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5 **Attorneys for Reza Zandian**

6 IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
7 CARSON CITY

9 JED MARGOLIN, an individual,
10 Plaintiff,
11 vs.
12 OPTIMA TECHNOLOGY CORPORATION,
a California corporation, OPTIMA
13 TECHNOLOGY CORPORATION, a Nevada
corporation, REZA ZANDIAN aka
14 GOLAMREZA ZANDIANJAZI aka
GHOLAM REZA ZANDIAN aka REZA
15 JAZI aka J. REZA JAZI aka G. REZA JAZI
aka GHONOREZA ZANDIAN JAZI, an
16 individual, DOE Companies 1-10, DOE
Corporations 11-20, and DOE Individuals
17 21-30,
18 Defendants.

Case No. 09OC00579 1B
Dept. No. I


19
20 **OPPOSITION TO MOTION FOR ORDER**
ALLOWING COSTS AND NECESSARY DISBURSEMENTS

21 COMES NOW, Defendant REZA ZANDIAN (“ZANDIAN”), by and through his
22 attorneys, Kaempfer Crowell, and hereby opposes the *Motion for Order Allowing Costs*
23 *and Necessary Disbursements and Memorandum of Points and Authorities in Support*
24 *Thereof (“Motion”)* served by mail on April 25, 2014. This *Opposition* is made pursuant

1 to FJDCR 15(3) and is based on the attached memorandum of points and authorities, all
2 papers and pleadings on file in this matter and any evidence received and arguments
3 entertained by the Court at any hearing on the *Motion*.

4 DATED this 12th day of May, 2014.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. THE COURT HAS DISCRETION TO AWARD COSTS AND EACH**
3 **PARTY SHOULD BEAR THEIR OWN COSTS IN THIS CASE**

4 The determination of allowable costs is within the sound discretion of the trial
5 court.¹ However, statutes permitting recovery of costs are in derogation of common law,
6 and therefore must be strictly construed.²

7 Here, while Defendant believes each party should bear its own costs, Plaintiff
8 seeks its photocopying costs at a rate of \$0.25 per page.³ NRS 18.005(12) authorizes
9 “[r]easonable costs for photocopies.” If the court is inclined to award costs, the Court
10 should reduce photocopy charges to \$0.15 per page, or a total of \$288.72 for
11 photocopies.⁴

12 **B. AN AWARD OF ATTORNEY’S FEES IS NOT APPROPRIATE AS A**
13 **MATTER OF LAW**

14 It is well settled law in Nevada that the district court may not award attorney fees
15 absent authority under a statute, rule, or contract.⁵ Here, there is no applicable statute
16 or rule and the parties did not enter into an agreement which permits an award of
17 attorney’s fees. Therefore, the American Rule that each party should bear its own
18 attorney’s fees and costs controls, and Plaintiff’s unsupported request for fees should be
19 rejected.

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22 ¹ See *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353-54, 971
23 P.2d 383, 386 (1998) (citing *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993)).

24 ² See *Gibellini v. Klindt*, 110 Nev. 1201, 1208, 885 P.2d 540, 544-45 (1994); NRS 18.005.

³ See *Declaration of Adam McMillen in Support of Pl.’s Mot. for Order Allowing Costs and Necessary Disbursements at Exhibit 4* (April 25, 2014).

⁴ See *Affidavit of Jano Barnhurst, Exhibit 1 to Motion to Retax and Settle Costs* (April 30, 2014).

⁵ See, e.g., *Horgan v. Felton*, 123 Nev. 577, 583 170 P.3d 982, 986 (2007) (citing *Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983)).

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1 **1. NRS 598.0999(2) does not permit an award of attorney’s fees in this**
2 **case**

3 Plaintiff claims that under its claim for “deceptive trade practices” it is entitled to
4 an award of attorney’s fees under “NRS 598.0999(2).”⁶ While Plaintiff concedes that
5 “NRS 598.0999(2) does not explicitly provide for attorney fees incurred postjudgment,”
6 Plaintiff nonetheless relies exclusively on the authority of NRS 598.0999(2) in the
7 request for an award of fees.

8 However, NRS 598.0999 does not permit an award of attorney’s fees in this case.
9 In pertinent part, that statute provides:

10 Except as otherwise provided in NRS 598.0974, in any action brought
11 pursuant to the provisions of NRS 598.0903 to 598.0999, inclusive, if the court
12 finds that a person has willfully engaged in a deceptive trade practice, *the district*
13 *attorney of any county in this State or the Attorney General bringing the action*
14 may recover a civil penalty not to exceed \$5,000 for each violation. The court in
15 *any such action* may, in addition to any other relief or reimbursement, award
16 reasonable attorney’s fees and costs.⁷

17 The statutory language “in any such action” refers to the potential action to be
18 brought by the district attorney or the Attorney General in pursuing its civil recourse. It
19 does not refer to an action brought by a Plaintiff in a civil action. Therefore, NRS
20 598.0999(2) does not apply.

21 **2. The district court may not award attorney fees absent authority under**
22 **a statute, rule, or contract.**

23 It is well settled Nevada law that attorney’s fees are not recoverable unless
24 authorized by a statute, rule, or contractual provision.⁸ Here, the American Rule that
each party should bear its own attorney’s fees and costs remains the case, in the absence
of a statute, rule or contract to the contrary. Under the “American Rule,” win or lose,

⁶ See Motion at 3:24-28.

⁷ NRS 598.0999(2) (emphasis added).

⁸ See, e.g., *Horgan*, 123 Nev. at 583 170 P.3d at 986 (citing *Rowland*, 99 Nev. at 315, 662 P.2d at 1336).

1 the parties bear their own legal fees.⁹ The district court may not award attorney fees
2 absent authority under a statute, rule, or contract.¹⁰

3 **3. The court's exercise of discretion in determining the reasonable value**
4 **of an attorney's services arises only when an award of attorney's fees**
5 **is prescribed.**

6 While it is within this Court's discretion to determine the reasonable amount of
7 attorney's fees under a statute or rule, in exercising its discretion, this Court must
8 evaluate the factors set forth in *Brunzell v. Golden Gate National Bank*.¹¹ Here, the
9 Court need not undertake such an analysis because there is no applicable statute or rule
10 which permits an award of fees to the Plaintiff. The *Brunzell* analysis only arises in
11 instances where attorney's fees are prescribed by statute, rule or contract.

12 **4. Even if a *Brunzell* analysis of an award of attorney's fees were**
13 **permissible, Plaintiff's fees are inflated.**

14 This case has been a series of default judgments and did not require years of legal
15 work focused on a specialty in intellectual property. If complex intellectual property
16 issues were involved, it *might*, in general, justify opposing counsel's billable hourly rate.
17 But this case was not driven by intellectual property law, but, rather, involves basic
18 principles concerning the default judgment process. The *Complaint* reflects this fact: it
19 offers up the run of the mill torts against Defendants and only alleges "deceptive trade
20 practices," as the one and only "intellectual property" specialty. Further, not one of the
21 Plaintiff's claims was ever never litigated and brought to a judgment on the merits. In
22 fact, the fees Plaintiff seeks to recover are related solely to post-judgment work that has
23 been performed – not even work that was performed to bring about the default
24 judgment.

⁹ See *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011).

¹⁰ See *State, Dep't of Human Resources v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993).

¹¹ 85 Nev. 345, 455 P.2d 31 (1969).

1 The judgment against this Defendant is exclusively by default and therefore, does
2 not impose specialized skill or unusual time and attention to the work performed by
3 counsel in this case. Plaintiff pursued and has only pursued default judgments against
4 all Defendants since the matter's inception. Hence, this case required no specialized
5 legal practice which justifies the hourly rate or justifies collection of an increased fee, if
6 any at all.

7 The *Brunzell* factors evaluate: (1) the qualities of the advocate: his ability, his
8 training, education, experience, professional standing and skill; (2) the character of the
9 work to be done: its difficulty, its intricacy, its importance, time and skill required, the
10 responsibility imposed and the prominence and character of the parties where they
11 affect the importance of the litigation; (3) the work actually performed by the lawyer:
12 the skill, time and attention given to the work; (4) the result: whether the attorney was
13 successful and what benefits were derived.¹² As set forth above, no factor weighs in
14 favor of an award of \$34,632.50 for 6 months of work dedicated to opposing a motion to
15 set aside a default judgment, taking steps to execute against a default judgment, and
16 responding to a notice of appeal.¹³

17 **5. Even if a *Brunzell* analysis of an award of attorney's fees was**
18 **permissible, Plaintiff's requested fees are exclusively for post-**
19 **judgment, pre-appeal work.**

20 Additionally, Plaintiff is asking that the *Brunzell* factors be applied exclusively to
21 post-judgment accrued attorney's fees. The default judgment was obtained on June 24,
22 2013 and Plaintiff is asking for its attorney's fees from "October 18, 2013 to April 18,
23 2014."¹⁴ Therefore, the *Brunzell* factors are applicable—if at all—only to the effort

24 ¹² See *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

¹³ The appeal has been assigned to the Nevada Supreme Court's settlement program and briefing has been suspended.

¹⁴ *Motion* at 5:22-23.

1 expended in defeating the motion to set aside the default judgment filed on January 9,
2 2014. No fees may be awarded for work performed related to the appeal noticed by
3 Defendant on March 12, 2014.

4 To the extent that the attorney's fees are applied to post-appeal work by Plaintiff's
5 counsel, an award of attorney's fees is prohibited in this case, as well. "There is no
6 provision in the statutes authorizing the district court to award attorney fees incurred on
7 appeal. NRAP 38(b) authorizes only this court [the Nevada Supreme Court] to make
8 such an award if it determines that the appeals process has been misused."¹⁵

9 **C. POST-JUDGMENT INTEREST SHOULD NOT COME DUE BY THIS
10 PREMATURE REQUEST**

11 The postjudgment interest is accounted for in the Court's June 24, 2013 *Default*
12 *Judgment* "until satisfied." And the interest that Plaintiff alleges is due cannot be
13 advanced via the *Motion*. Further, the matter is on appeal as of March 14, 2014.

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¹⁵ *Board of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P. 2d 1149, 1150 (2000).

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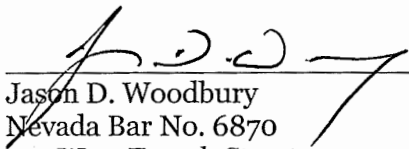
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D. CONCLUSION

For all the reasons set forth herein, it is respectfully requested that this Court DENY Plaintiff's *Motion for Order Allowing Costs and Necessary Disbursements*.

DATED this 12th day of May, 2014.

KAEMPFER CROWELL



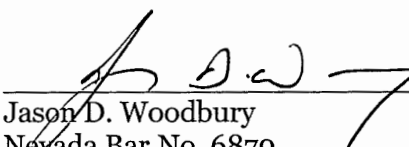
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AFFIRMATION pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 12th day of May, 2014.

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that service of the foregoing

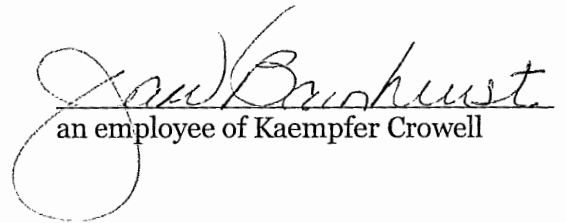
3 **OPPOSITION TO MOTION FOR ORDER ALLOWING COSTS AND**

4 **NECESSARY DISBURSEMENTS** was made this date by depositing a true copy of

5 the same for mailing at Carson City, Nevada, addressed to each of the following:

6 Matthew D. Francis
7 Adam P. McMillen
8 WATSON ROUNDS
9 5371 Kietzke Lane
10 Reno, NV 89511

11 DATED this 12th day of May, 2014.

12 
13 an employee of Kaempfer Crowell

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