IN THE SUPREME COURT OF NEVADA

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LAW OFFICE OF DANIEL S. SIMON; DOES 1 through 10; and ROE entities 1-10LC,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TIERRA JONES,

Respondents,

EDGEWORTH FAMILY TRUST; AND AMERICAN GRATING, LLC,

Real Parties in Interest.

Supreme Court Case No. 84367

Dist. Ct. Case No. A-18-767242-C
Consolidated with A-16-738444-C

EDGEWORTHS' ANSWER TO SIMON'S PETITION FOR WRIT OF MANDAMUS

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a) that must be disclosed. These representations are made to enable the Justices of this Court to evaluate possible disqualification or recusal.

Real Party in Interest Edgeworth Family Trust is a trust formed under the laws of the State of Nevada. American Grating, LLC, is a Limited Liability Company formed under the laws of the State of the Nevada. American Grating, LLC is wholly owned by Brian Edgeworth and Angela Edgeworth, who are also the Trustees of the Edgeworth Family Trust. These Real Parties in Interest were represented below by Vannah & Vannah, Messner Reeves and Morris Law Group. Real Parties in Interest are now represented by Morris Law Group.

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I. INTRODUCTION

Simon's current wasteful writ petition (Case No. 84367) was previously before the Court as Case No. 79821, filed on October 17, 2019, when he sought to overturn the district court's award of several hundred thousand dollars in fees to him under an implied contract based on the $550 per hour rate he specified for work from case inception in 2016 to November 29, 2017, when he was constructively discharged as the Edgeworths' attorney. It is worth noting that in both petitions, Simon acknowledges that the district court "properly found that the Edgeworths terminated the implied fee contract on November 29, 2017." *See* EAB0042 (Pet. in Case No. 79821 at 6) *and* Pet. in Case No. 84367 at 8.

In his 2019 petition, Simon contended the same thing as he contends here – that the district court erred in compensating him for all pre-discharge work based on his implied contract rate of $550 per hour. EAB0060. Rather, he says the court should have compensated him using a "market approach," testified to by his expert, which would yield him nearly $1.5 million more than the district court concluded he was entitled to at the rates he set under the implied contract. *Compare* Simon's writ petition in

Case No. 79821 at 4, 21 *with* the instant writ petition (Case No. 84367) at 4, 8.

The current 2022 writ petition is virtually the same as his 2019 petition, which Simon neglects to acknowledge. He also neglects to acknowledge that ***his 2019 petition was denied by this Court*** on December 30, 2020. Doc. No. 79821. (Had he done so, it is unlikely that the Court would have ordered an answer to Simon's latest petition).

Moreover, in asking the Court to entertain this writ, Simon altogether omits mention of the **fact** that he requested the **same** relief he seeks in this extraordinary proceeding – re-adjudication of the fees awarded him by the district court from September 29, 2017 to February 2018 — **on the same facts and same theory** — by countermotion in the district court following remand. WA02082 – 83. The court **denied** Simon's countermotion along with the Edgeworths' motion for reconsideration of the quantum meruit award this Court remanded for an explanation of its basis under *Brunzell v. Golden Gate Nat'l Bank,* 85 Nev. 345, 455 P.2d 31(1969). While the Edgeworths appealed the denial of their motion (before the Court in Case Nos. 83258/83260), Simon **neither pursued a cross-appeal or writ relief** from

the denial of his countermotion. Here is how he expressed his position to the district court:

> Simon respectfully suggests the Court make a reasonable fee award based on the market rate under quantum meruit for the work performed following September 19, 2017, through February of 2018, in accord with the unrefuted opinion of Will Kemp, which is consistent with the Supreme Court's order of remand.

WA02087. Sound familiar? It should, because it is precisely the relief he inappropriately asks this Court to grant here, and the same relief he sought in his 2019 petition that was ***denied*** on December 30, 2020. EAB0071. A writ of "mandamus is not the proper remedy" for a "do-over." *See County of Washoe v. City of Reno,* 77 Nev. 152,155, 360 P.2d 602, 603 (1961). This incurably faulty writ petition should be promptly denied and Simon chastised for not disclosing that the history of this case shows there is no merit to the extraordinary relief he seeks in 2022; and that the Court previously considered and denied his request in 2020. *See* Nev. R. P. C. 3.3 (Candor Toward the Tribunal).

At the same time, on December 30, 2020, the Court filed its order in Case No. 77876 that left undisturbed the district court's adjudication of $550 per hour for Simon's pre-discharge services. EAB0078. However, the Court vacated "the grant of $200,000 in quantum meruit and remand[ed] the

case for the district court to make findings regarding the basis of its award" by applying the *Brunzell* factors, with the caveat that the award be limited to work performed only after the constructive discharge. EAB0079. The district court failed to heed this instruction, as we discuss in the Edgeworths' appeal from the court's post-remand decision pending before the Court in Case Nos. 83258/83260.

This history shows that Simon is not deserving of any relief, much less extraordinary relief, from the district court's award of over $500,000 for work done prior to November 29, 2017. As for work done following his discharge on November 29, that issue of quantum meruit compensation is now before the Court and will be decided in due course in Case Nos. 83258/83260.

II. RELEVANT FACTS AND SIMON'S MISSTATEMENT OF FACTS

The relevant facts have been set out several times; for example, in the district court's 2018 order adjudicating Simon's lien, as considered in the Court's prior 2020 decision in Case No. 77678, and in subsequent briefs filed post-remand in Case Nos. 83258/83260, and 84159. *Edgeworth Family Trust v. Simon, 477 P.3d 1129 (Table) (Nev. 2020)*; EAB0075 - 84. Not all will

be repeated here; only those necessary to show the absence of merit in Simon's latest writ petition.

As has been the case throughout his briefs in this matter, Simon's petition is not faithful even to the most uncontroversial facts that are a matter of record. For example, Simon filed his lien on November 30, 2017, not on December 1 as he says, without citation in his petition at 3, which he repeats on page 16 by mis-citing the district court's order, which confirms the lien was filed on November 30. EAB0094, FOF #18 & 20. Simon also claims, without citation, that "Mr. Kemp's opinion was not disputed and was accepted by the district court" (Pet. at 24), but the record confirms that although Kemp was permitted to testify, the district court rejected his opinion in computing the quantum meruit award. EAB0029 (determining the quantum meruit value was $200,000, not the $2+ million in Mr. Kemp's opinion). Also contrary to the record, Simon falsely claims he "advanced almost $165,000.00 dollars in costs." Pet. at 2. The district court, however, found that the Edgeworths promptly ***paid all*** of Simon's invoices, which included costs. EAB0105 – 06. In truth, the district court found that the Edgeworths had paid ***all costs*** billed by Simon. EAB0106 ("The Court finds

that . . . Simon is not owed any monies for outstanding costs of the litigation . . . .").

Simon devotes nearly ten pages of his petition to self-praise and mischaracterizing facts to denigrate the Edgeworths rather than presenting facts that bear on the limited issue on remand. Most of the "Relevant Facts" he sets out in the instant petition are identical to those he set out in his Answer to the Edgeworths' Opening Brief in Case Nos. 83258/83260. Although Simon's mischaracterizations are largely consistent between the two briefs,[1] at times he contradicts himself, although the facts are immaterial in any event because they are not relevant to open issues. *Compare* Pet. at 12 (citing to his own testimony admitting that "[i]n preparation for the ECC

[1] *See, e.g.,* Pet. at 17 and Ans. Br. at 12 (recharacterizing an email referenced in the district court order discussing the Edgeworths' fear that Simon would steal the settlement as an email expressing "an intent to steal the settlement."); Pet. at 2 and Ans. Br. at 6 (misleadingly suggesting he advanced substantial costs when the record demonstrates that the Edgeworths promptly paid costs when invoiced. Any delay in him being reimbursed, if he in fact "advanced" costs is attributable to his failure to provide timely statements (EAB0105 – 06)); Pet. at 20 (claiming the "district court did not find the lien was excessive or otherwise improper" despite the fact his lien was for over $1.9 million (EAB0012, FOF #20), and the district court adjudicated it for under $500,000 (EAB0029)); Pet. at 14 (repeating Simon's contention from his answering brief that "Mr. Hale confirmed to Mr. Kemp that about $2,400,000 of the proposed settlement was intended for attorney fees," which testimony Simon tried to offer but was disallowed by the district court (*see* n. 4 of the Edgeworths' concurrently filed reply brief in Case Nos. 83258/83260)).

Simon wanted to produce a bill in support of the case against Lange"), *with* Simon's Answer in Case Nos. 83258/83260 at 5 (falsely claiming "***Brian Edgeworth wanted to produce an attorney's bill*** to bolster the case against Lange" and pointing to testimony by Mr. Edgeworth that does ***not*** support that proposition) (emphasis added)).

Brian Edgeworth testified that he may have asked Simon for a bill so he could pay it, and acknowledged he ultimately wanted to recover the money spent on attorney fees, as Simon told him he would. *Compare* also Pet. at 14 *with* Ans. Br. at 9, where Simon doubles down by not only mocking the Edgeworths' concerns regarding Simon's veiled threats to implode the settlement that had been negotiated before Simon's discharge, but bolstering his mischaracterizations by falsely claiming, without citation, that "the Edgeworths testified . . . [the November 17, 2017 meeting] included ***physical*** intimidation by Simon." Pet. at 14 (emphasis added); *see also* WA01109 – 15 (Brian testifying about the November 17, 2017 meeting Simon summoned them to attend on one hour's notice); WA01112 (Brian testifying Simon said "[he] was taking a huge risk here, You're not going to get this settlement, it's not done, and if I don't sign it, . . . there's no settlement . . .

."); WA01115 (Brian testifying that he and his wife "were scared, like we were scared the whole settlement might go.").

Simon was able to defend the filing of his lien only because he ignored the Edgeworths' repeated requests that he provide them an invoice for unbilled fees and costs so that they could pay it. The district court confirmed that the Edgeworths reiterated requests to Simon for their outstanding bill on November 15, 2017 (EAB0011, FOF #14), when they believed the final settlement would be finalized imminently since they accepted the material terms on that date. *See* Pet. at 14 (confirming that the monetary settlement proposal in the underlying products case was made on November 10, and that Viking made a counteroffer for the same amount and merely seeking confidentiality and dismissal of the Lange claims on November 15, 2017); *see also* EAB0011, FOF #13.

Simon also mischaracterizes the reason the Edgeworths hired the Vannah firm by avoiding reference to the November 17, 2017 meeting he convened in which the Edgeworths testified he made veiled threats about imploding the settlement if the Edgeworths did not acquiesce to his demands for more money. *See* WA01115. Simon reiterated the threats in his November 27, 2017 demand letter, in which he lied about the status of

settlement negotiations to bolster his demand for a larger fee and summed up by saying, "if [you are] not agreeable [to my fee demands], then I cannot continue to lose money to help you." EAB0187 – 88; *see also* WA01112 – 15 (veiled threats during 11/17/17 meeting).[2]

Simon says he argued to the district court in his 2021 countermotion to ignore the parties' implied agreement and consider the market value of his services to award him his desired bonus. Pet. at 4. But he omits the fact that the court had rejected that argument in 2018 and held that the appropriate basis for his pre-discharge services he refused to invoice were the hourly rates Simon himself selected, billed and was paid. EAB0023 – 24. The district court reasonably computed the amount due for his unbilled pre-discharge services by multiplying the total hours Simon acknowledges

[2] The Edgeworths accept that the district court found the retention of new counsel constructively discharged Simon and raise this not to reopen that settled issue, but to rebut Simon's suggestion they hired other counsel only after a large settlement was on the table to wrongfully cut Simon out of the settlement. Pet. at 3. Also note Simon's attempt to push the settlement into "late November," *id.*, which was after his constructive discharge; though at 14, he acknowledges the mediator's proposal was November 10, and the counteroffer on November 15, 2017, well within the implied contract period. Simon's testimony also establishes that the Viking settlement was fully negotiated before the constructive discharge. EAB0179 – 80; EAB0004:13 – 05:13 (confirming he completed his negotiations on the settlement ***before*** he drafted and sent the November 27, 2017 letter to the Edgeworths).

he detailed in his timesheets (Pet. at 4) times the rates established by the parties' implied agreement. *Id*. Simon attempts to escape the consequences of his billing by claiming the "super bill was [only] presented to support the quantum meruit award and demonstrate the extensive work performed."[3] Pet. at 4-5. In other words, Simon admits he invited the district court to rely on the "super bill" to prove how extensive his work was and justify the enormous quantum meruit award he requested; yet he criticizes the district court for having relied on it.

The district court did reject Simon's effort to collect more money for the 16-month period than he had already billed and been paid for. It found his attempt to go back and recreate his billing for that period was unreliable. EAB0022. In point of fact, the district court explained that it did so in part because "so much time had elapsed" between the time the work was allegedly done and the attempt to recreate the bill, and also because "the evidence does not demonstrate [an understanding that the earlier bills were incomplete and more would be later added] was relayed to the Edgeworths

[3] In a different part of his petition, at 27, he criticizes the district court's use of the "super bill" to re-compute his fees for September 29 through November 29, 2017 as arbitrary because the court found the superbill unreliable for services already billed and paid.

as the bills were being paid." EAB0022:4 – 19. This "issue," however, is now irrelevant because the district court's findings regarding the duration of Simon's employment under the implied contract was decided and affirmed in prior proceedings. EAB0078 (affirming quantum meruit period); EAB0084 (limited remand). Under law of the case doctrine, the district court was precluded from accepting Simon's invitation to extend the scope of remand by maintaining that he "was entitled to a reasonable value under the doctrine of quantum meruit for the period of work that was already performed but was not paid." Pet. at 5. It properly rejected that argument in 2021 by summarily denying his countermotion to re-adjudicate the lien amount. EAB0305.

The only issue left open by the prior appeal was the basis for and reasonableness of the district court's $200,000 quantum meruit award for work Simon performed after November 29, 2017. EAB0084. It did not, as Simon insists, invite him to relitigate the period to which quantum meruit applied (Pet. at 6), or reconsider Simon's prior claim that the district court committed an "error of law" by applying the implied contract rate to the work Simon performed during the period of time it found the contract was in effect. Pet. at 7; *contra* EAB0084 (describing limited scope of remand).

The Edgeworths filed the pending appeal challenging the post-remand order because the district court did not explain either the basis or reasonableness of the $200,000 award for a mere 71.10 hours of post-November 29, 2017 ministerial work, as this Court's December 30, 2020 order directed it to do. Simon's flip contention that because the Edgeworths appealed the post-discharge award, and he still contests the pre-discharge award, it "is in the best interests of the parties" to again remand the case to start everything over (Pet. at 29) evidences his misunderstanding of the appellate process. Decisions of the Court would become meaningless and never reach finality if Simon's contention were accepted and litigants could ignore settled issues and just continue to litigate them.

In the Edgeworths' pending appeal, Simon defends the district court's 2021 order and maintains it does not ignore the mandate because the court "added" language to it. But the added language does not explain the basis or reasonableness of the $200,000 award under *Brunzell*. Neither does Simon's answering brief in Case No. 83258/83260, or this petition. The district court's order on remand briefly discussed some of the post-discharge work Simon detailed in his "super bill" and added the following language:

> [T]he Court is considering the previous $550 per hour fee from the implied fee agreement, the *Brunzell* factors, and additional work performed after the constructive discharge.

EAB0111.

The Edgeworths agree that the $550 per hour rate in the implied agreement is more than a fair market rate at which to value the limited services Simon performed after the constructive discharge. *See* Open. Br. in Case No. 83258/83260 at 10. The post-remand order, however, ***did not*** apply this rate to the limited work (71.10 hours) Simon performed after November 29, 2017, as he detailed in his superbill. EAB0217 – 20. The $200,000 quantum meruit award (which amounts to more than $2,800 per hour) is not supported by a *Brunzell* explanation.

Simon does not address these issues; he wants a do-over to make another grab for the $2+ million fee that the district court has repeatedly rejected, which the Court has affirmed in Case Nos. 83258/83260. This petition is a misuse of the extraordinary writ process, and should be denied.

III. STANDARD FOR EXTRAORDINARY RELIEF

Challenging settled issues previously considered by the Court is not a proper use of the extraordinary writ process. Although Simon's petition alternatively seeks a writ of prohibition or mandamus, the petition

does not allege that the district court exceeded its jurisdiction in any manner. Thus a writ of prohibition is not applicable. *See Nev. Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 954, 102 P.3d 578, 582–83 (2004) ("A writ of prohibition is available to 'arrest the proceedings of any tribunal … when such proceedings are without or in excess of the jurisdiction of such tribunal'") (quoting NRS 34.320); *Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 247, 416 P.3d 228 (2018) (recognizing that the purpose of this extraordinary writ is not to correct errors but to prevent a court from exceeding the limits of its jurisdiction in the exercise of judicial, but not ministerial, power).

Simon's petition claims to seek correction of "a legal error" (Pet. at 21) made by the district court, but the "error" alleged is a settled issue that this Court previously reviewed and affirmed. *See Edgeworth Family Trust,* 477 P.3d 1129. For this reason, a writ of mandamus is also inappropriate. *State v. Second Jud. Dist. Ct.*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002) (mandamus is to compel performance of an act that law requires as duty resulting from office, trust, or station); *Nalder v. Eighth Jud. Dist. Ct.*, 136 Nev. 200, 201, 462 P.3d 677, 681 (2020) (mandamus is also the proper vehicle to "control an arbitrary or capricious exercise of discretion" or a manifest abuse of discretion); *Nevada Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 130

Nev. 949, 953, 338 P.3d 1250, 1253 (2014)) (mandamus may also be used to "clarify important issues of law" or unsettled questions or law).

There is nothing in the district court's 2021 order that requires clarification for Simon's benefit, nor does the 2021 order raise an unsettled question of law. While he continues to disagree with *the amount* awarded for his post-discharge work, he does not point to any legal error that should be corrected by mandamus. He merely rehashes the errors he alleged in his prior writ petition and prior appellate proceedings, which were fully heard and decided in the Court's 2020 order. Extraordinary relief for Simon is not appropriate on this record.

IV. ARGUMENT

A. Extraordinary Relief is Not Available to Relitigate Settled Issues.

Simon filed this sham petition to justify his refusal to release money to the Edgeworths and to support his attempt to re-litigate issues that have been decided. He mischaracterizes the issues in his petition. The real issues were addressed by the district court and affirmed by this Court in the prior appeal. At page 8 of his petition, he sets out his two false writ "Issues presented" as follows:

1. Having properly found that the Edgeworths terminated the implied fee contract on November 29, 2017, did the District Court err by enforcing the payment terms of the terminated contract to adjudicate fees due under the lien.

2. Did the [district] [c]ourt err by not applying the market approach to find the reasonable fee due Simon under quantum meruit.

While Simon wants to revisit his constructive discharge and reconfigure it for a bigger payday, he cannot escape the district court's finding of an implied agreement and compensating him under that agreement through November 29, 2017. EAB0024 (compensating Simon under the implied agreement through its duration); EAB0112 (2021 order reiterating finding, which disposes of this first issue). Moreover, in the prior appeal and Simon's 2019 writ petition, the Court considered the district court's entire decision and affirmed on that issue, resolving it once and for all. EAB0078 – 79; EAB0071 – 72. The district court also found, and this Court affirmed, that for work Simon performed post-discharge (after November 29, 2017), he was entitled to the reasonable value of that work under a quantum meruit theory in accordance with the *Brunzell* factors. *Id*.

The second issue as presented by Simon is also misleading. The issue is not that the district court did not employ the "market approach"; it did. Simon's complaint is that the court did not value his post-discharge

services under ***his version*** of market approach sponsored by Will Kemp. The court ***rejected*** his contention that the entirety of his work – including work for which he already had been compensated under the implied agreement – could be used to value of his limited post-discharge services. This Court not only affirmed the district court on this point, but it also corrected the district court's blurring of the pre- and post-discharge work in its *Brunzell* analysis. EAB0078 ("we agree . . . the district court abused its discretion by awarding $200,000 in quantum meruit without making findings regarding the work Simon performed after the constructive discharge."). The Court further explained that "***referencing work performed before the constructive discharge***, for which Simon had already been compensated under the terms of the implied contract, ***cannot form the basis of quantum meruit award***." EAB0079 (emphasis added).

These decided and settled issues are not open for re-litigation. EAB0304 – 05. The only open issue on remand and in these new post-judgment proceedings is whether the district court erred by again failing to explain the quantum meruit award by reference to post-discharge work. Nothing in Simon's current writ petition addresses this point.

B. The Method by which the District Court Computed Simon's Lien Award is Consistent with the Lien Statute and Case Law.

1. The District Court's Measure of Compensation is Entirely Consistent with the Lien Statute.

Simon glibly suggests that his billing and compensation under a contract until it was terminated, is inconsistent with the district court's decision to compensate at the contract rate for work performed but unbilled at contract termination.[4] Pet. at 21. There is no inconsistency here: all the district court did – and correctly – was apply the contract rate for work done while the contract was in effect. This Court reviewed that finding in December 2020 and affirmed the constructive discharge and noted the award for the pre-discharge period was not appealed. EAB0078.

Simon thoughtlessly contends that declining to pay him exponentially more than the contract called for at the rate he specified, somehow produces a windfall for the Edgeworths and is a "miscarriage of justice." Pet. at 27. But the converse is true: a miscarriage of justice for the Edgeworths would result if their lawyer – who has been untruthful and

[4] Furthermore, the only reason Simon had not yet been paid for work he performed during the contract period between his last invoice and the date of the constructive discharge was because he refused to provide the Edgeworths with an invoice for it. *See* EAB0011 – 12 (FOF #14 recognizing that on November 15, 2017, Brian Edgeworth again asked Simon for "any invoices that are unpaid" so that he could pay them).

threatened his clients to force them to accept his demand for more money – were to succeed with this extortion.

Simon is also off target with his nonsense contention that "retroactive enforcement of the payment term of a terminated contract is not consistent with the [conclusion he was constructively discharged], NRS 18.015(2) or case law and was thus an error of law." Pet. at 21. But the district court's order considering the appropriate basis for compensating the work Simon did pre- and post-discharge is entirely consistent with NRS 18.015(2), which says:

> [an attorney charging] lien . . . 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.

NRS 18.015(2).

The district court gave effect to this provision by compensating Simon for pre-discharge work ***at the hourly rate he set, billed and accepted***. Simon's meritless argument to the contrary ignores the fact that a court could reasonably, and within its discretion, determine that a lawyer's usual hourly rate is an appropriate and reasonable measure to compute a quantum meruit award. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005) (explaining that in computing fees, the district court

"may begin with any method rationally designed to calculate a reasonable amount"). Here, Simon set the basis for the district court to compute that amount.

2. The District Court's Methodology is Consistent with Case Law.

Simon mistakenly contends the district court's decision to hold him to his hourly rate for pre-discharge work is inconsistent with case law. Pet. at 21. His argument that the district court erred by not computing his entire "outstanding fee" under quantum meruit is also unavailing because the quantum meruit period was settled in the prior appeal. EAB0078 ("district court correctly found that Simon was entitled to quantum meruit ***for work done after the constructive discharge***") (emphasis added); *see also* the Introduction, *supra*. Simon's reliance on the unpublished decision in *Rosenberg v. Calderon Automation Inc.*, Case No. L-84-290, 1986 WL 1290 (Ct. App. Ohio 1986), is misplaced for two reasons: First, *Rosenberg* was not decided with reference to Nevada law and is not binding on Nevada courts.[5]

[5] The district court did cite *Rosenberg* (EAB0015), likely at Simon's insistence, for the limited proposition that "[r]efusal to communicate with an attorney creates constructive discharge."

Second, the facts in *Rosenberg* are inapposite to the facts here, which goes against considering the case as persuasive. Simon tries to align the facts in the Ohio case with the facts here by mischaracterizing *Rosenberg* as a case in which the client "stopped all communication with his lawyer, Rosenberg, on the eve of a settlement." Pet. at 22. *Rosenberg* was a patent infringement case in which the client employed an inexperienced lawyer to prosecute the case on a contingent fee basis. The neophyte lawyer hired a patent lawyer, Rosenberg, to assist him in presenting the patent portion of a case which the client accepted. *Rosenberg*, 1986 WL 1290 at *1. The court found the two lawyers formed a "one-case partnership" where they were presumably going to share the contingency fee. *Id*. at *4. Unlike this case, Rosenberg never billed the client or received any payment from him before he was constructively discharged. *Id*. He was not discharged on the eve of settlement, as Simon says; in fact, he was discharged because *after* he had successfully assisted with obtaining favorable jury findings, he suggested to the client that he consider engaging in settlement discussions, which the client did not like. Thereafter, all communications with the client stopped. The lawyer who hired Rosenberg stopped asking him for help and did not even inform him that the favorable jury findings on the patent issues he had

helped obtain were later reversed by the federal district court that entered a judgment against client Calderon's patent rights. *Id*. at *1.

Based on the court's determination that Rosenberg was constructively discharged without cause after contributing to the favorable jury findings, the Ohio court found he was entitled to compensation for work done under the contingent fee agreement before his discharge. *Id*. at *7. Ironically, the fees Rosenberg sought under quantum meruit were based on his own estimate of the number of hours he devoted to preparing for and presenting at trial at his hourly rate. The court awarded Rosenberg $27,000. *Id*. In that regard, *Rosenberg* supports the Edgeworths' position that Simon's post-discharge quantum meruit award should have been computed by multiplying the post-discharge hours he detailed in the super bill, which his petition vouches for, times the hourly rates Simon set for himself and his associates, which are well within the market rates for Las Vegas and would yield him $33,811.25. EAB0216 – 20.

One other case Simon points to also involved Nevada attorneys who filed a lien seeking "a reasonable fee." *Gonzales v. Campbell & Williams*, Case No. 81318, 2021 WL 4988154 *3, 497 P.3d 624 (Nev. 2021) (Table). There, the lien proponents, local counsel, had no fee agreement with

Gonzales, who nevertheless placed his matter in their hands, which under NRS 18.015(1)(a) supported their lien. The district court awarded Campbell & Williams fees in quantum meruit after considering each of the *Brunzell* factors and "locally customary fees," which the Court affirmed. *Id.* at *3 – 4. Unlike this case, Campbell & Williams did not bill Gonzales by the hour or accept payment from him on that basis.

Neither *Rosenberg, Campbell & Williams*, nor other cases Simon cites involve facts similar to the facts in this case, where the discharged lawyer continued work for a short time after discharge. Under the specific facts of this case, the district court was well within its discretion when it gave effect to the implied contract and determined quantum meruit applied only to post-discharge work. The Court has affirmed that determination, saying "we conclude that the district court correctly found that Simon was entitled to quantum meruit for work done after the constructive discharge." EAB0078. Valuing the 71.10 hours Simon detailed for his post-discharge work at the $550 hourly rate he established is an appropriate basis for computing reasonable (or "fair") value, and is one of several market approaches discussed in the Restatement on which Simon mistakenly relies to defend his version of "market approach." *See* EAB0216 – 20.

3. Simon's Reliance on the Restatement is Misplaced.

Simon invokes the Restatement Third, The Law Governing Lawyers § 39, comment c, to support his argument, but in doing so, he hand-picks buzz words without considering their context and full meaning. In its entirety, Section 39 says:

> If a client and lawyer have not made a valid contract providing for another measure of compensation, a client owes a lawyer who has performed legal services for the client the fair value of the lawyer's services.

Restatement (Third) of the Law Governing Lawyers § 39 (2000). Comment c to Section 39 discusses how the "fair-value" standard should be applied. *Id*. The comment starts with the proposition that assessing fair value requires consideration of the "fees customarily charged by comparable lawyers in the community for similar legal services," and recognizes that "[i]n some cases, a standard market rate for a legal service might in fact exist." *Id*. However, the comment also recognizes that a fair fee could also be based on the hourly fee of lawyers in the area with similar experience and credentials. More importantly, this comment concludes that:

> When a lawyer fails to agree with the client in advance on the fee to be charged, the client should not have to pay as much as some clients might have agreed to pay. ***A fair-value fee under this***

> *Section is thus less than the highest contractual fee* that would be upheld as reasonable under § 34.[6]

Id. (emphasis added). Since Simon failed to establish the terms of his engagement at the commencement of the representation, as the Rules of Professional Conduct require, the Restatement confirms that he is the one that should bear the risk of receiving a lower fee under quantum meruit. Comment b to Section 39 drives this point home even more bluntly:

> Where there has been no prior contract as to fee, the lawyer presumably did not adequately explain the cost of pursuing the claim and **is thus the proper party to bear the risk of indeterminacy**. Hence, the fair-value standard assesses additional considerations and starts with an assumption that the lawyer is entitled to recovery only at the lower range of what otherwise would be a reasonable negotiated fee.

Id. at cmt. b (emphasis added).

While Simon spends much time touting what he and Will Kemp believe his fee should be, he offers no authority requiring the court to accept their opinions.[7] His suggestion that the Restatement supports his argument

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[6] Section 34 of the Restatement provides that "A lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law." Restatement (Third) of the Law Governing Lawyers § 34 (2000). The comments elaborate that while clients and their lawyers are generally free to contract on terms as they wish, fees cannot be unreasonable or prohibited. *Id*.

[7] Simon also pounds on the fact that Kemp offered the only "expert testimony" and that his testimony was "unrebutted." Pet. at 24. But he points

that the "market approach" he fronts is the only way to determine fair or reasonable value is flat wrong. Considering the market rate for services of the same type, as the district court seems to have done, and applying that rate to the work performed (which the district court did not do on remand), is consistent with a market approach to determining a fair value under quantum meruit. *Shuette*, 121 Nev. at 864, 124 P.3d at 549 (court computing reasonable value of services under quantum meruit "may begin with *any* method rationally designed to calculate a reasonable amount").

The guidance provided by the Restatement also defeats Simon's claim that he should be paid more for work during the implied contract period because the Edgeworths would otherwise be "unjustly enriched." Pet. at 24 – 26. Simon props up this argument by again largely misstating the record. As detailed at page 6, n.4, of the Edgeworths' Reply Brief in Case Nos. 83258/83260, although Simon attempted to introduce the hearsay statement that "Mr. Hale [the mediator] confirmed to Mr. Kemp [Simon's expert] that about $2,400,000.00 of the [Viking] proposed settlement was

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to no authority to support the notion that expert testimony is necessary to assist the court in determining what constitutes a reasonable attorney's fee, something that courts are routinely tasked with doing. Cheerleading by an attorney's colleague is not required to establish a reasonable fee.

intended for attorney fees," (Pet. at 14) the district court ruled he could not do so. So, cheerleader Kemp changed his proposed testimony to say that "it was [his] understanding that the mediation 2.4 million was for fees." VII-AA-01750-51. In truth, the source of this statement was in a letter of self-praise that Simon authored and sent to the Edgeworths on November 27, 2017. I-AA00051 – 55; VII-AA01750. Thus, what Kemp "understood" is not relevant to these proceedings.

Since Simon failed to provide the terms of his engagement at the outset, as he should have, he, as the lawyer, "presumably did not adequately explain the cost of pursuing the claim ***and is thus the proper party to bear the risk of indeterminacy***." Restatement (Third) of the Law Governing Lawyers § 39 (2000) (emphasis added). Thus if there is any "windfall" to be confirmed, Simon has offered no legitimate reason why he should be the one to receive it.

C. Simon's Petition Is Barred by Laches.

The instant writ petition was filed on March 11, 2022, 267 days ***after*** the district court's April 19, 2021 post-remand order denying reconsideration of its quantum meruit award and Simon's countermotion. Simon did nothing to challenge the district court's denial of his

countermotion or the lien award, as we point out in the Introduction, *supra*. He filed this petition only after this Court directed him to respond to the Edgeworths' writ petition challenging the district court's approval of Simon's refusal to release funds he has wrongfully kept from them since 2018.

Although the Court's rules do not set out specific deadlines for filing writ petitions, writ petitioners should seek relief without inexcusable delay. Simon should have acted, if at all, no later than July 2021 when the Edgeworths appealed the district court's post-remand order. *See Buckholt v. Second Jud. Dist. Ct., 94 Nev. 631, 584 P.2d 672 (1978), overruled on other grounds by Pan v. Eighth Jud. Dist. Ct., 120 Nev. 222, 88 P.3d 840 (2004)* (recognizing the doctrine of laches applies to a petition for a writ of mandamus). In deciding whether to apply laches to preclude consideration of a writ petition, a court must determine whether "(1) there was an inexcusable delay in seeking the petition; (2) an implied waiver arose from petitioners' knowing acquiescence in existing conditions; and, (3) there were circumstances causing prejudice to respondent." *State v. Eighth Jud. Dist. Ct. (Anzalone)*, 118 Nev. 140, 148, 42 P.3d 233, 238 (2002) (recognizing that laches or implied waiver could apply in writ situations, although

determining it was not warranted in the specific circumstances presented, despite the nearly four month delay); *Widdis v. Second Jud. Dist. Ct.*, 114 Nev. 1224, 1227–28, 968 P.2d 1165, 1167 (1998) (finding a seven month delay did not warrant application of laches); *but see Nevada v. Eighth Jud. Dist. Ct. (DUI),* 116 Nev. 127, 135, 994 P.2d 692, 697 (2000) (where the district court concluded an 11-month delay barred relief).

In *Anzalone*, the Court reiterated the three factors that should be considered in determining whether laches bars a writ petition: "(1) whether there was an inexcusable delay in seeking the petition, (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions, and (3) whether there were circumstances causing prejudice to the respondent."). *Anzalone*, 118 Nev. at 148, 42 P.3d at 238; *see also Buckholt*, 94 Nev. at 633, 584 P.2d at 673 (outlining the same factors).

The Court considered these three factors in the *DUI* cases to determine that a petitioner's 11-month delay in seeking writ relief constituted laches. *DUI*, 116 Nev. at 135, 994 P.2d at 697. In the *DUI* cases, the State of Nevada filed six writ petitions challenging the dismissal of DUI charges in six cases involving motorists who were charged with DUIs, pleaded guilty in Justice Court to the traffic code infraction, and then

successfully moved to dismiss the DUI charges on a theory of redundancy. The district court affirmed the dismissals. The State filed six writ petitions and the cases were thereafter consolidated by the Court for disposition. *Id*. at 131; 994 P.2d at 694 – 95. The State filed the petitions months after the dismissals were affirmed, and in one instance, the petition was filed 11-months after the dismissal was affirmed by the district court.

Here, Simon inexcusably and knowingly delayed seeking this writ for nearly nine months, until he was prompted to do so by the Edgeworths' unrelated petition regarding withheld funds. Simon has for three years delayed releasing monies that rightfully belong to the Edgeworths to punish them for not acquiescing to his fee demands. He has effectively kept the Edgeworths in court for years, as he threatened to do when they declined his demand for a million-plus bonus. There is no end in sight, as he repeatedly extends these proceedings and sues the Edgeworths for defamation by mistakenly claiming their allegations in a complaint filed against him are actionable. The three factors set out in *Anzalone* and *Buckholt* weigh in favor of finding laches and barring Simon's current petition.

Although the Court in other cases has determined that neither a four-month delay in seeking writ relief (*Anzalone*), nor a seven-month delay (*Widdis*) was sufficient to find laches, here the delay is closer to the 11-month delay that the Court said barred relief in one of the *DUI* cases. Furthermore, the difference in circumstances between the *DUI* case and this one warrant finding laches here.

First, it is reasonable to allow the State or other public entities more time than private litigants to perform certain judicial acts given their added layers of bureaucracy and unpredictable workload. *See, e.g.,* Nev. R. Civ. P. 12(a)(2) (more than doubling the time for the State and other public entities to answer a complaint). Simon is an attorney and knew from prior proceedings when he was required to seek appellate relief by writ. Second, Simon's March 11, 2022 writ petition pertains to the same order that was timely appealed by the Edgeworths on July 17, 2021, eight months earlier. It is inequitable to require the Edgeworths to file a notice of appeal within 30 days from the date their motion for reconsideration was denied, while allowing Simon to sit on his rights for nearly eight *more* months to challenge the same order by writ. Gamesmanship like this results in a waste of judicial and litigant resources.

Under these circumstances, the Court would be more than justified in applying laches to bar relief to Simon.

V. CONCLUSION

Simon's writ petition is barred by laches, as well as his failure to cross-appeal in 2021. This petition is simply an attempt to relitigate issues this Court has considered and affirmed. Extraordinary relief is not warranted on these facts; the petition should be denied.

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CERTIFICATE OF COMPLIANCE

1. I certify that I have read the **EDGEWORTHS' ANSWER TO SIMON'S PETITION FOR WRIT OF MANDAMUS**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and limitations in NRAP 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Palatino 14 point font. Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,967 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

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VERIFICATION

1. I, Steve Morris, declare:

2. I am one of the attorneys, one of the Petitioners herein;

3. I verify that I have read the foregoing **EDGEWORTHS' ANSWER TO SIMON'S PETITION FOR WRIT OF MANDAMUS**; that the same is true my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

/s/ STEVE MORRIS
Steve Morris

CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be e-served via the Supreme Court's electronic service process. I hereby certify that on the 12th day of May, 2022, a true and correct copy of the foregoing **EDGEWORTHS' ANSWER TO SIMON'S PETITION FOR WRIT OF MANDAMUS** was served by mail and by the following method(s):

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