

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

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5550 PAINTED MIRAGE RD., LLC,

*Appellant*

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF  
AMERICA

*Respondent*

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**REPLY IN SUPPORT OF RESPONDENT'S RENEWED  
MOTION TO DISMISS APPEAL FOLLOWING CONCLUSION  
OF SETTLEMENT PROGRAM**

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Supreme Court Case No. 83413

On Review from The Eighth Judicial District Court

County of Clark, Case No. A803425, Hon. Veronica Barisich

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CLYDE & CO US LLP

AMY M. SAMBERG (NV Bar No. 10212)

[amy.samberg@clydeco.us](mailto:amy.samberg@clydeco.us)

LEE H. GORLIN (NV Bar No. 13879)

[lee.gorlin@clydeco.us](mailto:lee.gorlin@clydeco.us)

7251 W. Lake Mead Boulevard, Suite 430

Las Vegas, Nevada 89128

Telephone: 725-248-2900

Facsimile: 725-248-2907

*Attorneys for Respondent*

## **I. ARGUMENT ON REPLY**

### **A. Written Notice of Entry as Defined by NRAP 4(a)(3) Occurred on July 20, 2020 Rendering Painted Mirage’s Notice of Appeal Untimely**

In its Response, Painted Mirage does not dispute the pertinent dates, nor could it so dispute. Painted Mirage instead contends that the applicable date is July 21, 2021, because that is the day that a Notice of Entry was filed in the District Court pursuant to the District Court’s rules. In doing so, Painted Mirage cited to NRAP 4(a)(1), but wholly ignored NRAP 4(a)(3) which provides:

#### **RULE 4. APPEAL – WHEN TAKEN**

##### **(a) Appeals in Civil Cases.**

...

- (3) Entry Defined.** A judgment or order is **entered for purposes of this Rule when it is signed by the judge or by the clerk, as the case may be, and filed with the clerk.** ...

NRAP 4(a)(3) (emphasis added). Rule 4(a)(3) plainly provides that this definition of “Entry” is the one to be used for the purposes of Rule 4, and the definition defines “Entry” as the time when the order being appealed is signed by the judge and filed with the clerk. This occurred on July 20, 2021. Moreover, when this signed order was filed on July 20, 2021, it was also served on all parties using the district court’s

e-filing system simultaneously. Accordingly, it cannot be disputed that Painted Mirage was served with written notice of the “Entry” of the order on July 20, 2021.<sup>1</sup>

Painted Mirage received written notice of “Entry” of the Order on July 20, 2021, therefore its notice of appeal was untimely filed on August 20, 2021, 31 days after Painted Mirage’s receipt of written notice of “Entry.” For this reason, the appeal is untimely and the Court lacks jurisdiction to consider it any further. Accordingly, Travelers respectfully requests that the Court dismiss the appeal for lack of jurisdiction due to an untimely notice of appeal.

**B. The Order Directing Painted Mirage to Pay its Filing Fee by a Specific Date Utilized Mandatory, Not Permissive Language, In That the Appeal “Will” Be Dismissed**

In its Response, Painted Mirage, in a single paragraph writes off its untimely payment of the filing fee in that the Court “elected not to” dismiss the appeal following Painted Mirage’s untimely payment. Notably, Painted Mirage does not contend that its payment was timely, nor could it so contend.

Painted Mirage’s position ignores the language used in the Order directing it to pay the filing fee within 10 days of the August 24, 2021, Notice. The Court did not say that it “may” or “might” dismiss the appeal for failure to timely pay the fee. Instead, the Court said that it “will” dismiss the appeal for failure to timely pay.

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<sup>1</sup> The District Court’s formal notice of entry, which is required under the district court’s rules, *see* EDCR 7.03(c), is superfluous for the purposes of NRAP 4.

The use of the word “will” is mandatory, not permissive. *See Nat. Res. Def. Council, Inc. v. James R. Perry*, 940 F.3d 1072, 1078 (9th Cir. 2019) (“The word ‘will,’ like the word ‘shall,’ is a mandatory term...”); *Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 517-18, 473 P.3d 418, 429 (2020) (same); *Nelson v. Nelson*, 136 Nev. 335, 338, 466 P.3d 1249, 1252 (2020) (same). Painted Mirage failed to make its payment within the 10-day deadline.

Painted Mirage also posits that there is no basis to dismiss its appeal, because this Court accepted the late payment and the parties participated in the settlement program. As this Court is aware, prior to the settlement conference, Travelers filed a motion to dismiss, raising as issues both Painted Mirage’s untimely payment of the filing fee and its untimely notice of appeal. The Court denied Travelers’ motion, without prejudice, to permit Travelers to re-file its motion to dismiss after the parties participated in the settlement program. Use of programs and tools to facilitate settlement should not be used as weapons to circumvent compliance with Court rules nor to preclude appropriate motions practice. Painted Mirage should not be permitted to argue that the parties’ participation in the settlement program now, somehow, bars this Court from dismissing this appeal based upon Painted Mirage’s untimely payment of the filing fee.

As such, and pursuant to this Court’s own admonition, this appeal must be dismissed, for this reason in addition to the jurisdictional defect for untimely notice

of appeal. Accordingly, Travelers respectfully requests that this Court honor its own mandatory language and dismiss the appeal.

## **II. CONCLUSION**

Based on the forgoing, Travelers respectfully requests that this honorable Court dismiss this appeal for lack of jurisdiction.

Dated: February 14, 2022

CLYDE & CO US LLP

By: /s/ **Lee H. Gorlin**  
Amy M. Samberg  
Lee H. Gorlin  
7251 W. Lake Mead Boulevard, Suite 430  
Las Vegas, NV 89128

*Attorneys for Respondent*

**CERTIFICATE OF SERVICE**

I certify that on the 14<sup>th</sup> day of February 2022, I served a copy of this Reply in Support of Respondent's Renewed Motion to Dismiss Appeal Following Conclusion of Settlement Program upon all counsel of record by electronic means pursuant to NEFCR 9 and NRAP 25(c)(1)(E) via this Court's electronic filing system.

DATED this 14<sup>th</sup> day of February 2022

/s/ **Regina Brouse**  
An employee of Clyde & Co LLP