IN THE SUPREME COURT OF THE STATE OF NEVADA

RHONDA HELENE MONA AND MICHAEL J. MONA, JR.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JOE HARDY, DISTRICT JUDGE,

Respondents,

and

FAR WEST INDUSTRIES,

Real Party in Interest.

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Case No.: 68434

PETITIONERS' OPPOSITION TO FAR WEST INDUSTRIES' EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(e)

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I

INTRODUCTION

In its "emergency" motion, Real Party in Interest, Far West Industries ("Far West"), requests that this Court modify the temporary stay entered by the District Court on July 15, 2015, which was then extended by this Court's July 20, 2015 temporary stay order. 2 Petitioners' Appendix ("App.") 348-58. The true intent of Far West's "emergency" motion is for an expedited final ruling on the Monas' pending emergency motion for stay.[1] But, the substance of Far West's "emergency" motion is already included in the completed stay briefing. Thus, if this Court grants a stay of all District Court proceedings based upon the existing stay briefing, the Court can simply deny Far West's "emergency" motion as moot.

In weighing the NRAP 8(c) factors, Far West does not satisfy these factors for a modification of the temporary stay. In fact, Far West argues these factors as if it were the party seeking relief from this Court.[2] Far West's arguments on the fourth NRAP 8(c) factor dealing with the merits of the Monas' writ petition are virtually identical to the same contentions already argued in Far West's opposition to stay, filed on August 14, 2015. Opp. at 8-20. Accordingly, the Monas respond with their arguments already substantially

[1] Although Far West labels its motion as an "emergency," with relief requested by Tuesday, August 18, 2015, it does not identify why this specific date should be treated as an emergency deadline.

[2] Far West's "emergency" motion curiously borrows certain statements of law from ***the Monas'*** emergency motion for stay filed on July 17, 2015.

briefed in their reply in support of the emergency motion for stay, submitted to the Court for filing on August 21, 2015. Reply at 4-14. So, if the Court reaches the merits of Far West's request to modify the temporary stay, the Court should deny the request.

Alternatively, since Far West's request for a modification of the temporary stay order is being presented for the first time, the Court should either reject the request entirely or remand the issue to be determined by the District Court in the first instance.

II

LEGAL ARGUMENT

A. The Substance of Far West's "Emergency" Motion Is Already Addressed in the Completed Stay Briefing.

Although NRAP 27(a)(3)(B) allowed Far West to request affirmative relief in a countermotion with its opposition to the Monas' emergency motion for stay, Far West neglected to request any such affirmative relief. Instead, Far West has now presented nearly identical substantive arguments and asks for a modification of the temporary stay. Since Far West's substantive arguments are nearly identical to the completed stay briefing, if the Court stays the entire District Court proceedings, the Court can simply deny Far West's "emergency" motion as moot. The Monas point out Far West's duplicative arguments in its "emergency" motion to prevent the Court from spending time reviewing what amounts to the same arguments already briefed.

B. Far West's Request to Modify the Temporary Stay Should Be Denied on the Merits.

The essential point of Far West's motion is to prevent Rhonda Mona ("Rhonda") from using her own separate property that is located in her own accounts. After weighing the facts of this dispute, the District Court recognized, "The Court understands, however, that people need money to live." 2 App. 346. Since the District Court reached a factual finding with regard to the conditions of the temporary stay, this Court should not disturb these findings. *See, e.g., Nelson v. Heer*, 121 Nev. 832, 836-37, 122 P.3d 1252, 1254-55 (2005) (concluding that district courts are "in the best position" to weigh factual issues relevant to stay motions). Otherwise, Rhonda would be deprived of what the District Court characterized as her living expenses.[3]

With respect to the NRAP 8(c) factors, Far West has failed to demonstrate that it has satisfied any of these factors for a modification of the temporary stay. Therefore, the Court should deny Far West's "emergency" motion.

1. The Object of the Monas' Writ Petition Will Not Be Defeated if the Conditions of the Temporary Stay Remain Intact.

Even though Far West has not filed its own writ petition, it argues in favor of a modification of the temporary stay from a backward position. Far West contends, "There will be no point for the Supreme Court to consider what

[3] Far West's suggestion that Rhonda can live off of Michael Mona's ("Mike") salary is without basis in light of the Monas' recent divorce proceedings.

assets Far West can collect upon if those assets have been transferred, disposed of or encumbered while the appeal is pending." Motion at 3. Far West clearly avoids the entire purpose of the Monas' writ petition, which is to stop the execution proceedings. Regardless of where Rhonda's separate property resides, the Monas still need a legal ruling from this Court to define the parameters of Far West's ability to execute. *Cf. Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 265, 71 P.3d 1258, 1261 (2003) ("[W]e are of the view that actual or potential threat of garnishment or execution is sufficient coercion to avoid a mootness challenge based upon payment of the judgment."). Therefore, Far West's motion to modify the temporary stay fails as to the first NRAP 8(c) factor.

2. The Monas Will Suffer Serious Injury or Irreparable Harm if the Conditions of the Temporary Stay Are Modified.

Far West attempts to overcome the District Court's factual findings on the conditions of the temporary stay by unilaterally concluding that the Monas have plenty of money to live on. Yet, Far West avoids the fact that the Monas were going through a divorce at the time of the District Court proceedings, and such broad assumptions cannot overcome the District Court's conditions of the temporary stay. However, there is a more basic reason why Far West's request to freeze Rhonda's separate property should be denied—Rhonda was never made a party to the District Court case, and judgment could not be entered against her. The key distinction that Far West avoids is that Rhonda in her personal capacity is not the same as Rhonda in her capacity as a former trustee

of the Mona Family Trust. *See Salman v. Newell*, 110 Nev. 1333, 1335, 885 P.2d 607, 608 (1994). Yet, Far West continues to conflate Rhonda's two capacities. Just because Rhonda appeared for a deposition as a former trustee of the Mona Family Trust did not make her a party to this action, particularly in her personal capacity. Similarly, Mike has a vested interest in keeping Rhonda's separate property as separate. If Rhonda's separate property were treated as community property, Mike would have to come up with funds from some other source to replace Rhonda's separate property. So, Far West's bare conclusion that the Monas will not suffer serious injury or irreparable harm is untrue and does not justify modifying the conditions of the temporary stay.

3. Far West Will Not Suffer Any Serious or Irreparable Harm if the Conditions of the Temporary Stay Remain Intact.

In its "emergency" motion, Far West argues that it will suffer irreparable harm (Motion at 4) because it will supposedly lose the ability to collect upon Rhonda's separate property—a right it never had in the first place. Without ever holding an evidentiary hearing to trace funds, Far West claims that it was entitled to collect millions of dollars from the Monas. As such, Far West's claim to funds in Rhonda's separate accounts is speculative and does not form the basis of serious or irreparable harm. The District Court already recognized that these funds are Rhonda's limited liquid assets upon which she has to live: "The Court understands, however, that people need money to live." 2 App. 346. Tellingly, Far West does not respond to the argument that the legal measure for the loss of use of funds is the accrual of post-judgment interest.

See Waddell v. L.V.R.V., Inc., 122 Nev. 15, 26, 125 P.3d 1160, 1167 (2006). Therefore, the Court should deny Far West's request to modify the conditions of the temporary stay due to Far West's failure to satisfy the third NRAP 8(c) factor.

4. The Monas, Not Far West, Are Likely to Prevail on the Merits of Their Writ Petition.

In their writ petition, the Monas raised four main arguments for this Court to grant extraordinary relief: (1) the lack of personal jurisdiction over Rhonda for the District Court to enter judgment against her; (2) the need for a separate action against Rhonda to enter any relief against her, and the questionable status of *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) in light of this Court's more recent holdings in *Callie v. Bowling*, 123 Nev. 181, 160 P.3d 878 (2007); (3) the numerous violations of the Monas' procedural due process rights in which Far West has obtained "ultimate" sanctions against the Monas without proper procedure; and (4) the post-marital property settlement agreement that protects Rhonda's separate property. The Monas have raised at least serious questions to support this Court's granting of a stay. *See Hansen v. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000).

a. Counsel ***Did*** Object to the District Court's Lack of Personal Jurisdiction Over Rhonda.

It is undisputed that Far West did not serve Rhonda, in her personal capacity, with process or a subpoena. *See, e.g., Browning v. Dixon*, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) (explaining that service of process is required to satisfy due process); *see also Consol. Generator-Nevada, Inc. v.*

Cummins Engine Co., 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("Nevada Rules of Civil Procedure 45(c) requires that a subpoena be personally served."). Acknowledging the lack of personal service upon Rhonda, Far West unpersuasively argues that Rhonda's appearance at a judgment debtor examination in her capacity as a former trustee of the Mona Family Trust somehow equates to personal service upon Rhonda in her personal capacity. Motion at 5-6. Of course, Far West cites to no legal authority to support this argument, and this Court should completely disregard it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) ("Edwards neglected his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims.") (citations omitted).

Far West also argues that Rhonda's appearance through counsel in the District Court hearing constitutes a waiver of the lack of personal jurisdiction. Motion at 6. However, Far West's representations of the record are inaccurate. Counsel objected at the beginning of the District Court hearing to Far West's failure to serve Rhonda. 2 App. 317. In arguing in favor of a stay in the District Court, counsel once again reiterated that Rhonda is not a party to this litigation: "Your Honor, I think I've made the record I need in my request for a stay. And again, until—the fact that she's [Rhonda] not a party, until this order is final and she has the ability to pursue some type of appellate relief . . . ." 2 App. 345. So, Far West's argument that the District Court acquired personal jurisdiction over Rhonda based upon a waiver is simply wrong.

b. Far West Does Not Even Attempt to Address the Merits of *Callie v. Bowling*, 123 Nev. 181, 160 P.3d 878 (2007) and the Blatant Disregard for Rhonda's Procedural Due Process.

Even though the District Court never had personal jurisdiction over Rhonda, Far West improperly suggests that it did not need any such jurisdiction. Motion at 6-8. Far West completely skirts the mandatory procedural due process requirements outlined in *Callie v. Bowling*, 123 Nev. 181, 186, 160 P.3d 878, 881 (2007). In *Callie*, this Court explained that new parties cannot be added to a judgment in post-judgment proceedings because the new party is completely deprived of formal notice, discovery, fact finding, and an opportunity to be heard before the claim is resolved. *Id.*, 123 Nev. at 186, 160 P.3d at 881. Far West contends that Rhonda did not need to be added as a party, and that it was permissible for the District Court to rule against her without having party status. Motion at 6-8. But, Far West fails to explain why Rhonda would not have rights to formal notice, discovery, fact finding, and an opportunity to be heard before the summary proceedings took place in the District Court.

Not surprisingly, Far West relies upon *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) to support its position. *Id.* But, Far West has no explanation as to how *Randono* can withstand scrutiny under *Callie*. Moreover, Far West's complete reliance upon *Randono* and its progeny does not explain how the holding to allow a non-debtor spouse to be subject to a debt based upon an intentional tort finds any support in the actual language of the NRS, even though *Randono* bases its rulings upon the NRS. Very simply, when case law

interpreting a statute does not honor the plain language of the statute, the case law is no longer valid. *See, e.g.*, *Egan v. Chambers*, 129 Nev. __, __, 299 P.3d 364, 365 (2013) ("While we acknowledge the important role that *stare decisis* plays in Nevada's jurisprudence, we recognize that we broadened the scope of NRS 41A.071, expanding the reach of the statute beyond its precise words."). Just as *Egan* limited the reach of NRS 41A.071, the Court should similarly limit the holding of *Randono* to the language of the actual associated statutes, including NRS 123.220 and the definition of community property.

Far West then shifts gears and claims that Rhonda was just a third party. Notably, Far West abandons its previous reference to NRS 21.320, particularly because it contains the phrase "not exempt from execution," which the District Court never determined because Far West never invoked the protections or the burdens of NRS Chapter 21. Since Far West never served execution paperwork upon Rhonda's separate accounts, she was not allowed an opportunity to assert the exemptions outlined in NRS 21.090. For the same reason, NRS 21.280 also does not afford Far West any relief because it expressly requires as a precondition "the issuing of an execution against property, and upon proof by affidavit of a party or otherwise . . . ." Far West did not serve execution paperwork upon Rhonda's separate property at any time or present an affidavit to the District Court before proceeding ex parte. Further, Far West's reliance on NRS 21.330 is also unavailing because it requires a new lawsuit against Rhonda. Therefore, Far West has demonstrated that it is entitled to a modification of the conditions of the temporary stay.

c. Far West's Failure to Meet and Confer Deprived the Monas of Their Procedural Due Process.

Even though the District Court's entire sanctions order was based upon NRCP 37, Far West suggests that it did not have to comply with provisions of this rule or the related local rule, EDCR 2.34(d). Motion at 8. Just because this case involves post-judgment discovery does not mean that Far West can avoid these mandatory procedural rules. Far West argues that the meet and confer requirement of NRCP 37(a)(2)(a) only applies to NRCP 16.1 disclosures. Motion at 13. To support this argument, Far West attempts to recharacterize its requested relief in the District Court. But, NRCP 37(a)(3) extends the meet and confer requirement (even under Far West's characterization) because "an evasive or incomplete disclosure, answer or response is to be treated as a failure to disclose, answer or respond." Notably, EDCR 2.34(d) does not contain any arguable exception to avoid the meet and confer requirement, nor does Far West attempt to point to any such exception. So, the Monas were first deprived of their procedural due process by Far West's failure to meet and confer before seeking ex parte relief from the District Court.

d. The Monas Were Never Afforded a Predeprivation Hearing Before Rhonda's Bank Accounts Were Attached.

Far West argues that its offer to continue the District Court hearing ***after*** it had already frozen Rhonda's bank accounts (on an ex parte basis) satisfied procedural due process. Motion at 8. But, this argument is likewise unavailing. Not surprisingly, Far West never submitted an affidavit outlining why it proceeded ex parte in the District Court and why it froze Rhonda's accounts

without predeprivation notice or a hearing. Under procedural due process principles, a predeprivation notice is mandatory unless there is a specific exception. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 82, 97 (1972) (a later hearing does not remedy the prior deprivation in a replevin case); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("[T]he right to prior notice and a hearing is central to the Constitution's command of due process" absent extraordinary circumstances). Far West has never articulated any exception and cannot now because it never submitted an affidavit supporting such an exception. *Cf.* NRCP 65(b) (requiring an affidavit explaining why it would be impractical to give notice to seek a temporary restraining order issued without notice). Thus, Far West's failure to give predeprivation notice or a hearing likewise violated the Monas' procedural due process rights.

e. Because the District Court Imposed Ultimate or Case-Concluding Sanctions, an Evidentiary Hearing Was Required.

Far West argues that the case law on NRCP 37 sanctions does not require an evidentiary hearing under the circumstances of this case. Motion at 8-10. Far West also argues that the Monas failed to request an evidentiary hearing. *Id.* Far West is wrong on both points. When a district court makes a liability determination as a discovery sanction, as in the instant case (2 App. 357), an evidentiary hearing is mandatory. *See Foster v. Dingwall*, 126 Nev. __, __, 227 P.3d 1042, 1047 (2010); *see also Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. __, __, 235 P.3d 592, 602 (2010) ("Our policy favoring disposition on the

merits requires us to apply a heightened standard of review where the sanction imposed, as in this case, is liability-determining.") (Pickering, J., dissenting) (citations omitted).

In the instant case, even though the District Court did not allow an evidentiary hearing, it took the extreme steps of concluding that Mike "lied" (2 App. 351) and that a fraudulent transfer was conclusively established. 2 App. 357. Instead of hearing evidence, the District Court considered Mike's statements made in a judgment debtor examination and Rhonda's statements made in her representative capacity. Thus, there is no doubt that, legally, an evidentiary hearing was required.

Contrary to Far West's bare assertions, during the course of the District Court hearing, counsel asked for an evidentiary hearing: "The level of sanctions that they [Far West] are requesting on this time frame without Rhonda being present, it's certainly just—it violates due process, it's not fair. And if the Court is going to entertain anything about [this] case—or about these three accounts, it should be on an evidentiary basis in which all parties should be allowed to participate fully." 2 App. 326. The request for an evidentiary hearing was also made in the written opposition. 2 App. 295-96. Far West's argument that an evidentiary hearing was never requested, once again misrepresents the record. Therefore, the lack of an evidentiary hearing is yet another way in which the Monas were deprived of their procedural due process rights.

f. Far West's One-Sided "Evidence" Does Not Satisfy the Monas' Procedural Due Process Rights.

Far West argues that Rhonda, in her capacity as former trustee of the Mona Family Trust, made admissions that were so detrimental that she was not entitled to an opportunity to contest Far West's position in the District Court. Motion at 8-10. Of course, even seeming admissions made under oral cross-examination are not always treated as judicial admissions. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. __, __, 255 P.3d 268, 277 (2011) ("[O]ral responses to aggressive examination by trained lawyers will not be construed as a judicial admission.") (citation omitted). In fact, the *Reyburn* court stated that when a testifying party "admits a fact which is adverse to his claim or defense, [it] may be controverted or explained by the party." *Id.* (citation and internal quotation marks omitted). Thus, no matter how securely Far West believes in its own evidence, the Monas were still entitled to oppose Far West's position and explain their own testimony. *Cf. Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. No. 34, at *23-24 (Jun. 11, 2015) (citing *Miller v. A.H. Robins Co.*, 766 F.2d 1102, 1104 (7th Cir. 1985) ("An inconsistent affidavit may preclude summary judgment . . . if the affiant was confused at the deposition and the affidavit explains those aspects of the deposition testimony or if the affiant lacked access to material facts and the affidavit sets forth the newly-discovered evidence."); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983) (an inconsistent affidavit may be accepted if it was not a sham but rather was an attempt to explain certain aspects of the confused deposition testimony and therefore was

not really inconsistent) (further citations omitted)). In sum, Far West's one-sided "evidence" could not serve to prohibit a fair hearing for the Monas.

g. The District Court Never Considered the *Young* Factors.

In its "emergency" motion, Far West changes its position and now claims that that the District Court did not even need to consider the factors in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990) before issuing sanctions under NRCP 37. Motion at 10. Far West's novel argument is contrary to the prevailing case law commenting upon *Young*. In fact, this Court has specifically changed the "may" in *Young* to a "must" with regard to weighing these mandatory factors: "In *Young*, we emphasized that 'every order of dismissal with prejudice as a discovery sanction [must] be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors.'" *Foster v. Dingwall*, 126 Nev. __, __, 227 P.3d 1042, 1048 (2010) (bracketed language in original) (citing *Young*, 106 Nev. at 93, 787 P.2d at 780). Thus, Far West's attempt to avoid the mandatory *Young* factors also does not justify modifying the conditions of the temporary stay order.

5. Far West Does Not Meaningfully Respond to the District Court's Utter Failure to Analyze the Monas' Post-Marital Property Settlement Agreement.

Reaching back to its reliance on *Randono*, Far West provides only a cursory response to the District Court's utter failure to analyze the Monas' post-marital property settlement agreement. Motion at 8-10. For the same reasons that *Randono* is no longer valid authority in light of *Callie*, *Randono* cannot stand as a basis to defeat the Monas' written property settlement agreement. In

fact, NRS 123.220(1) specifically exempts "[a]n agreement in writing between the spouses" from the definition of "community property." The District Court never articulated why the Monas' property settlement agreement did not satisfy the statute. 2 App. 348-58.

Moreover, Far West relies upon case law outside of Nevada (Motion at 8-10) and ignores the fact that a bankruptcy court construing Nevada law has stated that this very issue of whether an individual tort creates a community debt is unresolved in Nevada law: "The question of whether community property in Nevada is liable for the judgment debt created by the tort of a spouse is one for a Nevada court not this court." *In re Bernardelli*, 12 B.R. 123, 123 (Bankr. D. Nev. 1981). The unsettled nature of this issue continues today, as Far West's authorities either predate *Bernardelli* or originate from other jurisdictions that rely upon the flawed reasoning of *Randono*. Therefore, the Monas' property settlement agreement cannot simply be brushed aside based upon Far West's broad arguments coupled with the District Court's utter failure to analyze the property settlement agreement. *See Jitnan v. Oliver*, 127 Nev. __, __, 254 P.3d 623, 629 (2011) ("Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation.") (citations omitted). In summary, Far West has not demonstrated that it is entitled to a modification of the conditions of the temporary stay based upon an analysis of the NRAP 8(c) factors. Therefore, the Court should deny Far West's "emergency" motion.

C. Since Far West Raises Stay Issues for the First Time, the Court Should Either Reject the Modification Request or Remand for the District Court to Consider the Request in the First Instance.

NRAP 8(a)(1) requires that any request for stay or injunctive relief first be brought in the District Court. NRAP 8(a)(2) states that this Court will consider stay motions without a prior District Court stay motion only upon certain conditions being met, including a showing that "moving first in the district court would be impracticable." NRAP 8(a)(2)(A)(i). Far West does not attempt to satisfy these conditions to modify the conditions of the temporary stay, even though Far West did not file a District Court stay motion. On this basis, the Court should deny Far West's motion to modify the temporary stay.

Moreover, the conditions placed upon the District Court's temporary stay order were based upon Rhonda's living expenses—a highly factual inquiry. Even in the context of stay relief, this Court has stated that it is ill suited to make such factual findings. *See Nelson*, 121 Nev. at 836, 122 P.3d at 1254 ("[T]he district court is better positioned to resolve any factual disputes concerning the adequacy of any proposed security, while this court is ill suited to such a task.") (citation omitted). If the Court is not inclined to simply deny Far West's request to modify the stay, the Court should, alternatively, remand this issue to be decided by the District Court.

III

CONCLUSION

In summary, the Court should deny Far West's "emergency" motion to modify the conditions of the temporary stay because the substance of this motion is already addressed in the completed stay briefing. This Court's stay of the entire District Court proceedings would render Far West's "emergency" motion moot. Likewise, this Court's weighing of the NRAP 8(c) factors demonstrates that Far West is not entitled to a modification of the conditions of the temporary stay, particularly because Far West has not shown a likelihood of success on the merits. Finally, since Far West raises its modification request for the first time, this Court should either deny the motion based upon Far West's failure to comply with NRAP 8(a)(1) or remand the stay issue because of the intensive factual inquiry.

DATED: August 25, 2015

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CERTIFICATE OF SERVICE

I certify that I am an employee of Marquis Aurbach Coffing and that on this date Petitioners' Opposition to Far West Industries' Emergency Motion for Relief Under NRAP 27(e) was filed with the Clerk of the Nevada Supreme Court, and, therefore, electronic service was made in accordance with the master service list as follows:

F. Thomas Edwards

I further certify that on this date I served a copy, postage prepaid, by U.S. Mail to:

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DATED this 25th day of August, 2015.

/s/ Leah Dell
Leah Dell, an employee of
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