IN THE SUPREME COURT OF THE STATE OF NEVADA

JAY BLOOM, an individual,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE

Respondents.

TGC/FARKAS FUNDING, LLC,

Real Party in Interest.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION DIRECTING THE EIGHTH JUDICIAL DISTRICT COURT CLARK COUNTY, NEVADA, HONORABLE MARK R. DENTON, DISTRICT JUDGE, TO VACATE (1) AN ORDER FINDING NON-PARTY JAY BLOOM TO BE THE ALTER EGO OF FIRST 100 AND (2) AN ORDER FOR ATTORNEYS' FEES AND COSTS AS RELATED TO NON-PARTY JAY BLOOM

Dist. Ct. Case No. A-20-822273-C

REPLY TO ANSWER TO ORIGINAL PETITION

From the Eighth Judicial District Court, Clark County, Nevada
The Honorable Mark R. Denton, District Court Judge

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I. THE DOCTRINE OF LACHES DOES NOT APPLY HERE

In its Answering Brief (AB), Real Party in Interest TGC/Farkas Funding, LLC contends that Jay Bloom (who was never a party to the underlying action) is subject to the doctrine of laches for "waiting" to file his writ petition for more than a year. AB at pp. 17-19.

That argument is disingenuous, as Mr. Bloom promptly filed his writ petition on May 16, 2022, just two months after this Court issued its order on First 100's appeal, which held that it "lack[s] jurisdiction in the context of this appeal to consider whether the district court appropriately held nonparty Bloom personally liable for the fees and costs." AA1010-AA1011.

This Court has held that "[l]aches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Bldg. & Const. Trades Council of N. Nevada v. State ex rel. Pub. Works Bd.,* 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (1992).

However, "[e]specially strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run." *Miller v. Walser*, 42 Nev. 497, 181 P. 437 (1919). And further, each case must be examined with care. *Cooney v. Pedroli*, 49 Nev. 55, 235 P. 637 (1925).

In determining whether the doctrine of laches should be applied to preclude consideration of a writ petition, the Court determines 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." *Buckholt v. Second Jud. Dist. Ct., In & For Washoe Cnty.*, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978), *overruled on other grounds by Pan v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 120 Nev. 222, 88 P.3d 840 (2004) (emphasis added).

Here, any "delay" from Mr. Bloom was excusable and negligible, as Mr. Bloom had anticipated the Court deciding the "joint and several" liability issue in First 100's appeal (Case No. 82794) because First 100 has standing to challenge whether the $151,535.81 ordered in attorneys' fees and costs "must be paid by Defendants [First 100] and/or Jay Bloom." AA0988.

In any event, once the Court indicated that the issue would not be decided because Mr. Bloom personally does not have standing to appeal, Mr. Bloom acted quickly in putting together his writ petition, and filed it just two months after the Court's decision was released in Case No. 82794. This was not a case of Mr. Bloom intentionally doing nothing for an entire year, but rather, Mr. Bloom having a good faith belief that the issue would be fully addressed in Case No. 82794, and then moving promptly after learning otherwise. Tellingly, no legal authority was

provided by TGC/Farkas Funding, LLC indicating that a petitioner incorrectly (but in good faith) believing that a portion of a pending appeal would preclude the necessity for a writ petition is considered an inexcusable delay in seeking a petition.

TGC/Farkas Funding, LLC also attempts to invoke a "waiver" argument because Mr. Bloom did not file his writ petition by whatever secret deadline TGC/Farkas Funding, LLC had in mind, but there was no waiver here at all, nor is there any requirement that a non-party must file a writ petition at the same time that a party is pursuing an appeal of the underlying case. AB at p. 18. To the contrary, writs of mandamus are governed by NRAP 21 which specifies no particular time limit within which a petition for a writ must be filed. As set forth above, there was no "knowing acquiescence" from Mr. Bloom, who acted promptly once it was confirmed by this Court that he would need to pursue a writ petition.

Finally, there has been zero prejudice to TGC/Farkas Funding, LLC. The only "prejudice" that TGC/Farkas Funding, LLC mentions is in a procedural sense, with TGC/Farkas Funding, LLC complaining that it has had to "brief the same matters for a second time." AB at p. 19. But that is not *actual* prejudice, nor is it non-party Mr. Bloom's fault that he has had to separately pursue a writ petition in addition to First 100 pursuing its own appeal. The issues would have been briefed twice regardless, as First 100 also has a separate interest in whether it should be considered joint and severally liable for the fee award along with Mr. Bloom.

An example of prejudice actually occurring is found in the facts set forth in *Bldg. & Const. Trades Council of N. Nevada v. State ex rel. Pub. Works Bd.*, 108 Nev. 605, 612, 836 P.2d 633, 637 (1992), a dispute involving a construction project at a public university. In that case, a petition for writ of mandamus was sought "approximately one month after construction of the project began," including after the inside of the building had already bene gutted, parts of the building had been rebuilt, cut, and removed, and the removal of asbestos from the building had already started. Id. at 612; 637 (1992). Naturally, the "consequent delay would have increased the project's cost and perhaps resulted in a withdrawal of the federal grant." *Id.*

Here, there is no such prejudice to TGC/Farkas Funding, LLC. Nothing has taken place between the time that the fee award was entered and the time that Mr. Bloom filed his writ petition that would constitute "prejudice" towards TGC/Farkas Funding, LLC, thus precluding the application of the doctrine of laches.

II. THE WRIT PETITION PRESENTS EXTRAORDINARY CIRCUMSTANCES

TGC/Farkas Funding, LLC also asserts that "the issue is now moot and does not require any further relief, let alone extraordinary relief," because after applying the supersedeas bond to the amended judgment, "a mere $1,606.87 remained due and owing, consistent of interest that accrued pending appeal." AB at pp. 19-20. But an outstanding fee award in *any* amount, even if it is a "mere" $1,606.87 against

Mr. Bloom jointly and severally with First 100, presents an extraordinary circumstance that warrants writ review and relief. Mr. Bloom is an active businessperson and investor, and a fee award of any amount against him personally may negatively affect his business endeavors.

TGC/Farkas Funding, LLC also asks this Court to ignore the portions of the underlying FFCL which focus on the district court's basis for joint and several liability, specifically the findings that Mr. Bloom is the "alter ego" of First 100, LLC. AB at p. 20. In the FFCL, the district court ordered that Mr. Bloom was the "responsible party" for complying with the Arbitration Order on behalf of First 100, which the district court ruled applies particularly here "***when there are no formalities being followed*** and, at least at this juncture, Bloom is the alter ego of [First 100]." AA0936 (emphasis added). The following of formalities refers to the alter ego analysis. The district court then went into its alter ego analysis (which generally involved the finding that First 100 is influenced and governed by the same person but no other findings as to the other alter ego factors), and ordered that "equity must be applied such that Bloom will not be immune from consequences for his intentional conduct for the purpose of disobeying and/or resisting the Order." AA0936-0937.

Accordingly, the district court did in fact base its contempt ruling on an improper alter ego finding that should have never been made because Mr. Bloom

was not put on notice of any alter ego cause of action. *See Callie v. Bowling*, 123 Nev. 181, 183, 185, 160 P.3d 878, 880–81 (2007) (holding that a motion to amend a judgment was not the correct procedure to allege an alter ego claim when the defendant who is subject to the alter ego claim was not part of the original complaint, as procedural due process safeguards required notice and an opportunity to be heard).

TGC/Farkas Funding, LLC's attempt to refashion the FFCL is improper, as the district court did not indicate that its "primary conclusion" was that Mr. Bloom orchestrated and directed contemptuous actions after receiving notice of the Judgment and OSC. To the contrary, the context of the FFCL indicate that the conclusions were primarily influenced by the district court's alter ego determination.

III. THE RESPONSIBLE PARTY DOCTRINE DOES NOT APPLY HERE

The district court also based its contempt order to Mr. Bloom on its "responsible party" analysis, which as detailed in the Writ Petition was improper, as that reasoning came from non-binding federal court cases which are not factually analogous to this case.

Contrary to TGC/Farkas Funding, LLC's arguments otherwise, the district court did abuse its discretion in finding Mr. Bloom in contempt, especially as Mr. Bloom had no real "authority" or "power" to obtain corporate documents not in his possession, as the First 100 business has not been operational since about 2017, and

therefore has no office, no employees, no active bank accounts, no cash, and only a single asset in the form of a substantial judgment against an individual that breached a funding commitment to the company. AA0697.

TGC/Farkas Funding, LLC continues to insist that "Bloom alone could cause First 100 to obey or disobey the Judgment," but that is not supported by the actual record from the evidentiary hearing. AB at p. 24. This is a unique situation where the former company controller, Michael Henriksen was in a position of having sole possession of and the ability to produce responsive records – not Mr. Bloom himself. AA0631. All that Mr. Bloom "could do" was contact Mr. Henriksen and inquire with Mr. Henriksen about compiling the requested business records, which was done. AA0719-AA0720 ("And there's third parties that need to be paid to compile responsive documents.").

The district court found that "once Bloom had notice of the Order, he could not delegate the responsibility for performance on a third party, but he himself had to take reasonable steps to provide the records in compliance with the Order in his capacity as the sole person legally associated with [First 100] and responsible for the books and records of [First 100]." AA0935. But respectfully, Mr. Bloom made no attempt to "delegate" anything, nor could he as First 100 has not been operational for years. All that Mr. Bloom could do is contact the individual in possession of any books and records, which was done. Finding Mr. Bloom to be the "responsible

party," in this situation where the company is no longer actively operating and has no cash or resources available to Mr. Bloom to independently obtain books and records that are in someone else's possession, was an error unsupported by the testimony presented at the evidentiary hearing.

Additionally, First 100 is not arguing that NRS 86.371 "shields" Mr. Bloom from contempt, as TGC/Farkas Funding, LLC argues (AB at p. 25), but rather that NRS 86.371 needs to be considered in conjunction with any "responsible party" analysis that this Court determines applies (if any applies). A hardline rule on the ability to arbitrarily designate a company's member or manager as the "responsible party" and make that member of manager subject to persona contempt proceedings for failures or deficiencies on the part of the company would eviscerate the purpose of NRS 86.371, which states that "[u]nless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company."

Accordingly, the district court erred in both (1) its alter ego analysis; and (2) its responsible party analysis, both of which were instrumental in leading to the error of finding Mr. Bloom in contempt and deeming him financially responsible for TGC/Farkas Funding, LLC's attorneys' fees and costs, despite him never being a party to the underlying action.

IV. MR. BLOOM WAS DENIED DUE PROCESS

TGC/Farkas Funding argues that Mr. Bloom "failed" to argue that he was wrongfully part of the contempt proceedings and being denied due process rights. AB at pp. 27-28. This is false.

In its response to the motion for an order to show cause, First 100 adamantly argued that Mr. Bloom should not and is not even part of the underlying litigation:

> No judgment was obtained against Mr. Bloom in this action, therefore Mr. Bloom has zero personal liability for the judgment obtained against First 100, LLC and First One Hundred Holdings, LLC. Further, no alter ego findings were made in the action as it relates to Mr. Bloom and First 100, LLC and First One Hundred Holdings, LLC, and Mr. Bloom obviously would have made arguments establishing the lack of any alter ego relationship had he been put on notice of any such allegation which was never made.
>
> Nevertheless, Plaintiff is attempting to unilaterally pierce the corporate veil without having ever successfully obtained an alter ego finding, and without ever lodging an alter ego claim where Plaintiff would have been required to prove the existence of an alter ego relationship pursuant to the factors set forth in *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846 (2000).

AA0211. There was no waiver of the argument, as it has always been clear in the underlying litigation that both First 100 and Mr. Bloom took issue with the lack of due process being afforded to Mr. Bloom, especially as it related to the rogue alter ego arguments that were being made despite the lack of any corresponding alter ego cause of action.

Although he put on evidence *on behalf of First 100*, Mr. Bloom was not entitled to put on evidence on behalf of himself during the evidentiary hearing, or to conduct discovery during the discovery period prior to the hearing, nor was he on notice that he would potentially be subjected to an alter ego finding and personally liable for a fees and costs. Mr. Bloom was not allowed to take depositions or file dispositive motions as to himself personally, and was therefore precluded from exercising his right to due process under Section 1 of the Fourteenth Amendment to the Constitution of the United States. The district court only allowed the "parties" to conduct up to four depositions each – not the parties *and* non-party Mr. Bloom. AA0519.

Had Mr. Bloom been permitted to conduct his own discovery, and had he been given notice that he *personally* would be subjected to a fees and cost award, he would have questioned TGC/Farkas Funding, LLC's members on the basis of their alter ego arguments and assumptions with respect to First 100 and Mr. Bloom.

Mr. Bloom's denial of his due process rights should not be overlooked, as every step of the way he was "treated" as a defendant (being served with an OSC regarding First 100's alleged refusal to abide by an order even though he was never a party; being ordered to show cause why he personally should not be found in contempt) without being given the evidentiary and procedural due process rights of an actual party.

TGC/Farkas Funding, LLC also notes that the district court "never found that Bloom was liable for the Judgment and no one has asked Bloom to pay the monetary award contained within the Judgment." AB at p. 29. Although this is technically true, this writ petition focuses on the district court finding Mr. Bloom liable for the subsequent fee award – which is based on the improper "alter ego" and "responsible party" findings in the FFCL.

CONCLUSION

Based on the foregoing, this Court should find that the district court erred in (1) holding Jay Bloom to be the alter ego of First 100; and (2) holding Jay Bloom to be jointly and severally liable for the six-figure attorneys' fees and costs award issued to TGC/Farkas Funding, LLC as a contempt sanction when he was never a party to the case who was subjected to the order confirming the Arbitration Award. This Court should reverse the district court's FFCL accordingly.

DATED this 25th day of July, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

2. I further certify that this reply brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,491 words.

3. Finally, I certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of July 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 21(a) and 25(c), I certify that I am an employee of MAIER GUTIERREZ & ASSOCIATES, and that on July 25 2022, **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION DIRECTING THE EIGHTH JUDICIAL DISTRICT COURT CLARK COUNTY, NEVADA, HONORABLE MARK R. DENTON, DISTRICT JUDGE, TO VACATE (1) AN ORDER FINDING NON-PARTY JAY BLOOM TO BE THE ALTER EGO OF FIRST 100 AND (2) AN ORDER FOR ATTORNEYS' FEES AND COSTS AS RELATED TO NON-PARTY JAY BLOOM** was served via electronic means by operation of the court's electronic filing system:

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