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

JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust,

Appellant,

v.

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.,

Respondent.

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Supreme Court Case No.: 82565

District Court Case No.: 19-CV-0242

# RESPONDENT'S ANSWERING BRIEF

RESNICK & LOUIS, P.C.
PRESCOTT JONES
Nevada Bar No. 11617
CARISSA YUHAS
Nevada Bar No. 14692
8925 W. Russell Road, Suite 220
Las Vegas, NV 89148
Telephone: (702) 997-3800
Facsimile: (702) 997-3800
pjones@rlattorneys.com
cyuhas@rlattorneys.com
*Attorneys for Respondent*

## RESPONDENT'S NRAP 26.1 DISCLOSURE STATEMENT

Respondent does not have a parent corporation or publicly held company that owns 10% or more of the party's stock. The attorneys and law firms whose partners or associates have appeared for Respondent are:

PRESCOTT JONES
Resnick & Louis, P.C.
8925 W. Russell Road, Suite 220
Las Vegas, Nevada 89148

JOSHUA ANG
Resnick & Louis, P.C.
8925 W. Russell Road, Suite 220
Las Vegas, Nevada 89148

CARISSA YUHAS
Resnick & Louis, P.C.
8925 W. Russell Road, Suite 220
Las Vegas, Nevada 89148

No litigant is using a pseudonym.

DATED this 7th day of September, 2021.

RESNICK & LOUIS, P.C.

*/s/ Prescott Jones*

_____

PRESCOTT JONES
Nevada Bar No. 11617
CARISSA YUHAS
Nevada Bar No. 14692
8925 W. Russell Road, Ste. 220
Las Vegas, Nevada 89148
*Attorneys for Respondent*

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## II.
## STATEMENT OF THE CASE

### A. RELEVANT FACTS

The underlying action arose from the enactment of the March 31, 2018 Architectural and Design Control Standards and Guidelines ("ADCDG") by Elk Point Country Club Homeowners Association, Inc. ("Respondent"). 1 AA 1-11. Respondent is a common-interest homeowner's entity, formed in 1925 as a social club, in charge of the Elk Point community located in Douglas County, Nevada. 3 AA 514. Appellant, Jerome Moretto, ("Appellant") purchased his property in the Elk Point community in 1990 subject to Respondent's recorded Bylaws. 3 AA 515-516.

Respondent's Bylaws provide, in pertinent part, that:

> The enumeration of the powers and duties of the Executive Board in these Bylaws shall not be construed to exclude all or any of the powers and duties, except insofar as the same are expressly prohibited or restricted by the provisions of these Bylaws or Articles of Incorporation, and the Board shall have and exercise all other powers and perform all such duties as may be granted by the laws of the State of Nevada and do not conflict with the provisions of these Bylaws and the Articles of Incorporation.

3 AA 524.

> The Executive Board shall have the power to conduct, manage and control the affairs and business of the Corporation, and to make rules and regulations not inconsistent with the laws of the State of Nevada, the Articles of Incorporation, and the Bylaws of the Corporation.

3 AA 524-525.

On March 31, 2018, through its power to make rules and regulations, Respondent's Executive Board created an Architectural Review Committee ("ARC") and adopted the ADCDG. 3 AA 516. The ADCSG generally contain recommendations for new construction and/or modifications on lots within the Elk Point community related to building height, building envelope, location of fences and walls, preserving views, exterior lighting interference with neighboring lots, materials that may be used for exterior walls and trims, and location of proposed landscaping elements. 2 AA 370-371. The ARC issues recommendations to the Executive Board regarding applications related to new construction or modifications. 2 AA 372.

### B. PROCEDURAL HISTORY

On August 16, 2019, Appellant filed his Complaint. 1 AA 1-11. Appellant alleged that the enactment and enforcement of the March 2018 ACDSG was illegal and arbitrary such that it caused damages in the form of the diminution of the value of his property because the new restrictions/encumbrances constituted encroachment upon his constitutional rights/fee title interest in being able to control his own property. 1 AA 1-11. On top of payment of monetary damages for said diminution of value, Appellant sought declaratory relief to enact his own desired version of the ACDSG and/or to prevent Respondent from enacting any new versions of the

ACDSG and delegating any authority to committees to enforce the ACDSG. 1 AA 1-11.

On November 2, 2020, the parties filed competing motions for summary judgment. 1 AA 148-181; 2 AA 294-307. Appellant asserted that Respondent simply did not possess the authority to enact the March 2018 ACDSG, and that the enforcement of the ACDSG violated his constitutional property rights. 1 AA 148-181. Conversely, Respondent's arguments centered around the assertion that Respondent did have the authority to do so since the creation of the March 2018 ACDSG was not prohibited by Respondent's Bylaws or controlling Nevada law. 2 AA 294-307.

On November 30, 2020, the district court held the hearing on both motions for summary judgment. 4 AA 828-929. During the hearing, the district court granted Appellant's Requests to take Judicial Notice pursuant to NRS 47.150(2) (which were filed on November 5, 2020 and December 1, 2020) of several documents cited in support of Appellant's Motion for Summary Judgment and Reply to Respondent's Opposition to said motion, including sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). 1 RA 1-173; 1 RA 174-221; 4 AA 895-896.

On January 6, 2021, the district court entered an Order granting in part and denying in part the summary judgment motions. 4 AA 930-939. The district court found that Respondent had the authority under the Bylaws to create Rules and

Regulations, including those that regulate architecture at the community. 4 AA 936. The district court further found that Respondent's Executive Board did not delegate any authority to the ARC because the ARC only issued recommendations to be taken up by the Executive Board. 4 AA 936. Additionally, the architectural guidelines were determined by the district court not to be arbitrary and capricious under NRS 116.31065, with the sole exception of the provision that allowed the Executive Board to deny applications for "purely aesthetic reasons." 4 AA 936. Finally, the district court determined that Appellant's claim for "violation of property rights" was not a cognizable claim in Nevada; but even if it was, Appellant's property rights were not violated in this matter. 4 AA 936.

## III.
## SUMMARY OF ARGUMENT

Appellant asserted several claims against Respondent which are derivative of the actions taken by Respondent when it established the March 2018 ACDSG. Appellant contends that Respondent did not have the authority to take said actions and focuses his primary issue on appeal to whether the district court erred by refusing to apply (or seemingly ignoring) the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES).

First, Appellant largely contends that since the body of the January 6, 2021 Order granting in part and denying in part the summary judgment motions did not mention the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), the district court

failed to apply and ignored the principles contained therein. However, Appellant fails to note that the district court was well-aware of his arguments regarding the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) as it was noted in his briefing, Judge Young confirmed that he had read the briefing prior to the hearing on November 30, 2020, and the district court took Judicial Notice of the excerpts of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) upon which Appellant supplied along with his Motion and Opposition to Respondent's Motion. 1 AA 168-169; 3 AA 668-669; 4 AA 895-896; 1 RA 1-173; 1 RA 174-221. Thus, the district court did not err because it properly weighed all the admissible evidence supplied by the parties in reaching its conclusion.

Furthermore, Respondent submits that the district court did not err in granting summary judgment as a matter of law in its favor because Appellant's claim for "violation of property rights" is not a cognizable claim under Nevada law. However, even if it was, Appellant's claim that Respondent exceeded its authority under the Nevada Constitution and Respondent's Bylaws in enacting the architectural restrictions contained in the ACDSG must also fail because Respondent acted within the confines of the Bylaws and controlling Nevada law.

Despite prior briefing and oral argument on this issue, Appellant comes on appeal now to get a second bite at the apple to argue why this Court should apply principles provided in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) to the

case at hand. In support of his proposition, Appellant cites to several cases from other jurisdictions where the principles of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) were discussed. Although these authorities were not cited in any of the briefing to the district court and are improperly discussed here for the first time on appeal, Respondent addresses this issue herein out of caution. Respondent submits that Appellant's request that this Court adopt new law is unwarranted since the cases relied upon by Appellant are not applicable to the factual scenario at hand and further restrictions upon an HOA's authority goes against the contemplated standards of NRS 116.

## IV.
## ARGUMENT

### A. STANDARD OF REVIEW

An appellate court reviews de novo a trial court's grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). An appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate. *Han v. Mobil Oil Corp.,* 73 F.3d 872, 875 (9th Cir. 1995).

Appellant's main dispute arises from the district court's alleged failure to consider and/or apply the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). Therefore, this Court need not determine whether genuine issues of material fact remain. As demonstrated below, the district court properly applied the controlling law and summary judgment in favor of Respondent is appropriate.

### B. THE DISTRICT COURT DID CONSIDER THE RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) WHEN DELIBERATING THE PARTIES' COMPETING MOTIONS FOR SUMMARY JUDGMENT AND THEREFORE DID NOT COMMIT ANY ERROR.

In the points and authorities in support of Appellant's Motion for Summary Judgment, Appellant quoted and cited to section 6.7 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). 1 AA 168-169. Shortly after filing his Motion, Appellant submitted a Request to take Judicial Notice pursuant to NRS 47.150(2) of, among other items, section 6.7 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). 1 RA 1-173.

Likewise, in the points and authorities in support of Appellant's Reply to Respondent's Opposition to the Motion for Summary Judgment, Appellant quoted and cited to section 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). 3 AA 669. Shortly thereafter, Appellant submitted a Request to take Judicial Notice pursuant to NRS 47.150(2) of, among other items, section 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). 1 RA 174-221.

On November 30, 2020, the district court held the hearing on both motions for summary judgment. 4 AA 828-929. At the outset of the hearing, the Honorable Judge Young confirmed that he had already read all the briefing that had been submitted by the parties (except for Respondent's Reply to Appellant's Opposition to Respondent's Motion for Summary Judgment which the Honorable Judge Young reviewed during a break in the hearing). 4 AA 830; 4 AA 894-896. Thus, the district court had already taken notice of Appellant's line of reasoning with respect to the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) before the hearing even took place.

Moreover, during the hearing, Appellant's counsel inquired as to whether the Requests for Judicial Notice would be granted. 4 AA 895. Noting no opposition from Respondent's counsel, the district court granted both of Appellant's Requests to take Judicial Notice which included sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). 4 AA 895-896; 1 RA 1-173; 1 RA 174-221. Therefore, Appellant's claim on appeal that the district court ignored these suggested authorities is simply without merit.

Thus, the district court did not commit error because it properly evaluated and weighed all the admissible evidence supplied by the parties prior to reaching its conclusion. For these reasons, Respondent submits that it is clear that the district

court properly applied the substantive law at issue when determining that summary judgment in favor of Respondent was appropriate.

### C. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE BYLAWS AND CONTROLLING NEVADA LAW ALLOWED FOR THE IMPLEMENTATION OF THE ACDSG, THEREFORE, SUMMARY JUDGMENT IN FAVOR OF RESPONDENT IS APPROPRIATE.

In Appellant's Complaint, he alleged that Respondent violated his property rights when it enacted the March 2018 ACDSG. 1 AA 6-7. Specifically, Appellant contended that Respondent did not have the authority to develop such guidelines and that the guidelines caused damages in the form of the diminution of the value of his property because the restrictions/encumbrances in which said property could be used constituted encroachment upon his constitutional rights/fee title interest in being able to control his own property. 1 AA 7.

Appellant cannot provide any authority whatsoever to demonstrate the existence of a claim for violation of property rights in Nevada. Appellant cited to several cases in his Opposition to Respondent's Motion for Summary Judgment to support his proposition that a plaintiff may sue on the basis of an improper "invasion of property rights" and argued that because the subject ACDSG are akin to a restrictive covenant, the same reasoning applies. 2 AA 474-475. However, Appellant provided no authority wherein Nevada courts have recognized a cause of action in this regard as applicable to rules enacted by an HOA. Thus, for this reason alone,

summary judgment is appropriate since Appellant's claim as alleged in his Complaint fails as a matter of law, regardless of the facts.

Assuming arguendo that such a claim existed, whether summary judgment is appropriate on this issue turns on whether Respondent was prohibited by Nevada law and/or Respondent's Bylaws from enacting the March 2018 ACDSG. As described herein, Respondent's Bylaws grant all legal powers to the Executive Board, not explicitly excluded by its language, which are legal under Nevada law. Thus, Respondent's Bylaws necessarily grant the Executive Board the power to enact and enforce the subject ACDSG.

First, there are simply no provisions of the subject Bylaws which explicitly prohibit Respondent's Executive Board from enacting architectural guidelines. 2 AA 440-454. Respondent's Bylaws confer upon the Executive Board the power to conduct, manage and control the affairs and business of the Corporation, and to make rules and regulations not inconsistent with the laws of the State of Nevada, the Articles of Incorporation, and the Bylaws of the Corporation. 2 AA 444. Pursuant to Article XVI of the Bylaws, no structure of any kind shall be erected or permitted upon the premises of any Unit Owner, unless the plans and specifications shall have first been submitted to and approved by the Executive Board. 2 AA 450. Thus, the Executive Board held the power to create the ACDSG to carry out the provisions of Article XVI of the Bylaws. This action was inherently consistent with the Bylaws.

Secondly, in Appellant's Motion for Summary Judgment, he acknowledges that it is permissible under Nevada law for the Bylaws of a HOA to grant an Executive Board the type of rule-making powers necessary to enacting the subject architectural guidelines. 1 AA 167-168. Notwithstanding this concession, Appellant briefly cited to sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) to imply that Respondent nonetheless should not have the authority to enact such architectural guidelines. 1 AA 168-169; 3 AA 669. However, it is widely known that the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) is not primary, binding authority, unless it has been specifically adopted by the appropriate court.

Appellant's argument on appeal concedes that this Court has not adopted the specific sections of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) that he relies upon in arguing that Respondent's Executive Board's actions were not permitted by Nevada law. As such, they are not binding law in this matter. Consequently, Appellant has failed to provide any controlling authority in Nevada law which prohibits Respondent's Executive Board from enacting architectural guidelines either.

Thus, even if a cause of action to "violation of property rights" hypothetically did exist, it would be moot, as explicit authority was granted to Respondent's Executive Board as stated by the Bylaws and permitted by controlling Nevada law.

No question of material fact remains as to this issue such that judgment as a matter of law in favor of Respondent is appropriate.

### D. APPELLANT'S REQUEST THAT THE COURT ADOPT THE PRINCIPLES OF THE RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) IS WITHOUT MERIT BECAUSE HE FAILED TO RAISE THIS ISSUE IN THE DISTRICT COURT PROCEEDINGS, THE PERSUASIVE AUTHORITIES PROVIDED ARE DISTINGUISHABLE FROM THE INSTANT MATTER, AND IT CONFLICTS WITH THE PROVISIONS OF NRS 116.

It has been held in many cases that nothing can be considered by this Court on an appeal from an order or judgment of a lower court, except the record as made and considered by the court below. *Wilson v. Wilson*, 55 Nev. 57, 58, 24 P.2d 317, 318, 1933 Nev. LEXIS 30, *1-2. This Court can only pass upon alleged errors or abuse of legal discretion committed by the lower court. *Water Co. v. Belmont Dev. Co.*, 50 Nev. 24, 249 P. 565, 1926 Nev. LEXIS 32. In determining such questions, this Court cannot look to matter dehors the record. *Brearley v. Arobio*, 54 Nev. 382, 12 P.2d 339, 1932 Nev. LEXIS 40. If a party fails to raise an issue below, this court need not consider it on appeal. *Walch v. State*, 112 Nev. 25, 30, 909 P.2d 1184, 1187, 1996 Nev. LEXIS 4, *10.

Appellant argues for the first time on appeal that this Court should adopt sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) based on holdings in other jurisdictions which have seemingly done the same. *See*, *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vasquez*, 300 P.3d 736 (N.M. App. 2013); *Wilson v. Playa de Serrano*, 123 P.3d 1148 (Ariz. App. 2005); *Sainani v.*

*Belmont Glen Homeowners Ass'n, Inc.*, 831 S.E.2d 662 (2019). However, Appellant failed to raise this argument in the district court proceedings. As can be seen by Appellant's Motion for Summary Judgment and Reply to Respondent's Opposition to Appellant's Motion for Summary Judgment, the proposition that the principles be adopted was not raised. 1 AA 148-181; 3 AA 663-674. Instead, Appellant simply quoted sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) as merely being informative secondary material to further expand on the limitations of NRS 116. 1 AA 168-169; 3 AA 669. Thus, Appellant's contention was not properly preserved and need not be considered by this Court.

Out of caution, even if this Court did consider Appellant's request that this Court adopt sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), Respondent contends that the authorities relied upon by Appellant are not indicative of similar situations as the one presented here, and that the factual scenario presented here does not warrant this Court to take such action.

In support of his proposition, Appellant cites *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vasquez*, 300 P.3d 736 (N.M. App. 2013) in which an HOA attempted to implement restrictions on an owner's ability to rent his home on a short-term basis. The court held that unless there is "specific authorization" in the HOA's declaration, the HOA's authority to restrict individually owned property pursuant to the HOA Rules was limited to protecting common property and individually owned

lots from any unreasonable interference by another lot owner's use of his or her property. 300 P.3d at 744. In reaching its holding, the court analyzed comment b. to section 6.7 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) which provided that absent a specific grant of power, an association does not have the power, by adoption of a rule or regulation, to impose restrictions on use or occupancy of individually owned lots or units, or on behavior within individually owned property beyond those permitted to protect the common property under subsection (1), or to protect other community members from nuisance-like activity under subsection (2). *Id.*

Similarly, the court in *Wilson v. Playa de Serrano*, 123 P.3d 1148 (Ariz. App. 2005) also analyzed this comment when it decided that a townhome association attempting to convert itself into an age-restricted community by amending its bylaws to impose a requirement that each townhouse be occupied by a person fifty-five years of age or older was improper. 123 P.3d at 1149.

However, Appellant's reliance on these cases does not offer any useful insight to the situation at hand since these cases dealt with the rules in place regarding the use (i.e. activity) taking place on the property, not the rules regarding the architectural structures on the property. Comment b. to section 6.7 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) relates to restrictions on *use or occupancy of individually owned lots or units, or on behavior within individually*

*owned property.* (emphasis added.) A basic canon of construction requires that "words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322, 97 S. Ct. 2307, 53 L. Ed. 2d 368 (1977). Thus, when the descriptors of "occupancy" and "behavior within" are grouped together with "use", this suggests that the term "use" signifies the performance of activities on the property – not the permanent exterior architecture of the building structures on the property.

Appellant's general interpretation of *Sainani v. Belmont Glen Homeowners Ass'n, Inc.*, 831 S.E.2d 662 (2019), also does not stand for the objective that this Court should adopt Sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), especially as it applies to the case at hand. The *Sainani* Court evaluated a recorded declaration of CC&Rs which allowed the HOA to adopt rules and regulations that it deemed necessary or appropriate and to regulate the external appearance of the individually owned properties which the HOA utilized to adopt seasonal guidelines, which purported to regulate the individual owners' displays of holiday lighting and decorations. *Id*. at 664. The Court looked to determine whether the imposition of temporary constraints went beyond the scope of the strictly construed restrictive covenants of the recorded declaration of CC&Rs. *Id*. at 666. In determining that the none of the covenants could be construed to authorize the seasonal guidelines, the court cited to sections 6.7 and 6.9 of the RESTATEMENT

(THIRD) OF PROPERTY (SERVITUDES) showing that its ruling was simply not against the ideas contained therein. *Id*. at 668. Additionally, the court provided that strict construction of the restrictive covenants in the recorded declaration of CC&Rs limited the HOA's authority to regulate permanent modifications or alterations as opposed to temporary ones. *Id*. at 669. Thus, the HOA did not have authority to implement the seasonal guidelines. *Id.*

Consequently, *Sainani* is not instructive here because it illustrates the limits of an HOA's power to implement temporary restrictions on the use of individually owned property when the restrictive covenants of the recorded declaration of CC&Rs limited the HOA to regulating permanent modifications. However, the ADCSG at issue generally contain recommendations for new construction and/or modifications on lots within the Elk Point community which are permanent fixtures by nature. 2 AA 370-371. Thus, there is no allegation that Respondent enacted temporary regulations outside of its scope of authority. Rather, Respondent held the power to create the ACDSG to carry out the provisions of Article XVI of the Bylaws and Appellant purchased his property subject to said Bylaws. Accordingly, adoption of sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) is not warranted under the factual scenario presented here.

Lastly, Respondent submits that Appellant's request that this Court adopt new law is unwarranted since it contradicts the limitations and authorizations already

provided for in NRS 116. For example, NRS 116.31065 lists the requirements necessary for any rules enacted by an HOA. Additionally, NRS 116.2111 lists several requirements for alterations of units. However, NRS 116 does not prohibit the implementation of architectural guidelines such as the subject ACDSG. Consequently, the narrow restrictions as detailed in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) would only serve to contradict the language of NRS 116 and need not be adopted.

## VI.
## CONCLUSION

Appellant seeks relief in the form of his motion for summary judgment being granted. However, the substance of Appellant's appeal addresses only a few of his claims against Respondent. Thus, if any relief were provided for Appellant, it would only be appropriate to remand for further determination from the district court.

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However, Respondent submits that the material facts of this case remain undisputed and the law governing the outcome of this case is clear and unequivocal. There are no genuine issues of material fact, the district court properly applied the relevant substantive law, and de novo review supports the finding that the critical elements of Appellant's claims cannot be proven. Accordingly, summary judgment in favor of Respondent is required.

DATED this 7th day of September, 2021.

RESNICK & LOUIS, P.C.

*/s/ Prescott Jones*

_____

PRESCOTT JONES
Nevada Bar No. 11617
CARISSA YUHAS
Nevada Bar No. 14692
8925 W. Russell Road, Ste. 220
Las Vegas, Nevada 89148
*Attorneys for Respondent*

## VII.
## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answering 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, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I further 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 365 ProPlus, Times New Roman 14 point and the type-volume limitation. This brief also complies with the length requirements of NRAP 32(7) because this brief does not exceed 30 pages nor 14,000 words (the entirety of this brief contains 21 pages and 4,882 words).

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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.

*/s/ Prescott Jones*

_____

PRESCOTT JONES
Nevada Bar No. 11617
CARISSA YUHAS
Nevada Bar No. 14692
8925 W. Russell Road, Ste. 220
Las Vegas, Nevada 89148
*Attorneys for Respondent*

## VII.
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served this 7th day of September, 2021, by:

[X] **BY ELECTRONIC SERVICE**: by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date as follows:

ROBERT L. EISENBERG
Nevada Bar No. 950
TODD R. ALEXANDER
Nevada Bar No. 10846
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
tra@lge.net
*Attorneys for Appellant*

*/s/ Susan Carbone*

An employee of RESNICK & LOUIS, P.C.