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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**  
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9 MB AMERICA, INC., A NEVADA  
10 CORPORATION,

Case No.: 66860

11 Appellant,

12 vs.

13 ALASKA PACIFIC LEASING  
14 COMPANY, A ALASKA BUSINESS  
15 CORPORATION,

16 Respondent.

17  
18 MB AMERICA, INC., A NEVADA  
19 CORPORATION,

Case No.: 67329

20 Appellant,

21 vs.

22 ALASKA PACIFIC LEASING  
23 COMPANY, A ALASKA BUSINESS  
24 CORPORATION,

25 Respondent.

26 **APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **I. THIS COURT SHOULD REVERSE AND REMAND THE DISTRICT COURT'S REFUSAL TO GRANT DECLARATORY RELIEF.**

The issues for resolution by this Court are simple. Did the District Court err in granting summary judgment in favor of Alaska Pacific Leasing Company ("Alaska Pacific") and dismiss the action (with an award of attorney's fees and costs), when the Appellant affirmatively sought declaratory relief compelling mediation according to the terms of the parties' agreement? It is suggested that the District Court erred by failing to recognize and honor the mandates of NRS 30.030 and NRS 30.040, which statutes vest a party with the right to seek a declaration of the duties and obligations owed under a written contract from a District Court.

As sought by MB America, Inc. ("MB"), the District Court found that the parties were required to mediate their dispute. However, rather than recognizing that Alaska Pacific was refusing to mediate the dispute in Reno, Nevada in accordance with the terms of the parties' agreement<sup>1</sup>, the District Court simply granted Alaska Pacific's motion for summary judgment and dismissed MB's complaint without prejudice. No relief was granted to MB with the District Court merely wiping its hands clean of the whole matter without providing any judicial assistance. The District Court then penalized MB for seeking declaratory relief

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<sup>1</sup> Which conduct MB also contends was error by the District Court because there was a question of fact regarding Alaska Pacific's refusal to mediate according to the parties' agreement making resolution by summary judgment improper.

1 and rewarded Alaska Pacific for refusing to mediate the parties' dispute in  
2 accordance with the contract terms by awarding Alaska Pacific \$5,649.75 in fees  
3 and costs as a "prevailing party".  
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5 **A. MB'S DECLARATORY RELIEF ACTION WAS NOT**  
6 **PREMATURE.**

7 Alaska Pacific's primary argument is that MB's complaint seeking  
8 declaratory relief was "premature" because MB had to mediate its dispute with  
9 Alaska Pacific before filing suit. Opp., pp. 11-13. Alaska Pacific's entire  
10 argument is premised on the contention that Alaska Pacific could refuse to mediate  
11 according to the terms of the parties' agreement yet MB was contractually  
12 prohibited from seeking declaratory relief from the District Court to enforce the  
13 terms of the parties' agreement. Opp., pp. 19-20. Alaska Pacific's rationale is that  
14 nothing in NRS 30.030 or NRS 30.040 allows a party "to violate a contractual pre-  
15 litigation mediation obligation." Opp., p. 20. This argument by Alaska Pacific has  
16 no merit.  
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21 Initially, none of the cases cited to by Alaska Pacific actually addressed  
22 declaratory relief claims seeking to compel mediation. See Opp., pp. 23-25.  
23 Further, MB was not violating the parties' agreement by seeking to compel  
24 mediation. Instead, MB wanted to mediate the dispute according to the terms of  
25 the parties' agreement. Accordingly, MB sought a declaration and order from the  
26 District Court compelling mediation to occur in Reno, Nevada despite Alaska  
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1 Pacific's contention that mediation should take place in Alaska. AA at 11-14. MB  
2 contends the District Court erred in refusing to grant the relief requested.<sup>2</sup>  
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4 As stated in MB's Opening Brief, there is no administrative exhaustion  
5 requirement imposed upon MB before seeking declaratory relief in this case.  
6 Further, there is no contractual bar to MB seeking declaratory relief to compel the  
7 parties' mediation obligations. Pursuant to NRS 30.030 and NRS 30.040, MB was  
8 absolutely entitled to obtain a declaration of the parties' duties and obligations to  
9 proceed with mediation according to the terms of the parties' agreement. To  
10 conclude otherwise would effectively render these statutes meaningless and of no  
11 force or effect.<sup>3</sup>  
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15 **B. ALASKA PACIFIC DID REFUSE TO MEDIATE.**

16 Alaska Pacific also argues to this Court that it did not refuse to mediate the  
17 dispute in Reno, Nevada, despite MB's counsel's affidavit establishing such  
18 refusal. AA at 141. Instead, Alaska Pacific argues that its oral rejections to  
19 mediate were not evidence that could be considered by the District Court. Opp., p.  
20 13. However, Alaska Pacific fails to recognize that its counsel's pre-litigation  
21 statements and conduct are admissible. See NRS 51.035(3)(a)-(d). Similarly,  
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25 <sup>2</sup> Simply put, Alaska Pacific says MB had to do "A" before pursuing its declaratory  
26 relief action (with "A" being proceeding with mediation). MB's contention is that  
27 if Alaska Pacific won't do "A", then MB's legal recourse is to seek judicial  
assistance to compel Alaska Pacific to do "A" via a declaratory relief action.

28 <sup>3</sup> *General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995)  
(statutory interpretation should avoid absurd or unreasonable results).

1 Alaska Pacific's own judicial admissions establish that Alaska Pacific asserted that  
2 Alaska law applied to the dispute even though the parties' agreement establishes  
3 Nevada law should apply.<sup>4</sup> Accordingly, Alaska Pacific's refusal to mediate and its  
4 efforts to force the mediation and/or litigation in Alaska was established by the  
5 evidence.  
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8 In addition, Alaska Pacific's own statements to this Court in its Opposition  
9 conclusively demonstrate why declaratory relief was appropriate and should have  
10 been granted by the District Court. This is because Alaska Pacific's Opposition  
11 states: "Alaska Pacific would submit that it is up to the AAA to make the  
12 determination where the mediation will take place." Opp., pp. 16-17 (citing AA 1,  
13 97-119). Alaska Pacific's contention directly violates the express terms of the  
14 parties agreement that requires: "any hearing or meeting should be conducted in  
15 Reno, NV." AA at 37, ¶13. Because of Alaska Pacific's assertions that the locale  
16 of the mediation should be somewhere other than Reno, Nevada, and/or the AAA  
17 could decide the location of the mediation, MB was entitled to obtain an order  
18 from the District Court compelling the mediation to take place in Reno, Nevada.  
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23 <sup>4</sup> Alaska Pacific's own Answer contended that Alaska law applied to the dispute  
24 (AA at 8 ) even though the agreement clearly states that Nevada law applies. See  
25 AA at 37, ¶ 12 ("This Agreement shall be construed according to the law of the  
26 State of Nevada."). Alaska Pacific seeks to pass this contention off as an attempt  
27 to "preserve" the issue. See Opp., p. 3, fn. 2. MB contends this contention by  
28 Alaska Pacific is a judicial admission establishing Alaska Pacific's wrongful  
conduct for which declaratory relief was appropriate. See *Reyburn Lawn &  
Landscape Designers, Inc. v. Plaster Development Co., Inc.*, 255 P.3d 268, 276 -  
277 (Nev. 2011) ("Judicial admissions are defined as deliberate, clear, unequivocal  
statements by a party about a concrete fact within that party's knowledge.").

1 The District Court's refusal to grant the relief requested was therefore error.

2 **II. THIS COURT SHOULD REVERSE AND ORDER THE DISTRICT**  
3 **COURT TO STAY THE ACTION.**

4 Alaska Pacific argues that MB did not request the District Court to stay the  
5 action and that this is "a new issue on appeal." Opp., p. 21. This contention is not  
6 accurate. MB did ask the District Court to enter its order directing the parties to  
7 mediation and to "stay" the proceedings in the district court. See AA at 217 ("**If**  
8 **this Court determines that mediation is appropriate, then the Court should**  
9 **stay the litigation of this matter so as to avoid unnecessary costs to both sides.**")  
10 (emphasis added); see also AA at 218 ("this Court **should stay the matter and**  
11 **order the parties to mediate** with any qualified mediator in Reno." (emphasis  
12 added)). Accordingly, the request to stay the proceedings in the district court is not  
13 a "new" issue on appeal.

14 **III. THIS COURT SHOULD REVERSE THE AWARD OF ATTORNEYS'**  
15 **FEEES AND COSTS.**

16 MB asserts that Alaska Pacific was not a prevailing party as a matter of law  
17 because no resolution of the merits of the parties' dispute has occurred. All that  
18 has taken place is that the District Court held the parties had to mediate their  
19 dispute. This issue was not contested as MB acknowledged the parties were  
20 obligated to mediate the dispute **and actually sought the District Court's**  
21 **assistance to compel compliance with the parties' mediation obligation.** Given  
22 that there has not been a resolution of the merits of the parties' substantive dispute,  
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1 it is suggested that Alaska Pacific cannot be a prevailing party as a matter of law.<sup>5</sup>

## 2 IV. CONCLUSION

3  
4 In its most simplistic form, the issue before the Court is what should the  
5 District Court do when faced with a complaint seeking declaratory relief ordering  
6 mediation when one party refuses to comply with the contract's mediation duties?  
7 MB contends that it is entitled to petition the District Court to determine the  
8 parties' rights and obligations and to seek an order compelling mediation in  
9 accordance with the terms of the parties' agreement, with the District Court staying  
10 the proceedings until the matter is resolved and/or until litigation proceeds.<sup>6</sup> It is  
11 therefore requested that this Court reverse the District Court's order granting  
12 Alaska Pacific's motion for summary judgment, and remand with instructions to  
13 proceed with the litigation in accordance with the terms of the parties' agreement.<sup>7</sup>

14 MB further requests that this Court reverse the District Court's award of attorney  
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21 <sup>5</sup> Compare *Roberts v. Packard, Packard & Johnson*, 217 Cal. App. 4th 822, 830,  
22 159 Cal. Rptr. 3d 180, 184 (2013) ("The trial court therefore erred in awarding  
23 defendants attorney fees for filing a successful petition to compel arbitration" since  
24 "the determination of the prevailing parties must await the resolution of plaintiffs'  
causes of action by an arbitrator.").

25 <sup>6</sup> Of note 92 AM. JUR. PROOF OF FACTS 3d 1, ¶50, "Petition to Compel Arbitration"  
26 (April 2015) identifies that the proper course of conduct a party should follow is to  
27 file a "Petition to Compel Arbitration and Stay Action and for Declaratory Relief"  
in such a situation.

28 <sup>7</sup> Because the parties participated in an unsuccessful mediation during the appeal, a  
remand with an order to complete mediation is moot. However, a remand with  
instructions to allow the litigation to proceed remains appropriate relief.

1 fees and costs to Alaska Pacific as Alaska Pacific is not a prevailing party.

2  
3 DATED this 15 day of June, 2015.

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**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO RULES 40 AND 40A**

1  
2  
3       1.     I hereby certify that this Appellant's Reply Brief complies with the  
4 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP  
5 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

6  
7           This brief has been prepared in a proportionally spaced typeface using  
8 Microsoft Word 10 in 14 font and Times New Roman type.  
9

10       2.     I further certify that this brief complies with the page- or type-volume  
11 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by  
12 NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or  
13 more, and contains 1626 words.  
14

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

2 DATED this 18<sup>th</sup> day of June, 2015.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(b), I certify that I am an employee of ROBISON,  
3 BELAUSTEGUI, SHARP & LOW, and that on this date I caused to be served a  
4 true copy of **APPELLANT'S REPLY BRIEF** on all parties to this action by the  
5 method(s) indicated below:  
6

7  
8 ✓ by placing an original of true copy thereof in a sealed envelope, with  
9 sufficient postage affixed thereto, in the United States mail at Reno, Nevada,  
10 addressed to:  
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16 DATED this 1<sup>st</sup> day of June, 2015.

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