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**DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1**

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

John Roberts, Real Party in Interest, is an individual.

Since the inception of the case, Real Party in Interest, has been solely represented by Jordan P. Schnitzer, Esq. of THE SCHNITZER LAW FIRM. There are no administrative agency actions in this case and no other attorneys are expected to appear on Appellant's behalf.

DATED this 27<sup>th</sup> day of September 2021.

*/s/ Jordan P. Schnitzer*  
Jordan P. Schnitzer, Esq.  
*Attorney for Real Party in Interest*

## **I. INTRODUCTION**

This Motion should be denied because USAA failed to initially seek a stay with the District Court and failed to allege that doing so would have been impractical pursuant to NRAP 8(a)(1) and (2). Additionally, the Motion failed to address the four factors set forth in *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).

## **II. LEGAL ARGUMENT**

### **A. USAA FAILED TO MOVE FOR A STAY IN THE DISTRICT COURT**

NRAP 8(a)(1) and (2) required that USAA move for a stay in the District Court prior to requesting a stay from this Court or set forth why doing so would be impracticable. The District Court found that USAA never requested a stay. *See* Exhibit 1 at paragraph 16. As a result, this Motion must be denied.

### **B. USAA DID NOT ADDRESS THE *HANSEN* FACTORS**

Additionally, the Motion should be denied because USAA failed to directly address the *Hansen* factors. In *Hansen*, the Supreme Court held:

In deciding whether to issue a stay, this court generally considers the following factors:

- (1) Whether the object of the appeal or writ petition will be defeated if the stay is denied;
- (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied;
- (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and

(4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

*Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).

In the Motion, USAA does claim it will be irreparably harmed because it would be left without a chance for appellate review of the order. This is simply not true. USAA has not waived its position on the discovery order, which issues can be raised after entry of any final judgment in this matter.

Further, the *Hansen* court noted that having to participate in the “expense of lengthy and time-consuming discovery, trial preparation, and trial... , while potentially substantial, are neither irreparable nor serious.” *Id.* at 986–87 (2000).

Conversely, delaying this matter over a minor discovery dispute will cause harm to Mr. Roberts. As the adage goes, justice delayed is justice denied.

Finally, USAA is not likely to prevail on the merits of the claim. USAA failed to provide this Court with the hearing transcript in front of the Discovery Commissioner, which will clearly show that proportionality was considered in issuing the Report and Recommendations. Even without this transcript, such considerations are evident given the volume of discovery that was not compelled or that was amended by the Discovery Commissioner.

### **III. CONCLUSION**

Based upon the foregoing, this Motion should be denied because of both

procedural and substantive reasons.

DATED this 27<sup>th</sup> day of September, 2021.

THE SCHNITZER LAW FIRM

BY: /s/ Jordan P. Schnitzer

JORDAN P. SCHNITZER, ESQ.

Nevada Bar No. 10744

*Attorney for Real Party in Interest*

*John Roberts*





**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of The Schnitzer Law Firm and on the 27<sup>th</sup> day of September, 2021, a true and correct copy of the above and foregoing REAL PARTY IN INTEREST, JOHN ROBERTS’S, RESPONSE TO EMERGENCY MOTION UNDER NRAP 27(e) was filed electronically and e-served on all registered parties to the Supreme Court’s electronic filing system:

Robert W. Freeman, Esq.  
Priscilla L. O’Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH, LLP  
6385 S. Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
*Attorneys for Petitioner*

The Honorable Nadia Krall  
Eighth Judicial District Court  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89102  
*Respondent*

By:  /s/ Olivia F. Bivens  
An Employee of  
THE SCHNITZER LAW FIRM

# EXHIBIT “1”

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*Attorney for Plaintiff*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JOHN ROBERTS, an individual,  
  
Plaintiff,

Case No.: A-19-790757-C  
  
Dept. No.: IV

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.

**ORDER GRANTING IN PART AND DENYING IN PART, PLAINTIFF'S MOTION TO  
STRIKE THE ANSWER OF USAA FOR ITS REFUSAL TO PARTICIPATE IN  
DISCOVERY AND VIOLATION OF DISCOVERY ORDERS**

Plaintiff's Motion to Strike the Answer of USAA for its Refusal to Participate in  
Discovery and Violation of Discovery Orders having come on regularly for hearing on  
September 16, 2021, at 9:00 am before this Honorable Court, with Jordan P. Schnitzer, Esq.  
appearing on behalf of Plaintiff and Priscilla L. O'Briant, Esq., appearing on behalf of  
Defendant, United Services Automobile Association. The Court having considered the papers  
and pleadings on file herein, the Court being fully advised in the premises and good cause  
appearing therefore, the Court makes the following findings of fact, conclusions of law and  
order:



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1. This is an action claiming damages for breach of contract and bad faith in a 1<sup>st</sup> party insurance claim as a result of a car crash where Plaintiff suffered injuries on May 9, 2014.
2. Plaintiff served written discovery upon USAA.
3. The parties met and conferred but eventually, Plaintiff filed two Motions to Compel on January 14, 2021.
4. 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.
5. That the DCRR required compliance within 30 days of the Order “being signed by the Court.”
6. Defendant objected to the DCRR, which was overruled by this Court on May 12, 2021.
7. As a result, Defendant’s supplemental responses were due on June 11, 2021.
8. 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.
9. Between the date of the Court’s Order and today, Defendant has filed two notices of intent to issue subpoenas.
10. On July 2, 2021, Plaintiff’s counsel sent an email to defense counsel inquiring about the overdue discovery responses.
11. 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.
12. Defense counsel submitted a declaration indicating it had issues responding to the written discovery timely because of staffing issues.
13. Plaintiff’s counsel countered that he had only dealt with Jennifer Taylor, Esq. regarding discovery in this matter and that she was still at the firm, which was not disputed.
14. After the filing of the Motion, Defendant responded to some written discovery, but admittedly did not supplement requests for production numbers 2, 9, 16, 32, 36 and 39 nor did it supplement interrogatories Nos. 12, 13 and 14.
15. Instead, Defendant filing a Petition for Writ of Mandamus related to those items.
16. Defendant did not request nor obtain any stay of the discovery pending resolution of its appeal from either the District Court or Supreme Court prior to or during the hearing.

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- 17. Therefore, while defense counsel appears to have had some staffing issues, the issues were not timely addressed, and defense counsel found the time to attempt to advance its defenses while depriving Plaintiff of his ability to conduct discovery related to the ordered items.
- 18. Even after the staffing issues apparently resolved, Defendant continues to be in willful and intentional non-compliance with this Court’s prior Order affirming the Discovery Commissioner’s Report and Recommendations partially granting Plaintiff’s Motion to Compel.
- 19. 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.
- 20. 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); see also *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").
- 21. 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).
- 22. 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

1 prejudiced by lesser sanction; (3) severity of sanction of dismissal relative to severity of  
2 discovery abuse; (4) whether any evidence has been irreparably lost; (5) policy favoring  
3 adjudication on merits; (6) whether dismissal would unfairly operate to penalize party for  
4 misconduct of his or her attorney; and (7) need to deter parties and future litigants from  
5 similar abuses. *Young v. Johnny Ribiero Building*, 106 Nev. 88 (1990).

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

12 24. After considering the above factors in the context of this case, the Court does not find it  
13 appropriate at this time to strike Defendant’s answer.

14 25. The Court does, however, find it appropriate pursuant to NRCP 37(b)(3) that defendant  
15 UNITED SERVICES AUTOMOBILE ASSOCIATION, and its counsel, LEWIS  
16 BRISBOIS BISGAARD & SMITH, LLP, be jointly and severally liable for Plaintiff’s  
17 reasonable expenses and attorneys’ fees because Defendant’s actions are not substantially  
18 justified.

19 **IT IS THEREFORE ORDERED** that Plaintiff’s Motion is granted in part and denied in  
20 part.

21 **IT IS FURTHER ORDERED** that Defendant, USAA and Lewis Brisbois Bisgaard &  
22 Smith, LLP are jointly and severally liable for sanctions in the form of Plaintiff’s costs and  
23 reasonable attorneys’ fees related to bringing the motion.

24 **IT IS FURTHER ORDERED** Plaintiff is to file a separate memorandum of fees and  
25 costs.

26 **IT IS FURTHER ORDERED** Defendant, USAA must comply with this Court’s prior  
27 Order and produce the entirety of the previously ordered discovery within 10 days of this hearing  
28 (by September 26, 2021) otherwise the Court will consider additional sanctions pursuant to  
NRCP 37.



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**IT IS FURTHER ORDERED** that Plaintiff does not need to meet and confer to file a Motion for Additional Sanctions.

**IT IS SO ORDERED.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2021.

Dated this 27th day of September, 2021

District Court Judge

**E6B 3C9 3DFA 5B6F**  
**Nadia Krall**  
**District Court Judge**

Respectfully Submitted by:

THE SCHNITZER LAW FIRM

BY: \_\_\_\_\_  
Jordan P. Schnitzer, Esq.  
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*Attorney for Plaintiff*

Approved as to form and content:

LEWIS BRISBOIS BISGAARD & SMITH, LLP.

BY: \_\_\_\_\_  
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*Attorney for Defendant*



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1 **CSERV**

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3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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6 John Roberts, Plaintiff(s)

CASE NO: A-19-790757-C

7 vs.

DEPT. NO. Department 4

8 United Services Automobile  
9 Association, Defendant(s)

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11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order was served via the court's electronic eFile system to all  
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 9/27/2021

15 Priscilla O'Briant priscilla.obriant@lewisbrisbois.com

16 Anne Cordell anne.cordell@lewisbrisbois.com

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