In the Supreme Court of the State of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

LAS VEGAS RESORT HOLDINGS, LLC,

Plaintiff-Appellant,

vs.

SCOTT ROEBEN,

Defendant-Respondent.

Supreme Court No. 82216

Appeal from the
Eighth Judicial District Court
for Clark County, Nevada

District Court Case No.
A-20-819171-C

REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

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NRAP 26.1 DISCLOSURE

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

1. Respondent Scott Roeben is an individual, and thus there is no parent corporation or publicly held company that owns 10% or more of her stock.

2. The following law firm represented Respondent in the district court proceedings leading to this appeal and represents Respondent in this appeal:

RANDAZZA LEGAL GROUP, PLLC
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No other law firm is expected to appear on Respondent's behalf in this appeal.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza
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1.0 Introduction and Procedural History[1]

The facts here are simple, and the conclusion inescapable. The District Court granted Roeben's Anti-SLAPP Motion. Anti-SLAPP motions are motions for summary judgment. An order granting a motion for summary judgment is an appealable order. This Court treats motions for costs and attorneys' fees as post-judgment orders that are independently appealable. Appellant's notice of appeal was late, and this Court lacks jurisdiction.

Appellant Las Vegas Resort Holdings, LLC ("Sahara") ignores the overwhelming weight of authority on this question and tries to concoct a set of contortionist arguments to turn a long-standing rule into an "issue of first impression." Appellant is being dishonest with this Court. Appellant's arguments rest primarily on an inapposite case from this Court that did not deal with the issue of appealability, or even attorneys' fees, *Kosor v. Olympia Cos.*, 136 Nev. Adv. Op. 83, 478 P.3d 390 (2020). Appellant's response is otherwise filled with misleading arguments that fail to address or even acknowledge Nevada jurisprudence.

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[1] Though Appellant filed a "Response to Order to Show Cause," it is in substance an opposition to Roeben's Motion to Dismiss Appeal for Lack of Jurisdiction. Roeben thus files this Reply in support of his Motion.

On January 20, 2021, Appellant purported to file an amended notice of appeal, attempting to add an appeal of an anti-SLAPP fee award to its belated appeal of the final judgment on the merits. The amended notice is an attempt to manufacture jurisdiction in this proceeding by joining it with the District Court's separately appealable order entered on December 30, 2020 granting Roeben's Motion for Costs and Attorneys' Fees. Sahara cannot turn a late appeal into a timely one, and the Court should dismiss this appeal in its entirety. If Sahara then wishes to separately appeal the post-judgment fee award, it should be free to explore that. But at this point, Sahara made a tactical decision or tactical error. Whichever it was, this Court lacks jurisdiction over *this* appeal.

2.0 Legal Argument

An appeal may be taken where "[a] final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." NRAP 3A(b)(1). Appellant bears the burden of establishing appellate jurisdiction. *See Moran v. Bonneville Square Assocs.*, 117 Nev. 525, 527, 25 P.3d 898, 899 (2001). A notice of appeal relating to a final judgment must be filed within 30 days from when notice of entry of the written order is served. NRAP 4(a)(1). This Court lacks jurisdiction

when the notice of appeal is late. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (Nev. 1987) (holding "the proper and timely filing of a notice of appeal is jurisdictional"); *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) (holding that "[f]iling a timely notice of appeal is jurisdictional and an untimely appeal may not be considered"); *Estate of Yan Shing v. Zhang*, No. 81378, 471 P.3d 75 (Nev. Sept. 4, 2020) (unpublished disposition) (finding "this court lacks jurisdiction to consider an untimely notice of appeal").

2.1 The Anti-SLAPP Order was a Final Judgment and Sahara's Appeal was Untimely

The Anti-SLAPP Order entered by the District Court on October 30, 2020 was the final judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (Nev. 2000) (holding that "**a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs**") (emphasis added). The appealability of an order is determined by "what the order or judgment actually does, not what it is called." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994); *Taylor v. Barringer*, 75 Nev. 409, 410 (1959) (finding that an order styled as "an

order" granting a motion to dismiss "is in effect a final judgment"). "[The Nevada Supreme Court has] consistently considered appeals from summary judgment orders disposing of the entire action." *GNLV*, 116 Nev. at 428. This is so even when fees and costs remain to be determined.

A dismissal under the Anti-SLAPP statute "operates as an adjudication on the merits." NRS 41.660(5). This is not an issue of first impression, this Court having previously decided it. "In providing an additional pretrial mechanism for filtering frivolous claims from those claims having arguable merit, these [Anti-SLAPP] statutes amount to *a unique summary judgment motion*, a motion that, if granted, is appealable." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 757-58 (2009) (emphasis added). Though *John* was decided on an older version of the Anti-SLAPP statute, the relevant portion of the statute has not changed, and subsequent cases affirmed that Anti-SLAPP motions are treated as summary judgment motions. *See Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013); *see also Coker v. Sassone*, 432 P.3d 746, 748-49 (Nev. 2019) ("the special motion to dismiss again functions like a summary judgment motion procedurally"). These cases are conclusive of the issue.

Here, all claims brought by Sahara against Roeben were disposed of by the Anti-SLAPP Order. Sahara has *now* done a flip-flop and argues that its original tardy notice of appeal was actually *premature*, without any explanation for why it filed its notice of appeal prematurely.

Sahara ignores the legion of cases that say it is wrong, and invents an argument that because fees and costs follow an Anti-SLAPP win, the merits adjudication is not final. Meanwhile, the Supreme Court has dealt with this issue already. *See, e.g.*, *Lee, supra.*

The entitlement to fees is irrelevant to the finality of the merits decision. *Lee, supra.* A losing party must appeal a merits decision within 30 days of notice of entry even if a fee motion is anticipated or is pending. *See Davidsohn v. Steffens,* 112 Nev. 136, 139, 911 P.2d 855, 856 (1996) (discussing dismissal of that portion of the appeal addressed to the merits where the appeal was taken after the fee motion was adjudicated); *accord Collins v. Murphy,* 113 Nev. 1380, 1384, 951 P.2d 598, 600-01 (1997).

The claim that its own prior appeal was premature is frivolous. An award of attorneys' fees is a "special order entered after final judgment" per NRAP 3A(b)(8) "and is substantively appealable on its own. Thus, [a party] may appeal an award of attorney fees even after the deadline to

file a notice of appeal from the final judgment has passed." *Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 591, 356 P.3d 1085, 1091 (2015). Per NRCP 54(d)(2)(A), "[t]he court may decide a postjudgment motion for attorney fees despite the existence of a pending appeal from the underlying final judgment." This Court has found that, even though entry of a judgment normally divests a district court of jurisdiction, that court retains jurisdiction to award attorneys' fees after the filing of an appeal. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 677-78, 263 P.3d 224, 227-28 (2011).

Sahara's argument is frivolous. It could not have been *premature* to file a notice of appeal when the Rules expressly contemplate that such an appeal would have been properly filed. Notably, NRCP 54 was specifically amended in light of *Collins* to ensure all parties understood these timing requirements. *See In re Amendments to the Nev. Rules of Civil Procedure*, No. 426, 2008 Nev. LEXIS 2064 (July 8, 2008). The mere mention of an entitlement to attorneys' fees in the Anti-SLAPP statute does not wipe away *every single case to consider this issue* – which is what Sahara urges. Indeed, this is not a "case of first impression" – it is just the first case in which anyone has ever raised such a frivolous argument.

The authorities Sahara cites do not support its arguments. *Stark v. Lackey* was an appeal of an order *denying* an Anti-SLAPP motion, which is immediately appealable as an interlocutory order per NRS 41.670(4). 136 Nev. 38, 458 P.3d 324, 344 n.1 (2020). *Kosor v. Olympia Cos., LLC,* does not alter the finality of the merits decision; the Court did not rule that the Anti-SLAPP statute's reference to both the substantive right to a speedy resolution of claims and the right to attorneys' fees require, nor even allow, the orders on both be jointly appealed. 2020 Nev. LEXIS 87 (Nev. Dec. 31, 2020). *Kosor* did not address the issue of attorneys' fees aside from an off-handed mention and with no mention of the issue of appealability.

Rather, this Court's jurisprudence holds that post-judgment orders, such as attorneys' fees awards, are independently appealable apart from merits decisions. In *Campos-Garcia v. Johnson*, this Court observed that:

> we have recognized that a post-judgment order awarding attorney fees and costs is appealable, even though not termed a "judgment" or incorporated into the final judgment
> . . .
> When district courts, after entering an appealable order, go on to enter a judgment on the same issue, the judgment is superfluous.
> . . .
> Here, the original judgment resolved all of the issues in the case and thus was the final, appealable judgment. The order

> awarding attorney fees and costs was independently appealable as a special order after final judgment.

130 Nev. 610, 611-12, 331 P.3d 890, 891 (2014). Similarly, in *Divinus v. Chena*, the Court reaffirmed that an "appellant cannot challenge the summary judgment order in the context of an appeal from the post-judgment order awarding fees and costs. To the extent appellant contends that the motion for fees and costs tolled the time to file the notice of appeal, the contention lacks merit as a motion for fees and costs is not a tolling motion." 2019 Nev. Unpub. LEXIS 1406 at * 3 (Nev. Aug. 23, 2019). Repeatedly, this Court recognized that an award of attorneys' fees is distinct from an order disposing of the claims in a case. Appellant has not cited a single case to the contrary.

Appellant asks this Court to overrule all of its precedent and to enact a sea change in this State. In no case has the post-judgment fee award been relevant to appealability. *See John*, 125 Nev. at 749-50, 219 P.3d at 1278-79 (in appeal of grant of Anti-SLAPP motion, making no mention of fee award); *Abrams v. Sanson*, 458 P.3d 1062, 1065-66 (Nev. 2020) (same); *Delucchi v. Songer*, 396 P.3d 826, 828-29 (Nev. 2017) (same); *Jablonski Enters. v. Summa, LLC*, 2017 Nev. App. Unpub. LEXIS 739, *2-3 (Nev. Oct. 13, 2017) (same); *Crabb v. Greenspun Media Grp.,*

LLC, 2018 Nev. App. Unpub. LEXIS 526, *2-3 (Nev. July 10, 2018) (same); *Brown-Osborne v. Jackson*, 2020 Nev. Unpub. LEXIS 386, *1-2 (Nev. Apr. 16, 2020) (same); *Wynn v. AP*, 475 P.3d 44, 46 (Nev. 2020) (same). To accept Sahara's position would mean that the Court *actually lacked jurisdiction in all of those prior decisions*; it did not.[2] The order granting Roeben's Anti-SLAPP motion was a final, appealable decision.

Appellant argues the appealability of Anti-SLAPP motions is governed exclusively by statute, while providing no authority for this position. NRS 41.670(4) and *Lackey* note that the *denial* of an Anti-SLAPP motion is an immediately appealable *interlocutory* order, but that is because this is an exception to the usual rules governing appealability. The denial of a motion to dismiss or a summary judgment motion is an interlocutory order because it does not dispose of all issues in a case. The Nevada Legislature chose to allow for an immediate interlocutory appeal

[2] Ironically, Appellant argues that following this well-established precedent would create confusion and bad policy. Well, this is the policy that this state has operated under, to no disaster, for at least 20 years. There is no potential confusion here. Every losing SLAPP plaintiff before this Appellant knew that an order granting an Anti-SLAPP motion must be filed within 30 days of notice of entry of such an order. Helping Appellant fix its mistake is not a good reason to upend all this precedent and to actually *create* confusion.

of Anti-SLAPP denials. This hardly means that since the legislature did not also say "if your case is dismissed, you have an immediate appeal," then no such ability to appeal exists – because *that was already the state of the law since the inception of the Anglo-American judicial system.* If we were to credit Sahara's arguments, then the grant of an Anti-SLAPP motion would never be appealable because the statute does not make a specific pronouncement on this issue. An order granting an Anti-SLAPP motion is the same as an order granting a summary judgment motion; a final judgment on the merits that is appealable. NRS 41.660(5) itself spells out that an order dismissing claims under the statute "operates as an adjudication upon the merits."

Appellant's attempt to contrast this language with California's Anti-SLAPP statute makes no sense. Our statute says that this Court should rely on case law interpreting California's statute. It says nothing about following the statutory language in the California statute.

Nevertheless, the California statute says that an order granting or denying an Anti-SLAPP motion is appealable, therefore Sahara expects this Court to believe that since Nevada did not put the word "granting" in its statute, that orders granting Anti-SLAPP motions are not

appealable. If that is the case, then the appeal should be denied, because the legislature did not intend to allow appeals from dismissals under the Anti-SLAPP act. Even Roeben does not support this argument, although it would certainly end the appeal if credited.

The simple fact is that there was no need to insert the language "**granting or** denying" when, by operation of existing statutes and rules, an order granting an Anti-SLAPP motion is already appealable. *See, e.g., John*, 125 Nev. at 757-58. Nevada's statute lacks a superfluous word that California decided to use. That is all. This does not mean there is a conflict between them.

Again, there is only a need to specially mention the appealability of the denial of an Anti-SLAPP motion because such an order is interlocutory and not normally appealable without a special statute saying so, whereas the order granting one is final. Appellant cites *Animal Care Clinic, Inc. v. Eighth Judicial Dist. Court*, 445 P.3d 221 (Nev. July 24, 2019), but this case is inapposite. It notes that an order *partially* granting an Anti-SLAPP motion is not immediately appealable. But that conclusion fits within the same summary judgment jurisprudence; an order partially granting summary judgment is

similarly not immediately appealable, because not all issues are resolved. Such an order is categorically different from an order disposing of all claims, like the order here, which is immediately appealable.

Sahara then expects this Court to cast aside decades more law for it and categorize a mandatory award of attorneys' fees under NRS 41.670(1)(a) as an award of "damages," which could leave issues to be resolved after a merits adjudication, but that is not what the statute says and there are no cases interpreting such an award as "damages." Nobody has ever even made this argument, much less had it upheld.

This argument is undermined by NRS 41.670 itself, as that provision allows a defendant, after prevailing on an Anti-SLAPP motion, to bring a separate claim for relief against the plaintiff for compensatory and punitive damages, as well as attorneys' fees. NRS 41.670(1)(c).[3] The statute considers an award of fees to be distinct from any recoverable

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[3] Similarly, Appellant's attempt to analogize an Anti-SLAPP motion to an affirmative claim for malicious prosecution or abuse of process is nonsensical. Bringing an Anti-SLAPP motion is not equivalent to bringing a counterclaim; it is a procedural vehicle allowing for quick dismissal of meritless suits based upon specified protected conduct. Again, NRS 41.670(1)(c), which Roeben never invoked, allows for an affirmative claim by a prevailing defendant, which may actually fit the analogy Appellant tries to make. Seeking early dismissal of meritless claims does not serve to further embroil a defendant in a SLAPP suit.

damages.[4]

Sahara's original notice of appeal from the appealable Anti-SLAPP order was late. A notice of appeal must be filed within 30 days from when notice of entry of the written order is served. NRAP 4(a)(1). Here, written notice of entry of the Anti-SLAPP Order was served on October 30, 2020. Accordingly, the deadline for Sahara to appeal the Anti-SLAPP Order was December 1, 2020. Sahara waited until December 9, 2020, to file its Notice of Appeal. The original notice was late and, therefore, this Court has no choice but to dismiss this appeal, as it lacks jurisdiction.

2.2 Appellant's Purported "Amended" Notice of Appeal is Not Effective

Another issue the Court needs to address, but which is largely ignored in Appellant's Response, is the timeliness of the purported amended notice of appeal. With full awareness that the original notice was late, Sahara attempted to manufacture jurisdiction through an "amended notice of appeal," to include an appeal of the fee award. A party

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[4] For some reason, Appellant cites *Mid-Century Ins. Co. v. Pavlikowski*, 94 Nev. 162 (1978) to support its position here. But that brief *per curiam* decision only noted that the issue of damages had not yet been tried. There was no indication as to what these potential damages could be, on what basis they could be awarded, or whether they included attorneys' fees.

may not expand the scope of appeal by amending it to include a separate, independently appealable order.

This Court dealt with just this kind of an attempt to tack on such orders to a prior appeal in *Weddell v. Stewart*, 127 Nev. 645 (2011). Weddell initially filed a timely notice of appeal of a judgment entered against him. He attempted to file an amended notice of appeal to group the appeal of later orders awarding attorneys' fees and denying his motion to set aside together. *Id*. at 648-49. The Court explained that this was not appropriate and the appeals of the subsequent orders were to be docketed separately because "an appeal from an order regarding attorney fees constitutes an independently appealable special order after final judgment," and that attempting to amend the appeal in this manner was "in contravention of NRAP 3A(b)." *Id*. at 648 n.1 & 649 n.3. Accordingly, Appellant may only appeal the order granting Roeben's fee motion by opening a separate, new, appeal, not amending the existing one over which the Court lacks jurisdiction.

Even in the specific context of Anti-SLAPP practice, this Court has rejected what Appellant is trying to do here. The appellant in *Patin v. Lee* filed an amended notice of appeal purporting to include the denial of

a renewed Anti-SLAPP motion within the scope of an appeal of the denial of the original motion. 2017 Nev. Unpub. LEXIS 306 at *1-2 (Nev. Apr. 27, 2017). In declining to hear argument on the denial of the renewed motion, the Court explained that the scope of an appeal must be determined by review only of the notice of appeal, except where the intent to appeal another order can be inferred. *Id*. at *3-4. That intent can only be inferred by the original notice or the order being appealed. *Id*. Subsequently filed documents cannot support an inference that the issues on appeal would be beyond those set forth in the original notice. *Id*. at *4.

The scope of Sahara's initial notice of appeal is straightforward. It only referred to the grant of the Anti-SLAPP Motion. No other issue on appeal can be inferred from that notice or the order. As in *Lee*, the scope of this appeal is restricted to the order granting Roeben's Anti-SLAPP Motion. The purported amendment must be disregarded and should be stricken. An appeal of a fee order must be taken by a second, independent notice of appeal, not an amendment of an original notice of appeal. Sahara cannot use an amendment to fabricate jurisdiction over its untimely appeal of the final merits decision.

2.3 There is No Reason to Delay in Deciding Jurisdiction

Appellant asks the Court to hold off on deciding the dispositive issue of jurisdiction because, 89 days after being served with notice of entry of the District Court's Anti-SLAPP order, it filed a frivolous motion seeking relief under NRCP 52(b),[5] 59(e), and 60(b). That motion is frivolous because motions under NRCP 52(b) and 59(e) must be brought within 28 days of service of notice of written entry of the judgment to which such motions relate. A district court does not have discretion to extend this time, and so denial is mandatory. *See* NRCP 6(b)(2) (specifying that "[a] court *must not extend the time to act* under Rules . . . 52(b), 59(b), (d), and (e) . . . ." (emphasis added)). The District Court is not allowed to entertain such a motion if it is untimely, and this Court's ruling on jurisdiction will determine whether that motion is timely.[6] There is no reason for this Court to hold off on making such a decision.[7]

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[5] Appellant's Response erroneously states this motion seeks relief under NRCP 52(a)(5) and 52(b), but that is false. Only NRCP 52(b) allows for relief; Rule 52(a)(5) merely provides grounds upon which such relief may be granted.

[6] Appellant's argument here begs the question by assuming its notice of appeal was premature, and thus that the district court may properly rule on its motion under NRCP 52(b) and 59(e). If this Court determines

Appellant's argument is also made in bad faith, having asked this Court and the District Court to each defer to the other, such that the timeliness issue would never be reached. In its District Court motion, Appellant urges the District Court not to decide the issue of timeliness because it is the subject of Roeben's Motion to Dismiss here, and this Court is better equipped to decide such an issue. (*See* Response at Exhibit A, p. 2.) (stating "[a]s that question is rightly the Supreme Court's to decide, this Court should not prejudge whether an anti-SLAPP motion under NRS 41.660 is reviewable in the context of an appeal from the order granting the defendant's 'remedies' under NRS 41.670. This Court should simply decide the merits of the Rule 59(e) motion"). In its Response here, however, Appellant argues that this Court should allow the District Court to resolve its post-judgment motion before making any decision on appealability. (Response at 9-10.) Appellant has taken

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that contention is wrong and the notice of appeal was late, Appellant's argument here fails.

[7] While Appellant's motion under NRCP 60(b) is not unquestionably untimely, such motions must be brought within a reasonable amount of time, which under no circumstances can exceed 6 months. *See Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 338-39 (1980) (finding motion under Rule 60(b) brought within six months of judgment was not timely). Whether the motion was brought 89 days after judgment, or 28 days after judgment, is significant to whether the motion is timely on that ground.

contradictory positions in this Court and the District Court, hoping to avoid any determination on the issue of timeliness so that it can obtain further appealable post-judgment orders that could drag this case out for years. It is exactly the kind of wasteful litigation strategy one would expect from a SLAPP plaintiff, and exactly the kind of conduct that the legislature sought to prevent when it passed the Anti-SLAPP law. The Court should not encourage it.

Appellant then tries to make policy arguments in favor of this Court uprooting all of its prior jurisprudence. Those arguments are clearly made out of selfish motive, not in good faith. The way Nevada and the entire federal system, and most states handle this is all the same – separate appeals of the case in chief and the fee awards.[8] Separate appeals of dispositive judgments and fee awards, as prescribed by the rules, is good policy and promotes judicial economy. Once a defendant wins a summary judgment motion, or a motion to dismiss, or an Anti-SLAPP motion, the losing plaintiff may appeal. In many cases, both parties may agree to stay briefing on the fee issues pending resolution of

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[8] To the best of the undersigned's knowledge, *all* states handle appeals this way. However, we have not conducted a 50-state survey.

the merits appeals where a) reversal would render it moot or b) affirmation would encourage voluntary settlement.[9] This saves costs for both parties and the Court should not displace this policy, or the rules, removing the incentive to settlement, because of Sahara's error.

Finally, Appellant claims the Court should allow the settlement conference to go forward before deciding the issue of jurisdiction. If this Court lacks jurisdiction over this appeal, it cannot require the parties to engage in settlement discussions. The Court granted Roeben's Motion for Reconsideration which raised this argument, seemingly agreeing with this position. And as explained above, the fact that Appellant filed an ineffective purported "amended notice of appeal" to include the fee award does not create jurisdiction.

3.0 Conclusion

The Anti-SLAPP Order was an appealable final judgment, and Sahara failed to timely file its Notice of Appeal. This Court lacks jurisdiction to hear this appeal, and it must be dismissed. This Court should not wait on any district court proceedings before making its

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[9] Indeed, in this case, Roeben made great efforts to settle the fee issue before a hearing. However, Sahara never once approached Roeben in good faith.

decision.

Dated: February 9, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2021, a true and correct copy of the foregoing Reply in Support of Motion to Dismiss Appeal for Lack of Jurisdiction was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Respectfully Submitted,

Employee,
Randazza Legal Group, PLLC