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.

Supreme Court No. 65205

District Court No. 090C005791B

Appeal from the First Judicial District Court of the State of Nevada
In and For Carson City
The Honorable James T. Russell, District Judge

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record, on behalf of Respondent Jed Margolin, certifies there are no corporations, entities, or additional law firms described in NRAP 26.1(a) which must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 17th day of November, 2014.

WATSON ROUNDS, P.C.

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STATEMENT OF THE ISSUES

1. The District Court did not abuse its discretion in denying Defendant Reza Zandian's ("Zandian") motion to set aside the default judgment.

STATEMENT OF FACTS

I. Factual Background

Plaintiff Jed Margolin ("Margolin") is the named inventor on United States Patent No. 5,566,073 ("the '073 Patent"), United States Patent No. 5,904,724 ("the '724 Patent"), United States Patent No. 5,978,488 and United States Patent No. 6,377,436 (collectively "the Patents").[1] In 2004, Margolin granted Optima Technology Group (hereinafter "OTG"), a company specializing in aerospace technology, a power of attorney regarding the Patents.[2] Subsequently, Margolin assigned the '073 and '724 patents to OTG.[3]

In May 2006, OTG and Margolin licensed the '073 and '724 Patents to Geneva Aerospace, Inc., and Margolin received a royalty payment pursuant to a royalty agreement between Margolin and OTG.[4] On or about October 2007, OTG licensed the '073 Patent to Honeywell International, Inc., and Margolin received a royalty payment pursuant to a royalty agreement between Margolin and OTG.[5]

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[1] *See* J.A. at Vol. I, 171; J.A. at Vol. III, 494.
[2] *See* J.A. at Vol. I, 171.
[3] *See* J.A. at Vol. I, 171.
[4] *See* J.A. at Vol. I, 171.
[5] *See* J.A. at Vol. I, 171.

On or about December 5, 2007, Zandian signed and filed assignment documents with the United States Patent and Trademark Office ("USPTO"), fraudulently assigning all four of the Patents to Optima Technology Corporation ("OTC"), a company owned by Zandian.[6] Shortly thereafter, on November 9, 2007, Margolin, Robert Adams, and OTG were named as defendants in a case titled *Universal Avionics Systems Corporation v. Optima Technology Group, Inc.*, No. CV 07-588-TUC-RCC (the "Arizona action").[7] Zandian was not a party in the Arizona action.[8] The plaintiff in the Arizona action asserted Margolin and OTG were not the owners of the '073 and '724 Patents, and OTG filed a cross-claim for declaratory relief against OTC in order to obtain legal title to the respective patents.[9]

On August 18, 2008, the Arizona court expressly found OTC had no interest in the '073 or '724 Patents and the assignment documents filed with the USPTO were "forged, invalid, void, of no force and effect."[10] The Arizona court's findings show Zandian and/or the corporate Defendants do not own the patents and the record Zandian cites to, J.A. at Vol. II, 194-293, does not support Zandian's argument. In fact, the record shows Zandian stated, "Margolin was the rightful

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[6] *See* J.A. at Vol. I, 61-70, 9-10, 41-42; J.A. Vol. II, 207-208; J.A. at Vol. III, 534-535; *see also* J.A. at Vol. IV, 660-661 (showing Zandian's same signature).
[7] *See* J.A. at Vol. I, 171-172; J.A. at Vol. I, 22-27.
[8] *See* J.A. at Vol. I, 22-42; J.A. at Vol. III, 500-532.
[9] *See* J.A. at Vol. I, 22-42, 171-172; J.A. at Vol. III, 500-532.

owner of Patents Nos. 5,566,073 and 5,904,724, dated July 20, 2004."[11] Zandian's purported ownership is not supported by the record.

Due to Zandian's fraudulent acts, title to the Patents was clouded and interfered with Margolin's and OTG's ability to license the Patents.[12] In addition, during the period of time Margolin worked to correct record title of the Patents in the Arizona action and with the USPTO, he incurred significant litigation and other costs associated with those efforts.[13]

II. Procedural Background

Margolin filed a complaint against Zandian on December 11, 2009.[14] On January 8, 2010, Margolin's counsel sent a letter to Zandian's counsel and requested assistance in serving Zandian.[15] Zandian's counsel did not respond and the complaint was personally served on Zandian on February 2, 2010.[16] Zandian did not answer or respond in any way.[17] Default was entered against Zandian on December 2, 2010, and Plaintiff filed and served a notice of entry of default on December 7, 2010 and on his last known attorney on December 16, 2010.[18] The

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[10] *See* J.A. at Vol. I, 9-10, 41-42; J.A. at Vol. II, 207-208; J.A. at Vol. III, 534-535.
[11] *See* J.A. at Vol. II, 196.
[12] *See* J.A. at Vol. I, 172; J.A. at Vol. III, 495-496; J.A. at Vol. III, 481-487.
[13] *See* J.A. at Vol. I, 172; J.A. at Vol. III, 495-496; J.A. at Vol. III, 481-493.
[14] *See* J.A. at Vol. I, 1-10.
[15] *See* J.A. at Vol. I, 46, 79-90.
[16] *See* J.A. at Vol. I, 11-14; *see also* Respondent's Appendix ("R.A.") at Vol. I, 12.
[17] *See* R.A. at Vol. I, 13.
[18] *See* R.A. at Vol. I, 13.

same history follows the Optima Technology Corporation Defendants.[19]

On February 28, 2011, Margolin filed an application for default judgment.[20] On March 1, 2011, a default judgment was entered against all Defendants.[21] On March 7, 2011, notice of entry of default judgment was filed.[22]

On June 9, 2011, Zandian filed a motion to dismiss and to set aside the default judgment.[23] Zandian argued he was not served with the summons and complaint, but acknowledged his residency "was at all times in California."[24] He also argued Nevada did not have personal jurisdiction over him.[25]

On June 22, 2011, Margolin filed an opposition to the motion to dismiss.[26] Margolin argued Zandian was served and the District Court had jurisdiction.[27] Margolin pointed out Zandian's counsel refusal to respond to the request to assist in service of process and Zandian's refusal in his motion to dismiss to disclose where he resided if he did not reside where he was served.[28] Margolin also showed Zandian held ownership interests in 21 parcels of real property throughout Nevada,

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[19] *See* R.A. at Vol. I, 12-13.
[20] *See* R.A. at Vol. I, 1-96.
[21] *See* R.A. at Vol. I, 97-98.
[22] *See* R.A. at Vol. I, 99-104.
[23] *See* J.A. at Vol. I, 15-42.
[24] *See* J.A. at Vol. I, 17.
[25] *See* J.A. at Vol. I, 18-20.
[26] *See* J.A. at Vol. I, 43-160.
[27] *See* J.A. at Vol. I, 46-50.
[28] *See* J.A. at Vol. I, 56, 79-80; *see also* J.A. at Vol. I, 161-164 (Zandian refused to tell the District Court where he resided).

totaling approximately 4,918.55 acres; that Zandian was an active owner, officer or manager of four Nevada businesses, one of which owned 640 acres of land in Churchill County; and that Zandian had acted as the resident agent, manager, owner, and officer of ten other Nevada businesses.[29]

On August 3, 2011, the default was set aside, but Zandian's motion to dismiss was denied.[30] On August 4, 2011, Margolin's counsel sent a letter to Zandian's counsel requesting he accept service and that he provide a current address for Zandian.[31] Zandian's counsel responded as follows:

> We cannot accept service, nor can we give you Reza Zandian's current address. Except to indicate that he does not reside in Nevada at the present time and is not subject to the jurisdiction of the courts of this State...[32]

On August 11, 2011, Margolin filed an amended complaint and a motion to serve by publication.[33] On September 27, 2011, the District Court ordered service of process against all Defendants by publication.[34] All Defendants were served by publication by November 2011.[35]

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[29] *See* J.A. at Vol. I, 47-50, 59, 92-160.
[30] *See* J.A. at Vol. I, 165-168.
[31] *See* R.A. at Vol. I, 148.
[32] *See* R.A. at Vol. I, 150.
[33] *See* J.A. at Vol. I, 169-176 (Amended Complaint); *See* R.A. at Vol. I, 105-157 (Motion to Serve by Publication).
[34] *See* R.A. at Vol. I, 158-159.
[35] *See* J.A. at Vol. I, 177-193.

On November 16, 2011, Zandian filed a motion to dismiss.[36] Zandian argued lack of service and personal jurisdiction.[37] On December 5, 2011, Margolin filed an opposition and provided evidence of service and personal jurisdiction.[38] On December 13, 2011, Zandian filed a reply and repeated his argument that service was not effectuated.[39]

On February 21, 2012, the District Court denied Zandian's motion to dismiss.[40] The District Court found he had been properly served and his property ownership and business dealings showed his forum activities were so substantial or continuous and systematic that he should be deemed present in the forum and therefore jurisdiction was appropriate.[41]

On March 6, 2012, Zandian filed a general denial to the amended complaint, including no affirmative defenses.[42] On March 14, 2012, the corporate Defendants filed a general denial to the amended complaint, also without any affirmative defenses.[43] On March 14, 2012, Zandian's counsel filed a motion to withdraw.[44]

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[36] *See* J.A. at Vol. II, 194-293.
[37] *See* J.A. at Vol. II, 194-200.
[38] *See* R.A. at Vols. I & II, 160-299.
[39] *See* R.A. at Vol. II, 350-357 (Zandian failed to disclose an address where he could be found or served).
[40] *See* J.A. at Vol. II, 294-302.
[41] *See* J.A. at Vol. II, 294-302.
[42] *See* J.A. at Vol. II, 303-305; *see also Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 395, 168 P.3d 87, 96 (2007) ("Under NRCP 8(c), a defense that is not set forth affirmatively in a pleading is waived.").
[43] *See* J.A. at Vol. II, 314-316.

The motion to withdraw provided Zandian's last known address as 8775 Costa Verde Blvd., San Diego, California 92122 (the "San Diego address").[45] On April 26, 2012, the District Court granted the motion to withdraw.[46]

On June 28, 2012, the District Court issued an order requiring counsel to enter an appearance on behalf of the corporate Defendants by July 15, 2012 or their general denial would be stricken .[47] There being no appearance, on September 14, 2012, Margolin filed an application for entry of default against the corporate Defendants.[48] A default was entered against them on September 24, 2012.[49] Notice of entry of default was filed on September 27, 2012.[50] After an application for default judgment, a default judgment was entered against the corporate Defendants on October 31, 2012, with notice of entry filed on November 6, 2012.[51]

On July 16, 2012, Margolin served Zandian at the San Diego address with a first set of interrogatories,[52] a first set of requests for production of documents,[53]

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[44] *See* J.A. at Vol. II, 317-322.
[45] *See* J.A. at Vol. II, 320. All subsequent papers and pleadings were mailed to the San Diego address, as set forth below.
[46] *See* J.A. at Vol. II, 323-328.
[47] *See* J.A. at Vol. II, 334-345.
[48] *See* J.A. at Vol. II, 346-353.
[49] *See* J.A. at Vol. II, 354-360.
[50] *See* J.A. at Vol. II, 361-371.
[51] *See* J.A. at Vol. II, 372-381.
[52] *See* J.A. at Vol. II, 390-403.
[53] *See* J.A. at Vol. II, 405-409.

and a first set of requests for admissions.[54] Having received no response to the written discovery, on September 10, 2012, Margolin mailed a meet and confer letter to Zandian at the San Diego address requesting a response.[55] Zandian never responded to the discovery requests or the letter.[56]

On December 14, 2012, Margolin filed and served a motion for sanctions pursuant to NRCP 37.[57] Margolin requested the District Court strike the general denial of Zandian and award Margolin his fees and costs for bringing the motion.[58]

On January 15, 2013, the District Court issued an order striking the general denial of Zandian and awarded Margolin his fees and costs for bringing the motion for sanctions.[59] On January 17, 2013, notice of entry of the order striking the general denial was filed.[60] On February 20, 2013, Margolin filed an application for attorney's fees and costs, pursuant to the order striking Zandian's general denial.[61] On April 3, 2013, notice of entry of the order granting the fees and costs was filed.[62]

A default was entered against Zandian on March 28, 2013, and a notice of

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[54] *See* J.A. at Vol. II, 411-417.
[55] *See* J.A. at Vol. II, 419-420.
[56] *See* J.A. at Vol. II, 390-391.
[57] *See* J.A. at Vol. II, 383-420.
[58] *See* J.A. at Vol. II, 383-420.
[59] *See* J.A. at Vol. II, 421-422.
[60] *See* J.A. at Vol. II, 423-428.
[61] *See* J.A. at Vol. III, 429-433, 434-441.
[62] *See* J.A. at Vol. III, 452-457.

entry of default was filed on April 5, 2013.[63] On April 17, 2013, Margolin filed an application for default judgment against all Defendants.[64] Zandian did not respond to the application for default judgment and a default judgment was entered on June 24, 2013.[65] Notice of entry of the default judgment was served on Zandian on June 26, 2013 and filed herein on June 27, 2013.[66]

On December 6, 2013, Zandian's new counsel wrote a letter to Margolin's counsel stating Zandian's intent to file a motion to set aside the default judgment.[67]

On December 11, 2013, Margolin filed a motion for judgment debtor examination and to produce documents.[68] Margolin pointed out the following important facts regarding Zandian's residency:

> [I]t is clear that in John Peter Lee's motion to withdraw, he provided counsel and the Court with Zandian's last known address as 8775 Costa Verde Blvd., San Diego, CA 92122. *See* Motion to Withdraw, dated 3/6/12, on file herein. Also, on April 11, 2012, Zandian and his business partners, including his new counsel in this matter, filed an easement where Zandian had his signature notarized in San Diego, CA. *See* Exhibit 2. In his fraudulent letter to the US Patent Office, dated December 5, 2007, Zandian provided his address as 8775 Costa Verde Blvd., Suite 501, San Diego, CA 92122. *See* Exhibit 3. Zandian signed a settlement agreement on June 19, 2008 and listed his address as 8775 Costa Verde Blvd., Suite 501, San Diego, CA 92122. *See* Exhibit 4.[69]

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[63] *See* J.A. at Vol. III, 458-462.
[64] *See* J.A. at Vol. III, 463-539.
[65] *See* J.A. at Vol. III, 540-542.
[66] *See* J.A. at Vol. III, 543-545; *see also* R.A. at Vol. II, 358-363.
[67] *See* R.A. at Vol. II, 375.
[68] *See* R.A. at Vol. II, 364-413.
[69] *See* R.A. at Vol. II, 367, 378-413.

On December 19, 2013, over five and a half months after notice of entry of the default judgment, Zandian served his motion to set aside.[70] Zandian claimed he never received any written discovery or notice of the pleadings or papers in this matter after his counsel withdrew since he alleges he was residing in France from August 2011 to the present, and he alleged (without providing any evidence) that his former counsel provided an incorrect last known address when he withdrew.[71]

On January 9, 2014, Margolin filed an opposition to the motion to set aside.[72] Margolin noted Zandian did not provide any evidence that he lived in France at any time from August 2011 to the present.[73] Margolin provided substantial evidence the last known address provided by Zandian's counsel in the motion to withdraw was correct and Zandian continued to maintain the San Diego address since August of 2011, not France, as follows:

- Check from Golden Enterprises to Zandian at 8775 Costa Verde Blvd, San Diego, CA, dated 10/31/12 and endorsed by Zandian;[74]
- Check from Golden Enterprises to Zandian at 8775 Costa Verde Blvd, San Diego, CA, dated 1/30/13 and endorsed by Zandian;[75]
- Wells Fargo withdrawal slip filled out and signed by Zandian, dated 2/20/13 (Wells Fargo does not have any branches in

[70] *See* J.A. at Vol. III, 546-562.
[71] *See* J.A. at Vol. III, 546-562.
[72] *See* J.A. at Vol. III, 570-643.
[73] *See* J.A. at Vol. III, 571-572.
[74] *See* J.A. at Vol. III, 588.
[75] *See* J.A. at Vol. III, 590.

France);[76]

- Check from and signed by Zandian to John Peter Lee, dated 1/13/12, with 8775 Costa Verde Blvd, San Diego, CA, printed on the check;[77]
- Checks, dated 11/28/11, 12/2/11, 1/25/12, 2/29/12, 3/1/12, 10/30/12, 1/15/13, showing Zandian maintained his 8775 Costa Verde Blvd, San Diego, CA, address, including checks to the IRS and the Washoe County Treasurer;[78]
- Wells Fargo bank statements from December 2011, March 2012 and April 2012 showing the 8775 Costa Verde Blvd, San Diego, CA, address;[79]
- Wells Fargo/Visa statements, dated August 2011, August 2013, September 2013, October 2013 showing a San Diego address;[80]
- Visa statement, dated 4/10/13, showing Zandian made four purchases in California on 3/15/13 which is the same date Zandian alleges he filed the appeal with the French address;[81]
- Visa statements showing Zandian making many purchases in California, not France, in September and October of 2011;[82]
- Property summary screen for one of Zandian's Clark County properties currently listing his 8775 Costa Verde, San Diego, CA, address, not France;[83]
- Checks, dated 1/25/12, 1/24/13, 2/21/13, 2/24/13 and 6/30/13, from Zandian to the Secretary of State of California, United States Treasury, Employment Development Department, and the Internal Revenue Service, all with the 8775 Costa Verde, San Diego, CA, address, and all of the checks are written for Optima Technology Corp, which is another named defendant in this matter.[84]

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[76] *See* J.A. at Vol. III, 592.
[77] *See* J.A. at Vol. III, 594.
[78] *See* J.A. at Vol. III, 596-602.
[79] *See* J.A. at Vol. III, 604-605.
[80] *See* J.A. at Vol. III, 607-613.
[81] *See* J.A. at Vol. III, 615-618; *see also* J.A. at Vol. III, 561-562 (Zandian's pro per notice of appeal showing French address was filed on March 15, 2013).
[82] *See* J.A. at Vol. III, 620-629.
[83] *See* J.A. at Vol. III, 631-632.
[84] *See* J.A. at Vol. III, 634-641; *see also* J.A. at Vol. III, 571-572; J.A. at Vol. III, 571, 580-586 (On February 13, 2013, in another motion to withdraw in an

On January 23, 2014, Zandian filed a reply in support of the motion to set aside, repeating his prior arguments, and adding "none of the evidence provided by Plaintiff demonstrates that the checks found in Plaintiff's Exhibits 2, 3, 5, 6, and 12 were sent from or received by Defendant Zandian in the United States."[85] This argument was false, as Zandian wrote and signed the check in "Exhibit 5" on "1/13/2012," the same date John Peter Lee endorsed and deposited the check with Bank of America on "1/13/12," which could not have occurred if Zandian was in France.[86]

On February 6, 2014, the District Court denied Zandian's motion to set aside.[87] Notice of entry of that order was served by mail on February 10, 2014.[88] Zandian's appeal followed.

SUMMARY OF THE ARGUMENT

What was clearly designed by Zandian to be a strategy of evasiveness and delay resulted in the District Court striking his answer, taking his default and denying his tardy plea to set the default judgment aside. His appeal has no more merit than his motion to set aside.

The District Court's ruling is tested under an abuse of discretion standard,

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unrelated matter, Zandian's counsel provided the Nevada Supreme Court with the same San Diego address as the last known address for Zandian).

[85] *See* J.A. at Vol. IV, 652.

[86] *See* J.A. at Vol. III, 594.

[87] *See* J.A. at Vol. IV, 672-681.

meaning it should only be reversed if it was clearly erroneous or not supported by substantial evidence. Zandian fails to meet this heavy burden of showing that the evidence before the District Court was not adequate to support its denial of his motion to set aside.

This is why Zandian tries to distract the Court by focusing away from the evidence demonstrating he maintained his San Diego address and never updated the District Court or the parties with any new address. Substantial evidence shows his counsel provided an accurate last known address, and he maintained that last known address at all relevant times. Also, Margolin had a right to rely upon that last known address or the best known address according to public records.

The District Court made factual findings based upon evidence that, among other things, all papers and pleadings were served at the San Diego address, Zandian received notice of all proceedings in this matter and he inexcusably waited almost six months to file the motion to set aside the default. Based upon the factual findings, Zandian could not meet his burden to obtain Rule 60(b) relief. Likewise, because the District Court's denial of Zandian's motion to set aside was supported by substantial evidence and was not clearly erroneous, Zandian cannot meet his burden on appeal.

The District Court also properly found Zandian failed to provide any

[88] *See* J.A. at Vol. IV, 741-754.

evidence of mistake, inadvertence, surprise, or excusable neglect for failing to respond to discovery, the default judgment or any other papers filed in the District Court. Moreover, it was proper to find that Zandian's own behavior prevented the case from being heard on the merits. The District Court's order denying Zandian's motion to set aside should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW ON RULE 60(b) MOTION FOR RELIEF FROM DEFAULT

"The district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b). Its determination will not be disturbed on appeal absent an abuse of discretion."[89]

A district court may relieve a party from a final judgment or order for grounds of "mistake, inadvertence, surprise, or excusable neglect."[90] A district court must consider several factors before granting a NRCP 60(b)(1) motion: (1) prompt application to remove the judgment; (2) absence of an intent to delay the proceedings; (3) evidence of a lack of knowledge of procedural requirements on the part of the moving party; (4) moving party made the motion in good faith; and

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[89] *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (*citing Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 338, 609 P.2d 323 (1980)); *see also Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 445, 488 P.2d 911, 914–15 (1971) ("[T]he trial judge is free to judiciously and reasonably exercise discretion in determining whether a default judgment should be set aside.").

[90] NRCP 60(b)(1).

(5) the state's "basic policy for resolving cases on their merits when possible."[91] However, "[l]itigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity."[92]

Finally, a district court's "findings of fact shall not be set aside unless they are clearly erroneous and not supported by substantial evidence."[93] Of course, "substantial evidence" is merely such evidence "which a reasonable mind might accept as adequate to support a conclusion."[94]

II. ZANDIAN FAILED TO MEET HIS BURDEN ON HIS RULE 60(b) MOTION

In order to prevail on his Rule 60(b) motion, Zandian had the burden to prove, by a preponderance of the evidence, that his and his counsel's conduct amounted to "mistake, inadvertence, surprise or excusable neglect."[95] Zandian did

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[91] *Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 792–93 (1992) (emphasis and internal quotations omitted). Also, the Nevada Supreme court in *Kahn* discussed another factor: "the moving party must promptly tender a meritorious defense to the claim for relief." 108 Nev. at 513, 835 P.2d at 793 (emphasis and internal quotations omitted). However, the meritorious defense requirement has since been overruled. *See Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997).
[92] *Lentz v. Boles*, 84 Nev. 197, 200, 438 P.2d 254, 256–57 (1968).
[93] *Bahena v. Goodyear Tire & Rubber*, 126 Nev. Adv. Op. 26, 235 P.3d 592, 599 (2010).
[94] *Weaver v. State of Nevada*, 121 Nev. 494, 501, fn. 12, 117 P.3d 193, 198, fn. 12 (2005).
[95] *Kahn v. Orme*, 108 Nev. 510, 513-14, 835 P.2d 790 792-93 (1992).

not meet the requirements set forth in *Kahn* to compel the court to set aside the judgment.[96]

The District Court expressly found Zandian received notice of all proceedings, did not promptly apply to remove the judgment, failed to show he lacked intent to delay, had sufficient knowledge to act responsibly regarding procedural requirements, lacked good faith, demonstrated inexcusable neglect, and disregarded the process and procedural rules of this matter in such a manner so as to warrant a denial of the motion to set aside.[97] Alone, any of these would have been sufficient to deny the relief requested. Taken together, Zandian's motion was untenable, as is his appeal.

A. Zandian Lacked Diligence And Failed To Act Promptly In Seeking Relief From The Default Judgment

"Want of diligence in seeking to set aside a judgment is ground enough for denial of such a motion."[98] Thus, even though a motion to set aside a judgment may be filed within the six month deadline provided for in NRCP 60(b), a party can still fail to act promptly.[99] In fact, "the six-month period represents the

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[96] *See* J.A. at Vol. IV, 749-753.
[97] *See* J.A. at Vol. IV, 749-753.
[98] *See Kahn,* 108 Nev. at 514, 835 P.2d at 793 (citing *Union Petrochemical,* 96 Nev. at 339, 609 P.2d at 324 (*citing Lentz,* 84 Nev. 197, 438 P.2d 254; *Hotel Last Frontier v. Frontier Prop.,* 79 Nev. 150, 380 P.2d 293 (1963)).
[99] *See Kahn,* 108 Nev. at 514, 835 P.2d at 793.

extreme limit of reasonableness."[100]

Without a viable excuse, Zandian waited nearly six months before filing the motion to set aside.[101] He claims he did not file the motion to set aside earlier because he did not receive notice of the default judgment until he came back from France on a business trip.[102] However, substantial evidence supports the District Court's finding that Zandian's claims regarding lack of notice were incorrect.[103]

First Judicial District Court Rule 22(3) expressly states that "[a]ny form of order permitting withdrawal of an attorney submitted to the Court for signature shall contain the address at which the party is to be served with notice of all further proceedings." In other words, Margolin "had a right to rely on the address given by Zandian's prior attorney." *See* J.A. at Vol. IV, 750; *see also Tulsa Professional Collection Services v. Pope,* 485 U.S. 478, (1988) (Court noted it "[had] repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."); *Greene v. Lindsey,* 456 U.S. 444, 455 (1982) ("[N]otice by mail may reasonably be relied upon to provide interested

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[100] *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307 (*citing Union Petrochemical*, 96 Nev. at 339, 609 P.2d at 324).

[101] *See* J.A. at Vol. IV, 749-753; *see also See* J.A. at Vol. III, 546-562.

[102] *See* J.A. at Vol. III, 555.

[103] *See above section* Procedural Background; *see also* J.A. at Vol. II, 320, 333, 337, 340, 345, 348, 353, 360, 363, 371, 377, 389, 393, 403, 409, 417, 419, 425; J.A. at Vol. III, 433, 437, 443, 449, 454, 460, 475, 478, 493, 498, 545, 570-578, 580-586, 588-643; J.A. at Vol. IV, 676-680, 690-694, 709-713, 735-739, 749-753; R.A. at Vol. II, 367-368, 378-387, 389, 392-410.

persons with actual notice of judicial proceedings."). Nevada law is in accord. *See Mitchell v. District Court*, 82 Nev. 377, 381–82, 418 P.2d 994, 997 (1966); NRS 47.250(13) (presumption "[t]hat a letter duly directed and mailed was received in the regular course of the mail"); *Durango Fire Protection v. Troncoso*, 120 Nev. 658, 663, 98 P.3d 691, 694 (2004) (service is complete upon mailing, citing NRCP 5(b)); *see also* 66 C.J.S. *Notice* § 15 n. 1 (2007) ("A party has a duty to keep abreast of all proceedings in his or her case from service of the original process until final judgment; included in this duty is the party's responsibility to keep the court or counsel informed of any address changes.").

The District Court also found no evidence supported Zandian's claim that he lacked knowledge of this matter.[104] Even if Zandian was living in France, for which the District Court found "no competent evidence," Zandian was required to provide the District Court and the parties with any new address.[105] However, Zandian never provided notice of any address change.[106] In fact, substantial

[104] *See* J.A. at Vol. IV, 749-750.

[105] *See* J.A. at Vol. IV, 750; *Mitchell*, 82 Nev. at 377, 418 P.2d at 994; NRS 47.250(13); *Durango*, 120 Nev. at 663, 98 P.3d at 694; NRCP 5(b); 66 C.J.S. *Notice* § 15 n. 1. Also, providing another court and another lawyer with notice of the French address did not provide legal notice that the San Diego address was not the proper address.

[106] *See* J.A. at Vol. IV, 750.

evidence shows Zandian maintained the San Diego address.[107]

It is undisputed that all papers and pleadings were served by mail to Zandian's last known address of record.[108] Under NRCP 5(b), service by mail is complete upon mailing.[109] Therefore, substantial evidence supports the District Court's finding that Zandian received notice of the proceedings and his failure to respond was inexcusable neglect.[110]

With regard to the notice of intent to take a default, the notice requirement of NRCP 55 was also fulfilled as Margolin also served written notice of the application for default judgment to Zandian's last known address.[111] The District Court also correctly found NRCP 55 was likely not implicated since the judgment ultimately resulted from sanctions arising from Zandian's failure to respond to discovery.[112]

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[107] *See* J.A. at Vol. III, 588-641; J.A. at Vol. III, 571-572; J.A. at Vol. III, 571, 580-586; R.A. at Vol. II, 380 (In January 2012, Zandian signed an affidavit in San Diego, which could not have been done if he were in France since August 2011).

[108] *See* J.A. at Vol. IV, 750; *see also* J.A. at Vol. II, 320, 333, 337, 340, 345, 348, 353, 360, 363, 371, 377, 389, 393, 403, 409, 417, 419, 425; J.A. at Vol. III, 433, 437, 443, 449, 454, 460, 475, 478, 493, 498, 545, 570-578, 580-586, 588-643; J.A. at Vol. IV, 676-680, 690-694, 709-713, 735-739, 749-753; R.A. at Vol. II, 367-368, 378-387, 389, 392-410.

[109] *See* NRCP 5(b)(2)(B) ("Service under this rule is made by…[m]ailing a copy to … the party at his or her last known address. Service by mail is complete on mailing.").

[110] *See* J.A. at Vol. IV, 750.

[111] *See* J.A. at Vol. IV, 750.

[112] *See* J.A. at Vol. IV, 750 (*citing Durango*, 120 Nev. at 658, 98 P.3d 691 (defendant's answer stricken as sanction for failure to appear at hearings rather

Therefore, Zandian cannot credibly claim to have made a prompt application for relief from the default judgment in light of the many notices Margolin and the District Court provided him. Zandian ignored the notices. His intentional delays eviscerate any claim that he acted promptly. Therefore, the District Court properly found Zandian's almost six month delay in filing the motion to set aside was inexcusable and not prompt.

B. Zandian Failed To Show He Lacked Intent To Delay

The *Kahn* case demonstrates it is Zandian's burden "to establish the absence of an intent to delay."[113] Zandian offered no evidence to suggest—much less establish—that he did not intend to delay. In fact, the opposite is true.

The entire proceedings in the District Court show Zandian's intent was to delay the proceedings.[114] Both he and his counsel evaded and refused to accept service of process.[115] Then, when his first counsel withdrew, Zandian completely

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than default judgment, thus, written notice before entry of default judgment not applicable)); *see also* NRCP 37(b)(2)(C) (allowing District Court to "render[] a judgment by default against the disobedient party"). Also, a judgment of default as a sanction is not void even when there was no written notice and motion requesting such relief. *Durango*, 120 Nev. at 662, 98 P.3d 87, 96 (finding that "no prior notice was required and, thus, the judgment is not void").

[113] *Kahn*, 108 Nev. at 515, 835 P.2d 790, 792-93 (1992).

[114] *See for example* J.A. at Vol. I, 11-14; R.A. at Vol. I, 13, 105-159, 132-133, 148, 150; J.A. at Vol. I, 15-42; J.A. at Vol. I, 43-160; *See* J.A. at Vol. II, 194-293; J.A. at Vol. II, 294-302; J.A. at Vol. II, 317-322; J.A. at Vol. II, 421-422; J.A. at Vol. III, 540-42; J.A. at Vol. III, 546-562; J.A. at Vol. III, 570-643.

[115] *See* J.A. at Vol. I, 11-14; R.A. at Vol. I, 13, 105-159, 132-133, 148, 150; J.A. at Vol. I, 15-42; J.A. at Vol. I, 43-160; *See* J.A. at Vol. II, 194-293; J.A. at Vol. II,

ignored this matter for several years until he filed the motion to set aside.[116] He did not respond to any of the papers and pleadings, including the discovery requests, motions, applications for judgment, or notices regarding the judgments.[117] Then, he waited nearly six months to file the motion to set aside.[118]

As a result, this Court should find Zandian's intentional delay prevents him from demonstrating he possessed such intent.

C. Zandian Cannot Establish Ignorance Of The Procedural Requirements

The *Kahn* court explained that when "all that was required" was for the party "to either personally appear …. or obtain counsel to appear on his behalf," the "failure to obtain new representation or otherwise act on [one's] own behalf is inexcusable."[119] As this Court has explained:

> [W]e are not confronted here with some subtle or technical aspect of procedure, ignorance of which could readily be excused. The requirements of the rule are simple and direct. *To condone the actions of a party who has sat on its rights only to make a last-minute rush to set aside judgment would be to turn NRCP 60(b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be.*[120]

294-302; J.A. at Vol. II, 317-322; J.A. at Vol. II, 421-422; J.A. at Vol. III, 540-42; J.A. at Vol. III, 546-562; J.A. at Vol. III, 570-643.

[116] *See* J.A. at Vol. II, 317-322; J.A. at Vol. III, 546-562.

[117] *See* J.A. at Vol. III, 549-550, 553-556; J.A. at Vol. IV, 749-753.

[118] *See* J.A. at Vol. III, 546-562.

[119] *Kahn*, 108 Nev. at 515, 835 P.2d 790, 792-93 (1992).

[120] *Id.* (citing *Union*, 96 Nev. at 339, 609 P.2d at 324 (citing *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979); *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245 (4th Cir.1974)) (emphasis added in original)).

In short, where a party "had sufficient knowledge to act responsibly," his subsequent failure to act responsibly cannot be excused under the guise that "he was ignorant of procedural requirements."[121] All that was required of Zandian was to either personally respond to the discovery and motions or obtain counsel to appear on his behalf. He previously retained counsel to defend this action and retained new counsel to set aside the judgment.[122] He even filed his own notice of appeal in another case.[123] His failure to obtain new counsel or otherwise act on his own behalf shows he cannot demonstrate he excusably lacked knowledge of procedural requirements.

D. Zandian Did Not Act In Good Faith

The *Kahn* court found good faith could not be shown when there was no legitimate reason for failing to appear at the hearing and no reason for waiting five months to move for relief from default.[124]

The District Court found Zandian had not provided a reasonable explanation for waiting over five months to obtain other counsel despite having knowledge of the judgment entered against him. It was inexcusable for Zandian not to respond to the discovery requests, motions and default judgment in a timely manner. "Zandian has only demonstrated inexcusable neglect by his willful failure to

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[121] *Id.*
[122] *See* J.A. at Vol. II, 194-293; J.A. at Vol. III, 546-562.
[123] *See* J.A. at Vol. IV, 660.

respond to, and participate in, th[e] action."[125] Accordingly, the District Court correctly determined "Zandian lacked good faith in contesting th[e] action."[126]

E. Zandian Prevented A Trial On The Merits

Margolin does not dispute that "good public policy dictates cases be adjudicated on their merits."[127] However, the policy has reasonable limits:

> Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity. Lack of good faith or diligence, or lack of merit in the proposed defense, may very well warrant a denial of the motion for relief from the judgment.[128]

Zandian disregarded the process and procedural rules of this matter "with impunity."[129] Overwhelming evidence shows his complete failure to respond and recalcitrant disregard of the judicial process, which prejudiced Margolin.[130] He intentionally prevented this matter from being heard on the merits. As a result, the

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[124] *Kahn*, 108 Nev. at 515, 835 P.2d 790, 792-93 (1992).
[125] *See* J.A. at Vol. IV, 752.
[126] *See* J.A. at Vol. IV, 752.
[127] *See Kahn*, 108 Nev. at 516, 835 P.2d at 794 (citing *Hotel Last Frontier*, 79 Nev. at 155–56, 380 P.2d at 295) (original emphasis).
[128] *Kahn*, 108 Nev. at 516, 835 P.2d at 794 (*citing Lentz*, 84 Nev. at 200, 438 P.2d at 256 (1968)).
[129] *See* J.A. at Vol. IV, 752; *see also above*.
[130] *See* J.A. at Vol. IV, 752; *see also Foster v. Dingwall*, 126 Nev. Adv. Op. 6, 227 P.3d 1042, 1049 (Nev. 2010) (citing *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (upholding strike order where defaulting party's "constant failure to follow [the court's] orders was unexplained and unwarranted"); *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir. 2006) (holding "[p]rejudice from unreasonable delay is presumed" and failure to comply with court orders mandating discovery "is sufficient prejudice")).

policy of adjudicating cases on the merits would not be advanced by setting aside the default judgment and rewarding him for his repeated evasive behavior. As evidenced by the record, the ultimate sanctions and resulting judgment were necessary to demonstrate to Zandian and future litigants that they are not free to act with wayward disregard of a court's orders.[131]

F. A Dispositive Sanction Was Warranted

Zandian has appealed only from the denial of his motion to set aside. This Court has clearly defined the scope of issues to be considered on appeal, stating that "[p]oints not urged in the district court will not be entertained for the first time on appeal."[132] The reasoning for this rule is obvious and clear:

> The respondent, who has had no opportunity to address these new theories would be prejudiced if they were to be given consideration by us [the Supreme Court]. We will not consider the validity of appellant's [new] theories . . .[133]

Simply, issues not raised in the District Court are not properly before this Court.[134] For the first time on appeal, Zandian argues *Young v. Johnny Ribeiro*

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[131] *See* J.A. at Vol. IV, 753; *see also Foster*, 126 Nev. Adv. Op. 6, 227 P.3d at 1049.

[132] *Gibbons v. Martin Martin*, 91 Nev. 269, 270, 534 P.2d 915 (1975).

[133] *Id.* at 270-71.

[134] *Monroe, Ltd. v. Central Telephone Company*, 91 Nev. 450, 455, 538 P.2d 152, 155 (1975); *see also See Durango*, 120 Nev. at 661, 98 P.3d 87, 96 (2007) (court not obligated to address new argument that default judgment void); *Securities and Exchange Commission v. Worthen*, 98 F.3d 480, 484 (9th Cir. 1996) (refusing to consider due process arguments raised for the first time on appeal).

Building[135] applies to the order striking his general denial and that the order failed to include the *Young* factors. Even if Zandian's new argument was considered – which it should not be - the facts and circumstances of this case discussed above do not require a *Young* analysis.[136]

As stated above, the order striking the general denial came after several motions to dismiss, a motion to serve by publication, a motion to withdraw, and other pleadings. Zandian received notice of all relevant proceedings, including the written discovery and the motion for sanctions. Zandian failed to respond to anything after his initial counsel withdrew. As a result, the District Court struck the general denial. Striking the general denial was more for not responding to the lawsuit than a discovery sanction. Therefore, *Young* is inapplicable. Under the circumstances, the terminating sanction and the resulting default judgment were appropriate.

CONCLUSION

Zandian failed to meet his burden in demonstrating by a preponderance of the evidence each of the criteria for obtaining Rule 60(b) relief from default. In his

[135] 106 Nev. 88, 787 P.2d 777 (1990).

[136] *See Clark County School District v. Richardson Construction*, 123 Nev. 382, 395, 168 P.3d 87, 96 (2007) (*Young* analysis not required in reviewing sanctions ordered by the district court striking all affirmative defenses raised by the appellant)

appeal, Zandian fails to meet his burden to demonstrate that the District Court abused its discretion in denying him such relief.

Therefore, Margolin respectfully requests this Court affirm the District Court's ruling denying the motion to set aside the default judgment.

Dated this 17th day of November, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answering 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record or appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

The brief complies with formatting requirements of Rule 32(a)(4), typeface requirements of Rule 32(a)(5), and type style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Times New Roman, 14-point font. I further certify that this brief complies with the page limitations of NRAP 32(a)(7), because it does not exceed thirty (30) pages.

Dated this 17th day of November, 2014.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1), I declare that I am an employee of Watson Rounds and on this 17th day of November, 2014, I served a copy of the foregoing *Respondent's Opening Brief* by Nevada Supreme Court CM/ECF Electronic Filing addressed to each of the following:

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