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** First Judicial District Court Case No. 17 OC 00269 1B

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

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as required by NRAP 26.1(a) and must be disclosed. These representations are made in order than the judges of this court may evaluate possible disqualification or recusal.

HWAN is a Nevada domestic corporation. It is not owned by any parent corporation and no publicly held company owns more than 10% of HWAN's stock.

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ARGUMENT

This is appeal is about regulatory overreach by the Division, not any purported "unlawful scheme" in other states. Emmermann found no unlawful scheme in other states involving HWAN. Regulatory actions from other states against CHW,[1] HWAN's administrator, were presented to Emmermann on the theory that HWAN had not disclosed them to the Division on HWAN's own renewal applications, but Emmermann found that HWAN was not required to disclose regulatory actions against its administrator. Yet even now, the Division insists that HWAN "was able to avoid disclosure of CHWG's[2] disciplinary actions in other states," though Nevada law does not require disclosure of an administrator's discipline in other states. No "pattern of deception" been established in the record here.

Instead, the record reveals that HWAN became a registered service contract provider in 2010 after its President was made aware of service contract provider registration requirements in Nevada.[3] Shortly thereafter, HWAN submitted a form service contract to the Division for approval listing itself as the obligor and

[1] Capitalized terms not otherwise defined herein have the same meaning as in HWAN's Opening Brief.

[2] The Division uses "CHWG" and HWAN uses "CHW" to describe the same entity, CHW Group, Inc.

[3] While some states require such registration, some do not.

"Choice Home Warranty," meaning CHW Group, Inc. DBA Choice Home Warranty, as its administrator. While that form service contract was approved by the Division, HWAN did not update its renewal application forms for subsequent years to change the administrator field from "self" to "CHW." Further confusing matters, after internally acknowledging in 2011 that HWAN and CHW were two separate entities, in 2014 the Division expressly required HWAN to register the DBA "Choice Home Warranty," the same DBA as CHW, citing "confusion" among consumers.

With the Administrative Case in 2017, the Division then noticed violations against HWAN for not disclosing regulatory actions in other states against CHW and for conducting business unsuitably based on consumer complaints. While Emmermann dismissed these violations, the Division backfilled the noticed violations with a new, previously unnoticed theory—that HWAN was not permitted to use its administrator to market and sell contracts on its behalf because CHW was not registered with the Division.

Through the Administrative Case, the Division seeks to squeeze a square peg through a round hole, rewriting the statutory scheme regulating service contract providers in Nevada to fit its unwarranted punishment of HWAN. Nevada law requires registration only of service contract providers, or obligors of service contracts, not administrators or sales agents. The Legislature expressly defined

"provider" as one who is obligated to a holder of a service contract, and no more. The Division now attempts to expand the statutory service contact "provider" definition beyond the obligor to vendors to whom the obligor delegates sales and administrative functions. This, despite the fact that there is no prohibition in Nevada on providers delegating these functions and no requirement that such vendors be licensed as providers since it is the obligor—not the sales agent or administrator—who is financially responsible to the service contract holder.

Moreover, the Division cannot simply request in its Answering Brief that the Administrative Decision be affirmed "unmodified" without having ever perfected any cross-appeal of the District Court Order.

I. The Division Failed to Give Proper Notice of the Charges, in Violation of HWAN's Due Process Rights.

The Division cannot simply fail to prove the violations it noticed and then backfill additional factual allegations at hearing. HWAN did not have notice of the Division's interpretation that NRS 690C.150 requires all those who sell or offer for sale service contracts, whether as provider or on behalf of a registered provider, to hold their own COR. Nor did HWAN have notice of the Division's intent to apply such an interpretation to HWAN's arrangement with CHW. Had HWAN had such notice, it would have presented other evidence showing this is not how the Division interprets this statute with respect to other providers, along with the

inconsistencies that result from such an interpretation. But HWAN did not get this opportunity because of the bait and switch tactics of the Division.

The Division admits that its violations noticed were "supported by different facts."[4] This is exactly the problem. At hearing, HWAN showed that HWAN and CHW are two separate entities and that HWAN was not asked on its renewal application about the regulatory actions in other states against its administrator.[5] The Division claims that because HWAN demonstrated HWAN and CHW are two separate entities, HWAN had "notice and opportunity to prepare any defense that such a theory would necessitate."[6] This is an oversimplification that falls flat when placed in the context of the actual violations alleged.

The Division initially accused HWAN of failing to disclose regulatory actions against CHW.[7] Emmermann correctly found that HWAN was not required to disclose CHW's disciplinary actions because CHW is a separate entity.[8] However, Emmermann found that HWAN had failed to list CHW as administrator on its renewal applications, also a false representation of material fact.[9] Even

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[4] Answering Brief ("Ans.Br.") at 18.

[5] App.Vol.VIII. 1396-97.

[6] Ans.Br. 18.

[7] App.Vol.I. 1-8.

[8] App.Vol.VIII. 1396-97.

[9] App.Vol.VIII. 1398. The Division blatantly misrepresents the record, stating Emmermann "found, that HWAN had deliberately concealed from the Division the

assuming the Division did not know HWAN had an administrator, CHW,[10] the Division's argument as applied to this first set of violations almost holds water, that HWAN failed to list its administrator (CHW) on renewal applications. But applied to the other category of violations alleged, this argument completely falls apart. HWAN could not anticipate a whole new interpretation of NRS 690C.150 or a change in the factual allegations underlying the "unsuitable" business charge. *How* HWAN is alleged to have conducted business unsuitably is the key component to developing HWAN's defense of the same. The facts are critical to giving notice of the issues at hand. And the Division has never before taken this position; therefore, HWAN could not have anticipated the Division's characterization of the same as a "violation" or "unsuitable" conduct, when the Division's current position is not even mentioned in its Complaint.

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existence of CHWG, and the fact that it was HWAN's administrator." Ans.Br. 16. Emmermann did not find deliberate concealment. Emmermann found that the form service contract the Division approved in 2011 names HWAN as obligor and Choice Home Warranty, who Emmermann identified as CHW, as administrator. App.Vol.VIII. 1382, 1395. Emmermann noted that approval of the contract showing that Choice Home Warranty administered the contract was not equal to approval of Choice Home Warranty marketing or selling service contracts. *Id.* 1402. Emmermann also noted the discrepancy between the contract and "self" listed as administrator on each subsequent renewal application, but she did not make any finding that HWAN deliberately concealed the existence of CHW. *Id.*

[10] Of course, because the Division had to have known of HWAN's use of CHW as administrator as detailed in Section IV., *infra*, the Division had no excuse for failing to notice this violation prior to hearing.

Moreover, *State ex rel. Kassabian v. State Bd. of Medical Examiners*, does not permit the agency to simply notice the statutory violation and change the factual basis at whim. In *Kassabian*, the respondent argued that the Board of Medical Examiners proceeded with a different charge at the hearing than noticed in the complaint. 68 Nev. 455, 466-68, 235 P.2d 327, 332-33 (1951). The board noticed the charge as "unprofessional conduct" based on performing an abortion. *Id.* At the hearing, the board initially proceeded on another definition of unprofessional conduct than the one noticed—that the respondent had been convicted of a felony. *Id.* But the board eventually did introduce evidence of the noticed charge, performing an abortion. *Id.* Therefore, the board was found to have actually adjudicated the charge as originally noticed.[11] *Id.*

With HWAN, the opposite is true. The Division initially alleged that HWAN was conducting business unsuitably based on consumer complaints.[12] The Division simply lost on its original theory of unsuitability, with Emmermann finding that "the Division's evidence was insufficient to show that [HWAN]

[11] Likewise, in *Dutchess*, the Board included within its accusation the *factual* allegations which formed the basis of violations adjudicated at hearing. *Dutchess Business Services, Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 712-13, 191 P.3d 1159, 1166-67 (2008).

[12] App.Vol.I. 6.

engaged in unfair practices in settling claims."[13] The Division then backfilled[14] an entirely new theory at hearing, that HWAN acted unsuitably through its choice of sales agent. HWAN could not have anticipated from an allegation that it was conducting business unsuitably based upon complaints that the Division would then at hearing advance a theory that HWAN acted unsuitably by using an unregistered administrator/sales agent.[15] Therefore, HWAN did not have the opportunity to present any evidence or make any legal argument as to this issue.[16]

II. Nevada Law Requires Registration Only of Obligors of Service Contracts.

A. The Division's Interpretation of NRS 690C.150 Ignores NRS 690C.070 and NRS 690C.120.

The Division's interpretation of NRS 690C.150 cannot be harmonized with the other provisions of NRS Chapter 690C or with the legislative intent to regulate only the obligor as the financially responsible party. Despite the express definition

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[13] App.Vol.VIII. 1399.

[14] The Division expressly states that a "disclosure of disciplinary actions would have likely resulted in a denial of HWAN's original application for certificate of registration." Ans.Br. 27. The Division cannot achieve this result by substituting whatever factual allegations are convenient.

[15] The Division's argument that HWAN did not request a more detailed statement is a red herring. Ans.Br. 18 n.41. The Division clearly identified the facts upon which its alleged violations were based in the Complaint, and a more detailed statement was not needed. App.Vol.I. 1-8.

[16] HWAN attempted to produce such evidence in connection with the Second PJR, which the Commissioner refused to admit because the interpretation of NRS 690C.150 was already "decided" in this Administrative Case.

of "provider" in NRS 690C.070 as the service contract obligor, the Division attempts to craft its own definition of a provider solely based upon its interpretation of NRS 690C.150 as creating "provider" functions, ignoring other provisions in NRS Chapter 690C that undercut this erroneous construction. There is no delineation in NRS Chapter 690C between "provider" versus "administrator" functions.

The term "provider" is expressly defined as "a person who is obligated to a holder pursuant to the terms of a service contract to repair, replace or perform maintenance on, or to indemnify the holder for the costs of repairing, replacing or performing maintenance on, goods." NRS 690C.070. A "holder" is a resident of Nevada who purchases a service contract or is legally in possession of and entitled to enforce the same. NRS 690C.060. Thus, whether a person is a "provider" depends not on what functions that person performs, but whether that person is ***obligated*** to a holder pursuant to the terms of a service contract.

Indeed, there is no provision in NRS Chapter 690C prohibiting a provider from delegating duties to an administrator or other agent. Rather, a provider is permitted to use an administrator, "a person who is responsible for administering a service contract that is issued, sold or offered for sale by a provider." NRS 690C.020. What constitutes "administering" a service contract is not defined. An administrator is not required to hold a COR, only a provider. NRS 690C.150 ("A

provider shall not issue, sell or offer for sale service contracts in this state unless the ***provider*** has been issued a certificate of registration pursuant to the provisions of this chapter") (emphasis added).

The Division attempts to contort the meaning of NRS 690C.150 to mean that ***anyone*** who issues, sells, or offers for sale service contracts must hold a COR. But the Legislature provided for registration and financial security of only the ***provider***, the person ***obligated*** to a holder of a service contract. NRS 690C.150; NRS 690C.070. The Division's oversight of the ***administrator*** of service contracts ends at disclosure. NRS 690C.160(1)(d); NRS 690C.260(1)(d)(1); *see also* Section II.C., *infra*.

Moreover, the definition of administrator as "a person who is responsible for administering a service contract that is issued, sold or offered for sale by a provider" does not restrict ***how*** a provider may "sell or offer for sale service contracts," as the Division suggests. *See* Section II.C., *infra*. The Division argues that the provider, itself, must sell or offer for sale service contracts, claiming that the provider may not delegate marketing and/or sales to a sales agent or administrator. But again, this is nowhere to be found in NRS Chapter 690C. In fact, NRS 690C.120(2) clearly distinguishes a "person who sells service contracts," from a provider. NRS 690C.120(2) ("provider, person who sells service contracts, administrator or any other person is not required to obtain a certificate of authority

from the Commissioner pursuant to chapter 680A of NRS to issue, sell, offer for sale or administer service contracts"). If the Legislature did not contemplate that a provider could delegate the sales function to a third party (where the provider remains the one obligated), then there would be no need to include "person who sells service contracts" in NRS 690C.120(2). Such person would not exist.

The Division attempts to explain NRS 690C.120(2) away by arguing that "person who sells service contracts" refers to other types of service contracts referred to in NRS 690C.100(1) ("Unregulated Service Contracts"), not NRS Chapter 690C regulated service contracts. Under NRS 690C.100(1), the Unregulated Service Contracts are excluded from the application of "the title," meaning the entire Nevada Insurance Code (Title 57), not just the registration requirements of NRS Chapter 690C. Because the Unregulated Service Contracts are already exempted from Title 57 by NRS 690C.100(1), the Division's assertion that NRS 690C.120(2), exempting "persons who sell service contracts" from only one part of Title 57 (i.e., the insurer certificate of authority requirement of NRS Chapter 680A), refers not to NRS Chapter 690C regulated service contracts but to the Unregulated Service Contracts would create an irreconcilable inconsistency in NRS Chapter 690C. To accept the Division's argument that "persons who sell service contracts" in NRS 690C.120(2) refers to the Unregulated Service Contracts would therefore render those words nugatory. This the Court cannot do. *Charlie*

Brown Const. Co., Inc. v. City of Boulder City, 106 Nev. 497, 502-03, 797 P.2d 946, 949 (1990) ("statutes . . . must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory. (citation omitted) And, there is a presumption that every word, phrase and provision in the enactment has meaning.") , *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

Therefore, the only logical interpretation is that providers, administrators, and persons who sell service contracts within the ambit of NRS Chapter 690C are not required to hold a certificate of authority. The chapter therefore necessarily contemplates that a person who sells service contracts may be someone other than the provider, so long as the provider is the one obligated under the service contract and holds a COR pursuant to NRS 690C.

HWAN is the registered provider and the one obligated to holders under the terms of the service contracts issued by HWAN.[17] HWAN is permitted to delegate certain functions, including marketing and sales on its behalf, to a nonregistered administrator, so long as HWAN remains the one obligated on the service contracts and registered pursuant to NRS Chapter 690C.

[17] App.Vol.III. 482, App.Vol.VIII. 1382.

B. To Require Both the Obligor and Obligor's Sales Agent to Register Would Lead to Absurd Results

Instead of holding HWAN liable for CHW's regulatory actions, Emmermann found, against substantial evidence on the whole record, that HWAN was "merely a figurehead, enabling an unlicensed entity to engage in the business of service contracts in Nevada under HWAN's license."[18] But this is not what the evidence at hearing revealed, and is yet another symptom of Emmermann's misapplication of Nevada law in holding that a provider is one who ***sells*** service contracts, rather than one who is ***obligated*** on service contracts. The evidence at hearing revealed that HWAN is responsible for regulatory compliance ***and*** for fulfilling its obligations to holders under the service contracts.[19] HWAN used CHW as its administrator to administer the contracts and to market and sell the contracts on HWAN's behalf. This does not change the obligor of the service contracts.[20] No evidence at hearing supports the idea that HWAN is a figurehead in this respect; rather HWAN fulfills claims made under the service contracts.

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[18] App.Vol.VIII. 1403.

[19] App.Vol.VI. 1027-28, 1040, 1053, 1124-132; App.Vol.III 482.

[20] The Division continues to conflate HWAN and CHW. For instance, Mr. Mandalawi did not testify it is his role as president of HWAN to oversee the day to day activities of CHW. Ans.Br. 7. Rather, Mr. Mandalawi responded to a question about his interaction with CHW on a daily basis, saying that he ensures CHW is working within the operating agreement between the two and from time to

The Nevada Legislature intended for there to be oversight and accountability between the provider and administrator. *See* Section II.C., *infra*. The provider is the one ultimately accountable to the customer and to the state, so, for instance, it makes sense that HWAN would work with CHW to resolve complaints, as CHW operates as administrator for HWAN.[21] This does not demonstrate a commingling of funds between HWAN and CHW.

Indeed, the record does not show HWAN's reserve account was improperly commingled. Only deposits ***from*** the CHW account were made ***to*** the HWAN account. These transfers are consistent with testimony that CHW collects the payment from customers and transfers the money to HWAN, the provider.[22] The record reveals no transfers ***from*** the HWAN account ***to*** the CHW account. Even the Division's citation to the record for this misleading assertion does not demonstrate any commingling of funds; rather, AA001202 reflects testimony confirming that both are HWAN accounts—a reserve account and an operating

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time consumer complaints would escalate to him. App.Vol.VI. 1119. Then, he was asked whether he was wearing the hat of president of HWAN when overseeing "that" function, referring back to handling consumer complaints. *Id.* Mr. Mandalawi confirmed that is "really more of HWAN" and confirmed that it is his role as president of HWAN to oversee ***those*** day-to-day activities of CHW, the oversight of complaints, not all activities of CHW on a daily basis. *Id.*

[21] Naturally, there is a common interest between both companies in resolving consumer complaints. *Id.* 1093.

[22] App.Vol.VI. 1081-82.

account. The only transfers out of the HWAN reserve account were those from the reserve account to an operating account, which is what would be expected of the business operating as normal.[23] Moreover, there is nothing improper about an administrator sending "goodwill" payments to customers to resolve complaints, as companies often resolve matters with "goodwill" payments, "settlements," "credits," etc.[24] HWAN remains the entity obligated to the customers in Nevada, not CHW.[25]

The Division's comparison to *Gaessler v. Sheriff, Carson City* is entirely distinguishable. There, the licensee argued that he advertised a property and did not act as a real estate broker or salesman, but the statutory requirements for real estate brokers specifically contemplate that those who charge an advance fee for advertising a property for sale or lease must be licensed under NRS Chapter 645. 95 Nev. 267, 270, 592 P.2d 955, 957 (1979). As detailed *supra*, this is unlike the licensing scheme in chapter 690C of the NRS, which requires only the obligor of a service contract to be licensed and necessarily assumes (e.g., NRS 690C.120(2)) that marketing and selling of service contracts by an unregistered sales agent on behalf of a registered provider is permitted.

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[23] App.Vol.II. 246-259.

[24] App.Vol.VI. 1029, 1130-31.

[25] App.Vol.III 482; App.Vol.VI. 1053; App.Vol.VII. 1222.

Indeed, the requirements for financial security make it abundantly clear that the Legislature created a statutory scheme for registration of the one ***obligated*** under the service contract, including financial security requirements to ensure the provider could pay the claims.[26] NRS 690C.170. A sales agent who sells a service contract obligating a registered provider is not the target of statutory registration requirements, and therefore financial security requirements, because the sales agent is not on the hook to pay claims. The provider is.

To carry the Division's argument through to its logical conclusion, the Division would read NRS Chapter 690C to require both the provider—the obligor under the service contracts—***and the sales agent***—who is not obligated under the service contracts—to register and post financial security. Both the provider and sales agent would be subject to the financial security requirements of NRS 690C.170, on the very same universe of service contracts and claims resulting from those contracts (those sold by the sales agent on behalf of and obligating the provider).

Therefore, the Division's position is not supported under any provision of NRS Chapter 690C and would, without any consumer protection rationale

[26] The Division agrees the purpose of financial security is to make sure claims are honored if the "provider was to go into insolvency." App.Vol.IV. 649; App.Vol.VI. 945.

whatsoever, create redundant security requirements for the payment of service contract claims and presumably require duplicative claim payments to the service contract holder by both the obligor and the sales agent.

C. The Legislative History Reveals That Only the Obligor Need Be Registered.

Even assuming arguendo that the statute is ambiguous as to the proper registrant, the legislative history of NRS Chapter 690C supports HWAN's interpretation of NRS 690C.150. As an initial matter, the Division incorrectly claims that HWAN argues for the first time that the legislative history supports its position. HWAN argued that the legislative history supports its position to the district court, and HWAN was unable to argue the same before Emmermann because it had no idea that Emmermann would adjudicate this registration issue in her order, as the issue was not noticed.[27] Conversely, the Division makes novel legislative history arguments on appeal, even including a document in Volume V of Respondent's Appendix that was never presented to the district court (AA003286-AA003295).[28]

Regardless, the legislative history makes clear that the Legislature intended to have only the provider, or obligor, registered with the Division, and all other

[27] App.Vol.I. 1-8.

[28] This document and the Division's related new arguments on appeal are outside the record and should not be considered by this Court. NRS 233B.135(1)(b).

persons involved in service contracts would fall under the umbrella of the registered provider:

> for simplicity of regulation they attempted to ensure the provider, as the obligor, was the "one stop shop." The administrator's activities were the responsibility of the provider. They were responsible for their administrator's actions and the Division of Insurance needed to go to the provider and inform them they had a complaint, which would allow for clarification of the problem.[29]

The Division contorts the use of the word "issue" in the definition of administrator to mean that the Legislature intended that "issue" be a provider function.[30] But this is not what the Legislature noted upon considering that language. Rather, the problem was with the undefinable nature of the term "issue," which could lead to the very misunderstanding that the Division now commits. The Legislature accommodated the change in language because there was concern that:

> Issue, as used in the act, was not a definable term. Limiting the term "issue," in the manner done in the bill, excluded a number of other avenues for delivery of service contracts or for the way providers would do business in the state. They thought there was a common understanding of the term, and the definition in the bill did not do it justice.[31]

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[29] App.Vol.XII. 2305.

[30] Ans.Br. 29.

[31] App.Vol.XII. 2305.

The Legislature did not remove the term "issue" from the definition of administrator because an administrator cannot "issue" service contracts or because only providers can "issue" service contracts, but for the exact opposite reason. Some providers may use another entity, an administrator or sales agent, to issue, or deliver, their service contracts. The Legislature did not want to prevent the way some providers do business in this state, preferring instead to differentiate between the provider, who is obligated to carry out the terms of the service contracts, and the administrator, who would "manage[] the program behind the scenes."[32] Indeed, "[a]dministrators were not contractually bound to provide the service but made filings with the state, oversaw the accounting of the program to ensure financial standards were met, and ensured the provider met obligations."[33]

This is exactly what is happening here. The Division is operating with a definition of "issue" that is so narrow it "exclude[s] a number of other avenues for delivery of service contracts" and excludes the way providers "do business in the state."[34] HWAN is now being punished because of this unduly narrow conception of "issue" (as well as sell and offer for sale). HWAN is the provider, the obligor of the service contract and the one responsible for fulfilling the financial terms of the

[32] *Id.*

[33] *Id.*

[34] *Id.*

service contract to the holder. CHW marketed, sold, and issued (in the sense of delivered) the service contracts to the holders on behalf of HWAN. CHW further administers the service contracts, operating "behind the scenes" to ensure HWAN fulfills its obligations by arranging for repair of covered goods under the terms of the service contracts. It was always HWAN that fulfilled these obligations of paying for repairs on covered claims, and it was always HWAN holding the COR with the Division. This was exactly what the Legislature envisioned when it designed the registration scheme in NRS Chapter 690C.

And where there are customer complaints, the provider is the one accountable. While the Division claims now it was uncertain of the relationship between "Choice Home Warranty" and HWAN, and while it claims without any support in the record whatsoever that this "has also been clearly a problem for the Division, as the regulator," the Division was nonetheless able to identify that the appropriate provider was HWAN, and addressed those consumer complaints with HWAN in a satisfactory matter.[35] This is exactly what the Legislature intended.

[35] Ans.Br. 30. The Division asked HWAN to register the same DBA as CHW, Choice Home Warranty. App.Vol.IV. 697:19-23. Thus, despite the confusing manner in which it addressed these entities, it was clear that when faced with a consumer complaint about HWAN, the Division knew it should address that complaint with HWAN. *See, e.g.*, App.Vol.V. 747-48, 759-763. And in each circumstance, HWAN resolved the complaint to the Division's satisfaction. *Id.* Thus, the Division's cries of danger to the public are purely speculative at best, and at worst, a gross misstatement of a record demonstrating that HWAN has remedied

The buck stops with HWAN, so to speak, and the Division has always been able to remedy complaints with the provider, HWAN. It need not also engage with the administrator, CHW, who operates behind the scenes and for whose actions HWAN is already accountable.

Nor is HWAN a "bad actor" who is "selling and issuing policies without financial backing."[36] HWAN maintains financial security in compliance with the statutory requirements governing financial security for the protection of Nevada consumers.[37] Indeed, to adopt the Division's interpretation and require CHW to also meet statutory financial requirements for ***providers*** would provide no additional support to consumers whatsoever because CHW is not obligated on any service contracts in the first place.

III. HWAN's COR Did Not "Automatically" Expire.

The Division argues it was permitted to deny HWAN's renewal application for its COR in 2016 without any notice or hearing to HWAN, stating that NRS 690C.325 does not apply because HWAN left three blanks on its application concerning customer complaints.[38] This argument was not accepted even by

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every complaint with which the Division has become involved.

[36] Ans.Br. 30.

[37] App.Vol.II. 218.

[38] Emmermann found HWAN's COR expired because it was not renewed by November 2016, but this does not mean she found that the COR was not renewed because the application was incomplete. *See* Ans.Br. 5. Completeness was the

Emmermann, who found that "when a provider timely submits a renewal application that is denied, then the Division must issue a notice to the provider about the denial, providing an explanation for the denial and an opportunity for the provider to requests a hearing on the propriety of the denial."[39] Likewise, NRS 233B.127(3) requires notice and an opportunity to show compliance prior to "revocation, suspension, annulment, or withdrawal of any license." Indeed, NRS 690C.160(3) requires simply that an application on a form prescribed by the Commissioner be submitted prior to expiration, not that such application be deemed complete by the Division.[40] NRS 690C.160(3). To determine otherwise would allow the Division to deem certain applications incomplete without a

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Division's reason for denial after the fact, but the Division failed to comply with NRS 690C.325(1) or NRS 233B.127's requirements for a prior hearing or certain findings by the Commissioner to "refuse to renew." There was no hearing adjudicating the propriety of the non-renewal.

[39] App.Vol.VIII. 1404.

[40] The Division's argument that HWAN's application was incomplete is contradictory at best. The Division claims that "[d]espite the Division alerting HWAN to the missing information, HWAN did not provide it prior to the expiration of its certificate of registration." Ans.Br. 5. First, HWAN disputed that it received requests for information. Second, and more importantly, the Division itself did not even request the information until February 1, 2017. App.Vol.III. 321. Thus, it is impossible for HWAN to have provided the information prior to "automatic" expiration on November 18, 2016. The COR must have necessarily been still in effect on February 1, 2017. The Division cannot now deem COR's "automatically" expired when it was still processing the renewal application months after the "automatic" expiration.

hearing, despite the plain language in NRS 690C.325(1) that the Commissioner may refuse to renew a COR only after hearing and express findings.

Despite the Division's failure to provide statutorily mandated due process and HWAN's timely submitted renewal application, Emmermann erroneously deemed HWAN's COR automatically expired. HWAN was entirely precluded from demonstrating that it had satisfied all the renewal requirements with its 2016 Application. Allowing HWAN to submit another renewal later did not cure this defect or moot this issue. HWAN has been forced to continue to litigate this issue with the Division after the underlying proceeding, as the Division denied HWAN's subsequent renewal application without adequate basis.[41] The Division cannot simply withhold due process of law required by express statute and purport to save itself from its failure at hearing. The errors have simply compounded and continued through the years, as the subsequent renewal application was itself also denied without a prior hearing as required by NRS 690C.325.

Even so, the Nevada Supreme Court may consider an issue that would be moot "if it involves a matter of widespread importance that is capable of repetition, yet evading review." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d

[41] The Division incorrectly states that "HWAN submitted an application, which was processed, and denied after a hearing thereon," but the fact that the Division did not hold a hearing prior to denial is the subject of the Second PJR. Ans.Br. 5-6.

572, 574 (2010). The Division cannot simply allow CORs to expire and simultaneously claim *ex post facto* that the error is a moot issue because the hearing officer attempted to craft a solution to correct its mistake. Thus results a cycle of disregard for due process and unending insufficient corrective action. The Division must follow the statutory provisions in NRS 690C.325(1) to deny a renewal application, and it cannot rely on the one-year time limit of a COR in NRS 690C.160(3) to eviscerate the due process requirements in NRS 690C.325(1). *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). Given the Division's predilection for denying renewals without holding a hearing prior to denial as required by NRS 690C.325 (as evidenced by both this appeal and the Second PJR), the Court may determine this issue now, regardless of any ruling of Emmermann attempting to remedy the Division's statutory failure.

IV. Alternatively, the Division Is Estopped from Assessing Fines Against HWAN for an Arrangement of Which It Was Fully Aware and Which Does Not Violate NRS Chapter 690C.

The Division continues to misrepresent the findings of Emmermann in an attempt to further the Division's narrative that HWAN was "hiding" CHW and its regulatory actions in other states. This narrative is not supported by the record. The evidence in the record demonstrates that the Division did in fact know that HWAN and CHW were two separate entities, the Division knew that CHW was HWAN's administrator, and the Division abruptly reversed course in an attempt to punish HWAN for this very same arrangement without statutory authority to do so.

This is the basis of HWAN's estoppel argument. HWAN plainly disputes that its arrangement with CHW violated Nevada law in the first place, but even if it does, HWAN committed to a course of conduct with the full knowledge of the Division and cannot now be punished for it.

The Division misrepresents the record, saying that HWAN first disclosed to the Division that CHW was a separate entity and HWAN's administrator in September 2017.[42] But HWAN had identified CHW as administrator in a form service contract approved by the Division in 2011.[43] Moreover, emails produced by the Division dating from 2010 and 2011 demonstrate that the Division was aware the HWAN and CHW were two separate entities and that HWAN used CHW as its administrator. Emmermann improperly excluded this evidence, determining on remand that the emails were immaterial.[44] This was plain error in light of the issues in the Administrative Case.

The emails demonstrate that in July 2010, before HWAN was licensed in Nevada,[45] the Division was investigating "Choice Home Warranty" when the

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[42] Ans.Br. 10.

[43] App.Vol.VIII. 1382, 1398.

[44] App.Vol.IX. 1759-767.

[45] Emmermann acknowledged that "Mandalawi and Hakim were not aware that other states required a license to sell this type of product. Choice Home Warranty was named in administrative actions in different states. As a result, Mandalawi created the Home Warranty Administrators name for states that require licensure." App.Vol.VIII. 1380. Nevada law permits this structure, where the provider

Washington regulator asked the Division if it had any complaints against Choice Home Warranty.[46] Dolores Bennett, Insurance Examiner for the Property & Casualty Section, referenced Choice Home Warranty as "CHW Group, Inc., DBA Choice Home Warranty" and acknowledged that Choice Home Warranty had planned to complete a registration application in Nevada.[47] By July 2011, Ms. Bennett confirmed in response to an email about a complaint about Choice Home Warranty that Choice Home Warranty was not registered as a service contract provider in Nevada.[48] Ms. Bennett further acknowledged that HWAN is registered as a service contract provider and had a form service contract pending for approval listing HWAN as the obligor and Choice Home Warranty as the administrator.[49] Given that Ms. Bennett had already learned Choice Home Warranty was CHW Group, Inc. back in July 2010,[50] presumably Ms. Bennett was aware that HWAN would be using CHW Group, Inc. DBA Choice Home Warranty as its

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registers with the state and the administrator works behind the scenes. Section II.C., *supra*.

[46] App.Vol.IV. 554-55.

[47] *Id.*

[48] *Id.* 550.

[49] *Id.*

[50] *Id.* 554.

administrator. That form service contract was indeed approved by the Division on August 26, 2011.[51]

In November 2011, Ms. Bennett confirmed again in an internal Division email that "Victor Mandalawi, who was listed as President of CHW Group, Inc., obtained a Certificate of Registration as a service contract provider a year ago with our office on 11/18/10 ***under a different corporation***: Home Warranty Administrator of Nevada, Inc."[52] Thus, by this time, the Division, specifically Ms. Bennett, knew that CHW Group, Inc. DBA Choice Home Warranty was not a registered service contract provider in Nevada, was a different corporation than registered service contract provider HWAN, and was being used by HWAN as administrator, as disclosed by HWAN in the form service contract that had been approved by the Division and identified as in use by HWAN in renewal applications for each year thereafter.

Later, in 2014, the Division requested that HWAN register the DBA "Choice Home Warranty." Only at hearing did the Division say that it believed at the time that HWAN and CHW were the same entity.[53] The Division's belated explanation

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[51] App.Vol.III. 480.

[52] App.Vol.IV. 548 (emphasis added).

[53] Emmermann did not find that this was *confirmed in a discussion with Mandalawi*. Ans.Br. 36. Rather, the Division itself "identified that Choice and HWAN were one and the same entity," (App.Vol.VIII. 1401) while Mr. Mandalawi testified that he was told at the time that the registration of the DBA

at the hearing that it believed HWAN and CHW to be one and the same is inconsistent with Ms. Bennett's emails from 2010 and 2011 determining HWAN and CHW were two different entities, with one holding a Nevada service contract provider registration and the other being used by the former as administrator.

NRS Chapter 690C requires only disclosure of a provider's administrator, not approval by the Division of the provider's selection of administrator or the agreement between them. NRS 690C.160(1)(d); NRS 690C.260(1)(d)(1). Here, the Division knew of the arrangement between HWAN and CHW, at the latest when it approved the form contract detailing the same, and cannot now reverse course and attempt to impose penalties upon HWAN for an arrangement of which it was well aware (and which is not violative of NRS Chapter 690C because licensing of administrators is not required). Even if such an arrangement violated the law, which it does not, it would be manifestly inequitable for the Division to remain silent and allow HWAN to continue to use CHW as its administrator for five years and then suddenly impose violations for each and every service contract sold by the administrator during those years.[54]

And despite the Division's argument to the contrary, the Division's own service contract provider application did not require the disclosure of regulatory

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was to prevent confusion among consumers. App.Vol.VI. 1093.

[54] App.Vol.VIII. 1405.

actions against an administrator. Emmermann correctly found the Division cannot require disclosure of the same by virtue of HWAN's registration of the same DBA (at the request of the Division).[55] Liability cannot then be imposed in the roundabout method used here, by holding HWAN liable for unsuitable conduct for using an administrator the identity of which the Division was undoubtedly aware.

The Court in *Las Vegas Convention and Visitors Authority v. Miller* recognized that estoppel may apply in circumstances where the governmental agency makes specific factual representations to an individual, and this is exactly what has happened here. 124 Nev. 669, 698, 191 P.3d 1138, 1157 (2008). The Division acknowledged the arrangement between HWAN and CHW when it approved the form service contract in 2011, then asked HWAN to register the same DBA in 2014. The Division cannot now impose fines on HWAN its course of conduct in using CHW as its administrator for five years. This is not a case where the Division is prevented from performing its governmental functions going forward (if the Division's interpretation of NRS 690C.150 is accepted by this Court); rather, the Division must be prevented from imposing penalties on HWAN for an arrangement of which it was aware.

V. The Fines Imposed on HWAN Should Be Reversed.

First, HWAN properly raised its statute of limitations argument before the

[55] *Id.* 1396-97.

district court.[56] In any event, the Division's citation to caselaw of other jurisdictions is inapposite because the action commenced against HWAN for fines and forfeiture of HWAN's license is clearly an action based upon a statute forfeiture or penalty, to which NRS 11.190(4)(b) applies by its plain language.

Second, despite the Division's assertion without citation to the record that "[s]ubstantial evidence unequivocally shows deliberate false entries," no such evidence of "deliberate" false entries exists within the record. Indeed, HWAN disclosed its administrator on a form service contract approved by the Division in 2011.[57]

Third, the Division attempts to characterize other service contracts as "undisclosed," to support Emmermann's findings, but none of those contracts were discussed at hearing, likely because those contracts are virtually identical to HWAN's approved contract HWA-NV-0711, save for one update to Choice Home Warranty's address.[58]

VI. The Division Cannot Request the Administrative Decision Be Affirmed "Unmodified."

The Division filed no cross-appeal in this matter, yet the Division seeks a reversal of a statutory cap imposed by the district court on the fines assessed

[56] App.Vol.XI. 2042-43.

[57] App.Vol.III. 480-87.

[58] *Compare* App.Vol.III. 481-487 *with* Resp.Vol.V. 3212-16.

against HWAN. In so doing, the Division confuses the standard of review of a district court's order on a petition for judicial review with the jurisdictional requirement that a party challenging the court's order must file a notice of appeal.

While this Court does not defer to a district court's findings in affirming, reversing, or, as here, modifying an administrative order on petition for judicial review, this is merely the ***standard*** of review. NRS 233B.150 provides that an aggrieved party may obtain review of any final judgment of the district court, and such appeal shall be taken as in other civil cases. NRAP 4(1)(2) requires any other party who also wishes to appeal an order to file a notice of appeal within 14 days of the first notice of appeal. "[T]imely notice of cross-appeal is mandatory and jurisdictional." *Mahaffey v. Investor's Nat. Sec. Co.*, 102 Nev. 462, 463, 725 P.2d 1218, 1218 (1986). This is the ***manner*** of review.

Only HWAN filed a notice of appeal, challenging the District Court Order to the extent it affirmed the Administrative Decision. Because the Division did not perfect any cross-appeal by filing a notice of appeal, it cannot seek to reverse the district court's modification of the fines by claiming simply that the district court is entitled to no deference.

CONCLUSION

For all the foregoing reasons, HWAN respectfully requests that the Administrative Decision be set aside to the extent it misinterprets NRS 690C.150, deems HWAN's COR expired, and imposes any fines on HWAN.

DATED this 10th day of August, 2020.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. 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 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **6,987 words**.

3. Finally, I hereby certify that I have read this appellate 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of August, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on the 10th day of August, 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:

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