IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 86412

LOUIS BELLOMO, AN INDIVIDUAL; AND SHAC, LLC, A/K/A SAPPHIRE LV GENTLEMAN'S CLUB, A DOMESTIC LIMITED-LIABILITY COMPANY,

Appellants,

v.

THUNDER ROYBAL, AN INDIVIDUAL,

Respondent,

On Appeal from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Tara Clark Newberry, District Judge
Case No. A-18-778040-C

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS

Jordan T. Smith, Esq., Bar No. 12097
Brianna Smith, Esq., Bar No. 11795
Daniel R. Brady, Esq., Bar No. 15508
Tyler W. Stevens, Esq., Bar. No. 16325
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Amicus Curiae

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

The Chamber of Commerce of the United States of America has no parent corporations, and there are no publicly held companies that own 10% or more of the organization's stock.

Jordan T. Smith, Esq., Brianna Smith, Esq., Daniel R. Brady, Esq., and Tyler W. Stevens, Esq. of the law firm of Pisanelli Bice PLLC, are the only attorneys who have or will appear for *Amicus Curiae* in this Court.

There are no other persons or entities described in NRAP 26.1(a) that need to be disclosed.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a substantial interest in ensuring that Nevada businesses may engage in common commercial business practices without facing exorbitant damages and extreme attorneys' fees awards. The Chamber also has a substantial interest in ensuring that Nevada's judicial system continues to adhere to the rule of law, which is essential in maintaining the predictability and stability that are crucial to one of the most robust economies in the nation and the world. *See* NRAP 29.[1]

[1] No party authored this brief or made a monetary contribution intended to fund the preparation or filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The State of Nevada was established on commerce and enterprise. Indeed, the Founders' entrepreneurial spirit was so strong that they memorialized it on the State Seal—emblazoning it with symbols of industry, agriculture, and technology.[2] Nevadans' enterprising nature has not waned over generations. The State competes to attract companies, and these efforts have succeeded—in no small part because of its strong Judiciary. The Judiciary plays an important role in Nevada's economic development. This Court tries to provide a stable legal environment with "certainty, predictability, and uniformity of result."[3] And the Court has long recognized the State's public policy of attracting and maintaining businesses—large and small.[4]

But excessive noneconomic damage verdicts and exorbitant attorneys' fee awards like those here threaten Nevada's businesses. Surveys show that litigation

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[2] Andrew J. Marsh, 1864 NEVADA CONSTITUTIONAL DEBATES & PROCEEDINGS 583-84 (1866).

[3] *See Gen. Motors Corp. v. Eighth Jud. Dist. Ct.*, 122 Nev. 466, 472, 134 P.3d 111, 115-16 (2006) (analyzing conflicts of law).

[4] *See State ex rel. Bibb v. City of Reno*, 64 Nev. 127, 134, 178 P.2d 366, 369 (1947) (recognizing Nevada "public policy…encourages agriculture and mining as paramount industries"); *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1043, 921 P.2d 933, 936 (1996) (Young, J., concurring) ("Nevada must protect its tourist industry as a matter of public policy."); *State v. Rosenthal*, 107 Nev. 772, 777, 819 P.2d 1296, 1300 (1991) (discussing the State's "vital gaming industry").

risks and the specter of runaway juries (or judges) factor heavily into corporate decisions to invest, open shop, conduct commerce, and stay in Nevada. From main street to the C-suite, the prospect of crushing and unpredictable "pain and suffering" awards *discourages* trade while *encouraging* businesspeople to go elsewhere.

That is why for centuries, courts—including this Court—have applied objective measures to prevent excessive verdicts and to mitigate the negative economic consequences of devastating awards. Dating back to English common law, courts have used as one objective measure comparisons to similar cases to determine whether a damage award is over-the-top and unjust given the circumstances. This Court inherited the traditional comparative approach and has applied it many times since the State's founding. Modern cases and literature confirm that the comparative approach brings stability and predictability to verdicts. Of course, other awards are not the exclusive measure of excessiveness. But they are an important factor that must be considered to bring standards to an otherwise inherently subjective analysis that puts defendants at a serious risk of inappropriately punitive awards driven by only passion or prejudice.

The district court erred when it rejected the traditional comparative approach and approved a $12 million noneconomic damage verdict that is unlike any other case in Nevada. Going from bad to worse, the district court next awarded almost

$8 million in contingent attorneys' fees based on the excessive verdict which included *pre*-offer of judgment expenses in violation of NRCP 68. Both awards hang a "Business Unwelcome" sign at the state-line.

Therefore, the Court should vacate the judgment and the NRCP 68 fee and cost award to clarify that (1) courts should use the objective comparative approach when assessing verdicts for excessiveness and (2) courts may only award the reasonable value of *post*-offer of judgment contingency fee services.

ARGUMENT

A. The Court Should Reiterate the Role of the Objective Comparative Approach in Reviewing Noneconomic Damage Awards.

1. Courts have historically used the comparative approach.

The district court seriously erred when it eschewed the historical method of reviewing a jury's noneconomic damage award for excessiveness. 23.App.5700-04. For centuries, English and American courts have ensured objective appellate review of damage awards by comparing the awards before them against awards in factually similar cases. English courts began reviewing the excessiveness of verdicts in the mid-1600s. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231, 235 (2003).

Around the middle of the eighteenth century, English jurists started comparing verdicts in similar cases to decide whether the judgment was excessive. *See, e.g.*, *Wilford v. Berkeley* (1758) 97 Eng. Rep. 472, 472; 1 Burr. 609, 609 (describing a case that was "exactly similar to this [case]; and the very same sum … was given"); *Goldsmith v. Lord Sefton* (1796) 145 Eng. Rep. 1046, 1046; 3 Anst. 808, 809 (comparing the award to another case where "the injury was much more serious than here, the damages not so great, yet the verdict was set aside").

The objective, comparative approach crossed the Atlantic and became a feature in American jurisprudence after the Founding. *See, e.g.*, *Clapp v. Hudson R.R. Co.*, 19 Barb. 461, 463-67 (N.Y. Gen. Term. 1854) (analyzing verdicts in three similar cases); *Murray v. Hudson River R. Co.*, 47 Barb. 196, 200-04 (N.Y. Gen. Term. 1866) (analyzing a man's "pain and suffering, for which he ought to be compensated" by recognizing that "[h]is injury is . . . less severe than several of those in which new trials were awarded").

Soon, the comparative approach traveled to Nevada. For example, in 1904, William Barnes sued Western Union Telegraph Company for negligently failing to deliver a message to his brother about buying a train ticket. *Barnes v. W. Union Tel. Co.*, 27 Nev. 438, 76 P. 931 (1904). William spent several days stranded, drifting, cold, hungry, and broke. *Id.* At one trial, William won $1,200 in damages

but "this court reversed the judgment as being excessive." *Id.* In a second trial, William was awarded $400.

During the second appeal, the defendant again argued the verdict was excessive. *Id.* at 438, 76 P. at 932. This Court debated whether mental suffering damages were available at all and noted "[t]he reason given in some of the cases why damages cannot be allowed for mental suffering alone is that the just estimation of such damages is so difficult." *Id.* at 438, 76 P. at 933. Even so, this Court determined that William could recover for emotional injury and then looked to similar cases to see whether William's award for mental anguish was excessive. *Id.*

The Court identified other analogous cases where passengers were left at the wrong station and suffered similar harm. *Id.* And this Court observed that, in those cases, courts held as "not excessive" larger verdicts for lesser suffering than William endured. *Id.* According to the Court, "[w]here railroad companies have negligently left passengers at the wrong station, and thereby exposed them to cold, fatigue, and suffering, verdicts for damages for larger amounts in proportion to the hardship undergone than the judgment here bears to the injury sustained have been held not excessive." *Id.* (collecting cases). As a result, the $400 judgment was affirmed as "neither remote nor excessive." *Id.* at 438, 76 P. at 934.

Following William's predicament, this Court engaged in an even more detailed comparative analysis in *Cutler v. Pittsburg Silver Peak Gold Mining Co.*, 34 Nev. 45, 116 P. 418, 425 (1911). There, the Court vacated a personal injury award as "unjust and excessive" and compiled a chart of prior awards from similar cases to explain why. The Court catalogued:

> In the following cases these judgments were adjudged excessive and ordered reduced:
>
> - $3,500. Young man, loss of fingers, joints permanently injured, reduced to $2,500. *Stiller v. Bohn Man. Co.*, 80 Minn. 1, 82 N. W. 981.
> - $1,800. Boy 8 or 9 years old, amputation of part of two fingers. *Gahagan v. Aermotor Co.*, 67 Minn. 252, 69 N. W. 914.
> - $4,000. Man 25 years old, loss of finger, one finger broken and stiffened, great pain, reduced to $3,000. *Mahood v. Pleasant Valley Coal Co.*, 8 Utah, 85, 30 Pac. 149.
> - $13,000. Man 34 years old, loss of an arm. *Louisville & N. R. Co. v. Lowe (Ky.)*, 66 S. W. 736.
> - $5,000. Laceration of right arm, hand somewhat smaller than other and flexed at wrist joint, circulation impaired, restoration likely, reduced to $3,000. *Orleans v. Perry*, 24 Neb. 831, 40 N. W. 417.
> - $3,000. Broken fracture of left arm and permanent impairment, six weeks medical attendance, kept from work considerable time, reduced to $2,500. *Thomas v. Consolidated Traction Co.*, 62 N. J. Law, 36, 42 Atl. 1061.
> - $2,000. Passenger, fracture of arm, disabled two months. *Watson v. Northern R. Co.*, 24 Up. Can. Q. B. 98.

- $15,000. Engineer, loss of left hand, reduced to $10,000. *Texas & C. R. Co. v. Hartnett*, 33 Tex. Civ. App. 103, 75 S. W. 809.
- $15,000. Employee, loss of right hand, reduced to $10,000. *O'Donnell v. American Sugar Refining Co.*, 41 App. Div. 307, 58 N. Y. Supp. 640.
- 15,000. Forty–three years old, earning $60 per month, injury to hand, usefulness not entirely impaired, reduced to $2,000. *Bomar v. Louisiana R. Co.*, 42 La. Ann. 983, 8 South. 478, 9 South. 244.
- $5,000. Manager of ranch, fingers stiffened, impairment of capacity for labor, reduced to $4,000. *San Antonio R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256.
- $5,000. Passenger, ligaments of finger strained, one lung weakened, time lost one month. *Union Pacific R. Co. v. Hand*, 7 Kan. 380.
- $1,100. Injury of finger, $225 for medical expenses, earning capacity not impaired. *Louisville R. Co. v. O'Mara (Ky.)*, 76 S. W. 402, 25 Ky. Law Rep. 819.

Id. at 45, 116 P. at 426 (bullet points added).

The *Cutler* Court also analyzed other awards and concluded "[f]or the foregoing reasons…the judgment awarded is excessive, for which error it is ordered that the judgment be reversed and a new trial granted, unless the plaintiff … consent[s] to a modification of the judgment to $7,500." *Id.*

In the decades since *Williams* and *Cutler*, this Court has employed the objective comparative approach many times. *See, e.g.*, *Knock v. Tonopah & G.R. Co.*, 38 Nev. 143, 145 P. 939, 940-41 (1915) (comparing Knock's lost right forearm to *Burch* and several others, finding Knock's injury "was not as serious as

the one caused to Burch" and stating "[a]mong the many cases in the books, we do not find any in which a sum as large as that awarded to respondent by the verdict was allowed to stand for the loss of an arm under conditions and results no more serious than those which relate to or flow from the accident suffered by respondent"); *S. Pac. Co. v. Watkins*, 83 Nev. 471, 496, 435 P.2d 498, 514 (1967) ("Appellant next contends that nowhere in Nevada law is there a case with comparable injuries resulting in a similar verdict. While not precisely in point, we feel the case of *Meagher v. Garvin* . . . is in a reasonable sense comparable in fact and in damages awarded."); *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (agreeing that defamation plaintiff was entitled, as a matter of law, to less than the defamation plaintiffs received in the *Burnett v. National Enquirer* and *Alioto v. Cowles Communications, Inc.* cases and stating, "Reduction of the Carol Burnett compensatory damages from $300,000 to $50,000 is very much in line with the views of this court").

This Court's use of comparator cases tracks modern jurisprudence in other jurisdictions. *See, e.g.*, *Anderson v. Durant*, 550 S.W.3d 605, 620 & n.65 (Tex. 2018) ("The jury's $400,000 award [for mental anguish] appears to be excessive compared to awards in cases involving similar or more egregious behavior . . . .") (collecting cases); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 (Mich. 2004)

("[W]hen a verdict is unsupported by the record or entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the amount required to compensate the injured party."); 23 Cal. Jur. 3d *Damages* § 209 (Feb. 2024 Update) ("The amount of an average award allowed for a particular injury in the past, as determined by jury verdicts which have been approved in previous actions, … has its place in ascertaining the damages to be allowed, and the appellate court may consider those amounts . . . .").

To be sure, similar cases are not the exclusive yardstick for excessiveness. *See Wells, Inc., v. Shoemake*, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947) ("nor is the fact that juries in other similar cases have fixed a much lower amount as damages *controlling* on the question of excessiveness") (emphasis added).[5] Still, other cases should be consulted as an important sign of whether the jury's verdict was unduly influenced by passion or prejudice. NRCP 59(a)(1)(F). A large award outside the norm of similar cases should be suspect and closely scrutinized for discrete factors supporting an outlier sum. By providing objective criteria, the traditional

[5] The one-off, footnoted statement in *Wyeth v. Rowatt*, 126 Nev. 446, 472 n.10, 244 P.3d 765, 783 n.10 (2010) did not engage this Court's historical practice of applying the comparative approach. *Wyeth*'s citation to *Wells* clarifies that the Court was not overruling this long line of precedent. Rather, the Court was reemphasizing that verdicts in other cases may be considered but they are not necessarily "controlling" on the question of excessiveness.

comparative approach brings integrity and a measure of predictability to inherently intangible injury awards. It is merely a logical corollary to the legal system's use of precedent—and an important corollary at that because it serves to ward off improperly punitive awards driven by passion or prejudice.

2. The objective comparative approach facilitates the rule of law by bringing certainty, predictability, and uniform results.

This Court seeks to provide a stable legal environment with "certainty, predictability, and uniformity of result." *See Gen. Motors Corp.*, 122 Nev. at 472, 134 P.3d at 115-16; *Maxwell v. Amaral*, 79 Nev. 323, 327, 383 P.2d 365, 367 (1963) ("It appears to us that predictability in this area is desired by the trial courts and the trial bar. To that end we propose to establish workable rules with regard to the questioned items here involved."). These tripartite goals—certainty, predictability, and uniform results—are pillars of the rule of law and necessary ingredients for economic flourishing.

A recent nationwide survey of in-house general counsel, senior litigators, and other senior executives at $100 million companies found that 89% of participants agreed that "a state's litigation environment … is likely to impact important business decisions at their companies, such as where to locate or do business." U.S. Chamber Inst. for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States* 3

(Sept. 2019).[6] "Decisions such as where to locate or where to expand businesses could have economic consequences for the state." *Id.* at 7.

Prevailing damage awards and the ability of businesses to reasonably predict their potential exposure to such awards are a "key element" of a state's legal environment. *See id.* at 10-11. "[A]ward unpredictability can cause failures in deterrence and 'corrective justice' objectives, harm to economies, high insurance premiums, and loss of faith in the legal system." Hillel J. Bavli & Reagan Mozer, *The Effects of Comparable-Case Guidance on Awards for Pain and Suffering and Punitive Damages: Evidence from A Randomized Controlled Trial*, 37 YALE L. & POL'Y REV. 405, 407 (2019). Unpredictable pain-and-suffering awards frustrate equal justice under the law, encourage inefficient precautions by affected industries and insurers, and make settlement harder. Allowing courts to use the comparative approach is a less drastic option than imposing hard damage caps. *See id*. at 407, 457. An objective, comparative approach assists reviewing courts because judges have a better frame of reference for the degree of any justifiable revision given similar cases in the jurisdiction. Requiring courts to review noneconomic damage awards with objective comparator cases fosters certainty, predictability, and

[6] *Available at* https://instituteforlegalreform.com/research/2019-lawsuit-climate-survey-ranking-the-states/

uniformity from which all businesses benefit. *See id*. at 408, 435, 441, 455-56. That approach is flexible, of course, and leaves discretion for juries—but it also ensures that courts tasked with reviewing jury awards can meaningfully assess the awards in light of objective criteria and guard against jury abuses that would make the State unfavorable as a destination for businesses.

B. This Court Should Clarify that Only the Reasonable Value of Post-Offer Contingency Fee Services is Recoverable Under NRCP 68.

Predictability and fairness are also key to interpreting NRCP 68's fee shifting provisions. *See Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 314-15, 236 P.3d 613, 615 (2010) (reversing district court's fee award and finding "[p]redictability and fairness are not served by reading the formal service requirements out of NRS 17.115, NRCP 5, and NRCP 68"). The plain language of NRCP 68 and this Court's opinion in *Capriati Construction Corp., Inc. v. Yahyavi*, 137 Nev. 675, 680, 498 P.3d 226, 231 (2021) provide notice to litigants that courts *may* consider contingency fee arrangements in awarding offer of judgment fees but that the full contingency fee is not the *presumptive* or *default* amount that should be awarded. The offeror must still provide a reasonable estimate of the contingency fee work

performed *after* the offer.[7] The district court's astronomical $8 million fee award turns NRCP 68 and *Capriati* upside down. The district court's ruling was neither predictable nor fair.

NRCP 68(f)(1)(B)'s plain language states that "the offeree must pay the offeror's *post*-offer costs and expenses, including . . . reasonable attorney fees, if any be allowed, *actually incurred by the offeror from the time of the offer*." (emphases added). *Capriati* explained that NRCP 68 contingency fee awards must still satisfy *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). *Capriati*, 137 Nev. at 679-80, 498 P.3d at 231.

Beattie requires that the "fees sought by the offeror [be] reasonable and justified in amount." 99 Nev. at 588-89, 668 P.2d at 274. And *Brunzell* demands that the fee relate to the "work actually performed by the lawyer." 85 Nev. at 349, 455 P.2d at 33. *Capriati* also approvingly discussed *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 562, 429 P.3d 664, 673 (Ct. App. 2018) where

[7] For instance, if a contingency fee attorney is fired before judgment in an ordinary case without an NRCP 68 offer, she is only entitled to the reasonable value of her services in quantum meruit up to the date of termination and may file a lien only for this amount. *See Gordon v. Stewart,* 74 Nev. 115, 119, 324 P.2d 234, 236 (1958) *rejected on other grounds by Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish,* 125 Nev. 527, 538, 216 P.3d 779, 787 (2009).

the Court of Appeals held that there must be "substantial evidence" of the contingency fees "earned post-offer."

Piecing this all together, a party may recover the reasonable and justifiable portion of a contingency fee that was actually earned *after* the offer of judgment *if* she provides substantial evidence that the fee sought is a reasonable measure of the value of the work performed *after* the offer. Yet nothing in any of those authorities provides notice to businesses that they risk paying an entire contingency fee award—which potentially includes *years* of pre-offer work—every time they reject an offer of judgment. There is no hint that the default rule in Nevada is to award a full contingency fee for the entire case despite the text and caselaw pointing the opposite direction. The district court's flawed interpretation transforms NRCP 68 from a tool to advance settlement into a draconian, retroactive punishment, and forces defendants to weigh offers of judgment without the information they need to assess whether an offer is reasonable.

If the district court correctly construed *Capriati*, then the case should be overruled. Saddling opposing litigants with exorbitant contingency fee awards—on top of excessive noneconomic damage verdicts—endangers the vitality of Nevada's existing businesses and disincentivizes others looking to practice their trade here. To advance the Judiciary's stated goals of providing "predictability and fairness," this

Court should clarify that courts may only award the reasonable value of *post*-offer of judgment contingency fee services under NRCP 68.

CONCLUSION

For these reasons, this Court should vacate the judgment and the award of attorneys' fees and costs under NRCP 68.

DATED this 28th day of February, 2024.

PISANELLI BICE PLLC

By: */s/ Jordan T. Smith*
Jordan T. Smith, Esq., #12097
Brianna Smith, Esq., #11795
Daniel R. Brady, Esq., #15508
Tyler W. Stevens, Esq., #16325
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman font.

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 type face of 14 points or more and contains 3,545 words.

Finally, I 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 that 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 28th day of February, 2024.

PISANELLI BICE PLLC

By: */s/ Jordan T. Smith*

Jordan T. Smith, Esq., #12097
Brianna Smith, Esq., #11795
Daniel R. Brady, Esq., #15508
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Amicus Curae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and pursuant to NRAP 25(b) and NEFCR 9, on this 28th day of February, 2024, I electronically filed the foregoing **BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex) to all parties registered for electronic service.

Erica C. Medley, Esq.
Stephen A. Davis, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134

Attorneys for Amicus Curiae Nevada Resort Association

Daniel F. Polsenberg, Esq.
Abraham G. Smith, Esq.
Kory J. Koerperich, Esq.
John McCormick-Huhn, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, #600
Las Vegas, NV 89169

Jonathan L. Powell, Esq.
WINNER BOOZE
1117 South Rancho Drive
Las Vegas, NV 89102

Attorneys for Appellant SHAC, LLC

Kelly H. Dove, Esq.
SNELL & WILMER LLP
3883 Howard Hughes Parkway, #100
Las Vegas, NV 89169

Attorneys for Appellant Louis Bellomo

Sean K. Claggett, Esq.
Micah S. Echols, Esq.
Geordan G. Logan, Esq.
David P. Snyder, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107

Ben J. Bingham, Esq.
BENSON & BINGHAM
11441 Allerton Park Drive, Suite 100
Las Vegas, NV 89135

Attorneys for Respondent

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC