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

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| In the Matter of<br><br>THE W.N. CONNELL and MARJORIE T. CONNELL LIVING TRUST, dated May 18, 1972. | Case No. 73837 |



APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Court Judge
District Court Case No. P-09-066425-T

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# APPELLANT'S REPLY BRIEF

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## NRAP 26.1 DISCLOSURE STATEMENT

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

**Appellant Eleanor Connell Hartman Ahern**

As Eleanor Connell Hartman Ahern is an individual, required disclosures regarding parent corporations and stock ownership are not applicable. Attorneys of the following law firms have appeared for, or are expected to appear for, Eleanor Connell Hartman Ahern, in her capacities as trustee and/or beneficiary of The W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972, within this matter:

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**Marquis Aurbach Coffing** **Jeffrey Burr, Ltd.**

**Brownstein Hyatt Farber Schreck, LLP**

Respectfully submitted this 4th day of October, 2018.

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## INTRODUCTION

Appellant asks that this Court vacate the district court's Order awarding punitive damages, and remand this matter for further proceedings for the following reasons: (1) the district court's statements did not constitute a finding that "punitive damages will be assessed" at the February/March 2016 evidentiary hearing, as such statements are ineffective without a written order; (2) without such an order, the February 2017 hearing is not the "subsequent proceeding" required under NRS 42.005(3); (3) the district court's award of punitive damages is unrelated to the actual harm suffered by the Daughters, and therefore unconstitutionally excessive and in violation of the Fourteenth Amendment; (4) Appellant is not judicially estopped from appealing the punitive damages award as the statements made by her former counsel are not inconsistent with the positions taken in this appeal; and (5) the district court abused its discretion by denying appellant's motion to continue trial.

## LEGAL ARGUMENT

### I. THE DISTRICT COURT'S AWARD OF PUNITIVE DAMAGES FAILED TO COMPLY WITH NRS 42.005 AND MUST BE VACATED.

The district court's August 9, 2017 Judgment awarding punitive damages to Respondents failed to comply with the provisions of NRS 42.005 in two ways: First, the district court improperly assessed punitive damages against Appellant without a properly bifurcated hearing under NRS 42.005(3). The district court's statements regarding punitive damages at the February/March 2016 evidentiary hearing highlighted by respondents have no legal effect, and therefore, the February 2017 evidentiary hearing, at which both a finding of punitive damages and their total amount were assessed, fails to follow the procedure under NRS 42.005(3).

Second, during the February 2017 evidentiary hearing, the court improperly considered evidence of acts and omissions that are unrelated and irrelevant to the claim that formed the basis for the Compensatory Judgment, in violation of both Federal and Nevada standards for the constitutional formulation of punitive damages.

#### A. NRS 42.005 Gives Appellant the Statutory Right to a Separate Hearing for Punitive Damages.

NRS 42.005(3) states:

> If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, **a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed**. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1. (emphasis added).

This Court reviews questions of statutory interpretation de novo. *Montage Marketing, LLC v. Washoe County ex. Rel Washoe County Board of Equalization*, ___ Nev. ___, 419 P.3d 129, 134 Nev. Adv. Op 29 (2018) (citing *State v. Bakst*, 122 Nev. 1403, 1409, 148 P.3d 717, 721(2006)). In interpreting a statute de novo, this Court will not look beyond the plain language when it is clear on its face. *D.R. Horton, Inc. v. Betsinger*, 130 Nev. 842, 335 P.3d 1230, 1232–33, 130 Nev. Adv. Op. 84, (2014). Here, the Supreme Court has already held that the language of NRS 42.005 is "plain and clear" on its face. *Betsinger*, 335 P.3d at 1233.

1. ***The February/March 2016 evidentiary hearing did not constitute the first hearing that is required under NRS 42.005(3) as Judge Sturman did not make a finding that punitive damages would be assessed in her Order.***

Oral statements made by the district court are ineffective without a written order. *See State, Div. Child & Fam. Servs. v. Dist. Ct.*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) (Stating that a "[c]ourt's oral pronouncement from the bench, the

clerk's minute order, and even an unfiled written order are ineffective for any purpose."). Further, punitive damages are not awarded as "a matter of right" and are instead left to the discretion of the trier of fact. *See Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (internal citations omitted) (2000).

Here, the district court's decision to not make a written finding that punitive damages are warranted at the February/March 2016 evidentiary hearing leads to the conclusion that the 2016 evidentiary hearing was not the "liability proceeding" required under NRS 42.005(3). Despite the Daughters' representations to the Court, Judge Sturman's statements at the February/March 2016 evidentiary hearings are inadequate as findings and are ineffective without a written order. (*See*, Ans. Brief at 32–34.) It is clear from the District Court's written Order that it did not make a finding that punitive damages will be assessed. (4 AAPP 409–413). To the contrary, the district court's September 19, 2016 Order explicitly stated in Paragraph 8 that:

> "Movants seek punitive damages, which requires a finding of willful and malicious conduct . . . Ms. Ahern's conduct was shocking and needs to be dealt with in a serious fashion, **but the final decision on *whether* punitive and/or treble damages *should be awarded in addition to restitution* will be made at the evidentiary hearing to be scheduled after [the Court Appointed Trustee] concludes discovery and prepares his report and final accounting to the Court."** (emphasis added) (4 AAPP 411).

Nowhere in her 2016 Order does Judge Sturman make a finding that punitive damages "will be assessed." (4 AAPP 409–413.) The use of language such as

"whether," "should be," and "in addition to," make it clear that the only findings Judge Sturman made at this hearing in relation to damages is that Appellant's actions "warrants a surcharge against Ms. Ahern's 35% share of the trust," and that the decision on whether to impose punitive damages would be made after the Court-Appointed Trustee makes his Final Accounting. (4 AAPP 411–412.)

This explicit language, along with the fact that the district court declined to make a finding that punitive damages will be assessed at the February/March 2016 No-Contest Clause Evidentiary Hearing leaves no room for other interpretation, and shows that the first criteria of NRS 42.005(3) (a finding that punitive damages "will be assessed") has not been met.

### 2. *The February 2017 hearing was not a "subsequent proceeding" under NRS 42.005(3), and thus the Order awarding punitive damages to the daughters is procedurally improper.*

As the district court did not make a finding at a prior hearing that punitive damages "will be assessed" against appellant, it cannot follow that the February 2017 hearing was a "subsequent proceeding" under the plain language of NRS 42.005(3). The language of NRS 42.00(3) is "plain and clear." *Betsinger*, 335 P.3d at 1233. The trier of fact "*shall* make a finding" of whether damages will be assessed, and a subsequent proceeding *must be conducted.* NRS 42.005(3) (emphasis added). The district court failed to do so.

During the February 2017 evidentiary hearing, the district court considered evidence regarding (1) the claim for compensatory damages; (2) the predicate finding of fraud; and (3) the amount of damages to be assessed. (4–6 AAPP 464–729.) The district court violated NRS 42.005(3) by holding only one evidentiary hearing that (1) determined liability for punitive damages, and (2) calculated the amount of those damages.

The Daughters inexplicably hone in on the fact that a year elapsed between the two evidentiary hearings. (*See*, Ans. Brief 30–31.) However, a calculation of the passage of time is irrelevant and not a requirement of NRS 42.005(3). Without the predicate finding that punitive damages are warranted, it matters not whether the time between the proceedings is weeks, months or years. What is required, by statute, is that the proceedings are bifurcated between a liability determination and the assessment of the amount of punitive damages to be awarded. *Wyeth v. Rowatt*, 126 Nev. 446, 476, 244 P.3d 765, 785 (2010) ("By statute, Nevada requires that the liability determination for punitive damages against a defendant be bifurcated from the assessment of the amount of punitive damages, if any, to be awarded."). As the district court failed to hold two separate proceedings for liability and calculation of damages, the Order awarding punitive damages to the Daughters is procedurally improper and should be vacated.

**B. The District Court's Award of Punitive Damages Based Upon the Cashier's Check Violates the Due Process Clause of the Fourteenth Amendment and is not Supported by Substantial Evidence.**

Due process protections impose a limit on punitive damages and prevent "arbitrary deprivations of liberty or property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994). The use of state power to punish a defendant must comply with the Fourteenth Amendment. *Id.* at 435. Nevada has adopted the federal standard for deciding when a punitive damages award has violated due process. *Bongiovi v. Sullivan*, 122 Nev. 556, 582, 138 P.3d 433, 451–52 (2006). Three factors comprise the federal standard: (1) 'the degree of reprehensibility of the defendant's conduct,' (2) the ratio of the punitive damage award to the 'actual harm inflicted on the plaintiff,' and (3) how the punitive damages award compares to other civil or criminal penalties 'that could be imposed for comparable misconduct.'" *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–584 (1996). Whether a punitive damages award violates a defendant's due process rights is subject to de novo review. *Bongiovi*, 122 Nev. at 582, 138 P.3d at 451–52. To survive appeal, an award of punitive damages must also be supported by substantial evidence. *Id.* at 122 Nev. 581, 138 P.3d 451. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

1. ***The district court's punitive damage award is improper—there is no relationship between the actual harm and the punitive damage award, as***

***the district court improperly used the 1.2 million cashier's check as the basis for its punitive damage award.***

The district court's award of punitive damages is not "reasonably related" to the actual harm caused to the Daughters. *See Gore*, 517 U.S. at 581; *Bongiovi*, 122 Nev. 582–83. The calculation the district court used in awarding compensatory damages is based on the amount of Trust income the Daughters should have received from the Trust from June 2013 to April 2015—$1,742,053—money that is "just gone" from the trust account, and unrecoverable by the Court appointed Trustee. (4–6 AAPP 452–462, 540, 622–630, 724–725.) The 1.2 million cashier's check, on the other hand, was recovered by the Court-Appointed Trustee, and not included in the general damages to be recovered by the Daughters. (6 AAPP 664.)

Judge Sturman herself expressed reservations regarding imposing punitive damages based upon the total amount of compensatory damages, stating: "So is that fraudulent? Is that in—willful? We don't have any testimony of that." (6 AAPP 645.) It was impossible to tell at the time of the evidentiary hearing how much of the 1.7 million awarded in compensatory damages was based upon Appellant's willful misconduct versus Appellant's improper actions as trustee. (6 AAPP 645, 656.) In fact, the use of the cashier's check as a measure of punitive damages was offered by Respondents' counsel as "common ground" between the district court's reservations regarding using the compensatory damages as the correct measure of

punitive damages, and the district court's desire to discourage similar conduct from future trustees. (6 AAPP 660, 663–664.)

Accordingly, Appellant's conduct regarding the cashier's check has *no relation* to the court's determination of what constituted actual harm to the Daughters, and is certainly not "reasonable and proportionate" as the ratio of punitive damages to actual harm in this case is a blatantly unconstitutional (3600000:0). *See Gore*, 517 U.S. at 583 (Stating "[w]hen the ratio is a breathtaking 500 to 1" the award must "raise a suspicious judicial eyebrow" (internal citations omitted)); *Bongiovi*, 122 Nev. 582–83. Further, While Appellant's conduct regarding the cashier's check may have been erratic, reckless, or negligent, the amount of "actual harm" inflicted by the cashier's check is nonexistent, as the check was delivered to the Court-Appointed Trustee by Appellant's Attorneys. (5 AAPP 531–532.)

Finally, the punitive damages award here is excessive when compared to the penalties imposed in a similar circumstance, such as embezzlement. Embezzlement of occurs when a "bailee" (or agent entrusted to carry collect and receive money) converts the money to his or her own use with the intent to steal or defraud the owner, with a penalty of restitution, a fine of $10,000 (if the amount embezzled is more than $3,500) and jail time. *See* NRS 205.300; NRS 205.0835. Restitution awards must be based upon "reliable and accurate information" *Cleveland v. State*,

124 Nev. 1458, 238 P.3d 802 (2008). However, the district court's August 8, 2017 award of punitive damages is not based upon its findings related to the compensatory damages but is instead an arbitrary decision to impose treble damages on a cashier's check that was, upon information and belief, never introduced into evidence. (1 AAPP 10–13; 4 AAPP 394; 5 AAPP 531–585.)

### 2. *The district court lacks substantial evidence to support its Punitive Damage Award.*

The district court's award of punitive damages should be vacated as it is not supported by substantial evidence. *See Bongiovi*, at 581, at 451; *Fowler v. Courtemanche*, 202 Or. 413, 448-49 (1954); *Mike Davidov Co. v. Issod*, 78 Cal.App.4th 597, 606, 92 Cal.Rptr.2d 897, 903 (2000). First, no evidence has been introduced (other than the testimony of the Court-Appointed Trustee) that the check existed, as the check has not been admitted into evidence. (5 AAPP 531–585.) Second, no evidence was provided at the evidentiary hearing that Appellant intended to keep the cashier's check for herself, as the cashier's check was made payable to the Trust and was ultimately delivered to the Court-Appointed Trustee by Appellant's attorneys. (5 AAPP 531-532.) Third, the district court provided no rationale as to why it decided to treble the amount of the cashier's check—an amount wholly unrelated to the Compensatory Judgment. The decision to base the

award of punitive damages on the cashier's check is arbitrary and not supported by substantial evidence.

## II. APPELLANT IS NOT JUDICIALLY ESTOPPED FROM PURSING AN APPEAL OF THE PUNITIVE DAMAGES AWARD BY THE STATEMENTS OF HER FORMER COUNSEL.

Judicial estoppel is an equitable doctrine used to protect the judiciary's integrity and is invoked by a court at its discretion. See *NOLM, L.L.C. v. Cnty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Whether judicial estoppel applies is a question of law that the Court reviews de novo. *Id.* The doctrine of judicial estoppel is an "extraordinary remedy," and will only bar a party from raising an argument when the following conjunctive test is satisfied:

> (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

*See Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 8, 390 P.3d 646, 652 (2017); *Delgado v. American Family Ins. Group*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009).

All five elements are necessary to sustain a finding of judicial estoppel. *Delgado*, 125 Nev. at 570, 217 P.3d at 567. Here, the conduct by Mr. Lenhard does not satisfy all five elements. Although the representations made by Mr. Lenhard

were made in a judicial proceeding, his words do not warrant the "extraordinary remedy" of judicial estoppel, and cannot prevent Appellant from challenging the punitive damages award.

The position advanced by Mr. Lenhard in his oral argument is not totally inconsistent with Appellant's position in this appeal. Mr. Lenhard, in asking this Court to affirm "an order to determine that [Appellant] had improperly administered the trust," was asking this court to affirm the district court's September 19, 2016 order. (9 AAPP 960.)

Seeking to affirm the district court's September 19, 2016 Order on the "No-Contest" appeal is not a separate position from what Appellant is arguing in the current appeal. In fact, Mr. Lenhard was correct in asking this Court to affirm the district court's September 19, 2016 Order. As argued above, the September 19, 2016 order contained *no* finding of liability for punitive damages. What Appellant is now disputing is the district court's August 8, 2017 decision to impose punitive damages without following statutory procedure, and in doing so, violated the Due Process Clause of the Fourteenth Amendment.

In any event, Appellant has never argued that she "accepts" punitive damages were warranted and that "no further punishment is justified" (*See* Ans. Brief at 41.) Mr. Lenhard's arguments speak to the fact that Appellant has accepted the district

court's surcharge and that this Court should affirm the district court's decision to not invoke the no contest clause—not that she has accepted a punitive damage award. (*See* Ans. Brief at 41–42; 9 AAPP 960–61.) As Appellants position in both the No-Contest Clause appeal and the current appeal is not "totally inconsistent" the "extraordinary remedy" of judicial estoppel should not be applied.

## III. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO CONTINUE TRIAL.

This Court reviews the district court's decision on a motion for continuance for an abuse of discretion. *Bongiovi,* at 443, at 569. Although the withdrawal of an attorney is not on its face a ground for continuance, the facts and circumstances surrounding this case show that the district court acted arbitrarily in denying Appellant's motion for continuances, causing extreme prejudice.

First, the Appellant was not required to submit an affidavit to the district court in support of her motion to continue the evidentiary hearing. The Daughters' reliance on *Piazza v Reid*, 83 Nev 123, 424 P.2d 413 (1967) is inappropriate. While the facts of *Reid* contained an oral motion for continuance, the ruling rested upon a motion made under NRS 16.010, which governs motions to postpone trial based upon the absence of evidence. *Reid*, 83 Nev. At 123; NRS 16.010. Here, the motion for continuance was not based on the absence of evidence but instead on Appellant's lack of counsel. Further, the Daughters' citation to *In re Estate of Eccleston*, 279

P.3d 739 (Kan. Ct. App. 2012) is inapposite. In that case, the appellant ignored a rule that a motion for new trial must be filed within 10 days—and instead filed his appeal five months after the trial court denied his motion. Here, there is no such rule being violated.

Second, Appellant did not "sit on her hands," and the prejudice she suffered at the hearing is not of her own making. Appellant made multiple requests to the court that funds be released for counsel (4 AAPP 426, 427–429, 463, 467–473.) Appellant had no way of knowing the district court would release funds until it issued its Minute Order on February 8, 2017, had no way of knowing that Mr. Semenza would decline to represent her after learning about the courts minute order issued at 3:10 PM the afternoon before the hearing, and could not contact alternative counsel as the court's order specified that the Court-Appointed Trustee release funds only to Mr. Semenza. (4–6 AAPP 465–667.)

Appellant was severely prejudiced by her lack of counsel at the evidentiary hearing. The district court did not inform Appellant of her right to present a case after the Daughters rested, and did not give Appellant the opportunity to cross-examine the witness. (5 AAPP 602-604, 607, 617.) Appellant did not have an entire year to prepare for this hearing, but rather less than one day, as she could not have known that Mr. Semenza would decline to represent her at this hearing, even with the district court's order releasing funds. (4 AAPP 463; 467–469.) Further, the

Daughters, the Court-Appointed Trustee, and even the district court itself have misgivings regarding Appellant's competence and serious concerns regarding persons exerting undue influence over the Appellant. (1 AAPP 46–94; 6 AAPP 730.)

The district court allowing an elderly woman, with less than an hour's notice that she would not be represented by counsel, who had no exhibits in front of her and no way to obtain those exhibits, to represent herself at an evidentiary hearing on less than a day's notice, is an abuse of discretion. (4–5 AAPP 482, 488, 490, 494–-495, 539, 549, 553, 560–561, 563, 564–566, 573, 594.)

## IV. THE DISTRICT COURT'S FAILURE TO CONDUCT THE "SUBSEQUENT PROCEEDING" UNDER NRS 42.005(3) AND THE DENIAL OF APPELLANT'S MOTION TO CONTINUE WAS NOT HARMLESS ERROR AND REQUIRES REVERSAL.

An error is harmless when it does not affect a party's substantial rights. NRCP 61. The inquiry into whether an error is harmless is fact-dependent and requires the Court to evaluate the error in light of the entire record. *Carver v. El–Sabawi*, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005). If a moving party can show that the error is prejudicial, reversal may be appropriate. *Cook v. Sunrise Hospital & Medical Center*, 124 Nev. 997, 1006–07, 194 P.3d 1214, 1219–20 (2008). **A denial of due process is never harmless error.** *Republic Nat'l Bank of Dallas v. Crippen*, 224 F.2d 565, 566 (5th Cir. 1955) (emphasis added).

Here, a review of the entire record shows that appellant's due process rights were violated, which is never harmless error. There is no question that the district court's award of punitive damages was based on improper evidence, and unrelated to the actual damages suffered by the Daughters, in violation of the Fourteenth Amendment Further, the district court violated the procedural requirements of NRS 42.005(3), which was enacted as a direct exercise of legislative judgment, and are worth respecting in any instance.

Finally, the district court's abuse of discretion in denying Appellant's motion to continue was anything but harmless. Through the actions of the district court, Appellant was effectively denied any method of meaningful participation throughout the evidentiary hearing. But for the district court's actions, Appellant would have been able to put on a defense during the February 2017 hearing, and potentially avoid the egregious abuse of due process that exists within the August 8, 2017 Order. As it is impossible to predict with any accuracy whether the denial of the continuance would have resulted in harmless error and what would have occurred in the absence of this abuse of discretion, this matter should be remanded to allow Appellant to put on a defense in this case.

The actions of the district court in this case violates Appellant's substantial rights by denying Appellant the protections of the due process clause of the Fourteenth Amendment, ignoring the statutory protections set by the Nevada

legislature, and abusing its discretion through the denial of the motion for continuance. Therefore, the actions of the district court do not constitute harmless error.

## CONCLUSION

In sum, Appellant requests that the Court protect the due process rights of appellant and uphold the statutory mandate set forth by the Nevada legislature in NRS 42.005(3) by vacating the Compensatory Judgement and Punitive Judgement and remanding this matter to the district court for further proceedings where Appellant will be able to have a fair hearing with legal representation.

## CERTIFICATE OF COMPLIANCE

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 style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 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 proportionately spaced, has a typeface of 14 points, and contains 3,753 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that 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 appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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.

Respectfully submitted this 4th day of October, 2018.

SOLOMON DWIGGINS & FREER, LTD.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I hereby certify that I am an employee of the law firm of Solomon Dwiggins & Freer, Ltd., and that on October 4, 2018, I filed a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, with the Clerk of the Court through the Court's e-flex electronic filing system and notice will be sent electronically by the Court to the following:

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