IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT P. HYATT,

Appellant,

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Respondent.

Case No.: 84707

RESPONDENT'S PETITION FOR REHEARING

INTRODUCTION

In its recent Order Affirming in Part, Reversing in Part, and Remanding ("Order"), this Court reversed FTB's award of $651,628.14 in photocopy costs, $15,844.82 in telephone costs, $6,728 in telecopy costs, and $46,745.97 in postage costs. In doing so, the Court cited *Cadle Co. v. Woods & Erickson, LLP* as the controlling case and found that FTB had "evidentiary problems" under *Cadle Co.* with its affidavit of counsel and supporting source documentation. As to the affidavit, the Court held that FTB must show reasonableness and necessity for "each set" of such costs and that counsel's detailed affidavit in this 25-year case could not establish the same. As to the documentation, the Court held that FTB's supporting documentation for its costs, some of which are a quarter century old, could not

support an award because they did not provide the reason for each set of costs. As a result, this Court held that the district court abused its discretion.

In doing so, however, the Court has once again discriminated against FTB relative to other litigants in this Court, violated FTB's due process rights by retroactively applying an evidentiary standard to costs that FTB incurred over a decade before the Court announced that standard, and otherwise announced a heightened and unworkable application of *Cadle Co.* that will make cost awards laborious affairs for district courts and litigants alike. Because of this, FTB petitions for rehearing under NRAP 40[1] and asks this Court to vacate its Order and instead affirm FTB's costs.

ARGUMENT

A. The Court Discriminated Against FTB By Applying a Heightened Evidentiary Standard Under *Cadle Co.* that It Has Not Applied to Other Litigants in Nevada.

In *Hyatt II*, the Supreme Court of the United States reiterated that this Court could not apply a "special rule" of Nevada law that discriminated against FTB relative to other litigants before this Court. *See Franchise Tax Bd. of California v. Hyatt* ("Hyatt II"), 578 U.S. 171, 177-79 (2016). In that discriminatory instance, the Court refused to apply statutory damages caps to FTB that the Court routinely

[1] NRAP 40(a)(2) allows a party to petition for rehearing when the Court has overlooked or misapprehended a material question of law or fact. For the reasons stated below, FTB contends that both apply to the Court's Order.

applied to Nevada state agencies. *See id.* By disregarding Nevada's "own ordinary legal principles," this discriminatory treatment of FTB evidenced a "policy of hostility" toward FTB that would create a chaotic and unworkable system where litigants would be unable to predict when Nevada would apply a "special and discriminatory" rule rather than its ordinary rule. *Id.*

Despite this warning, the Court has again discriminated against FTB by applying *Cadle Co.*'s evidentiary standard to FTB in a manner that it has not applied to other litigants. Specifically, and for the first time, the Court has made FTB's recovery contingent on justifying "sets" of individual costs through hyper-detailed documentation and affidavits. The Court suggests that FTB's supporting affidavit of counsel and documentation do not establish the reasonableness or need for various individual "sets" of costs. *See, e.g.*, Order at pp. 7-11. The Court even states that FTB, through its affidavit and supporting documentation, should have established the "*reason* for each set of photocopies, as *Cadle Co.* specifically requires." *Id.* at p. 9 (emphasis in original). In other words, FTB should have submitted an affidavit explaining the reason and need for each set of hundreds of thousands of pages of photocopies, over 2,000 postage charges, and over 5,000 long distance telephone calls made or incurred during this 25-year case that occurred almost entirely before

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Cadle Co.'s guidance.[2] Not only does *Cadle Co.* not use the term "set" much less requiring justifying "reasons" for individual costs, but the Court's reasoning contradicts how this Court has applied *Cadle Co.* after 2015. The Court has affirmed memoranda of costs with far less supporting detail, both in counsel's affidavit and the supporting documentation, and it has never announced (or applied) a standard where a party moving for costs must explain the reason for "each set" of photocopy, postage, or telephone costs or various other costs that the Court reduced for FTB.

For example, in *In re Dish Network Corp. Derivative Litigation*, the Court affirmed an award of a special litigation committee's photocopying costs under *Cadle Co*. *See* 133 Nev. 438, 452, 401 P.3d 1081, 1093-94, No. 69729 (2017). The committee's memorandum of costs only attached generic line-item entries for the photocopies, and they did not establish the *reason* for each set of photocopies. *See id.* at JA010287-371. Counsel's supporting declaration similarly stated only that the photocopies were broadly necessary for generic motion practice and discovery in the

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[2] The line-item breakdowns and supporting documents for the photocopies, postage, and telephone costs cover the following space in FTB's appendix of exhibits attached to FTB's Memorandum of Costs:

- Postage: Four volumes and 979 pages;
- Photocopies: Two volumes and 499 pages; and
- Telephone Calls: One volume and 194 pages

See 21 AA004761-72.

case. *See id.* at JA010622. Neither established the specific reason or need for "each set" of photocopies, and the committee's documentation and declaration were functionally no different from what FTB submitted. Yet the Court affirmed the committee's photocopy costs while denying FTB the same.

Tutor Perini Bldg. Corp. v. Show Canada Indus., US, Inc. is another case in which this Court affirmed an award of costs on far less of a showing than FTB made. 135 Nev. 729, 441 P.3d 548, 2019 WL 2305717, No. 74299 (2019) (unpublished). In *Show Canada*, the Court affirmed an award of costs under *Cadle Co.* even though the supporting affidavit from counsel generically stated that **all** costs were "necessarily and reasonably incurred." *See id.* at AA2683. The affidavit did not provide the *reason* for each subset of photocopy costs or any other subset of the various cost categories. *See id.* Nor did the supporting documentation. The moving party only included a line-item spreadsheet of photocopy costs. *See id.* at AA0582-83. For its postage, telecopy, and telephone costs, it did the same. *See, e.g.*, *id.* at AA0583-84; AA0585. Even so, this Court relaxed *Cadle Co.*'s evidentiary standard and affirmed the district court's award based on the "length and complexity of the case," each of which "justified the amount of costs" despite the supporting documentation and affidavit not reaching *Cadle Co.*'s evidentiary standard. *Show Canada*, 135 Nev. 729, 441 P.3d 548, 2019 WL 2305717, at *4. *Show Canada* was a 10-year-old case when the Court decided the cost issues while FTB's case is 25

years old. Despite being a smaller case, the Court allowed the movant in *Show Canada* to take cover under the length and complexity of that case to avoid *Cadle Co.*'s evidentiary standard while this Court applied a heightened version of *Cadle Co.* to FTB. There is no justifiable reason for doing so.

Ryles v. Holloway is one more example of this Court applying a relaxed standard under *Cadle Co.* that it did not apply to FTB. 135 Nev. 710, 449 P.3d 478, 2019 WL 4791800, No. 74733 (Sept. 27, 2019) (unpublished). In *Ryles*, the moving party's affidavit of counsel only generically stated that costs were incurred and made no effort to establish their reasonableness or necessity. *See* AA 3617. Indeed, the entire affidavit was only five paragraphs long. *See id.* The memorandum of costs only included a list of cost categories and amounts with generic supporting documentation. *See* AA 3818-19. Neither established the *reason* for various sub-sets of the costs. Even more, the district court's cost order generically awarded $19,814.30 in costs without a breakdown of each category of costs or detailed factual findings supporting the same. *See* AA 5050-51. Still, this Court relaxed the *Cadle Co.* standard and affirmed the district court's order in "its entirety." 135 Nev. 710, 449 P.3d 478, 2019 WL 4791800, at *3. It did not apply the heightened evidentiary standard of establishing the *reason* for each set of costs as this Court did to FTB in the Order.

There is no meaningful distinction between the above cases and FTB's case

other than the Court's hostility to FTB.[3] It is impossible to synthesize the above cases into "ordinary legal principles" under *Cadle Co.* without seeing the Court's harsh discrimination against FTB. *See Hyatt II*, 578 U.S. at 178-79. In *Dish Network*, *Show Canada*, and *Ryles*, the Court professed to apply *Cadle Co.* while practically applying a relaxed evidentiary standard to rubber stamp district court orders awarding generic claims to costs.[4] For FTB, however, the Court applied a heightened evidentiary standard under *Cadle Co.* that required supporting documentation and an affidavit describing the *reason* for "each set" of photocopies and other costs before they are recoverable. That has never been the standard in Nevada, and what appears to be driving the Court's Order is exactly what the Supreme Court of the United States said is inappropriate: hostility to FTB. There cannot be one set of rules for FTB and another set of rules for other litigants in front of this Court. The Court should vacate the Order and rehear the matter, and it should do so with oral argument to be transparent about its reasoning in deciding this appeal.

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[3] The Order's first footnote points out that FTB won this case after the Supreme Court of the United States overruled *Nevada v. Hall*. *See* Order at n.1. This footnote has no relevance to the cost award.

[4] The Court has similarly applied a relaxed version of *Cadle Co.*'s standard in *Parks! America Inc. v. Harper*, 132 Nev. 1015, 2016 WL 4082312 (2016) (unpublished), and *Hesser v. Gewerter*, 504 P.3d 522, 2022 WL 500480 (2022) (unpublished). Neither of these cases involved affidavits of counsel or supporting documentation stating the *reason* for "each set" of costs awarded as the Court's Order said *Cadle Co.* required FTB to provide here.

B. The Court Violated FTB's Due Process Rights by Retroactively Applying *Cadle Co.*'s New Evidentiary Standard to FTB's Costs Incurred Before *Cadle Co.*

Before the Court decided *Cadle Co.* in 2015, attorneys often estimated costs with no documentation for a district court to consider and provided short one- or two-paragraph boilerplate affidavits supporting the same. In *Cadle Co.*, however, the Court clarified that to receive costs under NRS 18.005, a memorandum of costs must include "justifying" documentation and an attorney affidavit or declaration confirming that the costs were "reasonable, necessary, and actually incurred." 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015). As a general legal principle, this new evidentiary standard was correct because of the rise in cost-tracking technology that made justifying documentation possible. In its Order, and with no discussion, the Court accepts Hyatt's invitation to retroactively apply *Cadle Co.* as the governing standard for evaluating and awarding FTB's costs even though FTB's case began 17 years before *Cadle Co.* and little to no cost-tracking technology was available when FTB incurred most of its costs. *See* Order at pp. 3-4.

This was legally erroneous and violates FTB's due process rights. *See Colwell v. State*, 118 Nev. 807, 816-18, 59 P.3d 463, 470-71 (2002) (applying new rule of law retroactively may violate procedural due process rights absent specific exceptions). FTB warned of this error in its answering brief. *See* FTB's Answering Brief n.5. As this Court has explained in other contexts, applying a new legal

standard retroactively raises fundamental issues of fair notice and reasonable reliance and often impedes the party's ability to comply with the new legal standard. *See Pub. Emp.'s Benefits Program v. Las Vegas Metro. Police Dep't.*, 124 Nev. 138, 154-55, 179 P.3d 542, 553-54 (2008). When FTB began incurring costs in 1998 and the many if not most of its photocopying, postage, telecopy, and telephone costs before the trial in 2008, it did not have fair notice of the *Cadle Co.* evidentiary standard that the Court would announce many years later. It certainly did not have warning of the heightened standard under *Cadle Co.* that the Court suddenly embraced in the Order. Between 1998 and 2014, FTB incurred costs under one set of rules. In 2015, however, the Court announced a new set of rules, and through its Order, it decided to apply them retroactively and hostilely to FTB. This is unfair.[5]

Even more, the cost-tracking technology necessary to meet *Cadle Co.*'s post-2015 standard was not in place when FTB incurred most of its costs before the 2008

[5] While Hyatt may argue this is what happened to him in *Hyatt III* when the Supreme Court of the United States reversed *Nevada v. Hall*, this would be incorrect. For nearly two hundred years before *Hall*, and as the dissents in *Hall* pointed out, the United States Constitution prohibited individuals from suing a state in the courts of another state. Thus, *Hyatt III* was not a journey to uncharted lands or an unforeseeable result for Hyatt as footnote 1 of the Court's Order implies. Quite the opposite, it was a return to constitutional principles that had existed since the Constitutional Convention. *Hall* was the constitutional outlier, and *Hyatt III* returned immunity principles to how they existed for nearly 200 years before *Hall*. *Hyatt III* returned the United States to a position that had existed much longer than the exception created by *Hall*.

trial. By the time this Court decided *Cadle Co.*, many if not most firms routinely used individual laptops and other cost-tracking technologies daily that allowed litigants to record and track costs in real-time as cases developed. Before *Cadle Co.*, however, that technology was largely unavailable. Even had FTB been able to predict which way this Court would go years later in *Cadle Co.*, it could not have met that evidentiary standard for costs incurred between 1998 and 2008. This is yet another reason why it is unfair for the Court to apply *Cadle Co.* retroactively.

The Court has voluminously written on these fairness concerns when it applies a new rule of law retroactively. *See Colwell*, 118 Nev. at 816-18, 59 P.3d at 470-71; *see also MDC Restaurants, LLC v. Eighth Jud. Dist. Ct.*, 132 Nev. 774, 781-82, 383 P.3d 262, 267-68 (2016) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). First, if the decision applies a new principle of law or evidentiary standard that was "not clearly foreshadowed," then the decision should not apply retroactively. *Chevron Oil Co.*, 404 U.S. at 106. Second, the Court should look at the history of the rule, its purpose and effect, and whether retroactive application will further or blunt the rule's operation. *See id.* at 107. Finally, the Court should look at whether retroactive application would "produce substantial inequitable results," and if so, the Court should only apply it prospectively to "avoid[] the injustice or hardship" that would result from retroactive application. *Id.* Each applies here.

One, the Court implemented a new evidentiary standard in *Cadle Co.*, and

although justified prospectively by the rise of cost-tracking technology, it is not justified retroactively because it gave litigants no way to comply for costs incurred long before *Cadle Co*.[6] In moving for costs, FTB aggregated the best evidence of costs available to it when it incurred those costs. It supplied this evidence and a detailed supporting affidavit to the district court, and it further provided extensive line-item breakdowns of the costs. It could do no more based on the technology of the time when FTB incurred these costs.

Two, retroactive application of *Cadle Co.* to FTB's costs, most of which occurred before 2010, will not further the rule's operation. NRS 18.005 and 18.110 allow prevailing parties to recover costs reasonably and necessarily incurred during litigation. Before *Cadle Co.*, this Court allowed litigants to recover such costs based on an affidavit from counsel and the party's presentation of the best cost-tracking technology at the time. That is what FTB used to track most of its costs. In exhibiting hostility to FTB, the Court has denied such costs by falsely holding FTB to technological capabilities and *Cadle Co.*'s resulting evidentiary standard that were

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[6] FTB is mindful that its case is unusual and that few if any cases decided after *Cadle Co.* began back in the 1990s or involved large swaths of costs incurred before the rise of the cost-tracking technology that justified the new standard in *Cadle Co.* While this Court may not have addressed retroactivity when it decided *Cadle Co.*, it must do so as applied to FTB's case because of the unique facts and equities involved.

not in place when FTB incurred most of its costs. That does not advance the operation of NRS 18.005 and 18.110. Quite the opposite, it only muddies the judicial waters when parties move for costs.[7]

Three, the substantial inequitable results and injustice of retroactively applying *Cadle Co.*'s standard suggest the Court's continued hostility to FTB. The Court does not say that it believes FTB's costs were unreasonable, unnecessary, or otherwise not incurred. It does not say that it had doubts about the veracity of counsel's affidavit supporting the costs. The Court could not do so because it is aware of the procedural path that FTB traveled to reach its constitutional right to immunity. Through the last 25 years, FTB defended itself in courts of another state and had to appeal multiple times to the Supreme Court of the United States to get the correct result. This included a multi-month trial, a vast trial record, and substantial discovery. FTB's costs awarded throughout this 25-year case—$2.26 million—is hardly the amount that would be unjustified, unreasonable, or otherwise

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[7] As discussed above, the Court's Order combined with *Dish Network*, *Show Canada*, *Ryles*, and other cases leave litigants to guess about how to faithfully apply *Cadle Co.* to establish the reasonableness and need for costs. Is it the five-paragraph affidavit of counsel from *Ryles* or the voluminous affidavit and supporting documentation describing the "*reason* for each set of photocopies" and various other cost categories as the Court's Order describes? Is it the short line-item spreadsheet from *Show Canada* or the thousands of pages that FTB submitted in its appendix to its memorandum of costs? No one knows, and a large part of that results from the Court's retroactive application of *Cadle Co.* to FTB's costs, and even then, its discriminatory application of *Cadle Co.* to FTB relative to other litigants.

raise a red flag about the veracity of claimed costs. That sort of "length and complexity" justified the costs awarded in *Show Canada*. *Show Canada*, 135 Nev. 729, 441 P.3d 548, 2019 WL 2305717, at *4. Without justification, however, the Court disregarded those same considerations in FTB's case and simultaneously and retroactively applied an evidentiary standard that FTB could not have met since it had no notice and no technology to comply with the same. This is the ultimate unjust result that flows from retroactively applying a new rule of law.

C. If Applied Faithfully, the Court's Order Will Prove Unworkable in Future Complex, Multiyear Litigation and Impose Substantial Time and Hardship on District Courts Evaluating Memorandums of Costs.

Cadle Co.'s original intent was correct. Once advanced cost-tracking technology became available, district courts could not accept mere estimates of costs or one- or two-paragraph affidavits under NRS 18.005 and 18.110. Instead, moving parties must satisfy *Cadle Co.* with more than numbers pulled out of thin air as was common before *Cadle Co*. by providing the justifying documents available through cost-tracking technology. And *Cadle Co.* grants district courts substantial discretion as gatekeepers to evaluate counsel's affidavit and supporting cost breakdowns in a pragmatic manner to ensure that the costs awarded are more than mere estimates. 131 Nev. at 120, 345 P.3d at 1054. By example, the movant in *Cadle Co.* only submitted an affidavit with no supporting documentation or line-item breakdown for

copies and postage, and so this Court correctly found that lack of effort[8] insufficient to show the district court that the claimed costs were more than mere estimates. *See id.*

But the Court's Order tortures this admirable spirit from *Cadle Co.* by applying a new, heightened evidentiary standard to FTB and other future litigants supplying memorandums of costs in complex, multiyear cases like this one. This standard goes beyond what *Cadle Co.* envisioned or sought to protect against and inserts a standard that does not appear in *Cadle Co.* No longer may movants provide a detailed affidavit of counsel asserting the reasonableness and need for costs incurred and supporting documents or line-item breakdowns showing that the costs are more than numbers pulled out of thin air. Instead, under the Court's Order, FTB and other future movants must now provide vast supporting documentation **and** a hyperdetailed affidavit explaining the *reason* for each "set" of photocopies, telephone calls, postage, and the like. *See* Order at pp. 8-9 (claiming FTB should

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[8] In the memorandum of costs in *Cadle Co.*, the movant did not attach supporting documentation of any cost (including any line-item spreadsheet of the same), and the affidavit of counsel was a lone paragraph. *See* 5041-68, 5113-14. When opposing the other side's motion to retax, the movant finally submitted a more detailed affidavit but still did not provide any line-item breakdown of each copy or postage cost or supporting documentation since counsel asserted that "formal invoices or other documentation for the cost of photocopies are rarely available to document copies, particularly when the client's law firm prepares the copies in-house, as occurred here" and "postage charges are not documented with invoices." *See* 5082-83, 5121.

have substantiated the "*reason* for each set of photocopies") (emphasis in original).

This is not faithful to *Cadle Co.*'s holding. The Court in *Cadle Co.* had an issue because the movant **only** provided an affidavit and **no** supporting documentation or other line-item breakdown of the photocopying and postage costs. *See* 131 Nev. at 121, 345 P.3d at 1054. Thus, the Court believed the memorandum of costs was a mere estimate, and the affidavit alone with no line-item breakdown of the costs could not overcome this. By comparison, FTB provided a detailed affidavit of counsel and detailed spreadsheets showing each individual photocopy or postage cost. *See* 21 AA004761-72. This included the date and amount for each cost. This goes far beyond the movant's nonexistent showing in *Cadle Co.*, and it is far more than an estimate pulled out of thin air.

The Court also highlights in the Order how *Cadle Co.* held that an affidavit of counsel could not support a cost request because it "*told* the court that the costs were reasonable and necessary, but it did not *demonstrate* how such fees were necessary to and incurred in the present action." *Id.* at p. 8. But again, the purported "demonstration" did not occur in *Cadle Co.* because the movant provided **no** supporting documentation or further line-item breakdown of the costs incurred. By comparison, FTB provided a vast appendix, and it detailed each individual photocopy, telephone call, or postage cost by date incurred and amount incurred. This exceeded the concern about estimates that bothered the Court in *Cadle Co.*

Even more, an evidentiary standard where the movant must "demonstrate" to the Court the reason for **each set** of photocopies, postage, or telephone call would be unworkable and a time drain for district courts in complex, multi-year litigation. Most modern cost-tracking software does not record the reason for a photocopy, postage fee, or telephone call, and so counsel in real-time will have to record the reason for each and save to the file for the possible memorandum of costs filed years later. Counsel will then have to include an affidavit setting forth the reason for "each set" of photocopies, postage, or telephone calls since the cost-tracking software does not independently record the reason. And while FTB's case is extreme in the number of copies, postage, and telephone calls over a 25-year period, even smaller complex cases that last multiple years can involve tens of thousands of copies and hundreds if not thousands of telephone calls and mailings requiring postage. Describing the reason for "each set" of these will inevitably lead to affidavits from counsel that number in the hundreds of pages since the supporting documentation will not otherwise include those reasons.[9]

[9] As is the case for FTB, preparing an affidavit of counsel that would meet the heightened evidentiary standard in the Court's Order would likely cost the movant more in attorney fees than the amount of costs to be recovered. This would discourage parties from moving for photocopying, postage, and telephone costs and so on, and it would effectively read such costs impermissibly out of NRS 18.005 because no movant would bear the inflated attorney fees needed to apply for the costs. *See Cromer v. Wilson*, 126 Nev. 106, 109-10, 225 P.3d 788, 790 (2010) (court may not read words out of statute and may not "give the statute a meaning that will nullify its operation").

Upon filing a memorandum of costs and such an affidavit, the district court will then have to assign a law clerk to review the extensive affidavit and supporting documentation, and on any appeal, this Court must do the same. This will lead to somewhat routine cost motions becoming laborious affairs where judges and law clerks must take a fine-tooth comb to each set of photocopies, telephone calls, and postage and plow through the reasons for "each set" of the same in voluminous affidavits from counsel. This does not address the valid concern of *Cadle Co.* in preventing mere estimates of costs. Instead, it is the judicial equivalent of killing a gnat with a cluster bomb, and it is one that comes at considerable expense of judicial resources. This cannot be the just or pragmatically correct result in this case or other complex, multi-year cases.

CONCLUSION

There is a middle ground between cost motion practice predating *Cadle Co.*, when parties merely provided an affidavit and nothing more, and the Order's new heightened evidentiary standard where parties must now detail the reason for "each set" of photocopies, postage, telephone calls, or other costs. That middle ground rests on the policy foundation of *Cadle Co.*—preventing mere estimates of costs. A movant should provide a detailed affidavit and supporting documentation or additional itemized breakdowns of these costs sufficient for the district court in its wide latitude to be satisfied that the costs are not mere estimates and instead were

reasonable, necessary, and actually incurred. FTB did so here. Unlike the movant in *Cadle Co.* that provided an affidavit and nothing more, FTB provided a detailed affidavit, a line-item breakdown of each cost (including the date and amount incurred), and supporting invoices and documentation when available through the cost-tracking technology that evolved during this 25-year case.

FTB's costs are far more than mere estimates. They were reasonable, necessary, and actually incurred. Because of this, the district court did not abuse its discretion in awarding these costs. Instead, it remained more faithful to the spirit of *Cadle Co.* than this Court's Order did. Once this Court treats FTB as it has other litigants, FTB is entitled to all its costs, and so FTB requests that the Court vacate its prior Order and rehear this matter.

Dated: July 24th, 2023.

McDONALD CARANO LLP

By: */s/ Rory T. Kay*

Pat Lundvall (NSBN 3761)
Rory T. Kay (NSBN 12416)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 40(b)(3) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,510 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this

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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 24th, 2023

McDONALD CARANO LLP

By: */s/ Rory T. Kay*

Pat Lundvall (NSBN 3761)
Rory T. Kay (NBSN 12416)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
lundvall@mcdonaldcarano.com
rkay@mcdonaldcarano.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on July 24th, 2023, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

Dated: July 24th, 2023.

/s/ CaraMia Gerard
Employee of McDonald Carano LLP