

Exhibit “Y”

RADFORD J. SMITH, CHARTERED

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FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Norton Roitman, M.D.	Lauren Lynch For Danielle Taylor, Esq.
COMPANY:	DATE:
	February 15, 2012
PHONE NUMBER:	FAX NUMBER:
702-222-1812	702-222-1786
RE:	CASE NUMBER:
Harrison v. Harrison	D-11-443611-D
TOTAL NO. OF PAGES INCLUDING COVER:	
2	

☐ URGENT ☒ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

DOCUMENT(S) ATTACHED:

Pursuant to the instructions of Danielle Taylor, Esq., please find enclosed correspondence dated today, February 15, 2012.

RADFORD J. SMITH, ESQ.
DANIELLE TAYLOR, ESQ.
JOLENE HOEFT, PARALEGAL

SMITH & TAYLOR

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February 15, 2012

VIA FACSIMILE

Norton Roitman, M.D.
2340 Paseo Del Prado, Suite D-307
Las Vegas, Nevada 89102

Re: Harrison v. Harrison

Dear Dr. Roitman:

On January 31, 2012, we served your office with a Subpoena Duces Tecum relative to the above matter. The Subpoena was directed to your Custodian of Records and required the production of documents detailed therein. Pursuant to the Subpoena, in order to avoid a formal deposition, you were required to produce those documents on or before February 10, 2012. If you did not do so, your Custodian of Records was required to appear at the deposition on February 15, 2012, at 10:00 a.m. Neither of these acts occurred.

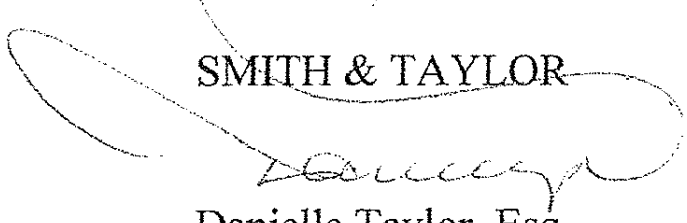
When my assistant contacted your office, your assistant, Linda, indicated that you had produced the documents to Mr. Kainen (Mr. Harrison's attorney), and that we should obtain the records from him. Mr. Kainen confirmed that he received a disc from you, but has been unable to access it. The purpose of the Subpoena was to obtain the records directly from you. You are under a legal obligation to comply with the Subpoena, which obligation is detailed in the copy of NRCP 45 attached to the Subpoena. Failure to comply may subject you to a finding of contempt.

Please consider this letter our demand that you produce the requested records on or before 5:00 p.m., on February 17, 2012. If you fail to do so, we will file a Motion seeking to have you held in contempt of court and will request the Court impose all applicable penalties against you.

I appreciate your prompt attention to this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

SMITH & TAYLOR


Danielle Taylor, Esq.

DT/mds

cc. Vivian Harrison
Gary Silverman, Esq.
Edward L. Kainen, Esq.
Thomas Standish, Esq.

Send Result Report

MFP

TASKalfa 500ci

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Complete

Document: doc20120215151640

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FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Norton Roitman, M.D.	Lauren Lynch
	For Danielle Taylor, Esq.
COMPANY:	DATE:
	February 15, 2012
PHONE NUMBER:	FAX NUMBER:

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
001	02/15/12 15:17	2221786	0°00'22"	FAX	OK	200x100 Normal/On

Exhibit “Z”

1 A. And then -- and then --

2 Q. So sometime prior to May 2011 you decided to
3 utilize Dr. Roitman as an expert in your divorce
4 action; correct?

5 A. I prepared for that contingency.

6 Q. Okay. And in doing so, you prepared a
7 43-page draft document that you provided to
8 Dr. Roitman; correct?

9 A. What -- I don't know what you're talking
10 about.

11 Q. There was a table of contents in
12 Dr. Roitman's materials. Do you recall that testimony
13 by Dr. Roitman?

14 A. Yes.

15 Q. And he indicated that he didn't have any
16 specific recollection, but upon further examination he
17 said he probably did receive a document from you that
18 corresponded to the pages contained in that outline.

19 A. Right. Right.

20 Q. Did you prepare such a document?

21 A. Yes.

22 Q. Do you have a copy of that document?

23 A. I don't believe I do.

24 Q. What did you do with it?

25 A. Probably threw it away.

Exhibit “AA”

1 ob -- observations on my own, that all collateral
2 information came from written documents anyway. The
3 only thing that I would do is see whether, in my
4 well-reasoned opinion, it fit the criteria. And since
5 I was the one who originated the diagnostic
6 hypothesis, to me this is not a very difficult task.

7 I was the one who suppose there was the
8 diagnosis. Mr. Harrison gave me evidence that he
9 gathered to support that diagnosis. Of course, he
10 thought there was that diagnosis. He did research on
11 it. He -- he read books on it. He gave me materials
12 on it.

13 Did I continue to see this diagnosis present
14 based on what I had? The answer is yes. Even if
15 there was another source document, it's not as though
16 he paid me for an opinion. This is my own opinion.

17 MR. SMITH: Those are your words, not mine.
18 My only question was whether or not you actually now
19 recall, based upon reviewing this information --

20 THE WITNESS: Yeah.

21 MR. SMITH: Do you now recall that you
22 actually did see another document, a document, for
23 example, that corresponded with the Table of Contents
24 that is Exhibit G?

25 THE WITNESS: The reason I can't say no is

1 because the quotes from Kernber in my report were
2 presented to me.

3 MR. SMITH: Okay.

4 THE WITNESS: And so the probably came from
5 another source document.

6 MR. SMITH: That's true, the quotes form
7 Ronningstam, correct?

8 THE WITNESS: Yes.

9 MR. SMITH: They were presented to you as
10 well?

11 THE WITNESS: Yeah.

12 MR. SMITH: So --

13 THE WITNESS: But I -- in all honesty, I can't
14 remember if I had that document in my hand or not.

15 MR. SMITH: Okay. But you do now recall
16 perhaps receiving such a document?

17 THE WITNESS: Yeah.

18 MR. SMITH: All right. And in regard to the
19 research that you did that's set forth in your report,
20 what portion, if you could point out to me, was the
21 portion that you actually researched versus what was
22 presented to you through research that was done by
23 Mr. Harrison?

24 THE WITNESS: I did several hours of research
25 to validate -- everything that I wrote I have to stand

1 MR. SMITH: No. Thank you, Doctor. You're
2 exact right. Page 23 is where the conclusions are.

3 THE WITNESS: Yes.

4 BY MR. SILVERMAN:

5 Q. And at Page 38 where in the conclusion it says
6 she has a narcissistic -- she's narcissistic, right?

7 A. I just don't see that use of that word there.
8 The narcissistic feeding?

9 Q. Yeah.

10 A. It's a minor disagreement with you. It just
11 describes a process.

12 Q. Oh, all right. So, we have three affidavits,
13 father daughters -- father and two daughters, and a
14 draft motion?

15 A. Uh-huh.

16 Q. The draft motion concludes my client is
17 narcissistic, pathol -- pathologically narcissistic
18 personality disorder, correct?

19 A. Yes.

20 Q. And then a month later you issue a report
21 saying that -- that my client's -- has a
22 pathologically narcissistic personality disorder?

23 A. Yes.

24 Q. Okay. Can you explain that?

25 A. Well, Mr. Harrison came to me with a bunch of

1 information and says, is there something wrong with my
2 wife? What is it? I said, I think she's probably --
3 has a narcissistic personality disorder. He does some
4 research, prepares a draft motion.

5 Q. When did he come to you with that information?

6 A. That she -- on the 5th of May.

7 Q. Oh, okay. Go ahead.

8 A. So, I -- I said I think this is what's wrong
9 with her. He comes back and writes a motion and asked
10 me to write a report. I've already pretty much
11 reached a -- I proposed that that might be true. And
12 then when I read through the material, I was
13 convinced.

14 Q. And this is again in May of 2011?

15 A. Yes.

16 Q. Okay. So, give me the chronology.

17 A. Consultation in 2010.

18 Q. Right.

19 A. Results of the consultation, I instructed him
20 to look in this area, because that's what I thought
21 was wrong.

22 Q. To look at Kernberg?

23 A. He looked at more than Kernberg, came back,
24 presented --

25 Q. How do you know that?

1 A. He told me.

2 Q. When? When he came back in 2011?

3 A. Yeah.

4 Q. Okay. Go ahead.

5 A. He presented me these materials and asked if I
6 would prepare a report with my findings based on this
7 information.

8 Q. And you did?

9 A. Yes.

10 Q. Within how long?

11 A. The date of my report was June 9th.

12 Q. June 9th.

13 A. Uh-huh.

14 Q. So, a month?

15 A. Uh-huh.

16 Q. Did you refer to the motion when you drafted
17 your report?

18 A. Yes.

19 Q. Did you adopt, incorporate, copy any parts of
20 the motion?

21 A. I think so.

22 Q. Okay. What and how much? What?

23 A. I incorporated it as a foundation. It's --
24 really the history through Mr. Harrison was the only
25 foundation that I have --

Exhibit “KK”

HARRISON V. HARRISON				
D-11-443611-D				
SUMMARY OF VIVIAN'S RESPONSE TO KIRK'S ALLEGATIONS				
That Vivian has "abandoned" the parties' two minor children				
Brief summary of statements	Statements in support of Vivian's response	Supporting Evidence	Page Reference	
Kirk worked long hours for the 14 years of the parties' marriage. Vivian raised the parties children. The three older children are accomplished adults. Vivian drove the children to various classes, and activities. She did all of the children's laundry, read to the children in the night, helped the children get ready for school, did the children's homework, volunteered in children's school, prepared dinners, took the children to their doctor's appointments, entertained the children's friends at home, did groceries, did crafts, did school projects etc. Vivian had always been, and continued to be, more actively involved in the minor children's lives than Kirk. She requested that the Court interview the children to state their preference. Vivian provided affidavits and declarations of several individuals who testified to Vivian's role and involvement in the children's upbringing.	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	(1) Pages 24-28, paragraphs 70-77 (2) Pages 40 -52; paragraph 105-135 (3) Page 70-75; Paragraph 194-202	
The parties' child, Rylee and Ms. Walker's daughter, Anna took ballet classes together. Ms. Walker testified regarding Vivian's role as a wonderful and attentive mother.	Affidavits of Michele Walker	Exhibit "B" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Paragraphs 7, 9, 13, 14, 16-23, 27-29	
Ms. Roberts' family and the Harrisons were close friends. They spent various festivals together. Ms. Roberts' testified regarding Vivian's active involvement with the children.	Affidavits of Nyla Roberts	Exhibit "C" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 7, Paragraphs 17-23	
Ms. Bailey and Vivian are good friends. Ms. Bailey testified regarding Vivian attending the sewing classes with the parties' two minor children. She testified regarding Vivian giving good advice to her children, and trying to fix their problems. She testified that the parties minor children, seemed happy, well-adjusted and closely bonded with Vivian.	Affidavits of Kim Bailey	Exhibit "D" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 1, paragraphs 2-18	
Ms. Mayer testified regarding Vivian's active involvement in the children's schools	Affidavit of Annette Mayer	Exhibit "E" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 1, Paragraphs 2-3	
Ms. Atkinson testified regarding her children and the parties' children playing soccer together, and regarding Vivian's role as a parent who was engaged in bringing the children to games, etc. She also testified regarding Vivian's involvement in the children's schools, scheduling trips with the children, etc.	Affidavit of Heather Atkinson	Exhibit "F" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 1-6, Paragraphs 4-23, page 7, paragraph 26	
Ms. Castelan was the parties housekeeper for several years. She testified regarding Vivian's active involvement with the children. Ms. Castelan stated that the bulk of child involvement was borne by Vivian.	Affidavit of Lizbeth Castelan	Exhibit "G" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Pages 1-2	

Kirk claimed that Ms. Castelan must not have “understood” what she was signing. Mr. Tobler translated the interview and affidavit for Ms. Castelan.	Affidavit of Brock Tobler	Exhibit “P” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Wendy testified that from 2005-2012, Vivian attended games, dance recitals, rehearsals, and birthday parties, traveled to Disneyland, and took the girls Trick-or-Treating. Vivian is “present” and involved.	Declaration of Kellie Wendy	Exhibit “Q” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Mojica testified that Vivian brought Rylee to gymnastics and stayed to watch. Vivian was “involved and enthusiastic.”	Declaration of Melissa Mojica	Exhibit “R” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Castersen testified that Vivian did majority of driving and waiting for holiday event across town; Vivian assisted and volunteered at school. “Deeply involved in [the children’s] wants and was very attuned to their needs.”	Declaration of Brandi Carstensen	Exhibit “S” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Kanaley testified that Vivian was co-parent in Rylee’s classroom. Vivian responded to every parent request, contributed to and participated in classroom parties and events. Vivian is “intimately knowledgeable about their activities, hopes and desires.”	Declaration of Noel Kanaley	Exhibit “T” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Klouse testified that Vivian alone was “concerned for their advancement in swimming, who initiated the call and then arranged for private swim lessons”; Vivian was “engaged and absorbed in the children. She knew their habits and needs and she knew how to deal with them in constructive ways. She was interested in them. She was genuinely interested in their activities.”	Declaration of Lois Klouse	Exhibit “U” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Gray testified that “Vivian was engaged and absorbed in Rylee’s life”; Vivian participated in Rylee’s activities.	Declaration of Kelley Gray	Exhibit “V” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Larson testified that “I emphatically state that I never understood I was signing a document which inferred I was ‘in support of’ primary custody and exclusive possession of their residence for Kirk Harrison . . . I do not claim that Vivian never drove the children to school or activities.” Vivian is a “caring, involved and supportive mother.”	Declaration of Laurie Larson	Exhibit “W” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012
Ms. Fectau was Rylee’s teacher. She testified that Vivian has participated in a variety of school events and is “an interested, caring and energetic volunteer.”	Declaration of Azure Fectau	Exhibit “X” to Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Counter motions for Exclusive Possession, etc. filed on January 27, 2012

Ms. Poindexter testified that in 2008, "Vivian was focused on Rylee and her swimming efforts." She testified that from 2010 -2011, she "recall seeing Vivian drop off and pick up from school from time to time[.] I have seen her assisting at the school. It appears to me that Vivian and Rylee have a very strong mother-daughter relationship."	Declaration of Gretchen Poindexter	Exhibit "Y" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012	
Ms. Broadbent testified that in 2008/2009, "I am certain I routinely saw Rylee and her mother and my grandchildren at soccer games in those years."	Declaration of Sue Broadbent	Exhibit "Z" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012	
Ms. Coleman testified that from 2007 through 2010, Vivian was actively involved in children's school.	Declaration of Tina Coleman	Exhibit "AA" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012	
Vivian lists the activities the parties shared between 2004 through 2012; however, the vast majority of the activities she did with the children, she did without Kirk's parental assistance -- including special activities and trips, school projects she did with the girls, her school-related volunteer work, the children's music lessons, dance classes, birthday parties, doctor appointments, holiday celebrations, and the miscellaneous other day-to-day "stuff" the children needed (hairecuts, clothes shopping, etc.)	List of activities	Exhibit "BB" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012	
List of major vacations and other trips that Vivian has planned and booked for the family -- including many for which Kirk chose not to accompany the family.	List of vacations	Exhibit "CC" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012	
The children's report cards demonstrate that the children are doing exceptionally well in school.	Children's Report Cards	Exhibits "DD" and "EE" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012	
Ms. Krumm testified regarding Vivian's interactions with, and care of, Brooke and Rylee	Declaration of Lorene Krumm	Supplemental Sworn Declarations in Support of Reply to Counter motion filed on January 31, 2012	
Ms. Morris testified regarding Vivian's work at children's school and with the PAC, as well as involvement with the girls' dance	Declaration of Lisa Morris	Supplemental Sworn Declarations in Support of Reply to Counter motion filed on January 31, 2012	
Ms. Wachtel testified regarding Vivian's involvement with Brooke and Rylee between 2007 to 2012	Declaration of Sandy Wachtel	Supplemental Sworn Declarations in Support of Reply to Counter motion filed on January 31, 2012	

THAT VIVIAN HAS MENTAL HEALTH ISSUES			
Brief summary of statements	Statements in support of Vivian's response	Supporting Evidence	Page Reference
Narcissistic Personality Disorder			
Dr. Ole Thienhaus, a psychiatrist and Chair of the University of Nevada Medical School Department of Psychiatry and Behavioral Sciences, met, interviewed and tested Vivian and concluded that Vivian suffers no personality disorder whatsoever after he read the entirety of Kirk's Motion and attached affidavits.	Dr. Ole J. Thienhaus's Report dated August 13, 2011	Exhibit "A-9" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	
	Dr. Ole J. Thienhaus's Report dated September 24, 2011	Exhibit "A-10" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	
	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 52-55; Paragraphs 136-146
Dr. Thienhaus' updated reports address the analysis and criticism of his report contained in Kirk's Opposition, and Dr. Thienhaus's review of Vivian's healthcare records upon which Kirk bases that criticism. In both reports, Dr. Thienhaus confirms his findings that Vivian suffers from no mental health disorder.	Report of Dr. Ole Thienhaus dated January 9, 2012	Exhibit "L" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counterarguments for Exclusive Possession, etc. filed on January 27, 2012	
Dr. Paul S. Applebaum is a board-certified psychiatrist and forensic psychiatrist with more than 31 years of clinical experience. He is a graduate of the Harvard School of Medicine, is currently the Elizabeth K. Dollard Professor of Psychiatry and Medicine at Columbia University, and the past president of the American Psychiatric Association and of the American Academy of Psychiatry and the Law. He is internationally recognized as a leading expert on Psychiatry and the Law. Prior to meeting with him, Vivian supplied Dr. Applebaum with Kirk's Motion and her Opposition with all exhibits. Upon receipt of Kirk's Reply to Defendant's Opposition on January 4, 2011, she provided that document, with exhibits, to him as well. Dr. Applebaum, after review of the pleadings and interview of Vivian, finds, in sum, that Vivian does not suffer from any personality disorder.	Report of Dr. Paul S. Applebaum dated January 15, 2012	Exhibit "I" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counterarguments for Exclusive Possession, etc. filed on January 27, 2012	


Dr. Elsa Ronningstam is an associate professor of psychology at Harvard Medical School. She is one of the world's foremost experts in the study, diagnosis, and treatment of Narcissistic Personality Disorder. Her books and articles on the subject are commonly referenced in works in the field, a fact confirmed by Dr. Roitman's reference to and citation of her book <i>Identifying and Understanding the Narcissistic Personality</i> (Oxford University Press, 2005) in his report. Vivian met with Dr. Ronningstam on January 6, 2012. Vivian, through counsel, provided Dr. Ronningstam with a copy of Kirk's Motion, Vivian's Opposition and Countertermotion, and Kirk's Reply and Opposition to Countertermotion as well as all of Vivian's healthcare records. At the conclusion of her report, Dr. Ronningstam states: "In sum, Mrs. Harrison does not demonstrate an enduring stable and long-term pattern of inflexible and pervasive inner experience and behavior that would qualify for a personality disorder, and in particular, she does not meet the criteria for a diagnosis of Narcissistic Personality Disorder."	Report of Dr. Elsa Ronningstam dated January 26, 2012	Exhibit "J" to Defendant's Reply to Plaintiff's Opposition to Defendant's Countertermotions for Exclusive Possession, etc. filed on January 27, 2012	
An obsession with Jonathan Rhys Meyers, an Irish actor/An Obsession with Sergio Becerra/Vivian's role in the Hope Foundation			
Vivian had never met the actor, nor had she attempted to do so. This claim arose out of her work for the Hope Foundation, a charitable organization whose mission is to aid poor children in India and her efforts to successfully open an office of that Foundation in the United States. The true facts (as opposed to Kirk's jealous rants), demonstrated that she cared deeply about her commitment to the work of the Hope Foundation, not an actor.	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 55-59; Paragraphs 147-162
Kirk had suggested that Vivian's care of the children has been sacrificed in favor of other, self-interested pursuits. Kirk alleges that among those pursuits are (1) Vivian's delusional pursuit of an actor, Jonathan Rhys Meyers and (2) Vivian's romantic pursuit of and dismissal by Sergio Becerra. Neither was true. Both were related, albeit remotely, to the Hope Foundation.	Hope Foundation Website	Exhibit "FF" to Defendant's Reply to Plaintiff's Opposition to Defendant's Countertermotions for Exclusive Possession, etc. filed on January 27, 2012	
Ms. Martin explained in significant detail the mission of the Hope Foundation, as well as Vivian's work within the organization.	Declaration of Teena Gates Martin	Exhibit "JJ" to Defendant's Reply to Plaintiff's Opposition to Defendant's Countertermotions for Exclusive Possession, etc. filed on January 27, 2012	

Perhaps because of the lack of connection between Jonathan Rhys Meyers and the Hope Foundation, Kirk changed his tack in his Reply or, more appropriately, changes Vivian's "target" to someone with whom she has had contact – Sergio Becerra. In his Motion, he repeatedly claims Vivian underwent cosmetic procedures to "prepare herself" to meet Jonathan Rhys Meyers; in his Reply, he changes his statements, alleging Vivian was doing it to impress Sergio Becerra. Similarly, he alleges in his Motion that Vivian purchased expensive clothing to impress and relate to Jonathan Rhys Meyers, but in his Reply, he claims this clothing was to "catch" Mr. Becerra. Mr. Becerra testified that, "If it is claimed that Vivian was "pursuing" me, I neither saw nor heard any behavior which indicated that. I never felt she was "pursuing" or "chasing" me. I think I would know it if she were . . . Vivian is a nice person who is a friend and who would visit from time to time when she was in Ireland. I do not feel she ever tried to pursue me or that I was an object of her desire or affection."	Declaration of Sergio Becerra	Exhibit "OO" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012	
Ms. Thomas testified regarding work performed by Vivian in Ireland and for the Hope Foundation	Declaration of Rosaleen Thomas	Supplemental Sworn Declarations in Support of Reply to Counter motion filed on January 31, 2012	
Ms. Zorrilla testified regarding the activities and accommodations of the parites' during Vivian's trip to Calcutta	Declaration of Tania Zorrilla, Jr.	Supplemental Sworn Declarations in Support of Reply to Counter motion filed on January 31, 2012	
An obsession with cosmetic surgery			
The procedures that Kirk described as cosmetic were medical in part. Further, Vivian's cosmetic procedures are the type commonly undergone by women of her age. Indeed, there is even a name for it: "the mommy makeover."	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 59-64; Paragraphs 163-175
Mental or physical defects due to prolonged drug use (Phentermine and Other Drugs)			
There was no evidence to suggest that Vivian suffered from any mental or physical defect. Moreover, the drug upon which Kirk based his claim, the commonly prescribed "diet pill" Phentermine, was prescribed by physicians who closely monitored Vivian's use. There is and never had been anything to suggest that Vivian has suffered any mental or physical side effects of the drug. Vivian tested negative for all drugs of any kind, including Phentermine. The other medicines Kirk attributes to Vivian's use were medications prescribed to Vivian at the time of surgeries, or as part of therapies, but then rarely, if ever, actually used by her.	Drug screen panel dated October 5, 2011	Exhibit "A-13" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	
	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 64-68; Paragraphs 176-189
Dr. Hendricks is a leading physician whose practice focuses on obesity medicine and obesity pharmacotherapy. Dr. Hendricks has particular expertise in the use of phentermine in treating obesity. Dr. Hendricks prepared a report that he provided to Dr. Paglini who did a full custody assessment in this case. Dr. Hendricks report, in summary, stated that there is no evidence to suggest that Phentermine is addictive medication and therefore, Vivian could not have been addicted to Phentermine and neither Phentermine nor any other anti-obesity drug could have affected her mental health. Prior to settling the case wherein the parites' agreed to joint legal and joint physical custody of the children, Kirk directed Dr. Paglini to not prepare his report.	Report by Dr. Ed Hendricks dated June 1, 2012		

Unhealthy reliance on a “psychic” for important life decisions				
On four occasions in her lifetime, Vivian has spoken to a “spiritual counselor” who has a syndicated radio show. Her discussions with that individual were not for any serious guidance, but instead primarily for amusement.	Affidavit of Vivian Harrison	Exhibit “A” to Defendant’s Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 69; Paragraphs 190-191	
THAT VIVIAN HAS MENTALLY AND PHYSICALLY HARMED THE MINOR CHILDREN BY ...				
<i>Brief</i> summary of statements	Statements in support of Vivian’s response	Supporting Evidence	Page Reference	
Inappropriate prenatal care of Rylee				
Kirk’s claimed that Vivian, by drinking one or two tablespoons of castor oil to address constipation prior to Rylee’s birth, caused some sort of problem to Rylee. Vivian responded that the only thing unusual about Rylee’s birth is that she appeared face first, rather than head first, but there was nothing to suggest that this was a result of castor oil. Moreover, Rylee has no physical defects.	Affidavit of Vivian Harrison	Exhibit “A” to Defendant’s Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 69-70; Paragraph 192	
Sleeping and cuddling with the children				
Kirk ignored that Brooke slept with <i>him</i> for approximately a year from 2009-2010, but claimed that Vivian sleeping with the children amounts to “emotional abuse.” Vivian had not slept with the children since May 2011, and there was no indication that the children have been negatively affected at all by Vivian sleeping with them. Kirk pointed to every little upset the children have had as “proof” that the children are being harmed, but he was unable to make any actual connection between those normal childhood upsets, Vivian sleeping with the children, and any real emotional problems. In truth, the primary effect of Vivian reading stories to the girls at night before bedtime and falling asleep is that both girls could read before starting kindergarten.	Affidavit of Vivian Harrison	Exhibit “A” to Defendant’s Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 75-79; Paragraph 203-210	
Dr. James. J. McKenna is a leading biological anthropologist with an established record of research in the area of co-sleeping between parents and their children. He provided a report to Dr. Paglini informing him that there was no scientific basis to suggest that sleeping with ones children may cause any psychological or emotional harm to the child. Dr McKenna reported that especially within any given family if the children exhibit adaptive and healthy daily functionings and are able to articulate their own enjoyment of or satisfaction with their sleeping circumstances, verified by any reasonable encounters with those children, and if their teachers verify successful engagements and performance in and at school then it can be assumed that the bedsharing rather than in any way changing the kind of support the children receive during the day, is only reinforced at night, in this context, arguing against the possibility that this is in any way harmful to the children. Prior to settling the case wherein the parousue me or that I was an object of her desire or affection."sorder."r would be at UNLV. We had a very good relationship.	Report by Dr. James J. McKenna dated May 29, 2012			

Kirk's claimed that Vivian knew or should have known the testosterone cream prescribed to her could be transferred to Rylee is false. Vivian had no reason to know this, as the packaging did not contain any warnings and her prescribing doctor did not warn her. Her prescribing doctor, Dr. Jeffrey Life confirmed that he did not provide any warning of the danger of transfer to Vivian. Immediately upon learning that Rylee may have been affected, <u>Vivian</u> took action to have Rylee evaluated and to change her prescription. Rylee's hormone levels were later normal. While Kirk focused on this incident, he failed to either recognize or acknowledge that Rylee's doctor was <i>more</i> concerned that the meals Kirk prepared for Rylee were generally highly-processed, high-calorie, and high-fat – something Vivian had been trying to convince Kirk to change.	Affidavit of Jeffrey Life	Exhibit "H" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	
	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 78-81; Paragraph 211-219
Recklessly or negligently transferring testosterone to Rylee			
In regard to his allegation that Rylee was injured when falling out of bed due to Vivian's presence in the bed, Brooke was present that night and will state that Vivian was not in the children's bed at all when Rylee fell out of it. Indeed, as set forth in the affidavit Vivian filed with her Counter-motion, Brooke specifically told Kirk that Vivian was not in the bed at the time of the incident, but Kirk has chosen to ignore that fact.			
A comprehensive 2010 study published in Pediatrics, a highly respected journal of the American Academy of Pediatrics, addressing the onset of puberty by a standard measurement of breast development in girls ages 6 to 8 years old found that 10.4% of white girls in the study had breast development. This figure was a dramatic increase in the percentage of girls tested in a 1997 study	<i>Pubertal Assessment Method and Baseline Characteristics in a Mixed Longitudinal Study of Girls</i> , Pediatrics (August 9, 2010)	Exhibit "N" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter-motions for Exclusive Possession, etc. filed on January 27, 2012	
WebMD Article describing the results of the study Pubertal Assessment Method and Baseline Characteristics in a Mixed Longitudinal Study of Girls	Article from WebMD	Exhibit "O" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter-motions for Exclusive Possession, etc. filed on January 27, 2012	
The manual is extensively researched, and contains citations to numerous studies. One the studies cited, at page 6 of the manual, demonstrated that study patients were treated safely for more than 10 years of continuous use with phentermine.	The American Society of Bariatric Physicians treatment guidelines titled "Overweight and Obesity Evaluation and Management.	Exhibit "L" to Defendant's Reply to Plaintiff's Opposition to Defendant's Counter-motions for Exclusive Possession, etc. filed on January 27, 2012	
RESPONSE TO TAHNEE AND WHITNEY'S AFFIDAVITS			
Brief summary of statements	Statements in support of Vivian's response	Supporting Evidence	Page Reference

Vivian's relationship with Tahnee and that Tahnee left the house due to an argument she had with Vivian.	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Pages 31-33; Paragraph 84-87
Allegations by the daughters that Vivian had harmed Brooke and Rylee by sleeping with them	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Page 76, Paragraph 208
KIRK'S CLAIMS OF DOMESTIC VIOLENCE			
Brief summary of statements	Statements in support of Vivian's response	Supporting Evidence	Page Reference
Kirk attempts to establish a history of domestic violence by Vivian ostensibly to give rise to the presumption that she should not have joint or primary physical custody of the children. Vivian has also cited domestic violence by Kirk arising from the incident of October 14, 2011.	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Pages 31-33; Paragraph 84-87
	Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012		Pages 13-17
VIVIAN'S REQUEST FOR EXCLUSIVE POSSESSION OF THE MARITAL RESIDENCE/FUNDS TO MEET EXPENSES			
Brief summary of statements	Statements in support of Vivian's response	Supporting Evidence	Page Reference
Vivian requested that she be awarded the exclusive possession of the marital residence based upon the fact that she had lived in Boulder City for many years, and did not intend to live anywhere else. She was active in the children's school which was close the home. Several neighbors had provided affidavits in support of Vivian's positions while Kirk had disparaged several neighbors in his pleadings. She also sought distribution of funds to meet her expenses, attorney's fees and expert's fees	Affidavit of Vivian Harrison	Exhibit "A" to Defendant's Opposition to Motion for Joint Legal Custody, etc., filed on September 14, 2011	Pages 81-84; Paragraphs 220-226
	Defendant's Reply to Plaintiff's Opposition to Defendant's Counter motions for Exclusive Possession, etc. filed on January 27, 2012		Pages 34-35


CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

KIRK ROSS HARRISON,

Plaintiff,

v.

VIVIAN MARIE LEE HARRISON,

Defendant.

CASE NO. D-11-443611-D
DEPT NO. Q

NOTICE OF ENTRY OF
FINDINGS, CONCLUSIONS AND ORDERS

TO: ALL PARTIES AND/OR THEIR ATTORNEYS

Please take notice that an Order From Hearing has been entered in the above-entitled matter. I hereby certify that on the above file stamped date, I caused a copy of the Findings, Conclusions and Orders and this Notice of Entry of Findings, Conclusions and Orders to be:

☒ Placed in the folder(s) located in the Clerk's Office of the following attorneys:

Edward Kainen, Esq.

Thomas Standish, Esq.

Radford J. Smith, Esq.

YCE G. DUCKWORTH
DISTRICT JUDGE

MILY DIVISION, DEPT. Q
S VEGAS, NEVADA 89101

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☒ Mailed postage prepaid, addressed to the following attorney:

Gary Silverman, Esq.
6140 Plumas St., #200
Reno, NV 89519

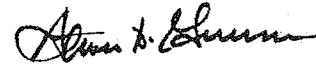
Kimberly Weiss

Kimberly Weiss
Judicial Executive Assistant
Department Q

YCE G. DUCKWORTH
DISTRICT JUDGE
MILY DIVISION, DEPT. Q
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CLERK OF THE COURT

DISTRICT COURT

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6 CLARK COUNTY, NEVADA

7 KIRK ROSS HARRISON,)

8 Plaintiff,)

9 v.)

CASE NO. D-11-443611-D

DEPT NO. Q

10 VIVIAN MARIE LEE HARRISON,)

11 Defendant.)
12)
13)

14 FINDINGS, CONCLUSIONS AND ORDERS

15 This matter came before this Court on the following papers that were reviewed
16 and considered by this Court:¹

- 17 (1) Defendant's Motion for Attorney's Fees and Sanctions (Apr. 3, 2013)
18 (hereinafter referred to as "Vivian's Motion") (37 pages in length, exclusive
19 of exhibits);
- 20 (2) Plaintiff's Opposition to Defendant's Motion for Attorneys' Fees and
21 Sanctions; Plaintiff's Request for Reasonable Discovery and Evidentiary
22 Hearing; Plaintiff's Countermotion for Equitable Relief; Plaintiff's

23 ¹Defendant also filed a Motion for an Order Appointing a Parenting Coordinator and
24 Therapist for the Minor Children as Required by the Court Ordered Parenting Plan; Motion for
25 Sanctions and Attorneys' Fees (May 10, 2013). Plaintiff also filed a Motion to Enter Decree
26 of Divorce (May 13, 2013). Additional papers were filed with respect to these two Motions.
27 (There was, however, no opposition filed in response to Plaintiff's Motion to Enter Decree of
28 Divorce (May 13, 2013)). With the exception of each party's request for attorney's fees
associated with these motions, the issues raised therein have been resolved by this Court by way
of the entry of the Decree of Divorce (Oct. 31, 2013), the Order Re: Appointment of Therapist
(Oct. 29, 2013), and the Order for Appointment of Parenting Coordinator (Oct. 29, 2013). As
such, these issues are not addressed herein.

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3 VEGAS, NEVADA 89101

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2 Countermotion for Attorneys' Fees and Sanctions; Plaintiff's
3 Countermotion for Declaratory Relief (May 28, 2013) (hereinafter referred
4 to as "Kirk's Opposition and Counterterms") (133 pages in length,
5 exclusive of exhibits);

6 (3) Exhibits to Plaintiff's Opposition to Defendant's Motion for Attorneys'
7 Fees and Sanctions; Plaintiff's Request for Reasonable Discovery and
8 Evidentiary Hearing; Plaintiff's Countermotion for Equitable Relief;
9 Plaintiff's Countermotion for Attorneys' Fees and Sanctions; and Plaintiff's
10 Countermotion for Declaratory Relief (May 28, 2013) (804 pages in
11 length);

12 (4) Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for
13 Attorneys' Fees and Sanctions; and Opposition to Plaintiff's Request for
14 Discovery and Evidentiary Hearing; Plaintiff's Countermotion for
15 Equitable Relief; Plaintiff's Countermotion for Attorneys' Fees and
16 Sanctions; Plaintiff's Countermotion for Declaratory Relief (May 31,
17 2013) (5 pages in length);

18 (5) Plaintiff's Reply to Defendant's Opposition to Plaintiff's Request for
19 Discovery and Evidentiary Hearing; Plaintiff's Countermotion for
20 Equitable Relief; Plaintiff's Countermotion for Attorneys' Fees and
21 Sanctions; Plaintiff's Countermotion for Declaratory Relief (June 3, 2013)
22 (hereinafter referred to as "Kirk's Reply") (10 pages in length, exclusive of
23 exhibits);

24 (6) Plaintiff's Motion for Scheduling Order or, in the Alternative, to Deny
25 Vivian's Motion for Attorneys Fees, Grant Each of Kirk's Counterterms,
26 and Grant Kirk's Motion for Enter Decree of Divorce (Sep. 4, 2013) (12
27 pages in length, exclusive of exhibits);

28 (7) Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for
Attorney's Fees and Sanctions; Defendant's Opposition to Plaintiff's
Countertermion Styled Request for Reasonable Discovery and Evidentiary
Hearing; Defendant's Opposition to Plaintiff's Countermotion for
Equitable Relief; Defendant's Opposition to Plaintiff's Countermotion for
Attorneys' Fees and Sanctions; and Defendant's Opposition to Plaintiff's
Countertermion for Declaratory Relief (Sep. 11, 2013) (hereinafter referred
to as "Vivian's Reply") (78 pages in length, exclusive of exhibits);

(8) Exhibits to Defendant's Reply to Plaintiff's Opposition to Defendant's
Motion for Attorney's Fees and Sanctions; Exhibits to Defendant's
Opposition to Plaintiff's Countermotion Styled Request for Reasonable

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2 Discovery and Evidentiary Hearing; Exhibits to Defendant's Opposition to
3 Plaintiff's Countermotion for Equitable Relief; Exhibits to Defendant's
4 Opposition to Plaintiff's Countermotion for Attorneys' Fees and Sanctions;
5 and Exhibits to Defendant's Opposition to Plaintiff's Countermotion for
6 Declaratory Relief (Sep. 11, 2013) (354 pages in length); and

- 7 (9) Plaintiff's Reply Brief in Support of Plaintiff's Countermotions for
8 Reasonable Discovery and Evidentiary Hearing, Equitable Relief,
9 Attorneys' Fees and Sanctions, and Declaratory Relief (Oct. 21, 2013) (57
10 pages in length, exclusive of exhibits).

11 This Court has entertained extensive briefing² on the issues raised by way of the
12 foregoing papers filed by each party, as well as arguments offered by counsel at the
13 hearing held on October 30, 2013. Based on the papers on file and the arguments of
14 counsel, this Court makes the following findings and conclusions:

15 I. SUMMARY OF LITIGATION: A successful settlement?

16 On March 18, 2011, Plaintiff, KIRK ROSS HARRISON ("Kirk"), filed his
17 Complaint for Divorce against the Defendant, VIVIAN MARIE HARRISON ("Vivian").
18 On November 23, 2011, Vivian filed her Answer to Complaint for Divorce and
19 Counterclaim for Divorce. By way of their respective pleadings, both parties sought
20 primary physical custody of their two minor children, Emma "Brooke" Harrison, born
21

22 ²During this litigation, both parties routinely filed papers in excess of the page limitations
23 specified in EDCR 2.20(a), which provides, in pertinent part, "[u]nless otherwise ordered by the
24 court, papers submitted in support of pretrial and post-trial briefs shall be limited to 30 pages
25 excluding exhibits." During the custody portion of the litigation, the length of papers was
26 discussed on one occasion before the Court. Specifically, at the hearing on November 1, 2011,
27 Defendant orally requested permission to submit a paper that exceeded the length allowed
28 pursuant to EDCR 2.20(a). In consideration of the gravity of the issue (i.e., child custody), this
Court indicated that it did not "have a problem" with the lengthy filings of the parties so long
as courtesy copies were provided to the Court. Although this Court tolerated such lengthy filings
at that time, this Court advised the parties at the October 30, 2013 hearing it would no longer
tolerate the same. Indeed, the excessive and burdensome length of filings that addressed the
remaining issues before this Court is dealt with in the award of attorneys' fees below.

1 June 26, 1999, and Rylee Harrison, born January 24, 2003. Further, both parties raised
2 the issue of attorney's fees in their respective pleadings.
3

4 Kirk and Vivian ultimately resolved nearly every contested issue identified in their
5 respective pleadings. The terms of their agreements were memorialized in their
6 Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012), and the Decree of
7 Divorce (Oct. 31, 2013). As such, the stipulated resolution reached by the parties could
8 be viewed as a "success" of the divorce process. Indeed, as expressed by the Honorable
9 David A. Hardy:
10

11
12 Litigants often respond negatively when their relationships and resources
13 are at risk. *A divorce proceeding culminating in trial represents a failure of our*
14 *legal system.* The adversarial process requires parties to emphasize their
15 virtues and their respective spouses' flaws. The divorce proceeding is both
16 *expensive and destructive.*

17 *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L. J. 325
18 (2009) (emphasis supplied).

19 Although there were several contested hearings in this divorce action, there was
20 no trial or evidentiary hearing prior to January 22, 2014. Through the date of the
21 October 30, 2013 hearing, not a single witness was called to testify at any proceeding
22 before this Court. Nevertheless, the financial cost (to say nothing of the unquantifiable
23 emotional cost) of this litigation was staggering. To this end, the parties devoted
24 significant time, energy, and resources to the issue of custody of the parties' two minor
25 children. Both parties filed multiple papers of voluminous length with the Court
26 regarding the issue of child custody. These papers included:
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DISTRICT JUDGE

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- ☐ Kirk's Motion for Joint Legal and Primary Physical Custody and Exclusive Possession of Marital Residence (Sep. 14, 2011) (hereinafter referred to as "Custody Motion") (206 pages in length, inclusive of the Affidavits of Kirk R. Harrison, Tahnee Harrison and Whitney Harrison, but exclusive of other exhibits);
 - ☐ Vivian's Opposition to Plaintiff's Motion for Joint Legal and Primary Physical Custody and Exclusive Possession of Marital Residence; Countermotions for Exclusive Possession of Marital Residence, for Primary Physical Custody of Minor Children; for Division of Funds for Temporary Support, and for Attorney's Fees (Oct. 27, 2011) (hereinafter referred to as "Custody Countermotion") (188 pages in length, inclusive of the Sworn Declaration of Vivian Harrison and various other declarations/affidavits, but exclusive of other exhibits);
 - ☐ Kirk's Reply to Defendant's Opposition to Plaintiff's Motion for Joint Legal and Primary Physical Custody and Exclusive Possession of Marital Residence; Countermotions for Exclusive Possession of Marital Residence, for Primary Physical Custody of Minor Children; for Division of Funds for Temporary Support, and for Attorney's Fees (Jan. 4, 2012) (hereinafter referred to as "Kirk's Custody Reply") (105 pages in length, inclusive of the Affidavit of Kirk R. Harrison and various other declarations/affidavits, but exclusive of other exhibits);
 - ☐ Vivian's Reply to Plaintiff's Opposition to Defendant's Countermotions for Exclusive Possession of Marital Residence, for Primary Physical Custody of Minor Children; for Division of Funds for Temporary Support; and for Attorney's Fees (Jan. 27, 2012)(hereinafter referred to as "Vivian's Custody Reply") (67 pages in length, inclusive of the Sworn Declaration of Vivian Harrison and various other declarations/affidavits, but exclusive of exhibits); and
 - ☐ Vivian's Supplemental Sworn Declarations in Support of Reply to Countermotion (Jan. 31, 2012) (2 pages in length, 12 pages of declarations).

24 The parties appeared at multiple hearings regarding the issue of custody. As
25 noted above, Kirk and Vivian each requested primary physical custody of their minor
26 children in their respective pleadings (i.e., Kirk's Complaint and Vivian's Counterclaim).
27 Each party relied on various "expert" reports attached to their respective filings.
28

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1 Ultimately, this Court appointed Dr. Paglini to provide evaluative services regarding the
2 issue of child custody. Notwithstanding the significant time, energy, and resources
3 devoted to the issue of custody (or perhaps as a result thereof), the parties entered into
4 a Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012). Thereafter, the
5 parties resolved the remaining issues of the divorce action, placing the terms on the
6 record at the December 3, 2012 hearing. Their agreement included a specific reservation
7 of jurisdiction to allow this Court to entertain a motion to be filed by either party
8 regarding the issue of attorneys' fees. *See* Decree of Divorce 28-29 (Oct. 31, 2013).

11 II. ATTORNEYS' FEES

13 A. LEGAL BASES

14 On April 3, 2013, Vivian's Motion was filed. "It is well established in Nevada
15 that attorney's fees are not recoverable unless allowed by express or implied agreement
16 or when authorized by statute or rule." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 830,
17 712 P.2d 786, 788 (1985), quoted in *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727
18 (2005). Pursuant to Vivian's Motion (Apr. 3, 2013), Vivian seeks an award of
19 attorney's fees on the following bases:
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1 (1) NRS 125.150;³

2 (2) EDCR 7.60(b);⁴ and

3 (3) *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).⁵

4 This Court finds and concludes that there is a basis to consider each party's
5 request for an award of attorney's fees pursuant to the foregoing bases.⁶
6

7
8 ³NRS 125.150 provides, in relevant part, as follows:

9
10 3. Except as otherwise provided in NRS 125.141, whether or not
11 application for suit money has been made under the provisions of NRS 125.040,
12 the court may award a reasonable attorney's fee to either party to an action for
13 divorce if those fees are in issue under the pleadings.

14 ⁴EDCR 7.60(b) provides as follows:

15 (b) The court may, after notice and an opportunity to be heard, impose
16 upon an attorney or a party any and all sanctions which may, under the facts of
17 the case, be reasonable, including the imposition of fines, costs or attorney's fees
18 when an attorney or a party without just cause:

19 (1) Presents to the court a motion or an opposition to a motion
20 which is obviously frivolous, unnecessary or unwarranted.

21 (2) Fails to prepare for a presentation.

22 (3) So multiplies the proceedings in a case as to increase costs
23 unreasonably and vexatiously.

24 (4) Fails or refuses to comply with these rules.

25 (5) Fails or refuses to comply with any order of a judge of
26 the court.

27 ⁵In *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), the husband challenged
28 the lower court's award of attorney's fees. The Nevada Supreme Court held that "[t]he wife
must be afforded her day in court without destroying her financial position. This would imply
that she should be able to meet her adversary in the courtroom on an equal basis." *Id.* at 227,
495 P.2d at 621. Vivian's Motion also cites *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d
1071, 1073 (1998) in support of her request ("[t]he disparity in income is also a factor to be
considered in the award of attorney fees."). Considering the relative income parity of the parties,
however, there has been no showing that a disparity in income exists that justifies an award of
fees. Nevertheless, the issue of whether Vivian was able to "meet [Kirk] in the courtroom on an
equal basis" is a legitimate issue that was debated and discussed throughout the papers filed by
the parties.

⁶NRS 18.010 is generally inapplicable in evaluating each party's requests for fees as a
"prevailing" party. Because the parties successfully negotiated a resolution of nearly all contested

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2 B. POST-RESOLUTION MOTIONS

3 Pursuant to EDCR 7.60, each party is entitled to an award of attorneys' fees
4 associated with Defendant's Motion for an Order Appointing a Parenting Coordinator
5 and Therapist for the Minor Children as Required by the Court Ordered Parenting Plan;
6 Motion for Sanctions and Attorneys' Fees (May 10, 2013), and Plaintiff's Motion to
7 Enter Decree of Divorce (May 13, 2013). In this regard, although there was a good faith
8 dispute regarding the appointment of a parenting coordinator and the language of the
9 Order Appointing Parenting Coordinator, there was no reasonable basis to delay the
10 selection of a counselor for the parties' children, particularly in light of recent papers
11 filed by Kirk in which he requested a modification of the Stipulation and Order
12 Resolving Parent/Child Issues (Jul. 11, 2012). Considering the factual allegations raised
13 in all papers filed regarding the issue of custody, any delay in initiating the counseling
14 process for the children is bewildering. At the same time, Plaintiff's Motion to Enter
15 Decree of Divorce (May 13, 2013) was unopposed by Vivian and the Decree entered by
16 the Court more closely mirrored the language proposed by Kirk. See Plaintiff's
17 Submission of Proposed Decree of Divorce (Sep. 27, 2013).

18 Pursuant to EDCR 7.60 and EDCR 5.11, aspects of both of the foregoing
19 Motions should have been resolved in advance of the October 30, 2013 hearing. This
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26 issues, there is no "prevailing" party. Each party requested primary physical custody of their
27 minor children in their underlying pleadings. Thus, neither party could be construed as the
28 prevailing party regarding the physical custody designation. Nevertheless, it is not lost on the
Court that the allegations that Vivian suffered from psychological infirmities that impacted her
ability to parent the children went unproven from an evidentiary standpoint.

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1 Court finds that the attorneys' fees attributable to the foregoing motions should be
2 offsetting, and no fees are awarded to either party.
3

4 C. SUMMARY OF FEES AND COSTS INCURRED AND PAID
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6 Each party received \$550,343.25 in community funds earmarked for attorneys'
7 fees. *See* Letter to Court from Edward Kainen, Esq. (Jan. 15, 2014), Letter to Court
8 from Radford Smith, Esq. (Jan. 15, 2014) and Kirk's Opposition and Countermotions
9 125 (May 28, 2013). Based on the billing statements offered to the Court, Kirk paid
10 a total of \$448,738.21 in fees and costs from March 8, 2011 through January 15, 2013.
11 In contrast, Vivian paid a total of \$686,341.33 in fees and costs from May 2, 2011
12 through January 30, 2013. *See* Exhibits to Kirk's Opposition and Countermotions Ex.
13 15 - 19 (May 28, 2013), and Defendant's and Plaintiff's Attorney Fee Billing
14 Statements (Apr. 5, 2013). Exhibit 1 attached hereto is a spreadsheet summarizing the
15 amounts paid by each party. Exhibit 2 attached hereto is a spreadsheet summarizing the
16 fees and costs incurred. A review of the billing statements and the Court's Exhibit 2
17 reveals the following:
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- 21 ○ Vivian incurred \$687,506.28 in fees and costs from May 2, 2011 through
22 January 19, 2013.⁷ Thus, as of January 30, 2013, Vivian paid
23 \$137,163.03 in fees and costs from her separate property portion of the
24 community assets. In contrast, Kirk incurred \$469,864.17 in fees and
25 costs from March 8, 2011 through December 21, 2012.⁸ Thus, as of

26 ⁷These dates (i.e., May 2, 2011 and January 19, 2013), represent the first and last billing
27 entries for fees and costs incurred by Vivian.

28 ⁸These dates (i.e., March 8, 2011 and December 21, 2013), represent the first and last
billing entries for fees and costs incurred by Kirk.

January 15, 2013, Kirk retained \$80,479.08 in unused community funds allocated for attorneys' fees.

- The fees and costs incurred by the parties to litigate the financial issues (i.e., post-Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012)) appear to be relatively equal. Specifically, Vivian incurred \$548,229.38 in fees and costs through the date the Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012) was filed. The balance of \$139,276.90 was incurred after the custody issue had been resolved.⁹ Kirk incurred \$349,593.56 through the same period of time. The balance of \$120,270.61 was incurred after the custody issue had been resolved. The difference in the amount incurred for post-custody issues totals \$19,006.29, or less than eight percent (8%). In contrast, the difference in the amount of fees and costs incurred by each party prior to the entry of the Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012) totals \$198,635.83.
- Kirk incurred a total of \$54,947 in fees and costs from the first reference of time spent on preparation of his Custody Motion (Sep. 14, 2011) (August 6, 2011 billing entry of Jolley Urga Wirth Woodbury & Standish) through the date the Custody Motion was filed (i.e., through September 14, 2011). Vivian incurred a total of \$105,957.50 in fees and costs from the first reference of time spent on preparation of her Custody Countermotion (Oct. 27, 2011) (September 14, 2011 billing entry of Radford J. Smith, Chartered) through the date her Opposition to Custody Motion was filed (i.e., through October 27, 2011).¹⁰
- Kirk's Custody Motion (Sep. 14, 2011) (with accompanying affidavits) consisted of 206 pages. This included the Custody Motion (48 pages), Kirk's Affidavit and Supplemental Affidavit (totaling 132 combined

⁹To be clear, this Court recognizes that the fees and costs incurred prior to July 11, 2012 included time spent on issues unrelated to child custody. Nevertheless, the entry of the Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012) should represent the end *by and large* of time spent on the child custody issue.

¹⁰Again, this Court recognizes that the fees and costs referenced were not entirely related to the child custody issues during the relevant periods of time defined above. In fact, Vivian offered that, based on her analysis of the billing statements, Kirk was billed the following amounts for the underlying custody papers: \$19,887.50 for the Custody Motion, \$8,450.00 for Kirk's Reply to Vivian's Custody Countermotion and \$1,400 for Kirk's Opposition to Defendant's Motion for Temporary Orders. *See* Exhibits to Vivian's Reply Ex. T (Sep. 11, 2013).

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1
2 pages)¹¹, the Affidavit of Tahnee Harrison (16 pages) and the Affidavit of
3 Whitney Harrison (10 pages)¹². Borrowing from Kirk's "value" billing
4 analysis,¹³ the monetary value of Kirk's Custody Motion was \$103,464
5 (206 pages multiplied by the hourly rate of \$500). As noted above, Kirk
6 was billed \$54,947 during that period of time, \$48,517 less than the
7 "value" of the work product created. Relying on Vivian's analysis of the
8 billing statements, Kirk was billed only \$19,887.50 for this initial paper,
9 \$83,576.50 less than the "value" of the work product created. (This
10 analysis does not include any value attributed to the time devoted by Kirk
11 in the drafting of Dr. Roitman's report. The record suggests that Kirk was
12 intimately involved in the preparation of the report. See Exhibits to
13 Vivian's Reply Ex. Z, AA, and DD (Sep. 11, 2013). The report attached
14 to the Custody Motion consisted of 36 pages, or a value of \$18,000.
15 Because such a report typically would be prepared by an expert and not an
16 attorney, the "savings" would be attributed to the costs incurred.)

- 17
18 ○ Vivian's Custody Countermotion (Oct. 27, 2011) (with accompanying
19 affidavits) consisted of 188 pages. This included Vivian's Sworn
20 Declaration as well as the declarations/affidavits of Michele Walker, Nyla
21 Roberts, Kim Bailey, Annette Mayer, Heather Atkinson, Lizbeth Castelan,
22 and Jeffry Lite. The record reflects, however, that Ms. Roberts and Ms.
23 Walker drafted their own statements (consisting of 15 pages each). See
24 Exhibits to Kirk's Opposition and Countermotions Ex. 11 (May 28, 2013).
25 Using the same "value" billing analysis, but excluding the statements of

26
27 ¹¹It does not appear to be disputed that Kirk prepared his own affidavits and the initial
28 Custody Motion, although his counsel "did a major re-write of our motion for temporary
custody," billing Kirk approximately 37 hours. Exhibits to Kirk's Opposition and
Countermotions, Ex. 1 (May 28, 2013).

¹²Although Kirk similarly was involved in the drafting of the Affidavit of Tahnee Harrison
and the Affidavit of Whitney Harrison, Kirk's counsel also spent time in preparation of the
same. Exhibits to Kirk's Opposition and Countermotions Ex. 2 (May 28, 2013).

¹³In his Opposition and Countermotions, Kirk offered the standard he applied with
respect to what he considered a reasonable value associated with the preparation of papers filed
with the Court. 51 (May 28, 2013). Specifically, the "standard was an average of one hour per
page for research and writing combined." *Id.* In his Affidavit, Kirk referenced the preparation
of "points and authorities" as part of his value billing analysis. See Kirk's Opposition and
Countermotions, Ex. 5 (May 28, 2013). In light of the comprehensive and detailed nature of
the affidavits submitted by both parties, this Court applied the same analysis. The approach
promoted by Kirk is analytically instructive in the context of the requests for fees pending before
this Court. Although the billing rates by the attorneys in this matter varied slightly, this Court
used the same billing rate of \$500 per hour for this theoretical exercise.

1
2 Ms. Roberts and Mr. Walker, the monetary value of Vivian's Custody
3 Countermotion was \$79,000 (158 pages multiplied by the hourly rate of
4 \$500). As noted above, Vivian was billed \$105,957.50, \$26,957.50 more
5 than the "value" of the work product created. Although non-attorneys may
6 have authored some of these papers (and some of the "statements" do
7 appear to have been drafted by the affiant), the resulting difference is not
8 significant when considering the totality of the filings, including Kirk's
9 extensive drafting contributions to Dr. Roitman's report. Indeed, it is not
10 unreasonable to expect significant time to have been spent in reading and
11 analyzing Kirk's exhaustive Custody Motion. The record supports a
12 conclusion that Kirk was actively involved in drafting of most papers
13 (including his drafting of papers in response to the instant Motion (Apr.
14 3, 2013)). See Kirk's Opposition and Countermotions Ex. 15 - 19 (May
15 28, 2013) (billing summaries); Defendant's and Plaintiff's Attorney Fee
16 Billing Statements (Apr. 5, 2013); and Kirk's Opposition and
17 Countermotions Ex. 2 (May 28, 2013) (Affidavit of Edward Kainen, Esq.).
18 To this end, Kirk's value billing analysis provides some assistance to this
19 Court in comparing the paperwork generated and the corresponding fees
20 incurred.

- 21 ○ A similar "value" analysis could be applied to other papers filed with this
22 Court, particularly those papers associated with the child custody dispute.
23 For example, Kirk's Custody Reply (Jan. 4, 2012) consisted of 105 pages
24 (inclusive of various affidavits), or a value of \$52,500. Further, Vivian's
25 Custody Reply (Jan. 27, 2012) consisted of 67 pages (inclusive of various
26 affidavits/declarations), or a value of \$33,500.
- 27 ○ Applying the same "value" analysis to the papers associated with Vivian's
28 Motion (Apr. 3, 2013) is instructive.¹⁴ The total length of points and
authorities associated with Vivan's filings (which included her Motion and
her Replies) was 120 pages, or \$60,000 in value. The total length of point
and authorities associated with Kirk's filings (which included his
Opposition, Countermotions and Replies) was 212 pages, or \$106,000 in
value. The difference in monetary value of the parties' respective filings is
\$46,000.

26 ¹⁴Vivian filed a Request to File Supplemental Information in Support of Motion for
27 Attorney's Fees; In the Alternative, Supplemental Motion for Attorney's Fees (Jan. 15, 2014).
28 This Court is not inclined to review additional billing records on an existing request for fees.
Rather, this Court relies on the value billing analysis in evaluating the issue of fees and "leveling
the playing field."

1
2 D. LITIGATION OF FINANCIAL AND CHILD CUSTODY ISSUES

3 The papers submitted by both parties conceptually divide the litigation (including
4 settlement aspects) into two *general* categories considered by the Court: (1) litigation
5 associated with financial issues; and (2) litigation associated with child custody issues.
6

7 (1) Financial Issues

8 With respect to the litigation associated with financial issues, this Court does not
9
10 find there is a basis to award fees to either party beyond this Court affirming the
11 Discovery Commissioner's recommendation made at the March 9, 2012 hearing to
12 award Vivian the sum of \$5,000. (This Court does not find a basis to reject or alter the
13 Discovery Commissioner's recommendations regarding attorney's fees.) Although both
14 parties submitted papers complaining about discovery improprieties and the conduct of
15 the other party with respect to the resolution of financial issues (and the relative
16 "simplicity" of the financial issues), this Court does not find that either party has
17 supplied this Court with an adequate legal or factual basis to award additional fees
18 related to the manner in which either party litigated the financial issues. It is not this
19 Court's prerogative to scrutinize the litigation methods employed by four of the most
20 highly esteemed and credentialed attorneys practicing family law in the State of Nevada
21 based on the record before the Court. This is particularly so after considering the
22 unused statutory mechanisms available to the parties to pursue a more expeditious
23 resolution of the financial issues. Further, this Court's review of the billing statements
24 (to the extent such information was decipherable amid extensive redactions by both
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26
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1 parties) submitted by the parties does not give rise to this Court finding or concluding
2 that an award of attorneys' fees is appropriate on the bases cited in their respective
3 papers.¹⁵
4

5 In Kirk's Opposition and Countermotions (May 28, 2013), Kirk expressed his
6 dismay about "heated" discussions with his attorneys regarding their wise advice against
7 the filing of a "motion for partial summary judgment to equally divide all of the
8 community financial accounts, the gold and silver coins, and the income stream from the
9 Tobacco case." 6 (May 28, 2013). Kirk expressed frustration about being thwarted in
10 his desire to resolve these financial issues expeditiously, complaining that "parties in
11 Family Court are more hostages, than clients." *Id.*
12

13 On September 19, 2013, this Court entered its Orders Incident to the Stipulation
14 and Order Resolving Parent/Child Issues and the December 3, 2012 Hearing. Therein,
15 this Court directed that "each party may file and serve by the close of business on
16 September 27, 2013, any offer(s) to allow decree concerning property rights of parties
17 made pursuant to NRS 125.141." Orders Incident to the Stipulation and Order
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22 ¹⁵In Kirk's Opposition and Countermotions (May 28, 2013), Kirk identified billing
23 entries for Gary Silverman, Esq., dated November 28, 2011 (totaling 24 hours) and November
24 29, 2011 (totaling 26 hours). This Court concurs that such billing would be considered
25 egregious. In Vivian's Reply to Kirk's Opposition and Countermotions (Sep. 11, 2013), Mr.
26 Silverman explained that his billings "for the mediation were inadvertently double entered and
27 he has removed those charges from his billing and refunded the fees to Ms. Harrison." Although
28 Kirk in his Reply Brief in Support of Plaintiff's Countermotions for Reasonable Discovery and
Evidentiary Hearing, Equitable Relief, Attorneys' Fees and Sanctions, and Declaratory Relief
(Oct. 21, 2103) found Mr. Silverman's explanation implausible, this Court disagrees. Although
not common or routine, the fact that two time entries were created for the same day (with
slightly different descriptions) is not outside the realm of possibility. Mr. Silverman
acknowledged the error and noted his remedial actions.

1 Resolving Parent/Child Issues and the December 3, 2012 Hearing 4 (Sep. 19, 2013).
2
3 Notwithstanding the alleged simplicity of financial issues, neither party submitted "an
4 offer to allow a decree to be entered concerning the property rights of the parties" as
5 authorized by NRS 125.141.¹⁶ (The settlement letter dated August 27, 2012 (included
6 as Exhibit 2 to Kirk's Opposition and Countermotions (May 28, 2013) and Exhibit
7 DDD to Vivian's Reply (Sep. 11, 2013)) does not qualify as an offer pursuant to NRS
8 125.141.)
9

10 The utilization of the process authorized by NRS 125.141 allows a party to
11 pursue pro-actively the resolution of certain financial issues. Indeed, this process can be
12 effective because it allows a court to penalize financially an unreasonable party (in the
13 form of attorney's fees). This Court believes that, even without final appraisals, each
14 party had sufficient information and knowledge upon which such an offer could have
15 been made well before the actual settlement was reached. Indeed, the May 22, 2013
16 report of Clifford R. Beadle, CPA, outlined in detail the simplicity of the financial issues
17 and the relatively small value of unresolved financial issues. *See* Kirk's Opposition and
18 Countermotions Ex. 3 (May 28, 2013). Therein, Mr. Beadle summarized that the value
19 of "undisputed assets" to be divided ranged between 89.30 to 90.36 percent of the total
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24 ¹⁶This Court recognizes that the resolution of all financial issues may have hinged on the
25 completion of additional discovery and/or evaluative services. If so, the so-called "simplicity"
26 may be an overstatement of reality. This Court would not expect the parties to reasonably
27 engage in piecemeal negotiations of such financial issues. To the extent either party reasonably
28 believed that the financial issues could have (and indeed should have) been resolved in short-
order due to their alleged simplicity, this Court would have expected *at least one* offer to allow
entry of decree from one of the parties. Thus, if the unresolved issues were "over really nothing"
(Kirk's Opposition and Countermotions 36 (May 28, 2013)), each party should have made at
least one offer pursuant to NRS 125.141.

1 community. Similarly, in his e-mail to James Jimmerson, Esq., Mr. Silverman noted that
2 "[i]t is a custody matter, primarily. The property issues are fairly straightforward [sic]."
3 Exhibits to Vivian's Reply Ex. GG (Sep. 11, 2013). For Kirk to accuse the process in
4 Family Court to be akin to "hostage-taking," yet at the same time fail to avail himself
5 of NRS 125.141 is incongruous.
6
7

8 In summary, each party's failure to utilize the process authorized by NRS
9 125.141, while at the same time proclaiming the relative simplicity of the financial
10 issues, mitigates against this Court engaging in an evaluation of alleged improper or
11 costly litigation tactics of either party. Further, as noted above, a similar amount of
12 attorney's fees was incurred by each party after the entry of the Stipulation and Order
13 Resolving Parent/Child Issues (Jul. 11, 2013) (i.e., when only financial issues remained
14 in dispute).
15
16

17 (2) Child Custody Issues

18 With respect to the litigation associated with the issue of custody, this Court
19 finds that Vivian is entitled to an award of fees pursuant to NRS 125.150, in
20 conjunction with establishing parity between the parties as discussed in *Sargeant, supra*.
21 Again, such an award of fees is based principally on the time spent and fees incurred
22 litigating the issue of child custody.
23
24

25 In his Complaint for Divorce, Kirk requested joint legal and "primary physical
26 care, custody and control of the minor children herein." 2 (Mar. 18, 2011). In her
27 Answer to Complaint for Divorce and Counterclaim for Divorce, Vivian requested joint
28

1 legal custody and "primary physical custody of the minor children, subject to the rights
2 of specific visitation of Plaintiff/Counterdefendant." 3 (Nov. 23, 2011). There is
3 nothing in the record that suggests that either party would capitulate to the other party
4 being awarded primary physical custody of the minor children, or that mediation would
5 have led to such a result.
6
7

8 The Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012) confirms
9 to the parties joint legal custody and joint physical custody of their children.
10 Preliminarily, the issue of custody is expressly excluded as an issue subject to the "offer
11 of judgment" provisions of NRS 125.141(6). Further, inasmuch as the parties have
12 utilized this post-resolution process to regurgitate the very same issues that were argued
13 as part of the underlying custody proceedings, this Court finds little salutary or
14 constructive value to rehashing these same arguments.¹⁷ The parties ultimately
15 stipulated that joint physical custody is in the best interest of their children.¹⁸
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19 ¹⁷This Court recognizes that said regurgitation perhaps was not the intent or motivation
20 of the parties in submitting their respective papers on the attorney's fees issue. Nevertheless,
21 the result for the Court is the same.

22 ¹⁸In his Opposition and Counter motions, Kirk argued that, based on Dr. Roitman's
23 advice, he "was willing to agree to custody terms he knew were not in Brooke's and Rylee's best
24 interest just to get this over." 39, FN 24 (May 28, 2013). Later, Kirk stated: "Kirk wanted this
25 matter resolved expeditiously, amicably, and on the merits, and without putting his children and
26 Vivian through an extended court battle and trial." *Id.* at 77. These statements, however, are
27 inconsistent with the record and Kirk's requests during the litigation. Notably, the delay in
28 finalizing custody by way of evidentiary proceedings was caused, in part, by Kirk's plea for this
Court to appoint Dr. Paglini as a "neutral" expert (which Vivian opposed). Kirk vehemently
argued that he would be bound by Dr. Paglini's recommendations. But for Kirk's impassioned
request for Dr. Paglini's appointment, an evidentiary hearing resolving the custody issue would
have been set and held earlier than the entry of the parties' Stipulation and Order Resolving
Parent/Child Issues (Jul. 11, 2012). The return hearing on the referral to Dr. Paglini (by which
time Dr. Paglini would have been expected to complete his report) was scheduled for May 16,
2012. Referral Order for Outsourced Evaluation Services (Feb. 24, 2012). Although this Court

1 Moreover, there is no basis for this Court to now make findings that either parent suffers
2 from any mental deficiency compromising his or her ability to care for the minor
3 children, particularly considering the fact that Kirk requested that the custody
4 evaluation undertaken by Dr. John Paglini not be completed.¹⁹
5

6 The tone of the custody litigation was set by Kirk's filing of his Custody Motion
7 (Sep. 14, 2011). This filing initiated a "battle of experts" that culminated with this
8 Court's appointment of Dr. Paglini. In addition to Kirk's Affidavit, the Custody Motion
9 (Sep. 14, 2011) was comprised of an unsigned letter from Kirk to Vivian, the Affidavit
10 of Tahnee L. Harrison, the Affidavit of Whitney J. Harrison, photographs, the
11 Psychiatric Analysis from Norton A. Roitman, MD, DFAPA (with attached documents
12
13
14

15
16 is unaware of the status of Dr. Paglini's actual completion of his report as of July 11, 2012 (the
17 time the parties' entered their stipulated resolution), it was Kirk who adamantly opposed Dr.
18 Paglini completing what Kirk had requested. (At the hearing on July 18, 2012, Vivian argued
19 that Dr. Paglini's report was nearly complete, while Kirk argued that the completion of Dr.
20 Paglini's report would not be possible without additional input from Kirk.) Notably, it appears
21 settlement discussions regarding custody began within weeks of the February 24, 2012 hearing
(when Dr. Paglini was appointed). See letter dated March 5, 2012 included in the Exhibits to
22 Vivian's Reply Ex. VV (Sep. 11, 2013). Further, Kirk offered that in "late February 2012,
23 Vivian and I began discussing the terms of a possible custody arrangement through our older
24 children." Exhibits to Kirk's Opposition and Countermotions Ex. 5 (May 28, 2013).

25
26 ¹⁹To the extent Kirk believed (or believes) the minor children were exposed to serious risk
27 while in Vivian's care, he would have insisted on the completion of the evaluation (which was
28 well underway at the time the issue of custody was resolved) even with a stipulated resolution
of custody. Kirk expressed that "no one would be happier than Kirk if it is determined that
Vivian does not have Narcissistic Personality Disorder." Kirk's Opposition and Countermotions
23: FN 16 (May 28, 2013). Yet, Kirk argued against having Dr. Paglini complete his evaluation.
If the purpose of Kirk's request to appoint Dr. Paglini was to assure him that "Vivian does not
have Narcissistic Personality Disorder" (which Kirk offered as a motivating factor for his request
to delay the resolution of custody by way of Dr. Paglini's appointment, and which arguably
would have been resolved conclusively with the completion of Dr. Paglini's report), it is
inconsistent to vociferously oppose the completion of the report while at the same time continue
to suggest that Vivian suffers from a psychological infirmity that impairs her parenting ability.

1 regarding various medications), and the Supplemental Affidavit of Kirk Harrison. Kirk's
2 Custody Motion relied, in part, on the aforementioned Psychiatric Analysis submitted
3 by Dr. Norton Roitman, in which Dr. Roitman declared "to a reasonable degree of
4 *medical certainty*" that "Vivian Harrison is suffering from a Narcissistic Personality
5 Disorder." 216 (Sep. 14, 2011) (emphasis added). Dr. Roitman acknowledged
6 limitations to this conclusion "in recognition of the lack of direct psychological
7 examination and testing." *Id.* Notwithstanding his acknowledgment of the limitations
8 created by having never met Vivian personally (and having relied on the veracity of the
9 information supplied by Kirk), Dr. Roitman's psychological assessment effectively
10 framed the complexity of the custody issue and established the blueprint for highly
11 contentious litigation.
12

13
14 In response to Kirk's Custody Motion, Vivian filed her Custody Countermotion
15 (Oct. 27, 2011). In addition to the Sworn Declaration of Vivian Harrison, Vivian's
16 Custody Countermotion was comprised of a disc, a Volunteer Application Form from
17 The Hope Foundation, various credit card summaries, grade reports for the minor
18 children, an unsigned letter from Tahnee to Vivian, a July 19, 2005 Psychiatric
19 Evaluation from Ventana Health Associates, a handwritten Last Will & Testament of
20 Kirk R. Harrison, a handwritten statement entitled "My Mom," an August 13, 2011
21 report from Ole J. Thienhaus, M.D., FACPsych, a September 24, 2011 report from Ole
22 J. Thienhaus, M.D., FACPsych, photographs, various pharmaceutical and LabCorp
23 records, the Sworn Declaration of Michele Walker, the Sworn Declaration of Nyla
24 Roberts, the Sworn Declaration of Kim Bailey, the Affidavit of Annette Mayer, the
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1 Sworn Declaration of Heather J. Atkinson, the Affidavit of Lizbeth Castlan, and the
2 Sworn Declaration of Jeffry Life.
3

4 Vivian supplemented the record with her Custody Reply (Jan. 27, 2012).
5 Attached thereto were reports from Paul S. Appelbaum, MD, and Elsa P. Ronningstam,
6 Ph.D., that challenged the findings of Dr. Roitman's Psychiatric Analysis. Kirk was not
7 involved in the preparation of these reports.
8

9 The volume of resulting paperwork in response to the Custody Motion (Sep. 14,
10 2011) and the Custody Countermotion (Oct. 27, 2011) was previously noted. In
11 summary, both parties submitted reports generated by way of their respective *unilateral*
12 retention of experts. These reports *all* failed to include the participation of the other
13 party. The precipitating salvo, however, was fired by way of Kirk's Custody Motion
14 (Sep. 14, 2011). Between the filing of the Custody Motion (Sep. 14, 2011) and the
15 finalization of the Stipulation and Order Resolving Parent/Child Issues (Jul. 11, 2012),
16 hundreds of thousands of dollars in community funds were expended by the parties.
17

18 In light of the voluminous nature of the papers filed and work generated by the
19 allegations made by both parties, this Court is not inclined to engage in a qualitative
20 analysis of whether the work performed was justified under the circumstances. Based
21 on the sheer volume of papers filed by both parties related to the custody issue, the
22 significance of the custody issue to Kirk and Vivian cannot be overstated. Indeed, it
23 would be impossible to quantify monetarily the value of custody. Considering the
24 gravity of the custody issue before the Court and the framework of litigation established
25 by Kirk's Custody Motion (Sep. 14, 2011), this Court does not find the amount of time
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1 spent by Vivian's counsel to be unreasonable. Indeed, the record established that Kirk
2 benefitted from his experience as an attorney and his ability to prepare detailed and
3 comprehensive papers in the prosecution of his claims. This Court would have expected
4 an extensive amount of time devoted to read and digest the content of the Custody
5 Motion (Sep. 14, 2011). In retrospect, the overall tenor of this initiating motion and
6 Kirk's argument suggests that if Vivian would not succumb to the specific relief sought
7 by way of the Custody Motion and psychological diagnosis, she would at least capitulate
8 to the manner in which Kirk proposed that the issue of custody be litigated.

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11
12 Notwithstanding the voluminous papers filed with the Court, the parties
13 ultimately reached a stipulated resolution of the custody issue. As noted previously, the
14 ability of two parents to reach such a stipulated resolution should be lauded as a success.
15 Thus, the fact that Kirk and Vivian entered into a Stipulation and Order Resolving
16 Parent/Child Issues (Jul. 11, 2012) is a success of the process, and more importantly, a
17 benefit to Brooke and Rylee. An "after-the-fact" analysis of the merits of the parties'
18 respective positions related to the child custody issue is not productive. To do so would
19 inhibit constructive settlement discussions and would be contrary to the sound policy
20 of encouraging the resolution of parenting issues by the individuals who should be most
21 in tune with the needs of their children — i.e., their parents.

22
23
24 Unfortunately, this entire post-resolution process has degenerated into attempts
25 by both parties to litigate the very issues that were the subject of settlement. To this
26 end, this Court was inundated with a seemingly endless diatribe of both finger-pointing
27
28

1 and rationalizations.²⁰ As with prior papers filed in this matter, the length of the papers
2 filed by both parties exceeded the limitations imposed by EDCR 2.20(a), with Kirk's
3 Opposition and Countermotions (May 28, 2013) consisting of an astounding 133 pages
4 in points and authorities alone. Therein, Kirk bemoaned the process in Family Court,
5 once again relying on Dr. Roitman to educate him that "[y]ou just don't get it. You are
6 not going to solve your family's problems in Family Court." Opposition and
7 Countermotions 6 (May 28, 2013). Kirk then opines: "What a sad commentary. The
8 one forum in the Nevada judicial system where it is most important to expeditiously and
9 amicably resolve problems, because children's emotional well being, lives, and futures
10 are at stake, is unquestionably the worst." *Id.* at 6. At the outset of this litigation, Kirk
11 should have been disabused of any notion that a complete stranger (i.e., the Court) is
12 in the best position to solve his family's problems. Indeed, the parties have failed to a
13 degree when it is left up to the Court — a stranger to the parties' children — to resolve
14 these issues.

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19 In his Opposition and Countermotions, Kirk takes no responsibility whatsoever
20 for the directional path of this litigation, but instead lectures about how the "one forum
21 in the Nevada judicial system where it is important to expeditiously and amicably
22 resolve problems, because children's emotional well being lives, and futures are at stake,
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24

25 ²⁰Amidst the personal attacks strewn throughout the papers, each party did provide this
26 Court with a measure of levity. For example, as part of his critique of the amount of time
27 Vivian's attorneys spent in preparing papers in response to Kirk's Custody Motion, Kirk offered:
28 "A monk with only a quill pen in dim candlelight would be more productive." Kirk's Opposition
and Countermotions 53 (May 28, 2013). Vivian retorted with: "A genie with a magic wand
could not have finished all of that work in 41.8 hours," in light of the comparatively low amount
of fees incurred by Kirk. Vivian's Reply 28 (Sep. 11, 2013).

1 is unquestionably the worst.” *Id.* It would indeed be shortsighted to believe that an
2 unprecedented 48-page initiating motion (accompanied by a 118-page, 241-paragraph
3 affidavit and a psychiatric diagnosis “to a reasonable degree of medical certainty” that Vivian
4 suffered “from a Narcissistic Personality Disorder”) would not somehow engender a
5 massive response of time and effort.²¹ See Custody Motion (Sep. 14, 2011). It similarly
6 would be shortsighted to believe that such a Custody Motion could possibly be
7 perceived or received by Vivian as an effort to “do what was indisputably best for . . .
8 Vivian” (6) or to “get Vivian help.”²² 4 (Sep. 14, 2011). Yet, despite such an initial
9 barrage of paperwork, Kirk uses 133 pages of diatribe to attack Vivian, Vivian’s
10 attorneys and this Court as being responsible entirely for the manner in which this case
11 was litigated. See Kirk’s Opposition and Countermotions (May 28, 2013). On 15
12 occasions in his Opposition and Countermotions (May 28, 2013), Kirk repeated nearly
13 verbatim the following: “The difference in fees billed by Vivian’s attorneys in this case
14 versus the fees billed by Kirk’s attorneys in this case is a function of how Vivian
15 and/Vivian’s attorneys chose to manage this case and how they overbilled this case,
16 rather than any drafting Kirk did on any points and authorities.” As if he was an
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23 ²¹Both parties complained about the process (or being “jaded” by the process) in some
24 fashion. Yet, both parties behaved in a manner not seen in most cases. Notably, Kirk argues
25 that “the letter opinions from [Vivian’s] two national experts are so qualified to be entirely
26 worthless.” Opposition and Countermotions 79 (May 23, 2013). If said reports are considered
27 “entirely worthless,” the “qualifying” factors associated with Dr. Roitman’s report (including the
fact that he *never* met with the person he was diagnosing) render his report “entirely worthless”
as well.

28 ²²At the point in time that Dr. Roitman’s reports was thrust into the litigation, his report
could hardly be viewed as a therapeutic tool.

1 innocent bystander throughout this entire process, Kirk fails to acknowledge that his
2 unprecedented approach to the initial paper he filed with this Court (i.e., his Custody
3 Motion (Sep. 14, 2011)) had any correlation to Vivian's response thereto and the path
4 of this litigation.
5

6
7 The sad reality is that the amount of fees awarded herein likely pales in
8 comparison to the emotional and financial toll this post-divorce process has created.
9 This entire process has generated more animosity and conflict that is not healthy for the
10 parties or their children, leading the Court to ask, is it worth it? Yet, amidst
11 complaining about this process, Kirk curiously requested the opportunity to further
12 lengthen these proceedings by pursuing additional discovery and an evidentiary hearing
13 regarding the issue of attorneys' fees — which would equate to even more fees.
14

15
16 In evaluating the amount of fees that should be awarded, this Court has
17 considered the factors enunciated in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345,
18 455 P.2d 31 (1969). Specifically, this Court has considered:

19 (1) The quality of the advocates. Both parties are represented by experienced
20 and highly esteemed advocates. Indeed the quality of representation was at an
21 exceptional level. (The high regard in which each party's attorneys are held magnifies
22 the disappointment of this Court in the unnecessary personal attacks strewn throughout
23 the papers filed with this Court.)
24

25
26 (2) The character of the work to be performed. This Court's analysis of the
27 character of the work performed is detailed above.
28

YCE C. DUCKWORTH
DISTRICT JUDGE

FAMILY DIVISION, DEPT. Q
3 VEGAS, NEVADA 89101

1
2 (3) The work actually performed. The work actually performed is represented
3 in the billing summaries submitted to the Court. In this regard, each party provided the
4 Court with billing statements encompassing the fees and costs associated with their
5 respective representation. This information included monthly billing statements from
6 Jolley Urga Wirth Woodbury & Standish, Ecker & Kainer/Kainen Law Group,
7 Silverman, Decaria & Kattelman, Radford J. Smith/Smith & Taylor and the Dickerson
8 Law Group. Kirk attached these monthly billing statements to his Opposition and
9 Countermotions (May 28, 2013) as Exhibits 15, 16, 17, 18 and 19. (The billing
10 statements attached as Exhibit 16 associated with Smith & Taylor, however, end with
11 the billing entry dated April 18, 2012.) Vivian filed these monthly billing statements
12 as part of her Defendant's and Plaintiff's Attorney Fee Billing Statements (Apr. 5, 2013).
13
14
15

16 (4) The result obtained. Although this Court does not view this factor as a
17 "prevailing party" analysis, the Court reiterates that this matter ultimately was resolved
18 by way of stipulation. The resolution was different than each party's relief requested in
19 their underlying pleadings. Nevertheless, it is not lost on the Court that Kirk's allegation
20 that Vivian suffered from a serious psychological disorder that impeded her parenting
21 abilities was not proven by *competent* evidence. In fact, over Vivian's objection, this
22 Court granted Kirk's request to halt Dr. Paglini's completion of his evaluation of Vivian's
23 alleged condition.
24
25

26 Based on the billing statements submitted to the Court, Vivian exhausted the
27 entire amount of funds allocated to her from the marital community for attorneys' fees.
28 In contrast, Kirk retained \$80,479.08 from the same allocation of funds from the marital

1 community. Further, borrowing from Kirk's value analysis of fees billed, Kirk saved at
2 least \$48,517 (\$83,576.50 according to Vivian's analysis) based on the amount that he
3 would have otherwise paid for the Custody Motion (Sep. 14, 2011). Separate and apart
4 from an analysis of the specific billing entries from Kirk's attorneys, this same value
5 based billing analysis suggests that Kirk donated significant time and expertise to the
6 preparation of various papers filed on his behalf. Absent a finding that Vivian's response
7 to Kirk's initial filing was unreasonable (which this Court cannot find), Vivian is entitled
8 to an award of fees to "meet her adversary in the courtroom on an equal basis." *Sargeant*
9 *v. Sargeant*, 88 Nev. 223, 227, 495 P.2d 618, 621 (1972).
10
11
12

13 The amount of fees awarded to Vivian should include one-half of the amount of
14 community funds Kirk saved as a result of his efforts (\$40,240), as well as the excess
15 amount in value billing associated with the papers filed by both parties relative to
16 Vivian's Motion (Apr. 3, 2013) (\$46,000). In summary, this Court finds that Vivian is
17 entitled to an award of fees from Kirk totaling \$86,240, plus the sum of \$5,000 based
18 on the March 9, 2012 recommendation of the Discovery Commissioner, for a total of
19 \$91,240.
20
21

22 Based on the foregoing findings and conclusions, and good cause appearing
23 therefore,
24

25 IT IS HEREBY ORDERED that Vivian's Motion is GRANTED in part, and
26 Vivian is awarded the sum of \$91,240 in attorneys' fees, which said sum is reduced to
27 judgment in Vivian's favor and against Kirk.
28

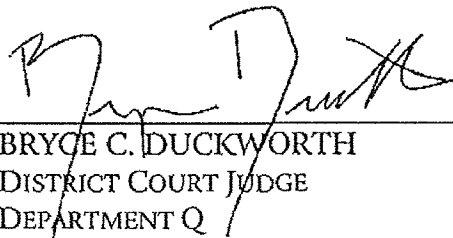
YCE C. DUCKWORTH
DISTRICT JUDGE

MILY DIVISION, DEPT. Q
3 VEGAS, NEVADA 89101

1
2 IT IS FURTHER ORDERED that Kirk's Request for Reasonable Discovery and
3 Evidentiary Hearing, his Countermotion for Equitable Relief, his Countermotion for
4 Attorney's Fees, and his Countermotion for Declaratory Relief are DENIED.

5 IT IS FURTHER ORDERED that all other relief sought by the parties by way of
6 their papers filed with the Court not otherwise specifically addressed or granted herein
7 is DENIED.
8

9 DATED this 10th day of February, 2014.

10
11
12 
13 BRYCE C. DUCKWORTH
14 DISTRICT COURT JUDGE
15 DEPARTMENT Q
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BRYCE C. DUCKWORTH
DISTRICT JUDGE

FAMILY DIVISION, DEPT. Q
3150 LAS VEGAS, NEVADA 89101

EXHIBIT 1

Harrison v. Harrison

Summary of Fees and Costs

(Exhibits 15, 16, 17, 18, and 19 (all heavily redacted - including disbursements)
(Smith's supplemented by Statement of Defendant's and Plaintiff's Attorney's Fees)

AMOUNTS PAID:

	Date	Amount
Vivian		
Silverman (Exhibit 15):		
	07/01/2011	35,000.00
	12-Apr	103,470.62
	12-May	9,340.61
	12-Jun	13,038.10
	12-Jul	12,053.85
	12-Aug	4,508.35
	12-Nov	33,331.09
	13-Jan	894.63
		40,013.32
Total Silverman:		251,650.57
Smith (EXHIBIT 16):		
	11-Nov	10,000.00
	11-Dec	83,509.73
	12-Mar	123,906.62
	12-Apr	58,466.79
	12-Jul	43,308.43
	12-Oct	29,299.90
	13-Jan	43,345.48
		20,928.61
Total Smith:		412,765.56
Dickerson (EXHIBIT 17):		
	11-Jul	5,000.00
		5,224.00
	11-Jun	1,701.20
		5,000.00
	11-May	5,000.00
Total Dickerson:		21,925.20
VIVIAN'S TOTAL:		686,341.33

	Date	Amount
Kirk		
Standish (EXHIBIT 18):		
	11-Jul	20,000.00
	11-Nov	26,376.50
	11-Dec	18,697.75
	12-Feb	32,821.50
	12-Apr	18,349.30
	12-May	12,292.50
	12-Jun	9,312.20
	12-Jul	17,479.00
	12-Aug	13,777.00
	12-Sep	12,352.00
	12-Oct	4,414.00
	13-Jan	49,282.65
Total Standish:		235,154.40
Kainen (EXHIBIT 19):		
	11-Apr	3,742.50
	11-Jun	1,650.00
	11-Aug	1,707.00
	11-Oct	3,850.00
		5,200.00
	11-Dec	11,805.00
		20,135.00
	12-Jan	2,500.00
		5,020.00
	Feb-29	32,881.50
	12-Mar	29,417.98
	12-May	21,447.18
	12-Jul	7,906.65
		18,177.00
	12-Aug	12,350.00
	12-Sep	2,400.00
	12-Oct	860.00
	12-Dec	32,534.00
Total Kainen:		213,583.81
KIRK'S TOTAL:		448,738.21
DIFFERENCE:		237,603.12

EXHIBIT 2

Harrison v. Harrison

Summary of Fees and Costs

(Exhibits 15, 16, 17, 18, and 19 (all heavily redacted - including disbursements)
(Smith's supplemented by Statement of Defendant's and Plaintiff's Attorney's Fees)

FEES AND COSTS INCURRED:

Vivian		Silverman		Smith/Dickerson		Total	Running Total
Billing Date		Fees	Costs/Disb	Fees	Costs/Disb		
May-11	DDCP			6,645.00	56.20	6,701.20	6,701.20
Jun-11	DDCP			10,200.00		10,200.00	16,901.20
Aug-11		1,090.00			24.00	1,114.00	18,015.20
Sep-11		9,417.50	1,215.25			10,632.75	28,647.95
Oct-11		2,287.50	3,633.50			5,921.00	34,568.95
Nov-11		6,675.00	1.75	82,585.00	924.73	90,186.48	124,755.43
Nov-11				29,775.00	304.76	30,079.76	154,835.19
Jan-12		41,668.75	8,793.65	25,705.00	24.22	76,191.62	231,026.81
Jan-12		38,288.00	6,523.31			44,811.31	275,838.12
Feb-12				58,695.00	8,093.13	66,788.13	342,626.25
Mar-12		13,692.00	5,184.41	9,745.00	612.30	29,233.71	371,859.96
Apr-12		8,381.25	959.36	54,270.00	4,196.79	67,807.40	439,667.36
May-12		12,583.75	454.35			13,038.10	452,705.46
Jun-12		11,550.00	503.85	32,620.00	10,744.43	55,418.28	508,123.74
Jul-12		4,091.25	417.10			4,508.35	512,632.09
Pre-July 11, 2012		9,241.24		24,625.00	1,731.05	35,597.29	548,229.38
Aug-12		5,066.26	610.34	2,920.00	23.85	8,620.45	556,849.83
Sep-12		9,125.00	12.00			9,137.00	565,986.83
Oct-12		9,272.00	4.25	6,550.00	192.62	16,018.87	582,005.70
Nov-12		12,918.75	380.23	13,885.00	109.30	27,293.28	609,298.98
Dec-12		20,937.00	5,777.34	22,305.00	303.56	49,322.90	658,621.88
Jan-13		3,262.50	236.80	19,115.00	1,813.61	24,427.91	683,049.79
Feb-13				4,390.00	66.49	4,456.49	687,506.28

TOTALS

219,547.75	34,707.49	404,030.00	29,221.04	687,506.28
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Kirk	Standish	Kainen				
Billing Date	Fees	Costs/Disb	Fees	Costs/Disb	Total	Running Total
Mar-11			3,742.50	292.50	4,035.00	4,035.00
Apr-11			100.00		100.00	4,135.00
Jun-11			1,950.00	3.50	1,953.50	6,088.50
Jul-11	2,577.50		1,700.00	7.00	4,284.50	10,373.00
Aug-11	10,909.50	4.50	3,850.00		14,764.00	25,137.00
Sep-11	6,110.00		5,200.00		11,310.00	36,447.00
Oct-11	26,775.00		11,800.00	5.00	38,580.00	75,027.00
Nov-11	18,265.00	432.75	20,130.00	5.00	38,832.75	113,859.75
Dec-11	24,090.00	1,503.50	5,020.00		30,613.50	144,473.25
Jan-12	7,122.50	105.50	32,400.00	2,981.50	42,609.50	187,082.75
Jan-12					0.00	187,082.75
Feb-12	8,787.50	1.30	27,080.00	2,337.98	38,206.78	225,289.53
Mar-12	9,490.00	20.50	14,160.00	10.00	23,680.50	248,970.03
Apr-12	12,292.50	23.70	3,570.00	3,707.18	19,593.38	268,563.41
May-12	9,267.50	21.00	7,060.00	846.65	17,195.15	285,758.56
Jun-12	17,446.50	32.50	18,170.00	7.00	35,656.00	321,414.56
Jul-12	13,777.00				13,777.00	335,191.56
Pre-July 11, 2012	6,990.00	12.00	7,400.00		14,402.00	349,593.56
Aug-12	5,350.00		7,350.00		12,700.00	362,293.56
Sep-12	4,499.00	14.00	860.00		5,373.00	367,666.56
Oct-12	8,160.00	7.00	6,870.00	7.00	15,044.00	382,710.56
Nov-12	11,215.00	33.00	23,650.00	2,007.00	36,905.00	419,615.56
Dec-12	28,445.00	3,922.65	6,050.00	2,003.50	40,421.15	460,036.71
Jan-13	9,760.00	67.46			9,827.46	469,864.17
Feb-13					0.00	469,864.17

TOTALS

241,329.50	6,201.36	208,112.50	14,220.81	469,864.17
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IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRK HARRISON,

Appellant,

v.

VIVIAN HARRISON,

Respondent.

No. 66157

Electronically Filed
May 06 2015 10:30 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

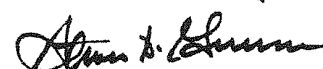
CHILD CUSTODY FAST TRACK RESPONSE
APPENDIX

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CLERK OF THE COURT

ORDR

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Co-counsel for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

KIRK ROSS HARRISON,

Plaintiff,

vs.

VIVIAN MARIE LEE HARRISON,

Defendant.

CASE NO. D-11-443611-D
DEPT NO. Q

Date of Hearing: 2/24/12
Time of Hearing: 9:00 a.m.

RECEIVED

JUN 07 2012

FAMILY COURT
DEPARTMENT Q

ORDER

This matter having come on for hearing this 24th day of February, 2012, before the Honorable Bryce Duckworth, Plaintiff, KIRK ROSS HARRISON ("Father"), present and represented by and through his attorney, EDWARD L. KAINEN, ESQ., of the KAINEN LAW GROUP, PLLC, and Defendant, VIVIAN MARIE HARRISON ("Mother"), present and represented by and through her attorneys, RADFORD J. SMITH, ESQ. and DANIELLE TAYLOR, ESQ., of the law firm of SMITH & TAYLOR, and MARY ANNE DECARIA, ESQ., of the law firm of SILVERMAN, DECARIA & KATTELMAN, CHARTERED; the parties having agreed by way of the pleadings to a monthly disbursement and to some distribution, based on the same terms as prior distributions which have

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1 occurred; the Court, having reviewed the psychological reports and evaluations which have been
2 submitted thus far, as well as all of the papers and pleadings on file herein, being fully advised in the
3 premises, and good cause appearing, makes the following Orders:

4 IT IS HEREBY ORDERED that the parties are referred to an Outsourced Evaluation
5 Service with Dr. John Paglini who shall conduct a psychological evaluation of Mother and Father. Dr.
6 Paglini shall also perform a risk assessment of both parties' parenting abilities. The cost for Dr.
7 Paglini's services shall be paid from community funds.

8 IT IS FURTHER ORDERED that the Court is not requiring any reports or documents
9 be provided to Dr. Paglini; the Court, however, is not prohibiting or limiting what each party may
10 submit to Dr. Paglini. Any documents provided to Dr. Paglini are to be copied to the other party,
11 specifically if the document has not been filed with the Court. If the document has been filed with the
12 Court, then the cover letter or communication to Dr. Paglini, attaching any such document, is to be
13 copied to the other party.

14 IT IS FURTHER ORDERED that Dr. Paglini may communicate with counsel should he
15 deem it necessary. Counsel are free to send correspondence to Dr. Paglini requesting he communicate
16 with them, and Dr. Paglini may do so if he so chooses. Further, each party is to be made aware of any
17 communication(s) between the parties and Dr. Paglini. The Court is not expecting Dr. Paglini to be the
18 fact finder in this action.

19 IT IS FURTHER ORDERED that the Court shall not stay this litigation pending Dr.
20 Paglini's report.

21 IT IS FURTHER ORDERED that, pursuant to the stipulation of the parties, the parties
22 shall maintain joint legal custody of the minor children, to-wit: EMMA BROOKE HARRISON, born
23 June 26, 1999; and RYLEE MARIE HARRISON, born January 24, 2003.

24 IT IS FURTHER ORDERED that the parties shall have temporary joint physical custody
25 as follows:

- 26 1. Father shall have custody of the children from Monday after school, or 10:00 a.m. if
27 school is not in session, until Friday before school, or 10:00 a.m. if school is not in
28 session. Father's custodial days are considered as Monday through Thursday.

1 2. Mother shall have custody of the children from Friday after school, or 10:00 a.m. if
2 school is not in session, until Monday before school, or 10:00 a.m. if school is not in
3 session. Mother's custodial days are considered as Friday through Sunday.
4 IT IS FURTHER ORDERED that the Court is not implementing a holiday schedule at
5 this time.
6 IT IS FURTHER ORDERED that Mother is not to sleep in the same bed with either
7 minor child.
8 IT IS FURTHER ORDERED that the Court shall implement a first right of refusal in the
9 event the minor children will be left alone overnight and the custodial parent is unavailable. This Order
10 does not include any sleepovers the children may have.
11 IT IS FURTHER ORDERED that Father is awarded exclusive possession of the marital
12 residence located at 1514 Sunrise Circle, Boulder City, Nevada, 89005. Mother shall have until March
13 18, 2012, to vacate the residence.
14 IT IS FURTHER ORDERED that, with respect to Mother's Financial Disclosure Form
15 ("FDF"), there is income on said FDF which the Court is unsure from where it stems, and the Court will
16 not label this income at this time. The Court is not including this amount in the allocation of income
17 and Mother may use this income toward the cost of any rent she may incur once she vacates the marital
18 residence.
19 ...
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1 IT IS FURTHER ORDERED that as to the monthly community expenses and income,
2 the following expenses are to be paid from community funds:

- 3 1. Taxes and insurance for the community residence: \$ 702.19
- 4 2. Cellular phones \$ 634.18
- 5 3. Car insurance (in the accurate amount, as both
6 parties listed different amounts) \$ 528.93
- 7 4. License and registration \$ 100.00
- 8 5. Health insurance \$1,903.30
- 9 6. Any monthly unreimbursed medical expenses
- 10 7. "Other" insurance
- 11 8. Minor children's extracurricular activities
- 12 9. Child care
- 13 10. Any accounting and tax fees

14 IT IS FURTHER ORDERED that the above amounts shall be paid "off the top." Any
15 other expenses the parties believe should be included "off the top" shall be agreed upon in writing.

16 IT IS FURTHER ORDERED that after the amounts listed above have been paid, each
17 party shall be entitled to a \$15,000 monthly distribution beginning March 1, 2012, payable by the first
18 day of each month.

19 IT IS FURTHER ORDERED that all community credit cards, including the Capital One
20 card in the approximate amount of \$7,401 and the Best Buy card in the approximate amount of \$8,100,
21 shall be paid off, as to the balance on February 24, 2012, with community funds. Any charges or
22 amounts incurred after today's date shall be paid by the party incurring such charges, using the \$15,000
23 monthly distribution allocated to each party. The Court retains jurisdiction to address any disputes as
24 to what items were purchased with these charges.

25 IT IS FURTHER ORDERED that, pursuant to the parties' agreement, \$75,000 shall be
26 distributed to each party, as their sole and separate property, to be used at each party's discretion. This
27 amount shall be distributed by March 1, 2012.

28 ...

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1 IT IS FURTHER ORDERED that, aside from the amounts ordered by the Court herein,
2 there is to be no access to any community funds absent a written agreement between the parties. The
3 Court specifically does not authorize any allowance payments to the parties' adult children.

4 IT IS FURTHER ORDERED that each party is allocated \$350,000 from community
5 funds for preliminary attorney's fees, which shall be paid by March 1, 2012, or as soon thereafter as
6 possible. Further, Mother shall receive an equalizing payment of attorney's fees to equal the amount
7 Father has paid to his attorneys. The Court retains jurisdiction to reallocate the payment of attorney's
8 fees, and whether one party shall receive a greater amount of community property at the conclusion of
9 the case. It is not the Court's intent for Mother to use the amount allocated to her for attorney's fees.

10 IT IS FURTHER ORDERED that counsel are to submit a litigation budget prior to the
11 next hearing, so that the Court can determine whether there is a need for an award of additional
12 attorney's fees.

JUN 12 2012

DATED this ____ day of June, 2012.

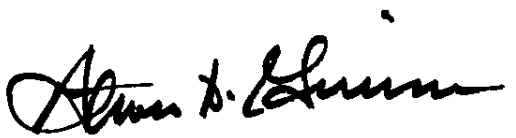

DISTRICT COURT JUDGE

Submitted by:

KAINEN LAW GROUP, PLLC

By: 

EDWARD L. KAINEN, ESQ.
Nevada Bar No. 5029
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Las Vegas, Nevada 89145
Attorney for Plaintiff



CLERK OF THE COURT

RPLY

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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

KIRK ROSS HARRISON,

Plaintiff,

v.

VIVIAN MARIE LEE HARRISON,

Defendant.

CASE NO.: D-11-44361-D

DEPT NO.: Q

FAMILY DIVISION

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND SANCTIONS

DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION STYLED REQUEST FOR REASONABLE DISCOVERY AND EVIDENTIARY HEARING

DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION FOR EQUITABLE RELIEF;

DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION FOR ATTORNEYS' FEES AND SANCTIONS;


DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION FOR DECLARATORY RELIEF

DATE OF HEARING: September 11, 2013
TIME OF HEARING: 10:00 a.m.

COMES NOW, Defendant, VIVIAN MARIE LEE HARRISON by and through her attorneys,
Radford J. Smith, Esq., of Radford J. Smith, Chartered, and Gary R. Silverman, Esq. of the firm of
Silverman, Decaria, & Kattleman and submits the following points and authorities in support of the Reply
and Oppositions identified above.

Dated this 11 day of September, 2013.

RADFORD J. SMITH, CHARTERED



RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
64 N. Pecos Road, Suite 700
Henderson, Nevada 89074
Attorney for Defendant

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1 *Preface*

2 One full month before Mr. Harrison filed his Complaint and Motions, counsel for Vivian sent the
3 following letter to counsel for Mr. Harrison:

4 *The following is not a settlement offer nor settlement negotiations; it is a demand. On*
5 *what facts does Mr. Harrison base his claim for primary custody? I asked and one of you*
6 *told me flatly that the issue was mental illness but he was not authorized to say any more.*
7 *I guess you think you have a smoking gun.*

8 *We are about to start mediation and litigation over an issue about which you will not*
9 *disclose what you think are the most salient facts. This constitutes, potentially, a*
10 *tremendous waste to the community because if Radford and I were informed of those*
11 *facts (if they exist), we could better evaluate the matter, advise our client, and, perhaps,*
12 *reach agreement.*

13 *This "black box" approach may work in criminal cases but will not work here, nor should*
14 *it even be attempted.*

15 *I am informed your client will not ask for sole or supervised custody, only primary. So,*
16 *how "ill" could Mrs. Harrison be?*

17 *Your approach is not the way peace is going to come the family, which I assume is the*
18 *goal of both sides. Given the ages of the children, peace between their parents is*
19 *probably the thing they want the most. Your approach, which may have made sense in*
20 *the past, is now an aggravation of the dispute and a provocation of this side of the case.*
21 *It may lead to ugliness and fights which inevitably will harm the children (minor and*
22 *adult) and which might have been avoided. If your client persists in gagging you, we will*
23 *ask for such sanctions and money as can be awarded against him for that kind of*
24 *behavior.*

25 The response was not peace but global war on all fronts. Only when Vivian amassed evidence to
26 counter a thousand averments from a thousand pages of pleadings and exhibits did Kirk settle with her
27 on terms which, in relation to his claims and prayer for relief, is surrender.

28 **I.**

INTRODUCTION

Defendant Vivian Marie Lee Harrison ("Vivian") has moved for attorney's fees and sanctions
against Plaintiff Kirk Ross Harrison ("Kirk"). The bases for her motion are:

1 1) Kirk contended Vivian is afflicted with Narcissistic Personality Disorder (“NPD”) in
2 pleadings of unheard-of volume. Kirk, a lawyer, prepared his case for three years, suborned Dr. Norman
3 Roitman, a psychiatrist, to unethically diagnose Vivian with NPD without meeting her, and requested
4 that she be limited to indefinite supervised visitation of the parties’ two minor daughters. Kirk’s
5 massive pleadings required Vivian’s lawyers to spend commensurate time and effort carefully rebutting
6 the multitude of allegations Kirk leveled (or invented) to support his claim. Three top experts in the
7 field who met and assessed Vivian, found Vivian did not suffer from any psychological disorder
8 whatsoever. Kirk abandoned his claim only after forcing the parties to incur enormous fees and costs.
9

10
11 2) Kirk’s massive and cleverly prolix claims caused Vivian’s counsel to do work that was
12 complex, elaborate, and intricate. The stakes in the case were whether the Court should repudiate
13 Vivian’s life endeavor, her care of her children; she was compelled to meet all of Kirk’s allegations.
14 Kirk, retired and with little gainful employment, performed most of his own legal work, and caused
15 Vivian to incur substantial fees that he did not.
16

17 After Vivian filed her Motion for Attorney’s Fees and Sanctions, Kirk responded. *He* prepared
18 an Opposition and Countermotion¹ of 133 pages, with 804 pages of exhibits. Vivian submits that his
19 filing has proved her point. He spent little or nothing to prepare his 133 page Opposition, while Vivian
20 incurred significant fees to respond to it.² Kirk, as with all his pleadings, included material that is
21 repetitive and irrelevant to the issues presented, and again multiplied the proceedings in this case.
22

23 Vivian’s motion is a request for fees and sanctions. The factors in *Brunzell v. Golden Gate*
24 *National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d
25

26 ¹ See, Affidavit of Edward Kainen, attached to Kirk’s Opposition as Exhibit “2”, page 2 ¶20 in which he acknowledges his
27 limited involvement in the preparation of the 133 page Opposition.

28 ² Vivian has addressed those facts in Kirk’s pleading that she believes constitute the core of his defense to the Motion for
fees. Because of the girth of his motion, certain facts are not specifically addressed. To the extent they are not addressed,
they are denied or deemed peripheral to the Court’s determination.

1 618 (1972), and EDCR 7.60 control. Kirk does not directly address the *Brunzell* factors, instead he
2 cleverly attempts to re-try the case in his Opposition, numbingly repeating unfounded claims he made in
3 nearly all of his motions that Vivian meticulously rebutted in her pleadings. Kirk had the opportunity to
4 present his claims to Dr. Paglini,³ and present them at evidentiary hearing or trial, but he settled under
5 terms that demonstrate he had no real fear of Vivian's care of the children.⁴ Under Nevada law, there is
6 no criteria to determine an award of fees that includes "the unproved and disputed allegations presented
7 by a party in the case." The positions the parties took are only relevant to the *Brunzell* requirements that
8 the Court weigh "the result" of the case, and the "character of the work to be done." *Brunzell*, 85 Nev. at
9 349, 455 P.2d at 33.
10

11
12 Both parties incurred substantial fees. Kirk incurred \$323,715.50 in attorney's fees prior to
13 resolving custody (through June 30, 2012), and \$126,500.50 fees through resolution of the property
14 issues on December 31, 2012. Vivian incurred \$447,006.78.78 in attorney's fees prior to resolving the
15 child custody portion of the case (through June 30, 2012), and \$141,477.75 in fees during the property
16 portion of the case through December 31, 2012. Kirk's total: \$450,216; Vivian's total: \$588,484.53.
17

18 Vivian's Motion presents the question, "What caused this case to be so expensive?" Kirk's
19 response is to suggest that the cost was all a result of a plan by Vivian's lawyers to "spend down the
20 estate." See Kirk's Opposition, page 5. Kirk suggests that Mr. Smith and Mr. Silverman: (1) refused to
21 negotiate in good faith; and (2) billed excessively. Kirk attributes all of the excessive cost of the case to
22 those factors, and his defense must then rest on those claims.
23

24
25 ³ Kirk's allegations in his current Opposition are the reason why Vivian requested, and still requests, Dr. Paglini complete his
26 report even after settlement. Kirk avoided scrutiny his claims by settling only after it became apparent he would not sustain
27 his core claim that Vivian suffered from a mental disorder. He uses here, and in other contexts (particularly toward the
parties' children) the failure of any "independent" determination (to which he had a nearly absolute right but never sought) as
a suggestion that Vivian has never been cleared of his charge of NPD.

28 ⁴ It has been over a year since the settlement granting the parties joint physical custody. Brooke and Rylee continue to do
extremely well in school and all activities, garnering A's in school, and advancing in dance.

1 Vivian points to a different cause: Kirk's campaign to win the case through pleading, not fact-
2 finding or trial. A skilled lawyer who largely defended corporations in construction defect cases, Kirk
3 went to his strength – complex, time-consuming pleadings. The counterintuitive fact is it is cheaper to
4 try a case against Kirk than plead it.

5
6 The bulk of Vivian's fees were expended during the custody phase responding to Kirk's
7 voluminous motions he filed to support his claim that Vivian suffered from NPD.⁵ Because Vivian was
8 the subject of Kirk's claims, she had to meet them. The nature of his claims required her to hire experts,
9 and pay their fees. Kirk reduced his own fees by contributing his community skill and labor to the
10 pleading tactic. **Kirk prepared the initial draft of every pleading he filed – there are *no* entries in**
11 **his attorney's billings for "preparation," only "review" or "revise."** See, Analysis of Attorney's Fees
12 by Pleading, **Exhibit "T."** Kirk used his years of skill and expertise to churn out his massive pleadings
13 with relatively low cost, while Vivian had no choice but to incur significant fees to fight Kirk's request
14 to limit her to supervised visitation, and be put out of her home.
15
16

17 II.

18 THE BRUNZELL FACTORS SUPPORT VIVIAN'S REQUEST FOR FEES⁶

19 NRS 125.150(4)⁷ grants Nevada district courts the discretion to award attorney's fees in divorce
20 actions. There is no presumption under Nevada law, as Kirk contends in his Opposition, that each party
21 should bear their own fees. "District courts have great discretion to award attorney fees, and this
22 discretion is tempered only by reason and fairness." *Haley v. Eighth Judicial District Court*, 273 P.3d
23

24 ⁵ Kirk's method in this case was unusual at best. Neither of Vivian's counsel, with a combined 70 years of experience
25 practicing family law, have ever been involved in a case in which a psychiatrist diagnosed a parent with a personality
26 disorder without ever meeting her, and recommended a custody order without ever meeting the children or any other
27 witnesses.

26 ⁶ The *Brunzell* factors apply to both parties' requests for fees, and the analysis below constitutes Vivian's Reply and
27 Opposition to Kirk's request for fees.

28 ⁷ NRS 125.150(4) reads: "Except as otherwise provided in NRS 125.141, whether or not application for suit money has been
made under the provisions of NRS 125.040, the court may award a reasonable attorney's fee to either party to an action for
divorce if those fees are in issue under the pleadings."

1 855, 128 Nev. Adv. Rep. 16 (2012). "[I]n determining the amount of fees to award, the court is not
2 limited to one specific approach; its analysis may begin with any method rationally designed to calculate
3 a reasonable amount, so long as the requested amount is reviewed in light of the factors set forth in
4 *Brunzell*." *Haley*, 273 P.3d at 860.

5
6 Under *Brunzell*, a district court weighs four factors when adjudicating a request for fees:

7 (1) **the qualities of the advocate**: his ability, his training, education, experience, professional
8 standing and skill;

9 (2) **the character of the work to be done**: its difficulty, its intricacy, its importance, time and
10 skill required, the responsibility imposed and the prominence and character of the parties where they
11 affect the importance of the litigation;

12 (3) **the work actually performed by the lawyer**: the skill, time and attention given to the work;
13 and,
14

15 (4) **the result**: whether the attorney was successful and what benefits were derived. *Brunzell*, 85
16 Nev. at 349, 455 P.2d at 33.

17
18 **A. Brunzell Applied:**

19 1. ***The Qualities of the Advocate***: This factor logically addresses the rate at which counsel
20 charges for services. A skilled and experienced attorney can justify an hourly rate greater than an
21 attorney with less skill and experience. A party can contend a rate is reasonable or excessive in the
22 market based upon the education, skill and experience of an attorney, or lack thereof.

23
24 Here, all counsel involved, including Kirk, are well-educated and trained, highly skilled, and
25 have excellent professional standing in the community. The rates charged (\$500 per hour for Mr.
26 Silverman, Mr. Standish, and Mr. Kainen, and \$450 per hour for Mr. Smith), are all market appropriate
27 for their level of skill and experience.

28 . . .

1 2. *The Character of the Work to Be Done:*

2 The character of the work goes to whether the fee charged was commensurate to the “difficulty,
3 intricacy and importance” of the issues raised. *Brunzell* also instructs us that the character of the work
4 includes “the prominence and character of the parties where they affect the importance of the litigation.”
5 This factor recognizes the value and importance of a party’s reputation.⁸ Where a parties’ character is in
6 issue, particularly a prominent figure, one may reasonably expect that the fees expended to protect that
7 character would be greater than those cases where character is not in issue.
8

9 a. **The Work in the Present Case Was Difficult, Intricate and Important**

10 Kirk begins his Opposition by minimizing work done in the case, and suggesting that the issues
11 did not justify the fees incurred. Kirk’s allegations there were few pleadings and no trial would mislead
12 a Court not familiar with the case. Kirk is correct - there was no trial, only five motions, and four
13 depositions, but he fails to acknowledge the enormous cost of his attempt to try the entire case in his
14 written pleadings, and his refusal to try the case at all.
15

16 Kirk’s motions for *temporary* orders engendered 454 pages of text and 1457 pages of exhibits.
17 (See **Exhibit “U”** attached hereto). The case involved 14 experts, all but one of whom provided one or
18 more detailed reports. Kirk’s initial Motion contained over one thousand factual assertions and opinions
19 found in 132 pages of his own affidavit, 26 pages of the parties’ adult daughter’s affidavits, and a 36
20 page report from Dr. Roitman. Vivian responded with her own affidavit of 84 pages, and 48 pages of
21 affidavits from 8 witnesses, and 11 pages of her expert’s reports. Kirk’s Reply topped that with 81
22 pages of text and 189 pages of exhibits. In her response to that motion, Vivian presented the expert
23 reports of two of the world’s leading authorities on NPD, 19 witness statements, 36 pages of text, and
24 343 pages of exhibits.
25
26
27
28

⁸ “Regard your good name as the richest jewel you can possibly be possessed of” *Socrates* (469-399 B.C.)

1 Kirk also minimizes the work necessary to rebut his convoluted and complex allegations. Kirk's
2 analysis of the work done in the case (his "one hour per motion text page" rule)⁹, does not account for
3 the time Vivian's counsel spent to identify and meet his thousand factual allegations, and then meet with
4 witnesses by person and by phone (at times eight to ten time zones away). It does not account for
5 counsel's preparation of detailed witness statements (Vivian presented 27 separate witness statements
6 during the custody phase alone), or counsel's review and preparation of long and extremely detailed
7 affidavits of the parties. Counsel reviewed medical records (Vivian's records composed 649 pages),
8 police reports, drug tests, report cards, expert reports, and the hundreds of pages of other information
9 necessary to rebut factual allegations (and assertions based on personal opinion or pure fantasy) that
10 numbered at least one thousand. Vivian's counsel researched and analyzed complicated issues of mental
11 health diagnosis, phentermine use, testosterone cream and its effect on puberty, co-sleeping, and a
12 plethora of other subjects raised in Kirk's pleadings. Kirk's suggests that was a simple custody case,
13 and by so doing mocks himself and this Court.

14
15
16
17 **b. The Vast Majority of Fees Spent on the Child Custody Portion of this Case**
18 **Were Expended because of Kirk's Extremely Complicated and**
19 **Unsubstantiated Claim That Vivian Suffered From Narcissistic Personality**
20 **Disorder**

21 The factor that distinguishes the "character of the work to be done" in this case from *any* other
22 was not Kirk's factual assertions, but instead how they were presented. Kirk tasked his expert
23 psychiatrist to opine that Vivian suffered from an incurable personality disorder, NPD, without ever
24 meeting her, and then filed 354 pages of text, affidavits, and diagnosis/custody assessment, in his
25 attempt to limit Vivian to supervised visitation *indefinitely*. The approach required Kirk to carefully
26 select a mountain of facts, assertion and innuendo that supported the DSM-IV elements of an NPD

27
28

⁹ Opposition filed on or about May 28, 2013, at page 51, lines 9-10.

1 claim, and present all of those “facts” in huge pleadings to support his expert’s “diagnosis.” (See,
2 Exhibit “H” to Vivian’s Motion for Attorney’s Fees and Sanctions filed on April 2, 2013).

3 Kirk understood his filing would change the nature of the work to be done in the case. On
4 August 10, 2011, before Kirk even apprised Vivian or her counsel of his allegations, or Roitman’s
5 involvement, *Kirk* proposed that each party take \$350,000 for the attorney’s fees, prompting Vivian’s
6 counsel, Mr. Silverman, to write to Kirk’s counsel:
7

8 I cannot fathom why \$350,000 is being requested for attorneys fees. The sum of
9 \$350,000 is simply not realistic as an amount needed for this particular case where the
10 assets are liquid, and a modest separate property claim is being advanced. Does Mr.
11 Harrison intend to spend over a quarter million dollars on a custody matter?

12 (See, Email from G. Silverman to E. Kainen and Tom Standish dated August 10, 2011, **Exhibit “V”**.)

13 Kirk and his lawyers knew before he even filed his initial motion his method would cause the
14 parties to spend enormous sums. Kirk may have believed he filed a pleading that would so overwhelm
15 and dispirit Vivian she would just give up. In that event, his proposal would have no adverse
16 consequences; he would treat it as an equal distribution of community funds.

17 Kirk litigation strategy and tactics unnecessarily and ruinously made the case enormously
18 complicated. Kirk’s NPD claim (which he abandoned through settlement with *no* counseling or
19 treatment requirements) was an invention – there was no fair or ethical assessment of Vivian done by
20 Kirk’s expert. Attached as **Exhibit “W”** hereto is the June 9, 2013 letter from Dr. Paul Applebaum¹⁰
21 assessing Dr. Roitman’s conduct in submitting a diagnosis of a litigant in a custody matter without ever
22 meeting, or attempting to meet, the subject. Dr. Applebaum finds to a reasonable degree of medical
23
24

25 ¹⁰ Dr. Paul S. Applebaum is a board-certified psychiatrist and forensic psychiatrist with more than 31 years of clinical
26 experience. He is a graduate of the Harvard School of Medicine, is currently the Elizabeth K. Dollard Professor of Psychiatry
27 and Medicine at Columbia University, and the past president of the American Psychiatric Association and of the American
28 Academy of Psychiatry and the Law. He is internationally recognized as a leading expert on Psychiatry and the Law. When
the Federal Judiciary sought an author for its judicial handbook, it asked the National Academy of Sciences to recommend a
psychiatrist to write it. It recommended Dr. Applebaum. A summary of his curriculum vitae, as well as a full copy, is
appended to his January 15, 2012 report, attached as Exhibit “I” to Vivian’s Reply to Countermotion filed January 27, 2012.

1 certainty that Dr. Roitman's diagnosis of Vivian, and his conclusions regarding her parenting ability and
2 best interest of the children, were below the standard of care of psychiatrists. Dr. Applebaum writes:

3 In the best of circumstances, diagnoses are made exclusively on the basis of information
4 provided by third parties are of dubious reliability. When psychiatrists cannot conduct an
5 examination, they are unable to ask the questions necessary to confirm diagnoses and to
6 rule out alternative explanations for a person's behavior. In the context of litigation,
7 however, to rely exclusively on information provided by an adverse party with an interest
8 in portraying the person in an unfavorable light is to fall below the standard of care with
9 regard to diagnostic practices. [. . .]

10 [W]hen the only information that an evaluator has been provided comes from a party with
11 a direct interest in the evaluator reaching a judgment adverse to the person whose
12 condition is being described, no reliable opinion can be rendered.

13 By reaching an opinion on the parenting abilities of a person whom he never evaluated,
14 and on the comparative benefits of parenting by two people whom he never evaluated,
15 Dr. Roitman violated one of the clearest standards of involvement in child custody cases.

16 **c. A Member of the Bar's Unethical Destruction of His Communication with his**
17 **Expert**

18 NRCP 16.2(4)(a) reads in pertinent part:

19 [A] party who retains or specially employs a witness to provide expert testimony in the
20 case . . . shall deliver to the opposing party a written report prepared and signed by the
21 witness . . . The report shall contain a complete statement of **all opinions to be expressed**
22 **and the basis and reasons therefor, the data or other information considered by the**
23 **witness in forming the opinions**, any exhibits to be used as a summary of or support for
24 the opinions, and the qualifications of the witness.

25 [Emphasis supplied].

26 NRCP 26(4)(A) states: "A party may depose any person who has been identified as an expert
27 whose opinions may be presented at trial." Kirk prepared and provided to Dr. Roitman a 43 page
28 document that contained a detailed "Table of Contents." Exhibit "G" to Vivian's Motion for Attorney's
Fees, filed April 3, 2013. When Vivian subpoenaed Dr. Roitman's records, she requested that the
documents be provided directly from his office.¹¹ Instead, his files were produced by his lawyers on

¹¹ By letter dated February 15, 2012, Danielle Taylor stated to Dr. Roitman, "Please consider this letter our demand that you produce the requested records on or before 5:00 p.m. on February 17, 2012. If you fail to do so, we will file a motion seeking

1 discs Mr. Kainen's office prepared. **Exhibit "X"** attached hereto. The 43 page report attached to the
2 Table of Contents was missing. In his deposition, Kirk admitted he prepared the report, but indicated
3 that he destroyed any copy, either paper or electronic. *See*, Excerpts from the Deposition of Kirk
4 Harrison, page 160, attached hereto as **Exhibit "Z."**

5
6 Kirk is a licensed attorney who has practiced for many years. Kirk prepared drafts of every
7 pleading in this case. Aff. of Kainen, Ex. 2 to Kirk's Opp. Vivian submits that Kirk understood that the
8 document he provides to an expert, which the expert specifically relies upon in preparing a report, is a
9 discoverable document. Nev. Rules of Prof. Conduct 3.4 reads:

10 A lawyer shall not:

- 11
12 (a) Unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or
13 conceal a document or other material having potential evidentiary value. A lawyer
shall not counsel or assist another person to do any such act.

14 Kirk's excuse: destruction of the report is permitted by a *federal*, not Nevada, procedural rule.
15 At page 81 of his Opposition, Kirk claims that he "did nothing improper when he deleted the draft he
16 prepared for Dr. Roitman from his computer." He cites FRCP 26(b)(4)(B) which reads: "Trial-
17 Preparation Protection for Draft Reports or Disclosures. Rule 26(b)(3)(A) and (B) protect drafts of any
18 report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."
19 FRCP 26(a)(2) requires the disclosure of expert witnesses (FRCP 26(a)(2)(A)) and defines an expert as
20 "one retained or specially employed to provide expert testimony."
21

22 Kirk's citation to the FRCP is misplaced – there is no counterpart to FRCP 26(b)(4)(B). Draft
23 reports of an expert who is identified to appear at trial are discoverable under Nevada's rules. More to
24 the point, *Kirk's* preparation of an outline with research relied upon by an expert is not a draft expert
25 report. Kirk knowingly violated NRCP 16.2 and Nev. Rule of Prof. Conduct 3.4.
26
27

28 to have you held in contempt of court and will request the Court impose all applicable penalties against you." *See*, **Exhibit "Y"** attached hereto.

1 **d. Kirk's Shaping of Dr. Roitman's Report**

2 The Table of Contents for the report Kirk destroyed included the DSM-IV elements of NPD, and
3 also included the headings: "5. Ms. Harrison's Narcissistic Personality Disorder is Extremely Difficult
4 to Treat and the Prognosis for Analytic Progress Unlikely," and , "6. Ms. Harrison's Behavior Towards
5 Brooke and Rylee Will Likely Cause Brooke and Rylee To Suffer the Same Or Similar Fate, Unless Ms.
6 Harrison's Behavior is Stopped Entirely Or Significantly Curtailed." These are highly analytic
7 conclusions that are the province of a psychiatric professional, yet Kirk felt comfortable to feed that
8 information to Dr. Roitman. Dr. Roitman admitted in his deposition that Kirk had provided him with
9 research from "Kernberg"¹² and from Dr. Ronningstam. See Excerpts from Dr. Roitman's deposition
10 transcript attached hereto as **Exhibit "AA."** Dr. Roitman indicated at first that he did not remember the
11 43 page report, then indicated in his deposition that it was a report Kirk prepared, but that he revised the
12 report "to make it [his] own."
13
14

15 On May 19, 2011, Kirk also provided Dr. Roitman with a draft custody motion that *already*
16 *concluded* that Dr. Roitman found Vivian suffered from NPD before Dr. Roitman ever issued a report.
17 See, Excerpts from that draft Motion, attached to Vivian's Motion for Attorney's Fees, Exhibit "F." The
18 part of Dr. Roitman's report that led to the war of pleadings was his finding that Vivian's condition of
19 NPD could not be treated, but this notion was actually first identified by *Kirk* in the report underlying
20 his Table of Contents. One of the headings of Kirk's Table of Contents reads:
21
22

23 Ms. Harrison's Narcissistic Personality Disorder is Extremely Difficult to Treat and the
24 Prognosis for Analytic Progress Unlikely

25 Compare that to Dr. Roitman's finding in his report a few days later, at page 31 of 36:

26 Vivian's pathological narcissistic personality disorder is near impossible to treat and her
27 prognosis is very poor.
28

¹² Dr. Roitman extensively cites Dr. Kernberg at pages 9 and 33-35 of his report.

1 This finding, proposed first by Kirk, was a key component in his motion. Kirk requested that
2 Vivian's contact with the children be supervised (Kirk's Motion for Custody, *etc.*, filed September 14,
3 2011, page 2), and commenced the "Conclusion" of his motion with "Vivian has a serious mental
4 disorder the makes it impossible for her to have a normal, healthy relationship [with] her children." Id. at
5 page 47. Kirk was not trying to help Vivian (as he now remarkably contends in his Opposition, page 4),
6 or provide her a fair opportunity to address or resolve his claims. On the contrary, Kirk's behavior
7 shows he intended to divide up the parties' accounts, and then cause Vivian to use her portion to defend
8 what he understood was going to be expensive custody litigation.
9

10
11 Kirk intentionally "stacked the deck" when he gave Dr. Roitman only selected "facts" to support
12 the diagnosis, and removed from his original letter to Dr. Roitman those facts in conflict with his
13 narrative about Vivian. (*See Exhibit "BB"* attached hereto). For example, in his letter to Dr. Roitman of
14 January 10, 2010, he writes:

15 At Page 7:

16
17 **Vivian worked with two of our three oldest children each night helping them with**
18 **homework and reading with them. Whitney always insisted that her homework was**
19 **hers and would not let Vivian be involved.** During the summer, she had the three older
20 children do A Beka, which is a Christian based home school curriculum. **Vivian**
21 **rightfully deserves a lot of the credit for our three older children's scholastic**
22 **successes. They have done the work, but she spent the time with them, showed them**
23 **the way, and created an environment and expectation conducive to success in the**
24 **classroom.**

25 At Page 8:

26 Until about the beginning of 2009, Vivian would snuggle in the large living room chair
27 watching cartoons with Rylee for hours each day. Vivian has trouble sleeping through
28 the night and will be asleep much of this time. At night time she will get in the same bed
with Brooke and Rylee and they will read. Brooke will read and, until about August of
2009, Vivian was teaching Rylee to read. **All of this is wonderful.** Unfortunately, it
doesn't stop there. The problem is that Vivian sleeps in the same bed with our 10 year
old and 6 year old daughters.

1 (Emphasis supplied). Those admissions and compliments set out above were not included in Kirk's
2 Affidavit supporting his motion. Vivian submits that Kirk's affidavit shows that he only chose to
3 include facts, opinions, hearsay¹³ and speculation that placed Vivian in a bad light. Vivian's Opposition
4 (filed October 27, 2011) to Kirk's original Motion fully and painstakingly discusses that Kirk failed to
5 mention Vivian's scholastic success, her career success, her devotion to the care of all of the children,
6 her tireless community service work,¹⁴ and her large network of friends (all of which were among the
7 27 fact witness statements that Vivian provided to the Court as part of her defense of Kirk's original
8 motion). Kirk even cast the positive facts (Vivian's work for the Hope Foundation, her completing the
9 Irish Marathon, and her climb to the base camp of Mt. Everest) in a negative light. All of these facts
10 were inconsistent with a diagnosis of a condition, NPD, that precludes a party from having empathy for
11 others, so Kirk left them out, or dismissed them.

14 Kirk had the right to bring a motion for primary custody, and allege facts supporting that claim.
15 Had Kirk stated his fundamental factual contentions in a motion seeking primary custody within the
16 mandated page limits¹⁵, and requested a child custody assessment with psychological testing, the parties
17 likely would have spent a minute fraction of the cost they ultimately spent on expert and attorney's fees.
18 Many litigants present claims to the family courts in which they seek primary custody of their children
19 by alleging drug use by the other party, claiming they have spent more time with children than the other
20 party, claiming that the other party is inattentive to the needs of the children, claiming the other party is
21 engaged in co-sleeping with the children that is harmful, and/or claiming that the other party has
22
23
24

25 ¹³ Kirk's affidavits contain numerous hearsay references. This may be due to Kirk's explanation that if someone tells him
26 something, and it corroborates something he believes is true, it does not constitute hearsay. See, Excerpt from the deposition
27 of Kirk Harrison, attached hereto as **Exhibit "CC."** This is not a believable explanation coming from an experienced trial
attorney, and is instead logically designed to offer an explanation to his liberal use of impermissible hearsay throughout his
affidavits.

28 ¹⁴ See, Vivian's Opposition filed October 27, 2011, pages 5-7 and 14-24.

¹⁵ See, EDCR 2.20 (a)

1 committed acts of domestic violence. There is nothing unusual at all about *those* meritless claims that
2 Kirk leveled in this case. Vivian would have met that Motion with a response to the essential facts, and
3 the matter would have proceeded to assessment without the expenditure of anything close to the fees the
4 parties expended.

5
6 The critical analysis here is whether Kirk's *method* of bringing his unsuccessful claim to limit
7 Vivian to supervised visitation caused a substantial increase in the character and difficulty of the work to
8 be performed in the case. A simple timeline illustrates the bad faith in which Kirk proceeded with his
9 claim.

10
11 1) **2008:** Vivian observes Kirk with a book on NPD. Affidavit of Vivian Harrison,
12 Opposition to Motion for Joint Legal Custody, etc. filed October 27, 2011, page 52, ¶136. (a contention
13 Kirk denies);

14 2) **July, 2008:** Kirk begins keeping a journal of criticisms and complaints about
15 Vivian's alleged behavior and thoughts; *See*, Affidavit of Kirk Harrison attached to his Motion filed
16 September 14, 2011, paragraph 39 (page 12 of 113).

17
18 3) **Late 2009:** Kirk consults a prominent *divorce* attorney, James Jimmerson. Kirk
19 claims he only did so to ask him for a recommendation for a psychiatrist to "help" Vivian; *See*, Kirk's
20 Reply to Opposition, filed January 4, 2012, Affidavit of Kirk Harrison ¶265, page 93 of 270 of pleading.
21 This claim, Vivian submits, is false. Of all the physicians and other professionals in the community
22 Kirk knows, why would he ask a divorce lawyer?

23
24 4) **January 4, 2010:** Kirk prepares and provides a 36 page letter to Dr. Roitman
25 regarding Vivian. He never advises Vivian he has done so. There is no entry in his journal indicating
26 that he ever requested that Vivian seek counseling either prior to or after January 4, 2010.

27 5) **January 15, 2010:** Kirk meets with Dr. Roitman who indicates to Kirk that based
28 upon the contentions outlined in Kirk's letters, Vivian may suffer from Borderline Personality Disorder

1 *or* NPD. *See*, Deposition of Norman Roitman, p. 37; p. 91-92. Kirk never requests that Vivian meet
2 with Dr. Roitman, nor requests that Dr. Roitman contact her. Even after litigation begins, Kirk never
3 requests and independent medical examination under NRCP 35.

4
5 6) **February 11, 2010:** Kirk prepares a second letter to Roitman;

6 7) **February, 2010:** Kirk admits buying many books on the subject of NPD and
7 reading them; Deposition of Kirk Harrison, page 150-151.

8 8) **March 1, 2010:** The parties' daughter Tahnee returns from college to the parties'
9 home alleging that her boyfriend suffers from Narcissistic Personality Disorder and does research on her
10 contention;
11

12 9) **March, 2011:** Kirk prepares affidavits for the parties' adult daughters, Tahnee
13 and Whitney, for use in Dr. Roitman's report, and for his Motion. Depo. of Roitman, p. 131. Kirk now
14 claims that he only filed his divorce action because Vivian claimed that she was going to file after
15 Whitney's wedding in March. (Opposition to present motion, Page 16, lines 12-17)

16 10) **March 18, 2011:** Kirk files his Complaint for Divorce without serving Vivian or
17 advising her that he has done so.
18

19 11) **March 22, 2011:** Kirk's lawyers revise his drafts of Tahnee and Whitney's
20 affidavits, and they sign them on that date.

21 12) **May 5, 2011:** Kirk provides a 39 page draft of a Motion for custody that includes
22 a finding that Dr. Roitman has found that Vivian suffers from NPD even though Kirk has had no contact
23 with Roitman since February 2010; *See* Depo. of Roitman, 128-135. There is no entry in Kirk's
24 attorneys fee billings prior to May 5, 2011 that suggests that either has ever seen the draft. Kirk also
25 provides his affidavit and the affidavits of Whitney and Tahnee. Kirk's affidavit selectively leaves out
26 facts contained in his January 4, 2010 letter to Roitman that place Vivian in a favorable light. *See*,
27 Exhibit "BB" attached hereto. Roitman does not list Kirk's January 10, 2010 letter as a "Source of
28

1 Information,” in his final report. *Report of Dr. Roitman*, Attached to Plaintiff’s Motion for Joint Legal
2 Custody, etc. filed September 14, 2011, page 1. Dr. Roitman never asks Kirk for exculpatory evidence
3 nor evidence that might contradict Kirk’s claims.
4

5 13) **May 5, 2011:** Kirk provides to Dr. Roitman a 43 page report that organizes the
6 allegations of his affidavit by DSM-IV elements of an NPD claim and provides research on NPD. *See*,
7 Excerpts from the Depo. of Roitman, page 145-147, attached as **Exhibit “DD.”** Sometime later Kirk
8 destroys both his written and electronic copies of the report he has provided to Roitman, explaining “that
9 he probably threw it away.” *See*, Depo. of Kirk Harrison, pages 160-161, attached as **Exhibit “Z.”**
10 Roitman at first claims he does not remember the draft report, then acknowledges that he received it.
11 Depo. of Roitman, page 145. Over a month after his deposition, in a letter dated June 4, 2012, Dr.
12 Roitman remembers that Kirk gave him the report in an electronic form that he modified, and that is
13 why he does not have a copy;
14

15 14) **May 6, 2011:** The parties enter mediation; Vivian’s counsel, Bob Dickerson,
16 prepares a standard parenting plan granting the parties joint physical custody, and provides it to Kirk on
17 May 23, 2011. Kirk does not respond to the plan. Kirk’s counsel, Mr. Standish recalls a conversation
18 with Mr. Dickerson on July 27 in which he advised Mr. Dickerson that Kirk wanted primary custody. He
19 attributes Kirk’s desire for custody to him being a stay home father, and Vivian’s travel over the
20 previous 18 months. (Aff. of T. Standish, Ex. “1” to Kirk’s Opposition, ¶5). Mr. Dickerson has no
21 recollection of that conversation (Affidavit of Robert Dickerson, attached to Vivian’s Motion for
22 Attorney’s Fees as Exhibit “B”).
23

24 15) **June 6, 2011** – Kirk files a request to seal records, preventing Vivian from
25 determining that a Complaint has been filed.
26

27 16) **June 9, 2011:** Roitman completes his 36 page report containing his diagnosis of
28 Vivian as suffering from NPD. He uses the *same* format as Kirk’s 43 page report (application of facts to

1 the DSM-IV elements). Dr. Roitman bases his report solely on Kirk's affidavit, and the affidavits of the
2 parties' two adult daughter's that Kirk initially drafted. Dr. Roitman does not reference Kirk's January
3 10, 2013 letter or Kirk's 43 page report in his, Dr. Roitman's, report. Though his report makes a
4 recommendation of custody, Dr. Roitman has not met the parties' adult or minor children or Vivian.
5

6 17) **July, 2011:** Kirk requests that Vivian agree to a distribution of \$350,000 from the
7 parties' community accounts for each party's attorney's fees. Kirk and his counsel continue to hide
8 from Vivian a Complaint is already on file, Kirk's contact with Dr. Roitman, the Motion Kirk has
9 drafted, and Dr. Roitman's report. In an email dated August 10, 2011, Mr. Silverman memorializes
10 Kirk's actions regarding the requested distribution:
11

12 From what I understand of the facts, the demand that a sum of money be set aside and
13 used for attorneys fees is a recent, surprise condition of Mr. Harrison's agreement to
14 give Vivian the funds to purchase a condominium for her sister. My client will not
15 execute the proposed agreement.

16 The facts as I understand them are as follows:

17 In their first mediation Husband asked Wife to sign an agreement giving each
18 approximately \$350,000 for attorneys fees. Vivian refused to sign. The next time the
19 parties met, he asked for money to purchase property adjacent to the ranch--
20 \$190,000-as his sole and separate property. Vivian then realized the first request was
21 a subterfuge for Mr. Harrison to purchase the ranch land, suspicious and saddened by
22 this treatment, she nonetheless agreed to set over to Kirk \$190,000. Vivian would
23 receive \$190,000, also.

24 Also in the second mediation, Vivian mentioned she had previously agreed to fund a
25 house transaction concerning certain friends. It was an investment with a reasonably
26 good yield. It is stalled at this time, but may go forward, yet.

27 Four weeks ago, Vivian asked for money to purchase a condo for her sister. Mr.
28 Harrison knew Vivian had already gone into contract when she asked for the money.
(Before going into contract Vivian had been told the entire matter would be settled
and her funds set over to her by the date she needed to perform.) He agreed to fund
the condo purchase, but said it would also be better if he received an equal amount of
funds. The issue of attorneys fees was not discussed.

Then, when the money was to be transferred several days ago, the attorneys fees
demand was resurrected. Essentially, Mr. Harrison at the last minute conditioned
delivery of Vivian's money on her acceptance of certain terms concerning attorneys

1 fees. Mrs. Harrison has a legal obligation to purchase the condo. She is now forced to
2 use funds from her IRA. Because Mr. Harrison will not fulfill his promise to fund the
3 condo purchase, or rather at the last minute attached certain attorneys fees conditions
4 Vivian previously rejected, she will incur unnecessary taxes and penalties which she
5 will ask the court Mr. Harrison pay from his separate property.

6 Given a liquid community estate perhaps north of \$12,000,000, attaching an attorneys
7 fees rider to an otherwise clean agreement is suspicious and will engender waste to
8 the community when Vivian invades her IRA.

9 I cannot fathom why \$350,000 is being requested for attorneys fees. The sum of
10 \$350,000 is simply not realistic as an amount needed for this particular case where
11 the assets are liquid, and a modest separate property claim is being advanced. Does
12 Mr. Harrison intend to spend over a quarter million dollars on a custody matter?
13 Instead of all the funds going to litigation, does Mr. Harrison have an attractive,
14 lucrative opportunity in which he wants to invest and not include Vivian? Is there
15 something more to the ranch transaction than has been disclosed? Mineral or timber
16 rights?

17 I propose the parties each take \$150,000 from joint funds and move on toward
18 mediation as soon as Mrs. Harrison returns from her trip.

19 18) **June 14, 2011:** Kirk meets with Dr. Gary Lenkiet, a local psychologist, who conducts an
20 MMPI on Kirk. Kirk never discloses this fact to Vivian or the Court in his hundreds of pages of filings,
21 or through discovery. Neither Kirk nor his attorneys provide the MMPI report to Vivian, her attorneys,
22 Dr. Paglini, or the Court (Vivian was first advised through billing records received April 10, 2013, the
23 relevant excerpt of which is attached as **Exhibit "FF"** hereto). In other words, through an oversight
24 Kirk disclosed a material fact that he would never have disclosed otherwise. Vivian submits that Kirk
25 wanted a practice MMPI to prepare for the inevitable order directing the parties to psychological exams
26 prompted by his claim of NPD against Vivian. The Court so orders those exams to be performed by Dr.
27 John Paglini at the hearing of February 26, 2013;

28 19) **August 14, 2011:** Mr. Silverman contacts Kirk's counsel and discusses continued
mediation. See Email from G. Silverman to Kirk's counsel, dated August 14, 2011 attached hereto as
Exhibit "GG" attached hereto. On that same date, Mr. Silverman contacts James J. Jimmerson
regarding his willingness to act as a mediator. Mr. Silverman describes the case as "[a] custody matter,

1 primarily. The property issues are fairly straightforward--some 12 million dollars, all liquid, with a
2 separate property claim to a ranch in Utah--the value of which I do not know." See Exhibit "HH"
3 attached thereto.

4
5 20) **Early August, 2011:** Mr. Silverman inquires of Kirk's counsel whether Kirk will
6 mediate custody. Kirk's counsel alludes to Kirk wanting primary custody of the minor children due to
7 Vivian being "mentally ill," but refuses to provide any detail based upon instruction from his client. Mr.
8 Silverman memorializes his conversation (with remarkable restraint, under the circumstances) in an
9 email on August 14, 2011 to Mr. Standish and Mr. Kainen that reads in pertinent part:

10
11 The following is not a settlement offer nor settlement negotiations; it is a demand. On
12 what facts does Mr. Harrison base his claim for primary custody? I asked and one of
13 you told me flatly that the issue was mental illness but he was not authorized to say any
14 more. I guess you think you have a smoking gun.

15 **We are about to start mediation and litigation over an issue about which you will**
16 **not disclose what you think are the most salient facts. This constitutes, potentially, a**
17 **tremendous waste to the community because if Radford and I were informed of**
18 **those facts (if they exist), we could better evaluate the matter, advise our client, and,**
19 **perhaps, reach agreement.**

20 This "black box" approach may work in criminal cases but will not work here, nor should
21 it even be attempted.

22 I am informed your client will not ask for sole or supervised custody, only primary. So,
23 how "ill" could Mrs. Harrison be?

24 Your approach is not the way peace is going to come the family, which I assume is the
25 goal of both sides. Given the ages of the children, peace between their parents is
26 probably the thing they want the most. Your approach, which may have made sense in
27 the past, is now an aggravation of the dispute and a provocation of this side of the case.
28 It may lead to ugliness and fights which inevitably will harm the children (minor and
adult) and which might have been avoided. If your client persists in gagging you, we will
ask for such sanctions and money as can be awarded against him for that kind of
behavior.

[Emphasis supplied]. On that date, counsel for the parties discussed Kirk's insistence that mediation
commence by addressing the financial matters, not custody. For the first time, Kirk's attorneys reveal
that Kirk has filed a Complaint. Mr. Standish advises Mr. Silverman and Mr. Smith of basic allegations

1 (Kirk spends more time with the children, Vivian is obsessed with an actor, Vivian has “poisoned”
2 Rylee with testosterone), neither of his counsel mention Dr. Roitman’s report, his “diagnosis,” or Kirk’s
3 demand that Vivian’s contact with the children be supervised.
4

5 21) **September 14, 2011:** Kirk files and serves his Motion for Custody seeking that Vivian
6 be limited to supervised visitation with Brooke and Rylee;

7 22) **October 27, 2011:** Vivian files her Opposition in which she provides the reports of Dr.
8 Ole Teinhaus, who interviewed Vivian, reviewed Kirk’s pleading (that included Kirk’s and the adult
9 daughters affidavits, and Dr. Roitman’s report), and concludes that Vivian does not suffer from any
10 psychological disorder whatsoever. Dr. Teinhaus takes issue with Dr. Roitman never meeting her or the
11 children. (Vivian’s Opposition to Motion for Custody, p. 37).
12

13 23) **November 9, 2011:** Dr. Roitman prepares letter addressing Dr. Teinhaus’s analysis, and
14 indicating that he, Dr. Roitman, would like to be given the opportunity to perform a Rule 35 medical
15 examination of Vivian. *See*, Letter from Dr. Roitman’s files dated November 9, 2011, a copy of which
16 is attached hereto as **Exhibit “II.”** Neither Kirk nor his counsel provide the letter to the Court, or
17 request a Rule 35 examination. Nevertheless, at the hearing of February 1, 2012, Mr. Kainen states:
18 “The idea that we haven’t asked for Vivian to be evaluated is preposterous.” Hearing transcript, page
19 22, line 22-23.
20

21 (End of Timeline).

22 This timeline demonstrates the careful and strategic way that Kirk proceeded with his claim for
23 primary custody. As discussed below, at the December 5, 2011 hearing, Mr. Kainen stated that, “the
24 temporary orders [. . .] will be used as an advantage in this case on the ultimate resolution.” (*See*,
25 excerpt from the transcript of hearing of December 5, 2011, attached hereto as **Exhibit “JJ”**). This was
26 Kirk’s method; he presented anything he could to gain a favorable temporary order to “use as an
27 advantage” in the custody determination.
28

1 Kirk excuses his gigantic pleading that started this case by claiming it was necessitated by a
2 “horrible situation.” Kirk’s present Opposition, at p.28, line 8. It was not – nothing about the facts of the
3 case justified Kirk’s massive filings or approach. His “situation” was far better than a multitude of
4 litigants who appear before this Court every day without filing 48 page motions with 306 pages of
5 exhibits (including 132 pages of his own affidavit). His children were healthy, happy straight “A”
6 students. There was no emergency that he needed to address, and he proved that by waiting months to
7 file his motion after he filed his Complaint. (*See Vivian’s Motion for Attorney’s Fees and Sanctions*,
8 page 7)
9

10
11 Kirk’s claims were not unusual, it was the mass of facts that he *had* to present to support his
12 claim of NPD, and the “diagnosis” by Dr. Roitman, that made this case extraordinary. The best
13 evidence of Kirk’s continued failure to understand that this method caused the cost of the case to
14 skyrocket is that he does it again in his present gargantuan Opposition.

15 In order to avoid yet another war of attrition, Vivian has identified, in Exhibit “KK” attached
16 hereto, references to her various pleadings and statements that firmly rebutted the allegations, opinions
17 and innuendo contained in Kirk’s massive filings. In sum, Kirk never proved any of his claims
18 underlying his request that Vivian be limited to supervised visitation. No psychologist or psychiatrist
19 who ever met treated, or examined Vivian diagnosed her with NPD. He never proved Vivian
20 “poisoned” Rylee.¹⁶ He never proved that Vivian was not involved with the children (his claims were
21 rebutted in 27 witness statements from friends, coaches, teachers, and other individuals who regularly
22 saw Vivian with the children). He never proved that her sleeping with the children caused them any
23 harm, nor did he ever prove that she suffered any ill effects, either psychological or physical, resulting
24 from her use of prescribed phentermine or Celexa. He never proved any addiction or abuse (Vivian
25
26
27

28 ¹⁶ In Dr. Dewan’s July 6, 2013 letter, attached as **Exhibit “LL.”**

1 voluntarily submitted to drug tests from the moment Kirk made that false assertion, all of which were
2 negative).

3 As stated above, however, analysis of the relative merits of the facts now misses the point. It
4 was not that there were disputes of fact in this case; that occurs in all cases. It was Kirk's recitation of
5 *every* allegation of fact, innuendo, and opinion he could think in his pleadings to support an NPD claim
6 shown to be vapid, vacant and illusory, that caused the parties in this case to incur massive cost.
7

8 **e. Vivian's Response to Kirk's Pleadings:**

9 Kirk's all out assault on Vivian in his pleadings greatly affected the scope of the work in this
10 case. The work of responding to Kirk's voluminous pleadings was difficult and intricate, and could not
11 have addressed a more important subject, Vivian's time and care of the parties' two daughters, Brooke
12 and Rylee. Kirk's attacks went to the heart of Vivian's character, and her reputation in the community.
13 Why didn't Vivian just deny Kirk's allegations in a summary fashion and head to an assessment? She
14 had no choice.
15

16 At the time Vivian was faced with Kirk's Motion, Vivian had these personal characteristics and
17 history: (1) She was primarily a stay at home mother (Aff. of Vivian Harrison, filed with Opposition to
18 Motion October 27, 2011, page 15, ¶48; (2) As to the parties' first three children, she oversaw their
19 education and managed their overscheduled extracurricular activities typical of upper middle class
20 children; (3) As to the first three, all excelled in school and extra-curricular activities, none was ever in
21 trouble with teachers, coaches, friends or siblings; (4) She raised the children nearly by herself as their
22 father worked long hours as a partner in a major state-wide law firm¹⁷; and, (5) when the first three were
23 on their way to leaving the nest, she asked for two more to raise.
24
25
26
27

28 ¹⁷ Kirk stated in his January 4, 2010 letter to Dr. Roitman that during the adult children's youth (until 2002), he worked 11 to 12 hours per day Monday through Thursday, and longer hours when in trial. This was yet another fact eliminated from the affidavit Kirk provided to Roitman for the basis of Roitman's "diagnosis."

1 As to Brooke and Rylee, they both excelled in school, both excelled in extra-curricular activities
2 and, neither child ever had a bad report from school, coaches, church, friends, or parents of friends.
3 Until Kirk's launch of the lawsuit, both were happy and healthy.
4

5 For thirty years Vivian believed her husband was entirely honorable, "super honest," had never
6 lost a case, and was the most implacable, clever lawyer imaginable. She did not know or understand the
7 individual that could file Kirk's initial motion.

8 Custody cases are never brought against corporations--only people. Kirk and his expert, Dr.
9 Roitman, accused Vivian of bad behavior and an incurable personality defect. They sought to remove
10 her from the children's lives, send her from the marital home in disgrace, make her live in some
11 unknown place, and make her a suppliant for supervised times and places to be with, not raise, the girls.
12 The object of Kirk's hostile and aggressive action is a woman whose being and identity is that of
13 mother. Kirk's claims, if proved, would have made a futile failure of Vivian's life and being.
14

15 Kirk's claim for fees, *ad hominum* attacks on his opponent and her lawyers, and his revision of
16 the facts, are the surprise and anger of a bully to whom Vivian stood up, fought back, and then
17 prevailed. His overt claims and his innuendo, based on so-called facts and a corrupt and unprofessional
18 medical opinion, were carefully rebutted.
19

20 Compare what Kirk sought with what he got--he did not get a favorable result in this case. Kirk
21 started a fight that only diligent, experienced counsel and substantial funds could defeat. If one reviews
22 the nature of Kirk's claims against her, the proper question is, "How could a woman not bring all her
23 resources to her defense when the husband's goal was to take their girls from her entirely and send her
24 from the marital home without them and in disgrace before her entire community?"
25

26 Kirk was not satisfied with defaming Vivian to the Court. Within a couple of weeks of his filing,
27 he provided a copy of his initial massive pleading to the parties' friend, and Vivian's real estate lawyer,
28 Rodney Woodbury, Esq., who was helping her with a real estate matter. Mr. Woodbury is a prominent

1 figure in the community, Boulder City, in which Vivian lives. When, on October 21, 2011, Vivian filed
2 a simple motion to divide funds so that she could purchase real estate, Kirk saw fit to file a scathing 14
3 page attack upon her that accused her of being unfit to make the decision to invest (Opposition to
4 Defendant's Emergency Motion, filed October 25, 2011). Undersigned counsel knew at that point that
5 Kirk was not going to voluntarily end his quest to have Vivian removed from the children's lives.
6

7 Far from the weak, depressed, person Kirk insists that Vivian was at the time of his filing,
8 Vivian, who had graduated at the top of her college class, had the confidence of a mother who had
9 devoted her life to her children. She worked tirelessly with her lawyers to prepare a response that met
10 all of the allegations in Kirk's motion. Vivian, however, was savvy enough to realize that the course the
11 case was heading would lead to substantial fees and costs, and damage to her family. She readily
12 embraced the concept of mediation, and plead with both the Court and Kirk's counsel to stop the
13 bleeding after the first round of motions.
14

15 **f. The Scope of the Work in the Case was Greatly Increased by Kirk's**
16 **Initial Filing :**

17 Kirk greatly expanded the scope and complexity of the work in the case by his NPD claim. Kirk
18 suggests, presumably with a straight face, that Vivian's response to his initial motion should have "only"
19 taken 56 hours. Kirk suggests that the Court should limit the reasonable fee for that Opposition to the
20 "one hour per page" rule. Kirk is also critical of Vivian using more than one person on the case, and
21 presumably believes only one attorney should have prepared the response (though as discussed below,
22 Kirk's counsel used 14 different attorneys or staff on the case). It follows then that on a single motion,
23 Kirk believes that an attorney with a busy practice, should, over the ten business days granted to file a
24 response to a motion, spend a full seven of those working on a single motion for preliminary custody of
25 two healthy, happy girls. That kind of effort is only possible if, like Kirk, you have retired and have
26 nothing else to do.
27
28

1 Kirk criticizes the hours and costs Mr. Smith's firm worked and billed to prepare Vivian's
2 response to Kirk's initial motion. Kirk does not have a clear understanding writing a brief that between
3 text and affidavits is 217 pages (not including exhibits that had to be studied, but were not created) takes
4 more than an hour per page. Kirk's counsel billed nearly an hour a page to prepare Kirk's motion (41.8
5 hours for a 48 page motion), even though Kirk prepared drafts of *all* documents. Vivian did not provide
6 her attorneys with a 132 page affidavit, a 39 page draft of a motion, and an expert's report in which
7 pertinent facts had been carefully organized first by Kirk, and then by the expert, and 25 pages of
8 witness affidavits. Vivian had not spent a year studying books on NPD. Vivian had not studied the
9 effect of long-term phentermine use, or the issue of puberty and how it might be affected by testosterone
10 cream or other factors. She had not done any formal study on co-sleeping. Vivian had not kept a
11 journal for the prior three years, and she did not have a lawyer's skill and knowledge to aid her counsel
12 with the drafting of any documents.

13 Moreover, Kirk ignores the unusual nature of his NPD claim. To rebut that claim, Vivian's
14 counsel was left with the task of addressing all of the facts underlying the NPD "diagnosis." Vivian's
15 counsel interviewed all of the witnesses who executed statements, and prepared statements that each
16 then revised or added to. Vivian's affidavit is the longest single affidavit undersigned counsel ever
17 wrote, 84 pages (Kirk's suggestion in his Affidavit that Vivian wrote it is false, and represents the kind
18 of rank speculation and erroneous conclusion that make his briefs so difficult to counter). Vivian's
19 response rebuts in excruciating detail all of Kirk's and the adult daughter's allegations.

20 The process of going over of a lifetime of allegations (Kirk's affidavit started with Vivian's
21 childhood) and coming to a clear understanding of the history of the parties' relationship, Vivian's
22 history of raising the adult children (which Kirk did not talk about in his motion), Vivian's education
23 and work history, etc., took hours upon hours to write, revise, and rewrite. Though 2 of the witnesses
24 wrote statements, those statement came after hours of interviews, and multiple conversations in which

1 counsel suggested that certain information that they were eager to include in their statement be left out
2 because it was irrelevant to Vivian's response.¹⁸ Because Kirk did not acknowledge anything about
3 Vivian's history with the adult children, and because history is the greatest teacher, Vivian and Mr.
4 Smith spent hours putting together hundreds of pages of information regarding all of the achievements
5 of the older children on a disc that was submitted with her Opposition on October 27, 2011. Counsel
6 and his staff went through years of Vivian's credit card billings and created 26 pages of charts of all of
7 the various charges associated with Vivian's activities with the girls (Kirk alleged she had "abandoned"
8 the girls after 2006). Counsel went through Vivian's drug history and studied the effects of those drugs
9 and their use. Counsel spent hours studying articles (and the DSM-IV) regarding NPD, co-sleeping,
10 phentermine use, effect of transfer of topical testosterone, and various other subjects underlying Kirk's
11 diagnosis of NPD.
12

14 If Kirk wants to fairly apply his "one hour" rule, he should apply it to all the text and affidavits in
15 Vivian's Opposition brief (save perhaps Ms. Roberts, who wrote the bulk of her affidavit), and allow for
16 202 hours to prepare Vivian's Opposition (which is more than it took). Vivian submits that Kirk spent
17 that amount of time if one considers his meetings with Dr. Roitman, his study of NPD, his preparation of
18 the 39 page draft of his initial motion, his preparation of 157 pages of affidavits, his preparation of a 43
19 page report containing an ordered presentation of facts by diagnosis criteria and substantial research on
20 the issue of NPD, his research (if one can call reading a disputed DEA label research) on the issue of
21 phentermine, and his research into the effect of drug interactions. Kirk was billed a total of 41.8 hours
22 for all of the above. (See Chart showing billings by Motion and Countermotion attached hereto as
23 **Exhibit "T."**) A genie with a magic wand could not have finished all of that work in 41.8 hours.
24
25
26
27
28

¹⁸ Counsel was overwhelmed with people who called and wanted to provide statements (many of whom later did). The outpouring of people who saw the injustice in Kirk's actions was moving.

1 After the first round of pleadings, Vivian's counsel asked Kirk and the Court to stop the
2 voluminous pleading practice. Vivian's response to Kirk's first motion was 56 pages of text, and 291
3 pages of exhibits. Those exhibits included Vivian's 84 page affidavit, seven witness affidavits totaling
4 48 pages, and the charts and outlines (composing 28 pages) referenced above. Perhaps most important,
5 Vivian provided two reports of Dr. Ole Teinhaus, the chair of the School of Psychiatry at the University
6 of Nevada, who had read all of Kirk's pleadings, and found that Vivian suffered from no personality
7 disorder whatsoever. She firmly believed that her response would be sufficient to stop Kirk from his
8 course of trying to prove that she suffered from NPD. It did not.
9

10
11 **g. Kirk's Insistence on Proceeding forward with NPD Claim**

12 It was Kirk's insistence in pursuing his quest to prove that Vivian suffered from NPD, even in
13 the face of Vivian's counsel's pleas to stop the bleeding and settle the case that led to even greater fees
14 being incurred after the initial motion and opposition. After the parties were unsuccessful in resolving
15 the case after 22 hours of mediation, on December 3, 2011, undersigned counsel plead with the Court to
16 stop the manner in which the case was being conducted, and proceed to hearing on the issue:
17

18 MR. SMITH: Let me just say this, look, the case is being tried in the pleadings, it seems
19 like. We don't have pleadings like this in - -

20 THE COURT: They're very extensive papers that have been filed.

21 MR. SMITH: Very extensive. I don't think that's the place for the case to be tried. I
22 think it's - - I think there is enough information in the pleadings, and certainly enough in
23 some brief and direct pleadings that would happen before the 19th to address the
24 preliminary issues.

25 There is no reason why we should have another round of several hundred-page briefings,
26 and let me - - there is a couple of reasons. While these people are wealthy people, Ms.
27 Harrison has not established a career. Under the circumstances, frankly, there is a lot of
28 money to go around. This will be the last money that she has to use.

Both sides now, between mediations that occurred since March of this matter, mediations
that recently occurred, the briefing of these issues, both sides have spent over to my
estimate, over \$150,000 in fees. It's - - the case is blown out for no apparent reason.
These are two healthy kids who are doing well in school. There is been no incidents of

1 violence. There is been no incidents of harm. There is no deep CPS reports. There is
2 nothing, and we're 380-page briefs.

3 To me, Judge, it's really over blown, and if there was a concern over the psychological
4 condition of my client, that's certainly met by the psychological testing that was done,
5 both before and with the filing of the brief. We've had drug tests that are clean. There is
6 just nothing here to justify this kind of case other than I've got a whole bunch of money
7 and I'm going to spend it trying to prove my merit.

8 Frankly, Judge, I think we need to keep this case under control or it's going to be in terms
9 of its scope over really nothing. What I would suggest we do is we have a brief briefing
10 schedule, you have the girls interviewed to find out if there is any problems with them
11 and we proceed forward on the 19th and the Court will have some information necessary
12 to make those preliminary orders.

13 (See, Transcript of hearing of December 5, 2011, pages 7-8, **Exhibit "NN"** attached hereto.) In light of
14 Kirk's demand that Vivian be limited to supervised visitation, the Court logically inquired why Kirk
15 would want to delay the hearing on his motion:

16 THE COURT: Okay. I guess my question is, why delay this? If we have children who
17 are potentially at risk, which is the nature of the underlying motion that was filed, why
18 delay this any further? Why not proceed on the 19th and at least start that process and if
19 it's not going to require outsourced evaluative services, why not get that moving now and
20 have that discussion in the immediate future?

21 Mr. Standish responded that Kirk needed more medical information on Vivian (**Exhibit "OO"**, pages
22 17-20), even though Kirk had already sent out and received responses to 17 separate subpoenas to
23 Vivian's medical providers. Kirk already had months of clean drug tests from Vivian. While Mr.
24 Standish indicated, "we're not talking about delaying the case for months," that is precisely what
25 happened – the case was delayed for approximately two months so Kirk could file more massive
26 pleadings (an 81 page reply with 189 pages of Exhibits).

27 Mr. Kainen's response to the Court's question evidenced that Kirk's request for delay was
28 tactical:

MR KAINEN: And my concern is quite frankly, the temporary orders which we're
seeking to rush to will be used as an advantage in this case on the ultimate resolution. In
other words, if you can move early and move in a way that's favorable to their position,
that will then create a situation where it benefits their case in the long run, which is why

1 you have two sides here, one that's rushing to judgment, because what they want to do is
2 start staking out grounds on custody and other things, okay, and you have one side that's
3 saying, look, move a little cautiously, get all the information.

4 If we're right, okay, and the medical evidence is what will determine that, then putting
5 the children in an unsupervised situation with Mrs. Harrison would be extremely
6 dangerous. And so the idea is let's rush in and make preliminary orders prior to
7 information being fully available.

8 **(Exhibit "OO")**. Mr. Kainen's response is a testament to why the case became so remarkably
9 expensive. Instead of just moving to an assessment that would ferret out his claim of harm to the
10 children, Kirk wanted to file more pleadings so he could gain an "advantage in this case on the ultimate
11 resolution." Mr. Kainen used as an excuse that Vivian's supervision of the children would be
12 "extremely dangerous." He stated this in the face of Kirk leaving the children with Vivian unsupervised
13 *the preceding weekend!*

14 Faced with these preposterous assertions, Vivian's counsel again pleaded with the Court to stop
15 Kirk's attempt to "try the case in the pleadings":

16 MR. SMITH: Let me just note that Mr. Harrison left the children in her care without
17 supervision this weekend, so if it was such a concern, why in the world would he worry
18 about these briefings. But what you said is exactly right, first question we should ask is,
19 what is the relief requested? The relief is based upon the allegation that she is unfit
20 because she has psychological issues.

21 You will be able to judge the evidence of psychological issues that are found in the two
22 expert reports that are before you. I don't presume we're going to have additional expert
23 reports since we don't have - - unless they perform more discovery, and that's why I'm
24 saying they're trying to try this in their pleadings. But you have expert reports before
25 you. You can weigh whether or not they suggest to you that there is a problem with the
26 mother. You're capable of doing that.

27 In regard to the damage to the children or the alleged problems with these almost straight
28 - A, well-loved, active children, you can - - there is no psychological evidence
whatsoever before you, but certainly the way to get to that point, is as you described, to
allow the parties to either have the children evaluated or set an outsource evaluation.
That's what makes sense. The rest of this is an attempt to gather up all this information
and basically do what they did with the initial salvo, and that was [throw] enough at the
wall and see if it sticks.

[. . .]

1 MR. SMITH: [Answering the Court's question about time necessary to Reply to Kirk's
2 next round of briefing]

3 If you give them six weeks, I have no idea.

4 I think frankly what we should do is set page limitations. I mean how much information
5 do you possibly need, Judge, to make simple [rulings] about healthy children? I mean
6 it's just so overblown because he has to make his case that way. Because the basic facts
7 of the case don't allow him to say that she should have supervised visitation, so he's got
8 to make up this giant factual analysis that he somehow thinks is going to convince you
9 that off the block, without ever hearing from these people in the courtroom or ever seeing
10 witnesses, that off the block he's going to get you to order supervised visitation when he
11 didn't even do that this weekend.

12 So, look, Judge, all I want to say is whatever you set will give me the guidance. So in
13 answering your question, if you give him six weeks, I have no idea how long I'm going
14 to need, three weeks, four weeks, if he's going to have another tome of 380 pages.

15 I did not only work on this case. I have a full practice, and that's why couldn't get it
16 done in one week or two weeks. You can't write 300 pages of response in that period of
17 time, and there are, in the 132 pages of his affidavit alone, there are probably a thousand
18 factual assertions, if you take the various factual assertions that are made.

19 It's just - - if we allow this thing to get out of control, they're going to spend another
20 \$100,000 in reply briefs. What case is like this?

21 And again, your observation was the absolute correct one. If, in fact, there is an issue,
22 let's get started. Let's set a trial date. Let's get started with whatever analysis the Court
23 [deems] fit. We don't think - - we think the first order of business would be to have these
24 girls interviewed, but, that's up to the discretion of the Court after it hears the evidence. I
25 just think we need to move this case along like any other case.

26 (Transcript from the December 3, 2011 hearing, **Exhibit "QQ"**, page 24-26.) The above quotes belie
27 Kirk's claim that Vivian's counsel's goal was to incur fees. Undersigned counsel offered solutions
28 (proceeding directly to assessment, a page limit, setting trial) that all would have been lower cost
solutions than Kirk's insistence on filing more briefs. Kirk's claim that he was willing to allow the
matter to be determined by a neutral expert is belied by his position in the hearing quoted above.
Vivian's counsel, not Kirk or his counsel, proposed that the Court do just that, send the case to a neutral
expert before another round of massive briefing.

1 **h. Vivian's Good Faith Efforts to Resolve the Case, and Thereby Limit the Scope**
2 **of the Work to be Performed.**

3 Kirk ostensibly argues in Opposition that the character and scope of the work would have been
4 less if Vivian had negotiated a resolution in good faith. He claims that he made reasonable settlement
5 offers, but Vivian (prompted by her lawyers) refused to negotiate in good faith. Contrary to his
6 argument, Vivian continuously negotiated in good faith.

7 Kirk's fundamental argument is that Vivian should have accepted *his* offers, all of which
8 contained elements of his claim that Vivian suffered from NPD. He demonstrates this when he states in
9 his Opposition, at p. 92, "This case was never complex: The questions regarding custody were very
10 straight forward: What was causing Vivian's misbehavior? What safeguards should be put into place to
11 protect Brooke and Rylee from any future physical and emotional damage?" His offers included
12 cameras, nannys, drug tests, exams and any number of terms based upon his presumption that something
13 was wrong with Vivian. Kirk never proved anything was wrong with Vivian, and her history of raising
14 great children largely without him should have instructed him.

15 Kirk ignores the fact that he could have settled the case in June 2011 by placing his signature on a
16 document (Mr. Dickerson's offer) that would have left him with nearly the exact same custody
17 arrangement that he has now. If he was so worried about "safeguards," why has he failed to respond to
18 Vivian's proposal for a therapist for the girls for over a year? Vivian submits that she was forced to
19 incur hundreds of thousands of dollars of fees and costs until Kirk finally realized that he was not going
20 to "win" his case.

21 At the hearing of February 1 on Kirk's initial motions, Kirk's counsel argued that Kirk's true goal
22 in having a "neutral" assessment by Dr. Paglini was to seek "treatment" for Vivian. *See* Transcript of
23 Hearing of February 1, 2012, page 31, lines 7-10. If that was true, why didn't Kirk allow Dr. Paglini to
24 complete his report? If Kirk wanted to find out whether Vivian suffered from NPD, why didn't he allow
25
26
27
28

1 Dr. Paglini to reveal the results of his psychological examination? How would that have hurt this
2 family? Vivian offered to allow Paglini's results to be wholly therapeutic, and inadmissible in the
3 custody case. *See*, Transcript of the hearing of July 18, 2012, page 6. Kirk refused, and thereby
4 demonstrated that at both the beginning and the end of his case, it was never about helping Vivian or his
5 family.
6

7 Examine the history of settlement efforts: Good faith would have been Kirk responding to
8 Vivian's counsel's offer of joint custody by explaining why he felt that he should have primary. He
9 would have worked with Vivian, and requested that she attend counseling or treatment to address
10 whatever problems that he perceived. Instead, Kirk played tactical games. Kirk cites no letter, email, or
11 any other written communication from the time he met with Dr. Roitman in February 2010, to
12 September 14, 2011 (or at any other time), in which Kirk or his lawyers state: 1) that Kirk wants primary
13 custody; 2) any reason why he wants primary custody; 3) that he wants Vivian to seek counseling; or 4)
14 that Vivian suffers from a personality disorder. The opposite is true; he deliberately failed to tell her
15 about the process of her "diagnosis" or the opinion expressed in it until he filed his Motion on
16 September 14, 2011. There was no response to the email from Mr. Silverman of August 14, 2011, cited
17 above.
18

19
20 The parties entered mediation in May, 2011. The parties met on three occasions. Mr. Dickerson
21 prepared a comprehensive outline of the parties' assets and liabilities. Vivian, through submission of a
22 parenting plan Kirk could have just signed, offered to settle the custody matter through a standard joint
23 physical custody order. Kirk was preparing his NPD claim; he did not respond to the offer.
24

25 Kirk claims that Vivian understood that Kirk wanted primary custody during the mediation, and
26 that her statement that "she envisioned a simple case where they would equally divide assets and share
27 custody of their minor children" was false. (Opposition., page 20). Kirk's failure to understand that he
28 can want primary custody without ending up with primary custody tells the story of this case. All of

1 Vivian's counsel advised her repeatedly that the most common order granted in the Family Division
2 courts is joint physical custody. She offered joint custody; Kirk rejected that offer. That did not stop her
3 from believing that would be the result.

4
5 Kirk was not honest with Vivian; he held secrets from her. Even if she could infer that Kirk was
6 seeking primary after Kirk rejected her proposal of joint physical custody, Kirk certainly did not explain
7 why. *See*, August 14 email from Mr. Silverman to Kirk's counsel, quoted above; Motion for Attorney's
8 Fees, page 11, and Affidavit of Robert Dickerson, Esq. attached as Exhibit "A" thereto.

9
10 He did not tell her he had filed for divorce, was gathering a custody case, causing their daughters
11 to sign affidavits, and feeding an expert for a pre-ordained "diagnosis." He mischaracterizes Vivian's
12 motivation for ending mediation in July, 2011. He selectively quotes her emails, but leaves out that she
13 terminated Mr. Dickerson, and wrote flowery statements about Kirk, because she was going to stay
14 married. She wrote Mr. Dickerson on July 15, 2011: "After careful consideration it has occurred to me
15 that it is not in my families (sic) best interest for me to file for a divorce." Kirk's Opp., Exhibit 5-D.

16
17 Vivian reconsidered that idea and hired Mr. Silverman two weeks later. Mr. Silverman sought
18 mediation as soon as he was up to speed on the case in early August 2011. On August 10, 2011, he sent
19 an email to James Jimmerson regarding acting as a mediator even though Mr. Jimmerson had met with
20 Kirk. Mr. Silverman also discussed the use of Scott Jordan, and others as potential mediators. (*See*,
21 **Exhibit "GG"** attached hereto, Mr. Silverman's email to Kirk's counsel addressing mediators). These
22 are hardly the acts of someone intent on sabotaging mediation.

23
24 Mr. Silverman and Mr. Smith wanted Kirk to be honest, and tell Vivian and her counsel why he
25 wanted primary custody, so, as Mr. Silverman wrote, he could address any issues with his client. That
26 was negotiation in good faith. Failure to respond, Vivian submits, is bad faith.

27
28 Kirk played games. He only selectively revealed any information. Mr. Standish had only
mentioned Kirk being a stay at home father and Vivian's travels to Vivian's counsel. Standish Aff, Exh.

1 to Kirk's Opp, ¶20. Kirk's counsel then refused to provide information. When Kirk's counsel finally advised Vivian's counsel of Kirk's issues, they did not reveal anything about Roitman or his diagnosis.

Kirk's allegation that Vivian and her counsel did not want to mediate is false; they just wanted to mediate child custody first. When Kirk indicated he would only mediate property first, Mr. Smith advised Mr. Kainen that she would file a motion so that Kirk would reveal why he would not agree to joint custody. This is verified in Mr. Kainen's billing statement entry of September 14, 2011, when describing a phone call with Mr. Smith: "Custody first intention by adverse party, Psychologists perform assessments, possibility of filing motion to 'smoke us out.'" Mr. Smith would not have had to "smoke out" anything had Kirk and his counsel been candid.

i. Vivian's Good Faith Participation in Mediation

The first time Mr. Smith discussed the issue of mediation with Vivian's counsel after Kirk's initial filing (at the hearing on Vivian's Emergency Motion on October 24, 2011)¹⁹, Vivian agreed to mediate. The parties attended mediation for approximately 22 hours on November 27 and 28, 2011. Though the parties discussed resolving the financial issues, little time was spent on that subject.

The primary property issue was the community and separate interest in the Utah ranch land. Beginning in September 2011, Kirk represented to counsel (and reiterated to Mr. Jimmerson) that Clifford Beadle, CPA was going to provide a report of the percentage of community interest in the various parcels comprising the Utah ranch. It was important to have the method Mr. Beadle used to calculate his interests so that Vivian could understand his methodology. Mr. Beadle was at the mediation, but he advised all parties present that he had not completed his report (Mr. Beadle did not provide his formal report until September, 2012, a year after first promised). As Kirk admits, no one came to the mediation with appraisals. Moreover, the valuation of the Utah land was made more

¹⁹ The Court should note that Vivian had one attorney at that hearing, Kirk had two.

1 complicated by water rights, and structures on the land that Kirk had erected without knowledge of the
2 Washington County officials or even a building permit. The parties were not in a position to resolve any
3 of those issues. Contrary to Kirk's contention (at page 40 of his current Opposition) the parties did not
4 have all the information to make a global financial settlement.
5

6 Kirk also suggests that Vivian's counsel demonstrated that they did not intend to resolve
7 financial issues at the mediation because they prepared Requests for Production and Interrogatories prior
8 to the mediation date. Vivian's attorney sent interrogatories and requests for production of financial
9 account records for multiple purposes. First, Vivian's trust that Kirk had properly accounted financial
10 accounts and records waned after his attacks on her contained in his filings. Further, the financial
11 records were necessary to determine the period of time that Kirk spent in Utah over the years. Attached
12 hereto is **Exhibit "SS"** is a report of Melissa Attanasio's carefully analyzing those records. The issue of
13 the time each party spent away from the children was significant. Kirk made this a cornerstone of his
14 original Motion by claiming he should have custody because Vivian had spent time away from the
15 children working for the Hope Foundation (indeed, this was the only factor mentioned by Mr. Standish
16 in July, 2011 to Mr. Dickerson). As demonstrated by the analysis, had this matter gone to evidentiary
17 hearing on the issue of custody, Vivian would have been able to demonstrate that Kirk spent far greater
18 time away from the children in Utah than he alleged in his pleadings. It was Kirk that placed this issue
19 into the case, and the financial information was one way to determine the truth about Kirk's allegation
20 regarding the time that he spent in Utah.²⁰
21
22
23

24 Moreover, the parties' daughter's affidavits contain many pages about their concern regarding
25 Vivian's purchases (an expensive pair of jeans, for example). Vivian wanted to confirm her spending
26 and Kirk's spending. Again, this was an issue that formed the basis of one of Dr. Roitman's arguments
27

28 ²⁰ The other way to determine this issue was phone records. When Vivian received Kirk's phone records in the mail, Kirk grabbed them out of her hand and then refused to produce them during discovery. *See*. Letter from Mr. Smith to Mr. Kainen dated February 3, 2012 attached hereto as **Exhibit "PPP."**

1 about Vivian's NPD. Nothing about Vivian preparing basic discovery requests suggested that she was
2 unwilling to resolve issues at mediation.

3 Kirk fails to mention that Vivian brought both Ms. Attanasio and Marvin Gawryn to the
4 mediation. Ms. Attanasio was there specifically to deal with financial issues. She and Mr. Standish met
5 to exchange information regarding account records. Ms. Attanasio was tasked by Vivian to meet with
6 Kirk and Mr. Beadle to divide up all of the parties' accounts, which she did. Kirk's continued claim that
7 over "90% of the estate" was not in dispute, ignores the disputes that did exist. The parties disputed the
8 value and possession of the marital residence, and the community and separate value of the Utah land.
9 If Kirk was intent on finalizing the financial case as a whole, why didn't he seek an appraisal on the
10 marital residence until approximately seven months after the November, 2011 mediation, and why
11 didn't he seek an appraisal on the Utah ranch property until a few days before trial? Kirk wanted to
12 divide accounts during the mediation because he wanted Vivian to be responsible for the payment of her
13 own expenses and attorney's fees, something he later demanded in his Countermotion for Temporary
14 Orders Pursuant to NRS 125.040, filed January 25, 2012. He made no effort to present information at
15 the mediation that would have allowed the parties to resolve the contested matters in the case.

16 Moreover, Kirk's contention that "90% of the estate" was not in dispute ignores disputes that he,
17 in bad faith, created during the case. Vivian provided credit card statements to Kirk's counsel showing
18 balances of approximately \$55,000.00 she had incurred prior to the divorce case, and requested that Kirk
19 release funds from a community account to pay them. Kirk alleged that Vivian had incurred those
20 charges without his consent, and refused to pay them until she gave him the underlying statements.
21 Kirk could not possibly in good faith believe that he could not account for Vivian's credit cards
22 expenditures in the divorce from the parties' assets, but he continued to cause both parties to spend
23 unnecessary fees by refusing to pay. Because of Kirk's inexplicable refusal to pay the sums due,
24
25
26
27
28

1 Vivian's credit was damaged, and she was forced to pay the cards from her IRA. *See*, Correspondence
2 attached hereto as **Exhibit "QQQ."** Kirk eventually reimbursed Vivian.

3 Kirk, in a clear showing that he believed that disclosure only applied to Vivian, refused to
4 provide his credit card statements until Vivian was required to file a Motion to Compel discovery. *See*,
5 Motion to Compel, filed January 27, 2012. Kirk refused to act in good faith even over relatively minor
6 disputes.
7

8 Kirk's grounds his Opposition, and his Countermotion for fees, in large part on his contention
9 that Vivian did not negotiate in good faith during mediation because she, at the behest of Mr. Silverman,
10 refused to accept Kirk's proposal that all discovery end, and that she be assessed by a "national expert"
11 on NPD. As set forth in Mr. Silverman's affidavit attached as **Exhibit "S"** hereto, he and undersigned
12 counsel were in complete accord that Kirk's request for assessment without discovery would not lead to
13 a fair and impartial diagnosis of Vivian.
14

15 Vivian already had a fair and impartial diagnosis from Dr. Teinhaus, there was no necessity of
16 further diagnosis. Contrary to Kirk's contention, Dr. Teinhaus had reviewed material from multiple
17 sources before rendering his opinion; he had reviewed the parties' pleadings containing Kirk's and
18 Vivian's detailed statements, and the affidavit of nine witnesses. Kirk cannot reasonably contend that
19 Kirk had more to tell him than was found in his 132 page affidavit that would have caused Dr. Teinhaus
20 to change his finding that Vivian suffered from no personality disorder whatsoever.
21

22 Under Kirk's proposal, he would have been the only attorney addressing the "national" expert,
23 and he would have done so without any scrutiny of the facts that he alleged. Kirk's strategy was to
24 leave himself as a persuasive lawyer arguing unverified allegations to a lay person without anyone
25 challenging Kirk's assertions through discovery. While experts have some ability to ferret out factual
26 issues, they do not have the ability to conduct discovery, or hear the cross examination of witnesses
27 whose statements are supplied to them during the time of the assessment. It is for this reason nearly all
28

1 custody assessment reports begin with an explanation by the party providing the assessment that he or
2 she has determined facts in a particular fashion, but if the factual findings of the court differ, the
3 diagnosis or recommendations contained in the assessment may change. As admitted by Dr. Roitman in
4 his deposition, his diagnosis was entirely based on a presentation of facts from Kirk, and if those facts
5 were incorrect, his diagnosis would change. As her counsel stated at the December 5, 2011 hearing,
6 Vivian was willing to undergo yet another assessment through Dr. Paglini, but wanted the opportunity to
7 investigate Kirk's and any other witnesses' allegations.
8

9 Moreover, by the time of mediation, both Mr. Silverman and undersigned counsel had come to
10 the conclusion that Dr. Roitman's "diagnosis" was both unethical and grossly inaccurate, and believed
11 that Vivian would prevail at a contested hearing. It was only when Vivian's counsel raised that point at
12 the mediation that Kirk suggested that Dr. Teinhaus, the chair of the School of Psychiatry and the
13 University of Nevada Reno, was unqualified, and that we needed a "national expert" in addition to Dr.
14 Teinhaus and Dr. Roitman.
15

16 Nevertheless, Vivian still negotiated Kirk's proposal for many, many hours, but the parties could
17 not agree on terms (the report's use, its effect on timeshare, whether it could be published, whether it
18 would end litigation, etc.). Both of Vivian's counsel remember Kirk, not Vivian, walking out of the last
19 day of mediation.
20

21 What Kirk fails to mention is that another proposal was also presented during mediation by both
22 Mr. Smith and Mr. Standish. Both attorneys posited that regardless of the outcome of any psychological
23 examinations, the parties would end up with joint physical custody. Mr. Standish and Mr. Smith
24 approached the resolution from a standpoint of protecting the children from behavior that was harmful to
25 them (Kirk's claim of NPD, Vivian's claim of alienation). Thus, Mr. Standish and Mr. Smith jointly
26 proposed a solution that would include an "empowered therapist" for the daughters. The therapist would
27
28

1 have the ability to demand meetings with the parents, and impose restrictions on the parent's behaviors.
2 Kirk flatly rejected that proposal.

3 The Court does not have to rely on the recollection of the lawyers present at the mediation on
4 that issue; Mr. Smith memorialized that offer to Mr. Standish after the mediation. In a letter Mr. Smith
5 faxed to Mr. Standish on December 13, 2011, he writes:

7 I have expressed to you and the Court in no uncertain terms that this is a custody case that
8 should have been, and can be, resolved. One of the proposals we have discussed is the
9 hiring of a therapist for Brooke and Rylee to monitor the behavior of the parties toward
10 the children, and any affect that behavior has upon them. The parties, under that
11 agreement, would take joint legal and physical custody of the children. That therapist
12 could require the parties, or either of them, to participate in such counseling, and would
13 be able to identify behaviors, actions or statements by either party that had an adverse
14 effect on the mental or physical health of the children. By instituting that process, my
15 client's concern about your clients' alienation, and your client's concern about my
16 client's behavior toward the children, would be addressed.

17 Rather than agreeing to such a process, your client seems intent on proving that my client
18 suffers from a personality disorder, and thereby seeks to severely limit her time with the
19 children. We have provided you an analysis from a qualified expert who has both met
20 and tested Vivian, and considered the allegations contained in Kirk's affidavit, and the
21 affidavits of Tahnee and Whitney. It is your client's desire to have further testing, even
22 in the face of a solution that will monitor any effect either party's behavior has upon the
23 children, that is causing the parties to spend enormous amounts of attorney's fees and
24 costs in this case. Please note that this settlement discussion is not confidential, and that
25 we intend to seek reimbursement from Kirk's portion of the parties' community assets for
26 all fees expended to counter what we believe will be shown to be a position that lacks
27 merit.

28 (See, **Exhibit "RR"** attached hereto, page 2). This case ultimately settled for the construct outlined in
that letter. While Mr. Standish in good faith attempted on several occasions to propose settlements
consistent with the notion expressed in the letter, Kirk insisted on various inclusions in the agreement
that would significantly affect Vivian's ability to care for the children, such as cameras in Vivian's
home that Kirk could monitor, or the use of a full-time nanny/informant. During that period of time,
Kirk filed another massive pleading suggesting that Dr. Teinhaus's diagnosis was flawed, and Vivian
and the bulk of her witnesses were "perjurers." See, Kirk's Reply to Motion for Custody, filed January

1 4, 2012, pages 64-78. The matter was ultimately ordered to assessment, and Vivian continued with the
2 process of gathering information to meet Kirk's claims.

3 Vivian's counsel continued to seek a resolution of the case even after the February 26, 2012
4 hearing. On March 5, 2012, Mr. Smith sent a letter to Kirk's counsel again outlining a simple settlement
5 offer with an "empowered therapist." *See*, Letter attached hereto as **Exhibit "VV."** In order to protect
6 the family, Vivian and Mr. Smith proposed that the parties would not discuss the custody case any
7 further with the adult children.
8

9 The parties would agree that neither of them would discuss this case (including both
10 custody matters or financial matters) with the parties' adult children for a period of two
11 years. The adult children would be given the operative parts of the parties' parenting plan
12 for the girls, but that would be the only information they would be provided. The adult
children would likely welcome a chance to distance themselves from the divorce case.

13 Again addressing Kirk's actions causing the parties to expend extraordinary fees:

14 As everyone is now well aware, the fees in this matter have been greatly inflated by your
15 client's claim that Vivian suffered from Narcissistic Personality Disorder. Both of you
16 and I know that had Kirk just proceeded in a normal fashion, this matter would have been
17 referred for outsourcing and ended without incurring significant cost at this point in the
18 litigation. Instead, he filed his monster motion including something I have not seen in 27
19 years of practice - a psychological report from a doctor who had never met the client,
20 Vivian. It was accompanied by the largest affidavit I have seen in the history of my
practice, 132 pages total. He was seeking to have Vivian subject to limited and
supervised visitation of children he was regularly leaving in her care. Now he claims that
it is my fault that fees have been run up in this case; his claims are delusional.

21 **If he was so worried about fees, why has he greatly increased the costs of this action**
22 **by filing a frivolous Rule 11 claim, failing to provide even basic discovery**
23 **documents, resisting Vivian's request to purchase a home as an investment even**
24 **though he was getting equal funds, demanding a hearing on the financial issues even**
25 **though Tom and I had come to a resolution of all terms, and continuing to demand**
26 **that Vivian had psychological issues?** Indeed, even after Dr. Teinhaus actually met
27 with Vivian, had her take an MMPI, reviewed all of the paperwork you filed with the
28 court, and found Vivian did not suffer from any personality disorder, that was not enough
to convince your client to stop filing his attacks against her. Then even after she saw
what are arguably the two top experts in the world in personality disorders, both of which
(after reading everything Kirk had filed) found that Vivian did not suffer from any
personality disorder, that was not enough to stop you from asking for what amounts to the
sixth psychiatrist or psychologist, Dr. Paglini, to analyze Vivian. Does Kirk really think
anyone believes that he is not writing the material that is being filed with the Court (while

1 Vivian is forced to pay attorneys to write her documents). He now has the temerity to
2 suggest that we have run up fees? He even went to the unethical length of alleging on
3 hearsay that I had charged Vivian \$20,000.00 to Vivian for trips to Boston (Harvard) and
New York (Columbia) for trips that I was not even on.

4 Exhibit “VV” attached hereto. (Emphasis supplied)

5 The parties met again on March 9. Kirk could have just accepted the simple offer stated in Mr.
6 Smith’s letter, but instead Kirk’s counsel wanted to continue to discuss the placement of cameras in
7 Vivian’s home, and the use of a nanny (though Kirk’s counsel were not of like mind on those issues).
8 Though Mr. Smith proposed a settlement of nearly the exact structure the parties eventually entered,
9 Kirk and his counsel appeared to be locked on the notion that Vivian needed to be watched (though,
10 admittedly, Kirk’s counsel were not of like mind on that issue).

11 What Kirk also fails to mention is that the negotiations of a resolution stalled after the Court’s
12 order because the parties’ now 14-year-old daughter, Brooke, did not desire to have equal time with
13 Kirk. The parties ultimately negotiated a “teenage discretion” clause into the final parenting plan²¹, but
14 that process took weeks. Vivian proceeded forward with her experts and discovery to provide to Dr.
15 Paglini, because she was not willing to rely on negotiations that had broken down before after 22 hours
16 of mediation.

17 Mr. Smith’s letter of March 5 also shows efforts to move the property matters toward a
18 resolution by requesting that Kirk agree to provide the financial information that had been requested,
19 produce the report of Cliff Beadle, and exchange that report for the marital residence and lot appraisals
20

21 ²¹ The parenting plan, at page 6, reads in pertinent part:

22 Notwithstanding the foregoing time-share arrangement, the parents agreed that, once each child reaches the age of fourteen
23 (14) years, such child shall have “teenage discretion” with respect to the time the child desires to spend with each parent.
24 Thus, while the parents acknowledge the foregoing time-share arrangement, the parents further acknowledge and agree that it
25 is in the best interest of each of their minor children to allow each child the right to exercise such “teenage discretion” in
26 determining the time the child desires to spend with each parent once that child reaches 14 years of age.
27
28

1 that had been prepared by Mr. Dugan. Kirk did not produce the documents until after Vivian was forced
2 to file a Motion to Compel, and did not produce a report from Cliff Beadle until September 2011, by
3 which time Mr. Smith had produced Mr. Dugan's appraisals.

4
5 Throughout the case, both Mr. Silverman and Mr. Smith made numerous settlement offers, and
6 repeatedly tried to resolve the case. See Mr. Silverman's August 27, letter attached hereto as **Exhibit**
7 **"CCC,"** and Mr. Smith's November 15, 2012 letters to Opposing counsel attached hereto as **Exhibit**
8 **"RRR."**

9
10 For the purposes of the present Motion, as demonstrated by the actual, verifiable offers made by
11 Vivian's counsel both at Court, and in direct correspondence to Kirk's counsel prior to Kirk's filing of
12 his massive briefs, and during the property phase of this case, Vivian attempted on several occasions to
13 limit the scope of work to be done, but Kirk insisted on proceeding forward with his NPD claim, and
14 arguing over property. Nothing about Vivian's actions by her attorneys in this case shows bad faith;
15 Vivian submits that same cannot be said for Kirk.

16
17 **j. Kirk's Claims of Overbilling**

18 Kirk argues that Vivian's lawyers overbilled her for services. Under *Brunzell*, the "time and skill
19 required" is a specific factor identified under the "character of work" element of the Court's analysis of
20 a fee request. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. It follows that the Court should address whether
21 the lawyer's billings reflect the time and skill required to perform the work presented by the facts and
22 law of the case in which the lawyer seeks fees.

23
24 The essence of Kirk's overbilling argument is at page 92 of his Opposition where he states: "The
25 case was never complex. The questions regarding custody were very straight forward." Vivian submits
26 that the case *was* complex because Kirk made it so, and the questions of custody were far from
27 "straightforward." Kirk presented a claim that Vivian suffered from a personality disorder that
28 prevented her from providing appropriate care for their children. Kirk's claim required him to file

1 extremely large briefs to support it. Vivian's counsel met his briefs in kind; it was too much risk for
2 Vivian to ignore his claim. His claims were unsuccessful – no one who ever met Vivian, including Dr.
3 Paglini, found Vivian suffered from any psychological disorder except Kirk.

4
5 Kirk also asserts in that in regard to the financial portion of the case, “[f]or most of the case, the
6 amount in controversy was zero.” That claim is false. The primary dispute was over the community's
7 value in Utah ranch land. Kirk and his counsel had continually represented that Mr. Beadle would
8 prepare a report of the community and separate percentages of the property. Mr. Beadle first provided a
9 formal report on September 21, 2012. There was no conceivable way that the financial matters could
10 have been resolved prior to that time.

11
12 Moreover, even after Mr. Beadle's report, the parties had to value the various Utah parcels. The
13 only way to value those interests was to have an appraisal. For reasons known only to Kirk, he never
14 sought such an appraisal. Instead he waited until Vivian secured an appraisal in October 2012. The
15 parties could not have finalized a settlement until the appraisal was completed.

16
17 Even Kirk's representations about the amount in controversy, “\$200,000,” is inaccurate. As late
18 as October, 2012, Kirk took the position in a pleading that Vivian's entire value for the ranch property
19 was \$113,400.00. *See*, Opposition to Motion for Exclusive Possession, filed October 19, 2012, at page
20 13, line 4. At that time, Vivian's accountant estimated the parties' interest to be Attached as **Exhibit**
21 **“TT”** is Vivian's expert's initial analysis indicating a community interest of \$1,046,117, making
22 Vivian's interest over \$500,000.00. Thus, just six weeks from trial, the parties were more approximately
23 \$370,000 apart on the ranch property. Also, the parties appraisals of the Sunrise Circle residence were
24 approximately \$200,000.00 apart.

25
26 Kirk also claims that Vivian walked out of a settlement conference regarding property issues.
27 What Kirk fails to note is that Vivian's Pre-trial Memorandum was due the following day and had not
28 been completed. Because Vivian did not believe settlement was imminent, she left the settlement

1 conference because she was concerned that undersigned counsel would not have sufficient time to
2 complete the Memorandum. Kirk's counsel did not share that concern because they advised Vivian's
3 counsel that Kirk was preparing his Pre-trial memorandum.

4
5 Kirk's assertion that the case was "never complex," ignores his own prediction that the parties
6 would each require \$350,000 to prosecute it before he ever filed his initial motion. His assertion is
7 belied by the amount his attorney's billed, \$450,215.50 in the case, even though Kirk prepared all of the
8 initial drafts of pleadings. The best indicator that Vivian's counsel did not overbill the financial issues is
9 that Kirk's attorneys billed nearly the same amount. (\$126,500 to \$141,477)

10
11 In regard to his specific claims of overbilling (Kirk's Opp., page ,) they are baseless. For
12 example, Mr. Silverman's billings for the mediation were inadvertently double entered, and he has
13 removed those charges from his billing and refunded the fees to Ms. Harrison. Some just do not make
14 sense – using paralegals and individuals who bill at lower rates to do work on the case *saves* client's
15 fees. Kirk's lawyers used 14 different individuals who billed on the case; Vivian's used 15 (LAL and
16 LAC are the same person; she got married). Others constitute "calling the kettle black" – Kirk, a
17 sophisticated and experienced lawyer who drafted all of his pleadings, had two lawyers at all but one
18 hearing, and every settlement conference or meeting. Had Kirk not blown this case into proportions that
19 only a retired lawyer with too much time on his hands could, neither party would have needed more than
20 one lawyer at any hearing, deposition or meeting.

21
22 Kirk makes much of billing surrounding the hearing of February 24, claiming that the parties
23 knew that the hearing was only going to be a recitation of the Court's order. Mr. Kainen, whose billing
24 entry shows a 5.8 hour entry the day before in preparation for the hearing suggests that he was not aware
25 it would be limited to a simple recitation of an order. Moreover, Kirk cites to Vivian's counsel's billings
26 include time for work that was not related to the February 24 hearing, but instead was part of the
27 ongoing custody case that would continue even after the Court's order on *temporary* custody. Indeed,
28

1 much of the time that Kirk cites as time to prepare for the hearing was time in conference with Vivian
2 discussing the possible outcomes of the hearing, settlement, expert witnesses, research and a variety of
3 subjects unrelated to the hearing.

4 The following addresses, in sum, Kirk's position's regarding overbilling:

5
6 1. Kirk's claim that Vivian's attorneys resisted his efforts to divide the community property
7 so that each side would have ample separate property to pay attorney's fees and costs is false. Vivian's
8 counsel proposed that distribution, not Kirk. Vivian's attorney's objected to Kirk's request that Vivian
9 pay her accrued fees out of monies that had previously been distributed to her.

10
11 Specifically, on December 13, 2011, Mr. Smith sent a letter to Mr. Standish stating that \$250,000
12 from the community funds should be released to each party for preliminary attorney's fees subject to any
13 readjustment at trial. *See* Letter from Radford J. Smith, Esq. to Tom Standish, Esq. dated December 13,
14 2011 attached hereto as Exhibit "RR." On December 20, 2011, Mr. Standish replied:

15 *Kirk* proposes that no lump sums be given, and that all attorney billings will be payable
16 by him forthwith upon presentment.

17 *See* Email from Mr. Standish to Mr. Smith dated December 20, 2011 attached hereto as Exhibit
18 "UU." (Emphasis supplied). On December 23, 2011, Mr. Smith sent a draft Stipulation and Order
19 Resolving Temporary Financial Issues incorporating Kirk's terms. *See* Email and Stipulation and Order
20 attached to the email dated December 23, 2011 attached hereto as **Exhibit "XX."** Kirk later reneged on
21 his offer, and instead requested that Vivian pay her existing fee balances (then approximately \$80,000 to
22) from funds already distributed to her. Vivian objected. *See* Letter from G. Silverman to E. Kainen,
23 January 12, 2012 attached hereto as **Exhibit "YY."** Vivian did not object to the concept of a
24 distribution of fees.
25
26

27 2. Kirk's claim that Vivian's attorneys resisted Kirk's efforts to mediate this case is false.
28 *See* Section d. above.

1 3. Kirk cites as evidence of overbilling that multiple professionals have billed Vivian's case.
2 Kirk forgot to review his own billings. Fourteen(14) people from his attorneys' firms billed time on his
3 case (excluding the work Kirk performed in this case). Thirteen (13) people billed on Vivian's case. *See*
4 Spreadsheet identifying billing attorneys and paralegals attached hereto as **Exhibit "ZZ."**

5
6 Kirk also cites as overbilling that "8" attorneys billed on Vivian's case; it was 7, and Mr.
7 Smith, Mr. Silverman and Ms. Taylor did the majority of work. Again, Kirk should review his billings.
8 7 attorneys billed his case as well. *See* Exhibit "ZZ."

9 Kirk claims that Vivian's attorneys had four (4) different named partners billing time to this
10 case. Mr. Smith, Ms. Taylor and Mr. Silverman are "named partners." Ms. Taylor was a partner in
11 name only. Kirk only had two named partners work on his case because Mr. Kainen has no named
12 partners, and Mr. Standish has no named partners that practice family law. One of Mr. Standish's
13 unnamed partners, Mr. Malley, performed work on the case.
14

15 Vivian's attorneys did more work at less cost. Kirk's attorneys and their paralegals have higher
16 billable rate than Vivian's attorneys and their paralegals. *See* Exhibit "ZZ." Ms. Taylor did substantial
17 amount of work, and her hourly rate was only \$350 compared to \$500 for Mr. Kainen and Standish, and
18 \$400 for Mr. Kynaston. Mr. Smith, hourly rate is lower than both Mr. Standish's rate and Mr. Kainen's
19 rate. Vivian saved **10%** for every hour worked by Mr. Smith, 30% for hours worked by Ms. Taylor,
20 compared to hours billed by Mr.'s Kainen and Standish.
21

22 Almost *all* the paralegals in Mr. Kainen's and Mr. Standish's office have a higher hourly rate.
23 Carol Navarro billed 98.70 hours at an hourly rate of \$200, for a total of \$19,740. Ms. Jill Hiatt billed
24 22.40 hours at an hourly rate of \$150, for a total of \$3,360. In comparison, Vivian's paralegal billings
25 were Kenneth Smith, 5.2 hours @\$100 /hr, Lauren Lynch, 1.6 hours @\$100 /hr, Jolene Hoeft 1.5 hours
26 @\$100/hr. *See* Spreadsheet of paralegals work attached hereto as **Exhibit "AAA."**
27
28

1 Kirk also criticizes Vivian for having three (3) attorneys present at the hearings. Vivian had only
2 one attorney, Mr. Smith, at the hearings of October 24, 2011, and October 2, 2012 while Kirk had two.
3 Except for one hearing on February 24, 2012, Kirk had two (2) attorneys (excluding him) present at all
4 hearings (including in front of the Discovery Commissioner), and Mr. Standish was present
5 telephonically at the hearing of February 24, 2012.
6

7 Kirk also states that Vivian had two named partners at three of the four depositions in this case.
8 Kirk and Dr. Rotiman were nearly the entirety of Kirk's custody case. Kirk's deposition, if completed,
9 would have addressed all of the allegations in his pleading, because those allegations were essential to
10 his claim for NPD. Kirk agreed to settle on the third day of his deposition. Both Mr. Kainen and Mr.
11 Standish (who came approximately an hour later), participated in that settlement discussion.
12

13 One of Mr. Silverman's lead roles in the case was experts. He conducted the vast majority of Dr.
14 Roitman's deposition. Mr. Smith asked questions because Dr. Roitman produced documents on the day
15 of the deposition, and Mr. Smith copied and reviewed those documents because the deposition occurred
16 at his office. Mr. Smith's questions were primarily limited to Dr. Roitman's discussion of the "Table of
17 Contents" underlying the 43 page report Kirk later destroyed.
18

19 In regard to the deposition of Mr. Lawlis, the day before the deposition Vivian's counsel
20 expressed their desire to use the Lawlis deposition as an opportunity to discuss settlement, and for that
21 reason Mr. Silverman attended the deposition.
22

23 The use of multiple attorneys in the case was caused by its size. Kirk, a licensed attorney who
24 performed much of his work, did not *need* two attorneys at every hearing and meeting. Kirk apparently
25 recognized the size of the case and had two attorneys present.

26 4. Kirk's assertion that Vivian's attorneys entered into mediation with Mr. Jimmerson, Esq.
27 in bad faith is false. See Section d. above.
28

1 5. Kirk's asserts that the cost of the case could have been avoided if Vivian would have agreed
2 to stay discovery and submit to an examination by a "national expert." Vivian agreed to an independent
3 expert (indeed pleaded for the Court to send the parties to Dr. Paglini at the hearing of December 5,
4 2011), but would not agree to a stay of discovery. That would have allowed Kirk's claims unchecked.
5 Most important, if Vivian's refusing Kirk's settlement proposal is a basis to argue that the fees were
6 exacerbated, that argument would apply to Kirk's refusal to enter the settlement offer from Mr. Smith in
7 December, 2011 that was essentially the same offer the parties settled upon in June 2012. Here, the most
8 important view of whose position was reasonable should be guided by the result in the case, a specific
9 *Brunzell* factor.
10

11 6. Kirk alleges that Vivian's attorneys opposed Kirk's request for a stay during the pendency
12 of Dr. Paglini's determination. Again, Kirk's goal was to allow his allegations to go unchallenged. The
13 Court specifically denied Kirk's request for a stay of discovery at the hearing of February 24, 2012. *See*
14 Order from the Hearing filed on June 13, 2012, page 2, Lines 19-20.
15

16 7. Kirk argues that Vivian's attorneys promulgated unnecessary written discovery upon the
17 Costco Optical Department, Kirk's dentist, Kirk's ophthalmologist, and other doctors. Vivian's cost of
18 production of the discovery was minimal, approximately \$1,400 plus a \$28 per subpoena witness fee.
19 *See* Spreadsheet for Subpoena fees attached hereto as **Exhibit "BBB."** Vivian did not trust Kirk to
20 reveal all information in his medical records, and the health of the parties is a specific factor in the
21 determination of the best interests of a child in a custody action. NRS 125.480.
22

23 8. Kirk claims Vivian's attorneys overbilled by seeking financial discovery from Kirk, and
24 then sending subpoenas out for the same documents. Vivian's attorneys sent the subpoenas to financial
25 institutions only after Kirk refused to provide those documents in discovery. On March 5, 2012 Mr.
26 Smith wrote to Mr. Standish and Mr. Kainen:
27
28

1 [I]n regard to Kirk's proposal regarding the resolution of the financial issues we propose
2 the following:

3 1. Kirk will produce the financial documents we have requested. We sent
4 the subpoenas out only after a) you failed to provide the initial documents when you
5 indicated you would provide them; b) you tactically delayed giving us any documents
6 until after the hearing before Judge Duckworth; c) you served us with a response that
7 claimed that we could inspect the documents, but when we asked to inspect them you
8 said you had given them back to Kirk; and, d) you promised us a disk containing the
9 documents by Monday of last week which I have still not seen. Now Kirk complains to
Vivian that she should try to save money by avoiding copy costs? We want a copy of all
of the documents, not a production. Vivian knows that Kirk has the bulk of what has
been requested in organized files at their home. Why Kirk continues with this game-
playing is known only to him, but raises questions as to the content of the documents.

10 See Letter from Mr. Smith to Mr. Standish and Mr. Kainen dated March 5, 2012 attached hereto as
11 **Exhibit "VV"** and Motion to Compel Discovery filed on January 27, 2012.

12 9. Kirk claims that Vivian's attorneys retained five custody experts- three of which
13 were cumulative and two of which were retained after the appointment of Dr. Paglini, who was
14 appointed to "avoid the battle of the experts." Vivian retained Dr. Tienhaus to rebut Kirk's expert
15 witness, Dr. Roitman's report. Vivian retained Dr. Ronningstam and Dr. Applebaum before Dr. Paglini
16 was appointed. Vivian hired Dr. McKenna and Dr. Hendrick to address Kirk's cornerstone claims of
17 "co-sleeping" and phentermine use to Dr. Paglini. See Section II(i) below. Vivian was not required to
18 and could not stand by and allow Kirk to make unsubstantiated and spurious claims about both of those
19 subjects as a method of inserting cameras into Vivian's home, or requiring that she employ a full-time
20 nanny as he had requested. Without expert reports, Kirk would have flayed Vivian at every opportunity
21 in his meetings with Dr. Paglini who is not an expert in the effects of phentermine or co-sleeping.

22 10. Kirk claims that Vivian's financial experts overbilled her. Mr. Harrison provides no
23 expert witnesses' declaration in support of the claim. Vivian's two financial experts, Mr. Boone
24 and Ms. Attanasio's combined fees were approximately \$50,000. Mr. Boone's fees were approximately
25 \$24,600. Mr. Beadle charged Kirk \$17,800 for his report. Mr. Boone was Mr. Beadle's counterpart, but
26
27
28

1 also did some forensic work. Ms. Attanasio had a number of roles in the case. She appeared at
2 settlement conferences to help divide assets, she met with Kirk and Mr. Beadle to go over the division of
3 the financial accounts, and she performed analyses of financial data for the custody action and for the
4 valuation of the ranch. Both financial experts earned their fees.

6 11. Kirk claims Vivian overbilled by taking his deposition, Dr. Roitman's deposition, and
7 Noticing the deposition of Tahnee while Dr. Paglini was conducting his psychological assessment. Kirk
8 fails to acknowledge what he knew well, psychological testing is based in large part on a party's history.
9 It is for this reason that Kirk was careful in crafting a diagnosis of Dr. Roitman by providing him
10 selected facts. Kirk insisted that Vivian suffered from NPD at that time. Kirk, Tahnee and Whitney's
11 affidavits were the entire basis for Dr. Roitman's diagnosis, and that diagnosis was the foundation of
12 Kirk's claim for primary custody and supervised visitation. Kirk suggestion that Vivian should just have
14 waited while Kirk bombarded Dr. Paglini with the same false allegations he had made to Dr. Roitman is
15 baseless. Vivian provided all transcripts of Dr. Roitman and Kirk to Dr. Paglini for his review.

17 12. Kirk alleges that Vivian's attorneys refused to provide the appraisals for the marital
18 residence and Lido lot, for seven months and six months, respectively. Kirk allegations are misleading
19 and incorrect. (*See* Section V(c) below).

21 13. Kirk alleges that Vivian's attorneys made a motion for exclusive possession of the
22 marital residence based upon their material representations to the Court that Vivian had wanted
23 the marital residence for many months and Kirk did not want the marital residence, when, in fact,
24 Vivian's attorneys knew Vivian had very recently pursued the purchase of another house in the
25 neighborhood. This is false. The only reason why Vivian was researching other properties was
26 because she was concerned that Kirk would not agree to let her have possession of the residence. *See*
27 Letter from Radford J. Smith to Tom Standish, dated June 8, 2012 attached hereto as **Exhibit "CCC."**
28 Indeed, when Kirk insisted on keeping the marital residence, on August 27, 2012, Mr. Silverman sent a

1 settlement letter to Kirk's counsel stating that Vivian will take the community interest in the ranch
2 property in exchange for the marital residence. *See* Letter from Gary Silverman to Tom Standish and Ed
3 Kainen dated August 27, 2012 attached hereto as **Exhibit "DDD."** If one calculates the values
4 ultimately reached in the final settlement, that exchange is essentially what occurred.
5

6 **k. Kirk's allegations Regarding the "War of Experts"**

7 Kirk alleges that Vivian incurred unnecessary expert fees for Dr. McKenna and Dr. Hendrick.
8 Both experts were part of Vivian's claim to rebut Kirk's allegation that she suffered from NPD.

9 Dr. McKenna is a professor at University of Notre Dame, and arguably the world's leading
10 expert on co-sleeping. At the hearing of February 26, 2012, the only factor the Court addressed that day
11 (other than confirming that it was not finding that Vivian suffered from NPD), was Vivian sleeping with
12 the children. The history and studies surrounding co-sleeping suggest that the common notion that
13 children are harmed by co-sleeping is erroneous. Vivian's co-sleeping with the children was one of the
14 elements of Dr. Roitman's diagnosis of NPD. *See*, Roitman Report, page 18-19. Vivian hired Dr.
15 McKenna to address that issue because Dr. Paglini was obliged by Dr. Roitman's report to address it.
16 Dr. McKenna's resume is **Exhibit "EEE,"** and his report **Exhibit "FFF."**
17

18 The same is true regarding her hiring of Dr. Edward Hendrick on the issue of long-term use of
19 phentermine. Kirk's initial motion suggested that Vivian suffered from an addiction to phentermine.
20 Vivian's response was to undergo drug tests. She attached those results, showing negative for all drugs.
21 *See*, Exhibit "A-14" to her Opposition filed October 27, 2011. She has continued to take drug tests on a
22 regular basis for many months, the results of which were all negative. *See* Exhibit "PP" to Vivian's
23 Reply to Opposition to Countermotion filed January 27, 2012.
24

25 The crux of Kirk's argument related to Vivian's use of Phentermine was grounded in the report of
26 Dr. Roitman. In his report, Dr. Roitman, at page 2, lists as one of his conclusions:
27
28

1 Vivian's long-term use of phentermine (a stimulant appetite suppressant related to
2 amphetamine), multiple hormone supplements combined with her antidepressants
3 (prescribed by different physicians) exacerbate her dysfunction caused by her NPD and
puts her at unnecessary health risks.

4 Kirk alleged that Phentermine is "related to amphetamine" and characterized phentermine as "speed" in
5 his Opposition to Countermotion filed January 4, 2012. Kirk's science was suspect. The drugs are
6 similar (but not the same) in molecular structure, but have very different effects and categorizations
7 under the DSM-IV. Attached as Exhibit "L" to Vivian's Reply to Opposition to Countermotion was the
8 The American Society of Bariatric Physicians treatment guidelines titled "Overweight and Obesity
9 Evaluation and Management." The manual is extensively researched, and contains citations to
10 numerous studies. One the studies cited, at page 6 of the manual, demonstrated that study patients were
11 treated safely for more than 10 years of continuous use with phentermine. Moreover, the manual
12 indicates that:
13
14

15 Phentermine, in practice, has proven to have little or no potential for addiction. While
16 addiction specialists have described well-defined addiction or abuse syndromes and
17 withdrawal syndromes for cocaine, amphetamine and other stimulant substances, neither
an addiction nor a withdrawal syndrome has ever been described for the category III or
IV weight management drugs ([DSM-IV).

18 Moreover, the perceived health results that Dr. Roitman addresses are issues associated with heart
19 function, and the study he cited in his report from the New England Journal of Medicine stated that it is
20 neither final or conclusive. Vivian does not have heart problems.

22 Dr. Roitman has also gleaned his analysis of the drugs from the drug literature that he attaches to
23 his report. Vivian submits that all prescription drugs have a series of potential side effects whether
24 misused or not (one simply needs to watch a television commercial advertising a prescription drug to
25 know this), and because of litigation regarding drugs, drug companies are keen to place warnings in their
26 packages of even the most remotely possible side effects.
27
28

1 Kirk never placed a medical record before this Court that suggests that Vivian has suffered any
2 ill effects from any drug she has taken in the past, including Phentermine, but that did not stop him from
3 alleging it. Both Dr. Thienhaus and Dr. Applebaum have, unlike Dr. Roitman, reviewed Vivian's
4 medical records regarding the use of prescription drugs, and neither has found that review to affect their
5 determination that Vivian does not suffer from NPD or any other personality disorder.
6

7 Dr. Hendrick received his medical degree at Columbia University. He is Board Certified in
8 Bariatric Medicine, and Clinical & Anatomic Pathology. He has devoted his professional life to the
9 study of phentermine, and has published dozens of articles on the subject of phentermine use. Dr.
10 Hendrick provided a report to Dr. Paglini dispelling the notion that Kirk still promotes: that long term
11 phentermine has adverse effects on cognitive function. See **Exhibit "OOO,"** attached hereto. It was
12 appropriate, in light of Kirk's continued allegations about the adverse effect of phentermine use, for
13 Vivian to want to have an expert on phentermine to dispel Kirk and Dr. Roitman's claims. Again, at the
14 time she hired Dr. Hendrick, Kirk had still refused to accept Vivian's offers of settlement, and was
15 proceeding forward with his NPD claim.
16
17

18 **3. The Work Actually Performed by the Lawyer:**

19 The third factor to consider is "**the work actually performed by the lawyer:** the skill, time and
20 attention given to the work." *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Vivian's lawyers provided her
21 regular, detailed statements of their services, and understood that those statements would be the subject
22 of scrutiny in this case. Vivian, who graduated number one in her college class in accounting and has a
23 master's degree in taxation, was capable of reviewing her statements. Vivian has provided those
24 statements, and Kirk's lawyer's billings, to the Court for review.
25

26 The Court has been presented with Vivian's counsels' work. Vivian submits that the work has
27 been done with skill, and evidences the time and attention given to the work. Kirk has not challenged
28 the quality of the work by Vivian's counsel, only the time spent to perform it.

1 **4. The Result**

2 Contrary to Kirk's position in his Opposition (at page 64), the Court does not need to find a
3 "prevailing party" in this action in order to award fees. Under *Brunzell*, it is not whether the attorney
4 prevailed in a contested action, it is "**the result**: whether the attorney was successful and what benefits
5 were derived."
6

7 The bulk of the fees incurred in this case were related to five Motions (primarily Kirk's Motion
8 for Custody) filed during the case: Vivian's motion for an equal distribution of community funds so she
9 could buy a house, Kirk's Motion for Custody and Exclusive Possession; Vivian's Motion to Resolve
10 Temporary Financial Issues, Vivian's Motion to Compel Discovery; and, Vivian's Motion for
11 Exclusive Possession of Residence. Vivian submits that the results of those Motions, particularly Kirk's
12 Motion For Custody, suggest an award of fees to Vivian.
13

14 On September 14, 2011, Kirk filed his Motion for Custody. Kirk sought primary custody and
15 with supervised visitation to Vivian. Kirk caused Vivian to spend enormous fees to respond. The Court
16 denied Kirk's motion for temporary primary custody and supervised visitation, and instead granted the
17 parties joint physical custody.
18

19 Kirk suggests that the argument at the February 24 hearing suggest that Vivian's counsel was
20 only concerned with fee issues. Opposition, page 46. Kirk ignores that the Court *denied* Kirk's Motions.
21 The Court specifically found that there was no basis for supervised visitation, and the Court granted the
22 parties joint physical custody. See Transcript from the hearing of February 24, 2012, pages 10, lines 20-
23 24 and page 11, line 1, page 11, lines 9. Kirk's contention that Vivian's counsel should have objected at
24 that point is bizarre – *Kirk's* counsel should have objected. Moreover, the specific timeframe the Court
25 awarded to Vivian gave her the Court awarded Vivian with nearly all of the free time with the children
26
27
28

1 (the children had school and dance during the weekdays awarded to Kirk)²². Why would she object?
2 The only point of objection was Kirk being granted temporary exclusive possession, and the Court
3 specifically indicated it was not going to render findings that would have explained its order. To argue
4 with an experienced judge after hundreds of pages of filings about a temporary order it indicated it was
5 not going to make findings upon would have been a futile act likely to only annoy the Court. As Kirk
6 was aware, at that point Vivian was not even sure she wanted to or could retain the marital residence,
7 and had already explored other possibilities, including building a home on a lot across the street.
8 Indeed, of the day of the February 1st hearing Mr. Standish asked undersigned counsel if Vivian was still
9 intending on building a home.
10
11

12 Kirk's counsel objected during the financial portion of the case because Kirk was trying to cause
13 Vivian to pay the balance of her fees from monies that had already been distributed to her as separate
14 property, even though Kirk had already paid his fees from the community accounts. Vivian's balance at
15 the time of the motion was over \$100,000, and undersigned counsel was not going to allow Kirk to shift
16 the entire balance of that obligation to Vivian's separate property. See Letter from Gary Silverman
17 dated January 12, 2012 attached hereto as Exhibit "YY." Kirk's suggestion that Vivian's counsel was
18 concerned only about his fees was a falsehood he later tried to use to form a wedge between Vivian and
19 her counsel. See, Letter from Mr. Smith to Mr. Standish and Mr. Kainen dated March 5, 2012 attached
20 hereto as Exhibit "VV." Not even that tactic, usually used by the more powerful, sophisticated, and
21 unscrupulous spouse, was beneath Mr. Harrison.
22
23

24 The custody case ultimately resolved in the manner Vivian had long requested. Vivian had
25 proposed joint custody as early as June, 2011 before the case began, proposed it again at mediation (this
26 time with an empowered therapist), proposed that same resolution in December 2011, and the case
27

28 ²² Until Kirk demanded that the children stop going to Vivian's temporary residence during the weekdays, Kirk had little time
with the children even after the Court's order.

1 ultimately settled with that solution in 2012. The final result of Kirk's massive pleadings, and the cost,
2 and pain that Kirk put this family through, was the very order that Vivian had requested nearly a year
3 prior.

4
5 On October 20, 2011, Vivian filed Defendant's Emergency Motion for Preliminary Distribution
6 of Community Property to Complete Executory Contract filed, in which she sought an equal distribution
7 of funds. The distribution she sought was similar to the equal distribution of funds the parties had
8 agreed to twice before in the months leading to the filing of Kirk's initial Motion for Custody. The
9 purpose of the distribution was to allow her to complete a contract for purchase of a residence that she
10 had entered prior to being served with Kirk's Complaint for Divorce on September 14, 2011. As stated
11 in the Motion, she had agreed to grant her close friends, Jesse and Heather Atkinson, a lease option on
12 the home. The transaction provided her greater return than was being earned by Kirk in the accounts
13 (4% to approximately 1%), it allowed the Atkinsons, and their children (with whom Brooke and Riley
14 are very close) to be in close proximity to the marital residence, and provided an income investment for
15 Vivian. In her Motion, at page , Vivian indicated she thought Kirk would release the funds prior to the
16 hearing on the motion.
17
18

19 Instead, on October 24, 2011, Kirk filed a scathing 15 page Opposition in which he alleged, at
20 page 5, that Vivian "has a history and pattern of exceedingly wasteful obsessive compulsive behavior"
21 and a "personality disorder that causes her to spend money foolishly in an effort to be 'the center of
22 attention'." He then discussed his view her use of phentermine, Celexa, and any other drug she had
23 been prescribed in the previous years. He claimed, at page 6 of the Opposition, and in his motion, that
24 Vivian "has been experiencing delusions, paranoia, and has exhibited unstable behavior." He then went
25 into detail about her purchases on the internet, for cookware, for sewing machine accessories, clothes,
26 and plastic surgery. Over the following pages he leveled insult after insult, including, at page 13,
27 "Vivian has a practice of trying to buy loyalty from people." He quotes yet more research on NPD at
28

1 page 14 (from Eleanor D. Payson – with no citation to any expert, even Roitman) suggesting his quote
2 applies to Vivian. He concludes with “Kirk respectfully submits that “Vivian needs to be protected from
3 herself and from her ‘friends’.”

4
5 At the time of the October 25, 2011 hearing, when Judge Ames indicated his inclination to
6 grant Vivian’s Motion (“Defendant’s Emergency Motion for Preliminary Distribution of Community
7 Property Funds”), Kirk’s attorneys requested a recess. At the recess, undersigned counsel and counsel
8 for Kirk agreed that the Motion would be granted, the parties would enter into the transaction proposed
9 in the Motion, and the parties would agree to the scheduling of mediation before Mr. Jimmerson that
10 would include mediation of the custody issues. Vivian achieved the result she set out to achieve in the
11 filing of her Motion.
12

13 Vivian was also forced to move to compel Kirk’s production of discovery that he wrongfully
14 withheld. *See* Motion to Compel, filed January 31, 2012. Again, without rehashing the particulars
15 addressed in the Motion and Countermotion, the result was a Discovery Commissioner finding that Kirk
16 and his counsel were “playing games” with discovery, and an order directing Kirk to produce the
17 discovery requested, and to pay \$5000.00 in sanctions to Vivian’s counsel. Vivian again achieved the
18 result that she sought through the Motion to Compel.
19

20 On January 3, 2012, Vivian filed her Motion to Resolve Temporary Financial Issues, for
21 Payment of Incurred and Outgoing Attorney’s Fees and Expert Fees; and For Other Related Relief.
22 Vivian was forced to move to compel Kirk to distribute monies evenly from the parties’ estate, as
23 opposed to him using whatever money he saw fit to provide to Vivian, and payment of the parties’
24 attorneys fees. Prior to ever filing that Motion, undersigned counsel sent a detailed letter to Mr.
25 Standish outlining Vivian’s proposed resolution of the temporary financial issues. *See* letter December
26 13, 2011 letter attached hereto as **Exhibit “RR.”** Mr. Standish responded with a brief email
27
28

1 acknowledging his acceptance of nearly all of those terms, but indicating that he was going on vacation.
2 *See*, Email from Mr. Standish to Mr. Smith dated December 20, 2011, attached hereto as **Exhibit “UU”**.

3 On December 23, 2011, Mr. Smith sent a Word version of a stipulation and order incorporating
4 the terms agreed to by Mr. Standish. *See* Email from Mr. Smith to Mr. Kainen, dated December 29,
5 2011 attached hereto as **Exhibit “UUU.”** On January 3, 2012, Mr. Smith sent Mr. Standish a copy of
6 the stipulation, but advised that “out of an abundance of caution,” he was filing a Motion to get a
7 hearing date in the event the parties could not resolve the issues. *See*, Email dated January 3, 2012,
8 attached hereto as Exhibit **“GGG.”** The Motion requested that the Court enter an order consistent with
9 the terms of the stipulation the parties had previously discussed and agreed to (as evidenced by Mr.
10 Standish’s email).

11 Kirk filed his Opposition on January 25, 2012, in which he took the remarkable position that this
12 Court was not authorized to award temporary attorney’s fees in a divorce action. *See*, discussion in
13 Defendant’s Reply, filed February 3, 2012, at page 4. At that time, Vivian addressed Kirk’s ability to
14 mitigate his fees due to his standing as an attorney. *Id.* Though **Kirk** had proposed that he fund the
15 attorney’s fees by paying them when due, in his Opposition he demanded that Vivian pay her existing
16 attorney’s fees balance from her portion of previously distributed community property. *See* Plaintiff’s
17 Opposition to Defendant’s Motion for Temporary Orders and Plaintiff’s Counter-Motion for Temporary
18 Orders Pursuant to NRS 125.040 filed on January 25, 2012, page 1. At the February 24 hearing, the
19 Court directed that Vivian’s existing balance be paid from community funds, and distributed more
20 money to each party than Kirk requested. The Court indicated that it would review each party’s fees
21 incurred at the time of trial. *See*, Order from hearing of February 24, 2012, filed June 13, 2012, page 5,
22 lines 7-9. That review is presented to the Court in Vivian’s Motion.

23 Even in Kirk’s responses to the financial and discovery Motions, he leveled long and vitriolic
24 attacks against Vivian. Kirk was never satisfied to simply address the financial or other issues that were
25
26
27
28

1 presented, but was always jockeying for position in his custody action. Indeed his Reply to his
2 Countermotion (re: financial issues) addresses the issue of the exclusive possession of the home, not the
3 financial issues that are properly addressed by that pleading. See Plaintiff's Reply in Support of
4 Plaintiff's Countermotion for Temporary Orders Pursuant to NRS 125.040 filed on February 22, 2012,
5 page 10.
6

7 Kirk took the same tactic when Vivian filed her Motion for exclusive possession of the marital
8 residence. See Plaintiff's Opposition to Defendant's Motion for Exclusive Possession of Residence filed
9 on October 19, 2012. The result of that Motion was that the court granted Vivian exclusive possession
10 and the right to purchase the residence. Vivian achieved the result she set out to achieve by filing the
11 Motion.
12

13 As shown above Vivian received the results she sought to receive in every filing in this case.
14 Kirk, and his counsel, gained virtually nothing by Kirk's massive filings other than large bills.
15

16 III.

17 **VIVIAN IS ENTITLED TO AN AWARD OF FEES BASED UPON KIRK'S USE OF HIS** 18 **COMMUNITY EFFORTS TO REDUCE HIS FEES AND INCREASE VIVIAN'S**

19 Kirk is a licensed Nevada attorney. He has substantially increased his skill and knowledge as an
20 attorney during the time of the parties' 30 year marriage. All property acquired after marriage is
21 community property. NRS 123.220. "Acquired" embraces "wages, salaries, earnings, or other property
22 acquired through the toil and talent or other productive faculty of either spouse." *Fredrickson & Watson*
23 *Construction Co., v. Boyd*, 60 Nev. 117, 102 P.2d 627, 629 (1940). The labor and skills of a spouse
24 belong to the community. *Kelly v. Kelly*, 86, Nev. 301, 468 P.2d 359 (1970). The use of labor to
25 improve or contribute to an asset grants the community an interest in the asset. *Sly v. Sly*, 100 Nev. 236,
26 679 P.2d 1260 (1984).
27
28

1 In *Sly*, a spouse had built a home during the time that he was working at another job and earning
2 an income. In valuing the home in the divorce, the Court attributed a value in the home to the
3 community based upon the labor contributed by Mr. Sly. *Id.* at 239, 679 P.2d at 1261. Mr. Sly
4 appealed, arguing the district court erred by attaching any community interest to the labor he expended
5 in building the house. *Id.* at 240, 679 P.2d at 1262. The Nevada Supreme Court held:

7 [A]ppellant's further argument that no community interest was created in the property by
8 virtue of his labor is meritless. The labor and skills of a spouse belong to the community.
9 The fact that appellant built the house in addition to working at his 'regular' job is of no
consequence.

10 *Id.*, 679 P.2d at 1263 (citation omitted).

11 Here, Kirk used community labor to advance his lawsuit to Vivian's detriment. Vivian was
12 forced to incur fees that Kirk did not as a result of his community talent and skill. Law is Kirk's
13 profession, and like the builder who constructs a home, Kirk constructed a case. The result for Vivian is
14 worse, however, because had Kirk used his skill for gainful employment, Vivian would have profited by
15 it. As it is, Vivian was damaged by the use of Kirk's expertise. In *Sly*, the spouse built the home for
16 himself – he contributed his labor for his own benefit. Here, Kirk expended his effort and labor to take
17 away a home they both owned and have it set over to him. Kirk contributed the labor for his own
18 benefit.
19
20

21 Moreover, Kirk's work comes at a time when he has no gainful employment. His resource that
22 is his community legal acumen is only going for his benefit by his choice. By concentrating his efforts
23 on his own case, he is not only depriving the community of his potential income, but is exacerbating
24 Vivian's costs. Kirk's analogy to a friend providing a discount misses the point; it is the source of the
25 savings to fees that matters. Here, that source is Kirk's community labor.
26

27 In *Sargeant*, the Nevada Supreme Court recognized the importance of each party having equal
28 resources to carry on the litigation.

1 The wife must be afforded her day in court without destroying her financial position. This
2 would imply that she should be able to meet her adversary in the courtroom on an equal
3 basis.

4 *Id.*, at 227, 495 P.2d at 621. These parties do not have equal resources if they are simply handed an
5 equal amount of funds from which to pay their fees.. While in *Sargeant*, the parties had vastly different
6 amounts of assets, the principle of parties being able to meet each other on an “equal basis” should be
7 consider more than just fees. If, for example, a parties’ relative was performing work for a party at no
8 cost, and the other party was required to pay fees, they would not be on an equal footing. The party with
9 the free lawyer would have no qualms about increasing fees because he would have nothing to pay.

10
11 Here, while Kirk’s attorneys were decidedly not free, his work was. If Kirk had a coupon for a
12 free lawyer, he would be required to divide the value of that coupon. Here, he has an unlimited free
13 lawyer, and has caused Vivian to incur substantial fees.

14 Kirk did not incur as much in fees because he performed much of the work. Kirk did not pay the
15 “hour per page” he believes is a reasonable fee for a brief. *See* Exhibit “T” attached. Vivian could not
16 do that, she does not have equal skill to contribute to her case to hold down her costs. The work that
17 Kirk, a skilled and experienced lawyer, has performed on this case both before and after its filings,
18 placed Vivian at a huge disadvantage - she cannot meet her adversary on an equal footing because her
19 adversary can perform a massive amount of the work that she must pay attorneys to perform.

20
21 The present Opposition is a perfect example of Kirk's ability to aid his counsel in a way Vivian
22 cannot. The facts (and, frankly, the content of the Opposition) demonstrate that Kirk wrote it, and Mr.
23 Kainen admits that fact. Under Kirk’s analysis, he saved himself \$66,500 (133 x \$500) just on the
24 present Opposition. For his 81 page brief filed January 4, 2012 he incurred \$8,450 or approximately 17
25 hours of time. Under Kirk’s analysis he saved \$32,000 (64 hours x 500). In reality, however, his time
26 commitment was likely far longer. As set forth at page 28 above, the 41.8 hours that Kirk’s lawyers
27 billed solely to “revise” Kirk’s initial pleading has no bearing on the actual time Kirk saved in creating
28

1 it. The estimate of 200 hours to complete the work comprising his first brief is a reasonable estimate
2 considering his meetings with Dr. Roitman, his study of NPD, his preparation of the 39 page draft of his
3 initial motion, his preparation of 157 pages of affidavits, his preparation of a 43 page report containing
4 an ordered presentation of facts by diagnosis criteria and substantial research on the issue of NPD, his
5 research (if one can call reading a disputed DEA label research) on the issue of phentermine, and his
6 research into the effect of drug interactions.
7

8 As stated, district courts have great discretion to award attorney fees, and this discretion is
9 tempered only by reason and fairness.” *Haley v. Eighth Judicial District Court*, 273 P.3d 855, 128 Nev.
10 Adv. Rep. 16 (2012). Here, Kirk’s use of his community labor to Vivian’s disadvantage is unfair to her.
11 The Court should exercise its discretion and compensate her for the funds she incurred defending Kirk’s
12 voluminous motions.
13

14 IV.

15 KIRK’S REQUEST FOR DISCOVERY

16 Kirk, apparently not satisfied to again try the case in the pleadings, now want to conduct more
17 discovery on the issue of fees. The issue presented by Vivian’s fee request is simple – what caused this
18 case to be different from other cases. Vivian submits that answer is obvious – Kirk’s habit of filing
19 massive pleadings. At first it was to support his contrived NPD claim, with enough facts to reinvent
20 Vivian, and now it is in Opposition to Vivian’s motion for fees in an attempt to reinvent the history of
21 the case.
22

23 If the Court believes it needs discovery or further information on any issue, the Court may so
24 order. Vivian believes, however, that the Court has enough information to render an order granting fees
25 and sanctions.
26

27 ...
28

V.

**KIRK'S REQUEST FOR FEES AND SANCTIONS IS BASELESS, AND UNNECESSARILY
MULTIPLIES THESE PROCEEDINGS**

By Countermotion, Kirk seeks fees and sanctions against Vivian and her lawyers. Kirk's request for fees has three components. First, he claims that Vivian's counsel entered mediation in bad faith. Second, he claims that that her counsel submitted an appraisal of Appraisal Expert R. Scott Dugan that was fraudulent. Third, he alleges that Vivian's counsel withheld an appraisal of the Utah Ranch land by Damon Lawlis, and thus should be held to Mr. Lawlis's values for the Utah property.

A. Vivian Entered and Conducted Mediation in Good Faith

Kirk's claim that Vivian, or her counsel, acted in bad faith during mediation is spurious. *See*, Section II.A.(2)(h), at page 32 above.

B. Vivian Disclosed to Both Kirk and the Court that She Had Made Inquiries into Other Homes after June, 2012

Kirk points to an appraisal Vivian commissioned for a home on located at 1018 Legacy Drive and suggests that Vivian lied to the Court when she indicated it was her intent to remain in the marital residence after June, 2012. Kirk claims that Vivian was "dismissive" in her response to his allegation at the time that she was looking at other homes. Opposition, page 115. In reality, Vivian readily acknowledged to both Kirk and the Court that she had shown interest in other homes:

Kirk's contention that Vivian has explored other options for housing is irrelevant to the present motion. **Vivian did explore other options, including building a home, and buying another home in the area.** Contrary to Kirk's contention, she never made an offer on any home. Again, she was unaware of Kirk's position regarding the marital residence, and unaware of when the custody and divorce actions would be resolved, and, upon advice of counsel, wanted to determine whether there were better options for her on the market.

Defendant's Reply to Plaintiff's Opposition, filed October 31, 2012.

...

1 **C. Kirk's Claim of Fraud By Vivian's Attorneys is False**

2 Kirk complains that Vivian's attorneys should have known that an appraisal of the marital
3 residence (1514 Sunrise Circle, Boulder City, Nevada) by R. Scott Dugan dated October 15, 2012 was
4 fraudulent. He bases that claim on an appraisal Mr. Dugan performed on 1018 Legacy Dr., Boulder,
5 City, Nevada. Kirk argues that Vivian's attorneys were in possession of the 1018 Legacy appraisal, and
6 thus should have known Mr. Dugan's values in the October 15, 2012 marital residence were artificially
7 low.
8

9 The premise of Kirk's motion is incorrect. Vivian's attorneys did not have a copy of the 1018
10 Legacy appraisal until May 6, 2013, when they requested it from Mr. Dugan's office based upon Kirk's
11 attorney's request. Attached as **Exhibit "HHH"** is an email from Lok Yi Wang transferring the
12 appraisal to Mr. Smith's office on that date.
13

14 Even if counsel had received the Legacy appraisal, they would not have second guessed Mr.
15 Dugan's Sunrise Circle appraisal. Mr. Dugan is an experienced appraiser who was willing to stand by
16 his appraisal and testify. Mr. Dugan and Vivian's counsel specifically addressed the rising value trend
17 in the market, and Mr. Dugan acknowledged the trend but indicated that it did not apply to the 1514
18 Sunrise Circle property. See, Email from S. Duggan to Mr. Smith dated November 30, 2012, attached
19 hereto as **Exhibit "III."**
20

21 Most important, if Vivian's counsel was attempting to defraud Kirk, the settlement proposals
22 they sent to Kirk's counsel did not reflect that preposterous contention. In Mr. Smith's email to Mr.
23 Standish at 4:24 p.m. on December 1, 2012, Mr. Smith and Vivian met Kirk's concern about the Dugan
24 appraisal by offering:
25

26 1514 Sunrise Circle: Mr. Dugan and Ms. Huber will jointly choose a third appraiser who
27 will appraise the residence. The appraised value must fall between \$650,000 and
28 \$870,000. Vivian will pay Kirk one-half of the appraised price.

1 See, Email from Mr. Smith to Mr. Standish dated December 1, 2012, **Exhibit “JJJ.”** Kirk rejected that
2 offer, and instead countered with a value in the middle of the two appraiser’s values.

3
4 Kirk performs a complicated analysis in his Opposition that he claims demonstrates that Mr.
5 Dugan’s appraisal was unsupportable, and admits, at page 115, line 25, “Kirk will readily concede that
6 he knew all of the foregoing when he agreed that Vivian could acquire the marital residence for
7 \$760,000.” The next lines in his Opposition:

8 Kirk was aware Mr. Dugan is a licensed appraiser, who he assumed was willing to raise
9 his right hand during the trial and, under oath, testify that the marital residence was only
10 worth \$650,000. Confronted with Mr. Dugan’s very recent appraisal of \$650,000,
despite all its flaws, Kirk felt he had no choice.

11 Opposition, page 118 line 26, page 119, line 2. His claim that he had “no choice” when he agreed to
12 settle is demonstrably false. He was given a clear “choice” to forego *any* testimony by Mr. Dugan, and
13 have a neutral third party appraiser value the property. If he had concerns regarding Mr. Dugan’s
14 appraisal, and confidence in Ms. Huber’s as he now contends, he should have accepted Vivian and Mr.
15 Smith’s offer. He did not, but now wants the court to charge Vivian’s lawyers with fraud based upon his
16 false statement that he had “no choice” but to accept Mr. Dugan’s number. Kirk’s claim is outrageous,
17 and Vivian’ submits that the Court should find that he has again unnecessarily, and unethically,
18 multiplied these proceedings.
19
20

21 Even forgetting these insurmountable flaws in Kirk’s argument, Kirk’s claim that Dugan’s
22 appraisal was wrong is not supported by any competent evidence. Kirk’s analysis is his own; he offers
23 no statement from his expert, Ms. Huber, suggesting that the Mr. Dugan’s October 15, 2012 appraisal of
24 marital residence was fraudulent or meritless. Ms. Huber and Kirk had Mr. Dugan’s appraisal, and
25 could have leveled all of the same criticisms that Kirk levels in his Opposition at trial or during
26 settlement discussions, but they did not.
27
28

1 Most important, Kirk's analysis of the two appraisals is comparing apples to oranges. The
2 marital residence is a *highly* unusual home. It sits on two lots in a non-gated residential neighborhood,
3 and is the largest home in the neighborhood. Common sense tells us that buyers looking for a 7000
4 square foot home prefer amenities like guard gates, and more expensive homes in the neighborhood.
5 The home also has a 4000 sq. foot garage space. While that size might be attractive to some buyers, the
6 increased property taxes and maintenance for most people who don't own multiple vehicles will be a
7 detractor for many.
8

9 Ms. Huber described the extreme difficulty an appraiser has in valuing the marital residence, as
10 opposed to other homes in the neighborhood:
11

12 It was very difficult to find suitable comparable properties for the subject property. It is
13 in a newer subdivision in Boulder City, but physically located nearest to the oldest
14 portions of the city, including the historic district. Its gross living area is larger than most
15 homes in Boulder City, and has a large garage with RV parking included. While there
16 are homes in Boulder City with similar overall size and amenities, they have not sold
17 during the past year. Most of the larger, custom homes which would be the most similar,
18 are located in the northern portion of the city, and nearer to Lake Mead. Due to the lack of
sales or listing activity in the subject's subdivision, and to compare to the most similar
properties, it was necessary to utilize comparable properties that are smaller in gross
living area, with smaller garages, and that are located more than one mile from the
subject.

19 Huber Appraisal, Kirk's Opposition, Exhibit "22." What Ms. Huber's comment tells us is that there
20 were no real comparable sales for the marital residence. Ms. Huber's appraisal uses smaller properties
21 and makes highly subjective "adjustments" to account for their substantial difference in size, quality,
22 view and location. *Id.* Her valuation is highly speculative, and must be due to the nature of the home.
23

24 Kirk's analysis is rife with speculation and opinion. For example, when criticizing Mr. Dugan's
25 appraisal, he cites the Review-Journal newspaper, and reports that the comparables were "not even
26 colorably comparable." Opposition, page 118. Kirk believes that because he, as a layman, thinks Mr.
27 Dugan used the wrong comparables, when his own appraiser suggested that there were no true
28

1 comparables when she did her appraisal, the submission of his appraisal is fraud. Kirk's claim is
2 wholly without foundation, and, as indicated above, false in its premises.

3 Vivian asks the Court to recall the "fraud" claims Mr. Harrison is so quick to make. He claims
4 Dugan, Lawlis, Smith, Silverman, Tienhaus, Appelbaum, and Ronningstam were corrupt, lying
5 cheaters. He claims to be the only honest man in the entire case. As when a spouse claims his wife is
6 unfaithful, the first reaction must be of what is *that* spouse guilty.

8 **D. Kirk's Allegations Regarding an "Appraisal" by Damnon Lawlis are Meritless, and**
9 **Arise from His Conduct in Violation of the Nevada Rules of Civil Procedure.**

10 In November, 2011, Vivian's counsel contacted Damon Lawlis of the Utah firm of Morley &
11 McConkie, LC, regarding an appraisal of the 9 lots comprising the Utah ranch property. Within a few
12 days of the resolution of the custody issues, the parties turned their attention to the property issues, and
13 Mr. Silverman directed Mr. Lawlis to proceed with the appraisal. From the commencement of Mr.
14 Lawlis's retention, Vivian's counsel had difficulty reaching him had difficulty reaching him. After he
15 missed several scheduled conference calls with a variety of excuses, Mr. Lawlis revealed to Vivian and
16 her counsel that he was suffering from cancer. That call begins a series of contacts from Lawlis
17 promising an appraisal.

18 Attached as **Exhibit "KKK"** is an outline, with text messages attached, prepared by Toni Matts,
19 Mr. Silverman's assistant. Mr. Lawlis continually promised to provide a full appraisal. His false
20 promises caused Mr. Smith to report to the Court at an October 3, 2012 that he expected to receive the
21 report within days. Lawlis's excuses for not providing the appraisal were legion, and ranged from
22 "hospitalized," to a flood in his office, to mysterious email losses, to the death of his assistant, etc. He
23 never provided an appraisal.

24 On October 17, 2012 Mr. Lawlis provided a document, not on letterhead, that purported to be a
25 valuation. During a conference call with Mr. Lawlis on October 22, it became clear that Mr. Lawlis
26

1 could not substantiate the basis for any number in the document he provided. Mr. Smith expressed his
2 concern to Ms. Harrison and Mr. Silverman that the letter was a sham, and that he had not prepared any
3 type of report. That belief has now been confirmed.

4
5 Vivian's counsel had set a deposition of the "Person Most Knowledgeable" of Morley and
6 McKonkie for November 2, 2012. On October 29, 2012, Mr. Lawlis claimed that he had emailed the
7 appraisal report; his representation was false. He never completed or prepared a report. Vivian's
8 counsel terminated his services on November 1, 2012, and advised Mr. Standish that they had done so.
9 See letter from Mr. Smith to Mr. Standish dated Nov. 1, 2012, **Exhibit "NNN."**

10
11 NRCP 26 reads:

12 A party may depose any person who has been identified as an expert whose opinions
13 may be presented at trial. If a report from the expert is required under Rule 16.1(a)(2)(B)
14 or 16.2(a)(3)²³, **the deposition shall not be conducted until after the report is
provided.**

15 [Emphasis supplied]

16 NRCP 16.2(4)(A) reads:

17 Except as otherwise stipulated or directed by the court, a party who retains or specially
18 employs a witness to provide expert testimony in the case, or whose duties as an
19 employee of the party regularly involve giving expert testimony, shall deliver to the
20 opposing party a written report prepared and signed by the witness within 60 days of the
21 close of discovery. The court, upon good cause shown or by stipulation of the parties,
22 may extend the deadline for exchange of the expert reports or relieve a party of the duty
23 to prepare a written report in an appropriate case. The report shall contain a complete
statement of all opinions to be expressed and the basis and reasons therefor, the data or
other information considered by the witness in forming the opinions, any exhibits to be
used as a summary of or support for the opinions, and the qualifications of the witness.

24 Mr. Standish indicated to Mr. Smith that he would proceed forward with the deposition.

25 On November 2, 2012, Mr. Lawlis appeared at the deposition ostensibly for Morley and
26 McKonkie. He did not bring a file or any other documents, causing Mr. Smith to further believe that his
27

28

23 The reference in NRCP 26 has not been revised since the revision of NRCP 16.2. NRCP 16.2(4)(A) corresponds to the
previously referenced section.

1 representation that he had prepared a report was false. Mr. Standish proceeded to take his deposition.

2 After he was sworn, Mr. Smith properly stated his objection for the record:

3 [W]e would like to state our objection on the record of the deposition of Mr. Lawlis.
4 We've advised you of the fact that he is not going to be acting as an expert in this matter.
5 Though we have consulted with him, we have not, and do not intend, to use him as an
6 expert, and we think the taking of the deposition is improper.

7 See, Transcript (in condensed form) of the deposition of Damon Lawlis, **Exhibit "LLL"** attached
8 hereto, at page 4, line 21-25, page 5, lines 1-3. The objection was well grounded in law – NRCP 26
9 prohibited a deposition of an expert until a report was produced. The very reason for the objection is
10 that Mr. Lawliss had never produced a report.

11 Lawliss's draft letter of October 17, 2012 was not a "report", it was a fraud. Attached as Exhibit
12 "MMM" is the August 15, 2013 declaration of Craig Morley, the Morley of Morley & McConkie.
13 Attached as Exhibit "A" to Mr. Morley's declaration is the October 17 unsigned document from Lawlis.

14 Mr. Morley states:

15
16 6. Exhibit A is not a report. Under the Rule at U-4, Line 134 of the USPAP, a "report" is
17 "any communication, written or oral, of an appraisal, appraisal review, or appraisal
18 consulting service that is transmitted to the client upon completion of an assignment."

19 7. The assignment, I am informed, was to provide an opinion of value supported by
20 documentation which substantiated that opinion and which documentation and opinion of
21 value would or may be reviewed by opposing counsel, a court or other qualified
22 appraiser. If Exhibit A was all that was supplied to Mrs. Harrison, the document is not a
23 "report."

24 8. In the ordinary course of my profession, and in the habits and custom of MAI
25 appraisers, it would be a material exception for Exhibit A to be deemed a "report."

26 9. **I have reviewed the files of the firm and find in them that no material work was
27 ever done on the Harrison ranch matter and there is little or no documentation and
28 support for any opinion.**

[Emphasis supplied]. Though prohibited by the clear language of NRCP 26 from taking the deposition,

Kirk's counsel continued, and requested that Mr. Lawlis retrieve his files. Mr. Smith again objected:

1 We vigorously object. We don't think its appropriate for you to take his deposition at
2 all, much less request records that he's prepared and have been paid for by Ms. Harrison,
3 or at least the work has been billed to Ms. Harrison.

4 **Exhibit "LLL,"** page Kirk's counsel first responded by stating that the deposition was permissible
5 under "federal cases" without city any. When Mr. Smith requested to consult as required under EDCR
6 2.34, Kirk's counsel explained:

7 Mr. Standish: You retained him as an expert. His work is discoverable. We're just
8 asking the questions since you've never given us anything of substance.

9 Mr. Smith: We never got it. We never got a final report. That's why Mr. Lawlis is no
10 longer the expert. It's been months.

11 Exhibit "LLL," page 12, lines 15-21. Kirk's counsel's position that Mr. Lawlis was subject to a
12 deposition because he had at one time been named as an expert has no support in Nevada law. Kirk's
13 counsel was made aware that Mr. Lawlis never provided a report. It was improper for Kirk to proceed
14 with the deposition.

15 Kirk now uses the transcript of the deposition to seek sanctions. He alleges, falsely, that Mr.
16 Lawlis prepared an appraisal. Mr. Lawlis prepared a fantasy with no basis in fact. Mr. Morley confirms
17 that fact when he acknowledges there is nothing in Mr. Lawlis's file regarding the Harrison ranch. It is
18 for that reason (Mr. Smith had understood there was nothing in Mr. Lawlis's file on October 22 when he
19 could not cite a single document from the file) that Mr. Smith did not believe, 1) it was proper to take
20 the deposition; and 2) that Mr. Lawlis had ever prepared anything that constituted a report of value. It
21 was Kirk's counsel, not Vivian's counsel, that was acting in violation of the Nevada Rules of Civil
22 Procedure, and unethically.

23
24
25 Mr. Smith's belief that Mr. Lawliss had never prepared even a report, and that his values were
26 invented, is now confirmed. Mr. Morley states:

27 10. Mr. Silverman, counsel for Ms. Harrison, related that Mr. Lawlis would routinely
28 promise the completed assignment by a certain date, miss that deadline, offer an excuse,

1 promise the assignment by a future date, miss that date, and so on, perpetuating the
2 process and the delay. Within the past year, five or six of Mr. Lawlis' clients have come
3 to me with the same complaints about the same behavior at or near the time Ms.
4 Harrison's lawyers were working with Mr. Lawlis.

5 11. Mr. Lawlis was a contract appraiser for this firm from..... to..... I
6 was informed by him he suffers from recurrences of a cancer and/or chronic blood
7 disease and that some six years ago a morphine pump was placed in him which did not
8 function as expected and which had to be replaced. The replacement implant did not
9 work as expected, either.

10 12. In June, 2012 a client of the firm came to me with complaints about Mr.
11 Lawlis: they were being "strung along" by him and he would never deliver the promised
12 work. That was the first of about six such clients who complained that Damon had
13 "every excuse in the world" but who could not or would not deliver promised
14 assignments. I counseled with Damon about the matters and he strung *me* along for a
15 period, using the same excuses he used with clients. When I would look at a work file,
16 there would be nothing in it. Damon would explain there was a computer problem and he
17 had the work in his laptop or flash drive. Because we knew Damon to be especially adept
18 with computers, the excuses worked for a while. Eventually, we counseled with Damon
19 and in mid-2012 he resigned.

20 13. I believe at all times Damon was acting with good intentions, but was
21 deceiving himself and his clients. Damon wants to please, thus, I believe, he deceived
22 himself and our firm and our clients that the work would be done. On reflection, his
23 excuses and behavior were like those of an addict who tries to hide their disease. I do not
24 say Damon is or was addicted to any substance, only that his behavior was like that in
25 2011-12.

26 14. Mr. Lawlis resigned from this firm in mid-2012. The claims of delay related
27 by Mr. Silverman were like the complaints I heard from other of Mr. Lawlis' clients and
28 caused his decision to resign.

15 15. When he resigned, we agreed Mr. Lawlis could take with him several projects
16 then in progress. We have heard from those clients the behavior described above
17 continued.

18 16. Clients who requested appraisals, sometimes with great urgency, were
19 victimized.

20 Exhibit "MMM," pages 1-2. Vivian was one of those victims.

1 Undersigned counsel continues to believe that Mr. Lawlis's report should never have
2 been produced. Mr. Lawlis was not going to act as an expert, and his fraudulent draft never qualified as
3 a report because Mr. Lawlis was unable to provide *any* back up or support for his numbers. Kirk's
4 request for sanctions ignores the fact that he, not Vivian's counsel, was in violation of Nevada law.
5 Vivian submits that Kirk's motion for sanctions, and his request to estop Vivian from using anything but
6 Mr. Lawlis's wholly made-up values, is frivolous, and should be denied.

8 VI.

9 **KIRK'S REQUEST FOR DECLARATORY RELIEF**
10 **IS NOT WELL GROUNDED IN FACT OR LAW**

11 In his Countermotion, Kirk requests a declaratory judgment to sue Vivian's attorneys for
12 allegedly overbilling Vivian. This Court is the correct forum to make any and all determinations of
13 attorneys' fees in this matter. There is simply no contractual relationship between Kirk and Vivian's
14 attorneys that would allow him to seek an independent action in another forum. For these reasons, Kirk's
15 request for declaratory relief must be denied.

17 **A. Any actions by Kirk of allegedly overbilling by Vivian's attorneys must be tried in the**
18 **present divorce action.**

19 NRS 125.150(3) states,

20 3. Except as otherwise provided in NRS 125.141, whether or not application for suit
21 money has been made under the provisions of NRS 125.040, the court may award a
22 reasonable attorney's fee to either party to an action for divorce if those fees are in issue
under the pleadings.

23 NRCP 11 states in relevant part,

24 **(b) Representations to Court.** By presenting to the court (whether by signing, filing,
25 submitting, or later advocating) a pleading, written motion, or other paper, an attorney or
26 unrepresented party is certifying that to the best of the person's knowledge, information,
and belief, formed after an inquiry reasonable under the circumstances,—

27 (1) it is not being presented for any improper purpose, such as to harass or to
28 cause unnecessary delay or needless increase in the cost of litigation;

1 (2) the claims, defenses, and other legal contentions therein are warranted by
2 existing law or by a nonfrivolous argument for the extension, modification, or reversal of
3 existing law or the establishment of new law;

4 (3) the allegations and other factual contentions have evidentiary support or, if
5 specifically so identified, are likely to have evidentiary support after a reasonable
6 opportunity for further investigation or discovery; and

7 (4) the denials of factual contentions are warranted on the evidence or, if
8 specifically so identified, are reasonably based on a lack of information or belief.

9 [As amended; effective January 1, 2005.]

10 **(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court
11 determines that subdivision (b) has been violated, the court may, subject to the conditions
12 stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that
13 have violated subdivision (b) or are responsible for the violation.

14 Pursuant to NRS 125.150(3) and NRCP 11, this Court is the appropriate forum to resolve Kirk's
15 complaints against Vivian's counsel in this divorce action, especially because the case is ongoing and
16 the issue of attorney's fees is before this court.

17 There is no law in Nevada that would permit an independent cause of action by a litigant against
18 opposing counsel. In this case, where the claim is that the opposing counsel overbilled his client, and
19 that the overbilling harmed the community, the complaining party should be required to raise the matter
20 in the underlying action. The most appropriate jurist to determine whether overbilling occurred is the
21 judge who presided over the divorce from beginning to end. Allowing a new action in a different court
22 consumes additional resources by requiring a second judge to become familiar with the facts and
23 circumstances and increasing the need for lengthy motions and briefs setting out the factual
24 circumstances. A second action is also expensive to defend (more so because it may not be covered by
25 malpractice insurance) and thus subject to abuse by irascible litigants to intimidate and harass opposing
26 counsel.

27 ...
28

1 **B. There is no contractual relationship between Kirk and Vivian's attorneys that allows**
2 **him to bring an independent action against Vivian's attorneys**

3 Kirk claims that he should be allowed to bring an independent action against Vivian's attorneys
4 for overbilling because he, through the community, paid her attorney's fees, thereby creating a
5 contractual relationship between him and Vivian's counsel. The community did not pay Vivian's
6 attorney's fees. Because the parties received equal distributions of fees, and because those distributions
7 counted against each party's share of the community estate, Vivian paid her fees. No relationship based
8 on payment arose between Kirk and Vivian's attorneys.

10 There is no reported Nevada case addressing this issue, but courts from around the country have
11 concluded that independent actions against opposing lawyers are disfavored. In *Toles v. Toles*, 113
12 S.W.3d 899, 910-911 (Tex. Ct. Civ. App. 2001), the wife in a divorce action sued her husband, his
13 lawyers, and a receiver appointed to sell the family home. She sued all parties in an independent action
14 for damages. She alleged her husband's lawyers harmed her by actions taken during the parties' divorce
15 case. The Texas court held the trial court properly granted summary judgment to the husband's lawyers
16 because they owed no duty to the wife as adversaries in litigation. The court stated that "an attorney's
17 conduct, even if frivolous or without merit, is not actionable as long as the conduct was part of the
18 discharge of the lawyer's duties in representing his or her client." *Toles v. Toles*, 113 S.W.3d 899, 910-
19 911 (Tex. Ct. Civ. App. 2001).

22 In *Pollock v. Superior Court*, 279 Cal. Rptr. 634, 636 (Cal. Ct. App. 1991), Mr. Pollock and Mr.
23 Silverstein represented opposing parties. Mr. Silverstein filed an action against Mr. Pollock for breach
24 of contract alleging Mr. Pollock failed to take a settlement conference off calendar as agreed resulting in
25 Mr. Silverstein's non-appearance and subsequent sanctions. When the district court refused to dismiss
26 the matter, Mr. Pollock sought a writ from the appellate court requiring dismissal. The appellate court
27 agreed Mr. Silverstein had no cause of action and held that "Silverstein's complaint represents an
28

1 intolerable attempt to end-run and abuse the judicial system and could lead to a geometric proliferation
2 of litigation, if such actions were allowed to proceed. There is no support in law or logic to condone the
3 initiation of such viruses into the legal system." *Pollock v. Super. Ct.*, 279 Cal. Rptr. 634, 636 (Cal. Ct.
4 App. 1991).

5
6 Public policy militates against such actions because of the chilling effect on the zealous
7 advocacy required of legal counsel. However, in cases where an attorney's actions exceed the bounds of
8 the law, a person not in privity with the attorney may bring an independent cause of action for damages.
9 *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. Ct. Civ. App. 1985). In all other
10 cases, a party must bring an action for sanctions in the underlying action to address alleged misconduct
11 by opposing counsel. *See Toles*, 113 S.W.3d at 911; *Pollock*, 279 Cal. Rptr. at 636.

12
13 Kirk is not in privity with Vivian's counsel, nor is he an intended beneficiary of Vivian's
14 attorney-client relationship with her attorneys. Kirk's only relationship with Vivian's lawyers is as an
15 adverse party in a divorce action. Without a relationship imposing some duty on Vivian's lawyers owed
16 to Kirk, he has no cause of action. Kirk cannot sue Vivian's attorneys to recover money he did not
17 spend.
18

19 VII.

20 CONCLUSION


21 Kirk has reaped what he has sown. Despite Vivian's continuous and diligent efforts to try to
22 cause Kirk to see that his method of proceeding in this case would do nothing but cause everyone money
23 and heartache, he callously proceeded forward. Vivian has again been forced to incur substantial fees to
24 address another voluminous motion filled with irrelevant material, speculation, innuendo, rumor and
25 falsehoods. Through his filings, Kirk has demanded that everyone in this case, including his own
26 counsel and this Court, be required to read and address any and every contention, complaint, criticism,
27 he could level against Vivian, her witnesses, her experts, and her attorneys. Nothing about this case
28

1 should have been unusual or costly, but Kirk made it so, and to make matters worse, he did so by
2 contributing a massive amount of his community labor, effort and skill.

3 The court may use any method of determining a fee award "reason and fairness" prescribe. The
4 simplest way to determine a reasonable distribution of fees is for this Court is to determine what this
5 case would have cost if not for Kirk's methods and unusual claims. In the absence of those methods
6 and claims, the briefs would have been smaller, there would have been no need for anyone but a court
7 appointed expert, and no need for multiple lawyers. Vivian incurred substantial fees because Kirk
8 repeatedly and unnecessarily increased the costs of this case. The Court should direct Kirk to pay
9 Vivian a reasonable fee based upon the *Brunzell* factors as applied above.
10

11 DATED this 11 day of September, 2013.

12
13 RADFORD J. SMITH, CHARTERED


14
15 
16 RADFORD J. SMITH, ESQ.
17 Nevada State Bar No. 002791
18 64 N. Pecos Road - Suite 700
19 Henderson, Nevada 89074
20 Attorneys for Defendant
21
22
23
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25
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27
28

DECLARATION OF RADFORD J. SMITH, ESQ.

COUNTY OF CLARK)
) ss:
STATE OF NEVADA)

Radford J. Smith, Esq., declare and state as follows:

1. I am the attorney of record for the Defendant in the above-entitled matter.
2. I make this Declaration based upon facts within my own knowledge, save and except as to matters alleged upon information and belief and, as to those matters, I believe them to be true.
3. I have personal knowledge of the facts contained herein, and I am competent to testify thereto. I have reviewed the foregoing Reply and Opposition and can testify to the facts referenced by "Mr. Radford J. Smith, Esq." or "Mr. Smith" or "undersigned counsel" therein are true and correct to the best of my knowledge. I hereby reaffirm and restate said facts as if set forth fully herein.
4. I declare under the penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.



RADFORD J. SMITH, ESQ.

9 / 11 / 13

Dated

1 CERTIFICATE OF SERVICE

2 I hereby certify that I am an employee of Radford J. Smith, Chartered ("the Firm"). I am over
3 the age of 18 and not a party to the within action. I am "readily familiar" with firm's practice of
4 collection and processing correspondence for mailing. Under the Firm's practice, mail is to be deposited
5 with the U.S. Postal Service on the same day as stated below, with postage thereon fully prepaid.

6 I served the foregoing document, described as

7
8 DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR
9 ATTORNEYS' FEES AND SANCTIONS

10 DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION STYLED REQUEST FOR
11 REASONABLE DISCOVERY AND EVIDENTIARY HEARING

12 DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION FOR EQUITABLE RELIEF;

13 DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION FOR ATTORNEYS' FEES
14 AND SANCTIONS;

15 DEFENDANT'S OPPOSITION TO PLAINTIFF'S COUNTERMOTION FOR DECLARATORY
16 RELIEF

17 on this 11th day of September, 2013, to all interested parties as follows:

18 ☒ BY MAIL: Pursuant To NRCP 5(b), I placed a true copy thereof enclosed in a sealed envelope
19 addressed as follows;

20 ☐ BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this
21 date via telecopier to the facsimile number shown below;

22 ☒ BY ELECTRONIC MAIL: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing
23 document this date via electronic mail to the electronic mail address shown below;

24 ☐ BY CERTIFIED MAIL: I placed a true copy thereof enclosed in a sealed envelope, return
25 receipt requested, addressed as follows:

26 Tom J. Standish, Esq.
27 3800 Howard Hughes Parkway, 16th Floor
28 Las Vegas, Nevada 89169
F: (702) 699-7555
Attorney for Plaintiff

Edward L. Kainen, Esq.
10091 Park Run Dr., Suite 110
Las Vegas, Nevada 89145
F: (702) 823-4488
Attorney for Plaintiff


An employee of Radford J. Smith, Chartered

Exhibit “T”

PLAINTIFF'S MOTION FOR JOINT LEGAL AND PRIMARY PHYSICAL CUSTODY AND EXCLUSIVE POSSESSION OF THE MARITAL RESIDENCE

Date of filing – On September 14, 2011

Number of pages of text – 48

Number of pages with exhibits – 354

Date	Staff	Description	Hours	Charges
8/6/11	Tom Standish	Begin reading and review ...; Review affidavits of Whitney, Tahnee, and client; Read report of Dr.Roitman	3.4	\$1,700
8/14/2011	Ed Kainen	Read and Study proposed Motion; Read and Study email from adverse attorney regarding mediators, appraisals, residence, marital balance sheet and demand for information on which custody case is based	2.8	\$1,400
9/8/11	Jennifer Poynter-Willis	Discuss Finalizing Motion and Set call for client and Standish	.7	192.5
9/9/11	Tom Standish	Conference with client regarding ... review notes and highlight factors for possible revisions to draft of motion	2.8	\$1,400
9/10/11	Tom Standish	Begin review of motion, letter from Rachel, and client's affidavit; Begin outline for revisions to Motion	1.8	\$900
9/10/2011	Tom Standish	Continue with review of client's affidavit and draft of motion; begin sorting of facts into time line and into categories with respect to poor parenting skills, obsessive behavior, NPD behavior, lack of focus on children	2.9	\$1,450
9/11/2011	Tom Standish	Read informal drafting of motion; Redraft initial statement of facts; Redraft portions of argument; Begin re-arrangement of facts to be cited under different category headings; Read emails back and forth between co-counsel and client regarding ... Read proposed letter from client	4.9	\$2,450
9/12/2011	Tom Standish	Telephone call to client regarding ... review notes and continue drafting of fact categories for revised motion	1.4	\$700
9/13/2011	Tom Standish	Three telephone calls with client regarding ...organize notes and outline revisions to motion with client's change and additions	1.7	\$850
9/13/2011	Tom Standish	Complete review of client's primary affidavit; complete review of Dr. Roitman's report; Review supplemental affidavit received from client; Review affidavits of client's daughters; continue to outline revisions to motion including revisions to prayers for relief	2.3	\$1,150
9/14/2011	Jennifer Poynter-Willis	Review exhibits with Mr. Standish and Ms. Carducci in preparation of motion; Review exhibits with client and Mr. Standish	.3	\$82.50
9/14/2011	Jennifer Poynter-Willis	Review revised Motion to finalize; Prepare exhibits; Review exhibits and prepare in final; Review Mr. Standish's revisions; Review acceptance of service; Confer with Mr. Matter regarding service; Telephone call with Mr. Kainen to advise of service	3.5	\$962.50
9/14/2011	Tom Standish	Continue with drafting of revisions to motion, commence dictation of additional fact categories; rearrange facts and revise provisions of motion; align facts in motion with facts cited in client's affidavit; re-	5.8	\$2,900

		check facts in motion as against statements in affidavits of daughters; Multiple telephone calls from client to discuss... proofread initial revisions and update portions of background facts; telephone call from regarding ...		
9/14/2011	Tom Standish	Dictate remaining additions to argument, background facts, and rearrangement of facts into categories; dictate additional revisions to argument regarding Vivian's activities, her obsessive behavior, and he actions depicting loss of focus on children, absence from home on vacations revise potions of argument to allege facts instead of criticisms; begin proof reading of second revisions to draft of motion.	3.3	\$1,650
9/15/2011	Tom Standish	Final proofreading of all revisions to motion; telephone call from client regarding ...conference with Ms. Carducci and Ms. Poynter-Willis regarding exhibits to motion, photographs, and footnotes in motion to correspond to argument and exhibits	4.2	\$2,100
		TOTAL	41.8	\$19,887.50

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR JOINT LEGAL CUSTODY AND PERMANENT PHYSICAL CUSTODY AND FOR EXCLUSIVE POSSESSION OF THE RESIDNECE AND OPPOSITION TO DEFENDANT'S COUNTERMOTION FOR EXCLUSIVE POSSESSION OF THE MARITAL RESIDENCE; FOR PRIMARY PHYSICAL CUSTODY OF MINOR CHILDREN; FOR DIVISION OF FUNDS FOR TEMPORARY SUPPORT, AND FOR ATTORNEY'S FEES

Date of filing – January 12, 2012

Number of pages of text – 81

Number of pages with exhibits – 270

Date	Staff	Description	Hours	Charges
11/3/2011	Tom Standish	Review of opposing counsel's opposition on custody motion; review maps of ranch parcels sent by client	1.7	\$850
11/4/2011	Tom Standish	Read memo from client; continue review of opposing counsel's opposition to custody motion	1.9	\$950
11/23/2011	Tom Standish	Review letter from Cliff Beadle; review custody motion and opposition; review Dr. Roitman's report, review report on his examination of Vivian.	1.7	\$850
11/28/2011	Ed Kainen	Read and study Affidavit of adverse party and other supporting affidavits and materials attached to Opposition filed by adverse attorney	2.8	\$1400
1/2/2012	Ed Kainen	Read and study...; Prepare revisions to Reply Brief; Exchange several emails with client...; Multiple telephone calls with client regarding...	3.6	\$1800
1/3/2012	Ed Kainen	Read and study revised draft of Reply Brief for additional revisions and comments; Lengthy telephone calls with client regarding...	4.4	\$2200
1/5/2012	Tom Standish	Read Reply Brief prepared by client and co-counsel	0.8	\$400
		TOTAL	16.9	\$8450

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR TEMPORARY ORDERS AND PLAINTIFF'S
COUNTERMOTION FOR TEMPORARY ORDERS PURSUANT TO NRS 125.040

Date of filing – January 25, 2012

Number of pages of text – 17

Number of pages with exhibits - 67

Date	Staff	Description	Hours	Charges
1/24/2012	Ed Kainen	Multiple telephone calls with client regarding ... Read and study email from client ... Read and Study revised Opposition and related documents, Prepare additional revisions to opposition, Lengthy telephone call with client regarding ...	2.8	\$1,400
	Tom Standish	NO ENTRY		
	TOTAL		2.8	\$1,400

Exhibit “W”



COLUMBIA UNIVERSITY
MEDICAL CENTER

DEPARTMENT OF
PSYCHIATRY
1051 RIVERSIDE DRIVE
NEW YORK, NY 10032

June 9, 2013

Gary R. Silverman, Esq.
Silverman, Decaria & Kattelman
6140 Plumas Street, Suite 200
Reno, NV 89519

Dear Mr. Silverman,

At your request, I have reviewed materials relating to the opinions offered by Norton A. Roitman, MD in connection with the litigation in *Harrison v. Harrison*. In particular, I considered whether Dr. Roitman met the standard of care of a psychiatrist in reaching and offering his diagnostic assessment of Vivian Harrison, and in drawing conclusions regarding arrangements for custody of the minor Harrison children.

Materials Reviewed: The materials that I reviewed included Dr. Roitman's report of June 9, 2011; his deposition of April 27, 2012; Mr. Harrison's Motion for Joint Legal and Primary Physical Custody and Exclusive Possession of Marital Residence, September 14, 2011; Mrs. Harrison's Opposition to the Motion for Joint Legal and Primary Physical Custody and Exclusive Possession of Marital Residence, and her Countermotions, October 27, 2011; Mr. Harrison's Reply to Defendant's Opposition to Plaintiff's Motion for Joint Legal Custody and Permanent Physical Custody and for Exclusive Possession of Residence, and Opposition to Defendant's Countermotions, January 4, 2012; Mr. Harrison's Opposition to Defendant's Motion for Temporary Orders and Plaintiff's Countermotion for Temporary Orders, January 25, 2012; and Mrs. Harrison's Reply to Plaintiff's Opposition to Defendant's Countermotions for Exclusive Possession of Marital Residence, for Primary Physical Custody of Minor Children, for Division of Funds for Temporary Support, and for Attorney's Fees of January 27, 2012.

In addition, I reviewed guidelines for the conduct of evaluations related to child custody formulated by the major professional organization concerned with child custody assessments and embodied in major texts in the field. These include:

American Academy of Child and Adolescent Psychiatry. Practice Parameters for Child Custody Evaluations. *Journal of the American Academy of Child and Adolescent Psychiatry* 1997;36(10 supplement):57S-68S.

American Academy of Psychiatry and the Law. Ethics Guidelines for the Practice of Forensic Psychiatry. May 2005. <http://www.aapl.org/ethics.htm>

American Psychological Association. Guidelines for Child Custody Evaluations in Family Law Proceedings. *American Psychologist* 2010;65:863-867.

Herman SP. Child Custody Evaluations, in Schetky DH, Benedek EP (eds.), *Principles and Practice of Child and Adolescent Forensic Psychiatry*. Washington, DC, American Psychiatric Press, 2002.

Ludolph PS. Child Custody Evaluation, in Benedek EP, Ash P, Scott CL (eds.), *Principles and Practice of Child and Adolescent Forensic Mental Health*. Washington, DC, American Psychiatric Press, 2010.

Nurcombe B, Parlett DF. *Child Mental Health and the Law*. New York, The Free Press, 1994.

Opinion: My opinion in this case is based on more than 30 years experience as a psychiatrist and forensic psychiatrist; my expertise in the ethics of psychiatry and forensic psychiatry; and my review of the literature cited above. It is my opinion to a reasonable degree of medical certainty that Dr. Roitman's evaluation and formulation of his opinions fell below the standard of care of psychiatrists in two respects: 1) his diagnosis of Vivian Harrison, and 2) his conclusions regarding her parenting ability and the best interests of the minor Harrison children.

Basis for Opinion: Dr. Roitman diagnosed Mrs. Harrison as having a narcissistic personality disorder. He concluded as well that her "pathological narcissistic personality disorder is near impossible to treat and her prognosis is very poor." In addition, he judged that "if her character were stronger, she might have a shot at [improving with treatment], but unfortunately, she is shallow and critical, and lacks internal structure." However, Dr. Roitman never met Mrs. Harrison, and based his diagnosis entirely on the information provided to him by Mr. Harrison, whom he described as "anticipating family court proceedings toward divorce and [who] requested this psychiatric analysis of his wife to inform the court of Vivian's mental condition and functional limitations."

In the best of circumstances, diagnoses made exclusively on the basis of information provided by third parties are of dubious reliability. When psychiatrists cannot conduct an examination, they are unable to ask the questions necessary to elicit the information necessary to confirm diagnoses and to rule out alternative explanations for a person's behavior. In the context of litigation, however, to rely exclusively on information provided by an adverse party with an interest in portraying the person in an unfavorable light is to fall below the standard of care with regard to diagnostic practices. Although the ethics guidelines of the American Academy of Psychiatry and the Law acknowledge that "if, after appropriate effort, it is not feasible to conduct a personal examination, an opinion may nonetheless be rendered on the basis of other information," that statement presumes that other objective data are available to render that judgment. Such data might include records of psychiatric evaluation and treatment by other psychiatrists, affidavits of non-party witnesses, police records,

school records, military records, and the like. However, when the only information that an evaluator has been provided comes from a party with a direct interest in the evaluator reaching a judgment adverse to the person whose condition is being described, no reliable opinion can be rendered.

In addition, Dr. Roitman reached conclusions regarding Mrs. Harrison's fitness as a parent and the custody arrangement that would meet the best interests of the minor children without ever evaluating her or the minor children. He expressed concern about "the pathogenic effect her characterological dysfunction will have on her young children," noting that her "incapacity for empathy is devastating to a child" and her "behaviors betray a disturbance in her psychological functioning that will harm her children." Because "[s]he will never be able to give the girls what they need most" and "is too unstable and volatile, and uses the children for her own psychological needs," "the only viable option for the health and well-being of [the] children is to visit with their mother only...She should not try to reinsert herself into their lives as their parent."

By reaching an opinion on the parenting abilities of a person whom he never evaluated, and on the comparative benefits of parenting by two people whom he never evaluated, Dr. Roitman violated one of the clearest standards of involvement in child custody cases. As the American Academy of Child and Adolescent Psychiatry notes in its Practice Parameters for Child Custody Evaluations, "[i]f the evaluator has seen only one parent, opinions should not be given on ultimate custody or on the parent not seen." Dr. Stephen Herman states in his chapter on child custody in the textbook *Principles and Practice of Child and Adolescent Psychiatry* that the expert should "[a]void unilateral evaluations...It is just not possible to compare and assess two parents if only one has been seen." Needless to say, that conclusion is even stronger when neither parent has been evaluated, as in this instance. Similarly, Nurcombe and Partlett note in their text on *Child Mental Health and the Law*, "the clinician who examines only one parent is in no position to comment upon the *relative* fitness of that parent or of other parties, unless there is a strong presumption of sexual abuse by the other parent." The ethics guidelines of the American Academy of Psychiatry and the Law note, "If one parent has not been interviewed, even after deliberate effort, it may be inappropriate to comment on that parent's fitness as a parent." Indeed, psychologists, who often conduct child custody evaluations, have adopted a similar rule; the Guidelines for Child Custody Evaluations in Family Law Proceedings of the American Psychological Association state, "Psychologists provide an opinion of an individual's psychological characteristics only after they have conducted an examination of the individual adequate to support their statements and conclusions." Hence, the conclusion is inescapable that Dr. Roitman fell below the standard of care in offering his opinion regarding Mrs. Harrison's capacity to parent her minor children and the most desirable custody option, without ever examining her.

Towards the beginning of his report, Dr. Roitman included a section titled "Limitations," which include the following statement: "The opinions rendered are

preliminary and subject to change based upon a psychiatric examination of Vivian L. Harrison." In his deposition testimony, Dr. Roitman explicitly referenced the guidelines of the American Academy of Psychiatry and the Law, which regarding child custody evaluations contain the following statement: "Any comments on the fitness of a parent who has not been interviewed should be qualified and the data for the opinion clearly indicated." However, Dr. Roitman's report fails to conform to this guidance. Rather than "qualifying" his conclusions, i.e., limiting them appropriately given the biased source of the data available to him, he expressed his conclusions with reasonable medical certainty—a degree of certainty unobtainable in these circumstances. In the "Discussion" section of his report, the cautionary clause "given the limitations of a reconstructive analysis" is followed by five pages of firmly stated conclusions regarding Mrs. Harrison's diagnosis, character flaws, and likely impact on her children, and a firm opinion regarding stripping her of custody of her children and permitting her only to visit them. Reaching such conclusions without examining the person in question does not constitute appropriately qualifying one's conclusions and falls below the profession's clear standard of care.

I am available to respond to any questions that you may have about this report.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul S. Appelbaum".

Paul S. Appelbaum, MD
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