IN THE SUPREME COURT OF THE STATE OF NEVADA

YACOV JACK HEFETZ,

Appellant,

v.

CHRISTOPHER BEAVOR,

Appellee.

Supreme Court No. 70327

District Court Case No.: A-11-645353-C

APPELLANT'S OPENING BRIEF

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I. DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Appellant-Plaintiff Yacov Jack Hefetz, is an individual and therefore has no parent corporations and no publicly held company owns 10% or more of his stock.

2. The follow are the law firms, whose partners or associates have appeared for Appellant-Plaintiff, or are expected to appear in this case:

a) Cohen|Johnson|Parker|Edwards, formerly Cohen-Johnson, LLC
255 E. Warm Springs Road, Suite 100
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b) Lee I. Iglody, Esq.
5940 South Rainbow Boulevard
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3. Stan Johnson's full name is Harold Stanley Johnson.

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IV. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Nev. R. App. P. 3A(b). On June 29, 2012, Notice of Entry of Order that dismissing claims of Alis Cohen was filed and served. ROA 96-99. On February 25, 2013, trial commenced on Plaintiff's claims and Defendants' counterclaims. ROA 431. On March 01, 2013, the court acknowledged the parties' agreement that Defendant Samantha Beavor would no longer be a party to the action and granted Plaintiff's Rule 50(a) motion which dismissed Defendants' counterclaims against Plaintiff Yacov Hefetz. *See* ROA 432-33, minutes date March 1, 2013. Also, on March 01, 2013, the jury entered a verdict in favor of Defendant Christopher Beavor on Plaintiff's remaining claims. Based on the trial results, on March 21, 2013, Notice of Entry of Judgment was filed and served. ROA 457-62. On June 10, 2013, Plaintiff filed a Motion for a New Trial or in the Alternative a Motion for Judgment Notwithstanding the Verdict (JNOV), which requested "granting the Plaintiff a new trial. . . ." ROA 470, Motion for New Trial at p. 8:25-26. On September 09, 2013, Notice of Entry of Order was filed and served granting Plaintiff's Motion for a New Trial. ROA 805-08. On June 18, 2015, Notice of Entry of Order was filed and served dismissing Plaintiff's Complaint, in its entirety, without prejudice, which disposed of all claims against Defendants. ROA 1035-39. Notice of Entry of Order granting Defendant's motion for attorney fees and costs was filed and served on

September 03, 2015. ROA 1188-91. On April 21, 2016, Notice of Entry of Order granting Plaintiff's Rule 50(a) motion dismissed all counter-claims asserted by Defendants against Plaintiff Yacov Hefetz, and therefore disposed of all remaining claims as to all remaining parties. *See* ROA 1202-10, Notice of Entry of Order Granting Plaintiff's Rule 50(a) Motion. Appellant-Plaintiff timely filed a notice of appeal on April 29, 2016. *See* ROA 12011-12. Plaintiff's Notice of Appeal is therefore timely pursuant to Nev. R. App. P. 4(a) and 26(c).

V. ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant to Nev. R. App. P. 17(a)(1) as this case does not involve a case category that is presumptively assigned to the Nevada Court of Appeals under Nev. R. App. P. 17(b).

This matter is also presumptively retained by the Nevada Supreme Court pursuant to Nev. R. App. P. 17(a)(14) as this case involves the application and waiver of the One Action Rule found in NRS 40.430 as applied to an action for the recovery on a guaranty of a debt, which is a question of statewide public importance and raises issues of first impression.

VI. STATEMENT OF ISSUES

1. Whether the district court erred in applying the One Action Rule (NRS 40.430) to an action for the recovery on a guaranty of a debt when the debt is not

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secured by a mortgage or lien upon real estate because the security has been rendered valueless?

2. Whether defendant waived the One Action Rule (NRS 40.430), and is therefore barred from raising that affirmative defense, by failing to plead that affirmative defense in his answer?

3. Whether defendant waived the One Action Rule (NRS 40.430), and is therefore barred from raising that affirmative defense, by failing to plead that affirmative defense prior to entry of a jury verdict in the first trial and on the eve of a second trial?

4. Whether Defendant waived the One Action Rule (NRS 40.430), and is therefore barred from raising that affirmative defense, by moving to dismiss Plaintiff's Complaint base on the One Action Rule after the time for filing such motion expired without showing the good cause required by Nev. R. Civ. P. 16(b)?

5. Whether the district court erred in dismissing Plaintiff's Complaint without prejudice when it could have, pursuant to NRS 40.435(2)(b), granted a continuance and ordered the amendment of the pleadings to convert the proceeding into an action which does not violate the One Action Rule (NRS 40.430)?

6. Whether the district court erred in awarding costs to Defendant as the "prevailing party against any adverse party against whom judgment is rendered" when Plaintiff's Complaint was dismissed without prejudice?

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7. Whether the district court erred in awarding attorney fees to Defendant, based on Plaintiff's good faith rejection of an offer of judgment under NRS 17.115 and Nev. R. Civ. P. 68, when Plaintiff's Complaint was dismissed without prejudice and therefore was not a "more favorable judgment"?

8. Whether the district court erred in awarding attorney fees and costs to Defendant when the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) were not met?

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VII. STATEMENT OF THE CASE

On June 21, 2011, Plaintiff filed his Verified Complaint asserting claims against Defendant for breach of a guaranty to repay a $6 million loan. *See* ROA 6-28, Complaint. Although Defendant never asserted the One Action Rule as an affirmative defense in his Answer (ROA 29-44), and the time to amend pleading had expired three (3) years before, Defendant untimely moved to dismiss, pursuant to NRS 40.435(2)(a) and NRS 40.430 (otherwise known as the "One Action Rule"). Defendant wrongly argued that the One Action Rule required Plaintiff to first pursue real property securing the loan before seeking to enforce the guaranty. *See* ROA 833-39, Defendant's Motion to Dismiss. Despite the clear waiver of this unpled affirmative defense, the district court erroneously dismissed Plaintiff's Complaint, without prejudice, pursuant to NRS 40.435. *See* ROA 1035-39, Notice of Entry of Order dated June 18, 2015.

On July 8, 2015, Defendant wrongly moved for attorney fees and costs based upon his unreasonable Offer of Judgment. *See* ROA 1070-80, Motion for Attorney Fees and Costs dated July 8, 2015. Without any analysis required by *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), the district court erroneously granted Defendant's attorney fees and costs. *See* ROA 1188-91, Notice of Entry of Order dated September 03, 2015.

On April 21, 2016, Notice of Entry of Order granting Plaintiff's Rule 50(a) motion dismissed all counter-claims asserted by Defendants against Plaintiff Yacov Hefetz, and therefore disposed of all remaining claims as to all remaining parties. *See* ROA 1202-10, Notice of Entry of Order Granting Plaintiff's Rule 50(a) Motion. Appellant-Plaintiff timely filed a notice of appeal on April 29, 2016. *See* ROA 1211-12.

VIII. STATEMENT OF FACTS

The Herbert Frey Revocable Family Trust ("Lender") loaned Toluca Lake Vintage, LLC ("Borrower") $6,000,000.00, pursuant to a loan agreement dated March 29, 2007. *See* ROA 128-40, Plaintiff's Motion for Partial Summary Judgment ("Plaintiff MJS"), Ex. 1, Loan Agreement. Plaintiff Yacov Hefetz contributed a little more than $2.3 million towards funding the loan. *See* ROA 160, Plaintiff MJS, Ex. 4, Hefetz Depo., at p. 31:21. The loan was evidenced by a note and secured by three (3) deeds of trust. *See* ROA 138-33, Plaintiff MJS, Ex. 1, Loan Agreement, at p. 4-5. The loan was further secured by the personal guarantee of Defendant Christopher Beavor, and his wife Samantha Beavor. *See* ROA 216-21, Plaintiff MJS, Ex. 6, Payment Guaranty. In the Payment Guaranty, Defendant agreed that the guaranty "may be enforced by Lender without the necessity at any time of resorting to or exhausting any other security or collateral . . . , or resorting to any other guaranties, and without limiting the generality of the

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foregoing, Guarantor waives any right Guarantor may have under Nevada one action rule, Nevada Revised Statutes Seton 40.430." *See* ROA 219, Plaintiff MJS, Ex. 6, Payment Guaranty, at p. 3, ¶ 5.

By at least May 14, 2009, Borrower defaulted on the Loan. *See* ROA 110, Plaintiff MJS, at p. 5:9-11; ROA 137, Plaintiff MJS, Ex. 1, Loan Agreement, at p. 9, ¶ 7.1(e). Defendant, however, breached the Payment Guaranty by refusing to repay the loan. *See* ROA 167, Plaintiff MJS, Ex. 4, Hefetz Depo., at p. 60:14-23. Subsequently, Lender assigned its interest in the Loan, Note, Deeds of Trust, and Guaranty to Plaintiff. *See* ROA 297-318, Plaintiff MJS, Ex. 15, Assignment by Lender; Plaintiff MJS, Ex. 16, Assignment by Alis Cohen.

On June 21, 2011, Plaintiff filed his Complaint against Defendant. *See* ROA 1-28, Complaint. Defendant, in his Answer, never asserted the defense of the one action rule. *See* ROA 29-44, Answer. The Scheduling Order, dated December 28, 2011, mandated that "all parties shall file motions to amend pleadings or add parties on or before 2/21/12." *See* ROA 56, Scheduling Order dated December 28, 2011, at p. 2:1-3. While the parties stipulated to extend discovery until July 23, 2012, and the dispositive motion deadline until August 23, 2012, the parties expressly acknowledged that the "deadline for any party to amend the pleadings has passed" and the "parties do not seek an extension of this date." *See* ROA 89, Stipulation and Order to Extend Discovery Deadlines dated May 29, 2012, at p.

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2:12-22. At trial, which was held between February 5, 2013 through March 1, 2013, Defendant still failed to assert the defense of the One Action Rule. While the jury entered a verdict in favor of the Defendant, the Court granted a new trial based on the outrageous slurs against Plaintiff's Jewish heritage by Defendant's counsel and counsel's improper arguments for the jury to ignore the law. *See* ROA 434, Verdict; ROA 463-72, Plaintiff's Motion for a New Trial; ROA 805-08, Order granting Motion for New Trial.

Although repeatedly rescheduled, the new trial was eventually scheduled for October 12, 2015. ROA 829-31, Order Resetting Civil Jury Trial dated April 7, 2015. The district court expressly ruled that: "All discovery deadline, deadlines for filing dispositive motions and motions to amend pleadings or add parties are controlled by the previously issued Scheduling Order and/or any Stipulation and Order to Extend Discovery Deadlines." *See* ROA 829, Order Re-Setting Civil Jury Trial dated April 7, 2015, at p. 1:23-27. Except for the parties' stipulation on May 29, 2012, these deadlines were never extended.

On April 3, 2015, Defendant served an offer of judgment pursuant to Nev. R. Civ. P. 68 and NRS 117.15. *See* ROA 1087-89, Offer of Judgment. Because Defendant Plaintiff offered a mere $10,000.00, which represented less than 1/4% of the more than $4,000,000.00 owed under the Payment Guaranty, Defendant reasonably and in good faith declined to accept the offer.

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Despite the fact that Defendant never moved to amend his Answer to assert the affirmative defense of the One Action Rule, or sought leave of court to file a motion to dismiss after the expiration of the dispositive motion deadline,[1] on May 5, 2015, Defendant moved to dismiss Plaintiff's Complaint, based on the One Action Rule. *See* ROA 833-39, Defendant's Motion to Dismiss. In the motion, Defendant for the first time claimed that part of the property securing the underlying loan included Defendant's residence and therefore the waiver of the One Action Rule found in the Payment Guaranty was not effective pursuant to NRS 40.495(5)(d). *See* ROA 835-37, Defendant's Motion to Dismiss, at p. 3:15-21, 4:20 – 5:22. Even if originally true, which was impossible to determine because discovery had expired on July 23, 2012, throughout this litigation the loan was not secured by Defendant's residence, as that security had become valueless, because public records indicated that the liens held by senior lienholders far exceeded the value of the property. *See* ROA 951-56, Plaintiff's Opposition to Motion to Dismiss, at p. 4:25 – 5:6; 8:23 – 9:4. More importantly, Defendant had waived that affirmative defense by not raising it prior to the expiration of the deadline to amend, which expired on February 21, 2012, more than three (3) years prior. Despite this clear waiver, the district court erroneously dismissed Plaintiff's

[1] Although, on May 8, 2015, Defendant filed a motion to reopen the dispositive motion deadline in order to file a motion for summary judgment, that motion was denied as moot. *See* ROA 858-68, Motion to Reopen Dispositive Motion

Complaint, without prejudice, pursuant to NRS 40.435. *See* ROA 1035-39, Notice of Entry of Order dated June 18, 2015.

On July 8, 2015, Defendant wrongly moved for attorney fees and costs based upon his unreasonable Offer of Judgment. *See* ROA 1070-80, Motion for Attorney Fees and Costs dated July 8, 2015. Without any analysis required by *Beattie*, the district court erroneously granted Defendant's attorney fees and costs. *See* ROA 1088-91, Notice of Entry of Order dated September 03, 2015.

On April 21, 2016, Notice of Entry of Order granting Plaintiff's Rule 50(a) motion dismissed all counter-claims asserted by Defendants against Plaintiff Yacov Hefetz, and therefore disposed of all remaining claims as to all remaining parties. *See* ROA 1202-10, Notice of Entry of Order Granting Plaintiff's Rule 50(a) Motion. Appellant-Plaintiff timely filed a notice of appeal on April 29, 2016. *See* ROA 1211-12.

IX. SUMMARY OF THE ARGUMENT

The district court wrongly dismissed Plaintiffs' Complaint, which asserted claims against Defendant for breach of a guaranty to repay a $6 million loan. The district court inappropriately dismissed Plaintiff's Complaint, pursuant to NRS 40.435, even though that section only permit dismissal when "provisions of NRS 40.430 [One Action Rule] ***are timely interposed as an affirmative defense***. . . ."

Deadline; ROA 1035-39, Notice of Entry of Order filed June 18, 2015.

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Defendant failed to timely interpose the affirmative defense of the One Action Rule because that defense was never pled in Defendant's Answer and the deadline to amend Defendant's Answer had expired more than three (3) years before Defendant moved to dismiss based on the One Action Rule. Defendant therefore waived the affirmative defense of the One Action Rule by failing to assert that defense in his Answer as required by Nev. R. Civ. P. 8(c) and 12(b). Even if Defendant had sought to amend his Answer, which was never the case, Defendant could not and did not show the "good cause," required by Nev. R. Civ. P 16(b), for failing to timely seek to amend his Answer.

Even if Defendant had not waived the One Action Rule as a matter of law, the affirmative defense of the One Action Rule did not even apply. Contrary to Defendant's claim, the underlying loan was not "secured" by an owner occupied property, due to the fact that the liens of senior lienholders far exceeded the value of the property, thus rendering the security valueless. Courts have universally held that when the security is rendered valueless through no fault of the creditor, the creditor is allowed to bring action on the debt and the One Action Rule does ***not*** apply because it would be futile to proceed against valueless security. As Defendant waived the affirmative defense of the One Action Rule, which does not even apply in any event, the district court erred in dismissing Plaintiff's Complaint.

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As Plaintiff's Complaint should not have been dismissed, the district court wrongly granted Defendant's motion for attorney fees and costs. Even if dismissal had been proper, attorney fees and costs may not be awarded when the complaint is dismissed without prejudice. Additionally, attorney fees may not be awarded because the district court failed to analyze the *Beattie* factors required to support an award of attorney fees. Accordingly, the district court erred in awarding attorney fees and costs. This Court should therefore reverse the district court's judgment and remand the matter so that Plaintiff may continue to pursue their valid claims against Defendant.

X. ARGUMENT

In *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008), this Court ruled that a motion to dismiss a complaint "is subject to a rigorous standard of review on appeal" and this Court reviews "the district court's legal conclusions de novo." In *Webb, ex rel. Webb v. Clark Cty. Sch. Dist*., 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009), this Court also concluded that "de novo review is appropriate when considering a challenge to a district court's determination that a defense need not be affirmatively pleaded." In ruling on a motion to dismiss, the court should "recognize all factual allegations in [plaintiff's] complaint as true and draw all inferences in its favor. *Buzz Stew,* 124 Nev. at 228, 181 P.3d at 672. A "complaint should be dismissed only if it appears beyond a

doubt that [Plaintiff] could prove no set of facts, which, if true, would entitle it to relief." *Id.* Because the district court failed to follow this standard, it erred in granting Defendant's motion to dismiss.

A. Defendant Waived the One-Action-Rule by *NOT* Pleading that Affirmative Defense in His Answer, and Therefore the District Court Erred in Considering that Defense.

The district court improperly dismissed Plaintiff's Complaint pursuant to NRS 40.435(2)(a). Section 2, however, provides: "If the provisions of NRS 40.430 [One Action Rule] ***are timely interposed as an affirmative defense*** in such a judicial proceeding, upon the motion of any party to the proceeding the court shall: (a) Dismiss the proceeding without prejudice; or (b) Grant a continuance and order the amendment of the pleadings to convert the proceeding into an action which does not violate NRS 40.430." *See* NRS 40.435(2) (emphasis added). Accordingly, under the plain language of the statute, the One Action Rule must be (1) "interposed as an affirmative defense" and (2) must be asserted "timely," before the district court may dismiss the proceeding.

Pursuant to Nev. R. Civ. P. 12(b) (emphasis added): "***Every defense***, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, ***shall be asserted in the responsive pleading*** thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of

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jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of process, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under Rule 19." As the One Action Rule is not one of the defenses permitted to be made prior to filing a responsive pleading, that defense must be interposed in Defendant's Answer. *See* Nev. R. Civ. P. 7(a) (indicating a responsive pleading to a complaint is an answer and that "[n]o other pleading shall be allowed"). Defendant, however, did not assert the affirmative defense of the One Action Rule in his Answer. *See* ROA 29-44, Answer. In fact, Defendant did not even seek to amend his Answer to interpose that affirmative defense. Defendant therefore waived the affirmative defense of the One Action Rule, and it was improperly considered by the district court. *See Wholesale Lumber Co. v. Myers Realty, Inc.*, 92 Nev. 24, 30, 544 P.2d 1204, 1208 (1976) (holding that the debtor "did not assert NRS 40.430 as an affirmative defense and therefore waived the right to force [the creditor] to exhaust its security"); *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 513 n.1, 611 P.2d 1079, 1082 n.1 (1980) (explaining that "[o]ur cases have made clear that a debtor may waive the one action rule by failing to assert it as a defense to a suit upon the underlying obligation").

In *Webb*, this Court held, *en banc*, that defendants "waived" the protection of a statutory affirmative defense "because [defendants] failed to assert the [statutory affirmative defense] in their answer." 125 Nev. at 620, 218 P.3d at

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1246. The Court reached this conclusion even though defendants had interposed that defense by motion. *See Id*. at 616, 620, 218 P.3d at 1243, 1245-46. This Court reasoned Nev. R. Civ. P. 8(c) mandates that "any other matter constituting an avoidance or affirmative defense . . . must be pleaded or it is waived." *Id.* at 619, 624, 218 P.3d at 1245, 1248; *see also* Nev. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense"). This Court found that the district court erred in concluding that "statutory defenses are not 'true' defenses under NRCP 8(c)," and therefore the district court improperly allowed defendants to argue the statute's protections by motion. *Webb*, 125 Nev. at 619-20, 218 P.3d at 1245-46.

The district court, however, did what *Webb* forbids, consider the One Action Rule raised in Defendant's motion when it was never pleaded as an affirmative defense in Defendant's Answer. There can be no doubt that the One Action Rule is an affirmative defense as NRS 40.435(2) expressly requires "the provisions of NRS 40.430," the One Action rule, be "timely interposed as an affirmative defense. . . ." Under *Webb*, Rule 8(c) mandates that the One Action Rule "must be pleaded or it is waived." As Defendant did not plead the One Action Rule in his Answer, Defendant has waived the protections of the One Action Rule.

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Additionally, even if Defendant had attempted to amend his Answer to assert the One Action Rule as an affirmative defense, such amendment would have been untimely. The Scheduling Order, dated December 28, 2011, mandated that "all parties shall file motions to amend pleadings or add parties on or before 2/21/12." *See* ROA 59, Scheduling Order dated December 28, 2011, at p. 2:1-3. While the parties stipulated to extend discovery, the parties expressly acknowledged that the "deadline for any party to amend the pleadings has passed" and the "parties do not seek an extension of this date." *See* ROA 104, Stipulation and Order to Extend Discovery Deadlines dated May 29, 2012, at p. 2:15-17. The district court expressly ruled that "motions to amend pleadings or add parties are controlled by the previously issued Scheduling Order and/or any Stipulation and Order to Extend Discovery Deadlines." *See* ROA 822, Order Re-Setting Civil Jury Trial dated December 30, 2014, at p. 1:22-26, ROA 825, Order Re-Setting Civil Jury Trial dated January 27, 2015, at p. 1:23-26; ROA 829, Order Re-Setting Civil Jury Trial dated April 7, 2015, at p. 1:24-27. Defendant, however, first raised the affirmative defense of the One Action Rule improperly by motion filed on May 7, 2015, without ever attempting to amend his Answer. *See* ROA 833-39, Defendant's Motion to Dismiss. Accordingly, this affirmative defense was raised more than three (3) years after the deadline to raise such affirmative defenses, and therefor untimely as a matter of law.

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While Nev. R. Civ. P. 15(a), provides that a court may grant leave to amend a pleading "when justice so requires," Nev. R. Civ. P. 16(b) requires showing "good cause" exists for moving to amend the pleadings after the deadline has expired. *See* Nev. R. Civ. P. 16(b)(5) ("A schedule shall not be modified except by leave of the judge or a discovery commissioner upon a showing of good cause"). In *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 968 (Nev. App. 2015), the Nevada Court of Appeals held that the district court erred when it "failed to independently analyze whether the proposed amendment was timely under the standards of NRCP 16(b) before considering whether it was warranted under the standards of NRCP 15(a)." The court reasoned that both [Rule 15(a) and Rule 16(b)] "govern the procedures for seeking leave to amend pleadings in a civil action," but that the "district court must first determine whether 'good cause" exists for missing the deadline under NRCP 16(b) before the court can consider the merits of the motion under the standards of NRCP 15(a)." *Id.* The court found that: "Disregard of the scheduling order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." *Id.* at 971. The court concluded that good cause is not present when the failure to timely amend was caused by a "[l]ack of diligence" such as "when a party was aware of the information behind its amendment before the deadline, yet failed to seek amendment before it expired." *Id*. at 972.

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Here Defendant can offer no justification for failing to timely amend his Answer to assert the affirmative defense of the One Action Rule. Defendant was fully aware of each and every fact used to assert the affirmative defense of the One Action Rule from the time Defendant executed the Guaranty in 2007, before Plaintiff filed his Complaint in 2011, and therefore years before the February 2012 deadline to amend pleadings. *See* ROA 833-39, Defendant's Motion to Dismiss Pursuant to NRS 40.435, at p. 3 - 4. In fact, Defendant failed to move to amend his Answer even though Plaintiff expressly cautioned Defendant that the One Action Rule could only be asserted as an affirmative defense in Defendant's Answer. *See* ROA 953, Plaintiff's Opposition to Defendant's Motion to Dismiss Pursuant to NRS 40.435, at p. 6:2-6. As Plaintiff's have no excuse for their complete failure to amend their Answer to assert the affirmative defense of the One Action Rule, and certainly have no excuse for their untimely assertion of that defense, Defendant has waived that defense as a matter of law. *See Sherman v. Winco Fireworks, Inc*., 532 F.3d 709, 716-18 (8th Cir. 2008) (holding the "district court abused its discretion" in "allowing [defendant] to amend its answer so long after the scheduling deadline" because defendant's "motion to amend was filed more than seventeen months after the established scheduling deadline," and defendant "was anything but diligent in complying with the scheduling deadline" as there was "no change in the law, no newly discovered facts, or any other changed circumstance made the

[affirmative] defense more viable after the scheduling deadline for amending pleadings"); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992) (holding party "had failed to demonstrate good cause for his belated motion to amend" his pleadings, where the party's attorney failed to "pay attention" to the facts indicating the need for an amendment prior to the scheduling deadline which showed "that party was not diligent" and thus ended the inquiry); s*ee also State v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 116 Nev. 953, 966-67, 11 P.3d 1209, 1217 (2000) (holding an attorney's "oversight" or "inadvertence . . . is not good cause"); *Crump v. Warden, Nevada State Prison*, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997) (ruling "attorney ignorance or inadvertence, is not 'cause' [much less good cause] because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error"). As Defendant completely failed interpose the affirmative defense of the One Action Rule in his Answer, much less timely do so as required by NRS 40.435(2), the district court erred in dismissing Plaintiff's Complaint based on NRS 40.435(2)(b).

Defendant has wrongly argued that his assertion of the affirmative defense was timely pursuant to NRS 40.435(3), which provides in pertinent part, that the "failure to interpose, before the entry of a final judgment, the provisions of NRS 40.430 [the One Action Rule] as an affirmative defense in such a proceeding

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waives the defense in that proceeding." *See* ROA 1008-09, Defendant's Reply in Support of Motion to Dismiss Pursuant to NRS 40.435, at pp. 2:3 – 3:21. First, nothing in NRS 40.435(3), eliminates the requirement of Rules 8(c) and 12(b), that affirmative defenses such as the One Action Rule be interposed by Answer, as set forth by this Court in *Webb*, *supra.* To the contrary, NRS 40.435(3), expressly requires that One Action Rule be interposed in the court proceeding, and provides no exception to the express rule that such affirmative defenses may only be interposed by Answer. As Defendant did not and could not amend his Answer, as already set forth, Defendant could not and did not interpose the affirmative defense of the One Action Rule.

Second, and just as important, nothing in NRS 40.435(3) addresses the absolute deadline for asserting the One Action Rule defense. Instead, NRS 40.435(3) mandates that the affirmative defense of the One Action Rule is waived if not interposed in the Answer prior to final judgment, thus merely establishing that the One Action Rule can never be timely if asserted after final judgment. NRS 40.435(3) says nothing about whether the One Action Rule may be untimely and waived prior to final judgment. NRS 40.435(3) certainly does not eliminate the requirement that affirmative defenses are only timely when they are asserted in an answer prior to the deadline set in the scheduling order. *See Bowyer v. Taack*, 107 Nev. 625, 627–28, 817 P.2d 1176, 1178 (1991) ("[A]pparent conflicts between a

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court rule and a statutory provision should be harmonized and both should be given effect if possible."), *superseded by statute and rule on other grounds as recognized by McCrary v. Bianco*, 122 Nev. 102, 131 P.3d 573 (2006).

Even if NRS 40.435(3) had attempted to eliminate the procedural requirement to interpose affirmative defenses by answer prior to the scheduling order deadline, which is absolutely not the case, such limitation would have no effect. In *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983), this Court held that "the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect." The Court reasoned that the "judiciary has the inherent power to govern its own procedures" and "the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature." *Id*. The Court concluded that where "a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls." *Id*. Accordingly, this Court's Rules of Civil Procedures control the timeliness of affirmative defenses such as the One Action Rule, and not some requirement imagined by Defendant.

In the present case, there can be no doubt that Defendant waived the affirmative defense of the One Action Rule. Not only did Defendant wait until

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after the February 2012 deadline for amending pleadings to assert this defense, Defendant did not assert the defense all through the first trial which concluded in March 2013, did not assert the defense when the district court granted Plaintiff's motion for a new trial in September 2013, did not assert the defense when the parties filed their pretrial disclosures in April 2015, in anticipation of the second trial to be held that same month, but waited until May 7, 2015 to assert the defense. Defendant has no excuse for his "indolent" and "caviler" disregard of the court's scheduling order, which has only served to disrupt the agreed upon course of the litigation, severely prejudicing Plaintiff who has spent countless hour preparing for not one, but two trials. Defendant's more than three-year delay in raising the affirmative defense of the One Action Rule is inexcusable, and the district court erred in dismissing Plaintiff's claims pursuant to a defense which has been waived as a matter of law.

B. Plaintiff's Complaint Seeking Recovery Based on Defendant's Guaranty of a Defaulted Debt Was Improperly Dismissed Pursuant to the One Action Rule as the Debt Was *NOT* "Secured by a Mortgage or Other Lien Upon Real Estate."

The district court erred in dismissing Plaintiff's Complaint pursuant to NRS 40.430, otherwise known as the One Action Rule. NRS 40.430 (emphasis added) provides, in pertinent part, that "there may be but one action for the recovery of any debt, or for the enforcement of any right ***secured*** by a mortgage or other lien upon real estate." In the Payment Guaranty, however, Defendant expressly agreed

that he "waives any right Guarantor may have under Nevada one action rule, Nevada Revised Statutes Section 40.430." *See* ROA 219, Plaintiff MJS, Ex. 6, Payment Guaranty, at p. 3, ¶ 5. While NRS 40.495(5)(d) prevents such contractual waiver when the loan is "***secured*** by real property upon which . . . [t]he owner maintains the owner's principal residence," both the One Action Rule and the exception to contractual waiver provision apply only when the debt is "secured" by real property. *Id*. (emphasis added).

In *United States v. Curty*, 156 F.3d 1240, 12401998 WL 391426, at *2 (9th Cir. 1998), the Ninth Circuit held, under an almost identical California statute, that when "the secured property is valueless," the debt is ***not*** **"**secured by mortgage upon real property" and therefore the One Action rule "does not preclude [plaintiff] from pursuing this deficiency judgment against [defendant]." The court reasoned "when a security becomes valueless through no fault of the creditor, the creditor is allowed to bring action on the debt." *Id.* Courts have universally applied the same reasoning. *F.D.I.C. v. Shoop*, 2 F.3d 948, 951 (9th Cir. 1993) (explaining because the "exhaustion of the security would be futile where the security has no value," an almost identical Montana One Action Rule "does not prohibit a personal action when the mortgage security has become valueless"); *City Consumer Servs., Inc. v. Peters*, 815 P.2d 234, 237 (Utah 1991) (reasoning that "where the security has been exhausted or rendered valueless through no fault of

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the mortgagee, or beneficiary under a trust deed, an action may be brought on the debt on the theory that the limitation to the single action of foreclosure refers to the time the action is brought rather than when the trust deed was made, and that if the security is lost or has become valueless at the time the action is commenced, the debt is no longer secured"); *Gebrueder Heidemann, K.G. v. A.M.R. Corp.*, 688 P.2d 1180, 1187 (Idaho 1984) (explaining that "if the mortgage given as security is defective or has become valueless, the mortgagee, assuming it prevails on the merits, is still entitled to a judgment on the promissory note which is independent of the mortgage security" notwithstanding an almost identical Idaho One Action Rule); *Brown v. Jensen*, 259 P.2d 425, 426 (Cal. 1953) (holding "where the security has been exhausted or rendered valueless through no fault of the mortgagee, or beneficiary under a trust deed, an action may be brought on the debt on the theory that the limitation to the single action of foreclosure refers to the time the action is brought rather than when the trust deed was made, and that if the security is lost or has become valueless at the time the action is commenced, the debt is no longer secured").

In *Buzz Stew*, this Court held that a "complaint should be dismissed only if it appears beyond a doubt that [Plaintiff] could prove no set of facts, which, if true, would entitle it to relief." 124 Nev. at 227-28, 181 P.3d at 672. Plaintiff's Complaint mentions nothing about the underlying debt being secured by real

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property, much less that any such real property has value. In fact, Plaintiff has determined that the fair market value of the real property allegedly securing the debt is between "$384,794.00 to $512,446.00," that real property is secured by first deed of trust with an outstanding amount owed of "$518,000.00, " a second deed of trust with an outstanding amount owed of "$1,350,000," and therefore the third deed of trust, which is held by Hefetz, is valueless because the real "is underwater by an amount in excess of eight hundred thousand dollars even without considering the Loan and third deed of trust held by Hefetz." *See* ROA 951-52, Opposition to Motion to Dismiss at 4:25 – 5:6. Accordingly, Plaintiff was entitled to establish that the third deed of trust was valueless, due to the priority of the other liens on the property, thus making it futile to proceed against the alleged security. The district court therefore erred in dismissing Plaintiff's Complaint, as the One Action Rule should not have been applied.

C. The District Court Abused its Discretion when Dismissing Plaintiff's Complaint.

Even if Defendant's had not waived the affirmative defense of the One Action Rule, the district court erred in dismissing Plaintiff's Complaint without prejudice instead of choosing the less drastic alternative of granting a continuance pursuant to NRS 40.435(b)(2). Section (b) states: "If the provisions of NRS 40.430 are timely interposed as an affirmative defense in such a judicial proceeding, upon the motion of any party to the proceeding the court shall: (a)

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Dismiss the proceeding without prejudice; ***or*** (b) ***Grant a continuance*** and order the amendment of the pleadings to convert the proceeding into an action which does not violate NRS 40.430." *See* NRS 40.435(b) (emphasis added).

In *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 870, 900 P.2d 323, 325 (1995), this Court explained that the "dismissal of a case . . . should be used only in extreme situations; if less drastic sanctions are available, they should be utilized." Further, in *Boonsong Jitnan v. Oliver*, 127 Nev. Adv. Op. 35, 254 P.3d 623, 629 (2011), this Court found that "[w]ithout an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation." Finally, in *Arnold v. Kip*, 123 Nev. 410, 416, 168 P.3d 1050, 1053 (2007), the Court held that the "district court's consideration of a motion to dismiss without prejudice should address factors that promote the purpose" of the underling statute.

In, its order granting dismissal, the Court gave absolutely no consideration to the less drastic alternative of continuing the case. *See* ROA 1035-39, Notice of Entry of Order dated June 18, 2015; ROA 1029-34, Transcript of Proceedings dated June 9, 2015. The entire purpose of NRS 40.435 was to protect lenders, not to provide an escape for debtors. *See* Minutes of Senate Committee on Judiciary, 65th Session (Nev. May 30, 1999), at p. 2194, Exhibit C, Remarks of Michael E. Buckley Re S.B. 479, at p. 2 (indicating section 3 of SB 479 [NRS 40.435] was to

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prevent the "trap for the unwary" lender caused by "the Compent System case, 101 Nev. 76 (1985)"). Due to Defendant's complete lack of diligence in asserting the affirmative defense of the One Action Rule, Plaintiff is now subject to Defendant's possible statute of limitations defense, not to mention additional discovery and other litigation expenses associated with restarting this case from scratch. Plaintiff should not have been subject to such prejudice when he shares no blame for Defendant's untimely assertion of the One Action Rule. The district court could have avoided such prejudice if it has simply ordered a continuance instead of dismissal. As the purpose of NRS 40.435 was to protect lenders from prejudice, the district court abused its discretion in dismissing Plaintiff's Complaint without any justification whatsoever.

D. Defendant Is *NOT* Entitled to Attorney Fees and Costs.

As Plaintiffs' Amended Complaint should not have been dismissed, the district court erred in awarding attorney fees and costs to Defendant. *See Schwabacher & Co. v. Zobrist*, 97 Nev. 97, 98, 625 P.2d 82, 82 (1981) (reversing award to defendant for attorney fees and costs when the district court erred in granting motion to dismiss "because the basis for the order no longer exists").

Additionally, because the district court dismissed Plaintiff's Complaint without prejudice, Defendant is not entitled to attorney fees and costs. The district granted costs pursuant to NRS 18.020, which provides for costs to the "prevailing

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party." In *United States v. Milner*, 583 F.3d 1174, 1196-97 (9th Cir. 2009), the Ninth Circuit held that defendant was not the prevailing party for the purpose of awarding costs when the complaint was dismissed without prejudice. The court reasoned that "although a defendant may no longer have a claim pending against him or her upon dismissal, a dismissal without prejudice does not materially alter the legal relationship of the parties, because the defendant remains subject to the risk of re-filing." *Id*. Likewise, although Plaintiff may not currently have claims pending against Defendant, he will be subject to refiling because the liens held by the senior lienholders far exceed the value of the property. Accordingly, the district court erred in awarding costs.

The district court also erred in awarded attorney fees based on Defendant's offer of judgment made pursuant to NRS 17.115 and Nev. R. Civ. P. 68. *See* ROA 1088-91, Notice of Entry of Order dated September 03, 2015. Both the statute and the rule require the party rejecting the offer must fail "to obtain a more favorable judgment" before the court may award attorney fees. In *In re Estate & Living Trust of Miller*, 125 Nev. 550, 554, 216 P.3d 239, 243 (2009) (emphasis added), this Court held "that the fee-shifting provisions in NRCP 68 and NRS 17.115 apply to the ***judgment*** that ***determines the final outcome in the case***. . . ." Because the district court dismissed this case without prejudice, the judgment did not determine the final outcome of the case. *See Clark v. Columbia/HCA Info. Servs., Inc*., 117

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Nev. 468, 481, 25 P.3d 215, 224 (2001) (explaining that "a dismissal without prejudice is not a final adjudication on the merits"). In fact, NRS 40.435 mandates the alternatives of "[d]ismiss the proceeding without prejudice" or "[g]rant a continuance" because the statute recognizes that creditor should be permitted to reassert claims against the guarantor once the requirements of the One Action Rule have been satisfied. As dismissal without prejudice is ***not*** a final determination on the merits of this case, Defendant cannot recover attorney fees pursuant to an offer of judgment. *See Boston Avenue Management, Inc. v. Associated Res., Inc*., 152 P.3d 880, 889 (Okl. 2007) (holding dismissal "without prejudice" was not "a final and actual adjudication sufficient to invoke the [Oklahoma offer of Judgment] provisions"); *MX Investments, Inc. v. Crawford*, 700 So. 2d 640, 642 (Fla. 1997) (holding Florida offer of judgment statute "does ***not*** provide a basis for the award of attorney fees and costs unless a dismissal is ***with prejudice***"). The district court therefore erred in granting attorney fees pursuant to Nevada's offer of judgment provisions.

Even if the district court had entered a final determination on the merits, Defendant would still not be entitled to attorney fees. In *Beattie*, this Court ruled that a district court's decision to award attorney fees pursuant to an offer of judgment is reviewed for "an abuse of discretion." 99 Nev. at 589, 668 P.2d at 274. This Court will not defer to a district court decision that is based on "legal

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error." *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). In *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 722-23 (1993), this Court explained that "where a district court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion."

In *Beattie*, this Court reversed an award of attorney fees where the district court failed to "carefully evaluate the following factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount." 99 Nev. at 588-89, 668 P.2d at 274. This Court reasoned that the purpose of the offer of judgment rules is "to encourage settlement, it is ***not to force plaintiffs unfairly to forego legitimate claims***." *Id*. at 588, 668 P.2d at 274 (emphasis added). This Court concluded "where the court has failed to consider these factors, and has made no findings based on evidence that the attorney's fees sought are reasonable and justified, it is an abuse of discretion for the court to award the full amount of fees requested." *Id*. at 589, 668 P.2d at 274. Under a proper analysis of these factors, attorney fees should never have been awarded.

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First, there can be no doubt that Plaintiff's claims were brought in good faith. Defendant does not dispute that he executed a guaranty for a loan by Plaintiff in excess of $6 million. Defendant also does not dispute that the underlying loan was in default. Defendant further does not dispute that the property allegedly securing the loan in now valueless because the amount owed to senior lienholders far exceed the value of the property. Defendant's obligation as a guarantor of the more than $4 million balance remaining on the loan did not evaporate due to the One Action Rule, but a best has been delayed, and in fact, as set forth above has been waived. Because underlying loan had not been paid, and the One Action Rule was clearly waivable, Plaintiff in good faith sought judicial relief for Defendant's breach of the guaranty.

Second, the offer of judgment was not reasonable in either timing or amount. Defendant never asserted the affirmative defense of the One Action Rule prior to the close of discovery and, as a consequence, Plaintiff was denied discovery on that issue. Defendant's counsel also did not formally raise and pursue the affirmative defense of the One Action Rule, as his basis for dismissal, until May 7, 2015, which was twenty-four (24) days after his offer of judgment was deemed to have been rejected. Additionally, Plaintiff offered a mere $10,000.00 which represented less than 1/4% of the more than $4,000,000.00 owed under the guaranty. This nominal amount can hardly be considered reasonable. The amount

is absolutely absurd when Defendant has admitted that, at a minimum, he owes at least $23,000.00 under the Payment Guaranty. *See* ROA 323, Opposition to Motion for Partial Summary Judgment, at 5:3-11. Accordingly, the timing and amount of Plaintiff's offer of judgment were facially unreasonable and made in bad faith. *See Certified Fire Prot. Inc. v. Precision Constr*., 128 Nev. Adv. Op. 35, 283 P.3d 250, 258 (2012) (finding that the district court appropriately denied attorney fees as unreasonable in timing and amount when defendant offered only $7,501.00 for a claim of $25,185.04 and was made when Plaintiff did not have a fair opportunity to assess the basis for the offer through discovery).

Finally, while the district court mentioned the *Beattie* factors in its award of attorney fees, the Court failed to provide any analysis required for an award of attorney fees. The district court therefore abused its discretion in awarding attorney fees to Defendant. *See State Drywall, Inc. v. Rhodes Design & Development*, 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) (finding that the district court did not properly consider the *Beattie* factors where the "record does not reflect what, if any, analysis was made by the district court," and holding that the record must reflect this analysis to support an award of attorney fees); *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994) (cautioning "the trial bench to provide written support under the *Beattie*

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factors for awards of attorney's fees made pursuant to offers of judgment even where the award is less than the sum requested").

XI. CONCLUSION

Defendant has waived the affirmative defense of the One Action Rule by not raising that defense in his Answer as required by Rules 8(c) and 12(b). In fact, the One Action Rule does not even apply because the underlying security is valueless. Accordingly, the district court erred in dismissing Plaintiffs' Complaint based on the One Action Rule.

Because Plaintiff's Complaint should not have been dismissed, Defendant is not entitled to attorney fees and costs. Even if dismissal had not been improper, attorney fees and costs may not be awarded when the complaint is dismissed without prejudice. Additionally, attorney fees may not be awarded when the district court failed to analyze the *Beattie* factors required to support an award of attorney fees. Accordingly, the district court erred in awarding attorney fees and costs. This Court should therefore reverse the district court's judgment and remand the matter so that Plaintiff may continue to pursue his valid claims against Defendant.

XII. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5)

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and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7199 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of July, 2016

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CERTIFICATE OF SERVICE

I certify that on 14th of July, 2016, pursuant to N.E.F.R. 7, I caused the **APPELLANT'S OPENING BRIEF** to be filed electronically with the Clerk of the Nevada Supreme Court. Pursuant to N.E.F.R. 9, notice of an electronically filed document by the Court "shall be considered as valid and effective service of the document" on the below listed persons who are registered users.

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DATED the 14th day of July, 2016.

/s/ C.J. Barnabi
An employee of
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