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 REPLY BRIEF

JASON WOODBURY
Nevada Bar No. 6870
SEVERIN A. CARLSON
Nevada Bar No. 9373
KAEMPFER CROWELL
510 West Fourth Street
Las Vegas, Nevada 89703
Telephone: (775) 884-8300

Attorneys for Appellant, Reza Zandian

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510 W. Fourth Street
Carson City, Nevada 89703

APPELLANT'S REPLY BRIEF

COMES NOW, Appellant, REZA ZANDIAN ("ZANDIAN") by and through his attorneys, KAEMPFER CROWELL, and hereby submits his reply to the *Respondent's Answering Brief* ("*Answering Brief*"), filed November 17, 2014 with this Court.[1]

ARGUMENT

I. Nevada law required MARGOLIN to serve ZANDIAN with notice of MARGOLIN's intent to have judgment entered by default, and the failure to provide the required notice renders the judgment in this case void.

The *Answering Brief* spends only a paragraph responding to the primary defect in this case: the failure to provide a notice of intent to take default.[2] On this point, MARGOLIN first argues:

> 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.[3]

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[1] A reply brief "must be limited to answering any new matter set forth in the opposing brief." NRAP 28(c). Accordingly, only those arguments which were not addressed in *Appellant's Opening Brief* are addressed herein.

[2] The *Answering Brief* does not dispute that ZANDIAN had "appeared" in the case and the notice requirement was thereby triggered. *See* NRCP 55(b)(2); *Lindblom v. Prime Hospitality Corp.*, 120 Nev. 372, 375, 90 P.3d 1283, 1285 (2004); *Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978)).

[3] *Answering Br.* at 19:9-15 (*citing* J.A. at Vol. IV, 750).

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510 W. Fourth Street
Carson City, Nevada 89703

In other words, MARGOLIN asserts that Nevada law does not require an independent notice of intent. Rather, the actual application for default judgment itself satisfies Nevada's notice requirement. No legal authority is cited in support of the proposition. And the argument is not consistent with Nevada law on the issue.[4] Clearly, MARGOLIN was required to serve ZANDIAN with advance notice of his intent to seek the default judgment in this case.

Strict compliance with notice requirements was especially vital in this case where there are numerous procedural irregularities. First, although NRCP 55(b)(2) contemplates a "prove-up hearing" in order to establish the correct amount of damages for judgment, no such hearing was held in this case.[5] The absence of a hearing allowed MARGOLIN's inflated allegations of damage to pass unexamined.[6] More importantly, the decision to forego

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[4] *See Lindblom*, 120 Nev. at 375-76, 90 P.3d at 1284-85; *Epstein v. Epstein*, 113 Nev. 1401, 1404-05, 950 P.2d 771, 772-73.

[5] *See Hamlett v. Reynolds*, 114 Nev. 863, 866-67, 963 P.2d 457, 458-59 (1998) (affirming court's award of default judgment entered following prove-up hearing).

[6] The lack of critical examination is substantiated by the fact that MARGOLIN's *Application for Default Judgment; Memorandum of Points and Authorities in Support Thereof* requested an award of $1,497,328.90 in damages. *See* J.A. at Vol. III, 492. However, the *Default Judgment*—submitted to the District Court by MARGOLIN—awarded a different sum, $1,495,775.74. *See* J.A. at Vol. III, 541. There is no explanation for the discrepancy. Indeed, all indications

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510 W. Fourth Street
Carson City, Nevada 89703

any hearing repudiated any ability of ZANDIAN to appear and challenge the assertions of MARGOLIN before the Court.

Second, the manner in which MARGOLIN directed the proceedings in this case—whether by intention or by happenstance—created significant confusion. This confusion was compounded by the fact that ZANDIAN was unrepresented by counsel. All of the following took place *after* ZANDIAN's counsel was allowed to withdraw:

- On May 15, 2012, MARGOLIN moved for an order compelling the Optima Entities to lodge an appearance of counsel.[7]
    - MARGOLIN attempted to serve this document by mail to ZANDIAN at "8775 Costa Verde Blvd." in San Diego, California. However, the zip code on the certificate of service is "82122."[8] The address provided by ZANDIAN's counsel upon withdrawal identified a zip code of "92122."[9]

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are that the difference was the result of a typographical error which went unnoticed.

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

[8] *See* J.A. Vol. II, 333.

[9] *See* J.A. Vol. II, 308, 320. 92122 appears to be an existing zip code utilized in San Diego. *See* http://www.city-data.com/zipmaps/San-Diego-California.html (last visited Dec. 17, 2014). 82122 does not appear to be a valid zip code in the United States.

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510 W. Fourth Street
Carson City, Nevada 89703

- On June 28, 2012, the District Court issued an order requiring the Optima Entities to lodge an appearance of counsel.[10]
    - That order was sent to ZANDIAN at the "8775 Costa Verde Blvd." address.[11] Again, the erroneous 82122 zip code was utilized.[12] And on this document's certificate of service, the address included an apartment number.[13] There is no explanation as to what led to the addition of an apartment number.
    - On July 2, 2012, MARGOLIN mailed a *Notice of Entry of Order* utilizing the "8775 Costa Verde Blvd." address, the erroneous zip code, and the unexplained apartment number.[14]
- Next, MARGOLIN applied for the entry of a default, but only against the Optima Entities, not against ZANDIAN.[15]

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[10] *See* J.A. Vol. II, 334-37.

[11] J.A. Vol. II, 337.

[12] *See id.*

[13] *See id.*

[14] J.A. Vol. II, 338-40.

[15] *See* J.A. Vol. II, 346-53. No notice of intent to seek default preceded MARGOLIN's application against the Optima Entities. *See Docket Sheet* at 6 (Nov. 13, 2014) (*Zandian v. Margolin*, Nevada Supreme Court Case Number 65205).

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- This document was purportedly served by mail to ZANDIAN utilizing the address "8775 Costa Verde Blvd." in San Diego, California.[16] This time the correct zip code, 92122, was utilized.[17] However, the apartment number was missing.[18]

- After the District Court entered the *Default* pursuant to MARGOLIN's application, MARGOLIN served a *Notice of Entry of Default*[19] to the "8775 Costa Verde Blvd." address in San Diego, but again utilized the erroneous zip code, 82122.[20]
- Subsequently, on October 30, 2012, MARGOLIN applied for a default judgment against the Optima Entities.[21]
- *The day after* MARGOLIN's application was filed, the District Court entered *Default Judgment* against the Optima Entities.[22]

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[16] *See* J.A. Vol. II, 348

[17] *See id.*

[18] *See id.*

[19] *See* J.A. Vol. II, 361-71.

[20] *See* J.A. Vol. II, 363.

[21] *See Docket Sheet* at 6 (Nov. 13, 2014) (*Zandian v. Margolin*, Nevada Supreme Court Case Number 65205). No notice of intent to seek default judgment was served in advance of MARGOLIN's application for default judgment against the Optima Entities. *See id.*

[22] *See* J.A. Vol. II, 372-74.

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510 W. Fourth Street
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- MARGOLIN filed and purported to serve notice of the *Default Judgment* on November 6, 2012.[23]
    - The notice was sent to the "8775 Costa Verde Blvd." address in San Diego utilizing the 92122 zip code, but omitting any apartment number.[24]
- Next, after the District Court issued its *Order Granting Plaintiff's Motion for Sanctions Under NRCP 37* against ZANDIAN, MARGOLIN mailed a copy of the *Notice of Entry of Order* to three addresses: the "8775 Costa Verde Blvd." address with no apartment number; the same address with an apartment number; and, for the first time, MARGOLIN sent the document to "Alborz Zandian" at "9 Almanzora, Newport Beach, CA 92657-1613."[25]
- Two and a half months after the District Court struck ZANDIAN's *General Denial*, MARGOLIN obtained a *Default* without providing notice and without actually applying for it.[26]

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

[24] *See* J.A. Vol. II, 377.

[25] See J.A. Vol. II, 425.

[26] *See* J.A. Vol. III, 444; *Docket Sheet* at 5 (Nov. 13, 2014) (*Zandian v. Margolin*, Nevada Supreme Court Case Number 65205).

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510 W. Fourth Street
Carson City, Nevada 89703

- Although it was later corrected, MARGOLIN's initial *Notice of Entry of Default* did not indicate that default had been entered against ZANDIAN. The initial notice stated, "the Court entered a Default in the above-referenced matter, against Defendants Optima Technology Corporation, a Nevada corporation and Optima Technology Corporation, a California corporation."[27]
- Even though a *Default Judgment* against the Optima Entities already existed, MARGOLIN applied for a new default judgment against the same Optima Entities and ZANDIAN.[28]
    - The *Application for Default Judgment; Memorandum of Points and Authorities in Support Thereof* was mailed to the aforementioned "8775 Costa Verde Blvd." address with the 92122 zip code and an apartment number, but a new address for ZANDIAN was included on the service list, this one at "8401 Bonita Downs Road, Fair Oaks, CA 95628."[29] There is no explanation as to how MARGOLIN came to associate this address with ZANDIAN and why it was not utilized in previous

[27] *See* J.A. Vol. III, 447.

[28] See J.A. Vol. III, 463-75.

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pleadings.[30] Further, the "Alborz Zandian" Newport Beach address which had been previously utilized was abandoned without explanation.

- On June 24, 2013, the District Court granted the second *Default Judgment* identifying all Defendants, ZANDIAN and the Optima Entities, as judgment debtors.[31]

This veritable conundrum would be difficult enough for experienced litigation counsel to navigate. Left to fend for himself without counsel, the expectation that ZANDIAN could maintain a reasonable understanding of the proceedings is simply not realistic. The multiple, constantly shifting addresses for service, the erroneous zip code, the *Default Judgment* first against the Optima Entities only and later against all Defendants, serve to create substantial confusion. This case raises significant and serious questions as to ZANDIAN's opportunity to participate. Among others: What happened to those documents which utilized an erroneous zip code?

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[29] J.A. Vol. III, 475.

[30] Of course, at that time, ZANDIAN's actual address was in Paris, France, *see Appellant's Opening Br.* at 8:17-18; J.A. at Vol. IV, 657, a fact to which MARGOLIN's counsel had ready access. *See Appellant's Opening Br.* at 9:1-4, 9 n.42; J.A. at Vol. IV, 660.

[31] *See* J.A. at Vol. III, 540-42. Curiously, the first *Default Judgment*—against the Optima Entities—has never been vacated or formally addressed in any subsequent proceedings.

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510 W. Fourth Street
Carson City, Nevada 89703

To those which did not specify an apartment number? How and when was the apartment number obtained? What association does "Alborz Zandian" have with ZANDIAN? When was that association discovered? Why is "Alborz Zandian" mailed some documents, but not others? How and when was the Fair Oaks address discovered? Did MARGOLIN or MARGOLIN's counsel have any information about ZANDIAN residing in Paris, France?

Of course, a hearing could have addressed these questions. But no hearing was ever held and the assertions of MARGOLIN slid through without meaningful examination. Under these circumstances, at a minimum, MARGOLIN should be held to the basic requirements of Nevada law, one of which is that he serve ZANDIAN with notice of his intent to seek a default judgment.

In his paragraph response to the absence of any notice of intent, MARGOLIN also indicates that,

> 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.[32]

But this mischaracterizes the District Court's action. Perhaps, the District Court *could* have sanctioned ZANDIAN in the form of a judgment, and thereby subverted the requirements of NRCP 55. But that is not what the

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[32] *See Answering Br.* at 19:11-15.

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510 W. Fourth Street
Carson City, Nevada 89703

District Court actually *did*. Nor did MARGOLIN request a sanction in that form. Rather, the District Court's *Order Granting Plaintiff's Motion for Sanctions Under NRCP 37* merely struck the *General Denial* of ZANDIAN.[33] The assertion that the District Court *could* have proceeded differently is not a persuasive argument that procedural rules should therefore be ignored.

For these reasons and for the reasons expressed in the *Opening Brief*, this Court should reverse the District Court's denial of ZANDIAN's motion to set aside the *Default Judgment* in this case.

II. ZANDIAN's effort to set aside the Default Judgment was timely.

Even though ZANDIAN's motion to set aside the *Default Judgment* was filed within the time required by NRCP 60, MARGOLIN claims that it should have been disregarded as untimely. This claim lacks merit.

As a threshold matter, the six month deadline does not apply to ZANDIAN's assertion that the *Default Judgment* is "void" under NRCP 60(b)(4).[34] But even if it was, there is no evidence—other than

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

[34] *See* NRCP 60(b)(4); NRCP 60(b) ("The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) 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.")

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510 W. Fourth Street
Carson City, Nevada 89703

MARGOLIN's bare supposition—that ZANDIAN was aware of the *Default Judgment* prior to discovering it at the end of 2013 when he engaged counsel to challenge it. To be sure, it is possible that a hearing on the *Motion to Set Aside* may very well have established an adequate record for the District Court to consider and for this Court to review whether ZANDIAN's claimed unawareness was credible or not. ZANDIAN, in fact, requested such a hearing.[35] However, the request was ignored and the District Court proceeded upon the unexamined assumption of MARGOLIN that ZANDIAN was aware of the *Default Judgment* in spite of the fact that it was never sent to the address of his actual residence. This was error on the part of the District Court and reversal of its denial of ZANDIAN's *Motion to Set Aside* is required.

III. The District Court's dispositive discovery sanction is a proper subject of this appeal.

MARGOLIN asserts that this Court should decline review of the District Court's discovery sanction in this case because ZANDIAN "has appealed only from the denial of his motion to set aside."[36] But this argument endeavors to divide issues which are inherently and inextricably intertwined. ZANDIAN has challenged the entry of the *Default Judgment* in

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[35] *See* J.A. Vol. IV, 662-64.

[36] *See Answering Br.* at 24:8.

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510 W. Fourth Street
Carson City, Nevada 89703

this case. The cause of the *Default Judgment* was the District Court's imposition of the discovery sanction which struck ZANDIAN's *General Denial*. To assert that ZANDIAN is entitled to challenge the *Default Judgment* but not the discovery sanction is to argue that ZANDIAN may challenge only the effect, not the cause.

Further, MARGOLIN's response to the argument lacks merit. Indeed, the case cited in support of their position, *Clark County School District v. Richardson Construction*,[37] actually supports ZANDIAN's proposition that because the District Court's sanction in this case was dispositive, the "heightened standards" of *Young* apply. In *Richardson Construction*, the trial court attempted to impose a discovery sanction which was limited to eliminating one party's affirmative defenses.[38] A sanction limited in this fashion would not be a dispositive sanction. However, in its application of the limited sanction, this Court determined that the trial court exceeded the scope of that limited sanction and effectively struck the party's entire answer.[39] This Court determined that the trial court had abused its discretion in imposing that dispositive sanction.[40]

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[37] 123 Nev. 382, 168 P.3d 87 (2007).

[38] *See Richardson Construction*, 123 Nev. at 391, 168 P.3d at 93.

[39] *See Richardson Construction*, 123 Nev. at 392, 168 P.3d at 94 ("Because many of CCSD's stated affirmative defenses were not true

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO
510 W. Fourth Street
Carson City, Nevada 89703

Notably, MARGOLIN does not attempt to argue that the District Court in this case complied with the *Young* requirements—only that *Young* is inapplicable. But *Young* controls this case. *Young* was not addressed in *Richardson Construction* [41] because the purported sanction was not and was not intended to be dispositive—it only became so in the manner in which it was applied. In contrast, this case involves a sanction which was expressly intended to be dispositive of the case. This distinction between the case at bar and *Richardson Construction* makes all the difference and clearly establishes that the District Court should have complied with the *Young* requirements. As there is no dispute that the District Court did not do this, the *Default Judgment* should be reversed and this Court should remand the case for further proceedings on the merits.

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NRCP 8(c) affirmative defenses, the court in reality applied a far greater sanction (striking CCSD's answer.")

[40] *See id.*

[41] *Young* is not even cited in the case.

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO
510 W. Fourth Street
Carson City, Nevada 89703

CONCLUSION

ZANDIAN respectfully requests that this Court reverse the District Court's Default Judgment and remand this case to the District Court for further proceedings on the merits of the case.

DATED this 23rd day of December, 2014.

KAEMPFER CROWELL

BY: _____

JASON D. WOODBURY
Nevada Bar No. 6870
SEVERIN A. CARLSON
Nevada Bar No. 9373
510 W. Fourth Street
Carson City, Nevada 89703
Telephone:(775) 884-8300
Facsimile: (775) 882-0257
Attorneys for ***Appellant,***
REZA ZANDIAN

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO
510 W. Fourth Street
Carson City, Nevada 89703

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 Times New Roman** font; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

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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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

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO
510 W. Fourth Street
Carson City, Nevada 89703

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 23rd day of December, 2014.

JASON D. WOODBURY
Nevada Bar No. 6870
SEVERIN A. CARLSON
Nevada Bar No. 9373
KAEMPFER CROWELL
510 West Fourth Street
Carson City, NV 89703

KAEMPFER CROWELL RENSHAW GRONAUER & FIORENTINO
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 23 day of December, 2014, I served a copy of the foregoing *Appellant's Reply Brief* by Nevada Supreme Court CM/ECF Electronic Filing to:

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

An employee of Kaempfer Crowell

KAEMPFER CROWELL RENSHAW
GRONAUER & FIORENTINO
510 W. Fourth Street
Carson City, Nevada 89703