IN THE SUPREME COURT OF THE STATE OF NEVADA

COMMISSIONER OF INSURANZCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.

Petitioner,

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, PEITION FOR EN BANC RECONSIDERATION

Respondents, and

ROBERT CHUR; STEVE FOGG; MARK GARBER; CAROL HARTER; ROBERT HURLBUT; BARBARA LUMPKIN; JEFF MARSHALL; ERIC STICKELS; UNI-TER UNDER-WRITING MANAGEMENT CORP.; UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION

Real Parties in Interest.

Supreme Court Case No.: 81857

DIRECTOR DEFENDANTS' ANSWER TO THE PETITION FOR EN BANC RECONSIDERATION

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in Nev. R. App. P. 26.1(a), and must be disclosed.

Real Parties in Interest-Defendants are Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Barbara Lumpkin, Jeff Marshall and Eric Stickels.

These individuals have been represented by the following attorneys and law firms over the course of this action:

J. Stephen Peek, Jessica E. Whelan, and Ryan A. Semerad of Holland & Hart, LLP; and

Joseph P. Garin, Angela T. Nakamura Ochoa, J. William Ebert and Jonathan K. Wong, of Lipson Neilson, P.C. formerly known as Lipson Neilson Cole Seltzer & Garin, P.C.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED: March 4, 2021.

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/s/ Angela Ochoa

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I. INTRODUCTION

Petitioner/Commissioner has requested En Banc Reconsideration of the Court of Appeals' denial of rehearing its Order denying Petitioner's Writ of Mandamus even though no novel legal issue is presented; no split among panels of the Nevada Supreme Court is identified; and no substantial precedential, constitutional or public policy issue is implicated. NRAP 40A. The request should be denied.

Contrary to Petitioner's representation, leave to amend was not denied based on the five-year rule. The District Court denied Petitioner's motion because the Commissioner requested leave, over five years after the commencement of the case and over eight years after any alleged violation could have possibly occurred, while at the same time suggesting any prejudice could be overlooked because this Court's *Chur* decision prevented the Commissioner from earlier asserting a claim for intentional misconduct. *Chur* did not unexpectedly "change the law." And Plaintiff's misplaced reliance upon *Shoen* does not explain why (if the facts existed to support intentional misconduct) the Commissioner did not allege or even disclose such facts during discovery years ago. Plainly, justice did not require leave to amend.

II. ISSUES PRESENTED

1. Did the trial court sufficiently rely upon NRCP 41(e) such that the December 4, 2020 amendment to the rule requires the District Court to re-review Petitioner's Motion for Leave to Amend?

2. Did the trial court err in not granting Petitioner leave to amend after the Nevada Supreme Court issued *Chur v. Eighth Jud. Dist. Ct.*, 136 Nev. Adv. Rep. 7, 458 P.3d 336 (2020), finding that the Third Amended Complaint failed to state a claim for relief against the Directors?

III. SUMMARY OF THE ARGUMENT

The answer to both questions is "No."

The District Court ("DC") did not deny leave to amend solely because of the pendency of five-year rule. The DC denied leave to amend because when Petitioner filed its motion, nearly six years after the commencement of the case and eight years after the last possible violation could have occurred, Petitioner had not once asserted a claim entitled "breach of fiduciary duty," much less accused the Directors of engaging in "intentional misconduct, fraud or a knowing violation of law."

Numerous times over several years Directors sought to understand the facts supporting Petitioner's claims thorough Rule 30(b)(6) questioning only to be met with such responses as "complaint speaks for itself" or that Petitioner would "rely on expert testimony." With witnesses and documents no longer available, including

Director Defendant Barbara Lumpkin, who passed away before this Court's *Chur* decision, the prejudice to Directors in mounting a defense to a brand new claim of "intentional misconduct" was more than sufficient to deny leave to amend. Compounding this prejudice was Petitioner's demand to extend the time in which to serve its expert disclosures while pressing forward to trial on an expedited basis, filing a motion for preferential trial setting concurrent with the motion for leave to amend.

None of this is changed by the Rule 41(e) Amendment because none of this can be cured by simply having more time to get to trial. More time cannot bring back documents or witnesses and it cannot remediate the prejudice Petitioner caused by failing to properly respond to discovery requests years ago. As the DC held: "[w]ith the passage of time, the Director Defendants will be unduly prejudiced in establishing their defenses to Plaintiff's new theory that the Director Defendants knowingly violated the law." PA003685.

As to the second question, this Court already rejected the bright line rule Petitioner urges when it "le[ft] it to the discretion of the trial court whether to grant the Commissioner leave to amend the complaint," after finding that the Third Amended Complaint failed to state a claim for relief.

IV. STATEMENT OF CASE

On May 17, 2018, the DC granted the parties' Stipulated Third Request for Extension of Discovery and included in the Order, "LAST STIPULATION TO CONTINUE." DD0012.

On January 29, 2019, over the objection of the defendants, the DC issued its Order Granting in Part and Denying in Part Plaintiff's Motion for Extension of Discovery Deadlines. In this order, the Court stated, "there shall be no further extensions of the discovery deadlines." PA003577.

On August 14, 2018, Directors filed their Motion for Judgment on the Pleadings. PP001953-2232. In response, Commissioner filed an Opposition to the Motion for Judgment on the Pleadings and Countermotion for Summary Judgment as to Liability. The Opposition did not seek relief to amend the complaint. PP002233-2584.

The Directors subsequently filed their Petition for Writ of Mandamus before this Court and was assigned case number 78301. On February 27, 2020, this Court issued its opinion in *Chur*-affirming what the Directors had argued repeatedly, that *Shoen* was nothing more than *dicta* and the plain language of NRS 78.138 required more than gross negligence to hold a director personally liable. This Court further ordered that it "leave[d] it to the discretion of the trial court whether to grant the Commissioner leave to amend the complaint."

On April 29, 2020, Commissioner filed its Petition for Reconsideration, which this Court subsequently denied on May 22, 2020. This Court subsequently issued its Notice in Lieu of Remittitur on June 16, 2020.

On June 24, 2020, before the DC, Commissioner filed its Motion for Preferential Trial Setting and Issuance of a New Discovery Scheduling Order. DD0013-DD0088. In this Motion, Commissioner sought a trial setting for March 31, 2021 and affirmatively stated it would file a motion for leave to amend and make its expert disclosures on July 2nd, while alternatively seeking a stay of all discovery. *Id.* At the hearing on the Motion, the DC granted the Commissioner until resolution of the motion for leave to amend to make its expert disclosures. DD0217.

On July 2, 2020, Commissioner filed its motion for leave to amend. PA002982. On July 9, 2020 Commissioner filed an Errata to the Motion for Leave to Amend. DD0089. On July 17, 2020, Directors filed their opposition outlining the prejudice a fourth amended complaint would impose, informing the DC of Commissioner's evasive discovery responses, providing evidence of unavailable witnesses and documents due to the passage of time and reminding the DC of its prior orders that it would no longer extend discovery. PA003014-3024; DD0222-DD0643. At the hearing on the Motion for Leave to Amend, the Commissioner requested that the case be tried in February 2021, and represented that there was 3 ½ months left for discovery. PA003250; PA003267. Based on the circumstances,

the DC found no just cause to grant Commissioner leave to amend to file a fourth amended complaint.

V. LEGAL ANALYSIS

A. The Petition for En Banc Reconsideration Raises No New Issues.

On December 15, 2020, eleven days after the Supreme Court adopted the Amendment to NRCP 41(e), Petitioner filed its request for Rehearing asserting that the recent Amendment required a reconsideration of the denial. Petition for Rehearing. The Court of Appeals denied rehearing, seemingly finding the argument unmerited. Nothing has changed since.

The Court of Appeals correctly denied the Petition for Writ of Mandamus because Petitioners have an adequate remedy at law-an appeal. "Where there is no 'plain, speedy and adequate remedy in the ordinary course of law,' extraordinary relief may be available. A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted." *Helfstein v. Eighth Jud. Dist. Ct.*, 131 Nev. 909, 912, 362 P.3d 91, 94 (2015).

Petitioner has not and cannot articulate why extraordinary relief is necessitated. Instead, Petitioner speculates as to the potential impact of the remaining defendants employing an "empty chair" defense at trial. The number and extent of the assumptions Petitioner offers in an attempt to measure this "impact" includes no less than the following: Petitioner assumes it would have: 1) prevailed

against a motion to dismiss by Respondents; 2) prevailed against a motion for summary judgment by Director Defendants; 3) prevailed against a motion for summary judgment by the remaining defendants; and 4) not been barred by the five-year rule.

Notably, Petitioner proffers no new evidence to establish that its proposed fourth amended complaint is likely to survive dispositive motions, such that interlocutory relief is appropriate. *See* Petitioner's Appendix; *see also* NRAP 30(g) (requiring an appendix sufficient for justice to be done without requiring the court's independent examination of portions of the original record). The Court of Appeals did not err in denying the Petition for Writ.

B. Amendment to NRCP 41(e) Does Not Cure the DC's Bases for Denying Leave to Amend.

1. The DC found Petitioner's Request for Leave to Amend was Belated and Would Prejudice Directors.

In an attempt to make this a "matter of public importance," Petitioner attempts to tie the DC's denial of leave to amend to the recent Amendment to NRCP 41(e) by suggesting that denial was based purely on the impending deadlines of the "five-year" rule. Neither the record nor the DC's holdings support that suggestion. To the contrary, the DC denied leave to amend because Petitioner waited over five years after commencement of the case, and eight years after the Directors last performed any duties, to allege a brand-new theory of liability in reaction to *Chur*.

For years, Petitioner was on notice of Directors' position that gross negligence was not a viable claim, and yet in discovery, when given the opportunity to state its case, Petitioner refused. PA003681-3682. It follows that Petitioner never had a case for intentional misconduct, and does not now. Petitioner never claimed in discovery or pleadings that Directors committed, "intentional misconduct, fraud or a knowing violation of the law." Rather, in response to NRCP 30(b)(6) questioning, Petitioner directed the defendants to refer to the facts as pled in the now-dismissed Third Amended Complaint and to wait for their expert disclosures. PA003683.

Although the Court had twice warned Petitioner that there would be no further extensions of discovery, even after the Court issued *Chur*, months before, in February 2020, Petitioner refused to immediately file a motion for leave to amend or produce expert disclosures to move the case forward. PA003682-3684; DD0013-88; DD0212-221.

When Petitioner finally filed its motion for leave to amend on July 1, 2020, it was over five years after the commencement of the case and eight years since any of the Directors performed any duties. PA003681, PA003684. The DC was provided with testimony as to the unavailability of witnesses and documents due to the passage of time. Certain employees of the Division of Insurance had either retired or passed away, leaving the Directors with the inability to ever depose them on the

Petitioner's newly-minted theory that the Directors intentionally violated insurance laws (even though the Directors were subject to Division quarterly review and the Division had an administrative hearing process to stop unlawful conduct). PA003038-3040. The DC was also aware of Director Defendant Barbara Lumpkin's passing prior to *Chur*. PA003683.

Based on that record, the DC found that justice did not require leave to amend. Petitioner's litigation strategy and conduct (not *Chur*) created the prejudice that Directors would face in attempting to defend against new allegations included in a fourth amended complaint to be filed eight years after the underlying events at issue. PA003685.

Petitioner's five-year rule argument misses the mark. Directors did not assert that leave must be denied based on the five-year rule. PA003014-3044; PA003362-3515. Plainly, it would have been prejudicial for Directors to complete discovery on Petitioner's NEW claim within the compressed time Petitioner demanded. But the crux of Directors' argument was that prejudice existed because Petitioner waited to over five years to assert the new claim and the claims and charges Petitioner sought to allege were subject to a five-year statute of limitation, which expired several years before leave to amend was sought. PA003036-3037.

2. Public Policy Supports the Just, Speedy and Inexpensive Determination of an Action through Case Management.

Irrespective of the applicability of the five-year rule, the public policy for the rule was at the foundation of the denial for leave to amend. Rule 41 is a mechanism to ensure the "just, speedy and inexpensive" determination of an action. *See* NRCP 1. Rule 41 ensures that a plaintiff moves its case forward in a timely manner, to avoid issues such as deceased witnesses, deleted documents and protracted litigation that places millions of dollars into the pockets of attorneys and litigation vendors at the expense of the parties. In *Allyn v. McDonald*, this Court has held that the policy from Rule 41(e) is apparent, "as the promoter of its case, the plaintiff has the duty to carefully track the crucial procedural dates and to actively advance the case at all stages, a duty that may require the plaintiff to take initiative and prod the district court when the case sits dormant." 117 Nev. 907, 912, 34 P.3d 584, 587 (2001).

The Nevada Supreme Court has routinely upheld a court's right to control its docket and caseload over hearing matters on its merits, and has dismissed appeals not timely prosecuted based on the court's inherent powers, even where the error was that of counsel. *See Huckabay Props. v. NC Auto Parts, LLC*, 130 Nev. 196, 203-204, 322 P.3d 429, 433 (2014) ("the policy preference for deciding cases on the merits is not boundless and must be weighed against other policy considerations").

Petitioner cites a number of cases for the proposition that disputes should be heard on the merits, but those cases concern default judgments (an event that occurs

early in a case) and were decided to ensure a *defendant's* right to due process. *See Banks v. Heater*, 95 Nev. 610, 600 P.2d 245 (1979); *Morris v. Morris*, 86 Nev. 45, 464 P.2d 471 (1970); *Howe v. Coldren*, 4 Nev. 171 (1868); *Blakeney v. Fremont Hotel*, 77 Nev. 191, 360 P.2d 1039 (1961); *Adams v. Lason*, 84 Nev. 687, 448 P.2d 695 (1968); *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 380 P.2d 293 (1963); *Bruno v. Schoch*, 94 Nev. 712, 582 P.2d 796 (1978); *Minton v. Roliff*, 86 Nev. 478, 471 P.2d 209 (1970); *Christy v. Carlisle*, 94 Nev. 651, 584 P.2d 687 (1978).

Petitioner likewise cites to cases involving motions to dismiss, but in those cases the Nevada Supreme Court ***affirmed*** dismissal, once again recognizing the need for speedy and inexpensive resolutions. *See Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 810 P.2d 785 (1991); *Moon v. McDonald, Carano & Wilson, LLP*, 126 Nev. 510, 245 P.3d 1138 (2010). The common thread in all these cases is that the concern for a merits decision inures for the protection of *defendants*-not plaintiffs who fail to act diligently in advancing their claims.

The Amendment did not change the public policy supporting Rule 41(e). Rather, the Amendment and the public hearing on ADKT 0560 highlighted the challenges our courts face, an overwhelming amount of languishing cases and the need to support district court judges actively managing their caseloads. *See*

Recording of the June 29, 2020 Public Hearing on ADKT 0560; s*ee also* Dissent on Order Amending Nevada Rule of Civil Procedure 41(e) dated December 4, 2020.

The DC warned Petitioner twice that discovery would not be extended. In the face of those warnings and near the close of discovery, Petitioner, with *no* new evidence, asked for leave to amend to bring a new cause of action, while simultaneously asking the DC to extend the date to make expert disclosures and to provide an expedited trial setting. PA003681-3685; DD0013-88. The DC was plainly justified in refusing these requests. There is no conflict with a court controlling its docket and hearing matters on the merits when the plaintiff has been given multiple opportunities to amend his complaint and refuses to place the defendant on notice of actionable facts. This is especially true here, where the Petitioner had access and control of all of the documents and witnesses. The merits of Petitioner's case have been tested, and Directors submit that they are lacking.

C. The Amendment does not Automatically Add 365 Days to Any Stay Issued by a District Wide Administrative Order.

The crux of Petitioner's argument is that filing a fourth amended complaint cannot prejudice Directors because the parties have 584 days to prepare for trial under the Amendment. Setting aside that the DC did not deny leave to amend based on the time remaining to bring the case to trial, Petitioner also incorrectly assumes that NRCP 41(e) automatically tacks 365 days onto any administrative order.

> NRCP 41(e) states in pertinent part, "[w]hen a court is unable to conduct civil trials due to compelling and extraordinary circumstances beyond the control of the court and the parties, such as an epidemic, pandemic, natural disaster, or safety or security threat, and enters a district-wide administrative order staying such trials, neither the period of the stay nor an additional period of up to one year after the termination of the stay, **if ordered by the court** in the same or a subsequent administrative order, shall be counted in computing the time periods under this section." (Emphasis bolded).

Based on the plain language, the five-year rule *may* be stayed up to a year longer than the end of the safety threat, *but only where set forth by administrative order*.

This case arises out of the Eighth Judicial District Court. There is no existing EJDC Administrative Order tacking 365 days onto the period of stay. On April 17, 2020, EJDC issued AO 20-13, stating "[t]his order shall continue to toll the time for bringing a case to trial for the purposes of NRCP 41(e) for the duration of this order and for a period of 30 days after this order expires, is modified or rescinded by a subsequent order." However, this administrative order was subsequently superceded by AO 20-17 stating, "[t]his order shall continue to stay trial for purposes of tolling NRCP 41(e) except where a District Court Judge makes findings in a specific case to allow the case to proceed to trial." AO 20-17.

NRCP 41(e) is consistent with Justice Pickering's comments in the June 29, 2020 public hearing on ADKT 0560 when she stated that the amendment committee should canvas each of the judicial districts to determine if there needs to be more time for the stay after district courts reopen for trials. Clearly, Nevada is a large and

diverse state and the various judicial districts will have differing caseloads and ability to address any backlog. Therefore, the Amendment gives the sole ability to the judicial districts to determine if they think it is appropriate to add days after the reopening of courts before the time on the five-year rule commences. Should this Court wish to issue an advisory opinion on the interpretation of NRCP 41(e), Directors submit, Petitioner's interpretation is plainly wrong.

D. *Chur* did not Establish New Law and Petitioner did not Justifiably Rely on *Shoen.*

As this Court knows from the briefing in *Chur v. Eighth Jud. Dist. Ct*., 136 Nev. Adv. Rep. 7, 458 P.3d 336 (2020), a number of Nevada district courts properly interpreted NRS 78.138 as limiting personal liability for directors and officers to breaches of fiduciary duty arising out of "intentional misconduct, fraud or a knowing violation of law." PA002589. This Court correctly noted that any statements in *Shoen v. SAC Holding Corp*., 122 Nev. 621, 137 P.3d 1171 (2006) interpreted to the contrary were nothing more than dicta. *Chur*, 136 Nev. Adv. Rep. at 9, 458 P.3d at 340. Dicta is not the law. *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009) ("[d]icta is not controlling. A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'"). Consistent with that basic legal principle, this Court "clarified" the dicta in *Shoen. Id*.

The clarification of prior dicta is not a "change in the law" sufficient to merit automatic leave to amend. Rather, this Court recognized the inherent power of a trial court to manage its docket and determine whether justice required leave to amend-thereby sending the issue back to the DC. *Chur*, 136 Nev. Adv. Rep. at 15, 458 P.3d at 342 (2006) ("we leave it to the discretion of the trial court whether to grant the Commissioner leave to amend the complaint").

Chur was decided on February 27, 2020. However, on August 25, 2017, approximately three years before seeking leave to amend in this case, the Commissioner of Insurance for the State of Nevada filed a complaint against officers and directors of another defunct insurance company, the Nevada Health CO-OP, specifically alleging a breach of fiduciary duty claim arising out of "intentional misconduct, fraud or a knowing violation of law." PA003371-3471. If Petitioner understood and acknowledged nearly three years before *Chur* that it was free to accuse directors and officers of intentional misconduct, Petitioner cannot now blame its delay in doing so in this case on some misplaced reliance on *Shoen* or the DC. PA003686. Petitioner plainly knew how to allege intentional misconduct and it simply chose not to in this case.

E. There is no "Bright-Line" Rule Requiring that Petitioner's Leave to Amend be Granted.

Chur was not a change in the law and Petitioner did not justifiably rely on *Shoen* so as to require the DC to automatically grant leave to amend. Moreover,

while it appears clear that this Court rejected any bright line rule to grant leave to amend when it left the decision to the discretion of the DC, insofar as Petitioner seeks a bright line rule to the contrary, this Court must reject it.

First, Petitioner cites no case law to support the contention that leave to amend should be granted solely because a motion for leave to amend is brought on or before the date set forth in a scheduling order. To grant a motion for leave to amend just because it was filed on the last day of the scheduling order would render NRCP 15(a)(2) nugatory. The Ninth Circuit is instructive in this regard, even though Nevada Rule of Civil Procedure 15(a) grants even more discretion to the courts, employing the word "should" instead of its Federal counterpart, "shall," when discussing leave to amend. *See* FRCP 15.

In *AmerisourceBergen Corp. v. Dialysist West, Inc*., 465 F.3d 946, 951-952 (9th Cir. 2006), the court was asked whether it was an abuse of discretion to deny a motion for leave to amend that was filed before the scheduling order's deadline to amend. The court held that "in assessing timeliness, we do not merely ask whether a motion was filed within the period of time allotted by the district court in a Rule 16 scheduling order. Rather in evaluating undue delay, we also inquire 'whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.'" *Id.*, at 953 (internal citations omitted). The court held that the moving party's 15-month delay from when it first discovered the

possibility of the theory for leave to amend and the 8 months left in discovery, was sufficient to deny leave to amend. *Id*. The court found that if leave to amend was granted, it would require 'the parties to scramble and attempt to ascertain" the facts that "would have unfairly imposed potentially high, additional litigation costs on [non-moving party] that could have easily been avoided had [moving party] pursued" the theory in the original complaint. *Id.*

Citing *Moss v. U.S. Secret Serv*., 572 F.3d 962, 972 (9th Cir. 2009), Petitioner contends that where a higher court's decision alters the pleading standard in a meaningful way, the plaintiff should be granted leave to amend. Citing *Darney v. Dragon Prod. Co*., LLC, 266 F.R.D. 23 (D. Me. 2010), Petitioner claims that when the law is changed, a plaintiff must be granted leave to amend. Neither case addresses the facts presented here.

Unlike *Moss*, Petitioner is not simply asking for a chance to meet the "plausibility" standard of pleading facts for a case in its infancy. Unlike in *Darney*, Petitioner is not requesting to reassert a claim that it previously pleaded against Directors.

For years, Petitioner sought to impose personal liability on the Directors for alleged gross negligence and for years Directors warned Petitioner that Nevada law would not allow it. So confident was Petitioner, that it did not once utter the words "violation of the law," let alone, a "knowing violation of the law," in any prior

versions of its complaint. PA000001-133, PA000178-696, PA000832-1353, PA001359-1887. Petitioner's sole cause of action against Directors was for "GROSS NEGLIGENCE," leaving no doubt as to what Petitioner was alleging. PA001397. More importantly, in discovery, Petitioner never once stated that Directors, knowingly violated the law, or referred to any laws that the Directors violated, or asserted that Directors committed fraud or intentional misconduct. PA003018-3020; DD0227-292; DD0304-363; DD0365-372; DD0374-384. Where a plaintiff was granted countless extensions to discovery, three different opportunities to correctly amend a complaint, was warned twice that no further continuances would be granted, had all the information it needed to assess claims to bring against a defendant and chose not to allege intentional misconduct until its gross negligence claims were dismissed (and even then, after the statute of limitations would have run on those claims), justice does not require leave to amend.

VI. CONCLUSION

Based on the foregoing, Directors request this Court deny the petition for en banc reconsideration, and affirm the District Court's order denying leave to amend.

DATED: March 4, 2021.

LIPSON NEILSON P.C.

/s/ Angela Ochoa

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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 in Times New Roman Size 14 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 proportionately spaced, has a typeface of 14 points or more, and contains less than 4667 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. 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: March 4, 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served the foregoing DIRECTOR DEFENDANTS' ANSWER TO THE PETITION FOR EN BANC RECONSIDERATION on the following parties, via the manner of service indicated below, on March 4, 2021:

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