

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

HOME WARRANTY  
ADMINISTRATOR OF NEVADA,  
INC. dba CHOICE HOME  
WARRANTY, a Nevada corporation,

Appellant,

vs.

STATE OF NEVADA, DEPARTMENT  
OF BUSINESS AND INDUSTRY-  
DIVISION OF INSURANCE, a Nevada  
administrative agency,

Respondent.

**Supreme Court No. 80218**

Electronically Filed  
Jan 22 2020 04:51 p.m.  
First Judicial District Court  
Elizabeth A. Brown  
Case No. 17 OC 00269 JB  
Clerk of Supreme Court

Appeal from First Judicial District Court, State of Nevada, County of Clark  
The Honorable James. T. Russell, District Judge

---

**HWAN'S OPPOSITION TO MOTION TO STRIKE APPELLANT'S  
REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP 27(e)**

---

Constance L. Akridge, Esq.  
Nevada Bar No. 3353  
Sydney R. Gambee, Esq.  
Nevada Bar No. 14201  
Brittany L. Walker, Esq.  
Nevada Bar No. 14641  
Holland & Hart LLP  
9555 Hillwood Drive, Second Floor  
Las Vegas, Nevada 89134  
Tel: (702) 669-4600  
Fax: (702) 669-4650  
clakridge@hollandhart.com  
srgambee@hollandhart.com  
blwalker@hollandhart.com

*Attorneys for  
Home Warranty Administrator of Nevada, Inc.  
dba Choice Home Warranty, a Nevada corporation*

Appellant Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty (“HWAN” or “Appellant”), through its counsel, hereby opposes Respondent State of Nevada, Department of Business and Industry, Division of Insurance’s (“Division” or “Respondent”) Motion to Strike (“Motion”) Appellant’s Reply in Support of Emergency Motion Under NRAP 27(e) (“Reply”).

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. PROCEDURAL HISTORY**

#### **A. District Court Motion for Stay and Motion for Order Shortening Time**

After full briefing and a hearing on HWAN’s Petition for Judicial Review, on November 25, 2019, the district court entered its Order Affirming in Part, and Modifying in Part, Findings of Fact, Conclusions of Law, Order of the Hearing Officer, and Final Order of the Commissioner in Cause No. 17.0050 in the Matter of Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty (“Order”), which is the subject of this appeal. Pursuant to NRCP 62(a), the Order was automatically stayed for 30 days from the date of service of the notice of entry of the Order, until December 26, 2019.<sup>1</sup>

On December 6, 2019, HWAN filed its Notice of Appeal and Motion for Stay Pending Appeal Pursuant to NRCP 62(D) (“DC Motion for Stay”) in the district

---

<sup>1</sup> While an email from the Division suggests the notice of entry was actually served on November 27, 2019, the certificate of service states that the notice of entry was served on November 26, 2019.

court, along with a Motion for Order Shortening Time for Briefing and Decision of the DC Motion for Stay (“Motion for OST”), respectively. HWAN requested a shortened briefing schedule because the 30-day automatic stay of execution under NRC 62(a) would expire before the DC Motion for Stay could be fully briefed, and before a motion could be made to this Court, if necessary. On December 9, 2019, the Division filed its opposition to the Motion for OST, and on December 10, 2019, HWAN filed its reply and submitted the Motion for OST to the district court for decision. The district court denied the Motion for OST. Without a shortened briefing schedule, the Division’s opposition to the DC Motion for Stay was due December 19, 2019, with HWAN’s reply due December 27, 2019, one day after the expiration of the automatic stay.

**B. The Nevada Supreme Court Motion for Stay**

With the Motion for OST denied and briefing on the DC Motion for Stay not likely to be completed until after the expiration of the automatic stay, on December 17, 2019, HWAN filed its Motion for Stay pursuant to NRC 8 as an emergency motion under NRC 27(e) in this Court (“NSC Motion for Stay”). HWAN sought a stay of the Order and asked for relief no later than December 26, 2019 given the expiration of the automatic stay.

On December 23, 2019, the Division filed its opposition to the NSC Motion for Stay (“Response”). HWAN would have had until and including December 30,

2019 to file a reply in support of its NSC Motion for Stay, but on December 23, 2019, this Court entered its Order Granting Temporary Stay.

The Order Granting Temporary Stay did not dispose of the NSC Motion for Stay (“expressing no opinion of the propriety of a stay pending appeal”), but rather entered a temporary stay of enforcement of the Order “pending decision on the district court stay motion and further order of this court.” Order Granting Temporary Stay at 2. The Order Granting Temporary Stay was silent as to the remaining briefing schedule on the NSC Motion for Stay but provided that HWAN “shall have 5 days from the date that the district court rules on its stay motion to provide a status report to this court. Counsel for HWAN confirmed with the Nevada Supreme Court clerk on December 30, 2019 that its reply deadline for the NSC Motion for Stay was no longer on schedule with the Court as of the Order Granting Temporary Stay (presumably because this court would not consider the “propriety of a stay” until after having received a status report after the district court ruling on the DC Motion for Stay). Declaration of Sydney R. Gambee, attached hereto as **Exhibit 1**.

### **C. Proceedings After Order Granting Temporary Stay**

With a temporary stay in place, HWAN filed its reply in support of DC Motion for Stay in the district court on December 26, 2019, along with a request for submission. The district court entered its Order Denying HWAN’s Motion for Stay

Pending Appeal (“Order Denying Stay”) on December 31, 2019, but HWAN was not served with Notice of Entry of this order until January 7, 2020.

On January 13, 2020,<sup>2</sup> HWAN filed its status report with this Court. Uncertain of whether the time remaining for its reply in support of the NSC Motion for Stay began to run again from January 7, 2020, HWAN also filed its Reply on January 13, 2020.

## **II. LEGAL ARGUMENT**

The Division filed the instant motion because it does not want this Court to consider the indisputable facts raised in the Reply that conclusively establish that HWAN will prevail on this appeal, and is thus entitled to a stay. Specifically, the Division repeatedly represented to this Court and to the district court that NRS 690C prohibits any entity (including those entities who are not service contract obligors) from selling service contracts without a certificate of registration (representations that the district court relied upon in rendering its decision). Nevertheless, on December 2, 2019 Division staff confirmed in writing to service contract industry representatives that service contract sales agents can sell service contracts without a certificate of registration.<sup>3</sup> This is dispositive.

---

<sup>2</sup> Five days from January 7, 2020 would have been January 12, 2020, a Sunday.

<sup>3</sup> These writings are attached to the Reply as Exhibit 2. The bulletin subsequently prepared by service contract industry representatives based on the Division’s representations is attached to the NSC Motion for Stay as Exhibit 16.

Ignoring the proverbial elephant in the room, the Division seeks to strike HWAN's Reply for three technical (and inapposite) reasons. First, the Division claims that "[t]here is no motion pending before the Court" and HWAN's Reply "is in effect a new motion for stay." Motion at 2-3. Second, the Division claims the Reply presents new matters that do not relate to the Division's December 23, 2019 opposition to HWAN's NSC Motion for Stay, in that the Reply addresses the district court's denial of the DC Motion for Stay. Third, the Division argues that the Reply is untimely because any reply should have been filed within 7 days of service of the Division's December 23, 2019 opposition, or by December 30, 2019. None of these arguments have any merit.

**A. The NSC Motion for Stay Is Currently Pending Before This Court, and As Such, the Reply Is Not a Fugitive Document Because HWAN Is Entitled to File a Reply Under NRAP 27(a)(4).**

The Division's first argument that the Reply is a fugitive document is misguided. Despite the plain language in the Order Granting Temporary Stay that this Court did not express any "opinion on the propriety of a stay pending appeal," the Division claims that the Order Granting Temporary Stay "adjudicated" the NSC Motion for Stay on December 23, 2019. Motion at 3. This is incorrect. The Order Granting Temporary Stay simply addressed the emergency consideration requested by the NSC Motion for Stay, and it did not "adjudicate" or dispose of the NSC Motion for Stay. The NSC Motion for Stay seeks a stay of the Order pending appeal

under NRAP 8. This Court has not ruled on the relief therein requested, and instead required a status report from HWAN after the district court ruled on the DC Motion for Stay. The request for a status report demonstrates that the NSC Motion for Stay was not “adjudicated” and rather remains pending before this Court.

And HWAN, as the movant, is entitled under NRAP 27(a)(4) to file a reply to the Division’s Response. The fact that this Court entered the Order Granting Temporary Stay does not dispense with briefing remaining on the NSC Motion for Stay, as that Order Granting Temporary Stay is completely silent on the matter of remaining briefing. As the movant, HWAN is entitled to file a reply brief in support of its motion, and would typically be afforded the final word on its own motion in any event. *See* NRAP 27(a)(4) (authorizing a reply by the movant).

**B. The Reply Comports with NRAP 27(a)(4)**

The Division’s second argument that the Reply presents matters that do not relate to its opposition in violation of NRAP 27(a)(4) is also incorrect. The Division claims that because the Order Denying Stay did not exist at the time of the filing of the Division’s Response, the discussion relating to that denial in the Reply violates NRAP 27(a)(4). But the Division’s December 23, 2019 opposition directly accuses HWAN of failing to fulfill NRAP 8(a)(1)(A)(i) and (ii), which require showing either that “moving first in the district court would be impracticable” or that “a motion having been made, the district court denied the motion or failed to afford the

relief requested and state any reasons given by the district court for its action.” Response at 4. Largely because the Division opposed the Motion for OST and refused to consider a stipulated shortened briefing schedule, by the time HWAN had to file its NSC Motion for Stay, no order had yet been entered by the district court on the DC Motion for Stay. Thus, HWAN set out these facts showing why moving first in the district court would be impracticable and that the district court failed to afford the relief requested in its NSC Motion for Stay, but advised the Court that no ruling had yet been issued on the DC Motion for Stay. The Division used the lack of a district court ruling against HWAN in its Response.

Now that the Order Denying Stay has been entered, the Division claims that HWAN addressing the ruling in the Reply constitutes a violation of NRAP 27(a)(4). The Division cannot reasonably claim on the one hand in its Response that HWAN did not address a non-existent district court ruling and then on the other hand claim that HWAN’s discussion of the entered district court ruling in its Reply is improper. The Division put HWAN’s inability to discuss the non-existent district court ruling directly at issue in its Response, and HWAN is entitled under NRAP 27(a)(4) to address in its Reply matters presented in the Division’s Response.

Nor is the Division prejudiced by HWAN’s discussion of Order Denying Stay. HWAN’s discussion of that order is limited to the following: (1) the district court

improperly analyzed the NRAP 8 factors, which only apply to the Nevada Supreme Court, and (2) the district court improperly denied the stay under NRCP 62(d).

As to the first, in its Response, the Division makes this same argument ultimately adopted in the Order Denying Stay: that HWAN did not set out the NRAP 8 factors in its DC Motion for Stay and the factors do not support a stay. Response at 4 (“none of the grounds asserted before this Court under NRAP 8(c), have been included in the district court’s motion”). HWAN’s discussion of how the district court improperly analyzed the NRAP 8 factors in the Order Denying Stay is the same as any discussion in reply to the Division’s Response regarding why the NRAP 8 factors were not originally included in the DC Motion for Stay. Therefore, not only was this a matter referenced in the Response properly analyzed on reply, but HWAN’s analysis of the misapplication of the NRAP 8 factors by the district court in connection with the Order Denying Stay is the same as HWAN’s analysis of why it did not include the NRAP 8 factors in the DC Motion for Stay in the first place.

As to the second, the district court’s reasons for denying the stay under NRCP 62(d) as discussed by HWAN in the Reply are exactly the reasons that were advanced by the Division for denial of the stay. To say the Division is prejudiced because HWAN discussed the district court’s ruling under NRCP 62(d) is unreasoned. The district court’s ruling under NRCP 62(d) is the Division’s argument against the stay under NRCP 62(d), which was adopted by the district court in its

entirety.<sup>4</sup> There is no other response from the Division on this matter. The entirety of the parties' positions on the issue have been presented to this Court with HWAN's Reply: HWAN's position in the Reply and the Division's position adopted in the district court's Order Denying Stay.

Likewise, the arguments advanced in the reply regarding the Division's position that sellers of service contracts need not hold a certificate of registration are directly responsive to the Division's contention in the opposition to the contrary. Opp. at 6.

Therefore, HWAN's Reply complies with NRAP 27(a)(4) in that it only addresses matters raised in the Division's Response, and the Division is not prejudiced by HWAN's Reply in any event.

### **C. The Reply Is Timely**

HWAN did not violate NRAP 27(a)(4) or "the Court's directive." NRAP 27(a)(4) provides for a reply brief within 7 days of service of a response to a motion, but here, both the Response and the Order Granting Temporary Stay were entered on the same day, December 23, 2019. Counsel for HWAN confirmed on December 30, 2019 with the Nevada Supreme Court clerk that no reply deadline was on the court's calendar. Ex. 1. Moreover, the only issue not addressed by the Order

---

<sup>4</sup> Indeed, the Division drafted the Order Denying Stay and included all of its own arguments.

Granting Stay was the timing of the briefing remaining on the NSC Motion for Stay, i.e., HWAN's reply brief. The silence of the Order Granting Temporary Stay on the matter combined with the absence of any briefing deadline on schedule with the Nevada Supreme Court clerk suggests that no reply was due to this Court on December 30, 2019 in connection with HWAN's NSC Motion for Stay. However, it was unclear whether the timeframe for HWAN's reply would also begin to run at the same time as its timeframe for filing a status report in accordance with the Order Granting Temporary Stay, from the Notice of Entry of the Order Denying Stay. As such, and in an abundance of caution that HWAN's timeframe for its reply brief began to run at the same time as the timeframe for its status report to this Court, HWAN filed both its status report and Reply together, on January 13, 2020.

Again, the Division is not prejudiced simply because HWAN filed a Reply. With any motion, the movant typically has the last word with the last filed brief. *See* NRAP 27(a)(4) And any arguments the Division may have in response to HWAN's Reply are already incorporated and adopted in their entirety in the district court's Order Denying the Stay. HWAN's filing of a reply brief in support of its own motion does not prejudice the Division.

### **III. CONCLUSION**

HWAN respectfully requests that this Court deny the Division's Motion to Strike HWAN's Reply.

DATED this 22nd day of January, 2020.

/s/ Sydney R. Gambee  
Constance L. Akridge, Esq.  
Nevada Bar No. 3353  
Sydney R. Gambee, Esq.  
Nevada Bar No. 14201  
Brittany L. Walker, Esq.  
Nevada Bar No. 14641  
HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134

*Attorneys for Home Warranty Administrator of  
Nevada, Inc. dba Choice Home Warranty, a  
Nevada corporation*

### **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(1)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **HWAN'S OPPOSITION TO MOTION TO STRIKE APPELLANT'S REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP 27(e)** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on the 22nd day of January, 2020.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System or by first class United States mail, postage prepaid, at Las Vegas, Nevada as follows:

**Via Electronic Filing System:**

Richard P. Yien  
Joanna N. Grigoriev

/s/ Joyce Heilich  
An Employee of Holland & Hart LLP