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, County of Clark
The Honorable James. T. Russell, District Judge

APPELLANT'S APPENDIX
VOLUME IX OF XIV
(AA001560 – AA001773)

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INDEX TO APPELLANT'S APPENDIX IN CHRONOLOGICAL ORDER

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Second Application for Subpoena Duces Tecum (Cause No. 17.0050)	07/19/17	I	AA000065 – AA000071
Request to Continue Hearing (Cause No. 17.0050)	07/20/17	I	AA000072 – AA000073
Limited Opposition to Motion for Pre-hearing Deposition Subpoenas or, in the alternative, Application for Hearing Subpoenas and Application for Subpoena Duces Tecum (Cause No. 17.0050)	07/21/17	I	AA000074 – AA000076
Notice of No Opposition to Request to Continue Hearing (Cause No. 17.0050)	07/24/17	I	AA000077 – AA000078
Subpoena Duces Tecum to HWAN (Cause No. 17.0050)	07/26/17	I	AA000079 – AA000083
Order on Motions (Cause No. 17.0050)	07/27/17	I	AA000084 – AA000091
Subpoena for Appearance at Hearing to Dolores Bennett (Cause No. 17.0050)	08/04/17	I	AA000092 – AA000095
Subpoena for Appearance at Hearing to Sanja Samardzija (Cause No. 17.0050)	08/04/17	I	AA000096 – AA000099
Subpoena for Appearance at Hearing to Vincent Capitini (Cause No. 17.0050)	08/04/17	I	AA000100 – AA000103
Subpoena Duces Tecum to the Commissioner of the State of Nevada Division of Insurance (the "Division") (Cause No. 17.0050)	08/09/17	I	AA000104 – AA000108
Subpoena for Appearance at Hearing to Chloe Stewart (Cause No. 17.0050)	08/09/17	I	AA000109 – AA000112
Subpoena for Appearance at Hearing to Derrick Dennis (Cause No. 17.0050)	08/09/17	I	AA000113 – AA000116
Subpoena for Appearance at Hearing to Geoffrey Hunt (Cause No. 17.0050)	08/09/17	I	AA000117 – AA000120
Subpoena for Appearance at Hearing to Linda Stratton (Cause No. 17.0050)	08/09/17	I	AA000121 – AA000124
Subpoena for Appearance at Hearing to the State of Nevada, Division of Insurance Person Most Knowledgeable as to the Creation of the Division's Annual Renewal Application Forms (Cause No. 17.0050)	08/09/17	I	AA000125 – AA000128

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Subpoena for Appearance at Hearing to the State of Nevada, Division of Insurance Person Most Knowledgeable as to the Date of the Division's Knowledge of the Violations Set Forth in the Division's Complaint on File in this Cause (Cause No. 17.0050)	08/09/17	I	AA000129 – AA000132
Subpoena for Appearance at Hearing to Vicki Folster (Cause No. 17.0050)	08/09/17	I	AA000133 – AA000136
Subpoena for Appearance at Hearing to Kim Kuhlman (Cause No. 17.0050)	08/09/17	I	AA000137 – AA000140
Subpoena for Appearance at Hearing to Martin Reis (Cause No. 17.0050)	08/09/17	I	AA000141 – AA000144
Subpoena for Appearance at Hearing to Mary Strong (Cause No. 17.0050)	08/09/17	I	AA000145 – AA000148
Joint Request for Pre-hearing Conference (Cause No. 17.0050)	08/16/17	I	AA000149 – AA000152
Order Setting Pre-hearing Conference (Cause No. 17.0050)	08/17/17	I	AA000153 – AA000158
Order on Joint Application to Conduct Deposition (Cause No. 17.0050)	08/17/17	I	AA000159 – AA000164
Joint Application to Conduct Deposition to Preserve Hearing Testimony (Cause No. 17.0050)	08/21/17	I	AA000165 – AA000168
Amended Complaint and Application for Order to Show Cause (Cause No. 17.0050)	09/05/17	I	AA000169 – AA000177
Division's Pre-hearing Statement (Cause No. 17.0050)	09/06/17	I	AA000178 – AA000188
Proposed Hearing Exhibits and Witness List by Division (Cause No. 17.0050) *(Exhibits 1, 3, 6, 8-11, 13-20, 24-29, and 38-40 excluded from appendix as irrelevant to this appeal)*	09/06/17	II	AA000189 – AA000275
Hearing Exhibit List by HWAN (Cause No. 17.0050) *(Exhibits D, F-H, J-K, M-N, W-X, and HH excluded from appendix as irrelevant to this appeal)*	09/06/17	III	AA000276 – AA000499
HWAN's Pre-hearing Statement (Cause No. 17.0050)	09/08/17	IV	AA000500 – AA000513
List of Hearing Witnesses by HWAN (Cause No. 17.0050)	09/08/17	IV	AA000514 – AA000517

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Updated Hearing Exhibits and Updated Witness List by Division (Cause No. 17.0050) *(Exhibits 41-42 excluded from appendix as irrelevant to this appeal)*	09/08/17	IV	AA000518 – AA000521
HWAN's Notice of Intent to File Supplemental Hearing Exhibits and Amended Hearing Exhibit List (Cause No. 17.0050)	09/11/17	IV	AA000522 – AA000582
Transcript of Hearing Proceedings on September 12, 2017 (Cause No. 17.0050)	09/12/17	IV-V	AA000583 – AA000853
Transcript of Hearing Proceedings on September 13, 2017 (Cause No. 17.0050)	09/13/17	V-VI	AA000854 – AA001150
Transcript of Hearing Proceedings on September 14, 2017 (Cause No. 17.0050)	09/14/17	VII	AA001151 – AA001270
HWAN's Notice of Filing Supplemental Hearing Exhibit SS (Cause No. 17.0050)	09/21/17	VII	AA001271 – AA001295
Order regarding Post-hearing Briefs and Written Closing Arguments (Cause No. 17.0050)	10/13/17	VII	AA001296 – AA001298
Division's Post-hearing Brief Pursuant to Order (Cause No. 17.0050)	10/30/17	VII	AA001299 – AA001307
HWAN's Post-hearing Brief on Hearing Officer's Inquiry (Cause No. 17.0050)	10/30/17	VII	AA001308 – AA001325
Motion to Strike Portions of the Division's Post-hearing Brief (Cause No. 17.0050)	11/13/17	VII	AA001326 – AA001332
Division's Opposition to Respondent's Motion to Strike Portions of the Division's Post-hearing Brief (Cause No. 17.0050)	11/14/17	VII	AA001333 – AA001338
Order regarding Motion to Strike and Written Closing Arguments (Cause No. 17.0050)	11/14/17	VII	AA001339 – AA001340
Division's Closing Statement (Cause No. 17.0050)	11/17/17	VII	AA001341 – AA001358
HWAN's Closing Argument (Cause No. 17.0050)	11/22/17	VIII	AA001359 – AA001378
Findings of Fact, Conclusions of Law, Order of Hearing Officer, and Final Order of the Commissioner (Cause No. 17.0050)	12/18/17	VIII	AA001379 – AA001409
Affirmation (Initial Appearance) (Case No. 17 OC 00269 1B)	12/22/17	VIII	AA001410 – AA001411

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/22/17	VIII	AA001412 – AA001458
Civil Cover Sheet (Case No. 17 OC 00269 1B)	12/22/17	VIII	AA001459
Order for Briefing Schedule (Case No. 17 OC 00269 1B)	12/26/17	VIII	AA001460 – AA001462
Affidavit of Service of Petition for Judicial Review on State of Nevada, Department of Business and Industry, Division of Insurance – Attorney General (Case No. 17 OC 00269 1B)	01/02/18	VIII	AA001463 – AA001464
Affidavit of Service of Petition for Judicial Review on State of Nevada, Department of Business and Industry, Division of Insurance –Commissioner of Insurance (Case No. 17 OC 00269 1B)	01/02/18	VIII	AA001465
Administrative Record (Case No. 17 OC 00269 1B)	01/12/18	VIII	AA001466 – AA001470
Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	01/16/18	VIII	AA001471 – AA001486
Statement of Intent to Participate (Case No. 17 OC 00269 1B)	01/19/18	VIII	AA001487 – AA001489
Division's Opposition to Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	01/30/18	VIII	AA001490 – AA001503
Supplement to Division's Opposition to Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	01/31/18	VIII	AA001504 – AA001537
Reply in Support of Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	02/08/18	VIII	AA001538 – AA001548
Request for Submission of Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	02/08/18	VIII	AA001549 – AA001551
Notice of Entry of Order Denying Motion for Stay (Case No. 17 OC 00269 1B)	02/16/18	VIII	AA001552 – AA001559
Petitioner's Opening Brief in Support of Petition for Judicial Review (Case No. 17 OC 00269 1B)	02/16/18	IX	AA001560 – AA001599
Stipulation and Order for Interpleading of Fines Pending Final Decision (Case No. 17 OC 00269 1B)	03/15/18	IX	AA001600 – AA001601

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Respondent's Answering Brief (Case No. 17 OC 00269 1B)	03/19/18	IX	AA001602 – AA001641
Certificate of Service of Stipulation and Order for Interpleading of Fines Pending Final Decision (Case No. 17 OC 00269 1B)	03/28/18	IX	AA001642 – AA001643
Reply Brief in Support of Petition for Judicial Review (Case No. 17 OC 00269 1B)	04/11/18	IX	AA001644 – AA001662
Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	04/19/18	IX	AA001663 – AA001680
Opposition to Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	05/04/18	IX	AA001681 – AA001687
Reply in Support of Petitioner's Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	05/14/18	IX	AA001688 – AA001701
Request for Submission of Petitioner's Motion for Leave to Present Additional Evidence and Petitioner's Request for Hearing on its Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	05/14/18	IX	AA001702 – AA001704
Order to Set for Hearing (Case No. 17 OC 00269 1B)	05/16/18	IX	AA001705 – AA001706
Hearing Date Memo (Case No. 17 OC 00269 1B)	06/06/18	IX	AA001707
Transcript of Hearing Proceedings on August 6, 2018 (Case No. 17 OC 00269 1B)	08/06/18	IX	AA001708 – AA001731
Order Granting Petitioner's Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	09/06/18	IX	AA001732 – AA001735
Order regarding Exhibits KK, LL & MM (Cause No. 17.0050)	10/31/18	IX	AA001736 – AA001738
HWAN's Brief regarding Exhibits KK, LL, and MM (Cause No. 17.0050)	11/13/18	IX	AA001739 – AA001745
Division's Opposition to HWAN's Proposed Exhibits KK, LL, and MM (Cause No. 17.0050)	11/20/18	IX	AA001746 – AA001753
HWAN's Reply to Division's Opposition to its Brief regarding Exhibits KK, LL and MM (Cause No. 17.0050)	11/21/18	IX	AA001754 – AA001758

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Order on Remand (Cause No. 17.0050)	01/22/19	IX	AA001759 – AA001767
Substitution of Attorney (Cause No. 17.0050)	01/24/19	IX	AA001768 – AA001770
Substitution of Attorney (Case No. 17 OC 00269 1B)	01/25/19	IX	AA001771 – AA001773
Notice of Filing Hearing Officer's Administrative Order (Case No. 17 OC 00269 1B)	01/28/19	X	AA001774 – AA001787
Notice of Amendment to Record on Appeal (Case No. 17 OC 00269 1B)	02/01/19	X	AA001788 – AA001801
Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	02/22/19	X	AA001802 – AA001961
Notice of Non-Opposition to Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal and Notice of Submission of Proposed Order (Case No. 17 OC 00269 1B)	03/12/19	X	AA001962 – AA001968
Request for Submission of Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	03/12/19	X	AA001969 – AA001971
Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	03/13/19	X	AA001972 – AA001973
Stipulation and Order (1) Withdrawing Notice of Non-Opposition and Request for Submission of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal; and (2) Extending the Time for Opposition to and Reply in Support of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	03/25/19	X	AA001974 – AA001976

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Notice of Entry of Order for Stipulation regarding (1) Withdrawing Notice of Non-Opposition and Request for Submission of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal; and (2) Extending the Time for Opposition to and Reply in Support of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	04/01/19	X	AA001977 – AA001982
Division's Opposition to Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (erroneously filed in Case No. 19 OC 00015 1B)	04/03/19	XI	AA001983 – AA002003
Reply Memorandum of Points and Authorities in Support of Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	04/15/19	XI	AA002004 – AA002008
Request for Submission of Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	05/06/19	XI	AA002009 – AA002011
Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/08/19	XI	AA002012 – AA002013
Notice of Entry of Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/21/19	XI	AA002014 – AA002018
Notice of Entry of Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	05/21/19	XI	AA002019 – AA002023
Petitioner's Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	05/28/19	XI	AA002024 – AA002138

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Notice of Amendment to Record on Appeal (Case No. 17 OC 00269 1B)	05/28/19	XI	AA002139 – AA002169
Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/30/19	XI	AA002170 – AA002173
Request for Submission of Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/31/19	XI	AA002174 – AA002176
Order on Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	06/05/19	XI	AA002177 – AA002179
Notice of Entry of Order on Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	06/06/19	XI	AA002180 – AA002185
Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	06/18/19	XI	AA002186 – AA002189
Notice of Entry of Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	07/10/19	XI	AA002190 – AA002194
Respondents' Response to Petitioner's Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	08/08/19	XII	AA002195 – AA002209
Petitioner's Reply in Support of its Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	08/15/19	XII	AA002210 – AA002285
Request for Hearing on Petition for Judicial Review Pursuant to NRS 233B.133(4) (Case No. 17 OC 00269 1B)	08/15/19	XII	AA002286 – AA002288

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Notice to Set (Case No. 17 OC 00269 1B)	08/15/19	XII	AA002289 – AA002291
Hearing Date Memo (Case No. 17 OC 00269 1B)	08/28/19	XII	AA002292 – AA002294
Legislative History Statement Regarding NRS 690C.325(1) and NRS 690C.330 (Case No. 17 OC 00269 1B)	11/06/19	XII	AA002295 – AA002358
Respondent's Statement of Legislative History of NRS 690C.325 (Case No. 17 OC 00269 1B)	11/06/19	XII	AA002359 – AA002383
Transcript of Hearing Proceedings on November 7, 2019 (Case No. 17 OC 00269 1B)	11/07/19	XIII	AA002384 – AA002455
Motion for Leave of Court Pursuant to FJDCR 15(10) and DCR 13(7) for Limited Reconsideration of Findings Pertaining to HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	11/15/19	XIII	AA002456 – AA002494
Notice of Submission of Competing Proposed Order (Case No. 17 OC 00269 1B)	11/22/19	XIII	AA002495 – AA002516
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 (Case No. 17 OC 00269 1B)	11/25/19	XIII	AA002517 – AA002521
Notice of Entry of 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 (Case No. 17 OC 00269 1B)	11/27/19	XIII	AA002522 – AA002530
Respondent's Opposition to Petitioner's Motion for Leave of Court for Limited Reconsideration of Court's Findings on HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	11/27/19	XIII	AA002531 – AA002541

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Reply in Support of Motion for Leave of Court Pursuant to FJDCR 15(10) and DCR 13(7) for Limited Reconsideration of Findings Pertaining to HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/04/19	XIII	AA002542 – AA002570
Request for Submission of Motion for Leave of Court Pursuant to FJDCR 15(10) and DCR 13(7) for Limited Reconsideration of Findings Pertaining to HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/04/19	XIII	AA002571 – AA002573
Motion for Order Shortening Time for Briefing and Decision of Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/06/19	XIII	AA002574 – AA002582
Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/06/19	XIV	AA002583 – AA002639
Case Appeal Statement (Case No. 17 OC 00269 1B)	12/06/19	XIV	AA002640 – AA002645
Notice of Appeal (Case No. 17 OC 00269 1B)	12/06/19	XIV	AA002646 – AA002693
Opposition to Petitioner's Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/09/19	XIV	AA002694 – AA002698
Order Denying Petitioner's Motion for Leave of Court for Limited Reconsideration of Court's Findings on HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/09/19	XIV	AA002699 – AA002702
Request for Submission of Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/10/19	XIV	AA002703 – AA002705
Reply in Support of Motion for Order Shortening Time for Briefing and Decision of Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/10/19	XIV	AA002706 – AA002716

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Notice of Entry of Order Denying Petitioner's Motion for Leave of Court for Limited Reconsideration of Court's Findings on HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/11/19	XIV	AA002717 – AA002723
Order Denying Petitioner's Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/12/19	XIV	AA002724 – AA002725
Notice of Entry of Order Denying Petitioner's Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/18/19	XIV	AA002726 – AA002731
Division's Opposition to Petitioner's Motion for Stay (Case No. 17 OC 00269 1B)	12/19/19	XIV	AA002732 – AA002741
Reply in Support of Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/26/19	XIV	AA002742 – AA002755
Request for Submission of Motion to Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/26/19	XIV	AA002756 – AA002758
Order Denying Petitioner's Motion for Stay Pending Appeal (Case No. 17 OC 00269 1B)	12/31/19	XIV	AA002759 – AA002764
Notice of Entry of Order Denying Petitioner's Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	01/07/20	XIV	AA002765 – AA002775

INDEX TO APPELLANT'S APPENDIX IN ALPHABETICAL ORDER

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Administrative Record (Case No. 17 OC 00269 1B)	01/12/18	VIII	AA001466 – AA001470
Affidavit of Service of Petition for Judicial Review on State of Nevada, Department of Business and Industry, Division of Insurance – Attorney General (Case No. 17 OC 00269 1B)	01/02/18	VIII	AA001463 – AA001464
Affidavit of Service of Petition for Judicial Review on State of Nevada, Department of Business and Industry, Division of Insurance –Commissioner of Insurance (Case No. 17 OC 00269 1B)	01/02/18	VIII	AA001465
Affirmation (Initial Appearance) (Case No. 17 OC 00269 1B)	12/22/17	VIII	AA001410 – AA001411
Amended Complaint and Application for Order to Show Cause (Cause No. 17.0050)	09/05/17	I	AA000169 – AA000177
Application for Subpoena Duces Tecum to Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("HWAN") (Cause No. 17.0050)	05/09/17	I	AA000011 – AA000014
Case Appeal Statement (Case No. 17 OC 00269 1B)	12/06/19	XIV	AA002640 – AA002645
Certificate of Service of Stipulation and Order for Interpleading of Fines Pending Final Decision (Case No. 17 OC 00269 1B)	03/28/18	IX	AA001642 – AA001643
Civil Cover Sheet (Case No. 17 OC 00269 1B)	12/22/17	VIII	AA001459
Complaint and Application for Order to Show Cause (Cause No. 17.0050)	05/09/17	I	AA000001 – AA000010
Division's Closing Statement (Cause No. 17.0050)	11/17/17	VII	AA001341 – AA001358
Division's Opposition to HWAN's Proposed Exhibits KK, LL, and MM (Cause No. 17.0050)	11/20/18	IX	AA001746 – AA001753
Division's Opposition to Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (erroneously filed in Case No. 19 OC 00015 1B)	04/03/19	XI	AA001983 – AA002003

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Division's Opposition to Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	01/30/18	VIII	AA001490 – AA001503
Division's Opposition to Petitioner's Motion for Stay (Case No. 17 OC 00269 1B)	12/19/19	XIV	AA002732 – AA002741
Division's Opposition to Respondent's Motion to Strike Portions of the Division's Post-hearing Brief (Cause No. 17.0050)	11/14/17	VII	AA001333 – AA001338
Division's Post-hearing Brief Pursuant to Order (Cause No. 17.0050)	10/30/17	VII	AA001299 – AA001307
Division's Pre-hearing Statement (Cause No. 17.0050)	09/06/17	I	AA000178 – AA000188
Findings of Fact, Conclusions of Law, Order of Hearing Officer, and Final Order of the Commissioner (Cause No. 17.0050)	12/18/17	VIII	AA001379 – AA001409
Hearing Date Memo (Case No. 17 OC 00269 1B)	06/06/18	IX	AA001707
Hearing Date Memo (Case No. 17 OC 00269 1B)	08/28/19	XII	AA002292 – AA002294
Hearing Exhibit List by HWAN (Cause No. 17.0050) *(Exhibits D, F-H, J-K, M-N, W-X, and HH excluded from appendix as irrelevant to this appeal)*	09/06/17	III	AA000276 – AA000499
HWAN's Brief regarding Exhibits KK, LL, and MM (Cause No. 17.0050)	11/13/18	IX	AA001739 – AA001745
HWAN's Closing Argument (Cause No. 17.0050)	11/22/17	VIII	AA001359 – AA001378
HWAN's Notice of Filing Supplemental Hearing Exhibit SS (Cause No. 17.0050)	09/21/17	VII	AA001271 – AA001295
HWAN's Notice of Intent to File Supplemental Hearing Exhibits and Amended Hearing Exhibit List (Cause No. 17.0050)	09/11/17	IV	AA000522 – AA000582
HWAN's Post-hearing Brief on Hearing Officer's Inquiry (Cause No. 17.0050)	10/30/17	VII	AA001308 – AA001325
HWAN's Pre-hearing Statement (Cause No. 17.0050)	09/08/17	IV	AA000500 – AA000513

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
HWAN's Reply to Division's Opposition to its Brief regarding Exhibits KK, LL and MM (Cause No. 17.0050)	11/21/18	IX	AA001754 – AA001758
Joint Application to Conduct Deposition to Preserve Hearing Testimony (Cause No. 17.0050)	08/21/17	I	AA000165 – AA000168
Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/30/19	XI	AA002170 – AA002173
Joint Request for Pre-hearing Conference (Cause No. 17.0050)	08/16/17	I	AA000149 – AA000152
Joint Request to Continue Hearing (Cause No. 17.0050)	06/20/17	I	AA000042 – AA000044
Legislative History Statement Regarding NRS 690C.325(1) and NRS 690C.330 (Case No. 17 OC 00269 1B)	11/06/19	XII	AA002295 – AA002358
Limited Opposition to Motion for Pre-hearing Deposition Subpoenas or, in the alternative, Application for Hearing Subpoenas and Application for Subpoena Duces Tecum (Cause No. 17.0050)	07/21/17	I	AA000074 – AA000076
List of Hearing Witnesses by HWAN (Cause No. 17.0050)	09/08/17	IV	AA000514 – AA000517
Motion for Leave of Court Pursuant to FJDCR 15(10) and DCR 13(7) for Limited Reconsideration of Findings Pertaining to HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	11/15/19	XIII	AA002456 – AA002494
Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	02/22/19	X	AA001802 – AA001961
Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	04/19/18	IX	AA001663 – AA001680
Motion for Order Shortening Time for Briefing and Decision of Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/06/19	XIII	AA002574 – AA002582

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Motion for Pre-hearing Deposition Subpoenas or, in the alternative, Application for Hearing Subpoenas and Application for Subpoena Duces Tecum (Cause No. 17.0050)	07/14/17	I	AA000054 – AA000064
Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	01/16/18	VIII	AA001471 – AA001486
Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/06/19	XIV	AA002583 – AA002639
Motion to Strike Portions of the Division's Post-hearing Brief (Cause No. 17.0050)	11/13/17	VII	AA001326 – AA001332
Notice of Amendment to Record on Appeal (Case No. 17 OC 00269 1B)	02/01/19	X	AA001788 – AA001801
Notice of Amendment to Record on Appeal (Case No. 17 OC 00269 1B)	05/28/19	XI	AA002139 – AA002169
Notice of Appeal (Case No. 17 OC 00269 1B)	12/06/19	XIV	AA002646 – AA002693
Notice of Entry of 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 (Case No. 17 OC 00269 1B)	11/27/19	XIII	AA002522 – AA002530
Notice of Entry of Order Denying Motion for Stay (Case No. 17 OC 00269 1B)	02/16/18	VIII	AA001552 – AA001559
Notice of Entry of Order Denying Petitioner's Motion for Leave of Court for Limited Reconsideration of Court's Findings on HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/11/19	XIV	AA002717 – AA002723
Notice of Entry of Order Denying Petitioner's Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/18/19	XIV	AA002726 – AA002731

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Notice of Entry of Order Denying Petitioner's Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	01/07/20	XIV	AA002765 – AA002775
Notice of Entry of Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/21/19	XI	AA002014 – AA002018
Notice of Entry of Order for Stipulation regarding (1) Withdrawing Notice of Non-Opposition and Request for Submission of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal; and (2) Extending the Time for Opposition to and Reply in Support of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	04/01/19	X	AA001977 – AA001982
Notice of Entry of Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	05/21/19	XI	AA002019 – AA002023
Notice of Entry of Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	07/10/19	XI	AA002190 – AA002194
Notice of Entry of Order on Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	06/06/19	XI	AA002180 – AA002185
Notice of Filing Hearing Officer's Administrative Order (Case No. 17 OC 00269 1B)	01/28/19	X	AA001774 – AA001787
Notice of No Opposition to Request to Continue Hearing (Cause No. 17.0050)	07/24/17	I	AA000077 – AA000078

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Notice of Non-Opposition to Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal and Notice of Submission of Proposed Order (Case No. 17 OC 00269 1B)	03/12/19	X	AA001962 – AA001968
Notice of Non-Opposition to Respondent's Request for Extension of Time to Comply with Subpoena Duces Tecum (Cause No. 17.0050)	06/01/17	I	AA000030 – AA000031
Notice of Non-Opposition to Respondent's Second Request for Extension of Time to Comply with Subpoena Duces Tecum (Cause No. 17.0050)	06/16/17	I	AA000040 – AA000041
Notice of Submission of Competing Proposed Order (Case No. 17 OC 00269 1B)	11/22/19	XIII	AA002495 – AA002516
Notice to Set (Case No. 17 OC 00269 1B)	08/15/19	XII	AA002289 – AA002291
Opposition to Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	05/04/18	IX	AA001681 – AA001687
Opposition to Petitioner's Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/09/19	XIV	AA002694 – AA002698
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 (Case No. 17 OC 00269 1B)	11/25/19	XIII	AA002517 – AA002521
Order Denying Petitioner's Motion for Leave of Court for Limited Reconsideration of Court's Findings on HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/09/19	XIV	AA002699 – AA002702
Order Denying Petitioner's Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/12/19	XIV	AA002724 – AA002725

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Order Denying Petitioner's Motion for Stay Pending Appeal (Case No. 17 OC 00269 1B)	12/31/19	XIV	AA002759 – AA002764
Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/08/19	XI	AA002012 – AA002013
Order for Briefing Schedule (Case No. 17 OC 00269 1B)	12/26/17	VIII	AA001460 – AA001462
Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	03/13/19	X	AA001972 – AA001973
Order Granting Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	06/18/19	XI	AA002186 – AA002189
Order Granting Petitioner's Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	09/06/18	IX	AA001732 – AA001735
Order on Joint Application to Conduct Deposition (Cause No. 17.0050)	08/17/17	I	AA000159 – AA000164
Order on Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	06/05/19	XI	AA002177 – AA002179
Order on Motion Requesting Extension of Time and Order on Joint Request for Continuance (Cause No. 17.0050)	06/22/17	I	AA000045 – AA000047
Order on Motions (Cause No. 17.0050)	07/27/17	I	AA000084 – AA000091
Order on Petition to Enlarge Time to Respond to Subpoena Duces Tecum (Cause No. 17.0050)	06/05/17	I	AA000032 – AA000035
Order on Remand (Cause No. 17.0050)	01/22/19	IX	AA001759 – AA001767
Order regarding Exhibits KK, LL & MM (Cause No. 17.0050)	10/31/18	IX	AA001736 – AA001738
Order regarding Motion to Strike and Written Closing Arguments (Cause No. 17.0050)	11/14/17	VII	AA001339 – AA001340

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Order regarding Post-hearing Briefs and Written Closing Arguments (Cause No. 17.0050)	10/13/17	VII	AA001296 – AA001298
Order Setting Pre-hearing Conference (Cause No. 17.0050)	08/17/17	I	AA000153 – AA000158
Order to Set for Hearing (Case No. 17 OC 00269 1B)	05/16/18	IX	AA001705 – AA001706
Order to Show Cause (Cause No. 17.0050)	05/11/17	I	AA000015 – AA000018
Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/22/17	VIII	AA001412 – AA001458
Petition to Enlarge Time to Respond to Subpoena Duces Tecum, with cover letter (Cause No. 17.0050)	06/01/17	I	AA000023 – AA000029
Petitioner's Opening Brief in Support of Petition for Judicial Review (Case No. 17 OC 00269 1B)	02/16/18	IX	AA001560 – AA001599
Petitioner's Reply in Support of its Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	08/15/19	XII	AA002210 – AA002285
Petitioner's Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	05/28/19	XI	AA002024 – AA002138
Pre-hearing Order (Cause No. 17.0050)	06/22/17	I	AA000048 – AA000053
Proposed Hearing Exhibits and Witness List by Division (Cause No. 17.0050) *(Exhibits 1, 3, 6, 8-11, 13-20, 24-29, and 38-40 excluded from appendix as irrelevant to this appeal)*	09/06/17	II	AA000189 – AA000275
Reply Brief in Support of Petition for Judicial Review (Case No. 17 OC 00269 1B)	04/11/18	IX	AA001644 – AA001662
Reply in Support of Motion for Leave of Court Pursuant to FJDCR 15(10) and DCR 13(7) for Limited Reconsideration of Findings Pertaining to HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/04/19	XIII	AA002542 – AA002570

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Reply in Support of Motion for Order Shortening Time for Briefing and Decision of Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/10/19	XIV	AA002706 – AA002716
Reply in Support of Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	02/08/18	VIII	AA001538 – AA001548
Reply in Support of Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/26/19	XIV	AA002742 – AA002755
Reply in Support of Petitioner's Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	05/14/18	IX	AA001688 – AA001701
Reply Memorandum of Points and Authorities in Support of Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	04/15/19	XI	AA002004 – AA002008
Request for Hearing on Petition for Judicial Review Pursuant to NRS 233B.133(4) (Case No. 17 OC 00269 1B)	08/15/19	XII	AA002286 – AA002288
Request for Submission of Joint Motion for Clarification and/or Reconsideration of the May 8, 2019 Order Denying Request for Submission (Case No. 17 OC 00269 1B)	05/31/19	XI	AA002174 – AA002176
Request for Submission of Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	05/06/19	XI	AA002009 – AA002011
Request for Submission of Motion for Leave of Court Pursuant to FJDCR 15(10) and DCR 13(7) for Limited Reconsideration of Findings Pertaining to HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	12/04/19	XIII	AA002571 – AA002573
Request for Submission of Motion for Leave to File Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	03/12/19	X	AA001969 – AA001971

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Request for Submission of Motion for Order Shortening Time for Briefing and Decision on Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/10/19	XIV	AA002703 – AA002705
Request for Submission of Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	02/08/18	VIII	AA001549 – AA001551
Request for Submission of Motion to Stay Pending Appeal Pursuant to NRCP 62(D) (Case No. 17 OC 00269 1B)	12/26/19	XIV	AA002756 – AA002758
Request for Submission of Petitioner's Motion for Leave to Present Additional Evidence and Petitioner's Request for Hearing on its Motion for Leave to Present Additional Evidence (Case No. 17 OC 00269 1B)	05/14/18	IX	AA001702 – AA001704
Request to Continue Hearing (Cause No. 17.0050)	07/20/17	I	AA000072 – AA000073
Respondent's Answering Brief (Case No. 17 OC 00269 1B)	03/19/18	IX	AA001602 – AA001641
Respondent's Opposition to Petitioner's Motion for Leave of Court for Limited Reconsideration of Court's Findings on HWAN's Petition for Judicial Review (Case No. 17 OC 00269 1B)	11/27/19	XIII	AA002531 – AA002541
Respondent's Statement of Legislative History of NRS 690C.325 (Case No. 17 OC 00269 1B)	11/06/19	XII	AA002359 – AA002383
Respondents' Response to Petitioner's Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 (Case No. 17 OC 00269 1B)	08/08/19	XII	AA002195 – AA002209
Second Application for Subpoena Duces Tecum (Cause No. 17.0050)	07/19/17	I	AA000065 – AA000071
Second Request for Extension of Time to Comply with Subpoena Duces Tecum (Cause No. 17.0050)	06/14/17	I	AA000036 – AA000039
Statement of Intent to Participate (Case No. 17 OC 00269 1B)	01/19/18	VIII	AA001487 – AA001489

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Stipulation and Order (1) Withdrawing Notice of Non-Opposition and Request for Submission of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal; and (2) Extending the Time for Opposition to and Reply in Support of Motion for Leave to File Supplemental Memo of Points and Authorities Pursuant to NRS 233B.133 and Amend the Record on Appeal (Case No. 17 OC 00269 1B)	03/25/19	X	AA001974 – AA001976
Stipulation and Order for Interpleading of Fines Pending Final Decision (Case No. 17 OC 00269 1B)	03/15/18	IX	AA001600 – AA001601
Subpoena Duces Tecum to HWAN (Cause No. 17.0050)	05/11/17	I	AA000019 – AA000022
Subpoena Duces Tecum to HWAN (Cause No. 17.0050)	07/26/17	I	AA000079 – AA000083
Subpoena Duces Tecum to the Commissioner of the State of Nevada Division of Insurance (the "Division") (Cause No. 17.0050)	08/09/17	I	AA000104 – AA000108
Subpoena for Appearance at Hearing to Dolores Bennett (Cause No. 17.0050)	08/04/17	I	AA000092 – AA000095
Subpoena for Appearance at Hearing to Sanja Samardzija (Cause No. 17.0050)	08/04/17	I	AA000096 – AA000099
Subpoena for Appearance at Hearing to Vincent Capitini (Cause No. 17.0050)	08/04/17	I	AA000100 – AA000103
Subpoena for Appearance at Hearing to Chloe Stewart (Cause No. 17.0050)	08/09/17	I	AA000109 – AA000112
Subpoena for Appearance at Hearing to Derrick Dennis (Cause No. 17.0050)	08/09/17	I	AA000113 – AA000116
Subpoena for Appearance at Hearing to Linda Stratton (Cause No. 17.0050)	08/09/17	I	AA000121 – AA000124
Subpoena for Appearance at Hearing to Vicki Folster (Cause No. 17.0050)	08/09/17	I	AA000133 – AA000136
Subpoena for Appearance at Hearing to Kim Kuhlman (Cause No. 17.0050)	08/09/17	I	AA000137 – AA000140
Subpoena for Appearance at Hearing to Mary Strong (Cause No. 17.0050)	08/09/17	I	AA000145 – AA000148

EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
Subpoena for Appearance at Hearing to Geoffrey Hunt (Cause No. 17.0050)	08/09/17	I	AA000117 – AA000120
Subpoena for Appearance at Hearing to Martin Reis (Cause No. 17.0050)	08/09/17	I	AA000141 – AA000144
Subpoena for Appearance at Hearing to the State of Nevada, Division of Insurance Person Most Knowledgeable as to the Creation of the Division's Annual Renewal Application Forms (Cause No. 17.0050)	08/09/17	I	AA000125 – AA000128
Subpoena for Appearance at Hearing to the State of Nevada, Division of Insurance Person Most Knowledgeable as to the Date of the Division's Knowledge of the Violations Set Forth in the Division's Complaint on File in this Cause (Cause No. 17.0050)	08/09/17	I	AA000129 – AA000132
Substitution of Attorney (Case No. 17 OC 00269 1B)	01/25/19	IX	AA001771 – AA001773
Substitution of Attorney (Cause No. 17.0050)	01/24/19	IX	AA001768 – AA001770
Supplement to Division's Opposition to Motion for Stay of Final Administrative Decision Pursuant to NRS 233B.140 (Case No. 17 OC 00269 1B)	01/31/18	VIII	AA001504 – AA001537
Transcript of Hearing Proceedings on September 12, 2017 (Cause No. 17.0050)	09/12/17	IV-V	AA000583 – AA000853
Transcript of Hearing Proceedings on September 13, 2017 (Cause No. 17.0050)	09/13/17	V-VI	AA000854 – AA001150
Transcript of Hearing Proceedings on September 14, 2017 (Cause No. 17.0050)	09/14/17	VII	AA001151 – AA001270
Transcript of Hearing Proceedings on August 6, 2018 (Case No. 17 OC 00269 1B)	08/06/18	IX	AA001708 – AA001731
Transcript of Hearing Proceedings on November 7, 2019 (Case No. 17 OC 00269 1B)	11/07/19	XIII	AA002384 – AA002455
Updated Hearing Exhibits and Updated Witness List by Division (Cause No. 17.0050) *(Exhibits 41-42 excluded from appendix as irrelevant to this appeal)*	09/08/17	IV	AA000518 – AA000521

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner,* v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY - DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent.*	CASE NO.: 17 OC 00269 1B DEPT NO.: I **PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW**

Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("Petitioner"), by and through its counsel of record Kirk B. Lenhard, Esq., Travis F. Chance, Esq., and Mackenzie Warren, Esq., of the law firm Brownstein Hyatt Farber Schreck, LLP, and hereby submits its Opening Brief in Support of its Petition for Judicial Review (the "Brief").

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This Brief is made and based upon the attached Memorandum of Points and Authorities, the papers on file herein, the record of the proceedings below, and any oral argument this Court shall choose to consider.

DATED this 15th day of February, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: _____

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TABLE OF CONTENTS

Page

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TABLE OF CONTENTS
(continued)

Page

BROWNSTEIN HYATT FARBER SCHRECK, LLP
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TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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Other Authorities

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the instant Petition and Opening Brief pursuant to NRS 233B.130(1), as a request for review of a final order of an administrative agency in a contested case, and pursuant to NRS 233B.130(2)(b). Further, the final administrative agency order being reviewed was issued December 18, 2017 and a Petition for Judicial Review was timely filed on December 22, 2017.

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STATEMENT OF THE ISSUES FOR REVIEW

1. Whether Petitioner received constitutionally and statutorily proper notice of the potential findings against it prior to the hearing of this matter below;
2. Whether Nevada law requires a service contract administrator to hold a certificate of registration to sell and/or offer for sale service contracts to Nevada residents on behalf of a properly registered service contract provider;
3. Whether Petitioner's certificate of registration expired as a matter of law pursuant to NRS 233B.127(2) as of November 18, 2016, when Petitioner timely submitted its renewal application, tendered all required fees, and the Division of Insurance ("Division") failed to give Petitioner notice of the renewal application's alleged incompleteness;
4. Whether sufficient evidence was admitted to support the findings that (1) Petitioner misrepresented that it self-administered its contracts on its 2011, 2012, 2013, 2014, and 2015 renewal applications and (2) Petitioner misrepresented on its 2015 renewal application that it was using the form of service contract approved by the Division; and
5. Whether there was sufficient proof that the Division made several requests for certain records and that Petitioner received them and failed to respond to the same.

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STATEMENT OF THE CASE

In essence, this matter concerns what is best described as a moving target method of administrative prosecution. Since 2010, Petitioner has been a properly registered service contract provider in the State of Nevada, regulated by the Division. With the Division's full knowledge, Petitioner has utilized CHW Group, Inc. ("CHWG") as its service contract administrator since 2011. On November 8, 2016, Petitioner timely submitted a provider renewal application to the Division.

On or around May 9, 2017, the Division filed a Complaint and Application for Order to Show Cause, alleging that Petitioner did not promptly and reasonably respond to customer claims, engaged in unfair and deceptive trade practices based upon decisions in other states against CHWG, submitted knowingly false statements in its 2011, 2012, 2014, and 2015 renewal applications, and failed to make records available for inspection upon the Division's request. The Division filed an Amended Complaint on September 5, 2017, the allegations of which were substantively the same as the original Complaint.

It was only at the hearing of this matter on September 12-14, 2017 that the true nature of the Division's allegations came to light. Namely, that: (1) the Division considered Petitioner's 2016 renewal application incomplete and that Petitioner was operating without a proper certificate of registration; (2) that Petitioner is one and the same entity as CHWG; and (3) Petitioner allows CHWG to utilize it to avoid CHWG's own licensing in Nevada. A close review of the Complaint and Amended Complaint filed by the Division against Petitioner shows that these allegations were never raised prior to the hearing.

After the hearing before the Division as set forth above, the hearing officer entered a Final Order with Findings of Fact and Conclusions of Law on December 18, 2017. The Commissioner's Order adopting the same was amended on December 19, 2017, to correct the Cause Number cited. The hearing officer found certain violations against Petitioner, most of which were never set forth in any pre-hearing paper, to wit: (1) Petitioner allowed CHWG to engage in conduct requiring a certificate of registration pursuant to Nevada law, namely, the issuing, selling, and/or offering for sale service contracts; (2) Petitioner made misrepresentations

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on its 2011-2015 renewal applications for stating that it self-administered its contracts when CHWG was doing so; (3) Petitioner made a misrepresentation on its 2015 renewal application when it indicated it was using the form contract approved by the Division; (4) Petitioner failed to respond to requests for information and records from the Division; and (5) Petitioner's certificate of registration expired as a matter of law as of November 18, 2016, despite the fact that Petitioner timely submitted all required materials and fees.

The hearing officer gave Petitioner 30 days from the date of the order to submit a renewal application for its certificate of registration, due to the fact that the Division failed to give notice that it considered the renewal application incomplete. The hearing officer then gave the Division 15 business days from the date of receipt to issue a decision on the application. The hearing officer further prohibited the Division from taking action against Petitioner for issuing, selling, or offering for sale service contracts without a certificate of registration during the foregoing 45 day period. Petitioner thereafter timely filed a Petition for Judicial Review with this Court on December 22, 2017. The hearing officer also imposed fines in the total amount of $1,224,950.00.[1]

[1] Pursuant to the Decision, applications were submitted to the Division in January 2018.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

I. PETITIONER IS A LICENSED SERVICE CONTRACT PROVIDER, WHOSE CONTRACTS ARE ADMINISTERED BY CHWG.

Nevada law requires that service contract providers apply for and obtain a certificate of registration to issue, sell, or offer for sale service contracts in this State. *See* NRS 690C.150. Petitioner has been a properly registered service contract provider in the State of Nevada since 2010.[3] Pursuant to its certificate of registration, Petitioner provides home warranty service contracts in this State. Victor Mandalawi ("Mr. Mandalawi") is the sole officer and shareholder of Petitioner.[4] He is also a minority shareholder in and serves as the President of CHWG.[5] CHWG is a New Jersey corporation[6] and is not registered as a service contract provider in the State of Nevada.[7] The relationship between Petitioner and CHWG is a purely contractual one,[8] with CHWG acting as Petitioner's service contract administrator.[9] Petitioner's relationship with CHWG is a long one: on or around July 29, 2010, Petitioner entered into an Independent Service Provider Agreement (the "ISPA") with CHWG, even before Petitioner sought registration in Nevada.[10] Pursuant to the ISPA, CHWG is responsible for:

1. communicating with potential clients and negotiating the signing of contracts on forms dictated by Petitioner;
2. collecting payments from Petitioner's customers and passing the same to Petitioner;
3. maintaining records of all contracts entered into by Petitioner's customers; and
4. inspecting any claims made by Petitioner's customers to determine whether the same are covered under their service contracts.[11]

Pursuant to the ISP, CHWG handles the sales and operations for Petitioner.[12] CHWG also markets service contracts to potential Nevada consumers on behalf of Petitioner.[13] CHWG also

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[2] The facts provided herein, as taken from the hearing transcripts, are a condensed version and are those that are relevant to address the specific violations found by the hearing officer below.
[3] One of the issues in the instant dispute is whether Petitioner's certificate of registration was properly renewed in November 2016.
[4] *See* Hr'g Tr., Day 2 at 131; 134-135.
[5] *Id.* at 126:15-25.
[6] *See* Ex. A.
[7] Hr'g Tr., Day 2 at 261:18-22; Hr'g Tr., Day 3 at 70:9-12.
[8] *Id.* at 131:19-23.
[9] Hr'g Tr., Day 3 at 70:24.
[10] *See* Ex. E.
[11] *See id.* at 1.
[12] *See* Hr'g Tr., Day 2 at 135:23-136:1; 237:23-25.
[13] *See id.* at 224:6-20; 236:19-24.

maintains records of Petitioner's service contracts on behalf of Petitioner[14] and resolves any claims or complaints made by Petitioner's consumers.[15] Petitioner handles all regulatory compliance work for itself.[16] Petitioner's complaint to claims ratio since it began operating in 2011 is .102%.[17]

II. THE DIVISION BEGINS TO INVESTIGATE "CHOICE HOME WARRANTY," RESULTING IN A REQUEST THAT PETITIONER ADOPT THE SAME AS A FICTITIOUS NAME.

Beginning sometime in May 2013, the Division received a consumer complaint lodged against "Choice Home Warranty."[18] This consumer complaint was referred to the desk of Rajat Jain, current Chief Insurance Examiner for the Property and Casualty Section of the Division, because a search of the Division's database of registered service contract providers did not turn up any results for Choice Home Warranty.[19] Mr. Jain instructed Division staff to continue monitoring further complaints against that entity.[20]

In early to mid-2014, an unidentified news article was forwarded to Mr. Jain from Division staff regarding Choice Home Warranty.[21] At the same time, Mr. Jain noted that responses received via the complaint investigation process from the company at issue were on letterhead that read "Choice Home Warranty."[22] In further investigating the Choice Home Warranty entity, the Division noted that Petitioner's approved service contract also used the same Choice Home Warranty logo.[23] Based upon this information, the Division believed that Choice Home Warranty and Petitioner were selling service contracts under Choice Home Warranty's name in Nevada illegally.[24] The Division was on the verge of initiating a cease and desist action against Choice Home Warranty for selling without being properly registered[25] when it made

[14] *Id.* at 136:15-19.
[15] *Id.* at 224:12-225:21.
[16] *Id.* at 136:3.
[17] *See* Ex. K. *See also* Hr'g Tr., Day 3 at 75-76.
[18] Hr'g Tr., Day 1 at 30:1-10. *See also* Hr'g Tr., Day 3 at 72:24-73:7.
[19] Hr'g Tr., Day 1 at 27:22-23, 30:1-10.
[20] *Id.* at 30:20-22.
[21] *Id.* at 30:23-31:11.
[22] *Id.* at 31:14-19.
[23] *Id.* at 115:11-15.
[24] *Id.* at 115:16-18; 115:25-116:6.
[25] Hr'g Tr., Day 3 at 48:20-25.

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contact with Mr. Mandalawi in April 2014.[26] Importantly, in the ensuing discussions, it was determined that "**Choice was not selling illegally because [Petitioner] was a licensed entity in Nevada**."[27] The Division then requested and assisted Petitioner in registering a fictitious name of "Choice Home Warranty" and a new certificate of registration was issued to that effect.[28] Even after Petitioner registered this fictitious name, however, the Division inexplicably continued "investigating" Choice Home Warranty through the year 2016.[29]

III. PETITIONER SUBMITS A 2016-2017 RENEWAL APPLICATION AND THE DIVISION REFUSES TO TAKE AFFIRMATIVE ACTION THERON.

On November 8, 2016, Petitioner submitted its renewal application for the 2016-2017 cycle (the "2016 Renewal").[30] Apparently, and unbeknownst to Petitioner, the Division considered the 2016 Renewal application to be "incomplete."[31] Specifically, the Division considered the 2016 Renewal incomplete because:

- Petitioner did not have the statutorily required amount deposited as security and did not submit a check with the 2016 Renewal to bring that amount into compliance;[32]
- Petitioner allegedly misrepresented that it had not been fined by another state or regulatory agency since its last renewal application;[33]
- Petitioner left a blank as an answer to the questions regarding the number of claims made by Nevada consumers in the prior year and the manner in which it dealt with those claims;[34] and
- Petitioner was nonresponsive and uncooperative in its responses to the Division's inquiries.[35]

The Division takes the position that a certificate of registration expires as a matter of law if it is not renewed one year from the date of the last renewal.[36] And, for prior renewal applications for which the Division needed more information, it was the Division's practice to ask

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[26] Hr'g Tr., Day 1 at 116:1-6.
[27] *Id.* at 117:12-15
[28] *Id.* at 86:1-21; 115:19-23; 116:1-6; 212:9-213:20. *See also* Exs. Q; 23.
[29] Hr'g Tr., Day 1 at 38:13-19.
[30] *See* Ex. 21.
[31] Hr'g Tr., Day 1 at 74:14-20.
[32] *Id.* at 75:1-9.
[33] *Id.* at 75:10-16. As is made clear in the hearing officer's Findings of Fact, Conclusions of Law, and Order of Hearing Officer (the "Decision"), Petitioner in fact honestly and accurately answered the question that was posed. *See* Decision at 18:26-19:27.
[34] Hr'g Tr., Day 1 at 75:17-24.
[35] *Id.* at 76:1-10. This reason seems to be more of a justification for denying the renewal, rather than deeming it incomplete.
[36] *Id.* at 76:16-25.

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for such information from Petitioner.[37] Indeed, Division procedure specifically required the application reviewer to contact the renewal applicant to discuss questions and concerns and obtain additional information.[38] Despite this, and despite the fact that the Division knew of this alleged incompleteness well in advance of Petitioner's November 18 renewal deadline, **no one** at the Division ever bothered to inform Petitioner that the 2016 Renewal was incomplete. Indeed, the sole communication with Petitioner as to its 2016 Renewal came via email on July 21, 2017[39] – **eight months later, and only one week before the original date set for the hearing of this dispute** – never mentioned the completeness of the form and instead only indicated that Petitioner did not renew on time. The Division's own witness and investigator testified that a reasonable amount of time to inform an applicant of a defect or an omission in its renewal application "is around one month at most."[40] The Division then unilaterally decided to list Petitioner as "inactive" on its website that same day, without so much as a telephone call or e-mail to Petitioner about its 2016 Renewal.[41] The Division never asserted Petitioner's 2016 renewal was incomplete or that its registration expired and it never amended its pleadings to incorporate a theory of operating without a proper registration.[42]

IV. THE DIVISION APPLIES FOR AN ORDER TO SHOW CAUSE AND A HEARING IS HELD ON ALLEGED VIOLATIONS OF THE INSURANCE CODE THAT WERE NOT SET FORTH IN THE PLEADINGS

On May 9, 2017, the Division filed a Complaint and Order to Show Cause with the Nevada Insurance Commissioner. An Amended Complaint was then filed on September 5, 2017, alleging the same substantive allegations as the original Complaint with the addition of a new alleged violation, to wit:

1. Violations of NRS 686A.070 by allegedly engaging in acts "that constitute the unlawful making of false entry of material facts in each of CHW's[43] renewal applications in the years 2011, 2012, 2014, and 2015";

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[37] *See* Hr'g Tr., Day 2 at 159:14-19; 186:4-11.
[38] *See* Exhibit CC at 8-9.
[39] Hr'g Tr., Day 1 at 107:12-16; 248:7-17.
[40] *See* Hr'g Tr., Day 2 at 116:2-117:5.
[41] *See* Hr'g Tr., Day 1 at 248:14-23.
[42] The Division amended its pleadings on September 5, 2017, just three days in advance of the pre-hearing conference. It did not include this new theory in the Amended Complaint.
[43] Both Complaints improperly commingled the identities of Petitioner and CHWG, an issue that was found in favor of Petitioner in the Decision. *See* Dec. at 18:11-23.

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2. Violations of NRS 686A.310(1)(b) by purportedly "failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies";
3. Violations of NRS 679B.125(2) by conducting its business in an "unsuitable manner," based upon consumer complaints, alleged news articles, and decisions of agencies and courts in other states;
4. Violations of NRS 686A.170 by engaging in "unfair and deceptive trade practices" based upon administrative and court decisions from other states; and
5. Violation of NRS 690C.320 by failing to make available for inspection Petitioner's records related to its offered service contracts.

On or around May 11, 2017, a subpoena was issued by the Commissioner to Petitioner, requesting copies of all open contracts in Nevada and copies of financial statements and accounting records showing estimated reserves for those open contracts.[44] Responsive records were produced to the Division pursuant to the subpoena on or around June 16, 2017.[45] At some point prior to the contested hearing of this matter, the Division's Assistant Chief of the Property & Casualty Division,[46] Timothy Ghan, reviewed the contracts provided and concluded that at least some of those contracts were not approved by the Division and so were not in compliance with NAC 690C.100.[47]

On September 12, 13 and 14, 2017, a contested hearing on the merits of the above allegations brought by the Division against Petitioner was held. Division Hearing Officer Alexia M. Emmermann, Esq. presided. Following the conclusion of the proofs, Ms. Emmermann desired post-hearing briefing on the following legal question:

> If a fictitious name does not create a separate legal entity, what is the effect of many separate legal entities that share the same DBA (fictitious name or doing business-as designation)? In considering this question, the Parties should explore the legal relationship between Home Warranty Administrator of Nevada, Inc. ("HWAN") and CHW Group, Inc. ("CHW").

Briefing on this question was submitted on October 30, 2017,[48] and written closings were filed on November 17, 2017.[49] Ms. Emmermann issued Findings of Fact, Conclusions of Law and Order

[44] *See* Record Entry No. 5.
[45] *See* Record Entry No. 12.
[46] *See* Hr'g Tr., Day 2 at 6:20-25.
[47] *See id.* at 20:22-21:4.
[48] *See* Record Entry Nos. 40-41.
[49] *See* Record Entry Nos. 45-46.

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of the Hearing Officer (the "Decision") on December 18, 2017.[50] That same day, the Commissioner of Insurance adopted the Decision and issued a Final Order, filing the same.[51]

In rendering the Decision, Ms. Emmermann found that:

1. Petitioner had engaged in unsuitable business practices in violation of NRS 690C.325(1)(b) since 2010 by allowing CHWG to sell 23,889 service contracts under which Petitioner was the obligor without CHWG being registered as a provider in Nevada;[52]

2. Although the Division failed to give proper notice to Petitioner that its 2016 renewal application was incomplete and the reasons therefor, Petitioner's certificate of registration expired as a matter of law as of November 18, 2016;[53]

3. Petitioner violated NRS 686A.070 five separate times when it stated on its renewal applications for years 2011-2015 that its service contracts were self-administered when they were actually administered by CHWG;[54]

4. Petitioner violated NRS 686A.070 when it misrepresented in its 2015 renewal application that it was using only an approved service contract form;[55] and

5. Petitioner failed to make its records available to the Division upon request, in violation of NRS 690C.325(2).[56]

For Petitioner's alleged unsuitable business practices related to allowing CHWG to sell and offer for sale service contracts on Petitioner's behalf, Ms. Emmermann imposed a fine of $50.00 for each violation, an aggregate fine of $1,194,450.00.[57] For Petitioner's alleged misrepresentations related to its contracts administrator and the contract form used, Ms. Emmermann imposed a fine of $5,000.00 for each violation, an aggregate fine of $30,000.00.[58] Lastly, Ms. Emmermann imposed a fine of $500.00 for the allege failure to respond to the Division's request for records, bringing the aggregate total fine to $1,224,950.00.[59]

It should be noted that none of these issues, other than the alleged failure to respond to

[50] *See* Record Entry No. 47.
[51] *See id.* The Commissioner issued an interlineated Decision on December 19, 2017 to correct the Cause Number in her final order.
[52] *See id.* at 25.
[53] *See id.* at 25-26.
[54] *See id.* at 20.
[55] *See id.*
[56] *See id.* at 21-22.
[57] *See id.* at 27.
[58] *See id.*
[59] *See id.*

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requests for records, were alleged whatsoever in the Complaint or Amended Complaint. Importantly, Ms. Emmermann found that the Division failed to prove its case on most of the allegations set forth in the Amended Complaint. Specifically, the Decision found, and this Brief therefore does not address, that:

1. Petitioner's use of a fictitious name of "Choice Home Warranty" does not makes Petitioner one and the same entity as CHWG;[60]

2. Petitioner was not required to disclose regulatory actions against CHWG because the renewal applications asked only whether Petitioner or any of its new officers had been subject to such actions since the last renewal application;[61] and

3. Insufficient evidence was presented to find that Petitioner engages in unfair practices in settling customer claims under their service contracts, or that Petitioner does so with such frequency so as to constitute a general unsuitable business practice.[62]

The Decision further stated that, despite the Division's misfeasance in failing to notify Petitioner that the 2016 Renewal was incomplete, Petitioner's certificate had nevertheless expired.[63] The Decision gave Petitioner an additional 30 days from the date of the Decision to submit another renewal application.[64] The Division was given 15 business days thereafter to respond and was prohibited from taking action against Petitioner related to the lack of registration for 45 days from the date of the Decision.[65]

On December 21, 2017, the Division provided, at Petitioner's request for the proper form, a Service Contract Provider Application rather than a renewal application for completion and submission. On January 2, 2018, Petitioner submitted a complete version of that form, in good faith. Counsel for Petitioner then wrote to counsel for the Division on January 5, 2018, noting that the Decision required completion of a "renewal application" and so a renewal application form was served on Division counsel on January 8, 2018. On February 1, 2018, Petitioner received a letter from a Division employee denying its renewal application submitted on January 8, 2018, on

[60] *See id.* at 18:11-23.
[61] *See id.* at 19:2-27.
[62] *See id.* at 21:1-17; 22:6-20.
[63] *See id.* at 26-27.
[64] *See id.* at 27.
[65] *See id.*

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the basis that Petitioner had failed to pay the fines lodged in the Decision,[66] the application was incomplete, and on the basis of the violations found in the Decision itself.[67]

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[66] The preliminary decision by the Division employee ignored the pending stay application and previous correspondence to Division counsel dated January 26, 2018.

[67] This improper and preliminary denial will likely be the subject of a second administrative hearing before the Division.

ARGUMENT

I. THE FINES IMPOSED BY THE DECISION FOR ALLEGEDLY CONDUCTING BUSINESS IN AN UNSUITABLE MANNER AND FOR FALSE ENTRIES OF MATERIAL FACTS DENIED PETITIONER DUE PROCESS.

Although it is accepted that "proceedings before administrative agencies may be subject to more relaxed procedural and evidentiary rules, due process guarantees of fundamental fairness still apply." *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 714, 191 P.3d 1159, 1168 (2008). The crucial element [of proper notice] is adequate opportunity to prepare." *Nev. State Appren. Council v. Joint Appren. Training Comm. for the Electrical Industry*, 94 Nev. 763, 765, 587 P.2d 1315, 1316-1317 (1978). The Decision's imposition of administrative fines for allowing CHWG to sell service contracts on its behalf and for alleged false representations made has denied Petitioner due process, as those alleged violations were not set forth in either the Complaint or Amended Complaint in this matter. Petitioner had a right to due process in the proceeding below.

The Nevada Supreme Court has held that due process mandates that "[a]dministrative bodies must follow their established procedural guidelines." *Dutchess*, 124 Nev. at 711, 191 P.3d at 1166 (noting that the State Board of Pharmacy's own governing statutes require it to file an accusation setting forth the alleged charges and acts or omissions of the respondent to allow her to prepare her defense). Additionally, the Division must give notice to HWAN of "the issues on which decision will turn and...the factual material on which the agency relies for decision so that [it] may rebut it." *Id.* (internal citations omitted). NRS 679B.320(1) requires a notice of hearing (i.e., a complaint) to "specify the matters to be considered thereat." Further, NRS 679B.320(2) states that "[i]f any person is entitled to a hearing by any provision of this Code before any proposed action is taken, the notice of the hearing...[must] stat[e] the basis of the proposed action."

Here, a close review of the Complaint and Amended Complaint that were lodged against Petitioner below clearly shows that the Division never intended to proceed against Petitioner on the basis that it had improperly allowed CHWG to sell service contracts on Petitioner's behalf without registration, or on the basis that Petitioner falsely represented that it self-administered its

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contracts and used only an approved service contract form. The Amended Complaint only and specifically alleges the following:[68]

A. Violation of NRS 686A.310(1)(b) by failing to promptly and reasonably respond to claims made under Petitioner's service contracts;

B. Violation of NRS 679B.125(2) by conducting its business in an unsuitable manner, based upon consumer complaints, alleged news articles, and decisions of agencies and courts in other states;

C. Violation of NRS 686A.170 by engaging in unfair and deceptive trade practices based upon administrative and court decisions from other states;

D. Violation of NRS 686A.070 by submitting knowingly false statements that no new officers of Petitioner were fined in Petitioner's 2011, 2012, 2014, and 2015 renewal applications; and

E. Violation of NRS 690C.320 by failing to make available for inspection Petitioner's records related to its offered service contracts.

Notably, none of these allegations relate to Petitioner allowing CHWG to sell contracts on its behalf. Nor do they relate to making false entries of material fact related to self-administration or use of an approved contract form. In other words, neither the Complaint nor the Amended Complaint complies with the Division's governing statutes because they fail to specify that one aspect of the hearing would be Petitioner's relationship with CHWG as administrator or false representations that Petitioner self-administered its contracts and used only approved forms. *Cf.* NRS 679B.320(1)-(2).[69] They also fail to give proper notice that the Decision could turn on those same issues and of the "factual material" the Division would rely upon to prove them. *Dutchess*, *supra*.

In that same vein, they fail to afford Petitioner appropriate constitutional notice of the charges against it and the factual basis for the same. Even though the Division amended its complaint on September 5, 2017, it never sought to amend the Amended Complaint to include these theories or allegations; nor did it seek to conform the Amended Complaint to its proofs at the hearing of this matter. Simply comparing the allegations set forth in the Amended Complaint with the findings of the Decision demonstrates that Petitioner could not have anticipated the main issue at the hearing would be whether its administrator must be registered to sell on Petitioner's

[68] These alleged violations substantively mirror those in the original Complaint.
[69] NRS 690C.325(1) prohibits the Commissioner from refusing to renew a COR without a properly noticed hearing.

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behalf. It cannot be overlooked that "CHW Group, Inc.," the New Jersey entity, does not appear **anywhere** in the Amended Complaint. This, of course, makes sense, given the Division's stance that it had no knowledge that Petitioner was utilizing CHWG as its contracts administrator.[70]

While Nevada law authorized the Decision to "affirm, modify or rescind action theretofore taken or may constitute taking of new action within the scope of the notice of the hearing," NRS 679B.360(4), this presupposes the existence of allegations that Petitioner improperly allowed CHWG to sell on its behalf. The record makes clear and it is beyond reasonable dispute that the Amended Complaint contained no such allegations and that, therefore, Petitioner had no notice of the foregoing issues until the close of the three day hearing below. *See Dutchess*, *supra* at 724, 191 P.3d at 1174 (noting that the State Board of Pharmacy would have to initiate a second action to pierce the corporate veil and hold the respondent's owners individually liable for imposed fines). Thus, the Decision's penalties against Petitioner on these issues is outside the scope of the notice for the hearing and are a denial of Petitioner's right to due process. The Decision's findings related to conducting business in an unsuitable manner and making false entries of material fact must be set aside. *See* NRS 233B.135(3)(a).

II. NEVADA LAW DOES NOT REQUIRE ADMINISTRATORS TO BE REGISTERED TO SELL OR OFFER FOR SALE SERVICE CONTRACTS ON BEHALF OF A REGISTERED OBLIGOR, A DETERMINATION PREVIOUSLY MADE BY THE DIVISION ITSELF.

A. Neither Nevada law nor public policy require a service contract administrator to obtain a certificate of registration to sell or offer for sale service contracts to Nevada consumers on behalf of a properly registered provider/obligor.

1. The plain and unambiguous language of NRS 690C.150 makes clear that only providers – the obligors of service contracts – are required to be registered to sell or offer for sale service contracts.

In general, judicial review of an agency's factual determinations is limited to "whether substantial evidence supports" them. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487, 491 (2014) (citing and interpreting NRS 233B.135). However, where the issue on review is one of law and, specifically, one of statutory interpretation, "independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate." *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993). A

[70] *See* Record Entry No. 47 at 23:20-27.

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reviewing court should only defer to an administrative agency's interpretation of its governing statutes where that interpretation is within the clear and unambiguous language of the statutes at issue. *See Dutchess*, 124 Nev. at 709, 191 P.3d at 1165 (noting that the State Board of Pharmacy's governing statutes clearly did not limit the jurisdiction of the Board to respondent's purely intrastate conduct).

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.* (holding that NRS 616.605(3) specifically precluded permanent partial disability awards for psychological impairment because it stated "[n]o factors other than the degree of physical impairment...may be considered" in calculating disability benefits). A court is "not empowered to go beyond the face of a statute to lend it a construction contrary to its clear meaning." *Union Plaza Hotel v. Jackson*, 101 Nev. 733, 736, 709 P.2d 1020, 1022 (1985). However, a court "must construe statutory language to avoid absurd or unreasonable results." *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528 (2001). The overarching goal in statutory interpretation is to effect the legislative intent and public policy underlying a statute. *See A.J. v. Eighth Jud. Dist. Ct.*, 394 P.3d 1209, 1213 (Nev. 2017), *reh'g denied* (July 27, 2017), *recon. en banc denied* (Dec. 19, 2017). This standard governs the issue of whether Nevada law requires CHWG to be registered to sell service contracts on behalf of Petitioner.

As set forth above, the Decision here concluded that Petitioner violated NRS 690C.325 and NRS 679B.125 by conducting business in an unsuitable manner.[71] The Decision based that conclusion solely upon the fact that CHWG acted as the contracts administrator for Petitioner and sold and offered for sale service contracts on behalf of Petitioner.[72] In so concluding, the Decision engaged in an interpretive analysis of NRS 690C.150 and found that service contract administrators must be properly registered with the Division in order to sell or offer for sale service contracts.[73] The Decision further found that a contrary interpretation would render "the

[71] *See* Record Entry No. 47 at 25:24.
[72] *See id.* at 25:6-24.
[73] *See id.* at 25:17-19.

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entirety of NRS Chapter 690C a nullity" and would pose "a danger to the public."[74] However, this conclusion is clearly erroneous in light of the plain, unambiguous language of NRS Chapter 690C as a whole as well as the public policy underlying the requirement that obligors of service contracts be properly registered. Specifically, NRS 690C.150 states, in pertinent part, that "[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" (emphasis added).

NRS 690C.070 defines a "provider" for purposes of that statute to mean "a person who is **obligated** to a holder pursuant to the terms of a service contract." On the other hand, a service contract administrator, which is defined in NRS 690C.020, appears nowhere in NRS 690C.150, the sole statute governing which entities must be properly registered with the Division to sell or offer for sale service contracts. That statute simply requires that *providers* be properly registered, and providers are those that are obligated under service contracts. Reading NRS 690C.150 and NRS 690C.070 to require contract administrators to be registered to sell or offer for sale service contracts on behalf of properly registered providers would "lend [those statutes] a construction contrary to [their] clear meaning." *Union Plaza, supra* (holding that a workers' compensation appeals officer exceeded his jurisdiction when referring a claimant to a physician of the officer's choice for evaluation when NRS 616.540 clearly intended referral to a medical board). As NRS 690C.150 has remained without an amendment since 1999, it is clear that the legislature intended that only obligors of service contracts be registered and subject to the remaining provisions of NRS 690C. This Court must strive to give effect to that intent. As a matter of law, the Decision on this issue must be set aside in its entirety. *See* NRS 233B.135.

2. The Division's own documents reveal there is no affirmative registration requirement for a Service Contract Administrator.

The Division adduced no proofs at the hearing indicating a registration requirement for an Administrator because there is in fact no such requirement. The need for or importance of proof of registration for an administrator was not elicited from any witness because the Division's own documents reveal there is no such registration requirement. In other words, the Decision is against the substantial evidence in the record based upon documents received from the Division itself.

[74] *Id.* at 25:4-5, 19.

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Exhibit CC, an 11 page document admitted into evidence at the hearing, is the Petitioner's 2015 Renewal Application, along with accompanying supporting documents.[75] Among the 11 pages, a two page "Procedure For Reviewing Renewal Applications" form was included (Pages 8 and 9 of 11), reflecting the work product of Mary Strong, a Division employee charged with reviewing Petitioner's Renewal Application and a Division witness at the hearing. Item No. 4 on Page 8 of that document indicates as follows:

> 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.

(emphasis added). The absence of a registration requirement for an administrator was confirmed by Mr. Jain, the Chief Insurance Examiner for the Property and Casualty Section of the Division. Mr. Jain testified that "Choice was not selling illegally because [Petitioner] was a licensed entity in Nevada."[76] This is only further confirmed by the checklist, as the version notes on the bottom left corner of page 9 of 11 to "confirm that the form was in use, including the item above, since at least February 7, 2011."

With NRS 690C.150 clearly indicating that only *providers* must be registered, and in light of the Division's own documents and the sworn testimony of its own witness at the hearing, the hearing officer below could not credibly claim that a certificate of registration is required for selling or offering for sale service contracts for a registered provider or that a provider utilizing an administrator without such registration was operating unsuitably. Inasmuch as the Decision penalizing the Petitioner is based on this very finding, it must be reversed because it is belied by the evidence in the record – namely, Exhibit CC and the testimony of Mr. Jain.

3. The Division failed to demonstrate that applicable law requires that administrators must be registered to sell service contracts on behalf of registered providers.

To be clear, CHWG's registration (or lack thereof) was not raised in the pleadings, nor was it discussed at all at the hearing until Mr. Hakim, Petitioner's final witness, was asked on cross-examination if CHWG "ha[d] a certification by the Nevada Division of Insurance to sell,

[75] Exhibit CC was produced by the Division during pre-hearing discovery in response to a subpoena.
[76] Hr'g Tr., Day 1 at 117:12-15.

solicit or offer for sale" service contracts, to which he replied, " administrators are not required to be licensed to sell service contracts in Nevada."[77] With the exception of a statement offered by Division's counsel in response, to wit "I believe my client would disagree with that,"[78] the Division offered no proofs to the contrary. In particular, it failed to rebut the documents it had produced and the sworn testimony it had elicited from Mr. Jain just two days before. Indeed, the Division did not cite a contrary statutory or regulatory provision contradicting the witness' interpretation at the hearing, nor in any briefing submitted thereafter. It also never asked for judicial notice of any provision or policy that contradicted him and it declined to call a rebuttal witness that could have established either applicable statute or even a Division policy on the same. The Division's burden of proof in the instant hearing never left the Division and the hearing record was closed without meeting the preponderance standard on this issue. *See* NRS 233B.125. In rendering her Decision, Ms. Emmermann made no effort to reconcile these contradictory facts.

Instead, Ms. Emmermann predicated her Decision on a statutory interpretation offered by Mr. Hakim during his testimony. Mr. Hakim testified that NRS 690C.120(2) exempted CHWG from a registration requirement.[79] Ignoring the Division's own documents and the sworn testimony of Mr. Jain, which should have indicated that the Division effectively conceded any registration requirement, Ms. Emmermann found Mr. Hakim's statutory interpretation to be mistaken, finding that the section upon which he relied pertained to the "certificate[s] issued to insurance companies" to operate in Nevada.[80] Yet, in rejecting his analysis, her Decision never identified any statutory provision indicating any such requirement for an administrator. Indeed, her Decision never reviewed or discussed NRS 690C.120(1), which exempts service contract providers and their administrators from any of the other requirements found in title 57, unless specifically provided therefor.[81] Mr. Hakim in fact may have been wrong, but that does not permit

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[77] Hr'g Tr., Day 3 at 95:9-11.
[78] *Id.* at 95:20.
[79] NRS 690C.120(2) states 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 to issue, sell, offer for sale or administer service contracts."
[80] *See* Record Entry No. 47 at 24:26-28.
[81] NRS 690C.120(1) provides that, "[e]xcept as otherwise provided in this chapter, the marketing, issuance, sale, offering for sale, making, proposing to make and administration of service

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Ms. Emmermann to legislate obligations where the law has none. NRS 690C.150 could not be clearer: it makes no mention of the requirements attributable to an administrator, dealing only and exclusively with a provider's obligation. There is clearly no requirement in Nevada law that a service contract administrator be licensed in order to sell such contracts on behalf of a properly registered provider.

4. With a clear disregard toward NRS 690C.150's plain language and the Division's own documents revealing no registration requirement, Nevada's public policy is furthered by interpreting NRS 690C.150 as requiring only obligors to be properly registered.

As stated above, in addition to legislative intent, this Court should also seek to further the public policy underlying a particular statute when construing its meaning. *See A.J., supra.* NRS 690C.150 requires that providers must be properly registered to sell or offer for sale service contracts to Nevada consumers. Moreover, NRS 690C.170 imposes certain requirements upon providers to ensure their ability to cover claims made under issued contracts. Specifically, providers must: (1) purchase an insurance policy covering all issued contracts; (2) maintain a reserve account with the Division; or (3) have a net worth of $100,000,000.00. *See* NRS 690C.170(1)-(3). The purpose of this statutory scheme is clearly to ensure a provider's security to pay for properly covered claims pursuant to service contracts under which that provider is an obligor.

The above interpretation of NRS 690C.150, and the corollary that an administrator need not be registered to sell or offer for sale on behalf of a registered provider, is consistent with this purpose. The clear intent of the security requirement is to protect Nevada consumers who sign up for service contracts. Indeed, Mr. Jain confirmed this policy by testifying that reserve accounts are maintained solely for Nevada consumers and that the purpose is to protect against those consumers paying for service contracts with providers who become insolvent and unable to make good on covered claims.[82]

Yet, as long as the provider – the one actually obligated to the consumer under a contract

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contracts are not subject to title 57 of NRS, except, when applicable, the provisions of" other chapters of the Insurance Code.

[82] Hr'g Tr., Day 1 at 67:13-21 130:3-5.

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– maintains the required security, there is no concern of potential harm to consumers because that security is available to pay for any covered claims. Conversely, interpreting NRS 690C to require administrators to be registered to sell on behalf of a provider does not further this policy because, regardless, **administrators who are not also providers are not obligated to consumers pursuant to service contracts**. Said differently, the solvency of an administrator is entirely irrelevant to protecting Nevada consumers because a non-provider administrator would never pay a claim made under a service contract, since it is not obligated to do so as a matter of contract law. Thus, the unambiguous interpretation of NRS 690C.150 proffered by Petitioner here is entirely consistent with the public policy of protecting Nevada consumers against insolvent obligors, versus administrators. Thus, the Division's finding that Petitioner engaged in unsuitable business practices must be set aside as a matter of Nevada public policy.

5. The Division's interpretation of who must be registered to sell or offer for sale service contracts is overly broad and renders 690C.150 a nullity.

Adopting the interpretation of NRS 690C.150 touted by the Division in this dispute would be absurd and unreasonable, a result that this Court must avoid. *Pellegrini, supra.* This absurdity results from the fact that the Division's interpretation is entirely too broad as a matter of agency law. The Decision specifically found that Petitioner's "practice [is] to allow [CHWG] to issue, sell, and offer for sale service contracts in Nevada" under Petitioner's certificate of registration.[83] In other words, the Decision acknowledges that CHWG is Petitioner's agent for the purposes of administering and selling service contracts on its behalf. This is further corroborated by the ISPA itself, which sets forth CHWG's role.[84]

In essence, the Division's interpretation of NRS 690C.150 means that **no agent** of a properly registered provider of service contracts may sell or offer for sale service contracts on behalf of that provider, without itself being properly registered. Although it is clear that CHWG is an independent contractor of Petitioner,[85] the Decision makes no effort to couch its decision on the distinction between an agent that is an independent contractor versus an employee.[86] As a

[83] Record Entry No. 47 at 25:21-22, 27:18-21.
[84] *See* Ex. E.
[85] *See id.* at 2, § 3.
[86] *See generally* Record Entry No. 47.

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result, the Decision ostensibly applies to *all* agents of Petitioner. In effect, this would preclude even properly retained and classified employees of Petitioner from marketing, selling or offering for sale service contracts in this State. This clearly cannot have been the intent of the legislature in enacting NRS 690C.150, as it would preclude any corporate entity from engaging in the business of service contracts. Thus, the Division's interpretation causes an absurd result that must be avoided. Based upon the foregoing, NRS 690C.150 must be interpreted to allow contract administrators to sell or offer for sale service contracts on behalf of properly registered providers. The Decision must be set aside.

B. Having required Petitioner to change its name and re-register in 2014 to reflect its association with CHWG, the Division is equitably estopped from advancing the argument that CHWG must be independently registered to sell or offer for sale Petitioner's service contracts.

In the proceedings below, Petitioner also argued that the Division is equitably estopped from penalizing Petitioner for CHWG's selling or offering for sale service contracts on its behalf because this same issue was resolved to the Division's satisfaction in 2014.[87] The Decision disagreed and found that there was no evidence that: (1) the Division knew that Choice Home Warranty and CHWG were the same; or (2) the Division was aware that CHWG was selling contracts in Nevada, only that Choice Home Warranty was doing so.[88] These are factual conclusions on the evidence, that lack even substantial evidentiary support and also err as a matter of law.

"[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). It requires an element of justifiable reliance by the party invoking the doctrine. *See Merrill v. DeMott*, 113 Nev. 1390, 1396, 951 P.2d 1040, 1043 (1997). Here, the doctrine is clearly applicable because the Division seeks to punish Petitioner for conduct of which it had notice at least as early as 2011 and most certainly by 2014 and of which it at least implicitly approved.

Mr. Jain admitted that the Division became aware at least as early as 2013 that an entity

[87] *See* Record Entry No. 45 at 9-10.
[88] *See* Record Entry No. 47 at 23:20-28.

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by the name "Choice Home Warranty" was selling service contracts in Nevada.[89] In further investigating the Choice Home Warranty entity, the Division noted that Petitioner's approved service contract also used the same Choice Home Warranty logo.[90] He testified that the Division was on the verge of initiating a cease and desist action against Choice Home Warranty for selling without being properly registered[91] when it made contact with Mr. Mandalawi,[92] adding that no enforcement action was undertaken because the Division concluded that "**Choice was not selling illegally because [Petitioner] was a licensed entity in Nevada**."[93] However, in order to avoid future confusion, the Division requested and assisted Petitioner in registering a fictitious name of "Choice Home Warranty" and a new certificate of registration was issued in July 2014 to that effect.[94]

Having concluded that "Choice Home Warranty" was not violating Nevada law by selling contracts without being registered because it was selling on behalf of Petitioner, who was itself properly registered, the Division is estopped from doing so now. Even if the Decision's conclusion that there is no evidence that the Division knew that "Choice Home Warranty" was CHWG is supported by the record, such a conclusion is a distinction without a difference. If the abstract entity "Choice Home Warranty" was permitted to properly sell service contracts without being registered on behalf of Petitioner, **any other entity may do so as well** – including CHWG. Mr. Jain's testimony substantially supports this conclusion, as well as the Division's own documents.[95] The foregoing was clearly communicated to Petitioner and Petitioner relied upon this representation in registering the fictitious name and having CHWG continue administering (including selling) service contracts on its behalf to Nevada consumers.[96]

Petitioner detrimentally relied upon the Division's representation that an unregistered entity may sell on behalf of Petitioner (i.e., the Division's opting out of pursuing a cease and desist action against Choice Home Warranty) and the Division must be equitably estopped from

[89] Hr'g Tr., Day 1 at 30:1-10.
[90] *Id.* at 115:11-15.
[91] Hr'g Tr., Day 3 at 48:20-25.
[92] Hr'g Tr., Day 1 at 116:1-6.
[93] *Id.* at 117:7-18.
[94] *Id.* at 86:1-21; 115:19-23; 116:1-6; 212:9-213:20. *See also* Exs. Q; 23.
[95] *See* Ex. CC.
[96] Hr'g Tr., Day 2 at 240:15-20.

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punishing Petitioner for the very conduct it approved more than three years ago. The Decision's conclusions on this point are unsupported by the clear evidence in this matter and misapply the law related to estoppel. Thus, the Division's attempt to penalize Petitioner for allowing CHWG to sell service contracts on its behalf is estopped and the Decision must be set aside in its entirety on this point.

III. THE AGGREGATE TOTAL FINE IMPOSED FOR THE ALLEGED UNSUITABLE BUSINESS PRACTICES IS WHOLLY IN EXCESS OF THE DIVISION'S STATUTORY AUTHORITY.

A. NRS 690C.330 limits administrative fines for violations of a similar nature to $10,000.00 in the aggregate.

NRS 233B.135(3)(a)-(b) sets forth that the Decision may be set aside where it is in violation of statutory provisions or is in excess of the Division's statutory authority. Even if the Decision's conclusion that Petitioner engaged in unsuitable business practices by allowing CHWG to sell service contracts on its behalf can somehow be affirmed in light of the clear statutory language, the penalty imposed by the Decision itself is in excess of the Division's unequivocal statutory authority. This issue is one of statutory interpretation, which, as noted above, is subject to *de novo* review by this Court. *See Maxwell, supra.* Again, 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.*, 109 Nev. at 330, 849 P.2d at 269-270.

In imposing the significant fine of $1,194,450.00, the Division relies upon NRS 690C.325(1), which states that, in lieu of suspending or revoking a certificate of registration for conducting business in an unsuitable manner, the Commissioner may impose an administrative fine "not more than $1,000 for each act or violation." However, this entirely ignores the limits on administrative fines set forth by the legislature in NRS 690C.330, which immediately follows NRS 690C.325(1). The former provision provides:

> "A person **who violates any provision of this chapter** or an order or regulation of the Commissioner issued or adopted pursuant thereto may be assessed a civil penalty by the Commissioner of not more than $500 for each act or violation, **not to exceed an aggregate amount of $10,000 for violations of a similar nature.**

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(emphasis added). NRS 690C.330 further states that "violations shall be deemed to be of a similar nature if the violations consist of the same or similar conduct, regardless of the number of times the conduct occurred." Conducting business in an unsuitable manner is clearly a violation of NRS 690C, as NAC 679B.0385 defines "unsuitable manner" to mean "conducting insurance business in a manner which…**[r]esults in a violation of any statute** or regulation of this State relating to insurance…with such frequency as to indicate a general business practice."

As applied here, the Decision found that Petitioner engaged in 23,889 independent violations of conducting business in an unsuitable manner by allowing CHWG to sell service contracts on its behalf.[97] These acts are clearly "of a similar nature" because they are the **exact** same conduct – allowing CHWG to sell on Petitioner's behalf utilizing the exact same contract, where CHWG is unregistered. This is only confirmed by the Decision itself, which found that "it is undeniable that it is [Petitioner's] practice to allow [CHWG] to issue, sell, and offer for sale service contracts in Nevada, thereby avoiding regulation for each contract sold in Nevada"[98] and characterizes this as a "general business practice." The nearly $1.2 million fine is therefore impermissible, as it far exceeds the $10,000 cap set forth in NRS 690C.330. The Decision's conclusion and imposition of this penalty is therefore clearly outside the Division's statutory authority and it must be set aside. At minimum, the fine must be reduced to a maximum of $10,000.00 in order to comply with Nevada law.

B. NRS 679B.185(4) prohibits the imposition of administrative fines for selling or offering for sale service contracts without registration to five years after the sales occur.

In addition to the foregoing, at least a portion of the nearly $1.2 million administrative fine imposed upon Petitioner is prohibited by the applicable statute of limitations. NRS 679B.185(4) provides that "the Commissioner shall commence a proceeding to impose an administrative fine [for engaging in the unauthorized transaction of insurance] not later than 5 years after the date on which the act or violation occurred." NRS 690C.120(1)(b) makes this statute of limitations applicable to service contract providers or those engaging in the sale of service contracts without proper registration.

[97] Record Entry No. 47 at 27:18-21.
[98] *Id.* at 25:20-22.

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Here, the instant regulatory action was not commenced until the filing of the original Complaint and Application for Order to Show Cause on May 9, 2017.[99] That Complaint clearly seeks to impose administrative fines and so NRS 679B.185(4) allows the Division to fine Petitioner for CHWG's allegedly improper selling of service contracts without being registered only for contracts sold from May 9, 2012 forward. Although the Decision does not specifically cite to NRS 679B.185(1), it quite plainly seeks to improperly fine Petitioner "$50 for each violation of NRS 690C.325(1)(b) for [CHWG's] sale of 23,889 service contracts **without proper registration**"[100] since the inception of Petitioner's doing business in the State of Nevada.[101] It is undisputed that Petitioner began operating in the year 2010.[102] Thus, the Decision intends to penalize Petitioner for CHWG's allegedly improper selling of service contracts prior to May 9, 2012. The portion of the fine representing a penalty for acts committed prior to that date is precluded under Nevada law. Because at least some of the significant fine imposed upon Petitioner is prohibited by NRS 679B.185(4), that portion must be set aside in full because it is both in violation of Nevada law and is in excess of the Division's statutory authority. *See* NRS 233B.135(3)(a)-(b).

IV. PETITIONER'S CERTIFICATE OF REGISTRATION DID NOT EXPIRE AS A MATTER OF LAW BECAUSE IT HAS NOT, TO DATE, RECEIVED A FINAL DETERMINATION ON THE MERITS OF ITS NOVEMBER 7, 2016 RENEWAL APPLICATION.

Petitioner's certificate of registration must be renewed on a yearly basis under Nevada law, with a submission deadline of November 18 each year. *See* NRS 690C.160(3). On November 7, 2016, Petitioner timely submitted its renewal application for the 2016-2017 cycle.[103] This fact is undisputed[104] and was specifically found by the hearing officer below.[105] However, the Decision also found that, notwithstanding the fact that the Division failed to inform Petitioner that

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[99] *See* Record Entry No. 1.
[100] *See* Record Entry No. 47 at 27:18-21.
[101] *Id.* at 15:3-5, 27:18-21 ("Since HWAN became licensed in Nevada, CHW has continually provided services to HWAN...According to its claims statistics, 23,889 customers have purchased a service contract through Choice Home Warranty in Nevada since 2011.").
[102] *See* Ex. U.
[103] *See* Ex. CC.
[104] *See* Ex. S.
[105] *See* Record Entry No. 47 at 26:18-19.

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it considered the 2016 Renewal "incomplete," Petitioner's certificate expired by operation of law as of November 18, 2016. This finding was both contrary to the evidence in the record and erroneous as a matter of law.

The Decision cites to NRS 690C.160(3) in support of its conclusion that certificates of registration for service contract providers expire as a matter of law. That section provides only that "[a] certificate of registration is valid for 1 year after the date the Commissioner issues the certificate to the provider." It further provides that "[a] provider may renew his or her certificate of registration if, before the certificate expires, the provider submits to the Commissioner an application on a form prescribed by the Commissioner, a fee of $1,000 and, in addition to any other fee or charge, all applicable fees required pursuant to NRS 680C.110." However, the Decision entirely disregards the applicability of NRS 233.127(2) to the instant case.

That statute states that "[w]hen a licensee **has made timely and sufficient application** for the renewal of a license or for a new license with reference to **any activity of a continuing nature**, 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." The facts before this Court make clear that it is undisputed that Petitioner filed a timely renewal application on November 7, 2016.[106] Moreover, the record indicates that the Division had no real concerns about the sufficiency of that application, as a memorandum from Mary Strong to Mr. Jain and Mr. Ghan dated January 26, 2017 indicates that the only issues were alleged misrepresentations related to CHWG.[107]

The Division **never** even notified Petitioner that its application was not renewed until July 21, 2017.[108] Even then, the Division gave no indication that the 2016 Renewal was considered incomplete.[109] The July 21, 2017 email to Petitioner from Ms. Strong never raises the "completeness of the application.[110] To date, Petitioner has **never received a formal**

[106] *See id.*
[107] *See* Ex. S.
[108] *See* Ex. II.
[109] *See id.*
[110] *See id.*

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determination from the Division on the 2016 Renewal. To compound this, Petitioner is entitled to a hearing prior to a formal denial of the 2016 Renewal, *see* NRS 690C.325(1), which it has never received (primarily because there has never been a formal response on the 2016 Renewal from which to request a hearing). Therefore, contrary to the Decision's findings, Petitioner's certificate of registration **did not** expire as a matter of law and Petitioner is currently operating under a valid, active certificate of registration. Pursuant to NRS 233B.127(2), the same would only expire 30 days after service of the Commissioner's final order denying the 2016 Renewal following a hearing thereon (i.e., the last day allowed under NRS 233B.130(2)(d) for filing a petition for judicial review of that order). The Division has failed to follow its own governing statutes in refusing to consider or hold a hearing on the 2016 Renewal. Similarly, the Decision violates Nevada law by holding Petitioner's certificate expired as a matter of law and this Court should set aside that finding in its entirety.

V. ENTIRELY INSUFFICIENT EVIDENCE WAS PRESENTED BY THE DIVISION TO SUPPORT THE FINDINGS THAT PETITIONER MADE SIX SEPARATE MISREPRESENTATIONS IN ITS 2011-2015 RENEWAL APPLICATIONS.

The Decision also found that Petitioner engaged in six distinct false entries of material fact in its 2011-2015 renewal applications.[111] Specifically, the Decision found that in each of its 2011, 2012, 2013, 2014, and 2015 renewal applications, Petitioner submitted renewal forms identifying "self" as the administrator of its service contracts.[112] According to the Division, however, this was false and material because CHWG administered Petitioner's contracts in each of those years.[113] That conclusion is entirely unsupported by the evidence in the record.

As noted in the Decision itself, the Division approved the service contract form bearing identification number HWA-NV-0711, the very same contract that listed CHWG as Petitioner's administrator.[114] The Decision also found that in its 2015 renewal application, Petitioner misrepresented that it was using only the contract form that was approved by the Division in 2011 when in fact it used an unapproved form at least once in the prior year.[115] That conclusion is clear

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[111] *See id.* 47 at 20.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 4:4-5. *See also* Ex. EE.
[115] *See* Record Entry No. 47 at 4:4-5.

from the testimony of Mr. Jain, who confirmed that the Division approved the same.[116] Notably, the contract itself states that "[t]his agreement is administered by Choice Home Warranty."[117]

Thus, by the time the Division filed the Complaints in the proceeding below, it had been on at least constructive notice that Petitioner did not self-administer its contracts for no less than six years by virtue of the approved service contract form that fully disclosed the same. The Division was fully informed of the relationship between Petitioner and CHWG and that CHWG was administering contracts on behalf of Petitioner. Moreover, Mr. Jain further admits that it was determined in 2014 that "Choice was not selling illegally because [Petitioner] was a licensed entity in Nevada."[118] Petitioner was, at all times, transparent.

NRS 686A.070 requires proof by a preponderance of the evidence of a "knowingly ma[de] false entry of material fact." Such proof is lacking here. Instead, the record below indicates that, the Division having known of Petitioner's relationship with CHWG in 2011, Petitioner's conduct is more one of a failure to correct and conform the renewal form to its prior filing than a "knowingly false entry." Indeed, the record is silent as to proof of intent to deceive. Accordingly, the Division cannot sustain a finding of such a violation on the record made below.[119] *See United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 544-545 (7th Cir. 1999) (holding that a false claims action may not be maintained where the government had prior knowledge of the allegedly false claim because "the government's knowledge effectively negates the fraud or falsity required"). *See also United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir.1991). The Decision's conclusion on this issue is unsupported by the evidence, errs as a matter of law, and must be set aside.

With regard to its 2015 renewal application, the Decision also found that Petitioner made another false representation of material fact when it represented that it was using only the approved contract form from 2011. The Decision claims that "on at least one occasion [in 2015],

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[116] *See* Hr'g Tr., Day 1 at 73:9-19.
[117] *See* Ex. 35 at 3.
[118] Hr'g Tr., Day 1 at 117:12-15
[119] It also raises a question: since this error is more properly characterized as nonfeasance on the part of the Petitioner, and because the applications only ask whether there have been "any changes in the administrator or designated a new administrator since your last application," is the identical error a sufficient "act" to sustain five separate violations of law and the imposition of a $30,000 fine?

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there is evidence that HWAN used a service contract that, in fact, was not approved by the Division. Service contracts must comply with certain provisions of the Insurance Code and, therefore, must be approved before they are used."[120] Notably absent from this conclusion is any citation to the evidence in the record that supports its.

Presumably, the Decision relies upon the testimony of Mr. Ghan, wherein he sets forth the conclusory assertion that he had reviewed the contracts provided by Petitioner pursuant to subpoena and concluded that "at least some" of those contracts were not approved by the Division and so were not in compliance with NAC 690C.100.[121] The Decision likely also relies upon the Division's Exhibit 37, one of the service contracts provided by Petitioner pursuant to a Division subpoena. Mr. Ghan testified that he had reviewed that contract and it was not on the form approved in 2011.[122] However, that contract clearly covers the term from July 27, 2016 to September 27, 2017.[123] It would have been a legal and factual impossibility for Petitioner to falsely represent in 2015 that it was not using a form for a contract entered into almost a year later. Thus, the Decision's finding of a false representation of material fact related to what contract form was in use in 2015 is not supported by substantial evidence and must be set aside.

VI. NO EVIDENCE WAS ADMITTED AT THE HEARING TO SHOW PETITIONER'S RECEIPT OF THE REQUEST FOR INFORMATION AT ISSUE.

Whatever concerns the Division may have had with respect to Petitioner or its operations, it failed to communicate them to Petitioner in real time. From the submission of the 2016 Renewal Application on November 7, 2016, until the date of the Decision, the Petitioner received only two communications from the Division – e-mails dated July 17, 2017 and July 21, 2017 – other than the accusatory documents instituting the proceeding below. Both e-mails were delivered on the eve of the first adjourned hearing date of August 1, 2017. Both e-mails were directed to the Petitioner and ignored the active representation by counsel. Responses to these e-mails were later made by and through legal counsel.

[120] Record Entry No. 47 at 20:21-22.
[121] *See id.* at 20:22-21:4.
[122] *Id.*
[123] *See* Ex. 37 at 1.

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Inasmuch as these e-mails followed the pleadings, no accusation arose from them. In its pleadings, the Division made only one reference to an unanswered request for information, a document request purportedly made via an e-mail from Mary Strong to Petitioner on or about February 1, 2017. Petitioner denied ever having received it. No electronic delivery or "read" receipts were offered to substantiate that this request was ever sent. No proof of any follow-up to the email was offered. Indeed, no Division witness ever even mentioned the February 1 e-mail at the hearing below, suggesting that the Division abandoned this allegation. Suffice it to say, Petitioner could not have responded to a document request that it had not received.

Beyond the vague and generalized testimony offered by Rajat Jain about the "several questions...left blank"[124] and the "nonresponsiveness and uncooperativeness of Choice," the Division offered no proofs to substantiate this testimony – no proofs of Division communications to Petitioner and none regarding Petitioner's failure to respond to those inquiries. No notes, internal memoranda, e-mail by or between employees or to or from the Commissioner, nor evidence that correspondence to the Petitioner complaining of this behavior was ever produced. The only reliable conclusion from the absence of such proof is that Division's files are devoid of any requests for information made of the Petitioner beyond the two e-mails set forth above, as well as their failure to make a timely response. Neither the Division nor the Decision meet the requisite preponderance standard on this allegation and thus the finding of a violation of NRS 690C.320 must be set aside.

[124] The purportedly problematic "blanks" referenced in Mr. Jain's testimony were present in a number of renewal applications approved by the Division. *See* Exs. Y, BB, CC, DD.

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CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court enter an order:

1) Finding that Petitioner's right to due process of law was violated by failing to notify Petitioner that the basis for adverse findings against it at the hearing could be CHWG's selling service contracts on its behalf;

2) Finding that, as a matter of Nevada law, service contract administrators need not be independently registered to issue, sell, or offer for sale such contracts on behalf of a properly registered provider;

3) Finding that the fines imposed upon Petitioner by the Decision are in clear excess of the Division's statutory authority;

4) Finding that Petitioner's certificate of registration did not expire as a matter of law as set forth herein and that it is currently operating on a valid, active certificate of registration;

5) Finding that there was insufficient evidence adduced at the hearing of this dispute to support the findings of six separate knowingly false misrepresentations made to the Division;

6) Finding that there was insufficient evidence adduced at the hearing to support a finding that Petitioner failed to provide information to the Division upon the Division's request;

7) Setting aside the Decision's adverse findings, and related fines, on the above issues, as set forth herein;

8) Such other and further findings and relief as this Court may deem just and proper.

DATED this 15th day of February, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2018, I served a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW** via United States Mail, first class postage prepaid, at Las Vegas, Nevada, addressed to the following at the last known address of said individuals:

Richard Yien, Deputy Attorney General
State of Nevada
Office of the Attorney General
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Attorneys for Respondent State of Nevada, Department Of Business And Industry -Division Of Insurance

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Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner,* v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY - DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent.*	CASE NO.: 17 OC 00269 1B DEPT NO.: I **STIPULATION AND ORDER FOR INTERPLEADING OF FINES PENDING FINAL DECISION**

Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("Petitioner"), by and through its counsel of record Kirk B. Lenhard, Esq., Travis F. Chance, Esq., and Mackenzie Warren, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP, and Lori Grifa, Esq., of the law firm of Archer & Greiner, P.C., and Respondent the State of Nevada Department of Business and Industry – Division of Insurance ("Respondent"), by and through its counsel of record Richard P. Yien, Esq., Deputy Attorney General, hereby stipulate and agree as follows:

WHEREAS, Respondent, via Findings of Fact, Conclusions of Law, Order of Hearing Officer, and a Final Order of the Commissioner (the "Decision"), issued fines against Petitioner after a contested administrative hearing in the total amount of $1,224,950.00;

WHEREAS, Petitioner filed a Petition for Judicial Review of the Decision with this Court on December 22, 2017 and a Motion to Stay the Decision on January 16, 2018;

WHEREAS, this Court denied Petitioner's Motion to Stay the Decision and its associated fines by Order dated February 14, 2018;

NOW, THEREFORE, the parties hereby stipulate and agree to have the fines imposed by the Decision interpleaded into this Court Clerk's Trust Fund until a final decision is issued by this Court on Petitioner's Petition for Judicial Review.

IT IS SO STIPULATED.

DATED this 12th day of March, 2018

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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TRAVIS F. CHANCE, Bar No. 13800
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ARCHER & GREINER P.C.

LORI GRIFA (admitted *pro hac vice*)

Attorneys for Petitioner

DATED this 1st day of March, 2018

ADAM PAUL LAXALT
ATTORNEY GENERAL

RICHARD P. YIEN, Bar No. 13035

Attorney for Respondent

IT IS SO ORDERED.

Dated March 15, 2018

James T. Russell
District Court Judge

Respectfully Submitted by:
BROWNSTEIN HYATT FARBER SCHRECK, LLP

By:
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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation, Petitioner, vs. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY – DIVISION OF INSURANCE, a Nevada administrative agency Respondent.	Case No. 17 OC 00269 1B Dept. No. 1

RESPONDENT'S ANSWERING BRIEF

Respondent, Department of Business and Industry, Division of Insurance ("Division") through its counsel, Nevada Attorney General ADAM P. LAXALT, Deputy Attorney General RICHARD YIEN, and Senior Deputy Attorney General JOANNA GRIGORIEV, hereby files Respondent's Answering Brief, pursuant to the Order for Briefing Schedule and consistent with NRS 233B.133(2).[1]

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[1] The Brief is organized similarly to Petitioner Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty's Brief for ease of aligning answers with allegations.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

JURISDICTIONAL STATEMENT

Certificate of Service

Petitioner has not filed with this Court a Certificate of Service pursuant to First Judicial District Court Rule 19.8.F.(3).

STATEMENT OF ISSUES FOR REVIEW

Petitioner sets forth five (5) issues in its Statement of the Issues for Review[2] Respondent challenges Issue No. 3, under its Statement For Issues For Review. It states, "Whether Petitioner's certificate of registration expires as a matter of law pursuant to NRS 233B.127(2)." This issue is moot and therefore non-justiciable. Petitioner must be aggrieved by a final decision in a contested case, pursuant to NRS 233B.130.1(b). Because the Final Order of the Administrative Court ("Final Order") finds in Petitioner's ***favor,***[3] on the issue by requiring Division's adjudication of Petitioner's renewal application, and preventing the Division from taking action against Petitioner for operating without a certificate during the period of expiry, Petitioner is not aggrieved. This Division discusses this issue in the corresponding argument section below.

STATEMENT OF THE CASE

In its Administrative Complaint against Petitioner, the Nevada Division of Insurance, sought to revoke Petitioner's certificate of authority and alleged regulatory violations of the Insurance Code, including failing to disclose multistate regulatory actions against "Choice Home Warranty," in California, Washington, Oklahoma, and New Jersey[4], not disclosed by the Petitioner on any of its applications filed with the Division of Insurance. The Hearing Officer found that the "Choice Home Warranty," subject to those disciplinary actions, was a dba used by CHW Group, Inc. ("CHWG"), a business entity incorporated in New Jersey, selling service contracts online in numerous states,

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[2] Petr's Opening Br, ix:2-20.

[3] Record of Entry ("ROE") 44 at 26:9 – 27:8.

[4] Choice Home Warranty was subject to regulatory actions in California, Oklahoma, Washington, and New Jersey. (*See* ROE 44, 10:26-28; 11:1-28).

including Nevada.[5]

Central to Petitioner's defense against that allegation by the Division was that the "Choice Home Warranty," subject to regulatory violations in other states, was really a dba for "CHW Group, Inc.," ("CHWG") which in turn was Petitioner's Administrator. This argument was used by the Petitioner to justify its failure to disclose disciplinary actions against "Choice Home Warranty." The Hearing Officer accepted Petitioner's defense that Home Warranty Administrator of Nevada, Inc. ("HWAN"), dba Choice Home Warranty and CHW Group, Inc. dba Choice Home Warranty ("CHWG"), were separate entities and therefore Petitioner was not required to disclose out-of-state disciplinary actions against CHWG. However, she found violations of NRS 686A.070[6] by Petitioner in making false entries of material fact by not disclosing CHWG, as its Administrator for conducting business in an unsuitable manner by using CHWG, an unlicensed entity, for all activities for which Nevada law requires a certificate of registration,[7] and failing to make records available to the Commissioner upon request in violation of NRS 690C.320.2.[8] The Hearing Officer ordered fines against Petitioner.[9] She did not order a revocation or cease and desist order, as the Division had sought. Instead, the Hearing Officer included procedural instructions on how to apply for a renewal of Petitioner's certificate of registration to sell service contracts in Nevada.[10]

Petitioner filed a Petition for Judicial Review ("PJR") on December 22, 2017, but neglected to file a Certificate of Service with their PJR, pursuant to First Judicial District Rule 19.8.F.(3). Subsequently, it filed its Opening Brief.

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[5] Prior to incorporating as Home Warranty Administrator of Nevada Inc., Petitioner had sold Service contracts online as Choice Home Warranty (ROE 44, 2:15-23). The Division began receiving complaints against Choice Home Warranty in 2009. (ROE 44, 7:14-15). CHW Group's president, Victor Mandalawi ("Mandalawi") incorporated in Nevada in 2010 as Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty, and it was Mandalawi on behalf of this entity who filed the applications with the Division. (ROE 44, 2:15-23).

[6] ROE 44, 21:1-19; 27:13-15.

[7] ROE 44, 25:17-24, 27:18-21.

[8] ROE 44, 21:23-28; 22:1-5; 27:16-17.

[9] ROE 44, 27:13-21.

[10] ROE 44, 27:2-8; 28: 1-2.

STATEMENT OF FACTS

On May 9, 2017, Nevada Division of Insurance filed a Complaint[11] and Application for Order to Show Cause against Petitioner HWAN, Inc. dba Choice Home Warranty. The Division alleged that Petitioner violated the following provisions of Nevada Revised Statutes ("NRS"): NRS 686A.070—making a false entry of a material fact in any book, report or statement of any person or knowingly omitting to make a true entry of any material fact pertaining to such person s business in any book, report or statement; NRS 686A.310—engaging in unfair practices in settling claims; NRS 690C.320.2—failing to make available to Commissioner for inspection any accounts, books, and records concerning any service contract issued, sold, or offered for sale by the provider; and NRS 690C.325.1(b)—conducting business in an unsuitable manner.[12] Based on the allegations presented, the Division sought relief under NRS 690C.325 (revocation or nonrenewal); 686A.183(1)(a) (fines); NRS 686A.170 (cease and desist order); and NRS 690C.170(2) (withholding of the security deposit and any other remedy deemed appropriate by the Hearing Officer).[13]

Victor Mandalawi ("Mandalawi") is President, Sole Officer, and Sole Employee, of Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty.[14] Mandalawi is also President of the separate business entity, CHWG dba Choice Home Warranty.[15] Mandalawi testified that CHWG was selling service contracts in various states, including Nevada, as early as 2008, and that it had run into problems in some jurisdictions for selling without a license.[16] [17] In turn, Mandalawi set up Home Warranty Administrator companies in the states that required a license.[18] [19] The Division began

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[11] ROE 1. Division amended its Complaint on September 5, 2017. The Amended Complaint is ROE 30.

[12] ROE 1 and ROE 30.

[13] ROE 30, 7:5-22.

[14] ROE 44, 2:20-23.

[15] ROE 44, 2:5-6.

[16] ROE Hr'g Tr. 09/13/17, 138:9-25; 139:1-25; 140:1-23.

[17] ROE 46, Division's Closing Statement Excerpt 2:20 to 3:21 citing ROE Hr'g Tr. 09/13/17, 138:24-25 to 139:3, ROE Hr'g Tr. 09/13/17, 139:14-18, ROE Hr'g Tr. 09/13/17, 139:22-25; 140:1- 6, ROE Hr'g Tr. 09/13/17, 140:10-14.

[18] ROE Hr'g Tr. 09/13/17, 137:3 – 139:25.

[19] ROE Hr'g Tr. 09/12/17, 125:16-24.

receiving complaints against "Choice Home Warranty" in 2009.[20] In states where no license was required, Mandalawi did not incorporate Home Warranty Administrator entities and CHWG continues to do business solely as CHWG.[21] Petitioner (HWAN) uses as its dba, the name "Choice Home Warranty." Victor Mandalawi and Victor Hakim are owners, principals and control persons of CHWG.[22] During the September hearing, Petitioner disclosed to the Division that CHWG is the "Administrator" for Petitioner (HWAN).[23] Petitioner (HWAN) never disclosed that CHWG is its administrator in its annual renewal applications from 2011 to the time the Final Order was issued.[24] [25] Petitioner (HWAN) never disclosed any disciplinary action against their administrator in any of their applications. Until the hearing, the Division believed Petitioner (HWAN) and CHWG were one and the same.[26] When it became apparent to the Division that Petitioner had failed to disclose prior regulatory actions brought against "Choice Home Warranty" in other states, it investigated Petitioner under the assumption that Petitioner (HWAN) and Choice Home Warranty were one in the same, and brought disciplinary action against Petitioner.[27]

Petitioner HWAN, dba Choice Home Warranty, consists of one employee, Victor Mandalawi, who controls the information that goes onto CHWG's web sites where Petitioner's (HWAN's) consumers go to sign up for services.[28] Mandalawi testified that it is his role as president of HWAN to oversee the day-to-day activities of CHWG.[29] Mandalawi communicates as President of CHWG from a CHWG email account when addressing complaints against HWAN.[30] Mandalawi agrees that "there

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[20] ROE 32, Exhibit 28, page 2/5, Problem Report IDs 21516, 21226

[21] ROE Hearing Transcript 09/14/17, 72:4-13.

[22] ROE 44, 2:5-6.

[23] ROE 44, 17:23-24.

[24] ROE 44, 20:12-19.

[25] Petitioner discloses, for the first time in any renewal application, that CHWG is their administrator, in the renewal application they submit in compliance with the Final Order, after issuance of the Final Order.

[26] ROE Hr'g Tr. 09/12/17, 117:12 to 118:2.

[27] ROE Hr'g Tr. 09/12/17, 29:12 to 31:1, 31:10-24, 32:16-22, 35:2-16, 35:23 to 39:17, 42:22 to 43:5, 46:19 to 47:2, 49:23 to 51:4, 53:8-16.

[28] ROE Hr'g Tr. 09/14/17, page 34 line 9 to page 35 line 12.

[29] ROE Hr'g Tr. 09/13/17, page 266, lines 11-13.

[30] ROE Hr'g Tr. 09/13/17, page 241, line 9 to page 242, line 5.

is a common interest between both companies."[31] He does not distinguish when and where he acts as President of HWAN as opposed to President of CHWG.[32] Mandalawi considers himself "working all the time for both entities, really."[33] Mandalawi is the sole person with access to both Petitioner (HWAN) and CHWG bank accounts and the bank records provided to the Division show comingling of the funds of the two entities.[34] Mandalawi authorizes "goodwill payments" for HWAN to come from the bank accounts of CHWG.[35] Mandalawi voluntarily steps in to resolve the complaints against CHWG[36] on behalf of HWAN.

After HWAN was created, CHWG continued to act in a provider capacity by performing the very functions for which Nevada law requires a certificate of registration, including sale, solicitation, and advertising. Mandalawi's testimony reflects that all of these functions are performed from the CHWG offices and Petitioner (HWAN's) only role is simply to attain and maintain the license.[37] Per Mandalawi, the CHWG employees perform "all the actions," including the advertisement, solicitation and sale of service contracts.[38] Hakim corroborates this in his testimony.[39]

Petitioner's statement of facts attempts to mislead the Court into believing the Division was aware of and approved the relationship between CHWG and Petitioner (HWAN). This is false. As stated in the Final Order, "Based on the Amended Complaint, it is clear that the Division considered Petitioner (HWAN) and Choice Home warranty to be one-and-the same entity."[40] "The record likewise shows no evidence that the Division was aware that CHWG was selling contracts in Nevada, only that Choice Home Warranty was selling contract in Nevada. The Division asked Petitioner (HWAN) to register Choice Home Warranty as a dba because, after a discussion with Mandalawi, "it was identified

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[31] ROE Hr'g Tr. 09/13/17, page 240, lines 11-14.
[32] ROE Hr'g Tr. 09/13/17, page 240, lines7-14.
[33] ROE Hr'g Tr. 09/14/17, page 56, lines 16-17.
[34] ROE Hr'g Tr. 09/14/17, page 52, line 4 to page 55 line 15.
[35] ROE Hr'g Tr. 09/14/17, page 55 line 25 to page 56 line 3. Mandalawi.
[36] ROE Hr'g Tr. 09/14/17, page 239, line 18 to page 240, line 14.
[37] "So the purpose that those companies were set up was to, you know, make sure that we – I could separate from each of those regulatory statutes from state to state" ROE Hearing Transcript 09/14//17, 39:4-9.
[38] ROE Hr'g Tr. 09/13/17, 135:23 to 136:5 and ROE Hearing Transcript 09/14/17, 40:9-14.
[39] ROE Hr'g Tr. 09/14/17, 70:1 to 72:13.
[40] ROE 44 23:4-5.

that Choice and HWAN were one and the same entity, that Choice was not selling illegally because HWAN was a licensed entity in Nevada.'"[41] "There is no evidence that the Division knew that Choice Home warranty was CHW Group or of the contract between HWAN and CHW Group."[42] Moreover, after Petitioner's contract was approved in 2011, Petitioner indicated in all of its renewal applications that it was **itself** administering its service contracts, which was not true."[43] Petitioner was found by the Hearing Officer to have violated NRS 686A.070, in part, for providing false information, and making false entries on its renewal applications after 2011, by indicating it was self-administered.[44] In its attempt, in their facts section, to insinuate that the Division knew about or approved sales by "Choice Home Warranty," Petitioner fails to acknowledge, understand, or communicate to the Court the difference between the Division's approval of Petitioner's d/b/a "Choice Home Warranty" selling and soliciting, as opposed to a separate unlicensed administrator, such as CHWG, doing the same.

STATEMENT OF THE STANDARD OF REVIEW

NRS 233B.135 provides in pertinent parts:

> ...
> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency 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.

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[41] ROE 44 23:22-27.
[42] ROE 44, 24:10-11.
[43] ROE 44, 24:13-15.
[44] ROE 44, 20:1-19.

> 4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

Administrative decisions are reviewed under an abuse of discretion standard. "An abuse of discretion occurs when the record does not contain substantial evidence supporting the administrative decision. Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *State Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). "Findings of fact must be based exclusively on substantial evidence and on matters officially noticed." NRS 233B.121.8. A final decision will not be reversed if supported by substantial evidence. *See Dep't of Motor Vehicles v. Torres*, 105 Nev. 558, 560-61, 779 P.2d 959, 960-61 (1989).

The inquiry on appeal is, thus, whether "the evidence on the whole record supports the appeals officer's decision." *Ranieri v. Catholic Cmty. Servs.*, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995). "To be arbitrary and capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved." *Meadow v. Civil Service Bd. of LVMPD*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989) (citations omitted).

While this court reviews purely legal questions *de novo*, a hearing officer's conclusions of law, which will necessarily be closely tied to the hearing officer's view of the facts, are entitled to deference on appeal." *City Plan Development, Inc., v. Office of the Labor Comm'r*, 121 Nev. 419, 117 P.3d 182, 187 (2005). (internal citations omitted. *See also Morrow v. Asamera Minerals*, 112 Nev. 1347, 1351, 929 P.2d 959, 962 (1996) (citing NRS 233B.135; other citations omitted). However, "an agency's conclusions of law, which are necessarily closely related to the agency's view of facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence." *Morrow v. Asamera Minerals*, 112 Nev. 1347, 1351, 929 P.2d 959, 962 (1996) (citing NRS 233B.135; other citations omitted). *See also Clements v. Airport Auth.*, 111 Nev. 717, 721–22, 869 P.2d 458, 460–61 (1995); *Beavers v. Dep't of Motor Vehicles*, 109 Nev. 435, 438, 851 P.2d 432, 434 (1993). Any type of factual review is entitled to deference. *Dep't Taxation v. McKesson Corp.*, 111 Nev. 810, 812, 896 P.2d 1145, 1146 (1995). The Nevada Supreme Court also has repeatedly recognized the specialized skill and knowledge of an agency and, thus, the agency's authority to interpret the language of a statute that they

are charged with administering. *Int'l Game Technology Inc. v. Second Judicial District Court*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) ("[A]s long as th[e] interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts."). An administrative agency's decision based on a credibility determination is not open to appellate review. *Brocas v. Mirage Hotel & Casino*, 109 Nev. 579, 585, 854 P.2d 862, 867 (1993).

Notably, a court may not substitute its judgment for that of an agency acting within its statutory authority. *Local Gov't Empl.-Mgmt Relations Bd. v. General Sales Drivers, Delivery Drivers & Helpers, Teamsters Local Union No. 14*, 98 Nev. 94, 98, 641 P.2d 478, 480-481 (1982) (citations omitted.) *See also City Plan Development*, 12 Nev. at 426, 117 P.3d at 187. An agency charged with duty of administering act is impliedly clothed with power to construe it as necessary precedent to administrative action. *Pyramid Lake Paiute Tribe of Indians v. Washoe County* 112 Nev. 743, 747. Great deference should be given to administrative agency's interpretation of statute when interpretation is within language of statute; while agency's interpretation is not controlling, it is persuasive. *Id.* at 748.

ARGUMENT

I. THE HEARING OFFICER'S FINDINGS OF VIOLATIONS OF NRS 686A.070 AND THE RESULTING FINES SHOULD BE AFFIRMED

A. Petitioner Was Not Denied Due Process As It Had Received Sufficient Notice and Opportunity to Prepare and There Was no Unfair Surprise

Petitioner argues that the fines imposed by the Final Order for conducting business in an unsuitable manner and for false entries of material facts under NRS 686A.070, denied Petitioner due process. Its rationale centers on the argument that "the Division never intended to proceed against Petitioner on the basis that it had improperly allowed CHWG to sell service contracts on Petitioner's behalf without registration or on the basis that Petitioner falsely represented that it self-administered its contract and used only an approved service contract form.[45]" Petitioner concludes: "the Decision's penalties against Petitioner on these issues is outside the scope of the notice for the hearing and are a denial of Petitioner's right to due process.[46]" Petitioner asks the Court to set aside the Hearing

[45] Petr's Opening Br. 11:26-28; 12:2.
[46] Petr's Opening Br. 12:12-13.

Officer's findings "related to conducting business in an unsuitable manner and making false entries of material fact.[47]" In Nevada, parties of contested cases "must be afforded an opportunity for hearing after reasonable notice." NRS 233B.121.1. The notice must include "[a] short and plain statement of the matters asserted. NRS 679B.320.2, governing proceedings under the Insurance Code (title 57 of the NRS), provides that "the notice of the 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." *Id.*

The Nevada Supreme Court has consistently held that in the context of administrative pleadings, due 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." *Nev. State Apprenticeship Council v. Joint Apprenticeship & Training Committee for the Electrical Industry,* 94 Nev. 763, 765, 587 P.2d 1315, 1316-17 (1978) (citations omitted). The Court in that case reversed the district court's ruling that the Council violated due process guarantees by failing to require a party in a contested case to file a detailed complaint stating in particularity the party's charges. 94 Nev. at 765-66, 587 P.2d at 1317. The Court found that a letter used to provide notice satisfied the requirements of NRS 233B.121 and concluded that Joint Apprenticeship and Training Committee suffered no prejudice because it "***knew and had access to the factual data upon which its action was based.***" *Id.* (Emphasis added). *See also Coury v. Whittlesea-Bell Luxury Limousine,* 102 Nev. 302, 308, 721 P.2d 375, 378 (1986), ("where parties are sufficiently apprised of the nature of the proceedings so that there is no unfair surprise, facially improper notice may in some cases be upheld." *Id.*).

The Amended Complaint in this case alleged that Petitioner violated NRS 686A.070 by "making false entries of material facts in each of CHW's [Petitioner's] renewal applications in the years 2011, 2012, 2014, and 2015."[48] The first indication that central to Petitioner's defense against the

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[47] Petr's Opening Br., 13:14-15.

[48] ROE 30, Amended Complaint at 6:13-15.

allegation by the Division that it violated NRS 686A.070 by failing to disclose that Choice Home Warranty was subject to administrative actions in other states, (being the argument that Choice Home Warranty was really a separate entity--Choice Home Warranty Group (CHWG), dba Choice Home Warranty and that therefore, that Petitioner did not need to disclose in its renewal applications any of the out-of-state disciplinary findings against CHWG), was a footnote in Petitioner's Motion for Administrative Subpoenas, filed on July 17, 2017.[4950] As an explanation for the fact that the name "Choice Home Warranty," appeared on Petitioner's service contracts in Nevada, but that Petitioner was not obligated to disclose disciplinary actions against "Choice Home Warranty," Petitioner disclosed that Choice Home Warranty Group (CHWG), dba Choice Home Warranty, was another entity, separate from HWAN dba Choice Home Warranty, and that it actually was Petitioner's contracted Administrator.[51]

The Division continued to believe and argue that there was one entity at issue. The Hearing Officer, however, accepted Petitioner's defense and found that Petitioner and CHGW were indeed separate entities[52], and that Petitioner did not need to disclose the administrative disciplinary decisions from other states[53]; however, she found that Petitioner repeatedly violated NRS 686A.070 by making false entries of material fact in deliberately concealing CHWG as Petitioner's Administrator. "For all of the renewal applications Mandalawi submitted on behalf of HWAN [Petitioner], the administrator is noted as 'self' and this was not true."[54]

Petitioner's argument that it had no notice that Petitioner's relationship with CHWG as its Administrator has no merit. It was Petitioner who for the first time during the administrative proceedings, used this as a defense. In its Pre-Hearing Statement, Petitioner identified as the first legal issue in the administrative matter: "[t]he Division's entire case related to fines in other states rests upon the false premise that HWAN [Petitioner] was the legal entity that was subject to those fines."[55]

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[49] ROE 17, 3:26 footnote 1 of Petitioner's Motion for Administrative Subpoenas
[50] ROE 33, 2:8-18.
[51] ROE Hr'g Tr. 09/13/17 132:3 to 133:4 and ROE Hr'g Tr. 09/14/17 46:22-25.
[52] ROE 44, 17:14 to 18:10.
[53] ROE 44, 18:24 to 19:27.
[54] ROE 44, 20:5-6.
[55] ROE 33, 3:3-4.

Petitioner went on to summarize its legal argument of why HWAN, dba Choice Home Warranty and CHWG, dba Choice Home Warranty were two separate legal entities.[56]

In *Dutchess Business Services Inc. v Nevada State Board of Pharmacy,* 124 Nev. 701, 713 191 P.3d 1159, 1167 (2008), the Nevada Supreme Court held that the licensees' argument that their due process rights were violated because the Board found them guilty of a charge not listed in the accusation was without merit: "[t]he language in the accusation clearly and unambiguously notified Dutchess that it was charged with failing to provide accurate pedigrees, and the Board found Dutchess guilty of this charge." *See also State ex rel. Kassabian v. State Bd. of Medical Examiners*, 68 Nev.455, 467-468, 235 P.2d 327 (1951) "Regardless of the theory upon which the board may, erroneously, have commenced its hearing, its ultimate decision and order . . . was based upon 'the charges made in the complaint.' "*Id.*

The Amended Complaint filed by the Division against the Petitioner in this case complied with the notice requirements. It set forth as one of its charges: "violations of NRS 686A.070" for making "false entries of material fact" in renewal applications.[57] It was Petitioner who, prior to the administrative hearing, in an attempt to defend against the allegation of making false entries, asserted that an entirely separate entity was involved in those out-of-state proceedings, and that said entity happened to be Petitioner's Administrator; effectively admitting to the violation of making false entries, but as pertaining to the identity of its Administrator.[58] Petitioner had adequate opportunity to prepare against any resulting violations as a product of its defense strategy and it cannot therefore claim unfair surprise.

Petitioner was sufficiently apprised of the nature of the administrative proceedings in this matter, had an opportunity to prepare and "***knew and had access to factual data***" upon which the action was based. As a result of its own defense, the Hearing Officer found six (6) violations of NRS 686A.070 by the Petitioner in making false entries of material fact in its renewal applications. There was no due process violation as a result of the Hearing Officer's findings and the resulting fines, as the findings were lawful and based on substantial evidence. The Hearing Officer's findings must be

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[56] ROE 33, 3:3 to 4:6.
[57] ROE 30 6:7-12.
[58] ROE Hr'g Tr. 09/14/17, 46:22-25.

affirmed.

II. THE HEARING OFFICER'S FINDINGS THAT PETITIONER CONDUCTED BUSINESS IN UNSUITABLE MANNER IN VIOLATION OF NRS 690C.325 AND 679B.125 BY ALLOWING UNLICENSED ENTITY TO ISSUE, SELL AND OFFER OR SALE SERVICE CONTRACTS, WERE LAWFUL, WITHIN STATUTORY LANGUAGE AND BASED ON SUBSTANTIAL EVIDENCE

A. Nevada Law Requires a Certificate of Registration to Issue, Sell, or Offer for Sale Service Contracts

Although questions of statutory construction are subject to *de novo* review by this court, "[a]n administrative agency . . . charged with the duty of administering an act, is impliedly clothed with power to construe the relevant laws and set necessary precedent to administrative action . . . [and] [t]he construction placed on a statute by the agency charged with the duty of administering it is entitled to deference." *SIIS*, 109 Nev. at 1228, 865 P.2d at 1170. *See also Westergard v. Barnes,* 105 Nev. 830, 834, 784 P.2d 944, 947 (1989) (an administrative statutory construction will not be readily disturbed by courts); *Dixon v. State Indus. Ins. Sys.,* 111 Nev. 994, 998, 899 P.2d 571, 574 (1995) ("Although a reviewing court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence") and *State v. State Engineer Morros,* 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (agency responsible for administering act has implied power to construe it as necessary precedent to administrative action; great deference is given to agency's interpretation if it is within statutory language).

The Hearing Officer in this case found that CHWG had engaged in issuing, offering and selling service contracts without the required certificate of registration, in violation of NRS 690C.150, and that Petitioner's practice to allow CHWG, its Administrator, to do so since 2010, amounted to "conducting business in an unsuitable manner, in violation of NRS 690C.325 and 679B.125."[59]

NRS 690C.150 provides: "Certificate required to issue, sell or offer for sale service contracts. 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 pursuant to the provisions of this chapter." NRS 690C.020, in

[59] ROE 44 25:20-24.

turn, defines "Administrator" as, "a person who is responsible for ***administering*** a service contract ***that is issued, sold or offered for sale by a provider.***" *Id.* (emphasis added). The well-settled rules of statutory construction require that the court must, whenever possible, "interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results." *Southern Nevada Homebuilders Ass'n v. Clark County,* 121 Nev. 446, 449, 117 P,3d 171, 173 (2005) (emphasis added). "[T]his court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.' "*Harris Assocs.* V. *Clark County School District*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

It is clear, that NRS 690C.020 and 690C.150, read in harmony, establish that the scope of the functions of an Administrator, (for which indeed a certificate of registration is not required), is to administer contracts that are ***sold by a licensed Provider.*** However, in order to ***issue, sell or offer for sale, an entity must be a Provider with a certificate of registration.*** This is the only reasonable and harmonious interpretation of the unambiguous provisions of chapter 690C of the NRS. CHWG, an unlicensed entity, under the Nevada statutory scheme governing service contracts, can only "administer" service contracts which are sold by Petitioner, as long as Petitioner has a valid certificate of registration. By delegating all of the functions that the Legislature requires be performed by a licensed Provider to an unlicensed entity, and never disclosing this entity to the regulator, Petitioner completely circumvented oversight and regulation scheme for years.

Petitioner's argument that the requirement of obtaining a certificate of registration before selling or offering for sale service contracts in NRS 690C.150 applies only to providers,[60] would produce an absurd result of nullifying the statutory scheme entirely by effectively allowing anyone, (except providers), to sell or offer for sale service contracts without a license. Petitioner also argues that an Administrator is not required to be licensed in Nevada. While this is correct, it does not mean that an Administrator can sell or offer for sale service contracts without a certificate of registration.

The Hearing Officer findings that CHWG had performed[61], on behalf of the Petitioner, all of the

[60] Petr's Opening Brief, 15:11-12.
[61] ROE 44, 25 17-22.

functions for which Nevada law requires a certificate of registration is based on statutory interpretation that is within the statutory language, harmonious with the general purpose of the statutory scheme and avoids "unreasonable or absurd results, thereby giving effect to the Legislature's intent." *Southern Nevada Homebuilders*, 121 Nev. At 449, 117 P.3d at 173. The findings are also based on substantial evidence presented at the hearing, including Petitioner's witnesses and its president, that CHWG, Petitioner's Administrator, sold, advertised, marketed, offered for sale and issued service contracts for Petitioner[62] without a certificate of registration[63].

Furthermore, the Nevada Supreme Court explained in *Gaessler v. Sheriff, Carson City* 95 Nev. 267, 270, 592 P.2d 955, 957 (1979), that it is ***the conduct and actions*** of a person or entity that define whether it is required to be licensed under a regulatory licensing scheme. In *Gaessler*, the Court considered the argument by Defendant ordered to stand trial for engaging in business or acting without a license, that he was merely acting as an advertiser rather than as a real estate broker or salesman and, therefore, not required to obtain a license. The Court held that defendant's solicitation and receipt of "advertising fee" for listing a business for sale was the "***type of conduct*** which real estate licensing statutes were designed to regulate . . . ." *Id.* (emphasis added), and therefore, defendant was required to have a real estate license.

In the present case, CHWG, an unlicensed entity, unlawfully engaged in the issuance, sale, and solicitation of service contracts, the type of conduct and activities which, not only do not fall within the scope of activities Administrators can engage in by definition (NRS 690C.020), but for which Nevada law expressly requires a certificate of registration. The Hearing Officer findings of violations by conducting business in unsuitable manner are based on proper statutory interpretation and are supported by substantial evidence and should be affirmed.

B. Equitable Estoppel Does Not Apply

Petitioner argues that the Division knew that CHWG was selling service contracts in Nevada on behalf of the Petitioner and that the Division should now be "equitably estopped from penalizing

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[62] ROE 44, 24:16-19 and 25:7-10.
[63] ROE 44, 25:17-18.

Petitioner for CHWG's selling or offering for sale service contracts on its behalf . . . ."[64] This argument fails on facts and law. First, it is well-settled, that "estoppel cannot prevent the state from performing its governmental functions." *Chanos v. Nevada Tax Com'n*, 124 Nev. 232, 238, 181 P.3d 675, 679 (2008). Thus, the Commissioner cannot be prevented from exercising her duties imposed by the Legislature under the Insurance Code, title 57 of the NRS, including protection of the public by disciplining licensees for their violations. Petitioner's argument that Division should be estopped from enforcing the law must be rejected.

Petitioner also fails to establish[65] that the Division knew CHWG was selling service contracts in Nevada on behalf of the Petitioner. As evidence thereof, Petitioner points to the fact that the Division requested that HWAN register as its dba, the name "Choice Home Warranty." Petitioner continues its argument based on the false premise it had created: "having concluded that 'Choice Home Warranty' was not violating Nevada law by selling contracts without being registered because it was selling on behalf of Petitioner, who was itself properly registered, the Division is estopped from doing so now."[66]

The Hearing Officer made an express factual finding that the Division was not aware that CHWG, dba Choice Home Warranty, was a separate entity from HWAN dba Choice Home Warranty. Until the hearing, the Division believed HWAN dba Choice Home Warranty and CHWG dba Choice Home Warranty, were one and the same.[67] It was precisely because the Division thought that HWAN

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[64] Petr's Opening Br. 20:12-14.

[65] The Nevada Supreme Court explained in *Chanos*:

> [e]quitable estoppel operates to prevent a party from asserting legal rights that, in equity and good conscience, [the party] should not be allowed to assert because of [his] conduct. . . . To establish that an opposing party should be equitably estopped, "the proponent must prove that: "(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; [and] (4) he must have relied to his detriment on the conduct of the party to be estopped.

Chanos, 124 Nev.at 679.

[66] Petr's Opening Br. 21:7-13.

[67] ROE Hr'g Tr. 09/12/17, 117:12 to 118:2

and "Choice Home Warranty" were one entity, it requested that Petitioner register a dba, as the public already knew HWAN as "Choice Home Warranty." The Hearing Officer found that "the Division considered HWAN and Choice Home Warranty to be one-and-the-same entity."[68] [69]

The first time that the Division learned that a separate entity, CHWG, acted as Administrator for the Petitioner, was after the administrative proceedings began, when Petitioner revealed it as a defense to the allegations by the Division that Petitioner failed to disclose out-of-state administrative actions against "Choice Home Warranty." Petitioner made its equitable estoppel argument to the Hearing Officer and she addressed it in her Final Order:[70]

> Respondent argues that the Division is equitably estopped from taking action against it because the Division knew that CHW Group and HWAN were selling contracts in Nevada. ***There is no evidence that the Division knew that CHW Group and Choice Home Warranty were the same. The record likewise shows no evidence that the Division was aware that CHW Group was selling contracts in Nevada, only that Choice Home Warranty was selling contracts in Nevada.*** The Division asked HWAN to register Choice Home Warranty as a dba because, after a discussion with Mandalawi, ***"[j]t was identified that Choice and HWAN were one and the same entity, that Choice was not selling illegally because HWAN was a licensed entity in Nevada."*** (Test. Jan.) Respondent argues that it detrimentally relied upon the Division's representation that in exchange for HWAN's use of the fictitious name, the Division released the legal right to initiate an adversarial action that HWAN and CHW Group are the same entity. How a fictitious name registration amounts to detrimental reliance is unclear."[71]

The Hearing Officer's factual findings may only be set aside if arbitrary and capricious.[72] They

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[68] ROE 44, 23:4-5 See also ROE Hr'g Tr. 09/12/17 117:11-18.

[69] Prior to incorporating as HWAN in Nevada in 2010, Choice Home Warranty had been selling service contracts online (Mandalawi testimony at ROE Hearing Transcript 09/14/17 33:22 to 34:3, and the Division began receiving complaints against Choice Home Warranty in 2009. After Mandalawi incorporated in Nevada in 2010 as HWAN, Petitioner failed to disclose, and thereafter actively concealed, the existence of CHWG, dba Choice Home Warranty, its Administrator, by repeatedly identifying in annual renewal applications "self" as the Administrator. ROE 44, 20:17-19.

[70] ROE 44, 23:20 to 24:5.

[71] ROE 44 at 23:20 to 24:5.

[72] "To be arbitrary and capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved." *Meadow*, 105 Nev. at 627, 781 P.2d at 774."

must be given deference.[73] As in *Chanos*, estoppel does not apply in this case for two reasons: estoppel cannot prevent the Division and the Commissioner, as its chief officer, from performing its governmental function in regulating entities, such as the Petitioner, which are subject to the provisions of the Insurance Code. Furthermore, Petitioner failed to prove that the Division knew that CHWG, dba Choice Home Warranty was a separate entity selling service contracts on behalf of HWAN, dba Choice Home Warranty, in the state of Nevada, thus failing to satisfy the first element required under the doctrine of equitable estoppel. Equitable estoppel is not applicable in this case.

III. THE AGGREGATE TOTAL FINES IMPOSED ARE LAWFUL BASED ON SUBSTANTIAL EVIDENCE AND MUST BE AFFIRMED.

A. There is no Statutory Cap on Administrative Fines Issued Against a Licensed Provider

Petitioner argues that the total amount of fines imposed by the Hearing Officer in this matter is "in excess of the Division's unequivocal statutory authority."[74] The Hearing Officer in this case imposed an administrative fine pursuant to NRS 690C.325.1 against Petitioner for 23,889 violations, at $50 per violation. NRS 690C.325, enacted in 2011, provides:

> 1. The Commissioner may refuse to renew or may suspend, limit or revoke a provider's certificate of registration if the Commissioner finds after a hearing thereon, or upon waiver of hearing by the provider, 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.***
> . . .

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[73] " A hearing officer's conclusions of law, which will necessarily be closely tied to the hearing officer's view of the facts, are entitled to deference on appeal." *City Plan Development,* 121 Nev. at 187. (Internal citations omitted.) *See also Morrow at* 112 Nev. at 1351, 929 P.2d at 962.

[74] Petr's Opening Br. 22:14-15.

Id. (Emphasis added).

Petitioner argues that the Hearing Officer failed to apply to her calculations a cap of $10,000 purportedly imposed by NRS 690C.330. NRS 690C.330, referenced in Petitioner's Opening Brief was enacted in 1999 and provides as follows:

> ***A person who violates any provision*** of this chapter or an order or regulation of the Commissioner issued or adopted pursuant thereto ***may be assessed a civil penalty*** by the Commissioner ***of not more than $500 for each act or violation, not to exceed an aggregate amount of $10,000 for violations of a similar nature.*** For the purposes of this section, violations shall be deemed to be of a similar nature if the violations consist of the same or similar conduct, regardless of the number of times the conduct occurred.

Id. (Emphasis added). Petitioner argues, in effect, that NRS 690C.330 provides a cap for the administrative fines set forth in 697.325. This interpretation would result in these two statutes being in conflict, even for the simple reason, that each imposes a different maximum amount per violation. NRS 690C.325 provides that the administrative fine imposed may not exceed $1,000 for each act or violation. NRS 690C.330 provides that a civil penalty assessed by the Division may not exceed $500 for each act or violation. If both statutes were addressing the same thing, then the two provisions would be in conflict.

Questions of statutory construction are subject to de novo review by this court. *SIIS v. Snyder*, 109 Nev. at 1227, 865 P.2d at 1170; however, [a]n administrative agency . . . charged with the duty of administering an act, is impliedly clothed with power to construe the relevant laws and set necessary precedent to administrative action . . . [and] [t]he construction placed on a statute by the agency charged with the duty of administering it is entitled to deference. 109 Nev. at 1228, 865 P.2d at 1170.

The rules of statutory construction dictate that whenever it is possible to do so, two potentially conflicting statutes must be interpreted "in harmony with one another." *DeStefano v. Berkus,* 121 Nev. 627, 629, 119 P.3d 1238, 1240. (2005), citing *Williams v. Clark County Dist. Attorney,* 118 Nev. 473, 485, 50 P.3d 536, 543 (2002). "We are obliged to construe statutory provisions so that they are compatible, provided that in doing so, we do not violate the legislature's intent. Additionally, we should not render any part of a statute ineffective if such consequences can be avoided." *Williams*, 118 Nev. at 485, 50 P.3d at 543-544 (internal citations omitted). The Court in *DeStefano* provides

guidance for determining whether statutes can be harmonized: "[w]hile the two statutes apply to the same subject . . . they do not conflict, since they differ in scope and available remedy."

Similarly, in the present case, the scope and intent behind each statute are different. The language of NRS 690C.325 clearly establishes that this provision addresses violations by the Division's licensees, namely ***service contract providers possessing a certificate of registration***. This statute provides for non-renewal, suspension, or revocation of a certificate of registration held by a provider for violations and non-compliance. In lieu of a suspension or revocation, the statute further authorizes the Commissioner to impose fines "of not more than $1,000 for each act or violation" on the provider. There is no cap on the total sum of fines allowed to be imposed.

NRS 690C.330, in turn, provides the Commissioner with authority to impose "a civil penalty" on any "person who violates any provision of this chapter," which allows the imposition of a penalty on a non-licensee. As an example, if the Division chose to bring an administrative action against CHWG for selling service contracts without a certificate of registration, NRS 690C.330 would govern, and the amount of fines would indeed be limited to $500 for each act or violation, not to exceed an aggregate amount of $10,000 for violations of a similar nature. NRS 690C.325 and .330 do not conflict. NRS 690C.325 addresses remedies available to the Division against its licensees—registered contract service providers. NRS 690C.330 allows the imposition of limited civil penalties against entities that are not regulated by the Division.

However, if this Court finds that the statutes indeed are in conflict, then Nevada law of statutory construction provides additional well-settled rules. Under both principles, NRS 690C.325 is the applicable provision. If there is a conflict, the statute that is "more recent in time controls over the provisions of an earlier enactment." *Laird v. State Public Emp. Retirement Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982) (citations omitted). NRS 690C.325 was enacted in 2011, while 697.330 was enacted in 1999.

Furthermore, "when a specific statute is in conflict with a general one, the specific statute will take precedence." *Sheriff v. Witzenburg*, 122 Nev.1056, 1062, 145 P.3d 1002, 1005 (2006) (citations omitted). *See also Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). In the present case, NRS 690C.325 unequivocally applies specifically to registered service contract providers—

Division licensees. Petitioner is a Nevada registered service contract provider, therefore, this more recent statute, specifically targeting service providers registered with the Division, is the provision that will take precedence if the Court finds a conflict. NRS 690C.325 applies and with no cap on the fines imposed.

A. NRS 679B.185 Does Not Apply to Licensed Providers

Petitioner alleges that the Hearing Officer's order imposing a fine of $50 for each act or violation[75] for "conducting business in an unsuitable manner" is precluded by NRS 679B.185.4. Petitioner argues that because the 23,889 service contracts, found by the Hearing Officer to be sold by Petitioner through an unlicensed entity, CHWG, in violation of law, go back to 2011, the Order violates a five-year statute of limitations. Petitioner relies on NRS 670B.185.4. However, this purported statute of limitations is inapplicable to this case. This statute is applicable to persons who engage in "unauthorized transaction of insurance." NRS 679B.185.1. Petitioner, the moving party here, and the sole respondent in the administrative hearing, is ***a licensee*** of the Division with a Nevada certificate of registration. The fine was imposed on Petitioner, a Division licensee, for conducting business in an unsuitable manner in violation of NRS 690C.325.1(c) and 679B.125.2.[76] The finding of an "unsuitable

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[75] The maximum fine allowed pursuant to NRS 690C.325.1 is $1,000 per violation.

[76] NRS 690C.325 provides in pertinent part:

> 1. The Commissioner may refuse to renew or may suspend, limit or revoke a provider's certificate of registration if the Commissioner finds after a hearing thereon, or upon waiver of hearing by the provider, that the provider has:
>
> (a) Violated or failed to comply with any lawful order of the Commissioner;
>
> (b) ***Conducted business in an unsuitable manner***;
>
> . . .

Id. (emphasis added).

NRS 679B.125 provides:

> The Commissioner may observe the conduct of each authorized insurer and other persons who have a direct material involvement with the insurance business to ensure that:
>
> 1. An unqualified, disqualified or unsuitable person is not involved in insurance; and
>
> 2. ***The insurance business is not conducted in an unsuitable manner.***

manner" of conducting business was based on the factual finding that Petitioner has allowed an unregistered entity to perform functions on its behalf for which Nevada law requires a certificate of registration. NRS 679B.185 does not apply to Petitioner.

It should be noted, that as a matter of public policy, the courts have declined to apply general statutes of limitations to disciplinary proceedings under statutory licensing schemes designed to protect the public. The policy behind this is articulated by the court in *Sinha v. Ambach*, 91 A.D.2d 703, 457 N.Y.S.2d 603, 604 (NYAD, 1982), a case involving disciplinary proceedings against a licensed physician: "[l]icensing of a physician imposes on the licensee an obligation to serve the public's good with concomitant adherence to strict ethics standards; ***errant behavior of a physician which contravenes such high calling should not be protected by the shield of a Statute of Limitations.***" *Id.* (Emphasis added). Protection of the public is also the underlying purpose of other licensing schemes. The Nevada Insurance Code does not impose statutes of limitations on the licensees of the Division. There is no statute of limitations under chapter 690C for violations by persons possessing a certificate of registration. The provisions addressing unauthorized and unlicensed entities are not applicable to Petitioner, a registered service contract provider and a Division licensee. The Hearing Officer's findings and resulting fines were lawful and should be affirmed.

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> The Commissioner shall, by regulation, define the terms "unsuitable person" and "unsuitable manner" for use in carrying out the provisions of this section and NRS 679B.310 and 680A.200.

NAC 679B.0385 interprets "unsuitable manner" as follows:

> As used in NRS 679B.125 and 680A.200, "unsuitable manner" means conducting insurance business in a manner which:
>
> 1. Results in a violation of any statute or regulation of this State relating to insurance;
> 2. Results in an intentional violation of any other statute or regulation of this State; or
> 3. Causes injury to the general public, with such frequency as to indicate a general business practice.

Id. (emphasis added)

IV. PETITIONER WAS NOT AGGRIEVED BY THE DICTUM IN THE FINAL ORDER IT SEEKS TO SET ASIDE, AND THE ISSUE IS MOOT AND NON-JUSTICIABLE

A. The Statement Made by the Hearing Officer that Petitioner Seeks to "Set Aside" Is Dictum in Hearing Officer's Finding in Favor of the Petitioner.

Petitioner argues that this Court should set aside a single sentence in the Hearing Officer's Final Order, which Petitioner characterizes as a finding that Petitioner's certificate it held prior to submitting its 2016 renewal application, expired as a matter of law: "the Decision violates Nevada law by holding Petitioner's certificate expired as a matter of law and this Court should set aside that finding in its entirety."[77] Petitioner's ploy to have this Court adjudicate the issue of its 2016 renewal application is improper and should not be permitted. It is clear when examining the missing context, is that this statement by the Hearing Officer can at best be characterized as dictum, "unnecessary to a determination of the questions involved." *See St. James Village, Inc. v. Cunningham*, 125 Nev. 210 P.3d 190, 193 (2009).

The Hearing Officer touched upon Petitioner's 2016 renewal application when she was considering the Division's request for a Cease and Desist order to be issued against the Petitioner[78] for selling service contracts without a valid certificate of registration. The Hearing Officer denied the Division's request explaining:

> In the Amended Complaint, the Division indicates that Respondent filed a renewal application for 2016, and that the Commissioner is authorized to refuse a provider's certificate of registration ("COR"). The Division requested a cease and desist be issued. In arguing that Respondent's 2016 COR was properly denied the Division appears to be claiming that Respondent is improperly engaging in the business of service contracts . . . The Hearing Officer finds that the Division did not properly notify Respondent that the 2016 renewal application was denied. ***In Nevada, certificates of registration for service contract providers expire one year after the COR is issued. NRS 690C.160.3.*** Nothing in the law grants the Division authority to allow a provider to continue operating after the expiration of a COR, but a provider may submit a renewal application to receive a new COR to continue operating . . . When the Division found

[77] Petr's Opening Br. 26:11-12.
[78] ROE 30, 7:18.

> the renewal application to be incomplete, the Division should have promptly notified Respondent that the renewal application was not complete and therefore, denied . . . Thus, the Hearing Officer finds that for the service contracts sold up to the date of this Order, ***Respondent cannot be found to have sold without a valid COR in violation of Nevada law since the Division did not properly notify Respondent of the denial . . .*** [79]

(Emphasis added). The Hearing Officer found for the Petitioner and ordered that the Division must process a renewal application for Petitioner within 15 business days of receipt of the complete application.[80] It is clear from the context, that the Hearing Officer's Final Order in effect, affirmed that Petitioner's certificate of registration had not expired, because one cannot apply to renew an expired certificate. The reference to one year was merely a re-statement of the statutory language of NRS 690C.160 which provides: "[a] certificate of registration is valid for 1 year after the date the Commissioner issues the certificate to the provider." *Id.*

NRS 233B.130.1(b) requires that a party seeking judicial review be aggrieved by a final decision in a contested case. Because Petitioner is not aggrieved by the Hearing Officer's Order on the issue before her in the administrative proceeding, Petitioner, lacks standing to bring this issue for review by this Court under NRS 233B.130.1(b). Petitioner fails to mention to the Court that despite the language of that statute limiting the certificate of registration to one year, and the Hearing Officer's acknowledgement thereof, she found in Petitioner's favor. The Hearing Officer instructed the Division: "[a]s a result, the Division cannot take action against Respondent [Petitioner] for issuing, selling, or offering for sale service contracts without a certificate of registration from the date of this Order plus 45 days."[81] Petitioner' is not an ***"aggrieved party"*** as pertaining to this issue before the Court, and as such fails to satisfy the standing requirement of NRS 233B.130.1(b).

B. Petitioner's Argument Also Is Moot and Therefore Non-Justiciable

A review on this issue is moot because the Division, pursuant to the Final Order, was required to process Petitioner's renewal application.[82] Clearly, regardless of the words used, as a result of the

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[79] ROE 44, 25:27-28; 26:1-28.
[80] ROE 44, 27:5-6
[81] ROE 44, 27:6-8.

Hearing Officer's Final Order, Petitioner's certificate of registration was still valid, as a "renewal" can only be effected if the certificate is still in force. Mootness is a question of justiciability. *Personhood Nevada v. Bristol,* 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (holding that this Court's function is not "to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment"). "A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights," *NCAA v. Univ. of Nev., Reno,* 97 Nev, 56, 58, 624 P.2d 10, 11 (1981) (citation omitted). An actual controversy must exist throughout the pendency of the case. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 67 (1997). Even if a controversy exists at the beginning of the case, subsequent events may render the case moot. *University Sys. v. Nevadans for Sound Gov't,* 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).

By requiring the Division to process Petitioner's renewal application[83] and Ordering that "the Division cannot take action against Respondent for issuing, selling or offering for sale service contracts without a certificate of registration from the date of this Order plus 45 days,"[84] the Hearing Officer effectively nullified any potential impact her words, as pertaining to NRS 690C.160.3, (that certificates of registration are valid for one year) may have had on the status of Petitioner's certificate of registration pre-2016 renewal application was submitted.

The Hearing Officer also did not order a revocation or issue a cease and desist order. Instead, although faced with the clear statutory time limit for certificates of registration, she included procedural instructions on how to apply for a renewal of Petitioner's certificate of registration to sell service contracts in Nevada[85]. Because no actual controversy exists, the issue before the Court is moot and non-justiciable. Moreover, the Division has since processed Petitioner's renewal application pursuant to the Final Order of the Administrative Hearing and issued a determination on February 1, 2018. Even if there were an actual "controversy" at the beginning of these proceedings, such "controversy" was extinguished by the subsequent processing of the renewal application, thereby rendering the issue moot pursuant to *University Sys.*[86]

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[83] ROE 44, 27:5-6.

[84] ROE 44, 27:6-8.

[85] ROE 44, at 27:2-8; 28: 1-2.

[86] Even if a controversy exists at the beginning of the case, subsequent events may render the case moot. *University Sys. v. Nevadans for Sound Gov't,* 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).

Because there is no relief this Court can grant on a review of this issue, it is non-justiciable. There is no actual controversy, as Petitioner's renewal application was ordered to be adjudicated, and subsequently adjudicated, thereby remedying and rendering moot Petitioner's alleged grievance. The Court's function is not "to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment." *Personhood Nevada.* 126 Nev. at 602, 245 P.3d at 574.

V. THE FINDING THAT PETITIONER MADE SIX SEPARATE MISREPRESENTATIONS IN ITS 2011-2015 RENEWAL APPLICATIONS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND MUST BE AFFIRMED

Petitioner claims that: "[e]ntirely insufficient evidence was presented by the Division to support the findings that Petitioner made six separate misrepresentations in its 2011-2015 renewal applications."[87] Pursuant to NRS 233B.135.3, the court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. *Id.* The standard of review for such factual evidence is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and/or arbitrary or capricious abuse of discretion."[88] Courts will overturn the agency's factual findings only if they are not supported by substantial evidence. NRS 233B.135.3(e), (f); *City of N. Las Vegas v. Warburton,* 127 Nev. at 686, 262 P.3d at 718. Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135.4; *Nev. Pub. Emps.' Ret. Bd.*

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[87] Petr's Opening Br. 26:13-15.

[88] NRS 233B.135provides:

> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency 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.
>
> 4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

v. Smith, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013).

The Hearing Officer in the present matter found that Petitioner made false entries on its renewal applications, in violation of NRS 686A.070. The renewal applications were introduced into the record by both parties and there were no discrepancies between the parties' exhibits.[89] On every renewal application, in response to the question requesting the applicant to identify the administrator, Petitioner responded "self."

> For all of the renewal applications Mandalawi submitted on behalf of HWAN [Petitioner], ***the administrator is noted as "self," and this was not true.*** "Self" means that the service contract provider—HWAN in this case, was administering all of the claims. According to the testimony of Mandalwi, Hakim, and Ramirez, Choice Home Warranty (which is CHW Group)[CHWG] is the administrator form HWAN . . . . As such, HWAN misstated a material fact in its application. ***For each application year starting in 2011 that HWAN reported "self" as the administrator, is one violation of NRS 686A.070.***"[90]

(Emphasis added). The Hearing Officer found five violations of NRS 686A.070 for each renewal application year starting in 2011.[91] These findings must be affirmed as they are based on uncontroverted evidence that supports the conclusion. The Hearing Officer also found one violation of the same statute for stating on the application that Petitioner was using an approved contract, while in fact, the form used was not one that was approved.

> Additionally, HWAN indicated in its applications filed starting in 2011 that it was using the service contract HWA-NV-0711 that was approved by the Division. ***On at least one occasion, there is evidence that HWAN used a service contract that, in fact, was not approved by the Division . . .The application year 2015 did not disclose the use of an unapproved form.*** The service contract is a material fact of the application. As such, HWAN misstated another material fact in its 2015 renewal application, in violation of NRS 686A.070.[92]

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[89] ROE 35, Exhibits Y, Z, AA, BB, CC and ROE 32, Exhibits 2, 4, 5, 7, 12.
[90] ROE 44, 20:5-19 (emphasis added).
[91] ROE 35, Exhibits Y, Z, AA, BB, CC and ROE 32, Exhibits 2, 4, 5, 7, 12.
[92] ROE 44 at 20:20-27 (emphasis added).

(Emphasis added). In view of the fact that the evidence in support of the findings by the Hearing Officer is such that any reasonable person reviewing the entries on the renewal applications would consider it adequate to support the conclusion, it is substantial and should not be overturned. NRS 233B.135.4.

Petitioner also argues the following theory: "[i]t [the Division] had been on at least constructive notice that Petitioner did not self-administer its contracts for no less than six years by virtue of the approved service contract form that fully disclose the same."[93] Petitioner blatantly misrepresents to the Court that: "[t]he Division was fully informed of the relationship between Petitioner and CHWG and that CHWG was administering contracts on behalf of Petitioner."[94] This statement directly contradicts the evidence presented at the hearing and the Hearing Officer's findings of fact.

As analyzed earlier in this Answering Brief, the Hearing Officer made an express factual finding that the Division was not aware of CHWG, dba Choice Home Warranty, or that it was a separate entity from HWAN dba Choice Home Warranty's Administrator. It was precisely because the Division thought that HWAN and "Choice Home Warranty" were one entity, that it requested that Petitioner register a dba, as the public already knew HWAN as "Choice Home Warranty."[95] The Hearing Officer found that "the Division considered HWAN [Petitioner] and Choice Home Warranty to be one-and-the-same entity."[96] [97] "There is no evidence that the Division knew that Choice Home warranty was CHW Group or of the contract between HWAN and CHW Group.[98]

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[93] Petr's Opening Br. 27:3-5.

[94] Petr's Opening Br. 27:5-7.

[95] ROE Hr'g Tr. 09/12/17, 114:21 to 115:18.

[96] ROE 44, 23: 4-5.

[97] As explained earlier in this Answering Brief, prior to incorporating as HWAN in Nevada in 2010, Choice Home Warranty had been selling service contracts online, and the Division began receiving complaints against Choice Home Warranty in 2009. After Mandalawi incorporated in Nevada in 2010 as HWAN, Petitioner failed, and thereafter actively concealed, the existence of CHWG, dba Choice Home Warranty, its Administrator, by repeatedly identifying in annual renewal applications "self" as the Administrator. (During the years 2011 to 2013 HWAN indicated "Self" in response to the Administrator question on the renewal application. During the years 2014 to 2015 the Administrator question response on the renewal application was left blank. In the 2016 renewal application the company submitted reverted back to its previous response on administrator as again stating "Self". See ROE 35, Exhibits Y, Z, AA, BB, CC and ROE 32, Exhibits 2, 4, 5, 7, 12.

[98] ROE 44, 24:10-11.

Aside from the fact that the "constructive notice"[99] argument is entirely based on a factually false premise, this theory as proposed by the Petitioner, implies that such "constructive notice" somehow would negate Petitioner's violations or the falsity of the entries[100]. This has no merit. Even if the Division could have had constructive notice that CHWG was Petitioner's Administrator, that still would not relieve Petitioner of the statutory burden to comply with NRS 686A.070. The Division's alleged "constructive notice," even if proven, would not nullify Petitioner's violations. *See Diamond v. Swick*, 117 Nev. 671, 28 P.3d 1087 (2001) (since the provisions of NRS 489.401(7) did not require fraudulent intent or reliance on false representations, "[t]hese violations are not nullified by the direct lender's knowledge that the applications contained false information.")

NRS 686A.070 provides in pertinent part:

> 1. A person subject to regulation under this Code ***shall not knowingly make or cause to be made any false entry of a material fact*** in any book, report or statement of any person or knowingly omit to make a true entry of any material fact pertaining to such person's business in any book, report or statement of such person.[101]

Id. (emphasis added). As in *Diamond*, in the present case, a violation occurs if a false entry is made with the knowledge of the falsity. Petitioner attempts to mislead the Court by implying that that a "knowingly false entry" is equivalent to "intent to deceive"[102] Intent to deceive is not a requirement under this statute.

Knowledge of the falsity of Petitioner's responses in the renewal applications cannot be disputed, as Petitioner's entire defense, reflected in the testimony of its president Mandalawi, employee Ramirez,

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[99] ROE 44 at 27:3-4; 15-20.

[100] Petitioner cites *U.S. ex rel. Durcholz v. FKW Inc*, 189 F.3d 542, 544-545 (7th Cir.1999) to support their stance: "holding that a false claims action may not be maintained where the government had prior knowledge of the allegedly false claim because "the government's knowledge effectively negates the fraud or falsity required." In *Durcholz*, the case cited is from the 7th Circuit and distinguishable from the present case in that the holding turns on the fact that the government not only knew of the falsity, but was found to have directed and ordered it. *Id.* at 545.

[101] *Id.* (Emphasis added).

[102] Petr's Opening Br. 27: 13-14).

and business partner Hakim, was based on its assertion that CHWG was Petitioner's administrator[103] and that it did not need to disclose the disciplinary actions against CHWG to the Division because it was a separate entity from HWAN dba Choice Home Warranty.[104] In five (5) renewal applications, when HWAN [Petitioner] was asked for the name of its Administrator, the response "self" was with the full knowledge that it was false. This evidence is substantial in that a reasonable person would accept it as adequate basis for the conclusion, and a far cry from the "clearly erroneous" standard under NRS 233B.135.3(e).[105]

Lastly, Petitioner challenges the sufficiency of evidence used to determine that Petitioner "made another false representation of material fact when it represented that it was using only the approved contract form from 2011."[106] The premise of Petitioner's challenge, relies on the presumption[107] that the Hearing Officer only considered testimony from Mr. Ghan and Division's Exhibit 37, which is a contract that covers a 2016-2017 term,[108] and as such it is a "legal and factual impossibility for Petitioner to falsely represent in 2015 that it was not using a form for a contract entered into almost a year later." Because Petitioner's challenge relies on a baseless presumption, Petitioner fails to meet its burden of proof required under NRS 233B.135.

An allegation that relies solely on a subjective presumption of what the Hearing Officer considered is simply insufficient to meet Petitioner's burden of proof under NRS 233B.135, especially in view of the fact that there was substantial evidence in the record which supported the Hearing Officer's finding, including Petitioner's exhibit HH,[109] along with corroborating testimony from the witnesses.[110] NRS 233B.135.3(e) requires that an administrative finding be "clearly erroneous in view of the reliable, probative and substantial evidence ***on the whole record,***" for Petitioner to succeed in its

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[103] ROE 44, 20:7-8.
[104] ROE 44, 19:12-18.
[105] ROE 44, 20:12-19.
[106] Petr's Opening Br. 27:22-24.
[107] Petr's Opening Br. 28:5, "Presumably, the Decision relies on . . . ."
[108] Petr's Opening Br. 28:5-12.
[109] ROE 35, Exhibit HH, *see* only a few examples of many unapproved contracts prior to 2015, including pages 16, 43, 86, 107, 128, of 1672 pages of unapproved contracts pursuant to witness testimony at ROE Hr'g Tr. 09/13/17 21:18 to 23:9.
[110] Hr'g Tr. 09/13/17, 21:18 to 23:9 testimony as to content of unapproved contracts.

argument. Petitioner cannot simply assert that the Hearing Officer based her decision on the review of a singular contract and that, therefore, makes it a "legal and factual impossibility," for Petitioner to falsify their 2015 application, when there are many contracts in the whole record, that do not conform with the Division's approved contract. The Hearing Officer's findings of Petitioner's violations of NRS 686A.070 are based on substantial evidence presented at the hearing and should be affirmed.

VI. THE HEARING OFFICER DID NOT ERR IN FINDING THAT PETITIONER VIOLATED NRS 690C.320

NRS 690C.320.2 provides that upon the Commissioner's request, '[a] provider shall . . . make available' records concerning any service contract issued, sold, or offered for sale. The Hearing Officer found one violation of NRS 690C.320[111] after finding that the Division sought information about Petitioner's claims and open contracts in Nevada, and that said information was not produced until after a subpoena was issued in the administrative hearing proceedings.[112] "The evidence shows that the Division made several requests of Respondent through Mandalawi, including to Mandalawi's email address of record."[113] The Hearing Officer found that the evidence showed, and that Mandalawi acknowledged, that he had communicated with the Division via email address of record.[114] She further found that the information relating to how many open contracts and claims Petitioner had in Nevada was requested to be provided in the renewal applications, but that Petitioner did not respond to those questions.[115]

Petitioner argues that [n]either the Division nor the Decision meet the requisite preponderance of the evidence standard" and that the finding must be set aside."[116] Petitioner bases this conclusion on its own general assertion that it had never received any emails with requests. Petitioner also states that,

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[111] NRS 690C.320.2 provides: "A provider shall, upon the request of the Commissioner, make available to the Commissioner for inspection any accounts, books and records concerning any service contract issued, sold or offered for sale by the provider which are reasonably necessary to enable the Commissioner to determine whether the provider is in compliance with the provisions of this chapter." *Id.*

[112] ROE 44, 21:23-27.

[113] ROE 44, 21:23-24, Also see examples in testimony ROE Hr'g Tr. 09/12/17 64:11 to 65:3, ROE Hr'g Tr. 0913/17 18:7-20, and examples in evidence ROE 35, Exhibit L, ROE 32, Exhibit 33.

[114] ROE 44, 21:23-26.

[115] ROE 44, 21:23; 22:4.

[116] Petr's Opening Br. 29:17-19.

as pertaining to the renewal applications, "[t]he purportedly problematic 'blanks' referenced in Mr. Jain's testimony were present in a number of applications approved by the Division;" however, this puzzling assertion only further substantiates and supports the Hearing Officer's finding of a violation of NRS 690C.320.2.[117]

A preponderance-of-the-evidence "amounts to whether the existence of the contested fact is found to be more probable than not." *Nassiri v. Chiropractic Physicians' Bd.*, 327 P.3d at 491, 130 Nev. Adv. Op. 27 (2014), citing *Brown v. State,* 107 Nev. 164, 166, 807 P.2d 1379, 1381 (1991). "The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3 . . . NRS 233B.135.2. The reviewing court will only overturn the findings of an administrative agency if they are not supported by substantial evidence. *City of North Las Vegas v. Warburton,* 127 Nev. at 686, 262 P.3d at 718. The substantial standard of review "contemplates deference to those [factual] determinations on review, asking only whether the facts found by the administrative factfinder are reasonably supported by sufficient, worthy evidence in the record." *Nassiri,* 327 P.3d 487, 490 (citations omitted). "The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." NRS 233B.135.3. The Hearing Officer's finding that Petitioner violated NRS 690C.320.2, was supported by the evidence discussed above. Additionally, although in reference to regular mail, Nevada law provides a rebuttable presumption that the "mailed document was received by the addressee." Nev. Rev. Stat. 47.250 (13).[118] Such presumption cannot be rebutted "simply by submitting an affidavit denying receipt of the document; rather, the presumption must be overcome by clear and convincing evidence." *In re Rose,* 564 B.R. 728, 732 (U.S Bankruptcy Court, D. Nevada) (2017).

Division witness testified and the evidence shows, "the Division made several requests of Respondent [Petitioner] through Mandalawi, including to Mandalawi's email address of record.

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[117] *See* Petr's Opening Br. 29: n. 124, referencing Exs. Y, BB, CC, and DD.

[118] Although Nevada courts have not addressed yet whether this presumption applies to electronic mail, courts in some other states have. "We agree with the district court that a presumption of delivery should apply to e-mails. A jury is permitted to infer that information sent via a reliable means—such as the postal service or a telegram—was received." 418 F.3d 910, 914 (8th Cir. 2005), citing *Kennell v. Gates,* 215 F.3d 825, 829 (8th Cir. 2000).

Respondent [Petitioner] acknowledges having communicated with the Division via email or telephone on other occasions, as evident through the testimony and exhibits."[119] However, even without the application of the presumption of receipt in this case, the Hearing Officer based her decision on substantial evidence in the form of renewal applications with blanks, in response to Division's request for information, witness testimony and documentary evidence, to find that the Division's requests for information had been received and not complied with, in violation of NRS 690C.320.2.

CONCLUSION

There was substantial probative and reliable evidence for the Hearing Officer to find violations not affected by error of law or arbitrary or capricious Respondent thus respectfully requests that the Final Order be affirmed in its entirety.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms that the preceding Respondent's Answering Brief, filed in case number 17 OC 00269 1B, does not contain the personal information of any person.

DATED this 19th day of March 2018.

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[119] ROE 44, 21:23-26.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 19th day of March 2018, I served a copy of *Respondent's Answering Brief* via email and by U.S., Mail, at Carson City, Nevada, postage prepaid to:

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

v.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY -DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

CASE NO.: 17 OC 00269 1B
DEPT NO.: I

CERTIFICATE OF SERVICE OF STIPULATION AND ORDER FOR INTERPLEADING OF FINES PENDING FINAL DECISION

I hereby certify that on the 27th day of March, 2018, I caused a true and correct copy of **STIPULATION AND ORDER FOR INTERPLEADING OF FINES PENDING FINAL DECISION**, filed with this Court on March 15, 2018, to be served via United States Mail, first class postage prepaid, at Las Vegas, Nevada, addressed to the following at the last known address of said individuals:

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner*, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY -DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent.*	CASE NO.: 17 OC 00269 1B DEPT NO.: I **REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW**

Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("Petitioner"), by and through its counsel of record Kirk B. Lenhard, Esq., Travis F. Chance, Esq., and Mackenzie Warren, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP, and Lori Grifa, Esq., of the law firm of Archer & Greiner, P.C., hereby submits its Reply Brief in Support of its Petition for Judicial Review (the "Reply").

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This Reply is made and based upon the attached Memorandum of Points and Authorities, the papers on file herein, the record of the proceedings below, and any oral argument this Court shall choose to consider.

DATED this 10th day of April, 2018.

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TABLE OF CONTENTS

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ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO ALLEGE PETITIONER'S USE OF AN UNLICENSED ADMINISTRATOR TO SELL ITS CONTRACTS AS A BASIS FOR A FINDING OF UNSUITABILITY

The Division's efforts to establish that it provided sufficient constitutional notice of the potential violations filed against Petitioner reveal that it either misunderstands or misconstrues the Petitioner's substantive position. Its lengthy arguments are irrelevant because they conflate two discrete issues. First, the Division argues a footnote in a pre-hearing motion filed by the Petitioner below indicates Petitioner had clear notice of the issue that "Choice Home Warranty Group (CHWG), dba Choice Home Warranty, was another entity, separate from HWAN dba Choice Home Warranty." Ans. Br. at 17:8-9. Then, the Division contends that it "continued to believe and argue that there was one entity at issue" but that the hearing officer "accepted Petitioner's defense and found that Petitioner and CHGW [*sic*] were indeed separate entities." *Id.* at 17:12-14. Lastly, the Division asserts that "[i]t was Petitioner who, prior to the administrative hearing, in an attempt to defend against the allegation of making false entries, asserted that an entirely separate entity was involved in" out-of-state proceedings. *Id.* at 18:14-16.

All of these points, however, entirely miss the mark. Nowhere in the Opening Brief does Petitioner argue that it had no notice that an issue at the hearing would be whether it and CHWG are one and the same. Rather, all of Petitioner's due process arguments before this Court focus on the issue of whether the Division ever alleged violations for Petitioner allowing CHWG to sell or offer for sale service contracts on its behalf without CHWG being licensed. Indeed, Petitioner's Opening Brief states the Amended Complaint clearly indicates that "the Division never intended to proceed against Petitioner on the basis that it had improperly allowed CHWG to sell service contracts on Petitioner's behalf without registration." Pet.'s Br. at 11:26-12:1. Petitioner could never have known by reading the Amended Complaint that it could be found to have conducted business in an unsuitable manner because it allowed CHWG to sell on its behalf – the Amended Complaint wholly fails to allege the same. In fact, the Division's conclusory pleading only alleges that Petitioner engaged in unsuitable business practices "as documented by Nevada complaints;

the Better Business Bureau, news and media outlets; and the findings of fact of the various Courts' actions described" elsewhere.[1]

Moreover, none of the cases cited by the Division aid its argument. The Division claims that due process is satisfied by administrative pleadings that "sufficiently apprise [the respondent] of the nature of the proceedings so that there is no unfair surprise." Ans. Br. at 16:9-11. In support of this far-reaching conclusion, the Division first cites to *Nev. State Appren. Council v. Joint Appren. Training Comm. for the Electrical Industry*, 94 Nev. 763, 765-766 587 P.2d 1315, 1317 (1978), in which the Supreme Court found that a letter from a terminated apprentice to the Nevada State Apprenticeship Council ("NSAC") styled as an "appeal" from an Apprenticeship Committee's termination was sufficient notice to satisfy due process. *Id.* The letter itself noted it was an "appeal" from the decision to terminate, giving the Committee sufficient notice to prepare a defense to that termination. *Id.* at 765, 587 P.2d at 1316.

That case, however, is clearly distinguishable from the instant matter, as the NSAC's own rules required only that "[t]he complaint of any person shall be stated with sufficient particularity to enable the respondent to prepare a defense thereto." *Id.* The applicable procedural statutes for the Division, NRS 679B.320(1) and NRS 679B.320(2), generally require that *all* matters to be considered at the hearing be specified in the complaint. As was fully noted in Petitioner's Opening Brief, however, there is absolutely **no** indication in the pleadings that an issue to be considered and decided at the hearing is the lack of licensure of CHW Group, Inc. ("CHWG") and Petitioner's allowing CHWG to sell or offer for sale service contracts on Petitioner's behalf. In connection with the violation of NRS 679B.125(2) for unsuitable business practices, the Amended Complaint referred summarily to "Nevada complaints; the Better Business Bureau, news and media outlets; and the findings of fact of the various Courts' actions described" therein to establish unsuitable practices.[2] It strains all credibility to claim that these allegations relate in any way to CHWG's lack of licensure and Petitioner's allowing CHWG to sell on its behalf.

[1] *See* Record Entry No. 30 at 6:20-22.
[2] *See id.*

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The remaining cases cited by the Division are likewise inapposite to its cause. In *State ex rel Kassabian v. State Bd. of Med. Exams.*, 68 Nev. 455, 459, 235 P.2d 327, 329 (1951),[3] a doctor was charged and criminally convicted of abortion. The Nevada State Medical Board initiated disciplinary proceedings for engaging in "unprofessional conduct," which was defined to include performing criminal abortions. *Id.* The charging document stated that the doctor had potentially violated said provision regarding professional conduct and set forth the facts of the alleged criminal act. *Id.* at 459, 232 P.2d at 329. After a hearing, the State Medical Board revoked Kassabian's license and Kassabian appealed. *Id.* at 461, 235 P.2d at 330. On appeal to the Nevada Supreme Court, Kassabian asserted that he was not provided sufficient notice of the charges against him and more specifically, the Board's theory of prosecution. *Id.* at 467, 235 P.2d at 332. Kassabian argued that the complaint charged him with unprofessional conduct but that the trial proceeded on the theory that Kassabian had been convicted of a felony. *Id.* The Supreme Court disagreed, noting that he was able to stick to his original plan of defense. *Id.* at 468, 235 P.2d at 333. Here, however, no amount of time or effort in preparing Petitioner's defense for the hearing could have prepared it for its reality: it would be penalized – to the tune of $1,194,450.00 – for allowing its administrator to sell service contracts on its behalf. Indeed, the first arguments on this issue ever raised by either party came in their briefing before this Court.

The Division also cites to *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharm.*, 124 Nev. 701, 713, 191 P.3d 1159, 1167 (2009) in support of its position that Petitioner received proper notice here. Yet, a close comparison of the circumstances of *Dutchess* illustrates the deficiencies in the Division's pleadings below. In *Dutchess*, the pharmaceutical licensee was found guilty of providing inaccurate drug pedigrees. 124 Nev. at 712, 191 P.3d at 1166. The licensee argued that the charging document failed to give it proper notice of such a charge because "the accusation failed to charge [the licensee] with providing inaccurate pedigrees." *Id.* However, as noted by the Supreme Court, the charging document specifically noted that the licensee "did not show on the pedigrees that the seller was [its] source" and that it therefore had violated Nevada law by

[3] *See* Ans. Br. at 18:3-11.

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"making and providing pedigrees to pharmaceutical wholesalers for sales of Lupron that made" a false representation. *Id.* at 713, 191 P.3d at 1167.

Here, again, the fact of CHWG's lack of licensure does not appear anywhere in the Amended Complaint in support of the Division's claim of unsuitability. This makes sense, of course, because as the Division exhaustively contends in its Answering Brief, it allegedly had no idea that Petitioner and CHWG were separate entities until after the administrative proceedings below were initiated.[4] *See* Ans. Br. at 23:4-5. If this is true, there is no possible way the charging documents could have given any notice that Petitioner may be violating Nevada law by allowing an unlicensed administrator to sell on its behalf. In short, the Division considers a conclusory allegation of violation of a particular statute, without more, sufficient notice. This Court must find that Petitioner failed to receive adequate notice of the full allegations and charges against it.

II. THE DIVISION'S INTERPRETATION OF NRS 690C.150 RELIES ON THE DEFINITION OF A TERM THAT DOES NOT APPEAR THEREIN

As an initial matter, the standard of review that the Division proffers to govern the issue of whether service contract administrators must be licensed to sell on behalf of licensed providers is in error. The Division contends that the "construction placed on a statute by the agency charged with the duty of administering it is entitled to deference." Ans. Br. at 19:9-11 (citing *State Indus. Ins. Sys. v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993)). However, this principle does not apply where the issue before the district court is, as here, a purely a legal one. *See Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). In other words, deference is required only to "findings of fact and conclusions of law" on those disputed facts. *Id.* (citing *Barnum v. Williams*, 84 Nev. 37, 42, 436 P.2d 219, 222 (1968)). Here, that CHWG is Petitioner's contract administrator and that CHWG is not a licensed provider per NRS 690C were not disputed below and are not disputed before this Court. Thus, this Court must determine whether Nevada law

[4] As noted in the Opening Brief, the Division's approval of Petitioner's contract in 2011 in which "Choice Home Warranty" was explicitly named as its administrator seriously undermines its position on this issue. *See* Pet.'s Op. Br. at 26:21-27:2.

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requires contract administrators to be licensed to sell on behalf of a licensed provider *de novo*, and without deference to the Division's interpretation, because it is a purely legal issue.[5]

Ignoring that the Division's own documents recognize that "[t]hird party administrators are not required to be registered,"[6] the Division substantively argues that Nevada law requires contract administrators to be licensed to sell on behalf of licensed providers based solely upon the definition of an administrator in NRS 690C. The Division asserts that NRS 690C.020 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," and that its reading of NRS 690C is "the only reasonable and harmonious interpretation" of the statute. Ans. Br. at 20:1-2; 13-14. Its focus on that definition is misplaced because the statute of importance here is actually NRS 690C.150 – the statute that **sets forth which entities must be licensed**. As the Division points out, this Court must strive to "interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results." *S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal citations and quotations omitted).

Yet, the Division's proffered interpretation completely ignores the clear language of NRS 690C.150, which unequivocally governs the behavior of a "provider," stating that 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." (emphasis added). The term "provider" is also defined by statute, at NRS 690C.070, as "a person who is obligated to a holder pursuant to the terms of a" service contract – no other person or role is contemplated.

Furthermore, and as noted by the Division itself, the definition of "administrator" is treated separately and includes the phrase "administering a service contract." Ans. Br. at 20:1-2 (citing NRS 690C.020). "Administer" is commonly understood to mean "[t]o provide or arrange

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[5] Further, although this Court defers to an "agency's interpretation of its governing statutes or regulations if the interpretation is within the [statute's or regulations language]," *Wynn Las Vegas, LLC v. Baldonado*, 129 Nev. 734, 738, 311 P.3d 1179, 1182 (2013) (internal citations and quotations omitted), the Division's interpretation of NRS 690C.150 as to which entities must be licensed is wholly outside that statute's language, as outlined fully in Petitioner's Opening Brief.

[6] *See* Ex. CC at 8, indicating "[t]hird party administrators are not required to be registered..."

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(something) officially as part of one's job." Black's Law Dictionary (10th ed. 2014). The plain meaning of that word, therefore, clearly allows for a service contract administrator to "provide" or "arrange" – i.e., sell – service contracts on behalf of a properly licensed provider. This explicit separate treatment is telling and neither the Division nor this Court may insert a word into a statute where it does not exist. *See Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993). Indeed, to adopt the Division's interpretation would preclude anyone other than the "provider" from participating in the service contract business, going so far as to preclude the "provider" from having any employees or contractors.

In fact, only the Petitioner's reading is both sensible and furthers the legislative intent of NRS 690C. As set forth in the Opening Brief, the purpose of the licensing requirement is to ensure a **provider's** security to pay for properly covered claims pursuant to service contracts under which that **provider** is an obligor. It was the Division's own Chief of Property and Casualty, Rajat Jain, who confirmed this intent to govern the **provider's** conduct.[7] Reading a requirement into NRS 690C.150 that administrators must also be licensed to sell service contracts for providers fails to further the Nevada Legislature's intent because administrators who are not also providers are not obligated to consumers pursuant to service contracts, no matter their licensing status. If the Legislature intended that administrators also be licensed to sell service contracts for providers, it clearly could have included them in NRS 690C.150. *See City of Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985) (holding that it "is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject"). Because it did not, the legislative intent is absolutely clear that only providers, as opposed to administrators, must be licensed pursuant to NRS 690C.150.

III. THE DIVISION'S OWN WITNESS TESTIFIED AS TO THE DIVISION'S KNOWLEDGE OF CHWG'S ACTIVITY ON BEHALF OF PETITIONER

The Division advances a fatally flawed argument, asserting that it is "well-established" that the principles of equitable estoppel do not apply to a state agency. *See* Ans. Br. at 22:2-7 (arguing that "the Commissioner cannot be prevented from exercising her duties imposed" by

[7] Hr'g Tr., Day 1 at 67:13-21 130:3-5.

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law). In support, the Division cites to *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 238, 181 P.3d 675, 679 (2008), which related to several closed hearings held by the tax commission and whether they violated Nevada's Open Meeting Law. *Chanos* is distinguishable from this matter, however, because it concerned whether "notions of estoppel" could prevent the attorney general from enforcing the Nevada Open Meeting Law where a deputy attorney general was present at each Commission hearing and failed to object to the closed sessions. 124 Nev. at 236, 181 P.3d at 678.

There can be no doubt that equitable estoppel applies to a state agency. *See Las Vegas Con. & Visitors Auth. v. Miller*, 124 Nev. 669, 699–700, 191 P.3d 1138, 1158 (2008) (noting that when a governmental agency makes factual representations to a person seeking information, and the person relies on those representations in pursuing a course of action, equitable relief may be appropriate). Here, estoppel applies because, as outlined in Petitioner's Opening Brief, the Division, by Mr. Jain, concluded that another entity, "'Choice Home Warranty', was not selling service contracts illegally, since Petitioner was licensed,"[8] but then sought in the proceeding below to reverse his conclusion in order to penalize Petitioner. Thus, the Division's first point on this issue must be rejected.

Second, the Division contends that estoppel cannot apply here because the Decision found that "[t]here is no evidence that the Division knew that CHW Group and Choice Home Warranty were the same" or that "the Division was aware that CHW Group was selling contracts in Nevada." Ans. Br. at 23:9-19. In this respect, the Decision ignores the existence of the approved contract document in which the two separate entities were identified,[9] and contradicts the actual testimony of Mr. Jain on this very issue, to wit: that, during the Division's investigation into Petitioner beginning in 2013, the Division knew that an entity by the name of "Choice Home Warranty" was selling contracts in Nevada;[10] Mr. Jain even noted that Choice Home Warranty appeared on Petitioner's 2011 approved service contract form, "le[ading] us to believe that Choice Home Warranty **and** HWAN were doing business, including selling of contracts under

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[8] *Id.* at 117:7-18.

[9] Additionally, evidence adduced at the hearing confirmed that Petitioner and CHWG have had separate addresses since inception. Hr'g Trs., Day 2 at 130:5-8; 19-25; Day 3 at 44:20-25; 45:9.

[10] Hr'g Tr., Day 1 at 115:16-18.

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Choice name, in the state of Nevada;"[11] He further testified that, per the very service contract approved by the Division, it was unclear to him whether it was Petitioner or Choice Home Warranty that submitted the form for approval.[12] These numerous references in Mr. Jain's testimony reveal that the Division had at least constructive if not actual knowledge of the existence of two separate entities.[13] Thus, the Division's knowledge and apparent approval of this fact can give rise to and warrants the protections provided by equitable estoppel.

IV. THE DIVISION'S INTERPRETATION OF NRS 690C.330 RESULTS IN A STATUTORY CONFLICT THAT MUST BE AVOIDED

In an effort to avoid the statutory cap on fines that may be imposed for acts of a similar nature, the Division proffers a self-serving interpretation of NRS 690C.330 that produces an absurd result. Specifically, the Division argues that NRS 690C.325 applies to its licensees, while NRS 690C.330 applies to non-licensees. Ans. Br. at 26:3-18. This interpretation, however, fails to consider the fact that NRS 690C.330 has broad applicability – including to violations of NRS 690C.325 – and clearly results in a conflict. The interpretation proffered by Petitioner, however, is a harmonious one that avoids any conflict between the two statutes. NRS 690C.330 imposes an aggregate cap of $10,000.00 upon any **person** who engages in acts of a "similar nature" that violate any provision of NRS 690C. NRS 690C.070 defines a provider to be a **person** holding a proper service contract license. Such a reading allows both statutes to be enforced together. The Division's claim that NRS 690C.330 applies to non-licensees lacks merit and is unsupported by the very terms of the statute itself.

Moreover, and as a practical matter, the Division's interpretation is absurd. By the Division's own logic, providers, who have completed the appropriate licensing and application process and have been vetted and deemed suitable by the Division, may be penalized in an

[11] *Id.* at 115:16-18.
[12] *Id.* at 122:18-20.
[13] The Division accuses Petitioner of "attempt[ing] to mislead the Court into believing the Division was aware of and approved the relationship between CHWG and Petitioner." Ans. Br. at 12:14-15. This accusation is baseless because a plain and reasonable reading of Mr. Jain's testimony on this issue supports the conclusion that the Division did consider "Choice Home Warranty" and Petitioner to be different entities. The Division relies upon the Decision itself to support this accusation, but the Decision's findings are not supported by the weight of the evidence.

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unlimited dollar amount, even for acts of a similar nature. At the same time, any unlicensed person, unvetted and without the Division's imprimatur of suitability, would enjoy statutory protection against an unlimited amount of fines for repeated misconduct.

Thus, the simplest principle of statutory construction must govern here; to wit: 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." *See Maxwell, supra,* 109 Nev. at 329, 849 P.2d at 269. This is because, as noted herein and in the Opening Brief, it is only Petitioner's interpretation of the statutory cap in NRS 690C.330 that results in a cohesive, harmonious interplay of that statute with NRS 690C.325. *See Williams v. Clark Cnty. Dist. Atty.*, 118 Nev. 473, 484, 50 P.3d 536, 543 (2002) (noting that only "[w]hen faced with inconsistent statutory provisions, [should the court] turn to the rules of construction").

For the same reasons, the Division's citation of cases concerning interpretation of conflicting statutes is irrelevant. The statutory scheme is clear that NRS 690C.330 was intended to apply not just to non-licensees but to *all* persons that are found to have violated NRS 690C in the "same or similar" manner. Thus, the imposition of $1,194,450.00 in fines against Petitioner for alleged unsuitable business practices was in excess of the Division's statutory authority and must be capped at $10,000.00 because they result from the "same or similar conduct."

V. IF PETITIONER CAN BE FOUND TO HAVE VIOLATED NRS 679B.125, IT MUST ENJOY THE STATUTE OF LIMITATIONS IN NRS 679B.185 AS WELL

The Division improperly attempts to "cherry pick" from NRS 679B, claiming that NRS 679B.185 does not apply to Petitioner because it is a "licensee" and there is no statute of limitations applicable to a service contract provider conducting business in an unsuitable manner. Ans. Br. at 27:6-11. The Division contends that NRS 679B.185 only applies to persons engaged in the "unauthorized transaction of insurance." *Id.* at 26:11-12. In so arguing, however, the Division attempts to have it both ways – a legal and factual impossibility.

First, NRS 679B.125 as well as NRS 679B.185 both relate to the "business of insurance" by their own terms. In addition, each are contained in the same section of Chapter 679B – the "General Provisions" of that Chapter. This structure indicates an intent to apply the statute of

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limitations contained in NRS 679B.185 to any potential violations of NRS 679B.125. Second, NRS 690C.120(1) applies the following provisions to service contract providers: NRS 679B.020-152, inclusive; NRS 679B.159-300, inclusive; NRS 679B.310-370, inclusive; and NRS679B.600-690, inclusive. Thus, the Division's contention that NRS 679B.185 cannot apply to Petitioner because it is a licensee, rather than an insurer, undermines the Division's theory of prosecution. If true, Petitioner could not possibly be found to have violated NRS 679B.125, since that statute relates by its very terms to the conduct of the business of insurance. Either Petitioner's service contract business is the business of insurance under Chapter 679B or it is not. If it is, Petitioner must enjoy the statute of limitations contained within NRS 679B.185 and the imposition of fines for CHWG's selling service contracts on its behalf prior to May 9, 2012 is in excess of the Division's statutory authority. If Petitioner is not engaged in the business of insurance, CHWG's sale of service contracts on behalf of Petitioner cannot violate NRS 679B.125 as a matter of law and the decision below must be vacated in its entirety.

VI. PETITIONER IS AGGRIEVED BY THE FINDING THAT ITS CERTIFICATE EXPIRED AS A MATTER OF LAW AS OF NOVEMBER 18, 2016

Petitioner also challenges the finding by the hearing officer below that its certificate of registration expired by operation of law as of November 18, 2016. Op. Br. at 24-26. The Division improperly characterizes Petitioner's argument on this point as a "ploy," and relying upon irrelevant law on the concept of *dicta* in appellate decisions, it claims that the issue is now moot. *Dicta* does not apply here; nor is the issue moot.

The Division first claims that the Decision's findings as to the November 18, 2016 renewal application were merely "*dicta*" because they were unnecessary to the Decision's findings. The principle of *dicta*, however, applies to statements made in **appellate** cases. *Cf. St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009). Indeed, the importance of whether a statement is "*dictum*" or not is whether it is controlling in future cases, a concept that applies to appellate decisions that have a precedential effect. *See id.* The Decision is clearly not of an appellate nature and is not controlling in future cases. Thus, no statements therein can be considered "*dicta*."

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In addition, even if the principle of *dicta* could apply to the Decision, the Division is simply incorrect that Petitioner is not aggrieved by the finding that its certificate expired as a matter of law as of November 18, 2016. The Division contends that the Decision actually found in Petitioner's favor on this issue because the Division was prohibited from taking action against Petitioner for operating without a certificate for 45 days to allow Petitioner to reapply for its certificate's renewal. Ans. Br. at 30:13-22. And, according to the Division, this makes the issue before the Court moot because Petitioner was given the opportunity to submit another renewal application, which was subsequently processed. *Id.* at 31:11-25.

However, this presupposes that the hearing officer's finding that NRS 690C.160 was correct and ignores the reality of the effect of that finding upon Petitioner. As was set forth at length in its Opening Brief, Petitioner's certificate of registration has yet to expire, pursuant to NRS 233B.127(2). Petitioner was aggrieved by the erroneous finding that it expired because of the purported remedy itself. Namely, Petitioner was required to resubmit a brand new renewal application that was processed and that has now been set for yet another contested hearing. The proper remedy was to have Petitioner's November 2016 renewal application considered on the merits and either approved or denied after a hearing; this never happened.

It is true that the principle of standing requires that this Court be able to provide Petitioner with a remedy to redress an alleged harm in connection with the November 2016 renewal. *See Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988) (noting that redressability of a harm is a requisite component of standing). A finding from this Court in Petitioner's favor as to the November 2016 renewal application would redress the harm noted above, in that it would obviate the current and continued contested hearing on the renewal application submitted pursuant to the Decision. As a result, the processing of the renewal application submitted pursuant to the Decision has not rendered the instant issue moot. A live controversy exists between the Petitioner and the Division with regard to the same and this Court should find in Petitioner's favor on this issue.

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VII. THE DECISION CITES NO EVIDENCE OF A FRAUDULENT INTENT

Neither the Division's record, nor the Decision below, are predicated on sufficient evidence to support a finding that Petitioner made six knowing misrepresentations on prior renewal applications. The Division's argument in this regard takes a far too narrow approach, focusing solely upon a single and repeated oversight resulting in violations of NRS 686A.070. Ans. Br. at 32-34. Specifically, the Division sets forth that the evidence at the hearing made clear that Petitioner reported that it self-administered its contracts at least five times, while in reality it was using CHWG as its administrator. *Id.* at 33:2-15. It also claims that the evidence at the hearing showed that Petitioner used an unapproved contract form at least once. *Id.* at 33:15-34:4.

NRS 686A.070(1) states, in relevant part, that a service contract provider "shall not knowingly make or cause to be made any false entry of a material fact in any book, report or statement." Clearly, the elements of a violation of this provision are the following: (1) a false entry; (2) of material fact; (3) made knowingly; (3) in a statement. However, even if the facts cited by the Division as set forth above are supported by substantial evidence, they relate to only some, but not all, of the foregoing elements. Specifically, they only show that a false statement of material fact may have been made, but this is not the end of the inquiry. Purposely or not, the Division wholly ignores the fact that NRS 686A.070 specifically requires the misrepresentation to be made "knowingly." The Division accuses Petitioner of "attempt[ing] to mislead the Court by implying that that [*sic*] a "knowingly false entry" is equivalent to "intent to deceive" and that such an intent "is not a requirement under this statute." Ans. Br. at 35:17-19. However, it is the Division that fails to inform this Court that its contention is belied by the very case it cites.

In citing *Diamond v. Swick*, 117 Nev. 671, 676, 28 P.3d 1087, 1090 (2001) , the Division relies on a case concerning a different statute, NRS 489.401(7). That statute, unlike NRS 686A.070(1), contains **no** *mens rea* requirement whatsoever. In fact, the *Diamond* Court held that "[t]he Legislature's omission of the terms "misrepresentation" and "fraud" from the text of NRS 489.401(7) creates the presumption that the Legislature did not intend to require proof of fraudulent intent or detrimental reliance as a prerequisite to disciplinary action." *Id.* at 676-77, 28 P.3d at 1090. Here, however, just the opposite is true. NRS 686A.070 does not simply call for a

false representation – it calls for a "knowingly" false representation – a solely false entry is insufficient. Likewise, the inclusion of a "knowing" element indicates the legislature's intent to require proof of fraudulent intent, contrary to the Division's contention that "[i]ntent to deceive is not a requirement under this statute." Ans. Br. at 35:18-19. Thus, *Diamond* actually indicates that an intent to deceive ***is*** required for a violation of NRS 686A.070. As argued in Petitioner's Opening Brief, however, no evidence of any such intent was either adduced at the hearing nor relied upon by the Decision as to any of the alleged six false entries.

Still, the Division contends this "knowingly" element is established by a statement in the Decision that "[a]ccording to the testimony of Mandalawi, Hakim, and Ramirez, Choice Home Warranty (which is CHW Group) is the administrator for HWAN."[14] But again, this only relates to one element – the falsity of the entry. The Decision makes no citations to the record testimony to support a finding of any fraudulent intent which, as set forth above, is a requisite component of a violation of NRS 686A.070. The Division relies upon Petitioner's defense that "it did not need to disclose the disciplinary actions against CHWG to the Division because it was a separate entity." Ans. Br. at 36:2-3. Yet again, however, the fact that Petitioner and CHWG are not the same entity, standing alone, does not substantiate what the Division contends – five knowingly false representations as to Petitioner's administrator at the time that they were made.

It should be emphasized that the lack of any fraudulent intent here is further confirmed by the Decision's other findings in favor of Petitioner. In the proceedings below, Petitioner established that the renewal forms at issue are fatally ambiguous in numerous respects.[15] Accordingly, the Petitioner was found ***not*** to have made a false representation for failing to disclose the existence of civil cases against Victor Mandalawi as an officer of Petitioner because the relevant question asked about such information for *new* officers due to an ambiguous internal cross-reference.[16] Similarly, Petitioner was found ***not*** to have made false representations for failing to disclose disciplinary proceedings in other states against CHWG because the relevant

[14] Record Entry No. 47 at 20:7-8.
[15] *See* Record Entry No. 45 at 11-13.
[16] *See id.* at 19:2-11.

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question did not ask about such violations against Petitioner's administrator.[17] The Decision found against the Division on these points, ruling that all of the foregoing questions were answered truthfully.[18] The Division's theory on this issue appears to be that Petitioner intended to conceal its administrator to avoid the Division's scrutiny. It makes little sense to think that Petitioner would truthfully answer only some, but not all, of the questions on the same renewal applications. On the whole, the Division failed to show that Petitioner had any fraudulent intent in connection with its administrator.[19] Indeed, negligence is far more likely.

Lastly, the Division also argues that substantial evidence supports the finding that Petitioner made a false entry of material fact, in violation of NRS 686A.070, as to the form of service contracts it had in use. The Division accuses Petitioner of relying upon an "assumption" of what the hearing officer considered in finding a false entry related to the form of Petitioner's service contracts. Ans. Br. at 36:8-17. In fact, it is the Division that attempts to expand the hearing officer's explicit factual finding by arguing that "there was substantial evidence in the record which supported the Hearing Officer's finding" and that "there are many contracts in the whole record[] that do not conform" to the approved contract. *Id.* at 36:36:18-19; 3737:3-4.

The Decision made an express finding in connection with the Petitioner's use of an unapproved contract, to wit: "On at least **one** occasion, there is evidence that HWAN used a service contract that, in fact, was not approved by the Division,"[20] and *one* violation of NRS 686A.070 was found for failing to disclose this single use "in application year 2015."[21] The only specific unapproved contract noted by the Decision was the Division's Exhibit 37.[22] Thus, the Decision clearly relied upon that record evidence to impose a fine for *one* false representation in connection with the use of that contract. That contract clearly covers the term from July 27, 2016

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[17] *See id.* at 19:12-27.
[18] *See id.* at 19:2-11.
[19] While the hearing officer asked *how* Mr. Mandalawi answered these questions, she did not inquire as to *why* no administrator changes were noted or *why* the administrator was noted as "self." *See* Hr'g Tr., Day 3 at 46:15-47:4. And notably, the Decision does not rely upon any record testimony related to *why* the pertinent questions were answered how they were for this finding. *See id.* at 20:1-19.
[20] Record Entry. No. 47 at 20:21-22 (emphasis added).
[21] *Id.* at 20:24, 26-27.
[22] *Id.* at 14:20.

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to September 27, 2017.[23] Because Petitioner could not have made a false representation as to the use of that contract when submitting its 2015 renewal application, the Decision's finding is unsupported by the very evidence upon which it relies and is therefore clearly erroneous.

VIII. THE DIVISION FAILED TO MEET ITS BURDEN OF PROOF AS TO PETITIONER'S RECEIPT OF A REQUEST FOR INFORMATION

Ironically, the Division opposes Petitioner's argument as to the non-receipt of any request for information by claiming such argument is based "on its own general assertion,"[24] even though the hearing record created by the Division is replete its own general assertions pertaining to this allegation. No Division witness below was able to substantiate that any "request" was received by Petitioner, as Petitioner denied receiving the February 1, 2017 e-mail – the only request for information supporting the Division's statutory allegation. Other than the vaguest of testimony offered by Division witnesses as to "other requests for information," there was not a single telephone receipt, e-mail, memorandum or file note proffered to indicate any such requests were ever received. On this record, the Division simply did not meet the "substantial evidence" standard to support this charge and the Decision below in this regard should not be upheld. *See City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011).

IX. CONCLUSION

Based upon the arguments set forth hereinabove and Petitioner's Opening Brief, Petitioner respectfully requests this Court enter judgment in its favor, as requested in the Opening Brief.

DATED this 10th day of April, 2018.

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[23] *See* Ex. 37 at 1.
[24] Ans. Br. 37:20-21

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2018, I served a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW** via United States Mail, first class postage prepaid, at Las Vegas, Nevada, addressed to the following at the last known address of said individuals:

Richard Yien, Deputy Attorney General
State of Nevada
Office of the Attorney General
100 N. Carson St.
Carson City, Nevada 89701
RYien@ag.nv.gov

Attorneys for Respondent State of Nevada, Department Of Business And Industry -Division Of Insurance

an employee of Brownstein Hyatt Farber Schreck, LLP

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Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner*, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY -DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent.*	CASE NO.: 17 OC 00269 1B DEPT NO.: I **MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE**

Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("HWAN"), by and through its counsel of record Kirk B. Lenhard, Esq., Travis F. Chance, Esq., and Mackenzie Warren, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP, and Lori Grifa, Esq., of the law firm of Archer & Greiner, P.C., hereby submits this Motion for Leave to Present Additional Evidence (the "Motion") pursuant to NRS 233B.131(2).

//

This Motion is made and based upon the attached Memorandum of Points and Authorities, the papers on file herein, the record of the proceedings below, and any oral argument this Court shall choose to consider.

DATED this 18th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Division's Answering Brief presents an incomplete picture of the facts of which it had specific knowledge in the years leading up to the September 12-14, 2017 hearing below (the "Hearing"). Specifically, the Division claims that it did not know that HWAN and CHW Group, Inc. ("CHWG") were two separate entities until that Hearing, a position that is directly contradicted by e-mails involving Division personnel that both parties agreed to exclude from the record at the Hearing on the basis that they may contain attorney-client privileged communications. HWAN had no reason to know that such a reasonable concession should not have been made then because it never had any notice that a primary issue would be the Division's knowledge of the separateness of those two entities (or lack thereof). The attorney-client privilege is designed to act as a shield and it is impermissible for the Division to use it as a sword. Accordingly, this Court should order the additional evidence be taken before the Division, at least *in camera*, because the e-mails are directly material and good reasons exist for their failure to be presented during the Hearing below.

II. STATEMENT OF MATERIAL FACTS

Before the parties convened in Carson City for the Hearing, HWAN served a subpoena *duces tecum* upon the Division (the "Subpoena"). *See* Record Entry No. 25.4. The Subpoena made specific documentary requests for production from the Division, including:

1. Any documents and/or communications, written, recorded or electronic, other than those protected by the attorney-client privilege, in the possession of the Division relating to the decision to file the Complaint and Application for Order to Show Cause;
2. Any documents and/or communications, written, recorded or electronic, other than those protected by the attorney-client privilege, in the possession of the Division relating to the allegations in the Complaint and Application for Order

to Show Cause, including documents related to the underlying investigation and charging decisions made in this matter;

3. Any documents and/or communications, written, recorded or electronic, other than those protected by the attorney-client privilege, in the possession of the Division proving service and receipt of the Division's request relating to the allegations in the Complaint and Application for Order to Show Cause, including documents related to the underlying investigation and charging decisions made in this matter.

See id. at 1-2. The Division produced responsive documents to the Subpoena on August 29, 2017.

In addition to numerous other documents, the Division produced several e-mails pursuant to the Subpoena. HWAN marked the e-mails as potential exhibits to be used at the Hearing – specifically, its proposed Exhibits II through QQ. However, at the Hearing, counsel for the Division argued that some of these e-mails contained privileged information. *See* Hr'g Tr., Day 3 at 64-66. Although HWAN initially intended to admit those exhibits, counsel for HWAN agreed to withdraw the proffer of Exhibits KK through QQ, all of which contain e-mails involving Division personnel, some of which include Division counsel, and some of which may have been privileged.[1] *See* Hr'g Tr., Day 3 at 107-108. These e-mails range in dates from February 2010 to November 2011.

Of course, during preparation for the Hearing, counsel for HWAN became familiar with the contents of the e-mails because they were intended to be used as Hearing exhibits. Based upon HWAN's knowledge and familiarity with the e-mails' contents, at least three of these withdrawn exhibits directly indicate that the Division knew of HWAN and CHWG as two separate corporate entities and that CHWG utilized the fictitious name of "Choice Home Warranty" as early as July

[1] It should be noted that the issue of whether these proposed exhibits were actually privileged and, if so, if that privilege had been waived was not an issue that was determined below because, as is outlined herein, HWAN did not know the contents of these e-mails would be at issue until receipt of the Decision itself.

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of 2010. In the Division's Answering Brief, however, it makes numerous arguments and assertions contrary to this evidence. *See* Ans. Br. at 11:11-12 (the Division investigated HWAN "under the assumption that Petitioner (HWAN) and Choice Home Warranty were one in the same); 12:14-15 ("Petitioner's statement of facts attempts to mislead the Court into believing the Division was aware of and approved the relationship between CHWG and Petitioner"); 12:16-17 ("[I]t is clear that the Division considered Petitioner (HWAN) and Choice Home Warranty to be one-and-the same entity."); 12:14-13:9 (quoting the Decision on this issue); 17:12 ("The Division continued to believe and argue that there was one entity at issue"); 22:16-17 ("Until the hearing, the Division believed HWAN dba Choice Home Warranty and CHWG dba Choice Home Warranty, were one and the same"); 23:4-5 ("The first time that the Division learned that a separate entity, CHWG, acted as Administrator for the Petitioner, was after the administrative proceedings began..."); 34:12-13 ("...the Division was not aware of CHWG, dba Choice Home Warranty, or that it was a separate entity from HWAN dba Choice Home Warranty's Administrator"); 34:17-18 ("There is no evidence that the Division knew that Choice Home warranty [sic] was CHW Group"). As this Court is well aware from the underlying briefing in this litigation, the issue of whether HWAN and CHWG were separate entities is a material question central to the merits of this case.

On April 11, 2018, counsel for HWAN wrote to counsel for the Division to raise the foregoing issue and requested that the Division take corrective action with regard to its briefing on file herein. A true and correct copy of this correspondence is attached hereto as **Exhibit 1.** That same day, Division counsel asked for clarification of which particular proposed exhibits HWAN felt showed the Division's knowledge of two separate entities, which was provided by HWAN's counsel. A true and correct copy of this e-mail exchange is attached hereto as **Exhibit 2.** On April 13, 2018, Division counsel provided a formal but conclusory response that they "strongly disagree with [HWAN's] allegations." A true and correct copy of this correspondence is attached hereto as **Exhibit 3.** Because the parties were unable to resolve this issue outside of this Court's intervention, the instant Motion is necessary.

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Overall, HWAN contends that the Hearing Officer's Findings of Fact and Conclusions of Law (the "Decision") were issued without the benefit of all relevant evidence because the foregoing e-mails were not admitted at the Hearing. The evidence is directly material to numerous issues before this Court on review of the Division's findings below. There is good cause for not having presented the e-mails because, as has been fully briefed before this Court, HWAN had no reason to know that the Division's knowledge that HWAN and CHWG were different entities, or of the existence of CHWG in general, would be primary factual issues underlying the Decision's findings prior to the issuance of the Decision itself. HWAN likewise could not have predicted that the Division's Answering Brief would rely upon this purported lack of knowledge of two separate entities. Thus, HWAN respectfully requests that this Court order additional evidence be taken before the Division – specifically, HWAN's proposed Exhibits KK, LL, and MM.

III. ARGUMENT

Under NRS 233B.131(2), when a party to an administrative proceeding seeks to present additional evidence that was not presented to the agency during the administrative hearing, the district court may order that such evidence be taken as follows:

> [i]f, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is ***material*** and that there were ***good reasons for failure to present*** it in the proceeding before the agency.

(emphasis added.)

Thus, the inquiry to determine whether the record should be supplemented is two-pronged: (1) whether the evidence sought to be added is "material" and (2) whether "good reasons exist for the failure to present the evidence to the agency." *See Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 53, 200 P.3d 514, 518 (2009). As an initial matter, the additional evidence HWAN seeks to be presented to the Division below is certainly material to the issues identified by the Decision. With regard to HWAN's purported unsuitable business practices for allowing CHWG to sell on its behalf, the Decision found the Division was not equitably estopped from punishing such conduct because "[t]here is no evidence that the Division knew that [CHWG] and Choice Home Warranty were the same" or that "the Division was aware that [CHWG] was selling

contracts in Nevada." Record Entry No. 47 at 23:21-24. Additionally, the Decision found that because HWAN failed to show the Division knew of the separateness of HWAN and CHWG, the Division's approval of the service contract form noting that HWAN's administrator was "Choice Home Warranty" did not demonstrate the Division's knowledge of the purported falsity of HWAN's "self" administration of its service contracts. *Id.* at 24:6-15. Indeed, the Answering Brief is replete with references to the Division's alleged lack of knowledge of the existence of two separate entities, CHWG and HWAN. *See* Ans. Br. 11:11-12; 12:14-17; 17:12; 22:16-17; 23:4-5; 34:12-1; 34:17-18.

As noted above, however, the e-mails in proposed Exhibits KK, LL, and MM reveal that the Division knew as early as 2010 that HWAN and CHWG were different entities – despite the Division's representations in its Answering Brief that it had no such knowledge. They further indicate that the Division knew that CHWG also utilized the fictitious name "Choice Home Warranty." Even if the e-mails were privileged when exchanged, the existence of that privilege does not affect their materiality – they are clearly material and should be considered by the Division below.

Next, "good reasons" exist for the failure to present the e-mails at the Hearing. First, the e-mails were claimed to be covered by the attorney-client privilege and a facial reading indicated that Division counsel was included in many of them. Second, HWAN had no way of knowing that the Division's knowledge of the existence of two separate legal entities and that CHWG utilized the name "Choice Home Warranty" would be the basis for disciplinary action against it. It is true that presenting additional evidence to the administrative agency is generally inappropriate when a party waits to submit evidence until learning how a hearing examiner will rule or pursues one strategy at trial and then, after an adverse result, seeks to pursue another strategy with additional evidence. *Garcia*, 125 Nev. at 55, 200 P.3d at 519.

Here, however, HWAN's request that the record be supplemented is not the result of sour grapes over the findings of the Decision – it is a legitimate request to supplement the record. HWAN had no notice whatsoever that the issue of HWAN and CHWG's separateness would be central to the Decision's findings because the pleadings on file below are constitutionally

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defective, an issue more fully argued in the parties' briefing before this Court. Nor could HWAN have predicted that the Division's Answering Brief would rely so extensively on this finding, as noted hereinabove. Supplementation of the administrative record is further warranted here because the Division is not permitted to use the attorney-client privilege as both a shield and a sword. At a minimum, an in-camera review by the administrative agency is appropriate to ensure that the Decision is supported by a complete record.

V. CONCLUSION

For the foregoing reasons, HWAN respectfully requests that the Court grant this Motion and allow it to supplement the record before the Division below to allow consideration of the proposed exhibits noted herein.

DATED this 18th day of April, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2018, I served a true and correct copy of the foregoing **MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE** via United States Mail, first class postage prepaid, at Las Vegas, Nevada, addressed to the following at the last known address of said individuals:

Richard Yien, Deputy Attorney General
State of Nevada
Office of the Attorney General
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Carson City, Nevada 89701
RYien@ag.nv.gov

Attorneys for Respondent State of Nevada, Department Of Business And Industry -Division Of Insurance

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INDEX OF EXHIBITS

EXHIBIT 1: April 11, 2018 Correspondence from HWAN Counsel to DOI

EXHIBIT 2: Email from DOI asking for Clarification re April 11, 2018 Correspondence

EXHIBIT 3: April 13, 2018 Correspondence from DOI to HWAN Counsel

EXHIBIT 1

EXHIBIT 1

Brownstein Hyatt
Farber Schreck

April 11, 2018

Kirk B. Lenhard
Attorney at Law
702.464.7045 tel
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klenhard@bhfs.com

SENT VIA E-MAIL AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Joanna Grigoriev, Senior Deputy Attorney General
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JGrigoriev@ag.nv.gov

Richard Yien, Deputy Attorney General
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100 N. Carson St.
Carson City, Nevada 89701
RYien@ag.nv.gov

RE: **Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty v. State of Nevada, Division of Insurance**
First Judicial District Court, Case No. 17OC00269-1B
Client-Matter No. 019812.0001

Dear Joanna and Richard:

Please accept this letter as a formal effort to bring to your attention what we believe to be certain inaccurate representations made in your Answering Brief on file in the above-referenced matter. Specifically, your Answering Brief makes numerous references to the Division's lack of knowledge of the existence of two separate entities, Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("HWAN") and CHW Group, Inc./Choice Home Warranty ("CHWG") and that "[u]ntil the hearing, the Division believed that Petitioner (HWAN) and CHWG were one and the same." Ans. Br. at 11:9-10.

The remainder of your Answering Brief is replete with similar references and arguments. *See id.* at 11:11-12 (the Division investigated HWAN "under the assumption that Petitioner (HWAN) and Choice Home Warranty were one in the same); 12:14-15 ("Petitioner's statement of facts attempts to mislead the Court into believing the Division was aware of and approved the relationship between CHWG and Petitioner"); 12:16-17 ("[I]t is clear that the Division considered Petitioner (HWAN) and Choice Home Warranty to be one-and-the same entity."); 12:14-13:9 (quoting the Decision on this issue); 17:12 ("The Division continued to believe and argue that there was one entity at issue"); 22:16-17 ("Until the hearing, the Division believed HWAN dba Choice Home Warranty and CHWG dba Choice Home Warranty, were one and the same"); 23:4-5 ("The first time that the Division learned that a separate entity, CHWG, acted as Administrator for the Petitioner, was after the administrative proceedings began..."); 34:12-13 ("...the Division was not aware of CHWG, dba Choice Home Warranty, or that it was a separate entity from HWAN dba Choice Home Warranty's Administrator"); 34:17-18 ("There is no evidence that the Division knew that Choice Home warranty [*sic*] was CHW Group").

As I am sure you are aware, an attorney "shall not...defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Nev. R. Prof. Conduct 3.1. Additionally, a lawyer "shall not knowingly...[m]ake a false statement of fact or law to a tribunal" or "[o]ffer evidence that the lawyer knows to be false." Nev. R. Prof. Conduct 3.3(a)(1), (3). Moreover, NRCP 11(b)(3)-(4) act as certifications of lawyers presenting a paper to the court that "the allegations and other factual contentions have evidentiary support" and that "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

As you will recall, HWAN served a subpoena *duces tecum* upon the Division in the underlying proceeding for documents related to the investigation and charging decisions made in that matter, including any communications related to the same. As you will also recall, numerous e-mails were produced by you pursuant to that subpoena and were marked as potential hearing exhibits by HWAN – specifically, Potential Exhibits II through QQ. At the hearing below, you raised the issue that some of those e-mails were made between Division personnel and the Division's counsel and on that basis contained privileged information. Although we initially intended to admit those exhibits, we agreed to withdraw our proffer of exhibits KK through QQ, acknowledging that many of them include Division counsel. *See* Hr'g Tr., Day 3 at 107. Of course, in our preparation for the underlying hearing we became fully familiar with the contents of all potential hearing exhibits, including those that were ultimately withdrawn. We believe that one or more of those withdrawn exhibits directly contradicts the position that the Division lacked any knowledge that HWAN and CHWG were separate entities and, in fact, show that the Division had such knowledge going back many years.

I assume that you also know of the contents of HWAN's Exhibits KK through QQ and the fact that they show the Division's knowledge of the two entities at issue, since you reviewed them in anticipation of the hearing and your objection based upon privilege. Your knowledge of those contents is contrary to the position you have taken in your Answering Brief, as set forth above. Even assuming the attorney-client privilege remains intact notwithstanding your voluntary production of the foregoing documents, this does not permit you to allege, assert, or controvert the issue of whether your client knew that HWAN and CHWG were separate entities in a manner that is directly contradictory to the contents of those Exhibits. For similar reasons, quoting the Decision's language on this issue is also improper before the Court. In other words, there is a difference between maintaining the privileged nature of those documents and advocating before the Court (and the tribunal below) in a manner that is irreconcilable and contrary to their contents.

Although the Answering Brief's representations noted herein may have been inadvertent, we nevertheless request that you honor the duties imposed by the ethical rules and the rules of the court by bringing those representations to the Court's attention and correcting the same. *See* Nev. Rule of Prof. Conduct 3.3(a)(3). We intend to engage in motion practice with the Court if appropriate remedial measures are not taken to correct the issues identified herein no later than the close of business on **Monday, April 16, 2018.** Should you have any questions or wish to discuss this letter further, please do not hesitate to contact me.

Sincerely,

Kirk B. Lenhard

KBL:tfc

cc: Lori Grifa, Esq. (lgrifa@archerlaw.com)
16696645

EXHIBIT 2

EXHIBIT 2

Kay, Paula

From:	Chance, Travis F.
Sent:	Wednesday, April 11, 2018 4:35 PM
To:	'Richard P. Yien'; Lenhard, Kirk B.
Cc:	'lgrifa@archerlaw.com'; 'Joanna N. Grigoriev'
Subject:	RE: HWAN dba CHW v State of Nevada, DOI, Case No. 17OC00269-1B

Richard,

Exhibit KK directly contradicts the position that there was no knowledge of two separate entities and I believe it also references "Choice Home Warranty" as HWAN's administrator.

Additionally, Exhibits LL and MM reference "CHW Group, Inc. dba Choice Home Warranty."

Travis F. Chance
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tchance@bhfs.com

From: Richard P. Yien [mailto:RYien@ag.nv.gov]
Sent: Wednesday, April 11, 2018 4:08 PM
To: Lenhard, Kirk B.
Cc: Chance, Travis F.; lgrifa@archerlaw.com; Joanna N. Grigoriev
Subject: RE: HWAN dba CHW v State of Nevada, DOI, Case No. 17OC00269-1B

Kirk,

Can you specify where in exhibits KK through QQ you assert directly contradicts the Division's testimony in order for us to consider how to correct the issues you identify per your request?

Thank you,
Richard

Richard Yien, Deputy Attorney General
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From: Kay, Paula <PKay@BHFS.com>
Sent: Wednesday, April 11, 2018 3:56 PM
To: Joanna N. Grigoriev <JGrigoriev@ag.nv.gov>; Richard P. Yien <RYien@ag.nv.gov>
Cc: Lenhard, Kirk B. <KLenhard@BHFS.com>; Chance, Travis F. <tchance@bhfs.com>; lgrifa@archerlaw.com
Subject: HWAN dba CHW v State of Nevada, DOI, Case No. 17OC00269-1B

Please find attached correspondence from Kirk Lenhard in the above-referenced matter.

Thank you,

Paula M. Kay
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Brownstein Hyatt Farber Schreck: celebrating 50 years of leadership at the intersection of business, law and politics.

EXHIBIT 3

EXHIBIT 3

ADAM PAUL LAXALT
Attorney General

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J. BRIN GIBSON
First Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

KETAN D. BHIRUD
General Counsel

April 13, 2018

Via Electronic Mail

Kirk Lenhard
klenhard@bhfs.com

Re: 17 OC 00269 1B

Mr. Lenhard:

We are in receipt of your letter dated April 11, 2018 alleging violations of NRPC 3.1 and NRCP 11(b)(3)-(4). We take these allegations very seriously and believe we hold ourselves out to higher standards of integrity, not only as attorneys, but also as public servants. We have reviewed the exhibits and the record, including witness testimony. We have gone through each of the instances you point out in the Division's Answering Brief that you allege to be misrepresentations or unsupported. We strongly disagree with your allegations.

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Attorneys for Respondent
Nevada Division of Insurance

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, Petitioner, vs. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INSURANCE, a Nevada administrative agency, Respondents.	**CASE No.: 17 OC 00269 1B** DEPT No.: 1

OPPOSITION TO MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE

The STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INSURANCE ("Respondent"), by and through its counsel, Nevada Attorney General ADAM PAUL LAXALT, Senior Deputy Attorney General JOANNA GRIGORIEV, and Deputy Attorney General RICHARD YIEN, hereby files this Opposition to Petitioner's Motion for Leave to Present Additional Evidence.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The underlying administrative case was brought by the Nevada Division of Insurance ("Division") against Petitioner after numerous consumer complaints against "Choice Home Warranty." In addition to these consumer complaints, there appeared to be a history of regulatory actions against "Choice Home

Warranty" in various states including New Jersey, Oklahoma, Washington, and California. The Division's charging document alleged violations for knowingly making false entries of material fact in their renewal applications, failure to communicate with policyholders, and inappropriately denying claims, conducting business in an unsuitable manner, and engaging in unfair and deceptive trade practices. Believing that Choice Home Warranty was the Petitioner, Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty, the Division brought forth these allegations. A hearing was held, and a Findings of Fact, Conclusions of Law, Order of the Hearing Officer, and Final Order of the Commissioner was filed on December 18, 2017 ("Final Order").

Central to Petitioner's defense was that the "Choice Home Warranty," subject to all the regulatory action was really a separate corporation, "Choice Home Warranty Group, dba Choice Home Warranty" ("CHWG"). During testimony, the President of both entities, CHWG and Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("Petitioner"), Victor Mandalawi, testified that he resolved the licensing issues he had with CHWG by establishing Home Warranty Administrator of Nevada, and various other "Home Warranty" companies of different states to deal with the regulatory matters of that state. In states where there were no licensing issues, he continued to operate solely as CHWG. Believing the two entities to be one and the same, the Chief of Property and Casualty at the Nevada Division of Insurance testified, "From every documentation that I have seen, from the consumer complaints that we have seen, from the dba's, from the service contract form that is out in the market, from the email advertisements that we have heard consumers receive, in fact, I have received them, there is no doubt in my mind that Choice Home Warranty is the same entity as Home Warranty Administrators of Nevada."[1] This testimony occurred on the first day of a three-day hearing. If Petitioner wanted to challenge the Chief's testimony (who was the first witness of the proceedings), it had plenty of opportunity to do so, and did in fact cross examine and re-cross examine the witness a total of four times,[2] peppering him with questions on the topic, without ever attempting to discredit it with the "additional evidence" Petitioner now wishes to introduce. This evidence that Petitioner seeks permission from this Court to introduce was available during the administrative

[1] Hr'g TR., September 12, 2017, 117:21 -118:2.

[2] Hr'g TR., September 12, 2017, p 80-111; 118-125; 126-132; 133-141.

proceedings, and Petitioner voluntarily chose not to admit into the record.

II. ARGUMENT

1. Petitioner Failed to Establish Good Reasons Under NRS 233B.131(2) to Introduce New Evidence to This Court

A judicial review of a final decision of an administrative agency is confined to the record. NRS 233B.135(1)(a). There is a narrow exception to this rule set out in NRS 233B.131(2). It provides: "[i]f before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is ***material*** and that there were ***good reasons*** for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines." *Id.* (Emphasis added). If no "good reasons" are found, the Court does not need to consider the "materiality" element. *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56 n.4, 200 P.3d 514, 519 n.4 (2009).

As a matter of first impression, the Supreme Court of Nevada in *Garcia* adopted the rationale in *McDowell v. Citibank*, 734 N.W.2d 1, 11 (S.D.2007) and *Northern Illinois Gas v. Industrial Com'n*, 148 Ill.App.3d 48, 101 Ill.Dec. 145, 498 N.E.2d 327, 332 (1986) as pertaining to the *good reasons* analysis and held that: "***good reasons do not exist when a party's attorney deliberately decides not to present available evidence*** during the course of an administrative proceeding and that party then seeks remand for reconsideration with that evidence after an adverse decision by the administrative agency." 125 Nev. at 53, 200 P.3d at 518 (emphasis added). The court in *Garcia* affirmed a district court's decision to deny Garcia's request to present a doctor's letter in support of her occupational disease claim. The doctor's letter was available during the administrative hearing, but counsel chose not to admit it.

In *McDowell*, the appellant sought to add evidence that bolstered the testimony of a witness whose credibility was challenged at the hearing. The court held that since that witness's testimony was "the central point" of the appellant's claim to reopen her workers' compensation settlement, the appellant could not reasonably argue surprise that the witness's credibility would be attacked, as a good reason for the failure to produce the evidence before the administrative body. In *Northern Illinois Gas,* the court held that the omitted evidence was available at the time of the administrative hearing and the fact that counsel did not believe the opposing party had sufficient proof to prevail did not constitute "good cause." 734 N.W.2d at 11. After

considering this situation, the court held that ***"[a] party cannot choose one trial strategy and then, faced with an adverse decision, supply additional evidence on review,*** absent, for example, the need to prevent injustice by correcting the arbitrator's misunderstanding of the evidence, or other good cause." *Id.* (Emphasis added). Finding that good cause had not been established, the court held that the lower tribunal did not abuse its discretion when it declined the request to present the additional evidence.

As in *Garcia*, *McDowell,* and *Northern Illinois Gas,* the evidence that Petitioner seeks to present to this Court was available at the time of the administrative hearing. In fact, it was listed as evidence in binders Petitioner sought to introduce at the hearing, but its counsel, ultimately and voluntarily decided not to seek admittance of the evidence. The following is the pertinent excerpt from the hearing record from:

> Ms. Grifa: Madam Hearing Officer, earlier in the proceeding today, I had offered or sought to offer a number of marked exhibits, II through QQ, inclusive. ***As it turns out, a number of them were never referenced in any testimony by any witness.*** A number of them do reference a counsel to the Division of Insurance. ***So I will withdraw the proffer of KK through QQ inclusive...***"

Hr'g TR., September 14, 2017, 107:8-15 (emphasis added).

Petitioner's Motion and the arguments presented in support of this Motion are deliberately misleading in suggesting that Petitioner was denied admission of this evidence on the basis of attorney-client privilege, or any other reason. Petitioner asserts as follows: "[t]he attorney-client privilege is designed to act as a shield and it is impermissible for the Division to use it as a sword." Similar dramatic language is used in their conclusion. There was, however, ***no evidence that was denied by the Hearing Officer due to attorney-client privilege.*** Although counsel for Respondent had initially raised a concern upon the introduction of evidence, the Hearing Officer ***did not address it, or deny*** the introduction or admittance of this evidence into the record for any reason, including that of protecting potentially privileged information. Instead, counsel for Petitioner, ***independently withdrew its request to admit the evidence it now seeks to present.***

Petitioner further claims that good reasons exist because it had no notice that the issue of Petitioner and CHW's separateness would be central to the Division's findings. This argument has no merit because the separateness of the two entities was central to Petitioner's defense in the administrative hearing. In its Pre-Hearing Statement, Petitioner stated:

> However, the Division will be unable to show at the hearing of this matter that it was HWAN that was disciplined in each of those states or was the subject of any negative media. In fact, it was CHW Group, Inc. d/b/a Choice Home Warranty ("CHW"). The evidence will unequivocally show that HWAN is an independent and separate entity from CHW. The Division's entire case related to the foregoing is based solely upon the fact that HWAN does business as "Choice Home Warranty" in Nevada.

Pet'r's Pre-Hr'g Statement: 2:8-13.

The circumstances in this case fall squarely within the holding in *Garcia*. As in *Garcia*, the additional evidence Petitioner seeks to present was available at the time of the administrative hearing and listed as Petitioner's exhibits it sought to introduce. It was counsel for Petitioner who at the end of the hearing voluntarily offered to the Administrative Court as to the evidence at hand: "[a]s it turns out, a number of them were never referenced in any testimony by any witness." Hr'g TR., September 14, 2017, 107:10-12. The decision regarding the admission of this evidence was made by counsel and was based on a trial strategy, as counsel decided said evidence was unnecessary. After an adverse decision was issued in this case, Petitioner now cannot seek to admit evidence available at the time of the administrative hearing and withdrawn from consideration for admission by a deliberate decision of its counsel. Petitioner also cannot claim surprise, as the separateness of the two entities was central to Petitioner's defense in the administrative proceedings. Pursuant to the ruling in *Garcia*, the Court should deny Petitioner's request, as the good reasons element of NRS 233B.131(2) have not been established.

Having determined that no good reasons existed, the court in *Garcia* did not address the materiality requirement under NRS 233B.131(2). "Because we conclude that *Garcia* has not established good reasons under NRS 233B.131(2), we need not address NRS 233B.131(2)'s materiality requirement." *Garcia*, 125 Nev. at 56 n. 4, 200 P.3d 519 n.4.

As in *Garcia*, Petitioner's failure to establish the good reasons element is dispositive. Should the Court nevertheless order review of said documents, Respondent respectfully requests that it would be allowed to do so *in camera,* as it contains communications with counsel.[3] As stated in Respondent counsel's reply letter to Mr. Lenhard's April 11, 2018 letter (Motion for Leave, Exhibit 3), alleging violations of

[3] In such case, Respondent also requests the opportunity to present arguments on the issue of the second element of NRS 233B.131(2) at that time, namely, the materiality of the evidence to the PJR, as Respondent strongly disagrees with Petitioner on this issue.

NRPC 3.1 and NRCP 11(b)(3)-(4), Respondent reiterates the following: "[w]e take these allegations very seriously and believe we hold ourselves out to higher standards of integrity, not only as attorneys, but also as public servants. We have reviewed the exhibits and the record, including witness testimony. We have gone through each of the instances you point out in the Division's Answering Brief that you allege to be misrepresentations or unsupported. We strongly disagree with your allegations." We represent the same to this Court.

CONCLUSION

For the reasons set forth above, as Petitioner failed to establish "good reasons" as required under NRS 233B.131, Respondent respectfully requests that the Court deny Petitioner's Motion.

DATED this 4th day of May 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 4th day of May 2018, I served a copy of *Opposition to Motion for Leave to Present Additional Evidence* via email and by U.S. Mail, at Carson City, Nevada, postage prepaid to:

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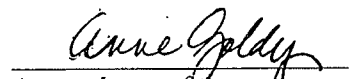

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

v.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY -DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

CASE NO.: 17 OC 00269 1B
DEPT NO.: I

REPLY IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE

Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("HWAN"), by and through its counsel of record Kirk B. Lenhard, Esq., Travis F. Chance, Esq., and Mackenzie Warren, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP, and Lori Grifa, Esq., of the law firm of Archer & Greiner, P.C., hereby submits this Reply in Support of its Motion for Leave to Present Additional Evidence (the "Reply") pursuant to NRS 233B.131(2).

This Reply is made and based upon the attached Memorandum of Points and Authorities, the papers on file herein, the record of the proceedings below, and any oral argument this Court shall choose to consider.

DATED this 11th day of May, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. THERE WAS GOOD CAUSE FOR HWAN NOT ADMITTING THE E-MAILS BASED UPON THE DIVISION'S CONTENTION OF PRIVILEGE, AN ISSUE THAT WAS NEVER DECIDED BELOW

The Division's contention of privilege and objection to the admissibility of certain e-mails provided by the Division in response to a pre-hearing subpoena, and in particular marked and identified as potential Exhibits KK, LL and MM at the contested hearing, caused HWAN to defer its proffer until the discussion of the issue could be reached. As is turned out, by the close of the September 2017 proceedings, the "privilege" issue with respect to these documents was never fully argued or explored. However, in light of the findings of the final order below (the "Decision") and the factual representations now made by the Division in its Answering Brief, the information contained in those three potential exhibits that contradicts those representations has become both material and probative and should be considered by the agency below.

There is no disagreement as to the legal standard which controls the decision to expand the record of a completed administrative proceeding. Pursuant to NRS 233B.131(2), the movant must demonstrate materiality and good reasons for failing to present available evidence during the course of a contested hearing. In opposition to HWAN's Motion, the Division fails to adequately address both elements of this statutory standard, arguing only that HWAN has failed to show "good reasons" for the failure to admit the e-mails outlined in HWAN's Motion during the administrative hearing, Opp. at 3:5-4:24, but failing to address the issue of materiality. Moreover, the Division ignores the content of the e-mails in potential Exhibits KK, LL, and MM, which is clearly material to the issues raised in the Decision and, more importantly, the Division's unfortunate representations made about them to this Court. *See* Mot. at 6:20-7:16.

As to the requirement of good reasons for failing to present the e-mails below, the Division contends that no such reasons exist, because the e-mails were "available at the time of the administrative hearing." Opp. at 4:7. While it is true the e-mails were available, indeed they were identified and marked as potential exhibits, the Division's reliance upon three cases is unavailing and ignores a critical distinction – the Division actively opposed the admissibility of these documents that were not relevant until *after* the conclusion of the hearing.

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The Division initially cites to *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 53, 200 P.3d 514, 518 (2009), which found that "good reasons do not exist when a party's attorney deliberately decides not to present available evidence during the course of an administrative proceeding." 125 Nev. at 53, 200 P.3d at 518. However, *Garcia* related to a worker's compensation proceeding in which the claimant's counsel chose not to seek admission of a functional capacity evaluation and a doctor's letter in support of his client's claim, documents relevant to the primary issue of the case, even though both were available prior to the hearing. *Id.* at 54, 200 P.3d at 518-519. The Division also cites to *McDowell v. Citibank*, 734 N.W.2d 1, 11 (S.D. 2007), where counsel later moved to admit evidence to rehabilitate the credibility of a witness that was attacked at the hearing who testified as to a "central point" of proof. Lastly, the Division relies upon *Northern Ill. Gas v. Indus. Comm'n*, 498 N.E.2d 327, 332 (Ill. App. 1986), in which counsel later moved to admit evidence that was not admitted at the administrative level because he felt the opposing party had insufficient proof to prevail.

The factual circumstances of the *Garcia*, *McDowell*, and *Northern Ill. Gas* courts are irrelevant to HWAN's Motion. In all three cases, the evidence at issue was not offered for admission at the administrative proceeding due to a strategic choice of counsel. That choice is the only issue those courts were asked to address, not whether the evidence sought to be admitted later was privileged and therefore inadmissible. Here, the existence of privilege ***is*** the issue and the Division actively opposed admissibility of this evidence on that basis. Mot. at 7:16-18. The hearing transcript is indisputable in this regard, wherein the issue of privilege was clearly **raised by the Division's counsel**, as follows:

> The reason why I'm bringing this up now is because, I believe, these [HWAN's Supplemental Hearing Exhibits, including Exhibits KK, LL, and MM] were documents inadvertently provided to the respondent as a result of a public records request.[1] And they contain **privileged attorney-client emails**, specifically attorney-client emails from the next witness that I intend to call, Mr. Hall.

Hr'g Tr., Day 2 at 81:2-8 (emphasis added). The hearing officer then directed counsel for the

[1] It was later clarified that the documents were provided by the Division in response to a subpoena served upon it by HWAN. Hr'g Tr., Day 2 at 84:8-9.

Division to reserve the issue unless and until it became relevant to witness testimony. *Id.* at 84:15-17.

The true merits of the Division's privilege claim were never reached and the issue was not raised again until the third and final day of the hearing below when Division counsel stated he "had initially objected to some of the exhibits being entered due to "**attorney-client privilege**," indicating an intent to withdraw his objection to admission of the exhibits. Hr'g Tr., Day 3 at 64:7-13 (emphasis added). HWAN then made a formal proffer for admission of the same. *See id.* at 65:9-10. After the hearing officer questioned Division counsel further as to whether the exhibits could be received on consent, Division counsel indicated he needed to check with his client before completely agreeing. *Id.* at 66:7-9. The parties then agreed that HWAN would proffer the exhibits and the issue of their admission would be reserved until later in the hearing. *Id.* at 66:10-12.

In opposing the instant Motion, the Division improperly asserts an accusatory posture here, alleging HWAN has advanced a "deliberately misleading" argument. HWAN has never claimed the hearing officer *denied* admission of the foregoing exhibits on the basis of privilege. Opp. at 4:19-22. Indeed, HWAN's own Motion acknowledged that the issue of whether the e-mails are privileged and, if so, whether that privilege was waived was not decided below. *See* Mot. at 4, n. 1. Nonetheless, the Division also, in the same breath, conveniently fails to set forth the facts and circumstances leading up to what it purports to be the "pertinent" excerpt from the hearing noting HWAN's withdrawal of the proffer of Exhibits KK, LL, and MM. Opp. at 4:8-16. Given the foregoing cited record excerpts, it is beyond incredible for the Division to claim that HWAN's counsel "independently withdrew its request to admit the evidence it now seeks to present." *Id.* at 4:23-24

In addition to the foregoing, *Garcia*, *McDowell*, and *Northern Ill. Gas* are inapposite here for another reason: all three concerned the issue of whether evidence clearly related to a ***key*** issue should be later admitted when it was not offered before an agency solely due to a strategic choice of counsel. *See Garcia*, 125 Nev. at 54, 200 P.3d at 518 (finding no good reason for failing to admit a functional capacity evaluation and doctor's letter in a worker's compensation

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proceeding); *McDowell*, 734 N.W.2d at 11 (finding no good reasons for failing to admit evidence to support the opinion of the claimant's expert because that opinion was clearly a "central point of[] proof" at the hearing); *Northern Ill. Gas*, 498 N.E.2d at 332 (finding no good reasons for failing to present medical testimony at a worker's compensation hearing because counsel should have been aware of the need to rebut the petitioner's medical testimony).

Here, on the other hand, that these three documents were not formally admitted into evidence was not a matter of failed strategy. The purportedly privileged nature of the e-mails was never decided and, far more importantly, HWAN had no way of knowing the relevance of these e-mails until receipt of the Decision and review of the Division's arguments in defense of the same in its Answering Brief. Thus, *Garcia*, *McDowell*, and *Northern Ill. Gas*. simply do not apply. The documents sought to be admitted here reveal that the Division's arguments about the relationship between HWAN and CHW Group, Inc. ("CHWG") and whether it knew that CHWG administered contracts for HWAN directly contradict the information and knowledge available to it in real time. The Division's contentions on the issue of the privileged nature of the e-mails lack merit and the Motion should be granted.

II. THE CONTENTS OF THE EMAILS DID NOT BECOME RELEVANT UNTIL THE DECISION WAS RENDERED AND THE BRIEFING ON THE PETITION FOR JUDICIAL REVIEW WAS FILED

Certain findings in the Decision with respect to HWAN and its relationship to its contract administrator made the e-mails at issue here relevant after the fact. In its Motion, HWAN argued that this is an additional good reason for failing to seek admission of the e-mails at issue – it had no notice that their contents would be relevant to the ultimate ruling until receipt of the Decision itself. Mot. at 7:16-8:6. In response, the Division contends this argument has no merit because "the separateness of the two entities was central to Petitioner's defense in the administrative hearing." Opp. at 4:27-28. In support, it cites to a portion of HWAN's Pre-Hearing Statement filed below, as follows:

> However, the Division will be unable to show at the hearing of this matter that it was ***HWAN*** that was disciplined in each of those states or was the subject of any negative media. In fact, it was *CHW Group, Inc. d/b/a Choice Home Warranty* ("CHW"). The evidence will unequivocally show that HWAN is an independent

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> and separate entity from CHW. The Division's entire case related to the foregoing is based solely upon the fact that HWAN does business as "Choice Home Warranty" in Nevada

Opp. at 5:1-5.

Again, the Division conveniently presents an incomplete recitation of the relevant facts. The foregoing is not a complete quote from HWAN's Pre-Hearing Statement, which paragraph ends as follows: " – but it was the Division itself that requested HWAN to obtain that fictitious name in 2014." *See* Record Entry No. 33 at 2:13-14. This omitted portion is important, as it frames the issue related to notice. The argument outlined in the portion of HWAN's Pre-Hearing Statement above related only to whether the use of the fictitious name "Choice Home Warranty" made HWAN subject to the out of state fines against an entity that shared that fictitious name and whether the same should have been reported to the Division. To be clear, the legal issue relied upon by the Division here is whether HWAN's use of the fictitious name "Choice Home Warranty" made it one and the same with the "Choice Home Warranty" subject to fines and orders in other states. This is distinct from the issue of the Division's awareness that HWAN and CHWG are different corporations and that CHWG is HWAN's administrator.

The Division instituted the proceeding below on the theory that the use of the fictitious name "Choice Home Warranty" by HWAN made HWAN the subject of fines and citations in other states issued against an entity that also used that fictitious name. The Amended Complaint included alleged violations against HWAN, which was defined as "Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("CHW")," for failing to disclose those citations. *See* Record Entry No. 30 at 2-6. These alleged violations were also noted in the Division's Pre-Hearing Statement, in which it referred to numerous citations and orders from other states against "Choice Home Warranty" and attributed the same to HWAN, which the Statement in turn defined as "Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("CHW")." *See* Record Entry No. 31 at 1-4. In fact, it was this theory of prosecution that resulted in the hearing officer's request – at the close of the hearing – that the parties brief the following inquiry:

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> If a fictitious name does not create a separate legal entity, what is the effect of many separate legal entities that share the same DBA (fictitious name or doing business-as designation)? In considering this question, the Parties should explore the legal relationship between Home Warranty Administrator of Nevada, Inc. ("HWAN") and CHW Group, Inc. ("CHW").

See Record Entry No. 33.

In other words, it is not the fact of the corporate separateness of HWAN and CHWG in and of itself that is relevant here, as the Division argues. Case in point, the theory espoused by the Division from inception of the below proceeding until the conclusion of the hearing was that citations and orders from other states against "Choice Home Warranty" should have been disclosed by HWAN due to HWAN's use of that same fictitious name. The relevant inquiry here is whether the ***Division's knowledge*** that HWAN and CHWG are separate corporate entities and that CHWG is HWAN's administrator were ever properly noticed. As was noted in the Motion, the importance of the fact of the ***Division's knowledge*** of this corporate separateness was never raised until after the hearing was held.

However, this fact underlies the Decision's conclusions that the Division was not equitably estopped from punishing HWAN for allowing CHWG to sell service contracts on its behalf because "[t]here is no evidence that the Division knew that [CHWG] and Choice Home Warranty were the same" or that "the Division was aware that [CHWG] was selling contracts in Nevada." Record Entry No. 47 at 23:21-24. Additionally, the Decision found that because HWAN failed to show the Division knew of the separateness of HWAN and CHWG, the Division's approval of the service contract form noting that HWAN's administrator was "Choice Home Warranty" did not demonstrate the Division's knowledge of the purported falsity of HWAN's "self" administration of its service contracts. *Id.* at 24:6-15.

In this regard, the Decision was unexpected as it raised an issue not in the case. Neither the pleadings nor the other papers filed with the Division below gave any indication that the Division knew whether HWAN and CHWG were separate entities, or whether it knew that CHWG was HWAN's administrator. Notably, nowhere in the above-quoted section of HWAN's Pre-Hearing Statement is there any indication that HWAN was on notice that it would be

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litigating the fact of the Division's ***awareness*** that HWAN and CHWG were separate entities or CHWG acting as HWAN's administrator. In sum, HWAN is not clairvoyant and it could never have known that the Division's knowledge (or lack thereof) of the corporate separateness of HWAN and CHWG, and CHWG's status as HWAN's administrator, would have been a critical fact underlying many of the adverse findings in the Decision, as set forth herein.

The e-mails addressed in HWAN's Motion establish that the Division did in fact know of two separate corporate entities and indicate that CHWG was HWAN's administrator at all times relevant to the underlying proceedings. The e-mails sought to be admitted now are directly on point as to the Division's knowledge and they should have been considered by the hearing officer. Had the issue of knowledge been raised during the proceedings below, these e-mails would have been used for cross-examination or rebuttal. Instead, in an effort to protect an erroneous Decision, the Division has knowingly asserted a position that is contradicted by the very facts in its possession, and in defense of this Motion, seeks to preclude that information from coming to light. Correcting a misunderstanding of facts or evidence is good cause to expand the record to include the e-mails and HWAN's Motion should be granted. *North Illinois Gas*, 498 N.E.2d at 332 (holding additional evidence can be considered "to prevent injustice by correcting a misunderstanding of the evidence, or other good cause").

III. CONCLUSION

The Division fails to rebut the good reasons shown by HWAN to warrant the consideration of the e-mails at issue here, for the reasons set forth above. In addition, as noted by the Division itself, through its own Chief of Casualty & Property, Rajat Jain, testified that HWAN and "Choice Home Warranty" are the same entity. The e-mails sought to be introduced are from the Division's personnel and explicitly indicate the contrary. They also indicate that the Division knew CHWG was HWAN's administrator. It is clear that the hearing officer misunderstood the evidence as to the Division's knowledge of the existence of HWAN and CHWG, separate and apart from each other, and that CHWG is HWAN's administrator. Therefore, the Motion should be granted and the e-mails should be considered by the hearing officer. A proposed order granting the Motion is attached hereto as **Exhibit 1**, pursuant to FJDCR 15(7).

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Alternatively, at the absolute minimum, this Court should conduct an *in camera* review of the e-mails to determine whether they in fact relate to the Division's knowledge of the separateness of HWAN and CHWG and CHWG administering HWAN's contracts, as outlined in the Motion and the exhibits attached thereto.

DATED this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2018, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE** via United States Mail, first class postage prepaid, at Las Vegas, Nevada, addressed to the following at the last known address of said individuals:

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EXHIBIT 1

EXHIBIT 1

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Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner*, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY - DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent.*	CASE NO.: 17 OC 00269 1B DEPT NO.: I **ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE**

This matter comes before the Court on Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice home Warranty's ("Petitioner") Motion for Leave to Present Additional Evidence pursuant to NRS 233B.131(2) (the "Motion"), which was filed herein on April 19, 2018. The Respondent State of Nevada, Department of Business and Industry – Division of Insurance (the "Division") filed an Opposition thereto on May 4, 2018 and Petitioner filed a

Reply in Support of the Motion. The Court having considered the papers on file herein, finds as follows:

Petitioner seeks to introduce new evidence to be considered by the Division, namely its Proposed Exhibits KK, LL, and MM (the "Evidence") in the proceeding below. The Court finds that, pursuant to NRS 233B.131(2), Petitioner must demonstrate that the Evidence is material to the issues before the agency and that good reasons exist for Petitioner's failure to present the same in the proceeding below.

Based upon a review of the papers and the record herein, the Court finds that the Evidence is material to the final decision's findings. Additionally, Petitioner had good reasons for failing to admit the Evidence in the proceeding below for the reasons set forth in its Motion and Reply in support thereof. Therefore, good cause appearing,

IT IS HEREBY ORDERED that Petitioner's Motion is hereby GRANTED. The Division is directed to receive the additional Evidence and to determine the effect of the same on its final decision, pursuant to NRS 233B.131(3).

DATED this ___ day of _____, 2018.

_____
DISTRICT COURT JUDGE

Submitted by:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____
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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner*, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY -DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent*.	CASE NO.: 17 OC 00269 1B DEPT NO.: I **REQUEST FOR SUBMISSION OF PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE** **AND** **PETITIONER'S REQUEST FOR HEARING ON ITS MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE**

Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("Petitioner"), by and through its counsel of record Kirk B. Lenhard, Esq., Travis F. Chance, Esq., and Mackenzie Warren, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP, and Lori Grifa, Esq., of the law firm of Archer & Greiner, P.C., hereby submits this Request for Submission of Petitioner's Motion for Leave to Present Additional Evidence as follows:

1. On April 19, 2018, Petitioner filed a Motion for Leave to Present Additional Evidence;
2. On May 4, 2018, Respondent filed its Opposition thereto;
3. Concurrently with the submission of the instant Request, Petitioner submitted for filing its Reply Brief.

Pursuant to FJDCR 15(6), as all briefing has been completed in connection with Petitioner's Motion for Leave to Present Additional Evidence, Petitioner hereby requests that the Clerk submit the above-referenced matter to the Court for decision.

Additionally, pursuant to FJDCR 15(9), Petitioner respectfully requests the Court set a date and time for hearing of Petitioner's Motion for Leave to Present Additional Evidence.

DATED this 11th day of May, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2018, I served a true and correct copy of the foregoing **REQUEST FOR SUBMISSION OF PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE AND PETITIONER'S REQUEST FOR HEARING ON ITS MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE** via United States Mail, first class postage prepaid, at Las Vegas, Nevada, addressed to the following at the last known address of said individuals:

Joanna Grigoriev, Senior Deputy Attorney General
Richard Yien, Deputy Attorney General
State of Nevada
Office of the Attorney General
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ryien@ag.nv.gov

Attorneys for Respondent State of Nevada, Department Of Business And Industry - Division Of Insurance

an employee of Brownstein Hyatt Farber Schreck, LLP

Case No.: 17 OC 00269 1B

Dept. No.: 1

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

vs.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

ORDER TO SET FOR HEARING

This matter is pending before this Court on Petitioner's Motion for Leave to Present Additional Evidence filed on April 19, 2018. Respondent filed an Opposition thereto on May 4, 2018. On May 14, 2018, Petitioner filed a Reply in Support of Motion and a Request for Submission and Request for Hearing.

This Court having reviewed the Motion and case file finds that a hearing would be helpful in determining the merits of this case. Therefore, good cause appearing;

IT IS HEREBY ORDERED that the parties will appear telephonically before the Judicial Assistant on Wednesday, June 6, 2018, at 9:00 a.m. to set this matter for hearing. All parties shall contact the Court's Judicial Assistant (775-882-1996) the day prior to the setting to provide contact information for the setting.

Dated this 16th day of May, 2018.

JAMES T. RUSSELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 16 day of May, 2018, I served the foregoing Order by placing a copy in the United States Mail, postage prepaid, addressed as follows:

Kirk B. Lenhard, Esq.
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Mackenzie Warren, Esq.
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Carson City, NV 89701

Angela Jeffries — Sydnie Mills
Judicial Assistant, Dept. 1
Law Clerk

In the First Judicial District Court of the State of Nevada
In and For Carson City
* * * *

HEARING DATE MEMO

RECD & FILED
2018 JUN -6 AM 9:16
SUSAN MERRIWETHER
CLERK
BY

Case No.: 17 OC 00269 1B

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

vs.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

_____/

KIRK B. LENHARD, Esq.
Attorney for Petitioner

RICHARD PAILI YIEN, Esq.
Attorney for Respondent

Set In Department: I

HEARING on MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE

TO COMMENCE on the 6th day of August, 2018, at 2:30 p.m.

TIME ALLOWED 1/2 hour(s)~~/day(s)~~ NO. 1 Setting

Telephonic setting
Attorney for Petitioner

Telephonic setting
Attorney for Respondent

DATED: June 6, 2018

James T. Russell
JAMES T. RUSSELL
District Judge

CERTIFICATE OF SERVICE

The undersigned, an employee of the Carson City Clerk/District Judge, hereby certifies that on the 6th day of June 2018, I served the foregoing MEMO by U.S. Mail, postage prepaid, addressed as follows:

Kirk B. Lenhard, Esq.
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Las Vegas, NV 89106-4614

Lori Grafia, Esq.
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Hackensack, NJ 97601

Richard Paili Yien, Esq.
100 N. Carson Street
Carson City, NV 89701

SUBSCRIBED and SWORN to before me
this ___ day of June, 2018
SUSAN MERRIWETHER, Clerk

BY:_____
Deputy

Angela Jeffries
Judicial Assistant, Dept. I

IN THE FIRST DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY, NEVADA

CERTIFIED COPY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

vs.

Case No. 17 OC 00269 1B

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY - DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

HEARING BEFORE JUDGE JAMES T. RUSSELL

Carson City, Nevada

Monday, August 6, 2018

4:22 p.m.

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

Transcribed by: Becky J. Parker, RPR, CCR
Nevada Certified Court Reporter No. 934

APPEARANCES:

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For Respondent:

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775.684.1100

CARSON CITY, NEVADA

MONDAY, AUGUST 6, 2018, 4:22 P.M.

-oOo-

THE COURT: For the record this is Case Number 17 OC 00269. Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty versus State of Nevada, Department of Business and Industry, Division of Insurance.

You're Richard Yien?

MR. YIEN: Yes, I am, Your Honor.

THE COURT: And you're Kirk Lenhard?

MR. LENHARD: Yes, sir.

THE COURT: Okay. We're here based upon a motion for relief to present additional evidence that was filed on April 19th, in respect this matter to allow for this to go back to the administrative agency for purposes of consideration of some evidence that was not presented -- well, it was marked in that but then never eventually became considered in respect to this particular matter. We're looking at the Garcia case versus Scolari's, 125 Nev. 48. We're also looking at primarily under the statute in respect to this matter, NRS 233B.131.2.

So Mr. Lenhard, it's your motion so you want

to go ahead?

MR. LENHARD: Thank you, your Honor. I think you've characterized the issue quite well. This case -- let me -- let me put the case in perspective.

When this matter was initially brought by the Department, there were five claims in the original complaint and the amended complaint. The claim that really focuses on the issue before the Court was the first count where my client, Home Warranty administer -- Administrators of Nevada, HWAN, was accused of not properly disclosing problems they had had in other states. The entity that had the problems in other states was an entity called CHW.

To further complicate things, HWAN has a dba in this state, CHW. The Department of Insurance took the position that meant that CHW and HWAN were one and the same. So the big issue initially for us was to establish for the hearing officer that they were two separate corporate entities.

We issued subpoenas to the State, and the State, of course, you know, Mr. Yien properly replied and gave us a number of emails. Included in those emails were Exhibits KK, LL, MM, the three exhibits that are before us today. It's our position that those three exhibits demonstrated that the Department knew for an

extended period of time that in truth and in fact these were two separate corporate entities.

In any event, when we marked and moved for the -- excuse me. When we submitted the exhibits and wanted to present them the first day of the hearing, Mr. Yien properly objected, stating there is a reference here to David Hall, who is one of the attorneys at the Department of Insurance. Mr. Yien contended that the documents had been improperly disclosed pursuant to the subpoena and wanted to claw them back. In looking at the documents, clearly Mr. Hall was a recipient, was on the documents. It appeared to be a proper clawback. So we turned over those exhibits to Mr. Yien. I don't even have copies of them today. I just remember what they said.

On the third day of the hearing the issue came up again because Mr. Yien stood up and said, I'm not sure I'm going to any longer object to the admission of these exhibits. At that time the hearing officer stated, I want you to check with your client. We finished the hearing. That final step was never taken. I missed it. Mr. Yien missed it. We submitted on the record.

The hearing officer ultimately decided that the dba issue fell in favor of HWAN. The fact that

there was a dba in favor of CHW did not make CHW and HWAN the same entity. They were in fact separate corporate entities. But then the hearing officer went one step further and she made a finding that was not in any way alleged in the original complaint or the amended complaint. She determined that since CHW is a separate corporate entity and they were being used as the administrator by HWAN, that HWAN had violated the Nevada administrative code and the DOI administrative code and they were subject to a finding of unsuitability.

We took the position in our briefing that there was an estoppel issue that the State knew all -- excuse me, the DOI knew all along of this relationship that they were separate corporate entities and therefore the DOI be estopped from taking that position. The Department, a, argued vehemently against that, which leads me to this courthouse today. It's our position that once the Department argued that the Department was unaware that they were separate corporate entities, these three exhibits come into play.

Now, I'm not in any way casting any aspersions on counsel for the Department. It's lawyers being lawyers. Lawyers reading documents in a different way. At a minimum I would suggest to the Court that it would be appropriate for you to review the documents and

decide if they say what we say -- what we believe they say since I haven't seen them in a while. If you agree, I would suggest then they should be added to the record and this matter should be sent back down to the hearing officer to determine if they change her decision.

THE COURT: What precluded you from offering them -- I mean, I -- I kind of looked through the record and I looked at the different arguments, but nothing precluded you from making that offer of these exhibits. It just -- just didn't happen.

MR. LENHARD: What happened -- and you hit it right. I mean, it's error on my part and partially on Mr. Yien's part. What happened was on the third day the hearing officer stated, I want you to check with your client before we agree to the admission of these exhibits. That just didn't occur and the hearing concluded. I mean, that's -- that's what happened.

THE COURT: And it never came back for any further --

MR. LENHARD: Never came back.

THE COURT: -- discussion or anything.

MR. LENHARD: It was not a tactical decision, Your Honor. I was not making a decision saying I don't need to use these exhibits. It frankly slipped through the cracks. And now in light of the position the State

is taking, I think, at least I believe from my memory of these exhibits, that they are now highly relevant.

Thank you.

THE COURT: Okay. Mr. Yien.

MR. YIEN: Good afternoon, Your Honor. I suppose I'll start off by saying that what I'm going to say is more narrowly tailored to the motion at hand. And Your Honor is correct in stating that the -- the applicable statute is under the Nevada Administrative Procedure Act 233B.131.2 that requires that it is shown to the satisfaction of this Court that the additional evidence is material and that there were good reasons for failure --

THE COURT: Well, do you think -- don't you think they're material if in fact there -- there's a differentiation? I mean, to me that -- it's a two prong test. When are they material, first of all. And the second aspect that I was looking at is whether or not there was good -- good reason, that's an interesting word to use, good reason exists for the failure to present the evidence in respect to that. And -- and again I did see Ms. Grifa, I guess she was co-counsel with you or --

MR. LENHARD: Yeah. She's the referring counsel from New Jersey. I'd done most of it here.

THE COURT: Okay. And it says that basically she will withdraw the pro offer of these exhibits, and that's when she withdrew that. That's your argument that I see.

MR. YIEN: That is my -- and I don't even need to make it. And I do want to respond. Those exhibits may or may not be material, but the law is clear on this on Scolari's. Your Honor need not even consider that if you find that there's no good cause, and I'll cite it, because we conclude that Garcia has not established good reasons under 233B.131.2. We need not address the materiality requirement.

THE COURT: Yes. I read that as well.

MR. YIEN: We could go there but --

THE COURT: But don't you think there was some confusion here? I guess I read those cases and looked at it. Seems to me that there -- initially there was an intent to maybe look at these documents and produce them. They were produced. There was an intent basically. They're marked as exhibits. Somehow in the course of things -- I guess I understand the attorney when she withdrew them. That's what bothers me more than anything from your standpoint, I'll be honest, when she withdrew the offer. But your argument is basically to some extent we were waiting to hear from them in

regards to what was transpiring. So that's kind of the confusion that I have.

MR. YIEN: Yeah. And -- and I want to clarify that confusion too. I don't think that we dropped the ball in that administrative hearing and I don't think anything slipped through. The law under Scolari's says good reasons do not exist when a party's attorney deliberately decides not to present available evidence. That's the standard, whether or not it's deliberate or not.

And in Ms. Grifa's statement to the hearing officer, she clearly says, I had offered or sought to offer a number of marked exhibits, II through QQ inclusive. As it turns out, a number of them were never referenced in any testimony by any witness. A number of them do reference a counsel to the Division of Insurance, so I will withdraw the proffer of KK through QQ inclusive.

THE COURT: When did that take place? Did -- did -- did that take place before or after the hearing officer asked for clarification to go back? Do you understand my question?

MR. YIEN: This was on the last day, and correct me if I'm wrong --

MR. LENHARD: It was all --

MR. YIEN: This was --

MR. LENHARD: Excuse me.

MR. YIEN: This was on the last day when everything was all said and done.

THE COURT: Okay.

MR. YIEN: The hearing was done and then we came back to the hearing officer --

THE COURT: See, timing to me, that's kind of important because we're waiting for you to check and see where you still are and everything else, and that doesn't happen. And suddenly you've made the choice to withdraw those exhibits so --

MR. LENHARD: All of this occurred on day three. Rich -- I mean, Mr. Yien is absolutely correct. I can't tell you the exact timing of that. I do know that the hearing officer told us that she wasn't -- didn't want to admit them yet until she was certain the Division was satisfied that the privilege could be waived. The hearing officer of course is an attorney with the Division and so she's going to protect those rights, and I appreciate that.

If Ms. Grifa -- let's assume for argument's sake that Ms. Grifa did that after the hearing officer made the statement that she did. I do not believe that -- my belief doesn't matter. I don't think it

should change the concern of the Court whether now these documents, if they do in fact contradict what this -- what the position of the State is taking that the deal I did not know anything, I don't -- I think the Court should consider these documents no matter what the timing is.

There's another issue here. And again, I'm being very careful because it's certainly not meant to imply the State is in any way trying to hide the ball or do anything improper here. But if the State has three documents in its possession, and I -- I believe Richard -- Mr. Yien and the other young lady who represents --

THE COURT: Which are directly material to the decision rendered by the hearing officer.

MR. LENHARD: Right.

THE COURT: In direct opposition to that, why doesn't -- why shouldn't it go back? And because technically they have in their possession that the very sort or items that defeat part of that decision.

MR. LENHARD: That's -- that's the issue I'm raising. No matter what the timing is of Ms. Grifa's statement. Now in all candor, I believe that Mr. Yien -- and I forgot how to say her last name.

MR. YIEN: Grigoriev.

MR. LENHARD: Ms. Grigoriev read those documents differently. Which I'm suggesting is maybe the best thing to do is have the documents delivered to you and you can make that initial decision.

THE COURT: Well --

MR. LENHARD: Thank you.

THE COURT: -- and I understand the argument on both parts, I really do in that -- so did you have anything further?

MR. YIEN: No, other than to just say that we did review Mr. Lenhard's letter to us and all the instances --

THE COURT: Okay.

MR. YIEN: -- that he thought --

THE COURT: Right.

MR. YIEN: -- we were misrepresenting.

THE COURT: Okay.

MR. YIEN: We went through every one of those.

THE COURT: Okay.

MR. YIEN: We went through the testimony. We went through our brief to make sure we were not misrepresenting anything. And we firmly believe that we're not.

THE COURT: What if I -- in this case, what

if I send them back -- this case back to the hearing officer to make a review and determine, at least consider those and make a review in respect this matter to ascertain whether or not if she had or he had those documents at the time he rendered his decision, would it have changed his decision in any manner.

MR. YIEN: Your Honor, I suppose you could do that. But I suppose we're -- I would have to argue that you can just mention it right now just to deny the motion. I mean, we're happy to provide those documents for Your Honor to review in court to see whether or not they're material or not, but I don't --

THE COURT: But see, that -- then that requires me to second guess what was in the mind of the hearing officer and what the hearing officer did or didn't do and what it was considering. And so I don't think that's fair.

So I'm inclined to go ahead and grant the motion on the following basis. Okay. It's very limited. It's the limited basis to go back, for the hearing officer to review the -- those documents, the documents I'm looking at were KK, LL and MM. I want the hearing officer to review those documents and -- and determine whether or not they would have had any impact of any nature or kind in respect to the decision being

rendered by the hearing officer and have the ability to review and alter or amend the decision rendered based upon that. Or supply to this court an indication that they had no bearing and made no impact at all on the decision. That's my determination. I think that's the fairest thing to do in respect to this matter.

MR. YIEN: Right. I --

THE COURT: Again, thank you. The briefs were great. I always enjoy getting great briefs and reading them.

MR. LENHARD: Is this being -- I asked it be recorded. Can I --

THE COURT: Yeah, it is.

MR. LENHARD: -- get a copy of the judge's decision so I get the order right?

COURT CLERK: Yeah. I -- if you just go to the clerk's office afterwards, I'll burn you a CD.

MR. LENHARD: Thank you.

THE COURT: Okay. Very limited though.

MR. LENHARD: Thank you very much, Your Honor.

MR. YIEN: Thank you, Your Honor.

THE COURT: Thank you.

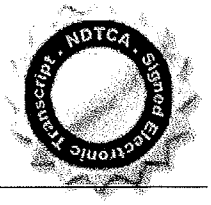
THE BAILIFF: Court will be in recess.

(Audio concluded.)

C E R T I F I C A T E

I, BECKY J. PARKER, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the digital recording, all transcribed to the best of my skill and ability.

WITNESS my hand this 2nd day of January, 2020.



BECKY J. PARKER, RPR, CCR

Nevada Certified Court Reporter No. 934

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Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner*, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY -DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent.*	CASE NO.: 17 OC 00269 1B DEPT NO.: I **ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE**

This matter having come on for hearing on August 6, 2018 on Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty's ("Petitioner") Motion for Leave to Present Additional Evidence pursuant to NRS 233B.131(2) (the "Motion"), which was filed herein on April 19, 2018,

The Respondent State of Nevada, Department of Business and Industry – Division of Insurance (the "Division") having filed an Opposition thereto on May 4, 2018 and Petitioner having filed a Reply in Support of the Motion on May 14, 2018,

The Court, having considered the papers on file herein and the arguments of counsel at the

hearing, and being fully advised in the premises, finds as follows:

Petitioner seeks to introduce new evidence to be considered by the Division, namely its Proposed Exhibits KK, LL, and MM (the "Evidence") in the proceeding below. The Court acknowledges that, pursuant to NRS 233B.131(2), Petitioner must demonstrate that the Evidence is material to the issues before the agency and that good reasons exist for Petitioner's failure to present the same in the proceeding below. The Court declines both Parties' offer to examine the disputed evidence *in camera*. Instead, the issue of materiality is best left to the Administrative Hearing officer to decide.

IT IS HEREBY ORDERED that Petitioner's Motion is GRANTED on the limited basis that -this matter be REMANDED to the Division of Insurance. The hearing officer is to consider Petitioner's Proposed Exhibits KK, LL, and MM. The hearing officer will receive the Evidence and determine whether the Evidence is material, and if so, whether it would have had any impact on the final decision. If so, the hearing officer will issue a new decision with new findings where applicable. If not, the hearing officer will issue a new decision indicating the Evidence would have had no impact on the original findings.

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Upon issuance of the new decision, the Division shall file an amendment to the Administrative Record on file herein to include a copy of the new decision.

DATED this 6th day of September, 2018.

DISTRICT COURT JUDGE

Submitted by:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By:
KIRK B. LENHARD, ESQ., Bar No. 1437
TRAVIS F. CHANCE, ESQ., Bar No. 13800
MACKENZIE WARREN, ESQ., Bar No. 14642

LORI GRIFA, ESQ., (admitted *pro hac vice*)
ARCHER & GREINER P.C.

Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

Approved as to form and content by:

ADAM PAUL LAXALT, NEVADA ATTORNEY GENERAL

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Attorneys for Respondent

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CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 6th day of September, 2018, I served the foregoing Order by placing a copy in the United States Mail, postage prepaid, addressed as follows:

Kirk B. Lenhard, Esq.
Travis F. Chance, Esq.
Mackenzie Warren, Esq.
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Las Vegas, NV 89106-4614

Lori Grifia, Esq.
21 Main Street, Suite 353
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Richard Paili Yien
Deputy Attorney General
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Carson City, NV 89701

Angela Jeffries
Judicial Assistant, Dept. 1

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE

IN THE MATTER OF

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY,

Respondent.

CAUSE NO. **17.0050**

ORDER REGARDING EXHIBITS KK, LL & MM

On or about September 6, 2018, the Hearing Officer received a copy of the First Judicial District Court's Order Granting Petitioner's Motion for Leave to Present Additional Evidence ("Remand Order") in the matter of Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty v. State of Nevada, Department of Business and Industry, Division of Insurance, Case No. 17 OC 00269 1B, Dept. No. I. The Remand Order instructs the Hearing Officer to "consider Petitioner's Proposed Exhibits KK, LL, and MM . . . and determine whether the Evidence is material," and to issue a new decision reflecting the Evidence's impact on the original findings. (Remand Ord. at 2:10–12.)

Having reviewed Exhibits KK, LL, and MM, the purpose of these Exhibits is not readily apparent. Therefore, to fully consider the materiality of these exhibits, consistent with the Court's Remand Order, the Hearing Officer HEREBY ORDERS the Parties to file the following:

1. Home Warranty Administrator of Nevada, Inc. ("HWAN") shall address the purpose for which Exhibits KK, LL, and MM are offered. The brief must be filed no later than 5:00 p.m. on November 13, 2018.
2. If the Division of Insurance ("Division") has any objection or opposition to the Exhibits, the Division may file the objections or opposition no later than 5:00 p.m. on November 20, 2018.

Each Party's brief may not exceed 5 pages. The Parties may file their briefs electronically through the Hearing Officer's Legal Secretary, Yvonne Renta at yrenta@doi.nv.gov. In order to expedite this matter and reduce the cost of service to the Parties, the Hearing Officer finds that good cause exists to

allow the Parties to use electronic service. Thus, if the Parties so stipulate, service may be met through electronic service.

So ORDERED this 31st day of October, 2018.

Alexia M. Emmermann
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the **ORDER REGARDING EXHIBITS KK, LL & MM,** in **CAUSE NO. 17.0050,** via electronic mail and by mailing a true and correct copy thereof via First Class mail, properly addressed with postage prepaid, to the following:

Kirk B. Lenhard, Esq.
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and copies of the foregoing were sent via electronic mail to:

Richard Yien, Deputy Attorney General
Nevada Attorney General's Office
E-MAIL: ryien@ag.nv.gov

DATED this 31st day of October, 2018.

Employee of the State of Nevada
Department of Business and Industry
Division of Insurance

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Attorneys for Respondent

STATE OF NEVADA - DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE

IN THE MATTER OF:	CAUSE NO.: 17.0050
HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, *Respondent.*	**HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. d/b/a CHOICE HOME WARRANTY'S BRIEF REGARDING EXHIBITS KK, LL, AND MM**

Respondent HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. d/b/a Choice Home Warranty ("HWAN") hereby submits the instant Brief Regarding Exhibits KK, LL, and MM, pursuant to the Order entered October 31, 2018 (the "Brief"). This Brief is made and based upon the pleadings and papers on file herein, the following arguments, and any oral arguments of counsel that are agreed to be considered.

DATED this 13th day of November, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: _____
KIRK B. LENHARD, ESQ., Nevada Bar No. 1437
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800
LORI GRIFA, ESQ., NJ Bar No. 011551989

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I. INTRODUCTION

On December 18, 2017, a Findings of Fact, Conclusions of Law, Order of Hearing Officer, and Final Order of the Commissioner (the "Decision") was issued in this Cause. The Decision found that HWAN had violated NRS 686A.070 five times by representing it was self-administered in its 2011-2015 renewal applications when CHW Group, Inc. ("CHWG") was its administrator. It also found that HWAN had conducted business in an unsuitable manner under NRS 679B.125 and NRS 690C.325 by allowing CHWG to sell and offer for sale service contracts on HWAN's behalf because CHWG does not hold a certificate of registration.

On December 22, 2018, HWAN timely filed a Petition for Judicial Review of the Order with the First Judicial District Court and on April 19, 2018, HWAN filed a Motion for Leave to Present Additional Evidence (the "Motion") – namely, Exhibits KK, LL, and MM – for the hearing officer's consideration. The district court entered an order on September 6, 2018 granting the Motion and requiring the hearing office in the instant cause to "receive the [Exhibits] and determine if [they] are material, and, if so, whether it would have had any impact on the final decision."[1] Pursuant to the hearing officer's order entered herein on October 31, 2018, HWAN submits the instant Brief outlining the relevance of the Exhibits.

II. ARGUMENT

A. Exhibits KK, LL, and MM are relevant to whether the Division should be equitably estopped from penalizing HWAN for its relationship with CHWG.

The Exhibits are directly material to numerous issues and findings in the Decision itself related to the Division's knowledge of certain facts. Specifically, HWAN's argument that the Division should be equitably estopped from penalizing HWAN for its relationship with CHWG was rejected because "[t]here is no evidence that the Division knew that CHW Group and Choice Home Warranty were the same."[2] Exhibit KK clearly establishes that no later than November 7, 2011, the Division was fully aware of the fact that CHWG used the fictitious name Choice Home Warranty. Moreover, there can be no merit to any contention that the Division thought Choice Home Warranty was HWAN since the Division did not require that HWAN file the fictitious name Choice Home Warranty until 2014.

[1] *See* Order Granting Pet.'s Mot. for Leave to Present Add'l Evidence, attached hereto as **Exhibit 1**.
[2] *See* Decision 23:21-22.

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Furthermore, Exhibit LL shows that the Division's Legal Department had been investigating CHW Group, Inc. dba Choice Home Warranty in response to questions about "Choice Home Warranty." In other words, a simple inquiry into any information on "Choice Home Warranty" was easily identifiable by the Division as relating to CHWG, as early as July 15, 2010. Exhibit MM, also an e-mail exchange, corroborates that the Division was fully aware that "CHW Group, Inc." was in fact the same as Choice Home Warranty.

It is equally indisputable that the Division knew that CHWG was selling service contracts on behalf of HWAN and explicitly authorized the structure of that relationship. In the Decision, the Hearing Officer rejected HWAN's arguments regarding equitable estoppel based upon the conclusion that "[t]he record likewise shows no evidence that the Division was aware that CHW Group was selling contracts in Nevada, only that Choice Home Warranty was selling contracts in Nevada."[3] Exhibit KK shows that in 2011 the Division knew CHWG was selling service contracts on behalf of HWAN and that the Division ultimately decided that CHWG could sell service contracts backed by HWAN, as the provider, by approving HWAN's service contract with full knowledge of the relationship between HWAN and CHWG.

NRS 690C.070 defines provider as a "person who is obligated to a holder pursuant to the terms of a service contract to repair, replace, or perform maintenance on, or to indemnify the holder for the costs of repairing, replacing, or performing maintenance on, goods." The record for this hearing demonstrates that CHWG has never been a provider in the State of Nevada, and the Exhibits demonstrate that the provider has always been HWAN and the Division has known this since at least 2011. Accordingly, Exhibits KK, LL and MM clearly show that the Division must be equitably estopped from seeking to penalize HWAN for utilizing CHWG to sell service contracts because it explicitly approved the relationship and HWAN relied upon that approval.

B. Exhibits KK and LL are relevant to the issue of whether HWAN made false representations of material fact.

The Decision imposed a fine on HWAN for not correcting the pre-populated entry of "self" as HWAN's administrator in HWAN's renewal applications. Leaving aside that the failure to correct this information was not a knowing misrepresentation, Exhibit KK notes the corporate identity of HWAN as "Home Warranty Administrator of Nevada, Inc." It also notes that "Choice

[3] *See* Decision 23:22-24.

Home Warranty" is HWAN's administrator and has an office address in New Jersey. Further, as detailed above, Exhibit LL clearly shows the Division knew that "Choice Home Warranty" was CHWG in 2010. Taken together, the only logical conclusion from Exhibits KK and LL is that the Division was obviously aware that HWAN was a separate entity from CHWG/"Choice Home Warranty." Moreover, these documents demonstrate that any error in the renewal application was not a knowingly false entry since the entry was contrary to all of the information provided to the Division through other documents. HWAN's inadvertent mistake cannot rise to the level of a knowing misrepresentation. Thus, even if HWAN made a mistake by failing to correct the "self" entry on its prior renewal applications, the Division knew that CHWG was administrator.

C. The Exhibits indicate that the testimony at the hearing was inaccurate and that the Division has known all along that CHWG sells on behalf of HWAN.

As set forth above, the Exhibits indicate several important facts related to the Division's knowledge: (1) that "Choice Home Warranty" is and was CHWG; (2) that HWAN and CHWG were separate legal entities; (3) that CHWG/"Choice Home Warranty" was not certificated and was selling service contracts in Nevada with the Division's knowledge and explicit approval; and (4) that HWAN used CHWG as its contract administrator. These facts, taken together, are relevant to the credibility of certain testimony made at the hearing. As the Decision noted, Rajat Jain testified that "[i]t was identified that Choice and HWAN were one and the same entity, that Choice was not selling illegally because HWAN was a licensed entity in Nevada."[4]

But this testimony is directly contradicted by the Exhibits, which show that the Division has long known that CHWG is Choice Home Warranty. The Exhibits further show that the Division clearly knew CHWG had been selling service contracts in Nevada and approved of the relationship. Contrary to Mr. Jain's testimony, then, the Division had specific knowledge that "Choice and HWAN were" **not** the same entity. In other words, the Division plainly knew that CHWG was selling contracts in Nevada without a certificate and, more importantly, was selling on behalf of HWAN as early as 2011 and never took any affirmative action due to this arrangement – likely because it knows that contract administrators and sales agents are not required to be certificated under Nevada law.[5] Indeed, not only was the Division aware of these

[4] *See* Hr'g Tr., Day 1 at 117:12-15.

[5] Indeed, the Division's own website contains numerous approved service contracts where the seller is not

facts, it explicitly approved the relationship between CHWG and HWAN. Consistent with the foregoing, the Decision erred in finding that HWAN engaged in unsuitable conduct by allowing an uncertificated entity to sell contracts on its behalf.

D. The Exhibits establish that the Decision erred by imposing penalties beyond the time permitted by the applicable statute of limitations.

The Decision ultimately imposed penalties pursuant to Nevada statutes for making false entries of material fact in its 2011-2015 renewal applications and for allowing CHWG to sell service contracts on its behalf since 2010.[6] As is set forth above, the Exhibits are relevant to the correctness of each of these findings and indicate that the Division was aware that CHWG was selling service contracts on behalf of HWAN as early as 2011. On this basis, the Exhibits are relevant to show that the current penalties violate the applicable statute of limitations. NRS 11.190(4)(b) is clear that "[a]n action upon a statute for a penalty or forfeiture, where the action is given to a person or the State" is two years. Enforcement actions and penalties against contract providers are clearly given to the Division and the Exhibits' timeline indicate that no penalties may be imposed for conduct prior to May 8, 2015.[7] The Decision should be revised accordingly.

E. Even if the Exhibits are privileged, that privilege has been waived.[8]

To the extent that the Division will argue in opposition that the Exhibits are privileged and must therefore not be considered, such a contention is without merit. As a threshold matter, the District Court's order requires the Hearing Officer to receive and consider the Exhibits so any argument regarding privilege is moot. In any event, it is questionable as to whether these exhibits are privileged at all. A privileged communication under Nevada law is one made between a client and lawyer for the purposes of facilitating legal services. *See* NRS 49.095. Exhibit LL is not directed to a Division attorney.[9] And, although Exhibits KK and MM are made to David Hall, a Division attorney, they do not on their face appear to be requesting legal advice or services.[10]

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certificated. *See, e.g.*, http://di.nv.gov/ins/f?p=600:35:0:

[6] *See* Decision at 25:19-20; 27:13-21. These penalties were imposed pursuant to NRS 686A.070, NRS 686A.181(1)(a), NRS 679B.125, and NRS 690C.325(1).

[7] This is because the Division did not initiate the instant cause until May 9, 2017.

[8] Due to the outstanding and unresolved claim of privilege of the e-mails, HWAN has made best efforts not to directly quote or attach the Exhibits.

[9] *See generally* Ex. 3.

[10] *See generally* Exs. 2, 4. *See also Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 399 P.3d 334, 341 (Nev. 2017).

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Even if the Exhibits are privileged, however, that privilege has been waived. Nevada law has long held that "[i]f there is disclosure of privileged communications, this waives the remainder of the privileged consultation on the same subject." *Cheyenne Const., Inc. v. Hozz*, 102 Nev. 308, 311–12, 720 P.2d 1224, 1226 (1986). Here, the Division voluntarily produced the Exhibits in response to a properly served subpoena *duces tecum*. This voluntary disclosure waived any privilege that could have attached to them.

In addition, "where the client has placed at issue the substance or content of a privileged communication," waiver attaches. *Wynn Resorts*, 399 P.3d at 345. This is because "[a] party is not allowed to assert the privilege when doing so places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege because the attorney-client privilege is not to be both a sword and a shield." *Mendoza v. McDonald's Corp.*, 213 P.3d 288, 304 (Ct. App. 2009) (internal quotations omitted). Here, the Division has argued directly contrary to the facts these very Exhibits make evident, as described hereinabove, at length on review.[11] The Division attempts to use the privilege as a sword, when it is meant to be a shield, and this it cannot do. The Division should not be permitted to invoke the privilege so that it can take a position that is directly contradictory to the facts.

III. CONCLUSION

Based upon the foregoing, the Exhibits should be considered and admitted into the record here and appropriate reconsidered findings made by the hearing officer as set forth above. In addition, HWAN requests that the hearing officer attach the Exhibits to any supplemental order entered to allow for proper review by the district court.

DATED this 13th day of November, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: _____
KIRK B. LENHARD, ESQ., Nevada Bar No. 1437
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800

Attorneys for Respondent

[11] *See* Division's Answering Br., attached hereto as **Exhibit 2**, at 11:11-12; 12:14-17; 12:14-13:9; 17:12; 22:16-17; 23:4-5; 34:12-13; 34:17-18.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on the 13th day of November, 2018, I caused a true and correct copy of the foregoing **HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. d/b/a BRIEF REGARDING EXHIBITS KK, LL, AND MM** to be served, U.S. Mail, postage prepaid, and via electronic mail, to the following:

Richard P. Yien, Esq., Deputy Attorney General
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Attorneys for Petitioner State of Nevada, Department Of Business And Industry - Division Of Insurance

ALEXIA M. EMMERMANN, ESQ.
Hearing Officer
Department of Business and Industry
Division of Insurance
1818 East College Parkway, Suite 103
Carson City, NV 89706
Email: yrenta@doi.nv.gov

BY: _____
an employee of Brownstein Hyatt Farber Schreck, LLP

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE

IN THE MATTER OF	CAUSE NO. 17.0050
HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY	**DIVISION'S OPPOSITION TO HWAN'S PROPOSED EXHIBITS KK, LL, AND MM**
Respondent.	

COMES NOW the State of Nevada Department of Business and Industry, Division of Insurance ("Division") through its counsel DAG Richard Paili Yien and SDAG Joanna Grigoriev. This matter appears before the Hearing Officer on a limited remand from the First Judicial District Court ("Court Order") instructing the Hearing Officer as follows: "[t]he hearing officer is to consider Petitioner's Proposed Exhibits KK, LL, and MM ('Exhibits'). The hearing officer will receive the evidence and determine whether the evidence is material, and if so, whether it would have had any impact on the final decision." (Order Granting Petitioner's Motion for Leave to Present Additional Evidence 2:11-13).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION/ PERTINENT FACTS

Pursuant to the instructions of the Court Order, the Hearing Officer, in turn, issued an order requiring HWAN to submit a brief to "address the purpose for which Exhibits KK, LL, and MM are offered." The Division was presented with the option to file an opposition to the proposed Exhibits[1]. The Division objects and opposes the introduction of these Exhibits, as set forth.

II. ARGUMENT

EXHIBITS KK, LL, AND MM ARE IMMATERIAL TO THIS MATTER AND NOTHING IN THE EXHIBITS NEGATES THE VIOLATIONS BY HWAN OR ABSOLVES IT FROM THE RESPONSIBILITY IMPOSED BY LAW

After an administrative hearing in Cause No. 17.0050, the Hearing Officer found that HWAN violated NRS 686A.070, by making false entries of material fact (six counts); conducted business in an unsuitable manner in violation of NRS 690.325 and 679B.125 by using Choice Home Warranty Group ("CHWG"), an unlicensed entity, for all activities for which Nevada law requires a certificate of registration (23,889 contracts)[2]; and violated NRS 690C.320.2 (one count) by failing to make records available to the Commissioner upon request,[3] and ordered fines.[4] The Exhibits HWAN is seeking to introduce are not material to any of these rulings and none would be affected by them.

HWAN makes five arguments in its brief. HWAN does not argue that the Exhibits show that it did not violate the law. The essence of HWAN's claim of relevancy can be characterized as follows—because the Exhibits may be suggesting that the Division staff knew or should have known of HWAN's misrepresentations, HWAN should not have been penalized for them. For the reasons set forth below, HWAN's arguments must fail.

A. Equitable Estoppel Does Not Apply

HWAN claims that Exhibits KK, LL, and MM show that "the Division must be equitably estopped from seeking to penalize HWAN for utilizing CHWG to sell service contracts because it

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[1] "[i]f the Division of Insurance has any objection or opposition to the Exhibits, the Division may file the objections or opposition no later than 5:00 pm.m on November 20, 2018 (October 31, 2018, Order, 1: 23-25).

[2] Final Order, 25:17-24, 27:18-21.

[3] Final Order; 22:1-5; 27:16-17.

[4] Final Order 27:13-21.

explicitly approved the relationship . . ." (HWAN Br., 2:23). Setting aside the fact that these Exhibits do not show what HWAN claims they show[5], it is well-settled that "estoppel cannot prevent the state from performing its governmental functions." *Chanos v. Nevada Tax Com'n*, 124 Nev. 232, 238, 181 P.3d 675, 679 (2008). The Commissioner cannot be prevented from exercising her duties imposed by the Legislature under the Insurance Code, title 57 of the NRS, including protection of the public by disciplining licensees for their violations. HWAN's argument that the Division should be estopped from enforcing the law must be rejected. Even if Exhibits KK, LL, and MM did show that someone from the Division staff could have had the knowledge of the existence of two separate entities, it is immaterial to whether or not the Commissioner may enforce the provisions of Title 57. Notably, HWAN does not argue that these Exhibits in any way could show that it did not use CHWG to sell its contracts.

B. The Exhibits Are Not Relevant to HWAN's Statutory Responsibility Under NRS 686A.070 or to the Finding of Violations Thereof

HWAN claims the Exhibits are relevant to HWAN's violations found under NRS 686A.070. In its Complaint, the Division alleged that HWAN violated NRS 686A.070 by failing to disclose material facts about its business in its renewal applications of the Nevada certificate of registration. The Hearing Officer found six (6) violations of NRS 686A.070[6]. NRS 686A.070 provides:

> A person subject to regulation under this Code ***shall not knowingly make or cause to be made any false entry*** of a material fact in any book, report or statement of any person ***or knowingly omit to make a true entry of any material fact*** pertaining to such person s business in any book, report or statement of such person.

(Emphasis added). The language of the statute places no burden on the Division to hold the hand of an applicant and correct any misstatements applicant enters as answers to the questions posed in the application. There is nothing in Exhibits KK, LL, and MM that would absolve HWAN from its responsibility to be truthful in applications to the Division under NRS 686A.070.

It is undisputed that Victor Mandalawi ("Mandalawi"), the president of HWAN and of CHWG, d/b/a Choice Home Warranty, did not disclose CHWG as HWAN's Administrator in its annual renewal

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[5] *See* analysis in section C of this brief.
[6] Final Order, 20:17-19, 26-27; 27:13-15.

applications. On its initial application filed with the Division on September 2, 2010, in response to the question, "[h]ave you designated an administrator to be responsible for administration of Nevada service contracts?" HWAN answered "*No*,"[7] even though, according to HWAN's own representations to this tribunal, the purported agreement between HWAN and CHW Group was signed on July 29, 2010. (*See* HWAN's Ex. E, ISP Agreement). Thereafter, the false entries and omissions continued in renewal applications. In response to the question pertaining to the "administrator" of the applicant (question 2 of Division's Exs. 2, 4, 5, and 21—renewal applications for years 2011, 2012, 2013 and 2016), HWAN's reply was "*self*." The answer to the same question in renewal applications for years 2014 and 2015 was left blank. (Exs. 7 and 12). When asked by the Hearing Officer who Mandalawi was referring to by entering "self" in response to these questions, he responded, "CHW," in direct conflict with HWAN's own defense that HWAN and CHWG are two separate entities.[8]

HWAN does not deny this. Instead, it argues that "[t]he Decision imposed a fine on HWAN for not correcting the pre-populated entry of 'self' as HWAN's administrator in HWAN's renewal applications."[9] This is a new argument, and it must be rejected on many grounds, mainly, because it is *irrelevant* to the issue on the limited remand and because it attempts to re-litigate issues already ruled upon.[10] HWAN's attempt to introduce a new argument that its false entries are merely "inadvertent mistakes" to correct a "prepopulated application form" not only improper, but it is also contradicted by tangible evidence.[11]

Nothing in the proposed Exhibits even remotely affects the findings of HWAN's violations of NRS 686A.070—HWAN made false entries and knowingly omitted material information in violation of NRS 686A.070. The allegation by HWAN that the Exhibits indicate knowledge by the Division of the relationship between HWAN and CHWG, even assuming it is true, does not negate or absolve HWAN

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[7] Division's Ex. 22 and HWAN's Ex. P.

[8] Tr., Day 3, 46:15-25.

[9] HWAN Br., 2:25-26.

[10] It is also an attempt to introduce an alleged fact not in the record. There is nothing in this record that suggests that the Division pre-populated HWAN's applications, including their initial application.

[11] The fact that HWAN attempted to conceal CHWG as its Administrator on the *initial application,* coupled with its answers in each subsequent renewal application--consistently making the same false representations—means the concealment was, at the least, with the knowledge thereof. Moreover, even if the renewal applications were "pre-populated," they would be pre-populated *based* on the information *submitted by HWAN* on its original application.

from the mandate or the responsibility placed on the applicant by NRS 686A.070.

HWAN does not claim that any other findings of violations by the Hearing Officer would be impacted by these Exhibits. They would not.

C. HWAN's Argument That Witness Testimony Was Inaccurate Has No Merit

This argument, designed to justify the introduction of these Exhibits by claiming that they discredit Division witnesses, is also without merit. Substantively, no argument is set forth on how these proposed Exhibits may be relevant, or affect the findings. As far as any effect on the credibility of the witnesses—HWAN's counsel was in possession of these Exhibits during the hearing, yet no attempt was made at that time to impeach the witnesses. In fact, counsel for HWAN voluntarily decided not to seek admittance of these Exhibits.[12] This attempt by HWAN to re-litigate the case under the guise of the limited Court Order is disingenuous, inapposite, and untimely.

Lastly, Exhibits KK, LL, and MM, are consistent with the testimony of the Division witnesses. These Exhibits, including privileged attorney-client communications in 2011, at best, show the confusion among Division employees, resulting from the deceit perpetrated on the State of Nevada by the set of overlapping characters operating CHWG and HWAN.[13] After being told by Mandalawi that the two entities were one and the same[14] [15], the Division allowed HWAN to register Choice Home

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[12] *See* Tr., 9/14/17, 107:8-15.

[13] CHWG was selling service contracts as Choice Home Warranty in various states, including Nevada, as early as 2008, and it had run into problems in some jurisdictions for selling without a license. Mandalawi testified:

Q: In 2010, in Nevada, right before you started the HWAN, there were a few problems, correct?
A. Yes.
Q. Well, the nature of the problems in Oklahoma, California and Washington were basically of the same nature, right?
A. Yes.
Q. And that involved selling without --
A. Selling without a license.
Q. And in Nevada?
A. Yes.
Q. Nevada, a similar problem?
A. Yeah (Tr. 9/13/17, 139:14-25, 140:1-5
Q. what was the company against whom the allegations [consumer complaints] were made?
A. ***CHW Group***. (Tr., 9/13/17, 138:24-25).

[14] Chief Jain testified: "[a]t some point, there was a discussion with Mr. Mandalawi. It was identified that Choice and HWAN were one in the same entity, that Choice was not selling illegally because HWAN was a licensed entity in Nevada. And Mr. Mandalawi then chose to register Choice in the state and surrendered the certificate of registration and agreed to the new certificate showing HWAN dba Choice." Tr., 09/12/17, 117:11-18.

[15] This is also supported by testimony of comingling of funds between HWAN and CHWG Tr., 09/12/17, 69:21-72:18.

Warranty as its d/b/a to avoid confusion among consumers. This is also consistent with HWAN's own annual renewal applications, which never disclosed an administrator. It was precisely because the Division thought that HWAN and "Choice Home Warranty" were one entity, that it requested that HWAN register a dba, as the public already knew it as "Choice Home Warranty."[16]

Believing the two entities to be one and the same, the Chief of Property and Casualty at the Nevada Division of Insurance testified, "[f]rom every documentation that I have seen, from the consumer complaints that we have seen, from the dba's, from the service contract form that is out in the market, from the email advertisements that we have heard consumers receive, in fact, I have received them, there is no doubt in my mind that Choice Home Warranty is the same entity as Home Warranty Administrators of Nevada."[17] HWAN's attempt to now use its own deception, resulting in confusion among Division staff, to in order to discredit Division witness by arguing the witness should have been aware of the lies and deceit perpetrated by HWAN, is troubling, absurd, and untimely.

D & E. HWAN's Attempt to Re-litigate the Case by Introducing New Arguments for the First Time is Improper as is HWAN's Attempt to Introduce the Issue of Waiver of Privilege in this Limited Remand Order.

HWAN, again, audaciously oversteps the scope of this briefing by attempting to introduce new legal arguments and theories. The Division's position is that improper and, again, beyond the scope of the limited charge in the Court Order. HWAN introduces a new argument citing NRS 11.190(4)(b) for the first time. Additionally, in an attempt to bypass the District Court's ruling and use these exhibits in the pending PJR, HWAN argues that the Division waived its privilege. The Division has not waived any such privilege. Moreover, the District Court still needs to find "good reasons" pursuant to NRS 233B.135 (1)(a) in order to admit these exhibits into the record. Because the District Court decided to first address the issue of materiality, by remanding it to the Hearing Officer prior to addressing whether "good reasons" exist, no such admittance of privileged information has occurred. These issues are beyond the scope of the limited remand order and need not be addressed to answer the question posed by the District Court. The charge of the Hearing Officer is limited to determining whether the proposed exhibits would have been material and had any affect as to her Final Order; no more.

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[16] Tr., 09/12/17, 114:21-115:18.
[17] Tr., 09/12/17, 117:21-118:2.

III. CONCLUSION

For the reasons set forth above, the Exhibits are not material to the issue of HWAN's statutory responsibilities or to the finding of violations thereof.

DATED this 20th day of November 2018.

ADAM PAUL LAXALT
Attorney General

By: _____

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 20th day of November 2018, I served the foregoing Nevada Division of Insurance's **DIVISION'S OPPOSITION TO HWAN'S PROPOSED EXHIBITS KK, LL, AND MM** via email and by U.S. Mail, postage prepaid, as follows:

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Division of Insurance
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Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE

IN THE MATTER OF HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation, *Respondent.*	CAUSE NO.: 17.0050 **HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. d/b/a CHOICE HOME WARRANTY'S REPLY TO DIVISION'S OPPOSITION TO ITS BRIEF REGARDING EXHIBITS KK, LL and MM**

Respondent HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. d/b/a Choice Home Warranty ("HWAN"), a Nevada corporation, hereby replies the Division of Insurance's November 20, 2018 Opposition (the "Opposition") to HWAN's November 13, 2018 Brief Regarding Exhibits KK, LL and MM (the "Exhibits") in light of material mischaracterizations of the terms of the underlying Order and prior sworn testimony adduced in the instant Cause. HWAN requests this Reply at it is necessary to correct the record.

//

DATED this 21st day of November, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

HWAN incorporates by reference the procedural and factual background set forth in its April 19, 2018 Motion before the First Judicial District Court, that Court's September 6, 2018 Order (the "Order") granting HWAN's Motion, as well as HWAN's November 13, 2018 Brief. For the sake of brevity, HWAN will not restate that which is contained therein.

The Division, by Sr. Deputy Attorney General Joanna Grigoriev, filed an Opposition to Respondent's Brief on November 20, 2018. Said Opposition, at Page 2, misstates the terms of the Order of the First Judicial Court in a material way. The Division "objects to and opposes" the introduction of these Exhibits". Neither an objection, nor an opposition is available to the Division pursuant to the terms of the Court's September 6, 2018 Order. That Order very plainly required the hearing officer "receive the [Exhibits] and determine if they are material and would have had any impact on the final decision."[1] Indeed, the Division quotes this very directive on Page 1 of its Opposition brief. It should be clear that the hearing officer has been ordered to receive the Exhibits and will do so.

The Division further argues that the Exhibits cannot be received because they were available during to HWAN during the instant Cause and HWAN "voluntarily decided" not to use them. The Division goes further to suggest the April 19, 2018 Motion is a tactic which is "disingenuous, inapposite, and untimely." This jibe ignores the procedural posture of the motion and the Order. To be clear, these Exhibits were not addressed by either party or their witnesses in the underlying hearing because the Division had never given notice of any fact, claim or argument in any complaint or filing that made them material or relevant to the proofs adduced at the hearing. Indeed, it was only after the hearing that these Exhibits became an issue. Well after the hearing, when the Division filed its closing papers, the Division proffered conclusions directly contrary to facts set forth in these Exhibits – contrary to facts in its possession and known at the time of the briefing, necessitating the post-hearing motion and this review. HWAN argues that

[1] See Order Granting Pet's Mot. For Leave to Present Add'l Evidence, attached to HWAN's Brief as Ex. 1

the Division cannot proffer conclusions based on facts it knows to be contrary to the argument and that these proffered conclusions formed the basis of errors in the hearing officer's decision that require reversal.

Finally, in its Opposition, the Division has taken liberties with sworn testimony, which cannot stand. Neither HWAN nor Mr. Mandalawi ever wavered on the separate identities of the two corporations before the Division in the instant Cause. There was no conflict or contradiction in Respondent's proofs. When asked, "So you listed the current administrator as self. Who's self?" He responded: "The administrator would be CHW Group.", referencing CHW Group, Inc. d/b/a Choice Home Warranty, an entity duly incorporated and operating in New Jersey.[2]

I. CONCLUSION:

Based upon the foregoing, HWAN respectfully requests record be corrected accordingly.

DATED this 21st day of November, 2018.

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[2] See Hr'g Tr. Day 3 at 46:22-25.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Archer & Greiner, P.C. and that on 21st day of November, 2018, I served a true and correct copy of the foregoing **HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. d/b/a CHOICE HOME WARRANTY'S REPLY TO DIVISION'S OPPOSITION TO ITS BRIEF REGARDING EXHIBITS KK, LL, and MM** via electronic mail and Federal Express, at Las Vegas and Carson City, Nevada, addressed to the following at the last known address of said individuals:

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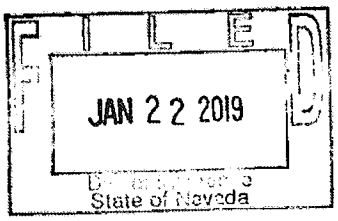
STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE

IN THE MATTER OF **HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY,** **Respondent.**	CAUSE NO. **17.0050**



ORDER ON REMAND

This matter was before the Nevada Division of Insurance ("Division") on an Order to Show Cause issued by the Commissioner of Insurance ("Commissioner") on May 11, 2017, against Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty. A hearing was held on September 12, 13, and 14, 2017. At the close of the hearing, the Parties were ordered to file briefs on a legal issue, and written closing arguments. The Findings of Fact, Conclusions of Law, Order of the Hearing Officer, and Final Order of the Commissioner were issued on December 18, 2017.

On September 6, 2018, the First Judicial District Court of the State of Nevada in and for Carson City issued an Order Granting Petitioner's Motion for Leave to Present Additional Evidence, remanding the matter on judicial review for the Hearing Officer's consideration of proposed exhibits KK, LL, and MM. As the Court explained, "pursuant to NRS 233B.131(2), Petitioner [HWAN] must demonstrate that the Evidence is material to the issues before the agency and that good reasons exist for Petitioner's [HWAN's] failure to present the same in the proceeding below." (Ord. Granting Pet'r's Mot. Leave to Present Add'l Evid 2.) The Court declined to examine the evidence *in camera*, and left the issue of materiality to the Hearing Officer. "Material" means "Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary (3d ed. 2006). Thus, the Hearing Officer's obligation is to receive the evidence, determine if it is material and, if so, issue a new decision with new findings where applicable, but if not, issue a new decision indicating the evidence would have had no impact on the original findings. While the issue of materiality was remanded, the Remand Order does not give the Hearing Officer the authority to

determine good reason for failure to present evidence at the hearing. Therefore, the Hearing Officer only addresses materiality in this new decision.

On remand, the Hearing Officer received exhibits KK, LL, and MM. After reviewing the exhibits, the purpose of each exhibit was not readily apparent, and the Hearing Officer issued an order on October 31, 2018, to give Home Warranty Administrator of Nevada, Inc. an opportunity to address the purpose of the exhibits by November 13, 2018, and to give the Division an opportunity to present its objections or opposition by November 20, 2018. The Parties timely filed their briefs. Home Warranty Administrator of Nevada, Inc. also filed a reply brief to the Division's opposition. Having reviewed exhibits KK, LL, and MM, and considered the Parties' briefs (addressed below), the Hearing Officer finds that the exhibits are not material and do not impact the final decision.

Review of Proposed Exhibits KK, LL, and MM

The proposed exhibits were presented out of chronological order; they are reviewed here in chronological order. For clarification, Home Warranty Administrator of Nevada, Inc. is also identified as HWAN, CHW Group, Inc. is also identified as CHW Group, and Choice Home Warranty is only identified as Choice Home Warranty.

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 emails is not discernable.
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 presented that a complaint was filed against Choice Home Warranty.

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.

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.

Arguments

1. The Exhibits Are Not Sufficient to Meet the Requirements for Equitable Estoppel

HWAN argues that exhibits KK, LL, and MM are material because they clearly establish that the Division was fully aware that CHW Group used the fictitious name Choice Home Warranty and that, because Choice Home Warranty was easily identifiable as CHW Group, the Division should be equitably estopped from penalizing HWAN. HWAN also argues that the Division should be equitably estopped from penalizing HWAN because the Division explicitly authorized the structure of the relationship.

In Nevada, "equitable estoppel operates to prevent a party from asserting legal rights that, in equity and good conscience, the party should not be allowed to assert because of his conduct." *Chanos v. Nev. Tax Comm'n*, 124. Nev. 232, 238 (2008). The Supreme Court has established a four-prong test to determine whether equitable estoppel applies. As applied to this case, equitable estoppel requires proof that (1) the Division was apprised of the true facts,

(2) the Division intended for HWAN to act upon the Division's conduct, (3) HWAN was ignorant of the true state of facts, and (4) HWAN detrimentally relied on the Division's conduct. *Id.* at 237.

Exhibits KK, LL, and MM are 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 trying to address the situation. Discussions among Division staff in which one employee identified CHW Group, Inc. dba Choice Home Warranty in her comments relating to questions about and investigations of Choice Home Warranty do not prove that the Division knew Choice Home Warranty was, in fact, CHW Group. There was no substantive discussion as to who CHW Group, Inc. dba Choice Home Warranty was, nor any substantive discussion as to who Choice Home Warranty was. Any interpretations about what Division staff meant in the email discussions and note of exhibits KK, LL, and MM would be conjecture.

Further, the discussions in 2010 and 2011 did not lead to any action by the Division to establish that the Division was fully aware that CHW Group was Choice Home Warranty. Awareness that CHW Group operated a fictitious name Choice Home Warranty does not prove that the Choice Home Warranty the Division had been investigating was the same company. The Division cannot regulate based on speculation—it must act on facts. The only action the Division took was to ask HWAN to register Choice Home Warranty as a fictitious name because, after a discussion with Mandalawi and based on records filed by Mandalawi, the Division believed that Choice Home Warranty and HWAN were one-and-the-same entity. Even if the conclusion did not come until 2014, the Division took no administrative action against Choice Home Warranty on the understanding that Choice Home Warranty did not operate without a license because it was HWAN. A discussion with Mandalawi and the filings Mandalawi submitted solidified the Division's conclusion.

A person wishing to sell service contracts in Nevada is required to register with the Division prior to selling service contracts, and CHW Group did not register with the Division. Without CHW Group's registration or administrative action taken by the Division that

concluded CHW Group was the same Choice Home Warranty being investigated by the Division, HWAN's arguments piece together speculation—it is not clear that the Division knew CHW Group dba Choice Home Warranty was the Choice Home Warranty the Division was investigating. Thus, there is no proof that the Division was apprised of the true facts.

Nothing in this evidence reflects that the Division intended HWAN to improperly sell contracts for CHW Group, nor is there evidence that the Division intended HWAN's registering Choice Home Warranty as a fictitious name to mean that CHW Group could sell contracts in Nevada. Since becoming registered as a service contract provider in Nevada, HWAN did not change its conduct, so nothing in the evidence suggests that HWAN relied to its detriment on the State.

On the other hand, HWAN was fully aware that CHW Group existed and operated the fictitious name Choice Home Warranty because it was spelled out in the Independent Service Provider Agreement that existed between HWAN and CHW Group, and because Mandalawi is the president of both HWAN and CHW Group. In other words, HWAN knew who the entities were and what they were doing, but there is no evidence to show that HWAN made clear to the Division that Choice Home Warranty was CHW Group. While exhibits KK, LL, and MM are relevant to the matter, they are not material because they are not enough to show that the Division actually knew that Choice Home Warranty was CHW Group. Therefore, the equitable estoppel test fails, and there is no impact on the final decision.

2. The Exhibits Do Not Negate the Findings of False Representations of Material Fact

HWAN argues that exhibits KK and LL are material because they show that the Division was aware that HWAN used Choice Home Warranty as its administrator and, therefore, HWAN should not have been fined for not correcting the "pre-populated entry of 'self'," which was not a knowing misrepresentation.

Exhibit KK contains three items: (1) an email from July 27, 2011, from Bennett indicating that HWAN submitted for review a contract listing Choice Home Warranty as the administrator; the contract was pending due to certain objections, and the contract would be approved after correction of errors; (2) a note dated November 1, 2011; and (3) an email from

November 7, 2011, from Bennett notifying Division employees that Mandalawi, who is president of CHW Group, obtained a certificate of registration for another company, HWAN, a year earlier. Only the first email in exhibit KK is relevant to HWAN's argument. As explained in Section 1, above, exhibit LL does not clearly show that the Division knew as of 2010 that Choice Home Warranty was CHW Group.

The email in exhibit KK shows that the Division was aware that HWAN's contract identified Choice Home Warranty as the administrator. However, HWAN failed to identify Choice Home Warranty on every renewal application HWAN submitted after the contract was approved. The fact that Mandalawi signed the application and each renewal affirming that the statements in the applications were true makes every answer regarding having an administrator on each application a knowing misrepresentation. HWAN had entered an agreement for CHW Group to act as its administrator on July 29, 2010, but HWAN did not report this on the application, which was also dated and signed on July 29, 2010. (Ex. 22 & Test. Mandalawi.) Mandalawi signed a separate notarized verification on August 31, 2010, affirming that the information presented in the application was true. (Ex. 22 at 4.) Only one document was filed with the Division identifying Choice Home Warranty as the administrator. Even if the Division had been aware that Choice Home Warranty was the administrator, three months later, Mandalawi submitted a renewal application indicating HWAN was the administrator, and did so again in 2012 and 2013. Pre-populated or not, Mandalawi attested to the truth of the information in the application, and the Division relied on the attestations such that the Division asked HWAN to register Choice Home Warranty as a fictitious name.[1] The Division's knowledge of whether Choice Home Warranty was CHW Group has no bearing on HWAN's intentional acts because nothing in the exhibits shows that Mandalawi was unaware of who the administrator was. The Division could only know what HWAN disclosed. Nothing in the exhibits refutes that it was a knowing misrepresentation. Thus, exhibits KK and LL do not show that the Division knew CHW Group was the administrator such that HWAN should not be

[1] The evidence shows that HWAN presented itself as one-and-the-same with Choice Home Warranty in the renewal applications, which also supports the conclusion in Section 1.

fined for making false representations of fact.

3. The Exhibits Do Not Show that the Division's Testimony Was Inaccurate

HWAN argues that the exhibits are material because they show that the Division's testimony was inaccurate. Specifically, HWAN argues that the credibility of Rajat Jain is directly contradicted by the exhibits because the exhibits show that the Division had long known that CHW Group is Choice Home Warranty. As explained in Sections 1 and 2, above, exhibits KK, LL, and MM do not show that the Division knew all along that Choice Home Warranty was CHW Group. The exhibits also do not show that the Division knew of and approved of CHW Group's sale of service contracts in Nevada. Therefore, the exhibits do not affect Jain's credibility. Jain's name does not appear in any of the email correspondence of exhibits KK, LL, or MM, so whether he was aware of or part of the discussions of 2010 and 2011 is unknown. Jain testified as to how the Division arrived at the determination in 2014 that HWAN and Choice Home Warranty were one-and-the-same entity, which is not the subject of any of the exhibits. Thus, the finding that HWAN engaged in unsuitable conduct is not impacted by exhibits KK, LL, or MM.

4. The Exhibits Do Not Establish that the Final Order Imposed Penalties Beyond the Statute of Limitations

HWAN argues that exhibits KK, LL, and MM are material since the exhibits show that the Division was aware that CHW Group was selling service contracts on behalf of HWAN as early as 2011. As a result, HWAN argues, the penalties for making false entries of material fact in its 2011–2015 renewal applications and for allowing CHW Group to sell service contracts on its behalf are improper under the statute of limitations. As explained in Sections 1, 2, and 3, above, exhibits KK, LL, and MM do not show that the Division knew that Choice Home Warranty was CHW Group. Moreover, HWAN did not raise the statute of limitations as an affirmative defense in the hearing; as such, the Hearing Officer will not consider it on remand.

5. Admissibility of Exhibits KK, LL, and MM

HWAN argues that any argument by the Division that exhibits KK, LL, and MM are privileged is without merit because the Remand Order requires the Hearing Officer to receive

and consider the exhibits. The Division argues that the Remand Order allows the Hearing Officer to only consider materiality because the Court has not yet ruled on whether HWAN had good reason for not presenting the exhibits during the hearing.

The Remand Order requires the Hearing Officer to receive the exhibits and consider materiality, and issue a new decision addressing materiality and impact on the final decision. The Court did not grant the Hearing Officer authority to make a determination as to whether good reasons exist for HWAN's failure to present the exhibits at the hearing. Receiving the exhibits and considering materiality required the Hearing Officer to look at the exhibits and evaluate them in the context of the issues; the Hearing Officer is not considering the exhibits' admissibility. Therefore, any argument regarding admissibility, such as privilege, is not within the Hearing Officer's jurisdiction.

Conclusion

Having received and reviewed exhibits KK, LL, and MM, as mandated in the Court's Remand Order, the Hearing Officer finds exhibits KK, LL, and MM not to be material and, therefore, do not impact the final decision.

DATED this 22nd day of January, 2019.

ALEXIA M. EMMERMANN
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the **ORDER ON REMAND,** in **CAUSE NO. 17.0050,** via electronic mail and by mailing a true and correct copy thereof via First Class mail, properly addressed with postage prepaid, to the following:

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and copies of the foregoing were sent via electronic mail to:

Richard Yien, Deputy Attorney General
Nevada Attorney General's Office
E-MAIL: ryien@ag.nv.gov

DATED this 22nd day of January, 2019.

Employee of the State of Nevada
Department of Business and Industry
Division of Insurance

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE

IN HE MATTER OF HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY Respondent.	CAUSE NO. 17.0050 **SUBSTITUTION OF ATTORNEY**

Petitioner Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty hereby substitutes the law firm of Holland & Hart LLP as its attorney of record in the above-entitled matter in the place and stead of Brownstein Hyatt Farber Schreck, LLP and Archer & Greiner P.C.

DATED this 18th day of January 2019.

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY

By: _____

Its: President

Brownstein Hyatt Farber Schreck, LLP and Archer & Greiner P.C. hereby consent to its substitution as attorney of record for Petitioner, Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty.

DATED this 23 day of January 2019.

By: _____

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Las Vegas, Nevada 89134

Holland & Hart LLP hereby consents to its substitution as attorney of record for Petitioner, Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty in the above-entitled matter in the place and stead of Brownstein Hyatt Farber Schreck, LLP and Archer & Greiner P.C.

DATED this 24th day of January 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January 2019 a true and correct copy of the foregoing **SUBSTITUTION OF ATTORNEY** was served via email and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Richard Yien
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Attorneys for Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, Petitioner, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency, Respondent.	Case No.: 17 OC 00269 1B Dept. No.: I **SUBSTITUTION OF ATTORNEY**

Petitioner Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty hereby substitutes the law firm of Holland & Hart LLP as its attorney of record in the above-entitled matter in the place and stead of Brownstein Hyatt Farber Schreck, LLP and Archer & Greiner P.C.

DATED this 18th day of January 2019.

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY

By: _____

Its: President

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HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Brownstein Hyatt Farber Schreck, LLP and Archer & Greiner P.C. hereby consent to its substitution as attorney of record for Petitioner, Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty.

DATED this 23 day of January 2019.

By: _____

Kirk B. Lenhard, Esq.
Travis F. Chance, Esq.
Mackenzie Warren, Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
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Las Vegas, Nevada 89106-4614

Lori Grifa, Esq. (admitted *pro hac vice*)
ARCHER & GREINER P.C.
21 Main Street, suite 353
Hackensack, NJ 97601

Holland & Hart LLP hereby consents to its substitution as attorney of record for Petitioner, Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty in the above-entitled matter in the place and stead of Brownstein Hyatt Farber Schreck, LLP and Archer & Greiner P.C.

DATED this 24th day of January 2019.

Constance L. Akridge

Constance L. Akridge, Esq.
Sydney R. Gambee, Esq.
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Las Vegas, Nevada 89134

Attorneys for Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

HOLLAND & HART LLP
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January 2019 a true and correct copy of the foregoing **SUBSTITUTION OF ATTORNEY** was served via email and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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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 APPENDIX (VOLUME IX OF XIV)** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on May 12, 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 as indicated below:

Via Electronic Filing System:

Richard P. Yien
Joanna N. Grigoriev

/s/ Joyce Heilich
An Employee of Holland & Hart LLP