

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID FIGUEROA,

Appellant,

v.

IDS PROPERTY & CASUALTY  
INSURANCE COMPANY,

Respondent.

Case No.: 69940

District Court Electronically Filed  
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Clerk of Supreme Court

**APPEAL**

**From the Eighth Judicial District Court  
The Honorable Susan W. Scann**

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**RESPONDENT IDS PROPERTY & CASUALTY INSURANCE  
COMPANY'S ANSWERING BRIEF**

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**N.R.A.P. §26.1 Disclosure Statement**

The undersigned counsel of record certifies that the following are persons and entities as described in N.R.A.P. §26.1(a) and must be disclosed. These

representations are made so the Justices of this Court may evaluate possible disqualification or recusal.

IDS Property & Casualty Insurance Company's parent corporation is Ameriprise Financial, Inc., which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of Ameriprise Financial, Inc.

Appellants: DAVID FIGUEROA, an individual.

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### **Statement of Jurisdiction**

The District Court properly dismissed Appellant's claims via Summary Judgment in Appellee's favor on February 22, 2016.<sup>1</sup> Within the statutory time frame, Appellant timely filed his Appeal from final judgment pursuant to N.R.A.P. §3A (b)(1).<sup>2</sup> This Court has appellate jurisdiction over this case.

### **Routing Statement**

Respondent disagrees with Appellant's claim that this case should be heard *en banc* due to public policy issues. Simply stated, Appellant is trying to claim insurance benefits from a policy regarding an accident that occurred while Appellant was riding a motorcycle insured by another insurance carrier.

The subject insurance policy did not contain any ambiguity and was issued in compliance with N.R.S. §690B.020 and N.R.S. §687B.145.

### **Statement of the Issues**

Whether the District Court correctly granted IDS Property & Casualty Insurance Company's ("IDS") motion for summary judgment pursuant N.R.S. §690B.020 and N.R.S. §687B.145 and by finding that there was no ambiguity in the insurance contract issued to David Figueroa.

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<sup>1</sup> AA271-280.

<sup>2</sup> AA269-270

## Statement of the Facts

The District Court properly granted IDS' Motion for Summary Judgment as the provisions contained within the insurance contract properly and pursuant to N.R.S. §690B.020 and N.R.S. §687B.145 restricted the available coverage for underinsured/uninsured motorist coverage while the insured was driving an "owned, but not insured vehicle."

It is undisputed that IDS provided Figueroa an insurance policy which was in effect at the time of the subject motorcycle accident. It is undisputed that the two vehicles noted on the renewal declaration page of the subject policy were 1) 2002 GMC Yukon and 2) 2014 Jeep Wrangler. It is undisputed that the renewal declaration page noted uninsured/underinsured motorists coverage at \$250,000 each person and \$500,000 each accident.

It is undisputed that at the time of the subject accident, Figueroa had an insurance policy with ANPAC that insured his 2011 Pol Cross Country Motorcycle. It is undisputed that Figueroa paid for uninsured/underinsured motorist coverage that had limits of \$250,000/\$500,000, per person/per accident.<sup>3</sup>

The District Court affirmed IDS' position in that it complied with the statutory provisions regarding uninsured/underinsured insurance policy limit; that

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<sup>3</sup> RA – ANPAC DEC PAGE (RA001)

the insurance contract language was clear and not ambiguous; and that the anti-stacking language contained in the policy was sufficient.

### **Standard of Review**

Respondent does not dispute Appellant's standard of review.

### **Summary of the Argument**

#### **I. The District Court Correctly Concluded That IDS' Insurance Policy Precluded Coverage Under Part III – Uninsured Motorists/Underinsured Motorists Coverage for an Accident Involving a Vehicle Not Insured By IDS Other Than the Statutory Minimum of \$15,000 for Underinsured Motorist's Coverage in Nevada as Set Out in Nevada Revised Statutes 690b.020(b) and 485.185(a).**

The District Court's finding that Figueroa is only entitled to the statutory minimum of UM/UIM coverage is consistent with N.R.S. §687B.145(2) and N.R.S. §690B.020 pursuant to the insurance contract. While Figueroa argues that he was not offered UM/UIM coverage equal to his bodily injury limits, because of the exclusions within the policy is misplaced.<sup>4</sup> The declarations page clearly shows UM/UIM coverage up to his bodily injury limits for the cars insured under the IDS policy.<sup>5</sup>

N.R.S. §687B.145(2) provides statutory exceptions regarding offers of UM/UIM coverage.

**Except as otherwise provided in subsection 5,** insurance companies transacting motor vehicle insurance in this

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<sup>4</sup> AAB p.8

<sup>5</sup> AA140.

State must offer, on a form approved by the Commissioner, uninsured and underinsured vehicle coverage in an amount equal to the limits of coverage for bodily injury sold to an insured under a policy of insurance covering the use of a passenger car. The insurer is not required to reoffer the coverage to the insured in any replacement, reinstatement, substitute or amended policy but the insured may purchase the coverage by requesting it in writing from the insurer. Each renewal must include a copy of the form offering such coverage. Uninsured and underinsured vehicle coverage must include a provision which enables the insured to recover up to the limits of the insured's own coverage any amount of damages for bodily injury from the insured's insurer which the insured is legally entitled to recover from the owner or operator of the other vehicle to the extent that those damages exceed the limits of the coverage for bodily injury carried by that owner or operator. If an insured suffers actual damages subject to the limitation of liability provided pursuant to N.R.S. §41.035, underinsured vehicle coverage must include a provision which enables the insured to recover up to the limits of the insured's own coverage any amount of damages for bodily injury from the insured's insurer for the actual damages suffered by the insured that exceed that limitation of liability.

(Emphasis Added).

As noted above N.R.S. §687.145(2) provides that an insurance carrier must provide an offer of UM/UIM coverage equal to the limits of bodily injury except for those statutory exceptions provided for in subsection 5.

Subsection 5 provides those statutory exceptions for when an insurance carrier is relieved of its obligations under N.R.S. §687B.145(2). N.R.S. §687B.145(5) provides as follows:

An insurer need not offer, provide or make available uninsured or underinsured vehicle coverage in connection with a general commercial liability policy, an excess policy, an umbrella policy or other policy that does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation or use of a *specifically insured motor vehicle*.

(Emphasis Added).

N.R.S. §687B.145(5) provides that if Figueroa’s policy is not the “primary motor vehicle insurance” for a “specifically insured motor vehicle” than IDS was not required to offer UM/UIM coverage to Figueroa consistent with the requirements of N.R.S. §687B.145(2), and therefore, the amount of Figueroa’s bodily injury coverage should not be implied into his policy with IDS. Figueroa’s motorcycle is not a “specifically insured motor vehicle” with IDS because it is not listed on the Renewal Declaration Page.

The Nevada Supreme Court has held that in “the absence of a violation of public policy, insurance contracts will be enforced as written.”<sup>6</sup> The Nevada Supreme Court in the *Nelson* case held that “owned but uninsured” exclusions are not void under Nevada public policy as long as the insured is allowed to recover the state minimum UM/UIM coverage of \$15,000.00.

Similar to the arguments made by Figueroa, the insureds in the *Murphy* case argued that they paid for full UM/UIM coverage, and therefore, the insureds argued they should receive the full amount of coverage as stated in the

declarations.<sup>7</sup> This same argument was also made by the insured in Zobrist who had a policy with Farmers Insurance Exchange insuring several cars under one policy with a UM/UIM limit of \$500,000.00.<sup>8</sup> As with Figueroa's policy, the insured policy in Zobrist contained an "owned but uninsured" exclusion.

The Zobrist case addresses the fact that UM/UIM coverage "must also allow an insured to recover up to the limits of his policy any amount which exceeds the policy limits of the other driver. N.R.S. §687B.145(2)". The insured in Zobrist made the same arguments as Figueroa that N.R.S. §690B.020(2) and N.R.S. §687B.145(2) required Farmers Insurance Exchange "to provide coverage up to his \$500,000 policy limit regardless of whether he was driving a vehicle which was specifically excluded in his policy." As with IDS, Farmers argued that the exclusion in the insured's policy only required the statutory minimum of \$15,000.00 to be paid to the insured. The Nevada Supreme Court ruled in Farmers' favor finding that the exclusionary provision was valid under public policy.

Figueroa argues "[t]he undisputed facts in Mr. Figueroa's case that he was not aware of the limiting exclusions, otherwise as he stated, he would have requested the coverage without exclusions or shopped elsewhere."<sup>9</sup> This argument

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<sup>6</sup> Nelson v. California State Automobile Association Inter-Insurance Bureau, 114 Nev. 345, 347-348, 956 P.2d 803, 803-805 (1998).

<sup>7</sup> Continental Insurance Company v. Murphy, 120 Nev. 506, 507, 96 P.3d 747, 748 (2004).

<sup>8</sup> Zobrist v. Farmers Insurance Exchange, 103 Nev. 104, 105, 734 P.2d 699 (1987).

<sup>9</sup> AAB, p.13, ll. 7-10.

has no merit as Figueroa did purchase UM/UIM insurance for his motorcycle with American National Property and Casualty Co.<sup>10</sup> Figueroa is trying to claim coverage under a policy that the insurer had no idea of the existence of the motorcycle, yet somehow must provide coverage for it despite that fact that IDS had no knowledge of the motorcycle's existence.

**II. The Language of Figueroa's Policy With IDS is Clear and Unambiguous and Does Not Provide Coverage For His Motorcycle Other Than the Statutory Minimum Coverage of \$15,000.00 Under Part III – Uninsured Motorists/Underinsured Motorists Coverage**

The plain language of the original policy and Amendment does not provide UM/UIM coverage for an accident while occupying a vehicle not insured under the policy.<sup>11</sup> Figueroa's motorcycle is not insured under the policy.<sup>12</sup> Figueroa's policy and Amendment with IDS are unambiguous that coverage is not provided to Figueroa for an accident involving an "owned but uninsured" vehicle.

The language of the original policy and Amendment restricts his coverage to the state minimum of \$15,000.00 for UM/UIM coverage. Part III – Uninsured Motorists/Underinsured Motorists Coverage of Figueroa's policy provides the following exclusion:

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<sup>10</sup> RA – ANPAC DEC PAGE (RA001).

<sup>11</sup> AA184 & AA195.

<sup>12</sup> AA205, paragraph 30, AA207, paragraph 39 & AA208, paragraph 48.

We do not cover bodily injury to a person:

1. **Occupying** or when struck by, **any motor vehicle owned by you or any relative which is not insured for this coverage under this policy.** This includes a trailer of any type used with that vehicle. **This exclusion applies only to the extent that the limits of liability for this coverage exceed the limits of liability required by the Nevada Motor Vehicle Safety Responsibility Act.**

(Emphasis Added).<sup>13</sup>

The Amendment to Figueroa's policy provides the following:

Part III – Uninsured Motorists/Underinsured Motorists Coverage

Coverage C – Uninsured Motorists Coverage/Underinsured Motorists Coverage

The first four paragraphs are replaced by the following:

We will pay compensatory damages which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of bodily injury caused by accident. We will pay these damages for bodily injury an insured person suffers in a car accident **while occupying your insured car or utility car, or as a pedestrian** as a result of having been struck by an uninsured motor vehicle or an underinsured motor vehicle. We will pay under this coverage only after any applicable bodily injury liability bonds or policies have been exhausted by payments or judgments or settlements.

(Emphasis Added).<sup>14</sup>

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<sup>13</sup> AA195

<sup>14</sup> AA184

When Figueroa’s policy is read as a whole, it is clear that UM/UIIM coverage above \$15,000.00 is not provided for an accident in a vehicle not insured under the policy.

Figueroa argues that the language relied upon by IDS to limit UM/UIIM coverage to an insured vehicle under the policy is a “*buried and vague exception*.”<sup>15</sup> Figueroa argues that “owned but uninsured” exclusion in the policy language is vague and ambiguous and therefore the court must construe the uncertainty against IDS.<sup>16</sup>

The Nevada Supreme Court has held that an Amendment to a policy must be compared to the original policy to determine clarity.<sup>17</sup> In *Neumann*, the court found an amendment was not clear based upon the fact that the amendment was mislabeled and mislettered with the corresponding portions of the original policy.<sup>18</sup>

The Amendment to Figueroa’s policy is not mislabeled or mislettered as the Amendment in *Neumann*.<sup>19</sup> Further, the Amendment specifically sets out which language is being replaced under specific headings of each part of the policy.<sup>20</sup> The Nevada Supreme Court has found that an amendment such as the one in Figueroa’s policy does not create confusion or ambiguity. In *Serrett v. Kimber*, the Court held as follows:

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<sup>15</sup> AAB p.20, l. 16

<sup>16</sup> AAB 21, ll. 1-5

<sup>17</sup> *Neumann v. Standard Fire Ins. Co. of Hartford, Conn.*, 101 Nev. 206, 699 P.2d 101 (1985)

<sup>18</sup> *Id.* @ 210, 104.

<sup>19</sup> AA184

<sup>20</sup> *Id.*

[i]n contrast, there is nothing in the instant amendment that could lead Serrett to conclude that it did not apply to his policy, nor would the amendment create confusion for the average layperson. Although the original policy and amendment are organized differently, the amendment correctly identifies the affected provisions of the policy and leaves no doubt as to its purpose or effect. Thus, the amendment complies with the clarity requirement.<sup>21</sup>

IDS' Amendment does not create ambiguity, and the language is clear throughout the policy that vehicles not insured with IDS are precluded from UM/UIM coverage above the state minimum requirement of \$15,000.00.

The language of the exclusion is also clear and unambiguous. In *Farmers Insurance Exchange v. Young*, the insured argued that a permissive user provision was ambiguous.<sup>22</sup> The insured challenged Farmers Insurance Exchange's position that it only owed the statutory minimum of \$15,000.00 when the policy had a liability limit of \$100,000.00 per person.<sup>23</sup> The exclusion clause specifically provided as follows:

This coverage does not apply to:

....

11.a. Liability for bodily injury to an insured person

The policy also provides, under the heading "Other Insurance," the following provision:

We will provide insurance for an insured person, other than a family member, up to the limits of the Nevada Financial Responsibility Law only.

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<sup>21</sup> *Serrett v. Kimber*, 110 Nev. 486, 490, 874 P.2d 747, 750 (1994)

<sup>22</sup> *Farmers Insurance Exchange v. Young*, 108 Nev. 328, 331-332, 832 P.2d 376, 378 (1992)

<sup>23</sup> *Id.* at 329-330, 377.

The policy defines an “insured person” as “you or any family member” or “any person using your insured car.”

The Nevada Supreme Court held that “it is difficult for us to see how the insured could have doubts or questions as to the provision’s meaning”.<sup>24</sup>

Figueroa’s policy and Amendment contains the following language:

We will pay these damages for bodily injury an insured person suffers in a car accident while occupying your insured car or utility car, or as a pedestrian as a result of having been struck by an uninsured motor vehicle or an underinsured motor vehicle.<sup>25</sup>

We do not cover bodily injury to a person: Occupying or when struck by, any motor vehicle owned by you or any relative which is not insured for this coverage under this policy...This exclusion applies only to the extent that the limits of liability for this coverage exceed the limits of liability required by the Nevada Motor Vehicle Safety Responsibility Act.<sup>26</sup>

Figueroa admits the motorcycle is not an insured vehicle on IDS’ policy.<sup>27</sup> If we compare the exclusionary language in the permissive use provision in *Farmers Insurance Exchange v. Young* with the “owned but uninsured” exclusion in Figueroa’s policy, it is clear that the language is not ambiguous.

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<sup>24</sup> Id. at 333, 279.

<sup>25</sup> AA184.

<sup>26</sup> AA195.

### **III. The Language of Figueroa's Policy With IDS Does Not Provide For Stacking of Coverage For His Motorcycle Under Part III – Uninsured Motorists/Underinsured Motorists Coverage**

Figueroa asserts that the policy does not provide a valid anti-stacking provision under N.R.S. §687.145(1).<sup>28</sup> First, IDS does not have to stack UM/UIM coverage under Figueroa's policy based upon the Nevada Supreme Court's holding in the Nelson v. California State Automobile Association Inter-Insurance Bureau case.<sup>29</sup> Second, it is IDS's position that the anti-stacking language in its policy fulfills the requirements of N.R.S. §687.145(1).

IDS is not relying upon the anti-stacking provision contained in Figueroa's policy. However, in opposition to Figueroa's arguments, it is IDS' position that the anti-stacking language in its policy fulfills the requirements of N.R.S. §687B.145(1). N.R.S. §687B.145(1) provides as follows:

Any policy of insurance or endorsement providing coverage under the provisions of N.R.S. §690B.020 or other policy of casualty insurance may provide that if the insured has coverage available to the insured under more than one policy or provision of coverage, any recovery or benefits may equal but not exceed the higher of the applicable limits of the respective coverages, and the recovery or benefits must be prorated between the applicable coverages in the proportion that their respective limits bear to the aggregate of their limits. Any provision which limits benefits pursuant to this section must be in clear language and be prominently displayed in the policy, binder or endorsement. Any limiting provision is void if the named insured has

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<sup>27</sup> AA205, paragraph 30, AA207, paragraph 39 & AA208, paragraph 48.

<sup>28</sup> AAB p. 24, ll. 12 & p. 25, l. 1.

<sup>29</sup> Nelson v. California State Automobile Association Inter-Insurance Bureau, 114 Nev. 345, 956, P.2d 803 (1998).

purchased separate coverage on the same risk and has paid a premium calculated for full reimbursement under that coverage.

The general rule is that Nevada allows stacking of coverage limits of each car insured under a single auto policy.

The purpose of stacking is to ensure that the insured receives the benefits for which he has paid. *Allstate Ins. Co. v. Maglish*, 94 Nev. 699, 702, 586 P.2d. 313, 314-15 (1978). Nevada case law permits two types of stacking: the aggregation of coverage limits of each car insured under a single automobile policy or the aggregation of coverage under more than one auto policy. For example, in *Cooke v. Safeco Ins. Co.*, 94 Nev. 745, 747, 587 P.2d 1324, 1325 (1978), this court allowed the insured to stack no-fault benefits under a single policy which covered two vehicles because the insured “paid two premiums for two separate no-fault coverage.” Likewise, where the insured had two separate policies which were issued by different insurers but which covered the same vehicle, no-fault benefits were considered stackable. *Travelers Ins. Co. v. Lopez*, 93 Nev. 463, 466-67, 567 P.2d 471, 473 (1977).<sup>30</sup>

IDS’ anti-stacking provision meets the statutory requirements for the same.

Under the requirements of N.R.S. §687B.145(1), the anti-stacking language in the amendment is in capital letters and is set off in a box.<sup>31</sup> The anti-stacking provision is identified in bold and titled “Limits of Liability”. The Renewal Declaration page of Figueroa’s policy provides:

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<sup>30</sup> *Nationwide v. MOYA*, 108 Nev. 578, 586, 837 P.2d 426, 431 (1992)

<sup>31</sup> AA184.

\*A multiple coverage discount has been applied to the UM/UIM base premium for policies with more than one vehicle.

This language provides direct notice to the policy holder of the discount to the UM/UIM portion of the policy. As such, IDS has satisfied the requirements of N.R.S. §687B.145(1) for a valid anti-stacking provision.

IDS' policy with Figueroa's policy contains a valid "owned but uninsured" policy exclusion. As such, the Nevada Supreme Court held that:

"Nelson paid two premiums under his CSAA policy. Had he been an occupant of one of the two insured vehicles when injured by an uninsured motorist, he would have been entitled to stack his uninsured motorist coverage pursuant to *Maglish*. However, Nelson's coverage was expressly limited by the owned by uninsured clause. While CSAA was obligated to pay the statutory minimum despite this exclusion, the dictates of *Maglish* do not prohibit explicit limitations on coverage in a way that does not violate public policy."<sup>32</sup>

The Nevada Supreme Court held that *Nelson* was not entitled to stack his UM/UIM coverage based upon the valid "owned but uninsured" exclusion rather than an anti-stacking provision. Based upon IDS' valid "owned but uninsured" exclusion, IDS does not owe Figueroa any coverage above the \$15,000.00 statutory UM/UIM minimum based upon the holding in *Nelson*.<sup>33</sup>

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<sup>32</sup> *Nelson v. CSSA Bureau*, 114 Nev. 345, 956, P.2d 803 (1998)

<sup>33</sup> *Id.*

**Conclusion**

For the foregoing reasons, this Court is requested to uphold the Summary Judgment Order and Dismissal of Appellant's claims.

Dated this 2<sup>nd</sup> day of February, 2017.

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## 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 Processor Version 2010 in 14 point Times New Roman font; or

This brief has been prepared in a monospaced typeface using Microsoft Word Processor Version 2010 with no more than 10.5 characters per inch in Times New Roman font.

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 either:

Proportionately spaced, has a typeface of 14 points or more and contains under 14,000 words; or

Monospaced, has 10.5 or fewer characters per inch, and contains under 14,000 words or less than 1,300 lines of text; or

Does not exceed 30 pages.

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 2<sup>nd</sup> day of February, 2017.

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**Certificate of Service**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On February 2, 2017, I caused to be served a true and correct copy of the foregoing

**RESPONDENT IDS PROPERTY & CASUALTY INSURANCE COMPANY'S ANSWERING BRIEF** upon the following by the method(s) indicated:

<b>ATTORNEY</b>	<b>PARTY</b>
Benjamin P. Cloward, Esq. <b>CLOWARD HICKS &amp; BRASIER, PLLC</b> 4101 Meadows Lane, Suite 210 Las Vegas, NV 89104	702-628-9888 702-960-4118 Fax Attorneys for Defendant, DAVID FIGUEROA

- VIA ELECTRONIC FILING/SERVICE NOTIFICATION** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
- VIA U.S. MAIL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the attached service list in the United States mail at Las Vegas, Nevada.
- VIA EMAIL** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.
- VIA PERSONAL DELIVERY:** by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the attached service list.

/s/ Adam Noyce  
An Employee of BROWN BONN & FRIEDMAN, LLP