IN THE SUPREME COURT OF THE STATE OF NEVADA

KOFI SARFO, M.D.,

Appellant,

vs.

THE NEVADA STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

_____/

Supreme Court No. 73117

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made so that the justices of the Court may evaluate possible disqualifications or recusal.

Respondent Nevada State Board of Medical Examiners is a government agency. The undersigned counsel appeared on behalf of this Respondent before the District Court, and is expected to appear on behalf of Respondent in this appeal.

Dated this 22nd day of November, 2017.

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NRAP 17 ROUTING STATEMENT

This matter is properly before the Supreme Court, unless this Court chooses to exercise its discretion to have this case assigned to the Court of Appeals. This appeal does not implicate any of the issues which would presumptively assign it to the Court of Appeals under NRAP 17(b). This appeal concerns a constitutional claim, but the issues are similar to the issues already decided by this Court in *Hernandez v. Bennett-Haron,* 128 Nev. 580, 287 P.3d 305 (2012). The issue in this appeal is whether appellant's due process rights were violated by the investigation performed by Respondent pursuant to NRS Chapter 630's statutory mandates. This Court has already held that due process protections do not attach to fact-finding functions of an agency. *See Hernandez,* 128 Nev. at 592-93, 287 P.3d at 314.

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JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying a request for injunctive relief, which is an appealable order pursuant to NRAP 3A(b)(3). Appellant also challenges a ruling on attorney fees. However, that ruling has not been separately appealed. *See* NRAP 3A(b)(8). Therefore, this Court lacks jurisdiction to consider Appellant's arguments regarding the award of attorney fees.

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STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in denying appellant's preliminary injunction after finding that appellant cannot prevail on the merits of his due process claims because due process protections do not attach to fact-finding functions of administrative agencies where there is no adjudication of legal rights?

2. Whether the District Court abused its discretion in awarding attorney fees to Respondent under NRS 18.010(2)(b), where Respondent prevailed in defeating the injunction on the ground that the underlying claim has no merit, and where there is evidence in the record that the lawsuit was brought without reasonable ground and maintained to harass Respondent?

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STATEMENT OF THE CASE

Appellant Kofi Sarfo, M.D. ("Dr. Sarfo") appeals the District Court's order denying his motion for a preliminary injunction seeking to enjoin respondent Nevada State Board of Medical Examiners (the "Board") from subpoenaing medical records relevant to the Board's investigation of a complaint filed against Dr. Sarfo. The complaint alleged that Dr. Sarfo failed to keep proper medical records and/or billed for medical services not provided to five patients. The Investigative Committee of the Board (the "I.C.") requested that Dr. Sarfo provide the I.C. with the medical records for the five patients pursuant to the I.C.'s statutory obligation to investigate the merits of each complaint filed against a physician.

Dr. Sarfo refused, and filed the underlying writ proceeding. He argued that his due process rights were violated because the I.C.'s investigation was over broad, unduly burdensome, and because the I.C. refused to disclose to Dr. Sarfo the identity of the actual complainant and a copy of the actual complaint. He also sought injunctive relief prohibiting the Board from enforcing the I.C.'s request for medical records.

The District Court denied Dr. Sarfo's motion for a preliminary injunction because it found that Dr. Sarfo cannot prevail on the merits on his due process claim. Relying on this Court's decision in *Hernandez v. Bennett-*

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Haron, 128 Nev. 580, 287 P.3d 305 (2012), the District Court held that due process protections do not attach to fact-finding and investigatory functions of an administrative agency, and that the I.C.'s order to Dr. Sarfo to produce records was consistent with the investigatory function of the Board. This appeal follows.

FACTUAL BACKGROUND

I. THE BOARD'S INVESTIGATORY FUNCTIONS

To fully understand the conduct of which Dr. Sarfo complains, it is important to understand the distinction between the two types of complaints which come before the Board: (1) a "complaint" filed by a member of the public, alleging wrongful conduct on the part of a physician; and (2) a "formal complaint" filed by the Board against the physician which results in an adjudicative hearing. Dr. Sarfo's appeal challenges the Board's procedures in investigating the merits of the first type of complaint.

"[A]ny person may file with the Board a complaint against a physician." NRS 630.307(1). When a member of the public complains about a physician, the Board must designate a committee to "review each complaint and conduct an investigation to determine if there is a reasonable basis for the complaint" (i.e., the I.C.). NRS 630.311(1). The I.C. "may issue orders to aid its investigation." *Id.* In addition, the I.C. "may issue subpoenas to

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compel the . . . production of books, X-rays, medical records or any other item within the scope of Rule 45 of the Nevada rules of Civil Procedure." NRS 630.140(1)(b). The subpoena must identify the "name of the witness and specifically identify the . . . medical records or other papers which are required to be produced." NAC 630.475(1).

The "proceedings of the committee" investigating the complaint are "confidential." NRS 630.311(3). The complaint made against the physician "and other information compiled as a result of the investigation conducted to determine whether to initiate disciplinary action" are also confidential. NRS 630.336(4).

Importantly, ***no adjudication of the physician's right to practice medicine is made during this investigation***. Instead, the I.C. is only authorized to determine whether (1) the complaint is frivolous, or (2) "there is a reasonable basis for the complaint." NRS 630.311(2). Thus, the I.C. acts as a fact finder and reports its findings to the Board.

If the I.C. determines that there is a reasonable basis for the complaint, it "may" file a "formal complaint" with the Board. *Id.* Once the formal complaint is filed, the physician and the Board proceed through an adjudicative process which provides notice, opportunity to be heard, and subsequent judicial review. *See* NRS 630.339 – NRS 630.356. A physician

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may be disciplined by the Board under his or her license only after an extensive hearing procedure and full adjudication before the Board. *See* NRS 630.352. A physician may seek judicial review of any final order entered by the Board. NRS 630.356(1).

II. THE INVESTIGATION OF DR. SARFO

On March 14, 2017, the I.C. served Sarfo with an order to produce medical records. *See* 1 Joint Appendix ("JA") 35. The order identified the witness (Dr. Sarfo), and specifically sought "complete copies of any all medical records" of the five identified patients. *Id.*

Accompanying the order was a letter from the I.C. informing Dr. Sarfo of the nature of the allegations against him and the pending investigation. *Id.* at 32-33. As the letter explained, a complaint had been filed against Dr. Sarfo which alleged that:

> [Y]our medical records have poor documentation, failed to keep legible, accurate and complete medical records and you may be billing for services not rendered. Furthermore, it is alleged that your patient notes/billings appears to make services potentially fabricated and then billing for services not rendered.

*Id.*at 32. The letter also identified the five patients whose medical records had been alleged to be deficient. *Id.*

The I.C. also informed Dr. Sarfo in the letter that it could "make no determination as to whether or not there has been a violation of the Medical

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Profession Act, prior to the completion of our investigation." *Id.* The I.C. specifically requested that Dr. Sarfo respond to the allegations. *Id.*

On March 16, 2017, Dr. Sarfo informed the I.C. that he would not respond or comply with the order because he believed that the order violated his due process rights. *Id.* at 38-39. Dr. Sarfo further complained that the I.C.'s request for all of the medical records of these five patients was overbroad because it was not limited in time. *Id.*

III. THE DISTRICT COURT DENIES DR. SARFO'S REQUEST FOR A PRELIMINARY INJUNCTION PROHIBITING COMPLIANCE WITH THE SUBPOENA.

Dr. Sarfo filed an Emergency Petition for Writ of Mandamus or Prohibition in the Eighth Judicial District Court, which sought to prevent the I.C. from enforcing its request for medical records on the ground that the I.C.'s request and refusal to disclose the identity of the complainant violated Dr. Sarfo's due process rights. *Id.* at 2-23. He simultaneously sought injunctive relief prohibiting enforcement of the order. *Id.* at 71-99.

While the injunctive relief motion was being briefed, the Board and Dr. Sarfo entered into a stipulation in which the Board agreed to initially accept two-years' worth of medical records for each of the five patients. *Id.* at 147-150. The Board reserved its right to seek additional records, pending the results of its initial review. *Id.* at 148. Dr. Sarfo compiled these records onto

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a CD-ROM, and brought the records with him to the hearing on the motion for preliminary injunction. 2 JA 244.

At the hearing on Dr. Sarfo's motion for a preliminary injunction, the District Court found:

> When I look at [NRS] 63[0].11[1] and it's clear that it says that the Board shall review complaints and conduct an investigation, and that's what they're doing at this point. So, I'm seeing they're complying with 63[0].11[1]. I'd have a different take on the *Hernandez* matter because *Hernandez,* we looked at general fact finding versus adjudication of legal rights. And I think when we have adjudication of legal rights, that's when due process kicks in. So, I think *Hernandez* is dispositive of this particular issue today. And, so, I'm going to deny the Motion for Preliminary Injunction based upon those reasons here.

Id. at 262.

Thus, the District Court denied Dr. Sarfo's request for a preliminary injunction because it held that Dr. Sarfo could not prevail on the merits of his underlying writ petition. *Id.* at 267. The District Court found that the Board "is empowered to issue the order of which Dr. Sarfo complains, the investigation itself is confidential, and the Board is prohibited from disclosing to Dr. Sarfo the identity of the person who filed the complaint, or the actual complaint disclosing such" under NRS 630.140(1), NRS 630.311(1), and NRS 630.336(4). *Id.* The District Court further found that the I.C. "has no

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authority to adjudicate any legal rights," and is merely "tasked with gathering facts and investigating whether there is any merit to the complaint filed with the Board against a physician." *Id.* at 268. Relying on *Hernandez,* the District Court found that the I.C.'s activities do not implicate any due process rights because they are merely "fact-finding and investigatory exercises." *Id.* Finally, the District Court also found that the public interest weighed in favor of the Board, given its "statutory duty to protect the public by investigating all complaints filed against a physician by members of the public, and issuing enforceable orders to aid its investigation." *Id.* Accordingly, it denied Dr. Sarfo's request for an injunction.

IV. ATTORNEY FEES

Dr. Sarfo appealed the District Court's denial of his request for a preliminary injunction on May 22, 2017. *Id.* at 359-60. Three days later, the Board filed a motion seeking attorney fees and costs against Dr. Sarfo under NRS 18.010(2)(b), and against his counsel, Jacob Hafter, Esq., under NRS 7.085. *Id.* at 289-305.

On June 28, 2017, the Court issued a minute order granting the Board's request for fees against Dr. Sarfo, but denying it against Mr. Hafter. *Id.* at 357-58. The minute order directed the Board to prepare and submit a proposed order upon service of the minute order. *Id.* at 358. Dr. Sarfo did

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not appeal the minute order. The final order regarding attorney fees was not entered until November 15, 2017. *See* Respondents Appendix ("RA") at 1-5.

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in denying Dr. Sarfo's motion for a preliminary injunction because Dr. Sarfo cannot prevail on the merits of his due process claim. Dr. Sarfo argues that he has been deprived of due process by the investigation of the Board. However, to bring a due process challenge, Dr. Sarfo must show that a protected property interest is at stake. Because no formal complaint has been filed against Dr. Sarfo to initiate a disciplinary proceeding, Dr. Sarfo's medical license is not at stake and Dr. Sarfo cannot suffer an infringement of a property interest sufficient to support a due process challenge.

In addition, this Court has held that due process protections do not attach to the fact-finding and investigatory functions of state administrative agencies. *Hernandez,* 128 Nev. at 592-93, 287 P.3d at 314. Dr. Sarfo challenges the investigatory functions of the I.C., which cannot take any disciplinary action against Dr. Sarfo under his license; only the full Board itself can do that, after a full hearing and formal adjudication.[1] Under NRS Chapter 630, the Board may discipline Dr. Sarfo under his license only if a

[1] The Board may also take disciplinary action against a physician if the physician enters into a settlement agreement which is approved by the Board.

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formal complaint is filed upon completion of the I.C.'s investigation, and then after a full hearing before the Board occurs. No member of the I.C. who participated in the investigation is permitted to render a decision during the hearing process. The I.C.'s investigation, and its lawful order to produce medical records, is unequivocally an investigative – not adjudicatory – function. Thus, the District Court correctly found that this Court's holding in *Hernandez v. Bennett-Haron*, 128 Nev. 580, 287 P.3d 305 (2012) governs this case and defeats Dr. Sarfo's claims. Application of the *Hernandez* case to the facts of this appeal is consistent with the holdings of other states addressing similar challenges made by physicians to medical board investigations.

Finally, Dr. Sarfo cannot demonstrate a threat of irreparable harm sufficient to support a request for injunctive relief. Because no formal disciplinary proceeding has been commenced, Dr. Sarfo's medical license is not currently at stake and any threat of harm of losing his license is purely speculative. Furthermore, the law is clear that a threat to reputation or the ability to earn income, alone, is not "irreparable harm." For these reasons, the District Court's order should be affirmed.

Regarding attorney fees, Dr. Sarfo's challenge to the District Court's award of attorney fees is not properly before this Court because Dr. Sarfo never independently appealed either the minute order or the formal order.

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Should this Court choose to address these arguments, the District Court did not abuse its discretion in awarding the Board attorney fees under NRS 18.010(2)(b). Contrary to Dr. Sarfo's contention, the Board is a "prevailing party" because it succeeded on a significant issue in the litigation, i.e., obtaining a ruling that Dr. Sarfo's underlying writ petition fails as a matter of law. Furthermore, there is substantial evidence in the record demonstrating that this lawsuit was brought merely to harass the Board. Accordingly, the District Court's order should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DR. SARFO'S MOTION FOR A PRELIMINARY INJUNCTION.

A. STANDARD OF REVIEW

This Court reviews district court orders denying motions for preliminary injunctions for an abuse of discretion. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). "Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence, but questions of law are reviewed de novo." *Id.*

A preliminary injunction is only available "upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable

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harm for which compensatory damages is an inadequate remedy." *Sobol v. Capital Mgmt.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986); *see also* NRS 33.010. The court must "weigh the potential hardships to the relative parties, and the public interest" in determining whether to grant injunctive relief. *Univ. & Cmty. Coll. Sys. of Nev.*, 120 Nev. at 721, 100 P.3d at 187.

B. DR. SARFO CANNOT PREVAIL ON THE MERITS.

The District Court did not abuse its discretion in denying Dr. Sarfo's motion for a preliminary injunction because: (1) no property interest is at stake during an agency's preliminary investigation that supports a due process challenge; (2) due process does not attach to administrative agency investigation and fact-finding functions; and (3) the Board is prohibited by statute from providing Dr. Sarfo with a copy of the actual complaint.

1. No Property Interest Is at Stake During an Agency's Preliminary Investigation that Supports a Due Process Challenge.

Because no formal complaint has been filed against Dr. Sarfo, Dr. Sarfo lacks standing to assert a due process challenge as his medical license is not currently at stake. To bring a due process challenge, the party must show that a protected property interest is implicated. *Board of Regents of State Coll. v. Roth,* 408 U.S. 564, 571, 92 S. Ct. 2701, 2706 (1972); *see also Hernandez*, 128 Nev. at 587, 287 P.3d at 310 (recognizing that the

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similarities between the Federal and State Constitutions allowed the Court to look to federal precedent for guidance in due process challenges). Although Nevada has recognized that a license to practice medicine is a protectable property interest, *Minton v. Bd. of Med. Exam'rs*, 110 Nev. 1060, 1082, 881 P.2d 1339, 1354 (1994) (disapproved on other grounds by *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev., Adv. Op. 27, 327 P.3d 487 (2014)), Dr. Sarfo cannot show that his license to practice medicine is at risk because the I.C. has no authority to take disciplinary action against Dr. Sarfo's license.

A procedural due process challenge to a medical board's investigation of a physician is not a novel concept. These challenges are uniformly rejected because no property interest in a license is at stake when the medical board is merely investigating the merits of a complaint filed against a physician by a member of the public. *See, e.g., Smith v. Bd. of Med. Quality Assurance*, 248 Cal. Rptr. 704, 710 (Ct. App. 1988); *Alexander D. v. State Bd. of Dental Exam'rs*, 282 Cal. Rptr. 201, 204 (Ct. App. 1991); *Humenansky v. Minn. Bd. of Med. Examiners*, 525 N.W. 2d 559, 566 (Minn. Ct. App. 1994).

In *Smith*, the California Court of appeals rejected a physician's argument that the California Board of Medical Quality Assurance's investigation of a complaint of incompetence against the physician violated his procedural due process rights because the board's "proceedings were

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conducted to determine whether there was reasonable cause to believe that Smith was an incompetent physician," and the investigation "was not a disciplinary proceeding and Smith's license was not immediately at stake." 248 Cal. Rptr. at 710. The Court reasoned that "[u]ntil a formal accusation is filed against a physician [by the Board], his or her license is valid." *Id.* Similarly in *Alexander D.*, the California Court of Appeals rejected a dentist's argument that the California Board of Dental Examiners violated the dentist's due process rights when it investigated a complaint of mental incompetency filed against the dentist because his "property interest or license" was not at stake in the preliminary investigatory proceedings. 282 Cal. Rptr. at 204.

In *Humenansky*, the Minnesota Court of Appeals rejected the argument that a physician's due process rights were violated by the Minnesota Board of Medical Examiner's investigation against her because "Humenansky's license to practice medicine is not immediately at stake in [the] investigatory proceeding." 525 N.W.2d at 566. Although licenses to practice medicine are also recognized as a property right in Minnesota, the Minnesota court found that the investigation had a pure "investigatory purpose" under the relevant Minnesota statutes, and that the board "has not yet decided to pursue discipline against Humenansky." *Id.* Because the physician faced "no potential discipline until the board begins formal adjudicatory proceedings,"

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the Court found that the physician's license was not at risk so as to support a due process challenge. *Id.*

Similarly, here, Dr. Sarfo's license to practice medicine remains valid and unimpaired during the pending of the I.C.'s investigation. *See* NRS Chapter 630. The I.C. has not yet decided whether there is merit to the complaint against Dr. Sarfo that would warrant the I.C. filing of a formal complaint, which would initiate a formal disciplinary proceeding. The I.C. has no authority to revoke or take any other such disciplinary action against Dr. Sarfo's medical license; instead, Dr. Sarfo may only be disciplined by the Board itself (not the I.C.) after an extensive hearing process. *See* NRS 630.352(1) (prohibiting the I.C. from participating in the decision making process). Because Dr. Sarfo's license is valid and unimpaired, Dr. Sarfo cannot demonstrate an infringement upon a protectable interest sufficient to support a due process challenge.[2] Thus, Dr. Sarfo's due process challenge fails.

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[2] Nor can Dr. Sarfo argue that the investigation places a "stigma" upon him that affects his medical license. "Injury to reputation alone is not a liberty interest protected under the Fourteenth Amendment." *Neal v. Fields*, 429 F.3d 1165, 1167 (8th Cir. 2005) (holding that an investigation of a nurse by the nursing board did not violate the nurse's procedural due process rights).

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2. Due Process Does Not Attach to Administrative Agency Investigations and Fact-Finding Functions.

The Nevada Constitution prohibits the deprivation of property without due process of law. Nev. Const. art. 1, § 8(5). However, due process is limited in the context of administrative agency proceedings. *See Hernandez*, 128 Nev. at 587, 287 P.3d at 310-311. "When a government agency is conducting proceedings, due process mandates that the protections afforded depend on whether the proceedings result in a binding adjudication or a determination of legal rights, in which case due process protections are greater." *Id.* "***Such protections, however, need not be made available in proceedings that merely involve fact-finding or investigatory exercise by the government agency.***" *Id.* at 587, 287 P.3d at 311 (emphasis added).

In *Hernandez*, this Court held that the county coroner's investigation of officer-involved deaths to determine whether excessive force was used did not trigger due process rights because the county coroner merely acted as an investigator and was not tasked with adjudicating formal disciplinary proceedings of the officers involved in the incident. *Id.* at 313-314. In reaching this holding, this Court relied on the substantial body of federal law which provides that "investigations conducted by administrative agencies, even though they may lead to criminal prosecutions, do not trigger due process rights." *Aponte v. Calderon*, 284 F.3d 184, 193 (1st Cir. 2002). The

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federal courts reason that "when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used." *Hannah v. Larche*, 363 U.S. 420, 442, 80 S. Ct. 1502, 1514-15 (1960); *see also S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742, 104 S. Ct. 2720, 2725 (1984) (holding that due process rights are not invoked in the context of administrative investigations and investigatory subpoenas if no legal rights are adjudicated).

Unlike the county coroner in *Hernandez*, the I.C. has the ability to file a formal complaint to initiate an adjudicatory proceeding before the Board. *See* NRS 630.311(2). However, the I.C. cannot participate in the decision-making process on that complaint. NRS 630.352(1). Even where administrative agencies have statutory authority to both investigate and initiate adjudicatory proceedings, federal and state courts uniformly hold that no due process protections attach to the investigatory portion of an agency's process ***unless and until*** a formal adjudication is commenced. *See Ramirez-De Leon v. Mujica-Cotto*, 345 F. Supp. 2d 174, 188 (D.P.R. 2004) ("This means that investigations, alone, do not trigger due process rights; there must also be an adjudication."); *see also U.S. v. E. River Hous. Corp.*, 90 F. Supp. 3d 118, 136-37 (S.D.N.Y. 2015) (holding that no due process rights attached during

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the HUD's investigation of a charge of discrimination, until after the HUD initiated a formal adjudicatory proceeding); *S.E.C. v. OKC Corp.*, 474 F. Supp. 1031, 1041 (N.D. Tex. 1979) (holding that a defendant does not have full due process rights until the SEC, pursuant to its investigation, either files a complaint or makes a criminal reference); *In re Petition of Atty. Gen. for Investigative Subpoenas*, 736 N.W.2d 594, 602 (Mich. Ct. App. 2007) (holding that subpoenas issued pursuant to the department of Public Health's investigation did not implicate due process unless and until the department filed a formal complaint initiating an adjudicatory process).

As these courts explain, using subpoena power to conduct an investigation does not implicate due process rights because investigation alone "cannot result in an adjudication of respondent's legal rights." *In re Petition of Atty. Gen.*, 736 N.W.2d at 602. Thus, these courts reason that it is irrelevant that subsequent adjudicatory action may be taken as a result of the investigation because any subsequent adjudication will require notice and a hearing, which afford the respondent due process. *Id.*; *see also Aponte*, 284 F.3d at 193 ("For plaintiffs to be held legally responsible, they would have to be found guilty after a formal adjudication during which full due process rights would attach.").

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And, when it comes to medical boards which have the authority to both investigate and initiate adjudicatory proceedings like the Board in Nevada, courts overwhelmingly reject the contention that physicians are entitled to the full panoply of due process during the investigatory period. *See, e.g., Gray v. Sup. Ct.*, 23 Cal. Rptr. 3d 50, 54 (Ct. App. 2005) (noting that a physician cannot bring a due process challenge until formal charges were filed against him by the medical board); *Gilmore v. Composite State Bd. of Med. Exam'rs*, 254 S.E.2d 365, 366 (Ga. 1979) (holding that a physician was not "denied due process because he is not permitted to participate in selecting the documents to be collected by the investigator or to participate in the deliberations prior to the decision to initiate proceedings against him"); *Humenansky,* 525 N.W.2d at 566 (holding that a physician was not entitled to due process protections during the preliminary investigation of a complaint against her); *In re Ambrose*, No. A-1271-04T5, 2005 WL 3730513, at *6 (N.J. Super. Ct. App. Div. Feb. 3, 2006) (holding that a physician was not entitled to full due process protections during the state medical board committee's investigation of a complaint against him).

Here, the I.C. has no authority to adjudicate any legal rights. *See* NRS 630.311(1); NRS 630.352(1). It is tasked with gathering evidence and investigating whether there is any merit to a complaint filed against a

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physician. *Id.* As the I.C. specifically explained to Dr. Sarfo, it "makes no determination as to whether or not there has been a violation of the Medical Practice Act, prior to the completion of our investigation." 1 JA 32. The I.C.'s role is simply to determine whether there is any merit to the complaint against a physician which would warrant the filing of a formal complaint. NRS 630.311(2). However, once that formal complaint is filed, the matter comes before the full Board for a formal hearing process which indisputably affords due process. *See* NRS 630.339-630.356. The I.C. cannot participate in that adjudicatory process. NRS 630.352(1).

No formal complaint has been filed against Dr. Sarfo for the concerns noted in the subpoena. The Board is merely in the investigatory stages to determine if there is any merit to the complaint against Dr. Sarfo. Accordingly, Dr. Sarfo's due process challenge fails because due process is not implicated by the preliminary investigations of the Board. The District Court's order should be affirmed.

3. The Board is Not Authorized to Disclose the Complaint.

Even if Dr. Sarfo were entitled to the full panoply of due process protections at this investigatory stage, Dr. Sarfo cannot dispute the fact that the I.C.'s letter satisfies the minimum due process requirements by providing him with notice of the specific allegations against him and an opportunity to

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refute those allegations. *See* 1 JA 32-35; *see also Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998) (holding that due process requires notice and an opportunity to be heard). Instead, Dr. Sarfo contends that his due process rights have somehow been violated because the Board refused to disclose a copy of the actual complaint to Dr. Sarfo.

NRS 630.336(4) states plainly that any complaint filed with the Board is "confidential." NRS Chapter 630 does not define "confidential," nor does it specify whether "confidential" means "confidential" from the licensee (i.e., Dr. Sarfo). However, the meaning of "confidential" can hardly by doubted in this context, and the Board has interpreted this phrase to mean confidential from the physician being investigated. "[A]n administrative agency charged with the duty of administering an act is impliedly clothed with the power to construe the relevant laws and set necessary precedent to administrative action, and the construction placed on a statute by the agency charged with the duty of administering it is entitled to deference." *Nev. Pub. Emp'ees Ret. Bd. v. Smith*, 129 Nev., Adv. Op. 65, 310 P.3d 560, 564 (2013). If the interpretation falls within the statute's language, this Court will defer to the agency's interpretation of the statute. *Wynn Las Vegas, L.L.C. v. Baldonado,* 129 Nev., Adv. Op. 78, 311 P.3d 1179, 1182 (2013).

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Nothing in the language of NRS 630.336(4) indicates that complaints must be disclosed to the physician being investigated; thus, the Board's interpretation is reasonable and consistent with statutory language. Furthermore, the Board's interpretation is consistent with Legislative intent. *See Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 10 n.10 (Nev. 2011) (holding that deference is given to an agency's interpretation of its governing statutes if the interpretation "does not conflict with legislative intent"). NRS 630.336(4) was added to NRS Chapter 630 in 2003 by Senate Bill 250. During a hearing, proponents of the bill explained that the confidential language was intended to keep the identity of the person filing the complaint confidential:

> Section 25 allows people to bring complaints to the board with immunity. That immunity gives people the ability to voice concerns that may be irrelevant and frivolous.

Hearing on S.B. 250 before Sen. Comm. on Commerce & Labor, 72d Reg. Sess. (April 11, 2003). Thus, the proponent of the bill explained that "[e]verybody should have a reasonable expectation of privacy whether a licensee ***or a citizen***." *Id.* (Emphasis added).

The Board's interpretation is also consistent with holdings from courts interpreting similar statutes. These courts have consistently interpreted "confidential" to mean that the medical board is required to keep a complaint

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confidential from the ***medical professional being investigated.*** *See, e.g., Tex. State Bd. of Chiropractic Exam'rs v. Abbott,* 391 S.W.3d 343, 349 (Tex. App. 2013) (holding that its similar statute was enacted "to make the Board's investigation files confidential and privileged and not subject to inspection by members of the public in general ***or the chiropractor under investigation in particular***" (emphasis added)).

For example, in *Atkins v. Guest,* the New York Court rejected a physician's argument that he must be provided the actual complaint filed against him by a member of public before he should be required to respond to a subpoena. 607 N.Y.S.2d 655, 656 (N.Y. App. Div. 1994). Relying on a statute similar to NRS 630.336(4), the court found that the complaint was confidential ***from*** the physician because "[c]onfidentiality can serve to prevent harassment of the complainants or the patients involved." *Id.*

Similarly, in *Levin v. Guest,* the New York Court also rejected a physician's petition to quash a medical records subpoena because the New York Medical Board refused to disclose the identity of the complainant, the complaint, or even the nature of the allegations against the doctor. 492 N.Y.S.2d 749, 751 (N.Y. App. Div. 1985). The court agreed with the medical board that disclosure of a complaint will result in "an important source of information drying up," because "[i]f the names of the complainants are made

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known to the petitioner, especially at this early investigational stage, the complainants may be subject to various types of harassment, including lawsuits, however groundless." *Id.*

The concern for harassment is very real, and has already occurred in this case. Dr. Sarfo admits he contacted the patients at issue for an explanation of why they are implicated in the Investigative Committee's investigation. 1 JA 28. If the Board is required to disclose the complaint and identity of each person who files a complaint to the physician, the Board's ability to regulate the medical profession will be severely undermined because common sense suggests that patients will be more hesitant to report concerns if their complaint and identity will be disclosed to the subject physician.

Dr. Sarfo does not cite to any authority which would require the Board to disclose the complaint and/or the identity of the complainant to him. The judicial discipline cases on which he relies are not cases in which the ***judicial officer*** being investigated demanded disclosure of a complaint, but are instead cases in which a member of the public sought access to confidential investigation files. *See, e.g., Kamasinski v. Jud. Review Council,* 797 F. Supp. 1083, 1085 (D. Conn. 1992) (balancing the interests of a state resident who wanted access to prior disciplinary complaints against a judge with the

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judge's interest in maintaining the confidentiality of these proceedings); *First Am. Coal. v. Jud. Inquiry & Rev. Bd.,* 784 F.2d 467, 477 (3d Cir. 1986) (rejecting requests by newspaper reporters and media owners to have judicial discipline records disclosed to the press); *People, ex. rel. Ill. Jud. Inquiry Bd. v. Hartel,* 380 N.E.2d 801, 803 (Ill. 1978) (rejecting request of sheriff and county prosecutor seeking records of a judicial disciplinary committee in a pending criminal investigation against a judge); *Whitehead v. Nev. Comm'n on Jud. Discipline,* 111 Nev. 70, 101-123, 893 P.2d 866, 886-898 (1995) (analyzing a judge's request that his investigation files remain confidential, amid allegations of a "leak" to the public by certain individuals involved in the disciplinary proceeding). Accordingly, the Board is not required to provide Dr. Sarfo with a copy of the actual complaint. NRS 630.336(4).

C. DR. SARFO CANNOT DEMONSTRATE IRREPARABLE HARM

The District Court's order should also be affirmed because Dr. Sarfo cannot demonstrate that the I.C.'s order to produce records will result in irreparable harm.[3] In his motion, Dr. Sarfo identified two types of irreparable harm: (1) potential discipline, and (2) the inability to continue to practice medicine if discipline does occur. 1 JA 94-95. Neither of these harms is

[3] *See, e.g., Saavedra-Sandoval v. Wal-Mart Stores, Inc.,* 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

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"irreparable." "Irreparable harm is an injury for which compensatory damage is an inadequate remedy." *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev., Adv. Op. 38, 351 P.3d 720, 723-24 (Nev. 2015) (internal quotations omitted). Irreparable harm does not exist "upon the bare possibility of an injury, or upon any unsubstantial or unreasonable apprehension of it." *Sherman v. Clark*, 4 Nev. 138, 142 (1868). Thus, "injunctive relief is not available in the absence of actual or threatened injury, loss or damage." *Berryman v. Int'l Bhd. of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388, (1966). "The injury, too, must be real, and not merely theoretical." *Sherman*, 4 Nev. at 142.

Dr. Sarfo's contention that discipline will result in "irreparable harm" is purely speculative. Because no formal complaint has been filed against Dr. Sarfo, there is no disciplinary proceeding. As noted above, Dr. Sarfo's medical license remains valid and active while an investigation is pending. *See* NRS Chapter 630; *see also Smith*, 248 Cal. Rptr. 704 ("Until a formal accusation is filed against a physician, his or her license is valid."); *Alexander D.*, 282 Cal. Rptr. at 204 (holding that a dentist's license to practice was not immediately at stake in an investigation of his or her fitness to practice dentristry); *Humenansky*, 525 N.W. 2d at 566 (holding that the physician's "license to practice medicine is not immediately at stake in this investigatory

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proceeding" because "the board has not yet decided to pursue discipline against Humenansky").

Dr. Sarfo's license will only be put at risk ***if*** the I.C. determines that the complaint is supported by reasonable grounds sufficient to warrant the filing of a formal complaint, and ***if*** the I.C. determines that the filing of a formal complaint is necessary to protect the public. NRS 630.311(2). Dr. Sarfo admits that most of these investigations do not result in formal disciplinary proceedings, given that of the six complaints made against him between 2010 and 2014, only one resulted in disciplinary action. *See* 1 JA 26-29. Thus, Dr. Sarfo's alleged "irreparable harm" is merely speculative and does not warrant injunctive relief.

In addition, any effect that the mere investigation or threat of discipline may have on Dr. Sarfo's ability to practice medicine is not irreparable harm. "[I]rreparable injury does not include the loss of income, inability to find other employment, or financial distress." *E.E.O.C. v. City of Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980); *see also Ogunleye v. Arizona,* 66 F. Supp. 2d 1104, 1111 (D. Ariz. 1999) (holding that "[l]oss of employment . . . is generally not sufficient to demonstrate 'irreparable injury'"); *Ahmad v. Long Island Univ.*, 18 F. Supp. 2d 245, 248 (E.D.N.Y. 1998) (holding that "loss of

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reputation, loss of income and difficulty in finding other employment – do not constitute 'irreparable harm' necessary to obtain a preliminary injunction").

Although Dr. Sarfo cites to *Chudacoff v. University Medical Center of Southern Nevada,* 649 F.3d 1143 (9th Cir. 2011) as support for his "irreparable harm" contention, nothing in that case supports Dr. Sarfo's contention that the "threat" of a disciplinary proceeding is irreparable harm. That case does not concern injunctive relief. Instead, it analyzes the propriety of § 1983 claims that were asserted against a hospital and its staff. *See id.* Thus, Dr. Sarfo does not identify any threat of irreparable harm, and the District Court properly denied his request for a preliminary injunction. The District Court must be affirmed.

D. THE PUBLIC INTEREST OUTWEIGHS THE POTENTIAL HARM TO SARFO.

Finally, the public interest outweighs any threat of harm to Dr. Sarfo, further supporting the District Court's denial of his request for injunctive relief. Nevada has an express interest in ensuring that "only competent persons practice medicine." NRS 630.003(1)(a). The Board was formed "[f]or the protection and benefit of the public" and tasked with determining the "continuing competency of physicians." NRS 630.003(1)(b). "The purpose of licensing physicians . . . is to protect the public health and safety and the general welfare of the people of this State," and a license to practice

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medicine "is a revocable privilege." NRS 630.045. Accordingly, a physician's right to practice his profession "must yield to the paramount right of the government to protect the public health by any rational means." *Kassabian v. State Bd. of Med. Exam'rs*, 68 Nev. 455, 464, 235 P.3d 327, 331 (1951) (internal quotations omitted).[4]

Courts addressing challenges similar to Dr. Sarfo's all find that the government's interest in protecting the public outweighs any potential harm to the physician. These courts correctly reason that "[t]he government's interest in protecting the public from unsafe or incompetent practitioners would be severely impacted if every preliminary investigation had to be conducted will full due process protections." *Humenansky*, 525 N.W.2d at 567; *see also In re Ambrose*, No. A-1271-04T5, 2005 WL 3730513, at *6 (N.J. Super. Ct. App. Div. Feb. 3, 2006) (holding that "requiring the Board to provide Dr. Ambrose with full due process rights in preliminary proceedings . . . would severely undermine the Board's ability to . . . protect[ ] the public's health and safety"). Thus, the public interest clearly outweighs Dr. Sarfo's

[4] *See also Humenansky*, 525 N.W.2d at 567 ("When a conflict arises between a physician's right to pursue a medical profession and the state's right to protect its citizenry, the physician's right must yield to the state's power to prescribe reasonable rules and regulations in order to protect the state's people from incompetent and unfit practitioners."); *In re Polk*, 449 A.2d 7, 14 (N.J. 1982) ("The right of physicians to practice their profession is necessarily subordinate" to the government's "paramount obligation to protect the general health of the public."); *Thompson v. Tex. State Bd. of Med. Exam'rs*, 570 S.W.2d 123, 128 (Tex. Civ. App. 1978) (holding that a physician's right to practice medicine is subordinate to state's police power).

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interest in this matter, warranting denial of a preliminary injunction. The District Court's order should be affirmed.[5]

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES.

A. THE ORDER ON FEES IS NOT PROPERLY ON APPEAL.

Dr. Sarfo admits that there was no order entered on attorney fees as of the date of his filing of the opening brief.[6] *See* AOB, p. 44. He further admits that he never separately appealed the minute order. *See id.* An order awarding attorney fees must be separately appealed. *See Campos-Garcia v. Johnson,* 130 Nev., Adv. Op. 64, 331 P.3d 890, 891 (2014); *see also* NRAP 3A(b)(8). Dr. Sarfo may not simply "amend" his notice of appeal; instead, he must separately appeal the order awarding attorney fees. Because no such

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[5] Dr. Sarfo spends considerable time discussing the holding of this Court in *Tate v. State Bd. of Med. Exam'rs*, 131 Nev., Adv. Op. 67, 356 P.3d 506 (Nev. 2015). *See* AOB, pp. 32-34. However, the *Tate* case is irrelevant to the issues before this Court. Similarly, Dr. Sarfo's prior disciplinary history is irrelevant as to the issue of whether the Board's investigation being challenged on this appeal violated Dr. Sarfo's due process rights. If Dr. Sarfo felt the prior investigations violated his due process rights at the time they were conducted, the appropriate time to challenge those investigations would have been while they were pending.

[6] The Eighth Judicial District Court never provided electronic notice to the Board's counsel that a minute order was entered. The Board did not receive "notice" until Dr. Sarfo provided the minute order in his appendix, and the Board has since promptly filed an order with the Eighth Judicial District Court. The Board has provided that order in their appendix for this Court's review.

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appeal was taken, the District Court's award of attorney fees is not properly before this Court.

B. REGARDLESS, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION.

Mindful of this Court's docket and limited resources, the Board is willing to argue the merits of Dr. Sarfo's improper "appeal" of the District Court's order on attorney fees, should this Court choose to consider it. This Court reviews a district court's award of attorney fees for an abuse of discretion. *Berkson v. LePome,* 126 Nev. 492, 504, 245 P.3d 560, 568 (2010).

On appeal, Dr. Sarfo does not attack the District Court's application of the *Brunzell* factors or the amount of fees awarded. *See* AOB, pp. 44-50. Instead, he argues that (1) the Board is not a prevailing party under NRS 18.010(2)(b), and (2) that his lawsuit was not "frivolous." *Id.* Neither of these contentions have merit.

1. The Board is a "Prevailing Party."

The District Court did not abuse its discretion in finding that the Board was a prevailing party because the Board succeeded on the significant issue in the litigation. 2 JA 357-58; RA 1-5. Under NRS 18.010(2)(b), a court may award attorney fees to the "prevailing party" if the court finds that the claims were "brought or maintained without reasonable ground." In Nevada, a prevailing party may be a respondent/defendant. *Valley Elec. Ass'n v.*

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Overfield, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005). "A party prevails if it success on *any significant issue*." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.,* 131 Nev., Adv. Op. 10, 343 P.3d 608, 615 (Nev. 2015) (internal quotations omitted).

"To be a prevailing party, a party need not succeed on every issue." *Id.* Furthermore, when a ruling on an injunction reaches the merits of the underlying claims, a defeat of the injunction is sufficient to "satisfy the prevailing-party test." *Davis v. Abbott,* 781 F.3d 207, 214 (5th Cir. 2015) (internal quotations and alterations omitted); *see also Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 15 (1st Cir. 2003) ("Thus, interlocutory orders that confer substantive injunctive relief often have been viewed as sufficient to carry the weight of a fee award.").

Here, the Board prevailed in defeating Dr. Sarfo's request for injunctive relief after the District Court found that Dr. Sarfo cannot prevail on the merits of his underlying claim. 1 JA 267-68. This is, in effect, a ruling that Dr. Sarfo's underlying claim is meritless and also fails. The Board is clearly a prevailing party because it defeated Dr. Sarfo's writ petition by defeating his request for injunctive relief. Accordingly, the District Court did not abuse its discretion in awarding attorney fees.

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2. Dr. Sarfo's Lawsuit was "Frivolous."

The District Court also did not abuse its discretion in finding that Dr. Sarfo's lawsuit was brought or maintained without reasonable ground. Under NRS 18.010(2)(b), attorney fees are properly awarded when the claim is unsupported by evidence or law. *Allianz Ins. Co. v. Gagnon,* 109 Nev. 990, 996, 860 P.2d 720, 724 (1993); *see also Singhaviroj v. Bd. of Educ. Of Town of Fairfield,* 17 A.3d 1013, 1023 (Conn. 2011) ("A claim is frivolous when, viewed objectively, it may be said to have no reasonable chance of success, and present no valid argument to modify the law." (Internal quotations omitted)). An award of fees is also appropriate when there is evidence in the record supporting a finding that the claims were brought merely to harass the opposing party. *Semenza v. Caughlin Crafted Homes,* 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995).

Here, the District Court found that Dr. Sarfo's due process challenge was brought without reasonable ground because it is directly governed by the *Hernandez* case, which clearly states that no due process attaches to preliminary fact-finding investigations of an administrative agency. 1 JA 268. Thus, Dr. Sarfo's claims were meritless and unsupported by law.

The District Court further correctly found that Dr. Sarfo's lawsuit was brought merely to harass the Board because it was filed against an agency that

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was merely performing its statutorily mandated duties. 2 JA 357; RA 1-5. Dr. Sarfo himself admits that his claims were prosecuted merely to harass the Board, as he admits that he "prevailed" when the Board entered into the stipulation with him, yet continued to prosecute this litigation. AOB, p. 46. In addition, there was ample evidence before the Board that (1) Dr. Sarfo and his counsel were talking with other doctors about replicating Dr. Sarfo's lawsuit ***after*** the District Court found that Dr. Sarfo could not prevail on the merits of his claim; (2) Dr. Sarfo offered up to the District Court on a CD-ROM the very medical records he claimed were too "burdensome" to produce in his due process challenge; and (3) Dr. Sarfo and his counsel made numerous statements to the District Court (and now this Court) about their desire to challenge the Board's lawful regulation of physicians. *See* 2 JA 298-301. The District Court's order was amply substantiated, and it did not abuse its discretion in awarding attorney fees to the Board under NRS 18.010(2)(b). Its order must be affirmed.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court affirm the District Court's denial of Dr. Sarfo's request for injunctive relief. Should this Court choose to consider Dr. Sarfo's improper appeal of

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the award of attorney fees, the Board further requests that this Court affirm the District Court's award of fees to the Board.

DATED this 22nd day of November, 2017.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 28.2

1. I hereby certify that this Respondents' Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 font and Times New Roman type.

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 proportionately spaced, has a typeface of 14 points or more, and contains 7,315 words.

3. Finally, I hereby certify that I have read this answering 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 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

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of November, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of ROBISON, SIMONS, SHARP & BRUST, and that on this date I caused to be served a true copy of the attached **RESPONDENT'S ANSWERING BRIEF** on all parties to this action by the method(s) indicated below:

__X__ by using the Court's CM/ECF Electronic Notification System addressed to:

Jacob L. Hafter, Esq.

DATED this 22nd day of November, 2017.

Employee of Robison, Simons, Sharp & Brust

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