, 2017, he believed he had been fired. *See*, **Exhibit 43.** Mr. Vannah's firm was retained on November 29, 2017 to represent the Plaintiffs for the Viking claims. The retainer specifically states, as follow:

> Client retains Attorneys to represent him as his Attorneys regarding Edgeworth Family Trust and AMERICAN GRATING V. ALL VIKING ENTITIES and all damages including, but not limited to, all claims in this matter and empowers them to do all things to effect a compromise in said matter, or to institute such legal action as may be advisable in their judgment, and agrees to pay them for their services, on the following conditions:
> …
> (b) $925 an hour for attorney time for Robert D. Vannah and John B. Greene
>
> (c) Client agrees that his attorneys will work to consummate a settlement of $6,000,000 from the Viking entities and any settlement amount agreed to be paid by the Lange entity. Client also agrees that attorneys will work to reach an agreement amongst the parties to resolve all claims in the Lange and Viking litigation.

See, **Exhibit 90**, Vannah Retainer Agreement. Thereafter, Mr. Vannah's firm soley advised the Edgeworths on all aspects of the case and settlement.

The Edgeworths had no direct contact with Mr. Simon and refused to speak with Mr. Simon even prior to Mr. Vannah's involvement. The last verbal conversation Mr. Simon had with the Edgeworths was on or about November 25, 2017 when Mr. Edgeworth requested the proposed retainer in writing. The last email correspondence with the Edgeworths was on November 29, 2017 when Mrs. Edgeworth promised to meet with Mr. Simon when Mr. Edgeworth returned from China. *See*, **Exhibit 44.** She later admitted that these were false promises to mislead Mr. Simon.

Mr. Simon had already been negotiating the terms of the settlement with Viking during the week of November 27, 2017 prior to Mr. Vannah's involvement. These negotiated terms were put into a final release signed by the clients and Mr. Vannah's office on December 1, 2017. *See*, **Exhibit 5.** Mr. Simon's name is not contained in the release; Mr. Vannah's firm is expressly

identified as the firm that solely advised the clients about the settlement. The provision of the release, V.(E) states, as follows:

> E. PLAINTIFFS represent that their independent counsel, Robert Vannah, Esq. and John Greene, Esq., of the law firm Vannah & Vannah has explained the effect of this AGREEMENT and their release of any and all claims, known or unknown and, based upon that explanation and their independent judgment by the reading of this Agreement, PLAINTIFFS understand and acknowledge the legal significance and the consequences of the claims being released by this Agreement. PLAINTIFFS further represent that they understand and acknowledge the legal significance and consequences of a release of unknown claims against the SETTLING PARTIES set forth in, or arising from, the INCIDENT and hereby assume full responsibility for any injuries, damages, losses or liabilities that hereafter may occur with respect to the matters released by this Agreement.

See, **Exhibit 5.**

The Law Office filed their Notice of Attorneys lien on December 1, 2017 recognizing the need to do so since Mr. Simon was effectively discharged. *See*, **Exhibit 3**. However, Mr. Simon continued to work on the case to protect the client's interest and at the specific direction of the Vannah firm.

On December 7, 2017, Lange offered the sum of $100,000 to resolve the entire claim against Lange Plumbing. Mr. Simon sent a letter advising Mr. Vannah that the Lange claim was a sizeable claim as it allowed for reimbursement of attorney's fees and costs incurred for enforcing the warranty against the Viking Defendants. *See*, **Exhibit 46**. Mr. Simon previously advised the clients at the November 17, 2017 meeting and throughout the litigation that the claim against Lange was a valid claim that was valuable to recover the attorney's fees and costs paid from the Viking settlement.

Later that same day, the Edgeworths signed a "Consent to Settle" the Lange claims for $100,000. *See*, **Exhibit 47**. Vannah advised the clients that they were made "more than whole from the Viking settlement." Mr. Edgeworth also testified that they were "made more than whole" during the evidentiary hearing:

PETE CHRISTIANSEN: So you agree with Mr. Vannah's assessment that as a result of Mr. Simon's work on the punitive aspect of your case, you were over paid? Right? Made more than whole, correct?

BRIAN EDGEWORTH: Correct, they paid me more than.

See, **Brian Edgeworth Testimony on August 27, 2018 at 3:52:00.**

The clients followed Mr. Vannah's advice and chose not to follow the advice of Mr. Simon. Regardless of the advice given, it is clear that the there was a breakdown in the attorney-client relationship preventing Mr. Simon from effectively representing the clients. This further confirmed the intentions of the Edgeworths to discharge Mr. Simon as of November 29, 2017 upon retaining the Vannah firm.

Prior to receiving the settlement proceeds from Viking, the clients, through their lawyer, Mr. Vannah, made accusations that they believed the Law Office would steal the money and would not allow Mr. Simon to deposit the settlement proceeds in his trust account. *See*, **Exhibit 48**. This is substantial evidence of a breakdown in the attorney-client relationship preventing Mr. Simon from effectively representing the clients. Mr. Vannah was already suggesting they were going sue Mr. Simon at that time. *See*, **Exhibit 48.**

The clients demanded that a new trust account be opened with Mr. Vannah as a signer to deposit the Viking settlement proceeds. *See*, **Exhibit 50**. Mr. Simon complied with their unusual request. Prior to depositing any settlement proceeds in the bank account, the Edgeworths, through their counsel, Mr. Vannah, sued Mr. Simon for conversion of the settlement proceeds on January 4, 2018. *See*, **Exhibit 19**. The settlement money was not deposited until January 8, 2018 and did not clear the bank for another week thereafter. The filing of the lawsuit is substantial and compelling evidence that there was a breakdown in the attorney-client relationship preventing Mr. Simon from effectively representing the clients.

The breakdown in the attorney-client relationship began as early as November 25, 2017 when the client's last spoke to Mr. Simon and all acts thereafter confirm that once Mr. Vannah's firm was retained, the Law Office was constructively discharged.

The Edgeworth's assert that because Mr. Simon has not been expressly terminated and since he has not withdrawn and is still technically their attorney of record, there cannot be a termination. Mr. Edgeworth was not credible when he testified in his affidavit that Mr. Simon was paid in full for his services and he was already paid for the work to finalize the settlement. In his affidavit Mr. Edgeworth states "Since we've already paid him for his work to resolve the LITIGATION, can't he at least finish what he's been retained and paid for? (*See*, **Exhibit 17**, 2-12-18 affidavit, 7:11-12) Mr. Edgeworth also alleged that Mr. Simon was paid in full in his complaint filed on January 4, 2018. *See*, **Exhibit 19**. Mr. Edgeworth contradicted himself under oath when he testified at the evidentiary hearing that Mr. Simon is still owed a substantial sum and was not paid in full. Mr. Edgeworth also testified that he always believed that Mr. Simon was owed money even prior to the filing of the complaint. An email from Mr. Vannah dated January 9, 2018, intimates that if Mr. Simon withdrew there would be harsh consequences. *See*, **Exhibit 53**. The Court should find that Mr. Simon was merely fulfilling his ethical duties after his termination by putting his clients' interests above his own and doing whatever acts were necessary to protect the interests of the clients. Mr. Simon's compliance with his ethical duties was also confirmed by the expert opinion of David Clark, Esq. who is a former long-standing Nevada State Bar counsel. *See,* **Exhibit 2**.

The **Court should find** that Mr. Simon was constructively discharged and there was no just cause for his termination. If this finding is made, quantum meruit is used to determine the amount of the lien.

III.

AN EXPRESS HOURLY FEE AGREEMENT WAS NOT FORMED

Mr. Edgeworth's proffered testimony is the only piece of evidence to suggest that an express agreement was made for $550 an hour. At the evidentiary hearing, Mr. Edgeworth testified for the first time that an express oral contract was formed on a phone call on June 10, 2016. The claim of contract formation during a June 10, 2016 phone call, contradicted the earlier testimony by Mr. Edgeworth made in his three declarations submitted to the court, contradicted the facts alleged in the Edgeworths' complaints, and contradicted his attorney's opening statement at the evidentiary hearing. In the Edgeworth declarations, complaint and opening statement, Edgeworth said the express oral contract was formed at the outset of the retention, which occurred on May 27, 2016. *See*, **Exhibits 16, 17, 18, 19** and **20.**

Mr. Edgeworth, through counsel, asserted that the conversation of May 27, 2016, that an express oral contract was formed to pay $275 an hour for the work of Law Office associate Ashley Ferrel, Esq. Mr. Simon denied any hourly fee was discussed let alone a fee for Ashley Ferrel. Mr. Edgeworth later conceded that the fee of Ms. Ferrel was never discussed. Mr. Edgeworth also testified that he was billed a week after the retention. He testified, as follows:

> PETE CHRISTIANSEN: Sir you just told the Court Danny took the case as a favor, do you remember that?
>
> BRIAN EDGEWORTH: Yeah and a week later he started billing me.

See, **Brian Edgeworth Testimony on August 27, 2018 at 1:43:00.**

This contradicted the undeniable evidence that the first bill was not created and sent to Edgeworth until December, 2016.

Ms. Ferrel did not work on the case until briefly in late December of 2016 and significant time until January of 2017. On cross examination, Mr. Edgeworth admitted that her

fee was never discussed at the outset. He also confirmed a bill from Ms. Ferrel was not provided until 14 months later. Mr. Simon did not send a bill for six months after the retention. This further supports Mr. Simon's version that a specific hourly fee amount of $550 was never discussed.

Mr. Edgeworth sent Mr. Simon almost 2,000 emails within 18 months and never stated that there was an hourly contract only for $550 an hour. The June 10, 2016 phone conversation was first testified to by Mr. Edgeworth at the evidentiary hearing and is not contained in any of the three (3) very detailed affidavits that Mr. Edgeworth prepared setting forth his version of the dispute. The June 10, 2016 conversation is inconsistent with his lawyer's opening statement asserting the oral agreement was made point blank at the outset of the representation on May 27, 2018. Mr. Edgeworth tried to suggest outset, which means the beginning, actually meant something else like several weeks after the beginning. This new explanation was created to get around the "cross that bridge later" email from Mr. Simon on May 27, 2016, concerning the fees. There is no evidence to support Mr. Edgeworth's contention that a phone called occurred wherein the parties expressly agreed orally to an hourly representation of $550 an hour. He could have, but did not provide his own phone bill. The email from Mr. Simon on June 10, 2016, when he was out of town, does not reference this crucial phone call. *See*, June 10, 2016 email, attached as **Exhibit 80, SIMONEH0003500.**

Mr. Simon never sent a bill for six months after he started working on the case and credibly explained the reasons for the bills created and the reasons that Mr. Edgeworth chose to pay them, which is discussed in further detail below. Ms. Ferrel credibly testified that the hourly rate of Mr. Simon was first discussed between herself and Mr. Simon only in December, 2016, to determine an amount to establish damages in the Lange claim only. The amount of $550

was determined by using an amount less than what was already approved by the Court in another case and used so that the Defendants would not dispute the amount as damages for the Lange claim. Mr. and Mrs. Edgeworth both admitted that they clearly understood the bills were used for damages in the Lange claim. It was never stated that the $550 an hour was an amount already agreed to with Edgeworth, which was expressly denied.

When the Early Case Conference happened in November, 2016, Mr. Simon had to go back and recreate a bill to produce under NRCP 16.1. The initial bill also had a lot of lost time as the bill was recreated and did not include a lot of emails and phone discussions. Yet, the Edgeworths now want to complain the bill was too high. The Edgeworths both concede they ***never*** suggested the bills were too high to Mr. Simon. To the contrary, the Edgeworths both admitted on the stand they knew the bills were used as damages in support of the Lange claims. As sophisticated and detailed as the Edgeworths are, they both denied knowing that the 2,000 emails and numerous phone calls were not contained in the bills they received. Yet, they want to complain about the time entries, even in the initial bill, was against their favor. Again, they have no basis for this testimony. Their credibility is completely gone when suggesting $550 an hour is too high, when they already acknowledge the reasonable fee in the Viking matter is $925 an hour. This is not a patent or trademark case.

The Edgeworths may argue that they did not know payment was optional. Mr. Simon made it clear in his testimony that costs were expected to be reimbursed, but it was Mr. Edgeworth that chose to pay the bills. He wanted to justify the high interest loans. Mr. Simon never sent an email suggesting he wanted the bills paid and in fact did not bill frequently. Also, Mr. Edgeworth sent a check and then tracked when it was not cashed urging Mr. Simon to cash it. *See*, **Exhibit 30**.

A. <u>While an implied contract between lawyer and client existed, there was no agreement on the payment term.</u>

A contract implied-in-fact must be "manifested by conduct"; it "is a true contract that arises from the tacit agreement of the parties." To find a contract implied-in-fact, the fact-finder must conclude that the parties intended to contract and promises were exchanged, the general obligations for which must be sufficiently clear. It is at that point that a party may invoke quantum meruit as a gap-filler to supply the absent term. Where such a contract exists, then, quantum meruit ensures the laborer receives the reasonable value, usually market price, for his services. *Certified Fire Prot. Inc. v. Precision Constr. Inc.,* 128 Nev. 371, 379-380, 283 P.3d 250, 256, (2012) (internal citations omitted)

There was no implied contract on the payment term. Mr. Simon credibly testified that the billing statements created and produced in litigation were to show damages in support of the Lange contract claim only and were not the amount of compensation to be paid for all the work on the case. Both Edgeworths conceded they knew the bills were used as damages in the Lange claim. Sadly, because the bills were created for this purpose, the Edgeworths now want to use this as a basis to support their scheme to avoid paying Mr. Simon.

On cross examination, Mr. Edgeworth admitted that Mr. Simon started the representation at the outset as a “favor.” The Law Office did not provide a bill until six months later, which was the time a billing statement was necessary to produce at the Early Case Conference to produce evidence of damage under NRCP 16.1 for the Lange claim only. The Law Office is not set up to bill, does not have other hourly clients, did not take a retainer from the Edgeworths, and did not bill regularly every 30 days. The Law Office advanced almost $200,000 in costs. Mr. Edgeworth abused the time of the Law Office sending almost 2,000 emails and he admitted to calling and

emailing at all hours of the day, night and weekends. Mr. Edgeworth never requested an hourly billing contract. These are all acts inconsistent with an hourly only billing contract.

Mr. Edgeworth never confirmed an hourly billing agreement in any of his almost 2,000 emails to the Law Office. A bill was not presented or paid by Mr. Edgeworth after September 2017 when the focus of litigation was directed toward Viking and the billing statements were not necessary to support any of the Viking claims.

Mr. Edgeworth is a very sophisticated, well-educated business man with an MBA from Harvard University. He has successful international companies and has hired many law firms for many years, including large firms on an hourly basis. These firms always have him sign a written agreement, pay a retainer and regularly bill for all time expended on a matter. Mr. Edgeworth is aware of the process of hourly billing. Mr. Edgeworth knew that Mr. Simon's representation was not like the hourly representation with which he has extensive experience. Mr. Edgeworth never asked Mr. Simon for an hourly contract further supporting this was not an hourly contract case.

Mr. Edgeworth sent Mr. Simon and email dated August 22, 2017 entitled "Contingency" in the subject line. *See*, **Exhibit 27**. There is no purpose for Mr. Edgeworth to send the email, except to attempt to reach an agreement about amount of compensation for the attorney's fees. This email supports the conclusion that there was no express or implied agreement for compensation.

The parties testified to a conversation occurring at the San Diego Airport on or about August 9, 2017. Mr. Simon credibly testified that the case was becoming more demanding for his small boutique law firm, and he wanted to reach some type of an express agreement. At the end of the conversation, Mr. Simon told Mr. Edgeworth the Law Office would continue with the case and work out a fair fee depending on the outcome of the case, which is what he usually does. At

that time, the many options explored still did not make any sense given the unique nature of the case. In Mr. Edgeworth's email he confirms that no agreement exists and was trying to explore options.

Mr. Kemp credibly testified that in his expert opinion, the email confirms there was no express or implied agreement for compensation as Mr. Edgeworth was looking for terms based on several options, including an hourly, contingency or hybrid. The email states as follows:

> "We never really had a structured discussion about how this might be done"
> …
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450k from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell."

See, **Exhibit 27.**

Mr. and Mrs. Edgeworth both agree that the nature of the case changed, and it became a beast. This was not a new case that could not have been contemplated by anyone prior. Simply, there was no meeting of the minds as to how to pay the Law Office to handle the beast.

Mr. Edgeworth never followed up about a potential fee agreement and no such agreement was ever reached as Mr. Simon was entrenched in the case and worked in good faith to get a great result. In further support that an agreement never existed, and that Mr. Simon did not work solely on an hourly basis, is that the bills that were produced were merely a fraction of the time the Law Office actually spent to prosecute the case. Rather than being grateful that the multimillion dollar investment in bitcoin did not have to be liquidated, the Edgeworths sued Mr. Simon without even a follow up meeting.

The Court should find the bills were produced to build the case against Lange only pursuant to their construction agreement. The intention of the Edgeworth's and Mr. Simon's strategy during the case was to present the billings statements as damages against Lange. Mr.

Edgeworth testified to this in his deposition and at the evidentiary hearing. The attorney's fees and costs were not an item of damage in the Viking claim.

Mr. Simon credibly testified that Mr. Edgeworth chose to pay the bills to give credibility to his actual damages above his property damage loss. The bills paid helped justify the loans that he took out from his mother-in-law and his long-time friend from high school, who is his current employee. Mr. Edgeworth set the interest rate for his mother-in-law without her knowledge at almost 36% a year. *See*, **Exhibit 57.**

Mr. Edgeworth wanted a bill to pay just prior to his deposition to support his testimony. Mr. Simon did not send any bills to Edgeworth and Edgeworth did not pay any bills after his September deposition. Substantial work was performed by the Law Office in the months of September, October and November, 2017, against Viking ultimately forcing a substantial settlement. The Edgeworths have already received a check in the sum of almost $4 million dollars for their property damage claim based on repairs made of approximately $500,000.

The Edgeworth's complain that RPC 1.5 suggests that an agreement for a contingency fee must be written and this somehow precludes quantum merit in this case. This is not true. Mr. Simon is not seeking a contingency fee as asserted. This case is unique and started out as a different case than what it became at the end when it resolved. Mr. Edgeworth could not find representation without a substantial investment in attorney's fee and costs up front. This did not make economic sense because of the small amount of property damage and the substantial legal work and costs needed to pursue the case. As a friend, Mr. Simon took the case as a favor to help the Edgeworths. Mr. Simon took that case as a favor without a retainer and did not send a bill for 6 months. This certainly benefited the Edgeworths, who cried poor and this property damage claim of $500,000 was too stressful yet they were taking vacations when the first bill was sent

and they had millions in bitcoin. Angela Edgeworth admitted they had cash all along to pay for the house. She was not worried about the loans from her mother. Mr. Simon's bills did not include substantial work that also benefited the Edgeworths. Mr. Simon credibly testified that the objective of his representation at the outset was to trigger coverage with Lange Plumbing to step in and pay the claim. This started with letters, then a complaint and several early motions for summary judgment. It was not until April, 2017 that it was finally determined that Lange Plumbing would not step in and pay the claim. Given the nature of the claims and Mr. Simon's efforts as a friend, a written fee agreement could not be reached early on and Mr. Edgeworth was agreeable with this arrangement. Later on, the need for a fee agreement was discussed, but never agreed to as the case morphed into an entirely new case that could not have been contemplated at the beginning. Absent an express agreement for compensation, the Law Office is due the reasonable value of its services. NRS 18.015.

IV.

THE EDGEWORTHS ARE NOT CREDIBLE

The Court is asked to make a specific finding that Brian Edgeworth and Angela Edgeworth intentionally provided false and misleading testimony in an attempt to persuade the Court to decide in their favor when seeking all of the disputed funds and to advance causes of actions against Mr. Simon personally and his practice for conversion and punitive damages. The intent to support false accusations with false testimony is the most egregious act a person or entity can do when consuming this courts valuable resources and causing another party extreme hardship to defend. The Edgeworths have thumbed their nose to the legal profession when attempting to undermine the legal work done in this case, as well as the testimony of Mr. Kemp. As the fact finder, the Court is free to disregard the entire testimony of the Edgeworths. Nevada

Pattern Jury Instruction 2.07 provides as follows:

> The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.
>
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

See, Nev.J.I.2.07 (196). The Law Office requests that the Court disregard the entire testimony of the Edgeworths based on the intentionally false testimony, as follows:

A. Mrs. Angela Edgeworth

i. They would have hired other lawyers

In an attempt to suggest they did not need to turn to their family friend, Mr. Simon, Mrs. Edgeworth suggested she had other options for help.

First, Mrs. Edgeworth testified they would have hired Mark Katz, but he was too busy. However, Mr. Katz is an Estate Planning and Tax Lawyer, not a trial lawyer handling complex product liability claims.

Next, Mrs. Edgeworth would have hired her longtime friend, Lisa Carteen. However, Ms. Carteen is a patent lawyer from Los Angeles and not licensed in the state of Nevada.

Then, Mrs. Edgeworth testified that they decided to use Mr. Simon instead suggesting they were doing him a favor by using him. However, Mr. Simon told them he did not even want the case at the outset, but they asked for a favor. *See*, **Exhibit 23.**

Mrs. Edgeworth did not have any knowledge of the underlying case and had no substantive involvement during the case, but consistently changed her position during her

testimony when it best suited their position.

ii. I reviewed and authorized all payments

Although at the evidentiary hearing, Mrs. Edgeworth wanted to portray she knew all about the billing because of their detailed internal procedures for payment, she took the opposite position when testifying in the underlying case. In her deposition taken September 18, 2017, she testified as follows:

> Q. Can you tell me how much you've paid in attorney's fees and costs to date.
> A. I don't know. That would be a question for my husband.
> Q. Okay. All right.
> A. I don't think I want to know.

See, **Exhibit 86**, at 39:18-23. She continued in her deposition in the underlying case:

> Q. So was part of this money used to pay the attorneys' fees as you've gone?
> A. Correct.
> Q. Okay. Because you guys have been paying the attorney's fees as you've gone?
> A. Correct.
> Q. Okay. So on a monthly basis you'll pay those fees?
> A. I don't know. I don't know. You'd have to ask my husband that.

See, **Exhibit 86**, at 48:8-17.

iii. We overpaid, his bills were inflated and rate was too high

Mrs. Edgeworth pays John Green $925 an hour. She had zero information regarding the work done by Mr. Simon. She refused to admit that 2,000 emails were not put in bills they paid, which was contrary to her husband. When questioned by the Court, she admitted she never discussed any billing concerns with Mr. Simon. When showed the boxes of documents, she stated "Simon's office did not review the information in the file," but it was just her unfounded belief. She thumbed her nose to the work lawyers do and the entire judiciary as we are all beneath the Edgeworths. In their skewed view, we should all consider ourselves lucky

to help them.

iv. <u>The new cabinets in the kitchen were already replaced.</u>

Her husband testified they were ordered and on the way (he was going to call the guy to follow up). *See,* **Brian Edgeworth testimony on August 27, 2018 2:31:29 to 3:31:54**. However shockingly, Mrs. Edgeworth testified they were already replaced. *See*, **Angela Edgeworth's testimony on September 18, 2018 at 4:20:34 to 4:22:47.** In the Viking case, they always asserted the need to replace kitchen cabinets for $220,000. Mr. Edgeworth wanted to suggest to the court that they were actually using the settlement money for alleged future repairs. This testimony was a sham. Mrs. Edgeworth did not know about this future cabinet claim or forgot. Replacing all cabinets in your kitchen is a huge undertaking requiring the removal of the granite tops and major construction, including drywall, paint and new countertops. The kitchen would not be usable in their home for over a month. The Edgeworths never replaced the cabinets and Mrs. Edgeworth contradicted her husband when she was lost in her own web.

v. <u>The remediation bill was not paid because they did not provide a mold certificate</u>

In an effort to explain they pay their bills and give a reason for not paying the remediator who worked in good faith on an emergency basis to remove all of the water from the flood to minimize the damage, she testified that they needed a mold certificate to get a Certificate of Occupancy. This is not true. The Certificate of Occupancy was issued in December, 2016. They listed their house for sale in June, 2017 for $5.5 Million and moved into the house at the same time. The email from the remediator for payment was dated April 18, 2017. *See,* **Exhibit 24.** The mold certificate she speaks of was not a basis to refuse payment to the remediator to get the certificate of occupancy as she asserted under oath. *See*, **Angela Edgeworth testimony on September 18, 2018 at 2:48:18 to 2:50:05.** It was not used as a basis

from her husband when he refused to pay because there was not a contract.

Mrs. Edgeworth also testified her husband pays all of their bills promptly. Yet, when confronted on cross examination and showed the email from the same remediation company she did not know anything about the email her husband authored, which stated as follows:

> I think we have paid him a fair price. It is doubtful the insurance will pay out. If he sends receipts we will pay cost plus a fair overhead. **We have no contract** and he continually told me that his pay is between him and the insurance company. I would have used the installing subs to tear apart their work if I was paying not the temp workers he did. I want to be fair but **I think he should wait for the judgement. I will give him what the court allows.**

See, **Exhibit 24.** (emphasis added)

vi. She spoke to Miriam Shearing to help her decide to proceed with case.

She suggested that her conversation with Ms. Shearing gave her the confidence to proceed with her claims against Mr. Simon. However, she admitted that she spoke to Ms. Shearing in February of 2018. She sued Simon January 4, 2018.

vii. Simon came around desk and leaned over them.

This is a physical impossibility as the legs of the persons sitting in guest chairs extend underneath the front of Mr. Simons desk and there is no room for someone to walk by a seated person and certainly no room to stand in front of the desk. Her husband never suggested this fact in his hearing testimony or 3 affidavits. If true, this would be a significant scenario that was glaringly absent from his version of the events. This was her false and misleading attempt to create intimidation. Her own husband's testimony undercuts this fabrication.

viii. She believes her husband

Mrs. Edgeworth's testimony was almost entirely based on "I believe my husband"

especially when she adopted all statements made in her husband's affidavit and ratified them on behalf of their company and trust, which include:

- Simon paid in full at the September deposition
- Simon already paid to resolve the litigation
- The money in the trust account is solely the Edgeworth's. His outstanding bill is a separate issue. (The Edgeworth's have lawyers to explain why their position is not legally true, yet they still sued him for conversion).
- August 22, 2017 email sent after significant offers already made.
- Papers were put in our face to sign on November 17, 2017, then they were only eluded to.
- Mr. Simon was a bully, scary, intimidating, extorting and blackmailing us at the 11-17-17 meeting. (No mention of this in any subsequent emails).
- We were uncomfortable because of "F" bombs in office. (She never heard one).
- Nothing except attorney's fees discussed at 11-17-17 meeting. (Mrs. Edgeworth admitted she knew about all matters on calendar and wanted to make sure Mr. Simon was continuing and not vacating them when she was so intimidated, worried, extorted, etc.).
- Simon said we were a danger to children to the volley ball coach. (She did not even speak to coach about the matter, only her husband. She is on board with her husband, coach and Mr. Katz. She did not know if coach even called Mr. Simon for the serious investigation).
- Mr. Edgeworth did all the work. (This comment speaks for itself).

ix. <u>No need for the loans from their mom and best friend/employee</u>

They paid the house off cash as they built it and did not use the Viking settlement to pay the house off. This testimony was disturbing as Mr. Edgeworth always cried poor and that the loans were stressful. Mrs. Edgeworth said she was not worried about her mother. Her husband testified that the Viking settlement was used to pay off the house. Which one is it? The checks for $1.1 million to pay mom and friend cleared the same day as the Edgeworth portion of

the Viking check was deposited. *See,* **Exhibit 94** and **95**. Their explanation was the banks called each other. Since there was no evidence of this, the Court can infer the real reason is that banks clear checks for $1.1 million dollars when the clients already have the money in the account. The Edgeworths can't be trusted or believed on anything.

x. Will Kemp is Wrong

Mrs. Edgeworth knows more than Mr. Kemp on the legal issue of contract formation. When Mr. Christiansen questioned Mrs. Edgeworth about the testimony of Mr. Kemp and that he opined that there was no contract, she stated "he is wrong." *See*, **Angela Edgeworth testimony on September 18, 2018 at 4:18:29 to 4:20:44.** Yet, she has no personal knowledge of any facts related to the alleged contract or the underlying case and her testimony was all based on "I believe my husband." When she was questioned on her basis for her statement, she had none. In fact, she admitted she only reviewed emails recently in preparation of the hearing. The Edgeworths do not have an expert, and cannot dispute the testimony of Mr. Kemp and cannot dispute the amount of the reasonable value of the services testified to by Mr. Kemp. Notably, Mr. Kemp's affidavit was provided in January, 2018. The Edgeworth's had plenty of time to get an expert if they could find one.

When Mrs. Edgeworth argued with Mr. Christiansen that the mystery bill of $72,000 was different than the costs of $72,000; Mrs. Edgeworth finally conceded that she knew about the accounting error that Mr. Simon found and deducted $2,750 from the $72,000 costs. She said yes it's just a coincidence that the $72,000 costs at that time were the same as a bill she never saw or reviewed in court. Since she knew about the credit, her testimony was again misleading to convince the court she had a basis for her personal belief. Once again, she never personally saw the alleged $72,000 bill for attorney's fees that she was testifying about and just

believed her husband.

The Edgeworths have been cursed with "Greed." There is never enough money to satisfy them and they will say and do anything to get more. Even more disturbing, they do not care about the people they hurt along the way. Especially those people who have worked so hard to help them.

xi. <u>An oral contract existed for $550 an hour because my husband told me</u>

All testimony by Mrs. Edgeworth was based on her husband only and that "she believes her husband." She confirmed that she adopts each and every statement of her husband's testimony. She adopted and ratified every statement contained within the three affidavits of Brian Edgeworth and both of their complaints filed against Mr. Simon. Since Mr. Edgeworth provided false and misleading testimony in all of his affidavits, and on the stand, merely adopting and ratifying his statements confirm her testimony cannot be believed. She had to acknowledge that the substantive information she had about the case came from her husband. Her testimony that there was a contract for $550 an hour and that Mr. Edgeworth did all of the work to win the case, came only from her husband, and was based on "I believe my husband." She never had any conversations with Mr. Simon about the fees until November 17, 2017. Mrs. Edgeworth does not have any personal knowledge about the case, the alleged oral contract, the legal work done, the negotiations or any other substantive matter and her testimony should be disregarded.

The reality is that Mrs. Edgeworth is really angry at her husband and tried to save the day by giving false and misleading testimony that defied logic. Most telling is she tried to suggest she knew about the alleged agreement for fees in June, 2016, but did not know anything about the attorney's fees in her deposition on September 18, 2017. She now wants to criticize the amount of the bills for $550 an hour when she was paying her current lawyers (Vannah and

Green together) $1,850 an hour to sue Mr. Simon to avoid paying anything.

B. The Edgeworth's Demeanor

The Edgeworths permeated the courtroom with arrogance and a story that just did not make sense when compared to the evidence. The Edgeworths exuded their arrogance believing that everyone will just agree with every statement they make because they are smarter than everyone else in the courtroom. The best example was when Mrs. Edgeworth had the audacity to testify that Will Kemp was "wrong" on his legal analysis of a legal issue concerning contract formation. Mrs. Edgeworth did not stop there when she attempted to become a billing expert offering opinions about the legal bills. Upon questioning by the Court, she admitted she had no basis for her testimony. She offered $140,000 as a reasonable number for the attorney's lien, but could not state on what basis. She offered the explanation that a bill only her husband allegedly saw at the mediation in October, 2017 was $72,000. Therefore, she thought she would be generous and just double that bill. Her statements were without any regard to the hours or work done during the most crucial time of the case, the results achieved and is just plain offensive. She also accused the Law Office of not reviewing the documents produced in the case based on her own personal belief. Such unfounded testimony undermines the entire legal profession and the work that trial lawyers do and how judicial decisions are made. This is why she thinks her husband did the entire case. She suggested her life was impacted because her husband was not around. Mrs. Simon's husband was not around equally for his family, and it was not her house that flooded, and her husband could have been working on other cases. The entire fee dispute has disrupted the lives of many, and the Edgeworths always demanded that Mr. Simon and his staff go above and beyond, but when it was time to be fair, they would not. The Edgeworths only care about their own lives and have no regard how their actions affect others. In

order to finish this hearing, Judge Herndon was kind enough to halt a criminal murder trial so Mrs. Edgeworth could complete her testimony.

Mrs. Edgeworth had no personal knowledge about the case or conversations her husband had with Mr. Simon, yet she advanced facts as if they were her own. She testified on direct examination as if she was actively involved, including all billing, then on cross examination went to her safe place and did not know anything as she was once again, not involved in the day-to-day. She admitted she only read the emails recently before the hearing and obviously she learned the case by sitting in the courtroom for 4 days.

Mrs. Edgeworth continued with the arrogance when name dropping Miriam Shearing as endorsing her position. The hearsay conversation with Ms. Shearing brought up for the first time with Mrs. Edgeworth allegedly occurred in February, 2018, long after Mrs. Edgeworth sued Mr. Simon personally for punitive damages and conversion for stealing money not yet received from the insurance company. Certainly, Ms. Shearing would not endorse filing a conversion claim against an attorney that placed the disputed funds in a trust account and did not even deposit the settlement funds from the settling defendant when the complaint was filed. The summary of Brian Edgeworth‘s testimony re-confirms their fabricated story telling. Mr. Edgeworth was even worse.

C. Mr. Brian Edgeworth

i. Mr. Edgeworth had to change his testimony about the “outset”

Since Mr. Edgeworth did not read the emails when he prepared his false affidavits, he was forced to change his testimony about the oral agreement from the Starbucks

meeting on May 28, 2016 to June 10, 2016.[2] The reason for the change was when the discussion about the fee was suggested in an email by Mr. Edgeworth, Mr. Simon replied stating "We will cross that bridge later." *See*, **Exhibit 80, SIMONEH0003557-0003558**. Obviously, a new version for the oral agreement had to be changed. Mr. Edgeworth has his own phone records and never provided any evidence of this crucial phone call. This conversation is not identified by a date in Mr. Simon's limited bill. There was an email on June 10, 2016 between Mr. Edgeworth and Mr. Simon. Mr. Simon was out of town, but still promptly answered a question Mr. Edgeworth had. Glaringly absent from the email is the lack of any statements as to the lawsuit being filed or the conversation about the alleged oral contract for $550 an hour. This further undermines the existence of a contract in favor of Mr. Simon's version of events. Simply, Mr. Edgeworth has zero evidence of his alleged "express oral agreement for $550 an hour."

ii. <u>The reason for the August 22, 2017 email was that the case blossomed after substantial offers were made by one defendant.</u>

In Mr. Edgeworth's initial affidavit signed under oath on February 2, 2018, Mr. Edgeworth asserted that the reason for an email to Mr. Simon labeled "Contingency" dated August 22, 2017 was based on the fact that one of the Defendants made a substantial offer and the case already blossomed. *See*, **Exhibit 16**. Mr. Edgeworth states in his affidavit "…after a significant sum of money was offered to Plaintiffs from defendants, Simon became determined to get more, so he started asking me to modify our contract. **<u>Thereafter, I sent an email labeled "Contingency."</u>** (*See*, **Exhibit 16**, B.E. Affidavit 2-2-18,3:8-10). (emphasis added)

During the evidentiary hearing it was confirmed that there were not any offers from any Defendant made prior to the time Mr. Edgeworth sent the August 22, 2017 email. The

[2] The Court will recall Mr. Vannah's opening remarks included the assertion that $550 an hour was made point blank at the "outset."

first minimal offers did not occur until October 10, 2017, which was after substantial time and effort was made by the Law Office.

This statement made in support of material issues in his February 2, 2018 affidavit is false and noticeably absent in his affidavits dated February 12, 2018 and March 15, 2018. *See*, **Exhibit 17** and **Exhibit 18**. This was a material fact asserted in an attempt to persuade the Court that an express agreement for an hourly fee was already in place when he sent his August 22, 2017 email. It was also made to explain away his August 22, 2017 email that made it clear an agreement did not exist. *See*, **Exhibit 27.** The Court should find this testimony was intentionally false and misleading and that no oral contract existed for compensation. Upon questioning by Mr. Christiansen, Mr. Edgeworth refused to acknowledge what was plainly stated in his affidavit. Conduct before, during and after an event can be considered by the Court when determining state of mind. The omission of this fact in the subsequent affidavits is "consciousness of guilt" of his false testimony.

iii. Mr. Edgeworth's Evidentiary Hearing Chart was false and misleading

Mr. Edgeworth testified that he spent 25-30 hours creating a chart to present to the court to show that the hourly time sheets of Mr. Simon and Ms. Ferrel were not accurate in an effort to undermine their efforts or suggest they were being deceitful. *See*, **Edgeworth Exhibit 9, 00007-00012**. One chart entry involved Mr. Simon billing for emails on 8-20-17 and 8-21-17. Mr. Edgeworth asserted that these entries for review of client emails were double entries for the same work. Mr. Simon showed the court 10 emails on 8-20-17 and 12 separate emails on 8-21-17. *See*, **Exhibit 80**, **SIMONEH0002430-0002457.**

Mr. Edgeworth had access to his own emails and could easily verify his own assertions that were intentionally put into a chart aimed solely to discredit Mr. Simon's work in

hopes of persuading this Court. These statements made by Mr. Edgeworth were false and misleading to the Court. Mrs. Edgeworth confirmed they had all of the emails when his chart was made and it would have been easy for her husband to verify the emails before making the wild accusations. When questioned by the Court on several other entries in the chart, Mr. Edgeworth conceded that his assertions made in the chart that he created had no basis and were also misleading and unreliable. Mr. Edgeworth testified he had no evidence to dispute any of the time entries presented by the Law Office. Mrs. Edgeworth also did not have any reason to dispute the entries made in the chart.

Notably, upon questioning by Mr. Christiansen, Mr. Edgeworth continued to refuse to acknowledge an amount owed despite his admission at the evidentiary hearing that he always knew he owed Mr. Simon substantial sums of money for the work performed, and he had no reason to dispute the entries after September, 2017. Mrs. Edgeworth offered speculative testimony based on her own self-serving beliefs that $140,000 would be reasonable. When questioned by the Court on her basis for the number owed, she conceded she had none.

Ms. Ferrel credibly testified to all of the entries in the time sheets and how the Law Office arrived at the hours listed. Ms. Ferrel testified that all of the work contained in the time sheets was work actually done and even though there are some days with entries of 15 plus hours, the work was performed albeit potentially on other days and the dates were merely used to tie the work done to a date as the bill was recreated merely to show the time spent by the Law Office. Ms. Ferrel also credibly testified that Law Office was unable to recover hundreds of hours due to the inability to get the phone logs from Cox Communications and other matters. Mr. Simon testified after Ms. Ferrel and the Edgeworths did not ask Mr. Simon any questions about the time sheets. Ms. Ferrel provided a clear explanation for the entries made. Mrs. Edgeworth sat

through all of Ms. Ferrel's testimony. Despite the explanations given by Ms. Ferrel, Mrs. Edgeworth attempted to advance the entries in her husband's misleading chart and then even created her own chart on phone logs that the Edgeworths never produced. The reason is that Mrs. Edgeworth suggested they she compared her own phone logs (never produced) to Mr. Simon's phone logs, which did not show what she testified to. She stated the bills were 100-200% more than the time for the phone calls. A simple review of the logs shows there is minimal time above the actual time on the logs 1.6% for Simon and 2% for Ms. Ferrel on average. The reason for the minimal difference is that the actual time on the bills is not the full time for billing purposes. The lawyer has to think about the purpose of the call, review information before making a call, then make the call before getting a connection, and after the call take some action that is responsive. Simply, all lawyers, including the Vannah firm, are well aware that billing entries for phone calls will always be more than the actual call time on a phone bill.

iv. <u>The November 17, 2017 Meeting</u>

Mr. Edgeworth testified that on November 17, 2017 while in Mr. Simon's office, Mr. Simon put fee agreement papers in front of him and demanded that Mr. and Mrs. Edgeworth sign them immediately. Specifically, Mr. Edgeworth testified:

PETE CHRISTIANSEN: This morning you heard Mr. Vannah tell the Judge that in your last meeting with Danny Simon he presented you a contract and wanted you to sign it. Remember hearing that?

BRIAN EDGEWORTH: Yes.

PETE CHRISTIANSEN: That's not true is it? When you and your wife Angela went to Danny's office November the 17th to meet with him about what was going on in court that very morning, right. He had to come over here in front of Judge Jones that morning, right?

BRIAN EDGEWORTH: Correct.

PETE CHRISTIANSEN: He didn't give you anything, try to force you to sign it, did he?

BRIAN EDGEWORTH: He tried to force us to sign something, yes.

See, **Brian Edgeworth Testimony on August 27, 2018 at 2:11:00.** Then when Mr. Green got up and questioned Mr. Edgeworth he changed his testimony and then Mr. Christiansen questioned him why he changed his testimony as follows:

PETE CHRISTIANSEN: Isn't it true that a day ago two days ago you told the Judge after you heard Mr. Vannah tell the judge in opening statement that on the 11/17 meeting Danny Simon presented you with a document and tried to force you and your wife to sign it, isn't it true that was your testimony.

BRIAN EDGEWORTH: Yes.

PETE CHRISTIANSEN: Isn't it also true that just now when Mr. Green is up here on direct examination you denied being forced, attempted to sign something on the 11/17 meeting? Isn't that true?

BRIAN EDGEWORTH: No.

…

PETE CHRISTIANSEN: Sir that's not what I asked you. When I asked you the question and when Mr. Vannah stood up in opening statement he told the court that Danny Simon tried to force you that day, you and your wife, to sign something, right?

BRIAN EDGEWORTH: Correct

PETE CHRISTIANSEN: But that's not what you just testified under oath for Mr. Green, you did not just say that, correct?

BRIAN EDGEWORTH: Not using the exact same words, no.

See, **Brian Edgeworth Testimony on August 29, 2018 at 11:13:59.**

Mr. Edgeworth also testified on another day that Mr. Simon did not show them any papers. Mrs. Edgeworth also contradicted her husband and their lawyers opening statement and said that no papers were put in front of them. Then, they changed their testimony and alleged that

Mr. Simon only eluded to papers behind him, whatever that means. This version makes no sense in the practice of law. If Mr. Simon had papers he wanted signed, why would they not be shown to them? Mr. Simon would have provided papers with an amount he thought was fair if there were actual papers. The emails show that Mr. Simon knew that they would get their own attorney to review the proposal and he was even willing to speak to that attorney. There is no secret about papers the clients would be asked to sign as that would be a part of their file and everyone gets copies under the law. The Edgeworths histrionic version of events do not make sense.

Mr. Edgeworth further testified that Mr. Simon said he wanted 40% plus an hourly fee for the entire case. This claim is inconsistent with the evidence presented, including the proposal sent to the Edgeworths on November 27, 2017. *See*, Edgeworth **Exhibit 4**. No lawyer would say he wanted 40% plus a full hourly as this does not make any sense. Yet, it was another attempt to suggest Mr. Simon was doing something improper. Mr. Edgeworth the contradicted himself when testifying that the proposal discussed at the meeting was sent to him on November 27, 2017. This proposal did not contain 40% plus full hourly.

Mr. Simon credibly testified that he did not present the Edgeworths with a proposed fee agreement on November 17, 2017, he merely advised what his normal fee would be and to figure out a fair fee. The proposed fee agreement was not created until November 27, 2017, after Mr. Simon returned from a Thanksgiving trip out of town. The letter and proposed agreement were created after Mr. Edgeworth requested the proposal in writing during their conversation on November 25, 2017. This is consistent with Mr. Simon's testimony regarding the reason for the November 21, 2017, email that Mr. Edgeworth sent to Mr. Simon showing his perceived losses. The purpose for the perceived losses was to allow Mr. Simon to create a proposal for the

reasonable value of his services. *See*, **Exhibit 39**. Mr. Edgeworth admitted the reason for the November 21, 2017 as follows:

> BRIAN EDGEWORTH: … in one of the phone calls he says give me a list of all your costs in his case. What you feel your damages or costs or whatever was. I cut and pasted an Excel thing and emailed it to him.

See, **Brian Edgeworth Testimony on August 27, 2018 at 2:11:00**. Again he testified:

> PETE CHRISTIANSEN: And his request is for you to do just that, tell you, tell him what you think your case is really worth.
>
> BRIAN EDGEWORTH: Correct.

See, **Brian Edgeworth Testimony on August 27, 2018 at 2:11:00.** This all occurred after the November 17, 2017 meeting.

Mr. Edgeworth also claimed that Mr. Simon's behavior was inappropriate at the November 17, 2017 meeting. The several emails and conversations after the November 17, 2017 meeting do not support the testimony that Mr. Simon was inappropriate and do not mention the alleged papers that Mr. Simon demanded they sign. The Edgeworths suggest they were offended, shocked, flabbergasted, blackmailed and extorted at this meeting, yet they did not mention it in any emails or even through communications with their new counsel after replacing Mr. Simon. Why would Mr. Edgeworth send the November 21, 2017, email to Mr. Simon if he was so outraged? Why didn't this email just say, send me your final bill at $550 an hour? Why doesn't a single email say we just had an hourly contract at $550 an hour? This was another false story created by his legal team and perpetuated by the testimony of the Edgeworths.

v. <u>The Edgeworths were "stunned" to get the proposal</u>

Mr. Edgeworth testified in his affidavit that he was stunned to get the proposal from Mr. Simon on November 27, 2017. *See*, **Exhibit 16**. This contradicted his testimony at the

evidentiary hearing where he testified that during their last conversation on November 25, 2017, he requested Mr. Simon put his proposal in writing. Mrs. Edgeworth said she was outraged to receive the letter and content, but none of Mrs. Edgeworth's emails after receiving this letter remotely suggest that she was stunned, outraged or anything other than we will review it with our attorney and get back to you. What did she expect the letter and proposal to say? She was texting Mrs. Simon "Happy Thanksgiving." after the 11-17-17 meeting. *See*, **Exhibit 73**.

Even more disingenuous is the irrational response testified to by Mrs. Edgeworth. She alleges "I was scared, shocked, outraged, blackmailed, bullied, confused, etc." Are you really all of those emotions instantly with a close friend who just helped you recover $6 million dollars? She immediately told her friend in Los Angeles, Lisa Carteen that Mr. Simon was extorting her within 2 days (November 19, 2017), yet there was no follow up meeting with Mr. Simon. The Edgeworths are revisionist story tellers. Mrs. Edgeworth reviewed and paid bills and was shocked at how high the rates were and had concerns about the blocked billing that was not in her favor, yet she admitted she never discussed it with Mr. Simon, when asked by the Court. The Edgeworths refused to sit down with Mr. Simon through their new lawyers, Mr. Vannah and Mr. Green, who all refused to speak about resolution and the amount due Mr. Simon. The Edgeworths and their lawyers knew Mr. Simon was owed substantial sums, but then raced to file a baseless lawsuit accusing him of stealing the settlement money and disparage his name and reputation. *See*, **Exhibit 48**. Even after the motion to adjudicate was filed, the Edgeworths never approached Mr. Simon for resolution. The Edgeworths allege they pay their bills promptly. It took them 3 months to pay Mr. Simon his outstanding costs and 2 months after Mr. Simon gave them a check for $4 million. Notably, they paid their mother and best friend the same day their

received the $4 million, yet a simple reimbursement for costs took 2 months. *See*, **Exhibits 55, 94** and **95**. Their motives to refuse payment to Mr. Simon are transparent.

Mr. Edgeworth was also not credible when testifying he did not understand the proposal that Mr. Simon sent on November 27, 2017. The proposal is not confusing on its face, especially for a highly educated business person like Mr. Edgeworth.

Mr. Simon credibly testified that he told the Edgeworths what his usual and customary fee was and that it was time to figure out a fair fee since the Viking portion of the case was resolving. This is when the bizarre behavior started. Mr. Simon credibly testified he did not present any paperwork to them except the print out of outstanding advanced costs in the approximate amount of $72,000. Mr. Edgeworth never said a word in response to the comments concerning the fee and Mrs. Edgeworth said we will talk about it and get back to you. This version is consistent with the Edgeworth's emails after the November 17, 2017 meeting and the November 27, 2017 proposal as they promised to sit down with Mr. Simon to discuss the proposal. *See*, **Exhibit 42**. The Edgeworths then took the November 27, 2017 proposal letter to create a story about the November 17, 2017 meeting.

vi. <u>The only thing discussed at the November 17, 2017 meeting was attorney's fees</u>

Mr. Edgeworth testified in his affidavit about the November 17, 2017 meeting and stated "Rather than discuss the LITIGATION, SIMON'S only agenda item was to pressure us into modifying the terms of the contract. (*See*, **Exhibit 17**, BE Affidavit, 2-12-17 4:5-7.) Mr. Edgeworth testified at the hearing that nothing about the case itself was discussed, and the conversation only concerned the attorney's fees. This testimony is not credible considering all of the pending matters on calendar and the intricacies of the Viking settlement as it related to the remaining Lange claim. The Edgeworth emails to Mr. Simon after the November 17, 2017

meeting also support that the Edgeworths had a lot of questions about the settlement and the process. Mrs. Edgeworth contradicted Mr. Edgeworth and said she told Mr. Simon that she wanted the Viking and Lange case to proceed, and that was worried about the matters on calendar, including the evidentiary hearing until the deal was formalized. She admitted to discussions of other matters about the case and had a detailed understanding of everything on calendar. Notably, this was the first time Mr. Simon ever spoke to Mrs. Edgeworth about the status of the case, which was exclusively handled by her husband. Obviously, the attorney's fees were not the only matter discussed.

Other things were discussed. The Viking acceptance of the mediator proposal was also discussed. Viking added conditions of confidentiality, waiving the Lange claim and the need for a motion for good faith settlement. Although the clients were agreeable to the settlement amount, many other issues still needed to be agreed to. The Edgeworths did not want to waive the Lange claim, didn't understand the determination of good faith settlement and did not like confidentiality. These were all matters discussed with the clients, as well as an update on everything on calendar and the reopening of discovery to proceed with Lange if that was preserved. Mr. Simon worked with Viking counsel from November 27, 2017 through November 30, 2017. The omission of confidentiality, preservation of the Lange claim, mutual release were all negotiated before Mr. Simon received the Vannah letter of direction on November 30, 2017. Although dated November 29, 2017, Mr. Simon received the letter of direction on November 30, 2017. *See*, **Exhibit 43**. Viking revised the release to include Vannah in the afternoon of November 30, 2017 and the release was immediately forwarded to Vannah to explain to the Edgeworths. The Edgeworths signed the next day on December 1, 2017. *See*, **Exhibit 5**. There is no delay as may be alleged by Edgeworth to secure the omission of the confidentiality clause.

Mr. Vannah asserted that the confidentiality issue was Mr. Simon's issue and not the Edgeworth's. This is not true. Mr. Edgeworth was very concerned. The reason is that Viking already sued the client and lawyer in the prior California case for disclosing the defect in its product to other people, as Mrs. Ferrel credibly testified about. Mr. Edgeworth requested a copy of lawsuit against these other people and Ms. Ferrel provided it to him.

Mr. Edgeworth also testified in his affidavit that "We really felt we were being blackmailed by Simon, who was basically saying "agree to this or else." (*See*, **Exhibit 17**, BE Affidavit, 2-12-17, 4:14-16.) This statement is not supported by the evidence. Mr. Simon never suggested "they sign the proposal or else" as a proposal did not exist on November 17, 2017. The evidence supports Mr. Simon's version as he continued to work on the case to protect the interests of the clients and Mr. Edgeworth's assertions in his affidavits that Mr. Simon was threatening to withdraw if papers were not signed is contrary to the Edgeworth's own emails sent after the meeting. The Edgeworth's emails after the November 17, 2017 meeting contradict the statements made in Mr. Edgeworth's affidavit and further support Mr. Simon's version of events.

vii. <u>Threats to withdraw</u>

Mr. Edgeworth testified in his affidavit that "Simon prepared a proposed settlement breakdown with his new numbers and presented it to us for our signatures. This, too, came with a high-pressure approach by Simon. This new approach also came with threats to withdraw and to drop the case…" (*See*, **Exhibit 17,** BE Affidavit, 2-12-18 5:10-13.) The evidence contradicts this statement. The several emails following the November 27, 2017 letter and proposal do not support a finding that he was threatening to withdraw or going to drop the case. These words are never used by Mr. Simon in any letter or email. Similar to the word "bonus" these are the words used by Edgeworth only. Mr. Simon continued to work on the case and protected the client's

interest negotiating favorable settlement terms. Again, the emails sent by Mrs. Edgeworth after the November 27, 2017 letter do not suggest Mr. Simon was threatening to withdraw and confirms Mr. Simon was inviting the Edgeworths to his office to discuss the case as they seemed to have a lot of questions. The Edgeworths promised to come to the office, but never did. *See,* **Exhibit 42**. Simply, there was never a high-pressure approach. The Edgeworths refused to speak with Mr. Simon after November 25, 2017, and the emails and later actions by Mr. Simon completely refute the Edgeworth's testimony.

viii. <u>Volleyball emails are not credible</u>

In Mr. Edgeworth's affidavit he states that "I was forced to tell Herrera everything about the lawsuit and Simon's attempt at trying to extort millions of dollars from me. I emphasized that Simon's accusation was without substance and there was nothing in my past to justify Simon stating I was a danger to children." (*See*, **Exhibit 17,** BE Affidavit, 8:12-16.) When questioned at the evidentiary hearing, Mr. Edgeworth again contradicted himself under oath and he denied telling Mr. Herrera what was contained in his affidavit. He denied saying to Herrera that Mr. Simon was extorting him even though it is clearly stated in his affidavit. However, Mrs. Edgeworth made it clear that she told her friend on November 19, 2017, that Mr. Simon was extorting her. This statement was made only 2 days after the November 17, 2017, meeting when her husband is still talking with Mr. Simon to work things out and long before the November 21, 2017 email from her husband. Mrs. Edgeworth testified she was staying out of it and wanted her husband to work it out with Mr. Simon. Mr. Simon did not send the November 27, 2017 letter yet, but Mrs. Edgeworth was already telling people Mr. Simon was extorting them? The Edgeworths cannot be believed on any topic.

ix. Danger to Children Investigation

The Court reviewed the emails and realized it does not state "he was a danger to children." This is more fabricated histrionic testimony. A simple review of the entire chain of emails suggests that any reasonable person would not conclude that Mr. Simon ever said or inferred that Mr. Edgeworth was a danger to children. *See*, **Exhibit 45**. When further questioned, Mr. Edgeworth testified he sits on the board with his wife, Coach Ruben Herrera and his personal attorney, Mr. Katz who created the loan documents for his mother-in-law. The revisionist story telling was in full force and the Edgeworth's dreamt up another story to add to the list. Any background check was self-inflicted and done at the hand of Edgeworth personally. *See*, **Exhibit 45**. Mrs. Edgeworth testified she never even talked to the coach about the emails, which was allegedly a serious allegation. Mr. Edgeworth made it seem as if the board forced a background check. The Coach never even called Mr. Simon concerning an alleged investigation stemming from the emails which merely requested that his daughter be released from the volleyball team due to her knee condition. This is another fabricated story and untrustworthy statement asserted by the Edgeworth's.

x. The money is solely the Edgeworth's

In his affidavits Mr. Edgeworth states several times that the settlement proceeds are solely the Edgeworths'. Mr. Edgeworth states "The settlement proceeds are ours, not SIMON'S. To us, what Simon did was nothing short of stealing what was ours." (*See*, **Exhibit 17,** BE Affidavit, 2-12-18; 6:23-25.) Mr. Edgeworth also testified under oath in his affidavit that "Since we've already paid him for this work to resolve the LITIGATION, can't he at least finish what he's been retained and paid for? (*See*, **Exhibit 17,** BE Affidavit, 2-12-18; 7:11-12.) When questioned at the evidentiary hearing, Mr. Edgeworth again contradicted himself acknowledging

these statements were false as the Edgeworths have always known that the Law Office was owed substantial sums for attorney's fees long before the affidavits were prepared and the complaints were filed against Mr. Simon. The last payment made to Mr. Simon was in September, 2017 making the statement that he was "already paid to resolve the litigation" is a complete falsehood. The allegations that the proceeds are solely the Edgeworth's and that Mr. Simon was paid in full was proven false at the evidentiary hearing.

xi. <u>Mr. Simon was paid in full based on the Deposition Testimony</u>

Even more absurd is when Mr. Edgeworth asserted in his affidavits and his complaints that Mr. Simon advised defense counsel in the September 27, 2017 deposition of Mr. Edgeworth that all of the bills were produced to them. This was done to suggest Mr. Simon and the Law Office was not owed any money after September 2017. *See*, **Exhibit 16, 17, 18** and **19.** Mr. Edgeworth attempts to assert that the bills referenced in the deposition represent all of the bills for the work, past and future, and Mr. Simon has already been paid in full. It is very disturbing that the Edgeworths would seek an order from this court that all bills were paid in full as part of its amended complaint filed on March 15, 2018. In the complaint the Edgeworths allege "the full amount of his fees, as produced, are the amounts set forth in the invoices that Simon presented to Plaintiff and that plaintiffs paid in full" at para. 36, and "that the contract has been fully satisfied by Plaintiff's, that Simon is in material breach of the contract, and that Plaintiffs are entitled to the full amount of the settlement proceeds." *See*, **Exhibit 20** at para. 37.

In the evidentiary hearing, Mr. Edgeworth again contradicted himself when he testified that he knew that the statement in the deposition did not include all work and payments in full. The statements in his affidavits are false and misleading and contradicted by his own testimony in the same deposition, as follows:

Q. And as a result of his breach of contract and his conduct in failing to act in good faith and deal fairly with you, you have incurred over $500,000 in attorney fees, costs in this case, haven't you.

A. That correct. In the contract, he was supposed to enforce the warranty against Viking if he believed it was a defect. He never did.

…….

Q. And these damages are accruing every day?

A. Correct.

See, **Exhibit 84**, Edgeworth deposition, 287: 19-25

Mr. Edgeworth knew at the time he made the statements in his affidavit and when he filed his complaints in January, 2018 and March, 2018 that Mr. Simon was owed substantial sums. During the evidentiary hearing Mr. Edgeworth admitted that Mr. Simon was not paid in full. Specifically during the evidentiary hearing, Mr. Edgeworth testified as follows:

PETE CHRISTIANSEN:	So in this paragraph under oath, you claim that finishing up the litigation is something you've already paid Danny in full for, correct?
BRIAN EDGEWORTH:	It doesn't say that.
PETE CHRISTIANSEN:	He's been retained and paid for, it absolutely says that.
BRIAN EDGEWORTH:	Since we've already paid him for this work to resolve the litigation can he at least finish what he's been retained and paid for?
PETE CHRISTIANSEN	You've already paid him is what you are telling the Judge.
BRIAN EDGEWORTH:	For all the work he's done to that point.
PETE CHRISTIANSEN:	Can he just finish what he's been retained and paid for, that's what you told the Judge in this affidavit, right?
BRIAN EDGEWORTH:	Correct.
PETE CHRISTIANSEN:	Ok, that's inconsistent with what you just told me a few minutes ago which is that you were still willing to pay Danny.

BRIAN EDGEWORTH: I don't think it's inconsistent.

See, **Brian Edgeworth Testimony on August 27, 2018 at 1:52:00**. Again he testified:

PETE CHRISTIANSEN: And then you agree that there are legal bills not billed yet?

BRIAN EDGEWORTH: Correct.

…

PETE CHRISTIANSEN: When you wrote this email you knew you owed Danny money?

BRIAN EDGEWORTH: Correct.

See, **Brian Edgeworth Testimony on August 27, 2018 at 3:52:00**.

The Edgeworths have not paid any attorney's fees to the law office after September, 2017. The statements that Mr. Simon was paid in full at the time of the September, 2017 deposition is false.

xii. <u>Mr. Edgeworth was savvy enough to know</u>

Mr. Edgeworth also acknowledged his understanding of the Lange claim in his deposition, as follows:

Q. Pursuant to the contract, they're responsible for your attorney's fees and costs; is that you understanding?

A. That is. That's correct. It's pretty clear in the contract.

See, **Exhibit 84** at 289: 6-13.

In his affidavits, Mr. Edgeworth testified that he was savvy enough to know that the fees and costs paid to Mr. Simon could not be recovered in a later action. This testimony was made by Mr. Edgeworth to suggest Mr. Simon was deceitful suggesting anything above the bills produced in the case could never be recovered in the Lange claim. Mr. Simon credibly explained that the trial and discovery was being continued with Lange Plumbing and the attorney's fees

and costs paid after the Viking settlement could have been pursued under the Lange claim. *See,* Letter to Teddy Parker, attached as **Exhibit 80, SIMONEH0004552-0004555.** Mr. Simon also explained that the case against Lange could have been dismissed without prejudice and since it was a breach of contract action, the statute does not expire for 4 more years. The claim for attorney's fees under the Lange contract did not become ripe until the attorney's fees and costs were finally determined. Mr. Edgeworth's testimony in his affidavit was again contradicted by the evidence in the case.

xiii. Mr. Edgeworth's efforts alone did not result in the six-million-dollar settlement.

Edgeworth asserted his efforts were what achieved the settlement. All agree that Mr. Edgeworth put a lot of time and effort into the case. This is demonstrated by the almost 2,000 emails to the Law Office alone. This also shows that Mr. Simon had to read and analyze these same emails. Merely because a client is involved, it is not the client that achieves the results in a complex, hotly contested products liability case.

Mr. Edgeworth asserts he uncovered the punitive damages aspect of this case and presented a July 25, 2017 email in support of this contention. *See*, **Edgeworth Exhibit 9, 00001**. However, as early as July 10, 2017, the Law Office already reviewed documents and confirmed in an email that they knew punitive damages were already in play. *See*, **Exhibit 80, SIMONEH0007860.** Mr. and Mrs. Edgeworth both brought up the name, Harold Rogers, suggesting they found his identity and he provided all of the magic to the case. This is not true. Ms. Ferrel made a chart of activations with associated names from the discovery received. *See*, **Exhibit 91**. Mr. Rogers name is the first entry on the chart and all over the chart that was created in July, 2017 before Mr. Edgeworth ever received any information.

The evidence supports the finding that the NRCP 30(b)(6) deposition taken by Mr. Simon in May, 2017, and the written discovery served by the Law Office, laid the groundwork for the extensive motion work that led to the great results achieved. Mr. Nunez and Mr. Kemp both credibly testified that the motion to strike Viking's answer was devastating and ultimately forced the Viking Defendants to settle the case. There was substantial work performed by the law office that led up to the ability to even file such a motion.

Mr. Edgeworth is not a lawyer, has no legal training and is not the reason for the six-million-dollar settlement. The information Mr. Edgeworth reviewed in the case was provided to him by the Law Office, which obtained the information through discovery. Mrs. Edgeworth testified that although she was not involved, she saw her husband reviewing a lot of documents. She has no other information of his involvement. The Court should find that the legal work done and Mr. Simon's trial skills and experience was the main reason that the $6 million dollar settlement was obtained, *not* Edgeworth.

Mr. Edgeworth admitted that Mr. Simon retained all the experts, including the appraiser that provided a stigma loss for $1.5 million. Mr. Simon researched and provided the materials for the appraiser to support his opinion. Mr. Simon also obtained a loan expert to justify the amounts and rate borrowed by Brian Edgeworth. Also, Mr. Simon persuaded the mediator, Floyd Hale, to propose six million instead of the five million that Mr. Edgeworth thought the number should have been. *See*, **Exhibit 36**. Notwithstanding the numerous hours expended by the Law Office, the extra $2.5 million was solely attributable to the work of Mr. Simon.

The register of actions clearly shows the substantial work that Mr. Simon did on the case. *See*, **Exhibit 63.** The Law Office's review of filings of over 120,000 pages of documents, the extensive motion work, including excluding a crucial expert, a motion to strike the Defendants

answer, the voluminous emails, lengthy depositions, multiple sets of written discovery, as well as Mr. Simon's negotiation skills, trial skills, knowledge of the law, experience, reputation, and 26 years of handling similar claims is the reason for the $6 million dollar settlement, not Mr. Edgeworth.

Mr. Edgeworth also asserts that Mr. Simon did not share in the risk of the case. However, Mr. Simon credibly testified that he committed his time almost exclusively to the Edgeworth case, not allowing him to work on other cases with significant value. Mr. Drummond credibly testified that Mr. Simon was not available to assist him on his cases that had value in the multi-millions. Many of Mr. Simon's cases were continued so that priority was given to the Edgeworth case. The time sheets submitted to the court on January 24, 2018 show substantial time was not billed during the case to benefit Edgeworth. *See,* **Exhibits 13, 14** and **15**. This time not billed or paid during litigation is sharing in the risk. If the outcome was not significant, Mr. Simon testified these hours would never had been billed and would be lost time for the law office. However, if the outcome was significant, the full reasonable value of his services would be expected. The only way to determine this amount would be at the end of the case depending on the outcome.

If the Court determines that a witness has lied about any material fact, the entire testimony of that witness can be disregarded. The **Court should find** that the testimony of the Edgeworths was so untrustworthy, their entire testimony is disregarded.

The testimony of both of the Edgeworths followed the same theme. We know everything about the case when Mr. Green asked the questions, but on cross examination, we don't know anything about the case or fail to understand the plain meaning of words. These words that they

were so confused about came directly from their own affidavits, their own emails and both of their complaints.

V.

NO WRITTEN AGREEMENT EXISTS

All agree that there was not a written contract. The Edgeworths suggest this favors their position. However, the Edgeworths are not credible on this point based on the evidence. The evidence confirmed that the Vannah firm did not have a written retainer for the lawsuit filed against Mr. Simon, which is a separate matter than the case they were retained, which was specifically for the Lange and Viking case. The retainer states as follows:

> Client retains Attorneys to represent him as his Attorneys regarding Edgeworth Family Trust and AMERICAN GRATING V. ALL VIKING ENTITIES and all damages including, but not limited to, all claims in this matter and empowers them to do all things to effect a compromise in said matter, or to institute such legal action as may be advisable in their judgment, and agrees to pay them for their services, on the following conditions:
> …
> (b) $925 an hour for attorney time for Robert D. Vannah and John B. Greene
>
> (c) Client agrees that his attorneys will work to consummate a settlement of $6,000,000 from the Viking entities and any settlement amount agreed to be paid by the Lange entity. Client also agrees that attorneys will work to reach an agreement amongst the parties to resolve all claims in the Lange and Viking litigation.

See, **Exhibit 90**.

Edgeworth repeatedly argued violations of NRCP 1.5, but if they consider this an important issue, then why don't their own lawyers have a written agreement for suing Mr. Simon. NRCP 18.015 and quantum meruit is the law that controls payment, not NRCP 1.5. The Edgeworth's acknowledged they are well educated in business, extremely savvy and experienced in hiring lawyers. They require contracts to reflect the real agreement as they want to know up front what they may have to pay. It is curious that the Edgeworths never asked for an hourly contract and were proposing terms that were much different than an hourly contract in August,

2017. The Edgeworths argue the reason for the proposal was so that the Edgeworths could get better terms. This testimony does not make any sense. They wanted Mrs. Edgeworth's mother to get paid back all of her initial loan with interest. After paying back the loan they didn't want to pay any fees and going forward and wanted the attorney's fees to operate on a percentage only. The limited bills produced at the time of the August, 2017 email were in the sum of $231,266.84. Following the Edgeworth's logic, Mr. Simon would have had to work for free from May 27, 2016 through August, 22, 2017 and come out of pocket in the sum of $47,291.84, and then continue the case from that point on a lower contingency only. The Edgeworths are only ever looking to benefit themselves and never the people trying to help them and who worked very hard for them. The unique nature of this case made it virtually impossible to put a written contract in place as the only realistic scenario was to determine what was fair at the end. Mr. Simon explained this throughout the case.

A. <u>Mr. Simon's Conduct Does Not Violate RPC 1.5</u>

Although the Edgeworth's complain there was not a written contract in place with Mr. Simon, they received 12 times their property damage when not having insurance in place. If insurance was in place they would not have received any money above the cost of repairs. The Edgeworths complain that Mr. Simon did not bill them for all of his time during the litigation, yet at the same time, they cried poor and were stressed out about their financial hardship. Imagine if Mr. Simon really did just do the case on an hourly and billed every single minute from beginning to end. The loans and payments for fees would have easily exceeded $2 million dollars. In March 2017, the Edgeworths were willing to accept One Million Dollars as full settlement of the entire claim, inclusive of attorney's fees. *See*, Offer of Judgement for 1 Million for entire case, attached as **Exhibit 87**. Notably, their house was repaired already, and the hard

damages were already established and never changed. It was only the soft damages that changed.

It was most telling at the end of Mrs. Edgeworth's testimony when she admitted that they always had the money and never needed the loans at all. She confirmed that the money from the Viking settlement was not used to pay off the house and the house was free and clear before the Viking settlement. *See*, **Angela Edgeworth's testimony on September 18, 2018 at 4:20:34 to 4:22:47.** Simply, the Edgeworths cannot be believed. She also confirmed that she was not worried about the loans from her mom, yet her husband testified that the risk of these loans caused extreme hardship. For the first time from Mrs. Edgeworth's testimony on the stand, is it now learned that the loans were just another scheme by the Edgeworths to increase their damages in the case.

VI.

SPOUSAL PRIVILEGE

During cross examination, Mr. Edgeworth invoked the spousal immunity doctrine to avoid providing testimony on discussions with his wife, Angela Edgeworth. Angela Edgeworth is a principal of Plaintiff American Grating, LLC., and is trustee and has an equal percentage of the Edgeworth Family Trust and was required to make decisions and sign settlement documents as a result.

It is a reasonable inference that Angela Edgeworth was knowledgeable to some degree over the events and circumstances relative to the discharge of Mr. Simon, and lien adjudication, including the alleged oral contract. Therefore, the use of the privilege creates an adverse inference that the precluded testimony would have been averse to the Edgeworths' cause.

VII.

THE FEE IS REASONABLE

A. Quantum Meruit

If the Court finds that if there is no express oral agreement and that there is no implied payment term, then the Court is required to use quantum meruit to determine compensation for the Law Office under the lien. *Certified Fire Prot. Inc. v. Precision Constr. Inc., 128 Nev. 371, 283 P.3d 250 (2012).* Alternatively, if the court finds constructive discharge, the court is also required to us quantum meriut to determine compensation for the Law Office.

The Court should find that the reasonable value of Mr. Simon's services in this case is in the sum of $2,440,000. Mr. Kemp testified his opinion for a reasonable fee is as follows:

> WILL KEMP: My opinion is that a reasonable fee for a case of this sort would be $2.44 and I take that, I get that by taking the, you know applying the Brunzell factors, as well as, I could go into more details but that's the general opinion.
>
> JIM CHRISTENSEN: Ok.
>
> WILL KEMP: Which I set forth in the declaration that we filed

See, **Will Kemp Testimony on August 30, 2018 at 11:17:41**.

Mr. Simon asserted a lien for an amount less than the full value of his services in the amount of $2,350,000 and provided a credit for all payments previously made by Edgeworth for a net lien of $1,977,843.00. It is requested that this full lien amount be awarded as quantum meruit, which is supported by substantial evidence.

The basis for the Court's findings should be made after full consideration and a detailed analysis of the *Brunzell* factors and the factors set forth in RPC 1.5.

B. The *Brunzell* Factors

A reasonable fee must be determined by use of the *Brunzell* factors. *Brunzell v. Golden*

Gate National Bank, 455 P.2d 31 (Nev. 1969). The *Brunzell* factors are:

1. The qualities of the advocate;
2. The character of the work to be done;
3. The work actually performed; and,
4. The result obtained.

The factors support a finding that the reasonable fee that is due to Mr. Simon for his great work on the clients' case is the full value of his lien.

i. Qualities of the advocate

Brunzell expands on the "qualities of the advocate" factor and mentions such items as training, skill and education of the advocate. Mr. Simon is considered one of the top lawyers in the state of Nevada. He has a proven track record handling large complex cases. Craig Drummond credibly testified that he considers Mr. Simon a top 1% trial lawyer and he associates and brings Mr. Simon in on cases that are complex and of significant value. Michael Nunez, the defense lawyer for Giberti, also credibly testified that Mr. Simon's work on the case was extremely impressive and second to none. Mr. Kemp also supported this factor as he has known Mr. Simon professionally for years and understands his work product and results, which is exceptional.

i. The character of the work to be done

Mr. Kemp credibly testified that the quality and quantity of the work was exceptional for a products liability case against a world-wide manufacturer that is very experienced in litigating cases. The Law Office had to advocate against several highly experienced law firms for Viking, including local and out of sate counsel. In this regard, the Motion to Strike Answer filed on September 29, 2017 is of utmost significance. *See***, Exhibit 1.**

Mr. Kemp further testified that the Law Office retained multiple experts to secure the

necessary opinions to prove the case. It also creatively advocated to pursue unique damages claims (e.g., the "stigma" damages) and to prosecute a fraud claim and file many motion that most lawyers would not have done. The Law Office also secured rulings that most firms handling this case would not have achieved. The continued aggressive representation prosecuting case was a substantial factor in achieving the exceptional results. *See***, Exhibit 1.**

iii. <u>The work actually performed</u>

Mr. Simon was aggressive and successful in discovery, which led to the disclosure of prior floods. Mr. Simon kept a tight hold on deadlines and the Court's trial order, which allowed the clients an opportunity to fully present their case, while placing the defense at risk of losing their main expert and having their answers struck. Michael Nunez also credibly testified that Mr. Simon's work on the case was extremely impressive and matched by no other.

Mr. Simon found, retained and prepared experts on the product defect, and on the difficult and rare damage claim of real estate stigma. Most lawyers would not be able to even address a claim of damages from real estate stigma, let alone present an expert opinion sufficient to survive a *Hallmark* challenge. *See*, **Exhibits 92** and **93**. Mr. Simon successfully negotiated the claim to obtain an additional one million dollars over and above what Mr. Edgeworth suggested.

iv. <u>The results</u>

The result was incredible. Mr. Simon recovered about double what it cost to build the entire house. Another lawyer might have set their target on a case value ranging from $500,000 to $1 Million. Mr. Simon recovered orders of magnitude above.

Mr. Kemp credibly testified that one client with property damage is not attractive to most experienced product liability litigators due to the amount of energy and costs. The case did not involve serious personal injury or multiple clients. A settlement of $6.1 million in a complex

product liability case with no personal injury or death and only $731,242 in "hard costs" is truly remarkable.

Mr. Edgeworth, a sophisticated client, expressed the opinion on August 2, 2017 that it would take a trial and appeal to get "Edgeworth expected result." Most lawyers would agree that it would take years to even get the hard costs.

The Edgeworths have failed to present any evidence that disputes Mr. Kemp's expert opinion as to the value of the services. The Edgeworths and their lawyers do not dispute the exceptional result obtained and do not dispute the incredible result. In fact, they do not dispute that every single factor in *Brunzell* and RPC 1.5 were met. The court only needs to rely on one factor to reach its decision; however, every single factor has been met and is supported by substantial evidence. Mr. Simon testified that this is potentially the highest property damage settlement for a single family home in the history of Nevada. Even Mr. Kemp testified he has never seen a better result for this type of case. Mr. Kemp's opinion as to the amount of the reasonable value of Mr. Simon's services is undisputed and Mr. Kemp confirmed the amount of the fee he determined was not calculated as a contingency fee, but is the amount that represents quantum meruit for this type of case and the results achieved. Mr. Kemp opined, as follows:

> "When evaluating the novelty and difficulty of the question presented; the adversarial nature of this case, the skill necessary to perform the legal service, the lost opportunities to work on the other cases, the quality, quantity and the advocacy involved, as well as the exceptional result achieved given the total amount of the settlement compared to the "hard" damages involved, the reasonable value or the services performed in the Edgeworth matter by the law office, in my opinion, would be the sum of $2,440,000. This evaluation is reasonable under the Brunzell factors. I make this declaration under penalty of perjury."

See, **Exhibit 1**, Declaration of Will Kemp, at para. 24, 25.

The *Brunzell* factors support the full lien amount to the Law Office. Mr. Simon met and exceeded every factor substantially. In the absence of an express contract, the market approach is

the most reasonable approach in determining the amount of the lien in this case. The Court should also consider the factors set forth in RPC 1.5, as follows:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

Mr. Kemp testified that the usual and customary fee in the state of Nevada for this type of case ranges from $2,440,000 to $2,745,000 based on the work done in this case and the amazing outcome. Mr. Kemp acknowledged that there was not a signed retainer for a contingency fee in this case and also understands that Mr. Simon is not seeking a contingency fee. However, in this case, the reasonable value of the fee is similar to that of an amount of 40%-45% of the settlement, but not solely based on a percentage. He testified that the results achieved were an overwhelming factor. He also testified that Mr. Simon met all other factors. Mr. Simon has a small firm and was precluded from other employment in which he would have earned a fee equal to or greater for the time spent. That the work performed, the quality of the advocacy, the novelty of the questions were very difficult limiting the quality of attorneys that Mr. Edgeworth would have been able to retain. The experience, reputation, and ability of Mr. Simon has been proven and was impeccable in this case. It is undisputed that the work Mr. Simon performed, and the results were nothing short of amazing. This is conceded by Edgeworth.

The market approach is supported by the expert opinion of Mr. Kemp. In support of this

finding, Mr. Kemp confirmed what was contained in Mr. Simon's letter to the Edgeworth's on November 27, 2017 that $2.4 million dollars was specifically included in the $6 million dollar mediator proposal by the mediator for attorney's fees when the mediator proposed the $6 million dollars. *See*, **Will Kemp Testimony on August 30, 2018 at 3:25:40**. There is no better support for the quantum meruit of the amount of attorney's fees in this case than the portion of the settlement directly attributable to attorney's fees in the actual settlement. In this case, that amount is $2,400,000. Mr. Kemp's testimony was not disputed and is substantial evidence in support of the court's findings.

The Court is not awarding a contingency fee. The Court is granting the full net lien as the reasonable value of the services for the work performed. Alternatively, the Court can reach the same result by taking the hours on the time sheets and multiply them by the hourly fee of $925 an hour. This is the fee that the Edgeworths established as fair and reasonable in this very case when paying Mr. Green $925 an hour for taking over the case from Mr. Simon on November 29, 2017. Arguably, the work that the Law Office performed on the case was much more difficult, demanding and complex warranting even a higher hourly fee. If the Court applies the hourly fee of $925 per hour to the hours on the time sheets, the total fees equal $2,316,477.70. The hours on the time sheets do not include several hundred hours spent by the Law Office that could not be recovered.

VIII.

THE COURT'S DECISION

The Court's should exercise its wide discretion in favor of the full lien. The case settled for $6.1 million. The Edgeworths received $4 million cash in January 2018 and now seek the remaining ***$1,977,843.80*** that is currently in the Trust account. The remaining amount in the trust account is the disputed amount and was earmarked by the mediator, Floyd Hale as

attorney's fees when the $6 million was offered by the mediator and accepted by Viking. The court is now faced with the decision to give the money earmarked for attorney's fees to the attorney that did the work with a great result or the clients who have already received $4 million for a $500,000 property damage claim. The Edgeworths already admit they have been made more than whole and any alleged agreement was not for the new case, referred to as the "punitive case" or "the beast" as the new case could not have been contemplated at the beginning.

When weighing the credibility of the parties, the court should find that the Edgeworths were not credible as the fact finder. That Mr. Simon was credible and no contract, express or implied was found. Absent an agreement, the Law Office is due quantum meruit. Alternatively, the court can reach the same conclusion to apply quantum meruit by finding that a constructive discharge occurred. If the court finds quantum meruit should be used to determine the lien amount, then the Court should determine the method of calculation.

A. <u>What method should the court use to determine quantum meruit?</u>

One alternative method of calculation would be taking the hours on all the time sheets and then use the hourly rate of $925, which is established as the reasonable fee by the Edgeworths in this very case. This calculation is the full lien.

Another alternative method of calculation to reach the same result, which is the preferred method of calculation for quantum meruit, is the market approach. Mr. Kemp provided undisputed and substantial evidence that the value of the services is actually greater than the claimed lien amount. Mr. Simon meets and exceeds every single *Brunzell* factor and RPC 1.5 factor in support of this conclusion. Since all factors are met and the conclusion is supported by substantial evidence, any reviewing court will not disturb such a finding. Therefore, this Court should not have any reservations awarding the full lien amount.

B. Why The Full Lien is Reasonable

The full lien does not include the following:

1. 600 plus hours by the Law Office to adjudicate the lien and defend the frivolous complaints filed against Mr. Simon.
2. The attorney's fees of Mr. Christiansen and Mr. Christensen
3. The expert fees of Mr. Kemp and Mr. Clark.
4. The damage to Mr. Simon's reputation from the wild accusations throughout this proceeding.

If the Edgeworths receive any portion of the disputed amount they will consider that a victory and likely continue with more spurious claims and unfounded actions.

IX.

CONCLUSION

The Law Office of Daniel Simon requests that the court make the specific findings as the fact finder, as follows:

1. That Mr. Simon properly perfected his lien and is entitled to a reasonable fee for the services which his office has rendered for the clients pursuant to NRS 18.015. Quantum meruit is the method used by the Court to determine the reasonable fee.

2. That Brian Edgeworth and Angela Edgeworth, both individually, and on behalf of both Plaintiffs, American Grating and Edgeworth Family Trust, intentionally provided false and misleading testimony in an attempt to persuade the Court to decide in their favor when seeking the disputed funds and to advance causes of actions against Mr. Simon personally and his practice for punitive damages.

3. That there was no credible evidence that any threats were made by Mr. Simon or the Law Office and the Court finds that no threats were made.

4. That there was no credible evidence of extortion or blackmail and the Court finds that extortion and/or blackmail by Mr. Simon or the Law Office did not occur.

5. That Mr. Simon did not state in the email that Mr. Edgeworth was a danger to children.

6. That there was no credible evidence that an express oral contract for $550 was entered into and the Court finds that there was no express or implied agreement to pay Mr. Simon $550 an hour between Mr. Simon or his Law Office and the Edgeworths.

7. That Mr. Simon was constructively discharged prior to depositing the settlement proceeds. Here was no just cause for his termination.

8. Mr. Simon did not waive the constructive termination as he was merely fulfilling his ethical duties to protect his clients' interests.

9. The bills generated by the Law Office were to establish the damages for the Lange claim only.

10. The payments made by the Edgeworths were to justify the high interest loans, and were not to be deemed as payment in full.

11. That there was no credible evidence that an implied agreement for compensation was established and the Court finds that there was not an implied contract for compensation between Mr. Simon or his Law Office and the Edgeworths.

12. That amount of the claimed lien is due the Law Office of Daniel Simon as a reasonable fee under quantum meruit.

13. That there was no credible evidence of a breach of contract.

14. That there was no credible evidence of a breach of the covenant of good faith and fair dealing.

15. That that the conversion claim was frivolous, and a legal impossibility and that the conversion cause of action was filed for an improper purpose.

16. That there was no credible evidence or basis for seeking punitive damages and the Court finds no such malice existed to support a claim for punitive damages.

17. That there was no credible evidence that there was a breach of fiduciary duty and the Court finds no such breach occurred.

18. That the Edgeworths were made "more than whole" from their portion of the Viking settlement and suffered no damages as alleged in their complaints.

19. The declaratory relief action was decided by the Court as part of the evidentiary hearing and is now moot.

The Law Office requests an opportunity to submit additional findings of fact and conclusions of law when the transcript becomes available and to address the testimony of Angela Edgeworth. The Law Office thanks the Court and its staff for its careful consideration and time devoted to this matter.

Dated this 24th day of September, 2018.

/s/ Peter S. Christiansen

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DISTRICT COURT

CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION; DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-18-767242-C DEPT NO.: XIV Consolidated with CASE NO.: A-16-738444-C DEPT. NO.: X **PLAINTIFFS' CLOSING ARGUMENT**

Plaintiffs EDGEWORTH FAMILY TRUST and AMERICAN GRATING, LLC (PLAINTIFFS), by and through their attorneys of record, ROBERT D. VANNAH, ESQ., and JOHN B. GREENE, ESQ., of the law firm VANNAH & VANNAH, hereby submit these closing arguments in support of their common sense arguments affirming an oral agreement between the Simon Defendants (SIMON) and PLAINTIFFS.

All of the reasons and the evidence necessary have been present all along (in Briefs, Oppositions; Exhibits; etc.) for this Court to comfortably find that an oral contract exists for the payment of attorney's fees (and costs) to SIMON in return for services rendered to PLAINTIFFS.

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Likewise, everything relevant points to the fact that the agreed to hourly rate for SIMON is $550 per hour, and the rate for his two associates is $275 per hour. Too much time and effort have been spent by SIMON to attempt to obscure what is self-evident. SIMON'S efforts to obscure began on November 17, 2017, in the infamous meeting in his office, and continued unabated until the late afternoon of September 18, 2018. The time has come to put an end to his charade.

WHAT IT'S NOT ABOUT: ANY FORM OF A CONTINGENCY FEE

On that note, let's be clear on what this isn't all about—a contingency fee in any amount or form, be it at law or in equity. In speaking directly to contingency fees, the Supreme Court of Nevada adopted Nevada Rule of Professional Responsibility 1.5(c), which succinctly states:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. **A contingent fee agreement shall be in writing, signed by the client**, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement. (Emphasis added.)

"Shall" is a strong word. Because of that, everyone agrees that there isn't—and that there can't be—a contingency fee agreement here. Rule 1.5(c) requires that a contingency fee agreement be in writing, and SIMON never reduced any fee agreement to writing, even though Rule 1.5(b) alerted him that written fee agreements are preferred and that they should discuss the scope of the representation and the rate of the fee. SIMON also admitted in his letter to PLAINTIFFS dated November 27, 2017 (PLAINTIFFS Exhibit 04-0006), that: "I realize I don't have a contract in place for percentages and I am not trying to enforce one…."

Since the parties admit that this case is not about an effort to enforce a contingency fee agreement, since the Rules would prohibit SIMON from enforcing one even if he wanted to, and since SIMON admits that he's not trying to enforce something based on "percentages", there isn't a factual or legal basis to even consider bestowing a fee upon SIMON that has any nexus to a percentage. Yet that's exactly the scheme that SIMON is selling to this Court by asking for a

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percentage of the Viking settlement via quantum meruit. PLAINTIFFS strongly object to the use and application of this doctrine, as the oral agreement for fees has been in force and effect since June of 2016. Pursuant to the oral agreement for fees, SIMON'S rate is $550 per hour. And, PLAINTIFFS never terminated SIMON, regardless of the theory pitched by him. Therefore, there's no legal or factual basis to retreat to the equitable remedy of quantum meruit.

Assuming for a nanosecond that quantum meruit has a place (in the corner of a very dark and secure room in a place far, far away where the law, common sense, and decency no longer exist in any measurable quantity), it is easily and forcefully dismissed here. As this Court is well aware, quantum meruit is an equitable remedy. In order for SIMON to qualify for an equitable remedy, his hands must be clean. SIMON'S hands on this topic are completely soiled, and all by his own doing.

How can SIMON admit to his clients and this Court that he's not seeking a fee based on a percentage (as in a contingency fee based on a percentage of the Viking settlement), then turn around and assert that he should get a percentage of PLAINTIFFS recovery based on quantum meruit? And proclaim that it should be 40%? That's the amount of SIMON'S Amended Lien. (P's Exhibit 07-0001-0002.) Isn't that the poster child percentage of a contingency fee? How can SIMON admit that he never reduced any fee agreement to writing, thus precluding the recovery of any contingency fee under Rule 1.5(c), then demand one from his clients—PLAINTIFFS—in a tension-filled meeting in his office and ask for one from this Court in equity? In other words, how can SIMON get in equity what he failed by his own admission per Rule 1.5(c) to obtain at law? The legal and equitable dots do not connect.

Not only does this cast a long shadow over SIMON'S credibility, it is a classic example of the Invited Error Doctrine in action, where SIMON is brazenly seeking to profit from "errors on which he himself induced or provoked." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1993). That cannot be allowed to happen, as the law does not allow it. Since the front door to a

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contingency fee has been slammed shut by the admissions of the parties, and also locked tight by the law, there's no reasonable, evidentiary, or legal basis for this Court to entertain SIMON'S request for a backdoor/sidedoor remedy of additional fees in quantum meruit based on a percentage of anything.

WHAT IT IS ALL ABOUT: AN ORAL AGREEMENT FOR AN HOURLY FEE OF $550

While this case isn't about any argument for, or right to, a fee based on a percentage of a recovery, it is all about an oral agreement for fees. Rule 1.5(b) states:

> (b) **The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation**, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. (Emphasis added.)

There is ample evidence in this case that the parties created an oral agreement for fees, whereby SIMON agreed to receive $550 per hour for his time for services performed and PLAINTIFFS agreed to pay SIMON $550 per hour for his time and effort. Brian Edgeworth (Brian) testified that he and SIMON agreed on that rate when it became clear in early June of 2016 that SIMON would need to file a complaint to get any relief for PLAINTIFFS. Brian also testified that SIMON explained at that time that this rate was reasonable because judges in other proceedings had approved that amount.

Angela Edgeworth (Angela) and Brian also testified that despite some initial hesitancy in keeping SIMON as their attorney (with his relatively high hourly rate and relative inexperience), they decided it was in their best interest to do so. Oddly and/or conveniently, SIMON testified that there was never a discussion about his fee and that he and PLAINTIFFS would agree on what a reasonable fee would be at the end of the case.

SIMON presented himself and testified that he is a very successful and ostensibly ethical lawyer. Yet, to believe SIMON'S testimony on this one point is to believe that he knowingly and

willingly violated Rule 1.5(b). Fortunately, there isn't a need to believe SIMON'S testimony on this one point or others), as there is a clear and bright conflict between what SIMON said on the stand versus what SIMON did from Day One. While SIMON'S words on the stand may (now) say "no" to an oral contract for fees, his prior words and deeds proclaim "yes!"

The evidence presented by the parties since this all began (in the late spring of 2016) shows that SIMON and PLAINTIFFS followed with exactness the terms of their oral contract for fees from June of 2016 until November 17, 2017…when SIMON decided he wouldn't. Compelling evidence in favor of SIMON'S deeds that support the clear existence of the oral contract for fees is first found in the four invoices (P's Exhibit 02-0001 through 0031) sent by SIMON to, and paid in full by, PLAINTIFFS. It's also found in the super bill (P's Exhibit 05-0001 through 0183) SIMON attached to his Motion to Adjudicate.

This evidence shows that from SIMON'S first (undated) billing entry for 1.75 hours entitled "Initial Meeting with Client" through SIMON'S last dated billing entry of January 8, 2018, for 2.5 hours entitled "Travel to Bank of Nevada 2x re Trust deposit," SIMON billed every task for every entry on every page on each invoice at $550 per hour. Simple math shows that over 225 entries on his first four invoices and more than 1,815 entries on his super bill are all billed at $550 per hour. SIMON never deviated from billing that rate, not once, not even after he claimed to PLAINTIFFS on November 17, 2017, that he was worth far more than he was getting paid, that he deserved a percentage of the recovery, and that he expected something else.

A second example where SIMON'S deeds and lack of words articulate his understanding of the contractual nature of things (more clearly than does his tongue on the stand) comes from the events in and after San Diego in August of 2017. Brian testified that he and SIMON discussed modifying the agreement for fees while sitting in a bar waiting for a flight back home. He also testified that options were discussed, such as a hybrid contingency agreement, a straight contingency

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agreement, or to continue on an hourly basis. Brian testified that he asked for a proposal from SIMON on how to modify the existing oral agreement for fees, but that SIMON didn't offer one.

Then, on August 22, 2017, the evidence shows that Brian again reached out to SIMON, this time via email, to get a proposal from him on perhaps changing the oral agreement for fees. (P's Exhibit 03-0001.) By that time, SIMON had sent, and PLAINTIFFS had paid in full, three invoices for fees and costs totaling $231,266.84, all billed at $550 for SIMON (and $275 for his associates). In that email entitled "Contingency," and as corroborated through Brian's testimony, Brian reminded SIMON that they "never really had a structured discussion about how this might be done." The "this" in that unstructured discussion, per Brian's testimony and the evidence, is changing how SIMON would be paid, from hourly to a contingency, or to something else. We know that's the case from what is clearly reflected in the next sentence from Brian, where he writes: "I am more than happy to keep paying hourly…." (Ex. 03-0001.)

After receiving this email from Brian and mulling over his options, what were SIMON'S words and deeds in response? For one, failing to reply to the email, sending the message loud and clear that he didn't favor changing the deal on the payment of his fees by the hour at the agreed to rate. For another, and most telling, SIMON then sent PLAINTIFFS the fourth invoice for $255,186.25, which included $183,631.25 in fees, all billed at $550 per hour. For all factual intents and legal purposes, SIMON rejected the option to change what was agreed to and instead continued on the path where PLAINTIFFS would "keep paying hourly."

A third example where SIMON made his intentions well known on the nature of his fee agreement with PLAINTIFFS, as well as how much was paid, is found in email correspondence prior to, and during the course of, Brian's deposition. In an email from SIMON to all counsel for the Viking and Lange Defendants dated January 4, 2017 (SIMONEH0004402), SIMON stated that: "My clients damages are increasing every day due to loans and attorney's fees and costs that he is

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paying out of pocket." Can SIMON'S intent and understanding be expressed more clearly than that? On this point, SIMON was right—PLAINTIFFS damages were increasing everyday, namely from the $550 per hour that SIMON was charging, and PLAINTIFFS were "paying out of pocket" in full, for SIMON'S services.

On September 29, 2017, Brian sat for his deposition. As the evidence clearly shows, lawyers for Viking and Lange were present. (P's Exhibit 06-0001 through 0003.) On pages 190-191 of that deposition, Brian was asked by Ms. Dalacas: "Is it your testimony that you've actually paid that full amount, $518,396.99, to Mr. Simon's law office?" To that question, Brian responded: "If your math is correct, I paid that amount. If you math is wrong, then I haven't. I've paid every bill under "Legal" on this sheet…." The follow up question of Ms. Dalacas was as follows: "So there's no place that you could look for that information and tell me a number of attorneys fees that American Grating LLC has actually incurred prior to May of 2017?" At that juncture, SIMON had sat silent long enough and, as an officer of the court, had to make the truth known to all.

At page 271, lines 18-19, SIMON says: "They've all been disclosed to you." SIMON goes on to admit at lines 23-24: "The attorneys' fees and cost for both of these plaintiffs as a result of this claim have been disclosed to you long ago." SIMON puts a finer and final point on the topic of PLAINTIFFS hourly fees paid to him by declaring at page 272, lines 2-3: "And they've been updated as of last week." All of the attorney's fees referenced by SIMON to counsel for defendants in Brian's deposition were billed by SIMON at $550 per hour.

At **no** point did SIMON ever say to counsel for the Defendants any words to the effect that: We've only disclosed a portion of both plaintiffs' fees and costs to you. Or, that more invoices for additional fees and costs will be disclosed by him soon. Or that he was going to be sifting through PLAINTIFFS invoices and our files and add time and fees that we haven't added or disclosed yet. Or that SIMON'S fees were being billed on a contingency basis, as opposed to hourly. Or anything

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else for that matter to give notice or even an indication that every fee and cost incurred by SIMON to date hadn't been produced to Defendants.

A fourth example where SIMON also made his intentions well known on the nature of his fee agreement with PLAINTIFFS, as well as how much was paid, is found in the NRCP 16.1 disclosures and calculations of damages that SIMON produced to Defendants. Just like we see with SIMON'S admissions in Brian's deposition, all of PLAINTIFFS damages were required by rule to be produced to Defendants. Testimony confirmed that PLAINTIFFS damages included a claim for attorney's fees paid to SIMON, and each of the calculations of damages produced by SIMON to Defendants for fees billed and paid to SIMON by PLAINTIFFS was based on SIMON'S four invoices where his hourly rate is $550 per hour for every entry.

With these three admissions alone from January of 2017, through September of 2017, how can SIMON in good conscience tell this Court now that any lawyer for Viking (or Lange) based any settlement offer on the notion that a contingency fee was in play here and needed to be factored in? There's no evidence that ANYONE from Viking thought that PLAINTIFFS owed a contingency fee to SIMON. Was it perhaps a mere memory lapse on SIMON'S part to now assert that? Confusion on his part? Or a flat-out fabrication from him to get a larger fee? None of those options speak well for SIMON.

A fifth example of the oral contract for fees is found in the email string between Angela and SIMON that began on November 27, 2017. (80SIMONEH1169, 1667, 1668, 1664, 1665, & 44SIMONEH00421). After SIMON admits to finally sending the Viking settlement agreement to PLAINTIFFS that morning—containing the terms that PLAINTIFFS had agreed to on November 15, 2017—Angela replies: "I do have questions about the process, and am quite confused. I had no idea we were in anything but an hourly contract with you until our last meeting." Thus far, the evidence states that Brian and Angela believed—rightfully—that an hourly contract for fees was in

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place and in play since June of 2016. What's holding SIMON back now from admitting the obvious to this Court?

His Retainer Agreement doesn't hold back. (P's Ex. 04-0008.) In paragraph 1 where he wants $1,500,000 (BTW: why is it now $1,977,843.80 as set forth in SIMON'S Amended Lien, or the $692,120 that he billed PLAINTIFFS in the super bill??) in total from the Viking settlement, SIMON says: "…This sum includes all past billing statements, the substantial time that is not included in past billing statements, the current outstanding billing statements and any further billing statements that may accrue to finalized and secure the settlement with Viking Entities only." Setting aside for a moment the bonus he wants, SIMON uses the word "billing" four times in that sentence. Can SIMON really say that the nature and terms of the oral fee agreement with PLAINTIFFS wasn't crystal clear to him?

But there's more. In SIMON'S letter dated December 7, 2017 (04-0001 through 0002), to Robert Vannah and John Greene, he states that the worked performed by him from the outset that had not been billed "may well exceed $1.5M." He goes on further by saying: "Simon Law is reviewing the case file and work performed from the outset that has not been billed (including such things as obtaining the forensic copy of case related e-mails and phone records) to provide a comprehensive hourly bill." He also adds: "It is reasonably expected at this time that the hourly bill may well exceed a total of $1.5M…." In that one paragraph, SIMON used the word "hourly" twice and "bill" or "billing" four times. "Billing," according to the evidence, means the hourly work at $550 per hour that SIMON had charged since May 27, 2016, through the date of that Retainer Agreement…and beyond to January 8, 2018.

While SIMON has been reluctant to admit to this Court that an oral agreement for fees is clearly in effect, his words and actions have spoken volumes and in loud decibels. Yet, while he admits, for all intents and purposes, to willfully violating Rule 1.5(b) by not discussing either the

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scope of the representation or the rate of the fee to PLAINTIFFS, SIMON wants this Court to bail him out of his willful acts and throw him a lifeline in equity by crafting a made up deal using quantum meruit. The better way is to embrace the overwhelming evidence that supports the existence of an oral contract for fees at the hourly rate of $550 for SIMON and $275 for his associates.

THERE'S NO DISCHARGE, CONSTRUCTIVE OR OTHERWISE

In yet another departure from reality and the evidence, SIMON raised the unfounded assertion that he was constructively discharged when PLAINTIFFS stopped following SIMON'S advice when they had the temerity to actually follow his advice to seek the counsel of another attorney! Of importance, no one has alleged or testified that anyone fired anybody, or that anyone withdrew from anything. Both Brian and Angela testified that during the meeting with SIMON in his office on November 17, 2017, SIMON encouraged them to speak with attorneys about what SIMON was now proposing.

Additionally, in his letter of November 27, 2017, SIMON acknowledges that: "I know you both have…likely consulted with other lawyers…." (P's Ex. 04-0007.) In an email to Angela later that day, SIMON writes: "**I am also happy to speak to your attorney as well**." (80SIMONEH1664.)(Emphasis added.) SIMON is rightfully fixated on the need for PLAINTIFFS to consult another lawyer, as he admitted on cross-examination that he meant it when he wrote it in his letter of November 27, 2017, that "he can't keep working on PLAINTIFFS case unless they worked something out because he was losing money." This message, sent loud and clear by SIMON, was received by PLAINTIFFS. So, what did PLAINTIFFS reasonably do when SIMON said he'd stop working on their case if PLAINTIFFS didn't, in essence, pay him a bonus, and that they should consult with an attorney?

Brian testified that two days later when he returned from China, he followed SIMON'S

advice and spoke with an attorney, Robert D. Vannah, Esq. The evidence also shows that the very next day, Mr. Vannah reached out to SIMON and spoke with him on the phone. Was SIMON happy to speak with Mr. Vannah, as his email promised? And what basis does he have to object? How can SIMON testify that he felt he was "terminated" when his clients chose to follow his advice to speak with another lawyer? That position defies any measure of factual, legal, or common sense.

It is also disingenuous. SIMON testified that he also went out and consulted with his own lawyer, as he testified that he "didn't know what my options were at the time." SIMON is uncertain about the point in time that he spoke with his attorney and testified all over the charts on that matter. At one point he said he sought counsel when he "didn't hear from them verbally since November 25, 2017." At yet another point, he testified that he consulted with James R. Christensen, Esq., "sometime" around the time SIMON sent the letter of November 27, 2017.

Yet again, he testified that he met with Mr. Christensen around November 30, 2017. In but another iteration, SIMON testified that: "…it would have been around that time or a few days or more before…." Why not a straight answer from a bright, ethical lawyer whose life, he testified to, had been consumed by this case? Why would SIMON promote a flagrant double standard where he can seek guidance to protect his alleged rights, but where PLAINTIFFS cannot?

Regardless, the evidence is undisputed that SIMON was instructed by PLAINTIFFS, through Mr. Vannah, to continue working to complete the settlements with the Viking and Lange entities. This included settling with Lange for the $25,000 offer on the table and to finalize the settlement with Viking for the terms that were acceptable to PLAINTIFFS and communicated to SIMON back on November 11, 2017 (SIMONEH1754.), and again on November 16, 2017 (SIMONEH1709). Regarding the Viking settlement agreement, the evidence shows that the original version that SIMON sent to PLAINTIFFS was without paragraph E. This was the version that Mr. Vannah instructed SIMON to have finalized "as is", per the clients instructions.

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Then, merely hours later, without consulting PLAINTIFFS, SIMON caused to be added (and billed PLAINTIFFS for) language in the agreement that Vannah & Vannah would be consulting PLAINTIFFS on the merits of the settlement agreement. At no point was any evidence presented by SIMON to suggest or to prove that Mr. Vannah or the Vannah firm had anything to do with any revisions to the Viking agreement, as inferred by SIMON'S counsel during the proceedings. Despite SIMON'S revisions, the evidence proves that PLAINTIFFS signed the Viking agreement the next day and that it was promptly delivered to SIMON'S office. On December 1, 2017, the matter with Lange resolved, as well.

In a summary of the timeline, here's what the evidence shows as to how this all went down: Brian, on behalf of PLAINTIFFS, agreed to the amount of the settlement with Viking no later than November 11, 2017, and that SIMON was aware of PLAINTIFFS consent; SIMON met with PLAINTIFFS in his office on November 17, 2017, where SIMON demanded more money in fees and encouraged PLAINTIFFS to consult with attorneys on the merits of SIMON'S demands; on November 27, 2017, SIMON said he'd be "happy to speak" with PLAINTIFFS attorneys; in the meantime, SIMON had spoken with his own attorney; on November 29, 2017, PLAINTIFFS, through Brian, consulted with and retained Mr. Vannah; on November 30, 2017, SIMON sent a draft of the Viking agreement to PLAINTIFFS; later that morning, Mr. Vannah spoke with SIMON and instructed him to keep working on the Viking and Lange matters and to finalize the Viking agreement "as is"; and, by December 1, 2017, the Viking and the Lange matters were resolved, thus concluding the primary scope of SIMON'S responsibilities.

SIMON can't credibly claim now that PLAINTIFFS constructively discharged him when they followed his advice and counsel by meeting with and speaking with other attorneys! That defies logic and common sense. SIMON also can't credibly claim that PLAINTIFFS constructively discharged him when they chose to resolve a very lengthy and contentious chunk of litigation with

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Lange, especially since it would likely cost PLAINTIFFS, by SIMON'S own admission, significantly more in fees and expenses.

If it wasn't bad enough for SIMON to assert that he was constructively discharged by his clients for following his advice to consult with an attorney who he said he'd be "happy to speak with"; or for SIMON to cry foul that he got his alleged pink slip (denied by PLAINTIFFS and the evidence) after the Viking and the Lange matters resolved by December 1, 2017; or for SIMON to say that he was constructively discharged, then continue to bill PLAINTIFFS for his time at $550 per hour; or for SIMON to play the victim; then, the most shameful thing of all is that he wants what appears to be an extra fee by abusing the equitable remedy of quantum meruit.

The cases cited by SIMON on constructive discharge are not helpful to him. Missing is any mention or cite of any authority, controlling or otherwise, that holds that a contingency fee can rise like a phoenix in equity in quantum meruit from the ashes of an attorney's failure at law to reduce a contingency fee agreement to writing. If that abuse of an equitable principle were ever found to be okay, SIMON would have cited that case till the end of days. It isn't and he didn't.

To reiterate, SIMON cannot get in equity what he failed by his own admission to obtain at law. To allow him a windfall in the form of a contingency fee in quantum meruit would lay to waste what the Supreme Court of Nevada has adopted in Rule 1.5(c) what a lawyer MUST do in order to receive one, which is to put all of the relevant and specified terms IN WRITING. SIMON the lawyer did not do that here. He's admitted as much on several occasions. Therefore, he's precluded from sneaking in the back-, side-, or any-door with the key of quantum meruit, as that key does not fit here.

What does fit here and does make sense is the rate of the fee of $550 per hour that SIMON and PLAINTIFFS agreed to from the beginning. PLAINTIFFS agree that SIMON is entitled to a measure of additional fees billed at $550 per hour for the work he performed from the date of the

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last billing entry of the fourth invoice—September 19, 2017—to a reasonable time after December 1, 2017, the date when both the Viking and Lange matters had resolved. Similarly, the reasonable time for SIMON'S associates would be billed at $275.

SPAM FOLDER

Since the meeting with PLAINTIFFS in his office on November 17, 2017, SIMON has presented one notion after another that are all belied by the evidence, common sense, and/or the law. Therefore, they are destined for the proverbial Spam Folder. Here are a few of the more bizarre, sad, untruthful, and objectionable examples.

*SIMON'S testimony under oath that the payment of his fees by PLAINTIFFS was optional on their part**.** This one might go down as one of the most bizarre things testified to under oath by a coherent and intelligent witness. No one should believe this nonsense. Of course SIMON expected to be paid what he'd billed, as he made a huge deal in these proceedings on how he was losing money on this case. SIMON also admitted that he never told PLAINTIFFS that paying his fees was optional. To the contrary, when Brian emailed SIMON on December 15, 2016, and asked him if he should send the check for SIMON'S (first) invoice to his house or office (SIMONH3109), SIMON replied that "Anything regarding case should be sent to 810 s casino center Blv LV 89101." (SIMONH3102) Wouldn't that have been the prime time for SIMON to let his clients know that they didn't need to pay his fees? OR SEND THE CHECK/CHECKS BACK TO PLAINTIFFS/SIMON'S CLIENTS WITHOUT DEPOSITING THEM?!? Spam.

*SIMON'S testimony and arguments throughout that PLAINTIFFS don't pay their bills, including SIMON'S fees. In light of the content of the prior Spam Folder item where SIMON says that PLAINTIFFS paid over $370,000 in fees to him that were optional for them to pay, which should be enough to swat this odd assertion to the Spam Folder. But, SIMON stayed on this point like a terrier on a pant leg. In other examples, Mr. Christiansen trotted out an email where Brian was

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contesting paying a bill to show PLAINTIFFS as financial slackers. Yet, Brian and Angela explained that this bill was related to United Restorations, a remediation company that failed to provide a mold certificate at the conclusion of their work, thus preventing occupancy. Once the certificate was provided, Brian testified that the bill was paid in full.

Mr. Christiansen also mentioned a time or two that PLAINTIFFS didn't pay their lawyer. He really said that—even though SIMON remarkably said that the payment of his fees was optional. The evidence also showed that on the morning of November 15, 2017, Brian sent an email to SIMON asking him to send an invoice for any outstanding fees and costs. SIMON never bothered to reply to that email, or send the invoice for fees and costs that Brian requested.

The final example was brought to light when Mr. Christiansen boldly asserted/asked Angela on cross in condescending words (to the effect that): "You want us to believe that you paid your lenders in full the day after you received your settlement check?" When Angela answered "yes," Mr. Christiansen scoffed…until he couldn't when copies of the checks were immediately produced showing exactly what Angela had testified to moments earlier. PLAINTIFFS don't pay their bills, including their legal fees? Spam.

*SIMON'S testimony that PLAINTIFFS wanted the fourth invoice to pay in full before Brian's deposition. Did SIMON ever show anyone an email, letter, or text message to support that wild and wacky assertion? Of course not, because it's untrue and unsupportable. Brian adamantly refuted any morsel of truth to this story. Common sense dictates that no one who had to take out high interest loans to pay SIMON'S fees and costs for damages that they never wanted in the first place is ever going to beg for a bill in the amount of $255,186.25 to pay. Spam.

*SIMON'S testimony that PLAINTIFFS earned interest and benefited from the high interest that was accruing on the loans taken to pay SIMON'S fees. Even a political science major with a history minor knows that when one is paying interest on a loan, the borrower isn't either benefiting

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from or earning interest on what they are paying. George H.W. Bush might have called SIMON'S testimony voodoo economics, or the like. In any event, SIMON'S testimony makes no sense and was only offered to slime PLAINTIFFS. Spam.

*SIMON'S argument that the Viking settlement was made with the understanding that PLAINTIFFS likely owed SIMON a contingency fee. As discussed above, NO ONE in the Viking and Lange litigation—neither SIMON nor PLAINTIFFS nor counsel for Viking and/or Lange—was operating under any notion that a contingency fee was in play here. SIMON and PLAINTIFFS have testified that there wasn't any agreement for a contingency fee. As mentioned above, in an email to Defense counsel on January 4, 2017 (SIMONEH0004402), SIMON stated that: "My clients damages are increasing every day due to loans and attorney's fees and costs that he is paying out of pocket." That reality was reinforced by SIMON to the attorneys for Defendants at Brian's deposition and in 16.1 disclosures. For SIMON or his attorneys to assert to this Court anything to the contrary is not in harmony with the evidence. Spam.

*SIMON'S incessant assertion that he's lost money on this case. How can SIMON admittedly fail to bill (at $550 per hour!) for all of the time he allegedly spent working on this case, then claim that he's the victim who's lost money? He's not a victim under any definition. He had no risk, unlike PLAINTIFFS, as he was paid all along. It boggles the mind and does violence to the equity that SIMON sorely seeks. If one is willing to believe him for a moment, had SIMON contemporaneously kept track of the time that he reasonably spent, it is possible that he would have made more money as the case slogged along.

And, contrary to what SIMON would have one believe, keeping track of one's time is no more difficult than taking notes. Yet, SIMON makes this simple task out to be second only to solving world hunger. This is yet another example of SIMON'S invited error being used by him to fashion an equitable remedy that he doesn't deserve. Equity requires clean hands, and SIMON has

willfully soiled his. Spam.

*Mr. Christiansen's position that since PLAINTIFFS are wealthy and live in a big house that they own free and clear, they should share some of the Viking settlement with SIMON. If the relative wealth of the parties were relevant, the fortunate circumstances of the SIMONS' would certainly be added to the conversation. (Perhaps that of Mr. Christiansen, too.) But, the wealth of the parties is neither relevant nor a crime. Why would a wealthy person disparage the wealth of another wealthy person when none of the above is remotely relevant to the proceedings? Spam.

*SIMON'S testimony that he's not trying to seek a contingency fee in addition to the hourly fees he's billed and paid for. SIMON said on the stand that he wouldn't and doesn't do that. Yet, as Brian and Angela testified, that's exactly what he demanded of them in the November 17, 2017, meeting. SIMON doubled down on his demand on page one of his proposed Retainer Agreement where he wanted $1,500,000 from PLAINTIFFS pertaining to the Viking matter. That's 25% of the settlement. And he's already billed and received from PLAINTIFFS $560,000 in fees and costs. Spam.

*SIMON'S testimony that he was constructively discharged "…when he's meeting with other lawyers...etc." SIMON admits that he encouraged Brian and Angela to seek out the advice of other counsel, so that can't be a decent reason for this odd argument. It's also undisputed from the entries in SIMON'S super bill that he alone continued to bill PLAINTIFFS $550 per hour in 74 additional entries and 43.3 additional hours, not including the whopping 135.8 hours in the block billing entry to review emails. That amounts to $23,815 in SIMON'S fees alone from the mid-morning of November 30, 2017, through January 8, 2018! Is that the conduct of one who reasonably believes he was discharged at any time after he spoke with Mr. Vannah on the mid-morning of November 30, 2017? Spam.

*SIMON'S testimony that the hourly value of his work is now worth more than the $550 per

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hour that he was paid throughout this case. There's no documentary evidence that SIMON ever expressed any displeasure to PLAINTIFFS for either the hourly rate that SIMON was charging and cashing large checks for…until November 17, 2017, after PLAINTIFFS agreed to the number to settle the Viking matter on November 11, 2017. If SIMON truly believed he was losing money on this case all along, and/or that he was entitled to a percentage of any eventual settlement with Viking, he would have spent the 15 minutes max it would have taken to either reply to Brian's email of August 22, 2017, where he was encouraged to provide alternatives, or submit a written proposal for fees many months earlier. SIMON didn't do either, though he did present another large hourly invoice, all billed at $550 per hour.

SIMON'S sudden buyer's remorse doesn't sell well, either to the facts of this case or to cases at large. By analogy, SIMON'S sudden remorse is akin to the chipmaker(s) for iPhones suing Apple for more than the original contract price, or a portion of Apple's profits, simply because they helped Apple's premier product rise to the lofty status that it enjoys. Or, closer to home, if Mr. Nunez decided that the hourly rate paid by his insurance carrier clients has been beneath his value all along, and exercised his wrath by suing them for his perceived rate on past cases. Two things would surely happen then: One, his insurance clients would pull all of his files by 5:00 p.m. Two, the Nevada Supreme Court would either dismiss his appeal or simply uphold the Motion for Summary Judgment that the District Court would have granted in favor of his clients. SIMON doesn't really believe that his services here are worth more per hour than the $550 per hour he agreed to be paid. Spam.

*Will Kemp's testimony that Rule 1.5(c) is Dan Polsenberg's rule. That's either a bad stab at humor or a very clueless statement from one who should (and really does) know better. Up front and center to these Rules is language that tells us lawyers that they are "adopted by the Supreme Court of Nevada." There are numerous cases published by them that show how much they are paying attention to whether or not their Rules are being followed by those of us to whom they

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apply—lawyers such as SIMON. Do the Justices not give a darn whether a contingency fee agreement is in writing? Hardly! Have they EVER upheld the award of a contingency fee to a lawyer who didn't have a written contingency fee agreement with all of the whistles and bells per Rule 1.5(c)? If they had, SIMON would have cited it in bold and all caps.

The Nevada Supreme Court cares very much how lawyers interact with their clients. And they care even more deeply to preserve the integrity of the practice of law. They rightfully keep a tight leash on how we do things, as one can plainly see near the end of each edition of the Nevada Lawyer magazine. The Rules of Professional Conduct are cited again and again. Dan Polsenberg's Rules to which the Nevada Supreme Court would choose to dismiss? Spam.

MAKING IT REAL

In reality, none of this was necessary but for SIMON. Had he truly believed that he needed a different fee structure to make this case more profitable for him and his firm, he would have prepared and provided the proposal to Brian that the undisputed evidence proves that Brian asked for. Instead, SIMON did nothing. If SIMON really thought that he was losing money on this case, he also would have provided the additional invoice for fees and costs that the undisputed evidence shows that Brian asked for via email during the morning hours of November 15, 2017. Instead, SIMON, again, did nothing.

Despite himself, SIMON is entitled to additional fees for work he performed from September 19, 2017, the date of the last entry of the fourth invoice, through the wrap-up of the Viking and Lange settlements. By his own admission, SIMON billed nearly $400,000 in fees for his time at $550 per hour on his super bill for that period of time. PLAINTIFFS presented evidence that this portion of the super bill contains block billings, double billings, and that offensive and wild entry of 135.8 hours for reviewing emails. That totals $74,690 in fees alone!

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But it gets worse—what SIMON is attempting to sell this Court as reasonable fees in his super bill from September 20, 2017, to the settlements of the Viking and Lange matters amounts to an average of $6,500 billed each day, seven days a week! That's the epitome of unreasonable. While PLAINTIFFS don't agree that the amount in SIMON'S super bill is reasonable, they assert that between $180,000 and $300,000 is the most that could possibly be justified in reasonable additional hourly fees for SIMON to compensate him from the date of his last billing entry on the fourth invoice to the bitter end.

What is neither real nor fair is to award and reward SIMON for his do-overs. These are the entries in his super bill where SIMON and his staff went back and added time and entries for the time frame between May 27, 2016 and September 19, 2017. PLAINTIFFS already paid him handsomely for that timeframe. More telling, the evidence shows that SIMON admitted to defense counsel as an officer of the court that all of "the fees and costs for both of these plaintiffs as a result of this claim have been disclosed to you." He can't have it both ways, especially as he seeks equity from this Court when he's willfully soiled his own hands.

ALTERED REALITY

SIMON'S version of the evidence, including the remedy he longs to receive, is altered reality. There is simply no factual or legal basis for SIMON'S conduct or the amount of his Amended Attorneys' Lien, which is a thinly veiled scheme to compel a contingency fee. There are no practical reasons, either. To the contrary—to entertain SIMON'S position in this matter sends a very troubling message to the community looking to lawyers for help. It also undermines the fiduciary duty that lawyers, such as SIMON, owe to clients, such as PLAINTIFFS. PLAINTIFFS refer to this as The SIMON Rule.

If The SIMON Rule is adopted, attorneys will be emboldened by the following in the handling of their client's interests: 1.) Agree to represent a client for an hourly fee of $550, but fail

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to represent their best interests by reducing the fee agreement to writing; 2.) Bill the client $550 per hour for an extended period of time and collect thousands or hundreds of thousands of dollars from the client, who pays on time when the invoices are presented; 3.) Express a desire to change the terms of the fee agreement when it becomes clear that a much higher fee, or bonus, can be had if the client will agree to do so; 4.) When the client won't agree to pay more than the agreed to fee of $550 per hour, lien the file for the additional proceeds, or bonus, that you had your eyes on late in the game; and, 5.) Use your failure to reduce your fee agreement in writing as a basis to get more money on the back of a "charging lien" and a Motion to Adjudicate with its accelerated timelines and no discovery.

What are the optics of The SIMON Rule if it were widely known that this is the way that we attorneys can operate? Not good. Thankfully, neither the facts, nor the law, nor practical nor common sense supports The SIMON Rule. And neither should this court.

THE END

It is so simple to connect the evidentiary dots to find that an oral contract for fees was created by the parties in June of 2016 and performed with exactness. The agreed-to rate is and always has been $550 per hour for SIMON (and then $275 for his associates). It is equally simple to recognize that there is nothing in the evidence or the law to find that SIMON was ever discharged by anyone for anything. To the contrary—PLAINTIFFS followed SIMON'S advice and counsel by speaking with an attorney on November 29, 2017, and PLAINTIFFS directed SIMON on November 30, 2017, through counsel, to complete all of the tasks necessary to finalize the Viking and Lange settlements. All of that was completed by December 1, 2017. That is what the evidence says and that is what this Court should find.

While it's possible to support an additional fee to SIMON in a range between $180,000 and $300,000, it is reasonable to award him less. We would not be here had it not been for SIMON'S

numerous errors in judgment and procedure, and his own invited errors cannot be used as a tool to extract an unreasonable remedy in equity.

DATED this 24th day of September, 2018.

VANNAH & VANNAH

/s/ Robert D. Vannah

ROBERT D. VANNAH, ESQ.

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Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

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18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was $692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

The Law Office Appropriately Asserted A Charging Lien Which Must Be Adjudicated By The Court

An attorney may obtain payment for work on a case by use of an attorney lien. Here, the Law Office of Daniel Simon may use a charging lien to obtain payment for work on case A-16-738444-C under NRS 18.015.

NRS 18.015(1)(a) states:

> 1. An attorney at law shall have a lien:
> (a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

Nev. Rev. Stat. 18.015.

The Court finds that the lien filed by the Law Office of Daniel Simon, in case A-16-738444-C, complies with NRS 18.015(1)(a). The Law Office perfected the charging lien pursuant to NRS 18.015(3), by serving the Edgeworths as set forth in the statute. The Law Office charging lien was perfected before settlement funds generated from A-16-738444-C of $6,100,000.00 were deposited, thus the charging lien attached to the settlement funds. Nev. Rev. Stat. 18.015(4)(a); Golightly & Vannah, PLLC v. TJ Allen LLC, 373 P.3d 103, at 105 (Nev. 2016). The Law Office's charging lien

is enforceable in form.

The Court has personal jurisdiction over the Law Office and the Plaintiffs in A-16-738444-C. Argentina Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury & Standish, 216 P.3d 779 at 782-83 (Nev. 2009). The Court has subject matter jurisdiction over adjudication of the Law Office's charging lien. Argentina, 216 P.3d at 783. The Law Office filed a motion requesting adjudication under NRS 18.015, thus the Court must adjudicate the lien.

Fee Agreement

It is undisputed that no express written fee agreement was formed. The Court finds that there was no express oral fee agreement formed between the parties. An express oral agreement is formed when all important terms are agreed upon. *See,* Loma Linda University v. Eckenweiler, 469 P.2d 54 (Nev. 1970) (*no oral contract was formed, despite negotiation, when important terms were not agreed upon and when the parties contemplated a written agreement*). The Court finds that the payment terms are essential to the formation of an express oral contract to provide legal services on an hourly basis.

Here, the testimony from the evidentiary hearing does not indicate, with any degree of certainty, that there was an express oral fee agreement formed on or about June of 2016. Despite Brian Edgeworth's affidavits and testimony; the emails between himself and Danny Simon, regarding punitive damages and a possible contingency fee, indicate that no express oral fee agreement was formed at the meeting on June 10, 2016. Specifically in Brian Edgeworth's August 22, 2017 email, titled "Contingency," he writes:

> "We never really had a structured discussion about how this might be done. I am more than happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these

> scumbags will file etc. Obviously that could not have been done earlier snce who would have thought this case would meet the hurdle of punitives at the start. I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell. I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?"

(Def. Exhibit 27).

It is undisputed that when the flood issue arose, all parties were under the impression that Simon would be helping out the Edgeworths, as a favor.

The Court finds that an implied fee agreement was formed between the parties on December 2, 2016, when Simon sent the first invoice to the Edgeworths, billing his services at $550 per hour, and the Edgeworths paid the invoice. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for Simon's associates. Simon testified that he never told the Edgeworths not to pay the bills, though he testified that from the outset he only wanted to "trigger coverage". When Simon repeatedly billed the Edgeworths at $550 per hour for his services, and $275 an hour for the services of his associates; and the Edgeworths paid those invoices, an implied fee agreement was formed between the parties. The implied fee agreement was for $550 per hour for the services of Daniel Simon Esq. and $275 per hour for the services of his associates.

Constructive Discharge

Constructive discharge of an attorney may occur under several circumstances, such as:

- Refusal to communicate with an attorney creates constructive discharge. Rosenberg v. Calderon Automation, 1986 Ohio App. LEXIS 5460 (Jan. 31, 1986).
- Refusal to pay an attorney creates constructive discharge. *See e.g.*, Christian v. All Persons Claiming Any Right, 962 F. Supp. 676 (U.S. Dist. V.I. 1997).

- Suing an attorney creates constructive discharge. See Tao v. Probate Court for the Northeast Dist. #26, 2015 Conn. Super. LEXIS 3146, *13-14, (Dec. 14, 2015). *See also* Maples v. Thomas, 565 U.S. 266 (2012); *Harris v. State*, 2017 Nev. LEXIS 111; and Guerrero v. State, 2017 Nev. Unpubl. LEXIS 472.

- Taking actions that preventing effective representation creates constructive discharge. McNair v. Commonwealth, 37 Va. App. 687, 697-98 (Va. 2002).

Here, the Court finds that the Edgeworths constructively discharged Simon as their lawyer on November 29, 2017. The Edgeworths assert that because Simon has not been expressly terminated, has not withdrawn, and is still technically their attorney of record; there cannot be a termination. The Court disagrees.

On November 29, 2017, the Edgeworths met with the Law Firm of Vannah and Vannah and signed a retainer agreement. The retainer agreement was for representation on the Viking settlement agreement and the Lange claims. (Def. Exhibit 90). This is the exact litigation that Simon was representing the Edgeworths on. This fee agreement also allowed Vannah and Vannah to do all things without a compromise. Id. The retainer agreement specifically states:

> Client retains Attorneys to represent him as his Attorneys regarding Edgeworth Family Trust and AMERICAN GRATING V. ALL VIKING ENTITIES and all damages including, but not limited to, all claims in this matter and empowers them to do all things to effect a compromise in said matter, or to institute such legal action as may be advisable in their judgment, and agrees to pay them for their services, on the following conditions:
>
> a) …
> b) …
> c) Client agrees that his attorneys will work to consummate a settlement of $6,000,000 from the Viking entities and any settlement amount agreed to be paid by the Lange entity. Client also agrees that attorneys will work to reach an agreement amongst the parties to resolve all claims in the Lange and Viking litigation.

Id.

This agreement was in place at the time of the settlement of the Viking and Lange claims. Mr. Simon had already begun negotiating the terms of the settlement agreement with Viking during the

week of November 27, 2017 prior to Mr. Vannah's involvement. These negotiated terms were put into a final release signed by the Edgeworths and Mr. Vannah's office on December 1, 2017. (Def. Exhibit 5). Mr. Simon's name is not contained in the release; Mr. Vannah's firm is expressly identified as the firm that solely advised the clients about the settlement. The actual language in the settlement agreement, for the Viking claims, states:

> PLAINTIFFS represent that their independent counsel, Robert Vannah, Esq. and John Greene, Esq., of the law firm Vannah & Vannah has explained the effect of this AGREEMENT and their release of any and all claims, known or unknown and, based upon that explanation and their independent judgment by the reading of this Agreement, PLAINTIFFS understand and acknowledge the legal significance and the consequences of the claims being released by this Agreement. PLAINTIFFS further represent that they understand and acknowledge the legal significance and consequences of a release of unknown claims against the SETTLING PARTIES set forth in, or arising from, the INCIDENT and hereby assume full responsibility for any injuries, damages, losses or liabilities that hereafter may occur with respect to the matters released by this Agreement.

Id.

Also, Simon was not present for the signing of these settlement documents and never explained any of the terms to the Edgeworths. He sent the settlement documents to the Law Office of Vannah and Vannah and received them back with the signatures of the Edgeworths.

Further, the Edgeworths did not personally speak with Simon after November 25, 2017. Though there were email communications between the Edgeworths and Simon, they did not verbally speak to him and were not seeking legal advice from him. In an email dated December 5, 2017, Simon is requesting Brian Edgeworth return a call to him about the case, and Brian Edgeworth responds to the email saying, "please give John Greene at Vannah and Vannah a call if you need anything done on the case. I am sure they can handle it." (Def. Exhibit 80). At this time, the claim against Lange Plumbing had not been settled. The evidence indicates that Simon was actively

working on this claim, but he had no communication with the Edgeworths and was not advising them on the claim against Lange Plumbing. Specifically, Brian Edgeworth testified that Robert Vannah Esq. told them what Simon said about the Lange claims and it was established that the Law Firm of Vannah and Vannah provided advice to the Edgeworths regarding the Lange claim. Simon and the Law Firm of Vannah and Vannah gave different advice on the Lange claim, and the Edgeworths followed the advice of the Law Firm of Vannah and Vannah to settle the Lange claim. The Law Firm of Vannah and Vannah drafted the consent to settle for the claims against Lange Plumbing (Def. Exhibit 47). This consent to settle was inconsistent with the advice of Simon. Mr. Simon never signed off on any of the releases for the Lange settlement.

Further demonstrating a constructive discharge of Simon is the email from Robert Vannah Esq. to James Christensen Esq. dated December 26, 2017, which states: "They have lost all faith and trust in Mr. Simon. Therefore, they will not sign the checks to be deposited into his trust account. Quite frankly, they are fearful that he will steal the money." (Def. Exhibit 48). Then on January 4, 2018, the Edgeworth's filed a lawsuit against Simon in Edgeworth Family Trust; American Grating, LLC vs. Daniel S. Simon; the Law Office of Daniel S. Simon, a Professional Corporation d/b/a Simon Law, case number A-18-767242-C. Then, on January 9, 2018, Robert Vannah Esq. sent an email to James Christensen Esq. stating, "I guess he could move to withdraw. However, that doesn't seem in his best interests." (Def. Exhibit 53).

The Court recognizes that Simon still has not withdrawn as counsel of record on A-16-738444-C, the Law Firm of Vannah and Vannah has never substituted in as counsel of record, the Edgeworths have never explicitly told Simon that he was fired, Simon sent the November 27, 2018 letter indicating that the Edgeworth's could consult with other attorneys on the fee agreement (that was attached to the letter), and that Simon continued to work on the case after the November 29,

2017 date. The court further recognizes that it is always a client's decision of whether or not to accept a settlement offer. However the issue is constructive discharge and nothing about the fact that Mr. Simon has never officially withdrawn from the case indicates that he was not constructively discharged. His November 27, 2017 letter invited the Edgeworth's to consult with other attorneys on the fee agreement, not the claims against Viking or Lange. His clients were not communicating with him, making it impossible to advise them on pending legal issues, such as the settlements with Lange and Viking. It is clear that there was a breakdown in attorney-client relationship preventing Simon from effectively representing the clients. The Court finds that Danny Simon was constructively discharged by the Edgeworths on November 29, 2017.

Adjudication of the Lien and Determination of the Law Office Fee

NRS 18.015 states:

1. An attorney at law shall have a lien:

(a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

(b) In any civil action, upon any file or other property properly left in the possession of the attorney by a client.

2. A lien pursuant to subsection 1 is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client.

3. An attorney perfects a lien described in subsection 1 by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien.

4. A lien pursuant to:

(a) Paragraph (a) of subsection 1 attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action; and

(b) Paragraph (b) of subsection 1 attaches to any file or other property properly left in the possession of the attorney by his or her client, including, without limitation, copies of the attorney's file if the original documents

> received from the client have been returned to the client, and authorizes the attorney to retain any such file or property until such time as an adjudication is made pursuant to subsection 6, from the time of service of the notices required by this section.
>
> 5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as inconsistent with the attorney's professional responsibilities to the client.
>
> 6. On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.
>
> 7. Collection of attorney's fees by a lien under this section may be utilized with, after or independently of any other method of collection.

Nev. Rev. Stat. 18.015.

NRS 18.015(2) matches Nevada contract law. If there is an express contract, then the contract terms are applied. Here, there was no express contract for the fee amount, however there was an implied contract when Simon began to bill the Edgeworths for fees in the amount of $550 per hour for his services, and $275 per hour for the services of his associates. This contract was in effect until November 29, 2017, when he was constructively discharged from representing the Edgeworths. After he was constructively discharged, under NRS 18.015(2) and Nevada contract law, Simon is due a reasonable fee- that is, quantum meruit.

Implied Contract

On December 2, 2016, an implied contract for fees was created. The implied fee was $550 an hour for the services of Mr. Simon. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for the services of Simon's associates. This implied contract was created when invoices were sent to the Edgeworths, and they paid the invoices.

The invoices that were sent to the Edgeworths indicate that they were for costs and attorney's fees, and these invoices were paid by the Edgeworths. Though the invoice says that the fees were

reduced, there is no evidence that establishes that there was any discussion with the Edgeworths as to how much of a reduction was being taken, and that the invoices did not need to be paid. There is no indication that the Edgeworths knew about the amount of the reduction and acknowledged that the full amount would be due at a later date. Simon testified that Brian Edgeworth chose to pay the bills to give credibility to his actual damages, above his property damage loss. However, as the lawyer/counselor, Simon did not prevent Brian Edgeworth from paying the bill or in any way refund the money, or memorialize this or any understanding in writing.

Simon produced evidence of the claims for damages for his fees and costs pursuant to NRCP 16.1 disclosures and computation of damages; and these amounts include the four invoices that were paid in full and there was never any indication given that anything less than all the fees had been produced. During the deposition of Brian Edgeworth it was suggested, by Simon, that all of the fees had been disclosed. Further, Simon argues that the delay in the billing coincides with the timing of the NRCP 16.1 disclosures, however the billing does not distinguish or in any way indicate that the sole purpose was for the Lange Plumbing LLC claim. Since there is no contract, the Court must look to the actions of the parties to demonstrate the parties' understanding. Here, the actions of the parties are that Simon sent invoices to the Edgeworths, they paid the invoices, and Simon Law Office retained the payments, indicating an implied contract was formed between the parties. The Court find that the Law Office of Daniel Simon should be paid under the implied contract until the date they were constructively discharged, November 29, 2017.

Amount of Fees Owed Under Implied Contract

The Edgeworths were billed, and paid for services through September 19, 2017. There is some testimony that an invoice was requested for services after that date, but there is no evidence

that any invoice was paid by the Edgeworths. Since the Court has found that an implied contract for fees was formed, the Court must now determine what amount of fees and costs are owed from September 19, 2017 to the constructive discharge date of November 29, 2017. In doing so, the Court must consider the testimony from the witnesses at the evidentiary hearing, the submitted billings, the attached lien, and all other evidence provided regarding the services provided during this time.

At the evidentiary hearing, Ashley Ferrel Esq. testified that some of the items in the billing that was prepared with the lien "super bill," are not necessarily accurate as the Law Office went back and attempted to create a bill for work that had been done over a year before. She testified that they added in .3 hours for each Wiznet filing that was reviewed and emailed and .15 hours for every email that was read and responded to. She testified that the dates were not exact, they just used the dates for which the documents were filed, and not necessarily the dates in which the work was performed. Further, there are billed items included in the "super bill" that was not previously billed to the Edgeworths, though the items are alleged to have occurred prior to or during the invoice billing period previously submitted to the Edgeworths. The testimony at the evidentiary hearing indicated that there were no phone calls included in the billings that were submitted to the Edgeworths.

This attempt to recreate billing and supplement/increase previously billed work makes it unclear to the Court as to the accuracy of this "recreated" billing, since so much time had elapsed between the actual work and the billing. The court reviewed the billings of the "super bill" in comparison to the previous bills and determined that it was necessary to discount the items that had not been previously billed for; such as text messages, reviews with the court reporter, and reviewing, downloading, and saving documents because the Court is uncertain of the accuracy of the "super

bill."

Simon argues that he has no billing software in his office and that he has never billed a client on an hourly basis, but his actions in this case are contrary. Also, Simon argues that the Edgeworths, in this case, were billed hourly because the Lange contract had a provision for attorney's fees; however, as the Court previously found, when the Edgeworths paid the invoices it was not made clear to them that the billings were only for the Lange contract and that they did not need to be paid. Also, there was no indication on the invoices that the work was only for the Lange claims, and not the Viking claims. Ms. Ferrel testified that the billings were only for substantial items, without emails or calls, understanding that those items may be billed separately; but again the evidence does not demonstrate that this information was relayed to the Edgeworths as the bills were being paid. This argument does not persuade the court of the accuracy of the "super bill".

The amount of attorney's fees and costs for the period beginning in June of 2016 to December 2, 2016 is $42,564.95. This amount is based upon the invoice from December 2, 2016 which appears to indicate that it began with the initial meeting with the client, leading the court to determine that this is the beginning of the relationship. This invoice also states it is for attorney's fees and costs through November 11, 2016, but the last hourly charge is December 2, 2016. This amount has already been paid by the Edgeworths on December 16, 2016.[2]

The amount of the attorney's fees and costs for the period beginning on December 5, 2016 to April 4, 2017 is $46,620.69. This amount is based upon the invoice from April 7, 2017. This amount has already been paid by the Edgeworths on May 3, 2017.

The amount of attorney's fees for the period of April 5, 2017 to July 28, 2017, for the services of Daniel Simon Esq. is $72,077.50. The amount of attorney's fees for this period for

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[2]There are no billing amounts from December 2 to December 4, 2016.

Ashley Ferrel Esq. is $38,060.00. The amount of costs outstanding for this period is $31,943.70. This amount totals $142,081.20 and is based upon the invoice from July 28, 2017. This amount has been paid by the Edgeworths on August 16, 2017.[3]

The amount of attorney's fees for the period of July 31, 2017 to September 19, 2017, for the services of Daniel Simon Esq. is $119,762.50. The amount of attorney's fees for this period for Ashley Ferrel Esq. is $60,981.25. The amount of attorney's fees for this period for Benjamin Miller Esq. is $2,887.50. The amount of costs outstanding for this period is $71,555.00. This amount totals $255,186.25 and is based upon the invoice from September 19, 2017. This amount has been paid by the Edgeworths on September 25, 2017.

From September 29, 2017 to November 29, 2017, the Court must determine the amount of attorney fees owed to the Law Office of Daniel Simon.[4] For the services of Daniel Simon Esq., the total amount of hours billed are 340.05. At a rate of $550 per hour, the total attorney's fees owed to the Law Office for the work of Daniel Simon Esq. is $187,027.50. For the services of Ashley Ferrel Esq., the total amount of hours billed are 337.15. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Ashley Ferrel Esq. from September 19, 2017 to November 29, 2017 is $92,716.25.[5] For the services of Benjamin Miller Esq., the total amount of hours billed are 19.05. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Benjamin Miller Esq. from September 19, 2017 to November 29, 2017 is $5,238.75.[6]

The Court notes that though there was never a fee agreement made with Ashley Ferrel Esq. or Benjamin Miller Esq., however, their fees were included on the last two invoices that were paid

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[3] There are no billings from July 28 to July 30, 2017.
[4] There are no billings for October 8th, October 28-29, and November 5th.
[5] There is no billing for the October 7-8, October 22, October 28-29, November 4, November 11-12, November 18-19, November 21, and November 23-26.
[6] There is no billing from September 19, 2017 to November 5, 2017.

by the Edgeworths, so the implied fee agreement applies to their work as well.

The Court finds that the total amount owed to the Law Office of Daniel Simon for the period of September 19, 2018 to November 29, 2017 is $284,982.50.

Costs Owed

The Court finds that the Law Office of Daniel Simon is owed for outstanding costs of the litigation in Edgeworth Family Trust; and American Grating, LLC vs. Lange Plumbing, LLC; The Viking Corporation; Supply Network, Inc. dba Viking Supplynet in case number A-16-738444-C. Pursuant to the Memorandum of Costs and Disbursements filed on January 17, 2018, the Law Firm submits that it is owed $71,594.93 in costs. These costs include $3,122.97 in Clerk's Fees; $9,575.90 in Video and Court Recorder's Fees; $57,646.06 in Expert Witness Fees; and $1,250.00 in Copy Fees. The Court finds that the Law Office of Daniel Simon is owed these costs in the amount of $71,594.93.

Quantum Meruit

When a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract, but is paid based on quantum meruit. *See e.g.* Golightly v. Gassner, 281 P.3d 1176 (Nev. 2009) (*unreported*) (*discharged contingency attorney paid by quantum meruit rather than by contingency fee pursuant to agreement with client*); *citing,* Gordon v. Stewart, 324 P.3d 234 (1958) (*attorney paid in quantum meruit after client breach of agreement*); and, Cooke v. Gove, 114 P.2d 87 (Nev. 1941) (*fees awarded in quantum meruit when there was no contingency agreement*). Here, Simon was constructively discharged by the Edgeworths on November 29, 2017. The constructive discharge terminated the implied contract for fees. William

Kemp Esq. testified as an expert witness and stated that if there is no contract, then the proper award is quantum meruit. The Court finds that the Law Office of Daniel Simon is owed attorney's fees under quantum meruit from November 29, 2017, after the constructive discharge, to the conclusion of the Law Office's work on this case.

In determining the amount of fees to be awarded under quantum meruit, the Court has wide discretion on the method of calculation of attorney fee, to be "tempered only by reason and fairness". Albios v. Horizon Communities, Inc., 132 P.3d 1022 (Nev. 2006). The law only requires that the court calculate a reasonable fee. Shuette v. Beazer Homes Holding Corp., 124 P.3d 530 (Nev. 2005). Whatever method of calculation is used by the Court, the amount of the attorney fee must be reasonable under the Brunzell factors. Id. The Court should enter written findings of the reasonableness of the fee under the Brunzell factors. Argentena Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury Standish, 216 P.3d 779, at fn2 (Nev. 2009). Brunzell provides that "[w]hile hourly time schedules are helpful in establishing the value of counsel services, other factors may be equally significant. Brunzell v. Golden Gate National Bank, 455 P.2d 31 (Nev. 1969).

The Brunzell factors are: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed; and (4) the result obtained. Id. However, in this case the Court notes that the majority of the work in this case was complete before the date of the constructive discharge, and the Court is applying the Brunzell factors for the period commencing after the constructive discharge.

In considering the Brunzell factors, the Court looks at all of the evidence presented in the case, the testimony at the evidentiary hearing, and the litigation involved in the case.

1. *Quality of the Advocate*

Brunzell expands on the "qualities of the advocate" factor and mentions such items as

training, skill and education of the advocate. Mr. Simon has been an active Nevada trial attorney for over two decades. He has several 7-figure trial verdicts and settlements to his credit. Craig Drummond Esq. testified that he considers Mr. Simon a top 1% trial lawyer and he associates Mr. Simon in on cases that are complex and of significant value. Michael Nunez Esq. testified that Mr. Simon's work on this case was extremely impressive. William Kemp Esq. testified that Mr. Simon's work product and results are exceptional.

2. *The Character of the Work to be Done*

The character of the work done in this case is complex. There were multiple parties, multiple claims, and many interrelated issues. Affirmative claims by the Edgeworths covered the gamut from product liability to negligence. The many issues involved manufacturing, engineering, fraud, and a full understanding of how to work up and present the liability and damages. Mr. Kemp testified that the quality and quantity of the work was exceptional for a products liability case against a world-wide manufacturer that is experienced in litigating case. Mr. Kemp further testified that the Law Office of Danny Simon retained multiple experts to secure the necessary opinions to prove the case. The continued aggressive representation, of Mr. Simon, in prosecuting the case that was a substantial factor in achieving the exceptional results.

3. *The Work Actually Performed*

Mr. Simon was aggressive in litigating this case. In addition to filing several motions, numerous court appearances, and deposition; his office uncovered several other activations, that caused possible other floods. While the Court finds that Mr. Edgeworth was extensively involved and helpful in this aspect of the case, the Court disagrees that it was his work alone that led to the other activations being uncovered and the result that was achieved in this case. Since Mr. Edgeworth is not a lawyer, it is impossible that it was his work alone that led to the filing of motions

and the litigation that allowed this case to develop into a $6 million settlement. All of the work by the Law Office of Daniel Simon led to the ultimate result in this case.

4. The Result Obtained

The result was impressive. This began as a $500,000 insurance claim and ended up settling for over $6,000,000. Mr. Simon was also able to recover an additional $100,000 from Lange Plumbing LLC. Mr. Vannah indicated to Simon that the Edgeworths were ready so sign and settle the Lange Claim for $25,000 but Simon kept working on the case and making changes to the settlement agreement. This ultimately led to a larger settlement for the Edgeworths. Recognition is due to Mr. Simon for placing the Edgeworths in a great position to recover a greater amount from Lange. Mr. Kemp testified that this was the most important factor and that the result was incredible. Mr. Kemp also testified that he has never heard of a $6 million settlement with a $500,000 damage case. Further, in the Consent to Settle, on the Lange claims, the Edgeworth's acknowledge that they were made more than whole with the settlement with the Viking entities.

In determining the amount of attorney's fees owed to the Law Firm of Daniel Simon, the Court also considers the factors set forth in Nevada Rules of Professional Conduct – Rule 1.5(a) which states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

NRCP 1.5. However, the Court must also consider the remainder of Rule 1.5 which goes on to state:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:

(1) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;

(2) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;

(3) Whether the client is liable for expenses regardless of outcome;

(4) That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and

(5) That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

NRCP 1.5.

The Court finds that under the Brunzell factors, Mr. Simon was an exceptional advocate for the Edgeworths, the character of the work was complex, the work actually performed was extremely significant, and the work yielded a phenomenal result for the Edgeworths. All of the Brunzell factors justify a reasonable fee under NRPC 1.5. However, the Court must also consider the fact

that the evidence suggests that the basis or rate of the fee and expenses for which the client will be responsible were never communicated to the client, within a reasonable time after commencing the representation. Further, this is not a contingent fee case, and the Court is not awarding a contingency fee. Instead, the Court must determine the amount of a reasonable fee. The Court has considered the services of the Law Office of Daniel Simon, under the Brunzell factors, and the Court finds that the Law Office of Daniel Simon is entitled to a reasonable fee in the amount of $200,000, from November 30, 2017 to the conclusion of this case.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court must adjudicate the lien. The Court further finds that there was an implied agreement for a fee of $550 per hour between Mr. Simon and the Edgeworths once Simon started billing Edgeworth for this amount, and the bills were paid. The Court further finds that on November 29, 2017, the Edgeworth's constructively discharged Mr. Simon as their attorney, when they ceased following his advice and refused to communicate with him about their litigation. The Court further finds that Mr. Simon was compensated at the implied agreement rate of $550 per hour for his services, and $275 per hour for his associates; up and until the last billing of September 19, 2017. For the period from September 19, 2017 to November 29, 2017, the Court finds that Mr. Simon is entitled to his implied agreement fee of $550 an hour, and $275 an hour for his associates, for a total amount of $284,982.50. For the period after November 29, 2017, the Court finds that the Law Office of Daniel Simon properly perfected their lien and is entitled to a reasonable fee for the services the office rendered for the Edgeworths, after being

constructively discharged, under quantum meruit, in an amount of $200,000. The Court further finds that the Law Office of Daniel Simon is entitled to costs in the amount of $71,594.93.

ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Adjudicate the Attorneys Lien of the Law Office of Daniel S. Simon is hereby granted and that the reasonable fee due to the Law Office of Daniel Simon is $556,577.43, which includes outstanding costs.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST, and AMERICAN GRATING, LLC Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5 and ROE entities 6 through 10; Defendants.	Case No.: A-16-738444-C Dept. No.: 10 **MOTION TO AMEND FINDINGS UNDER NRCP 52; and/or FOR RECONSIDERATION** Date of Hearing: Time of Hearing:
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC Plaintiffs, vs. DANIEL S. SIMON d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	CONSOLIDATED WITH Case No.: A-18-767242-C Dept. No.: 10

The Law Office of Daniel Simon, Daniel Simon individually, and Simon Law, (Simon) requests amendment of the findings recently issued by the Court pursuant to NRCP 52, and/or, reconsideration of the findings and orders recently issued pursuant to EDCR 2.20.

This motion is made and based upon the papers and pleadings on file herein, exhibits attached, the points and authorities set forth herein, all other evidence that the Court deems just and proper, as well as the arguments of counsel at the time of the hearing hereon.

Dated this 29th day of October, 2018.

/s/ *James R. Christensen*
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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

You, and each of you, will please take notice that the undersigned will bring on for hearing the Motion for Reconsideration, Clarification of Decision and Order, and Amendment of the Findings of Fact and Conclusions of Law before the above- entitled Court located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155 on the **29th** day of **November**, 2018, at **In Chambers** ~~a.m./p.m~~. in Department X, Courtroom 14B.

DATED this 29th day of October, 2018.

/s/ *James R. Christensen*
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MEMORANDUM OF POINTS & AUTHORITIES

I. Introduction

On October 11, 2018, this Court made three decisions:

- Decision and Order on Motion to Dismiss NRCP 12(b)(5). ("MTDO") Attached hereto as Exhibit 1.
- Decision and Order on Motion to Adjudicate Lien. ("Lien D&O") Attached hereto as Exhibit 2.
- Decision and Order on Special Motion to Dismiss Anti-SLAPP. ("ASO") Attached hereto as Exhibit 3.

Upon review, Simon believes there are matters that require correction, clarification and/or merit reconsideration by the court. Accordingly, Simon respectfully requests the Court amend its findings pursuant to NRCP 52 and/or reconsider its rulings pursuant to EDCR 2.20 on the following issues:

A. The implied oral contract finding in the MTDO appears to be a typo.

B. The cost award in the Lien D&O needs clarification.

C. The Viking claim settled on or after December 1, 2017, not November 15, 2017.

D. Because Simon was constructively discharged, the Simon fee is determined by quantum meruit.

E. Simon must be paid for all work on the file.

Simon asks the Court to revisit its findings, conclusions and orders on these topics as argued below.

II. Statement Of Relevant Facts

Simon represented Plaintiffs in a complex and hotly contested products liability and contractual dispute stemming from a premature fire sprinkler activation in April of 2016 which flooded Plaintiffs speculation home during its construction causing $500,000.00 in property damage. Lien D&O, pp. 2-7.

In May/June of 2016, Simon helped Plaintiffs on the flood claim as a favor, with the goal of ending the dispute by triggering insurance to adjust the property damage loss. Simon and Plaintiffs never had an express written or oral attorney fee agreement.

In June of 2016, a complaint was filed. In November of 2016, a joint case conference was held.

In August/September of 2017, Simon and clients agree that the flood case dramatically changed. The case had become extremely demanding and was dominating the time of the law office. Simon and the clients made efforts to reach an express attorney fee agreement. In August of 2017, Daniel Simon and Brian Edgeworth agreed that the nature of the case had changed and had discussions about an express fee agreement based on a hybrid of hourly and contingency fees. However, an express agreement could not be reached due to the unique nature of

the property damage claim and the amount of work and costs necessary to achieve a great result. Simon and the clients agree that the attorney fee was in flux during this period.

Although efforts to reach an express fee agreement failed, Simon continued to forcefully litigate Plaintiffs' claims by serving and assertively pursuing discovery and dynamic motion practice, including the filing of a motion to strike Vikings' answer.

In mid-November of 2017, an offer was made by Viking. The first Viking offer was made in the context of mediation, as a counter offer to a mediator's proposal. The first Viking offer was made as several dispositive motions and an evidentiary hearing on the request to strike Vikings answer were pending. The first Viking offer contained contingencies and provisions which had not been previously agreed to.

Following the Viking offer in mid-November, Simon continued to vigorously pursue the litigation against Viking pending resolution of the details of settlement, and against the co-defendant, Lange Plumbing. Simon also again raised the desire for an express attorney fee agreement with the clients.

On November 29, 2017, the Edgeworths constructively fired Simon by retaining new counsel, Vannah and Vannah, and ceased all direct communications with Simon.

On November 30, 2017, Vannah and Vannah provided Simon notice of retention.

On November 30, 2017, Simon served an attorney lien pursuant to NRS 18.015. However, Simon continued to protect his former clients' interests in the complex flood litigation, to the extent possible under the unusual circumstances.

On December 1, 2017, the Edgeworths entered into an agreement to settle with Viking and release Viking from all claims in exchange for a promise by Viking to pay six million dollars ($6,000,000.00 USD).

On January 2, 2018, Simon served an amended attorney lien.

On January 4, 2018, Plaintiffs sued Simon, alleging Conversion and various other causes of actions based on the assertion of false allegations.

Simon responded with two motions to dismiss, which detailed the facts and explained the law on why the complaint was frivolous. Rather than conceding the lack of merit as to even a portion of the complaint, Plaintiffs filed an Amended Complaint to include new causes of action for the Breach of the Implied Covenant of Good Faith and Fair Dealing and Breach of Fiduciary Duty and reaffirmed all the false facts in support of the claims. The false facts asserted alleged extortion, blackmail, stealing, by Simon and sought punitive damages.

The facts elicited at the five-day evidentiary hearing confirmed that the allegations in the complaints were false and that the complaints were filed for an

improper purpose as a collateral attack on the lien adjudication proceeding; which forced Simon to retain counsel and experts to defend the suit.

The Court found that Simon was discharged as of November 29, 2017. The Court also found an implied contract existed based solely on the bills sent and paid.

III. Argument

A court may, for sufficient cause shown, amend, correct, resettle, modify, or vacate an order previously made and entered on motion in the progress of the cause or proceeding. *See, e.g.*, *Trail v. Faretto,* 91 Nev. 401 (1975).

NRCP 52(b) allows a party to request amendment of findings of fact and conclusions of law, and the court to do so, as long as the request is timely made:

> **b) Amendment.** Upon a party's motion filed not later than 10 days after service of written notice of entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may later be questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

Notice of entry of order for the MTDO and ASO just occurred and a notice has not yet been filed for the Lien D&O, therefore, this motion is timely.

A party may also move to reconsider an order. A motion to reconsider must set forth the following: (1) some valid reason why the court should revisit its prior order; and (2) facts or law of a "strongly convincing nature" in support of reversing the prior decision. *Keating v. Gibbons*, 2009 U.S. Dist. LEXIS 22842 (citing

Frasure v. U.S., 256 F. Supp.2d 1180, 1183 (D. Nev. 2003)). Reconsideration may be appropriate if (1) the court is presented with newly considered evidence; (2) has committed clear error; or (3) there has been an intervening change in controlling law. *Id*. (citing *Kona Enterprises, Inc. v. Estate of Bishop,* 229 F.3d 877, 890 (9th Cir. 2000).

EDCR 2.24 sets forth the way parties are permitted to seek reconsideration of a prior court ruling. EDCR 2.24(b) provides:

> A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion.

Notice of entry of order for the MTDO and ASO just occurred and a notice has not yet been filed for the Lien D&O, therefore, this motion is timely.

As detailed below there are grounds to amend, alter and/or reconsider the D&O under NRCP 52(b) and/or EDCR 2.24.

A. The implied oral contract finding in the MTDO appears to be a typo.

The order granting the motion to dismiss pursuant to NRCP 12(b)(5) references an implied oral contract, "After the Evidentiary Hearing, the Court finds that there was no express contract formed, and only an implied oral contract." MTDO at 7:8-9.

It appears that the reference to an implied oral contract in the MTDO is likely a typo. For example, the Lien D&O at page 9 describes the basis for finding an implied contract and does not mention an implied oral contract. Further, the Court found an implied contract was based on the past performance only, that is- the bills generated and paid. This is an implied contract based on past performance only and was not based on an express oral agreement. Accordingly, Simon requests that the order be amended to reference an implied contract only.

B. The cost award in the Lien D&O needs clarification.

The Lien D&O can be read to award outstanding costs to Simon.

The Simon attorney liens sought reimbursement for advanced costs. The amount of advanced costs originally sought was $71,594.93. The amount sought for advanced costs was later changed to $68,844.93.

In March of 2018, the Edgeworths finally paid the outstanding advanced costs. As of the evidentiary hearing, no advanced costs were sought by Simon and no advanced costs were outstanding.

It is proper and necessary for the Court to find that Simon acted appropriately in securing repayment of advanced costs through use of an attorney lien, in accord with statute and case law. However, Simon is uncertain how the Court addressed the costs in relation to what is currently owed Simon.

The Edgeworths have also indicated uncertainty concerning the findings in the Lien D&O regarding the need to currently pay costs.

Simon respectfully requests clarification on the cost issue and whether costs are to be added, deducted or are considered separate from the amount currently owed to Simon, and reconciliation of the amount of the fee owed.

C. The Viking claim settled on or after December 1, 2017, not November 15, 2017.

Finding of fact #13 in the MTDO, the ASO, and the Lien D&O states:

> 13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

An express settlement agreement with Viking was not formed in November of 2017. An express settlement agreement with Viking was formed after Brian Edgeworth returned from China, and after Mr. Vannah was hired-on or after December 1, 2017.

It is undisputed that on November 15, 2017, Viking made its first settlement *offer*, with conditions. The conditions were contrary to the mediator's proposal; therefore, the first Viking offer was not an acceptance of the mediator's proposal, but a counter offer. The three main new Viking conditions were:

(1) Confidentiality;

(2) A court order granting of good faith settlement status; and,

(3) Plaintiffs dismissal of the case against Lange.

On November 17, 2017, Simon met the Edgeworths and provided a litigation and settlement update and again raised the issue of an express written fee agreement.

Following November 17, Simon continued to negotiate with Viking and Lange, despite being hobbled by the clients' unusual silence.

On November 29, Vannah was hired.

On November 30, Simon was informed of Vannah's retention.

On December 1, 2017, the express written settlement agreement with Viking was signed by the Edgeworths. The express written agreement was later signed by Viking.

A settlement agreement is formed only when all essential terms are agreed upon. *See, May v. Anderson*, 119 P.3d 1254 (Nev. 2005). The express written settlement agreement signed by the Edgeworths on December 1, 2017, *did not* contain a confidentiality provision or a term requiring dismissal of the case against Lange-a million dollar plus claim, which was later settled by Plaintiffs for an additional $100,000.00. Both are essential terms which were not expressly reached until on or after December 1, 2017.

In addition, advice by Vannah to the Edgeworths on the written Viking settlement agreement presumably did not occur until December 1, according to the express terms of the settlement agreement. And, good faith settlement status,

granted later by the Court, was an agreed upon pre-condition to enforceability of the agreement.

The forgoing all mean that settlement with Viking did not occur on November 15, 2017, as a matter of law. The earliest possible date for a finding of an express settlement agreement with Viking is December 1, 2017. Accordingly, Simon requests that finding #13 in all orders be so amended.

D. Because Simon was constructively discharged, the Simon fee is determined by quantum meruit.

In the Lien D&O, the Court concluded that an implied contract existed between Simon and clients until November 29, 2017, the date of Simon's discharge; and, that Simon must be compensated prior to November 29, 2017, under the hourly payment terms of the implied contract as found by the Court. Lien D&O at pages 15-19. Simon requests the Court alter and/or reconsider this conclusion of law.

As a matter of law, the Edgeworths cannot use the implied contract as a shield from the Simon lien claim for reasonable value, because by discharging Simon, the Edgeworths disavowed the implied contract:

> A client who voids the contract as stated here cannot then enforce its favorable terms against the lawyer, and the client is liable to the lawyer for the fair value of the lawyer's services (see § 39).

Third Restatement, *The Law Governing Lawyers*, §18, at comment e.[1]

The Court agreed that when a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract but is paid based on *quantum merit*. *See, Golightly v. Gassner*, 281 P.3d 1176 (Nev. 2009) (unreported) (discharged contingency attorney paid by *quantum merit* rather than by contingency); *citing*, *Gordon v. Stewart*, 324 P.3d 234 (1958) (attorney paid in *quantum merit* after client breach of agreement); and, *Cooke v. Gove*, 114 P.2d 87 (Nev. 1941)(fees awarded in *quantum merit* when there was no agreement). D&O at 19:18-25.

The law cited by the Court prevents the client from enforcing the terms of a contract, which the client has disavowed. This means that quantum meruit is used to determine the amount of fee owed for the period before as well as after the discharge.

In this case, the Edgeworths disavowed the implied contract with Simon, and the implied hourly rate, when they fired Simon and hired Vannah. Accordingly, the Court erred when it analyzed a portion of the lien claim as if the implied

[1] The Nevada Supreme Court frequently relies upon the Third Restatement. *E.g., NC-DSH, Inc., v. Gardner*, 218 P.3d 853, 861 (Nev. 2009); *Waid v. Eighth Jud. Dist. Ct.*, 119 P.3d 1219 (Nev. 2005); *Leibowitz v. Eighth Jud. Dist. Ct*., 78 P.3d 515, 520 n. 19, 521 n. 23 (Nev. 2003); *Palmer v. Pioneer Inn Assocs., Ltd*., 59 P.3d 1237, 1247 (Nev. 2002).

contract hourly rate was enforceable. The law calls for the entirety of Simon's services to be analyzed by the Court under quantum meruit-that is, a reasonable fee pursuant to the *Brunzell* factors.

The Court cited *Rosenberg* in support of the constructive discharge and the payment method to the discharged attorney. *Rosenberg v. Calderon Automation, Inc.*, 1986 Ohio App. LEXIS 5460 (1986). In *Rosenberg*, client Calderon hired attorney Brenner for a patent infringement case. Brenner recently graduated from law school and did not have much patent infringement experience, so he hired attorney Rosenberg, which was authorized by Calderon. Rosenberg believed he was hired and to be paid based on the 1/3 contingency fee agreement between Calderon and Brenner.

After a trial on special interrogatories, Rosenberg recommended settlement negotiations between Calderon and General Motors. Calderon refused and had no further communications with Rosenberg. The refusal to communicate was held to be a constructive discharge. Rosenberg then filed suit against Calderon in order to recover his attorney fees.

The *Rosenberg* court noted that an attorney that is discharged without just cause is entitled to compensation based upon a stated agreement or upon the theory of quantum meruit. *Id.* at *15. The Court found that Rosenberg was constructively discharged when Calderon ceased all communications with Rosenberg. On the

question of how Rosenberg should be compensated – either by a percentage of the contingency fee per the agreement or by the basis of quantum meruit. The *Rosenberg* court indicated that termination of a contract by a party after part performance of the other party, entitles the performing party to recover the value of the labor performed *irrespective of the contract price. Although the Court acknowledged that Rosenberg could have elected to be compensated pursuant to the agreement, the court adopted Rosenberg's election to be compensated via quantum meruit:*

> Consequently, the reasonable value of Rosenberg's services must be based either on a percentage of the contingency fee or on the basis of quantum meruit. Rosenberg has elected, by his testimony and by his letters to Calderon, to be paid based upon the theory of quantum meruit." *Id.* at *19.

The *Rosenberg* Court applied a basic legal principle. Following a discharge, a performing party may elect to be paid the contract price or quantum meruit, at the election of the performing party.

Notably, Rosenberg did not keep time records, but Rosenberg attempted to estimate the total number of hours on the case that was outstanding at the time of the constructive discharge. The *Rosenberg* court found that Rosenberg's testimony on the work he performed was corroborated by Calderon and Brenner and, therefore, upheld the lower court's award to Rosenberg:

> "Upon a review of the record, we find that the trial court exercised its discretion in arriving at a fair and equitable determination of fees for

> services rendered by Rosenberg. The trial court's award, in our opinion, accomplishes the same and we accordingly affirm." *Id.* at *20.

In Rosenberg, when the discharge occurred, the Court confirmed that the method of payment for outstanding services was elected at the choice of the discharged attorney. The discharged lawyer was given the option by the court to elect to enforce the terms of the contract or have the court determine the outstanding fee based on quantum meruit. The discharged lawyer elected quantum meruit. The Court then determined the reasonable value of his services based on the quantum meruit and not the contract. This result was upheld by the reviewing court on appeal.

Our case is directly on point to the facts and law in *Rosenberg*, and the Ohio Court of Appeals decision is still good law. Like Calderon, Brian Edgeworth fired Simon on the eve of a fantastic result but prior to case conclusion. At the time of termination there were substantial attorney's fees and costs owed to Simon. Edgeworth does not get the benefit of the repudiated implied contract because Simon elected to be compensated by quantum meruit.

The period of quantum meruit could be from the beginning of the case, but certainly for the period after September 19, 2017, which is the period when outstanding services were rendered. The value of quantum meruit for this period is 1.9 million based on the undisputed testimony of expert Will Kemp, and is corroborated by the size of the file, the work performed and the amazing result.

The Court is asked to make a new finding based on this period of time, or at a minimum, to make an alternative finding for this period of time, which can be used if the Supreme Court determines that quantum meruit is the correct measure of fees for this period of time.

The law is clear that if there is no express contract, or if Simon is fired, then the fee is set by reasonable value-that is quantum meruit. The Edgeworths know this is the law, which is why the Edgeworths would not admit they had fired Simon even when they filed a complaint alleging Simon was a thief. No matter, because by ceasing communication, hiring Vannah, and suing Simon for conversion, the Edgeworths constructively fired Simon, and Simon is due the reasonable value of his services. *Rosenberg,* 1986 Ohio App. LEXIS 5460.

E. Simon must be paid for all work on the file.

In the alternative to a reasonable fee under quantum meruit, Simon requests amendment and reconsideration of the conclusion that every single entry of additional time in the super bill for a previously billed period was speculative.

The Court found that an implied contact existed based solely on the past performance of the bills sent and paid up until September 2017. The Court then described general concerns over the accuracy of the superbill entries for work down prior to September 2017, without identifying any specific inaccuracies. In

addition, neither the Court nor the Edgeworths identified a meaningful contract law defense for payment of the past work.

The undisputed evidence at the hearing was that the time entries in the super bill was for work that was done-even if a date was a day or two off. The entries in the superbill were based on tangible work product and/or events in the file, not speculative guess work. Mr. Simon and Ms. Ferrel both testified in detail about the foundation for the superbill and that *every entry was based upon a tangible event*.

In fact, the use of a landmark tangible event meant that many hundreds of hours of work were not included, because those hours could not be tied to a tangible event. The use of only confirmable tangible events by Simon creates a time sheet which can be objectively confirmed, is not speculative, and is considerably lower than a typical hourly bill.

The Edgeworths attempts at establishing double billing and other billing inaccuracies fell flat, and were exposed, by the Court and Simon counsel, as groundless. As such, the Edgeworths failed attempts helped to establish that the foundation for all Simon billing was rock solid. Accordingly, Simon requests an amended finding/conclusion granting a fee for all the documented work performed for the Edgeworths.

1. The superbill was supported by substantial evidence.

There is no requirement for an attorney to keep a contemporaneous time record. *See, e.g., Mardirossian & Associates v. Ersoff*, 153 Cal. App. 4th 257 (2007). In *Mardirossian*, attorney Mardirossian was fired on the eve of a $3.7 million-dollar settlement. Mardirossian then sued former client Ersoff for a reasonable fee. Mardirossian did not keep contemporaneous time records. At trial Mardirossian and other firm lawyers gave *estimates* of the time spent on the file. The estimates were not grounded on tangible work product or events. Rather, they were given on an average hour per week basis. *Ibid*.

The jury awarded Mardirossian a considerable fee based, in part, on the time estimates. The foundation for the time estimates was repeatedly challenged by Ersoff at the trial court and on appeal. And, Ersoff lost at every turn because the testimony of a witness with knowledge, Mardirossian and the firm lawyers, constitutes substantial evidence.

At attorney's testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. *Id*., at 269; *quoting, Steiny & Co., v. California Electric Supply*, 79 Cal. App. 4th 285, 293 (2000).

The law is the same in Nevada. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion**."** *Bongiovi v.*

Sullivan, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006). The witnesses' testimonies alone can constitute substantial evidence supporting a finding by a Court. Coru*Summit Vill., Inc., v. Hilltop Duplexes Homeowners Ass'n*, 2011 Nev. Unpub. LEXIS 873, *10-11 (Nev. April 27, 2011).

The evidence of time spent provided by Simon was magnitudes stronger than that provided by Mardirossian. Simon provided time sheets, Mardirossian did not. Every entry on the Simon time sheets is founded on tangible work product or a tangible confirmable event, such as the court file or a disclosed e-mail or phone record. Mardirossian did not. The Court's current finding creates a burden for proof of damages which is well beyond anything found in the law. The Court is asked to re-visit its decision and grant Simon fees for the all the work performed.

2. Minimum billing entries are the norm.

The Edgeworths are seemingly criticized the use of minimum billing entries by Simon. However, the use of a minimum billing entry by Simon is entirely appropriate and the use of minimum billing entries is commonplace.

Minimum billing amounts are the norm, are accepted and are enforceable. *Manigault v. Daly & Sorenson*, 413 P.3d 1114 (Wyo. 2018) (the court found that minimum billing units benefit "both attorneys and clients" and are reasonable). To the extent that the Court discounted work billed under a minimum entry, the Court is asked to revisit the decision.

3. The Edgeworths will be unjustly enriched if the full amount of the time entries is not awarded to Simon for the work performed.

The Court did not grant Simon fees for a lot of documented time spent on the Edgeworths' case. The Court discounted all entries for past billing periods in the superbill. There is no doubt that enormous time was spent, and work was done, the boxes of emails are objective proof of that fact. Therefore, by holding that Simon not get paid for work done and time spent, the Edgeworths have been given a windfall.

Lien adjudication is a proceeding in equity to determine the fair value of an attorney's services, and the lawyer should be compensated for the work performed. In *Leventhal v. Black & LoBello*, 129 Nev. 472, 475, 305 P.3d 907, 909 (2013), the Supreme Court of the state of Nevada stated:

> "A charging lien "is not dependent on possession, as in the case of the general or retaining lien. It is based on natural equity—the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it." 23 *Williston on Contracts* § 62:11 (4th ed. 2002)."

There is no rule or authority that supports a finding that work not billed during a case cannot be recovered later. Excepting, of course, the statute of limitations, which is four years or six years, depending on the contract. NRS 11.190 (1)(a) & 2(c).

The Edgeworths were aware of the phone calls and the 2,000+ emails not included in the bills. The Edgeworths received or sent a huge number of the emails and Brian initiated many of the phone calls. A finding that does not award the Law Office the actual time spent unjustly enriches the Edgeworth's for the work performed, which is contrary to the purpose and intent of lien adjudication and certainly the principles of fundamental fairness.

There is no evidence in the record that the billing entries in the super bill were speculative or that the work was not actually performed. The Edgeworths did not have a basis to dispute any of the entries, and the Edgeworths admitted they had no basis to challenge the time entries during the hearing. If the Court is going to determine the fee based on the hourly rate of the implied contact found for all work done through November 29, 2017, then the actual time of the Law Office should be reimbursed.

The Edgeworths admit they have been more than fully compensated. The Edgeworths admitted at hearing that their claimed liquidity problems were caused by their own decisions, like when they used cash on hand to refurbish their 12,000 square foot paid for home instead of for the litigation. There is no basis to grant the Edgeworths another windfall. There is no doubt that the Edgeworths dominated the time of the Law Office, one look at the boxes of e-mails confirms the magnitude of the time spent. The Court is asked to revisit its decision to

prevent a further windfall for the Edgeworths, and to grant fees to Simon for all the work performed.

IV. Conclusion

Simon respectfully requests that the findings and conclusions be clarified, reconsidered and/or amended as stated.

Dated this 29th day of October 2018.

/s/ *James R. Christensen*
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Attorney for Daniel Simon

CERTIFICATE OF SERVICE

I CERTIFY SERVICE of the foregoing Motion for Reconsideration, Clarification of Decision and Order, And Amendment of Findings of Fact and Conclusion of Law was made by electronic service (via Odyssey) this 29th day of October 2018, to all parties currently shown on the Court's E-Service List.

/s/ *Dawn Christensen*
an employee of
JAMES R. CHRISTENSEN, ESQ.

Exhibit 1

Electronically Filed
10/11/2018 11:14 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

DECISION AND ORDER ON MOTION TO DISMISS NRCP 12(B)(5)

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing

> you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was

$692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

Breach of Contract

The First Claim for Relief of the Amended Complaint alleges breach of an express oral contract to pay the law office $550 an hour for the work of Mr. Simon. The Amended Complaint alleges an oral contract was formed on or about May 1, 2016. After the Evidentiary Hearing, the Court finds that there was no express contract formed, and only an implied oral contract. As such, a claim for breach of contract does not exist and must be dismissed as a matter of law.

Declaratory Relief

The Plaintiff's Second Claim for Relief is Declaratory Relief to determine whether a contract existed, that there was a breach of contract, and that the Plaintiffs are entitled to the full amount of the settlement proceeds. The Court finds that there was no express agreement for compensation, so there cannot be a breach of the agreement. The Plaintiffs are not entitled to the full amount of the settlement proceeds as the Court has adjudicated the lien and ordered the appropriate distribution of the settlement proceeds, in the Decision and Order on Motion to Adjudicate Lien. As such, a claim for declaratory relief must be dismissed as a matter of law.

Conversion

The Third Claim for Relief is for conversion based on the fact that the. Edgeworths believed that the settlement proceeds were solely their and Simon asserting an attorney's lien constitutes a claim for conversion. In the Amended Complaint, Plaintiffs allege "The settlement proceeds from the litigation are the sole property of the Plaintiffs." Amended Complaint, P. 9, Para. 41.

Mr. Simon followed the law and was required to deposit the disputed money in a trust account. This is confirmed by David Clark, Esq. in his declaration, which remains undisputed. Mr. Simon never exercised exclusive control over the proceeds and never used the money for his personal use. The money was placed in a separate account controlled equally by the Edgeworth's own counsel, Mr. Vannah. This account was set up at the request of Mr. Vannah.

When the Complaint was filed on January 4, 2018, Mr. Simon was not in possession of the settlement proceeds as the checks were not endorsed or deposited in the trust account. They were finally deposited on January 8, 2018 and cleared a week later. Since the Court adjudicated the lien and found that the Law Office of Daniel Simon is entitled to a portion of the settlement proceeds, this claim must be dismissed as a matter of law.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The Fourth Claim for Relief alleges a Breach of the Implied Covenant of Good Faith and Fair Dealing based on the time sheets submitted by Mr. Simon on January 24, 2018. Since no express contract existed for compensation and there was not a breach of a contract for compensation, the cause of action for the breach of the covenant of good faith and fair dealing also fails as a matter of law and must be dismissed.

Breach of Fiduciary Duty

The allegations in the Complaint assert a breach of fiduciary duty for not releasing all the funds to the Edgeworths. The Court finds that Mr. Simon followed the law when filing the attorney's lien. Mr. Simon also fulfilled all his obligations and placed the clients' interests above his when completing the settlement and securing better terms for the clients even after his discharge. Mr.

Simon timely released the undisputed portion of the settlement proceeds as soon as they cleared the account. The Court finds that the Law Office of Daniel Simon is owed a sum of money based on the adjudication of the lien, and therefore, there is no basis in law or fact for the cause of action for breach of fiduciary duty and this claim must be dismissed.

Punitive Damages

Plaintiffs' Amended Complaint alleges that Mr. Simon acted with oppression, fraud, or malice for denying Plaintiffs of their property. The Court finds that the disputed proceeds are not solely those of the Edgeworths and the Complaint fails to state any legal basis upon which claims may give rise to punitive damages. The evidence indicates that Mr. Simon, along with Mr. Vannah deposited the disputed settlement proceeds into an interest bearing trust account, where they remain. Therefore, Plaintiffs' prayer for punitive damages in their Complaint fails as a matter of a law and must be dismissed.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court adjudicated the lien. The Court further finds that the claims for Breach of Contract, Declaratory Relief, Conversion, Breach of the Implied Covenant of Good Faith and Fair Dealing, Breach of the Fiduciary Duty, and Punitive Damages must be dismissed as a matter of law.

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ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Dismiss NRCP 12(b)(5) is GRANTED.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

Exhibit 2

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10/11/2018 11:09 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

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DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON MOTION TO ADJUDICATE LIEN

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This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

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18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was $692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

The Law Office Appropriately Asserted A Charging Lien Which Must Be Adjudicated By The Court

An attorney may obtain payment for work on a case by use of an attorney lien. Here, the Law Office of Daniel Simon may use a charging lien to obtain payment for work on case A-16-738444-C under NRS 18.015.

NRS 18.015(1)(a) states:

> 1. An attorney at law shall have a lien:
> (a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

Nev. Rev. Stat. 18.015.

The Court finds that the lien filed by the Law Office of Daniel Simon, in case A-16-738444-C, complies with NRS 18.015(1)(a). The Law Office perfected the charging lien pursuant to NRS 18.015(3), by serving the Edgeworths as set forth in the statute. The Law Office charging lien was perfected before settlement funds generated from A-16-738444-C of $6,100,000.00 were deposited, thus the charging lien attached to the settlement funds. Nev. Rev. Stat. 18.015(4)(a); Golightly & Vannah, PLLC v. TJ Allen LLC, 373 P.3d 103, at 105 (Nev. 2016). The Law Office's charging lien

is enforceable in form.

The Court has personal jurisdiction over the Law Office and the Plaintiffs in A-16-738444-C. Argentina Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury & Standish, 216 P.3d 779 at 782-83 (Nev. 2009). The Court has subject matter jurisdiction over adjudication of the Law Office's charging lien. Argentina, 216 P.3d at 783. The Law Office filed a motion requesting adjudication under NRS 18.015, thus the Court must adjudicate the lien.

Fee Agreement

It is undisputed that no express written fee agreement was formed. The Court finds that there was no express oral fee agreement formed between the parties. An express oral agreement is formed when all important terms are agreed upon. *See,* Loma Linda University v. Eckenweiler, 469 P.2d 54 (Nev. 1970) (*no oral contract was formed, despite negotiation, when important terms were not agreed upon and when the parties contemplated a written agreement*). The Court finds that the payment terms are essential to the formation of an express oral contract to provide legal services on an hourly basis.

Here, the testimony from the evidentiary hearing does not indicate, with any degree of certainty, that there was an express oral fee agreement formed on or about June of 2016. Despite Brian Edgeworth's affidavits and testimony; the emails between himself and Danny Simon, regarding punitive damages and a possible contingency fee, indicate that no express oral fee agreement was formed at the meeting on June 10, 2016. Specifically in Brian Edgeworth's August 22, 2017 email, titled "Contingency," he writes:

> "We never really had a structured discussion about how this might be done. I am more than happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these

> scumbags will file etc. Obviously that could not have been done earlier snce who would have thought this case would meet the hurdle of punitives at the start. I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell. I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?"

(Def. Exhibit 27).

It is undisputed that when the flood issue arose, all parties were under the impression that Simon would be helping out the Edgeworths, as a favor.

The Court finds that an implied fee agreement was formed between the parties on December 2, 2016, when Simon sent the first invoice to the Edgeworths, billing his services at $550 per hour, and the Edgeworths paid the invoice. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for Simon's associates. Simon testified that he never told the Edgeworths not to pay the bills, though he testified that from the outset he only wanted to "trigger coverage". When Simon repeatedly billed the Edgeworths at $550 per hour for his services, and $275 an hour for the services of his associates; and the Edgeworths paid those invoices, an implied fee agreement was formed between the parties. The implied fee agreement was for $550 per hour for the services of Daniel Simon Esq. and $275 per hour for the services of his associates.

Constructive Discharge

Constructive discharge of an attorney may occur under several circumstances, such as:

- Refusal to communicate with an attorney creates constructive discharge. Rosenberg v. Calderon Automation, 1986 Ohio App. LEXIS 5460 (Jan. 31, 1986).
- Refusal to pay an attorney creates constructive discharge. *See e.g.*, Christian v. All Persons Claiming Any Right, 962 F. Supp. 676 (U.S. Dist. V.I. 1997).

- Suing an attorney creates constructive discharge. See Tao v. Probate Court for the Northeast Dist. #26, 2015 Conn. Super. LEXIS 3146, *13-14, (Dec. 14, 2015). *See also* Maples v. Thomas, 565 U.S. 266 (2012); *Harris v. State*, 2017 Nev. LEXIS 111; and Guerrero v. State, 2017 Nev. Unpubl. LEXIS 472.

- Taking actions that preventing effective representation creates constructive discharge. McNair v. Commonwealth, 37 Va. App. 687, 697-98 (Va. 2002).

Here, the Court finds that the Edgeworths constructively discharged Simon as their lawyer on November 29, 2017. The Edgeworths assert that because Simon has not been expressly terminated, has not withdrawn, and is still technically their attorney of record; there cannot be a termination. The Court disagrees.

On November 29, 2017, the Edgeworths met with the Law Firm of Vannah and Vannah and signed a retainer agreement. The retainer agreement was for representation on the Viking settlement agreement and the Lange claims. (Def. Exhibit 90). This is the exact litigation that Simon was representing the Edgeworths on. This fee agreement also allowed Vannah and Vannah to do all things without a compromise. Id. The retainer agreement specifically states:

> Client retains Attorneys to represent him as his Attorneys regarding Edgeworth Family Trust and AMERICAN GRATING V. ALL VIKING ENTITIES and all damages including, but not limited to, all claims in this matter and empowers them to do all things to effect a compromise in said matter, or to institute such legal action as may be advisable in their judgment, and agrees to pay them for their services, on the following conditions:
>
> a) …
> b) …
> c) Client agrees that his attorneys will work to consummate a settlement of $6,000,000 from the Viking entities and any settlement amount agreed to be paid by the Lange entity. Client also agrees that attorneys will work to reach an agreement amongst the parties to resolve all claims in the Lange and Viking litigation.

Id.

This agreement was in place at the time of the settlement of the Viking and Lange claims. Mr. Simon had already begun negotiating the terms of the settlement agreement with Viking during the

week of November 27, 2017 prior to Mr. Vannah's involvement. These negotiated terms were put into a final release signed by the Edgeworths and Mr. Vannah's office on December 1, 2017. (Def. Exhibit 5). Mr. Simon's name is not contained in the release; Mr. Vannah's firm is expressly identified as the firm that solely advised the clients about the settlement. The actual language in the settlement agreement, for the Viking claims, states:

> PLAINTIFFS represent that their independent counsel, Robert Vannah, Esq. and John Greene, Esq., of the law firm Vannah & Vannah has explained the effect of this AGREEMENT and their release of any and all claims, known or unknown and, based upon that explanation and their independent judgment by the reading of this Agreement, PLAINTIFFS understand and acknowledge the legal significance and the consequences of the claims being released by this Agreement. PLAINTIFFS further represent that they understand and acknowledge the legal significance and consequences of a release of unknown claims against the SETTLING PARTIES set forth in, or arising from, the INCIDENT and hereby assume full responsibility for any injuries, damages, losses or liabilities that hereafter may occur with respect to the matters released by this Agreement.

Id.

Also, Simon was not present for the signing of these settlement documents and never explained any of the terms to the Edgeworths. He sent the settlement documents to the Law Office of Vannah and Vannah and received them back with the signatures of the Edgeworths.

Further, the Edgeworths did not personally speak with Simon after November 25, 2017. Though there were email communications between the Edgeworths and Simon, they did not verbally speak to him and were not seeking legal advice from him. In an email dated December 5, 2017, Simon is requesting Brian Edgeworth return a call to him about the case, and Brian Edgeworth responds to the email saying, "please give John Greene at Vannah and Vannah a call if you need anything done on the case. I am sure they can handle it." (Def. Exhibit 80). At this time, the claim against Lange Plumbing had not been settled. The evidence indicates that Simon was actively

working on this claim, but he had no communication with the Edgeworths and was not advising them on the claim against Lange Plumbing. Specifically, Brian Edgeworth testified that Robert Vannah Esq. told them what Simon said about the Lange claims and it was established that the Law Firm of Vannah and Vannah provided advice to the Edgeworths regarding the Lange claim. Simon and the Law Firm of Vannah and Vannah gave different advice on the Lange claim, and the Edgeworths followed the advice of the Law Firm of Vannah and Vannah to settle the Lange claim. The Law Firm of Vannah and Vannah drafted the consent to settle for the claims against Lange Plumbing (Def. Exhibit 47). This consent to settle was inconsistent with the advice of Simon. Mr. Simon never signed off on any of the releases for the Lange settlement.

Further demonstrating a constructive discharge of Simon is the email from Robert Vannah Esq. to James Christensen Esq. dated December 26, 2017, which states: "They have lost all faith and trust in Mr. Simon. Therefore, they will not sign the checks to be deposited into his trust account. Quite frankly, they are fearful that he will steal the money." (Def. Exhibit 48). Then on January 4, 2018, the Edgeworth's filed a lawsuit against Simon in Edgeworth Family Trust; American Grating, LLC vs. Daniel S. Simon; the Law Office of Daniel S. Simon, a Professional Corporation d/b/a Simon Law, case number A-18-767242-C. Then, on January 9, 2018, Robert Vannah Esq. sent an email to James Christensen Esq. stating, "I guess he could move to withdraw. However, that doesn't seem in his best interests." (Def. Exhibit 53).

The Court recognizes that Simon still has not withdrawn as counsel of record on A-16-738444-C, the Law Firm of Vannah and Vannah has never substituted in as counsel of record, the Edgeworths have never explicitly told Simon that he was fired, Simon sent the November 27, 2018 letter indicating that the Edgeworth's could consult with other attorneys on the fee agreement (that was attached to the letter), and that Simon continued to work on the case after the November 29,

2017 date. The court further recognizes that it is always a client's decision of whether or not to accept a settlement offer. However the issue is constructive discharge and nothing about the fact that Mr. Simon has never officially withdrawn from the case indicates that he was not constructively discharged. His November 27, 2017 letter invited the Edgeworth's to consult with other attorneys on the fee agreement, not the claims against Viking or Lange. His clients were not communicating with him, making it impossible to advise them on pending legal issues, such as the settlements with Lange and Viking. It is clear that there was a breakdown in attorney-client relationship preventing Simon from effectively representing the clients. The Court finds that Danny Simon was constructively discharged by the Edgeworths on November 29, 2017.

Adjudication of the Lien and Determination of the Law Office Fee

NRS 18.015 states:

1. An attorney at law shall have a lien:

(a) Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

(b) In any civil action, upon any file or other property properly left in the possession of the attorney by a client.

2. A lien pursuant to subsection 1 is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client.

3. An attorney perfects a lien described in subsection 1 by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien.

4. A lien pursuant to:

(a) Paragraph (a) of subsection 1 attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action; and

(b) Paragraph (b) of subsection 1 attaches to any file or other property properly left in the possession of the attorney by his or her client, including, without limitation, copies of the attorney's file if the original documents

> received from the client have been returned to the client, and authorizes the attorney to retain any such file or property until such time as an adjudication is made pursuant to subsection 6, from the time of service of the notices required by this section.
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> 5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as inconsistent with the attorney's professional responsibilities to the client.
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> 6. On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.
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> 7. Collection of attorney's fees by a lien under this section may be utilized with, after or independently of any other method of collection.

Nev. Rev. Stat. 18.015.

NRS 18.015(2) matches Nevada contract law. If there is an express contract, then the contract terms are applied. Here, there was no express contract for the fee amount, however there was an implied contract when Simon began to bill the Edgeworths for fees in the amount of $550 per hour for his services, and $275 per hour for the services of his associates. This contract was in effect until November 29, 2017, when he was constructively discharged from representing the Edgeworths. After he was constructively discharged, under NRS 18.015(2) and Nevada contract law, Simon is due a reasonable fee- that is, quantum meruit.

Implied Contract

On December 2, 2016, an implied contract for fees was created. The implied fee was $550 an hour for the services of Mr. Simon. On July 28, 2017 an addition to the implied contract was created with a fee of $275 per hour for the services of Simon's associates. This implied contract was created when invoices were sent to the Edgeworths, and they paid the invoices.

The invoices that were sent to the Edgeworths indicate that they were for costs and attorney's fees, and these invoices were paid by the Edgeworths. Though the invoice says that the fees were

reduced, there is no evidence that establishes that there was any discussion with the Edgeworths as to how much of a reduction was being taken, and that the invoices did not need to be paid. There is no indication that the Edgeworths knew about the amount of the reduction and acknowledged that the full amount would be due at a later date. Simon testified that Brian Edgeworth chose to pay the bills to give credibility to his actual damages, above his property damage loss. However, as the lawyer/counselor, Simon did not prevent Brian Edgeworth from paying the bill or in any way refund the money, or memorialize this or any understanding in writing.

Simon produced evidence of the claims for damages for his fees and costs pursuant to NRCP 16.1 disclosures and computation of damages; and these amounts include the four invoices that were paid in full and there was never any indication given that anything less than all the fees had been produced. During the deposition of Brian Edgeworth it was suggested, by Simon, that all of the fees had been disclosed. Further, Simon argues that the delay in the billing coincides with the timing of the NRCP 16.1 disclosures, however the billing does not distinguish or in any way indicate that the sole purpose was for the Lange Plumbing LLC claim. Since there is no contract, the Court must look to the actions of the parties to demonstrate the parties' understanding. Here, the actions of the parties are that Simon sent invoices to the Edgeworths, they paid the invoices, and Simon Law Office retained the payments, indicating an implied contract was formed between the parties. The Court find that the Law Office of Daniel Simon should be paid under the implied contract until the date they were constructively discharged, November 29, 2017.

Amount of Fees Owed Under Implied Contract

The Edgeworths were billed, and paid for services through September 19, 2017. There is some testimony that an invoice was requested for services after that date, but there is no evidence

that any invoice was paid by the Edgeworths. Since the Court has found that an implied contract for fees was formed, the Court must now determine what amount of fees and costs are owed from September 19, 2017 to the constructive discharge date of November 29, 2017. In doing so, the Court must consider the testimony from the witnesses at the evidentiary hearing, the submitted billings, the attached lien, and all other evidence provided regarding the services provided during this time.

At the evidentiary hearing, Ashley Ferrel Esq. testified that some of the items in the billing that was prepared with the lien "super bill," are not necessarily accurate as the Law Office went back and attempted to create a bill for work that had been done over a year before. She testified that they added in .3 hours for each Wiznet filing that was reviewed and emailed and .15 hours for every email that was read and responded to. She testified that the dates were not exact, they just used the dates for which the documents were filed, and not necessarily the dates in which the work was performed. Further, there are billed items included in the "super bill" that was not previously billed to the Edgeworths, though the items are alleged to have occurred prior to or during the invoice billing period previously submitted to the Edgeworths. The testimony at the evidentiary hearing indicated that there were no phone calls included in the billings that were submitted to the Edgeworths.

This attempt to recreate billing and supplement/increase previously billed work makes it unclear to the Court as to the accuracy of this "recreated" billing, since so much time had elapsed between the actual work and the billing. The court reviewed the billings of the "super bill" in comparison to the previous bills and determined that it was necessary to discount the items that had not been previously billed for; such as text messages, reviews with the court reporter, and reviewing, downloading, and saving documents because the Court is uncertain of the accuracy of the "super

bill."

Simon argues that he has no billing software in his office and that he has never billed a client on an hourly basis, but his actions in this case are contrary. Also, Simon argues that the Edgeworths, in this case, were billed hourly because the Lange contract had a provision for attorney's fees; however, as the Court previously found, when the Edgeworths paid the invoices it was not made clear to them that the billings were only for the Lange contract and that they did not need to be paid. Also, there was no indication on the invoices that the work was only for the Lange claims, and not the Viking claims. Ms. Ferrel testified that the billings were only for substantial items, without emails or calls, understanding that those items may be billed separately; but again the evidence does not demonstrate that this information was relayed to the Edgeworths as the bills were being paid. This argument does not persuade the court of the accuracy of the "super bill".

The amount of attorney's fees and costs for the period beginning in June of 2016 to December 2, 2016 is $42,564.95. This amount is based upon the invoice from December 2, 2016 which appears to indicate that it began with the initial meeting with the client, leading the court to determine that this is the beginning of the relationship. This invoice also states it is for attorney's fees and costs through November 11, 2016, but the last hourly charge is December 2, 2016. This amount has already been paid by the Edgeworths on December 16, 2016.[2]

The amount of the attorney's fees and costs for the period beginning on December 5, 2016 to April 4, 2017 is $46,620.69. This amount is based upon the invoice from April 7, 2017. This amount has already been paid by the Edgeworths on May 3, 2017.

The amount of attorney's fees for the period of April 5, 2017 to July 28, 2017, for the services of Daniel Simon Esq. is $72,077.50. The amount of attorney's fees for this period for

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[2]There are no billing amounts from December 2 to December 4, 2016.

Ashley Ferrel Esq. is $38,060.00. The amount of costs outstanding for this period is $31,943.70. This amount totals $142,081.20 and is based upon the invoice from July 28, 2017. This amount has been paid by the Edgeworths on August 16, 2017.[3]

The amount of attorney's fees for the period of July 31, 2017 to September 19, 2017, for the services of Daniel Simon Esq. is $119,762.50. The amount of attorney's fees for this period for Ashley Ferrel Esq. is $60,981.25. The amount of attorney's fees for this period for Benjamin Miller Esq. is $2,887.50. The amount of costs outstanding for this period is $71,555.00. This amount totals $255,186.25 and is based upon the invoice from September 19, 2017. This amount has been paid by the Edgeworths on September 25, 2017.

From September 29, 2017 to November 29, 2017, the Court must determine the amount of attorney fees owed to the Law Office of Daniel Simon.[4] For the services of Daniel Simon Esq., the total amount of hours billed are 340.05. At a rate of $550 per hour, the total attorney's fees owed to the Law Office for the work of Daniel Simon Esq. is $187,027.50. For the services of Ashley Ferrel Esq., the total amount of hours billed are 337.15. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Ashley Ferrel Esq. from September 19, 2017 to November 29, 2017 is $92,716.25.[5] For the services of Benjamin Miller Esq., the total amount of hours billed are 19.05. At a rate of $275 per hour, the total attorney's fees owed to the Law Office for the work of Benjamin Miller Esq. from September 19, 2017 to November 29, 2017 is $5,238.75.[6]

The Court notes that though there was never a fee agreement made with Ashley Ferrel Esq. or Benjamin Miller Esq., however, their fees were included on the last two invoices that were paid

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[3] There are no billings from July 28 to July 30, 2017.
[4] There are no billings for October 8th, October 28-29, and November 5th.
[5] There is no billing for the October 7-8, October 22, October 28-29, November 4, November 11-12, November 18-19, November 21, and November 23-26.
[6] There is no billing from September 19, 2017 to November 5, 2017.

by the Edgeworths, so the implied fee agreement applies to their work as well.

The Court finds that the total amount owed to the Law Office of Daniel Simon for the period of September 19, 2018 to November 29, 2017 is $284,982.50.

Costs Owed

The Court finds that the Law Office of Daniel Simon is owed for outstanding costs of the litigation in Edgeworth Family Trust; and American Grating, LLC vs. Lange Plumbing, LLC; The Viking Corporation; Supply Network, Inc. dba Viking Supplynet in case number A-16-738444-C. Pursuant to the Memorandum of Costs and Disbursements filed on January 17, 2018, the Law Firm submits that it is owed $71,594.93 in costs. These costs include $3,122.97 in Clerk's Fees; $9,575.90 in Video and Court Recorder's Fees; $57,646.06 in Expert Witness Fees; and $1,250.00 in Copy Fees. The Court finds that the Law Office of Daniel Simon is owed these costs in the amount of $71,594.93.

Quantum Meruit

When a lawyer is discharged by the client, the lawyer is no longer compensated under the discharged/breached/repudiated contract, but is paid based on quantum meruit. *See e.g.* Golightly v. Gassner, 281 P.3d 1176 (Nev. 2009) (*unreported*) (*discharged contingency attorney paid by quantum meruit rather than by contingency fee pursuant to agreement with client*); *citing,* Gordon v. Stewart, 324 P.3d 234 (1958) (*attorney paid in quantum meruit after client breach of agreement*); and, Cooke v. Gove, 114 P.2d 87 (Nev. 1941) (*fees awarded in quantum meruit when there was no contingency agreement*). Here, Simon was constructively discharged by the Edgeworths on November 29, 2017. The constructive discharge terminated the implied contract for fees. William

Kemp Esq. testified as an expert witness and stated that if there is no contract, then the proper award is quantum meruit. The Court finds that the Law Office of Daniel Simon is owed attorney's fees under quantum meruit from November 29, 2017, after the constructive discharge, to the conclusion of the Law Office's work on this case.

In determining the amount of fees to be awarded under quantum meruit, the Court has wide discretion on the method of calculation of attorney fee, to be "tempered only by reason and fairness". Albios v. Horizon Communities, Inc., 132 P.3d 1022 (Nev. 2006). The law only requires that the court calculate a reasonable fee. Shuette v. Beazer Homes Holding Corp., 124 P.3d 530 (Nev. 2005). Whatever method of calculation is used by the Court, the amount of the attorney fee must be reasonable under the Brunzell factors. Id. The Court should enter written findings of the reasonableness of the fee under the Brunzell factors. Argentena Consolidated Mining Co., v. Jolley, Urga, Wirth, Woodbury Standish, 216 P.3d 779, at fn2 (Nev. 2009). Brunzell provides that "[w]hile hourly time schedules are helpful in establishing the value of counsel services, other factors may be equally significant. Brunzell v. Golden Gate National Bank, 455 P.2d 31 (Nev. 1969).

The Brunzell factors are: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed; and (4) the result obtained. Id. However, in this case the Court notes that the majority of the work in this case was complete before the date of the constructive discharge, and the Court is applying the Brunzell factors for the period commencing after the constructive discharge.

In considering the Brunzell factors, the Court looks at all of the evidence presented in the case, the testimony at the evidentiary hearing, and the litigation involved in the case.

1. *Quality of the Advocate*

Brunzell expands on the "qualities of the advocate" factor and mentions such items as

training, skill and education of the advocate. Mr. Simon has been an active Nevada trial attorney for over two decades. He has several 7-figure trial verdicts and settlements to his credit. Craig Drummond Esq. testified that he considers Mr. Simon a top 1% trial lawyer and he associates Mr. Simon in on cases that are complex and of significant value. Michael Nunez Esq. testified that Mr. Simon's work on this case was extremely impressive. William Kemp Esq. testified that Mr. Simon's work product and results are exceptional.

2. *The Character of the Work to be Done*

The character of the work done in this case is complex. There were multiple parties, multiple claims, and many interrelated issues. Affirmative claims by the Edgeworths covered the gamut from product liability to negligence. The many issues involved manufacturing, engineering, fraud, and a full understanding of how to work up and present the liability and damages. Mr. Kemp testified that the quality and quantity of the work was exceptional for a products liability case against a world-wide manufacturer that is experienced in litigating case. Mr. Kemp further testified that the Law Office of Danny Simon retained multiple experts to secure the necessary opinions to prove the case. The continued aggressive representation, of Mr. Simon, in prosecuting the case that was a substantial factor in achieving the exceptional results.

3. *The Work Actually Performed*

Mr. Simon was aggressive in litigating this case. In addition to filing several motions, numerous court appearances, and deposition; his office uncovered several other activations, that caused possible other floods. While the Court finds that Mr. Edgeworth was extensively involved and helpful in this aspect of the case, the Court disagrees that it was his work alone that led to the other activations being uncovered and the result that was achieved in this case. Since Mr. Edgeworth is not a lawyer, it is impossible that it was his work alone that led to the filing of motions

and the litigation that allowed this case to develop into a $6 million settlement. All of the work by the Law Office of Daniel Simon led to the ultimate result in this case.

4. The Result Obtained

The result was impressive. This began as a $500,000 insurance claim and ended up settling for over $6,000,000. Mr. Simon was also able to recover an additional $100,000 from Lange Plumbing LLC. Mr. Vannah indicated to Simon that the Edgeworths were ready so sign and settle the Lange Claim for $25,000 but Simon kept working on the case and making changes to the settlement agreement. This ultimately led to a larger settlement for the Edgeworths. Recognition is due to Mr. Simon for placing the Edgeworths in a great position to recover a greater amount from Lange. Mr. Kemp testified that this was the most important factor and that the result was incredible. Mr. Kemp also testified that he has never heard of a $6 million settlement with a $500,000 damage case. Further, in the Consent to Settle, on the Lange claims, the Edgeworth's acknowledge that they were made more than whole with the settlement with the Viking entities.

In determining the amount of attorney's fees owed to the Law Firm of Daniel Simon, the Court also considers the factors set forth in Nevada Rules of Professional Conduct – Rule 1.5(a) which states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

NRCP 1.5. However, the Court must also consider the remainder of Rule 1.5 which goes on to state:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:

(1) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;

(2) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;

(3) Whether the client is liable for expenses regardless of outcome;

(4) That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and

(5) That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

NRCP 1.5.

The Court finds that under the Brunzell factors, Mr. Simon was an exceptional advocate for the Edgeworths, the character of the work was complex, the work actually performed was extremely significant, and the work yielded a phenomenal result for the Edgeworths. All of the Brunzell factors justify a reasonable fee under NRPC 1.5. However, the Court must also consider the fact

that the evidence suggests that the basis or rate of the fee and expenses for which the client will be responsible were never communicated to the client, within a reasonable time after commencing the representation. Further, this is not a contingent fee case, and the Court is not awarding a contingency fee. Instead, the Court must determine the amount of a reasonable fee. The Court has considered the services of the Law Office of Daniel Simon, under the Brunzell factors, and the Court finds that the Law Office of Daniel Simon is entitled to a reasonable fee in the amount of $200,000, from November 30, 2017 to the conclusion of this case.

CONCLUSION

The Court finds that the Law Office of Daniel Simon properly filed and perfected the charging lien pursuant to NRS 18.015(3) and the Court must adjudicate the lien. The Court further finds that there was an implied agreement for a fee of $550 per hour between Mr. Simon and the Edgeworths once Simon started billing Edgeworth for this amount, and the bills were paid. The Court further finds that on November 29, 2017, the Edgeworth's constructively discharged Mr. Simon as their attorney, when they ceased following his advice and refused to communicate with him about their litigation. The Court further finds that Mr. Simon was compensated at the implied agreement rate of $550 per hour for his services, and $275 per hour for his associates; up and until the last billing of September 19, 2017. For the period from September 19, 2017 to November 29, 2017, the Court finds that Mr. Simon is entitled to his implied agreement fee of $550 an hour, and $275 an hour for his associates, for a total amount of $284,982.50. For the period after November 29, 2017, the Court finds that the Law Office of Daniel Simon properly perfected their lien and is entitled to a reasonable fee for the services the office rendered for the Edgeworths, after being

constructively discharged, under quantum meruit, in an amount of $200,000. The Court further finds that the Law Office of Daniel Simon is entitled to costs in the amount of $71,594.93.

ORDER

It is hereby ordered, adjudged, and decreed, that the Motion to Adjudicate the Attorneys Lien of the Law Office of Daniel S. Simon is hereby granted and that the reasonable fee due to the Law Office of Daniel Simon is $556,577.43, which includes outstanding costs.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

Exhibit 3

Electronically Filed
10/11/2018 11:16 AM
Steven D. Grierson
CLERK OF THE COURT

ORD

DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan Corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5; and, ROE entities 6 through 10;

Defendants.

CASE NO.: A-18-767242-C
DEPT NO.: XXVI

Consolidated with

CASE NO.: A-16-738444-C
DEPT NO.: X

EDGEWORTH FAMILY TRUST; and AMERICAN GRATING, LLC,

Plaintiffs,

vs.

DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, a Professional Corporation d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10;

Defendants.

DECISION AND ORDER ON SPECIAL MOTION TO DISMISS ANTI-SLAPP

DECISION AND ORDER ON SPECIAL MOTION TO DISMISS ANTI-SLAPP

This case came on for an evidentiary hearing August 27-30, 2018 and concluded on September 18, 2018, in the Eighth Judicial District Court, Clark County, Nevada, the Honorable Tierra Jones presiding. Defendants and movant, Daniel Simon and Law Office of Daniel S. Simon d/b/a Simon Law ("Defendants" or "Law Office" or "Simon" or "Mr. Simon") having appeared in

Hon. Tierra Jones
DISTRICT COURT JUDGE
DEPARTMENT TEN
LAS VEGAS, NEVADA 89155

Case Number: A-16-738444-C

person and by and through their attorneys of record, Peter S. Christiansen, Esq. and James Christensen, Esq. and Plaintiff Edgeworth Family Trust and American Grating, ("Plaintiff" or "Edgeworths") having appeared through Brian and Angela Edgeworth, and by and through their attorneys of record, the law firm of Vannah and Vannah, Chtd. Robert Vannah, Esq. and John Greene, Esq. The Court having considered the evidence, arguments of counsel and being fully advised of the matters herein, the **COURT FINDS**:

FINDINGS OF FACT

1. The Court finds that the Law Office of Daniel S. Simon represented the Plaintiffs, Edgeworth Family Trust and American Grating in the case entitled Edgeworth Family Trust and American Grating v. Viking, et al., case number A-16-738444-C. The representation commenced on May 27, 2016 when Brian Edgeworth and Daniel Simon Esq. met at Starbucks. This representation originally began as a favor between friends and there was no discussion of fees, at this point. Mr. Simon and his wife were close family friends with Brian and Angela Edgeworth.

2. The case involved a complex products liability issue.

3. On April 10, 2016, a house the Edgeworths were building as a speculation home suffered a flood. The house was still under construction and the flood caused a delay. The Edgeworths did not carry loss insurance if a flood occurred and the plumbing company and manufacturer refused to pay for the property damage. A fire sprinkler installed by the plumber, and within the plumber's scope of work, caused the flood; however, the plumber asserted the fire sprinkler was defective and refused to repair or to pay for repairs. The manufacturer of the sprinkler, Viking, et al., also denied any wrongdoing.

4. In May of 2016, Mr. Simon agreed to help his friend with the flood claim and to send

a few letters. The parties initially hoped that Simon drafting a few letters to the responsible parties could resolve the matter. Simon wrote the letters to the responsible parties, but the matter did not resolve. Since the matter was not resolved, a lawsuit had to be filed.

5. On June 14, 2016, a complaint was filed in the case of Edgeworth Family Trust; and American Grating LLC vs. Lange Plumbing, LLC; the Viking Corporation; Supply Network Inc., dba Viking Supplynet, in case number A-18-738444-C. The cost of repairs was approximately $500,000. One of the elements of the Edgeworth's damages against Lange Plumbing LLC ("Lange") in the litigation was for reimbursement of the fees and costs that were paid by the Edgeworths.

6. On August 9, 2017, Mr. Simon and Brian Edgeworth traveled to San Diego to meet with an expert. As they were in the airport waiting for a return flight, they discussed the case, and had some discussion about payments and financials. No express fee agreement was reached during the meeting. On August 22, 2017, Brian Edgeworth sent an email to Simon entitled "Contingency." It reads as follows:

> We never really had a structured discussion about how this might be done.
> I am more that happy to keep paying hourly but if we are going for punitive we should probably explore a hybrid of hourly on the claim and then some other structure that incents both of us to win an go after the appeal that these scumbags will file etc.
> Obviously that could not have been doen earlier snce who would have thougth this case would meet the hurdle of punitives at the start.
> I could also swing hourly for the whole case (unless I am off what this is going to cost). I would likely borrow another $450K from Margaret in 250 and 200 increments and then either I could use one of the house sales for cash or if things get really bad, I still have a couple million in bitcoin I could sell.
> I doubt we will get Kinsale to settle for enough to really finance this since I would have to pay the first $750,000 or so back to Colin and Margaret and why would Kinsale settle for $1MM when their exposure is only $1MM?

(Def. Exhibit 27).

7. During the litigation, Simon sent four (4) invoices to the Edgeworths. The first invoice was sent on December 2, 2016, seven (7) months after the original meeting at Starbucks.

This invoice indicated that it was for attorney's fees and costs through November 11, 2016. (Def. Exhibit 8). The total of this invoice was $42,564.95 and was billed at a "reduced" rate of $550 per hour. Id. The invoice was paid by the Edgeworths on December 16, 2016.

8. On April 7, 2017 a second invoice was sent to the Edgeworths for attorney's fees and costs through April 4, 2017 for a total of $46,620.69, and was billed at a "reduced" rate of $550 per hour. (Def. Exhibit 9). This invoice was paid by the Edgeworths on May 3, 2017. There was no indication on the first two invoices if the services were those of Mr. Simon or his associates; but the bills indicated an hourly rate of $550.00 per hour.

9. A third invoice was sent to the Edgeworths on July 28, 2017 for attorney's fees and costs through July 28, 2017 totaling of $142,080.20. (Def. Exhibit 10). This bill identified services of Daniel Simon Esq. for a "reduced" rate of $550 per hour totaling $104,021.20; and services of Ashley Ferrel Esq. for a "reduced" rate of $275 per hour totaling $37,959.00. Id. This invoice was paid by the Edgeworths on August 16, 2017.

10. The fourth invoice was sent to the Edgeworths on September 19, 2017 in an amount of $255,186.25 for attorney's fees and costs; with $191,317.50 being calculated at a "reduced" rate of $550 per hour for Daniel Simon Esq., $60,981.25 being calculated at a "reduced" rate of $275 per hour for Ashley Ferrel Esq., and $2,887.50 being calculated at a "reduced" rate of $275 per hour for Benjamin Miller Esq. (Def. Exhibit 11). This invoice was paid by the Edgeworths on September 25, 2017.

11. The amount of attorney's fees in the four (4) invoices was $367,606.25, and $118,846.84 in costs; for a total of $486,453.09.[1] These monies were paid to Daniel Simon Esq. and never returned to the Edgeworths. The Edgeworths secured very high interest loans to pay fees and

[1] $265,677.50 in attorney's fees for the services of Daniel Simon; $99,041.25 for the services of Ashley Ferrel; and $2,887.50 for the services of Benjamin Miller.

costs to Simon. They made Simon aware of this fact.

12. Between June 2016 and December 2017, there was a tremendous amount of work done in the litigation of this case. There were several motions and oppositions filed, several depositions taken, and several hearings held in the case.

13. On the evening of November 15, 2017, the Edgeworth's settled their claims against the Viking Corporation ("Viking").

14. Also on November 15, 2017, Brian Edgeworth sent an email to Simon asking for the open invoice. The email stated: "I know I have an open invoice that you were going to give me at a mediation a couple weeks ago and then did not leave with me. Could someone in your office send Peter (copied here) any invoices that are unpaid please?" (Def. Exhibit 38).

15. On November 17, 2017, Simon scheduled an appointment for the Edgeworths to come to his office to discuss the litigation.

16. On November 27, 2017, Simon sent a letter with an attached retainer agreement, stating that the fee for legal services would be $1,500,000 for services rendered to date. (Plaintiff's Exhibit 4).

17. On November 29, 2017, the Edgeworths met with the Law Office of Vannah & Vannah and signed a retainer agreement. (Def. Exhibit 90). On this date, they ceased all communications with Mr. Simon.

18. On the morning of November 30, 2017, Simon received a letter advising him that the Edgeworths had retained the Vannah Law Firm to assist in the litigation with the Viking entities, et.al. The letter read as follows:

> "Please let this letter serve to advise you that I've retained Robert D. Vannah, Esq. and John B. Greene, Esq., of Vannah & Vannah to assist in the litigation with the Viking entities, et.al. I'm instructing you to cooperate with them in every regard concerning the litigation and any settlement. I'm also instructing

> you to give them complete access to the file and allow them to review whatever documents they request to review. Finally, I direct you to allow them to participate without limitation in any proceeding concerning our case, whether it be at depositions, court hearings, discussions, etc."

(Def. Exhibit 43).

19. On the same morning, Simon received, through the Vannah Law Firm, the Edgeworth's consent to settle their claims against Lange Plumbing LLC for $25,000.

20. Also on this date, the Law Office of Danny Simon filed an attorney's lien for the reasonable value of its services pursuant to NRS 18.015. (Def. Exhibit 3). On January 2, 2018, the Law Office filed an amended attorney's lien for the sum of $2,345,450, less payments made in the sum of $367,606.25, for a net lien in the sum of $1,977,843.80. This lien includes court costs and out-of-pocket costs advanced by the Law Office of Daniel S. Simon in the sum of $76,535.93.

21. Mr. Edgeworth alleges that the fee agreement with Simon was only for an hourly express agreement of $550 an hour; and that the agreement for $550 an hour was made at the outset of the case. Mr. Simon alleges that he worked on the case always believing he would receive the reasonable value of his services when the case concluded. There is a dispute over the reasonable fee due to the Law Office of Danny Simon.

22. The parties agree that an express written contract was never formed.

23. On December 7, 2017, the Edgeworths signed a Consent to Settle their claims against Lange Plumbing LLC for $100,000.

24. On January 4, 2018, the Edgeworth Family Trust filed a lawsuit against Simon in Edgeworth Family Trust; American Grating LLC vs. Daniel S. Simon, the Law Office of Daniel S. Simon, a Professional Corporation, case number A-18-767242-C.

25. On January 24, 2018, the Law Office of Danny Simon filed a Motion to Adjudicate Lien with an attached invoice for legal services rendered. The amount of the invoice was

$692,120.00. The Court set an evidentiary hearing to adjudicate the lien.

CONCLUSION OF LAW

The Court has adjudicated all remaining issues in the Decision and Order on Motion to Dismiss NRCP 12(b)(5), and the Decision and Order on Motion to Adjudicate Lien; leaving no remaining issues.

CONCLUSION

The Court finds that the Special Motion to Dismiss Anti-Slapp is MOOT as all remaining issues have already been resolved with the Decision and Order on Motion to Dismiss NRCP 12(b) and Decision and Order on Motion to Adjudicate Lien.

ORDER

It is hereby ordered, adjudged, and decreed, that the Special Motion to Dismiss Anti-Slapp is MOOT.

IT IS SO ORDERED this 10th day of October, 2018.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

Electronically served to:

Peter S. Christiansen, Esq.
James Christensen, Esq.
Robert Vannah, Esq.
John Greene, Esq.

Tess Driver
Judicial Executive Assistant
Department 10

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA
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EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan corporation; and DOES I through V and ROE CORPORATIONS VI through X, inclusive, Defendants.	CASE NO.: A-16-738444-C DEPT. NO.: X **PLAINTIFFS' OPPOSITION TO SIMON'S MOTION TO AMEND FINDINGS UNDER NRCP 52; and/or, FOR RECONSIDERATION**
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC, Plaintiffs, vs. DANIEL S. SIMON; THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION; DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-18-767242-C DEPT. NO.: XXIX

VANNAH & VANNAH
400 S. Seventh Street, 4th Floor • Las Vegas, Nevada 89101
Telephone (702) 369-4161 Facsimile (702) 369-0104

Plaintiffs EDGEWORTH FAMILY TRUST and AMERICAN GRATING, LLC (PLAINTIFFS), by and through their attorneys of record, ROBERT D. VANNAH, ESQ., and JOHN B. GREENE, ESQ., of the law firm VANNAH & VANNAH, hereby file their Opposition to the Motion of DANIEL S. SIMON and THE LAW OFFICE OF DANIEL S. SIMON, A PROFESSIONAL CORPORATION (SIMON) to Amend Findings Under NRCP 52, and/or For Reconsideration pursuant to EDCR 2.24 (the Motion).

This Opposition is based upon the attached Memorandum of Points and Authorities; the pleadings and papers on file herein; the Findings of Fact and Orders entered by this Court; NRCP 52, EDCR 2.24(c); NRAP 36(c)(2); NRPC 1.5; and, any oral argument this Court may wish to entertain.

DATED this 8 day of November, 2018.

VANNAH & VANNAH

ROBERT D. VANNAH, ESQ.

VANNAH & VANNAH
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I.

SUMMARY

The facts of this matter are well known to this Court. The path to this intricate knowledge was gained by, but not limited to, having listened to five days of comprehensive testimony; by having reviewed the totality of the evidence presented; by having read hundreds of pages of pre and post hearing briefing, exhibits, notes, and arguments; and, by having carefully crafted factual findings and orders. Therefore, PLAINTIFFS will spare this Court yet another recitation of the facts.

Suffice it to say that, other than the agreed-to removal of the award of costs to SIMON, there isn't anything in SIMON'S Motion that possesses a morsel of merit—nothing new factually that wasn't litigated and argued ad nauseum throughout the proceedings; nothing in the law that suddenly changed that SIMON didn't have the fair opportunity to assert and argue from Day One; no reasonable basis for SIMON to portray himself as a victim of some fictional manifest injustice here when he's set to earn over $1,000,000 in fees and costs (past payments made by PLAINTIFFS together with those recently Ordered by this Court) for less than nineteen (19) months of time and work; and, no evidence presented of clear error by this Court.

As mentioned, PLAINTIFFS and SIMON do agree that the award of costs to SIMON in the amount of $71,594.93 should be removed from the Lien Decision and Order (LDO), as everyone agrees that PLAINTIFFS paid SIMON in full for all outstanding costs once SIMON provided PLAINTIFFS with the correct amount, together with supporting documentation. (As things have gone in this attorney client relationship, SIMON also billed PLAINTIFFS $1,700 in expert costs that were clearly related to another client file. Despite providing evidence of this erroneous invoice and payment to SIMON, he refuses to reimburse PLAINTIFFS for his error.) Plus, SIMON admits in his Motion that he was not and is not seeking the payment of costs in this matter. (See Motion at 11:26-28.)

PLAINTIFFS respectfully request that this Court refuse SIMON'S invitation to reconsider—in other words re-litigate—what he was given a full and fair opportunity to present to this Court in months of briefing and five (5) days of an evidentiary hearing.

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II.

ARGUMENTS

A. THE FINDING OF AN IMPLIED CONTRACT VERSUS AND IMPLIED ORAL CONTRACT IS A DISCRETIONARY DISTINCTION WITHOUT A DIFFERENCE.

Whether or not the Court found that the contract between PLAINTIFFS and SIMON was an implied oral contract versus an implied contract is irrelevant in the context of the Decision and Order on Motion to Dismiss NRCP 12(b)(5)(DOMD). This Court has the discretion to find the existence of either form of contract. *Certified Fire, Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 283 P.3d 250 (2012). It is a discretionary distinction without a difference, as either form of contract is a **contract**, whether it was entered into after oral discussions or through repeated performance. (*Id.*)

There was testimonial evidence presented by Brian Edgeworth that as early as June of 2016, he and SIMON spoke about SIMON'S hourly fee for this matter being $550. There was also substantial evidence presented by all parties that PLAINTIFFS paid every dime of hourly fees that SIMON billed and submitted to PLAINTIFFS for payment in the four original invoices. (LDO at p. 9:10-20.) Regardless, substantial evidence presented at the hearing (and in the months leading to the hearing) supports the finding of this Court that a contract was created between the parties. (LDO 14; 24.) However, if the Court wishes to clarify in the DOMD whether the contract was an implied oral contract or an implied contract, PLAINTIFFS defer to the discretion of the Court.

B. SIMON AGREES THAT ALL COSTS HAVE BEEN PAID IN FULL.

SIMON admits at page 11:26-28 of his Motion that PLAINTIFFS do not owe any additional costs. (In fact, they're owed a reimbursement in the amount of $1,700 that SIMON refuses to pay.) SIMON'S attorney, Peter S. Christiansen, Esq., also acknowledged as much in a reply email to this Court on October 9, 2018, at 8:28 a.m., where he stated: "The check in

question was received by Mr. Simon as a reimbursement of costs and is not included in the asserted attorneys lien." (Please see email string attached as Exhibit 1.) Since the evidentiary hearing was premised on a Motion to Adjudicate Attorney's Lien, and since SIMON was not seeking costs in the Amended Lien that was adjudicated, the award of costs in the LDO in the amount of $71,594.93 should be removed.

Strangely, SIMON seeks "clarification" in his Motion at page 12, lines 9-12, whether "costs are to be added, deducted or are considered separate from the amount currently owed to Simon, and reconciliation of the fee owed." (Emphasis added.) SIMON clearly knows that there aren't any costs owed to him. (See SIMON'S Motion at p. 11:26-28.) He also admits he was not seeking costs at the time of the evidentiary hearing. (Id.) Plus, SIMON knows that he didn't present any evidence at the hearing that he was owed any costs.

Certainly by this point in time, SIMON must be well enough acquainted with the Nevada Rules of Professional Conduct, namely 1.5, as these Rules came up again and again at the evidentiary hearing due to what SIMON did and didn't do here. A recitation of Rule 1.5 appears again at page 22 of the LDO. Of importance to this issue here, NRPC 1.5(a) states: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." (Emphasis added.) If charging an unreasonable amount for an expense (as in a "cost") is prohibited, then seeking to charge and/or charging PLAINTIFFS for a nonexistent cost must be deemed much, much worse.

SIMON'S suggestion that he's somehow entitled to money for costs he didn't incur and isn't owed is yet another self-inflicted transgression and unnecessary violation of the Nevada Rules of Professional Conduct. Why can't SIMON just represent to this Court in his Motion that he agrees that costs awarded in the amount of $71,594.93 should be removed from the LDO, as they're not owed to him? That would be—and is—the simple truth, as well as the right thing to do. It's also the request of PLAINTIFFS.

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C. EDCR 2.24(c) DOES NOT ALLOW FOR THE REMEDY THAT SIMON SEEKS.

In support of his Motion at page 10, SIMON'S cite of EDCR 2.24 was a little light on content. In only referencing (b), he left out the most important and relevant part found in (c). In doing so, SIMON leads this Court to believe that his Motion should be heard and reargued just because it was filed. Yet, it is no secret that a motion for reconsideration is an extraordinary remedy that is disfavored and should only be used sparingly. *Peterson v. Miranda*, 57 F.Supp 3d 1271 (D. Nev. 2014). In short, they're generally nothing more than a thinly veiled request for a do-over of what's already been done by a trier-of-fact who's vested with the authority and the discretion to decide what's already been decided. It is also tantamount to an insult to the acumen of the trier-of-fact.

Furthermore, in filing a Motion to clarify an irrelevant fact (implied oral contract versus implied contract) and regarding costs he knows he isn't owed under any circumstances, SIMON seems to want to avoid the impactful language and effect of section (c). There we read:

> **If** a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make other such orders are deemed appropriate under the circumstance of the particular case. (Emphasis added.)

The word "If" that begins this portion of the Rule gives this Court a clear directive and the discretion to refuse to rehear what this Court has already heard and decided. And, in this instance, heard and heard and heard again for an extended period of time. Therefore, the hearing that is presently set for November 15, 2018, does not need to happen if this Court exercises her discretion to deny SIMON'S Motion under EDCR 2.24(c), or to dispose of it in summary fashion.

Even "if" this Court grants the Motion by allowing reargument, there isn't any basis to entertain the Motion. One, it doesn't contain any new facts. Two, it does not bring to light any new or intervening law. Three, SIMON did not and cannot point to any manifest injustice that must be corrected. Last, SIMON cannot present any evidence or facts that the LDO was clearly

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erroneous. *Peterson v. Miranda*, 57 F.Supp 3d 1271 (D. Nev. 2014). To the contrary, a simple reading of the Motion is akin to watching the movie Groundhog Day—just the same facts, law, and arguments (aka stuff) that this Court has been seeing, reading, and hearing over and over and over again.

Other than the issue concerning costs, since SIMON cannot meet his burden under the law by pointing out specific findings of this Court that are either unsupported by substantial evidence or clearly erroneous, his latest Motion must be denied. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partners*hips, 110 Nev. 23, 866 P.2d 1138 (1994).

D. THE COURT'S FINDINGS THAT SIMON ATTACKS IN HIS MOTION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In his Motion, SIMON wants to revisit this Court's findings that: the Viking case settled on the evening of November 15, 2017; the reasonable amount of SIMON'S fee from June of 2016, through September 18, 2017, are the amounts set forth in his four original invoices that were paid in full by PLAINTIFFS; the reasonable amount of SIMON'S fee from September 19, 2017, through November 29, 2017, is $284,982.50, which represents the amount of fees SIMON (& associates) billed in his "super bill" for that specific period of time; and, SIMON is entitled to an attorney's fee of $200,000 in quantum meruit from November 30, 2017, through the conclusion of the case.

Nevada law is very clear that "the ...court's findings will not be set aside unless those findings are clearly erroneous or not supported by substantial evidence." *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partners*hips, 110 Nev. 23, 866 P.2d 1138 (1994). Other than the one finding concerning costs, SIMON'S Motion fails to offer sufficient evidence to show that the Court's findings are either clearly

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erroneous and/or not supported by substantial evidence. Therefore, SIMON has failed to meet his burden. As a result, his Motion should be denied.

First, substantial evidence was presented at the hearing that PLAINTIFFS' case against Viking settled on the evening of November 15, 2017. (LDO 5:5-6.) This Court heard evidence that by that date, Viking offered $6,000,000 to PLAINTIFFS to resolve their claims: an amount coupled with material terms that were acceptable to PLAINTIFFS. The Court also heard evidence that on November 16, 2017, Janet C. Pancoast, Esq., counsel for Viking, sent a letter stating that the **amount** of the **settlement** (between Viking and PLAINTIFFS that was reached the day before) would be subject to a confidentiality agreement. (Emphasis added.)

This Court also evaluated evidence in the form of text messages between SIMON and Brian Edgeworth that were sent on November 16, 2017, concerning the Pancoast letter where Mr. Edgeworth stated: "That line is fine. The settlement is the only thing that is confidential. I assume that means the amount." (Emphasis added.) The evidence is clear that Brian Edgeworth did not care about the confidentiality of the amount of the Viking settlement. In other words, substantial evidence presented at the hearing showed that confidentiality wasn't an "essential" term, as now argued by SIMON.

In short, substantial evidence was presented that all of the material terms of the Viking **settlement** were reached on November 15, 2017. The fact that this settlement was reached on November 15, 2017, was perfectly clear to PLAINTIFFS, Viking/Ms. Pancoast, and the mediator, Floyd Hale. The only one who is clearly erroneous as to the date of the Viking settlement is SIMON. For him to attempt to rewrite history and to argue to this Court as to when he feels that the Viking case settled is factually incorrect, strange, and legally insufficient.

Second, substantial evidence was presented at the hearing that (assuming a constructive discharge occurred and that it occurred on November 29, 2017) at the earliest, SIMON was entitled to a fee based on quantum meruit from November 30, 2017, through the conclusion of the

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case. (LDO 24-25.) In attacking this finding and conclusion, SIMON uses the same law, facts, and arguments that he's made and referenced in several previous filings and arguments with and before this Court. He doesn't offer anything new. Instead, SIMON merely reiterates why he thinks he's right and why he says this Court is wrong. In doing so, SIMON has again failed to meet his burden under EDCR 2.24(c) and the case law interpreting its provisions. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partners*hips, 110 Nev. 23, 866 P.2d 1138 (1994). Therefore, his Motion must be denied.

While SIMON has stated in several previous briefs and testified under oath at the evidentiary hearing that he's not seeking a contingency fee from PLAINTIFFS, he's seeking a contingency fee from PLAINTIFFS. He's had his eyes on that prize since August of 2017, a time when adverse facts against Viking had caused the risk of loss to begin to rapidly evaporate. He again makes that wish clear in his Motion at page 19:9-10, when he asks for $1.9 million, the same number he's asked for since he served his Amended Lien in January of 2018. Simple math shows that 40% of the Viking settlement of $6 million is $2.4 million, an amount that is eerily similar to what PLAINTIFFS have already paid in fees, plus the amount of SIMON'S Amended Lien.

While SIMON attacks the findings of this Court on the reasonable amount of SIMON'S fee for the hourly fees billed and paid in full for the time period of April of 2016 through September 19, 2017; the hourly fees billed and ordered to be paid from September 19, 2017, through November 29, 2017; and, the amount of fees in quantum meruit that SIMON is owed from November 30, 2017, through the conclusion of this case, SIMON has not shown one example that these findings are clearly erroneous or unsupported by substantial evidence.

To the contrary, the discretionary findings of this Court that SIMON wrongfully attacks are actually correct and supported by substantial evidence. For example, substantial evidence (such as invoices presented by SIMON and paid by PLAINTIFFS; admissions made by SIMON

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in deposition testimony on September 27, 2017 that all his fees had been paid to date; 16.1 disclosures and computations of damages presented by SIMON as complete billings; etc.) was presented that SIMON was fully, fairly, and reasonably compensated (i.e. PAID IN FULL) by PLAINTIFFS from the beginning of this case in May of 2016, through September 19, 2017. (LDO 15-17.)

Since substantial evidence presented at the hearing supports a finding that SIMON was paid in full from the beginning of the case (May of 2016) through September 19, 2017, this Court is correct to make at finding that no additional fees are owed to SIMON for this time period. (LDO 17-18.)

Additionally, substantial evidence was presented at the hearing that SIMON'S entries on his "super bill" from September 19, 2017, through November 29, 2017, contain admissions of SIMON as to the EXACT amount that he believes PLAINTIFFS owe him for that period of time, which is $284,982.50. (LDO 18-19.) SIMON hasn't presented any new facts or law to show that it was either clearly erroneous for this Court to rely on SIMON'S own billing entries to establish a reasonable fee from September 19, 2107, through November 29, 2017, or that this Court's findings were not supported by substantial evidence. Therefore, his attack on these findings must fail as well.

Finally, this Court had the discretion to find that substantial evidence was presented at the hearing that undermined the credibility of SIMON and his associate, Ashley Ferrel, on the accuracy of SIMON'S "super bill" concerning his attempt to add time to the four invoices that were paid in full by PLAINTIFFS. (See LDO 15-17.); *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partners*hips, 110 Nev. 23, 866 P.2d 1138 (1994). While SIMON may want this Court to reconsider why he claims he's right and why he believes this Court is wrong—of course, it's really the other way around—he's failed to meet his burden under the law for that drastic remedy to be afforded. (*Id.*)

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The law that SIMON cites in support of his position on quantum meruit is not only familiar—as it's the same stuff that's been cited by him for months in other briefs—it fails to get him to where he's desperate to go = a contingency fee disguised as quantum meruit. This Court found that "this is not a contingency fee case, and the Court is not awarding a contingency fee." (LDO 24:3-4.) Substantial evidence presented at the hearing showed that SIMON failed to reduce his late-onset dream of a contingency fee to writing. (Or any fee agreement for that matter.) NRPC 1.5(c) prohibits SIMON from obtaining a contingency fee, thus providing further support for this Court's findings.

Furthermore, the Third Restatement, *The Law Governing Lawyers*, as cited by SIMON, does not provide him with a route for a contingency fee in any form in Nevada, including quantum meruit, as Nevada law specifically forbids SIMON from receiving one here. NRPC 1.5(c). Neither do the unpublished opinions of *Golightly v. Gas*sner, 281 P.3d 1176 (Nev. 2009), or *Rosenberg v. Calderon Automation, Inc.*, 1986 Ohio App. LEXIS 5460 (1986). (Note that NRAP 36(c)(2) states: "an unpublished disposition, while publicly available, **does not** establish mandatory precedent....")(Emphasis added.)

Unlike SIMON, Chad Golightly was retained under a written contingency fee agreement and was discharged after an offer of $44,500 was made but before a settlement was reached. In post settlement motion practice, Mr. Golightly asked for (or, **"elected"** to receive under the *Rosenberg* scenario that SIMON wants to believe is the law of Nevada, though it isn't Nevada law) a fee of $9,790, which was 22% of the amount of the offer he'd received and the amount provided for under the contingency fee agreement with Gassner.

Gassner's replacement attorney asked Mr. Golightly to provide evidence of the amount of work he'd performed on behalf of the client, but he refused, citing the contingency fee that the fee agreement provided for upon discharge. The trial court asked Mr. Golightly to provide evidence of the work he'd done on behalf of Gassner to justify the fee. That evidence wasn't provided.

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The Nevada Supreme Court rejected Mr. Golightly's request and position and instead affirmed the award to him of a fee of $1,000 based on quantum meruit, an amount that was about 10% of the amount of his "elected" remedy.

In the Ohio case of *Rosenberg*, again unlike SIMON, attorney Brenner was retained under a one third contingency fee agreement. Brenner, in turn, retained Rosenberg to assist on the case, with the understanding that his fee would be paid by sharing in the contingency fee agreement that the client had signed with Brenner. At that time, Brenner and the client evaluated the case at $16,000,000.

After a favorable result from a jury, Rosenberg suggested to the client that settlement discussions be had with General Motors, the adverse party. The client vehemently refused to negotiate and things began to deteriorate. Thereafter, Rosenberg was discharged before and without any form of payment being rendered. Under an apparent law or procedure in Ohio that is not shared or followed by Nevada (see *Golightly*), Rosenberg elected to be paid via quantum meruit as opposed to a contingency fee, and was subsequently awarded $27,000 (in a case evaluated at $16,000,000).

In affirming the award of the trial court, the appellate court stated in *Rosenberg*: "We find that the trial court exercised its discretion in arriving at a fair and equitable determination of fees for services rendered by Rosenberg." (Emphasis added.) While the *Golightly* case clearly shows that Nevada does not follow the apparent Ohio model of allowing an attorney to elect which form of fee to be paid upon discharge, the court in *Rosenberg* does embrace the well established rule that gives this Court the discretion to arrive at a fair and equitable determination of any fee owed to SIMON. *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 291 P.3d 114 (2012); *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 866 P.2d 1138 (1994). That's exactly what happened here. (See LDO.)

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On a side note, this Court awarded SIMON $200,000 in fees based on quantum meruit from the period of time when the Court found a constructive discharge had occurred (November 30, 2017) through the conclusion of the case. (LDO 24-25.) SIMON should be thrilled with that award, but there's no indication of that emotion in his Motion. This Court could have just as easily and reasonably awarded SIMON $33,811.25 in fees, which is the amount of fees that SIMON admitted that he (and Ms. Ferrel) billed in his "super bill" for the actual work performed during that time frame. That's what the trial court did in *Rosenberg* (and later affirmed by the appellate court), a case warmly embraced by SIMON.

Since SIMON has not and cannot point to any abuse of discretion or clear error by this Court, since the discretionary findings of this Court are supported by substantial evidence, and since SIMON cannot meet the heavy burden for a Motion for Reconsideration, his Motion should be denied, as indicated.

III.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court deny SIMON'S Motion, as indicated in this Opposition.

DATED this 8 day of November, 2018.

VANNAH & VANNAH

ROBERT D. VANNAH, ESQ.

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CERTIFICATE OF SERVICE

I hereby certify that the following parties are to be served as follows:

Electronically:

James R. Christensen, Esq.
JAMES R. CHRISTENSEN, PC
601 S. Third Street
Las Vegas, Nevada 89101

Peter S. Christiansen, Esq.
CHRISTIANSEN LAW OFFICES
810 S. Casino Center Blvd., Ste. 104
Las Vegas, Nevada 89101

Traditional Manner:
None

DATED this 8th day of November, 2018.

An employee of the Law Office of
Vannah & Vannah

VANNAH & VANNAH
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Exhibit 1

Exhibit 1

Gmail by Google

John Greene <jgreene@vannahlaw.com>

Edgeworth Family Trust- Question Regarding Defense Exhibit

7 messages

Wyse, Seleste <Dept10LC@clarkcountycourts.us> Tue, Oct 9, 2018 at 7:54 AM
To: "John Greene (jgreene@vannahlaw.com)" <jgreene@vannahlaw.com>, "James R. Christensen (jim@jchristensenlaw.com)" <jim@jchristensenlaw.com>, "rvannah@vannahlaw.com" <rvannah@vannahlaw.com>, "pete@christiansenlaw.com" <pete@christiansenlaw.com>

Counsel,

As the Judge is reviewing her notes and finalizing her findings she has a question about Defense Exhibit 55. It appears to be a check dated 3/1/18 written from the Trust Account and signed off on by Danny Simon and Robert Vannah. The check is for $68,844.93 and indicates that is reimbursement for costs. The only time that her notes reference this exhibit is during the testimony of Angela Edgeworth. However, it was not clear to the Judge if the Law Office of Danny Simon actually received the proceeds of this check or if this amount was still in dispute. Can you please clarify this with an email cc'ing all parties above?

Thank you very much.

Seleste A. Wyse

Law Clerk to the Honorable Judge Tierra D. Jones

Eighth Judicial District Court, Dept. 10

Dept10LC@clarkcountycourts.us

Phone: (702) 671-4389

Fax: (702) 671-4384

Peter S. Christiansen <pete@christiansenlaw.com> Tue, Oct 9, 2018 at 8:28 AM
To: "Wyse, Seleste" <Dept10LC@clarkcountycourts.us>
Cc: "John Greene (jgreene@vannahlaw.com)" <jgreene@vannahlaw.com>, "James R. Christensen (jim@jchristensenlaw.com)" <jim@jchristensenlaw.com>, "rvannah@vannahlaw.com" <rvannah@vannahlaw.com>

The check in question was received by Mr Simon as a reimbursement of costs and is not included in the asserted attorneys lien.

Thanks

Peter S. Christiansen, Esq.
Christiansen Law Offices
810 S. Casino Center Boulevard, Suite 104
Las Vegas, NV 89101
Phone: 702-232-1920
Fax: 866-412-6992

[Quoted text hidden]

Wyse, Seleste <Dept10LC@clarkcountycourts.us> Tue, Oct 9, 2018 at 8:45 AM
To: "Peter S. Christiansen" <pete@christiansenlaw.com>
Cc: "John Greene (jgreene@vannahlaw.com)" <jgreene@vannahlaw.com>, "James R. Christensen (jim@jchristensenlaw.com)" <jim@jchristensenlaw.com>, "rvannah@vannahlaw.com" <rvannah@vannahlaw.com>

Good morning,

Thank you for your response.

Take care,

Seleste A. Wyse

Law Clerk to the Honorable Judge Tierra D. Jones

Eighth Judicial District Court, Dept. 10

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jim@jchristensenlaw.com
Attorney for Daniel S. Simon

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

EDGEWORTH FAMILY TRUST, and AMERICAN GRATING, LLC Plaintiffs, vs. LANGE PLUMBING, LLC; THE VIKING CORPORATION, a Michigan corporation; SUPPLY NETWORK, INC., dba VIKING SUPPLYNET, a Michigan Corporation; and DOES 1 through 5 and ROE entities 6 through 10; Defendants.	Case No.: A-16-738444-C Dept. No.: 10 **REPLY IN SUPPORT OF MOTION TO AMEND FINDINGS UNDER NRCP 52; and/or FOR RECONSIDERATION** Date of Hearing: 11.15.18 Time of Hearing: 9:30 a.m.
EDGEWORTH FAMILY TRUST; AMERICAN GRATING, LLC Plaintiffs, vs. DANIEL S. SIMON d/b/a SIMON LAW; DOES 1 through 10; and, ROE entities 1 through 10; Defendants.	CONSOLIDATED WITH Case No.: A-18-767242-C Dept. No.: 10

I. NRCP 52(b)

Years ago, NRCP 52 was amended to allow a District Court to accept *ex parte* findings submitted by a party. NRCP 52; and, *Foster v. Bank of America*, 365 P.2d 313, 318 (Nev. 1961). In conjunction, NRCP 52 (b) was amended to allow an aggrieved party to file a motion to amend findings at the trial court level. *Foster*, 365 P.2d at 318.

Rule 52 *does not* provide a standard of review for the trial court to apply to amendment of its own findings; nor, has a standard been supplied by the Nevada Supreme Court. NRCP 52; and, *Foster*, 365 P.2d at 318. As such, the ability to amend findings under Rule 52 is left to the Court's discretion.

The absence of a more stringent standard of review in Rule 52 was not an oversight. The Supreme Court clearly could have written a standard of review greater than Court's discretion into the Rule if it wanted to. Rather, the lack of a higher stated standard of review is a function of the "radical" modification of Rule 52, which allows *ex parte* findings and, in turn, allows an aggrieved party a broad ability to seek amendment of findings. *See, Foster*, 365 P.2d at 318.

Simon filed a motion to amend under Rule 52. (Also, as per typical civil practice, Simon included an alternate request for reconsideration under EDCR 2.24.) Simon requested amendment of the findings as raised in the motion. As per the Rule, the Court may amend its own findings per the Court's own discretion.

The opposition is puzzling. The Edgeworths do not mention Rule 52, nor do the Edgeworths address how a District Court may amend its own findings. Instead, the Edgeworths cite two cases that set forth the standard of review applied by an appellate court when findings are challenged on appeal. (*See, e.g.*, Opp., at 7:5-10.) And, the Edgeworths argue about how to address a motion to reconsider.

Under Rule 52, the appellate standards of review for upholding a finding on appeal *do not* apply. Under the Rule, the Court may amend findings at its discretion. At this stage, the District Court *is not* limited to amendment of findings which are clearly erroneous or not supported by substantial evidence.

The Edgeworths do not argue the applicable law, but instead argue standards that do not apply at this stage. Simon asks that the Court address the current motion pursuant to Rule 52, and amend the findings as requested per the Court's discretion.

II. Argument

Simon requests the findings be amended pursuant to Rule 52. Simon set forth substantial factual grounds and legal reasoning for each requested amendment. In opposition, the Edgeworths argued application of the wrong standard of review for a Rule 52 motion. EDCR 2.20(e) requires a party opposing a motion to file a memorandum of points and authorities. Providing the Court with applicable authority is implied. Accordingly, the Court may grant the Simon

motion on the failure to properly oppose the motion, in addition to the grounds which follow. EDCR 2.20(e).

A. The "implied oral contract" typo.

The Court found an implied contract. *E.g.*, Lien D&O at page 9. The Court *did not* find an oral contract. *E.g.*, Lien D&O at page 9.

A contract can be formed by express oral communication *or* implied by conduct. *Certified Fire v. Precision Const*., 283 P.3d 250 (Nev. 2012). Said another way:

> A promise may be stated in words either oral or written, *or* may be inferred wholly or partly from conduct. (Italics added.)

Restatement (Second) of Contracts §4 (1981).

In this case, the Court found an implied contract; a contract inferred from conduct. *E.g.*, Lien D&O at page 9. The Court did not find an oral contract. *E.g.*, Lien D&O at page 9. Thus, the inclusion of the word "oral" in the MTDO appears to be a typo.

Simon asks that the finding in the MTDO at 7:8-9 be amended by removal of the word "oral".

B. Costs.

The cost number in the finding needs to be addressed. Also, how the Court envisioned the costs found to be allocated within the final amount awarded needs clarification, so the amount can be reconciled by the parties.

It is appropriate and necessary for the findings to address the history of the costs advanced by Simon. The uncontested facts are that the attorney liens were filed months before advanced costs were paid by the Edgeworths. (An attorney should not be sued for filing an attorney lien to protect recovery of advanced costs…)

Contrary to the Opposition, Simon is not seeking an award of already paid costs. Simon clearly told the Court,

> In March of 2018, the Edgeworths finally paid the outstanding advanced costs. As of the evidentiary hearing, no advanced costs were sought by Simon and no advanced costs were outstanding.

Motion at 11:25-27. This is not an issue of contention between the parties, it is not clear why the Edgeworths' try to make it one.

The Edgeworths also complain about a $1,700.00 cost charge. Mr. Vannah engaged in an email exchange with the undersigned in late October regarding a $1,700.00 cost charge questioned by the Edgeworths after the evidentiary hearing. The exchange was cordial - at least as far as this case goes. The upshot was that neither Mr. Vannah or the undersigned had a true understanding of the $1,700 cost issue. However, both agreed to look into it. Which was done. Simon reviewed all cost entries and found that an expert included a $1,700 entry properly charged to another case on an Edgeworth billing. Simon agrees that cost is not chargeable to

the Edgeworths and the money will be refunded. Again, this is not an issue of contention between the parties, the Edgeworths should not make it one.

C. The Viking case did not settle on November 15.

Under a Rule 52 motion to amend, a court may amend its own findings per its discretion. This is not an appeal, and the appellate standards of review do not apply. Thus, the Edgeworths' argument misses the mark. In addition, the Edgeworths' argument misses the mark because it is factually incorrect.

By definition, the Viking case did not settle on November 15, because the Viking November 15 counter offer required the Edgeworths to dismiss the Lange case; and, that did not happen. Rather, negotiation continued, the Viking requirement of a Lange dismissal was later removed, and the Edgeworths obtained additional money from Lange.

As a matter of law, a settlement contract with Viking cannot be formed until the essential terms are reached and there is manifestation of mutual consent. Restatement (Second) of Contracts §18 (1981) ("[M]anifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance"); and, *May v. Anderson*, 119 P.3d 1254 (Nev. 2005) (agreement must be had on all essential terms for formation of a settlement contract).

Clearly the Viking case did not settle on November 15th, because the essential terms of the Viking counter offer were not accepted by the Edgeworths.

Rather, negotiation continued, and the Lange case was not dismissed as requested by Viking, to the benefit of the Edgeworths. In short, essential terms were not reached on November 15, because the Edgeworths did not agree to dismiss Lange for no money from Lange as Viking requested.

Also, clearly the Viking case did not settle on November 15, because there is no evidence of manifestation of Edgeworth assent on the 15th. As the uncontroverted facts go, Mr. Hale made a mediator's proposal. Viking did not accept the mediator's proposal as is, but instead made a counter offer on November 15. That is at most half the story; for mutual assent both parties must express their agreement with the mediator's proposal or to a different deal. There is no evidence the Edgeworths sent an acceptance of the mediator's proposal - even had Viking accepted the proposal, which it did not. In short, there is no evidence that the Edgeworths told Viking "we agree to your counter proposal" on November 15. In fact, the Edgeworths own opposition cites to text messages between client and counsel on the 16th, in which the terms offered by Viking are debated.

The facts are that Mr. Edgeworth travelled to China and did not return until November 29, 2017. And, the facts are that the Edgeworths stopped communicating with Mr. Simon. Mr. Simon could not provide assent on behalf of a client who does not communicate. It was not until after Mr. Edgeworths return, that he met with Mr. Vannah, and (presumably) took Mr. Vannah's advice and

counsel regarding the Viking settlement, per the December 1, 2017, settlement agreement.

While the appellate standards of review do not apply to a Rule 52 motion, if they had, as a matter of law, the finding of a settlement on November 15 would be reversible error.

D. The impact of the Edgeworths' decision to discharge Simon.

The uncontroverted facts establish, and the Court found that Simon was constructively discharged by the Edgeworths. The Edgeworths made a conscious decision to hire new counsel, to end communication with Simon, and to follow the advice of new counsel (and to pay new counsel $925 an hour, when they testified that $550 an hour was too high).

The Edgeworth decision to fire their lawyer comes with consequences. Legally, when an attorney is discharged, the attorney may, at the attorney's option, elect to seek payment due under contract or under quantum meruit. While the Edgeworths go to great lengths to try to distinguish the cases which so hold, the Edgeworths overlook the fact that this Court agreed with and adopted the case authority in the findings. The Edgeworths did not ask this Court to amend its findings on the applicable legal authority under Rule 52. In fact, they concede the legal authority is the correct law to apply to the facts of this case.

The appellate standards of review do not apply to a Rule 52 motion to amend; however, if they had, as a matter of law, the Edgeworths cannot use the implied contract as a shield from the Simon lien claim for reasonable value; because by discharging Simon, the Edgeworths disavowed the implied contract:

> A client who voids the contract as stated here cannot then enforce its favorable terms against the lawyer, and the client is liable to the lawyer for the fair value of the lawyer's services (see § 39).

Third Restatement, *The Law Governing Lawyers*, §18, at comment e.

In the Lien D&O, the Court concluded that an implied contract existed between Simon and clients until November 29, 2017, the date of Simon's discharge; and, that Simon must be compensated prior to November 29, 2017, under the hourly payment terms of the implied contract as found by the Court. Lien D&O at pages 15-19. Simon requests the Court amend its finding and apply quantum meruit to determine the amount of the Simon lien claim for fees.

Going further, the last date of submitted and paid for billing was September 19, 2017. At a minimum, quantum meruit should be applied to determine the fee due for work done after September 19 - which is the period when most of the work that lead to the amazing result occurred, and which should be reflected in the fee grant. The main rule is that an attorney should be paid based on results. As even the Edgeworths concede, the results were amazing. Simon should be paid for results.

The main opposition argument raised by the Edgeworths is that Simon is seeking a contingency fee. That is not true. A contingency fee is a *method* of determining a fee by use of a percentage. For example, in *Golightly v. Gassner*, 281 P.3d 1176 (Nev. 2009), Golightly was fired by a client. Golightly elected to seek a percentage of 22% of the amount recovered as his fee under his lien. The reason Golightly did not recover his fee was because the Court has the statutory obligation to review a fee sought by an attorney under a lien for reasonableness. Golightly did not present sufficient evidence of what he did to earn the fee, so the Court awarded $1,000.00. Golightly exercised his election, but then made a bad decision to not adequately support his claim.

In this case, Simon elected to seek payment under quantum meruit. Simon supported his claim with evidence of the huge amount of superior work done by the law firm, the amazing result, and for which the Court was a firsthand observer. The enormous amount of work is further supported by the register of actions, the boxes and boxes of documents produced, as well as undisputed testimony of the parties, including the Edgeworths. The question is how to calculate the fee due. The law clearly allows the Court to use the market rate as a method to determine the fee. Simon presented evidence of the market rate via expert testimony by Will Kemp. Mr. Kemp's knowledge and expertise in this area is unquestioned, and the testimony of Mr. Kemp is uncontroverted.

The distinction between what was sought by Golightly and what is sought by Simon is obvious. Golightly asked the Court to use a percentage, and nothing more. The classic contingency fee. Simon presented evidence of mounds of impressive work, an amazing result, and expert testimony of the market rate; all of which is subject to a reasonableness review by the Court. That is not an application of a simple percentage, as per a contingency fee; but is a fee sought under quantum meruit, subject to Court review.

E. Simon should be paid for all work on the file.

In the alternative to a reasonable fee under quantum meruit, Simon requests amendment and reconsideration of the conclusion that every single entry of additional time in the super bill for a previously billed period was speculative.

The Edgeworths ignored the substantial case law presented regarding compensation for a lawyer on an hourly basis presented by Simon. Instead, the Edgeworths relied upon the appellate standard of review, which invites plain error by this Court.

The bottom line is Simon gets to be paid for work done. Edgeworths did not present one legal argument against the idea that an attorney can correct, amend or supplement a bill. That is because there is not one. Legally, an attorney can seek payment for all work on a file, even if the work was not immediately and contemporaneously billed for. The work in the super bill is not speculative as every

entry was 100% tied to a specific email or document or event. Hundreds of normally billable hours were lost, because of the Simon decision to bill only on tangible events.

Upon questioning by the Court and by Simon, the Edgeworths conceded they did not have any evidence to dispute the billing entries. Plus, Mr. Simon and Ms. Ferrel confirmed that the billing entries were tied to a tangible event on the case. By ignoring every single entry, the Court effectively reduced the Simon rate and provided the Edgeworths with a windfall. There is no legal or equitable reason why Brian Edgeworth should not pay for the time he demanded, and received, on his case.

Lien adjudication is an equitable proceeding, Simon should be paid for the all the work done on the file, anything less provides the Edgeworths with a windfall and causes manifest injustice.

The appellate standards of review do not apply, but if they did, Simon established that refusal to pay an attorney for work performed is reversible error. In contrast, the Edgeworths did not support their legal position.

III. Conclusion

Rule 52 allows a party to request, and a Court to amend its own findings at its discretion. Simon respectfully requests relief under Rule 52 as stated.

Dated this 13th day of November, 2018.

/s/ *James R. Christensen*
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CERTIFICATE OF SERVICE

I CERTIFY SERVICE of the foregoing Reply was made by electronic service (via Odyssey) this 13th day of November, 2018, to all parties currently shown on the Court's E-Service List.

/s/ *Dawn Christensen*
an employee of
JAMES R. CHRISTENSEN, ESQ.

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Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

EDGEWORTH FAMILY TRUST, Plaintiff, vs. LANGE PLUMBING, L.L.C., Defendant. AND OTHER RELATED CASES	)	CASE NO. A-16-738444-C DEPT NO. X **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE TIERRA JONES, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 15, 2018

RE: MOTION TO AMEND FINDINGS UNDER NRCP 52; AND/OR FOR RECONSIDERATION; ORDER SHORTENING TIME

APPEARANCES:

FOR DANIEL SIMON: JAMES R. CHRISTENSEN, ESQ.
PETER S. CHRISTIANSEN, ESQ.

FOR EDGEWORTH TRUST: ROBERT D. VANNAH, ESQ.
JOHN B. GREENE, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

LAS VEGAS, CLARK COUNTY, NEVADA, NOVEMBER 15, 2018, 9:27 A.M.

*** * * * ***

THE COURT: -- we have Mr. Christensen is here. Well, and this is also consolidated with Edwards versus Daniel Simon. Mr. Christensen is here representing the law office of Daniel Simon and Daniel Simon. Mr. Greene is here on behalf of the trust.

MR. GREENE: Bob Vannah is --

THE COURT: He's not late. I didn't know if you two were ready to get started because I know you two were here, but --

MR. GREENE: Bob is on his way if you could just wait a moment for him.

THE COURT: Okay.

MR. GREENE: I know I saw the car pull up. So he's not late as usual.

THE COURT: Well, he's technically not late. It's 9:28.

MR. CHRISTENSEN: And, Your Honor, Mr. Christiansen is --

THE COURT: Christiansen.

MR. CHRISTENSEN: No relation.

-- and Mr. Simon and Mr. Simon are on their way too. So hopefully they'll be here before Mr. Vannah, but you never know.

MR. GREENE: The odds are likely that will happen.

MR. CHRISTENSEN: You never know.

(Proceedings recessed 9:28 a.m. to 9:38 a.m.)

THE COURT: -- versus Lange Plumbing, L.L.C. This is also Edgeworth Family Trust versus Daniel Simon and the Law Office of Daniel Simon.

This is on for the motion -- defense's motion to amend and/or a motion for reconsideration. I have read the motion. I read the opposition. I read the reply.

Mr. Christiansen, do you have anything you want to add?

MR. CHRISTIANSEN: Just maybe briefly.

THE COURT: Okay. And before you do that I just want to say, there is one thing that I think that is undisputed, and you guys would agree. The cost, so the cost is undisputed, the $71,594.93 that I awarded --

Mr. Christiansen, I apologize. I misunderstood the email that we sent that you clarified.

MR. CHRISTIANSEN: I'm sorry.

THE COURT: So that is money -- my notes were unclear. So then when I sent the email, I misunderstood the email. So that should not be included. So in regards to that, the Court's going to issue an amended findings with the correct judgment amount to remove that.

MR. VANNAH: And one other thing though, clarify, is

they have paid that $1,700. That's no longer anything --

MR. CHRISTIANSEN: It's all resolved. All the cost --

MR. VANNAH: All the costs are all resolved.

THE COURT: Okay. So pursuant to the parties, the costs are resolved, and I think that was something you guys had already agreed on.

MR. VANNAH: Yes.

THE COURT: Okay. Mr. Christiansen, do you have anything else in regards to Number 1, 3, 4 and 5?

MR. CHRISTIANSEN: As to the costs, I don't have anything else, Your Honor.

THE COURT: Right. No, but issue Number 1, which is the implied oral contract; Issue Number 3, the date the Viking claim settled; and issue Number 4 is the constructive discharge issue; and then Number 5 is the findings of cost from the super bill.

MR. CHRISTIANSEN: A few things, and I don't know that I'll take them in exactly the right order.

THE COURT: Okay.

MR. CHRISTIANSEN: But to back up, I think we filed a motion under Rule 52. Sort of the analysis that I see from the defense is not a Rule 52 analysis. So I think this is a proper way to ask the Court to amend the findings and conclusions, and that's what the Supreme Court says you're encouraged to do

because they're ultimately going to look at this and make a decision.

So we'll start on the easy one, which is -- I think my read at least is that the Court over and over and over in the decision has found that the conduct of the parties created a contract, an implied contract. The Court didn't ever find, and I think, in fact, disavowed the notion that an oral contract was reached. I think just the word oral got stuck in there somehow, and Mr. Christensen, who's more of the appellate guy than me, says that for purposes of review it's important that if it's not an oral contract, which I don't think you ever said it was, that that just comes out of the order so when the Supreme Court or the appellate court or whoever would look at this would understand clearly as it is throughout all three of your orders that it was the conduct of the parties Your Honor found created an implied contract, not an implied oral contract. So I think that's the first issue.

THE COURT: Okay.

MR. CHRISTIANSEN: The second, and I guess I'll go in and somewhat reverse order is to the quantum meruit. When the case settled, the Viking case settled when the settlement agreement is signed, not when Viking makes an offer because nobody accepted it, and that's sort of undisputed. I mean, there's a bunch of, I don't know, name calling or whatever I guess is a good word for it in some of the briefing, but it's

undisputed that Mr. Vannah's office with the Edgeworth signed a settlement agreement December the 1st, 2017, and that's when that case was settled, not November the 15th, when Viking made the offer. So that's another easy one, I think, like the oral contract.

So I guess that backs me into sort of our two main issues, Judge, and that is when a constructive discharge occurs, from what point is the Court to apply the quantum meruit, and the Court decided in your ruling that the quantum meruit was to apply from the day of the discharge forward, which was you found November 29th, forward in time, and you awarded $200,000.

What the Rosenberg case says, and we cited it at length and went through them both in opening and the reply brief, is that when a client discharges a lawyer, a client can't then say well I want to keep the terms of the, in our case, implied contract for the time going back where the Court decided the conduct of the parties created the agreement, and so it's our position, Judge, that you've got to go back to what you sort of relied on, which was the conduct of the parties.

And the conduct of the parties last is codified in the September 19th invoice, right. That's the last invoice that is given. That's the conduct of the parties that created the binding agreement that Your Honor found was for 550 an hour and 275 an hour for the bills that were submitted in those four

invoices.

But what quantum meruit says in the Rosenberg case, which is squarely on point and good law, says that you can't, as the Edgeworths say, well, I want to hold Simon to this 550, 275, knowing full good and well, as they both told you on the stand he wasn't billing them for all his time. Full good and well, both of them acknowledge that. We want to hold Simon to that even though we both agree the case has changed in the infamous, you know, in the August 22nd email with Mr. Edgeworth saying we never contemplated it. We've got to incent us both blah, blah, blah.

When they ultimately try to fire him and then sue him, which you've tossed in its entirety, alleging conversion and claiming that all the money that was owed, that was in the trust by then, I think Mr. Vannah and Mr. Simon had agreed the money was getting put in the trust, that they both signed off on them. They filed a lawsuit saying that all that money was theirs knowing it wasn't, and both of them testified they knew all that money wasn't theirs when they hit the stand, a year after they filed the lawsuit saying it was all theirs.

So what Rosenberg says and what I would encourage the Court to do is to make a determination from September 19th forward: What's the quantum meruit? What's the value of the services rendered? And I think it's a simple easy analogy. September 19th, 2017, there was zero dollars on the table to

settle this case, not one penny, not a grocery dollar.

When Mr. Simon was fired, as the Court found November the 29th, there's $6 million on the table. You use Will Kemp's market value analysis, the quantum meruit, the value of the services rendered, and it's not a contingency fee agreement. I know the defense wants to try to argue that because it gets them into the Rule 1.5, and then they can say, well, it's a violation,you can't -- well, that's not the analysis that Will Kemp gave you, and Mr. Kemp's testimony is unrefuted, Judge. They didn't have an expert. Arguments of counsel is not evidence.

So the value of services rendered, the market value, according to unrefuted testimony of Will Kemp is 2.4 million. You back off what they paid, and that's the full value of what's in the case. So that's what I suggest to the Court should happen, which is a legal analysis.

Now, if I step back and say, all right, well, Judge Jones decided this implied contract exists, how do we deal with the -- sort of your last issue, the superbill and the hours not awarded, and I wrote -- I'll try to have some numbers for you, Judge. The superbill, Your Honor, in total is $692,120. The amount from May of '16, when the initial Starbucks meeting, through constructive discharge, just to give you a number is $583,618. So the amount of time billed on the superbill that was not included in the four invoices is $583,618.75.

Let me step back for a tiny second. What I think the testimony was between all the parties, all of them, is that the Edgeworths, although there was that chart that was created to sort of try to reflect that there was double billing or something done, Your Honor caught that before anybody did, and both the Edgeworths conceded they had no reason to doubt that all the time billed on the superbill was billed. Time was expended. It was expended for their benefit by Mr. Simon and his office.

And so the question really becomes, and I'll get to where your conclusions -- you were worried is the way I read your decision, Your Honor, and actually I was here for the whole hearing. So I got to watch the Court's demeanor. And I think the concern comes from -- I'll just give you a simple example that I can recall -- Mr. Vannah making hay with Ms. Ferrel, who is about as honest and straightforward as a person could be up there about the day where she had 23 hours billed, and what Ms. Ferrel said, and I think it's reflected in sort of the Court's findings is well, hey, I can't tell you I worked 23 hours that day, but I can tell you I did all 23 of hours at work although it may have been spread over some days.

And so what I think the Court's concern was was that hey, that makes it kind of speculative, these superbill bills that weren't paid -- that weren't billed contemporaneous, and what I would suggest to the Court is that the Court, as a

finder of fact can't speculate, can't guess as to whether something is true or not true, and the evidence, the record, as we sit here today, the record is without blemish that every single hour was tied to a tangible event in that superbill, every single hour, and that in fact the superbill is a gross under exaggeration. I mean, recall, Your Honor, the nine banker boxes of emails, not one of which was ever billed in those four invoices. So I think the Court was worried that hey, well there's this 23 hours in one day. That doesn't seem possible so, you know, I should -- I really don't know that I can go backwards in time and do that.

And we cited the law, the Messengers [phonetic]. I'm mispronouncing it. It's kind of a goofy spelling, but there is no requirement, and the defendant has not provided you any requirement, any legal authority for the notion that a lawyer has to bill contemporaneously or the notion that a lawyer can't go back and bill for hours he really expended and, in fact, in the cases we gave you, lawyers were allowed to estimate their time, right, and give their best guess as to what their time was, and the courts have upheld that across the country, including in Nevada.

Mr. Simon and Ms. Ferrel didn't do that. They went back in meticulous detail underbilling by hundreds, if not more hours what work they put in to the benefit of the Edgeworths, and I say that for the following reasons, Your Honor. Both

Mr. and Mrs. Edgeworth concede on cross-examination that the 4 million bucks they already got, that Mr. Vannah settled the case with the four of them, they got out of the settlement their 4 million, but that has made them more [indiscernible]. That's the 4 million.

So the question sort of ultimately comes down: Do they still get the unjust enrichment of hours, hundreds and hundreds of hours that Mr. Simon and Ms. Ferrel put in to get them more than whole by the windfall of another one and a half? I mean, it's just a windfall to them, and the hours were expended, and if you think, and I guess I would encourage you, if you're worried about one or two days that Mr. Vannah did a very nice job on cross and pointed out to Ms. Ferrel probably you didn't work 23 hours on that day, all right. Cut 15 hours. Don't cut the superbill across the board, Your Honor. I mean, that's just punishing the law firm and is rewarding folks that came in here and in your court.

You didn't make blatant findings of it, but my read of your orders is you didn't buy a lot of what the Edgeworths were selling in terms of Mr. Simon threatening them, intimidating Mrs. Edgeworth by lurching over her in his office, which is a physical impossibility. I just don't see how you reward persons that come in here and say, hey, from the outset we had an agreement, and then you find that not true.

They didn't have an agreement from the outset, didn't

have an agreement your finding was until Mr. Simon, being the gullible friend that he was, billed them in December, seven months after he started working on the file. That was when the Court found that the conduct of the parties created an implied agreement, not Mr. Edgeworth and Mrs. Edgeworth's fantasies about they always had this agreement, and it was going to be this. You found just the opposite.

And so I would suggest to the Court that if you are still of the mindset that it is the hourly rate that controls, and that hourly rate controls up until the constructive discharge, and I've told you my view of the quantum meruit and when it should occur, that you've really got to go back and under the law that we give you, where Courts say over and over and over, if the lawyer puts in the work, he deserves to be paid for it. Whether he billed contemporaneous or not is irrelevant. Whether he went back and had to do a new bill because the client sued him and accused him of stealing, and that's what happened.

They sued in early January, accused Mr. Simon of stealing their money. I mean, there's emails to that effect. Mr. Vannah sent an email, the clients think he's going to steal the money, run off with it I think Bob -- is what he said to --

MR. VANNAH: Yeah. That's what the client said. He thought he was going to steal the money. I told them I don't think he is, but --

MR. CHRISTIANSEN: That's right. I was just trying to quote it accurately.

THE COURT: I read the emails. I've read the emails.

MR. VANNAH: That's what my clients think. They still think he would've stolen the money. So what if I tell you?

MR. CHRISTIANSEN: And I think the Court should consider that, Judge, when you toss a conversion case on its face as being -- having no merit, I mean, you threw it out on a 12B5 motion that's likely a summary judgment.

And what I was getting at to you before is in terms of who are you going to award for the firm's hard work. You've got the people that did it or the people that have already been made more than whole. I'd point out to you in this case an attorney fee adjudication, our Supreme Court is crystal clear that this is a court of equity.

You're supposed to do what's equitable amongst the parties, and I can cite to you. It's the Leventhal versus Black case. Natural equity, the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it. That's on page 24 of our brief, Your Honor, Leventhal versus Black & LoBello, 129 Nevada 472.

So if the Court's going to -- if the Court is married to the notion that it's an hourly billable case throughout, the

firm deserves all those hours, not to be chopped because the Court suspects there may have been a problem on a given day with a given number of hours billed. Chop that bill if that's what you want to do, but not across the board all of the superbill because those bills are --

I mean, I can tell you, I had to learn this case -- not an easy case to learn. I mean, you had to learn it too. It was probably a bigger pain for you to listen to all of us, but, I mean, there are thousands of hours involved in this case, and I had the office next to the guy who was prosecuting the case and there every weekend every night. To not pay him for those hours, Judge --

MR. VANNAH: Let me object. This is coming very close to testimony, personal testimony of what he personally observed. I mean, that's not appropriate. I can't cross-examine him, and he's just going to, trust me, Judge. I was over there. I saw how hard they worked.

MR. CHRISTIANSEN: I'll rephrase. I'll rephrase.

MR. VANNAH: This is supposed --

THE COURT: Okay. He's going to rephrase.

MR. CHRISTIANSEN: I'll move on. I'm sorry.

MR. VANNAH: Now, I'm getting testimony, and I'm not going to get up and testify.

THE COURT: Okay.

MR. CHRISTIANSEN: Judge, you heard the testimony.

THE COURT: I did.

MR. CHRISTIANSEN: Don't listen to me. What the lawyers say isn't testimony, just like what Mr. Greene and Mr. Vannah argue or put in these briefs, and we all got to see each other's closings, you know, postruling.

THE COURT: Right.

MR. CHRISTIANSEN: It's been sent over in your -- so I saw all the arguments put forward, and I guess I would just have the Court think about like if were in a jury trial what would I be saying to the jury. Hey, what Mr. Vannah says isn't evidence. You can't even consider it. You can listen to him for what he thinks -- how the evidence played, but their view on the superbill isn't the record you're left with and the Court that reviews this is left with.

The record that everybody is left with is that the work was done, the hours were expended. They're underestimated. There's not even bills for phone calls which, I mean, undoubtedly, by listening to Mr. and Mrs. Edgeworth, you know there were tons of them. The Edgeworths concede, both of them, Angela and Brian, that they had no evidence that any of the hours in the superbill were not expended. In other words, they agree all that time was spent.

If all the time was spent, under the equitable law that we've cited to you in the Leventhal case, you can't, you know, over reward them again or unjustly enrich them again when

they've been made more than whole from the settlement they've already received.

So I'd encourage the Court to look at the Rosenberg decision. It's our view that quantum meruit applies from the last time the parties' conduct created the implied agreement, Your Honor, referenced, and that was September the 19th. It's an easy evaluation. September 19th, there's not a dollar on the table. November the 29th, there's $6 million on the table.

If the Court legally disagrees with me on that and wants to stick with the hourly analysis, suspicion that there may have been an erroneous entry here or there should not lead to the conclusion that the superbill needs to be chopped across the board is suspicious because that's a guess. The evidence you are left with from the Edgeworths, from Mr. Simon and Ms. Ferrel is that all of those bills were tied to a tangible event, every one of them and that it was a mass under billing.

And finally I would tell the Court that if you do chop the superbill, what you're, in fact, doing is undermining your own conclusion because you concluded that an implied contract for 550 and 275, took place by the conduct of the parties starting in December of '16 when Simon sent the first bill. If you chop all of his time, you're not even giving him the 550 an hour you concluded the implied contract created. He's making 100 bucks an hour, 150 bucks an hour. Ashley is working for 75, 50 bucks an hour, and the Edgeworths are

gaining a windfall and being unjustly enriched.

And that's just not the way it should work in a court of equity when persons hit the stand, as the Edgeworths both did, and my read of your conclusions is you didn't buy the versions of the truth they were selling, and that's because they couldn't even be consistent with each other. Remember, Brian Edgeworth said, We needed the loans because we didn't have money to pay off the house, and then Mrs. Edgeworth the last day says, Oh, we had all the money in the world. We didn't even need the settlement to pay off the house. We planned. We paid that all off.

I won't belabor the point, Your Honor, but those are our issues. We appreciate all the time the Court has spent, and I know it's been a lot of time -- I really do -- you read everything, were thoughtful with all of us, and so respectfully we'd submit it on that, Your Honor.

THE COURT: Okay. Mr. Vannah.

MR. VANNAH: I think it telling when Mr. Simon wrote this -- I know who wrote it. I can tell who wrote it, [indiscernible]. It's telling when he says, well, Mr. Vannah has conceded, the Edgeworths have conceded that there was no -- that there was a constructive discharge because they didn't file a motion to reconsider. So, see, I guess --

We respect the Court. I respect you, Judge. I don't agree with everything that you decided. I don't agree with the

constructive discharge. I don't think it was there, but we went through five days of testimony. You gave us all the time that we needed, and you didn't cut us short. You said I'm here as long as you need me, and we went through five days of testimony. We went through an oral argument. We presented everything to the Court, and you made an incredibly detailed decision, findings and, you know, do I agree --

So when Mr. Simon said, well, he must agree that there was constructive discharge because he didn't file a motion to reconsider. I didn't file a motion to reconsider because I follow the rules. I actually believe in the rules that we live under. I thought we all lived under. The motion to reconsider is to be filed if there is new law that wasn't -- that came out. Maybe there is a new case that came out, new facts that came out, that suddenly out of somewhere new facts.

And so if we don't agree with Your Honor on a constructive discharge, what is our obligation? I'm not going to come in here and tell you you're wrong. I'm not going to come in and say, Judge, you just got it all wrong after five days, your decision. I wouldn't do that to a jury. If we don't like what you did and if we think you're wrong, our obligation is to file an appeal with the Supreme Court and say, hey, is the Judge right or wrong on the law on constructive discharge?

And so I'm not going to come in here and file a

motion to reconsider and say I don't have anything new to add, absolutely nothing. There is not one shred of things that were added today that you haven't already considered. I mean, nothing new, not one single new thing other than to come in and say I only got a million dollars in the last couple years, and I'm a victim. A million dollars, a lot of people would think that's not being victimized if you made a million bucks in a couple years working on a case. I just don't see anything new to add.

I mean, you considered where we are. If the parties are aggrieved, then we go to the Supreme Court and say, look, in all due respect, we think the Judge applied the law wrong or whatever but factual decisions you made in detail. I don't understand why we're here. I don't see anything new to be added.

It's hard for me to argue because it's what -- what they've done is just got up and argued the whole case again saying, well, you got it wrong. You listened to all the argument, and you got all the argument. You read everything. You spent five days listening to testimony, and you screwed it up. That's what they're saying. So you don't just reverse yourself and just tear this order apart and write a whole new order.

I thought, you know, getting the fees straight, the cost straightened out, that's important for all of us and, you

know, I don't care if you use the word oral, implied contract or implied contract, you know, I don't know. That was for you to decide. I think either choice would be fine, but I thought the way you wrote it was fine.

I wasn't conceding we thought there was constructive discharge. I mean, in all due honesty, I believe that that -- you know, with all due respect for the Court, I mean, [indiscernible] but, yeah, I think you got that wrong.

THE COURT: That's okay, Mr. Vannah.

MR. VANNAH: And they think you got it right, and so, you know, I'm not sure you got it wrong. I mean, it's an issue, but I've thought that before with a Judge and have gone to the Supreme Court, and the Supreme Court said, hey, Mr. Vannah, the Judge was right, and you're wrong. I'm, like, all right. I'm an advocate. So we didn't --

So when they write in there and say, well, he's conceded it because he didn't file a motion to reconsider, what that tells me is Mr. Simon -- I don't think it's the other two gentlemen who wrote this motion. There's no doubt in my mind. When he wrote it, he doesn't understand that if you're not -- if the trier of fact makes decisions and you don't have anything new to add, you don't just keep coming back like Groundhog Day. You ask the Supreme Court to look at it and say, hey, did the Judge apply the right standard or not?

And that's where I don't see a reason for us to come

in here and reargue this case and, you know, the fact that I didn't file a motion to reconsider doesn't mean that I adopted every decision that you made, but it just means that I don't think there's anything new to add, and I thought you applied the law and the facts. It's a very rational decision. I mean, there's nothing like some crazy thing you did. It's all very rationally applied, and so, I mean, this motion to reconsider was just incorrect.

There's stuff in there, like -- which is not relevant. Like, well, Mr. Vannah charges 925 an hour, and the clients said 550 was too much. Well, first of all, I'm not Danny Simon. So I don't know. Maybe I'm worth 2,000 an hour. Maybe he's worth 100. I'm not saying -- what has that got to do with this motion to reconsider to throw stuff in there like that?

And to sit here and say that my clients never even said that 550 an hour was unreasonable, they never said that. There's no testimony they ever got up here, and they put that in the motion that they said 550 is unreasonable. No, they thought 550 was the rate. They agreed to it, and that's what they agreed to, and they continued paying the 550.

And by the way, and he's absolutely right. All the money, all the money in that trust account belongs to my client, 100 percent of it. What my clients do owe him is a fee, and that's how it was always the way it was. He wasn't

withholding money. He wasn't even getting a retainer. When they would send a bill -- he sent a bill, they would send a check. So their point was is that's all our money, but we do owe Mr. Simon money. We owed him a fee, and so if we were willing to pay a reasonable bill, that 550 an hour, and so that is our money.

It's our money that's being held in that trust account when we owe him a reasonable fee. That's not the way it was in the first place, but I get the lien law. They're misconstruing what I'm saying, and that's my fault. I wrote it, but technically all the money in the trust account was theirs. Having said that, they did owe him a fee and owed him money for costs, which they would've written a check, like they always had.

I don't see -- see, that's the problem with this. If we file a motion to reconsider, and we start doing that over and over like Groundhog Day, we're really subverting the rules. We're just coming here and saying that you're wrong. Therefore you should reconsider. After you've heard all this, you've made the decision. You know, there comes a point where if we're not happy with what you decided, and we feel that you've abused your discretion, we file an appeal, and that's where we are right now, not to rewrite this whole decision, otherwise, I mean, every case you ever get involved in where you're acting Judge you're going to get these motions to reconsider when

there's nothing new. I know you understand what I'm saying.

Well, thank you, Your Honor. That's where we are.

THE COURT: Okay.

MR. CHRISTENSEN: Your Honor, if I could, I'm going to do a brief reply. I want to do one quick reply on the law and on why we're here, and then just I want to --

MR. VANNAH: Well, wait a minute. I thought we had this rule that we had in the first place that we had one person on each side. I mean, Mr. Greene is not going to -- and I thought that's what you guys insisted upon.

THE COURT: Well, I mean, I think that was something that we did during the hearing, but Mr. Christensen is the person who signed all these motions.

MR. VANNAH: [Indiscernible.]

THE COURT: I understand that, but Mr. Christensen --

MR. VANNAH: The other --

THE COURT: These motions are written in his name.

MR. VANNAH: That's fine. You know what, Judge, it's --

THE COURT: It's just going to be their reply, Mr. Vannah.

MR. CHRISTENSEN: I'll be fast.

THE COURT: Mr. Christensen.

MR. CHRISTENSEN: You'll only dislike a little bit of it.

MR. VANNAH: I hope we're not going to do a motion to reconsider the motion to reconsider. Somewhere this has to end.

MR. CHRISTENSEN: So, Your Honor, I just want to address the whole rules issue, and we do operate under the rules. We had a hearing which was -- essentially this is a bench trial that we had.

THE COURT: Pretty much.

MR. CHRISTENSEN: And you issued findings of fact and conclusions of law. So if we had a jury trial, and if we thought something went awry, we'd file a motion under Rule 59 from the District Court to see if we could fix it before we go to the appellate court. That's what the rule says.

When you've got a bench trial and you've got a hearing, and the Court issues findings of fact, conclusions of law, and you think something went awry, the Appellate Court wants you to fix it in District Court level which is why they created Rule 52, which is why when I wrote this motion I led off with motion to amend findings under NRCP 52 because that's what it is. Now, you throw in reconsideration because that's what we all do. I apologize for doing it. Next time I'll only say motion to amend under Rule 52.

But that rule doesn't have any of those large barriers that a motion for reconsideration has. Rule 52 is simply the Court's discretion. If there's a problem with

findings of fact and conclusions of law, you clean them up then. So the appellate standard of review that was cited in the briefs filed by Mr. Vannah and Mr. Greene don't apply. You don't have to show that's something new. You don't have to show a change in the law. Rule 52 gives you an opportunity when you've got findings of fact and conclusions of law to make proper amendments and to try to fix perceived problems at the District Court level to save the Appellate Court time, and that's why the Appellate Court likes these kinds of motions, and that's why we filed it.

And just one general observation, I can understand the characterization that Mr. Simon has made close to a million dollars, and he's claiming he's a victim. Of course, the other side of that coin is the Edgeworths have made over 4 million, and they're claiming victimization. So it's probably a bad argument for either side to make.

Getting into what we're talking about here, and this is kind of a quick laundry list. I'm not going to go on over and argue everything. The costs resolved; however, to the extent that the Court addresses the costs in the findings section, we'd request that the Court still do so because it's important under the timeline of events that it be made clear that there were advanced outstanding costs at the time that the lien's filed and at the time that the complaint was filed against Mr. Simon alleging he was trying to steal money when he

filed the liens to secure his advance costs.

So we agree costs have been paid. We agree that the issue of the final accounting of the costs has been resolved, at least as far as we know, as of today, but we would -- while there should not be an award of new money to Mr. Simon for costs, the costs should still be mentioned.

THE COURT: Okay.

MR. CHRISTENSEN: Fair enough.

We found what we think is a typo that might address an appellate view of this issue at page 18, lines 11 through 12, of the order that addresses the adjudication. It's a fairly minor thing, but, you know, sometimes those things get blown up. The Court indicated that it was addressing the area of billing from September 29 through constructive discharge, and we think that that probably should have been September 19th, which was the last date billed for under the fourth and last bill submitted. It was probably just a typo.

THE COURT: Okay.

MR. CHRISTENSEN: As far as the actual billing goes, if the Court is not going to award quantum meruit at a minimum for September 19th forward, we would request the Court would find an alternate finding as to what that would be because that would prevent us from going through this again if an Appellate Court said, no, you get quantum meruit and sent it back down. So as an alternate finding, that would be useful. That's

not -- the Court doesn't have to do that, of course. We just are making a request.

MR. VANNAH: Now, let me object to this. This is all new material you just heard on an argument. In other words, they made an argument. I -- now, we're hearing something new beyond what was argued just a few minutes ago. So I do want to respond to that new argument he just made.

MR. CHRISTENSEN: It's not an argument. It's just a request.

MR. VANNAH: Well, then I --

THE COURT: Right. But are these also --

MR. CHRISTENSEN: And then if the Court doesn't want to do it, the Court doesn't --

THE COURT: Yeah. But these are also like new request. I mean, you guys made specific requests in the motion of what you would like me to do. Is this in addition to that?

MR. CHRISTENSEN: Well, no, Your Honor.

THE COURT: Okay.

MR. CHRISTENSEN: I don't think it is.

THE COURT: Okay.

MR. CHRISTENSEN: You know, Mr. Vannah may disagree.

THE COURT: Right. I'm aware of the specific requests that you guys made in the motion.

MR. CHRISTENSEN: Okay. Right.

THE COURT: We don't have to go through them all

individually.

MR. CHRISTENSEN: Correct.

THE COURT: I read the motion.

MR. CHRISTENSEN: If Your Honor is going to readdress the issue of the superbill that was addressed in our motion, Mr. Christiansen talked about it --

THE COURT: Christiansen argued it. Yep.

MR. CHRISTENSEN: -- then we would also ask that you specifically, if you're going to address it, that you readdress the paragraph at page 17, lines 2 through 12, of the lien order because that kind of -- that's kind of the paragraph that has the meat and potatoes of -- or at least what our interpretation of it that addressed to that issue.

And if you're not going to readdress the superbill, then we ask the Court to flesh out -- then we're asking the Court to flesh out what -- if the Court actually had a specific ruling on minimum billing because I think that that was --

THE COURT: Well, I mean, I'm --

MR. CHRISTENSEN: It wasn't directly addressed, but --

THE COURT: I'm just going to say this right now, Mr. Christensen. I'm not going to rewrite my findings. If there's something that was argued here today that you guys believe is erroneous, that I make a finding is erroneous or if I choose to revisit the superbill, if I choose to revisit the

superbill, I'm telling you right now I'm revisiting the numbers. I'm not going to go back and rewrite my original findings because everything that I intended to be in those findings is included in them.

And I know somebody is taking this up no matter what I choose to do. So if the Supreme Court wants more explicit information from me, I'm just going to have them to request it because I'm not going to go back and alter. If I believe that there is a reason to alter the numbers, I'll go back and alter the numbers, but as far as my findings as to -- and if I alter the numbers based on my findings versus the superbill, I'll do that, but I'm not going to go line by line and alter my findings. I mean, if it's not complete enough for the Supreme Court, they're going to order me to do something different.

MR. CHRISTENSEN: I know. And I appreciate your response, and just to wrap up very quickly, we actually did request the alternate finding.

THE COURT: Right. And that's what I'm saying.

MR. CHRISTENSEN: Page 19 of the --

THE COURT: I know you did.

MR. CHRISTENSEN: Page 19 of our brief, we did make that request.

THE COURT: No. You requested that in your brief. That's why I'm saying you don't have to request it today. I've read the brief.

MR. CHRISTENSEN: So it's not new argument. I just wanted to bring it up. So thank you, Your Honor.

THE COURT: No problem.

Okay. Well, like I said, I know that no matter what happens here today and in the future of this case, somebody is taking this up. So I'm going to issue a written order on this. I'll have it done within the next week, probably by -- it'll be done by Monday because I'm not here the rest of next week. So it'll be done before the holiday. Okay.

(Proceedings concluded 10:15 a.m.)

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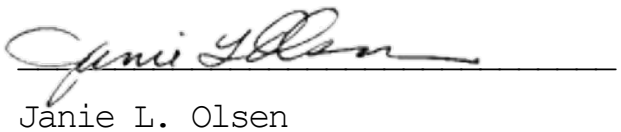
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case.



Janie L. Olsen
Transcriber

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