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**FIRST JUDICIAL DISTRICT COURT**
**IN AND FOR CARSON CITY, STATE OF NEVADA**

| | |
|---|---|
| REPUBLICAN NATIONAL COMMITTEE; NEVADA REPUBLICAN PARTY; DONALD J. TRUMP FOR PRESIDENT 2024, INC.; SCOTT JOHNSTON,<br>Plaintiffs,<br>v.<br>FRANCISCO AGUILAR, in his official capacity as Nevada Secretary of State; State of NEVADA; CARI-ANN BURGESS, in her official capacity as the Washoe County Registrar of Voters; JAN GALASSINI, in her official capacity as the Washoe County Clerk; LORENA PORTILLO, in her official capacity as the Clark County Registrar of Voters; LYNN MARIE GOYA, in her official capacity as the Clark County Clerk,<br>Defendants,<br>and<br>VET VOICE FOUNDATION; NEVADA ALLIANCE FOR RETIRED AMERICANS,<br>Intervenor-Defendants | Case No.: 24 OC 00101 1B<br>Dept. No.: 1<br><br>**INTERVENOR-DEFENDANTS' OPPOSITION TO PRELIMINARY INJUNCTION MOTION** |

Plaintiffs ask the Court to enter a preliminary injunction requiring election officials to reject timely cast mail ballots from qualified voters if the postal service, through no fault of the voter, fails to apply a visible postmark to the ballot return envelope. Plaintiffs' motion fails at the threshold because Plaintiffs offer no evidence, only unsworn allegations, with respect to their assertion of irreparable harm and standing to sue. Plaintiffs' motion fails on the merits because Plaintiffs lack standing and their core statutory construction argument is wrong: Nevada law anticipates that some ballots will lack a visible postmark date and expressly provides that such ballots must be counted if they are received by the statutory deadline. And Plaintiffs' motion fails as an equitable matter, because Plaintiffs do not face irreparable injury from the counting of valid votes from qualified voters and the relief they seek would disenfranchise qualified Nevada voters due to post office errors beyond their control. The Court should deny the motion.

## BACKGROUND

When Nevada voters return ballots by mail, they must generally be "(1) [p]ostmarked on or before the day of the election; and (2) [r]eceived by the clerk not later than 5 p.m. on the fourth day following the election." NRS 293.269921(1)(b). But there is a fallback if "the date of the postmark cannot be determined": if such ballots are "received by mail not later than 5 p.m. on the third day following the election, . . . the mail ballot shall be deemed to have been postmarked on or before the day of the election." NRS 293.269921(2). The Secretary of State recently issued guidance clarifying that ballots received by mail without any visible postmark qualify for that fallback provision and must be counted if they are received by 5 p.m. on the third day after election day. *See* Mot. for Prelim. Inj. ("Mot.") Ex. 1. Plaintiffs filed suit to challenge that clarification and prevent the counting of ballots without a visible postmark that are delivered by mail after election day.

## STANDARD OF LAW

"A party seeking a preliminary injunction must show a likelihood of success on the merits of their case and that they will suffer irreparable harm without preliminary relief." *Shores v. Global*

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*Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018). The moving party "must make a prima facie showing through substantial evidence that it is entitled to the preliminary relief requested." *Id.* at 507, 422 P.3d at 1242. "[C]ourts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

## ARGUMENT

### I. Plaintiffs fail to adequately support the Motion with evidence.

The Motion fails at the threshold because Plaintiffs' argument for injury and irreparable harm relies entirely on the Amended Complaint's unsworn allegations, not evidence. "[I]n the absence of testimony or exhibits establishing the material allegations of the complaint, . . . the application for a preliminary injunction [should] be denied." *Coronet Homes, Inc. v. Mylan*, 84 Nev. 435, 437, 442 P.2d 901, 902 (1968); *see also Chattah v. Cegavske*, No. 85302, 2022 WL 4597416, at *1 (Nev. Sept. 29, 2022) (unpublished disposition) (similar). Plaintiffs overwhelmingly fail to provide such evidence. They cite a total of four exhibits: the challenged memorandum, two barebones declarations from election observers describing the counting of ballots without visible postmarks, and a one-page Clark County "Quick Guide" that does not mention postmarks. These exhibits show, at most, that Clark and Washoe Counties are following the Secretary's challenged guidance. None does anything to support Plaintiffs' allegations of injury and irreparable harm, which turn on alleged but unproven diversions of resources and alleged but unproven disparities in the partisanship of late-arriving mail ballots. Mot. at 14. Plaintiffs' failure to provide any evidence supporting their claimed injuries requires denial of their Motion. *Coronet*, 84 Nev. at 437, 442 P.2d at 902.

### II. Plaintiffs are unlikely to succeed on the merits.

#### A. Plaintiffs lack standing.

Plaintiffs are unlikely to succeed on the merits, first, because they lack standing. At the preliminary injunction stage, Plaintiffs have the burden of showing that they will be injured by the

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counting of ballots without visible postmarks. They have failed to do so. Indeed, they have even failed to make colorable allegations that—if believed—would make this showing. And, at this stage, the Court is no longer permitted to simply accept Plaintiffs' allegations as true.

As explained in more detail in Intervenor-Defendant's Motion to Dismiss the Amended Complaint, regardless of what happens in this case, mail ballots will be a central component of Nevada elections, and many of them will be counted after election day. Plaintiffs are unable to explain how or why the counting of ballots without visible postmarks in particular would cause them to "expend[] additional resources that they would not have otherwise expended." *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942 (9th Cir. 2021) (citation omitted). Nor do Plaintiffs adequately allege injury to their electoral prospects, which requires showing "an unfair advantage in the election process." *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1003 (D. Nev. 2020) (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)). The challenged guidance applies equally to *all* candidates and to *all* voters, so no one "is specifically disadvantaged" by it. *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 737–38 (N.D. Ill. 2023) (quoting *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020)). And a "veritable tsunami" of decisions have rejected Plaintiffs' "vote dilution" theory that all voters are injured by the counting of supposedly unlawful votes. *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases); *see also Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020). At bottom, Plaintiffs' claim that "the law . . . has not been followed" is a "generalized grievance about the conduct of government" that is insufficient to show standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

### B. The Secretary's interpretation of the no-postmark provision is correct.

Plaintiffs are also unlikely to succeed on the merits of their challenge to the Secretary's interpretation of NRS 293.269921. Their claim depends on reading the no-postmark-date provision to create an arbitrary distinction between ballots that have a visible postmark but no legible date and ballots that have no visible postmark at all, even though the provision applies to *all* ballots for

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which "the date of the postmark cannot be determined." NRS 293.269921(2). "In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it. But when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 879, 362 P.3d 83, 85 (2015) (citations omitted). Plaintiffs' strained interpretation of NRS 293.269921 cannot be squared with the statute's plain text, evident purpose, or legislative history. The Court should reject it.

**1. The statute's plain text does not make the distinction Plaintiffs assert.**

Nothing in the text of the no-postmark-date provision supports Plaintiffs' effort to distinguish between ballots with a visible postmark but no legible date and ballots with no visible postmark at all. The provision applies *whenever* "a mail ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined." NRS 293.269921(2). The provision is not limited to particular *reasons* why the "date of the postmark cannot be determined," and it nowhere requires that there be a visible postmark on the ballot envelope. When a statute imposes a particular set of requirements, courts may not add additional requirements that the Legislature declined to impose. *See Dep't of Tax'n v. DaimlerChrysler Servs, N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("Nevada law also provides that omissions of subject matters from statutory provisions are presumed to have been intentional."); *City of Reno v. Yturbide*, 135 Nev. 113, 115–16, 440 P.3d 32, 35 (2019) ("Where the language of the statute is plain and unambiguous, a court should not add to or alter the language to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports." (cleaned up)). Yet that is what Plaintiffs ask the Court to do in demanding that only ballots with a visible postmark be counted.

The structure of NRS 293.269921 reinforces the conclusion that no visible postmark is required for the no-postmark-date provision to apply. NRS 293.269921 carefully articulates two

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sets of rules for counting ballots delivered by mail to election officials. The first, in subsection (1), applies to ballots whose postmark dates *can* be determined. Such ballots may be counted only if they are postmarked on or before election day and received by 5 p.m. on the fourth day after election day. The second, in subsection (2), applies where the date of the postmark *cannot* be determined. Such ballots may be counted only if they are received by 5 p.m. on the third day after election day. These two subsections are plainly intended to cover all ballots delivered to election officials by mail: those with determinable postmark dates, and those without. There is no third set of rules. The Secretary's interpretation therefore does not, as Plaintiffs assert, render any portion of the statute superfluous. Mot. at 9. It gives effect to *both* sets of rules in NRS 293.269921.

Plaintiffs' argument that the statute implicitly demands election officials reject ballots with no visible postmark at all inserts words into the statute that are not there. No provision in the statute addresses that specific category of ballots, as distinct from the broader set of all ballots for which a postmark date cannot be determined. The Court must "look to the statute's plain language" to "ascertain the Legislature's intent." *Williams v. State Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). If the Legislature intended that ballots without visible postmarks be rejected, it could easily have said so. Because "the statute's language is clear and unambiguous," the Court must "enforce the statute as written." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011).

Moreover, while Plaintiffs' complaint specifically targets ballots arriving after election day, their argument would lead to absurd results, putting *any* ballot that arrives in the mail at the county clerk's office without a visible postmark at risk of rejection, even if it arrives before or on election day. Subsection 1 allows for the counting of "[p]ostmarked" ballots. NRS 293.269921(1)(b)(1). It is NRS 293.269921(2) that explicitly provides for ballots without a visible postmark or legible postmark to be counted, with the only temporal limitation being the three-day post-election deadline. Even Plaintiffs implicitly acknowledge that rejecting such ballots that arrive by election day would be untenable: their requested relief reflects as much—they ask the Court to order that election officials throw out only ballots that arrive after election day without a

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1 visible postmark. But this distinction between ballots that arrive before and after election day
2 appears nowhere in the text and would require the Court to read in language that is not there.

3 **2. Legislative history confirms the error in Plaintiffs' interpretation.**

4 The legislative history of NRS 293.269921 confirms the Secretary's plain text
5 interpretation. The Nevada Supreme Court "determines the Legislature's intent by evaluating the
6 legislative history and construing the statute in a manner that conforms to reason and public
7 policy." *A.J. v. Eighth Jud. Dist. Ct. in and for Cnty. of Clark*, 133 Nev. 202, 207, 394 P.3d 1209,
8 1213 (2017) (internal quotation marks omitted). Here, the Legislature explicitly considered the
9 very interpretive question at issue when it adopted NRS 293.269921, and the bill's sponsor directly
10 confirmed what is apparent from the face of the statute: NRS 293.269921(2) applies equally to
11 mail ballots lacking a postmark as to those with illegible postmarks. He explained that under the
12 bill, "to the extent that there were envelopes that *were not postmarked* or the postmark was
13 illegible, smudged, or otherwise damaged to where it could not be read—I think similar to the
14 postmark requirement of three days—any of those that came in within that same period of time
15 *would be counted* and anything that came in after that would not be counted." Minutes of the
16 Meeting of the Assemb. Comm. on Legislative Operations & Elections, 2021 Leg., 81st Session
17 21 (Nev. Apr. 1, 2021) (statement of Jason Frierson, Speaker of the Nev. Assemb.)
18 https://www.leg.state.nv.us/Session/81st2021/Minutes/Assembly/LOE/Final/663.pdf (emphasis
19 added). Speaker Frierson's statement could not be more clear or explicit: it was the intent of the
20 Legislature in enacting NRS 293.269921(2) that ballots lacking a visible postmark would be
21 counted if they arrived within three days of election day.

22 **3. Public policy does not support Plaintiffs' interpretation.**

23 The Secretary's interpretation also "conforms to reason and public policy," *Great Basin*
24 *Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010), while Plaintiffs'
25 interpretation defies common sense. The no-postmark-date provision is designed to ensure that
26 timely-cast ballots are not discarded due to circumstances—such as the smudging or omission of
27
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a postmark—that are entirely outside the voter's control. This rationale applies equally to ballots with no visible postmark as to ballots with illegible postmarks dates. An illegible postmark provides election officials with no information that a ballot delivered by mail without a visible postmark lacks. The Secretary's interpretation gives effect to the intent of the Legislature by ensuring that ballots are not discarded due to postal service error. Plaintiffs' interpretation, on the other hand, would lead to absurd—and potentially unconstitutional—results. A state may not "disenfranchise[] voters who *do* meet the deadlines imposed by state law by invalidating their ballots that, through no fault of their own, are not postmarked and are delivered two or more days after Election Day." *DCCC v. Kosinski*, 614 F. Supp. 3d 20, 56–57 (S.D.N.Y. 2022); *see also Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 44 (S.D.N.Y. 2020) (similar). But, again, whether or not a ballot ends up with a visible postmark is entirely outside the voter's control. The Legislature could not have intended such arbitrary disenfranchisement. *See Tate v. State, Bd. of Medical Examiners*, 131 Nev. 675, 678, 356 P.3d 506, 508 (2015) ("Statutes should be construed so as to avoid absurd results."). "[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Degraw v. Eighth Jud. Dist. Ct.*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018) (citation omitted).

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**C. The Secretary's interpretation is not subject to the procedural rulemaking requirements of the APA.**

Plaintiffs' procedural claim under the APA also fails because the Secretary's Memorandum is not a regulation. It is instead an interpretation that the Secretary has statutory authority to issue, and therefore is not subject to the APA's procedural requirements. An agency engages in "rulemaking" only when it "promulgates, amends, or repeals an agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure, or practice requirements of any agency." *Labor Comm'r of State of Nev. v. Littlefield*, 123 Nev. 35, 39–40, 153 P.3d 26, 29 (2007) (cleaned up). The APA's statutory

definition of "regulation" explicitly excludes "an interpretation of an agency that has statutory authority to issue interpretations," NRS 233B.038(2)(h). The Secretary has statutory authority to "provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, presidential preference primary, general, special and district elections in this State." NRS 293.247(4). Such "interpretations" therefore are not "regulations," which the Secretary is separately authorized to promulgate under a different subsection, NRS 293.247(1). *See Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 6–7 (Nev. 2011) (distinguishing between a regulation and an interpretation).

## III. Plaintiffs will not suffer irreparable harm absent an injunction.

As explained above, Plaintiffs have not submitted *any evidence* of injury, much less of irreparable harm, in support of their motion. And even their allegations fail to show that they face any concrete harm sufficient for standing, let alone "immediate threatened injury." *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). The only authority on which Plaintiffs rely for their supposed interest in "ensuring that the final vote tally accurately reflects the legally valid votes cast," *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020), rested on flawed reasoning and has been repeatedly rejected by other federal courts. *See id.* at 1063 (Kelly, J., dissenting) (explaining the plaintiffs' "claimed injury—a potentially 'inaccurate vote tally' . . . —appears to be 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court has long considered inadequate for standing." (quoting *Lance*, 549 U.S. at 442)); *see also Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 351 n.6 (3d Cir. 2020) (explaining *Carson*'s error and declining to follow it), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *King v. Whitmer*, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020) (same); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 612 (E.D. Wis. 2020) (same); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 710–11 (D. Ariz. 2020) (same); *Bost*, 684 F. Supp. 3d at 734 (same). Even the rare courts that have accepted *Carson*'s premise have still required plaintiffs to "allege[] facts to show that it is plausible that the field is 'tilted'." *Lake v. Hobbs*, 623

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F. Supp. 3d 1015, 1029 (D. Ariz. 2022). Plaintiffs have not done so here.

Second, Plaintiffs speculate that the challenged guidance will harm their electoral prospects because it will help Democratic voters more than it helps Republican voters. But to establish a cognizable "competitive" injury requires a structural "ongoing, unfair advantage." *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022); *Cegavske*, 488 F. Supp. 3d at 1003. Here, the Secretary's interpretation equally benefits *all* voters, including Plaintiffs' supporters. Far from showing irreparable harm, Plaintiffs have alleged nothing more than a generalized interest in compliance with the law, coupled with rank speculation that Democratic ballots are more likely to be affected by their requested relief than Republican ballots.

Finally, Plaintiffs' claim that their votes will be "diluted" cannot establish the necessary irreparable harm. As discussed above and in Intervenors' Motion to Dismiss, courts have routinely and uniformly rejected the theory of "vote dilution" that Plaintiffs advance here. Because the Secretary's interpretation treats all voters the same, no one "is specifically disadvantaged" by this level playing field. *Wood*, 981 F.3d at 1314. This distinguishes Plaintiffs' theory from the distinct circumstances in which courts have found vote dilution to be a cognizable injury. *See id.* at 1314–15 (comparing "vote dilution in this context," which "is a 'paradigmatic generalized grievance that cannot support standing,'" with its use in the racial gerrymandering and malapportionment contexts, where "vote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts" (quoting *Baker v. Carr*, 369 U.S. 186, 207–08 (1962)).[1]

### IV. The balance of hardships and the public interest weigh against a preliminary injunction.

While Plaintiffs will suffer no harm in the absence of a preliminary injunction, granting an injunction would work grave harm to Nevada voters—including Intervenors' members and

[1] Plaintiffs' APA claim also does not support their assertions of irreparable harm. "[P]rocedural harm, standing alone, cannot support the necessary finding of a likelihood of irreparable harm." *Nevada v. United States*, 364 F. Supp. 3d 1146, 1154 (D. Nev. 2019).



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constituents—and the public interest. Of course, voters have no control over whether the postal service prints a visible postmark on their mail ballot. If Plaintiffs succeed in imposing their atextual interpretation of Nevada law, an untold number of qualified Nevada voters will be disenfranchised due to postal errors or omissions that are entirely out of their control. Plaintiffs do not dispute this—it is the *stated purpose* of their lawsuit. They argue that "[t]he counting of non-postmarked ballots in violation of state law will affect the results of Nevada elections, to the detriment of Republican candidates, because late-arriving ballots are disproportionately cast by Democratic voters." Mot. at 14. And they do not allege that ballots lacking a visible postmark are likely to be cast by anyone other than qualified Nevada voters.

Plaintiffs bizarrely claim that the balance of hardships tips in their favor because they "will suffer injury to their constitutional rights." Mot. at 15. But there is no constitutional right to prevent the counting of another person's ballot. *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). The only constitutional interests involved in this case cut exactly the other way. Courts have long recognized that the public interest "is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful" and "favors permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) (citations omitted). The public has a "strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (cleaned up *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("By definition, [t]he public interest . . . favors permitting as many qualified voters to vote as possible."); *Election Integrity Proj. of Nev., LLC v. Eighth Jud. Dist. Court*, No. 81847, 2020 WL 5951543, at *1 (Nev. Oct. 7, 2020) (unpublished disposition) (same). It is not in the public interest for a court of equity to help Plaintiffs win elections by throwing out the ballots of qualified voters they do not like.

## CONCLUSION

The Court should deny Plaintiffs' request for a preliminary injunction.

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## AFFIRMATION

Pursuant to NRS 239B.030 and 603A.040, the undersigned does hereby affirm that this document does not contain the personal information of any person.

DATED this 16th day of July 2024.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July 2024, a true and correct copy of **INTERVENORS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUINCTION** was served by depositing a true copy of the same via U.S.P.S. Mail postage pre-paid Las Vegas, Nevada and via electronic mail as follows:

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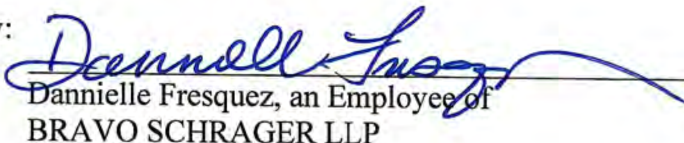
By: 
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