IN THE SUPREME COURT OF THE STATE OF NEVADA

REZA ZANDIAN A/K/A GOLAMREZA ZANDIANJAZI A/K/A GHOLAM REZA ZANDIAN A/K/A REZA JAZI A/K/A J. REZA JAZI A/K/A G. REZA JAZI A/K/A GHONOREZA ZANDIAN JAZI, AN INDIVIDUAL,

Appellant,

vs.

JED MARGOLIN, AN INDIVIDUAL,

Respondent.

Nevada Supreme Court
Case No. 65205

APPEAL

from the FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY
THE HONORABLE JAMES T. RUSSELL, District Judge

APPELLANT'S OPENING BRIEF

JASON WOODBURY
Nevada Bar No. 6870
KAEMPFER CROWELL
510 West Fourth Street
Las Vegas, Nevada 89703
Telephone: (775) 884-8300

Attorneys for Appellant, Reza Zandian

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OPENING BRIEF

COMES NOW, Appellant, REZA ZANDIAN ("ZANDIAN"), by and through his attorneys, KAEMPFER CROWELL, and hereby submits his *Appellant's Opening Brief* ("*Opening Brief*") and requests that this Court reverse the *Order Denying Defendant Reza Zandian aka Golamreza Zandianjazi aka Gholam Reza Zandian aka Reza Jazi aka J. Reza Jazi aka G. Reza Jazi aka Ghonoreza Zandian Jazi's Motion to Set Aside Default Judgment* issued February 6, 2014 by the District Court in this case below.

STATEMENT OF JURISDICTION

On February 6, 2014, the First Judicial District Court of the State of Nevada in and for Carson City, the Honorable James T. Russell presiding ("District Court") issued an *Order Denying Defendant Reza Zandian aka Golamreza Zandianjazi aka Gholam Reza Zandian aka Reza Jazi aka J. Reza Jazi aka G. Reza Jazi aka Ghonoreza Zandian Jazi's Motion to Set Aside Default Judgment* ("*Order*") in this case, which constitutes a "special order entered after final judgment."[1] On February 10, 2014, notice of entry of the *Order*

[1] *See* Joint App. at Vol. IV, 672-81 [hereinafter "J.A."]; NRAP 3A(b)(8).

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was served by mail upon counsel for ZANDIAN.[2] And on March 12, 2014, ZANDIAN filed his timely *Notice of Appeal* of the *Order*.[3]

ISSUES PRESENTED

I. Whether the District Court incorrectly entered a default against ZANDIAN even though ZANDIAN had appeared in the case and no advance not of any intention to take a default had been provided to ZANDIAN;

II. Whether the District Court incorrectly sanctioned ZANDIAN for failing to respond to discovery requests when both the discovery requests and the motion to impose the sanction were served upon an incorrect service address;

III. Whether the District Court incorrectly imposed a dispositive sanction upon ZANDIAN by striking ZANDIAN's answer to the operative complaint; and

IV. Whether the District Court incorrectly denied ZANDIAN's motion to set aside the default and default judgment under the circumstances of this case.

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[2] *See* J.A. at Vol. IV, 682-95.

[3] *See* J.A. at Vol. IV, 696-756; NRAP 4(a)(1).

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STATEMENT OF CASE

On December 11, 2009, Respondent, Jed Margolin ("MARGOLIN") filed a *Complaint* naming OPTIMA TECHOLOGY CORPORATION, a California corporation, OPTIMA TECHNOLOGY CORPORATION, a Nevada corporation, and ZANDIAN as Defendants.[4] MARGOLIN alleged several claims for relief in the original *Complaint*, all of which concerned ownership of four United States patents and allegations of conduct which damaged MARGOLIN's interest in the patents.[5] Subsequent to some initial proceedings between December, 2009 and August, 2011,[6] MARGOLIN filed an *Amended Complaint* naming the same Defendants and addressing the same subject matter.[7]

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[4] *See* J.A. at Vol. I, 1-10. For purposes of this appeal, the different domiciles of the two OPTIMA entities are not material. Therefore, they will hereinafter be referred to collectively as the "Optima Entities."

[5] *See* J.A. at Vol. I, 1-10.

[6] The proceedings prior to the filing of the *Amended Complaint* are not pertinent to this appeal. For information as to those initial proceedings, *see Docket Sheet* at 9-10 (Aug. 19, 2014) (*Zandian v. Margolin*, Nevada Supreme Court case number 65205).

[7] *See* J.A. at Vol. I, 169-76.

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At the time, ZANDIAN was represented by counsel.[8] In response to the *Amended Complaint*, ZANDIAN's counsel filed a *Motion to Dismiss Amended Complaint on a Special Appearance* ("*Motion to Dismiss*").[9] The District Court denied the *Motion to Dismiss*[10] and through his counsel, ZANDIAN then filed a *General Denial* to the *Amended Complaint*.[11] At the time the Optima Entities were represented by the same counsel and also filed a *General Denial*.[12]

Subsequently, ZANDIAN's counsel filed a *Motion to Withdraw* as counsel for ZANDIAN and the Optima Entities which was subsequently granted.[13] The *Motion to Withdraw* stated that ZANDIAN's address was "8775 Costa Verde Blvd., San Diego, CA 92122."[14]

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[8] *See* J.A. at Vol. I, 15-42; Vol. II, 194-293.

[9] *See* J.A. at Vol. II, 194-293.

[10] *See* J.A. at Vol. II, 294-302.

[11] *See* J.A. at Vol. II, 303-05.

[12] *See* J.A. at Vol. II, 314-16.

[13] *See* J.A. at Vol. II, 306-10, 317-22.

[14] *See* J.A. at Vol. II, 308, 320. The putative address of ZANDIAN provided in the *Motion to Withdraw* will be hereinafter referred to as the "San Diego address."

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MARGOLIN's counsel next proceeded against the Optima Entities, asserting that as corporate entities they were required to be represented by counsel in the litigation.[15] The District Court agreed and ordered that the Optima Entities appear through counsel.[16] When they did not, MARGOLIN filed and served on the San Diego address an *Application to Take Default* against the Optima Entities.[17] Subsequently, both default and a default judgment were entered against the Optima Entities.[18] On November 6, 2012, MARGOLIN served *Notice of Entry of Judgment* by default against the Optima Entities upon the San Diego address.[19]

In July, 2012, MARGOLIN attempted to serve ZANDIAN with discovery requests at the San Diego address.[20] Because ZANDIAN never received the 2012 discovery requests, no responses were ever provided.[21] Later, MARGOLIN moved the District Court for the

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[15] *See* J.A. at Vol. II, 329-33.

[16] *See* J.A. at Vol. II, 334-45.

[17] *See* J.A. at Vol. II, 346-53.

[18] *See* J.A. at Vol. II, 354-74.

[19] *See* J.A. at Vol. II, 375-81.

[20] *See* J.A. at Vol. II, 385. The discovery requests issued in July, 2012 will hereinafter be referred to as the "2012 discovery requests."

[21] *See* J.A. at Vol. II, 385; Vol. IV, 657.

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imposition of sanctions due to the absence of discovery responses.[22] The *Motion for Sanctions Pursuant to NRCP 37* ("*Motion for Sanctions*") was also served to the San Diego address.[23] Again, ZANDIAN did not receive the *Motion for Sanctions*, so no opposition or other response was filed.[24] The District Court granted the *Motion for Sanctions* and struck the *General Denial* of ZANDIAN.[25]

Although no notice of intent to take default or application for default was filed or served by MARGOLIN after the District Court struck the General Denial—on the San Diego address or anywhere else,[26] a *Default* against ZANDIAN was entered on March 28, 2013 by the clerk of the District Court.[27] MARGOLIN served an *Amended*

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[22] *See* J.A. at Vol. II, 383-420.

[23] *See* J.A. at Vol. II, 389.

[24] *See* J.A. at Vol. II, 421; Vol. IV, 657.

[25] *See* J.A. at Vol. II, 421-22.

[26] *See Docket Sheet* at 5 (Aug. 19, 2014) (*Zandian v. Margolin*, Nevada Supreme Court case number 65205).

[27] *See* J.A. at Vol. III, 444.

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Notice of Default on April 5, 2012.[28] The *Amended Notice of Default* was served upon the San Diego address.[29]

Once Default was entered against ZANDIAN, MARGOLIN proceeded to apply for a Default Judgment. An *Application for Default Judgment* was filed and served on the San Diego address in April, 2013.[30] On June 24, 2013, the District Court entered the Default Judgment against ZANDIAN.[31] And on June 27, 2013, Notice of Entry of the Default Judgment was filed.[32] Both were served to the San Diego address.[33]

On December 20, 2013, ZANDIAN filed his *Defendant Reza Zandian aka Golamreza Zandianjazi aka Gholam Reza Zandian aka Reza Jazi aka J. Reza Jazi aka G. Reza Jazi aka Ghonoreza Zandian Jazi's Motion to Set Aside Default Judgment* ("*Motion to Set*

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[28] *See* J.A. at Vol. III, 458-62. The original *Notice of Entry of Default* was in error because it indicated that the clerk of the District Court had entered default against the Optima Entities. *See* J.A. at Vol. III, 447-51.

[29] *See* J.A. at 460. Also served, without explanation, was Alborz Zandian. *See id.*

[30] *See* J.A. at Vol. III, 463-539.

[31] *See* J.A. at Vol. III, 540-42.

[32] *See* J.A. at Vol. III, 543-45

[33] *See* J.A. at Vol. III, 540-45.

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Aside").[34] An opposition to the *Motion to Set Aside* was filed January 9, 2014.[35] And a *Reply* to the *Opposition* was filed January 23, 2014.[36] Also on January 23, 2014, ZANDIAN filed a request for a hearing on the *Motion to Set Aside*.[37]

On February 6, 2014, the District Court, without hearing, issued its *Order Denying the Motion to Set Aside*.[38] Notice of entry of that order was served by mail on February 10, 2014.[39] This appeal followed.

STATEMENT OF FACTS

Due to the nature of the proceedings in this matter, the material facts at issue are limited to the following:

(1) After the withdrawal of his counsel was authorized in April, 2012, ZANDIAN never actually received any of the documents served to the San Diego address;[40]

(2) Since August, 2011, ZANDIAN has resided in France;[41]

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[34] *See* J.A. at Vol. III, 546-62.
[35] *See* J.A. at Vol. III, 570-643.
[36] *See* J.A. at Vol. IV, 648-61.
[37] *See* J.A. at Vol. IV, 662-64.
[38] *See* J.A. at Vol. IV, 731-40.
[39] *See* J.A. at Vol. IV, 741-53.
[40] *See* J.A. at Vol. IV, 657.

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(3) Counsel for MARGOLIN was on notice of ZANDIAN's residential address in France no later than March, 2013, prior to seeking the default or the default judgment against him;[42] and

(4) ZANDIAN and/or the Optima Entities own the patents at issue and there is a meritorious defense to this action available to ZANDIAN.[43]

SUMMARY OF THE ARGUMENT

The *Default Judgment* in this case was entered after ZANDIAN appeared in the case and without notice of intent to seek the default judgment, which is mandated by Nevada law under these circumstances. The District Court's imposition of a dispositive discovery sanction in this case was an abuse of discretion and not proportionate to the alleged violation, if any. Finally, ZANDIAN's

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[41] *See* J.A. at Vol. IV, 657.

[42] *See* J.A. at Vol. IV, 660. In March, 2013, ZANDIAN was the Plaintiff in an independent action pending in the Eighth Judicial District Court of the State of Nevada in and for Clark County. *See* J.A. at Vol. IV, 660. At the time, ZANDIAN was representing himself in proper person in that action. *See* J.A. at Vol. IV, 660. On March 15, 2013, ZANDIAN filed a document in that action which included a certificate of service to, among others, an attorney with the law firm representing MARGOLIN in this action. *See* J.A. at Vol. IV, 660. As required by the Eighth Judicial District Local Rules, the document includes ZANDIAN's address for service, which was the French address. *See* J.A. at Vol. IV, 660.

[43] *See* J.A. at Vol. II, 194-293.

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default constitutes excusable neglect under the jurisprudence of this Court. For these reasons, this Court should reverse the denial of the *Motion to Set Aside* and remand this case to the District Court for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

The refusal to set aside the *Default Judgment* against ZANDIAN in this case should be reviewed by this Court for an abuse of the District Court's discretion.[44] Likewise, the appeal of the

[44] *See Gazin v. Hoy*, 102 Nev. 621, 623, 730 P.2d 436, 437 (1986) ("The district court has wide discretion in deciding whether to set aside a default pursuant to NRCP 60(b)(1), and its determination will not be disturbed absent a showing of an abuse of discretion." (*citing Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980)). The appeal in this case implicates the District Court's denial of the *Motion to Set Aside* based on both NRCP 60(b)(1) and NRCP 60(b)(4). It is possible to interpret this Court's authority in a manner which applies different standards of review to those provisions. *Compare, e.g., Union Petrochemical* 96 Nev. at 338, 609 P.2d at 323 ("A motion to set aside a judgment is governed by NRCP 60(b). The district court has wide discretion in such matters and, barring an abuse of discretion, its determination will not be disturbed." (*citing Cicerchia v. Cicerchia*, 77 Nev. 158, 360 P.2d 839 (1961)) *with Gazin*, 102 Nev. at 623, 730 P.2d at 437 (applying abuse of discretion standard to circumstances implicating NRCP 60(b)(1) and affirming lower court but holding that lower court erred by not determining that the default judgment was void) *and Guerin v. Guerin*, 114 Nev. 127, 133, 953 P.2d 716, 720 (1998) (holding that lower court "erred in refusing to set aside" a judgment by default which was void). In this case, however, the possibility that different standards apply is

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District Court's decision to impose a sanction upon ZANDIAN under NRCP 37 for a discovery violation also implicates the "abuse of discretion standard."[45] However, this Court has acknowledged a "heightened standard of review" which applies to sanctions which effectuate a dispositive result in a case, such as the sanction at issue in this case.[46] This "heightened standard" requires that sanctions be proportional to violations.[47] Dispositive sanctions may only be imposed after "thoughtful consideration of all the factors involved in a particular case."[48] These factors include

> the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter

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inconsequential because the District Court's error meets the higher, abuse of discretion standard.

[45] *See Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 456, 458 (1998) (*citing Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)); NRCP 37(b).

[46] *Young*, 106 Nev. at 92, 787 P.2d at 780.

[47] *See Young*, 106 Nev. at 92, 787 P.2d at 779-780.

[48] *See Young*, 106 Nev. at 92, 787 P.2d at 780.

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both the parties and future litigants from similar abuses.[49]

The first factor—willful noncompliance—is required to justify a sanction which effectuates default.[50]

II. THE DEFAULT JUDGMENT AGAINST ZANDIAN IS VOID BECAUSE MARGOLIN FAILED TO SERVE A NOTICE OF INTENTION TO TAKE DEFAULT IN ADVANCE OF THE ENTRY OF DEFAULT AND DEFAULT JUDGMENT.

In this case, there is no dispute that ZANDIAN had "appeared" in the case prior to the entry of default and there is no dispute that MARGOLIN did not provide any notice of his intention to seek a default in advance of the default. As such, the *Default Judgment* is void under Nevada law.

NRCP 55 provides, in pertinent part:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60.[51]

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[49] *Young* at 106 Nev. at 93, 779 Nev. at 780 (*citing Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 591 (9th Cir. 1983); *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980); *Silas v. Sears Roebuck & Co.*, 586 F.2d 382 (5th Cir. 1978)).

[50] *See Temora Trading Co. v. Perry*, 98 Nev. 229, 231, 645 P.2d 436, 437 (1982) ("The sanction of dismissal or default may be imposed only in cases of willful noncompliance of the court's orders." (*citing Finkelman v. Clover Jewelers Boulevard, Inc.*, 91 Nev. 146, 532 P.2d 608 (1975)).

[51] NRCP 55(c).

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In conjunction, NRCP 60 provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... for the following reasons: ... (4) the judgment is void.[52]

It is blackletter law in Nevada that a judgment entered without notice to a party who has "appeared" in the case is void under NRCP 60(b)(4).[53]

Here, there is no question that ZANDIAN had "appeared" in this case prior to the entry of the *Default* and *Default Judgment* at issue. *Default* was entered on March 28, 2013. Prior to that time, through counsel, ZANDIAN had filed a *Motion to Dismiss on Special Appearance* as well as a *General Denial* in response to the allegations asserted in the *First Amended Complaint*. This constitutes a formal appearance by ZANDIAN in the case. Even if this was not a "formal appearance," these actions constitute an "appearance" under Nevada

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[52] NRCP 60(b).

[53] NRCP 55(b)(2); *Lindblom v. Prime Hospitality Corp.*, 120 Nev. 372, 375, 90 P.3d 1283, 1285 (2004) ("Under our decision in *Christy v. Carlisle*, a judgment entered without notice when required under NRCP 55(b)(2) is void and subject to a motion to set aside." (*citing Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978)).

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law because they are indicative of a "clear purpose to defend the suit."[54] The subsequent withdrawal of ZANDIAN's counsel, through whom the appearance was made, does not extinguish the appearance. As such, there is no question that ZANDIAN had "appeared" and was entitled to the protection afforded by NRCP 55.

And MARGOLIN denied ZANDIAN that required protection. The record establishes that MARGOLIN provided no specific notice to ZANDIAN of MARGOLIN's intent to take ZANDIAN's default or any intent to seek default judgment between the time of ZANDIAN's appearance and the entry of the *Default Judgment* on June 24, 2013. Consequently, under NRCP 60(b)(4), the *Default Judgment* is void and the District Court's denial of the *Motion to Set Aside* should be reversed.

III. STRIKING ZANDIAN'S RESPONSE TO THE FIRST AMENDED COMPLAINT WAS ERRONEOUSLY IMPOSED AS A SANCTION

The preceding cause of ZANDIAN's default was the sanction imposed by the Court as a result of ZANDIAN's failure to respond to

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[54] *See Gazin v. Hoy*, 102 Nev. 621, 624, 730 P.2d 436, 438 (1986) (holding that "appearance for purposes of NRCP 55(b)(2) does not require a presentation or submission to the court" but may consist of "a clear purpose to defend the suit" (*citing Franklin v. Bartsas*

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the 2012 discovery requests served on the San Diego address. Had ZANDIAN's *General Denial* not have been stricken, of course, he would not have been in default in the first place. The District Court's decision to effectively compel ZANDIAN's default was an abuse of discretion in this case.

A. The sanction should not have been imposed in the first place because the discovery requests and the motion to impose the sanction were not validly served.

The sanction which the District Court imposed is premised on the assumption that ZANDIAN received the discovery requests and neglected or refused to respond to them. However, this assumption fails for three reasons. First, as noted above, ZANDIAN, in fact, did not reside at the address to which the discovery requests were sent. Second, MARGOLIN offered no proof to the District Court that the discovery requests were actually received by ZANDIAN. And, third, the District Court necessarily abused its discretion by declining to hold a hearing to determine whether MARGOLIN had properly served the discovery requests.

Realty, Inc., 95, Nev. 559, 598 P.2d 1147 (1979); *Christy*, 94 Nev. 651, 584 P.2d 687).

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NRCP 37 requires, as a condition precedent to the imposition of a discovery sanction, proof that the discovery request at issue was properly served on the non-responding party.[55] As previously explained, ZANDIAN did not reside at the San Diego address at the time the discovery requests were sent. ZANDIAN, in fact, never received the discovery requests at issue. There is no evidence in the record to the contrary.

MARGOLIN, of course, could have easily resolved any question as to whether ZANDIAN actually received the discovery requests in any number of ways. First, the requests could have been personally served and service documented by an affidavit of service. Alternatively, the requests could have been sent by certified mail or in some other fashion which would provide uncontroverted evidence that they were, in fact, delivered and to whom. But no effort was made to do this. Nor was any effort made to attempt to determine whether an alternative address—other than the San Diego address—might allow for actual service upon ZANDIAN.

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[55] NRCP 37. Normally, an order compelling responses to the discovery is required as well. *See* NRCP 37(a)-(b). MARGOLIN elected to deprive ZANDIAN of this procedural safeguard and request the sanction under NRCP 37(d) which does not require that step.

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Further, there are numerous irregularities in regard to the service of the discovery requests. First, it is notable that the discovery requests were sent to an address with no apartment number specified, while the *Motion for Sanctions* was sent to the same address and to the same address with an apartment number.[56] The meet and confer letter referenced in the *Motion for Sanctions* bears the address without the apartment number. But the *Declaration* in support of the *Motion for Sanctions* indicates that the meet and confer letter was not mailed, but rather that it was "emailed and faxed."[57] However, the letter does not include a facsimile number or e-mail address for ZANDIAN. Nor does the record contain a fax confirmation sheet, e-mail read receipt or any other indication that would show proof of delivery of the meet and confer letter. Most importantly, the record includes no information as to how counsel for MARGOLIN acquired an e-mail address and facsimile number for ZANDIAN or why this information was not utilized in other communications—such as the very discovery requests which ZANDIAN did not receive.

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[56] *See* J.A. at Vol. II, 389.

[57] See J.A. at Vol. II, 391.

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A hearing should have been held to allow a more comprehensive and critical examination of the assumption that underlies the discovery sanction. Indeed, a hearing under these circumstances was *required* to test the reliability of the information.[58] The District Court's failure to hold a hearing under these circumstances—particularly in light of MARGOLIN's use of the procedural shortcut obviating the requirement of a court order compelling discovery—was an abuse of discretion. As such, this Court should reverse the order striking ZANDIAN's General Denial as a discovery sanction.

B. Imposition of a dispositive sanction was not warranted under the circumstances of this case.

Young v. Johnny Ribeiro Bldg.,[59] establishes the stringent standards which apply to a discovery sanction which is effectively dispositive to the merits of a case. One of those requirements is "an express, careful and preferably written explanation of the court's

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[58] *Cf. Nevada Power v. Fluor Ill.*, 108 Nev. 638, 837 P.2d 1354 (1992). *Nevada Power* directly requires an evidentiary hearing when the allegedly non-responding party raises a "question of fact" as to the non-compliance with discovery. *See Nevada Power*, 108 Nev. at 745-46, 837 P.2d at 1359-60. By analogy, the *Nevada Power* proposition extends to a situation like the one at bar, where the party seeking discovery raises questions of fact itself as to the application of NRCP 37.

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analysis of the pertinent factors" supporting the imposition of such a severe sanction.[60]

The District Court's order in this case does not satisfy the requirement of an "express, careful and preferably written explanation of the court's analysis." Indeed, there is no substantive analysis whatsoever. The *Order Granting Plaintiff's Motion for Sanctions Under NRCP 37* notes the date upon which the *Motion for Sanctions* was filed.[61] It then states, "No opposition has been filed."[62] The "analysis" which follows provides, "Based on the foregoing and good cause appearing ...."[63] This is not compliant with the *Young* requirement. Coupled with the fact that no hearing was held to perform—much less memorialize—such an analysis, the deficiency of the order compels reversal of the discovery sanction imposed in this case.

To be fair, *some* sanction was called for under the circumstances. But three procedural defects prohibit that sanction

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[59] 106 Nev. 88, 787 P.2d 777 (1990).

[60] *Young*, 106 Nev. at 93, 787 P.2d at 780.

[61] *See* J.A. at Vol. II, 427.

[62] J.A. at Vol. II, 427.

[63] J.A. at Vol. II, 427.

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from being the severe, effectively dispositive sanction which was imposed. First, there is insufficient evidence in the record to establish that the failure to respond was the product of willful noncompliance—a condition precedent to a sanction this severe.[64] Second, a hearing was required under the circumstances of this case and no hearing was ever held.[65] And third, the District Court's order fails to implicate the analysis required when a dispositive sanction is being contemplated.[66]

For these reasons, the sanction is disproportionate to the alleged violation. And the District Court's order imposing the sanction should be reversed as should the denial of the *Motion to Set Aside*.

IV. THE DISTRICT COURT SHOULD HAVE GRANTED ZANDIAN'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT UNDER THE CIRCUMSTANCES OF THIS CASE.

NRCP 60 provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1)

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[64] *See Temora Trading Co.*, 98 Nev. at 231, 645 P.2d at 437.

[65] *See Nevada Power*, 108 at 745-46, 837 P.2d at 1359-60.

[66] *See Young*, 106 Nev. at 93, 787 P.2d at 780.

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mistake, inadvertence, surprise, or excusable neglect....[67]

Several factors are implicated when a court considers whether to set aside a default judgment on the basis of NRCP 60(b)(1). First, there must be a prompt application to the court requesting the relief.[68] Second, there must be no intent to delay the proceedings.[69] Third, the moving party must demonstrate a misunderstanding of procedural requirements.[70] And, finally, the application must be made in good faith.[71]

While, the trial court is vested with broad discretion in evaluating a motion to set aside, the rule must consistently be applied

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[67] NRCP 60(b). Timeliness is also an element of a cognizable request to set aside a default judgment. NRCP 60(b) requires that a motion to set aside "be made within a reasonable time" and, under some circumstances, "not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served." In this case, the Motion to set aside was presented both "within a reasonable time" and less than "6 months" after entry of the *Default Judgment*.

[68] *See Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 792 (1992) (*citing Yochum v. Davis*, 98 Nev. 484, 653 P.2d 1215 (1982); *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 380 P.2d 293 (1963)), *partially overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997) (removing requirement that applicant "show a meritorious defense in order to have a court set aside a default judgment")).

[69] *See id.*

[70] *See id.*

[71] *See id.*

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510 W. Fourth Street
Carson City, Nevada 89703

in a manner accomplishing its "salutary purpose" which is "to redress any injustices that may have resulted because of excusable neglect or the wrongs of any opposing party."[72]

The circumstances of this case, in all material respects, are identical to the circumstances of a case in which this Court has previously set aside a default judgment, *Stoecklein v. Johnson Elec.*[73] In *Stoecklein*, the attorney for a named defendant withdrew as counsel for the defendant after an answer to the complaint had been filed.[74] The withdrawal documentation reflected an incorrect service address for the defendant.[75] Neither the defendant nor any representative appeared at trial in the matter which resulted in the entry of judgment against the defendant.[76] The defendant moved for relief from the judgment under NRCP 60(b)(1), but the trial court denied the request.[77]

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[72] *Petersen v. Petersen*, 105 Nev. 133, 135, 771 P.2d 159, 161 (1989) (*citing Nevada Industrial Development, Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987)).

[73] 109 Nev. 268, 849 P.2d 305 (1993).

[74] *See Stoecklein*, 109 Nev. at 270, 849 P.2d at 307.

[75] *See id.*

[76] *See Stoecklein*, 109 Nev. at 270-71, 849 P.2d at 307.

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510 W. Fourth Street
Carson City, Nevada 89703

In reviewing the circumstances, this Court determined that the defendant acted promptly in challenging the invalid judgment.[78] The Court also concluded that "the facts do not evidence an intent to merely delay the proceedings."[79] Further, the *Stocklein* Court determined that even though the defendant was a licensed attorney in California, he did not have "specific procedural knowledge" in the case because he did not know that a trial date had been scheduled.[80] And finally, the Court determined that the defendant had acted in good faith.[81] Therefore, the *Stoecklein* Court reversed the trial court's ruling and remanded the case for a new trial on the merits due to the defendant's excusable neglect which resulted in the judgment.[82]

The circumstances in this case are indistinguishable. If anything, the lack of legal training on the part of ZANDIAN makes this case more compelling in regard to the request to set aside the *Default Judgment*. Just as in *Stoecklein*, ZANDIAN's counsel appeared on his behalf in the case and then provided an incorrect

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[77] *See Stoecklein*, 109 Nev. at 271, 849 P.2d at 307.

[78] *See Stoecklein*, 109 Nev. at 271-72, 849 P.2d at 308.

[79] *Stoecklein*, 109 Nev. at 272, 849 P.2d at 308.

[80] *Id.*

[81] *See Stoecklein*, 109 Nev. at 273-74, 849 P.2d at 309.

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510 W. Fourth Street
Carson City, Nevada 89703

service address. As a result, ZANDIAN was unaware of further proceedings until he learned of the entry of a *Default Judgment* in November, 2013.[83] Upon learning this information, ZANDIAN moved promptly, engaging counsel who prepared and filed the *Motion to Set Aside* well within the six-month mandatory period following entry of the *Default Judgment*. The record is devoid of any evidence on the part of ZANDIAN to delay these proceedings. ZANDIAN, as an unrepresented individual, clearly lacks knowledge of procedural requirements and certainly has far less knowledge than the licensed attorney in *Stoecklein*. And, finally, there is sufficient evidence of good faith on the part of ZANDIAN is presenting the *Motion to Set Aside*.

The unusual and irregular proceedings in this case require some equitable leniency in procedural stringencies. While there is nothing overtly deceptive about the manner in which MARGOLIN proceeded, when examined from the perspective of a layperson untrained in the law the circumstances are bewildering. Most significantly, it would be next to impossible to understand how it could be that MARGOLIN would seek and obtain the default of the Optima Entities, seek and

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[82] *See Stoecklein*, 109 Nev. at 275, 849 P.2d at 309-10.

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510 W. Fourth Street
Carson City, Nevada 89703

eventually obtain a default judgment against the Optima Entities, and yet, the case would not be concluded. The bifurcated manner in which MARGOLIN proceeded in this matter—while it may not have been *intentionally* deceptive—certainly had that effect.

Additionally, ZANDIAN justifiably relied on the belief that providing his French address to MARGOLIN's firm—albeit in an independent case—sufficed to provide them notice of his actual residence.

And finally, in the limited filings ZANDIAN has presented in this case, a meritorious defense has been offered.

Equity and the "salutary purpose" of Nevada's judicial process require that this matter proceed to disposition on the merits. Therefore, this Court should reverse the ruling of the District Court, grant the Motion to Set Aside and remand this matter for further proceedings.

CONCLUSION

ZANDIAN respectfully requests that this Court reverse the District Court's Order, grant ZNADIAN's *Motion to Set Aside Default*

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[83] *See* J.A. at Vol. IV, 648-60.

KAEMPFER CROWELL
510 W. Fourth Street
Carson City, Nevada 89703

Judgment and remand this matter to the District Court for further proceedings consistent with its ruling.

DATED this 16th day of October, 2014.

KAEMPFER CROWELL

BY: _____

JASON D. WOODBURY
Nevada Bar No. 6870
510 West Fourth Street
Carson City, Nevada 89703
Telephone: (775) 884-8300
Facsimile: (775) 882-0257
Attorneys for ***Appellant, REZA ZANDIAN***

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements or NRAP 32(a)(6) because:

[**X**] This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2003 in 14 point Georgia** font; or

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2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pasts of the brief exempted by NRAP 32(a)(7)(c), it is either:

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510 W. Fourth Street
Carson City, Nevada 89703

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of October, 2014.

JASON D. WOODBURY
Nevada Bar No. 6870
KAEMPFER CROWELL
510 West Fourth Street
Carson City, NV 89703

KAEMPFER CROWELL
510 W. Fourth Street
Carson City, Nevada 89703

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1), I declare that I am an employee of Kaempfer Crowell and on this 16th day of October, 2014, I served a copy of the foregoing *Appellant's Opening Brief* by Nevada Supreme Court CM/ECF Electronic Filing addressed to each of the following:

Adam P. McMillen
WATSON ROUNDS
5371 Kietzke Lane
Reno, NV 89511

DATED this 16th day of October, 2014.

an employee of Kaempfer Crowell

KAEMPFER CROWELL
510 W. Fourth Street
Carson City, Nevada 89703