IN THE SUPREME COURT OF THE STATE OF NEVADA

MMAWC, LLC, a Nevada limited liability company; BRUCE DEIFIK, an individual; and NANCY AND BRUCE DEIFIK FAMILY PARTNERSHIP LLLP, a Colorado limited liability partnership,

Appellants

v.

ZION WOOD OBI WAN TRUST and SHAWN WRIGHT as trustee of ZION WOOD OBI WAN TRUST; WSOF GLOBAL, LLC, a Wyoming limited liability company,

Respondents.

APPEAL No. 75596

Eighth Judicial District Court
Case No. A-17-764118-C

APPELLANTS' [Amended] OPENING BRIEF

Attorney For Appellants:
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APPELLANTS' NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Appellants/Defendants MMAWC, LLC, Bruce Deifik and the Nancy And Bruce Deifik Family Partnership LLLP certifies that:

MMAWC, LLC is a private Nevada limited liability corporation registered to do business in Nevada. To our knowledge, there are no publicly held companies that own 10% or more of common stock of MMAWC, LLC and that no publicly held company owns any interest in MMAWC, LLC.

The Nancy And Bruce Deifik Family Partnership LLLP is a private Colorado family partnership that does not do transact business in Nevada within NRS Chapter 86. To our knowledge, there are no publicly held companies that own 10% or more of common stock of the Nancy And Bruce Deifik Family Partnership LLLP and that no publicly held company owns any interest in the Nancy And Bruce Deifik Family Partnership LLLP.

MMAWC, LLC, Bruce Deifik and the Nancy And Bruce Deifik Family Partnership LLLP have been represented in this appeal and the underlying matter by the following attorneys and law firms:

BLACK & LOBELLO
Maximiliano D. Couvillier III, Esq. NSB 7661
10777 W. Twain Ave., Ste. 300
Las Vegas, Nevada 89135

and
KENNEDY & COUVILLIER, PLLC
Maximiliano D. Couvillier III, Esq. NSB 7661
3271 E. Warm Springs Rd.
Las Vegas, NV 89120

Respectfully Submitted this 15th day of August, 2018.

KENNEDY & COUVILLIER< PLLC

/s/ Maximiliano D. Couvillier III, Esq.
Maximiliano D. Couvillier III, Esq. NSB 7661

Attorneys for Appellants MMAWC, LLC, Bruce Deifik and The Nancy And Bruce Deifik Family Partnership LLLP

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over the appeal pursuant to NRS 38.247(1)(a), which provides in relevant part: "An appeal may be taken from…[a]n order denying a motion to compel arbitration." *Id.* Appellants appeal from an order denying a motion to compel arbitration that was entered on March 13, 2018 (*Appellants' Appendix ("AA") Vol. 1, AA205-AA206*).[1]

[1] Undersigned Appellants' counsel made several good faith efforts to confer with Respondents counsel regarding the Appendix, as provided by NRAP 30(a). Respondents' counsel, however, did not respond and Appellants are filing their individual Appendix.

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STATEMENT OF ISSUES FOR REVIEW

1. Whether NRS 597.995 Is Invalid And Unenforceable Because It Violates The Federal Arbitration Act, Which Preempts NRS 597.995.

2. Whether The District Court's Application of NRS 597.995 Here Violated the U.S. Constitution.

3. Whether The District Court Erred In Refusing To Apply And Follow The Federal Arbitration Act.

4. Whether The Circumstances Here Demonstrate That NRS 597.995 Is Vague And Ambiguous And Therefore, Void And Unenforceable.

5. Whether The District Court Abused Its Discretion and/or Erred In Elevating Form Over Substance And Finding The Arbitration Provision At Issue Here Was Void Under NRS 597.995.

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ROUTING STATEMENT

Respectfully, this is appeal should be retained by the Supreme Court because this appeal raises constitutional issues, important issues that significantly affect commercial transactions and agreements, and because this appeal takes up the issues regarding NRS 597.995 observed by the Supreme Court in *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 580, 2016 WL 5800335 *1, n. 1 (Nev. 2016).

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STATEMENT OF THE CASE

This appeal arises from the District Court's refusal to enforce a clear and unambiguous arbitration provision ("**Arbitration Provision**") pursuant to NRS 597.995. The sole issue on appeal is whether the parties' otherwise valid, expressly negotiated and jointly drafted arbitration agreement is nonetheless void under NRS 597.995.

First, the Arbitration Provision at issue complies with NRS 597.995. While the Arbitration Provision does not specifically have a signature or initial line underneath the provision for the parties' signature or initials, the arbitration provision was specifically negotiated, drafted and authorized by the parties and their respective counsel and thus, substantively complies with NRS 597.995, which does not set forth clear standards for compliance.

Second, and more importantly, NRS 597.995 is not enforceable because it violates the Federal Arbitration Act, which preempts NRS 597.995 under the Supremacy Clause of the US Constitution, as this Court previously suggested in *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 580, 2016 WL 5800335 *1, n. 1 (Nev. 2016); *see* NRAP 36(c)(3).

STATEMENT OF FACTS

A. BACKGROND

Appellant MMAWC, LLC's ("**MMAWC**") is a private Nevada

limited liability company whose previous primary asset and business was operating and promoting mixed martial arts ("MMA") events across the United States under the marks and monikers "World Series of Fighting" and "WSOF," which intellectual property MMWAC owned. *AA Vol. 1 at AA004*, *AA105-115*. MMAWC's MMA events were also broadcasted across the United States and beyond via NBC Sports. *Id.*

Appellant BRUCE DEIFIK ("**Deifik**") is a founding member of MMAWC, who subsequently transferred his membership interest to the NANCY AND BRUCE DEIFIK FAMILY PARTNERSHIP LLLP ("**The Deifik Family Partnership**") which remains a member and owner of a majority of membership interests in MMAWC[2]. Respondent ZION WOOD OBI WAN TRUST ("**Zion Wood**") is a member of a MMAWC. *AA Vol. 1 at AA004.* Respondent SHAWN WRIGHT ("**Wright**") is a Control person and Trustee of Zion Wood (*AA Vol. 1 at AA004-005*) and former employee and director of MMAWC. *AA Vol. 1 at AA042.*

Since its inception in 2011, MMAWC has had a tortured history of power struggles and financial disputes, which resulted in several lawsuits

[2] In 2015, MMAWC's initial manager and majority membership holder, Shawn Lampman, plead guilty and was sentenced to ten months in prison for willful failure to file a tax return. That same year, after Mr. Lampman became incarcerated, The Deifik Family Partnership acquired Mr. Lampman's interest in MMAWC and became the majority membership holder (Mr. Lampman's interest in MMAWC were held by the ACAK Revocable Trust, of which Mr. Lampman was the Trustee).

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over the years (*i.e.*, Eighth Judicial District Court Case Nos. A724474, A725225 and A725975; and US Dist. Court, Dist. Of NV, Case No. 2:15-cv-02065)("Prior Lawsuits"). Such power plays and disputes included certain loans purportedly made by Zion Wood to MMAWC and an October 2012 licensing agreement entered into between MMAWC (signed by then manager, Shawn Lampman, on behalf of MMACW) and Vince Hesser whereby MMAWC granted Mr. Hesser an "exclusive license for the WSOF brand to be used or licensed outside of the US territory for mixed martial arts events, or any other related business." *AA Vol. 1 at AA043.* Mr. Hesser served as Chief Financial Officer and on the Board of Managers of MMAWC between October 2013 and July 2015, when he was removed from both positions. *See e.g., AA Vol. 1 at AA042*. Mr. Hesser subsequently assigned that October 2012 licensing agreement to WSOF Global Limited, a Hong Kong company ("**Hong Kong**") (*AA Vol. 1 at AA105*), of which Respondent Wright was a director (*AA Vol. 1 at AA043*).

In February 19, 2016, MMAWC, Deifik and The Deifik Family Partnership, Wright, Zion Wood, Hong Kong and others entered into a comprehensive settlement agreement, composed of several cross-referenced and interconnected agreements, to resolve the Prior Lawsuits. At the top of the hierarchy of the interrelated written agreements that make up the

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settlement is a Confidential Settlement Agreement dated February 19, 2016 ("Settlement Agreement"). *AA Vol. 1 at AA042-064.* Flowing underneath the Settlement Agreement are several other agreements that are part of and expressly incorporated into the Settlement Agreement (as both exhibits and incorporation language) which include a Fourth Amended And Restated Operating Agreement Of MMAWC, L.L.C. ("4th Operating Agreement")(*AA Vol. 1 at AA066-102*) and Amendment to Consulting And Master Licensing Agreement ("Amended Licensing Agreement") (*AA Vol. 1 at AA104-115*).

Among other things provided by such inter-woven settlement agreements: (a) MMAWC paid $750,000 to Zion Wood as repayment in full for all outstanding loans (*AA Vol. 1 at AA048*); (b) Zion Wood agreed to reduce its membership interest in MMAWC to 4.50%, but not further dilutable, and the 4th Operating Agreement was executed (*id. at AA047*); and (c) MMAWC agreed to amend the October 2012 licensing agreement between MMAWC and Hong Kong, and the Amended Licensing Agreement was executed (*id.*), which defines MMAWC's business territory to include "the United States and its territories" and provides for Hong Kong to operate outside such business territory of MMAWC (*id. at* AA106). Respondent WSOF Global, LLC, a Wyoming limited liability company ("**Global**"),

represents and alleges that Mr. Hesser subsequently assigned Hong Kong's rights under the Amended Licensing Agreement to Respondent Global. *AA Vol. 1 at AA004, AA008.*

In 2016, MMAWC refocused its business from operating and promoting its own MMA events to becoming an investor in another, unrelated entity that operates its own MMA events. Specifically, MMAWC sold substantially all of its rights and assets, including the "World Series of Fighting" and "WSOF" marks and monikers, to MMAX Investment Partners, Inc. ("MMAX"), but provide MMAX with the Amended Licensing Agreement. MMAX initially promoted and produced its MMA events using the "World Series of Fighting" and "WSOF" marks and monikers across the United States. *AA Vol. 1 at AA006 (¶14).* MMAX, however, ultimately opted to operate and promote its own MMA events under MMAX's primary mark and moniker "Professional Fighter's League" or "PFL" and eventually discontinued promoting its MMA events under the "World Series of Fighting" tradename. *AA Vol. 1 at AA011* (¶*64*).

In sum, MMAWC's current primary operation is simply being an investor in MMAX, and MMAWC's asset is its membership interest in MMAX. Moreover, after such transaction, the rights to use the "WSOF" or "World Series of Fighting" brands and monikers conveyed in the October

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2012 licensing agreement or its Amended Licensing Agreement have not been restricted. Nor have Respondents' interest in MMAWC been affected. In other words, Respondents' interest in MMAWC did not decrease after MMAWC sold its assets and became an investor in MMAX.

Nonetheless, in the action below, the Respondents attempt to usurp certain interests they manifestly do not have. In sum, Respondents' substantially allege that: (a) they somehow acquired certain licensing rights to the intellectual property of MMAX, *i.e.*, the right to use MMAX's "Professional Fighter's League" brand and tradename as the result of MMAWC becoming an investor in MMAX; (b) their interest in MMAWC has somehow been diluted because MMAWC became an investor and part owner in MMAX; and (c) they are somehow entitled to their own, individual interest in MMAX (as opposed to what they have now: an indirect interest in MMAX via their undiluted interest in MMAWC). *AA Vol. 1 at AA003-023*.

B. RESPONDENTS' CLAIMS ARE SUBJECT TO THE EXPRESSLY AGREED TO AND A JOINTLY NEGOTIATED & DRAFTED ARBITRATION PROVISION

Respondents (and all relevant parties) were unquestionably aware of and specifically authorized the Arbitration Provision at issue because the parties, with aid of counsel (including Respondents' counsel of record), jointly negotiated, drafted and expressly agreed to such Arbitration

Provision.

Respondents' claims are all based on the integrated settlement agreements discussed above (*e.g.*, the Settlement Agreement, 4th Operating Agreement and Amended Licensing Agreement)[3] which are subject to an expressly negotiated Arbitration Provision that was jointly drafted by the parties and subsequently expressly agreed to by the parties.

Specifically, the Amended Licensing Agreement provides the broad reaching Arbitration Provision at issue here:

> 18. Arbitration. MMA and Consultant agree that

[3] Respondents' first and second claims are for breach of the Settlement Agreement and associated and incorporated Licensing Agreement, and related breach of the implied covenant of good faith and fair dealing. *AA Vol. 1 at AA015-016*. Respondents' third claim seeks declaratory relief as to the parties' rights and obligations under the Settlement Agreement. *Id. at AA017*. Respondents' fourth and fifth claims for "Intentional Interference with Prospective Economic Advantage" and "Tortious Interference with Contract" concern Respondents' alleged rights under the Licensing Agreement. *Id. at AA008, AA012, AA015, AA018, AA019(Comp. ¶¶49, 76, 77, 104-107, 139-146 & 147-153)*. Respondents' sixth claim alleges alter ego liability for Deifik and the Deifik Family Partnership for the alleged contract claims against MMAWC. *Id. at AA019* (*¶153*). Respondents' seventh claim is for breach of fiduciary duty arising from the Settlement Agreement and the 4th Operating Agreement. *Id. at AA020*. Respondents' ninth claim for relief seeks specific performance of the interrelated settlement agreements. *Id. at AA021-022*.

Respondents' eighth claim for RICO was dismissed with leave to amend, but Respondents did not amend their RICO claim within the deadline imposed by the District Court. *AA Vol. 1 at AA2016.* Finally, Respondents' tenth claim is an unjust enrichment asserted in the alternative to the contract claims. *Id. at AA022.*

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> any dispute, controversy, claim or any other causes of action whether based on contract, tort, misrepresentation, or any other legal theory, related directly or indirectly to the Master License (as amended hereby), which cannot be amicably resolved by the parties, shall be resolved by binding arbitration in accordance with the provisions of this Section 18. Unless the parties agree to use other rules, or the arbitrator deems other rules to be applicable, the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") in effect at the time the demand for arbitration is filed, and either the Federal Arbitration Act (Title 9, U.S. Code) or the applicable State of Nevada arbitration statute. The arbitration award or decision may be confirmed, entered and enforced as a judgment in a court having jurisdiction, subject to appeal only in the event of the arbitrator's misapplication of the law, no evidence to support the award, or such other grounds for appeal of arbitration awards that exist by statute, common law or the applicable rules. If any party commences litigation in violation of this Section 18, or refuses or neglects to timely submit to arbitration in accordance with this Section, then such party shall reimburse the other party(s) for costs and expenses, including reasonable attorney's fees: (1) incurred in seeking abatement or dismissal of such litigation; and/or (2) incurred in judicially compelling arbitration. However, the foregoing does not preclude a party from seeking emergency relief, including injunctive relief, from a court of competent jurisdiction and the prosecution of a request for such emergency relief will not be deemed a breach or waiver of the provisions contained herein.

See AA Vol. 1 at AA114.

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The **Amended Licensing Agreement was initially drafted by Respondents' counsel of record, Byron Thomas, Esq.,** in late January 2016. On January 26, 2016, counsel for MMAWC, Christopher Childs, Esq., responded to Respondents' counsel with several edits to the initial draft by Respondents' counsel:

> **Christopher Childs** <chris@childswatson.com> Tue, Jan 26, 2016 at 11:55 AM
> To: Vince Hesser <vincehesser@yahoo.com>, "Antony M. Santos" <tony@amsantoslaw.com>, Byron Thomas <byronthomaslaw@gmail.com>
> Cc: Keith Redmond <keithredmond@mac.com>, Carlos Silva <carlos@wsof.com>, Bruce Deifik <bruce@integprop.com>, Max Couvillier <mcouvillier@blacklobellolaw.com>
>
> Gentlemen,
>
> Attached is a redline of the license against the last draft that Byron sent me. Although I have reviewed the document you proposed with Keith Redmond, I have not had the chance to review it in detail with Carlos Silva or Bruce Deifik. Hopefully the attached draft and redline help move along our 1:30 toward a resolution.
>
> Please use the following dial-in information for the call:
>
> Dial in: 760-569-7171
> Access Code: 207 555 532
>
> Thank you,
> Chris
>
> Christopher R. Childs
> Childs Watson & Gallagher, PLLC
> 770 E. Warm Springs Road, Suite 225
> Las Vegas, Nevada 89119
> Email: chris@childswatson.com
> Office: 702-848-4533
> Mobile: 702-606-1034

AA Vol. 1 at AA160. Included in such edits was the addition of the Arbitration Provision at Paragraph 18 of the Amended License Agreement. In addition to Respondents' counsel, Respondent Zion's control person (Vince Hesser[4]) was directly included among the recipients of Mr. Childs' January 26, 2016 email and discussion of the Arbitration Provision. *Id.* Mr.

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Childs' January 26 response further confirms the conference call scheduled among the parties to discuss the Amended Licensing Agreement and various related documents. *Id.*

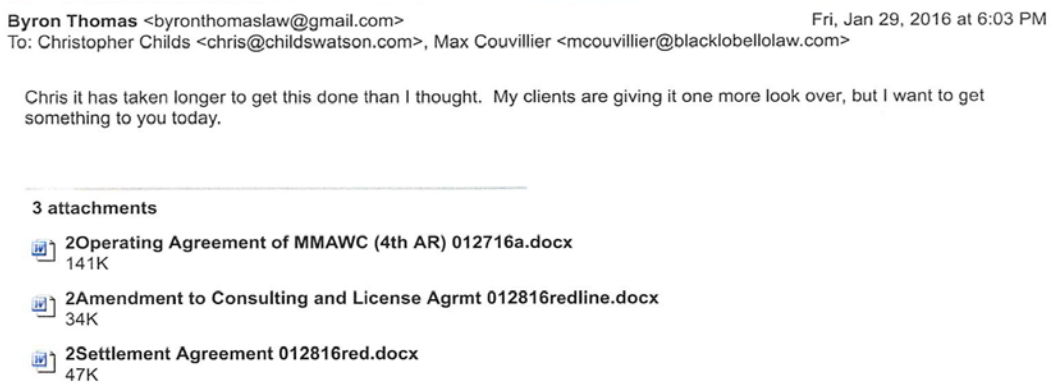
In the draft exchanged among Respondents' counsel, Respondent Zion and MMAWC's counsel, the Arbitration Provision was prominently identified in distinctive blue, underlined font that stood apart from the original text:

> 18. **Arbitration.** MMA and Consultant agree that any dispute, controversy, claim or causes of action whether based on contract, tort, misrepresentation, or any other legal theory, related directly or indirectly to the Master License (as amended hereby), which cannot be amicably resolved by the parties, shall be resolved by binding arbitration in accordance with the provisions of this Section 18. Unless the parties agree to use other rules, or the arbitrator deems other rules to be applicable, the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") in effect at the time the demand for arbitration is filed, and either the Federal Arbitration Act (Title 9, U.S. Code) or the applicable State of Nevada arbitration statute. The arbitration award or decision may be confirmed, entered and enforced as a judgment in a court having jurisdiction, subject to appeal only in the event of the arbitrator's misapplication of the law, no evidence to support the award, or such other grounds for appeal of arbitration awards that exist by statute, common law or the applicable rules. If any party commences litigation in violation of this Section 18, or refuses or neglects to timely submit to arbitration in accordance with this Section, then such party shall reimburse the other party(s) for costs and expenses, including reasonable attorney's fees: (1) incurred in seeking abatement or dismissal of such litigation; and/or (2) incurred in judicially compelling arbitration. However, the foregoing does not preclude a party from seeking emergency relief, including injunctive relief, from a court of competent jurisdiction and the prosecution of a request for such emergency relief will not be deemed a breach or waiver of the provisions contained herein.

AA Vol. 1 at AA172.

[4] *See AA Vol. at AA005 (¶5).*

On January 29, 2016, Respondents' counsel responded to Mr. Childs' revision stating that: (a) his clients had reviewed Mr. Childs' January 26 draft of the Amended Licensing Agreement(which included the Arbitration clause); and (b) he had some changes to the revised draft:



Byron Thomas <byronthomaslaw@gmail.com> Fri, Jan 29, 2016 at 6:03 PM
To: Christopher Childs <chris@childswatson.com>, Max Couvillier <mcouvillier@blacklobellolaw.com>

Chris it has taken longer to get this done than I thought. My clients are giving it one more look over, but I want to get something to you today.

3 attachments

2Operating Agreement of MMAWC (4th AR) 012716a.docx
141K

2Amendment to Consulting and License Agrmt 012816redline.docx
34K

2Settlement Agreement 012816red.docx
47K

AA Vol. 1 at AA178.

Neither Respondents' counsel nor his clients objected to the Arbitration Provision; nor expressed any concerns that it did not comply with NRS 597.995 or was otherwise unenforceable. On the contrary, those changes that Respondents' counsel mentioned included **Respondents' counsel broadening the scope of the Arbitration Provision.** *AA Vol. 1 at A189.*

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Specifically, Respondents' counsel broadened the Arbitration Provision to cover any cause of actions beyond the Amended Licensing Agreement, which he identified by red font and underlined edits:

> 18. **Arbitration.** MMA and Consultant agree that any dispute, controversy, claim, uncured breach or any other causes of action whether based on contract, tort, misrepresentation, or any other legal theory, related directly or indirectly to the Master License (as amended hereby), which cannot be amicably resolved by the parties, shall be resolved by binding arbitration in accordance with the provisions of this Section 18. Unless the parties agree to use other rules, or the arbitrator deems other rules to be applicable, the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") in effect at the time the demand for arbitration is filed, and either the Federal Arbitration Act (Title 9, U.S. Code) or the applicable State of Nevada arbitration statute. The arbitration award or decision may be confirmed, entered and enforced as a judgment in a court having jurisdiction, subject to appeal only in the event of the arbitrator's misapplication of the law, no evidence to support the award, or such other grounds for appeal of arbitration awards that exist by statute, common law or the applicable rules. If any party commences litigation in violation of this Section 18, or refuses or neglects to timely submit to arbitration in accordance with this Section, then such party shall reimburse the other party(s) for costs and expenses, including reasonable attorney's fees: (1) incurred in seeking abatement or dismissal of such litigation; and/or (2) incurred in judicially compelling arbitration. However, the foregoing does not preclude a party from seeking emergency relief, including injunctive relief, from a court of competent jurisdiction and the prosecution of a request for such emergency relief will not be deemed a breach or waiver of the provisions contained herein.
>
> **[signature page follows]**
>
> 11
>
> Amendment to Consulting and License Agrmt 012816redline.docx~~Amendment to Consulting and License Agrmt 012716~~

AA Vol. 1 at A189.

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On February 10, 2016, Respondents' counsel confirmed that his clients approved the jointly drafted settlement documents, including the revised Licensing Agreement and Arbitration Provision, which Respondents' counsel himself broadened:

> On Wed, Feb 10, 2016 at 12:09 PM, Byron Thomas <byronthomaslaw@gmail.com> wrote:
> Hello Chris. Have you guys had a chance to look at the documents? I know there was a delay on our part in getting them back to you, but we pretty much accepted all of Chris's changes from his last version, so I thought we would get this done in a day or so. If that is not going to happen please let me know. Deadlines in the litigation were pushed out until this Friday and I need to know if we are back in litgation [sic] mode. Thanks.

AA Vol. 1 at AA193.

Shortly thereafter, the Amended Licensing Agreement was signed by Respondent Wright (*AA Vol. 1 at AA114-115)*, who is also the Managing Member of Respondent Global (*id. at AA147*) and the control person and trustee of Respondent Zion (*id. at AA005)(¶5))*.

As drafted by Respondents' counsel, the broad Arbitration Provision not only applies to all claims concerning the Amended Licensing Agreement, but to all claims concerning or arising from the related and integrated Settlement Agreement and 4th Operating Agreement. Thus, Section 2 of the Settlement Agreement also provides that the Amended

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Licensing Agreement is a "material part of settlement" and "incorporated" thereto. *AA Vol. 1 at AA047 (¶2.1)*. Respondents further admit the terms and conditions of the underlying and associated Licensing Agreement and 4th Operating Agreement apply to the Settlement Agreement. *See i.e., AA Vol. 1 at A005 (¶10)*("The Amended Operating Agreement was attached to the Settlement Agreement as an Exhibit and fully incorporated into the Settlement Agreement"); *id. at AA016 (¶110*)(alleging that the Defendants "breached the Settlement Agreement….by breaching the terms of the Licensing Agreement…").

C. DISTRICT COURT DECLINED TO ENFORCE ARBITRATION BECAUSE IT DETERMINED THAT IT VIOLATED NRS 597.995

On January 8, 2018, Appellant MMAWC moved to dismiss the complaint and to enforce the parties' jointly prepared Arbitration Provision. *AA Vol. 1 at AA024-115.*[5] Respondents argued that it was not enforceable because it did not comply with NRS 597.995. *AA Vol. 1 at AA118-119.* The District Court agreed with Respondents and concluded that the Arbitration Provision was void pursuant to NRS 597.995 and, on March 13, 2018,

[5] Appellants Deifik and The Deifik Family Partnership were served after the February 21, 2018, hearing on Appellant MMAWC's Motion to Dismiss, during which the Court denied the motion. Accordingly, Deifik and The Deifik Family Partnership filed a subsequent joinder and motion to dismiss on March 23, 2018, to preserve their appeal rights with MMAWC. *See AA Vol. 1 at AA211 to Vol. 2 at AA337.*

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entered an order denying Appellant's motion to compel arbitration ("03/13/18 Order"). *AA Vol. 1 at AA206.*

SUMMARY OF ARGUMENT

The only issue before the District Court, and now before this Court, is whether the parties' Arbitration Provision is void under NRS 597.995.

Foremost, NRS 597.995 is preempted by the Federal Arbitration Act, which compels enforcement of the Arbitration Provision here and reversal of the District Court's 03/13/18 Order.

To the extent that NRS 597.995 may somehow be applicable here (which it is not), the record demonstrates substantive compliance. Respondents had notice of and specifically negotiated, drafted, authorized and agreed to the Arbitration Provision as otherwise required by NRS 597.995. Respectfully, the District Court's elevated form over substance in its determination and its conclusion that the parties' Arbitration Provision was void under NRS 597.995 was abuse of discretion or reversable error.

ARGUMENT

Standard Of Review

Together, Section 2 of the Federal Arbitration Act (9 U.S.C. § 2 (2013)) and Nevada's Uniform Arbitration Act of 2000 express Nevada's fundamental policy favoring the enforceability of arbitration agreements.

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NRS 38.219(1) provides: "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except ... upon a ground that exists at law or in equity for the revocation of a contract." *Id.*

Enforcement of an arbitration provision is a question of law which this Court reviews de novo. *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 118–19 (2015)(*quoting State ex rel. Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009)). "As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration." *Id*.

Courts may not invalidate an agreement to arbitrate under state laws, such as NRS 597.995, which are applicable only to arbitration. *U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. Adv. Op. 25, 415 P.3d 32, 40 (2018)(*citing Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652 (1996)("Courts may not ... invalidate arbitration agreements under state laws applicable only to arbitration provisions.").

I. As This Court Previously Suggested, NRS 597.995 Is Invalid And Unenforceable Because It Violates The Federal Arbitration Act, Which Preempts NRS 597.995

In *Fat Hat, LLC v. DiTerlizzi*, this Court alluded to the fact that NRS 597.995 violates the Federal Arbitration Act:

> Fat Hat makes no argument that the Federal Arbitration Act, 9 U.S.C. § 1, et seq., applies. We therefore do not address NRS 597.995's validity or application under the FAA. *But see Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

Id., 385 P.3d 580, 2016 WL 5800335 *1, n. 1 (Nev. 2016); *see* NRAP 36(c)(3).

The Nevada Supreme Court is indeed correct, NRS 597.995 is displaced and preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.* Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, **shall be valid, irrevocable, and enforceable**, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. (emphasis added).

In *Doctor's Assocs.*, the authority cited by the Nevada Supreme Court in *Fat Hat*, the U.S. Supreme Court determined that the FAA applies to state courts and trumps any state statute (like NRS 597.995) which single out arbitration provisions to void them in otherwise valid contracts. *Id.* 517 U.S. 681, 116 S. Ct. 1652. Specifically, the U.S. Supreme Court commands that

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"the FAA applies in state as well as federal courts and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Doctor's Assocs., Inc.*, 517 U.S. at 684, 116 S. Ct. at 1655 (internal quotations omitted)(*citing Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S.Ct. 852, 859 (1984)). Thus, the U.S. Supreme Court further commands that, per the FAA, "Courts may not … invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs., Inc.*, 517 U.S. at 687, 116 S. Ct. at 1656; *see also Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270, 115 S. Ct. 834, 838, (1995)("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."). And here NRS 597.995 applies only to arbitration provisions and is therefore displaced and preempted by the FAA.

A main problem with NRS 597.995 is that it places arbitration clauses on an unequal footing vis-à-vis other contract provisions and settled contract law, giving arbitration provisions "suspect status." The U.S. Supreme Court reasons:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of any contract…. ***What States may not do is decide that a contract is fair enough to***

> ***enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful***, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress's intent.

Doctor's Assocs., Inc., 517 U.S. at 685–86, 116 S. Ct. at 1655 (emphasis added)(*quoting Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S.Ct. 834, 843 (1995)).

Therefore, NRS 597.995 does not preclude the Court from enforcing the parties' jointly negotiated, authorized and drafted Arbitration clause and dismissing Plaintiffs' Complaint in its entirety.

II. The District Court's Application of NRS 597.995 Here Violated the U.S. Constitution

The FAA was enacted pursuant to the Commerce Clause of the US Constitution (U.S. Const., Art. I, § 8, cl. 3) and "is enforceable in both state and federal courts." *Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id.*

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Thus, the U.S. Supreme Court in *Perry* (which is relied on by *Doctor's Assocs., Inc.*) specifically found that the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause" and preempts state law. *Perry*, 482 U.S. at 490–91, 107 S. Ct. at 2526. Accordingly, that any state arbitration statue [like NRS 597.995] which conflicts with the FAA, "must give way" under the Supremacy Clause. *Id.*

The Commerce Cause is undisputedly triggered here because the parties' settlement and corresponding agreements and activities, including the Arbitration Provision, involve commerce. As stated above, the FAA applies to "any transaction or a contract evidencing a transaction involving commerce…." 9 U.S.C. §1 *et seq.* The application of the FAA under the Commerce Clause is expansive and far reaching to the very outer limits of Constitutional power. The US Supreme Court has examined such language and the FAA's background and structure and concluded "that the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'" *Allied-Bruce Terminix Companies, Inc.*, 513 U.S. at 273–74, 115 S. Ct. at 839. And, the US Supreme Court has ultimately concluded that the FAA "signals an intent to exercise Congress' commerce power to the full." *Id.*, 513 U.S. at 277, 115 S. Ct. at 841.

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The record here includes several factors indisputably establishing interstate commerce. MMAWC promoted MMA events nationwide, which were nationwide broadcasted via the commonly known national network, NBC Sports (*AA Vol. 1 at AA004* (¶1)), which MMAX continues to broadcast after acquiring MMAWC's assets and rights (*id. at AA006)(¶14). See Fisher's Blend Station v. Tax Comm'n of State of Washington*, 297 U.S. 650, 655, 56 S. Ct. 608, 609 (1936)("By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."). Indeed, one of the MMA productions specifically at issue occurred in New York City, New York, which was nationally televised via NBC Sports. *AA Vol. 1 at AA008.*

Furthermore, the subject matter of the Amended Licensing Agreement expressly concerns interstate commerce, as defined by the FAA. Section 1 of the FAA defines "commerce" to include "**commerce among the several States or with foreign nations, or in any Territory of the United States**." *9 U.S.C. §1* (emphasis added). Respondent Global's rights at issue under the Amended Licensing Agreement[6] are rights to engage in commerce with foreign nations using the licensed marks and reserving MMAWC's

[6] As the represented assignee of Hong Kong, the original party to the Amended Licensing Agreement. *AA Vol. 1 at AA008 (¶50).*

commerce territory to include the United States and the rest of the Americas. Thus, Section 1.2 of Amended Licensing Agreement provides:

> The Parties agree that the geographic area within which Consultant shall be permitted to use the Licensed Marks for the Licensed Use pursuant to the terms of the Master License (as amended hereby) shall be any part of the world other than North America (including Canada, the United States and its territories and possessions, including, but not limited to, Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands, and U.S. ships at sea), the Islands of the Caribbean Basin, Mexico and the countries that comprise any party of Central America, and South America (the "WSOF Territory").

AA Vol. 1 at AA106 (§1.2).

Section 3 and 4 further provide that Respondents intend to produce several MMA events outside of North America, Central America or South America, which events may be broadcasted and/or promoted across the Unites States and world-wide via You Tube and other social media. *AA Vol. 1 at AA107-108.*

The District Court's 03/13/18 Order is manifestly contrary to the FAA and Commerce Clause and therefore, violates the US Constitution.

III. The District Court Erred In Refusing To Apply And Follow The Federal Arbitration Act, 9 U.S.C. § 1, et seq.

In seeking to compel arbitration, MMAWC established to the District Court that the FAA applies, which displaces NRS 597.995 and directs

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enforcement of the Arbitration Provision. *AA Vol. 1 at AA031-33 and AA153-155*. The District Court had no discretion to ignore the FAA and committed reversible error in refusing to apply the FAA. "So long as 'commerce' is involved, the FAA applies." *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 121 (2015). Thus, this Court further recognizes that "[t]he [US] Supreme Court has made it unmistakably clear that state courts must abide by the FAA, which is the supreme Law of the Land… and by the opinions of [the Supreme] Court interpreting that law." *Id.*, 131 Nev. Adv. Op. 71, 359 P.3d at 121 (internal citations and quotations omitted). Thus, the District Court was obligated to cede to the FAA and enforce the Arbitration Provision, and its failure to do compels reversal of its 03/13/18 Order and a directive to compel arbitration.

IV. The Circumstances Here Demonstrate That NRS 597.995 Is Vague And Ambiguous And Therefore, Void And Unenforceable

The constitutionality of a statute is a question of law that this Court reviews de novo. *Sheriff, Washoe Cty. v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002). "Statutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality." *Id.* (*quoting Childs v. State*, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991). To overcome this burden, there must be a " clear showing" of invalidity. *Sheriff, Washoe Cty.*, 118 Nev. at 857, 59 P.3d at 486. A statute is vague

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and unenforceable when "it lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Silvar v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006)

Appellants are aware that in the unpublished determination of *Fat Hat, LLC*¸ the three-member Panel determined that NRS 597.995 was not void or ambiguous regarding its scope[7], but respectfully the circumstances here reveal ambiguities and possible, unintended problems and obstacles to commercial, arms-length transactions which impermissibly burden the fundamental right to contract, as the District Court did here. The legislative intent behind NRS 597.995 is to address circumstances where arbitration provisions are obfuscated in consumer, unilaterally prepared boiler-plate and not readily obvious to one of the parties. *See NV Assem. Comm. Min. on AB 326, 3/27/2013 (BDR 52-803).* Thus, NRS 597.995(1) requires an agreement to "include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision." *Id.* NRS 597.995(1) however, does not specify or articulate what it means to include such specific authorization and what such authorization looks like. In other words, NRS 597.995 lacks specific standards for compliance.

[7] *Fat Hat*, 385 P.3d 580, 2016 WL 5800335.

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Fat Hat, LLC concerned boilerplate independent contractor and employment contracts presented by *Fat Hat, LLC* to employees or contractors. Under the facts of *Fat Hat, LLC* the Court's three-member Panel stated that the placement of an arbitration provision immediately above the signature line for the contract was somehow not "specific authorization" under NRS 597.995(1). *Id.* 2016 WL 5800335 at *2. The Panel also determined that an initial at the bottom of the page containing the arbitration provision was also not "specific authorization" under NRS 597.995(1) because the party had also initialed the other pages. *Id.* Ultimately, the Panel concluded printing a name and address in the blank spaces of the arbitration provision did constitute "specific authorization" under NRS 597.995(1). *Id.*

Respectfully, NRS 597.995(1) however, does not state or imply that printing a name and address constitutes "specific authorization." Nor does NRS 597.995(1)

say that a separate signature line is required. Nor does it say that initials by the arbitration provision are required. In sum, NRS 597.995(1) says nothing about what a specific authorization looks like, must state, must include, or where it is located vis-à-vis the arbitration provision. *See Silvar,* 122 Nev. at 293, 129 P.3d at 685 (a statute is vague when "it lacks specific standards,

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thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."). NRS 597.995(1) also says nothing about agreements and arbitration provisions that are jointly drafted by the parties, as is the case here.

To be sure the circumstances here unquestionably demonstrate that the arbitration provision was "specifically authorized" by Respondents, as substantively intended by NRS 597.995:

- The Amended Licensing Agreement is not a take it or leave it form/boilerplate agreement or consumer agreement.
- The Amended Licensing Agreement was jointly negotiated and drafted among Respondents and Appellants.
- In fact, Respondents' counsel initially drafted the Amended Licensing Agreement.
- Respondents' counsel and Respondents themselves actively discussed with Appellants the drafting and editing of the Amended Licensing Agreement, including the addition of the Arbitration Provision.
- Respondents' counsel edited and increased the reach and application of the Arbitration Provision, thereby conclusively demonstrating knowledge of the provision and agreement to

arbitrate; indeed Respondents wanted an even broader arbitration obligation imposed.

- Respondents agree and admit that the Amended Licensing Agreement, including the Arbitration Provision, together with the 4th Operating Agreement, are part and parcel of the Settlement Agreement.

See e.g., AA Vol. 1 at AA016; 047; 105-115; and 159-197.

NRS 597.995 says nothing about such circumstances and evidence. Certainly, the consideration of the foregoing evidence is not excludable as parol evidence (because evidence does not vary contract). And yet, such circumstances compellingly and without question show that the Arbitration Provision was specifically authorized and NRS 597.995 substantively satisfied, particularly when NRS 597.995 does not provide a clear and unambiguous form of compliance.

Moreover, it is facially apparent that the Amended Licensing Agreement is not a form or boiler plate agreement. It deals with a discreet subject matter regarding very specific and individualized: (a) intellectual property; (b) broadcast and promotion rights; (3) limitations on promotions and events; (4) geographic scope of commerce; and (5) parties, among other things; and the agreement cannot be replicated over and over just by

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changing one of the names of the parties. In other words, it is not like a residential loan agreement for example, which can be replicated by simply changing the names of the parties, purchase price and property address.

The lack of clarity and guidance from NRS 597.995 raises other concerns here, where you have parties, like Respondents, which take to machinations and suddenly disavow a jointly negotiated and drafted contract provision for self-serving purposes, as Respondents argued here because their counsel did not include a so-called "specific authorization" – whatever that may be – under NRS 597.995**. Indeed, Respondents are themselves responsible for such "omission" since they jointly drafted and edited the Amended Licensing Agreement and the Arbitration Provision**. If Respondents omitted drafting a "specific authorization" (however that may look like) from the Arbitration Provision because they never intended to comply with such provision, they have engaged in bad faith or committed fraud to induce Appellants' consent – which is safe to say not what NRS 597.995 intended as a result. On the other hand, a "specific authorization" may not have been restated because, *inter alia:* (i) again, NRS 597.995 does not say what such authorization looks like or must say; (ii) arbitration clauses should not be singled out "suspect" and treated differently than other contract terms, as the US Supreme Court recognized in *Doctor's Assocs.*,

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Inc., 517 U.S. 681, 116 S. Ct. 1652; or (iii) because such would have been unnecessary and redundant since Respondents and Appellants jointly discussed, negotiated and drafted the Arbitration Provision.

V. The District Court Abused Its Discretion and/or Erred In Voiding The Arbitration Because It Did Not Comply With Or Violated NRS 597.995 Because Such Findings Is Contradicted By The Record

Respectfully, the District Court exalted form of substance and ignored the compelling circumstances here which unquestionably show Respondents "specifically authorized" the Arbitration Provision. And, as discussed above, such "form" is vague and ambiguous. Accepting the District Court's determination allows the Respondents to escape by subterfuge their unquestionable agreement to arbitrate their claims.

Such is contrary to the very principles of justice, fairness and reasonableness. Indeed, this Court time and again rejects following form over substance when it delivers absurd and unfair results, as is the case below. *See e.g., Brad Assocs. v. Nevada Fed. Fin. Corp.*, 109 Nev. 145, 848 P.2d 1064 (1993). In *Brad Assocs.*, the district court granted the defendant credit union's motion to dismiss plaintiff's action because plaintiff failed to file a fictitious name certificate as required by NRS 602.070, which "clear mandate" states: "No action may be commenced or maintained by any

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person ... or general partnership ... unless prior to the commencement thereof the certificate required by this chapter has been filed." *Id.*, 109 Nev. at 147-149, 848 P.2d at 1066-1067 (citing NRS 602.070). Notwithstanding the clarity of NRS 602.070, this Court determined that the district court erred in granting the credit union's motion and dismissing plaintiff's claims because, given the circumstances, the district court wrongly elevated form over substance and dismissal was unreasonable:

> Brad Associates argues that, under the present facts, NRS 602.010 and NRS 602.070 should not operate to deny Brad Associates its day in court. The reason, contends Brad Associates, is because the note and the deed of trust were executed not by Brad Associates, but by the partners in their individual capacities. Accordingly, the Credit Union had all the information which a filed certificate would have given it.
>
> ****
>
> We agree with Brad Associates. The Credit Union knew full well the identity of the parties with whom it was dealing. Throughout the negotiations, the Credit Union was dealing with each individual partner of Brad Associates. Neither the original note nor the deed of trust and assignment of rents agreement makes any mention of Brad Associates. Indeed, according to the documents presented to this court, "Brad Associates" does not even appear until the extension agreement.
>
> Furthermore, the original loan applications presumably required the partners to disclose personal information to the Credit Union. Surely the Credit Union's decision to approve the loan was based on each individual partner's credit

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> worthiness and not upon Brad Associates' credit record. Even had Brad Associates filed a certificate as required by NRS 602.010, the Credit Union would have had no additional information on which to base its decision. Because the Credit Union had all the information which a certificate would have provided, we conclude that an application of NRS 602.070 would be a classic case of form over substance. Accordingly, we hold that the district court erred in granting the Credit Union's motion to dismiss Brad Associate's claim.

Brad Assocs., 109 Nev. at 148–49, 848 P.2d at 1066–67.

The District Court similarly erred here in ignoring the undisputed circumstances which clearly demonstrate that Respondents "specifically authorized" the Arbitration provision that they negotiated, discussed and drafted with Appellants.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court, vacate the 03/13/18 Order and direct the District Court to compel arbitration of Respondents' claims, as Respondents expressly agreed to via the Arbitration Provision they jointly negotiated and drafted.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO NRAP 32

1. I hereby certify that this Appellants' Opening 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, 2016 Edition, Times New Roman in 14-point font.

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

It is proportionately spaced, has a typeface of 14 points or more and contains approximately **6,115 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 an improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 23(e)(1), which requires every assertion in the brief regarding matters

in the record to be supported by 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: August 15, 2018.

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CERTIFICATE OF SERVICE

I certify that on August 15, 2018, I served a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** together with **APPELLANTS' APPENDIX VOLS. 1 & 2 (in CD Format**) upon all counsel of record by depositing the same in the US Mail, correct postage pre-paid, to the following at their last known address:

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