Case No. 81804

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAIDE, L.L.C. d/b/a GENTLE SPRING CARE HOME; SOKHENA K. HUCH; MIKI N. TON,

Appellants,

vs.

CORINNE R. DILEO, as Special Administrator for the Estate of Thomas DiLeo; THOMAS DILEO, JR., as Statutory Heir to Thomas DiLeo; and CINDY DILEO, as Statutory Heir to Thomas DiLeo,

Respondents.

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Appeal

from the Eighth Judicial District Court, Clark County
The Honorable Adriana Escobar, District Court Judge
District Court Case No. A-19-797533-C

RESPONDENTS' SUPPLEMENTAL ANSWERING BRIEF

JAMIE S. COGBURN, ESQ.
Nevada Bar No. 8409
HUNTER S. DAVIDSON, ESQ.
Nevada Bar No. 14860
COGBURN LAW
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
(702) 748-7777
Attorneys for Respondents

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INTRODUCTION

This Supplemental Answering Brief is limited to the following Issue on Appeal: (5) *Whether the Federal Arbitration Act preempts NRS 597.995 when the subject agreement involves in-state nursing home care provided to a Nevada individual, by a Nevada entity, licensed under Nevada law, and the Defendants otherwise failed to produce evidence proving interstate commerce.*

STATEMENT OF FACTS[1]

I. The Subject Abuse / Neglect

In or about January 2015, Decedent was admitted into Defendants' Gentle Spring Care Home[2], which is an assisted living facility / residential facility for groups[3] ("Nursing Home"). App. Vol. I at

[1] The District Court decided Defendants' Motion to Compel Arbitration, which is the subject of this Appeal, before the opening of discovery. As such, this Statement of Facts is based on the allegations in Plaintiffs' Complaint and the limited documents attached to the briefing previously before the District Court.

[2] At all relevant times, Defendants owned, operated, and controlled Gentle Spring Care Home, which is located at 6418 Spring Meadow Drive, Las Vegas, Nevada 89103 ("Nursing Home"). App. Vol. I at 00003.

[3] *See* NRS 449.017(1) ("Except as otherwise provided in subsection 2, 'residential facility for groups' means an establishment that furnishes food, shelter, assistance and limited supervision to a person with an intellectual disability or with a physical disability or a person who is aged

00003–00004. Defendants' Nursing Home is operated from a single-family residential home located in a Las Vegas, Nevada suburb. *Id.* at 00003, 00012. At all relevant times hereto, Decedent was a Nevada resident, Decedent's power of attorney, Plaintiff Corinne DiLeo, was a Nevada resident, Defendant Maide, L.L.C d/b/a Gentle Spring Care Home ("Defendant Maide") was a Nevada limited liability company, Defendant Sokhena K. Huch ("Defendant Huch") was a Nevada resident, and Defendant Miki N. Ton (Defendant Ton") was a Nevada resident. *Id.* at 00002, 00012.

Upon admission, Decedent suffered from, among other things, dementia and required 24-hour care and supervision. *Id.* This constant care and supervision included Decedent's most basic needs, such as, providing him with food, water/liquids, shelter, clothing, and services necessary to maintain his physical and mental health. *Id.* at 00004.

In or about July 2017, Decedent injured his leg on a wheelchair at Defendants' Nursing Home. *Id.* To treat Decedent's leg injury, one of Defendants' caregivers wrapped Decedent's leg with an elastic bandage

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or infirm. The term includes, without limitation, an assisted living facility.").

wrap and would not let Decedent remove it, despite complaints of discomfort. *Id*. Unfortunately, Defendants' caregiver wrapped the elastic band too tightly around Decedent's leg, causing Decedent's leg to become gangrenous. *Id*. Upon noticing Decedent's leg changing colors, Defendants' Nursing Home attempted to treat Decedent themselves, rather than transporting Decedent to a hospital. *Id*.

On or about July 21, 2017, after realizing Defendants' Nursing Home would not transport Decedent to a hospital, Plaintiff Cindy DiLeo called 911 and had Decedent immediately transported to Spring Valley Hospital. *Id.* at 00005. Upon being admitted to Spring Valley Hospital, hospital physicians determined they needed to amputate Decedent's leg to stop the spread of gangrene. *Id.*

On or about August 3, 2017, Decedent's leg was amputated. *Id.* One week later, on or about August 10, 2017, Decedent passed away from complications stemming from his inadequate care at Defendants' Nursing Home. *Id.*

II. The Subject Arbitration Agreement

Upon Decedent's admission into Defendants' Nursing Home, Plaintiff Corinne DiLeo, as Decedent's power of attorney[4], purportedly executed a number of agreements, including an Admission Agreement and a "Bella Estate Care Home Resident Agreement Addendum" ("Grievance and Arbitration Agreement"). *Id.* at 00082–00093. The presentation of these agreements, and whether Plaintiff Corinne DiLeo comprehended them, is unknown because the District Court's decision on this matter preceded discovery.[5]

On its face, the Admission Agreement is a five (5) page agreement between Defendants' Nursing Home and Decedent, by and through Decedent's power of attorney, Plaintiff Corinne DiLeo. *Id.* at 00082–00086. Decedent's statutory heirs, Plaintiffs Cindy DiLeo[6] and Thomas

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[4] Plaintiff Corinne DiLeo is also the Special Administrator for the Estate of Decedent. *Id.* at 00001.

[5] Defendants' statements that the Admission Agreement "was set aside from the rest of the intake paperwork" is not based in any evidence, nor is it supported by a citation to the record. *See* Appellant's Opening Brief, at p.5; *see also* p.8 ("The [Arbitration] Agreement was set aside from the rest of the Admission Agreement . . . .").

[6] Cindy DiLeo is the daughter of Decedent and Plaintiff Corinne DiLeo.

DiLeo, Jr.[7] (collectively, "Statutory Heirs"), were not signatories to the Admission Agreement. *Id.* The Admission Agreement, in relevant part, states Defendants would provide the following "basic general services":

(a) A private room;

(b) Three meals per day, plus snacks;

(c) Laundry (not including drying cleaning);

(d) Cleaning of the resident's room;

(e) A twin-size bed (linens changed biweekly); and

(f) Bedside care for minor, temporary illnesses (not including care for a contagious disease or illness).

Id. at 00082–00083. Importantly, Defendants have not produced any declarations / affidavits, receipts, purchase agreements, or any other evidence demonstrating these services required out-of-state supplies or vendors. *See generally* App. Vol. I at 00001 through App. Vol. III at 00334. Similarly, Defendants have not produced any declarations / affidavits, receipts, billing statements, or any other evidence demonstrating its residents were Nevada Medicaid beneficiaries or that they otherwise received monies through Nevada's Medicaid program. *Id.*

[7] Thomas DiLeo, Jr. is the son of Decedent and Plaintiff Corinne DiLeo.

On its face, the Grievance and Arbitration Agreement is a one (1) page agreement between Bella Estate Care Home and Decedent, by and through Decedent's power of attorney, Plaintiff Corinne DiLeo. *Id.* at 00093. Bella Estate Care Home[8] is an entirely separate assisted living facility / residential facility for groups, located at a different address from Defendants' Nursing Home. *Id.* at 00037, 00095. The Grievance and Arbitration Agreement makes no reference to Defendants' Nursing Home or Defendants Maide, Huch, or Ton. *Id.* at 00093. Similarly, Decedent's Statutory Heirs were not signatories to the Grievance and Arbitration Agreement. *Id.*

Notwithstanding these deficiencies, the Grievance and Arbitration Agreement, which includes two (2) distinct provisions on one (1) page, states:

BELLA ESTATE CARE HOME

Resident Agreement Addendum

Grievance and Arbitration

1. **Grievances:** Resident may voice reasonable grievances about services rendered by staff or other personnel and the Home shall record such

[8] Bella Estate Care Home is located at 3140 Coachlight Circle, Las Vegas, Nevada 89117. *Id.* at 00037.

> grievances upon request to do so. In the event of a written grievances *[sic]*, the Home shall investigate it and make written reply to residents of the Home's findings with *[sic]* a reasonable period thereafter.
>
> 2. **Arbitration:** Any controversy, dispute or disagreement, whether sounding in tort or contract to law, arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in (City, State) *[sic]* in accordance with American health *[sic]* Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the Arbitration, shall be binding of all parties to the agreement and judgment on the award rendered by the arbitrator maybe *[sic]* entered in any court having jurisdiction thereof. The parties shall agree upon a sole arbitrator of their choice and if they cannot agree on a single arbitrator there shall be three arbitrators with the neutrals *[sic]* arbitrator chosen by the parties' nominated arbitrators.

Id.

The bottom of the Grievance and Arbitration Agreement has two (2) general signature lines: one purportedly signed by Plaintiff Corinne DiLeo and the other purportedly signed by Defendant Ton. *Id.* at 00093, 00095. The second provision in the Grievance and Arbitration Agreement—which mandates any dispute arising between the parties be

subject to binding arbitration ("Any Dispute Provision")—does not have a separate signature line or any other indication that Plaintiff Corinne DiLeo affirmatively agreed to that specific provision. *Id.* at 00093.

III. Relevant Procedural History

On June 27, 2019, Plaintiffs filed their Complaint, asserting the following causes of action against each of the Defendants: (1) Abuse/Neglect of an Older Person; (2) Negligence; (3) Wrongful Death; and (4) Survival Action. *Id.* at 00001–00010. On August 14, 2019, Defendants filed their Answer to Plaintiffs' Complaint. *Id.* at 00011–00018.

On September 13, 2019, Defendants filed a Motion to Compel Arbitration arguing Plaintiffs' entire case should be removed into binding arbitration pursuant to the Any Dispute Provision of the Grievance and Arbitration Agreement. *Id.* at 00019–00026. In addition to the Estate's claims,[9] Defendants also sought to compel the Statutory Heirs' Wrongful Death claims into binding arbitration, even though the Statutory Heirs were not signatories to any of the agreements or provisions in this

[9] The Estate's claims include Negligence, Elder Abuse, Wrongful Death, and Survivor Action. *Id.* 00003–00009.

matter. *Id.* at 00078–00079, 00097–00104. Importantly, Defendants' Motion to Compel Arbitration was based upon Nevada's Uniform Arbitration Act (NRS Chapter 38), not the Federal Arbitration Act. *Id.* at 00021–00022. The only item Defendants submitted in support of their Motion to Compel Arbitration was a copy of the one-page Grievance and Arbitration Agreement. *Id.* at 00026.

On September 14, 2019, Plaintiffs filed their Opposition to Defendants' Motion to Compel Arbitration wherein they argued: (1) that the Any Dispute Provision was void and unenforceable because it lacked NRS 597.995(1)'s specific authorization requirement; (2) that the Statutory Heirs could not be bound to the Any Dispute Provision because they were not signatories to the Grievance and Arbitration Agreement; and (3) that Defendants did not meet their burden of proving that the Grievance and Arbitration Agreement was a valid, enforceable agreement. *Id.* at 00027–00034.

On October 10, 2019, Defendants filed their Reply in Support of Motion to Compel Arbitration. *Id.* 00071–00096. In support of their Reply, Defendants submitted a Declaration from Defendant Ton, who attested that the Grievance and Arbitration Agreement was a true and

accurate copy and related to Defendants' Nursing Home, not the listed home, Bella Estate Care Home. *Id.* at 00094–00095. Importantly, Defendant Ton's Declaration does not attest that Defendant Nursing Home utilized out-of-state supplies or vendors in providing its services as listed in the Admission Agreement. *Id.* Similarly, Defendant Ton's Declaration does not attest that Defendant Nursing Home received payments from out-of-state family members or through Nevada's Medicaid Program. *Id.*

On January 28, 2020, Defendants' Motion to Compel Arbitration came before Senior Judge Charles Thompson, who held that the Any Dispute Provision within the Grievance Arbitration Agreement was enforceable against the Estate of Decedent, but not enforceable against the Statutory Heirs. *Id.* at 00097–00109; 00159–00163. As such, the Estate's claims for Elder Abuse, Negligence, Wrongful Death, and Survival Action would be subject to binding arbitration, while the Statutory Heirs' claims for Wrongful Death would be stayed in District Court during the pendency of the binding arbitration. *Id.* at 00162–00163.

On April 21, 2020, Plaintiffs timely filed a Motion for Rehearing on Defendants' Motion to Compel Arbitration ("Motion to Reconsider"). *Id.* at 00110–00118. In their papers, Plaintiffs argued that Judge Thompson's decision was clearly erroneous because Plaintiff Corinne DiLeo's signature at the end of the Grievance and Arbitration Provision did not constitute specific authorization of the Any Dispute Provision. *Id.* at 00115–00116; App. Vol. II at 00206–00210. In support of their position, Plaintiffs specifically pointed to the various arbitration agreements and provisions in *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 50 (Nev. 2016), wherein the Nevada Supreme Court interpreted NRS 597.995(1)'s specific authorization requirement. App. Vol. II at 00206–00210.

On May 5, 2020, Defendants filed their Opposition to Plaintiffs' Motion to Reconsider wherein they argued: (1) that the Any Dispute Provision within the Grievance and Arbitration Agreement was specifically authorized as required by NRS 597.995; and (2) that the Any Dispute Provision within the Grievance and Arbitration Agreement is enforceable because it substantially complies—rather than strictly complies—with NRS 597.995. App. Vol. I at 00164–00204. Defendants did not attach any document or evidence to their Opposition that was not

already provided in support of their Motion to Compel Arbitration and Reply in Support of Motion to Compel Arbitration. *Id.*

On May 26, 2020, Plaintiffs' Motion to Reconsider came before the Honorable Adriana Escobar ("Judge Escobar"), who held that Judge Thompson's decision regarding Defendants' Motion to Compel Arbitration was clearly erroneous because the Any Dispute Provision within the Grievance and Arbitration Agreement lacked NRS 597.995(1)'s specific authorization requirement. App. Vol. II at 00254–00273; App. Vol. III at 00277–00283. Specifically, Judge Escobar found that the Any Dispute Provision lacked a separate signature block, initial line, or other acknowledgement that demonstrates Plaintiff Corinne DiLeo affirmatively agreed to the Any Dispute Provision. App. Vol. III at 00281. As such, Judge Escobar ruled that the Any Dispute Provision was void and unenforceable pursuant to NRS 597.995(2) and, therefore, all of Plaintiffs' causes of action shall proceed before the Eighth Judicial District Court. *Id.*

On September 14, 2020, Defendants filed their Notice of Appeal, challenging the District Court's Order regarding Plaintiffs' Motion to Reconsider. *Id.* at 00284–00286.

For the reasons set forth below, Plaintiffs respectfully request the Court affirm the District Court's Order regarding Plaintiffs' Motion to Reconsider, and further find the FAA does not preempt NRS 597.995, thereby allowing each of Plaintiffs' claims to proceed before the Eighth Judicial District Court.

SUMMARY OF THE ARGUMENT

The Federal Arbitration Act ("FAA") may only preempt a state law "when the FAA applies." *See Tallman v. Eighth Judicial District Court*, 131 Nev. 713, 723, 359 P.3d 113, 121 (2015) (citing *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533, 132 S.Ct. 1201, 1203 (2012); *see also MMAWC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 278, 448 P.3d 568, 571 (2019). Importantly, the FAA only applies to arbitration provisions within contracts involving interstate commerce or commerce with foreign nations. 9 U.S.C. § 2. As such, the FAA may only preempt a state law if the contract at issue substantially affects or involves interstate commerce or commerce with foreign nations. *See U.S. Home Corp. v. Michael Ballesteros Trust*, 134 Nev. 180, 185–87, 415 P.3d 32, 38–39 (2018) (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57, 123 S.Ct. 2037, 2040 (2003)).

Here, the FAA does not preempt NRS 597.995 because the Agreement involved basic care of a Nevada resident, provided by Nevada caregivers, working at a single-family residential home located in a Nevada suburb, which is owned and operated by a Nevada limited liability company. Defendants fail to set forth any evidence that Decedent's care involved interstate commerce because there is none. Decedent's care was strictly limited to food, laundry, and room cleaning—all of which was likely supplied by a local grocery store or general merchandise store (e.g. Walmart or Target). Ultimately, the record demonstrates that this was a "profoundly local transaction." To hold otherwise would demand the conclusion that *everything* is interstate commerce and, therefore, subject to federal preemption.

Further, even if the Federal Arbitration Act preempts NRS 597.995, the Estate's claims should not be compelled into binding arbitration because the Agreement violates its own governing rules: the American Health Law Association's Rules of Procedure for Arbitration ("AHLA Arbitration Rules"). The United States Supreme Court is clear: even where the FAA applies, privately negotiated arbitration agreements shall be enforced in accordance with their terms. *Volt Information*

Sciences v. Board of Trustees, 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). Here, Defendants unilaterally selected the AHLA Arbitration Rules, which explicitly state that the arbitration of a matter shall be terminated when the subject arbitration agreement does not include its specific language located in a conspicuous location. *See* AHLA Arbitration Rules 11.5 and 11.6. Because Defendants' Agreement violates the AHLA Arbitration Rules, it is void and unenforceable.

In sum, the FAA does not apply and, even if the Court finds otherwise, the governing rules unilaterally chosen by Defendants render the Agreement void and unenforceable. As such, Plaintiffs respectfully request the Nevada Supreme Court affirm the District Court's Order and direct each of Plaintiffs' claims to proceed before the Eighth Judicial District Court.

STANDARD OF REVIEW

Whether a state law is preempted by a federal statute is a question of law subject to *de novo* review. *Nanopierce Technologies, Inc. v. Depository Trust & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007); *see also MMAWC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 277,

448 P.3d 568, 570 (2019) (applying *de novo* review to determine whether the Federal Arbitration Act preempts NRS 597.995).

ARGUMENT

I. The Federal Arbitration Act does not preempt NRS 597.995 because the Agreement does not involve interstate commerce.

The United States Supreme Court and Nevada Supreme Court routinely hold that the FAA may only preempt a state law "when the FAA applies." *See Tallman v. Eighth Judicial District Court*, 131 Nev. 713, 725, 359 P.3d 113, 121 (2015) (citing *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 531, 132 S.Ct. 1201, 1203 (2012); *see also MMAWC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 278, 448 P.3d 568, 571 (2019). Importantly, the FAA only applies to arbitration provisions within contracts involving interstate commerce or commerce with foreign nations:

> A written provision in . . . a **contract evidencing a transaction involving commerce** to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added); *see also* 9 U.S.C. § 1 (defining "commerce" as "commerce among the several States or with foreign nations."). As

such, the FAA only preempts a state law if the contract at issue substantially affects or involves interstate commerce or commerce with foreign nations. *See U.S. Home Corp. v. Michael Ballesteros Trust*, 134 Nev. 180, 186–90, 415 P.3d 32, 38–40 (2018) (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57, 123 S.Ct. 2037, 2040 (2003)).

Although the Nevada Supreme Court has not provided a specific list, prior decisions indicate the following non-exhaustive factors may be used to determine whether a contract involves interstate commerce: (1) the residency of the parties to the contract; (2) whether the services provided under the contract cross state lines; (3) whether the services provided under the contract involve out-of-state supplies or vendors; and (4) whether the plain language of the contract explicitly states it shall be governed by the FAA. *See Sentry Systems, Inc. v. Guy*, 98 Nev. 507, 509, n.1, 654 P.2d 1008, 1009, n.1 (1982); *Michael Ballesteros Trust*, 134 Nev. at 186–90, 415 P.3d at 38–40; *Zion Wood Obi Wan Trust*, 135 Nev. at 275–78, 448 P.3d at 570–71; *Tallman*, 131 Nev. at 723, 359 P.3d at 121; *Principal Investments, Inc. v. Harrison*, 132 Nev. 9, 15, 366 P.3d 688, 692 (2016). Sister States have similarly used these factors to determine whether a contract with a skilled nursing facility or nursing home

involves interstate commerce and implicates the FAA. *See e.g. Community Care of America v. Davis*, 850 So.2d 283, 285 (Ala. 2002); *Bruner v. Timberlane Manor Ltd. Partnership*, 155 P.3d 16, 18 (Okla. 2007); *Ruszala v. Brookdale Living*, 415 N.J. Super. 272, 291–92 (N.J. Super. 2010). The party seeking enforcement of the arbitration provision has the burden of proving FAA preemption. *See Michael Ballesteros Trust*, 134 Nev. at 186–90, 415 P.3d at 38–40; *see also Woolls v. Superior Court*, 127 Cal.App.4th 197, 211, 25 Cal. Rptr. 3d 426, 437 (2005); *Brookfield Const. Co. v. Van Wezel*, 841 So. 2d 220, 221–22 (Ala. 2002). Importantly, the existence of interstate commerce is not presumed—"[t]here must be evidence . . . that interstate commerce [is] actually involved." *Michael Ballesteros Trust*, 134 Nev. at 187, 415 P.3d at 38 (citing *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834, 841 (1995)).

As detailed below, the Agreement does not involve interstate commerce because: (A) all the parties to the Agreement are Nevada residents; (B) none of the services provided under the Agreement crossed state lines; (C) there is no evidence that the services under the Agreement involved out-of-state supplies or vendors; and (D) the Agreement does not

state that it is governed by the FAA or that it otherwise involves interstate commerce.

A. The Agreement does not involve interstate commerce because all of the parties to the Agreement are Nevada residents.

The first factor courts commonly consider when determining whether a contract involves interstate commerce is the residency of the parties to the contract. *See Sentry Systems*, 98 Nev. at 509, n.1, 654 P.2d at 1009, n.1 (1982). To illustrate, in *Sentry Systems*, the plaintiff, a Nevada franchisee, filed suit against the defendant, a California corporation, seeking to cancel a franchise agreement entered between the parties. *Id.* at 508–09. Ultimately, the Nevada Supreme Court held that the FAA applied to the arbitration provision within the franchise agreement because the parties were residents of different states and the franchise agreement, on its face, involved interstate commerce. *Id.* at 509, n.1. In support of this conclusion, the Nevada Supreme Court stated:

> [The Franchise Agreement] contemplates an on-going relationship conducting business across state lines. [Defendant], a California corporation has agreed to "train, equip, and license the prospective franchise buyer and promises extensive follow up and on-going assistance to the franchisee," and **the franchisee has agreed to operate a business in Nevada and to pay royalties to the**

> **California corporation** in return for use of the trademark, license and assistance.

Id. (emphasis added). As such, the arbitration provision within the franchise agreement was subject to the FAA because the parties were residents of different states who, pursuant to the franchise agreement, conducted transactions across state lines. *Id.*

Alternatively, a contract that involves parties who are all residents of the same state favors a finding that the contract does not involve interstate commerce. *Lane v. Francis Capital Mgmt. LLC*, 224 Cal.App.4th 676, 688 (Cal. Ct. App. 2014); *Aronov Realty Brokerage v. Morris*, 838 So. 2d 348, 356–57 (Ala. 2002); *City of Cut Bank v. Tom Patrick Construction*, 290 Mont. 470, 476–78 (1998). In *Lane*, the plaintiff, a California citizen, filed suit against his employer, a California corporation, alleging wrongful termination and unpaid wages. *Id.* at 680. Ultimately, the California Court of Appeals held that the FAA did not apply to the arbitration provision in plaintiff's employment contract because the parties to the contract were all California residents and defendant employer failed to set forth any evidence of interstate commerce. *Id.* at 688. Specifically, the California Court of Appeals found:

> [T]he complaint alleged that **[Plaintiff] is a California resident and [Defendant Employer] a California corporate entity, doing business and with its principal place of business in California**. [Plaintiff] never admitted to being engaged in interstate commerce, and [Defendant Employer] **produced no declaration** about the nature of its business or the scope of [Plaintiff's] employment. [Defendant Employer's] bare asserting that "[Plaintiff] was a security analyst at a firm which manages capital investments" is insufficient to support a finding that [Plaintiff's] employment involved interstate commerce.

Id. (emphasis added). As such, the California Court of Appeals held the FAA did not preempt California Labor Code § 229 because the underlying employment contract did not involve interstate commerce. *Id.; see also Aronov Realty Brokerage*, 838 So. 2d at 356–57 (finding the subject contract did not involve interstate commerce, in part, because all parties to the contract were Alabama residents); *City of Cut Bank*, 290 Mont. At 476–78 (finding the subject contract did not involve interstate commerce because all parties to the contract were Montana residents who were completing a construction project located in Montana).

Here, the Agreement does not involve interstate commerce because each of the parties are Nevada residents. This case is easily distinguishable from *Sentry Systems*, where the parties were a mix of Nevada and California residents, and more comparable to *Lane*.

Specifically, like *Lane*, where each of the parties were California residents doing business in California, here, each of the parties are Nevada residents and the Agreement concerns care at a single-family residential home located in a Las Vegas, Nevada suburb. Moreover, like *Lane*, Defendants failed to produce a declaration, or other evidence, that supports a finding that their Nursing Home's operations involve interstate commerce. As such, this first factor favors a finding that the Agreement does not involve interstate commerce.

B. The Agreement does not involve interstate commerce because none of the services provided under the Agreement crossed state lines.

When determining whether a contract involves interstate commerce, courts also consider whether the services provided under the contract cross state lines. *Michael Ballesteros Trust*, 134 Nev. at 186–90, 415 P.3d at 38–40; *see also Zion Wood Obi Wan Trust*, 135 Nev. at 278, 448 P.3d at 570–71 (involving a global licensing agreement—i.e. commerce with a foreign nation). To illustrate, in *Community Care of America v. Davis*, the plaintiff, an Alabama resident, sued a nursing home, a Delaware corporation, alleging neglect that resulted in multiple pressures sores and the amputation of the plaintiff's legs. 850 So. 2d 283,

284 (Ala. 2002). In response, the nursing home filed a motion to compel the plaintiff's suit into binding arbitration pursuant to an arbitration provision in the nursing home's admission agreement. *Id.* In support of the motion, the nursing home submitted an affidavit stating, *inter alia*, that the nursing home's treatment of the plaintiff would not have been possible without the management, medication, equipment, and supplies that were provided by out-of-state entities at the time of plaintiff's residency. *Id.* at 285. In pertinent part, the nursing home's declaration stated:

> [Nursing Home] answers to a regional office in Florida and a corporate office in Maryland. **Our monthly quality assurance reports are submitted for review in Florida and then are forwarded to Maryland for further review.** These reports were prepared at the time [Plaintiff] was a resident at [Nursing Home]
>
> [Nursing Home] has patients who are residents from other states. In addition, we receive regular shipments of supplies from other states, including Georgia, Wisconsin and Mississippi. The supplies that came from those states were ultimately used in the treatment and care of [Plaintiff]. **The treatment and care given to [Plaintiff] would not have been possible without the shipments from Georgia, Wisconsin and Mississippi.** Our medications were purchased from Pharmerica which is based in Florida and is a subsidiary of a California corporation. The medications purchased from Pharmerica are manufactured in and shipped from all parts of the country . . . **[Plaintiff's] treatment and**

> **care would not have been possible but for the medications that are shipped in from out of state.**

Id. (emphasis added). Ultimately, the Alabama Supreme Court found that the FAA may apply to the admission agreement because the affidavit demonstrated a nexus with interstate commerce. *Id.*

Alternatively, the FAA does not apply if the services provided under the contract do not involve interstate commerce. *Bruner v. Timberlane Manor Ltd. Partnership*, 155 P.3d 16, 18 (Okla. 2007); *Woolls*, 127 Cal.App.4th at 214, 25 Cal. Rptr. 3d at 437 (holding the FAA did not apply because the party demanding arbitration failed to present any facts to show the transaction involved interstate commerce); *see also Leos v. Dardens Restaurants, Inc.*, 217 Cal.App.4th 473, 158 Cal. Rptr. 3d 384, 390 (2013) (holding the FAA did not apply because, "although [Employer] contends in its opening brief that it is 'doing business in all 50 states and around the world, in the operation of a restaurant—which involved numerous interstate transactions as part of [plaintiffs'] day-to-day job duties,' [Employer's] citations to the record do not support that contention."). In *Bruner*, the plaintiff, an Oklahoma resident, sued a nursing home, an Oklahoma partnership, alleging wrongful death arising from a broken hip and malnutrition. 155 P.3d at 18, 31. In

response, the nursing home filed a motion to compel the plaintiff's suit into binding arbitration pursuant to an arbitration provision in the nursing home's admission agreement. *Id.* at 18. Ultimately, the Oklahoma Supreme Court held the admission agreement "involves a profoundly local transaction—instate nursing home care provided to an Oklahoma individual by an Oklahoma entity licensed under Oklahoma law." *Id.* at 31. Further, the Court found that, alone, the nursing home's assertion that it purchased some supplies from out-of-state vendors and used telephone and internet lines is not enough to establish interstate commerce. *Id.* As such, the Court held the FAA did not apply to the admission agreement because the nursing home failed to demonstrate that any of the services provided under the admission agreement involved interstate commerce. *Id.*

Here, the Agreement does not involve interstate commerce because none of the services provided under the Agreement crossed state lines. Unlike *Community Care of America*, where the management, medication, equipment, and supplies necessary to the plaintiff's care were provided by multiple out-of-state providers, here, all of Decedent's care was provided within Defendants' Nursing Home by Defendants' local

caregivers. In fact, this case is analogous to *Bruner* where the Oklahoma Supreme Court held that the admission agreement "involves a profoundly local transaction" because it strictly involved in-state nursing home care provided to a local individual by a local entity. Specifically, under the instant Admission Agreement, Decedent's care merely included: (i) three meals per day, plus snacks; (ii) laundry; (iii) cleaning; and (iv) bedside care for minor temporary illnesses that were not contagious. This extremely basic care was provided by Nevada caregivers, working at a Nevada single-family residential home, which is owned by a Nevada limited liability company. Any care beyond meals, laundry, and cleaning—i.e. medical care, hospice care, or medication prescribing—was overseen by outside entities that are not referenced or otherwise contemplated in the Agreement. In sum, there is no evidence that suggests the services under the Agreement involve interstate commerce and, therefore, the FAA does not apply.

C. The Agreement does not involve interstate commerce because there is no evidence that the services provided under the Agreement involved out-of-state supplies or vendors.

When determining whether a contract involves interstate commerce, courts also consider whether services provided under the

contract involve out-of-state supplies or vendors. *Michael Ballesteros Trust*, 134 Nev. at 186–90, 415 P.3d at 38–40. Importantly, the use of out-of-state supplies or vendors must be supported by evidence. *Id.* In *Michael Ballestros Trust*, the plaintiffs brought suit against a residential property developer for construction defects arising from twelve single-family homes located in a Nevada common-interest community. *Id.* at 181. In response, the residential property developer filed a motion and compelled the plaintiffs' suit into binding arbitration pursuant to an arbitration provision contained in the common-interest community's Covenants, Conditions, and Restrictions (CC&Rs). *Id*. Ultimately, the Nevada Supreme Court held that the FAA applied to the arbitration provision because construction of the common-interest community, as contemplated in the CC&Rs, involved interstate commerce. *Id.* In support of this conclusion, the Court explicitly pointed to the affidavits submitted to the district court, which stated multiple out-of-state businesses provided supplies and services in constructing the homes. *Id.*

Alternatively, the FAA does not apply if the party seeking enforcement of the arbitration provision fails to set forth evidence showing the services under the contract involve out-of-state supplies or

vendors. *Arkansas Diagnostic Center v. Tahiri*, 370 Ark. 157, 167, 257 S.W.3d 884, 893 (2007); *see also Brookfield Const. Co.*, 841 So. 2d at 222 (holding the defendant's conclusory affidavit that the contract involved interstate commerce was insufficient evidence of interstate commerce); *see also Ambulance Billings Systems, Inc. v. Gemini Ambulance Services, Inc.*, 103 S.W.3d 507, 511 (Tex. App. 2003) (holding that, even though the subject contract required payments from an out-of-state provider, the FAA did not apply because the defendant failed to introduce any evidence of out-of-state payments). In *Arkansas Diagnostic Center*, the plaintiff, an Arkansas doctor, sued his employer, an Arkansas medical corporation, alleging harsh work conditions and breach of his employment agreement. 370 Ark. At 158–59. In response, defendant medical corporation filed a motion to compel the plaintiff's suit into binding arbitration pursuant to an arbitration provision within the employment agreement. *Id.* at 159. Defendant medical corporation further argued that the employment agreement involved interstate commerce—and, therefore, was subject to the FAA—because defendant medical corporation treated out-of-state patients, received payments from out-of-state insurance carriers, purchased goods from out-of-state vendors, and paid for the plaintiff to

attend out-of-state seminars. *Id.* at 160–61. Ultimately, the Arkansas Supreme Court rejected defendant medical corporation's argument because they failed to set forth any evidence of its purported interstate activities. *Id.* at 166–67. Specifically, the Court stated:

> **[Medical Corporation] failed to provide proof that it engaged in interstate business activities.** For instance, Marion York, the office administrator at [Medical Corporation], testified that [Medical Corporation] had only three out-of-state patients and, to her knowledge, [Medical Corporation] had never advertised in any out-of-state publication on a regular basis to attract clients. Moreover, **[Medical Corporation] failed to put on any proof of an outward attempt by [Medical Corporation] to obtain patients from out of state or any effort by [Medical Corporation] to promote the clinic's reputation outside of Arkansas** . . . Nothing presented by [Medical Corporation] demonstrated that it considered itself, or operated as, an interstate business. **Instead, the evidence [Medical Corporation] did present failed to demonstrate anything other than that it was a local clinic, with local physicians who had privileges at local hospitals, and treated local patients.** Most importantly, not only did [Medical Corporation] fail to prove it had interstate business activities, it also failed to prove that [Plaintiff's] employment facilitated its alleged interstate business activities. A review of the employment agreement reveals that [Plaintiff] contracted with [Medical Corporation] to provide medical services, not to purchase interstate goods, nor to receive payment from out-of-state insurance companies. **No testimony was presented as to how much, if any, of the out-of-state supplies purchased by [Medical Corporation] were used by [Plaintiff]. Nor was any evidence presented as to whether [Plaintiff] was required to attend *out-of-state* conferences to continue**

> **his medical education. Most specific to the employment contract at issue is that [Medical Corporation] was a *local* clinic, which contracted with [Plaintiff] to provide medical services to its *local* patients.** Based on these factors, we hold that [Plaintiff's] employment agreement did not facilitate [Medical Corporation's] alleged interstate business activities and did not evidence a transaction involving commerce.

Id. (italics in original; bold added). In sum, bare statements of interstate commerce are insufficient; the party seeking enforcement of the arbitration provision must set forth evidence that the services under the contract involve out-of-state supplies or vendors. *Id.*

Here, the Agreement does not involve interstate commerce because Defendants failed to set forth any evidence that proves their services required out-of-state supplies or vendors. Unlike *Michael Ballesteros Trust*, where the defendant submitted affidavits to the district court attesting that the construction project required multiple out-of-state business to provide supplies and services, here, Defendant Ton's Declaration fails to demonstrate—or even reference—how Defendants' services involved out-of-state supplies or vendors. Instead, this case is analogous *Ambulance Billing Systems* in that Defendant merely *argues* that "[p]roviding these services requires [Defendants] to purchase goods within commerce [that] are shipped across state lines," without providing

any supporting evidence. As such, the Agreement does not involve interstate commerce because there is no evidentiary foundation that demonstrates the services provided under the Agreement required out-of-state supplies or vendors.

In addition, even if Defendants' assertions were supported by evidence, it would be an absurd result to find that care for (i) a Nevada resident, (ii) from Nevada caregivers, (iii) working at a Nevada single-family residential home, (iv) which is owned by a Nevada limited liability company implicates interstate commerce solely because groceries and supplies purchased from a local grocery store or local merchandise store may ultimately be traced to an out-of-state or foreign origin. This rationale requires a finding that *everything* is foreign commerce, and that a Nevada resident's simple purchase of bananas from the local grocery store, or paper clips from the local office supply store, suddenly thrusts that Nevada resident into interstate commerce and subjects them to federal regulation.

In the end, Plaintiffs respectfully request that his Court adopt the Oklahoma Supreme Court's view in *Bruner v. Timberlane Manor Ltd. Partnership*, 155 P.3d 16 (Okla. 2007). There, the Court held that the

purchase of supplies from out-of-state vendors demonstrates a *de minimis* impact on interstate commerce which, alone, is insufficient to introduce FAA preemption. *Id.* at 31.

D. The Agreement does not involve interstate commerce because the Agreement does not unequivocally state that it is governed by the Federal Arbitration Act and the Defendants failed to otherwise present evidence of interstate commerce.

While not conclusive, when determining whether a contract involves interstate commerce, courts may also consider whether the plain language of the contract explicitly states it shall be governed by the FAA. *Tallman*, 131 Nev. at 723, 359 P.3d at 121; and *Principal Investments*, 132 Nev. at 13, 366 P.3d at 692. In *Tallman*, plaintiffs filed a class action suit against defendant employer, a security company that offered services to construction companies across multiple states. 131 Nev. at 714, 359 P.3d at 116. In response, the security company filed a motion and compelled the plaintiffs' suit into binding arbitration pursuant to arbitration agreements signed by the plaintiffs. *Id.* These arbitration agreements included, *inter alia*, an acknowledgment that the security company "is engaged in transactions involving interstate commerce [and] that the employment relationship between [the parties] affects interstate

commerce." *Id.* at 718. Ultimately, the Nevada Supreme Court found that the class's employment by a multistate security company, together with the plain language of the arbitration agreements, involved interstate commerce. *Id.* at 723. As such, the FAA applied. *Id.; see also Principal Investments*, 132 Nev. at 13, 366 P.3d at 692 (finding the FAA applied because the plain language of the subject agreements stated they are "made pursuant to a transaction involving interstate commerce" and shall "be governed by the Federal Arbitration Act.").

Alternatively, the FAA does not apply when there is no evidence of interstate commerce, and the contract does not unequivocally state it shall be governed by the FAA. *Leos v. Dardens Restaurants, Inc.*, 217 Cal.App.4th 473, 158 Cal. Rptr. 3d 384, 390 (2013). In *Leos*, the plaintiffs filed a workplace harassment suit against their employer. *Id.* In response, the employer filed a motion to compel arbitration pursuant to an agreement that stated disputes shall be resolved by arbitration governed by the FAA or applicable state law. *Id.* Ultimately, the California Court of Appeals held that the California Arbitration Act, not the FAA, governed the arbitration provision because the arbitration provision did not unequivocally state it would be governed by the FAA

and the employer failed to set forth any evidence of interstate commerce. *Id.* In relevant part, the Court stated:

> In the present case, the [Arbitration Agreement] recited that it "is governed by the Federal Arbitration Act *or whatever state law is required to authorize and/or enforce the arbitration*." (emphasis in original). Without evidentiary support, the [Arbitration Agreement] stated that it "is used through the United States." Although [the Employer] contends in its opening brief that it is "doing business in all 50 states and around the world, in the operation of a restaurant—which involved numerous interstate transactions as part of [plaintiffs'] day-to-day job duties," [the Employer's] citations to the record do not support that contention. Further, [the Employer's] motion to compel arbitration was brought pursuant to the [California Arbitration Act ("CAA")]. **Because the [Arbitration Agreement] does not unequivocally state that it is governed by the FAA, and [the Employer] has not offered any evidence that plaintiffs' employment or any relevant transaction involved interstate commerce, we conclude that the CAA governs this case.**

Here, the Agreement does not involve interstate commerce because it does not unequivocally state that it is governed by the FAA and the Defendants failed to otherwise present evidence proving interstate commerce. Like *Leos*, where the arbitration provision did not explicitly state whether it was governed by state or federal law and defendant employer failed to otherwise introduce evidence of interstate commerce, here, the Agreement does not specifically state whether it is governed by

state or federal law and the Defendants failed to set forth any evidence of interstate commerce. Further, like *Leos*, where defendant employer's motion to compel arbitration was based upon the California Arbitration Act, here, Defendants' Motion to Compel Arbitration was based upon Nevada's Uniform Arbitration Act of 2000—i.e. NRS Chapter 38.

In sum, the Agreement does not involve interstate commerce because it involved basic care to a Nevada resident (Decedent), provided by Nevada caregivers, working at a single-family residential home located in a Nevada suburb, which is owned by a Nevada limited liability company. Defendants' care of Decedent merely included food, laundry, and cleaning services, all of which was provided in the household and did not otherwise involve commerce. Defendants' assertion that these extremely basic services required supplies shipped across state lines is not supported by *any* evidence and, therefore, pursuant to the extensive authority provided above, should be disregarded by the Court. Ultimately, the record demonstrates this was a "profoundly local transaction"—involving in-state nursing home care provided to Nevada individual by a Nevada entity, licensed under Nevada law.

II. Even if the Federal Arbitration Act preempts NRS 597.995, the Estate's claims should not be compelled into binding arbitration because the Agreement violates its own governing rules: the American Health Law Association's Rules of Procedure for Arbitration.[10]

Even where the FAA applies, privately negotiated arbitration agreements, like other contracts, shall be enforced in accordance with their terms. *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 478, 109 S.Ct. 1248 (1989) (citing *Prima Pain Corp. v. Flood Conklin Manufacturing*, 388 U.S. 395, 404, n.12, 87 S.Ct. 1801, 1806, n.12 (1967) (the FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so."). In fact, the United States Supreme Court has explicitly held:

> [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may

[10] This argument was also presented in Plaintiffs' / Respondents' Answering Brief, on file herein, at pp. 45–46.

> they specify by contract the rules under which that arbitration will be conducted.

Id. at 479 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3354 (1985)).

In this case, Defendants unilaterally selected the American Health Law Association's Rules of Arbitration ("AHLA Arbitration Rules") as the Agreement's governing rules.[11] Importantly, for the arbitration agreement to be enforceable by the AHLA, the AHLA Arbitration Rules require specific language located in a conspicuous location. *See* AHLA Arbitration Rules 11.5 and 11.6. Specifically, AHLA Arbitration Rule 11.5 states:

> **11.5 Requirements for Administration by AHLA**
>
> If the agreement to arbitrate was signed before the events giving rise to the claim occurred, the agreement must:
>
> (a) be a separate document conspicuously identified as an agreement to arbitrate;

[11] The Agreement was executed on January 30, 2015. Therefore, the April 7, 2014 American Health Law Association's Rules of Arbitration are the applicable rules. These rules are available at:

https://www.americanhealthlaw.org/getmedia/77e85825-ef41-4578-b3d6-b83a0bfabf6b/April-7-2014.pdf

(b) include the following notice, or substantially similar language, in a conspicuous location;

Voluntary Agreement to Arbitrate

THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ IT CAREFULLY BEFORE SIGNING.

This is a voluntary agreement to resolve any dispute that may arise in the future between the parties under the American Health Lawyer's Association's Rules of Procedure for Arbitration. In arbitration, a neutral third party chosen by the parties issues a final, binding decision. When parties agree to arbitrate, they waive their right to a trial by jury and the possibility of an appeal.

(c) state conspicuously that the health care entity will provide the same care or treatment, without delay, if the agreement is not signed; and

(d) state conspicuously that the agreement to arbitrate may be revoked within 10 days after being signed (unless a state law applicable to contracts generally grants a longer period for revocation).

Id. (emphasis in original). AHLA Rule 11.6 further states that arbitration of a matter should be terminated if the arbitration agreement does not comply with AHLA Rule 11.5.

Here, the Agreement is unenforceable because it violates AHLA Rule 11.5. Specifically, the Agreement: (i) fails to identify that the Agreement is voluntary; (ii) fails to advise the parties are waiving their

right to a jury trial and possibility of appeal; (iii) fails to advise that Defendants will still provide the same care or treatment if the Agreement is not signed; and (iv) fails to advise that the Agreement can be revoked within 10 days after being signed. As such, the Agreement is unenforceable under AHLA Rules 11.5 and 11.6—the very rules that Defendants unilaterally chose to govern the arbitration.

CONCLUSION

As set forth, the Agreement does not involve interstate commerce and, therefore, the FAA does not apply. The Agreement is a "profoundly local transaction" that involves basic care of a Nevada resident, provided by Nevada caregivers, working at a single-family residential home located in a Nevada suburb, which is owned and operated by a Nevada limited liability company. The services provided under the Agreement did not cross state lines, nor did they require out-of-state supplies or vendors. To hold otherwise would demand the conclusion that *everything* is interstate commerce and, therefore, subject to federal preemption.

Lastly, even if the Federal Arbitration Act preempts NRS 597.995, the Estate's claims should not be compelled into binding arbitration because the Agreement violates its own governing rules: the AHLA

Arbitration Rules. The AHLA Arbitration Rules, which were unilaterally chosen by Defendants, explicitly state that the arbitration of a matter shall be terminated when the subject arbitration agreement does not include the Rule's specific language located in a conspicuous location. Defendants' Agreement blatantly violates the AHLA Rules and, therefore, is void and unenforceable.

Based on the foregoing, Plaintiffs respectfully requests the Nevada Supreme Court affirm the District Court's Order and direct each of Plaintiffs' claims to proceed before the Eighth Judicial District Court.

Dated this 26th day of October, 2021.

COGBURN LAW

By: */s/Hunter S. Davidson*

JAMIE S. COGBURN, ESQ.
Nevada Bar No. 8409
HUNTER S. DAVIDSON, ESQ.
Nevada Bar No. 14860
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

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 either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 8,504 words; or

☐ does not exceed _____ pages.

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. 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 26th day of October, 2021.

COGBURN LAW

By: */s/Hunter S. Davidson*

JAMIE S. COGBURN, ESQ.
Nevada Bar No. 8409
HUNTER S. DAVIDSON, ESQ.
Nevada Bar No. 14860
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS' SUPPLEMENTAL ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 26th day of October, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Orr
S. Vogel

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

n/a

/s/*Noel Raleigh*
An employee of Cogburn Law