IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

JOHN S. WALKER, and RALPH ORTEGA,

Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT COURT and BARRY L. BRESLOW, as District Judge,

Respondents.

SHEILA MICHAELS, and KATHERYN FRITTER, real parties in interest.

_____/

DISTRICT COURT NOS.:

CV18-01798 and CV18-02032

ORTEGA APPENDIX VOLUME 3

William R. Kendall, Esq.

State Bar No. 3453

137 Mt. Rose Street

Reno, NV 89509

(775) 324-6464

Attorney for Petitioners

ORTEGA APPENDIX VOLUME 3 INDEX

EXHIBIT 13

EXHIBIT 13

ADAM P. MCMILLEN, ESQ.
State Bar No. 10678
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50 West Liberty Street, Suite 303
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adam.mcmillen@farmersinsurance.com
Attorney for Defendant,
SHEILA MICHAELS

DISTRICT COURT

WASHOE COUNTY, NEVADA

JOHN S. WALKER,

Plaintiffs,

vs.

SHEILA MICHAELS; DOES I-V, inclusive,

Defendants.

Case No.: CV18-01798

DEPT. NO. 7

OPPOSITION TO MOTION TO STAY SHORT TRIAL PROCEEDINGS

Plaintiff fails to cite any legal authority allowing a stay pending the resolution of his MOTION TO STRIKE TRIAL DE NOVO; IMPOSE SANCTIONS; AND PERMIT DISCOVERY. Also, said motion is based upon an incompetent and incomplete statistical analysis of each request for trial de novo filed by the undersigned, as described more fully in the OPPOSITION TO MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS; AND PERMIT DISCOVERY, filed herein on April 12, 2019. As a result, Defendant requests that Plaintiff's motion to stay be denied.

Affirmation: Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED: April 12, 2019

THE LAW OFFICES OF S. DENISE MCCURRY - RENO

BY: /s/ Adam McMillen
ADAM P. MCMILLEN, ESQ.
Attorney for Defendant,
SHEILA MICHAELS

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify that I am an employee of THE LAW OFFICES OF S. DENISE MCCURRY - RENO and that on the 12th day of April, 2019, I served a true and correct copy of the above and foregoing OPPOSITION TO MOTION TO STAY SHORT TRIAL PROCEEDINGS on the parties addressed as shown below:

_____ *Via U.S. Mail* by placing said document in a sealed envelope, with postage prepaid [N.R.C.P. 5(b)]

__X__ *Via Electronic Filing* [N.E.F.R. 9(b)]

_____ *Via Electronic Service* [N.E.F.R. 9]

_____ *Via Facsimile* [E.D.C.R. 7.26(a)]

William R. Kendall
Law Offices of William R. Kendall
137 Mt. Rose St.
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/s/ Adam McMillen

An Employee of The Law Offices of
S. Denise McCurry - Reno

EXHIBIT 14

EXHIBIT 14

FILED
Electronically
CV18-01798
2019-06-19 11:13:56 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7329229

2840

IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN S. WALKER,

Plaintiff,

vs.

SHEILA MICHAELS,
and DOES I-V, inclusive,

Defendant.

Case No. CV18-01798

Department No.: STP

ORDER ADDRESSING 1) MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS AND PERMIT DISCOVERY, and 2) MOTION TO STAY SHORT TRIAL PROCEEDINGS

An Arbitrator's Award, dated March 18, 2019, was served on the parties in Case ARB18-01798. On March 18, 2019, Defendant SHEILA A. MICHAELS (hereinafter "MICHAELS"), by and through her attorney, Adam P. McMillen, Esq. of the Law Offices of S. Denise McCurry-Reno, filed a *Request for Trial De Novo.* On April 2, 2019, Plaintiff JOHN S. WALKER (hereinafter "WALKER"), by and through his attorney, William R. Kendall, Esq., filed a *Motion to Strike Request for Trial De* Novo; *Impose Sanctions; and Permit Discovery.* On April 12, 2019, MICHAELS filed her *Opposition to Motion to Strike Request for Trial De Novo; Impose Sancitons; and Permit Discovery.* On April 18, 2019, MICHAELS filed *Plaintiff's Reply in Support of Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery,* and the matter was submitted to the originally assigned department for the Court's consideration. Thereafter, the matter was transferred to the Short Trial Program Commissioner-District Judge for decision.

Contemporaneously with WALKER's motion to strike, he filed a *Motion to Stay Short Trial Proceedings* on April 2, 2019. On April 12, 2019, MICHAELS filed her *Opposition to Motion to Stay Short Trial Proceedings*. On April 18 2019, WALKER filed *Plaintiff's Reply in Further Support of Motion to Stay Short Trial Proceedings,* and the matter was submitted to the originally assigned department for the Court's consideration. Thereafter, the matter was transferred to the Short Trial Program Commissioner-District Judge for decision.

NAR 18(A) provides that within 30 days after an arbitration award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the commissioner a written request for trial de novo of the action. NAR 18(b) provides that the 30 day filing requirement is jurisdictional. NAR 18(e) provides that after the filing and service of the written request for trial de novo, the case shall be set for trial upon compliance with applicable court rules. NAR 22(a) provides that "[t]he failure of a party or an attorney to either prosecute or defend a cause in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo." For the purposes of NAR 22(a), good faith is equivalent to a requirement that the parties participate in the arbitration proceedings in a meaningful manner. Casino Properties, Inc. v. Andrews, 112 Nev. 132, 135 (1996)(appellant failed to defend arbitration in good faith by refusing to produce documents during discovery, failing to timely deliver a pre-arbitration statement and failing to produce a key witness at the arbitration (citing Gilling v. Eastern Airlines, Inc., 680 F.Supp. 169 (D.N.J.1988)). However, the constitutional right to a jury trial is not waived simply because individuals disagree over the most effective way to represent a client at an arbitration proceeding. Chamberland v. Labarbera, 110 Nev. 701, 705 (1994). The denial of a request for trial de novo pursuant to NAR 22(a) must be accompanied by specific written findings of fact and conclusions of law by the district court describing what type of conduct was at issue and how that conduct rose to the level of bad faith participation in the court annexed arbitration program. Chamberland, 110 Nev. at 705. The Nevada Supreme Court has provided examples of circumstances that may indicate a failure of a party to participate in good faith. Campbell v. Maestro, 116 Nev. 380, 385, 996 P.2d 412, 415 (2000). However, the Nevada Supreme Court ultimately reversed the district court's order

striking the request for trial de novo, finding that even through the defendant's tactics were questionable, the record did not justify elimination of a right to trial. 116 Nev. at 386. Similarly, in Chamberland, the Nevada Supreme Court found a failure to conduct discovery and failure to attend the arbitration did not warrant the "draconian sanction" of terminating the defendant's right to further litigation proceedings. 110 Nev. at 705.

In the instant matter, WALKER argues that MICHAELS' attorney, Adam McMillen, Esq., has a pattern and practice to file a request for trial de novo in every case that goes against them (Farmer's Insurance) without regard to the facts and circumstances of each individual case, and that this is a tactic designed to increase the time and expense of litigation for claimants, uses the arbitration process as a device to obstruct and delay payment, and designed to frustrate the purposes of the arbitration program. Additionally, WALKER argues that the Nevada Supreme Court supports the district court conducting an inquiry into the conduct of insurance companies that appear to be abusing the arbitration program by routinely requesting trial de novo without regard to the facts and circumstances of each case and the insurance companies' use of the de novo process as a way to obstruct. Should the Court find that additional information is needed, WALKER requests an evidentiary hearing and the opportunity to conduct narrowly tailored discovery into Farmers' practices associated with requests for trial de novo. Finally, WALKER argues that MICHAELS be precluded from conducting any discovery which it could have performed during the arbitration process, but failed to perform.

In response, MICHAELS argues that only bad-faith participation in the arbitration process waives her right to a jury trial and that she meaningfully participated in good faith during the arbitration process and did not waive her right to trial de novo. To determine whether MICHAELS did not participate in the arbitration in good faith, MICHAELS argues that the Court must examine the entirety of the arbitration process, including the facts and circumstances of the case. In support of that contention, MICHAELS states that her attorney served a written offer of judgment, engaged in written discovery, took WALKER's deposition, timely served her arbitration statement, never refused to comply with any court order, did not purposefully deny WALKER of his ability to participate fully, refuse to discuss settlement at any time during the

process, her attorney represented her interests during the arbitration hearing by preparing an arbitration brief, presented a witness at the hearing, examined her and cross-examined WALKER, and the arbitrator, in his award, did not allude to any bad faith or lack of meaningful participation on MICHAEL's, her attorney's, or her insurer's part. MICHAELS further argues that the cases WALKER cites involving a filing of a request for trial de novo were handled based upon the facts and circumstances of each of the individual cases and no finding of bad faith conduct was cited in any of those cases.

In his reply, WALKER argues that MICHAEL's insurer's bad faith lies in their practice of automatically requesting a trial de novo regardless of the arbitration process in which an adverse arbitration award is rendered, and that it is irrelevant how the MICHAEL's attorney (and insurer) prepared for the arbitration hearing.

The heart of WALKER's assertion of bad faith is the course of advocacy that MICHAEL's counsel followed by filing a request for trial de novo in ten cases in which he asserts were decided against MICHEAL's insurer. WALKER states that the total number of cases that McMillen has handled for Farmers insureds, the number of cases settled before arbitration, the amounts they settled for and when, and information about arbitrations in other jurisdictions, binding arbitrations, or small claims cases are not relevant to the issue before the Court. Rather, it is the statistics cited in his motion pulled from the Second Judicial District Court's Eflex system data that prove that McMillen/Farmers routinely filed a request for trial de novo in 100% of adverse arbitration cases without regard to the facts and circumstances of each case. Gittings v. Hartz, 116 Nev. 386, 393 (competent statistical information that demonstrates that an insurance company has routinely filed trial de novo requests without regard to the facts and circumstances of each individual case may be used to support a claim of bad faith).

The Court finds that it does not have a factual record to support a finding that MICHAELS, through her attorney/insurance company, acted in bad faith. Id., 116 Nev. at 393 (finding that the district court did not have a sufficient factual record to support a finding of bad faith because it was based solely on the basis of statements made in the pleadings of the parties). Moreover, the Court finds that the sanction of eliminating MICHAELS' right to trial must be

supported by an evidentiary hearing where competent evidence, including a qualitative and quantitative statistical analysis, are provided to substantiate that MICHAELS' attorney/insurer has routinely filed requests for trial de novo without regard to the facts and circumstances of each individual case is necessary.[1]

Next, WALKER has requested, that if the Court found an evidentiary hearing was necessary, that he be afforded the opportunity to perform narrowly tailored discovery into Farmers' practices associated with requests for trial de novo. NRCP 26(b)(1) states that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses...." Farmers' business practices are outside the scope of NRCP 26(b)(1) concerning WALKER's negligence (personal injury) claims or MICHAELS' defenses that are the subject of this lawsuit.

Finally, WALKER has requested that MICHAELS be precluded from conducting any discovery which it could have performed during the arbitration process, but failed to do so. The issue as to whether MICHAELS should be precluded from conducting any discovery is an issue for the Short Trial Program Pro Tempore Judge to decide, and therefore, will not be decided at this time.

The Court next considers WALKER's Motion to Stay Short Trial Proceedings. WALKER request a stay of the Short Trial Proceedings given the likelihood that his Motion to Strike Trial De Novo will not be ruled upon until after the Short Trial process has been well underway. As such, WALKER argues that a stay of the short trial proceeding is in order pending resolution of his motion to strike. In her opposition MICHAELS argues that the motion to stay the short trial proceedings should be denied as it is based upon an incompetent and incomplete statistical analysis of each request for trial de novo filed by Mr. McMillen. In his reply,

[1] Gittings v. Hartz, 116 Nev. 386, fn 7. The Nevada Supreme Court states "[w]e recognize that the bare statistics create the impression that certain insurance carriers are abusing the arbitration process, and we would have no problem with supporting the denial of a jury trial if a hearing produced competent evidence to substantiate such a conclusion. We are not, however, suggesting that an extensive evidentiary hearing would be necessary in each case. It is conceivable that a detailed statistical analysis, properly authenticated, could be used in more than one proceeding or that testimony taken in one hearing might be admissible in other hearings involving the same carrier under the doctrine of collateral estoppel."

WALKER argues that as a matter of judicial economy and expedience, a stay of the proceedings is in order until resolution of the motion to strike. After considering the arguments of the parties, the Court finds that as a matter of judicial economy and as a matter of fundamental fairness, it is appropriate to enter a short stay of the above-entitled matter until the motion to strike is resolved.

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the above entitled matter is stayed until resolution of John S. Walker's Motion to Strike Request for Trial De Novo is decided.

IT IS HEREBY FURTHER ORDERED that the parties shall appear before the Administrative Assistant for Department 4 within 15 days to set this matter for an evidentiary hearing to provide competent evidence, including a qualitative and quantitative statistical analysis, to substantiate that Adam McMillen, Esq./Farmers Insurance Company has routinely filed requests for trial de novo without regard to the facts and circumstances of each individual case.

IT IS HEREBY FURTHER ORDERED that John S. Walker's request for discovery into Farmers Insurance Company's practices associated with requests for trial de novo is denied.

DATED this 19 day of June, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV18-1798

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 19 day of June, 2019, I filed the **ORDER ADDRESSING 1) MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS AND PERMIT DISCOVERY, AND 2) MOTION TO STAY SHORT TRIAL PROCEEDINGS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____**Personal delivery to the following: [NONE]**

__X__**Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

WILLIAM KENDALL, ESQ. for JOHN S. WALKER
ADAM MCMILLEN, ESQ. for SHEILA MICHAELS

_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 19 day of June, 2019.

William R. Kendall, Esq.
State Bar No. 3453
137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

****

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN JEAN FRITTER; DOES I-V; inclusive,

Defendants.
_____/

CASE NO.: CV18-02032

DEPT. NO.: 4

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS; AND PERMIT DISCOVERY

Plaintiff, RALPH ORTEGA, hereby files his Reply in Support of Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery, and submits the following Points and Authorities, exhibits and argument in support thereof.

Dated this 31st day of July, 2019.

WILLIAM R. KENDALL, ESQ.

137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

POINTS AND AUTHORITIES

1. FARMERS' "STATEMENT OF FACTS" CONTAIN FALSEHOODS

Plaintiff testified that he did continue to work as a mechanic, but that he enlisted others to do any heavy lifting required. Plaintiff testified that he stopped riding his motorcycles during the time that he was injured and receiving medical care. Plaintiff provided written wage loss verification signed by his employer. Farmers' has actual knowledge of these facts, but misrepresents those facts to the Court.

2. ONCE AGAIN, FARMERS TOTALLY MISSES THE MARK

Farmers spends the bulk of its opposition arguing irrelevant points.

a) Farmers goes into detail attempting to show the Court that it "meaningfully participated in good faith during the arbitration process...." However, this is not the issue. **Plaintiff does not assert that Farmers' participation in discovery or the arbitration hearing was bad faith.** What discovery was done or what questions were asked is irrelevant. In fact, such things are irrelevant to Farmers; it files for de novo regardless of what happened in the case.

Farmers' bad faith lies not in how they prepared for the arbitration hearing or in how they conducted themselves at the hearing. Farmers' bad faith lies in their practice of automatically requesting a trial de novo regardless of the arbitration process in every single case in which an adverse arbitration award is render. This is a tactic designed to increase the time and expense of litigation for claimants, use the arbitration process as a device to obstruct and delay payment, and to pressure a settlement for less. This nefarious conduct is designed to frustrate the purpose of the arbitration program, which is to "...provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." NAR 2(A).

Regardless of the "participation" in the arbitration hearing, Farmers' undeniable practice of requesting trial de novo in nearly every case they lose at arbitration demonstrates that they intended to file a de novo request if they lost. That is the essence of bad faith.

In *Gittings v. Hartz,* 116 Nev. 386, 393-394 (2000), the Supreme Court eliminated as possible support for the striking of the request for trial de novo the level of "participation" in the arbitration hearing by the defendant. The Court went on to rule on the issue of routinely filing requests for trial de novo, holding that:

> ...competent statistical information that demonstrates that an insurance company has routinely filed trial de novo requests without regard to the facts and circumstances of each individual case may be used to support a claim of bad faith.

Accordingly, the extent of "participation" Farmers demonstrated before and during the arbitration hearing is irrelevant to whether they failed to participate in the Program in good faith because they de novo nearly every case they lose. The clearly proven fact that they have filed for trial de novo in **nearly all of the cases they lost at arbitration** is clear and convincing evidence of bad faith. **If they lose, they de novo.**

b) Farmers' has exhibited **bad faith participation in the arbitration process** by filing for trial de novo in nearly every case it lost at arbitration. The unrefutable statistics from the Second Judicial District's own records show this is how McMillen has approached the arbitration process since his first day at Farmers in 2017. The proof of this bad faith lies in the statistics of trial de novo requests filed by McMillen after a Plaintiff's arbitration award.

It is irrelevant that McMillen:

1) settled cases outside the arbitration program;

2) settled cases in the arbitration program before the arbitration hearing;

3) settled cases after the arbitration award[1];

4) "accepted" some arbitration awards;

5) settled some arbitration cases below the arbitration award (see footnote 1);

6) defensed 2 arbitrations;

7) tried 5 short trials and obtained a verdict less than the arbitration award;

8) tried 1 short trial after the Plaintiff filed for trial de novo;

9) tried 1 short trial after Farmers de novo, resulting in a verdict higher than the arbitration award;

10) tried cases in Justice Court.

What Farmers, through McMillen, does outside the arbitration program, unrelated to requests for trial de novo, does not matter. It is how they abuse the trial de novo that is under scrutiny here.

This is clear evidence that Farmers goes into arbitration with the plan that if they lose, they will file a request for trial de novo. There exists a clear correlation between requests for trial de novo and arbitration verdicts against Farmers.

NAR 22 provides:

> If, during the proceedings in the trial de novo, the district court determines that a party or attorney engaged in conduct designed to obstruct, delay or otherwise adversely affect the arbitration proceedings, it may impose, in its discretion, any sanction authorized by NRCP 11 or NRCP 37.

[1] In fact, filing for trial de novo in order to increase the time and expense of litigation and to force a lower payment is one of Farmers' tactics.

In *Gittings v. Hartz,* 116 Nev. 386, 394 (2000), the Nevada Supreme Court held:

> We recognize that the bare statistics create the impression that certain carriers are abusing the arbitration process, and **we would have no problem with supporting the denial of a jury trial if a hearing produced competent evidence to substantiate such a conclusion**. We are not, however, suggesting that an extensive evidentiary hearing would be necessary in each case. It is conceivable that a detailed statistical analysis, properly authenticated, could be used in more than one proceeding or that testimony taken in one hearing might be admissible in other hearings involving the same carrier under the doctrine of collateral estoppel.

The *Gittings* Court cited the fact that Allstate "requests trial de novo in at least 52% of cases", and characterized that statistic as "a comparatively high percentage of de novo requests." Id. at 391 and 393. The Court held that "this statistic raises a question in this court's mind as to whether this percentage constitutes bad faith per se in violation of Rule 2(A) of the Nevada Arbitration Rules." Id. at 391.

The Court addressed the argument that if Allstate's high percentage of requests for trial de novo amounted to a prima facie showing of bad faith, additional discovery would be necessary. The Court held that statistical analysis could demonstrate bad faith participation in the arbitration program due to excessive requests for trial de novo. Id. at 393. Therefore, the Court remanded the case "to the district court for further proceedings consistent with this opinion."

3. CONCLUSIONS

How Farmers and McMillen prepared for and what it did at arbitration hearings are not relevant. What Farmers and McMillen did in cases other than those in which they requested trial de novo is irrelevant. The only cases that are relevant to the issue of bad faith requests for trial de novo are those cases in which Farmers lost at arbitration and filed requests for trial de novo.

The statistics cited herein show beyond a doubt that Farmers and McMillen have automatically filed a request for trial de novo in **nearly every** case resulting in an arbitration award for the Plaintiff. Plaintiff submits that the official Washoe Courts website case lists and the official Washoe County District Court Eflex system data irrefutably prove that Farmers and McMillen have routinely filed trial de novo requests in nearly 100 % of adverse arbitration cases without regard to the facts and circumstances of each individual case. Plaintiff submits that this evidence is "competent statistical information" (*Gittings,* at 394) upon which this Court can conclude that Farmers and have not been participating in the arbitration process in good faith.

Plaintiff submits that statistics showing that Farmers and McMillen request trial de novo in nearly 100% of adverse award arbitrations should raise a question in the "Court's mind as to whether this percentage constitutes bad faith per se in violation of Rule 2(A) of the Nevada Arbitration Rules." Plaintiff also submits that such a high percentage constitutes a prima facie showing of bad faith.

Dated this 31st day of July, 2019.

WILLIAM R. KENDALL, ESQ.

137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

Certificate of Service

RE: CV18-02032

Judge: HONORABLE JUDGE CONNIE STEINHEIMER

Court: Second Judicial District Court - State of Nevada

Case Title: Ortega v. Fritter

This certificate was automatically generated by the courts auto-notification system.

Date Generated: 07-31-2019.

I hereby certify that on 07-31-2019, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Adam McMillen, Esq.

The following people need to be notified:

None.

Dated this 31st day of July, 2019.

William R. Kendall

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document

filed in case number**: CV18-02032**_____

[X] Document does not contain the social security number of any person

Date: **7/31/2019**

William R. Kendall, Esq.
State Bar No. 3453
137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN JEAN FRITTER; DOES I-V; inclusive,

Defendants.
_____/

CASE NO.: CV18-02032

DEPT. NO.: 4

MOTION FOR NRCP 11 SANCTIONS

Plaintiff, RALPH ORTEGA, hereby files his Motion for NRCP 11 Sanctions, and submits the following Points and Authorities, exhibits and argument in support thereof.

Dated this 9th day of August, 2019.

WILLIAM R. KENDALL, ESQ.

137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

1. Facts

This case stems from a rear-end collision between Plaintiff and Defendant which occurred on 11/6/2017. On 6/17/2019, the case was arbitrated before court-appointed arbitrator, David M. Zaniel, Esq.

Liability was admitted by the Defendant at the arbitration hearing. Plaintiff incurred medical expenses of $ 13,348.00, which were not contested by the Defendant. Plaintiff suffered a wage loss of $ 1,600.00 which was verified by his employer and was not refuted by Defendant at the arbitration.

On 6/19/2019, Mr. Zaniel filed the Arbitration Award, finding in favor of Plaintiff and awarding total damages of $ 20,448.00, broken down as: $ 13,448.00 in medical expenses, $ 1,600.00 in wage loss, and $ 5,500.00 in general damages. On 7/5/2019, Defendant, through Farmers' attorney Adam P. McMillen, filed a Request for Trial De Novo.

On July 15, 2019, Plaintiff filed his Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery. The basis of Plaintiff's Motion is that Farmers does not participate in the Arbitration Program in good faith. Specifically, the "strategy" of filing trial de novo requests without regard to the facts and circumstances of each individual case is a tactic that is designed to increase the time and expense of litigation for claimants and uses the arbitration process as a device to obstruct and delay payment. This conduct is designed to frustrate the purposes of the arbitration program, which are to "...provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." NAR 2(A).

The statistics show without a doubt that Farmers files requests for trial de novo in nearly 100 % of cases where an arbitration award in favor of Plaintiff occurs.

2. Argument

NRCP 11 provides that by presenting a pleading to the court, the attorney is certifying to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that (1) it is not being presented for any improper purpose, such as to harass or to

cause unnecessary delay or needless increase in the cost of litigation.

Plaintiff asserts that Farmers files requests for trial de novo for these delineated improper purposes. Accordingly, Plaintiff asserts that NRCP 11 sanctions are in order.

3. Conclusions

Plaintiff respectfully submits that should the Court grant his Motion to Strike Request for Trial De Novo, finding that Farmers has engaged in the nefarious conduct alleged, then NRCP 11 sanctions are warranted. Therefore, Plaintiff requests that the Court rule upon this motion for sanctions at or after the hearing scheduled for 10/22/2019, and grant such other or further relief that the Court deems just and fair.

Dated this 9th day of August, 2019.

William R. Kendall, Esq.
137 Mt. Rose Street
Reno, NV 89509
Attorney for Plaintiff

Certificate of Service

RE: CV18-02032

Judge: HONORABLE JUDGE CONNIE STEINHEIMER

Court: Second Judicial District Court - State of Nevada

Case Title: Ortega v. Fritter

This certificate was automatically generated by the courts auto-notification system.

Date Generated: 8-9-2019.

I hereby certify that on 08-09-2019, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Adam McMillen, Esq.

The following people need to be notified:

None.

Dated this 9th day of August, 2019.

William R. Kendall, Esq.

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document

filed in case number**: CV18-02032**_____

☒ Document does not contain the social security number of any person

Date: **8/9/2019**

William R. Kendall

Exhibit 1

Exhibit 1

The Law Offices of
WILLIAM R. KENDALL
kendalllaw@aol.com

137 Mt. Rose Street
Reno, NV 89509

Phone: (775) 324-6464
Fax: (775) 324-3735

July 16, 2019

Adam P. McMillen, Esq.
The Law Offices of S. Denise McCurry-Reno
P.O. Box 258829
Oklahoma City, OK 73125-8829

Re: Ortega v. Fritter; CV18-02032

Dear Mr. McMillen:

Enclosed with this letter is Plaintiff's Motion for NRCP 11 Sanctions. Pursuant to the rule, the Motion shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after the service of the motion, the challenged pleading, in this case your Request for Trial De Novo, is withdrawn.

Therefore, if you have not withdrawn your Request for Trial De Novo withing 21 days, this Motion will be filed with the Court.

Sincerely,

William R. Kendall, Esq.

William R. Kendall, Esq.
State Bar No. 3453
137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN JEAN FRITTER; DOES I-V; inclusive,

Defendants.
_____/

CASE NO.: CV18-02032

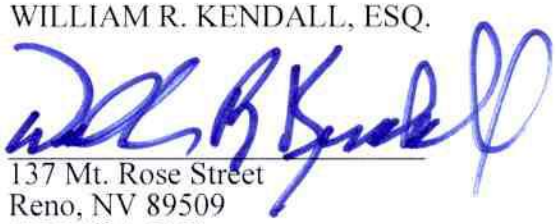
DEPT. NO.: 4

MOTION FOR NRCP 11 SANCTIONS

Plaintiff, RALPH ORTEGA, hereby files his Motion for NRCP 11 Sanctions, and submits the following Points and Authorities, exhibits and argument in support thereof.

Dated this 16th day of July, 2019.

WILLIAM R. KENDALL, ESQ.



137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

1. Facts

This case stems from a rear-end collision between Plaintiff and Defendant which occurred on 11/6/2017. On 6/17/2019, the case was arbitrated before court-appointed arbitrator, David M. Zaniel, Esq.

Liability was admitted by the Defendant at the arbitration hearing. Plaintiff incurred medical expenses of $ 13,348.00, which were not contested by the Defendant. Plaintiff suffered a wage loss of $ 1,600.00 which was verified by his employer and was not refuted by Defendant at the arbitration.

On 6/19/2019, Mr. Zaniel filed the Arbitration Award, finding in favor of Plaintiff and awarding total damages of $ 20,448.00, broken down as: $ 13,448.00 in medical expenses, $ 1,600.00 in wage loss, and $ 5,500.00 in general damages. On 7/5/2019, Defendant, through Farmers' attorney Adam P. McMillen, filed a Request for Trial De Novo.

On July 15, 2019, Plaintiff filed his Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery. The basis of Plaintiff's Motion is that Farmers does not participate in the Arbitration Program in good faith. Specifically, the "strategy" of filing trial de novo requests without regard to the facts and circumstances of each individual case is a tactic that is designed to increase the time and expense of litigation for claimants and uses the arbitration process as a device to obstruct and delay payment. This conduct is designed to frustrate the purposes of the arbitration program, which are to "...provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." NAR 2(A).

The statistics show without a doubt that Farmers files requests for trial de novo in nearly 100 % of cases where an arbitration award in favor of Plaintiff occurs.

2. Argument

NRCP 11 provides that by presenting a pleading to the court, the attorney is certifying to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Plaintiff asserts that Farmers files requests for trial de novo for these delineated improper

purposes. Accordingly, Plaintiff asserts that NRCP 11 sanctions are in order.

3. Conclusions

Plaintiff respectfully submits that should the Court grant his Motion to Strike Request for Trial De Novo, finding that Farmers has engaged in the nefarious conduct alleged, then NRCP 11 sanctions are warranted. Therefore, Plaintiff requests that the Court rule upon this motion for sanctions at or after the hearing scheduled for 10/22/2019, and grant such other or further relief that the Court deems just and fair.

Dated this 16th day of July, 2019.

William R. Kendall, Esq.
137 Mt. Rose Street
Reno, NV 89509
Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of William R. Kendall, Esq., and that I served a true and correct copy of the foregoing document by:

✓ Depositing for mailing, in a sealed envelope, U.S. Postage prepaid, at Reno, Nevada;

_____ Hand delivery

_____ Facsimile

_____ Federal Express or other overnight delivery

_____ Reno Carson Messenger Service

addressed as follows:

Adam P. McMillen, Esq.
50 West Liberty Street, Suite 303
Reno, NV 89501

Dated this 16th day of July, 2019.

William R. Kendall

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document

filed in case number: **CV18-02032**

☒ Document does not contain the social security number of any person

Date: **7/16/2019**

William R. Kendall

ADAM P. MCMILLEN, ESQ.
State Bar No. 10678
THE LAW OFFICES OF S. DENISE MCCURRY - RENO
200 S. Virginia Street
8th Floor
Reno, NV 89501
Phone: (775) 329-2221
adam.mcmillen@farmersinsurance.com
Attorney for Defendant,
KATHERYN JEAN FRITTER

DISTRICT COURT

WASHOE COUNTY, NEVADA

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN JEAN FRITTER; DOES I-V; inclusive,

Defendants.

Case No.: CV18-02032

DEPT. NO. 4

OPPOSITION TO MOTION FOR RULE 11 SANCTIONS

In their Rule 11 Motion, Plaintiff, through counsel, make the kind of accusation that is of the utmost seriousness. They not only attempt to impugn the character of another lawyer, but charge that lawyer and his client with "nefarious" conduct. Such accusations should not and cannot be made or taken lightly; the lawyer who casts such aspersions against another lawyer without a well-grounded basis for doing so is violating his duty as an officer of the Court and subjects himself to sanctions and punishment.

Without providing any factual basis, Plaintiff's counsel makes the following bald assertions at page 2, lines 14-20 of the motion:

> The basis of Plaintiff's Motion is that Farmers does not participate in the Arbitration Program in good faith. Specifically, the "strategy" of filing trial de novo requests without regard to the facts and circumstances of each individual case is a tactic that is designed to increase the time and expense of litigation for claimants and uses the arbitration process as a device to obstruct and delay payment. This conduct is designed to frustrate the purposes of the arbitration program, which are to "...provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." NAR 2(A).

Without providing any factual basis, Plaintiff's counsel further contends at page 2, line 24 through page 3, line 3 of the motion:

> NRCP 11 provides that by presenting a pleading to the court, the attorney is certifying to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Plaintiff asserts that Farmers files requests for trial de novo for these delineated improper purposes. Accordingly, Plaintiff asserts that NRCP 11 sanctions are in order.

Such serious accusations, if true, should be dealt with by any court. However, the corollary is equally as true; that is, if such accusations are not true, and known not to be true, or are otherwise recklessly made without regard to their veracity, the Court also needs to deal with such falsehoods just as severely and swiftly:

> Rule 11 is not a toy. A lawyer who transgresses the rule abuses the special role our legal system has entrusted to him. *E.g., Dreis & Krump Mfg. Co. v. International Association of Machinists and Aerospace Workers,* 802 F.2d 247, 255 (7th Cir.1986). He can suffer severe financial sanctions and, if his misconduct persists, he can find himself before a disciplinary commission. *See, e.g.,* Model Rule of Professional Responsibility 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous."). In short, a Rule 11 violation is a serious thing, and an accusation of such wrongdoing is equally serious.
>
> An unjustly accused attorney who argues a losing position may seek to demonstrate that, although his argument was unsuccessful, his opponents' Rule 11 accusation was frivolous. *See Local 106 v. Homewood Memorial Gardens, Inc.,* 838 F.2d 958 (7th Cir.1988). When the accused attorney actually prevails on his underlying position, his effort to turn the tables on his accuser has particular strength. It will be a rare case indeed in which such an attorney cannot successfully show that the accusation lacked a reasonable basis in fact and law.
>
> Rule 11 forces lawyers to think twice before filing; this mandate applies with equal force when the filing includes a Rule 11 claim.

Draper & Kramer, Inc. v. Baskin-Robbins, Inc., 690 F. Supp. 728, 732 (N.D. Ill. 1988).

As was abundantly demonstrated prior to the filing of Plaintiff's motion for Rule 11 sanctions, Plaintiff's accusations are patently untrue. *See* OPPOSITION TO MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS; AND PERMIT DISCOVERY, filed herein on 7/25/19; DECLARATION OF ADAM MCMILLEN IN SUPPORT OF OPPOSITION TO MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS; AND PERMIT DISCOVERY, filed herein on 7/25/19.

Therefore, Plaintiff's motion was never well grounded or supported in either fact or law, and he knew or should have known this, but brought the motion anyway to harass or to cause unnecessary delay or needless increase in the cost of litigation. For his conduct, Plaintiff's counsel should be properly punished and reprimanded by the Court for filing this frivolous motion. *See Rivero v. Rivero*, 125 Nev. 410, 441, 216 P.3d 213, 234 (2009) (The district court may award attorney fees as a sanction under NRS 18.010(2)(b) and NRCP 11 if it concludes that a party brought a frivolous motion).

Also, Plaintiff's counsel's motion is a character assassination against Defense counsel and his professional integrity and ethics. Defense counsel has no adequate remedy to "unring" a bell that has been rung by Plaintiff's counsel's false accusations, because they are contained in a public record. Therefore, Defense counsel is entitled not only to a denial of Plaintiff's motion, and whatever sanctions this Court sees fit, Defense counsel should also be entitled to an express exoneration of these serious accusations.

By filing this additional motion for sanctions, without regard to the facts and circumstances of each case, and without regard to the actual statistics, Plaintiff's counsel is engaging in the very behavior that he is wrongfully accusing Farmers and the undersigned of.

The request for trial de novo, filed in this matter, is based upon the facts and circumstances of this case. The requests for trial de novo, filed in all other matters, are based upon the facts and circumstances of each individual case. There is no evidence to the contrary. Plaintiff's counsel's motion should be denied. If any sanctions are warranted, they should be directed at Plaintiff's counsel for bringing this frivolous motion and engaging in the very behavior he is accusing the undersigned of.

Affirmation: Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED: August 19, 2019

THE LAW OFFICES OF S. DENISE MCCURRY - RENO

BY: /s/ Adam McMillen
ADAM P. MCMILLEN, ESQ.
Attorney for Defendant,
KATHERYN JEAN FRITTER

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify that I am an employee of THE LAW OFFICES OF S. DENISE MCCURRY - RENO and that on the 19th day of August, 2019, I served a true and correct copy of the above and foregoing OPPOSITION TO MOTION FOR RULE 11 SANCTIONS on the parties addressed as shown below:

_____ *Via U.S. Mail* by placing said document in a sealed envelope, with postage prepaid [N.R.C.P. 5(b)]

__X__ *Via Electronic Filing* [N.E.F.R. 9(b)]

_____ *Via Electronic Service* [N.E.F.R. 9]

_____ *Via Facsimile* [E.D.C.R. 7.26(a)]

William R. Kendall, Esq.
137 Mount Rose St
Reno, NV 89509
Attorney for Plaintiff, Ralph Ortega
Fax: (775) 324-3735

/s/ Adam McMillen

An Employee of The Law Offices of
S. Denise McCurry - Reno

William R. Kendall, Esq.
State Bar No. 3453
137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN JEAN FRITTER; DOES I-V; inclusive,

Defendants.
_____/

CASE NO.: CV18-02032

DEPT. NO.: 4

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF MOTION FOR NRCP 11 SANCTIONS

Plaintiff, RALPH ORTEGA, hereby files his Reply in Further Support of Motion for NRCP 11 Sanctions as follows.

Dated this 21st day of August, 2019.

WILLIAM R. KENDALL, ESQ.

137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

The factual basis of Plaintiff's Motion is contained at length in his Motion to Strike Request for Trial De Novo, which is currently set for hearing on 10/22/2019. Plaintiff will prove by statistical analysis of the trial de novo request statistics that Farmers and McMillen routinely request trial de novo in nearly every case that they lose. It is nearly 100 %. Plaintiff asserts that this is *per se* bad faith participation in the Arbitration Program. Plaintiff asserts that such statistical analysis will show ulterior motivation for such filings, ie, that the requests are made for "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." NRCP 11.

When the Court agrees and holds that Farmers and McMillen routinely file requests for trial de novo in nearly 100 % of cases that they lose at arbitration, such conduct, necessarily fits squarely within the definition of a Rule 11 violation.

3. Conclusions

Plaintiff respectfully submits that should the Court grant his Motion to Strike Request for Trial De Novo, finding that Farmers has engaged in the nefarious conduct alleged, then NRCP 11 sanctions are warranted. Therefore, Plaintiff requests that the Court rule upon this motion for sanctions at or after the hearing scheduled for 10/22/2019, and grant such other or further relief that the Court deems just and fair.

Dated this 21st day of August, 2019.

William R. Kendall, Esq.
137 Mt. Rose Street
Reno, NV 89509

Certificate of Service

RE: CV18-02032

Judge: HONORABLE JUDGE CONNIE STEINHEIMER

Court: Second Judicial District Court - State of Nevada

Case Title: Ortega v. Fritter

This certificate was automatically generated by the courts auto-notification system.

Date Generated: 8-21-2019.

I hereby certify that on 08-21-2019, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Adam McMillen, Esq.

The following people need to be notified:

None.

Dated this 21st day of August, 2019.

William R. Kendall, Esq.

SECOND JUDICIAL DISTRICT COURT

COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in case number**: CV18-02032**_____

☒ Document does not contain the social security number of any person

Date: **8/21/2019**

William R. Kendall

William R. Kendall, Esq.
State Bar No. 3453
137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN JEAN FRITTER; DOES I-V; inclusive,

Defendants.
_____/

CASE NO.: CV18-02032

DEPT. NO.: STP

PLAINTIFF'S DISCLOSURE OF EXPERT WITNESSES

Plaintiff, RALPH ORTEGA, by and through his counsel, William R. Kendall, Esq., submits the following Disclosure of Expert Witnesses produced in accordance with NRCP 16.1:

1. Dr. Gilbert Coleman, Ph.D., 40 Pine View Court, Reno, NV 89511-2761. Dr. Coleman's report, CV, list of publications, list of testimonies, and fee schedule are attached hereto. Dr. Coleman is expected to testify in accordance with his report, elaborating upon it where necessary.

Dated this 13th day of September, 2019.

WILLIAM R. KENDALL, ESQ.

137 Mt. Rose Street
Reno, NV 89509
(775) 324-6464
Attorney for Plaintiff

Certificate of Service
RE: CV18-02032

Judge: HONORABLE JUDGE CONNIE STEINHEIMER

Court: Second Judicial District Court - State of Nevada

Case Title: Ortega v. Fritter

This certificate was automatically generated by the courts auto-notification system.

Date Generated: 09-13-2019.

I hereby certify that on 09-13 -2019, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Adam McMillen, Esq.

The following people need to be notified:

None.

Dated this 13th day of September, 2019.

William R. Kendall

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in case number**: CV18-02032**_____

☒ Document does not contain the social security number of any person

Date: **9/13/2019**

LIST OF EXHIBITS

Exhibit 1

Exhibit 1

GILBERT COLEMAN, PH.D.
ECONOMIC CONSULTING, INC.

40 PINE VIEW COURT
RENO, NV 89511-2761
TELEPHONE 775-852-3259
FAX 775-852-3033
E-MAIL Grcoleman@colemaneconomics.com
WEBSITE www.colemaneconomics.com

September 12, 2019

William R. Kendall, Esq.
Attorney at Law
137 Mt. Rose Street
Reno, NV 89509

Dear Mr. Kendall:

I have completed a statistical analysis of the cases on which Adam McMillen represented clients of Farmers Insurance Company and for which trial de novo was requested. The results of that statistical analysis are reported on the enclosed report and accompanying quantitative addendum.

Please call me if you have any questions.

Sincerely

Gilbert R. Coleman, Ph.D.
President

enclosures

Introduction

In the Gittings v. Hartz case (116 Nev. 386,386(2000)), the issue of the percentage of the cases that were referred to arbitration pursuant to the Nevada Arbitration Rules and subsequently resulted in a request for trial de novo was raised by the Appellant. The ruling on the case discusses the use of statistics to demonstrate the percentage of de novo requests filed by the Respondent's insurance company. The Court ruled as follows:

> While a comparatively high percentage of de novo requests are filed by Allstate, there is no analysis accompanying the statistics to support a conclusion that the statistics prove that Allstate automatically requests a trial de novo regardless of the arbitration process.[1]

The purpose of this report is to provide a comprehensive quantitative statistical analysis that can be used to evaluate the percentage of de novo requests from Attorney Adam P. McMillen for Farmers' Insurance.

Discussion of the Analysis

The Rules Governing Alternative Dispute Resolution were effective March 3, 2005.[2] There has been, therefore, many years of experience with the latest version of the rules. In fact, in the 2015 Annual Report of the Nevada Judiciary, the results of the Alternative Dispute Resolution Caseload and Settlement Rates, Fiscal Year 2015 were reported on Table 10.[3] I have reproduced the Long-Term Average entry for the Second Judicial District. This is the district in which Mr. McMillen's cases were filed.

Table 10. Alternative Dispute Resolution Caseload and Settlement Rates, Fiscal Year 2015

Second Judicial District Court

	Long-Term Average
Civil Caseload	4,131
Cases Entered	412
Cases Removed	375
Cases Settled or Dismissed	295
Settlement Rate	85%
Trials De Novo Requested	51
Trials De Novo Rate	15%

[1] 116 Nev. 386,386(2000) Gittings v. Hartz; Headnote 10. Page 8

[2] Rules Governing Alternative Dispute Resolution, Adopted by the Supreme Court of Nevada, dated December 22, 2004

[3] 2015; Annual Report of the Nevada Judiciary, Fiscal Year 2015; Table 10; page 35

Cases Eligible for Trial De Novo Request[4]	340

For the purposes of this analysis, I assume that the system works. By this, I mean that as a general rule, the parties in the system participate in good faith. The results over the long term in the Second Judicial District will, from this assumption, demonstrate how the Alternate Dispute Resolution process would work when in general participants act in good faith. For any particular participant, significant divergence from the long-term results would yield a conclusion that the participant was not acting according to the general process of good faith and could yield the conclusion, if the actions thwarted the purpose of the Alternate Resolution process, that the participant was acting in bad faith.

In this instance, the purpose is to compare the results of cases on which Adam McMillen was the attorney to the long-term results of the Alternative Resolution process. This is done using a test of the equality of means of two random processes. The assumption of the analysis, called the null hypothesis in statistical terms, is that the percentage of Mr. McMillen's cases that go through the Alternative Resolution process and end up going to a request for trial de novo is not significantly greater than the percentage of cases in the Second Judicial District over the long term that go through the process and end up going to a request for trial de novo. The other option, called the alternative hypothesis, is that the percentage of McMillen case is greater than the long-term average.

Data Analysis

The data used to calculate the sample mean of the long-term results for the Second Judicial District comes from the 2015 Annual Report of the Nevada Judiciary.[5] This is a primary source of data. There was one piece of information missing from the table. It is number of cases eligible for a de novo request. There is no specific heading for that information nor is there any number that corresponds to it given the data descriptions that are listed. However, it is a simple value to calculate from the data available and to confirm from the other relationships on the table. I have made that calculation.

I compiled the data for the McMillen analysis from the Washoe County Courts website. I recorded all the cases listed on the Washoe County website from 2006 to the present in which McMillen was counsel. I was able to determine the process of each case and could determine whether the case had gone to arbitration at all, if the case had been referred to arbitration and then returned prior to the arbitration to the regular trial process, if the case had been referred to arbitration, had the arbitration, but settled before the arbitration ruling was issued, if the case has not been completed yet, and if the case had gone through the arbitration process to the arbitration award and either the award accepted or there was a request for trial do novo. The only cases of interest were the ones that went through the arbitration process to an award and either the award was accepted, the decision was for the defense and, therefore, in Mr. McMillen's and Farmer's favor, or trial de novo was requested by McMillen. I have eliminated all other cases from the

[4] This value is the result of the calculation of 51 De Novo trial requests being 15% of the cases that could result in De Novo trial requests

[5] Nevada Supreme Court; Annual Report of the Nevada Judiciary Fiscal Year 2015, Page 35, Table 10

analysis. They were eliminated because they were not either entered into the Alternative Dispute Resolution process, for cases that have been resolved, or have not entered into the process for cases that are on-going, or they started with the process but resolved before the process continued through to either acceptance of the award or request for trial de novo. As a result, these eliminated cases were not relevant to an analysis of the percentage of cases where trial de novo could be requested since the cases did not reach the point where trial de novo was an option.

There were eighteen total cases involving Mr. McMillen that were eligible for trial de novo request. In two cases, trial de novo was requested by the party not represented by Mr. McMillen and these two were not included in the statistical analysis. In three cases, the arbitrator's decision was in favor of the defense and, therefore, the party represented by Mr. McMillen and Farmer's. There would be no reason why the defense would request trial de novo when it had prevailed in the arbitration. As a result, these three cases were also not included in the statistical analysis. Of the remaining thirteen cases, trail de novo was requested in eleven and the award was accepted in two.

See the McMillen Cases page on the attached spreadsheet for the full list of McMIllen cases and the Cases Eligible page for the list of eligible cases represented by Mr. McMillen

Statistical Analysis

I ran a test of the equality of two sample means for the statistical analysis. The null and alternate hypotheses are:

Null Hypothesis: $p_1 \leq p_2$

Alternate Hypothesis: $p_1 > p_2$

where p_1 is the proportion of eligible cases for which Mr. McMillen requests trial de novo and p_2 is the proportion of eligible cases for which trial de novo is requested in the Second Judicial District over the ten years between 2005 and 2015. If the null hypothesis is accepted, Mr. McMillen requests trial de novo at the same rate or less that the long-term average. If the alternative hypothesis is accepted, Mr. McMillen requests trial de novo significantly more often than the long-term average.

The test statistic, also called a z-statistic or a standard normal statistic is calculated using:

$$z = \frac{\left(\hat{p_1} - \hat{p_2}\right) - (p_1 - p_2)}{\sqrt{\bar{p}(1-\bar{p})\left(\frac{1}{n_1} + \frac{1}{n_2}\right)}}$$

where $\hat{p_1}$ is the proportion of cases for which Mr. McMillen has requested trial de novo, $\hat{p_2}$ is the proportion of cases that request trial de novo in the long − term Second JudicialDistrict data, p_1 and p_2 are the proportion of cases where trial de novo are requested by Mr. McMillen and in the Second Judicial District assuming that the null hypothesis is true and therefore are equal, and n_1 and n_2 are the two sample sizes.

$$p^- = \frac{n_1\hat{p_1} + n_2\hat{p_2}}{n_1 + n_2}$$

If $z \leq 2.5758293$, we accept the null hypothesis that Mr. McMillen's request for trial de novo is insignificantly different from the long-term average in the Second Judicial District. If $z > 2.5758293$, we accept the alternate hypothesis that Mr. McMillen's request for trial de novo is significantly greater from the long-term average in the Second Judicial District. This test is conducted at the 99% level.

See the Statistical Analysis page of the attached spreadsheet for the calculations of these values.

Statistical Results

Mr. McMillen requests trial de novo **84.62%** of the time compared to 15% of the time over the long term in the Second Judicial District. From the analysis, we can state that we accept the alternate hypothesis at the 99% level. This means that the analysis demonstrates that Mr. McMillen requests trial de novo significantly more often than trial de novo requested in the long-term average in the Second Judicial District. The z-statistic is 6.47383126. This is a large z-statistic compared to the critical value of 2.5758293. This value yields a conclusion that Mr. McMillen certainly, by any reasonable measure, requests trial de novo more often than the long-term average.

Conclusions

The basic statistical conclusion of this analysis is that Mr. McMillen's use of the request for trial de novo is significantly different from and significantly greater than the average use of request for trial de novo by attorneys practicing in the Second Judicial District. In the Gittings ruling, the Nevada Supreme Court wrote:

> (C)ompetent statistical information that demonstrates that an insurance company has routinely filed trial de novo requests without regard to the facts and circumstances of each individual case may be used to support a claim of bad faith.[6]

[6] Gittings Ruling page 8

No statistical analysis looks at individual cases. Statistical analysis looks at averages to determine what the common practice is. This analysis demonstrates that Mr. McMillen in his role as representative of Farmers Insurance routinely requests trial de novo at a rate that is so much higher than the common practice in the Second Judicial District that the conclusion must be drawn that Farmers Insurance does not approach the Alternative Dispute Resolution process as is common practice among other attorneys for insurance companies.

McMillen Cases

Case Number	Arbitration?	Settled?	Arbitration Award	Request for De Novo
CV06-00013	No			
CV07-00233	No			
CV08-00067	No			
CV08-00261	No			
CV08-02918	No			
CV08-03239	No			
ARB08-02918	Yes	Yes		
ARB08-03239	Yes	Yes		
CV09-00666	No			
CV09-02189	No			
CV09-02547	No			
CV09-02823	Yes	No		Plaintiff
CV09-02862	No			
CV09-03225	No			
CV09-03256	No			
ARB09-02547	Yes	Yes		
ARB09-02823	Yes	No	Yes	Plaintiff
CV10-00757	No			
CV10-00881	No			
CV10-01122	No			
ARB10-00757	Yes	Yes		
CV10-01408	No			
CV10-01544	No			
CV10-01682	No			
CV10-01745	No			
CV10-02169	No			

ARB10-01122	Yes	Yes		
CV10-03697	No			
CV10-03736	No			
CV11-01836	No			
CV11-02059	No			
CV11-02272	No			
CV11-02675	No			
CV11-03473	No			
CV11-03683	No			
CV12-00786	No			
CV12-01400	No			
CV12-01751	No			
ARB12-01400	Yes	Yes		
CV13-01234	No			
PR13-00306	No			
CV13-01440	No			
CV14-00653	No			
CV14-01057	No			
CV16-00915	No			
CV16-01472	No			
CV16-01806	No			
CV16-01903	No			
CV16-02062	Yes	No	Yes	Plaintiff
CV16-02080	No			
CV16-02166	No			
CV16-02521	Yes	No		Defendant/McMillen
ARB16-02166	Yes	No	Yes	Not McMillen
CV17-00108	No			
CV17-00192	No			
CV17-00534	Yes	No	Yes	Defendant/McMillen
CV17-00588	No			
CV17-00623	Yes	No	No	Yes
CV17-00764	Yes	Dismissed		

CV17-00879	Yes	Yes		
ARB17-00623	Yes	No	Yes	Defendant/McMillen
ARB16-02062	Yes	No	Yes	Plaintiff
CV17-01094	No			
CV17-01260	No			
CV17-01349	Yes	No	Yes	Defense award
CV17-01356	Yes	No	Yes	Defendant/McMillen
CV17-01380	Yes	Yes	Yes	
CV17-01399	No			
ARB17-01094	No			
CV17-01448	No			
CV17-01468	No			
CV17-01505	Yes	Yes		
CV17-01517	No			
ARB17-01260	Yes	Yes		
CV17-01568	Yes	Yes		
CV17-01614	Yes	No	Yes	Defendant/McMillen
CV17-01629	Yes	Yes		
CV17-01633	No	Yes		
CV17-01641	Yes	Yes		
CV17-01666	Yes	Yes		
ARB17-01356	Yes	No	Yes	Defendant/McMillen
CV17-01723	No			
CV17-01721	No			
CV17-01761	No			
ARB17-01448	No			
CV17-01839	No			
CV17-01939	Yes	No	Yes	Defendant/McMillen
ARB17-01614	Yes	No	Yes	Defendant/McMillen
ARB17-01666	No			
ARB17-01505	Yes	Yes		
ARB17-01349	Yes	No	Yes	Defense Award
CV17-02197	No			

CV17-02215	No			
CV17-02237	No			
ARB17-01939	Yes	No	Yes	Defendant/McMillen
CV17-02247	No			
CV17-02288	No			
CV17-02351	No			
CV17-02380	No			
CV18-00005	Yes	Yes		
CV18-00031	Yes	Yes		
ARB17-01839	No			
ARB17-01641	Yes	Yes		
CV18-00163	No			
CV18-00187	Yes	Yes		
CV18-00204	Yes	Yes		
CV18-00244	No			
ARB17-02237	Yes	Yes		
ARB17-01629	Yes	Yes		
ARB18-00005	Yes	Yes		
ARB18-00031	Yes	Yes		
ARB17-01568	Yes	Yes		
CV18-00439	No			
CV18-00457	Yes	No	Yes	Defendant/McMillen
CV18-00491	No			
CV18-00504	No			
CV18-00530	No			
CV18-00565	No			
ARB17-00764	Yes	Yes		
CV18-00620	No			
CV18-00662	No			
CV18-00713	No			
CV18-00744	Yes	No	Yes	Defendant/McMillen
ARB18-00204	Yes	Yes		
ARB18-00439	Yes	Yes		

ARB18-00163	Yes	Yes		
ARB18-00244	Yes	Yes		
CV18-00949	No			
CV18-00974	Yes	No	Yes	Defense Award
CV18-00982	Yes			
CV18-01000	No			
ARB18-00530	Yes	Yes		
ARB18-00457	Yes	No	Yes	Defendant/McMillen
CV18-01147	No			
CV18-01318	Yes	Yes		
CV18-01382	No			
CV18-01419	Yes			
CV18-01416	Yes	No	Yes	Defendant/McMillen
CV18-01428	No			
CV18-01441	Yes	Yes		
CV18-01532	No			
CV18-01629	No			
CV18-01619	Yes	Yes		
CV18-01633	Yes	Yes		
ARB18-00744	Yes	No	Yes	Defendant/McMillen
CV18-01673	Yes			
CV18-01691	No			
CV18-01697	No			
CV18-01749	Yes	Yes		
CV18-01798	Yes	No	Yes	Defendant/McMillen
ARB18-01147	Yes	Yes		
ARB18-01416	Yes	No	Yes	Defendant/McMillen
CV18-01865	No			
ARB18-01619	Yes	Yes		
CV18-01901	No			
ARB18-01441	Yes	Yes		
ARB18-01318	Yes	Yes		
CV18-02032	Yes	No	Yes	Defendant/McMillen

ARB18-01798	Yes	No	Yes	Defendant/McMillen
ARB18-00974	Yes	Yes		
CV18-02137	Yes			
ARB18-01749	Yes	Yes		
ARB18-00982	Yes	No	Yes	Accepted
CV18-02316	No			
ARB18-01419	Yes	No	Yes	Accepted
CV18-02383	No			
CV18-02391	No			
ARB18-01633	Yes		Accepted	
ARB18-02032	Yes	No	Yes	Defendant/McMillen
CV18-02504	No			
CV19-00067	Yes			
CV19-00088	Yes	Yes		
CV19-00099	Yes			
CV19-00132	Yes			
CV19-00151	Yes			
ARB18-01673	Yes			
CV19-00229	No			
CV19-00254				
CV19-00336	Yes			
CV19-00347	No			
CV19-00351	No			
CV19-00400	Yes			
CV19-00416	Yes			
ARB18-01691	No			
CV19-00507	No			
ARB19-00067	Yes			
CV19-00616	Yes			
ARB19-00088	Yes	Yes		
CV19-00705				
CV19-00716	Yes			
CV19-00706				

CV19-00739		
ARB19-00099	Yes	
ARB19-00416	Yes	
CV19-00886	Yes	
CV19-00885	Yes	
ARB19-00400	Yes	
ARB19-00336	Yes	
CV19-01201		
ARB19-00616	Yes	
ARB19-00151	Yes	
CV19-01192		
ARB19-00347	Yes	Yes
ARB19-00132	Yes	
ARB19-00716	Yes	
ARB19-00886	Yes	
ARB19-00885	Yes	

Case Eligible

	Case Number	Arbitration?	Settled?	Arbitration Award	Request for De Novo
1	CV09-02823	Yes	No	Yes	Plaintiff
	ARB09-02823	Yes	No	Yes	Plaintiff
2	CV16-02062	Yes	No	Yes	Plaintiff
	ARB16-02062	Yes	No	Yes	Plaintiff
3	CV16-02521	Yes	No	Yes	Defendant/McMillen
	ARB16-02521	Yes	No	Yes	Defendant/McMillen
4	CV17-00534	Yes	No	Yes	Defendant/McMillen
5	CV17-00623	Yes	No	Yes	Defendant/McMillen
	ARB17-00623	Yes	No	Yes	Defendant/McMillen
6	CV17-01349	Yes	No	Yes	Defense Award
	ARB17-01349	Yes	No	Yes	Defense Award
7	CV17-01356	Yes	No	Yes	Defendant/McMillen
	ARB17-01356	Yes	No	Yes	Defendant/McMillen
8	CV17-01614	Yes	No	Yes	Defendant/McMillen
	ARB17-01614	Yes	No	Yes	Defendant/McMillen
9	CV17-01939	Yes	No		Defendant/McMillen
	ARB17-01939	Yes	No	Yes	

10	CV18-00457	Yes	No	Yes	Defendant/McMillen
	ARB18-00457	Yes	No	Yes	Defendant/McMillen
11	CV18-00744	Yes	No	Yes	Defendant/McMillen
	ARB18-00744	Yes	No	Yes	Defendant/McMillen
12	CV18-00974	Yes	No	Yes	Defense Award
13	CV18-01416	Yes	No	Yes	Defendant/McMillen
	ARB18-01416	Yes	No	Yes	Defendant/McMillen
14	CV18-01798	Yes	No	Yes	Defendant/McMillen
	ARB18-01798	Yes	No	Yes	Defendant/McMillen
15	CV18-02032	Yes			Defendant/McMillen
	ARB18-02032	Yes		Yes	Defendant/McMillen
16	ARB18-00982	Yes	No	Yes	Defense Award
17	ARB18-01419	Yes	No	Yes	Accepted
18	ARB18-01633	Yes	No	Yes	Accepted

Total Cases	13
Trial de novo requested	11
Award Accepted	2

Statitical Analysis

Test of the Difference in Population Proportions

Data

	Adam McMillen	Second Judicial District
de novo requests	11	51
potential cases to be requested	13	340
Percentage requested	84.62%	15.00%

$\bar{p} =$	0.17563739
$z =$	6.47383126
z critical =	2.5758293
Probability of the z statistic	1

Exhibit 2

Exhibit 2

GILBERT R. COLEMAN

Address: 40 Pine View Court
Reno, Nevada 89511
Telephone: 775-852-3259
Fax: 775-852-3033
E-mail: grcoleman@colemaneconomics.com

EDUCATION

University of Southern California; Bachelor of Arts; Economics and Mathematics; 6/77

Stanford University; Master of Science; Operations Research; 6/80

Stanford University; Doctor of Philosophy; Economics; 6/83

EXPERIENCE

Professional

Economic consultant; Self-employed; Consultant of litigation, legislative issues, economic impact; economic feasibility; regulation, statistical analysis, and general economic issues, 3/84 to present. I have worked as a consultant for the United States, the State of Nevada, the State of California, Washoe County, Newmont Mining, Equitorial Mining Limited, Sempra Generation, the Airport Authority of Washoe County, First Interstate Bank, Nevada Bell, Sierra Pacific Power, the AFL-CIO, the Retired Public Employees of Nevada, Circus Circus, Atlantic Richfield Company, Western Hyway Trucking Company, Design Concepts West, Richard D. Irwin, Inc., Lawyers Title Company of Northern Nevada, Harvey's Wagon Wheel, The law firms of Woodburn and Wedge; Yetter and Warden, Lionel, Sawyer, and Collins; Beckley, Singleton, De Lanloy, Jemison, and List; Tuttle and Taylor; Perry and Spann; and Hibbs, Roberts, Lemons, and Grundy; as well as several others. I have appeared on television stations KCRL, KOLO, and KTVN and radio station KRNO, on Nevada Newsmakers and have been interviewed by the Reno Gazette-Journal, Reno News and Review, and the Northern Nevada Business Weekly as an economic expert.

University of Nevada, Reno; Part-time faculty; beginning 1/87.

University of St. Francis, Part-time faculty, beginning 1/03 to 6/09.

University of Phoenix, Part-time faculty, beginning 7/03 to 12/04.

University of Nevada, Reno; Assistant Professor of Economics; 1/83 to 6/86.

Merrill Lynch IBAR; Economist; 8/81 to 1/83. I worked as a consultant for litigation. I was responsible for legal cases involving personal injury, wrongful death, antitrust, lost profit, other business cases, pension evaluations, business evaluations, testimony, depositions, and client services.

Rosse and Olszewski; Research Assistant; 8/80 to 8/81. I was responsible for basic research into vertical integration issues for the AT&T antitrust litigation and statistical research into pricing behavior for price-fixing litigation involving Gulf Oil and a uranium cartel.

United States Committee on Commerce, Science, and Transportation; Intern summer of 1978 and 1979. I was responsible for background research and preparation of testimony on trucking and railroad regulation, productivity, international trade, and the Panama Canal Treaties implementing legislation.

Research

Study on Washoe County housing market; 3/85.

Nevada Economic Diversification Study; 6/84 to 11/84. I wrote and/or edited sections on labor, regulation, and science and technology.

Pacific Gas and Electric; Operations Research consultant; 4/80 to 6/80. I was part of a team working on a feasibility study regarding the construction of a coal-fired power plant.

Ongoing research involving taxes in Nevada, employment trends in Nevada counties, railroad regulation, pricing under uncertainty, oligopolies, and research and development.

PAPERS AND PUBLICATIONS

"Welfare Tradeoffs Between Innovation and Market Structure: An Examination of the Functional Form of Cost Reducing Activities"; Delivered to the Western Social Science Association; April 1986.

"A Model of Railroad Regulation"; University Microfilms; 1983.

"Rate Bureaus and Optimal Prices"; Studies in Industrial Economics; Stanford University; 1980.

HONORS

Phi Beta Kappa

Omicron Delta Epsilon

Trustees' Award at the University of Southern California

Sloan Fellow at Stanford

Who's Who in Business and Industry, 1991 through 1997

Who's Who in Science and Engineering, 1993

Who's Who in the West, 1996-1997

Who's Who International, 1995

Exhibit 3

Exhibit 3

GILBERT R. COLEMAN Ph.D.

TESTIMONY AND DEPOSITION EXPERIENCE

FOUR YEARS PRECEDING SEPTEMBER 2019

Depositions

Case	Date Billed
Portola vs. California	9/ 4/15
Simkins vs. PN II	11/ 2/15
Hansen vs. Werner	4/ 8/16
Atkins vs. Del Webb	8/29/16
Sacramento vs. Hardesty	11/30/16
Bard vs. Meritage	1/ 4/17
Phillips vs. Del Webb	1/22/18
Adams vs. California	4/ 5/18

Lombardi vs. PNC	5/15/18
Dilling vs. Mertitage Homes	5/16/18
Prieto vs. KB Homes	7/30/18
Breeden vs. Prime Health Care Services	9/05/18
Pacific Energy vs. New Mexico Pipeline	10/11/18
Carlson vs. CVS	1/11/19
Henning vs. D. H. Horton	6/24/19

Trial Testimony

Ling vs. Georgiou	10/ 6/15
Portola vs. California	10/20/15
Hunt vs. Padilla	2/ 3/16
Hansen vs. Werner	5/ 3/16

Schneider and Hardesty vs. Sacramento	3/21/17
Chill vs. Skach	9/15/17
NRS vs. Waste Management	2/21/18
Browett vs. City of Reno	3/ 8/18
Adams vs. California	5/19/18
Borchik vs. Holtz	12/ 7/18
Angel vs. Brabender	6/ 7/19

Exhibit 4

Exhibit 4

Our fee schedule is as follows:

$ 300 per hour for regular work plus costs
$ 400 per hour for deposition or in court testimony plus costs with a two hour minimum
$4,000 maximum per day for out-of-town work plus costs
$ 500 surcharge in addition to hours for any work that requires a less than one working day deadline.

Regular work is all work involved in the analysis of the case that is not either deposition or in-court testimony. This includes but is not limited to all meetings involved in the case with attorneys and/or clients and/or other experts and/or anyone else involved in the case including but not limited to accountants, medical doctors, or relatives whether these meetings are held in person or over the telephone. Regular work also includes but is not limited to reading of documents, mathematical, statistical, and economic analysis, writing reports, and reading depositions, including our own. It also includes travel time. Testimony time includes travel to and from the place of testimony and all time spent waiting as well as the actual time of the testimony. Out-of-town work includes any work that is out of the Reno-Carson City-Douglas County-Lake Tahoe area. This time is billed at a flat fee regardless of the work being done. This fee schedule is subject to change at any time but the fee schedule on any given case will not change.

2840

IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN JEAN FRITTER
DOES I-V, inclusive,

Defendant.

Case No. CV18-02032

Department No.: STP

ORDER ADDRESSING 1) MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS AND PERMIT DISCOVERY, 2) MOTION TO STAY SHORT TRIAL PROCEEDINGS, 3) MOTION TO CONSOLIDATE, and 4) MOTION FOR NRCP 11 SANCTIONS

An Arbitrator's Award, dated June 20, 2019, was served on the parties in Case ARB18-02032. On July 5, 2019, Defendant KATHERYN JEAN FRITTER (hereinafter "FRITTER"), by and through her attorney, Adam P. McMillen, Esq. of the Law Offices of S. Denise McCurry-Reno, filed a *Request for Trial De Novo.* Additionally, on July 5, 2019, FRITTER filed a *Demand for Jury*, and posted first day jury fees in the amount of Three Hundred Twenty Dollars ($320.00).

On July 15, 2019, Plaintiff RALPH ORTEGA (hereinafter "ORTEGA"), by and through his attorney, William R. Kendall, Esq., filed a *Motion to Strike Request for Trial De* Novo; *Impose Sanctions; and Permit Discovery.* Additionally, on July 15, 2019, ORTEGA filed a *Motion to Stay Short Trial Proceedings,* and a *Motion to Consolidate Hearings.*

On July 25, 2019, FRITTER filed her *Opposition to Motion to Strike Request for Trial De Novo: Impose Sanctions; and Permit Discovery,* and a *Declaration of Adam McMillen in Support of Opposition to Motion to Strike Request for Trial De Novo; Impose Sanctions; and*

Permit Discovery was filed. Additionally, on July 25, 2019, FRITTER filed an *Opposition to Motion to Stay* and an *Opposition to Motion to Consolidate*.

On July 31, 2019, ORTEGA filed *Plaintiff's Reply in Support of Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery.* Additionally, on July 31, 2019, *Plaintiff's Reply in Further Support of Motion to Stay Short Trial Proceedings* and *Plaintiff's Reply in Further Support of Motion to Consolidate Hearings* and the matters were submitted for the Court's consideration.

Nevada Arbitration Rule (NAR) 1 states that the "Court Annexed Arbitration Program (the program) is a mandatory, non-binding arbitration program...for certain civil cases commenced in judicial districts that include a county whose population is 100,00 or more. NAR 2(c) states in pertinent part that

> These arbitration rules are not intended, nor should they be construed, to address every issue which may arise during the arbitration process. The intent of these rules is to give considerable discretion to the arbitrator, the commissioner and the district judge.

NAR 18(A) provides that within 30 days after an arbitration award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the commissioner a written request for trial de novo of the action. NAR 18(b) provides that the 30 day filing requirement is jurisdictional. NAR 18(e) provides that after the filing and service of the written request for trial de novo, the case shall be set for trial upon compliance with applicable court rules. NAR 22(a) provides that "[t]he failure of a party or an attorney to either prosecute or defend a cause in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo." For the purposes of NAR 22(a), good faith is equivalent to a requirement that the parties participate in the arbitration proceedings in a meaningful manner. Casino Properties, Inc. v. Andrews, 112 Nev. 132, 135 (1996)(appellant failed to defend arbitration in good faith by refusing to produce documents during discovery, failing to timely deliver a pre-arbitration statement and failing to produce a key witness at the arbitration (citing Gilling v. Eastern Airlines, Inc., 680 F.Supp. 169 (D.N.J.1988)). However, the constitutional right to a jury trial is not waived simply because individuals disagree over the most

effective way to represent a client at an arbitration proceeding. Chamberland v. Labarbera, 110 Nev. 701, 705 (1994). The denial of a request for trial de novo pursuant to NAR 22(a) must be accompanied by specific written findings of fact and conclusions of law by the district court describing what type of conduct was at issue and how that conduct rose to the level of bad faith participation in the court annexed arbitration program. Chamberland, 110 Nev. at 705. The Nevada Supreme Court has provided examples of circumstances that may indicate a failure of a party to participate in good faith. Campbell v. Maestro, 116 Nev. 380, 385, 996 P.2d 412, 415 (2000). However, the Nevada Supreme Court ultimately reversed the district court's order striking the request for trial de novo, finding that even though the defendant's tactics were questionable, the record did not justify elimination of a right to trial. Id., 116 Nev. at 386. Similarly, in Chamberland, the Nevada Supreme Court found a failure to conduct discovery and failure to attend the arbitration did not warrant the "draconian sanction" of terminating the defendant's right to further litigation proceedings. Chamberland, 110 Nev. at 705.

In the instant matter, ORTEGA argues that FRITTER'S attorney, Adam McMillen, Esq., has a pattern and practice to file a request for trial de novo in every case that goes against his client Farmer's Insurance without regard to the facts and circumstances of each individual case. Further, this is a tactic designed to increase the time and expense of litigation for claimants, uses the arbitration process as a device to obstruct and delay payment, and is designed to frustrate the purposes of the arbitration program. Additionally, ORTEGA argues that the Nevada Supreme Court supports the district court conducting an inquiry into the conduct of insurance companies that appear to be abusing the arbitration program by routinely requesting trial de novo without regard to the facts and circumstances of each case and the insurance companies' use of the de novo process as a way to obstruct. Should the Court find that additional information is needed, ORTEGA requests an evidentiary hearing and the opportunity to conduct narrowly tailored discovery into Farmers' practices associated with requests for trial de novo. Finally, ORTEGA argues that FRITTER be precluded from conducting any discovery which it could have performed during the arbitration process, but failed to perform.

In response, FRITTER argues that only bad-faith participation in the arbitration process waives her right to a jury trial and that she meaningfully participated in good faith during the arbitration process and did not waive her right to trial de novo. To determine whether FRITTER did not participate in the arbitration in good faith, FRITTER argues that the Court must examine the entirety of the arbitration process, including the facts and circumstances of the case. In support of that contention, FRITTER states that her attorney served a written offer of judgment, engaged in written discovery, took ORTEGA'S deposition, timely served her arbitration statement, never refused to comply with any court order, did not purposefully deny ORTEGA of his ability to participate fully, did not refuse to discuss settlement at any time during the process, represented her interests during the arbitration hearing by preparing an arbitration brief, presented a witness at the hearing, examined the witness and cross-examined ORTEGA. Further, the arbitrator, in his award, did not allude to any bad faith or lack of meaningful participation on FRITTER's, her attorney's, or her insurer's part. Additionally, FRITTER argues that the cases ORTEGA cites involving a filing of a request for trial de novo were handled based upon the facts and circumstances of each of the individual cases and no finding of bad faith conduct was cited in any of those cases.

In his reply, ORTEGA argues that FRITTER's insurer's bad faith lies in their practice of automatically requesting a trial de novo regardless of the arbitration process in which an adverse arbitration award is rendered.

In the Second Judicial District Court, the Chief Judge has the authority to make administrative decisions pertaining to the business of the Court pursuant to WDCR 2(2) and NRS 3.025(2)(c). On June 3, 2019, in order to effectuate the orderly administration of justice within the Second Judicial District Court, Chief Judge Scott Freeman entered Administrative Order 2019-07 wherein he assigned the Alternative Dispute Resolution Program to the Honorable Barry Breslow, and the Short Trial Program to the Honorable Connie J. Steinheimer.

ORTEGA has requested a stay of the Short Trial Proceedings based upon his belief that there is a likelihood that his Motion to Strike Trial De Novo will not be ruled upon until after the Short Trial process has been well underway. As such, ORTEGA argues that a stay of the short

trial proceeding is proper pending resolution of his motion to strike. In her opposition, FRITTER argues that the motion to stay the short trial proceedings should be denied as it is based upon an incompetent and incomplete statistical analysis of each request for trial de novo filed by Mr. McMillen. In his reply, ORTEGA argues that as a matter of judicial economy and expedience, a stay of the proceedings is in order until resolution of the motion to strike.

After considering the arguments of the parties, the Court finds that as a matter of judicial economy and as a matter of fundamental fairness, it is appropriate to enter a stay of the short trial until the motion to strike is resolved.

Further, in the instant matter, ORTEGA has requested this matter be consolidated for hearing with CV18-0798. In that matter, the Court found that the motion to strike was alleging a global issue not based solely upon the facts of that individual case. As such, the Court determined that the Arbitration Department of the Second Judicial District Court had jurisdiction to decide the question instead of the Short Trial Department. That included Walker's Motion for NRCP 11 Sanctions, but not the Motion to Stay the Short Trial, which remained appropriately in the Short Trial department.

Therefore, the Court finds that in the interests of judicial economy and in furtherance of the Mandatory Arbitration Program, it is appropriate to set this matter before the Honorable Barry Breslow, as Arbitration Judge, for decision on ORTEGA's motion for lack of good faith participation in the Mandatory Arbitration Program, Motion for Sanctions, and all other requests except the stay of the Short Trial proceedings.

If the Arbitration Judge finds there was not good faith participation in the arbitration, the request for trial de novo will be stricken. If the Arbitration Judge finds good faith participation,

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the stay will be lifted and the matter will proceed in the Short Trial Program, overseen by the Short Trial judge.

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the above entitled short trial is stayed until resolution of Ralph Ortega's Motion to Strike Request for Trial De Novo, Motion to Consolidate Hearings, request for discovery into Farmers Insurance Company's practices associated with requests for trial de novo and Motion for NRCP 11 Sanctions are decided.

IT IS HEREBY FURTHER ORDERED that Ralph Ortega's Motion to Strike Request for Trial De Novo, Motion to Consolidate Hearings, request for discovery into Farmers Insurance Company's practices associated with requests for trial de novo and Motion for NRCP 11 Sanctions are transferred to the Arbitration Department, Honorable Barry Breslow for decision.

DATED this 10 day of October, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

DATED this 10 day of October, 2019.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV18-2032

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 10 day of October, 2019, I filed the **ORDER ADDRESSING 1) MOTION TO STRIKE REQUEST FOR TRIAL DE NOVO; IMPOSE SANCTIONS AND PERMIT DISCOVERY, 2) MOTION TO STAY SHORT TRIAL PROCEEDINGS, 3) MOTION TO CONSOLIDATE, 4) MOTION FOR NRCP 11 SANCTIONS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____**Personal delivery to the following: [NONE]**

__✓__**Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

ADAM MCMILLEN, ESQ. for KATHRYN J FRITTER
WILLIAM KENDALL, ESQ. for RALPH ORTEGA

_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 10 day of October, 2019.

FILED
Electronically
CV18-02032
2019-11-20 08:58:37 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7598052

2840

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE COUNTY

JOHN S. WALKER,

Plaintiff,

vs.

SHEILA MICHAELS,

Defendant.

---/

RALPH ORTEGA,

Plaintiff,

vs.

KATHERYN FITTER,

Defendant.

Case No.: CV18-01798 & CV18-02032

DEPT. NO. 8

ORDER ADDRESSING MOTIONS TO STRIKE AND FOR RULE 11 SANCTIONS

On April 2, 2019, Plaintiff JOHN S. WALKER (hereinafter "WALKER"), by and through his attorney, William R. Kendall, Esq., filed a *Motion to Strike Request for Trial De* Novo; *Impose Sanctions; and Permit Discovery.* On April 12, 2019, SHEILA A. MICHAELS (hereinafter "MICHAELS"), filed her *Opposition to Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery.* On April 18, 2019, MICHAELS filed *Plaintiff's Reply in Support of Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery,* and the matter was submitted for the Court's consideration.

On August 9, 2019, WALKER, by and through his attorney, William R. Kendall, Esq., filed a *Motion for NRCP 11 Sanctions.* Additionally, on August 9, 2019, WALKER filed *Proof of NRCP*

11(c)(1)(A) 21 Day Notice. On August 19, 2019, MICHAELS, by and through her attorney, Adam P. McMillen, Esq., filed her *Opposition to Motion for Rule 11 Sanctions.* On August 21, 2019, *Plaintiff's Reply in Further Support of Motion for NRCP 11 Sanctions* was filed and the matter was submitted for the Court's consideration.

On July 15, 2019, Plaintiff RALPH ORTEGA (hereinafter "ORTEGA"), by and through his attorney, William R. Kendall, Esq., filed a *Motion to Strike Request for Trial De* Novo; *Impose Sanctions; and Permit Discovery.* On July 25, 2019, KATHERYN JEAN FRITTER (hereinafter "FRITTER") filed her *Opposition to Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery,* and a *Declaration of Adam McMillen in Support of Opposition to Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery* was filed. On July 31, 2019, ORTEGA filed *Plaintiff's Reply in Support of Motion to Strike Request for Trial De Novo; Impose Sanctions; and Permit Discovery.* Additionally, on July 31, 2019, the matter was submitted for the Court's consideration.

On August 9, 2019, ORTEGA, by and through his attorney, William R. Kendall, Esq., filed a *Motion for NRCP 11 Sanctions.* Additionally, on August 12, 2019, ORTEGA filed *Proof of NRCP 11(c)(1)(A) 21 Day Notice.* On August 19, 2019, FRITTER, by and through her attorney, Adam P. McMillen, Esq., filed her *Opposition to Motion for Rule 11 Sanctions.* On August 21, 2019, *Plaintiff's Reply in Further Support of Motion for NRCP 11 Sanctions* was filed and the matter was submitted for the Court's consideration.

On November 12, 2019, the Court held an evidentiary hearing on the motions.

After considering the briefings, the arguments and evidence adduced at the hearing, the Court observes that Plaintiffs argue that Farmers Insurance, through Adam McMillen, make requests for trial de novo without regard to the facts and circumstances of each individual case. Plaintiffs provided statistics and analysis therefrom and argued that the Court need look no further than the number of de novo requests in relation to the number of adverse arbitration awards that went against the requestor, apply *Gittings v. Hartz,* 116 Nev. 386, 996 P.2d 898 (2000), and come to the ready conclusion that abuse is occurring to a sufficient degree under Nevada Arbitration Rule 22 to strike the requests for trial de novo.

In opposition, Farmers Insurance, through Adam McMillen, suggests to the Court that *Gittings,* fairly read, should direct this Court to look at all of Adam McMillen's cases in the arbitration program, not

just the 11 or 13 cases cited by Plaintiffs, and, in addition, look at the manner in which, among other things, each individual case is handled in the arbitration process.

Farmers also argues that it has had success in a majority of the cases that it took to trial in the de novo process, as well as the fact that it thoroughly analyzes, investigates, and processes the claims before it on a case-by-case basis; all, according to Farmers, as evidence that it is taking its obligations seriously, respectfully, and consistent with the goals as identified most particularly in Rule 2 of the Nevada Arbitration Rules to proceed in the program in an effort to achieve quick, economical justice.

After considering the briefings, evidence and argument, the Court finds that based on the fairly limited sample for this limited time period, and taking into account the uniqueness of the individual cases, the results obtained on those cases that went to trial, and other circumstances, the Court is not convinced that the identified requests for trial de novo statistically demonstrate that Farmers actions rise to the level of bad faith.

As a result, the Court finds that Farmers Insurance and Adam McMillen have not engaged in bad-faith arbitration practices.

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that both Motions to Strike Request for Trial De Novo and both Motions for NRCP 11 Sanctions are hereby denied, along with any other remedies the parties have sought.

IT IS HEREBY FURTHER ORDERED that both matters (CV18-01798 & CV18-02032) shall proceed in the Short Trial Program.

Dated this 20 day of November, 2019.

DISTRICT JUDGE