IN THE SUPREME COURT OF THE STATE OF NEVADA

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, Appellant, vs. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency, Respondent.	**Supreme Court No. 80218** First Judicial District Court Case No. 17 OC 00269 1B

Appeal from First Judicial District Court, State of Nevada, Carson City
The Honorable James. T. Russell, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Petitioner Home Warranty Administrator of Nevada, Inc. d/b/a Choice Home Warranty ("HWAN") is a Nevada domestic corporation. It is not owned by any parent corporation and no publicly held company owns more than 10% of HWAN's stock.

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DATED this 12th day of May, 2020.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRS 233B.150. The final judgment of the district court on HWAN's petition for judicial review was entered on November 25, 2019, with notice of entry served on November 26, 2019. The notice of appeal was timely filed with the district court on December 6, 2019.

ROUTING STATEMENT

While ordinarily an administrative agency matter would be presumptively assigned to the Nevada Court of Appeals under NRAP 17(b)(9), this case involves matters raising as a principal issue a question of statewide public importance, which should be retained by the Supreme Court under NRAP 17(a)(12).

This appeal concerns statutory interpretation of NRS Chapter 690C's registration requirements, which affects the entire Nevada service contract industry. Namely, does NRS Chapter 690C require anyone other than a provider of service contracts to register with the Division of Insurance ("the Division") to sell service contracts?[1] In other words, are sales agents required to be registered under NRS Chapter 690C as providers of service contracts even though they are not obligors under any service contracts? The answer to this question will have far-reaching consequences for the entire Nevada service contract industry, as many Nevada service contract providers use sales agents who are not registered as service contract providers under NRS Chapter 690C to sell service contracts on their behalf.

[1] Appellant's Appendix ("App.") Volume ("Vol.") VIII 1402-03; App.Vol.XIII 2519.

STATEMENT OF THE ISSUES

1. Whether HWAN was denied due process of law as required by NRS 690C.325, NRS 233B.127, and the Nevada Constitution when the Division imposed fines and deemed HWAN's certificate of registration expired on grounds not noticed in the complaint and failed to provide notice and a hearing prior to refusing to renew HWAN's certificate of registration.

2. Whether NRS 690C.150 requires ***only*** a "provider" of service contracts, which is specifically is defined in NRS 690C.070 as the obligor of the service contract, to hold a service contract provider certificate of registration.

3. Whether the doctrine of equitable estoppel precludes the Division's imposition of fines.

4. Whether the imposition of fines against HWAN for alleged violations of NRS 686A.070, NRS 690C.320, NRS 679B.125, and NRS 690C.325 is unsupported by Nevada law and substantial evidence.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises out of a Division decision that was taken to the district court on judicial review. The hearing officer violated HWAN's due process rights by *sua sponte* basing her decision on factual allegations and legal theories of which HWAN had no notice prior to the hearing, including HWAN's use of an unregistered sales agent and alleged failure to make certain disclosures. This due process violation, combined with the hearing officer's misinterpretation of clear statutory language requiring only service contract providers to register with the Division, led to further errors in a case that involves an issue of great public importance—whether Nevada law requires anyone other than service contract providers, the obligors on service contracts, to register with the Division for protection of consumers.

II. Course of the Proceedings

A. The Administrative Proceedings.

HWAN is a service contract provider that has held a certificate of registration ("COR") in Nevada since 2010 pursuant NRS Chapter 690C.[2] In November 2016, HWAN filed its timely and complete renewal application for its COR with the Division ("2016 Application"), like it had done every November

[2] App.Vol.VIII 1380-85.

since 2011.[3] The Division did not notify HWAN that its 2016 Application was denied until eight months later, when a Division employee e-mailed HWAN to inform it that its COR had "expired."[4]

Meanwhile, in May 2017, the Division filed a Complaint and Application for Order to Show Cause ("Complaint") against HWAN under Cause No. 17.0050 (the "Administrative Case") seeking to strip HWAN of its COR for allegedly violating the following: "NRS 686A.070 – falsifying material fact in any book, report, or statement; NRS 690C.325(1)(B) – conducting business in an unsuitable manner; and NRS 686A.310 – engaging in unfair practices in settling claims."[5] The Division alleged that HWAN falsified material facts by not disclosing actions in other states against HWAN's administrator and sales agent, CHW Group, Inc. d/b/a Choice Home Warranty ("CHW"). In so doing, it treated CHW and HWAN as one entity despite the two being separate business entities.[6] The Division further alleged that HWAN engaged in unfair practices in settling claims and conducted business in an unsuitable manner based on a number of Better Business Bureau, news, and media outlet complaints (such as Yelp and other review sites), along with some consumer complaints received by the Division.[7] The Division finally

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[3] *Id.* 1384-85, 1404:18-19.
[4] *Id.* 1385:8-12, 1404:19-25.
[5] App.Vol.I 1.
[6] *See generally id.* 1-9; App.Vol.VIII 1380-81, 1395-96.
[7] App.Vol.I 2-7.

alleged that HWAN failed to make its records available to the Division despite a subpoena.[8]

The Division sought imposition of fines against HWAN, revocation of HWAN's COR, a cease and desist order against HWAN, and withholding of HWAN's security deposit.[9] On September 5, 2017, the Division filed a nearly identical Amended Complaint and Application for Order to Show Cause ("Amended Complaint"), which clarified that HWAN had produced information in response to the Division's subpoena.[10]

A hearing was held on September 12-14, 2017.[11] On December 18, 2017, Hearing Officer Alexia M. Emmermann, Esq. ("Emmermann") entered Findings of Fact, Conclusions of Law, Order of Hearing Officer, and Final Order of the Commissioner (the "Administrative Decision").[12] Emmermann did not find that HWAN had engaged in unfair practices in settling claims or conducted business in an unsuitable manner, the original allegations in the Complaint.[13] She also did not find that HWAN made false statements of fact in failing to disclose regulatory actions in other states against CHW on HWAN's applications.[14]

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[8] *Id.*
[9] *Id.* 7.
[10] *Id.* 169-177.
[11] App.Vol.IV-VII 583-1270.
[12] App.Vol.VIII 1404-06.
[13] *Id.* 1399-1400.
[14] *Id.* 1396-97.

Emmermann instead imposed fines on HWAN primarily for using an administrator and sales agent (CHW) that did not itself hold a COR, which allegation was raised for the first time at the hearing.[15] Emmermann incorrectly determined that "HWAN has been merely a figurehead, enabling an unlicensed entity to engage in the business of service contracts in Nevada under HWAN's license" and concluded that "CHW Group has engaged in the business of service contracts without a license."[16] In so doing, Emmermann inexplicably ignored the Division-approved service contracts at issue, which state that registered service contract provider HWAN, not CHW, is the obligor of those contracts.[17]

Emmermann imposed fines on HWAN totaling $1,194,450 for 23,889 instances of CHW selling, issuing, or offering for sale service contracts.[18] Emmermann further imposed another $30,500 in fines for alleged misrepresentations on HWAN's applications that it self-administered its contracts when CHW was HWAN's administrator, failure to disclose use of an unapproved service contract form, and failure to respond to requests for information from the Division.[19] Only the last alleged violation was noticed in the original Complaint

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[15] *Id.* 1400-03, 1405.
[16] *Id.* 1403:16-18.
[17] *See generally id.* 1381:24-1382:22; *see also* App.Vol.III 480-88.
[18] App.Vol.VIII 1405.
[19] *Id.*

and Amended Complaint.[20] To excuse the failure of the Division to give notice of these alleged violations, Emmermann further found that the Division was not aware that HWAN and CHW were two separate entities until after the administrative proceedings began.[21]

Additionally, Emmermann chastised the Division for failing to notify HWAN that its 2016 Application had been denied.[22] She refused to revoke HWAN's COR or issue a cease and desist order.[23] Rather, she deemed HWAN's COR expired as a matter of law as of November 2016 and afforded HWAN an opportunity to again submit a renewal application within 30 days of the Administrative Decision.[24] She also ordered the Division to issue a decision on any renewal application within 15 business days of receipt.[25] Finally, Emmermann ordered that the Division could not "take action against [HWAN] for issuing, selling, or offering for sale service contracts without a certificate of registration from the date of [the Administrative Decision] plus 45 days."[26]

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[20] *Compare* App.Vol.VIII 1396-1405 *with* App.Vol.I 1-9, 169-177.
[21] App.Vol.VIII 1395-98, 1400-03.
[22] *Id.* 1404:1-1405:1.
[23] *Id.*
[24] *Id.* 1405:2-5.
[25] *Id.* 1405:5-6.
[26] *Id.* 1405:6-8.

B. The District Court Proceedings.

On December 22, 2017, HWAN filed a petition for judicial review of the Administrative Decision ("PJR") with the district court under Case No. 17 OC 00269 1B (the "PJR Case").[27] On January 16, 2018, HWAN filed a motion for stay of the Administrative Decision.[28] Although the district court denied the motion as untimely,[29] the Division and HWAN stipulated to interplead the Fines into the First Judicial District Court Clerk pending resolution of the PJR.[30]

HWAN filed its Opening Brief on February 16, 2018.[31] The Division filed its Answering Brief on March 19, 2018.[32] HWAN filed its Reply Brief on April 11, 2018.[33]

On April 19, 2018, HWAN filed a Motion for Leave to Present Additional Evidence pursuant to NRS 233B.131(2) ("Motion for Additional Evidence"), wherein HWAN sought leave to present exhibits that it had agreed in good faith to exclude from the underlying Administrative Case based on the Division's representations that the documents (which the Division produced to HWAN in

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[27] App.Vol.VIII 1412-17.
[28] *Id.* 1471-486.
[29] *Id.* 1557-58.
[30] App.Vol.IX 1600-01. Pursuant to the District Court Order, those funds have now been released to the Division and HWAN. App.Vol.XIII 2520.
[31] App.Vol.IX 1560.
[32] *Id.* 1602.
[33] *Id.* 1644.

response to subpoena) were privileged, as these exhibits did not seem material at the time.[34] However, the exhibits demonstrate that the Division knew of the true separate business identities of HWAN and CHW and knew CHW was HWAN's administrator.[35] With the exhibits excluded, the Division then claimed at hearing it did not know HWAN and CHW were separate entities, which finding was adopted in the Administrative Decision.[36]

On September 6, 2018, the district court entered an Order granting the Motion for Additional Evidence.[37] The Court remanded the issue to Emmermann to decide whether the proposed evidence was material, and if so, whether it would have impacted the final decision.[38] On October 31, 2018, Emmermann ordered the parties to submit additional briefing addressing why the Evidence was offered.[39] On November 13, 2018, HWAN submitted its Brief Regarding Exhibits KK, LL, and MM.[40] On November 20, 2018, the Division submitted its Opposition to HWAN's Proposed Exhibits KK, LL, and MM.[41] On November 21, 2018, HWAN submitted its Reply.[42] Emmermann concluded in her Order on Remand entered

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[34] *Id.* 1663-671.
[35] *See id.*
[36] *Id.*; App.Vol.VIII 1401.
[37] App.Vol.IX 1732-35.
[38] *Id.* 1733:9-15.
[39] *Id.* 1736-37.
[40] *Id.* 1739-745.
[41] *Id.* 1746-753.
[42] *Id.* 1754-58.

January 22, 2019 that the proposed evidence was neither material nor would have impacted the final decision, but in so doing improperly adopted a heightened standard of materiality, as discussed *infra*.[43]

With that, HWAN filed a Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal ("Motion for Supplemental Briefing") in the district court, seeking to file additional briefing addressing the Order on Remand.[44] The Motion for Supplemental Briefing was granted,[45] and HWAN filed its supplemental brief on May 28, 2019,[46] with a response filed by the Division on August 8, 2019,[47] and a reply filed by HWAN on August 15, 2019.[48]

A hearing on the PJR was set for November 7, 2019.[49] On November 5, 2019, the district court requested briefing from the parties regarding the legislative history of NRS 690C.325(1) and any relationship to NRS 690C.330.[50] On November 6, 2019, the parties filed their respective briefing.[51]

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[43] *Id.* 1759-767.
[44] App.Vol.X 1802-1961.
[45] App.Vol.XI 2186-89. Initially granted as unopposed, the Division later opposed the motion and the district court granted the motion after receiving all briefing. App.Vol.X 1962-2023, 2170-194.
[46] App.Vol.XI 2024-2138.
[47] App.Vol.XII 2195-2209.
[48] *Id.* 2210-285.
[49] *Id.* 2292-94.
[50] *See id.* 2295:23-25.
[51] *Id.* 2295-2383.

On November 7, 2019, the district court heard oral arguments on the PJR. Despite having obtained a ruling in the Administrative Case that "[b]y definition, an ***administrator*** should not be engaged in issuing, selling, or offering to sell service contracts,"[52] the Division took the position at the hearing that ***any person*** who offers for sale a service contract in Nevada, regardless of whether that person offers the service contract on behalf of a registered provider (i.e., as a sales agent), must hold a COR as a service contract provider.[53] HWAN argued that only a provider, or obligor, of service contracts must be registered with the Division under the plain language of the statute, and that the legislative history supports this interpretation that only the provider be the "one stop shop" for regulation.[54]

On November 25, 2019, the district court entered its Order Affirming in Part, and Modifying in Part, Findings of Fact, Conclusions of Law, Order of the Hearing Officer, and Final Order of the Commissioner in Cause No. 17.0050 in the Matter of Home Warranty Administrator of Nevada, Inc DBA Choice Home Warranty ("District Court Order").[55] The district court summarily determined HWAN was not denied due process, the Division was not estopped from stating that it did not know that CHW and HWAN were two separate entities or that CHW

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[52] App.Vol.VIII 1403:6-7 (emphasis added).
[53] *See, e.g.*, App.Vol.XIII 2415:1-2416:2, 2429:19-2430:10.
[54] *See, e.g.*, *id.* 2390:18-2394:18, 2403:9-2404:15, 2407:2-20, 2426:1-2429:16.
[55] *Id.* 2517-521.

was HWAN's administrator and sales agent, and adopted the Division's interpretation that any person who sells, offers for sale, or issues service contracts, regardless of whether this person is the obligor of said service contracts, must hold a COR as a provider pursuant to NRS 690C.150.[56] Among other things, the district court failed to reconcile the legislative history of the statute with its novel interpretation, or address the fact that HWAN is plainly the obligor on the service contracts issued to Nevada residents, not CHW.[57]

On November 15, 2019, HWAN filed a Motion for Leave of Court Pursuant to FJDCR 15(1) and DCR 13(7) for Limited Reconsideration of Findings Pertaining to HWAN's Petition for Judicial Review ("Motion for Reconsideration").[58] HWAN sought reconsideration solely on the legal issue of whether a sales agent who sells service contracts on behalf of a registered provider, but is not obligated under those service contracts, must be registered under NRS Chapter 690C.[59] HWAN provided the district court evidence showing that the Division does not abide by its own interpretation of NRS 690C.150 as advanced at hearing, and allows other service contract providers to use unregistered sales agents to sell service contracts on their behalf.[60] By the time HWAN filed its reply

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[56] *Id.*
[57] *Compare id. with* App.Vol.VIII 1381:24-1382:22 & App.Vol.III 480-88.
[58] App.Vol.XIII 2456-494.
[59] *Id.* 2460:16-18.
[60] *Id.* 2461:3-13, 2469-470, 2481-494.

in support of its Motion for Reconsideration, the Division had taken the opposite position regarding sales agent registrations to the Service Contract Industry Council[61] (the "SCIC").[62] One day after the District Court Order, the Division told SCIC representatives that sales agents selling service contracts need ***not*** be registered.[63] HWAN included evidence of this flip-flop position of the Division with its reply,[64] but the district court nonetheless denied the Motion for Reconsideration.[65]

III. Disposition

HWAN appeals from the Administrative Decision, Order on Remand, District Court Order, and Order Denying Reconsideration.

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[61] The SCIC is a national trade association for the service contract industry, with members including providers and administrators of service contracts. Service Contract Industry Council *About* webpage, available at https://go-scic.com/about/ (last accessed May 12, 2020).
[62] App.Vol.XIII 2543:26-2544:24.
[63] *Id.* 2555.
[64] *Id.* 2543:26-2544:24, 2555.
[65] App.Vol.XIV 2699-2701.

STATEMENT OF THE FACTS

I. The Division Conflates HWAN and CHW.

Since 2010, by contractual agreement, CHW has administered, marketed, and sold HWAN's service contracts, among other things.[66] CHW is not obligated under the service contracts sold on behalf of HWAN.[67] Only HWAN is the obligor of all service contracts, and only HWAN is registered as a service contract provider, i.e., obligor, in Nevada.[68] In 2011, the Division approved HWAN's form service contract that uses the "Choice Home Warranty" logo, explicitly states that the obligor is HWAN, and notes that the contract is administered by "Choice Home Warranty" (CHW).[69]

Beginning in May 2013, the Division began investigating a consumer complaint against "Choice Home Warranty."[70] According to the Division's witnesses at Administrative Case hearing, in 2013, the Division believed "Choice Home Warranty" was selling contracts in Nevada without a registration.[71] Upon further investigation, the Division spoke with the President of HWAN, Victor Mandalawi, and for some reason determined that HWAN should register the d/b/a

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66 App.Vol.VIII 1381:4-16.
67 *Id.* 1381:24-1382:22; App.Vol.III 480-88.
68 Note 67, *supra*.
69 *Id.*
70 App.Vol.IV 612:1-10.
71 *Id.* 696:25-697:2, 697:16-18.

"Choice Home Warranty."[72] This, despite the fact that HWAN's approved service contract form noted that HWAN is the ***obligor*** of the contract, while "Choice Home Warranty" (referring to CHW, the only entity operating under that d/b/a at that time, as a matter of public record) is the ***administrator*** of the contract.[73] In fact, the Division was preparing to file a cease and desist action against "Choice Home Warranty" for acting as an unregistered service contract provider when it changed course to simply having HWAN also register the d/b/a "Choice Home Warranty."[74]

More than three years later at the Administrative Case hearing, the Division would claim that it believed "Choice and HWAN were one and the same entity."[75] But at the time the Division requested HWAN register the d/b/a in 2014, the Division told HWAN that having just the name "HWAN" was confusing for customers.[76] Thus, HWAN registered the d/b/a as requested.[77] In return, the Division did not proceed with an action against "Choice Home Warranty," determining that "Choice was not selling illegally because HWAN was a licensed entity in Nevada."[78] HWAN continued to be the provider (obligor) of all Nevada

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[72] *Id.* 697:19-23.
[73] App.Vol.III 480-88.
[74] App.Vol.VII 1198:6-25.
[75] *See, e.g.*, App. Vol. VIII 1401:4-5.
[76] App.Vol.VI 1045:9-1046:3.
[77] *See* App.Vol.III 367-406; App.Vol.VIII 1395:24-25.
[78] App.Vol.III 374, 386; App.Vol.IV 699:14-15.

service contracts, which continued to be administered, marketed, and sold by CHW on behalf of HWAN, using the same form service contract approved by the Division in 2011.[79]

Despite the Division's request that HWAN register the same d/b/a as CHW, the Division later conflated the two entities when it attempted to revoke HWAN's COR, in part, for ***HWAN's*** failure to disclose regulatory actions in other states against ***CHW***.[80]

II. The Division Ignores HWAN's 2016 Renewal Application, Then Deems HWAN's COR Nonrenewed Despite Its Own Inaction.

On November 7, 2016, HWAN submitted the 2016 Application.[81] The Division did not communicate with HWAN regarding the 2016 Application until February 1, 2017, when it purportedly sent an email to HWAN's president stating that the Division was "in the process of reviewing the Renewal Application" and requesting information regarding the number of open service contracts for HWAN.[82] HWAN disputes receiving this email.[83]

Meanwhile, an internal Division memorandum dated January 26, 2017 reveals the Division considered certain responses to questions on HWAN's 2016

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[79] App.Vol.III 480-88.
[80] *Id.* 345-47.
[81] App.Vol.VIII 1404:18-19.
[82] App.Vol.III 321.
[83] App.Vol.IX 1597.

Application to be false.[84] The 2016 Application asked whether HWAN or any newly identified officers had been fined in other states.[85] HWAN truthfully answered no.[86] According to the Division memorandum, the Division considered this response untruthful because of regulatory actions against ***CHW***, not HWAN.[87]

Despite the memorandum recommending HWAN's COR not be renewed, the Division did not communicate these issues to HWAN in its February 1, 2017 email.[88] This, despite the Division's own practices and procedures requiring the application reviewer to contact the renewal applicant to discuss questions and concerns and obtain additional information.[89] At hearing, the Division's witness admitted that a reasonable amount of time to inform an applicant of defects in its renewal application "would be a couple of weeks or a month at the most."[90]

Yet, the Division did not communicate any denial of the 2016 Application to HWAN prior to agency proceedings.[91] Rather, on May 9, 2017, the Division commenced the Administrative Case.[92] Even the Complaint and Amended Complaint do not allege that HWAN's COR had expired and HWAN was then

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[84] App.Vol.III 345-47.
[85] App.Vol.VIII 1397:4-11.
[86] *Id.* 1383:1-8, 1384:9-16.
[87] App.Vol.III 345-47.
[88] *Id.* 321.
[89] *Id.* 472.
[90] App.Vol.VI 969:13-970:5.
[91] *See* App.Vol.VIII 1404:18-25.
[92] App.Vol.I 1.

operating without a license.[93] Only ***after*** the Complaint did the Division notify HWAN that it did not approve the 2016 Application. On July 21, 2017, Division employee Mary Strong sent an email to HWAN demanding it return its COR because it had expired and was not renewed by November 18th, 2016.[94] No reasons were provided for the refusal to renew HWAN's COR, not even that HWAN's 2016 Application was incomplete.[95]

Only at hearing in September 2017 did the Division articulate that it believed HWAN's 2016 Application to be incomplete[96] for the following reasons:

- HWAN did not submit a check with the 2016 Application to meet the required security deposit amount,[97]
- HWAN allegedly misrepresented that it had not been fined by another regulatory agency since its last renewal application,[98]
- HWAN left three blanks in the 2016 Application concerning complaints in the prior two years,[99] and
- HWAN was nonresponsive to the Division's inquiries.[100]

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[93] *See generally* App.Vol.I 1-9, 169-177.
[94] App.Vol.IV 532.
[95] *Id.*
[96] *Id.* 656:18-20.
[97] *Id.* 656:22-657:9.
[98] *Id.* 657:10-16. Emmermann determined HWAN honestly answered the question on the 2016 Application, because the CHW was fined, not HWAN. App.Vol.VIII 1396:26-1397:27.
[99] App.Vol.IV 657:18-24.
[100] *Id.* 657:25-658:10.

Despite never seeking additional information from HWAN on these alleged deficiencies or communicating the refusal to renew to HWAN in accordance with the Division's own policies and practices (and Nevada law), the Division listed HWAN as "inactive" on its website as of July 21, 2017.[101]

III. The Division Issues the Administrative Decision.

Emmermann issued the Administrative Decision in the Administrative Case on December 18, 2017, after a three-day hearing from September 12-14, 2017, finding in HWAN's favor on four out of the original five alleged violations.[102] Emmermann found insufficient evidence to support the Division's allegations of unfair business practices and unsuitable business conduct based on complaints, noting that "this evidence regarding claims handling does not show that Respondent is violating Nevada laws or causing injury to the general public 'with such frequency as to indicate a general business practice'" and "the Division's evidence was insufficient to show that [HWAN] engaged in unfair practices in settling claims."[103] All but two of 62 consumer complaints (out of 23,889

[101] App.Vol.V 830; App.Vol.III 322.
[102] App.Vol.VIII 1379, 1385, 1406.
[103] *Id.* 1399:15-17, 1400:18-20.

customers since 2011) against HWAN had been closed,[104] and the Division "made no effort to verify the substance of the [online] complaints."[105]

Emmermann also found HWAN did not misstate material facts by not reporting administrative actions against CHW.[106] The Division incorrectly characterized HWAN's renewal applications as asking whether there were regulatory actions against any of the officers of HWAN.[107] However, "the questions ask whether any of the *new* officers identified in the renewal application have had actions taken against them."[108] HWAN truthfully answered no.[109] Moreover, because the applications only ask about administrative actions in other states against the applicant, HWAN was not asked to disclose administrative actions against CHW, a separate entity.[110] Emmermann neither specifically addressed nor adjudicated against HWAN the Division's allegation of deceptive trade practices.[111]

Out of the five originally noticed alleged violations, Emmermann found in favor of the Division on only one—failure to make records available upon

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104 *Id.* 1387:4-5.
105 *Id.* 1400:12-13.
106 *Id.* 1397:23-24.
107 *Id.* 1396:26-1397:4.
108 *Id.* 1397:4-7.
109 *Id.* 1383:1-8, 1384:9-16.
110 *Id.* 1397:12-27.
111 *See generally*, *id.* 1379-1409.

request.[112] But the parties agreed HWAN provided the requested information in response to subpoena, and the Division presented no documentary evidence that HWAN received a request for this information prior to subpoena.[113]

Emmermann, however, also found HWAN committed additional violations never alleged in the Complaint or Amended Complaint. Emmermann found that HWAN misstated a material fact for failing to change the prepopulated entry of "self" as its administrator in its renewal applications for multiple years (five violations) and failed to disclose the use of an unapproved service contract form in 2015.[114] However, the only service contract form presented by the Division covered a term of 2016-2017, and therefore could not have been disclosed in HWAN's 2015 renewal application.[115]

Emmermann further found that HWAN conducted business in an unsuitable manner by using CHW as its administrator and sales agent without CHW having a COR, thereby "allowing an unregistered entity to engage in the business of service contracts in Nevada."[116] Emmermann concluded that NRS 690C.150 "clearly prohibits the issuance, sale, or offering for sale service contracts unless the

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[112] *Id.* 1399:19-1400:4.
[113] *Id.* 1399:26-27.
[114] *Id.* 1398.
[115] *Id.* 1392:12-20; App.Vol.II 271-75.
[116] App.Vol.VIII 1400:22-1403:24-25.

provider has been issued a certificate of registration."[117] Emmermann found that HWAN was "merely a figurehead, enabling an unlicensed entity to engage in the business of service contracts in Nevada under HWAN's license."[118] NRS 690C.150 requires only a service contract provider (obligor) to hold a certificate of registration, not a service contract administrator or sales agent. Emmermann ignored best evidence of the provider here—the Division-approved service contract that specifically states that HWAN, not CHW, is the obligor.[119] CHW merely sold the contracts and administered claims under those contracts ***on behalf of HWAN***.[120] The evidence plainly shows HWAN is the only entity obligated under the service contracts, and HWAN is the entity that posts the statutorily required security for those contracts.[121]

Emmermann assessed $1,224,950 in fines (the "Fines") against HWAN, of which $1,194,450 were imposed for using CHW to sell its service contracts.[122] Another $30,000 of the Fines were imposed for making misrepresentations of material fact on renewal applications, and the remaining $500 was imposed for

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[117] *Id.* 1402:24-25.
[118] *Id.* 1403:16-17.
[119] *See generally*, *id.* 1381:24-1382:22, 1400-03; App.Vol.III 480-88; App.Vol.II 261-67.
[120] Note 119, *supra*; App.Vol.VIII 1381:4-16.
[121] Notes 119 & 120, *supra*; App.Vol.VIII 1380:24-3, 1382:23-24; App.Vol.III 439-479.
[122] App.Vol.VIII 1405.

failing to provide information to the Division upon request.[123] Emmermann denied the Division's request for a cease-and-desist order and revocation of HWAN's COR, instead allowing HWAN 30 days from the Administrative Decision to apply for renewal of its COR.[124]

IV. HWAN Files Its Petition for Judicial Review with the District Court and Moves to Admit Additional Evidence.

As detailed in the Statement of the Case, on December 22, 2017, HWAN filed its PJR with the district court.[125] On April 19, 2018, HWAN also filed the Motion for Leave to Present Additional Evidence.[126] HWAN originally sought this additional evidence, consisting of internal Division correspondence and other writings, via subpoena.[127] After producing responsive documents, the Division argued some documents contained information protected by the attorney-client privilege, so HWAN agreed to withdraw them on that basis.[128] At the time, HWAN was unaware of the significance of the evidence.[129] At least three of these documents, Exhibits KK, LL, and MM, (the "Evidence"), do not implicate the attorney-client privilege and demonstrate that the Division knew that HWAN and

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123 *Id.*
124 *Id.* 1403:27-1405:8.
125 *Id.* 1412-17.
126 App.Vol.IX 1663-671.
127 App.Vol.I 104-06.
128 App.Vol.VII 1214-16, 1257-58.
129 App.Vol.IX 1665-66.

CHW were separate entities and that the HWAN was using CHW as its administrator and sales agent.[130]

Until the Administrative Decision was issued, HWAN had no idea that the Division's alleged misunderstanding of HWAN and CHW's separateness would provide the basis for depriving HWAN of its due process right to notice of the violations the Division alleged against it.[131] To excuse the Division's failure to include certain allegations raised for the first time at hearing in the Complaint or Amended Complaint, Emmermann found that the Division believed HWAN and CHW to be one and the same entity.[132] Emmermann concluded that HWAN

> cannot claim that HWAN and Choice Home Warranty are two separate entities and, in the same breath, conclude that [HWAN] had no notice of the Division's position that HWAN and Choice Home Warranty were considered one and the same entity to avoid responsibility for violations of law that resulted from the very conclusion they advocated. Therefore, it cannot be said that [HWAN] had no notice of the Division's argument that CHW Group is one and the same with HWAN.[133]

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130 *Id.* 1665:5-11, 1666:23-25, 1668:10-11, 1669:9-15.
131 *See generally*, *id.*
132 App.Vol.VIII 1401:4-5; *see also id.* 1395-98, 1400-03.
133 *Id.* 1401:14-19.

But HWAN had no notice of this argument because it in fact possessed documents showing the Division knew HWAN and CHW were two separate entities (not to mention that their separateness is easily verifiable as a matter of public record).[134]

On September 6, 2018, the district court granted HWAN's Motion for Additional Evidence and remanded to Emmermann, directing her "to receive the evidence and determine whether the Evidence is material, and if so, whether it would have had any impact on the final decision."[135] On January 22, 2019, Emmermann issued the Order on Remand with findings indicating the Evidence contained the following:

> 1. In July 2010, in response to another state's inquiry about a company called "Choice Home Warranty," Division employees were aware that such a named company was operating in Nevada without a registration. (Ex. LL at 1—3.) Employee Dolores Bennett referenced "CHW Group, Inc., dba Choice Home Warranty," but all other employees only referenced 'Choice Home Warranty.' (Ex. LL at 2.) Whether all employees understood Choice Home Warranty to be CHW Group in this (sic) emails is not discernable.
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> 2. In July 2011, Division employees again discussed "Choice Home Warranty." and Bennett again referred to "CHW Group, Inc. dba Choice Home Warranty." (Ex. MM at 1—3.) Division Counsel indicated that the Division was in the process of filing a complaint against Choice Home Warranty. (Ex. MM at 2.) Whether all employees understood Choice Home Warranty to be CHW Group is not discernable, and no evidence was

[134] *See generally* App.Vol.IX 1665-670.
[135] *Id.* 1732-35.

> presented that a complaint was filed against Choice Home Warranty.
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> 3. Approximately two weeks later, in July 2011, Bennett sent an email about Choice Home Warranty and Home Warranty Administrator of Nevada, Inc., and indicated that HWAN listed Choice Home Warranty as its administrator in the proposed contract. (Ex. KK at 3—4.) Bennett did not make any reference to CHW Group, Inc. dba Choice Home Warranty.
>
> 4. On November 1, 2011, a note was written referencing Choice Home Warranty, and business written without being registered. (Ex. KK at 2.) Whether the Division interpreted Choice Home Warranty to include CHW Group is not discernable, and the author of the note is unknown.
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> 5. On November 7, 2011, Bennett emailed Division employees indicating Victor Mandalawi, president of CHW Group, Inc. obtained a certificate of registration as a service contract provider a year earlier for a different corporation called Home Warranty Administrator of Nevada, Inc. (KK at 1.) Whether the reference to CHW Group Inc., dba Choice Home Warranty was intended to mean Choice Home Warranty as used in prior discussions is not discernable.[136]

Emmermann determined the Evidence was immaterial and did not impact the final decision.[137]

After receiving supplemental briefing[138] regarding the Order on Remand, the district court heard oral arguments on the PJR and on November 25, 2019 entered

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[136] *Id.* 1760:17-1761:15.
[137] *Id.*1760:10-11.
[138] App.Vol.XI 2024-2138; App.Vol.XII 2195-2285.

the District Court Order.[139] The District Court Order affirmed Emmermann's finding of six violations of NRS 686A.070 and imposition of the maximum $5,000 fine per violation (totaling $30,000) based on the alleged disclosure defects in HWAN's applications.[140] The District Court Order further affirmed Emmermann's finding of one violation of NRS 690C.320(2) and imposition of a fine of $500 based on HWAN's alleged failure provide information to the Division.[141] The district court also affirmed Emmermann's finding of 23,889 violations of NRS 690C.325(1)(b) and NRS 679B.125(2) based on HWAN's use of CHW to sell service contracts on its behalf.[142] However, the district court found that the statutory cap on fines for violations of a similar nature in NRS 690C.330 applies, and modified these fines from $1,194,450 to $10,000.[143]

Because HWAN had already interpleaded the full amount of the Fines with the clerk, the district court ordered that the $40,500 fines as modified by the District Court Order be released to the Division, with the remainder refunded to HWAN.[144] The district court summarily dispensed with HWAN's estoppel and due process arguments.[145]

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[139] App.Vol.XIII 2517.
[140] *Id.* 2519.
[141] *Id.*
[142] *Id.*
[143] *Id.* 2519-520.
[144] *Id.* 2520.
[145] *Id.*

Finally, the district court did not determine whether HWAN's COR expired as a matter of law, instead ordering that

> contingent upon [HWAN's] compliance with NRS 690C.150 and other requirements of chapter 690C of the NRS, [HWAN's] Certificate of Registration be reinstated. In particular, [HWAN] is prohibited from using an administrator to perform the duties of selling, issuing, or offering for sale service contracts in Nevada, unless said administrator has been granted a certificate of registration pursuant to NRS 690C and consistent with this Order.[146]

V. The Division Tells the SCIC that Sales Agents Need Not Be Registered, Despite Taking the Opposite Position Regarding HWAN and CHW.

On November 26, 2019, one day after the District Court Order, the Division met with the SCIC because the SCIC had concerns about the implications of the District Court Order on the service contract industry in Nevada.[147] Because the Division has never required sales agents for service contract providers to register as providers themselves, the SCIC wished to confirm with the Division whether it would now require sales agents to register as service contract providers to sell service contracts. Division employee Timothy Ghan confirmed to the SCIC that "service contract sellers that are not providers of service contracts will not be

[146] *Id.* 2520:13-18.
[147] *Id.* 2554-55, 2557-58.

required to be licensed as service contract providers," and this "is not and will not be the Division's position."[148]

HWAN learned of the Division's contradictory position to the SCIC on November 27, 2019, when the SCIC send an email newsletter to its members, including HWAN, detailing the same.[149] Because the Division only confirmed this contradictory position to the SCIC one day ***after*** obtaining the District Court Order, HWAN could not present this evidence in the Administrative Case. However, HWAN promptly brought the issue to the district court via HWAN's reply in support of its Motion for Reconsideration, which was denied.

On December 2, 2019, Mr. Ghan sent an email to the SCIC concurring that "service contract sellers that are not providers of service contracts will not be required to be licensed as service contract providers," which HWAN received on January 10, 2020, after filing its Notice of Appeal.[150]

As such, HWAN requests by way of separate motion that this Court consider the communications between the Division and the SCIC.[151] Otherwise, HWAN will be denied meaningful review of the Administrative Decision, which holds that

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[148] *Id.* 2555.
[149] *Id.* 2554-55.
[150] *See* Exhibit 1 to Motion for Leave to File Supplemental Appendix, filed concurrently herewith.
[151] Motion for Leave to File Supplemental Appendix, filed concurrently herewith.

HWAN's sales agent must be registered, while the Division obviously does not require the same of other service contract providers.[152]

[152] Indeed, the Division denied HWAN's request for hearing on this issue pursuant to NRS 679B.310(2), which is currently the subject of a third petition for judicial review before the district court, Case No. 20 OC 00030 1B ("Third PJR"). The Division attempts to foreclose any judicial review of its contradictory interpretations of NRS 690C.150 in this case, in a second petition for judicial review before the district court, Case No. 20 OC 00030 1B ("Second PJR"), and in the Third PJR. *See id.*

SUMMARY OF THE ARGUMENT

The Administrative Decision is riddled with legal and factual errors. Precipitating all other errors, HWAN was denied due process of law as mandated by both the constitution and Nevada law because the issues ultimately adjudicated against HWAN were not noticed in the complaint. Therefore, HWAN was not provided adequate opportunity to develop the record and defend itself in the Administrative Case. Indeed, only one violation resulting in a $500 fine was adjudicated against HWAN as noticed in the Complaint. The true factual bases for the other violations resulting in more than $1.2 million in fines and, notably, a determination that HWAN's license was expired, were not noticed prior to hearing.

The Administrative Decision imposed fines against HWAN for (1) allowing an unregistered entity to issue and offer services contracts as a sales agent; (2) making false entries of material fact on its applications; and (3) failing to make records available to the Commissioner upon request. Only the third was actually adjudicated as noticed in the complaint. The factual bases for the first two categories of violations were entirely changed, and HWAN had no notice of the true allegations against it until the hearing.

Moreover, the Administrative Decision also deemed HWAN's COR expired as a matter of law, even though HWAN timely submitted the required application and completed all statutory requirements to effectuate the renewal of its COR, but

the Administrative Decision allowed HWAN to submit a renewal application within 30 days of the order. The basis for finding HWAN's 2016 Application insufficient was also never articulated prior to hearing. Nonetheless, Nevada law does not allow the Division to ignore a timely-filed renewal application then deem a COR expired on its annual renewal date, without even providing notice and a hearing of the same to the certificate holder. Rather, NRS 233B.127 and NRS 690C.325 require cause to deny a renewal application, with notice and an opportunity for hearing ***prior*** to nonrenewal. Thus, the Administrative Decision purports to strip HWAN of its COR without any prior notice or meaningful opportunity to rebut the allegations against it pursuant to NRS 233B.127 and 690C.325. Because HWAN submitted a timely, complete renewal application and received no notice or hearing prior to the nonrenewal, HWAN currently possesses a valid, unexpired COR.

The district court affirmed all the fines imposed by the Administrative Decision, but imposed the statutory cap in NRS 690C.330 to reduce $1,194,450 of the fines for violations of a similar nature to $10,000. Thus, the district court modified the total amount of the fines from $1,224,950 to $40,500. But in determining that HWAN conducted business in an unsuitable manner by using an unregistered administrator and sales agent, the Division and the district court misinterpreted NRS 690C.150 and NRS 690C.070, which only require a provider,

or obligor, of service contracts to be registered. Moreover, both the Administrative Decision and the District Court Order completely ignore evidence that HWAN, not CHW, is the obligor on all service contracts. And the evidence reveals that not only does the Division not require sales agents to be registered with the Division to sell service contracts on behalf of registered providers, but the Division confirmed the same to service contract industry association representatives, just one day after obtaining the District Court Order containing the exact opposite conclusion.

Moreover, $30,500 in fines are also unsupported by evidence in the record, and evidence that was wrongfully excluded from the record demonstrates that the Division had no justifiable reason to change its factual allegations against HWAN at the hearing. The Division argued at the hearing that it did not realize that HWAN and its administrator and sales agent, CHW, were separate entities. Therefore, its original allegations being unsubstantiated, the Division changed its factual allegations at the hearing, leaving HWAN with no prior notice of the true allegations against it. HWAN sought leave before the district court to present evidence that the Division actually did know of the separate identities of HWAN and CHW. The district court remanded this issue back to the agency, which predictably found that the evidence did not change the conclusions in the Administrative Decision.

Thus, the Administrative Decision rests nearly entirely on new factual allegations raised by the Division at hearing to replace its unsubstantiated original allegations. HWAN was deprived any meaningful opportunity to defend itself and was instead forced to pivot its defense at hearing due to the Division's shifting-target prosecution. The Division cannot simply notice which Nevada statutes it deems HWAN to have violated and then at hearing materially revise its factual allegations to match.

ARGUMENT

I. Standard of Review

"On appeal from orders deciding petitions for judicial review, this court reviews the administrative decision in the same manner as the district court." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014). The Court may remand, affirm, or set aside the administrative decision if it is:

> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3).

II. HWAN's Due Process Rights Were Violated

A. HWAN's Right to Notice of the Charges Against It Was Violated.

"A decision of an administrative agency 'must be set aside . . . if the action failed to meet statutory, procedural, or constitutional requirements.'" *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). While "proceedings before administrative agencies may be subject to more relaxed

procedural and evidentiary rules, due process guarantees of fundamental fairness still apply." *Dutchess Bus. Services, Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 714, 191 P.3d 1159, 1168 (2008). "[D]ue process requirements of notice are satisfied where the parties are sufficiently apprised of the nature of the proceedings so that there is no unfair surprise. The crucial element is adequate opportunity to prepare." *Nevada State Apprenticeship Council v. Joint Apprenticeship & Training Comm. for Elec. Indus.*, 94 Nev. 763, 765, 587 P.2d 1315, 1317 (1978). Moreover, due process requires that "[a]dministrative bodies must follow their established procedural guidelines." *Dutchess*, 124 Nev. at 711, 191 P.3d at 1166 (noting the Board of Pharmacy's governing statutes require it to file an accusation setting forth the alleged charges and acts or omissions of respondent to allow her to prepare her defense).

NRS 679B.320(1) requires a notice of hearing (e.g., complaint) to "specify the matters to be considered thereat." The notice of hearing "may be in the form of a notice to show cause, stating that the proposed action may be taken unless such person shows cause at a hearing to be held as specified in the notice why the proposed action should not be taken, and stating the basis of the proposed action." NRS 679B.320(2). The notice of hearing must contain a "short and plain statement of the matters asserted." NRS 233B.121(1)(d). If the agency "is unable to state the matters ***in detail*** at the time the notice is served, the initial notice may be

limited to a statement of the issues involved. Thereafter, upon application, a ***more definite and detailed statement must be furnished***." *Id.* (emphasis added). Therefore, the Division was required to give HWAN notice of "the issues on which decision will turn and . . . the factual material on which the agency relies for decision so that [HWAN] may rebut it." *Dutchess*, 124 Nev. at 711, 191 P.3d at 1166 (internal citations omitted). The notice should "fully state[] the factual bases for the charges." *See id.*

The Division failed to include within the Complaint or Amended Complaint the factual allegations forming the basis for the violations ultimately adjudicated against HWAN. The Complaint asserted that HWAN conducted business in an unsuitable manner with respect to its handling of consumer complaints, upon which basis Emmermann found in HWAN's favor.[153] Nonetheless, without the Division ever noticing such a violation prior to hearing, Emmermann *sua sponte* found that HWAN conducted business in an unsuitable manner by using CHW as its administrator and sales agent to sell service contracts on HWAN's behalf because CHW did not have a COR.[154] *How* HWAN is alleged to have conducted business unsuitably is the key fact of which HWAN needs notice to adequately prepare its defense. HWAN had no notice that the Division intended to prosecute

[153] App.Vol.I. 6, 174; App.Vol.VIII 1399-1400.
[154] App.Vol.VIII 1400-03.

violations relating to HWAN's use of CHW as its administrator or sales agent. Had the Division noticed such issues, HWAN would have had the opportunity to introduce the myriad evidence demonstrating that the Division has never required sellers of service contracts to obtain a COR.[155]

Likewise, the Complaint and Amended Complaint assert HWAN failed to disclose regulatory actions in other states against CHW, but Emmermann found in favor of HWAN on this issue.[156] The applications asked about the applicant (HWAN), not HWAN's administrator (CHW).[157] However, Emmermann again, *sua sponte*, found HWAN failed to change the pre-populated field "self" in the space designated for HWAN's administrator and failed to disclose the use of an unapproved service contract form.[158] Again, these allegations are not in the Complaint or Amended Complaint.[159]

The agency's order may "affirm, modify or rescind action theretofore taken . . . within the scope of the notice of the hearing." NRS 679B.360(4). But here the new allegations were not even remotely related to the original allegations in the Complaint and therefore fall outside the scope of the notice of hearing.

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[155] *See, e.g.*, App.Vol.XIII 2469-494, 2554-58; *see also* Motion for Leave to File Supplemental Appendix, filed concurrently herewith.
[156] App.Vol.I 6, 174; App.Vol.VIII 1396-97.
[157] App.Vol.VIII 1397.
[158] *Id.* 1398.
[159] *See* App.Vol.I 1-9, 169-177.

HWAN had no notice that it would be expected to defend against allegations that it was prohibited from using CHW as its administrator or sales agent (given the Division's prior approval of HWAN's service contract form disclosing CHW as its administrator), that the Division contends sales agents need to be registered (given the lack of authority under NRS Chapter 690C for this position and the Division's prior pattern and practice of not requiring the same), or that its renewal applications contained other misrepresentations. And HWAN's prehearing statement reveals HWAN was only prepared to defend against the allegations relating to HWAN's claim and complaint handling history, the regulatory actions against CHW, and HWAN's responsiveness to the Division.[160] Even the Division's own prehearing statement failed to mention the allegations that were ultimately adjudicated against HWAN in the Administrative Decision, namely, HWAN's use of an unregistered administrator and sales agent, CHW.[161]

B. HWAN Currently Holds a Valid, Unexpired COR.

If the governing statute does not afford the governing body discretion in denying the license, the licensee has a property interest in the license. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1165 (9th Cir. 2005) (internal citations omitted). "[A] state operating license that can be revoked only "for

[160] App.Vol.IV 500-513.
[161] App. Vol.I 178-188.

cause" creates a property interest." *Id.* at 1164. Such operating "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971).

A service contract "provider may renew his or her certificate of registration if, before the certificate expires, the provider submits to the Commissioner" an application, the requisite fees, and certain information regarding controlling persons. NRS 690C.160(3). The Commissioner may only refuse to renew a COR "if the Commissioner finds after a hearing thereon . . . that the provider has:

> (a) Violated or failed to comply with any lawful order of the Commissioner;
>
> (b) Conducted business in an unsuitable manner;
>
> (c) Willfully violated or willfully failed to comply with any lawful regulation of the Commissioner; or
>
> (d) Violated any provision of this chapter.
>
> ***In lieu of such a suspension or revocation***, the Commissioner may levy upon the provider, and the provider shall pay forthwith, an administrative fine of not more than $1,000 for each act or violation.

NRS 690C.325(1) (emphasis added). Moreover, NRS 233B.127(2) provides that

> when a licensee has made timely and sufficient application for the renewal of a license . . . ***the existing license does not expire until the application has been finally determined*** by the agency and, in case the application is denied or the terms of the new license

> limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

NRS 233B.127(2) (emphasis added). And NRS 233B.127(3) provides in relevant part that

> No revocation, suspension, annulment or withdrawal of any license is lawful unless, ***before the institution of agency proceedings, the agency gave notice*** by certified mail to the licensee ***of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements*** for the retention of the license.

NRS 233B.127(3) (emphasis added).

Thus, the Commissioner has a nondiscretionary duty to renew a COR if, before it expires, the provider submits an application and remits the necessary fees and information, unless there is statutorily-granted cause to deny an application. NRS 690C.160(3) does not provide the Commissioner with any discretion in the renewal process, so HWAN has a property interest in its COR. *See* NRS 690C.160(3); *Thornton*, 425 F.3d at 1165.

The Commissioner may not fail to process a timely submitted renewal application and then allege the registration has expired once the registration anniversary date has passed. The Commissioner must act if she intends to non-renew a COR, by providing notice prior to revocation of the license, holding a

hearing, and making certain findings pursuant to NRS 690C.325(1). NRS 233B.127(3).

HWAN's 2016 Application was timely and complete, and HWAN provided the Division with all of the information it requested.[162] Indeed, Emmermann found that the Division failed to provide notice of its decision to deny the 2016 Application for nearly eight months; thus, Emmermann refused to issue a cease and desist order.[163]

But Emmermann nonetheless incorrectly found that HWAN's COR expired as a matter of law on November 18, 2016.[164] To accept that a COR expires if not renewed within one year where the applicant timely files a renewal application and the Division does not act on the application, would render the procedural due process requirements of NRS 690C.325 and NRS 233B.127(2) and (3) superfluous. This interpretation effectively amounts to revocation of the license by expiration, despite the timely filing of a completed renewal application; the Division cannot sit on its hands and deny licensees without cause. *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (prohibiting statutory interpretation yielding absurd results).

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[162] App.Vol.VIII 1404:18-19.
[163] *Id.* 1404-05.
[164] *Id.* 1405:2.

Moreover, Emmermann cannot fine HWAN for violations *in lieu of revocation*[165] and also deem HWAN's COR expired as a matter of law because NRS 690C.325(1) prohibits the imposition of a fine ***and*** revocation of a COR for the same violations. HWAN timely filed its 2016 Application, so its COR could not simply "expire." NRS 233B.127(2); NRS 690C.325(1). To simultaneously fine HWAN and find that HWAN's COR "expired" despite its timely filed 2016 Application is tantamount to a fine and revocation, in violation of NRS 690C.325(1).

Ultimately, the "expiration" strips HWAN of its due process rights. The Division denied HWAN's 2016 Application without prior notice or hearing, completely ignoring NRS 690C.325 and NRS 233B.127(3)'s notice and hearing requirements. Only after determining that the 2016 Application should be denied for failure to disclose regulatory actions in other states against CHW[166] did the Division commence an action in May 2017 to *revoke* HWAN's COR.[167]

Moreover, HWAN's COR cannot expire until "the application has been finally determined by the agency and, in case the application is denied . . . , until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court." NRS 233B.127(2). In the Administrative Case, Emmermann

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165 *Id.* 1405:16-17.
166 App.Vol.III 345-47.
167 App.Vol.I 1-9.

did not "finally determine" the application.[168] Rather, she allowed HWAN to submit another renewal application.[169] The Division's denial of this subsequent renewal application in currently on review in PJR 2, in which case there is a stay of the administrative order purporting to deny the application.[170] Therefore, HWAN still holds a valid unexpired COR pursuant to NRS 233B.127(2 & 3) and NRS 690C.325. The determination that HWAN's COR expired as a matter of law and District Court order mandating "reinstatement" with conditions are erroneous.

III. The Agency Misinterpreted NRS 690C.150.

A. NRS 690C.150 Unambiguously Requires Only Service Contract Providers to Be Registered.

"A de novo standard of review is applied when this court addresses a question of law, 'including the administrative construction of statutes.' [This Court] will decide purely legal issues without deference to the agency's conclusions of law." *Nassiri*, 130 Nev. at 248, 327 P.3d at 489 (internal citations omitted); *see also Maxwell v. State Indus. Ins. Sys*., 109 Nev. 327, 329, 849 P.2d 267, 269 (1993) (where the issue on review is one of statutory interpretation, "independent appellate review of an administrative ruling, rather than a more

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[168] *See* App.Vol.VIII 1403-06.
[169] *Id.* 1405:3-5, 1406:1-2.
[170] Findings of Fact, Conclusions of Law, and Order Granting Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140, filed April 24, 2019 in Second PJR.

deferential standard of review, is appropriate"). The agency's interpretation cannot go beyond the face of the statute or "lend it a construction contrary to its clear meaning." *Union Plaza Hotel v. Jackson*, 101 Nev. 733, 736, 709 P.2d 1020, 1022 (1985).

"Statutory construction rules also apply to administrative regulations." *Silver State Elec. Supply Co. v. State, Dep't of Taxation*, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007). When interpreting a statute, a court must first determine whether the statute is ambiguous. *See Maxwell*, 109 Nev. at 330, 849 P.2d at 269-270. Where a statute's language is plain and unambiguous, a court may not "add to or alter [the language] to accomplish a purpose not on the face of the statute." *Id.* (internal citations omitted; alteration in original). "[I]n interpreting a statute, this court considers the statute's multiple legislative provisions as a whole. Additionally, statutory interpretation should not render any part of a statute meaningless, and a statute's language should not be read to produce absurd or unreasonable results." *Leven*, 123 Nev. at 405, 168 P.3d at 716 (internal quotation marks and citations omitted).

Setting aside that the Division violated HWAN's right to due process, the statutes applicable here are plain and unambiguous on their face and must be interpreted consistent with their plain language in such a way to avoid absurd or unreasonable results. *See Maxwell*, 109 Nev. at 330, 849 P.2d at 269-270.

Because Emmermann's interpretation of the statutes goes beyond their unambiguous language, this Court should not defer to her interpretation. *Dutchess*, 124 Nev. at 709, 191 P.3d at 1165.

Emmermann erroneously concluded that HWAN conducted business in an unsuitable manner and therefore violated NRS 690C.325 and NRS 679B.125, solely because HWAN allowed CHW to administer and market for sale service contracts on HWAN's behalf. Emmermann misconstrued the plain language of NRS 690C.150 to conclude that an administrator and sales agent of a registered provider must themselves be registered with the Division, despite the provider being the only obligor under the service contracts.

NRS 690C.150 states "[a] provider shall not issue, sell, or offer for sale service contracts in this state unless the provider has been issued a certificate of registration." NRS 690C.150 (emphasis added). NRS 690C.150 does not apply to all persons, only providers. The term "provider" is explicitly defined in NRS 690C.070 as "a person who is ***obligated*** to a holder pursuant to the terms of a service contract." NRC 690C.070 (emphasis added). By contrast, NRS 690C.010 defines an administrator as "a person who is responsible for administering a service contract that is issued, sold, or offered for sale by a provider." NRS 690C.010. Thus, only the person obligated to the holder of the service contract, not one who merely markets the service contract on behalf of the obligor, is a

provider under NRS 690C.070. Regardless of who markets the service contract for sale to the holder, the ***obligor*** of the service contract is the required registrant under NRS 690C.150.

Moreover, NRS 690C.120(2) provides that "[a] provider, person who sells service contracts, administrator or any other person is not required to obtain a certificate of authority from the Commissioner pursuant to chapter 680A of NRS [governing the authorization of insurers] to issue, sell, offer for sale or administer service contracts." NRS 690C.120(2). Thus, NRS 690C.120(2) details the categories of persons involved to "issue, sell, offer for sale or administer service contracts" without receiving a certificate of authority from the Commissioner: (1) a provider, (2) a person who sells service contracts, (3) an administrator, or (4) any other person. By its very inclusion of "person who sells service contracts" as a category separate and apart from "provider," NRS Chapter 690C necessarily contemplates that those who sell service contracts are separate and distinct from providers who are obligors of those service contracts. To adopt the interpretation of Emmerman and the district court would render the inclusion of "person who sells service contracts" in NRS 690C.120 superfluous, which violates basic canons of statutory construction. *Leven*, 123 Nev. at 405, 168 P.3d at 716.

NRS 690C.150 only requires the ***provider*** to obtain a certificate of registration from the Commissioner for a simple reason—the registration

requirements ensure that the ***provider*** of the service contract is vetted by the Division pursuant to NRS 690C.160 and posts the financial security required by NRS 690C.170.[171] Such is not necessary of anyone who sells the service contracts, so long as the obligor of the service contracts, the provider, is registered. This is because the person selling service contracts on behalf of registered service contract providers is not the one responsible for fulfilling obligations under the service contracts or meeting service contract provider financial security requirements under NRS Chapter 690C.

The legislative history supports this interpretation. Prior to the addition of the entire service contract provider chapter to the Nevada Revised Statutes in 1999, there was confusion as to how Nevada would treat service contracts, as some were considered insurance and some were not. Minutes of the Assembly Committee on Commerce and Labor, 70th Session, April 5, 1999 ("Minutes"), at 3. This led to "case-by-case" determinations by the Division, creating regulatory uncertainty, imposing "too burdensome" regulations, and resulting in limited service contract

[171] Under NRS 690C.170(1)(b), HWAN "[m]aintain[s] a reserve account" with an "amount of money equal to at least 40 percent of the unearned gross consideration received by the provider for any unexpired service contracts" AND "deposit[s] with the Commissioner security in an amount that is equal to $25,000 or 10 percent of the unearned gross consideration received by the provider for any unexpired service contracts, whichever is greater."

options for customers. *Id.* Service contract providers desired "the same level playing field as others in the industry." *Id.*

Relevant here, the definition of an administrator was carefully considered by the Nevada legislature in 1999. "As originally drafted, the term administrator included any person who carried out the terms of a service contract." *Id.* at 4. But

> an administrator was ***not the individual who would carry out the terms of service contracts***. The person who did such would be the one who repaired the covered product. The administrator was the one who ***managed the program behind the scenes***. Administrators were ***not contractually bound*** to provide the service but made filings with the state, oversaw the accounting of the program to ensure financial standards were met, and ensured the provider met obligations.

*Id.*at 4 (emphasis added). Moreover,

> for simplicity of regulation they attempted to ensure ***the provider, as the obligor, was the 'one stop shop.'*** The administrator's activities were the responsibility of the provider. ***They were responsible for their administrator's actions and the Division of Insurance needed to go to the provider and inform them they had a complaint***, which would allow for clarification of the problem."

Id. at 4 (emphasis added).

In the same way, whoever is selling the service contracts is also the responsibility of the provider and therefore need not be registered. Rather, the provider, the entity obligated on the contracts, is the "one stop shop" for regulation and takes responsibility for the actions of its administrator and sales agents. NRS

690C.150 has been unchanged since 1999; clearly the legislature intended that only ***obligors*** of service contracts be registered under NRS 690C. This Court must give effect to that intent.

B. HWAN Is the Provider Required to Be Registered, Not CHW.

Here, HWAN is the provider—HWAN is solely obligated to service contract holders for the payment of claims.[172] Emmermann relied on the testimony of HWAN's witness that CHW performs sales and marketing for HWAN pursuant to an Independent Service Provider Agreement ("ISP Agreement")[173] to conclude that because CHW is selling the contracts on behalf of HWAN, it is required to be registered.[174] HWAN does not dispute that CHW sold service contracts ***on behalf of*** HWAN; however, this does not negate HWAN's role as the sole obligor of those service contracts.[175]

The Division has not identified any law preventing HWAN from delegating sales to its administrator and sales agent. Rather, the Division has so contorted the plain meaning of NRS 690C.150 that its application is inconsistent with the

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[172] App.Vol.VIII 1381:4-16, 1381:24-1382:22; App.Vol.III 290-97, 480-88.
[173] The words "Service Provider" in the ISP Agreement do not transform CHW into a provider, as defined by NRS 690C.070.
[174] App.Vol.VI 1003:14-1007:20 (noting HWAN is responsible for providing warranties, while CHW is responsible for communicating and negotiating with clients for contracts between HWAN and the client); App.Vol.III 290-97, 480-88; App.Vol.VIII 1382:6-20, 1403:14-22.
[175] Note 174, *supra*.

unambiguous plain language of the statute itself (requiring providers, i.e., obligors, to be registered), other provisions of the chapter (e.g., NRS 690C.120(2) separating "persons who sell" from the "providers"), and its own legislative history (where the provider was to be the "one stop shop" for regulation).

Therefore, CHW marketing and administering service contracts on HWAN's behalf is not "engag[ing] in the business of service contracts without a license."[176] In concluding HWAN does "nothing more" than "regulatory compliance,"[177] Emmermann ignored the most important piece of evidence—the service contracts—and the most critical fact—who is obligated on those service contracts. The service contracts obligate only HWAN.[178]

Indeed, it is HWAN who posts the requisite financial security for the service contracts pursuant to NRS 690C.170.[179] Should problems arise with any contracts that CHW sells on HWAN's behalf or with any claims CHW administers under those contracts, HWAN is obligated to resolve those issues, not CHW, and the consumer is adequately protected by the financial security posted with the Division by HWAN. Indeed, Emmermann acknowledged that where any complaints arose,

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[176] App.Vol.VIII 1403:17-18.
[177] *Id.* 1403:14.
[178] App.Vol.III 480-88.
[179] *Id.* 476-79. With the 2016 Application, HWAN had deposited $306,465 with the Commissioner as security and maintained a reserve account with $1,225,860, in accordance with NRS 690C.170(1)(b). *Id.* 479.

HWAN, not CHW, resolved those complaints.[180] And this on contracts that CHW sold and administered on HWAN's behalf. Furthermore, there is no evidence that CHW's marketing, selling, and administration of HWAN's contracts present "a danger to the public."[181]

Emmermann's conclusion on the one hand that HWAN's resolution of claims did not constitute unfair practices or unsuitable business[182] is fundamentally inconsistent with her conclusion on the other hand that using CHW to sell those contracts in the first place presents a danger to the public.[183] HWAN is obligated on the contracts and pays out the claims, and HWAN is therefore the provider required to be registered pursuant to NRS 690C.150 and post the financial security required by NRS 690C.170.

Additionally, requiring CHW to also register and post financial security for the same universe of service contracts defies all logic. CHW is not financially obligated under those contracts just because it sells or administers them on HWAN's behalf.[184] Nor is CHW the provider under the contracts because it administers the contracts it markets on HWAN's behalf in the background; this type of arrangement was always contemplated by the legislature. Registration

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[180] App.Vol.VIII 1399:7-17.
[181] *Id.* 1403:19.
[182] *Id.* 1399:2-17, 1400:7-20.
[183] *Id.* 1403:17-19.
[184] *See, e.g.*, *id.* 1381:6-16; App.Vol.III 480-87.

reduces financial risk for consumers by requiring the ***obligor*** on the contracts to be examined by and post security with the regulator. Minutes at 3-4.

C. The Division Does Not Customarily Require Sales Agents or Administrators to Be Registered.

The Court only "defers to an agency's interpretation of its governing statutes or regulations if the interpretation is within the statute's or regulation's language." *Local Gov't Employee-Mgmt. Relations Bd. v. Educ. Support Employees Ass'n*, 134 Nev. 716, 718-19, 429 P.3d 658, 661 (2018). Deference to the agency interpretation is only given "if it is consistent with the legal text." *Id.* at 719, 429 P.3d at 661.

The Division has never interpreted NRS 690C.150 to require sales agents or administrators to be registered. However, in its ever-shifting legal theory against HWAN, the Division claimed that HWAN was merely a "figurehead" and CHW should be a registered provider because it sells service contracts on HWAN's behalf. This interpretation is unsupported by law, evidence, and customary practice and therefore is entitled to no deference.

Evidence presented at the Administrative Case hearing reveals the Division does not require anyone other than the provider to be registered. The Division's own checklist for reviewing renewal applications for service contract providers reveals that the Division does not require administrators to be registered:

> The Company may or may not have a third party administrator. Third party administrators are not required to be registered for service contracts. Check application for changes in administrator.[185]

To deal with this representation in its own checklist, at the district court hearing, the Division attempted to distinguish between an administrator who *administers* service contracts on behalf of a provider and one who *sells* service contracts on behalf of a provider, claiming that a license is required for the latter and not the former.[186] The district court was persuaded by this argument, even though no evidence supporting this distinction had ever been introduced in the Administrative Case.[187] Thus, HWAN attempted to bring evidence before the district court contradicting this purported distinction in its Motion for Reconsideration.[188] For instance, the Division allows AIG WarrantyGuard, a registered service contract provider, to use Best Buy, an unregistered sales agent, to sell service contracts on its behalf.[189] As such, it appears it is not actually the

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[185] App.Vol.III 472.
[186] *See* App.Vol.XIII 2415:1-2416:6.
[187] *See generally* App.Vol.VIII 1379-1406.
[188] App.Vol.XIII 2456-494.
[189] *Id.* 2469, 2481-494. This evidence was not presented in the Administrative Case because the issue of whether service contract administrators or sales agents should be registered was not noticed in the Complaint or Amended Complaint. Once HWAN realized the Division was imposing this requirement on HWAN and no one else, and once the Division used the same ground (use of CHW as unregistered administrator and sales agent) against HWAN to again deny the renewal of its COR, HWAN attempted to introduce evidence showing the disparate treatment of HWAN in a subsequent administrative proceeding. *See* Second PJR.

function the administrator performs—selling versus administering—which triggers the registration requirement.

The Division's own statements to the SCIC a mere one day after entry of the District Court Order demonstrate that the Division has not and does not intend to apply the statutory requirements evenhandedly. Just one day after the Division persuaded the district court to find that ***anyone*** who sells service contracts needs a license,[190] the Division told the exact opposite to the SCIC.[191] To the SCIC, the Division claimed that service contract sellers need not be registered as providers of service contracts, but administrators who sell contracts must be.[192]

The Division's actions make clear that HWAN has been specifically targeted to meet requirements that do not apply to any other service contract providers. The Division cannot simply single out HWAN for discipline in the absence of evidence that HWAN has violated Nevada law. *See Mishler v. State of Nev. Bd. of Med. Examiners*, 109 Nev. 287, 297, 849 P.2d 291, 297 (1993) (looking "beyond the

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The Division refused to consider any such evidence because the interpretation of NRS 690C.150 was already decided in this Administrative Case. Yet HWAN was not permitted to present such evidence in the Administrative Case because it did not have notice of the true charges against it. Thus began a trajectory where HWAN would continue to be repeatedly punished for violations it had no notice of and no opportunity to defend against, with the underlying Administrative Case conclusions of law being used to justify further punishment based on the same alleged violations.

[190] App.Vol.XIII 2517-19.

[191] *Id.* 2554-55.

[192] *Id.*

label of the discipline" in the Board of Medical Examiners' revocation of an outspoken physician's license and determining that "[t]he Board's power was not exercised for the proper and commendable purpose of protecting the public," but to discipline a physician despite the absence of evidence).

IV. The Division Should Be Equitably Estopped from Insisting that CHW Be Registered, as the Division Knew HWAN Was Using CHW as Its Administrator and Sales Agent

"[E]quitable estoppel operates to prevent the assertion of legal rights that in equity and good conscience should be unavailable because of a party's conduct." *United Brotherhood v. Dahnke*, 102 Nev. 20, 22, 714 P.2d 177, 178-79 (1986). Estoppel applies when the party to be estopped (1) is aware of true facts, (2) intends the conduct to be acted upon, (3) the party asserting estoppel is ignorant of the true facts, and (4) relies to his detriment on the conduct. *Chanos v. Nevada Tax Comm'n*, 124 Nev. 232, 181 P.3d 675 (2008). Moreover, Nevada courts have applied estoppel against state agencies where specific representations were made and were detrimentally relied upon. *See, e.g., Southern Nev. Mem. Hospital v. State*, 101 Nev. 387, 705 P.2d 139 (1985).

Here, the Division informed HWAN in 2014 that it intended to commence a cease and desist action against CHW, but would not do so if HWAN registered the d/b/a "Choice Home Warranty" to, allegedly, make its contracts less confusing to

consumers.[193] HWAN complied with this request, which d/b/a the Division later attempted to use in the Administrative Case to make HWAN liable for nondisclosure of regulatory proceedings against CHW.[194] Thus, HWAN relied upon the Division's representation that it wanted HWAN to register the same d/b/a as CHW, "Choice Home Warranty," so that the Division would refrain from taking cease and desist action against CHW. A mere two years later, the Division then attempted to use that very compliance against HWAN, claiming HWAN should disclose regulatory actions against CHW on HWAN's renewal applications.[195]

Emmermann correctly found that HWAN did not need to disclose regulatory actions against CHW on HWAN's renewal applications because having the same d/b/a did not merge the two entities.[196] However, the Division persuaded Emmermann that it did not know HWAN and CHW were two separate entities,[197] and therefore the Division was permitted to morph its allegations against HWAN at hearing without giving HWAN prior notice of these allegations.

Accordingly, HWAN filed its Motion for Additional Evidence before the district court so evidence that the Division knew HWAN and CHW were two

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[193] App.Vol.III 367-69; App.Vol.IV 697-699; App.Vol.VI 1045:9-1046:3, App.Vol.VII 1198:6-25; App.Vol.VIII 1395:24-25.
[194] *See* App.Vol.I 1-9, 169-177.
[195] *See id.*
[196] App.Vol.VIII 1396:2-23, 1397:12-27.
[197] *Id.* 1401:4-5.

separate entities could be considered.[198] On remand, Emmermann incorrectly determined the Evidence was immaterial and would not have changed the Administrative Decision,[199] even though the reason she allowed the Division to change its allegations at hearing was because she believed the Division did not know that HWAN and CHW were separate entities prior to the administrative proceeding.[200] *See Wyman v. State,* 125 Nev. 592, 608, 217 P.3d 572, 583 (2009) (Defining material evidence as that which is "logically connected with the facts of consequence or the issues in the case"); *see also United States v. De Lucia*, 256 F.2d 487 (7th Cir. 1958 ("evidence is 'material' where it is relevant and goes to substantial matters in dispute.").

The Evidence is plainly material to HWAN's estoppel argument. In the Order on Remand, Emmermann acknowledged that the Evidence encompasses "conversations that reflect the Division's awareness that there was an entity that went by the name Choice Home Warranty that was selling unlicensed service contracts and that the Division was investigating," and that "one employee identified CHW Group, Inc. dba Choice Home Warranty in her comments relating to questions about and investigations of Choice Home Warranty."[201] Thus, the

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198 App.Vol.IX 1663-680.
199 *Id.* 1760:10-11.
200 App.Vol.VIII 1401:4-19.
201 App.Vol.IX 1762:4-10.

Evidence is relevant and logically connected to whether the Division knew (1) CHW and HWAN were separate entities and (2) CHW was the same "Choice Home Warranty" used by HWAN as administrator and sales agent when the Division asked HWAN to register the d/b/a in exchange for foregoing administrative action. HWAN should have been allowed to present the evidence and question relevant witnesses at hearing. The District Court agreed the Evidence was material.[202]

Moreover, Emmermann's own findings show the Division knew the "true fact" that HWAN was using CHW as its administrator and sales agent when it required HWAN to register the d/b/a. The Division had approved a form service contract listing HWAN as obligor and CHW as administrator.[203] Moreover, in July 2011, Division employees discussed Choice Home Warranty while referring to it as CHW Group, Inc. d/b/a Choice Home Warranty[204] and was in the process of filing a complaint against Choice Home Warranty for selling contracts without a COR.[205] Two weeks later, a Division employee acknowledged in an email that HWAN listed Choice Home Warranty as its administrator in the proposed service contract.[206] Then on November 7, 2011, a Division employee acknowledged that

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[202] App.Vol.XIII 2422:19-20.
[203] App.Vol.III 480-88.
[204] App.Vol.IX 1760:20, 1760:24.
[205] *Id.* 1760:25-26.
[206] *Id.* 1761:1-4.

CHW's president obtained a certificate of registration as a service contract provider a year earlier for a ***different corporation*** called Home Warranty Administrator of Nevada, Inc.[207] Following this, the Division did not ask HWAN or CHW to register CHW as a provider. This shows that the Division knew that and/or approved of HWAN using CHW, a "different corporation" as its administrator and sales agent no later than November 2011.

Yet, Emmermann erroneously concluded that the Evidence does not prove Division employees were aware HWAN and CHW are separate entities, stating that "the only action the Division took was to ask HWAN to register Choice Home Warranty as a fictitious name."[208] First, this confusion did not occur until 2014, three years later, when the Division told HWAN it was confusing for customers for it to do business under the name HWAN.[209]

Second, Emmermann's conclusions directly contradict the Evidence, which shows the Division investigated CHW selling contracts under the d/b/a Choice Home Warranty, and thereafter stopped investigating CHW once it discovered that a different corporation, HWAN, was a registered provider and was using CHW as its administrator and sales agent.[210] Emmermann nonetheless concluded that it "is

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[207] *Id.* 1761:10-13.
[208] *Id.* 1762:18-19.
[209] App.Vol.III 367-69; App.Vol.IV 697-699; App.Vol.VI 1045:9-1046:3, App.Vol.VII 1198:6-25; App.Vol.VIII 1395:24-25.
[210] App.Vol.IX 1760:17-1761:13.

not discernable" whether the Division *and its employees* knew CHW Group Inc. was the same as Choice Home Warranty or whether *all* of the employees understood CHW Group Inc. to be one and the same with Choice Home Warranty.[211] Emmermann's misplaced significance on whether *all* employees knew CHW to be Choice Home Warranty demonstrates her error. It does not matter whether all employees knew that CHW and Choice Home Warranty were the same. At least those employees determining whether to file a complaint against CHW understood CHW and Choice Home Warranty to be the same, HWAN and CHW to be different corporations, and CHW to be HWAN's administrator and sales agent.[212] This knowledge is imputed to the Division, which can only learn information through its employees. *See USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1222 (D. Nev. 2011) ("Nevada recognizes the well-accepted rule that an agent's knowledge and acts are imputed to his principal").

By Emmermann's logic, only a document expressly stating that the Division did not file a complaint against CHW because (1) CHW and Choice Home Warranty are the same and (2) CHW is HWAN's administrator and sales agent proves the Division knew the same. But a "smoking gun" document is not

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[211] *Id.*
[212] *Id.*

required. Such inferences may be drawn from common sense and logic. *See United States v. Kelly*, 527 F.2d 961, 965 (9th Cir. 1976) ("circumstantial evidence can be used to prove any fact, including facts from which another fact is to be inferred").

One can reasonably infer the Division understands the acronym "dba" to denote a fictitious firm name. Rather than drawing reasonable inferences from the Evidence, Emmermann required direct evidence of the Division's knowledge,[213] but that is not and cannot be the legal requirement. If this heightened standard of direct evidence were applied to every matter, it is difficult to see how the Division could be held to know anything.

Additionally, the Division's later request that HWAN register the d/b/a "Choice Home Warranty" demonstrates the Division did not consider HWAN's use of CHW inappropriate. The only logical reason the Division would ask HWAN, a "different corporation," to register the same d/b/a as CHW, is that the Division understood and authorized HWAN to utilize CHW as its administrator and sales agent under the same name. To accept that the Division believed HWAN and CHW to be the same entity would be to believe that the Division does not understand corporate law and is incapable of performing simple business and fictitious firm name searches.

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[213] *Id.* 1762:14-18.

Finally, Emmermann summarily concluded that HWAN did not detrimentally rely on the Division's representations because "HWAN did not change its conduct," so HWAN did not detrimentally rely on the Division.[214] But the very conduct at issue here is HWAN's use of CHW as administrator and sales agent. HWAN reasonably, and detrimentally, relied on the Division's actions apparently approving of HWAN's use of CHW. The Division approved HWAN's form service contract designating CHW as administrator.[215] The Division acknowledged that a "different corporation" than HWAN, "Choice Home Warranty," was selling service contracts in the state and later asked HWAN to register the same d/b/a to avoid administrative action against CHW.[216] HWAN is now being penalized for an arrangement the Division understood and approved. HWAN "relied to its detriment" by registering the d/b/a and continuing its course of conduct, which d/b/a the Division tried to use against HWAN in the Administrative Case. When that failed, the Division pivoted, saying HWAN was not allowed to use CHW as its administrator and sales agent.

Accordingly, the Division made factual representations to HWAN, on which HWAN then detrimentally relied in commencing a course of action. *See Las Vegas Convention & Visitors Auth*, 124 Nev. at 698-700, 191 P.3d at 1157-58.

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[214] *Id.* 1763:8-10.]
[215] App.Vol.III 480-88; App.Vol.VIII 1382:4-5.
[216] App.Vol.VIII 1383:23-25; App.Vol.III. 367-69.

Therefore, the Division should be equitably estopped from arguing that HWAN improperly used CHW as its administrator and sales agent without the Division's knowledge or approval.

V. The Evidence Does Not Support the Imposition of Fines for Other Violations.

"A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal." *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). Substantial evidence is defined as "evidence which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(3)(c).

HWAN seeks reversal of the underlying legal conclusions that it violated NRS 690C.325(1)(b) and NRS 679B.125(2), which resulted in the $1,194,450 fines (reduced by the district court to $10,000).[217] The Division has not appealed the imposition of the cap of $10,000 to this group of fines. *See* NRAP 4(a)(2). Therefore, HWAN seeks reversal of both the modified $10,000 fine on the grounds discussed herein[218] (Sections II, III, and IV, *supra*), and the remaining $30,500 as detailed below.

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[217] App.Vol.XIII 2519-520.

[218] HWAN's alternative argument before the district court that some of the fines are barred by the statute of limitations is moot given the district court's imposition of the NRS 690C.330 cap and therefore not discussed herein. App.Vol.XI 2042-43.

A. Emmermann Wrongly Fined HWAN $30,000 for Violations of NRS 686A.070.

Setting aside that none of the violations of NRS 686A.070 for which HWAN was ultimately fined were noticed prior to hearing (Section II, *supra*), Emmermann improperly fined HWAN $5,000[219] for each of six violations of NRS 686A.070, for a total of $30,000.[220] These fines are based on allegations that HWAN falsely listed "self" as its administrator in its 2011-2015 renewal applications and failed to disclose the use of an unapproved service contract form in its 2015 renewal application.[221]

First, four of the instances of listing "self" as administrator are barred by the two-year statute of limitations. NRS 11.190(4)(b) (imposing a two-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture, where the action is given to a person or the State, or both, except when the statute imposing it prescribes a different limitation"). The Complaint was filed on May 9, 2017,[222] meaning only the 2015 renewal application (filed in November 2015) could form the basis for these alleged violations.[223] Thus, $20,000 of the fines for four alleged

[219] This is the maximum fine under NRS 686A.183(1)(a).
[220] App.Vol.VIII 1398, 1405; App.Vol.XIII 2519:7-12.
[221] App.Vol.VIII 1398.
[222] App.Vol.I 1.
[223] App.Vol.VIII 1398:17-19.

violations prior to May 2015 (the 2014, 2013, 2012, and 2011 applications) must be reversed as time-barred.

Second, NRS 686A.070 requires proof of a "knowingly ma[de] false entry of material fact." While there is no guidance in Nevada[224] for how the term "knowingly" should be interpreted in the context of NRS 686A.070, interpretation of similar statutes has required more than mere negligence for a representation to be "knowingly" made. *See United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 544-45 (7th Cir. 1999) (interpreting the "knowingly" requirement in the context of the False Claims Act as requiring the defendant to "have actual knowledge of (or deliberately ignore or act in reckless disregard of) the truth or falsity of the information presented" such that "[i]nnocent mistakes or negligence are not actionable"). Proof of such "knowing" representation is lacking here.

Instead, the record shows that the Division knew of CHW's status as HWAN's administrator since 2011, when the Division approved HWAN's form service contract listing CHW as HWAN's administrator.[225] HWAN simply did not correct the pre-populated[226] field for administrator from "self" to "CHW" on each

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[224] NAC 686A.488 defines "knowingly," but expressly only in the limited context of NAC 686A.485 to 686A.4955. NAC 686A.4855.

[225] App.Vol.III 480-88; App.Vol.VIII 1382:4-5.

[226] The Division provides to each applicant a pre-populated renewal application each year. *See, e.g.*, App.Vol.III 301 (with current administrator field pre-populated as "self").

of its renewal applications following the 2011 approval of the service contract form. The Division presented no evidence that this failure was "knowing" as opposed to inadvertent, and the fact that HWAN's approved service contract filing specifically states that CHW is the administrator demonstrates the absence of any intent to deceive.

Third, Emmermann's imposition of $5,000 in fines for HWAN's failure to disclose the use of an unapproved service contract form is unsupported by evidence. The Division presented only one unapproved service contract for the term of 2016-2017.[227] Yet Emmermann found that HWAN failed to disclose the use of an unapproved form in its ***2015*** renewal application.[228] It is factually impossible for HWAN to have disclosed the use of a 2016-2017 service contract in its 2015 renewal application.

B. Emmermann's Wrongly Fined HWAN $500 for Failure to Make Records Available to the Division.

Emmermann found that "the Division made several requests of [HWAN]" for "information about HWAN's claims and open contracts in Nevada."[229] But apart from general statements of Division witnesses characterizing HWAN as "uncooperative" and "nonresponsive," there is no evidence that HWAN received

[227] App.Vol.II 271-75; App.Vol.VIII 1392:12-20.
[228] App.Vol.VIII 1398:21-27.
[229] *Id.* 1399:20-27.

and disregarded requests for information. The Complaint[230] alleges the Division sent a subpoena to HWAN for information regarding open contracts, and the Amended Complaint[231] alleges that HWAN responded to this subpoena. No evidence was presented that HWAN received any request for this information prior to the subpoena, and the fact that HWAN inadvertently left blanks on its application cannot be the basis for a violation of NRS 690C.320 for failing to provide its ***accounts, books and records*** to the Commissioner for inspection ***upon request***.

[230] App.Vol.I 6:1-5.
[231] App.Vol.I 174:1-5.

CONCLUSION

Based on the foregoing, HWAN requests that the Court set aside the Administrative Decision to the extent it misinterprets NRS 690C.150, deems HWAN's COR expired, and imposes any fines on HWAN.

DATED this 12th day of May, 2020.

/s/ Sydney R. Gambee

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **13,928 words**.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that 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 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 12th day of May, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on the 12th day of May, 2020.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System or by first class United States mail, postage prepaid, at Las Vegas, Nevada as follows:

Via Electronic Filing System:
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/s/ Joyce Heilich
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