IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER BETWEEN RONALD J. ROBINSON, APPELLANT, v. STEVEN HOTCHKISS, RESPONDENT	)	Case No. 83250 ANSWERING BRIEF
RONALD J. ROBINSON, APPELLANT, v. ANTHONY WHITE, ROBIN SUNTHEIMER, TROY SUNTHEIMER, STEPHENS GHESQUIERE, JACKIE STONE, GAYLE CHANY, KENDALL SMITH, GABRIELE LAVERMICOCCA, ROBERT KAISER, RESPONDENTS	)	

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Respondents are all individuals.

2. David Liebrader, NV SBN 5048 is the attorney who represented Respondents at trial, and is their attorney for this appeal.

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1. Self-Directed IRA Custodian Provident Trust was not an "indispensable party"

A self-directed IRA custodian is not an indispensable party to litigation. Appellant's contract with Provident Trust disclaimed any duty to pursue litigation. In addition, Provident Trust assigned any rights it ostensibly had to pursue litigation to Respondents.

2. VCC's discharge and Provident Trust's receipt of stock had no effect on Appellant's liability as guarantor of the Note or as a control person under NRS §90.660

Appellant claims that Respondents will receive a double recovery, because when the issuer of the Promissory Note, Virtual Communications Corporation ("VCC") filed for bankruptcy, Respondents were forced to accept preferred shares in exchange for their VCC Notes. In fact, the shares issued to Plaintiffs are unregistered, have no market value, and Plaintiffs have not received any "recovery." As to Appellant's individual liability, VCC's "reorganization" did not extinguish the debt, it simply released VCC from liability. This is bedrock bankruptcy law.

3. The VCC Promissory Note was a security under NRS §90.295

The Court performed an analysis under State v. Friend, 118 Nev. 115 (2002), and found the VCC Promissory Note was a security.

4. The claims are not barred by the statutes of limitations

Appellant failed to raise the affirmative defense of statute of limitations in any of the four answers he filed in the Hotchkiss (and White) case(s). He also failed to argue it via motion pretrial, or with evidence at trial. Because Appellant failed to assert a statute of limitations defense at any time during the proceedings, the issue was waived.

5. The Court properly awarded damages against Appellant pursuant to NRS. §90.660

NRS §90.660 has a civil liability component. The Court found that as a control person, Appellant was liable to Respondents for damages under NRS §90.660 for the sale of unregistered securities. Appellant has not proven that Respondents received anything of value when the bankruptcy court ordered their Notes be exchanged for VCC's preferred shares. In any event, N.R.S. §90.660 provides a mechanism to settle the rescission related accounting issues.

6. The Court did not make an award based upon fraud, misrepresentations and omissions, so this issue is moot.

7. The award of attorney's fees is supported by the record

The court performed a Brunzell analysis (cites and discussion *infra*), and found that Respondents' attorney was entitled to the costs and fees submitted.

STATEMENT OF THE CASE

This was an action to recover money owed under promissory notes. Plaintiffs/Respondents are investors in Virtual Communications Corporation's ("VCC") Promissory Notes. Appellant has set forth a schedule of the dates and amounts invested by the individual Plaintiffs on **pages 12 and 13 of his Opening Brief**.

VCC agreed to make monthly 9% interest payments on the Notes, and to return Plaintiffs' principal within 18 months (with an option to extend an additional 6 months). VCC stopped making payments in February, 2015. Prior to the filing of their complaints Plaintiffs notified VCC that they were in default under the Note terms for failing to pay interest. See i.e. Hotchkiss demand letter at **Appellant's Appendix (hereafter "AA") p. 824**. On September 28, 2017 Respondent Steven Hotchkiss filed his complaint for damages. **AA pp. 1-16** Case # A-17-762264-C (The Hotchkiss case"). Appellant Robinson filed his Answer to Mr. Hotchkiss' Complaint on February 5, 2018 **AA pp 92-98**.

Respondent Anthony White filed his complaint on October 12, 2017

AA pp. 17-36 as case A-17-763003-C (the "White case") . Appellant Robinson filed his answer to Mr. White's complaint on December 29, 2017 **AA pp. 82-90.** On October 4, 2018 Respondents Troy Suntheimer, Robin Suntheimer, Stevens Ghesquiere, Jackie Stone, Gayle Chany, Kendall Smith, Gabriele Lavermicocca and Robert Kaiser were added to the White case via the filing of a first amended complaint. **AA pp. 134-151**. Appellant filed his Answer to the first amended complaint on October 24, 2018. **AA 152-164**. On November 9, 2018 Appellant filed an amended Answer to the First Amended Complaint in White **AA 218-230.** None of the Answers filed by Appellant asserted a statute of limitations affirmative defense.

On July 1, 2019 by stipulation the Hotchkiss case and White case were consolidated into the Hotchkiss case. **AA pp. 422-423**. Thereafter the two cases proceeded to trial under the Hotchkiss case.

The common issue among all the Plaintiffs was the assertion that Appellant Ron Robinson signed the Note as guarantor. During the litigation, Mr. Robinson claimed that his signature was used without his permission, and that he did not intend to guarantee repayment. The Court disagreed. At least four separate documents evidence Mr. Robinson's intent to guarantee the Note. **AA pp. 865, 869, 1001, 1044.** In addition, Frank Yoder the former President of Wintech, VCC's

wholly owned subsidiary, testified that Appellant intended to guarantee the Note. **AA p. 733 lines 1-6.**

To avoid honoring his guarantee, Robinson claimed that his signature was affixed to a blank promissory note without his knowledge. The supposed culprit for this unauthorized act was Robinson's own granddaughter, Alisa Davis, who Robinson blamed for the supposed misdeed. When called to the stand, Ms. Davis refuted the testimony of her grandfather. **AA p. 698 lines 4-24.**

The issues of whether the VCC Notes were securities, as well as "control person" liability were the subjects of Plaintiffs' pre-

trial brief **AA pp. 451-495,** testimony at trial (see infra) and post-trial briefing **AA pp. 1161-1168 and 1169-1186.** After trial, in its Decision **AA pp.1187-1194** the Court found the Notes were unregistered securities, and that Mr. Robinson, as Chairman and CEO was a control person and guaranteed the Notes. Thereafter, Findings of Fact were issued **AA pp. 1195-1199** and Judgment were entered **AA pp. 1371-1373.**

SUMMARY OF ARGUMENT

Appellant was Chairman and CEO of a company the trial court found to have sold unregistered securities. As Chairman and CEO,

Appellant was a statutory control person, and liability attached pursuant to NRS §90.660.

A separate basis for liability was Appellant's role as guarantor of the Notes, which was established via documentary evidence received at trial, as well as from testimony by other Defendants. Robinson's guarantee was not extinguished by VCC's bankruptcy, as the discharge of a debtor does not serve as a discharge of a third party that guaranteed the debt. 11 USC 524(e). See *infra*.

As to the shares Respondents were forced to accept in exchange for their Notes, there is no market for them, they are restricted, pay no distributions, and for all intents and purposes have no value.

However, they are traceable to the unlawfully sold unregistered securities promissory notes, and pursuant to NRS §90.660, will be transferred to Appellant upon payment of the recission amount ordered by the Court.

Under NRS §90.660 a prevailing party is entitled to attorney's fees, and the trial court performed a Brunzell analysis (see *infra*), and issued an award of attorney's fees that became part of the judgment.

Lastly, the issue of a self-directed IRA Custodian being an indispensable party is one of first impression in Nevada. Other jurisdictions have declined to find self-directed IRA Custodians

"necessary and indispensable", finding that the account owner is the real party in in interest, and that the relationship is governed by contract. That was the case here, where self-directed IRA Custodian Provident Trust disclaimed, via contract, any duty or obligation to pursue litigation on behalf of Respondents. To resolve any question on this point, Provident Trust delegated whatever rights it may have had to Respondents to pursue the litigation. **AA pp. 322-323 and 502-503.**

LEGAL ARGUMENT

1. SELF-DIRECTED IRA CUSTODIAN PROVIDENT TRUST WAS NOT AN "INDISPENSABLE PARTY"

Because some Respondents used pretax "qualified" funds to invest in the VCC promissory notes[1], some purchases were made through an IRA "Custodian", Provident Trust Group, a Henderson, Nevada based business. Respondents provided Provident Trust with authorization to purchase the Notes, and after unregistered broker Retire Happy directed the funds to them, Provident Trust processed the paperwork, and forwarded the funds to VCC.

Provident Trust Group is a "self-directed" IRA Custodian, not a

[1] The schedule on pp. 12-13 of Appellant's Opening Brief sets forth which Respondents purchased individually, or through a self-directed IRA.

Trustee (and not a Bank). Per the contracts signed with the individual Plaintiffs, Provident Trust disclaimed any obligation to pursue these claims.

The document that governs the relationship between Plaintiff and Provident Trust Group is the "Custodial Agreement." The services Provident is contractually obligated to provide are set forth in this written agreement.

Plaintiffs' Promissory Notes plainly state that Provident Trust Group is **the Holder** of the Notes, and was not acting in the capacity of a Trustee. The Notes bear Plaintiffs' initials on each page, and their signatures on page three. Next to Plaintiffs' signatures is a stamped signature from Provident Trust where the CEO signed off as **a consultant,** and not as a Trustee. **See Plaintiffs' promissory notes contained in Exhibit "1" AA pp. 821-861.**

This is consistent with the terms governing the accounts, as stated in paragraph 8.05 (b) "**Custodian Acting in Passive Capacity Only**"

> "It is not our responsibility to review the prudence, merits, viability or suitability of any investment directed by you or your investment advisors... we do not offer any investment advice, nor do we endorse any investment, investment product or investment strategy...."

"We are under no obligation or duty to investigate, analyze, monitor verify title to, or otherwise evaluate or perform due diligence for any investment directed by you or your investment advisor, representative or agent; **nor are we responsible to notify you or take any action should there be any default** or other obligation with regard to any investment."

AA p. 523.

In light of this specific language limiting Provident's role, there was no basis for requiring them to participate in this action. Nor were they necessary or indispensable to affording complete relief between the parties.

Appellant has not explained how Plaintiffs could have forced Provident Trust to sue on their behaves when it wasn't obligated to do so. Further, Appellant took no action to bring Provident Trust into the case, and did not seek any relief, other than on the eve of trial claiming that they were necessary and indispensable.

Provident Trust's only role in these transactions was to receive the investor's money, send it off as directed, and then report this fact to the IRS. It didn't maintain control of the funds, as would a traditional Trustee. Once the funds passed through to the issuer of the investment (here, VCC) Provident's role was limited to reporting annually to the IRS

the original or updated value of the investment.

Not surprisingly at any intersection of unlicensed brokers and unregistered securities there are going to be problems. The issue of the IRA Custodian as real party in interest has been asserted unsuccessfully as a defense in several recent cases, most notably in a Utah District Court case (Deem v. Baron) in 2016. There, the court cited two recent federal court decisions that held that an IRA Custodian was not a real party in interest

> "In the case before the court, the actual agreement between Plaintiff David Law, and the custodian, American Pension Services, clearly states that the owner, David Law, not the custodian, has sole responsibility for decisions. The custodian was to have "no responsibility."[9] Following the logic of the *Vannest* case and the *FBO David Sweet IRA* case, which this court finds compelling, the Plaintiffs, not the holder or custodian of the IRA are the true parties in interest. Since the custodian/holder has not been involved in the decision-making process, it lacks the knowledge of the facts which would allow it to bring this action."

Deem v. Baron (D. Utah 2016) 2:15-CV-00755-DS (cites to Vannest v. Sage, Rutty & Co., Inc., 960 F. Supp. 651 (W.D. N.Y. 1997) and "FBO David Sweet IRA v. Taylor, 4 F. Supp. 3d 1282 (M.D. Ala. 2014).

AA pp. 528-531

The facts here are identical; Provident Trust acting as 1) "Custodian" was the 2) "Holder' of the 3) "Note", and 4) "was not

involved in the decision making process" on the investment.

Nevertheless, Plaintiffs applied a "belt and suspenders" approach to addressing this issue by having Provident Trust delegate any rights it may have had to take action to Plaintiffs. This was filed with the Court. **AA pp. 322-323, 502-503.**

Appellant has not explained how the Court failed to provide "complete relief" or how Provident might have had "an interest relating to the subject matter of the action." As a result, Provident was neither a necessary nor an indispensable party to the action.

In his opening brief Appellant argues, for the first time, that an IRA Custodian must be a bank (or other approved entity) under 26 U.S.C. 408(a)(2). **Appellant's opening brief at p. 18.**

This argument is misplaced, and seems more in line with an argument the IRS would make to disqualify Provident Trust from acting as a self-directed IRA Custodian.

Nevertheless, a Trustee need not be a bank. Under 26 U.S.C. 408(a)(2) an IRA Custodian can be "such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of the section." 26 U.S.C. 408(a)(2)

Had Appellant raised this issue prior to this appeal, Respondents

could have obtained evidence via deposition or trial testimony from the Nevada Secretary of State as to whether Provident Trust was "one of the other persons" qualified to operate as a self-directed IRA Custodian in Nevada. Now, all of this relevant information is outside the record.

Regardless, whatever Provident Trust is, or isn't, the rights and duties between Provident Trust and Respondents are defined by contract, which unequivocally states that Provident Trust has no duty to bring claims on Plaintiff's behalf.

2. <u>There was no "double recovery": VCC's discharge had no effect on Appellant's liability as guarantor of the Note, or as a Control Person under NRS §90.660</u>

Appellant argues that his personal guarantee was extinguished by the VCC Bankruptcy, and that the Court improperly granted a "double recovery" to Respondents by disregarding the fact that they received preferred shares from the VCC bankruptcy. Appellant claims that issuance of the shares precludes the Court from making an award under NRS. §90.660.

As to the shares, they are restricted, pay no distributions and represent a tiny fraction of VCC's outstanding shares, a privately held,

money losing company. In short the shares have no value, so there has been no recovery.

BY MR. LIEBRADER: Q Mr. Hotchkiss, how -- can you sell the stock in your Provident Trust account?

A Not as far as I know I can't.

Q Is -- there's actually a restriction on it, right?

A Right.

Q And does it -- so can you go out and sell it to Mr. Gewerter for a dollar share.

A I couldn't sell it to anybody.

AA 603-604

As to whether VCC's bankruptcy discharges Appellant's liability as guarantor of the Notes, the answer is no. The general rule is that a discharge of a debtor does not affect the liability of another entity for the discharged debt. See 4-524 Collier on Bankruptcy p 524.05.

From the bankruptcy Code:

> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11 USC 524(e)

"A discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt." In re Edgeworth, 993 F.2d 51, 53 (5th Cir. 1993). Following the discharge, section 524(a)(2) enjoins "actions against a debtor," Owaski v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.), 883 F.2d 970, 972 (11th Cir. 1989), but section 524(e) "specifies that the debt still exists and can be collected from any other entity that might be liable." In re Edgeworth, 993 F.2d at 53; see also In re Jet Florida Sys., Inc., 883 F.2d at 973 ("a discharge will not act to enjoin a creditor from taking action against another who also might be liable to the creditor.").

VCC included a provision in its Order of Reorganization (approved by Judge Barbero on September 5, 2018) that specifically provided that the VCC's bankruptcy did not release any claims held by third parties against anyone other than VCC:

> EFFECTIVE AS OF THE CONFIRMATION DATE, THE DEBTOR AND ALL CURRENT OFFICERS AND DIRECTORS OF THE DEBTOR AS OF THE EFFECTIVE DATE SHALL RECEIVE A FULL RELEASE FROM THE DEBTOR AND ITS ESTATE FROM ANY AND ALL CAUSES OF ACTION THAT MIGHT BE ASSERTED ON BEHALF OF THE DEBTOR OR ITS ESTATE, WHETHER KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, LIQUIDATED OR UNLIQUIDATED, CONTINGENT OR NON-CONTINGENT, EXISTING AS OF THE EFFECTIVE DATE OF THE PLAN, WHETHER IN LAW, AT EQUITY, WHETHER FOR TORT, FRAUD, CONTRACT OR OTHERWISE, ARISING FROM OR RELATED IN ANY WAY TO

> THE DEBTOR, INCLUDING, WITHOUT LIMITATION, IN ANY WAY RELATED TO THE CHAPTER 11 CASE, THE DEBTOR'S RESTRUCTURING, THE NEGOTIATION, FORMULATION OR PREPARATION OF THE PLAN, THE DISCLOSURE STATEMENT, OR ANY OTHER ACT OR OMISSION RELATED THERETO OCCURRING ON OR BEFORE THE CONFIRMATION DATE; PROVIDED, **HOWEVER, THAT THE FOREGOING RELEASE SHALL NOT OPERATE TO WAIVE OR RELEASE ANY CAUSES OF ACTION** (1) OF THE DEBTOR OR ITS ESTATE FOR ANY CLAIMS ARISING FROM WILLFUL MISCONDUCT OR GROSS NEGLIGENCE; (2) CLAIMS AGAINST ANY FORMER OFFICER OR DIRECTOR OF THE DEBTOR; OR (3) **CLAIMS THAT MAY BE ASSERTED BY THIRD PARTIES AGAINST PERSONS OR ENTITIES OTHER THAN THE DEBTOR.**

AA pp. 1277 (Emphasis added) (Caps in the original).

While the preferred shares may have served as a satisfaction of VCC's debt to Plaintiffs, the plain language of the bankruptcy court's Order makes it clear that the reorganization, with the issuance of preferred shares to Plaintiffs did not serve as a release of any claims that Plaintiffs had against Mr. Robinson.

Appellant argues that the Bankruptcy court's Order exchanging VCC's obligations under the note for VCC's worthless preferred eliminates Appellant's debt obligations to Plaintiffs. He claims it is a "novation," and cites cases where creditors voluntarily agreed to accept a modification that eliminated the obligations of a guarantor.

No such assent is found here. While the plan was approved by 80% of the investors **(Robinson testimony AA p. 674)** none of the

Plaintiffs voted to approve the plan, and none of them had any choice but to allow the VCC preferred shares to be deposited into their Provident Trust accounts. This distinguishes this case from all those cited by Appellant.

The bankruptcy cram down was not a novation. In a case of novation, the parties must approve of the new terms. When a guarantor is left out of the discussions, as in Williams v. Crusader, 75 Nev. 67 (1959) (cited by Appellant) and does not give his consent to the modification of the contract, the guarantor is released. That wasn't the case here. VCC's Chairman and CEO Appellant Robinson deliberately placed VCC into bankruptcy (**AA pp. 1184-1186**), hoping that the issuance of preferred shares would extinguish his debt (as he argues here). Because none of the Plaintiffs voted (agreed) to accept the preferred shares in substitution of their promissory notes, this cannot be a case of novation.

The case primarily relied upon by Appellant was Marion Properties, Ltd. by Loyal Crownover v. Goff, 108 Nev. 946 (1992), and it is also easily distinguished. In that case a creditor voluntarily dismissed claims against the debtor with prejudice, then later tried to sue the guarantor. The court found that in voluntarily dismissing the debtor, the claim against the guarantor was extinguished. Mr. Robinson cannot point to any similarities to the facts in Marion; no settlement, no dismissal

with prejudice, no intent to release claims.

Appellant also claimed the bankruptcy "modified" the underlying contract, giving him a "get out of jail free card" on his guarantee.

> "[i]n order to determine whether a guarantor or other surety is discharged by alteration of the underlying contractual obligation, a court must first ask whether the guarantor consented to the modification. If so, the guarantor is not discharged. If not, the court must determine whether the guarantor is an uncompensated or compensated surety. If the guarantor is uncompensated, a change to the guaranteed contract discharges the guarantor if the change is material, as long as the change is not one that could inure only to the guarantor's benefit. If, on the other hand, the guarantor is compensated, an alteration to the contract discharges the guarantor only if it materially increases the guarantor's risk on the contract

Marc Nelson Oil Prods. V. Grim Logging Co., 110P. 3d 120, 124

Under the Nelson analysis because Robinson consented to the modification - as Chairman and CEO, he authorized and approved the bankruptcy filing - he is not discharged. Going further, Robinson is a compensated guarantor; defined in Nelson as:

> "a guarantor who acts as the president of the guaranteed company, *see* Nike, Inc., 75 Or. App. at 369, 707 P.2d 589, as well as one who undertakes the obligation in order to further his own business interests, Equitable Savings & Loan, 268 Or. at 492, 522 P.2d 217."
>
> Nelson at 125.

As President, CEO and Chairman, Mr. Robinson is clearly a "compensated guarantor." As a compensated guarantor, Mr. Robinson

wouldn't be discharged because the modification did not materially increase his risk. Quite the contrary, the exchange of equity for debt was intended to eliminate his $4.5 million obligation, and thereby reduce or eliminate his risk altogether.

Finally, bankruptcy cases with a securities overlap may be helpful to the Court on the issue of whether Appellant's underlying debt was extinguished. In Schleicher v. Wendt, 529 F. Supp. 2d 959 (S.D. Ind. 2007) the Plaintiffs alleged that individual "control persons" were liable for securities fraud committed by the corporate Defendant Conseco. The control persons argued that they couldn't be liable, because Conseco filed for bankruptcy. The Court rejected this argument.

> " Defendants argue that they can be held liable under section 20(a) only *"to the same extent as"* Conseco is held liable. Since Conseco was discharged in bankruptcy from any potential liability under the Exchange Act, defendants argue, plaintiffs cannot state a claim against them under section 20(a)."
>
> "Plaintiffs counter by citing *Kemmerer v. Weaver,* 445 F.2d 76 (7th Cir. 1971). In *Kemmerer,* the alleged primary violator, an agricultural cooperative association, was dissolved by the defendants. Defendants there, like the defendants here, argued they could be held liable under section 20(a) only to the same

extent as the alleged primary violator; *i.e.*, not at all. The court disposed of the defendants' argument as follows:

> "The premise of this argument is that there is a finding of "no liability" with respect to the [alleged primary violator]. No such finding exists, it appearing instead that the [alleged primary violator] was dismissed from the suit for lack of jurisdiction due to a failure to obtain service of process. It further appears that the reason for the failure to obtain process was that the [alleged primary violator] had been dissolved on the initiative of many of the individual defendants in the present suit. On such facts it is evident that [§ 20(a)] is of no avail to defendants."

Id. at 78. " (Emphasis added).

"While *Kemmerer* involved the alleged primary violator's dissolution rather than its bankruptcy, the Seventh Circuit's reasoning applies here. Accord, *In re CitiSource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1077 (S.D.N.Y. 1988); *Elliott Graphics, Inc. v. Stein,* 660 F. Supp. 378, 381-82 (N.D. Ill. 1987). **Conseco has not been found "not liable" for securities fraud. It would be inconsistent with the broad remedial purposes of the**

securities laws to permit senior executives of a bankrupt corporation — whose actions allegedly contributed to the bankruptcy — to avoid liability by relying on the same corporation's bankruptcy.

Schleicher v. Wendt, 529 F. Supp. 2d 959, 980-981 (S.D. Ind. 2007). **(Emphasis added.)**

Like Conseco, VCC was put into bankruptcy by its control person, Chairman and CEO, Appellant Robinson. Permitting him to escape liability for this self-serving act would be an inequitable result.

Appellant also claims that the involuntary exchange of Plaintiff's Notes for preferred shares should serve as their sole recovery. In fact, these shares are restricted, and Plaintiffs cannot sell them. They also pay no dividends. So, as point of fact, Plaintiffs have not received any recovery.

As to this argument, the civil liability component of the Nevada Securities Act provides that if a purchaser "no longer owns" the security, he or she may recover damages:

> 1. A person who offers or sells a security in violation of any of the following provisions:
>
> (b) NRS 90.460;
>
> (d) Subsection 2 of NRS 90.570;

> is liable to the person purchasing the security. Upon tender of the security, the purchaser may recover the consideration paid for the security and interest at the legal rate of this State from the date of payment, costs and reasonable attorney's fees, less the amount of income received on the security. A purchaser who no longer owns the security may recover damages. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, plus interest at the legal rate of this State from the date of disposition of the security, costs and reasonable attorney's fees determined by the court. Tender requires only notice of willingness to exchange the security for the amount specified.

NRS §90.660(1) (Emphasis added).

Here, we have a hybrid; Respondents were forced to accept the exchange of their VCC Notes for preferred shares by operation of law. Since they are traceable to the original Notes, they are obligated to tender those preferred shares to Appellant upon payment of the judgment amount. And, to the extent that Plaintiffs are able to sell any of the preferred shares, or if they receive a distribution, any amounts received would offset the amounts owed under the judgment. These monetary issues are easily addressed by the trial court that issued the recission order when, and if, Appellant pays on the judgment.

3. THE VCC PROMISSORY NOTE WAS A SECURITY UNDER NRS §90.295

One of the primary issues Judge Silva was asked to decide at trial

was whether the VCC Note was a security. In making the finding the Court applied the test approved by the Court in State v. Friend, 40 P. 3d 436; 118 Nev. 115 (2002). **AA pp. 1188-1190.**

The Nevada Securities Act's definition of a security under NRS § 90.295 includes a "Note" in the same form that was sold to Plaintiff. In addition to meeting the traditional "Howey" test of being 1) an investment of money, in 2) a common enterprise, with 3) the expectation of profits, from 4) the efforts of others (See SEC v. W J Howey & Co., 328 U.S. 293; 66 S.Ct. 1100 (1946)), the VCC Note also meets the "family resemblance test" standard adopted by Nevada in State v. Friend, 40 P. 3d 436; 118 Nev. 115 (2002).

NRS §90.295 provides the statutory definition of a security:

> **NRS 90.295** "Security" defined. "**Security" means a note**, stock, bond, debenture, evidence of indebtedness..."

NRS §90.295 (Emphasis added).

In State v. Friend, the Nevada Supreme Court adopted the use of the "family resemblance test" to determine whether a note would be considered to be a security under the Act.

The "family resemblance" test was established in Reves v. Ernst and Young 494 U.S. 56, 57, 110 S.Ct. 945 (1990) to help courts determine whether a note is a security. There are two components to the test, with four subparts to the second component. The Note sold by VCC meets all

of the requirements to be considered to be a security.

The test begins with a presumption that all Notes are securities except for those Notes which traditionally have been used in consumer financing, or among sophisticated investors such as large commercial banks. These exceptions include mortgage notes, interbank loans or accounts receivables. See, Friend 40 P. 3d at 440. Those exceptions have no application here.

If the Note is not deemed to belong to the class of financing that has not traditionally been considered to be a security, the first component of the test is completed. The next step is to apply four factors to the investment at issue:

1) What are the motivations of the buyer and sellers to enter into the transaction;

2) What manner was the Note made available to the public;

3) Did the purchaser view the Note as an investment; and,

4) Is there a need for regulatory protections.

See Friend generally, 40 P. 3d at 439-441.

Step One: The Motivation test:

The first step is to analyze what motivations would prompt a reasonable seller and buyer to enter into the transaction. "If the seller's purpose is to raise money for the general use of a business enterprise or

to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security."

Friend at 439-440.

Step Two: The Distribution test

The second step examines the distribution of the note "to determine whether it is an instrument in which there is common trading for speculation or investment." Common trading occurs when the instrument is "offered and sold to a broad segment of the public."

Friend at 440.

Step Three The "Investor Expectation test

The third step of the analysis considers "whether ... [the notes] are reasonably viewed by purchasers as investments." Under this step, we must determine if the seller of the notes calls them investments and, if so, whether it is reasonable for a prospective purchaser to believe them.

Friend at 441.

Step Four: The need for Regulation

"The final step of the analysis examines the adequacy of other regulatory schemes in reducing the risk to the lender. Although Friend

has been charged with two counts of obtaining money under false pretenses, we conclude that there is a need for securities laws in Nevada. The purpose of the federal securities acts was "`to eliminate serious abuses in a largely unregulated securities market.'" Recognizing "the virtually limitless scope of human ingenuity ... `by those who seek the use of the money of others on the promise of profits,'" Congress broadly defined the scope of securities laws. Like Congress, it appears that the Nevada Legislature recognized a similar need for such broad security regulations. We will give effect to that determination."

Friend at 441.

Here; the VCC Notes were not in the category that are traditionally exempt such as mortgage notes, or notes used in consumer financing. VCC's "Motivation" for participating in the offering was to raise funds for use in developing its "ALICE" technology, while Plaintiffs were motivated by the 9% interest payable over 18 months.

In fact, Appellant confirmed these facts in his testimony under questioning by Respondents' counsel

> Q Okay. And you refer to these people as investors, right? These were investors in VCC, is that right?
>
> A Certainly.

Q And their money was being pooled for the common goal of growing the company?

A Which it did.

Q Which it did. And they expected to get a 9% rate of return in exchange for their -- the investment of their money?

A Yes.

Q Did they have to do anything? Did they have to come down and do coding or anything or they can just sit back and collect the 9% interest?

A Totally passive.

AA p. 625

These answers tick the boxes of 1. An investment of money, in 2. a common enterprise, 3. With the expectation of profits, 4. Solely from the efforts of others, and thereby satisfy the Howey test.

These answers also satisfy several parts of the Friend test, as they show the motivations of the parties, with the purchasers viewing the transaction as an "investment".

Step 2 of the Friend test, "the manner of distribution" was established by Appellant's testimony on the actions of the fund raiser Julie Minuskin of Retire Happy, which was tasked with going out into the investment community to raise money:

Q And you understood that Ms. Minuskin was using this blank pre-signed document to go out there in the community to raise money, right?

A Correct.

AA p. 617

And Ms. Minuskin was wildly profitable, bringing in over $4 million to VCC's coffers:

Q And so would it be accurate to say as of September 14th, Ms. Minuskin might have raised $4.5 million for the company?

A Very possible.

Q And it says the company is entered into a series of notes payable with several unrelated parties. All notes containing identical terms from the date of consummation. The notes are unsecured bearing an interest rate of 9% and due within 18 months from the execution date with an option to extend for 6 months. Those are our notes that we're talking about, right, the $4.5 million raised by Ms. Minuskin?

A Yes, I would assume.

AA 649

VCC used Ms. Minuskin's firm Retire Happy to "Distribute" the Notes to a wide section of people; $4.5 million was raised. It is clear that the intent was to market the investment to a broad section of the public in order to raise the needed capital. This satisfies the second part of step two to the Friend test "manner in which note is made available to the public.

Further, Mr. Robinson referred to the Notes as investments, and the purchasers as investors. An email Robinson wrote to Julie Minuskin, which was introduced as an exhibit confirmed this:

> "We're in complete agreement with communication with your investors. Vern will be the direct contact and in addition, we would be open to make presentation of our technology anytime with your investors. Naturally, Frank would be the contact for this. It is our desire to make full disclosure to all investors and for that reason, we are open to any suggestion that you might have in accomplishing this, so don't hesitate in making the clear to your contacts. "In addition, should your investors wish to contact me directly, I would be happy to meet with them and show them our accountant's prepared current financial statement. My present worth is 17,699,000, which is represented in cash and equities, both real and personal. Ron Robinson."

AA p. 862.

Lastly, VCC referred to the Notes as securities in the PowerPoint presentations they prepared for Retire Happy to show to prospective investors **AA pp. 897, 928, 947**.

As to part four of step two of the Friend test, "the need for regulation" for this type of investment transaction triggers the application of the securities laws; the Note is not of a type that would be regulated by the real estate, mortgage or insurance divisions in the state. As an investment sold to members of the public, it is subject to the regulations and provisions of the Nevada Securities Act.

Because the VCC Note checks all the boxes established by the Nevada Supreme Court in State v. Friend, (as well as Howey), Judge Silva found it was a security under Nevada law.

As a security, VCC needed to register it prior to offering it for sale, or to file a request for exemption from registration. They did neither. Nor are any exemptions applicable. Defendants never raised the issue of exemption at any point in this proceeding. Under NRS 90.690(1), Defendants had the burden of proof when claiming an exemption, and were required to prove each and every element. If proof is not offered as to any one element, the entire exemption is lost. *See e.g.,* Sheets v. Dziabis, 738 F. Supp. 307 (N.D. Ind. 1990).

Further, Defendants cannot rely on a good faith belief that the VCC Note interests were not securities, or that they didn't need to be registered. *See e.g.*, Kahn v. State, 493 N.E.2d 790 (Ind. App. 1986). Nor may VCC rely upon opinions of counsel on these issues. *See e.g.*, Smith v. Manausa, 385 F. Supp. 443 (E.D.Ky. 1974); People v. Clem, 39 Cal. App.3d 539, 114 Cal. Rptr. 359 (1974).

NRS §90.460 provides that a security must be registered prior to sale.

> **NRS 90.460** Registration requirement. It is unlawful for a person to offer to sell or sell any security in this State unless the security is registered or the security or transaction is exempt under this chapter.

NRS §90.460

The Nevada Secretary of State's Certificate of Absence of Record received into evidence **AA p. 972** stated that VCC never filed an application for registration of its note offering, a fact confirmed by Appellant on the stand:

> I think you testified in the Waldo trial, I just want to kind of speed things up. Tab 11 is a certificate from the Secretary State of Nevada showing that there were no exemptions or registration for VCC Securities filed with the state.
>
> A Correct.

AA p. 642.

Appellant tried to pass off reasonability for registering the security or obtaining the exemption to Ms. Minuskin or Provident Trust. **See Opening Brief p. 43**. This sleight of hand, misdirection overlooks the fact that it was VCC, not Provident Trust that was issuing/selling the securities. Therefore it was VCC's responsibility to register, or request an exemption. Regardless, it was not done, and VCC sold the securities without registration or an applicable exemption.

Lastly, Appellant cites the IRA Custodian agreement, claiming that Respondents signed boilerplate in the Custodian contract affirming that they would not purchase unregistered securities in their self-directed IRA accounts.

Whether the VCC Notes meet the definition of a security under law is a decision for the trial judge, not the Plaintiffs. Judge Silva properly applied the law to the facts, and reached the conclusion that the Notes were securities, and that VCC sold unregistered, non-exempt securities in violation of NRS §90.460. **AA pp. 1187-1194.**

4. THE CLAIMS ARE NOT BARRED BY THE STATUTES OF LIMITATIONS

Appellant failed to raise the affirmative defense of statute of limitations in any of the four answers he filed in the Hotchkiss (and White) case(s). Original Hotchkiss Answer; **AA pp. 92-98** Original White Answer; **AA pp. 82-90** Answer to amended complaint in White; **AA pp. 152-164,** Amended Answer in White: **AA pp. 218-230.**

He also failed to argue it via motion pretrial, or establish it with evidence at trial. In sum, he completely ignored it. Because Appellant failed to apprise Respondents that he was asserting a statute of limitations defense at any time during the proceedings, Respondents were denied the opportunity to introduce evidence opposing the claim, and therefore the issue was waived.

It should be noted that any statute of limitations argument applies only to Respondents' securities law claims, and not to the guarantee claims against Appellant, which are governed by a 6 year breach of written contract statute See NRS §1190(1)(b).

While it is true that a 5 year statute of limitations governs Respondents' securities law claims, and would have placed some of the Respondents' purchases outside the five year limit (**See schedules in Appellant's opening brief pp. 12 and 13**), Appellant never raised or argued the point prior to, or at trial.

A point not urged in the trial court is deemed to have been waived,

and will not be considered on appeal. Old Aztec Mine v. Brown, 97 Nev. 49, 52 (623 P.2d 981, 983 (1981). The consideration of legal arguments not properly presented to and resolved by the District Court will almost never be appropriate. Archon v. Eighth Judicial District Court, 133 Nev. 816, 822; 407 P.3d 702, 708 (2017). The failure to raise the statute of limitation in the trial court waives the defense. Hubbard v. State, 920 P. 2d 991; 112 Nev. 946 (1996).

Since the averments of an affirmative defense are taken as denied or avoided (Jones v. Barnhart, 89 Nev. 74, 506 P.2d 430 (1973); N.R.C.P. 8(d)), each element of the defense must be affirmatively proved. United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10 (D.Nev.1975). The burden of proof clearly rests with the defendant. See, e. g., Rosenbaum v. Rosenbaum, 86 Nev. 550, 471 P.2d 254 (1970).

The date on which a statute of limitations accrues is normally a question of fact, and the district court may determine that date as a matter of law only when the uncontroverted evidence irrefutably demonstrates the accrual date. Winn v. Sunrise Hosp. & Med. Ctr., 128 Nev. Adv. Op. 23, 277 P.3d at 458, 462-63 (2012). Non-compliance with a statute of limitations is a non-jurisdictional, affirmative defense, see, e.g., Dozier v. State, 124 Nev. 125, 129 (2008), and the party asserting an affirmative defense bears the burden of proof. *See* Nev. Ass'n Servs., Inc.

v. Eighth Judicial Dist. Court, 130 Nev. Adv. Op. 94, 338 P.3d 1250, 1254 (2014).

The appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted. Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996); see also Bemis v. Estate of Bemis, 114 Nev. 1021 1025, 967 P.2d 437, 440 (1998) ("Dismissal on statute of limitations grounds is only appropriate 'when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered' the facts giving rise to the cause of action." (quoting Nevada Power Co. v. Monsanto Co., 955 F.2d 1304, 1307 (9th Cir.1992).

Because Appellant did not raise or attempt to prove the statute of limitations affirmative defense, the issue was never before the court, and Plaintiffs were not given the chance to argue or present evidence of tolling or other facts to explain any delay that might have been a factor in filing suit. For example, received into evidence were emails VCC's COO Vern Rodriguez and Appellant sent to Mr. Hotchkiss after VCC defaulted, asking him to be patient, and that the company intended to return his principal (**AA pp. 873, 876, 877).**

Receipt and reliance on this email is relevant evidence of Mr. Hotchkiss' decision to wait before filing his complaint. Had Appellant raised the statute of limitations issue, the other Plaintiffs could have

produced evidence, or testified as to reasons for waiting/delayed discovery, etc.

5. THE COURT PROPERLY AWARDED DAMAGES AGAINST APPELLANT PURSUANT TO NRS. §90.660

NRS §90.460 provides:

"It is unlawful for a person to offer to sell or sell any security in this State unless the security is registered or the security or transaction is exempt under this chapter."

NRS §90.460 Registration Requirement

NRS § 90.660 Civil liability provides:.

1. A person who offers or sells a security in violation of any of the following provisions:

(b) NRS 90.460;

(d) Subsection 2 of NRS 90.570;

is liable to the person purchasing the security. Upon tender of the security, the purchaser may recover the consideration paid for the security and interest at the legal rate of this State from the date of payment, costs and reasonable attorney's fees, less the amount of income received on the security. A purchaser who no longer owns the security may recover damages. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, plus interest at the legal rate of this State from the date of disposition of the security, costs and reasonable attorney's fees determined by the court. Tender requires only notice of willingness to exchange the security for the amount specified.

NRS §90.660

And, liability is imposed on control people:

> "A person who directly or indirectly controls another person who is liable under subsection 1 or 3 [unlicensed broker dealers, sale of unregistered securities], a partner, officer or director of the person liable, a person occupying a similar status or performing similar functions, any agent of the person liable, an employee of the person liable if the employee materially aids in the act, omission or transaction constituting the violation, and a broker-dealer or sales representative who materially aids in the act, omission or transaction constituting the violation, are also liable jointly and severally with and to the same extent as the other person, but it is a defense that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by which the liability is alleged to exist."

NRS 90.660 (Emphasis added).

Appellant now claims that the preferred shares that Respondents received in the bankruptcy should offset any damages they are entitled to receive pursuant to their judgment under NRS §90.660. Missing from this argument is any evidence that the preferred shares have any value. Appellant did not offer any evidence or testimony concerning the value of

the preferred shares that Respondents were forced to accept by operation of law. The value of the preferred shares, if any, is entirely speculative as they are restricted, pay no dividends, and are shares in a privately held corporation.

Appellant also claims that Respondents are not entitled to interest from the date of conversion, but that is inconsistent with the language of NRS §90.660.

> Upon tender of the security, the purchaser may recover the consideration paid for the security and interest at the legal rate of this State from the date of payment, costs and reasonable attorney's fees, less the amount of income received on the security. A purchaser who no longer owns the security may recover damages. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, plus interest at the legal rate of this State from the date of disposition of the security, costs and reasonable attorney's fees determined by the court. Tender requires only notice of willingness to exchange the security for the amount specified.

NRS §90.660

First; Plaintiffs did not receive the "consideration they paid for the security," they received worthless preferred shares in exchange for the Notes sold to them in violation of NRS §90.460. As a result, this was not a completed tender, as they didn't receive anything of discernable value.

Likewise, the right to damages contemplates restoring the purchaser to the position he was in prior to purchase, by assessing

damages as the difference between what Plaintiff paid for the security, and what he received when he disposed of it. Under either the "tender" or the "damages" components of NRS §90.660, interest does not stop accruing until the purchaser receives the consideration paid for the security.

Here, there is no evidence on the value of the preferred shares that Plaintiffs received, and there is no way to assess what portion of the purchase price or interest remains outstanding. It was incumbent on Appellant to introduce evidence of the value of the preferred shares at trial if he wanted an offset. He failed to do so.

Application of N.R.S. §90.660 provides the remedy that Appellant seeks; upon payment of the consideration, plus interest and attorney's fees, Appellant is entitled to receive the preferred shares held by Respondents. The damages component of NRS §90.660 contemplates that a purchaser may no longer hold the original security. To the extent an issue arises over valuation upon payment of the recission remedy ordered by the Court, the parties can request an evidentiary hearing in District Court to introduce expert testimony on the valuation of the preferred shares and any distributions made to Plaintiffs that might offset the Judgment amount.

6. THE COURT DID NOT MAKE AN AWARD BASED UPON FRAUD, MISREPRESENTATIONS AND OMISSIONS, SO THIS ISSUE IS MOOT.

7. THE AWARD OF ATTORNEY'S FEES IS SUPPORTED BY THE RECORD

Pursuant to NRS §90.660, a prevailing party is entitled to his or her attorney's fees. In addition, the promissory notes contained an attorney's fees provision. (See i.e. The Hotchkiss note **AA p. 822**.)

Counsel filed a motion with a supporting Declaration attesting to his time, and his motion included a Brunzell analysis describing the time spent prosecuting the case from initial filing though trial. The District Court then performed an analysis pursuant to Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 455P.2d 37 (1969) ("Brunzell") and found that Respondents' attorney was entitled to the costs and fees submitted. **AA pp. 1364-1367**.

Evidence of time spent and diligence of counsel was established by the fact that two separate theories were advanced and proven. Appellant was found liable both as a guarantor, as well as a control person for the sale of unregistered securities. None of the elements needed to prevail on these claims were conceded, and liability was not admitted.

The case proceeded to trial, and Respondents received a full judgment. Other issues that needed to be addressed were issues that arose due to the VCC bankruptcy filing, the issue concerning Provident Trust, as well as the requirement to name Mr. Robinson's granddaughter as a Defendant after he attempted to pin liability on her on the issue of the guarantee. Judge Silva was aware of these issues, as she issued rulings on all of them. This was the "substantial evidence" before the Court when Judge Silva decided Respondents' motion for attorney fees.

In Nevada, "the method upon which a reasonable fee is determined is subject to the discretion of the court," which "is tempered only by reason and fairness." University of Nevada v. Tarkanian, 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186 (1994).

"Accordingly, in determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a "lodestar" amount or a contingency fee. We emphasize that, whichever method is chosen as a starting point, however, the court must continue its analysis by considering the requested amount in light of the factors enumerated by this court in Brunzell v. Golden Gate National Bank, namely, the advocate's professional qualities, the nature of the litigation, the work performed, and the result. In this manner,

whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination."

Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 121 Nev. 837 (Nev. 2005) (Emphasis added).

In Cooke v. Gove, 61 Nev. 55, 61 (1941), the Nevada Supreme Court upheld an attorney fees award based on "the reasonable value" of the attorney's services, even though the case was taken on a contingency fee basis with no formal agreement. 61 Nev. 55 at 61 (1941). The "evidence" to support the fee was the case file from the successful matter, some of the letters between the client and attorney, and two depositions from other attorneys about the value of the appellant's services. Id. at 57. The court noted that the reasonable fee was based on the trial court's evaluation of "the reasonable value of plaintiff's services from all the facts and circumstances" Id. at 61.

"Thus, the district court is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements. See Shuette, 121 Nev. at 864-65; Brunzell, 85 Nev. at 349. Rather, limiting the source for the calculation primarily to billing records is too restrictive. See Shuette, 121 Nev. at 864. Accordingly, a trial court can award attorney fees to the prevailing party who was represented under a

contingency fee agreement, even if there are no hourly billing records to support the request."

O'Connell v. Wynn Las Vegas, LLC, 429 P.3d 664 (Nev. App. 2018).

"Courts have recognized an additional reason that supports awarding attorney fees—the risks attorneys take by offering or accepting contingency fee agreements. See King v. Fox , 7 N.Y.3d 181, 818 N.Y.S.2d 833, 851 N.E.2d 1184, 1191-92 (2006) ("In entering into contingent fee agreements, attorneys risk their time and resources in endeavors that may ultimately be fruitless... Additionally, contingency fees allow those who cannot afford an attorney who bills at an hourly rate to secure legal representation. See King, 818 N.Y.S.2d 833, 851 N.E.2d at 1191 ("Contingent fee agreements between attorneys and their clients ... generally allow a client without financial means to obtain legal access to the civil justice system.").

O'Connell v. Wynn Las Vegas, LLC, 429 P.3d 664, 672

This case was taken on a straight 30% contingency fee **AA pp. 1247-1250,** with counsel advancing all costs. Not only was the case briefed and taken to trial on several theories (against several Defendants), counsel bore the risk of prosecuting the case, which resulted in a full award to all Plaintiffs on two separate theories. In light of these factors, a 30% contingency fee is customary and reasonable.

CONCLUSION

Appellant was the control person for a company that sold unregistered securities in the form of promissory notes that he personally guaranteed. After considering the evidence of securities law violations, the Court found for Plaintiffs, and issued a judgment on both Appellant's guarantee and for his role for directing the offering of unregistered securities. Appellant never raised the issue of statutes of limitations, never offered any evidence on them, and never argued for their application. As to Provident Trust, by contract, by delegation, and by case law, this self-directed IRA Custodian was not the real party in interest, and therefore not a necessary party to the resolution of the lawsuit. As to VCC's bankruptcy, Plaintiffs did not assent to receiving the preferred shares, nor did VCC's bankruptcy extinguish Appellant's obligation as guarantor on the debt. Plaintiffs continue to hold the preferred shares, and stand ready to transfer them to Appellant upon payment of the judgment amount. For these reasons, the Supreme Court should affirm.

Dated: December 29, 2021 Respectfully submitted

The Law Office of David Liebrader, Inc.

By: 
David Liebrader
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) because this brief has been prepared in a proportionality spaced typeface using Microsoft Word in Georgia font at 14 point.

2. I further certify that this brief complies with the page volume limitations of NRAP 37(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionately spaced, and has a typeface of 14 points and contains 10,008 words.

3. 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 the applicable Nevada Rules of Appellate Procedure, which requires every assertion in this brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found

Dated: December 29, 2021 Respectfully submitted

The Law Office of David Liebrader, Inc.

By: _____
David Liebrader
Attorney for Respondent

CERTIFICATE OF SERVICE

In accordance with NRAP 25 hereby certify that I am an employee of The Law Office of David Liebrader, and that on the 29th day of December, 2021, a copy of the foregoing

ANSWERING BRIEF (AMENDED)

Was served electronically through the Court's electronic filing system to the to the following

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