

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

O.P.H. OF LAS VEGAS, INC.,

Appellants,

v.

OREGON MUTUAL INSURANCE COMPANY;  
DAVE SANDIN; AND SANDIN & CO.,

Respondents.

Supreme Court No. 76966

Electronically Filed  
District Court No. A-12-872138  
Feb 22 2019 09:02 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
**APPELLANTS'**  
**APPENDIX VOL. 4 OF 4**

# **ALPHABETICAL INDEX TO APPELLANTS' APPENDIX – VOL. I**

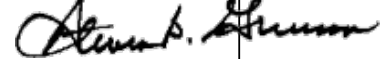
<b><u>DOCUMENT</u></b>	<b><u>DATE</u></b>	<b><u>VOLUME</u></b>	<b><u>BATES RANGE</u></b>
Civil Cover Sheet; Complaint	11/19/2012	I	APP00104- APP00122
Correspondence from OMI Re: Policies were no longer in force	8/20/2012	I	APP00001- APP00103
Court Minutes Motion for Attorney Fees and Costs	11/17/2015	III	APP00607
Court Minutes Defendants David Sandin and Sandin & Company's Motion to Dismiss	2/13/2013	I	APP00160
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Dave Sandin and Sandin & Co.'s Answer to Complaint	4/3/2013	I	APP00168- APP00178
David Sandin and Sandin & Co.'s Motion for Attorney's Fees and Costs	9/2/2015	III	APP00484- APP00606
Dave Sandin and Sandin & Co.'s Motion for Summary Judgment	3/17/2015	I	APP00199- APP00222
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Motion to Dismiss	12/26/2012	I	APP00123- APP00133
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Notice of Appeal	9/11/2018	IV	APP00883- APP00884
Notice of Appeal	7/30/2015	III	APP00450- APP00479
Notice of Entry of Judgment	8/13/2015	III	APP00480- APP00483
Notice of Entry of Order Denying Plaintiff O.P.H. of Las Vegas Inc.'s Motion to Reconsider and/or Amend Judgment	6/12/2018	IV	APP00878- APP00882
Notice of Entry of Order Denying the Sandin Defendants' Motion to Dismiss	3/22/2013	I	APP00164- APP00167
Notice of Entry Order Findings of Facts, Conclusion of Law and Judgment in Favor of Dave Sandin and Sandin & Co. on their Motion for Attorneys' Fee and Costs	3/16/2018	IV	APP00770- APP00781
Notice of Entry of Order Granting Defendants Dave Sandin and Sandin & Co.'s Motion for Summary Judgment	7/1/2015	II	APP00439- APP00449
Notice of Entry of Stipulation and Order for Dismissal with Prejudice	9/11/2018	IV	APP00885- APP00888
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Opposition to Dave Sandin and Sandin & Co.'s Motion for Attorney's Fees and Costs	9/28/2015	IV	APP00587-APP00594
Opposition to Dave Sandin and Sandin & Co.'s Motion for Summary Judgment	4/9/2015	II	APP00223-APP00377
Opposition to Defendants Dave Sandin and Sandin & Co.'s Motion for Additional Attorneys' and Costs Associated with Appeal	11/30/2017	IV	APP00684-APP00693
Opposition to Sandin Defendant's Motion to Dismiss	1/10/2013	I	APP00134-APP00151
Order Granting Defendants Dave Sandin and Sandin & Co.'s Motion for Summary Judgment	6/30/2015	II	APP00430-APP00438
Plaintiff O.P.H. of Las Vegas Inc.'s Motion to Reconsider and/or Amend Judgment	3/30/2018	IV	APP00782-APP00816
Plaintiff O.P.H. of Las Vegas Inc.'s Reply in Support of its Motion to Reconsider and/or Amend Judgment	4/24/2018	IV	APP00834-APP00863
Reply in Support of Dave Sandin and Sandin & Co.'s Motion for Attorney's Fees and Costs	11/10/2015	III	APP00595-APP00606
Reply in Support of the Sandin Defendants' Motion to Dismiss	1/24/2013	I	APP00152-APP00159
Sandin Defendants' Opposition to Motion for Reconsideration	4/16/2018	IV	APP00817-APP00833
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Transcript of Proceedings – All Pending Motions	5/14/2015	II	APP00380- APP00429
Transcript of Proceedings – Motion for Attorney’s Fees and Costs	2/6/2018	IV	APP00608- APP00623

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1 **OPPS**  
2 MARGARET A. MCLEATCHIE, Nevada Bar No. 10931  
3 **MCLEATCHIE SHELL LLC**  
4 701 East Bridger Ave., Suite 520  
5 Las Vegas, Nevada 89101  
6 Telephone: (702) 728-5300  
7 Facsimile: (702) 425-8220  
8 Email: [maggie@nvlitigation.com](mailto:maggie@nvlitigation.com)  
9 Attorney for Plaintiff, O.P.H. of Las Vegas, Inc.

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY NEVADA**

10 O.P.H. OF LAS VEGAS, INC.,

Case No.: A-12-672158-C

11 Plaintiff,

Dept. No.: XXVI

12 vs.

13 OREGON MUTUAL INSURANCE  
14 COMPANY, DAVE SANDIN, AND  
15 SANDIN & CO.,

16 Defendants.

**OPPOSITION TO DEFENDANTS**  
**DAVE SANDIN AND SANDIN &**  
**CO.'s MOTION FOR ADDITIONAL**  
**ATTORNEYS' FEES AND COSTS**  
**ASSOCIATED WITH APPEAL**

17 Plaintiff O.P.H. of Las Vegas, Inc. ("O.P.H."), by and through its counsel of record,  
18 Margaret A. McLetchie of McLetchie Shell LLC, hereby submits this Opposition to  
19 Defendants Dave Sandin and Sandin & Co.'s (the "Sandin Defendants") Motion for  
20 Attorneys' Fees and Costs Associated With Appeal. This Opposition is supported by the  
21 attached memorandum of points and authorities, as well as all papers and pleadings on file  
22 in this matter.

23 DATED this 30<sup>th</sup> day of November, 2017.

24 /s/ Margaret A. McLetchie

25 MARGARET A. MCLEATCHIE, Nevada Bar No. 10931

26 **MCLEATCHIE SHELL LLC**

27 701 East Bridger Ave., Suite 520

28 Las Vegas, Nevada 89101

Attorney for Plaintiff, O.P.H. of Las Vegas, Inc.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On October 23, 2017, following the Nevada Supreme Court's issuance of an opinion affirming this Court's grant of summary judgment to the Sandin Defendants, the Sandin Defendants filed a Motion for Decision on Attorneys' Fees and Motion for Additional Attorneys' Fees and Costs Associated With Appeal.<sup>1</sup> ("Motion.") In the first part of their pleading, the Sandin Defendants request this Court rule on its September 2, 2015 Motion for Attorneys' Fees and Costs. (Motion, pp. 3:27-4:12; 5:1-6:4.) As noted by the Sandin Defendants, following a November `17, 2015 oral argument, the Court orally granted the Sandin Defendants' Motion for Costs, and took the Motion for Attorneys' Fees under advisement. O.P.H. relies on the arguments presented in its September 28, 2015 Opposition to the Motion for Attorneys' Fees and arguments to this Court.

The Sandin Defendants then assert that because they made an offer of judgment to O.P.H. pursuant to Nevada Rule of Appellate Procedure ("NRAP") 68 one day after this Court denied its motion to dismiss, they are now entitled to an award for fees and costs incurred after O.P.H. appealed this Court's order granting them summary judgment. (*See generally* Motion, pp. 6-15.) Defendants' argument, however, is premised on a misapplication of the factors outlined in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983) to the facts of this case. As the record of this matter demonstrates, O.P.H. brought its claims against the Sandin Defendants in good faith, and reasonably rejected an offer of judgment that was both premature and unreasonable. Moreover, the fees requested by the Sandin Defendants are neither reasonable nor justified in their amount. Accordingly, this Court should deny the Sandin Defendants' Motion in its entirety. However, to the extent this Court is inclined to grant the Defendants' request for fees, any such award should be reduced to reflect counsel's overbilling.

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<sup>1</sup> The Sandin Defendants also filed a Memorandum of Costs and Disbursements on October 20, 2017, seeking reimbursement of \$97.92 for costs associated with O.P.H.'s appeal. O.P.H. filed objections to that Memorandum on November 6, 2017.

**II. PROCEDURAL HISTORY**

Plaintiff O.P.H. filed its initial Complaint in this matter on November 19, 2012 naming Oregon Mutual Insurance Company (“O.M.I.”), as well as the Sandin Defendants. In that Complaint, O.P.H. raised claims for Fraud in the Inducement, unfair practices in settling claims in violation of Nev. Rev. Stat. § 686A.310, and Negligence as to the Sandin Defendants.

After service of the Complaint, the Sandin Defendants filed a Motion to Dismiss on December 26, 2012. This Motion was heard on February 13, 2013, and decided in the O.P.H.’s favor. (*See* Register of Actions; *see also* March 8, 2013 Order Denying the Sandin Defendants’ Motion to Dismiss.) Before discovery had begun in this case, and even before the Sandin Defendants filed an Answer to the O.P.H.’s Complaint, the Sandin Defendants served an Offer of Judgement on the O.P.H. in the amount of \$2,000.00. (*See* Exh. C to Defendants’ Motion (February 14, 2013 Offer of Judgment).) Given that the parties had begun discovery, that O.P.H. had successfully pled its Complaint to survive a motion to dismiss, and that O.P.H. had not received an Answer from the Sandin Defendants, it rejected the Sandin Defendants’ offer of judgment.

On March 7, 2015, after the parties had completed discovery, the Sandin Defendants moved for summary judgment. O.M.I. filed its own motion for summary judgment on March 17, 2015. On June 26, 2015, the Court granted the Sandin Defendants’ motion for summary judgment. The Court also granted O.M.I.’s motion for summary judgment. O.P.H. then timely appealed the Court’s orders.

On September 14, 2017, the Nevada Supreme Court issued a decision reversing the Court granting of summary judgment to O.M.I., and affirming the order of summary judgment to the Sandin Defendants. *See O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 401 P.3d 218 (2017). In the portion of its decision addressing O.P.H.’s claims against the Sandin Defendants, the Supreme Court noted that while that “an insurance broker may assume additional duties to its insured client in special circumstances,” the record of this case did not establish the Sandin Defendants took on such additional duties. *Id.*, 401 P.3d 218,



223. The Supreme Court subsequently issued a remittitur on October 9, 2017.

In their Motion, the Sandin Defendants assert that, pursuant to Nevada Rule of Civil Procedure (“NRCP”) 68(f), they are entitled to attorneys’ fees because O.P.H. rejected its February 14, 2013 Offer of Judgment. (*See generally* Motion, pp. 6:5-17:18.) However, proper of analysis of the factors outlined by the Supreme Court in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), demonstrates the Sandin Defendants are not entitled to attorneys’ fees pursuant to NRCP 68(f).

### III. ARGUMENT

#### A. Legal Standard

Under NRCP 68, either party in a suit may make an offer of judgment and serve it on another party to the case at least ten days before trial. If the party to whom the offer is made rejects it and then fails to obtain a more favorable judgment at trial, the district court may order that party to pay the offeror “reasonable attorney fees.” NRCP 68(f)(2); *see also* Nev. Rev. Stat. § 17.115(4)(d)(3). Although the decision to award such fees lies within this Court’s discretion, that discretion must be cabined by the Nevada Supreme Court’s admonition that the “purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims.” *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983); *accord Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365, 371 (Nev. App. 2015) (“[W]hile Nevada’s offer of judgment provisions are designed to encourage settlement, they should not be used as a mechanism to unfairly force plaintiffs to forego legitimate claims”).

In exercising its discretion, this Court must evaluate:

(1) whether the plaintiffs claim was brought in good faith; (2) whether the defendants’ offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiffs decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

*Beattie*, 99 Nev. at 588-89, 668 P.2d at 274; *accord Trustees of Carpenters for S. Nevada Health & Welfare Tr. v. Better Bldg. Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985).

The Supreme Court has further advised that while the party served an offer of judgment may

1 have lost the case entirely, the timing of an NRCP 68 offer of judgment is relevant to whether  
2 the decision to reject was reasonable and in good faith. *See Carpenters*, 101 Nev. at 746, 710  
3 P.2d at 1382 (finding that the district court did not abuse its discretion in denying attorney's  
4 fees to a party who failed to provide essential documents to the offeree at the time the offeree  
5 decided to reject an offer of judgment); *see also Wynn v. Smith*, 117 Nev. 6, 13-14, 16 P.3d  
6 424, 429 (2001) (holding that the trial court did not abuse its discretion in refusing attorney's  
7 fees to a prevailing party when the offeree required discovery to determine the liability of  
8 the parties and the offer of judgment was premature).

9 In this case, O.P.H.'s claims against the Sandin Defendants were brought in good  
10 faith. However, the offer of judgment provided by the Sandin Defendants was woefully  
11 premature and in an amount that would not have begun to compensate O.P.H. for the  
12 damages caused by its lapsed insurance policy. As such, an award of attorney's fees pursuant  
13 to Nev. R. Civ. P. 68 is not appropriate.

14 **A. The *Beattie* Factors Weigh Against an Award of Attorneys' Fees and Costs  
15 to the Sandin Defendants.**

16 **1. O.P.H.'s Claims Against the Sandin Defendants Were Brought in  
17 Good Faith.**

18 In their analysis of the *Beattie* factors, the Sandin Defendants first assert that  
19 O.P.H.'s claims against them were not brought in good faith. (Motion, pp. 8:2-10:13.) To  
20 support this assertion, the Sandin Defendants point to two facts: that O.P.H. consented to  
21 judgment in their favor on one of its claims, and that they were unaware of the pending  
22 cancellation of O.P.H.'s insurance policy with O.M.I. (Motion, p. 8:2-11; *id.* at n. 2 and n.  
23 3.) These facts, however, are of little relevance to this Court's determination of whether  
24 O.P.H. brought its claims in good faith, because both facts came to light almost six months  
25 after the Defendants made their offer of judgment to O.P.H.

26 With regard to the assertion that they had "no idea of the pending cancellation and  
27 could not have reminded O.P.H. to pay its premium," the Defendants point to a series of  
28 discovery responses that they provided to O.P.H. nearly six months after the Defendants'  
February 2013 offer of judgment. (Motion, p. 8:10-11 and n. 3.) Because these discovery

1 responses were provided so long after the Sandin Defendants' pre-discovery offer of  
2 judgment, they are of no relevance to this Court's assessment.

3 Likewise, O.P.H.'s concession to judgment on one claim against the Defendants is  
4 irrelevant to determining whether its claims against the Sandin Defendants were brought in  
5 good faith. As noted above, the Sandin Defendants moved for summary judgment on March  
6 7, 2015—over two years after its premature offer of judgment and after the close of  
7 discovery. Thus, the Court should not consider this post-offer factual development in  
8 determining whether O.P.H. brought its suit in good faith.

9 What is relevant to this Court's consideration of this factor was the factual and  
10 procedural posture of the case *at the time the Sandin Defendants made their offer of*  
11 *judgment*. The Sandin Defendants made their offer of judgment on February 14, 2013. Just  
12 one day earlier—February 13, 2013—this Court had denied the Sandin Defendants' Motion  
13 to Dismiss. At the time the Court denied the Defendants' Motion to Dismiss, no discovery  
14 had taken place. As such, it is unclear how O.P.H. brought its claims in bad faith when the  
15 legal theory it was predicated upon had been upheld by this Court and the facts of the case  
16 had not yet been discovered. There is no evidence that O.P.H. acted maliciously or without  
17 a good faith belief that its claims were meritorious.

18 Moreover, the Nevada Supreme Court's decision indicates that—while it was  
19 ultimately unsuccessful—O.P.H. had acted in good faith in bringing its claims against the  
20 Sandin Defendants. As the Supreme Court observed, while insurance brokers do not typically  
21 have a fiduciary duty to their insured clients, brokers may nevertheless “assume additional  
22 duties” to their clients in “special circumstances.” *O.P.H. of Las Vegas, Inc.*, 401 P.3d 218,  
23 223-24 (citing Gary Knapp, Annotation, *Liability of Insurer or Agent of Insurer for Failure*  
24 *to Advise Insured as to Coverage Needs*, 88 A.L.R. 4th 249, § 2[a] (1991)). Thus, although  
25 the Supreme Court ultimately found that the record of this case did not support a finding that  
26 the Sandin Defendants had assumed additional duties to O.P.H., O.P.H.'s claims were legally  
27 cognizable, and thus brought in good faith.

28 ///

**2. The Sandin Defendants' Early Offer of Judgment in the Amount of \$2,000.00 Was Unreasonable and Not in Good Faith.**

With regard to the second *Beattie* factor, the Sandin Defendants contend that their \$2,000 offer was not only reasonably timed but tendered in a reasonable amount. (Motion, pp. 10:14-11:12.) What the defendants seem to ignore is that, in this case, a popular Las Vegas restaurant burned to the ground. Without money to rebuild the restaurant, O.P.H. suffered, and continues to suffer, hundreds of thousands of dollars in lost profits. Two thousand dollars would not even begin to compensate the Plaintiff for the damages suffered by having its insurance lapse. Moreover, the \$2,000.00 offer of judgment would not even begin to cover O.P.H.'s damages as assessed by Defendants' own expert, Kevin Kirkendall. (*See* Motion, p. 11:7-9 (estimating damages at either \$10,748.00 or \$54,036.00).)

Further, the timing of the Offer of Judgment was entirely premature. The Sandin Defendants had not answered the Complaint at the time that the offer was presented. As such, O.P.H. was not given notice of the Sandin Defendants' contentions, affirmative defenses, or access to any allegedly exculpatory discovery. Thus, to assert that the O.P.H. should have accepted an inadequate offer before any opportunity to litigate the case is unreasonable.

**3. O.P.H.'s Decision to Reject the Sandin Defendants' Offer of Judgment and Proceed to Discovery Was Reasonable and Made in Good Faith.**

Again, the Sandin Defendants made their offer of judgment the day after this Court denied their Motion to Dismiss. In denying a motion to dismiss, the Court necessarily found that had sufficiently pled a legal claim on which relief could be granted. It is incongruous to suggest that O.P.H. could prevail on such a motion, and then accept the merest scintilla of their damages the next day. O.P.H.'s decision to proceed at this time was not only reasonable and in good faith, but the right decision at the time.

**4. The Fees Being Sought by the Sandin Defendants Are Excessive and Unreasonable.**

The final *Beattie* factor this Court must consider is "whether the fees sought by the offeror are reasonable and justified in amount." *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. Here, the Sandin Defendants are requesting \$18,385.42 in attorneys' fees for work performed in defending against O.P.H.'s appeal. (Motion, p. 15:21-23.) Pursuant to *Brunzell v. Golden*

1 *Gate Nat. Bank*, 455 P.2d 31, 33 (Nev. 1969), the Court must consider the following factors  
2 in determining whether this request is reasonable:

3 (1) the qualities of the advocate: his ability, his training, education,  
4 experience, professional standing and skill; (2) the character of the work to  
5 be done: its difficulty, its intricacy, its importance, time and skill required,  
6 the responsibility imposed and the prominence and character of the parties  
7 where they affect the importance of the litigation; (3) the work actually  
8 performed by the lawyer: the skill, time and attention given to the work; (4)  
9 the result: whether the attorney was successful and what benefits were  
10 derived.

11 As to the first and fourth factor, O.P.H. does not contend that Ms. Lee, Mr. Kelley,  
12 or Mr. Wall are less than competent or unqualified to perform the job assigned to them. Nor  
13 does O.P.H. deny that the attorneys prevailed on appeal. However, the billing in this case  
14 exceeds the “character of the work” that was required by this case.

15 O.P.H. does not contest that appeals are complex. However, many of the Sandin  
16 Defendants’ billing entries are for work that was not complex, and were repetitive and  
17 unnecessary. For example, the Sandin Defendants’ billing ledger (attached to Motion as Exh.  
18 F) includes multiple, duplicative entries for routine procedural matters such as a July 30,  
19 2015 entry “Legal Analysis of notice of change of address filed by Plaintiff’s counsel (Exh.  
20 F, p. 1); two separate entries on August 3, 2015 for “Legal analysis” of O.P.H.’s notice of  
21 substitution of counsel (*id.*); two entries on September 10, 2015 for “Legal Analysis” of prior  
22 counsel’s withdrawal (*id.*, p. 4); a September 14, 2015 entry for “Legal Analysis” of the  
23 Supreme Court’s electronic notification regarding that withdrawal; and two December 3,  
24 2015 entries for “Legal Analysis” of the briefing schedule set by the Nevada Supreme Court  
25 (*Id.*, pp. 6-7.)

26 An award of \$18,385.42 in attorney’s fees to the Sandin Defendants for the work  
27 their attorneys performed in connection with O.P.H.’s appeal is unreasonable on its face. As  
28 such, if this Court is inclined to grant attorney’s fees despite the premature and unreasonable  
nature of the offer of judgment, O.P.H. requests that the fees be reduced by 50% to reflect  
the rampant over-billing by the Defendants’ attorneys.

///

1 **IV. CONCLUSION**

2 Based upon the foregoing, Plaintiff respectfully requests this Court deny the Sandin  
3 Defendants' Motion for Attorney's Fees in its entirety. In the alternative, O.P.H. requests the  
4 Court reduce the attorney's fees by 50% to reflect counsel's overbilling.  
5

6 DATED this 30<sup>th</sup> day of November, 2017.  
7

8 /s/ Margaret A. McLetchie

MARGARET A. MCLETSHELL, Nevada Bar No. 10931

**MCLETSHELL LLC**

701 East Bridger Ave., Suite 520

Las Vegas, Nevada 89101

Telephone: (702) 728-5300

Facsimile: (702) 425-8220

Email: maggie@nvlitigation.com

Attorney for Plaintiff, O.P.H. of Las Vegas, Inc.  
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10  
11  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of November, 2017, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing OPPOSITION TO DEFENDANTS DAVE SANDIN AND SANDIN & CO.'s MOTION FOR ADDITIONAL ATTORNEYS' FEES AND COSTS ASSOCIATED WITH APPEAL in *O.P.H. of Las Vegas, Inc. v. Oregon Mutual Ins. Co., et al.*, Clark County District Court Case No. A-12-672158-C, to be served electronically using the Court's Odyssey File & Serve system, to all parties with an email address on record.

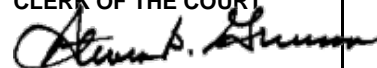
Patricia M. Lee, Esq.  
Michael S. Kelley, Esq.  
HUTCHISON & STEFFEN  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
*Attorneys for Sandin Defendants*

plee@hutchlegal.com  
mkelley@hutchlegal.com  
kchappuis@hutchlegal.com  
ntrautman@hutchlegal.com  
gmaass@hutchlegal.com

Robert W. Freeman, Esq.  
Priscilla L. O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
6385 South Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
*Attorneys for Defendant Oregon Mutual, Ins.*

kristen.freeman@lewisbrisbois.com  
priscilla.obriant@lewisbrisbois.com  
kellene.mckay@lewisbrisbois.com  
anne.cordell@lewisbrisbois.com

/s/ Pharan Burchfield  
Employee, McLetchie Shell LLC



**RPLY**

Patricia Lee (8287)  
HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Tel: (702) 385-2500  
Fax: (702) 385-2086  
plee@hutchlegal.com

*Attorneys for defendants  
Dave Sandin and Sandin & Co.*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

O.P.H. OF LAS VEGAS, INC.,

Plaintiff,

v.

OREGON MUTUAL INSURANCE  
COMPANY, DAVE SANDIN, and SANDIN  
& CO.,

Defendants.

Case No.: A-12-672158-C

Dept. No.: XXVI

**DEFENDANTS DAVE SANDIN AND  
SANDIN & CO'S REPLY IN  
SUPPORT OF THEIR MOTION  
FOR DECISION ON ATTORNEYS'  
FEES AND MOTION FOR  
ADDITIONAL ATTORNEYS' FEES  
AND COSTS ASSOCIATED WITH  
APPEAL**

As a preliminary matter, Plaintiff, O.P.H. of Las Vegas, Inc.'s opposition does not appear to oppose the Sandin Defendants' request for a ruling on their prior motion for attorneys' fees and costs heard by this court more than two years ago. OPH's failure to object should be construed as a non-opposition on this narrow issue and the Court should in fact enter her ruling on the Sandin Defendants' prior motion for fees and costs.

In opposition to the Sandin Defendants' Motion for Fees and costs, Plaintiff argues the following: (1) that Plaintiff's claim was brought in good faith (the first *Beattie*<sup>1</sup> factor); (2) that the offer of judgment upon which the Sandin Defendants' Motion is predicated, was unreasonable both as timing and amount (i.e. the second *Beattie* factor); (3) that the decision to reject the offer was done in good faith (i.e. the third *Beattie* factor); and (4) that the fees being

<sup>1</sup>*Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).



1 sought by the Sandin Defendants are excessive and unreasonable (the fourth and final *Beattie*  
2 factor). The following addresses each of these contentions in turn.

3 **1. Plaintiff's claims were extortionate and not made in good faith**

4 Plaintiff's lawsuit against the Sandin Defendants was ill-conceived from its inception.  
5 Factually, this lawsuit is tantamount to suing one's real estate broker for failure to pay one's  
6 mortgage and, as a result, suffering a foreclosure. It would not be the realtor's fault that a  
7 homeowner neglected to make their monthly mortgage payments thus triggering foreclosure,  
8 and it certainly is not the Sandin Defendant's fault that OPH failed to make its insurance  
9 premium payments thus triggering a policy cancellation. Both the District Court and Nevada  
10 Supreme Court emphatically agreed.

11 Plaintiff nonetheless continues to hang its hat on the fact that discovery had not yet  
12 commenced when the Sandin Defendants' offer of judgment was made. Plaintiff conveniently  
13 fails to respond, however, to those portions of the Sandin Defendants' Motion pointing out 3  
14 material and undisputed facts, all of which were known by Plaintiff *prior to even filing the*  
15 *lawsuit*: (1) as stated verbatim in paragraph 27 of Plaintiff's complaint "Defendant OREGON  
16 MUTUAL did not send a cancellation notice to Defendant Dave Sandin;" (2) as further stated  
17 verbatim in Plaintiff's complaint at paragraph 28 "Defendant DAVE SANDIN did not receive a  
18 cancellation notice" and (3) the admission by Plaintiff that on August 13, 2012, *prior to the*  
19 *cancellation of the Policy*<sup>2</sup>, Plaintiff realized that it did not make the monthly premium  
20 payment for July. Plaintiff, however, did not contact anyone at Oregon Mutual or the Sandin  
21 defendants regarding its failure to pay the July premium.<sup>3</sup> Instead, Plaintiff cut a check on  
22 August 13, 2012 to Oregon Mutual for the July premium but never mailed it before the Policy  
23 was cancelled.<sup>4</sup>

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25 <sup>2</sup>The policy terminated on August 16, 2012.

26 <sup>3</sup> Deposition of Linda Snyder (Ex. I), at 90:7 – 95:14.

27 <sup>4</sup> *Id.*; Payment Record of Check to Oregon Mutual Insurance Group, attached hereto as Ex. J  
28 (SAN 000111) (authenticated by Deposition of Linda Snyder (Ex. I), at 90:7 – 95:14).

1 Plaintiff knew that its policy was in jeopardy of being cancelled, *before the effective*  
2 *cancellation date* (and thus by logical conclusion, did not need to rely on the Sandin defendants  
3 to notify them of the policy cancellation or “remind them” to make a payment), and Plaintiff  
4 also knew that Oregon Mutual did not supply the Sandin Defendants with the notice of  
5 termination. This fact was recognized and touted by the Supreme Court as one of the reasons it  
6 was denying Plaintiff’s appeal, to wit: “Oregon Mutual sent its premium billings to OPH, not  
7 Sandin.” *See* written ruling from Supreme Court denying Plaintiff’s appeal at page 12,  
8 attached hereto as Exhibit K. Accordingly, there is no possible way, under any set of facts  
9 known to the parties, that the Sandin Defendants could have notified Plaintiff even if such a  
10 duty existed (which it did not). All of this was known by Plaintiff before ever putting pen to  
11 paper to craft the extortionate complaint against the Sandin Defendants.

12 Plaintiffs assertion that these facts “came to light almost six months after Defendants  
13 made their offer of judgment to OPH” is disingenuous at best. Perhaps what Plaintiff meant to  
14 write was that six months after Defendants made their offer of judgment to OPH, these facts  
15 were revealed *to the Sandin Defendants* for the first time<sup>5</sup>. This should not be conflated with  
16 what Plaintiff knew at the time the offer of judgment was made. None of these facts “came to  
17 light” for Plaintiff, because this information was always in the exclusive knowledge of  
18 Plaintiff. Plaintiff cannot be contending that it only learned *from itself* what it knew some 6  
19 months into discovery. That would be nonsensical.

20 While the Court did deny the Sandin Defendants’ Motion to Dismiss, the Court was  
21 careful to note that Nevada state court, unlike Federal Court, had a low pleading standard. *See*  
22 Minutes from February 13, 2013 hearing. Moreover, Plaintiff has cited to no case law that  
23 stands for the proposition that cases that survive a motion to dismiss under the minimal  
24 pleading standards of Nevada, somehow are deemed to be prima facie evidence of good faith  
25 claims. The former simply suggests that enough facts were alleged to meet each element of the

---

26  
27 <sup>5</sup>Namely referring to the fact that Plaintiff knew that it had missed its premium payment  
28 and had attempted to cure the same. The other material and undisputed facts were pleaded in  
Plaintiff’s complaint.

1 surviving claims and says nothing about the good faith nature of the party bringing them.  
2 Black's Law Dictionary defines good faith, in part, as "[a]n honest intention to abstain from  
3 taking any unconscientious advantage of another, *even through technicalities of law*, together  
4 with absence of all information, notice, or benefit or belief of facts which render transaction  
5 unconscientious." Black's Law Dictionary, 4<sup>th</sup> Ed. (1951). Emphasis added. Here, while the  
6 Court had to abide by its legally sworn duty to uphold the law and deny the Sandin Defendant's  
7 Motion to Dismiss based on the liberal pleading standards of Nevada, OPH then capitalized on  
8 this technicality of the law to exploit these legal proceedings in an effort to wrongfully extort  
9 funds from the Sandin Defendants. This Court should not allow Plaintiff to conflate the denial  
10 of dismissal, without prejudice, with its own good faith as the former is in no way indicative of  
11 the latter.

12 As for Plaintiff's ill conceived appeal, it, much like its lower court papers "cites no  
13 cases holding that an insurance broker owes a duty to monitor its insured client's premium  
14 payments and to alert the client when the policy is about to be canceled for nonpayment of  
15 premiums." See Nevada Supreme Court Ruling at 11, attached hereto as Exhibit K. In short,  
16 Plaintiff had absolutely no legal or factual support for its claims, as noted by the District Court,  
17 and ultimately echoed by the Nevada Supreme Court. Plaintiff knew it had neither before it  
18 even brought its claims, yet maliciously and audaciously brought these claims against the  
19 Sandin Defendants without regard for the astronomical amount of resources that the Sandin  
20 Defendants would need to expend to defend them.

21 In sum, Plaintiff admits that it knew that its policy was in jeopardy of cancelling for  
22 non-payment of its July 2012 premium, and even wrote a check with the intent of mailing it in  
23 in order to cure the same. It was nobody's fault other than Plaintiff's that the check somehow  
24 never found its way in the mail. Plaintiff further fails to explain, ever, how it expected the  
25 Sandin Defendants to notify Plaintiff of the policy cancellation when Plaintiff admits, as early  
26 as its initial pleading, that the Sandin Defendants never received notice of the policy  
27 termination. In its opposition to the Sandin Defendants' Motion to Dismiss, Plaintiff failed to  
28 cite *to even one* case that would make the Sandin Defendants' liable under any theory of

1 recovery, and similarly failed to do so at the appellate level. This is the quintessential  
2 definition of bad faith and the Sandin Defendants should recover their fees and costs as a result  
3 of the same.

4 **2. Under the circumstances, the Sandin Defendants' offer of judgment**  
5 **was reasonable as to both its timing and amount**

6 There is no hard and fast rule as to when the presentation of an offer of judgment is  
7 reasonable. It is a fact intensive inquiry and analyzed on a case by case basis. The Nevada  
8 Supreme Court has stated, "the offer of judgment is a useful settlement device which should be  
9 made available *at every possible juncture* where the rules allow." *Allianz Ins. Co. v. Gagnon*,  
10 109 Nev. 990, 995, 860 P.2d 720, 724 (1993). Emphasis added. The offer of judgment made  
11 by the Sandin Defendants was made at a time at which "the rules allow."

12 Moreover, this Court's discretion with respect to the granting of attorneys' fees  
13 pursuant to the offer of judgment rule is substantially broad and can only be overturned if the  
14 district court's exercise of discretion in evaluating the *Beattie* factors is arbitrary or  
15 capricious. *Coe v. Centeno-Alvarez*, No. 57724, 2013 WL 3936512, at \*1 (Nev. July 24, 2013);  
16 *Citing Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789  
17 (1995), *superseded by statute on other grounds as stated in RTTC Comm'n's, LLC v. Saratoga*  
18 *Flier, Inc.*, 121 Nev. 34, 41–42, 110 P.3d 24, 29 (2005). Importantly, no single *Beattie* factor is  
19 determinative and the district court has broad discretion in awarding attorney fees so long as all  
20 factors are considered in a non-arbitrary manner. *Id.* at \*1.; *Citing Yamaha Motor Co., U.S.A. v.*  
21 *Arnoult*, 114 Nev. 233, 251, 955 P.2d 661, 672 (1998).

22 Plaintiff repeatedly references the fact that the Sandin Defendants presented their offer  
23 of judgment only one day after this Court denied their Motion to Dismiss. This fact is  
24 immaterial to this court's analysis since all of the facts constituting the bad faith nature of this  
25 lawsuit were known to Plaintiff at the inception of the action. This is not unlike the Nevada  
26 Supreme Court case of *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nevada*, 116 Nev. 415,  
27 423, 997 P.2d 130, 136 (2000); *citing Bidart v. American Title*, 103 Nev. 175, 179, 734 P.2d  
28 732, 735 (1987), in which the Court upheld an award of attorneys' fees per Rule 68.

1 In *LaForge* the appellant argued that his rejection of respondents' offer of judgment was  
2 reasonable because respondents at the time, had not disclosed to him that they would raise the  
3 issue preclusion defense. Appellant further argued that respondents' failure to give notice of the  
4 issue preclusion defense prior to making the offer made their offer unreasonable in its timing.  
5 *Id.* The Nevada Supreme Court rejected that argument holding respondents' failure to bring the  
6 issue preclusion defense earlier did not constitute a withholding of information that rendered  
7 appellant's rejection of the offer of judgment reasonable, because respondents did not actually  
8 withhold any information from appellant. Appellant's failure to anticipate respondents' defense  
9 does not amount to a withholding of information *Id.* at 424. Therefore there was no abuse of  
10 discretion and the award of attorneys' fees was proper.

11 In this case, Plaintiff brought this lawsuit against the Sandin Defendants in bad faith.  
12 Plaintiff knew, at the time it filed its complaint, that it had neither any legal support or factual  
13 substantiation for its claims. When this fact was affirmed by this Court by its granting of the  
14 Sandin Defendants' Motion for Summary Judgment, Plaintiff, once again, pushed its non-  
15 existent claims onto the Court by filing an appeal which, once again, failed to offer any case  
16 law or other legal support for its assertion that a broker "owes a duty to monitor its insured  
17 client's premium payments and to alert the client when the policy is about to be canceled for  
18 nonpayment of premiums" *See* ruling denying Plaintiff's appeal attached hereto as Exhibit K at  
19 page 11. The Nevada Supreme Court further noted the lack of any support in the record  
20 suggesting that the Sandin Defendants voluntarily assumed any such duties, to wit: "[T]he  
21 record does not establish that Sandin undertook the duty OPH claims." *Id.* at 12. The  
22 complete absence of any factual evidence in the record as referenced by the Supreme Court,  
23 speaks volumes as to the bad faith nature of Plaintiff's claims.

24 Indeed, the only "evidence" put forth by Plaintiff, after tens of thousands of dollars of  
25 discovery work was completed, was false testimony that Mr. Sandin had, on 3 other occasions  
26 contacted Plaintiff to notify it of an impending policy cancellation. But, as noted by the  
27 Supreme Court, "[T]wo of the three times this occurred, Sandin was working elsewhere,  
28 meaning the broker who provided OPH notice of impending cancellation was someone other

1 than Sandin<sup>6</sup>.” See Exhibit K at page 12 .

2 Plaintiff knew all of this information, *i.e.* that there was no factual or legal basis for its  
3 claims, *before* filing its malicious lawsuit against the Sandin Defendants. In an effort to  
4 manufacture some untenable theory of liability predicated on “reliance” or “custom and  
5 practice,” Plaintiff accused the Sandin Defendants of previously notifying it of 3 other  
6 instances of pending cancellations. This representation was clearly false since it was  
7 established that Mr. Sandin was not even Plaintiff’s insurance broker at the time Plaintiff  
8 alleges that these notifications occurred.

9 Plaintiff’s claims were made in bad faith from their inception. Plaintiff knew that it did  
10 not have any legitimate claims against the Sandin Defendants, but sued them anyway in an  
11 effort to extort funds. These facts, all known to Plaintiff at the time the offer of judgment was  
12 made, clearly justifies the both the timing and amount of the Sandin Defendants’ Offer.

13 **3. The decision to reject the offer and force the Sandin Defendants to**  
14 **unnecessarily incur fees and costs to defend bad faith claims was**  
**unreasonable**

15 For all of the same reasons articulated herein and in the Sandin Defendants’ original  
16 and renewed motions for attorneys’ fees, Plaintiff’s decision to reject the offer and instead  
17 force the Sandin Defendants to expend six figures to defend its frivolous claims, was done in  
18 bad faith. It was indeed unreasonable for Plaintiff to pursue its claims when it knew it had no  
19 legal or factual support.

20 **4. The fees being sought by the Sandin Defendants are reasonable and**  
21 **are well within the industry standard**

22 Plaintiff argues that the fees charged by counsel for the Sandin Defendants were both  
23 excessive and unreasonable. In support of this assertion, Plaintiff points to duplicative entries  
24 by members of counsel’s firm. It is wroth noting, as a preliminary matter, that no one attorney

---

25  
26 <sup>6</sup>Plaintiff appears to misrepresent the ruling by the Supreme Court by suggesting that the  
27 Court held that “OPH had acted in good faith in brings [sic] its claims against the Sandin  
28 Defendants”. See Plaintiff’s Opposition at 6:18-20. This language is not part of the Supreme  
Court’s ruling. Indeed, there is no language whatsoever to suggest that the Plaintiff brought its  
claims in good faith.

1 billed more than once for any given task. Instead, Plaintiff's chief complaint appears to be that  
2 more than one attorney billed for certain tasks. Specifically, Plaintiff identifies 5 separate line  
3 items (out of well over 100 billing entries) which were billed by two separate attorneys for  
4 review of incoming papers and pleadings. *See* Plaintiff's Opposition at 8:15-22. These entries  
5 were reviewed by 2 separate attorneys because they were received, electronically, by two  
6 separate attorneys. Even were the Court persuaded that these entries were "excessive" or  
7 "unreasonable", the sum total of these entries is \$60.00 per reviewing attorney, or \$120.00  
8 total. Given the circumstances under which these entries were received and reviewed, and the  
9 fact that each billing counsel's hourly rate for the appeal was \$159.00 per hour (well below the  
10 industry standard for attorneys who have a combined total of 40 years of experience), the  
11 amount billed for the appeal was neither excessive nor unreasonable.

## 12 **5. Conclusion**

13 Plaintiff unfairly tried to make the Sandin Defendants pay for its own negligent  
14 conduct. It had absolutely no support for its claim in fact or in law. In an effort to manufacture  
15 facts to support a theory of recovery based on "reliance" and/or "custom and practice," it  
16 falsely testified that the Sandin Defendants had notified them of pending cancellations on three  
17 separate occasions in the past. Plaintiff either "mis-remembered" this evidence, or  
18 manufactured it. If the former, Plaintiff should have conducted a reasonable inquiry of these  
19 facts prior to bringing the lawsuit since it is the sole and single fact upon which it based its  
20 claims of liability. If the latter, then bad faith is presumed.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 In either event, Plaintiff's claims were not brought in good faith and the Sandin  
2 Defendants' early attempts at resolution, given the substantially thin case against them, was  
3 reasonable. Plaintiff's rejection of the offer of judgment was unreasonable and the Sandin  
4 Defendants should be awarded their attorneys' fees and costs as a result.

5 DATED this 6<sup>th</sup> day of December, 2017.

6  
7 HUTCHISON & STEFFEN, LLC

8 */s/Patricia Lee*

9 

---

Patricia Lee (8287)  
10 Z. Kathryn Branson (11540)  
11 Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145

12 *Attorneys for defendants*  
13 *Dave Sandin and Sandin & Co.*  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN,  
3 LLC. and that on this 6<sup>th</sup> day of December, 2017, I caused the above and foregoing document  
4 entitled **DEFENDANTS DAVE SANDIN AND SANDIN & CO'S REPLY IN SUPPORT**  
5 **OF THEIR MOTION FOR DECISION ON ATTORNEYS' FEES AND MOTION FOR**  
6 **ADDITIONAL ATTORNEYS' FEES AND COSTS ASSOCIATED WITH APPEAL**\*to  
7 be served as follows:

- 8 ☐ by placing same to be deposited for mailing in the United States Mail, in a  
9 sealed envelope upon which first class postage was prepaid in Las Vegas,  
10 Nevada; and/or
- 11 ☒ to be served via electronic mail pursuant to the parties' consents to electronic  
12 service; and/or
- 13 ☐ pursuant to Administrative Order 14-2, N.E.F.C.R. 9, EDCR 8.05(a) and  
14 8.05(f), to be electronically served through the Eighth Judicial District Court's  
15 electronic filing system, with the date and time of the electronic service  
16 substituted for the date and place of deposit in the mail; and/or
- 17 ☐ to be hand-delivered;

18 to the attorneys listed below at the address and emails indicated below:

19 Margaret A. McLetchie, Esq.  
20 Matthew J. Rashbrook, Esq.  
21 MCCLECHIE SHELL, LLC  
22 701 East Bridger Ave., Ste. 520  
23 Las Vegas, NV 89101

24 *Attorneys for plaintiff*  
25 *O.P.H. of Las Vegas Inc.*

26 Robert Freeman, Esq.  
27 Priscilla O'Briant, Esq.  
28 LEWIS BRISBOIS BISGAARD & SMITH LLP  
6385 S. Rainbow Blvd., Ste. 600  
Las Vegas, NV 89118

*Attorneys for Oregon Mutual Insurance*  
*Company*

/s/Danielle Kelley

\_\_\_\_\_  
An employee of Hutchison & Steffen, LLC

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EXHIBIT PAGE ONLY

## EXHIBIT I

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HUTCHISON & STEFFEN

A PROFESSIONAL LLC

30(b)(6) Linda Snyder - 8/13/2013  
O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1 DISTRICT COURT  
2 CLARK COUNTY, NEVADA  
3  
4 O.P.H. OF LAS VEGAS, INC., )  
5 Plaintiff, ) CASE NO. A-12-672158-C  
6 vs. ) DEPT. NO.: XXVII  
7 OREGON MUTUAL INSURANCE )  
8 COMPANY; DAVE SANDIN; and )  
9 SANDIN & CO., )  
10 Defendants. )  
11  
12  
13

14 DEPOSITION OF NRCP Rule 30(b)(6) DEPONENT FOR  
15 ORIGINAL PANCAKE HOUSE OF LAS VEGAS, LINDA SNYDER

16 Taken on Tuesday, August 13, 2013

17 At 9:00 a.m.

18 6385 South Rainbow Boulevard, Suite 600

19 Las Vegas, Nevada

20

21

22

23

24

25 Reported by: RENE' HANNAH, CCR #326

**30(b)(6) Linda Snyder - 8/13/2013**  
**O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.**

**1 APPEARANCES:**

**2 For the Plaintiff: MAGGIE MCLETCHIE, ESQ.**  
**3 DANNY HEIDTKE, ESQ.**  
**4 Langford McLetchie**  
**5 616 South Eighth Street**  
**6 Las Vegas, Nevada 89101**  
**7 (702) 471-6565**  
**8 maggie@nvlitigation.com**  
**9 danny@nvlitigation.com**

**6 For the Defendant Oregon Mutual Insurance Company:**  
**7 KRISTIN E. MEREDITH, ESQ.**  
**8 Lewis Brisbois Bisgaard**  
**9 & Smith, LLP**  
**6385 South Rainbow Boulevard**  
**Suite 600**  
**Las Vegas, Nevada 89118**  
**(702) 893-3383**

**11 For Defendant Dave Sandin and Sandin Insurance:**  
**12 Z. KATHRYN BRANSON, ESQ.**  
**13 Hutchison & Steffen**  
**10080 West Alta Drive, #200**  
**Las Vegas, Nevada 89145**  
**(702) 385-2500**  
**kbranson@hutchlegal.com**

**15 I N D E X**

<b>16 Examination by:</b>	<b>Direct</b>	<b>Cross</b>	<b>Re-direct</b>	<b>Recross</b>
<b>17 Ms. Meredith</b>	<b>4</b>	<b>179, 187, 189, 191</b>		
<b>18 Ms. Branson</b>		<b>134</b>		<b>192</b>
<b>Ms. McLetchie</b>		<b>186</b>		<b>1188</b>

**19 E X H I B I T S**

<b>20 Number</b>	<b>Description</b>	<b>Page</b>
<b>21 Defendant's</b>		
<b>22 Exhibit 1</b>	<b>Amended Notice of Taking</b>	<b>17</b>
	<b>Deposition</b>	
<b>23 Exhibit 2</b>	<b>Evidence of Property</b>	<b>36</b>
	<b>Insurance</b>	
<b>24 Exhibit 3</b>	<b>Commercial Insurance</b>	<b>43</b>
	<b>Proposal</b>	
<b>25 Exhibit 4</b>	<b>Payment Schedule</b>	<b>44</b>

**30(b)(6) Linda Snyder - 8/13/2013**  
**O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.**

1	E X H I B I T S, cont'd		
2	Number	Description	Page
3	Defendant's		
4	Exhibit 5	Copy of Insurance Policy	46
	Exhibit 6	Certificate of Liability	62
5	Exhibit 7	Affinity Gaming requirements	72
	Exhibit 8	Payment History	78
6	Exhibit 9	OMI Billing Statement	79
	Exhibit 10	Notice of Cancellation	81
7	Exhibit 11	Emails	84
	Exhibit 12	Emails	86
8	Exhibit 13	OMI Loss Notice	89
	Exhibit 14	OMI Billing Statement	90
9	Exhibit 15	Fed Ex Airbill with checks	95
	Exhibit 16	Plaintiff's Answers to	96
10		Defendant's First Set	
		of Interrogatories	
11	Exhibit 17	Certificate of Liability	99
		Insurance	
12	Exhibit 18	OMI Non-payment Cancellation	100
	Exhibit 19	Loss Report	101
13	Exhibit 20	August 24, 2012 letter	101
	Exhibit 21	Plaintiff's Response to	102
14		Defendant's Mutual Interrogatories	
	Exhibit 22	Letter dated 8/21/12	112
15	Exhibit 23	Plaintiff's Response to	167
		Defendant's Request for	
16		Admissions	
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30(b)(6) Linda Snyder - 8/13/2013  
O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1 (NRCP Rule 30(b)(4) was waived by the parties prior  
2 to commencement of the deposition.)

3 Thereupon,

4 LINDA SNYDER,  
5 having been first duly sworn, was examined and  
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MS. MEREDITH:

9 Q Could you state your name and spell it for  
10 the record, please?

11 A My name is Linda, L-I-N-D-A, Lorraine,  
12 L-O-R-R-A-I-N-E, Snyder, S-N-Y-D-E-R.

13 Q And Miss Snyder, can you give us an  
14 address where you can be reached at?

15 MS. MEREDITH: Or Counsel, is she to be  
16 reached through you?

17 MS. MCLETHIE: Through counsel is fine.

18 BY MS. MEREDITH:

19 Q Have you been deposed before?

20 A No.

21 Q Given that you haven't been deposed  
22 before, this might be a little unfamiliar to you,  
23 although you probably had a chance to --

24 MS. MEREDITH: Let me make the record  
25 clear. Ms. McLetchie, are you representing Miss

30(b)(6) Linda Snyder - 8/13/2013  
O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1 Q Back on the record. Can you tell me what  
2 method of payment you had for Fireman's Fund?

3 A Initially?

4 Q Yes.

5 A It was check.

6 Q Did that change at some point?

7 A Yes, it did.

8 Q How long did you pay by check with  
9 Fireman's Fund?

10 A I want to say maybe, maybe a year. And  
11 the reason that it changed is that I missed a  
12 payment. Dave Sandin notified me that I had missed  
13 a payment and that the policy was in jeopardy. I  
14 Fed Ex'd the payment and we set it up on auto-pay  
15 immediately thereafter.

16 Q Okay. Did OMI send OPH a monthly billing  
17 statement for the policy?

18 MS. MCLETCHE: Objection, vague.

19 THE WITNESS: Yes.

20 BY MS. MEREDITH:

21 Q Do you recall receiving any monthly  
22 billing statements from OMI for the policy?

23 A Yes.

24 Q How many do you remember receiving?

25 A Six to seven.

30(b)(6) Linda Snyder - 8/13/2013  
O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1           A     Yes.

2           Q     Another monthly payment on 4/16/12?

3           A     Yes.

4           Q     Another monthly payment on 5/14/12?

5           A     Yes.

6           Q     And another monthly payment on 4/16/12?

7           A     6/14/12, yeah.

8           Q     Thank you. I get a little dyslexic here.

9     Then we have an 8-13-12, and it says void?

10          A     Right.

11          Q     What is that reflecting there?

12          A     This payment, the 8/13, 2012 check was

13     voided, as was the 8/22, 2012 check voided because

14     they were returned by Oregon Mutual and not

15     accepted.

16          Q     So you voided those checks out and

17     re-accounted for the money in your?

18          A     In my Quick Books accounting.

19          Q     Okay.

20                 MS. MEREDITH: I'd like to have marked

21     next as Exhibit 9 a billing statement from Oregon

22     Mutual Insurance Group to OPH.

23                 (Defendant's Exhibit 9 marked.)

24     BY MS. MEREDITH:

25          Q     Miss Snyder, have you had a chance to look



30(b)(6) Linda Snyder - 8/13/2013  
O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1 at Exhibit 9?

2 A Yes, I have.

3 Q And do you know what this document says?

4 A That was the billing statement for the  
5 July payments.

6 Q And have you seen this prior to today?

7 A Yes, I have.

8 Q Do you recall when you first saw it?

9 A In July.

10 Q Okay. Did OPH receive monthly billing  
11 statements from OMI between January and July of  
12 2012?

13 MS. MCLEITCHIE: Objection, asked and  
14 answered.

15 THE WITNESS: Yes.

16 BY MS. MEREDITH:

17 Q Is there any reason to believe that OPH  
18 did not receive the billing statement marked as  
19 Exhibit 9?

20 A This one?

21 Q Yes.

22 A No, there is no reason to doubt that.

23 MS. MEREDITH: I'd like to mark next as  
24 Exhibit 10 the notice of cancellation by Oregon  
25 Mutual.

1 our behalf, Dave Sandin discussed it with someone at  
2 Oregon Mutual, but I did not personally discuss it  
3 with someone at Oregon Mutual.

4 Q Okay.

5 MS. MEREDITH: I would like to have marked  
6 as Exhibit 11 an August 20, 2012 letter. I'll  
7 represent for the record that the first page is a  
8 one-page document. Attached to it then is a  
9 document that is again the first page is the same,  
10 the second page has a cc.

11 MS. MCLEITCHIE: So the second page, the  
12 third page?

13 MS. MEREDITH: Yes, I'm sorry. The third  
14 page of the document shows the cc.

15 (Defendant's Exhibit 11 marked.)

16 BY MS. MEREDITH:

17 Q Miss Snyder, have you seen the first page  
18 of the document that we've marked as Exhibit 11  
19 prior to today?

20 A Yes.

21 Q Do you recall when you first saw it?

22 A Around August the 23rd.

23 Q Was that your first notice that the OMI  
24 policy had been canceled?

25 A Yes.

30(b)(6) Linda Snyder - 8/13/2013  
O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1 Q Had you discussed it with Mr. Masonheimer  
2 prior to receipt of this letter?

3 A The cancellation?

4 Q Yes.

5 A No.

6 Q Did you discuss the contents of the  
7 August 20, 2012 letter with anyone?

8 A Mr. Freudenberger and Mr. Sandin.

9 Q And what was said?

10 A I believe that Dave Sandin said that he  
11 would contact Oregon Mutual on our behalf, you know,  
12 to see what had happened, because he had received no  
13 notification of cancellation, either. Which  
14 according to our history with him, he had always  
15 received notice of cancellation or notice of sending  
16 cancellation or past due premiums. He was our  
17 failsafe, so.

18 Q How many times prior to August of 2012 had  
19 Mr. Sandin told you that you were late on a premium?

20 A Probably three.

21 Q Do you recall approximately what years  
22 those were?

23 A One was in 2006 when I made an online  
24 payment, one was I believe 2008 and I paid two  
25 months at the same time, and then once again in 2009

1 when we then went on auto-pay after I Fed Ex'd the  
2 payments to Fireman's Fund. Then he put us on  
3 auto-pay for Fireman's Fund.

4 MS. MEREDITH: I'd like to have marked as  
5 Exhibit 12 an email from you, Linda Snyder, to Dave  
6 Sandin dated August 16th, 2012.

7 (Defendant's Exhibit 12 marked.)

8 BY MS. MEREDITH:

9 Q Miss Snyder, have you had a chance to  
10 review Exhibit 12?

11 A Yes, I have.

12 Q And can you tell me what this is?

13 A This is a follow-up email to a telephone  
14 conversation that was made first on Monday, and then  
15 on Wednesday advising Dave Sandin that there had  
16 been a break-in at the Charleston location and he  
17 requested that I shoot him an email.

18 MS. MCLEITCHIE: Counsel, make sure she's  
19 able to finish her answer.

20 BY MS. MEREDITH:

21 Q Sure.

22 A So what I did was I sent him an email as  
23 he requested, but it was our second conversation on  
24 the telephone regarding the break-in. And I sent  
25 him an email as he requested and he said that he

1 would get us a claim number, and that someone would  
2 be contacting us. And he even states that they have  
3 my cell phone number.

4 Q So if I'm understanding you correctly, on  
5 Monday, August 13 you contacted Dave Sandin about  
6 the vandalism claim, correct?

7 A Uh-huh, yes.

8 Q And that was telephonically?

9 A Yes, it was.

10 Q And did he indicate that he contacted  
11 Oregon Mutual that day with respect to the claim?

12 A He said he would get with Oregon Mutual  
13 and get me a claim number.

14 Q Okay. Then you contacted him by telephone  
15 again on Wednesday, August 15th?

16 A It may have been Wednesday, August the  
17 15th. It was either Wednesday or Thursday.

18 Q Okay.

19 A I'm not sure of the exact date. And at  
20 that point in time I said, "I haven't heard from  
21 anyone. Do you have a claim number for me, do you  
22 have an adjustor for me?"

23 Q Okay.

24 A And he said, "Shoot me an email and I'll  
25 contact Oregon Mutual and get you a claim number."

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1 there was a claim coming and I was waiting for a  
2 claim number.

3 MS. MEREDITH: I'd like to have marked  
4 next as Exhibit 14 an 8/17, 2012 fax cover sheet  
5 with attachments with Bates No. SAN 000109 through  
6 111.

7 (Defendant's Exhibit 14 marked.)

8 THE WITNESS: I see it.

9 BY MS. MEREDITH:

10 Q Okay. Miss Snyder, have you seen this  
11 document that we've marked as Exhibit 14 before?

12 A Yes, I have.

13 Q Can you tell me what this is?

14 A This is the July billing statement from  
15 Oregon Mutual to the Original Pancake House.

16 Q Okay. And is there a third document  
17 attached?

18 A Oh, sorry. Copy of a check.

19 Q Okay. And is that check dated 8/13, 2012?

20 A Yes, it is.

21 Q And that's the July payment; is that  
22 correct?

23 A Yes, it is.

24 Q And do you remember faxing this to  
25 Mr. Sandin on July 17th?

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1 A Yes, I was.

2 Q And why were you doing that?

3 A Because he said that we were canceled due  
4 to non-payment.

5 Q Okay. And so you were providing him  
6 evidence of payment?

7 MS. MCLEITCHIE: Objection, asked and  
8 answered.

9 THE WITNESS: Yes.

10 BY MS. MEREDITH:

11 Q And did Mr. Sandin respond to this 8/17  
12 fax?

13 A Yes, he did.

14 Q How did he respond?

15 A He spoke with Mr. Freudenberger.

16 Q And do you know what went on in that  
17 conversation?

18 A It was my understanding that, it was my  
19 understanding that the check in question was too  
20 late to pay the July premium, that we had been  
21 canceled without notification on August 16th. So  
22 when, again, this is third-party, Stephan asked him  
23 if we should go ahead and mail the check and he said  
24 no, don't bother.

25 Q Okay. Let me back up for a minute. So

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1 the document with the Bates No. SAN 000111 reflects  
2 that a check was cut on 8/13, 2012, correct?

3 A Correct.

4 Q And that check did not get put in the  
5 mail?

6 A It was going to be mailed. The check was  
7 cut, had to be signed and then was going to be  
8 mailed.

9 Q Who had to sign the check?

10 A Stephan Freudenberger.

11 Q And Mr. Freudenberger did not sign the  
12 check?

13 A He signed the check and then we were going  
14 to mail it out. But there was no sense of urgency  
15 because there had been no late notice or no August  
16 statement provided showing a previous balance, so it  
17 was just going to go out in Monday's mail.

18 Q Okay. Did you look back at all and  
19 realize that you had not made the July payment on  
20 August 13, 2012?

21 MS. MCLEITCHIE: Objection, vague.

22 THE WITNESS: Yes, I did.

23 BY MS. MEREDITH:

24 Q When did you realize that?

25 A When I wrote the check on August the 13th.



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1           Q     Did you contact anybody about the fact  
2     that your payment was not paid pursuant to the terms  
3     of the billing statement for July?

4           MS. MCLETCHIE:  Objection, compound,  
5     vague.

6           THE WITNESS:  No, because again, there was  
7     no sense of urgency.  It wasn't 30 days late, it was  
8     due July the 26th.  It would have gotten there prior  
9     to August the 26th.  There had been no August  
10    statement mailed or received reflecting a previous  
11    balance or any notice of intent to cancel, any past  
12    due reminder.  There had been no correspondence to  
13    infer the account was in jeopardy.  So by mailing  
14    the check out on the 16th or 17th it still would  
15    have been there prior to August 26th, which would  
16    have been 30 days.

17          Q     Why did you decide that August 26th was  
18     the appropriate date?

19          A     Because that's the due date.

20          Q     Well, the due date is actually July 26th.

21          A     Right.  So the next due date would be  
22     August 26th.

23          Q     Why did you decide that you received  
24     another 30 days on top of the due date?

25          A     I didn't decide that I received an extra

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1 30 days. I realized when I wrote the check on the  
2 13th that I needed to get it signed and I needed to  
3 get it in the mail so that it would be received  
4 timely. But I had received no notification that the  
5 account was in jeopardy. I got no past due notice,  
6 no call from Dave Sandin, no notice of intent to  
7 cancel, so in my mind there was no sense of urgency.  
8 There was no, nothing was in Jeopardy. It was just  
9 merely late and it needed to be taken care of. Had  
10 I received notice of intent to cancel, I would have  
11 made two payments online or via credit card or via  
12 Fed Ex.

13 Q Did you make any attempt on August 13th to  
14 call Mr. Sandin and advise him that you were going  
15 to be making this payment past the July 26th due  
16 date?

17 A No.

18 Q Did you make any attempt to contact anyone  
19 at OMI and advise them that you were going to be  
20 making a payment past the July 26 due date?

21 A No.

22 Q And the policy was canceled effective  
23 midnight on August 16, correct?

24 MS. MCLETCHIE: Is that a question,  
25 Counsel?

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O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1 BY MS. MEREDITH:

2 Q Correct. You understand that?

3 A That's my understanding.

4 Q So one minute past midnight on  
5 August 15th, do you understand that to be the?

6 A I understand. That's my understanding.

7 Q So this check was actually prepared prior  
8 to the cancellation of the policy?

9 A Yes, it was.

10 Q And OPH knew prior to cancellation that a  
11 payment was due, correct?

12 A Correct.

13 Q And even had prepared a check, correct?

14 A Correct.

15 MS. MEREDITH: I'd like to have marked  
16 next as Exhibit 15 a Federal Express airbill with  
17 enclosed checks.

18 (Defendant's Exhibit 15 marked.)

19 BY MS. MEREDITH:

20 Q Miss Snyder, have you seen this Federal  
21 Express bill on the attached check for 2,814.75?

22 A Yes, I have.

23 Q Do you recall approximately when you first  
24 saw this?

25 A The day that I took it to Fed Ex.

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1 Q Can you tell me what you understand this  
2 to be?

3 A This is a certificate of insurance, which  
4 is what I call it, certificate of insurance stating  
5 that Affinity Gaming is also covered under this  
6 policy. Which leads me back to my original premise  
7 that based on the documents that I gave to Dave  
8 Sandin asking him if we met all the parameters  
9 required by Affinity Gaming, this in my mind states  
10 that yes, we did.

11 Q Would it be correct to say that the  
12 certificate of insurance we marked as Exhibit 17 is  
13 the certificate you were referring to a little  
14 earlier today when talking about Affinity Gaming?

15 A Yes.

16 Q Okay.

17 MS. MEREDITH: I'd like to have marked in  
18 this case next as Exhibit 18 an Oregon Mutual non-  
19 payment cancellation notice.

20 (Defendant's Exhibit 18 marked.)

21 THE WITNESS: I see it.

22 BY MS. MEREDITH:

23 Q Have you seen Exhibit 18 prior to today?

24 A Yes, I have.

25 Q Do you recall approximately when you first

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1 saw it?

2 A I think around the 23rd of August.

3 Q When you saw this non-payment of  
4 cancellation notice did you already know that OMI  
5 had canceled the policy?

6 A Yes. And I found it rather ironic that  
7 the note at the top states please contact your agent  
8 before this coverage terminates when they don't send  
9 it out until it's terminated.

10 Q Okay.

11 MS. MEREDITH: I'd like to have marked  
12 next as Exhibit 19 a loss notice, non-automobile.

13 (Defendant's Exhibit 19 marked.)

14 THE WITNESS: Okay.

15 BY MS. MEREDITH:

16 Q Miss Snyder, have you had a chance to look  
17 at Exhibit 19?

18 A Yes, I have.

19 Q Have you seen this document prior to  
20 today?

21 A No.

22 MS. MEREDITH: I'd like to have marked as  
23 Exhibit 20 next an August 24th, 2012 letter to OPH  
24 from Oregon Mutual.

25 (Defendant's Exhibit 20 marked.)

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1 Q How would that have changed anything? How  
2 would Mr. Masonheimer instead of saying to you,  
3 "Here's your claim number," if he had said, "Your  
4 policy is canceled," how would that have affected  
5 anything with respect to the case?

6 MS. MCLETCHIE: Objection, vague,  
7 compound, calls for speculation, asked and answered.

8 THE WITNESS: It wouldn't have affected  
9 the cancellation. It's not applicable.

10 BY MS. MEREDITH:

11 Q I think you indicated before lunch that  
12 there had been three prior occasions that Dave  
13 Sandin advised OPH that it was late on a premium  
14 payment.

15 A Uh-huh.

16 Q Is that correct?

17 A Yes, it is.

18 Q Okay. With respect to those three  
19 occasions where he advised you that OPH was late,  
20 had you received notice from the insurance carrier  
21 that you were late?

22 A I don't recall. Really, truly I don't  
23 recall. I know in one instance I wrote a check for  
24 two months' premium, which must mean that I had  
25 received a statement showing a balance forward and I

1     paid them both at the same time.

2           Q     And was that prior to Mr. Sandin  
3     contacting you to tell you that you were late?

4           A     I would have no, I don't know. He would  
5     call me and let me know if I was late on a, it was  
6     such a rarity that I'm sure if nothing else they  
7     were probably simultaneous.

8           Q     Do you recall on any of those three  
9     occasions if you had received notice from the  
10    insurer?

11           MS. MCLEITCHIE: Objection, asked and  
12    answered.

13    BY MS. MEREDITH:

14           Q     That the policy was going to be canceled?

15           MS. MCLEITCHIE: Objection, asked and  
16    answered, now calls for speculation.

17           THE WITNESS: I don't believe that I ever  
18    got a notice of cancellation. I think the closest  
19    we ever came to getting a notice of cancellation was  
20    when we went on auto-pay with Fireman's Fund because  
21    the premium was late.

22    BY MS. MEREDITH:

23           Q     If I could have you look again at Exhibit  
24    21, which are the interrogatory answers, and I'm  
25    sorry, starting at line nine.

1 at Ft. Apache was damaged by the fire.

2 MS. MCLEITCHIE: Objection, counsel's  
3 testifying, lack of foundation.

4 BY MS. MEREDITH:

5 Q No. Okay. Was the restaurant at Ft.  
6 Apache damaged by the fire?

7 A No.

8 Q What was damaged by the fire?

9 A The restaurant at West Charleston.

10 Q Sorry. Okay. So the West Charleston  
11 location, is that operational now?

12 A No.

13 Q Okay. Have any repairs been made to the  
14 West Charleston location?

15 A It's gone.

16 Q It's on?

17 A It's gone. It's no longer there.

18 Q Oh, okay.

19 A It's a cement slab.

20 Q Was it burned completely to the ground?

21 A It was burned past the point of  
22 restoration.

23 Q Okay. Was OPH responsible for rebuilding  
24 the structure?

25 MS. MCLEITCHIE: Objection, calls for a



1 town he would call so that he could possibly meet  
2 with Stephan. I mean, it was not just a cut and  
3 dried business relationship.

4 Q How often then were those conversations  
5 revolved around your premium payment?

6 MS. MCLETCHE: Objection, calls for  
7 speculation.

8 THE WITNESS: You mean the amount of the  
9 premium payments, or?

10 BY MS. BRANSON:

11 Q That's a good question. Just your premium  
12 payments in general. How often did you discuss with  
13 Dave what you owed to the insurance company, the  
14 premium?

15 MS. MCLETCHE: Objection, compound,  
16 vague.

17 THE WITNESS: I would say basically never,  
18 unless there was a past due issue, at which point he  
19 initiated the conversation.

20 BY MS. BRANSON:

21 Q You know the three late payments that you  
22 testified earlier about, how did he notify you of  
23 those?

24 A A phone call.

25 Q A phone call, all three of them?

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1           **A     Probably, yes.**

2           **Q     So over the ten-year period you were with**  
3     OPH and OPH was using Dave Sandin he communicated  
4     late payments three times?

5           **A     Roughly, yes.**

6           **Q     Okay. Was OPH ever late on an insurance**  
7     policy premium other than those three times?

8           **A     I don't believe so, no.**

9           **Q     Did OPH ever miss a premium payment other**  
10    than those three times?

11          **A     Other than those three times, no, I don't**  
12    believe so.

13          **Q     Did OPH ever have a policy canceled for**  
14    lack of payment, other than those threats of --

15          **A     No. To the best of my knowledge --**

16          **Q     -- in 2009.**

17          **A     No.**

18          **Q     Thank you. With respect to the Oregon**  
19    Mutual policy, can you explain to me a little about  
20    your conversations with Dave about direct bill  
21    versus auto-pay?

22          **A     To me they're one in the same.**

23          **Q     I'm sorry. Let me clarify. You testified**  
24    that you asked Dave to set you up with auto-pay with  
25    Oregon Mutual, correct?

1 provide PMK notices, and that's because she should  
2 have an opportunity to ask other persons of the  
3 company to make sure she's prepared. You were  
4 certainly able to notice additional questions as Ms.  
5 Meredith has done in the depo she's been taking.

6 MS. BRANSON: Thank you, Maggie.

7 BY MS. BRANSON:

8 Q Okay. Let's see. Under the  
9 interrogatories I am looking at interrogatory number  
10 one. And Miss Snyder, just to let you know, if you  
11 do not know any of these, if you don't know the  
12 answer or you don't feel capable of answering my  
13 question, please let me know and we will absolutely  
14 move on.

15 MS. MCLEITCHIE: And just again, she's  
16 going to only answer them based on her own personal  
17 recollection, not in any preparation of the PMK.

18 BY MS. BRANSON:

19 Q And again, I will expect that you're  
20 answering as PMK. So if you don't have knowledge,  
21 let me know and we will move on. Number one is,  
22 sorry, are you at number one?

23 A Yes, I am.

24 Q Okay. Thank you. Can you please identify  
25 which policy Dave Sandin informed you was late?

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1 Which policy premium was late on March 23rd, 2006?

2 A No.

3 Q Is it because you don't know or don't  
4 remember?

5 A I don't remember who the carrier was at  
6 the time.

7 Q What about the May, 2008 payment that was  
8 late and/or outstanding? Do you recall which  
9 carrier that was?

10 A I believe that would have been Fireman's  
11 Fund.

12 Q Is this the one that resulted in the  
13 auto-pay?

14 A No, that was in 2009.

15 Q Were these, in this interrogatory number  
16 one, are these the only two late payments then that  
17 were notified, that they then notified you about?

18 MS. MCLETCHIE: Objection, asked and  
19 answered.

20 THE WITNESS: There were actually three  
21 because there would have been the one prior to the  
22 auto-pay in 2009.

23 Q Okay. Interrogatory number four.

24 A Number four, okay.

25 Q Sorry, just a second. If you look at line

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O.P.H. of Las Vegas, Inc. vs. Oregon Mutual Insurance Company, et al.

1   15." My question is besides the failure of the  
2   notice of cancellation, the alleged failure to  
3   notify you of the cancellation, in what other ways  
4   did OMI not meet OPH's insurance needs?

5           MS. MCLEITCHIE: Objection, compound,  
6   vague, calls for a narrative.

7           THE WITNESS: There was a contractual  
8   agreement that we would be insured and covered and  
9   notice would be sent to us if our policy was in  
10   jeopardy. And that was not the case. So I'm not an  
11   attorney, so to me, because no notice was given, not  
12   only to us, but to Dave Sandin as well, Oregon  
13   Mutual did not meet their obligations to us.

14   BY MS. BRANSON:

15           Q    I understand. That's not quite what I'm  
16   asking.

17           A    Well, I know. You're asking me how else?

18           Q    Besides that.

19           A    I don't know how else.

20           Q    And I'm specifically relying on topic one  
21   of the PMK, knowledge regarding the negotiation --

22           A    Oh, yes, I do know. Yes, I do know how.  
23   Pardon me. They didn't cover our claim that their  
24   representative said he was going to combine with the  
25   break-in. So they failed to meet their obligation

CERTIFICATE OF REPORTER

[illegible]

I, Rene' Hannah, Certified Court Reporter,  
do hereby certify:

That I reported the deposition of LINDA SNYDER, commencing on Tuesday, August 13, 2013, 9:00 a.m.

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand in  
my office in the County of Clark, State of Nevada,  
this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

RENE' R. HANNAH, CCR NO. 326

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EXHIBIT PAGE ONLY

## EXHIBIT J

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PREUDENBERGER RESTAURANT GROUP, LLC / CORPORATE OFFICE

2850

Oregon Mutual Insurance Group  
Insurance-Building

8/13/2012

2,814.75

PAYMENT  
RECORD

Kirkwood Bank

Acct 121053462

2,814.75

607073 (1/11)



005421

Aug 10/10

P.3

7028701553

Aug 17 2012 11:23PM FRG

SAN 000111

APP00734



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EXHIBIT PAGE ONLY

## EXHIBIT K

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC

133 Nev., Advance Opinion 60

IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC.,  
Appellant,  
vs.  
OREGON MUTUAL INSURANCE  
COMPANY; DAVE SANDIN; AND  
SANDIN & CO.,  
Respondents.

No. 68543

**FILED**

SEP 14 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from district court orders granting summary judgment in an action by an insured against its insurer and its broker arising out of cancellation of a fire insurance policy. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

*Affirmed in part, reversed in part, and remanded.*

McLetchie Shell, LLC, and Margaret A. McLetchie and Alina M. Shell, Las Vegas,  
for Appellant.

Hutchison & Steffen, LLC and Michael K. Wall, Patricia M. Lee, and Michael S. Kelley, Las Vegas,  
for Respondents Dave Sandin and Sandin & Co.

Lewis Brisbois Bisgaard & Smith LLP and Robert W. Freeman, Jr., and Priscilla L. O'Briant, Las Vegas,  
for Respondent Oregon Mutual Insurance Company.

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BEFORE DOUGLAS, GIBBONS and PICKERING JJ.

## OPINION

By the Court, PICKERING, J.:

In this insurance policy cancellation dispute, we are asked to resolve two issues. The first is whether NRS 687B.360 requires a cancellation notice to contain a statement of a policyholder's right to request additional information to be effective. We hold that NRS 687B.360 requires strict compliance; without an express statement of a policyholder's right to request additional information about the reasons for a policy's cancellation, the cancellation notice is ineffective. Because the insurance company's cancellation notice failed to provide the statement required by NRS 687B.360, the policy remained in effect at the time of loss. We therefore reverse the district court's grant of summary judgment for the insurance company and remand so the insured may pursue its claims against the insurer.

The second issue is whether, under Nevada law, an insurance broker who obtains an insurance policy for a client has a duty to monitor the client's premium payments and to alert the client when the policy is about to be canceled for nonpayment of premiums. We hold that the relationship between the insurance broker and the insured client in this case did not give rise to such a duty. We therefore affirm summary judgment in favor of the broker against the insured.

### I.

Unless otherwise noted, the following facts are undisputed: Appellant O.P.H. of Las Vegas, Inc. operated an Original Pancake House restaurant in Las Vegas. Between 2002 and 2012, respondent Dave Sandin or Sandin & Co. served as the insurance broker for OPH (except for a two-year period when OPH used another broker). In December 2011, Sandin recommended that OPH purchase a Business Owner Protector

policy<sup>1</sup> for the restaurant from respondent Oregon Mutual Insurance Co., which OPH did. The policy term ran from December 26, 2011, until December 26, 2012, and permitted periodic premium payments.

On July 26, 2012, OPH defaulted on its obligation to pay the premium for which it had been billed earlier in the month. Five days later, Oregon Mutual issued OPH a cancellation notice (Notice). The Notice stated that Oregon Mutual would cancel the policy on August 16, 2012, if it did not receive payment by August 15, 2012. The Notice did not inform OPH of its right under NRS 687B.360 to request and receive within 6 days additional information if needed to relay “with reasonable precision” the facts on which OPH based its cancellation decision.

Though OPH denies receiving the Notice, Oregon Mutual attests that it mailed the Notice to OPH on August 1, 2012. Oregon Mutual did not mail a copy of the Notice to the broker, Sandin. On August 13, 2012, OPH realized that it had not made its July premium payment, wrote a check for the premium due, then failed to mail the payment to Oregon Mutual. On August 17, 2012, a fire destroyed the Original Pancake House. OPH reported the loss and submitted a claim under the policy. Oregon Mutual denied coverage, stating that the policy had been canceled for failure to pay the premium effective August 16, 2012, the day before the fire.

OPH sued Oregon Mutual, Sandin, and Sandin & Co. on various theories, including, as against Oregon Mutual, breach of contract,

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<sup>1</sup>A Businessowner's Policy is an insurance policy that typically includes property insurance, business interruption insurance, and liability protection. *What Does a Businessowner's Policy (BOP) Cover?* Insurance Information Institute (July 18, 2017, 4:24 p.m.), <http://www.iii.org/article/what-does-businessowners-policy-bop-cover>.

bad faith and negligence and, as against the Sandin defendants, breach of fiduciary duty. Early on in the case, OPH filed a motion for partial summary judgment against Oregon Mutual on the ground the Notice did not comply with NRS 687B.360 and thus had no effect. The district court denied the motion. After conducting discovery, Oregon Mutual moved for summary judgment asserting that the policy did not cover the loss because it had been validly canceled for nonpayment of premiums before the fire occurred. The Sandin defendants also filed a motion for summary judgment in which they disclaimed any duty to monitor and notify OPH of its premium payment default. The district court granted both motions, and OPH appeals.

## II.

### A.

Whether NRS 687B.360 invalidates Oregon Mutual's notice of cancellation presents an issue of law that we review de novo. *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000) ("review in this court from a district court's interpretation of a statute is de novo") (internal quotation and editing marks omitted); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("[t]his court reviews a district court's grant of summary judgment de novo").

Like most states, Nevada has enacted statutes that restrict the permissible bases for, and impose procedural limits on, an insurer's ability to cancel an insurance policy midterm. *See* NRS 687B.310-NRS 687B.420; for a general discussion see Eric Mills Holmes, *Holmes's Appleman on Insurance 2d*, § 16.10, at 423 (2016). These statutes aim to provide policyholders "protection against arbitrary termination" of insurance coverage, NRS 687B.310(3), and provide rights that "are in

addition to and do not prejudice any other rights the policyholder may have at common law or under other statutes,” NRS 687B.310(4). Here, Oregon Mutual’s cancellation Notice complied with NRS 687B.320(1)(a) and (2), which allow an insurer to cancel a policy for “[f]ailure to pay a premium when due” on 10 days’ written notice. The Notice also complied with NRS 687B.310(6), which specifies how an insurer must deliver a notice of cancellation, and requires that it “state the effective date of the cancellation . . . and be accompanied by a written explanation of the specific reasons for the cancellation.” The question presented is whether the Notice needed to comply with NRS 687B.360 as well, and, if so, whether strict compliance was required or substantial compliance would do.

NRS 687B.360 reads in full as follows:

If a notice of cancellation or nonrenewal under NRS 687B.310 to 687B.420, inclusive, does not state with reasonable precision the facts on which the insurer’s decision is based, the insurer shall supply that information within 6 days after receipt of a written request by the policyholder. *No notice is effective unless it contains adequate information about the policyholder’s right to make such a request.*

(Emphasis added.)

Oregon Mutual’s Notice did not advise OPH that it had the right to request additional information about the reason for the cancellation and to receive a response, if appropriate, within 6 days. Oregon Mutual offers two reasons why its failure to include the information NRS 687B.360 seemingly requires does not invalidate the Notice. First, Oregon Mutual argues that the Notice “state[d] with reasonable precision the facts” on which Oregon Mutual based its cancellation decision, to wit: OPH did not pay the \$2,822 premium by its

due date. Since NRS 687B.360 only requires the insurer to supply additional information “if” the notice of cancellation “does not state with reasonable precision the facts” underlying the cancellation decision, and here, the cancellation Notice gave all the information there was to give, Oregon Mutual maintains that the second sentence in NRS 687B.360, requiring that the Notice advise the insured of its right to additional information on request, never came into play. Second, Oregon Mutual argues that, even if the Notice did not literally comply with NRS 687B.360, it substantially did so. As support, Oregon Mutual points to the facts that the Notice directed OPH to call Sandin with any questions, giving Sandin’s contact information, and that, on the back of the Notice, Oregon Mutual provided “information describ[ing] the billing practices of Oregon Mutual,” which included a “billing customer service” 800 number the insured could call.

Neither argument carries. Textually, NRS 687B.360 does not condition its requirement that a notice of cancellation tell the insured about the insured’s right to ask for and receive additional information on the notice providing incomplete information. By law, a notice of cancellation is already required to “be accompanied by a written explanation of the specific reasons for the cancellation.” NRS 687B.310(6). NRS 687B.360 establishes the further right of a policyholder to request and receive additional information on 6 days’ written request if the notice “does not state with reasonable precision the facts on which the insurer’s [cancellation] decision is based”—and to be advised of this right in the notice itself. And, as written, NRS 687B.360 categorically invalidates a notice of cancellation that does not include this advice: “*No notice is*

*effective* unless it contains adequate information about the policyholder's right to make such a request." (Emphasis added.)<sup>2</sup>

"[I]n determining whether strict or substantial compliance [with a statute] is required, courts examine the statute's provisions, as well as policy and equity considerations." *Leven v. Frey*, 123 Nev. 399, 406-07, 168 P.3d 712, 717 (2007). "Substantial compliance may be sufficient 'to avoid harsh, unfair or absurd consequences.'" *Id.* at 407, 168 P.3d at 717 (quoting 3 Norman J. Singer, *Statutes and Statutory Construction* § 57:19, at 58 (6th ed. 2001)). The question is whether "the purpose of the statute . . . can be adequately served in a manner other than by technical compliance with the statutory . . . language." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1278 (2011).

Oregon Mutual makes a strong substantial compliance case. The notice was clear; it unequivocally stated that Oregon Mutual would cancel the policy due to OPH's failure to pay its premium; and it otherwise

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<sup>2</sup>The Nevada Division of Insurance agrees:

If a notice of cancellation or nonrenewal does not state with reasonable precision the facts on which the insurer's decision is based, the insurer shall supply that information within 6 days after receipt of a written request by the policyholder. *No notice is effective unless it contains adequate information about the policyholder's right to make such a request even if the notice does include the reason for cancellation or nonrenewal.*

Nevada Division of Insurance, Property and Casualty Review Standards Checklist, updated 2014, 4th ed., [doi.nv.gov/.../\\_public-documents/Insurers/ReviewStandardsChecklist.pdf](http://doi.nv.gov/.../_public-documents/Insurers/ReviewStandardsChecklist.pdf) (last visited Aug. 28, 2017) (emphasis added) (2012 Standards identical to text quoted above).



complied with NRS 687B.310 through NRS 687B.420. Invalidating the Notice because it failed to include the statutorily required language regarding the insured's right to request information about the cancellation when there was no more information to provide seems illogical, especially since OPH denied receiving the Notice. It also seems unfair, since the loss occurred before Oregon Mutual could send a second, properly worded notice.<sup>3</sup>

But the arguments for strict compliance are more compelling. Judicially relaxing the statute's literal requirements and accepting substantial compliance as good enough would disserve NRS 687B.360's plain text and invite litigation and its attendant uncertainty. NRS 687B.310 through NRS 687B.420 are "designed to protect individuals from the arbitrary actions of insurers who cancel insurance policies without [adequate] notice to their insureds" and reflect the "state's overriding concerns of protecting its citizens and insuring that they are afforded fair and equitable treatment by insurers." *Daniels v. Nat'l Home Life Assurance Co.*, 103 Nev. 674, 677, 747 P.2d 897, 899 (1987). For these and related reasons, most states hold that statutes imposing requirements on cancellation notices "are to be strictly construed" such that "[n]otices not conforming to the statutory requirements [are] ineffective to terminate the insurance contract for nonpayment of premiums. Even if a policy is in default, recovery may be had for a loss occurring prior to the time a

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<sup>3</sup>Of note, Oregon Mutual sent a second notice of cancellation, dated August 21, 2012, which advised, "If this notice of cancellation or non-renewal does not state the facts on which our decision is based we will supply that information within 6 days after receipt of a written request by you." By then, the fire had occurred.

[statutorily compliant] notice of termination was given.” *Appleman on Insurance, supra*, § 16.10, at 446-47 (footnote omitted).

The California court of appeal addressed a challenge similar to that presented here in *Lee v. Industrial Indemnity Co.*, 223 Cal. Rptr. 254 (1986). In *Lee*, the insurer sent the insured a notice of cancellation for nonpayment of premium that did not advise the insured, as required by then-current California law, “that, upon written request of the named insured, the insurer shall furnish the facts on which the cancellation is based.” *Id.* at 256 n.1 (quoting 1972 Cal. Stat., ch. 237, § 1(677), at 478). The district court granted summary judgment for the insurer and denied the insured’s cross-motion for summary judgment, holding that the notice substantially complied with the statute. The court of appeal reversed and entered summary judgment for the insured, holding that the statute imposed a mandatory requirement on the insurer, noncompliance with which invalidated the notice of cancellation. *See id.* at 257-58; accord *Grubbs v. Credit Gen. Ins. Co.*, 939 S.W.2d 290, 294 (Ark. 1997) (“strict compliance with the cancellation statute is what is mandated—not substantial compliance”); *Reynolds v. Infinity Gen. Ins. Co.*, 694 S.E.2d 337, 340 (Ga. 2010) (“to effect a cancellation of insurance coverage, the language of the statute is to be strictly construed against the insurer . . . . And, until the statutory notice requirements are met, the policy remains in effect.”); *Dorsey v. Mich. Mut. Liab. Co.*, 250 N.W.2d 143, 145 (Mich. Ct. App. 1976) (requiring strict compliance with the statutory notice requirements and noting that, to hold otherwise, would defeat the “salutary goal of the notice statute, that is, the desire to avoid embroiling the courts in needless litigation on the question of whether or not a cancellation notice had been received”); *Blanks v. Farmers Ins. Co.*, 97 S.W.3d 1, 5 (Mo. Ct. App. 2002) (“To cancel an insurance policy, strict

compliance with all the notice requirements is a prerequisite, even when such requirements are unreasonable.”); *Pearson v. Nationwide Mut. Ins. Co.*, 382 S.E.2d 745, 750 (N.C. 1989) (“strict compliance by the insurer with a statute governing cancellation notices is essential to effect cancellation by such notices”).

Oregon Mutual notes that, after *Lee*, the California legislature amended its statute to exempt premium nonpayment cancellations from the requirement that the insurer advise the insured of its right to additional information. See Cal. Ins. Code § 677 (West 1987). But this change in California statutory law favors OPH, not Oregon Mutual, because it underscores the fact that it is the legislature, not the courts, that scripts the requirements for a valid notice of cancellation. As written, NRS 687B.360 applies to premium nonpayment cancellations equally with other cancellations permitted by NRS 687B.320(1). While many premium-nonpayment cancellations are cut-and-dried, not all are. See *Lee*, 223 Cal. Rptr. at 257 (noting the confusion the insurer engendered by sending multiple premium billings, in varying amounts). The Legislature can and has treated premium-nonpayment cancellations differently from other types of cancellations as it deems apt. See NRS 687B.370 (specifically excepting premium nonpayment cancellations from the requirement that the notice of cancellation provide information about applying for insurance through a voluntary or mandatory risk-sharing plan). That the Legislature has not done so when it comes to NRS 687B.360’s requirement that, to be effective, a notice of cancellation must advise the insured of the insured’s right to request additional information, reflects a legislative policy judgment we should respect. See *Daniels*, 103 Nev. at 678, 747 P.2d at 900 (“If the statute under consideration is clear on its face, we cannot go beyond it . . .”).

Our holding that NRS 687B.360 requires strict, not substantial, compliance disposes of Oregon Mutual's back-up argument that the notice sufficiently complied with NRS 697B.360 to pass muster. The Notice did not inform OPH of its right to request additional information from Oregon Mutual about the reasons for the cancellation. Advising the insured that it could contact its broker is not enough. Nor was it enough to provide an 800 number on the back of the Notice that the insured could call with billing inquiries. For these reasons, we reverse the district court's decision to grant summary judgment in favor of Oregon Mutual.

B.

We turn next to OPH's appeal of the district court's summary judgment order in favor of Sandin. OPH urges us to hold that Sandin had a "de facto fiduciary duty" to monitor OPH's premium payments and to alert OPH when its policy was at risk of cancellation for nonpayment of premiums. The existence of duty presents a question of law; if no duty is owed to the plaintiff by defendant, then summary judgment is appropriate. *Turner v. Mandalay Sports Ent., LLC*, 124 Nev. 213, 220-21, 180 P.3d 1172, 1177 (2008); see *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).

In Nevada, an agent or broker has a duty "to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so." *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978); see *Havas v. Carter*, 89 Nev. 497, 499-500, 515 P.2d 397, 398-99 (1973). OPH cites no case holding that an insurance broker owes a duty to monitor its insured client's premium payments and to alert the client when the policy is about to be canceled for nonpayment of premiums. "The duty of a broker, by and large, is to use reasonable care,

diligence, and judgment in procuring the insurance requested by its client.” *Kotlar v. Hartford Fire Ins. Co.*, 100 Cal. Rptr. 2d 246, 250 (Ct. App. 2000). As even OPH recognizes, the usual “relationship between an insurance broker and its client is not the kind which would logically give rise to” a duty to monitor and remind the client about overdue premium payments. *Id.*

We recognize that an insurance broker may assume additional duties to its insured client in special circumstances. See Gary Knapp, Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R. 4th 249, § 2[a] (1991) (collecting cases). But here, the record does not establish that Sandin undertook the duty OPH claims. Oregon Mutual sent its premium billings to OPH, not Sandin. OPH cites three instances over a ten-year period in which its broker alerted it to a past-due premium, but two of the three times this occurred, Sandin was working elsewhere, meaning the broker who provided OPH notice of impending cancellation was someone other than Sandin. This is not enough to establish a genuine issue of material fact sufficient to defeat summary judgment in favor of Sandin.

### III.

We thus affirm the order of summary judgment for Dave Sandin and Sandin & Co., reverse the order of summary judgment for

Oregon Mutual Insurance Company, and remand this case to the district court for proceedings consistent with this opinion.

Pickering, J.  
Pickering

We concur:

Douglas, J.  
Douglas

Gibbons, J.  
Gibbons

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**RTRAN**

DISTRICT COURT  
CLARK COUNTY, NEVADA

O.P.H. OF LAS VEGAS, INC.,	}	CASE#: A-12-672158-C
Plaintiff,		DEPT.: CIVIL
vs.		
OREGON MUTUAL INSURANCE COMPANY,		
Defendant.		

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE  
TUESDAY, FEBRUARY 6, 2018  
***RECORDER'S TRANSCRIPT OF HEARING***  
**MOTION FOR ATTORNEY'S FEES AND COSTS**

APPEARANCES:

For the Plaintiff:	GABRIEL A. BLUMBERG, ESQ.
For the Defendant:	PATRICIA LEE, ESQ. PRISCILLA L. O'BRIANT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, February 6, 2018

2  
3 [Case called at 11:16 a.m.]

4 THE COURT: O.P.H. v Oregon Mutual Insurance.

5 MS. LEE: Good morning, Your Honor. Patricia Lee, bar  
6 number 8287, on behalf of the Sandin defendants.

7 THE COURT: Okay.

8 MR. BLUMBERG: Good morning, Your Honor. Gabriel  
9 Blumberg, 12332, on behalf of O.P.H.

10 MS. O'BRIANT: Priscilla O'Briant, bar number 10171, on  
11 behalf of Oregon Mutual Insurance.

12 THE COURT: So this motion for fees had been brought  
13 previously, then the appeal happened. What the Court had wanted to  
14 look at was these arguments that the fees were excessive during the  
15 arbitration phase of the case where their fees would have been limited to  
16 \$3,000. So is that unreasonable to have failed to accept the offer of  
17 judgment at that point in time, or if it wasn't, should they be entitled to  
18 the fees based on \$38,000 being incurred in a phase when there's only  
19 \$3,000? And the reason that was significant was the Court of Appeals  
20 had just, a month or two earlier, decided *Frazier v Drake*, 357 P.3d 365,  
21 September 3<sup>rd</sup>, 2015, which went to this whole issue of offers of  
22 judgments and awarding attorney's fees under them. So that was really  
23 the case that was of interest to me. And I don't think anything new in the  
24 intervening period of time has really been decided.

25 So since this is kind of the last word on -- on appeals, you did



1 have -- oh, the only other one that was particularly significant, and this  
2 one is unpublished, but it's a Supreme Court unpublished, is a decision  
3 on -- it really kind turned on whether attorney's fees could be awarded  
4 for block billed entries. And the Supreme Court said you can -- you can  
5 award block billed fees if you can tell what portion of each block billing  
6 entry was attributed to which part of the amount claimed.

7 So those were the cases that are of interest to me. So if  
8 there's anything further, then,

9 Ms. Lee?

10 MS. LEE: Yes, Your Honor, and thank you. As you know, we  
11 were here a couple of years ago on this motion for attorney's fees, so  
12 we are trying to get rolling on that initial motion. I know Your Honor did  
13 have a curiosity about this whole arbitration issue. I hope that your  
14 research has satisfied your inquiries in that regard.

15 We still maintain that the offer was reasonable, both in its  
16 timing and amount again, at the time it was in arbitration, which would  
17 have limited their damages to \$50,000. The experts have ultimately  
18 opined that the damages ranged between \$10,000 and \$14,000,  
19 depending on whether or not this lease would have continued for  
20 O.P.H., or if the landlord were to cancel the lease. Also, those damages  
21 were not apportioned. We would have said that our, as the broker, our  
22 liability would have been substantially less than the actual insured.

23 And, Your Honor, and I won't belabor the points. We've gone  
24 through the *Brunzell* and *Beattie* factors ad nauseam, you've heard them  
25 before. We have some new arguments, just in terms of the appeal,

1 which we are entitled to ask for under the relevant case law we cited.  
2 THE COURT: And so --  
3 MS. LEE: But --  
4 THE COURT: -- in your Exhibit F, this is the attorney's fees  
5 from the appeal --  
6 MS. LEE: Is that for the --  
7 THE COURT: -- from the motion for fees and costs forward.  
8 It's after the summary judgment was granted --  
9 MS. LEE: Yes.  
10 THE COURT: -- going forward.  
11 MS. LEE: Correct.  
12 THE COURT: So --  
13 MS. LEE: So and that -- that totaled about \$18,000 for the  
14 entirety of the appellate process, which we would -- we would submit is  
15 fairly reasonable given the -- the complexity of the appeal, having to go  
16 back and review the entire record. You know, I don't know, Michael Wall,  
17 who is the attorney from my office who handled that appeal, he usually  
18 doesn't roll out of bed for less than 25 grand on an appeal.  
19 THE COURT: Um-hmm.  
20 MS. LEE: However, this client does have special rates for us.  
21 So the -- so the amount of fees are more than reasonable, we would  
22 argue, Your Honor.  
23 And the only thing that I would like to just kind of put on the  
24 record orally is the timing. I think the timing was the biggest issue that I  
25 saw raised in the opposition. Granted, the offer of judgment was made

1 the day after Your Honor denied our motion to dismiss without  
2 prejudice --

3 THE COURT: Um-hmm.

4 MS. LEE: -- and with reservation, I might add. Your Honor  
5 was, you know, kind of lamenting the fact that we don't apply the more  
6 stringent *Iqbal* standard here. And perhaps if that were the case, Your  
7 Honor would have granted that motion. And ultimately Your Honor went  
8 back at that motion for summary judgment phase and said: You know, I  
9 really can't see this being more than just a contract that was frustrated  
10 by the insured not paying their premiums on time.

11 So when we talk about timing, Your Honor, and I looked  
12 carefully at their motion -- their opposition --

13 THE COURT: Um-hmm.

14 MS. LEE: -- and I see where they are conflating newly  
15 discovered facts that happened six months down the road after, you  
16 know, we had started this case. You know, we had not filed a response  
17 to the pleading. They didn't know what our answer was going to be or  
18 our affirmative defenses or, you know, an exculpatory allegations.

19 However, what they -- this is what they did know before filing  
20 the Complaint. First, they knew that our clients as the insurance brokers  
21 did not receive notice of the cancellation, of the pending cancellation.  
22 They put that right into their Complaint as an affirmative allegation.  
23 Paragraphs 26 and 27 of their Complaint says that the Sandin  
24 defendants were never provided notice of the cancellation, and they did  
25 not know about the notice of cancellation.

1           So just as a practical matter, Your Honor, even if there was  
2 some kind of duty, some strained, tenuous duty, which the Supreme  
3 Court has said doesn't exist, which Your Honor said doesn't exist, which  
4 case law, statute, and every jurisdiction says doesn't exist, there is no  
5 duty, but even if there was this duty, it was factually impossible for my  
6 client to give them notice of a pending cancellation because they  
7 themselves never had notice. So they knew that before they filed the  
8 Complaint.

9           Another thing that they knew, the whole reason why Your  
10 Honor actually allowed this case to move forward is because they made  
11 this course and conduct argument. Well, the Sandin defendants had  
12 done this in the past. They had warned us that our policy was going to  
13 terminate, and so they had a duty to continue this course of conduct.  
14 Well turns out when we had deposed their person most knowledgeable  
15 on this issue, she said: Well, the three previous times that they gave us  
16 notice were on these three specific dates. And she gave very specific  
17 dates.

18           Well, that date span that she gave, my client wasn't even their  
19 broker of record at the time. He was working at another company under  
20 a noncompete. In fact, he could not have been their broker. And then  
21 Nevada Supreme Court acknowledged that fact and said out of two out  
22 of the three times that they touted, my client wasn't even their broker of  
23 record during that time. So they knew that before they filed the  
24 Complaint.

25           Another thing that they knew, Your Honor, is that they knew

1 that they actually knew about the termination prior to the termination  
2 term. They wrote a check. They realized that they were late on their  
3 July payment. They wrote a check and for whatever reason, they never  
4 sent it. So they were well aware.

5 So, you know, Your Honor, it's just -- it's just, you know, this  
6 whole climate of let's blame everybody else for our things that we were  
7 supposed to take responsibility for. If I don't pay my mortgage and my  
8 home gets foreclosed on, I can't go sue my real estate broker for not  
9 giving me notice that I didn't pay my mortgage.

10 THE COURT: Okay.

11 MS. LEE: It's not -- it's not her responsibility. So they knew  
12 that as well.

13 And, in fact, I wanted to point out that as far as the payment  
14 being missed, Steven Freudenberger testified during his deposition, 1 of  
15 16 that was taken in this case, 11 of which were out of state, he said:  
16 Had I done my work that I'm paying myself to do -- and he's the  
17 president of O.P.H. or he was at the time -- that I'm paying myself to do  
18 to make sure that all this stuff gets paid in a timely manner, we wouldn't  
19 be sitting here either.

20 So that is the procedure. I didn't do my job in that moment.  
21 That's all I can say about that. I mean, it's a mishap in the company.  
22 There is no -- I'm not trying to blame anybody for that payment not being  
23 made on July 26th.

24 Well, they are trying to blame someone for that payment not  
25 being made. And it looks here Mr. Freudenberger is trying to take

1 responsibility for it, but legally they're doing the exact opposite. They're  
2 trying to put the blame on an insurance broker. There was no basis in  
3 law.

4 THE COURT: Well, I don't understand why we're talking  
5 about because that doesn't really have anything to do with this whole  
6 issue of, as you point out, the *Beattie* -- first you look at *Beattie*, and  
7 then you look at *Brunzell*. So how does that contribute --

8 MS. LEE: It goes to the --

9 THE COURT: -- to the analysis of the attorney's fee?

10 MS. LEE: The first *Beattie* factor, Your Honor, is whether or  
11 not they brought the claims in good faith. And that ties to and informs  
12 the timing of our offer of judgment. They brought the claims initially in  
13 bad faith. So our bringing of an offer of judgment at the initiation of the  
14 case makes sense. It was a bad case. They brought the claims in bad  
15 faith. So it informs the timing of our motion, and that's why I bring that  
16 up, Your Honor.

17 And I would also like to point out, under the -- the -- the offer  
18 of judgment rule is that the Nevada Supreme Court allows you to bring it  
19 at any point, at every possible juncture where the rules allow.

20 THE COURT: Okay.

21 MS. LEE: So we were not precluded. So you can bring it as  
22 early as -- before you even answer the Complaint, as long as it's not  
23 brought within ten days. So there's no hard and fast rule that says that  
24 just because they won a motion to dismiss, barely, that does not then  
25 translate into good faith, that they brought these claims in good faith. So

1 we would say that it was reasonable in both its timing --

2 THE COURT: Okay.

3 MS. LEE: -- and its amount. And I just bring up the timing  
4 because that was the primary basis for the opposition, as far as I could  
5 tell.

6 THE COURT: Thank you.

7 Ms. O'Briant, your client takes -- this is not relevant to your  
8 client.

9 MS. O'BRIANT: No. The only reason we appeared today is  
10 because they have new counsel and we wanted to make sure if there  
11 was any discussion about the procedural posture, that we were a part of  
12 it.

13 THE COURT: Okay. Thank you.

14 Counsel?

15 MR. BLUMBERG: And we'd agree that Oregon Mutual has no  
16 role in this motion, Your Honor.

17 I think Your Honor has hit the nail right on the head. We have  
18 to look at the *Beattie* factors and the *Brunzell* factors. It's not just the  
19 fact that they beat their offer of judgment.

20 THE COURT: Uh-huh.

21 MR. BLUMBERG: And we think the *Beattie* factors actually  
22 show that this was unreasonable in every single manner.

23 THE COURT: Uh-huh.

24 MR. BLUMBERG: First, the good faith claim is the first factor.  
25 And I think opposing Counsel somewhat misrepresented the Supreme

1 Court's holding, which I have right here, wherein they say: --

2 THE COURT: Uh-huh.

3 MR. BLUMBERG: -- We recognize that an insurance broker  
4 may assume additional duties to its insured client in special  
5 circumstances.

6 Fortunately we found here we didn't quite get there, but that  
7 doesn't mean the claim was unreasonable when we brought it. And it  
8 shows that it is actually possible to succeed on such a claim.

9 And then the second factor is the unreasonableness of the  
10 timing and the amount, and we think that's where they have a huge  
11 issue in this case, the timing. Opposing Counsel mentioned it. Before  
12 they filed an answer, before any discovery was conducted, the only  
13 information we had was that we had won on a motion -- their motion to  
14 dismiss. So there was some legs for our case and we didn't see any  
15 reason why a \$2,000 offer of judgment, when we had damages in the  
16 hundreds of thousands, if not more, was reasonable at all. And we  
17 know that the amount is not reasonable based on the amount of work  
18 they put into this case. In just the arbitration period, where if they're  
19 claiming they believe this was actually subject to only a \$50,000 cap  
20 despite our Complaint, our initial Complaint saying damages in excess  
21 of \$50,000, they spent over thirty-five -- \$35,000 defending a claim  
22 which they're now going to claim should have only been valued at  
23 \$2,000.

24 THE COURT: Uh-huh.

25 MR. BLUMBERG: It shows that's disingenuous at best. Even



1 they understood the claim wasn't properly valued at \$2,000. It would not  
2 have been reasonable to expect O.P.H. to accept such an offer,  
3 especially that early in the case.

4 And then we also see, when we look at the *Brunzell* factors,  
5 that they actually ended up spending over a thousand hours on this  
6 case. And if you look at that and then have them come back and say,  
7 you know, \$2,000 was probably a very reasonable offer when we've now  
8 expended over a thousand hours defending this case, if the claim was  
9 as meritless as they say, it never should have taken a thousand hours of  
10 work.

11 And I think that also goes to, if Your Honor somehow does find  
12 the *Beattie* factors weigh in their favor that the *Brunzell* factors mandate  
13 that this award must be substantially reduced. There's no way that this  
14 case should have taken a thousand hours to defend if the claim was as  
15 meritless as they believe. We had filed that in the initial opposition a  
16 couple years ago. And I think we highlight another few points in our  
17 opposition to their attorney -- appellate attorney's fees motion --

18 THE COURT: Right.

19 MR. BLUMBERG: -- that we think there was some excessive  
20 billing that was incurred. And while we agree that the hourly rate was  
21 reasonable, of course, it was discounted, it doesn't mean that they can  
22 make up for the discount in the hourly rate by then charging a thousand  
23 hours throughout the duration of the case.

24 THE COURT: Okay. Thank you. Originally the Court had  
25 found -- it's my recollection, is I didn't have my problem so much with the

1 *Beattie* factors as to the timing of the offer. I mean, you can make an  
2 offer immediately after appearing. One of the problems is how much is  
3 reasonable? So that was my -- more my concern, was it reasonable at  
4 that point in time to offer \$2,000?

5 But my real issue was more with the *Brunzell* factors. And  
6 that kind of ties into this whole thing of if you're really making a  
7 legitimate \$2,000 offer, why would you then spend \$35,000 when you  
8 know the most you can recover if you win at arbitration is \$3,000? So  
9 that was a problem for me. And where we -- that's why I got into these  
10 two cases that had just been decided earlier in 2015, I think like literally  
11 weeks on *Frazier v Drake*, before we had our hearing.

12 The first one is this whole concept of block billing. I know this  
13 is an unpublished decision, and for some reason an unpublished order  
14 shall not be regarded as precedent and shall not be set as legal  
15 authority, but that's after the rule change, so I don't know why they have  
16 that on there. I think this can be decided. And this is this concept of one  
17 problem with billing is block billing. How, when you're awarding  
18 attorney's fees, can you, if it's just like a big block of billing, say that's  
19 reasonable or not?

20 But -- so when I went back and looked through all these bills,  
21 just because the word and appears in a billing entry, it doesn't mean  
22 you're doing two completely separate and unrelated things and billing  
23 one amount for it. I mean, there's one in here where it's like, more  
24 recently, receive notice of substitution of counsel, and think something  
25 changed some database entry. That's not really two different things,

1 that's one thing, they go together.

2           So in looking for, you know, do we have block billing problems  
3 here? You know, I didn't really see that that was a problem for us in this  
4 case. It's pretty clearly broken out and you can tell what was billed in  
5 the different entries. So I didn't, in the end, really think that with respect  
6 to the reasonableness of their bills and, you know, were they something  
7 the Court could look at and say, yes, I think that's all reasonable and  
8 necessary.

9           Under this case, I ended up in the end not seeing any real  
10 concern. And that's the Margaret Mary Adams 2006 Trust. That's why  
11 I -- that's why I know about this case is it's a trust case which was dated  
12 March 26<sup>th</sup>, 2015. It is an unpublished Supreme Court decision, so I  
13 think that one was significant. So I looked at -- first, I looked at it for  
14 that. You know, you could maybe go through, if you want, the entire  
15 billing statement and pick and choose a couple of little entries. But  
16 when I look at them, they're like 0.2, so really, is it worth the time to go  
17 through and say, well, I can't award this because it's block billing when  
18 it's 0.2. I mean, it's going to be more time to review for maybe a couple  
19 of hours of time than you're going to -- you're going to find. It's not cost  
20 effective. There's not enough of it.

21           This isn't true block billing. I mean, for true block billing,  
22 you're looking at lengthy entries of, you know, I went to a deposition and  
23 I prepared for motion for summary judgment, and then I wrote a letter,  
24 eight hours, that's block billing. And I just didn't see it. So that -- my first  
25 concern there was gone.

1 And then under *Frazier v Drake*, which was decided on  
2 September 3, 2015 and is reported, 357 P.3d 365, this is a Court of  
3 Appeals case. This is the one that had just -- I don't know, I think our  
4 hearing was in October and this had just been decided September 3<sup>rd</sup>,  
5 2015, so this was the one that was really of interest to me. And again,  
6 they did do the analysis. You look first at your *Beattie* factors, then you  
7 look at your *Brunzell* factors. And what most people know this case for,  
8 and that's what I had done, is reduce the expert fees to \$1500 because  
9 this is the case that gives our authority to say, you know, really, unless  
10 they testify, it's unreasonable to charge more than \$1500.

11 But there's other stuff in here about the timing of the offer of  
12 judgment. The District Court found that the offers of judgment were  
13 brought in good faith, that the -- the *Frazier*, *Keys* offers. *Drake's* offers  
14 were not reasonable or made in good faith in either timing or amount,  
15 and that the decisions to reject those offers were not grossly  
16 unreasonable or in bad faith.

17 So that's kind of what was new in *Frazier v Drake* was this  
18 concept that if you decide to reject -- if your client decided to reject not in  
19 good faith, it had to be grossly unreasonable. And that's -- I mean, I  
20 thought pretty much everybody was operating in good faith here.  
21 Nobody -- it's just you guys didn't agree. Your clients were relying on  
22 this course of conduct that they felt they had with their real estate  
23 agent -- insurance agent, which was what Ms. Lee was talking about,  
24 this course of conduct. You know, ultimately the Court didn't find that  
25 that standard was met. That's a very unusual and way outside normal

1 duties of insurance agents.

2           So, I mean, it wasn't unreasonable to proceed, but on the  
3 other hand, it was certainly a reasonable offer from them because they  
4 just -- there is no such -- there is no such global duty. It's not a duty. It's  
5 just this exception from the failure to have a duty that is just a course of  
6 conduct if you can establish it. It's not technically a duty. The point is  
7 there is no duty, but there is an exception. And it's a high burden to  
8 carry that the exception should apply.

9           So the problem that they found was with the -- what the  
10 District Court found that reasonable -- that the reasonableness of the  
11 offer alone supported the award of attorney's fees, and they said that's  
12 not enough. You can't just award everything just based on  
13 reasonableness, you have to go back and look at it all. So that was the  
14 point in saying I'm going to -- I have to take another look at it under  
15 *Frazier v Drake*. But it didn't really -- it didn't really change my opinion  
16 about overall, as we pointed out, that you can't argue with the fee. It's a  
17 discounted fee, much lower than what they would normally charge.

18           But that I -- my one problem is, is with the arbitration phase.  
19 You know, I agree with you on the arbitration phase. I just think if you  
20 make an offer of judgment for \$2,000 at the arbitration phase and you  
21 insist it's only -- an arbitration case, you're only going to get \$3,000 at  
22 the end of the process. It just doesn't make any sense to me. That's  
23 the only problem I ever had with it.

24           And after looking at it all over again, it's still the only problem I  
25 have with it, because I looked at everything else. I don't see block

1 billing. I don't see overbilling. It's a discounted rate. I just didn't have  
2 any problems with any of the rest of it. The only thing, and unfortunately  
3 neither of these cases address it, they only address the other factors,  
4 they don't address this whole concept of is it really reasonable once  
5 you've made a \$2,000 offer of judgment during a phase when you're  
6 only going to get \$3,000 if it stays where it is, that to me was -- that to  
7 me showed they really were intending to litigate the whole time. And  
8 that's fine. That was their choice. I think that everybody realized that it  
9 was a big claim.

10 And it was -- it was -- this was difficult. This went on for  
11 months and months and months, going all over the country on  
12 depositions -- I just didn't see anywhere where any of that was inflated.  
13 That's what it took to get to the point where they could file the motion.  
14 And for me, it was a very arduous process, and it was hard fought the  
15 whole time.

16 So I can't say that for either side the discovery phase of this  
17 thing was handled in any way inappropriately. Those -- every one of  
18 those depositions, I thought they were relevant. I mean, we looked at all  
19 of them in these motions because some of them were relevant to  
20 Ms. O'Briant, some of them were relevant to Ms. Lee. They had to do  
21 the whole thing. They had to be present for them. They couldn't pick  
22 and choose which ones they'd go to, it was because it was all one case.  
23 So for that reason, I did not see anything unreasonable. As I said, my --  
24 and they have every right to seek their appeal fees and costs. I don't  
25 think anybody really disputes that.

1                   So at this point, like I said, years later we come back  
2 around to it and I still feel the same way about it. I don't -- I didn't see  
3 anything in these cases. I'm -- as I said, I don't -- I think this is kind of  
4 the last word. I haven't seen any significant new offer of judgment cases  
5 come down. *Frazier v Drake* is the last reported one that I could find.  
6 And these others are -- these other issues, like this unpublished  
7 Supreme Court decision on block billing, which nobody seems to know  
8 about, but I guess I do because it's a trust case. But I looked at the  
9 other things that they've raised that were problems, and I just -- I don't  
10 see anything but the initial thing that was raised by your client initially, is  
11 why would you make an offer of judgment and then proceed to bill  
12 \$35,000 when you knew you were only going to get back three? I think  
13 that's a legitimate question, and that's really only ever been my problem  
14 with it.

15                   So that would be the only amount I would be willing to take a  
16 look at. And I think that they stuck with the \$3,000, but anything over  
17 that, until that phase is over, that arbitration phase is over going forward,  
18 it was all necessary, every bit of it. And it's unfortunate. This was --  
19 that's what I've said all along, it's so unfortunate that we have this  
20 relatively low standard for motions to dismiss. You're entitled to try to  
21 prove your case and, unfortunately, this one just -- it was one of those  
22 cases that you just -- there's no way to do it, but to go forward on all of  
23 these issues. And everybody else was out of state. I mean, I just -- I  
24 don't think there's any other way to do it. It had to be done.

25                   So I'm only reducing this by the -- I think it's \$32,000 from the

1 arbitration phase. The rest of it, plus the appeal fees, I think are all  
2 perfectly warranted because, like I said, the only real case that picks  
3 around at offers of attorney's fees after offers of judgment is this block  
4 billing case, and I didn't see that was a problem for us here. They didn't  
5 block bill.

6 So since that's about the only thing I think you can reduce  
7 fees by now, I mean, that's the only -- in years that it's come up is this  
8 objection to block billing. Not relevant here, so nothing else I could  
9 really reduce it for.

10 So as we -- I would say they otherwise meet *Brunzel*. Every  
11 other factor is fully satisfied under *Brunzell*. And the only thing that they  
12 tell us to take a look at is block billing and, you know, it's just not a  
13 problem for us.

14 So I don't see anywhere else I could make any reductions with  
15 all -- and I read it. You know, I did the -- I did not come in to be a judge  
16 in order to read other people's billing statements, but it's so important to  
17 the Supreme Court that we do a lot of it. And under the guidance  
18 they've given us, I just don't see anywhere else to reduce it but by the  
19 arbitration phase that I see as a legitimate question. So I'll take that  
20 reduction, but everything else up through the appeal is awarded. I just  
21 didn't see anywhere else to take a deduction.

22 MS. LEE: Thank you, Your Honor. I'll prepare the order.

23 THE COURT: Okay. Thank you.

24 MR. BLUMBERG: Thank you, Your Honor.

25 THE COURT: And if you'd please direct it to Counsel.



1 Do you even want to see it, Ms. O'Briant? Do you want to  
2 review the --  
3 MS. O'BRIANT: No, I don't need to see it.  
4 THE COURT: Okay.  
5 MS. LEE: Okay. All right.  
6 THE COURT: All right.  
7 MS. LEE: Thanks, Priscilla.  
8 THE COURT: Because I didn't think you cared, but. Okay.  
9 Thanks very much.  
10 MS. LEE: Thank you, Your Honor.  
11 THE COURT: Then we'll see you guys back here. And then  
12 just the only thing we have left is a calendar call in July. I think we're  
13 otherwise --  
14 MS. O'BRIANT: Well, Your Honor, we discussed at the last  
15 hearing we need to --  
16 MS. LEE: I'm sorry, Your Honor. I have an appointment.  
17 THE COURT: You can leave. Yeah. Sorry  
18 MS. LEE: I'm going to just head out.  
19 MS. O'BRIANT: -- resubmit the motions in limines --  
20 THE COURT: Uh-huh.  
21 MS. O'BRIANT: -- and motion for summary judgment  
22 because they have changed a little --  
23 THE COURT: Okay.  
24 MS. O'BRIANT: -- with the remand back from the Supreme  
25 Court.

1 THE COURT: Right. Yeah. Yeah.  
2 They told us to focus on some other things, yeah.  
3 MS. O'BRIANT: So I know we did set a deadline for MILs.  
4 THE COURT: Uh-huh.  
5 MS. O'BRIANT: I didn't -- I reviewed all the calendar dates. I  
6 didn't see one for the motion for summary judgment, but we can get that  
7 on file --  
8 THE COURT: Okay.  
9 MS. O'BRIANT: -- whenever.  
10 THE COURT: Yes. Just working back from the calendar call  
11 date, we like, like 60 days in advance, if we can. If not, 60 days before  
12 the actual trial start date. We just need some time to get everything  
13 briefed and have a chance to have a hearing before the actual --  
14 MS. O'BRIANT: Is that for the motion --  
15 THE COURT: -- deadline.  
16 MS. O'BRIANT: -- for summary judgment?  
17 THE COURT: On the summary judgment motion.  
18 MS. O'BRIANT: Okay.  
19 THE COURT: So we need, you know, we need 60 days --  
20 MS. O'BRIANT: Two months, no problem.  
21 THE COURT: -- to look at -- to get that all through the  
22 process, so we don't have to be doing a whole bunch on order  
23 shortening time. So if you can just work on that --  
24 MS. O'BRIANT: Okay. Thank you, Your Honor.  
25 THE COURT: -- for your schedule.

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MR. BLUMBERG: Thank you.

THE COURT: Thank you, guys.

[Hearing concluded at 11:42 a.m.]

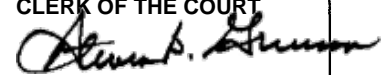
\* \* \* \* \*

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



---

Martha Nelson  
Court Recorder/Transcriber



1 NEFF  
2 Patricia Lee (8287)  
3 HUTCHISON & STEFFEN, PLLC  
4 Peccole Professional Park  
5 10080 West Alta Drive, Suite 200  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 385-2500  
8 Facsimile: (702) 385-2086  
9 [plee@hutchlegal.com](mailto:plee@hutchlegal.com)

10 *Attorneys for Defendants*  
11 *Dave Sandin and Sandin & Co.*

12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 O.P.H. PF LAS VEGAS, INC.,  
15 Plaintiff,

16 v.

17 OREGON MUTUAL INSURANCE  
18 COMPANY, DAVE SANDIN, and  
19 SANDIN & CO.;  
20 Defendants.

) Case No. A-12-672158-C  
) Dept. No. XXVI  
)  
)  
)

) **NOTICE OF ENTRY OF ORDER OF**  
) **FINDING OF FACTS, CONCLUSIONS**  
) **OF LAW AND JUDGMENT IN FAVOR**  
) **OF DAVE SANDIN AND SANDIN &**  
) **CO. ON THEIR MOTION FOR**  
) **ATTORNEYS' FEES AND COSTS**  
)  
)

21 PLEASE TAKE NOTICE that an Order Granting the of Findings of Facts, Conclusions of  
22 Law and Judgment in Favor of Dave Sandin and Sandin & Co., on their Motion for attorneys' Fees  
23 and Costs was entered in the above-entitled action on 8<sup>th</sup> day of March, 2018, a copy of which is  
24 attached hereto.

25 DATED this 16<sup>th</sup> day of March, 2018

26 HUTCHISON & STEFFEN, PLLC

27 /s/ Patricia Lee

28 Patricia Lee (8287)  
HUTCHISON & STEFFEN, PLLC  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145

*Attorneys for Defendants*  
*Dave Sandin and Sandin & Co.*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Hutchison & Steffen,  
3 PLLC and that on this 16th day of March, 2018, I caused the above and foregoing document  
4 entitled **NOTICE OF ENTRY OF ORDER OF FINDING OF FACTS, CONCLUSIONS OF**  
5 **LAW AND JUDGMENT IN FAVOR OF DAVE SANDIN AND SANDIN & CO. ON THEIR**  
6 **MOTION FOR ATTORNEYS' FEES AND COSTS** to be served as follows:

7 ☐ by placing same to be deposited for mailing in the United States Mail, in  
8 a sealed envelope upon which first class postage was prepaid in Las  
Vegas, Nevada; and/or

9 ☐ pursuant to EDCR 7.26, to be sent via facsimile; and/or

10 ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served  
11 through the Eighth Judicial District Court's electronic filing system, with  
the date and time of the electronic service substituted for the date and  
12 place of deposit in the mail; and/or

13 ☐ to be hand-delivered;

14 to the attorney(s) listed below at the address and/or facsimile number indicated below:

15 Margaret A. McLetchie, Esq.  
16 Matthew J. Rashbrook, Esq.  
17 MCCLETCHIE SHELL, LLC  
701 East Bridger Ave., Ste. 520  
Las Vegas, NV 89101

18 *Attorneys for plaintiff*  
19 *O.P.H. of Las Vegas Inc.*

Robert Freeman, Esq.  
Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH,  
LLP  
6385 S. Rainbow Blvd., Ste. 600  
Las Vegas, NV 89118

*Attorneys for Oregon Mutual Insurance*  
*Company*

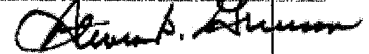
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23 An Employee of Hutchison & Steffen, PLLC  
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EXHIBIT PAGE ONLY

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

**EXHIBIT 1**



1 JGMT  
2 Patricia Lee (8287)  
3 HUTCHISON & STEFFEN, LLC  
4 10080 West Alta Drive, Suite 200  
5 Las Vegas, NV 89145  
6 Tel: (702) 385-2500  
7 Fax: (702) 385-2086  
8 [plee@hutchlegal.com](mailto:plee@hutchlegal.com)

9 *Attorneys for defendants*  
10 *Dave Sandin and Sandin & Co.*

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13 O.P.H. OF LAS VEGAS, INC.,  
14 Plaintiff,

Case No.: A-12-672158-C

Dept. No.: XXVI

15 v.

16 OREGON MUTUAL INSURANCE  
17 COMPANY, DAVE SANDIN, and  
18 SANDIN & CO.,

**FINDING OF FACTS, CONCLUSIONS  
OF LAW AND JUDGMENT IN  
FAVOR OF DAVE SANDIN AND  
SANDIN & CO. ON THEIR MOTION  
FOR ATTORNEYS' FEES AND  
COSTS**

19 Defendants.

20 Defendants Dave Sandin's and Sandin & Co.'s Motion for Decision on Attorneys' Fees  
21 and Motion for Additional Attorneys' Fees and Costs associated with Appeal came before this  
22 Court on February 6, 2018 at 9:30 a.m. Patricia Lee of the firm Hutchison & Steffen, PLLC  
23 appeared on behalf of Dave Sandin and Sandin & Co, (together the "Sandin Defendants").  
24 Priscilla O'Briant of Lewis Brisbois Bisgaard & Smith, LLP., appeared on behalf Oregon  
25 Mutual Insurance Company, ("OMI") and Gabriel Blumberg of the firm Dickinson Wright,  
26 PLLC appeared on behalf of Plaintiff, O.P.H. of Las Vegas, Inc. ("OPH").

27 Having reviewed all papers and pleadings on file and entertained oral arguments  
presented by all counsel, this Court makes the following findings of fact, conclusions of law and

1 judgment with respect to the Sandin Defendants' Motion for Decision on Attorneys' Fees and  
2 Motion for Additional Attorneys' Fees and Costs associated with Appeal:

3  
4 **FINDINGS OF FACT**

5 1. OPH commenced this action on November 11, 2012, by filing claims against  
6 OMI and the Sandin Defendants based on the denial of insurance coverage from a fire on  
7 August 17, 2012 that destroyed OPH's restaurant located at 4833 West Charleston Boulevard in  
8 Las Vegas, Nevada.

9 2. OPH asserted claims for fraud in the inducement (third cause of action), fraud  
10 (fourth cause of action), breach of fiduciary duty (fifth cause of action), violations of NRS  
11 §686A.310 (sixth cause of action), and negligence (seventh cause of action) against the Sandin  
12 Defendants.

13 3. On December 26, 2012, the Sandin Defendants filed a motion to dismiss seeking  
14 to dismiss all of the claims against them for failure to state a claim pursuant to NRCP 12(b)(5).  
15

16 4. The Sandin Defendants' motion to dismiss was denied without prejudice orally at a  
17 hearing on February 13, 2013 and by written order on March 12, 2013.

18 5. On February 14, 2013, the Sandin Defendants served an Offer of Judgment to  
19 OPH offering to settle all claims for the sum of Two Thousand Dollars and No Cents  
20 (\$2,000.00) pursuant to NRCP 68 and/or NRS 17.115.  
21

22 6. OPH rejected the offer by failing to respond within the time proscribed.

23 7. At the time the offer was made, this matter was in the court annexed arbitration  
24 program in which the maximum amount of recovery would have been \$50,000.00 and the  
25 maximum amount of attorneys' fees recoverable would have been \$3,000.00.  
26  
27



1           8.     Six months after the offer of judgment was made, OPH filed a Request for  
2 Exemption from Arbitration which request was granted on September 17, 2013.

3           9.     On March 17, 2015, the Sandin Defendants filed their motion for summary  
4 judgment, seeking judgment on all of OPH's claims against them.

5           10.    On May 14, 2015, a hearing was held before this Court on the Sandin  
6 defendants' motion for summary judgment.<sup>1</sup>

7           11.    At the hearing, the Court granted the Sandin Defendants' motion for summary  
8 judgment.

9           12.    An order was entered on July 1, 2015, granting the Sandin Defendants' motion  
10 for summary judgment.

11           13.    On August 13, 2015, judgment was entered in favor of the Sandin Defendants  
12 and against OPH an all of OPH's claims against the Sandin Defendants.

13           14.    Thereafter on September 2, 2015, the Sandin Defendants brought a Motion for  
14 Attorneys' Fees and Costs.

15           15.    The matter came before the Court for oral argument on November 17, 2015, at  
16 which the time the Court granted the Sandin Defendants' Motion for Costs<sup>2</sup> and took their  
17 Motion for Attorneys' Fees under advisement.

18           16.    In the meantime and following the notice of entry of judgment in favor of the  
19 Sandin Defendants, OPH appealed this Court's granting of the Sandin Defendants' Motion for  
20 Summary Judgment to the Nevada Supreme Court on July 30, 2015.

---

21  
22  
23  
24  
25 <sup>1</sup> Also on hearing that day was OMI's Motion for Summary Judgment.

26 <sup>2</sup> The Court first re-taxed the costs to adjust expert witness fees down to the maximum statutory cap. Ultimately,  
27 Sandin Defendants were awarded a total of \$7,448.63 in costs.

1           17     On September 14, 2017, the Nevada Supreme Court affirmed the ruling of this  
2 Court as to the summary disposition of OPH's claims against the Sandin Defendants and a  
3 remittur was issued on October 9, 2017.<sup>3</sup>

4                                   **CONCLUSIONS OF LAW**

5           18.     Under NRCP 68(a), "[a]t any time more than 10 days before trial, any party may  
6 serve an offer in writing to allow judgment to be taken in accordance with its terms and  
7 conditions."

8           19.     If the offeree rejects an offer and fails to obtain a more favorable judgment, "the  
9 offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time  
10 of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be  
11 allowed, actually incurred by the offeror from the time of the offer." NRCP 68(f)(2).  
12

13           20.     NRS 17.115 provides, in relevant part:  
14

15           1.     At any time more than 10 days before trial, any party may serve upon one or  
16 more other parties a written offer to allow judgment to be taken in accordance with the terms  
17 and conditions of the offer of judgment.

18                                   ...

19           4.     Except as otherwise provided in this section, of a party who rejects an offer of  
20 judgment fails to obtain a more favorable judgment, the court:  
21

22                                   ...

23                   (c)     Shall order the party to pay the taxable costs incurred by the party who  
24 made the offer; and

25                   (d)     May order the party to pay to the party who made the offer any or all of  
26 the following:

27                   \_\_\_\_\_  
<sup>3</sup> The Nevada Supreme Court reversed this Court's ruling against OMI.

1  
2 (2) Any applicable interest on the judgment for the period from the  
date of service of the offer to the date of entry of the judgment.

3 (3) Reasonable attorney's fees incurred by the party who made the  
4 offer for the period from the date of service of the offer to the date of entry of the judgment.

5 NRS 17.115(1) & (4).

6 21. The Sandin Defendants timely served their offer of judgment, which offer was  
7 rejected by OPH.

8 22. The Court must consider various factors when determining whether to award  
9 attorney's fees and costs under NRCF 68. The factors are as follows: (1) whether the offeree's  
10 claims were brought in good faith; (2) whether the offeror's offer of judgment was reasonable  
11 and in good faith in both its timing and amount; (3) whether the offeree's decision to reject the  
12 offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees  
13 sought by the offeror are reasonable and justified in amount. *See RTTC Commc'ns., LLC v.*  
14 *Saratoga Flier, Inc.*, 121 Nev. 34, 41, 110 P.3d 24, 28 (2005) (citing *Beattie v. Thomas*, 99 Nev.  
15 579, 588-89, 668 P.2d 268, 274 (1983)).

16  
17  
18 23. The Sandin Defendants' offer was brought in good faith, was reasonable and in  
19 good faith both in timing and amount and the fees sought by the Sandin Defendants are  
20 reasonable and justified in amount.

21 24. The fourth *Beattie* factor (whether the fees sought by the offeror are reasonable  
22 and justified in amount) implicates *Brunzell*, the 1969 Nevada Supreme Court case that sets  
23 forth factors for courts to consider in rendering attorneys' fees awards. *See Gunderson v. D.R.*  
24 *Horton, Inc.*, — Nev. —, 319 P.3d 606, 616 (2014), *reh'g denied* (Apr. 23, 2014) (concluding  
25 that the district court's failure to consider the *Brunzell* factors within its *Beattie* analysis  
26  
27

1 constitutes an abuse of discretion); see also *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345,  
2 349, 455 P.2d 31, 33 (1969).<sup>4</sup>

3 25. *Brunzell* establishes that the trial court must consider:

- 4 (1) the character and difficulty of the work performed;  
5 (2) the work actually performed by the attorney;  
6 (3) the qualities of the advocate; and  
7 (4) the result obtained.  
8

9 See *Brunzell*, 85 Nev. at 350, 455 P.2d at 33.

10 26. All of the *Brunzell* factors weigh in favor of granting the Sandin Defendants'  
11 Motion for Attorneys' Fees pre-appeal.

12 27. The Nevada Supreme Court has recognized that these statute and rules governing  
13 offers of judgment, permitting fee-shifting penalties to be assessed against an offeree who  
14 "rejects an offer and fails to obtain a more favorable judgment," extend to fees incurred on and  
15 after appeal. *In re: The Estate and Living Trust of Miller*, 125 Nev. 550, 555 (2009).  
16

17 28. Weighing all of the factors articulated in *Beattie* and *Brunzell*, an award of post  
18 appeal attorneys' fees and costs in favor of the Sandin Defendants is warranted.

19 29. Because the offer was made while this matter was in the court annexed  
20 arbitration program in which the maximum recovery for attorneys' fees would have been  
21

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22 <sup>4</sup> ~~Error! Main Document Only.~~ The Nevada Supreme Court has also ruled that other accepted methods may be  
23 used to calculate attorneys' fees, provided that the *Brunzell* factors are still considered. See *Haley v. Eighth*  
24 *Judicial Dist. Ct.*, — Nev. —, 273 P.3d 855, 860 (2012) ("[I]n determining the amount of fees to award, the court  
25 is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a  
26 reasonable amount,' so long as the requested amount is reviewed in light of the factors set forth in *Brunzell* . . .")  
27 (quoting *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 549 (2005))).

1 \$3,000.00, the amount of attorneys' fees and costs incurred during this period should be  
2 discounted by the amount of attorneys' fees accrued in excess of \$3,000, i.e., by \$32,000.00.  
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**JUDGMENT**

IT IS THEREFORE ORDERED that the Sandin Defendants' Motion for Attorneys' Fees and Costs is hereby GRANTED and that judgment be entered against OPH and in favor of the Sandin Defendants accordingly:

**Total Attorneys' Fees pre- and post appeal:** (\$140,857 pre-appeal + \$18,385 post-appeal) = **\$159,242.00**

**Less arbitration discount:** (\$159,242.00 - \$32,000.00) = **(\$127,242.00)**

**Costs:** (\$7,448.63 pre appeal + \$97.92 post appeal) = **\$7,546.55**

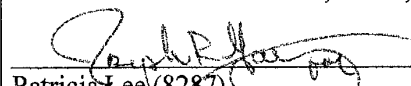
**TOTAL AMOUNT OF JUDGMENT: \$134,788.55**


IT IS SO ORDERED this 8<sup>th</sup> day of March, 2018.

  
HONORABLE JUDGE GLORIA STURMAN

HUTCHISON & STEFFEN, PLLC,

DICKINSON WRIGHT, PLLC

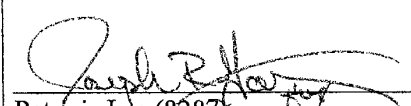
  
Patricia Lee (8287)  
10080 W. Alta Drive, Suite 200  
Las Vegas, Nevada 89129  
E-Mail: [plee@hutchlegal.com](mailto:plee@hutchlegal.com)

  
Michael N. Feder (7332)  
Gabriel Blumberg (12332)  
8363 W. Sunset Rd., Suite 200  
Las Vegas, Nevada 89113  
E-Mail: [mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
[gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)

*Attorneys for Dave Sandin and Sandin & Co.*

Respectfully submitted by:

HUTCHISON & STEFFEN, LLC

  
Patricia Lee (8287)  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN,  
3 LLC. and that on this <sup>22<sup>nd</sup></sup> day of February, 2018~~February, 2018~~, I caused the above and  
4 foregoing document entitled **FINDING OF FACTS, CONCLUSIONS OF LAW AND**  
5 **JUDGMENT IN FAVOR OF DAVE SANDIN AND SANDIN & CO. ON THEIR**  
6 **MOTION FOR ATTORNEYS' FEES AND COSTS**  
7 to be served as follows:

8 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed  
9 envelope upon which first class postage was prepaid in Las Vegas,  
10 Nevada; and/or

11 ☒ to be served via electronic mail pursuant to the parties' consents to electronic  
12 service; and/or

13 ☐ pursuant to Administrative Order 14-2, N.E.F.C.R. 9, EDCR 8.05(a) and 8.05(f),  
14 to be electronically served through the Eighth Judicial District Court's  
15 electronic filing system, with the date and time of the electronic service  
16 substituted for the date and place of deposit in the mail; and/or

17 ☐ to be hand-delivered;

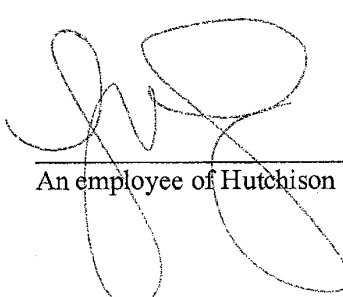
18 to the attorneys listed below at the address and emails indicated below:

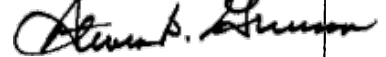
19 Michael N. Feder, Esq.  
20 Gabriel Blumberg, Esq.  
21 DICKINSON WRIGHT, PLLC  
22 8363 W. Sunset Rd., Suite 200  
23 Las Vegas, NV 89113

24 *Attorneys for plaintiff*  
25 *O.P.H. of Las Vegas Inc.*

26 Robert Freeman, Esq.  
27 Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
6385 S. Rainbow Blvd., Ste. 600  
Las Vegas, NV 89118

*Attorneys for Oregon Mutual Insurance*  
*Company*

  
An employee of Hutchison & Steffen, LLC



1 **MOT**  
2 **DICKINSON WRIGHT PLLC**  
3 **MICHAEL N. FEDER**, Nevada Bar No. 7332  
4 Email: [mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
5 **GABRIEL BLUMBERG**, Nevada Bar No. 12332  
6 Email: [gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)  
7 8363 West Sunset Road, Suite 200  
8 Las Vegas, Nevada 89113-2210  
9 Tel: (702) 550-4400  
10 Fax: (844) 670-6009  
11 *Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

7  
8 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

9 **O.P.H. OF LAS VEGAS, INC.,**

10 Plaintiff,

11 v.

12 **OREGON MUTUAL INSURANCE**  
13 **COMPANY, DAVE SANDIN, AND SANDIN**  
14 **& Co.**

15 Defendants.

CASE NO. A-12-672158-C  
DEPT. NO. XXVI

**PLAINTIFF O.P.H. OF LAS VEGAS**  
**INC.'S MOTION TO RECONSIDER**  
**AND/OR AMEND JUDGMENT**

15 Plaintiff O.P.H. OF LAS VEGAS, INC. ("OPH"), by and through its counsel, the law  
16 firm of Dickinson Wright PLLC, hereby files its Motion to Reconsider and/or Amend this  
17 Court's March 14, 2018 Findings of Facts, Conclusions of Law and Judgment in Favor of Dave  
18 Sandin and Sandin & Co. (the "Sandin Defendants") on their Motion for Attorneys' Fees and  
19 Costs (the "Judgment").

20 This motion is based on the following Memorandum of Points and Authorities; the  
21 declaration of Gabriel A. Blumberg attached hereto as Exhibit 1 and the exhibits attached  
22 thereto; the papers and pleading already on file herein; and any oral argument the Court may  
23 permit at the hearing of this matter.

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**NOTICE OF MOTION**

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the above and foregoing **PLAINTIFF O.P.H. OF LAS VEGAS INC.'S MOTION TO RECONSIDER AND/OR AMEND JUDGMENT** on for hearing before this Court on the 01 day of May 2018, at the hour of 9:00 o'clock A.m. of said day, or as soon thereafter as counsel can be heard in Department No. XXVI.

DATED this 30<sup>th</sup> day of March 2018.

DICKINSON WRIGHT PLLC

  
Michael N. Feder  
Nevada Bar No. 7332  
Gabriel A. Blumberg  
Nevada Bar No. 12332  
8363 West Sunset Road, Suite 200  
Las Vegas, Nevada 89113-2210  
*Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

The Court should reconsider its prior ruling and vacate the Judgment because it erred in analyzing and applying the *Beattie* factors. In Nevada, a party can only recover attorneys' fees pursuant to an offer of judgment if the Court finds that the *Beattie* factors are satisfied. The *Beattie* factors hone in on the reasonableness of the plaintiff in pursuing claims and rejecting an offer of judgment, as well as the reasonableness in timing and amount of any offer of judgment made by the defendant.

A review of the facts in this matter indicates that the Court erred in applying the *Beattie* factors and awarding attorneys' fees to the Sandin Defendants. As the Court recognized, OPH reasonably and in good faith pursued claims against the Sandin Defendants in this matter. Indeed, OPH even defeated the Sandin Defendants' motion to dismiss its claims.

///

When the parties' actions are scrutinized, it is unmistakable that OPH acted reasonably and in good faith throughout the proceedings. OPH's admirable conduct is sharply contrasted by that of the Sandin Defendants, who merely made a token offer of judgment after their motion to dismiss was denied in an effort to spring over one hundred thousand dollars of attorneys' fees on OPH as it pursued its claims in good faith. This bad faith conduct by the Sandin Defendants is the exact type of behavior the Nevada Supreme Court attempted to guard against by requiring the *Beattie* analysis and therefore the Court's decision to award attorneys' fees to the Sandin Defendants should be reconsidered and the Judgment should be vacated.

OPH commenced this action on November 11, 2012, by filing claims against Oregon Mutual Insurance (“OMI”) and the Sandin Defendants based on the denial of insurance coverage from a fire on August 17, 2012 that destroyed OPH’s restaurant located at 4833 West Charleston Boulevard in Las Vegas, Nevada. Judgment at ¶ 1. OPH asserted claims for fraud in the inducement (third cause of action), fraud (fourth cause of action), breach of fiduciary duty (fifth cause of action), violations of NRS §686A.310 (sixth cause of action), and negligence (seventh cause of action) against the Sandin Defendants. *Id.* at ¶ 2. In the caption of the Complaint itself, OPH alleged in bold font that it was seeking damages in excess of \$50,000. *See* Complaint, on file herein.

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1 prepared for and attended the hearing on the motion to dismiss that was held on February 13,  
2 2013. At the hearing, this Court orally denied the Sandin Defendants' motion to dismiss.<sup>1</sup> *Id.* at  
3 ¶ 4.

4 The very next day, on February 14, 2013, the Sandin Defendants served an offer of  
5 judgment on OPH offering to settle all claims for the sum of Two Thousand Dollars and No  
6 Cents (\$2,000.00) pursuant to NRCP 68 and/or NRS 17.115. *Id.* at ¶ 5. OPH, who had just  
7 prevailed on the Sandin Defendants' motion to dismiss, had already expended more than \$2,000  
8 in attorneys' fees, and was seeking hundreds of thousands of dollars in damages, reasonably  
9 rejected the offer of judgment. *Id.* at ¶ 6.

10 A little more than a year later, on March 17, 2015, the Sandin Defendants filed their  
11 motion for summary judgment, seeking judgment in their favor on all of OPH's claims against  
12 them. *Id.* at ¶ 9. The Court granted the Sandin Defendants' motion for summary judgment at a  
13 hearing on May 14, 2015. *Id.* at ¶¶ 10-11.

14 The written summary judgment order was entered on July 1, 2015 and, on August 13,  
15 2015, judgment was entered in favor of the Sandin Defendants and against OPH on all of OPH's  
16 claims against the Sandin Defendants. *Id.* at ¶¶ 12-13.

17 On September 2, 2015, the Sandin Defendants brought a Motion for Attorneys' Fees and  
18 Costs seeking to recover attorneys' fees as the prevailing party on their token \$2,000 offer of  
19 judgment. *Id.* at ¶ 14. The matter came before the Court for oral argument on November 17,  
20 2015, at which the time the Court granted the Sandin Defendants' Motion for Costs and took  
21 their Motion for Attorneys' Fees under advisement. *Id.* at ¶ 15.

22 In the meantime and following the notice of entry of judgment in favor of the Sandin  
23 Defendants, OPH appealed this Court's granting of the Sandin Defendants' motion for summary  
24 judgment. *Id.* at ¶ 16. On September 14, 2017, the Nevada Supreme Court affirmed the ruling  
25 of this Court as to the summary disposition of OPH's claims against the Sandin Defendants and a  
26 remittur was issued on October 9, 2017. *Id.* at ¶ 17.

27 ///

28 <sup>1</sup> The written order was entered on March 12, 2013. Judgment at ¶ 4.

This Court then held another hearing on the Sandin Defendants' Motion for Attorneys' Fees on February 6, 2018. *See* Ex. 1-A. At the hearing, this Court found that "it wasn't unreasonable [for OPH] to proceed" and OPH was acting "in good faith here." *Id.* at 14:20; 15:2. The Court further found that Nevada Supreme Court precedent dictated that if a party rejected an offer of judgment, such rejection "had to be grossly unreasonable" to justify awarding attorneys' fees. *Id.* at 14:18-19. In addressing this issue, the Court specifically held that OPH's decision to reject the offer of judgment was not grossly unreasonable. *Id.* at 14:18-21. Despite making these findings and observing that the Court "can't just award everything just based on reasonableness [of the offer]," the Court then granted the Sandin Defendants' motion for attorneys' fees.<sup>2</sup> *Id.* at 15:12-13.

### III. LEGAL ARGUMENT

#### A. Legal Standard for Reconsideration

A court has the inherent authority to reconsider its prior orders. *Trail v. Farretto*, 91 Nev. 401, 536 P.2d 1026 (1975)("[A] trial court may, for sufficient cause shown, amend, correct, resettle, modify or vacate, as the case may be, an order previously made and entered on the motion in the progress of the cause or proceeding"). This authority is also provided by Eighth Judicial District Court Rule ("EDCR") 2.24, which provides, in pertinent part:

A party seeking reconsideration of a ruling of the court ... must file a motion for such relief within 10 days after service of the written order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion.

EDCR 2.24(b); *see also* *N. Main, LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 128 Nev. 922, 381 P.3d 646 (2012) (citing *Masonry and Tile v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)) ("a district court may consider a motion for reconsideration concerning a previously decided issue if the decision was clearly erroneous.")<sup>3</sup>. For the reasons set forth more fully herein, reconsideration is appropriate and the Judgment should be vacated.

<sup>2</sup> The Court reduced the Sandin Defendants' requested attorneys' fees by \$32,000 to account for the fact that attorneys' fees are capped at \$3,000 while a matter is in the court-annexed arbitration.

<sup>3</sup> The standard for amending a judgment under NRCP 59(e) is similar to that of a motion for reconsideration under EDCR 2.24(b). *See, e.g., AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010).

1 **B. Reconsideration is Warranted Because the Court Misapplied the *Beattie* Factors**

2 An offer of judgment made pursuant to NRCP 68 may be made at any time more than ten  
3 days prior to trial. NRCP 68(a). If the offeree rejects an offer and fails to obtain a more  
4 favorable judgment, “the offeree shall pay the offeror’s post-offer costs, applicable interest on  
5 the judgment from the time of the offer to the time of entry of the judgment and reasonable  
6 attorney’s fees, if any be allowed, actually incurred by the offeror from the time of the offer.”  
7 NRCP 68(f)(2). An offer is rejected if it is not accepted within ten days of the offer being made.  
8 NRCP 68(e).

9 In addition to the mandates of NRCP 68, the Nevada Supreme Court has set forth several  
10 factors to be considered in determining when and how the Court may exercise its discretion in  
11 awarding attorneys’ fees after entry of judgment, including:

- 12 (1) whether OPH’s claims were brought in good faith;
- 13 (2) whether the Sandin Defendants’ Offer of Judgment was reasonable and in  
14 good faith in both its timing and amount;
- 15 (3) whether OPH’s decision to reject the offer was grossly unreasonable or in  
16 bad faith; and
- 17 (4) whether the attorneys’ fees sought by the Sandin Defendants are  
18 reasonable and justified in amount.

19 *See Beattie v. Thomas*, 99 Nev. 579, 588-89; 668 P.2d 268, 274 (1983); *see also Ozawa v. Vision*  
20 *Airlines*, 216 P.3d 788, 792 (Nev. 2009). Where the first three factors weigh in favor of denying  
21 attorneys’ fees, “the reasonableness of the fees requested by the offeror becomes irrelevant, and  
22 cannot, by itself, support a decision to award attorney fees to the offeror.”<sup>4</sup> *Frazier v. Drake*,  
23 131 Nev. Adv. Op. 64, 357 P.3d 365, 373 (Nev. Ct. App. 2015).

24 Here, the Court unambiguously found in favor of OPH on the first and third *Beattie*  
25 factors, but clearly erred in concluding that the second factor alone supported awarding  
26 attorneys’ fees.<sup>5</sup> As a result, reconsideration of the attorneys’ fees award is warranted.

27 ///

28 <sup>4</sup> Given this holding in *Drake*, OPH does not address the Court’s *Brunzell* analysis.

<sup>5</sup> *See* Ex. 1-A at 14:18-21; 15:2.

1                   **1.       OPH Filed Its Claims in Good Faith**

2           The first *Beattie* factor considers whether OPH brought its claims in good faith. *Beattie*  
3 *v. Thomas*, 99 Nev. at 588-89. In evaluating this factor, it is important to note that “[c]laims may  
4 be unmeritorious and still be brought in good faith.” *Max Baer*, 2012 WL 5944767, \*3. In fact,  
5 a party can pursue claims in good faith even if the plaintiff’s belief that it will prevail on its  
6 claims turns out to be incorrect in hindsight. *Assurance Co. of America v. National Fire &*  
7 *Marine Ins. Co.*, 2012 WL 6626809, \*3 (D. Nev. Dec. 19, 2012).

8           Here, the Court found that OPH was acting “in good faith here” and “it wasn’t  
9 unreasonable to proceed.”<sup>6</sup> Ex. 1-A at 14:20; 15:2. As a result, the first factor undoubtedly  
10 favors OPH and denying attorneys’ fees to the Sandin Defendants.

11                   **2.       The Offer of Judgment Was Unreasonable and in Bad Faith in Both**  
12                   **Timing and Amount**

13           The Court clearly erred in finding that the Sandin Defendants made a good faith offer of  
14 judgment and that the offer was reasonable in amount and timing. The purpose of an offer of  
15 judgment “is to promote settlement of suits by rewarding defendants who make reasonable  
16 offers.” *See Muije v. A North Las Vegas Cab Co., Inc.*, 106 Nev. 664, 667, 799 P.2d 559, 561  
17 (1990). It is not intended to be used “as a mechanism to unfairly force plaintiffs to forego  
18 legitimate claims,” nor is it supposed to be used as a trap by defendants to force attorneys’ fees  
19 upon plaintiffs who seek to pursue colorable claims in good faith.<sup>7</sup> *Drake*, 357 P.3d at 373;

20 \_\_\_\_\_  
21 <sup>6</sup> When this Court denied the Sandin Defendants’ motion to dismiss, the only reasonable belief OPH could have was  
22 that it was pursuing meritorious claims in good faith. Had that not been the case, then the claims against the Sandin  
23 Defendants should have been dismissed. If they were dismissed, the Sandin Defendants never would have incurred  
six figures worth of attorneys’ fees that OPH is now on the hook for paying. Simply put, it is fundamentally unfair  
to penalize OPH, a party who prevailed on the Sandin Defendants’ motion to dismiss, solely because the Court in  
retrospect may believe that the motion to dismiss maybe should have been granted. Ex. 1-A at 17:19-23.

24 <sup>7</sup> By imposing a penalty of over one hundred thousand dollars in attorneys’ fees on OPH based on the Sandin  
25 Defendants’ nominal \$2,000 offer of judgment, the Court contradicted this governing precedent and even its own  
26 admission that OPH was “entitled to try to prove [its] case.”<sup>7</sup> Ex. 1-A at 17:20-21. Indeed, the Court effectively is  
27 telling future litigants that they will be assessed attorneys’ fees if they ultimately cannot prevail on their claims,  
28 regardless of the reasonableness (or unreasonableness) of the offer of judgment made by a defendant or the  
reasonableness of the plaintiff pursuing its case. This is directly contrary to Nevada’s controlling precedent, which  
focuses on using *Beattie* to avoid the exact outcome that the Court implemented in this case. *See e.g. Drake*, 357  
P.3d at 371; *see also Scrima*, 126 Nev. 702, \*3, n. 1 (holding that courts should not “encourage defendants to submit  
small, token offers of judgment so they can obtain attorney fees and costs every time the jury gives a verdict in their  
favor”).

1 *Costco Wholesale Corp. v. Scrima*, 126 Nev. 702, 367 P.3d 760, \*3 n.1 (2000).

2 Indeed, Nevada courts have routinely looked with disfavor upon small, token offers of  
3 judgment. *Scrima*, 126 Nev. 702, \*3 n.1 (finding \$1,000 offer of judgment “not reasonable or  
4 made in good faith”); *Max Baer*, 2012 WL 5944767, \*3 (finding \$1,000 token offer at the outset  
5 of the case to be unreasonable). The fact pattern in *Max Baer* is particularly instructive. In *Max*  
6 *Baer*, the defendant made a \$1,000 offer of judgment to the plaintiff after the close of discovery.  
7 *Id.* The plaintiff rejected the offer by failing to respond. *Id.* Ultimately, the plaintiff’s claims  
8 were dismissed and the defendant moved for an award of attorneys’ fees based on its offer of  
9 judgment. *Id.*

10 The Court was indecisive as to whether the plaintiff brought its claims in good faith and  
11 concluded that the timing of the offer reflected good faith because the offer was made after the  
12 close of discovery, thereby allowing the plaintiff “to better assess his chances of success when  
13 the offer was made, *as opposed to the situation where a Defendant makes a token offer at the*  
14 *outset of a case.*” *Id.* (emphasis added). The court further found that plaintiff’s rejection of the  
15 offer was not grossly unreasonable because the “offer was made for a token amount after  
16 Plaintiff had already expended many times the offer in legal fees.” *Id.* (“Plaintiff’s decision to  
17 await dispositive motion rulings rather than accept the token offer was not unreasonable in-and-  
18 of-itself under the circumstances”). The court also determined that the attorneys’ fees and costs  
19 sought by defendant were reasonable. *Id.* Thus, after conducting this analysis and finding that  
20 factors two and four weighed in favor of awarding fees, factor one was neutral, and factor three  
21 weighed against awarding attorneys’ fees, the court ultimately held that “the second and third  
22 factors are most important, and that fees and costs should not be permitted because of the  
23 reasonableness of the rejection of the offer in light of the amount and timing.” *Id.* at \*4.

24 Here, the factors weigh noticeably more in favor of OPH than the plaintiff in *Max Baer*  
25 who was not penalized with attorneys’ fees. Similar to the plaintiff in *Max Baer*, the Court here  
26 concluded that OPH acted reasonably in rejecting the offer of judgment. Ex. 1-A at 14:18-21.  
27 Unlike the plaintiff in *Max Baer*, however, the Court here also concluded that OPH brought its  
28 claims in good faith. Ex. 1-A at 14:20; 15:2. Furthermore, in contradiction to *Max Baer* where

1 the court found the timing of the offer of judgment to be reasonable because it was made after  
2 discovery closed, the timing of the Sandin Defendants' offer was unreasonable and in bad faith  
3 because it was made *prior to any discovery and the day after OPH had defeated the Sandin*  
4 *Defendants' motion to dismiss*, for an amount far less than what the parties had already expended  
5 on the Sandin Defendants' unsuccessful motion to dismiss. Based on these facts, it is apparent  
6 that the award of attorneys' fees to the Sandin Defendants based solely on the second *Beattie*  
7 factor contravened well-established case law in Nevada analyzing and implementing the *Beattie*  
8 factors.

9 **3. OPH's Decision to Reject the Offer Was Not Grossly Unreasonable or**  
10 **in Bad Faith**

11 The third *Beattie* factor also suggests that an award of attorneys' fees was improper  
12 because OPH was not grossly unreasonable in rejecting the offer of judgment. "Grossly  
13 unreasonable or bad faith rises to a much higher level than poor judgment or incorrect tactical  
14 decisions." *Assurance Co. of America v. National Fire & Marine Ins. Co.*, 2012 WL 6626809,  
15 \*3 (D. Nev. Dec. 19, 2012). As noted above, a plaintiff's rejection of an offer of judgment is  
16 not grossly unreasonable when the "offer was made for a token amount after Plaintiff had  
17 already expended many times the offer in legal fees." *Max Baer*, 2012 WL 5944767, \*3.

18 Here, the Court specifically found that OPH's decision to reject the offer of judgment  
19 was not grossly unreasonable. Ex. 1-A at 14:18-21. This finding was corroborated by the fact  
20 that OPH pursued its claims in good faith and had already expended more than the offer in legal  
21 fees by the time the offer was made. Ex. 1-A at 14:20; 15:2. Thus, in addition to the first and  
22 second factors, the third *Beattie* factor also indicates that the Sandin Defendants' request for  
23 attorneys' fees should have been denied.

24 Given that all three of these *Beattie* factors disfavor an award of attorneys' fees, the Court  
25 should reconsider its prior ruling and vacate its Judgment.

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IV. CONCLUSION

Based on the foregoing, OPH respectfully requests that this Court reconsider its prior ruling, vacate the Judgment, and deny the Sandin Defendants' request for attorneys' fees.

DATED this 30<sup>th</sup> day of March 2018.

DICKINSON WRIGHT PLLC



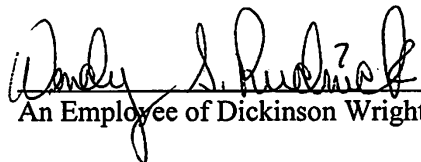
Michael N. Feder  
Nevada Bar No. 7332  
Gabriel A. Blumberg  
Nevada Bar No. 12332  
8363 West Sunset Road, Suite 200  
Las Vegas, Nevada 89113-2210  
*Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 30th day of March 2018, she caused a copy of the **PLAINTIFF O.P.H. OF LAS VEGAS INC.'S MOTION TO RECONSIDER AND/OR AMEND JUDGMENT** to be transmitted via Odyssey E-Filing System pursuant to Rule 5(b)(2)(D) of the Nevada Rules of Civil Procedure and Rule 8.05 of the Eighth Judicial District Court Rules as follows:

Robert W. Freeman, Esq.  
Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD &  
SMITH LLP  
6385 S. Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
Email: [robert.freeman@lewisbrisbois.com](mailto:robert.freeman@lewisbrisbois.com)  
Email: [pobriant@lewisbrisbois.com](mailto:pobriant@lewisbrisbois.com)  
*Attorneys for Defendant*  
*Oregon Mutual Insurance Company*

Patricia Lee, Esq.  
HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Email: [plee@hutchlegal.com](mailto:plee@hutchlegal.com)  
*Attorneys for Defendants*  
*Dave Sandin and Sandin & Co.*

  
An Employee of Dickinson Wright PLLC

## EXHIBIT 1

## EXHIBIT 1

**DECLARATION OF GABRIEL A. BLUMBERG, ESQ. IN SUPPORT OF MOTION TO RECONSIDER AND/OR AMEND JUDGMENT**

I, Gabriel A. Blumberg, Esq. do hereby state and declare as follows:

1. I am an attorney with the law firm of Dickinson Wright PLLC, counsel for Plaintiff O.P.H. of Las Vegas, Inc. ("O.P.H."). I am duly licensed to practice before all courts in the State of Nevada and I have personal knowledge of all facts addressed herein, except for those matters stated on information and belief, and as for those matters, I am informed and believe them to be true, and if called upon to testify, could and would do so.

2. I make this declaration in support of OPH's Motion to Reconsider and/or Amend Judgment (the "Motion").

3. Attached hereto as Exhibit 1-A is a true and correct copy of the transcript of the February 6, 2018 hearing on the Sandin Defendants' motion for attorneys' fees.

DATED this 30<sup>th</sup> day of March 2018.

  
GABRIEL A. BLUMBERG, ESQ.

## EXHIBIT 1-A

## EXHIBIT 1-A

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**RTRAN**

DISTRICT COURT  
CLARK COUNTY, NEVADA

O.P.H. OF LAS VEGAS, INC.,	}	CASE#: A-12-672158-C
Plaintiff,		DEPT.: CIVIL
vs.		
OREGON MUTUAL INSURANCE COMPANY,		
Defendant.		

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE  
TUESDAY, FEBRUARY 6, 2018  
***RECORDER'S TRANSCRIPT OF HEARING***  
**MOTION FOR ATTORNEY'S FEES AND COSTS**

APPEARANCES:

For the Plaintiff:	GABRIEL A. BLUMBERG, ESQ.
For the Defendant:	PATRICIA LEE, ESQ. PRISCILLA L. O'BRIANT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, February 6, 2018

2  
3 [Case called at 11:16 a.m.]

4 THE COURT: O.P.H. v Oregon Mutual Insurance.

5 MS. LEE: Good morning, Your Honor. Patricia Lee, bar  
6 number 8287, on behalf of the Sandin defendants.

7 THE COURT: Okay.

8 MR. BLUMBERG: Good morning, Your Honor. Gabriel  
9 Blumberg, 12332, on behalf of O.P.H.

10 MS. O'BRIANT: Priscilla O'Briant, bar number 10171, on  
11 behalf of Oregon Mutual Insurance.

12 THE COURT: So this motion for fees had been brought  
13 previously, then the appeal happened. What the Court had wanted to  
14 look at was these arguments that the fees were excessive during the  
15 arbitration phase of the case where their fees would have been limited to  
16 \$3,000. So is that unreasonable to have failed to accept the offer of  
17 judgment at that point in time, or if it wasn't, should they be entitled to  
18 the fees based on \$38,000 being incurred in a phase when there's only  
19 \$3,000? And the reason that was significant was the Court of Appeals  
20 had just, a month or two earlier, decided *Frazier v Drake*, 357 P.3d 365,  
21 September 3<sup>rd</sup>, 2015, which went to this whole issue of offers of  
22 judgments and awarding attorney's fees under them. So that was really  
23 the case that was of interest to me. And I don't think anything new in the  
24 intervening period of time has really been decided.

25 So since this is kind of the last word on -- on appeals, you did

1 have -- oh, the only other one that was particularly significant, and this  
2 one is unpublished, but it's a Supreme Court unpublished, is a decision  
3 on -- it really kind turned on whether attorney's fees could be awarded  
4 for block billed entries. And the Supreme Court said you can -- you can  
5 award block billed fees if you can tell what portion of each block billing  
6 entry was attributed to which part of the amount claimed.

7 So those were the cases that are of interest to me. So if  
8 there's anything further, then,

9 Ms. Lee?

10 MS. LEE: Yes, Your Honor, and thank you. As you know, we  
11 were here a couple of years ago on this motion for attorney's fees, so  
12 we are trying to get rolling on that initial motion. I know Your Honor did  
13 have a curiosity about this whole arbitration issue. I hope that your  
14 research has satisfied your inquiries in that regard.

15 We still maintain that the offer was reasonable, both in its  
16 timing and amount again, at the time it was in arbitration, which would  
17 have limited their damages to \$50,000. The experts have ultimately  
18 opined that the damages ranged between \$10,000 and \$14,000,  
19 depending on whether or not this lease would have continued for  
20 O.P.H., or if the landlord were to cancel the lease. Also, those damages  
21 were not apportioned. We would have said that our, as the broker, our  
22 liability would have been substantially less than the actual insured.

23 And, Your Honor, and I won't belabor the points. We've gone  
24 through the *Brunzell* and *Beattie* factors ad nauseam, you've heard them  
25 before. We have some new arguments, just in terms of the appeal,



1 which we are entitled to ask for under the relevant case law we cited.

2 THE COURT: And so --

3 MS. LEE: But --

4 THE COURT: -- in your Exhibit F, this is the attorney's fees

5 from the appeal --

6 MS. LEE: Is that for the --

7 THE COURT: -- from the motion for fees and costs forward.

8 It's after the summary judgment was granted --

9 MS. LEE: Yes.

10 THE COURT: -- going forward.

11 MS. LEE: Correct.

12 THE COURT: So --

13 MS. LEE: So and that -- that totaled about \$18,000 for the

14 entirety of the appellate process, which we would -- we would submit is

15 fairly reasonable given the -- the complexity of the appeal, having to go

16 back and review the entire record. You know, I don't know, Michael Wall,

17 who is the attorney from my office who handled that appeal, he usually

18 doesn't roll out of bed for less than 25 grand on an appeal.

19 THE COURT: Um-hmm.

20 MS. LEE: However, this client does have special rates for us.

21 So the -- so the amount of fees are more than reasonable, we would

22 argue, Your Honor.

23 And the only thing that I would like to just kind of put on the

24 record orally is the timing. I think the timing was the biggest issue that I

25 saw raised in the opposition. Granted, the offer of judgment was made

1 the day after Your Honor denied our motion to dismiss without  
2 prejudice --

3 THE COURT: Um-hmm.

4 MS. LEE: -- and with reservation, I might add. Your Honor  
5 was, you know, kind of lamenting the fact that we don't apply the more  
6 stringent *Iqbal* standard here. And perhaps if that were the case, Your  
7 Honor would have granted that motion. And ultimately Your Honor went  
8 back at that motion for summary judgment phase and said: You know, I  
9 really can't see this being more than just a contract that was frustrated  
10 by the insured not paying their premiums on time.

11 So when we talk about timing, Your Honor, and I looked  
12 carefully at their motion -- their opposition --

13 THE COURT: Um-hmm.

14 MS. LEE: -- and I see where they are conflating newly  
15 discovered facts that happened six months down the road after, you  
16 know, we had started this case. You know, we had not filed a response  
17 to the pleading. They didn't know what our answer was going to be or  
18 our affirmative defenses or, you know, an exculpatory allegations.

19 However, what they -- this is what they did know before filing  
20 the Complaint. First, they knew that our clients as the insurance brokers  
21 did not receive notice of the cancellation, of the pending cancellation.  
22 They put that right into their Complaint as an affirmative allegation.  
23 Paragraphs 26 and 27 of their Complaint says that the Sandin  
24 defendants were never provided notice of the cancellation, and they did  
25 not know about the notice of cancellation.

1           So just as a practical matter, Your Honor, even if there was  
2 some kind of duty, some strained, tenuous duty, which the Supreme  
3 Court has said doesn't exist, which Your Honor said doesn't exist, which  
4 case law, statute, and every jurisdiction says doesn't exist, there is no  
5 duty, but even if there was this duty, it was factually impossible for my  
6 client to give them notice of a pending cancellation because they  
7 themselves never had notice. So they knew that before they filed the  
8 Complaint.

9           Another thing that they knew, the whole reason why Your  
10 Honor actually allowed this case to move forward is because they made  
11 this course and conduct argument. Well, the Sandin defendants had  
12 done this in the past. They had warned us that our policy was going to  
13 terminate, and so they had a duty to continue this course of conduct.  
14 Well turns out when we had deposed their person most knowledgeable  
15 on this issue, she said: Well, the three previous times that they gave us  
16 notice were on these three specific dates. And she gave very specific  
17 dates.

18           Well, that date span that she gave, my client wasn't even their  
19 broker of record at the time. He was working at another company under  
20 a noncompete. In fact, he could not have been their broker. And then  
21 Nevada Supreme Court acknowledged that fact and said out of two out  
22 of the three times that they touted, my client wasn't even their broker of  
23 record during that time. So they knew that before they filed the  
24 Complaint.

25           Another thing that they knew, Your Honor, is that they knew

1 that they actually knew about the termination prior to the termination  
2 term. They wrote a check. They realized that they were late on their  
3 July payment. They wrote a check and for whatever reason, they never  
4 sent it. So they were well aware.

5 So, you know, Your Honor, it's just -- it's just, you know, this  
6 whole climate of let's blame everybody else for our things that we were  
7 supposed to take responsibility for. If I don't pay my mortgage and my  
8 home gets foreclosed on, I can't go sue my real estate broker for not  
9 giving me notice that I didn't pay my mortgage.

10 THE COURT: Okay.

11 MS. LEE: It's not -- it's not her responsibility. So they knew  
12 that as well.

13 And, in fact, I wanted to point out that as far as the payment  
14 being missed, Steven Freudenberger testified during his deposition, 1 of  
15 16 that was taken in this case, 11 of which were out of state, he said:  
16 Had I done my work that I'm paying myself to do -- and he's the  
17 president of O.P.H. or he was at the time -- that I'm paying myself to do  
18 to make sure that all this stuff gets paid in a timely manner, we wouldn't  
19 be sitting here either.

20 So that is the procedure. I didn't do my job in that moment.  
21 That's all I can say about that. I mean, it's a mishap in the company.  
22 There is no -- I'm not trying to blame anybody for that payment not being  
23 made on July 26th.

24 Well, they are trying to blame someone for that payment not  
25 being made. And it looks here Mr. Freudenberger is trying to take

1 responsibility for it, but legally they're doing the exact opposite. They're  
2 trying to put the blame on an insurance broker. There was no basis in  
3 law.

4 THE COURT: Well, I don't understand why we're talking  
5 about because that doesn't really have anything to do with this whole  
6 issue of, as you point out, the *Beattie* -- first you look at *Beattie*, and  
7 then you look at *Brunzell*. So how does that contribute --

8 MS. LEE: It goes to the --

9 THE COURT: -- to the analysis of the attorney's fee?

10 MS. LEE: The first *Beattie* factor, Your Honor, is whether or  
11 not they brought the claims in good faith. And that ties to and informs  
12 the timing of our offer of judgment. They brought the claims initially in  
13 bad faith. So our bringing of an offer of judgment at the initiation of the  
14 case makes sense. It was a bad case. They brought the claims in bad  
15 faith. So it informs the timing of our motion, and that's why I bring that  
16 up, Your Honor.

17 And I would also like to point out, under the -- the -- the offer  
18 of judgment rule is that the Nevada Supreme Court allows you to bring it  
19 at any point, at every possible juncture where the rules allow.

20 THE COURT: Okay.

21 MS. LEE: So we were not precluded. So you can bring it as  
22 early as -- before you even answer the Complaint, as long as it's not  
23 brought within ten days. So there's no hard and fast rule that says that  
24 just because they won a motion to dismiss, barely, that does not then  
25 translate into good faith, that they brought these claims in good faith. So

1 we would say that it was reasonable in both its timing --

2 THE COURT: Okay.

3 MS. LEE: -- and its amount. And I just bring up the timing  
4 because that was the primary basis for the opposition, as far as I could  
5 tell.

6 THE COURT: Thank you.

7 Ms. O'Briant, your client takes -- this is not relevant to your  
8 client.

9 MS. O'BRIANT: No. The only reason we appeared today is  
10 because they have new counsel and we wanted to make sure if there  
11 was any discussion about the procedural posture, that we were a part of  
12 it.

13 THE COURT: Okay. Thank you.

14 Counsel?

15 MR. BLUMBERG: And we'd agree that Oregon Mutual has no  
16 role in this motion, Your Honor.

17 I think Your Honor has hit the nail right on the head. We have  
18 to look at the *Beattie* factors and the *Brunzell* factors. It's not just the  
19 fact that they beat their offer of judgment.

20 THE COURT: Uh-huh.

21 MR. BLUMBERG: And we think the *Beattie* factors actually  
22 show that this was unreasonable in every single manner.

23 THE COURT: Uh-huh.

24 MR. BLUMBERG: First, the good faith claim is the first factor.  
25 And I think opposing Counsel somewhat misrepresented the Supreme

1 Court's holding, which I have right here, wherein they say: --

2 THE COURT: Uh-huh.

3 MR. BLUMBERG: -- We recognize that an insurance broker  
4 may assume additional duties to its insured client in special  
5 circumstances.

6 Fortunately we found here we didn't quite get there, but that  
7 doesn't mean the claim was unreasonable when we brought it. And it  
8 shows that it is actually possible to succeed on such a claim.

9 And then the second factor is the unreasonableness of the  
10 timing and the amount, and we think that's where they have a huge  
11 issue in this case, the timing. Opposing Counsel mentioned it. Before  
12 they filed an answer, before any discovery was conducted, the only  
13 information we had was that we had won on a motion -- their motion to  
14 dismiss. So there was some legs for our case and we didn't see any  
15 reason why a \$2,000 offer of judgment, when we had damages in the  
16 hundreds of thousands, if not more, was reasonable at all. And we  
17 know that the amount is not reasonable based on the amount of work  
18 they put into this case. In just the arbitration period, where if they're  
19 claiming they believe this was actually subject to only a \$50,000 cap  
20 despite our Complaint, our initial Complaint saying damages in excess  
21 of \$50,000, they spent over thirty-five -- \$35,000 defending a claim  
22 which they're now going to claim should have only been valued at  
23 \$2,000.

24 THE COURT: Uh-huh.

25 MR. BLUMBERG: It shows that's disingenuous at best. Even

1 they understood the claim wasn't properly valued at \$2,000. It would not  
2 have been reasonable to expect O.P.H. to accept such an offer,  
3 especially that early in the case.

4 And then we also see, when we look at the *Brunzell* factors,  
5 that they actually ended up spending over a thousand hours on this  
6 case. And if you look at that and then have them come back and say,  
7 you know, \$2,000 was probably a very reasonable offer when we've now  
8 expended over a thousand hours defending this case, if the claim was  
9 as meritless as they say, it never should have taken a thousand hours of  
10 work.

11 And I think that also goes to, if Your Honor somehow does find  
12 the *Beattie* factors weigh in their favor that the *Brunzell* factors mandate  
13 that this award must be substantially reduced. There's no way that this  
14 case should have taken a thousand hours to defend if the claim was as  
15 meritless as they believe. We had filed that in the initial opposition a  
16 couple years ago. And I think we highlight another few points in our  
17 opposition to their attorney -- appellate attorney's fees motion --

18 THE COURT: Right.

19 MR. BLUMBERG: -- that we think there was some excessive  
20 billing that was incurred. And while we agree that the hourly rate was  
21 reasonable, of course, it was discounted, it doesn't mean that they can  
22 make up for the discount in the hourly rate by then charging a thousand  
23 hours throughout the duration of the case.

24 THE COURT: Okay. Thank you. Originally the Court had  
25 found -- it's my recollection, is I didn't have my problem so much with the



1 *Beattie* factors as to the timing of the offer. I mean, you can make an  
2 offer immediately after appearing. One of the problems is how much is  
3 reasonable? So that was my -- more my concern, was it reasonable at  
4 that point in time to offer \$2,000?

5 But my real issue was more with the *Brunzell* factors. And  
6 that kind of ties into this whole thing of if you're really making a  
7 legitimate \$2,000 offer, why would you then spend \$35,000 when you  
8 know the most you can recover if you win at arbitration is \$3,000? So  
9 that was a problem for me. And where we -- that's why I got into these  
10 two cases that had just been decided earlier in 2015, I think like literally  
11 weeks on *Frazier v Drake*, before we had our hearing.

12 The first one is this whole concept of block billing. I know this  
13 is an unpublished decision, and for some reason an unpublished order  
14 shall not be regarded as precedent and shall not be set as legal  
15 authority, but that's after the rule change, so I don't know why they have  
16 that on there. I think this can be decided. And this is this concept of one  
17 problem with billing is block billing. How, when you're awarding  
18 attorney's fees, can you, if it's just like a big block of billing, say that's  
19 reasonable or not?

20 But -- so when I went back and looked through all these bills,  
21 just because the word and appears in a billing entry, it doesn't mean  
22 you're doing two completely separate and unrelated things and billing  
23 one amount for it. I mean, there's one in here where it's like, more  
24 recently, receive notice of substitution of counsel, and think something  
25 changed some database entry. That's not really two different things,

1 that's one thing, they go together.

2           So in looking for, you know, do we have block billing problems  
3 here? You know, I didn't really see that that was a problem for us in this  
4 case. It's pretty clearly broken out and you can tell what was billed in  
5 the different entries. So I didn't, in the end, really think that with respect  
6 to the reasonableness of their bills and, you know, were they something  
7 the Court could look at and say, yes, I think that's all reasonable and  
8 necessary.

9           Under this case, I ended up in the end not seeing any real  
10 concern. And that's the Margaret Mary Adams 2006 Trust. That's why  
11 I -- that's why I know about this case is it's a trust case which was dated  
12 March 26<sup>th</sup>, 2015. It is an unpublished Supreme Court decision, so I  
13 think that one was significant. So I looked at -- first, I looked at it for  
14 that. You know, you could maybe go through, if you want, the entire  
15 billing statement and pick and choose a couple of little entries. But  
16 when I look at them, they're like 0.2, so really, is it worth the time to go  
17 through and say, well, I can't award this because it's block billing when  
18 it's 0.2. I mean, it's going to be more time to review for maybe a couple  
19 of hours of time than you're going to -- you're going to find. It's not cost  
20 effective. There's not enough of it.

21           This isn't true block billing. I mean, for true block billing,  
22 you're looking at lengthy entries of, you know, I went to a deposition and  
23 I prepared for motion for summary judgment, and then I wrote a letter,  
24 eight hours, that's block billing. And I just didn't see it. So that -- my first  
25 concern there was gone.

1           And then under *Frazier v Drake*, which was decided on  
2     September 3, 2015 and is reported, 357 P.3d 365, this is a Court of  
3     Appeals case. This is the one that had just -- I don't know, I think our  
4     hearing was in October and this had just been decided September 3<sup>rd</sup>,  
5     2015, so this was the one that was really of interest to me. And again,  
6     they did do the analysis. You look first at your *Beattie* factors, then you  
7     look at your *Brunzell* factors. And what most people know this case for,  
8     and that's what I had done, is reduce the expert fees to \$1500 because  
9     this is the case that gives our authority to say, you know, really, unless  
10    they testify, it's unreasonable to charge more than \$1500.

11           But there's other stuff in here about the timing of the offer of  
12    judgment. The District Court found that the offers of judgment were  
13    brought in good faith, that the -- the *Frazier*, *Keys* offers. *Drake's* offers  
14    were not reasonable or made in good faith in either timing or amount,  
15    and that the decisions to reject those offers were not grossly  
16    unreasonable or in bad faith.

17           So that's kind of what was new in *Frazier v Drake* was this  
18    concept that if you decide to reject -- if your client decided to reject not in  
19    good faith, it had to be grossly unreasonable. And that's -- I mean, I  
20    thought pretty much everybody was operating in good faith here.  
21    Nobody -- it's just you guys didn't agree. Your clients were relying on  
22    this course of conduct that they felt they had with their real estate  
23    agent -- insurance agent, which was what Ms. Lee was talking about,  
24    this course of conduct. You know, ultimately the Court didn't find that  
25    that standard was met. That's a very unusual and way outside normal

1 duties of insurance agents.

2           So, I mean, it wasn't unreasonable to proceed, but on the  
3 other hand, it was certainly a reasonable offer from them because they  
4 just -- there is no such -- there is no such global duty. It's not a duty. It's  
5 just this exception from the failure to have a duty that is just a course of  
6 conduct if you can establish it. It's not technically a duty. The point is  
7 there is no duty, but there is an exception. And it's a high burden to  
8 carry that the exception should apply.

9           So the problem that they found was with the -- what the  
10 District Court found that reasonable -- that the reasonableness of the  
11 offer alone supported the award of attorney's fees, and they said that's  
12 not enough. You can't just award everything just based on  
13 reasonableness, you have to go back and look at it all. So that was the  
14 point in saying I'm going to -- I have to take another look at it under  
15 *Frazier v Drake*. But it didn't really -- it didn't really change my opinion  
16 about overall, as we pointed out, that you can't argue with the fee. It's a  
17 discounted fee, much lower than what they would normally charge.

18           But that I -- my one problem is, is with the arbitration phase.  
19 You know, I agree with you on the arbitration phase. I just think if you  
20 make an offer of judgment for \$2,000 at the arbitration phase and you  
21 insist it's only -- an arbitration case, you're only going to get \$3,000 at  
22 the end of the process. It just doesn't make any sense to me. That's  
23 the only problem I ever had with it.

24           And after looking at it all over again, it's still the only problem I  
25 have with it, because I looked at everything else. I don't see block

1 billing. I don't see overbilling. It's a discounted rate. I just didn't have  
2 any problems with any of the rest of it. The only thing, and unfortunately  
3 neither of these cases address it, they only address the other factors,  
4 they don't address this whole concept of is it really reasonable once  
5 you've made a \$2,000 offer of judgment during a phase when you're  
6 only going to get \$3,000 if it stays where it is, that to me was -- that to  
7 me showed they really were intending to litigate the whole time. And  
8 that's fine. That was their choice. I think that everybody realized that it  
9 was a big claim.

10 And it was -- it was -- this was difficult. This went on for  
11 months and months and months, going all over the country on  
12 depositions -- I just didn't see anywhere where any of that was inflated.  
13 That's what it took to get to the point where they could file the motion.  
14 And for me, it was a very arduous process, and it was hard fought the  
15 whole time.

16 So I can't say that for either side the discovery phase of this  
17 thing was handled in any way inappropriately. Those -- every one of  
18 those depositions, I thought they were relevant. I mean, we looked at all  
19 of them in these motions because some of them were relevant to  
20 Ms. O'Briant, some of them were relevant to Ms. Lee. They had to do  
21 the whole thing. They had to be present for them. They couldn't pick  
22 and choose which ones they'd go to, it was because it was all one case.  
23 So for that reason, I did not see anything unreasonable. As I said, my --  
24 and they have every right to seek their appeal fees and costs. I don't  
25 think anybody really disputes that.

1                   So at this point, like I said, years later we come back  
2 around to it and I still feel the same way about it. I don't -- I didn't see  
3 anything in these cases. I'm -- as I said, I don't -- I think this is kind of  
4 the last word. I haven't seen any significant new offer of judgment cases  
5 come down. *Frazier v Drake* is the last reported one that I could find.  
6 And these others are -- these other issues, like this unpublished  
7 Supreme Court decision on block billing, which nobody seems to know  
8 about, but I guess I do because it's a trust case. But I looked at the  
9 other things that they've raised that were problems, and I just -- I don't  
10 see anything but the initial thing that was raised by your client initially, is  
11 why would you make an offer of judgment and then proceed to bill  
12 \$35,000 when you knew you were only going to get back three? I think  
13 that's a legitimate question, and that's really only ever been my problem  
14 with it.

15                   So that would be the only amount I would be willing to take a  
16 look at. And I think that they stuck with the \$3,000, but anything over  
17 that, until that phase is over, that arbitration phase is over going forward,  
18 it was all necessary, every bit of it. And it's unfortunate. This was --  
19 that's what I've said all along, it's so unfortunate that we have this  
20 relatively low standard for motions to dismiss. You're entitled to try to  
21 prove your case and, unfortunately, this one just -- it was one of those  
22 cases that you just -- there's no way to do it, but to go forward on all of  
23 these issues. And everybody else was out of state. I mean, I just -- I  
24 don't think there's any other way to do it. It had to be done.

25                   So I'm only reducing this by the -- I think it's \$32,000 from the

1 arbitration phase. The rest of it, plus the appeal fees, I think are all  
2 perfectly warranted because, like I said, the only real case that picks  
3 around at offers of attorney's fees after offers of judgment is this block  
4 billing case, and I didn't see that was a problem for us here. They didn't  
5 block bill.

6 So since that's about the only thing I think you can reduce  
7 fees by now, I mean, that's the only -- in years that it's come up is this  
8 objection to block billing. Not relevant here, so nothing else I could  
9 really reduce it for.

10 So as we -- I would say they otherwise meet *Brunzel*. Every  
11 other factor is fully satisfied under *Brunzell*. And the only thing that they  
12 tell us to take a look at is block billing and, you know, it's just not a  
13 problem for us.

14 So I don't see anywhere else I could make any reductions with  
15 all -- and I read it. You know, I did the -- I did not come in to be a judge  
16 in order to read other people's billing statements, but it's so important to  
17 the Supreme Court that we do a lot of it. And under the guidance  
18 they've given us, I just don't see anywhere else to reduce it but by the  
19 arbitration phase that I see as a legitimate question. So I'll take that  
20 reduction, but everything else up through the appeal is awarded. I just  
21 didn't see anywhere else to take a deduction.

22 MS. LEE: Thank you, Your Honor. I'll prepare the order.

23 THE COURT: Okay. Thank you.

24 MR. BLUMBERG: Thank you, Your Honor.

25 THE COURT: And if you'd please direct it to Counsel.

1 Do you even want to see it, Ms. O'Briant? Do you want to  
2 review the --  
3 MS. O'BRIANT: No, I don't need to see it.  
4 THE COURT: Okay.  
5 MS. LEE: Okay. All right.  
6 THE COURT: All right.  
7 MS. LEE: Thanks, Priscilla.  
8 THE COURT: Because I didn't think you cared, but. Okay.  
9 Thanks very much.  
10 MS. LEE: Thank you, Your Honor.  
11 THE COURT: Then we'll see you guys back here. And then  
12 just the only thing we have left is a calendar call in July. I think we're  
13 otherwise --  
14 MS. O'BRIANT: Well, Your Honor, we discussed at the last  
15 hearing we need to --  
16 MS. LEE: I'm sorry, Your Honor. I have an appointment.  
17 THE COURT: You can leave. Yeah. Sorry  
18 MS. LEE: I'm going to just head out.  
19 MS. O'BRIANT: -- resubmit the motions in limines --  
20 THE COURT: Uh-huh.  
21 MS. O'BRIANT: -- and motion for summary judgment  
22 because they have changed a little --  
23 THE COURT: Okay.  
24 MS. O'BRIANT: -- with the remand back from the Supreme  
25 Court.



1 THE COURT: Right. Yeah. Yeah.  
2 They told us to focus on some other things, yeah.  
3 MS. O'BRIANT: So I know we did set a deadline for MILs.  
4 THE COURT: Uh-huh.  
5 MS. O'BRIANT: I didn't -- I reviewed all the calendar dates. I  
6 didn't see one for the motion for summary judgment, but we can get that  
7 on file --  
8 THE COURT: Okay.  
9 MS. O'BRIANT: -- whenever.  
10 THE COURT: Yes. Just working back from the calendar call  
11 date, we like, like 60 days in advance, if we can. If not, 60 days before  
12 the actual trial start date. We just need some time to get everything  
13 briefed and have a chance to have a hearing before the actual --  
14 MS. O'BRIANT: Is that for the motion --  
15 THE COURT: -- deadline.  
16 MS. O'BRIANT: -- for summary judgment?  
17 THE COURT: On the summary judgment motion.  
18 MS. O'BRIANT: Okay.  
19 THE COURT: So we need, you know, we need 60 days --  
20 MS. O'BRIANT: Two months, no problem.  
21 THE COURT: -- to look at -- to get that all through the  
22 process, so we don't have to be doing a whole bunch on order  
23 shortening time. So if you can just work on that --  
24 MS. O'BRIANT: Okay. Thank you, Your Honor.  
25 THE COURT: -- for your schedule.

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MR. BLUMBERG: Thank you.

THE COURT: Thank you, guys.

[Hearing concluded at 11:42 a.m.]

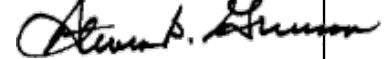
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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Martha Nelson  
Court Recorder/Transcriber



**OPPM**

Patricia Lee (8287)  
HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Tel: (702) 385-2500  
Fax: (702) 385-2086  
plee@hutchlegal.com  
kbranson@hutchlegal.com

*Attorneys for defendants  
Dave Sandin and Sandin & Co.*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

O.P.H. OF LAS VEGAS, INC.,

Plaintiff,

v.

OREGON MUTUAL INSURANCE  
COMPANY, DAVE SANDIN, and SANDIN  
& CO.,

Defendants.

Case No.: A-12-672158-C

Dept. No.: XXVI

**SANDIN DEFENDANTS'  
OPPOSITION TO MOTION FOR  
RECONSIDERATION**

Dave Sandin and Sandin & Co, (together, the "Sandin Defendants") hereby oppose Plaintiff, O.P.H. of Las Vegas, Inc.'s ("OPH"), Motion for Reconsideration.

Plaintiff's motion is predicated on the misguided notion that it "won" on two of the three "motive based" factors articulated in *Beattie*, namely that it brought its claims in good faith and that its rejection of the Sandin Defendants' offer was not grossly unreasonable. Plaintiff thus summarily concludes that this Court "misapplied" the *Beattie* factors because if they "won" two out of three "most important" *Beattie* factors, then the Sandin Defendants cannot be awarded fees as a matter of law.

Plaintiff is wrong for two primary and important reasons. First, a review of the Court transcripts *do not* suggest that Plaintiff "won" on two of the three "motive based" *Beattie* factors. While the Court did opine that it was not "grossly" unreasonable for Plaintiff to reject the Sandin Defendants' offer of judgment and proceed with the case, the Court was silent as to whether or not Plaintiff brought its claims in good faith in the first instance. As discussed more fully below, the

1 two concepts are in fact, mutually exclusive. Notwithstanding, the Court's failure to specifically  
2 address this factor is not error and does not justify a reversal of its ruling. *See Scott-Hopp v.*  
3 *Bassek*, 2014 WL 859181 \*5 (2014) *citing Certified Fire Prot., Inc v. Precision Constr., Inc.*, 128  
4 Nev. —, —, 283 P. 3d 250, 258 (2012) (holding that “[e]xplicit findings on every *Beattie* factor  
5 [are not] required for the district court to adequately exercise its discretion.”) Emphasis  
6 added. “Instead, the district court may adequately exercise its discretion if the parties brief the  
7 application of the *Beattie* factors.” *Id. citing Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318,  
8 324, 890 P.2d 785, 789 (1995) (superceded by statute on other grounds).

9 Second, even if the court did, *arguendo*, rule in Plaintiff's favor on two of the three  
10 “motive-based” *Beattie* factors, that alone would not justify a reversal of the Court's decision.  
11 Indeed, the Nevada Supreme Court has emphasized time and again that each factor need not favor  
12 awarding attorney fees because “no one factor under *Beattie* is determinative.” *Yamaha Motor Co,*  
13 *U.S.A. v. Arnouli*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n. 16 (1998).

14 Plaintiff's Motion is nothing more than a regurgitated and re-packaged recitation of its  
15 original arguments, but with impermissibly added “new” case law, which case law neither supports  
16 its position nor should be considered by this Court since it was not previously cited by Plaintiff in  
17 the underlying motion papers.

18 In short, this Court has virtual unfettered discretion in awarding Defendants' Motion for  
19 Attorneys' Fees, limited only by her consideration of the *Beattie* factors in a non-arbitrary and non-  
20 capricious way. Notwithstanding the wide discretion granted to this Court, Plaintiff's motion  
21 seeks to impose a rigid and formulaic approach to *Beattie* whereby he who “wins” the most factors,  
22 wins the day. This is not what is contemplated by the well-developed case law in this jurisdiction.  
23 This Court clearly considered each and every *Brunzell* and *Beattie* factor which is all that is  
24 required when issuing an award of attorneys' fees. So long as the Court considered all of the  
25 factors, and the consideration was neither arbitrary nor capricious, her award will not be disturbed  
26 on appeal.

27 This Opposition is filed pursuant to EDCR 2.24 and is supported by the following  
28 Memorandum of Points and Authorities including and all exhibits hereto, the papers and pleadings

1 on file and any oral arguments that this Court may allow.

2

3 DATED this 16<sup>th</sup> day of April, 2018

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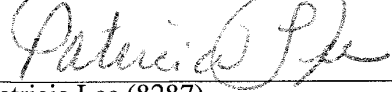
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HUTCHISON & STEFFEN, PLLC



Patricia Lee (8287)  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145

*Attorneys for defendants Dave Sandin and  
Sandin & Co.*

1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2   **1.     Relevant Facts**

3  
4           The facts supporting the Sandin Defendants' Motion for Attorneys' Fees and Costs has  
5 been briefed and set forth extensively in prior papers. The Sandin Defendants will not burden this  
6 Court with a detailed regurgitation of the facts previously set forth in their Motion for Attorneys'  
7 Fees (both the original motion and the post judgment versions) and their replies (collectively, the  
8 "Motions") in support of the same, and instead hereby incorporate all papers, pleadings and oral  
9 arguments associated with the Motions as if set forth fully herein.

10           Plaintiff's chief complaint in its motion for reconsideration is that the Court granted the  
11 Sandin Defendants' Motion for Attorneys' fees despite also commenting that the decision to reject  
12 the offer was not grossly unreasonable, i.e. the third *Beattie* factor. Plaintiff then goes on to take  
13 copious liberties with this Court's statements to conclude that it also "won" the first *Beattie* factor,  
14 i.e. that the case was brought in good faith. Plaintiff does not deny that the Court affirmatively  
15 held that two of the other *Beattie* factors weighed in favor of the Sandin Defendants (that the offer  
16 was reasonable both in timing and amount and that the fees and costs were reasonable).

17           While it is the law that this Court need not articulate its findings with respect to each  
18 *Beattie* factor, it can reasonably be presumed that the Court weighed the good faith claim element  
19 in favor of the Sandin Defendants since the Court noted that the sought-after exception [to the  
20 broker duty rule] employed by the Plaintiff was "very unusual and way outside normal duties of  
21 Insurance agents." See hearing transcript attached as exhibit to Plaintiff's Motion at 14:24-25.  
22 The Court further opined that the Sandin Defendants' offer was "certainly reasonable" because  
23 there was just no such duty for insurance brokers [to warn insureds of potential policy cancellations  
24 due to non-payment of premiums].

25  
26           Furthermore, the record before the Court is replete with indicia of Plaintiff's bad faith in  
27 bringing its claims. At the time it filed its lawsuit, Plaintiff was well aware of the following  
28 information:

1 • That the Sandin Defendants never received the notice of cancellation (which means  
2 it was factually impossible for them to notify or warn OPH of the same)

3 • That there was no set of facts that would support a course and conduct theory of  
4 liability since the dates on which Plaintiff alleges that the Sandin Defendants  
5 previously warned them of pending policy cancellations, were dates on which the  
Sandin Defendants were not even OPH's brokers of record;

6 • That the cancellation was imminent. OPH knew that it had missed its premium  
7 payment, wrote out the check in an attempt to remedy the same, but inexplicably  
8 and negligently failed to mail the payment thus resulting in policy termination. In  
fact, its own president took full responsibility for the failure and acknowledged that  
it was his own fault for not paying his bills, to wit:

9 "Had I done my work that I'm paying myself to do to  
10 make sure that all this stuff gets paid in a timely manner,  
11 . . . we wouldn't be sitting here, either. So that is the  
12 procedure. I didn't do my job in that moment. That's all  
I can say about that. I mean, it's a mishap in the company.  
13 There is no, **I'm not trying to blame anybody for that  
payment not being made on July 26<sup>th</sup>, you know?"**

14 Emphasis added.

15 Despite knowing that it had absolutely no basis in the law (as later evidenced by the fact  
16 that none was cited in Plaintiff's opposition to the Sandin Defendants' Motion for Summary  
17 Judgment) and absolutely no basis in fact (other than blatant falsehoods that did not withstand the  
18 scrutiny of discovery), OPH nonetheless dragged the Sandin Defendants into costly litigation  
19 where it was forced to spend well over \$100,000 and over a thousand hours of time and resources  
20 defending completely baseless claims. While the Court did not explicitly state one way or the  
21 other that Plaintiff brought these claims in bad faith (which it is not required to do) it surely had  
22 this information at the time the ruling was issued and is presumed to have read and considered the  
same.

## 23 2. Discussion

### 24 A. Standard for Motion for Reconsideration

25 EDCR 2.24 reads:

26 (a) No motions once heard and disposed of may be renewed in the  
27 same cause, nor may the same matters therein embraced be  
28

1 reheard, unless by leave of the court granted upon motion therefor,  
2 after notice of such motion to the adverse parties.

3 (b) A party seeking reconsideration of a ruling of the court, other  
4 than any order which may be addressed by motion pursuant to  
5 N.R.C.P. 50(b), 59 or 60, must file a motion for such relief within  
6 10 days after service of written notice of the order or judgment  
7 unless the time is shortened or enlarged by order. A motion for  
8 rehearing or reconsideration must be served, noticed, filed and  
9 heard as is any other motion. A motion for reconsideration does  
10 not toll the 30-day period for filing a notice of appeal from a final  
11 order or judgment.

12 (c) if a motion for rehearing is granted, the court may make a  
13 final disposition of the cause without reargument or may reset it  
14 for reargument or resubmission or may make such other orders as  
15 are deemed appropriate under the circumstances of the particular case.

16 If the movant fails to raise any new facts or point out any misinterpretations of the law, then  
17 the Motion must fail. *See Feda v. Nevada*, No. 69991, 2016 WL 7190008 \*1 (2016). *See also In*  
18 *the Matter of the Trust of JMWM Spendthrift Trust*, 385 P.3d 35 (Table) (Nev. 2016) (affirming  
19 denial of Motion for Reconsideration where lower court denied the same because the movant  
20 “presented no new evidence to [the] court to serve as a basis for reconsideration under EDCR  
21 2.24”; *Khuory v Seastrand*, 132 Nev. Dav. Op. 52 n.2---P.3d---, -----n2 (2016) (issues not raised  
22 until reply are waived); *In re Estate of Coventry v. Uchikura et. al.*, 128 Nev. 906, n3 (2012)  
23 (upholding and affirming District Court’s decision to deny motion for reconsideration where  
24 movant “failed to present any new evidence as a basis to support rehearing.”)

### 25 **3. The Court did not “misapply” the Beattie Factors**

26 Plaintiff argues that this court should reverse its prior ruling because the Court  
27 “unambiguously found in favor of OPH on the first and third *Beattie* factors, but clearly erred in  
28 concluding that the second factor alone supported awarding attorneys’ fees.” *See* Motion at 6:23-  
29 25. Plaintiff has taken liberties with this Court’s ruling, stretching its language practically to the  
30 point of misrepresentation. Plaintiff’s entire inflated conclusion is ostensibly supported by two  
31 specific comments made by this Court during the hearing on the Sandin Defendants’ Motion for  
32 Attorneys’ Fees, to wit:



1 1. So, that's kind of what was new in *Frazier v. Drake* was this concept that if you decide to  
2 reject -- if your client decided to reject not in good faith, it had to be grossly unreasonable.  
3 And that's -- I mean, I thought pretty much everybody was operating in good faith here.  
Nobody -- it's just you guys didn't agree. See hearing transcript at 14:18-21.

4 2. So, I mean, it wasn't unreasonable to proceed, but on the other hand, it was certainly a  
5 reasonable offer from them because they just -- there is no such -- there is not such global  
6 duty. See hearing transcript at 15:2.

7 From these two statements *alone*, Plaintiff has concluded that it "won" on both the first and  
8 third *Beattie* factors. In addition to being incredibly presumptuous, Plaintiff's historic revisionism  
9 is simply wrong. The Court's two statements clearly only go to address the third *Beattie* factor,  
10 i.e. whether or not rejection of the offer was "grossly unreasonable." The Court made absolutely  
11 no mention whatsoever as to whether or not Plaintiff brought its claims in good faith in the first  
12 instance, i.e. the first *Beattie* factor. Nor does it have to. The Nevada Supreme Court has  
13 unequivocally held that "[e]xplicit findings on every *Beattie* factor [are not] required for the district  
14 court to adequately exercise its discretion." *Scott-Hopp v. Bassek*, 2014 WL 859181 \*5 (2014)  
15 citing *Certified Fire Prot., Inc v. Precision Constr., Inc.*, 128 Nev. —, —, 283 P. 3d 250, 258  
16 (2012). "Instead, the district court may adequately exercise its discretion if the parties brief the  
17 application of the *Beattie* factors." *Id. citing Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318,  
324, 890 P.2d 785, 789 (1995) (superseded by statute on other grounds).

18 The Sandin defendants have extensively briefed the *Beattie* factors and have supported each  
19 one with a detailed recitation of facts, all supported with references to the record. With respect to  
20 the first *Beattie* factor, i.e. whether or not the claims were brought in good faith, the Sandin  
21 Defendants specifically noted the following (among other things):

22 1. OPH acknowledged on the face of its complaint, that the Sandin Defendants never  
23 received notice of the impending policy termination, and therefore, as a practical  
24 matter, there is no way that the Sandin Defendants could have warned OPH of the  
25 impending cancellation, even if they wanted to. See complaint at ¶ 27 "Defendant  
26 OMI did not send a cancellation notice to Defendant Dave Sandin"; and ¶28  
27 "Defendant Dave Sandin did not receive a cancellation notice." Linda Snyder  
28

1 further testified that "no notice was given, not only to us, but to Dave Sandin as  
2 well." See Ex. H to the Sandin Defendants' Motion for Summary Judgment, at  
3 174:11-12. O.P.H.'s expert further testified that the Sandin defendants did not  
4 have actual notice of the provisional policy cancellation and if an agent does not  
5 have notice of a pending cancellation, the agent cannot inform the insured of the  
6 pending cancellation. See Ex. S to the Sandin Defendants' Motion for Summary  
7 Judgment, at 60:11-17; 76:18-23. Even OPH's president later admitted that he had  
8 no reasonable expectation that the Sandin Defendants would alert them to a policy  
9 termination notice that they never received, to wit:

10 Q. If Dave Sandin did not actually receive notice of the late  
11 payment and pending cancellation, did you still expect him to  
12 notify you?

13 ....

14 THE WITNESS: It's a foolish question. How could he inform me about something  
15 he doesn't know about?

16 ....

17 Q. Do you not have that expectation if Mr. Sandin doesn't have the information  
18 about the late payment? Does that expectation go out the window?

19 A. How can he inform me about something he doesn't know about? How can you  
20 ask that question? If I find out that a man doesn't know something, then how can  
21 I expect him to tell me about it? You cannot seriously ask me that?

22 Q. Yes, I am asking you that.

23 A. I don't, it's a foolish question. He cannot inform me about  
24 something he doesn't know about.

25 Q. That -

26 A. So how could I have the expectation he's going to tell me  
27 about something that he doesn't know about?

28 Ex. A, at 90:25 - 92:6.

1           2.     The admission by Plaintiff that on August 13, 2012, *prior to the*  
2                 *cancellation of the Policy*<sup>1</sup>, Plaintiff realized that it did not make  
3                 the monthly premium payment for July. Plaintiff, however, did  
4                 not contact anyone at Oregon Mutual or the Sandin defendants  
5                 regarding its failure to pay the July premium.<sup>2</sup> Instead, Plaintiff  
6                 cut a check on August 13, 2012 to Oregon Mutual for the July  
7                 premium but never mailed it before the Policy was cancelled.<sup>3</sup>

8           3.     In Nevada, insurance agents do not have a fiduciary relationship with their clients.  
9                 An “insurance agent is obliged to use reasonable diligence to place the insurance  
10                and seasonably to notify the client if he is unable to do so.” *Keddie v. Beneficial*  
11                *Insurance, Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978).<sup>4</sup> The Nevada  
12                Supreme Court has further stated that “[a]n insurance agent or broker does not owe  
13                the insured any additional duties other than procuring the requested insurance.”  
14                *Flaherty v. Kelly*, 2013 WL 7155078 (Nev. Dec. 18, 2013).

15           4.     The admission by the President of OPH that he had nobody but himself to blame  
16                 for the missed premium payment, to wit: OPH’s president,, testified that “Had I  
17                 done my work that I’m paying myself to do to make sure that all this stuff gets paid  
18                 in a timely manner, . . we wouldn’t be sitting here, either. So that is the procedure.  
19

20  
21                 <sup>1</sup> The policy terminated on August 16, 2012.

22                 <sup>2</sup> Deposition of Linda Snyder (Ex. I to Sandin Defendants’ Reply in support of post-appeal  
23                 Motion for Attorneys’ Fees and Costs), at 90:7 – 95:14.

24                 <sup>3</sup> *Id.*; Payment Record of Check to Oregon Mutual Insurance Group, attached as Ex. M (SAN  
25                 000111) to Sandin Defendants’ Reply in support of post-appeal Motion for Attorneys’ Fees and Costs  
26                 (authenticated by Deposition of Linda Snyder (Ex. H to Sandin Defendants’ Reply in support of post-  
27                 appeal Motion for Attorneys’ Fees and Costs), at 90:7 – 95:14).

28                 <sup>4</sup> *See also Havas v. Carter*, 89 Nev 497, 499-500, 515 P.2d 397, 399 (1973) (“the general rule  
[is] that an insurance agent or broker who undertakes to procure insurance for another owes an  
obligation to his client to use reasonable diligence in attempting to place the insurance and to  
seasonably notify the client if he, the agent or broker, is unable to obtain the insurance”).

1 I didn't do my job in that moment. That's all I can say about that. I mean, it's a  
2 mishap in the company. There is no, I'm not trying to blame anybody for that  
3 payment not being made on July 26<sup>th</sup>, you know?" See deposition transcript of  
4 Stephen Freudenberger attached to the Sandin Defendants' Motion for Summary  
5 Judgment as Exhibit A at 120:17 – 121:1.

- 6 5. The single tenuous thread upon which Plaintiff's entire strained theory of liability  
7 hung was that of "course and conduct," meaning, since the Sandin Defendants had  
8 undertaken a pattern of previously alerting Plaintiff to impending policy  
9 terminations, it had a duty to do so on this occasion. There is no case law in  
10 Nevada that supports such a theory of liability, but, even if there were, the  
11 allegation itself was completely contrived. In her deposition, Linda Snyder testified  
12 that Dave Sandin had previously notified O.P.H. on three different occasions (in  
13 2006, 2008, and then again in 2009) that O.P.H. was late paying a premium and,  
14 accordingly, O.P.H. paid the premium prior to the policy being cancelled.<sup>5</sup>  
15 O.P.H.'s response to an interrogatory further states that "Dave Sandin informed  
16 Plaintiff on or about March 23, 2006 that Plaintiff's February 2006 payment was  
17 late and/or outstanding, and on or around May 13, 2008 that Plaintiff's May 2008  
18 payment was late and/or outstanding. In addition, Dave Sandin set up Plaintiff's  
19 account with Fireman's Fund Insurance (a previous insurance policy) for auto-pay  
20 beginning in May 2009 until December 2011."<sup>6</sup> These statements by Ms. Snyder  
21 and O.P.H. are false. Between February 2006 and October 2008, it is undisputed  
22 that Dave Sandin was employed by Heffernan Insurance Brokers and was subject  
23 to a non-compete agreement. During this time, Dave Sandin was not the broker for  
24

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25 <sup>5</sup> Deposition of Linda Snyder (Ex. H to Sandin Defendants' Reply in support of post-appeal  
26 Motion for Attorneys' Fees and Costs), at 85:10-86:3; 118:11-119:21; 152:11-153:17; 164:24-165:22.

27 <sup>6</sup> Plaintiff O.P.H. of Las Vegas, Inc.'s Answers to Defendant Dave Sandin's First Set of  
28 Interrogatories, Response No. 1

1 O.P.H. Therefore, he could not have notified O.P.H. of late or missed payments  
2 or anything related to O.P.H.'s insurance policy.<sup>7</sup> Furthermore, after O.P.H. missed  
3 a payment to Fireman's Fund, Fireman's Fund required that O.P.H. be set up for  
4 automatic payments.<sup>8</sup>

5 All of these facts were raised in the volumes of briefing submitted by the Sandin  
6 Defendants and the Court appropriately weighed this uncontroverted evidence in her *Beattie*  
7 analysis. The fact that the Court did not explicitly make a finding on this one element does not  
8 lead to a "misapplication" of the *Beattie* factors. It also does not mean that Plaintiff gets to claim  
9 victory on this *Beattie* factor. It is critical to note *that Plaintiff has never, not once, denied or*  
10 *argued against any of the foregoing facts.* Instead, OPH simply and audaciously refers to its  
11 conduct as "admirable" and glosses over the egregious facts set forth throughout the plethora of  
12 papers in this action. Any one of these facts alone would constitute the bringing of the claims in  
13 bad faith. Collectively, it is beyond bad faith and ventures into the realm of unconscionability.

14  
15 **4. Plaintiff's arguments regarding Defendant's "bad faith" presentation of the offer  
both in timing and amount, cannot be re-considered at this time**

16 Much like its attempt to take a second bite of the proverbial apple with respect to the first  
17 and third *Beattie* factors, Plaintiff takes another bite at trying to convince this Court that the  
18 Sandin Defendants' offer was made in bad faith both in its timing and amount. These arguments,  
19 however, have already been made in Plaintiff's opposition papers and cannot be re-argued now.  
20 If the movant fails to raise any new facts or point out any misinterpretations of the law, then the  
21 Motion [for Reconsideration] must fail. *See Feda v. Nevada*, No. 69991, 2016 WL 7190008 \*1  
22 (2016). *See also In the Matter of the Trust of JMWM Spendthrift Trust*, 385 P.3d 35 (Table) (Nev.  
23 2016) (affirming denial of Motion for Reconsideration where lower court denied the same because  
24 the movant "presented no new evidence to [the] court to serve as a basis for reconsideration under  
25

26  
27 <sup>7</sup> Deposition of Dave Sandin, Vol. II, attached hereto as Ex. U at 292:25 – 293:16; 314:1-17.

28 <sup>8</sup> Deposition of David Sandin, Vol. I (Ex. C), at 183:4 – 193:18.

1 EDCR 2.24”; *Khuory v Seastrand*, 132 Nev. Dav. Op. 52 n.2----P.3d----, -----n2 (2016) (issues  
2 not raised until reply are waived); *In re Estate of Coventry v. Uchikura et. al.*, 128 Nev. 906, n3  
3 (2012) (upholding and affirming District Court’s decision to deny motion for reconsideration  
4 where movant “failed to present any new evidence as a basis to support rehearing.”)

5 Here, Plaintiff simply repackages the same arguments but cites to a handful of “new” cases  
6 in hopes of persuading the Court to change its position. The first problem with this tactic is that  
7 the case law cited to by Plaintiff is not “new” or “recent” and was available to Plaintiff to rely upon  
8 in its initial oppositions. The fact that Plaintiff failed to cite to these cases before, acts as a waiver  
9 to raising them for consideration now. *See Pitzel v. Software Development and Inv of Nevada*, 124  
10 Nev. 1500, 238 P3d 846 (Table) (2008) (Sustaining lower court’s denial of Pitzel’s Motion for  
11 Reconsideration for Pitzel’s failure to present evidence until his motion for reconsideration and  
12 for his failure to “assert a reasonable explanation for his failure to submit [it] earlier.”)

13  
14 Second, and more importantly, the introduction of these additional case citations does not  
15 change the bad faith nature of Plaintiff’s claims and should not change this Court’s analysis.  
16 Indeed, the cases cited by Plaintiff only tends to strengthen the Sandin Defendants’ position and  
17 the decision made by this Court. Plaintiff relies heavily on one “new” case in particular, *Max Baer*,  
18 2012 WL 5944767, \*3. As set forth more fully below, this case does nothing to bolster Plaintiff’s  
19 regurgitated arguments.

20 **A. Max Baer Productions, Ltd. v. Riverwood Partners, LLC**

21 The *Max Baer* case cited by Plaintiff, ironically, *supports* this Court’s finding of  
22 reasonableness as to the Sandin Defendants’ offer. Incidentally, the *Max Baer* case was not  
23 decided by the Nevada Supreme Court, but by the Federal District Court for the District of Nevada,  
24 applying Nevada state law. In that case, the Defendant made a “token” \$1,000.00 offer to settle the  
25 case. The *Max Baer* court recognized it as a “token” amount, however went on to hold that the  
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1 amount offered was “reasonable” because “**the weakness of Plaintiff’s case made this token**  
2 **offer reasonable**”<sup>9</sup>.” *Id.* Emphasis added.

3         The *Max Baer* court also went on to suggest that a case could be pursued in good faith,  
4 even if it was brought at the outset in bad faith, to wit: “Although the lawsuit itself may have been  
5 unreasonable in the first instance, Plaintiff’s decision to await dispositive motion rulings rather  
6 than accept the token offer was not unreasonable in-and-of-itself under the circumstances.” *Id.*  
7 Also, the *Max Baer* court held, much like the Court did in this case, that “[b]oth parties acted  
8 reasonably in offering and rejecting the \$1,000.00 respectively.” Ultimately, the court in *Max Baer*  
9 denied Defendant’s request for fees when it balanced all four factors together. In doing so, the  
10 Court noted that (1) “it is possible that Plaintiff’s claims were brought in bad faith” but also  
11 waffled by further noting that “claims may be unmeritorious and still be brought in good faith,  
12 however” (2) that Defendants’ offer was reasonable both in timing and amount; (3) that it was not  
13 grossly unreasonable to reject the offer and proceed; and (4) that the fees and costs were  
14 reasonable.

15         Notably, the *Max Baer* court waffled on the first *Beattie* factor, (in other words, the court  
16 was silent on who won this factor) found for the offering Defendant on the second and fourth  
17 *Beattie* factors, and found for the Plaintiff on the third *Beattie* factor. Plaintiff argues that because  
18 this Court awarded the first and third *Beattie* factors in favor of OPH in this case, the facts here  
19 are stronger than those presented in *Max Baer*. Defendant is simply wrong. The court did not  
20 award the first *Beattie* factor in favor of OPH. The Court remained silent on this issue, just as the  
21 Court did in *Max Baer*. And while the “score” in this case is the same as the “score” in *Max Baer*,  
22

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24  
25         <sup>9</sup> Inexplicably, Plaintiff cites to the *Max Baer* case and misstates that the court found  
26 Defendant’s “\$1,000 token offer at the outset of the case to be unreasonable.” *See* Plaintiff’s Motion at  
27 8:4. This is, at best, a misstatement of the holdings in the case. The Court unequivocally found that the  
28 “token” amount was reasonable due to the weakness of Plaintiff’s claims.” Plaintiff’s statements to the  
Tribunal.

1 i.e. 2 in favor of Defendant, 1 in favor of Plaintiff, and an ostensible “tie” on the first factor,<sup>10</sup> this  
2 Court reached a different result. This is completely permissible. This Court is not duty bound to  
3 mathematically equate its analysis to other courts who have similarly weighed the *Beattie* factors.  
4 There is no uniform parity or rigid formula that must be mirrored in each case. The underlying  
5 facts in *Max Baer* are starkly different than the ones now before this Court<sup>11</sup> and it is all together  
6 reasonable that this Court weighed certain facts associated with the *Beattie* factors more or less  
7 heavily based on the conduct and motivations of the parties. This is why the Nevada Supreme  
8 Court has repeatedly recognized that “attorney fees under NRS 17.115 and NRCP 68 are fact  
9 intensive” . . . “Thus, we will not disturb such awards in the absence of an abuse of discretion.”  
10 *Wynn v. Smith*, 16 P.3d 424, 428, 117 Nev. 6, 13 (2001) *citing to Uniroyal Goodrich Tire v.*  
11 *Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995); *Schouweiler v. Yancey Co.*, 101 Nev. 827,  
12 833, 712 P.2d 786, 790 (1985). In short, “[i]f the record clearly reflects that the district court  
13 properly considered the *Beattie* factors, [the Nevada Supreme Court] will differ to its discretion.”  
14 *Wynn v. Smith*, 16 P.3d at 428-429; 117 Nev. at 13.

15 As for the timing, it is true that the Federal Court in *Max Baer* opined that because  
16 Defendant waited until after the close of discovery, the timing of the offer was made in good faith.  
17 Again, *Max Baer* is a different case with a completely different set of facts. For instance, there  
18 is no indication from the Court in *Max Baer*, that would suggest that Plaintiff knew, *before it even*  
19 *brought its lawsuit*, that Defendant was not and could not be liable under any theory of liability.  
20

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21 <sup>10</sup> The Sandin Defendants would argue that in this case, unlike the case in *Max Baer*, there was  
22 no “tie” on the first factor and that the record fully supports the Court’s award of attorneys’ fees  
23 inasmuch as Plaintiff clearly brought its claims for extortionate purposes with no real sense of harm  
caused by the Sandin Defendants.

24 <sup>11</sup> The underlying transaction in the *Max Baer* case involved a purchaser of land subject to a  
25 cost sharing and development agreement with the defendant whereby the latter was obligated to make  
26 various improvements to the property, establish utilities, roadways and other infrastructure to service  
27 the casino anticipated to be opened by the Plaintiff. Ultimately, Defendant was unable to procure the  
28 necessary financing to make such improvements and the Plaintiff sued. Plaintiff’s lawsuit was  
ultimately dismissed for a failure to state a claim and Defendant’s counterclaims were dismissed for  
failure to prosecute. *See generally Max Baer Productions, LTD v. Riverwood Partners, LLC*, 2012 WL  
5944767 No.3:09-cv-00512-RJC-RAM (Nov. 26, 2012).



1 Here, the record is markedly different. OPH knew, *all along*, that it had no one to blame for its  
2 missed premium payment but itself. Furthermore, Plaintiff completely fabricated facts in an effort  
3 to squeeze the Sandin Defendants into some nebulous “exception” predicated on course and  
4 conduct and thus rescuing its case from preliminary dismissal. These acts go well beyond the  
5 “well meaning” Plaintiff who realistically believes that the Defendant could potentially be on the  
6 hook and therefore brings unmeritorious claims in “good faith.” Here, Plaintiff brought an  
7 extortionate complaint, rooted in misinformation and impermissible burden shifting. The record  
8 therefore fully supports an award of attorneys’ fees in this instance and would not be disturbed on  
9 appeal.

10 Finally, Plaintiff cites to the timing of Defendants’ offer as if to suggest that it is per se or  
11 prima facie evidence of unreasonableness. However, if that were the case, the Rules would not  
12 permit serving an offer of judgment during the early stages of a case. They do not. There is no  
13 hard and fast rule as to when the presentation of an offer of judgment is reasonable. It is a fact  
14 intensive inquiry and analyzed on a case by case basis. The Nevada Supreme Court has stated,  
15 “the offer of judgment is a useful settlement device which should be made available *at every*  
16 *possible juncture* where the rules allow.” *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d  
17 720, 724 (1993). Emphasis added. The offer of judgment made by the Sandin Defendants was  
18 made at a time at which “the rules allow.”

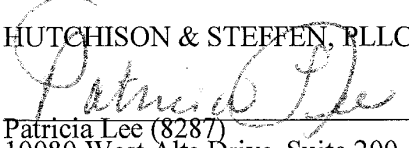
## 19 **5. Conclusion**

20  
21 Plaintiff has raised no new facts or cited to no newly created law that would justify a  
22 reversal of this Court’s position. Plaintiff further does not adequately explain how the Court  
23 “misapplied” the *Beattie* factors. Plaintiff is simply unhappy with the Court’s result and is likely  
24 positioning itself for an appeal. This Court’s ruling will not be disturbed on appeal because the  
25 record clearly reflects this Court’s careful consideration of the *Beattie* factors. The Court is not  
26 required to pontificate on each factor individually so long as the factors have been fully briefed and  
27 there is evidence in the record to support the Court’s finding. The Court in this instance, did its  
28

1 job and should not reverse itself based on Plaintiff's dissatisfaction with this Court's ruling.  
2 Accordingly, Defendants ask that the Court deny Plaintiff's Motion in its entirety.

3 DATED this 16<sup>th</sup> day of April, 2018

HUTCHISON & STEFFEN, RLLC

  
Patricia Lee (8287)  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145

*Attorneys for defendants Dave Sandin and  
Sandin & Co.*

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC. and that on this 16th day of April, 2018, I caused the above and foregoing document entitled **SANDIN DEFENDANTS' OPPOSITION TO MOTION FOR RECONSIDERATION** to be served as follows:

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☒ To be served via electronic mail pursuant to the parties' consents to electronic service; and/or

☐ Pursuant to Administrative Order 14-2, N.E.F.C.R. 9, EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

☐ To be hand-delivered;

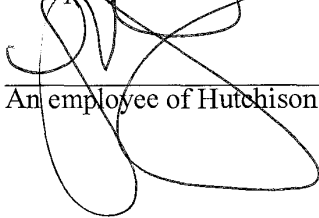
to the attorneys listed below at the address and emails indicated below:

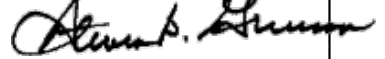
Margaret A. McLetchie, Esq.  
Matthew J. Rashbrook, Esq.  
MCCLETCHIE SHELL, LLC  
701 East Bridger Ave., Ste. 520  
Las Vegas, NV 89101

Robert Freeman, Esq.  
Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
6385 S. Rainbow Blvd., Ste. 600  
Las Vegas, NV 89118

*Attorneys for plaintiff  
O.P.H. of Las Vegas Inc.*

*Attorneys for Oregon Mutual Insurance  
Company*

  
An employee of Hutchison & Steffen, LLC



1 **RIS**  
2 **DICKINSON WRIGHT PLLC**  
3 **MICHAEL N. FEDER**  
4 Nevada Bar No. 7332  
5 Email: [mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
6 **GABRIEL BLUMBERG**  
7 Nevada Bar No. 12332  
8 Email: [gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)  
9 8363 West Sunset Road, Suite 200  
10 Las Vegas, Nevada 89113-2210  
11 Tel: (702) 550-4400  
12 Fax: (844) 670-6009  
13 *Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

8 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 O.P.H. OF LAS VEGAS, INC.,

11 Plaintiff,

12 v.

13 OREGON MUTUAL INSURANCE  
14 COMPANY, DAVE SANDIN, AND SANDIN  
15 & Co.

16 Defendants.

CASE NO. A-12-672158-C  
DEPT. NO. XXVI

**PLAINTIFF O.P.H. OF LAS VEGAS  
INC.'S REPLY IN SUPPORT OF ITS  
MOTION TO RECONSIDER AND/OR  
AMEND JUDGMENT**

16 Plaintiff O.P.H. OF LAS VEGAS, INC. ("OPH"), by and through its counsel, the law  
17 firm of Dickinson Wright PLLC, hereby files its Reply in Support of its Motion to Reconsider  
18 and/or Amend this Court's March 14, 2018 Findings of Facts, Conclusions of Law and Judgment  
19 (the "Attorneys' Fees Order").

20 This Reply is based on the following Memorandum of Points and Authorities, the  
21 declaration of Gabriel A. Blumberg attached hereto as Exhibit 1 and the exhibits attached  
22 thereto, the papers and pleadings already on file herein, and any oral argument the Court may  
23 entertain on this matter.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I.**

26 **INTRODUCTION**

27 The Sandin Defendants' misinterpretation of OPH's arguments and the governing case  
28 law causes their Opposition to be ineffective and unpersuasive. First, the Sandin Defendants

1 attempt to avoid reconsideration altogether by ignoring OPH's central argument that the Court  
2 misapplied Nevada's governing law relating to awarding attorneys' fees pursuant to an offer of  
3 judgment. Next, the Sandin Defendants focus on the Court's silence in its Attorneys' Fees Order  
4 on the first *Beattie* factor in an attempt to shift attention away from the Court's unambiguous  
5 statements during the February 6, 2018 hearing that clearly indicated it found in favor of OPH on  
6 the first *Beattie* factor. Lastly, in a misguided effort to distinguish OPH's case law regarding the  
7 *Beattie* factors, the Sandin Defendants' actually confirm that the Court misapplied the law in  
8 awarding them attorneys' fees. The Sandin Defendants' arguments therefore fail to offer any  
9 legitimate opposition to OPH's Motion and provide no basis for denying reconsideration. If  
10 anything, the Sandin Defendants' Opposition highlights why reconsideration is appropriate and  
11 the judgment should be amended.

## 12 II.

### 13 LEGAL ARGUMENT

#### 14 A. **Reconsideration Is Appropriate When the Court Misapplies the Governing Law**

15 The Sandin Defendants first try to avoid reconsideration by repeatedly citing to  
16 unpublished case law indicating that reconsideration is inappropriate when a party presents  
17 evidence that could have been presented before. *See, e.g.,* Opposition at 6:10-19. This case law  
18 is irrelevant here because it fails to address OPH's arguments in the Motion that the Court  
19 misapplied the law, not that there are new facts which OPH is seeking to introduce for the first  
20 time in its Motion.

21 As argued in the Motion, the Court's misinterpretation or misapplication of governing  
22 law is grounds for reconsideration. *See* Motion at 5:20-23; *see also Huckabay Props. v. NC Auto*  
23 *Parts*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 435 n.5 (2014). Had this Court properly reviewed  
24 the offer of judgment in the context of when it was made and correctly applied Nevada law in  
25 analyzing the *Beattie* factors, it could not have awarded attorneys' fees to the Sandin Defendants.  
26 The Court's Attorneys' Fees Order therefore is properly subject to reconsideration.

**B. The Sandin Defendants Contradict the Court's Statements When Proposing the Untenable Theory that the Court Found OPH Brought Its Claims in Bad Faith**

After accusing OPH of stretching the record, the Sandin Defendants offer the unsustainable proposition that the Court should be presumed to have found in their favor on the first *Beattie* factor. Opposition at 4:17-20. Even a cursory review of the transcript dispels the Sandin Defendants' argument. The transcript unequivocally demonstrates that the Court believed OPH was acting in good faith in bringing its claims and that "it wasn't unreasonable [for OPH] to proceed." See Ex. 1-A to Motion at 14:19-20; 15:2.

In their Opposition, the Sandin Defendants attempt to recast these statements as somehow only addressing the third *Beattie* factor in order to make the inaccurate assertion that the Court was silent on the first *Beattie* factor.<sup>1</sup> This position is untenable because the Court's comments were relating to the good faith of OPH in bringing and pursuing its claims. This much is obvious from the Court's references to its ultimate conclusions regarding the Sandin Defendants' liability and their alleged duty to OPH in the same breath as it explained its belief that OPH was acting in good faith. These statements surround the lone quote offered by the Sandin Defendants to support their unfounded and unsupportable belief that the Court found OPH pursued its claims in bad faith. See Ex. 1-A to Motion at 14:19-15:2.

Perhaps recognizing that there is no support in the transcript or Attorneys' Fees Order for their untenable assertion that the Court ignored the first *Beattie* factor or found OPH acted in bad faith, the Sandin Defendants turn to spilling much ink over a number of allegations they claim show OPH's bad faith. The Sandin Defendants then try to bolster these allegations—allegations that are nowhere to be found in the transcript or Attorneys' Fees Order—by claiming that "Plaintiff has never, not once, denied or argued against any of the foregoing facts." Opposition at 11:9-10. This claim is simply inaccurate and demonstrably false.

Much like the rest of the Sandin Defendants' Opposition, however, this whole argument is based on a flawed premise. For example, the Sandin Defendants argue that OPH exhibited bad faith by pursuing a theory of liability relating to the Sandin Defendants' believed duty to inform

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<sup>1</sup> In doing so, the Sandin Defendants concede that the Court found in favor of OPH on the third *Beattie* factor. Thus, this Reply only focuses on the first and second *Beattie* factors.

1 OPH of missed premium payments based on the parties' course of conduct. Opposition at 10:6-  
2 9. To support this faulty position, the Sandin Defendants blatantly misrepresent that "[t]here is  
3 no case law in Nevada that supports [a course of conduct] theory of liability." Opposition at  
4 10:9-11. This not only ignores the holding of the Nevada Supreme Court *in this case* where it  
5 stated "an insurance broker may assume additional duties to its insured client in special  
6 circumstances," but also the Nevada Supreme Court's observation in *Flaherty v. Kelly*, 2013 WL  
7 7155078 (Nev. Dec. 18, 2013) (unpublished), a case cited by the Sandin Defendants in their  
8 Opposition, that "[m]any jurisdictions . . . recognize that insurance brokers may assume  
9 additional duties in special circumstances." *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*,  
10 401 P.3d 218, 223 (Nev. 2017); *Flaherty*, 2013 WL 7155078, \*2.

11 The Sandin Defendants further argue that OPH acted in bad faith because there was no  
12 way the Sandin Defendants could ever notify OPH of the pending cancellation because OMI  
13 supposedly never sent a cancellation notice to Sandin. Opposition at pp. 7-8. As articulated in  
14 OPH's reply brief in the Nevada Supreme Court, however, OMI asserted that it did provide Dave  
15 Sandin with notice of the pending cancellation. *See* Exhibit 2 at p. 9, n. 1.

16 Somewhat similarly, the Sandin Defendants argue OPH must have pursued this case in  
17 bad faith because Dave Sandin could not have done anything wrong between February 2006 and  
18 October 2008 because he was working for Heffernan Insurance Brokers. Opposition at 10:21-  
19 24. The Sandin Defendants are not candid with this Court, much like they were not candid with  
20 the Nevada Supreme Court, in making this untenable argument. As pointed out in the Nevada  
21 Supreme Court, the Sandin Defendants' misleading argument conceals the critical fact that Dave  
22 Sandin's son, Anthony Sandin, was serving as the broker for OPH during that period *at Dave*  
23 *Sandin's direction*. *See* Exhibit 2 at pp. 8-9. As a result, it is not only plausible, but indeed quite  
24 likely, that Dave Sandin would be responsible for actions during the period in question.

25 Lastly, the Court must reject the Sandin Defendants' misrepresentation that OPH's single  
26 theory of liability against the Sandin Defendants was the parties' previous course of conduct. As  
27 evidenced even by the complaint, OPH also pursued liability against Dave Sandin based on his  
28 undisputed failure to comply with Nevada's licensing requirements. Tellingly, the Sandin

1 Defendants omit any reference to this conceded, critical fact that provided another reasonable  
2 basis for OPH to pursue Dave Sandin in this action.

3 Based on all of this information, it is clear that the Sandin Defendants' theory that this  
4 Court simply ignored the first *Beattie* factor or, somehow, without any indication in the transcript  
5 or Attorneys' Fees Order, found that OPH acted in bad faith, is simply unsustainable. Rather, the  
6 only logical conclusion that can be drawn is that the Court's statements at the hearing on the  
7 motion for attorneys' fees indicated that it believed OPH pursued its case in good faith and thus  
8 found in favor of OPH on the first *Beattie* factor.

9 **C. The Sandin Defendants' Opposition Further Demonstrates that the Court**  
10 **Misapplied Nevada Law in Finding that Their Offer of Judgment was Reasonable in**  
11 **Timing and Amount**

12 The Sandin Defendants' arguments concerning the second *Beattie* factor once again  
13 ignore OPH's contentions and rely on unpublished, irrelevant case law.<sup>2</sup> To be clear, OPH is not  
14 claiming it is presenting new facts or newly issued case law. Instead, as it argued in its initial  
15 Motion, OPH simply believes that this Court misapplied Nevada's longstanding law regarding  
16 offers of judgment, thereby rendering reconsideration appropriate. Motion at 6:1-25. The  
17 Sandin Defendants' analysis of the *Max Baer* case in its Opposition further evidences that the  
18 Court misinterpreted Nevada law when finding that the Sandin Defendants' offer was reasonable  
19 in timing and amount.

20 In analyzing the *Max Baer* case, the Sandin Defendants' admit that attorneys' fees were  
21 denied in that case, but attempt to distinguish it by stating the facts were different. Opposition at  
22 14:17-19. OPH agrees with the Sandin Defendants that the facts in *Max Baer* were different than  
23 they are in this matter. Indeed, the facts here make the Sandin Defendants' offer of judgment

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24 <sup>2</sup> It is strange that the Sandin Defendants would allege OPH lacked candor given the Sandin Defendants' flagrant  
25 disregard for Nevada's unambiguous rule prohibiting citation of unpublished decisions of the Nevada Court of  
26 Appeals. See NRAP 36 (providing that "unpublished dispositions issued by the Court of Appeals may not be cited  
27 in any Nevada court for any purpose"). Also, as evidenced by OPH's lengthy analysis of *Max Baer* in the Motion  
28 and this Reply, it is apparent that OPH was not intending to misrepresent anything about the *Max Baer* case and the  
one line cited by the Sandin Defendants as a potential inaccuracy was obviously an accidental, inadvertent statement  
that should have only cited to *Costco Wholesale Corp. v. Scrima*, 126 Nev. 702, \*3, 367 P.3d 760 (2010)  
(unpublished). Notably, the Sandin Defendants do not make any attempt to distinguish or devalue the *Scrima* case  
cited by OPH in its Motion wherein the Nevada Supreme Court unambiguously concluded that a token "\$1,000 offer  
was not reasonable or made in good faith." *Scrima*, 126 Nev. 702, \*3.



1 even more unreasonable compared to the one in *Max Baer* that was deemed insufficient to justify  
2 an award of attorneys' fees. Unlike the offer of judgment in *Max Baer* that was made *after the*  
3 *close of discovery*, here the Sandin Defendants made their offer of judgment *the day after their*  
4 *motion to dismiss was denied and before discovery had commenced*. As noted by both the  
5 Sandin Defendants and the court in *Max Baer*, this distinction is critical because courts analyzing  
6 Nevada's *Beattie* factors have observed that an offer of judgment made after the close of  
7 discovery allows the plaintiff the opportunity "to better assess his chances of success when the  
8 offer was made, *as opposed to the situation where a Defendant makes a token offer at the outset*  
9 *of a case.*" *Max Baer*, 2012 WL 5944767, \*3 (D. Nev. Nov. 26, 2012) (emphasis added);  
10 Opposition at 14:15-16.

11 Furthermore, as outlined above, the Court here found in favor of OPH on the first and  
12 third *Beattie* factors. Thus, this case presents a much stronger argument dictating against an  
13 award of attorneys' fees than *Max Baer* where the court still rejected the defendant's request for  
14 attorneys' fees even though it was indecisive on the first *Beattie* factor and only found in favor of  
15 the plaintiff on the third *Beattie* factor. This point is further solidified by the Sandin Defendants'  
16 concession that the "score" of the *Beattie* factors would be identical to that in *Max Baer*—where  
17 Nevada law was used to deny recover of attorneys' fees based on an offer of judgment—even  
18 under the Sandin Defendants' untenable belief that this Court did not find that OPH brought its  
19 claims in good faith. Opposition at 13:22-14:2.

20 Thus, when all the facts are taken into consideration, including both the unreasonably  
21 small amount of the offer of judgment and the ridiculous timing of making it the day after losing  
22 a motion to dismiss and prior to any discovery commencing, it is apparent that the Court  
23 misapplied Nevada's law relating to the *Beattie* factors and therefore erred in awarding  
24 attorneys' fees to the Sandin Defendants.

25 ...

26 ...

27 ...

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IV.

CONCLUSION

Based on the foregoing, OPH respectfully requests that the Court reconsider its Attorneys' Fees Order and amend the judgment because all three determinative *Beattie* factors weigh in favor of OPH and against awarding attorneys' fees to the Sandin Defendants.

DATED this 24<sup>th</sup> day of April 2018.

DICKINSON WRIGHT PLLC




Michael N. Feder  
Nevada Bar No. 7332  
[mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
Gabriel A. Blumberg  
Nevada Bar No. 12332  
[gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)  
8363 West Sunset Road, Suite 200  
Las Vegas, Nevada 89113-2210

**CERTIFICATE OF SERVICE**

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 24th day of April 2018, she caused a copy of the **PLAINTIFF O.P.H. OF LAS VEGAS INC.'S REPLY IN SUPPORT OF ITS MOTION TO RECONSIDER AND/OR AMEND JUDGMENT** to be transmitted via Odyssey E-Filing System pursuant to Rule 5(b)(2)(D) of the Nevada Rules of Civil Procedure and Rule 8.05 of the Eighth Judicial District Court Rules as follows:

Robert W. Freeman, Esq.  
Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD &  
SMITH LLP  
6385 S. Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
Email: [robert.freeman@lewisbrisbois.com](mailto:robert.freeman@lewisbrisbois.com)  
Email: [pobriant@lewisbrisbois.com](mailto:pobriant@lewisbrisbois.com)  
*Attorneys for Defendant*  
*Oregon Mutual Insurance Company*

Patricia Lee, Esq.  
HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Email: [plee@hutchlegal.com](mailto:plee@hutchlegal.com)  
*Attorneys for Defendants*  
*Dave Sandin and Sandin & Co.*

  
An Employee of Dickinson Wright PLLC

## EXHIBIT 1

## EXHIBIT 1

**DECLARATION OF GABRIEL A. BLUMBERG, ESQ. IN SUPPORT OF O.P.H. OF LAS VEGAS INC.'S REPLY IN SUPPORT OF ITS MOTION TO RECONSIDER AND/OR AMEND JUDGMENT**

I, Gabriel A. Blumberg, Esq. do hereby state and declare as follows:

1. I am an attorney with the law firm of Dickinson Wright PLLC, counsel for Plaintiff O.P.H. of Las Vegas, Inc. ("OPH"). I am duly licensed to practice before all courts in the State of Nevada and I have personal knowledge of all facts addressed herein, except for those matters stated on information and belief, and as for those matters, I am informed and believe them to be true, and if called upon to testify, could and would do so.

2. I make this declaration in support of OPH's Reply in Support of its Motion to Reconsider and/or Amend Judgment.

3. Attached hereto as Exhibit 2 is a true and correct copy of OPH's Consolidated Reply Brief in Nevada Supreme Court Case No. 68543.

DATED this 24<sup>th</sup> day of April 2018.



GABRIEL A. BLUMBERG, ESQ.

## EXHIBIT 2

## EXHIBIT 2

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

O.P.H. OF LAS VEGAS INC.,

Appellant,

vs.

OREGON MUTUAL INSURANCE  
COMPANY, DAVE SANDIN, AND  
SANDIN & Co.,

Respondents.

Electronically Filed  
Aug 25 2016 10:25 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court  
No.: 68543  
DC No.: A-12-672158

**APPELLANT'S CONSOLIDATED REPLY BRIEF**

MARGARET A. MCLETCHE  
Nevada Bar No. 11711  
McLetchie Shell, LLC  
701 E. Bridger Avenue, Suite 520  
Las Vegas, Nevada 89101  
(702) 728-5300

*Attorney for Appellant O.P.H. of Las Vegas, In*

### **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. No publicly traded company has a material interest in this appeal. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

MARGARET A. MCLEITCHIE  
Nevada Bar No. 10931  
ALINA M. SHELL  
Nevada Bar No. 11711  
MCLEITCHIE SHELL LLC  
701 E. Bridger Avenue, Suite 520  
Las Vegas, Nevada 89101  
(702) 728-5300  
*Attorneys for Appellant*

Patricia M. Lee, Esq.  
Michael S. Kelley, Esq.  
Michael K. Wall, Esq.  
HUTCHISON & STEFFEN LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
*Attorneys for Respondent Dave Sandin and Sandin & Co.*

Robert W. Freeman, Esq.  
Priscilla L. O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
6385 South Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
*Attorneys for Respondent Oregon Mutual Insurance Co.*

///



DATED THIS 24<sup>th</sup> DAY OF AUGUST, 2016.

/s/ Margaret A. McLetchie

Margaret A. McLetchie

Nevada Bar No. 10931

MCLEATCHIE SHELL LLC

701 E. Bridger Avenue, Suite 520

Las Vegas, Nevada 89101

*Counsel for Respondent*

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## INTRODUCTION

This Consolidated Reply Brief addresses arguments raised by Respondents Oregon Mutual Insurance Company (“OMI”) and Dave Sandin and Sandin & Co. (“Sandin Defendants”).

As discussed in Appellant O.P.H.’s Opening Brief, O.P.H.’s appeal challenges three final orders entered by the Honorable Gloria Sturman, District Judge of the Eighth Judicial District Court, Clark County: one order denying partial summary judgment to O.P.H. against OMI on its claim that OMI’s notice of insurance cancellation did not comply with NRS §§ 687B.320 and 687B.360 on the grounds that the claim presented a question of fact for the jury to consider (Vol. X at AA1597); a subsequent order granting summary judgment to OMI on that same claim (Vol. IX at AA1479); and a third order granting summary judgment to the Sandin Defendants on all of O.P.H.’s claims.

## ARGUMENT

**A. This Court Should Accord Deference to the Nevada Department of Insurance’s Interpretation of NRS § 687B.360 as Requiring All Cancellation Notices to Include Information About a Policyholder’s Right to Submit a Written Request for Information About the Reasons for Cancellation.**

Pursuant to Nev. Rev. Stat. § 687B.360, a notice of cancellation is not effective “unless it contains adequate information about the policyholder’s right” to request information regarding the facts which support the insurer’s decision to

cancel a policy. The July 31, 2012 notice from OMI, however, did not inform O.P.H. of this right. (See Vol. I at AA0116.) As a result, contrary to the district court's decision, OMI's notice did not effectively cancel O.P.H.'s policy.

In its Answering Brief, OMI asserts that its July 31, 2012 midterm cancellation notice to O.P.H. complied with NRS §§ 687B.320 and 687B.360 because it informed O.P.H. that it was terminating O.P.H.'s insurance policy for nonpayment. (OMI Answering Brief at pp. 14-15, 22-23.) In reaching that conclusion, OMI argues in part that the Court should grant no deference to the Nevada Department of Insurance's interpretation of NRS § 687B.360 as requiring all cancellation notices to contain information informing the insured of its right submit a written request for the specific reasons for cancellation. (See Vol. I at AA0160.) This position, however, ignores longstanding precedent from this Court that courts must accord substantial weight to an agency's interpretation of Nevada statutes. See, e.g., *Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983).

In this case, the district court failed to consider that the Nevada Department of Insurance has interpreted NRS § 687B.360 as requiring all cancellation notices to include information about a policyholder's right to make a written request for specific information about the reasons for cancellation "*even if the notice does include the reason for cancellation or nonrenewal.*" (Vol. I at AA0160) (emphasis added). Ignoring this interpretation was error because, as noted above, this Court has

repeatedly held that courts must defer to an agency's interpretation of its own governing statutes. See *Dutchess Business Services, Inc. v. Nevada State Bd. Of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008); see also *Int'l Game. Tech., Inc. v. Second Jud. Dist. Court of Nevada*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1989) (city's interpretation of its own laws is cloaked with a presumption of validity). This Court has also explained that the judicial branch should refrain from stepping into the shoes of the State and making decisions for it. *North Lake Tahoe Fire Protection District v. Washoe County Board of County Commissioners*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 585-587 (2013). Because agencies such as Nevada Department of Insurance have discretion to construe the statutes under which they operate, courts "are obliged to attach substantial weight to the agency's interpretation." *Folio*, 99 Nev. 30, 33, 656 P.2d 842, 844; accord *Cape Jasmine Court Trust v. Central Mortgage Co.*, 2014 WL 1305015 at \*6 (D. Nev. 2014).

In this instance, despite OMI's protestations to the contrary, the Nevada Department of Insurance has interpreted NRS § 687B.360 as requiring all cancellation notices to include information regarding a policyholder's right to submit a written request for an explanation of the reasons for cancellation—even if, as here, the cancellation notice indicates the insurer is canceling the policy for a specific reason.

Although O.P.H. maintains that it is entitled to summary judgment on this claim, the dispute over the weight this Court must accord to the Nevada Department of Insurance's interpretation of NRS § 687B.360 demonstrates that there may be a genuine issue of material fact in dispute regarding the adequacy of OMI's July 31 cancellation notice to O.P.H. Accordingly, the Court erred in granting summary judgment to OMI on this claim.

**B. The Record is Devoid of Any Indication That the District Court's Reversal of its Initial Position that the Effectiveness of OMI's Cancellation Notice Was a "Question of Fact" Was the Result of the District Court Correcting a Clear Error.**

As set forth in the Opening Brief, the district court erred in entering what were essentially incompatible orders. On February 19, 2014, the district court denied O.P.H.'s motion of partial summary judgment on its claim against OMI for failure to comply with the notification provisions codified in Chapter 687B of the Nevada Revised Statutes on the grounds that this was a "question of fact." (Vol. X at AA1597, AA1600.) On June 26, 2015, however, the district court reversed course, holding that the interpretation of the relevant statutes was "not a question of fact for the jury, but a question of law for resolution by the court." (Vol. IX at 1483.)

In its Answering Brief, OMI asserts that the district court "simply realized that [its order denying summary judgment to O.P.H.] was erroneous" and corrected that error with its subsequent order granting summary judgment to OMI. (OMI Answering Brief at p. 26; *see also id.* at p. 24-25 (citing *Sch. Dist. No. 1J, Multnomah*



*Cnty., Or. V. ACandS, Inc.*, 5 F.3d 1255, 1236 (9th Cir. 1993).) However, the district court's order is devoid of any indication that is this case; in fact, the court's June 26, 2015 order does not even acknowledge its prior order denying O.P.H. summary judgment on this claim. Instead, the district court decided to reverse its position without specifically articulating the grounds for its reversal. Absent some clear indication from the district court that it was correcting an error in its prior order, it is impossible for any party to divine the district court's rationale for reversing its position.

Moreover, as discussed above, the district court's grant of summary judgment to OMI on this claim is erroneous in light of the Nevada Department of Insurance's interpretation of NRS § 687B.360. Accordingly, the district court erred in granting summary judgment to OMI after previously denying O.P.H. summary judgment on the same claim because it had found that the adequacy of the notice was an "issue of fact."

**C. The Special Relationship Between the Sandin Defendants and O.P.H. Created a *De Facto* Duty for the Sandin Defendants to Advise O.P.H. That Its Insurance Premiums Were Due.**

Throughout this case, O.P.H. has asserted that the Sandin Defendants had a duty to remind O.P.H. about its monthly insurance premiums due to the specifics of the relationship between the Sandin Defendants and O.P.H. (*See, e.g.*, Vol. I at AA0014-15 (O.P.H.'s claims against the Sandin Defendants for breach of fiduciary

duty and negligence).) Although insurance agents do not typically have a fiduciary relationship with their clients, O.P.H. maintains that, consistent with law from other jurisdictions, Dave Sandin's relationship with O.P.H. created a *de facto* fiduciary duty to O.P.H.

In their Answering Brief, the Sandin Defendants criticize O.P.H.'s used of the phrase "*de facto* fiduciary duty." (*See, e.g.,* Sandin Defendants Answering Brief at pp. 17-18.) However, the Sandin Defendants' critique of O.P.H.'s nomenclature does not address O.P.H.'s larger point: that, even in the absence of a statutory or legal obligation to advise O.P.H. of pending policy cancellations, Mr. Sandin's practice of advising O.P.H. of such issues created a special relationship between Mr. Sandin and O.P.H. This special relationship carried with it duties that exceed the scope of the typical insurance agent-insured relationship.

As the Sandin Defendants point out in their Answering Brief, the United States Court of Appeals for the Ninth Circuit has noted that this Court has not yet imposed a fiduciary duty on insurance brokers towards insureds. (Sandin Defendants Answering Brief at p. 19 (quoting *CBC Financial, Inc. v. Apex Insurance Managers, LLC*, 291 Fed. Appx. 30 at \*3 (9th Cir. Aug 14, 2008).) However, as this Court has previously noted, other courts have recognized that even in the absence of an explicit fiduciary duty, "insurance brokers may *assume* additional duties in special circumstances." *Flaherty v. Kelly*, 2013 WL 7155078 at \*2 (Nev. 2013)

(unpublished) (compiling case law and publications finding a special relationship between insurance agents and insureds created additional duties).

Indeed, several other jurisdictions have recognized that a “special relationship” between a broker and an insured triggers additional duties. As the Connecticut Court of Appeals explained in *Precision Mech. Servs., Inc. v. T.J. Pfund Associates, Inc.*, 109 Conn. App. 560, 565–66, 952 A.2d 818, 822 (2008), “inherent in the obligation to seek continuation of an insurance policy is the duty to notify the applicant if the insurer declines to continue [to insure] the risk, so the applicant may not be lulled into a feeling of security or put to prejudicial delay in seeking protections elsewhere.” (citations and punctuation omitted); *see also Martinonis v. Utica Nat’l Ins. Group*, 65 Mass. App. Ct. 418, 420, 421 840 N.E.2d 994, 996 (2006) (Finding that “in an action against the agent for negligence, the insured may show that special circumstances prevailed that gave rise to a duty on the part of the agent to ensure that adequate insurance was obtained”); *Sadler v. Loomis Co.*, 139 Md. App. 374, 392–93, 776 A.2d 25, 35–36 (2001) (holding that under Maryland law, an insurance broker’s responsibilities to the insured ends with the procurement of an appropriate policy unless there is a “special relationship: between the agent and the insured or applicant); *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 377 S.E.2d 34 (1988) (holding that a special relationship exists where there is a course of dealing over an extended period of time which would have put objectively

reasonable insurance agents on notice that their advice was being sought and specially relied on).

Dave Sandin first started working with O.P.H. as their insurance agent while employed with another insurance company. (Vol. V at AA0861-62.) Linda Snyder, O.P.H.'s office manager, testified that O.P.H. first retained the services of Dave Sandin in the late 1990's while he was employed with another firm, and continued to use him as an agent as he moved to other firms. (Vol. VIII at AA1187, AA1189.) Ms. Snyder also testified that Dave Sandin and/or the firms he worked for had previously notified O.P.H. of late payments on insurance premiums on three prior occasions. (Vol. VIII at AA1198; *see also* AA1199 (“[W]e had a ten-plus year relationship with Dave Sandin specifically, regardless of what company he worked for. Our relationship was with Dave Sandin.”).) Relatedly, former O.P.H. president Stephan Freudenberger testified that he relied on Dave Sandin to provide him with information when a policy premium was late. (Vol. VIII at AA1257.) Additionally, Dave Sandin's testimony establishes that he imposed a duty on himself to inform clients about missed payments and cancellations, even though this is beyond the scope of his duties under Nevada law. (*See* Vol. VIII at AA1247-48.)

In their Answering Brief, the Sandin Defendants assert that Dave Sandin was not O.P.H.'s broker between February 2006 and October 2008. (*See* Sandin Defendants Answering Brief at p. 26.) During that time period, however, Mr.

Sandin's son, Anthony Sandin, acted as the broker for O.P.H. at Mr. Sandin's direction. Thus, the Sandins' longstanding relationship with O.P.H. created a special duty on the part of Mr. Sandin to notify O.P.H. regarding pending cancellations, overdue premium payments, and other matters relevant to the insurance policies he had procured for O.P.H.

Thus, despite the district court's findings to the contrary, there are numerous genuine issues of material fact regarding the Sandin Defendants' duty to notify O.P.H. of the impending cancellation of their policy with OMI.<sup>1</sup> The Court therefore erred in granting summary judgment in favor of the Sandin Defendants on this claim.

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<sup>1</sup> In their Answering Brief, the Sandin Defendants assert that Dave Sandin never received notification from OMI regarding the pending cancellation of O.P.H.'s policy. (See Sandin Defendants Answering Brief at pp. 29-31.) However, OMI has asserted that it did provide Mr. Sandin notice of the pending cancellation. (Vol. VIII at AA 1208-10.)

## CONCLUSION

Based upon the above and foregoing, and for the reasons set forth in Appellant O.P.H.'s Opening Brief, the district court erred in denying O.P.H.'s motion for partial summary judgment, and also erred in granting OMI's and the Sandin Defendants' motions for summary judgment. In this case, there remain genuine issues of material fact which must be resolved by a jury. Accordingly, O.P.H. respectfully requests that this Court reverse the district court's orders disposing of this case, and remand the matter to the district court for further proceedings.

Respectfully submitted this 24<sup>th</sup> day of August, 2016,

/s/ Margaret A. McLetchie  
Margaret A. McLetchie  
Nevada Bar No. 10931  
MCLECHIE SHELL LLC  
701 E. Bridger Avenue, Suite 520  
Las Vegas, Nevada 89101  
*Counsel for Respondent*

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Nev. R. App. P. 28.2, I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the Reply Brief has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this Reply Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 2,235 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

///

///

///

///

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24<sup>th</sup> day of August, 2016.

/s/ Margaret A. McLetchie  
MARGARET A. MCLETCHE  
Nevada Bar No. 10931  
MCLETCHE SHELL LLC  
701 E. Bridger Avenue, Suite 520  
Las Vegas, Nevada 89101



### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing APPELLANT'S REPLY BRIEF was filed electronically with the Nevada Supreme Court on the 24<sup>th</sup> day of August, 2016. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Patricia M. Lee, Esq.  
Michael S. Kelley, Esq.  
Michael K. Wall, Esq.  
HUTCHISON & STEFFEN LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
*Attorneys for Respondent Dave Sandin and Sandin & Co.*

Robert W. Freeman, Esq.  
Priscilla L. O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
6385 South Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
*Attorneys for Respondent Oregon Mutual Insurance Co.*

/s/ Alina M. Shell  
McLetchie Shell LLC

# RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

O.P.H. of Las Vegas, Inc.,  
Plaintiff,

**VS.**

Oregon Mutual Insurance  
Company

Defendant.

CASE#: A-12-672158-C

DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN,  
DISTRICT COURT JUDGE

TUESDAY, MAY 1, 2018

**RECORDER'S TRANSCRIPT OF HEARING**  
**MOTION FOR RECONSIDERATION**

APPEARANCES:

For the Plaintiff:

GABRIEL BLUMBERG, ESQ.

For the Defendant:

PATRICIA LEE, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, May 1, 2018

2  
3 [Case called at 9:18 a.m.]

4 THE COURT: All right. Good morning.

5 MS. LEE: Good morning, Your Honor.

6 MS. BLUMBERG: Good Morning, Your Honor. Gabriel  
7 Blumberg on behalf of Plaintiff, OPH.

8 MS. LEE: And Patricia Lee on behalf of the Sandin  
9 Defendants. Bar Number 8287.

10 THE COURT: Good morning. All right. This is a motion for  
11 reconsideration.

12 MR. BLUMBERG: It is. Thank you, Your Honor. We're here  
13 today because we think that the award of attorney fees under Beatty  
14 Factors was incorrect in favor of the Sandin defendants. We think one  
15 of the key things at issue here is determining whether or not that offer  
16 of judgment was worth awarding attorney's fees at the time it was  
17 made.

18 We understand we're many years later now and what you  
19 know now may change your opinion, but the key in these situations is  
20 at the time the offer was made, was it reasonable? Did OPH have a  
21 good-faith basis in pursuing its claims? And did OPH -- was OPH  
22 grossly unreasonable in declining that offer of judgment. And we think  
23 all three of those factors cannot be satisfied here unless the award of  
24 attorney's fees simply cannot stand here.

25 We think the transcript in the case from the original hearing

1 we had demonstrates that this Court found that OPH pursued its claims  
2 in good faith and that it was not grossly unreasonable for OPH to  
3 decline a \$2,000 offer of judgment. The only sticking point that I  
4 believe this Court had was that it found that the \$2,000 offer of  
5 judgment was reasonable in time and amount, which we simply think  
6 cannot withstand scrutiny in this matter when you look at the time the  
7 offer was made.

8           Here that offer was made the day after the Sandin  
9 defendants had lost a motion to dismiss. So at this point, the only  
10 thing in OPH's knowledge is they have claims. They come in here  
11 having their entire business destroyed by a fire. They file the  
12 complaint, which on its face said they're seeking damages in excess of  
13 \$50,000. They've already spent more than \$2,000 in fees filing the  
14 complaint and arguing the motion to dismiss, which they prevailed on.  
15 And then before any discovery commences, they receive this \$2,000  
16 offer of judgment, which I submit there's not a single person in this  
17 courtroom or county who would even hesitate to even consider that  
18 offer because it's so unreasonable in timing, amount, and just general  
19 concept as to what the damages are in this case and why anybody  
20 would accept that.

21           And I think that leads to the bigger issue here, which is  
22 policy reason-wise if this Court were to award attorney's fees on such a  
23 nominal offer of judgment, before discovery commences when  
24 damages are well in excess of that amount, this Court would basically  
25 be turning the Supreme Court precedent on its head, which says you

1 can't use these offer of judgments as a penalty. You can't use them to  
2 force Plaintiffs into submission of forgoing their claims. You simply  
3 need to have an offer of judgment if it's ever going to be a basis for  
4 attorney's fees, it has to make a plaintiff think, say hey, is this a  
5 reasonable offer, should I even consider this.

6 And that simply couldn't have been the case here, Your  
7 Honor. I mean otherwise every single attorney in this courtroom is  
8 going to start filing motions to dismiss. Either they're going to win the  
9 motion to dismiss or they'll lose. They'll submit a 1,000 - \$2,000 offer  
10 of judgment that they have no belief will ever be accepted, but they're  
11 going to do it because they're then going to then put the Plaintiff on the  
12 hook for hundreds of thousand dollars in attorney's fees and therefore  
13 enforce a penalty which is going to make every plaintiff forego  
14 legitimate claims which I simply don't think is what the Supreme Court  
15 intended when they instituted the Beatty Factors.

16 THE COURT: Ms. Lee?

17 MS. LEE: Thank you, your Honor. On a motion for  
18 reconsideration counsel needs to show that you misapplied the law. I  
19 didn't hear counsel say that you misapplied the law. When he came up  
20 here, he just debated with your discretion, basically. He was saying  
21 you made the wrong decision.

22 He's not saying that you misapplied the Beatty Factors,  
23 which is what they said in their motion. The record is clear, Your  
24 Honor, and it will not be disturbed on appeal unless there is no  
25 evidence to support your decision in the record. What counsel is trying

1 to do is make you articulate your reasoning under every single Beatty  
2 Factor, which is not only not required, but it's expressly not required by  
3 the Supreme Court. It said over and over again you don't have to  
4 articulate your reasoning as long as there's ample support in the record  
5 for your decision. And Your Honor, there was.

6           At the time that my clients made their offer of judgment,  
7 this case was in arbitration, which means that the amount would have  
8 been capped at \$50,000. So we made an offer of judgment for \$2,000,  
9 and we made it early because we knew this case was ridiculous. What  
10 they did was -- unfortunately, yes, their business burned down, but  
11 they didn't pay their insurance premiums and that's the only reason  
12 they didn't get coverage, not because the broker, who put these two  
13 people together, the insurance agency and the Plaintiff, did anything  
14 wrong.

15           What they said is they were trying to create a duty that did  
16 not exist in the law, which is that the Sandin defendants must inform  
17 the Plaintiff that their insurance is going to be cancelled because they  
18 didn't pay their premiums. And then they tried to say well, this was a  
19 course in conduct thing. He had done it in the past. Although, there's  
20 no duty in the law, they created this duty because he had warned us  
21 before. Well, then we get through the depositions and we find out that  
22 the Sandin -- Dave Sandin, who is the person they said they relied on  
23 99.9 percent of the time is what they said in their opposition to our  
24 motion for summary judgment.

25           He couldn't have advised him on the dates that they said he

1 advised them because he wasn't even their broker of record at that  
2 time. He was at another firm, under a non-compete. Linda Schneider  
3 (phonetic) testified to that. And so they had absolutely no good-faith  
4 basis for bringing this lawsuit. They actually knew that their premium  
5 was late. They knew it was late. They wrote the check out to pay the  
6 premium and for some reason, they didn't tender that check. And  
7 somehow that is the broker's fault? Even the president of the company  
8 says I'm not trying to blame anyone for us not paying our premium.  
9 Well, then what are you doing suing my client?

10               It was a ridiculous lawsuit. And Your Honor even gave  
11 strong admonitions at the time of motion to dismiss and I understand,  
12 and appreciate counsel was not counsel of record at that time. Your  
13 Honor gave very strong admonitions warning the other side. I'm not  
14 sure how you're going to make this burden work because it's just a  
15 duty that doesn't exist. However, because we are constrained, Your  
16 Honor was constrained, by the very low standard of a motion to  
17 dismiss. This is not Federal Court where we have the higher lqbal  
18 standard. I don't think it would have survived that. And Your Honor  
19 warned them. It's going to be a difficult case for you to approve.

20               And so we did it early because we knew we would have to  
21 spend hundreds and thousands of dollars to defend this ridiculous  
22 lawsuit. It was absolutely asinine, which is why the offer was so early.  
23 And the rules permit it, Your Honor. There's no de facto, if you submit  
24 your offer of judgment prior to discovery stating that it's per say  
25 unreasonable. There's no prima facie unreasonableness about when

1 we served it. It was within the times -- within the time allotted by the  
2 rules. And therefore, Your Honor can say that it was reasonable.

3 And as far as the amount, as we saw in the Max Baer case,  
4 it can be a token amount if the claims were bought in bad faith. And by  
5 the way, the first Beatty Factor and the third Beatty Factor should be  
6 kept separate. They're not the same thing.

7 The first Beatty factor is whether or not they brought the  
8 claims in the first instance in good faith. And we would say no. Now,  
9 when they file their reply brief, you see for the first time -- well, actually  
10 in their Supreme Court brief. My Supreme Court brief they say oh,  
11 actually it wasn't David Sandin who was giving us this information. It  
12 was Anthony Sandin, the son. This was never, ever, ever alleged at  
13 any point throughout the two-year litigation. We deposed everybody.  
14 Anthony Sandin's name did not come out of anyone's mouth in terms  
15 of he was the one that was giving them this notification of cancellation  
16 at the behest of his father, Dave Sandin. That is a new allegation that  
17 was raised for the first time on appeal, which was soundly rejected by  
18 the Supreme Court as indicated by its written order, which it didn't  
19 mention that at all.

20 In fact, the Supreme Court looked at it and said, yeah, Dave  
21 Sandin couldn't have given them any notice of the cancellation because  
22 he wasn't broker of the record.

23 So it was a really, really bad idea, Your Honor, to sue our  
24 clients. And I wanted to make sure that my clients got the full benefit  
25 of their offer of judgment because they knew that it was ridiculous.



1 This case was forced upon my clients, then we do our motion for  
2 summary judgment. We win. They try to get another bite of the apple  
3 by appealing, which is their right. They lose again. Then we ask for  
4 our attorney's fees for the appeal and revisit our motion for attorney's  
5 fees filed two years earlier. And then after two years of consideration,  
6 Your Honor, you've read all the papers, you've read all the pleadings.  
7 We've incorporated the motions for summary judgment into our  
8 papers by reference. The record is replete with support for your  
9 decision and that is all that is required, Your Honor.

10           You do not have to go through each factor and articulate  
11 your basis for each factor so long as the record supports it. There is no  
12 abuse of discretion. Your Honor got it right. And we ask that you do  
13 not change your decision based on the dissatisfaction of opposing  
14 counsel. Thank you.

15           THE COURT: Thank you.

16           MR. BLUMBERG: Thank you. Your Honor, I think we'll start  
17 with a couple of the factual issues opposing counsel raised, not that I  
18 think they're terribly relevant, but just so the record's clear. She spent  
19 a lot of time on this issue of whether Sandin was the insurance broker  
20 at the time or this is an issue that's been first raised on appeal. I think  
21 the record clearly dispels it.

22           If you look at the motion in limine filed in this case by the  
23 Sandin defendant, they specifically state Dave Sandin, Anthony Sandin,  
24 and Sandin and Co. have worked on Plaintiff's account since 2010.  
25 Sandin and Co. and Anthony Sandin's respective Nevada licenses

1 expired on June 1st, 2013. It's clear they knew that was an issue.  
2 We're not bringing it up now.

3           The point, that that I guess ultimately gets to is they knew  
4 they were the broker for OPH, one of the Sandins, or Sandin and  
5 company during the time of this case. Whether or not they believe they  
6 had a duty, I understand they don't think they did, but the Supreme  
7 Court case law not only -- that ultimately ended in this case with the  
8 Supreme Court saying it is possible that a duty may exist. There's case  
9 law from 2013 which has been cited by the Sandin defendant in this  
10 case in Flaherty versus Kelly where this Supreme Court in Nevada said  
11 many jurisdictions recognize that insurance brokers may assume  
12 additional duties in special circumstances. OPH believed those special  
13 circumstances existed here. They thought they had a good-faith basis  
14 for pursuing their claims. That was reflected in Your Honor's  
15 statements during the hearing on the initial attorney's fees where Your  
16 Honor stated you believe that OPH was reasonable in pursuing its  
17 claims or thought it was pursuing its claims in good faith. That is the  
18 first Beatty Factor.

19           The third Beatty Factor, I don't think there's been any  
20 argument as I think they concede that it wasn't grossly unreasonable  
21 for OPH to reject that \$2,000 offer of judgment. So really the only  
22 factor this Court could possibly find in favor of them is on the second  
23 Beatty Factor and we think the Court misapplied the law which is the  
24 governing standard, and I think that's clear from the Max Bear case that  
25 opposing counsel spoke about early here. And I think that goes exactly

1 to the timing and amount argument.

2 In that case there was a \$1,000 offer of judgment where it  
3 was made after the close of discovery. And the Court was pretty clear  
4 that that is a huge distinction to make whether or not it comes before  
5 or after the close of discovery. Yes, the rule says you can make it any  
6 time, but if you're going to make it before any discovery happens or  
7 before anyone has really moved forward in the case, you have to make  
8 an offer that is going to make someone pause and forego their entire  
9 case the day it first begins, which the \$2,000 offer of judgment here  
10 simply didn't do.

11 And this arbitration issue they keep raising, obviously, prior  
12 counsel stated on the face of this complaint, they sought exemption  
13 from arbitration. The damages were in excess of 50 grand. I think  
14 everybody knew the damages had to be that large given that entire  
15 business was shut down from a fire that destroyed a restaurant. So I  
16 don't think it's reasonable for them to come in here and say I think the  
17 damages had to be that low so the offer of judgment is reasonable.  
18 There's no way that a business owner who loses his entire business is  
19 going to even hesitate and consider an offer of \$2,000 the day after this  
20 Court tells him he can proceed with his claims.

21 It's simply unreasonable. It imposes a penalty directly  
22 contrary to what the Beatty Factor set out to avoid. And it would set  
23 horribly precedent in this court, Your Honor, to allow Defendants, who  
24 lose on a motion to dismiss, to instantly accrue their entire attorney's  
25 fees by submitting an offer of judgment they know has no basis or

1 chance of being accepted.

2 THE COURT: Okay. Well, I have always said -- and I think  
3 because I am familiar with the law that says an insurance broker may  
4 assume duties, they have to do so in some affirmative manner.

5 And that was the problem in this case. And at the time of  
6 the motion to dismiss, again with our low standard, I feel that the Court  
7 was pretty clear that this is only because we've got the Nevada  
8 standard and not the Federal standard, you wouldn't have passed  
9 muster under the Federal standard, but if you wish to proceed, I felt --  
10 while I may not have used these words, I feel that it was pretty clear  
11 from this record, that you did so at your own risk or your client did.

12 I mean, you were not counsel of record and your client was  
13 on notice of the response of the Sandin defendants. Their motion to  
14 dismiss was very thorough on why this case was just never going to  
15 reach the affirmative standard necessary to show that a duty had been  
16 assumed. That was on the record from the beginning. They put you  
17 on notice after they were not successful in having the case dismissed  
18 that they felt confident in their position.

19 And I never said that I thought that that was -- that it was a  
20 reasonable decision to reject the offer. I felt it was a choice that was  
21 made by OPH to take the risk. They were on notice that they had a  
22 substantial risk before them it was going to be a tough fight and if they  
23 proceeded with the Sandin defendants, you know, there's a risk. And  
24 that's, I'm assuming, the decision analysis that they followed and  
25 determined that it was worth the risk to proceed.

1 I never said that I thought it was reasonable to reject that  
2 offer. I never said that. I did do some digesting on the amount of the  
3 award. I felt overall the fees were reasonable, but technically and  
4 arguably OPH advanced the theory that until we were out of arbitration,  
5 there was a limitation on what they could expect to receive. And so the  
6 Court agreed with that and limited their recovery to the amount that is  
7 allowed in an arbitration case.

8 As you indicated, I don't think there was ever any indication  
9 that this case was going to stay in arbitration, but because all of this  
10 part of the case, the motion to dismiss was, as I said, thoroughly  
11 briefed. There is a lot of fees related to that early stage of the case,  
12 which I felt was on them at that point. They chose to do that that early  
13 in the case, okay fine. It limited their fees for recovery until they were  
14 out of the arbitration. I think that amounted to about a \$30,000 cut in  
15 their request.

16 But I don't believe, and I -- you'd have to point me to a  
17 place where anywhere where I said that I felt that it was reasonable to  
18 reject that offer. I never said that. I said it -- I felt it was good faith to  
19 plead it after you read the motion to dismiss, they're on notice of the  
20 risk and the difficulty they were going to have in proving Mr. Sandin  
21 had assumed any obligations. He was right up front in I think  
22 substantial affidavits in support of the motion to dismiss, should have  
23 put your client on notice of the risk in going forward. It was their  
24 choice. They took that risk. But I think there were on full notice of what  
25 they were taking on.

1                   So I never said it was good faith to not accept the award. I  
2 never said it. It's good faith to bring the case once you see their  
3 response, then it's on you if you choose to go forward or not. I never  
4 said it was good faith to reject the offer.

5                   So for that reason, that's why I did what I did. I don't think  
6 any of that is an error in the application of the law. And I think we're all  
7 pretty much in agreement with facts. I don't think there's been any  
8 change to the facts. It's just a question of applying the Beatty Factors.  
9 And I think that it may have been a little unclear why I did it the way I  
10 did it. I don't think under the Beatty Factors are required to lay it out,  
11 you know, in a lot of detail. But if you want it on the record, there it is.

12                  So I'm going to reject the motion to amend -- reconsider or  
13 amend a judgment. I believe that it was appropriate, as I said.

14                  With respect to reconsidering, I don't think there's any basis  
15 to reconsider either as a matter of law and certainly not as a matter of  
16 fact.

17                  With respect to amending as in adjusting the award, I think  
18 the award -- the adjustment that was due and owing to OPH was their  
19 point was valid, that at the point in which the offer was made, they  
20 were limited in what they could hope to recover through an arbitration  
21 process. So that was why the adjustment was made.

22                  I didn't really see any other adjustment. I didn't see any  
23 problems with the billing, no over billing, no double billing. I just really  
24 did not see any other problems with the fees as requested. And  
25 certainly, I think it could have been more. I believe, as I recall, Ms. Lee

1 did this on an adjusted rate as a courtesy to this particular client. It's  
2 actually pretty far below what she normally would have been charging.  
3 So I felt that in and of itself was enough of an adjustment that I didn't  
4 make any other adjustments.

5 So I see nothing that would show me that I need to  
6 otherwise amend the judgment. So for that reason I'm going to deny  
7 both requests.

8 Ms. Lee, are you going to do the order?

9 MS. LEE: I can do it, Your Honor.

10 THE COURT: Would you please show it to counsel?

11 MS. LEE: Absolutely.

12 THE COURT: Thank you.

13 MS. LEE: Thank you, Your Honor.

14 MR. BLUMBERG: Thank you, Your Honor.

15 [Proceedings concluded at 9:37 a.m.]  
16  
17  
18

19 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
20 audio/video proceedings in the above-entitled case to the best of my ability.  
21

22 Valori Weber

23 Valori Weber  
24 Court Recorder/Transcriber

25 Date: January 14, 2019

*Attorneys for Defendants  
Dave Sandin and Sandin & Co.*



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of Hutchison & Steffen,  
3 PLLC and that on this 11<sup>th</sup> day of June, 2018, I caused the above and foregoing document entitled  
4 **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF O.P.H. OF LAS VEGAS INC.'S**  
5 **MOTION TO RECONSIDER AND/OR AMEND JUDGMENT** to be served as follows:

6 ☐ by placing same to be deposited for mailing in the United States Mail, in  
7 a sealed envelope upon which first class postage was prepaid in Las  
Vegas, Nevada; and/or

8 ☐ pursuant to EDCR 7.26, to be sent via facsimile; and/or

9 ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served  
10 through the Eighth Judicial District Court's electronic filing system, with  
the date and time of the electronic service substituted for the date and  
11 place of deposit in the mail; and/or

12 ☐ to be hand-delivered;

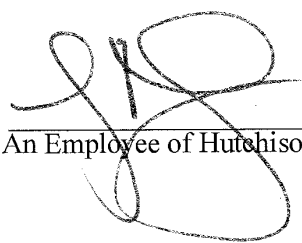
13 to the attorney(s) listed below at the address and/or facsimile number indicated below:

14 Michael N. Feder, esq.  
Gabriel Blumberg, Esq.  
15 DICKISON WRIGHT, PLLC  
8363 W. Sunset rd., Ste. 200  
16 Las Vegas, Nv 89113

17 *Attorneys for plaintiff*  
*O.P.H. of Las Vegas Inc.*

Robert Freeman, Esq.  
Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH,  
LLP  
6385 S. Rainbow Blvd., Ste. 600  
Las Vegas, NV 89118

18 *Attorneys for Oregon Mutual Insurance*  
*company*

19  
20  
21   
22 An Employee of Hutchison & Steffen, PLLC  
23  
24  
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26  
27  
28

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EXHIBIT PAGE ONLY

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC

**EXHIBIT 1**

APP00880

*Steven D. Grierson*

1 **ORDD**  
Patricia Lee (8287)  
2 HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
3 Las Vegas, NV 89145  
Tel: (702) 385-2500  
4 Fax: (702) 385-2086  
plee@hutchlegal.com  
5

6 *Attorneys for defendants*  
Dave Sandin and Sandin & Co.  
7

8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10  
11 O.P.H. OF LAS VEGAS, INC.,  
12 Plaintiff,

13 v.

14 OREGON MUTUAL INSURANCE  
COMPANY, DAVE SANDIN, and SANDIN  
15 & CO.,

16 Defendants.  
17

Case No.: A-12-672158-C

Dept. No.: XXVI

**ORDER DENYING PLAINTIFF  
O.P.H. OF LAS VEGAS INC.'S  
MOTION TO RECONSIDER  
AND/OR AMEND JUDGMENT**

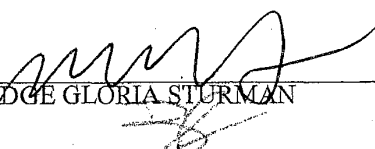
18 Plaintiff O.P.H. OF LAS VEGAS, INC.'s Motion to Reconsider and/or Amend  
19 Judgment came before this Court on May 1, 2018 at 9:00 a.m. Patricia Lee of the firm  
20 Hutchison & Steffen, PLLC appeared on behalf of Dave Sandin and Sandin & Co, (together the  
21 "Sandin Defendants") and Gabriel Blumberg of the firm Dickinson Wright, PLLC appeared on  
22 behalf of Plaintiff, O.P.H. of Las Vegas, Inc. ("OPH").

23 Having reviewed all papers and pleadings on file and entertained oral arguments  
24 presented by all counsel, this Court makes the following Order:

25 For the reasons set forth on the record at the hearing, the Court believes it has properly  
26 considered and weighed all factors articulated in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668  
27 P.2d 268, 274 (1983) and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d  
28 31, 33 (1969), IT IS HEREBY ORDERED that Plaintiff O.P.H. OF LAS VEGAS, INC.'s

1 Motion to Reconsider and/or Amend Judgment is hereby DENIED.

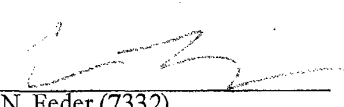
2 IT IS SO ORDERED this 7<sup>th</sup> day of June, 2018.

3  
4   
5 HONORABLE JUDGE GLORIA STURMAN

6 HUTCHISON & STEFFEN, PLLC

DICKINSON WRIGHT, PLLC

7   
8 Patricia Lee (8287)  
9 10080 W. Alta Drive, Suite 200  
10 Las Vegas, Nevada 89129  
E-Mail: [plee@hutchlegal.com](mailto:plee@hutchlegal.com)

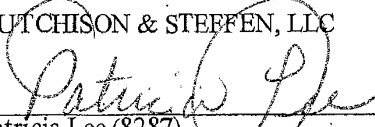
  
Michael N. Feder (7332)  
Gabriel Blumberg (12332)  
8363 W. Sunset Rd., Suite 200  
Las Vegas, Nevada 89113  
E-Mail: [mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
[gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)

11 *Attorneys for Dave Sandin and Sandin &*  
12 *Co.*

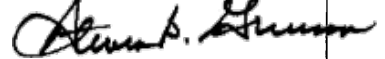
*Attorneys for plaintiff*  
*O.P.H. of Las Vegas Inc.*

13  
14 Respectfully submitted by:

15 HUTCHISON & STEFFEN, LLC

16   
17 Patricia Lee (8287)  
18 10080 West Alta Drive, Suite 200  
19 Las Vegas, NV 89145

20 *Attorneys for Dave Sandin and Sandin & Co.*  
21  
22  
23  
24  
25  
26  
27  
28



1 NOA  
2 **DICKINSON WRIGHT PLLC**  
3 MICHAEL N. FEDER, Nevada Bar No. 7332  
4 Email: [mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
5 GABRIEL BLUMBERG, Nevada Bar No. 12332  
6 Email: [gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)  
7 8363 West Sunset Road, Suite 200  
8 Las Vegas, Nevada 89113-2210  
9 Tel: (702) 550-4400  
10 Fax: (844) 670-6009  
11 *Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY, NEVADA**

10 O.P.H. OF LAS VEGAS, INC.,

11 Plaintiff,

12 vs.

13 OREGON MUTUAL INSURANCE COMPANY,  
14 DAVE SANDIN, AND SANDIN & CO.,

15 Defendants.

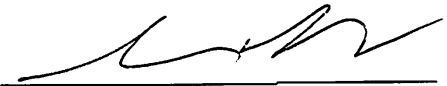
Case No. A-12-672158-C  
Dept. No. XXVI

**NOTICE OF APPEAL**

16  
17 Notice is hereby given that Plaintiff O.P.H. of Las Vegas, Inc. ("OPH"), by and through  
18 its attorneys, the law firm of Dickinson Wright PLLC, hereby appeals to the Supreme Court of  
19 Nevada from the March 14, 2018 *Finding of Facts, Conclusions of Law and Judgment in Favor*  
20 *of Dave Sandin and Sanin & Co. on their Motion for Attorneys' Fees and Costs* and June 11,  
21 *2018 Order Denying Plaintiff O.P.H. of Las Vegas, Inc.'s Motion to Reconsider and/or Amend*  
22 *Judgment.*

23 DATED this 11<sup>th</sup> day of September 2018.

24 **DICKINSON WRIGHT PLLC**

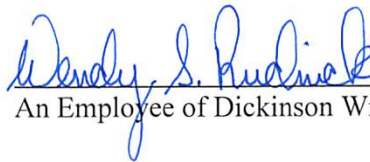
25  
26   
27 Michael N. Feder, Nevada Bar No. 7332  
28 Gabriel A. Blumberg, Nevada Bar No. 12332  
8363 West Sunset Road, Suite 200  
Las Vegas, Nevada 89113-2210  
*Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 11th day of September 2018, she caused a copy of **NOTICE OF APPEAL** to be transmitted via Odyssey E-Filing System pursuant to Rule 5(b)(2)(D) of the Nevada Rules of Civil Procedure and Rule 8.05 of the Eighth Judicial District Court Rules as follows:

Robert W. Freeman, Esq.  
Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD &  
SMITH LLP  
6385 S. Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
Email: robert.freeman@lewisbrisbois.com  
Email: pobriant@lewisbrisbois.com  
Attorneys for Defendant  
Oregon Mutual Insurance Company

Patricia Lee, Esq.  
HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Email: plee@hutchlegal.com  
Attorneys for Defendants  
Dave Sandin and Sandin & Co.

  
An Employee of Dickinson Wright PLLC



1 **NESO**  
2 **DICKINSON WRIGHT PLLC**  
3 MICHAEL N. FEDER, Nevada Bar No. 7332  
4 Email: [mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
5 GABRIEL BLUMBERG, Nevada Bar No. 12332  
6 Email: [gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)  
7 8363 West Sunset Road, Suite 200  
8 Las Vegas, Nevada 89113-2210  
9 Tel: (702) 550-4400  
10 Fax: (844) 670-6009  
11 *Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

12 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 O.P.H. OF LAS VEGAS, INC.,

15 Plaintiff,

16 v.

17 OREGON MUTUAL INSURANCE  
18 COMPANY, DAVE SANDIN, AND SANDIN  
19 & Co.

20 Defendants.

CASE NO. A-12-672158-C  
DEPT. NO. XXVI

**NOTICE OF ENTRY OF STIPULATION  
AND ORDER FOR DISMISSAL WITH  
PREJUDICE**

21 Please take notice that a STIPULATION AND ORDER FOR DISMISSAL WITH  
22 PREJUDICE was entered on September 7, 2018, a copy of which is attached hereto.

23 DATED this 11<sup>th</sup> day of September 2018.

24 DICKINSON WRIGHT PLLC



25 Michael N. Feder, Nevada Bar No. 7332  
26 [mfeder@dickinson-wright.com](mailto:mfeder@dickinson-wright.com)  
27 Gabriel A. Blumberg, Nevada Bar No. 12332  
28 [gblumberg@dickinson-wright.com](mailto:gblumberg@dickinson-wright.com)  
8363 West Sunset Road, Suite 200  
Las Vegas, Nevada 89113-2210

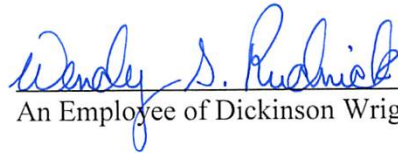
DICKINSON WRIGHT PLLC  
8363 West Sunset Road, Suite 200  
Las Vegas, Nevada 89113-2210

**CERTIFICATE OF SERVICE**

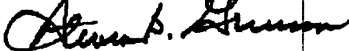
The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 11<sup>th</sup> day of September 2018, she caused a copy of the **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL WITH PREJUDICE** to be transmitted via Odyssey E-Filing System pursuant to Rule 5(b)(2)(D) of the Nevada Rules of Civil Procedure and Rule 8.05 of the Eighth Judicial District Court Rules as follows:

Robert W. Freeman, Esq.  
Priscilla O'Briant, Esq.  
LEWIS BRISBOIS BISGAARD &  
SMITH LLP  
6385 S. Rainbow Blvd., Suite 600  
Las Vegas, NV 89118  
Email: [robert.freeman@lewisbrisbois.com](mailto:robert.freeman@lewisbrisbois.com)  
Email: [pobriant@lewisbrisbois.com](mailto:pobriant@lewisbrisbois.com)  
*Attorneys for Defendant*  
*Oregon Mutual Insurance Company*

Patricia Lee, Esq.  
HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Email: [plee@hutchlegal.com](mailto:plee@hutchlegal.com)  
*Attorneys for Defendants*  
*Dave Sandin and Sandin & Co.*

  
An Employee of Dickinson Wright PLLC





1 **SODW**  
2 **DICKINSON WRIGHT PLLC**  
3 MICHAEL N. FEDER, Nevada Bar No. 7332  
4 Email: mfeder@dickinson-wright.com  
5 GABRIEL BLUMBERG, Nevada Bar No. 12332  
6 Email: gblumberg@dickinson-wright.com  
7 8363 West Sunset Road, Suite 200  
8 Las Vegas, Nevada 89113-2210  
9 Tel: (702) 550-4400  
10 Fax: (844) 670-6009  
11 *Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

7 **IN THE EIGHTH JUDICIAL DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 O.P.H. OF LAS VEGAS, INC.,

10 Plaintiff,

11 v.

12 OREGON MUTUAL INSURANCE  
13 COMPANY, DAVE SANDIN, AND SANDIN  
14 & Co.

15 Defendants.

CASE NO. A-12-672158-C  
DEPT. NO. XXVI

**STIPULATION AND ORDER FOR  
DISMISSAL WITH PREJUDICE**

15 It is hereby stipulated to between Plaintiff O.P.H. of Las Vegas, Inc. ("OPH"), by and  
16 through its counsel, the law firm of Dickinson Wright PLLC, and Defendant Oregon Mutual  
17 Insurance Company ("OMI"), by and through its counsel, the law firm of Lewis Brisbois  
18 Bisgaard & Smith, LLP, that all claims asserted by OPH against OMI in the above-captioned  
19 matter shall be dismissed with prejudice.

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<input type="checkbox"/> Voluntary Dismissal	<input type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input checked="" type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

Each party to bear their own costs and attorneys' fees.


Dated this 4<sup>th</sup> day of ~~August~~ <sup>September</sup>, 2018

Dated this 14 day of August, 2018

DICKINSON WRIGHT PLLC

LEWIS BRISBOIS BISGAARD & SMITH

  
MICHAEL N. FEDER

  
ROBERT W. FREEMAN

Nevada Bar No. 7332

Nevada Bar No. 3062

GABRIEL A. BLUMBERG

PRISCILLA L. O'BRIANT

Nevada Bar No. 12332

Nevada Bar No. 10171

8363 West Sunset Road, Suite 200

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89113-2210

Las Vegas, NV 89118

Tel: (702) 550-4400

Tel: (702) 893-3383

Fax: (844) 670-6009

Fax: (702) 893-3789

*Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*

*Attorneys for Defendant Oregon Mutual Insurance Company*

**ORDER**

Based upon the foregoing, IT IS HEREBY ORDERED that all claims asserted by OPH against OMI in the above-captioned matter shall be dismissed with prejudice, with each party to bear their own costs and attorneys' fees. The November trial date and all scheduled hearings are hereby vacated.

Dated this 6<sup>th</sup> day of ~~August~~ <sup>Sept</sup>, 2018.

  
DISTRICT COURT JUDGE

Respectfully submitted by:  
DICKINSON WRIGHT PLLC

  
MICHAEL N. FEDER

Nevada Bar No. 7332

GABRIEL A. BLUMBERG

Nevada Bar No. 12332

8363 West Sunset Road, Suite 200

Las Vegas, Nevada 89113-2210

*Attorneys for Plaintiff O.P.H. of Las Vegas, Inc.*