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VIA EMAIL AND CERTIFIED MAIL

Elizabeth A. Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, Nevada 89701
Email: nvscclerk@nvcourts.nv.gov

Re: ADKT 522 proposed amendments to Nevada Rules of Civil Procedure

Dear Justices of the Nevada Supreme Court:

Please allow this to serve as Littler Mendelson, P.C.'s (hereinafter "Littler") formal written comments and request for participation at hearing regarding the proposed amendments to the Nevada Rules of Civil Procedure (NRCP) pursuant to ADKT 522's Order Scheduling Public Hearing and Requesting Public Comment.

Littler's Las Vegas and Reno offices have handled multiple class and collective action lawsuits on behalf of businesses and employers in the State and Federal courts of Nevada. In its class and collective action representation, Littler has extensively litigated various aspects of NRCP 23 (also referred to as "Rule 23. Class actions.") as well as under Federal Rule of Civil Procedure 23 (also referred to as "Rule 23. Class actions."). With this background, Littler provides its written comments to the proposed amendment to NRCP 23(d)(2).

The proposed amendment to NRCP 23(d)(2) consists of two sentences that state:

> (2) When determining whether an action may be maintained as a class action, the representative party's rejection of an offer made under Rule 68 or other offer of compromise that offers to resolve less than all of the class claims asserted by or against the representative party has no impact on the representative party's ability to satisfy the requirements of Rule 23(a)(4). When the representative party is unable or unwilling to continue as the class representative, the court must permit class members an opportunity to substitute themselves as the class representative except in cases where the representative party has been sued.

ADKT 522 at Exhibit A. The Advisory Committee Notes for proposed NRCP 23 state "TBD" and provide no additional comments. *Id.*

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Proposed NRCP 23(d)(2) would represent a radical change from existing class action rules and case law. The first sentence of proposed NRCP(d)(2) eradicates a portion of the adequacy requirement in the existing NRCP 23(a)(4) by creating an exception to the adequacy of class representatives with regards to Rule 68 offers or other offers of compromise. The second sentence of proposed NRCP (d)(2) goes one giant leap further by forcing a court to substitute a class representative whenever that party is "unable or unwilling" to continue as the class representative. These changes would completely vitiate the existing NRCP 23(a)(4) and its adequacy requirement for class representatives.

Existing NRCP 23(a)(4) encompasses the prerequisites to a class action and states:

> *Prerequisites.* One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.

NRCP 23(a)(4). Thus, under existing Rule NRCP 23(a)(4), a class action cannot be maintained if a representative party cannot fairly and adequately protect the interests of the class. Indeed, the requirement that class representatives fairly and adequately protect the interests of the class may be regarded as a threshold question of constitutional dimensions, since it would violate due process to bind a class member to a ruling against inadequate class representatives. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-79 (1977).

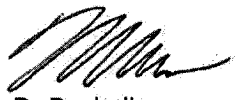
Here, proposed NRCP 23(d)(2) removes a court's ability to determine whether or not the lack of a class representative affects adequacy under NRCP 23(a)(4) or even moots a class. Proposed NRCP 23(d)(2) creates a broad and mandatory exception to existing NRCP 23(a)(4) by forcing a class action to maintain itself, arguably prior to class certification, even without an adequate class representative. Such maintenance of a pre-certification headless class would be the equivalent of removing existing NRCP 23(a)(4)'s requirement for a representative party who fairly and adequately protects the interest of the class.

These issues, and the complexities that surround them, continue to evolve in recent rulings before the United States Supreme Court. *See e.g. Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). The ramifications of a Nevada-specific rule would splinter Nevada off from this line of authority. The Federal Rules of Civil Procedure have no equivalent to Nevada's proposed NRCP 23(d)(2). *See* Federal Rules of Civil Procedure. Thus, Nevada courts would have no frame of reference for the unanswered questions of proposed NRCP 23(d)(2) such as: what does "unable or unwilling" mean?; by using the term "class representative" and "class members," does that mean NRCP 23(d)(2) is limited to post-class certification?; what does "permit ... an opportunity" mean?; if named plaintiff is dismissed on a dispositive motion, does the court need to provide time to get another (thereby leading to an endless chain of plaintiffs stepping in and getting dismissed)? Again, given the

dearth of any case law regarding proposed NRCP 23(d)(2), its enactment would create a litany of new litigation related to its interpretation.

For these reasons, Littler respectfully submits that proposed NRCP 23(d)(2) should not be enacted as it would upend existing rules and case law and require Nevada to create needless exceptions to existing class action law.

Sincerely,



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