

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE SALLOUM,

Appellant.

vs.

BOYD GAMING CORPORATION,
d/b/a MAIN STREET STATION, a
Delaware corporation,

Respondents.

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Watkins & Letofsky, LLP.

Attorney of Record for Antoine Salloum.

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT.....	iv
ROUTING STATEMENT.....	iv
STATEMENT OF THE ISSUES.....	v
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	4
A. APPELLANT TIMELY FILED HIS CHARGE OF DISCRIMINATION.....	4
B. APPELLANT’S CASE LIVED WITHIN THE ADMINISTRATIVE PROCESS UNTIL THE ISSUANCE OF THE RIGHT TO SUE LETTER.....	6
C. BECAUSE SB177 RELATES TO REMEDIES AND PROCEDURES, IT APPLIES TO THE INSTANT CASE.....	8
D. ANY MISCALCULATION BY APPELLANT IS EXCUSABLE UNDER THE DOCTRINE OF EQUITABLE TOLLING.....	7 - 12
CONCLUSION.....	14
ATTORNEY’S CERTIFICATE – COMPLIANCE WITH NRAP 28.2.....	15

TABLE OF AUTHORITIES

CASES

<i>AM. Pipe and Construction Co.,</i> 414 U.S. 538, 554 (1974)	14
<i>B.K.B. v. Maui Police Dept.,</i> 276F.3d 1091 9 th Cir. 2002.....	7
<i>City of North Las Vegas v. State Local Government Employee Management Relations Bd.,</i> 127 Nev. 631, 261 P.3d 1071, 1077 (2011)	12
<i>Copeland v. Desert Inn Hotel,</i> 99 Nev. 823, 826 (1983)	12
<i>Friel v. Cessna Aircraft Co.,</i> 751 F.2d 1037, 1039 (1985)	10
<i>Green v Los Angeles County Superintendent of Schs.,</i> 883 F.2d 1472, 1476 (9 th Cir. 1989)	6
<i>McConnell v. Gen.Tel. Co. of California,</i> 814 F.2d 1311, 1315-16 (9 th Cir. 1987)	6
<i>Palmer v. State Gaming Control Board,</i> 106 Nev. 151, 153, 787 P.3d 803, 804 (1990)	7,9
<i>Pope v. Motel 6,</i> 121 Nev. 307, 114 P.3d 277 (2005)	7,9
<i>Richardson v HRHH Gaming Senior Mezz, LLD.,</i> 99 F.Supp. 3d 1267, 1275 (D. Nev. 2015)	3
<i>Seino v. Employers Ins. Co. of Nevada,</i> 121 Nev. 146, 152 111 P.3d 1107 (2005)	12
<i>Valdez v. Employers Ins. Co. of Nevada,</i> 123 Nev. 170, 179 (2007)	10
<i>Ware v. NBC Nevada Merchants, Inc.,</i> 219 F.Supp. 3d 1040, 1046 (2017).....	6

STATUTES

NRS 233.160.....	3
NRS 613.330.....	7-12
NRS 613.430.....	7-12
29 CFR §1601.13(a)(4)(ii)(A).....	5
42 USC §20003-5(b).....	6

LEGISLATION

Senate Bill 177, 2019 Legislature.....	8-12
----------------------------------------	------

JURISDICTIONAL STATEMENT

The Court's appellate jurisdiction over this matter lies in NRAP 3A(b)(1), because this appeal is from a final district court judgement granting a motion to dismiss. The district court entered the order granting the motion to dismiss on February 10, 2020. Notice of Entry of Order was served electronically on February 14, 2020. Defendant Antoine Salloum timely filed his Notice of Appeal on March 5, 2020.

ROUTING STATEMENT – RETENTION IN THE SUPREME COURT

This case is presumptively retained for the Supreme Court to “hear and decide” because it raises “as a principal issue a question of first impression involving common law. NRAP 17(a)(11). This case presents the question whether NRS 613.430, amended by SB 177 in the 2019 legislative session, and which went into effect on October 1, 2019, extended the deadline for Appellant to file an action in District Court. This statement is made pursuant to NRAP 28(a)(5).

STATEMENT OF THE ISSUES

1. Whether Appellant timely submitted a sworn charge of discrimination within Nev. Rev. Stat. Section 613.430's 180-day deadline.
2. Whether the 90-day language added to NRS Section 613.430 that became effective on October 1, 2019, extended the deadline for Appellant to file an action in District Court.
3. Whether any miscalculation by Appellant is excusable under the Doctrine of Equitable Tolling.

STATEMENT OF THE CASE

Appellant, Antoine Salloum, was discharged from employment on or about August 15, 2018. (JA005). Appellant submitted a Complaint with the Equal Employment Opportunity Commission (hereinafter “EEOC”) on February 11, 2019 – exactly 180-days after his termination. The EEOC Inquiry Form on file at EEOC lists February 14, 2019, as Respondent’s initial EEOC inquiry date. (JA060 – JA062). Correspondence from Appellant to the EEOC is dated February 11, 2018. (JA030 – JA035).

On June 10, 2019, the EEOC issued a formal Charge of Discrimination against Respondent, citing discrimination based upon age, sex, and national origin. (JA022). On August 13, 2019, the EEOC issued a Right to Sue letter. (JA011). Appellant filed his Complaint in state district court eighty-one days later, on November 1, 2019. (JA001 – JA012).

Respondent filed a Motion to Dismiss on November 25, 2019. (JA013 – JA021). Respondent maintains that Appellant’s claims are time-barred because although he filed an administrative Charge of Discrimination, Appellant did not bring a legal action until November 1, 2019, more than eight months past the 180-day deadline to do so. *Id.*

Appellant maintains that amendments to NRS 613.430, which became effective on October 1, 2019, extended the time for Appellant to bring an action to November

13, 2019 (ninety-days following the right-to-sue notice) – a deadline which Appellant met. (JA022 – JA046; JA069 – JA119). Appellant further maintains that because SB177 addressed remedies and procedures, as opposed to specific conduct, the changes to NRS 613.430 applied to all pending unlawful employment actions at the time the law was passed and not simply those that occurred after October 1, 2019, the day SB177 became effective. *Id.*

Alternatively, based upon the theory of equitable tolling and excusable delay, Appellant’s Complaint is timely.

STATEMENT OF FACTS

On or about August 15, 2018, Respondent discharged Appellant, Antoine Salloum, from employment for allegedly borrowing money from employees and/or soliciting employees to donate to charitable causes – a violation of Respondent’s policies and procedures. (JA005). Appellant alleges the termination, instead, was substantially motivated by discrimination based upon age, sex, and national origin. (JA001 – JA012). Appellant’s discharge occurred despite his adamant denials of any wrongdoing, and in spite of several long-time employees approaching management in his defense. *Id.*

Appellant filed a complaint with the Equal Employment Opportunity Commission (hereinafter “EEOC”) on February 11, 2019 – exactly 180-days after his termination. (JA060 – JA062). The EEOC and the Nevada Equal Rights Commission

(hereinafter, “NERC”), have a work-sharing agreement and as such, a complaint is timely if it is filed with an appropriate federal agency within that period. *See* NRS 233.160 (1).

On June 10, 2019, the EEOC issued a formal Charge of Discrimination against Respondent, citing discrimination based upon age, sex, and national origin. (JA021). On August 13, 2019, the EEOC issued a Right to Sue letter. (JA011). Having exhausted his administrative remedies, Appellant filed his Complaint in District Court eighty-one days later, on November 1, 2019. (JA001 – JA012).

SUMMARY OF THE ARGUMENT

Appellant’s submission of a Complaint to the EEOC occurred on February 11, 2019 – exactly 180-days after his termination, and as such, the subsequent filing of a complaint in district court on November 1, 2019, was also timely.

Prior to October 1, 2019, discrimination claims authorized by Chapter 613 of the Nevada Revised Statutes could not be brought more than 180-days after the date of the act complained of. *Richardson v HRHH Gaming Senior Mezz, LLD.*, 99 F.Supp. 3d 1267, 1275 (D. Nev. 2015). However, the Nevada legislature amended NRS 613.430 during the 2019 legislative session, providing that a complaint for a wrongful employment action must be brought either within 180-days of the wrongful act *or* within 90-days following the right-to-sue notice from the Nevada Equal Rights Commission.

Amendments to NRS 613.430, which became effective on October 1, 2019, extended the time for Appellant to bring an action to November 13, 2019 (ninety-days following the right-to-sue notice) – a deadline which Appellant met. In addition, because SB177 addressed remedies and procedures, as opposed to specific conduct, the changes to NRS 613.430 applied to all pending unlawful employment actions at the time the law was passed and not simply those that occurred after October 1, 2019, the day SB177 became effective.

Alternatively, based upon the theory of equitable tolling and excusable delay, Appellant's Complaint is timely.

ARGUMENT

A. Appellant Timely Filed His Charge of Discrimination.

The adverse employment action in this matter occurred on August 15, 2018 – the day that Appellant was fired from Respondent's employ. (JA005). NRS 613.430 provides that a charge of discrimination must be filed within 180-days of the adverse action. In this instance, the 180th day was February 11, 2019. *Id.*

Appellant has consistently maintained that he submitted his complaint with the EEOC on February 11, 2019, the 180th day to do so. (JA030 – JA035). Appellant's Charge of Discrimination was therefore timely submitted. However, even if Appellant was incorrect in his calculations and filed his Charge on the 183rd day, the Charge of Discrimination is still considered timely because of the work sharing

agreement between the Equal Employment Opportunity Commission and the Nevada Equal Rights Commission.

In jurisdictions such as Nevada, where cases are shared or transferred between the Equal Employment Opportunity Commission and the related state agency, the 180-day deadline is extended – to 300-days. C.F.R. § 1601.13(a)(4)(ii)(A). A Charge of Discrimination filed with the EEOC “is timely if the charge is received within 300-days from the date of the alleged violation.” C.F.R. § 1601.13(a)(4)(ii)(A). The EEOC, on its website, provides that the 180-calendar-day filing deadline is extended to 300-calendar days “if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis.” <https://www.eeoc.gov/how-file-charge-employment-discrimination> last visited December 11, 2020.

The Nevada Equal Rights Commission is the state agency in Nevada that enforces a state law that prohibits employment discrimination. The Nevada Equal Rights Commission, on its website, provides that if an employee has filed a complaint with the EEOC, he does not have to file a separate complaint with NERC.

The NERC has a work-sharing agreement with the EEOC. Where both NERC and the EEOC have jurisdiction, you can file a complaint with either agency, and the agency where you file first will investigate. If you have already filed a complaint with EEOC, they will file the complaint with NERC. www.detr.nv.gov/Page/Complaint_Process last visited December 11, 2020.

Finally, courts have consistently maintained that, as it relates to the exhaustion of administrative remedies, service upon one agency serves as a constructive filing upon the other. *Ware v. NBC Nevada Merchants, Inc.*, 219 F.Supp. 3d 1040, 1046 (2017). *See also, Green v Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1476 (9th Cir. 1989), holding that if a state agency has a work-sharing agreement with the EEOC, the state agency is an agent of the EEOC for the purpose of receiving charges, and *McConnell v. Gen.Tel. Co. of California*, 814 F.2d 1311, 1315-16 (9th Cir. 1987), holding that work-sharing agreements function to constructively file charges with both agencies at once, thus exhausting a plaintiff's administrative remedies.

In light of federal and state policies, as well as case law, Appellant timely filed his Charge of Discrimination.

B. Appellant's Case Lived Within the Administrative Process Until the Issuance of the Right to Sue Letter.

Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on race, color, sex, sexual orientation, national origin, and religion. Before beginning a lawsuit, Title VII requires that a plaintiff exhaust his administrative remedies by filing a timely charge with the EEOC, or the appropriate state agency, thereby affording the agency an opportunity to investigate the charge. 42 U.S.C. §20003-5(b). "The administrative charge requirement serves the important

purposes of giving the charged party notice of the claim and ‘narrow[ing] the issues for prompt adjudication and decision.’ *B.K.B. v. Maui Police Dept.*, 276F.3d 1091 9th Cir. 2002, citing *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C.Cir.1995) (quoting *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 n. 325 (D.C. Cir.1976));

Similar to its federal counterpart, NRS 613.330 protects employees from discrimination on the basis of race, color, sex, sexual orientation, national origin, and religion. (Nevada’s also includes age/disability). NRS 613.420 requires an employee alleging employment discrimination to exhaust his administrative remedies by filing a complaint with the Nevada Equal Rights Commission before filing a district court action. *See Pope v. Motel 6*, 121 Nev. 307, 114 P.3d 277 (2005). *See also Palmer v. State Gaming Control Board*, 106 Nev. 151, 153, 787 P.3d 803, 804 (1990).

Appellant complied with these administrative requirements when he filed his complaint with the EEOC in February 2019. (JA030—JA035) (JA060—JA062). From February 2019 until August 13, 2019, Appellant’s case lived within the administrative process, first awaiting a response to his discrimination complaint, and then awaiting the issuance of the Right to Sue letter. Appellant’s complaint remained under the jurisdiction of the EEOC until the EEOC issued a Right to Sue Notice on August 13, 2019. (JA011).

Following the issuance of the Right to Sue Notice, Appellant had ninety-days – until November 13, 2019 – to bring an action in District Court. Appellant timely filed his Complaint on November 1, 2019. (JA001—JA012).

During the time that Appellant’s case moved through the administrative process of the EEOC, the Nevada legislature amended NRS Chapter 613. Chapter 613 now provides that a person alleging an unlawful employment practice must bring an action within 180-days of the act complained of *or more than 90 days after the date of the receipt of the right to sue notice, whichever is later*. NRS 613.420 (2). (Emphasis added.) The changes to NRS Chapter 13 became effective October 1, 2019. Appellant filed his Complaint on November 1, 2019 within the 90-day window he had to file a complaint. (JA001—JA012).

C. Because SB177 Relates to Remedies and Procedure, It Applies to the Instant Case

Senate Bill 177 greatly expanded the remedies available under Nevada’s anti-discrimination statute and provided other significant changes to the NERC’s administrative process. SB177 went into effect on October 1, 2019. It is codified in Chapter 613 of the Nevada Revised Statutes.

The purpose behind SB177 was to remedy the procedural “catch-22” presented by old provisions of NRS 613.430 which prevented claimants from ever filing in a complaint in district court if they did not file a complaint with the EEOC/NERC and

receive a right to sue letter from EEOC/NERC within 180-days of the adverse employment action. (JA043—JA045). The right to sue letter is required before filing a complaint to confirm completion of the administrative process. *See Palmer v. State of Nevada, et. al.*, 106 Nev. 151, 153 787 P.2d 803, 804 (1990), holding that claims involving employment discrimination are to be administratively exhausted prior to seeking redress in district court. “Section 613.420 authorizes the filing of employment discrimination claims in district court once a plaintiff has exhausted his administrative remedies by filing a complaint with NERC.” *Russo v. Clearwire US, LLC.*, No. 2:12-CV-01831-PMP-VCF, 2013 WL 1888753, (D. Nev. 2013), citing *Pope v. Motel 6*, 114 P.3d 277, 311 (Nev. 1990). If a complainant did not receive the right to sue letter by the 180th day, he could still proceed administratively, but he was time-barred from seeking a remedy in state court. Thus, although a claimant had 300-days to file a Charge of Discrimination (NRS 233.160), he only had 180-days to file suit in state court (NRS 613.430). *Id.*

In this case, the Appellant timely filed his complaint with the EEOC 180-days after the adverse employment action. (JA30—JA35). Because Appellant needed a right to sue letter from the EEOC/NERC prior to filing a complaint in district court, and because the EEOC/NERC does not issue right to sue letters until after they complete an interview and issue a charging complaint, it would be impossible for a claimant to have the opportunity to present his/her claim to a jury in district court if

he/she did not file the initial complaint with the EEOC/NERC with sufficient time for them to complete the process of receiving the complaint, completing the interview, issuing a charging complaint and providing a right to sue letter. Importantly, the EEOC/NERC does not operate on a set schedule when it comes to the process of completing interviews, issuing charges, and providing right to sue letters. Therefore, any claimant who filed a complaint with the EEOC/NERC in the last days of the 180-day limit to file a complaint in district court, would be precluded from filing in district court, because the right to sue letter would not be returned within the 180-day limit to file a complaint in District Court. The legislature sought to remedy this procedural quagmire with SB 177. (JA036—JA041) (JA043—JA046.)

SB177 was silent regarding whether it applies to violations that occurred prior to October 1, 2019 or only those violations that occur after October 1, 2019. However, the Nevada Supreme Court has discussed this issue in the past and has held that a statute is presumed to apply prospectively, unless it relates to remedies and procedure. *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (1985). See also *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 179 (2007). If a statute relates to remedies and procedure, it will apply to any case pending when it is enacted, because remedies do not alter the conduct that occurred before the change.

It is a rule of construction that statutes are ordinarily given prospective effect. But when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending

cases. . . The legislative change in no way alters the effect given to conduct before the change.” *Id.*

SB177 sought to extend the remedies available under Title VII to the four categories of discrimination that the Nevada Constitution protects but which are not enumerated as discrimination under Title VII — sexual orientation, gender identity or expression, age, and disability. (JA036—JA041) (JA043—JA046.) SB177 also addressed the administrative remedies provision of NRS 613.430 and clarified the relationship of the 180-day filing deadline. *Id.* Because SB177 addressed remedies and procedures, as opposed to specific conduct, the changes to NRS 613.430 applied to all pending unlawful employment actions – not simply those that have occurred since October 1, 2019. As such, the amendments to Chapter 613 that took effect on October 1, 2019 apply to Appellant’s case and are controlling in the instant matter.

Respondent maintains that Appellant’s claim was already time-barred when SB177 went into effect and that allowing the claim to survive would be reviving an expired claim. This argument would apply if SB177 had been a substantive bill. However, SB177 was fashioned to address remedies and procedure relating to substantive rights. *Id.* Because SB177 did not add or remove any substantive rights, it only applied to remedies and procedures; and because it only applied to remedies and procedures, SB177 applied to any case pending when it was enacted. Appellant’s case was pending at the time it was enacted.

Because the new law went into effect on October 1, 2019, the old provisions of NRS 613 expired on September 30th. Beginning on October 1st, Appellant was under the authority of the Amendments to Chapter 613. Application of the Amendments to Chapter 613 to this case perfectly serves the purpose behind the amendments.

D. Any Miscalculation by Appellant Is Excusable Under the Doctrine of Equitable Tolling.

Should this Court find that Appellant's Complaint was, in fact, untimely, Appellant requests that this Court find it timely upon the theory of equitable tolling.

Under the doctrine of equitable tolling, a statute of limitations will not bar a claim if despite use of due diligence, the plaintiff did not or could not discover the injury until after the expiration of the limitations period. The Nevada Supreme Court adopted the theory of equitable tolling for employment discrimination cases in 1983, holding that "procedural technicalities that would bar claims of discrimination will be looked upon with disfavor." *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826 (1983). *See also Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 152 111 P.3d 1107 (2005) and *City of North Las Vegas v. State Local Government Employee-Management Relations Bd.*, 127 Nev. 631, 261 P.3d 1071, 1077 (2011).

In determining whether the doctrine should apply in a given case, this Court noted several factors to consider: (1) the diligence of the claimant; (2) the claimant's knowledge of the relevant facts; (3) the claimant's reliance on authoritative statements

by the administrative agency that misled the claimant about the nature of the claimant's rights; (4) any deception or false assurances on the part of the employer against whom the claim is made; (5) the prejudice to the employer that would actually result from delay during the time that the limitations period is tolled; (6) and any other equitable considerations appropriate in the particular case. *Id.*

In this instance, Appellant electronically submitted a complaint to the EEOC on Monday, February 11, 2019 – exactly 180-days after his termination. (JA060—JA062) (JA030—JA035). Appellant considered this a timely filing. Unfortunately, the EEOC does not provide confirmation codes for receipt of uploaded Complaints, so Appellant cannot provide any support for his timely filing other than his own testimony.

Additionally, Appellant timely requested a Right to Sue letter. Appellant received his Right to Sue letter on August 13, 2019. (JA011). Appellant had ninety days from the issuance of the Right to Sue letter to file suit. The 90-day deadline was November 11, 2019. Appellant acted in good faith upon his understanding of the new law and timely filed suit on November 1, 2019. (JA001—JA012).

Finally, tolling the limitations period would not prejudice Respondent. Statutes of limitations “are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Am. Pipe & Construction*

Co. v. Utah, 414 U.S. 538, 554 (1974) citing (*Order of Railroad Telegraphers v Railway Express Agency*, 321 U.S. 342, 64 S. Ct 582 (1944)). Here, had it not been for the dismissal of the action based on a miscalculation of an amended statute, Appellant would be aggressively prosecuting his case. As such, equitable tolling will not prejudice Respondent.

CONCLUSION

The amendments to NRS 613.430, which became effective on October 1, 2019, extended the time for Appellant to bring an action to November 13, 2019 (ninety days following the right-to-sue notice) – a deadline which Appellant met. Because SB177 addressed remedies and procedures, as opposed to specific conduct, the changes to NRS 613.430 applied to all pending unlawful employment actions at the time the law was passed and not simply those that occurred after October 1, 2019, the day SB177 became effective. Alternatively, based upon the theory of equitable tolling and excusable delay, Appellant’s Complaint is timely.

DATED this 18th day of December, 2020.

WATKINS & LETOFSKY, LLP

/s/ Daniel R. Watkins

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CERTIFICATE OF COMPLIANCE (NRAP 28.2)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

(a) This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, font size 14, and double spaced.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

(a) Proportionately spaced, has a typeface of 14 points or more, and contains 3144 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to unnecessary delay or needless increase in the cost of litigation. 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 18th day of December, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Watkins & Letofsky, LLP, and that on this **18TH day of December 2020**, I electronically served the foregoing **APPELLANT'S OPENING BRIEF** on the interested parties in this action via Electronic Service through the Nevada Supreme Court E-filing.

- ☒ Electronic: by submitting the foregoing document via Electronic Service through the Nevada Supreme Court E-filing System upon the parties/counsel listed on the Court's Electronic Service List pursuant to ADKT 404. The copy of the document electronically served bears a notation of the date and time of service. The original document will be maintained with the document(s) served and be made available, upon reasonable notice, for inspection by counsel or the Court. The document will be served on the following:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Farah Kachermeyer
Farah H. Kachermeyer
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