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6 IN THE FIRST JUDICIAL DISTRICT COURT  
7 OF THE STATE OF NEVADA IN AND FOR  
8 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

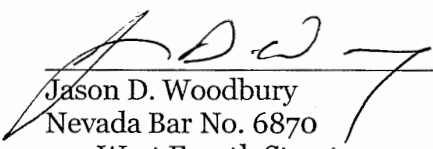
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20 **SUR-REPLY TO REPLY IN SUPPORT OF**  
**MOTION FOR WRIT OF EXECUTION**

21 COMES NOW, Defendant REZA ZANDIAN ("ZANDIAN"), by and through his  
22 attorneys, Kaempfer Crowell, and hereby files this sur-reply to the *Reply in Support of*  
23 *Motion for Writ of Execution* filed July 17, 2014 ("Reply"). This *Sur-Reply* is made  
24 pursuant to this Court's *Order Granting Defendant Zandian's Request to File a Sur-*

1 *Reply* and is based on the attached memorandum of points and authorities, all papers  
2 and pleadings on file in this matter and any evidence received and arguments  
3 entertained by the Court at any hearing on the underlying *Motion for Writ of Execution*  
4 (*"Motion"*).

5 DATED this 6<sup>th</sup> day of August, 2014.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Argument**

**A. MARGOLIN requests the issuance of proposed Writs enforcing a “judgment” which is not consistent with this Court’s *Default Judgment*.**

On June 24, 2013, this Court entered its *Default Judgment* in favor of MARGOLIN in the amount of \$1,495,775.74.<sup>1</sup> That *Default Judgment* has never been amended. And yet, MARGOLIN now requests this Court to issue Writs of Execution based on what he believes the *Default Judgment should be*. Not what it is.

In his *Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of Points and Authorities in Support Thereof* filed with this Court on April 28, 2014, MARGOLIN requested that this Court enter “an order awarding him postjudgment interest, costs and attorneys’ fees.”<sup>2</sup> In his efforts to acquire an order for “postjudgment interest, costs and attorneys’ fees,” MARGOLIN made no reference to any request that the *Default Judgment* itself be *amended* to include such sums.<sup>3</sup>

There is good reason that MARGOLIN requested an order rather than an amended judgment. Amendment of the judgment was untimely.<sup>4</sup> Additionally, the *Default Judgment* was already the subject of an appeal by the time MARGOLIN filed the *Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of*

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<sup>1</sup> See *Default J.* at 17-18.

<sup>2</sup> *Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of Points and Authorities in Support Thereof* at 1:24-25 (April 28, 2014) (emphasis added).

<sup>3</sup> See *id.*; *Reply in Support of Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of Points and Authorities in Support Thereof* (May 12, 2014).

<sup>4</sup> A motion to alter or amend a judgment must be made within 10 days after service of written notice of entry of the judgment. See NRCP 59(e) (“A motion to alter or amend the judgment shall be filed no later than 10 days after service of written notice of entry of the judgment.”) MARGOLIN filed *Notice of Entry of Default Judgment* on June 27, 2013.

1 *Points and Authorities in Support Thereof* with this Court.<sup>5</sup> As such, this Court lacked  
2 jurisdiction to amend the *Default Judgment*.<sup>6</sup>

3 Despite the absence of such a request in either the *Motion for Order Allowing*  
4 *Costs and Necessary Disbursements and Memorandum of Points and Authorities in*  
5 *Support Thereof* or the *Reply in Support of Motion for Order Allowing Costs and*  
6 *Necessary Disbursements and Memorandum of Points and Authorities in Support*  
7 *Thereof*, in its proposed order submitted to this Court, MARGOLIN included language  
8 stating:

9 The total amount awarded to Margolin herein is \$96,287.07. *This award shall be*  
10 *added to the judgment*.<sup>7</sup>

11 Thereby, MARGOLIN, in effect, accomplished an amendment to the *Default Judgment*,  
12 even though such an amendment is clearly disallowed under the law.

13 Arguing that this Court has amended the *Default Judgment* to include these post-  
14 judgment sums,<sup>8</sup> MARGOLIN now endeavors to have this Court issue the proposed  
15 *Writs* which purport to execute the *Default Judgment* “as amended.”

16 Nevada law prescribes the form of an enforceable judgment.<sup>9</sup> And one essential  
17 component of the form is that it be contained in a single written document, signed by

18 \_\_\_\_\_  
<sup>5</sup> See *Notice of Appeal* (Mar. 12, 2014).

19 <sup>6</sup> See *Foster v. Dingwall*, 126 Nev. Adv. 5, 228 P.3d 453, 454-55 (2010) (“This court has repeatedly held  
20 that the timely filing of a notice of appeal “divests the district court of jurisdiction to act and vests  
jurisdiction in this court.”” (quoting *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529  
(2006) (quoting *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987)))).

21 <sup>7</sup> *Order on Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of Points*  
22 *and Authorities in Support Thereof* at 9:1-2 (emphasis added) (May 19, 2014) [hereinafter the “*Order*”].  
ZANDIAN had no opportunity to object to the draft before this Court signed the *Order*. Despite the  
requirements of F.J.D.C.R. 19(4), counsel for ZANDIAN was not provided a copy of the proposed order  
presented to the Court.

23 <sup>8</sup> See *Reply* at 2:15-17 (“The Order on Motion for Order Allowing Costs and Necessary Disbursements,  
24 dated May 19, 2014, expressly states that the post-judgment interest, fees and costs of \$96,287.07 ‘shall  
be added to the judgment.’”)

<sup>9</sup> See NRCP 58; see generally NRS 17.120 – 17.190; see also NRCP 84, Form 32.

1 the presiding judge and filed with the clerk.<sup>10</sup> Even when the amount of a judgment is  
2 supplemented by an award of costs subsequent to the initial entry of judgment, Nevada  
3 law requires that this information be reflected on the judgment itself.<sup>11</sup>

4 Precision is the policy which supports this requirement. Those officials who  
5 administer and enforce judgment executions must know or be able to calculate—to the  
6 penny<sup>12</sup>--the amount owed by the judgment debtor in order to accomplish a lawful  
7 execution. As such, there must be no ambiguity or room for interpretation as a  
8 judgment is conveyed to writ of execution. In this case, there is plenty of both.

9 First, the proposed *Writs* require an analysis and interpretation of two separate  
10 documents: the *Default Judgment* and the *Order on Motion for Order Allowing Costs*  
11 *and Necessary Disbursements and Memorandum of Points and Authorities in Support*  
12 *Thereof*. This, in and of itself, is contrary to Nevada law which requires that writs of  
13 execution be issued on a judgment reflected in a single written document. Second, it is  
14 impossible to precisely determine the amount owed on the judgment because those  
15 documents are not consistent with the proposed *Writs*. The *Default Judgment* states

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17 <sup>10</sup> See NRCPC 58(a); see also NRCPC 84, Form 32.

18 <sup>11</sup> See NRS 17.190 (“1. Included in any judgment filed shall be a computation of the costs, if they have been  
19 ascertained. The clerk shall insert a computation of the costs in the copies and docket of the judgment. 2.  
20 If costs are not ascertained or included in the judgment at the time of entry, the clerk shall, within 2 days  
21 after costs are ascertained, *insert the same in a blank left in the judgment for that purpose* and shall  
22 make a similar insertion of costs in the copies and docket of the judgment.” (emphasis added)); NRS  
23 18.120 (“The clerk shall include in the judgment entered up by the clerk any interest on the verdict or  
24 judgment of the court or master, from the time it was rendered or made, and the costs, if the same have  
been taxed or ascertained; and the clerk shall, within 2 days after the same shall be taxed or ascertained, if  
not included in the judgment, *insert the same in a blank to be left in the judgment for that purpose*, and  
shall make a similar insertion of the costs in the copies and docket of the judgment.” (emphasis added));  
NRS 18.180 (“Within 2 days after the costs are tried or ascertained, or after the time for making a motion  
to tax the same has expired, *the clerk or judge shall enter the amount thereof on the margin of the*  
*judgment*, and thereafter they shall be included together with the amount of the fee charged for issuance  
thereof in any execution issued upon such judgment.” (emphasis added)).

<sup>12</sup> See NRS 17.130(1) (“In all judgments and decrees, rendered by any court of justice, for any debt,  
damages or costs, and in all executions issued thereon, the amount must be computed, as near as may be,  
in dollars and cents, rejecting smaller fractions, and no judgment, or other proceedings, may be  
considered erroneous for that omission.”)

1 that interest accrues on the “principal amount ... from the date of default until the  
2 judgment is satisfied.”<sup>13</sup> The *Order on Motion for Order Allowing Costs and Necessary*  
3 *Disbursements and Memorandum of Points and Authorities in Support Thereof* then  
4 provides that the “total amount awarded ... shall be added to the judgment.” From that  
5 language, it is not clear if that amount is to be added to the “principal amount” of the  
6 *Default Judgment*—in which case it would be included in the calculation of interest  
7 from the “date of default” or whether it is to be added to the judgment after the  
8 calculation of interest. If interest is to accrue on the amount awarded in the *Order on*  
9 *Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of*  
10 *Points and Authorities in Support Thereof* in a fashion differing from that required by  
11 the *Default Judgment*—i.e., commencing on a later date—nothing in either document  
12 reflects such a result.

13 MARGOLIN cannot save these ambiguities with temporary<sup>14</sup> concessions for the  
14 sake of expediting the issuance of improper writs. A writ of execution is—by design—a  
15 ministerial product which the Court issues relative to an unambiguous judgment. The  
16 insertion of ambiguity into a judgment necessarily precludes performance of this  
17 ministerial function. In other words, the content of a judgment controls the content of a  
18 writ of execution. This Court should reject MARGOLIN’s attempt to reverse that.

19 MARGOLIN may seek a writ of execution on the *Default Judgment* as issued;  
20 MARGOLIN may seek to have the *Default Judgment* supplemented by the Clerk or by  
21 this Court to reflect additional costs which have been awarded; or MARGOLIN may  
22 move this Court for an amended *Default Judgment* to accurately reflect all sums to  
23 which he claims to be entitled. But he may not seek to unilaterally accomplish an

24 <sup>13</sup> *Default J.* at 17-23.

<sup>14</sup> *See Reply* at 2:18-22; 2 n.1.

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1 amendment to this Court's *Default Judgment* in a fashion that results in the issuance of  
2 a writ of execution which is not consistent with the existing *Default Judgment*.<sup>15</sup>

3 **B. MARGOLIN is not entitled to interest on attorneys' fees**  
4 **awarded post-judgment under NRS 598.0999.**

5 Interest was disallowed under common law. Therefore, interest is imposed only  
6 when expressly authorized by statute.<sup>16</sup> Further, because statutes in derogation of  
7 common law must be "strictly construed" the imposition of interest must be clear.<sup>17</sup>

8 In this case, subsequent to the *Default Judgment*, this Court determined that  
9 MARGOLIN was entitled to post-judgment attorneys' fees under NRS 598.0999.<sup>18</sup>  
10 However, that statute does not provide that interest accrues on an award of attorneys'  
11 fees imposed.<sup>19</sup> This Court need consider the matter no further as the requisite  
12 statutory authorization directing deviation from common law is absent on this issue.  
13 Interest on the award of attorneys' fees is disallowed and the proposed *Writs* are  
14 erroneous for including such interest.

15 *Albios v. Horizon Cmtys., Inc.*<sup>20</sup> is consistent with this position. In *Albios*,  
16 prevailing plaintiffs in a construction defect case were awarded their attorneys' fees

17 <sup>15</sup> The ambiguity has repercussions beyond judgment enforcement as well. Among others, if the award  
18 from the *Order on Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of*  
19 *Points and Authorities in Support Thereof* is "added to the judgment," it is not clear whether appellate  
20 issues arising therefrom should be addressed in the appeal of the *Default Judgment* pending with the  
Nevada Supreme Court. If ZANDIAN attempts to address such issues, are they procedurally barred  
because they arose subsequent to the appealed judgment? If he does not attempt to address such issues,  
will he waive the right to raise them because the result of the order was "added to the judgment?" These  
are another category of issues which firm compliance with regular procedure will avoid.

21 <sup>16</sup> See *Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540 (1994) (citing *Paradise Homes v. Central Surety*,  
84 Nev. 109, 116, 437 P.2d 78, 83 (1968)).

22 <sup>17</sup> *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993) (citing *Calcagagno v.*  
*Personalcare Heath Management*, 565 N.E.2d 1330, 1336 (Ill. Ct. App. 1991) (citing *Commissioners of*  
*Lincoln Park v. Schmidt*, 69 N.E.2d 869 (Ill. 1946))).

23 <sup>18</sup> See *Order on Motion for Order Allowing Costs and Necessary Disbursements and Memorandum of*  
*Points and Authorities in Support Thereof* at 4:1-4.

24 <sup>19</sup> See NRS 598.0999.

<sup>20</sup> 122 Nev. 409, 132 P.3d 1022 (2006).

1 pursuant to NRS 40.655.<sup>21</sup> In considering whether the fees would accrue interest, the  
2 *Albios* court determined,

3 Thus, when attorney fees are awarded *as damages*, they fall within the plain  
4 language of NRS 17.130(1). Accordingly, we hold that when attorney fees are  
awarded *as an element of damages*, the prevailing party is entitled to recover  
prejudgment interest on the attorney fees.<sup>22</sup>

5 The import of the emphasized language is dispositive of the issue before this Court.  
6 When attorneys fees are statutorily designated as damages, as in NRS 40.655, and  
7 included in a judgment<sup>23</sup>, NRS 17.130 authorizes the accrual of interest on those fees.<sup>24</sup>  
8 However, where, as here, fees are awarded under a statute which does not designate  
9 them as “damages” and where, as here, the fees are not included in the judgment, NRS  
10 17.130 does not authorize the accrual of interest on the awarded fees. Consequently, the  
11 accrual of interest on post-judgment attorneys’ fees in this case is in derogation of  
12 common law, not expressly authorized by statute, and should be denied.<sup>25</sup>

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19 <sup>21</sup> See *Albios*, 122 Nev. at 417-28 , 132 P.3d at 1028-34.  
20 <sup>22</sup> *Albios*, 122 Nev. at 430, 132 P.3d at 1036 (emphasis added).  
21 <sup>23</sup> The fees awarded in *Albios* were included in the trial court’s judgment. See *Albios*, 122 Nev. at 415-17,  
132 P.3d at 1026-27.  
22 <sup>24</sup> NRS 17.130(2).  
23 <sup>25</sup> *Waddell v. L.V.R.V. Inc.*, 122 Nev. 15, 125 P.3d 1160 (2006) is not contrary. *Waddell* involved a suit for  
24 “both equitable relief and money damages” incurred by plaintiffs’ purchase of a defective RV. *Waddell*,  
122 Nev. at 17-18, 125 P.3d at 1161-62. The *Waddell* plaintiffs were awarded attorneys fees, but the basis  
for the award is not specified. Further, it is not clear whether or not the fees were included in the original  
judgment or the amended judgment in the case. See *id.* In any event, it is clear that *Waddell* did not  
involve an interpretation of the statute at issue, NRS 598.0999. Therefore, there is nothing to indicate  
that the general language of the *Waddell* case authorizing post-judgment interest on attorneys’ fees  
applies in this case.



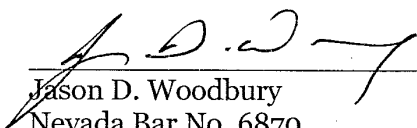
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**II. Conclusion**

For all these reasons explained herein, it is respectfully requested that this Court deny the *Motion*.

DATED this 6<sup>th</sup> day of August, 2014.

**KAEMPFER CROWELL**



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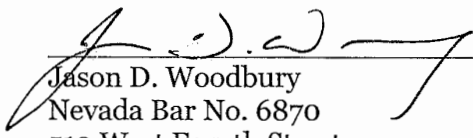
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**AFFIRMATION pursuant to NRS 239B.030**

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

DATED this 6<sup>th</sup> August, 2014.

**KAEMPFER CROWELL**



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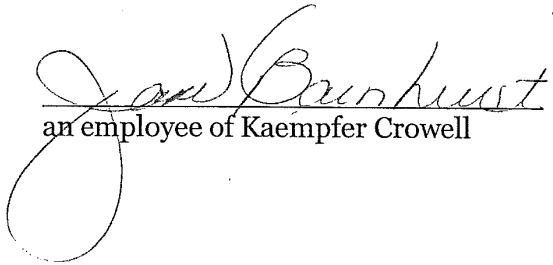
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that service of the foregoing **SUR-  
REPLY TO REPLY IN SUPPORT OF MOTION FOR WRIT OF EXECUTION**  
was made this date by depositing a true copy of the same for mailing at Carson City,  
Nevada, addressed to each of the following:

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

DATED this 6<sup>th</sup> day of August, 2014.

  
an employee of Kaempfer Crowell