IN THE SUPREME COURT OF THE STATE OF NEVADA

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MEI-GSR HOLDINGS, LLC, AM-GSR HOLDINGS, LLC, and GAGE VILLAGE COMMERCIAL DEVELOPMENT, LLC, Appellants, v. ALBERT THOMAS, *et al.,* Respondents.	Case Nos. 85915 86092 86985 87243 87303 87566 87567

MOTION TO SET ASIDE OR STRIKE NRCP 54(b) CERTIFICATION OF AMENDED FINAL JUDGMENT
AND
APPELLANTS' RESPONSE TO NOVEMBER 16, 2023 ORDER TO SHOW CAUSE

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I. INTRODUCTION

On November 16, 2023, the Court issued an Order to Show Cause noting a defect in the district court's NRCP 54(b) certification of the Amended Final Judgment. The Court instructed one or both of the parties to seek an amended certification and to report back within fourteen days whether the district court granted or declined the request. Respondents moved the district court to amend the prior certification order. Appellants opposed the motion and hereby notify this Court of the many reasons for their opposition. Over Appellants' opposition, the district court amended its prior certification to reflect that "there is no just reason for delay" on November 28, 2023.

Like the prior NRCP 54(b) certification attempt, the amended certification is improper. The Amended Final Judgment is already "final" and appealable without certification. The Final Judgment resolved all claims against all parties and awarded Respondents multi-million dollars in damages for which Appellants have posted more than $30 million dollars in supersedeas bonds. It is inappropriate to "certify" an already final and appealable order.

Moreover, there are no claims or parties remaining in the district court to separate from the issues pending on appeal. A receivership is not a *claim*; it is a provisional *remedy*. Therefore, a receivership is not amenable to NRCP 54(b) certification. As a result, the Court must set aside or strike the district court's NRCP 54(b) certification of the Amended Final Judgment.

Even after striking the certification, this Court has appellate jurisdiction over the

issues presented for the reasons more fully described in Appellants' June 13, 2023 Response to May 8, 2023 Order to Show Cause and their July 13, 2023 Supplement to Response to Order to Show Cause. Similarly, because the Final Judgment and Amended Final Judgment extinguished all provisional remedies like preliminary injunctions and receiverships, the Court should dismiss the appeal and cross-appeal from the December 5, 2022 preliminary injunction in Docket 85915.

II. STATEMENT OF FACTS

A. The District Court Enters Final Judgment and the Parties Appeal.

A comprehensive history of this case is described in Appellants' (1) motion to dismiss briefing in Docket 85915, (2) response to May 8, 2023 order to show cause briefing in Docket 86092, and (3) motion to consolidate briefing in all dockets. It suffices to summarize here that, on February 2, 2023, the district court entered a "Final Judgment." (Ex. 12.)[1] Acting as though the Final Judgment was "final," Respondents filed a motion to alter or amend judgment, which was granted in part on March 27, 2023. (Ex. 13.)

An Amended Final Judgment was entered on April 10, 2023. (Ex. 14.) It awarded $8,318,215.54 in compensatory damages and $9,190,521.92 in punitive damages. (*Id.* at 2.) The Amended Final Judgment also struck Defendants' counterclaims. (*Id.* at 3.) It

[1] Unless otherwise noted, all numerical exhibits reference Appellants' Appendix in Support of Appellants' Response to May 8, 2023 Order to Show Cause or Appellants' Appendix in Support of Appellants' Supplement to Response to May 8, 2023 Order to Show Cause in Docket 86092. Alphabetical exhibits are attached hereto.

did not render permanent any injunction or receivership. (*See id.*)

Appellants filed a notice of appeal on April 13, 2023 and have posted more than $30 million dollars in supersedeas bonds. (*See* Exs. 11, 15-16.) Respondents filed a cross-appeal. (Notice of Cross-Appeal, Apr. 26, 2023, No. 86092.) And while Respondents called "protective" an earlier cross-appeal related to punitive damages, they did not call their cross-appeal from the *Amended Final Judgment* a "protective" notice of appeal. *Compare MEI-GSR Holdings, LLC*, No. 86092, at *2 n.1 (Notice of Cross-Appeal, Feb. 22, 2023), *with MEI-GSR Holdings, LLC*, No. 86092 (Notice of Cross-Appeal, May 1, 2023). In their docketing statement, Respondents acknowledged the finality of the Amended Final Judgment. They asserted this Court has appellate jurisdiction pursuant to NRAP 3A(b)(1) ("A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered."). *MEI-GSR Holdings, LLC v. Thomas, et al.*, No. 86092, at § 21(a)-(b) (Cross-Appellants' Docketing Statement, Mar. 14, 2023.)

Respondents also represented that the order "may have concluded the second *and final phase of the underlying proceeding.*" (*Id.* at § 21(b)) (emphasis added). They also identified the only remaining issue in this proceeding as their motion to alter or amend the judgment. (*Id.* at § 25; *see also id.* at § 26 ("The order at issue may be appealable pursuant to NRAP 3A(b)(1) as it potentially resolved all outstanding issues in the underlying proceeding.").) Once their motion to alter or amend was decided, Respondents foresaw "it potentially resolved *all outstanding issues in the underlying*

proceeding." (*Id.* at § 26) (emphasis added). Respondents did not indicate that the Receivership remained pending or that there were other tasks to complete.

B. District Court Judges Confirm All Claims are Resolved.

The district court also confirmed that the Amended Final Judgment was "final." In a May 23, 2023 order, the district court stated, "[t]he Court has entered a final judgment on the issues pending in the operative pleadings." (Ex. 1 at 1.) This is consistent with Judge Sattler's earlier 2019 statement that the compensatory damage order was meant to "adjudicate[] all of the Plaintiffs' claims and definitely held the Defendants liable for $8,318,215.55 in damages." (Ex. A at 5, attached hereto.)

C. Respondents Move to Certify the Amended Final Judgment as "Final" after This Court issues an Order to Show Cause.

Meanwhile, in the appellate proceedings, this Court issued an Order to Show Cause to clarify its jurisdiction due to the strange posture of the receivership in the lower court. (Order to Show Cause and Granting Temporary Stay, Case No. 86092, May 8, 2023). In a tacit admission that the Final Judgment and Amended Final Judgment did, in fact, automatically terminate the receivership as Appellants demonstrated, Respondents filed a "Motion to Certify Amended Final Judgment as Final Pursuant to NRCP 54(b)." (Ex. 19.) Respondents' motion was designed to give the appearance that the Receivership was a separate, pending "claim" even though they continually treated the Final Judgment and Amended Final Judgment as "final."

The district court granted the motion on June 28, 2023. (Ex. 20.) The court

explained that it was certifying the Amended Final Judgment "[i]n an abundance of caution." (*Id.* at 1.) Because the district court was being cautious, it did not make any finding "[t]hat there is no just reason for delay." (*Id.*); NRCP 54(b).

D. The District Court Enters a "Second Amended" and a "Corrected Second Amended Final Monetary Judgment."

Even though the Amended Final Judgment had been appealed and cross-appealed, the district court entered a "Second Amended Final Monetary Judgment" to add May 2023 attorneys' fee and cost awards. (Ex. 26.) The court later identified a math error and entered a "Corrected Second Amended Final Monetary Judgment" on July 10, 2023. (Ex. 27.) These "judgments" were appealed too. (*See* Case No. 86985.)

E. This Court Issues another Order to Show Cause and the District Court Again Needlessly Certified the Amended Final Judgment.

Months later, this Court issued another Order to Show Cause pointing out that the Amended Final Judgment's prior certification order was missing NRCP 54(b)'s phrase about "no just reason for delay." (Order to Show Cause, Case No. 86902, Nov. 16, 2023.) The Court stated "a proper NRCP 54(b) certification ***may*** assist this court in resolving the jurisdictional issues presented in these appeals." (*Id.*) (emphasis added). However, this Court expressly noted that the district court had discretion to "declin[e] to enter one." (*Id.*) The Court required an update within fourteen days.

Respondents moved to amend the prior certification order for the Amended Final Judgment under NRCP 60. Appellants opposed. The district court granted the motion on November 28, 2023. (Exs. B-C, attached hereto.)

III. ARGUMENT

A. This Court May Set Aside or Strike Improper NRCP 54(b) Certifications.

The 2019 Advisory Committee Notes to NRCP 54(b) state that "[a]n appellate court may review whether a judgment was properly certified under this rule." This Court has held that, "[w]here an appellant is uncertain as to the propriety of a district court's certification of finality pursuant to NRCP 54(b) … the appellant should move this court to determine whether the district court properly certified that order as final..." *Fernandez v. Infusaid Corp.*, 110 Nev. 187, 192, 871 P.2d 292, 295 (1994). This Court may set aside or strike an erroneous NRCP 54(b) certification. *See Paul v. Pool*, 96 Nev. 130, 133, 605 P.2d 635, 637 (1980) (stating an improper "certificate of finality is without operative effect" and directing "an order setting aside… the NRCP 54(b) certification").

B. The Final and Amended Final Judgments are Not Subject to Certification.

The district court again wrongly certified the Amended Final Judgment because it was already "final." Under NRCP 54(b), a court may only certify orders that are not already "final" and appealable. Once an order becomes final, "the district court no longer had the power to certify the order as final pursuant to NRCP 54(b). The order was no longer amenable to certification pursuant to the rule." *Fernandez*, 110 Nev. at 192, 871 P.2d at 295; *see Mynes v. Brooks,* 918 N.E.2d 511, 514 (Ohio 2009) (holding there is no need to certify order denying stay of trial pending arbitration because it is already a final and appealable order by statute).

The Sixth Circuit's decision in *Libertarian Party of Ohio v. Husted*, 808 F.3d 279 (6th Cir. 2015) is illustrative. There, the court denied a political party's motion for preliminary injunction. *Id.* at 280. Rather than appealing immediately, the political party filed a motion to certify under Rule 54(b). *Id.* On appeal, the Sixth Circuit observed that the political party could not certify the denial of the preliminary injunction because it was "*already* a 'judgment' as defined by the Federal Rules of Civil Procedure." *Id.* (emphasis in original). The court also noted that a "Rule 54(b) motion …. serves only to make a non-appealable order an appealable judgment." *Id.*

The Final Judgment and Amended Final Judgment were "final" before certification. They were appealed and cross-appealed because they resolved all substantive claims between Appellants and Respondents, and awarded Respondents multimillion dollars in damages. Two district court judges have observed that all claims and issues from the operative pleadings have been resolved. (Ex. 1; Ex. A at 5.) Thus, the Final and Amended Final Judgments are—and have been—final and are not amenable to certification. The district court's certification was improper.

C. Receivership is Not a "Claim" Subject to Certification.

Nevada Rule of Civil Procedure 54(b) allows a district court in an action involving more than one claim for relief to direct entry of a final judgment as to one or more, but fewer than all claims, if the court determines there is no just reason to delay. But NRCP 54(b) permits only the certification of "claims"—it does not permit the certification of provisional ***remedies***. As noted by Wright and Miller, "[a]n order with

regard to a provisional remedy does not go to an independent claim in a multiple-claim action ***and cannot be given finality for purposes of appeal by Rule 54(b)***." 11A Fed. Prac. & Proc. Civ. § 2936 (3d ed.) (emphasis added). "'A provisional remedy is a remedy other than a claim for relief. Therefore, an order granting or denying a provisional remedy is not subject to the requirements of Civ. R. 54(B).[2]'" *Empower Aviation, L.L.C. v. Butler Cty. Bd. of Commrs.,* 924 N.E.2d 862, 865 (Ohio App. 2009).

A receivership is a type of provisional *remedy*. 75 C.J.S. *Receivers*, *What is a Receivership*? § 2 ("A receivership is a remedy."). It is not a "claim" or "cause of action." 75 C.J.S. *Receivers* § 5 ("it alone does not constitute a cause of action."). By statute, a receiver may only be appointed before judgment to protect rights during litigation or after judgment to protect the ability to collect a judgment. NRS 32.010.

This Court has long recognized that a receivership is a provisional remedy before judgment to maintain the status quo until the action is done. *See Bowler v. Leonard*, 70 Nev. 370, 384, 269 P.2d 833, 840 (1954) ("'Receivership is generally regarded as a *remedy* of last resort.'") (emphasis added); *Hines v. Plante*, 99 Nev. 259, 261, 661 P.2d 880, 881-82 (1983) ("The appointment of a receiver *pendente lite* is a harsh and extreme *remedy* which should be used sparingly and only when the securing of ultimate justice requires it.") (emphasis added). Recently, in *Direct Grading & Paving, LLC v. Eighth Judicial District Court*, 137 Nev. 320, 324, 491 P.3d 13, 17 (2021), the Court said "[a] provisional remedy

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[2] The Ohio Rule 54(B)'s "claim" requirements are substantively the same.

is '[a] *temporary remedy awarded before judgment and pending the action's disposition*, such as … *a prejudgment receivership*, … that 'is intended to maintain the status quo by protecting a person's safety or preserving property.'" (quoting *Remedy*, *provisional remedy*, *Black's Law Dictionary* (11th ed. 2019)) (emphases added).

In other recent unpublished orders, this Court has explained "that generally the appointment of a receiver 'is not the final or ultimate relief .... It is merely an ancillary remedy, or it is merely an auxiliary, incidental, and *provisional remedy*.'" *N5HYG, LLC v. Iglesias*, No. 83425, 2022 WL 2196855, at *1 (Nev. June 17, 2022) (parenthetically quoting 75 C.J.S. *Receivers* § 5 (2022)) (emphasis added). "The appointment of a receiver is incidental to the purpose of effecting other relief." *Id.*

Here, the Receiver was appointed during the litigation in 2015 but before any final judgment. Thus, the Receiver was necessarily appointed as a provisional remedy to maintain the status quo *until* final judgment. *See* NRS 32.010. The Receivership is not a standalone claim that can be severed from the pending appeals. It is a remedy that has dissolved. As a result, the district court wrongly entered NRCP 54(b) certification.

D. Plaintiffs are Estopped from Belatedly Requesting Certification.

Respondents are also estopped from arguing that NRCP 54(b) certification is needed. This Court "has long precluded a litigant from arguing that a judgment was not final … when the party treated the judgment as final." *Witter v. State*, 135 Nev. 412, 416, 452 P.3d 406, 409-10 (2019). A party cannot flip-flop and argue that NRCP 54(b) certification is required when it previously indicated that certification was unnecessary.

For instance, in *Renfro v. Forman*, this Court held "[t]he Honda motor companies previously treated the judgment against them as final when they appealed to this court from the judgment, and when they did not request an NRCP 54(b) certification before they appealed. They are now estopped from asserting that the judgment was not final and that a certification of finality was necessary under NRCP 54(b)." 99 Nev. 70, 71-72, 657 P.2d 1151, 1151-52 (1983).

As with *Renfro*, Respondents previously represented the finality of the Final Judgment when they moved to alter or amend under NRCP 59(e) and when they cross-appealed from the Final and Amended Final Judgments. They made representations of finality in their docketing statement. (*See, e.g.,* Cross-Appellants' Docketing Statement, Case No. 86092 § 25(a), Mar. 14, 2023) (answering "[a]ll claims remain[ed] pending *until a motion to alter or amend the Final Judgment entered February 2, 2023 is decided.*"). Respondents also pressured Appellants to post astronomical supersedeas bonds for the final judgment amount plus interest. Thus, Respondents have represented and acted like the Final Judgment and Amended Final Judgment were final with no need for NRCP 54(b) certification. Respondents are estopped from claiming certification is now needed.

IV. CONCLUSION

For these reasons, Appellants did not seek an amended certification of the Amended Final Judgment and this Court should set aside or strike the district court's unnecessarily amended certification.

DATED this 28th day of November, 2023.

PISANELLI BICE PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and pursuant to NRAP 25(b) and NEFCR 9, on this 28th day of November, 2023, I electronically filed the foregoing **MOTION TO SET ASIDE OR STRIKE NRCP 54(b) CERTIFICATION OF AMENDED FINAL JUDGMENT AND APPELLANTS' RESPONSE TO NOVEMBER 16, 2023 ORDER TO SHOW CAUSE** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC

EXHIBIT A

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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ALBERT THOMAS, individually; et al.,

Plaintiffs,

Case No. CV12-02222

Dept. No. 10

vs.

MEI-GSR HOLDINGS, LLC, a Nevada limited liability company, GRAND SIERRA RESORT UNIT OWNERS' ASSOCIATION, a Nevada nonprofit corporation, GAGE VILLAGE COMMERCIAL DEVELOPMENT, LLC, a Nevada limited liability company; AM-GSR HOLDINGS, LLC, a Nevada limited liability company; and DOES I through X, inclusive,

Defendants.
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ORDER DENYING MOTION TO SET ASIDE OR AMEND JUDGMENT

Presently before the Court is DEFENDANTS' MOTION TO SET ASIDE JUDGMENT OR IN THE ALTERNATIVE TO AMEND JUDGMENT ("the Motion") filed by Defendants MEI-GSR HOLDINGS, LLC, GRAND SIERRA RESORT UNIT OWNERS' ASSOCIATION, GAGE VILLAGE COMMERCIAL DEVELOPMENT, LLC and AM-GSR HOLDINGS, LLC (collectively, "the Defendants") on March 13, 2019. Plaintiffs ALBERT THOMAS et al. ("the Plaintiffs") filed the OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE JUDGMENT OR IN THE ALTERNATIVE TO AMEND JUDGMENT ("the Opposition") on April 10, 2019.

The Defendants filed DEFENDANTS' REPLY IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT OR IN THE ALTERNATIVE TO AMEND JUDGMENT ("the Reply") on April 19, 2019. The Court held a hearing on July 25, 2019, and took the matter under advisement.

Case-concluding sanctions were entered against the Defendants for abuse of discovery and disregard for the judicial process. *See* ORDER GRANTING PLAINTIFFS' MOTION FOR CASE-TERMINATING SANCTIONS, p. 12 (Oct. 3, 2014) ("the October Order"). *See also Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779-80 (1990) (discussing discovery sanctions). The Court held a three-day prove up hearing at which the Plaintiffs' damages expert, Craig Greene ("Mr. Greene"), was the sole witness. The Court precluded the Defendants from calling their own witnesses during the prove-up hearing, but permitted them to cross-examine Mr. Greene extensively.[1] *See* ORDER 5:3-16 (Feb. 5, 2015) ("the February Order"). The Court ultimately entered a judgment in favor of the Plaintiffs for $8,318,215.55 in damages. *See* FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT (Oct. 9, 2015) ("the FFCLJ"). The parties have filed extensive post-judgment motion practice.[2]

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[1] While the Defendants insist their cross-examination of Mr. Greene was limited, such a contention is belied by the record of the prove-up hearing. The Defendants' cross-examination of Mr. Greene took up the entirety of the second day of the prove-up hearing, in addition to some time on the first day.

[2] On May 9, 2016, the Court entered the ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION ("the Dismissal Order"). The Plaintiff appealed the Dismissal Order to the Nevada Supreme Court on May 26, 2016. On February 26, 2018, the Nevada Supreme Court reversed the Dismissal Order and remanded the case to the Court. The Nevada Supreme Court denied rehearing on June 1, 2018, and denied en banc reconsideration on November 27, 2018. The case has been remanded to the Court and assumes the procedural posture immediately preceding entry of the Dismissal Order.

The Defendants argue the Court should revise or set aside the FFCLJ because they were unfairly precluded from presenting witnesses or evidence in response to Mr. Greene's testimony, which was riddled with fundamental defects.[3] The Motion 2:11-23. The Defendants insist the Court has the inherent power to revise the FFCLJ to correct these fundamental defects because there is no final judgment, and a new prove-up hearing is necessary because the Plaintiffs received windfall damages unsupported by substantial evidence. The Motion 4:3-17; 6:1-15; 19:23-28; 20:1-2. The Plaintiffs argue the Motion is procedurally defective because it is untimely and is a disguised motion for reconsideration. The Opposition 1:3-17. The Plaintiffs contend the Motion is substantively defective because it makes arguments previously raised and rejected by the Court, and the Defendants failed to make offers of proof regarding the alleged fundamental defects during the prove-up hearing, which would have allowed them to present relevant evidence.[4] The Opposition 1:7-17, 26-28; 2:1-2-20. The Defendants respond by arguing the Plaintiffs' offer of proof argument is not grounded in any controlling authority, and the declarations submitted with

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[3] The Defendants argue Mr. Greene's calculations were flawed in the following manner: 1) Mr. Greene calculated damages for underpaid revenue to unit owners without certain owners' statements and for units which were sold or foreclosed upon; 2) Mr. Greene calculated damages for the rental of units without rental agreements without an understanding of the IHAP rental program; 3) Mr. Greene calculated damages for discounting owners' rooms if a room was rented for less than $79.00 per night, without considering applicable nuances in the rental program; 4) Mr. Greene inflated the damages for complimentary rooms because he failed to consider the Defendants' right to comp a unit five times a year; 5) Mr. Greene's damage calculations for the preferential rotation system included Plaintiffs to whom the Defendants had no further rental obligations and did not recognize nuances in the rotation system; and 6) Mr. Greene's damage calculations for contracted fees and allocations ignores the Defendants' right to collect such money and penalized them for merely placing the money in the wrong account. The Motion 6:16-23; 7:6-17; 8:1-8, 17-27; 9:3-13; 10:6-25, 11:9-25; 12:7-20. The Defendants also contend the Court erroneously awarded non-monetary relief as a matter of law, erred in allowing Mr. Greene's testimony, and the FFCLJ does not identify the causes of action supporting the damages award and the individual damage award for each of the Plaintiffs. The Motion 13:6-10, 26-28; 15:25-26; 16:1-4, 25-27; 17:1-2.

[4] The Plaintiffs also insist the declarations of Kent Vaughn and Sean Clarke were improperly provided to the Court. The Court will not consider these declarations because the Defendants made no offers of proof regarding the necessity of their testimony during the prove-up hearing.

the Motion are intended to be offers of proof.[5] The Reply 5:24-28; 6:11-18. The Defendants also contend the damages calculated by Mr. Greene were neither fair nor reasonable because of the multitude of fundamental defects. The Reply 9:2-28; 10:1-15.

NRCP 55(b)(2) permits a district court to hold a prove-up hearing to establish damages where a default judgment has been entered. Where default judgment has been entered as a discovery sanction, "the nonoffending party retains the burden of presenting sufficient evidence to establish a prima facie case for each cause of action as well as demonstrating by substantial evidence that damages are attributable to each claim." *Foster v. Dingwall*, 126 Nev. 56, 60, 227 P.3d 1042, 1045 (2010). *See also Horgan v. Felton*, 123 Nev. 577, 581, 170 P.2d 982, 985 (2007) (internal quotation marks omitted) ("Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion."). A district court may limit a defaulting party's presentation of evidence during a prove-up hearing; however, it is an abuse of discretion to preclude a defaulting party from presenting evidence if the defaulting party has identified a "fundamental defect in the nonoffending party's case." *Foster*, 126 Nev. at 68, 227 P.3d at 1050 (explaining nonoffending party is not entitled to "unlimited or unjustifiable damages").

NRCP 54(b) provides:

> **Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

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[5] The Reply is more than double the length permitted by the PRETRIAL ORDER, p. 8:10-18 (May 13, 2019). The Defendants are counseled to avoid exceeding the allotted page limits without permission from the Court.

WDCR 12(8) provides:

> The rehearing of motions *must* be done in conformity with DCR 13, Section 7. A party seeking reconsideration of a ruling of the court, other than an order which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of entry of the order or judgment . . . .

Emphasis added.

The Court will not revise the FFCLJ because it is not an interlocutory order subject to revision. The FFCLJ adjudicated all of the Plaintiffs' claims and definitely held the Defendants liable for $8,318,215.55 in damages. *Contra Bower's v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 716 (2009) (holding district judge was permitted to reconsider summary judgment motion regarding one plaintiff before final judgment regarding all parties was entered). Simply because the FFCLJ did not address punitive damages does not render it interlocutory and capable of revision. The Defendants cite no case law in support of the proposition that the lack of a punitive damage award makes the FFCLJ an interlocutory order which can be amended more than four years after its entry.

Even if the FFCLJ could be amended pursuant to NRCP 54(b), the Motion falls within the confines of WDCR 12(8) and D.C.R. 13(7) and is thus untimely. As the language of WDCR 12(8) demonstrates, all requests for reconsideration, except a motion pursuant to NRCP 50(b), 52(b), 59 or 60, are encompassed by WDCR 12(8). The Motion is subject to these local rules because it seeks reconsideration of the Court's damages award in the FFCLJ. WDCR 12(8) requires such a motion to be filed within ten days of service of the written notice of entry of the order or judgment. While the Defendants insist the Motion does not seek reconsideration, the label assigned to a pleading does not control. *Cf. Pangallo v. State*, 112 Nev. 1533, 1535-36, 930 P.2d 100, 102 (1996) *overruled on other grounds by Griffin v. State*, 122 Nev. 737, 137 P.3d 1165 (2006) (holding improper labelling does not preclude court from considering arguments made therein). Furthermore, the Defendants

cannot and do not argue the Motion was filed within ten days of the notice of entry of the FFCLJ. The Defendants chose to pursue relief other than reconsideration by filing DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION on December 1, 2015. Additionally, the fact the Defendants now have new representation does not excuse errors of previous counsel.[6] For all of these reasons, the FFCLJ is not an interlocutory order subject to revision under NRCP 54(b).

NRCP 59 governs motions to alter or amend a judgment. NRCP 59(e) provides:

> **Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment *must* be filed no later than 28 days after service of written notice of entry of judgment.

Emphasis added. NRS 0.025(1)(c) provides:

> "Must" expresses a requirement when:
>
> (1) The subject is a thing, whether the verb is active or passive.
>
> (2) The subject is a natural person and:
>
> (I) The verb is in the passive voice; or
>
> (II) Only a condition precedent and not a duty is imposed.

NRCP 59(f) explicitly states, "[t]he 28-day time periods specified in this rule cannot be extended under Rule 6(b)." A motion to alter or amend must be in writing and state the grounds for relief with particularity and identify the relief sought. *United Pac. Ins. Co. v. St. Denis*, 81 Nev. 103, 106, 399 P.2d 135, 137 (1956). *See also* NRCP 7(b). One ground for relief under a motion to amend or alter the judgment is the correction of "manifest errors of law or fact." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010) (explaining motions

[6] Five attorneys have represented the Defendants before the Court. The Defendants were originally represented by Sean Brohawn and subsequently by H. Stan Johnson, concurrently with Gayle Kern and Mark Wray. The Defendants are currently represented by David McElhinney. On appeal, the Defendants were represented by Daniel Polsenberg, Joel Henriod and Dale Kotchka-Alanes.

to alter or amend are not permitted to correct clerical errors). A district court has considerable discretion in determining whether a motion to amend or alter should be granted. *Stevo Design, Inc. v. SBR Mktg. Ltd*, 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013). *See also AA Primo*, 126 Nev. at 582, 245 P.3d at 1193 (explaining FRCP 59 may be consulted in interpreting NRCP 59).

The Court will not alter or amend the FFLCJ because the Motion is procedurally defective and substantively without merit. First, the Motion is procedurally defective because it was untimely. The Motion was not filed until March 13, 2019, almost four years after the entry of the FFCLJ. Had the Defendants wished to request reconsideration of the FFCLJ, they certainly could have done so within the requisite twenty-eight day period. In fact, such a motion was filed by the Plaintiffs within the requisite time period and was adjudicated by the Court following the remand of this matter. *See* ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND JUDGMENT (Mar. 7, 2019).

Even though the Court could refuse to alter or amend the FFCLJ on procedural grounds alone, the Motion is also substantively without merit.[7] First, the Defendants contend they were unfairly precluded from calling their own witnesses and presenting evidence during the prove-up hearing. However, it is well-established that a district court may limit a defaulting party's participation in a prove-up hearing. *See Hamlett v. Reynolds*, 114 Nev. 863, 866-67, 963 P.2d 457, 459 (1998) (explaining party participation in prove-up hearing is decision reserved for district court). The Nevada Supreme Court has explicitly affirmed limiting a defaulting party's participation to cross-examination where default has been entered as a discovery sanction. *See id.* at 867, 963 P.2d at 459 ("Allowing Hamlett [defaulted party] to introduce evidence, which he

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[7] The Court will not consider the remaining arguments as the two arguments selected are dispositive of the Motion. *See generally Chaffee v. Smith*, 98 Nev. 222, 224, 645 P.2d 966, 967 (1982)

consistently refused to produce during discovery, would have been inequitable."). The Defendants' discovery violations were extensive: failure to respond to the first request for production of documents, despite various extensions; failure to respond to the second request for production of documents and interrogatories, despite various extensions; failure to make timely pretrial disclosures; failure to obey rulings of the Discovery Commissioner and the Court's corresponding confirming orders; and a general tendency to turn over incomplete information in a belated fashion with no legitimate explanation for the delay. *See* ORDER, p. 4-6 (Oct. 17, 2013) (striking Defendants' counterclaims). *See also* the October Order, p. 4-5 (striking Defendants' Answer and explaining Defendants' conduct has "severely prejudiced" Plaintiffs' case).

The Defendants' repeated discovery violations demonstrate the extreme inequity of allowing the Defendants to call their own witnesses during the prove-up hearing. *Cf. Foster*, 126 Nev. at 66, 227 P.3d at 1049 ("In light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."). The Court would also note the Plaintiffs requested the Defendants be almost entirely precluded from participating in the prove-up hearing, and the request was denied by the Court. *See* PLAINTIFFS' BRIEF PROPOSING PROCEDURES FOR DAMAGES PROVE-UP HEARING 1:11-24; 3:11-16, 25-28; 4:1-2 (Dec. 15, 2014). *See also* the February Order 5:3-8, 15-16. For these reasons, the Defendants were not unfairly precluded from calling their own witnesses and presenting evidence during the prove-up hearing.

The Defendants also contend Mr. Greene incorrectly calculated damages for units without rental agreements without an adequate understanding of the IHAP program. Mr. Greene generally testified that the Defendants used units in the IHAP program without compensating the owners and

attempted to drive IHAP out of business. Contrary to the Defendants' argument, Mr. Greene's direct and cross examination testimony demonstrates that he had a thorough understanding of the IHAP program.[8] While the Defendants cross-examined Mr. Greene on this point, at no point did they make an offer of proof regarding a fundamental defect in his calculation. *See* Tr. of Prove-Up Hr'g Day 2, p. 324-347. Additionally, the Defendants never requested the opportunity to call a witness to testify about the IHAP program. *Id.* Furthermore, the Defendants attempted to convince the Court of these fundamental defects during closing argument. *See* Tr. of Prove-Up Hr'g Day 3, p. 541-546. The unpersuasive nature of the argument does not create a fundamental defect where none existed. For these reasons, the Court will not alter or amend the FFCLJ.

The Court would conclude by noting the Plaintiffs did not receive "windfall damages" unsupported by substantial evidence. This argument is premised on a misunderstanding of the standard of the substantial evidence standard in the case of default. *See generally Foster*, 126 Nev. at 60, 227 P.3d at 1045. Contrary to the Defendants' assertions, the Plaintiffs were not required to prove their damages with mathematical certainty. Expecting mathematical certainty for damages in the millions and where evidence was routinely withheld by the Defendants is highly impractical and contradicts prevailing case law. *See generally Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 397, 168 P.3d 87, 97 (2007) ("[D]amages need not be proven with mathematical certainty."). Rather, the Plaintiffs were required to and did in fact provide adequate evidence of the nature and the extent of their damages. The level of particularity provided by Mr. Greene reasonably supported the amount of damages awarded to the Plaintiffs.

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[8] Mr. Greene's direct examination regarding IHAP can be found at pages 136-166 of the transcript for the first day of the prove-up hearing.

IT IS ORDERED DEFENDANTS' MOTION TO SET ASIDE JUDGMENT OR IN THE ALTERNATIVE TO AMEND JUDGMENT is hereby **DENIED**.

DATED this 2 day of October, 2019.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of October, 2019, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 2nd day of October, 2019, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JARRAD C. MILLER, ESQ.
JONATHAN JOEL TEW, ESQ.
DAVID C. MCELHINNEY, ESQ.

M. Merkouris for
Sheila Mansfield
Judicial Assistant

EXHIBIT B

Hon. Elizabeth Gonzalez (Ret.)
Sr. District Court Judge
PO Box 35054
Las Vegas, NV 89133

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ALBERT THOMAS, et. al.,

Plaintiff,

vs.

MEI-GSR HOLDINGS, LLC., a Nevada Limited Liability Company, et al

Defendant.

ORDER

Case#: CV12-02222

Dept. 10 (Senior Judge)

Pursuant to WDCR 12(5) the Court after a review of the briefing and related documents and being fully informed rules on MOTION TO AMEND ORDER CERTIFYING AMENDED JUDGMENT AS FINAL PURSUANT TO NRCP 54(b) filed on November 17, 2023. ("Motion to Alter or Amend")[1] is granted.

Dated this 28th day November, 2023.

Hon. Elizabeth Gonzalez, (Ret.)
Sr. District Court Judge

[1] The Court has reviewed DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO AMEND ORDER CERTIFYING AMENDED JUDGMENT AS FINAL PURSUANT TO NRCP 54(b) filed on November 22, 2023; and, Plaintiffs REPLY IN SUPPORT OF MOTION TO AMEND ORDER CERTIFYING AMENDED JUDGMENT AS FINAL PURSUANT TO NRCP 54(b) filed on November 27, 2023.

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 28th day of November, 2023, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

DALE KOTCHKA-ALANES
DANIEL POLSENBERG, ESQ.
DAVID MCELHINNEY, ESQ.
BRIANA COLLINGS, ESQ.
ABRAN VIGIL, ESQ.
JONATHAN TEW, ESQ.
JARRAD MILLER, ESQ.
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STEPHANIE SHARP, ESQ.
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EXHIBIT C

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Attorneys for Plaintiffs

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ALBERT THOMAS, individually; *et al*., Plaintiffs, vs. MEI-GSR HOLDINGS, LLC, a Nevada limited liability company, GRAND SIERRA RESORT UNIT OWNERS' ASSOCIATION, a Nevada nonprofit corporation, GAGE VILLAGE COMMERCIAL DEVELOPMENT, LLC, a Nevada limited liability company; AM-GSR HOLDINGS, LLC, a Nevada limited liability company; and DOE DEFENDANTS 1 THROUGH 10, inclusive, Defendants.	Case No. CV12-02222 Dept. No. OJ41

AMENDED ORDER

Pursuant to WDCR 12(5) the Court after a review of the briefing and related documents and being fully informed rules on MOTION TO CERTIFY AMENDED FINAL JUDGMENT

AS FINAL PURSUANT TO NRCP 54(b) ("Motion to Certify")[1]. In an abundance of caution, the Motion to Certify is granted. This Court expressly determines that there is no just reason for delay. Accordingly, the Court expressly directs entry of final judgment pursuant to NRCP 54(b).

While it is clear that the claim for a Receiver has previously been adjudicated through the Order Appointing Receiver and Directing Defendants' Compliance filed January 7, 2015 ("Appointment Order"), the oversight of the Receivership and the Receivership Estate is a continuing judicial responsibility. The Court has repeatedly stated that it retains jurisdiction over the dissolution plan detailed in the December 5, 2022 order, and the wind up of the Receivership. The December 5, 2022 order provides in pertinent part:

> Therefore the Court issues the following Orders:
> IT IS THEREFORE ORDERED, that the Grand Sierra unit owners are allowed to proceed with their vote to terminate the GSRUOA and election to sell the Property as a whole.
> IT IS FURTHER ORDERED that prior to a sale of the Property as a whole, the Court shall enter an Order on motion to terminate and or modify the Receivership that addresses the issues of payment to the Receiver and his counsel, the scope of the wind up process of the GSRUOA to be overseen by the Receiver, as well as the responsibility for any amounts which are awarded as a result of the pending Applications for OSC.
> IT IS FURTHER ORDERED that no sale of the units at GSRUOA or the property rights related to the GSRUOA and the units which currently compose GSRUOA shall occur until further order of this Court which includes a process for the resolution of any retained claims by Plaintiffs and procedure for the determination of fair market value of Plaintiffs' units under NRS 116.2118 et seq.
> IT IS FURTHER ORDERED that this Court shall provide supervision of the appraisal process of the units in order to assure that Plaintiffs are provided an opportunity to submit their own appraisal of their respective units for consideration and determination of the fair market value of their units and their allocated interests.
> IT IS FURTHER ORDERED that Defendants and anyone acting on their behalf are restrained from transferring, selling or otherwise alienating, the units at GSRUOA or the property rights related to the GSRUOA and the units which currently compose GSRUOA pending further order of the Court.
> IT IS FURTHER ORDERED that the bond posted by Plaintiffs in the amount of $50,000, following the Court's granting a

[1] The Court has reviewed the Motion to Certify Amended Final Judgment as Final Pursuant to NRCP 54(b) filed on May 26, 2023; Defendants' Opposition to Plaintiff's Motion to Certify Amended Final Judgment as Final pursuant to NRCP 54(b) (filed 5/26/23) filed on June 14, 2023 and Plaintiffs' Reply in Support of Motion to Certify Amended Final Judgment as Final Pursuant to NRCP 54(b) filed June 23, 2023.

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> Temporary Restraining Order on March 11, 2022, remain in place as adequate security for this Preliminary Injunction.

By choosing the process detailed under the December 5, 2022 preliminary injunction and moving forward with the termination of the GSRUOA under that framework, the Defendants have voluntarily elected to proceed with the process outlined in the December 5, 2022 order.

On February 6, 2023, the parties entered into a stipulation related to the termination and agreed that the agreement to terminate was consistent with the January 26, 2023 order filed at 11:06 a.m. That order provides in pertinent part:

> Any sale of the GSRUOA units will be conducted in accordance with the Court's December 5, 2022 Order.

Based upon the February 6, 2023 stipulation, on February 7, 2023 the Court entered an order approving the stipulation. In compliance with the February 7, 2023 order, the Receiver on February 14, 2023 executed the agreement to terminate and now is the trustee over the property interests previously held by the unit owners and GSRUOA pending approval of the sale.

As the Receiver's past due fees have now been paid, within 10 judicial days of this order, the Receiver shall file a written status report related to the status of calculation of the actual historical permissible expenses for Defendants to deduct from the revenue of the Parties units as well as the amount of correct expenses to deduct from ongoing revenue.

The Receiver's calculations, payment by Plaintiffs of any shortfall, and return of any excess expenses unilaterally deducted from the Plaintiffs' revenues by Defendants since the appointment of the Receiver may affect one of the accepted valuation methods. Additionally return of the reserve funds related to the recently completed contempt trial may affect another valuation methodology.

It is the Court's intention to complete the true up of these calculations and accounts prior to Plaintiffs submitting their appraisals for consideration by the Court as part of the dissolution plan set forth in the December 5, 2022 order.

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IT IS SO ORDERED.

DATED this ___ day of _____, 2023.

THE HONORABLE ELIZABETH G. GONZALEZ (RET.)

Submitted by:

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

/s/ Briana N. Collings
Jarrad C. Miller, Esq. (NV Bar No. 7093)
Briana N. Collings, Esq. (NV Bar No. 14694)
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