IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC., Appellant, v. DAVE SANDIN; AND SANDIN & CO., Respondents.	Supreme Court No. 76966 District Case No. A672158

RESPONDENT DAVE SANDIN AND SANDIN & CO.'S ANSWER TO PETITION FOR REVIEW

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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(1), and must be disclosed:

Sandin & Co. has no parent company and is not publicly traded. There is no publicly traded company that owns more than 10% of the stock of Sandin & Co.

Dave Sandin is an individual.

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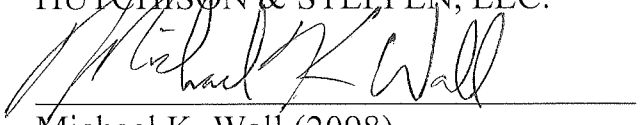
These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 17 day of March, 2020.

HUTCHISON & STEFFEN, LLC.



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CASE LAW

Dave Sandin and Sandin & Co. (collectively "Sandin") submit this answer to appellant/plaintiff's petition for review.

INTRODUCTION

When a party is sued that party has a choice. It may pay a settlement or it may defend. When the lawsuit is baseless, it is a Hobson's Choice.

Plaintiff sued Sandin, without basis in law or fact, in a desperate attempt to find someone, anyone, to bear a loss plaintiff knowingly and intentionally imposed on itself. Sandin was innocent, and plaintiff knew it. Sandin did not settle. Sandin defended.

Alleging facts it knew were untrue and could not be supported, plaintiff survived a motion to dismiss. Feeling its oats, plaintiff refused Sandin's offer of judgment. Plaintiff made its choice knowing Sandin's argument that Sandin had no liability, knowing it had no evidence to support its false version of facts, and assuming the risk that it would have to pay attorney's fees after losing. Following protracted litigation on a litany of claims not even plaintiff has the temerity to repeat at this stage, plaintiff lost on all claims by summary judgment.

Plaintiff appealed.

This Court determined that Sandin had no duty to plaintiff, and that there was no evidence to support plaintiff's factual allegations in its complaint. After

protracted post-judgment motion practice, and having given great consideration to all of the appropriate standards, the district court awarded Sandin a portion of its attorney's fees and costs. Parsing the record to make up yet another factually false syllogism regarding the basis for the district court's award, plaintiff again appealed. The award was affirmed.

Now plaintiff, still asserting facts that are untrue, continues its relentless attack on a party it knew was innocent from the beginning, seeking further review from this Court. There has got to be an end.

Why did plaintiff pursue a battery of false claims (not just the one it now claims was asserted in good faith) against Sandin through expensive litigation? Why did plaintiff refuse an offer of judgment and accept the risk of losing? Because plaintiff had suffered a huge fire loss, and due to its intentional failure to pay its insurance premium, it had no coverage and was willing to subject anyone to a lawsuit, even a party against which it knew it had no legitimate claim, in its blind rush to rescue itself from its own folly.[1]

Plaintiff believes that requiring litigants who pursue frivolous claims in bad

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[1]That plaintiff was able to recover from OMI, its insurer, because its insurer failed to follow the law in the manner in which it cancelled the policy, which has nothing to do with plaintiff's independent claims against its broker. Those claims were frivolous and were pursued in bad faith from the day the complaint was filed.

faith to pay attorney's fees when they refuse a legitimate offer of judgment will have a chilling effect on advocacy. Misrepresenting facts and making up legal theories that are not supportable factually or legally is not the type of zealous advocacy the public policy of Nevada should foster. Plaintiff cries for justice. How about justice for the innocent defendants in this case who have been forced to endure frivolous, bad faith litigation for almost a decade? How about justice for defendants accused of fraud under circumstances where the allegations are so outrageous they are not even defended in response to a motion for summary judgment, after years of protracted discovery where those claims were asserted in bad faith? How about justice for a defendant who is accused of not informing a plaintiff of facts of which plaintiff admittedly knew defendant had no notice? How about justice for a defendant who is blamed for a plaintiff's failure to pay an insurance premium when the plaintiff made a knowing and conscious choice not to pay the premium?

Plaintiff's misrepresentations of fact at every stage of this protracted litigation scream of bad faith, but the nightmare continues. The facts relied on by plaintiff in it brief on appeal and again in this petition for review are not facts. Their continued repetition by plaintiff will never make them facts.

DISCUSSION

I. Standard of Review

"A decision of the Court of Appeals is a final decision that is not reviewable by the Supreme Court except on petition for review." NRAP 40B(a). The factors this Court considers are:

> (1) Whether the question presented is one of first impression of general statewide significance;
> (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court;
> (3) Whether the case involves fundamental issues of statewide public importance.

Id. Plaintiff relies on factor (2), arguing that the Court of Appeal's decision conflicts with *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), but the Court of Appeals did not issue an opinion that purports to conflict with *Beattie* on a question of law. Plaintiff's complaint is that the Court of Appeals "applied" *Beattie* incorrectly by not properly weighing the factors set forth in *Beattie*. Factor (2) is intended to insure that the published law of Nevada remains consistent, not to provide an avenue of review for every decision of the Court of Appeals that applies Nevada law in a manner a plaintiff does not like.

Plaintiff relies on factor (3), stating that the issue has statewide importance. To be clear, the issue of the correct construction of NRCP 68 has statewide

importance, and there is a significant amount of published law in Nevada on the subject. The question of whether the district court properly applied that law to the facts of this case, and the even further removed question of whether the Court of Appeals abused its discretion in determining that the district court did not abuse its discretion in applying the established law to the facts of this case, has importance only to the parties to this appeal. Again, this factor was not intended to reach the garden variety issues raised in plaintiff's petition for review.

Of course, this Court has discretion to grant review on any basis it deems sufficient.

II. Plaintiff Knowingly Sued Sandin in Bad Faith.

In this petition for review, plaintiff attacks only the district court's application of the *Beattie* factors to the facts of this case, and relies for authority only on Judge Gibbons's dissent. With the utmost respect to Judge Gibbons and his dissenting opinion, it is based on a set of facts of plaintiff's creation, which plaintiff repeats in this petition for review. Although all of the facts underlying the lawsuit cannot be set forth herein, the fact that the lawsuit was without basis from the instant it was filed is the most critical fact ignored by plaintiff.

The real facts are set forth in detail with copious and meaningful citations to the record in Sandin's answering brief. In contrast, plaintiff's opening brief set

forth facts not supported by any meaningful citation to the record, that are untrue. Plaintiff has repeated its incorrect statement of facts in its petition for review. Sandin's answering brief demonstrates the falsity of plaintiff's factual statements; Sandin relies on all of the arguments of the answering brief to refute plaintiff's misleading statement of facts.

As a point of clarification, all of the opinions that have been issued in the appeals in this case indulge a factual assumption that is untrue. All of the opinions proceed from the assumption that plaintiff simply neglected to make its premium payment by oversight, and that the penalty of loss of coverage is therefore harsh. The opinions also seem to suggest that plaintiff did not pay its premium because it did not receive notice. That is not true.

Why plaintiff neglected to pay its monthly premium in the first place is not reflected in the record, but it was not because it did not receive its monthly notice. At no time has plaintiff claimed it did not receive its monthly notice to pay its premium. Indeed, Stephan Freudenberger, plaintiff's president, acknowledged that the non-payment was solely due to his own personal neglect. IV AA 519.

Below, plaintiff claimed that it did not receive a copy of the notice of cancellation, but the facts demonstrated that plaintiff did receive that notice and that plaintiff made a conscious decision before the policy was cancelled not to

correct its delinquency. Plaintiff wrote a check for the premium in time, but chose not to mail it. The case was reversed as to OMI, plaintiff's insurer, solely because the notice of cancellation was technically deficient in its content, not because the notice had not been properly and timely delivered to plaintiff. This Court–not the Court of Appeals–determined that there was *no evidence* in the record on appeal from the final judgment to support plaintiff's baseless claims regarding its lack of notice.

Plaintiff's willfulness in intentionally choosing not to pay its premium after it had notice is mirrored by its willfulness in filing a baseless complaint against its innocent broker after suffering a loss it knew was not the fault of the broker, based on allegations it knew could not be factually supported.[2] It is also mirrored in plaintiff's willfulness in rejecting an offer of judgment after these facts had been spelled out for it in Sandin's motion to dismiss.

III. Factual Misrepresentations.

Plaintiff asserts that after it failed to pay its premium, OMI "allegedly notified OPH and the Sandin Defendants that it would cancel the Policy." Pet. at 3. This is untrue. Plaintiff alleged in its complaint that OMI had not so informed

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[2]Plaintiff's lawyers may not have known that plaintiff's story about its alleged course of conduct with Sandin was not true, but plaintiff knew. As found by this Court, there was no evidence of any such course of conduct.

Sandin, and demanded from Sandin an admission that it had not been informed. There was incontrovertible evidence that OMI never notified Sandin, and both the district court and this Court relied on that evidence in concluding that Sandin could not have informed plaintiff of the notice of cancellation because Sandin was never informed there would be a cancellation until after the policy had been canceled. Still, in it brief in the second appeal and in this petition for review plaintiff repeats this misstatement, in order to support the misrepresentation that plaintiff had a good faith basis for suing Sandin.

Plaintiff accuses Sandin again of never having warned it of the impending cancellation (although it knew Sandin did not know of the impending cancellation), purposely implying that it was not aware before the cancellation that its premium had not been paid. This is an intentional misrepresentation. Plaintiff knew before cancellation that it had not paid its premium.

Plaintiff correctly notes that it sued Sandin for fraud in the inducement, fraud, breach of fiduciary duty and negligence, and pursued all of these claims until the time Sandin moved for summary judgment, forcing Sandin to defend. Plaintiff fails to inform this Court that the fraud claims were frivolous from the outset, arguing only that its breach of fiduciary duty and negligence claims were pursued in good faith. This Court will recall that both this Court and the district

court disposed of plaintiff's claim of breach of duty claims because there is no such duty in Nevada, and there was no evidence to support an exception to the no-duty rule. Contrary to plaintiff's mantra, this Court never suggested that plaintiff's claims had been pursued in good faith.

Plaintiff argues that because Sandin's motion to dismiss was denied, plaintiff had a good faith basis to reject an offer of judgment. Any first year law student can compose a complaint sufficient to survive a motion to dismiss. At that stage, false facts pleaded and argued by plaintiff had to be accepted by the district court as true. The denial of the motion was not an endorsement of plaintiff's claims. Indeed, the district court made clear that under the federal summary judgment standard, plaintiff's complaint could not have survived. APP 874 (The Court: "I feel that the Court was pretty clear that [denial of the motion to dismiss was] only because we've got the Nevada standard and not the Federal standard, you wouldn't have passed muster under the Federal standard.").

Still, plaintiff asserts that its having defeated the motion to dismiss supports a finding that it acted in good faith in rejecting the offer of judgment. Sandin suggests this fact cuts against, not in favor of, plaintiff. At the time plaintiff rejected the offer, plaintiff had been fully informed that its claims were both legally and factually unsupportable. It had been warned by the district court that

the claims were marginal, at best. If in the euphoria of its great victory plaintiff (and more importantly, plaintiff's counsel) failed to properly evaluate the weaknesses of its claims, that does not militate against an award of attorney's fees. Attorney's fees are the consequence of rejecting an offer of judgment to pursue questionable claims.

Plaintiff asserts that "[a]t the first hearing for attorney's fees in 2015, the district court appeared to determine that OPH brought its claims in good faith and was not unreasonable in rejecting the Offer." Pet. at 4. This false assertion is the primary basis for plaintiff's appeal. It was false when plaintiff first asserted it, and it is false now. This argument was fully refuted in the answering brief at 30-33.

The district court stated that the parties had been acting toward each other in conducting the litigation in good faith. APP 761-62. It did not state that plaintiff brought its claims in good faith. It did not state that plaintiff rejected the offer of judgment in good faith. *Id.* At the hearing on the motion for reconsideration, the district court denied that it had *ever* stated that plaintiff acted reasonably in rejecting Sandin's offer of judgment. The district court denied this not once, not twice, not thrice, but eight times. APP 874-76.[3] The district court simply never

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[3]For example, the district court stated: "And I never said that I thought that that was -- that it was a reasonable decision to reject the offer. I felt it was a choice that was made by OPH to take the risk. They were on notice that they had a

concluded that OPH's rejection of the offer was justified. Even if it had said something at the hearing that plaintiff can twist to support its argument, what the district court says at a hearing is not its order, and is not a ruling on which any party can rely. *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("An oral pronouncement of judgment is not valid for any purpose . . . only a written judgment has any effect . . . ."). Plaintiff's continued assertion that the district court found that it acted in good faith, which it mischaracterizes as "an explicit finding," Pet. at 4, is improper.

IV. This Case is Not Appropriate For Supreme Court Review.

Plaintiff claims the Court of Appeal's decision is at odds with *Beattie*, all the while acknowledging that the Court of Appeals was reviewing the district court's decision for an abuse of discretion, not to impose its own view. Pet. at 5. Plaintiff complains that the district court's written findings were not detailed enough to meet this Court's established standards, but ignores that it had the burden on appeal to demonstrate that the district court's decision was "arbitrary and capricious," and that both the majority and the dissent cited *Wynn v. Smith*,

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substantial risk before them it was going to be a tough fight and if they proceeded with the Sandin defendants, you know, there's a risk. And that's, I'm assuming, the decision analysis that they followed and determined that it was worth the risk to proceed. APP 874.

117 Nev. 6, 13, 16 P.3d 424, 428 (2001), for the well-established proposition that, "[a]lthough explicit findings with respect to [the Beattie] factors are preferred, the district court's failure to make explicit findings is not a *per se* abuse of discretion." *Id.*, (citing *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994)). Plaintiff further ignores the majority's conclusion that "support for an implicit ruling regarding all of the *Beattie* factors is clear on the record." Surely, it would be an inefficient use of this Court's limited resources to review whether the Court of Appeals abused its discretion in determining that the record clearly supported the conclusion that the district court properly exercised and did not abuse its discretion. What plaintiff wanted the Court of Appeals to do is to re-weigh the *Beattie* factors and replace the district court's opinion with its own. Now that a majority of the Court of Appeals has declined that invitation, plaintiff wants this Court to re-weigh the factors on a cold record.

Plaintiff argues multiple times that "the Dissent established that the Majority violated" the law. With all due respect to Judge Gibbons (and the greatest respect is due), the dissent establishes only that in his minority view, the district court did not properly weigh the factors that are established by existing law. The dissent does not "establish" that the majority violated any decision of this Court, or any principle of law, in reaching the opposition conclusion that the

record demonstrates the district court properly weighed the factors. This Court's review of the Court of Appeals is reserved for instances where there is a dispute as to what the law is. It is not intended as a second bite at the error-correction apple when application of the same standards are applied differently to the facts contained in the record by members of the Court of Appeals.

V. The District Court Properly Considered and Applied the *Beattie* Factors.

The focus of the dissent is that the district court did not adequately explain its application of the *Beattie* factors. Judge Gibbons focused on the argument that the district court did not adequately address whether the timing of the offer was reasonable in timing and amount, and did not address whether plaintiff's claims were brought in good faith, and whether plaintiff's rejection of the offer of judgment was grossly unreasonable. But these are factors, not standards, and the district court record is more than sufficient to demonstrate that the district court fully considered these factors, as found by the majority. In particular, it is difficult to imagine claims with less basis in fact or law than those in this case. The case was pursued to find a scapegoat with a deep pocket from the beginning, and the pleadings themselves demonstrate plaintiff's knowledge that Sandin was not responsible for the loss. Plaintiff wanted as many defendants as possible, and sued

Sandin because he was there. Plaintiff never articulated a coherent legal claim against Sandin, and presented no evidence to support its claims. The fact that "plaintiff's business had just been destroyed," dissent at 13, although it makes plaintiff a sympathetic party, is no excuse for plaintiff to sue a party it knew had no liability. As a result of plaintiff's baseless suit, Sandin's business has been destroyed by unjustified attorney's fees and costs. The sympathy one might feel for plaintiff should be tempered by the undeniable fact that plaintiff's loss of insurance coverage was based on its own intentional choice not to pay its premium, and Sandin's loss has been caused by plaintiff's intentional choice to sue a party with no arguable liability.

Plaintiff's rejection of the offer was grossly unreasonable, and the district court properly weighed this factor as well.

Plaintiff argues that both the district court and Court of Appeals "failed to perform any analysis of the first and third *Beattie* factors," which in plaintiff's view constitutes a "dangerous error." Pet. 6. This is a reckless and unprofessional accusation, at best. It is a misrepresentation of the record in any event. Plaintiff's real complaint is that the district court decided those factors favored Sandin, not plaintiff.

Hyperbole aside, both the district court and the Court of Appeals performed

extensive analysis of all of the *Beattie* factors. Long hearings were conducted where all of these factors were considered. The district court's order affirmatively declares that it carefully considered all factors. What would be "dangerous error" would be to review every district court order on attorney's fees based on insubstantial complaints from losing parties. What would be "dangerous error" would be to remove the protections of NRCP 68 based on arguments that plaintiff had a good reason not to accept a timely offer of judgment, when that reason boils down to plaintiff wanted more money and plaintiff did not properly evaluate the extreme weaknesses of its own case, especially when it turns out that there is no basis in law or fact for the claims in the first place, and that fact was pointed out in a motion to dismiss, in a motion for summary judgment, in a district court order granting that motion for summary judgment, and was affirmed by this Court on appeal.

VI. The Offer Was Reasonable in Timing and Amount, and Was Unreasonably Rejected by Plaintiff.

Plaintiff's relies on six circumstances which it believes makes its rejection of Sandin's offer so immanently reasonable that any award of attorney's fees and costs was arbitrary and capricious. Each reason is insubstantial, and accepting any of these reasons, either individually or collectively, will deprive the offer of

judgment rule of any real application.[4]

First, plaintiff complains that the offer was in a nominal amount. $2,000 may be a nominal amount to plaintiff, but when one has been sued without basis and is offering to settle a debt he or she does not arguably owe, $2,000 is hardly nominal. At the time of the offer, plaintiff knew that it had no evidence to support its claims against Sandin. Plaintiff knew it was searching for a deep pocket, regardless of fault or liability. The most important factor demonstrating the sufficiency of Sandin's offer of judgment is that plaintiff failed to beat that offer. Plaintiff's claims were worth zero dollars as a matter of law. The district court awarded plaintiff zero dollars on its claims as a matter of law. This Court affirmed on appeal that plaintiff's claims were worth zero dollars as a matter of law. An offer in any amount would have been a gift. Further, Plaintiff did not remove the action from the mandatory arbitration program for the first six months of the litigation, suggesting that damages were not in excess of $50,000.

Second, plaintiff notes that it had suffered hundreds of thousand of dollars

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[4]Sandin recognizes that, based on the particular facts of any given case, factors such as those relied on by plaintiff might justify a party's refusal of an offer of judgment. But the facts of this case do not justify plaintiff's unreasonable refusal to accept an offer of judgment. This being necessarily a factual determination and analysis, it is particularly unsuited for a third review as to reasonableness.

in damages. The amount of the plaintiff's damages is hardly relevant if the plaintiff chooses to sue a party that is not responsible for those damages. It would be a dangerous precedent indeed to hold that any person wrongfully and baselessly sued must make an offer of judgment measured by the amount of the false accuser's damages in order to obtain the protections of NRCP 68. As stated at the outset, when one is falsely sued, one's options are limited. One of those options is to place the risk of the litigation on the party pursuing the litigation. An offer of judgment is not unreasonable in amount just because the amount in controversy exceeds the offer.

Third, plaintiff argues that the offer was made the day after plaintiff defeated Sandin's motion to dismiss. How this enures to plaintiff's benefit is a mystery. Plaintiff has cited no case law to support the proposition that a case's survival of a motion to dismiss is evidence the claims were brought in good faith. Survival at that stage simply suggests that counsel pleaded enough facts to satisfy the elements of the claims. Nor is there any law that suggests that a defendant must wait for any specified length of time after a motion to dismiss is denied before making an offer of judgment. Indeed, this is the prime time when a wrongfully sued defendant would consider making an offer of judgment. After losing the motion based on the low pleading bar, the wrongfully sued defendant

must either concede or defend, and defending is expensive. At that time, an offer of judgment may be a defendant's only hope of a fair result at the end of the long process. A defendant has no duty to incur expense before offering a reasonable settlement of a baseless lawsuit.[5]

Fourth, plaintiff argues the it had already incurred expense before the offer was made. But a defendant's offer, to be in good faith, need not make a plaintiff whole.

At the time plaintiff filed its suit, it knew the action was a shakedown. It does not make plaintiff's refusal of Sandin's offer good faith because Sandin did not tender an amount that approximated plaintiff's perceived nuisance value of the shakedown. Further, the amount plaintiff had spent pursuing his baseless complaint is not a baseline for determining whether an offer is reasonable. No matter how badly one is injured in an accident, if one knowingly sues a person with no liability, one cannot argue when an offer is made that the amount of the offer is too small because the injuries are great and one has already spent money

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[5]In rejecting this argument, the district court stated: "Their motion to dismiss was very thorough on why this case was just never going to reach the affirmative standard necessary to show that a duty had been assumed. That was on the record from the beginning. They put you on notice after they were not successful in having the case dismissed that they felt confident in their position." APP 874.

pursuing a baseless lawsuit. A frivolous lawsuit does not become less frivolous because the person bringing it has suffered a loss, or because the person bringing it has expended funds.

Fifth, plaintiff complains that no answer had been filed. How this impacts the question of whether a rejection of a valid offer of judgment is good or bad faith is not apparent. Nothing in the Rule suggests that a party must answer a complaint and incur expenses before making an offer of judgment.

And finally, plaintiff notes that no discovery had been conducted. That would seem to be the best time to offer settlement, *i.e.*, before the parties have incurred expenses. More to the point, plaintiff was in possession of all of the facts it needed to evaluate the offer before discovery was conducted. Plaintiff knew its policy was in jeopardy of being cancelled before the policy was canceled. Plaintiff did not need to rely on Sandin to notify it of the pending policy cancellation or to remind it to make a payment. Plaintiff also knew that OMI did not supply Sandin with the notice of termination. Plaintiff's knowledge of these fact is the law of this case, as found by this Court in the first appeal. Knowing all of these facts, plaintiff's rejection of an offer, any offer, to settle against a defendant it knew it had sued in bad faith was not justified.

Plaintiff has not suggested any matter of fact it learned in discovery that

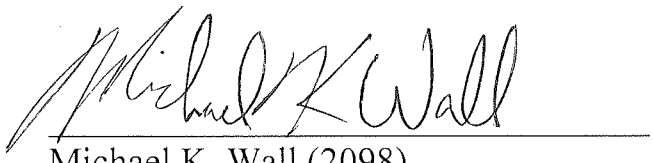
impacted its decision. This is just another way of saying the public policy of Nevada should be against early offers of judgment. The converse should be the case. Early settlement should be encouraged.

CONCLUSION

Enough is enough. This petition for review should be denied.

DATED this 17 day of March, 2020.

HUTCHISON & STEFFEN, LLC.



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CERTIFICATE OF COMPLAINCE

I, Michael K. Wall, certify as follows:

1. I have prepared respondents answer to petition for review, and I am familiar with its content.

2. To the best of my knowledge, information and belief, this answer is not frivolous or interposed for any improper purpose, such as to harass, or to cause unnecessary delay, or to needlessly increase the cost of litigation.

3. The answer to petition for review complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 40.

4. I certify that this answer to petition for review 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). This brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman.

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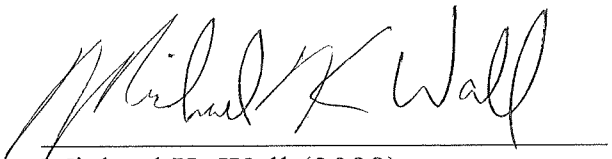
I further certify this brief complies with the page or type limitations of NRAP 40 or NRAP 40A because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,642 words, within the limitation of 4,667 words established by NRAP 40(b)(3).

DATED this 17 day of March, 2020.

HUTCHISON & STEFFEN, LLC.



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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **RESPONDENT DAVE SANDIN AND SANDIN & CO.'S ANSWER TO PETITION FOR REVIEW** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 17th day of March, 2020.

An employee of Hutchison & Steffen, PLLC