IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CCMSI Appellants, vs. ROBERT HOLLAND Respondent,	Supreme Court No.: 82384 District Court No. : A-20-813873-C

RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR STAY OF DISTRICT COURT'S ORDER

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DISCLOSURE STATEMENT

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

There is no corporation as defined in Rule 26.1(a) involved in this matter.

The law firm of Greenman Goldberg Raby & Martinez and its partners and associates are the only attorneys for the Appellant.

DATED this 11th day of May, 2021.

GREENMAN GOLDBERG RABY & MARTINEZ

By: _____

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STATEMENT OF THE ISSUE

COMES NOW, Respondent, ROBERT HOLLAND (hereinafter "Respondent"), by and through his attorneys, LISA M. ANDERSON, ESQ., of the law firm of GREENMAN GOLDBERG RABY & MARTINEZ, and files his Opposition to Motion for Stay of District Court's Order. At issue before the Court is whether the District Court's Order Granting Petition for Judicial Review of the Appeals Officer's July 27, 2020 Decision and Order that had affirmed Appellant's determination denying liability for Respondent's July 23, 2019 claim for occupationally related heart disease is supported by substantial evidence in the record and is devoid of legal error. Appellants, LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CCMSI (hereinafter "Appellants") appealed the District Court's Order Granting Petition for Judicial Review and filed a Motion for Stay Pending Supreme Court Appeal on Order Shorting Time, which was heard and denied on April 23, 2021. Thereafter, Appellants filed the instant Motion for Stay before to the District Court's Order Denying Motion for Stay Pending Supreme Court Appeal was sign, filed and entered.

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POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE AND FACTS

On or about May 26, 2019, Respondent reported the onset of an occupationally related disease of the heart that was contracted while in the course and scope of his employment as a police officer with Appellant." Respondent had been employed with Respondent for approximately twenty-five (25) years (since September 11, 1987) before retiring (December 29, 2012) and subsequently filing this claim.

On May 29, 2019, Respondent was admitted to Summerlin Hospital Medical Center, where he remained hospitalized until being discharged on June 4, 2019. Dr. Dost Wattoo diagnosed three (3) vessel coronary artery disease with stinting following two (2) heart attacks. Dr. Wattoo completed a C-4 form and confirmed that Respondent's disabling heart disease condition was directly related to his employment. Dr. Wattoo reported that Respondent was totally disabled from May 27, 2019 through June 17, 2019. Dr. Wattoo confirmed that further medical treatment was medically necessary. (Appellant's Exhibit C pages 167-194)

On July 20, 2019, Appellant's unnamed medical director suggested that Respondent's May 26, 2019 claim for occupational heart disease was not compensable pursuant to NRS 617.440 or NRS 617.457. The medical director

suggested that corrective action was given at the time of his annual physical examinations to "stop his testosterone therapy as it can contribute to heart disease." (Appellant's Exhibit C page 195)

On July 23, 2019, Appellant notified Respondent that liability was denied for the May 26, 2019 claim for occupational heart disease. Appellant advised Respondent that he did not meet the requirements for a claim for heart disease, occupational disease, or industrial injury. Appellant also advised that it was not established that Respondent's condition arose out of the course and scope of his employment. (Appellant's Exhibit C pages 196-199)

Respondent timely appealed Appellant's July 23, 2019 determination to the Hearing Officer.

On September 17, 2019, the Hearing Officer (2001960-JK) affirmed Appellant's July 23, 2019 determination denying liability for the May 26, 2019 claim for occupational heart disease. The Hearing Officer concluded that Respondent failed to correct predisposing conditions. (Appellant's Exhibit C pages 200-201)

Respondent timely appealed the Hearing Officer's September 17, 2019 Decision and Order to the Appeals Officer.

On March 6, 2020, the Appeals Officer issued an Order for Briefing Schedule to the parties. (Appellant's Exhibit C pages 40-41)

/ / /

On April 7, 2020, Respondent filed his Closing Brief. Respondent argued that he has been diagnosed with a disabling disease of the heart and had attained the minimum length of employment requirement to qualify for the conclusive presumption for claim compensability under NRS 617.457. Respondent also argued that he was never advised during any of his annual physical to discontinue testosterone therapy nor was testosterone therapy ever identified as a predisposing condition or a corrective measure. Lastly, Respondent argued that his annual physical from 2008 and to his 2012 retirement demonstrated that he took the necessary steps to correct the predisposing conditions that were within his ability to correct. (Appellant's Exhibit C pages 33-39)

On May 4, 2020, Appellant filed its Written Closing Argument. Appellant argued that Petitioner "continuously" failed on multiple occasions to correct predisposing conditions. (Appellant's Exhibit C pages 23-32)

On May 21, 2020, Respondent filed his Reply Brief. Respondent replied to Appellant's argument that he repeatedly and continuously failed to correct predisposing condition by pointing out that Respondent's cholesterol and triglyceride levels steadily declined to a normal range. In fact, the 2012 annual physical confirmed that the only predisposing condition identified was abnormal hearing even though his triglycerides were slightly elevated. Since Respondent's predisposing conditions had been correct to the point where the physician

conducting the 2012 annual physician no longer identified cholesterol or triglycerides as needing correction, Respondent reiterated that he qualified for the conclusive presumption for claim compensability under NRS 617.457. (Appellant's Exhibit C pages 17-22)

On July 27, 2020, the Appeals Officer affirmed the Hearing Officer's September 17, 2019 Decision and Order affirming Appellant's July 23, 2019 claim denial determination. The Appeals Officer concluded that Respondent was precluded from the conclusive presumption because he failed to correct predisposing conditions. The Appeals Officer based its conclusion on laboratory results that his triglycerides were elevated while hospitalized in 2019 due to his cardiac event. The Appeals Officer also cited a statement from the discharging physician in 2019 that testosterone might affect his heart. (Appellant's Exhibit C pages 3-12)

Respondent timely filed a Petition for Judicial Review with the District Court.

On March 1, 2019, the District Court executed the Order Granting Petition for Judicial Review. Respondent established that the Appeals Officer acted arbitrarily or capriciously, and thus an abuse of discretion that warranted reversal The District Court found that:

> First, the Court FINDS that the medical records did contain written instructions to Petitioner to correct predisposing conditions. However, the Court notes that these written instructions were much too general in nature to effect change to Petitioner's cholesterol, triglycerides, LDL Levels, and not at all specific and

> pointed. Rather, specific and pointed advice would have included recommendations that Petitioner adopt a given regimented diet plan and/or given regimented exercise routine, both programs of which would have laid out diet specific instructions as to what Petitioner could and could not eat, and specific exercise instructions as to what exercises Petitioner needed to complete, frequency, duration, etc.
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> .

The District Court also found that:

> Second, with regard to the NRS 617.457(11) requirement that correction of the predisposed conditions be within Petitioner's ability, the Court FINDS that Petitioner's medical records do not contain sufficient documentation that correcting the predisposing conditions was within Petitioner's ability as contemplated by NRS 617.457(11). Specifically, the physician's recommendations of diet change and exercise programs, i.e. low fat diet, cardio, and 4 mg/day omega 2, etc., coupled with recurring testing of cholesterol, triglycerides, LDL, which primarily yielded unchanging results, is an insufficient basis to support the NRS 617.457(11) requirement that correcting Petitioner's predisposed conditions: cholesterol, triglycerides, LDL, was within the ability of the employee to control.

The District Court further found that:

> Third, for the relevant period 2008 to 2012, the reviewing physicians that conducted Petitioner's annual physical examination concluded: 2008 - In conclusion with all the information that has been provided to me, it appears you are in good health and remain acceptable for employment; and for 2009 2012 - In conclusion with all the information that has been provided to me, it appears that the employee is in good health and remains acceptable for employment.

> The physician's minimal recommendations of a low fat diet, cardio, and 4 mg/day omega 2, combined with a finding that Petitioner was in good health suggest to this Court that Petitioner exercised good faith in adhering to the physician's recommendations. Additionally, there was no indication in the Record to the contrary. This, in fact, resulted in Petitioner receiving consecutive bills of good health from 2008 to 2012.

The District Court thus concluded that:

> Lastly, the physicians did not prescribe any cholesterol, triglycerides, or LDL medication to further control Petitioner's cholesterol, triglycerides, LDL levels. This illustrates to this Court that Petitioner, in good faith, was doing what he was supposed to be doing, and despite following his physician's recommendations, Petitioner's inability to alter his cholesterol, triglycerides, or LDL levels suggests that Petitioner may have been incapable of correcting his predisposing conditions through diet and exercise alone. This negates the NRS 617.457(11) requirement that correction of the predisposed conditions be within Petitioner's ability. (Appellant's Exhibit 1 pages 1-6)

Appellants appealed the District Court's Order Granting Petition for Judicial Review to the Supreme Court. Respondent also filed a Motion for Stay Pending Supreme Court Appeal, which was summarily denied. (Appellant's Exhibit B page 1)

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II

ARGUMENT

A. Appellant Has Failed To Demonstrate That The District Court's Order Granting Petition For Judicial Review Should Be Stayed

NRAP 27(a)(3)(A) states that:

> (3) Response.
>
> > (A) Time to File. Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 7 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8 or 41 may be acted upon after reasonable notice to the parties that the court intends to act sooner.

Here, the District Court noted that it reviewed the Motion for Stay Pending Supreme Court Appeal and the Opposition to Motion for Stay Pending Supreme Court Appeal. "Colloquy regarding whether Respondent was seeking a reconsideration of the Court's decision granting the petition for judicial review and a stay, Mr. Reeves stated they had not specifically filed a motion for reconsideration but for a stay." Following arguments by counsel regarding the stay pending an appeal, the District Court denied Appellants Motion for Stay Pending Supreme Court Appeal. The District Court ruled that Appellants did not make a strong showing that it will likely prevail on the merits of the appeal. It was also ruled Appellants would not suffer irreparable harm absent a stay and Respondent, an interested party, would be substantially harmed by further delaying workers' compensation benefits under

DIIR v. Circus Circus Enterprises, 101 Nev. 405, 408, 705 P.2d 645, 648 (1985). Finally, the District Court ruled that public interest favored Respondent in the instant case.

B. Appellant Has Not Satisfied The Requirements For A Stay

An order for stay is not a right to be exercised, but a matter of judicial discretion to be used by the Court, when appropriate, upon application of a party. NRS 233B.140(3) provides that in making a ruling, the Court shall give deference to the trier of fact and consider the risk to the public, if any, of staying the administrative decision.

When considering an application for a stay order pending appeal, there are four factors which must be addressed:

1) Whether the petitioner for the stay order has made a *strong* showing that it is likely to prevail on the merits of the appeal;

2) Whether or not the petitioner has shown it would sustain irreparable injury absent the stay order;

3) Whether or not the issuance of a stay order would substantially harm the other interested parties; and

4) Where the public interest lies.

Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d 1371, 1374 (Nev. 1975); American Horse Protection Assoc. v. Frizzel, 403 F.Supp. 1206, 1215

(Nev. 1975). In this matter, a stay is unwarranted as Appellant has failed to meet the burden of making a strong showing that it is likely to prevail on the merits or that it will sustain irreparable injury absent the stay order. Moreover, a stay is unwarranted because the issuance of a stay order will substantially harm one of the other interested parties and the public interest favors Respondent. The administrative determination that is the subject of this appeal is tantamount to an attempt by Appellant to deny Respondent workers' compensation benefits to which he is clearly entitled.

1. Appellant Has Not Made A Strong Showing That It Will Prevail On The Merits

In order to show that it will prevail on the merits, Appellant has the burden of demonstrating that the District Court's Order Granting Petition for Judicial Review of the Appeals Officer's decision was factually or legally incorrect when it ruled that the Appeals Officer acted arbitrarily or capriciously. NRS 233B.135(2); Campbell v. Nevada Tax Com'n, 853 P.2d 717 (Nev. 1993). In determining the appropriateness of the Appeals Officer's decision, this Court may not substitute its judgment for that of the Appeals Officer as to the weight of the evidence. N.R.S. 233B.135; SIIS v. Campbell, 862 P.2d 1184 (Nev. 1993); Campbell v. Nev. Tax Com'n, 853 P.2d 717 (Nev. 1993). On questions of fact, this Court is limited to determining whether *substantial evidence* exists in the record to support the Appeals Officer's decision. Desert Inn Casino & Hotel v. Moran, 106 Nev. 334, 792 P.2d

400, 401 (1990); SIIS v. Swinney, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987). Substantial evidence is "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." State of Nevada Emplmt. Sec. Dept. v. Hilton Hotels Corp., 102 Nev. 606, 607-08, 729 P.2d 497, 98 (1986), quoting Robertson Transp. Co. v. P.S.C., 39 Wis.2d 653, 159 N.W.2d. 636, 638 (1968). In the instant case, Respondent met his burden of demonstrating that the Appeals Officer's decision was factually and/or legally incorrect. Respondent has also showed that the Appeals Officer acted arbitrarily or capriciously, and thus an abuse of discretion that warranted reversal. Thus, the District Court correctly granted Respondent's Petition for Judicial Review and properly denied Appellant Motion for Stay Pending Supreme Court Appeal.

2. Appellant Will Not Suffer Irreparable Harm

Appellant has the burden of demonstrating that it will suffer irreparable harm if the stay order is not issued. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. Appellant argues in its Motion that if the stay is not granted, it will be irreparably harmed because of the payment of benefits. This argument was rejected by the District Court and is without merit since there are no Nevada Supreme Court cases that indicate irreparable harm results from the sole payment of money. To the contrary, the Nevada Supreme Court, in DIIR v. Circus Circus Enterprises, 101 Nev.

405, 408, 705 P.2d 645, 648 (1985) held that:

> ...the object of workers' (sic) compensation social legislation is to provide the disabled worker with benefits during the period of his disability so that the worker and his dependents may survive the catastrophe which the temporary cessation of necessary income occasions.

The court also indicated that "...it is clearly the injured worker and not the employer who is more likely to be irreparably harmed when immediate payment of benefits is contrasted with delayed payment pending the outcome of the hearing on the merits." Id. Respondent is the party more likely to be harmed by the issuance of a stay since he would continue to be denied appropriate workers' compensation benefits currently being withheld.

3. The Issuance Of A Stay Order Will Substantially Harm An Interested Party

In determining whether or not to issue a stay, the Court must consider whether the issuance of a stay order will substantially harm an interested party. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. In this matter, the issuance of a stay is unwarranted because it would substantially harm Respondent, an interested party, by further delaying benefits for his occupationally related disease of the heart. Moreover, the continued delay of benefits is contrary to the policy expressed by the Nevada Supreme Court in DIIR v. Circus Circus Enterprises, *supra*.

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4. The Public Interest Favors Respondent In The Instant Case

In determining whether to issue a stay, the Court must consider where the public interest lies. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. A stay in this matter is unwarranted since there is no public interest which will be sacrificed by the Court's refusal to grant the stay.

The issue in this case involves Appellant denying liability for Respondent's claim for occupational heart disease. Substantial evidence confirms that Respondent met the necessary criteria under NRS 617.457 to qualify for the conclusive presumption of claim compensability. Appellant has made no allegation that such action will force it into liquidation, necessitate the termination of employees, or result in any similar outcome that might affect the public interest.

C. Appellant Has Failed To Show That Respondent's Predisposing Conditions Were Within His Ability To Correct

The Nevada Supreme Court in Manwill v. Clark County, 162 P.3d 876, 123 Nev. 28 (2007) held a claimant has no burden to disprove the failure to correct predisposing conditions did not lead to heart disease under NRS 617.457(11), or that no predisposing conditions exist, to receive the benefits under NRS 617.457. *See*, 123 Nev. 238, 242-44 (2007). The predisposing conditions section under NRS 617.457 has existed since 1973. NRS 617.457(11); *see*, 1973 Nev. Stat. ch. 504, § 1, at 769. In 1989, the Nevada legislature set the current conclusive presumption

found in NRS 617.457(1). 1989 Nev. Stat. ch. 480, § 2, at 1021. Since that time, the Nevada legislature has only expanded the ability for claims under NRS 617.457 to be accepted. *Compare* NRS 617.457(1989) *with* NRS 617.457(2017); *see also*, Manwill, 123 Nev. 238; Gallagher v. City of Las Vegas, 114 Nev. 595, 601, 959 P.2d 519, 522 (1998).

The Manwill Court knew the existence of, and failure to correct, predisposing conditions would exclude a claimant from benefits under NRS 617.457. Manwill, 123 Nev. 238, 242-43. However, the Court found an injured worker has absolutely no burden to show they do not have any predisposition conditions and/or had the ability to correct them but failed to do so. *See*, *Id.* at 244. If such a burden and requirement existed, then the Nevada Supreme Court would have listed it as such, but instead merely requires Respondent to "show only two things: heart disease and five years' qualifying employment before disablement." *Id.* at 242-44. The injured worker in Manwill did not have to show the correction of a predisposing condition within their ability to correct nor did he have to show no predisposing conditions existed. *Id.*

As such, it is Appellant burden to meet the requirements under NRS 617.457(11) to exclude Respondent from receiving the benefits under NRS 617.457, which states:

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NRS 617.457(11) provides:

> Failure to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to a physical examination required pursuant to subsection 4 or 5 excludes the employee from the benefits of this section if the correction is within the ability of the employee.

The Nevada Supreme Court provided a more in-depth interpretation NRS 617.457(11) in Emplrs. Ins. Co. of Nevada v. Daniels, 122 Nev. 1009, 145 P.3d. 1024 (2006). In Daniels, the Supreme Court applied the conclusive presumption of NRS 617.457, holding that the employer had the burden to defend a claim for industrial disease using NRS 617.457(11), stating "An employer can defend a claim by showing that the employee failed to correct a predisposing condition". *Id* at 1029. Nevada's higher courts have heard subsequent matters on predisposing conditions, including most recently City of Las Vegas v. Burns (Unpub.). Ultimately the holdings in these matters reflect interpretation of NRS 617.457(11) based on the plain and ordinary language of the statute, giving each and every word full force and effect. The higher courts have held that if an injured worker's efforts were insufficient to satisfy a correction of any potentially predisposing conditions, the burden of proof rests with the opposing party to show that the corrections were within the injured worker's ability. Further, the language of the court's holding in Burns reflects that the corrections must fall within the ability of the specific injured worker; Burns was expected to perform corrections within Burns' ability, not a

firefighter's ability.

Here, Respondent maintains that his annual physical examinations show a consistent effort, however unsuccessful it may have proven, to control predisposing conditions. Any attempt by Appellant to force Respondent to prove his actions on predisposing would constitute a shift of the burden on predisposing conditions to Respondent, under the standards of Daniels and Burns. Under Daniels and Burns, Respondent bears no burden to show by evidence the attempts to resolve his predisposing conditions under the order of his annual physicals. Instead, it is Appellant who must prove up their own argument and must adduce evidence that Respondent did not follow orders to correct predisposing conditions, and that those orders were within Respondent's ability to correct.

Respondent maintains, with the support of the annual physicals from 2008 to his 2012 retirement that, to the best of his ability, he engaged in diet and exercise to correct the predisposing conditions when corrective actions were provided. In 2008, Respondent was encouraged to engage in a low-fat diet. In 2009 and 2010, the annual examining physician provided no corrective actions. Then in 2011 and 2012, Respondent was instructed to engage in a low-fat diet and take Omega-2 fish oil supplements. During this period, Respondent's cholesterol and triglycerides remains at consistent levels. In fact, examining each annual physical's corrective actions, it is clear that in the five (5) years leading up to his 2012 retirement,

Respondent committed to "good faith" efforts to meet the orders set by the annual examining physician.

Respondent's annual physicals leading up to his retirement simply do not support Appellant's assertion that Respondent failed to correct predisposing conditions that were within his ability to correct. Normal cholesterol is 200. Normal triglycerides are 150. Optimal LDL is under 100 while near optimal/above optimal is between 100 and 129. The acceptable range for HDL is 40-60. These figures are contained in the blood work portion of his annual physicals. (Appellant's Exhibit C page 320)

	2008	2009	2010	2011	2012
Cholesterol	188	223	189	186	186
Triglycerides	175	177	130	159	181
LDL	125	153	128	117	120
HDL	28	35	35	37	30

From 2008 through 2012, Respondent's cholesterol was 188 (2008), 223 (2009), 189 (2010), 186 (2011) and 186 (2012). From 2008 through 2012, Respondent's triglycerides were 175 (2008), 177 (2009), 130 (2010), 159 (2011) and 181 (2012). In fact, Respondent's 2012 annual physical questionnaire signed by the examining physician confirms that the only predisposing condition indicated with an 'X" was abnormal hearing. (Appellant's Exhibit C page 302)

There has been no substantial evidence submitted in the record to support a conclusion that completely correcting the potentially predisposing conditions was within Respondent's ability. Appellant cites to no authority to suggest that a physician's order to correct a predisposing condition somehow presumptively puts that correction within the Respondent's ability. Since there is no substantial evidence to support the conclusion that the correction was within Respondent's ability prior to the diagnoses in question, any argument that Respondent failed to correct any potentially predisposing conditions does not bar Respondent from establishing his claim from industrial heart disease.

III

CONCLUSION

Based on the foregoing law and argument, Respondent, ROBERT HOLLAND, respectfully requests that this Honorable Court's DENY Appellant's Motion For Stay of District Court's Order

DATED this 14th day of May, 2021.

GREENMAN GOLDBERG RABY & MARTINEZ

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Respondent's Opposition to Appellant's Motion for Stay of District Court's Order, 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I hereby certify that this brief complied 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). This brief has been prepared in proportionally spaced typeface using Word in Times New Roman 14 point font.

I further certify that this brief complies with the page- or type-volume limitation of NRAP 32(a)(7) in that it is eighteen (18) pages in length.

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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.

DATED this 11th day of May, 2021.

GREENMAN GOLDBERG RABY & MARTINEZ

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CERTIFICATE OF MAILING

I hereby certify that on this 11th day of May, 2021, I served the foregoing Respondent's Opposition to Appellant's Motion for Stay of District Court's Order, upon the following person(s), by depositing a copy of same in a sealed envelope in the United States Mail, postage pre-paid, to the following and that I also caused the foregoing document entitled RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION FOR STAY OF DISTRICT COURT'S ORDER to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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An Employee of Greenman Goldberg Raby & Martinez