JULY 2021

NEVADA BAR EXAM

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

Cate and Jon are Nevada lawyers who began their careers at Big Law, Ltd. Cate practiced civil litigation while Jon practiced in the bankruptcy department. Both quickly grew disillusioned with Big Law due to the high stress environment and outrageous billable hour requirement. Cate and Jon decided to quit Big Law and start their own general practice firm called Nevada Attorneys General ("NAG").

Before leaving Big Law, Cate asked one of her clients to follow her to NAG. The client had a trial coming up and Cate had invested a lot of time in the case. The client agreed to follow Cate. A week before the trial, Cate was upset to learn that the client was still talking to Big Law attorneys and questioning Cate's trial strategy. Cate refused to do any more work on the case and told the client to go back to Big Law.

Jon's first clients at NAG were a couple who hired him to file a bankruptcy petition. After several months, while waiting for the court to close the bankruptcy case, the wife asked Jon to represent her in what she characterized as an "uncontested divorce." Jon agreed and charged her a $50,000 flat fee. Jon did not have any family law experience, so NAG hired a veteran paralegal who was able to produce the divorce documents in just a few hours. Without reading them, Jon signed the pleadings filed with the court.

Cate had a consultation at NAG with a man who was seriously injured in a slip-and-fall at a local restaurant. Cate told him they would be going up against Big Law because the restaurant

kept her former law firm on retainer for cases like this. After agreeing Cate would be paid one-third of any recovery, the two shook hands to finalize the deal.

That evening, Cate and Jon dined at the restaurant where the accident happened. The general manager, who recognized Cate from Big Law, came to the table to greet the two attorneys. After exchanging pleasantries, Cate declared, "When my new case is over, I'll own this place." When asked about the case, Cate told the manager the name of her client and asked for a copy of the restaurant's internal incident report related to the accident.

Please fully discuss all ethical issues implicated under the Nevada Rules of Professional Conduct.

JULY 2021

NEVADA BAR EXAM

QUESTION NO. 2: ANSWER IN RED BOOKLET

Allstar Cinema is a movie theater in Reno, Nevada. Alex and his girlfriend Becca often spend Friday nights at the theater enjoying the newest movie release.

Last Friday after purchasing their tickets, Alex and Becca went to the snack bar. Alex chose a soda and popcorn. Alex has a severe peanut allergy. During a previous visit to the theater, he asked if the popcorn was cooked in peanut oil and the employee said they always cook the popcorn in canola oil. Last Friday, however, and unbeknownst to Alex, the popcorn was cooked in peanut oil.

After getting their snacks, Alex and Becca went to their favorite seats. Becca's seat was wrapped with yellow caution tape. Becca insisted on sitting where she always sat so she removed the tape and sat down. The movie began moments later. Becca soon realized the seat's rocking mechanism was not working. Becca used her legs to push on the seat in front of her to help her recline, but her seat snapped, and Becca fell to the ground. Alex was having a difficult time breathing and realized he did not have his emergency allergy medication. Panicking, he told Becca they had to leave immediately. Becca, in severe pain and unable to move, asked the patron next to her to get help. Moments later, a theater employee called an ambulance for both Alex and Becca and they were transported to the hospital where they spent several days recovering.

During the same movie, another patron, Charlie, tripped on a cracked stair and fell. David, an Allstar off-duty theater manager enjoying the movie, witnessed Charlie fall and offered to help. David escorted Charlie to the hallway and noticed his chin was bleeding. David said to Charlie, "I am happy to glue your cut. I know how to do it; I saw it in a movie once." Charlie, embarrassed and eager to get back to the movie, agreed to let David glue his cut. While David got some glue from the main office, he also

left a note for the on-duty manager stating, “Another patron fell on the cracked stair in theater #2, we must fix it!” Rather than cleaning the cut or waiting for the bleeding to stop, David squeezed some glue into the cut, put a bandage on it and escorted Charlie back to the theater. Charlie suffered a minor concussion when he fell and halfway through the movie went to sleep. Charlie did not wake until the next morning. The theater manager failed to see Charlie when he locked the theater that night. Charlie went home the next morning with a severe headache and an infected wound on his chin.

Please fully discuss the following:

1. **The claims Alex and Becca have against Allstar Cinema and the defenses Allstar Cinema will assert.**
2. **The claims Charlie has against David and Allstar Cinema and the defenses that David and Allstar Cinema will assert.**

JULY 2021

NEVADA BAR EXAM

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

Oscar owned Blackacre, a parcel of land located in Henderson, Nevada. Oscar borrowed $500,000 from Amy and granted Amy a Deed of Trust on Blackacre to secure repayment of the loan. Amy did not record her Deed of Trust. Oscar then borrowed $100,000 from Bob, who did not know about Amy's Deed of Trust, and granted Bob a Deed of Trust on Blackacre to secure repayment of the loan. Bob did not record his Deed of Trust. Oscar was current on his loan payments to Amy and Bob.

Oscar's sole heir and devisee was his niece, Christina. Christina was aware that she would inherit Blackacre when Oscar died. Oscar did not tell Christina about the secured loans from Amy and Bob.

Before Oscar died, Christina needed cash and agreed to immediately sell Blackacre to Dennis for $1,000,000. Dennis conducted a title search and did not find any recorded encumbrances against Blackacre. When Dennis asked Christina why title to Blackacre was not in her name, she told Dennis that she was Oscar's heir and devisee and that she would obtain title to Blackacre when Oscar died.

Dennis paid Christina $1,000,000 in exchange for a Warranty Deed under which Christina agreed to "grant, bargain and sell" Blackacre to Dennis, without any exceptions to title. Dennis immediately recorded the Warranty Deed with the Clark County Recorder. Oscar died a month later and a Warranty Deed to Blackacre from Oscar's estate to Christina was recorded with the Clark County Recorder.

Christina found a copy of the Deeds of Trust that Oscar had granted to Amy and Bob in Oscar's papers. Christina contacted Amy and Bob to tell them that Oscar died and that she would not be making any further payments on their loans.

Amy called Christina the next day and demanded immediate payment of all amounts due on her loan. Christina told Amy that she was out of luck because Amy failed to record her Deed of Trust and Dennis was now the owner of Blackacre. She also told Amy that Oscar had borrowed money from Bob and granted Bob a Deed of Trust on Blackacre. Amy immediately recorded her Deed of Trust with the Clark County Recorder and sent notice of the recording and a Notice of Default to Christina, Dennis and Bob. Bob then recorded his Deed of Trust with the Clark County Recorder.

Dennis demanded that Amy and Bob discharge their Deeds of Trust. Amy and Bob refused. Dennis filed a lawsuit against Amy and Bob seeking to quiet title to Blackacre in Dennis, free and clear of Amy's and Bob's Deeds of Trust. Dennis also sued Christina for damages arising out of her alleged breach of warranties of title when she conveyed Blackacre to Dennis.

Please fully discuss the following under Nevada law:

1. As between Amy and Bob, and prior to any conveyance of Blackacre, whose Deed of Trust is superior?

2. Will Dennis prevail in his quiet title action against Amy and Bob?

3. What claims under the Warranty Deed, if any, does Dennis have against Christina and will he prevail? What defenses, if any, does Christina have against Dennis' claims?

JULY 2021

NEVADA BAR EXAM

QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

After returning home from a trip to Las Vegas, Paul, an Arizona resident, reviewed his rental car receipt and saw that he had been charged a $20 "concession and service fee" per day in addition to the advertised rental charge. Upset, Paul contacted his Arizona-based lawyer, a sole practitioner licensed in both Arizona and Nevada who previously handled a personal injury matter for Paul.

Paul's lawyer filed a complaint in Nevada state court against Drive, the rental car company used by Paul in Las Vegas. Drive is a Nevada corporation with its principal place of business in Nevada. The complaint stated that it was brought on behalf of Paul "and all others who have paid a concession and service fee to Drive Las Vegas in the last five years." The concession and service fee ranged from $20 to $30 per day depending upon the type of car rented and length of rental. The complaint estimated that 150,000 individuals from all over the United States and internationally had rented from Drive Las Vegas over the last five years.

Twenty days after being properly served with the complaint, Drive removed the case to the United States District Court for the District of Nevada. Following removal, Paul filed motions to certify a class and to remand the action to state court.

Drive opposed both motions, arguing that the case properly belonged in federal court and that class certification was inappropriate because: (1) the concession and service fee varied by type of car and length of rental; and (2) the concession and service fee was waived if an individual was a member of Drive's loyalty program or if the individual elected to purchase rental insurance through Drive. Drive also argued that it would be impossible to notify everyone who rented over the last five years as it changed reservation systems last year and did not

maintain records from the old system. Paul argued there were many annual repeat visitors to Las Vegas and therefore Drive's reservation records were adequate.

The federal court denied the motion to remand and granted the motion to certify a class. Shortly thereafter, Drive's counsel approached Paul's lawyer offering to settle the case by giving each member of the class a $20 coupon to be applied toward a future rental from Drive and payment of $200,000 in attorney's fees to Paul's lawyer. Paul and his lawyer quickly agreed and notice of the proposed settlement was sent to individuals who could be identified through Drive's reservation system. After receiving notice of the proposed settlement, a group of approximately 100 individuals objected to the proposed settlement terms as not being fair or in their best interest. After a hearing, the court approved the settlement in a written order. The order stated in its entirety, "based upon the record and good cause appearing, the court approves the terms of the proposed settlement." The individuals in the group who objected intend to appeal.

Please fully discuss the following:

1. Did the court properly decide the motion to remand?

2. Did the court properly decide the motion to certify?

3. Did the court properly rule on the motion to approve the settlement?

4. Were the terms of the settlement legally permissible?

5. May the group objecting to the settlement appeal from the court's order approving the settlement?

JULY 2021

NEVADA BAR EXAM

QUESTION NO. 5: ANSWER IN PURPLE BOOKLET

Dan and Steve were drinking at the Bar along with several other patrons. As the evening wore on Dan and Peter got into a heated argument. Unable to stop the altercation George, one of the two bartenders ejected them from the Bar. Dan and Peter continued fighting in the alley behind the Bar. Dan and Peter both claim the other threw the first punch. Peter suffered multiple head wounds from the fight. Dan was later arrested for battery and his case was set for a criminal trial. Peter sued Dan for battery and the Bar for negligence.

Please discuss the admissibility of the following at the criminal trial:

1. The Defense's request to admit Steve's testimony that "Dan is a person of good character, and he would never start a fight."

2. The State's request to admit George's testimony "Dan always drinks too much, gets belligerent and gets into arguments challenging people to fights."

3. The Defense's request to admit evidence that Peter was previously convicted of felony theft in 2017.

Please discuss the admissibility of the following at a civil trial:

4. Defendant's request to admit evidence that Dan, Peter, and the Bar participated in a settlement conference and Peter was offered $100,000 to settle the civil case.

5. Plaintiff's request to admit testimony from Steve that Dan told him he wishes he wouldn't have overreacted that night, he feels really bad for Peter, and would like to pay for Peter's medical expenses.

6. Defendant's request to admit medical records of Peter's injuries showing that he was intoxicated on the night of the fight.

7. Defendant's request to admit George's testimony that Alice, the other bartender working with him the night of the fight, told him: "I looked out the back door and saw Peter throw the first punch." Alice has since moved to Canada and refused to return to Nevada to testify at the trial.

JULY 2021

NEVADA BAR EXAM

QUESTION NO. 6: ANSWER IN YELLOW BOOKLET

Officer Smith was dispatched to a residence in Reno, Nevada, in response to a disconnected 911 call. He knocked on the door and announced his presence. Mrs. Davis opened the door. Officer Smith saw blood around her nose and asked her if there was a problem. Mrs. Davis answered that everything was "okay." Officer Smith asked her if there was anyone else inside and, if so, was the person injured. Mrs. Davis, while glancing over her shoulder back into the house, answered that she was alone. When Officer Smith asked why she had blood on her face, she stated that her husband had hit her during an argument. Officer Smith told her that he needed to come in and check to see if anyone else was injured. As Officer Smith pushed the door open, Mrs. Davis stepped aside letting Officer Smith enter the residence. Once inside, Officer Smith found the house to be in disarray. He also found Mr. Davis sitting in the kitchen at the back of the residence.

Officer Abby, who arrived moments later, entered the residence. Officer Smith had Officer Abby take Mrs. Davis outside so that he could talk to Mr. Davis. During that conversation Mr. Davis told him that he and his wife owned the home and that their adult son had a bedroom upstairs but was probably not home. Officer Smith arrested Mr. Davis for battery, walked him outside, and had Officer Abby place him into a patrol car.

Officer Smith reentered the residence, again announcing his presence as a law enforcement officer, and headed upstairs. As Officer Smith walked down a hallway he saw the door of the master bedroom was open. Standing by the bedroom door, he looked inside and saw a plastic bag containing a white powdery substance (later determined to be methamphetamine) on the floor next to the bed. Officer Smith entered the room, took possession of the plastic bag, and left the residence. Outside, Officer Smith told Mr. and Mrs. Davis that he had found drugs in their bedroom. He then requested permission to continue his search of the rest of residence, which they refused. Officer Smith placed them under arrest for drug possession and had them transported to the police station. Later, Officer Smith applied for a search warrant to search the residence for drugs.

The search warrant was signed by a magistrate the next day. Because Officer Smith was off duty, Officer Rogers was assigned to conduct the search of the residence pursuant to the search warrant. During her search, Officer Rogers found a plastic bag containing a powdery substance (later determined to be heroin) in a kitchen cabinet drawer.

Mr. and Mrs. Davis have been charged with two counts of possession of a controlled substance. They have filed a joint pretrial motion to suppress the methamphetamine and heroin evidence.

Please fully discuss how the trial court should rule on their motion to suppress regarding:

(1) the methamphetamine evidence; and

(2) the heroin evidence.

JULY 2021

NEVADA BAR EXAM

QUESTION NO. 7: ANSWER IN DARK BLUE BOOKLET

On August 1, Carol called Alice's Spirits Supply Store ("Alice") and requested 500 bottles of a $10 French white wine for her daughter's wedding, to be delivered before August 15. Carol explained that the wedding was planned for the afternoon of August 15. Later that day, Alice sent Carol an email stating:

"Will get the order of white wine, as you requested."

Carol received the email and responded with an email stating:

"Sounds good. Please confirm delivery date and time no later than August 12."

Big Bob's Wholesale Liquor ("Big Bob") distributes alcohol to Nevada retail suppliers. On the same day that Carol called Alice, Alice called Big Bob and ordered 500 bottles of French white wine because Alice did not have sufficient wine in stock. Alice told Big Bob that Alice needed the white wine before August 15. Big Bob told Alice that he had a French white wine available at $8 a bottle. On August 2, Big Bob confirmed Alice's order by an email stating:

"Order for 500 bottles of French white wine confirmed at $8 a bottle, plus shipping costs of $100 per case; delivery before August 15."

Alice received the email and responded: "Ok."

Big Bob learned August 2 that he did not have enough French white wine to fill Alice's order on time. However, Big Bob did have 300 bottles of the French white wine and 200 bottles of a Pahrump white wine.

Later on August 2, Bob sent the following email to Alice:

"Did not have enough French white wine but will timely deliver to you 300 bottles of French white wine and 200 bottles of Pahrump white wine, all at $10 a bottle. Shipping costs increased to $115 per case."

Alice received but did not respond to Big Bob's second email.

Alice received Big Bob's wine delivery in the morning on August 14, and immediately, without opening, delivered it to Carol that afternoon with an invoice stating:

"Order for 500 bottles of white wine confirmed at $12 a bottle, plus delivery costs of $175 per case, cash on delivery."

Not having heard from Alice prior to August 12, Carol refused Alice's delivery because she had to obtain a French white wine from another retailer at $14 a bottle. Alice refused to pay Big Bob and returned the order to him.

Big Bob sued Alice for breach of contract, and Alice sued Carol for breach of contract.

Please fully discuss the following under Nevada law:

1. **Is there a contract between Alice and Carol, and if so, what are the terms?**
2. **Discuss Carol's and Alice's claims against each other?**
3. **Is there a contract between Alice and Big Bob, and if so, what are the terms?**
4. **What are Alice's and Big Bob's claims against each other?**

INSTRUCTIONS
NEVADA PERFORMANCE TEST
JULY 2021

Materials to be used for the Nevada Performance Test are contained in a "File" and a "Library." The first document in the File is a memorandum that contains the instructions and a summary of the problem. Other documents in the File contain factual information, which may or may not be relevant to the issues.

The Library contains the legal authority. It is your responsibility to determine what legal authority is pertinent. The legal authorities include statutory provisions and cases.

You will be graded on your responsiveness to the instructions and on the content, thoroughness and organization of your document. Time management is also a critical factor. You reasonably should expect to use half the time reading and analyzing the materials and organizing your document. The remaining time should be sufficient time to write it.

FILE

FILE MEMORANDUM

TO: Applicant

FROM: Senior Partner

SUBJECT: Specialty Solar Installations, Inc.

DATE: July 29, 2021

Our client, Specialty Solar Installations, Inc. (Specialty), sells and installs residential solar photovoltaic panels for electricity generation (Solar Panels). The panels are attached to the single-family house roofs by means of bolting the Solar Panels steel frames to the house roof joists. Per Las Vegas building codes, the installation is required to withstand winds in excess of 60 MPH, which requires steel beams bolted onto the roof trusses. The average price for a Solar Panels installation, including the panels, is about $25,000 per house. When Specialty sells and installs Solar Panels, it has the buyer execute a promissory note, security agreement, and an authorization to file a standard UCC-1 financing statement. In accord with the advice of its former attorneys, Specialty always describes the collateral as "PV solar panels." Specialty's previous attorneys advised it to file UCC-1 financing statements for all sales and installations in the Office of the Secretary of State, UCC Division, the place specified in NRS §104.9501(1)(a) and (b). Specialty does not always get around to filing the financing statements.

Darby purchased Solar Panels from Specialty on January 15, 2018, and Specialty installed solar panels on her home in Henderson, Nevada. Darby's home was financed by Pacific Security Finance (PSF). PSF properly recorded a deed of trust securing the purchase price with the Clark County Recorder on December 31, 2017. A copy of the deed of trust is attached to this memo as Attachment 1. PSF also filed a financing statement with the Nevada Secretary of State on December 30, 2017, a copy of which is attached to this memo as Attachment 2. Specialty filed a financing statement on March 31, 2018. A copy of the financing statement filed by Specialty with the Nevada Secretary of State is attached to this memo as Attachment 3.

Due to staff reductions caused by the pandemic Darby lost her job on May 31, 2020. After attempting to make the mortgage payments to PSF for a couple of months, Darby walked away from the house and the mortgage. To generate as much cash as possible Darby sold all the appliances in the house as well as the solar panels on-line on August 1, 2020. Bob purchased the solar panels for $5,000. Darby moved back to New York and cannot be located.

Specialty was served with a summons and complaint in a mortgage foreclosure brought by PSF. PSF's complaint alleges that the Solar Panels are fixtures and hence covered under PSF's deed of trust. The complaint also alleges that Specialty's security interest in the Solar Panels is unperfected because it was

not filed "in the office where a mortgage on the real estate would be filed or recorded," citing NRS §104.9501, and "fails to comply with the requirements of" NRS §104.9502.

Susan said she had driven by the house and noticed that the solar panels had been removed. As part of her research, she told me that she discovered that Bob had purchased the panels and they are installed on his house in North Las Vegas.

Susan is very upset about all of this. She has asked us to prepare a letter to Specialty's CEO detailing the company's rights to the solar panels and the likelihood of success of any legal proceedings involving PSF and Bob. Specialty's management will decide how to proceed based on the analysis and recommendations in our letter.

Please prepare a draft letter to Specialty for my review. Specialty is a very sophisticated client so please include all case and statutory authorities in your letter.

A.P.N.: 004-292-08

When recorded mail to:

Pacific Security Finance, Inc.
3000 Wedekind Road
Henderson, NV 89002

The undersigned hereby affirms that this document submitted for recording does not contain the personal information of any person or persons per N.R.S. 239B.030.

DEED OF TRUST WITH ASSIGNMENTS OF RENTS

THIS DEED OF TRUST WITH ASSIGNMENT OF RENTS (the "Deed of Trust"), is made as of this 31st day of December, 2017, by and between Darby Douglass, 1 First Street, Henderson, Nevada ("Trustor"), FIRST PACIFIC TITLE INSURANCE COMPANY ("Trustee"), whose address is 5000 Main Street, Henderson, Nevada 89002, and Pacific Security Finance, Inc., whose address is 3000 Wedekind Road, Henderson, NV 89002, in connection with that certain Purchase and Sale Agreement and Joint Escrow Instructions, dated October 20, 2017, (APN 004-292-08), and legally described therein.

WITNESSETH: That Trustor hereby grants to Trustee in trust, with power of sale, that certain real property located in the County of Clark State of Nevada, being Assessor Parcel No. 004-292-08, and more particularly described on Exhibit A attached hereto and incorporated herein by reference, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any way appertaining (the "Property"), and together with the rents, issues and profits, thereof, subject, however, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, and profits.

For the purposes of securing (1) payment of the sum of Five Hundred Forty-One Thousand Dollars ($500,000.00), with interest thereon according to the terms of that certain Promissory Note of even date herewith made by Trustor, payable to order of Beneficiary, and all extensions or renewals thereof (the "Note"), (2) the performance of the Note and this Deed of Trust, each of which is incorporated herein by reference or contained herein, and (3) payment of any additional sums, together with interest thereon, if any, which may be due to Beneficiary pursuant to the terms of the Note or this Deed of Trust.

To protect the security of this Deed of Trust, and with respect to the Property, Trustor expressly makes each and all of the following agreements and agrees to perform and be bound by each and all of the following terms and provisions, and it is mutually agreed that each and all of the following terms and provisions shall inure to and bind the parties hereto, with respect to the property above described.

A. ***TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:***

1. To keep the Property in good condition and repair....

4. To pay at least ten (10) days before delinquency, taxes and assessments affecting the Property...

5. To pay immediately and without demand all sums so expended by Beneficiary or Trustee, with interest from date of expenditure at the Default Rate (as defined in the Note).

B. ***IT IS MUTUALLY AGREED:***

1. ...

2. That by accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require prompt payment when due or all other sums so secured or to declare default for failure so to pay...

(a) in payment of any indebtedness secured hereby, (b) in performance of any agreement hereunder, or (c) in performance of any other agreement or obligation of Trustor under the Note or this Deed of Trust, Beneficiary may declare all sums secured hereby immediately due and payable by delivery to Trustee of written notice of default and of election to cause to be sold the Property, which notice Trustee shall cause to be recorded. ...

10. It is expressly agreed that the trust created hereby is irrevocable by Trustor.

11. That this Deed of Trust applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devises, administrators, executors, successors and assigns. The term Beneficiary shall mean the owner and holder, including pledges, of the note secured hereby, whether or not named as Beneficiary herein. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

12. That Trustee accepts this trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, beneficiary or Trustee shall be a party unless brought by Trustee.

13. Trustor agrees to pay any deficiency arising from any cause after application of the proceeds of the sale held in accordance with the provision of the covenants hereinabove adopted by reference. The undersigned Trustor requests that a copy of any notice of default and any notice of sale hereunder be mailed to him at his address hereinbefore set forth.

Beneficiary may charge for a statement regarding the obligation secured hereby, provided the charge therefor does not exceed a reasonable amount. The undersigned Trustor requests that a copy of any notice of default and any notice of sale hereunder be mailed to him at his address above set forth.

[Signature appears on following page]

[Signature page to Deed of Trust with Assignment of Rents]

IN WITNESS WHEREOF, this Deed of Trust with Assignment of Rents was entered into by the undersigned as of the day and year first above written.

Darby Douglass

Darby Douglass

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF Nevada)
)
COUNTY OF Clark)

On December 20, 2017 , before me, Jan Smith, Notary Public, personally appeared **Darby Douglass**, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Jan Smith (Seal)

Signature

Exhibit A

Legal Description of Property

The land referred to herein below is situated in the County of Washoe, State of Nevada, and described as follows:

PARCEL 1:

PARCEL A, AS SHOWN ON PARCEL MAP NUMBER 171, FILED IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, STATE OF NEVADA, ON JUNE 25, 1975, UNDER FILE NUMBER 368770, OFFICIAL RECORDS.

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS

9. NAME OF FIRST DEBTOR: Same as line 1a or 1b on Financing Statement; if line 1b was left blank because Individual Debtor name did not fit, check here ☐

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S SURNAME
Douglass

FIRST PERSONAL NAME
Darby

ADDITIONAL NAME(S)/INITIAL(S) | SUFFIX

Print | Reset

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

10. DEBTOR'S NAME: Provide (10a or 10b) only one additional Debtor name or Debtor name that did not fit in line 1b or 2b of the Financing Statement (Form UCC1) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name) and enter the mailing address in line 10c

10a. ORGANIZATION'S NAME

OR

10b. INDIVIDUAL'S SURNAME

INDIVIDUAL'S FIRST PERSONAL NAME

INDIVIDUAL'S ADDITIONAL NAME(S)/INITIAL(S) | SUFFIX

10c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

11. ☐ ADDITIONAL SECURED PARTY'S NAME or ☐ ASSIGNOR SECURED PARTY'S NAME: Provide only one name (11a or 11b)

11a. ORGANIZATION'S NAME
Pacific Security Finance, Inc.

OR

11b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

11c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
3000 Wedekind Road	**Henderson**	**NV**	**89002**	

12. ADDITIONAL SPACE FOR ITEM 4 (Collateral):
PV solar panels and hardware

13. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS (if applicable)

14. This FINANCING STATEMENT:
☐ covers timber to be cut ☐ covers as-extracted collateral ☑ is filed as a fixture filing

15. Name and address of a RECORD OWNER of real estate described in item 16 (if Debtor does not have a record interest):
Darby Douglass
1 First Street
Henderson, NV 89001

16. Description of real estate:
single family residence located at 1 First Street, Henderson, NV 89001
APN: 004-292-08

17. MISCELLANEOUS:

[redacted]

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. E-MAIL CONTACT AT FILER (optional)

C. SEND ACKNOWLEDGMENT TO: (Name and Address)

Speciality Solar Installations, Inc.
1000 Third Street
Henderson, NV 89001

Print Reset

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
Douglas	Darby		

1c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
1 First Street	Henderson	NV	89001	US

2. DEBTOR'S NAME: Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

2c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

3. SECURED PARTY'S NAME (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME
Specialty Solar Installations, LLC

OR

3b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

3c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
1000 Third Street	Henderson	NV	89001	US

4. COLLATERAL: This financing statement covers the following collateral:
PV solar panels and hardware

5. Check only if applicable and check only one box: Collateral is ☐ held in a Trust (see UCC1Ad, item 17 and Instructions) ☐ being administered by a Decedent's Personal Representative

6a. Check only if applicable and check only one box:
☐ Public-Finance Transaction ☐ Manufactured-Home Transaction ☐ A Debtor is a Transmitting Utility

6b. Check only if applicable and check only one box:
☐ Agricultural Lien ☐ Non-UCC Filing

7. ALTERNATIVE DESIGNATION (if applicable): ☐ Lessee/Lessor ☐ Consignee/Consignor ☐ Seller/Buyer ☐ Bailee/Bailor ☐ Licensee/Licensor

8. OPTIONAL FILER REFERENCE DATA:

LIBRARY

LIBRARY
NEVADA REVISED STATUTES

NRS 104.9102 Definitions and index of definitions.

1. In this Article:

. . .

(nn) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying subsections 1 and 2 of NRS 104.9502. The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(oo) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.

. . .

(v) "Consumer debtor" means a debtor in a consumer transaction.
(w) "Consumer goods" means goods that are used or bought for use primarily for personal, family or household purposes.
(x) "Consumer-goods transaction" means a consumer transaction to the extent that:

(1) A natural person incurs an obligation primarily for personal, family or household purposes; and

(2) A security interest in consumer goods or in consumer goods and software that is held or acquired primarily for personal, family or household purposes secures the obligation.

. . .

(cc) "Deposit account" means a demand, time, savings, passbook or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

NRS 104.9103 Purchase-money security interest: Circumstances of existence; applicability of payments; burden of establishing.

1. In this section:

(a) "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(b) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

2. A security interest in goods is a purchase-money security interest:

(a) To the extent that the goods are purchase-money collateral with respect to that security interest;

. . .

6. In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(a) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(b) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(c) The purchase-money obligation has been renewed, refinanced, consolidated or restructured.

7. In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

8. The limitation of the rules in subsections 5, 6 and 7 to transactions other than consumer-goods transactions leaves to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.

NRS 104.9203 Attachment and enforceability of security interest; proceeds; formal requisites; supporting obligations.

1. A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

2. Except as otherwise provided in subsections 3 to 9, inclusive, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(a) Value has been given;

(b) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(c) One of the following conditions is met:

(1) The debtor has authenticated a security agreement that provides a description of the collateral;

• • •

6. The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by NRS 104.9315 and is also attachment of a security interest in a supporting obligation for the collateral.

7. The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage or other lien.

NRS 104.9309 Security interest perfected upon attachment. The following security interests are perfected when they attach:

1. A purchase-money security interest in consumer goods, except as otherwise provided in subsection 2 of NRS 104.9311 with respect to consumer goods that are subject to a statute or treaty described in subsection 1 of that section;

2. An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

NRS 104.9320 Protection of certain buyers of goods.

1. Except as otherwise provided in subsection 5, a buyer in the ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

2. Except as otherwise provided in subsection 5, a buyer of goods from a person who used or bought the goods for use primarily for personal, family or household purposes takes free of a security interest, even if perfected, if the buyer buys:

(a) Without knowledge of the security interest;

(b) For value;

(c) Primarily for his or her personal, family or household purposes; and

(d) Before the filing of a financing statement covering the goods.

3. To the extent that it affects the priority of a security interest over a buyer of goods under subsection 2, the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by subsections 1 and 2 of NRS 104.9316.

NRS 104.9316 Continued perfection of security interest following change in governing law.

1. A security interest perfected pursuant to the law of the jurisdiction designated in subsection 1 of NRS 104.9301 or subsection 3 of NRS 104.9305 remains perfected until the earliest of:

(a) The time perfection would have ceased under the law of that jurisdiction;

(b) The expiration of 4 months after a change of the debtor's location to another jurisdiction; or

(c) The expiration of 1 year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

2. If a security interest described in subsection 1 becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

NRS 104.9322 Priorities among conflicting security interests in and agricultural liens on same collateral.

1. Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(a) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(b) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(c) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

2. For the purposes of paragraph (a) of subsection 1:

(a) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(b) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

NRS 104.9324 Priority of purchase-money security interests.

. . .

5. Except as otherwise provided in subsection 7, a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in NRS 104.9327,[Deposit Accounts] a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

. . .

7. If more than one security interest qualifies for priority in the same collateral under subsection 1, 3, 5 or 6:

(a) A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and

(b) In all other cases, subsection 1 of NRS 104.9322 applies to the qualifying security interests.

NRS 104.9334 Priority of security interests in fixtures and crops.

1. A security interest under this article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this article in ordinary building materials incorporated into an improvement on land.

2. This article does not prevent creation of an encumbrance upon fixtures under real property law.

3. In cases not governed by subsections 4 to [7], inclusive, a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

4. A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(a) The security interest is a purchase-money security interest;

(b) The interest of the encumbrancer or owner arises before the goods become fixtures; and

(c) The security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter.

5. A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(a) The debtor has an interest of record in the real property or is in possession of the real property and the security interest:

(1) Is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and

(2) Has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

(b) Before the goods become fixtures, the security interest is perfected by any method permitted by this article and the fixtures are readily removable:

(1) Factory or office machines;

(2) Equipment that is not primarily used or leased for use in the operation of the real property; or

(3) Replacements of domestic appliances that are consumer goods;

(c) The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article; or

(d) The security interest is:

(1) Created in a manufactured home in a manufactured-home transaction; and

(2) Perfected pursuant to a statute described in paragraph (b) of subsection 1 of NRS 104.9311.

6. A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(a) The encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(b) The debtor has a right to remove the goods as against the encumbrancer or owner.

7. The priority of the security interest under paragraph (b) of subsection 6 continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

NRS 104.9501 Filing office.

1. Except as otherwise provided in subsection 2, if the law of this State governs perfection of a security interest, the office in which to file a financing statement to perfect the security interest is:

(a) The office designated for the filing or recording of a mortgage on the real property, if:

(1) The collateral is as-extracted collateral or timber to be cut; or

(2) The financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(b) The Office of the Secretary of State in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

2. The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the Office of the Secretary of State. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

NRS 104.9502 Contents of financing statement; record of mortgage as financing statement; time of filing financing statement.

1. Subject to subsection 2, a financing statement is sufficient only if it:

(a) Provides the name of the debtor;

(b) Provides the name of the secured party or a representative of the secured party; and

(c) Indicates the collateral covered by the financing statement.

2. Except as otherwise provided in subsection 2 of NRS 104.9501, to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection 1 and also:

(a) Indicate that it covers this type of collateral;

(b) Indicate that it is to be filed for record in the real property records;

(c) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of the mortgage under the law of this State if the description were contained in a mortgage of the real property; and

(d) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

3. A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

(a) The record indicates the goods or accounts that it covers;

(b) The goods are or are to become fixtures related to the real property described in the mortgage or the collateral is related to the real property described in the mortgage and is as-extracted collateral or timber to be cut;

(c) The record satisfies the requirements for a financing statement in this section but:

(1) The record need not indicate that it is to be filed in the real property records; and

(2) The record sufficiently provides the name of a debtor who is a natural person if it provides the individual name of the debtor or the surname and first personal name of the debtor, even if the debtor is a natural person to whom paragraph (d) of subsection 1 of NRS 104.9503 applies; and

(d) The mortgage is recorded.

4. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

NRS 111.320 Filing of conveyances or other instruments is notice to all persons: Effect on subsequent purchasers and mortgagees. Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

NRS 107.026 Priority of certain deeds of trust over other liens. Except as otherwise provided in NRS 104.9335, a deed of trust given to secure a loan made to purchase the real property on which the deed of trust is given has priority over all other liens created against the purchaser before the purchaser acquires title to the real property.

Leasepartners Corporation v. Brooks Trust
Supreme Court of Nevada (1997)

LeasePartners financed a long-term equipment lease for Danzig Corporation (Danzig), the tenant of the Royal Hotel and Casino (Royal Hotel). The Royal Hotel was owned by respondent Robert L. Brooks Trust (the Brooks Trust). After the Danzig. defaulted on its lease with the Brooks Trust, its hotel lease was terminated and neither Danzig. nor the Brooks Trust made any payments to LeasePartners for the signs.

The Brooks Trust owns the Royal Hotel in Las Vegas. On August 6, 1989, the Brooks Trust leased the Royal Hotel to Danzig for a term of twenty-five years with an option for an additional twenty years. Danzig determined that the old signage in front of the hotel needed to be replaced because it wasn't bright enough.

Danzig Corp. and Ad Art Signs, Inc. (Ad Art) entered into an equipment lease which provided for the construction, lease, installation, and maintenance of the new signage. The signage was designed, engineered, and manufactured by Ad Art in Stockton, California.

Testimony was presented that the signage was custom built to match the design and layout of the Royal Hotel and was custom fit for the Royal Hotel. However, testimony was also presented that portions of the signage could be used elsewhere. For example, testimony indicated that the electronic message center,

which accounted for over fifty percent of the cost of the sign, could be removed and used in other signs. Additionally, there was testimony that all of the signage could be removed without damage to the building, that with the exception of the word "Royal," most of the signage was reusable, and that the signage was modular and could be recreated in different lengths in different locations.

The issue of whether the signs were fixtures or personal property was debated throughout the proceedings in the lower court. At the hearing and again in granting the Brooks Trust's motion for summary judgment, the district judge determined as a matter of law that the signs were fixtures; however, we conclude that the district judge's determination was erroneous.

This court has stated that the three factors to determine whether an item is a fixture are annexation, adaptation, and most importantly, intent. We also stated the annexation test is met where the chattel is actually or constructively joined to the real property.

The adaptation test is met when the object in question is adapted to the use to which the real property is devoted. However, the most important factor in making the determination of whether an item is a fixture is the intention of the parties at the time the items were installed.

The characterization of an item as a fixture or as personal property is a mixed question of law and fact. However, the application of the three-part test delineated

in Fondren becomes a pure question of law when only one reasonable conclusion may be drawn from the evidence. We conclude that these facts did not present a situation where the three-part Fondren test became a pure question of law which could have been decided by a district judge pursuant to a motion for summary judgment.

On the issue of annexation, Brooks Trust argued that the signs were attached to the realty such that they became fixtures. LeasePartners, however, presented evidence that the signs, while attached to the realty, could be removed without damaging the building. We conclude that the evidence strongly indicated that the signage was firmly secured to the realty and the hotel, and therefore the only reasonable conclusion that could have been drawn from the evidence was that the signage was annexed to the structure.

The second issue was whether the signage was adapted to the use to which the real property was devoted. Brooks Trust argued that the signage was specially designed and engineered for the Royal and that the electric lighting was designed to advertise the Royal. However, Lease Partners argued that the electronic message center could be removed and used in any sign, that the sign was modular and could be reused and recreated at any other location, and that the only unusable part of the sign was the word "Royal." This conflicting evidence allowed more than one

reasonable conclusion to be drawn as to whether the signage was adapted to the use to which the real property was devoted.

Finally, and most importantly, we reach the issue of intent of the parties. At the time the equipment lease agreement was entered into between Ad Art and Danzig Corp., the intention of Ad Art, Lease Partners, and Danzig Corp. was that the signs would remain personal property. Brooks Trust argued, however, that it had a separate lease agreement with Danzig Corp. which designated that everything, including all personal property except for gaming equipment, would be "surrendered with the Leased Property as a part thereof," and that they were neither a party to nor bound by the Ad Art/Danzig Corp. or LeasePartners/Danzig Corp. contracts.

It appears that there may be a conflict between the contract between Brooks Trust and Danzig Corp. and the contract between LeasePartners and Danzig Corp. Clearly then, there is more than one reasonable conclusion that can be drawn from the evidence as to the parties' intentions regarding the characterization of the signs at the time of installation.

Therefore, this is not a situation where the district court could have concluded as a matter of law that the signage was personal property or a fixture.

Nevada Attorney General Opinion
Opinion No. 1969-623

OPINION NO. 1969-623 Secretary of State—A fixture is a chattel so permanently annexed or attached to realty or such an integral part of the realty that its removal would severely damage the realty or change its essential character. The intent of the party bringing the chattel on the land, as determined by his conduct, should also be considered.

Carson City, October 23, 1969

The Honorable John Koontz, Secretary of State, Carson City, Nevada 89701

Attention: Mr. Ford E. Holmes, Deputy Secretary of State, Division of Securities

Dear Mr. Koontz:

You have asked for a definition of "fixtures" as applied to the filing of financing statements under the Uniform Commercial Code, and have included a letter from a manufacturing firm presenting a set of facts in which a collateral interest exists in retail store displays which are nailed or screwed to floors and walls.

ANALYSIS:

In general, the proper place to file to perfect security interests under Article 9 of the Uniform Commercial Code is the office of the Secretary of State. Fixtures, however, are covered by NRS 104.9401, subsection 1(b), which provides that:

The proper place to file in order to perfect a security interest is as follows:

(b) When the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded.

NRS 104.9313, subsection 1, provides, in part, that:

The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this article unless the structure remains personal property under applicable law. The law of this state other than this chapter determines whether and when other goods become fixtures.

The law of fixtures, as well as the concept of trade fixtures, is filled with varying tests and philosophies. (A workable definition of "trade fixtures" can be found in Attorney General's Opinion No. 41 of June 12, 1963.)

In the early case of Brown v. Lillie, 6 Nev. 244 (1870), the Nevada Supreme Court, in holding that a sawmill built upon timbers lying upon the surface of the ground and constructed to be easily removed was not a fixture, stated that a fixture must be attached, annexed, or connected to the realty. Any personalty that was not attached to the realty, was not placed upon the land with a view of making it permanent, and was not essential to the full and complete enjoyment of the freehold, could not become a fixture. The court relied to a degree on the rules in the famous fixtures case of Teaff v. Hewitt, 1 Ohio S.R. 511, which called for:

the united application of the following requirements:

1st, Actual annexation to the realty or something appurtenant thereto. 2d, Appropriation to the use or purpose of that part of the realty with which it is connected. 3d, The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made.

In the case of Treadway v. Sharon, 7 Nev. 37 (1871), the court held that a steam sawmill boiler, engine, and machinery which were placed upon a foundation and attached to the building frame by bolts, belts, shafts, and pipes were fixtures. The actual and firm annexation to the soil was enough to make the articles fixtures.

Mining appliances which form an integral part of a single mining mechanism and are annexed to the soil have been held to be fixtures. See Arnold v. Goldfield Third Chance Mining Co., 32 Nev. 447 (1910).

In the case of Reno Electrical Works v. Ward, 51 Nev. 291 (1929), electric fans which were fastened to the walls of a restaurant with screws and nails but

which were removable without injury to the property were held not to be fixtures. The court looked to the intention of the party bringing the chattel on the land, the use to which the chattel was applied, and its fitness for that purpose.

A recent definition of "fixtures" under the New Jersey Uniform Commercial Code (similar for these purposes to Nevada's statute) used the "traditional test" of intention as a dominant factor in determining when a chattel becomes a fixture. See In the Matter of Park Corrugated Box Corp., 249 F.Supp. 56 (D. N.J. 1966). Intention is inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose of annexation.

CONCLUSION:

A fixture would therefore seem to be a chattel so permanently annexed or attached to realty or such an integral part of the realty that its removal would severely damage the realty or change its essential character. The intent of the party bringing the chattel on the land, as determined by his conduct, should also be considered. In your example, the manufacturer's retail trade display "fixtures" are not the "fixtures" discussed in NRS 104.9401. Filing with the Secretary of State would be sufficient to protect the manufacturer's collateral interest in the items.

Respectfully submitted,

Harvey Dickerson, Attorney General
By Michael L. Melner, Deputy Attorney General

INSTRUCTIONS
NEVADA PERFORMANCE TEST
JULY 2021

Materials to be used for the Nevada Performance Test are contained in a "File" and a "Library." The first document in the File is a memorandum that contains the instructions and a summary of the problem. Other documents in the File contain factual information, which may or may not be relevant to the issues.

The Library contains the legal authority. It is your responsibility to determine what legal authority is pertinent. The legal authorities include statutory provisions and cases.

You will be graded on your responsiveness to the instructions and on the content, thoroughness and organization of your document. Time management is also a critical factor. You reasonably should expect to use half the time reading and analyzing the materials and organizing your document. The remaining time should be sufficient time to write it.

FILE

FILE MEMORANDUM

TO: Applicant

FROM: District Attorney

SUBJECT: County Medical Center Personnel Issues

DATE: July 29, 2021

I just finished a phone call with Dr. Sandra Hernandez, the Medical Director of the County Hospital, who needs urgent legal advice. She found out this morning about problems with three doctors associated with the County Hospital and wants to suspend each of them immediately. Dr. Hernandez has scheduled meetings this afternoon or evening with each of the three doctors. I told her to take no further action until I could get back to her later today with instructions.

I am attaching the Hospital's policy for Stage I and Stage II procedures prior to disciplinary action that apply here. Our Stage II procedures are well-settled and constitutionally sound, so don't worry about them. But the Hospital's policy for Stage I procedures is quite loose and may not be sufficient if procedural due process rights are implicated. So, I need to know what procedural due process rights, if any, Dr. Adams, Dr. Baker, or Dr. Carlaw have right now, prior to immediate disciplinary action against them by Director Hernandez.

The situations are messy.

Dr. Alex Adams is a well-regarded local heart surgeon. Although not an employee of the Hospital, Dr. Adams has had clinical privileges (also known as staff privileges or medical privileges) for twelve years that permit him to perform surgeries at the Hospital. Early this morning Dr. Adams was in an accident in which his car seriously injured a pedestrian. Dr. Adams' wife emailed Director Hernandez this morning that Dr. Adams was arrested and charged this morning with driving under the influence of alcohol and for being impaired by cocaine and methamphetamine in violation of NRS 484C.110. Dr. Adams is scheduled to perform two heart surgeries at the Hospital early next week. Director Hernandez wants to immediately suspend his privileges while arranging for the Stage II Hearing.

Dr. Bill Baker is a trauma surgeon who was a passenger in Dr. Adams' car during the accident. Dr. Adams' wife's voicemail message for Director Hernandez suggested that Dr. Baker got into a dispute with one of the police officers and may have been arrested for interfering with a police officer, although apparently no charges were filed. Like Dr. Adams, Dr. Baker is not an employee but has clinical privileges. In addition, he is on the "call list" for emergency surgical services. Medical Director Hernandez wants to suspend his clinical privileges and immediately remove him from the "call list." Unless removed from the "call list"

today, Dr. Baker could be called in for any emergency surgeries needed at the Hospital tonight.

The third situation has nothing to do with the car accident. Dr. Chris Carlaw is a long-time employee of the County Hospital who can only be terminated with cause, the hospital's equivalent of tenure. Dr. Carlaw is conducting important cancer research funded by the National Federation to Fight Cancer (NFFC). Director Hernandez received a letter this morning from the NFFC informing her that the NFFC has found discrepancies in Dr. Carlaw's research that may violate their ethics standards. Under NFFC funding rules, if the tentative finding of discrepancies is confirmed after a review, Dr. Carlaw's grant could be stopped and then the Hospital could lose the ability for any of its employees to get NFFC funding. Another research team at the Hospital plans to seek funding from NFFC in 2023. Dr. Hernandez is furious that Dr. Carlaw has gotten into this trouble and wants to suspend him without pay immediately until this is worked out.

Using the File and Library attached, please provide me with a memo that explains how Director Hernandez should proceed in light of any limitations that procedural due process protections under the Nevada and U.S. Constitutions place on her ability to take the immediate disciplinary actions against Drs. Adams, Baker, and Carlaw that she has proposed.

COUNTY HOSPITAL POLICIES (EXCERPTS)

The County Hospital enters into a variety of relationships with medical professionals who provide medical services to patients of the Hospital. Protecting the safety and promoting the health of our patients is our highest priority….

Procedures Prior to Taking Disciplinary Action

In order to protect the rights of medical professionals who provide services, establish that all disciplinary decisions are made on sound bases, and maintain the highest standards of medical care, the Hospital uses a two-stage procedure when disciplinary action is contemplated.

Stage I: The Hospital has temporary authority to take any immediate, temporary disciplinary action at the discretion of the Medical Director.

Stage II: Prior to any permanent action taken for disciplinary reasons to change a medical professional's relationship with the Hospital, the person being disciplined has a right to (1) written notice of the allegations and of the potential disciplinary action at least 15 days prior to the formal hearing; and (2) a hearing, represented by counsel if desired, at which the medical professional will have an opportunity to refute the allegations and address possible disciplinary actions. This Stage II Hearing will be provided prior to any permanent termination, salary reduction, or loss of title or privileges, if done for disciplinary reasons.

Letter from National Federation to Fight Cancer

July 22, 2021

Dr. Sandra Hernandez
County Medical Hospital

Dear Dr. Hernandez,

I regret to inform you that a routine data audit by the Research Review Committee of the National Federation to Fight Cancer (NFFC) undertaken on July 1, 2021, revealed significant apparent discrepancies in the results reported by Dr. Christopher Carlaw in his June 1, 2021, progress report on his research funded by NFFC Grant #2019-234F. These discrepancies have triggered an additional Investigatory Review that is being started now. If discrepancies are confirmed, the Review will attempt to discover the explanation for the errors.

As you know, if confirmed following the Investigatory Review, any finding of discrepancies could have serious repercussions not only for Dr. Carlaw, but also for County Hospital as his employer. We are writing to make sure that you are fully aware of the processes and possible penalties if the discrepancies are confirmed and determined to have been caused by purposeful misconduct or negligent errors by Dr. Carlaw.

We notified Dr. Carlaw yesterday that pursuant to NFFC policies and his funding agreement, he has sixty days to refute or explain the apparent

discrepancies as the first stage in the Investigatory Review. If the Research Review Committee subsequently determines that he has not adequately explained the data in question, the Investigatory Review will be continued. If then it determines that Dr. Carlaw has violated NFFC standards, the Committee will be authorized to withdraw all pending funding to Dr. Carlaw and place Dr. Carlaw on the NFFC's Prohibited Researcher list. This Investigatory Review process typically is completed in as soon as nine months.

As I'm sure you are aware, under NFFC funding rules, any hospital that employs a Prohibited Researcher becomes ineligible for new funding from NFFC starting six months following the imposition of the Prohibited Researcher designation as long as that or any Prohibited Researcher continues to be employed. I have provided Dr. Carlaw with extensive documentation regarding the specific data in his report that appear questionable.

Please do not hesitate to contact me if I can answer any questions.

Sincerely,

Janet Jones

Dr. Janet Jones
Research Director
National Federation to Fight Cancer

Transcript
Voicemail Message to Medical Director

Hi Sandra. This is Kathy Adams, Alex's wife. I have very bad news. Alex was in a car accident last night and was arrested for drunk driving and having controlled substances in his system. He's been charged with a violation of NRS 484C.110 because a pedestrian was seriously injured. Our lawyer expects to bail him out this morning so he'll be able to work without interruption. Alex was driving another one of your doctors, Bill Baker, home when the accident occurred. I think Bill got into some kind of an argument with one of the police officers who accused Bill of getting in the way of the emergency services. The police brought both Alex and Bill to the station, but Alex told me he thinks Bill went home without being charged with anything.

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CONSTITUTIONAL PROVISIONS

Constitution of the United States, 14th Amendment, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Nevada, Article 1

Sec. 8. Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.

. . .

2. No person shall be deprived of life, liberty, or property, without due process of law.

NEVADA REVISED STATUTES

NRS 484C.110 Unlawful acts; affirmative defense; additional penalty for violation committed in work zone or pedestrian safety zone.

1. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath; or

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath,

2. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access who:

(a) Is under the influence of a controlled substance;

(b) Is under the combined influence of intoxicating liquor and a controlled substance; or

(c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders the person incapable of safely driving or exercising actual physical control of a vehicle. The fact that any person charged with a violation of this subsection is

or has been entitled to use that drug under the laws of this State is not a defense against any charge of violating this subsection.

NRS 484C.430 Penalty if death or substantial bodily harm results.

A person does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this State, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, another person, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and must be further punished by a fine of not less than $2,000 nor more than $5,000.

Gilbert v. Homar
Supreme Court of the United States (1997)

This case presents the question whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.

Respondent Richard J. Homar, a police officer at East Stroudsburg University (ESU), was arrested in a drug raid. Later that day, the state police filed a criminal complaint charging respondent with possession of marijuana, possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony. When notified of the arrest, ESU suspended respondent without pay effective immediately.

The supervisor and police chief subsequently met with respondent in order to give him an opportunity to tell his side of the story. He was advised "as a result of admissions made by yourself to the Pennsylvania State Police that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of the [ESU] Police Department Manual."

We previously concluded that a public employee dismissable only for cause was entitled to a very limited hearing prior to his termination, to be followed by a

more comprehensive post-termination hearing. Stressing that the pretermination hearing should be an initial check against mistaken decisions-essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action, we held that pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story.

It is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands. This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. We also have rejected the proposition that due process *always* requires the State to provide a hearing prior to the initial deprivation of property. An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

To determine what process is constitutionally due, we have generally balanced three distinct factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

Respondent contends that he has a significant private interest in the uninterrupted receipt of his paycheck. But while our opinions have recognized the severity of depriving someone of the means of his livelihood they have also emphasized that in determining what process is due, account must be taken of "the *length*" and "*finality* of the deprivation."

On the other side of the balance, the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers. ESU's interest in preserving public confidence in its police force is at least as significant as the State's interest in preserving the integrity of the sport of horse racing, an interest we have deemed sufficiently important . . . to justify a brief period of suspension prior to affording the suspended trainer a hearing.

The last factor in the *Mathews* balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and the likely value of any additional procedures. The purpose of a pre-termination hearing is to determine whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action.

The purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay. But here that has already been assured by the arrest and the filing of charges. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted," in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime.

Respondent further contends that he had to be given an opportunity to persuade his supervisor of his innocence before the decision was made. We disagree. In *Mallen,* despite the fact that the FDIC had *discretion* whether to suspend an indicted bank employee, we nevertheless did not believe that a presuspension hearing was necessary to protect the private interest.

The Court finds that the circumstances of this suspension did not violate due process.

Eureka County v. The Seventh Judicial District Court
Supreme Court of Nevada (2018)

A vested, senior water rights holder has asked the district court to order the State Engineer to curtail junior water rights in the Diamond Valley Hydrographic Basin No. 153 (Diamond Valley). In this writ proceeding, we must determine whether junior water rights holders are entitled to notice of and an opportunity to participate in the district court's consideration of this curtailment request. Because the district court's consideration of the matter at the upcoming show cause hearing could potentially result in the initiation of curtailment proceedings, we conclude that due process requires junior water rights holders in Diamond Valley be given notice and an opportunity to be heard.

The Nevada Constitution protects against the deprivation of property without due process of law. Nev. Const. art. 1, § 8. Procedural due process requires that parties receive notice and an opportunity to be heard. In Nevada, water rights are regarded and protected as real property.

Because the language in the show cause order indicates that the district court may enter an order forcing curtailment to begin, junior water rights holders must be given an opportunity to make their case for or against the option of curtailment. Notice must be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights.

Olsen v. Washoe County School District
U.S. District Court (D. Nev. 2021)

Plaintiff Trina Olsen alleges that Defendant Washoe County School District ("WCSD") violated her procedural due process rights under the United States and Nevada Constitutions when it fired her from her job as an assistant high school principal. Plaintiff received the process she was due.

Because Plaintiff's Fourteenth Amendment procedural due process claim fails, so does her due process claim under the Nevada Constitution. Because Nevada's due process requirements are largely coextensive with those of the Fourteenth Amendment and the Court found that Defendants are entitled to summary judgment on Plaintiff's Fourteenth Amendment claim, Defendants are also entitled to summary judgment on Plaintiff's due process claim under Nev. Const. Art. 1, § 8(2).

Chudacoff v. University Medical Center of Southern Nevada
United States District Court (D. Nev. 2009)

This case arises out the suspension of a physician's medical staff privileges with University Medical Center of Southern Nevada.

Plaintiff Dr. Richard Chudacoff, a physician who specializes in the practice of obstetrics and gynecology, had medical privileges to work at several local hospitals in the Las Vegas area, including University Medical Center of Southern Nevada (or "UMC").

On May 28, 2008, Chudacoff received a letter from Defendant John Ellerton, M.D., Chief of Staff at UMC, in which Ellerton told Chudacoff that the Medical Executive Committee (or "MEC") had suspended, altered or modified his medical staff privileges. In addition, the MEC ordered Chudacoff to undergo drug testing and physical and mental examinations. Chudacoff alleges that this suspension came from out of the blue; he had no knowledge that the MEC was considering altering or changing his privileges.

The May 28 letter advised Chudacoff that he was entitled to a Fair Hearing; however, he was not advised of the allegations presented against him.

Chudacoff's motion for summary judgment is limited to whether the defendants violated his due process rights by suspending his hospital privileges without notice or an opportunity to be heard.

The Fourteenth Amendment prevents states from depriving individuals of protected liberty or property interests without affording those individuals procedural due process. In evaluating procedural due process claims, the Court must engage in a two-step inquiry: (1) we must ask whether the state has interfered with a protected liberty or property interest; and (2) we must determine whether the procedures attendant upon that deprivation were constitutionally sufficient.

1. Protected Property Interest A protected liberty or property interest is one that is recognized and protected by state law. For example, when a state issues licenses to drivers, which confer citizens the right to operate a vehicle in that state, the state may not withdraw that right without affording due process.

Just as Nevada grants licenses to its drivers, so too does it grant licenses to qualified physicians to practice medicine. In Nevada, Chapter 630 of the Revised Statutes generally governs the licensing of physicians in the state. The Nevada Supreme Court has recognized under Nevada law a right subject to reasonable rules and regulations to enjoy medical staff privileges in a community hospital. Further, UMC's bylaws and regulations provide for extending privileges to physicians to practice at the hospital provided that certain requirements are met. A physician's medical staff privileges are thus a protected interest under Nevada state law.

The defendants have attempted to revoke Chudacoff's privileges at UMC. This protected interest cannot be revoked without constitutionally sufficient procedures.

2. Whether the Procedures Were Constitutionally Sufficient

The amount of process that is due is a flexible concept that varies with the particular situation. The Court tests this concept by weighing several factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The private interest at stake here is the ability to practice medicine at a particular location. The interest extends further, however, in that a suspension of privileges at one hospital, when reported to the NPDB, could limit a physician's ability to practice anywhere in the country. The amount of process must accord sufficient respect for a professional's life and livelihood.

Next, the risk of an erroneous deprivation is also significant, as an improper suspension would have dramatic consequences for the physician. Once the damage is done, it is hard to undo.

Third, it is important for the state to have control over the quality of care that its physicians provide. The state has an interest in insuring that it can discipline malfeasance without further burdening limited state resources.

Given the important interests outlined above, it simply cannot be that a physician may have his privileges revoked without ever having a chance to refute or challenge the accusations leveled against him. The MEC met late in May 2008 to discuss allegations concerning Chudacoff's level of care, allegations that Chudacoff did not know were being leveled against him. The MEC suspended Chudacoff's medical staff privileges. Without ever even knowing that his privileges were in jeopardy, Chudacoff was informed of the loss of his privileges on May 28, 2008. The NPDB was informed of the suspension on June 16, 2008, well before Chudacoff ever had an opportunity to be heard on the matter.

The fatal flaw here is that the defendants suspended Chudacoff's staff privileges before giving him any type of notice or opportunity to be heard with respect to that suspension. Chudacoff's due process rights were violated by the timing of the MEC's actions.

Conclusion

Prior to being deprived of a protected property interest, Dr. Chudacoff was entitled to notice and an opportunity to be heard. He was not afforded constitutionally sufficient procedural protections.

Tate v. University Medical Center of Southern Nevada
United States District Court (D. Nev. 2009)

Following an altercation involving the plaintiff, Dr. James Tate, and the parent and grandparent of a minor patient at University Medical Center of Southern Nevada (UMC), Dr. John Fildes removed Tate from the Trauma Department call schedule.

Tate currently has clinical privileges to practice medicine at UMC. In 1991, he entered into a Trauma Services Agreement with UMC to provide trauma surgery services to UMC, and provided those services until August 8, 2008.

On April 5, 2008, Tate found himself in a "situation" with the father and grandmother of a minor patient. In his complaint, he alleges that they were verbally hostile and aggressive, that he removed himself from the room, that they came after him in a fast and aggressive manner, stopping an inch away from him, that he placed his hands on the father and pushed him back "with the intent to create some space," and subsequently did the same with the grandmother. After a member of the nursing staff intervened and pulled the father and grandmother away, he finished his departure.

On August 8, Medical Director Fildes sent Tate a letter stating that, effective immediately, he would be removed from the Trauma Department call schedule indefinitely. He has not worked as a trauma surgeon at UMC since that date.

Tate asserts that he had a right to, but was not afforded, due process prior to his removal from the trauma call schedule by Fildes.

Tate alleges he was deprived of a constitutionally protected property interest in violation of his due process rights. Tate asserts, and the defendants do not dispute, that a physician might have a property interest in clinical privileges. Tate has not alleged that Fildes limited or revoked his clinical privileges. Rather, despite clearly alleging that he "currently possesses clinical privileges to practice medicine at [UMC]," Tate alleges in his complaint that his removal from the trauma call schedule effected a "de facto suspension" of his clinical privileges.

While Tate may have a property interest in clinical privileges, he lacks any property interest in an employment position providing one of several different avenues by which he can exercise those privileges. While UMC entered into an agreement with Tate pursuant to which he could be paid for services rendered, which services would require that he exercise his clinical privileges, that agreement did not create, expand, or limit his privileges at UMC. Accepting Tate's allegation that Fildes removed Tate from the on-call schedule for trauma, such removal did not suspend or revoke his underlying privileges at UMC.

In this case, Tate's complaint permits only the inference that Fildes limited one of several avenues by which Tate could exercise his privilege to admit patients, but did not that limit the privilege itself. As the constitutionally protected

property interest lies in the clinical privilege, rather than one avenue to exercise those privileges, the court finds that the claim must be dismissed with prejudice.

Vatner v. Board of Trustees of the University of Medicine et al.
U.S. District Court (D. of NJ) (2015)

Plaintiff, Dr. Stephen Vatner, is a Professor of Medicine at Rutgers Biomedical and Health Sciences-New Jersey Medical School and Director of the Cardiovascular Research Institute ("CVRI") at the New Jersey Medical School ("NJMS" or "Medical School").

The Court begins by noting that to the extent Plaintiff's procedural due process claim is premised on disciplinary actions *other* than his unpaid suspension, such alleged reprimands or the termination of his right to conduct K-9 research—none of which affected his salary or benefits—do not constitute a deprivation of employment (or property interest) for purposes of triggering his procedural due process rights.

There is no dispute, however, that tenured professors at public universities hold a property interest in their tenure, so that procedural due process is necessary when the university seeks to dismiss a tenured professor. Generally speaking, "absent extraordinary circumstances," Plaintiff cannot be suspended without pay from his tenured employment unless there has been a pre-suspension hearing. Post-deprivation process alone may satisfy the requirements of the Due Process Clause if a state must act quickly or if pre-deprivation process would be impractical.

Turning now to the interest-balancing framework set forth by the Supreme Court in *Mathews v. Eldrige*, the Court must determine whether the totality of the administrative process Plaintiff received in connection with his suspension satisfied the fundamental requirement of due process, which is the opportunity to be heard at a meaningful time and in a meaningful manner.

First, the Court finds that the private interest affected here is the continuation of Plaintiff's pay (i.e., the means of sustaining his livelihood). This private interest is, of course, significant.

The Court finds that the second factor—risk of erroneous deprivation—was similarly great in this case inasmuch as there were conflicting stories as to whether Plaintiff had violated the Dean's directive. In light of this evidence, the Court finds that there was certainly a factual dispute as to whether or not Plaintiff had in fact violated Dean Johnson's directive. The purpose of such notice and hearing is to provide the person an opportunity to clear his name. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.

The Court finds that Defendants' interest in suspending Plaintiff without pay and without a meaningful pre-deprivation hearing was minimal. This is not a situation where Plaintiff had been arrested or indicted for criminal wrongdoing.

Rather, evidence in the record shows that Plaintiff was suspended based upon his alleged failure to follow Dean Johnson's directive to cancel his trip to the Philippines.

The Court finds that Plaintiff should have been afforded the minimal pre-deprivation process of notice and an opportunity to be heard. Such process would not have necessarily resolved the dispute definitively, but at least it would have accomplished the goal of pre-deprivation process, namely an initial check against a potentially mistaken decision.

Turning now to the evidence in the record, in support of its position that Dean Johnson afforded Plaintiff a *pre-deprivation* opportunity to respond to the claims of insubordination and/or the imposition of the suspension, Defendants cite to the following deposition testimony of Dean Johnson:

> Q: Did you meet with Dr. Vatner upon his return to discuss this with them before you issued the memo?
>
> A: I met with him at the time we issued the memo, yes.
>
> Q: Was the meeting with the intention to give him the memo or to hear what he had to say about the travel?
>
> A: Both.

Evidence in the record also demonstrates, however, that: (1) pursuant to the letter of reprimand at issue, dated March 26, 2010, Plaintiff's suspension was

effective on the same day—March 26, 2010, (2) Dean Johnson submitted the Faculty Transaction Form authorizing Plaintiff's "suspension w/out pay" on March 25, 2010, and (3) the memorandum from Dean Johnson to Freda Zackin, Vice President for Academic Affairs containing the Faculty Transaction Form is dated March 25, 2010 and states:

> This is to advise you that I have suspended Dr. Stephen Vatner for a period of two weeks beginning March 26, 2010 without pay. Attached is the necessary paperwork to remove him from payroll for this period.

The Court finds it is reasonable to conclude that: (1) the decision to impose an unpaid suspension on Plaintiff had already been made by the point in time in which Dean Johnson handed him the March 26, 2010 letter of reprimand, and (2) Plaintiff's suspension was, in fact, already in effect by the point in time in which he received notice of same. In other words, the Court finds that Defendants failed to provide Plaintiff with advance notice of his unpaid suspension and/or with a *meaningful* opportunity to be heard before it went into effect.

Yagman v. Garcetti
U.S. Court of Appeals (9th Cir. 2017)

The issue in this appeal is whether the California Vehicle Code's procedure for contesting parking citations deprives contestants of property without due process.

Appellant Stephen Yagman alleges that he received and contested three parking citations from the City of Los Angeles. Yagman alleges that he asked for a hearing and, after his requests to waive the deposit requirement were denied, deposited the penalties and prevailed at two of the three formal administrative hearings. Yagman does not dispute that he also underwent an initial review process.

Yagman argues that the City's procedure for contesting parking citations violates procedural due process because it requires contestants to surrender property before holding a formal hearing. Due process is a flexible concept that varies with the particular situation. The base requirement of the Due Process Clause is that a person deprived of property be given an opportunity to be heard at a meaningful time and in a meaningful manner. This principle does not always require a full evidentiary hearing or a formal hearing.

The predeprivation hearing, which need not be elaborate, serves only as an initial check against mistaken decisions—essentially, a determination of whether

there are reasonable grounds to believe that the charges are true and support the proposed action. To that end, a due process plaintiff need only be accorded oral or written notice of the charges against him, an explanation of the adverse evidence, and an opportunity to present his side of the story. Further, where prompt postdeprivation review is available for correction of administrative error, due process generally requires no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

Accordingly, there are no hard and fast rules for determining the requisite timing and adequacy of pre- and post-deprivation procedures. Rather, once this court has concluded a protected interest is at stake, it must apply the three-part balancing test established in *Mathews v. Eldridge* to determine whether a pre-deprivation hearing is required and what specific procedures must be employed at that hearing given the particularities of the deprivation. The Mathews factors are: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used, and the value of additional procedural safeguards; and (3) the government's interest, including the burdens of additional procedural requirements. By weighing these concerns, courts can determine whether a State has met the

fundamental requirement of due process—the opportunity to be heard at a meaningful time and in a meaningful manner.

Yagman mistakenly assumes an initial review does not satisfy the general rule requiring predeprivation notice and hearing. Properly framed, the issue is not whether predeprivation notice and a full, formal hearing are required; it is whether the City's procedures as a whole are constitutionally adequate under the circumstances—a determination that requires application of the *Mathews* test.

With respect to the first *Mathews* factor, the private interest at stake is relatively modest. Any erroneous deprivation based on the City's prehearing deposit requirement is temporary, as the deposit is refunded after a successful challenge. Here, given the exception for individuals who cannot afford the deposit, the only private interest at stake for those subject to the deposit requirement is the temporary use of deposited funds during the period between a request for an administrative hearing and any refund following resolution of that hearing—a period which cannot exceed 120 days under state law. Yagman characterizes this private interest as the lost time-value of money, According to the Complaint, Yagman’s largest penalty was $73. Thus, the actual amount at stake was the interest accrued on $73 over perhaps as little as a few days, and no more than a few months. In other words, a very modest sum over a short period of time—a few dollars at most.

With respect to the second *Mathews* factor, the risk of erroneously depriving contestants of the deposited funds is relatively small. The initial-review process gave Yagman an opportunity to present evidence and arguments challenging his citations.

Finally, with respect to the third *Mathews* factor, the City's interests served by the deposit requirement are substantial. One such interest is in discouraging dilatory challenges. Requiring the City to provide formal administrative hearings without collecting deposits would encourage contestants to request hearings simply to delay paying the penalties. The City has an interest in promptly collecting parking penalties.

Balancing the *Mathews* factors discussed above, this court concludes that the deposit requirement does not violate procedural due process. Given the moderate risk of erroneous deprivation, Yagman's modest interest in temporarily retaining the amount of a parking penalty is outweighed by the City's more substantial interests in discouraging dilatory challenges, promptly collecting penalties, and conserving scarce resources.

Thus, Yagman cannot state a claim for violation of procedural due process based on the deposit requirement. The dismissal of Yagman's claims with prejudice is affirmed.