IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO, JR.; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCKOFF,

Appellants,

v.

CLARK COUNTY EDUCATION ASSOCIATION; JOHN VELLARDITA; AND VICTORIA COURTNEY,

Respondents.

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Supreme Court No. 79208

District Court Case
No. A-17-761364-C
(Consolidated with Case
No. A-17-761884-C)

APPEAL
From the Eighth Judicial District Court
The Honorable Kerry Earley

RESPONDENTS' SUPPLEMENTAL APPENDIX VOL. II

Andrew M. Jacobs
Nevada Bar No. 12787
Kelly H. Dove
Nevada Bar No. 10569
John S. Delikanakis
Nevada Bar No. 5928
Bradley T. Austin
Nevada Bar No. 13064
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway,
Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252

Joel D'Alba
Admitted *Pro Hac Vice*
ASHER, GITTLER & D'ALBA, LTD.
200 W. Jackson Blvd., Ste. 720
Chicago, IL 60606
Telephone: (312) 263-1500
Facsimile: (312) 263-1520

Attorneys for Respondents

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Plaintiffs NSEA's and NEA's Motion for Partial Summary Judgment[1]	11/09/2018	I	RA058-RA092

DATED: April 3, 2020

SNELL & WILMER L.L.P.

/s/ Andrew M. Jacobs

Andrew M. Jacobs (Nevada Bar No. 12787)
Kelly H. Dove (Nevada Bar No. 10569)
John S. Delikanakis (Nevada Bar No. 5928)
Bradley T. Austin (Nevada Bar No. 13064)
Michael Paretti (Nevada Bar No. 13926)
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
ajacobs@swlaw.com
kdove@swlaw.com
jdelikanakis@swlaw.com
baustin@swlaw.com
mparetti@swlaw.com

[1] This document was submitted under seal in its entirety for CCEA's benefit due to the inclusion of confidential CCEA bank records. Because CCEA does not include those confidential exhibits in the instant appendix, and because the included document does not contain account or social security numbers, CCEA is not submitting this document under seal.

ASHER, GITTLER & D'ALBA, LTD.

Joel D'Alba (Admitted *Pro Hac Vice)*
200 W. Jackson Blvd., Ste. 720
Chicago, IL 60606
Telephone: (312) 263-1500
Facsimile: (312) 263-1520
jad@ulaw.com
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 3, 2020, I caused to be served a true and correct copy of the foregoing **RESPONDENTS' SUPPLEMENTAL APPENDIX VOL. II** upon the following by the method indicated:

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☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Maricris Williams
An Employee of SNELL & WILMER L.L.P.

RPLY

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
ralexander@bredhoff.com
mcdrexler@bredhoff.com

Attorneys for NSEA Parties

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, AND MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, AND BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **NSEA AND NEA PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL** Hearing Date: September 19, 2019 Hearing Time: 9:00 a.m.

The Nevada State Education Association ("NSEA") and the National Education Association ("NEA"), by and through their counsel, respectfully submit this Reply in support of their motion for a stay of the Court's Order on CCEA Parties' Motion to Alter or Amend pending appeal. The grounds for this Motion are set forth in the Memorandum of Points and Authorities filed July 16, 2019, the papers and pleadings on file in the present case, this reply memorandum, and any argument the Court may entertain with respect to this Motion at the time of hearing.

DATED this 3rd day of September, 2019.

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Parties

NSEA AND NEA PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

The NSEA Parties' motion seeks to stay the execution of the Court's Order granting CCEA Parties' Motion to Alter or Amend pending resolution of the NSEA Parties' appeal—a mechanism that is expressly provided by Nevada Rule of Civil Procedure 62(c) and Nevada Rule of Appellate Procedure 8(c).

The CCEA Parties' opposition to our motion fundamentally mischaracterizes the nature of the relief that we seek and the grounds for granting that relief. Rather than asking the Court for "the same injunctive relief" that the Court terminated through its July 1, 2019 Order – what the CCEA Parties suggest is a sinister attempt at a second bite at the apple – the NSEA Parties merely seek a procedural protection available to appellants who have lost on the merits of their claim in the district court.[1] When viewed in the proper framework, applying the factors required by NRAP 8(c), it becomes clear that the Court should grant the NSEA Parties' requested stay pending resolution of the case on appeal.

I. Granting a Stay is Warranted and Not Inconsistent with the Court's Order

CCEA Parties begin their brief by arguing that granting a stay pending appeal would be impermissibly inconsistent with the Court's July 1, 2019, Order granting the CCEA Parties' Motion to Alter or Amend the Restricted Account Order. *See* CCEA Parties' Opposition to NSEA and NEA Motion for Stay Pending Appeal ("CCEA Opp'n") at 4-5. In CCEA's view, having granted the motion to allow disbursement of the funds from the Restricted Account, the Court cannot now stay that Order. *Id.* at 5.

CCEA's argument disregards the express language of NRCP 62(c) and, if accepted by the Court, would render that rule a nullity. As we explained in our opening brief, Rule 62(c)

[1] And in fact the parties discussed this stay motion at the May 9, 2019, hearing, where the Court predicted counsel's request for a stay. *See* May 9, 2019, Hearing Transcript ("Hr'g Tr.") at 233.

provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants *or refuses to grant, or dissolves* or refuses to dissolve, an injunction, the court may stay . . . or grant an injunction on terms for bond or other terms that secure the opposing party's rights." NRCP 62(c) (emphasis added). The rule itself thus contemplates that a court that has recently dissolved an injunction can nonetheless stay the execution of that dissolution pending appeal. In other words, the very purpose of the rule is to allow parties that lose in the district court to seek this relief. If, as CCEA would have it, the district court's underlying merits decision were dispositive, Rule 62(c) would serve no purpose and would be rendered meaningless, an interpretation that longstanding precedent makes clear is to be avoided. *Blackburn v. State*, 129 Nev. 92, 97, 294 P.3d 422, 426 (2013) ("[S]tatutes must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." (quoting *Butler v. State*, 120 Nev. 879, 892-93, 102 P.3d 71, 81 (2004))).

Contrary to CCEA's dismissive treatment, however, Rule 62(c) serves an important purpose: Preserving the status quo during the pendency of appeal to protect the parties' rights and ensuring that the object of appeal will not be defeated prior to the final decision on the merits. A review of the structure of Rule 62 as a whole further confirms that CCEA's dismissive treatment of Rule 62(c) must be rejected. Like Rule 62(c), other provisions in Rule 62 are geared toward preserving the status quo pending appeal, even when doing so means that the party that prevailed in the district court must await execution of its judgment. For instance, Rule 62(d) provides for an automatic stay of a money damages award pending appeal when the appellant posts a bond or other security. Once the court approves the security, the stay is entered—without consideration of whether the appellant has any likelihood of success on the merits, or of the hardship to the appellee in having to await ultimate relief. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1254 (2005) (describing rule as allowing appellant "to obtain a stay pending appeal as of right upon the posting of a supersedeas bond for the full judgment amount"). Similarly, Rule 62(g) grants the appellate court the authority to "issue an order to

preserve the status quo or the effectiveness of the judgment to be entered," even in the absence of a bond. Rule 62(d)'s automatic stay and Rule 62(g)'s discretionary stay, like Rule 62(c), are premised on the desire to preserve the status quo during the course of appeal in an ongoing controversy. NSEA Parties seek a similar preservation of the status quo here: To protect the money that is the subject of the dispute pending the final resolution of the merits on appeal. *See Nelson*, 121 Nev. at 834-35, 122 P.3d at 1253-54 (discussing interest in preserving status quo while protecting judgment creditor's interest). Granting a stay of the Court's Order would therefore be entirely in keeping with the spirit and purpose of Rule 62.

CCEA's argument that losing below is dispositive on a motion to stay fails as well because it ignores the four-factor test prescribed by NRAP 8(c) to guide the analysis on a motion to stay. Pursuant to the Rule, the Court should consider:

> (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Nev. R. App. P. 8(c). CCEA's assertion that the July 1, 2019 Order is dispositive and that the Court need not "evaluate the individual factors for issuing a stay pending appeal" is simply wrong. *See* CCEA Opp'n at 6. But Nevada law is clear that the Court's decision requires consideration of all four factors. *See State v. Robles-Nieves*, 129 Nev. 537, 541, 306 P.3d 399, 402-03 (2013) .

In sum, CCEA's contention that the Court's July 1, 2019 Order is dispositive of the stay motion misunderstands the purpose and application of NRCP 62(c).

II. When the Court Applies the NRAP Rule 8(c) Four-Factor Test, the Motion for Stay Should Be Granted

In our opening brief, we showed that a review of NRAP Rule 8(c)'s four factors compels the conclusion that the motion for stay should be granted. *See* NSEA Parties' Motion for Stay

Pending Appeal ("NSEA Parties' Mot. for Stay") at 9-18. Nothing in CCEA's arguments undermines that conclusion.

a. The NSEA Parties Stand to Suffer Irreparable Harm or Serious Injury Absent a Stay

For the reasons set forth in our opening brief, the first and second factors are best analyzed together in this case as the NSEA Parties' irreparable harm or serious injury arises from the fact that absent a stay the object of the appeal is likely to dissipate. *See id.* at 9. The CCEA Parties do not address the NSEA Parties' argument that the object of appeal will be defeated absent a stay. Instead, they focus on the irreparable harm inquiry, arguing that because the NSEA Parties' potential harm stems from a monetary injury, we cannot show a likelihood of irreparable harm.

This argument ignores the long line of authority, cited in our opening brief, explaining that a likelihood of irreparable harm arises where there is a significant possibility that the funds at issue might disappear or be disbursed absent injunctive relief. *See id.* at 10-13. Indeed, the only portion of the NSEA Parties' argument on irreparable harm to which CCEA responds is an attempt to distinguish *In re Estate of Ferdinand Marcos, Human Rights Litig*., 25 F.3d 1467 (9th Cir. 1994). NSEA concedes that, as CCEA pointed out, the instant case does not involve the "torture, disappearance, and summary execution" involved in *Marcos*. CCEA Parties' Opp'n at 9. But CCEA's argument ignores the central holding in *Marcos* – namely, that a court may enjoin distribution of a party's *general* assets "where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant." *Marcos*, 25 F.3d at 1469. Applying that principle, the court in *Marcos* enjoined distribution of assets where it was alleged that the defendant's financial condition or actions would frustrate a potential *money judgment*. *Id*. at 1478-80.

Those same concerns exist here. In our opening brief, the NSEA Parties introduced evidence giving strong reason to believe that CCEA will not be able to satisfy a judgment for

more than $4 million should they be allowed to disgorge the money in the Restricted Account: CCEA was operating at a projected budget shortfall of more than $2 million for the 2017-2018 budget year and during the middle of the following budget year, CCEA imposed a 23.5% increase in member dues—something it surely would have preferred not to do, given the undoubted financial hardship that steep increase created for its members. *See* NSEA Parties' Mot. for Stay at 11-12. In response, CCEA presented an exceedingly general declaration from its executive director that states merely that CCEA is "solvent." *See* CCEA Opp'n Ex. 1 ¶ 4. Tellingly, nowhere in the declaration does CCEA state that it "would be able to satisfy a judgment," despite the CCEA Parties' citation of the declaration to support that assertion. *See id.* at 8. And nowhere does CCEA suggest—in its brief or in the declaration—that it could satisfy a money judgment in excess of $4 million. CCEA's inability to provide a declaration stating that it would be able to satisfy *any* money judgment, let alone the substantial judgment at stake here, should amplify, not allay concerns that CCEA will be unable to pay NSEA should it lose on appeal after disgorging the Restricted Account funds.

Two additional factors – ignored entirely by CCEA in its opposition – further justify a finding of irreparable harm or serious injury to the NSEA Parties. First, CCEA has already announced that it will disburse the funds in the Restricted Account to members.[2] As we highlighted in our opening brief, there exists a long line of authority that holds that irreparable harm arises in the injunctive relief context where a litigant's recovery of money could be obstructed by the other party's dissipation of funds, *or* where a multiplicity of suits may be required to recover disbursed funds.[3] *See* NSEA Parties' Mot. for Stay at 10-13 (citing and

[2] As we discussed at length in our opening brief, the dissipation of the Restricted Account funds would also defeat the object of appeal—a fact that weighs overwhelmingly in favor of granting a stay. *See Mikohn Gaming Corp*., 120 Nev. 248, 253, 89 P.3d 36, 39-40 (2004).

[3] CCEA perhaps felt it was unnecessary to distinguish cases holding that a party who may have to initiate a multiplicity of suits to recover faces irreparable harm because, CCEA claims, it has "never suggested that NSEA initiate individual lawsuits against the teachers." CCEA Opp'n at 10. But in fact, it has done so explicitly and in the context of opposing the Restricted Account

discussing *Lynch Corp. v. Omaha Nat'l Bank*, 666 F.2d 1208, 1212 (8th Cir. 1981) (finding irreparable injury would arise if disputed funds were disbursed); *Johnson v. Couturier*, 572 F.3d 1067, 1081-82 (9th Cir. 2009) (upholding district court's decision enjoining corporation from advancing defense costs where it was unlikely that defendants would be able to reimburse those costs); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940) (preliminary injunction to preserve status quo merited in face of allegations that party against whom judgment was sought was "insolvent and its assets in danger of dissipation or depletion"); *Tujague v. Adkins*, No. 4:18-CV-631, 2018 WL 4816094, at *3 (E.D. Tex. Oct. 4, 2018) (irreparable harm arises where dissipation of assets will require initiating multiple suits to recover disputed funds); *Basin Elec. Power Co-op v. MPS Generation, Inc.*, 395 F. Supp. 2d 859, 867 (D. N.D. 2005) (irreparable harm arises where release of escrowed funds may render them unavailable in the future)).

Second, the case for preserving the status quo pending appeal is even stronger than in cases like *Marcos*, discussed above, where, as here, the money that the moving party seeks to freeze is the subject of the suit itself. Indeed, even in Circuits in which courts are reluctant to freeze defendants' *general* assets to preserve their ability to satisfy a future money judgment, courts have provided interim injunctive relief where the moving party seeks the "return of a *particular* asset or fund that had been used to violate a statute." *See Marcos*, 25 F.3d at 1479-80 (emphasis in original) (discussing *Dixie Carriers, Inc. v. Channel Fueling Serv., Inc.*, 843 F.2d

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Order. During the April 23, 2018, hearing that resulted in the Restricted Account Order, counsel for CCEA said:

> But the fact of the matter is, if they really want their remedy, and they're not—they're never going to do this. You know who—you know who their contract is [sic]? Because they keep saying this. The teachers are on the hook. When they sign that card, they're on for—for dues for the year and even if they leave testimony [sic] system, their position has always been, the teachers still owe those dues for the year. So you know who the remedy is against? I hate to say it, because it's distasteful, the teachers.

Apr. 23, 2018, Hearing Transcript at 132:22-133:7.

821, 824 (5th Cir. 1988)). This is in keeping with the principle that it "is always appropriate to grant intermediate relief of the same character as that which may be granted finally," and that therefore courts may issue interlocutory injunctions "with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945); *see also United States v. First Nat'l City Bank*, 379 U.S. 378, 384-85 (1965) (citing *De Beers* and approving of injunction to preserve status quo by preventing dissipation of assets where assets would be the subject of final decree in the case). In other words, in a case like this, where the NSEA Parties seek injunctive relief to preserve the very assets that are the subject of the parties' dispute, it is eminently appropriate to preserve those assets, which will be the subject of any final relief, during the pendency of the litigation, including the appeal.

b. CCEA Members Will Suffer No Irreparable Harm from a Stay

Next, CCEA contends that its members will be harmed—though it does not contend they will be irreparably harmed—by having to wait for their refunds until the resolution of the case on appeal. *See* CCEA Opp'n at 11. The opposite is true. Only if a stay is put in place will the members' interests be protected in securing a complete and accurate accounting of the funds in question and not be put in the position of initially being awarded funds, which subsequently are determined to have already been expended by NEA and NSEA on services and representation previously provided. In this regard, it is worth noting, as we discussed in our opening brief, that no member has made a claim at this time to the Restricted Account funds. This is the very scenario that Rule 62(d) contemplates—the automatic stay of disbursement of a money judgment pending appeal, so long as the money is somewhere safe during the appeal.[4] *Nelson*, 121 Nev. at 834-35, 122 P.3d at 1253-54 (discussing interest in preserving status quo while protecting

[4] If CCEA was truly concerned with potential harm to its members, and if it was truly able to satisfy a judgment, it could offer to post a bond in place of the Restricted Account. It has not done so.

judgment creditor's interest). The CCEA Parties' citation to cases holding that monetary damages, absent other circumstances, cannot constitute irreparable harm is properly directed to the question whether the *members* stand to suffer any irreparable harm. Because they do not, and, by contrast, because dissolution of the Restricted Account stands to irreparably harm the NSEA Parties, the balance of equities undoubtedly tips in the NSEA Parties' favor.

c. Likelihood of Success on the Merits

Finally, CCEA's opposition places essentially dispositive weight on the last factor—likelihood of success on the merits. We strongly disagree with CCEA's analysis of the substantive claims, and as we explained in our opening brief, even the Court recognized the difficult issues involved. *See* NSEA Parties' Mot. for Stay at 14-18. More fundamentally, CCEA's argument suffers from a misconception of this factor. A party seeking a stay is not required to prove to the district court that it will win on the merits in order to bring a successful motion. As we discussed in our opening brief, the Nevada Supreme Court explained in *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000), a case that the CCEA Parties cite in their brief, that "when moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits." *Id*. Instead, in order to satisfy the fourth stay factor under NRAP 8(c), the moving party must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Id*. CCEA's opposition makes no attempt to address this standard, resting entirely on the fact that NSEA Parties lost in the district court to argue that NSEA Parties cannot satisfy this fourth stay factor. *See* CCEA Parties' Opp'n at 11-14. On that ground alone, CCEA's opposition must be rejected.

While the foregoing is dispositive, we note as well that where, as here, the object of appeal will be defeated absent a stay, only frivolous appeals or stay motions filed for dilatory purposes will fail to satisfy this factor. *See* NSEA Parties' Mot. for Stay at 14 (citing *Mikohn*

Gaming Corp. v. McCrea, 120 Nev. 248, 254, 89 P.3d 36, 40 (2004) (granting stay where merits were "unclear" but first factor was strong)); *see also Robles-Nieves*, 129 Nev. at 546, 306 P.3d at 406 (granting stay where there was "at least a fair dispute"). This appeal is certainly not frivolous—indeed, the Court acknowledged during the May 9, 2019, hearing that the claims in this case involve "complicated issues." May 9, 2019 Hr'g Tr. at 237-38.

In sum, the CCEA Parties have failed to rebut the NSEA Parties' case for a stay pending appeal.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the NSEA Parties' opening brief, the Court should stay its Order on the Motion to Alter or Amend pending appeal.

Dated this 3rd day of September, 2019.

Respectfully submitted,

/s/ Paul J. Lal
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Parties

CERTIFICATE OF SERVICE

This document applies to Case No. A-17-761884-C, and the parties in the case are, on the one hand, the Nevada State Education Association, National Education Association, Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff, and, on the other hand, the Clark County Education Association, John Vellardita, and Victoria Courtney.

Pursuant to NRCP 5(b), I, an employee of BOIES SCHILLER FLEXNER LLP, hereby certify service of the foregoing ***NSEA AND NEA PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL*** was made this date by electronic filing and/or service via the Eighth Judicial District Court's E-Filing System to the following:

Richard G. McCracken
Kimberly C. Weber
McCracken, Stemerman & Holsberry, LLP
1630 S. Commerce Street, Suite A-1
Las Vegas, NV 89102

Joel A. D'Alba
Asher, Gittler & D'Alba, LTD.
200 West Jackson Blvd, Suite 720
Chicago, Illinois 60606

John S. Delikanakis
Michael Paretti
Bradley T. Austin
Snell & Wilmer, L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Dated this 3rd day of September, 2019.

/s/ Carolyn E. Wright
An employee of Boies Schiller Flexner LLP