IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 65409

LEWIS HELFSTEIN; MADALYN HELFSTEIN; SUMMIT LASER PRODUCTS, INC; AND SUMMIT LASER TECHNOLOGIES, LLC,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK,

Respondent,

And

IRA AND EDYTHE SEAVER FAMILY TRUST, IRA SEAVER, AND CIRCLE CONSULTING CORPORATION,

Real Parties in Interest.

Eighth Judicial District Court, Clark County, Nevada
The Honorable Elizabeth Gonzalez, District Judge
The Honorable Elissa Cadish, District Judge

District Court Case No. A-09-587003

ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

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BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

LEWIS HELFSTEIN; MADALYN HELFSTEIN; SUMMIT LASER PRODUCTS, INC; AND SUMMIT TECHNOLOGIES, LLC, PETITIONERS, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, RESPONDENT, AND IRA AND EDYTHE SEAVER FAMILY TRUST, IRA SEAVER, AND CIRCLE CONSULTING CORPORATION, REAL PARTIES INTEREST.	Supreme Court Case No.: 65409 District Court Case No. A-09-587003 **ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF**

Real Parties In Interest, the Ira and Edythe Seaver Family Trust, Ira Seaver and Circle Consulting Corporation, on behalf of all "Respondents" herein, and pursuant to this Court's Order Directing Answer (from them) filed herein on May 23, 2014, hereby answer the Petition For Extraordinary Writ Relief filed herein by Lewis Helfstein, Madalyn Helfstein, Summit Laser Products, Inc., and Summit Technologies, LLC ("Petitioners").

Dated this 1st day of August, 2014.

HOLLEY, DRIGGS, WALCH, PUZEY & THOMPSON

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INTRODUCTION/STATEMENT OF ISSUES

I. INTRODUCTION.

Respectfully, Petitioner's mendacious characterization of the proceedings conducted below by the trial court to date is for the singular purpose of Mr. and Mrs. Helfstein ("Helfstein") avoiding ever having to answer or account for their fraudulent conduct against it and the Seaver family ("Seaver"). Having commenced and perpetrated fraud against Seaver for the past ten years, and Seaver only having 'discovered' as much before the first trial in this case but after settling with Petitioners for a mere $60,000, Mr. and Mrs. Helfstein now seek to avoid an evidentiary hearing before the trial court below on whether they did indeed fraudulently induce Respondents into settling with them. In other words, the trial court is not yet trying to hold Petitioners liable for the claims they ostensibly settled with Respondents, but simply trying to hold an evidentiary hearing on the issue of whether Petitioners procured that settlement from Respondents by means of fraud below. In short, Petitioners' claims and arguments to this Court are not yet ripe for determination by it absent such an evidentiary hearing below and, to date, the trial court has not yet erred in any form or manner because it has not yet entered a final judgment in this case as to these parties.

For these and other reasons, Petitioners' "Statement of Issues" and the "Facts" they allege in support of their Petition For Extraordinary Writ Relief (the "Petition") are not entirely accurate. Indeed, noticeably absent from their four volume Appendix submitted in support of the Petition are any transcripts of the trial proceedings before the lower court, particularly the sworn testimony of Mr. Helfstein which Judge Gonzalez found "lacked credibility." [1] Accordingly, (also) provided herewith as Appendix B to this Brief is a copy of the "Transcript of Proceedings"

[1] See Judge Gonzalez's "Findings Of Fact And Conclusions Of Law" in Petitioners' Appendix, Vol. 2, pages 369-383, a copy of which is also provided as Appendix A to this Brief for the convenience of this court, and hereinafter referred to as the "Findings."

for Day 2 of the Bench Trial before Judge Gonzalez which includes Mr. Helfstein's sworn trial testimony, and on which Judge Gonzalez's Findings were based, *inter alia*.

II. ISSUES ACTUALLY RAISED BY PETITION.

Respondents respectfully submit that the Petition actually raises the following three issues for review by this Honorable Court:

1. Whether the issues raised by Petitioners now are ripe for determination by this Court in that the trial court below has not yet had the opportunity to conduct an evidentiary hearing (i.e., adjudicate) whether they fraudulently induced Respondents into a settlement and voluntary dismissal of their claims against them below, thereby effectuating a fraud upon them and the trial court. In other words, this Honorable Court must give the trial court the opportunity to adjudicate this issue below first *vis-à-vis* means of due process (i.e., conducting an evidentiary hearing), before addressing it *de novo* here or on appeal.

2. Generally, whether Petitioners have waived their objections, if any, to Nevada having personal jurisdiction over them in this case, i.e., whether the trial court abused its discretion below by ruling that it had "specific personal jurisdiction" over Petitioners.

3. Whether the trial court below, *vis-à-vis* another judge (the Honorable Judge Elissa Cadish) as required by Rule, abused its discretion in refusing to disqualify the Honorable Elizabeth Gonzalez in hearing this case any further on the ground that she had expressed bias towards Mr. Helfstein (i.e., Petitioners). In other words, did Judge Cadish abuse her discretion below when she found that Judge Gonzalez should not be disqualified because she was not personally biased against Petitioners in that her impressions of Mr. Helfstein were formed as a result of court proceedings before her, and did not stem from any extra judicial source affecting her opinion of the merits of the case?

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STATEMENT OF FACTS

I. UNDERLYING FACTS.[2]

Petitioner Lewis Helfstein initiated business dealings with Respondent Ira Seaver in early 2004. At that time, in addition to being a licensed and practicing attorney in the State of New York, Mr. Helfstein and his wife (Madalyn) also owned a company named Summit Laser Products, Inc. Correspondingly, Seaver owned two companies named National Data Center, Inc. d/b/a Graphic Technologies (the Seavers' sales company) and LaserStar Distribution Corp (the Seavers' microchip and research technology company). In a nutshell, Mr. Seaver and Mr. Helfstein agreed to merge their companies to form Summit Technologies, LLC in August, 2004.[3]

In conjunction therewith, Summit Technologies also entered into a ten year license agreement with LaserStar for the codes and programs for laser cartridge microchips which it had previously sold and marketed through Graphic Technologies. In order to secure the income derived therefrom, Mr. Seaver also entered into a Consulting Agreement with Summit Technologies (*vis-à-vis* his company, Circle Consulting Corporation), which also bound him to noncompetition and confidentiality covenants with it. Correspondingly, Mr. Helfstein also entered into a Consulting Agreement with Summit Technologies, both agreements in lieu of any salary to be paid by Summit Technologies to either Mr. Helfstein or Mr. Seaver. In other words, their Consulting Agreements with Summit Technologies contained "Payment Schedules" as well

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[2] These facts are based upon the evidence admitted at the trial below between Respondents and the "UI Defendants," memorialized by Judge Gonzalez (in her own hand) in her "Findings Of Fact and Conclusions Of Law" and partial judgment in favor of Respondents filed below on May 18, 2012. (See "Findings," Appendix A hereto.) Based upon questionable medical excuses he had proffered to the lower court, Mr. Helfstein testified at that trial below by means of video conferencing. (Appendix B hereto.)

[3] Summit Technologies, LLC and Summit Laser Products, Inc, were formed in New York. National Data Center, Inc, d/b/a Graphic Technologies was a California corporation. LaserStar Distribution Corp was a Nevada corporation in which Mr. and Mrs. Helfstein were shareholders and of which Mr. Helfstein was also president. According to Mr. Helfstein, all of these companies did business in Nevada, California and New York. (See Appendix B, pages 9, 17 and 18.)

as other obligations related to nondisclosure of confidential information and agreements not to compete in the future. Mr. Seaver's Consulting Agreement with Summit Technologies (*vis-à-vis* Circle Consulting) specifically provided for payments to him of $125,000 per year with annual $5,000 increases, payable on a monthly basis, and reimbursement for certain expenses such as health insurance provided by LaserStar, as well as payments to Mr. Seaver based on sales of laser printer chips. After honoring that agreement for one year, Mr. Helfstein then notified Mr. Seaver that he was suspending all such payments by Summit Technologies to both of them in August, 2005, for "cash flow reasons." (See Appendix B, pages 16-17.)

In late 2006, Mr. Seaver suffered a severe head injury which required surgery, hospitalization followed by recovery for several months. During that time, unbeknown to Seaver, Mr. Helfstein began marketing Summit Technologies for sale, even soliciting offers from others to buy it outright from him, including to one Nestor Saporiti who owns the UI/Uninet Companies (collectively "UI Defendants"). At that time, Mr. Saporiti's (UI and Uninet) companies were clients of Summit Technologies. During this period of time, Mr. Helfstein also continued to represent to Seaver that Summit Technologies was a failing company and would have to be sold before it went bankrupt. Significantly, Mr. Helfstein continued to make these misrepresentations in his sworn testimony at trial although they were clearly contradicted by the books and accounting records of Summit Technologies. (See Appendix B, pages 16 and 17, 88 and 91; and Appendix C hereto.) Mr. Helfstein ultimately sold Summit Technologies to Mr. Saporiti (*vis-à-vis* his UI and Uninet Companies) in April, 2007, over the objection of Seaver.

Further according to Mr. Helfstein's trial testimony below, Mr. Saporiti did not want to assume Summit Technologies' Consulting Agreements with either Mr. Seaver or him. Incredibly, as part of their sales transaction, the UI Defendants ultimately did assume liability for Mr. Helfstein's Consulting Agreement with Summit Technologies but not Mr. Seaver's

agreement, which sworn testimony (of both Mr. Helfstein and Mr. Saporiti) the trial court found to be "not credible." [4] (See also Appendix B, page 70.) Also unbeknown to Seaver (as well as the lower court), including when Respondents settled with Petitioners for $60,000, Mr. Helfstein had engineered his sales transaction with Mr. Saporiti to hide the transfer of substantial benefits and income to his family in order to defraud Seaver out of what was due to them from the sale of Summit Technologies to the UI Defendants. (See Appendix C hereto.) Not until Respondents hired a CPA (Rodney Conant) as an expert witness in the case below to support their claim for an accounting of the books and records of Summit Technologies did they become aware of the fraud that had been, and was being, perpetrated upon them and the lower court by Petitioners. Mr. Conant's testimony and Report (which was admitted into evidence at the trial below between Respondents and the UI Defendants) are being provided herewith as Appendix C to this

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[4] These Findings by Judge Gonzalez include, in this regard (*inter alia)*, the following:

> Findings 45: The UI Defendants, as successors-in-interest to Summit, also assumed certain other contractual obligations and rights of Summit, but claim those obligations due and owing from Summit to Seaver were not included.
>
> Findings 46: Helfstein claims he drafted Exhibit "E" to address the two consulting agreements that Helfstein and Seaver had with Summit after Seaver refused to agree to a replacement consulting agreement. Exhibit "E" of the Asset Purchase Agreement specifically set forth that "CONSULTING AGREEMENTS WITH IRA SEAVER AND LEWIS HELFSTEIN NOT BEING ASSUMED." Helfstein claims to have created Exhibit "E" as a part of the original Asset Purchase Agreement to insure that the previous consulting contracts would not be enforced against UI.
>
> Findings 47: While the UI Defendants claim that an Exhibit "E" disclaiming responsibility for the consulting agreement with Seaver was included as part of the transaction the evidence supporting this contention lacks credibility. (*See, FN 16*)
>
> > *FN 16: During the original motion to dismiss, it came to the Court's attention that there were significant issues about the existence of the proffered Exhibit "E". Trial Exhibit 207, documents an additional occasion where the agreement was not provided. The testimony and evidence taken together leads the Court to the conclusion that Exhibit "E" was not created and executed at the time of the closing of the transaction.*
>
> Findings 48: The subsequent conduct and actions of the UI and Helfstein Defendants, however, do not correspond or support the assertion on their part that the Circle Consulting Agreement was not assumed because the UI Defendants made representations to Seaver that they held and owned the rights to the Circle Consulting Agreement and that he was bound by it insofar as he could not compete with them nor disclose any information they deemed confidential.

Answering Brief.

Notwithstanding having received a copy of Mr. Conant's "forensic accounting" report, as well as being aware of Mr. Conant's trial testimony the day before his, Mr. Helfstein continued perpetrating his fraud upon Seaver *vis-à-vis* his trial testimony and, therefore, the trial court below. Among other things, Mr. Helfstein testified that "Summit was losing money" when he was trying to sell it to the UI Defendants (Appendix B, page 19), and that his sales transaction with Mr. Saporiti "was not a merger, it was never intended to be a merger, and there are no documents to substantiate that it was a merger" (Appendix B, page 83), although there were documents admitted into evidence which substantiated as much including Mr. Conant's Report (Appendix C). Incredibly, Mr. Helfstein admitted soliciting Mr. Seaver to settle with him and to that end, testified under oath that his basis for doing so was that "there was only $360,000" to be distributed between them from the sale of Summit to the UI Defendants, $240,000 to Mr. Helfstein (as a two/thirds owner) and $180,000 to Seaver (as a one/third owner) of Summit. (See Appendix B, pages 64-65.) Mr. Helfstein also failed to proffer whatsoever any explanation in his sworn testimony at trial for the "findings and conclusions" set forth in Mr. Conant's Report, as well as Mr. Conant's trial testimony. On cross examination, Mr. Helfstein upon being questioned why assumption of his Consulting Agreement by the UI Defendants was a condition of the sale but Mr. Seaver's was not, he blithely responded "that's the way it worked out." (Appendix B, page 70.) Mr. Helfstein also admitted on cross examination that he had a "side gentleman's agreement" with Mr. Saporiti for health insurance that was not set forth in their Asset Purchase Agreement. (Appendix B, page 92.) Furthermore, not only did Mr. Helfstein fail to explain why he received better than a half a million dollars from the sale transaction within the first 33 days after it closed, but he also proffered no explanation for his undisclosed reduction of Seaver's capital account in the Summit Companies from six figures to zero prior to that sales

transaction. (See Appendix C.) Last but not least, Mr. Helfstein's "own man" in Nevada, Joe Cachia, testified to conversion of a $100,000 check payable to LaserStar Distribution Corp (the Seavers' company) to Summit Technologies' bank account while Mr. Helfstein instructed him not to disclose it to Mr. Seaver. (See Appendix B, pages 113-114.) In short, Mr. Helfstein not only perpetrated a fraud on Seaver as discovered by Mr. Conant, but he insisted on continuing to perpetrate that fraud on Seaver at trial *vis-à-vis* his sworn testimony and, therefore, on the trial court below.

Again, Respondents did not discover this fraud until after they had already settled with Petitioners for $60,000. Unfortunately, the trial court could not consider that evidence insofar as Mr. Helfstein's liability was concerned because this Honorable Court had stayed all proceedings between the Helfstein Defendants and the UI Defendants while Respondents pursued their claims against the UI Defendants in the proceedings below. In other words, the trial court could not entertain any evidence of fraud offered by Respondents against Petitioners so long as their claims against the UI Defendants remained pending, meaning Respondents' claims and the evidence they offered in support of them were so intertwined with all of the Defendants named by them below that their case against the UI Defendants had to be completed before they could pursue their case against Petitioners.

In summary, the trial court simply never had an opportunity to consider Respondents' fraud case against Petitioners because Respondents had settled their claims with Petitioners before discovering that fraud and after this Court had stayed all proceedings as between Petitioners and the UI Defendants below (whether intended or not). As a direct consequence of this Court's stay order, however, the trial court was required to first adjudicate the claims between Respondents and the UI Defendants below before it could adjudicate Respondents' claims against Petitioners. Be that as it may, the trial court does not intend to do so now until it

first holds an evidentiary hearing to determine whether Petitioners procured their settlement with Respondents by means of fraud below including upon it. If the trial court says no afterwards, then this case is over. If the trial court says yes, the arguments raised by Petitioners here in their Petition may then be ripe for this Honorable Court's determination. With all due respect, should this Court decide otherwise, Petitioners will have then gotten away with the fraud they have perpetrated upon not only the trial court below, but the Seaver family since 2005.

II. THE PROCEEDINGS BELOW TO DATE.

Respondents filed their Complaint in the case below in April, 2009, alleging various claims including, with respect to Petitioners, that they had manipulated the books and records of Summit Technologies in breach of its Operating Agreement and their fiduciary duty to Seaver, including engaging in self-dealing and unauthorized transfers of company assets for their own benefit and gain to the detriment of Seaver. (Petitioners' Appendix Vol. I, pages 1-16.) Again, Respondents' Complaint also demanded an accounting from all named defendants, particularly Mr. Helfstein and Summit Technologies.

Unfortunately, before obtaining that accounting, Respondents settled with Petitioners for $60,000 in November, 2009, based upon the misrepresentations of Mr. Helfstein that the poor and dire financial condition of the Summit Companies compelled their sale to the UI Defendants. Their settlement agreement not only provided for Petitioners to pay Respondents the sum of $60,000, but that Mr. Helfstein would also aid Seaver in their case against the UI Defendants to recover the balance due to them under Mr. Seaver's Consulting Agreement with Summit Technologies. (Petitioners' Appendix, Vol. I, pages 74-122.) In other words, in settling their differences Mr. Helfstein and Mr. Seaver also wanted to make certain that Mr. Seaver received a total of $180,000 in compensation, $60,000 from Petitioners and $120,000 from Mr. Saporiti's UI/Uninet Companies, because Mr. Helfstein anticipated receiving $240,000 from them under

his Consulting Agreement with Summit Technologies and for which they had assumed liability. (Appendix B hereto, page 65.) To that end, and based upon what they did not know at that time, Respondents filed a Notice of Voluntary Dismissal against Petitioners, albeit "without prejudice" as Petitioners note in their Petition. (Petitioners' Appendix, Vol. I, pages 38-39.)

In January, 2010, the UI Defendants filed third party claims and/or cross-claims against Petitioners. (Petitioners' Appendix, Vol. I, pages 40-73.) In February, 2010, Respondents filed a Motion To Approve Good Faith Settlement with Petitioners. (Petitioners' Appendix, Vol. I, pages 74-122.) In March, 2010, the UI Defendants filed an Opposition to that Motion For Approval Of Good Faith Settlement. That motion was vacated in March, 2010, meaning the trial court below never heard or ruled on that motion.

In April, 2010, Petitioners filed their Motion For Stay or Dismissal and To Compel Arbitration as to the third party claims and cross-claims filed against them by the UI Defendants. (Petitioners' Appendix, Vol. I, pages 123-160.) The trial court below denied that Motion and Petitioners then made their first interlocutory appeal to this Honorable Court which reversed that decision in April, 2010, requiring that Petitioners and the UI Defendants resolve all of their disputes *vis-à-vis* binding arbitration in New York pursuant to their contractual agreements (and to which Respondents were not parties). In August, 2010, Petitioners filed their Initial List of Witnesses and Documents in the case below (a copy of which is attached hereto as Appendix "D").

In September, 2010, Respondents' expert witness, Rodney Conant, a Certified Public Accountant hired by them to perform forensic accounting on the books and records of Petitioners, found substantial fraudulent conduct on their part (Appendix C.) Mr. Conant's report revealed, among other things, that Petitioners had unilaterally reduced Seaver's capital account in the Summit Companies by hundreds of thousands of dollars and structured a deal with

the UI Defendants to provide for payment of substantial monies to them, but not to Seaver, after their sales transaction closed. In fact, within the first 33 days after that sales transaction closed, Mr. Helfstein received an additional $562,756.45 as part of his scheme for collection of the accounts receivable of the Summit Companies for his own benefit and without the knowledge of Seaver. Incredibly, during discovery in the case below, Petitioners never bothered to "Bates stamp" or number these documents which evidenced this additional money they received in those first 33 days after their sale of Summit Technologies to the UI Defendants, although some of that documentation had columns labelled "due LH" (referring to Lewis Helfstein) for which there is no other explanation and, indeed, none was provided at trial by Mr. Helfstein (see Appendix B hereto). In other words, but for Mr. Conant's discovery of these documents, Petitioners intended to hide this information from Respondents and the lower court. (See Appendix C hereto.) Accordingly, Respondents provided notice of their rescission of their Settlement Agreement with Petitioners in January, 2011. (Petitioners' Appendix, Vol. II, pages 352-361.) Respondents could not proceed any further in prosecuting their case against Petitioners, however, by virtue of this Court's stay order in April, 2010, and their continued prosecution of their case against the UI Defendants. (Petitioners' Appendix, Vol. II, pages 347-351 and 362-366.)

The case between Respondents and the UI Defendants was tried on the merits beginning in March, 2012, before Judge Gonzalez. Upon conclusion of that trial between Respondents and the UI Defendants, Judge Gonzalez entered her own "Findings Of Fact and Conclusions Of Law" and partial judgment in favor of Respondents (Appendix A hereto and Petitioners' Appendix, Volume II, pages 369-383). Again, among other things, Judge Gonzalez found the trial testimony of Mr. Helfstein to be "not credible" although she considered him to be a nonparty witness at that time. Based upon Judge Gonzalez's Finding that Mr. Helfstein was not

a credible witness – indeed, he lied through his teeth at trial (and in his deposition) – Petitioners now contend that she is improperly biased against them in this case.

In March, 2013, Respondents filed their Motion To Set Aside Rescinded Settlement Agreement And Proceed On Claims Against Petitioners (Petitioners' Appendix, Vol. II, pages 384-411), and Petitioners then filed their Opposition to the same (Petitioners' Appendix, Vol. II, pages 472-518). In May, 2013, the lower Court found Respondents' motion to be timely. (Petitioners' Appendix, Vol. IV, pages 917-921.) Petitioners then filed a motion to disqualify Judge Gonzalez shortly thereafter (Petitioners' Appendix, Vol. III, pages 651-759), which motion was denied by Judge Cadish in July, 2013 (Petitioners' Appendix, Vol. IV, pages 912-916).

In December, 2013, Respondents filed their Motion To Dismiss Uninet Defendants Only, which motion was granted by Judge Gonzalez below in February, 2014 (Petitioners' Appendix, Vol. IV, pages 930-932). That same month, Petitioners also filed their (first and only) Motion To Dismiss this case against them on the ground that the court below lacked personal jurisdiction over them (Petitioners' Appendix, Vol. IV, pages 933-939). Judge Gonzalez denied that motion in April, 2014 (Petitioners' Appendix, Vol. IV, pages 917-921). On that same day, Petitioners filed their Petition with this Honorable Court.

LEGAL ARGUMENTS

I. STANDARD OF REVIEW ON RELIEF REQUESTED.

Petitioners seek a "Writ of Extraordinary Relief" from this Court to compel three items of relief from the trial court below: (1) denying Respondents' "Motion To Set Aside Rescinded Helfstein Settlement Agreement And Proceed On Claims Against Them," meaning to prevent the trial court from holding an evidentiary hearing below on the sole issue of whether Petitioners procured their settlement from Respondents by means of fraud upon it and/or them; (2) granting

Petitioners' Motion To Dismiss (but denied by the trial court below) on the ground that Nevada does not have personal jurisdiction over them; and (3) in the absence of any relief on items (1) and (2), granting Petitioners' Motion to Disqualify Judge Gonzalez in the case below.

Writ petitions are granted only when the Petitioner has a clear right to the relief requested and has met the burden of establishing that writ relief is appropriate. *Halverson v. Miller,* 124 Nev. 484, 186 P.3d 893 (2008). Generally, this Court will not consider writ petitions challenging orders denying motions to dismiss, unless an important issue of law requires clarification. See, *Buckwalter v. Eighth Jud. Dist. Ct.,* 126 Nev. Adv. Rep. 21, 234 P.3d 920, 921 (2010) (holding that the court will only entertain writ petitions challenging the denial of a motion to dismiss if the "issue is not fact bound and involves an unsettled and potentially significant, recurring question of law"). Thus, a writ petition challenging a denial of a motion to dismiss will only be granted when "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." See *Beazer Homes v. Eighth Jud. Dist. Ct.,* 120 Nev. 575, 578-579, 97 P.3d 1132 (2004).

Such is hardly the case below or here because Petitioners are effectively asking this Court to bar the trial court from holding an evidentiary hearing to determine the threshold issue of whether they did indeed procure their settlement from Respondents by means of fraud perpetrated upon it and them. Until the trial court holds that evidentiary hearing and makes additional "findings" in the case below, there are no "pure questions of law" yet for this Court to decide *de novo* here as requested by Petitioners. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." NRCP 52(a). See also *Gonski v. District Court,* 126 Nev. Adv.

Rep. 51, 245 P.3d 1164, 1168 (2010) (this court gives deference to the district court's findings of fact and reviews questions of law *de novo*). Furthermore, notwithstanding Petitioners' improper request for "extraordinary writ relief" here, all motions under Rule 60(b) are addressed to the sound discretion of the trial court and the exercise of discretion by the trial court in granting or denying such motions is not to be disturbed on appeal absent an abuse of discretion." See, *Heard v. Fisher's & Cobb Sales,* 88 Nev. 566, at 568, 502 P.2d 104 (1972).

II. RESPONDENTS' MOTION TO SET ASIDE/RESCIND THEIR SETTLEMENT AGREEMENT WITH PETITIONERS IS NOT UNTIMELY AND, INDEED, THIS ISSUE IS NOT EVEN RIPE FOR CONSIDERATION BY THIS COURT UNTIL THE TRIAL COURT HOLDS AN EVIDENTIARY HEARING TO DETERMINE WHETHER PETITIONERS PROCURED THEIR SETTLEMENT FROM RESPONDENTS BY MEANS OF FRAUD.

A. The Six Month Time Period for Seeking NRCP 60(b) Relief Does Not Apply Here, At Least Not Yet.

The Petition is unripe for review until the trial court determines the existence of fraud upon it and Respondents with respect to Petitioners' settlement with Respondents. In other words, this Court cannot address the first two issues raised in the Petition until the lower court has determined whether the motion is properly before it under NRCP 60(b).

NRCP 60(b) provides, in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc. **On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons**: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) **fraud (whether heretofore denominated intrinsic or extrinsic)**, misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. **This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment,**

> **order, or proceeding, or to set aside a judgment for fraud upon the court.** Writes of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

"While a motion under NRCP 60(b)(3) must be made 'not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served,' NRCP 60(b) does not specify a time limit for motions seeking relief for 'fraud upon the court.'" See, *Murphy v. Murphy*, 103 Nev. 185, 186, 734 P.2d 739 (1987), citing *Savage v. Salzmann*, 88 Nev. 193, 195, 495 P.2d 367, 368 (1972) ("Fraud upon the court consists of such conduct as...prevents a real trial upon the issues involved"). Such is and was the case below.

> "Fraud upon the court" has been recognized for centuries as a basis for setting aside a final judgment sometimes even years after it was entered.
> ...
> It is, of course, true that "in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. For this reason, a final judgment, once entered, normally is not subject to challenge. However, the policy of repose yields when "the court finds *after a proper hearing* that fraud has been practiced upon it, or the very temple of justice has been defiled. [A] case of fraud upon the court [calls] into question the very legitimacy of the judgment. Put another way, '[w]hen a judgment is shown to have been procured' by fraud upon the court, 'no worthwhile interest is served in protecting the judgment.'
>
> The problem lies in defining what constitutes 'fraud upon the court.' Obviously, it cannot mean any conduct of a party or lawyer of which the court disapproves; among other evils, such formulation 'would render meaningless the [time] limitation on motions under [Rule] 60(b)(3).' The most widely accepted definition, which we adopt, holds that [HN6] the concept
>
> > Embrace[s] only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot [***12] perform in the usual manner its impartial task of adjudging cases ... and relief should be denied in the absence of such conduct."
> > (Citations omitted, emphasis supplied.)

See, *NC-DSH, Inc., d/b/a Valley Hospital Medical Center v. Garner*, 120 Nev. 647, at 653-54,

218 P.3d 853 (2009). Furthermore, "comity and efficiency make a motion in the court that rendered the judgment the preferred and normal procedure to attack a judgment for fraud on the court." *Id.*

Respondents' motion below was brought specifically to seek relief from fraud upon them and the Court. Thus, this threshold determination can only (and should) be made by Judge Gonzalez holding an evidentiary hearing below to determine whether Petitioners perpetrated a fraud upon her and Respondents when they settled with Respondents for a mere $60,000 – and then (Mr. Helfstein) testifying in his deposition and at trial in furtherance of that fraud while enjoying the protection of the stay order entered by this Honorable Court in his favor – meaning Judge Gonzalez wants to determine whether Mr. Helfstein's participation in Respondents' trial against the UI Defendants was also in furtherance of the fraud he perpetrated upon Seaver, in turn, thereby perpetrating a fraud upon her. In other words, not only must Judge Gonzalez determine whether Petitioners perpetrated a fraud upon her as well as Seaver, but when/or how long that fraud was perpetrated by Petitioners including in the case below. Until Judge Gonzalez is allowed to hold such an evidentiary hearing below to make factual findings on such issues, there is nothing for this Court to determine here *de novo*.

Again, unbeknown to Seaver, Mr. Helfstein "cooked the books" of Summit Technologies to not only enrich himself, but to also convince Seaver that Summit was in dire financial condition and needed to be sold, and then he engineered the sales transaction with the UI Defendants to result in additional payments of monies to him without the knowledge or consent of Seaver. When Seaver settled with Petitioners for $60,000, Mr. Seaver was not only unaware that Mr. Helfstein had substantially reduced his capital account in Summit Technologies, but that Mr. Helfstein had also engineered the sales transaction with Mr. Saporiti to further enrich himself at Seaver's expense. Indeed, Judge Gonzalez ultimately awarded Seaver damages

against only the UI Defendants in the amount of $565,597.44. Correspondingly, Mr. Conant testified at trial that "total lost income" to Seaver was $3,792,570, which was based primarily upon his review of Petitioner's books, not the books of the UI Defendants (Appendix C). Significantly, neither Petitioners nor the UI Defendants ever bothered to hire an accountant or expert to provide any other financial opinion to the trial court, or to rebut Mr. Conant's opinion, which is and was the only evidence admitted below regarding Respondents' damages. In other words, neither the UI Defendants nor Petitioners have bothered to ever rebut or oppose Mr. Conant's findings and, therefore, Petitioners are guilty of *prima facie* fraud for which they have even yet to account below. Again, the trial court does not (yet) intend to address the subject of Respondents' claims against Petitioners at the evidentiary hearing she wishes to hold below, but to only address the issue of whether Mr. Seaver was fraudulently induced by Mr. Helfstein into a settlement of $60,000. Once that threshold issue is affirmatively determined, the trial court would then proceed on Respondents' underlying claims against Petitioners. Again, if Respondents fail to make such a case below, this case is over. The policy of repose yields when "the court finds after a proper hearing that fraud has been practiced upon it, or the very temple of justice has been defiled." *Id.*, quoting *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575 at 580, 66 S. Ct. 1176 (1946).

In summary, Respondents ultimately recovered more than $565,000 from the UI Defendants because, in the course of litigation, an expert opinion report based on an analysis of Petitioners' books and records revealed that Mr. Helfstein had been stealing from Mr. Seaver for years, including unlawfully and improperly reducing his capital account to zero and then receiving an additional $562,756.45 as a result of the merger of Summit Technologies and the UI companies over the 33 days following that transaction. Petitioners concealed these fraudulent transactions to induce Respondents to settle their claims for a mere fraction of Petitioners' actual

liability and to procure a dismissal below from them. Furthermore, ostensibly because they had the protection of a stay order from this Honorable Court, Petitioners then went so far as to continue perpetrating that fraud on Respondents in the trial conducted by Judge Gonzalez below between Respondents and the UI Defendants. By doing so, Petitioners have effectively prevented a real trial upon the merits against them, thereby perpetrating a fraud upon the court below. For these reasons, the issues raised in the Petition are not yet ripe for determination by this Court, not at least until the trial court holds an evidentiary hearing below on the sole issue of whether Petitioners procured their settlement from Respondents by means of fraud.

B. The Trial Court Has Yet To Enter A Final Judgment In The Proceedings Below.

The Petition is effectively a premature appeal insofar as it seeks to end this case without the lower court ever having had the opportunity to try or hear it against Petitioners. Albeit, Respondents did settle with Petitioners, the trial court still has yet to enter a final judgment in the case between them because it has not yet had the opportunity to conduct an evidentiary hearing on whether Petitioners procured their settlement with Respondents by means of fraud. See NRCP 58(c). For these reasons, as the trial court below also ruled, it has not yet entered a final judgment in the proceedings between these parties. There was no "order of dismissal" entered by the trial court below, only a Voluntary Dismissal *without prejudice* by Respondents. Furthermore, there was no order entered below by the trial court confirming the settlement between Petitioners and Respondents, as well as finding it to be in good faith. In fact, on the contrary, Petitioners relied upon the trial court's retention of jurisdiction to preclude the UI Defendants from bringing their Third Party or Cross-Claims against them, the basis of this Court's stay order in their favor. Finally, the Settlement Agreement itself expressly conditioned the payment of the $60,000 consideration "upon the filing and receipt of a Final Order of Dismissal With Prejudice, as against the Helfstein Defendants."

Because there was no such "Final Order of Dismissal With Prejudice" ever entered by the trial court, the case between these parties was never adjudicated on the merits below nor has a final judgment ever been entered as to them below. See NRCP 58(c). Until Judge Gonzalez can determine whether Petitioners perpetrated fraud upon her as well as Respondents, meaning when and whether that fraud also was perpetrated by Mr. Helfstein testifying and participating at Respondents' trial against the UI Defendants, there is no way for this Honorable Court to determine here *de novo* -- not only whether the six month time period or limitation of NRCP 60(b) even applies here -- but when it would have even begun to apply with respect to Respondents' request for 60(b) relief here. In short, Judge Gonzalez simply needs to make these determinations by holding the evidentiary hearing she wishes to hold below now, and from which Petitioners desperately want to escape or avoid.

C. Respondents' Voluntary Dismissal Of The Case Below Against Respondents Pursuant to NRCP 41(a) Does Not Prevent Or Preclude the NRCP 60(b) Relief They Seek Below.

Again, there was never any judgment entered below as to these parties. See NRCP 58(c). Thus, Petitioners' reliance on *Jeep Corporation v. District Court*, 98 Nev. 440, 652 P.2d 1180 (1982) is sorely misplaced here. There, this court held that in the case of a stipulation and dismissal under NRCP 41(a)(1), dismissal is effectuated automatically once the stipulation has been signed and filed, without the need of judicial sanction or affirmation. This authority, however, is inapposite here for two important reasons. First, *Jeep* makes no considerations of, nor any reference to, motions for relief made under NRCP 60(b); *Jeep's* considerations are related solely to whether a stipulated dismissal is final under NRCP 41(a)(1). Second, the stipulated dismissal in *Jeep* under NRCP 41(a)(1) was accompanied by findings of fact, conclusions of law, and a judgment on the merits in the same action, whereas the stipulated dismissal here was made with no accompanying findings of fact, conclusions of law, or judgment

on the merits.

The importance of these distinctions is illuminated by the policy function of NRCP 41(a)(1). Under NRCP 41(a)(1), a notice of dismissal "with prejudice" operates as an adjudication on the merits only if the plaintiff has previously dismissed an action in any state or federal court based on or including the same claims. Because Respondents have not previously dismissed any other action based on or including their claims here, the case below has not been adjudicated on the merits yet.

II. NOT ONLY DO NEVADA COURTS HAVE SPECIFIC PERSONAL JURISDICTION OVER PETITIONERS, BUT THEY WAIVED THEIR OBJECTIONS TO SUCH PERSONAL JURISDICTION HERE.

Nevada has "general" and "specific" personal jurisdiction over the Petitioners, particularly Mr. Helfstein, as is evident from his trial testimony in the case below that among other things, Mr. Helfstein testified below that, he and his wife conducted business in Nevada for several years *vis-à-vis* the Summit Companies. (Appendix B, pages 9, 17 and 18.) Although Mr. Seaver and others (like Mr. Cachia) operated the Summit Companies in Nevada, Mr. and Mrs. Helfstein clearly availed themselves of the benefits and privileges of this forum in conducting those businesses here. Indeed, by operating the Summit Companies here, Mr. and Mrs. Helfstein not only derived income from their corporate activities in Nevada, but also received the protections and privileges of doing so (for e.g., not having to pay corporate or individual income tax here). Furthermore, the very activities of Petitioners in this case gives Nevada personal jurisdiction over them, which the record below also shows they have failed to preserve, i.e., or have waived.

Indeed, Petitioners have never filed an Answer in the case below setting forth any affirmative defense preserving their objection to Nevada having personal jurisdiction over them. Likewise, Petitioners never filed prior to trial a Motion to Dismiss in response to Respondents'

Complaint below, thereby preserving any defense on their part to Nevada having personal jurisdiction over them. In fact, Petitioners did not file a Motion to Dismiss this case against them based on Nevada not having personal jurisdiction over them until this year (2014). (See Petitioners' Appendix, Vol. IV, pages 933-939.) In the interim, Petitioners negotiated a Settlement Agreement under Nevada law with Respondents to ostensibly resolve the case below. Petitioners also sought relief from the court below with respect to the Third Party Claims and Cross-Claims of the UI Defendants against them, and upon appeal to this Court, were successful in securing a stay order in preventing any further prosecution of the action below against them. Petitioners also participated in the discovery process below, even filing Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 (Appendix D hereto), and Mr. Helfstein participated in depositions and the production of documents while requesting the trial court to allow him to testify by means of video conferencing rather than in person (which was also a condition of the Settlement Agreement). And again, the Settlement Agreement between these parties expressly conditioned the payment of the $60,000 settlement "upon the filing and receipt of a Final Order of Dismissal With Prejudice, as against the Helfstein Defendants," further demonstrating that the Petitioners' submitted and waived any objection to the trial court's jurisdiction over them below.

With that said, Mr. Helfstein's trial testimony is what really sinks this defense here. At trial, Mr. Helfstein "consented to be sworn in by the (trial) court clerk here in Nevada and to be bound by the rules of perjury here in Nevada." (Appendix B, page 2.) Mr. Helfstein also testified that all of their companies did business here in Nevada (Appendix B, page 9), and that Joe Cachia had operated the Las Vegas office for him (Appendix B, page 17). Mr. Helfstein even testified that "I actually made a trip out to Las Vegas to meet with a gentleman who had a company in California who showed interest, but we couldn't reach an acceptable price."

(Appendix B, page 18.) According to Mr. Cachia's testimony, Mr. Helfstein even converted a $100,000 check payable to the Seaver's Nevada Corporation, LaserStar Distribution, for deposit into Summit, unbeknown to Mr. Seaver. (Appendix B, page 113.) In short, Petitioners have clearly submitted to Nevada jurisdiction and there is simply nothing in the Petition to this Honorable Court showing otherwise, including that Petitioners ever preserved any objection or defense to Nevada having personal jurisdiction over them, whether specific or general.

> "General jurisdiction (occurs) where a defendant is held to answer in a forum for causes of action unrelated to his forum activities. General jurisdiction over the defendant is appropriate where the defendant's forum activities are so substantial or continuous and systematic that it may be deemed present in the forum. A court has specific jurisdiction over a defendant in instances where: (1) the defendant purposefully establishes a contact with the forum state and affirmatively directs his conduct towards the state, and (2) the cause of action arises from such purposeful contact with the forum." (Citations omitted.)

See, *Baker v. Eighth Jud. Dist. Ct.,* 116 Nev. 527, 531-32, 999 P.2d 1020 (2000). Petitioners cannot and do not dispute that they purposely established contact with Nevada to conduct business here *vis-à-vis* the Summit Companies, and this case arises specifically from such purposeful contact by them with Nevada. With all due respect, this issue as set forth in the Petition is simply incredible and unsupported by the record below.

> "Factors to consider in determining whether assuming personal jurisdiction is reasonable include: (1) the burden on a defendant of defending the action in the foreign forum; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenience and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversy; and (5) the shared interest of the several states in furthering fundamental substantial social policies." (Citations omitted.)

See, *Consipio Holding BV v. Carlberg,* 128 Nev. Adv. Rep. 43, 282 P.3d 751 (2012).

First, there is no burden on Petitioners in defending this action here because Mr. Helfstein has been participating in it for the past several years. Second, Nevada obviously has a state interest in adjudicating this dispute because it involves companies who did business here as well

as Respondents who are residents here. Third, as residents of Nevada, Respondents have an interest in obtaining convenient and effective relief here. Fourth, there is no other state but Nevada that has any interest in obtaining an efficient resolution of this controversy between these parties. Finally, there is no "shared interest of the several states" for this court to consider here because only Nevada and New York would have any such interest and, correspondingly, Mr. Helfstein has never bothered to try and pursue anything against Respondents in New York.

For these reasons, Petitioners' defense or objections based on Nevada not having personal jurisdiction over them are without any merit whatsoever.

IV. THE LOWER COURT'S DENIAL OF PETITIONERS' MOTION FOR DISQUALIFICATION OF JUDGE GONZALEZ WAS NOT AN ABUSE OF DISCRETION AND SHOULD NOT BE DISTURBED BY THIS COURT AS A CONSEQUENCE OF THE PETITION.

With all due respect, Judge Cadish decided this issue correctly below (Petitioners' Appendix, Vol. IV, pages 909-911), and Petitioners' *ad hominine* attacks on Judge Gonzalez are as unfortunate as they are unwarranted. As the record below reflects, Mr. Helfstein testified at the trial between Respondents and the UI Defendants by means of video conferencing but without the benefit or participation of his counsel. His testimony (contained in Appendix B hereto) simply speaks for itself and certainly vitiates any argument or defense that Nevada does not have personal jurisdiction over Petitioners and, more importantly here, that any impressions formed by Judge Gonzalez of Petitioners and their case is based on the evidence adduced at that trial, particularly the testimony of Mr. Helfstein, not any other or "outside" influence, extrajudicial or otherwise. See NRCP 52(a). Judge Gonzalez's opinions on the merits of this case arise directly from the proceedings that have been conducted by her below including the trial between Respondents and the UI Defendants and from no other source. In short, Judge Gonzalez should not be disqualified from the proceedings below, pursuant to NRS 1.230(1), because she does not entertain any actual bias or prejudice for or against Petitioners or

Respondents in this action.

This Court has held that "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *In Re Petition to Recall Dunlevy,* 104 Nev. 784, 789, 769 P.2d 1271 (1988). "The personal bias necessary to disqualify must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from her participation in the case." *Id at 790.* "Remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all of the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169 (1998).

> "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties or their cases, ordinarily do not support a bias or partiality challenge."

See, *Litekey v. United States,* 510 U.S. 540, 555, 114 Sup. Ct. 1147 (1994).

Furthermore, a judge is "presumed to be impartial, and the burden is upon the party asserting the challenge to establish sufficient factual grounds warranting disqualification." *Ybarra v. State*, 137 Nev. Adv. Op. 4 at 6, (March 3, 2011.) Certainly, Judge Gonzalez's opinion of Mr. Helfstein's trial testimony – that it was not credible – does not sufficiently carry Petitioners' burden here to disqualify her in the case below. If parties could get rid of judges who formed opinions regarding their credibility and those of the witnesses and parties who appear before them with as much ease as Petitioners wish to accomplish here, no judge would ever survive any case to its conclusion. With all due respect (again), Judge Gonzalez has done nothing wrong in the case below insofar as showing any bias towards any party is concerned and,

in fact, is among the best trial judges we have down here. Ergo, this Court should not even begin to consider Petitioners' request to disqualify Judge Gonzalez from the case below. Indeed, judicial economy clearly militates against as much here because of the long, convoluted and complex history (particularly procedural history) of this case. There is simply no other judge who should or would want to hear the remainder of this case, and no other judge who is as familiar with the evidence adduced and proceedings conducted to date in this case, as Judge Gonzalez.

For these reasons, the Petition does not present any basis for extraordinary relief insofar as disqualifying Judge Gonzalez from the case below is concerned.

CONCLUSION

Respondents respectfully request that this Court deny any and all relief as requested by Petitioners in their Petition. Not only did Petitioners perpetrate a fraud upon Seaver prior to this case and after it was filed in settling with them, but they continued to perpetrate that fraud in their participation in the case below including in discovery and at trial *vis-à-vis* Mr. Helfstein. Make no mistake about it, Mr. Helfstein's strategy from day one, as is evident from his trial testimony (Appendix B hereto), was intended to avoid ever having to account in any court anywhere for his fraud against Seaver. To that end, he continued perpetrating that fraud on Seaver in the trial below and, therefore, on the lower court, and continues perpetrating that fraud with his Petition to this Honorable Court. In short, Mr. Helfstein has no more regard for the indisputable evidence admitted below – as Petitioners' have never bothered to dispute it and therefore it is now undisputed – than he has for the integrity of these judicial proceedings. Ergo, the relief sought by the pending Petition must be denied, at least for now until the trial court is

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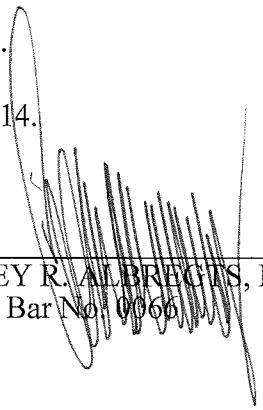
able to hold an evidentiary hearing on the issues it raises.

Respectfully submitted this 1st day of August, 2014.



JEFFREY R. ALBREGTS, ESQ.
Nevada Bar No. 0066

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 1st day of August, 2014, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing Respondent's Answer to Petition For Extraordinary Writ Relief, postage prepaid and addressed to:

J. Michael Oakes, Esq.
Foley & Oakes
850 East Bonneville Avenue
Las Vegas, NV 89101
Attorney for Petitioners

And via messenger to:

Hon. Elizabeth Gonzalez
Eighth Judicial District Judge
Department 11
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89155

Honorable Elissa Cadish
Eighth Judicial District Judge
Department 6
Eighth Judicial District Court
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Heather L Stroup

An employee of Holley, Driggs, Walch,
Puzey & Thompson