

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JESSEPH; AND CHARLES
CURCHWELL,
Appellants,

vs.

DIGITAL ALLY, INC.,
Respondent.

SUPREME COURT NO. 78480

District Court Case No. A-781874
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RESPONDENT DIGITAL ALLY, INC.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Respondent Digital Ally Inc. is a publicly-held company, but it has no parent corporations and no person or corporation owns more than 10% of Digital Ally Inc.'s stock.

Jeffrey F. Barr, Esq. of the law firm of ASHCRAFT & BARR | LLP has appeared as Counsel for Respondent Digital Ally Inc.

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Nevada has never recognized a cause of action called, “Attorney’s Fees.” Certain Shareholders (through their attorneys) wrote a letter to Digital Ally Inc. demanding that Digital Ally fix alleged defects in its capital structure. Digital Ally immediately fixed those defects. The Shareholders subsequently sued, asserting a single claim called, “Attorney’s Fees,” and seeking \$250,000. Does Nevada law recognize an autonomous cause of action for attorney’s fees?

STATEMENT OF THE CASE

The underlying nature of this case is a corporate dispute and involves a single claim for relief for attorney’s fees by Plaintiffs/Appellants Charles Jesseph and Charles Churchwell (collectively, the “Shareholders”). The Shareholders appeal from the Eighth Judicial District Court’s Order granting Defendant/Respondent Digital Ally Inc.’s (“Digital Ally”) Motion to Dismiss.

As detailed below, Nevada law recognizes no independent cause of action for “Attorney’s Fees” under the substantial benefit doctrine (or otherwise), and this Court should affirm the District Court’s Order.

STATEMENT OF FACTS

1. In May 2017, the Shareholders served a written demand on Digital Ally, demanding that the corporation fix certain purported issues with its capital structure. [JA0012-13, Comp. ¶¶ 38 and 39.]

2. In response and between June 2017 and August 2017, Digital Ally fixed the purported issues with its capital structure, publicly disclosing the purported issues with shareholder ratification of the adjustment. [JA0013-14, Comp. ¶¶ 40-46.]

3. Digital Ally adjusted the capital structure without litigation by the Shareholders.

4. Nevertheless, in September 2018, the Shareholders filed suit against Digital Ally. [JA0001.]

5. The sole claim for relief in the Shareholders' Complaint was a cause of action called, "Attorney's Fees." [JA0014-15, Comp. ¶¶ 45-49.]

6. The Shareholders' Complaint claimed that they were entitled to an award of attorney's fees because their letter "conferred a fundamental and substantial benefit on the Company's stockholders...." [JA0015, Comp. ¶¶ 47.]

7. The District Court granted Digital Ally's Motion to Dismiss, holding that "predicate litigation is an essential element to maintaining a claim for attorney's fees under the substantial benefit doctrine found in Nevada common law...." [JA0251.]

8. The Shareholders timely appealed the District Court's Order. [JA0256.]

SUMMARY OF THE ARGUMENT

In this case, the Shareholders claim that their attorneys' solitary letter conferred a benefit on Digital Ally and that without any underlying litigation, Nevada's iteration of the substantial benefit doctrine justifies an award of \$250,000 of attorney's fees.

It does not. The Shareholders' claim fails on three grounds.

First, "Attorney's Fees" are not a cognizable claim for relief in Nevada for two reasons: Preliminarily, Nevada courts lack subject matter jurisdiction to entertain an independent claim for attorney's fees. Next, this Court has repeatedly rejected an autonomous cause of action for attorney's fees. Nevada simply does not recognize a claim for attorney's fees divorced from an actionable right.

Second, the Shareholders misapply the substantial benefit doctrine. Underlying litigation is an existential prerequisite to awarding attorney's fees under the substantial benefit doctrine. Here, it is undisputed that the Shareholders filed no underlying litigation. The Shareholders, instead, wrongly claim that the district court can award them attorney's fees solely for their letter writing. But no State in the United States has adopted the Shareholders' broad reading of the substantial benefit doctrine. Thus, the District Court was correct in holding that "predicate litigation is an essential element to maintaining a claim for attorney's fees under the substantial benefit doctrine found in Nevada common law...." [JA0251.]

Third, serious public policy considerations militate against the expansive reading of the substantial benefit doctrine urged by the Shareholders.

In conclusion, this Court should affirm the District Court's Order.

ARGUMENT

I. "ATTORNEY'S FEES" ARE NOT A COGNIZABLE CLAIM¹

Implicitly in this case, the Shareholders seek to create a new claim for relief called, "Attorney's Fees." But the Shareholders fundamentally misconstrue the nature of attorney's fees. Attorney's fees are a remedy, not a right of action. *See generally*, Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* §§ 3.10(1)-(2) (3d ed. 2017).² Because an award of attorney's fees is a remedy, Nevada law does not recognize this claim as an autonomous cause of action.

¹ The placement of the apostrophe in the phrase "attorney's fees" (or whether to use an apostrophe at all) is "a matter of heated controversy." *Synanon Found., Inc. v. Bernstein*, 517 A.2d 28, 30 n.2 (D.C. 1986); *see also*, *Niccum v. Enquist*, 286 P.3d 966, 968 n.2 (Wash. 2012). This Court uses all three formulations. *See e.g.*, *Patush v. Las Vegas Bistro, LLC*, 135 Nev. Adv. Op. 46, 449 P.3d 467, 470 (2019) ("attorney fees"); *Schouweiler v. Yancey Co.*, 101 Nev. 827, 829, 712 P.2d 786, 788 (1985) ("attorney's fees"); and *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 348, 455 P.2d 31, 32 (1969) ("attorneys' fees").

NRS 18.010(2), NRS 41.520(4)(b), and NRS 78.257(5)(a) use the apostrophe-s formulation; this Answering Brief will adhere to this convention.

² As a form of relief, a Nevada court may award attorney's fees under one of three theories:

(1) Under a taxable "cost of litigation" theory awarded by statute, rule, or contract. *See Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001) *receded from on other grounds by Horgan v.*

Dismissal under NRCP 12(b)(5) is appropriate where a complaint asserts no cognizable cause of action. *See e.g., Mills v. Cont'l Parking Corp.*, 86 Nev. 724, 726, 475 P.2d 673, 674 (1970) (affirming NRCP 12(b)(5) dismissal of complaint where Nevada did not recognize cause of action for negligent entrustment in bailor-bailee relationship).

In this case, the Shareholder's sole claim of "Attorney's Fees" is not a legally cognizable cause of action in Nevada for two reasons: (A) First, Nevada law grants no subject matter jurisdiction over an independent claim for attorney's fees; and (B) Secondly, Nevada has previously rejected a cause of action called, "Attorney's Fees," and the Court should likewise decline to create one in this case. As such, the District Court's Order dismissing this case was proper, and this Court should affirm the dismissal.

A. NEVADA COURTS HAVE NO SUBJECT MATTER JURISDICTION OVER AN INDEPENDENT ATTORNEY'S FEES CLAIM

As a matter of law, Nevada courts have no subject matter jurisdiction over an autonomous cause of action called "Attorney's Fees." In general, a district court has subject matter jurisdiction only where the amount in controversy exceeds \$15,000.

Felton, 123 Nev. 577, 170 P.3d 982 (2007) and *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 321 P.3d 875 (2014);
(2) Under a "special damages" theory pursuant to NRCP 9(g). *Id.*;
(3) As a sanction for deliberate misconduct. *E.g.*, NRS 7.085; NRCP 11(c)(4); NRCP 37(a)(5)(A); and NRAP 38(b).

Nev. Const. Art. 6, § 6; NRS 4.370(1)(b). For subject matter jurisdiction purposes, the calculation of the amount in controversy excludes attorney's fees. *See Royal Ins. v. Eagle Valley Constr.*, 110 Nev. 119, 120, 867 P.2d 1146, 1147 (1994); *see also, Knight v. Knight*, 207 F.3d 1115, 1117 (9th Cir. 2000) (holding that "fee shifting provisions cannot themselves confer [Federal] subject matter jurisdiction that is otherwise absent" (internal quotations and citations omitted)). Thus, where the amount in controversy exclusive of attorney's fees is less than \$15,000, the district court lacks subject matter jurisdiction.

Here, the Shareholders' sole claim is for attorney's fees. [JA0014-15.] The Shareholders assert no other amount in controversy. Because they claim no other amount in controversy, and because attorney's fees are not part of the calculus for subject matter jurisdiction, the District Court in this case had no subject matter jurisdiction over the Shareholders' alleged claim.³ Thus, the exclusion of attorney's fees in the amount in controversy calculation for subject matter jurisdiction indicates that Nevada law recognizes no cause of action called "Attorney's Fees." This lack of subject matter jurisdiction, alone, is enough for the Court to affirm the District Court's Order.

³ The issue of "whether a court lacks subject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties." *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (internal quotations and citations omitted).

B. NEVADA REJECTS ATTORNEY’S FEES AS A SEPARATE CLAIM

Assuming that the Shareholders successfully prove subject matter jurisdiction, Nevada law has consistently refused to recognize an independent cause of action for “attorney’s fees.” See *Guild, Hagen & Clark, Ltd. v. First Nat’l Bank*, 95 Nev. 621, 623, 600 P.2d 238, 239 (1979); *Las Vegas v. Sw. Gas Corp.*, 90 Nev. 178, 180, 521 P.2d 1229, 1230 (1974); and *Consumers League v. Sw. Gas Corp.*, 94 Nev. 153, 157-58, 576 P.2d 737, 740 (1978). This, too, is reason enough to affirm the District Court’s Order.

In *Guild*, for example, this Court rejected a law firm’s independent lawsuit for attorney’s fees for benefits allegedly conferred on an estate in a previous a probate matter. *Guild*, 95 Nev. at 623. In the probate matter, the law firm represented a decedent’s daughter who contested the decedent’s assignment of certain monies. *Id.* at 622. The probate court invalidated the assignment but held that the daughter had not demonstrated that she was entitled to the money and ordered the money to be paid to the decedent’s estate. *Id.* Subsequent to the probate action, the law firm filed its own separate complaint against the estate claiming that the firm’s representation of the daughter ultimately benefitted the estate and that the estate thus owed the firm attorney’s fees under both the “common fund” and the “substantial benefit doctrine” theories. *Id.* at 623. The *Guild* Court rejected both theories and ultimately affirmed the district court’s order granting summary judgment. *Id.* at 624.

Likewise, in *Las Vegas*, this Court affirmed the district court's dismissal of a complaint where the sole claim for relief was a claim for attorney's fees. *Las Vegas*, 90 Nev. at 180. The claimant in *Las Vegas* was a successful intervenor in an administrative proceeding involving a utility rate increase and filed a subsequent claim in the district court seeking to recover attorney's fees for its success. *Id.* at 179. The *Las Vegas* Court refused to recognize an independent action for attorney's fees. *Id.* at 180.

Similarly, in *Consumers League*, the Court again affirmed the district court's dismissal of an independent claim for attorney's fees by a claimant who successfully procured a substantial refund to ratepayers in another administrative hearing. *See Consumers League*, 94 Nev. 157-58. The claimant subsequently sued in the district court to recover attorney's fees in the administrative action, and the *Consumers League* Court rejected both the "common fund" and the "substantial benefit doctrine" theories espoused by the claimant, holding that Nevada law provided no cognizable cause of action for attorney's fees. *See id.*

Here, like the claimants in *Guild*, *Las Vegas*, and *Consumers League*, the Shareholders also assert that they have conferred a "fundamental and substantial benefit on the Company's stockholders" and that this purportedly substantial benefit forms the basis their sole claim for relief: attorney's fees. [JA0014-15.] But the Shareholders allege no wrong-doing that would give rise to an award of attorney's

fees in the first place. Thus, the Shareholders' autonomous attorney's fees claim here amounts to a solution searching for a non-existent problem—a remedy detached from any right. As did the *Guild, Las Vegas*, and *Consumers League* Courts, this Court should likewise reject the Shareholders' implicit request for the Court to create a new caused of action called, "Attorney's Fees."⁴

In conclusion, the Shareholders fundamentally misapprehend the nature of attorney's fees. Awarding attorney's fees is a remedy, not an independently actionable right. Nevada law grants no subject matter jurisdiction to the courts to entertain an autonomous cause of action for attorney's fees. It recognizes no claim for attorney's fees divorced from a suit giving rise to such an award. Because this claim is not cognizable in Nevada, the District Court was correct to dismiss the Complaint. The Court should affirm the District Court's Order.

II. THE SHAREHOLDERS MISAPPLY THE SUBSTANTIAL BENEFIT DOCTRINE

Assuming that the Shareholders prove that Nevada recognizes an independent claim for relief called "Attorney's Fees," their claim under the substantial benefit

⁴ While this Court has the inherent power to create a new cause of action, it will "construe such power narrowly and exercise it cautiously." *Badillo v. Am. Brands*, 117 Nev. 34, 42, 16 P.3d 435, 440 (2001). "Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function." *Id*; see also, *Consumers League*, 94 Nev. at 158 (Gunderson J., concurring) (concurring opinion specifically to exhort Legislature to provide for attorney's fees).

doctrine still fails. Because the Shareholders misunderstand the nature of a claim for attorney's fees, they concomitantly misapply the "substantial benefit doctrine." Their argument fails for two reasons: (A) First, litigation is a prerequisite to invoking the substantial benefit doctrine, and the District Court did not add an "element" to the doctrine; and (B) No State has adopted the reading of the substantial benefit doctrine urged by the Shareholders. For the reasons detailed below, the District Court correctly held that "litigation is an essential element to maintaining a claim for attorney's fees under the substantial benefit doctrine...." [JA0251.] Because there was no underlying litigation, there could be no award of attorney's fees; thus, the substantial benefit doctrine simply does not apply. In short, the Court should affirm the District Court's Order.

A. LITIGATION IS A PREDICATE TO THE SUBSTANTIAL BENEFIT DOCTRINE

Nevada follows the American rule that a party to litigation cannot recover attorney's fees absent a statute, rule, or contract authorizing the award. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) and *Guild, Hagen & Clark, Ltd. v. First Nat'l Bank*, 95 Nev. 621, 622, 600 P.2d 238, 239 (1979) (holding "in the absence of a statute or contract authorizing such an award, attorney's fees may not be recovered by a party to litigation") (emphasis added); *see also, Sun Realty v. Eighth Judicial Dist. Court*, 91 Nev. 774, 776, 542 P.2d 1072, 1073 (1975) (holding that Nevada courts have no "inherent power" to award attorney's fees).

The American rule does have exceptions. *E.g.*, NRS 18.010. The exception at issue in this case is the judicially-created “substantial benefit doctrine.” *Thomas*, 122 Nev. at 90-91. The substantial benefit doctrine invokes the court’s equitable powers to award attorney’s fees to a prevailing party whose litigation confers a substantial benefit on an ascertainable class. *Id.* at 91 (internal quotations and citations omitted). The doctrine tells a court when it may equitably spread the costs of a lawsuit to class members who have benefited from the action, specifically “where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself.” *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970) (emphasis added) *cited with approval in Thomas*, 122 Nev. at 91 n.12.

The two, seminal cases on the substantial benefit doctrine in Nevada agree: Prevailing in litigation is the predicate act to invoking the substantial benefit doctrine. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 91, 127 P.3d 1057, 1063 (2006); and *Guild, Hagen & Clark, Ltd. v. First Nat’l Bank*, 95 Nev. 621, 624, 600 P.2d 238, 240 (1979).

For example, the *Thomas* Court described the substantial benefit doctrine thusly: “This doctrine allows recovery of attorney fees when a successful party confers a substantial benefit on the members of an ascertainable class, and where the court’s jurisdiction over the subject matter of the suit makes possible an award that

will operate to spread the costs proportionately among them.” *Thomas*, 122 Nev. at 91 (emphasis added; internal quotations and citations omitted). The *Thomas* Court added that courts apply the substantial benefit doctrine in cases involving shareholders, “who are beneficiaries of the litigation.” *Id.*

The *Guild* Court also concurs that litigation is a predicate act to invoking the substantial benefit doctrine, specifically stating, “The ‘substantial benefit’ doctrine applies when the defendant in a class action or corporate derivative suit receives some benefit as a result of the action.” *Guild*, 95 Nev. at 624 (emphasis added).

Moreover, a federal district court in Michigan recently rejected a claim for attorney’s fees under similar facts as the Shareholders here. *See Willner v. Syntel*, 256 F. Supp. 3d 684, 696 (E.D. Mich. 2017). In *Willner*, a plaintiff wrote a demand letter, the corporation complied, and the plaintiff subsequently filed suit, claiming his counsel was entitled to attorney’s fees for the substantial benefit conferred on the corporation. *Id.* at 686. In granting the defendant’s motion to dismiss under Michigan law, the court found that the plaintiff was “not entitled an award of attorney fees because the benefit that he claims to have conferred did not result from litigation.” *Id.* at 696.

Here, the Shareholders assert that the District Court should award them attorney’s fees under the substantial benefit doctrine solely because their demand letter allegedly caused Digital Ally to take corrective action. [JA0014-15.] But the

Shareholders have not initiated or prevailed in any litigation. In fact, the Shareholders have not even initiated litigation. [Opening Brief, pp. 9-10.] Because the Shareholders have not maintained a lawsuit, the substantial benefit doctrine simply does not apply. Like the letter-writing plaintiff in *Willner*, the benefit allegedly conferred here was not result from any litigation, as correctly identified by the District Court's Order.

Contrary to the Shareholders' misapplication, the doctrine is not an independent source of redress; rather the doctrine is an equitable procedure to distribute the costs of litigation to those who have benefitted from the lawsuit. Thus, the District Court's legal conclusion that "predicate litigation is an essential element to maintaining a claim for attorney's fees under the substantial benefit doctrine..." is correct, and this Court should affirm it.

As a consequence of their misapplication of the substantial benefit doctrine, the Shareholders erroneously allege that the District Court added an element to the substantial benefit doctrine, dismissing the litigation prerequisite language in both *Thomas* and *Guild* as "dictum." [Opening Brief, p. 17.]

This is simply wrong and, again, reflects the fundamental misunderstanding at issue in this case. If the American rule is a rule predicated upon litigation, then it stands to reason that an exception to the American rule is likewise predicated upon litigation. In Nevada, an award of attorney's fees is a remedy, and a remedy

presupposes a lawsuit; that is, a lawsuit is an existential requirement to applying the substantial benefit doctrine. Litigation is not a new element of the substantial benefit doctrine, and the “litigation” language in *Thomas* and *Guild* is not dictum; instead, litigation is a precondition to the function of the doctrine as a remedy.

In sum, underlying litigation is necessary in order to invoke the substantial benefit doctrine. The doctrine does not form a basis for relief in-and-of-itself. It is a remedy for a court to apply at the termination of litigation. But litigation remains an indispensable condition before a court may apply it. The District Court’s Order was correct, and this Court should affirm it.

B. NO STATE RECOGNIZES THE SUBSTANTIAL BENEFIT DOCTRINE OUTSIDE OF LITIGATION

No State has adopted the reading of the substantial benefit doctrine urged by the Shareholders. *See* Addendum 1: 50-State Survey of Substantial Benefit Doctrine as Applied to Shareholder Cases.

Some high courts, like the Alaska Supreme Court, openly reject the Shareholders’ formulation that no litigation is required. *See Jerue v. Millett*, 66 P.3d 736, 748 (Alaska 2003) (“If the directors promptly take curative action that satisfies the shareholder’s concerns, there would be no suit and clearly no attorney’s fees awarded to the shareholder”).

Some states have codified the litigation prerequisite of the substantial benefit doctrine such that a court may award attorney’s fees on “termination of the derivative

proceeding...if the proceeding has resulted in a substantial benefit to the corporation.” *See e.g.*, Me. Rev. Stat. Ann. Title 13-C § 757(1); Neb. Rev. Stat. § 21-281(1); N.C. Gen. Stat. § 55-7-46(1); R.I. Gen. Laws § 7-1.2-711(g)(1); Tenn. Code Ann. § 48-17-401(d)(1); Va. Code Ann. § 13.1-672.5(1); and Wis. Stat. § 180.0746(1).

Even the Delaware Supreme Court requires litigation as a prerequisite to apply the substantial benefit doctrine, called the “corporate benefit doctrine” in Delaware. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989); *see also*, *Waterside Partners v. C. Brewer & Co.*, 739 A.2d 768, 770 (Del. 1999). In *Waterside Partners*, for example, the Delaware Supreme Court affirmed the Chancery Court’s order denying attorney’s fees to claimants where a contemporaneous, parallel proxy contest rendered the claimant’s derivative action moot. *Waterside Partners*, 739 A.2d at 770. In rejecting the claimant’s claim for attorney’s fees, the Delaware High Court stated, “Plaintiffs’ argument that fee shifting should be permitted for a common benefit created outside the litigation context has no limiting principle.” *Id.* The Court then concluded, “Fee shifting is the exception rather than the rule in corporate litigation and the establishment of a nexus between the litigation, itself, and the claimed corporate benefit is a *sine qua non*.” *Id.*

The Shareholders erroneously rely on the decisions of two Delaware Chancery Courts. [Opening Brief, pp 19-20.] But these cases have only suggested that an autonomous cause of action for attorney's fees for letter writing might be possible under the corporate benefit doctrine. *See Bird v. Lida, Inc.*, 681 A.2d 399, 405 (Del. Ch. 1996) and *Raul v. Astoria Fin. Corp.*, Civil Action No. 9169-VCG, 2014 Del. Ch. LEXIS 103, at *15 (Ch. June 20, 2014) *citing Bird*, 681 A.2d at 405. In both cases, however, the Chancery Courts actually refused to award fees. *Bird*, 681 A.2d at 407 and *Raul*, 2014 Del. Ch. LEXIS 103, at *34-5.

Also, as detailed above, the Federal Court in Eastern Michigan recently rejected the Delaware Chancery Courts' concept of attorney's fees for letter writing, noting that the Delaware Supreme Court appears to have never actually adopted the concept. *See Willner*, 256 F. Supp. 3d at 690 n.4 (E.D. Mich. 2017).

In short, no state, not even Delaware, has adopted a reading of the substantial benefit doctrine urged by the Shareholders. Given the Shareholders' misapplication of the doctrine, this Court should decline the invitation to be the first. The Court should affirm the District Court's Order.

III. PUBLIC POLICY CONSIDERATIONS MILITATE AGAINST THE EXPANSIVE READING URGED BY THE SHAREHOLDERS

The Shareholders' sweeping reading of the substantial benefit doctrine implicates at least two public policy considerations.⁵

The first public policy implication is judicial economy. The Shareholders' broad interpretation encourages "wasteful litigation." *See Jerue v. Millett*, 66 P.3d 736, 748 (Alaska 2003). It creates a type of "strike suit," where nominal shareholders and their enterprising attorneys allege purported benefits in hope that defendant-corporations will quickly settle to avoid the expense of attorney's fees litigation.⁶ The doctrine would have no limit, and it will make the courts arbiters of value of attorney's fees voluntarily rendered to corporations. *See Waterside Partners*, 739 A.2d at 770. It also violates the long-standing principle of the courts' reluctance to interfere with the inner workings of the corporation. *Hawes v. Oakland*, 104 U.S. 450, 454 (1881); *see also*, NRS 78.138. Thus, the Shareholders'

⁵ There may be more policy criticisms of the substantial benefit doctrine. *See generally*, Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* § 3.10(2) at 284-85 (3d ed. 2017); John P. Dawson, *Lawyers and Involuntary Clients: Attorney's Fees from Funds*, 87 Harv. L. Rev. 1597, 1643-51 (1974).

⁶ A "strike suit" is a shareholder action "brought not to redress real wrongs, but to realize upon their nuisance value." *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 547-8 (1949); *see also*, *Jacksonville Police & Fire Pension Fund v. Brokaw (In re DISH Network Derivative Litig.)*, 133 Nev. Adv. Op. 61, 401 P.3d 1081, 1095 (2017) (Pickering, J. dissenting).

expansive reading of the substantial benefit doctrine would clog the courts with new litigation.

The second public policy implication of the Shareholders' interpretation is that it will chill the incentive for boards to correct mistakes when receiving a demand. The very purpose behind the demand requirement in NRCP 23.1 and NRS 41.520(2) is to avoid subjecting a board to immediate litigation. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006). The Shareholders' reading vitiates the purpose of demand and exposes a corporation to potential litigation each time it receives a demand letter, regardless of whether it corrects the mistakes. Thus, corporate boards will be less inclined to correct mistakes.

Serious public policy issues arise with the Shareholders' radical interpretation of the substantial benefit doctrine. The Court should decline their invitation to expand the doctrine and should affirm the District Court's Order.

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CONCLUSION

For the reasons detailed above, the Court should affirm the District Court's Order affirming Digital Ally's Motion to Dismiss.

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ADDENDUM 1

50 State Survey of Substantial Benefit Doctrine in Shareholder Actions

Alabama. In Alabama, a party can recover attorney’s fees for conferring a substantial benefit on a corporation via a shareholder derivative action. *See Lee v. Baldwin Cty. Elec. Mbrshp. Corp.*, 853 So. 2d 946, 953 (Ala. 2003). The Alabama Supreme Court has indicated support for the proposition that “successful litigation” is a requisite for the awarding of attorney’s fees in derivative actions. *See Reynolds v. First Ala. Bank, N.A.*, 471 So. 2d 1238, 1242-43 (Ala. 1985) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970)).

Alaska. Alaska recognizes the substantial benefit doctrine as a variant on the common fund doctrine, “implicated any time one *litigant’s* success release well-defined benefits for a limited and identifiable group of others.” *Municipality of Anchorage v. Gallion*, 944 P.2d 436, 446 (Alaska 1997) (emphasis added). In the context of a shareholder action, the Alaska Supreme Court has explicitly stated that a pre-suit demand—resulting in corrective action and avoiding litigation altogether—does *not* warrant the awarding of attorney’s fees. *See Jerue v. Millet*, 66 P.3d 736, 748 (Alaska 2003). The Court opined that awarding fees in such a situation would “encourage wasteful litigation.” *See id.*

Arizona. The substantial benefit doctrine is an underdeveloped area of law in Arizona. Indeed, the Arizona Supreme Court has stated that “Arizona law is

cognizant of the substantial benefit doctrine, but has neither adopted nor rejected it.”
See Kadish v. Ariz. State Land Dep’t, 747 P.2d 1183, 1196-97 (Ariz. 1987).

Arkansas. The Arkansas Supreme Court allows for the recovery of attorney’s fees under the substantial benefit doctrine in shareholder derivative actions. *See Millsap v. Lane*, 706 S.W.2d 378, 379-80 (Ark. 1986). The Court has noted, “the successful plaintiff in a derivative action may be awarded attorneys’ fees against the corporation if the corporation received ‘substantial benefits’ *from the litigation*.” *See id.* at 380 (emphasis added).

California. Under the substantial benefit doctrine in California, litigation is likely a requirement for awarding attorney’s fees in shareholder actions. *See Robbins v. Alibrandi*, 127 Cal. App. 4th 438, 448 (Cal. Ct. App. 2005) (holding that “fees may be awarded only when the litigation results in a substantial benefit to the corporation”).

Colorado. The substantial benefit doctrine in the corporate context is an underdeveloped area of law in Colorado. In the context of limited liability companies, however, Colorado allows for the recovery of attorney’s fees in derivative actions under the substantial benefit doctrine. *See Colo. Rev. Stat. § 7-80-718*. Colorado’s code states “[o]n termination of the derivative *proceeding*,” a court may award attorney’s fees to plaintiffs that have conferred a “substantial benefit” on the company. *Id.* (emphasis added). This language implies that at a

minimum, plaintiffs must initiate litigation to recover attorney's fees under the substantial benefit doctrine.

Connecticut. Connecticut allows for the recovery of attorney's fees in shareholder derivative actions under the substantial benefit doctrine. *See Stutz v. Shepard*, No. CV010388156, 2004 Conn. Super. LEXIS 423, at * 6 (Conn. Super. Feb. 24, 2004). "A threshold prerequisite to any award of counsel fees to the plaintiff is a determination ... the *action commenced by the plaintiff* ultimately resulted in 'a substantial benefit' to the corporation." *Id.* (emphasis added). Requiring a plaintiff to "commence" an action implies that litigation serves as a requisite for the awarding of attorney fees.

Delaware. Under the substantial benefit doctrine in Delaware (called the "common or corporate benefit doctrine"), litigation acts as a requirement for recovering attorney's fees in shareholder actions. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989); *Waterside Partners v. C. Brewer & Co.*, 739 A.2d 768, 770 (Del. 1999)

Florida. It is unclear whether Florida has a substantial benefit doctrine that allows for the recovery of attorney's fees in shareholder derivative actions. An appellate court held that the substantial benefit doctrine is "alien to Florida law." *See Bd. of Trs. of the City Pension Fund for Firefighters v. Parker*, 113 So. 3d 64, 69 (Fla. Dist. Ct. App. 2013). Nevertheless, the Florida Supreme Court subsequently

quashed this decision, issuing no opinion on the validity of the substantial benefit doctrine. *See Parker v. Bd. of Trs. of the City Pension Fund for Firefighters & Police Officers in the City of Tampa*, 149 So. 3d 1129, 1131-34 (Fla. 2014).

Georgia. It is unclear from Georgia case law whether there is a substantial benefit doctrine that entitles successful plaintiffs to attorney's fees in shareholder derivative actions. At best, a Georgia appellate court has alluded to a shareholder derivative plaintiff recovering attorney's fees, albeit with no reference to the substantial benefit doctrine. *See Stephens v. McGarrity*, 660 S.E.2d 770, 773 n.9 (Ga. Ct. App. 2008).

Hawaii. Hawaii requires litigation as a prerequisite to invoking the substantial benefit doctrine (called the "common benefit rule"), holding that "the court may award attorneys' fees to plaintiffs who bring class-action *litigation* that produces a common benefit...." *In re Water Use Permit Applications*, 25 P.3d 802, 804 (2001) (emphasis added). But it is unclear if the doctrine is available in shareholder actions.

Idaho. Idaho provides courts with the statutory option to award attorney's fees under the substantial benefit doctrine in shareholder derivative actions. *See* Idaho Code § 30-29-746(1). Notably, this option applies after "termination of the derivative proceeding," implying that litigation is a prerequisite for the recovery of attorney's fees. *See id.*

Illinois. Illinois does not have a comprehensive substantial benefit doctrine that allows for the recovery of attorney's fees in shareholder derivative suits. Instead, Illinois allows successful derivative plaintiffs to recover attorney's fees "out of the 'common fund' awarded as damages in the litigation." *See Abreu ex rel. Ebro Foods v. Unica Indus. Sales*, 586 N.E.2d 661, 669 (Ill. App. Ct. 1991). Litigation acts as a requisite for the recovery of attorney's fees since they are awarded from the damages stemming from the suit.

Indiana. Indiana does not have a comprehensive substantial benefit doctrine allowing for the recovery of attorney's fees in shareholder derivative suits. Overall, it is an unresolved legal issue whether successful derivative plaintiffs in Indiana can recover attorney's fees via a common benefit, common fund or private attorney general doctrine. *See Cmty. Care Ctrs. v. Ind. Family & Soc. Servs. Admin.*, 716 N.E.2d 519, 542-45 (Ind. Ct. App. 1999). At a minimum, Indiana seems to allow for the recovery of fees via the common fund doctrine. *See id.*

Iowa. Iowa's statutory code states that "[o]n termination of the *derivative proceeding*," a court may award attorney's fees to successful plaintiffs who confer a "substantial benefit" on the corporation. *See Iowa Code* § 490.746 (emphasis added). Awarding fees only after the termination of the derivative proceeding suggests that litigation acts as a prerequisite.

Kansas. Kansas allows for the recovery of attorney's fees in shareholder derivative actions where the "plaintiff's successful litigation" has conferred a substantial benefit upon an ascertainable class. *See Williams v. Randall*, No. 115,586, 2017 Kan. App. Unpub. LEXIS 256, at * 26 (Kan. Ct. App. Apr. 14, 2017) (emphasis added). As such, litigation is a prerequisite for the recovery of attorney's fees in shareholder derivative actions in Kansas.

Kentucky. It is unclear whether Kentucky allows for the recovery of attorney's fees in shareholder derivative actions, and whether litigation acts as a prerequisite. Corporations can recover attorney's fees if the plaintiff did not have "reasonable cause" for instituting the action. *See* KRS § 271B.7-400(4). There is no such statutory provision allowing plaintiffs to recover attorney's fees. Nevertheless, in a 1964 case, the Kentucky Court of Appeals upheld an awarding of attorney's fees to the plaintiffs in a successful shareholder derivative action. *See Black Motor Co. v. Greene*, 385 S.W.2d 954, 955-56 (Ky. Ct. App. 1964).

Louisiana. The awarding of attorney's fees in shareholder actions under the substantial benefit doctrine in Louisiana is undeveloped.

Maine. Maine's statutory code states that "[o]n termination of the derivative proceeding," a court may award attorney's fees to successful plaintiffs who confer a "substantial benefit" on the corporation. *See* 13-C M.R.S. § 757(1). Awarding fees

only after the termination of the derivative proceeding suggests that litigation acts as a prerequisite.

Maryland. Maryland requires litigation as a prerequisite to the recovery of attorney's fees in shareholder actions under the corporate benefit doctrine, holding that the "justification for...attorney's fees awarded by the court in shareholder litigation lies with the benefit conferred by the litigation upon the entire class of shareholders." *See Dexter v. Zais Fin. Corp.*, 2016 Md. Cir. Ct. LEXIS 11, *8 (December 8, 2016).

Massachusetts. In the context of limited liability companies, Massachusetts allows for the recovery of attorney's fees in derivative actions under the substantial benefit doctrine. *See* Mass. Ann. Laws ch. 156C, § 57. Massachusetts's code states "[o]n termination of the derivative *proceeding*," a court may award attorney's fees to plaintiffs that have conferred a "substantial benefit" on the company. *Id.* (emphasis added). This language implies that at a minimum, plaintiffs must initiate litigation to recover attorney's fees under the substantial benefit doctrine.

Michigan. Michigan's statutory code seems to adopt the substantial benefit doctrine, allowing courts "[o]n *termination of the derivative proceeding*" to award attorney's fees if the proceeding conferred a substantial benefit on the corporation. *See* MCLS § 450.1497(b) (emphasis added). Litigation likely acts as a prerequisite under the substantial benefit doctrine.

Minnesota. Minnesota allows for the recovery of attorney’s fees in shareholder derivative actions under the substantial benefit doctrine. *See Lansky v. NWA, Inc.*, 471 N.W.2d 713, 714 (Minn. Ct. App. 1991). Notably, the substantial benefit conferred on the corporation must be “caused by the *derivative suit*.” *See id.* (citing *Bosch v. Meeker Coop. Light and Power Ass’n*, 101 N.W.2d 423, 426-27 (Minn. 1960) (emphasis added)). The requirement of a “derivative suit” means that litigation acts as a prerequisite for the recovery of attorney’s fees.

Mississippi. There is little Mississippi law dealing with shareholder derivative suits. *See Aqua-Culture Techs v. Holly*, 677 So. 2d 171, 184 (Miss. 1996). As such, the Court relied on its general rule that attorney’s fees are not recoverable absent a statutory or contractual provision unless “punitive damages are also proper.” *See id.* A Mississippi appellate court reiterated the punitive damages requirement in the derivative context in *Griffith v. Griffith*. *See* 997, So. 2d 218, 224 (Miss Ct. App. 2008). Requiring a finding of punitive damages likely means that litigation acts as a requirement for the recovery of attorney’s fees.

Missouri. Missouri courts have not addressed the issue of the substantial benefit doctrine in the context of shareholder litigation.

Montana. Montana allows for the recovery of attorney’s fees in shareholder derivative actions under the substantial benefit doctrine. MCA 35-1-547(1). Montana’s code states “[o]n *termination of the derivative proceeding*,” a court may

award attorney’s fees to plaintiffs that have conferred a “substantial benefit” on the corporation. *Id.* (emphasis added). This language implies that at a minimum, plaintiffs must initiate litigation to recover attorney’s fees.

Nebraska. Nebraska allows for the recovery of attorney’s fees in shareholder derivative actions under the substantial benefit doctrine. *See* R.R.S. Neb. § 21-281(1). Nebraska’s code states “[o]n *termination of the derivative proceeding*,” a court may award attorney’s fees to plaintiffs that have conferred a “substantial benefit” on the corporation. *Id.* (emphasis added). This language implies that at a minimum, plaintiffs must initiate litigation to recover attorney’s fees.

New Hampshire. The New Hampshire Supreme Court has acknowledged a right to recover attorney’s fees in shareholder derivative actions under the substantial benefit doctrine. *See Jesurum v. WBTSCC Limited Partnership*, 151 A.3d 949, 961 (N.H. 2016). New Hampshire’s statutory code—which says a court may award attorney’s fees on “*termination of the derivative proceeding*”—suggests that litigation is a prerequisite. *See* N.H. RSA 293-A:7.46(1) (emphasis added).

New Jersey. Rule 4:42-9(a)(2) of the New Jersey Court Rules permits an award of attorney’s fees “[o]ut of a fund in court.” New Jersey has interpreted the phrase “out of a fund in court” to mean the substantial benefit doctrine. *See Trimarco v. Trimarco*, 933 A.2d 621, 626-27 (N.J. 2007). The term, “in court” in Rule 4:42-9(a)(2) suggests that a lawsuit is a precondition for the recovery of attorney’s fees.

New Mexico. New Mexico does not seem to permit the recovery of attorney's fees under the substantial benefit doctrine in shareholder derivative actions. Instead, New Mexico recognizes the "common fund" exception to the traditional American rule for attorney's fees. *See N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450, 456 (N.M. 1999). The New Mexico Supreme Court has described the "common fund" exception as allowing attorney's fees when "*litigants* have established their rights to a common fund." *See id.* (emphasis added).

New York. New York allows for the recovery of attorney's fees under the substantial benefit doctrine in shareholder derivative actions. *See* N.Y. Bus. Corp. Law § 626(e). The statute requires that "if the action on behalf of the corporation was successful...the court may award...reasonable attorney's fees...." *Id.* Thus, litigation appears to be requirement to invoke the substantial benefit doctrine in New York.

North Carolina. North Carolina allows for the recovery of attorney's fees under the substantial benefit doctrine in shareholder derivative actions. *See* N.C. Gen. Stat. § 55-7-46(1); *Lowder v. All Star Mills, Inc.*, 346 S.E.2d 695, 698 (N.C. Ct. App. 1986). Notably, the fees are awarded "[o]n *termination of the derivative proceeding*." N.C. Gen. Stat. § 55-7-46(1) (emphasis added). Such language suggests that litigation is a prerequisite for the awarding of attorney's fees under the substantial benefit doctrine.

North Dakota. North Dakota allows for the recovery of attorney's fees in shareholder derivative actions. *See* N.D. Cent. Code, § 10-19.1-85.1; *Thompson v. Schmitz*, 795 N.W.2d 913, 920 (N.D. 2011). The recovery of fees is available “*in an action brought by a shareholder* of the corporation.” *See* N.D. Cent. Code, § 10-19.1-85.1 (emphasis added). Requiring a shareholder to “bring an action” suggests that litigation is a requirement for the recovery of attorney's fees.

Ohio. Ohio allows for the recovery of attorney's fees under the substantial benefit doctrine in shareholder derivative actions. *See Abrams v. Siegel*, 850 N.E.2d 99, 115 (Ohio Ct. App. 2006). In describing the substantial benefit doctrine as an extension of the common fund doctrine, an Ohio appellate court indicated that “In order to recover attorney fees, however, the party who brought the suit must be successful.” *Id.* This language implies that litigation is an inherent prerequisite for the recovery of attorney's fees under the substantial benefit doctrine in Ohio.

Oklahoma. Oklahoma allows successful plaintiffs in shareholder derivative actions to recover attorney's fees. *See Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 853 (Okla. 1987). Specifically, the Oklahoma Supreme Court has held that a successful derivative plaintiff can recover fees “*in a suit* instituted in behalf of a corporation.” *See id.* (emphasis added). This language explicitly suggests that litigation acts a prerequisite for the recovery of attorney's fees.

Oregon. Oregon allows for the recovery of attorney's fees under the substantial benefit doctrine in shareholder derivative actions. *See Crandon Capital Partners v. Shelk*, 181 P.3d 773, 789 (Or. Ct. App. 2008). In describing its reliance on Delaware case law, an Oregon appellate court noted that to recover fees under the substantial benefit doctrine, the derivative *suit* must have been *meritorious when filed*. *See id.* at 780. This requirement, referencing the filing of a suit, suggests that initiating litigation is a prerequisite for recovering attorney's fees.

Pennsylvania. Pennsylvania does not award attorney's fees under the common benefit or substantial benefit doctrines. *See Petow v. Warehime*, 996 A.2d 1083, 1089 (Pa. Super. Ct. 2010).

Rhode Island. As per its statutory code, Rhode Island allows for the recovery of attorney's fees under the substantial benefit doctrine. *See* R.I. Gen. Laws § 7-1.2-711(g)(1). Specifically, successful derivative plaintiffs can recover fees “[o]n *termination of the derivative proceeding*.” *See id.* (emphasis added). This language suggests that litigation is a requirement to recover attorney's fees.

South Carolina. The awarding of attorney's fees in shareholder derivative actions is an underdeveloped area of law in South Carolina. The South Carolina Supreme Court has sustained an awarding of attorney's fees to plaintiff shareholders that filed suit against a corporation. *See Segall v. Shore*, 236 S.E.2d 316, 317-20

(S.C. 1977). Nevertheless, the ruling sheds little to no light on the substantial benefit doctrine and how it applies, if at all, in South Carolina.

South Dakota. The awarding of attorney's fees in shareholder derivative actions is an underdeveloped area of law in South Dakota. The South Dakota Supreme Court acknowledged the substantial benefit doctrine and its applicability to shareholder derivative actions. *See Van Emmerik v. Montana Dakota Utils. Co.*, 332 N.W.2d 279, 283 (S.D. 1983). Nevertheless, the Court declined to award attorney's fees under the doctrine, instead reiterating the principle that "absent statute or enforceable contract, litigants pay their own attorney's fees." *See id.* at 282.

Tennessee. Tennessee's statutory code allows for the recovery of attorney's fees under the substantial benefit doctrine in shareholder derivative actions. *See* Tenn. Code Ann. § 48-17-401(d)(1). Specifically, fees are to be awarded "[o]n *termination of the [derivative] proceeding.*" *See id.* (emphasis added). This language regarding the "termination of a proceeding" suggests that litigation acts as a prerequisite for the recovery of attorney's fees.

Texas. Texas's statutory code allows for the recovery of attorney's fees under the substantial benefit doctrine in shareholder derivative actions. *See* Tex. Bus. Orgs. Code § 21.561(b)(1). Specifically, fees are to be awarded "[o]n *termination of the [derivative] proceeding.*" *See id.* (emphasis added). This language regarding the

“termination of a proceeding” suggests that litigation acts as a prerequisite for the recovery of attorney’s fees.

Utah. Utah allows for the recovery of attorney’s fees under the substantial benefit doctrine in shareholder derivative suits. *See LeVanger v. Highland Estates Props. Owners Ass’n*, 80 P.3d 569, 575-77 (Utah Ct. App. 2003). A Utah appellate court has noted that the substantial benefit doctrine “permits the award of [attorney] fees when the *litigant...obtains a decision* resulting in the conferral of a substantial benefit.” *See id.* at 575 (emphasis added). This language explicitly suggests that litigation is a prerequisite for recovering attorney’s fees under the substantial benefit doctrine.

Vermont. Vermont allows for the recovery of attorney’s fees under the substantial benefit doctrine in shareholder derivative suits. *See Solomon v. Atlantis Dev.*, 516 A.2d 132, 137 (Vt. 1986). Notably, the recovery of fees is only available in derivative actions “where *the suit* confers a benefit on the corporation.” *See id.* (emphasis added). The requirement that the *suit* must confer the benefit suggests that litigation acts a prerequisite for the recovery of fees.

Virginia. Virginia allows for the recovery of attorney’s fees under the substantial benefit doctrine in shareholder derivative actions. *See Va. Code Ann. § 13.1-672.5(1); Cattano v. Bragg*, 727 S.E.2d 625, 631 (Va. 2012). Virginia’s statutory code states that attorney’s fees can be awarded “[o]n *termination of the*

derivative proceeding.” See Va. Code Ann. § 13.1-672.5(1) (emphasis added). Awarding fees only after the *termination* of a derivative proceeding suggests that litigation is a prerequisite.

Washington. The Washington Supreme Court allows for the recovery of attorney’s fees under the substantial benefit doctrine in shareholder derivative actions. See *City of Sequim v. Malkasian*, 138 P.3d 943, 954 (Wash. 2006). Specifically, the Court has noted that the substantial benefit doctrine applies when “the *litigant* preserves assets or creates a common fund.” See *id.* (emphasis added). This language explicitly suggests that litigation is a necessary requirement for recovering attorney’s fees.

West Virginia. Whether a successful derivative plaintiff can recover attorney’s fees under the substantial benefit doctrine is an underdeveloped area of law in West Virginia. In a 2018 opinion, the West Virginia Supreme Court of Appeals suggested that it recognized a narrow exception to the American rule governing attorney’s fees: when the losing party has acted in bad faith. See *Tri-State Petroleum Corp v. Coyne*, 814 S.E.2d 205, 227 (W. Va. 2018). Otherwise, it does not seem apparent from West Virginia case law that a successful derivative plaintiff could recover fees.

Wisconsin. Wisconsin’s statutory code provides that “[o]n *termination of the derivative proceeding*,” a court may award the plaintiff fees under the substantial

benefit doctrine. *See* Wis. Stat. § 180.0746(1) (emphasis added). Awarding fees only after the termination of the derivative proceeding implies that litigation acts as a prerequisite.

Wyoming. Wyo. Stat. Ann. § 17-14-1104 authorizes the awarding of attorney's fees in shareholder derivative actions but the substantial benefit doctrine is an underdeveloped area of law in Wyoming.

NRAP 28.2 CERTIFICATION

A. 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 Word in 14-point Times New Roman font.

B. 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 does not exceed 14,000 words. The brief contains 9,283 words;

C. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference

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to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of November, 2019.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of November, 2019, I served a copy of **RESPONDENT’S ANSWERING BRIEF** upon all counsel of record by using the Nevada Supreme Court’s eFlex Electronic Filing System, and if necessary, by mailing it first class mail with sufficient postage prepaid to the following address:

/s/Michelle T. Harrell

An Employee of ASHCRAFT & BARR | LLP