IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TOH KOK SOON, an Individual, Appellant, vs. ALEXANDER HENDERSON, an Individual; and TOGA LIMITED, a Nevada corporation, Respondent.	)	Appeal No.: 85115 Nature of Proceedings: Civil Appeal

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Elizabeth A. Brown
Clerk of Supreme Court

APPENDIX TO
APPELLANT'S OPENING BRIEF
VOLUME VI of VII

Appeal from the Eighth Judicial District Court
Case No. A-21-841604-B

CORY READE DOWS & SHAFER

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Docket 85115 Document 2023-19064

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CORY READE DOWS & SHAFER
1333 North Buffalo Drive, Suite 210
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am a representative of CORY READE DOWS & SHAFER that on this 15th day of June 2023, I caused the foregoing **APPENDIX TO APPELLANTS OPENING BRIEF VOLUME VI OF VII** to be served as follows:

■**NEFCR System upon the following All Parties in accordance with NEFCR 9 and 13**

James A. Beckstrom, Esq. BECKSTROM & BECKSTROM, LLP 400 S. 4th Street, Suite 650 Las Vegas, NV 89101 Counsel for Respondent Alexander Henderson	Peter Chasey, Esq. CHASEY LAW OFFICES 3925 N. Fort Apache Road, #110 Las Vegas, NV 89129 Counsel for Respondent Toga Limited

□ **By fax or other electronic transmission in accordance with NRCP 5(D) upon the following Parties, for which proof of successful transmission is attached hereto.**

□ **By direct email upon the following Parties, for whom I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.**

□ **By fax or other electronic transmission in accordance with NRCP 5(D) upon the following Parties, for which proof of successful transmission is attached hereto.**

/s/ Keala Keyes
A Representative of Cory Reade Dows & Shafer

Electronically Filed
6/3/2022 9:03 PM
Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Defendant Toga Limited

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, vs. ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31 HEARING DATE: 11/9/2021 HEARING TIME: 8:30 a.m.

DEFENDANT TOGA LIMITED'S OPPOSITION TO MOTION TO DISQUALIFY CHAD F. CLEMENT, ESQ., JORDAN W. MONTET, ESQ., AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED AND JAMES A. BECKSTROM, ESQ., AS COUNSEL FOR ALEX HENDERSON

Defendant Toga Limited, by and through the law firm of the law firm of Marquis Aurbach, hereby files this Opposition to Plaintiff's Motion to Disqualify Chad F. Clement, Esq., Jordan W. Montet, Esq., and Marquis Aurbach Coffing as Attorneys for Toga Limited and James Beckstrom Esq., as Counsel for Alex Henderson ("Opposition").

Dated this 3rd day of June, 2021.

MARQUIS AURBACH

By */s/ Jordan W. Montet, Esq.*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff has waited almost a year to bring the instant Motion to Disqualify ("Motion"). Contrary to the representations contained therein, Plaintiff has never been represented by the law firm of Marquis Aurbach ("MAC") or any of the practicing attorneys affiliated with MAC. Indeed, no attorney from MAC has ever seen, spoke with, or engaged Plaintiff, whether in this case or any other case. In short, Plaintiff has never maintained an attorney-client relationship with MAC. On this basis alone, Plaintiff lacks standing and authority under the Nevada Rules of Professional Conduct ("RPC") to move to disqualify MAC and its affiliated attorneys.

On September 23, 2021, Plaintiff filed the instant case. According to Plaintiff's Complaint, Plaintiff asserts the following causes of action: (1) Declaratory Relief; (2) Injunction; (3) Breach of Contract; (4) Breach of Duty of Good Faith; (5) Breach of Duty of Loyalty; (6) Breach of Fiduciary Duty; (7) Unjust Enrichment; and (8) Intentional Interference with Contractual Relations.[1] Plaintiff sues Alexander Henderson ("Henderson"), the prior Chief Financial Officer of Toga, current Director, and current Chairman of the Board of Directors. The Complaint is not verified as required by NRCP 23.1.[2]

All claims regarding Henderson, Henderson's employment contract, or any conduct of Toga's Board with respect to Henderson were resolved on May 24, 2022, when this Court granted summary judgment in favor of Defendants.[3] No other Board members are named in this lawsuit and it is unclear what remaining claims exist, if any. The only claim unrelated to Henderson revolves around the sole issue regarding Plaintiff Toh's personal complaints that the Toga Board of Directors improperly called a series of Special Board of Director meetings.[4] But that issue was also recently decided in connection with summary judgment. At all times defense counsel has

[1] Complaint, on file.

[2] *Id.*

[3] See Minutes Granting Defendants Motion for Summary Judgment, on file.

[4] Complaint, on file.

represented the interests of the corporation and its unnamed Board members. Plaintiff's contention that Board members cannot choose their legal counsel is convoluted and legally incorrect

There is no conflict of interest here. The RPC do not allow a litigant to strategically disqualify opposing counsel on pure conjecture and unsupported statements—exactly what Plaintiff attempts to do through his Motion. Plaintiff vaguely claims "Henderson and Toga have adverse interests in this litigation." Yet, Plaintiff's Motion completely ignores that Henderson is no longer a defendant in this matter as summary judgment has already been granted in his favor and that Toh is the only one with adverse interests. Moreover, all claims against Toga related to Henderson had summary judgment granted in Toga's favor. Likewise, Plaintiff fails to comprehend that Mr. Henderson is a director of Toga and like Toh, is a member of the Toga Board of Directors.

Finally, Plaintiff's claims of a conflict as a result of "dual representation" are not only a legal fiction, but are an exercise in futility, as Plaintiff's "derivative" claims have been dismissed upon this Court's granting of summary judgment. It is undisputed that Plaintiff lacks standing to assert a derivative action, has failed to file a verified derivative complaint, and the derivative claims, if any, have been dismissed. Consequently, the Motion must be denied.

II. LEGAL ARGUMENT

A. LEGAL STANDARD

"[D]isqualification . . . is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel . . . serves to destroy a relationship by depriving a party of representation of their own choosing . . . ." *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 279 P.3d 166, 170 n.3 (2012) (citations omitted). "Speculative contentions of conflict of interest cannot justify disqualification of counsel." *Liapis v. Dist. Ct.*, 128 Nev. 414, 420, 282 P.3d 733, 737 (2012) (quotations and citations omitted).

The party seeking disqualification has a "high standard of proof to meet in order to prove that counsel should be disqualified." *Practice Mgmt. Solutions, LLC*, 2016 WL 2757512 at *3 n.4; *see also Fid. and Deposit Co. of Maryland v. Travelers Cas. and Sur. Co. of Am.*, 2017 WL 6520912, at *4 (D. Nev. Dec. 19, 2017) ("The moving party bears the burden of establishing an

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ethical violation or other factual predicate upon which the motion depends.") (listing cases interpreting Nevada law).

"District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case." *Brown v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000). In doing so, courts must ensure that "parties [are] not [ ] allowed to misuse motions for disqualification as instruments of harassment or delay." *Brown*, 116 Nev. at 1205, 14 P.3d at 1270. To prevail on a motion for disqualification, the moving party must establish: (1) "'at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,'" and (2) "'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.'" *Brown*, 116 Nev. at 1205, 14 P.3d at 1270 (quoting *Cronin v. Eighth Judicial Dist. Court*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989). "Courts should only disqualify counsel with considerable reluctance and only when *no other practical alternative exists*." *Millen v. Eighth Judicial Dist. ex rel. County of Clark*, 122 Nev. 1245, 1256, 148 P.3d 694, 701–02 (2006) (emphasis added).

B. PLAINTIFFS LACKS STANDING TO SEEK DISQUALIFICATION

Before the Court can consider the merits of the concurrent-conflict rule [NRPC 1.7], it must first address a party's standing to seek disqualification. *Liapis*, 128 Nev. 414 at 420, 282 P.3d at 737. "The party seeking to disqualify bears the burden of establishing that it has standing to do so." *Id.* "The general rule is that only a former or current client has standing to bring a motion to disqualify counsel on the basis of a conflict of interest." *Id.* (Emphasis added) (quoting Model Rules of Prof'l Conduct R. 1.7 (RPC 1.7 is identical to the model rule); *see also Great Lakes Const., Inc.*, 114 Cal.Rptr.3d at 307 ("Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney."). The only exception to these well stated rules is instances where the Court finds a breach of ethics "so infects the litigation in which disqualification is sought that it impacts the [nonclient] moving party's interest in a just and lawful determination of her claims, she may have

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the ... standing needed to bring a motion to disqualify based on a third-party conflict of interest or other ethical violation." *Liapis*, 128 Nev. 414 at 420, 282 P.3d at 737.

In evaluating this threshold issue, there is little to discuss. At no point in time has MAC ever represented Plaintiff.[5] Plaintiff has always been the *opposing party* to the clients MAC has represented (which has been limited to this case). It is simply impossible for Plaintiff to attempt to disqualify MAC on grounds that are reserved for those who have had, or do have, an attorney-client relationship with MAC. Likewise, Plaintiff cannot identify any "breach of ethics" so infectious that would severely impact his interests in the litigation, let alone any ethical breach. Moreover, MAC does not have access to any inside or confidential information that could place Plaintiff in a compromised position in this litigation, particularly where Plaintiff is also a member of the Toga Board of Directors. No other members of Toga's Board of Directors were named individually in this case. Because MAC has never shared such a relationship with Plaintiff and no ethical breach exists, Plaintiff lack standing to bring a motion to disqualify under RPC 1.7.

To the extent Plaintiff claims that the derivative claims at issue in this case create a conflict of interest, such a position is moot. The entirety of the basis for Plaintiff's contention that a conflict exists based on the breach of fiduciary duty claims related to Henderson's actions and the Henderson severance package. Pl. Mot. 5:25-6:6. All such claims have been summarily adjudicated. If it is Plaintiff's position that he is not truly suing Toga Limited, only Henderson, then there are no remaining issues in this case following this Court's granting of summary judgment. As Henderson is no longer a defendant in this matter and no other board members are personally named, Toga, as named in the Complaint, is not merely a nominal defendant like Plaintiff contends. Essentially, Plaintiff's Motion seeks the ability for Plaintiff to choose counsel for the "derivative suit" but also counsel that will defend the actions of the company. Such a position is both non-sensical and unsupported by Nevada law. Plaintiff in a "derivative action"

[5] Declaration of Jordan W. Montet, Esq. in Support of Opposition to Plaintiffs' Motion to Disqualify Counsel for Defendants ("Montet Decl."), attached hereto as **Exhibit A**, at ¶ 3.

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does not have standing to cherry pick who will serve as defense counsel representing the actions of the Toga Board of Directors.

C. DISQUALIFICATION IS NOT REQUIRED UNDER RPC 1.7 OR RPC 1.13.

RPC 1.7(a) prohibits a lawyer from representing a client "if the representation involves a concurrent conflict of interest." Such a conflict exists if "(1) [t]he representation of one client will be directly adverse to another client; or (2) [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." RPC 1.7(a)(2). Even if a conflict arises, however, RPC 1.7 also provides that "a lawyer may represent a client if ... [t]he lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ... [t]he representation is not prohibited by law; ... [and e]ach affected client gives informed consent, confirmed in writing." RPC 1.7(b)(1), (2), (4). Pursuant to RPC 1.13(g) "[a] lawyer representing an organization *may* also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

Plaintiffs contend that MAC's representation of Defendants violates RPC 1.7 and RPC 1.13. Plaintiff miserably fails, however, to articulate what the claimed conflict actually is. The closest Plaintiff comes is arguing that because Plaintiff has brought claims against Henderson, dual representation of Henderson and the Board of Directors (which includes Henderson) is not possible based on "competing interests."[6] Plaintiff further argues that because he has attempted to advance a derivative claim on behalf of Toga, MAC is somehow prohibited from representing Toga and Henderson against the legally untenable claims. Plaintiff's reasoning ignores the fact Henderson *is a Director and Officer of the Company*. Plaintiff similarly ignores the fact the Board of Directors

[6] Mtn. at 5:1-8.

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and Henderson have been advised of the claimed conflict and, despite waiving any such conflict, had Henderson obtain his own representation even though he is a member of the Board.[7] Thus, even if this Court believed some conflict existed, pursuant to RPC 1.13(g), "the appropriate officials of the organization,"*i.e.*, the Board of Directors, waived any such conflict. Finally, Henderson is no longer a party to this lawsuit and all claims related to Henderson have been dismissed, so there is no risk of any conflict.

Plaintiff's Motion is silent as to any case law whatsoever construing the conflict-of-interest provisions of the RPC in light of a representation by a law firm of both the corporation and the individual board member defendants in a derivative action. However, other jurisdictions have addressed the issue. In *Robinson v. Snell's Limbs & Braces of New Orleans, Inc*., 538 So. 2d 1045, 1048 (La. Ct. App. 1989), the Louisiana Court of Appeal analyzed this exact issue, one where a claimed conflict was raised by a law firm representing both a nominal corporate defendant and a director. *Id*. The Court concluded no conflict existed after reviewing the same legal challenges raised by Plaintiff in this matter. Notably, the Court explained the unique nature of a derivative action and the legal fiction it holds in the law, as follows:

> Although the corporation appears as a party on both sides of the lawsuit, ***its true interest lies with the plaintiff shareholder; it is only nominally a defendant. Therefore, [the law firm] represents only the interests of the individual directors who have allegedly harmed the corporation***, and the plaintiff's counsel actually represents the interest of the corporation, to which any recovery will be returned. [the law firm] is not representing adverse interests because the corporation ***has no interest as a defendant; it is merely required to be named as one***.

Id. at 1048.

The analysis in *Robinson* is spot on. Plaintiff is attempting to manufacture a conflict to obtain a tactical advantage in litigation. The purported "derivative claims" are aimed towards the board of directors—not the nominal defendant corporation, who is nothing more than a placeholder. Likewise, MAC has satisfied the factors set forth in RPC 1.7(b)(1)-(4). MAC reasonably believed it could provide competent representation to both Toga and Henderson, as the claims against both parties are patently frivolous (as demonstrated by the Court's entry of summary

[7] Exhibit A at ¶ 4.

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judgment in Defendants' favor), the representation is not prohibited by law, there are no claims between the clients, both clients provided informed written consent,[8] and all claims related to and against Henderson have been dismissed. As such, no conflict exists and the Motion must be denied.

D. HENDERSON IS NO LONGER A PARTY TO THIS LAWSUIT AND MAC'S REPRESENTATION OF TOGA LIMITED IS WITHOUT PREJUDICE TO ANY PARTY.

The main purpose for disqualifying counsel is to prevent disclosure of confidential information that could be used to a former client's disadvantage. *See Nevada Yellow Cab,* 123 Nev. 44, 152 P.3d 737 (2007). "Courts should only disqualify counsel with considerable reluctance and only when ***no other practical alternative exists***." *Millen v. Eighth Judicial Dist. ex rel. County of Clark*, 122 Nev. 1245, 1256, 148 P.3d 694, 701–02 (2006) (emphasis added).

In this case, MAC has not become privy to any confidential information of either party during the limited time in which it represented both Toga and Henderson in this case.[9] Indeed, the representation has only been with respect to procedural matters at this early stage in the litigation. All of the information MAC has obtained is information that was freely available to any Board Member of Toga—inclusive of Plaintiff.

Most importantly, this Court has already granted summary judgment in favor of Henderson on the claims related to Henderson. Plaintiff inexplicably waited until the eve of the hearing on Defendants' dispositive motion to file the instant Motion. Plaintiff brings the instant Motion as nothing more than a poorly calculated, untimely litigation tactic—a tactic that is well recognized by the Nevada Supreme Court and highly disfavored. *See e.g.*, *Brown*, 116 Nev. at 1205, 14 P.3d at 1270; *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 279 P.3d 166, 170 n.3 (2012) (disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary). This Motion was not brought on an order shortening time and seemingly had no concern or urgency that this Motion be heard before this Court ruled on the claims which

[8] Exhibit A at ¶ 4.

[9] *Id.* at ¶ 7.

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Plaintiff improperly contends creates a conflict between Board member representation. Thus, there is no rational concern that MAC has confidential information of Plaintiff's or could somehow not proceed in representing Toga in this matter, if anything is left to adjudicate as to Toga.

E. PLAINTIFF HAS NOT IDENTIFIED ANY ALLEGED IMPROPER ACTION BY DEFENSE COUNSEL.

Plaintiff does nothing more than make conclusory, unsupported assertions that defense counsel has acted contrary to the Plaintiff-Shareholders without so much as even alluding to a singular action taken by defense counsel contrary to the interests of Toga Limited. Defense counsel is left only guessing as to what Plaintiff means by such "adverse action", demonstrative that Plaintiff has not met his burden to establish any alleged "conflict." Such blatantly unsupported, vague contentions do not even remotely establish any basis for disqualification. It is not Toga Limited's burden to proactively establish that there is not a conflict. It is the burden of the party contending that a conflict exists to establish a conflict and Plaintiff has failed to meet their burden in this case.

III. CONCLUSION

Based on the foregoing, the Motion to Disqualify must be denied as no conflict exists, or has ever existed.

Dated this 3rd day of June, 2022.

MARQUIS AURBACH COFFING

By */s/ Jordan W. Montet, Esq.*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
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Attorneys for Defendant Toga Limited

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT TOGA LIMITED'S OPPOSITION TO MOTION TO DISQUALIFY CHAD F. CLEMENT, ESQ., JORDAN W. MONTET, ESQ., AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED AND JAMES A. BECKSTROM, ESQ., AS COUNSEL FOR ALEX HENDERSON** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 3rd day of June, 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[10]

CORY READE DOWS & SHAFER
Jay A. Shafer, Esq.
1333 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89128

/s/ Jordan W. Montet, Esq.
an employee of Marquis Aurbach Coffing

[10] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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EXHIBIT “A”

EXHIBIT “A”

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual,

Plaintiff,

vs.

ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive,

Defendants.

Case No.: A-21-841604-B

Dept. No.: 31

DECLARATION CHAD F. CLEMENT, ESQ. IN SUPPORT OF OPPOSITION TO MOTION TO DISQUALIFY CHAD F. CLEMENT, ESQ., JORDAN W. MONTET, ESQ., AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED AND JAMES A. BECKSTROM, ESQ., AS COUNSEL FOR ALEX HENDERSON

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Chad F. Clement, Esq., declares, pursuant to 28 U.S.C. § 1746 and NRS § 53.045, under penalty of perjury, that the following is true and correct:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true. I am an attorney with the law firm of Marquis Aurbach Chtd. ("MAC"), counsel of record for defendant Toga Limited, and I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. I submit this declaration in support of DEFENDANT'S OPPOSITION TO MOTION TO DISQUALIFY CHAD F. CLEMENT, ESQ., JORDAN W. MONTET, ESQ., AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED AND JAMES A. BECKSTROM, ESQ., AS COUNSEL FOR ALEX HENDERSON ("Opposition").

3. At no point in time has MAC ever represented Plaintiff Michael Toh Kok Soon. I have confirmed this through our internal conflict check system, which logs every client and potential client of MAC.

4. I have discussed and reviewed the issue of conflicts with the Board of Directors for Toga and obtained written waivers of consent as it applies to any potential conflicts of interest, however in an abundance of caution ultimately Henderson retained separate counsel.

5. I, along with the working attorneys at MAC, have discussed the potential of a conflict in this case and have concluded with no doubt that no conflict exists.

6. During my limited representation of both Defendants, there was no exchange of confidential information in this case that relates to any party or entity involved in this case.

7. Since Henderson obtained separate counsel, there was been no exchange of confidential information in this case that relates to any party or entity involved in this case.

8. MAC has not become privy to any confidential information of either party during its limited representation of Toga and Henderson in this case.

Dated this 3rd day of June, 2022.

/s/ Chad F. Clement
CHAD F. CLEMENT, ESQ.

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Attorney for Alexander Henderson

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual Plaintiff, v. ALEXANDER HENDERSON, an individual; TOGA LIMITED; a Nevada corporation; DOES 1-100; and ROE BUSINESS ENTITIES I through C; inclusive, Defendant.	Case No.: A-21-841604-B Dept No.: 31

ALEXANDER HENDERSON'S JOINDER TO TOGA LIMITED'S OPPOSITION TO MOTION TO DISQUALIFY CHAD CLEMENT, ESQ., JORDAN MONTET, ESQ. AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED AND JAMES A. BECKSTROM, ESQ. AS COUNSEL FOR ALEXANDER HENDERSON

Defendant ALEXANDER HENDERSON, by and through his attorney of record, JAMES A. BECKSTROM, ESQ., of the law firm of BECKSTROM & BECKSTROM, LLP, hereby joins Toga Limited's Opposition to Motion to Disqualify Chad Clement, Esq., Jordan Montet, Esq., and Marquis Aurbach Coffing as Attorneys for Toga Limited and James A. Beckstrom, Esq. as Counsel for Alexander Henderson, filed by Defendant Toga Limited, in all material points submitted

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therein.

Dated this 3rd day of June 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 South 4th Street, Suite 650
Las Vegas, NV 89101
Attorney for Alexander Henderson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, **ALEXANDER HENDERSON'S JOINDER TO TOGA LIMITED'S OPPOSITION TO MOTION TO DISQUALIFY CHAD CLEMENT, ESQ., JORDAN MONTET, ESQ. AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED AND JAMES A. BECKSTROM, ESQ. AS COUNSEL FOR ALEXANDER HENDERSON** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 3rd day of June 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

Jay A. Shafer, Esq.
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Attorney for Plaintiff

Chad F. Clement, Esq.
Jordan W. Montet, Esq.
MARQUIS AURBACH
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Attorneys for Toga Limited

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Suzanne Boggs
An employee of Beckstrom & Beckstrom, LLP

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6/6/2022 8:04 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual,

Plaintiff,

vs.

ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive,

Defendants.

Case No.: A-21-841604-B
Dept. No.: 31

DEFENDANT TOGA LIMITED'S OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO DISMISS

Toga Limited ("Toga"), by and through its counsel of record, Marquis Aurbach, hereby files this Opposition to Plaintiff's Renewed Motion to Dismiss. This Opposition is made and based on the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may choose to entertain at the time of hearing.

Dated this 6th day of June, 2022.

MARQUIS AURBACH

By */s/ Jordan W. Montet*
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Case Number: A-21-841604-B

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This instant Motion once again leaves Defendant puzzled by the illogical and untimely requests of Plaintiff. It appears on the face of the instant Motion that Plaintiff seeks to circumvent this Court's ruling granting summary judgment. Plaintiff's Motion concedes that there is nothing left in this case to be decided or dismissed at this juncture. In the Motion, Plaintiff sets forth the two bases for the instant litigation. First, Plaintiff sought to "preclude the derailment" of a "special shareholder meeting via injunctive relief," which he admits was "mooted." Pl. Mot. p. 3, fn. 3. Second, Plaintiff seeks derivative relief regarding actions related to Defendant Alex Henderson, which this Court has already ruled on – granting summary judgment in favor of all Defendants. Accordingly, based on his own admissions, there is nothing left for Plaintiff to dismiss.

Despite multiple requests from defense counsel as to whether Plaintiff intended to proceed with this mooted Motion, no response has ever been received. It is entirely unclear to Defendants what, if anything, remains at issue in this case. The proposed notice attached to the untimely Motion does not accurately represent the procedural history of this case or the status of this case after summary judgment was granted in Defendants' favor. All that is left to do in this case is have the Court enter the Order granting summary judgment, and any post-judgment motions that may be brought following its entry.[1] Despite summary judgment awarded in Defendants' favor, Plaintiff inexplicably maintains the instant motion seeking dismissal. As all issues in this case have already been resolved, there is nothing left for Plaintiff to "voluntarily dismiss" and the instant Motion must be denied as moot.

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[1] Pursuant to NRS 18.010, Defendants are entitled to an award of attorney's fees and costs as the prevailing party in litigation, and such an award is mandatory rather than discretionary. *Day v. West Coast Holdings, Inc.*, 101 Nev. 123, 133 (1970).

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II. LEGAL ARGUMENT

A. PLAINTIFF CANNOT SEEK VOLUNTARY DISMISSAL WHERE DEFENDANTS HAVE ALREADY OBTAINED A FINAL JUDGMENT IN THEIR FAVOR.

Plaintiff waited until the day before the Court's hearing on the Defendants' Motion for Summary Judgment and Joinder thereto before filing the instant Motion. "A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a); *see also Wood v. Safeway, Inc.*, 121 Nev.724, 731, 121 P.3d 1026, 1031 (2005). Procedurally, Plaintiff failed to timely oppose Henderson's Motion for Summary Judgment. *See* EDCR 2.20. Despite Plaintiff having failed to comply with the mandatory deadlines of this Court evaluated Plaintiff's Opposition on the merits and concludes Plaintiff has failed to set forth any admissible evidentiary support to avoid summary judgment as required by NRCP 56 or justify a continuance for discovery as allowed under NRCP 56(d). Thus, summary judgment was entered in favor of Defendants as to all claims advanced by Plaintiff with respect to Defendant Henderson on both procedural grounds and substantive grounds.

Plaintiff asks this Court to rule on the illogical procedural situation of a plaintiff seeking voluntary dismissal following this Court's ruling granting of summary judgment. While no Nevada case has addressed this scenario, California courts provide guidance on the issue. A plaintiff is precluded from voluntarily dismissing an action without prejudice under various circumstances including a general demurrer sustained without leave to amend, a general demurrer sustained with leave to amend where no amendment is made within the allotted time, and where all issues have been deemed admitted in defendant's favor, such as a motion for summary judgment. *Goldtree v. Spreckels*, 135 Cal. 666, 672-673 (1902); *Wells v. Marina City Properties*, *Inc*., 29 Cal.3d 789 (1981); *Miller v. Marina Mercy Hospital* 157 Cal. App. 3d 765, 770 (1984). Pertinent here, a summary judgment order bars voluntary dismissal. *Sweat v. Hollister*, 37 Cal. App. 4th 603, 614-615 (1995). In sum, " a plaintiff's right to a voluntary dismissal is cut off as of the moment there is a ruling which effectively disposes of the case." *M & R Properties v. Thomson*, 11 Cal.App.4th

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899 (1992). Here, Plaintiff admits there is nothing else for this Court to rule on as all issues in this case were resolved when summary judgment was granted in Defendants' favor. All aspects of this Motion are now moot and accordingly the instant Motion should be denied as an untimely attempt to circumvent this Court's prior rulings.

B. PLAINTIFF'S MOTION TO DISMISS VIOLATES NRCP 23.1.

To the extent there is anything left for this Court to dismiss, which Defendant denies, the proposed NRCP 23.1 notice is inconsistent with the procedural status of this case. Additionally Plaintiff once again incorrectly contends that NRCP 23.1 notice prior to dismissal is optional rather than mandatory. NRCP 23.1 states that a derivative action "may not be dismissed or compromised without the approval of the court and **notice of the proposed dismissal or compromise must be given to shareholders or members in such manner as the court directs**." NRCP 23.1 (emphasis added). NRCP 23.1 is clear that dismissal cannot be entered without providing the shareholders notice of the proposed dismissal in order to protect their rights.

Plaintiff brings the instant lawsuit as a shareholder derivative suit. Comp. 10, ¶¶ 58-60. NRCP 23.1 mandates that prior to dismissal, all shareholders **SHALL** be given notice of the proposed dismissal. Plaintiff incorrectly interprets NRCP 23.1, contending that the notice is discretionary, contrary to the plain language of the statute. The notice is mandatory and the manner of notice is subject to the court's direction. Plaintiff cannot unilaterally dismiss the case as the rights of other shareholders, who were not given notice, and are implicated by the derivative action. Due process mandates strict adherence to these requirements. *See Cramer v. Gen. Tel. & Elecs.Corp*., 582 F.2d 259, 268-69 (3d Cir. 1978). The purpose of the notice provision of NRCP 23.1 is not to ensure there is no prejudice to the **shareholders**, not Defendants, *"to ensure that the dismissal of the derivative action comports with the best interests of the corporation and its shareholders*." *Cramer*, 582 F.2d at 268-69 (emphasis added). To the extent there are any claims remaining, Toga shareholders have a constitutional right to know why the claims allegedly advanced by Toh to protect them are being dismissed and are entitled to an accurate notice regarding any remaining pending claims abandonment, prior to any dismissal by this Court.

/ / /

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C. IN THE EVENT THE COURT IS INCLINED TO DISMISS THIS CASE, FEES AND COSTS SHOULD BE AWARDED IN FAVOR OF TOGA LIMITED.

NRS 7.085(1) states:

If a court finds that an attorney has:

(a) Filed, maintained or defended a civil action or proceeding in any court in this State and such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in good faith; or

(b) Unreasonably and vexatiously extended a civil action or proceeding before any court in this State, the court **shall** require the attorney personally to pay the additional costs, expenses and attorney's fees reasonably incurred because of such conduct.

NRS 7.085(1) (emphasis added).

The District Court retains jurisdiction to consider collateral matters, including requests for sanctions, attorney's fees and costs, when a case is voluntarily dismissed by a plaintiff. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 677-679; 263 P.3d 224, 228-229 (2011).

As clearly demonstrated in Plaintiff's, once again, procedurally defective Motion to Dismiss, Plaintiffs' Complaint constituted an impermissible shareholder derivative lawsuit. Plaintiff's Motion concedes the instant lawsuit was not well-grounded in fact or was not warranted by existing law. Moreover, Plaintiff maintains this frivolous request while ignoring that the entirety of the instant Motion is moot. Plaintiff has repeatedly engaged in duplicative efforts and wasted judicial resources, seeking to obtain their most favorable ruling, and the present dismissal effort is a continuation of such behavior as demonstrated by the granting of Defendant Henderson's Motion for Summary Judgment and Defendant Toga Limited's Joinder thereto.

"The court shall liberally construe the provisions of this section in favor of awarding costs, expenses and attorney's fees in all appropriate situations." NRS 7.085(2) (emphasis added). As Plaintiff admits there are no merits to this action left pending before this Court, this Honorable Court "shall require the attorney personally to pay the additional costs, expenses and attorney's

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fees reasonably incurred because of such conduct." NRS 7.085(1). Pursuant to NRS 7.085, Plaintiff should be required to pay Defendant's costs, expenses and attorney's fees in the amount of $103,612.77, and counting, which were reasonably incurred in this case. The rationale for conditioning a voluntary dismissal without prejudice on the payment of the defendants' costs and expenses is to prevent the defendants from being unfairly affected by such dismissals. *Yoffe v. Keller Industries, Inc.*, 582 F.2d 982, 26 Fed. R. Serv. 2d 405 (5th Cir. 1978). Plaintiff should be required to compensate the defendant for the unnecessary expense that the litigation has caused, as demonstrated by the fact that the defendants have already been forced to engage in duplicative litigation. *In re Calomiris*, 3 A.3d 308 (D.C. 2010). Moreover, as a shareholder derivative action, Plaintiff's frivolous conduct has cost Toga Limited to incur significant expenses that should be returned to the company. This Court having seen firsthand the time this case has consumed and the procedurally defective duplicative actions of Plaintiff, fees and costs should be awarded in favor of Toga Limited if a dismissal is ordered.

III. CONCLUSION

In sum, Defendant is more than perplexed as to why Plaintiff has proceeded with the instant Motion when it is clear from its contents there are no remaining claims in this case for the Court to dismiss. Plaintiff's untimely Motion is an entirely inaccurate recounting of the current procedural status of this case. Without any indication as to what remaining claims exist for Plaintiff to proceed with, follow this Court's granting of summary judgment, it is clear to Defendant that the instant Motion must be denied as moot.

Dated this 6th day of June, 2022.

MARQUIS AURBACH

By */s/ Jordan W. Montet*
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANT TOGA LIMITED'S OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR VOLUNTARY DISMISSAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of April, 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[2]

Jay A. Shafer, Esq.
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Attorney for Alexander Henderson

/s/ Jordan W. Montet
An employee of Marquis Aurbach

[2] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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Attorney for Alexander Henderson

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual Plaintiff, v. ALEXANDER HENDERSON, an individual; TOGA LIMITED; a Nevada corporation; DOES 1-100; and ROE BUSINESS ENTITIES I through C; inclusive, Defendant.	Case No.: A-21-841604-B Dept No.: 31

ALEXANDER HENDERSON'S JOINDER TO DEFENDANT TOGA LIMITED'S OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO DISMISS

Defendant ALEXANDER HENDERSON, by and through his attorney of record, JAMES A. BECKSTROM, ESQ., of the law firm of BECKSTROM & BECKSTROM, LLP, hereby joins Defendant Toga Limited's Opposition to Plaintiff's Renewed Motion to Dismiss, filed by Defendant Toga Limited, in all material points submitted therein.

Dated this 8th day of June 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 South 4th Street, Suite 650
Las Vegas, NV 89101
Attorney for Alexander Henderson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, **ALEXANDER HENDERSON'S JOINDER TO DEFENDANT TOGA LIMITED'S OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO DISMISS** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 8th day of June 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

Jay A. Shafer, Esq.
CORY READE DOWS & SHAFER
1333 North Buffalo Drive, Suite 210
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Attorney for Plaintiff

Chad F. Clement, Esq.
Jordan W. Montet, Esq.
MARQUIS AURBACH
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Attorneys for Toga Limited

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Suzanne Boggs
An employee of Beckstrom & Beckstrom, LLP

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MICHAEL TOH KOK SOON, Plaintiff, vs. TOGA LIMITED, ALEXANDER HENDERSON, Defendants.	)	CASE NO. A-21-841604-B DEPT. NO. XXXI **Transcript of Proceedings**

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

TUESDAY, MAY 24, 2022

TRANSCRIPT RE:
DEFENDANT ALEXANDER HENDERSON'S MOTION FOR SUMMARY JUDGMENT

DEFENDANT TOGA LIMITED'S JOINDER TO DEFENDANT ALEXANDER HENDERSON'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

FOR THE PLAINTIFF:	JAY A. SHAFER, ESQ.
FOR DEFENDANT TOGA LIMITED:	CHAD F. CLEMENT, ESQ.
FOR DEFENDANT ALEXANDER HENDERSON:	JAMES A. BECKSTROM, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER
TRANSCRIPTION BY: LGM TRANSCRIPTION SERVICE

LAS VEGAS, NEVADA, TUESDAY, MAY 24, 2022, 8:40 A.M.

* * * * *

THE COURT: So now we're going to go to page 4. Page 4 is Michael Toh Kok Soon versus Toga Limited; 841604. Let's see who we've got on this case.

Counsel for Michael Toh Kok Soon, please.

MR. SHAFER: Yes. Good morning. Jay Shafer for plaintiff.

THE COURT: On behalf of Alexander Henderson, please.

MR. BECKSTROM: Good morning, Your Honor. James Beckstrom.

THE COURT: Thank you. And on behalf of Toga Limited, please.

MR. CLEMENT: Good morning, Your Honor. Chad Clement on behalf of Toga.

THE COURT: Okay. So here's what we have. We have defendant Alexander Henderson's motion for summary judgment, Document 44. Defendant Toga Limited's joinder to co-defendant Henderson's motion for summary judgment, Document 52. Interestingly enough, your request to redact documents isn't set to be heard for another few days, so we're going to have to see if you want to advance and take care of that one first.

And so let's move forward and ask that question first. You all did your motion to redact. It's not set to

be heard for two more days. Do you all wish the Court to address that first?

MR. BECKSTROM: Your Honor, James Beckstrom on behalf of Alexander Henderson. It was my motion I filed. Those exhibits we sought to redact were subject to a prior order of redaction by the Court. It was almost identical to the exhibits provided at the preliminary injunction hearing. Your Honor will remember that was granted and also advanced.

I saw there was some form of objection, very limited. It does not affect the substance of today's motion. We'd ask that it be advanced and granted.

THE COURT: Okay, so let's circle around. Let's go to counsel for Toga Limited.

MR. CLEMENT: Your Honor, on behalf of Toga, Chad Clement. We're in agreement that you can hear the redaction motion today.

THE COURT: Are you requesting that it be advanced and granted?

MR. CLEMENT: Yes.

THE COURT: Okay. Counsel for plaintiff, go ahead, please.

MR. SHAFER: Jay Shafer for plaintiff. We have no objection to the motion to redact filed under seal being granted. We filed a limited response to that, asking for the document that we were submitting to be redacted as well.

THE COURT: Right, which doesn't meet the rules; remember? And in fact, just to let you know, one of the reasons why I was mentioning about making sure people read the administrative orders, it says that again in Administrative Order 22-7.

However, since I have you all here and since it's an exhibit that's part of your motion, I'm sure this is how I'll take it into the clarity of the variety of different administrative orders. Can we address counsel for plaintiff's redaction request today, too, or do I need to put off the whole hearing for today so that I address that once he files a timely motion to redact?

MR. BECKSTROM: On behalf of Alexander Henderson, Your Honor, we have no objection. These are all exhibits. The only reason they're redacted is because it's a publicly-traded company. To the extent there's internal communications, they're for the eyes of the Court and not subject to disclosure until the board decides otherwise. So that's why -- the basis for redaction.

THE COURT: Okay. So you're okay, even though it wasn't technically procedurally appropriate, I can hear it today? And then are you okay with it being advanced and granted --

MR. BECKSTROM: Yes, Your Honor.

THE COURT: -- or do you have a different position?

MR. BECKSTROM: We are in agreement that it should be advanced and granted.

THE COURT: If anyone thinks from a due process standpoint that you want to respond, let me know. These are just questions. I'm just trying to see if we can get you where you need to be.

Counsel?

MR. CLEMENT: On behalf of Toga, we agree that plaintiff's motion can be advanced and heard today as well.

THE COURT: Okay, so both motions to redact advanced and granted for today.

So now let's get to your substance. I have Alexander Henderson's motion for summary judgment, like I said, and then I have the joinder thereto. I have an opposition.

So counsel for movant, on behalf of Henderson, feel free to commence. You can either sit down, stand up, be at counsel table, be at podium, whatever you'd like.

Go ahead, please.

MR. BECKSTROM: Good to be back at the podium, Your Honor. James Beckstrom on behalf of Alexander Henderson.

Your Honor, this case is not new to the Court. We've been here several times over the past month. This motion is incredibly narrow. It seeks to have a declaration which plaintiff sought, that is offered in the complaint, and it is a combined issue of law with a handful -- and I mean

a handful of undisputed facts. Background -- I know the Court has read this. We have Mr. Henderson. Mr. Henderson was a sought after CFO. Mr. Toh recruited him to run Toga. They had desires to bring this company to NASDAQ. Mr. Henderson was the only person who was highly qualified. He had an employment contract. In fact, Mr. Toh negotiated that employment contract. It was approved by the board.

At some point Mr. Henderson, who signs off on the financials for the company, received some problems. An accounting firm, a very respected accounting firm came in and said, hey, you're doing business in China under some sub-companies and we can't get numbers out of them. It ended up that an opinion came from qualified counsel in China that said you are violating laws. Not only are you violating laws, you have not submitted accurate information, okay.

Mr. Henderson as the CFO complies with and is bound by the ethical duties he signed for the company. He sends a notice to the board and says, listen, I am in a Catch-22 here. I cannot continue. If you don't show me something that's going to allow me to rectify this in 30 days, I have to resign. If I resign, I'm seeking all the compensation due under my employment agreement.

No corrections were made. The board is then tasked with a claim from Mr. Henderson saying I'm due compensation. The board compromises that claim. The board is comprised of

five individuals. They have never changed the totality of this. We have three independents, which is a term of art. They have no ownership interest in Toga. We have one, who is Mr. Toh, and we have Mr. Henderson. The bylaws state that the decisions, like any corporation, are made by the board. The board is the judge, jury and executioner, okay. A majority vote controls.

The board through appropriate counsel, Baker Hostetler, says, hey, we have Alex saying that he's due compensation, give us an opinion. They give the board an opinion. They brief the board on the opinion. At the end of the day the board decides to compromise the claim. They enter into a binding settlement agreement. It is signed by three, a majority, all independent board members. It's reduced to writing, okay. That happens on August 28th, okay. August 28th is important because Mr. Toh disputes notice, okay; notice of the board meeting approving that contract.

Now, because of that dispute, the board members, all four except Mr. Toh, go and say, listen, you disputed this -- the notice under this. We've been here on the preliminary injunction on an issue; we're going to do it again. Here's your notice. They do it five additional times, okay. I will show the Court how to shortcut this. September 27th notice goes out. It's proper. In fact, plaintiff concedes the same in his opposition. We have declarations from all four board

members. We have the emails providing the notice, which is appropriate under the bylaws. It's within the 24 hours as required under the bylaws, okay.

The hearing goes forward. Mr. Toh appears. He appears to object and says, hey, I think I'm the only person who can call board meetings so this isn't valid. The board goes through and says, listen, we previously approved this settlement agreement with Henderson. We're going to do it again and we're going to ratify it, okay. We provided the Court the minutes. Those minutes are authenticated, okay. The foundation is laid for those minutes in the declarations.

The declarations from, again, all of the four board members, are undisputed. They say what happened. They say that they approved the compensation package to Mr. Henderson and they say, hey, we told Henderson, as the prior CFO with signatory authority on the bank account, to transfer the money to himself, okay.

That's what Mr. Toh's complaint is about. He brings two claims to the Court in a dec relief action. He says, Judge, declare that the meeting was void on the 28th; therefore there's no authorization for the Henderson contract, okay. Now, the response to that is move along from the 28th hearing, let's go down all the other ones, okay. That September hearing, clearly correctly called, again authorizes this contract, okay.

The second claim Mr. Toh wants is, hey, make a decision that only I, who was the prior chairman of the board, can call these special board meetings. And the Court recalls this because during the preliminary injunction hearing Your Honor had the bylaws, you were combing through the pages and we interpreted this Section 3.9 of the bylaws, okay. And it is very clear on its face. It says the chairman of the board can call special board meetings and a majority of the directors, okay.

Those are the two points. Those are the only claims he has in his dec relief claim and those claims then transmute and form into what he phrases as a breach of fiduciary duty claim, a breach of loyalty claim and a breach of contract claim, okay.

We're here today telling the Court that there's no disputed facts. There's not a dispute that these board meetings went forward. There's not a dispute that the contract was authorized. And the fact of the matter is it doesn't matter what Mr. Toh wants. It happens every day in corporate law that one board member disagrees with a decision.

So the dec relief claims are very clear to us, Your Honor. I will provide the Court with the support we provided and point to the lack of support in the opposition because the opposition has two declarations. They have no facts in them. They are rife with I think this was done wrong. I think this

was a bad opinion. Well, the underlying agreement didn't really authorize this. I think the board's decision was wrong. That is not actionable in corporate law, okay.

The business judgment rule is exactly in place for these reasons. The board's decisions, okay -- and I note for the Court there is one director sued in this case. A derivative action was filed incorrectly in the first place. If Mr. Toh had a problem with the decision, the way you advance a derivative action is you sue every board member, okay. That's what you do. They didn't. And the board members who authorized this agreement are not sued here. In fact, it's just Mr. Henderson.

So when we go to look at what the supporting evidence is here at summary judgment, there is no dispute that no discovery is needed. These are issues well between the Court. We have the Henderson declaration, okay, Exhibit A, paragraphs 33 through 40. We have the Bratt declaration, another board member. We have the Ginn (phonetic) declaration, the Lupkin declaration.

We have the September 24th, meeting minutes, Exhibit H, okay. It details the explicit discussions the board members had and the vote that followed, all authorizing this contract. We have the Notice of Meetings, Exhibit K and L. We have Section 3.11 of the bylaws. All these things are undisputed. Discovery is not going to change these

people's minds and it's not going to change the decision that was made.

The opposition, page 18, Your Honor, it goes so far as to say this is a bad decision. Again, bad decisions are not authorized in derivative claims. We point the Court to a Nevada Supreme Court decision. It's the decision that followed -- it's the Chur decision. And it sets forth that two-prong test of the business judgment rule which pretty much lays out what a plaintiff has to do to even get in the court and survive a summary judgment motion on a fiduciary duty claim. None of those factors were met. We have at most Mr. Toh saying, hey, I disagree with the decision the board came to on this agreement. We have no fraudulent action. We have no allegations of conspiracy, let alone plausible ones. He doesn't even get past the first hurdle there.

And the burden is on Mr. Toh, it is not on Mr. Henderson. So I think that's been fairly briefed, Your Honor. I'm happy to go into the fiduciary duty claims if the Court has more questions, but the crux of this is when you look at the dec relief claims that were brought and you go down the list and you say these are legitimate things that were ruled on and done, all the other claims fall like dominoes. They all find behind them.

Now, we have a request for 56(d) relief. I'll note there's a series of late filings here.

THE COURT: Okay. That's where I was going to get to.

MR. BECKSTROM: You know, I'm not conceding the late filings. They clearly were deficient, okay. We don't have the declaration that followed saying what discovery I needed. But even then, I'm a simple person. At the end of the day you look at what he's asking for, it doesn't change any of this, okay. You can't get past summary judgment by saying, well, we think there was collusion, okay. Well, that's a great thought. Do you have any facts? You know, well, we don't think that it was properly noticed. Well, we have the evidence. We have the emails. We have the bylaws. You know, you compare the facts and there's no dispute here.

So the 56(d) relief is improper. We know what's happening in this case. The Court is not new to this. We have someone who realizes they have a bad case. They're now trying to dismiss the case. Mr. Henderson is entitled to summary judgment here. A claim was brought. There's no dispute and we want a ruling on the law. There is no reason why Mr. Shafer should be able to get up here and feign that there's some disputed facts and then go dismiss the case, okay. Mr. Toh has made it clear as to what he's decided to do. He wants to toss the board, which he will do, and he wants to then bring the same action, okay.

Mr. Henderson is entitled to judgment today. There's

no disputed facts in this case. The issues of law are there for the Court. Like I said, the Court has interpreted these bylaws before. I'm happy to answer any questions you may have, Your Honor.

THE COURT: The Court does not have any, thank you so very much, at this time.

MR. BECKSTROM: Thank you, Your Honor.

THE COURT: Okay. Counsel, joinder party.

MR. CLEMENT: I'll be short, Your Honor. I don't really have much to add. I'd probably just be regurgitating what Mr. Beckstrom or what the briefs say. But I'll just add my comment that I really think this case for the most part comes down to the business judgment rule, and I think we've set forth or Mr. Beckstrom set forth enough facts to show that the presumption of the business judgment rule would apply in this scenario.

And to get outside of that business judgment rule, under Chur you've either got to have intentional misconduct, fraud, or a knowing violation of the law. And I don't -- I haven't seen in anything that's been filed that those are really even asserted, let alone that there's genuine issues of fact on those issues. So that's really my only other -- my comment, Your Honor.

THE COURT: Okay. Counsel for plaintiff, would you like to respond?

MR. SHAFER: Yes.

THE COURT: Go ahead, please.

MR. SHAFER: Okay. Jay Shafer for plaintiff. I'd just like to address a few things. First, we do have a pending motion to disqualify. I just wanted to alert the Court to that fact. I won't argue that because it's not before the Court right now.

On the motion for summary judgment, they make a lot of things about what we say and what we think. That's not what the facts -- that's not what the declarations say. The fact is that there is a significant issue of fact. We have alleged documents which were produced by Mr. Henderson without any indication of authenticity. In fact, their very production undermines the validity of them. They have produced conflicting records. They produced, for example, a signed copy of an August 28th meeting minutes, and then another one that's unsigned, that are different. They're the ones in charge of these things that have produced them and my client does not believe that they are accurate nor that they were there.

I'll just -- on the meeting issue, the issue is not just that there was a meeting that we think was invalid, it was invalid. The contract -- the operating agreement, which governs the actions of the company, only allows for the chief executive officer to call board meetings. It does not permit

a board to do that unless there is no CEO in place. So these allegations that these were noticed before doesn't hold weight because they didn't have the authority to invoke the meetings.

Let me start here with what I think is the most significant issue. Mr. Henderson claims that he was entitled to damages under the contract and that good reasons existed for his self-termination. He quit the job. I don't know why. But the circumstances surrounding his termination don't indicate that good reasons exist.

They make a lot of hay about this legal opinion that Mr. Henderson himself commissioned where there's allegations of illegal activity on the part of Toga, which is not what the memo says. The memo says that there are concerns about potential issues that might happen, but it doesn't say that there's any illegal actions.

Further, the lack of communication with the auditors just doesn't exist. Mr. Toh indicated his attempts to cooperate with this. The actions that they said are -- you know, there wasn't any action and the time when they submitted it is very, very short.

So it's plaintiff's position that the good reasons that entitle Mr. Henderson or supposedly entitle Mr. Henderson to the half a million dollars that he's claiming he's owed don't exist. But even if the circumstances do exist, his

calculation of what was due overestimates what he is entitled to under the contract. So not only has he manufactured a crisis by retaining the June e-firm (phonetic) and the other ones, it's also undermined by the fact that he then resumed his affiliation with the company.

One other point on this is that in addition to the cause not existing, he should be estopped from claiming that it does exist because his rejoining the firm, or rejoining the company, excuse me, indicates that good cause doesn't exist, that there's no conflict there. He wasn't forced to make any false statements, he didn't make any false statements, and therefore the terms of his good reasons don't exist.

The contract does provide for some cash payments if good reasons do exist. Soaking wet, taking every inference in his favor, he's entitled to $165,000. The board approved $180,000. How they can go beyond that as a compromise begs the question. I mean, it's beggar's belief. Further, the additional funds that he was paid were in lieu of stock payments that were supposed to be made. There's no reason why the payments needed to be in cash, especially when the calculation for those cash payments exceeded the market value for the stock that was supposed to be issued.

So not only is he not compromising on the monetary payments, he's not compromising on the stock. And, in fact, going beyond the terms of the agreement such that the board

could not have done that. That was an *ultra vires* act. They did not have the ability to do that.

There's arguments about that this was fully briefed to the board, yet the brief that was presented to the board has never been provided to Mr. Toh; it's never been provided to plaintiff. No cuts for these records are in there. It can't be relied upon. It's the sort of credentialism that's at the worst of this case here. They're manufacturing these issues and saying because of these papers that we have created there's no genuine issue of material fact, when that's not the case at all.

We talk about the intentional acts that are recorded under the business judgment rule. The business judgment rule is not intended to be an absolute immunity for any corporate officer or director in the state of Nevada. It's not that. While there are protections that are involved -- you can't necessarily bring a claim against the directors from your negligence -- that's not what we're asserting here. We're asserting here that Mr. Henderson intentionally acted and knowingly acted against the terms of this contract and against the interests of the shareholders and the company to whom he owed an ethical and legal obligation. He owed a duty of care to those people and he didn't abide by it. He intentionally breached that to enrich himself.

Now, are we entitled to summary judgment issued on

that right now? Obviously not. We haven't even done discovery or disclosures. But Mr. Henderson is also not entitled to discovery on this because he had a fiduciary duty to the company and the shareholders and intentionally acted to manufacture the crisis to promote a settlement which exceeded the contractual amount, and then attempted to induce the other members of the board, to coerce or to conspire with them. I'm not sure which it is yet because we haven't had the discovery or the communications between the counsel.

But we have some problematic things here. First, he raised the payments to the board. They voted themselves a raise, doubling the amount that they were supposed to be paid. Further, they took a million dollars extra out of the company and put it into a trust account that's supposed to indemnify former officers and directors and extended the period of time for those claims, doubling it again. Is that proper? I don't think it is, Your Honor.

THE COURT: But is that against Henderson? I mean, is that -- remember, they're asking for summary judgment. Henderson is the one asking for summary judgment. I've got a limited joinder from Toga. But are you asserting that the amount placed in the fund was part of your claims against Henderson, or the amount done to Toga?

MR. SHAFER: No.

THE COURT: I'm trying to get clarity.

MR. SHAFER: Sure. We are not now claiming that the million dollars is the damages that asserts to Mr. Henderson. What it is is an improper act that acted against the company's interest that is indicia of the cooperation or conspiracy for the coercion to try to unduly influence the members of the board. It's an improper act. Obviously he didn't directly benefit, although he might indirectly benefit at some point because of that. So we are not claiming a million dollars at this point from Mr. Henderson for the money that was put into the trust account, but we are indicating that that is a further violation of his breach of his fiduciary duty to where he has enriched or benefitted himself at the expense of the company.

We talk about Chur. Chur doesn't say we get -- you can do whatever you want, you get scot-free and make up the rules as you go along. What it says is you can't just have negligence; that in the ordinary course if you disagree with their decision that that's not enough. But that's not what we have here. We have clear evidence that he conspired or coerced or hoodwinked the board into approving a, quote, unquote, "settlement" that was more than he was entitled to under the express terms of the contract.

So we have asked -- we've asked a long time that the board not act, that there be a clear delineation of who is entitled to run the company. The board has routinely delayed,

delayed, delayed that. Now there is a meeting set for July. The reason that the case should be dismissed -- well, that's not before the Court today.

The case should not be dismissed on the merits because this, again, is a further inclination of Mr. Henderson acting to benefit himself at the expense of the shareholders, rather than let the shareholders and the officers or the directors of the corporation make the determination. He's trying to rush this through in order to prejudice the rights of the shareholders, the same shareholders he claims should not be prejudiced in their other rights.

I think it would be absolutely inappropriate to grant summary judgment now. I appreciate that the 56(d) declaration was not filed in support of our application. I think that good cause exists for its notification of their received existence. If that's not the case, we'd be happy to allow the Court to extend this motion so that plaintiff -- or defendant, excuse me, can respond if they need to, but I don't think it's necessary.

I think the issue here is we're at the outset of the case. No discovery has been done. They've presented some unsigned information which they claim are the records, which we contest aren't valid. And on that basis there is no basis for summary judgment at this point. The Court -- and I don't believe that the Court can find that there is no genuine issue

of material fact as to our claims against Mr. Henderson at this point.

Unless the Court has any further questions --

THE COURT: I do.

MR. SHAFER: Okay.

THE COURT: How do I take into account any of your three untimely documents that are not in accordance with the rules; right? You have an untimely opposition filed on 5/19; Document 58. You have an untimely supplement to an opposition filed on 5/23 at 5:13 p.m.; Document 64. And then you have your declaration regarding a corrected supplement, a corrected supplement; 65 and 66. How do I take any of those into account because none of them are timely and they violate the rules?

MR. SHAFER: Well, the opposition, we had an understanding with defendant's counsel to get an extension of time to file the opposition.

THE COURT: It says that the extension was only to the 18th and you filed it on the 19th. And it was never approved by the Court, regardless. So two separate questions; right?

MR. SHAFER: Sure.

THE COURT: One, they filed their non-opposition because they said your agreement was only until the 18th and you hadn't filed it by the 18th. They filed a non-opposition

on the 19th and then shortly thereafter -- theirs was Document 57 and then all of a sudden shortly thereafter Document 58 pops up, which is the opposition. But they say it's a day late from you, even in your informal agreement, which can't be an effective agreement because it's not signed by the Court. But even without the Court signing issue, how is it timely even by your informal agreement?

MR. SHAFER: Well, I apologize for that. On the 18th we intended to file it but we had computer issues which precluded it being filed the 18th. And I tried to address that. I spoke to counsel for Mr. Henderson, who said just get it in, we'll be fine. I offered to extend the hearing date if additional time was needed and to put together a stipulation.

I apologize for my personal failings before the Court, but certainly my client should not be prejudiced by that when there was an agreement. And I understand that perhaps a stipulation and order should have been presented to the Court to extend that deadline and I apologize for that, and I will not do so in the future.

THE COURT: And how about the supplement that wasn't even filed until 5/23 or the declaration, 5/23, or the other corrected supplement on 5/23, which is way --

MR. SHAFER: Okay. Well --

THE COURT: -- right, that's after the reply date.

MR. SHAFER: Sure.

THE COURT: That is less than 24 hours before a hearing. And after they filed --

MR. SHAFER: Again, I apologize for that. That declaration should have been attached to the opposition. It was not until I was preparing for the hearing that I discovered it had not been.

THE COURT: Okay. Thank you so much.

Okay. Movant, you get a brief last word. You can appreciate we've got a courtroom full, we've got a semi screen full of people as well. Go ahead, please.

MR. BECKSTROM: I'll be very brief, Your Honor. James Beckstrom on behalf of Alexander Henderson. A couple things of importance here, okay. Facts about the underlying dispute don't matter, okay. He doesn't understand this point. The business judgment rule is designed exactly for this reason. The simplest way of thinking about it is no Monday morning quarterbacking absent --

THE COURT: Tuesday these days, but go ahead.

MR. BECKSTROM: Tuesday these days. Facts saying, hey, clearly fraudulent act. Clearly intentional act. Chur is very clear on it. The Nevada Supreme Court has gone above and beyond the Shoen case and it continues to expand and strengthen that doctrine. So none of the underlying facts matter.

Very interesting, we get a lot of words, you know, coercion, brainwashed. None of that matters, okay. The board had a contested claim and they actually -- even the allegations of, well, he was paid more than he was, it was a compromised claim, okay. Arms length. In fact, Mr. Henderson was due in excess of 180,000 more. He compromised the claim. So none of that matters, okay.

Mr. Shafer concedes the board approved. The board approved. It's not at issue here. Neither is Section 3.9. We had about one sentence of argument on that. The Court has ruled on that. I won't say any more about it.

The board has not been sued here, either. Again, Mr. Henderson never blessed this contract. A very different scenario if we have Mr. Henderson being the only person to act and bless his own contract. Not what happened here, okay. The board, three of them independent, approved this agreement.

Now, it's also interesting when we look at whether these meetings were properly noticed. These same meetings are the ones that authorized this, you know, majestic shareholders meeting. There's no dispute. Mr. Shafer is not here saying, well, the shareholder meeting they planned isn't accurate. We're going forward with that. Everything done at the board of directors meeting was legal. The contract is legal. And Mr. Toh has nothing but hurt feelings, Your Honor. And that's unfortunate, but in the corporate context that's how the

cookie crumbles.

They have not met their burden to bring any type of fiduciary duty claim. There is no claim here and no issue before this Court that should preclude summary judgment.

THE COURT: Okay. The Court is going to have a quick question, though.

MR. BECKSTROM: Yes.

THE COURT: Walk back through counsel for plaintiff's assertion that the monetary amounts are disputed and that would preclude summary judgment because the monetary amounts are disputed as to what your client should have gotten, the one sixty-five versus the one eighty. Do you wish to address that?

MR. BECKSTROM: Yes, I do, because it's very simple. And I tried to address it at the beginning of this rebuttal here. This was a compromised claim. Mr. Henderson said my contract entitles me to X, okay. I don't want this to get nasty, board. Get an opinion. They got an opinion. They got a letter and the board decided this is the amount we're willing to pay you; accept or not. Accept. Arms-length transaction memorialized, okay.

That claim is no different than any other contested claim. And what Mr. Toh is trying to do is come back and collaterally dig and say, well, the board should have taken this into account. You know, this may have been inflated.

Well, the board made the decision and they weighed their options. And the business judgment rule and the bylaws state that absent a showing of fraud or some intentional act on behalf of the board, who's not sued here, that contract is valid. So it's very simple. We can't collaterally attack these, and this is exactly what the business judgment rule protects.

THE COURT: Okay, thank you. Do you have --

MR. CLEMENT: Can I just make -- well, I don't --

THE COURT: Remember, yours was not a substantive joinder, so.

MR. CLEMENT: Yeah.

COURT RECORDER: You'll have to go to the mic, too, if you need to -- up there. Sorry.

THE COURT: If you wish to make a quick --

MR. CLEMENT: No comments, Your Honor. I'm okay.

THE COURT: Okay, no worries.

Okay, so here's the Court's ruling. The Court is going to give two specific alternative bases, okay. The first is a procedural ruling. Procedurally the Court needs to grant defendant Alexander Henderson's motion for summary judgment, Document 44, and the limited joinder, Document 52 procedurally because even taking the informal agreement between the parties for an extension of the opposition, there was not a timely opposition. There was not -- even taking

into account the opposition, there still was not the appropriate evidentiary support required under Rule 56 timely provided because you can't take into account things filed less than a judicial day, i.e., Document 64, 65 and 66, which purported to be supplements and declarations, which were filed less than 24 hours before the hearing and way after when the replies were due. So that is a pure procedural ruling, that it would need to be granted for being unopposed; EDCR 2.20.

Now let's get into a specific alternative basis. The alternative and really the main basis for the Court is the substantive ruling. The substantive ruling is the Court is also going to find that the motion for summary judgment, Document 44, and the limited joinder, Document 52, are granted.

Let's first go to the Rule 56(d) request and whether that would preclude the Court from ruling today. The Court finds it does not. Not only is the Rule 56(d) request not appropriate, Choy v. Ameristar -- fully appreciating that Choy v. Ameristar was under 56(f) before the changes in 2019. However, the analysis of Choy is still in full force and effect and there was not the appropriate aspects set forth for it to be a proper 56(d) motion. That's fully taking into account, separate and apart from the procedural issue of it being untimely.

So then you look at even if you somehow could

consider the 56(d) motion as being proper, which it's not, then a third basis there would be the fact that this is not a standard case where really you haven't done anything at the early inception. You all have been here a lot. You have already done a significant amount of work. The fact that you both referenced at the beginning of this hearing about advancing and granting the motions to redact documents because those documents were already before the Court in prior hearings, you all have already had that full opportunity. You already have all the -- a lot of the information.

So here really the Court even substantively, if it got that far past the failure for Choy v. Ameristar, still would find that 56(d) is not proper because it would not preclude when you look at the facts that have -- are really in the control of the parties.

So now you go to the substantive motion itself. The Court can't just focus on the August 28th. The court has to look at the totality of the undisputed facts before the Court. The Court does then have to take into account subsequent meetings that had taken place. And taking all of the actual evidence presented to the Court, then the Court does not find that there's a material issue of fact in dispute as to what happened.

3.9, the Court already ruled on its interpretation. If for some reason somebody is saying the Court didn't, the

Court would reaffirm the plain, clear language of 3.9 has an alternative provision, right. One is it can be the chairman and the second is -- there's an "or," right? The or -- and it was even underlined in the moving papers and I believe in the reply, too -- provision means that the meetings could take place. Here you have meetings taking place. You have the appropriate notice being given. Even taking the disputed August 28th, you then have September and the subsequent meetings.

You then have the actions taken at said meetings; the approval by the majority consistent with the underlying documentation. So therefore when you look at the actual evidence presented to the Court, it finds that the Henderson summary judgment would need to be granted.

Therefore, the claims with regards to declaratory relief, the breach of contract, breach of good faith and fair dealing, unjust enrichment, breach of loyalty and breach of fiduciary duty would all have to be appropriately granted pursuant to summary judgment.

Now, the Court, before it goes to -- then we have the second aspect with regards to all the claims as improper derivative claims. The Court really didn't see that there was much really in response to the derivative claims. The Court, based on what's the evidence under Rule 56, would have to grant the balance of those claims based on what's set forth

and adopting the legal argument and the undisputed facts in the motion and reply.

Now, with regards to Toga Limited, the Court is going to ask one question before it goes to its ruling. The way this Court saw, because it was a non-substantive joinder, Toga Limited was joining in on the relief requested by Henderson only, was not asking for specific relief against itself, Toga Limited, because that would have required its own substantive pleading with some points and authorities.

Is that correct on behalf of Toga Limited?

MR. CLEMENT: The way I understood it is that the ruling would kind of necessarily apply to Toga because much of what was being asserted by the plaintiff were board actions, although he didn't name the individual board members. So --

THE COURT: The Court doesn't see it that way.

MR. CLEMENT: Okay.

THE COURT: When you do a non-substantive joinder, then you're, right, you're saying you're joining in Henderson's. And I don't have a substantive joinder that would provide this Court points and authorities on why the requested relief would equally apply to a separate independent -- this would be entity versus individual, right, and there's rules, differences between individuals and entities. Really the Court sees that you're supporting Henderson's but not seeing specifically on Toga. The reason why the Court was

asking that question. But I don't see it on a non-substantive joinder. I didn't see how that could --

MR. CLEMENT: That's fine. I guess we can move on it subsequently. You know, I understood that it would be two sides of the coin, really. I mean, a lot of what we argued today were business judgment rules as to the board as it applies to Mr. Henderson. But I understand what you're saying.

THE COURT: So the Court's ruling is to the extent the joinder applies to Henderson, the Court has granted. The Court is not granting independent relief as to Toga because in a non-substantive joinder under the EDCR then the Court wouldn't see that there is the appropriate points and authorities as to why any said relief would go to a separate entity versus the individual who did the motion.

MR. CLEMENT: Understood.

THE COURT: Okay?

MR. CLEMENT: Okay.

THE COURT: So that's the Court's ruling. That means, Henderson, you're preparing the order. That means you're going to circulate it to all parties in accordance with EDCR 7.21, return it back to the Court's inbox in accordance with the administrative orders.

And the Court is going to thank you all and wish you a great rest of your day and week. Thank you so very much.

MR. BECKSTROM: Thank you, Your Honor.

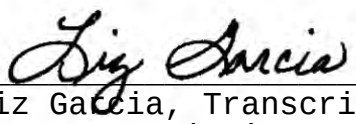
MR. SHAFER: Thank you, Your Honor.

THE COURT: Thank you.

(PROCEEDINGS CONCLUDED AT 9:19 A.M.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, v. ALEXANDER HENDERSON, an Individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31

REPLY IN SUPPORT OF MOTION TO DISQUALIFY CHAD F. CLEMENT, ESQ., JORDON W MONTET, ESQ AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED and JAMES A. BECKSTROM, ESQ AS COUNSEL FOR ALEXANDER HENDERSON

Plaintiff MICHAEL TOH KOK SOON ("Plaintiff") by and through his attorneys of record, the law firm of Cory Reade Dows and Shafer, hereby submits this reply in support of an order disqualifying Chad F. Clement, Esq., Jordon W. Montet, Esq. and Marquis Aurbach Coffing Conflicted Counsel from representing TOGA LIMITED ("Toga") and James A. Beckstrom, Esq from representing ALEXANDER HENDERSON ("Henderson) (collectively "Conflicted Counsel") due to an unwaivable conflict of interest pursuant to the Nevada Rules of Professional

Conduct 1.7. This Reply is made and based upon all papers, pleadings, and records on file herein, the attached Memorandum of Points and Authorities, and any oral argument allowed at a hearing on this motion.

DATED this 16th day of June.

CORY READE DOWS AND SHAFER

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POINTS AND AUTHORITIES

In this matter, Plaintiff, the largest shareholder of Toga, filed suit against Henderson because Henderson failed to comply with his employment contract and other duties owed to Toga. Plaintiff brought this action as a shareholder in a derivative capacity *on behalf of* Toga. The claims asserted are *Toga's claims against Henderson*. Toga is named as a nominal defendant, but it is the "real party in interest" plaintiff. If Henderson is found liable and there is an award of damages against Henderson, it would belong to Toga. Defendant agrees with this proposition, but it claims that no harm exists nor is there any basis to disqualify as waivers were obtained.

Even though Henderson (Defendant) and Toga (the Real Plaintiff in Interest) have adverse interests in this litigation, Conflicted Counsel Chad F. Clement, Esq., Jordon W. Montet, Esq. as well as the other attorneys at Marquis Aurbach Coffing ("MAC"), and James A. Beckstrom, Esq. have entered an appearance for both Henderson and Toga and gained confidential information and have conflicting obligations to their clients.

Confidential information was obtained by these attorneys in their inappropriate joint representation of Henderson and Toga causing a conflict of interest, which conflict cannot be circumvented or waived. While an attorney may represent an organization and its constituents,

the representation of Toga and Henderson in this litigation where Toga has claims *against* Henderson cannot comply with NRPC 1.7, 1.8 1.9 and NRPC 1.13 because there is a concurrent conflict of interest; they are directly adverse parties. As such, the court should disqualify the Conflicted Counsel from representing Henderson and Toga as this concurrent conflict of interest cannot be waived.

The court's granting of summary judgment in favor of Henderson does not preclude this court from hearing or considering this motion. Post judgment motions will and are occurring, and this matter will be considered on appeal. This issue is thus ripe.

If the court finds that Plaintiff lacks standing to assert the derivative claims he brought, and thus Plaintiff has no standing to bring this Motion to Disqualify, the court should make this specific determination.

The Nevada Rules of Professional Conduct must strictly be adhered to, as they protect not only the parties, by the entire system of justice. Given the conflicts and violations raised in the Motion, there can be no dispute that disqualification must occur.

Further, James Beckstrom, Counsel for Henderson, has not opposed this motion, but has only filed a joinder to Toga's opposition. This lack of opposition must be taken as recognition of the validity of the motion. Further, as the argument for disqualification of disqualification is different, then the lack of substantive opposition must be considered a concession to the requested relief.

ARGUMENT

I. THERE IS AN UNWAIVABLE CONCURRENT CONFLICT OF INTERREST UNDER NRPC 1.7(B)(3) BECAUSE HENDERSON'S INTEREST IN THIS LITIGATION IS DIRECTLY ADVERSE TO TOGA'S INTEREST

In the Toga's Opposition, Toga fails to address the un-waivable nature of the conflict of interest caused by MAC's representation of both Toga, as the nominal defendant in this shareholder derivative action, and Henderson, the target defendant. They are directly adverse parties, which creates a concurrent conflict of interest under the NRPC, and no waiver is possible.

Under the NRPC, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." NRPC 1.7(a). The rule defines a current conflict of interest as where the "representation of one client will be directly adverse to another client" or it poses "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." NRPC 1.7(a)(1), (2). Further, Henderson and Toga cannot waive this conflict under NRPC 1.7 because NRPC 1.7(b)(3) prohibits any waiver when the clients are directly adverse in the *same litigation*.

> **Rule 1.7. Conflict of Interest: Current Clients.**
>
> (a) Except as provided in paragraph (b), ***a lawyer shall not represent a client if the representation involves a concurrent conflict of interest***. A concurrent conflict of interest exists if:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) The representation is not prohibited by law;
>
> (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer ***in the same litigation*** or other proceeding before a tribunal; and
>
> (4) Each affected client gives informed consent, confirmed in writing.

(Emphasis added).

Conflicted Counsel represented Toga and Henderson at the same time in the same action. Conflicted counsel represented them from September of 2021 until February 15, 2022, which evidenced a concurrent conflict of interest under NRPC 1.7(a). They are directly adverse parties in the same action. It is a concurrent conflict of interest, which is strictly prohibited. The rule says "shall not." This type of conflict is not waivable under NRPC 1.7(b)(3) because MAC's representation involves the assertion of a claim by one client, Toga, against another client, Henderson, in the same litigation. The subsequent referral of Henderson to Beckstrom does not change this original breach of NRPC 1.7(a), but indeed is evidence of their knowledge of the

conflict. See Opposition page 7:1-2. The granting of summary judgment does not fix the original ethical breach. It tainted and continues to taint all Conflicted Counsel, requiring disqualification

Toga argues that the burden to prove disqualification under the NRPC is so exceedingly high to try and create an insurmountable bar. Opposition at 3, lines 25-26. To support the position that there is a high burden of proof, Toga's counsel cites to a footnote in an unpublished decision. Opposition at 3, lines 25-26, citing to Practice Mgmt. Sols., Ltd. Liab. Co. v. Eighth Judicial Dist. Court, 132 Nev. 1019 n.4 (2016) This is not the state of the law and is not supported by their briefing. Indeed, this same case takes the position that the court should "resolve all doubts in favor of disqualification." Id. [1] Here, Plaintiff has been concerned about the existence of a conflict of interest for some time and previously filed a motion, which was withdrawn during the stay that the parties entered into on November 16, 2021 ("STIPULATION AND ORDER TO STAY CASE") and then again attempted on January 10, 2022.

Here, Plaintiff has brought derivative claims on behalf of Toga alleging improper conduct by Henderson. Counsel for Toga, MAC, also represented Henderson when its client, Toga, is adverse to Henderson in the same lawsuit. This a concurrent conflict of interest causes an ethical breach, and acts to disrupt the integrity of the bar and the public's perception thereof. It is not waivable under NRPC 1.7(b)(3).

Finally, under NRPC 1.7, Counsel must provide "competent and diligent representation to each affected client."[2] When the benefit to Henderson must necessarily come at the cost to Toga, and vice-versa, it is impossible for counsel to provide full representation to both parties. Here, there is a clear an irreconcilable conflict, which must be addressed by the Court to preserve the integrity of the bar.

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1 Note that Defendant's brief did not properly cite this decision, omitting the Nevada reporter or full name of the case. See Opposition to motion to disqualify, page 3:25-26.

2 While a lawyer may represent both the organization and its directors, officers, or other constituents, the joint representation must comply with NRPC 1.7. NRPC 1.13(g).

II. A MAJORITY OF JURISDICTIONS EXAMINING CONFLICTS OF INTEREST IN SHAREHOLDER DERIVATIVE SUITS AGREE THAT THE LAWYER REPRESENTING THE NOMINAL DEFENDANT CORPORATION CANNOT ALSO REPRESENT THE DIRECTOR WHO IS THE TARGET OF THE CLAIMS

As Henderson's and Toga's interests are directly adverse, counsel cannot "provide competent and diligent representation to each affected client." NRPC 1.7(b)(1). Defendant argues that "Henderson is a Director and Officer of the Company" and as such there is no conflict in having one firm represent both. See Opposition page 6, lines 25-26. There is no legal basis for this position, nor is there any factual basis. If Henderson were not a director or officer, there would be no need for a derivative action. Henderson's current status as either a director or separately represented party does not resolve the conflict. Henderson and Toga were and are directly adverse regarding Toga's employment claims against Henderson, and the same attorney or law firm cannot represent both sides of this contest. This litigation is related to Henderson's breaches of contract and fiduciary duties to Toga. Since both Henderson's and Toga's interests are directly adverse in this litigation, one law firm representing both the real-party-in-interest plaintiff and the target defendant cannot comply with the NRPC.

Toga asserts that other courts have addressed the issue of conflict of interest in a derivative lawsuit. Toga misleads the court by suggesting that Robinson v. Snell's Limbs & Braces of New Orleans, Inc., 538 So. 2d 1045, 1048 (La. Ct. App. 1989) is indicative of the majority of decisions, when it is not. Robinson, which is a thirty plus year old decision from an intermediate appellate court in a jurisdiction with different rules and a different codified jurisprudence, is the exception to the rule established by a majority of jurisdictions. The majority of courts addressing the issue here have concluded that representation by one law firm of both the company and the insider defendants in a shareholder derivative suit is categorically impermissible. See In re Oracle Sec. Litig., 829 F. Supp. 1176, 1188-89 (N.D. Cal. 1993) ("Here, because Oracle's special settlement committee lacked independent counsel, the derivative settlement reeks of collusion between derivative plaintiffs' counsel and the individual defendants, at the expense of the corporation."); *see also* In re Conduct of Kinsey, 294 Ore. 544, 660 P.2d 660, 669 (Or. 1983) (requiring separate

counsel unless the claim is "patently sham or patently frivolous"); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 216 n.10 (N.D. Ill. 1975) ("This consent rationale seems peculiarly inapplicable to a derivative suit, because the corporation must consent through the directors, who . . . are the individual defendants"), *aff'd in part, rev'd in part*, 532 F.2d 1118 (7th Cir. 1976); Clark v. Lomas & Nettleton Fin. Corp., 79 F.R.D. 658 (N.D. Tex. 1978) (*citing* Cannon and similar cases); Frank v. Ducy, 1986 WL 1964 (N.D. Ill. No. 85C9642, Feb. 10, 1986) ("Courts have been increasingly reluctant to permit a single lawyer or law firm to represent both a corporation and the individual directors in shareholder's derivative actions"); Horowitz v. Horowitz, 151 A.D.2d 646, 542 N.Y.S.2d 708 (1989); Tydings v. Berk Enters., 80 Md. App. 634, 565 A.2d 390, 393 (Md.App. 1989) ("Representation of a corporation as an entity and the majority of its directors, individually, creates a possible conflict of interest for the attorney, particularly where the corporation's interests are adverse to those of the directors") (*citing* Model Rules of Professional Conduct); Rowen v. LeMars Mut. Ins. Co., 230 N.W.2d 905, 914-15 (Iowa 1975) ("It is also well established that a potential conflict of interest exists when the same law firm attempts to represent the nominal corporate defendant in a derivative action while at the same time representing the corporate insiders accused of wrongdoing") (citing numerous cases). Stepak ex rel. S. Co. v. Addison, 20 F.3d 398, 404-05 (11th Cir. 1994) (disqualification required in derivative suit for firm who previously represented board-member defendants when there are allegations of fraud or improper dealing).

The analysis of the weight of the jurisdictions is spot on. A firm cannot represent the party accused of malfeasance and the party who is to benefit from recovery of these detrimental actions in a share.[3] MAC's concurrent representation of Toga and Henderson in this lawsuit is precluded by the NRPC because there are claims by Toga against Henderson causing a direct conflict of interest which is unwaivable.

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3 Again, the derivative suit is not aimed at the "board of directors" of Toga, but at Defendant Henderson. See Opposition to Motion to Disqualify, page 7:22-24.

III. MAC REPRESENTS THE ENTITY, TOGA, AND NOT TOGA'S BOARD OF DIRECTORS

Plaintiff Toh brought this derivative lawsuit to protect Toga's assets and interests because Toga has been damaged by Henderson's acts. Toga is named as a nominal defendant in this shareholder derivate lawsuit.

As in all shareholder derivate lawsuits, the board of directors and the corporation are separate and distinct parties because the corporation has been injured by the actions of its insiders, often the board of directors. While the board oversees the corporation, the directors are not the corporation. They have different interests and different liabilities. MAC conflates the parties. MAC continues to misidentify the correct party, asserting that MAC is representing Toga's board of directors and not the corporation, but that is not true. This is problematic in many ways because it means that Conflicted Counsel may not know who they are actually representing, or that they are not representing the corporation's interests appropriately or are making misrepresentations to this court in violation of their ethical duty of candor under NRPC 3.3.

For example, MAC argues that Plaintiff should not be able to "cherry pick who will serve as defense counsel representing the actions of the Toga Board of Directors." Opposition Page 6:1-2. Even though Plaintiff is not seeking to pick who represents anyone besides himself, this is problematic as the only Toga director who is involved in this lawsuit is Henderson; none of the other board members are named. As explained herein, the problem is that Conflicted Counsel has a conflict of interest by representing both the director and the corporation, but instead of acknowledging the issue, Conflicted counsel obfuscates and confuses it by asserting that there is "dual representation of Henderson and the Board of Directors (which includes Henderson)," which is simply not true. See Opposition page 6:21-23.

Here, Conflicted Counsel claim to represent Toga's board of directors and acknowledge at the same time that Plaintiff is also a board member. Opposition Page 5:9-12. Yet, Conflicted Counsel cannot represent Plaintiff. They cannot and do not represent any board members, as such representation would be a conflict to their duty to represent the corporation. Conflicted Counsel

claims to have consulted and obtained approval from the Board of Directors, but never consulted with Plaintiff. See Opposition Exhibit A Declaration of Counsel - paragraph 4. The issue before the court is simple. Conflicted counsel cannot represent both sides of a dispute. They cannot represent both the plaintiff and defendant. There is a concurrent conflict which cannot be waived under NRPC 1.7(b)(3), and the attempt to avoid this conflict is an ethical violation not just for counsel but for the board of directors who are authorizing the same. The Court cannot sanction a prior ethical violation and must not allow this violation to continue. As such, the court should disqualify Conflicted Counsel so that no further violations may continue.

IV. NRPC 1.7 MANDATES DISQUALIFICATIONS WHEN CONFIDENTIAL INFORMATION IS OBTAINED

One reason for disqualifying counsel is to prevent disclosure of confidential information that could be used to a former client's disadvantage. See Nevada Yellow Cab v. Eighth Judicial District Court, 123 Nev. 44, 152 P.3d 737 (2007). In that case, court examined whether there was a former client, whether the former representation is "substantially related" and whether the representation is adverse. Id. 123 Nev. at 49. Toga's argument also fails to address NRPC 1.9. This rule provides that a lawyer shall not use information related to the representation against the former client's interest or that there was no conflict in the interests of Toga and Henderson.

Here, MAC's current client is Toga, and its former client is Henderson. Beckstrom's former client is Toga, and his current client is Henderson. The scope of the representation is the same matter. Itis reasonable to infer that Henderson gave confidential information to MAC when MAC represented Henderson and that Toga gave confidential information to Beckstrom when he represented Toga and it is reasonable to infer that the information is "relevant to the issues raised in the present litigation. Id. 123 Nev. at 52 (citing to Waid v. District Court., 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005)).

Despite Toga's argument, it is implausible that MAC and Beckstrom did not obtain confidential information about Toga and Henderson while they simultaneously represented Toga and Henderson when Beckstrom was at MAC. Disqualification to protect confidential information

is warranted to protect Toga. Waiver cannot be obtained, nor can any structural barriers at either firm be erected to partition or protect this confidential information. Henderson cannot waive the conflict as this belongs to the corporation. Nor can counsel waive for it would be prejudicial to allow for improper information gained by Mr. Beckstrom during his time as counsel for Toga to be used to defend Henderson. Accordingly, attorney disqualification is warranted.

V. THIS COURT HAS BROAD DISCRETION IN ORDERING DISQUALIFICATION

Toga argues that disqualification of counsel is a disfavored remedy and should only be applied when no other alternative exists, relying upon Millen v. Eighth Judicial Dist. ex rel. County of Clark, 122 Nev. 1245, 1256, 148 P.3d 694, 701–02 (2006). Opposition at 9, lines 9-11. Toga's interpretation of Millen is incorrect and not the holding of this case. In Millen, the Nevada Supreme Court considered the application and propriety of a judicial recusal list. As the court is aware, a judge's recusal list is a registry of persons with respect to whom the judge has some disqualifying relationship that would warrant the judge's disqualification from hearing the case. In this case, an attorney who was a former family court judge entered an appearance on behalf of a party in a divorce proceeding. The issue before the court was whether the retention of the attorney was intended to force a judge's disqualification, thus obstructing the court's management of its calendar. Millen, 122 Nev. at 1256, 148 P.3d at 702. The court was not concerned with the conflict of interest between parties, or an attorney's compliance with NRPC 1.7.

"District courts are responsible for controlling the conduct of attorneys practicing before them and have broad discretion in determining whether disqualification is required in a particular case." Brown v. The Eighth Judicial District Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000). Therefore, the law is that this court has broad discretion in ordering disqualification and not that it is a disfavored remedy. Id.

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/ / /

VI. COUNSEL SHOULD BE DISQUALIFIED BECAUSE OF IMPROPER ACTIONS.

Toga concedes that in a derivative action where the corporation stands to benefit, a corporation is required to take a neutral position and cannot oppose or defend such action on the merits. Cotter on behalf of Reading International, Inc. v. Kane, 136 Nev. 559, 563 473 P.3d 451, 455 (2020). *Here,* Defendant and its counsel have taken direct action against Plaintiff and the interests of the company.

Counsel purports to support the motion to disqualify with the sworn statement of counsel, which is insufficient if not entirely without merit. Counsel's declaration states that a waiver of the conflict of interest between Toga and Henderson has been obtained in writing. Counsel does not specify when these waivers were obtained and does not attach these executed written waivers as evidence; they could be redacted to protect any attorney-client privileged information. Moreover, as these are substantive rights which should be in Plaintiff's control as the party asserting Toga's rights and they cannot be waived. Even if this conflict could be waived, which it cannot, there is no indication that the waivers predated the commencement of MAC's representation which would cause its own conflict. The Declaration goes on to state that "There was no exchange of confidential information in this case that relates to any party or entity involved in this case." See Exhibit A to Opposition, Paragraph 6. However, this cannot be the case as there necessarily is confidential information. This is why there were matters filed under seal, and also why both Henderson and Toga refused to turn over all of the communications and records. Moreover, the Declaration states that "Since Henderson obtained separate counsel, there has been no exchange of confidential information in this case that relates to any party or entity involved in this case." See Exhibit A to Opposition, Paragraph 7. But there is no specificity on the documents or information exchanges prior to March of 2022.

There is no requirement in the rules cited herein to show "improper action" beyond the continued representation of parties in direct contravention of the rules. Plaintiff does not believe it necessary to show that Mr. Clement, Ms. Montet, Mr. Beckstrom, or anyone else knowingly acted improperly beyond the continued representation. Plaintiff alerted MAC to this conflict of

interest in November of 2021, and so counsel should have known of the existence of a conflict. It has become abundantly clear that while purportedly representing Toga, MAC took improper actions by coordinating a defense for Henderson to Toga's detriment. Had MAC not inexplicably filed an answer when the matter was set to be dismissed, or had they not opposed the setting aside of the dismissal, Toga would not have incurred the costs unnecessarily incurred in every action since. This is doubly true as Toga is likely paying for the defense of Henderson. This does not even begin to address the potential harm which may have been impacted by the Motion for Summary Judgment, and how Henderson got the confidential business records that were not made available to plaintiff. The "settlement agreement" which was "approved" by the board did not benefit the company one whit. Despite the suggestion that there was a compromise, when specifically addressed, Henderson denies that there is any compromise or release.[4]

Here, MAC's continued representation of Toga means there is a direct conflict which hampers their representation. MAC has taken position on behalf of Toga which are directly adverse to Toga's best interests (and not its board of directors). The analysis is clear, in that this violation alone is grounds for disqualification. Whether further sanctions should apply are not the purview of the instant motion, and thus the consideration of other ethical violations should not be the basis for the lower standard for disqualification.

Due to the nature of this action, not only would it be appropriate for the Court to disqualify the MAC as counsel for Toga due to its unwaivable conflict and improper actions to the benefit of Henderson and to the detriment of Toga, but it would also be appropriate to strike all of the pleadings because Toga has taken adverse positions against Plaintiff Toh in this derivative action, which is not permissible under the Nevada Supreme Court's holding in Cotter.

VII. DISQUALIFICATION APPLIES TO COUNSEL FOR HENDERSON

To the extent that the lack of any substantive opposition is not unambiguous evidence of the merits to disqualify James Beckstrom, the analysis shown herein applies to him and his firm as well. While there is a clear disqualification for MAC as counsel for Toga, the company was

4 See Exhibit 1, Communication with Attorney Beckstrom, dated June 1, 2022.

also represented by James Beckstrom prior to his departure from MAC. This raises the same concurrent conflict as with Toga. He has the same issues regarding unhaveable conflict under NRPC 1.7. He was party to the same confidential information of Toga. All conflicted counsel took actions against the interest of Toga, as it appears that all conflicted counsel favored the interests of Henderson over the company and its shareholders. As such all Conflicted Counsel should be disqualified.

VIII. DISQUALIFICATION IS NOT PRECLUDED BY THE COURT'S GRANTING OF SUMMARY JUDGMENT IN HENDERSON'S FAVOR

Toga asserts that because this court has granted summary judgment as to the claims against Henderson that disqualification has been waived or rendered moot. Opposition page 8:16-18. There is no case law supporting this position. Nor is such a position logically correct. Just because an adjudication on the merits of some claims has occurred, the underlying breach of the ethical rules by the lawyers involved does not disappear. There remain issues to adjudicate as to the summary judgment was only as to Henderson. Further, there are pending post-trial motions, and will likely be an appeal. As such the issue of disqualification is ripe, and the prejudice for a conflict and ethical violation not reduced by the grant of summary judgment.

IX. PLAINTIFF HAS STANDING TO RAISE THIS UNWAIVABLE CONFLICT OF INTEREST BECAUSE THIS IS A DERIVATIVE ACTION

Toga asserts that Plaintiff lacks standing to seek disqualification of MAC and Beckstrom because he is not a former client of either law firm. This position lacks merit. Here, Plaintiff has standing to object because this is a derivative action where he is seeking to assert Toga's rights. He is standing in the shoes of Toga. Toga is a current client of MAC and a former client of Beckstrom. Plaintiffs is asserting the disqualification as a representative of Toga because it clearly has not been accurately represented in this proceeding.

While a lawyer may represent both the organization and its directors, officers, or other constituents, the joint representation must comply with NRPC 1.7. NRPC 1.13(g). "A derivative action is a suit by a shareholder to enforce a corporate cause of action." Price v. Gurney, 324 U.S.

100, 105, 65 S. Ct. 513, 516 (1945). "[T]he relief which is granted is a judgment against a third person in favor of the corporation." Id. While there are other claims being brought against Henderson for his breach of duties to Toga, a number of the claims relate directly to the Board not having the authority authorize a severance package for Mr. Henderson. See Complaint ¶¶ 27–34. As this case will determine what Henderson owes to Toga or alternatively, what Toga owes Henderson, there are adverse claims in this litigation between the parties and Defendants cannot satisfy the third prong on the test. Plaintiff does not seek to choose the counsel for Toga.[5] Rather Plaintiff does not believe that it is proper for one law firm to represent both the actual plaintiff and the actual defendant in a derivative lawsuit.

Moreover, disqualification can occur when a non-client shows an ethical breach that so infects the litigation that it impacts the moving party's interest in a just and lawful determination of its claims. Fid. & Deposit Co. v. Travelers Cas. & Sur. Co. of Am., No. 2:13-cv-00380-JAD-GWF, 2017 U.S. Dist. LEXIS 133519, at *14-15 (D. Nev. Aug. 21, 2017) Also, the court may also disqualify an attorney from representing a particular client in order to preserve the integrity of the bar. Sentry Select Ins. Co. v. Meyer, 2011 U.S. Dist. LEXIS 36290, 2011 WL 110333, at *7 (D.Nev. March 23, 2011) (*citing* Coles v. Arizona Charlie's, 973 F.Supp. 971, 973 (D.Nev. 1997)).

Toga and Henderson argue that Plaintiff lacks standing to object to the gross ethical violation by Conflicted Counsel because Conflicted Counsel never represented Plaintiff. This argument intentionally or negligently misstates the facts and the standard. First, it is false to state that "Plaintiff has always been the opposing party to the clients [Defendants' Counsel] represented. Plaintiff has brought a derivative lawsuit *on behalf of* Toga. Plaintiff has not and is not adverse to Toga's interests. Plaintiff and Toga are however adverse to Henderson. The conflict is that Toga and Henderson's interests are necessarily adverse to each other as Toga is the real plaintiff in interest, and Henderson is the defendant.[6] Plaintiff, as a shareholder of the corporation bringing

5 Defendant misstates that the issue arises out of "who will serve as defense counsel representing the actions of the Toga Board of Directors" as the Board of Directors have not been a party to the lawsuit. (See Opposition to Motion to Disqualify, page 6:1-2. Indeed, only one person has been a Defendant, Alexander Henderson, and the failure to recognize this is a significant obstacle in the proper handling of this matter.

6 The court will recall that in the motion to dismiss, there was argument about improper settlement negotiations or dismissals to cut off an actual hearing. This is the exact concern presented by Defendants' joint representation.

claims on behalf of the corporation, which is a client of Conflicted Counsel, should have standing to assert disqualification.

CONCLUSION

Conflicted Counsel's joint representation of Henderson and Toga at the outset of this case was impermissible due to the parties being directly adverse to each other in the same case and the adversity creates a concurrent conflict of interest for their lawyers that is unwaivable. The fact that Mr. Beckstrom has since left Marquis Aurbach Coffing and that Mr. Beckstrom now separately represents Henderson does not cure the original unwaivable conflict of interest for Conflicted Counsel. Disqualification must occur because confidential information was obtained in the inappropriate joint representation which cannot be circumvented or waived.

Finally, as a nominal defendant in a derivative action by the plaintiff-shareholder, Toga should not have taken any action contrary to the plaintiff herein under Cotter. Yet, Toga, at the direction of Conflicted Counsel took many improper actions, which prejudiced the rights of the company and the shareholders and further causes Conflicted Counsel's disqualification. The court should order that Conflicted Counsel is disqualified from representing Henderson and Toga.

One firm cannot represent directly and concurrently conflicted parties, and thus this court must disqualify the Conflicted Counsel.

DATED this 16th day of June, 2022.

CORY READE DOWS AND SHAFER

By: **/s/** Jay A. Shafer

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am a representative of CORY READE DOWS & SHAFER that on this 16th day of June, 2022, I caused the foregoing REPLY IN SUPPORT OF MOTION TO DISQUALIFY CHAD F. CLEMENT, ESQ., JORDON W. MONTET, ESQ. AND MARQUIS AURBACH COFFING AS ATTORNEYS FOR TOGA LIMITED and JAMES A. BECKSTROM, ESQ AS COUNSEL FOR ALEXANDER HENDERSON be served as follows:

- ■ **NEFCR System upon the following All Parties in accordance with NEFCR 9 and 13:**
- □ **By First-Class United States Mail, postage prepaid upon the following Parties, for whom no compliance with the Electronic Service requirements has been undertaken:**
- □ **Personal Service upon the following parties or their Counsel:**
- □ **By direct email upon the following Parties, for whom I did not receive, within a reasonable time indication that the transmission was unsuccessful:**
- □ **By fax or other electronic transmission in accordance with NRCP 5(D) upon the following Parties, for which proof of successful transmission is attached hereto:**

Counsel of Record	Telephone & Fax	Email
Chad F. Clement, Esq. MARQUIS AURBACH COFFING 10001 Park Run Drive Las Vegas, Nevada 89145 Attorneys for Toga Limited		
James A. Beckstrom, Esq. BECKSTROM & BECKSTROM, LLP 400 S. 4th Street, Suite 650 Las Vegas, Nevada 89101 Attorney for Alexander Henderson		

Kathrine von Ark
A Representative of
CORY READE DOWS & SHAFER

Exhibit 1

Exhibit 1

From: James Beckstrom <JB@beckstromlaw.com>
Sent: Wednesday, June 1, 2022 5:39 PM
To: Jay Shafer
Cc: Chad F. Clement
Subject: Re: Confirmation of representations made re Henderson / Toga Settlement

I disagree and your statement confirms you haven't read any of the underlying documents. I have limited service and am out of the office. Do you think I was born yesterday? The representations in court as well as in the briefing were crystal clear. I'm at Disneyland with my kids. I don't need any other Mickey Mouse games. We can discuss when I return.

Looping in other party to the case.

Get Outlook for iOS

From: Jay Shafer <jshafer@crdslaw.com>
Sent: Wednesday, June 1, 2022 5:35 PM
To: James Beckstrom <JB@beckstromlaw.com>
Subject: Confirmation of representations made re Henderson / Toga Settlement

James

I have been reviewing this matter, and I am writing to confirm that you were accurate when you reported to the court that Alex Henderson had reached a settlement agreement with Toga Limited. You reported that as a result of the Board increasing the equity award portion of compensation from $165,000 to $180,000, along with other concessions, Mr. Henderson agreed to waive all claims to any additional compensation under his employment agreement with Toga

I will take this as confirmation that Mr. Henderson has agreed not to seek any additional payment from Toga under his CFO employment contract including but not limited to an additional payment of $180,000, which Mr. Henderson appears to have previously requested from the Board. Further, I take this as confirmation that Toga's Board of Directors will not be approving any additional payment to him.

If I do not hear from you, I will take this as confirmation that you do not disagree with my client's reliance on Mr. Henderson's representations.

CORY READE DOWS & SHAFER
ATTORNEYS AT LAW
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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, v. ALEXANDER HENDERSON, an Individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31

REPLY IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR COURT-ORDERED DISMISSAL WITHOUT PREJUDICE PURSUANT TO N.R.C.P. 41(a)(2)

Plaintiff MICHAEL TOH KOK SOON ("Plaintiff") by and through his attorneys of record, the law firm of Cory Reade Dows and Shafer, and hereby files this Reply in support of his Renewed Motion for a Court Order dismissing the instant action without prejudice pursuant to NRCP 41(a)(2).

Plaintiff, having attempted to voluntarily dismiss the action pursuant to NRCP 41(a)(1)(A)(i), and the Court having determined that the filing of Defendants' Answer minutes

before the entry of the voluntary dismissal rendered it ineffective under NRCP 41(a)(1)(A)(i), filed the instant Motion to Dismiss under NRCP 41(a)(2). Subsequently a motion for summary judgment was decided by this court as to Defendant Henderson. This Motion is made and based upon the Memorandum of Points and Authorities contained herein, the papers and pleadings on file in this action, as well as the oral argument, if any, by counsel at the hearing of this matter.

This motion was previously brought and considered by the Court, who declined to grant the requested relief because the form of the "notice of the proposed dismissal or compromise must be given to shareholders or members in such manner as the court directs" discussed in NRCP 23.1 had not been provided. Plaintiff now renews his motion with the proposed notice attached. The opposition to this motion does not reject the form of the notice but argues only that the matter is mooted following the summary judgment as to Henderson.

DATED this 16th day of June.

CORY READE DOWS AND SHAFER

By: **/s/** Jay A. Shafer

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POINTS AND AUTHORITIES

I. INTRODUCTION

A. Summary

Plaintiff has attempted to resolve this matter without unnecessary litigation for an extend period of time, first seeking to stay this matter in November of 2021 and then dismissing since February 2022. However, as Plaintiff sought to discuss this professionally with counsel for Defendants, an answer was filed for both Defendants by counsel for TOGA in an attempt to beat Plaintiff to the post in their voluntary dismissal. Following the denial of the voluntary dismissal on the basis that the form of the notice was not finalized, Plaintiff brought this motion again. This dismissal has nothing to do with the merits of the initial claims brought but is an attempt to avoid the incredible expense being incurred unnecessarily. Plaintiff has set forth the basis for a meritorious dismissal, which has not been mooted by the summary judgment motion. Finally, no fees are warranted for an NRCP 41(a)(2), and Defendant's claim that NRS 7.085 mandates fees against counsel is without basis in law or fact. The Court should thus dismiss any remaining claims without prejudice.

B. History and Status

Defendants do not dispute the history and procedural status of this matter, so Plaintiff will not repeat this section. Further, James Beckstrom, Counsel for Henderson, has not opposed this motion, but has only filed a joinder to Toga's opposition. This lack of opposition must be taken as recognition of the validity of the motion.

ARGUMENT

I. DEFENDANT TOGA HAS NOT OPPOSED THE SUBSTANCE OF THE MOTION, AND MUST BE DEEMED TO HAVE ACCEPTED THESE POINTS AS A MATTER OF LAW

Here, Plaintiff has made substantive arguments as to why this matter should be dismissed voluntarily. Except for the explicit arguments made by TOGA as to mootness and a lack of notice, there has been no opposition raised. Thus, the points raised by Plaintiff must be deemed

to be meritorious. Additionally, Defendant HENDERSON has raised no independent opposition, and should be deemed to have assented to the merits of the arguments raised by Plaintiff.

II. PLAINTIFFS DISMISSAL MOTION IS NOT IMPROPER OR MOOTED

Here, the Court has granted a motion for summary judgment as to Defendant Henderson in a hearing on May 24, 2022. This motion was brought on May 23, 2022, prior to the hearing. Defendant's argument acknowledges that but then argues that Plaintiff was improper in seeking a dismissal after a grant for summary judgment. Defendant's argument is based upon non biding and non-persuasive. For example, in M & R Properties v. Thomson, 11 Cal.App.4th 899 (1992) the court was not considering a dismissal following a summary judgment motion. Rather the Court was considering whether, following a grant of dismissal under the equivalent of NRCP 41(e) a party could submit a voluntary dismissal. In that case, and the others cited, the entire case had been resolved. Here, the entire case has not been resolved by the summary judgment ruling. Indeed, the Court's ruling on May 24, 2022, found that the Court was not granting independent relief to TOGA because there was a non-substantive joinder, and explicitly found that this would "necessarily apply to TOGA". Counsel for TOGA agreed indicating that they would file their own motion. This concession makes it inexplicable why they would oppose the instant motion resolving the claims.

III. PLAINTIFF'S MOTION TO DISMISS DOES NOT VIOLATE NRCP 23.1

Defendant's Opposition falsely argues that the motion should not be granted because it proposes dismissal without notice.[1] Opposition page 4:8-9 This argument is inexplicable, as it appears to be a cut and paste response from the prior motion which ignores the entirety of Section VII(B) of the Renewed motion which proposed a form of the notice to the shareholders. Given the lack of objection to the form of the notice from either TOGA or HENDERSON, the

1 This recitation also fraudulently reproduces the rule. Defendants argue that the rule provides "all shareholders SHALL be given notice of the proposed dismissal". See Page 4, lines 15-16 of opposition to motion to dismiss. (emphasis in text). Whereas the actual rule provides that "notice of the proposed dismissal or compromise must be given to shareholders or members in such manner as the court directs." Thus the form or even existence of notice is up to the Court's discretion, as supported by the cited caselaw.

court should consider this an admission to the propriety and adequacy of the proposed notice.

Defendant claims that the notice is incorrect procedurally but did not provide a counter form. First, if Defendant Toga truly had concerns about the form of the notice, they would have either proposed their own notice or suggested revisions. The truth is that they do not want this dismissed but want to drag this fight out unnecessarily in order to increase the costs and expense and put the existing board in a preferential placement for the upcoming board of directors election. Second, the "procedural" defects only include events which had not occurred at the time the motion was filed. These are included in a revised notice, which is attached as Exhibit "2".

While Defendant does not dispute that there is no prejudice to them from dismissal, they complaint that the dismissal to be concerned of is those of the shareholders. See opposition 4:21-23. However, they do not say why it would be prejudicial to the shareholders to dismiss the claims. Plaintiff is not abandoning the claims. Further, Defendant suggests that Plaintiff is acting to prejudice the claims other shareholders might have against Henderson[2], while at the same time they have actively acted to compromise those same claims in both the boardroom and in this case. This insincere position cannot stand.[3] Plaintiff is permitted to seek a voluntary dismissal, has set out uncontroverted good cause, and a form of a notice used in other matters and is thus entitled to a dismissal of any remaining claims.

IV. IN THE EVENT THE COURT IS INCLINED TO DISMISS THIS CASE, FEES AND COSTS SHOULD BE AWARDED IN FAVOR OF TOGA LIMITED.

A. NRS 7.085 Does Not Demand Fees When The Party Has Repeatedly Sought To Dismiss This Matter.

Plaintiff has attempted to resolve this matter in the most expeditious and efficient manner. It has since November of 2021 attempted to stay this matter until a shareholder meeting could be held. Moreover, it has attempted to voluntarily resolve this case since February of

2 See Opposition, page 4:24-27

3 Further counsel for Toga has suggested that a dismissal with prejudice without notice would be appropriate, which directly contradicts the argument that the shareholders have the right to weigh in.

2022. It is thus unfathomable how Defendant could make a claim for fees under NRS 7.085

NRS 7.085(1) states:

> If a court finds that an attorney has:
> (a) Filed, maintained or defended a civil action or proceeding in any court in this State and such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in good faith; or
> (b) Unreasonably and vexatiously extended a civil action or proceeding before any court in this State, the court shall require the attorney personally to pay the additional costs, expenses and attorney's fees reasonably incurred because of such conduct. NRS 7.085(1) (emphasis added)

Plaintiff's actions were not in violation of NRS 7.085. Plaintiff has not brought an action that is "not well-grounded in fact or is not warranted by existing law," nor has it "Unreasonably and vexatiously extended a civil action." NRS 7.085 does not authorize sanctions for actions which were "warranted under existing law." Pintar v. Eighth Judicial Dist. Court of Nev., 480 P.3d 839 (Nev. 2021)

Plaintiff has not "repeatedly engaged in duplicative efforts and wasted judicial resources", seeking to dismiss this matter for some time against the indecorous machinations of Henderson and his various counsel. That Defendant is now seeking for fees against Counsel for plaintiff personally is inexplicable. Indeed, Plaintiff believes that such a position is "not well grounded in fact" and is "not warranted by existing law". As such, no fees should be awarded.

B. *Fees Are Not Required Under NRCP 41(A)(2).*

Defendant also misinterprets NRS 7.085 by discussion of a voluntary dismissal. Defendant cites to Yoffe v. Keller Industries, Inc., 582 F.2d 982, 26 Fed. R. Serv. 2d 405 (5th Cir. 1978) which does not consider the application of NRS 7.085. NRCP 41(a)(1)(C) conditions a voluntary dismissal upon repayment of the defendant's filing fees when such a request is brought without a motion. Plaintiff acknowledges that repayment of filing fees would have been due under NRCP 41(a)(1)(C), and would have made arrangements for the payment of these fees. However, Defendants TOGA sought to set this aside, which the court granted. Plaintiff's motion is now brought under NRCP 41(a)(2), and as such this provision is no longer mandatory as costs under NRCP 41(a)(2) are evaluated under NRCP 41(d).

NRCP 41(d) provides that costs are not appropriate unless a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant. There is no previously dismissed action and therefore, costs are not awardable. There is no other statute or contract which would otherwise govern fees and costs. As such there is no basis for fees.

C. Defendants Fail To Satisfy the Brunzell Requirements, and No Fees Should be Awarded.

Courts should consider the request for fees considering certain factors, namely "the advocate's professional qualities, the nature of the litigation, the work performed, and the result." Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 455 P.2d 31, 33 (1969). Nevertheless, the award must be reasonable under all the circumstances. University of Nevada v. Tarkanian 110 Nev. at 591. The burden is on the movant to demonstrate that the fees were actually incurred and are reasonable in amount. Id. Defendant does not address any of the factors, nor is there any supporting declaration. Defendant's argument is that $103,612.77 "and counting" has been incurred, but addresses none of the factors required. The fact that this was a derivative action does not fulfill Brunzell either.

Defendant further fails to illuminate any reason why fees are awardable, nor that they are reasonable under Brunzell as there must be a basis for the sanction. The law requires the trial court to calculate "a reasonable fee" using a method rationally designed to calculate a reasonable amount. Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005). In so doing the Court's decision must provide "sufficient reasoning and findings in support of its ultimate determination" Id. at 865, 124 P.3d at 549. The party seeking fees must provide substantial evidence of the Brunzell factors. O'Connell v. Wynn Las Vegas, LLC, 2018 Nev. App. LEXIS 6, *24, 429 P.3d 664, 673, 134 Nev. Adv. Rep. 67, 2018 WL 4178139. As to the result achieved, Counsel fails to address this matter.

No fees are warranted under either law or statute, and the Court may not award fees where not shown to be substantiated under Brunzell. As no law or statute permits, the court must not award fees, but should instead dismiss the remaining claims of the action without prejudice.

CONCLUSION

Voluntary dismissals are favored in the interests of judicial efficiency, as a method of clearing a court's docket and allowing for the resolution of claims. Here, Defendants have not opposed the merits of the dismissal. The only argument raised was that it was moot because of the summary judgment. However, this only applies to claims as to Henderson, but does not address the remaining issues and claims which this court has ruled were not included as Toga did not file a substantive joinder. Finally, there is no basis for fees and costs.

Defendants have not shown good cause as to why this instant action should proceed, or why there would be an equitable basis for doing so. Maintaining this action is a waste of judicial resources and only benefits the lawyers. It damages TOGA and its shareholders when it unnecessarily increases TOGA's legal fees and costs. Plaintiff thus requests the court dismiss this matter under NRCP 41(a)(2).

DATED this 16th day of June, 2022.

CORY READE DOWS AND SHAFER

By: **/s/** Jay A. Shafer

JAY A. SHAFER, ESQ.
Nevada Bar No. 009184
1333 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89128
Telephone: (702) 794-4411
Facsimile: (702) 794-4421
jshafer@crdslaw.com
Attorneys for Plaintiff Michael Toh Kok Soon

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am a representative of CORY READE DOWS & SHAFER that on this 16th day of June, 2022, I caused the foregoing REPLY IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR COURT-ORDERED DISMISSAL WITHOUT PREJUDICE PURSUANT TO N.R.C.P. 41(a)(2) be served as follows:

- ■ **NEFCR System upon the following All Parties in accordance with NEFCR 9 and 13:**
- □ **By First-Class United States Mail, postage prepaid upon the following Parties, for whom no compliance with the Electronic Service requirements has been undertaken:**
- □ **Personal Service upon the following parties or their Counsel:**
- □ **By direct email upon the following Parties, for whom I did not receive, within a reasonable time indication that the transmission was unsuccessful:**
- □ **By fax or other electronic transmission in accordance with NRCP 5(D) upon the following Parties, for which proof of successful transmission is attached hereto:**

Counsel of Record	Telephone & Fax	Email
Chad F. Clement, Esq. MARQUIS AURBACH COFFING 10001 Park Run Drive Las Vegas, Nevada 89145 Attorneys for Toga Limited		
James A. Beckstrom, Esq. BECKSTROM & BECKSTROM, LLP 400 S. 4th Street, Suite 650 Las Vegas, Nevada 89101 Attorney for Alexander Henderson		

Kathrine von Ark
A Representative of
CORY READE DOWS & SHAFER

EXHIBIT 2 – REVISED NOTICE

This notice relates to a proposed voluntary dismissal of a shareholder derivative action and is being given pursuant to an order of Eighth Judicial District Court for the State of Nevada. The purpose of the notice is to advise Toga Limited (TOGL) shareholders that plaintiff, MICHAEL TOH KOK SOON, in the below referenced action wishes to voluntarily dismiss the case. Additional information on the action and right to intervene can be found below.

THE SHAREHOLDER DERIVATIVE ACTION

On September 23, 2021, plaintiff TOH filed a purported shareholder derivative complaint in the of Eighth Judicial District Court for the State of Nevada, Case No. A-21-841604-B (the "Derivative Action"), against a member of Toga Limited's board of directors, Alexander Henderson (the "Individual Defendant" or "Henderson"), seeking relief on behalf of Toga Limited, a nominal defendant. The Derivative Action arises from the decision by the board of directors to approve a settlement of employment claims with the Individual Defendant and related actions by Henderson. The Derivative Action purports to allege six causes of action related to the adoption of the forum selection By-Law: (I) declaratory relief as to the invalidity of actions of the board, (II) breach of contract by Henderson, (III) breach of the duty of good faith, (IV) breach of duty of loyalty, (V) breach of fiduciary duty, and (VI) unjust enrichment.

Approximately one month after the Derivative Action was filed, another action was brought in the First Judicial District Court of Nevada in Carson City seeking relief by several shareholders, including Plaintiff, under NRS 78.345 asking for a shareholder meeting to be held. (The "Carson City action"). The company opposed this relief, which has now been transferred to the Eighth Judicial District Court. Toga Limited has now noticed a shareholders meeting for July 8, 2022.

On February 11, 2021, Plaintiff sought to set this action aside voluntarily, but this was set aside on March 15, 2022 because an answer had been filed. On April 7, 2022 Plaintiff in the derivative action filed a motion to dismiss the case without prejudice. This motion was denied because the Court required additional notice to the shareholders. On may 23, 2022 Plaintiff brought the motion to dismiss again. In a hearing on May 10, 2022 the Court granted summary judgment in favor of Defendant Henderson, which is set forth in an order entered on the ___ day of ____, 2022. Toga Limited has since asked the Eighth Judicial District Court to postpone any ruling on the motion to dismiss in the Derivative Action until the shareholders of Toga have had an opportunity to object to a dismissal of the Derivative Action. Plaintiff will not receive any compensation or payment arising from the derivative action.

On the ___ day of ____, 2022, the District Court ordered that notice of the voluntary dismissal be provided to Toga Limited shareholders before the Derivative Action could be dismissed without prejudice. If no other Toga Limited shareholder seeks to intervene in the Derivative Action, the voluntary dismissal will be approved and the Derivative Action will be dismissed without prejudice.

THE RIGHT TO INTERVENE IN THE DERIVATIVE ACTION

Any Toga Limited shareholder may seek to intervene as a plaintiff in the Derivative Action if he, she, or it (1) owns shares in Toga Limited and (2) wishes to pursue the claims in the Derivative Action or has any reason why the action should not be voluntarily dismissed. All motions to intervene must be filed with the Clerk of the Court no later than the ___ day of ____, 2022. Every motion to intervene must contain: (1) the caption of the Derivative Action; (2) the intervenor's name, address and phone number; (3) proof or certification of the date the

intervenor purchased Toga Limited stock; and (4) any supporting papers, including all documents and writings that the intervenor desires the Court to consider.

Any motions to intervene must be filed with the Eighth Judicial District Court at:
Clerk of Court
Eighth Judicial District Court
Regional Justice Center
200 Lewis Ave
Las Vegas, Nevada 89011
3rd Floor
Phone Number: (702) 455-2590

A copy of any motion to intervene must also be mailed to:

Chad F. Clement
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Toga Limited

James A. Beckstrom
BECKSTROM & BECKSTROM, LLP
400 S. 4th Street, Suite 650
Las Vegas, Nevada 89101
Attorney for Alexander Henderson

Jay A. Shafer
CORY READE DOWS AND SHAFER
1333 North Buffalo Drive, Suite 210
Attorneys for Plaintiff Michael Toh Kok Soon

Electronically Filed
6/20/2022 2:41 PM
Steven D. Grierson
CLERK OF THE COURT

CHAMBERS:
702-671-3634

LAW CLERK:
702-671-0899

MEMO

DISTRICT COURT
DEPARTMENT XXXI

To:	ALL COUNSEL served via Electronic Service
From:	DEPARTMENT 31
Subject:	**A841604 – MICHAEL TOH KOK SOON vs. TOGA LIMITED**
Date:	June 20, 2022

Counsel,

Currently, the above-listed matter has been set in Department 31 on Thursday, June 23, 2022. Due to the unavailability of the Court, the matter was continued to **JUNE 30, 2022, at 8:30 A.M.**

Department 31 will be hearing this matter either by remote **audiovisual** appearances through Bluejeans **or** parties may appear in-person. If appearing remotely, the Court would **strongly** prefer and encourage that **all** parties appear **audiovisually** to ensure a better record. However, **any/all** counsel and/or parties appearing in a multi-party case, Construction Defect (CD) case, or a Business Court (BC) case, **must** appear **audiovisually** or appear in person to better aid the Court with keeping track of connected parties.

****NOTE** Please be advised that any hearing on or after May 30, 2022, must comply with Administrative Order 22-07 and Nevada Supreme Court Rule Part IX- A and B – Rules Governing Appearance by Telephonic Transmission Equipment and Rules Governing Appearance by Simultaneous Audiovisual Transmission Equipment. Current Administrative Orders and Forms for Audiovisual appearances may be found on the Court's website: www.clarkcountycourts.us. (Please see Administrative Order 22-07 and Supreme Court Rule Part IX (A and B) to ensure full compliance.)**

ALL parties must register for electronic service, pursuant to the rules and Administrative Order 22-07, to ensure every party receives all Notices from the Court. Instructions on how to register for electronic service may be found on the Court's website, http://www.clarkcountycourts.us/departments/clerk/electronic-filing/file-and-serve/#Service-Contacts

The Bluejeans connection information is:

Phone Dial-in
+1.408.419.1715 (United States(San Jose))
+1.408.915.6290 (United States(San Jose))
(Global Numbers)

Room System
199.48.152.152 or bjn.vc

From internet browser, copy and paste:
https://bluejeans.com/621838351/1475

Meeting ID: **621 838 351** Participant Passcode: **1475**

INSTRUCTIONS FOR APPEARING VIA BLUEJEANS:

Please ensure that you are able to connect prior to the hearing. You may test your connection at: https://bluejeans.com/111. Below are a few guidelines that must be followed when appearing remotely:

1. If appearing audiovisually via computer or an app, it is **very** helpful for the Court to identify participants if they appear **via video**. All parties must check in - in the chat box - upon connection versus just having the phone number appear. **Therefore, please check in for your matter (name, bar number, party you represent) in the "Chat" box upon connection**.

2. You should connect for your remote appearance at least **5 minutes prior to your SCHEDULED hearing time, NOT the Bluejeans session time**. However, due to multiple matters scheduled at the same time, there may be a delay in your case being called, so please be patient.

3. **Upon connection, please place your phone on MUTE and wait for your matter to be called.** If you are interrupted for any reason, please **DO NOT place the call on hold**, it will interrupt other matters being heard and we will hear background music. Either set your phone down and step away (**while it is on mute**), or please hang up and then reconnect when you are ready.

   ****To mute/unmute: Press *4 on your phone keypad to mute (and unmute) your microphone within the BlueJeans system; or if using your computer, click on the microphone icon or "M" on your keyboard.****

4. Background noise is **very** disturbing and it does not allow for a good record. **Please refrain from using the speaker mode on your phone and use the hand-set**. The record will be much clearer. Please do not connect while driving and please do not be in an area with others talking.

5. When your case is called - to make your appearance, please clearly state your name, bar number, and the party you represent – with Plaintiff's counsel appearing first. ****Please state your name EACH and EVERY time you speak to ensure a complete record.****

6. If you are only a participant/interested party listening to the hearing, you must make your appearance and after making your appearance, please ensure to adhere to the same instructions and please ensure your phone remains on mute for the entire hearing.

7. Please be patient until your case is called and please be considerate of others who are participating remotely.

If you have any questions, please let me know.

Thank you,

Tracy L. Cordoba
Judicial Executive Assistant to the
Honorable Joanna S. Kishner

Electronically Filed
06/29/2022 9:04 AM
CLERK OF THE COURT

Marquis Aurbach
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cclement@maclaw.com
jmontet@maclaw.com

Attorneys for Defendant
TOGA LIMITED

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, vs. ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31 HEARING DATE: JULY 14, 2022 HEARING TIME: 8:30 A.M.

STIPULATION AND ORDER TO CONTINUE JUNE 30, 2022 HEARINGS ON MOTION TO DISQUALIFY AND MOTION FOR VOLUNTARY DISMISSAL

(First Request)

Plaintiff Michael Toh Kok ("Plaintiff"), by and through his attorneys of record, the law firm of Cory Reade Dows and Shafer, and Defendant Alexander Henderson, by and through his counsel, Beckstrom & Beckstrom, and Defendant Toga Limited, by and through its attorneys of record, the law firm of Marquis Aurbach, hereby stipulate and agree as follows:

1. WHEREAS, there are motions set for hearings on Thursday, June 30, 2022, specifically, a motion to voluntarily dismiss and motions to disqualify counsel for defendants.

2. WHEREAS, due to a material conflict in Defendant Toga's counsel's schedule, and because Plaintiff and Defendants believe they may be able to resolve these motions via stipulation, the parties hereby jointly stipulate to and request a continuance of the hearing on

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

these two motions for two (2) weeks, until July 14, or at such time thereafter which is convenient to the court.

Dated this 27th day of June 2022.

CORY READE DOWS & SHAFER

/s/ Jay A. Shafer
Jay A. Shafer, Esq.
Nevada Bar No. 9184
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 891289
Attorney for Plaintiff,
Michael Toh Kok Soon

Dated this 27th day of June 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 S. 4th Street, Ste. 650
Las Vegas, NV 89101
Attorney for Alexander Henderson

Dated this 27th day of June 2022.

MARQUIS AURBACH

By: */s/ Chad F. Clement*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, NV 89145
Attorneys for Defendant,
Toga Limited

ORDER

IT IS SO ORDERED.

The hearings set for June 30, 2022, at 8:30 a.m. shall be continued to July 14th, 2022 at 8:30 a.m.

Dated this 29th day of June, 2022

Michael A Cherry

5FB 674 65C7 C783
Michael Cherry
District Court Judge

Submitted By:

MARQUIS AURBACH

/s/ Chad F. Clement
Chad F. Clement, Esq.
Nevada Bar No. 12192
Attorney for Defendant,
TOGA LIMITED

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MAC:16726-001 4762631_1

Lenore A. Fraga

From: Chad F. Clement
Sent: Monday, June 27, 2022 2:55 PM
To: Lenore A. Fraga
Subject: FW: [External] Stipulation to continue motions set for 6/30 [IWOV-iManage.FID1158002]

Chad F. Clement, Esq.
10001 Park Run Drive
Las Vegas, NV 89145
t | 702.207.6092
f | 702.382.5816
cclement@maclaw.com
maclaw.com

Please consider the environment before printing this e-mail!
DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us (collect) immediately at (702) 382-0711 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Marquis Aurbach - Attorneys at Law

---

From: Jay Shafer <jshafer@crdslaw.com>
Sent: Monday, June 27, 2022 2:37 PM
To: James Beckstrom <JB@beckstromlaw.com>
Cc: Chad F. Clement <cclement@maclaw.com>; Jordan Montet <jmontet@MACLAW.com>
Subject: Re: [External] Stipulation to continue motions set for 6/30 [IWOV-iManage.FID1158002]

That is acceptable

> On Jun 27, 2022, at 2:36 PM, James Beckstrom <JB@beckstromlaw.com> wrote:
>
> Approved by me.
>
> Get Outlook for iOS

From: Chad F. Clement <cclement@maclaw.com>
Sent: Monday, June 27, 2022 2:34:58 PM
To: 'Jay Shafer' <jshafer@crdslaw.com>; James Beckstrom <JB@beckstromlaw.com>
Cc: Jordan Montet <jmontet@MACLAW.com>
Subject: RE: [External] Stipulation to continue motions set for 6/30 [IWOV-iManage.FID1158002]

My minor revisions attached.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael Toh Kok Soon, Plaintiff(s) vs. Toga Limited, Defendant(s)	CASE NO: A-21-841604-B DEPT. NO. Department 31

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/29/2022

Chad Clement	cclement@maclaw.com
Lennie Fraga	lfraga@maclaw.com
Kathrine von Arx	kvonarx@crdslaw.com
Elizabeth Arthur	earthur@crdslaw.com
James Beckstrom	jb@beckstromlaw.com
Suzanne Boggs	sb@beckstromlaw.com
Kellie Piet	kpiet@maclaw.com
Jordan Montet	jmontet@maclaw.com
Jay Shafer	jshafer@crdslaw.com

Electronically Filed
6/29/2022 10:37 AM
Steven D. Grierson
CLERK OF THE COURT

Marquis Aurbach
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cclement@maclaw.com
jmontet@maclaw.com

Attorneys for Defendant Toga Limited

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, vs. ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31

NOTICE OF ENTRY OF STIPULATION AND ORDER

PLEASE TAKE NOTICE that a Stipulation and Order to Continue June 30, 2022 Hearings on Motion to Disqualify and Motion for Voluntary Dismissal was entered in the above-entitled action on June 29, 2022, a copy of which is attached hereto.

Dated this 29th day of June, 2022.

MARQUIS AURBACH

By */s/ Chad F. Clement*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Defendant Toga Limited

MAC:16726-001 4765241_1

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 29th day of June, 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

CORY READE DOWS & SHAFER
Jay A. Shafer, Esq.
1333 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89128
Attorney for Plaintiff

BECKSTROM & BECKSTROM
James A. Beckstrom, Esq.
400 South 4th Street, Suite 650
Las Vegas, Nevada 89101
Attorney for Defendant
Alexander Henderson

/s/ Lennie Fraga
an employee of Marquis Aurbach

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

ELECTRONICALLY SERVED
6/29/2022 9:05 AM

Electronically Filed
06/29/2022 9:04 AM
CLERK OF THE COURT

Marquis Aurbach
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
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Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cclement@maclaw.com
jmontet@maclaw.com

Attorneys for Defendant
TOGA LIMITED

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, vs. ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31 HEARING DATE: JULY 14, 2022 HEARING TIME: 8:30 A.M.

STIPULATION AND ORDER TO CONTINUE JUNE 30, 2022 HEARINGS ON MOTION TO DISQUALIFY AND MOTION FOR VOLUNTARY DISMISSAL

(First Request)

Plaintiff Michael Toh Kok ("Plaintiff"), by and through his attorneys of record, the law firm of Cory Reade Dows and Shafer, and Defendant Alexander Henderson, by and through his counsel, Beckstrom & Beckstrom, and Defendant Toga Limited, by and through its attorneys of record, the law firm of Marquis Aurbach, hereby stipulate and agree as follows:

1. WHEREAS, there are motions set for hearings on Thursday, June 30, 2022, specifically, a motion to voluntarily dismiss and motions to disqualify counsel for defendants.

2. WHEREAS, due to a material conflict in Defendant Toga's counsel's schedule, and because Plaintiff and Defendants believe they may be able to resolve these motions via stipulation, the parties hereby jointly stipulate to and request a continuance of the hearing on

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

these two motions for two (2) weeks, until July 14, or at such time thereafter which is convenient to the court.

Dated this 27th day of June 2022.

CORY READE DOWS & SHAFER

/s/ Jay A. Shafer
Jay A. Shafer, Esq.
Nevada Bar No. 9184
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 891289
Attorney for Plaintiff,
Michael Toh Kok Soon

Dated this 27th day of June 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 S. 4th Street, Ste. 650
Las Vegas, NV 89101
Attorney for Alexander Henderson

Dated this 27th day of June 2022.

MARQUIS AURBACH

By: */s/ Chad F. Clement*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, NV 89145
Attorneys for Defendant,
Toga Limited

ORDER

IT IS SO ORDERED.

The hearings set for June 30, 2022, at 8:30 a.m. shall be continued to July 14th, 2022 at 8:30 a.m.

Dated this 29th day of June, 2022

Michael A Cherry

5FB 674 65C7 C783
Michael Cherry
District Court Judge

Submitted By:

MARQUIS AURBACH

/s/ Chad F. Clement
Chad F. Clement, Esq.
Nevada Bar No. 12192
Attorney for Defendant,
TOGA LIMITED

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MAC:16726-001 4762631_1

AA01194

Lenore A. Fraga

From: Chad F. Clement
Sent: Monday, June 27, 2022 2:55 PM
To: Lenore A. Fraga
Subject: FW: [External] Stipulation to continue motions set for 6/30 [IWOV-iManage.FID1158002]

Chad F. Clement, Esq.
10001 Park Run Drive
Las Vegas, NV 89145
t | 702.207.6092
f | 702.382.5816
cclement@maclaw.com
maclaw.com

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DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us (collect) immediately at (702) 382-0711 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Marquis Aurbach - Attorneys at Law

---

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That is acceptable

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> Approved by me.
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My minor revisions attached.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael Toh Kok Soon, Plaintiff(s) vs. Toga Limited, Defendant(s)	CASE NO: A-21-841604-B DEPT. NO. Department 31

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Service Date: 6/29/2022

Chad Clement	cclement@maclaw.com
Lennie Fraga	lfraga@maclaw.com
Kathrine von Arx	kvonarx@crdslaw.com
Elizabeth Arthur	earthur@crdslaw.com
James Beckstrom	jb@beckstromlaw.com
Suzanne Boggs	sb@beckstromlaw.com
Kellie Piet	kpiet@maclaw.com
Jordan Montet	jmontet@maclaw.com
Jay Shafer	jshafer@crdslaw.com

Electronically Filed
06/29/2022 2:54 PM
CLERK OF THE COURT

BECKSTROM & BECKSTROM, LLP
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 South 4th Street, Suite 650
Las Vegas, Nevada 89101
Telephone: (725) 300-0599
Facsimile: (725) 300-0261
jb@beckstromlaw.com
Attorney for Alexander Henderson

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual Plaintiff, v. ALEXANDER HENDERSON, an individual; TOGA LIMITED; a Nevada corporation; DOES 1-100; and ROE BUSINESS ENTITIES I through C; inclusive, Defendant.	Case No.: A-21-841604-B Dept No.: 31 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT ALEXANDER HENDERSON'S MOTION FOR SUMMARY JUDGMENT AND TOGA LIMITED'S JOINDER THERETO**

This matter, having been considered by the Honorable Joanna Kishner on May 24, 2022 at 8:30 a.m., in connection with Defendant Alexander Henderson's ("Henderson") Motion for Summary Judgment ("Motion") and Defendant Toga Limited's Joinder thereto ("Joinder"); with James A. Beckstrom, Esq., of Beckstrom & Beckstrom, LLP, appearing for Defendant Alexander Henderson ("Henderson"), with Chad F. Clement, Esq. of Marquis Aurbach appearing for Defendant Toga Limited ("Toga") filing a Joinder thereto, and Jay A. Shafer, Esq., of Cory Reade Dows & Shafer, appearing for Plaintiff Michael Toh Kok Son ("Plaintiff"). The Court having reviewed the Motion, the Joinder thereto, and all related briefing thereto, the papers and pleadings on file herein, and hearing oral arguments regarding the Motion and Joinder, and good cause appearing therefore orders based on the below stated findings of fact and conclusions of law the following:

/ / /

/ / /

6/20/2022 12:05 PM

AA01197

/ / /

/ / /

FINDINGS OF FACT

1. Toga is a publicly traded corporation incorporated in Delaware.

2. In or around July 2019, Toga decided to move towards listing on the Nasdaq, which caused the selection of independent directors who were not officers or owners of the company for an independent Board of Directors.

3. The Board of Directors is comprised of three independent directors—Iain Bratt ("Bratt"), Shemori Guinn ("Guinn"), and Jim Lupkin ("Lupkin") (collectively "Independent Directors"), with Henderson and Plaintiff currently sitting as the fourth and fifth directors, respectively.

4. Pursuant to the Toga Bylaws, the Board of Directors maintain full control over the business affairs of Toga and decisions by the Board of Directors are subject to majority vote.

5. In addition to electing the existing Board of Directors, Toga hired Henderson as the to serve as the corporation's Chief Financial Officer ("CFO")..

6. Thereafter, Toga retained Baker Hostetler, LLP ("Baker") to serve as the Company's legal counsel and Marcum LLP ("Marcum") to serve as Toga's independent accounting firm.

7. Plaintiff's appointment of Henderson as CFO was memorialized by an Employment Agreement, setting forth standard compensation and termination clauses (the "Henderson Contract" or "Employment Contract"). The Employment Contract was negotiated by Plaintiff and was an arms-length transaction.

8. In or around March or April 2021, Marcum auditors informed the Board of Directors that they could not complete the necessary year 2020 audit for Toga, because Toga's financials lacked necessary back-up bank statements and Toga's subsidiary entities were refusing to or were unable to provide various business contracts and bank records to Marcum for verification.

9. On July 30, 2021, Henderson provided the Board of Directors, inclusive of Plaintiff, a signed letter or resignation for his position as CFO. The resignation was based upon a memorandum by Toga's Chinese legal counsel JunHe, LLP regarding the activities of the company in the People's Republic of China ("China").

10. As the CFO responsible for overseeing the finances of Toga, Henderson maintained that he could not ethically continue as CFO, without violating Toga's Code of Ethics or his Employment Agreement. As a result, Henderson provided the Company thirty (30) days resolve the operations in China or accept his resignation as of August 29, 2021. In the event the Company failed to cure the problems in China stated by JunHe, LLP, Henderson notified Toga that he would seek his contractual compensation due under the Employment Agreement.

11. Toga was unable to cure the issues raised within China and as a result Henderson resigned. The result was Henderson submitting a demand for compensation to the Board of Directors as authorized by the Employment Contract. Henderson maintained that under Section 1(b) of the Employment Contract, "Good Reason" existed for the resignation, as a result of his misleading statements about the Company he made in his role as CFO and information received from Toga's Chinese legal counsel JunHe, LLP.

12. Toga employed legal counsel who provided the Board of Directors an opinion that based on Henderson's Employment Contract, Henderson was legally due a lump sum payment of his monthly salary of $15,000 thru the term of the Agreement, accrued benefits, and existing equity awards. Following negotiations, the Board of Directors were advised and did negotiate a settlement with Henderson in the amount of $445,607, reduced from Henderson's request for $625,607.

13. On August 26, 2021, the Independent Directors noticed a Special Board of Director meeting for August 28, 2021 (the "August 28 Meeting"). A quorum was established at the August 28 Meeting, with the only absent Directors being Plaintiff and Guinn. At the August 28 Meeting, the Board of Directors discussed a number of topics, ~~including winding up the Company in a way that would not harm shareholders (as a result of the Company not being able to complete a necessary audit), the viability of the Company's Malaysian subsidiaries, requested payments to and on behalf of Toga's subsidiaries~~, and the resignation and compensation of Henderson.

14. Relevant to the Henderson Contract, the Board of Directors, with the assistance of counsel and with Henderson not participating in the discussions with counsel, determined Henderson was entitled to compensation as a result of his employment being terminated for "good reason" under Section 2(b), and this determination led to the Board of Directors approving a settlement for the compensation based on Henderson's termination as CFO, including monthly payments thru the term. The result was a partial compromised settlement in the amount of $445,607, with an agreement to address the balance of the $180,000 demanded by Henderson at a future date.

15. In conjunction with authorizing the compromise to resolve the Henderson Contract, the Board authorized Henderson, the sole signatory on Toga's bank account, to transfer the agreed to settlement amount and accepted Henderson's resignation as CFO.

16. The settlement amount was memorialized with a written Settlement Agreement ("Settlement Agreement") signed by the Independent Directors. Henderson thereafter transferred the authorized amount under the Settlement Agreement.

17. Plaintiff disputed the legitimacy of the August 28 Meeting on the basis (1) he did not receive notice within the notice period required by the Bylaws; and (2) no director other than the Chairman of the Board could call for Special Board of Director meetings under Section 3.9 of the Bylaws.

18. Based on Plaintiff's position he did not receive notice of the August 28 Meeting, though disputed, the Independent Directors and Henderson set another Special Meeting of the Board of Directors for September 17, 2021. All meeting details for this September 17, 2021 were provided to Plaintiff. In response, Plaintiff stated he would hold a Special Meeting of the Board of Directors on September 24, 2021, despite the Independent Directors conveying that the meeting could not wait.

19. On September 17, 2021, the Board of Directors met as noticed, with all the Independent Directors and Plaintiff present. Despite Plaintiff appearing, he appeared only to "object to the meeting not being called lawfully." As a result of being unable to discuss multiple

agenda items with Plaintiff, the Board of Directors noticed yet another special meeting for September 24, 2021, a date in which Plaintiff previously confirmed he could attend.

20. On September 21, 2021, the Independent Directors e-mailed Plaintiff stating they were disappointed he left the September 17, 2021 meeting and memorialized the follow up Special Board of Directors Meeting set for September 24, 2021. The Independent Directors further laid out for Plaintiff, the anticipated agenda items, which included (1) ratification of prior Board actions, including approval of the Henderson Contract and settlement, (2) consideration of removing Toh as Chairman of the Board, CEO, and President, and (3) consideration of appointing a new Chairman, CEO, and President.

21. The Independent Directors noticed the September 24, 2021 Special Board of Directors Meeting (a date provided by Plaintiff weeks prior). Return receipts from Plaintiff's e-mail account confirm the September 24, 2021 notice was received timely as required by the Bylaws. This meeting went forward with all board members other than Plaintiff appearing. Legal counsel for Toga was present and a quorum was established. At this meeting, the Board of Directors as constituted on that day: (1) discussed actions taken at the prior two board meetings dated August 28, 2021 and September 17, 2021 and unanimously approved of the ratification of prior board actions, including the actions related to the Henderson Contract; (2) discussed Plaintiff's roles as Chairman, CEO, and President of the Company and unanimously voted to remove Plaintiff from each respective position; (3) discussed the necessity of a new Chairman and unanimously approved the appointment of Henderson as the Chairman; and (4) discussed Plaintiff's request that Henderson be removed as the Company's signatory and Trustee of the Indemnification Trust and return the $445,207 in settlement proceeds. The Board unanimously agreed to deny such a request and resolved not to take such action. The vote by the Board of Directors was 4-0.

22. On October 12, 2021, the Board of Directors once again met at a duly noticed Special Board of Directors Meeting, with Plaintiff present. The Board of Directors discussed Plaintiff's prior claims of "lack of notice" of the prior Board Meetings of August 28 and September 17. The Board once again ratified the minutes from the Board Meetings of September 17 and

September 24, which approved the Henderson settlement agreement. The vote was 4-1, which Plaintiff the only objecting party.

23. On November 1, 2021, the Board of Directors once again met at a duly noticed meeting, with Plaintiff present. Among other things, the Board of Directors once again ratified the minutes from the Board Meetings of August 28, September 17, September 24, and October 12, 2021, which approved the Henderson settlement agreement. The vote weas 4-1, which Plaintiff the only objecting party.

24. On April 19, 2022, the Board of Directors met again and among other things again adopted all prior Board Meeting Minutes as a Resolution of the Company. The Resolution confirmed the August 28, 20221, September 17, 2021, September 24, 2021, October 12, 2021, November 1, 2021, and April 19, 2022 decisions by the Board of Directors.

25. On September 23, 2021, Plaintiff filed this derivative lawsuit in the Eighth Judicial District Court against Henderson and Toga, asserting the following claims for relief: (1) declaratory relief; (2) injunctive relief; (3) breach of contract; (4) breach of duty of good faith; (5) breach of loyalty; (6) breach of fiduciary duty; (7) unjust enrichment; and (8) intentional interference with contractual relations.

26. Within the Complaint, Plaintiff asserted (1) the August 28, 2021 Special Board of Director Meeting was invalid, because Plaintiff did not receive timely notice of the meeting as required by Section 3.11 of the Company Bylaws; and (2) all of the Board of Directors' Special Director Meetings were void, because the authority to call Special Board of Director Meetings was only within the authority of the Chairman. Plaintiff concluded that as a result, the Henderson Settlement Agreement and resulting payments to Henderson were "void."

27. On April 21, 2022, Henderson filed a Motion for Summary Judgment as to all of Plaintiff's claims, with Toga filing a joinder on April 28, 2022.

28. Plaintiff obtained an extension of the deadline for the Opposition to the Motion for Summary Judgment from counsel for Henderson, but no approval of the Court was sought or provided.

29. Plaintiff filed an untimely Opposition to the Motion for Summary Judgment on May 19, 2022 following Henderson's Notice of Non-Opposition being filed on May 19, 2022. Henderson thereafter filed a Reply to Plaintiff's Opposition the same day.

30. Thereafter, with oral argument on Henderson's Motion for Summary Judgment set for May 24, 2022 at 8:30 a.m., on May 23, 2022 after 5:00 p.m., Plaintiff filed: (1) a Declaration of Jay A. Shafer, Esq.; (2) Plaintiff's Corrected Supplement to His Opposition to Defendant Alexander Henderson's Opposition; (3) Plaintiff's Supplement to his Opposition to Defendant Alexander Henderson's Motion for Summary Judgment; and (4) Plaintiff's Renewed Motion for Court-Ordered Dismissal.

31. The Court never authorized a continued briefing schedule or extension for Plaintiff's Opposition.

32. Plaintiff's untimely Declaration failed to set forth any material facts that would necessitate or require discovery under NRCP 56(f). Setting aside the procedural defects within the Declaration, none of the proposed discovery or anticipated facts that could be unearthed in any such discovery would be of any relevance to the legal and factual issues before the Court.

CONCLUSIONS OF LAW

33. Summary judgment is entered in favor of Henderson as to all claims advanced by Plaintiff on both procedural grounds and substantive grounds.

34. "A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a); *see also Wood v. Safeway, Inc.*, 121 Nev.724, 731, 121 P.3d 1026, 1031 (2005).

35. "[I]n order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact."

36. Procedurally, Plaintiff failed to properly oppose Henderson's Motion for Summary Judgment. *See* EDCR 2.20. Despite Plaintiff having failed to comply with the mandatory deadlines

of this Court evaluated Plaintiff's Opposition on the merits and concludes Plaintiff has failed to set forth any admissible evidentiary support to avoid summary judgment as required by NRCP 56 or justify a continuance for discovery as allowed under NRCP 56(d).

37. This Court concludes as a matter of law that the plain language of Section 3.9 of Toga's Bylaws authorizes a majority of the Board of Directors to call and hold Special Board of Director Meetings. Once again, so there is no confusion, this relevant section states:

> Except as otherwise required by law, and subject to any rights of the holders of preferred stock, special meetings of the Board of Directors may be called only by the Chairman of the Board, if any, or if there be no Chairman of the Board, by any of the chief executive officer, the president or the secretary, **or the secretary upon the request of at least a majority of the authorized number of directors**. If the Chairman of the Board, or if there be no Chairman of the Board, each of the chief executive officer, president and secretary, refuses or neglects to call such special meeting, a special meeting may be called by a written request signed by the Lead Independent Director or at least a majority of the directors in office.

38. Pursuant to Section 3.9, while the Chairman of the Board can call for Special Board Meetings unilaterally, a majority of authorized directors can also call for such a meeting.

39. Board Meeting Minutes and Declarations submitted to the court from Toga's Independent Directors Bratt, Guinn, and Lupkin and the declaration of Henderson confirm each of the Special Board Meetings dated August 28, 2021, September 17, 2021, September 24, 2021, October 12, 2021, and November 1, 2021 were authorized by a majority of the Board of Directors as required under Section 3.9.

40. Having established no dispute of fact or law exists as to the authority of the majority of the Board of Directors being able to call a Special Board Meeting, the Court further finds that notice was properly provided to Plaintiff for the relevant Special Board Meeting.

41. In total, the Board of Directors had five (5) Special Board Meetings (August 28, 2021, September 17, 2021, September 24, 2021, October 12, 2021, and November 1, 2021) in which the Board considered, voted, and/or ratified the Henderson Settlement Agreement. The Court finds as a matter of law, each Special Board Meeting constitutes an affirmative vote of approval and ratification of the Settlement Agreement and corresponding authorization for disbursement of the related settlement proceeds to Henderson.

42. The Cout finds no genuine dispute exists as to the September 24, 2021 special meeting (a date provided by Plaintiff weeks prior) being properly noticed. Admissible evidence in the form of authenticated e-mails and declarations confirm return receipts from Plaintiff's e-mail account demonstrating Plaintiff received notice well in advance of the required twenty-four-hour notice. Uncontroverted evidence further confirms the September 24, 2021 Special Board Meeting went forward with all board members other than Plaintiff appearing, with a quorum established. At this September 24, 2021 meeting, the Board as constituted on that day: (1) Discussed actions taken at the prior two board meetings dated August 28, 2021 and September 17, 2021 and unanimously approved of the ratification of prior board actions, including the actions related to the Henderson Contract; and (2) Discussed Plaintiff's roles as Chairman, CEO, and President of the Company and unanimously voted to remove Plaintiff from each respective position; *(3)* Discussed Plaintiff's request that Henderson return the $445,207 in settlement proceeds. The Board unanimously agreed to deny such a request and resolved not to take such action.

43. In total, the September 24, 2021 Special Board Meeting is determinative of the issues Plaintiff complains of, as it was properly noticed under Section 3.11 of the Bylaws, was authorized by a majority of the Directors, and resulted in a majority vote to approve the settlement agreement with Henderson and the resulting payout. The subsequent Special Board Meetings accomplished the same result.

44. Based on the foregoing, the Court enters summary judgment in favor of Henderson as to Plaintiff's First Cause of Action for Declaratory Judgment.

45. Having established no genuine dispute of fact exists as to the validity and legality of the Henderson Settlement Agreement, Plaintiff's Breach of Contract, Breach of Good Faith and Fair Dealing, and Unjust Enrichment claims are also subject to summary judgment. All these claims are predicated on the Henderson Contract and Plaintiff's assertion Henderson "breached the Agreement by failing to perform" and "exceeded his scope of authority by taking more payment than he was entitled to." Plaintiff further avers "Henderson accepted terms that favored him personally at the expense of Toga's shareholders."

46. Section III(A) of the Settlement Agreement and the supporting declarations from the Independent Directors and Henderson leave no dispute that the Board of Directors authorized the Henderson Settlement Agreement and approved the same in writing. The Henderson Settlement Agreement was a compromised claim approved by a majority of the Board of Directors following the advice of counsel. No facts exist to support Henderson breached any obligation of the Henderson Settlement Agreement ~~and any decision by the Board, relating to the reasoning and judgment underlying the approval of the Henderson Settlement Agreement was vested firmly within their discretion under the Business Judgment Rule~~. Consequently, enters summary judgment in favor of Henderson on Plaintiff's Breach of Contract, Breach of Good Faith and Fair Dealing, and Unjust Enrichment claims.

47. Plaintiff's Sixth and Seventh Claims for Relief are styled as ones of Breach of Duty of Loyalty and Breach of Fiduciary Duty. The entirety of the allegations supporting both claims are that Henderson engaged in self-dealing by "voting for approval of an unduly large compensation" package.

48. The undisputed facts set forth in the preceding findings and conclusions of the Court confirm there weas no "breach" of any duty by Henderson. Rather, Henderson maintained a valid Employment Agreement that was approved by the Board of Directors and that agreement was followed by a subsequently approved, arms-length resolution memorialized in writing through the Henderson Settlement Agreement.

49. The Nevada Supreme Court has held that corporate officers and directors owe a fiduciary duty to the company and its shareholders. *See Shoen v. Sac Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006). This fiduciary duty "imparts upon the directors duties of care and loyalty." *Id.* at 122 Nev. at 632.

50. The duty of loyalty requires board members and directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests. *Id*. However, "[a] director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in NRS 78.138(7).

Chur v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev. 68, 71, 458 P.3d 336, 339 (2020).

51. A high threshold exists for a plaintiff to advance a breach of fiduciary duty or loyalty claim under NRS 78.138(7):

> Under this section, a two-step analysis to impose individual liability on a director or officer applies. First, the presumptions of the business judgment rule, codified in *NRS 78.138*, must be rebutted. NRS 78.138(7)(a); *Wynn Resorts, Ltd. v.* Eighth *Judicial Dist. Court*, 133 Nev. 369, 375, 399 P.3d 334, 342 (2017) ("Nevada's business judgment rule is codified at NRS 78.138 ...."). The business judgment rule states that "directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Second, the "director's or officer's act or failure to act" must constitute "a breach of his or her *fiduciary duties,"* and that breach must further involve "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(1)-(2) (emphasis in original).

Chur, 136 Nev. at 71.

52. The Court finds that Plaintiff has failed to meet either of the required prongs to avoid summary judgment on the fiduciary duty-based claims. The facts of this case as to Henderson are not subject to dispute—a contractual basis for the Settlement Agreement existed and payment was made in conjunction with that agreement.

53. Plaintiff has failed to set forth through any documentary or admissible evidence any conduct remotely alleged, or in existence that could rise to the level of "intentional misconduct, fraud, or a knowing violation of the law." Rather, the undisputed facts establish the Toga Board of Directors after relying on the advice of counsel, compromised a disputed claim involving compensation rightfully due to Henderson under his employment agreement using their discretion and judgment.

54. Consequently, like Plaintiff's other Claims for Relief, as a matter of law and fact, Plaintiff's Breach of Fiduciary Duty and Breach of Loyalty claims are subject to summary judgment in favor of Henderson.

55. Separate and distinct from the above stated reasons summary judgment is entered in favor of Henderson, summary judgment is independently necessary based on Plaintiff's failure to comply with the mandatory prerequisites for bringing derivative claims against Henderson on behalf of Toga as set forth within NRS 23.1.

56. Toh's Complaint advances solely derivative claims. A fundamental policy underlying Nevada corporate law is that "a corporation's board of directors has full control over the affairs of the corporation." *Shoen v. SAC Holding Corp*., 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006) (quoting NRS 78.120(1)). This includes the power to decide whether the Company should engage in litigation. *Id.* A shareholder derivative action provides a narrow exception to this rule. *Id*. A shareholder's ability to bring a derivative action is limited by what is commonly known as the "demand requirement." "[B]ecause the power to manage the corporation's affairs resides in the board of directors, a shareholder must, before filing suit, make a demand on the board . . . to obtain the action that the shareholder desires." *Shoen*, 122 Nev. at 633, 137 P.3d at 1179. If a shareholder fails to make a demand, he must demonstrate that a demand would be futile before being permitted to proceed with the litigation. *Id.*

57. When distinguishing between direct and derivative claims, the analysis is two-fold: Who suffered the alleged harm—the corporation or the suing stockholders, individually—and who would receive the benefit of any recovery or other remedy? *See Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for County of Clark*, 133 Nev. 417, 423, 401 P.3d 1100, 1105 (2017). A claim is direct in nature if the alleged wrongful act caused direct harm to the shareholder that is separate from or independent of any harm to the corporation. *Id*. This requires proof that the plaintiff can prevail on his or her claim "without showing an injury to the corporation." *Id*. By contrast, a claim is derivative in nature if the alleged wrongful act caused direct harm to the corporation and only indirect harm to the shareholder. *Id.*

58. In this case, all of Plaintiff's claims (Declaratory Judgment, Breach of Contract, Breach of Good Faith and Fair Dealing, Breach of Loyalty, Breach of Fiduciary Duty, and Unjust Enrichment) are derivative in nature. The claims based on the Employment Agreement are all between Toga and Henderson—with Plaintiff having no contractual right or standing therein. The same applies for the Breach of Fiduciary Duty claims, which are owed to the corporation, not the shareholders. *Id.* at 1105.

59. Plaintiff has never made a demand upon the Board to take the action he attempts to sue for and instead avers with no factual allegations, the Board would not have been able to

impartially consider Plaintiff's demands for action and as a result, the demand requirements of NRPC 23.1 were excused.

60. The Court finds that Plaintiff has failed to set forth a particularized showing of futility and has failed to provide any facts to plausibly suggest the Independent Board Plaintiff elected could not be impartially consider the requested action.

61. Without a proper demand upon the Board of Directors, Plaintiff is left with no ability to cure such defect, because any such attempt to cure with a proper demand upon the Board is rendered moot by this Court's findings and conclusions regarding the validity of the Henderson Settlement Agreement. Consequently, Plaintiff's derivative claims (which are the entirety of the Complaint) are independently subject to summary judgment in favor of Henderson.

62. The Court further finds that Plaintiff's request for additional discovery pursuant to NRCP 56(d) is procedurally defective, unwarranted, and futile.

63. To avoid summary judgment on the basis of a necessity of unavailable but necessary discovery, the non-moving party must show "by affidavit of declaration" the specified reasons it cannot present facts to justify its opposition. NRCP 56(d). *Choy v. Ameristar Casinos, Inc*., 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) (failing to provide affidavit in support of request for discovery under NRCP 56(f) was not substantially compliant with NRCP 56(f) and the district court properly denied request for a continuance of summary judgment).

64. Plaintiff failed to set forth any facts that would raise a genuine dispute of material fact or justify a continuance of Henderson's Motion for Summary Judgment, as there are no facts that could eliminate the decisions of the Board of Directors or their judgment to compromise claims such as the Henderson Settlement Agreement.

65. To the extent not referenced in these Findings of Fact and Conclusions of Law, the Court adopts the analysis and factual basis, inclusive of the referenced exhibits from Alexander Henderson's Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment.

66. If any conclusion of law could be construed as a finding of fact, it shall be so construed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Alexander Henderson's Motion for Summary Judgment ~~and Defendant Toga Limited's Joinder thereto~~ are **GRANTED IN ITS ENTIRETY** with final judgment entered in favor of Defendant Alexander Henderson ~~and Toga Limited~~.

IT IS SO ORDERED.

Defendant Toga Limited's Joinder is granted in part, to the extent it supports Defendant Henderson. Defendant Toga Limited's Joinder is denied in part, to the extent it is independent relief as to Toga Limited.

Dated this 29th day of June, 2022

Michael A. Cherry
DISTRICT COURT JUDGE

93B 9A8 C11B 170F
Michael Cherry
District Court Judge

Submitted By:

Dated this 17th day of June 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
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400 S. 4th Street, Suite 650
Las Vegas, NV 89101
Attorney for Defendant,
Alexander Henderson

Approved as to Form and Content:

Dated this __X_ day of May 2022.

CORY READE DOWS & SHAFER

By: *REFUSED TO SIGN*
Jay A. Shafer, Esq.
Nevada Bar No. 9184
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 891289
Attorney for Plaintiff,
Michael Toh Kok Soon

Dated this 17th day of June 2022.

MARQUIS AURBACH

By: */s/ Chad F. Clement*
Chad F. Clement, Esq.
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Attorneys for Defendant,
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6/20/2022 12:05 PM

James Beckstrom

From: James Beckstrom
Sent: Friday, June 17, 2022 4:33 PM
To: Jay Shafer
Cc: Chad F. Clement; Jordan Montet; Suzanne Boggs
Subject: RE: Toh v. Henderson, et al. -- FFCL and Order
Attachments: 2022-06-15 Findings of Facts Conclusions of Law - _FINAL CLEAN.docx; 2022-06-15 Findings of Facts Conclusions of Law - _JAB _v3.docx

Jay,

I have provided comments to each of your revisions. I have accepted some and rejected the others. The only real material rejection was the issue of the derivative claims. That issue is opposite of what you struck from the document. The transcript states:

" Now, the Court, before it goes to -- **then we have the second aspect with regards to all the claims as improper derivative claims. The Court really didn't see that there was much really in response to the derivative claims. The Court, based on what's the evidence under Rule 56, would have to grant the balance of those claims based on what's set forth and adopting the legal argument and the undisputed facts in the motion and reply**."

To save time, I obtained Toga's changes and position on your comments, they are reflected in the same comments and the final clean version is approved.

Please confirm today if we can use your signature on the clean version. We are not negotiating further on the language, we kept it as neutral as possible, and it accurately reflects the order of the Court. We will be submitting to the Court Monday, with a notation in the signature line a competing order will follow by you.

James

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From: Jay Shafer <jshafer@crdslaw.com>
Sent: Wednesday, June 15, 2022 5:46 PM
To: James Beckstrom <JB@beckstromlaw.com>
Subject: Toh v. Henderson, et al. -- FFCL and Order

Per our discussion I have made some revisions. I disagree with the form, and think a simpler version would be wise, but that is not what you prepared. The largest change is the discussion on the derivative action. This was not found by the court. As you know Judge Kishner's argument was detailed, and you now have the transcript for this, so there is no dispute on what she said. I will be out of the office but can make time to discuss on Monday. I believe we can likely reach a resolution. If you cannot, and submit this I request that you advise the court that I am out dealing with a family matter and will submit a competing order on Monday.



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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael Toh Kok Soon, Plaintiff(s) vs. Toga Limited, Defendant(s)	CASE NO: A-21-841604-B DEPT. NO. Department 31

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/29/2022

Chad Clement	cclement@maclaw.com
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Electronically Filed
6/29/2022 4:52 PM
Steven D. Grierson
CLERK OF THE COURT

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Attorney for Alexander Henderson

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual Plaintiff, v. ALEXANDER HENDERSON, an individual; TOGA LIMITED; a Nevada corporation; DOES 1-100; and ROE BUSINESS ENTITIES I through C; inclusive, Defendant.	Case No.: A-21-841604-B Dept No.: 31 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT HENDERSON'S MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that a **Findings of Fact, Conclusions of Law, and Order Granting Defendant Alexander Henderson's Motion for Summary Judgment** was entered in the above-entitled action on June 29, 2022. A copy of which is attached hereto.

Dated this 29th day of June 2022.

BECKSTROM & BECKSTROM

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 So. 4th Street, Suite 650
Las Vegas, NV 89101
Attorney for Alexander Henderson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT ALEXANDER HENDERSON'S MOTION FOR SUMMARY JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 29th day of June 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

Jay A. Shafer, Esq.
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MARQUIS AURBACH
10001 Park Run Drive
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Attorneys for Toga Limited

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Suzanne Boggs
An employee of Beckstrom & Beckstrom

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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6/29/2022 2:54 PM

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06/29/2022 2:54 PM
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual Plaintiff, v. ALEXANDER HENDERSON, an individual; TOGA LIMITED; a Nevada corporation; DOES 1-100; and ROE BUSINESS ENTITIES I through C; inclusive, Defendant.	Case No.: A-21-841604-B Dept No.: 31 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT ALEXANDER HENDERSON'S MOTION FOR SUMMARY JUDGMENT AND TOGA LIMITED'S JOINDER THERETO**

This matter, having been considered by the Honorable Joanna Kishner on May 24, 2022 at 8:30 a.m., in connection with Defendant Alexander Henderson's ("Henderson") Motion for Summary Judgment ("Motion") and Defendant Toga Limited's Joinder thereto ("Joinder"); with James A. Beckstrom, Esq., of Beckstrom & Beckstrom, LLP, appearing for Defendant Alexander Henderson ("Henderson"), with Chad F. Clement, Esq. of Marquis Aurbach appearing for Defendant Toga Limited ("Toga") filing a Joinder thereto, and Jay A. Shafer, Esq., of Cory Reade Dows & Shafer, appearing for Plaintiff Michael Toh Kok Son ("Plaintiff"). The Court having reviewed the Motion, the Joinder thereto, and all related briefing thereto, the papers and pleadings on file herein, and hearing oral arguments regarding the Motion and Joinder, and good cause appearing therefore orders based on the below stated findings of fact and conclusions of law the following:

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Case Number: A-21-841604-B

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FINDINGS OF FACT

1. Toga is a publicly traded corporation incorporated in Delaware.

2. In or around July 2019, Toga decided to move towards listing on the Nasdaq, which caused the selection of independent directors who were not officers or owners of the company for an independent Board of Directors.

3. The Board of Directors is comprised of three independent directors—Iain Bratt ("Bratt"), Shemori Guinn ("Guinn"), and Jim Lupkin ("Lupkin") (collectively "Independent Directors"), with Henderson and Plaintiff currently sitting as the fourth and fifth directors, respectively.

4. Pursuant to the Toga Bylaws, the Board of Directors maintain full control over the business affairs of Toga and decisions by the Board of Directors are subject to majority vote.

5. In addition to electing the existing Board of Directors, Toga hired Henderson as the to serve as the corporation's Chief Financial Officer ("CFO")..

6. Thereafter, Toga retained Baker Hostetler, LLP ("Baker") to serve as the Company's legal counsel and Marcum LLP ("Marcum") to serve as Toga's independent accounting firm.

7. Plaintiff's appointment of Henderson as CFO was memorialized by an Employment Agreement, setting forth standard compensation and termination clauses (the "Henderson Contract" or "Employment Contract"). The Employment Contract was negotiated by Plaintiff and was an arms-length transaction.

8. In or around March or April 2021, Marcum auditors informed the Board of Directors that they could not complete the necessary year 2020 audit for Toga, because Toga's financials lacked necessary back-up bank statements and Toga's subsidiary entities were refusing to or were unable to provide various business contracts and bank records to Marcum for verification.

9. On July 30, 2021, Henderson provided the Board of Directors, inclusive of Plaintiff, a signed letter or resignation for his position as CFO. The resignation was based upon a memorandum by Toga's Chinese legal counsel JunHe, LLP regarding the activities of the company in the People's Republic of China ("China").

10. As the CFO responsible for overseeing the finances of Toga, Henderson maintained that he could not ethically continue as CFO, without violating Toga's Code of Ethics or his Employment Agreement. As a result, Henderson provided the Company thirty (30) days resolve the operations in China or accept his resignation as of August 29, 2021. In the event the Company failed to cure the problems in China stated by JunHe, LLP, Henderson notified Toga that he would seek his contractual compensation due under the Employment Agreement.

11. Toga was unable to cure the issues raised within China and as a result Henderson resigned. The result was Henderson submitting a demand for compensation to the Board of Directors as authorized by the Employment Contract. Henderson maintained that under Section 1(b) of the Employment Contract, "Good Reason" existed for the resignation, as a result of his misleading statements about the Company he made in his role as CFO and information received from Toga's Chinese legal counsel JunHe, LLP.

12. Toga employed legal counsel who provided the Board of Directors an opinion that based on Henderson's Employment Contract, Henderson was legally due a lump sum payment of his monthly salary of $15,000 thru the term of the Agreement, accrued benefits, and existing equity awards. Following negotiations, the Board of Directors were advised and did negotiate a settlement with Henderson in the amount of $445,607, reduced from Henderson's request for $625,607.

13. On August 26, 2021, the Independent Directors noticed a Special Board of Director meeting for August 28, 2021 (the "August 28 Meeting"). A quorum was established at the August 28 Meeting, with the only absent Directors being Plaintiff and Guinn. At the August 28 Meeting, the Board of Directors discussed a number of topics, ~~including winding up the Company in a way that would not harm shareholders (as a result of the Company not being able to complete a necessary audit), the viability of the Company's Malaysian subsidiaries, requested payments to and on behalf of Toga's subsidiaries~~, and the resignation and compensation of Henderson.

14. Relevant to the Henderson Contract, the Board of Directors, with the assistance of counsel and with Henderson not participating in the discussions with counsel, determined Henderson was entitled to compensation as a result of his employment being terminated for "good reason" under Section 2(b), and this determination led to the Board of Directors approving a settlement for the compensation based on Henderson's termination as CFO, including monthly payments thru the term. The result was a partial compromised settlement in the amount of $445,607, with an agreement to address the balance of the $180,000 demanded by Henderson at a future date.

15. In conjunction with authorizing the compromise to resolve the Henderson Contract, the Board authorized Henderson, the sole signatory on Toga's bank account, to transfer the agreed to settlement amount and accepted Henderson's resignation as CFO.

16. The settlement amount was memorialized with a written Settlement Agreement ("Settlement Agreement") signed by the Independent Directors. Henderson thereafter transferred the authorized amount under the Settlement Agreement.

17. Plaintiff disputed the legitimacy of the August 28 Meeting on the basis (1) he did not receive notice within the notice period required by the Bylaws; and (2) no director other than the Chairman of the Board could call for Special Board of Director meetings under Section 3.9 of the Bylaws.

18. Based on Plaintiff's position he did not receive notice of the August 28 Meeting, though disputed, the Independent Directors and Henderson set another Special Meeting of the Board of Directors for September 17, 2021. All meeting details for this September 17, 2021 were provided to Plaintiff. In response, Plaintiff stated he would hold a Special Meeting of the Board of Directors on September 24, 2021, despite the Independent Directors conveying that the meeting could not wait.

19. On September 17, 2021, the Board of Directors met as noticed, with all the Independent Directors and Plaintiff present. Despite Plaintiff appearing, he appeared only to "object to the meeting not being called lawfully." As a result of being unable to discuss multiple

agenda items with Plaintiff, the Board of Directors noticed yet another special meeting for September 24, 2021, a date in which Plaintiff previously confirmed he could attend.

20. On September 21, 2021, the Independent Directors e-mailed Plaintiff stating they were disappointed he left the September 17, 2021 meeting and memorialized the follow up Special Board of Directors Meeting set for September 24, 2021. The Independent Directors further laid out for Plaintiff, the anticipated agenda items, which included (1) ratification of prior Board actions, including approval of the Henderson Contract and settlement, (2) consideration of removing Toh as Chairman of the Board, CEO, and President, and (3) consideration of appointing a new Chairman, CEO, and President.

21. The Independent Directors noticed the September 24, 2021 Special Board of Directors Meeting (a date provided by Plaintiff weeks prior). Return receipts from Plaintiff's e-mail account confirm the September 24, 2021 notice was received timely as required by the Bylaws. This meeting went forward with all board members other than Plaintiff appearing. Legal counsel for Toga was present and a quorum was established. At this meeting, the Board of Directors as constituted on that day: (1) discussed actions taken at the prior two board meetings dated August 28, 2021 and September 17, 2021 and unanimously approved of the ratification of prior board actions, including the actions related to the Henderson Contract; (2) discussed Plaintiff's roles as Chairman, CEO, and President of the Company and unanimously voted to remove Plaintiff from each respective position; (3) discussed the necessity of a new Chairman and unanimously approved the appointment of Henderson as the Chairman; and (4) discussed Plaintiff's request that Henderson be removed as the Company's signatory and Trustee of the Indemnification Trust and return the $445,207 in settlement proceeds. The Board unanimously agreed to deny such a request and resolved not to take such action. The vote by the Board of Directors was 4-0.

22. On October 12, 2021, the Board of Directors once again met at a duly noticed Special Board of Directors Meeting, with Plaintiff present. The Board of Directors discussed Plaintiff's prior claims of "lack of notice" of the prior Board Meetings of August 28 and September 17. The Board once again ratified the minutes from the Board Meetings of September 17 and

September 24, which approved the Henderson settlement agreement. The vote was 4-1, which Plaintiff the only objecting party.

23. On November 1, 2021, the Board of Directors once again met at a duly noticed meeting, with Plaintiff present. Among other things, the Board of Directors once again ratified the minutes from the Board Meetings of August 28, September 17, September 24, and October 12, 2021, which approved the Henderson settlement agreement. The vote weas 4-1, which Plaintiff the only objecting party.

24. On April 19, 2022, the Board of Directors met again and among other things again adopted all prior Board Meeting Minutes as a Resolution of the Company. The Resolution confirmed the August 28, 20221, September 17, 2021, September 24, 2021, October 12, 2021, November 1, 2021, and April 19, 2022 decisions by the Board of Directors.

25. On September 23, 2021, Plaintiff filed this derivative lawsuit in the Eighth Judicial District Court against Henderson and Toga, asserting the following claims for relief: (1) declaratory relief; (2) injunctive relief; (3) breach of contract; (4) breach of duty of good faith; (5) breach of loyalty; (6) breach of fiduciary duty; (7) unjust enrichment; and (8) intentional interference with contractual relations.

26. Within the Complaint, Plaintiff asserted (1) the August 28, 2021 Special Board of Director Meeting was invalid, because Plaintiff did not receive timely notice of the meeting as required by Section 3.11 of the Company Bylaws; and (2) all of the Board of Directors' Special Director Meetings were void, because the authority to call Special Board of Director Meetings was only within the authority of the Chairman. Plaintiff concluded that as a result, the Henderson Settlement Agreement and resulting payments to Henderson were "void."

27. On April 21, 2022, Henderson filed a Motion for Summary Judgment as to all of Plaintiff's claims, with Toga filing a joinder on April 28, 2022.

28. Plaintiff obtained an extension of the deadline for the Opposition to the Motion for Summary Judgment from counsel for Henderson, but no approval of the Court was sought or provided.

29. Plaintiff filed an untimely Opposition to the Motion for Summary Judgment on May 19, 2022 following Henderson's Notice of Non-Opposition being filed on May 19, 2022. Henderson thereafter filed a Reply to Plaintiff's Opposition the same day.

30. Thereafter, with oral argument on Henderson's Motion for Summary Judgment set for May 24, 2022 at 8:30 a.m., on May 23, 2022 after 5:00 p.m., Plaintiff filed: (1) a Declaration of Jay A. Shafer, Esq.; (2) Plaintiff's Corrected Supplement to His Opposition to Defendant Alexander Henderson's Opposition; (3) Plaintiff's Supplement to his Opposition to Defendant Alexander Henderson's Motion for Summary Judgment; and (4) Plaintiff's Renewed Motion for Court-Ordered Dismissal.

31. The Court never authorized a continued briefing schedule or extension for Plaintiff's Opposition.

32. Plaintiff's untimely Declaration failed to set forth any material facts that would necessitate or require discovery under NRCP 56(f). Setting aside the procedural defects within the Declaration, none of the proposed discovery or anticipated facts that could be unearthed in any such discovery would be of any relevance to the legal and factual issues before the Court.

CONCLUSIONS OF LAW

33. Summary judgment is entered in favor of Henderson as to all claims advanced by Plaintiff on both procedural grounds and substantive grounds.

34. "A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a); *see also Wood v. Safeway, Inc.*, 121 Nev.724, 731, 121 P.3d 1026, 1031 (2005).

35. "[I]n order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact."

36. Procedurally, Plaintiff failed to properly oppose Henderson's Motion for Summary Judgment. *See* EDCR 2.20. Despite Plaintiff having failed to comply with the mandatory deadlines

of this Court evaluated Plaintiff's Opposition on the merits and concludes Plaintiff has failed to set forth any admissible evidentiary support to avoid summary judgment as required by NRCP 56 or justify a continuance for discovery as allowed under NRCP 56(d).

37. This Court concludes as a matter of law that the plain language of Section 3.9 of Toga's Bylaws authorizes a majority of the Board of Directors to call and hold Special Board of Director Meetings. Once again, so there is no confusion, this relevant section states:

> Except as otherwise required by law, and subject to any rights of the holders of preferred stock, special meetings of the Board of Directors may be called only by the Chairman of the Board, if any, or if there be no Chairman of the Board, by any of the chief executive officer, the president or the secretary, **or the secretary upon the request of at least a majority of the authorized number of directors**. If the Chairman of the Board, or if there be no Chairman of the Board, each of the chief executive officer, president and secretary, refuses or neglects to call such special meeting, a special meeting may be called by a written request signed by the Lead Independent Director or at least a majority of the directors in office.

38. Pursuant to Section 3.9, while the Chairman of the Board can call for Special Board Meetings unilaterally, a majority of authorized directors can also call for such a meeting.

39. Board Meeting Minutes and Declarations submitted to the court from Toga's Independent Directors Bratt, Guinn, and Lupkin and the declaration of Henderson confirm each of the Special Board Meetings dated August 28, 2021, September 17, 2021, September 24, 2021, October 12, 2021, and November 1, 2021 were authorized by a majority of the Board of Directors as required under Section 3.9.

40. Having established no dispute of fact or law exists as to the authority of the majority of the Board of Directors being able to call a Special Board Meeting, the Court further finds that notice was properly provided to Plaintiff for the relevant Special Board Meeting.

41. In total, the Board of Directors had five (5) Special Board Meetings (August 28, 2021, September 17, 2021, September 24, 2021, October 12, 2021, and November 1, 2021) in which the Board considered, voted, and/or ratified the Henderson Settlement Agreement. The Court finds as a matter of law, each Special Board Meeting constitutes an affirmative vote of approval and ratification of the Settlement Agreement and corresponding authorization for disbursement of the related settlement proceeds to Henderson.

42. The Cout finds no genuine dispute exists as to the September 24, 2021 special meeting (a date provided by Plaintiff weeks prior) being properly noticed. Admissible evidence in the form of authenticated e-mails and declarations confirm return receipts from Plaintiff's e-mail account demonstrating Plaintiff received notice well in advance of the required twenty-four-hour notice. Uncontroverted evidence further confirms the September 24, 2021 Special Board Meeting went forward with all board members other than Plaintiff appearing, with a quorum established. At this September 24, 2021 meeting, the Board as constituted on that day: (1) Discussed actions taken at the prior two board meetings dated August 28, 2021 and September 17, 2021 and unanimously approved of the ratification of prior board actions, including the actions related to the Henderson Contract; and (2) Discussed Plaintiff's roles as Chairman, CEO, and President of the Company and unanimously voted to remove Plaintiff from each respective position; *(3)* Discussed Plaintiff's request that Henderson return the $445,207 in settlement proceeds. The Board unanimously agreed to deny such a request and resolved not to take such action.

43. In total, the September 24, 2021 Special Board Meeting is determinative of the issues Plaintiff complains of, as it was properly noticed under Section 3.11 of the Bylaws, was authorized by a majority of the Directors, and resulted in a majority vote to approve the settlement agreement with Henderson and the resulting payout. The subsequent Special Board Meetings accomplished the same result.

44. Based on the foregoing, the Court enters summary judgment in favor of Henderson as to Plaintiff's First Cause of Action for Declaratory Judgment.

45. Having established no genuine dispute of fact exists as to the validity and legality of the Henderson Settlement Agreement, Plaintiff's Breach of Contract, Breach of Good Faith and Fair Dealing, and Unjust Enrichment claims are also subject to summary judgment. All these claims are predicated on the Henderson Contract and Plaintiff's assertion Henderson "breached the Agreement by failing to perform" and "exceeded his scope of authority by taking more payment than he was entitled to." Plaintiff further avers "Henderson accepted terms that favored him personally at the expense of Toga's shareholders."

46. Section III(A) of the Settlement Agreement and the supporting declarations from the Independent Directors and Henderson leave no dispute that the Board of Directors authorized the Henderson Settlement Agreement and approved the same in writing. The Henderson Settlement Agreement was a compromised claim approved by a majority of the Board of Directors following the advice of counsel. No facts exist to support Henderson breached any obligation of the Henderson Settlement Agreement ~~and any decision by the Board, relating to the reasoning and judgment underlying the approval of the Henderson Settlement Agreement was vested firmly within their discretion under the Business Judgment Rule~~. Consequently, enters summary judgment in favor of Henderson on Plaintiff's Breach of Contract, Breach of Good Faith and Fair Dealing, and Unjust Enrichment claims.

47. Plaintiff's Sixth and Seventh Claims for Relief are styled as ones of Breach of Duty of Loyalty and Breach of Fiduciary Duty. The entirety of the allegations supporting both claims are that Henderson engaged in self-dealing by "voting for approval of an unduly large compensation" package.

48. The undisputed facts set forth in the preceding findings and conclusions of the Court confirm there weas no "breach" of any duty by Henderson. Rather, Henderson maintained a valid Employment Agreement that was approved by the Board of Directors and that agreement was followed by a subsequently approved, arms-length resolution memorialized in writing through the Henderson Settlement Agreement.

49. The Nevada Supreme Court has held that corporate officers and directors owe a fiduciary duty to the company and its shareholders. *See Shoen v. Sac Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006). This fiduciary duty "imparts upon the directors duties of care and loyalty." *Id.* at 122 Nev. at 632.

50. The duty of loyalty requires board members and directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests. *Id*. However, "[a] director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in NRS 78.138(7).

Chur v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev. 68, 71, 458 P.3d 336, 339 (2020).

51. A high threshold exists for a plaintiff to advance a breach of fiduciary duty or loyalty claim under NRS 78.138(7):

> Under this section, a two-step analysis to impose individual liability on a director or officer applies. First, the presumptions of the business judgment rule, codified in *NRS 78.138*, must be rebutted. NRS 78.138(7)(a); *Wynn Resorts, Ltd. v.* Eighth *Judicial Dist. Court*, 133 Nev. 369, 375, 399 P.3d 334, 342 (2017) ("Nevada's business judgment rule is codified at NRS 78.138 ...."). The business judgment rule states that "directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Second, the "director's or officer's act or failure to act" must constitute "a breach of his or her *fiduciary duties,"* and that breach must further involve "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(1)-(2) (emphasis in original).

Chur, 136 Nev. at 71.

52. The Court finds that Plaintiff has failed to meet either of the required prongs to avoid summary judgment on the fiduciary duty-based claims. The facts of this case as to Henderson are not subject to dispute—a contractual basis for the Settlement Agreement existed and payment was made in conjunction with that agreement.

53. Plaintiff has failed to set forth through any documentary or admissible evidence any conduct remotely alleged, or in existence that could rise to the level of "intentional misconduct, fraud, or a knowing violation of the law." Rather, the undisputed facts establish the Toga Board of Directors after relying on the advice of counsel, compromised a disputed claim involving compensation rightfully due to Henderson under his employment agreement using their discretion and judgment.

54. Consequently, like Plaintiff's other Claims for Relief, as a matter of law and fact, Plaintiff's Breach of Fiduciary Duty and Breach of Loyalty claims are subject to summary judgment in favor of Henderson.

55. Separate and distinct from the above stated reasons summary judgment is entered in favor of Henderson, summary judgment is independently necessary based on Plaintiff's failure to comply with the mandatory prerequisites for bringing derivative claims against Henderson on behalf of Toga as set forth within NRS 23.1.

56. Toh's Complaint advances solely derivative claims. A fundamental policy underlying Nevada corporate law is that "a corporation's board of directors has full control over the affairs of the corporation." *Shoen v. SAC Holding Corp*., 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006) (quoting NRS 78.120(1)). This includes the power to decide whether the Company should engage in litigation. *Id.* A shareholder derivative action provides a narrow exception to this rule. *Id*. A shareholder's ability to bring a derivative action is limited by what is commonly known as the "demand requirement." "[B]ecause the power to manage the corporation's affairs resides in the board of directors, a shareholder must, before filing suit, make a demand on the board . . . to obtain the action that the shareholder desires." *Shoen*, 122 Nev. at 633, 137 P.3d at 1179. If a shareholder fails to make a demand, he must demonstrate that a demand would be futile before being permitted to proceed with the litigation. *Id.*

57. When distinguishing between direct and derivative claims, the analysis is two-fold: Who suffered the alleged harm—the corporation or the suing stockholders, individually—and who would receive the benefit of any recovery or other remedy? *See Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for County of Clark*, 133 Nev. 417, 423, 401 P.3d 1100, 1105 (2017). A claim is direct in nature if the alleged wrongful act caused direct harm to the shareholder that is separate from or independent of any harm to the corporation. *Id*. This requires proof that the plaintiff can prevail on his or her claim "without showing an injury to the corporation." *Id*. By contrast, a claim is derivative in nature if the alleged wrongful act caused direct harm to the corporation and only indirect harm to the shareholder. *Id.*

58. In this case, all of Plaintiff's claims (Declaratory Judgment, Breach of Contract, Breach of Good Faith and Fair Dealing, Breach of Loyalty, Breach of Fiduciary Duty, and Unjust Enrichment) are derivative in nature. The claims based on the Employment Agreement are all between Toga and Henderson—with Plaintiff having no contractual right or standing therein. The same applies for the Breach of Fiduciary Duty claims, which are owed to the corporation, not the shareholders. *Id.* at 1105.

59. Plaintiff has never made a demand upon the Board to take the action he attempts to sue for and instead avers with no factual allegations, the Board would not have been able to

impartially consider Plaintiff's demands for action and as a result, the demand requirements of NRPC 23.1 were excused.

60. The Court finds that Plaintiff has failed to set forth a particularized showing of futility and has failed to provide any facts to plausibly suggest the Independent Board Plaintiff elected could not be impartially consider the requested action.

61. Without a proper demand upon the Board of Directors, Plaintiff is left with no ability to cure such defect, because any such attempt to cure with a proper demand upon the Board is rendered moot by this Court's findings and conclusions regarding the validity of the Henderson Settlement Agreement. Consequently, Plaintiff's derivative claims (which are the entirety of the Complaint) are independently subject to summary judgment in favor of Henderson.

62. The Court further finds that Plaintiff's request for additional discovery pursuant to NRCP 56(d) is procedurally defective, unwarranted, and futile.

63. To avoid summary judgment on the basis of a necessity of unavailable but necessary discovery, the non-moving party must show "by affidavit of declaration" the specified reasons it cannot present facts to justify its opposition. NRCP 56(d). *Choy v. Ameristar Casinos, Inc*., 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) (failing to provide affidavit in support of request for discovery under NRCP 56(f) was not substantially compliant with NRCP 56(f) and the district court properly denied request for a continuance of summary judgment).

64. Plaintiff failed to set forth any facts that would raise a genuine dispute of material fact or justify a continuance of Henderson's Motion for Summary Judgment, as there are no facts that could eliminate the decisions of the Board of Directors or their judgment to compromise claims such as the Henderson Settlement Agreement.

65. To the extent not referenced in these Findings of Fact and Conclusions of Law, the Court adopts the analysis and factual basis, inclusive of the referenced exhibits from Alexander Henderson's Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment.

66. If any conclusion of law could be construed as a finding of fact, it shall be so construed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Alexander Henderson's Motion for Summary Judgment ~~and Defendant Toga Limited's Joinder thereto~~ are **GRANTED IN ITS ENTIRETY** with final judgment entered in favor of Defendant Alexander Henderson ~~and Toga Limited~~.

Defendant Toga Limited's Joinder is granted in part, to the extent it supports Defendant Henderson. Defendant Toga Limited's Joinder is denied in part, to the extent it is independent relief as to Toga Limited.

IT IS SO ORDERED.

Dated this 29th day of June, 2022

Michael A. Cherry
DISTRICT COURT JUDGE

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Michael Cherry
District Court Judge

Submitted By:

Dated this 17th day of June 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
Nevada Bar No. 14032
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Attorney for Defendant,
Alexander Henderson

Approved as to Form and Content:

Dated this __X_ day of May 2022.

CORY READE DOWS & SHAFER

By: *REFUSED TO SIGN*
Jay A. Shafer, Esq.
Nevada Bar No. 9184
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 891289
Attorney for Plaintiff,
Michael Toh Kok Soon

Dated this 17th day of June 2022.

MARQUIS AURBACH

By: */s/ Chad F. Clement*
Chad F. Clement, Esq.
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6/20/2022 12:05 PM

James Beckstrom

From: James Beckstrom
Sent: Friday, June 17, 2022 4:33 PM
To: Jay Shafer
Cc: Chad F. Clement; Jordan Montet; Suzanne Boggs
Subject: RE: Toh v. Henderson, et al. -- FFCL and Order
Attachments: 2022-06-15 Findings of Facts Conclusions of Law - _FINAL CLEAN.docx; 2022-06-15 Findings of Facts Conclusions of Law - _JAB _v3.docx

Jay,

I have provided comments to each of your revisions. I have accepted some and rejected the others. The only real material rejection was the issue of the derivative claims. That issue is opposite of what you struck from the document. The transcript states:

" Now, the Court, before it goes to -- **then we have the second aspect with regards to all the claims as improper derivative claims. The Court really didn't see that there was much really in response to the derivative claims. The Court, based on what's the evidence under Rule 56, would have to grant the balance of those claims based on what's set forth and adopting the legal argument and the undisputed facts in the motion and reply**."

To save time, I obtained Toga's changes and position on your comments, they are reflected in the same comments and the final clean version is approved.

Please confirm today if we can use your signature on the clean version. We are not negotiating further on the language, we kept it as neutral as possible, and it accurately reflects the order of the Court. We will be submitting to the Court Monday, with a notation in the signature line a competing order will follow by you.

James

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From: Jay Shafer <jshafer@crdslaw.com>
Sent: Wednesday, June 15, 2022 5:46 PM
To: James Beckstrom <JB@beckstromlaw.com>
Subject: Toh v. Henderson, et al. -- FFCL and Order

Per our discussion I have made some revisions. I disagree with the form, and think a simpler version would be wise, but that is not what you prepared. The largest change is the discussion on the derivative action. This was not found by the court. As you know Judge Kishner's argument was detailed, and you now have the transcript for this, so there is no dispute on what she said. I will be out of the office but can make time to discuss on Monday. I believe we can likely reach a resolution. If you cannot, and submit this I request that you advise the court that I am out dealing with a family matter and will submit a competing order on Monday.



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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael Toh Kok Soon, Plaintiff(s) vs. Toga Limited, Defendant(s)	CASE NO: A-21-841604-B DEPT. NO. Department 31

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/29/2022

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07/12/2022 12:27 PM
CLERK OF THE COURT

SAO

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK, an individual, **Plaintiff,** **vs.** **ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive,** **Defendants.**	Case No.: A-21-841604-B Dept. No.: 31

STIPULATION AND ORDER TO CONTINUE JULY 14, 2022 HEARINGS ON MOTION TO DISQUAIFY AND MOTION FOR VOLUNTARY DISMISSAL

(Second Request)

Plaintiff Michael Toh Kok ("Plaintiff") by and through his attorneys of record, the law firm of Cory Reade Dows and Shafer, and Defendant Alexander Henderson, through his counsel, Beckstrom & Beckstrom, and Defendant Toga Limited, by and through its attorneys of record, the law firm of Marquis Aurbach, hereby stipulate and agree as follows:

1. WHEREAS, Plaintiff has two motions set for hearings on Thursday, July 14, 2022, specifically, a Motion to Voluntarily Dismiss and Motion to Disqualify Counsel for Defendants ("Motions").

2. WHEREAS, counsel for Defendant Henderson has a hearing out of state the morning of Thursday, July 14, 2022 and,

counsel for Plaintiff has been out of the office due to a COVID-19 infection.

3. WHEREAS, Plaintiff and Defendants also believe they may be able to resolve the Motions via stipulation, and have been working towards such resolution, and therefore, hereby request a continuance of the hearings on the Motions for two (2) weeks, for a date after July 27, 2022, or at such time thereafter which is convenient to the Court.

Submitted By:

Dated this 12th day of July 2022.

CORY READE DOWS & SHAFER

/s/ Jay Shafer
Jay A. Shafer, Esq.
Nevada Bar No. 9184
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 891289
Attorney for Plaintiff,
Michael Toh Kok Soon

Dated this 12th day of July 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/* James A. Beckstrom
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 S. 4th Street, Ste. 650
Las Vegas, NV 89101
Attorney for Alexander Henderson

Dated this 12th day of July 2022.

MARQUIS AURBACH

By: */s/* Chad F. Clement
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, NV 89145
Attorneys for Defendant,
Toga Limited

ORDER

IT IS SO ORDERED.

The Hearings set for July 14, 2022, at 8:30 a.m. shall be continued to the 28th day of July, 2022 at 8:30 a.m.

Dated this 12th day of July, 2022

50B 1B6 EC7F 318A
Joanna S. Kishner
District Court Judge

AA01234

Submitted By:

CORY READE DOWS & SHAFER

/s/ Jay A. Shafer
Jay A. Shafer, Esq.
Nevada Bar No. 9184
Attorney for Plaintiff,
Michael Toh Kok Soon

From:	Chad F. Clement
To:	"James Beckstrom"; Jay Shafer; Jordan Montet
Cc:	Kathrine von Arx
Subject:	RE: [External] SAO to continue hearings - Toh v. Toga [IWOV-iManage.FID1157923]
Date:	Tuesday, July 12, 2022 10:42:12 AM

Approved. You may affix my electronic signature.

Chad F. Clement, Esq.
10001 Park Run Drive
Las Vegas, NV 89145
t | 702.207.6092
f | 702.382.5816
cclement@maclaw.com
maclaw.com

Please consider the environment before printing this e-mail!
DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us (collect) immediately at (702) 382-0711 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Marquis Aurbach - Attorneys at Law

From: James Beckstrom <JB@beckstromlaw.com>
Sent: Tuesday, July 12, 2022 10:40 AM
To: Jay Shafer <jshafer@crdslaw.com>; Chad F. Clement <cclement@maclaw.com>; Jordan Montet <jmontet@MACLAW.com>
Cc: Kathrine von Arx <kvonarx@crdslaw.com>
Subject: RE: [External] SAO to continue hearings - Toh v. Toga [IWOV-iManage.FID1157923]

Approved

James A. Beckstrom, Esq.
400 S. 4th Street, Suite 650
Las Vegas, NV 89101
O: 725.300.0599
D: 725.201.0166
M. 714.875.0351
F. 725.300.0261
jb@beckstromlaw.com
Admitted: NV & CA

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael Toh Kok Soon, Plaintiff(s) vs. Toga Limited, Defendant(s)	CASE NO: A-21-841604-B DEPT. NO. Department 31

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/12/2022

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Suzanne Boggs	sb@beckstromlaw.com
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Electronically Filed
07/25/2022 10:05 AM
CLERK OF THE COURT

MWCN
Marquis Aurbach
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Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cclement@maclaw.com
jmontet@maclaw.com
Attorneys for Toga Limited

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual,

Plaintiff,

vs.

ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive,

Defendants.

Case No.: A-21-841604-B
Dept. No.: 31

MOTION TO WITHDRAW AS COUNSEL AND CONTINUE UPCOMING HEARINGS ON ORDER SHORTENING TIME

HEARING REQUESTED
HEARING DATE: JULY 28, 2022
HEARING TIME: 8:30 A.M.

The law firm of Marquis Aurbach moves this Court for an order allowing it to withdraw as counsel of record for Defendant Toga Limited on shortened time. This motion is made and based on the Declaration of Chad F. Clement, Esq., the attached Memorandum of Points and Authorities, and any oral argument the Court permits at the time of hearing on this matter.

Dated this 22 day of July, 2022.

MARQUIS AURBACH

By */s/ Jordan W. Montet*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Toga Limited

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

ORDER SHORTENING TIME

Upon the Declaration of Chad F. Clement, Esq., and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the time for time hearing of the above-identified matter will be heard on the 28th day of July, 2022 at the hour of 8:30 a.m. in Department 31 of the above-entitled court.

Any opposition is due: by 2:00 pm on July 26, 2022 with courtesy copies by: July 26, 2022

Any reply is due: by noon on July 27, 2022 with courtesy copies by: July 27, 2022

DATED this ____ day of July 2022.

Motion must be served on all parties by noon on July 25, 2022

Dated this 25th day of July, 2022

Joanna S. Kishner

728 A85 1976 31AB
Joanna S. Kishner
District Court Judge

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

DECLARATION OF CHAD F. CLEMENT, ESQ. IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL OF RECORD ON AN ORDER SHORTENING TIME

I, Chad F. Clement, Esq., declare as follows:

1. I am a partner with Marquis Aurbach Chtd. ("MAC") and I am licensed to practice law in the State of Nevada. I have personal knowledge of and am competent to testify concerning the facts stated herein, except for those matters stated upon information and belief, and as to those matters, I believe them to be true.

2. MAC is counsel of record for Defendant Toga Limited ("Toga") in the above-captioned case against Plaintiff Micheal Toh Kok Soon ("Toh").

3. As of July 13, 2022, MAC's representation of Toga in this case has been discharged.

4. A copy of the Motion to Withdraw as Counsel of Record on an Order Shortening Time has been served Toga, at its last known address, which is: 2575 McCabe Way, Suite 100, Irvine, CA 92614.

5. Additionally, MAC has been informed that Toga has or will be retaining Peter Chesney as counsel and a copy of the Motion to Withdraw as Counsel of Record on an Order Shortening Time has also been served on him via email.

6. Given the upcoming hearings on Plaintiff's Renewed Motion for Voluntary Dismissal and Plaintiff's Renewed Motion to Disqualify Marquis Aurbach set for Thursday July 28, 2022 it is necessary that this motion be heard on order shortening time.

7. In order to effectuate MAC's withdrawal, while preserving Toga's opportunity to obtain counsel for the upcoming motion hearings, the present motion must be heard on shortened time; otherwise, if heard in the normal course, it would not be heard until after the hearings, which would be severely prejudicial to both MAC and Toga.

8. Accordingly, we ask that the instant Motion to Withdraw and Continue Hearings be heard no later than Wednesday July 27, 2022.

/ / /

/ / /

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

9. As a result, good cause exists to hear the motion to withdraw as counsel of record on an order shortening time.

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 22nd day of July 2022.

/s/ *Chad F. Clement*
Chad F. Clement, Esq.

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Marquis Aurbach Chtd. ("MAC") seeks to withdraw as counsel of record for Defendant Toga as they have been discharged as counsel. On July 15, 2022, MAC received correspondence from Toga stating that an election for a new board of directors had occurred and a new board put in place. That correspondence also informed MAC that its services were being discharged and Toga intended to retain Peter Chesney, Esq. as new counsel. MAC has been in communication with Mr. Chesney to facilitate a transfer of client records and was informed Mr. Chesney would be filing a substitution of counsel. However, as of the date of filing the instant motion, no substitution has been filed. Out of an abundance of caution given the upcoming hearings on Plaintiff's Renewed Motion for Voluntary Dismissal and Plaintiff's Renewed Motion to Disqualify MAC set for July 28, 2022, it is imperative that MAC be withdrawn as counsel in advance of those hearings. MAC further requests those hearings be continued to allow for Toga's retention of new counsel.

II. LEGAL ARGUMENT

Pursuant to EDCR 7.40(b)(2), the Court can enter an Order allowing the withdrawal of an attorney. EDCR 7.40(b)(2) requires the withdrawing attorney to provide an Affidavit of the client's last-known address, at which the client may be served with notice of further proceedings in case the application for withdrawal is granted, and that the withdrawal shall not delay the trial or hearing of other matters in the case. The Declaration of Chad F. Clement, Esq. in Support of this Motion to Withdraw as Counsel of Record satisfies these particular requirements.

EDCR 7.40(b)(2) provides, in pertinent part, that counsel of record may be changed only "[w]hen no attorney has been retained to replace the attorney withdrawing, by order of the court, granted upon written motion." EDCR 7.40(b)(2) requires the withdrawing attorney to "include in an affidavit the address, or last known address, at which the client may be served with notice of further proceedings taken in the case in the event the application for withdrawal is granted, and the telephone number, or last known telephone number, at which the client may be reached."

/ / /

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

NRCP 1.16 further states, in pertinent part, "a lawyer . . . where representation has commenced, *shall withdraw* from the representation of a client if . . . [t]he lawyer is discharged." NRCP 1.16(a)(3). Here, MAC's representation in this case has been discharged by Toga, and as a consequence, MAC is required to withdraw from representing Toga.

Under EDCR 2.25(a), a party may seek to extend the time on a motion or hearing and in doing so must "state the reasons for the extension requested." Here, Toga has discharged MAC and MAC is currently seeking to withdraw from this case. Due to the discharge, Toga needs additional time to obtain counsel to represent its interests at the upcoming hearings on Plaintiff's Renewed Motion for Voluntary Dismissal and Plaintiff's Renewed Motion to Disqualify MAC set for July 28, 2022. Toga has recently instated a new board of directors who predominately live in Malaysia. In addition to MAC's withdrawal/discharge from this case, MAC has been informed that Peter Chesney, Esq. will be substituting in as counsel but such substation has not been filed as of today's date. To allow for an effective transition of counsel and protection of Toga's interests good cause exists for the requested extension. MAC respectfully requests a two-week continuance of the hearing on Plaintiff's motions.

III. CONCLUSION

Accordingly, MAC respectfully requests that this Court grant its motion to withdraw as counsel of record and continue upcoming hearings on an order shortening time.

Dated this 22nd day of July 2022.

MARQUIS AURBACH

By */s/ Jordan W. Montet*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Toga Limited

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael Toh Kok Soon, Plaintiff(s) vs. Toga Limited, Defendant(s)	CASE NO: A-21-841604-B DEPT. NO. Department 31

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Shortening Time was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/25/2022

Chad Clement	cclement@maclaw.com
Lennie Fraga	lfraga@maclaw.com
Kathrine von Arx	kvonarx@crdslaw.com
Elizabeth Arthur	earthur@crdslaw.com
Kellie Piet	kpiet@maclaw.com
Jordan Montet	jmontet@maclaw.com
James Beckstrom	jb@beckstromlaw.com
Suzanne Boggs	sb@beckstromlaw.com
Jay Shafer	jshafer@crdslaw.com

Electronically Filed
7/25/2022 11:56 AM
Steven D. Grierson
CLERK OF THE COURT

NEOJ
Marquis Aurbach
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cclement@maclaw.com
jmontet@maclaw.com
Attorneys for Defendant Toga Limited

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, vs. ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31

NOTICE OF ENTRY OF ORDER SHORTENING TIME

PLEASE TAKE NOTICE that an Order Shortening Time on Defendant Toga Limited's Motion to Withdraw as Counsel and Continue Upcoming Hearings was entered in the above-entitled action on July 25, 2022, a copy of which is attached hereto.

Dated this 25th day of July 2022.

MARQUIS AURBACH

By */s/ Chad F. Clement*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Defendant Toga Limited

MAC:16726-001 4790599_1

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER SHORTENING TIME** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 25th day of July 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

CORY READE DOWS & SHAFER
Jay A. Shafer, Esq.
1333 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89128
Attorney for Plaintiff

BECKSTROM & BECKSTROM
James A. Beckstrom, Esq.
400 South 4th Street, Suite 650
Las Vegas, Nevada 89101
Attorney for Defendant
Alexander Henderson

/s/ Kellie Piet
An employee of Marquis Aurbach

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

ELECTRONICALLY SERVED
7/25/2022 10:06 AM

Electronically Filed
07/25/2022 10:05 AM
CLERK OF THE COURT

MWCN
Marquis Aurbach
Chad F. Clement, Esq.
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Jordan W. Montet, Esq.
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10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cclement@maclaw.com
jmontet@maclaw.com
Attorneys for Toga Limited

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual,

Plaintiff,

vs.

ALEXANDER HENDERSON, an individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive,

Defendants.

Case No.: A-21-841604-B
Dept. No.: 31

MOTION TO WITHDRAW AS COUNSEL AND CONTINUE UPCOMING HEARINGS ON ORDER SHORTENING TIME

HEARING REQUESTED
HEARING DATE: JULY 28, 2022
HEARING TIME: 8:30 A.M.

The law firm of Marquis Aurbach moves this Court for an order allowing it to withdraw as counsel of record for Defendant Toga Limited on shortened time. This motion is made and based on the Declaration of Chad F. Clement, Esq., the attached Memorandum of Points and Authorities, and any oral argument the Court permits at the time of hearing on this matter.

Dated this 22 day of July, 2022.

MARQUIS AURBACH

By */s/ Jordan W. Montet*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Toga Limited

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

ORDER SHORTENING TIME

Upon the Declaration of Chad F. Clement, Esq., and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the time for time hearing of the above-identified matter will be heard on the 28th day of July, 2022 at the hour of 8:30 a.m. in Department 31 of the above-entitled court.

Any opposition is due: by 2:00 pm on July 26, 2022 with courtesy copies by: July 26, 2022

Any reply is due: by noon on July 27, 2022 with courtesy copies by: July 27, 2022

DATED this ____ day of July 2022.

Motion must be served on all parties by noon on July 25, 2022

Dated this 25th day of July, 2022

Joanna S. Kishner

728 A85 1976 31AB
Joanna S. Kishner
District Court Judge

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

DECLARATION OF CHAD F. CLEMENT, ESQ. IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL OF RECORD ON AN ORDER SHORTENING TIME

I, Chad F. Clement, Esq., declare as follows:

1. I am a partner with Marquis Aurbach Chtd. ("MAC") and I am licensed to practice law in the State of Nevada. I have personal knowledge of and am competent to testify concerning the facts stated herein, except for those matters stated upon information and belief, and as to those matters, I believe them to be true.

2. MAC is counsel of record for Defendant Toga Limited ("Toga") in the above-captioned case against Plaintiff Micheal Toh Kok Soon ("Toh").

3. As of July 13, 2022, MAC's representation of Toga in this case has been discharged.

4. A copy of the Motion to Withdraw as Counsel of Record on an Order Shortening Time has been served Toga, at its last known address, which is: 2575 McCabe Way, Suite 100, Irvine, CA 92614.

5. Additionally, MAC has been informed that Toga has or will be retaining Peter Chesney as counsel and a copy of the Motion to Withdraw as Counsel of Record on an Order Shortening Time has also been served on him via email.

6. Given the upcoming hearings on Plaintiff's Renewed Motion for Voluntary Dismissal and Plaintiff's Renewed Motion to Disqualify Marquis Aurbach set for Thursday July 28, 2022 it is necessary that this motion be heard on order shortening time.

7. In order to effectuate MAC's withdrawal, while preserving Toga's opportunity to obtain counsel for the upcoming motion hearings, the present motion must be heard on shortened time; otherwise, if heard in the normal course, it would not be heard until after the hearings, which would be severely prejudicial to both MAC and Toga.

8. Accordingly, we ask that the instant Motion to Withdraw and Continue Hearings be heard no later than Wednesday July 27, 2022.

/ / /

/ / /

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

9. As a result, good cause exists to hear the motion to withdraw as counsel of record on an order shortening time.

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 22nd day of July 2022.

/s/ *Chad F. Clement*
Chad F. Clement, Esq.

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Marquis Aurbach Chtd. ("MAC") seeks to withdraw as counsel of record for Defendant Toga as they have been discharged as counsel. On July 15, 2022, MAC received correspondence from Toga stating that an election for a new board of directors had occurred and a new board put in place. That correspondence also informed MAC that its services were being discharged and Toga intended to retain Peter Chesney, Esq. as new counsel. MAC has been in communication with Mr. Chesney to facilitate a transfer of client records and was informed Mr. Chesney would be filing a substitution of counsel. However, as of the date of filing the instant motion, no substitution has been filed. Out of an abundance of caution given the upcoming hearings on Plaintiff's Renewed Motion for Voluntary Dismissal and Plaintiff's Renewed Motion to Disqualify MAC set for July 28, 2022, it is imperative that MAC be withdrawn as counsel in advance of those hearings. MAC further requests those hearings be continued to allow for Toga's retention of new counsel.

II. LEGAL ARGUMENT

Pursuant to EDCR 7.40(b)(2), the Court can enter an Order allowing the withdrawal of an attorney. EDCR 7.40(b)(2) requires the withdrawing attorney to provide an Affidavit of the client's last-known address, at which the client may be served with notice of further proceedings in case the application for withdrawal is granted, and that the withdrawal shall not delay the trial or hearing of other matters in the case. The Declaration of Chad F. Clement, Esq. in Support of this Motion to Withdraw as Counsel of Record satisfies these particular requirements.

EDCR 7.40(b)(2) provides, in pertinent part, that counsel of record may be changed only "[w]hen no attorney has been retained to replace the attorney withdrawing, by order of the court, granted upon written motion." EDCR 7.40(b)(2) requires the withdrawing attorney to "include in an affidavit the address, or last known address, at which the client may be served with notice of further proceedings taken in the case in the event the application for withdrawal is granted, and the telephone number, or last known telephone number, at which the client may be reached."

/ / /

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

NRCP 1.16 further states, in pertinent part, "a lawyer . . . where representation has commenced, *shall withdraw* from the representation of a client if . . . [t]he lawyer is discharged." NRCP 1.16(a)(3). Here, MAC's representation in this case has been discharged by Toga, and as a consequence, MAC is required to withdraw from representing Toga.

Under EDCR 2.25(a), a party may seek to extend the time on a motion or hearing and in doing so must "state the reasons for the extension requested." Here, Toga has discharged MAC and MAC is currently seeking to withdraw from this case. Due to the discharge, Toga needs additional time to obtain counsel to represent its interests at the upcoming hearings on Plaintiff's Renewed Motion for Voluntary Dismissal and Plaintiff's Renewed Motion to Disqualify MAC set for July 28, 2022. Toga has recently instated a new board of directors who predominately live in Malaysia. In addition to MAC's withdrawal/discharge from this case, MAC has been informed that Peter Chesney, Esq. will be substituting in as counsel but such substation has not been filed as of today's date. To allow for an effective transition of counsel and protection of Toga's interests good cause exists for the requested extension. MAC respectfully requests a two-week continuance of the hearing on Plaintiff's motions.

III. CONCLUSION

Accordingly, MAC respectfully requests that this Court grant its motion to withdraw as counsel of record and continue upcoming hearings on an order shortening time.

Dated this 22nd day of July 2022.

MARQUIS AURBACH

By */s/ Jordan W. Montet*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Jordan W. Montet, Esq.
Nevada Bar No. 14743
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Toga Limited

MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael Toh Kok Soon, Plaintiff(s) vs. Toga Limited, Defendant(s)	CASE NO: A-21-841604-B DEPT. NO. Department 31

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Shortening Time was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/25/2022

Chad Clement	cclement@maclaw.com
Lennie Fraga	lfraga@maclaw.com
Kathrine von Arx	kvonarx@crdslaw.com
Elizabeth Arthur	earthur@crdslaw.com
Kellie Piet	kpiet@maclaw.com
Jordan Montet	jmontet@maclaw.com
James Beckstrom	jb@beckstromlaw.com
Suzanne Boggs	sb@beckstromlaw.com
Jay Shafer	jshafer@crdslaw.com

Electronically Filed
7/25/2022 12:52 PM
Steven D. Grierson
CLERK OF THE COURT

BECKSTROM & BECKSTROM, LLP
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 South 4th Street, Suite 650
Las Vegas, Nevada 89101
Telephone: (725) 300-0599
Facsimile: (725) 300-0261
jb@beckstromlaw.com
Attorney for Alexander Henderson

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual Plaintiff, v. ALEXANDER HENDERSON, an individual; TOGA LIMITED; a Nevada corporation; DOES 1-100; and ROE BUSINESS ENTITIES I through C; inclusive, Defendant.	Case No.: A-21-841604-B Dept No.: 31 Date of Hearing: July 28, 2022 Time of Hearing: 8:30 a.m.

ALEXANDER HENDERSON'S NOTICE OF NON-OPPOSITION

Defendant Alexander Henderson (hereinafter "Henderson"), by and through his counsel of record, Beckstrom & Beckstrom, LLP, hereby files Henderson's Notice of Non-Opposition to Defendant Toga Limited's Motion to Withdraw as Counsel and Continue Upcoming Hearings on

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/ / /

Order Shortening Time, which is currently scheduled to be heard on July 28, 2022.

Dated this 25th day of July 2022.

BECKSTROM & BECKSTROM, LLP

By: */s/ James A. Beckstrom*
James A. Beckstrom, Esq.
Nevada Bar No. 14032
400 South 4th Street, Suite 650
Las Vegas, NV 89101
Attorney for Alexander Henderson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ALEXANDER HENDERSON'S NOTICE OF NON-OPPOSITION** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 25th day of July 2022. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

Jay A. Shafer, Esq.
CORY READE DOWS & SHAFER
1333 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89128
Attorney for Plaintiff

Chad F. Clement, Esq.
Jordan W. Montet, Esq.
MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Toga Limited

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Suzanne Boggs
An employee of Beckstrom & Beckstrom, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TOH KOK SOON, an individual, Plaintiff, v. ALEXANDER HENDERSON, an Individual; TOGA LIMITED, a Nevada Corporation; DOES 1-100, and ROE BUSINESS ENTITIES I through C, inclusive, Defendants.	Case No.: A-21-841604-B Dept. No.: 31

RESPONSE TO MOTION TO WITHDRAW AS COUNSEL BY MARQUIS AURBACH

Plaintiff MICHAEL TOH KOK SOON ("Plaintiff") by and through his attorneys of record, the law firm of Cory Reade Dows and Shafer, hereby submits this response to Marquis Aurbach's Motion to withdraw as counsel for Defendant TOGA LIMITED.

Plaintiff has no objection to Marquis Aurbach [hereinafter "MAC"] cessation as counsel for Defendant TOGA LIMITED except to the extent that the company having no counsel prejudices TOGA's interests. Plaintiff's interest in this is making sure that the interests of the company and its shareholders are protected. To that end, the time for an appeal is running and Plaintiff wants to ensure that clarity is reached regarding the finality of judgment. Assuming that

Mr. Peter Chasey makes an appearance shortly, there are likely no issues, and Plaintiff has no opposition. It is Plaintiff's position that any remaining claims should be dismissed without prejudice and the matter allowed to proceed accordingly.

In summary Plaintiff does not dispute the withdrawal of MAC, and agrees that MAC should not address the remaining issues in the case.

DATED this 26th day of July.

CORY READE DOWS AND SHAFER

By: **/s/** Jay A. Shafer

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am a representative of CORY READE DOWS & SHAFER that on this 26th day of July, 2022, I caused the foregoing RESPONSE TO MOTION TO WITHDRAW AS COUNSEL BY MARQUIS AURBACH be served as follows:

- ■ **NEFCR System upon the following All Parties in accordance with NEFCR 9 and 13:**
- □ **By First-Class United States Mail, postage prepaid upon the following Parties, for whom no compliance with the Electronic Service requirements has been undertaken:**
- □ **Personal Service upon the following parties or their Counsel:**
- □ **By direct email upon the following Parties, for whom I did not receive, within a reasonable time indication that the transmission was unsuccessful:**
- □ **By fax or other electronic transmission in accordance with NRCP 5(D) upon the following Parties, for which proof of successful transmission is attached hereto:**

Counsel of Record	Telephone & Fax	Email
Chad F. Clement, Esq. MARQUIS AURBACH COFFING 10001 Park Run Drive Las Vegas, Nevada 89145 Attorneys for Toga Limited		
James A. Beckstrom, Esq. BECKSTROM & BECKSTROM, LLP 400 S. 4th Street, Suite 650 Las Vegas, Nevada 89101 Attorney for Alexander Henderson		

Kathrine von Arx
A Representative of
CORY READE DOWS & SHAFER