# IN THE SUPREME COURT OF THE STATE OF NEVADA

**Supreme Court Case No. ___**



**GLAXOSMITHKLINE LLC**,
*Petitioner*,

v.

**THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**, in and for the County of Clark, and **THE HONORABLE JOE HARDY JR.**
*Respondents*

**SARA ELABBASSY**, as Special Administrator of the **ESTATE OF DECEDENT HUSROM**, deceased; **JAMIL HUSROM**, individually and as a legal guardian for **KHULOD HUSROM**, a minor, **SALIH HUSROM**, a minor, **FATIMA HUSROM**, a minor, and **MOHAMMED HUSROM**, a minor
*Real Parties in Interest*

District Court Case No. A-21-835385-C

## PETITION FOR WRIT OF PROHIBITION

Kelly A. Evans, Esq.
Chad R. Fears, Esq.
Hayley E. LaMorte, Esq.
EVANS FEARS & SCHUTTERT LLP
6720 Via Austi Parkway, Suite 300
Las Vegas, NV 89119
(702) 805-0290
kevans@efstriallaw.com
cfears@efstriallaw.com
hlamorte@efstriallaw.com

*Counsel for Petitioner*
*GlaxoSmithKline LLC*

Jay Lefkowitz, Esq.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4970
lefkowitz@kirkland.com

*Counsel for Petitioner*
*GlaxoSmithKline LLC*

## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following is an entity described in NRAP 26.1(a) and must be disclosed:

GlaxoSmithKline LLC is a Delaware limited liability corporation represented in this matter by the law firms of Kirkland & Ellis LLP, Dechert LLP, and Evans Fears & Schuttert LLP. GlaxoSmithKline LLC is wholly owned, through subsidiaries, by GSK PLC, a multinational company based in the United Kingdom.

Dated: October 12, 2022.

Respectfully submitted,

*/s/ Chad R. Fears*

Kelly A. Evans, Esq.
Chad R. Fears, Esq.
Hayley E. LaMorte, Esq.
Evans Fears & Schuttert LLP
6720 Via Austi Parkway, Suite 300
Las Vegas, NV 89119

*Counsel for Petitioner*
*GlaxoSmithKline LLC*

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## ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding pursuant to NRAP 17(a)(11) & (12) because it is a matter raising a question of first impression and statewide importance regarding personal jurisdiction that has not been decided by the Nevada Supreme Court.

## I. INTRODUCTION

In this petition for a writ of prohibition, GlaxoSmithKline LLC ("GSK") seeks relief from the district court's improper assertion of personal jurisdiction in a product-liability case where the Decedent *never used a product made or sold by GSK.* It is undisputed that Decedent exclusively used over-the-counter ("OTC") Zantac and generic equivalents made by other companies. Indeed, GSK had not sold OTC Zantac in Nevada for *eighteen years* when Decedent began using the product. But Plaintiffs nonetheless seek to hold GSK liable because it created the original label for Zantac, and the companies that sold OTC Zantac after GSK relied on its labeling decisions. This theory of "innovator liability" has been rejected by the vast majority of courts to consider it, including four courts applying Nevada law, because it is incompatible with the fundamental tort principle that a company is liable for defects in *its own* products, not those of its competitors. The court

below was the first court in the state to ever recognize the theory, and GSK maintains its position that innovator liability cannot be reconciled with black-letter Nevada tort law.

This petition, however, concerns a threshold problem with Plaintiffs' innovator-liability claim. Even if the innovator-liability theory were viable in Nevada, the claim would fail for lack of personal jurisdiction. All agree that a Nevada court cannot assert general jurisdiction over GSK, which is a Delaware limited liability company with corporate offices in Pennsylvania and North Carolina. And a Nevada court cannot assert specific jurisdiction over GSK either, because the Plaintiffs' innovator-liability claim does not "arise out of or relate to" GSK's contacts with Nevada. The only actions by GSK that "relate to" the innovator-liability claim are the decisions the company made about the contents of the Zantac label many years before Decedent ever used the product. The allegation that GSK's labeling decisions affected the label that subsequent manufacturers placed on OTC Zantac is the sole basis for attempting to hold GSK liable for injuries allegedly caused by those companies' products. Because Plaintiffs do not and cannot allege

that GSK made any decisions about Zantac's label in Nevada, the innovator-liability claim fails for lack of personal jurisdiction.

The district court concluded there was an adequate basis for specific jurisdiction because GSK had served the market for OTC Zantac in Nevada at one time, but that argument fails for two reasons. *First*, GSK's past sale of OTC Zantac in Nevada is completely irrelevant to the innovator-liability theory. Even if GSK had *never* sold OTC Zantac in Nevada, Plaintiffs could still bring an innovator-liability claim based purely on GSK's past labeling decisions. *Second*, even if GSK's past sale of its own OTC Zantac in Nevada could support specific jurisdiction, despite its irrelevance to the innovator-liability theory, those sales cannot support specific jurisdiction over claims that arise *after the sales have ceased*. Otherwise, GSK would be subject to specific jurisdiction forever, without any opportunity to alter its conduct and minimize its exposure to innovator-liability litigation in Nevada, as the Due Process Clause requires.

## II. RELIEF SOUGHT

GSK seeks a writ of prohibition to prevent the district court from asserting personal jurisdiction over it in the underlying lawsuit.[1]

## III. ISSUE PRESENTED

Did the district court err by exercising specific jurisdiction over GSK in the underlying product-liability litigation where the alleged injury was caused by products made and sold by other companies?

## IV. BACKGROUND

### A. Factual Background

Plaintiffs in this case, Sara Elabassy and Jamil Husrom, allege that Decedent Yasmin Husrom died from cancer after consuming an over-the-counter ("OTC") antacid medication, Zantac, and its generic equivalents. Petitioner's Appendix (PA) 14 ¶¶ 69-70. GSK—a British pharmaceutical company whose American affiliates are incorporated in Delaware and have their headquarters in Pennsylvania—discovered the active ingredient in Zantac, ranitidine, more than forty years ago. PA 15 at ¶ 77. In 1983, the FDA granted GSK's NDA and approved the sale of prescription ranitidine under the trade name "Zantac." *Id.* Within just

[1] *Elabassy v. Las Vegas Medical Grp., et al.*, Case No. A-21-83585-C (Eighth Judicial District Court, in and for the County of Clark, Dept. No. XV).

a few years, Zantac became the most popular prescription medication in the world, used by tens of millions to treat ulcers, gastroesophageal reflux disease, and other gastric conditions. PA 16 at ¶ 78.

GSK has controlled the New Drug Application (NDA) for prescription Zantac since 1983, but there is a separate NDA for OTC Zantac. PA 3 at ¶ 12. The holder of the NDA for a product has the exclusive right to manufacture the brand-name drug and the exclusive responsibility to add warnings to the product's label. *See PLIVA, Inc. v. Mensing*, 564 U.S. 604, 614 (2011). GSK and a predecessor company of Pfizer jointly held the NDAs for OTC Zantac from 1995 to 1998, and Pfizer had sole control of the NDAs from 1998 to 2006. Boehringer Ingelheim held the NDA for OTC Zantac from December 2006 to January 2017, PA 3 at ¶ 13, and Sanofi has held the NDA from January 2017 to the present, PA 4 at ¶ 17.

Plaintiffs allege that Decedent took branded Zantac and generic ranitidine from November 2016 through September 2019. PA 14 at ¶ 69. When Decedent began taking OTC Zantac, GSK had not sold the product or controlled its label for nearly eighteen years. Plaintiffs do not dispute that Decedent never consumed Zantac made by GSK. Their claim

against GSK is predicated entirely on the theory of "innovator liability." PA 94.

### B. GSK's Motion to Dismiss and the District Court's Decision

GSK moved to dismiss the Plaintiffs' innovator-liability claim for lack of personal jurisdiction and for failure to state a claim. GSK explained that general jurisdiction was not present because GSK is a Delaware limited liability company, and specific jurisdiction did not exist because Plaintiffs' innovator-liability claim did not "relate to" GSK's contacts with Nevada. PA 73 (quoting *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021)). As the federal court overseeing the Zantac MDL has held, the "only conduct that gives rise to [innovator-liability] claims is Defendants' alleged failure to update the warning label" and thus "only those activities that relate to the brand-name manufacturers' labeling decisions" can support specific jurisdiction. *In re Zantac (Ranitidine) Prod. Liab. Litig.*, 546 F. Supp. 3d 1192, 1213 (S.D. Fla. 2021). Because Plaintiffs could not allege that GSK made any decisions about Zantac's label in Nevada, their innovator-liability claim failed for lack of personal jurisdiction.

GSK also argued that, even if the district court had personal jurisdiction, the innovator-liability theory would fail as a matter of Nevada law. The "overwhelming national consensus" is against innovator liability. *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 510 F. Supp. 3d 1175, 1195 (S.D. Fla. 2020). Courts across the country have rejected the theory because it is inconsistent with "traditional common law tort principles under which a manufacturer is liable for injuries caused by *its own* product[s]," not those of other companies. *McNair v. Johnson & Johnson*, 818 S.E.2d 852, 865 (W. Va. 2018) (quoting *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1285 (10th Cir. 2013) (emphasis added)). Accordingly, all four courts to address the issue had concluded that Nevada law did not recognize innovator-liability claims. *See In re Zantac*, 510 F. Supp. 3d at 1218 (citing *Baymiller v. Ranbaxy Pharm., Inc.*, 894 F. Supp. 2d 1302, 1310 (D. Nev. 2012)); *Moretti v. Wyeth, Inc.*, 2009 WL 749532, at *3 (D. Nev. March 20, 2009), *aff'd* 579 F. App'x 563 (9th Cir. 2014)).

Plaintiffs responded that the district court had specific jurisdiction to adjudicate their innovator-liability claim against GSK because, under the United States Supreme Court's decision in *Ford*, there need only be

an "affiliation between the forum and the underlying controversy." PA 89 (quoting *Ford*, 141 S. Ct. at 1027). Such an affiliation existed, Plaintiffs argued, because GSK had "created a market" for Zantac in Nevada "through its advertising," and Decedent had used Zantac in Nevada and developed cancer there. PA 89. On the merits, Plaintiffs argued that all the prior courts to address innovator liability under Nevada law had erred, and that their claim could proceed under a negligent misrepresentation theory. PA 91-96. Defendants pointed out in reply, however, that *no* personal-injury claim can proceed under a negligent misrepresentation theory, because the Nevada Supreme Court has "limited claims for negligent misrepresentation to only those claims resulting in pecuniary loss." PA 108 (quoting *Reynolds v. Tufenkjian*, 136 Nev. 145, 152 (2020)).

The district court heard argument on April 20, 2022 and issued an order denying GSK's motion to dismiss on September 9, 2022. On the personal-jurisdiction issue, the court began by noting that "GSK is not headquartered or incorporated in Nevada, and therefore there is no general jurisdiction over GSK in this state." PA 181. But the court concluded, "with all due respect to the MDL court" and its contrary

conclusion, that it could exercise specific jurisdiction over GSK to adjudicate Plaintiffs' innovator-liability claim. PA 182.

The court recognized that specific jurisdiction is appropriate only if Plaintiffs' claim "arise[s] out of" or "relate[s] to" GSK's contacts with Nevada, and determined it was the "second test—the 'relate to' test—that Plaintiffs in this case have satisfied." PA 181. The court rejected GSK's argument that only its labeling decisions "relate to" Plaintiffs' innovator-liability claim because "[i]n *Ford*, the Supreme Court did not first winnow down the relevant jurisdictional facts to only those aspects of the defendants' conduct that were allegedly tortious." PA 182. *Ford* had established, the district court believed, that there is an "affiliation between the forum and the underlying controversy" whenever "the defendant has made 'efforts' to 'serve, directly or indirectly, the market' in that state." PA 182-83. "Because GSK actively cultivated a market for ranitidine in Nevada," the Court reasoned, there was an adequate "affiliation," and thus specific jurisdiction was present. PA 183. The district court acknowledged that even if GSK "had *never* marketed or sold Zantac in Nevada," "Plaintiffs could still seek to hold GSK liable under a theory of innovator liability." *Id.* In such a case, "it would be unclear

that Plaintiffs' claims would sufficiently 'relate to' the forum," but the court noted "this hypothetical is not the case here." *Id.*

## V. THE WRIT SHOULD ISSUE

### A. Writ Review is Warranted in this Case.

Writ review is appropriate because it is the only adequate avenue available for GSK to challenge the district court's improper exercise of personal jurisdiction. "A writ of prohibition is available to arrest or remedy district court actions taken without or in excess of jurisdiction." *Viega GmbH v. Eighth Judicial Dist. Court,* 130 Nev. 368, 373, 328 P.3d 1152 (2014). "While an appeal is generally considered to be an adequate legal remedy precluding writ relief, the right to appeal is inadequate to correct an invalid exercise of personal jurisdiction over a defendant." *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Ct.,* 131 Nev. 30, 35, 342 P.3d 997 (2015) (citations omitted). The court's ruling also presents important and contested issues at the intersection of personal jurisdiction and products-liability law that the Nevada Supreme Court has not addressed, and that other courts have decided differently than the district court. *See In re Zantac*, 546 F. Supp. 3d at 1213.

### B. The District Court Erred by Exercising Specific Jurisdiction over GSK for an Innovator-Liability Claim.

A court can assert specific jurisdiction over an out-of-state defendant only if the plaintiff's claims "arise out of *or relate to* the defendant's contacts with the forum." *Ford*, 141 S. Ct. at 1025 (emphasis added). The Supreme Court has stressed that "the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Id.* at 1026. The district court's decision respects no such limits. By subjecting GSK to personal jurisdiction based on conduct that is *legally irrelevant* to Plaintiffs' claims, and that GSK *ceased nearly two decades before the plaintiff's claims arose*, the district court's decision flouts the limits the Due Process Clause places on a state's ability to regulate the conduct of out-of-state defendants.

The district court held there was an adequate "affiliation between the forum and the underlying controversy," and thus that the "relate to" test was satisfied, because GSK had "cultivated" a market for Zantac in Nevada. PA 183. But neither the court nor Plaintiffs dispute that GSK's past sale and marketing of its own Zantac in Nevada is *legally irrelevant* to Plaintiffs' innovator-liability claim. The court's own decision, as well

as the decisions from other state courts that have recognized innovator liability, makes clear that the theory rests entirely on the defendant's "control over the contents of the drug label" and "failure to properly warn of known risks." PA 186 ; *see T.H. v. Novartis Pharm. Corp.*, 407 P.3d 18, 34 (Cal. 2017) (the conduct giving rise to innovator liability is the "failure to update and maintain the warning label"); *Rafferty v. Merck & Co.*, 92 N.E.3d 1205, 1209 (Mass. 2018) (the culpable conduct in an innovator-liability case is the "intentional[] fail[ure] to update the label"). An innovator-liability claim is concerned with the effects of the defendant's labeling decisions on the label that *other companies* placed on their products. The defendant's marketing and sale of *its own* products is legally irrelevant. Indeed, the court acknowledged that Plaintiffs could have brought an innovator-liability claim even if GSK had *never* sold Zantac in Nevada, as long as some other company sold Zantac to Decedent in the state. PA 183.

Conduct that is legally irrelevant to a plaintiff's claim cannot possible "relate to" that claim. Indeed, this Court has expressly held that a plaintiff must "identify a link between the acts or conduct *underlying his tort claims* and Nevada" to support specific jurisdiction. *Trichari v.*

*Cooperative Rabobank, N.A.*, 440 P.3d 635, 647 (Nev. 2019) (emphasis added). GSK's past sale and marketing of its own Zantac is not the conduct "underlying [Plaintiffs'] tort claim[]." *Id.* The only acts underlying the innovator-liability claim are GSK's past labeling decisions, which took place outside the state. Because GSK's past sale and marketing of its own Zantac in Nevada has no bearing on an innovator-liability claim, those past activities should not be a basis for specific jurisdiction.

The MDL court held that plaintiffs could not pursue innovator-liability claims in Nevada (or any other state in which a brand-name manufacturer like GSK did not make labeling decisions) for precisely this reason. After a thorough review of the innovator-liability case law, the MDL court recognized that "the core conduct that constitutes the rationale for ... the theory of innovator liability" is the "brand-name manufacturer's labeling decisions regarding its own product." *In re Zantac*, 546 F. Supp. 3d at 1213. Because the sole basis for an innovator-liability claim is the brand-name manufacturer's control of the label, nothing else the brand-name company does matters. If a plaintiff does not allege the brand-name manufacturer made labeling decisions in the

forum state, he has not alleged forum contacts that "relate to" an innovator-liability claim, and there is no basis for specific jurisdiction. *See In re Zantac*, 546 F. Supp. 3d at 1214 ("Plaintiffs conceded at the Hearing that they do not allege that Defendants made labeling decisions related to brand-name ranitidine products in California or Massachusetts. As such, Plaintiffs' claims, as alleged, do not 'arise out of or relate to' Defendants' alleged activities within those forums.").

The MDL court expressly rejected the district court's position that a company's sale and marketing of its own Zantac could be a basis for specific jurisdiction in an innovator-liability case. Alleged "misrepresentations made in the course of sales and marketing," the MDL court explained, are "not necessary to state a misrepresentation claim premised on the innovator-liability theory" and thus "do not give rise to 'jurisdictionally relevant' contacts between the brand-name manufacturers and the forum." *In re Zantac*, 546 F. Supp. 3d at 1213 (quoting *Walden v. Fiore*, 571 U.S. 277, 289 (2014)). Taking note of *Ford*'s admonition that the "relate to" test "incorporates real limits," the MDL court stated that it was "compel[ed]... to establish those 'real limits ... as only those activities that relate to the brand-name manufacturers'

labeling decisions regarding their own product." *Id.* If activities with no relevance to a plaintiff's innovator-liability claim, such as the brand-name manufacturers' "marketing and sales contacts relating to their own products," could support specific jurisdiction, then "the phrase 'relate to' would have no 'real limits.'" *Id.*

The district court dismissed the MDL court's analysis because, in *Ford*, the Supreme Court "did not first winnow down the relevant jurisdictional facts to only those aspects of the defendant's conduct that were allegedly tortious." PA 182. But *Ford* did not *sub silentio* overrule the well-settled principle that a plaintiff must allege a "link between the acts or conduct *underlying his tort claims* and [the forum state]" and replace it with a new rule that *any* conduct in the forum state, no matter how irrelevant to the plaintiff's claims, could suffice. *Trichari*, 440 P.3d at 647. On the contrary, specific jurisdiction was present in *Ford* because the defendant was engaged, in the forum states, in exactly the sort of tortious conduct alleged by the plaintiffs. The two plaintiffs in *Ford* had brought product-liability suits in Minnesota and Montana alleging that two car models—the 1996 Explorer and 1994 Crown Victoria—were defective. *See Ford*, 114S. Ct. at 1023. The Supreme Court held that the

forum states could exercise specific jurisdiction over Ford because the company "had advertised, sold, and serviced those two car models in both States for many years." *Id.* at 1028. In other words, Ford was marketing and selling allegedly defective cars in the forum states—precisely the sort of tortious conduct underlying the plaintiffs' claims.

Here, by contrast, the only acts underlying Plaintiffs' innovator-liability claim are GSK's past decisions regarding Zantac's label, none of which were made in Nevada. GSK's past marketing and sale of its own Zantac in Nevada is completely irrelevant to Plaintiffs' claim, which is exclusively concerned with the effect of GSK's decisions on the labels of *other companies'* products. If GSK's legally irrelevant past sale of its own products can nonetheless support specific jurisdiction, then there are no longer any "real limits" on the scope of specific jurisdiction. *Id.* at 1026.

Exercising specific jurisdiction over GSK based on its own sale and marketing of Zantac would not be justifiable even if GSK was still selling OTC Zantac in Nevada today, because that conduct is simply irrelevant to Plaintiffs' innovator-liability claim. But it would be especially inappropriate to assert specific jurisdiction over GSK based on sales and marketing activities that it *ceased nearly eighteen years before the*

*plaintiff began using Zantac.* In *Ford*, the Supreme Court noted that "at all relevant times," Ford had "systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." 141 S. Ct. at 1028. Here, GSK was not serving the market for OTC Zantac in Nevada at *any* time relevant to Plaintiffs' innovator-liability claim.

Legally irrelevant acts that GSK ceased nearly two decades before Plaintiffs' claim arose cannot possibly support specific jurisdiction. The Supreme Court has repeatedly stressed that a defendant must be able to "act to alleviate the risk of burdensome litigation" in the forum state by "severing its connection with the State." *Ford*, 141 S. Ct. at 1027 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Ford, for example, could have eliminated any exposure to product-liability claims targeting the Explorer and Crown Victoria in Minnesota and Montana by pulling its cars from those states. Here, GSK *did* stop selling OTC Zantac in Nevada in 1998, yet it still faces putative innovator-liability claims in the state based on OTC Zantac that other companies sold long after (in this case, eighteen years after) GSK left the market. If the district court's decision is correct, then innovator-liability

claims could be brought against GSK *in perpetuity* in Nevada, no matter what GSK does, simply because it sold OTC Zantac in the state for three years in the 1990s.

That cannot be the law. Activities that are legally irrelevant to a plaintiff's claim, especially activities that the defendant ceased long before the plaintiff's claim arose, do not "relate to" the claim and cannot support specific jurisdiction. This Court should issue a writ of prohibition and reaffirm the "real limits" that this Court and the United States Supreme Court have placed on the scope of specific jurisdiction by holding that the district court does not have jurisdiction to adjudicate Plaintiffs' innovator-liability claim against GSK.

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## CONCLUSION

For these reasons, the district court cannot properly exercise personal jurisdiction over GSK in the underlying lawsuit, and this Court should issue the writ of prohibition.

Dated: October 12, 2022.

Respectfully submitted,

*Chad R. Fears*
Kelly A. Evans, Esq.
Chad R. Fears, Esq.
Hayley E. LaMorte, Esq.
EVANS FEARS & SCHUTTERT LLP
6720 Via Austi Parkway, Suite 300
Las Vegas, NV 89119
*Counsel for Petitioner*
*GlaxoSmithKline LLC*

## VERIFICATION

On October 13, 2022, the affiant, Chad R. Fears, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

I am counsel for Petitioners. I have read the foregoing Petition of Writ for Prohibition and all factual statements in the petition are either within the affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition.

The exhibits in the appendix are true and correct copies of the original documents.

Chad R. Fears

State of Nevada )
) ss:
County of Clark )

Subscribed and sworn to before me on the 13th day of October, 2022, by Chad R. Fears.

FAITH B. RADFORD
Notary Public, State of Nevada
Appointment No. 13-9667-1
My Appt. Expires Dec 7, 2024

Faith B. Radford
NOTARY PUBLIC In and For the State of Nevada

## CERTIFICATE OF COMPLIANCE

I, Chad R. Fears, hereby certify:

1. I have read the foregoing petition and to the best of my knowledge, information, and belief, the foregoing document is not frivolous or interposed for any improper purpose, and it complies with all applicable rules of appellate procedure, including NRAP 28(e)(1).

2. The foregoing brief complies with type-volume limitations of NRAP 21(d) because it contains 4,303 words.

3. This brief complies with the typeface, formatting, and type style requirements of NRAP 32(a)(4)-(6) because it was prepared in a double-spaced typeface in Century Schoolbook, 14-point, type style with one-inch margins on all sides.

Dated: October 13, 2022.

*/s/ Chad R. Fears*

Kelly A. Evans
Chad R. Fears
Jay J. Schuttert
**EVANS FEARS & SCHUTTERT LLP**
6720 Via Austi Parkway, Suite 300
Las Vegas, NV 89119
Telephone: (702) 805-0290

## CERTIFICATE OF SERVICE

I certify that on October 13, 2022, I submitted the foregoing Petition for Writ of Prohibition for filing via the Court's eFlex electronic filing system. Electronic notifications will be sent to the following:

Michael C. Kane
Bradley J. Myers
Brandon A. Born
service@the702firm.com
The702Firm
*Attorneys for Real Parties in Interest*

The Hon. Joe Hardy
Eighth Judicial District Court
Department XV
Dept15lc@clarkcountycourts.us
*Respondent*

*/s/ Faith Radford*
an Employee of Evans Fears & Schuttert LLP