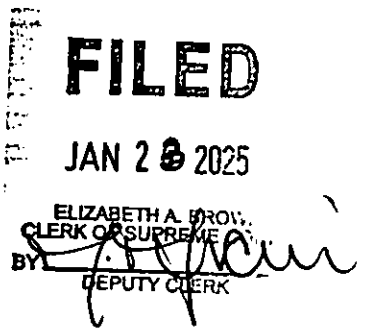
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TAYO OSHIFODUNRIN, AN INDIVIDUAL; AND A NEW DAY COMMUNITY HEALTH CENTER, INC., A NEVADA NON-PROFIT CORPORATION,
Appellants,
vs.
KRISTA N. ALBREGTS, AN INDIVIDUAL; JEFFREY ALBREGTS, AN INDIVIDUAL; JEFFREY R. ALBREGTS, LLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY; CHARLESTON HEIGHTS SHOPPING CENTER, A NEVADA LIMITED LIABILITY COMPANY; AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Respondents.

No. 87601-COA



ORDER OF AFFIRMANCE

Tayo Oshifodunrin (Tayo) and A New Day Community Health Center, Inc. (ANDCHC) (collectively referred to as appellants where appropriate) appeal from a district court order dismissing their complaint concerning the alleged wrongful attachment of property. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

The underlying proceeding has its origins in a prior district court action where A New Day Adult Daycare (ANDAD) sued its landlord, respondent Charleston Heights Shopping Center, LLC (CHSC), in district

25-03350

court, seeking injunctive relief and damages for alleged rent overcharges.[1] CHSC, which was represented by respondents Krista Albregts, Jeffrey Albregts, and Jeffrey R. Albregts, LLC (generally referred to collectively as the Albregts law firm), answered and counterclaimed for unpaid rent and electricity charges. CHSC also filed a third-party complaint against the lease guarantors, including John Oshifodunrin (John). The district court ultimately granted CHSC's motions for partial summary judgment on its counterclaims and dismissed ANDAD's complaint.[2] A final money judgment was entered in CHSC's favor against ANDAD and each guarantor for unpaid rent, totaling approximately $367,610, for which the judgment debtors were jointly and severally liable.

In an effort to satisfy the judgment against John, as a guarantor, CHSC was granted an ex parte writ of attachment targeting the "property" of Tayo, as John's purported wife, as well as ANDCHC, an entity allegedly controlled by John, and other corporate entities.[3] CHSC subsequently obtained a writ of garnishment against respondent First American Title Insurance Company (First American), which was holding $200,000 in escrow from the sale of real property allegedly jointly owned by

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[1]We recount the facts only to the extent necessary to our disposition.

[2]The district court granted CHSC's first motion for partial summary judgment against ANDAD, finding that ANDAD had breached its lease by failing to pay the rent due. It subsequently granted CHSC's second motion for partial summary judgment against the lease guarantors, concluding that they were liable for the contractual damages awarded pursuant to their personal guarantees of ANDAD's lease.

[3]Below, the parties disputed whether Tayo and John were still married when CHSC obtained the monetary judgment against him, and whether ANDCHC was John's alter ego. However, we need not address these issues in resolving this appeal.

the appellants. The writ of garnishment directed First American to turn over the escrow funds to CHSC. Both the writ of attachment and the writ of garnishment were served on First American. Although appellants were not served with the writs of attachment and garnishment, they began corresponding with CHSC after learning from First American that the escrow funds had been turned over. They engaged in discussions regarding a voluntary release of the funds, but these discussions ultimately failed.

After CHSC filed a motion to add appellants as judgment debtors, appellants filed an emergency motion to set aside the writ of attachment and sought the immediate return of the attached funds pursuant to NRS 31.010. Appellants argued that because no judgment had been levied against either of them, CHSC's ex parte application for a writ of attachment for property belonging to Tayo and ANDCHC was baseless.

An evidentiary hearing was held on the emergency motion to set aside the writ of attachment.[4] Appellants appeared through their attorney. Despite being served with a subpoena, Tayo did not appear to testify. Likewise, no principal from ANDCHC appeared to testify on its behalf. On the other hand, Tara Pelander, an escrow officer appearing on behalf of First American, testified that she only ever "spoke or dealt" with John regarding the $200,000 in escrow funds and that he was the one who claimed them. After allowing supplemental briefing on the motion, the district court ruled that appellants had not "produced any evidence or testimony to suggest that the proceeds from the sale of the real property at

[4]The same hearing also addressed CHSC's motion to add the appellants as judgment debtors, but the court ultimately denied the motion, noting that neither Tayo nor ANDCHC had been named as defendants in the third-party action or served with process at the start of the litigation.

issue belonged solely to them," and therefore denied the emergency motion. Appellants did not appeal the order denying their emergency motion to set aside the writ of attachment as required. *See* NRAP 3A(b)(5); NRAP 4(a)(1).

While awaiting the district court's decision on the emergency motion in the prior action, appellants initiated a separate lawsuit, the underlying tort action in this appeal, against First American, CHSC, and the Albregts law firm (collectively referred to as respondents), based on the wrongful levy of the escrow funds. In the operative complaint, appellants alleged the $200,000 in escrow funds, jointly and solely owned by them, was illegally turned over to CHSC by First American pursuant to the writ of attachment and writ of garnishment. Appellants asserted claims for abuse of process, negligence, conversion, civil conspiracy to defraud, and tortious interference with contractual rights in their complaint. Appellants sought the immediate return of the seized escrow funds, requesting punitive damages.

Respondents moved to dismiss, arguing that the district court lacked subject matter jurisdiction to consider appellants' complaint. In arguing for dismissal, respondents demonstrated that, in the prior case, appellants filed their emergency motion to set aside the writ of attachment, which the district court denied. As a result, respondents asserted that appellants were required to appeal the order denying their emergency motion to set aside the writ of attachment under NRAP 3A(b)(5), rather than filing the underlying action. For support, respondents relied on NRS 31.070, which sets forth a procedure for third-parties to challenge the wrongful attachment of their property "without the necessity of an independent action," arguing that the statute provides an exclusive remedy.

The district court agreed and dismissed the action for lack of subject matter jurisdiction. Furthermore, the district court implicitly concluded that an exception to the exclusive remedy rule did not apply to the appellants' abuse of process claim, reasoning that they could not pursue claims based on a wrongful attachment without alleging an ulterior purpose behind the attachment. In granting the motion to dismiss, the district court also determined that any claims arising from the alleged "unlawful attachment of funds" had been fully adjudicated in the prior case. As a result, the district court concluded that, under the doctrines of claim and issue preclusion, appellants were barred from asserting claims based on the alleged wrongful attachment of the funds in future proceedings. Appellants then appealed the court's dismissal of their complaint.

On appeal, appellants contend that the district court erred in dismissing their complaint for lack of subject matter jurisdiction. In support, appellants argue that NRS 31.070, based on its plain language, is not an exclusive remedy for third parties whose property has been wrongfully attached. Alternatively, they argue that even if NRS 31.070 is an exclusive remedy, their causes of action did not specifically include a claim for wrongful attachment and therefore they should have been allowed to proceed with their case.

Conversely, respondents argue that Nevada Supreme Court precedent clearly establishes NRS 31.070 as the exclusive remedy for claims involving a sheriff's wrongful levy on property. Thus, respondents contend that because the order from the prior action denying appellants' emergency motion to set aside the writ of attachment was appealable under NRAP 3A(b)(5) and appellants failed to file a timely appeal, they forfeited their right to recover the claimed funds and any related damages from the alleged

wrongful attachment of their property. With respect to appellants' alleged ability to bring causes of action under alternative legal theories, respondents reiterate that NRS 31.070 is an exclusive remedy, not limited to claims of wrongful attachment of property, but covers any type of claim related to wrongful attachment. Additionally, respondents argue that issue preclusion provides this court with an independent basis for affirming the dismissal.

We review both decisions regarding subject-matter jurisdiction and the application of issue preclusion de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (subject-matter jurisdiction); *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) (issue preclusion). The district court properly dismissed the negligence, conversion, civil conspiracy, and tortious interference claims, as NRS 31.070 provides an exclusive remedy.

NRS 31.070 outlines a specific procedure for a third-party claimant to challenge a writ of attachment by submitting a written, verified claim. If the claim is disputed, section 5 of the statute grants the claimant the right to a hearing before the court handling the case, where the court will determine title to the property in question. This hearing is available upon petition and notice to all parties involved in the action, as well as any parties asserting an interest in the property. In other words, the procedure set forth in NRS 31.070 is the designated remedy for resolving disputes over the right and title to property that has been levied upon by a judgment creditor and is claimed to be owned by a third party. *Brooksby v. Nev. State Bank*, 129 Nev. 771, 773, 312 P.3d 501, 502 (2013); *see also Elliott v. Denton & Denton*, 109 Nev. 979, 980, 860 P.2d 725, 726 (1993) (noting that NRS 31.070 sets forth the procedure to resolve questions to title where "the

property levied on is claimed by a third person as his [or her] property" (quoting NRS 31.070(1))); *Kulik v. Albers, Inc.*, 91 Nev. 134, 137, 532 P.2d 603, 605-06 (1975) (referring third-party claims concerning writs of execution to the NRS 31.070 process).

Although the appellants' emergency motion in the prior action was styled as a motion under NRS 31.010, it was, in fact, a petition under NRS 31.070. *See Luong v. Vahey*, No. 83929-COA, 2022 WL 17367574, at *3 (Nev. Ct. App. Nov. 30, 2022) (Order Affirming in Part, Reversing in Part and Remanding) (providing that this court construes motions based on their substance rather than their titles); *cf. State Farm Mut. Auto Ins. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (providing "that it is the nature of the grievance rather than the form of the pleadings that determines the character of the action" (internal quotation marks omitted)). NRS 31.010 allows a judgment creditor to use a writ of attachment to recover a post-judgment debt, *see LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 901, 8 P.3d 841, 845 (2000), while NRS 31.070 provides the recourse for third parties, such as the appellants, to assert claims to property even after a district court has released it to the judgment creditor, *see Brooksby*, 129 Nev. at 774, 312 P.3d at 503. Thus, under NRS 31.070—not NRS 31.010—appellants had standing to challenge the writ of attachment. *Cf. Clark NMSD, LLC v. Goldstein*, 138 Nev. 766, 767, 520 P.3d 356, 358 (2022) ("NRS 31.070 . . . conveys party standing on the third-party entities that petition the district court pursuant to it for the return of property levied under a writ of execution.").

Our supreme court has clearly addressed the question of whether NRS 31.070 is an exclusive remedy on multiple occasions. *See Elliot*, 109 Nev. at 980, 860 P.2d at 726 ("Nevada, like most states, has a

statute which, by its terms, provides an exclusive and summary means for disposing of claims [where] the sheriff has levied on the wrong property. The statute, NRS 31.070, is called a 'third party claims' statute." (footnote omitted)); *Cooper v. Liebert*, 81 Nev. 341, 344, 402 P.2d 989, 991 (Nev. 1965) ("We hold that NRS 31.070 is a complete and valid remedy to third persons whose property has been attached, [and] that the remedy therein provided is exclusive . . . ."). Consistent with precedent, we conclude that NRS 31.070 is the exclusive remedy for third parties to challenge the wrongful attachment of property.

Here, the record establishes that appellants were able to challenge the attachment of their escrow funds in the prior action by filing the emergency motion to set aside the writ of attachment. *Cf. Goldstein*, 138 Nev. at 767, 520 P.3d at 358. NRAP 3A(b)(5) allows appeals from an order refusing to dissolve an attachment, and NRAP 3A(b)(8) allows appeals from special orders after final judgment. As NRS 31.070 is an exclusive remedy, the proper avenue for appellants to challenge the attachment of the escrow funds was to appeal the district court's order denying their emergency motion in the prior action where the judgment was entered against John.

Although appellants filed the proper motion to set aside the writ of attachment in the prior case, they failed to appeal the denial of their motion; and, therefore, did not follow the procedures set forth in NRS 31.070. Instead, appellants filed a separate tort action against the respondents, asserting claims based on the wrongful attachment of their property, as reflected in their emergency motion, which demanded the return of the escrow funds. As NRS 31.070 is an exclusive remedy for third parties to challenge the improper attachment of property, and appellants

failed to appeal the court's denial of their emergency motion, they could not properly pursue claims based on the wrongful attachment of their escrow funds in a separate lawsuit such as the underlying proceeding in this appeal.

Appellants argue that because they did not specifically sue for wrongful attachment, they were free to seek relief under alternative theories, including negligence, conversion, civil conspiracy to defraud, and tortious interference with contractual rights. However, appellants' claims are each premised on the wrongful attachment of their property, and appellants do not cite to any legal authority that would allow them to bypass NRS 31.070 by simply reframing a wrongful reattachment claim under alternative tort theories. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority); *see also Wharton*, 88 Nev. at 186, 495 P.2d at 361 (explaining "that it is the nature of the grievance rather than the form of the pleadings that determines the character of the action" (internal quotation marks omitted)). Therefore, we decline to consider this argument and conclude that the district court did not err in dismissing appellants' claims for negligence, conversion, civil conspiracy to defraud, and tortious interference with contractual rights based on the wrongful attachment of the escrow funds. Indeed, even if the district court erred in basing its dismissal of the negligence, conversion, civil conspiracy, and tortious interference claims on a lack of subject-matter jurisdiction, dismissal was nevertheless appropriate for the reasons stated above. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (providing

that this court will affirm a district court order "if it reached the correct result, albeit for different reasons").

Appellants' only remaining claim is for abuse of process, which was similar to their other claims in that it was premised on the wrongful attachment of the escrow funds. The Nevada Supreme Court has recognized an exception to NRS 31.070's exclusive remedy in the context of a malicious abuse of process claim, explaining that "a third-party claimant might, in an independent action, sue a sheriff or an attaching party for tort damages if she or he could prove (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Elliot*, 109 Nev. at 980 n.1, 860 P.2d at 726 n.1 (internal quotation marks omitted).[5] When the district court dismissed the appellants' claims for lack of jurisdiction under NRS 31.070, it implicitly determined that the exception did not apply to appellants' abuse of process claim. However, this court need not address the propriety of the district court's decision in this respect, as the abuse of process claim is barred by the doctrine of issue preclusion, regardless of whether the exception applies. *See Alcantara*, 130 Nev. at 258, 321 P.3d at 916.

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[5]Appellants styled their claim as "abuse of process" rather than using the "malicious abuse of process" language from *Elliot*. However, this is a distinction without a difference, as the elements set forth in *Elliot* for "malicious abuse of process" are essentially identical to those widely recognized for abuse of process. *Compare Elliot*, 109 Nev. 980 n.1, 860 P.2d at 726 n.1, *with Land Baron Invs., Inc. v. Bonnie Springs Fam. Land P'ship*, 131 Nev. 686, 697-98, 356 P.3d 511, 519-20 (2015) ("To support an abuse of process claim, a claimant must show (1) an ulterior purpose by the party abusing the process other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." (internal quotation marks and alterations omitted)).

"[I]ssue preclusion is applied to conserve judicial resources, maintain consistency, and avoid harassment or oppression of the adverse party." *Id.* For this doctrine to apply, the following four elements must be met:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

Id. (internal quotation marks and ellipses omitted). As previously explained, NRS 31.070 granted appellants standing to challenge the writ of attachment, and they exercised that right by filing an emergency motion to challenge the writ in the prior action, making the parties in both the prior and underlying actions identical. *Cf. Goldstein*, 138 Nev. at 767, 520 P.3d at 358; *see also Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009) ("Issue preclusion can only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation."). We thus turn to the remaining issue preclusion elements: same issues, final judgment, and actually and necessarily litigated.

"For 'issue preclusion to attach, the issue decided in the prior [proceeding] must be identical to the issue presented in the current [proceeding].'" *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 891, 266 P.3d 602, 605 (2011) (alterations in original) (quoting *Redrock Valley Ranch v. Washoe County*, 127 Nev. 451, 458, 254 P.3d 641, 646 (2011)). This requirement addresses whether "identical factual allegations are at stake in the two proceedings, not whether the ultimate issues or disposition are

the same." *In re Marriage of Brubaker & Strum*, 288 Cal. Rptr. 3d 256, 266 (Ct. App. 2021) (internal quotation marks omitted).

In the underlying case, appellants alleged in their complaint that CHSC and the Albregts law firm willfully and unlawfully used the legal process not to resolve a legitimate dispute, but as a ruse to steal funds belonging to the appellants, who were not parties or judgment debtors. Appellants further alleged that this conduct constituted an abuse of process, causing them financial harm and forcing them to retain legal counsel to recover the wrongfully seized funds. Although Tayo and ANDCHC's complaint attempted to plead abuse of process as a separate claim from a wrongful attachment cause of action under NRS 31.070, the claim was based on the premise that the escrow funds belonged to them and were wrongfully attached—a matter already rejected in the prior action, where it was determined that the attachment was not wrongful. In the prior action, the district court denied Tayo and ANDCHC's emergency motion, finding no evidence or testimony to support their claim that the proceeds from the sale of the real property belonged exclusively to them or that John had no ownership interest in the funds.

Issue preclusion cannot be circumvented by presenting new legal or factual arguments if they involve the same ultimate issue that was already decided in the prior case. *Alcantara*, 130 Nev. at 259, 321 P.3d at 916-17; *see also LaForge v. State, Univ. and Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000) ("Issue preclusion may apply 'even though the causes of action are substantially different, if the same fact issue is presented.'" (quoting *Clark v. Clark*, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964))); *Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) (stating that "[i]f a party could avoid issue preclusion by finding some argument it failed to

raise in the previous litigation, the bar on successive litigation would be seriously undermined"). The issue concerning the ownership of the escrow funds is the same for both cases. The abuse of process claim is not separate and distinct from the wrongful attachment determination—it is based on the same facts involving the improper attachment of the escrow funds. Because the issues are the same, we conclude that this element is met.

"For purposes of issue preclusion, a final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994) (internal quotation marks omitted). The Nevada Supreme Court has identified three factors that indicate finality: (a) whether the parties were fully heard, (b) whether the court supported its decision with a reasoned opinion, and (c) whether the decision was subject to appeal. *See Kirsch v. Traber*, 134 Nev. 163, 167, 414 P.3d 818, 822 (2018).

Here, appellants were provided an opportunity to present arguments and evidence at the evidentiary hearing on the emergency motion, during which First American's escrow officer, Tara Pelander, testified. Although appellants did not testify and no principal for ANDCHC appeared, the district court still allowed the parties to be fully heard through their legal counsel. Furthermore, the court's order in the prior action denying the emergency motion provided detailed reasoning, specifically addressing the lack of evidence from appellants to prove that the escrow funds solely belonged to them. Additionally, the court's decision was subject to appeal under NRAP 3A(b)(5). Although appellants did not appeal the decision, the fact that the ruling was subject to appeal indicates that the court's judgment was final. The order denying the emergency

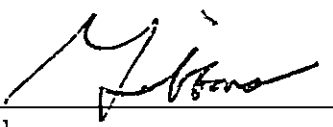
motion required no further action by the district court and should be considered a final judgment for the purposes of issue preclusion, as an appeal of the order was the only avenue for relief available to appellants under the exclusive remedy provided by NRS 31.070. *See Elliot*, 109 Nev. at 980 n.1, 860 P.2d at 726 n.1; *see also Bekken v. Greystone Residential Ass'n*, 227 So.3d 1201, 1213 (Ala. Civ. App. 2017) ("[A] decision on the merits of the claims asserted by the parties is a final decision . . . ." (internal quotation marks omitted)). Accordingly, we determine that the final judgment element is satisfied here.

The fourth element concerns whether the issue was actually and necessarily litigated. *Alcantara*, 130 Nev. at 262, 321 P.3d at 918. "When an issue is properly raised . . . and is submitted for determination, . . . the issue is actually litigated." *Id.* (quoting *Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013) (internal quotation marks omitted). "Whether the issue was necessarily litigated turns on whether the common issue was . . . necessary to the judgment in the earlier suit." *Id.* (quoting *Tarkanian*, 110 Nev. at 599, 879 P.2d at 1191) (internal quotation marks omitted). Resolving the ownership of the escrow funds was necessary to determine whether they were wrongfully attached in the previous case. As the previous case was decided on the merits, it is evident that the issues of the ownership of the escrow funds and the alleged wrongful attachment were actually and necessarily litigated in the prior action, and the district court in that case found that the funds were not wrongfully attached. Therefore, there is no legal basis for allowing appellants' claim of abuse of process to continue.

Based on the foregoing, we conclude that issue preclusion barred the appellants' abuse of process claim in the underlying tort case. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[6]

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

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[6]In their opening brief, appellants argue that NRS 31.070 is unconstitutionally vague on its face and ask this court to review the issue sua sponte. As the constitutionality of the statute was not raised prior to this appeal and was not considered by the district court below, we decline to address this issue for the first time on appeal. *See Munoz v. State ex rel. Dep't of Highways*, 92 Nev. 441, 444, 552 P.2d 42, 43-44 (1976) (holding that a constitutional challenge to Nevada's statutory dismissal procedures for classified personnel was waived because it was not raised at the district court level). Our decision in this respect is reinforced by appellants' failure to comply with NRAP 44, which requires parties who assert a constitutional challenge to a statute in a proceeding before this court in which the state is not a party to give written notice to the clerk of this court, so the clerk can certify the fact to the attorney general. *See In re Candelaria*, 126 Nev. 408, 415, 245 P.3d 518, 522 (2010) (providing that a failure to comply with NRAP 44 is an independent basis for summarily rejecting a constitutional argument). Regardless, given that NRS 31.070 provides the exclusive remedy to challenge the wrongful attachment of property, appellants' constitutional challenge should have been presented in the prior action in which they filed their emergency motion to set aside the writ of attachment, and not in the case that is the subject of this appeal. Moreover, to the extent that appellants primarily challenge NRS 31.070 as being unconstitutional for failing to specify a timeframe for third parties to enforce their rights under the statute, the Nevada Supreme Court has clarified that NRS 31.070 does not impose an "absolute deadline" for bringing such claims, so any such challenge is not well-founded. *Brooksby*, 129 Nev. at 774, 312 P.3d at 503.

cc: Hon. Crystal Eller, District Judge
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