

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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Elizabeth A. Brown  
Clerk of Supreme Court

VINCENT W. HESSER, AN  
INDIVIDUAL,

Appellant,  
vs.

KENNEDY FUNDING, INC., A NEW  
JERSEY CORPORATION,

Respondent.

Supreme Court No.: 81383

District Court Case No. A582746

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT  
DEPARTMENT XI  
Clark County, Nevada  
Honorable Elizabeth Gonzales

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**RESPONDENT'S ANSWERING 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.

There are no parent corporations and/or publicly held companies that own 10% or more of Respondent Kennedy Funding, Inc.

Partners or associates of the law firm of Holley Driggs Law Firm (fna Holley Driggs Walch Fine Puzey Stein & Thompson) appeared for Respondent Kennedy Funding, Inc. in the district court proceedings.

Michael F. Lynch of the law firm of Lynch Law Practice appeared for Respondent Kennedy Funding, Inc. in the district court proceedings and in this appeal, and is expected to appear in this court.

Dated August 2, 2021.

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## **STATEMENT OF THE ISSUES**

Whether the District Court properly found that the Affidavit of Renewal of Judgment at issue was timely served on the Appellant in accord with NRS 17.214(3).

Whether the District Court properly held that the Affidavit of Renewal of Judgment at issue, electronically submitted on Christmas Eve, December 24, 2015, certified by the Clerk of Court as a true and correct copy of the original on file on January 6, 2016, and recorded on January 8, 2016, satisfied Nevada's judgment renewal statutes set forth in NRS Chapter 17.

## STATEMENT OF FACTS

1. On February 18, 2010, Judgment was entered in favor of Respondent against Appellant Vincent W. Hesser (the “Judgment”). Vol 4 VH000705-707.

2. The Judgment certified on March 24, 2010, by the Clerk of Court as a full and correct copy, and subsequently recorded with the Clark County Recorder’s office by Respondent. Vol 4 VH000672—684.

3. On December 24, 2015, Respondent electronically submitted for electronic filing its Affidavit for Renewal of Judgment Against Vincent W. Hesser (the “Judgment Renewal Affidavit”) which was, at that time, approximately \$16.8 million, accruing interest at the default rate of 25% per annum. Vol 4 VH000730—747.

4. On December 24, 2015, Respondent notified Appellant of the renewal of the judgment by sending a copy of the affidavit of renewal by certified mail, return receipt requested, to his last known addresses; which mailing was completed on the same day the Judgment Renewal Affidavit was electronically submitted. Vol 4 VH000747.

5. On January 6, 2016, the Judgment Renewal Affidavit was certified by the Clerk of Court as a full and correct copy for recording purposes. Vol 4 VH000732.

6. On January 7, 2016, Respondent prepared a notarized Affidavit pursuant to NRS 17.150 (the “NRS 17.150 Affidavit”) disclosing, among other things, the judgment debtor’s identity and his last known addresses. Vol 4 VH000748.

6. The Judgment Renewal Affidavit, together with the NRS 17.150 Affidavit, were collectively recorded on January 8, 2016, which is just two days after the Judgment Renewal Affidavit was certified as a true and correct copy of the original by the Clerk of Court. Vol 4 VH000729, 732.

## ARGUMENT

### A. **Respondent Met the Requirements for Judgment Renewal Before the Judgment Expired, and the Renewed Judgment is Valid and Enforceable.**

The original Judgment appeared on the Court’s docket on February 18, 2010. Vol. 2 VH000423—431. Pursuant to NRS 11.190(1), an action upon a judgment lasts for a duration of six years. Six years from February 18, 2010, is February 18, 2016.

Pursuant to NRS 17.214(1)(a), a judgment creditor may renew a judgment which has not been paid by (in addition to other requirements) “[f]iling an affidavit with the clerk of the court where the judgment is entered and docketed, within 90 days before the date the judgment expires by limitation.” Leven v. Frey, 123 Nev. 399, 402 (2007) describes the statute governing renewal of judgments, NRS 17.214, as “expressly refer[ring] to these three aspects of judgment renewal—affidavit filing, recording, and service[.]”

Ninety days previous to the expiration of the Judgment is November 20, 2015. Thus, Respondent needed to renew the Judgment between November 20, 2015, and February 18, 2016. As demonstrated by the record, Respondent timely sought renewal of the Judgment during this period and completed all three steps necessary for renewal well in advance of February 18, 2016. Appellant does not dispute that all three steps were completed before February 18, 2016.

#### 1. Timely Filing: The First Requirement Is Met.

Regarding filing (the “First Requirement”), the statute begins with:

A judgment creditor or a judgment creditor’s successor in interest may renew a judgment which has not been paid by: (a) Filing an affidavit with the clerk of the court where the judgment is entered and docketed, within 90 days before the date the judgment expires by limitation. The affidavit **must** be titled as an “Affidavit of Renewal

of Judgment” and must specify [each of nine enumerated subprovisions and a non-enumerated provision].

NRS 17.214(1)(a) (emphases added).

The Judgment Renewal Affidavit was submitted for electronic filing with the Court on Thursday December 24, 2015. Vol 4 VH000730—747. The electronic filing date of December 24, 2015, falls within the ninety days preceding expiration of the underlying Judgment. As such, the filing of the Judgment Renewal Affidavit was timely and in compliance with the statute.

Appellant does not dispute that the Judgment Renewal Affidavit complies with the statute, does not dispute that the First Requirement was timely met, and does not dispute that Respondent completed this requirement in advance of the original Judgment’s expiration on February 18, 2016. The record establishes that the First Requirement is met.

2. Timely Service: The Second Requirement Is Met.

Regarding service (the “Second Requirement”), the statute reads:

The judgment creditor or the judgment creditor’s successor in interest shall notify the judgment debtor of the renewal of the judgment by sending a copy of the affidavit of renewal by certified mail, return receipt requested, to the judgment debtor at his or her last known address within 3 days after filing the affidavit.

NRS 17.214(3) (emphasis added).

Appellant does not contest that the Second Requirement was completed in advance of the expiration of the original Judgment or that this step was completed during the ninety days preceding expiration of the Judgment, but rather misreads the Judgment Renewal Affidavit and fails to notice that the Judgment Renewal Certificate of Service (its last page) states clearly that the Judgment Renewal



Affidavit was served to the Appellant, personally, via certified mail, return receipt requested. The source of Appellant's confusion on this point is unclear, as the Judgment Renewal Certificate of Service provides uncontroverted evidence that an "as-filed" copy of the Judgment Renewal Affidavit was served the very same day it was submitted for filing. Vol 4 VH000747.

Appellant does not argue that the manner of service (by e-service, by regular mail, and by certified mail, return receipt requested) was improper or deficient in any way, but rather, Appellant appears to overlook the fact the Judgment Renewal Affidavit was served before a file-stamped copy was available. Appellant offers no authority for the proposition, as there is none, that a *file-stamped* Renewal Affidavit must be served, and the fact the document was served before a file-stamped copy was available does not affect the validity of service in any way.

The record demonstrates that the timely-filed Judgment Renewal Affidavit was served on the same date it was filed with the Court, December 24, 2015. Appellant offered nothing in the District Court and can point to nothing in the record that controverts the duly executed certificate of service. Therefore, the Second Requirement was expressly met, and Appellant's argument that the mailing deadline was somehow missed is entirely without support in the record.

3. The Renewal Affidavit Was Certified Pursuant to NRS 17.214(1)(a)(9) and Substantially Complied With the Form and Content Requirements.

Regarding recording (the "Third Requirement"<sup>1</sup>), the statute reads:

A judgment creditor or a judgment creditor's successor in interest may renew a judgment which has not been paid by: . . . (b) If the judgment is recorded, recording the affidavit of renewal in the office of the county recorder in

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<sup>1</sup> Together with the First Requirement and Second Requirement, the "Requirements".

which the original judgment is filed within 3 days after the affidavit of renewal is filed pursuant to paragraph (a).

This court has recognized as a “‘general tenet that time and manner’ requirements are strictly construed, whereas substantial compliance may be sufficient for ‘form and content’ requirements.” Leven, 123 Nev. at 408. Moreover, “[s]ubstantial compliance may be sufficient to avoid harsh, unfair[,] or absurd consequences.” Leyva v. Nat’l Default Servicing Corp., 127 Nev. 470, 475 (2011) (internal omitted). Substantial compliance requires that a party (1) have actual knowledge, and (2) not suffer prejudice. Hardy Cos., Inc. v. Snmark, LLC, 126 Nev. 528, 536 (2010). In this instance, Appellant has never even argued that he was not fully aware of Respondent’s renewal efforts and will not be prejudiced merely by missing out on a windfall in the form of the destruction of a judgment with a current balance, on information and belief, (including interest) of over \$50 million.

The Nevada Statute setting forth the form and content requirements for an Affidavit of Judgment Renewal are set forth in NRS 17.214, which provides, in relevant part:

(a) Filing an affidavit with the clerk of the court where the judgment is entered and docketed, within 90 days before the date the judgment expires by limitation. The affidavit must be titled as an “Affidavit of Renewal of Judgment” and **must specify**:

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(9) Any other fact or circumstance necessary to a **complete disclosure** of the **exact condition** of the judgment.

NRS 17.214(1)(a)(9)(emphasis added).

Indeed, prior to recording a local judgment in Nevada, the applicable statute *requires* the judgment creditor to first have the judgment certified prior to its first recordation. See NRS 17.150(2) (providing “any judgment or decree of a district court of the State of Nevada or the District Court or other court of the United States in and for the District of Nevada, the enforcement of which has not been stayed on appeal, **certified by the clerk of the court** where the judgment or decree was rendered, may be recorded in the office of the county recorder in any county, and when so recorded it becomes a lien...”). It appears beyond reasonable argument, therefore, that a judgment certified as “a true and correct copy of the original” discloses certain “fact[s] or circumstance[s] necessary [for] a complete disclosure of the exact condition of the judgment” as is arguably required by the judgment renewal statute provisions of NRS 17.150(2). If a certification by the clerk of court was not relevant to the exact condition of the judgment, there would be no reason to require certification in NRS 17.150(2). Accordingly, a creditor who determined that certification of an Affidavit of Renewal was necessary or appropriate prior to recording (within 3 days of its certification as is the case here) the Court has the discretion to determine such a renewal has substantially complied with the judgment renewal provisions set forth in NRS Chapter 17.

In Einhorn v. BAC Home Loans Servicing LP, 128 Nev. 689, 696 (2012), the Court was faced with issues of strict compliance with a statutory provision, where the purpose undergirding the provision at issue had been met even though the parties had not complied with the express language “to the tee.” Einhorn concerned a statute then-in effect regarding foreclosure mediation, NRS 107.086(4), at that time required that a beneficiary of the deed of trust bring to the parties’ mediation a certified or original copy of the relevant deed, note, and assignment documents. In Einhorn, the borrower brought the missing assignment to the parties’ mediation. However, the Court found that there had been strict

compliance with the statute and affirmed the District Court’s denial of sanctions, noting that strict compliance had been met when all required documentation was present, and “[t]o make the outcome determinative upon who brought the documents, . . . exalts literalism for no practical purpose.” Einhorn, 128 Nev. at 697.

The Court, mindful of its own precedent, also stated:

In general, “‘time and manner’ requirements are strictly construed, whereas substantial compliance may be sufficient for ‘form and content’ requirements.” [Levin, 123 Nev.] at 408, 168 P.3d at 718; see id. at 408 n.31, 168 P.3d at 718 n.31 (noting that one part of a statute can be “subject to strict compliance, even though other aspects of the statutory scheme were subject to review for substantial compliance”). Furthermore, strict compliance does not mean absurd compliance. Pellegrini v. State, 117 Nev. 860, 874, 34 P.3d 519, 528 (2001) (“[W]e must construe statutory language to avoid absurd or unreasonable results....”); 2A Norman J. Singer & J.D. Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION § 46:2, at 162 (7th ed. 2007) (“Statutes should be read sensibly rather than literally and controlling legislative intent should be presumed to be consonant with reason and good discretion.”).

Einhorn, 128 Nev. at 696. In other words, when a statute requiring strict compliance was not complied with “to the tee,” compliance was found when all requirements had been met.

It is well-established that the District Court’s have the authority to recognize substantial compliance with “form and substance” requirements. Certifying the affidavit of renewal was done in an effort to fully comply with the letter and spirit of Chapter 17.

In this instance, it is entirely reasonable for the Respondent to first have the Clerk of Court certify as true and accurate the Judgment Renewal Affidavit prior to recordation. Indeed, it seems beyond reasonable argument that encouraging recordings to be in the form of certified documents can only improve, enhance, or at least ensure that the official recorded documents available to the public and actual and/or potential creditors are true and accurate. While the Judgment Renewal Affidavit was filed electronically, a mere file-stamp on the document does not necessarily fully comply the “complete disclosure” of the “exact condition” of the judgment prior to recording as required by NRS 17.214(1)(a)(9). A document cannot be certified until it is “file-stamped”, and it can take several days for a file-stamped copy to become available. Only then may the certification process start: first, by notifying the law firm’s “runner” service of the order; second, by arranging payment of the certification fee to the clerk of court; third, arranging a physical pick up of a paper certified raised-seal copy. These steps to certify a document can easily take 3-5 business days, which were completed, in this instance, on January 6, 2016 Vol. 4 VH000732. Once Respondent obtained a certified copy, it was recorded just two days later on January 8, 2018. Vol. 4 VH000729.

In short, Appellant implores this Court to recognize that for an Affidavit of Judgment Renewal to be “filed” in full conformity with NRS 17.214(1)(a), including subsection (9), obtaining a certified copy of an Affidavit of Judgment Renewal for recordation of the affidavit is highly preferable from an accuracy and integrity of public records perspective, and as discussed above, any attorney attempting to follow best practices could conclude certification may be necessary.

Admittedly, there appears to be no Nevada authority discussing whether a certification from the clerk of court, that a particular copy of an Affidavit of Judgment Renewal is true and correct, is within the universe of all facts and

circumstances necessary to a complete disclosure of the exact condition of the judgment, but certainly, whether certification by the Clerk of Court is necessary or permissible, is a question of “form and substance” rather than a question of “time and manner”. As such, this Court should affirm that the District Court correctly applied a substantial compliance standard rather than a strict compliance standard and determine the Judgment Renewal Affidavit was properly filed when it was certified on January 6, 2016, which would dispose of this appeal as the renewal in question was recorded within 3 days of certification, on January 8, 2016. Vol. 4 VH000732; VH000729.

4. Recording Was Completed Wells Before the Original Judgment Expired.

Additionally, although NRS 17.214(1)(b) provides that renewing a recorded judgment include recording its affidavit of renewal, the word “shall” and the word “must” do not appear in this provision—a noticeable distinction from the First Requirement (in which the word must appears twice with respect to the renewal affidavit<sup>2</sup>) and the Second Requirement (in which the word shall appears once, with respect to service of the renewal affidavit<sup>3</sup>).

The record here demonstrates that NRS 17.214’s three Requirements for judgment renewal were all completed in advance of the expiration of the original Judgment. Respondent therefore urges this Court to find that NRS 17.214 was complied with because Respondent completed all three Requirements of renewal in advance of the underlying Judgment expiring.

Appellant essentially asks this Court to invalidate the Recorded Renewed

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<sup>2</sup> With respect to the First Requirement, Appellant’s timely compliance cannot be disputed.

<sup>3</sup> With respect to this requirement, Appellant’s compliance cannot be reasonably disputed, as Appellant’s allegations to the contrary appear to be premised upon a misreading of filed documents and thus contradicted by the record.

Judgment because this was recorded less than ten (10) business days after the three-day period. The Judgment Renewal Affidavit and the Statutory Affidavit were together recorded January 8, 2016, well in advance of the Judgment's expiration on February 18, 2016. Appellant does not contest that the Third Requirement was completed in advance of the original Judgment expiring nor that this step was completed during the ninety-day timeframe set forth in the statute. Rather, more than three and a half years after he and his counsel each received separate notice of the Judgment Renewal Affidavit—and well beyond expiration of the original Judgment—Appellant now contends that the Third Requirement was not met because recording occurred January 8, 2016.

Even though recording of the Judgment Renewal Affidavit occurred during the ninety-day period established by the statute and was completed well in advance of the expiration of the original Judgment, Appellant now asks this Court to invalidate the Judgment Renewal Affidavit. The Motion should be denied for the reasons set forth herein.

- a. **Leven v. Frey is factually distinguishable from the instant case as it involved a creditor who completed only one requirement before the original judgment expired.**

In relying upon Leven, 123 Nev. 399, Appellant presents this Court with authority that can be factually distinguished from the instant dispute. The judgment creditor in Leven (identified by that Court as “Frey”) had accomplished only one of the Requirements in advance of the expiration of his original judgment, filing the affidavit of renewal. *See Leven*, 123 Nev. at 401. Then, after his original judgment had expired, Frey sought first to notice the renewal—again, after the original judgment had expired—and eventually sought to record the renewal one week after the original judgment had expired. *Id.*

The Court's thorough and careful analysis in Leven was undertaken in a case where judgment creditors had let a “gap” or lapse occur between expiration of the

original judgment and complete compliance with all three of the Requirements—facts which are not present here. Because of these factual differences, the specific issue of a recorded judgment renewal under NRS 17.214(1)(b) occurring timely in advance of the six-year deadline established by NRS 11.190(1)(a) and timely within the ninety-day deadline established by NRS 17.214(1)(a)(1), but more than three days after the renewal affidavit was filed, was not present before the Court in *Leven*. Moreover, unlike *Leven*, here there was no “lapse” or “gap” period for the underlying judgment lien because all of the Requirements were completed before the original Judgment expired.

**b. O’Lane v. Spinney involved a creditor who completed zero requirements before the original Judgment expired.**

In *O’Lane v. Spinney*, 110 Nev. 496 (1994), a judgment creditor filed her renewal affidavit after the expiration of the original underlying judgment and therefore failed to renew her judgment within the time period set forth in the statute. *See O’Lane*, 110 Nev. at 498. Moreover, in *O’Lane*, the Supreme Court addressed the untimely creditor’s arguments regarding tolling, whether renewal of a judgment would be considered a ministerial act in connection with the judgment debtor’s bankruptcy automatic stay, and whether equitable considerations based upon the underlying medical malpractice that gave rise to the judgment in the first instance merit an exception allowing the untimely creditor to salvage her judgment.

Not only do the factual circumstances and analysis of *O’Lane* differ from the factual circumstances here, but the legal arguments addressed by the Court are not brought forth by Appellant here. Appellant does not ask the Court to address issues of tolling, issues of the potential impact of a bankruptcy automatic stay, or issues of equitable considerations premised upon medical malpractice. Instead, Appellant asks for relief from a judgment against him, which is a judgment based upon



monies which were lent, guaranteed, and never repaid to Appellant.

Even though Appellant points to O’Lane for the premise that the Nevada Supreme Court specifically addressed this timing issue in that matter, a careful read of O’Lane shows otherwise. As such, the Motion’s reliance on O’Lane is misplaced, as the O’Lane Court did not have before it a creditor who completed all steps necessary to renew a recorded judgment, before the original Judgment expired.

**c. The Policy of NRS 17.214 Has Been Met. Appellant’s position does not comport with the policy underlying NRS 17.214.**

Setting aside Appellant’s confusion over the record and when the Judgment Renewal Affidavit was filed, the primary issue raised by Appellants is one of form over substance—namely, that, although the Renewed Judgment was recorded before the expiration of the six-year statutory period set forth in NRS 11.190(1)(a), and although the Renewed Judgment was recorded during the ninety-day period contemplated under NRS 17.214(1)(a), and although there was timely and full compliance with the First Requirement and the Second Requirement by application of prevailing law, the Renewed Judgment—more than three-and-a-half years after renewal—should be set aside, even though Appellants had actual notice in advance of the Judgment’s expiration that Appellant sought to renew the Judgment.

With respect to timing: Thursday December 24, 2015, the Judgment Renewal Affidavit was filed with the Court, and service of same was effected (i) upon Appellant personally through first class mail and also through certified mail, return receipt requested; and (ii) upon both of his counsel in this case. Appellant immediately mailing the Judgment Renewal Affidavit to Appellants on December 24, 2015, with no delay and on the very same date it was filed with the Court, was in full compliance with the mailing requirement under NRS 17.214(3) (the Second Requirement). Thus, Appellant fails to establish he did not receive timely notice of

the Judgment Renewal Affidavit pursuant to NRS 17.214(b)(3). Thereafter, Tuesday December 29, 2015, would likely have been the earliest “third day” contemplated by application of then-NRCP 6(a)<sup>4</sup> to periods of time prescribed by statute of less than eleven days in length (such as the three days of NRS 17.214(1)(b)). On Friday January 8, 2016 (at most seven business days after Tuesday December 29, 2015), the Judgment Renewal Affidavit (together with the Statutory Affidavit) was recorded.

Appellant’s reading of Nevada Supreme Court case law on the issue of timely renewal of recorded judgments would lead to an absurd result because the cases relied upon involved creditors who completed one (or none) of the renewal requirements before the underlying judgment expired. Simply put, the Supreme Court in Leven was not presented with facts and circumstances which are present here—namely, completion of the three Requirements timely during the ninety-day renewal period afforded by the statute and well in advance of the original Judgment expiring.

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<sup>4</sup> Which, at the time, provided in pertinent part:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and nonjudicial days shall be excluded in the computation except for those proceedings filed under Titles 12 or 13 of the Nevada Revised Statutes.

*See* Nevada Supreme Court ADKT 0522 at Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the NEFCR, filed December 31, 2018, and Errata, filed January 25, 2019; see also Adopted Rules and Redlines, at [https://nvcourts.gov/AOC/Committees\\_and\\_Commissions/NRCP/Adopted\\_Rules\\_and\\_Redlines/](https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Adopted_Rules_and_Redlines/) (last accessed July 31, 2021).

## **CONCLUSION**

Respondent respectfully request this Court affirm the District Court's affirmation of the Renewed Judgment.

## **VERIFICATION**

Under the penalty of perjury, the undersigned declares that he is the attorney for Respondent and knows the contents of the Respondent's Answering Brief. The pleading and facts stated therein are true of his own knowledge, excepts as to those matters stated on information and belief, and that as such matters he believes them to be true. This verification is made by the undersigned attorney pursuant to NRAP 21(a)(5).

## CERTIFICATE OF COMPLIANCE

1. I certify that this Respondent's Answering 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 it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this Respondent's Answering Brief complies with the page-or-type volume limitations of NRAP 32(a)(7), excluding the parts of the response exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface font of 14 points or more, and contains less than 4,000 words.

3. I certify that I have read this Respondents Answering Brief and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose.

4. I further certify that this Respondent's Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Respondent's Answering Brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcripts or appendix which the matter relied on is to be found. In 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 August 2, 2021.

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## **CERTIFICATE OF SERVICE**

I certify that on this day, the foregoing document was served upon the following party via the Nevada Supreme Court's electronic filing system:

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Dated: August 2, 2021.

/s/Michael F. Lynch

Attorney for Respondent