Case No. 83379

In the Supreme Court of Nevada



FIRST STREET FOR BOOMERS & BEYOND, INC. & BEYOND, INC.; AITHR DEALER, INC.,

Petitioner,

*vs.*

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE CRYSTAL ELLER, District Judge,

Respondents,

and

ROBERT ANSARA, as special administrator of the ESTATE OF SHERRY LYNN CUNNISON, deceased; ROBERT ANSARA, as special administrator of the ESTATE OF MICHAEL SMITH, deceased heir to the ESTATE OF SHERRY LYNN CUNNISON, deceased; and DEBORAH TAMANTINI, individually and heir to the Estate of SHERRY LYNN CUNNISON, deceased; HALE BENTON, individually; HOMECLICK, LLC; JACUZZI INC., doing business as JACUZZI LUXURY BATH; BESTWAY BUILDING & REMODELING INC.; WILLIAM BUDD, individually and as BUDDS PLUMBING; DOES 1 through 20; ROE CORPORATIONS 1 through 20; DOE EMPLOYEES 1 through 20; DOE MANUFACTURERS 1 through 20; DOE 20 INSTALLERS 1 through 20; DOE CONTRACTORS 1 through 20; and DOE 21 SUBCONTRACTORS 1 through 20, inclusive,

Real Parties in Interest.

# JOINDER TO MOTION FOR STAY

## 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.

Real party in interest Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath is a privately held corporation.

Jacuzzi has been represented by attorneys at Snell & Wilmer L.L.P.; Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; and Lewis Roca Rothgerber Christie LLP.

Dated this 12th day of November, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*


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*Attorneys for Real Party in Interest Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath*

## JOINDER TO MOTION FOR STAY

Real party in interest, co-defendant Jacuzzi Inc. dba Jacuzzi Luxury Bath joins in petitioners' "Motion for Stay of Trial Court Proceedings Under NRAP 8." Jacuzzi joined petitioner's motion for stay in the district court, as well. Petitioner First Street's writ petition presents a legal question of first impression, which ought to be addressed before trial if possible to spare all parties concerned the time of appeal and cost of retrial on remand. *See Dekker/Perich/Sabatini Ltd., et al. v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 53, 495 P.3d 519, 522 (Sep. 23, 2021) ("when a writ petition presents an opportunity to clarify an important issue of law and doing so serves judicial economy, [this Court] may elect to consider the petition").

Jacuzzi joins the motion to stay trial also to enable this Court to resolve its pending writ petition (doc. 2021-28571) in *Jacuzzi, Inc. vs. Eighth Jud. Dist. Ct.*, case no. **83571**. (*See* Jacuzzi's petition attached as Exhibit 1.) Like First Street, Jacuzzi's answer was stricken in part as a discovery sanction. Jacuzzi's petition contests a discrete but essential legal aspect of that order, to wit the district court's erroneous application of the preponderance-of-evidence burden of proof. Jacuzzi

contends that any sanction as severe as striking an answer in whole or in part must be subject to a clear-and-convincing burden of proof. The case warrants advisory mandamus for several reasons set out in Jacuzzi's petition. (Petition attached as Exhibit 1, at 12-20.)

In its order denying First Street's motion for stay and Jacuzzi's joinder thereto, the district court opined there "is little basis for [the district court] to conclude that Jacuzzi's Writ will succeed under current Nevada law" largely because "no mandatory standard of review has been outlined by the Nevada Supreme Court." (*See* index to First Street's motion for stay, at PA00049-57, 53.)[1] Yet, the fact that

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[1] After acknowledging the lack of controlling precedent, the district court nevertheless mused about heightened scrutiny not applying to appellate review of non-case-terminating sanctions. But the level of scrutiny on appeal is different from the burden of proof applied in the district court to the underlying claim. For example, although this Court does not apply heightened scrutiny per se in reviewing an award of punitive damages, any punitive award not based on clear and convincing evidence would be reversed regardless. *See* NRS 42.005(1) ("where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied"); *c.f., Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082 (1993) (criminal) (erroneous burden of proof constituted structural error). Nor would applying an incorrect burden of proof ever be deemed harmless simply because an amount of punitive damages were less than the maximum allowed under NRS 42.005(1).

Similarly, as Jacuzzi explains in its writ petition, any punitive sanction striking a pleading in whole or part must be subject to the

Jacuzzi's petition raises a matter of first impression militates in favor of advisory mandamus, not against it. *See Dekker/Perich/Sabatini Ltd.,* 495 P.3d at 522 ("writ relief may be appropriate where the petition presents a matter of first impression and considerations of judicial economy support its review.") That is why "when moving for a stay pending an appeal or writ proceedings, a movant does not have to show a probability of success on the merits" but rather "must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659,

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same level of proof. (Exhibit 1 at 14.) Any exercise of discretion requires the trial court to follow the correct, applicable legal framework in the first place. *Petit v. Adrianzen*, 133 Nev. 91, 92, 392 P.3d 630, 631 (2017) ("Whether a district court used the proper standard of proof is a legal question we review de novo."); *In re J.D.N.*, 128 Nev. 462, 471, 283 P.3d 842, 848 (2012) (although decisions to terminate parental rights are reviewed deferentially for sufficiency of the evidence, "Determining the appropriate burden of proof to rebut NRS 128.109's presumptions [was] a question of law subject to de novo review."). Thus, while a decision on a motion for discovery sanctions is discretionary, applying the correct burden of proof in the process of making that decision is a legal duty the district court must perform "without discretion on [the judge's] part either to do or refuse" (*see Walker v. Second Jud. Dist. Ct.*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1196 (2020)).

6 P.3d 982, 987 (2000). Jacuzzi's petition presents such a substantial case.

This Court, therefore, should grant First Street's motion to stay the trial pending resolution of its writ petition, as well as Jacuzzi's.

Dated this 12th day of November, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*


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*d/b/a Jacuzzi Luxury Bath*

## CERTIFICATE OF SERVICE

I certify that on November 12, 2021, I submitted the foregoing JOINDER TO MOTION FOR STAY for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Crystal Eller
DISTRICT COURT JUDGE – DEPT. 19
200 Lewis Avenue
Las Vegas, Nevada 89155

*Respondent*

*/s/ Emily D. Kapolnai*
An Employee of Lewis Roca Rothgerber Christie LLP

# EXHIBIT 1

# EXHIBIT 1

Case No. _____

In the Supreme Court of Nevada



JACUZZI, INC. doing business as JACUZZI LUXURY BATH,

Petitioner,

*vs.*

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE CRYSTAL ELLER, District Judge,

Respondents,

and

ROBERT ANSARA, as special administrator of the ESTATE OF SHERRY LYNN CUNNISON, deceased; ROBERT ANSARA, as special administrator of the ESTATE OF MICHAEL SMITH, deceased heir to the ESTATE OF SHERRY LYNN CUNNISON, deceased; and DEBORAH TAMANTINI, individually and heir to the Estate of SHERRY LYNN CUNNISON, deceased,

Real Parties in Interest.

# PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

*With Supporting Points and Authorities*

District Court Case No. A-16-731244-C

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*Attorneys for Petitioner*

**PETITION FOR WRIT OF MANDAMUS**
**OR, ALTERNATIVELY, PROHIBITION**

1. This petition arises from district court case *Ansara, et al. v. First Street for Boomers & Beyond, Inc., et al.*, District Court No. A-16-731244-C, currently before the respondent judge, the HONORABLE CRYSTAL ELLER. (1 App. 1.)

2. In the underlying case, plaintiffs/real-parties-in-interest ROBERT ANSARA, as special administrator of the ESTATE OF SHERRY LYNN CUNNISON, deceased; ROBERT ANSARA, as special administrator of the ESTATE OF MICHAEL SMITH, deceased heir to the ESTATE OF SHERRY LYNN CUNNISON, deceased; and DEBORAH TAMANTINI, individually and heir to the Estate of SHERRY LYNN CUNNISON, deceased, seek to recover damages for the death of Ms. Cunnison allegedly caused by an experience in a walk-in tub designed and manufactured by defendant/petitioner JACUZZI INC. dba Jacuzzi Luxury Bath ("Jacuzzi").

3. Plaintiffs moved to strike Jacuzzi's answer, accusing Jacuzzi of various discovery abuses and of making misrepresentations to the

discovery commissioner, the district court, and to this Court in a prior writ petition.

4. The previous judge presiding over this case, THE HONORABLE RICHARD SCOTTI, entertained full briefing on plaintiffs' request for sanctions and held an evidentiary hearing.

5. On November 18, 2020, shortly before leaving the bench, Judge Scotti entered an order striking Jacuzzi's answer as to liability for compensatory damages. The sanction allows Jacuzzi to defend itself before a jury on the amount of compensatory damages and on liability for, and the amount of, any punitive damages.

6. The order states that it is "supported by substantial evidence" and that "[i]n reviewing the evidence presented and relied upon in reaching this decision, the Court applied the ***preponderance of the evidence*** standard." (29 App. 7017:21, 7018:5 (emphasis added).)

7. By applying that standard, the court rejected Jacuzzi's contention that any sanction as severe as striking an answer in whole or part must be subject to a clear-and-convincing burden of proof, and

that evidence must be compelling and not inferred from possibilities. (24 App. 5878:12–5880:22.)

8. On September 29, 2021, the court entered an order trifurcating the trial to separate the question of compensatory damages from the question of liability for punitive damages. This order ensures the sanction order's language precluding Jacuzzi "from presenting any evidence to show that it is not liable for Plaintiffs' harms as to any of Plaintiffs' causes of action against Jacuzzi", does not limit Jacuzzi's ability to defend itself against liability for punitive damages. (33 App. 8042.) Importantly, this recent ruling allows Jacuzzi to narrow the scope of this petition to the legal standard employed in the sanctions order.

Now, therefore, petitioner Jacuzzi asks this Court to exercise its discretionary jurisdiction and enter a writ of mandamus directing the district court to vacate its order striking Jacuzzi's answer as to liability and directing the district court to reevaluate the propriety of any such sanction subject to a clear-and-convincing burden of proof.[1]

[1] Alternatively, petitioner seeks a writ of prohibition to prevent the district court from enforcing the sanction order.

Dated this 5th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*


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## VERIFICATION

STATE OF NEVADA )
COUNTY OF CLARK )

Under penalty of perjury, I declare that I am counsel for the petitioner in the foregoing petition and know the contents thereof; that the pleading is true of my own knowledge, except as to those matters stated on information and belief; and that as to such matters I believe them to be true. I, rather than petitioner, make this verification because the relevant facts are procedural and thus within my knowledge as petitioner's attorney. This verification is made pursuant to NRS 15.010.

Dated this 5th day of October, 2021.

*/s/ Joel D. Henriod*
JOEL D. HENRIOD

## 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.

Petitioner Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath is a privately held corporation.

Petitioner has been represented by attorneys at Snell & Wilmer L.L.P.; Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; and Lewis Roca Rothgerber Christie LLP.

Dated this 5th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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## ROUTING STATEMENT

The Supreme Court should retain this petition because it raises an important issue of first impression regarding which burden of proof applies to a motion to strike a party's pleading as a discovery sanction. *See* NRAP 17(a)(11), (12).

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## TABLE OF AUTHORITIES

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## ISSUE PRESENTED

Whether a judge may strike a party's pleading (in whole or substantial part) upon finding justification under the circumstances and in the record only by a preponderance of the evidence, as opposed to by clear and convincing evidence.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### A. The Underlying Event

This writ proceeding arises from a product liability case involving a Jacuzzi® 5229 Walk-In Tub ("the tub"). (1 App. 50.) Plaintiffs are the surviving heirs of Sherry Cunnison, who died at a hospital after allegedly becoming stuck in the tub for a prolonged period. (1 App. 51–52, 54–56.) Plaintiffs claim a physical defect in the tub's design, or a defect in the warnings Jacuzzi provided along with it, caused Ms. Cunnison's death. (1 App. 57–59.) Jacuzzi disputes most of plaintiffs' allegations, but this petition does not depend on the merits of plaintiffs' claims or Jacuzzi's defenses.

### B. The Motions for Sanctions and Evidentiary Hearing

The order striking Jacuzzi's answer followed several discovery disputes about material relating to other consumers' experiences with the product. Plaintiffs twice moved to strike Jacuzzi's answer (1 App. 76, 29 App. 7016:1–7), and then moved for reconsideration of the second order denying those requests (6 App. 1319). The district court scheduled an evidentiary hearing. (8 App. 1793.) The scope of the hearing then expanded after Jacuzzi, in July and August of 2019, disclosed dozens of communications from tub users complaining about their experiences with walk-in tubs, which Jacuzzi explained had been discovered recently. (16 App. 3883.)

#### *1. Plaintiffs' Criticisms of Jacuzzi's Disclosures*

Put simply, plaintiffs contended that—until Jacuzzi's "document dump" in July and August of 2019—the company had flouted obligations under the rules of civil procedure and willfully violated court orders by withholding documents and information about other incidents, allegations, and complaints, regarding walk-in tubs. (See 19 App. 4749–20 App. 4759.) They claimed Jacuzzi had been dishonest in representing to the discovery commissioner and the district court that it

had no information about any other incidences of alleged injury or death relating to walk-in tubs (20 App. 4760–65), and had even misled this Court in a December 10, 2018 writ petition stating "[t]o date, Jacuzzi has identified and produced to Plaintiffs all of the evidence in Jacuzzi's possession of the other prior and subsequent incidents of alleged bodily injury or death related to the Jacuzzi tub in question." (20 App. 4753–54.)

Plaintiffs highlighted telephone calls that Jacuzzi received in October 2018, about a month before Jacuzzi filed its writ petition, from a man named Robert Pullen who alleged his mother fell because of a problem with a Jacuzzi walk-in tub and felt she may not have died if she had not fallen, and threatened litigation. (20 App. 4763.) They argued that the disclosures in July and August of 2019 should have been provided long before. (20 App. 4756–57.) And plaintiffs accused Jacuzzi of lying about previous search efforts when Jacuzzi previously asserted it had undertaken a complete search for other incidences, *etc.*, despite knowing that it had not searched all individual employee email accounts. (20 App. 4766–74.)

### *2. Jacuzzi Demonstrated its Good Faith*

Jacuzzi explained itself at the evidentiary hearing and in its papers. First, all the documents upon which plaintiffs sought sanctions *were* produced by Jacuzzi, albeit later than the district court thought they should have been. Importantly, the sanction is not based on documents Jacuzzi destroyed or never provided.[2] (24 App. 5861–71; 25 App. 6054–134; 25 App. 6136–42.) Second, in Jacuzzi's view, the late productions could be explained in part because the scope of plaintiffs' claims and material deemed discoverable had continuously expanded over time—evolving from claims[3] concerning this model tub occurring before Ms. Cunnison's incident to all incidents involving any personal injury or death involving any walk-in tub occurring before or after Ms. Cunnison's incident, and eventually to any communications from any

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[2] The district court's sanction order states, "Jacuzzi's piecemeal, 'drip-drip-drip' style of production makes this Court extremely concerned that Jacuzzi has still failed to produce all relevant documents." (29 App. 7041:11].) But the court provided no reason for that uncharitable conjecture.

[3] Jacuzzi construed *claim* consistently with the definition in BLACK'S LAW DICTIONARY: "A legal assertion; a legal demand; taken by a person wanting compensation, payment, or reimbursement for a loss under a contract, or an injury due to negligence."

user expressing even dissatisfaction with slipperiness, drainage, grab bars, or the tub door, regardless of whether injury occurred or circumstances were substantially similar.[4] Jacuzzi witnesses testified that it endeavored to comply along the way. Jacuzzi said the moving target of plaintiffs' changing defect theory also had complicated identifying relevant material. (24 App. 5854.)

Third, the Jacuzzi employee leading efforts to meet discovery obligations, in-house attorney Ronald Templer,[5] explained he was not

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[4] For further explanation regarding the expansion of plaintiffs' claims and the scope of discovery ordered by the courts, as well as Jacuzzi's attempted response to each, *see* "Defendant Jacuzzi Inc. Doing Business as Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief," filed December 2, 2019, at 8-11. (24 App. 5857–60.)

[5] As Mr. Templer verified at the evidentiary hearing:

> MR. CLOWARD: Well, I'm trying to get answers to questions about what Jacuzzi knew or didn't know. So the particular question is if you, Mr. Templer, don't know, then who at Jacuzzi would know?
>
> A: In regard to responding to a discovery request?
>
> Q: Yes.
>
> A: Nobody, it should be me.
>
> Q: So you're the only guy?
>
> A: I was the one that dealt with outside counsel in responding to discovery, if that's what you're asking.

(18 App. 4347–48.)

aware the company's disclosures were incomplete or that its representations were inaccurate when made.[6] For instance, he testified that Jacuzzi had uncovered the materials it disclosed in July and August of 2019 only shortly before it disclosed them, which was after Mr. Templer had heard the district court elucidate the forensic search the court envisioned, while in the course of preparing a Rule 30(b)(6) witness for his deposition and in response to discovery requests that were propounded by plaintiffs' in May 2019. (18 App. 4373.) Mr. Templer testified that Jacuzzi had not searched through several individual email accounts, or the company's email database as a whole, because Jacuzzi believed any potentially responsive information in any employee's email accounts also would appear in the company's

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[6] As to the representations in Jacuzzi's prior writ petition to this Court, Mr. Templer testified:

> Q: No. Did Jacuzzi actually produce what it said it had produced to the Supreme Court? Did Jacuzzi produce incidents of any alleged bodily injury related to any Jacuzzi walk-in tub, regardless of how the incident occurred or the nature or severity of the injury?
>
> A: At the time the company thought it had. It has subsequently been learned there was information that was not complete over that disclosure.

(18 App. 4365.)

"Salesforce" database[7] (18 App. 4329–30), making the email database superfluous. And Mr. Templer explained that, when Jacuzzi did attempt to search the company's entire email database, the effort proved futile because the commonality of the search terms yielded unworkably massive results. (18 App. 4317.) The word "slip," for instance, "turned up nearly a million hits because of the way that term is used throughout the company." *Id.* Mr. Templer also testified that Jacuzzi initially limited Salesforce searches to entries coded to "Jacuzzi Bath" without realizing that there were entries that had not been coded to any specific entity, which caused those entries to be excluded unintentionally from the search results. (18 App. 4329–30.)

### C. The District Court Found Justification to Strike Jacuzzi's Answer Only by a "Preponderance of the Evidence"

The district court ruled in favor of the plaintiffs, "substantially adopt[ing] the factual and legal analysis presented by Plaintiffs" in their post-hearing briefs. (29 App. 7017:19.) The order states that "[a]ll findings of fact described herein are supported by substantial evidence."

[7] "Salesforce" is a widely used Customer Relationship Management (CRM) platform.

(*Id.*) The district court expressly acknowledged that "[i]n reviewing the evidence presented and relied upon in reaching the decision, the Court applied the preponderance of the evidence standard." (29 App. 7018:5.) Importantly, the district court understood the importance of the burden of proof under the facts of this case and had asked for briefing on this issue. (17 App. 4023:1–15; 19 App. 4585; 24 App. 5878–80' 25 App. 6219–20; 29 App. 7018.) The district court rejected Jacuzzi's argument that a sanction as severe as striking an answer, in whole or part, ought to be justified by clear and convincing evidence. (29 App. 7019; 24 App. 5878.)

The district court concluded that Jacuzzi should have disclosed earlier the material it provided in July and August of 2019 and that failing to do so constituted a breach of Jacuzzi's discovery obligations and a violation of orders. (29 App. 7019, 7025, 7029–30, 7033, 7036, 7040.) The court found that Jacuzzi made false statements to plaintiffs, the discovery commissioner, the district court, and to this Court, concerning the information it possessed and regarding the investigations it conducted. (29 App. 7022, 7025, 7028.) And the district court—by a mere preponderance of the evidence—rejected the

explanations that Jacuzzi provided, believing them to be pretextual. (29 App. 7018, 7038–40.)

### D. The Sanction Imposes Liability for Compensatory Damages

The district court struck Jacuzzi's answer "as to liability only." (29 App. 7044:27.) Jacuzzi will receive a jury trial on the amount of compensatory damages, as well as on liability for punitive damages. (*See* 29 App. 7045:3.)

Just recently the district court provided critical definition to the sanction by establishing its parameters and operation for trial.[8] On September 29, 2021, the court entered its order trifurcating the trial to separate the question of compensatory damages from the question of liability for punitive damages, as was done in the seminal case

[8] The reasonableness of a district court's sanction often depends in large part on the severity of its application. *See Hamlett v. Reynolds*, 114 Nev. 863, 866–67, 963 P.2d 457, 458 (1998) (the trial court has discretion to tailor the procedure of a hearing or trial after striking an answer in whole or part). For example, in *Goodyear v. Bahena*, the majority opinion affirming the district court's sanction discusses at length the extent to which Goodyear was allowed an unfettered defense against punitive damages. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 255–56, 235 P.3d 592, 600 (2010). For all intents and purposes, a sanction is defined both by its technical effect and the manner of its application.

regarding non-case-ending sanctions *Bahena v. Goodyear Tire & Rubber Co.*.[9] (33 App. 8042.) This will ensure the sanction order's language precluding Jacuzzi "from presenting any evidence to show that it is not liable for Plaintiffs' harms[10] as to any of Plaintiffs' causes of action against Jacuzzi" does not limit Jacuzzi's ability to defend itself against liability for punitive damages, including disputation that Ms. Cunnison's death did not even result from a defect in the tub.[11] (33 App. 8042.)

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[9] *See Valley Health Sys., LLC v. Estate of Doe*, 134 Nev. 634, 639, 427 P.3d 1021, 1027 (2018), *citing Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 249, 235 P.3d at 596, for the proposition that "sanctions are not considered case ending when, as here, the district court strikes a party's answer thereby establishing liability, but allows the party to defend on the amount of damages."

[10] The term "plaintiffs' harms" denotes compensatory damages. *C.f. Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006) ("Punitive damages are designed not to compensate the plaintiff for *harm* suffered but, instead, to punish and deter the defendant's culpable conduct."); *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987), *abrogated on other grounds by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006) ("punitive damages are not, as in the case of compensatory damages, awarded to compensate the plaintiff for *harm* incurred").

[11] *C.f., Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 259 n. 1, 235 P.3d at 603 n. 1 (Pickering, J., dissenting) (noting "Goodyear avoided punitive damages in this case by arguing that a road hazard, rather than design or manufacturing defect, caused the tire failure from which this accident resulted").

### E. Subsequent Discovery and the Trial Setting

Soon after the district court entered the sanction order, it also reopened discovery to ameliorate any prejudice that may have resulted from the timing of Jacuzzi's disclosures. (29 App. 7183.) The parties were free to "conduct discovery on all issues that remain in the case" at least through June 30, 2021. (29 App. 7183.) This was the full extension requested by plaintiffs. Extensive discovery continued partly because of the burden of proof that plaintiffs still face to justify punitive damages[12] and to enable plaintiffs to respond to Jacuzzi's unfettered defense during the punitive phase(s). As Jacuzzi acknowledged at the September 22, 2020 hearing:

> MR. ROBERTS: And the other thing the Court would need to address is the scope of discovery and some of the issues that were deferred by the Court as moot after the last hearing. . .
>
> I think Mr. Cloward's made it clear to us that the fact that our answer is struck, and he gets to go to the compensative -- compensatory phase on damages doesn't mean he's done with discovery on liability, causation, and other facts that may support his

[12] Plaintiffs still must prove relevant malice by clear and convincing evidence (NRS 42.005(1)), including (1) "despicable conduct" (2) "engaged in with a conscious disregard of the rights or safety of others" (NRS 42.001) that (3) has a causal nexus to the harm suffered by the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409–10, 123 S. Ct. 1513, 1516 (2003) (the "conduct must have a nexus to the specific harm suffered by the plaintiff").

> punitive claim. So I think we do still have discovery left. But there are issues regarding the scope of that discovery and who pays for it. (27 App. 6586:7.)

And discovery has continued in earnest. Since the district court announced its decision to strike Jacuzzi's answer, plaintiffs had an opportunity to depose every single person they sought to depose. They noticed depositions of 28 people as ("OSI") witnesses to other similar incidents. (32 App. 7798.) Jacuzzi did not object to any. Ultimately, plaintiffs elected to depose six of them. In addition to those depositions, plaintiffs were also granted additional depositions of Rule 30(b)(6) representatives of the defendants and granted additional time well beyond the presumptive seven hour limit.

The trial is set to commence on November 29, 2021. (31 App. 7624.)

## WHY WRIT RELIEF IS APPROPRIATE

The relief Jacuzzi seeks is appropriate for interlocutory intervention. Mandamus is available "to compel the performance of an

act that the law requires as a duty resulting from an office, trust, or station." *See* NRS 34.160.[13] That is what we have here.

As the Court recently explained, "the chief requisites" for a petition of traditional writ of mandamus are:

> (1) The petitioner must show a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

*Walker v. Second Jud. Dist. Ct.*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1196 (2020). To determine whether a subsequent appeal would provide an effective remedy, each case must be individually examined, and extraordinary relief may be granted "where circumstances reveal urgency or strong necessity." *Jeep Corp. v. Second Jud. Dist. Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

[13] Alternatively, prohibition arrests the proceedings of a tribunal when such proceedings are in excess of the tribunal's jurisdiction. NRS 34.320.

### A. This Petition Concerns the Deprivation of a Legal Right the District Court Had No Discretion to Deny

For the reasons set out below, Jacuzzi has a legal right to have any sanction striking its pleading (even if in part) imposed only upon clear and convincing evidence of the alleged conduct purportedly justifying the sanction. Every litigant is entitled to application of the correct burden of proof, and application of an incorrect level of proof may cause structural error. *C.f., Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082 (1993) (criminal) (application of erroneous burden of proof constituted structural error).

The district court does not have discretion to employ a lower standard of proof than is legally required. It is true that the ultimate decision whether to impose discovery sanctions rests within the district court's discretion. *See Valley Health System, LLC v. Estate of Doe*, 134 Nev. at 638-39, 427 P.3d at 1026-27 (2018); *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). Yet, any exercise of discretion requires the trial court to follow the correct, applicable legal framework, which is a matter of law. *Petit v. Adrianzen*, 133 Nev. 91, 92, 392 P.3d 630, 631 (2017) ("Whether a district court used the proper standard of proof is a legal question we review de novo."); *In re J.D.N.*, 128 Nev.

462, 471, 283 P.3d 842, 848 (2012) (although decisions to terminate parental rights are reviewed deferentially for sufficiency of the evidence, "Determining the appropriate burden of proof to rebut NRS 128.109's presumptions [was] a question of law subject to de novo review."); *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007). Thus, while a decision on a motion for discovery sanctions is discretionary, applying the correct burden of proof in the process of making that decision is a legal duty the district court must perform "without discretion on his part either to do or refuse" (*see Walker*, 476 P.3d at 1196).

### B. This Case Warrants Advisory Mandamus

As to the third *Walker* prong, while the sanction certainly is reviewable on appeal from the final judgment[14] and Jacuzzi therefore has an "other plain, speedy, and adequate remedy,"[15] this is a

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[14] *See generally Valley Health System, LLC v. Estate of Doe*, 134 Nev. at 634; *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 249, 235 P.3d at 596; *Foster v. Dingwall*, 126 Nev. at 65, 227 P.3d at 1048.

[15] Walker, 476 P.3d at 1198-99; *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) ("Under NRS 34.170, a writ of mandamus is proper only when there is no plain, adequate and speedy legal remedy.").

compelling circumstance warranting advisory mandamus. "[W]hen a writ petition presents an opportunity to clarify an important issue of law and doing so serves judicial economy, [this Court] may elect to consider the petition." *Dekker/Perich/Sabatini Ltd., et al. v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 53, 2021 WL 4347015, *2 (Sep. 23, 2021); *see Walker*, 476 P.3d at 1198-99 (advisory mandamus appropriate for "legal issues of statewide importance requiring clarification" and where it would "promote judicial economy and administration by assisting other jurists, parties, and lawyers"). "Similarly, writ relief may be appropriate where the petition presents a matter of first impression and considerations of judicial economy support its review." *Dekker*, 137 Nev. Adv. Op. 53, 2021 WL 4347015 at *2; *see Walker*, 476 P.3d at 1198-99 (advisory mandamus appropriate where it would "promote judicial economy and administration by assisting other jurists, parties, and lawyers").

#### *1. This Petition Presents an Opportunity to Clarify an Important Issue*

Across the state, on a regular basis, litigants ask Nevada trial judges to strike pleadings in whole or part—either because the conduct genuinely warrants it, because a minor sanction may be appropriate but

the moving party asks for the worst sanction to anchor the judge toward the harsh end of the spectrum, or simply out of "litigation by sanction" opportunism. In every case, the judge should be aware of the appropriate burden of proof. That determination must not be *ad hoc*, varying between districts, departments, or parties. Thus, the precedential value of hearing this petition would be significant.

### *2. Mandamus Would Promote Judicial Economy*

Mandamus also would increase judicial economy. *See Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) ("The interests of judicial economy ... will remain the primary standard by which this court exercises its discretion").

First, the district court's erroneous application of the preponderance-of-the-evidence standard will be a significant issue on appeal. Mandamus compelling reevaluation of the sanction in light of the proper burden of proof now would eliminate that question on appeal, as well as the need for remand and potentially a new trial. And if the district court were to determine on reconsideration that no

sanction is appropriate, this Court likely would not have to address *any* sanction-related issue on appeal.[16]

Second, reevaluation of the sanction before trial would not be unduly inconvenient. The district court need only review the existing record, hearing transcripts, and exhibits, to determine that the sanction cannot stand under the appropriate burden of proof. There is plenty of time before trial to accomplish that.

### *3. Plaintiffs Should Be Prepared to Try this Case on the Merits*

This Court's intervention would be relatively undisruptive. Even if the district court were to reverse the sanction and require plaintiffs to prove liability and causation for compensatory damages, it should not affect unduly plaintiffs' trial readiness. Plaintiffs possess the information that Jacuzzi was faulted for not disclosing earlier. Discovery also continued in earnest after the court imposed its sanction, enabling plaintiffs to follow up on those disclosures as much as they

[16] If this Court were to issue mandamus and the district court were to sanction Jacuzzi under the higher burden of proof, Jacuzzi still would contest on appeal the sufficiency of the record to justify that sanction.

desired. This ameliorated any harm the timing of Jacuzzi's disclosures may have caused.[17]

As a practical matter, moreover, plaintiffs will have to be prepared to prove the merits of their case at trial anyway in order to justify punitive damages. As the district court clarified:

> . . . because the sanction does not establish any aspect of plaintiff's showing to justify punitive damages—plaintiffs still must prove implied malice by clear and convincing evidence (NRS 42.005(1)), including (1) "despicable conduct" (2) "engaged in with a conscious disregard of the rights or safety of others" (NRS 42.001) that (3) has a causal nexus to the harm suffered by the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409–10, 123 S. Ct. 1513, 1516 (2003) (the "conduct must have a nexus to the specific harm suffered by the plaintiff").

(33 App. 8041.) The purported "despicable conduct" would have to be that Jacuzzi manufactured a product it knew was allegedly dangerous

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[17] An essential factor in evaluating the propriety of a sanction is the extent of any harm or prejudice that the sanctionable conduct caused the non-offending party. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 780 (1990). "Sanctions interfering with a litigant's claim or defenses violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." *Rubin v. Belo Broadcasting Corp.,* 769 F.2d 611, 618 (9th Cir. 1985). And in certain instances, an ultimate sanction such as dismissal or default is necessary only because any less of a sanction would prejudice the non-offending party. *Fire Ins. Exch. v. Zenith Radio Corp*., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987); *Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 314, 810 P.2d 785, 788 (1991).

in some particular way that is causally relevant to Ms. Cunnison's death. That entails the same body of evidence regarding defectiveness and causation in the punitive phases of trial that would be used to warrant compensatory damages. Thus, plaintiffs already are prepared—as much as they can be and ever would have been—to prove that a defect in this tub somehow caused Ms. Cunnison's death.

## ARGUMENT ON THE MERITS

Clear and convincing evidence should be required to impose significant sanctions, especially one that removes or devastates a person's ability to defend itself in Court. Such sanctions should not rest on distrustful assumptions, as this one does.

### I.
### SIGNIFICANT SANCTIONS SHOULD BE JUSTIFIED BY CLEAR AND CONVINCING EVIDENCE

#### A. This is an Important Issue of First Impression

This Court has never determined the burden of proof the district court must employ when considering evidence to decide whether to strike a pleading or impose other severe sanctions for litigation conduct. The standard of *appellate review* is established for oversight of the

district court's decision.[18] But the Court has given no clear instruction regarding the level of proof the district court should require in the first instance.

### B. The Clear-and Convincing Standard is Consistent with Nevada Case Law

The Court previously has alluded that clear and convincing evidence is appropriate. In *Valley Health System, LLC v. Estate of Doe*, the Court reviewed a sanction similar to that imposed on Jacuzzi and noted thrice in its published opinion that Judge Scotti—the same district court judge who issued the sanctions order against Jacuzzi here—had justified that sanction by "clear and convincing" evidence. 134 Nev. 634, 637-41, 427 P.3d at 1026-28. The heightened burden of

[18] "Non-case-concluding sanctions" are reviewed for an abuse of discretion and "will be upheld if the district court's sanction order is supported by substantial evidence." *Valley Health Sys., LLC v. Peterson*, 134 Nev. at 639, 427 P.3d at 1027; *citing Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 254, 235 P.3d at 599. "A somewhat heightened standard of review applies where the sanction strikes the pleadings, resulting in dismissal with prejudice." *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P. 3d 1042, 1048 (2010), citing *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). "Under this somewhat heightened standard, the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated." *Id.*

proof in the district court also would be harmonious with the "somewhat heightened" standard of review that Nevada appellate courts employ when reviewing a district court's imposition of ultimate sanctions. *Foster v. Dingwall*, 126 Nev. at 65, 227 P.3d at 1048. And petitioner finds no opinion in which the Court has embraced the lower preponderance-of-the-evidence standard.

This Court would not be alone in holding that clear and convincing evidence is necessary. Several courts have required that modicum of proof to impose severe sanctions. *See, e.g., Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) ("a district court may use its inherent power to enter a default judgment only if it finds, first, by clear and convincing evidence—a preponderance is not sufficient—that the abusive behavior occurred; and second, that a lesser sanction would not sufficiently punish and deter the abusive conduct while allowing a full and fair trial on the merits"); *Qantum Comms. Corp. v. Star Broadcasting, Inc.*, 473 F.Supp.2d 1249, 1277 (S.D.Fla.2007) (finding by clear and convincing evidence that defendant engaged in abusive conduct, including lying under oath, and that no sanction less than default judgment and fees would sufficiently deter

and punish such conduct); *Chemtall, Inc. v. Citi–Chem, Inc.*, 992 F.Supp. 1390, 1408 (S.D.Ga.1998) (observing that district court may use its inherent power to enter a default judgment only if it finds by clear and convincing evidence that the abusive behavior occurred and that lesser sanction would not suffice).

### C. Analogous Contexts Point to a Burden of Proof Higher than Mere Preponderance of the Evidence

The law in general also calls for a standard of proof higher than mere preponderance of the evidence, at least clear and convincing evidence.

#### *1. The State Constitution's Guarantee of a Trial By Jury Should Not be Disregarded Lightly*

The Nevada Constitution provides that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever" although parties may waive it "in the manner to be prescribed by law[.]" NEV. CONST. art. I, § 3. "Courts must indulge every reasonable presumption against the loss of constitutional rights." *Collins v. State*, 133 Nev. 717, 720, 405 P.3d 657, 661 (2017), *quoting Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060 (1970). Depriving a litigant of that constitutional right, whether completely or in substantial part, should not be taken

lightly. By employing a preponderance-of-the-evidence standard, the district court deprived Jacuzzi of its constitutional right to a full jury trial on liability based on a conclusion that as little as *50.1%* of the evidence, record, and legal factors, established Jacuzzi's necessary culpability of missteps in discovery.

### *2. The Gravamen of Plaintiff's Request for Sanctions was an Accusation of Intentional Misrepresentation and Litigation Misconduct*

The nature of the allegation also calls for the higher standard of proof. Plaintiffs' request for sanctions accused Jacuzzi of intentional misrepresentation, which must be proven by clear and convincing evidence. "To prevail on an intentional misrepresentation claim, a plaintiff must prove by clear and convincing evidence the following four elements: (1) the defendant asserts a false representation with the knowledge or belief that it is false or without sufficient foundation, (2) the defendant intended to induce the plaintiff to act or refrain from acting, (3) the plaintiff justifiably relies on the misrepresentation, and (4) the plaintiff suffers damages as a result." *Pro-Brokers, Inc. v. Muhlenberg*, 124 Nev. 1501, 238 P.3d 847 (2008). Depriving a party of their ability to defend themselves also is punitive in nature, which calls

for the clear and convincing standard. C.f., NRS 42.005(1) (punitive damages must be proven by clear and convincing evidence). And, generally, the key to unlocking a court's inherent power to sanction is a finding of bad faith (*see Bahena*, 126 Nev. at 615, 245 P.3d at 1188 (propriety of sanctions are based on "criteria of willfulness, bad faith, and prejudice")), which Nevada generally requires be proven by clear and convincing evidence. *See, e.g, In re Discipline of Drakulich*, 111 Nev. 1556, 1566–67, 908 P.2d 709, 715 (1995)) (bad faith in context of attorney discipline); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260, 969 P.2d 949, 957 (1998), as amended (Feb. 19, 1999) (insurance bad faith).

## II.
## THE ERRONEOUS BURDEN OF PROOF PROBABLY MADE A DIFFERENCE IN THIS CASE

The erroneous application of the preponderance-of-the-evidence standard was prejudicial.

### A. The Judge's Deliberate Choice of the Standard Implies the Ruling May Have Been Different

The district court did not employ the low burden of proof by happenstance. The court specifically asked the parties to address which

burden of proof would apply to the sanction analysis. (17 App. 4023.) Jacuzzi argued that the clear-and-convincing evidence standard was most appropriate. (24 App. 5878.) Plaintiffs argued that level of proof was not necessary. (19 App. 4585; 25 App. 6219.) The court then deliberately avoided the higher burden, expressly opting to determine the propriety of any sanction by only a preponderance of the evidence. (29 App. 7018:5–7.)

That choice of standards is striking because the Honorable Richard Scotti also was the trial court judge in *Valley Health System, LLC v. Estate of Doe*, 134 Nev. at 634, 427 P.3d at 1021. There, he expressly justified his sanctions with findings by clear and convincing evidence, which this Court noted repeatedly in the opinion affirming his ruling. Put simply, the district court was cognizant of the difference between the burdens of proof. He candidly employed the lower standard. That considered choice suggests the outcome may have been different under the higher standard.

### B. The Sanction Relies on Cynical Assumptions

The higher burden of proof is important because it carries over to the application of evidentiary inferences. Although bad-faith intent can

be inferred from indirect and circumstantial evidence, "such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement." *Star Sci., Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366–67 (Fed. Cir. 2008). Moreover, "the inference must not only be based on sufficient evidence and be reasonable in light of that evidence, but it must also be the single most reasonable inference able to be drawn from the evidence to meet the clear and convincing standard." *Id.* At each level of inference, any indirect evidence relied upon to justify sanctions also should clear and convincing.

Here, the district's court's sanction rests on critical assumptions pertaining to the element of willfulness. Jacuzzi explained the timing of the evidentiary disclosures at the evidentiary hearing and in its papers. The Jacuzzi employee overseeing responses to discovery, in-house attorney Ronald Templer, explained he was not aware the company's disclosures were incomplete or that its representations were inaccurate when made. (See above at pp. 5–7.) For instance, he testified that Jacuzzi had uncovered the materials it disclosed in July and August of 2019 only shortly before it disclosed them. He explained

that Jacuzzi had not searched through several individual email accounts, or the company's email database as a whole, previously because Jacuzzi believed any potentially responsive information in any employee's email accounts also would appear in the company's "Salesforce" database (18 App. 4329–30), making the email database superfluous. And Mr. Templer explained that, when Jacuzzi did attempt to search the company's entire email database, the effort proved futile because the commonality of the search terms yielded unworkably massive results. (18 App. 4317.)

The district court heard that testimony but chose to disbelieve Jacuzzi's explanations, drawing inferences from circumstantial evidence against Jacuzzi to conclude that its explanations were pretextual. (29 App. 7018, 7038–40.) Even assuming that circumstantial evidence could possibly be sufficient to support a finding of willfulness by a preponderance of the evidence—which it cannot[19]—it should not be

[19] Jacuzzi maintains that the sanction was an abuse of discretion even if it was legally appropriate to apply the preponderance-of-the-evidence standard. That abuse of discretion will be an issue on appeal if the sanction is not reconsidered before trial. For the moment, however, that fact-intensive, discretionary decision is beyond the scope of advisory mandamus. *See Walker v. Second Jud. Dist. Ct.*, 476 P.3d at 1196 ("it must appear that the act which is to be enforced by the

deemed sufficient under the appropriate burden of proof requiring clear and convincing evidence. At very least, the fact-finder should weigh the direct testimony from Jacuzzi's witnesses against that circumstantial evidence in light of the appropriate burden of proof.

## CONCLUSION

For the forgoing reasons, the Court should issue a writ of mandamus instructing the district court to vacate the order striking Jacuzzi's answer in part and compelling the district court to reevaluate any sanction in light of the correct evidentiary standard.

Dated this 5th day of October, 2021.

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mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse").

## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 5,887 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 5th day of October, 2021.

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## CERTIFICATE OF SERVICE

I certify that on October 5, 2021, I submitted the foregoing PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Crystal Eller
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*Respondent*

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