

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESPAC and GREG CHRISTIAN,
Appellants,

vs.

GREGORY O. GARMONG
Respondent,

_____ /

APPELLANTS OPENING BRIEF

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Electronically Filed
Feb 12 2024 03:08 PM
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Clerk of Supreme Court
Supreme Court No. 87411
District Court No. CV12-01271

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESPAC and GREG CHRISTIAN,

Supreme Court No. 87411

Appellants,

District Court No. CV12-01271

vs.

GREGORY O. GARMONG,

Respondent,

_____ /

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants, WESPAC and GREG CHRISTIAN, disclose that there are no

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persons or entities as described in NRAP 26.1(a) that must be disclosed.

Petitioners' counsel is Stephen S. Kent, Esq. of GORDON REES SCULLY
MANSUKHANI, LLP.

DATED this 12th day of February, 2024.

GORDON REES
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BY: 

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**STATEMENT REGARDING PRESUMPTIVE JURISDICTION OF
COURT OF APPEALS (NRAP 21(a)(1) AND 17(b)(8))**

Pursuant to NRAP 21(a)(1) and NRAP 17(b)(8), Petitioner submits the following statement regarding the presumptive jurisdiction of the Court of Appeals:

This Petition is one for the presumptive jurisdiction of the Court of Appeals.

DATED this 12th day of February, 2024.

GORDON REES
SCULLY MANSUKHANI, LLP

BY: _____



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STATEMENT OF JURISDICTION

A. Appellate Court Jurisdiction. This Court has jurisdiction under Rule 3A(b)(1) of the Nevada Rules of Appellate Procedure.

B. Timeliness of Appeal.

A final judgment dated July 16, 2021, Appendix pp. 14-16, (hereinafter “A 14-16”) in this case was entered after an Order of Affirmance dated December 1, 2021. (A 1-11). This Court issued a Clerk Certificate on May 14, 2021. (A 12-13). On August 10, 2023, the district court entered its Order Granting In Part, and Denying In Part Motion for Fees and Costs (A 180-193) which was a final and appealable order. On September 14, 2023, Appellants served upon Respondent a written Notice of Entry of this August 10, 2023, Order (A 194-212). On October 4, 2023, Appellants filed their Notice of Appeal (A 213-215), which was within thirty (30) days after Appellants served their September 14, 2023, written Notice of Entry of the Court's August 10, 2023, Order.

These proceedings were part of Appellants Wespac and Greg Christian efforts to collect their judgment for fees and costs. Appellants propounded short interrogatories and requests for production which were never timely objected to and still remain unanswered. The District Court issued an order compelling Respondent to answer the discovery and awarded fees and costs from the motion to compel. (A 77-88).

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the district court commit error of law and abuse its discretion in failing to award all of Defendants Appellants attorneys fees pursuant to NRCPC 37(a)(5)(A) after the Court granted a motion to compel and award of fees and costs for the fees and costs incurred in a separate motion for fees and costs. Such an application cannot be presented in a reply under court decisions and therefore the request for fees and costs must be presented separately by motion. Fees and costs for this separate motion should have been also awarded pursuant to Rule 37(a)(5)(A), as an award of expenses for a successful motion to compel. The District Court erred and abused its discretion in not awarding these fees and costs.

STATEMENT OF THE CASE

A. Nature of the Case.

On January 24, 2023, Defendants filed their *Motion to Compel and Request for Expenses of Motion* (“*Motion to Compel*” (A 17-36)). Then on April 10, 2023, the Court entered its *Order Granting Motion to Compel and Request for Expenses of Motion* (“*Order Granting*” A 77-88) ordering Respondent Garmong to respond to interrogatories and requests for production related to discovery to locate Garmong’s assets to satisfy a fees and costs judgment to Appellants. These six (6) interrogatories (A 23-25) and six (6) requests for production (A 27-29) were never objected to and still have not been answered by Respondent.

In its April 10, 2023, Order (A 77-88) the District Court granted the motion to compel answers to interrogatories and request for production related to discovering Mr. Garmon's assets and awarded the expenses of the motion.

As required by Court decisions, see *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969), on April 26, 2002 Defendants filed their subsequent separate motion for fees related to the motion to compel seeking \$4,878.25 in fees and \$13.25 in costs (A 89-96). Respondent opposed. (A 97-172). Appellants replied. (A 173-176).

On August 10, 2023 the District Court awarded fees of \$2,835.00 because it believed NRCP 37(a)(5)(A) only allowed recovery of \$2,835.00, the fees for the first motion to compel pleading and reply, disallowing fees for the separate motion for fees and costs. (Order, A 180-193).

Appellants believe NRCP 37(a)(5)(A) which requires an award of fees and costs after a successful motion to compel, and discusses the "expenses" of a motion to compel, implicitly includes all fees related to that motion, including fees for a separate motion for fees and costs explaining in detail the fees and costs incurred for the motion to compel, not just the motion to compel and reply pleadings. This is especially true since this Court has established requirements for attorneys fees that necessitate a separate motion to meet those requirements.

It is this Order that did not award the fees and costs for the separate motion for fees and costs that Appellants appeal as error and an abuse of discretion under these circumstances.

B. Course of Proceedings.

The instant appeal arises from an action for breach of a financial management agreement and carries with it a long procedural history. This Court recited this history in its Affirmance (A 1-11). The District Court recited this history in its May 10, 2023, Order. (A 77-88).

Mr. Garmong filed his *Complaint* on May 9, 2012, alleging the following claims for relief:

- 1) Breach of Contract;
- 2) Breach of Nevada Deceptive Trade Practices Act;
- 3) Breach of Implied Covenant of Good Faith and Fair Dealing;
- 4) Unjust Enrichment;
- 5) Breach of Fiduciary Duty;
- 6) Malpractice; and
- 7) Negligence.

Complaint, generally.

On September 19, 2012, Defendants filed a *Motion to Dismiss and Compel*

Arbitration. On December 13, 2012, the District Court¹ entered its *Order* granting Defendants' request to compel arbitration but denying the motion to dismiss. Mr. Garmong then filed his *Combined Motions for Leave to Rehear and for Rehearing of the Order of December 13, 2012 Compelling Arbitration* ("*Reconsider Motion*"). The *Reconsider Motion* was opposed by Defendants. Mr. Garmong did not file a reply and this case was stagnant for nearly a year until January 13, 2014, when the District Court entered its *Order to Proceed*. Mr. Garmong filed his reply on February 3, 2014. The *Reconsider Motion* was denied on April 2, 2014.

Mr. Garmong then sought writ relief from the Nevada Supreme Court. On December 18, 2014, the Nevada Supreme Court in Case No. 65899 entered its *Order Denying Petition for Writ of Mandamus or Prohibition*, entered its *Order Denying Rehearing* on March 18, 2015, and, subsequently, entered its *Order Denying En Banc Reconsideration* on May 1, 2015.

After the Nevada Supreme Court's orders were entered, the District Court again entered its *Order for Response* on November 17, 2015, instructing the parties to proceed with this case. In response, the parties indicated they had initiated an

¹ Judge Brent T. Adams originally presided over this proceeding in Department 6 before his retirement. Judge Lynne K. Simons was sworn in on January 5, 2015, and presides in Department 6

arbitration proceeding with JAMS in Las Vegas. *Notice of Status Report*, December 1, 2015.

On June 8, 2016, Mr. Garmong filed his *Motion for a Court-Appointed Arbitrator* arguing the JAMS arbitrators were prejudiced against him. This matter was fully briefed; and, on July 12, 2016, the District Court entered its *Order re: Arbitration* requiring each party to submit the names of three arbitrators to the Court. The parties then stipulated to select one arbitrator, to reduce costs. *Stipulation to Select One Arbitrator*, October 17, 2016. Thereafter, the District Court entered its *Order Appointing Arbitrator* on October 31, 2016, appointing Michael G. Ornstil, Esq., as arbitrator. After it was determined Mr. Ornstil was unavailable, Mr. Garmong stipulated to the appointment of either retired Judge Phillip M. Pro (“Judge Pro”),² or Lawrence R. Mills. Esq.

On November 13, 2017, the District Court entered its *Order Granting Motion to Strike* which stayed the proceeding pending the outcome of the arbitration, and directed the parties to file an amended complaint and other responsive papers at the direction of Judge Pro. *Order Granting Motion to Strike*, p. 2. On February 21, 2017, the District Court entered its *Order Appointing Arbitrator*, appointing Judge Pro.

² Mr. Garmong stipulated to Judge Pro despite previously moving to preclude a judge from serving as an arbitrator.

On March 27, 2017, Mr. Garmong filed Plaintiff's Objection Pursuant to NRS 38.231(3) and 38.241(e) *That There is No Agreement to Arbitrate; Notification of Objection to the Court*. Despite prior determinative orders from this Court, Mr. Garmong again objected to arbitration on the basis there was no agreement to arbitrate.

On May 23, 2017, the District Court entered its *Order to Show Cause Why Action Should not be Dismissed for Want of Prosecution Pursuant to NRCP 41(E)* ("OSC Order"), finding "Mr. Garmong and Defendants have been ordered numerous times to participate in arbitration as early as December 13, 2012." The District Court found the file did not contain any evidence the parties had proceeded to arbitration as ordered. *OSC Order*. Accordingly, the District Court ordered the parties to show cause why the action should not be dismissed for want of prosecution and required each party to file one responsive brief. *OSC Order*.

In the responsive briefs, the parties stated they attended their first arbitration conference in April 2017. The District Court acknowledged sufficient cause was shown in the *Order* entered June 30, 2017.

On July 22, 2018, without asking for leave of Court to lift the stay, Mr. Garmong filed *Plaintiff's Motion to Disqualify Arbitrator Pro, Vacate Order Denying Motion for Summary Judgment and Appoint New Arbitrator*. The District Court thereafter entered its *Order Denying Plaintiff's Motion to Disqualify*

Arbitrator Pro; Order Denying Motion to Vacate Order Denying Motion for Summary Judgment; Order Denying Motion to Appoint New Arbitrator (“*Arbitrator Order*”) on November 29, 2018.

Defendants Wespac and Greg Christian thereafter filed their *Motion for Limited Relief From Stay to File Motion for Attorney’s Fees and Sanctions* (“*Motion for Sanctions*”) requesting limited relief from this Court’s order staying the proceeding pending the outcome of arbitration. While the *Motion for Sanctions* was under consideration, Defendants filed their *Notice of Completion of Arbitration Hearing* on October 22, 2018. The District Court found, with completion of the arbitration, Defendants’ *Motion for Sanctions* was moot. Additionally, the District Court took notice of Defendants’ *Notice of Completion of Arbitration* and determined there were additional decisions to be rendered regarding the *Notice of Completion of Arbitration*.

Judge Pro found Mr. Garmong’s claims for: (1) Breach of Contract; (2) Breach of Implied Warranty; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Nevada’s Deceptive Trade Practices Act; (5) Breach of Fiduciary Duty of Full Disclosure; (6) Intentional Infliction of Emotional Distress; and (7) Unjust Enrichment all failed as a matter of law because Mr. Garmong did not establish his claims by a preponderance of the evidence. *Final Award*. Furthermore, after weighing the necessary factors required by *Brunzell v. Golden*

Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), Judge Pro found Defendants Wespac and Greg Christian were entitled to an award of reasonable attorneys' fees in the amount of \$111,649.96. *Final Award*.

After the *Final Award*, the litigation continued with several filings. On August 8, 2019, the District Court entered its *Order re Motions* ("ORM"): (1) granting *Defendants' Petition for an Order Confirming Arbitrator's Final Award and Reducing Award to Judgment, Including, Attorneys' Fees and Costs*; (2) denying *Plaintiff's Motion to Vacate Arbitrator's Final Award*; (3) denying *Plaintiff's Motion to Vacate Arbitrator's Award of Attorneys' Fees*; (4) denying *Plaintiff's Motion to Vacate Arbitrator's Award of Denial of Plaintiff's Motion for Partial Summary Judgment and for the Court to Decide and Grant Plaintiff's Motion for Partial Summary Judgment*; and (5) granting *Defendants' Motion for an Order to File Exhibit as Confidential*. *ORM*.

On August 27, 2019, the District Court entered its *Order*: (1) directing WESPAC to file an *Amended Motion for the Award of Attorneys' Fees*; (2) allowing Mr. Garmong the standard response time to file and serve his opposition to Defendants' *Amended Motion for the Award of Attorneys' Fees*; and (3) directing WESPAC would not be required to file its proposed final judgment until ten (10) days following this Court's ruling on WESPAC's *Amended Motion for the Award of Attorneys' Fees*. *Order*.

On December 6, 2019, the District Court entered its *Order Denying Motion to Alter or Amend Judgment* (“AA Order”) maintaining its prior rulings within the ORM. On January 7, 2020, Mr. Garmong filed a *Notice of Appeal* to the Nevada Supreme Court regarding this Court’s *Arbitrator Order*, ORM, and AA Order. On December 9, 2019, *Defendants’ Amended Motion for Attorney’s Fees* was filed. Due to Mr. Garmong’s pending appeal, the District Court entered its *Order Holding Issuance of Order on Defendants’ Amended Motion for Attorney’s Fees in Abeyance*. On December 1, 2020, the Nevada Court of Appeals issued its *Order of Affirmance* upholding the District Court’s judgment in its entirety and noting Defendants may seek amended fees pursuant to the fee shifting provision in NRCF 68 which extends to fees incurred on and after appeal.

On February 18, 2021, Defendants filed Defendants’ Second Amended Motion for *Attorney’s Fees*. On February 22, 2021, the Nevada Court of Appeals entered its *Order Denying Rehearing* pursuant to NRAP 40(c). Next, the parties entered into a stipulation to extend the time for Mr. Garmong to file an opposition to *Defendants’ Second Amended Motion for Attorney’s Fees*. The stipulation was granted on March 1, 2021, by the District Court’s *Order Extending Time for Plaintiff to File Points and Authorities in Opposition to the Defendants’ Second Amended Motion for Fees*. On April 6, 2021, the Nevada Supreme Court entered its *Order Denying Petition for Review*. On July 16, 2021, the District Court entered

its *Order Granting Defendants' Second Amended Motion for Attorney's Fees; Order Confirming Arbitrator's Final Award* ("July 16, 2021, Order"), which confirmed Judge Pro's arbitration award of \$111,649.96, and awarded Defendants attorneys' fees in the amount of \$45,084.50. On August 10, 2021, Mr. Garmong filed a *Notice of Appeal*, appealing the *July 16, 2021, Order* to the Nevada Supreme Court.

On August 16, 2021, the District Court entered final judgment against Garmong in favor of Appellants, Wespac and Greg Christian. (A 14-16).

On November 3, 2021, Defendants filed a *Substitution of Attorney* replacing Thomas C. Bradley, Esq. with Stephen S. Kent, Esq. as their counsel of record. Mr. Kent was retained to collect the attorneys fees and costs award judgment against Respondent Garmong. On April 4, 2022, Defendants filed an *Affidavit of Judgment* and *Judgment Lien Abstract of Judgment and Affidavit of Judgment* both naming Mr. Garmong as the judgment debtor. On May 10, 2022, Defendants filed a *Declaration of Service* of a writ of execution and garnishment on Mr. Garmong's financial institution with a date of service of the writ of May 3, 2022, by the Washoe County Sheriff's Office.

On July 25, 2022, the Nevada Court of Appeals entered its Order of Affirmance affirming the *July 16, 2021, Order* in its entirety. (A 1-11). On October 24, 2022, the Nevada Supreme Court entered its *Order Denying Rehearing*

pursuant to NRAP 40(c). On January 17, 2023, the Nevada Supreme Court issued its *Remittitur*.

On November 28, 2022 Appellants served six (6) interrogatories (A 23-25) and six (6) requests for productions (A 27-29) in an attempt to identify assets to satisfy the judgment. Respondent Garmong did not respond to this discovery and to the current date has never responded despite the May 10, 2022 order to compel. (A 77-88).

On January 24, 2023, Defendants filed their *Motion to Compel and Request for Expenses of Motion* (“*Motion to Compel*” A 17-36), and on April 10, 2023, the Court entered its *Order Granting Motion to Compel and Request for Expenses of Motion* (“*Order Granting*” A 77-88).

The motion to compel (A 17-36) requested an award of fees and costs pursuant to NRCP 37(a)(5) but did not request a specific amount because the total amount of fees and costs was unknown and Court decisions require a separate specific motion to include detailed specific information for a party seeking fees and costs. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

On April 10, 2023 the District Court granted the motion to compel answers to interrogatories and request for production related to Mr. Garmong’s assets and awarded the expenses of the motion. (A 77-88).

On April 26, 2002 Defendants filed their separate motion for fees (A 86-96) related to the motion to compel seeking \$4,878.25 in fees and \$13.25 in costs.

On August 10, 2023 the District Court awarded fees of \$2,835.00 because it believed NRCP 37(a)(5)(A) only allowed recovery of \$2,835.00, the fees for the first motion to compel and reply pleadings only, not the separate motion for fees and cost. (Order, A 180-193).

Appellants believe NRCP 37(a)(5) which requires an award of fees and costs for a successful motion to compel implicitly includes all fees related to that motion because the amount of fees is not known when the motion to compel is filed and a request for fees is not appropriate for a reply. Rule 37(a)(5) implicitly includes a fee award for the required subsequent motion for fees and costs, not just the motion to compel and reply pleadings. The district courts failure to recognize this was error. The district courts failure to award these fees of \$2,043.25 was an abuse of discretion.

It is this Order that Appellants appeal as error and an abuse of discretion under these circumstances.

C. Standard of Review.

1. Most decisions are reviewed for an abuse of discretion. *See, Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009).

2. Generally, a district court abuses its discretion when it makes a factual finding that is not supported by substantial evidence or is clearly erroneous. *See, Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) ("The district court's factual findings will not be set aside if supported by substantial evidence."); *Bopp v. Lino*, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994) ("The district court's findings of fact will not be set aside unless those findings are clearly erroneous."); *Real Estate Division v. Jones*, 98 Nev. 260, 264, 65 P.2d 1371, 1373-74 (1982) ("Our task on appeal has been to search the record for a foundation of substantial evidence upon which to validate the rulings of the Commission...[¶]The decision of the Commission both initially and as later modified does not meet the substantial evidence test.").

3. This Court generally reviews a district court's award of attorney's fees for an abuse of discretion. *See, Rivero, supra*, 125 Nev. at 440-41, 216 P.3d at 234; *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727 (2005).

4. A district court's open and obvious error of law, here incorrectly applying NRCP 37(b)(5), can also be an abuse of discretion. *See, Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979), *quoting, Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 205, 207 (1951) ("E)ven within the area of discretion where the court's discernment is not to be bound by hard and fast rules, its exercise of discretion in the process of discernment may be [g]uided by such applicable legal principles as may have

become recognized as proper in determining the course of justice. A clear ignoring by the court of such established guides, without apparent justification, may constitute abuse of discretion.").

5. A district court's failure to exercise discretion when required to do so can also be an abuse of discretion. *See, Massey v. Sunrise Hospital*, 102 Nev. 367, 371, 724 P.2d 208, 210 (1986) ("A court's failure to exercise discretion (when available) is error.").

SUMMARY OF ARGUMENT

A. Concise Statement of Relevant Facts

On January 24, 2023, Defendants filed their *Motion to Compel and Request for Expenses of Motion* ("Motion to Compel") (A 17-36), and on April 10, 2023, the Court entered its *Order Granting Motion to Compel and Request for Expenses of Motion* ("Order Granting"). (A 77-88).

On April 10, 2023 the District Court granted the motion to compel answers to interrogatories and request for production related to Mr. Garmon's assets and awarded the expenses of the motion. (A 77-88).

On April 26, 2022 Defendants filed their motion for fees (A 89-96) related to the motion to compel seeking \$4,878.25 in fees and \$13.25 in costs.

On August 10, 2023 the District Court awarded only part of the fees requested of \$2,835.00 because it believed NRCP 37(a)(5)(A) only allowed

recovery of \$2,835.00 the fees for the first motion to compel pleading only not the separate motion for fees and costs. (Order, A 180-193).

Appellants believe NRCP 37(a)(5) which requires Courts to award fees and costs for a motion to compel implicitly includes all fees related to that motion including the required subsequent motion for fees and costs, not just the motion to compel pleadings.

It is this Order that Appellants appeal.

B. Concise Statement of Argument on Appeal

Rule 37(a)(5) implicitly requires an award of attorneys fees for not only the motion to compel but for a separate motion for fees and costs after the Court grants the motion to compel. The detailed requirements for a motion for fees and costs cannot be included in the motion to compel because the amount of fees, hours expended, etc, are unknown. Nor can the detailed requirement of a fee and cost request be included in a reply. Court Rules require a separate motion for fees. In *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969) this court explained:

“Before discussing the separate counts, it seems advisable that we state the wellknown basic elements to be considered in determining the reasonable value of an attorney’s services. From a study of the authorities it would appear such factors may be classified under four general headings (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility

imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derives. See, C.J.S. Attorney and Clients. 191 a. (2), p. 1080 et seq.; 5 Am.Jur., Attorneys at Law, section 198. Cf. *Ives v. Lessing*, 19 Ariz. 208, 168 P. 506. Furthermore, good judgment would dictate that each of these factors be given consideration by the trier of fact and that no one element should predominate or be given undue weight.” (Emphasis by court.)

The District Court erred and abused its discretion in not awarding the \$2,043.25 in fees requested by Appellants for preparing the motion for fees and costs, and reply after the successful motion to compel.

As explained in Federal Practice and Procedure (Wright & Miller) (April 2023 update) §§ 2288 discussing the nearly identical Federal Rule:

A major purpose of the 1970 revision of the discovery rules was to encourage extrajudicial discovery with a minimum of court intervention. One means of accomplishing that was to tighten the judicial sanctions with respect to unjustified insistence upon or objection to discovery. This led the draftsmen to place new emphasis on the availability and compulsory nature of an award of expenses.

The potential availability of the award of expenses and fees was therefore broadened. Prior to 1970 it could be used only with regard to a failure to answer questions at a deposition any, very occasionally, a refusal to answer interrogatories. Rule 37(a)(5), in which the provisions for a monetary award are now found, is much broader. It applies by its own terms to any motion to compel disclosure or discovery under Rule 37(a). Thus an award of expense and fees was provided if there is a motion to compel an answer to a question at a deposition, or to compel a corporation or other entity to designate a person or persons to testify for it as a deposition, or to compel an answer to an interrogatory, or to compel inspection of documents and tangible things. In addition, Rule 37(a)(5) applies by express reference in the pertinent rules to a motion by a person not a party to

obtain a copy of a statement he or she has given, to a motion for a protective order, to a motion to terminate or limit examination at a deposition, and to a motion to determine the sufficiency of answers or objections to a request for admissions. Finally, though Rules 37(b)(2)(C) and 37(d)(3) do not refer to Rule 37(a)(5), they do provide that in lieu of or in addition to any of the other sanctions made available by those subdivisions the court shall make an award of expenses and attorney's fees against the delinquent party that is similar in all respects to an award under Rule 37(a)(5).

This Court has imposed specific requirements for a request for an award of attorneys fees and costs including the above-referenced Brunzell analysis.

Fortunet, Inc. v. Rosten, 2024 WL 390133 (Nev. 2024); *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969); *Logan v. Abe*, 131 Nev. 260, 350 P.2d 1139 (2015); *Haley v. Eighth Judicial Dist. Ct.*, 128 Nev. 171, 273 P.3d 855 (2012); *Skender v. Brunsonbuild Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006); *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353-54, 971 P.2d 383, 386 (1998).

A party making a motion to compel cannot include or meet all of these requirements in the motion to compel as it is unknown what the specific tasks and time will be needed to consider the opposition, prepare a reply, submit the motion to the Court or participate in any oral arguments.

It would be inappropriate to include in the reply the necessary specifics for a request for fees and costs since a reply is limited to responding to the opposition. 16AA Federal Practice and Procedure, Jurisdiction § 3974.3 (5th Ed). Including

the specifics of a request for fees in the reply would not give the opposing party any chance to oppose the specifics of the request for fees.

Efficiency and judicial economy is best served by a subsequent motion for fees after the motion to compel is granted as Appellants did here.

The governing rules provide a presumption that reasonable expenses – which include attorneys’ fees from a motion detailing the fees incurred – will be awarded to the party that prevails on a motion to compel discovery. Fed. R. Civ. P. 37(a)(5)(A); see also *Big City Dynasty v. FP Holdings, L.P.*, 336 F.R.D. 507, 513 (D. Nev. 2020); *Underwood v. O’Reilly Auto Enterprises, LLC*, 2022 WL 4359096, not reported in Fed. Supp. (Nev. 2022).

The fact that a separate motion is required by Court decisions should not preclude Appellants from recovering the \$2,043.25 fees incurred in such a motion.

ARGUMENT

I. APPELLANTS CORRECTLY FILED A SEPARATE MOTION FOR FEES AND COSTS AFTER AN ORDER TO COMPEL AND AWARD OF FEES WAS GRANTED. APPELLANTS SHOULD HAVE BEEN AWARDED THEIR \$2,043.25 IN FEES AND COSTS FROM THE APRIL 26, 2023 MOTION FOR FEES AND COSTS UNDER NRCP 37(A)(5)(A)

Rule 37(a)(5)(A) mandates an award of fees and costs as part of a successful motion to compel.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

(a) Motion for an Order Compelling Disclosure or Discovery

(5) Payment of expenses; Protective Orders.

(A) If the Motion is Granted (or Disclosure or Discovery Is Provided After Filings). If the motion is granted – or if the disclosure or requested discovery is provided after the motion was filed – the court must, after giving an opportunity to be heard, require the party or deponent whose conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure of discovery without court action;

(ii) the opposing party’s nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

It is well founded that the purpose of this rule is to award the moving party all of the expenses they were forced to incur in being forced to seek an order to compel, because the opposing party ignored and continued to ignore responding to discovery.

It was error and an abuse of discretion to deny Appellants the recovery of the \$2,043.25 in fees incurred in meeting the fee motion requirements imposed by Courts.

CONCLUSION

Appellants appropriately sought recovery of fees and costs in a separate motion after a successful motion to compel. Pursuant to Rule 37(a)(5)(A) fees and costs in this motion should have been awarded. The District Court

erred in limiting Rule 37(a)(5)(A) to the fees for the motion to compel only.
The District court abused its discretion in not awarding the \$2,043.25 in fees
from the subsequent motion for fees.

AFFIRMATION

The undersigned hereby declares that the within document does not contain
the Social Security Number of any person.

DATED this 12th day of February, 2024.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief does not comply with the page- or type-volume limitations of NRAP 32(a)(7), because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced and contains 4,720 words.

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


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that I may be subject to sanctions in the event that the accompanying brief is not
in conformity

DATED this 12th day of February, 2024.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(b) of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of Gordon Rees Scully Mansukhani and that on this date, I served a true and correct copy of the attached document as follows:

_____ By placing the document(s) in a sealed envelope with first-class US. Postage prepaid, and depositing for mailing at Reno, Nevada, addressed to the person at the last known address as set forth below.

X_____ Electronic Filing states that the attached document will be electronically mailed; otherwise, an alternative method will be use.

_____ By personally delivering the document(s) listed above, addressed to the person at the last known address as set forth below.

Carl Hebert, Esq.
2215 Stone View Drive
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Attorneys for Respondent

DATED this 12 day of February, 2024.

Sam Baker