IN THE SUPREME COURT OF NEVADA

PAUL LAGUDI, an individual; and WILLIAM TODD PONDER, an individual, Appellants, vs. FRESH MIX, LLC, a Delaware limited liability company; and GET FRESH SALES, INC., A Nevada corporation, Respondents.	 Supreme Court No. 86162 District Court Case No. A-18-785391-B **MOTION TO DISMISS APPEAL**

MARK E. FERRARIO
Nevada Bar No. 1625
TAMI D. COWDEN
Nevada Bar No. 8994
JASON HICKS, ESQ.
Nevada Bar No. 13149
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135
Telephone: (702) 792-3773
Email: ferrariom@gtlaw.com
cowdent@gtlaw.com
jason.hicks@gtlaw.com

Counsel for Get Fresh Sales, Inc.

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed.

Get Fresh Sales, Inc. has no parent companies, and no public companies own 10% or more of its stock.

Get Fresh Sales, Inc. has been represented by the following law firms of record in the district court:

Greenberg Traurig, LLP

Brownstein Hyatt Farber Schreck, LLP

Pisanelli Bice, PLLC

Respectfully submitted this 13th day of April 2023.

GREENBERG TRAURIG LLP

/s/ Tami Cowden

MARK E. FERRARIO
Nevada Bar No. 1625
TAMI D. COWDEN
Nevada Bar No. 8994
JASON HICKS
Nevada Bar No. 13149
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135

Counsel for Get Fresh Sales, Inc.

I. INTRODUCTION

This Appeal should be dismissed for lack of jurisdiction. The Court has no jurisdiction under NRAP 3A(b)(1) because there is no final judgment in this matter. The Court also lacks jurisdiction over the appeal under NRS 38.247, because the challenged order does not fall within any of the six categories of orders from which an appeal may be taken under NRS 38.247(1)(a)-(f). Moreover, the basis of the Appellants' claim of jurisdiction is that the District Court's order "effectively dismissed the complaint in arbitration." *See* Docketing Statement, filed April 7, 2023, ¶ 21(b). However, not only does this inaccurately describe the order in question, but the portion of the order to which Appellants refer has already been vacated by the District Court, rendering the stated grounds for appeal moot. Accordingly, the Appeal should be dismissed.

II. PROCEDURAL HISTORY

This case concerns a business divorce between the owners of a company called Fresh Mix, LLC ("Fresh Mix"). Respondent Get Fresh Sales, Inc. ("GFSI") owns 60% of Fresh Mix and Appellants Paul Lagudi and William Todd Ponder (collectively, "L&P") own the remaining 40%.

On February 1, 2019, the District Court stayed the case and ordered the parties into binding arbitration on their non-equitable claims pursuant to Fresh Mix's

operating agreement. *See* Order Compelling Arbitration, attached as **Ex. 1.** The parties' equitable claims would then be resolved by the District Court following the arbitration. *Id.*

A. The District Court Sanctions L&P and Their Counsel for Their Improper use of a Privileged Memorandum Belonging to GFSI.

While the arbitration was pending, L&P filed a motion in the District Court that attached a privileged memorandum belonging to GFSI. GFSI then moved the District Court for sanctions based on L&P's improper use of the privileged memorandum.

Following a three-day evidentiary hearing, the District Court sanctioned L&P and their counsel for their improper use of the privileged memorandum ("Sanctions Order"). *See* Sanctions Order, attached as **Ex. 2**. The District Court also disqualified one of L&P's attorneys for his role in the misconduct. *Id.* at p. 29, ¶ 1 Moreover, because L&P had improperly used the privileged memorandum so extensively in the arbitration, including quoting from it in arbitration filings, the District Court ordered the parties to start the arbitration over with a new panel of arbitrators. *Id.* at ¶ 3.

B. L&P files a Motion to Vacate, Alter, or Amend the Sanctions Order and Twice Seeks a Premature Appeal.

On March 30, 2020, L&P filed a Motion to Vacate, Alter, or Amend the Sanctions Order pursuant to NRCP 52(b), 59(e), and 60(b) ("Motion to Vacate"). *See*

Motion to Vacate, attached as **Ex. 3**. The following day, L&P filed its first appeal, Case No. 80950. L&P admitted that its appeal in Case No. 80950 was premature because of the pending Motion to Vacate. *See* Case No. 80950, April 29, 2020, Docketing Statement, at p. 7 ("In candor, this appeal probably is premature because appellants also filed a timely motion under NRCP 52(b), 59(e), and 60(b)."). However, on September 3, 2020, this Court dismissed Case No. 80950 without prejudice, after notice of Fresh Mix's bankruptcy was filed. *See* Case No. 80950, September 4, 2020, Order of Dismissal.

While the bankruptcy stay was lifted in February 2022, L&P did not seek to have its pending Motion to Vacate ruled on in the District Court for many months. Instead, L&P first sought to reinstate the appeal filed in Case No. 80950. Following GFSI's filing of a motion to dismiss appeal both on the grounds of the pending Motion to Vacate as well as the lack of a final judgment, L&P conceded that the appeal was premature based on the Motion to Vacate. This Court dismissed Case No. 80950 on August 4. 2022. *See* Case No. 80950, Order Dismissing Appeal.

C. The District Court Vacates the Portion of the Sanctions Order that had Vacated the Arbitration and Required a New Panel.

Following dismissal of Case No. 80950, the parties agreed, and the District Court ordered, that paragraph 3 of the Sanctions Order, which had called for the discharge of the arbitration panel and ordered a new arbitration panel, was vacated**.**

See Order Granting In Part And Denying In Part Plaintiffs' Motion To Vacate, Alter, Or Amend Sanctions Order And Fresh Mix's Joinder Thereto, attached as **Ex. 4.**

III. LEGAL ARGUMENT

L&P's appeal must be dismissed for three independent reasons: (1) the Sanctions Order is not final and appealable; (2) the appeal is premature because there is no longer an order that could even arguably be said to have "effectively dismissed the complaint"; and (3) the Sanctions Order is not listed or comparable to any of the six orders from which an appeal may be taken under NRS 38.247.

A. The Sanctions Order is not Final and Appealable.

NRAP 3A(b)(1) allows a party to appeal from a "final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." An order is not final unless it disposes "of all the issues presented in the case, and leave[s] nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Brown v. MHC Stagecoach*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). The appellant bears the burden of establishing that a district court order is final and appealable. *See Moran v. Bonneville Square Associates*, 117 Nev. 525, 527, 25 P.3d 898, 899 (2001) ("the burden rests squarely upon the shoulders of a party seeking to invoke our jurisdiction to establish, to our satisfaction, that this court does in fact have jurisdiction.").

Here, there is no final judgment. Neither the Sanction Order as it was originally issued, nor as it now stands with a portion of it vacated, disposed of all claims between the parties. The legal claims remain to be resolved in the arbitration, and the equitable claims will presumably be resolved in the district court.

L&P's most recent docketing statement concedes that not all issues have been resolved, but instead claims that the District Court order had essentially dismissed the complaint in arbitration. Docketing Statement filed April 7, 2023, at ¶ 21(b). However, even if that were true, which it is not, not all claims between the parties would have been resolved. Accordingly, there is no basis for jurisdiction pursuant to NRAP 3A(b)(1).

B/ NRS 38.247 does not offer any basis for Jurisdiction.

Under NRS 38.247, a party may only take an immediate appeal from:

(a) An order denying a motion to compel arbitration;
(b) An order granting a motion to stay arbitration;
(c) An order confirming or denying confirmation of an award;
(d) An order modifying or correcting an award;
(e) An order vacating an award without directing a rehearing; or,
(f) A final judgment entered pursuant to NRS 38.206 to 38.248, inclusive.

NRS 38.247(1).

The Sanctions Order does not fall into any of these six enumerated categories. Contrary to L&P's contention, the Sanctions Order is also not "akin to the denial of a motion to compel arbitration" or "the vacatur of the arbitration panel's order." Docketing Statement filed April 7,

2023, at ¶ 21(b) (citing NRS 38.247(1)(a) and NRS 38.247(1)(e)). Both the original Sanction Order and modified Sanctions Order contemplated the arbitration proceedings continuing. At no time did the District Court deny the parties the opportunity to arbitrate their claims. In fact, the parties are presently proceeding in arbitration. There is no final award that the District Court vacated.

Even assuming an order that requires an arbitration proceeding to start anew with a new panel somehow constitutes dismissal of the complaint—it does *not*—it would be a moot point, because the portion of the Sanctions Order that required a newly constituted panel and a restart of the arbitration has already been vacated. Accordingly, there is no conceivable basis for jurisdiction under NRS 37.247.

III. CONCLUSION

For the reasons set forth above, this Court should dismiss the appeal for lack of jurisdiction.

Dated this 13th day of April 2023.

GREENBERG TRAURIG LLP

/s/ Tami Cowden

MARK E. FERRARIO, Nevada Bar No. 1625
TAMI D. COWDEN, Nevada Bar No. 8994
JASON HICKS, Nevada Bar No. 13149
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135

Counsel for Get Fresh Sales, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Greenberg Traurig, LLP, that in accordance therewith, I caused a true and correct copy of the foregoing *Motion to Dismiss Appeal* to be served via this Court's e-filing system, on counsel of record for all parties to this matter on April 13, 2023.

I further certify that a copy of the foregoing *Motion to Dismiss Appeal* was duly served upon settlement judge, Ara H. Sharinian, via email and U.S. Mail, postage prepaid, at the below noted address:

Ara Shirinian Mediation
10651 Capesthorne Way
Las Vegas, NV 89135
arashirinian@cox.net

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP.

EXHIBIT 1

James J. Pisanelli, Esq., Bar No. 4027
JJP@pisanellibice.com
Debra L. Spinelli, Esq., Bar No. 9695
DLS@pisanellibice.com
Ava M. Schaefer, Esq., Bar No. 12698
AMS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No.: A-18-785391-B Dept. No.: XI **ORDER REGARDING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY AND TO COMPEL ARBITRATION** Hearing Date: January 16, 2019 Hearing Time: 9:00 a.m.

Defendants Fresh Mix, LLC ("Fresh Mix") and Get Fresh Sales, Inc.'s ("Get Fresh") (collectively, the "Defendants") Motion to Dismiss or Stay and to Compel Arbitration (filed on December 13, 2018), having come on for hearing on January 16, 2019, in Department XI of the above-titled Court, with the Honorable Elizabeth Gonzalez presiding. James Pisanelli, Esq., Debra L. Spinelli, Esq., and Ava M. Schaefer, Esq., of PISANELLI BICE PLLC, having appeared on behalf of Defendants. Jeffery A. Bendavid, Esq., of MORAN BRANDON BENDAVID MORAN, having appeared on behalf of Plaintiffs Paul Lagudi and William Todd Ponder (collectively, the "Plaintiffs"). This Court, having reviewed and considered Motion, the Opposition

filed by Plaintiffs on January 9, 2019, the Reply filed by Defendants on January 15, 2019, the arguments of counsel presented at the hearing, and good cause appearing therefore,

The Court HEREBY FINDS as follows:

1. Plaintiffs are parties to the Limited Liability Company Agreement (the Operating Agreement") for Defendant Fresh Mix, dated January 11, 2010;
2. The terms and conditions of the Operating Agreement were adopted to govern the respective rights and obligations of the members and managers of Defendant Fresh Mix;
3. This Court is obligated pursuant to NRS 38.219 and other applicable law to determine whether a valid agreement to arbitrate exists between Plaintiffs and Defendants concerning Plaintiffs' claims arising from the terms and conditions of the Operating Agreement;
4. The Operating Agreement contains several provisions determining the methodology for resolving any disputes arising from the Operating Agreement;
5. With the exception of equitable remedies sought, Section 14.7 of the Operating Agreement obligates Plaintiffs and Defendants to arbitrate any claims or disputes arising from the Operating Agreement;
6. Section 14.8 of the Operating Agreement expressly entitles any party subject to the Operating Agreement to equitable relief in the event of an actual or prospective breach or default of the Operating Agreement; and
7. Plaintiffs' remaining claims relating to the Operating Agreement are subject to arbitration pursuant to Section 14.7 of the Operating Agreement.

In light of the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

///

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Defendants' Motion to Dismiss or Stay and to Compel Arbitration is GRANTED IN PART and DENIED IN PART as follows:

1. The Motion is GRANTED as to Plaintiffs' claims concerning the Operating Agreement, to the extent they do not demand any equitable remedies, are subject to arbitration pursuant to Section 14.7 of the Operating Agreement.

2. Consistent with the *Stipulation and Order to Continue Plaintiffs' Hearing on Preliminary Injunction and Extend the Temporary Restraining Order Entered December 11, 2018*, filed on January 3, 2019, the Temporary Restraining Order entered on December 11, 2018, including the injunctive relief granted therein, remains in full force and effect until the preliminary injunction hearing.

3. This matter is hereby stayed until such time as the required arbitration, if any, is concluded.

4. A status hearing on this matter is set for May 17, 2019, in chambers, and counsel for the parties shall file with the Court a status report prior thereto.

The Motion is DENIED as to any remaining relief requested therein

DATED: February 1, 2019.

THE HONORABLE ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

Respectfully submitted by:

PISANELLI BICE PLLC

By: _____
James J. Pisanelli, Esq., Bar No. 4027
Debra L. Spinelli, Esq., Bar No. 9695
Ava M. Schaefer, Esq., Bar No. 12698
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Fresh Mix, LLC and Get Fresh Sales, Inc.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

EXHIBIT 2

Electronically Filed
3/2/2020 12:30 PM
Steven D. Grierson
CLERK OF THE COURT

FFCL

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an Individual; and a WILLIAM TODD PONDER, an Individual,

Plaintiffs,

v.

FRESH MIX, LLC, a Delaware Limited Liability Company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

Case No.: A-18-785391-B
Dept. No.: XI

DECISION AND ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date of Hearing: January 21-22, 2020 and February 14, 2020

Time of Hearing: 9:30 a.m. / 9:00 a.m.

On January 21 and 22, 2020, and February 14, 2020, this Court conducted an evidentiary hearing on Get Fresh Sales, Inc. ("Get Fresh") and Fresh Mix, LLC's ("Fresh Mix") (Get Fresh and Fresh Mix, together "Defendants") (1) Motion for Sanctions filed on August 26, 2019, (the "Motion for Sanctions") and (2) Motion to Disqualify Fox Rothschild LLP filed on August 23, 2019 (the "Motion to Disqualify"). Based on the evidence presented, the briefs before the Court and the arguments of counsel, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. A Dispute Arises Between Get Fresh and Plaintiffs Lagudi and Ponder.

1. Fresh Mix is owned by Get Fresh (60%), Plaintiff Paul Lagudi ("Lagudi") (30%), and Plaintiff William Todd Ponder ("Ponder") (10%), each of which is Member of Fresh Mix. Get Fresh, in turn, is owned by Dominic Caldara, Scott Goldberg, and John Wise. Caldara, Goldberg, Wise, Lagudi, and Ponder are all Managers of Fresh Mix.

2. Beginning on January 11, 2010, Lagudi and Ponder were employees of Fresh Mix.

3. In late 2017/early 2018, disputes arose between Get Fresh and Plaintiffs Lagudi and Ponder (Lagudi and Ponder, together "Plaintiffs") concerning Fresh Mix. Although the parties endeavored to resolve their disputes without litigation, the prospect of litigation remained throughout 2018. By the spring of 2018, all parties had retained counsel to guide and advise them through these disputes, but also in anticipation of the arbitration mandated by Fresh Mix's Operating Agreement.

4. In April 2018, Get Fresh retained Bruce A. Leslie, Esq. for legal advice and representation related to its disputes with Plaintiffs related to Fresh Mix. Plaintiffs had already retained Jeffrey Bendavid, Esq.

B. <u>The Creation of the Confidential and Privileged Memorandum.</u>

5. Near the outset of Get Fresh's retention of Leslie, Goldberg prepared a memorandum at Leslie's request and for the purpose of seeking legal advice relating to the on-going disputes that Get Fresh was having with Lagudi and Ponder (the "Memorandum").

6. Goldberg began drafting the Memorandum on his secured drive at Get Fresh. The secured drive is only accessible via Goldberg's password-protected account, that of the Get Fresh Senior Vice President of Finance (Mary Supchak), and the members of the IT administrator group. Goldberg saved a partial draft of the Memorandum to the secured drive, and then emailed the partial draft as an attachment from his password protected Get Fresh email address to his non-Get Fresh business email address.

7. Goldberg's non-Get Fresh business email address is also password protected.

8. Goldberg finished drafting the Memorandum on his password-protected personal desktop computer and then emailed it as an attachment from his non-Get Fresh business email address to his Get Fresh email address.

9. On May 2, 2018, in anticipation of a May 3, 2018 meeting with Leslie and Get Fresh partners, Caldara and Wise, Goldberg sent an email to Leslie with the Memorandum attached, copying Caldara and Wise.

10. The Memorandum contains an assessment of Get Fresh's strengths and weaknesses regarding its dispute with Plaintiffs concerning Fresh Mix. It also contains legal strategies and a decision tree regarding potential resolution and plans.

11. Goldberg, Caldara, and Wise never printed the Memorandum or disseminated the document outside of the privileged sphere.

C. Fresh Mix Terminates Lagudi and Ponder's Employment and Get Fresh Delivers Lagudi and Ponder's Personal Effects to them via their Attorney, Bendavid.

12. Fresh Mix sent letters terminating Lagudi and Ponder's employment on November 26, 2018.

13. Supchak packed up Plaintiffs' personal items from their offices, separating personal and company documents.

14. Supchak testified that the Memorandum was not in any of the boxes of documents that she packed up when assembling the boxes of Plaintiffs' personal items.

15. On December 3, 2018, Leslie emailed Bendavid about the return of Plaintiffs' personal items from their offices at Get Fresh. Bendavid testified that he intentionally refused to respond to Leslie about where to deliver the boxes.

16. The same day, December 3, 2018, Plaintiffs initiated this action by filing the Complaint.

17. On December 4, 2018, the boxes of Plaintiffs' personal effects were delivered to Bendavid's office by Get Fresh employees Scott Putske and Marcus Sutton. A receipt of the boxes was executed by an employee at Bendavid's office and returned to Get Fresh.

18. Bendavid did not see the boxes being delivered and he did not know how long the boxes were in his office before he saw them.

19. Bendavid testified that the Memorandum was purportedly sticking up out of one of the boxes of Plaintiffs' personal items, rolled in half but without a crease.

20. Bendavid testified that he did not see anyone place the Memorandum into one of the boxes.

21. Both Putske and Sutton testified that neither of them saw a piece of paper sticking out of any of the boxes they delivered, no one asked them to deliver any paper/memorandum, and no one asked them to place a piece of paper such that it was sticking out of any of the boxes when they were delivered.

22. Ponder was at Bendavid's office reviewing documents and meeting with one of Bendavid's associates the day the boxes were delivered, *i.e.*, December 4, 2018.

23. Bendavid testified that he did not and could not see if Ponder had access to the boxes prior to Bendavid seeing the boxes after they were delivered to his office.

24. At Bendavid's request, Ponder took all of the boxes home with him that same day, and went through each one, including the boxes containing Lagudi's personal items.

25. Ponder testified that the boxes he took home with him did not contain the Memorandum. According to Plaintiffs, Bendavid had taken it out of a box and not provided it to Ponder.

26. Bendavid testified that he removed the Memorandum from the box, initially thinking it was an inventory or receipt, but did not look at the document at that time. Instead, he read and digested the Memorandum either later that same day, on December 4, 2018, or the following day, December 5, 2018.

27. Bendavid testified that, upon his review of the Memorandum, (a) he recognized the Memorandum was a document belonging to his adversaries about what they wanted to do in this dispute against Plaintiffs; (b) he understood that the Memorandum contained concepts of litigation strategy of his adversaries; and (c) he understood the Memorandum contained strengths and weaknesses of Defendants' case.

28. Bendavid testified that he did not know, when he read the Memorandum, who drafted it, although he knew it was not drafted by his clients, Lagudi or Ponder.

29. Bendavid testified that both the drafter and the source of the Memorandum were anonymous to him.

30. Nevertheless, Bendavid said that he assumed the Memorandum was voluntarily and intentionally sent by an authorized Get Fresh representative and stated also his belief that it was not privileged because it was a threat.

31. Although he had interacted with Leslie regarding Plaintiffs' personal items in their office, Bendavid did not alert Leslie nor did he alert any other counsel for Defendants to his receipt of the Memorandum.

32. Bendavid submitted a declaration in which he stated that "had [he] had the Memo [while drafting the Complaint and TRO], we would have referred to it in the Complaint and attached it to the Motion for Preliminary Injunction and TRO." (Ex. 1 to Pls.' Second Suppl. Opp'n, Feb. 3, 2020, Bendavid Decl. ¶ 23.)

33. Bendavid testified that he did not inform his clients, Lagudi and Ponder, of the Memorandum for weeks. During a meeting at his office weeks after receipt, Bendavid told Plaintiffs about the Memorandum, and read them excerpts from the Memorandum, but did not provide them copies. Lagudi and Ponder did not ask for copies of the Memorandum.

D. Bendavid Transitions Out of the Case and Sends the Memorandum to Stern & Eisenberg and Fox Rothschild.

34. Plaintiffs retained Stern & Eisenberg in or around March of 2019. On March 1, 2019, Evan Barenbaum, Esq., of Stern & Eisenberg, first appeared in the arbitration compelled by this Court, pending before the American Arbitration Association.

35. Berkley testified that Barenbaum contacted Fox Rothschild LLP about representing the Plaintiffs. Brian Berkley, Esq., and Mark Connot, Esq., both of Fox Rothschild LLP, subsequently interviewed to represent Plaintiffs.

36. Plaintiffs retained Fox Rothschild in March of 2019. Fox Rothschild attorneys Berkley and Connot testified that they were co-lead counsel for Plaintiffs in this litigation and the arbitration.

37. Upon retention, Fox Rothschild subsequently received the case file. Berkley did not recall whether the file transfer was in electronic or paper form, nor did he recall whether the

files came directly from Bendavid, or went through Barenbaum. Connot testified that to the best of his recollection, the bulk, if not the entirety, of the file came in an electronic format.

38. Fox Rothschild admits to learning of the Memorandum upon its retention, *i.e.*, in March of 2019. Berkley testified that he first received the Memorandum from Barenbaum in March 2019 as an attachment to an email. Fox Rothschild did not log this communication on the privilege log ordered by this Court as part of the sanctions discovery.

39. Stern & Eisenberg's redacted billing records reveal that it, too, received the Memorandum upon retention. Specifically, the billing records reveal that, on March 13, 2019, Barenbaum spoke to "Mr. Bendavid re delivery of Get Fresh document."

40. Despite multiple interactions with Defendants' counsel, including interactions directly related to the contents of the boxes delivered to Plaintiffs on December, 4, 2018 and an inspection of another set of boxes in the spring of 2019, neither Fox Rothschild nor Stern & Eisenberg notified Get Fresh or their counsel of their receipt or possession of the Memorandum.

41. Berkley testified that, prior to him reading the Memorandum, he asked Barenbaum about the circumstances regarding the delivery of the Memorandum to Bendavid. Berkley and Connot testified that Barenbaum told them that the Memorandum was delivered with a box of documents when Lagudi and Ponder's employment was terminated, and that the Memorandum was viewed as a threat. Barenbaum, as well as Lagudi and Ponder, told Berkley that the Memorandum came from Get Fresh.

42. Connot testified that there was no specific knowledge or evidence of how the Memorandum ended up in Plaintiffs' boxes; Bendavid did not have any direct knowledge regarding who put the Memorandum in the boxes.

43. Prior to reading the Memorandum, Berkley knew that it was not Lagudi or Ponder's document, and that neither of them had written it. Around the time he read the Memorandum, or shortly thereafter, Connot assumed that it was Defendants' record, and that it was Defendants' document.

E. Plaintiffs Weaponize the Memorandum, and Refuse to Return, Sequester, or Destroy It, Notwithstanding Multiple Court Orders.

44. On July 17, 2019, Plaintiffs filed a motion to lift the stay that this Court entered pending the arbitration, and to amend their complaint.

45. Get Fresh and Fresh Mix filed their opposition on July 25, 2019.

46. In preparation of their reply in support of their motion to stay (the "Reply"), on July 31, 2019, Plaintiffs attorney, Barenbaum, emailed his clients Lagudi and Ponder, as well as his Fox Rothschild co-counsel, Connot, Berkley,[1] and Emily Bridges, Esq., and a colleague at his own firm, Thomas Shea, Esq., attaching the Memorandum to his email.

47. Plaintiffs logged this July 31, 2019 email communication on their December 13, 2019 privilege log, and identified the Memorandum attached thereto as a Word document.

48. Fox Rothschild attorney Berkley was the lead drafter of the Reply. Fox Rothschild attorney Connot was involved in editing and revising the Reply. Berkley and Connot conferred about the strategy to use the Memorandum in connection with the Reply, and agreed to do so. Berkley further testified that Barenbaum participated in the decision to put the Memorandum into the public record.

49. Plaintiffs filed their Reply on Thursday, August 1, 2019. The Reply contained arguments based upon the Memorandum, including quotations from the Memorandum and paraphrases of its content. Plaintiffs also attached the Memorandum to the Reply as Exhibit T. Despite filing a motion to seal and redact associated with their Reply and certain exhibits thereto, Plaintiffs filed the Memorandum in the public record.

50. Plaintiffs' Reply was the first notice Defendants received of Plaintiffs' possession of the privileged Memorandum.

---

[1] Plaintiffs filed a Motion to Associate Counsel, seeking an order permitting Berkley to practice in Nevada pursuant to SCR 42 on August 20, 2019. Defendants filed a Response thereto on August 30, 2019, and the Court subsequently granted the Motion to Associate Counsel on October 4, 2019.

51. Upon receipt and review of the Reply, Get Fresh's counsel immediately took action to protect Get Fresh's privileges.

52. On Friday, August 2, 2019, James J. Pisanelli, counsel for Get Fresh and Fresh Mix, called and spoke to Plaintiffs' counsel, Connot, asserted Get Fresh's privilege claim over the Memorandum, asked how Plaintiffs acquired the Memorandum, and stated that Get Fresh would be seeking Court relief. Connot stated that he did not know that the Memorandum was privileged because it "seems to be internal" and references getting litigation counsel.

53. Get Fresh moved promptly and, that same day, submitted an Emergency Motion to Strike the Reply and Exhibit T, unequivocally asserting its privilege claim over the Memorandum, asking that the offending Reply and Exhibit T be struck, and that Plaintiffs be directed to sequester the Reply, the Memorandum, and any related notes or memos from use and review.

54. Fox Rothschild claimed that they sequestered the Memorandum once Get Fresh alerted them of its privilege claim.

55. Connot submitted a declaration in which he stated that "While I disagreed with whether the document was privileged, I immediately sequestered the Memo and advised by co-counsel at Fox Rothschild and Stern Eisenberg, as well as my clients, to sequester the Memo."

56. Similarly, Berkley submitted a declaration stating that "[u]pon receipt of the notice of privilege, I stopped review of the Memo . . . ."

57. Despite sequestration, Fox Rothschild took the position that it was permitted to review and use the Memorandum (including reference to its substance) to argue that it was not privileged.

58. The next business day, Monday, August 5, 2019, Get Fresh and Fresh Mix served its privilege log related to the Memorandum. (*See* Ex. J5, Defs. Fresh Mix & Get Fresh's Initial Privilege Log, Aug, 5, 2019.)

59. Rather than sequester the Memorandum upon notice of Get Fresh's privilege assertion, on Sunday, August 4, 2019, Plaintiffs again reviewed and digested the Memorandum to prepare and file their Opposition to the Emergency Motion. Throughout this Opposition, Plaintiffs ***again*** refer to, discuss, quote, and paraphrase the privileged Memorandum.

60. Berkley was the lead drafter of the August 4, 2019 Opposition to the Emergency Motion. Connot edited the Opposition.

61. At the hearing on Plaintiffs' Motion to Lift Stay and Amend the Complaint held on Monday, August 5, 2019, the Court struck Exhibit T (the Memorandum) from the record and permitted Get Fresh and Fresh Mix to move to redact both Plaintiffs' August 1, 2019 Reply and August 4, 2019 Opposition. The Court stated:

> I am not going to impede any efforts you make to obtain the ability to use Exhibit T in whatever format. And you guys are going to fight, and at that point I assume I'll do an in-camera review of Exhibit T and then make a decision . . . But I'm not there. . . . I'm going to mark the emergency motion, which I did not set for hearing, and the opposition to the emergency motion which I did not set for hearing as Court's Exhibit 1. I'm going to place them in a sealed envelope, because they have some reference to the document that I'm granting the striking of.

62. The Court's order was entered on August 22, 2019. Get Fresh and Fresh Mix subsequently moved to redact the briefs, and such relief was granted.

63. Notwithstanding the Court's order and statements during the August 5, 2019 hearing, Fox Rothschild took the position that it could nevertheless use the substance of the Memorandum to argue that it was not privileged or otherwise subject to protection.

64. Thus undeterred, Plaintiffs continued to use and paraphrase the Memorandum. Plaintiffs' August 12, 2019 Response to Amended Demand for Arbitration and Counterclaims (the "Response") submitted to the AAA in the arbitration compelled by this Court, paraphrases and uses exact words and phrases from the Memorandum (just omitting the quotation marks). (*See* Ex. J6, admitted under seal, ¶¶ 243, 244, 245, 300, 305, and p. 46:13-14.)

65. Berkley was the lead drafter of the Response. Connot was involved in analyzing, editing, and revising the Response. Other attorneys at Fox Rothschild (*e.g.*, Emily Bridges) worked on the Response, as did attorneys at Stern & Eisenberg.

66. Berkley and Connot each claim that they did not review the Memorandum when working on the Response, but the exact language of the Memorandum had been part of their institutional knowledge. Specifically, Berkley and Connot each submitted declarations stating

that they did not "have any intent to include references to the Memo or language from the Memo in the Arbitration Response."

67. Berkley testified that he did not intentionally incorporate direct language from the Memorandum into the Response. "That language was at that time in my head because I had written that multiple times during that one week." (Feb. 14, 2020 Hr'g Tr. 89:12-14; *see also id.* at 126:1-3 ("Those – those words were in my mind at that time, and the concepts and the actions that were being taken in real time by the defendants was also fresh in my mind.") and 131:1-20.[2])

68. Plaintiffs attached or relied upon their August 12, 2019 Response in briefs they filed both in the arbitration and this action.

69. Plaintiffs cited to and relied upon the Response within a Rule 37 Motion for Advancement of Indemnification under the Operating Agreement, filed on September 11, 2019. In their Motion for Advancement, Plaintiffs directed the arbitration panel to the very section of the Response that parroted the Memorandum.

70. Plaintiffs later attached the Response as Exhibit A to their Motion to Compel Production of Books and Records, filed on September 30, 2019 with this Court. Plaintiffs again directed the Court to the very section of the Response that parroted the Memorandum.

---

[2] The final excerpt, 131:1-20 from the third day of the evidentiary hearing is as follows:

> THE COURT: Okay. So explain to me why the terms from the memo appear less than a week later in the reply you filed in the arbitration.
>
> THE WITNESS [BERKLEY]: Because those terms were fresh in my mind at that time because I had written those terms in multiple filings prior to the August 5th hearing and . . . and the concepts were fresh in my mind, as well, because both the writing of that as well as independently I had – you know, those actions were being taken by the plaintiffs – or the defendants. Excuse me.
>
> THE COURT: So the words were embedded in your mind because you'd previously quoted from the memo and used it in the reply brief?
>
> THE WITNESS: At that time they were, yes.
>
> THE COURT: So you couldn't forget what was in the memo and not use it as I directed because it was so fresh in your mind??
>
> THE WITNESS: At that time, yes.

71. Trying to bolster their argument that facts that independently supported the offending allegations in their Response, Plaintiffs again draw from the Memorandum in their February 3, 2020 Supplemental Brief.

72. On August, 23, 2019, Get Fresh and Fresh Mix filed the Motion to Disqualify Fox Rothschild LLP.

73. On August 26, 2019, because of Plaintiffs' continued use of the Memorandum and refusal to sequester it, Get Fresh and Fresh Mix filed a Motion for Claw Back, Discovery, and Sanctions Related to Plaintiffs and Their Counsel's Improper Possession and Use of Exhibit T and Other Privileged and Confidential Information.

74. On September 5, 2019, Plaintiffs filed their Opposition to the Motion for Claw Back and Counter-Motion, ***again*** referring to and discussing the Memorandum, and ***again*** attaching the Memorandum as an exhibit (Exhibit A).

75. Get Fresh and Fresh Mix moved to strike the Memorandum and all references to and discussion of the Memorandum in the brief, and this Court granted the requested relief via its order entered on September 25, 2019. Specifically, this Court ordered:

> Defendants' request for claw back is GRANTED in that Plaintiffs shall sequester the memorandum identified as Exhibit T to Plaintiffs' Reply in Support of Motion to Lift Stay and Amend Complaint from review and/or use. Plaintiffs may not quote, or discuss the content of the memorandum in any further pleadings or other papers other than in an evidentiary hearing or otherwise relating to the privileged nature of the document or the motion for disqualification.

76. Get Fresh and Fresh Mix subsequently moved to redact Plaintiffs' Opposition, and this Court granted the requested relief.

77. Plaintiffs filed another brief seeking to inject the Memorandum into the record, despite court orders and multiple filings and hearings.

78. In their September 19, 2019 motion, Plaintiffs moved to have the Court accept its offending Opposition to the Motion to Strike under seal and the Memorandum. The Court denied Plaintiffs' request in an October 8, 2019 order:

> ***The Court previously ordered the memorandum*** identified as Exhibit T to Plaintiffs' Motion to Lift Stay and Amend Complaint

> ***sequestered***. As a result, Plaintiffs shall not quote or summarize Exhibit T in any briefing until further order of the Court.

79. Despite this history, Plaintiffs tried again, filing a Motion to Clarify the Procedure related to this evidentiary hearing. In response, the Court reiterated its prior rulings:

> The Court ***previously*** made a decision that the memorandum identified as Exhibit T to Plaintiffs' Motion to Lift Stay and Amend Complaint ("The Memorandum") is facially privileged based upon the information that was provided to the Court.
>
> . . .
>
> Plaintiffs ***shall continue*** to sequester the Memorandum, and may not quote, summarize, or discuss the content of the Memorandum.

(Order on Pls.' Mot. to Clarify the Procedure re: Privilege Determination, dated January 8, 2020.)

80. Plaintiffs' counsel held, read, reviewed, and referred to the Memorandum throughout the evidentiary hearing on January 21 and 22, 2020.

81. Connot used the Memorandum during the examination of Scott Goldberg, while Berkley read along to assist Connot in the cross-examination.

82. Berkley and Connot each submitted declarations testifying that, after reviewing their billing records, they estimated to have spent less than two hours reviewing the Memorandum since being retained by Plaintiffs.

83. Although Berkley had access to Stern & Eisenberg and Fox Rothschild's full billing records regarding Plaintiffs' representation, he testified that he did not review these records for purposes of determining the full scope of the Memorandum's circulation and digestion. Berkley also testified that he did not ask his colleagues, other than Connot, how broadly the Memorandum had been circulated and digested.

84. Connot also reviewed billing records, reading in detail his time entries relating to the Memorandum.

85. Fox Rothschild did not take any action to remove the language from the Memorandum from the arbitration. The information is presently in the arbitration record.

86. Following the first two days of the evidentiary hearing on January 21 and 22, 2020, Berkley directed Bridges, an associate with Fox Rothschild, to run searches of the words

located in paragraphs 243 - 245 of the Response that are from the Memorandum against the other filings in the Arbitration. Berkley testified that Bridges emailed him the result of those searches and that there were no hits. The search was limited to the exact words from the Memorandum that were used in the Response, and did not capture themes derived from the Memorandum.

F. Plaintiffs Received Other Get Fresh Documents from Third Parties and Did Not Disclose Their Receipt to Defendants.

87. On September 25, 2019, the Court granted Get Fresh and Fresh Mix's request for discovery related to Plaintiffs' and their counsel's improper possession and use of the Memorandum and other privileged and confidential information. (*See* Order, dated Sept. 25, 2019.)

88. While conducting the Court-ordered discovery, Plaintiffs revealed, for the first time, that they had received documents from third parties unrelated to the litigation. Specifically, Plaintiffs revealed that they received documents from two disgruntled former Get Fresh employees.

89. Plaintiffs received confidential documents from David Heinrich, Get Fresh's former IT director. Heinrich left Get Fresh in 2014.

90. Ponder testified that in August of 2018, Heinrich informed him that he was in possession of certain Get Fresh purchase orders.

91. Later, in 2019, Heinrich gave copies of confidential Get Fresh records, specifically purchase orders ("POs"), to Lagudi. Some of these POs bear print dates ***years after*** Heinrich separated from Get Fresh, e.g., from September 2018.

92. Lagudi testified that in September of 2019, Matthew McClure emailed him confidential Get Fresh documents and records related to a recall from 2016. McClure had previously worked as a food safety consultant for Get Fresh, and left Get Fresh in 2017.

93. Rather than provide copies of the documents to Get Fresh, Lagudi provided these documents to his attorneys to determine how best to use them in the pending dispute with Defendants.

94. Plaintiffs made allegations in the arbitration related to these documents, Plaintiffs did not provide any notice to Defendants of their receipt of confidential company records outside of the ordinary discovery process from either a third party unrelated to the litigation or a person unauthorized to access or provide confidential company records.

95. Plaintiffs also did not provide Defendants' counsel with the particular details about how, when, and from whom they obtained the documents.

96. Any finding of fact stated above that is more appropriately deemed a conclusion of law shall be so deemed.

CONCLUSIONS OF LAW

A. Plaintiffs Were Required to Give Prompt Notice of Their Receipt of Their Adversary's Confidential and Privileged Document.

1. Under Nevada law, an attorney who receives confidential or privileged documents of its adversary regarding a case from an anonymous source or a third party unrelated to the litigation must promptly notify opposing counsel. *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 697, 262 P.3d 720, 725 (2011).

2. The required notice "must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery and describe, with particularity, the facts and circumstances that explain how the document or evidence came into counsel's or his or her client's possession." *Id.*

3. This notice requirement is designed to prevent parties from receiving an adversary's confidential or privileged documents outside the normal course of discovery and process, and "lying in wait" to announce their procurement and use the document against their adversary.

4. The notice requirement provides the owner of the document(s) an "opportunity . . . to register an objection and demand return and non-use. . . ." *Id.* at 694, 262 P.3d at 723.

5. If an attorney fails to comply with this notice requirement, the attorney "risk[s] being in violation of his or her ethical duties and/or being disqualified a counsel." *Id.* at 697, 262 P.3d at 725.

6. Plaintiffs testified that they first received the Memorandum in boxes of Plaintiffs' personal items from their offices at Get Fresh delivered to Bendavid in early December 2018.

7. Bendavid discussed the delivery of those boxes over email with Leslie, counsel for Defendants, but intentionally refused to respond to Leslie about where to deliver the boxes.

8. The boxes were delivered on December 4, 2018, the day after Plaintiffs filed a complaint in this action and the very day Plaintiffs submitted their application for temporary restraining order to this Court in this action.

9. Discovery had not yet commenced, and therefore documents received were received outside the normal course of discovery.

10. According to Bendavid, the Memorandum was purportedly sticking up out of one of the boxes of Plaintiffs' personal items. While he initially set it aside thinking it was an inventory, he read and digested the Memorandum later that same day, December 4, 2018, or the following day, December 5, 2018.

11. Bendavid testified that (a) he recognized the Memorandum was a document belonging to his adversaries about what they wanted to do in this dispute against Plaintiffs; (b) he understood that the Memorandum contained concepts of litigation strategy of his adversaries; and (c) he understood the Memorandum contained strengths and weaknesses of Defendants' case.

12. While Plaintiffs and Bendavid testified that they "believe" the Memorandum was "voluntarily" or "intentionally" provided to Bendavid by Goldberg, Plaintiffs failed to offer evidence, only supposition, to support this theory.

13. Bendavid testified that he did not see the boxes being delivered, he did not see anyone place the document in a manner sticking up out of one of the boxes, and he did not know how long the boxes were in his office before he saw them.

14. Plaintiffs themselves recognized that the Memorandum was not an item that had been in their offices and therefore should not have been in boxes that were delivered to them.

15. Despite Bendavid's admissions regarding the general subject matters of the contents of the privileged Memorandum, its suspicious receipt, and his communications with

Leslie about delivery of personal items but no company documents, Bendavid assumed that the Memorandum was voluntarily or intentionally sent by an authorized Get Fresh representative.

16. Nevada law requires more than an "assumption" to avoid the prompt notice obligation upon receipt of an adversary's confidential or privileged document outside the normal course of discovery. If an assumption were sufficient, the rule would be set aside merely by one's claim, without more, that their opponent gave it to them for any reason one can conjure.

17. It is not credible that Plaintiffs believed the Memorandum was a threat delivered to them, because it revealed not only Get Fresh's strengths and weaknesses, but also the options for potential resolution and plans.

18. Both the drafter and the source of the Memorandum were anonymous.

19. The notice requirement established by the Nevada Supreme Court in *Merits Incentives* was triggered.

B. Plaintiffs Failed to Give Prompt Notice of Their Receipt of Their Adversary's Confidential and Privileged Document.

20. Bendavid testified that he did not provide notice to Leslie or any other counsel for Defendants of either his receipt of the Memorandum or provide with any particularity the facts and circumstances that explain how the document or evidence came into his possession.

21. It is undisputed that neither Fox Rothschild nor Stern & Eisenberg provided notice to Leslie or any other counsel for Defendants of either their receipt of the Memorandum or any facts and circumstances that explain how the document or evidence came into their possession.

22. Failure to comply with the notice requirement and related ethical obligations may result in counsel's disqualification, even when the receipt of the privileged information was through no fault of their own. *Merits Incentives*, 127 Nev. at 697, 262 P.3d 725.

23. Fox Rothschild associated with Bendavid as counsel for Plaintiffs on May 16, 2019. Stern & Eisenberg is counsel for Plaintiffs in the arbitration (compelled by this Court). Both Fox Rothschild and Stern & Eisenberg took over as counsel for Plaintiffs in Bendavid's stead in or around March 2019. Bendavid's formal notice of withdrawal was filed on July 3, 2019.

24. Bendavid testified to transferring his file to Fox Rothschild. Bendavid's billing records confirm this copying, as well as receipt and review of the files by both Fox Rothschild and Stern & Eisenberg.

25. The Stern & Eisenberg billing records reflect that on March 13, 2019, Barenbaum spoke to "Mr. Bendavid re delivery of Get Fresh document."

26. Fox Rothschild represented, and it is in the record, that Bendavid imputed his knowledge concerning the Memorandum to Fox Rothschild. (*See* Pls.' First Suppl. Opp'n, 9:6-11 ("When Mr. Bendavid provided the Fresh Mix Memo to Fox Rothschild, he imputed this knowledge. Accordingly, Fox Rothschild, after considering whether the Fresh Mix Memo was a 'corporate work document,' and the circumstance between the parties at the time, had no reason to identify or suspect the Fresh Mix Memo to be privileged." (internal citation omitted).)

27. Fox Rothschild also represented, and it also is in the record, that they, too, reviewed and digested the Memorandum. (*See, e.g., id.* at 3:23-25 ("Upon being retained by Plaintiffs, Fox Rothschild learned of the Fresh Mix Memo and, like Mr. Bendavid, recognized that the Fresh Mix Memo was not privileged."), 10:6-9 ("Fox Rothschild abided by its ethical obligations at all times and reviewed the Fresh Mix Memo before Defendants ever claimed privilege. Mr. Bendavid knew upon reading the document that it was not privileged. Fox Rothschild attorneys reached the same conclusion.").)

28. It is undisputed that the first time Plaintiffs or any of their counsel provided notice to Defendants and their counsel of their possession of the Memorandum was on August 1, 2019, when Plaintiffs filed their Reply in Support of their Motion for Leave to Amend, attached the Memorandum to the Reply as an exhibit, and quoted extensively from the Memorandum.

29. According to Plaintiffs' testimony and argument in the record, they possessed the Memorandum without providing notice to Defendants or their counsel from December 4, 2018 to August 1, 2019, when they affirmatively used it, quoted from it, and attached it to a public filing in support of a motion they filed to advance their position.

30. Each and all of Plaintiffs' counsel, Bendavid, Fox Rothschild, and Stern & Eisenberg (via his representation of Plaintiffs in the arbitration this Court compelled) failed to comply with the notice requirement set forth in *Merits Incentives*.

31. Having received the Memorandum under suspicious circumstances in December 4, 2018 (by Bendavid) and the spring 2018 (by Stern & Eisenberg and Fox Rothschild), yet not providing any notice until affirmatively using the Memorandum in a Reply brief on August 1, 2019, Plaintiffs' counsel did "lie in wait" to provide notice only when it worked for them in the dispute against their adversary, and denied Get Fresh of any opportunity to object, demand return of the document, and non-use of the document. This is the exact type of behavior the Nevada Supreme Court criticized in *Merits Incentives*. 127 Nev. at 699, 262 P.3d at 727.

C. The Memorandum and Related Communications are Protected by the Attorney-Client Privilege and Work Product.

32. The attorney-client privilege protects the disclosure of a confidential communication "[b]etween the client or the client's representative and the client's lawyer or the representative of the lawyer" "for the purpose of facilitating the rendition of professional services." NRS 49.095.

33. "A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the client or those reasonably necessary for the transmission of the communication. NRS 49.055.

34. Nevada's work-product doctrine is set forth in NRCP 26(b)(3). It "protects documents with two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 383, 399 P.3d 334, 347 (2017) (citing *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004)) (internal quotation marks omitted).

35. The Nevada Supreme Court adopted the "because of" test to determine whether material was prepared in anticipation of litigation, and thereby satisfy the first requirement for

work-product protection. "The anticipation of litigation must be the *sine qua non* for the creation of the document – but for the prospect of that litigation, the document would not exist." *Wynn Resorts*, 133 Nev. at 383-84, 399 P.3d at 347-48 (internal quotation marks and citation omitted).

36. The party claiming privilege bears the burden of establishing the privilege, and does so by serving a privilege log. *See Rogers v. State*, 127 Nev. 323, 330, 255 P.3d 1264, 1268 (2011) (the proponent of privilege bears the burden of establishing the privilege); *Alboum v. Koe, M.D., et al.,* Discovery Commissioner Opinion #10, 15 (Nov. 2001) (a party provides a factual basis for its claims of privilege by producing a privilege log); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) ("In essence, the party asserting the privilege must make a *prima facie* showing that the privilege protects the information the party intends to withhold. We have previously recognized a number of means of sufficiently establishing the privilege, one of which is the privilege log approach." (citations omitted).

37. "The party asserting the privilege has the burden of proving its applicability, including that the party has not waived it." *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1040 (D. Nev. 2006) (citing *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981)).

38. "[A] corporation's current management controls the [attorney-client privilege] 'to refuse to disclose, and to prevent any other person from disclosing, confidential communications.'" *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 643, 656, 331 P.3d 905, 914 (2014).

39. "Courts in the Ninth Circuit consider the circumstances surrounding the disclosure when deciding if an inadvertent disclosure has waived the privilege. These courts typically apply a five-factor test to determine the waiver issue. These factors include: (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness." *IGT v. All. Gaming Corp.*, 2-04-CV-1676-RJC RJJ, 2006 WL 8071393, at *6 (D. Nev. Sept. 28, 2006) (quotation marks and citations omitted).

40. The Memorandum was prepared by Goldberg, owner and Chief Financial Officer for Get Fresh in April/May 2018, at the request of counsel, Leslie, providing confidential information for the purpose of seeking legal advice relating to the on-going dispute between the parties.

41. The Memorandum is facially and substantively privileged.

42. Get Fresh has maintained the confidentiality of the Memorandum since its creation.

43. Get Fresh has ensured the password protected nature and secured access to email and the related server.

44. None of the individuals on the email (Goldberg, Caldara, Wise, and Leslie) printed the Memorandum. None of them have ever disseminated the Memorandum outside of the privileged sphere.

45. Get Fresh did not voluntarily disclose the Memorandum to Plaintiffs or their counsel.

46. There is no indication that Get Fresh waived its claim to privilege or protection over the Memorandum. Any assumption as to how the document got into Plaintiffs or their counsel's possession is not controlling in a determination of waiver.

47. Upon learning that Plaintiffs possessed the Memorandum, Get Fresh alerted Plaintiffs and their counsel to its claim of privilege fewer than 24 hours later, repeatedly sought (and obtained) relief from the Court in order to keep the Memorandum out of the public record.

48. Get Fresh served a privilege log on August 5, 2019, in which Get Fresh asserted privilege over the Memorandum and communications related thereto.

D. Plaintiffs' Counsel Did Not Return or Sequester the Memorandum as Required By NRCP 26(b)(5)(B).

49. Once a party is placed on notice that information is subject to a claim of privilege or protection, NRCP 26(b)(5)(B) enumerates an affirmative obligation upon a party and their

counsel to "promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved."

50. Get Fresh informed Plaintiffs, through their counsel, of their claims of privilege and protection over the Memorandum on August 2, 2019. This was fewer than twenty-four hours after learning that Plaintiffs were in possession of the Memorandum.

51. Get Fresh served a privilege log asserting their claims of privilege and protection over the Memorandum and communications related thereto on August 5, 2019.

52. Plaintiffs admit that they did not "return, sequester, or destroy" the Memorandum after Get Fresh notified them of their claims of privilege and protection August 2, 2019.

53. Plaintiffs admit that they relied upon the Memorandum and its substance to argue that it was not privileged after they were put on notice of Get Fresh's claims.

54. It is "not [the receiving party's] prerogative to unilaterally determine whether the information received anonymously was truly proprietary, confidential, privileged, or some combination of those labels, and use the information it deem[s] appropriate." *Raymond v. Spirit AeroSystems Holdings, Inc.,* No. 16-1282-JTM-GEB, 2017 WL 2831485, at *15 (D. Kan. June 30, 2017) (discussing the analogous FRCP 26(b)(5)(B)).

55. "Rule 26(b)(5)(B) could not be more clear. Once a producing party claims a privilege in materials that have been produced, no further use is to be made of the information until the claim of privilege is resolved. As far as Rule 26(b)(5)(B) is concerned, it is immaterial if [the receiving parties] disagree with the claim of privilege. [The receiving parties] were prohibited from making any use of the information, period." *Mafille v. Kaiser-Francis Oil Co.*, 18-cv-586-TCK-FHM, 2019 WL 3219151, at *1 (N.D. Okla. July 17, 2019) (discussing the analogous FRCP 26(b)(5)(B); *Jensen v. Indianapolis Public Schools*, No. 1:16-cv-02047-TWP-DLP, 2019 WL 911241, at *3 (S.D. Ind. Feb. 22, 2019) (while attaching a cover letter and filing a motion for the court to make a privilege determination is consistent with FRCP 26, weaponizing the documents by referencing its contents violates the rule).

56. Plaintiffs continued to use and rely upon the Memorandum, as stated above.

57. Plaintiffs and their counsel continued to use the Memorandum in conjunction with the arbitration, using exact words and phrases from the Memorandum (just absent the quotation marks) and paraphrasing information from it in their Response to Amended Demand for Arbitration for Counterclaims. Plaintiffs and their counsel referred to and attached their Response to briefing both in the arbitration and this action.

E. Limited Disqualification is Necessary.

58. Disqualification may be necessary to prevent disclosure of confidential information that may be used to an adverse party's disadvantage. *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 53, 152 P.3d 717, 743 (2007).

59. "Where the 'asserted course of conduct by counsel threatens to affect the integrity of the adversarial process, [the court] should take appropriate measures, including disqualification, to eliminate such taint.'" *Richards v. Jain*, 168 F. Supp. 2d 1195, 1200 (W.D. Wash. 2001) (modifications in original) (quoting *MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991)); *cf. Clark v. Superior Court*, 196 Cal. App. 4th 37, 55 (Cal. App. 2011) (describing disqualification "as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed").

60. Where privilege information has been disclosed and misused, doubts should generally be resolved in favor of disqualification. *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000).

61. The Nevada Supreme Court has found that "there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified." *Merits Incentives, LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 689, 698, 262 P.3d 720, 726 (2011).

62. The Court "has the power, under appropriate circumstances, to disqualify an attorney even though he or she has not violated a specific disciplinary rule." *In re Meador*, 968 S.W. 2d 346, 351 (Tex. 1998).

63. When determining whether to disqualify an attorney who received an opponent's privileged information outside the course of discovery, the trial court should consider, in addition

to "all the facts and circumstances to determine whether the interests of justice require disqualification," the following non-exclusive factors:

> 1) Whether the attorney knew or should have known that the material was privileged;
>
> 2) The promptness with which the attorney notifies the other side that he or she has received its privileged information;
>
> 3) The extent to which the attorney reviews and digests the privileged information;
>
> 4) The significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> 5) The extent to which movant may be at fault for the unauthorized disclosure; [and]
>
> 6) The extent to which the nonomovant will suffer prejudice from the disqualification of his or her attorneys.

Merits Incentives, 127 Nev. at 699, 262 P.3d at 726-27 (citations and quotation marks omitted).

64. While it is unclear how the Memorandum came to be in the boxes of Plaintiffs' personal effects delivered to Bendavid's office on December 4, 2018, it is apparent that the Memorandum was not from Plaintiffs' offices and that it was not Plaintiffs' document. Therefore, *Merits Incentives* applies.

65. Considering the *Merits Incentives* factors, the Court concludes that Berkley's pro hac shall be revoked.

i. *Merits Incentives Factors 1 & 2: Plaintiffs knew or should have known that the Memorandum was privileged; Plaintiffs failed to notify Get Fresh.*

66. The Court initially determined that the Memorandum is facially privileged. (*See* Order on Pls.' Mot. to Clarify the Procedure Re: Privilege Determination, Jan. 7, 2020 (based upon Dec. 9, 2019 hearing) ¶ 1.)

67. Following an *in camera* review on January 21, 2020, the Court confirmed that the Memorandum is privileged.

68. Given the way the Memorandum appeared in Plaintiffs' possession, it was appropriate for counsel at the time to have either sequestered the Memorandum or made a

notification. Plaintiffs did not sequester or notify Defendants of their receipt of the Memorandum in December 2018, as required under *Merits Incentives*.

69. It is not credible that the Plaintiffs believed the Memorandum was a threat delivered to them, because it revealed not only Get Fresh's strengths and weaknesses, but also the options for potential resolution and plans. (Jan. 22, 2020 Hr'g Tr. 240:19-22.)

70. Counsel for Plaintiffs, Fox Rothschild and Stern & Eisenberg, became involved in March of 2019, and Plaintiffs' case file, including the Memorandum, was transferred to Fox Rothschild and Stern & Eisenberg at that time. Neither Fox Rothschild nor Stern & Eisenberg sequestered the Memorandum or notified Defendants of their possession of the Memorandum in March 2019.

71. Plaintiffs did not sequester the Memorandum or notify Defendants of their possession of the Memorandum prior to discussing, quoting, and attaching it to their Reply in Support of Motion to Lift Stay and Amend the Complaint on August 1, 2019.

72. Once Get Fresh notified Plaintiffs of their claims of privilege and protection concerning the Memorandum on August 2, 2019, the Memorandum should have been sequestered and not used for any purpose.

ii. Merits Incentives Factor 3: Plaintiffs' counsel extensively reviewed and digested the privileged Memorandum, even after Get Fresh asserted privilege and protection and after the Court struck the Memorandum.

73. On August 5, 2019, the Court struck Exhibit T to Plaintiffs' Reply in Support of Motion to Lift Stay and Amend the Complaint, *i.e.*, the Memorandum. The Court also directed Plaintiffs to not use the Memorandum for any purpose until Get Fresh's claims of privilege and protection was resolved. The Court tried to be clear that it would rule on Get Fresh's claims of privilege and protection during an *in camera* review, as opposed to counsel filing the document with the Court's electronic filing system.

74. Rather than sequester the Memorandum, Plaintiffs repeatedly relied upon the Memorandum to argue that it was not subject to privilege or protection.

75. There is no credible explanation for Plaintiffs' use of the Memorandum in the Response filed in the arbitration on August 12, 2019, utilizing exact language from the Memorandum which the Court has determined is privileged.

76. The explanation by counsel Berkley and Connot that the quotes from the Memorandum were quoted and embedded in their minds because of the briefing filed in this Court on August 1, 2019 and August 4, 2019 after notification by the Defendants of the claims of privilege and protection is of deep concern to the Court and militates in favor of disqualification.

77. Based upon the information that has been provided to the Court, it appears that the only person in whom the Memorandum is embedded in the brain of is Berkley.

iii. ***Merits Incentives Factor 4: Plaintiffs elected to employ the Memorandum as a playbook for their conduct in this action and the arbitration***

78. Plaintiffs' August 12, 2019 Response is their operating pleading in the arbitration. Plaintiffs' possession and use of the Memorandum has, and continues to, prejudice Get Fresh.

79. Plaintiffs incorporated the Memorandum into their pleading and have used it to prosecute their claims (including, as the basis for their extensive discovery requests and motions for advancement and summary judgment in the arbitration). As a result, the return of the Memorandum to Get Fresh would not mitigate the prejudice to Get Fresh or excise the taint permeating throughout the arbitration from Plaintiffs' improper use of the content of the privileged Memorandum.

iv. Merits Incentives Factor 5: There is no evidence that Get Fresh is at fault for the unauthorized disclosure of the Memorandum

80. The Court is not commenting on how the Memorandum came to be in Plaintiffs' possession because it is not of import in making a determination for disqualification.

81. Once Defendants became aware that Plaintiffs possessed the Memorandum on August 1, 2019, Defendants took immediate action to protect their privilege and keep it out of the Court's record.

v. Merits Incentives Factor 6: Plaintiffs' prejudice from disqualification is limited

82. Fox Rothschild's entire representation of Plaintiffs is tainted by Plaintiffs' possession and use of the Memorandum. Plaintiffs wove the Memorandum into their operative pleading in the arbitration.

83. The inability of counsel to extricate privileged information from his or her mind supports disqualification. *See, e.g.*, *Matter of Beiny*, 129 A.D. 2d 126, 141-44 (N.Y. App. 1987) (explaining that use of privileged material warrants disqualification: "While documents may be effectively suppressed, the information gathered from them cannot be so easily contained. We simply do not know whether the information acquired from the [privileged] files will subsequently be used by [counsel], for even if [counsel] attempts to abide by the . . . suppression order, there is no way of assuring that the tainted knowledge will not subtly influence its future conduct of the litigation."); *McDermott Will & Emery LLP v. Superior Court*, 10 Cal. App. 5th 1083, 1124-25 (Cal. App. 2017) ("But the court's order could not prevent Gibson Dunn from using the knowledge it acquired by carefully reviewing and analyzing the e-mail even if the e-mail itself is no longer available to the firm. Even after a trial court has taken remedial action to protect the privilege, 'disqualification still serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage [acquired through the earlier review and use of the inadvertently disclosed, privileged materials].'"); *Clark*, 196 Cal. App. 4th at 54-55 (noting that counsel's review of the privileged material would lead to "inevitable questions about the sources of [counsel's] knowledge (even if [counsel] in fact obtained such knowledge from legitimate sources) could undermine the public trust and confidence in the integrity of the adjudicatory process"); *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092 (Cal. 2007) (affirming disqualification where counsel's use of the privileged information was so extensive, "the damage caused by [the] use and dissemination of the notes was irreversible").

84. Based upon Berkley's testimony and the evidence presented, the Memorandum is embedded in his mind such that he is unable to extricate it from his knowledge of the case.

85. Although Connot's examination of Goldberg during the evidentiary hearing utilized the Memorandum, such use was limited and not a wholesale use of the Memorandum.

Accordingly, Connot's mere use of the document in examining Goldberg does not rise to the level of Connot's disqualification.

86. Based upon the evidence presented, including Even Barenbaum's circulation of the Memorandum to Plaintiffs and counsel on July 31, 2019, it would be better if Stern & Eisenberg, including, but not limited to, Barenbaum, did not participate in this action or any related actions going forward.

F. Sanctions are Necessary.

87. This Court has broad discretion to enter sanctions for litigation misconduct. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93,787 P.2d 777, 780 (1990).

88. The Nevada Supreme Court identified the pertinent, non-exclusive factors for the district court to consider when considering the ultimate sanction, dismissal with prejudice, in *Young v. Johnny Ribeiro Building, Inc.* (the "*Ribeiro* factors"):

> [1] [T]he degree of willfulness of the offending party[;]
>
> [2] [T]he extent to which the non-offending party would be prejudiced by a lesser sanction[;]
>
> [3] [T]he severity of the sanction of dismissal relative to the severity of the discovery abuse[;]
>
> [4] [W]hether any evidence has been irreparably lost[;]
>
> [5] [T]he feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party[;]
>
> [6] [T]he policy favoring adjudication on the merits[;]
>
> [7] [W]hether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney[;] and
>
> [8] [T]he need to deter both the parties and future litigants from similar abuses.

Id. at 93, 787 P.2d at 780.

89. Sanctions are necessary here to "'deter and punish those who abuse the judicial process.'" *Emerson v. Eighth Jud. Dist. Ct.*, 127 Nev. 672, 678, 263 P.3d 224, 228 (2011) (quoting *Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006)).

90. Considering the *Ribeiro* factors, the Court concludes that sanctions are appropriate.

91. Plaintiffs willfully disregarded Get Fresh's claims of privilege and protection on August 2, 2019, and this Court's subsequent orders that the Memorandum be sequestered and not used for any purpose, by incorporating the exact language from the Memorandum into their Response in the arbitration, as well as relying upon the substance of the Memorandum to argue that it was not privileged in this action.

92. While this Court declines to strike Plaintiffs' pleadings filed in this action, it is necessary to discharge the arbitration panel, strike all documents in the arbitration, and order the refiling of all documents in the arbitration. Plaintiffs and their counsel used the Memorandum in their foundational pleading in the arbitration: their Response and Counterclaims. Plaintiffs utilized information contained in the Memorandum since the beginning of the substantive arbitration, including to support their broad discovery requests and claim for advancement.

93. "It is well settled that dismissal is warranted where, as here, a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings: 'courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.'" *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (quoting *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir. 1983)).

94. When Plaintiffs found out about the Memorandum in late January or early February 2019, they recognized the Memorandum was not theirs, had not been in their offices, and should not have been in the boxes that were delivered to their counsel. Plaintiffs did nothing to stop their attorneys from utilizing the Memorandum in this action and the arbitration.

95. There is a significant need to deter Plaintiffs and future litigants from similar abuse and misuse of an adversary's privileged information. Plaintiffs and their counsel acted in contravention of *Merits Incentives*, this Court's orders, and Get Fresh's claims of privilege and protection.

96. Any conclusion of law stated above that is more appropriately deemed a finding of fact shall be so deemed.

ORDER

Based upon the foregoing, the Court grants the Motion for Sanctions and the Motion to Disqualify for the reasons set forth in these Findings of Fact and Conclusions of Law. The Court hereby orders the following relief:

1. Based upon the information that has been provided to this Court it appears that the only person in whom the Memorandum is embedded in the brain of is Brian Berkley of Fox Rothschild LLP. For that reason, Berkley is no longer permitted to participate in any form in this litigation, including, but not limited to, this action and the arbitration. Berkley's pro hac vice status is hereby STRICKEN.

2. Each of Plaintiffs' attorneys (including former attorneys) and Plaintiffs shall provide all copies of the Memorandum, electronic and print, to Defendants. Each of Plaintiffs' attorneys must provide a certification that all versions of the Memorandum have been destroyed and/or provided to Defendants' counsel. This Court is concerned about the number of people have who touched the Memorandum.[3]

3. The current arbitration panel shall be discharged of its duties. A new arbitration shall be initiated and a new arbitration panel shall be appointed. All filings and related proceedings or orders in the arbitration are hereby STRICKEN. The parties are ordered to refile all documents in the arbitration, with Plaintiffs to remove all direct and indirect references to the Memorandum.

4. An award of reasonable attorneys' fees and costs incurred related to this contest of the Plaintiffs' improper possession and use of the Memorandum, and the activities after the August 2, 2019 notification occurred. Get Fresh and Fresh Mix shall file their application for those fees and costs within twenty (20) days of the entry of this Decision and Order.

---

[3] Plaintiffs offered to submit declarations from the other members of Plaintiffs' litigation team regarding their use of the Memorandum. (*See* Feb. 14, 2020 Hr'g Tr. 203:16-20.) The Court then provided that "If there is a particular time keeper besides Mr. Berkley that [Defendants] have concerns for, I will have a brief hearing with [Defendants] and [Plaintiffs] related to that after you've had the opportunity to have a declaration and decide if I need more information to make a judgment call." (*Id.* at 203:24-204:3.)

5. This Decision and Order; Findings of Fact and Conclusions of Law is hereby STAYED for fifteen (15) days of its entry, as requested by Plaintiffs on February 14, 2020.[4]

IT IS SO ORDERED.

DATED: 2 Mar 2020

ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

[4] This stay includes a stay of the deadline for Get Fresh and Fresh Mix to file their application for attorneys' fees and costs.

EXHIBIT 3

MAMJ
MARK J. CONNOT (SBN 10010)
LUCY C. CROW (SBN 15,203)
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, #700
Las Vegas, Nevada 89135
(702) 262-6899
(702) 597-5503(Fax)
MConnot@RoxRothschild.com
LCrow@FoxRothschild.com

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
(702) 949-8398 (Fax)
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.com

Attorneys for Plaintiffs Paul Lagudi and William Todd Ponder

DISTRICT COURT
CLARK COUNTY, NEVADA

PAUL LAGUDI, an individual; and WILLIAM TODD PONDER, an individual, Plaintiff, vs. FRESH MIX, LLC, a Delaware limited liability company; GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No. A-18-785391-B Dept. No. XI Hearing Requested **MOTION TO VACATE, ALTER, OR AMEND SANCTIONS ORDER** Hearing Date: Hearing Time:

Plaintiffs ask this Court to vacate—or, alternatively, to alter and amend—its March 2, 2020 order that imposes sanctions, including the dissolution of the parties' ongoing arbitration proceeding. NRCP 52(b), 59(e), 60(b). The

ELECTRONICALLY SERVED
1/24/2023 3:12 PM

Electronically Filed
01/24/2023 1:34 PM
CLERK OF THE COURT

ORDR

MARK E. FERRARIO
Nevada Bar No. 1625
JASON K. HICKS
Nevada Bar No. 13149
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
Telephone: 702.792.3773
Facsimile: 702.792.9002
Email: ferrariom@gtlaw.com
hicksja@gtlaw.com

Attorneys for Defendant Get Fresh Sales, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, and individual; and WILLIAM TODD PONDER, an individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware limited liability company; GET FRESH SALES, INC., a Nevada corporation; DOES 1-25; and ROE BUSINESS ENTITIES I-X, inclusive Defendants.	Case No.: A-18-785391-B Dept. No.: 22 **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO VACATE, ALTER, OR AMEND SANCTIONS ORDER AND FRESH MIX'S JOINDER THERETO**

Plaintiffs Paul Lagudi's and William Todd Ponder's Motion to Vacate, Alter, or Amend Sanctions Order (the "Motion") and Defendant Lenard E. Schwartzer, Trustee for the Bankruptcy Estate of Fresh Mix, LLC's ("Fresh Mix") Joinder and Response thereto came on for hearing before this Court on November 1, 2022. Plaintiffs were represented by Mark Connot of Fox Rothschild and Daniel Polsenberg and Abraham Smith of Lewis Roca Rothgerber Christie LLP. Defendant Fresh Mix was represented by Steven Eisenberg of Stern & Eisenberg, P.C. and Jason A. Imes, Esquire of

Case Number: A-18-785391-B

Schwartzer & Imes Law Firm and Defendant Get Fresh Sales, Inc. was represented by Mark Ferrario and Jason Hicks of Greenberg Traurig, LLP.

The Court, having reviewed the parties' filings and heard argument, hereby **GRANTS** the Motion and Joinder in part and **DENIES** them in part. The Motion and Joinder sought to vacate, alter, or amend Judge Elizabeth Gonzalez' Decision and Order; Findings of Fact and Conclusions of Law dated March 2, 2020 (the "Order") in its entirety. The parties agree, and the Court finds, that ¶3 of the Order in which Judge Gonzalez struck the arbitration filings and ordered a new panel be constituted was a ruling that the Court did not have the power or authority to make. Accordingly, this Court grants the Motion and Joinder in part and vacates only that provision of the Order (page 29, ¶3). For the reasons more fully set forth at the hearing, the Motion is denied in all other respects, and all other findings of fact and conclusions of law in the Order remain undisturbed and in full force and effect.

IT IS SO ORDERED.

Dated this 24th day of January, 2023

33B 32B 9BF5 CF4D
Susan Johnson
District Court Judge

Submitted this 23rd day of January 2023

GREENBERG TRAURIG, LLP

By: */s/ Jason Hicks*
MARK E. FERRARIO
Nevada Bar No. 1625
JASON K. HICKS
Nevada Bar No. 13149

Attorneys for Get Fresh Sales, Inc.

Approved by:

SCHWARTZER & IMES LAW FIRM

By: */s/ Steven Eisenberg*
JASON A. IMES
Nevada Bar No. 7030

STERN & EISENBERG, P.C.
STEVEN K. EISENBERG
Pro Hac Vice

Attorneys for Lenard E. Schwartzer, Trustee for the Bankruptcy Estate of Fresh Mix, LLC

GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
702.792.3773

By: *Did Not Sign*
MARK J. CONNOT
Nevada Bar No. 10010
FOX ROTHSCHILD, LLP

DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
ABRAHAM G. SMITH
Nevada Bar No. 13250
LEWIS ROCA ROTHGERBER CHRISTIE

Attorneys for Paul Lagudi and William Todd Ponder

GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
702.792.3773

portion of the order interfering in the arbitration exceeds the Court's jurisdiction and is void. NRCP 60(b)(4).

Dated this 30th day of March, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169

MARK J. CONNOT (SBN 10010)
LUCY C. CROW (SBN 15,203)
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, #700
Las Vegas, Nevada 89135
(702) 262-6899

Attorneys for Plaintiffs

POINTS AND AUTHORITIES

This Court should vacate the sanctions order for three principal reasons:

1. Under the Uniform Arbitration Act (NRS 38.206 *et seq.*) or the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*), a district court lacks jurisdiction to interfere in an ongoing arbitration, including by dissolving the arbitration panel for perceived taint and vacating all of its orders. Such relief must be sought in the first instance in the arbitration and reviewed only upon a motion to vacate a final arbitration award.

2. This Court erred in sustaining defendants' claim of privilege. Because NRCP 26(b)(5)(B) allows the recipient of an allegedly privileged document to "promptly present the information to the court under seal for a determination of the claim," this Court was not barred from considering the allegedly privileged information, and plaintiffs as the recipients of the memo were not subject to sanctions for providing the information to the Court in a filing under seal. Moreover, under controlling Delaware law, Fresh Mix's attorney who allegedly

requested the memo owed fiduciary obligations to plaintiffs as Fresh Mix's minority shareholders. Under the circumstances, plaintiffs were entitled to see the memo, and it could not be withheld on the basis of attorney-client privilege.

3. The sanctions here were disproportionate to the alleged privilege violation.

BACKGROUND

This case arises from a falling out over a produce company. Plaintiffs and defendant Get Fresh Sales, Inc. worked together to form defendant Fresh Mix, LLC in 2010. (1/21/20 Hr'g Tr., at 26:11-13, Ex. 1; 1/22/20 Hr'g Tr., at 155:8-18, Ex. 2.) Plaintiffs collectively own 40%; Get Fresh owns the remaining 60%. (1/21/20 Hr'g Tr., at 27:9-10.) In 2019, following a failed sale of the companies, the relationship deteriorated and defendants locked plaintiffs out of the company. (1/22/20 Hr'g Tr., at 104:17-22, 112:22-113:7, Ex. 2.)

Defendants ultimately delivered plaintiffs' things to their former counsel, Jeffrey Bendavid. (1/22/20 Hr'g Tr., at 119:10-25, Ex. 2.) He saw a piece of paper sticking out of one of the boxes and later read it. (1/22/20 Hr'g Tr., at 60:2-25, 126:3-23, Ex. 2.)

Believing the memo to be an intentionally included threat, plaintiffs attached it to a filing in this Court. (Reply Brief on Motion to Amend Compl.) Defendants asserted attorney-client privilege, asked for the memo to be clawed back, sought plaintiffs' counsel's disqualification, and demanded sanctions.

This Court agreed. Citing the district court's inherent authority to impose sanctions, this Court (1) struck *pro hac vice* status of Fox Rothschild attorney Brian Berkley and prohibited him from participating in either the court or arbitration proceedings; (2) ordered plaintiffs and their counsel to return all copies of the memo to defendants and to certify the return or destruction of all copies; and (3) ordered plaintiffs to pay defendants' attorneys' fees and costs. (3/2/20 Decision and Order 29:5-23.).

But citing that same authority, this Court went farther, inserting itself into the pending arbitration: The Court dissolved the panel and vacated all of the panel's orders. (*Id.*) The Court also struck all of the pleadings in the arbitration, directing that they be re-filed before a new arbitration panel removing "direct and indirect references" to the memo. (*Id.*)

ARGUMENT

I.

STANDARD FOR RELIEF

This Court has several avenues to review an order for legal error.

First, under Rule 59(e) this Court may alter or amend an appealable order[1] "to correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (citation and internal quotation marks omitted) (collecting cases). This same relief obtains under Rule 60(b)(1). *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966) ("[W]hy should not the trial court have the power to correct its own judicial error under 60(b)(1) within a reasonable time . . . and thus avoid the inconvenience and expense of an appeal by the party which the trial court is now convinced should prevail?" (quoting 7 MOORE, FEDERAL PRACTICE § 60.22(3), at 235–38)).

Second, an order that exceeds the Court's powers is void. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (citing *State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984)). Such an order is a nullity that may be vacated under NRCP 60(b)(4) at any time, including by the court on its own motion. *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017); *Pickett v. Comanche Const., Inc.*, 108

[1] Although Rule 59(e) uses the word "judgment," the Supreme Court has clarified that the rule includes any appealable order. *Lytle v. Rosemere Estates Prop. Owners*, 129 Nev. 923, 926, 314 P.3d 946, 948 (2013).

Nev. 422, 428, 836 P.2d 42, 46 (1992) (judgment vacated for absence of jurisdiction was properly construed as void under Rule 60(b)(4)).

Third, this Court may review its findings—including evidentiary findings not previously objected to—any time within 28 days after service of written notice of entry of the Court's order. NRCP 52(a)(5), (b).

Finally, even if the Court's order is not a final judgment, the Court retains broad inherent authority to reflect on and reconsider such orders, not just on a motion under EDCR 2.24, but at "*any time* prior to the entry of final judgment." *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466 n.4, 134 P.3d 698, 705 n.4 (2006) (Maupin, J., concurring) (emphasis added).[2]

At this juncture, this Court has considerable discretion to revisit the March 2 sanctions order. And if the sanction exceeds the Court's jurisdiction, the Court must grant relief.

II.

THIS COURT LACKED JURISDICTION TO INTERFERE IN THE ARBITRATION

When this Court was considering defendants' motion for disqualification and sanctions, the parties disagreed over the proper sanction: defendants believed that the entire complaint could be dismissed, while plaintiffs thought no sanction—or, at most, a monetary penalty—was warranted. This Court picked what it likely thought was a middle ground: based on alleged taint in the arbitration, this Court purported to terminate that proceeding and dissolve the arbitration panel before it ever entered a final award.

---

[2] *See also Div. of Child and Family Servs. v. Eighth Judicial Dist. Court (J.M.R.)*, 120 Nev. 445, 453 & n.27, 92 P.3d 1239, 1244 & n.27 (2004); *State v. Kay*, 4 P.2d 498, 500 (Wash. 1931) (noting that oral announcement was not binding where a trial judge announced his ruling for the plaintiff but died before findings of fact and conclusions of law were presented to him for signature); EDCR 2.24(b) (recognizing that motions may also be brought under NRCP 50(b), 52(b), 59 or 60).

But that course is jurisdictionally forbidden.

A. Arbitration Is a Contractual Choice to Eliminate Interlocutory Judicial Action

"The basic purpose of arbitration is the speedy disposition of disputes without the expense and delay of extended court proceedings." *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973). "The Supreme Court has made clear that courts have only a limited role to play when the parties have agreed to arbitration." *In re Sussex*, 781 F.3d 1065, 1072 (9th Cir. 2015).

That is because arbitration is a contractual election to forgo the judicial apparatus. Even in a jury trial, this Court does not supervise or commandeer the district court: if the district court errs in, say, rejecting a *Batson* objection, "the disappointed litigant cannot bring a suit to enjoin the litigation." *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 506 (7th Cir. 2000). To the extent an appellate court can exercise limited mandamus review of interlocutory rulings, that is a perk of litigation—not arbitration:

> [A] party who wants to have such an option should not (and of course need not) consent to arbitration, which generally and here does not have an appellate component. The choice of arbitration is a choice to trade off certain procedural safeguards, such as appellate review, against hoped-for savings in time and expense (other than the expense of the tribunal), a measure of procedural simplicity and informality, and a differently constituted tribunal.

Id.

Courts across the country have recognized "a liberal federal policy favoring arbitration agreements . . . . The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Savers Prop.*, 748 F.3d at 717 (internal quotations omitted). If the parties are able to obtain interlocutory review of the decisions of arbitrators, "[t]hat would be the end of arbitration as a speedy and (relatively low-cost alternative to litigation." *Trustmark Ins. Co. v. John Hancock*

Life Ins. Co., 631 F.3d 869, 874 (7th Cir. 2011). Furthermore, "a prime objective of arbitration law is to permit a just and expeditious result with a minimum amount of judicial interference . . . any other such rule could spawn endless applications to the courts and indefinite delay . . . ." *Gulf Guar. Life Ins.*, 304 F.3d at 492. "[A] district court should not hold itself open as an appellate tribunal during an ongoing arbitration proceeding, since applications for interlocutory relief result only in a waste of time, the interruption of the arbitration proceeding, and delaying tactics in a proceeding that is supposed to produce a speedy decision." *Michaels*, 624 F.2d at 414. Arbitration is designed "to conserve the time and resources of both the courts and the parties; thus, 'for the court to entertain review of intermediary arbitration decisions involving procedure or other interlocutory matter, would disjoint and unduly delay the proceedings, thereby thwarting the very purpose of conservation.'" *Michaels*, 624 F.2d at 414 (citing to *Mobil Oil Indonesia v. Asamera Oil (Indonesia) Ltd.*, 372 N.E.2d 21, 23 (N.Y. 1977)).

B. A District Court Cannot Interfere in an Ongoing Arbitration or Vacate the Panel and Chair's Orders

Applying these principles, a district court has statutory authority to review a final arbitration award, but *no* authority to interfere with an incomplete arbitration.

This conclusion is the same no matter the governing law: There is no statutory authority allowing judicial interference in an ongoing arbitration in Nevada's Uniform Arbitration Act, Delaware's Uniform Arbitration Act, or the Federal Arbitration Act.[3] To the contrary, authority from around the country

[3] While the operating agreement states that any arbitration shall be held in Las Vegas, Nevada, it does not exclude the application of the Federal Arbitration Act. (Plaintiffs' Motion to Compel Books and Records 11:21-28.) The Supreme Court has held that, in order to avoid the requirements of the FAA, the parties

confirms that courts lack the power to vacate orders and dismiss an arbitration panel midstream.

1. The Uniform Arbitration Act Forbids Judicial Interference in Arbitration

If applicable, the Uniform Arbitration Act does not give this Court authority to interfere with an ongoing arbitration.

a. NEVADA'S UNIFORM ARBITRATION ACT CONTEMPLATES JUDICIAL REVIEW OF A FINAL AWARD, NOT A MID-ARBITRATION JUDICIAL TAKEOVER

The Nevada Uniform Arbitration Act provides no basis for the district court to exercise jurisdiction over the arbitration. Nothing in the act grants courts jurisdiction over interim awards, orders, pleadings, or decisions by arbitrators.

Instead, the act contemplates a role for courts only at the beginning and the end: NRS 38.244 states that a court may enforce an agreement to arbitrate, and that an agreement to arbitrate that provides for arbitration in Nevada confers exclusive jurisdiction on the court to enter judgment on any arbitration award. Once arbitration commences, a court loses its authority to interfere until the arbitrator issues a final award, and the scope of any judicial review of a final award is limited. *New Shy Clown Casino, Inc. v. Baldwin*, 103 Nev. 269, 271, 737 P.2d 524, 525 (1987).

There is no statutory provision granting the district court authority to hold an evidentiary hearing or to modify the arbitration award where there has

---

must make this clear and specific. *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 58-60 (1995). There is no language excluding application of the FAA. Fresh Mix is a Delaware limited liability company doing business in multiple states. (Amended Complaint ¶¶ 97-99.) Accordingly, the FAA applies. *U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 186–87, 415 P.3d 32, 38 (2018) (citations omitted).

not been a ruling regarding to the validity of the award (NRS 38.145) or the form of the award (NRS 38.155). *Richardson v. Harris*, 107 Nev. 763, 766, 818 P.2d 1209, 1211 (1991).

b. DELAWARE'S UNIFORM ACT LIKEWISE PROVIDES NO INTERLOCUTORY JUDICIAL SUPERVISION

To the extent applicable, the Delaware Uniform Arbitration Act similarly gives courts no jurisdiction over interim awards or over an ongoing arbitration. Instead, a Delaware court may only modify, correct, or vacate a final award under specific circumstances. *See* DEL. CODE ANN. tit. 10, §§ 5701-5725.

c. CASE LAW UNDER THE UNIFORM ACT CONFIRMS THE IMPROPRIETY OF JUDICIAL INTERFERENCE

Case law under the uniform act is limited because few courts have attempted to intercede in ongoing arbitrations. But in Pennsylvania, one court did so and was found to have exceeded its jurisdiction: a trial court lacks the inherent authority to terminate an arbitration before there has been a final award. *Fastuca v. L.W. Molnar & Assocs.*, 10 A.3d 1230 (Pa. 2011). There, the trial court attempted to terminate a common-law arbitration proceeding after the arbitrator had entered certain "findings" but had not resolved all of the outstanding issues between the parties. The Pennsylvania Supreme Court, interpreting language similar to the uniform acts adopted in Nevada and Delaware, held that these interim "findings" were not a final award within the meaning of the arbitration act "and, thus, that the trial court had no authority under that section to review such findings." *Id.* at 1232. The court further held that a trial court does not have the inherent authority to terminate arbitration proceedings before a final award is issued. *Id.* One party's dissatisfaction with the arbitrator was not enough to give the court any form of equitable jurisdiction. *Id.*

2. The Federal Arbitration Act Forbids Judicial Interference in Arbitration

Cases applying the FAA, with its very similar limitation on the jurisdiction of judges to attempt to interfere in ongoing arbitrations, are numerous—and consistent. Time and time again, the federal circuit courts have held that until a final arbitration award issues, trial courts do not have jurisdiction to interfere in the arbitration. Circuit court decisions in the Ninth, Second, Third, Fourth, Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits all hold that the silence and structure of the FAA "preclude[s] interlocutory review of arbitration proceedings and decisions."[4]

---

[4] *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 748 F.3d 708, 717-18 (**6th** Cir. 2014); *see also Gulf Guar. Life Ins. Co. v. Conn. Gen Life Ins. Co.*, 304 F.3d 476, 488, 490 (**5th** Cir. 2002) ([T]here is no authorization under the FAA's express terms for a court to remove an arbitrator from service. Rather, even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award."); *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 506 (**7th** Cir. 2000) ("The time to challenge an arbitration, on whatever grounds, including bias, is when the arbitration is completed and an award rendered."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (**4th** Cir. 1999) (any objections on the basis of fairness should typically be made to the arbitrator, subject only to limited judicial review after the end of the arbitration); *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 & n.4 (**2d** Cir. 1980) (a district court does not have the authority to review an interlocutory ruling by an arbitration panel); *Travelers Ins. Co. v. Davis*, 490 F.2d 536, 541-42 (**3d** Cir. 1974) (same); *Schatt v. Aventura Limousine & Transp. Serv., Inc.*, 603 Fed. App'x 881, 887-88 (**11th** Cir. 2015) (interim award is not properly reviewable by a district court); *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899, 903 (**D.C.** Cir. 1998) ("The Arbitration Act contemplates that courts should not interfere with arbitrations by making interlocutory rulings . . . ."); *Cox v. Piper, Jaffray & Hopwood, Inc.*, 848 F.2d 842, 843-44 (**8th** Cir. 1988) ("Appellants cannot obtain judicial review of the arbitrators' decisions about the qualifications of the arbitrators or other matters prior to the making of an award.").

District courts overwhelmingly agree. *See, e.g.*, *Queen's Med. Ctr. v. Travelers Cas. & Sur. Co. of Am.*, No. CV 17-00361 JMS-RLP, 2018 WL 1719703, at *6 (D. Haw. Apr. 9, 2018) (surveying the "consistent[] precedent); *John Hancock*

a. COURTS CANNOT VACATE INTERLOCUTORY RULINGS BEFORE A FINAL AWARD

The Eleventh Circuit's decision in *Schatt v. Aventura Limousine & Transportation Service, Inc.* illustrates the rule. There, after the arbitration had proceeded to a hearing, but before any order, the defendant Aventura filed a motion in district court seeking to disqualify the plaintiff Schatt's counsel for, among other things, *ex parte* contact with the defendant. 603 Fed. App'x at 882-83. While the disqualification motion was pending, the arbitrator issued an interim award on liability but deferred a final award on damages. *Id.* at 883. The district court stayed the arbitration pending resolution of the disqualification motion. Ultimately, Schatt's counsel moved to withdraw and lift the stay of arbitration. *Id.* at 884. Aventura opposed and asked the district court to instead vacate the interim award on liability, and reassign the case to a different arbitrator. *Id.* at 885. The district court granted Aventura's request, vacating the interim award and directing the parties to a new arbitration before a new arbitrator. *Id.* at 885.

Life Ins. Co. v. Emp'rs Reassurance Corp., 2016 WL 3460316, at *3 (D. Mass. June 21, 2016) ("The FAA contains no provision expressly granting courts the authority to remove a party-appointed arbitrator prior to the conclusion of the arbitration."); *Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, 2010 WL 431592, at *3 (N.D. Ill. Feb. 1, 2010) (refusing to disqualify allegedly biased arbitrator, even though the arbitration agreement required disinterested arbitrators, because issues of bias or qualification can only be challenged post-award); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 935 (N.D. Cal. 2003) ("[C]ourts have consistently held that courts do not have the power under the FAA to disqualify an arbitrator while proceedings are pending."); *Crim v. Pepperidge Farm, Inc.*, 32 F. Supp. 2d 326, 331 (D. Md. 1999) ("Absent extraordinary circumstances under which the Court's equitable powers could be invoked, such as overt misconduct on the part of the arbitrator, the remedy available to a party who suspects that an arbitrator will be impartial is to seek to vacate the award after it is rendered.").

The Eleventh Circuit reversed, holding that "the district court was without jurisdiction to vacate the Interim Award" as it was not a final arbitration award. *Id.* at 886. Courts have held that the language of the FAA "allows review of final arbitral awards only, but not of interim or partial rulings . . . . This limited review is consistent with the long-held principle that review of arbitral awards is among the narrowest known to the law." *Id.* at 887 (internal quotations omitted). The Eleventh Circuit held that "the Interim Award on Liability clearly established that the arbitrator's work was not complete"; thus, it was not final. *Id.* at 887-88. "Because the Interim Award was not a final arbitral award, it was not properly under review by the district court." *Id.* at 888.

Similarly, the Seventh Circuit held that a district court did not have the authority to block the consolidation of several arbitration proceedings: "judges must not intervene in pending arbitration to direct arbitrators to resolve an issue one way rather than another. Review comes at the beginning or the end, but not in the middle." *Blue Cross Blue Shield of Mass. Inc. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011).

3. The FAA Rule Applies in State Court

Because the language of state uniform arbitration acts (like Nevada's) is similar in material respects to that of the FAA, the same reasoning applies to an arbitration ordered by a state court. *See Savers Prop.*, 748 F.3d at 716. In *Savers Property*, a party brought a court action to vacate an interim arbitration award. The district court issued a preliminary injunction halting the arbitration to avoid irreparable harm to the plaintiff. *Savers Prop.*, 748 F.3d at 715. The Sixth Circuit reversed, holding that judicial review before a final arbitration award is categorically improper. Initially, although Michigan's uniform act governed, that act (and Nevada's) is similar to the FAA, so it was proper to rely on cases interpreting the FAA. *Savers Prop.*, 748 F.3d at 716.

The Sixth Circuit reiterated the district court's limited role in arbitration—at the beginning (to see whether the parties agreed to it) and at the end, but not the middle: "[i]f parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process." *Savers Prop.*, 748 F.3d at 717 (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568-69 (2013)). Judicial review prior to the issuance of a final arbitration award is improper, and "the district court erred by prematurely injecting itself into this private dispute." *Savers Prop.*, 748 F.3d at 716.

C. This Court Lacked Jurisdiction to Take Over the Arbitration

In most of these cases, the district court was at least reviewing an arbitrator's decision. Here, however, this Court purported to vacate interim orders and dismiss the panel before such a remedy had even been presented to the arbitrators. That was jurisdictional error.

1. Issues Affecting the Arbitration Must First Be Presented to the Arbitrators, Not the District Court

As the Fourth Circuit has noted, "Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance. Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award. . . [F]airness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA." *Hooters of Am.,* 173 F.3d at 941.

Thus, while, partiality or corruption may justify vacating a final arbitration award, that post-award protection "does not provide for pre-award removal of an arbitrator" that the parties have contractually selected. *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (citing 9 U.S.C. § 10(a)(2) and

noting an exception only if the agreement to arbitrate is itself "subject to attack under general contract principles as exist at law or in equity" (internal quotation marks omitted)).

2. This Court Improperly Struck the Arbitration Panel and its Orders

This Court has no jurisdiction to vacate the arbitration panel's orders, to terminate the arbitration, or to dismiss the panel. The panel's interlocutory rulings were not "final arbitral awards" as they do not resolve all (or even nearly all) of the disputed issues. Moreover, as in *Schatt*, one side's claim that an arbitrator has been tainted cannot be raised to the district court until after a final award.

It is doubtful that any case would justify a judicial exception to the statutory limits on the court's jurisdiction. The Ninth Circuit assumed for argument that such an "extreme case[]" might exist, *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973), but recently it affirmed that it has never found cause to disqualify an arbitrator mid-arbitration.[5] *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015). In *In re Sussex*, the Ninth Circuit granted extraordinary mandamus relief to stop a district court from ordering an arbitrator's disqualification: even if the arbitrator's impartiality could be questioned, the district court needed to await the final award to decide that issue. *Id.* at 1075.

[5] Indeed, even under the Ninth Circuit's outlier approach of allowing a district court to intervene in the "most extreme cases," a case cannot fall within the exception unless the circumstances "could cause severe irreparable injury from an error that cannot effectively be remedied on appeal from the final judgment and that would result in manifest injustice." *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015) (internal citations omitted). As discussed immediately below, remedies for taint arising from privilege violations exist both before the arbitrators and in this Court at the proper juncture, on a motion to vacate the final arbitral award. This is not the mythical "extreme case."

So, too, here. A court only has jurisdiction at the outset and conclusion of an arbitration—not the in the middle of it. Neither the statutes of Nevada or Delaware, nor the FAA, confer jurisdiction on the court to interfere with the arbitration proceeding until its conclusion. Defendants' claim that the panel was tainted could have been presented to the arbitrators and, if they disagreed, to the district court on a motion to vacate any final award. This Court lacked jurisdiction to determine that issue now.

3. Defendants Could Have Sought this Remedy in the Arbitration, or Following a Final Arbitral Award

This makes sense because any taint from the arbitrators' exposure to language from the memorandum can be remedied through the American Arbitration Association's ("AAA") procedures. The AAA's rules permit a party to appeal directly to the AAA when seeking the disqualification of an arbitrator or panel. AAA Comm'l Arb. R. 18(c). The AAA is entitled to then "determine whether the arbitrator should be disqualified." *Id.* The arbitration panel also retains its own authority to rule on privilege disputes and provide the appropriate remedy. AAA Comm'l Arb. R. 34(c), 18(c); cf. NRS 38.233(5); *see Odfjell Asa v. Celanese AG*, 348 F. Supp. 2d 283, 287–88 (S.D.N.Y. 2004), *aff'd sub nom. Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005) ("[S]ection 7 [of the FAA] would make no sense if it provided the arbitrators with the power to subpoena witnesses and documents but did not provide them the power to determine related privilege issues."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) ("[F]airness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA.").

But direct appeal to the AAA or the arbitrator was not defendants' only avenue of relief from the purported misuse of the memorandum. Defendants could have ultimately appealed the *final* arbitration award to the district court.

9 U.S.C. §§ 9–11, 16; NRS 38.241. While waiting until the resolution of the arbitration would cost additional fees and time, the "equitable concern that delays and expenses would result if an arbitration award were vacated is manifestly inadequate to justify a mid-arbitration intervention, regardless of the size and early stage of the arbitration." *Sussex*, 781 F.3d at 1075.

4. Defendants Did Not Give the Arbitrators a Chance to Evaluate their Claim of Privilege and Any Remedy for Alleged Taint

Defendants asked this Court to leapfrog all that, however. At defendants' invitation, the Court decided for itself in the first instance the authority of the arbitrators to determine whether events surrounding the memo have affected the proceedings and what remedial measures, if any, should be taken.

D. The Jurisdictional Defect Renders this Part of the Court's Order Void

Because this Court lacked jurisdiction to interfere in the ongoing arbitration, the portion of this Court's order purporting to do so is void. *Rawson v. Ninth Judicial Dist. Court*, 133 Nev., Adv. Op. 44, 396 P.3d 842, 848 & n.4 (2017); *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). This Court should vacate it. NRCP 60(b)(4).

III.

THIS COURT ERRED IN SUSTAINING DEFENDANTS' CLAIM OF PRIVILEGE

This Court's sanction stems from its conclusion that the memo was subject to attorney-client privilege. But this is error: this Court ought not to have disregarded the content of the memo, or punished plaintiffs for seeking to promptly present it to the Court. And under controlling Delaware law, plaintiffs are minority shareholders with a right to view and use the memo, regardless of any privilege.

A. A Party Receiving Allegedly Privileged Information Can Promptly Challenge the Privilege Using that Information under Seal

Nevada Rule of Civil Procedure 26(b)(5)(B) states as follows:

> If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. ***After being notified***, ***a party must promptly return, sequester, or destroy the specified information and any copies it has***; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; ***and may promptly present the information to the court under seal for a determination of the claim***. The producing party must preserve the information until the claim is resolved.

(Emphasis added.) The requirement to sequester or destroy the allegedly privileged information does not prohibit the Court's review of it under seal.

And cases applying Rule 26's language confirm that in presenting the information to the Court, plaintiffs may rely on the content of a document to argue, under seal, that it is not privileged. *See, e.g., Diamond X Ranch LLC v. Atlantic Richfield Co.*, 2016 WL 3176577, at *4 (D. Nev. June 3, 2016) (interpreting federal version of Rule 26(b)(5)(B) and finding the receiving party may present the information claimed to be privileged in briefing); *Great-West Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, 2013 WL 5332410, at *1 (D. Nev. Sept. 23, 2013) (applying Rule 26's language in a protective order and relying on the "parties' description of the documents" to determine if the documents are privileged); *LightGuard Sys., Inc. v. Spot Devices, Inc.*, 281 F.R.D. 593, 600 (D. Nev. 2012) (considering arguments concerning the content of documents and examining each document at issue to determine whether they were privileged); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 626 (D. Nev. 2013) (same); *see also Smith v. Life Investors Ins. Co. of Am.*, 2009 WL 2045197, at *3 (W.D. Penn. July 9, 2009) (accepting arguments by receiving party that the content of the document is not privileged).

In *Diamond X Ranch LLC*, the court discussed whether Federal Rule 26(b)(5)(B)[6] requires a party to file a brief under seal that discusses information that is subject to a claim of privilege or protection. *See Diamond X Ranch LLC*, 2016 WL 3176577, at *4. But there is no question the party receiving the purportedly privileged document may make arguments that it is not privileged using the content of the document.

In *Great-West Life*, the plaintiffs received many documents in discovery that the defendants later claimed were privileged. *See Great-West Life & Annuity*, 2013 WL 5332410, at *1. Consistent with language similar to Rule 26(b)(5)(B), plaintiffs presented certain documents to the court for consideration and argued based on the content that they were not privileged. *See id*. at *1-2, 6-8. The court entertained these arguments without issue. *See id.* For other documents that defendants had claimed were privileged, however, the plaintiffs failed to present those documents to the court for consideration. *See id*. at *9. As a result, the court found plaintiffs had failed to meet their obligation to "promptly present" the information for the court to determine the claim of privilege and therefore the court found the plaintiffs lost their ability to argue the documents were not privileged. *See id.*

B. Plaintiffs Properly Presented the Memo to the Court under Seal; the Court Improperly Disregarded It

Defendants provided[7] the memo to plaintiffs, and on August 2, 2019, defendants gave notice that they claimed attorney-client privilege. (2/14/20 Hr'g

[6] Federal Rule 26(b)(5)(B) is identical to NRCP 26(b)(5)(B).

[7] The memo was delivered just before the commencement of litigation rather than produced in response to a discovery request. This Court's order nevertheless presumes that Rule 26(b)(5)(B) applies and imposes sanctions apparently on the basis that it was violated. (3/2/20 Decision and Order, at 20-21.)

Tr., at 168:22-169:9, Ex. 3.) As Rule 26's express language shows, upon receiving such notice, plaintiffs had the obligation to "promptly present the information to the court under seal for a determination of the claim." Rule 26 directs plaintiffs, not defendants, to present the "information" claimed privileged—here the memo—to the Court.

That is precisely what the plaintiffs did. They presented the memo to the Court under seal so that the Court could consider the "four corners" of the memo to determine whether or not it is privileged. *See LightGuard Sys., Inc. v. Spot Devises, Inc.*, 281 F.R.D. 593, 600 (D. Nev. 2012).

The Court should have considered the content of the memo and allowed plaintiffs, in a nonpublic setting, to present argument based on it. Instead, this Court rejected that evidence and held that plaintiffs committed misconduct, in part for their attempt to have the Court consider the memo's contents. (Order on Plaintiffs' Motion to Clarify Procedure Regarding Privilege Determination, at 2:9-12.)

But that content is critically important. If considered, it could have provided evidence that

- the subject matter was not that of an attorney-client communication;
- the memo was *not* prepared at the direction of retained counsel; but
- the memo instead was created before counsel was retained.

This violation of plaintiffs' rights under NRCP 26(b)(5)(B) caused severe prejudice and constitutes reversible error.

C. Under Delaware Law, Communications Cannot Be Shielded from Minority Shareholders Under the Guise of Privilege

1. A Minority Stakeholder Can Defeat Claims of Privilege that Seek to Hide Majority Oppression

Delaware law does not grant business entities an absolute privilege if the entity is being sued by its minority owners. Under long-established Delaware law, attorneys retained by entities owe fiduciary duties to all shareholders, not just the majority owners. *Opdyke v. Kent Liquor Mart, Inc.*, 181 A.2d 579 (Del. Ch. 1962) (attorney owed fiduciary duty to minority shareholder and breached his duty when purchasing majority stock). As a consequence, a claim of attorney-client privilege does not block a minority shareholder from receiving documents if the minority shareholder demonstrates good cause. Good cause can be shown if there is an issue related to conflict of interest.

The leading case on the good-cause standard to be employed when determining whether there is privilege is *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).[8] There, minority stockholders brought a class action against a corporation alleging violations of federal and state security laws, as well as common law fraud. The court determined that a

> corporation is not barred from asserting [attorney-client privilege] merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit

[8] The Operating Agreement includes a choice of law provision selecting Delaware law. (Plaintiffs' Motion to Compel Books and Records, at 11:21-28.) A determination regarding whether the majority members can assert privilege at the expense of Plaintiffs must be considered under the law of Delaware based on the choice of law provision. *See Wellin v. Wellin*, 2016 WL 123066, at *3 (D.S.C. Jan. 8, 2016) (choice of law provision in trust agreement governed questions relating to privilege). When examining issues of privilege, courts look to the choice of law rules of the forum state. *See Wolpin v. Philip Morris Inc.*, 189 F.R.D. 418, 423 (C.D. Cal. 1999). Under Nevada choice of law rules, courts enforce a contractual choice of law provision. *Engel v. Ernst*, 102 Nev. 390, 724 P.2d 215 (1986). Therefore, based on the choice of law provision contained within the Operating Agreement, the privilege law of Delaware applies to this analysis.

> against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

Id. at 1103-04. *Garner* sets forth a list of non-exhaustive factors that could demonstrate such good cause:

> 1. Number of shareholders and the percentage of stock they represent;
> 2. Bona fides of the shareholders;
> 3. Nature of the shareholders' claim and whether it is obviously colorable;
> 4. Apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
> 5. Whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;
> 6. Whether the communication related to past or to prospective actions;
> 7. Whether the communication is of advice concerning the litigation itself;
> 8. The extent to which the shareholders are blindly fishing;
> 9. The risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 1104.

Valente v. PepsiCo, Inc., 68 F.R.D. 361 (D. Del. 1975) illustrates the limits of the privilege when a majority shareholder is in conflict with the minority. There, PepsiCo was the majority shareholder of Wilson Sporting Goods Co. In that role, it considered various merger strategies, eventually merging Wilson into PepsiCo. Wilson's minority shareholders protested the arrangement. The court held that because the general counsel of PepsiCo also sat on the board of Wilson, he owed dual fiduciary obligations to both entities and his documents written for PepsiCo were discoverable by Wilson. *Id.* at 364. The court discussed the recognized exception that "where an attorney serves two clients having common interests and each party communicates to the attorney, the communications are not privileged in a subsequent controversy between the two." *Id.* at

368. The Court further held that "[i]t is no longer open to question that a majority shareholder who controls a corporation must not use his position to the undue disadvantage of the minority; his obligation is to the corporation and not simply to himself." *Id.* at 369. That included letting the minority shareholders view PepsiCo documents that touched upon the interests of the minority members of Wilson:

> Where the fiduciary has conflicting interests of its own, to allow the attorney-client privilege to block access to the information and bases of its decisions as to the persons to whom the obligation is owed would allow the perpetration of frauds. A fiduciary owes the obligation to his beneficiaries to go about his duties without obscuring his reasons from the legitimate inquiries of the beneficiaries.

Id. at 369-70.

Similarly, in *Deutsch v. Cogan*, 580 A.2d 100 (Del. Ch. 1990), the Court used the standards articulated by both *Valente* and *Garner* to compel production of allegedly privileged material. General Felt was a controlling entity of GFI Nevada, which in turn was Knoll International's majority shareholder. The law firm Akin Gump represented both Knoll and General Felt in a transaction later disputed by Knoll's minority shareholders. The Court held that discovery of attorney-client privilege communications is not automatic in shareholder suits, but because GFI Nevada owed fiduciary duties to Knoll's minority shareholders, and those obligations run "necessarily to protect the interests of the minority from domination and overreaching by the controlling shareholder." *Id.* at 107. Moreover, "[w]here a fiduciary has conflicting interests, to allow the lawyer-client privilege to block access to the information and basis of its decisions as to the persons to whom the obligations are owed might allow the perpetration of frauds." *Id.* at 108.

2. The "Client" to Whom the Privilege Belonged Was Fresh Mix, in Which Plaintiffs Have a Stake

Here, Get Fresh owner Scott Goldberg testified he prepared the memo at the direction of attorney Bruce Leslie. (1/21/20 Hr'g Tr., at 42:2-8, Ex. 1.) He has also testified that Mr. Leslie was retained as an attorney for *Fresh Mix*, the entity in which plaintiffs are minority members. (Scott Goldberg Dep., at 38:8-10, Ex. 1 to Plaintiffs' Supplemental Briefing in Opposition to Defendants' Motion for Claw-Back.)

3. The Memo Cannot Be Withheld from Fresh Mix's Minority Shareholders on the Basis of Privilege

Under controlling Delaware law, Mr. Leslie owed fiduciary obligations to plaintiffs as Fresh Mix's minority shareholders. They were entitled to see the memo, and it could not be withheld on the basis of attorney-client privilege.

Here, the content of the memo must be considered to assess whether it provides evidence that the majority members of Fresh Mix were oppressing plaintiffs, the minority members, and thus cannot be treated as privileged. By refusing to review the contents of the memo and permit the parties to make substantive arguments related to any statements contained within the memo, this Court made no determination of whether any action was being taken to disadvantage or oppress the minority. If this was occurring, then defendants could not withhold the memo from the minority shareholders, and no privilege exists.

* * *

The order and the procedure that led to it are unlawful. Plaintiffs should have been permitted to present and make arguments based on the text of the memo to establish that it was not entitled to treatment as an attorney-client privileged document or that it was not actually created at the direction of attorney Bruce Leslie. Instead, the Court barred that critically relevant testimony and ignored Delaware law. These legal determinations constitute reversible error.

IV.

EVEN IF THE MEMO IS PRIVILEGED, THE SANCTIONS ARE OVERLY PUNITIVE AND DISPROPORTIONATE

Even ignoring the jurisdictional defect and the improper privilege determination, the sanctions are disproportionate to any alleged violation of the privilege.

A. Sanctions Are Reserved for Willful Noncompliance

In Nevada, "[t]he general rule in the imposing of sanctions is that they be applied only in extreme circumstances where willful noncompliance of a court's order is shown by the record." *Finkelman v. Clover Jewelers Blvd., Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609 (1975); *see also Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 313, 810 P.2d 785, 787 (1991) (same). Courts will also consider the degree of harm caused by the alleged misconduct. *See, e.g.*, *Stubli*, 107 Nev. at 313; *see also Rish v. Simao*, 132 Nev. 189, 200, 368 P.3d 1203, 1212 (2016) (same).

The party seeking sanctions bears the burden of proving the facts to support their imposition. *Practice Mgmt. Sols., LLC v. Eighth Judicial Dist. Court*, No. 68901, 2016 WL 2757512, at *3 (Nev. May 10, 2016) (unpublished disposition). The same burden exists under California law, where the Court of Appeal, in another "privileged document in a box" case, held that the burden was on the party seeking sanctions to "persuasively demonstrate" that including the document in the box was the result of inadvertence in order to obtain sanctions:

> We note that whenever a lawyer seeks to hold another lawyer accountable for misuse of inadvertently received confidential materials, the burden must rest on the complaining lawyer to persuasively demonstrate inadvertence. Otherwise, a lawyer might attempt to gain an advantage over his or her opponent by intentionally sending confidential material and then bringing a motion to disqualify the receiving lawyer.

State Compensation Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 657 (1988).

And even after that burden is met, Nevada courts are not to award sanctions beyond a curative measure that would remove the harm. *See, e.g.*, *Rish*, 132 Nev. at 200 (noting that a violation must be "so extreme that it cannot be eliminated through an objection and admonition.").

B. Plaintiffs' Counsel Did Not Willfully Disregard this Court's Sealing Order

The unrebutted testimony from Messrs. Berkley and Connot demonstrates that there was no willfulness or intentional disregard of this Court's orders. (2/14/20 Hr'g Tr., at 88:23-89:1; 174:16-177:2, Ex. 3.) *See Finkleman*, 91 Nev. at 147 (noting that counsel's "explanation for their failure to fully comply" with a court order "of course, negates willfulness."). This Court itself admitted that it was not faulting plaintiffs for the memo's placement in the box delivered to plaintiffs' former counsel: "[t]he Court is not commenting on how the memo came to be in the Plaintiffs' possession." (1/22/20 Hr'g Tr., at 240:14-15.) Rather, it appears that this Court relied on plaintiffs' presenting the memo to the Court under seal, which the court misinterpreted as a violation of NRCP 26(b)(5)(B), as discussed in Section III.B.

But even if defendants had met their burden, the sanctions imposed by this Court greatly outweigh any alleged harm that has occurred. Defendants never presented evidence on how the brief references in one response have irreparably tainted the arbitration panel or warrant striking the entire proceeding. The order betrays a desire to severely punish plaintiffs and their counsel for what at most are inadvertent or curable violations.

Plaintiffs did not violate NRCP 26(b)(5)(B) and did not engage in any willful misconduct, and the allegedly "privileged" nature of the memo has not been conclusively established when its content has not been considered. The order and its attendant sanctions should be vacated.

CONCLUSION

This Court's sanction authority is customarily broad. But in the context of arbitration, the Court's inherent authority runs up against a statutory preference for arbitration, where the parties have elected it. Once this Court determined that the parties have committed a portion of their dispute to arbitration, this Court cannot simply arrest *that* proceeding for reasons that might otherwise cause the Court to arrest its own proceedings—as when it declares a mistrial or strikes an answer. The Court's authority instead reattaches only at the conclusion of arbitration, on a motion to confirm or vacate the arbitral award.

For the foregoing reasons, this Court should vacate its order on sanctions and allow the parties to resume their proceedings in arbitration.

Dated this 30th day of March, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

MARK J. CONNOT (SBN 10010)
LUCY C. CROW (SBN 15,203)
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, #700
Las Vegas, Nevada 89135
(702) 262-6899

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on March 30, 2020, I served the foregoing brief through the Court's electronic filing system and by courtesy e-mail to the following counsel:

JAMES J. PISANELLI
DEBRA L. SPINELLI
AVA M. SCHAEFER
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
JJP@PisanelliBice.com
DLS@PisanelliBice.com
AMS@PisanelliBice.com

Attorneys for Defendants

/s/ Lisa M. Noltie
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT 4

ELECTRONICALLY SERVED
1/24/2023 3:12 PM

Electronically Filed
01/24/2023 1:34 PM
CLERK OF THE COURT

ORDR

MARK E. FERRARIO
Nevada Bar No. 1625
JASON K. HICKS
Nevada Bar No. 13149
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
Telephone: 702.792.3773
Facsimile: 702.792.9002
Email: ferrariom@gtlaw.com
hicksja@gtlaw.com

Attorneys for Defendant Get Fresh Sales, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, and individual; and WILLIAM TODD PONDER, an individual, Plaintiffs, v. FRESH MIX, LLC, a Delaware limited liability company; GET FRESH SALES, INC., a Nevada corporation; DOES 1-25; and ROE BUSINESS ENTITIES I-X, inclusive Defendants.	Case No.: A-18-785391-B Dept. No.: 22 **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO VACATE, ALTER, OR AMEND SANCTIONS ORDER AND FRESH MIX'S JOINDER THERETO**

Plaintiffs Paul Lagudi's and William Todd Ponder's Motion to Vacate, Alter, or Amend Sanctions Order (the "Motion") and Defendant Lenard E. Schwartzer, Trustee for the Bankruptcy Estate of Fresh Mix, LLC's ("Fresh Mix") Joinder and Response thereto came on for hearing before this Court on November 1, 2022. Plaintiffs were represented by Mark Connot of Fox Rothschild and Daniel Polsenberg and Abraham Smith of Lewis Roca Rothgerber Christie LLP. Defendant Fresh Mix was represented by Steven Eisenberg of Stern & Eisenberg, P.C. and Jason A. Imes, Esquire of

Case Number: A-18-785391-B

Schwartzer & Imes Law Firm and Defendant Get Fresh Sales, Inc. was represented by Mark Ferrario and Jason Hicks of Greenberg Traurig, LLP.

The Court, having reviewed the parties' filings and heard argument, hereby **GRANTS** the Motion and Joinder in part and **DENIES** them in part. The Motion and Joinder sought to vacate, alter, or amend Judge Elizabeth Gonzalez' Decision and Order; Findings of Fact and Conclusions of Law dated March 2, 2020 (the "Order") in its entirety. The parties agree, and the Court finds, that ¶3 of the Order in which Judge Gonzalez struck the arbitration filings and ordered a new panel be constituted was a ruling that the Court did not have the power or authority to make. Accordingly, this Court grants the Motion and Joinder in part and vacates only that provision of the Order (page 29, ¶3). For the reasons more fully set forth at the hearing, the Motion is denied in all other respects, and all other findings of fact and conclusions of law in the Order remain undisturbed and in full force and effect.

IT IS SO ORDERED.

Dated this 24th day of January, 2023

33B 32B 9BF5 CF4D
Susan Johnson
District Court Judge

Submitted this 23rd day of January 2023

GREENBERG TRAURIG, LLP

By: */s/ Jason Hicks*
MARK E. FERRARIO
Nevada Bar No. 1625
JASON K. HICKS
Nevada Bar No. 13149

Attorneys for Get Fresh Sales, Inc.

Approved by:

SCHWARTZER & IMES LAW FIRM

By: */s/ Steven Eisenberg*
JASON A. IMES
Nevada Bar No. 7030

STERN & EISENBERG, P.C.
STEVEN K. EISENBERG
Pro Hac Vice

Attorneys for Lenard E. Schwartzer, Trustee for the Bankruptcy Estate of Fresh Mix, LLC

GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
702.792.3773

By: *Did Not Sign*
MARK J. CONNOT
Nevada Bar No. 10010
FOX ROTHSCHILD, LLP

DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
ABRAHAM G. SMITH
Nevada Bar No. 13250
LEWIS ROCA ROTHGERBER CHRISTIE

Attorneys for Paul Lagudi and William Todd Ponder

GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
702.792.3773