IN THE SUPREME COURT OF THE STATE OF NEVADA

X'Zavion Hawkins, an individual,

Petitioner,

vs.

Eighth Judicial District Court of the State of Nevada, In and For the County of Clark, The Honorable Joanna Kishner, District Judge,

Respondents.

GGP Meadows Mall, a Delaware Limited Liability Company, Mydatt Services, Inc., d/b/a Valor Security Services, an Ohio Corporation; and Mark Warner, an Individual.

Real Parties in Interest.

Supreme Court Case No. 71759

District Court Case No. A717577

RESPONDENTS/REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Respondent/Real Party in Interest, MYDATT SERVICES, INC., d/b/a Valor Security Services (hereinafter referred to as "Mydatt"), is an Ohio corporation, existing and operating under the laws of the State of Ohio. It is not a publicly traded company and SMS Holdings Corp. is its corporate parent. No publicly traded entity owns 10% or more of Mydatt Services, Inc.'s stock.

Respondent/Real Party in Intertest, GGP MEADOWS MALL, LLC (hereinafter referred to as "GGP"), is a Delaware limited liability company, existing and operating under the laws of the State of Delaware. It is not a publicly traded company and its parent entity is GGP Limited Partnership. No publicly traded entity owns 10% or more of its membership interest.

The law firms who have represented and are currently representing the Respondents/Real Parties in Interest are as follows:

A. Mydatt Services, Inc. and Mark Warner:

1. Resnick & Louis, PC (former counsel).
2. Lewis Brisbois Bisgaard & Smith, LLP (former counsel).
3. Lee, Hernandez, Landrum & Garofalo (current counsel).
4. BACKUS, CARRANZA & BURDEN (current counsel).

B. GGP:

1. Thorndal, Armstrong, Delk, Balkenbush & Eisinger (former counsel).
2. Lee, Hernandez, Landrum & Garofalo (current counsel).

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I. ROUTING STATEMENT

NRAP 17(b) provides that the "Court of Appeals shall hear and decide only those matters assigned to it by the Supreme Court." The Rule goes on to identify the type of cases which are "presumptively assigned to the Court of Appeals," and includes "[p]retrial ***writ proceedings challenging discovery orders***...".[1]

This case involves Petitioner's writ proceedings initiated in order to challenge portions of the August 24, 2016, discovery Order entered by the District Court which imposed sanctions against him for the repeated discovery abuses identified during the evidentiary hearing held on July 21, 2016.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Does the trial court have broad discretion to fashion discovery sanctions against a party for repeatedly failing to adhere to the rules of discovery by intentionally misrepresenting, withholding and lying about information known to him?

B. Can the trial court include work performed by a later-disqualified law firm to a sanction award against the offending party intended to punish him for his abusive conduct?

C. Is a yet-to-be-crafted jury instruction against a party for his repeated and intentional discovery abuses ripe for review?

[1] NRAP 17(b)(8) (Emphasis added).

III. STATEMENT OF FACTS

A. PETITIONER'S INSTIGATION OF THE SHOOTING AND VOLUNTARY STATEMENT.

This lawsuit stems from a shooting that occurred on August 17, 2013, at the Meadows Mall in Las Vegas, Nevada.[2] Petitioner was assaulted and shot by two assailants after Petitioner threw a glass bottle at them in retaliation for a robbery he had been the victim of at the hands of one of the assailants a couple of years earlier.[3]

A few days after the shooting, on August 22, 2013, Petitioner gave a voluntary statement to Detective Majors of the Las Vegas Metropolitan Police Department wherein he admitted throwing a glass bottle at the assailants because he was "so heated" about the prior robbery.[4] In addition to describing the prior robbery and bad blood between the parties, Petitioner also gave Detective Majors detailed information about the event including the full name and street moniker for one of the assailants,[5] the first name and street moniker of the shooter,[6] a physical description of both assailants[7] and the name of the known associate of the assailant.[8]

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[2] Petitioner's Appendix, Vol. 1, Pages 4-5.

[3] Petitioner's Appendix, Vol. 1, Page 111 ("Det. Majors: OK, um, ***who threw the glass bottle?*** X. Hawkins: I did, oh, yeah, I, I didn't mention that, I , I did, I threw that. ...***I was just so heated*** about my 150, I had $150 to my name that my dad had just sent me, I had $60 in my pocket ***when he robbed me***." (Emphasis added).

[4] *Id.*

[5] Petitioner's Appendix, Vol. 1, Page 109 ("X. Hawkins: Ashley Christmas, known as Pooh Man.").

[6] Petitioner's Appendix, Vol. 109, Page 109 ("X. Hawkins: ... he said 'Zak,' Zak came out of nowhere. I guess Zak is ah, he called his self, Little Pooh Man G.").

[7] Petitioner's Appendix, Vol. 1, Page 110.

[8] *Id.*

B. LAW FIRMS INVOLVED.

On April 27, 2015, Petitioner filed this lawsuit.[9] Respondents/Real Parties in Interest, Mydatt and Mark Warner were initially represented by the Resnick & Louis law firm[10] while Respondent/Real Party in Interest, GGP Meadows Mall, LLC was initially represented by the Thorndal, Armstrong, Delk, Balkenbush & Eisinger law firm.[11]

On September 9, 2015, the Lee Hernandez law firm entered its appearance on behalf of Respondents/Real Parties in Interest, Mydatt and Mark Warner[12] and the Resnick & Louis firm filed its disassociation of counsel on September 30, 2015.[13] On September 21, 2015, the Lee Hernandez law firm entered it appearance on behalf of Respondent/Real Party in Interest, GGP[14] and the Thorndal Armstrong firm was substituted out the next day.[15]

On November 16, 2015, the Lewis Bribois Bisgaard & Smith law firm associated in as counsel for Respondents/Real Parties in Interest, Mydatt and Mr. Warner.[16]

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[9] Petitioner's Appendix, Vol. 1, Page 2.
[10] Petitioner's Appendix, Vol. , Page .
[11] Petitioner's Appendix, Vol. 1, Page 26.
[12] Petitioner's Appendix, Vol. 1, Pages 54-55.
[13] Petitioner's Appendix, Vol. 1, Pages 60-61.
[14] Petitioner's Appendix, Vol. , Pages 56-57.
[15] Petitioner's Appendix, Vol. 1, Pages 58-59.
[16] Petitioner's Appendix, Vol. 1, Page 63-64.

C. PETITIONER'S WITHHOLDING OF INFORMATION AND RESULTING MOTION PRACTICE.

From the inception of this case, Petitioner misrepresented and withheld information about the assailants from the Respondents/Real Parties in Interest, including the identity of the assailants, the prior robbery, the bad blood between them and his participation in the altercation which led to the shooting. Initially, he failed to disclose the identities of the assailants as part of his initial disclosures required under NRCP 16.1.[17] Later, he refused to accurately respond to written discovery requesting information about the assailants.[18] And still later he repeatedly provided incomplete and untruthful responses to inquiries during his sworn deposition as to the identity of the assailants, street monikers of the assailants, physical descriptions of the assailants, the bad blood between he and the assailants, the prior robbery involving one of the assailants and his own assault on one of the assailants, which involved the throwing of the glass bottle.[19]

Upon confirming that Petitioner was being untruthful during discovery, on March 23, 2016, Respondents/Real Parties in Interest filed a motion to dismiss the case based on Petitioner's systematic discovery abuses.[20] The motion was filed by the Lewis Brisbois law firm, on behalf of its clients,[21] and was joined by the Lee

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[17] Petitioner's Appendix, Vol. 4, Page 819.
[18] Petitioner's Appendix, Vol. 4, Page 818.
[19] *Id.*
[20] Petitioner's Appendix, Vol. 1, Page 66.
[21] *Id.*

Hernandez law firm on behalf of its clients.[22]

Petitioner responded to the motion with an opposition and by filing a countermotion seeking sanctions.[23] A subsequent motion to disqualify the Lewis Brisbois law firm was filed by Petitioner on May 11, 2016.[24]

D. DISQUALIFICATION OF THE LEWIS BRISBOIS LAW FIRM.

The crux of Petitioner's argument in seeking the disqualification was that the Lewis Bribois law firm could not represent the Respondents/Real Parties in Interest because one of its associate attorneys had previously consulted with Petitioner when the associate attorney was employed by a separate law firm (The Eglet Law Group) with whom Petitioner met to discuss possible representation.[25] Eventually, the Eglet Law Group declined to represent Petitioner citing to "problems we see with liability in this case" based on the facts provided by Petitioner "in the police report [which] creates a lot of issues for us."[26] Petitioner was sent "a letter... [letting] him know [of the problems] as well."[27] No doubt it was the letter advising him of the liability problems within the statement which prompted Petitioner to be evasive and untruthful in this case about the information he provided .

After consulting with Petitioner, the associate attorney left the Eglet Law Group for employment at the Lewis Brisbois law firm (the attorney had previously

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[22] Petitioner's Appendix, Vol. 1, Pages 195-97.
[23] Petitioner's Appendix, Vol. 2, Page 198.
[24] Petitioner's Appendix, Vol. 2, Page 454.
[25] *Id.*
[26] Petitioner's Appendix, Vol. 2, Page 481.
[27] *Id.*

been employed by Lewis Brisbois before going to work for the Eglet Law Group). Because of the volume of cases between the Eglet Law Group and the Lewis Brisbois law firm, a letter was sent to the Eglet Law Group by Lewis Brisbois advising that the associate attorney would be screened from the cases.[28] Upon his return to Lewis Brisbois, the attorney did not discuss the cases with anyone at the firm, did not have access to the files, did not receive any fees related to the matters and did not participate in them.[29] At the time, Lewis Brisbois had not yet appeared on this case so this case was included in the letter.[30]

Several months later, the Lewis Brisbois law firm was retained to monitor this case on behalf of the excess carrier for Respondent/Real Party in Interest, Mydatt.[31] Shortly, thereafter the associate attorney advised his superior at the Lewis Brisbois law firm about his prior involvement with the matter, including meeting with Petitioner and various other attorney's and members of the Eglet Law Group and another law firm.[32] Steps were taken immediately at Lewis Brisbois to similarly screen the associate attorney from this case, as had been done with the prior eight cases.[33] However, no letter was sent to Petitioner's counsel as had previously been sent to the Eglet Law Group.

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[28] Petitioner's Appendix, Vol. 3, Pages 505-506 and 580-586.
[29] Petitioner's Appendix, Vol. 3, Page 506.
[30] *Id.*
[31] Petitioner's Appendix, Vol. 3, Page 507 and 580-583.
[32] *Id.*
[33] Petitioner's Appendix, Vol. 3, Page 508.

At a disqualification hearing held on June 8, 2016, the District Court correctly granted Petitioner's motion to disqualify finding that the attorney employed at the Lewis Brisbois law firm "is viewed to have represented [Petitioner] when he was practicing with [the] Eglet Law Group" and therefore determined to have had a conflict.[34] In reaching its decision, the court found that while the Lewis Brisbois firm had taken appropriate internal steps to screen the attorney from the case, it omitted providing notice to the Petitioner as required by the rule.[35] Moreover, after considering all the circumstances involved, the District Court declined to award any sanctions against the disqualified law firm.[36]

E. EVIDENTIARY HEARING AND SANCTIONS AGAINST PETITIONER.

Upon the disqualification of the law firm, all Respondents/Real Parties in Interest were still represented by counsel in the form of the Lee Hernandez law firm, and the firm was "prepared to go forward [with the evidentiary hearing] if the Court pleases" since the firm had filed an independent joinder to the motion to dismiss.[37] Despite counsel's readiness to proceed, the District Court continued the hearing until July 21, 2016.[38]

On July 21, 2016, an evidentiary hearing was held to address Respondents/Real Parties in Interest motion to dismiss. By this time the BACKUS, CARRANZA & BURDEN law firm had been hired to represent Respondents/Real

[34] Petitioner's Appendix, Vol. 4, Page 826.
[35] Petitioner's Appendix, Vol. 5, Pages 1115-1121.
[36] Petitioner's Appendix, Vol. 4, Pages 823-829.
[37] Petitioner's Appendix, Vol. 5, Page 1122.
[38] *Id.*

Parties in Interest, Mydatt and Mark Warner, along with the Lee Hernandez law firm.

During the all-day evidentiary hearing, the District Court heard testimony from live witnesses, Detective Majors and Petitioner, and reviewed evidence presented by both sides, including the audio recording of the Petitioner's voluntary statement and a copy of the transcribed voluntary statement.[39] Ultimately, the District Court disagreed with Petitioner's attempts to justify his withholding of information and multiple misrepresentations, and found that sanctions were warranted against him, including an award of attorney's fees and costs related to the motion to dismiss and a curative jury instruction to be crafted at the time of trial.[40] Specifically, the District Court found that Petitioner "failed to provide information requested by [Respondents/Real Parties in Interest] in the written discovery and … at [his] deposition which was within [his] knowledge, custody and control" including "the identity of the assailants … ; descriptions of the assailants; the history between Plaintiff and the assailants; the facts involving the altercation; and Plaintiff's role in the altercation."[41] It further found that Petitioner "failed to provide some of [the] information as part of his mandatory obligations under NRCP 16.1" and that Petitioner's "failure to provide the information, and denying knowledge of the information…, is belied by evidence and testimony presented,

[39] Petitioner's Appendix, Vol. 6, Page 1131.
[40] Petitioner's Appendix, Vol. 4, Pages 815-821.
[41] Petitioner's Appendix, Vol. 4, Pages 818-819.

including [Petitioner's] voluntary statement … , the testimony of Detective Majors (which this Court finds to be credible) and by [Petitioner's] Complaint."[42]

As a consequence, the District Court ordered that Respondents/Real Parties in Interests' request for dismissal was denied, but ordered that, would be "GRANTED against [Petitioner] for the discovery and disclosure abuses involved as follows:

> A. [Respondents/Real parties in Interest] ***shall be awarded***, and [Petitioner] ***shall pay, reasonable attorney's fees*** and costs in an amount to be determined by this Court after proper submission by all parties…
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> B. If requested by [Respondents/Real Parties in Interest], ***the Court shall provide a curative jury instruction(s)*** that seeks to address the harm caused by [Petitioner's] discovery abuises by establishing inter alia that if [Petitioner] had complied with his obligations under NRCP 16.1, NRCP 30, NRCP 33 and NRCP 36, evidence and testimony would have been discovered which would have more accurately reflected the circumstances involved in the altercation at issue between [Petitioner] and the assailants as indicated in the voluntary statement provided to LVMPD. ***The applicable curative jury instruction(s) will be crafted*** by the parties and this Court ***contemporaneous with the submission of all jury instructions closer to the time of trial***;
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> C. If good cause is shown, the Court shall grant an extension of the discovery period, currently set for September 16, 2016, and trial, currently set for November 14, 2016, upon a timely request by [Respondents/Real Parties in Interest]…".[43]

Respondents/Real Parties in Interest submitted their request for fees and costs on August 19, 2016, detailing the work performed by the three law firms involved in the motion to dismiss.[44] After the completion of the briefing schedule, supplemental

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[42] *Id.*

[43] Petitioner's Appendix, Vol. 4, Pages 820-821 (Emphasis added).

[44] Petitioner's Appendix, Vol. 4, Pages 710-814.

briefs and oral arguments, the District Court ordered that Petitioner pay to Respondents/Real Parties in Interest $41,635.00 in attorney's fees (consisting of 1) ***$19,846.00 for work performed by the Lewis Brisbois law firm***; 2) $11,629,50 for worked performed by the Lee Hernandez law firm; and 3) $10,159.50 for work performed by the BACKUS, CARRANZA & BURDEN law firm)[45] and $196.66 in costs, for a total award of $41,831.66.[46] The District Court further ordered that the sanctions be paid "***within 30 days*** of the Notice of Entry of this Order by the Court."[47]

It is the portions of this Order which involve the attorney fee award related to work performed by the disqualified Lewis Brisbois law firm and the jury instruction which Petitioner contests in these proceedings[48] and to which Respondents/Real Parties in Interest provide the instant Answer.

IV. SUMMARY OF ARGUMENT

The District Court is in the best position to craft appropriate sanctions for discovery related abuses under Rule 37 given its intimate familiarity with the parties and circumstances involved. As such, it has broad discretion to award sanctions so long as it does not abuse its discretion. The offending party should be provided notice of potential sanctions and an opportunity to defend itself before any such

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[45] The objection raised by the Petition for Extraordinary Writ Relief relative to the award of attorney's fees is limited to the fees awarded for work performed by the Lewis Brisbois law firm. As no substantive argument is made relative to the fees attributed to work by the Lee Hernandez law firm or the BACKUS, CARRANZA & BURDEN law firm, neither is addressed in this Answer.

[46] Petitioner's Appendix, Vol. 4, Pages 948-951.

[47] *Id.* (Emphasis added).

[48] Petitioner for Extraordinary Writ Relief, Page 11.

sanctions are imposed.

In this case, Petitioner chose to be intentionally evasive, incomplete and untruthful in his written discovery and during his sworn deposition. He did so with the intent to withhold damaging information about his relationship with the persons who assaulted and shot him. He chose to hide their identity, their street monikers and their physical description to prevent Respondents/Real Parties in Interest from identifying and locating them. Moreover, he withheld his past altercation with the assailants, his desire to impose retribution against them and his own act of assault in throwing a glass bottle at the assailants which instigated the altercation at issue in this case. He did so with the intent of hiding the "problems with liability" that had previously been brought to his attention by a law firm with whom he consulted about possible representation. And by so doing, he substantively affected Respondents/Real Parties in Interests' ability to productively move discovery forward and forced them to engage in needless discovery and motion practice.

Once Petitioner's discovery abuses were uncovered and brought to the District Court's attention, an all-day evidentiary hearing was held so that the Court could properly evaluate the issue and fashion an appropriate sanction based on the evidence and testimony presented. The District Court found that Petitioner had intentionally engaged in extensive discovery abuses, but denied the requested dismissal. Instead, it crafted a three-prong sanction consisting of a) an award of attorney's fees and costs related to the motion to dismiss; b) a curative jury

instruction to be crafted at the time of trial; and c) a possible continuation of discovery and/or trial for the defense.

The attorney's fees and costs awarded were apportioned based on the work performed by the three law firms involved in the defense of the case and based on the work each performed relative to the motion to dismiss. In these proceedings, Petitioner objects to the portion of the attorney fee award related to the Lewis Brisbois law firm (and the curative jury instruction)[49] based on the disqualification of the Lewis Brisbois firm as the result of an imputed conflict of interest.

However, by imposing the sanctions, the District Court's intent was not to compensate the disqualified law firm, but to punish Petitioner for his deceptive litigious tactics. And in doing so, the District Court afforded Petitioner an opportunity to be heard and exercised its sound discretion in fashioning the sanctions imposed.

V. ARGUMENT

A. STANDARD OF REVIEW.

In reviewing an award of sanctions, this Court does not consider whether it, as an original matter, would have imposed the sanctions.[50] Rather, "the standard of review is whether the district court abused its discretion in doing so."[51]

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[49] No substantive objection is made relative to the attorney's fee based on work performed by the Lee Hernandez law firm or the BACKUS, CARRANZA & BURDEN law firm. Nor is any substantive argument made relative to the continuation of discovery and trial solely for the defense.

[50] *Bahena v. Goodyear Tire & Rubber Company*, 126 Nev. 243, 249, 235 P. 3d 592, 596 (2010).

[51] *Foster v. Dingwall,* 126 Nev. ——, 227 P.3d 1042 (2010); *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990),

A somewhat heightened standard of review applies only where the sanction is case-dispositive or case-concluding.[52] Under this somewhat heightened standard, the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated.[53] However, no heightened standard of review should be imposed when the sanctions at issue were not case concluding.[54] Therefore, in this case, the appropriate standard of review is for abuse of discretion.

B. THE DISTRICT COURT HAS BROAD DISCRETION TO FASHION DISCOVERY SANCTIONS, PETITIONER WAS AFFORDED ADEQUATE OPPORTUNITY TO BE HEARD ON THE MATTER AND DID NOT ABUSE ITS DISCRETION.

A district court has broad discretion to sanction a party for his failure to comply with the discovery rules and orders under NRCP 37. Furthermore, the general purpose of a sanction is to punish an offending party for its conduct and the district court is in the best position to craft an appropriate sanction after affording the offending party an opportunity to be heard. Thus, the sanctions imposed by the District Court in this case, including the attorney's fees and jury instruction complained of, were squarely within its discretion, served to punish Petitioner for his repeated and abusive discovery tactics and were imposed after Petitioner was afforded an opportunity to be heard.

It is well settled in Nevada that the selection of a particular sanction for

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[52] *Young,* 106 Nev. at 92, 787 P.2d at 779.
[53] *Young*, 106 Nev. at 92, 787 P.2d at 779–80.
[54] *Bahena v. Goodyear Tire & Rubber Company*, 126 Nev. 243, 249, 235 P. 3d 592, 596 (2010).

discovery abuses under NRCP 37 is generally a matter committed to the sound discretion of the district court.[55] This, naturally, includes the imposition of an award of attorney's fees against a party.[56] Rule 37(c)(1) provides that,

> ***A party that*** without substantial justification ***fails to disclose information required by Rule 16.1***, 16.2, or 26(e)(1), ***or to amend a prior response to discovery as required by Rule 26(e)(2)***, is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. ***In addition*** to or in lieu of this sanction, ***the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions***. In addition to ***requiring payment of reasonable expenses, including attorney's fees, caused by the failure***, these sanctions may include any of the actions authorized under ***Rule 37(b)(2)(A), (B), and (C)*** and may include informing the jury of the failure to make the disclosure.[57]

NRCP 37(a)(4)(A) and 37(a)(4)(C) both allow for an award against the offending party "whose conduct ***necessitated the motion***" "to pay reasonable expenses ***incurred in making the motion***, including attorney's fees" "after affording a reasonable opportunity to be heard."[58] This type of broad discretion is afforded to the district court, in part, because "the trial judge . . . is usually the person most familiar with the circumstances of the case and is in the best position to evaluate the good faith and credibility of the parties. . .".[59] After all, the purpose of a sanction is to "command obedience to the judiciary and to ***deter and punish*** those who abuse

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[55] *See, e.g., Fire Ins. Exchange v. Zenith Radio Corp.,* 103 Nev. 648, 649, 747 P.2d 911, 912 (1987); *Kelly Broadcasting v. Sovereign Broadcast,* 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980).

[56] *See, Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560 (1993) ("The decision whether to award attorney's fees is within the sound discretion of the trial court.").

[57] Emphasis added.

[58] Emphasis added.

[59] *See, Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45, 51 (1st. Cir. 2009).

the judicial process."[60] These rules and policy considerations should be read in harmony with the district courts' inherent authority to construe and administer the rules of civil procedure "to secure the just, speedy, and inexpensive determination of every action."[61] And, as outlined above, an award of non-case concluding sanctions should not be disturbed unless "the district court abused its discretion."[62]

This Court has historically examined the opportunity to be heard provided to the offending party when considering a challenge to discovery related sanctions. In *Bahena v. Goodyear*,[63] this Court considered the district court's imposition of sanctions against a party stemming from repeated discovery abuses in a roll-over vehicle accident case which left three people dead and seven others seriously injured.[64] The case involved a series of disputes involving *Goodyear*'s discovery practices, which culminated with the district court striking *Goodyear*'s answer as to both liability and damages.[65] Upon motion for reconsideration, the district court permitted the attorneys for the parties make factual representations regarding the various discovery issues in dispute.[66] It further considered affidavits and exhibits submitted by the parties regarding the Discovery Commissioner's orders and

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[60] *Emerson v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 263 P.3d 224, 228, 127 Nev. 672, 678 (2011) *quoting Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir.2006); (Emphasis added).

[61] NRCP 1.

[62] *Foster v. Dingwall*, 126 Nev. ——, 227 P.3d 1042 (2010); *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990),

[63] 126 Nev. 243, 235 P.3d 592 (2010).

[64] *Id.*

[65] *Goodyear*, 126 Nev. at 246, 235 P.3d at 594-95.

[66] *Goodyear*, 126 Nev. at 256, 235 P.3d at 601.

ultimately reduced sanctions of striking *Goodyear*'s answer as to liability only, and denied the plaintiff's request to establish its damages by way of a prove-up hearing.[67] In reaching its order, the district court analyzed and applied the factors to be considered in the imposition of discovery sanctions set forth in *Young v. Johnny Ribeiro Building,* and codified its findings of fact and conclusions of law in a written order filed January 29, 2007.[68]

On appeal, it was determined that because the sanctions were non-case concluding, a heightened standard of review would not be imposed and, rather, the sanctions would be examined simply on an abuse of discretion standard.[69] This Court thoroughly examined the extent to which the district court considered the sanctions, despite not allowing for an evidentiary hearing. In so doing, it discussed with favor the factual representations which were permitted of each party, the volumes of documents and affidavits presented by each party at the hearing and the extent to which the district court outlined its written basis for its decision in determining that the district court sufficiently examined the discovery abuse allegations.[70] This Court affirmed the district court's order finding that no abuse of discretion had taken place.

Unlike in the *Goodyear* case, in this case all parties were allowed to introduce evidence and witness testimony they deemed necessary during an all-day

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[67] *Goodyear*, 126 Nev. at 248, 235 P.3d at 595.
[68] Goodyear, 126 Nev. at 248, 235 P.3d at 596.
[69] *Goodyear,* 126 Nev. at 249, 235 P.3d at 596.
[70] *Id.*

evidentiary hearing. On July 21, 2016, the District Court convened an evidentiary hearing to consider Respondents/Real Parties in Interests' motion to dismiss.[71] During the evidentiary hearing the District Court heard the audio recorded voluntary statement provided by Petitioner to the Las Vegas Metropolitan Police Department shortly after the shooting,[72] reviewed the transcription of the voluntary statement[73] and heard testimony from Detective William Majors, who took the voluntary statement.[74] The District Court then had an opportunity to compare Petitioner's written discovery responses and NRCP 16.1 initial disclosures, and also had an opportunity to hear from Petitioner, and his feigned explanations for why his written discovery responses and deposition testimony conflicted drastically with his voluntary statement and interview with Detective Majors.[75] Petitioner has chosen to regurgitate the same unbelievable explanation about "memory lapses" and his production of a belated errata sheet in an effort to "correct" his deposition testimony as part of these proceedings[76] which the District Court already determined to not be credible. The "errata sheet" referenced by the Petitioner actually worked to demonstrate Petitioner's deceptive practices during discovery. Petitioner's deposition was only 54 pages of substantive questions and answers,[77] which he tried to re-write by producing the ridiculous 4 page errata form containing 25 substantive

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[71] Petitioner's Appendix, Vol. 6, Pages 1130-1331.
[72] Petitioner's Appendix, Vol. 6, Page 1115.
[73] Petitioner's Appendix, Vol. 6, Page 1115.
[74] Petitioner's Appendix, Vol. 6, Pages 1137-1170.
[75] Petitioner's Appendix, Vol. 6, Page 1170-1245.
[76] Petition for Extraordinary Writ relief, Page 21 Line 16 – Page 22, Line 8.
[77] Petitioner's Appendix, Vol. 1, Pages 118-132.

changes to his sworn testimony.[78] The District Court considered it all and did not buy into Petitioner's excuse.

The parties were permitted to make extensive closing arguments and provide their supportive legal authority culminating in the District Court's decision.[79] Petitioner was provided more than a sufficient opportunity to be heard.

In awarding the sanctions, the District Court took consideration and due care to provide a detailed eight-page order in which it outlined its legal basis for imposing sanctions and findings of fact. Specifically, it found that Petitioner "failed to provide information requested by [Respondents/Real Parties in Interest] in the written discovery and ... at [his] deposition which was within [his] knowledge, custody and control" including "the identity of the assailants ... ; descriptions of the assailants; the history between Plaintiff and the assailants; the facts involving the altercation; and Plaintiff's role in the altercation."[80] It further found that Petitioner "failed to provide some of [the] information as part of his mandatory obligations under NRCP 16.1" and that Petitioner's "failure to provide the information, and denying knowledge of the information..., is belied by evidence and testimony presented, including [Petitioner's] voluntary statement ... , the testimony of Detective Majors (which this Court finds to be credible) and by [Petitioner's] Complaint."[81]

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[78] Petitioner's Appendix, Vol. 2, Pages 335-338.
[79] Petitioner's Appendix, Vol. 6, Page 1215-1331.
[80] Petitioner's Appendix, Vol. 4, Pages 818-819.
[81] *Id.*

While the District Court in this case ultimately found that the requested relief of terminating sanctions was not appropriate, it did find that "[g]iven the extent and gravity of the conduct," "sanctions are warranted against [Petitioner] based on both Nevada law, including *Young v. Johnny Ribeiro* and its progeny; the evidence and testimony presented; and [Petitioner's] conduct in litigating this case."[82] And thereby imposed the sanctions, including the attorney's fees and jury instruction at issue in these proceedings.

Just as in *Goodyear*, the District Court adequately detailed its basis for the non-case concluding sanctions based on the consideration of all circumstances involved and after Petitioner was afforded an opportunity to be heard. It did not abuse its discretion in issuing its order for sanctions.

C. IN ITS DISCRETION, THE DISTRICT COURT CAN INCLUDE WORK PERFORMED BY A LATER-DISQUALIFIED LAW FIRM AS PART OF AN ATTORNEY'S FEES SANCTION AWARD MEANT TO PUNISH THE OFFENDING PARTY.

In making its well-reasoned decision, the District Court order included, *inter alia*, the award of attorney's fees and curative jury instruction. Petitioner's primary objection in these proceedings is to the inclusion of the fees for work performed by the disqualified law firm as part of the sanction awarded against him.[83]

In an effort to blur the circumstances involved, Petitioner mischaracterizes the nature of the proceedings by claiming that the disqualified law firm is affirmatively

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[82] Petitioner's Appendix, Vol. 4, Pages 819-820 (Internal citation omitted).

[83] Because Petitioner's opening brief makes no substantive argument about the fees and costs awarded to the other law firms (the Lee Hernandez law firm and the BACKUS, CARRANZA & BURDEN law firm), this Answer will be limited only to the fees awarded for work related to the Lewis Brisbois law firm.

"seeking to recover attorney's fees" from Petitioner and that there is a bright line rule precluding attorney's fees by a disqualified law firm in all cases. Neither is an accurate representation of the circumstances involved. As he failed to do before the District Court, Petitioner fails in these proceedings to identify any Nevada legal authority, or authority from any other jurisdiction, which prohibits the inclusion of the fees from a disqualified law firm *as a sanction* under circumstances similar to those present in this case. As described below, the inclusion of the attorney's fees incurred by the disqualified law firm in this case actually furthers public policy and properly seeks to address the systematic discovery abuses perpetrated by the Petitioner.

1. THE DISQUALIFIED LAW FIRM IS NOT SEEKING PAYMENT OF ITS ATTORNEY'S FEES FROM PETITIONER WITH WHOM IT HAD AN ETHICAL CONFLICT.

Petitioner intentionally mischaracterizes the circumstances involved in this case in order to lure this Court down the wrong path. Despite Petitioner's repeated claims to the contrary, this case is not one wherein the disqualified law firm is "seeking to recover attorney's fees" from Petitioner[84] or seeking to "monetarily profit[]" at the expense of the Petitioner.[85] This case involves the District Court's order for sanctions against Petitioner in an effort to ameliorate the consequences of Petitioner's egregious discovery abuses.

In making his argument, Petitioner relies heavily on the California case of

[84] Petition for Extraordinary Writ Relief, Page 17, Line 18 and Page 13, Line 14.
[85] Petition for Extraordinary Writ Relief, Page 11, Line 19.

Sheppard Mullin Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.[86] In addition to the status of the opinion being under review,[87] the case is wholly distinguishable from the circumstances involved in this case and therefore should be given no precedential credence.

The *Sheppard Mullin* case involved a law firm's lawsuit against a former client, J-M Manufacturing Co., Inc., seeking payment for legal services provided in a case the law firm was defending on behalf of the client. In the underlying case involved in the opinion, the law firm was disqualified after an adverse party, South Tahoe Public Utility District, filed a motion to disqualify it for a conflict of interest, as the law firm was simultaneously representing South Tahoe in an unrelated matter. On appeal, the California appellate court overturned the arbitration award in favor of the law firm finding that the law firm failed to secure a written informed consent from South Tahoe and, in essence, finding that the attorney's duty of undivided loyalty trumped the law firm's efforts to secure payment for services rendered. That is wholly different in several important aspects from the circumstances before this Court in this case.

First, unlike the *Sheppard Mullin* case, in this case the disqualified law firm is not suing Petitioner, or anyone else, for the payment of outstanding attorney's fees. Petitioner is the initiator of this action and it is he who seeks the assistance of the judicial system for claimed personal injuries. Were this case one where Lewis

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[86] 198 Cal. Rptr. 3d 253 (Cal App. 4th 2016).
[87] 368 P.3d 922, 201 Cal.Rptr.3d 254 (April 27, 2016).

Brisbois was suing its former clients, Mydatt and Mr. Warner, for fees owed, then arguably the *Sheppard Mullin* case analysis might be applicable. It is not.

Second, Petitioner is not the defendant in this case with a judgment entered against him requiring payment of outstanding attorney's fees. Instead, it is the District Court which has ordered that Petitioner pay attorney's fees and costs incurred by the defense as a monetary sanction for his deceptive tactics. Therefore, the public policy considerations on which the *Sheppard Mullin* decision is based are not present in this case.

A very different, but equally compelling, public policy consideration is present in this case: the District Court's inherent authority to protect the integrity of the judicial process from the abuses of dishonest litigants. It is well settled that sanctions are intended to "command obedience to the judiciary and to deter and punish those who abuse the judicial process."[88] Thus the District Court's order in this case requiring Petitioner to pay fees related to work performed by the three law firm, including the disqualified law firm, was not meant to compensate the three law firms, but rather was meant to punish Petitioner for his well-documented abusive conduct which was detailed and proven at an extensive evidentiary hearing.

A third important distinction is that Petitioner is not in the same position as the successful party in the *Sheppard Mullin* case. In that case, it was J-M

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[88] *Emerson v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 263 P.3d 224, 228, 127 Nev. 672, 678 (2011) *quoting Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir.2006); *See also, Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 356, 858 P.2d 1054 (1993).

Manufacturing, not South Tahoe, that was seeking relief from attorney's fees being sought by the law firm. South Tahoe was the client who filed the successful motion to disqualify. In this case, Petitioner is the party that successfully sought the disqualification, and thus it stands in South Tahoe's position, while Respondents/Real Parties in Interest, Mydatt and Mr. Warner, are the clients who would owe Lewis Brisbois attorney's fees for worked performed on their behalf. Plaintiff's position in this case is not analogous to position of the J-M Manufacturing party and therefore is entirely distinguishable from the circumstances involved in that decision.

Given the glaring differences in circumstances and drastically different public policy considerations involved in the *Sheppard Mullin* case, it is not applicable to this matter and this Court should not allow itself to be lured down the wrong path by the Petitioner.

2. THERE IS NO BRIGHT LINE RULE PROHIBITING THE TRIAL COURT FROM INCLUDING WORK PERFORMED BY A DISQUALIFIED LAW FIRM IN THE SANCTION AWARD MEANT TO PUNISH THE OFFENDING PARTY.

Petitioner fails to cite to any Nevada legal authority, or any authority from any other jurisdiction, which provides a bright line rule against awarding attorney's fees based on work performed by a disqualified law firm under all circumstances. A survey of other jurisdictions reveals a limited number of cases where such fees were considered and none of those cases support any such bright line prohibition.

In *Weigal v. Shapiro*, the Seventh Circuit Court of Appeals considered a

diversity derivative lawsuit brought against controlling stockholders and directors complaining that stock option or first refusal agreement between defendants interfered with corporation's attempts to reacquire its outstanding shares.[89] During discovery, two of the plaintiffs refused to answer questions at their duly noticed depositions arguing that they would continue to refuse "until present counsel … withdrew from these proceedings or are disqualified by order of the Court" as a result of a pending motion to disqualify filed by the plaintiffs.[90] The case was eventually dismissed for insufficiencies of the pleadings, before the motion to disqualify was disposed of, rending the motion moot.[91] Upon dismissal, the Illinois federal court made a monetary award against a plaintiffs for refusing to answer questions at their depositions despite the pending motion to disqualify counsel. In upholding the district court's award, Seventh Circuit considered the plaintiffs' argument that it should not be sanctioned due to the disqualification motion which was pending at the time of the dismissal and refused to enter any bright line rule against an award of fees under those circumstances.[92] Instead it focused on the plaintiffs' discovery abuses and reasoned that there "was no legitimate excuse for failure to make discovery and defendants' counsel submitted detailed affidavits setting forth their fees, copy of time records and court reporter bills that amply

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[89] 608 F.2d 268 (7th Cir. 1979).
[90] *Weigal*, 608 F.2d at 270.
[91] *Id.*
[92] *Weigal*, 608 F.2d at 272.

supported the modest award."[93]

In Colorado, the federal bankruptcy court addressed, *inter alia*, the ability of a disqualified law firm to recover attorney's fees for work it performed prior to the disqualification.[94] In that case, the debtor employed counsel who had various connections with Debtor's general partners and other persons related to the partnership.[95] The primary question addressed by the court, *sua sponte*, was whether a Chapter 11 partnership/debtor could employ counsel who also represents general partners of the partnership who are potentially in conflict?[96] In other words, could the law firm involved represent, and ultimately be compensated, for representing one party (the debtor) when it had prior and ongoing representation relationships with other parties (creditors)? The court ultimately found that the law firm was disqualified to serve as counsel for the debtor given the past and on-going relationships with the other parties, but nonetheless awarded attorney's fees in favor of disqualified firm citing that "there is no condemnation of Counsel for what they have done and the representation that they have thus far provided . . . this Court will not preclude the award of compensation to the Firm which proceeded in its representation in good faith."

Neither case evidences any bright line rule against an award of fees for work performed by a disqualified law firm. Just the opposite is true. In both cases, the

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[93] *Id.* (also holding the disqualification issue moot as a result of the dismissal).
[94] *See, In re TMA Associates, Ltd.*, 129 B.R. 643 (Bkrtcy. D.Colo., 1991).
[95] *Id.*
[96] *TMA Assoc.* 129 B.R. at 644.

courts awarded fees incurred by a law firm that was either disqualified or subject to a motion to disqualify at the time of the end of the case.

In this case, the District Court considered the circumstances involved in the disqualified law firm's involvement in this case and the good faith efforts by the Lewis Brisbois law firm to screen off the associate attorney after the conflict was discovered. It discussed with favor those efforts, but ultimately found that the lack of written notice and consent mandated disqualification. Had the District Court felt that the disqualified firm's efforts were not in good faith, then it had the opportunity to sanction the firm, especially given the countermotion for sanctions filed by Petitioner. Instead, the firm was merely precluded from further proceeding with litigation.

There is no bright line rule in Nevada prohibiting inclusion of attorney's fees for work by a disqualified law firm as part of a sanction award under the circumstances involved in this case. They have been allowed under other circumstances in cases from other jurisdictions and because of the firm's good faith efforts in representing its client and screening the associate attorney involved, there is no compelling reason to adopt any bright line preclusion.

D. PETITIONER'S OBJECTION TO THE YET-TO-BE-CRAFTED JURY INSTRUCTION IS NOT RIPE FOR REVIEW.

Petitioner's objection to the proposed jury instruction relating to his documented discovery abuses is premature.[97] The District Court has not yet crafted

[97] Petitioner provided very limited substantive argument as to why the jury instruction component

the jury instruction and thus the issue is not yet ripe for review.

In Nevada, "the question of ripeness closely resembles the question of standing, except that ripeness focuses on the timing of the action rather than on the party bringing the action."[98] The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review.[99] A primary focus in such cases has been the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy.[100] Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present.[101]

In this case, neither factor is sufficiently present to make the objection as to the jury instruction ripe for judicial review. First, there will be no hardship to Petitioner for withholding judicial review as no actual jury instruction has been given to the jury in this case. In fact, no such jury instruction has even been crafted by the parties or the District Court. At this point, the jury instruction complained of is merely hypothetical. It is possible, if not likely, that once the jury instruction is crafted it will not be prejudicial to Petitioner at all. Thus, at this stage of the proceedings Petitioner's objection is not sufficiently concrete so as to present a

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of the sanctioning order is erroneous. Nonetheless, Respondents/Real Parties in Interest address the issue because it was specifically identified in the body of the Petition.

[98] *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887 (Nev. 2006).

[99] *Id.*

[100] *Id.*

[101] *Id.*; *See also, See Resnick v. Nevada Gaming Commission,* 104 Nev. 60, 65–66, 752 P.2d 229, 232–33 (1988); *Doe v. Bryan,* 102 Nev. 523, 525–26, 728 P.2d 443, 444 (1986).

justiciable controversy.

Second, consideration of the hypothetical jury instruction is not a suitable issue for review. Other jurisdictions appear to have considered similar issues and reached the same conclusion. In *State v. Hammer*, the North Dakota supreme court considered a case involving an individual who appealed his criminal conviction after entering a conditional guilty plea.[102] Prior to trial, the defendant submitted proposed jury instructions to the trial court, but the court promptly rejected them.[103] The defendant subsequently pled guilty, and the case never went to trial.[104] The North Dakota supreme court refused to review the proposed jury instructions submitted by the defendant, because "no trial has taken place, and the district court has not yet issued jury instructions . . .".[105] The court further reasoned that it "cannot know whether the district court's instructions would fairly and adequately inform the jury of the applicable law, not whether the instructions would affect [the defendant's] substantial rights."[106] Additionally, the court was concerned with addressing the proposed jury instructions on appeal "because to do so would require an issue of an advisory opinion" which it felt was inappropriate.[107]

Likewise, in this case, the Petitioner has not yet gone to trial on the matter and a full set of jury instructions has not been given by the District Court. Currently, the

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[102] 787 N.W.2d 716 (2010).
[103] *Id.* at 719.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 726.
[107] *Id.* at 725.

jury instruction to which Petitioner objects is merely "proposed" and, in no way, finalized for the jury to use. To review the proposed undrafted jury instruction and determine the outcome of matter would be an advisory opinion and contrary to this Court's duties "not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment."[108] Therefore, Petitioner's objection as to the proposed jury instruction carries no weight because it is not ripe for review.

VI. CONCLUSION

Petitioner's efforts to challenge two of the four components of the District Court's non-case concluding sanctioning Order has no merit. The District Court has broad discretion to fashion sanctions it deems appropriate under Rule 37 after considering all circumstances involved. Prior to issuing its Order, the District Court gave Petitioner ample opportunity to explain the documented serial discovery abuses by calling witnesses and introducing evidence. It also allowed Petitioner to provide legal argument and authority he felt supported his position. At the conclusion of the hearing, the District Court simply found that Petitioner's explanations were not credible and agreed that his actions warranted serious sanctions.

Respondents/Real Parties in Interest requested dismissal of the case, but the District Court found that dismissal was not appropriate. Instead the Court used its discretion to fashion the three-prong sanctioning Order involved in these proceedings which include, *inter alia*, an award of attorney's fees and costs related

[108] *Personhood Nevada v. Bristol*, 245 P.3d 572, 574, 126 Nev. 599, 602 (2010).

to the work on the motion to dismiss by the three law firms involved and a jury instruction to be crafted at the time of trial. Petitioner's objection is limited to the fees awarded for work performed by a disqualified law firm and the jury instruction. He has no quarrel with the fees awarded for work performed by the other two law firms or the extension/continuation of the discovery period/trial date. As explained above, because the jury instruction has not yet been crafted, the issue is not yet ripe for review by this Court. With respect to the fees awarded, the District Court did not abuse its discretion by including the fees incurred by the disqualified law firm for work it performed related to the motion to dismiss. Inclusion of the fees was not the result of the disqualified law firm's efforts to be compensated at the expense of the Petitioner. Rather, the fees were a component of what the District Court determined was warranted as a means to punish the Petitioner for his abusive tactics, failure to follow the rules of the Court and his complete lack of respect for the judicial process. It also served as a means to try to deter Petitioner from future abusive behavior (which unfortunately fell on deaf ears). The sanction components were based on the evidence presented by the parties during the July 21 evidentiary hearing and the findings and legal basis were well-reasoned as part of the Order. The District Court did not abuse its discretion and the Respondents/Real Parties in Interest respectfully request that this Court not disturb the components of the District Court's Order objected to by Petitioner.

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VII. ATTORNEY'S CERTIFICATION

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type and style requirements of NRAP 32 (a)(6) because, this brief has been prepared in a proportionally spaced typeface using Microsoft Word processing program in 14-point Times new Roman type style.

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

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains ___ words; or;

[ ] Monospaced, has 10.5 or fewer charters per inch, and contains __ words or __ lines of text; or

[X] This brief does not exceed 30 pages.

3. Finally, I hereby certify that I have read this Respondent's Answer To Petition For Extraordinary Writ Relief, 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 NRAP 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 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 20th day of January, 2017.

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