

1 **IN THE SUPREME COURT OF THE**
2 **STATE OF NEVADA**

3 NANYAH VEGAS, LLC, a Nevada
4 limited liability company,

5 Appellant

6 v.

7 SIG ROGICH a/s/a SIGMUND
8 ROGICH as Trustee of The Rogich
9 Family Irrevocable Trust, ELDORADO
10 HILLS, LLC, a Nevada limited liability
11 company; DOES I-X; and/or ROE
12 CORPORATIONS 1-x, inclusive

13 Respondents

Case No. 66823

Electronically Filed
District Court Case No. 2015-168350
Dept. No.: XXVI
Tracie K. Lindeman
Clerk of Supreme Court

14 **APPEAL**

15 From the Eighth Judicial District Court
16 The Honorable Nancy L. Allf, District Judge

17 _____
18 **RESPONDENTS ANSWERING BRIEF**
19 _____
20

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1 **CERTIFICATION PURSUANT TO NEV. R. APP. P. 26.1**

2 The undersigned certified that the following have an interest in the outcome
3 of this appeal. These representations are made to enable judges of the Panel to
4 evaluate possible disqualifications or recusal:
5

6
7 [NOT APPLICABLE]

8 Dated this 13th day of July, 2015.
9

10
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1 Inc., his wholly owned company, as a consulting fee.

2 With respect to Nanyah's third party beneficiary claim, Nanyah, as it has in
3 other parts of its brief, ignores that Eldorado is the sole defendant it is suing for
4 unjust enrichment and constantly argues that agreements entered into by the Rogich
5 Trust, the Flangas Revocable Trust and Huerta, in which Eldorado is not a party, is
6 basis for its claim. Not only did Nanyah never have any dealings with Eldorado,
7 there is nothing in the record showing that Eldorado ever recognized Nanyah as an
8 investor or accepted any benefit from Nanyah.
9

10 **STATEMENT OF FACTS**

11 Nanyah's Statement of Facts consists of 16 paragraphs taken from 18
12 paragraphs of Huerta's Declaration (APP 153) which morphs into a paragraph of
13 Nanyah's argument. Op.Br. at 9:16-15: 2. Eldorado will respond to 11 numbered
14 paragraphs of Nanyah's Statement of Facts which repeat Huerta's Declarations,
15 and which concern possibly relevant matters. As will be shown by the responses,
16 there is no evidence to support any of Huerta's declarations. The following are the
17 responses.
18

19 4. There is no evidence Eldorado paid anything to Eric Reitz, Craig
20 Dunlap or Antonio Nevada.
21

22 5. Eldorado was not a party to the October 30, 2008 Purchase Agreement.
23

24 6. Nothing in the Purchase Agreement provided that Eldorado would
25 make any payments or distributions.
26
27
28

1 7. The Purchase Agreement did have attached an Exhibit A as shown on
2 lines 4-9 APP174. The Purchase Agreement states that Huerta, Go Global and the
3 Rogich Trust “may be subject to certain potential claims of those entities set forth
4 and attached hereto as Exhibit A”. APP165. Eldorado was not a party to the
5 Agreement and there is no evidence Exhibit A is relevant in any respect to
6 Eldorado.
7

8 8 This paragraph concerns a response to a production request for
9 documents “relating to the \$1,500,000 alleged in paragraph 15 of the First Amended
10 Complaint to have been invested in Eldorado Hills, LLC by Nanyah Vegas, LLC.”
11 (Op.Br. at 11:15-17). The production request was not for “documents which
12 affirmed that Nanyah Vegas was owed \$1,500,000” (emphasis supplied) as
13 Nanyah’s characterized its request. (Op.Br. at 11:11-13). The paragraph says
14 nothing about the documents response except in a footnote 1 which states that
15 Exhibit PLTFS 0032-33 is a copy of one of Eldorado’s bank statements showing
16 that \$1.5 million was deposited into Eldorado’s bank account. Op.Br. at 11:24-26.
17 That bank statement is part of a chain of bank transactions by Huerta, starting with
18 a \$1,500,000 wire from Yoav Harlap in Israel to Huerta’s Canamex Nevada
19 account on December 6, 2007, which had been opened on December 4, 2007, with
20 a deposit of \$3,000. Ex. D, APP84-85. The \$1,500,000 deposit was sent by
21 Harlap to the attention of Melissa Dewin as Huerta had instructed him. APP120 at
22 20-121 at 21. The next day, November 7, Huerta transferred the \$1,500,000 to the
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1 Eldorado account in the Nevada State Bank. Ex. E, APP87,APP 88, APP123 at 13-
2 18. Three days later, November 10, Huerta transferred \$1,450,000 of the
3 \$1,500,000 to a money market account. Ex. F, APP91, APP124 at 16-125 at 10.
4 Four days later, November 14, Huerta drew a check for \$1,420,000 from the
5 money market account to Go Global, his wholly owned company (Ex. G, APP93,
6 APP125 at 11-127 at 11) and the same day the check was deposited to Go Global's
7 account at Nevada State Bank, Ex. G, APP93, APP126 at 19-127 at 11.
8

9 The general ledger of Eldorado, kept by Huerta, shows the \$1,420,000 as a
10 consulting fee to Go Global on December 14, 2007, 8 days after Harlap's wire to
11 Huerta's Canamex Nevada account. APP127 at 17-24, APP95.
12

13 Surprisingly, Huerta volunteered that Eldorado would have better chances to
14 obtain needed financing if its financials looked better by his taking the income from
15 the consulting fee because he had not made any money the last year. He testified
16 the refinancing was not obtained. APP107 at 2-109 at 1.
17

18 9. Eldorado is not a party to Exhibit D which concerns the Purchase of an
19 Eldorado membership interest by the Flangas Trust and the confirmation referred
20 to was made by the Rogich Trust which sold the membership interest to the Flangas
21 Trust.
22

23 10. This paragraph contains Nanyah's continued irrelevant unsupported
24 claims that the Rogich Trust owed \$1,500,000 to Nanyah. Nanyah just ignores the
25 fact that its unjust enrichment claim is against Eldorado only and whether there is
26
27
28

1 any basis for anyone else owing anything to Nanyah is totally irrelevant.

2 11. There is no evidence that Eldorado ever worked on paying anything to
3 anyone who provided funds to Eldorado.
4

5 12. There is no evidence that Eldorado paid anything to Eric Reitz or
6 Craig Dunlap and the cited Purchase Agreement provided for the Rogich Trust, not
7 Eldorado, to pay Dunlap. Eldorado is not a party to the cited Agreement.
8

9 14. There is no evidence that Mr. Rogich represented he would pay
10 anyone. Furthermore, any such representation would have no relevance to
11 Nanyah's claim against Eldorado.
12

13 15. Nothing in the paragraph is relevant to Nanyah's claim against
14 Eldorado. Eldorado is not a party to any of the agreements referred to in the
15 paragraph.
16

17 The paragraph following the numbered paragraphs states that "[I]t was
18 against these willful admissions that the Defendants were obligated to repay
19 Nanyah." Op.Br. at 14:7-9. There is no evidence that Eldorado ever admitted it
20 owed Nanyah anything. Nanyah just continues to link Eldorado with other entities
21 who have nothing to do with Nanyah's claim against Eldorado.
22

23 STANDARD OF REVIEW

24 The Court reviews a summary judgment de novo without deference to the
25 district court's findings. Wood v. Safeway, Inc. 121 Nev. 724, 729, 121 P.3d 1026,
26 1029 (2005).
27
28

ARGUMENT

As shown in the foregoing Statement of Facts section, Nanyah's purported facts are just that – purported facts. In its Legal Argument, Section A, there is a continuation of purported facts. The section heading states that "'Eldorado Hills' members acknowledged that Nanyah was owed \$1.5MM in express agreements and Nanyah was not informed that it would not be repaid until late 2012." Op.Br. at 16:6-8. Who are the Eldorado Hills members? What did they acknowledge? Who owed Nanyah \$1,500,000? Who told Nanyah it would not be repaid until late 2012? There is no evidence to support answers to any of those questions nor is there any basis to believe answers could involve any possible Eldorado liability.

The first 5 lines of Nanyah's legal Argument states:

"Mr. Rogich and Eldorado continued to represent all the way up to 2012 that Nanyah Vegas would be repaid, and only after their representations in 2012 that none of the parties owed would be repaid did Nanyah suffer damages. *See* Sig Rogich as Trustee of Rogich Family Irrevocable Trust Answers to Plaintiff's First Set of Interrogatories, APP. Vol. 1 at p. 2:13-17, 22-26."

There is no evidence that Mr. Rogich or Eldorado ever represented that Nanyah would ever be paid anything or represented in 2012 or at any other time that Nanyah or anyone else would not be repaid. Nanyah cites Rogich's Interrogatory Answers for the representations. The citation fails to state the APP page. Attached hereto, as a Supplemental Appendix, is a copy of the Interrogatories cited by Nanyah. They do not support Nanyah's repeated claim that

1 not until 2012 did Nanyah become aware it would not be paid. The interrogatory
2 answer at 2:13-17, 22-26 by Mr. Rogich as Trustee of the Rogich Trust is simply
3 that he informed Huerta in early fall 2012 that the Rogich Trust no longer had a
4 membership interest in Eldorado and the Rogich Trust received no consideration
5 for conveying its interest. Even Huerta, in his Declaration, stated that Mr. Rogich
6 had only told him in 2012 that the Rogich membership had been transferred. Op.
7 Br. at 13:12-14:3. Huerta's Declaration does conclude "Plaintiff had no reason to
8 suspect that they would not be repaid for the monies provided." More relevant is
9 that none of this has anything to do with Eldorado.

13 Nanyah states that "the statute of limitations could not begin to accrue until
14 Nanyah was made aware that they would not receive the \$1,500,000 promised by
15 Mr. Rogich and evidently received by Eldorado, according to its own bank
16 statements." Op.Br. at 20:5-7. No citation is offered but it is obvious that Nanyah
17 is alluding to its footnote 1 on page 11 of its Opening Brief with respect to the
18 \$1,500,000 check deposited in Eldorado's account on December 7, 2007. PLTFS
19 0032-33. The \$1,500,000 promised by Mr. Rogich and evidently received by
20 Eldorado" is based on Nanyah's unsupported contention that the Rogich trust
21 promised in the Purchase Agreement to pay Nanyah 1.5 million. As set forth
22 herein, the December 7, 2007 \$1,500,000 transaction was the source of the
23 \$1,420,000 consulting fee to Go Global. And even if Rogich had promised to pay
24 anything to Nanyah, it had nothing to do with Nanyah's claim against Eldorado.

1 **I. NANYAH DID NOT INVEST IN ELDORADO**

2 Nanyah alleged an \$1,500,000 investment in Eldorado in 2006 and 2007.

3
4 There is no evidence of such investment. Rule 56(c) provides that a motion for
5 summary judgment shall include a concise statement setting forth facts material to
6 the disposition of the motion which the party claims is not genuinely in issue.

7
8 Eldorado set forth in its motion assertions of undisputed Material Facts. APP71.

9 Included is the assertion that “[t]here is no evidence Nanyah ever invested anything
10 in Eldorado.” APP71. That fact assertion, if undisputed, would demonstrate that

11
12 Nanyah has no basis for any claim against Eldorado for unjust enrichment. The
13 assertion was truly a challenge to Nanyah to come forth with facts, if it had any, to
14 dispute the assertion. Below, Nanyah made no effort to dispute the assertion. Here,

15
16 Nanyah makes two feeble references to a \$1,500,000 deposit to Eldorado’s account.

17 The first is the statement in a footnote that an exhibit “is a statement and a copy of
18 one of Eldorado’s bank statements showing that \$1.5 million was deposited into the
19 company’s bank account.” Op.Br. at 11:25-26. See detailed response 8 to

20
21 Nanyah’s Statement of Facts. The second is even more feeble. “The statute of
22 limitations could not begin to accrue until Nanyah was made aware that they would

23
24 not receive the \$1,500,000 promised by Mr. Rogich and evidently received by
25 Eldorado, according to its own bank statements.” Op.Br. at 20:5-7. There is no

26
27 cite. Go Global apparently relies on the statements in its brief about the alleged

28 Rogich promises, none of which is supported by even a shred of evidence, nor were

1 they Eldorado's statements. Furthermore, the 1.5 million deposit was on December
2 7, 2007 and the non-existent Rogich statements were allegedly in 2012.

3
4 Except for the above two abortive references to Harlap's 1.5 million, almost
5 all of which was misappropriated by Harlap's steward, Huerta, there is no evidence
6 of any available funds for Nanyah to purchase some undisclosed membership
7 interest in Eldorado.
8

9 Except for Nanyah's Complaint allegation that it invested 1.5 million in
10 Eldorado in 2006 and 2007, there is nothing in the record showing such
11 investment. Huerta testified that even though he was the tax matters partner of
12 Eldorado, Nanyah was not shown as having an Eldorado interest. APP112 at 2-18.
13 Thus, as there is no evidence Nanyah invested anything in Eldorado, it has no basis
14 for any claim against Eldorado.
15
16

17 **II. NANYAH'S CLAIM IS BARRED BY THE STATUTE OF**
18 **LIMITATIONS**

19 There is no writing by Eldorado with respect to Nanyah's claim. Assuming
20 that Nanyah did in fact have a claim for unjust enrichment as it claims, NRS
21 11.190(2) is the applicable limitations statute. It provides that [a]n action upon a
22 contract, obligation or liability not founded upon an instrument in writing "must be
23 commenced within four years." Nanyah's action was commenced on July 31,
24 2013, 5 years and seven months after its alleged investment in 2006 and 2007
25 (using December 31, 2007 as the beginning date). Thus, Nanyah filed its action
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1 one year and seven months beyond the four year limitation,

2 In Soper v. Means, 111 Nev. 1290, 1295, 903 P.2d 222, 225 (1995)), where
3
4 the issue was when a cause of action for breach of contract accrued, the Court held
5 that the statute began to run as soon as Means knew or should have known of facts
6 constituting the breach of contract.” (underscoring supplied). In Bemis v. Estate
7 of Bemis, 114 Nev. 1021, 1025, 967 P. 2d 437, 440 (1998) the Court cited Soper
8 approvingly and italicized “knows or should know” of facts constituting a breach.
9

10 Surely, Harlap must have known within 5 years and seven months that he had
11 not received his Eldorado interest. He surely expected his steward, Huerta, to keep
12 him advised. There is no way to know the extent of Harlap’s diligence, if any. No
13 Harlap affidavit was filed nor did Nanyah disclose any communication between
14 Harlap and Huerta. There must have been some communications between them
15 during that more than 5 year time period. In any event, the failure to file its action
16 for 5 years and seven months after the alleged investment was unreasonable as a
17 matter of law.
18
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21 Nanyah claims tolling based on Nanyah not being aware “Defendants” would
22 not honor debts until 2012 which was admitted by Mr. Rogich. Op.Br. at 19:7-10.
23 There is no evidence to support such claim. Thus the tolling contention is meritless
24 as is Nanyah’s unjust enrichment claim and argument that the statute of limitations
25 does not bar such meritless claim.
26
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1 **III. NANYAH IS NOT A THIRD PARTY BENEFICIARY**

2 Relying on Olson v. Iacometti, 91 Nev. 241,533 P. 2d 1360 (1975) and
3
4 Lipshie v. Tracy Inv. Co., 93 Nev. 370, 566 P. 2d 819 (1977), Nanyah argues that
5 it is the intended third party beneficiary under the Purchase Agreement and
6 Membership Purchase Agreements. Op.Br. at 23:1-25. Appellant makes no effort
7
8 to advise the Court of the specific language or even the page of such agreements
9 that purportedly show Nanyah was an intended third party beneficiary.
10 Olson v. Iacometti requires that such an agreement be made for the benefit of such
11 intended beneficiary and the fact that he might incidentally benefit by performance
12 of the agreement is insufficient. 91 Nev. 245. Lipshie v. Tracy holds that to be an
13 intended third party beneficiary, there must clearly appear a promissory intent to
14 benefit the third party. 93 Nev. 379.

17 Exhibit “A” to the Purchase Agreement under the heading “Potential
18 Claimants” shows “Nanyah Vegas, LLC (through Canamex Nevada, LLC)
19 \$1,500,000.00”. No place else in the Purchase Agreement is Nanyah or the three
20 other “Potential Claimants” listed. APP 12. In recital A, the Purchase Agreement
21 provides that “[s]uch interest [of the Seller] as well of the ownership interest
22 currently held by the Buyer, may be subject to contain potential claims of those
23 entities set forth and attached hereto in Exhibit “A” ...Buyer intends to negotiate
24 such claims with Seller’s assistance so that such claimants confirm or convert the
25 amounts...into non interest bearing debt, or an equity percentage...and a
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1 distribution in respect of their claims in amounts from the one third (1/3rd)
2 ownership interest in the company retained by buyer.” Of course, Buyer is the
3 Rogich Trust, not Eldorado.
4

5 Clearly, the Purchase Agreement was not made for the benefit of Nanyah. It
6 was an agreement between a seller and buyer of an interest in Eldorado and in the
7 event one or the Potential Claimants in Exhibit “A” actually had a claim with
8 respect to the interest being sold the buyer would be responsible. Providing for the
9 possibility of a creditor recovery in a transaction does not mean the agreement is
10 made for the ultimate claimant’s benefit. Furthermore, the subject of the Purchase
11 Agreement was the sale of the Eldorado not the possible incidental benefit to a
12 “Potential Claimant.” Eldorado was not a party.
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16 The only Membership Interest Purchase Agreement in Appellant’s Appendix
17 is dated October 30, 2008 APP177. It is a somewhat complex agreement between
18 six parties. There are nine recitals. The purpose of the Agreement is the sale of an
19 Eldorado interest to the Flangas Trust by the Rogich Trust. Eldorado is not a party
20 to the agreement. Nanyah’s claim is against Eldorado only. Nanyah has not
21 shown that Eldorado ever agreed to confer a benefit on Nanyah, directly or
22 indirectly. Thus, there can be no basis for Nanyah to claim it is a third party
23 beneficiary of an Eldorado obligation. Its argument that “all the parties who signed
24 those same agreements represented all the members of Eldorado Hills, LLC” and
25 therefore by some legal legerdemain, Eldorado was liable to Nanyah is bizarre.
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1 Op.Br. at 23:22-26.

2 There is no basis for Nanyah's argument that it is a third party beneficiary.

3
4 **IV. THERE IS NO BASIS FOR NANYAH'S CLAIM OF UNJUST**
5 **ENRICHMENT**

6 Nanyah states that it asserted a claim of unjust enrichment because Eldorado
7 "retained a benefit which under equity and good conscious it should not have been
8 permitted to retain." Op.Br. at 22:7-9. Citing In Re Amerco Derivative Litig., 127
9 Nev. Adv. Op. 17, 252 P.3d 681, 703,(2011) and Leasepartners Corp. v. Robert L.
10 Brooks Trust, 113 Nev. 747, 755, 942 P. 2d 182, 187 (1997). . See also Certified
11 Fire Protection v. Precision Construction, 128 Nev. Adv. Op. 35, 283 P.3d 250, 257
12 (2012).

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14
15 Certified Fire Protection holds that:

16 "Unjust enrichment exists when the plaintiff confers a benefit on
17 the defendant, the defendant appreciates such benefit, and there is
18 'acceptance and retention by the defendant of such benefit under
19 circumstances such that it would be unequitable for him to retain
20 the benefit of the value thereof.' Union America Mtg. v.
McDonald, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)."

21 Nanyah's unjust enrichment claim is based solely on the \$1,500,000 deposit
22 made by Huerta on December 7, 2007, to Eldorado's account, where it remained
23 until \$1,450,000 of it was transferred to a money market account on December 10
24 from which Huerta transferred \$1,420,000 to Go Global on December 14, 2007.

25 Thus, Eldorado's bank account included the \$1,500,000 for 3 days. Nanyah's
26 claim is that it invested \$1,500,000, it did not receive the Eldorado interest it
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1 expected and therefore it wanted the return of the \$1,500,000 from Eldorado.
2 Actually, Nanyah's claim has also morphed into the unsupportable one that the
3 Rogich Trust in 2008 represented it would pay the \$1,500,000 to it and in 2012,
4 decided not to pay the money. Nanyah totally ignores the fact that the money from
5 Canamex Nevada was in the Eldorado account for 3 days only and was removed by
6 Huerta as part of his scheme to appropriate almost all of the money 4 days later.
7

8
9 Nanyah has made no showing that (1) it conferred a benefit on Eldorado, (2)
10 Eldorado appreciated such benefit and (3) there is acceptance and retention by
11 Eldorado of such benefit is under circumstances that it would be inequitable for
12 Eldorado to retain the benefit. Clearly, Eldorado received no benefit of any kind.
13 There is no showing that anyone but Huerta was even aware there was \$1,500,000
14 in its account in December, 2007.
15

16
17 Huerta testified as follows with respect to the benefit of the deposit in
18 Eldorado's account for three days.
19

20 "Q. Are there any documents or anything that would show that
21 this was a benefit and that Eldorado accepted it for that purpose?

22 A. The bank statement.

23 Q. Just the bank statement? That's it?

24 A. That I can remember at this point in time, yes.

25 Q. And the bank statement showed that they accepted it? Is that
26 your point?

27 A. Yes, sir.

28 Q. It doesn't show what they were going to do with it, or
anything like that?

A. The bank statement wouldn't show that, no."

APP110 at 3-15

1 There is no basis for any Nanyah claim that Eldorado was unjustly enriched.
2 Certified Fire Protection v. Precision Construction. 128 Nev. Adv. Op. 35.
3


4 **CONCLUSION**

5 Nanyah's arguments have been based on alleged facts, some of which are
6 repeated several times. Eldorado has shown that Nanyah's facts are not supported
7 by evidence. Eldorado's evidence and the narrative of Harlaps' money wired to
8 Huerta's Canamex Nevada bank account and Huerta's conduct with respect to it are
9 supported by Huerta's direct testimony and relevant bank statements. Such
10 evidence shows that there were no funds for a Nanyah investment in Eldorado and
11 there was no such investment.
12
13

14 Eldorado's Summary Judgment should be affirmed.
15

16 Dated this 13th day of July, 2015.
17

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18 By 
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1 **CERTIFICATION PURSUANT TO NEV. R. APP. P. 28.2**

2 1. I hereby certify that this brief complies with the formatting
3
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
5 the type style requirements of NRAP 32(a)(b) because:

6 This brief has been prepared in proportionally spaced typeface using
7
8 Microsoft Word 2010 in Times New Roman with a font size of 14.

9 2. I further certify that this brief complies with the page-or-type-volume
10 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
11 NRAP 32(a)(7)(C), it is:

12 Proportionally spaced, has a typeface of 14 points or more, and contains
13
14 3,723 words and does not exceed 30 pages.

15
16 3. Finally, I hereby certify that I have read this appellate brief, and to the
17 best of my knowledge, information and belief, it is not frivolous or interposed for
18 an improper purpose. I further certify that this brief complies with all applicable
19 Nevada Rules of Appellate Procedure. In particular NRAP 28(A)(3), which requires
20 every assertion in the brief regarding matters in the record to be supported by a
21 reference to the page and volume number, if any, of the transcript or appendix,
22 where the matter relied on is to be found. I understand that I may be subject to
23 sanctions in the event that the accompanying brief is not in conformity with the
24

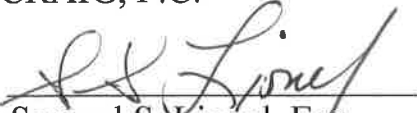
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1 requirements of the Nevada Rules of Appellate Procedure.

2 Dated this 13th day of July, 2015.

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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25 (c)(1), I hereby certify that I am an employee of FENNEMORE CRAIG and that on this 17th day of July, 2015, I caused the foregoing **RESPONDENTS ANSWERING BRIEF AND SUPPLEMENTAL APPENDIX** to be served by submission to the electronic filing service for the Nevada Supreme Court upon the following to the email addresses on file and by depositing same for mailing in the United States Mail, in a sealed envelope addressed to

:

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