Case No. 86162

In the Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

PAUL LAGUDI and WILLIAM TODD PONDER,

Appellants,

vs.

FRESH MIX, LLC; and GET FRESH SALES, INC.,

Respondents.

RESPONSE TO RENEWED MOTION TO DISMISS

This is an appeal from orders imposing sanctions—both the original order and the subsequent order partially denying its amendment. In this hybrid litigation-arbitration action, the original order disqualified plaintiffs' counsel of choice, ordered payment of attorney fees and costs, and dissolved an ongoing arbitration panel. (*See* Ex. 1 to Renewed Notice of Appeal.) The latest order vacates the original order's dissolution of the arbitration but affirms the other sanctions. Given the orders' effect on the ongoing arbitration, and this Court's indication that "[a] sanctions order is final and appealable," plaintiffs in an abundance of caution filed this appeal. *Mona v. Eighth Judicial Dist. Court*, 132 Nev. 719, 724, 380 P.3d 836, 840 (2016).

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Although respondent Get Fresh Sales, Inc.'s contends that these orders are not appealable, the question is at best unclear. Allowing the parties to brief the merits would give this Court an opportunity (1) to clarify its jurisprudence and (2) even if the issues must be resolved via writ petition, to treat this appeal as a writ petition.

RELEVANT FACTS

What Get Fresh characterizes as a "business divorce" (Mot. 3) was the culmination of its months-long campaign to harass and isolate Fresh Mix's minority owners to force them to sell their ownership interests. Those efforts peaked in November 2018, when Get Fresh locked the minority owners, plaintiffs/appellants Paul Lagudi and William Todd Ponder, out of their Fresh Mix offices and confiscated their work and personal possessions. (Ex. A, Complaint, at ¶ 77.)

Plaintiffs sued Get Fresh and Fresh Mix for breaches of the Fresh Mix operating agreement and equitable relief. (*Id.*) In February 2019, the district court ordered plaintiffs to arbitrate their claims under the operating agreement and simultaneously stayed any equitable claims pending the arbitration. (*See* Ex. 1 to Mot.)

When Get Fresh continued its harassment campaign, including by adding plaintiffs' wives to the arbitration and not providing services to Fresh Mix's customers, plaintiffs moved to lift the stay in the district court and to amend their complaint. (Ex. B, 7/15/19 Motion to Lift Stay and Amend Complaint; Ex. C, 9/19/19 Verified Amended Complaint.) In a reply on this motion, they attached a memo that they had received along with their personal items when Get Fresh finally returned them. (Ex. D, 9/6/22 Supp Mot. to Vacate, at 4.) The memo purportedly details the problems with plaintiffs and included possible solutions. (Ex. D, 9/6/22 Supp Mot. to Vacate, at 3.)

Get Fresh moved to strike the memo from the record, claiming for the first time that the memo was protected by attorney-client privilege. (*See* Ex. 2 to Mot., at ¶ 61.) Plaintiffs' counsel immediately sequestered the memo, and the district court agreed to not consider the memo at the hearing on the motion to amend the complaint. (*Id.*) The district court nonetheless granted the motion to amend and then extended the stay pending arbitration. (Ex. E, 8/23/19 Order.) Notably, however, the district court also told Get Fresh that it would hear arguments about the memo "outside the stay." (*See* Ex. F, 8/5/2019 Transcript, at 14 ("If you

want me to make determinations [about the memo], I will outside the stay make those determinations, since the issue came up in my court.").)

Get Fresh asked the district court to sanction plaintiffs, including for counsel's reference to the memo in an effort to show that it was not privileged. (*See* Ex. 2 to Mot., at 1.) The district court agreed, finding that the memo was attorney-client privileged and that plaintiffs misused it. (*Id.* at 28.) As sanctions, the Court disqualified one of plaintiffs' attorneys, vacated the parties' ongoing arbitration, and awarded attorney fees and costs to defendants. (*Id.* at 29.)

Plaintiffs moved to vacate, alter, or amend the sanctions order on March 30, 2020. (Ex. 3 to Mot.) Shortly thereafter, Get Fresh forced Fresh Mix into bankruptcy, and the entire case was stayed.

After the bankruptcy stay was lifted, the district court (now Judge Susan Johnson) granted plaintiffs' motion to vacate the arbitration sanctions, finding that the court lacked the authority to issue such sanctions. (Ex. 4 to Mot.) But the district court denied the remainder of the motion, leaving in place the finding of privilege, as well as the sanctions of disqualification and attorney's fees. Plaintiffs appealed.

ARGUMENT

I.

PLAINTIFFS APPEALED IN GOOD FAITH

A. When Appellate Rights Are at Stake, Plaintiffs Cannot Simply Assume that an Order is Unappealable

Unlike some state and federal courts, this Court presently treats "the proper and timely filing of a notice of appeal" as "jurisdictional." *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). So where the law is unsettled, deciding whether to appeal or file a writ petition is risky business: if you wrongly guess that an issue is writable, you may lose your appellate rights altogether. In *Rawson v. Ninth Judicial Dist. Court*, for instance, this Court held that a void order should have been challenged through an appeal, not a writ petition: "as [petitioner] had a right to appeal the challenged order, but failed to pursue it, we decline to consider the merits of her writ petition and deny it." 133 Nev. 309, 316–17, 396 P.3d 842, 847–48 (2017). Oof.[1]

[1] Well, the petitioner could still collaterally attack the order under Rule 60(b)(4), and then, if necessary, appeal from the denial of *that* relief. *See id.*, 133 Nev. at 317 n.4, 396 P.3d at 848 n.4.

In *Yount v. Criswell Radovan, LLC*, undersigned counsel sought this Court's guidance on a question of appellate jurisdiction, believing that an order that referred only to unspecified damages of "two years' salary" and "management fees (if applicable)" was insufficiently definite to constitute the final judgment. *See* 136 Nev. 409, 414, 469 P.3d 167, 171 (2020) (referring to Aug. 24, 2018 order, Doc. No. 18-33097). Turns out, it was a good thing we filed the just-in-case notice of appeal: this Court determined that this was indeed the final judgment; a later "judgment" reducing the damages to a dollar figure was a nullity. *Id.*

B. The Original Sanctions Order Was Likely Appealable under the Uniform Arbitration Act

Here, when plaintiffs appealed from the original sanctions order striking the arbitration panel, it appeared that such an unprecedented remedy was appealable under the Uniform Arbitration Act. It was tantamount to "denying a motion to compel arbitration" or "stay[ing] arbitration," or indeed "vacating an award without directing a rehearing" before the panel—as the ongoing arbitration was not just halted, but the panel and all of its orders were to be stricken. NRS 38.247(1)(a), (b), (e).

C. The Modified Sanctions Order May Be Appealable under *Mona*

Now, plaintiffs maintain their appeal from the original order, but the modification of that order removes the arbitration sanction. While Get Fresh may be correct that an appeal under NRS 38.247 may be unavailable, that does not end the appealability question. For although a sanctions order is not listed in NRAP 3A(b) as an appealable order, this Court has previously stated that "[a] sanctions order is final and appealable." *Mona*, 132 Nev. at 724, 380 P.3d at 840.

There is no question that this is an appeal from a sanctions order. In fact, the sanctions award is the final resolution of a three-day evidentiary hearing in standalone proceedings; after the sanctions were resolved, the case resumed in arbitration. According to *Mona*, an *en banc* decision from this Court, a sanctions order is a final and appealable order. *See also* NRCP 54(c) ("Judgment" means "any order from which an appeal lies").

Plaintiffs understand that *Mona* relies on *Bahena v. Goodyear Tire & Rubber Co.*, which involved an appeal of a sanctions order after entry of judgment. 126 Nev. 243, 248–49, 235 P.3d 592, 596 (2010). Plaintiffs also understand the Court has previously considered

sanctions orders in writ petitions and that the Court has been more stringent in what constitutes a final order in other contexts, such as contempt. *See, e.g.*, *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000). But *Mona* did not limit itself when it used language indicating a sanctions order is appealable as a final judgment, as long as it is one of the parties to the case filing the appeal. *Mona*, 132 Nev. at 724, 380 P.3d at 840.

Further, the Court's consideration of this appeal would not be inconsistent with the policy underlying the final judgment rule. The final judgment rule is meant to promote judicial economy and efficiency by avoiding piecemeal appellate review. *See Archon Corp. v. Eighth Judicial District Court*, 133 Nev. 816, 823–24, 407 P.3d 702, 709 (2017). Here, the sanctions order, and the proceedings underlying it to determine privilege, were conducted in discrete proceedings; the district court treated them as neither part of the arbitration nor part of the stayed equitable claims.

At a minimum, until this Court clarifies or limits the statement in *Mona*, plaintiffs hesitate to guess that these orders are unappealable.

II.

ALTERNATIVELY, THE COURT SHOULD TREAT THIS APPEAL AS A PETITION FOR A WRIT OF MANDAMUS

If plaintiffs had pursued a writ petition instead of this appeal, and then the Court applied *Mona*'s language to find that plaintiffs could have appealed, then plaintiffs would effectively be barred from challenging the order. *See, e.g.*, *Rawson v. Ninth Judicial Dist. Court*, 133 Nev. 309, 317, 396 P.3d 842, 848 (2017). If the Court ultimately determines that the sanctions order is not appealable, plaintiffs alternatively ask the Court to convert the appeal to a petition for a writ of mandamus and/or prohibition. Indeed, if no appeal is available, this would indicate that writ review is warranted.

This Court has treated an appeal as a petition for a writ of mandamus when "it would be unfair to do otherwise." *Clark County Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 658, 730 P.2d 443, 446 (1986). It has specifically done so when there is "confusing case precedent" for whether an order is appealable or not. *Jarstad v. National Farmers Union Property & Cas. Co.*, 92 Nev. 380, 384, 552 P.2d 49, 51

(1976). Here, if a sanctions order is not appealable, then *Mona*'s directly contrary language should qualify as confusing precedent.[2]

Plaintiffs are prepared to file a separate writ petition if necessary, but are reluctant to so duplicate efforts without this Court's express direction. After briefing, converting the appeal to a writ petition as necessary would conserve party and judicial resources.

Dated this 15th day of September, 2023.

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[2] Notably, *Mona* appears for the proposition that "A sanctions order is final and appealable" when you conduct a Westlaw search in "all states" and "all federal" jurisdictions with the question: "Is a sanctions order appealable?"

CERTIFICATE OF SERVICE

I certify that on September 15, 2023, I submitted the foregoing "Response to Renewed Motion to Dismiss" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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EXHIBIT A

EXHIBIT A

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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.

A-18-785391-B

CASE NO:
DEPT. NO: **Department 11**

REQUEST TO ASSIGN MATTER TO BUSINESS COURT:
EDCR 1.61(a)(1) and (c)(2)

Exempt from Arbitration:

Claimed damages in excess of $50,000.00;
Declaratory Judgment;
and
Injunctive Relief

COMPLAINT

COMES NOW, Plaintiffs, PAUL LAGUDI, an individual, and WILLIAM TODD PONDER, an Individual (together, the "Plaintiffs"), by and through their attorney of record, JEFFERY A. BENDAVID, ESQ. and STEPHANIE J. SMITH, ESQ., of MORAN BRANDON BENDAVID MORAN, and hereby submit their Complaint against Defendants, FRESH MIX, LLC, a Delaware limited liability

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company ("Fresh Mix"); GET FRESH SALES, INC., a Nevada corporation; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, and alleges the following:

I. PARTIES

1. Plaintiff, PAUL LAGUDI ("Lagudi"), is an individual residing in Clark County, Nevada.

2. Plaintiff, WILLIAM TODD PONDER ("Ponder"), is an individual residing in Clark County, Nevada.

3. Plaintiffs are informed and believe and thereupon allege that Defendant, FRESH MIX, LLC, is a Delaware limited liability company registered with the Nevada Secretary of State as a foreign entity authorized to conduct business in the State of Nevada.

4. Plaintiffs are informed and belied and thereupon allege that Defendant, GET FRESH SALES, INC. ("Get Fresh"), is a Nevada corporation conducting business in Clark County, Nevada.

5. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as DOES 1 through 25, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, and each of them, are unknown to Plaintiffs who therefore sues such Defendants by such fictitious names. Plaintiffs are informed, believe and thereon allege that each of the Defendants designated herein as a "DOE" or "ROE BUSINESS ENTITY" are agents, employees, servants and representatives of the named Defendant or persons and entities answering in concert with the named Defendants with respect to the agreement herein pled, who are liable to

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Plaintiffs by reason thereof, and Plaintiffs pray leave to amend this Complaint to insert their true names or identities with appropriate allegations when same become known.

6. This Court maintains jurisdiction over this matter since Plaintiffs allege damages in excess of $15,000, and seek injunctive relief. Venue is proper in this Court pursuant to NRS 13.010 and 13.040, in that this is the county in which the Defendants reside and the obligations of the parties hereto were to be performed or occurred.

II. GENERAL ALLEGATIONS

7. The allegations of paragraphs 1 through 6 of this Complaint are incorporated by reference herein with the same force and effect as set forth in full below.

8. Fresh Mix is a Delaware limited liability company organized to engage in the business of distributing food products.

9. Lagudi is a member of Fresh Mix owning 30% of Fresh Mix's total membership interest.

10. Ponder also is a member of Fresh Mix owning 10% of Fresh Mix's total membership interest and also was a member of Get Fresh's Strategic Leadership Team.

11. The remaining 60% of Fresh Mix's total membership interest is owned by Get Fresh Sales, Inc.

12. On or about January 11, 2010, Plaintiffs, Get Fresh, and Fresh Mix entered into a Limited Liability Company Agreement (the "Operating Agreement"), which provided the terms and conditions for the operation and management of Fresh Mix and which bound Fresh Mix and its Members and Managers to perform in the manner required by this Operating Agreement.

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13. Pursuant to Section 5.1 of the Operating Agreement, the business, property, and affairs of Fresh Mix are managed exclusively by the Managers acting through a Board of Managers.

14. Pursuant to Section 5.2(a) of the Operating Agreement, five (5) Managers comprise Fresh Mix, LLC's Board of Managers.

15. Three (3) Managers, Dominic Caldara ("Caldara"), Scott Goldberg ("Goldberg"), and Jonathan Wise ("Wise"), were appointed by Get Fresh, and Plaintiffs are the remaining Managers comprising Fresh Mix's current Board of Managers.

16. Section 5.2(b) of the Operating Agreement provides that Plaintiffs, so long as they are members of Fresh Mix, cannot be removed as Fresh Mix's Managers.

17. Section 5.1(c) of the Operating Agreement requires each Manager to perform his managerial duties in good faith and in a manner in the best interests of the Company.

18. Pursuant to Section 5.4(c) of Fresh Mix's Operating Agreement, Get Fresh was required to contribute all of the required sales and administrative staff to Fresh Mix required for Plaintiffs to operate Fresh Mix's day-to-day operations.

19. Except for certain decisions that required the Super Majority (>75%) vote or consent of Fresh Mix's members, Section 5.3 of the Operating Agreement provides that Fresh Mix's Board of Managers has full and exclusive authority to manage and control Fresh Mix's business, property, and affairs.

20. Unless otherwise required by the Operating Agreement, Section 5.1(e) of the Operating Agreement provides that any decision by the Board of Managers of Fresh Mix requires the majority (>50%) vote or consent of the managers on the Board after a

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quorum of managers (>50%) has been found.

21. Section 5.3 of Fresh Mix's Operating Agreement identifies several actions or activities of Fresh Mix that cannot occur or be engaged in unless a Supermajority (>75%) of Fresh Mix's members approve such actions or activities.

22. Included as part of this list of decisions requiring the prior Supermajority (>75%) approval of Fresh Mix's members is any act which would make it impossible to carry on the ordinary business of Fresh Mix.

23. Section 5.5 of Fresh Mix's Operating Agreement permitted its Board of Managers to appoint officers of the Company to conduct the day-to-day business and affairs of the Company.

24. The members of Fresh Mix organized Fresh Mix so that the day-to-day business operations could be run exclusively by Plaintiffs.

25. In accordance with this intention, Lagudi was appointed as Fresh Mix's President and Ponder was appointed as Fresh Mix's Chief Operating Officer.

26. On or about January 11, 2010, Lagudi and Ponder entered into a separate Employment Agreement with Fresh Mix to perform duties as the President and Chief Operating Officer of Fresh Mix.

27. Section 1 of Plaintiffs' employment agreement provided that the term of the agreement was for a period of three (3) years commencing on January 11, 2010, and Section 1 further required that if any party wished to renew their employment agreement, such party was required to provide written notice to the other party not later than 120 days prior to the expiration of the term of the employment agreement.

28. As acknowledged previously by Get Fresh, Caldara, Goldberg, and

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Wise, each employment agreement expired without renewal and without the required 120 day prior notice from any party notifying the other party of their desire to renew.

29. However, Plaintiffs did not remain employees after the expiration of their employment agreements.

30. Once Plaintiffs' employment agreements expired on January 10, 2013, Plaintiffs did not continue as employees of Fresh Mix.

31. Instead, Plaintiffs operated Fresh Mix on a day-to-day basis only in their capacity as Managers and Members of Fresh Mix.

32. Plaintiffs never received any wages after their employment agreements expired on January 10, 2013.

33. Plaintiffs did not receive any IRS Form W-2's from Fresh Mix memorializing the payment of any wages to Plaintiffs by Fresh Mix after the expiration of their employment agreements.

34. Fresh Mix did not pay any payroll, social security, or Medicare taxes regarding Plaintiffs after the expiration of Plaintiffs' employment agreements.

35. Since the expiration of Plaintiffs' employment agreements, Plaintiffs have only received a guaranteed bonus for operating the day-to-day business of Fresh Mix.

36. In fact, Fresh Mix, since the expiration of Plaintiffs' employment agreements on January 10, 2013, only had a single, actual employee, an administrative assistant, who Get Fresh terminated on November 26, 2018.

37. Since the expiration of Plaintiffs' employment agreements, Lagudi and Ponder were the only Managers and Members of Fresh Mix who operated the day-to-

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day business of Fresh Mix.

38. Lagudi set pricing on a weekly basis for Fresh Mix's major casino resort client.

39. Plaintiffs are the only Managers and Members of Fresh Mix who meet regularly with that client to discuss and address the issues of its accounts.

40. Lagudi is the only Manager and Member of Fresh Mix who receives the orders at least four (4) days a week from another client who is a national grocery store chain.

41. Lagudi is the only Manager and Member of Fresh Mix who instructs and determines the recipe changes of Fresh Mix's Organic Salad kits and programs, which was a product created by Lagudi.

42. Lagudi is the only Manager and Member of Fresh Mix who manages Fresh Mix's "Sous Vide" product line, including, but not limited to the organization and management of the purchasing, manufacturing, sales, and logistics required specifically for the continued viability of this product line.

43. Lagudi is the only Manager and Member of Fresh Mix who manages all sales and organizes all production requested by another of Fresh Mix's clients who also is a national retail grocery provider.

44. Plaintiffs are the only Managers and Members of Fresh Mix who have pursued new business clients on behalf of Fresh Mix, including the recently retained multi-million dollar customer that is scheduled to commence business with Fresh Mix in January 2019, but likely cannot do so as a result of Plaintiffs' removal since they were the only Managers and Members managing with the work required to commence

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business.

45. Ponder is the Manager and Member of Fresh Mix who performs the orders and tracking for Fresh Mix.

46. Plaintiffs are the sole Managers and Members of Fresh Mix in contact and communication with each of Fresh Mix's customers, including, but not limited to those customers' Executive Chefs, Presidents, Vice-Presidents or other senior executive and staffs, purchasing agents, and representatives.

47. Plaintiffs are the sole Managers and Members of Fresh Mix who maintain the day-to-day operation of Fresh Mix, its, business, affairs, and client relationships.

48. Absent Plaintiffs' performance of their duties as Managers and Members, it is impossible for Fresh Mix to carry on the ordinary business of Fresh Mix, which was as intended by Fresh Mix's other Managers and Members, Get Fresh, Caldara, Goldberg, and Wise.

49. This impossibility has already become reality as the manager for the production of Fresh Mix's "Sous Vide" product line has already sought information and contact from Fresh Mix after Plaintiffs' removal without any response from Fresh Mix despite the fact that this operator is supposed to receive product on Monday December 3, 2018 to produce the "Sous Vide" product line, which now it will not receive on time because no one at Get Fresh knows what to do to manage this product line.

50. In fact, Lagudi has already been contacted by this operator, because he has not received any response from Fresh Mix, informing him that he has not heard anything from Fresh Mix as to what product is arriving, or if product is arriving at all,

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even though is he supposed to receiving product on Monday, December 3, 2018.

51. Previously, Plaintiffs have entered into negotiations with Get Fresh Sales, Inc., for Get Fresh's purchase of Plaintiffs' membership interests in Fresh Mix.

52. These negotiations have been extensive and contentious.

53. As part of these negotiations, Plaintiffs identified several instances where additional monies were owed Fresh Mix by Get Fresh as a result of sales and accounting practices contributed by Get Fresh pursuant to Fresh Mix's Operating Agreement.

54. In retaliation for Plaintiffs assertions that Get Fresh owed Fresh Mix additional monies and after negotiations became unsatisfactory to Get Fresh, Get Fresh and Caldara began a strategic campaign to harass, isolate, and irritate Plaintiffs to such a degree that performing their duties as Managers and Members would be nearly impossible and as a result, they would agree to sell their membership interests for terms more satisfactory to Get Fresh.

55. As an example, Ponder, on one occasion appeared at Fresh Mix's offices and was informed by an employee of Get Fresh that Caldara had instructed him to move Ponder's office and its contents into the office occupied by Lagudi, which was an office suitable only for one person, and despite the fact that an adjacent office was empty and available for use by Ponder.

56. This office "move" was done solely to harass and irritate Ponder and isolate Plaintiffs from any other individuals.

57. On another occasion, Ponder, who is disabled, having lost a leg in a horrific motor cycle accident and is now forced to wear a prosthetic leg, appeared at

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Fresh Mix's offices during the summer wearing shorts, which was a common practice during the summertime.

58. Upon seeing Ponder wearing shorts that exposed his prosthetic leg, Caldara began screaming at Ponder in front of other individuals that he was not permitted to wear shorts in the office and could never do so again.

59. Caldara's outburst was intentional to embarrass Ponder and further isolate him from any employees of Get Fresh who witnessed this exchange.

60. On another occasion, Get Fresh removed Ponder from the Strategic Leadership Team set up by Get Fresh without explanation or reason.

61. Ponder was removed from the Strategic Leadership Team solely to further isolate Ponder and Lagudi and reduce their knowledge of events occurring around them.

62. In addition to directly harassing Plaintiffs, Get Fresh undertook a campaign to devalue Fresh Mix by interfering with Fresh Mix's customer relationship and preventing Plaintiffs from conducting the day-to-day business of Fresh Mix.

63. For approximately the past eight (8) months, Get Fresh and Caldara have been instructing Get Fresh's sales executives and staff to limit their conversations and dealings with Plaintiffs and were instructed to not assist Plaintiffs in performing Fresh Mix's business.

64. Get Fresh and Caldara also instructed Get Fresh's accounting staff to no longer provide any financial and accounting information to Plaintiffs and to not speak to Plaintiffs at all.

65. After negotiations between Plaintiffs and Get Fresh for the purchase of

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Plaintiffs' membership interests in Fresh Mix came to a complete impasse in the past weeks, Get Fresh, solely and without the prior vote or consent of the Board of Managers and a Supermajority (>75%) of the members, caused Fresh Mix to terminate the employment of Plaintiffs on November 26, 2018, the first Monday after the Thanksgiving holiday, by providing Plaintiffs written notice of their termination.

66. In fact, Fresh Mix emailed Plaintiffs its notice of termination to their employee e-mail accounts and then upon delivery, then immediately terminated Plaintiffs' access to their e-mail accounts.

67. As it turns out, Caldara has now diverted Plaintiffs' email accounts to himself and its reviewing and taking over their Fresh Mix emails.

68. Specifically, Fresh Mix informed Plaintiffs that it was not renewing their employment agreements "beyond the current, January 2019 expiration," despite the undisputable fact, acknowledged repeatedly by Get Fresh and Caldara that Plaintiffs were not subject to an employment agreement expiring in January 2019 and had not been subject to any employment agreement since January 10, 2013, when their original employment agreements expired without renewal.

69. At the same time, Get Fresh caused Fresh Mix to declare to Plaintiffs that it believed it had grounds to terminate Plaintiffs "for cause" under Section 8.2 of their expired employment agreements despite the undisputed fact acknowledged repeatedly by Get Fresh and Caldara that Plaintiffs were not subject to any employment agreement with Fresh Mix since January 10, 2013.

70. Fresh Mix did not identify or discuss such grounds, but instead declared that these grounds would be discussed later at a meeting required by Section 14.7 of

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Fresh Mix's Operating Agreement.

71. However, no such meeting is required or authorized by Section 14.7 of Fresh Mix's Operating Agreement to discuss grounds for terminating Plaintiffs' employment "for cause."

72. The incurable problem with these despicable actions is that Plaintiffs were not employees of Fresh Mix and had not been employees of Fresh Mix since their employment agreements expired on January 10, 2013.

73. Since the expiration of Plaintiffs' employment agreements on January 1, 2013, Plaintiffs have been operating and managing all of Fresh Mix's day-to-day business operations in their capacity as Managers and Members Fresh Mix.

74. Fresh Mix, Get Fresh, Caldara, Goldberg, and Wise all were aware of this reality since Plaintiffs had not received any W-2 wages from Fresh Mix since the expiration of their employment agreements and instead only received a guaranteed bonus and Plaintiffs have paid for their own health insurance as "self-employed."

75. Although Plaintiffs remain Managers and Members of Fresh Mix, Fresh Mix informed Plaintiffs that they were not permitted on the premises of Fresh Mix and could not contact any of Fresh Mix's customers even though Plaintiffs were the sole customer contacts for Fresh Mix's customers.

76. Fresh Mix terminated access to Plaintiffs' business e-mail accounts and then re-routed them to Caldara, demanded the return of its personal property from Plaintiffs, and expressly prohibited Plaintiffs from entering Fresh Mix's property for any reason, including to retrieve any personal items left behind in their offices.

77. Fresh Mix completely locked Plaintiffs out of their offices, confiscated

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their possessions, confiscated their digital and physical files and terminated access their emails and then re-routed them to Caldara despite the fact that Plaintiffs remain Managers and Members of Fresh Mix.

78. Plaintiffs remain Managers and Members of Fresh Mix and as a result, Fresh Mix has no right to take such action against Plaintiffs, Fresh Mix cannot retain the personal emails and files of Plaintiffs, some of which absolutely are subject to attorney/client privileges, since they remain Managers and Members of Fresh Mix.

79. Fresh Mix also has no right to confiscate and retain Plaintiffs' personal property, including their personal records, documents, and files.

80. All of these actions by Fresh Mix constitute an unlawful removal of Plaintiffs as Managers and Members of Fresh Mix.

81. However, Section 5.2(b) expressly prohibits the removal of Plaintiffs as Managers for any reason or in any manner.

82. Plaintiffs remain Managers and Members of Fresh Mix and as a result, cannot be excluded from the physical and digital property of Fresh Mix simply because Get Fresh is attempting to strong-arm Plaintiffs into a sale of their membership interests.

83. Fresh Mix cannot take such action because Plaintiffs were not employees of Fresh Mix and pursuant to Section 5.2(b) of Fresh Mix's Operating Agreement could not be removed as Managers for any reason so long as they remained Members of Fresh Mix.

84. Fresh Mix attempted to terminate or in fact remove Plaintiffs as Managers without any right to do so and nonetheless, did so without notifying

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Plaintiffs, as Managers of Fresh Mix, of any meeting of Fresh Mix's Board of Managers to consider such actions.

85. Additionally, Fresh Mix attempted to "terminate" Plaintiffs, and in fact remove Plaintiffs as Managers without any right to do so, and in addition, without notifying Plaintiffs, as Members of Fresh Mix, of any meeting of Fresh Mix's Members to consider whether such actions would render it impossible for Fresh Mix to carry on the ordinary business of Fresh Mix thereby requiring the approval of a Supermajority (>75%) of Fresh Mix's members pursuant to Section 5.3 of Fresh Mix's Operating Agreement.

86. In reality, Get Fresh caused Fresh Mix to attempt to take such actions against Plaintiffs because it knew that such action would result in the loss of Fresh Mix's existing and potential customers because Fresh Mix had only one actual employee, an administrative assistant who was terminated by Get Fresh, and Plaintiffs were the only Managers and Members of Fresh Mix who operated Fresh Mix's business, handled the day-to-day needs of Fresh Mix's customers, and who solicited new customers for Fresh Mix.

87. Get Fresh also knew that if Fresh Mix lost its existing customers, the value of Fresh Mix would be severely decreased resulting in a lesser purchase price for Get Fresh to acquire Plaintiffs' membership interests in Fresh Mix.

88. Get Fresh was completely aware of this reality as Plaintiffs' efforts on behalf Fresh Mix resulted in Fresh Mix annually increasing Fresh Mix's gross profits.

89. In fact, Goldberg, a Manager of Fresh Mix appointed by Get Fresh, repeatedly stated that Fresh Mix would lose at least 60-75% of its value if Plaintiffs

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were not working for Fresh Mix and that Lagudi was a one of kind salesman who drove the business with his enthusiasm and efforts.

90. Get Fresh was keenly aware of this reality since immediately after unlawfully removing Plaintiffs, Caldara met with a representative of Fresh Mix's customer and informed him that he "terminated" Plaintiffs and that they were no longer with Fresh Mix and that their account was still in good hands, even though he knew he could not take such action and Plaintiffs remain Managers and Members of Fresh Mix.

91. Besides being completely false, Caldara's statements to Fresh Mix's customers were on their face defamatory to Plaintiffs since neither, Fresh Mix, Get Fresh, nor Caldara had any right to "terminate" Plaintiffs since they were not employees of Fresh Mix and could not be removed from their positions as Managers and Members of Fresh Mix.

92. In addition, Wise, also a Manager of Fresh Mix, notified Fresh Mix's customer, Roger Oswalt Produce, that they were no longer to have any communications with Plaintiffs even though both remain Managers and Members of Fresh Mix and prior to their unlawful removal were the sole contacts for this customer.

93. Nonetheless, Get Fresh unlawfully caused Plaintiffs to be removed as Managers of Fresh Mix and barred them from accessing Fresh Mix's property and accounts.

94. It is clear that all of the steps taken by Get Fresh were taken intentionally to devalue Fresh Mix as a going concern and force Plaintiffs to sell their membership interests at a lower price and not as a result of any failures by Plaintiffs to perform their duties as Managers or Members.

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95. Plaintiffs' termination allegedly "for cause" under employment agreements that indisputably expired more than five years ago is just another transparent attempt to force Plaintiffs' to sell at a lower price.

96. Section 8.3(c) of Fresh Mix's Operating Agreement identifies the termination of Plaintiffs "for cause" under the Employment Agreement as a "Repurchase Event."

97. Pursuant to Sections 8.4(b) and (c) of Fresh Mix's Operating Agreement, the existence of a "Repurchase Event" such as a termination "for cause" of Plaintiffs' employment agreements authorizes Fresh Mix to purchase Plaintiffs' membership interests at just 25% of their fair market value.

98. Thus, Get Fresh caused Fresh Mix to terminate Plaintiffs allegedly "for cause" under their previously expired employment agreements solely to force Plaintiffs' to sell their membership interests at a greatly reduced price, especially since Get Fresh and Fresh Mix's other Managers knew full well that these employment agreements expired more than five (5) years ago and Plaintiffs had not been employed by Fresh Mix since that time.

99. Fresh Mix also tried to enforce other advantageous provisions of the expired employment agreements.

100. As part of Fresh Mix's notice to Plaintiffs, Fresh Mix asserted that Plaintiffs were subject to the two (2) year non-competition obligation provided in Section 5.1 of the Plaintiffs' employment agreements, which prohibited Plaintiffs from competing against Fresh Mix for a period of two (2) years from the expiration of the agreement's term.

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101. Again, this provision is wholly inapplicable since each employment agreement's term expired on January 10, 2013, and as a consequence any obligation by Plaintiffs to not compete with Fresh Mix expired two (2) years later on January 10, 2015.

102. Strangely, Fresh Mix only attempts to enforce those provisions of the expired employment agreement that could force Plaintiffs to sell their membership interests at a greatly reduced price.

103. Fresh Mix, however, did not attempt to apply other provisions of the now expired employment agreements such as Section 8.2(viii), which required Fresh Mix to first provide Plaintiffs written notice of any breach of the employment agreement other than Section 5, stating the nature of the breach and affording Plaintiffs fifteen (15) days to cure the alleged breach.

104. Plaintiffs have not received any such written notice or has had an opportunity to cure any such alleged breach of their employment agreements, which of course would be contrary to the obvious strategy of blatantly attempting to force Plaintiffs into selling their membership interests for a greatly reduced price.

105. Such absence only further demonstrates the true motive of Get Fresh to force Plaintiffs to sell their membership interests at a greatly reduced price.

III. FIRST CAUSE OF ACTION
(Breach of Operating Agreement Get Fresh and Fresh Mix)

106. The allegations of paragraphs 1 through 105 of this Complaint are incorporated by reference herein with the same force and effect as set forth in full below.

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107. Plaintiffs, along with Get Fresh, own 100% of the total membership interests in Fresh Mix.

108. On or about January 11, 2010, Plaintiffs, Get Fresh, and Fresh Mix entered into a valid and enforceable Operating Agreement for Fresh Mix, which provided the terms and conditions for the operation and management of Fresh Mix and which further bound Fresh Mix and its Members and Managers to perform in the manner required by this Operating Agreement.

109. At all times relevant, Plaintiffs performed every term and condition of the Operating Agreement required of Plaintiffs as members, as managers, and as officers of Fresh Mix.

110. Pursuant to Section 5.1 of the Operating Agreement, the business, property, and affairs of Fresh Mix are managed exclusively by the Managers acting through a Board of Managers.

111. Pursuant to Section 5.2(a) of the Operating Agreement, five (5) Managers comprise Fresh Mix's Board of Managers.

112. Section 5.2(b) of the Operating Agreement provides that Plaintiffs, so long as they are members of Fresh Mix, are Managers on the Board of Managers of Fresh Mix and cannot be removed as Managers for any reason so long as they are Members of Fresh Mix.

113. Section 5.5 of Fresh Mix's Operating Agreement permitted its Board of Managers to appoint officers of the Company to conduct the day-to-day business and affairs of the Company.

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114. Accordingly, Lagudi was appointed as Fresh Mix's President and Ponder was appointed as Fresh Mix's Chief Operating Officer.

115. On or about January 11, 2010, each Plaintiff entered into a separate Employment Agreement with Fresh Mix to perform duties as the President and Chief Operating Officer of Fresh Mix.

116. Section 1 of Plaintiffs' employment agreements provided that the term of the agreement was for a period of three (3) years commencing on January 11, 2010, and Section 1 of the employment agreements further required that if any party wished to renew their employment agreement, such party was required to provide written notice to the other party not later than 120 days prior to the expiration of the term of the employment agreement.

117. As acknowledged previously by Get Fresh, Caldara, Goldberg, and Wise, each employment agreement of Plaintiffs expired without renewal and without the required 120 day prior notice from any party notifying the other party of their desire to renew.

118. Once Plaintiffs' employment agreements expired on January 10, 2013, Plaintiffs did not continue as employees of Fresh Mix.

119. Instead, Plaintiffs operated Fresh Mix on a day-to-day basis only in their capacity as Managers and Members of Fresh Mix.

120. Plaintiffs never received any wages after their employment agreements expired on January 10, 2013.

121. Plaintiffs did not receive any IRS Form W-2's from Fresh Mix memorializing the payment of any wages to Plaintiffs by Fresh Mix after the expiration

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of their employment agreements.

122. Fresh Mix did not pay any payroll, social security, or Medicare taxes for Plaintiffs after the expiration of Plaintiffs' employment agreements.

123. Since the expiration of Plaintiffs' employment agreements, Plaintiffs only have received a guaranteed payment for their operating the day-to-day business of Fresh Mix.

124. Since the expiration of Plaintiffs' employment agreements, Lagudi and Ponder were the only Managers and Members of Fresh Mix who operated the day-to-day business of Fresh Mix.

125. In fact, Fresh Mix, since the expiration of Plaintiffs' employment agreements on January 10, 2013, only had a single, actual employee, an administrative assistant, who was terminated by Get Fresh on November 26, 2018.

126. On Monday, November 26, 2018, Plaintiffs received by email notice from Get Fresh and Fresh Mix that their "employment" was terminated immediately and were prohibited from entering Fresh Mix's property.

127. Plaintiff were further instructed to cease all work on Fresh Mix matters and cease use of all Fresh Mix property or data.

128. Plaintiffs were further instructed to return all of Fresh Mix's property such as keys, cell phones, computers, files, etc.

129. After receiving this email, Plaintiffs email accounts were terminated immediately and then re-routed to Caldara, and thereafter, Plaintiffs no longer had access to their offices, email accounts, or Fresh Mix's records, files, data, documents, or customers.

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130. Thereafter, some of Fresh Mix's customers have been instructed to not speak with or contact Plaintiffs even though both remain Managers and Members of Fresh Mix.

131. In one instance, Caldara told a representative of one Fresh Mix customer that "he had to terminate" Plaintiffs and that Plaintiffs were no longer part of Fresh Mix anymore, even though Plaintiffs, as Caldara knows, remain Managers and Members of Fresh Mix.

132. In another instance, Wise instructed Fresh Mix's customer, Roger Oswalt Produce, that it was no longer permitted to communicate with Plaintiffs even though both remain Managers and Members of Fresh Mix.

133. As a result, Get Fresh and Fresh Mix removed Plaintiffs as Managers of Fresh Mix since the actions taken by Get Fresh and Fresh Mix prevented Plaintiffs from performing their duties as Managers in operating the business and affairs of Fresh Mix.

134. However, Section 5.2(b) of Fresh Mix's Operating Agreement expressly prohibits Plaintiffs from being removed in any manner as a Manager of Fresh Mix so long as they are Members of Fresh Mix.

135. As such, Fresh Mix and Get Fresh breached the terms and conditions of Fresh Mix's Operating Agreement when it removed Plaintiffs as Managers from Fresh Mix.

136. As a result of Get Fresh's and Fresh Mix's breach of its Operating Agreement, Plaintiffs have been damaged in an amount exceeding $15,000.00 and/or requiring Injunctive Relief.

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137. It has also become necessary for Plaintiffs to retain the services of an attorney to commence this action, and Plaintiffs are therefore entitled to reasonable attorney's fees and the costs of this action.

IV. SECOND CAUSE OF ACTION
(Breach of Operating Agreement Fresh Mix)

138. The allegations of paragraphs 1 through 137 of this Complaint are incorporated by reference herein with the same force and effect as set forth in full below.

139. On or about January 11, 2010, Plaintiffs, Get Fresh, and Fresh Mix entered into the Operating Agreement for Fresh Mix, which provided the terms and conditions for the operation and management of Fresh Mix and which further bound Fresh Mix and its Members and Managers to perform in the manner required by this Operating Agreement.

140. At all times relevant, Plaintiffs performed every term and condition of the Operating Agreement required of Plaintiffs as members, as managers, and as officers of Fresh Mix.

141. Pursuant to Section 5.1 of the Operating Agreement, the business, property, and affairs of Fresh Mix are managed exclusively by the Managers acting through a Board of Managers.

142. Section 5.5 of Fresh Mix's Operating Agreement permitted its Board of Managers to appoint officers of the Company to conduct the day-to-day business and affairs of the Company.

143. Accordingly, Lagudi was appointed as Fresh Mix's President and Ponder was appointed as Fresh Mix's Chief Operating Officer.

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144. On or about January 11, 2010, each Plaintiff entered into a separate Employment Agreement with Fresh Mix to perform their duties as the President and Chief Operating Officer of Fresh Mix.

145. Section 1 of Plaintiffs' employment agreements provided that the term of the agreement was for a period of three (3) years commencing from January 11, 2010, and Section 1 the employment agreements further required that if any party wished to renew their employment agreement, such party was required to provide written notice to the other party not later than 120 days prior to the expiration of the term of the employment agreement.

146. As acknowledged previously by Get Fresh, Caldara, Goldberg, and Wise, each employment agreement expired without renewal and without the required 120 day prior notice from any party notifying the other party of their desire to renew.

147. Lagudi sets pricing for Fresh Mix's major casino resort customer.

148. Plaintiffs are the only Managers and Members of Fresh Mix who meet regularly with that customer to discuss and address the issues with its accounts.

149. Lagudi is the exclusive individual who receives the orders at least four (4) days a week from another client who is a national grocery store chain.

150. Lagudi is the sole person who instructs and determines the recipe changes of Fresh Mix's Organic Salad kits and programs, which was a product created by Lagudi.

151. Lagudi is the sole person who manages Fresh Mix's "Sous Vide" product line, including, but not limited to the organization and management of the

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purchasing, manufacturing, sales, and logistics required specifically for the continued viability of this product line.

152. Lagudi is the sole person who manages all sales and organizes all production requested by another of Fresh Mix's clients who also is a national retail grocery provider.

153. Plaintiffs are the only individuals who have pursued new business clients on behalf of Fresh Mix, including the recently retained multi-million dollar customer that is scheduled to commence business with Fresh Mix in January 2019, but likely cannot do so as a result of Plaintiffs' removal since they were the only Managers and Members managing with the work required to commence business.

154. Ponder is the sole employee who performs the orders and tracking for Fresh Mix.

155. Plaintiffs are the sole individuals in contact and communication with each of Fresh Mix's customers, including, but not limited to those customers' Executive Chefs, Presidents, Vice-Presidents or other senior executive and staffs, purchasing agents, and representatives.

156. Plaintiffs are the sole individuals who maintain the day-to-day operation of Fresh Mix, its, business, affairs, and client relationships.

157. Absent Plaintiffs' presence at Fresh Mix, it is impossible for Fresh Mix to carry on the ordinary business of Fresh Mix, which was as intended by the members of Fresh Mix.

158. This impossibility has already become reality as the manager for the production of Fresh Mix's "Sous Vide" product line has already sought information and

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contact from Fresh Mix after Plaintiffs' removal without any response from Fresh Mix despite the fact that this operator is supposed to receive product on Monday December 3, 2018 to produce the "Sous Vide" product line, which now it will not receive on time because no one at Get Fresh knows what to do to manage this product line.

159. In fact, Lagudi has already been contacted by this operator, because he has not received any response from Fresh Mix, informing him that he has not heard anything from Fresh Mix as to what product is arriving, or if product is arriving at all, even though is he supposed to receiving product on Monday, December 3, 2018.

160. As such, Section 5.3(c) of Fresh Mix's Operating Agreement expressly prohibited Fresh Mix's Board of Managers or its members from taking any action to remove Plaintiffs as Managers, prohibit their access to Fresh Mix's property, prohibit their contact with Fresh Mix's clients, and eliminate their access to their email accounts, records, files, and documents without the Supermajority (>75%) vote or consent of Fresh Mix's members since such an action, as Get Fresh knew and desired to cause to occur, would render it impossible for Fresh Mix to carry on its ordinary business.

161. Plaintiffs are members of Fresh Mix owning 40% of the total voting and membership interests in Fresh Mix.

162. Despite Plaintiffs' membership in Fresh Mix, Plaintiffs were never contacted or noticed of any meeting, formal or informal, of Fresh Mix's members to determine whether such actions should be taken against Plaintiffs or whether such actions, if executed, would result in Fresh Mix being unable to carry on its ordinary business.

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163. The written notice to Plaintiffs from Get Fresh and Fresh Mix does not provide any information as to when a meeting of its members was noticed or occurred.

164. The written notice to Plaintiffs also does not contain any information demonstrating that the members of Fresh Mix actually met, considered, or voted on the actions taken Plaintiffs or whether such actions would render it impossible for Fresh Mix to carry on its ordinary business.

165. As such, Fresh Mix has breached the terms and conditions of its Operating Agreement since Fresh Mix's members, as required by Section 5.3(c) of its Operating Agreement, did not meet, did not consider, and did not vote or consent with the approval of a Supermajority (>75%) of its members to take action against Plaintiffs that rendered it impossible for Fresh Mix to carry on its ordinary business.

166. As a result of Fresh Mix's breach of its Operating Agreement, Plaintiffs have been damaged in an amount exceeding $15,000.00, and/or require Injunctive Relief.

167. It has also become necessary for Plaintiffs to retain the services of an attorney to commence this action, and Plaintiffs are therefore entitled to reasonable attorney's fees and the costs of this action.

V. THIRD CAUSE OF ACTION
(Injunctive Relief)

168. The allegations of paragraphs 1 through 167 of this Complaint are incorporated by reference herein with the same force and effect as set forth in full below.

169. On or about January 11, 2010, Plaintiffs, Get Fresh, and Fresh Mix entered into the Operating Agreement for Fresh Mix, which provided the terms and

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conditions for the operation and management of Fresh Mix and which further bound Fresh Mix and its Members and Managers to perform in the manner required by this Operating Agreement.

170. At all times relevant, Plaintiffs performed every term and condition of the Operating Agreement required of Plaintiffs as members, as managers, and as officers of Fresh Mix.

171. Pursuant to Section 5.1 of the Operating Agreement, the business, property, and affairs of Fresh Mix are managed exclusively by the Managers acting through a Board of Managers.

172. Section 5.5 of Fresh Mix's Operating Agreement permitted its Board of Managers to appoint officers of the Company to conduct the day-to-day business and affairs of the Company.

173. Accordingly, Lagudi was appointed as Fresh Mix's President and Ponder was appointed as Fresh Mix's Chief Operating Officer.

174. On or about January 11, 2010, each Plaintiff entered into a separate Employment Agreement with Fresh Mix to perform their duties as the President and Chief Operating Officer of Fresh Mix.

175. Section 1 of Plaintiffs' employment agreements provided that the term of the agreement was for a period of three (3) years commencing from January 11, 2010, and Section 1 the employment agreements further required that if any party wished to renew their employment agreement, such party was required to provide written notice to the other party not later than 120 days prior to the expiration of the term of the employment agreement.

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176. As acknowledged previously by Get Fresh, Caldara, Goldberg, and Wise, each employment agreement expired without renewal and without the required 120 day prior notice from any party notifying the other party of their desire to renew.

177. Once Plaintiffs' employment agreements expired on January 10, 2013, Plaintiffs did not continue as employees of Fresh Mix.

178. Instead, Plaintiffs operated Fresh Mix on a day-to-day basis only in their capacity as Managers and Members of Fresh Mix.

179. Plaintiffs never received any wages after their employment agreements expired on January 10, 2013.

180. Plaintiffs did not receive any IRS Form W-2's from Fresh Mix memorializing the payment of any wages to Plaintiffs by Fresh Mix after the expiration of their employment agreements.

181. Fresh Mix did not pay any payroll, social security, or Medicare taxes for Plaintiffs after the expiration of Plaintiffs' employment agreements.

182. Since the expiration of Plaintiffs' employment agreements, Plaintiffs only have received a guaranteed payment for their operating the day-to-day business of Fresh Mix.

183. Since the expiration of Plaintiffs' employment agreements, Lagudi and Ponder were the only Managers and Members of Fresh Mix who operated the day-to-day business of Fresh Mix.

184. In fact, Fresh Mix, since the expiration of Plaintiffs' employment agreements on January 10, 2013, only had a single, actual employee, an administrative assistant, who was terminated by Get Fresh on November 26, 2018.

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185. Lagudi sets pricing for Fresh Mix's major casino resort customer.

186. Plaintiffs are the only Managers and Members of Fresh Mix who meet regularly with that customer to discuss and address the issues with its accounts.

187. Lagudi is the exclusive individual who receives the orders at least four (4) days a week from another client who is a national grocery store chain.

188. Lagudi is the sole person who instructs and determines the recipe changes of Fresh Mix's Organic Salad kits and programs, which was a product created by Lagudi.

189. Lagudi is the sole person who manages Fresh Mix's "Sous Vide" product line, including, but not limited to the organization and management of the purchasing, manufacturing, sales, and logistics required specifically for the continued viability of this product line.

190. Lagudi is the sole person who manages all sales and organizes all production requested by another of Fresh Mix's clients who also is a national retail grocery provider.

191. Plaintiffs are the only individuals who have pursued new business clients on behalf of Fresh Mix, including the recently retained multi-million dollar customer that is scheduled to commence business with Fresh Mix in January 2019, but likely cannot do so as a result of Plaintiffs' removal since they were the only Managers and Members managing with the work required to commence business.

192. Ponder is the sole employee who performs the orders and tracking for Fresh Mix.

193. Plaintiffs are the sole individuals in contact and communication with

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each of Fresh Mix's customers, including, but not limited to those customers' Executive Chefs, Presidents, Vice-Presidents or other senior executive and staffs, purchasing agents, and representatives.

194. Plaintiffs are the sole individuals who maintain the day-to-day operation of Fresh Mix, its, business, affairs, and client relationships.

195. Absent Plaintiffs' presence at Fresh Mix, it is impossible for Fresh Mix to carry on the ordinary business of Fresh Mix, which was as intended by the members of Fresh Mix.

196. This impossibility has already begun to become reality as Lagudi has already been contacted by the operator who produces this "Sous Vide" product line informing him that he has not heard anything from Fresh Mix as to what product is arriving, or if any product is arriving, despite his prior inquiries to Fresh Mix, even though is he supposed to receiving product on Monday, December 3, 2018, in order to produce the "Sous Vide" product line for Fresh Mix, which now it will not receive on time because no one at Get Fresh knows what to do to manage this product line.

197. On Monday, November 26, 2018, Plaintiffs received by email notice from Get Fresh and Fresh Mix that their "employment" was terminated immediately and were prohibited from entering Fresh Mix's property.

198. Plaintiff were further instructed to cease all work on Fresh Mix matters and cease use of all Fresh Mix property or data.

199. Plaintiffs were also instructed to return all of Fresh Mix's property such as keys, cell phones, computers, files, etc.

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200. After receiving this email, Plaintiffs email accounts were terminated immediately and re-routed to Caldara and thereafter, Plaintiffs no longer had access to their offices, email accounts, or Fresh Mix's records, files, data, documents, or customers.

201. As a result of these actions, Get Fresh and Fresh Mix removed Plaintiffs as Managers of Fresh Mix since the actions taken by Get Fresh and Fresh Mix prevented Plaintiffs from accessing Fresh Mix's property let alone, performing their duties as Managers in operating the business and affairs of Fresh Mix.

202. However, Section 5.2(b) of Fresh Mix's Operating Agreement expressly prohibits Plaintiffs from being removed in any manner as a Manager of Fresh Mix so long as they are Members of Fresh Mix.

203. As such, Fresh Mix and Get Fresh breached the terms and conditions of Fresh Mix's Operating Agreement when it removed Plaintiffs as Managers from Fresh Mix.

204. Additionally, Section 5.3(c) of Fresh Mix's Operating Agreement expressly prohibited Fresh Mix's Board of Managers or its members from taking any action to remove Plaintiffs as Managers, prohibit their access to Fresh Mix's property, prohibit their contact with Fresh Mix's clients, and eliminate their access to their email accounts, records, files, and documents without the Supermajority (>75%) vote or consent of Fresh Mix's members since such an action, as Get Fresh knew and desired to cause to occur, would render it impossible for Fresh Mix to carry on its ordinary business.

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205. Despite Plaintiffs' 40% membership in Fresh Mix, Plaintiffs were never contacted or noticed of any meeting, formal or informal, of Fresh Mix's members to determine whether such actions should be taken against Plaintiffs or whether such actions, if executed, would result in Fresh Mix being unable to carry on its ordinary business.

206. The written notice to Plaintiffs from Get Fresh and Fresh Mix did not provide any information as to when a meeting of its members was noticed or occurred.

207. The written notice to Plaintiffs also did not contain any information demonstrating that the members of Fresh Mix actually met, considered, or voted on the actions taken Plaintiffs or whether such actions would render it impossible for Fresh Mix to carry on its ordinary business.

208. As such, Fresh Mix also breached the terms and conditions of its Operating Agreement since Fresh Mix's Board of Managers and members, as required Section 5.3(c) of its Operating Agreement, did not meet, did not consider, and did not vote or consent to approve, with the required Supermajority (>75%) of its members, to take the actions taken against Plaintiffs or determine whether such actions rendered it impossible for Fresh Mix to carry on its ordinary business.

209. As a result of Get Fresh's and Fresh Mix's breach of Fresh Mix's Operating Agreement as demonstrated above, Plaintiffs enjoy a reasonable likelihood of success on the merits of its Breach of Contract claim asserted against Fresh Mix.

210. Get Fresh and Fresh Mix's unlawful actions, including the removal of Plaintiffs as Managers, were permitted without cause and have resulted in an unreasonable interference with the day-to-day business of Fresh Mix and have begun to

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cause confusion with its customers, destroy its profits, and damage its goodwill and the reputation of Plaintiffs.

211. If these unlawful, unjustified actions are permitted to continue without being enjoined, it will result in irreparable harm to Plaintiffs since Plaintiffs are Managers and Members of Fresh Mix and Fresh Mix will be prevented from continuing its ordinary business, will result in the loss of Fresh Mix's customers, will prevent the commencement of business with Fresh Mix's new customers, and will result in the immediate loss of profits and value of Fresh Mix.

212. Further, Section 14.8 of Fresh Mix's Operating Agreement specifically provides that any actual or prospective breach of the Operating Agreement by any party thereto constitutes an acknowledged event of irreparable harm to Plaintiffs for purposes of obtaining injunctive relief in the event that the Operating Agreement was not specifically enforced, which Plaintiffs have alleged has not occurred.

213. As a result, Get Fresh and Fresh Mix should be enjoined from removing Plaintiffs, prohibiting Plaintiffs from managing the day-to-day business of Fresh Mix, from accessing Fresh Mix's property, and from accessing Fresh Mix's emails, records, documents, and data since Plaintiffs are irreparably harmed by Fresh Mix's breach of its Operating Agreement.

214. Plaintiffs also should be entitled to a low or no bond since injunctive relief is necessary to preserve the status quo and permit Fresh Mix to carry on its ordinary business and protect its value. Further, Section 14.8 of the Operating Agreement for Fresh Mix expressly provides that Plaintiffs are entitled to seek

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injunctive relief without being required to post any bond or other security.

215. It has also become necessary for Plaintiffs to retain the services of an attorney to commence this action, and Plaintiffs are therefore entitled to reasonable attorney's fees and the costs of this action.

VI. FOURTH CAUSE OF ACTION
(Declaratory Judgment)

216. The allegations of paragraphs 1 through 215 of this Complaint are incorporated by reference herein with the same force and effect as set forth in full below.

217. On or about January 11, 2010, each Plaintiff entered into a separate Employment Agreement with Fresh Mix to perform duties as the President and Chief Operating Officer of Fresh Mix.

218. Section 1 of Plaintiffs' employment agreement provided that the term of the agreement was for a period of three (3) years commencing on January 11, 2010, and Section 1 of the employment agreements further required that if any party wished to renew their employment agreement, such party was required to provide written notice to the other party not later than 120 days prior to the expiration of the term of the employment agreement.

219. As acknowledged previously by Get Fresh, Caldara, Goldberg, and Wise, each employment agreement expired without renewal and without the required 120 day prior notice from any party notifying the other party of their desire to renew.

220. After expiration of the employment contracts on January 10, 2013, Plaintiffs continued operating and managing the business of Fresh Mix as Managers

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and Members of Fresh Mix.

221. On Monday, November 26, 2018, the first Monday after the Thanksgiving Holiday, Get Fresh and Fresh Mix sent written notice to Plaintiffs informing them that it was not renewing the term of their respective employment agreements upon expiration in 2019.

222. Get Fresh and Fresh Mix sent this notice to Plaintiff despite indisputably knowing and acknowledging previously that the term of Plaintiffs' employment agreements expired on January 10, 2013, and neither Fresh Mix nor Plaintiffs had made any attempt to renew these agreements in any manner.

223. Plaintiffs also were informed by these notices that they were terminated immediately "for cause" under Section 8.2 of their respective, expired employment agreements.

224. Again, however, neither Get Fresh nor Fresh Mix could enforce any provision of the employment agreements, including Section 8.2 of the expired employment agreements, because the employment agreements expired without renewal on January 10, 2013.

225. Get Fresh and Fresh Mix further asserted to Plaintiffs that as a result of Plaintiffs' termination they were now also subject to the two (2) year non-compete provision as set forth in Section 5.1 of their employment agreements.

226. However, Section 5.1 of the employment agreements provided for a two (2) year period of non-compete period for Plaintiffs commencing upon the expiration of the employment agreement, which occurred on January 10, 2013.

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227. As such, Plaintiffs' two (2) year obligation not to compete expired on January 10, 2015, or two years from the January 10, 2013 date of expiration of Plaintiffs' employment agreements.

228. Thus, all of the provisions of the "employment agreements" relied upon by Get Fresh and Fresh Mix are void since the term of these employment agreements expired more than five (5) years ago on January 10, 2013.

229. As such, Plaintiffs, as parties to the expired employment agreements, are entitled to Declaratory Judgment pursuant to NRS 30.040(1) determining that the employment agreements entered into with Fresh Mix on January 11, 2010 expired on January 10, 2013, and neither Fresh Mix nor Plaintiffs have any further rights, interests, or obligations thereto.

WHEREFORE, Plaintiffs pray for the following:

1. For an award to Plaintiffs of actual damages in excess of Fifteen Thousand Dollars ($15,000.00) in an exact amount to be determined at Trial;

2. For Injunctive Relief enjoining Fresh Mix and Get Fresh from removing Plaintiffs as Managers, and from further prohibiting Plaintiffs' access to Fresh Mix's property, accounts, records, data, and customers;

3. For Declaratory Judgment pursuant to NRS 30.040(1) determining that the employment agreements entered into with Fresh Mix on January 11, 2010 expired on January 10, 2013, and neither Fresh Mix nor Plaintiffs have any further rights, interests, or obligations thereto;

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4. For reasonable attorneys' fees and costs of suit; and

5. For any other such relief, which this Court deems just and proper.

DATED this 3rd day of December, 2018.

MORAN BRANDON BENDAVID MORAN

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EXHIBIT B

EXHIBIT B

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DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an 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 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No. A-18-785391-B Dept. No. XI **MOTION TO LIFT STAY AND AMEND COMPLAINT**

Plaintiffs Paul Lagudi and William Todd Ponder, by and through their attorneys of record, Fox Rothschild LLP, submit their Motion to Lift the Stay and Amend the Complaint. This motion is based on the pleadings and papers on file, the following Memorandum of Points and Authorities, and any argument that the Court may deem just and proper. A proposed amended complaint ("Proposed Amended Complaint") is attached hereto as Exhibit 1.

DATED this 15th day of July, 2019.

FOX ROTHSCHILD LLP

/s/Mark J. Connot
MARK J. CONNOT (SBN 10010)
1980 Festival Plaza Drive, #700
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Attorneys for Paul Lagudi and William Todd Ponder

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

On January 16, 2019, this Court ordered certain claims to arbitration, but specifically stated: "[t]he equitable remedies that are sought in the complaint are excluded from arbitration paragraph 14.8 of the operating agreement." (Ex. 1, Am. Compl., Ex. E).[1] Since that time, Defendant Get Fresh Sales, Inc. ("Get Fresh") and related parties (collectively, "Defendants") have executed on a strategy focused on destroying Plaintiffs' minority shareholder interest in the parties' joint venture, Fresh Mix, LLC ("Fresh Mix" or "Company"). Among other things, Defendants have sued Plaintiffs (and their spouses) but then wrongfully refused to allow Plaintiffs to exercise their indemnification rights, withheld Plaintiffs' routine distributions, fired Plaintiffs but then threatened Plaintiffs with more litigation should they seek other employment, and blocked Plaintiffs' access to Company information. Perhaps worst of all, Defendants have stopped servicing Fresh Mix's customers. Defendants take these actions for the purpose of destroying Fresh Mix, and with it the value of Plaintiffs' shares in the Company.

Consistent with the Court's direction, Plaintiffs seek to lift the currently-pending stay so that they may be allowed to file the attached Proposed Amended Complaint. Each cause of action in the Proposed Amended Complaint seeks equitable relief, and, therefore, falls within this Court's express jurisdiction. Once Plaintiffs are permitted to file their Proposed Amended Complaint, they will seek appropriate emergent relief to protect their interests and stop Defendants' continuing misconduct.

II. BACKGROUND

1. Factual Background

In 2001, the Plaintiffs began their company in the produce business. Through their hard work, it thrived. Within just a few years, the business was generating millions in revenue. In 2010,

[1] Plaintiffs incorporate by reference all facts and allegations articulated in its Proposed Amended Complaint, attached hereto as Exhibit 1, which includes exhibits to the Proposed Amended Complaint. The facts set forth here summarize the more detailed description set forth in the Proposed Amended Complaint.

they decided to sell 60% of their company to a competitor, defendant Get Fresh Sales, Inc., while retaining 40% ownership. As part of the deal, the parties executed an Operating Agreement, which set forth the parties' rights and obligations. Many of those rights had built in protections for the minority shareholders. Plaintiffs' company was renamed Fresh Mix.

Going forward, Get Fresh was supposed to provide the materials, certain labor, and back-office support, while Plaintiffs continued to grow sales and customers. Shortly after closing the deal, Plaintiffs noticed that Defendants were overcharging Fresh Mix and misallocating its revenue. Through the documents Plaintiffs received as Members and Managers of Fresh Mix, they pointed out these errors, and Defendants admitted they made such mistakes. Nevertheless, the overcharging and misallocating of revenues continue to this day.

Defendants also used the resources of Fresh Mix to develop new business opportunities, but did not permit Fresh Mix to share in the revenues and profits of such new business, despite promises to the contrary. As a result of Defendants' constant mistreatment of the Plaintiffs, the parties tried to negotiate a sale of Plaintiffs' interest in Fresh Mix. The parties were unable to reach a deal.

As a result of not getting what they wanted, Defendants have decided to execute on a different negotiating strategy. Starting in November 2018, Defendants have:

(a) removed Lagudi and Ponder from the business and shut them out from receiving any further work communications and falsely informed employees and customers that Lagudi and Ponder are no longer with Fresh Mix;

(b) initiated a costly arbitration, against not only Lagudi and Ponder but also their spouses with baseless claims;

(c) threatened to sue Lagudi and Ponder should they choose to work;

(d) refused to indemnify Lagudi and Ponder in violation of the Operating Agreement;

(e) stopped providing full distributions to Lagudi and Ponder;

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(f) stopped providing documents and information about the business that Lagudi and Ponder received for years, and frustrate the book and records rights of Lagudi and Ponder;

(g) purposely stopped adequately servicing Fresh Mix customers; and

(h) ignored voting procedures set forth in the Operating Agreement.

In taking these actions, Defendants violated multiple contractual, fiduciary, and tort duties they owe to the Plaintiffs. Defendants' actions have significantly decreased the revenue generated by Fresh Mix. Plaintiffs, therefore, seek monetary, equitable, and other relief to which they are entitled.

2. Procedural Background

Plaintiffs initiated this action by way of a Complaint against Defendants on December 3, 2018. In turn, Defendants filed a Motion to Dismiss or Stay and Compel Arbitration. Thereafter, on January 16, 2019, the Honorable Elizabeth Gonzalez conducted a hearing on Defendants' Motion. (Ex. 1, Am. Compl., Ex. E). The Court granted in part and denied in part the motion to compel arbitration. (Ex. 2, Order). The Court sent certain non-equitable claims to arbitration, but maintained jurisdiction over equitable claims, consistent with Sections 14.7-14.8 of Fresh Mix's Operating Agreement. (Ex. 2, Order). The Court then stayed this matter rather than dismissing it. (Ex. 2, Order).

The Court ordered the parties to arbitrate, "[w]ith the exception of equitable remedies sought…." (Ex. 2, Order, ¶ 5). During the hearing on January 16, 2019, the Court stated that "[t]he equitable remedies that are sought in the complaint are excluded from arbitration in paragraph 14.8 of the operating agreement." (Ex. 1, Am. Compl., Ex. E). The Court also stated that the Plaintiffs have "a right under Nevada statutes to file a separate books and records case or to amend your complaint to add a books and records portion." (Ex. 1, Am. Compl., Ex. E). The Court's Order stated that the Operating Agreement "expressly entitles any party subject to the Operating Agreement to equitable relief in the event of an actual or prospective breach of default of the Operating Agreement." (Ex. 2, Order, ¶ 6).

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On February 13, 2019, Defendants filed a Demand for Arbitration with the American Arbitration Association against Lagudi and Ponder ("Arbitration"). Since filing the Arbitration, and as noted above, Defendants have engaged in activities that violate the rights of Plaintiffs. This is the first amendment requested by Plaintiffs. Moreover, Defendants have not filed a responsive pleading.

Consistent with this Court's order of May 17, 2019, Plaintiffs provided the proposed amended complaint and attached exhibits to opposing counsel in order to satisfy the meet and confer obligation. (Ex. 3, Order of May 17). Plaintiffs requested the defendants consent to this motion to lift the stay and amend the complaint; however, defendants would not consent. (Ex. 4, 7/11/19 Spinelli Email).

III. ARGUMENT

A. The Court Should Lift The Stay To Permit Plaintiffs To Amend Their Complaint And Seek Equitable Relief.

Just as the Court has discretionary power to stay proceedings, it likewise has the discretionary power to lift such a stay. "[T]he same court that imposes a stay of litigation has the inherent power and discretion to lift the stay." *Sierra Med. Sers. Alliance v. Maxwell-Jolly*, No. CV 10-04182 CAS (MANx), 2011 WL 3837076, at *2 (C.D. Cal. Aug. 29, 2011); *see also Canady v. Erbe Elektromedizin GmBH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002) (same). "A court may lift the stay if the circumstances supporting the stay have changed such that the stay is no longer appropriate." *Ontiveros v. Zamora*, No. CIV S-08-567 LKK/DAD, 2012 WL 13042504, at *2 (E.D. Cal. July 26, 2012) (internal quotations omitted).

Moreover, "[c]ourts have the power to allow plaintiffs to amend a complaint while arbitration is pending." *Marc I. Willick v. Napoli Bern Ripka & Associates, LLP, et al.*, No. CV 15-00652-AB (Ex), 2018 WL 6443081, at *3 (C.D. Cal. Mar. 23, 2018); *see also Estrella v. Freedom Fin. Network, LLC*, No. CV 09-03156 SI, 2011 WL 4595017, at *2 (N.D. Cal. Oct. 3, 2011) (granting plaintiffs leave to amend complaint to add defendants after action was stayed pending arbitration). In each of these cases, the court lifted the stay so that the plaintiffs could add

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additional parties to the complaint, and, if necessary, to the arbitration. Similarly, Plaintiffs in the matter before the Court seek to add several additional defendants, who are not parties to the Operating Agreement's arbitration clause.

As discussed in more detail below, the circumstances have changed such that the Complaint should be amended. At the time of filing the Complaint, Plaintiffs were unaware Defendants would engage in all of the breaches of their contractual, fiduciary, and tort duties such that Plaintiffs would be forced to assert additional causes of action to seek relief. For example, Defendants' refusal to provide indemnification, to produce the requested books and records to which Plaintiffs are entitled, and to pay required distributions to Plaintiffs had not occurred at the time of filing of the Complaint. Additionally, Defendants have failed to act on the demand of Plaintiffs to institute actions on behalf of Fresh Mix for the wrongful acts of Get Fresh, the majority shareholder, and its principals, thereby creating derivative actions. Finally, Plaintiffs have learned Defendants have failed to service customers of Fresh Mix, harming the business such that appointment of a custodian and/or receiver may be required to protect the business while this dispute is ongoing.

It is in the best interest of judicial expediency for all new claims to be brought before this Court so that the Court may determine which claims, if any, are required to be submitted to Arbitration. Additionally, Plaintiffs have asserted numerous equitable claims that are subject to this Court's jurisdiction. It is most efficient for all of these claims to be consolidated prior to any resolution of the Arbitration as the Court's decision regarding the causes of action for which it retains jurisdiction may impact the Arbitration.

Thus, this Court should use its discretion to lift the stay in order to permit the amendment of Plaintiff's Complaint.

B. <u>Plaintiffs Should be Granted Leave to Amend the Complaint.</u>

Under Nevada Rules of Civil Procedure Rule 15(a)(2), a court should give leave to amend when justice so requires. NRCP Rule 15(a)(2). Leave to amend a pleading should be granted "in the absence of any apparent or declared reason – such as undue delay, bad faith, or dilatory motive

on the part of the movant." *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973); *accord Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 23, 62 P.3d 720, 734 (2003). "Thus, NRCP 15(a) contemplates the liberal amendment of pleadings, which in colloquial terms means that most such motions ought to be granted unless a strong reason exists not to do so, such as prejudice to the opponent or lack of good faith by the moving party. " *Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 970 (Nev. Ct. App. 2015).

Any proposed amendments cannot be futile. "A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim…or a last-second amendment alleging meritless claims in an attempt to save a case from summary judgment." *Id.* at 973. Furthermore, "[t]he liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had." *Id.* at 975.

As set forth below, justice is served by granting Plaintiffs leave to amend to add additional claims and parties.

C. <u>There Is No Undue Delay or Dilatory Motive.</u>

Plaintiffs have not unduly delayed or have any dilatory motive in seeking leave to amend the Complaint, and Defendants will suffer no prejudice by the allowance of the amendment. Both this case and the Arbitration are in their early stages. Here, Defendants have not filed any responsive pleadings, and the parties have not engaged in any discovery. Likewise, the Arbitration has just begun. The arbitration panel has only recently been determined, with the initial hearing not scheduled until July 25, 2019. Other than decisions related to the determination of the members of the arbitration panel, nothing substantive has occurred in the Arbitration. There has been no discovery, and the Plaintiffs have not yet pled their counterclaims.

Further, several causes of action asserted by Plaintiffs, such as the claims related to indemnification, the failure to pay distributions, the books and records request, and the derivative claims, have only recently become ripe based on the actions of the Defendants. All of these actions

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have occurred in a matter of months, throughout which Defendants have been aware of the Plaintiffs' requests and claims. Given Defendants' ongoing knowledge, they have suffered no prejudice, and Plaintiffs have not delayed in bringing forth these amendments.

D. <u>There Is No Bad Faith.</u>

Plaintiffs have not operated in bad faith at any point in this process. In the context of a motion to amend, courts have found bad faith when the amendments requested are designed to circumvent an existing decision or to prolong a case that has already been determined. *See Glesenkemp v. Nationwide Mut. Ins. Co.*, 71 F.R.D. 1 (N.D. Cal. 1974) (holding amendment was attempt to circumvent a prior summary judgment ruling); *M/V American Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983) (same); *PI, Inc. v. Quality Products, Inc.*, 907 F. Supp. 752, 764 (S.D.N.Y. 1995) (upholding denial of amendment when it appeared "that leave to amend is sought in anticipation of an adverse ruling on the original claims"). There is no such intent or concern in the matter before the Court.

As discussed in more detail below, each cause of action in the Amended Complaint seeks either equitable relief or seeks relief from a party not subject to arbitration with the Plaintiffs. Accordingly, the Amended Complaint is consistent with this Court's February 1 Order, wherein it retained jurisdiction over such claims. Furthermore, Plaintiffs' new claims primarily emanate from actions taken since this Court stayed this Action. Under these facts, there is no basis to find Plaintiffs seek to amend in bad faith.

E. <u>The Amendment Is Not Futile.</u>

Finally, amending the Complaint is not futile. None of the claims is impermissible. Each is supported by detailed facts establishing Defendants' misconduct and liability. Plaintiffs anticipate Defendants will argue the claims are subject to arbitration, but that is not correct. Each count asserts either equitable relief for which this Court has retained jurisdiction, or claims against parties with whom Plaintiffs have not agreed to arbitrate.

Counts I (Breach of Contract) and IX (Books and Records) seek specific performance and equitable relief. Specific performance is available when "(1) the terms of the contract are definite

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and certain; (2) the remedy at law is inadequate; (3) [one party] has tendered performance; and (4) the court is willing to order it." *Serpa v. Darling*, 107 Nev. 299, 305, 810 P.2d 778, 782 (Nev. 1991). Section 14.8 of the Operating Agreement carves out from arbitration claims for specific performance. Furthermore, under Delaware law, the remedy of specific performance is considered equitable. *See NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 437 (Del. Ch. 2007) (stating that specific performance is a form of equitable relief); *G.W. Baker Mach. Co. v. United States Fire Apparatus Co.*, 97 A. 613, 616 (Del. 1916) ("[e]quity enforces specific performance when there is no adequate remedy at law.").

Under Count I, Plaintiffs seek specific performance of their contractual rights to books and records, distributions, and indemnification. With regard to books and records, Delaware law treats such a claim as equitable. *See Skoglund v. Ormand Industries, Inc.*, 372 A.2d 204, 213 (Del. Ch. 1976) (stating that books and records cause of action is in equity). Indeed, this Court previously recognized that it retains jurisdiction for books and records requests, when it noted, during the hearing on Defendants' motion to compel arbitration, that Plaintiffs had the right to amend their Complaint and add a books and records cause of action. (Ex. 1, Am. Compl., Ex. E). They do so now.

With regard to distributions and indemnification, Plaintiffs have a contractual right to obtain those payments now. For instance, Section 12.4 of the Operating Agreement, titled "Contract Right; Expenses," expressly states Plaintiffs' right to indemnification "shall be a contract right" under which Fresh Mix "shall ***promptly*** reimburse each Indemnified Person for all costs and expenses . . . ***as they are incurred*** by an Indemnified Person" in connection with an action like the Arbitration and this Action. (emphasis added). This means Plaintiffs have a contract right for specific performance of payment for their costs and expenses now while arbitration and litigation between the parties are pending. Like typical indemnification provisions, the key to this right is "prompt" payment. This claim is not proper in the Arbitration because Plaintiffs will not obtain relief until the Arbitration is over and they seek enforcement by this Court of any arbitration award. By then, their right to "prompt" payment will have been frustrated. Thus, there is no

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adequate remedy at law, and Plaintiffs are entitled to specific performance. *See O'Brien v. IAC/Interactive Corp.*, No. 3892-VCP, 2009 WL 2490845, at *5-6 (Del. Ch. Aug. 14, 2009) (discussing indemnification as claim in equity).

Similarly, Plaintiffs have received distributions on a quarterly basis since the formation of Fresh Mix until now. They are entitled to specific performance to continue this practice.

Counts II (Breach of Fiduciary Duty), VII (Breach of Fiduciary Duty), VIII (Aiding and Abetting Breach of Fiduciary Duty), X (Breach of Fiduciary Duty And Aiding And Abetting Such Breach Derivatively), and XI (Breach of Duties Of Good Faith And Fair Dealing And Aiding And Abetting Such Breach Derivatively), are equitable in nature as breach of fiduciary duty claims. Under Delaware law, "[a] cause of action based on breach of fiduciary duty is often referred to as the 'quintessential equitable claim.'" *Prospect Street Energy, LLC v. Bhargava*, C.A. No. N13C-08-203 WCC CCLD, 2016 WL 446202, at *4 (Del. Super. Ct. Jan. 27, 2016) (quoting *QC Communications Inc. v. Quartarone*, C.A. No. 8218-VCG, 2013 WL 1970069, at *1, (Del. Ch. May 14, 2013)). When a party asserts claims arising from a fiduciary duty, "the origin of the asserted right in a breach of fiduciary duty claim is equity because 'equity, not law, is the source' of a fiduciary relationship." *Dickerson v. Murray*, C.A. No. 214C-07-026 (RFS), 2015 WL 447607, at *6 (Del. Super. Ct. Feb. 3, 2015) (quoting *McMahon v. New Castle Associates*, 532 A.2d 601, 604 (Del. Ch. 1987)).

Further, "even if only monetary damages are sought," breach of fiduciary duty is a claim in equity seeking equitable relief "because the claim arises out of a relationship that is equitable in nature." *Dickerson*, 2015 WL447607, at *6. Since Counts II, VII, VIII, X, and XI are based on breaches of fiduciary duties, they are considered claims arising in equity, and are properly before this Court under its prior Order and Section 14.8 of the Operating Agreement.

Counts X, XI and XII (Waste And Aiding And Abetting Such Waste Derivatively) are also equitable in nature because they arise derivatively on behalf of Fresh Mix. *See Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (holding that derivative claims are equitable because, "the stockholder's right to sue on behalf of the corporation [is] historically an equitable matter."). Count III

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(Declaratory Judgment) is equitable under Delaware law. *See Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 591 (Del. 1970) (stating that a declaratory judgment is an equitable remedy "if there is any underlying basis for equity jurisdiction measured by traditional standards"). Count IV (Accounting) is equitable too, as well as Count XV (Appointment of Custodian or Receiver). *See, e.g., Albert v. Alex. Brown Management Services, Inc.*, No. Civ.A. 762-N-Civ.A. 763-N, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) (stating that an accounting is an equitable remedy); *see also Ross Holding and Management Co. v. Advance Realty Group, LLC*, C.A. No. 4113-VCN, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010) (holding that a receiver may be appointed in accordance with a court's general equity powers).

Plaintiffs also seek to add parties with whom they do not have an agreement to arbitrate, including Get Fresh Kitchen, LLC, Dominic Caldara, Scott Goldberg, and John Wise. Plaintiffs assert the following claims against these non-parties to the arbitration clause: Counts V (Tortious Interference), VI (Unjust Enrichment), VII (Breach of Fiduciary Duty), VIII (Aiding And Abetting Breach Of Fiduciary Duty), XIII (Breach Of Implied Covenant Of Good Faith And Fair Dealing), and XIV (Tortious Breach Of Implied Covenant Of Good Faith And Fair Dealing). Accordingly, it is not futile to amend the complaint to include these claims as well. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."); *In re Zappos.com, Inc., Customer Sec. Breach Litigation*, 893 F. Supp. 2d 1058, 1062 (D. Nev. 2012) (noting the Federal Arbitration Act "does not require parties to arbitrate when they have not agreed to do so.").

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IV. CONCLUSION

For the foregoing reasons, it is in the interest of justices for the Court to lift the stay and permit Plaintiffs to comprehensively set forth their causes of action. Plaintiffs respectfully request the Court lift the stay of this matter and permit Plaintiffs to file the proposed amended complaint.

DATED this 15th day of July, 2019.

FOX ROTHSCHILD LLP

/s/ Mark J. Connot
MARK J. CONNOT (10010)
1980 Festival Plaza Drive, Suite 700
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Attorneys for Plaintiffs Paul Lagudi and William Todd Ponder

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of FOX ROTHSCHILD LLP and that on the 15th day of July, 2019, I caused the above and foregoing **MOTION TO LIFT STAY AND AMEND COMPLAINT** to be served via electronic service through the court's Efile and Serve system to the parties listed below:

James J. Pisanelli, Esq.
Debra L. Spinelli, Esq.
Pisanelli Bice PLLC
400 South 7th Street, Ste. 300
Las Vegas, Nevada 89101
Attorneys for Defendants Fresh Mix, LLC and Get Fresh Sales, Inc.

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

DATED this 15th day of July, 2019.

/s/ Doreen Loffredo
An employee of FOX ROTHSCHILD LLP

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EXHIBIT C

EXHIBIT C

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DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an 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 through 25; and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	Case No. A-18-785391-B Dept. No. XI **VERIFIED AMENDED COMPLAINT AND DERIVATIVE ACTION**

COMES NOW, Plaintiffs, PAUL LAGUDI, an individual, and WILLIAM TODD PONDER, an individual (together, the "Plaintiffs"), by and through their attorney of record, MARK CONNOT of FOX ROTHSCHILD LLP, and hereby submit their Amended Complaint on their own behalf and derivatively on behalf of FRESH MIX, LLC, a Delaware limited liability company, against Defendants, GET FRESH SALES, INC., a Nevada corporation; GET FRESH KITCHEN, LLC, a Nevada limited liability company; DOMINIC CALDARA, an individual; SCOTT GOLDBERG, an individual; JOHN WISE, an individual; DOES 1 through 25; and ROE BUSINESS ENTITIES I through X, and alleges the following:

GENERAL ALLEGATIONS

1. This case concerns the oppressive actions taken by a majority shareholder and related defendants designed to harm two minority shareholders. The Defendants have employed

these actions as part of a grand scheme intended to weaken the Plaintiffs and devalue their shares. In the process, Defendants have violated their contractual, fiduciary, and tort duties owed to the Plaintiffs.

2. In 2001, the Plaintiffs began their company in the produce business. Through their hard work, it thrived. Within just a few years, the business was generating millions in revenue.

3. In 2010, they decided [redacted] As part of the deal, the parties executed an Operating Agreement, which sets forth the parties' rights and obligations. Many of those rights had built in protections for the minority shareholders. Plaintiffs' company was renamed Fresh Mix, LLC.

4. Going forward, Get Fresh was supposed to provide the materials, certain labor, and back-office support, while Plaintiffs continued to grow sales and customers.

5. Shortly after closing the deal, Plaintiffs noticed that Defendants were overcharging Fresh Mix, LLC and misallocating its revenue. Through the documents Defendants received as members and managers of Fresh Mix, LLC, they pointed out these errors, and Defendants admitted they made such mistakes. Nevertheless, the overcharging and misallocating of revenues continues to this day.

6. Defendants also used the resources of Fresh Mix, LLC to develop new business opportunities, but did not permit Fresh Mix, LLC to share in the revenues and profits of such new business, despite promises to the contrary.

7. As a result of Defendants' constant mistreatment of the Plaintiffs, the parties tried to negotiate a sale of Plaintiffs' interest in Fresh Mix, LLC. The parties were unable to reach a deal.

8. As a result of not getting what they wanted, Defendants have decided to execute on a different negotiating strategy. Starting in November 2018, Defendants have:

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(a) removed Lagudi and Ponder from the business and shut them out from receiving any further work communications and falsely informed employees and customers that Lagudi and Ponder are no longer with Fresh Mix;

(b) initiated a costly arbitration, against not only Lagudi and Ponder but also their spouses with baseless claims;

(c) threatened to sue Lagudi and Ponder should they choose to work;

(d) refused to indemnify Lagudi and Ponder in violation of the Operating Agreement;

(e) stopped providing full distributions to Lagudi and Ponder;

(f) stopped providing documents and information about the business that Lagudi and Ponder received for years, and frustrated the book and records rights of Lagudi and Ponder;

(g) purposely stopped adequately servicing Fresh Mix customers; and

(h) ignored voting procedures set forth in the Operating Agreement.

9. In taking these actions, Defendants violated multiple contractual, fiduciary, and tort duties they owe to the Plaintiffs. Defendants' actions have significantly decreased the revenue generated by Fresh Mix, LLC.

10. Plaintiffs seek monetary, equitable, and other relief to which they are entitled.

PARTIES

11. Plaintiff, PAUL LAGUDI ("Lagudi"), is an individual residing in Clark County, Nevada.

12. Plaintiff, WILLIAM TODD PONDER ("Ponder"), is an individual residing in Clark County, Nevada.

13. FRESH MIX, LLC ("Fresh Mix"), is a Delaware limited liability company registered with the Nevada Secretary of State as a foreign entity authorized to conduct business in the State of Nevada.

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14. Plaintiffs are informed and believe and thereupon allege that Defendant, GET FRESH SALES, INC. ("Get Fresh"), is a Nevada corporation conducting business in Clark County, Nevada.

15. Plaintiffs are informed and believe and thereupon allege that Defendant, GET FRESH KITCHEN, LLC ("Get Fresh Kitchen"), is a Nevada limited liability company conducting business in Clark County, Nevada.

16. Plaintiffs are informed and believe and thereupon allege that Defendant Dominic Caldara is a Nevada resident and citizen and the President/CEO of Get Fresh.

17. Plaintiffs are informed and believe and thereupon allege that Defendant Scott Goldberg is an Arizona resident and citizen and principal of Get Fresh.

18. Plaintiffs are informed and believe and thereupon allege that Defendant John Wise is a Nevada resident and citizen and principal/founder of Get Fresh.

19. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as DOES 1 through 25, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, and each of them, are unknown to Plaintiffs who therefore sue such Defendants by such fictitious names. Plaintiffs are informed, believe and thereon allege that each of the Defendants designated herein as a "DOE" or "ROE BUSINESS ENTITY" are agents, employees, servants and representatives of the named Defendants or persons and entities answering in concert with the named Defendants with respect to the agreement herein pled, who are liable to Plaintiffs by reason thereof, and Plaintiffs pray leave to amend this Complaint to insert their true names or identities with appropriate allegations when same become known.

20. This Court maintains jurisdiction over this matter since Plaintiffs allege damages in excess of $15,000, and seek injunctive relief. Venue is proper in this Court pursuant to NRS §§ 13.010 and 13.040, in that this is the county in which Defendant resides, and the obligations of the parties hereto were to be performed or occurred.

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FACTUAL BACKGROUND

Paul Lagudi and Todd Ponder Build Lagudi Enterprises Into A Multi-Million Dollar Business In The Produce Industry

21. In 2001, Paul Lagudi formed Lagudi Enterprises, which, based on a hand-shake deal, was owned by Lagudi and Ponder, 75% and 25%, respectively. The company was built on honesty and integrity.

22. Lagudi Enterprises initially focused on providing fresh fruits and vegetables to commercial customers. It became known as the "kitchen to the hotels." Lagudi Enterprises would cut and prepare all fresh cut fruits and vegetables for hotel and casino clients. It built its reputation with a keen focus on building customer relationships by servicing every customer need efficiently and effectively.

23. Ever responsive to the industry's needs, Lagudi Enterprises expanded to include "table ready," prepared fruits and vegetables, allowing for its commercial customers to serve and utilize the fruits and vegetables absent additional cleaning, cutting, and preparation.

24. Lagudi and Ponder grew Lagudi Enterprises by working hard, providing a high-quality product, and solidifying strong personal relationships with its suppliers and customers built on trust.

25. Through these efforts, Lagudi Enterprises began growing its client roster, which included Mandalay Bay, Bellagio, MGM Grand, Venetian, Mirage, Luxor, Excalibur, Circus Circus, and Monte Carlo, just to name a few.

26. Within 3 years, Lagudi and Ponder grew Lagudi Enterprises into a business with gross revenues in the multi-millions. It became the primary fresh cut supplier to both the MGM Mirage and the Mandalay Bay Group.

27. Lagudi Enterprises continued to grow its client roster. In 2005, Mandalay Bay Group merged with MGM Mirage (collectively, "***MGM***"). MGM expanded the business Mandalay Bay had done with Lagudi Enterprises.

28. In that same year, Lagudi and Ponder landed another desired and sought out customer for Lagudi Enterprises, Trader Joe's.

29. By 2005, Lagudi Enterprises had established itself as a leading supplier to MGM/Mirage, Inc. and Mandalay Bay Group and continued to grow revenues by even more millions of dollars.

Lagudi Enterprises Becomes A Competitive Threat To Get Fresh

30. With the growth of Lagudi Enterprises, it started to take market share from one of its competitors, Get Fresh.

31. For instance, in 2006, Get Fresh, Lagudi Enterprises, and another competitor had bid on an exclusive contract on continuing business for MGM for cut produce.

32. Lagudi Enterprises beat out Get Fresh and the other competitor for the MGM business. It did so despite the fact that Get Fresh had a much larger facility. Lagudi Enterprise's honor, integrity, attention to detail, and twenty-four hours/seven days a week service mentality gave it the edge it needed to win MGM's ongoing business.

33. Lagudi Enterprises continued to obtain business for which Get Fresh had either bid on or serviced. For instance, Lagudi Enterprises attracted new clients Caesars Entertainment, Stations, and Boyd Group.

Get Fresh Decides To Purchase Lagudi Enterprises

34. Get Fresh began to recognize the significant competitive threat posed by Lagudi Enterprises. In 2008, Dominic Caldara encountered Ponder at a social event, and began "planting the seeds" for a deal with Lagudi Enterprises.

35. In 2009, Caldara reached out to Lagudi and Ponder, requested a meeting, and suggested that he was interested in purchasing Lagudi Enterprises as a going concern, as long as Lagudi and Ponder remained involved in the business.

36. On information and belief, Caldara wanted Lagudi and Ponder to stay involved because he knew the value of Lagudi Enterprises lie with the reputation and network of Lagudi and Ponder.

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37. Get Fresh was focused on sharing in Lagudi Enterprises' business, in part to recapture the clients it had lost to Lagudi and Ponder. Caldara claimed there was no downside of the deal for Lagudi and Ponder. He emphasized that all operations would be taken care of by Get Fresh. Caldara even committed to ensuring that Lagudi and Ponder received a guaranteed payment each month, irrespective of whether the profit generated from the business called for distributions.

The Parties Form Fresh Mix Out Of Lagudi Enterprises With Important Protections In Place For The Founders Lagudi and Ponder

38. Ultimately, they struck a deal. Lagudi and Ponder divested their interest in Lagudi Enterprises, [redacted]

39. Generally, Lagudi and Ponder would continue to grow revenue by servicing existing customers and attracting new ones. Get Fresh would provide the "back-office" operational support.

40. As part of the formation of Fresh Mix, the parties executed an Operating Agreement.

41. As set forth in the Operating Agreement, the primary purpose of Fresh Mix is to [redacted] Section 2.4 of Operating Agreement.

42. Given that primary purpose, Fresh Mix is in direct competition with Get Fresh and its other businesses, affiliated entities, trade names, and product channels, including Get Fresh Market, Get Fresh Harvest, Fresh Cuts, and Get Fresh Kitchen. Specifically, these businesses provide the following similar services:

(a) Get Fresh Market is a Get Fresh trade name and product channel producing gourmet grocery items.

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(b) Get Fresh Harvest is another trade name and product channel that provides produce to customers.

(c) Fresh Cuts was originally formed in 1996, and is a related company 100% owned by Caldara, Goldberg and Wise. It provides custom produce processing.

(d) Get Fresh Kitchen was formed in 2017 and is 100% owned by Caldara, Goldberg, and Wise. It provides USDA products to Kroger, Associated Foods, and others, and Get Fresh competes in the same geographic region as Fresh Mix.

43. In part because of this dynamic, the Operating Agreement [redacted]

Management Rights

44. Pursuant to the Operating Agreement, [redacted] *See id.* at Section 5.2(a)-(b).

45. [redacted] *Id.* at Section 5.1.

46. Section 5.1(c) states that [redacted]

47. Section 5.1(c) further gives [redacted]

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48. [redacted] the Operating Agreement [redacted] *Id.* at Section 1.67. For instance, only a [redacted] *Id.* at Section 7.1.

49. Similarly, certain decisions must be approved by a [redacted] *Id.* at Section 1.66.

[redacted] Section 5.3(a)-(j) [redacted]

Business Protection Rights

51. The Operating Agreement also [redacted].

52. Section 4.4, [redacted] Section 2.4 [redacted]

53. Section 5.4(d), [redacted]

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[redacted]

54. The Operating Agreement also [redacted]

55. Section 5.4(b), [redacted]

56. Section 5.4(c), [redacted]

Distribution Rights

57. The Operating Agreement [redacted] A few are particularly relevant to this dispute.

58. Section 1.22 [redacted]

59. [redacted]

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[redacted]

60. Section 7.1 [redacted]

Books And Records, And Accounting Rights

61. The Operating Agreement [redacted]

62. Section 9.1 [redacted]

63. Section 9.1 [redacted]

64. Section 9.3 [redacted]

65. Section 9.2, [redacted]

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66. Section 9.7, [redacted]

Employment Rights

67. The Defendants recognized that separate and apart from Lagudi Enterprises, as individuals, both Lagudi and Ponder brought significant value to Fresh Mix and wanted to employ them.

68. Accordingly, Section 5.5 of the Operating Agreement, [redacted]

69. Section 5.6 of the Operating Agreement [redacted]

70. The Employment Agreements state that "[t]he Company hereby employs Employee and Employee accepts such employment commencing effective as of January 11, 2010, and unless sooner terminated as hereinafter provided, terminating three years (3) from thereof (the "Term"). At the end of the Term, the parties may agree to renew this Agreement and thereby extend the Term; provided, however, that if either party wished to renew this Agreement, such party must provide written notice to the other party not later than one hundred twenty (120) days prior to the expiration of the Term." Section 1 of Employment Agreement.

71. Accordingly, if the parties did not provide prior written notice of renewal, the Employment Agreements terminated on January 11, 2013.

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72. The Employment Agreements contain a non-compete provision. That provision, however, expires two years after expiration of the Term. *See* Section 5.1 of Employment Agreement.

73. The Operating Agreement, as compared to the Employment Agreements, [redacted]

74. Section 4.4 [redacted]

75. Section 5.7, [redacted]

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[redacted]

76. The Employment Agreements expired in January 2013 and Plaintiffs' non-compete obligations expired two years later, in January 2015.

77. Accordingly, only the rights and obligations set forth in the Operating Agreement control.

Purchase Rights And Protections

78. Lagudi and Ponder also enjoy certain rights and protections should the majority member seek to sell its ownership interests or the assets of Fresh Mix.

79. For instance, Lagudi and Ponder [redacted] Section 8.4(c) of the Operating Agreement [redacted]

80. Section 8.3(b), [redacted]

Limitation of Liability And Indemnification Rights

81. Multiple sections of the Operating Agreement protect Lagudi and Ponder [redacted]

82. Section 12.1, [redacted]

83. Section 12.2, [redacted]

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[redacted]

84. Lagudi and Ponder also enjoy [redacted]

[redacted]

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[redacted]

85. Section 12.4, [redacted]

[redacted]

86. As is typical for Members and Managers like Lagudi and Ponder, [redacted]

Injunctive Rights And Arbitration Rights

87. Sections 14.7 and 14.8 of the Operating Agreement [redacted]

88. [redacted]

89. Section 14.7 [redacted]

90. Section 14.8 [redacted]

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91. Thus, Plaintiffs may [redacted]

Lagudi and Ponder Continue To Grow The Business

92. As a result of the formation of Fresh Mix, Lagudi and Ponder brought multiple new customers and new business to Fresh Mix. These included Trader Joe's, Sysco, and bulk and cut fruit produce for MGM Resorts, among others.

93. After the formation of Fresh Mix, Lagudi and Ponder continue to do what they had done before – work hard to grow business from their existing customers while bringing in new customers.

94. With regard to MGM, Lagudi and Ponder expanded their existing relationship to include supplying tomatoes. This was an exclusive arrangement to supply MGM on a corporate basis.

95. In 2012, Lagudi successfully and significantly grew the amount of Walmart business being serviced by Fresh Mix. In that year, Fresh Mix, through Get Fresh, as per the Operating Agreement, began supplying Walmart with fruits and vegetables whenever any of its Nevada stores were short a particular produce product. It also supplied Walmart with certain special orders.

96. In 2014, Fresh Mix lost the business because Walmart stopped purchasing from any local vendors in Nevada while Walmart went through certain personnel changes. However, through his tireless efforts, Lagudi succeeded in bringing Walmart back as a client for Fresh Mix, which it continues to be today.

97. In 2015, Lagudi and Ponder brought in Ralphs (i.e. Kroger) as a new client. Fresh Mix began supplying Ralphs with portion control vegetables for its retail deli market. Fresh Mix also launched a retail portion control organic salad line for Ralphs.

98. Also in 2015, Lagudi negotiated a new contract with MGM Resorts, which is part of a joint venture that owns the T-Mobile Arena in Las Vegas. Lagudi secured a six-year contract to supply the arena and MGM Resorts properties in southern Nevada with their produce needs.

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99. In 2016, Lagudi and Ponder launched the "straight from the root" sous vide vegetable product line for all major retailers, including but not limited to, Publix, Kroger, Whole Foods, and Walmart. It is a fully cooked vegetable line that is always fresh, but has a multiple month shelf life.

100. From 2017 through 2019, Lagudi and Ponder continued to grow these customers, as well other existing customers, while also working to secure more new business.

101. Like they did starting with their handshake deal in 2001, Lagudi and Ponder worked around the clock devoting themselves to servicing their clients at the highest level. Through their efforts, they continued to grow the business. By 2016, Fresh Mix had gross revenues of more than $26 million annually.

Given The Competitive Dynamic Between Get Fresh And Fresh Mix, Lagudi And Ponder Must Continually Monitor Get Fresh's Operational Support

102. Since Get Fresh provides the operational support, Fresh Mix must reimburse Get Fresh the costs associated with that support.

103. Further, Get Fresh performs the reporting function for Fresh Mix and controls the information concerning costs, revenues, etc.

104. Given this dynamic, Lagudi and Ponder have been forced to repeatedly monitor and audit the information Get Fresh has provided to ensure Get Fresh does not overcharge Fresh Mix for the operational support Get Fresh provides. Lagudi and Ponder have also had to make sure Fresh Mix receives the proper recognition of the revenue it generates. Ponder has been the primary person responsible for such monitoring and auditing.

105. To do this, Ponder requested and received access to certain information. He received "Margin and Analysis Reports," which provide detailed information concerning gross revenue, profits and costs associated with each product line. Up until November 2018, he received these reports on a daily basis, as did other Managers of Fresh Mix.

106. Ponder, like the other Managers for Fresh Mix, also received the following reports: (i) "Daily Usage Reports" (which he received until November 2018), (ii) "Value Add Analysis

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Reports" (which he received until July 2018), and (iii) "Internal New Item Request Forms" (which he received until May 2018). These reports included even more detailed information concerning the produce items that were attributable to Fresh Mix as compared to Get Fresh and its affiliates.

107. Based on his knowledge of the business, Ponder would compare the reports identified above against the Margin and Analysis Reports to ensure Fresh Mix received credit for the items it sold to its customers.

108. Often, these reports showed Fresh Mix was not receiving proper credit for the items it sold. Instead, that credit went to Get Fresh and/or its affiliates.

109. From 2010 through 2018, Ponder would on a weekly basis inform Get Fresh of these discrepancies. Get Fresh admitted Ponder was correct.

110. Upon information and belief, these errors in allocating revenue continue to this day.

111. As a result of the misconduct of Get Fresh, Caldara, Goldberg, and Wise, upon information and belief, Fresh Mix is owed millions of dollars in misallocated revenue.

Get Fresh Admits Overcharging Fresh Mix in Breach Of Operating Agreement

112. Lagudi and Ponder also would audit the cost-side of the business.

113. At the formation of Fresh Mix, the parties agreed that, consistent with Section 5.4(b) of the Operating Agreement, Get Fresh would charge Fresh Mix the actual costs for the services and goods Fresh Mix received from Get Fresh.

114. Yet, since the formation, Lagudi and Ponder repeatedly learned Get Fresh overcharged Fresh Mix.

115. In reviewing information received from Get Fresh regarding the costs that Get Fresh charged Fresh Mix, Ponder and Lagudi discovered that Get Fresh repeatedly overcharged Fresh Mix.

116. Get Fresh overcharged Fresh Mix for, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs.

117. After being confronted, Get Fresh admitted that it overcharged Fresh Mix over $1 million in 2010 alone.

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118. Nevertheless, it continued to overcharge Fresh Mix for the operational support it provided.

119. For instance, Get Fresh is part of a consortium called "PRO*ACT" that allows it to obtain rebates for certain produce it purchases through the consortium.

120. Notwithstanding its obligation to charge Fresh Mix its actual costs, Get Fresh has pocketed and refused to pass its cost savings on to Fresh Mix, as it is required to do.

Get Fresh Uses Fresh Mix To Develop New Business Opportunities But Does Not Share Profits With Fresh Mix

121. In 2014, Get Fresh sales performance was particularly poor. As a result, it brought in a consultant to assist.

122. One of the consultant's recommendations was to obtain a larger presence in the retail category. Since Lagudi and Ponder had already done that very successfully through their deli vegetable and organic salad kit program, Get Fresh asked Fresh Mix to provide resources and services to assist in expanding further in the retail category so that Get Fresh could follow the success Fresh Mix was having in the retail market.

123. Ponder, on behalf of Fresh Mix, agreed to assist in building the sector together with Get Fresh in a shared capacity with Fresh Mix.

124. Starting in 2015, Ponder worked to create an organic "grab n' go" fruit and vegetable line to be placed in all Smiths grocery stores located in Nevada and Utah. Ponder was instrumental in convincing Smiths' owner, Kroger, to accept the fruit and vegetable program. He was also instrumental in setting up the USDA kitchen requested by Smiths for purposes of supplying the Smiths' grocery stores.

125. This introduced a new, highly profitable revenue stream to Defendants called "Kroger Fresh Kitchen."

126. For the next several years, Ponder worked tirelessly to get the Kroger Fresh Kitchen business off the ground and running. He hired the key employees, purchased the necessary equipment to process the Kroger Fresh Kitchen line of products, and pushed sales until they were in over forty stores in Nevada.

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127. In 2016, through Ponder's efforts, the Kroger Fresh Kitchen business was consistently among the most profitable businesses within Get Fresh (along with Fresh Mix). Ponder pushed its growth further, with Smiths expanding the business from forty stores to one hundred fourteen.

128. Based on his success, in 2017, Ponder met with Kroger corporate officers and succeeded in getting Smiths' entire "grab n' go" deli line.

129. At all times, Ponder was paid by Fresh Mix, including 50% of his expenses.

130. Defendants Get Fresh, Caldara, Goldberg, and Wise informed Ponder and Lagudi that Fresh Mix would be provided its share of the profits from the Kroger Fresh Kitchen business.

131. That, however, never happened.

132. Instead, Defendants Get Fresh, Caldara, Goldberg, and Wise have moved the business under Get Fresh affiliate, Defendant Get Fresh Kitchen, which is 100% owned by Defendants Caldara, Goldberg, and Wise.

133. In 2017, Ponder successfully secured a new line of business on behalf of Fresh Mix called "Purple Carrot." Purple Carrot is a one hundred percent (100%) vegetarian meal kit, which includes all the components needed to make a complete, nutritious meal at home. Ponder saw an opportunity to expand into this new line of business, and after months of hard work and effort, successfully secured it.

134. Notwithstanding Ponder's efforts, Get Fresh has not provided Fresh Mix with the appropriate credit for bringing this new line of lucrative business.

135. As noted above, Walmart for a period of time ceased being a customer of Fresh Mix. At that time, it was a customer of both Get Fresh and Fresh Mix separately. Under the arrangement at that time, Get Fresh received the first $25,000 of monthly profit.

136. Under Get Fresh's practice, once a customer stopped doing business with Get Fresh for four months, it then became available to Fresh Mix to attempt to secure as a new customer.

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137. After more than four months passed, Fresh Mix successfully brought Walmart back as a customer. Pursuant to that agreement, Fresh Mix was entitled to keep all the profits generated by the Walmart business.

138. In violation of its agreement with Fresh Mix, Get Fresh insisted on receiving the first $25,000 in monthly profit.

As The Relationship Worsens, Get Fresh Unsuccessfully Seeks To Sell Fresh Mix

139. Throughout the years, Lagudi and Ponder would complain about Defendants' mistreatment. This led to mistrust between the parties, and the relationship deteriorated.

140. In November 2017, Defendants Caldara, Goldberg, and Wise communicated to Lagudi and Ponder that they had an opportunity to sell Get Fresh and its affiliates, including Fresh Mix.

141. Defendants Caldara, Goldberg, and Wise informed Plaintiffs that the potential buyer, however, required that all owners of any Get Fresh affiliate sign representations and warranties for all the businesses.

142. As a result, Defendants Get Fresh, Caldara, Goldberg, and Wise demanded Lagudi and Ponder sign representations and warranties confirming the accuracy of the information concerning **all** of the Get Fresh businesses.

143. Lagudi and Ponder, however, have no ownership interest in any Get Fresh business except Fresh Mix. Further, they do not control the information relating to Fresh Mix, as that is controlled by Get Fresh. Additionally, throughout the years they had challenged the accuracy of that information.

144. Accordingly, Lagudi and Ponder would not agree to sign the representations and warranties in the form proposed, even assuming Lagudi and Ponder agreed to accept a sum certain for their interests in Fresh Mix.

145. Defendant Get Fresh then sought to buy out Lagudi and Ponder. Yet, because the information from Get Fresh had repeatedly been wrong, Lagudi and Ponder reasonably required

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that valuation of their collective forty percent interest should be based on actual correct financial information.

146. On or before November 14, 2018, Lagudi, on behalf of Ponder and himself, met with Goldberg to negotiate a buy-out of Plaintiffs' interests in Fresh Mix. The parties were unable to reach a deal.

147. As a result, Defendants Get Fresh, Caldara, Goldberg, and Wise decided they would pursue another "negotiation" tactic. They began to execute on a plan designed to artificially drive down the value of Fresh Mix and force Plaintiffs back to the negotiating table in a much weaker position.

Get Fresh Retaliates Against Lagudi And Ponder As Part Of Grand Scheme To Drive Down The Value Of Fresh Mix And Bring Lagudi And Ponder To The Bargaining Table

148. On November 26, 2018, the Monday after Thanksgiving, Defendants Get Fresh, Caldara, Goldberg, and Wise began executing on a new multi-prong scorched earth strategy designed to harm and oppress Lagudi and Ponder and Fresh Mix.

149. The strategy includes the following:

(a) remove Lagudi and Ponder from the business and shut them out from receiving any further work communications and falsely inform employees and customers that Lagudi and Ponder are no longer with Fresh Mix;

(b) initiate a costly arbitration against not only Lagudi and Ponder but also their spouses with baseless claims;

(c) threaten to sue Lagudi and Ponder should they choose to work;

(d) refuse to indemnify Lagudi and Ponder in violation of the Operating Agreement;

(e) stop providing full distributions to Lagudi and Ponder;

(f) stop providing documents and information about the business that Lagudi and Ponder received for years and frustrate the book and records rights of Lagudi and Ponder;

(g) purposely stop adequately servicing Fresh Mix customers; and

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(h) ignore voting procedures set forth in the Operating Agreement.

150. This scheme has at least three goals. *First*, Defendants Get Fresh, Caldara, Goldberg, and Wise seek to increase the legal expenses and costs of Lagudi and Ponder. *Second*, these Defendants want to starve off the funds Lagudi and Ponder need to pay for those legal expenses and costs. *Third*, these Defendants intend to devalue the shares of Lagudi and Ponder in Fresh Mix by reducing its revenue while continuing to artificially inflate its costs.

151. Defendants Get Fresh, Caldara, Goldberg, and Wise anticipate that if they succeed in obtaining these goals, they will force Lagudi and Ponder to the negotiating table in a weakened position and be able to purchase their shares at a *de minimus* value.

152. By employing this strategy, however, Defendants Get Fresh, Caldara, Goldberg, and Wise have breached the Operating Agreement and violated their fiduciary duties.

Defendants Wrongfully Remove Lagudi And Ponder From Fresh Mix

153. On November 26, 2018, Get Fresh sent a letter to Lagudi and Ponder informing them that the letter "serves as notice of termination of your employment with Fresh Mix, effective immediately." Ex. A. The letter suggested Get Fresh had also chosen not to renew the Employment Agreements of Lagudi and Ponder, thereby ending the term of those agreements as of January 2019.

154. Further, notwithstanding that Lagudi and Ponder were Managers and Members of Fresh Mix, the letter informed Lagudi and Ponder that "[i]n light of your termination, please cease all work on Fresh Mix matters, cease use of all Fresh Mix property or data, and do not hold yourself out as a Fresh Mix employee." *Id.*

155. It also stated Lagudi and Ponder were "prohibited from entering [Fresh Mix] property. We will arrange for your personal items, if any, located at Fresh Mix to be delivered to you."

156. The letter also "remind[s]" Lagudi and Ponder of their purported "continuing obligations, including your confidentiality and two year non-compete obligations, as detailed in your Fresh Mix Employment Agreement."

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157. Get Fresh took the position that the Employment Agreements were still in effect, even though it had admitted for years that those agreements terminated under their respective terms, in 2013. It did so, in part, to threaten Lagudi and Ponder with non-existent non-compete obligations under those Agreements.

158. Get Fresh claimed the termination was "for cause," and pointed to a separate "Notice of Dispute" that it served on Lagudi and Ponder that same day.

159. That "notice," which is attached hereto as Exhibit B, purported to provide a list of seven (7) "disputes."

160. It provided, however, no facts or support. Indeed, it was a concoction.

161. For instance, for a dispute titled "Breach of Contract (Operating Agreement)," the "notice" states: "Costco, Disclosure of Confidential Information, Failure to Perform under the Operating Agreement." The other entries similarly suffered from the same lack of facts or notice of the actual dispute. Ex. B.

162. The "notice" demonstrates the pretextual nature of Defendants' termination of Lagudi and Ponder.

163. On that same day, Get Fresh also fired the executive assistant working with Lagudi and Ponder at Fresh Mix.

164. By removing Lagudi, Ponder, and their assistant, Get Fresh removed all employees working for Fresh Mix at the time.

165. To make matters worse, Get Fresh also falsely informed the employees of Get Fresh and Fresh Mix's customers that "both Paul Lagudi and Todd Ponder have left the company to pursue other career endeavors."

166. These actions were without cause, pretextual, and designed to harm Lagudi, Ponder, and Fresh Mix.

167. As a result of these actions, Lagudi and Ponder were forced to initiate this action and seek a temporary restraining order.

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168. The Court granted the application for a temporary restraining order, finding that Lagudi and Ponder showed a likelihood of success on the merits and that irreparable harm could result. *See* Ex. C.

169. Specifically, the Court ordered Defendants Fresh Mix, Get Fresh, and the Doe and Roe entities to reinstate Lagudi and Ponder as "Managers of Fresh Mix having all rights, interests, and obligations as Managers of Fresh Mix." *See* Ex. C.

170. The Court further stated that those Defendants were to return to Plaintiffs access to their previously used email accounts as well as return any personal property to Plaintiffs. *See* Ex. C.

171. Finally, the Court ordered that those Defendants could not make any further statements that Lagudi and Ponder were no longer associated with Fresh Mix. *See* Ex. C.

Get Fresh Brings A Baseless Arbitration Against Not Only Lagudi And Ponder, But Also Their Spouses

172. As part of the Court's hearing on December 11, 2018, the Court stated the following in connection with Get Fresh's contention that the Employment Agreements did not terminate (emphasis added):

> I am concerned, counsel, related to the employment status. However, ***at this point it appears that they were at-will employees because of the expiration of the agreement, and I am not going to grant any other relief related to the employment contracts***.

Ex. D.

173. On January 16, 2019, the Court ruled as follows (emphasis added):

> Based upon the information currently before me it appears the employment agreement expired long ago. ***Therefore, no arbitration provision in the employment agreement survives for purposes of this dispute***.

Ex. E.

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174. Notwithstanding this clear direction from the Court, on February 13, 2019, Get Fresh filed a Notice of Arbitration with the American Arbitration Association ("AAA") bringing arbitration claims under the Employment Agreements. *See* Ex. F.

175. Specifically, it states:

> This Demand for Arbitration is further made pursuant to the January 11, 2010 Employment Agreements between Fresh Mix and Messrs. Lagudi and Ponder. The Employment Agreements require that any disputes "arising out of, relating to or concerning" the Employment Agreements, their breach, or the termination of Messrs. Lagudi and Ponder's employment, "shall be settled by arbitration in Las Vegas, Nevada, in accordance with the Commercial Arbitration Rules of the [AAA]."

176. In defiance of the Court, Get Fresh brought its arbitration under the Employment Agreements and alleges Lagudi and Ponder breached those Agreements.

177. It did so because under the Operating Agreement, [redacted]

178. The Arbitration sets forth baseless claims against Lagudi and Ponder.

179. To make matters worse, without any legal or factual basis Get Fresh also sued the spouses of Lagudi and Ponder.

180. It did so without having any claims against either spouse and for the sole purpose of attempting to intimidate Lagudi and Ponder.

181. Despite Plaintiffs' requests, Get Fresh refused to remove or dismiss the spouses from the arbitration. The spouses of Lagudi and Ponder were forced to file a motion to intervene with this Court.

182. Only after forcing the spouses of Lagudi and Ponder to incur expenses associated with such filing did Get Fresh agree to remove the spouses from the arbitration.

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183. Get Fresh's actions in the arbitration are designed to further its scheme to harm Plaintiffs.

Get Fresh Threatens To Sue Lagudi and Ponder Should They Choose To Work

184. Get Fresh stopped making payments to Lagudi and Ponder, which they received since 2010, after Get Fresh sent notice of terminating their employment.

185. Get Fresh has used the Employment Agreements to stop Lagudi and Ponder from obtaining earnings from anywhere else.

186. Specifically, on February 19, 2019, Defendant Caldara sent a letter to Mr. Ponder stating that Defendant Goldberg "told us that you might be considering employment at MGM Resorts. Presumably, your involvement is in the purchasing of produce." *See* Ex. G.

187. It further states "your Employment Agreement provides for a period of non-competition for two years after termination. We believe that provision prevents you being employed, or assisting in any manner, an entity that engages in the business of purchasing food products. The company intends to enforce this restrictive covenant." *Id*.

188. It also notes "the Employment Agreement also prohibits you from disclosing or using for personal gain and benefit any of the company's trade secrets. The company does not envision any circumstance where you could avoid violating this provision in the performance of your anticipated duties for MGM Resorts. Please refer to the provisions of your Employment Agreement regarding the company's remedies to prevent such misuse." *Id.*

189. On April 24, 2019, counsel for Get Fresh sent a letter demanding Ponder disclose his intentions for further employment, threatening again to enforce the Employment Agreement. Counsel did so, despite knowing that the Court had already stated the Employment Agreements had "expired long ago." Ex. H.

190. When pressed to provide a basis for Get Fresh's threats, counsel for Get Fresh refused to provide any. Ex. I.

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191. Get Fresh seeks to threaten non-compete obligations it knows expired "long ago" for the sole purpose of intimidating Lagudi and Ponder and prevent them from gainful employment.

Defendants Refuse To Indemnify Lagudi and Ponder

192. As set forth in Section 12.3 of the Operating Agreement, Lagudi and Ponder are entitled to [redacted] Section 12.3 [redacted]

193. Section 12.4 [redacted]

194. On March 13, 2019, Lagudi and Ponder sought to exercise their rights and requested [redacted], consistent with Sections 12.3 and 12.4 of the Operating Agreement. Ex. J.

195. On March 15, 2019, Defendants responded and [redacted] in violation of Sections 12.3 and 12.4 of the Operating Agreement. Ex. K.

196. Upon information and belief, Defendant Get Fresh also failed [redacted] in violation of Section 12.3.

197. Defendant Get Fresh breached the Operating Agreement as part of its overall scheme to deny Lagudi and Ponder the resources necessary to defend themselves against all Defendants.

Defendants Stop Making Full Distributions To Lagudi And Ponder

198. Incredibly, at the same time Defendants Get Fresh, Caldara, Goldberg, and Wise were refusing to indemnify Lagudi and Ponder, they purportedly used Plaintiffs' request for indemnification as justification to stop making full distributions to Lagudi and Ponder.

199. On April 8, 2019, Defendant Goldberg sent a letter to Lagudi and Ponder stating that the April 2019 Distributions were "affected by [Fresh Mix's] responsibility to establish

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Reserves to account for contingent liabilities relating to the pending and threatened disputes between and among [Fresh Mix].” Ex. L.

200. It then listed the following contingent liabilities (emphasis added):

- [Fresh Mix’s] anticipated costs and expenses in connection with the Disputes.
- The impact on [Fresh Mix], including its obligation to materially adjust prior years’ tax forms and prior distributions of Distributable Cash to its Members, if the arbitrators (or a Court) presiding over the Disputes confirm that Messrs. Lagudi and Ponder were not [Fresh Mix] employees after 2013.
- ***Messrs. Lagudi and Ponder’s demand for indemnification and advancement of costs and expenses relating to the Disputes.***
- The anticipated demand for indemnification and advancement of costs and expenses incurred by Get Fresh Sales, Inc. and Messrs. Caldara, Goldberg and Wise in connection with the Disputes, assuming indemnification or advancement is ultimately ordered or provided to Messrs. Lagudi and Ponder.

201. Defendants Get Fresh, Caldara, Goldberg, and Wise admit that this is the first time ever that Fresh Mix has set a reserve.

202. Defendants failed to comply with the voting procedures set forth in the Operating Agreement that would permit the distributions to not be paid.

203. Plaintiffs have requested, but Defendants Get Fresh, Caldara, Goldberg, and Wise have refused to provide any further information concerning the reserve, including information

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relating to the analysis and amount of exposure these Defendants anticipate for the contingent liabilities.

204. Defendant Get Fresh purposely has not provided full distributions to Lagudi and Ponder for no legitimate reason. Instead, it represents yet another tactic designed to deny Lagudi and Ponder resources necessary to defend themselves and prosecute their rights.

205. Defendants Get Fresh, Caldara, Goldberg, and Wise are in breach of the Operating Agreement and their fiduciary duties.

Defendants Refuse To Provide Lagudi And Ponder With Books And Records

206. Starting in May 2018, Defendants Get Fresh, Caldara, Goldberg, and Wise began to stop providing Lagudi and Ponder with documents that they, along with the other Managers, had received for years. Those documents include, but are not limited to, Margin and Analysis Reports, Daily Usage Reports, Value Add Analysis Reports, and Internal New Item Request Forms.

207. On April 26, 2019, Lagudi and Ponder, in their capacity as Members and Managers, requested certain books and records consistent with Section 9.1 of the Operating Agreement and Section 18-305 of the Delaware Limited Liability Act. Ex. M.

208. Specifically, Lagudi and Ponder requested the following:

(a) Margin and Analysis Reports from November 1, 2018 through the present;

(b) Books of Account, as referenced in Section 9.2 of the Operating Agreement;

(c) The Reserve (as defined in the Operating Agreement), including any analysis conducted by Fresh Mix (or any of its agents) in connection with setting the Reserve, from January 1, 2017 through the present;

(d) Daily Usage Reports from November 1, 2018 through the present;

(e) Value Add Analysis Reports from July 1, 2018 through the present;

(f) Internal New Item Request Forms from May 1, 2018 through the present;

(g) Check ledger from November 1, 2018 through the present;

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(h) Documentation relating to the accounting adjustment in the amount of approximately $108,000 made in 2018 relating to Sous Vide Packaging and Product;

(i) Schedule A costs and the supporting information for each cost, from January 1, 2017 to the present;

(j) Customer listing and Revenue from April 1, 2018 to the present;

(k) Spoilage Report from April 1, 2018 to the present;

(l) Warehouse Expense Back-up from January 1, 2017 to the present;

(m) Expenditures relating to marketing, brokerage, and sales promotion from January 1, 2018 to the present;

(n) G&A expenditures, including back-up documentation, from January 1, 2017 to the present; and

(o) Fresh Mix processing, inventory, and labor analysis reports from January 1, 2018 to the present. *See* Ex. M.

209. On May 3, 2019, Defendant Get Fresh responded. *See* Ex. N. Initially, Get Fresh offered to produce a small subset of the documents requested. On May 21, 2019, Plaintiffs responded providing additional detail as to why Plaintiffs were entitled to all the documents. Plaintiffs also offered to inspect and collect the few documents that Get Fresh agreed to produce on Wednesday, May 22, 2019. Ex. O.

210. On May 21, 2019, just one day before the scheduled pick-up, Defendants Get Fresh, Caldara, Goldberg, and Wise insisted that Plaintiffs agree to a Non-Disclosure Agreement before Defendants would release the few documents it agreed to provide. *See* Ex. P.

211. The NDA was onerous and included one-sided provisions that severely limited the rights of Plaintiffs.

212. Further, and more fundamentally, the NDA was wholly unnecessary. Section 9.7 of the Operating Agreement [redacted]

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213. Accordingly, Plaintiffs declined to sign the NDA, but reaffirmed their commitment to abide by their obligations under Section 9.7 of the Operating Agreement. *See* Ex. Q.

214. Defendants Get Fresh, Caldara, Goldberg, and Wise refused to produce *any* of the books and records, including those they had previously committed to provide. *See* Ex. R.

215. These Defendants had no intention of providing any books and records to Plaintiffs. Instead, they purposely insisted Plaintiffs sign a superfluous and onerous NDA as an impermissible roadblock to Plaintiffs' books and records rights, in breach of the Operating Agreement.

Defendants Stop Adequately Servicing Fresh Mix Clients

216. Perhaps most importantly, since the removal of Lagudi and Ponder, Defendants Get Fresh, Caldara, Goldberg, and Wise have purposely stopped providing the service and value that Fresh Mix's customers have received for years during Plaintiffs' tenure and have diverted customers away from Fresh Mix.

217. In December 2018, Get Fresh blocked Plaintiffs from meeting with Associated Food Services, which is a customer Plaintiffs brought to Fresh Mix. Instead, Get Fresh took Associated Food Services for itself and diverted it away from Fresh Mix.

218. Also in December 2018, Walmart expressed interest in Fresh Mix providing retail product to it. As a result of Defendants Get Fresh, Caldara, Goldberg, and Wise removing Plaintiffs from Fresh Mix, it fell on Get Fresh to develop this business. It refused.

219. In January 2019, Kroger reached out to meet with Lagudi to pursue a nationwide sous vide program, a steamable organic vegetable program, and a full line sous vide ready meal program, which Lagudi had been pitching for some time. Due to the actions of Defendants Get Fresh, Caldara, Goldberg, and Wise, Lagudi was forced to pass the opportunity to Get Fresh to pursue on behalf of Fresh Mix. Months have passed and Get Fresh has not pursued the sous vide program, or any other aspects of the program, let alone secure the business, which has a potential value of millions of dollars to Fresh Mix.

220. On May 21, 2019, Get Fresh received the following email from MGM Grand, which is Fresh Mix's biggest customer:

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> I hope that this email finds you well. I am emailing you in regards to the quality of the produce that your company has been delivering here to the Conference Center over these past few months. Just say that it has not been up to the standards that we uphold here at the MGM Grand or for the fact of the standards that I have personally set forth for my team and it is getting progressively worse and unacceptable moving forward. Today my team intercepted an order of fresh cut fruit that was labeled 5/21 yet the contents of the vessel was all labeled 5/17 & 5/18. How does this happen? These types of issues or oversights does not sit well with me as an operator. What if this product reached our guests? It affects everyone internally and externally. Think of all of the labor that went into correcting this. How are you holding your team accountable? How does this affect the reputation of MGM Grand? I'm at a loss right now and trying to understand the sudden decline with your services. If you see below as an example of the type of efforts that your team is discussing to rectify certain situations.

221. The service issues identified in this email typify the problems Fresh Mix's customers have faced since Defendants Get Fresh, Caldara, Goldberg, and Wise purposely removed Lagudi and Ponder.

222. Defendants Get Fresh, Caldara, Goldberg, and Wise are purposely not properly servicing Fresh Mix's customers in order to drive down the value of Fresh Mix, in violation of their fiduciary, contractual, and tort duties.

223. For example, since Ponder and Lagudi were forcibly removed: (1) average sales have decreased by approximately thirteen percent; (2) average gross margins have decreased by over twenty-one percent; and (3) the average net margin has decreased by nearly twenty-eight percent.

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224. Further, despite acknowledging and agreeing to meet with Kroger in order to develop a nationwide strategy for the sous vide program developed by Lagudi and Ponder, Get Fresh refused this meeting and, instead, stated the equipment for this program was no longer needed.

225. Additionally, upon information and belief, since Lagudi and Ponder were removed, no representatives of Fresh Mix or Get Fresh have visited with Ralphs to maintain, innovate, or grow this business. Ralphs is a major customer of Fresh Mix, and business from Ralphs has dramatically decreased.

226. As a result of these and other actions, Fresh Mix's revenues and profits have significantly decreased since these Defendants removed Lagudi and Ponder.

Lagudi and Ponder Demand Fresh Mix Act

227. Based on all of the actions of Defendants Get Fresh, Caldara, Goldberg, and Wise, Ponder and Lagudi became concerned about the status of Fresh Mix and its operations.

228. As such, on or about March 26, 2019, counsel for Ponder and Lagudi sent a letter to the individual Defendants requesting a meet and confer pursuant to the terms of the Operating Agreement and setting forth in detail and with particularity the claims Ponder and Lagudi had against Get Fresh. *See* Ex. S.

229. Get Fresh failed to act on these concerns.

230. Alternatively, should this court find the demand was improper, any demand on Fresh Mix's current board to bring the causes of action alleged herein would be futile, and, therefore, is excused because Get Fresh and its shareholders, Caldara, Goldberg, and Wise (the "Individual Defendants"), who constitute the majority of the board, were in a position to and did dominate the board during the relevant time period and are interested in the wrongdoing alleged herein and/or are incapable of exercising independent business judgment.

231. Get Fresh has a sixty percent (60%) interest in Fresh Mix. Get Fresh is controlled one hundred percent by the Individual Defendants.

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232. These Defendants, who currently constitute a majority of the board, are incapable of exercising independent business judgment because: (a) they engaged in the wrongful conduct alleged herein; (b) they possess other entangling financial relationships with other board members; (c) they are interested in the actions and transactions challenged herein; and (d) they exhibited a willful and reckless refusal to consider the information made available to them by Plaintiffs.

233. The board's inability to exercise its independent business judgment is further demonstrated by its refusal to permit Plaintiffs a full, adequate, and transparent examination of Fresh Mix's books and records, despite due and proper demand having been made pursuant to the terms of the Operating Agreement.

COUNT I

BREACH OF CONTRACT

(Against Get Fresh)

234. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

235. The duties and obligations of the Operating Agreement are binding upon Defendant Get Fresh.

236. Get Fresh breached the Operating Agreement, including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

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(f) Get Fresh wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) Get Fresh wrongfully refused to provide to Ponder and Lagudi the distributions to which they were entitled;

(h) Get Fresh failed to comply with the voting procedures to deny distributions and indemnification;

(i) Get Fresh refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) Get Fresh failed to properly service ongoing customers of Fresh Mix.

237. Ponder and Lagudi are informed and believe that Get Fresh has breached additional provisions of the Operating Agreement in addition to those set forth above, and reserve the right to assert all such breaches herein.

238. Get Fresh's breaches of the Operating Agreement have caused and continue to cause injury and damage to Ponder and Lagudi. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

239. Get Fresh's breaches of the Operating Agreement are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi. These immediate and irreparable injuries are continuing and will continue so long as Get Fresh's conduct persists.

240. Ponder and Lagudi are entitled to recover damages from Get Fresh, in amounts to be determined. However, Ponder and Lagudi are further entitled to specific performance of certain terms of the contract, including, but not limited to, specific performance of the indemnification and advancement of costs (Sections 12.3 and 12.4 of the Operating Agreement); specific performance of the proper procedure for paying distributions (Sections 1.22 and 7.1 of the Operating Agreement); and specific performance of complying with the demand for books and records (Sections 9.1, 9.2, and 9.3 of the Operating Agreement).

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COUNT II

BREACH OF FIDUCIARY DUTY

(Against Get Fresh)

241. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

242. As a manager of Fresh Mix, Get Fresh owes fiduciary duties to Ponder and Lagudi, the other managers of the limited liability company.

243. The Operating Agreement does not remove all fiduciary duties owed by the managers.

244. In fact, Section 4.4 of the Operating Agreement specifically states that the members and managers owe fiduciary duties to Fresh Mix as it relates to the business of distributing food products of every kind and nature, and diversion of customers to a new business enterprise.

245. Get Fresh has breached the fiduciary duties it owes in multiple ways, including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue of Fresh Mix;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) Get Fresh wrongfully refused to provide the distributions to which they were entitled to Ponder and Lagudi;

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(h) Get Fresh failed to comply with the voting procedures to deny distributions and indemnification;

(i) Get Fresh refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) Get Fresh failed to properly service ongoing customers of Fresh Mix.

246. Ponder and Lagudi are informed and believe that Get Fresh has continued to act in a manner that violates the fiduciary duties owed to them, and reserve the right to assert all such breaches herein.

247. Get Fresh's breaches of its fiduciary duties have caused and continue to cause injury and damage to Ponder and Lagudi. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

248. Get Fresh's breaches of its fiduciary duties are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi. These immediate and irreparable injuries are continuing and will continue so long as Get Fresh's conduct persists.

249. Ponder and Lagudi are entitled to recover damages from Get Fresh, in amounts to be determined.

COUNT III

DECLARATORY JUDGMENT

(Against Get Fresh)

250. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

251. An actual controversy exists regarding the enforceability of the non-competition clauses included in the Employment Agreements.

252. Ponder and Lagudi seek a declaration that, under applicable Nevada law, the non-competition clauses contained within the Employment Agreements are unenforceable.

253. The Employment Agreements expired as of January 11, 2013, and no further consideration has been provided to Ponder and Lagudi in support of the non-competition terms.

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254. Therefore, Plaintiffs respectfully request that this Court declare that the non-competition clauses contained within the Employment Agreements are unenforceable.

COUNT IV

ACCOUNTING

(Against Get Fresh)

255. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

256. As members of Fresh Mix, all managers have a fiduciary relationship to the company founded on trust and confidence.

257. Plaintiffs are entitled under Nevada common law to recover any amounts that are attributable to Get Fresh's wrongful acts.

258. The amount of money due from Get Fresh to Ponder and Lagudi is unknown to them and cannot be ascertained without an accounting of the amounts attributable to Get Fresh's wrongful acts.

259. Accordingly, Ponder and Lagudi are entitled to an accounting of all funds and information received and retained by Get Fresh.

COUNT V

TORTIOUS INTERFERENCE

(Against Get Fresh Kitchen)

260. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

261. Get Fresh Kitchen was and remains aware of the continuing contractual obligations of Get Fresh and Ponder and Lagudi to Fresh Mix.

262. In spite of the above, Get Fresh Kitchen has intentionally interfered with the contractual relationships of Fresh Mix, including inducing breaches of the obligations for improper purposes and by improper methods.

263. At all relevant times, Get Fresh Kitchen has known and remains aware of the contractual relationship between Get Fresh and Ponder and Lagudi to operate Fresh Mix in order to seek new customers and business.

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264. In spite of the above, Get Fresh Kitchen intentionally sought out and took for itself certain customers and business Ponder and Lagudi had developed on behalf of Fresh Mix.

265. Get Fresh Kitchen's misconduct in that regard was and continues to be wanton, willful, intentional, and in reckless disregard of Fresh Mix's rights.

266. Fresh Mix, and specifically Lagudi and Ponder, have been damaged as a result of Get Fresh Kitchen's tortious interference with its contractual relations.

COUNT VI

UNJUST ENRICHMENT

(Against all Defendants)

267. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

268. Defendants have wrongfully taken business opportunities that rightfully belong to Ponder and Lagudi as managers of Fresh Mix.

269. Permitting these Defendants to retain the benefit of these opportunities would be inequitable.

270. Defendants have been unjustly enriched and should pay restitution such that Ponder and Lagudi are returned to the status quo.

271. Ponder and Lagudi are entitled to recover the full amounts of the profits made by Defendants related to these wrongful actions.

COUNT VII

BREACH OF FIDUCIARY DUTY

(Against Caldara, Goldberg, and Wise)

272. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

273. Caldara, Goldberg, and Wise, as managers of Get Fresh and signatories to the Operating Agreement in this capacity, owe fiduciary duties to Fresh Mix and the other managers, including Ponder and Lagudi.

274. The Operating Agreement does not remove all fiduciary duties owed by the managers.

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275. In fact, Section 4.4 of the Operating Agreement specifically states that the members and managers owe fiduciary duties to Fresh Mix as it relates to the business of distributing food products of every kind and nature, and diversion of customers.

276. These Individual Defendants have breached the fiduciary duties they owe to Fresh Mix in multiple ways, including, without limitation, as follows:

(a) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(b) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix; and

(c) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds.

277. Ponder and Lagudi are informed and believe that Caldara, Goldberg, and Wise have continued to act in a manner that violates the fiduciary duties owed to Fresh Mix via their roles as managers of Get Fresh, and reserve the right to assert all such breaches herein.

278. The Individual Defendants' breaches of their fiduciary duties have caused and continue to cause injury and damage to Ponder and Lagudi and Fresh Mix. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

279. The Individual Defendants' breaches of their fiduciary duties are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi, and Fresh Mix. These immediate and irreparable injuries are continuing and will continue so long as their conduct persists.

COUNT VIII

AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

(Against Caldara, Goldberg, and Wise)

280. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

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281. Get Fresh and the Individual Defendants owed fiduciary duties to Lagudi and Ponder.

282. Get Fresh and the Individual Defendants breached their fiduciary duties to Lagudi and Ponder as articulated in more detail above.

283. Caldara, Goldberg, and Wise were aware of the Operating Agreement between Get Fresh and Lagudi and Ponder as they signed it in their capacity as managers of Get Fresh.

284. These Individual Defendants were aware of the fiduciary duties Get Fresh and each other owe to Fresh Mix and Lagudi and Ponder.

285. Despite this knowledge, Caldara, Goldberg, and Wise knowingly assisted Get Fresh and each other in violating these duties in numerous ways, including, without limitations, as follows:

(a) failed to properly allocate revenue;

(b) wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) wrongfully refused to provide to Ponder and Lagudi the distributions to which they were entitled;

(h) failed to comply with the voting procedures to deny distributions and indemnification;

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(i) refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) failed to properly service ongoing customers of Fresh Mix.

286. Fresh Mix, Lagudi, and Ponder were directly damaged by these actions.

COUNT IX

BOOKS AND RECORDS DEMAND

(*Against Fresh Mix)*

287. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

288. Section 18-305 of the Delaware Limited Liability Act provides that each member and manager of the entity are entitled to inspect the books and records.

289. Plaintiffs have made such a demand for the books and records on Fresh Mix on or about April 26, 2019, including the items listed above in Paragraph 208.

290. Fresh Mix refused to provide the books and records as mandated by the statute.

291. Pursuant to 8 Del. C. Section 220, Plaintiffs demand Fresh Mix produce the requested books and records.

COUNT X

BREACH OF FIDUCIARY DUTY AND AIDING AND ABETTING SUCH BREACH

(Against Get Fresh Derivatively)

292. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

293. This claim is asserted derivatively on behalf of Fresh Mix against Get Fresh.

294. Get Fresh has breached its fiduciary duty to Fresh Mix including, without limitations, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

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(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh failed to properly service ongoing customers of Fresh Mix.

295. Get Fresh has rendered substantial assistance in the accomplishment of the wrongdoing asserted in this complaint. In so doing, Get Fresh acted with awareness of its wrongdoing, realized that its conduct would substantially assist and/or directly affect the accomplishment of wrongdoing, and were aware of their overall contribution to the common scheme and course of wrongful conduct alleged herein.

296. By reason of the foregoing, Fresh Mix has sustained and will continue to sustain serious damages and irreparable injury, for which relief is sought herein.

COUNT XI

BREACH OF DUTIES OF IMPLIED GOOD FAITH AND FAIR DEALING AND AIDING AND ABETTING SUCH BREACH

(Against Get Fresh derivatively)

297. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

298. This claim is asserted derivatively on behalf of Fresh Mix against Get Fresh.

299. Get Fresh has breached its duties of good faith and fair dealing to Fresh Mix including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

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(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh failed to properly service ongoing customers of Fresh Mix.

300. Get Fresh has rendered substantial assistance in the accomplishment of the wrongdoing asserted in this complaint. In so doing, Get Fresh acted with awareness of its wrongdoing, realized that its conduct would substantially assist and/or directly affect the accomplishment of wrongdoing, and were aware of their overall contribution to the common scheme and course of wrongful conduct alleged herein.

301. By reason of the foregoing, Fresh Mix has sustained and will continue to sustain serious damage and irreparable injury, for which relief is sought herein.

COUNT XII

WASTE AND AIDING AND ABETTING SUCH WASTE

(Against Get Fresh derivatively)

302. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

303. This claim is asserted derivatively on behalf of Fresh Mix against Get Fresh.

304. Get Fresh has wasted Fresh Mix's assets, including, without limitation, as follows:

(a) Get Fresh failed to properly allocate revenue;

(b) Get Fresh wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) Get Fresh wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

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(d) Get Fresh wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) Get Fresh wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) Get Fresh failed to properly service ongoing customers of Fresh Mix.

305. Get Fresh has rendered substantial assistance in the accomplishment of the wrongdoing asserted in this complaint. In so doing, Get Fresh acted with awareness of its wrongdoing, realized that its conduct would substantially assist and/or directly affect the accomplishment of wrongdoing, and were aware of their overall contribution to the common scheme and course of wrongful conduct alleged herein.

306. By reason of the foregoing, Fresh Mix has sustained and will continue to sustain serious damage and irreparable injury, for which relief is sought herein.

COUNT XIII

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(Against Get Fresh and Individual Defendants)

307. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

308. As a contract, the Operating Agreement includes an implied covenant of good faith and fair dealing.

309. As a manager of Fresh Mix, Get Fresh is subject to the implied covenant of good faith and fair dealing in its interactions with Ponder and Lagudi, the other managers of the limited liability company.

310. The Individual Defendants, as managers of Get Fresh and signatories to the Operating Agreement in this capacity, are subject to the implied covenant of good faith and fair dealing in their interactions with Fresh Mix and the other managers, including Ponder and Lagudi.

311. The Individual Defendants and Get Fresh have breached this covenant in multiple ways, including, without limitation, as follows:

(a) failed to properly allocate revenue;

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(b) wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds;

(f) wrongfully refused to provide indemnification to Ponder and Lagudi;

(g) wrongfully refused to provide to Ponder and Lagudi the distributions to which they were entitled;

(h) failed to comply with the voting procedures to deny distributions and indemnification;

(i) refused to provide Ponder and Lagudi with the books and records to which they are entitled; and

(j) failed to properly service ongoing customers of Fresh Mix.

312. Ponder and Lagudi are informed and believe that the Individual Defendants and Get Fresh have continued to act in a manner that violates the implied covenant of good faith and fair dealing, and reserve the right to assert all such breaches herein.

313. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty have caused and continue to cause injury and damage to Ponder and Lagudi and Fresh Mix. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

314. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty are material, ongoing, and serious. They have caused immediate and irreparable

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injury to Ponder and Lagudi, and Fresh Mix. These immediate and irreparable injuries are continuing and will continue so long as their conduct persists.

COUNT XIV

TORTIOUS BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(Against Get Fresh and Individual Defendants)

315. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

316. Get Fresh and the Individual Defendants owe fiduciary duties to Fresh Mix and Lagudi and Ponder, the other managers of Fresh Mix.

317. Get Fresh owns the majority of Fresh Mix, with the Individual Defendants as the owners of Get Fresh.

318. Based on the fiduciary nature of the relationship, Get Fresh and the Individual Defendants have a special relationship with Lagudi and Ponder.

319. As such, Lagudi and Ponder were entitled to rely on, and expected, Get Fresh and the Individual Defendants, to comply with the implied covenant of good faith and fair dealing.

320. However, the Individual Defendants and Get Fresh have breached this covenant in multiple ways, including, without limitation, as follows:

(a) failed to properly allocate revenue;

(b) wrongfully overcharged Fresh Mix for certain costs, including, among other line items, whole produce items, sous vide costs, warehouse costs, and spoilage costs;

(c) wrongfully used Fresh Mix and its resources to develop a new business opportunity entitled "Get Fresh Kitchen" without sharing the profits of this endeavor with Fresh Mix;

(d) wrongfully used Fresh Mix to secure a new line of business entitled "Purple Carrot" without sharing the profits of this endeavor with Fresh Mix;

(e) wrongfully insisted upon receiving, and did in fact collect, initial profits from Walmart, despite Fresh Mix's entitlement to these funds; and

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(f) failed to properly service ongoing customers of Fresh Mix.

321. Ponder and Lagudi are informed and believe that the Individual Defendants and Get Fresh have continued to act in a manner that violates the implied covenant of good faith and fair dealing, and reserve the right to assert all such breaches herein.

322. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty have caused and continue to cause injury and damage to Ponder and Lagudi and Fresh Mix. These injuries include loss of income from customers, loss of business opportunities, loss of goodwill, loss of client relationships, and other such losses.

323. Get Fresh and the Individual Defendants' breaches of the implied covenant of good faith and fair duty are material, ongoing, and serious. They have caused immediate and irreparable injury to Ponder and Lagudi, and Fresh Mix. These immediate and irreparable injuries are continuing and will continue so long as their conduct persists.

XV

APPOINTMENT OF CUSTODIAN OR RECEIVER

324. The allegations of the preceding paragraphs are reiterated as if fully set forth herein.

325. The parties are have been unable to agree on acceptable price and terms for any buyout of Plaintiffs' membership interests.

326. Fresh Mix is suffering because of the failure of the parties to make business decisions on behalf of Fresh Mix.

327. Fresh Mix has lost business opportunities because of its failures to respond to requests.

328. Fresh Mix has lost revenues because of the ongoing dispute among the managers.

329. The managers are unable to terminate the Operating Agreement in compliance with its terms.

330. Therefore, Plaintiffs request this Court order the appointment of one or more persons to serve as custodian or receiver for Fresh Mix during the pendency of this lawsuit and any required arbitration.

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CONCLUSION

WHEREFORE, Plaintiffs respectfully demand judgment in their favor and in favor of Fresh Mix against the Defendants as follows:

A. Providing immediate advancement of expenses to Lagudi and Ponder pursuant to the indemnification requirements;

B. Declaring that Get Fresh is in breach of the Operating Agreement and awarding damages related thereto, including but not limited to the equitable relief demanded;

C. Declaring that Get Fresh has breached its fiduciary duties to Plaintiffs and awarding damages related thereto, including but not limited to the equitable relief demanded;

D. Compelling Get Fresh to specifically perform its obligations under the Operating Agreement;

E. Declaring the alleged Employment Agreements have ended and are no longer enforceable;

F. Authorizing an accounting;

G. Declaring that Get Fresh Kitchen has tortuously interfered with the contractual relations and awarding damages related thereto;

H. Declaring the Individual Defendants have breached their fiduciary duties to Plaintiffs and awarding damages related thereto;

I. Declaring the Individual Defendants have aided and abetted the breach of fiduciary duty by Get Fresh and awarding damages related thereto;

J. Declaring that Get Fresh has breached its fiduciary duties to Fresh Mix and awarding damages related thereto;

K. Declaring that Get Fresh has breached its duty of good faith and fair dealing to Fresh Mix and awarding damages related thereto;

L. Declaring that Get Fresh has engaged in waste and awarding damages related thereto;

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M. Declaring that Get Fresh and the Individual Defendants have breached the contractually implied duty of good faith and fair dealing and awarding damages related thereto;

N. Declaring that Get Fresh and the Individual Defendants have tortuously breached the implied duty of good faith and fair dealing and awarding damages related thereto;

O. Appointing one or more persons to serve as custodian or receiver for Fresh Mix;

P. Awarding Plaintiffs their attorneys' fees and costs in this action;

Q. Awarding Plaintiffs and Fresh Mix pre- and post-judgment interest on all sums sought herein; and

R. Granting such other and further relief as the Court deems just and proper.

DATED this 19th day of September, 2019.

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/s/Mark J. Connot
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on the 19th day of September, 2019, I served the above and foregoing **VERIFIED AMENDED COMPLAINT AND DERIVATIVE ACTION** via the Court's electronic service system to the parties listed below:

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

DATED this 19th day of September, 2019.

/s/ Doreen Loffredo
An employee of Fox Rothschild LLP

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EXHIBIT D

EXHIBIT D

SUPP

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DISTRICT COURT
CLARK COUNTY, NEVADA

PAUL LAGUDI, an individual; and WILLIAM TODD PONDER, an individual., Plaintiffs, *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 Dep't No. 22 **(REDACTED)** **SUPPLEMENT TO MOTION TO VACATE, ALTER, OR AMEND SANCTIONS ORDER** Hearing Date: November 1, 2022 Hearing Time: 8:30 a.m.

Plaintiffs Paul Lagudi and William Todd Ponder provide this supplemental brief in support of their motion to vacate, alter, or amend sanctions order, originally filed March 30, 2020.

In March 2020, Judge Gonzalez sanctioned plaintiffs for what she considered improper use of defendant Get Fresh Sales, Inc.'s attorney-client-privileged memorandum. Plaintiffs timely moved to vacate the sanctions because the

memo was not privileged and the Court's sanctions order erroneously interfered with the ongoing arbitration proceedings in excess of the court's jurisdiction. The order was stayed pending the resolution of plaintiffs' motion. But then Get Fresh forced defendant Fresh Mix, LLC into bankruptcy proceedings, and the briefing on the motion to vacate was itself stayed.

Those bankruptcy proceedings have uncovered testimony from Get Fresh owner Scott Goldberg that shows that Get Fresh misled Judge Gonzalez about the creation of the at-issue memorandum, including the nature of the relationship between Scott Goldberg and attorney Bruce Leslie at the time the memo was created. Judge Gonzalez was led to believe that the memo was created for Get Fresh within Get Fresh's attorney-client relationship with Bruce Leslie.

[redacted]

These facts directly contradict the testimony given at the 2020 hearing that led to the sanctions order and on which Judge Gonzalez relied to conclude that the memo was Get Fresh's privileged document.

In light of the new testimony from the bankruptcy proceedings, and the jurisdictional overreach of a remedy that interferes with an ongoing arbitration, plaintiffs ask this Court to vacate the sanctions.

FACTS & PROCEDURE

A. Scott Goldberg Creates a Memorandum Addressing the Disputes Between the Fresh Mix Managers Before Defendants Lock Out the Plaintiffs

Plaintiffs and defendant Get Fresh Sales, Inc. worked together to form defendant Fresh Mix, LLC in 2010. (1 App. 2, 1/21/20 Hr'g Tr., at 26:11-13, Ex. 1; 1 App. 43, 1/22/20 Hr'g Tr., at 155:8-18, Ex. 2.) Fresh Mix is a produce company, and the plaintiffs were responsible for the company's sales. (1 App. 44, 1/22/20 Hr'g Tr., at 157:19-24). Plaintiffs collectively own 40% of Fresh Mix; Get Fresh owns the remaining 60%. (1 App. 3, 1/21/20 Hr'g Tr., at 27:9-10.)

Fresh Mix has five member-managers who run the company. (1 App. 4, 1/21/20 Hr'g Tr., at 31:3-6.) Plaintiffs Paul Lagudi and William Todd Ponder are two of the five member-managers. (1 App. 5, 1/21/20 Hr'g Tr., at 32:20-22.) The other three member-managers are the owners of Get Fresh: Scott Goldberg, Dominic Caldara, and John Wise (the "Get Fresh Managers"). (1 App. 5, 1/21/20 Hr'g Tr., at 32:1-6.) In late 2018, following talks about a sale of the companies, the Get Fresh Managers began a strategic campaign to harass, isolate, and irritate the plaintiffs so that it would be nearly impossible for the plaintiffs to perform their duties and they would sell their interests in Fresh Mix for terms more satisfactory to Get Fresh. The defendants ultimately locked plaintiffs out of Fresh Mix on November 26, 2018. (1 App. 33, 34-35, 1/22/20 Hr'g Tr., at 104:17-22, 112:22-113:7, Ex. 2; 1 App. 53, 2/14/20 Hr'g Tr., at 43:10-11, Ex. 3.)

Several months before the lock out, in April or May of 2018, Scott Goldberg created a memorandum. According to Goldberg, the memorandum is an "outline summary of the disputes" involving the plaintiffs that "describe[s] how the businesses function" and includes "a decision-tree type of scenario" describing "the problems and the possible solutions, outcomes." (1 App. 6, 1/21/20 Hr'g Tr., at 42:13-16.) Goldberg testified at the 2020 sanctions hearing that the

memo was created at the direction of attorney Bruce Leslie in anticipation of a meeting between the Get Fresh Managers and Leslie. (1 App. 6-7, 1/21/20 Hr'g Tr., at 42:2-43:1.) In the process of creating the memo, Goldberg sent the draft memo between his external and Get Fresh email accounts. (1 App. 7, 1/21/20 Hr'g Tr., at 43:4-13.) After completing the memo, Goldberg circulated it by email to the Get Fresh Managers and attorney Leslie; Goldberg claimed he circulated the email to the other Get Fresh Managers and Leslie the day before all four of them met to discuss Leslie providing legal advice to the companies.[1] (1 App. 6-7, 1/21/20 Hr'g Tr., at 42:23-43:13.)

B. Defendants Deliver the Memo to Plaintiffs Along with Plaintiffs' Personal Belongings

After the lockout, the defendants gave plaintiffs the memorandum along with plaintiffs' personal items from their offices. On December 4, 2018, the defendants delivered the plaintiffs' personal items to plaintiffs' former counsel, Jeff Bendavid. (1 App. 20, 1/22/20 Hr'g Tr., at 48:16-25.) The personal items arrived in several boxes, some of which were closed and others had open tops, that were stacked in two or three rows in Bendavid's law office. (1 App. 21,

[1] The best evidence of when the document was created would be Scott Goldberg's email to himself, *see* 11 App. 8-10, 1/21/20 Hr'g Tr., at 65:4-67:21, but that email was never produced. Nor was the email from Goldberg to Leslie that attached the memo, nor any email between Goldberg, Caldara, Wise, and Leslie. Plaintiffs requested but were denied such discovery. (*See, e.g.*, 1 App. 45, 1/22/20 Hr'g Tr., at 167:7-13; Plaintiffs' Motion for Limited Discovery in Connection with Defendants' Claim of Privilege Over the Fresh Mix Memo on An Order Shortening Time, filed September 19, 2019.)

Only the defendants were permitted to engage in such discovery, which effectively allowed Get Fresh to mislead the Court. (Order on (1) Motion for Claw Back, Discovery, and Sanctions Related to Plaintiffs and Their Counsel's Improper Use of Exhibit T and Other Privileged and Confidential Information, and (2) Plaintiffs' Counter-Motion for Discovery Related to Fresh Mix Memo, filed September 25, 2019.)

1/22/20 Hr'g Tr., at 55:12-17.) A rolled-up piece of paper was sticking out of the top of one of the open boxes. (1 App. 22-23, 1/22/20 Hr'g Tr., at 56:7-57:22.) Assuming it was a receipt or inventory for the boxes, Bendavid picked up the paper and took it to his office. (1 App. 24-25, 1/22/20 Hr'g Tr., at 59:5-60:17.)

Bendavid later looked at the paper and realized it was a memo involving the Get Fresh Managers' disputes with plaintiffs over Fresh Mix. (1 App. 26-27, 1/22/20 Hr'g Tr., at 66:18-67:25.) According to Bendavid, the memo included issues that plaintiffs had been arguing about with the Get Fresh Managers in 2018. (1 App. 28, 1/22/20 Hr'g Tr., at 68:20-24.) Although there was no name on the memo, he assumed it was the three Get Fresh Managers "talking to each other." (1 App. 29, 30-31, 1/22/20 Hr'g Tr., at 70:16, 73:21-74:19.)

The substance of the memo did not give Bendavid any concern that the document was protected by attorney-client privilege. (1 App. 36-37, 1/22/20 Hr'g Tr., at 124:25-125:1.) Bendavid testified that the disputes discussed in the memo did not have anything to do with Get Fresh: "Get Fresh really didn't have anything to do with it, right. In other words, this was a Fresh Mix issue. The fights were about Fresh Mix." (1 App. 32, 1/22/20 Hr'g Tr., at 75:12-14.) In fact, he testified that there was nothing in the memo that was new to him; it "was all stuff that the parties had been discussing that whole year." (1 App. 39, 1/22/20 Hr'g Tr., at 127:8-11.) Even the "weaknesses" described in the memo were already known to the plaintiffs, and the plaintiffs and Goldberg were discussing such things on a near daily basis. (1 App. 40-41, 1/22/20 Hr'g Tr., at 128:20-129:12.)

Bendavid did not immediately show the memo to the plaintiffs, because he was concerned that if Paul Lagudi saw the memo, "he would have just gone crazy" and it would have blown up any chance of resolving the outstanding disputes. (1 App. 37, 1/22/20 Hr'g Tr., at 125:2-23.) In particular, the substance of the memo indicated that it was drafted shortly after the breakdown in the sale

negotiations between the Get Fresh Managers and the plaintiffs, which occurred around February 2018. (1 App. 42, 1/22/20 Hr'g Tr., at 130:2-7.) Bendavid feared that Lagudi "would have flipped out" knowing that the Get Fresh Managers had been thinking about and planned those actions months ago. (1 App. 42, 1/22/20 Hr'g Tr., at 130:9-14.)

Indeed, Bendavid thought that the memo was placed among the plaintiffs' personal things as a form of intimidation, to say "look, this is how far ahead we are of you" and that "[w]e've already thought all this out, we've made our plan, we know what we're going to do. If you don't resolve it with us, you know, we're ready to do all this and here's our positions, we're not afraid of it." (1 App. 38, 1/22/20 Hr'g Tr., at 126:6-10.) The timing of the delivery of the memo—just after the lockout and a few weeks before a meet and confer between the plaintiffs and Get Fresh Managers to discuss the disputes—further led Bendavid and plaintiffs to believe that the memo was a type of a threat. (*See* 1 App. 47-48, 1/22/20 Hr'g Tr., at 215:20-216:15.) Bendavid's conclusion was further supported by the fact that the memo was just "sticking out" of the box for plaintiffs to notice; it just so happened that Bendavid found the memo instead of the plaintiffs. (1 App. 38, 1/22/20 Hr'g Tr., at 126:19-23.)

Several months later, plaintiffs attached the memo to their reply in support of a motion to amend the complaint. (Reply Brief in Support of Motion to Lift Stay and Amend Compl., filed August 2, 2019.) Defendants then asserted attorney-client privilege, asked for the memo to be clawed back, sought plaintiffs' counsel's disqualification, and demanded sanctions. Immediately upon the defendants' assertion of privilege, Fox Rothschild sequestered the purportedly privileged document, except as authorized by NRCP 26(b)(5)(B) to allow the court to determine whether the memo was privileged. *See, e.g.*, (1 App. 54-55, 2/14/21 Hr'g Tr., at 122:24-123:1) (one of plaintiffs' counsel testifying about how Fox Rothschild sequestered the memo).

C. The Court Sanctions Plaintiffs in 2020 By Disqualifying Counsel, Dissolving the Arbitration Panel, and Striking Plaintiffs' Arbitration Filings

Relying on Goldberg's account of the attorney-client relationships at the time of the memo's creation, Judge Gonzalez agreed with Get Fresh that the memo was privileged. The sanctions order finds that "[n]ear 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 ongoing disputes that Get Fresh was having with Lagudi and Ponder." (Decision and Order; Findings of Fact and Conclusions of Law ("FFCL"), at ¶ 5 (3/2/2020); *see also* FFCL, at ¶ 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.").) The order finds that "[o]n 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." (FFCL at ¶ 9.) The court also found that "Get Fresh has maintained the confidentiality of the Memorandum since its creation." (FFCL, at ¶ 42.)

The court then found that plaintiffs should have given notice to defendants that they possessed the memo, and that the plaintiffs made improper use of the memo. Citing the district court's inherent authority to impose sanctions, the 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. (FFCL, at 29:5-23.)

The court also went a step further and inserted itself into the pending arbitration by dissolving the arbitration panel and vacating all of the panel's orders. (*Id.*) The court struck all of the pleadings in the arbitration, directing that they be re-filed before a new arbitration panel and that "direct and indirect references" to the memo be removed. (*Id.*)

D. Plaintiffs Move to Vacate Sanctions, and then Get Fresh Forces Fresh Mix into Bankruptcy

Plaintiffs timely moved to vacate the order under NRCP 49(e) and 60(b). (Motion to Vacate, Alter, or Amend Sanctions Order, filed March 30, 2020.) Plaintiffs asserted that the court lacked jurisdiction to interfere with an ongoing arbitration by striking pleadings in the arbitration and dissolving the arbitration panel. (*Id.*) Plaintiffs also urged the court to reconsider its finding that the memorandum was privileged, because the person who created the memo owed fiduciary obligations to plaintiffs as Fresh Mix's minority shareholders, which entitled plaintiffs to see the memorandum under the fiduciary exception to attorney-client privilege. (*Id.*) Finally, plaintiffs asked the court to vacate the sanctions because they were overly punitive and disproportionate to the alleged sanctionable conduct. (*Id.*)

Before responding to the motion, Get Fresh forced Fresh Mix—its own company—into an involuntary Chapter 7 bankruptcy. (*See* Notice of Bankruptcy, filed 4/24/2020.) Get Fresh had apparently been considering whether to place Fresh Mix into bankruptcy as a litigation strategy as early as December 2019. (*See* Chapter 7 Trustee's Opposition to Motion for Preliminary Injunction on Order Shortening Time, Exhibit A, Schwartzer Decl. In Support of Opposition to Mtn for Preliminary Injunction, ¶ 8.) One day before he filed the involuntary petition, Scott Goldberg took $2.3 million from Fresh Mix's bank account

and transferred it to insiders. (Schwartzer Decl., ¶ 10.) The next day, the petition claimed that Fresh Mix owed Get Fresh $159,807 and alleged that Fresh Mix was not paying its debts. (*See* Schwartzer Decl., ¶ 20.)

E. Scott Goldberg's Testimony in the Bankruptcy Proceedings Demonstrates the Memo is Not Privileged

The bankruptcy Trustee quickly determined there was good cause to investigate Get Fresh's and the Get Fresh Managers' breaches of fiduciary duties and various conflicts between counsel ostensibly representing both Get Fresh and Fresh Mix at the same time. (Schwartzer Decl., ¶ 21-23.) Ultimately, the bankruptcy court authorized the Trustee to act on behalf of Fresh Mix and also to pursue state court actions against Get Fresh and Fresh Mix's former counsel. Before doing that, the Trustee sought documents belonging to Fresh Mix in the possession of former counsel. That pursuit is still unresolved but has resulted in contradictory testimony from Scott Goldberg that undermines the sanctions order entered in this case. In particular, Scott Goldberg's testimony in the bankruptcy proceedings demonstrates that Get Fresh misled Judge Gonzalez about how the memo was created, which resulted in the erroneous finding that the memo was Get Fresh's privileged creation.

[redacted] (Scott Goldberg Dep. on June 22, 2022, at 73-75, Ex. 4.) [redacted]" (2 App. 130-32, 6/22/22 Goldberg Dep., at 73:18-20.) [redacted] (2 App. 130, 6/22/22 Goldberg Dep., at 73:22-74:1.) [redacted] (2 App. 131, 6/22/22 Goldberg Dep., at 74.) [redacted]

[redacted] (2 App. 131, 6/22/22 Goldberg Dep., at 74.)

At an evidentiary hearing in the bankruptcy case, [redacted]. (2 App. 299, 7/1/22 Bankr. Hr'g Tr., at 53, Ex. 5.) [redacted]. (2 App. 300-01, 7/1/22 Bankr. Hr'g Tr., at 54-55.) [redacted]. (2 App. 301, 7/1/22 Bankr. Hr'g Tr., at 55.) [redacted]. (2 App. 301, 7/1/22 Bankr. Hr'g Tr., at 55.) [redacted] (3 App. 354, 7/1/22 Bankr. Hr'g Tr., at 108.) [redacted] (3 App. 401, 7/1/22 Bankr. Hr'g Tr., at 155.) [redacted]

[redacted] (*See, e.g.*, 3 App. 401-03, 7/1/22 Bankr. Hr'g Tr., at 155-57.) [redacted] (3 App. 403-04, 7/1/22 Bankr. Hr'g Tr., at 157-58.) [redacted] (3 App. 433-34, 7/1/22 Bankr. Hr'g Tr., at 187-188.) [redacted] (3 App. 434, 7/1/22 Bankr. Hr'g Tr., at 188.) [redacted] (3 App. 435, 7/1/22 Bankr. Hr'g Tr., at 189.) [redacted] he

[redacted] (3 App. 436, 7/1/22 Bankr. Hr'g Tr., at 190; 3 App. 433-39, 7/1/22 Bankr. Hr'g Tr., at 187-193 ([redacted]) [redacted] (*See, e.g.*, 3 App. 452-53, 7/1/22 Bankr. Hr'g Tr., at 206-207 ([redacted] 3 App. 435, 7/1/22 Bankr. Hr'g Tr., at 189 [redacted]

[redacted]

(3 App. 453, 7/1/22 Bankr. Hr'g Tr., at 207.)

ARGUMENT

I.

THE SANCTIONS ORDER MUST BE VACATED BECAUSE THE MEMO IS NOT A PRIVILEGED GET FRESH DOCUMENT

The sanctions order rests on the now-clearly-erroneous finding that the memo was an attorney-client privileged document created by Get Fresh. Had Goldberg and Get Fresh been forthcoming in the sanctions hearing about how this memo was created, the Court could not have found that it was a privileged

Get Fresh document. That reason alone should be sufficient to find that the memo was not a privileged Get Fresh document and to vacate the sanctions order. But the sanctions order should also be vacated for the additional reason that, to the extent the document was ever attorney-client privileged, the privilege was repeatedly waived through disclosures outside of the attorney-client relationship between Goldberg and Leslie.

A. Goldberg's Testimony in the Bankruptcy Proceedings Contradicts the Testimony that Led to Sanctions

As the bankruptcy court acknowledged, Goldberg's testimony does not support a finding that the memo was a privileged Get Fresh document. That testimony would have altered the court's understanding, and consequently the findings in the sanctions order, in several important ways. Notably, evidence undermining Goldberg's testimony existed at the time of the hearing on the motion for sanctions. (*See, e.g.*, 1 App. 12, 1/21/2020 Hr'g Tr., at 79 (Goldberg indicating that his counsel had the engagement letter from Mr. Leslie but he did not know whether it had been produced to plaintiffs).) But the plaintiffs were denied the ability to engage in discovery of such matters, which allowed Get Fresh to mislead the court. *See, supra,* n.1.

[redacted] (2 App. 299-301, 7/1/22 Bankr. Hr'g Tr., at 53-55.)

[redacted] (*See* 2 App. 299, 7/1/22 Bankr. Hr'g Tr., at 53.)

[redacted]; just the opposite, Dominic Caldara's testimony at the time affirmatively misled the court by implying that Goldberg would have

had authority to retain counsel. (1 App. 15-16, 1/21/2020 Hr'g Tr., at 150-51 (Caldara testifying that it was not unusual for Goldberg to run point and obtaining counsel was a typical role that Goldberg would play for Get Fresh).)

[redacted] indicated to Judge Gonzalez that Bruce Leslie was Get Fresh's attorney. Goldberg's testimony in bankruptcy court directly contradicts the testimony given to Judge Gonzalez.

Goldberg's testimony from the 2020 sanctions proceedings is extremely misleading given what he has now testified to in the bankruptcy proceedings. [redacted] Given Goldberg's misleading testimony from the 2020 sanctions proceedings, Judge Gonzalez would have had no reason to suspect that this was a personal engagement instead. In short, Get Fresh misrepresented how the memo was created, which misled the court to find that the memo was Get Fresh's privileged creation.

B. Get Fresh Cannot Meet its Burden to Establish that the Memo is Privileged and That It Was Kept Confidential

Get Fresh has the burden to show that the memo is attorney-client privileged and that privilege has not been waived. Both Delaware and Nevada law place the burden of proving attorney-client privilege on the proponent of the privilege. *See Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992) ("The burden of proving that the privilege applies to a particular communication is on the party asserting the privilege."); *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247,

252, 464 P.3d 114, 120 (2020) ("The party asserting the privilege has the burden to prove that the material is in fact privileged.").

Both states also recognize that disclosure of otherwise attorney-client privileged communications waives the privilege. *See Cheyenne Const., Inc. v. Hozz*, 102 Nev. 308, 311-12, 720 P.2d 1224, 1226 ("If there is disclosure of privileged communications, this waives the remainder of the privileged consultation on the same subject."); *cf. Wolhar v. General Motors Corp.*, 712 A.2d 457, 462-63 (Del. Super. Ct. 1997) ("[I]f the protected materials are disclosed to others with either the intention or practical result that the opposing party may see the documents . . . the privilege is waived."); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2008 WL 498294, *3 (Del. Super. Ct. 2008) ("A party may waive the attorney-client privilege with intent or when a party's actions have the practical result of granting access to the opposing party.").

1. Goldberg is Not Credible and a Privilege Finding Should Not Be Based on His Testimony

Goldberg has shown that he is not a credible witness about how and why the memo was created. As a result, Goldberg's testimony in support of a finding of attorney-client privilege can and should be completely disregarded as to the creation of the memo and whether there was a waiver. This would be consistent with how courts often instruct juries on their ability to disregard testimony in whole or in part from a witness who has shown that he is not credible: "If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence." *See* Nevada Jury Instruction: Civil 1.9 (2018 ed.); *Zelavin v. Tonopah Belmont Development Co.*, 39 Nev. 1, 10, 149 P. 188, 190 (1915) (approving of similar instruction). This Court should

find that, based on a comparison between Goldberg's testimony to Judge Gonzalez and his testimony in the bankruptcy proceedings, Goldberg is not a credible witness and his testimony cannot support a finding of privilege.

2. Even Accepting Goldberg's Most Recent Testimony, the Memo Was Repeatedly Disclosed Outside of the Attorney-Client Relationship

Even if plaintiffs and this Court are to accept Goldberg's latest testimony in the bankruptcy proceedings, there is no credible argument that the memo is attorney-client privileged between the entity Get Fresh and attorney Bruce Leslie. Notably, Jeff Bendavid certainly thought that it was not privileged, and this Court should reconsider whether the contents of the memorandum are themselves privileged in light of Goldberg's new testimony. But even if it were privileged, the memo would have been privileged only between Goldberg as an individual and his attorney Bruce Leslie. And that privilege has been waived multiple times through disclosure.

a. THE MEMO WAS DISCLOSED TO GET FRESH AND FRESH MIX

First, Goldberg disclosed the memorandum outside of his relationship with Bruce Leslie by placing the memo on the shared Get Fresh and Fresh Mix server. The sanctions order found that Goldberg drafted and saved the memo on his secured drive at Get Fresh. (FFCL, at 2:14-19.) Goldberg testified, and the court found, that he used a Get Fresh email account to transfer the memorandum. (FFCL, at 2:17-19.) According to Goldberg's own testimony, Get Fresh and Fresh Mix emails are not confidential and belong to the company; Get Fresh and Fresh Mix shared email domains and the emails are stored on "the Get Fresh, Fresh Mix server system." (1 App. 11, 1/21/20 Hr'g Tr., at 76:18-25.) Indeed, that is precisely how the Get Fresh Managers justified looking through the plaintiffs' email accounts while plaintiffs were locked out of Fresh Mix. (*Id.*)

Therefore, Goldberg waived any confidentiality of the memorandum as to plaintiffs by placing the memorandum on Get Fresh and Fresh Mix's server, which was outside of his personal legal relationship with Leslie.

b. THE MEMO WAS DISCLOSED TO TWO OUT OF THE FOUR OTHER FRESH MIX MANAGERS

Second, and along similar lines, Goldberg waived the privilege between himself and his personal counsel when he shared the memorandum with Dominic Caldara and Tim Wise, who were outside the scope of the relationship between Goldberg and Leslie. This disclosure, along with placing the memorandum on the Get Fresh/Fresh Mix server, are displays of Goldberg's carelessness with corporate distinctions and confidentiality. [redacted] (3 App. 453, 7/1/22 Bankr. Hr'g Tr., at 207 ([redacted] 3 App. 354, 7/1/22 Bankr. Hr'g Tr., at 108 [redacted] Goldberg's carelessness is reflected in his failure to keep the memo confidential.

c. THE MEMO WAS DISCLOSED TO PLAINTIFFS

Third, and most importantly, the memo was disclosed to the plaintiffs. This is not a case of inadvertent disclosure during discovery of one privileged document in a mountain of hundreds of other discoverable documents. *See Meritis Incentives, LLC v. Eighth Judicial Dist. Court*, 127 Nev. 689, 695, 262 P.3d 720, 724 (2011) (noting the ethical requirement under NRPC 4.4(b) for when a

lawyer "receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent"). This was a single document sticking out of the top of a box that was among other boxes of personal items like dumbbells, bottles of alcohol, and other personal effects one can find in an office. (1 App. 13-14, 1/21/20 Hr'g Tr., at 125:24-126:1; 1 App. 22-23, 1/22/20 Hr'g Tr., at 56:23-57:12.) The circumstances indicate purposeful, not accidental, disclosure. *Cf., e.g.*, *P.T. Buntin, M.D. v. Becker*, 727 N.E.2d 734, 741 (Ind. Ct. App. 2000) (distinguishing between an inadvertently disclosed document mistakenly included in a large number of documents from a document "affirmatively placed in materials" given to an expert witness to prepare for a deposition).

Nor can there be any dispute about who sent the plaintiffs the boxes in which the memorandum was included—the Get Fresh Managers did. Despite that, the defendants have tried to characterize the author and person who disclosed the memorandum to the plaintiffs as "anonymous" because then *Merits Incentive* could apply. (*See* FFCL, at 14:12-15.) *Merits Incentives* requires "an attorney who receives documents regarding a case from an anonymous source" or third party to "promptly notify opposing counsel . . . that the documents were not received in the normal course of discovery" and to describe the "the facts and circumstances that explain how the documents or evidence came into counsel's or his or her client's possession." *Merits Incentives*, 127 Nev. at 725, 262 P.3d at 697.

The sanctions order, drafted by the defendants, finds that both the drafter and the disclosing source of the memo were anonymous. (FFCL, at 16:10.) But other than the fact that the memo is not signed by an author, there is nothing anonymous about the memo or who gave it to the plaintiffs. Plaintiffs knew from reading the memo that it was drafted by one of the Get Fresh Managers, most likely Scott Goldberg. (1 App. 29, 30-31, 1/22/20 Hr'g Tr., at 70:16, 73:21-

74:19.) Plaintiffs could even tell when the memo was drafted. (1 App. 46, 1/22/20 Hr'g Tr., at 171:6-25 (plaintiff Paul Lagudi testifying about how the contents of the memo related to a phone call that he had with Goldberg on March 1, 2018).) Plaintiffs also knew from the circumstances of how they obtained the memo—in a box of their personal items *sent by* the Get Fresh Managers from the plaintiffs' Fresh Mix offices—that the Get Fresh Managers sent the memo with the personal items. To conclude otherwise elevates conspiracy theories over common sense, without any supporting evidence. Yet the sanctions order improperly dismisses this extremely relevant circumstantial evidence by finding that "Plaintiffs failed to offer evidence, only supposition, to support this theory." (FFCL, at 15:18-20, 16:3.)

Circumstantial evidence is evidence. *See, e.g.*, *Crawford v. State*, 92 Nev. 456, 457, 552 P.2d 1378, 1379 (1976) (one of numerous cases acknowledging that circumstantial evidence is admissible and a criminal conviction can even be "based solely on circumstantial evidence"). When intent is not announced or admitted, it must be established through circumstantial evidence. *See Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence.").

Here, the circumstances support plaintiff's belief that the Get Fresh Managers sent the memo to the plaintiffs as a type of a threat or intimidation tactic. The memo was included among entirely unrelated items sent by the Get Fresh Managers, sticking out of the top of a box as if it were waiting to be noticed. (1 App. 38, 1/22/20 Hr'g Tr., at 126:19-23.) The memo was also received from the Get Fresh Managers at a time when it was most likely to send a message to the plaintiffs that the Get Fresh Managers had long been prepared for these disputes with the plaintiffs and that the plaintiffs should give in and settle. (1 App. 38, 1/22/20 Hr'g Tr., at 126:6-10; 1 App. 47-48, 49, 1/22/20 Hr'g Tr., at 215:20-216:15, 222:21-25.) Further, there has been no testimony or indication

that the memo was marked on its face as confidential or attorney-client privileged such that its disclosure would have reasonably been considered inadvertent.

Bendavid, an officer of the court, is the only individual who testified with firsthand knowledge of how the plaintiffs received the memo: it was included in the boxes delivered by the Get Fresh Managers. If anything, it is the defendants' conspiracy theories in response that engage in supposition and assumption. Indeed, the sanctions order does not find that the plaintiffs received the memo any other way than among the boxes of the personal items, but instead finds that *Merits Incentive* applies because the memo was not the plaintiff's document:

> 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' office and that it was not Plaintiffs' document. Therefore, *Merits Incentives* applies.

(3/2/20 FFCL, at 23:13-17.)

Thus, the court credited Bendavid's testimony that the memo was disclosed to the plaintiffs among the boxes of the plaintiffs' personal items, but then discredited the reasonable inferences that follow from that finding—specifically, that the memo was intentionally included among the boxes as a form of intimidation or to send a statement to the plaintiffs. The contrary assumption—that the memo was anonymously or inadvertently disclosed—is not reasonably supported by the evidence. Rather, because the Get Fresh Managers were the ones who sent the boxes to the plaintiffs, and the boxes were made up of personal items rather than discovery materials in which a privileged memorandum might inadvertently be included, the reasonable inference is that the memo—like everything else with which the memo was intermingled—was purposefully included in the boxes by the Get Fresh Managers. In light of the esca-

lating dispute between the parties and the upcoming meeting to discuss settlement, the Get Fresh Managers' decision to include the memo as a message was unremarkable.

Accordingly, this Court should find that to the extent the memo was at one time protected by attorney-client privilege, that privilege has been repeatedly waived through disclosures outside of the relationship between Goldberg and Leslie, including through direct disclosure to the plaintiffs.

II.

PLAINTIFFS ARE ENTITLED TO THE MEMO UNDER THE FIDUCIARY DUTY EXCEPTION

Even if the defendants can establish that Goldberg created the memo in his capacity as a manager of Fresh Mix (even though Leslie had not been retained to represent Fresh Mix), this would not help Get Fresh. That would simply mean that the memo became a privileged document for Fresh Mix: the plaintiffs would still be entitled to the memo as managers of Fresh Mix and under the fiduciary exception. The plaintiffs urge the court to consider the memo under seal and then find that the fiduciary duty exception to the attorney-client privilege applies, as argued in the motion to vacate sanctions, and vacate the sanctions order as a result. (*See* Motion to Vacate, at 20-23.)

Delaware law "allows stockholders of a corporation to invade the corporation's attorney-client privilege in order to prove fiduciary breaches by those in control of the corporation upon showing of good cause." *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1276 (Del. 2014). In the seminal case, *Garner v. Wolfingbarger*, the court held that "where the corporation is in suit 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 instances." *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

In short, because the Get Fresh Managers owed fiduciary duties of care and loyalty to the plaintiffs as minority members of Fresh Mix, and the Get Fresh Managers engaged in a targeted campaign to devalue the plaintiffs' interest in Fresh Mix and push the plaintiffs out of the company, the Get Fresh Managers are barred from claiming attorney-client privilege over those efforts. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1341 (Del. 1987) (recognizing a board of directors' "underlying fiduciary duties are equally applicable in a takeover context"). Indeed, "[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." *Deutsch v. Cogan*, 580 A.2d 100, 108 (Del. Ct. Chanc. 1990). Under those circumstances, "the more general and important right of those who look to fiduciaries to safeguard their interests, to be able to determine the proper functioning of the fiduciary, outweighs the need for the privilege and its base of attorney-client confidence." *Id.* (quoting *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361, 369-70, n. 16 (D.Del. 1975)). Accordingly, if Goldberg's testimony from the bankruptcy proceedings is to be believed and the memo was indeed drafted in Goldberg's capacity as a Fresh Mix manager, and the memo concerned Fresh Mix's actions toward the plaintiffs, the memorandum is subject to the fiduciary exception to attorney-client privilege. The Get Fresh Managers cannot resort to the attorney-client privilege to hide their breaches of fiduciary duties against the plaintiffs, who were the minority member-managers of Fresh Mix.

III.

EVEN IF THE MEMO WAS PRIVILEGED, THE COURT LACKED JURISDICTION TO INTERFERE WITH THE ONGOING ARBITRATION PROCEEDINGS

Regardless of the memo's privilege status, the sanctions order must be vacated as void because it exceeds the court's power by interfering with ongoing arbitration proceedings. (*See* Motion to Vacate, at 4-16.) Since the sanctions order, the Nevada Supreme Court has held that a court's inherent authority over a case does not extend to an ongoing arbitration. *Direct Grading & Paving, LLC v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 31, 491 P.3d 13, 18-19 (2021). In *Direct Grading & Paving*, the Court considered "whether the district court has authority, either under NRS 38.222's provisional remedy allowance or through its inherent powers, to intervene in binding arbitration to sanction a party's misconduct." *Id.* at 15. The Court held that a district court who is not providing a provisional remedy under NRS 38.222 does not otherwise have inherent authority to intervene in an arbitration. *Id.*

The sanctions order was not authorized by NRS 38.222. "Under NRS 38.222(2)(b), after an arbitrator has been appointed and is able to act, a party to the arbitration 'may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." *Id.* at 17. Provisional remedies are remedies that "preserve the status quo if the arbitrator is not able to do so." *Id.* NRS 38.222(2)(b) "does not allow the district court to withdraw a case from arbitration or award potentially case-ending sanctions that the arbitrator previously declined to award." *Id.* Here, the court's order dissolving the arbitration panel and striking pleadings in the arbitration is clearly beyond the scope of the provisional remedies authorized by NRS 38.222.

The sanctions order interfering with the arbitration proceeding is also beyond the court's inherent authority. Although the courts have "inherent powers

to sanction parties for litigation abuse occurring during district court proceedings," that power does not extend to arbitration proceedings. *Id.* at 18. The Nevada cases that recognize inherent authority to sanction "concern the court's authority over its own pending case and say nothing about cases that have been stayed and removed to arbitration." *Id.* The simple fact that a complaint was filed in the district court, which then proceeded to binding arbitration proceedings, was not sufficient to give the district court jurisdiction to sanction the parties in the arbitration. *Id.* at 19. Because a court does not have inherent authority to sanction parties in an arbitration proceeding in a way that affects the merits of the arbitration, the court's sanction order is in excess of its jurisdiction and must be vacated.

IV.

THE SANCTIONS ARE OVERLY PUNITIVE AND DISPROPORTIONATE

Even if the court had jurisdiction to interfere with the arbitration, and the memo was protected by attorney-client privilege, and it was not disclosed to the plaintiffs, the sanctions are disproportionate to any alleged violation of the privilege. (*See* Motion to Vacate, at 24-25.)

Nevada generally reserves sanctions like striking a party's pleadings for extreme circumstances involving willful noncompliance with a court's order. *See Finkelman v. Clover Jewelers Blvd., Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609 (1975). Defendants have failed to demonstrate willfulness or intentional misconduct on the part of the plaintiffs or their counsel to warrant the extreme sanctions of disqualification and striking of the arbitration panel. Nor have the defendants demonstrated any prejudice or how consideration of the memo irreparably tainted the ongoing arbitration proceedings. When considered in context of how the plaintiffs obtained the memo, and that the plaintiffs already had knowledge of the facts contained in the memo from other sources, the sanctions

order is extremely disproportionate to any alleged violation or harm in this case.

In particular, plaintiff's counsel testified in the 2020 sanctions proceedings that they took immediate steps to sequester the memo after the defendants asserted privilege. The court's basis for disqualifying attorney Brian Berkley—that the memorandum was so ingrained in his head that he was using its concepts in the arbitration pleadings—does not extend as a justification for dissolving the entire arbitration proceedings. The court's punitive sanctions did not match the level of the plaintiffs' alleged culpable conduct and should be vacated.

Dated this 6th day of September, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

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CERTIFICATE OF SERVICE

I certify that on this 6th day of September, 2022, I served the foregoing "Supplement to Motion to Vacate, Alter, or Amend Sanctions Order" through the Court's electronic filing system and by courtesy e-mail to the following counsel:

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EXHIBIT E

EXHIBIT E

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

PAUL LAGUDI, an 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 through 25; and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

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

ORDER ON PLAINTIFFS PAUL LAGUDI AND WILLIAM TODD PONDER'S MOTION TO LIFT STAY AND AMEND COMPLAINT

Hearing Date: August 5, 2019
Hearing Time: 9:00 a.m.

Plaintiffs Paul Lagudi and William Todd Ponder's (together, the "Plaintiffs") Motion to Lift Stay and Amend Complaint (the "Motion"), filed on July 15, 2019, came on for hearing before this Court on August 5, 2019. Mark J. Connot, Esq., of FOX ROTHSCHILD LLP, having appeared on behalf of Plaintiffs. James Pisanelli, Esq., Debra L. Spinelli, Esq., and Ava M. Schaefer, Esq., of PISANELLI BICE PLLC, having appeared on behalf of Defendants Fresh Mix, LLC ("Fresh Mix") and Get Fresh Sales, Inc. ("Get Fresh") (together, the "Defendants"). This Court, having reviewed and considered the Motion, the Opposition filed by Defendants on July 25, 2019, the Reply filed on August 1, 2019, the arguments of counsel presented at the hearing, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART as follows:

1. Plaintiffs' Motion is GRANTED IN PART to the extent that Plaintiffs are permitted to file their proposed Amended Complaint in this action.

2. Plaintiffs may proceed with counts I and IX in this Court to the limited extent those claims relate to Plaintiffs' claim for books and records. If Plaintiffs move for the appointment of a receiver, then Plaintiffs may file a motion for such relief with this Court.

3. The Motion is DENIED in all other respects.

4. Except for the claims set forth in Paragraph 2, the stay pending arbitration entered on February 1, 2019 is ~~hereby reset and~~ extended until such time as the arbitration is concluded. Further, except for the claims set forth in Paragraph 2, the claims set forth in Plaintiffs' proposed Amended Complaint are subject to arbitration.

5. A status check on this matter is set for February 7, 2020, in chambers, and counsel for the parties shall file with the Court a status report prior thereto.

6. The previously scheduled September 13, 2019 status check is hereby vacated.

DATED: 8/22/19

THE HONORABLE ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

Respectfully submitted by:

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EXHIBIT F

EXHIBIT F

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Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

PAUL LAGUDI, et al. Plaintiffs vs. FRESH MIX LLC, et al. Defendants	.	CASE NO. A-18-785391-B DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFFS' MOTION TO LIFT STAY, AMEND COMPLAINT, AND REDACT EXHIBIT T TO PLAINTIFFS' MOTION

MONDAY, AUGUST 5, 2019

APPEARANCES:

FOR THE PLAINTIFFS:	MARK J. CONNOT, ESQ.
FOR THE DEFENDANTS:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ. AVA SCHAEFER, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, MONDAY, AUGUST 5, 2019, 9:02 A.M.

(Court was called to order)

THE COURT: If I could go to Lagudi.

I have lots of issues on Serenity, Mr. Prince. You've just missed most of them.

MR. PRINCE: I'm certain of that.

THE COURT: Yes.

Mr. Pisanelli, good morning.

MR. PISANELLI: Good morning, Your Honor.

THE COURT: Mr. Connot, good morning.

So I apparently have an issue about an exhibit that I didn't actually read. So I haven't read the exhibit which is the subject of the emergency motion to strike which Mr. Pisanelli wanted me to discuss before we started the hearing. So since I haven't read it, I'm going to grant the request to strike it, but I am going to let you then argue whether it should be produced subject to disclosure and whether information in it is okay. So I wanted to give you a minute to understand that before I get to the argument of your case, Mr. Connot.

MR. CONNOT: Okay.

THE COURT: Okay? I didn't read Exhibit T, I'm not going to read Exhibit T, and I certainly understand that you have issues as to whether it is entitled to any protection at all. And we'll get to that in a minute. But I wanted to warn

you before I got to the hearing that I'm going to grant the request to strike only Exhibit T, but not the reply. Okay?

MR. PISANELLI: Your Honor, may I ask? Have you read the reply?

THE COURT: I read the reply.

MR. PISANELLI: Because it is a summary and analysis of Exhibit T.

THE COURT: Well, you know. But it's -- yeah, so what? But the document I didn't read.

MR. PISANELLI: Okay.

THE COURT: Okay?

MR. PISANELLI: Yes.

THE COURT: So I'll see you guys in a minute. But I wanted Mr. Connot to understand so he could frame whatever argument he needs to.

MR. CONNOT: So for the interim we're not --

THE COURT: Interim being this morning?

MR. CONNOT: Yes. We're not -- you're not entertaining argument about whether or not it should be protected.

THE COURT: That is correct. I am not -- I did not read Exhibit T.

MR. CONNOT: Okay.

THE COURT: I'm not going to read Exhibit T. I'm going to grant the motion to strike it for purposes of this

hearing.

MR. CONNOT: Okay.

THE COURT: 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.

MR. CONNOT: Okay.

THE COURT: But I'm not there.

So, Dulce, 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. The only thing I've stricken is Exhibit T.

MR. PISANELLI: So, Your Honor --

THE COURT: There may be more redactions you want on the reply brief, Mr. Pisanelli, instead.

MR. PISANELLI: Sure. And the problem we have is that we received the reply on Thursday night. Within hours of reading it in the morning on Friday we filed our emergency motion. And so we not only asked you to strike it, but to stay this proceeding --

THE COURT: I know.

MR. PISANELLI: -- because of that reply --

THE COURT: I know.

MR. PISANELLI: -- and because counsel now, rather than sequestering and quarantining the document, has not only analyzed it in his reply, he analyzed it in the opposition to our stay. And so we have lots of continuing violations of a privilege here.

THE COURT: I understand your position. I'm not going to litigate that position this morning, but I am going to go forward with the hearing. I didn't [sic] want to tell Mr. Connot it was not my intention and had not reviewed Exhibit T and didn't plan to, and for purposes of today we're not going to talk about it.

MR. CONNOT: Certainly.

THE COURT: And if you want to propose additional redactions to his reply brief to protect the privilege, you may.

MR. PISANELLI: It may be cover to cover. But thank you for that.

THE COURT: Okay. All right. So I'll see you guys in a minute.

(Court recessed at 9:05 a.m., until 9:43 a.m.)

THE COURT: Back to Lagudi versus Fresh Mix.

MS. SPINELLI: I'm just going to stay here.

THE COURT: Really.

Mr. Connot, it's your motion.

MR. CONNOT: Thank you, Your Honor. Mark Connot on behalf of Paul Lagudi and Todd Ponder. And Mr. Lagudi and Mr. Ponder are present today, as well.

Your Honor, the motion to lift the stay is to seek the ability to file an amended complaint. And we pretty much laid that out. And you see the background of what has happened here by the conduct of the defendants, and they've removed Mr. Lagudi and Mr. Ponder, as you're well aware based on previous hearings in this. They've now initiated the arbitration. They threatened to sue or actually did bring claims against -- with no basis against the spouses in the arbitration, and, you know, probably one of the more egregious things is they've refused to comply with the requirement for advancing identification rights. And there's simply no basis for that.

At the same time they stopped the distribution. So it's sort of a confluence of factors where they removed them, they stopped paying them anything in November of 2018, they initiate an arbitration, require them to incur substantial legal fees and expenses, refuse to provide the indemnification to which they're entitled, and at the same time stopped the distributions on this sudden theory of we are now going to set reserves, which has never been done before. And those are claims that would be equitable relief, as well as the books

and records requests which the Court noted back in the January hearing that that would be a claim that would come before this Court.

So these are equitable claims, not subject to the arbitration, and certainly not subject to wait until the arbitration is done. We compound that with the fact that since the removal of Mr. Lagudi and Mr. Ponder in November of 2018 through the end of June of 2019, a period of less than seven months, the profits of this company have reduced over 50 percent. We also want the ability to seek the appointment of a receiver in this matter, Your Honor, given the fact that there's certainly an intent to devalue this company and drive it into the ground. And we believe for all of those reasons, as well as the fact that this Court previously ruled that the employment agreements were expired, or at least noted that, that the employment agreements were expired. And that continues to be an issue that's raised in the arbitration and that they contend to the opposite of that.

And so for all of those equitable claims, Your Honor, we're seeking the ability to have the Court lift the stay, permit the plaintiffs to amend the complaint, and let the defendants take whatever action they want at that point, to answer or move to dismiss in part or total, but certainly under the standard for amending the pleadings. And the fact that these are equitable claims that within the operating

agreement are not subject to arbitration, the plaintiffs should be permitted to amend their complaint, Your Honor.

THE COURT: Thank you.

Mr. Pisanelli.

MR. PISANELLI: Good morning, Your Honor. James Pisanelli for the defendants.

Your Honor, irony abounds here. In these papers the plaintiffs accuse us of delay and trying to stall the full adjudication of their rights. Yet the truth of the matter is nearly seven months ago you addressed these exact same arguments. You ordered the plaintiffs to bring their claims into arbitration, and they did nothing. We initiated the arbitration, and they simply gave a flat denial of our allegations, so everything that you told them to do in their original complaint remains in limbo either through indifference or a strategy to somehow delay the arbitration to find a way to get back in front of you. So now nearly seven months later they come in on an emergency motion, telling you that there are new circumstances which require the lifting of the stay. And I would suggest to Your Honor that there is no emergency at all and that there's no reasons given that are different from what we've already adjudicated the first time you sent everybody into arbitration.

On the issue of the emergency, I have a hard time understanding where that comes from. If you think of the four

different grievances that they want you to reconsider, and that's really what this is, is a motion for reconsideration, first is indemnification and advancement. That was denied four months ago, denied for the reasons we put forth in our complaint, that they are offering a tortured interpretation of the governing documents of this company. Books and records dispute came to a head over two months ago simply because they wouldn't follow Delaware law and give an adequate reason for what they wanted and because of the concern over competition they refused to sign an NDA, which was certainly reasonable in the circumstances. These client issues that they're complaining about now, four months ago those came to a head. And the issue of distribution, the need to reserve funds now because of contingent liability associated with this litigation, contingent new expenses that this company hasn't seen before by way of attorneys' fees, that was three months ago.

So what in the world is this new emergency that brings us here today? Certainly they've never tied anything in these four claims to you to explain why it is that, you know, these seven months have elapsed and they still haven't initiated the arbitration that you directed a long time ago. So the truth of the matter, of course, Your Honor, is that there is nothing new, they just don't like the idea of the forum of Triple A or whatever arbitration organization that

they could have chosen but chose not to.

So, Your Honor, we have set forth in our papers how nothing is new, there's no change of circumstances; that the need to file new complaints is not a changed circumstance, that's certainly not good enough; and notably, Your Honor, they have not offered a reason why the arbitration clause doesn't apply to these new claims. They even concede in their papers, their word, "it may" be subject to arbitration. Well, I think there had to be a clear line here on these new claims of why they are not, and not a concession that they simply want to come in and potentially create parallel proceedings which have parallel expenses, parallel resources, and, of course, the potential for inconsistent judgments is what we always try to avoid when we're faced with issues of this sort.

And finally I'd offer this, Your Honor. Even a cursory glance at the new, and I use the air quotes on this one, the new claims that they claim justify coming in here shows that there really is no basis to be here. There is no legitimacy to these claims. Plaintiffs have somehow tortured their interpretation to tell you because they have mixed claim for damages and equitable relief, the most notable of which is specific performance, because they tag specific performance along with a claim for damages they say it's now equitable. Because a claim they say like breach of fiduciary duty has its origins in equity, it isn't an equitable claim that somehow is

outside the arbitration clause. Problem, of course, is the arbitration provision specifically talks about equitable claims.

What the parties intended when they created these organizational documents was very simple, that if they needed Your Honor to direct something that couldn't be done through the arbitration, then that can be done. But just simply tagging equitable claims like specific performance along with a breach of contract does not take the breach of contract claim itself out of arbitration. Before specific performance, before any of these tag-along remedies, like accounting, could come along, the core issue of breach of contract, what the parties always conceded had to be put before the arbitration, the core issues had to be arbitrated before they can come here. The attempt to plead around it by putting new tags and labels on it doesn't get them there.

The futility of these arguments in and of themselves should be a reason to deny the claim. I know Your Honor doesn't often take a long analysis on futility claims on a Rule 15, but in light of these circumstances where these same claims, the same core issues are already in arbitration we have a stay, and no good can come from having parallel actions going at the same time.

We ask Your Honor to take a look at the futility of these arguments, take a look, see that there really is no

there there, as we've set forth in our pleading, and it all brings us full circle, that you told these plaintiffs a long time ago that they're obligated because they contracted to do so to arbitrate. Nothing has changed, nothing is new, there's certainly no emergency, they still have to arbitrate them, and these claims are no different. Thank you.

THE COURT: Thank you.

Mr. Connot, anything else?

MR. CONNOT: Brief, Your Honor. Defendants' arguments would go to if the Court permits the complaint to be amended and what remedies that they would seek therefor. But certainly not on the standard to amend the complaint. And certainly the indemnification issue had not arisen until they initiated the arbitration and plaintiffs made the demand within the arbitration that they provide the indemnification. They flat out refused to do it.

The books and records requests, we certainly disagree as to the propriety of the books and records request, as well as the fact that --

THE COURT: Well, if you have a disagreement, you're supposed to file a motion or a petition or do something. And we had an avenue in here for you to do it, and you didn't do it.

MR. CONNOT: And that's the purpose of the amended complaint, Your Honor, to bring that along with the

indemnification, along with the receivership allegation given the fact that the end of June of 2019 is when the steady decline but certainly came to a head that you had a over 50 percent decline in the profits of this company since they removed these two individuals from the day-to-day involvement. They are still members and managers of this entity that are being wholly shut out, both from the significant financial information that they're entitled to under the books and records request, which is proper under Delaware law, and which, despite defendants' position to the contrary, courts have routinely said, you're not required to bring that in a court in Delaware, you can bring that in a court where the action is pending. And we certainly have, like I said, the issue of the distributions, as well. So we've got this situation where they're entitled to the indemnification, they're entitled to the books and records. Those are equitable claims and within the scope of 14.7, Article 14.7 and 14.8 of the operating agreement.

These are certainly not futile claims. There's certainly not any dilatory conduct. Plaintiffs are participating in the arbitration. Plaintiffs have sought to advance that arbitration on a much quicker schedule than have the defendants. And so this is not a situation where they're avoiding the arbitration, they're simply exercising their rights as the parties contemplated in the operating agreement

to bring their equitable claims to this Court, Your Honor.

THE COURT: Thank you.

The motion is granted. However, the claims appear to be subject to the order I've previously entered on February 1st, 2019, related to the arbitration with the sole exception of the books and records issue, which, as the Court has previously addressed and it has not then been renewed in front of this Court, if there is a motion to appoint receiver, you may file it here. I'm going to set a status check in six months to see how you're doing on the arbitration.

Mr. Pisanelli, have an issue related to your protection request on what was marked as Exhibit T. If you want me to make determinations, I will outside the stay make those determinations, since the issue came up in my court. If you prefer to do it in arbitration, I would be happy to let you proceed there. But I'm trying to figure out what the plan is before you leave here so I don't lose track of it.

MR. PISANELLI: Well, Your Honor, it seems that it might require action on both sides. And not to get too deep into it, but if we -- there's an issue right now of whether this document was stolen or whether it was inadvertently produced.

THE COURT: Well, I understand what the other issues are from Jacobs, remember?

MR. PISANELLI: Right.

THE COURT: Okay.

MR. PISANELLI: So -- but there's a consequence --

THE COURT: Mr. Peek keeps reminding me about that stuff.

MR. PISANELLI: The problem is there's a consequence to both actions, which may require disqualification of counsel in both cases.

THE COURT: I remember those issues. So what's your plan? Are you going to file a motion in front of me, or are you intending to raise that issue in the arbitration?

MR. PISANELLI: Can I give you a status report by the end of the day today so I can confer with co-counsel on that?

THE COURT: Yes. I'm going to set a status check on Friday's chambers calendar for us to determine if we need to work with you to set a hearing on a motion for protection, or whether you want to do it by in-camera review.

MR. PISANELLI: That's perfect. Your Honor, point of clarification of the order. Do I understand correctly that you're allowing the new claims that stays open to add the new claims but then they're sent right back to arbitration so the stay's put back in place?

THE COURT: Absolutely. Except for books and records and if somebody wants to appoint a receiver.

MR. PISANELLI: So while the new claims are here we

won't be responding to them, they have to go into arbitration.

THE COURT: Absolutely.

MR. PISANELLI: Got it. Thank you.

THE COURT: Consistent with the February 1st, 2019, order, and I reset a -- I extended the stay.

MR. PISANELLI: Thank you, Your Honor.

MR. CONNOT: Just to confirm, Your Honor, that includes the claim for indemnification?

THE COURT: It does include the claim for indemnification. You can raise that in front of the arbiter.

MR. CONNOT: Okay.

THE COURT: Anything else?

THE CLERK: Your Honor, so there's now going to be a six-month status check on arbitration?

THE COURT: Yep.

THE CLERK: That will be February 7th, 2020, in chambers. There's a September 13th status check. Should I vacate?

THE COURT: Yes. That was when they were supposed to be done with the arbitration. But they're not.

MR. PISANELLI: So, Your Honor, by Friday we'll give you a status report that tells you about the arbitration schedule. We'll tell you what we want by way of redactions of the reply brief, and we'll tell you what our intentions are by way of further briefing or prosecution of our motion for

disqualification and for stay and whether we're going to file a parallel motion in the arbitration.

THE COURT: And if you do not have an agreement on the redactions on the reply brief, I will have to have a motion related to that.

MR. PISANELLI: Okay. Very good.

THE COURT: I'm going to advance the hearings from August 30th and September 6th chambers calendar on the motion to seal because the information contained therein, with the exception of Exhibit T to the reply, appear to include potentially confidential information.

The Court is granting the request with to the Exhibit T to the reply brief. I've previously ordered that stricken, and the motion to redact that's on today's calendar is granted.

Anything else?

MR. PISANELLI: No, Your Honor.

MR. CONNOT: No, Your Honor.

MR. PISANELLI: Thank you.

THE COURT: Thank you. 'Bye.

THE PROCEEDINGS CONCLUDED AT 9:58 A.M.

* * * * *

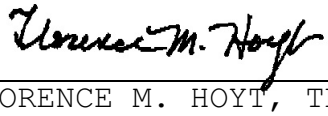
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

8/6/19

DATE