IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED SERVICES AUTOMOBILE ASSOCIATION, an Unincorporated Association; Petitioner, v. EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE NADIA KRALL, DISTRICT COURT JUDGE, Respondents, and JOHN ROBERTS Real Party in Interest.	Supreme Court No.: 83355-COA District Court Case: A-19-797757-C

EMERGENCY MOTION UNDER NRAP 27(e)

EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE DISPUTED DISCOVERY WITHOUT ANY JUDICIAL FINDINGS

ACTION IS REQUIRED BY SEPTEMBER 29, 2021 AS PETITIONER IS REQUIRED TO DISCLOSE THE INFORMATION AND DOCUMENTS ON SEPTEMBER 30, 2021

PETITIONER'S WRIT OF MANDATE AND/OR PROHIBITION WAS FILED ON AUGUST 11, 2021 AND TRANSFERRED TO THE COURT OF APPEALS ON SEPTEMBER 8, 2021

DECLARATION OF PRISCILLA L. O'BRIANT, ESQ., IN SUPPORT OF PETITIONER'S EMERGENCY MOTION FOR STAY AND NRAP 27(E) CERTIFICATE

1. I am an attorney licensed to practice in the State of Nevada and am an attorney at the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP, attorney for Petitioner United Services Automobile Association and make this Declaration in Support of this Emergency Motion under NRAP 27(e) and NRAP 8.

2. The telephone number and office addresses of the attorney for the Real Party in Interested are listed as follows:

Jordan P. Schnitzer, Esq.
TheSchnitzerLawFirm.com
Tel 702.960.4050 | Fax 702.960.4092
Email Jordan@TheSchnitzerLawFirm.com

3. The facts showing the existence and nature of Petitioner's emergency are as follows: At a hearing on September 16, 2021, the District Court ordered Petitioner to respond to discovery which is in dispute within 10 business days or by September 30, 2021. The discovery which is the subject of the Order is currently the subject of a writ pending before the Nevada Court of Appeals based on the District Court's failure to enter any findings regarding relevant or proportionality. At the hearing in this matter, Petitioner indicated that if it needed to file a motion to stay discovery it would. However, the Court ordered the discovery "within 10 business days, no matter what motion is on calendar or what appeal or writ you file." Therefore, immediate action is required to prevent irreparable harm –

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Petitioner is being ordered to produce voluminous documents without any judicial findings as to their relevance and proportionality.

4. Counsel for Real Party in Interest was served with this Motion via electronic service as identified on the proof of service in this document. Prior to filing this Motion my office contacted, by telephone, the clerk of the Supreme Court, the Clerk of the Eighth Judicial District Court of the State of Nevada, and Real Party in Interest's attorney to notify them that Petitioners were filing the instant Emergency Motion under NRAP 27.

5. The grounds advanced in support of this motion, that the disputed discovery is the subject of a pending writ and should not be allowed pending the outcome of that writ, were made at the September 16, 2021 hearing. The District Court ordered Petitioner to produce the discovery which is the subject of the writ by September 30, 2021, regardless of filing any motion. Thus, Petitioner does not have the ability to obtain the requested relief at the District Court and it is imperative that this matter be heard at the Court's earliest possible convenience.

6. I certify that I have read this motion and, to the best of my knowledge, information and belief, this motion complies with the form requirements of NRAP 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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7. I further certify that this brief complies with all Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the appendix where the matter relied upon is to be found. I also certify that the documents attached as exhibits hereto are true and correct copies are of the pleadings and documents they are represented to be as cited herein. I understand I may be subject to sanctions in the even the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I declare under penalty of perjury and under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on September 20, 2021.

/s/ Priscilla L. O'Briant
PRISCILLA L. O'BRIANT, ESQ.

No Notary Required per NRS 53.045

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT AS TO RELIEF SOUGHT IN DISTRICT COURT

COMES NOW, Petitioner United Services Automobile Association, by and through its counsel of record, LEWIS BRISBOIS BISGAARD & SMITH, and respectfully petitions this Court for the following immediate relief related to Eight Judicial District Court Case A-19-790757-C ("Case A790757"), *John Roberts v. United Services Automobile Association* ("USAA").

During a September 16, 2021 hearing, USAA was ordered to produce the disputed discovery which is the subject of Petitioner's pending writ in this matter. USAA indicated it would file a motion to stay discovery. However, USAA was ordered to produce the disputed discovery, notwithstanding the pending writ or any motion it might file. Due to the exigent circumstances in which USAA is being ordered to produce voluminous corporate documents without any judicial findings as to their relevance and proportionality, this Emergency Motion is being filed with this Court. It has been brought in good faith.

In addition, Petitioners have no other available avenue for relief. This is a matter of great importance to Petitioner not only as to this litigation, but as to all future litigation as Petitioner is entitled to a judicial finding as to the relevance and proportionality of discovery before it is ordered to produce the disputed discovery. Accordingly, once Petitioner complies with the order, there is no reasonable means

of "repairing" the damage, Petitioner's writ would be rendered moot, and Petitioner, now and in the future, will be deprived of its right to judicial findings as to the relevance and proportionality of discovery.

II. BASIS FOR RELIEF

1. The District Court failed to weigh the issues of relevance and proportionality required under NRCP 26(b)(1) and issue findings regarding the same as required by *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court,* 2020 Nev. App. LEXIS 2, *8, 467 P.3d at 5-6, 136 Nev. Adv. Rep. 26, 2020, WL 2510923.

Petitioner will be irreparably harmed without the issuance of a stay of the order directing it to serve the disputed discovery, regardless of the writ or any other motion. The Order effectively eliminates Petitioner's ability for appellate review and its right to have judicial findings regarding the relevance and proportionality of the corporate documents which have been ordered. Under the allegations of the Complaint, the disputed discovery has marginal relevance to the case in light of prevailing Nevada law as more fully outlined in Petitioner's briefing at the state court level and in its Petition For Writ Of Prohibition Or Mandamus. Therefore, providing this information without any judicial findings will cause Petitioner irreparable harm, rendering its Petition for Writ of Mandamus moot, and denying

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Petitioner, now and in the future, of its right for judicial findings as to the relevance and proportionality of corporate documents *prior* to discovery.

Accordingly, Petitioner respectfully requests that this Court grant the emergency motion and issue an immediate order staying production of the discovery which is the subject of Petitioner's pending writ until such time as the Court can rule on the writ of mandamus that has been filed in this case.

III. STATEMENT OF FACTS

On May 9, 2014, Plaintiff was traveling southbound on Nellis Blvd. in the number one left turn lane entering the intersection on a green light. Petitioner's Appendix in Support of Petition for Writ of Prohibition or Mandamus ("PA"), Vol. I, No. 3, 0012, ¶ 10. A vehicle driven by Oscar Zazueta-Espinoza (the "tortfeasor") was traveling west on Russell Road in the number 2 travel lane approaching the intersection of Nellis on a red traffic signal. PA, Vol. I, No. 3, 00012, ¶ 11. The tortfeasor failed to stop and continued traveling into the intersection where the front of his vehicle struck the left side of Robert's vehicle. PA, Vol. I, No. 3, 0012, ¶ 12. The traffic accident report indicates moderate damage to the left side of Roberts' vehicle. PA, Vol. I, No. 2, 0008. Roberts was transported from the scene of the accident to Sunrise Hospital. PA, Vol. I, No. 2, 0008.

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On the date of the reported loss, Plaintiff was insured under a policy of insurance with USAA, Policy No. 00562 55 57U 7101 3. PA, Vol. I, No. 1, 0002. Robert's USAA policy includes UIM limits of $300,000 per person/$500,000 per occurrence with $10,000 in medical payments benefits. PA, Vol. I, No. 1, 0002.

Plaintiff made a claim under his USAA automobile policy for underinsured motorists ("UM") and medical payments benefits for injuries claimed sustained in the May 9, 2017 MVA. PA, Vol. I, No. 3, 0012, ¶¶ 16-17. USAA investigated the claim and evaluated the claim for an amount less than the full policy and offered to settle the claim. PA, Vol. I, No. 3, 0012, ¶ 18. Plaintiff disputed USAA's claim evaluation and filed the instant action on March 8, 2019. PA, Vol. I, No. 3, 0011.

Plaintiff's complaint alleges that he "made a valid covered claim under his USAA insurance policy." PA, Vol. I, No. 3, 0013, ¶ 25. The Complaint further alleges that "USAA refused to pay monies owed under the policy." PA, Vol. I, No. 3, 0013, ¶ 26. The complaint further alleges that Plaintiff "sustained damages as a result of USAA's refusal to pay monies owed under the policy." PA, Vol. I, No. 3, 0013, ¶ 27.

The complaint alleges claims against USAA for 1) Breach of Contract; (2) Breach of the Implied Duty of Good Faith and Fair Dealing - Tortious and 3) Tortious Breach of the Implied Duty of Good Faith and Fair Dealing. PA, Vol. I,

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No. 3, 0011-0016. Within the claims for tortious bad faith claims handling, Roberts alleges upon information and belief:

> 1) that USAA failed to acknowledge and act reasonably promptly upon communications with respect to claims arising under Plaintiff's insurance policy in violation of NRS 686A.310(1)(b). PA, Vol. I, No. 3, 0015, ¶ 50;
>
> 2) that USAA failed to affirm or deny coverage of claims within a reasonable time after Plaintiff completed and submitted proof of loss requirements, a violation of NRS 686A.310(1)(d). PA, Vol. I, No. 3, 0015, ¶ 51;
>
> 3) that USAA failed to effectuate prompt, fair and equitable settlement of claims in which liability of USAA became reasonably clear, a violation of NRS 686A.310(1)(e). PA, Vol. I, No. 3, 0015, ¶ 52;
>
> 4) that USAA failed to settle Plaintiff's claims promptly, where liability has become clear, under Plaintiff's portion of the insurance policy coverage in order to influence settlement under his portion of the insurance policy, a violation of NRS 686A.310. PA, Vol. I, No. 3, 0015, ¶ 53;

Petitioner's Answer to the Complaint admits that it issued the policy to Roberts which was in effect on the date of the accident and provided UM coverage subject to the terms conditions, provisions, limitations and exclusions of the policy. PA, Vol. I, No. 4, 0018, ¶ 7. Petitioner further admits that it investigated Roberts' claim, placed a value range on the claim based on the information known to it, and made an initial offer of $46,000. PA, Vol. I, No. 4, 0019, ¶ 12.

In the course of discovery, Roberts served written discovery on USAA to which USAA objected in part on the basis of relevance and proportionality. PA, Vol. I, Nos. 5, 6, 7, 8, 9 and 10, 0017-184. USAA also objected to the production of confidential information without a protective order but Plaintiff refused to enter

a confidentiality agreement. PA, Vol. I, No. 6, 0060-0101. Plaintiff thereafter filed a *Motion to Compel Defendant's Request for Production Responses* and *Motion to Compel Defendant's Responses to Interrogatories and Requests for Admission* (the "motions"). PA, Vol. I, Nos. 11 and 12, 0185-0232. Defendant opposed the motions. PA, Vol. II, Nos. 13 and 14, 0233-0264. After a hearing on the motions, the Discovery Commissioner found that the lawsuit involved claims of breach of contract and extra-contractual insurance claims and that some of the material sought was proprietary and confidential in nature. PA, Vol. II, Nos. 16 and 17, 0273-0279. The Discovery Commissioner's Report and Recommendations ("DCCR") granted in part and denied in part the motions. PA, Vol. II, No. 17, 0275-0279. On April 29, 2021, USAA filed an objection ("Objection") to portions of the DCCR. PA, Vol. II, No. 18, 0280-0301. On May 12, 2021, the District Court entered an order affirming and adopting the DCCR. PA, Vol. II, No. 19, 0302-0309. The Order was entered prior to any opposition by Roberts to Petitioner's Objection, without a hearing, and did not include any analysis of how the disputed discovery was relevant and proportional, given the claims and defenses in the litigation. PA, Vol. II, No. 20, 0310-0311.

On July 14, 2021, Roberts filed a motion to strike USAA's Answer for its alleged failure to participate in discovery and violation of discovery orders. See Exhibit A (without exhibits). On July 28th, USAA filed its Opposition to Roberts'

Motion outlining its good faith participation in discovery and explaining why the deadline to *supplement* discovery had originally been missed. See Exhibit B. On August 11, 2021, USAA filed its Petition For Writ Of Prohibition Or Mandamus, which is currently pending before the Nevada Court of Appeals. Plaintiff filed his reply in support of his motion on September 9, 2021. See Exhibit C (without exhibits). The hearing on Roberts' Motion was held on September 16, 2021. See Exhibit D, Transcript of Proceedings. At the hearing, Petitioner pointed out that the only discovery that had not been responded to as of the hearing date, is the discovery which is the subject of the writ. Exhibit D, p. 7, l. 5-7. Petitioner noted that the disputed discovery is not relevant to the claims in the action and not necessary for Plaintiff to move forward with discovery, and that if Petitioner needed to move forward with a motion to stay the disputed discovery, it would. Exhibit D, p. 7, l. 7-14. After further argument by both parties, the District Court ordered that "within 10 business days, USAA must fully comply with the prior Court order on discovery, any writs or any motions notwithstanding." Exhibit D, p. 10, l. 4-6. The District Court clarified that it was ordering USAA to produced the discovery that was disputed in the writ (Exhibit D, p. 11, l. 4-6) and that USAA needed to produce this within 10 days "no matter what motion is on calendar or what appeal or what writ you file." (Exhibit D, p.

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11., l. 12-15). Pursuant to this Order, USAA must produce the disputed discovery by September 30, 3021.

IV. LEGAL ARGUMENT

Petitioner incorporates herein the arguments made in its Writ for Petition of Mandamus as though fully set forth herein. The primary basis of USAA's Petition for Writ of Prohibition or Mandamus is that under Nevada law, USAA is entitled to have judicial findings as to the relevance and proportionality of the requested discovery – findings which have not been made.

This motion simply expands the argument to include the fact that USAA is entitled to have judicial findings as to the relevance and proportionality of the requested discovery *prior* to production of the discovery. Nevada law is clear that it was an abuse of discretion for the District Court to adopt the Discovery Commissioner's Report and Recommendation without making findings on the relevance and proportionality of the disputed discovery. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court,* 2020 Nev. App. LEXIS 2, *8, 467 P.3d at 5-6, 136 Nev. Adv. Rep. 26, 2020, WL 2510923**.** The September 16, 2021 order *compounds* the wrong by requiring USAA to produce the disputed discovery without judicial findings as to the relevance and proportionality of the requested discovery, notwithstanding the pending writ and any other motion USAA might

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file. If this is allowed, no district court judge need ever again make findings on relevance and proportionality.

As set forth in more detail above, Petitioner has met the requirements of NRCP 8(a) and has set forth the need for an emergency stay under the circumstances, having no other speedy and adequate remedy at law other than to seek relief from this Honorable Court.

V. CONCLUSION

The fundamental unfairness of requiring Petitioner to produce voluminous corporate documents without any judicial finding as to relevance and proportionality shocks the conscience. It is impossible to believe that Nevada would be unwilling to protect production of corporate documents where they have no relevance to the issues in the case. Therefore, Petitioner hereby moves for emergency relief as requested herein so that this Court may consider Petitioner's Writ of Mandamus. If the requested relief is not granted on an emergency basis, Petitioners Writ of Mandamus will be rendered moot, and Petitioner will be

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denied, now and in the future, of its right to judicial findings as to the relevance and proportionality of discovery prior to production.

DATED this 20th day of September, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ Priscilla L. O'Briant
PRISCILLA L. O'BRIANT, ESQ.
Nevada Bar No. 10171
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I, Priscilla L. O'Briant, being first duly sworn, deposes and states:

1. I am an attorney licensed to practice in the State of Nevada, and am a member of the law firm of Lewis Brisbois Bisgaard & Smith, LLP, attorneys for Petitioner.

2. 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 of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

3. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,141 words in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 14,000 words).

4. Finally, I hereby certify that I have read this motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 20th day of September, 2021 at Las Vegas, Nevada.

/s/ Priscilla L. O'Briant_____
PRISCILLA L. O'BRIANT, ESQ.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25 , I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, that, in accordance therewith, I caused a copy of the foregoing, **EMERGENCY MOTION UNDER NRAP 27(e)/EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE DISPUTED DISCOVERY WITHOUT ANY JUDICIAL FINDINGS** to be to be served by electronic service with the Eighth Judicial District Court filing system to counsel for Real Party in Interest, John Roberts. I also caused a copy of the foregoing to be delivered by United States Postal Service, First Class mail, in a sealed envelope, on the date and to the addressee(s) shown below:

The Honorable Nadia Krall
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

Jordan P. Schnitzer, Esq.
THE SCHNITZER LAW FIRM
9205 W. Russell Road, Ste. 240
Las Vegas, NV 89148
Attorneys for Plaintiff/Real Party in Interest

Dated this 20th date of September, 2021.

By: /s/ Priscilla L. O'Briant
An employee of Lewis Brisbois Bisgaard & Smith LLP

EXHIBIT A

EXHIBIT A

JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744
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Las Vegas, Nevada 89148
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Jordan@TheSchnitzerLawFirm.com
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

JOHN ROBERTS, an individual, Plaintiff, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, an unincorporated entity and/or a reciprocal insurance exchange with members residing in the State of Nevada; DOES 1 through 10; and ROE CORPORATIONS 11 through 25, inclusive, Defendants.	Case No.: A-19-790757-C Dept. No.: IV **PLAINTIFF'S MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS** **HEARING REQUESTED**

COMES NOW, Plaintiff John Roberts, by and through his attorney of record, THE SCHNITZER LAW FIRM, and hereby files this Motion to Strike the Answer of USAA for its Refusal to Participate in Discovery and Violation of Discovery Orders.

This Motion is based on the Points and Authorities submitted herewith, together with the papers and pleadings on file herein, exhibits attached hereto and oral arguments at the time of hearing.

DATED this 14th day of July 2021.

THE SCHNITZER LAW FIRM

By: _____
JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744
9205 West Russell Road, Suite 240
Las Vegas, NV 89148
Attorney for Plaintiff

DECLARATION OF JORDAN SCHNITZER IN SUPPORT OF MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS

JORDAN SCHNITZER, being first duly sworn, deposes and says:

1. I am a licensed attorney admitted to practice law in all courts in the State of Nevada.
2. I make this affidavit in support of Plaintiff's Motion to Strike the Answer of USAA for its Refusal to Participate in Discovery and Violation of Discovery Orders.
3. I have personal knowledge of the matters stated in this affidavit and could testify as a competent witness, if called upon to do so.
4. That Plaintiff filed two Motions to Compel on January 14, 2021. *See* **Exhibit "1" & "2".**
5. That the Motion was granted in part at a hearing on March 4, 2021, memorialized in a Discovery Commissioner's Report and Recommendations, signed on April 15, 2021. *See* **Exhibit "3"**
6. That the DCRR required compliance within 30 days of the Order "being signed by the Court."
7. That Defendant objected to the DCRR, which was overruled by this Court on May 12, 2021. *See* **Exhibit "4".**
8. That between the date of the Court's Order and today, Defendant has filed two notices of intent to issue subpoenas. *See* **Exhibit "5"**and **Exhibit "6"**.
9. That on July 2, 2021, I sent an email to defense counsel inquiring about the overdue discovery responses. *See* **Exhibit "7".**
10. Rather than respond to the email about the overdue responses or provide supplements, counsel for USAA asked Plaintiff to undergo two separate Rule 35 examinations. *See* **Exhibit "8".**

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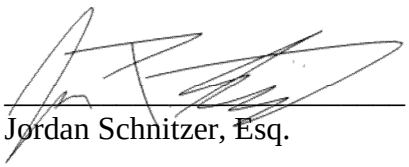
11. That pursuant to E.D.C.R. 2.34, Declarant has made numerous good faith efforts to resolve this matter as described above and been more than reasonable but has been unsuccessful in resolving this dispute and now seeks an order from the Court striking the defendant's answer.

DATED this 14th day of July 2021.



Jordan Schnitzer, Esq.

THE SCHNITZER LAW FIRM

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

USAA was previously compelled to provide responses to certain written discovery within 30 days of this Court signing the DCRR. Approximately 60 days have now passed and USAA has not served the supplemental responses nor responded to inquires regarding the overdue responses. Rather than respond, USAA has been busy conducting its own discovery including sending out subpoenas and attempting to schedule multiple Rule 35 exams of Plaintiff. Due to USAA's failure to comply with this Court's Order, severe sanctions, including striking the answer, or as the Court otherwise sees fit, should issue.

II. STATEMENT OF FACTS

This is an action claiming damages for breach of contract and bad faith in a 1st party insurance claim as a result of a car crash where Plaintiff suffered injuries on May 9, 2014. Plaintiff served written discovery upon USAA. After granting courtesy extensions, USAA responded with several incomplete and inadequate responses and contained inappropriate objections. The parties met and conferred but eventually, Plaintiff filed two Motions to Compel on January 14, 2021. *See* **Exhibit "1" & "2".**

The Motion was granted in part at a hearing on March 4, 2021, memorialized in a Discovery Commissioner's Report and Recommendations, signed on April 15, 2021. *See* **Exhibit "3".** That the DCRR required compliance within 30 days of the Order "being signed by the Court." *Id.*

Defendant objected to the DCRR, which was overruled by this Court on May 12, 2021. *See* **Exhibit "4".** As a result, Defendant's supplemental responses were due on June 11, 2021.

Rather than fulfill its duties to respond to Plaintiff, USAA engaged in its own discovery while causing Plaintiff's discovery efforts to come to a halt. Between the date of the Court's Order and today, Defendant has filed two notices of intent to issue subpoenas. *See* **Exhibit "5"**and **Exhibit "6".**

On July 2, 2021, the undersigned sent an email to defense counsel inquiring about the overdue discovery responses. *See* **Exhibit "7".** Rather than respond to the email about the

overdue responses or provide supplements, counsel for USAA asked Plaintiff to undergo two separate Rule 35 examinations. *See* **Exhibit "8".**

This case has been repeatedly delayed due to USAA's failure to provide required discovery responses and USAA is in willful violation of discovery orders requiring it to respond to written discovery. The plaintiff has sought the assistance of the Court and has made every possible effort to obtain the defendant's compliance with his discovery obligations but despite these efforts has had no success in convincing the defendant to participate. For these reasons it is appropriate for the Court to strike the defendant's answer due to its failure to comply with his discovery obligations, its litigation abuses and the halting of the normal adversary process due to this unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights.

III. ARGUMENT

The failure of a defendant to answer interrogatories is also grounds for the striking of an answer. *Havas v. Bank of Nevada*, 96 Nev. 567, 570 (1980); *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 192 (1980). *See* also *Schatz v. Devitte*, 75 Nev. 124, 126, 335 P.2d 783, 784 (Nev. 1959) (The failure of a defendant to appear for a deposition by itself is grounds for the striking of an answer.) NRCP 37(b) empowers the District Court with a broad range of sanctions that may be invoked when parties fail to comply with discovery orders.

NRCP 37 states:

> **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**
>
> …
>
> (b) Sanctions for Failure to Comply With a Court Order.
>
> (1) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 35 or 37(a), the court may issue further just orders that may include the following:
>
> (A) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> (B) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(C) striking pleadings in whole or in part;
(D) staying further proceedings until the order is obeyed;
(E) dismissing the action or proceeding in whole or in part;
(F) rendering a default judgment against the disobedient party; or
(G) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

…

(3) **Payment of Expenses.** Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

…

(d) **Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.**

(1) In General.

(A) Motion; Grounds for Sanctions. The court may, on motion, order sanctions if:

…

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

…

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(1). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

The court may strike all or part of a party's pleadings and enter a default judgment. *Temora Trading Co. v. Perry*, 98 Nev. 229, 645 P.2d 436, cert. denied, 459 U.S. 1070, 103 S. Ct. 489, 74 L. Ed. 2d 632 (1982). The Court has the power to apply whatever sanction it finds necessary or reasonable with respect to litigation abuses by a party, including terminating sanctions. See *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (Nev. 1973) (holding a "[d]efault judgment will be upheld where the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights"); see also *Schatz v. Devitte*, 75 Nev. 124, 126, 335 P.2d 783, 784 (Nev. 1959) (upholding order to strike defendant's answer for failure to appear at a deposition); *Hamlett v. Reynolds*, 114 Nev. 863, 865 (Nev. 1998).

A Court also has the inherent power to sanction, which power is designed to protect the dignity and decency of its proceedings and to enforce its decrees, and thus it may issue contempt orders and sanction or dismiss an action for litigation abuses. See *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007).

In deciding whether dismissal or the striking of an answer is an appropriate sanction for party's discovery abuses, the district court may properly consider: (1) degree of willfulness of offending party; (2) extent to which non-offending party would be prejudiced by lesser sanction; (3) severity of sanction of dismissal relative to severity of discovery abuse; (4) whether any evidence has been irreparably lost; (5) policy favoring adjudication on merits; (6) whether dismissal would unfairly operate to penalize party for misconduct of his or her attorney; and (7) need to deter parties and future litigants from similar abuses. *Young v. Johnny Ribiero Building*, 106 Nev. 88 (1990). In this case the Young factors support the striking of defendant USAA's answer.

A. <u>THE YOUNG FACTORS</u>

(1) <u>degree of willfulness of offending party</u>

In this case the defendant has willfully and flagrantly refused to cooperate in discovery despite numerous opportunities and professional courtesies. Rather than immediately moving to strike the defendant's answer for his failure to comply with the Court's Order, Plaintiff asked USAA's counsel for a status. Rather than responding, USAA sent a separate email asking for 2 separate Rule 35 examinations. A month has passed since the Court order required USAA's and USAA has refused to obey that order. This type of willful and repetitive disregard of Court orders supports the striking of an answer.

In *Foster v. Dingwall*, 227 P.3d 1042 (Nev. 2010) the Nevada Supreme Court struck a defendant's answer based upon conduct that was "repetitive, abusive, and recalcitrant." "The district court awarded Dingwall, Yang, and Chai attorney's fees after it entered default judgment against Dornan, Foster, and Cochrane for their wrongful conduct, **particularly their failure to comply with the court's March 1, 2007, discovery order** and the fact that their claims and defenses were frivolous, asserted in bad faith, and not based in law or fact." *Id*.

The Court found that the defendant's continued discovery abuses evidenced their willful and recalcitrant disregard of the judicial process, which presumably prejudiced the other parties. See *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (upholding sanctions where the 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 that, with respect to discovery abuses, **"[p]rejudice from unreasonable delay is presumed"** and repeated discovery violations "is sufficient prejudice").

The conduct of USAA is repetitive, abusive, and recalcitrant like the conduct of the defendants in the *Foster* case. Defendant Brooks' on-going failure to follow the Court's order is unexplained and unwarranted. For these reasons the striking of his answer is appropriate.

(2) extent to which non-offending party would be prejudiced by lesser sanction

There is no sanction that can undo the prejudice to the plaintiff short of striking the defendant's answer. There can be no doubt that the denial of an opportunity to have complete discovery responses prior to conducting depositions and finalizing expert witness opinions is extremely prejudicial. "Depositions are arguably the most powerful and productive device available during the discovery proceeding." Notes on Discovery and Arbitration by Wesley M. Ayers, Discovery Commissioner North, June 1999. "Depositions are the factual battleground where most of the litigation takes place." Moore's Federal Practice – Civil § 30.24.

In this case the plaintiff has been prevented from conducting the deposition of the defendant and its adjusters because it doesn't have a large volume of information that the Court ordered USAA to produce. The appropriate sanction for failing to answer written discovery is the striking of an answer. *Havas v. Bank of Nevada*, 96 Nev. 567, 570 (1980); *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 192 (1980).

(3) severity of sanction of striking answer relative to severity of discovery abuse

As has been described above, the denial of an opportunity to conduct a deposition is extremely prejudicial and Plaintiff cannot conduct depositions of Defendant's personnel without the basic information required by this Court. Notes on Discovery and Arbitration by Wesley M. Ayers, Discovery Commissioner North, June 1999. Moore's Federal Practice – Civil § 30.24. *Stars' Desert Inn Hotel & Country Club v. Hwang*, 105 F.3d 521, 525 (9th Cir. Nev. 1997)("We

also have no difficulty concluding that Stars was prejudiced by Hwang's reluctance to be deposed."); *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 771 (9th Cir. 1995) (repeated failure of corporation to designate a representative to testify at a discovery deposition "severely prejudiced" government's ability to make its case), cert. denied, 117 S. Ct. 64 (1996); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. Cal. 1994) (failure to appear at depositions prejudiced opposing party); *Adriana International Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990) (repeated failure of party to appear at scheduled depositions "interfered with the rightful decision of the case

The defendant's discovery abuse is also severe and without explanation. The complete refusal to provide the amended responses, without explanation constitutes willful discovery misconduct. It is necessary for Courts to impose severe sanctions on parties who engage in this type of misconduct. *Foster v. Dingwall*, 227 P.3d 1042 (Nev. 2010). This type of discovery misconduct is the kind that warrants the striking of an answer.

(4) <u>whether any evidence has been irreparably lost</u>

As a result of the defendant's utter refusal to cooperate in discovery the plaintiff has been prevented from discovering a large volume of information from USAA and prevented Plaintiff from being able to proceed with discovery. As the crash at issue happened in 2014, time is of the essence as memories of how the claim was handled are likely to fade away.

(5) <u>policy favoring adjudication on merits</u>

In *Foster* the Court held that similar discovery misconduct engaged in by defendant USAA was sufficient to merit the ultimate sanction and struck the defendant's answer. The Court explained: "In light of appellants' <u>repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case</u>, and the ultimate sanctions were necessary to <u>demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders</u>." *Foster v. Dingwall*, 227 P.3d 1042 (Nev. 2010). The Court has already provided the defendant with time to comply. Plaintiff's counsel gave a courtesy and waited before pressing the issue. Plaintiff's counsel then sent an email trying to get USAA to comply. Rather than comply, USAA simply asked Plaintiff to undergo two separate Rule 35 exams on top of sending out multiple subpoenas to search for information in support of

its defense. For these reasons, which are the same as the reasons in *Foster*, the striking of the defendant's answer is an appropriate sanction.

(6) <u>whether dismissal would unfairly operate to penalize party for attorney misconduct</u>

In this case the fault for the defendant's misconduct falls solely on USAA and not on his counsel. Therefore, this factor weighs in favor of striking the defendant's answer.

(7) <u>need to deter parties and future litigants from similar abuses</u>

In *Foster* the Court explained that striking an answer was necessary to ". . . demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders." *Foster v. Dingwall*, 227 P.3d 1042 (Nev. 2010). For this same reason the striking of the defendant's answer is an appropriate sanction in this case.

The defendant has been provided with ample opportunity to comply with discovery and has been provided with ample warnings of the consequences of the failure to cooperate. The plaintiff has been prejudiced by this discovery misconduct. The undersigned has several 1st party cases pending against USAA and if unpenalized, USAA is likely to continue its discovery abuses. It is now time to impose appropriate sanctions on the defendant by striking the answer and awarding attorney's fees and costs to the plaintiff for the work which was necessary to bring this issue before the Court.[1]

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[1] If granted, Plaintiff requests the opportunity for supplemental briefing on the applicable factors regarding attorneys' fees.

IV. CONCLUSION

For the reasons set forth above, the subject motion to strike the defendant's answer, or other just sanctions as the Court determines, for its failure to participate in discovery and the willful disobedience to discovery orders and the plaintiff should be awarded attorney's fees and costs against the defendant.

DATED this 14th day of July 2021.

THE SCHNITZER LAW FIRM

By:_____
JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744
9205 West Russell Road, Suite 240
Las Vegas, NV 89148
Attorney for Plaintiff

THE SCHNITZER LAW FIRM

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July 2021, I served a true and correct copy of the foregoing **PLAINTIFF'S MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS** to the above-entitled Court for electronic filing and service upon the Court's Service List to the following counsel.

Robert W. Freeman, Esq.
Priscilla L. O'Briant, Esq.
Jennifer Taylor, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP.
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89119
Attorney for Defendants

An employee of
THE SCHNITZER LAW FIRM

THE SCHNITZER LAW FIRM

EXHIBIT B

EXHIBIT B

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Attorneys for Defendant United Services Automobile Association

DISTRICT COURT

CLARK COUNTY, NEVADA

JOHN ROBERTS, an individual, Plaintiff, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, an unincorporated entity and/or a reciprocal insurance exchange with members residing in the State of Nevada; DOES 1 through 10; and ROE CORPORATIONS 11 through 25, inclusive, Defendants.	CASE NO. A-19-790757-C Dept. No.: IV **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS**

COMES NOW Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION, ("USAA"), by and through its attorneys, Lewis Brisbois Bisgaard & Smith LLP, and hereby submits its Opposition to *Plaintiff's Motion to Strike the Answer of USAA for its Refusal to Participate in Discovery and Violation of Discovery Order*.

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This Opposition is made and based upon the attached Memorandum of Points and Authorities, any exhibits attached hereto, the papers and pleadings on file herein, the attached declaration of counsel and any oral argument that the Court may entertain at the hearing

DATED this 28th day of July, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Priscilla L. O'Briant*

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DECLARATION OF PRISCILLA L. O'BRIANT, ESQ. IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS

1. I am an attorney at the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP, and am duly licensed to practice law in the State of Nevada. I am an attorney of record representing Defendant USAA in this lawsuit. I am competent to testify to the matters set forth in this Declaration, and will do so if called upon.

2. On November 5, 2019, Defendant served its Initial Disclosure of Witnesses and Production of Documents Pursuant to NRCP 16.1 in which it produced its entire claim file relating to Plaintiff's claim and the insurance policy which is the subject of this litigation.

3. On April 23, 2020, Plaintiff served his First Set of Request for Production to Defendant, First Set of Interrogatories to Defendant, and First Set of Requests for Admission.

4. On August 7, 2020, Defendant timely served its responses to Plaintiff's Interrogatories, admissions requests and production requests.

5. In September, 2020, Defendant and Plaintiff met and conferred regarding Defendant's responses. Defendant indicated that much of the documentation sought by Plaintiff was confidential and proprietary and requested Plaintiff agree to a confidentiality and protective order. Plaintiff refused.

6. On September 17, 2020, Plaintiff served his Second Set of Requests for Production to Defendant.

7. On October 5, 2020, based on the meet and confer efforts, Defendant served Supplemental Answers to Plaintiff's First Set of Interrogatories and First Set of Requests for Production.

8. On November 6, 2020, Defendant timely served its responses to Plaintiff's Second Set of Requests for Production.

9. On January 14, 2021 Plaintiff filed two Motions to Compel. The motion was granted in part at a hearing on March 4, 2021, memorialized in a Discovery Commissioner's Report and Recommendations, signed on April 15, 2021 which required compliance within 30 days of the Order "being signed by the Court."

10. Defendant objected to the DCCR which was overruled by this Court on May 12, 2021.

11. Through oversight of staff, upon service of the Court's Order of May 12, 2021, the June 11 deadline to provide supplemental discovery responses was not calendared.

12. Additionally, during this timeframe, two Associates within the "bad faith" group, of which the undersigned is a member, left the law firm in rapid succession. The undersigned has endeavored to move forward timely in all matters, however the increased workload along with the lack of calendaring, caused this supplemental discovery to be missed. The undersigned's firm has actively sought new associate hires and one new Associate on-boarded the week of July 12, 2021, immediately preceding the filing of Plaintiff's Motion. Another is scheduled to on-board as soon as conflicts are cleared.

13. The undersigned is the Partner on the case and the attorney responsible for responding to discovery served upon Defendant. While Defendant has moved forward with discovery on Plaintiff's medical condition, that is the responsibility of the Associate assigned to this case who was not as greatly impacted by the departure of the two Associates as she was not involved in their cases.

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14. Plaintiff did not meet and confer with Defendant prior to filing his *Motion to Strike the Answer of USAA for its Refusal to Participate in Discovery and Violation of Discovery Order*.

I declare under penalty of perjury and under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on July 28, 2021.

/s/ Priscilla L. O'Briant
PRISCILLA L. O'BRIANT, ESQ.

No Notary Required per NRS 53.045

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Plaintiff filed his *Motion to Strike the Answer of USAA for its Refusal to Participate in Discovery and Violation of Discovery Order* ("Motion").

II. ARGUMENT

A. Plaintiff's Motion is Procedurally Improper

Parties should strive to be cooperative, practical, and sensible, and should seek judicial intervention "only in extraordinary situations that implicate truly significant interests." *In re Convergent Techs. Securities Litig.,* 108 F.R.D. 328, 331 (N.D. Cal. 1985). As such, nearly every court has rules requiring counsel to meaningly meet and confer prior to filing any discovery motion. In Nevada, this requirement is set forth in EDCR 2.34(d).

> EDCR 2.34(d) provides as follows:
>
> > Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that after a discovery dispute conference or a good faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A conference requires either a personal or telephone conference between or among counsel. Moving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. If a personal or telephone conference was not possible, the affidavit shall set forth the reasons.

EDCR 2.34(d).

While Plaintiff asserts that the parties met and conferred before he file the Motion, this is not the case. EDCR 2.34(d) requires that meet and confer efforts include a *personal* or *telephone* conference between counsel. This did not occur.

The consultation obligation "promote[s] a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus matters in controversy before judicial resolution is sought." *NevadaPower Co. v. Monsanto Co*., 151 F.R.D. 118, 120 (D. Nev. 1993). To meet this obligation, parties must "treat the informal negotiation process as a substitute for, and

not simply a formalistic prerequisite to, judicial resolution of discovery disputes." Id. This occurs when the parties "present to each other the merits of their respective positions with the same candor, specificity, and support during the informal negotiations as during the briefing of discovery motions." Id

To ensure that parties comply with these requirements, movants must file certifications that "accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute*." ShuffleMaster, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996). Courts may look beyond the certification made to determine whether a sufficient meet and confer occurred. See *Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d 1137, 1145 (D. Nev. 2015). "A *threshold* issue in the review of any motion to compel is whether the movant made adequate efforts to resolve the dispute without court intervention." Id. (emphasis added).

Plaintiff's failure to properly meet and confer prior to filing his motion to compel provides sufficient grounds for denying the motion. See *Cardoza*, 141 F. Supp. 3d at 1145.

As set forth above, the failure to timely supplement discovery was a confluence of the departure of two attorneys from the "bad faith" group as well as an oversight in calendaring the 30 day deadline to serve supplemental responses. Whether Plaintiff would have agreed to allow Defendant additional time to respond or not, Defendant would have addressed the issue. However, rather than attempting to confer with Defendants, Plaintiff is wasting the Court's time by filing a motion that would not have been necessary if Plaintiff had taken the time to confer with Defendants as required by EDCR 2.34.

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B. Striking Defendant's Answer is a Harsh Sanction Not Warranted Under the Facts of This Matter

Defendant will serve the supplemental discovery responses which are the subject of Plaintiff's *Motion* tomorrow.[1] While the defense is cognizant of its failure to timely supplement written discovery in conformance with the Court's order, sanctions, including striking Defendant's answer, are disproportionate and unreasonable measures based on the facts and circumstances of this case, especially in light of Plaintiff's failure to comply with local rules.

As set forth in the Declaration of counsel, Defendant has throughout participated in discovery, disclosing the entirety of its claim files and the subject insurance policy, responding to multiple sets of written discovery, and supplementing both its disclosure and responses to written discovery. The Discovery Commissioner refused to award sanctions in relation to Plaintiff's motions to compel, finding that sanctions were not warranted as there was a good faith dispute and some discovery was protected. See Motion, Exhibit 3, p. 4. In fact, Defendant prevailed completely on its objections to Plaintiff's Requests for Admission. See Motion, Exhibit 3, p. 4. A good faith dispute over discovery does not warrant any sanction, much less the striking of Defendant's Answer.

What at issue here is Defendant's failure to timely supplement responses following the Court's May 12, 2021 Order overruling Defendant's Objection to the Discovery Commissioner's Report and Recommendation, a delay of less than 7 weeks. That the supplementation which is the subject of Plaintiff's motion was not timely due to a confluence of events, does not warrant the sanction requested.

The cases cited by Plaintiff support the contention that sanctions are not warranted under the facts here. In *Havas v. Bank of Nev., 96 Nev. 567, 613 P.2d 706 (1980)*, the Defendant

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[1] Defendant has instructed counsel to file a Writ regarding certain items of the supplemented discovery due to the fact that the Order did not include findings related to proportionality. *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 2020 Nev. App. LEXIS 2, *8, 467 P.3d 1, 5-6, 136 Nev. Adv. Rep. 26, 2020 WL 2510923. Counsel will make the filing of the Writ a priority and will file the week of August 2, 2021.

brought a motion to strike in October 7, 1977, after Havas failed to respond to interrogatories served February 18, 1977. Havas served responses to the interrogatories on October 17, 1977, the day prior to the hearing on the Motion to Strike. The Court therefore *denied* the Motion to Strike but ordered Havas to answer all interrogatories fully and in good faith within fifteen days, by November 1, 1977. By April 26, 1978, nearly 6 months later, Havas had not made an additional response to the interrogatories and the Defendant renewed its motion to strike. This time, the Court granted the motion.

Similarly, in *Kelly Broad. Co. v. Sovereign Broad.*, 96 Nev. 188, 192, 606 P.2d 1089, 1091 (1980), the answers to interrogatories were filed two years late. In *Temora Trading Co. v. Perry*, 98 Nev. 229, 645 P.2d 436 (1982), Plaintiff's officers refused to be deposed in violation of the court's order. In *Skeen v. Valley Bank of Nev.*, 89 Nev. 301, 511 P.2d 1053 (1973), the Plaintiff did not appear for his deposition and offered no excuse for his failure to appear. In *Schatz v. Devitte*, 75 Nev. 124, 335 P.2d 783 (1959), after continuing the date for deposition several times, the defendant failed to appear for her deposition and counsel advised she would not appear and her deposition consequently could not be taken. In *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998), the Defendant failed to comply with orders from the discovery commissioner and district even after the imposition of monetary sanctions. *Foster v. Dingwall*, 227 P.3d 1042 involved plaintiffs' failure to appear for deposition after which the Defendant moved to strike their complaint based on this and "other alleged discovery violations." The Foster Court *refused* to strike the complaint but ordered plaintiffs to supplement discovery responses and appear for deposition. The Foster Court found that plaintiffs had been acting in bad faith and warned plaintiffs that failure to comply with the order would result in striking their pleading. Despite the Court's order two plaintiffs failed to appear for their deposition while one appeared and refused to answer many relevant questions. Plaintiffs also failed to provide supplemental discovery responses. As a result, Defendant moved to strike the pleadings and the district court agreed. On appeal the Nevada Supreme Court upheld the district court's decision based on "appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their *willful* and *recalcitrant* disregard of the judicial process."

None of the circumstances which warranted the striking of a pleading in the above cases are present here.

C. Striking Defendant's Answer is Not an Appropriate Sanction Under the Young Factors

Additionally, applying the factors set for in *Young v. Johnny Ribiero Building*, 106 Nev. 88 (1990), the striking of Defendant's answer is not an appropriate sanction.

1. Degree of Willfullness of Offending Party

As set forth above, defendant has not "willfully and flagrantly" refused to cooperate in discovery, but rather has made required disclosures and responded to multiple sets of written discovery. Nor has there been any "willful and repetitive disregard of Court orders." There was a good faith dispute over the written discovery as the Discovery Commissioner found. In fact, Defendant prevailed on many of its objections as well as in having protection ordered over its documents. See Motion, Exhibit 3, supra.

Rather, there has been a single instance of Defendant not timely supplementing discovery following this Court's May 12 order. Additionally, as set forth in the declaration of counsel, a confluence of events contributed to this delay and it was in no manner willful or flagrant. While Plaintiff was apparently frustrated by the fact that Defendant requested IMEs during this timeframe, this was explained by the various attorneys handling the claim (which Defendant would have explained and addressed had Plaintiff met and conferred as required).

The sanction of dismissal or default may be imposed only in cases of willful noncompliance of the court's orders. *Finkelman v. Clover Jewelers Boulevard, Inc*., 91 Nev. 146, 532 P.2d 608 (1975). This is not the case here. Therefore this factor weighs against striking Defendant's answer.

2. Extent to Which Non-Offending Party Would be Prejudiced by Lesser Sanction

Plaintiff has argued that he has been prejudiced as he has been prevented from conducting depositions due to the lack of information. However, Plaintiff produced its entire claim file at the onset of litigation. Additionally, Defendant agreed to produce many of the documents Plaintiff

sought subject to a confidentiality order, but Plaintiff refused to agree. These documents are of the type regularly protected in litigation and were ordered to be protected in the Discovery Commissioner's Report and Recommendation. Thus, much of the purported delay in obtaining these documents is the result of *Plaintiff's* failure to cooperate in discovery. Plaintiff should not be rewarded from impeding document production and then be allowed to claim prejudice as a result. Finally, the Discovery Cutoff in this matter is January 7, 2022. As such, Plaintiff has sufficient time to review the documents and notice any depositions and will suffer no prejudice. Therefore this factor weighs against striking Defendant's answer.

3. Severity of Sanction of Striking Answer Relative to Severity of Discovery Abuse

As set forth above, there is no severe prejudice to Plaintiff. Additionally, there is no discovery abuse. There is simply one instance of Defendant not timely supplementing discovery. This was the fault of counsel based on a "perfect storm" of events which caused the supplemental responses to not be served timely. Plaintiff argues that Defendant's actions are without explanation. They are not as set forth herein and as Plaintiff would have known if he had engaged in the mandatory meet and confer process. Therefore this factor weighs against striking Defendant's answer.

4. Whether Any Evidence had Been Irreparably Lost

USAA's handling of the claim is set forth in its claim file which was produced with USAA's initial disclosures. As such, no evidence had been irreparably lost. Therefore this factor weighs against striking Defendant's answer.

5. Policy Favoring Adjudiction on the Merits

As set forth herein, the conduct in *Foster* is not similar to the alleged misconduct here. In *Foster*, plaintiffs repeatedly failed to appear for deposition and supplement discovery, even after surviving a motion to strike and being warned by the Court. This is not the case here. Therefore this factor weighs against striking Defendant's answer.

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6. Whether Dismissal Would Unfairly Operate to Penalize Party for Attorney Misconduct

As set forth herein, the failure to timely supplement the discovery lies on the undersigned counsel, although counsel denies any "misconduct."

7. Need to Deter Parties and Future Litigants From Similar Abuses

There has been no discovery abuse. Under Nevada law, a party who disagrees with the scope of written discovery is entitled to assert objections. Additionally, a party who disagrees with the findings of the Discovery Commissioner is free to file an objection with the District Court. None of this is a failure to cooperate in discovery. Nor has USAA "been provided ample warnings of the consequences of the failure to cooperate." As noted above, the Discovery Commissioner found that there was a good faith dispute over the written discovery and Defendant prevailed on many of its objections as well as in having protection ordered over its documents. While Plaintiff's counsel would certainly like to be able to obtain limitless discovery with the knowledge that any challenge to the scope of such discovery would be evidence of a failure to cooperate subjecting the defendant to sanctions, this is not the law.

Defendant does not dispute that it was required to provide supplemental responses to written discovery by June 11, 2020 but did not. As explained herein, this was the result of the negligence of counsel based on a variety of facts. As such, Defendant respectfully requests that this Court deny Plaintiff's Motion. Additionally, due to Plaintiff's failure to comply with the

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mandatory meet and confer requirements of E.D.C.R. 2.34, Plaintiff is not entitled to an award of attorney's fees and costs.

DATED this 28th day of July, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s Priscilla L. O'Briant*

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Attorneys for Defendant United Services Automobile Association

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), A.O. 14-2 and N.E.F.C.R. 9, I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, and that on this 28th day of July, 2021, I did cause a true and correct copy of **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS** in *John Roberts v. United Services Automobile Association,* Clark County District Court Case No. A-19-790757-C, to be served by electronic service with the Eighth Judicial District Court filing system to the parties on the Electronic Service List addressed as follows:

Jordan P. Schnitzer, Esq. Jordan@theschnitzerlawfirm.com
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By */s/ Priscilla L. O'Briant*
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT C

EXHIBIT C

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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN ROBERTS, an individual,

Plaintiff,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, an unincorporated entity and/or a reciprocal insurance exchange with members residing in the State of Nevada; DOES 1 through 10; and ROE CORPORATIONS 11 through 25, inclusive,

Defendants.

Case No.: A-19-790757-C

Dept. No.: IV

REPLY TO OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS

Hearing Date: September 16, 2021
Hearing Time: 9:00 a.m.

COMES NOW, Plaintiff John Roberts, by and through his attorney of record, THE SCHNITZER LAW FIRM, and hereby files this Reply to Opposition to Plaintiff's Motion to Strike the Answer of USAA for its Refusal to Participate in Discovery and Violation of Discovery Orders.

This Reply is based on the Points and Authorities submitted herewith, together with the papers and pleadings on file herein, exhibits attached hereto and oral arguments at the time of hearing.

DATED this 9th day of September 2021.

THE SCHNITZER LAW FIRM
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Attorney for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

USAA was previously compelled to provide responses to certain written discovery within 30 days of this Court signing the DCRR. Approximately 60 days have now passed, and USAA has not served the supplemental responses nor responded to inquires regarding the overdue responses. Rather than respond, USAA has been busy conducting its own discovery including sending out subpoenas and attempting to schedule multiple Rule 35 exams of Plaintiff. Due to USAA's failure to comply with this Court's Order, severe sanctions, including striking the answer, or as the Court otherwise sees fit, should issue.

II. STATEMENT OF FACTS

This is an action claiming damages for breach of contract and bad faith in a 1st party insurance claim as a result of a car crash where Plaintiff suffered injuries on May 9, 2014. Plaintiff served written discovery upon USAA. After granting courtesy extensions, USAA responded with several incomplete and inadequate responses and contained inappropriate objections. The parties met and conferred but eventually, Plaintiff filed two Motions to Compel on January 14, 2021. *See* **Exhibit "1" & "2".**

The Motion was granted in part at a hearing on March 4, 2021, memorialized in a Discovery Commissioner's Report and Recommendations, signed on April 15, 2021. *See* **Exhibit "3".** That the DCRR required compliance within 30 days of the Order "being signed by the Court." *Id.*

Defendant objected to the DCRR, which was overruled by this Court on May 12, 2021. *See* **Exhibit "4".** As a result, Defendant's supplemental responses were due on June 11, 2021.

Rather than fulfill its duties to respond to Plaintiff, USAA engaged in its own discovery while causing Plaintiff's discovery efforts to come to a halt. Between the date of the Court's Order and today, Defendant has filed two notices of intent to issue subpoenas. *See* **Exhibit "5"**and **Exhibit "6".**

On July 2, 2021, the undersigned sent an email to defense counsel inquiring about the overdue discovery responses. *See* **Exhibit "7".** Rather than respond to the email about the

overdue responses or provide supplements, counsel for USAA asked Plaintiff to undergo two separate Rule 35 examinations. *See* **Exhibit "8".**

This case has been repeatedly delayed due to USAA's failure to provide required discovery responses and USAA is in willful violation of discovery orders requiring it to respond to written discovery. The plaintiff has sought the assistance of the Court and has made every possible effort to obtain the defendant's compliance with his discovery obligations but despite these efforts has had no success in convincing the defendant to participate. For these reasons it is appropriate for the Court to strike the defendant's answer due to its failure to comply with his discovery obligations, its litigation abuses and the halting of the normal adversary process due to this unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights.

III. ARGUMENT

A. Plaintiff Attempted to Meet and Confer

EDCR 2.34 applies to discovery motions. This Motion is not a discovery motion but a motion resulting from Defendant failing to comply with a Court order. Regardless, Plaintiff did attempt to meet and confer as shown in **Exhibit "7**". Rather than responding, Defendant engaged in its own efforts to forward discovery for its benefit. **Exhibit "8"**.

B. Defendant's Position is Belied by Prior Interactions on This Case

Defendant's opposition claims that Ms. O'Briant is the one in charge of "discovery" for Defendant and it was her increased workload that created issues. Yet, every communication between counsel, every meet and confer and even the underlying discovery motion involved and was argued by Ms. Taylor, not Ms. O'Briant. Therefore, it makes no sense why Ms. Taylor was unable to respond to emails seeking the untimely supplements yet had time to request medical exams.

C. Defendant Still Has Not Fully Complied with the Court's Order and Admittedly Refuses to Do So

Defendant has also brazenly continued to ignore this Court's order. Specifically, Defendant provided some of the supplemental responses ordered by the Court but admittedly did

not supplement RDPs 2, 7, 9, 15, 16, 28, 32, 36 and 39 nor did it supplement interrogatories Nos. 12, 13 and 14. *See* Petition for Writ of Mandamus attached hereto as **Exhibit "9".**

The mere filing of a writ does not excuse Defendant from the requirement to respond to the written discovery. "Absent a stay, a party must promptly comply with a court order, and failure to do so warrants a finding of contempt." *Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.*, C 04-2266 JW (PVT), 2010 WL 10133699, at *1 (N.D. Cal. Sept. 22, 2010) citing *Maness v. Meyers*, 419 U.S. 449, 458–59 (1975) and *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir.1987).

Here, Defendant has neither sought nor obtained a stay from its discovery obligations. Rather, it made the unilateral choice to ignore this Court's order and seek appellate intervention months after the deadline, and only after Plaintiff filed the instant motion. Therefore, USAA's current actions in willfully ignoring the Court's Order represents a most serious sanctionable offense.

This behavior by USAA contradicts its position that its conduct does not rise to the same level as any of the cases cited in the motion. Although striking USAA's pleadings are clearly warranted here, USAA fails to suggest how any lesser sanction would deter such conduct in the future. USAA also fails to even acknowledge the unjustified delay its conduct has caused nor the fact that USAA refused to even acknowledge the outstanding discovery until this Motion was filed.

USAA also misconstrues the *Young* factors in the context of this case:

(1) <u>degree of willfulness of offending party</u>

USAA claims its behavior is not willful, yet acknowledges it *still* has not complied with this Court's order because it wanted to file a writ petition. As set forth above, without a stay USAA is willfully ignoring this Court's order. It's failure to even acknowledge this fact supports a finding of willfulness by USAA.

(2) <u>extent to which non-offending party would be prejudiced by lesser sanction</u>

USAA's argument regarding a confidentiality order is an improper straw-man argument. The discovery rules require USAA to file a motion for protective order if it believes documents

should be confidential. The Court gave USAA confidentiality of certain materials, but USAA still has not produced them.

USAA also improperly seeks to limit the scope of relevant evidence to the claims file when the Discovery Commissioner and this Court have already determined the additional items discoverable. Therefore, to say Plaintiff should proceed with depositions with this evidence is simply another attempt to preclude Plaintiff from obtaining and using the evidence previously ordered.

(3) severity of sanction of striking answer relative to severity of discovery abuse

USAA's argument regarding the third factor continues to ignore its failure to timely respond and the fact that it still has not fully complied with the Court's Order. USAA claims that there is no prejudice to Plaintiff. This position ignore the adage: justice delayed is justice denied. Here, USAA continues to ignore this Court's order and that should be met with the most severe sanction available to the Court.

(4) whether any evidence has been irreparably lost

USAA again, improperly tries to limit evidence to the claims file. This Court has already determined there is other potentially relevant evidence that has not been turned over. More importantly, memories of the claims handlers continue to fade while Plaintiff waits for USAA to comply. This damage cannot be undone.

(5) policy favoring adjudication on merits

Given USAA's failure to comply with the Order to file the Petition for Writ without a stay further highlights the similarity in *Foster*: "In light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders." *Foster v. Dingwall*, 227 P.3d 1042 (Nev. 2010).

USAA continues to ignore this Court's order without acknowledging any wrongdoing.

(6) whether dismissal would unfairly operate to penalize party for attorney misconduct

While USAA's counsel attempts to fall on the sword, the Opposition indicates it was USAA that instructed counsel to file a petition for writ rather than complying with this Court's Order.

(7) <u>need to deter parties and future litigants from similar abuses</u>

Again, USAA confuses issues that existed before the Discovery Commissioner with the issue of failing to comply with the Court's order, ignoring Plaintiff's emails to get a resolution and their continued refusal to comply with the Court's order without obtaining a stay. Plaintiff's counsel has several bad faith cases pending against USAA. Allowing USAA to ignore this Court's Order without consequence will only serve to embolden USAA to continue with this type of conduct, which is not surprising given the acts of bad faith it committed against its insured in this and other cases.

IV. CONCLUSION

For the reasons set forth above, the subject motion to strike the defendant's answer, or other just sanctions as the Court determines, for its failure to participate in discovery and the willful disobedience to discovery orders (which is ongoing) and the plaintiff should be awarded attorney's fees and costs against the defendant.

DATED this 9th day of September 2021.

THE SCHNITZER LAW FIRM

By:_____

JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744
9205 West Russell Road, Suite 240
Las Vegas, NV 89148
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September 2021, I served a true and correct copy of the foregoing **REPLY TO OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS** to the above-entitled Court for electronic filing and service upon the Court's Service List to the following counsel.

Robert W. Freeman, Esq.
Priscilla L. O'Briant, Esq.
Jennifer Taylor, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP.
6385 S. Rainbow Blvd., Suite 600
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Attorney for Defendants

An employee of
THE SCHNITZER LAW FIRM

THE SCHNITZER LAW FIRM

EXHIBIT D

EXHIBIT D

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JOHN ROBERTS, Plaintiff, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	CASE NO. A-19-790757-C DEPT NO. IV **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE NADIA KRALL, DISTRICT COURT JUDGE

THURSDAY, SEPTEMBER 16, 2021

TRIAL READINESS

MOTION TO STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN DISCOVERY AND VIOLATION OF DISCOVERY ORDERS

APPEARANCES:

FOR THE PLAINTIFF:	JORDAN P. SCHNITZER, ESQ. (via BlueJeans)
FOR THE DEFENDANT:	PRISCILLA L. O'BRIANT, ESQ. (via BlueJeans)

RECORDED BY: MELISSA BURGENER, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

LAS VEGAS, CLARK COUNTY, NEVADA, SEPTEMBER 16, 2021, 9:36 A.M.

* * * * *

THE CLERK: John Roberts versus United Services Automobile Association.

Appearances, please.

MR. SCHNITZER: Good morning, Your Honor. Jordan Schnitzer for the plaintiff.

THE COURT: Good morning, Mr. Schnitzer.

MS. O'BRIANT: Priscilla O'Briant for defendant.

THE COURT: Good morning Ms. O'Briant.

This is Plaintiff's Motion to Strike the Answer of USAA for Its Refusal to Participate In Discovery and Violation of Discovery Orders.

The Court has read everything. The Court is inclined to deny the motion because in this case, on November 5th of 2019, the defendant produced its entire claim file.

And then two months later, on January -- well, actually a year and two months later, on January 14th of 2021, plaintiff filed a motion to compel. That was filed in January, and that was not officially ruled on until May.

And then in July of this year, plaintiff's counsel sent an e-mail regarding that supplemental discovery which was due in June. And in response the defendant asked for its own discovery in a Rule 35 exam and ignored the issue of the outstanding discovery.

And then on July 14th, this motion was filed.

In September, a stipulation and order to extend discovery was filed.

So plaintiff is alleging that they haven't been able to take the depositions of the adjusters without this information. And defense argues that the discovery was accidentally not responded to because two attorneys in the bad faith team left the firm, and it just wasn't calendared as well. And defendant argues that a Rule 2.34 meet and confer was not done, and therefore this motion shouldn't be heard.

When it comes to a party allegedly not complying with a Court order, as in this case, a Rule 2.34 meet and confer is not required, and that is what we have here.

But what really stems this discovery dispute is that the plaintiff did not want to sign a protective order. Defendant wanted them to, and that was the reason why these documents were not produced. And this is on a writ to the Supreme Court that was filed on August 11th of 2021. So these documents appear that they still have not been produced. So in reality, the order was filed in May. This motion was filed in July.

And the Court believes, based upon the reading of the pleadings that there was good cause to excuse it based upon two attorneys leaving the firm and a missed calendaring, and we still have this issue with a writ on the Supreme Court. So the

Court is inclined to deny the motion.

But, Mr. Schnitzer, this is your motion. Please proceed.

MR. SCHNITZER: Thank you, Your Honor. And I can tell you read everything. So I'll try to address the items you brought up.

The fact that some attorneys left the firm should be of no consequence. Because in this case, the only attorney I've ever dealt with I think until this very hearing was Jennifer Taylor. Jennifer Taylor was the one that I did the meet and confer with on -- just before we filed the motion to compel. Jennifer Taylor was the one who showed up to the hearings on the motion to compel. And so Jennifer Taylor was the one handling all of the discovery.

So I don't know what attorneys she's referencing when she says two attorneys left the firm. I'm not disputing that that's true. I'm saying the only attorney who dealt with discovery in this case with me is still at the firm, and is the one I e-mailed and said, Hey, the Court overruled your objection on the DCRR. It's overdue. Where is it? And rather than even say, hey, some attorneys left, can we have some more time? I would've said fine. Rather than that, she said, hey, can we get an IME of your client.

So this wasn't a situation of, hey, we're not getting anything done in the case because of, you know, these people

leaving. This was -- I think this was done, you know, in a way to advance their case. So that's number one.

Number two, even to this day, they still haven't responded. So after we file our motion to strike, then they file their petition for a writ. So and they don't ask for a stay. And we said the case, the Ninth Circuit case says, absent a stay, a party must promptly comply with the Court order. And failure to do so warrants a finding of contempt.

So this case is not stayed. I'm sitting here. I'm missing nine responses to requests for productions and three responses to interrogatories --

THE COURT: Mr. Schnitzer.

MR. SCHNITZER: -- and without a stay --

THE COURT: Mr. Schnitzer. Mr. Schnitzer. The Court missed one point it wanted to make and so you can address it.

MR. SCHNITZER: Yes.

THE COURT: Is that the Court did note that you had requested attorneys' fees and costs for filing the motion. The Court is inclined to grant that request.

But please proceed.

MR. SCHNITZER: Okay. I appreciate that.

Yeah, and so but in terms of these outstanding written discovery, I can't depose the adjuster. I can't depose the 30(b)(6) without those answers, and they have not sought a stay to protect them from having to respond. And the case law

is very clear. Without a stay, they have to respond.

And time is ticking off on my discovery, and I can't do anything about it. And it's willful. They very blatantly say we're not responding to this because we don't think we're supposed to. And in their briefing they try to reargue the items that they've already lost.

And so that's my issue. As I'm sitting here I can't move forward with discovery. They haven't sought a stay. I don't know what the Court's position would be on that, but they haven't asked for it. I would certainly oppose it, but that's why I think there should be some additional sanctions beyond simply I keep having to bring this, and plaintiff -- since the Court's inclined to grant my fees on it, I won't address that unless the Court changes the Court's mind after hearing from defense counsel.

THE COURT: Thank you, Mr. Schnitzer.

Ms. O'Briant.

MS. O'BRIANT: Yes, Your Honor.

I would just like to point out plaintiff seems to believe we are [video interference] to discovery. That's false. We produced the entire claim file initially. We provided discovery responses. We provided at least four supplements to our initial disclosures. We provided supplemental responses to discovery. We have not responded to several responses which are the basis of our writ. But we've

given them an immense amount of information.

Some of that delay, as you noted, was based on plaintiff's refusal to enter a protective order after the initial ruling by the DCCR and this Court. We supplemented and provided additional information. The only information that has not been provided is the information which is the subject of that writ. If we need to get a motion to stay that discovery, we will. But plaintiff has more than sufficient information to take any of the depositions he wants regarding this claim.

The nature of the disputed discovery is, for example, practices and policies and training on underwriting. There are simply no underwriting issues in this case. And the lack of that information doesn't prevent plaintiff from moving forward with any discovery or a deposition that he wants to.

Additionally, you know, plaintiff argues that he's been dealing with Jennifer Taylor. Jennifer Taylor is a new associate to our firm. She's been here less than one year. USAA is a long-term client of mine, for over 11 years. And when it comes to discovery and company documents, they do want the partner dealing with that.

I have outlined why there were failures in my ability to do that. But that is not anything willful on the act of the company. I just don't think there is any basis for a sanction here. We have definitely proactively responded to discovery, supplemented discovery, produced thousands of pages of

documents.

And, you know, even after this motion, you know, the plaintiff had called and spoke to me. He indicates he was speaking to Jennifer. This motion was never brought up with Jennifer either. But for that I just don't think -- I mean, the plaintiff can talk to anybody rather than filing this motion, the result would have been exactly the same. We would've apologize. We would've explained, and we would have produced the supplementation, which is what we did after this motion. The motion itself was completely unnecessary in my opinion, but I leave the rest to Your Honor, unless you have any specific questions, I'm happy to address.

THE COURT: Ms. O'Briant, this motion was filed on July 14th of 2021. Have you still not responded to the discovery? It's now September 16th. It's been over 60 days.

MS. O'BRIANT: We did supplement, after the motion was filed, our discovery responses. And we did at least two supplemental disclosures after that providing additional documents.

THE COURT: All right. Thank you.

Mr. Schnitzer, any rebuttal?

MR. SCHNITZER: Just a couple things.

So yes, they did provide some of the written discovery answers after we filed it, but the Court knows I shouldn't even have had to file this. They ignored my e-mail.

There's still no -- no one has explained why they ignored my e-mail when I said, hey, what's going on? You owe written discovery. That's number one.

Number two, when I say they keep wanting to reargue the motions, that's exactly what she did here. She said, oh, he can take the deposition because this stuff isn't relevant. Well, that's not true because the Discovery Commissioner has said I'm entitled to the documents. The Court has said I'm entitled to the documents. So they don't get to say, well, no, you can just go forward without it. The Court has already said I'm entitled to it.

So that's my issue is I believe I'm entitled to it. I've already won on those issues pending the writ. And so I need [video interference] discovery, and that's my position. That's why I think I've been prejudiced and why I think more severe sanctions than just attorneys' fees should issue. Thank you.

THE COURT: Thank you.

The Court is going to deny in part and grant in part plaintiff's motion to strike USAA's answer for refusing to participate in discovery in violation of discovery orders.

The Court is going to grant plaintiff's request for attorneys' fees and costs for having to file the motion. USAA and the defense firm of Lewis Brisbois will be jointly and severally liable for the attorneys' fees and costs.

Plaintiff will submit a memorandum of costs and disbursements for that, including the time it took, takes to prepare the memorandum for costs and disbursements.

Secondly, the Court orders that within 10 business days USAA must fully comply with the prior Court order on discovery, any writs or any motions notwithstanding. Any failure to do so will result in further Rule 37 sanctions and a 2.34 conference will not be required for any additional motion that plaintiff is required to file based upon the defense failures -- ongoing failure to fail to respond to discovery.

Mr. Schnitzer, if you can prepare the order and run it by Ms. O'Briant.

MR. SCHNITZER: Will do, Your Honor. Thank you, Your Honor.

THE COURT: Thank you.

MS. O'BRIANT: Your Honor, if I could just clarify. Are we ordered to produce that not -- what I understand is that you're ordering us to produce it notwithstanding our writ, and therefore we cannot file a motion to stay the disputed discovery.

THE COURT: Any motion you filed does not relieve you of your obligation to respond to the discovery. The Court is not going to enjoin you from filing any motion, but you are under an obligation to comply with a Court order.

MS. O'BRIANT: Yes, Your Honor, I understand, but

part of that order is on appeal. So I'm just trying to figure out if you're ordering us to produce the documents that are disputed on the appeal?

THE COURT: Yes. Any writ or any motion not withstanding, you're still required to follow the Court's orders.

MS. O'BRIANT: So if we -- so just to make sure, you're saying that we cannot file a motion to stay in the disputed discovery?

THE COURT: No. The Court said you can file a motion to stay. The Court is not telling you what motions you can and cannot file. You can file any motion. But within 10 business days, no matter what motion is on calendar or what appeal or what writ you file, you still have to comply with the prior Court orders.

MS. O'BRIANT: Okay. Thank you.

THE COURT: Thank you.

(Proceedings concluded at 9:49 a.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Dana L. Williams
Transcriber