IN THE SUPREME COURT OF THE STATE OF NEVADA

ASSOCIATED RISK MANAGEMENT, INC., Appellant, v. MANUEL IBANEZ, Respondents.	Supreme Court No.: 80480 District Court No.: A-19-792902-J

RESPONDENT'S ANSWERING BRIEF

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I.

STATEMENT OF THE FACTUAL ISSUE

Whether the Appeals Officer's decision reversing the Respondent Administrator, ASSOCIATED RISK MANAGEMENT, INC., denial of the claimant's request for permanent total disability benefits (PTD") from June 25, 2018 to the present, is not an abuse of discretion, error of law and supported by substantial evidence.

II.

STATEMENT OF THE CASE

This case involves an appeal to the Supreme Court filed by the Appellant, ASSOCIATED RISK MANAGEMENT, INC., (hereinafter referred to as "Administrator" or "Appellant"), of an Appeals Officer Decision and Order dated April 11, 2019. (Joint Appendix, hereinafter "Appendix" at pp. 027-037).

In a written determination dated July 9, 2018, the Administrator denied the claimant, MANUEL IBANEZ, (hereinafter referred to as "Claimant" or "Respondent"), request that he be declared Permanently and Totally Disabled ("PTD") from June 2018. (Appendix at pp. 045-047).

The claimant would appeal this determination to the Hearing Officer, who affirmed this determination on August 28, 2018. (Appendix at pp. 732-734). The claimant would appeal this Decision to the Appeals Officer.

On March 18, 2019, the present hearing came before the Appeals Officer. Following review of the documentary evidence, the Appeals Officer would issue a Decision dated April 11, 2019, **reversing** the Administrator's July 9, 2018 determination denying the claimant's request for retroactive and ongoing PTD benefits. (Appendix at pp. 027-037).

The Administrator would appeal to the Supreme Court.

III.

STATEMENT OF THE FACTS

On **October 16, 2014**, the claimant, Manuel Ibanez sustained multiple severe industrial injuries, while working within the course and scope of his employment as a Carpenter, for High Point Construction. (Appendix at pp. 512).

According to the C-4, claim for compensation form, filled out on the date of injury, the claimant was putting block on the stairs, when a 2x4 fell from the second floor hitting him in the head, right shoulder and low back. The physician diagnosed him with contusion to the right shoulder, cervical strain and lumbar strain, which he directly connected to the claimant's injury. Additional medical treatment was recommended and the claimant was placed on **light duty restrictions of no lifting over 10 pounds, no reaching above shoulders**. (Appendix at pp. 512).

The Employer completed its C-3 form on October 24, 2014. Validity of the claim was not doubted. The Employer indicated that the claimant was building stairs on a second floor home when a 2x4 piece of lumbar fell from the roof trusses and dropped down hitting him on the shoulder. (Appendix at pp. 513).

The claimant would undergo various modalities of treatment at Concentra Medical Center and was prescribed medications and physical therapy. The claimant remained on **light duty restrictions consisting of no lifting over 10 pounds and no reaching above shoulders**. (Appendix at pp. 514-528).

In a determination dated October 30, 2014, the Administrator advised the claimant that his claim had been accepted for a cervical and lumbar strain, and right shoulder contusion. (Appendix at pp. 135-136).

On January 6, 2015, the claimant's care was transferred to Dr. G.M. Elkanich for his low back and cervical conditions. Dr. Elkanich recommended injections for the low back and referral to pain management, as well as an orthopedic referral for the right shoulder. The claimant remained on **light duty restrictions consisting of no lifting over 10 pounds and no bending at the waist**. (Appendix at pp. 534-536).

The claimant would undergo various modalities of treatment including injections at the L4-5 and L5-S1 levels with Dr. Fischer and ultimately underwent **diskectomy and lumbar interbody fusion by Dr. Elkanich on November 11,**

2015. The claimant would be taken off work. (Appendix at pp. 537-573).

On February 2, 2015, the claimant's care for his right shoulder was transferred to Dr. Steven Sanders, and he underwent conservative treatment. The claimant would ultimately undergo **a right shoulder surgery on February 4, 2016**. The operative report noted the postoperative diagnosis of right shoulder acromioclavicular joint posttraumatic arthroplasty, right biceps tendinopathy, and right shoulder posttraumatic impingement syndrome, which Dr. Sanders opined was all industrially related. A distal clavicle resection was performed. (Appendix at pp. 574-577).

On May 17, 2016, the claimant returned to Dr. Elkanich and he opined the claimant had reached maximum medical improvement and was stable and ratable for his lumbar and cervical spine. (Appendix at pp. 580-582).

The claimant was examined by Dr. Avi Weiss on July 21, 2016 with a complaint of hematuria. He noted the claimant presented with a finding of persistent microscopic hematuria and indicated it was common for orchalgia to be present in such circumstances after reviewing the Op report from Dr. Elkanich with an L5 discogenic. (Appendix at pp. 583-586).

Due to continued symptomology in the lumbar and cervical spine, the claimant treated with Dr. Ryan Workman, for pain management, on December 22, 2016. (Appendix at pp. 590-611). He underwent various modalities of treatment.

On April 24, 2017, the claimant would begin treating with Dr. Archie Perry. Following additional injection therapy in the lumbar and cervical spine by Dr. Schifini, the claimant underwent **a second lumbar surgery on September 12, 2017**. Dr. Perry performed a removal of segmental pedicle screw instrumentation at L4, L5, and S1, and exploration of posterior final fusion at L4-5 and L5-S1. (Appendix at pp. 612-647).

The claimant underwent **surgical intervention to the cervical spine by Dr. Perry on September 26, 2017, consisting of a C5-6 fusion**. The claimant was seen post-operatively by Dr. Stacy Oliver on October 16, 2017. She noted he was now having significant right shoulder pain and recommended medication management. (Appendix at pp. 652-659).

On November 13, 2017, the claimant returned to Dr. Perry for a follow up evaluation. He noted despite the surgical interventions, the claimant was continuing to have **significant low back, neck and right shoulder pain**. His impression was status post C5-6 fusion and post removal of lumbar instrumentation. Dr. Perry recommended additional treatment, including a dorsal column stimulator, and took the claimant off work. (ROA at pp. 660-665).

The claimant continued to undergo various modalities of treatment for his low back, neck and right shoulder with various physicians from December 7, 2017 through January 11, 2018. (Appendix at pp. 666-672).

In his reporting dated January 11, 2018, Dr. Perry released the claimant with **light duty restrictions consisting of no lifting over 10 pounds and no bending/twisting at the waist**. (Appendix at pp. 673-677).

On January 28, 2018, the claimant was evaluated by Dr. Elizabeth Munoz for a psychological clearance for the dorsal column stimulator. Dr. Munoz noted the claimant was **suffering from severe depression, anxiety, and post traumatic stress and several medical issues as a result of his job accident in 2014**. She recommended treatment for these conditions. (Appendix at pp. 680-681).

The claimant returned to Dr. Perry for follow up on February 12, 2018 and he continued to recommend approval of the dorsal column stimulator trial. He continued to recommend work restrictions consisting of no lifting over 10 pounds and no bending/twisting at the waist. (Appendix at pp. 492).

The claimant continued to undergo various modalities of treatment for his multiple industrial injuries. (Appendix at pp. 682-696).

According to Dr. Oliver's April 5, 2018 reporting, the claimant was continuing to have significant issues with his industrial injuries. She continued to prescribe various **medications including Hydrocodone, celebrex and tizandine to support the claimant's pain, additional injections**, as well the SCS trial lumbar stimulator recommended by Dr. Perry. (Appendix at pp. 697-711). Similar reporting was issue through July 26, 2018.

Due to the claimant's **severe industrial injuries, ongoing need for medical treatment, including opiate medication, his lack of education and work experience**, the claimant requested acceptance for permanent total disability (PTD) status on June 25, 2018. (Appendix at pp. 045).

On July 9, 2018, the Administrator issued a determination denying the claimant's request for Permanent Total Disability ("PTD") benefits based on the fact he was not documented to work in the United States. (Appendix at pp. 045-047). The claimant would appeal this determination to the Hearing Officer.

On August 1, 2018, the claimant, via counsel, scheduled an appointment with Dr. Richard Cestkowski for a permanent total disability (PTD) assessment and provided him all the claimant's medical records. (Appendix at pp. 508-711).

In his report dated August 21, 2018, after examining the claimant and reviewing the records, Dr. Cestkowski **opined to a reasonable degree of medical probability that the claimant was permanently and totally disabled as a result of his industrial injury of October 16, 2014.** (Appendix at pp. 716-723).

He based his opinion on the significant impairments Mr. Ibanez had to the low back, cervical spine, and right shoulder as a result of **multiple industrial surgeries**. (Appendix at pp. 716-723). Dr. Cestkowski also noted the claimant's need for opiate medication, including Norco, Celebrex, and Zanaflex, secondary to pain as a result of his multiple surgeries.

In addition, Dr. Cestkowski indicated Mr. Ibanez had **no significant educational background,** only completing the ninth grade, and his employment history was significant for working in heavy duty related positions such as the construction field as well as a restaurant helper, with no trade school or military experience. (Appendix at pp. 716-723).

Regarding the claimant's current employability, Dr. Cestkowski opined it would be very difficult for the claimant to sell his employment services, in a competitive market. He considered the patients **pain and limitations in multiple activities of daily life, along with his requirement for opiate medication would make it clearly impracticable to find employment even on a sedentary basis**. (Appendix at pp. 716-723).

In a Decision dated August 28, 2018, the Hearing Officer **affirmed** the Administrator's July 9, 2018 determination denying the claimant's request for Permanent Total Disability ("PTD") benefits. (Appendix at pp. 732-734). The claimant would appeal this Decision to this Court.

The claimant continued to treat at MONOS Health with Dr. Oliver in December of 2018, and she noted the SCS trial occurred on 9/15/18, but the claimant did not get adequate pain relief to justify implant. She continued to **prescribe opiate medication and continued to release the claimant with the sedentary 10 pounds work restrictions imposed by Dr. Perry**. The claimant

would continue to undergo various modalities of treatment with Dr. Patek at the same facility beginning in March of 2019. (Appendix at pp. 068-089).

On March 18, 2019, the present hearing came before the Appeals Officer. Following review of the documentary evidence, the Appeals Officer would issue a Decision dated April 11, 2019, **reversing** the Administrator's July 9, 2018 determination denying the claimant's request for retroactive and ongoing PTD benefits. (Appendix at pp. 027-037).

The Appeals Officer found that **as a result of his severe industrial injury**, which included multiple surgeries by various physicians for the claimant's low back, cervical spine, and right shoulder, the significant physical impairment as documented by Dr. Cestkowski in his IME report, and his sedentary 10 pound lifting restrictions imposed by Dr. Perry and Dr. Oliver, **the claimant qualifies for PTD status**. (Appendix at pp. 027-037).

The Administrator would appeal to the Supreme Court.

IV.

ARGUMENT

The central question on appeal is whether the Appeals Officer's **factual finding** that the Administrator's denial of Permanent Total Disability benefits retroactive to June of 2018, was improper, is supported by substantial evidence and not arbitrary or capricious.

This case involves an injured worker's request for Permanent Total Disability benefits **based on an IME physician, Dr. Richard Cestkowski, who opined Mr. Ibanez was permanently disabled**. No evidence was submitted by the Administrator before the Appeals Officer to rebut this IME report.

It has been the Respondent's position throughout the underlying proceedings that the voluminous facts of this case, particularly the claimant's multiple surgeries, sedentary work restrictions and the credible and persuasive reporting of Dr. Cestkowkski, supports the Appeals Officer's Decision to reverse the Administrator's denial of PTD benefits, and further supports a finding that he is entitled to retroactive PTD benefits since June of 2018 as mandated by law.

A. STANDARD OF REVIEW

The Nevada Administrative Procedure Act delineates the standard of review which the Court must apply in its review of Appeals Officers decisions. NRS 233B.135, provides, in pertinent part, as follows:

> 1. Judicial review of a final decision of an agency must be:
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> (a) Conducted by the court without a jury; and
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> (b) Confined to the record. In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.
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> 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:
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> (a) In violation of constitutional or statutory provisions;
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> (b) In excess of the statutory authority of the agency;
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> (c) Made upon unlawful procedure;
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> (d) Affected by other error of law;
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> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> (f) Arbitrary or capricious or characterized by abuse of discretion.

The Court reviews an administrative decision to determine whether the agency's decision was arbitrary or capricious and thus an abuse of discretion. State Indus. Ins. Sys. v. Montoya, 109 Nev. 1029, 1031, 862 P.2d 1197, 1199 (1993), citing Shetakis v. Dep't of Taxation, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992), NRS 233B.135(3).

An agency ruling without substantial evidentiary support is arbitrary or capricious and therefore unsustainable. State Indus. Ins. Sys. v. Christiansen, 106 Nev. 85, 787 P.2d 408 (1990). On factual determinations, the findings and ultimate decisions of an Appeals Officer are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Indus. Comm'n v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977).

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The Nevada Supreme Court has defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State Employment Security Dept. v. Hilton Hotels, 102 Nev. 606, 729 P.2d 497 (1986).

In reviewing an agency decision, the Court **is free to address purely legal questions without deference to the agency's decision**. Mirage v. State, Dep't of Administration, 110 Nev. 257, 259, 871 P.2d 317 (1994), citing Town of Eureka v. State Engineer, 108 Nev. 163, 826 P.2d 948 (1992).

The construction of an administrative statute is a question of law for the Court's de novo review. Maxwell v. State Indus. Ins. Sys., 109 Nev. 327, 329, 849 P.2d 267, 269 (1993); Nyberg v. Nevada Industrial Commission, 100 Nev. 322, 324, 683 P.2d 3, 4 (1984); American Int'l Vacations v. MacBride, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983).

In the present case, it is the Respondent's position that the Appeals Officer's Decision **clearly supports entitlement to** PTD benefits, and is supported by substantial evidence and is not an error of law, and therefore this Honorable Court should defer to the **Trier of Facts**' Decision in reviewing this matter.

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B. THE APPEALS OFFICER'S FACTUAL FINDINGS THAT DR. CESTKOWSKI'S REPORTING WAS CREDIBLE AND PERSUASIVE EVIDENCE REVERSING THE ADMINISTRATOR'S DENIAL OF PERMANENT TOTAL DISABILITY BENEFITS IS UNREBUTTED AND SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

The Factual issue argued before the Appeals Officer involves the un-rebutted reporting of Dr. Cestkowski, who examined the claimant and reviewed all the records and opined the claimant **was Permanently and Totally Disabled**. (Appendix at pp. 716-723).

NRS 616C.435 is the applicable statute and the Appeals Officer found the claimant would fall under the "odd lot doctrine" as explained in the Nevada Supreme Court case of Nevada Indus. Comm'n v. Hildebrand, 100 Nev. 47 (1984). The Court stated as follows: "On the other hand, a worker may qualify for permanent total disability benefits under the odd-lot doctrine even if the worker's injury is not found in the statutory schedule. The doctrine is generally recognized by use of a residuary catch-all clause following the list of scheduled injuries. In Nevada, odd-lot situations are recognized by NRS 616.575 (2)[3] which provides that the list of scheduled injuries is not exclusive, and that in all other cases permanent total disability must be determined by the insurer **in accordance with the facts presented**." (Emphasis added).

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In determining whether a worker with a nonscheduled injury qualifies for permanent total disability benefits under the odd-lot doctrine factors in addition to physical impairment of the worker must be taken into account. This is because, as Professor Larson has stated, the odd-lot doctrine permits: [T]otal disability [to] be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employable regularly in any way well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market....2 A. Larson, the Law of Workmen's Compensation, section 57.51 (1981).

Larson has also stated that the worker need not be in a state of utter and abject helplessness to be considered permanently and totally disabled under the odd-lot doctrine. Id.

The Appeals Officer found that as a result of **his severe industrial injury**, which included **multiple surgeries** by various physicians for the claimant's low back, cervical spine, and right shoulder, the **significant physical impairment** as documented by Dr. Cestkowski in his IME report, and **his sedentary 10 pound lifting restrictions** imposed by Dr. Perry and Dr. Oliver, **the claimant qualified for PTD status**. (Appendix at pp. 027-037).

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As noted above, consideration of factors other than physical impairment is necessary to determine whether a nonscheduled injury qualifies the worker for permanent total disability benefits under the odd-lot doctrine. Such factors may include, among others, the worker's age, experience, training and education. See E.R. Moore Co. v. Industrial Com'n, 71 I11. 2d 353, 17 I11.Dec. 207, 211, 376 N.E.2d 206, 210 (I11. 1978); Lyons v. Industrial Special Indem. Fund, 98 Idaho 403, 565 P.2d 1360 (1977); see generally 2 A. Larson, supra, at sec. 57.51. The focus of the analysis, in considering the various factors, is on the degree to which the worker's physical disability impairs the worker's earning capacity or ability to work. See E.R. Moore Co., 17 I11.Dec. at 211,376 N.E.2d at 210.

In the present case, the claimant's primary "odd lot" factor would be the credible reporting from Dr. Cestkowkski opining it would be very difficult for the claimant to sell his employment services, in a competitive market. He considered the patients pain and limitations in multiple activities of daily life, along with his requirement for opiate medication, which would make **it clearly impracticable to find employment on a sedentary basis**. (Appendix at pp. 716-723).

As a result and based on the totality of the evidence, including the credible reporting from Dr. Cestkowski, and the credible reporting of Dr. Perry and Dr. Oliver, documenting the claimant's **significant sedentary work restrictions** and **need for opiate medication**, the Appeals Officer properly found that the claimant

had demonstrated an entitlement to permanent total disability status as a result of his industrial injury. (Appendix at pp. 027-037).

Thus, the substantial evidence in the record supports the Appeals Officer's factual April 11, 2019 Decision to reverse the Administrator's July 9, 2018 determination denying the claimant's request for PTD benefits. (Appendix at pp. 027-037).

The Appeals Officer properly found that the Administrator's argument that because the claimant **did not possess a valid work visa,** he was not entitled to PTD status not credible or persuasive and not relevant to the inquiry of Permanent and Total Disability eligibility.

Specifically, under NRS 616A.105, the Nevada Industrial Insurance Act provides that an employee or worker includes "every person in the service of an employer under any appointment or contract for hire or apprenticeship, express or implied, oral or written, **whether lawfully or unlawfully employed**." (Emphasis added).

In Tarango v. State Industrial Insurance System, 117 Nev. 444, 25 P. 2d 175 (2001), our Supreme Court concluded that although **compensation can be paid to an injured undocumented worker** pursuant to the state's workers' compensation scheme, formal vocational retraining must be denied if that training is required **solely because of immigration status**. (Emphasis added).

Unlike Tarango, this case is distinguishable as Permanent Total Disability benefits **do not depend on immigration status** and priorities for returning an injured worker to employment. Mr. Ibanez is not circumventing federal law and requiring this Administrator to provide him with greater benefits than a similarly situated worker who is here unlawfully, like in Tarango.

Mr. Ibanez' inability to return to work is not due to his immigration status, but rather due to his significant industrial injury, requiring multiple surgeries and continued opiate medication and treatment.

Furthermore, contrary to Appellants argument, there is **no requirement** in the Nevada Industrial Insurance Act that the claimant has to be at maximum, medical improvement **to qualify for Permanent Total Disability status**.

The statutes cited by the Administrator in their frivolous brief refer to **Temporary** Total Disability benefits and Permanent **Partial** Disability benefits, which require an injured worker to be at maximum medical improvement to qualify for PPD benefits. **There is no such requirement in NRS 616C.435**.

As the Administrator is well aware, after the claimant's multiple surgeries he was taken off work and paid TTD benefits, notwithstanding his immigration status. The fact he continues to need treatment **six years after his original injury**, further supports this Appeals Officer's factual Decision that the claimant is Permanently and Totally Disabled.

Accordingly, the Claimant would respectfully request that this Court **affirm** the Appeals Officer Decision regarding reversing the denial of PTD benefits, which is supported by the substantial medical evidence in the record.

V.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court deny the Administrator's appeal to the Supreme Court for the reasons noted above, as the Respondent contends that the Appeals Officer's Decision is based upon substantial evidence, and should be affirmed by this Honorable Court.

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Wherefore, Respondent prays this Court deny the Petitioner's appeal to the Supreme Court and affirm the Appeals Officer's April 11, 2019 Decision ordering this claim accepted for PTD benefits and remand this matter to the Administrator **to pay retroactive PTD benefits, with interest**, consistent with the facts set forth in this Brief.

DATED this _____ day of April, 2020.

Respectfully submitted,

BERTOLDO, BAKER, CARTER & SMITH

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of April, 2020.

Respectfully submitted,

BERTOLDO, BAKER, CARTER & SMITH

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons and entities as described in NRAP 26.1(a), that must be disclosed because the undersigned Respondent has no parent corporation and no shareholders. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 15th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I HEREBY CERTIFY that I am an employee of BENSON, BERTOLDO, BAKER & CARTER, CHTD and that, on the _____ day of April, 2020, I deposited a true and correct copy of the above and foregoing **RESPONDENTS ANSWERING BRIEF** in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first-class postage was fully prepaid, addressed to the following:

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