

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

NATIONAL CASUALTY COMPANY, a  
foreign corporation,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT FOR  
THE STATE OF NEVADA IN AND FOR THE  
COUNTY OF CLARK; THE HONORABLE  
MARK RALPH DENTON, DISTRICT COURT  
JUDGE,

Respondents,

and

PHILIP BOUCHARD,

Real Party in Interest.

Supreme Court No.:

District Court No. A-20-81333-C  
Electronically Filed  
Sep 14 2021 01:30 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPENDIX IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION  
OR MANDAMUS**

**Volume II of II**

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## **CERTIFICATE OF SERVICE**

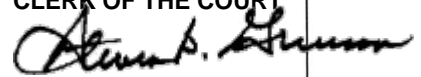
Pursuant to Nev. R. App. P. 25, I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, that, in accordance therewith, I caused a copy of the **APPENDIX IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS, Volume II of II**, to be delivered by United States Postal Service, First Class mail, in a sealed envelope, on the date and to the addressee(s) shown below:

The Honorable Mark R. Denton  
The Eighth Judicial District Court  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89101  
Respondent

Jordan P. Schnitzer, Esq.  
THE SCHNITZER LAW FIRM  
9205 W. Russell Road, Ste. 240  
Las Vegas, NV 89148  
Attorneys for Plaintiff/Real Party in Interest

Dated this 14th date of September, 2021.

By: /s/ Anne Cordell  
An employee of  
Lewis Brisbois Bisgaard & Smith LLP



1 ORDR

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 PHILIP MICHAEL BOUCHARD, an individual,

7 Plaintiff,

Case No.: A-16-740711-C

Dept. No.: XXXI

8 vs.

9 EFREN ISSAC SOTELO, an individual; JUAN  
10 SOTELO, an individual, NOW SERVICES OF  
11 NEVADA, LLC d/b/a/ COOL AIR NOW, a  
12 Nevada limited liability company; DOES 1  
13 through 10, inclusive; and ROE  
CORPORATIONS 1 through 20, inclusive,

**ORDER GRANTING PLAINTIFF'S**  
**APPLICATION FOR DEFAULT**  
**JUDGMENT**

14  
15 Plaintiff's Default prove-up hearing having come on for hearing on  
16 September 12, 2019, and September 13, 2019, before this Honorable Court with  
17 the Honorable Joanna S. Kishner presiding. Jordan P. Schnitzer, Esq. appeared  
18 on behalf of Plaintiff Phillip Bouchard and Marsha Stephenson, Esq., appeared  
19 on behalf of defaulted party, Efren Sotelo.

20 I. RELEVANT BACKGROUND REGARDING THE SCOPE AND  
21 PARTICIPATION IN THE PROCEEDING

22 By agreement of counsel, Marsha Stephenson, counsel for defaulted  
23 party, Efren Sotelo, was able to cross-examine each of Plaintiff's witnesses to the  
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25  
26  
27  
28

1 extent she wished to do so.<sup>1</sup> Counsel also agreed that each counsel could  
2 provide a closing argument after the witnesses had completed their testimony.  
3

4 II. WITNESSES CALLED

5 Plaintiff called the following witnesses:

- 6 1. Lynnette Marrujo
- 7 2. Dr. Raimundo Leon
- 8 3. Dr. Anthony Ruggeroli
- 9 4. Michelle Bouchard
- 10 5. Phillip Bouchard
- 11 6. David Grant
- 12 7. Scott Richardson
- 13 8. Josh Batley

14  
15 III. LEGAL AUTHORITY PRESENTED

16 “Generally, where a district court enters default, the facts alleged in the  
17 pleadings will be deemed admitted. Thus, during an NRCP 55(b)(2) prove-up  
18 hearing, the district court shall consider the allegations deemed admitted to  
19 determine whether the non-offending party has established a prima facie case for  
20 liability. This court has defined a “prima facie case” as sufficiency of evidence in  
21 order to send the question to the jury. A prima facie case is supported by  
22 sufficient evidence when enough evidence is produced to permit a trier of fact to  
23

24  
25  
26 <sup>1</sup> The Court had been previously informed that pursuant to the terms of the Settlement between  
27 Plaintiff and the other Defendants, Juan Sotelo and Now Services of Nevada, LLC d/b/a Cool Air  
28 Now, Plaintiff withdrew his Motion in Limine which sought to exclude counsel for Mr. Efren Sotelo  
from participating in any trial/default hearing. Thus, the participation of Efren Sotelo in the  
proceeding through his counsel was per the agreement of the parties.

1 infer the fact at issue and rule in the party's favor." *Foster v. Dingwall*, 126 Nev.  
2 56, 67, 227 P.3d 1042, 1049 (2010). (Citations omitted).

3 " [T]he movant is entitled to all reasonable inferences from the evidence  
4 offered." *Int'l Painters & Allied Trades Indus. Pension Fund v. R.W. Amrine*  
5 *Drywall Co., Inc.*, 239 F. Supp. 2d 26, 30 (D.D.C. 2002) citing *Au Bon Pain Corp.*  
6 *v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir.1981). "[W]here the nonoffending party  
7 seeks monetary relief, a prima facie case requires the nonoffending party to  
8 establish that the offending party's conduct resulted in damages, the amount of  
9 which is proven by substantial evidence. We therefore stress that we do not read  
10 Young and Hamlett as entitling a nonoffending party to unlimited or unjustifiable  
11 damages simply because default was entered against the offending party."

12 *Foster v. Dingwall*, 126 Nev. 56, 68, 227 P.3d 1042, 1050 (2010)

13  
14  
15 However, "once a default has been entered and entry of judgment  
16 pursuant to the default is sought, the function of the trial court is not to weigh  
17 conflicting evidence; rather, the court must make the sole determination whether  
18 the allegations of the party in whose favor the default has been entered are  
19 susceptible of proof. The narrow question before the court, therefore, is whether  
20 any of the above-enumerated exceptions to the rule of default are applicable to  
21 the case: given conflicting but legitimate evidence on both sides, the court is  
22 bound to enter judgment for the party in whose favor the default has been  
23 entered." *In re Consol. Pretrial Proceedings in Air W. Sec. Litig.*, 436 F. Supp.  
24 1281, 1286 (N.D. Cal. 1977) citing *Thomson v. Wooster*, 114 U.S. 104, 115  
25 (1885).  
26  
27  
28



1  
2 IV. DAMAGES AWARDED

3 1. Past Medical Special Damages:

4 Plaintiff sought \$65,563.02 which was supported by the testimony of both  
5 Dr. Leon and Dr. Ruggeroli as well as the exhibits that were introduced. In  
6 addition, based on the closing remarks by counsel for Efren Sotelo, he did not  
7 dispute the amount. The Court finds that Plaintiff has met his burden to be  
8 awarded past medical special damages in the amount of \$65,563.02  
9 independently of the position of the defaulted Defendant Efren Sotelo. The fact  
10 that he does not contest the amount provides an independent basis to award the  
11 amount requested.

12 2. Past Pain and Suffering:

13 Plaintiff sought past pain and suffering damages. He stated that all the  
14 witnesses supported that request. The applicable case law provides that there is  
15 no set standard by which to award pain and suffering damages. The Court must  
16 take into account, however, the medical testimony provided by both the medical  
17 doctors that specialize in pain management. The medical testimony included  
18 statements that *inter alia* the course of treatment that Plaintiff underwent  
19 including the facet injections and the ablation therapy/rhizotomies<sup>2</sup> would provide  
20 a patient with significant pain relief including up to and including the 90 percent  
21 pain relief. Similarly, Mr. Bouchard testified that he felt almost complete relief  
22 from the treatment he underwent for what could be viewed as significant periods  
23 of time. Similarly, the medical records discussed and introduced show significant  
24  
25  
26

27 <sup>2</sup> These words were used interchangeably to describe the medical procedures Plaintiff underwent.  
28

1 pain reduction after treatment and one chiropractor released him from treatment.  
2 The Court also has to take into account that Plaintiff conceded that he had  
3 migraine headaches, had intermittent back issues, and had seen a chiropractor  
4 at various times since he was a youth. Thus, not all of his pain was related to the  
5 accident by his own testimony and the medical records.  
6

7 In addition, the lay witnesses who described Plaintiff's pre-injury vs. post-  
8 injury condition did not detail significant impairments. One witness said that he  
9 missed a camping trip, but he did not inquire why so he did not know if was due  
10 to the injury. Another described that Plaintiff had to stretch or lay down during a  
11 lunch meeting on one occasion that she observed. Another testified that Plaintiff  
12 no longer went to the same gym to work out, but then Plaintiff stated that he went  
13 to a different gym that had a trainer more experienced with injuries. Plaintiff's  
14 wife did describe changes in his behavior and interaction with family members.  
15 Plaintiff also described occasions where he missed out on in part on family  
16 events due to pain but he did not differentiate whether the pain was solely due to  
17 the pain from the accident or his other pre-existing issues.  
18

19 Taking all the testimony, exhibits, and giving full consideration to the  
20 standards for a default proceeding, the Court finds that an award of past pain and  
21 suffering is merited. The Court finds that it needs to take into account the  
22 testimony and exhibits, as well as the time period at issue, and finds that an  
23 award of \$40,000.00 for past pain and suffering is appropriate.  
24

25 3. Future Medical Special Damages:  
26

27 Plaintiff's counsel argued that Plaintiff should be awarded future medical  
28

1 special damages in an amount that would allow Plaintiff to have ablation therapy  
2 every six to eight months for his anticipated life span. The cost of each  
3 procedure was based on Dr. Leon's expert report of July 2019 and his testimony.  
4 Dr. Leon stated that the reasonable cost in the community for ablation therapy  
5 was \$10,605.00. Plaintiff then took that amount and proffered that Plaintiff would  
6 live to potentially one of two ages, 81 or 88, based on what he viewed would be  
7 Plaintiff's life expectancy. He utilized Exhibit 22, the National Vital Statistics  
8 Report. He then multiplied the cost of one procedure over what he viewed as  
9 Plaintiff's life time. He argued that Plaintiff should then receive either  
10 \$381,780.00 or \$477,225.00, depending on which life span was selected.  
11

12 While Dr. Leon did testify that the reasonable and necessary cost in the  
13 community for ablation therapy is \$10,605.00, neither his testimony nor that of  
14 Dr. Ruggeroli support that Plaintiff would or should receive ablation therapy every  
15 six to eight months for his entire life expectancy. Instead, Dr. Leon's expert  
16 report which Plaintiff used for the cost of a procedure further stated, in relevant  
17 part, that: "Although the literature is limited as to how many rhizotomies can be  
18 performed in a lifetime it is well within reason given Mr. Bouchard's period of pain  
19 improvement I would state to a reasonable degree of medical probability he will  
20 require a rhizotomy once a year." (Leon Report July 28, 2019) He also testified  
21 on the stand that there is not agreement in the literature as to how many  
22 rhizotomies should be performed on a person. He also stated that the most he  
23 ever performed on a person was nine.  
24

25 Similarly, Dr. Ruggeroli did not testify that individuals should receive them  
26  
27  
28

1 their entire life, although he was not specifically asked the question. In the  
2 absence of medical support, Plaintiff did not meet his burden to establish that  
3 there is medical support that he will need future rhizotomies/ablation therapy for  
4 the rest of his life expectancy. His own expert also stated that he, unlike the  
5 general population, only needed the procedure on a yearly basis. Further,  
6 Plaintiff's own testimony showed that given his work and other obligations, he  
7 chose to undergo medical treatment when it was more convenient to him rather  
8 than on a set schedule. In the absence of an evidentiary support for the need of  
9 a lifetime of future medical treatment in the form of ablation therapy combined  
10 with the acknowledged controversy over whether such is even recommended, as  
11 well as Plaintiff's own testimony, the Court does not find that there is support for  
12 Plaintiff's request even under the standard for a default prove up hearing.  
13  
14 Accordingly, based on the evidence presented, the Court finds that Plaintiff's  
15 future medical special damages would be in the range of nine yearly ablations  
16 over his lifetime at a cost of \$10,605.00 each. The Court also needs to take into  
17 account that Plaintiff has already had three ablations. Taking into account Dr.  
18 Leon's testimony that the most he performed is nine, then the Court finds there  
19 is support for Plaintiff to have an additional six ablations. The cost of those six  
20 ablations based on Dr. Leon's testimony would be \$63,630.00, and that amount  
21 would fall in line with the testimony of the medical experts.  
22  
23

24 4. Future Pain and Suffering:

25 Plaintiff also sought future pain and suffering that was to be offset by the  
26 number of future ablation therapies he was to receive. The testimony of the  
27  
28

1 witnesses set forth above, as well as the medical testimony and records, are all  
2 taken into account. The Court also takes into account that the testimony that  
3 Plaintiff would have had more pain in the past, but also that his having complete  
4 pain relief is unlikely. At the same time, the Court has to take into account the  
5 medical testimony as to the anticipated severity of the accident related pain given  
6 that Plaintiff will be able to have several more ablation therapies. Taking all of  
7 these factors into account, the Court finds that an award of future pain and  
8 suffering in the amount of \$50,000.00 is appropriate.

10 The Court, having considered the evidence and testimony presented, the  
11 argument of counsel, and for good cause appearing as Plaintiff having met his  
12 burden to show entitlement by substantial evidence, therefore:

14 ORDER

15 IT IS HEREBY ORDERED that this Court deems all factual allegations in  
16 the Complaint as admitted and finds in favor of Plaintiff Philip Bouchard and  
17 orders Judgment against Defendant Efren Sotelo in the following amounts:

19 Past Medical Specials: \$65,563.02

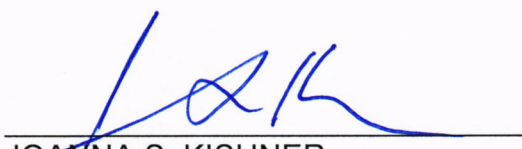
20 Past Pain and Suffering: \$40,000.00

21 Future Medical Specials: \$63,630.00

22 Future Pain and Suffering: \$ 50,000.00

1 The total monetary Judgment against Defendant Efren Sotelo is  
2 \$219,193.02, plus interest, at the applicable rate.

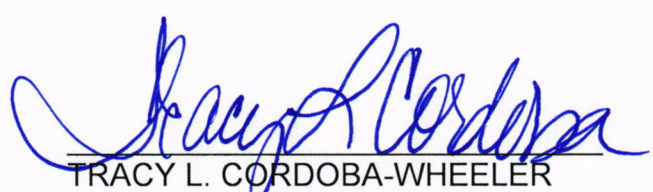
3 DATED this 26<sup>th</sup> day of September, 2019.

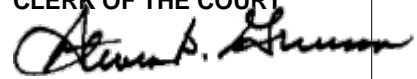
4  
5  
6   
7 JOANNA S. KISHNER  
8 DISTRICT COURT JUDGE  
9  
10  
11

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on or about the date filed, a copy of this Order was  
14 served via Electronic Service to all counsel/registered parties, pursuant to the  
15 Nevada Electronic Filing Rules, and/or served via in one or more of the following  
16 manners: fax, U.S. mail, or a copy of this Order was placed in the attorney's file  
17 located at the Regional Justice Center:

18 **ALL COUNSEL SERVED VIA E-SERVICE**

19   
20 TRACY L. CORDOBA-WHEELER  
21 Judicial Executive Assistant  
22  
23  
24  
25  
26  
27  
28



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[Jordan@TheSchnitzerLawFirm.com](mailto:Jordan@TheSchnitzerLawFirm.com)  
*Attorney for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

PHILIP MICHAEL BOUCHARD, an individual,  
  
Plaintiffs,

vs.

EFREN ISSAC SOTELO, an individual; JUAN  
SOTELO, an individual, NOW SERVICES OF  
NEVADA, LLC d/b/a/ COOL AIR NOW, a  
Nevada limited liability company; DOES 1  
through 10, inclusive; and ROE  
CORPORATIONS 1 through 20, inclusive,  
  
Defendants.

Case No.: A -16-740711-C


Dept. No.: XXXI

**NOTICE OF ENTRY OF ORDER  
GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR FEES, COSTS AND  
INTEREST AND GRANTING IN  
PART AND DENYING IN PART  
DEFENDANT'S MOTION TO  
RETAX**

PLEASE TAKE NOTICE that on the 3<sup>rd</sup> day of March 2020, the Order Granting in Part and Denying in Part Plaintiff's Motion for Fees, Costs and Interest and Granting in Part and Denying in Part Defendant's Motion to Retax. A true and correct copy of the Order filed on the 9<sup>th</sup> day of March 2020, is attached hereto and incorporated herein by the reference.

DATED this 9<sup>th</sup> day March 2020.

THE SCHNITZER LAW FIRM

BY:   
JORDAN P. SCHNITZER, ESQ.  
Nevada Bar No. 10744  
9205 W. Russell Road, Suite 240  
Las Vegas, Nevada 89148  
*Attorney for Plaintiff*







**CERTIFICATE OF SERVICE**

In accordance with Rule 9 of the N.E.F.C.R., I, the undersigned hereby certify that on the 9<sup>th</sup> day March 2020, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR FEES, COSTS AND INTEREST AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO RETAX** to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case to the following counsel:

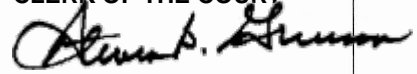
Steven T. Jaffe, Esq.  
Kevin S. Smith, Esq.  
HALL JAFFE & CLAYTON, LLP  
724 Peak Drive  
Las Vegas, NV 89128  
*Attorneys for Defendants,  
Now Services of Nevada LLC dba  
Cool Air Now & Juan Sotelo*

Marsha L. Stephenson, Esq.  
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2820 West Charleston Blvd., Suite 19  
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*Attorney for Defendant,  
Efren Issac Sotelo*

John H. Cotton Esq.  
Katherine L. Turpen, Esq.  
JOHN H. COTTON & ASSOCIATES, LTD.  
7900 West Sahara Avenue, Suite 200  
Las Vegas, NV 89117  
*Attorney for Non-party Zoran Maric, M.D.*

An employee of  
THE SCHNITZER LAW FIRM





JORDAN P. SCHNITZER, ESQ.  
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Telephone: (702) 960-4050  
Facsimile: (702) 960-4092  
Jordan@TheSchnitzerLawFirm.com  
*Attorney for Plaintiff*

DISTRICT COURT

CLARK COUNTY, NEVADA

PHILIP MICHAEL BOUCHARD, an individual,  
  
Plaintiff,

Case No.: A-16-740711-C

Dept. No.: XXXI

vs.

EFREN ISSAC SOTELO, an individual; JUAN  
SOTELO, an individual, NOW SERVICES OF  
NEVADA, LLC d/b/a/ COOL AIR NOW, a  
Nevada limited liability company; DOES 1  
through 10, inclusive; and ROE  
CORPORATIONS 1 through 20, inclusive,

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR FEES, COSTS AND  
INTEREST AND GRANTING IN  
PART AND DENYING IN PART  
DEFENDANT'S MOTION TO RETAX**

Defendants.

Plaintiff's Motion For Attorneys' Fees and Costs and Defendant Efren Sotelo's Opposition to Plaintiff's Application of Costs and Interest and Motion to Retax Plaintiff's Memorandum of Costs and Fees having come on regularly for hearing on November 21, 2019, and January 28, 2020, at 9:00 am before this Honorable Court, with Jordan P. Schnitzer, Esq. appearing on behalf of Plaintiff and Marsha Stephenson, Esq., appearing on behalf of Efren Sotelo. The Court having considered the papers and pleadings on file herein, the Court being fully advised in the premises and good cause appearing therefore, makes the following Findings of Fact, Conclusions of Law and Order, in addition to those findings and conclusions made it in its oral decision during the hearings:

**I. FINDINGS OF FACT**

1. Efren Sotelo was served on August 17, 2016.

2. Plaintiff brought his claims for personal injuries based upon a car crash where Efren Sotelo rear-ended Plaintiff.

3. ~~Efren's insurance carrier initially declined to defend him in the lawsuit.~~ *Efren Sotelo did not file an Answer*

4. As a result, Plaintiff entered a default on October 18, 2016.

5. The insurance carrier agreed to provide a defense for Efren and attempted to set aside the default by filing his Motion to Set Aside Default on February 16, 2017.

6. The Court initially heard the Motion on April 27, 2017, before allowing additional briefing. *APRIL reviewing all the pleadings and taking into account the record.* The Court issued a minute order on May 26, 2017, denying the Motion to set aside the default.

7. Nearly 5 months later, Plaintiff served an Offer of Judgment on October 19, 2017, to all Defendants in the amount of \$99,900.00 inclusive of any and all applicable accrued prejudgment interest, fees and costs.

8. *After a Full hearing/bench trial that lasted two days,* On September 27, 2019, the Court issued its Order granting default judgment in the amount of \$219,193.02 in damages plus prejudgment interest.

9. Plaintiff also sought costs.

10. As a result, Plaintiff beat the offer of judgment by more than double.

11. Plaintiff timely filed a Motion for Attorneys' Fees, Costs and Interest, as well as a verified Memorandum of Costs and verified supplements thereto requesting Attorneys' fees of \$215,200.00, supported by billing entries, or, alternatively a contingency fee award in the amount of 40%, supported by a declaration setting forth counsel's contingent agreement with Mr. Bouchard.

12. Mr. Bouchard also sought costs of \$32,818.37, supported by appropriate documentation.

13. Defendant timely filed an opposition to the request for attorneys' fees and a motion to retax.

## II. CONCLUSIONS OF LAW

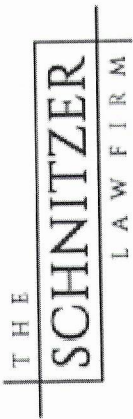
1. The offer was more than double the result.

2. The Court concludes Plaintiff is entitled to an award of fees Pursuant to N.R.C.P. 68 after considering (1) whether the plaintiff's claim was in good faith/the defense was

maintained in good faith; (2) whether the offer was reasonable; (3) whether the defendants' decision to reject the offer was reasonable; and (4) whether the fees sought were reasonable. See *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983); *Trustees of Carpenters v. Better Bldg. Co.*, 101 Nev. 742, 710 P.2d 1379 (1985).

3. The Court concludes Plaintiff is entitled to a portion of the attorneys' fees requested after having considered the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 350, 455 P.2d 31, 33 (1969) and *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 786 (1985), including: (i) the qualities of the advocate; his ability, training, education, experience, professional standing, and skill; (ii) the character of the work done; its difficulty, intricacy, importance, the time and skill required, the responsibility imposed, and the prominence and character of the parties when they affect the importance of the litigation; (iii) the work actually performed by the lawyer; the skill, time, and attention given to the work; and (iv) the result; whether the attorney was successful and what benefits were derived.
4. Given that this was a contingency fee case, the Court finds it appropriate to award Plaintiff 40% attorneys' fees pursuant to *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7 (Nev. App. 2018) totaling \$87,677.20.
5. The Court declines to award contingency fees on interest on damages.
6. Plaintiff is entitled to costs pursuant to N.R.S. §18.020(3) and NRCP 68.
7. Having reviewed Plaintiff's verified memorandum of costs and all supplements thereto, this Court concludes Plaintiff is entitled to costs in the amount of \$32,232.37, representing the amount requested less reductions for unrecoverable or unreasonable costs as set forth in the Court's oral ruling.
8. Plaintiff is entitled to prejudgment interest on the costs awarded in the amount of \$1,594.97. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 113 Nev. 1348, 1352-1353 (1998).
9. Plaintiff is entitled to prejudgment interest on damages in the amount of \$46,005.58. N.R.S. 17.13
10. The total amended judgment to be entered in favor of Plaintiff is \$385,108.17.





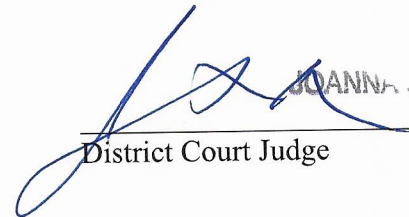
11. Plaintiff is entitled to post-judgment interest on the total judgment of \$385,108.17 dating back to September 27, 2019. N.R.S. 18.120.

**V. ORDER**

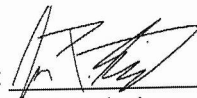
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Fees, Costs and Interest is granted in part and denied in part and Defendants' Motion to Retax Costs is granted in part and denied in part. Plaintiff is awarded \$87,677.20 in attorneys' fees, \$32,232.37 in costs, together with prejudgment interest on damages in the amount of \$46,005.58 and prejudgment interest on costs in the amount of \$1,594.97. Plaintiff is also awarded post-judgment interest on the total amended judgment of \$385,108.17 dating back to September 27, 2019.

**IT IS SO ORDERED**

DATED this 3 day of Mar 2020.

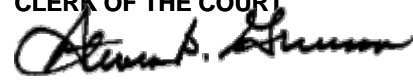
  
JOANNA L. SHNER  
District Court Judge

Respectfully Submitted by:

BY:   
Jordan P. Schnitzer, Esq.  
THE SCHNITZER LAW FIRM  
9205 W. Russell Road, Suite 240  
Las Vegas, NV 89148  
*Attorney for Plaintiff*

Approved as to form and content:

BY: Refused to Sign  
Marsha L. Stephenson, Esq.  
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*Attorney for Defendant,*  
*Efren Issac Sotelo*



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*Attorney for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

PHILIP MICHAEL BOUCHARD, an individual,  
  
Plaintiff,

Case No.: A-16-740711-C

Dept. No.: XXXI

vs.

EFREN ISSAC SOTELO, an individual; JUAN  
SOTELO, an individual, NOW SERVICES OF  
NEVADA, LLC d/b/a/ COOL AIR NOW, a Nevada  
limited liability company; DOES 1 through 10,  
inclusive; and ROE CORPORATIONS 1 through 20,  
inclusive,

Defendants.

**ORDER ON PLAINTIFF'S  
MOTION FOR JUDICIAL  
ASSIGNMENT OF CAUSES OF  
ACTION**

Plaintiff's Motion For Judicial Assignment of Causes of Action having come on an Order Shortening Time for hearing on February 13, 2020, before this Honorable Court, with Jordan P. Schnitzer, Esq. appearing on behalf of Plaintiff, Philip Michael Bouchard and Marsha Stephenson, Esq., appearing on behalf of Defendant, Efren Sotelo. The hearing was continued, and the parties were provided time to submit additional briefing. The matter then came on again for hearing on March 23, 2020, with Jordan P. Schnitzer, Esq. appearing on behalf of Plaintiff, Philip Michael Bouchard and Marsha Stephenson, Esq., appearing on behalf of Defendant, Efren Sotelo, both via CourtCall.

The Court having considered the papers and pleading on file herein, the Court noting there be no opposition filed, the Court being fully advised in the premises and good cause appearing therefore, finds and Orders as follow:

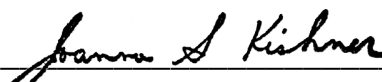


1. Although Ms. Stephenson indicated she may have a conflict of interest, she did not file a Motion to Withdraw as Counsel nor has Mr. Sotelo obtained separate counsel after this matter was continued;
2. There was no filed opposition and, therefore, the Motion may be granted pursuant to EDCR 2.20;
3. The Court also finds Plaintiff's Motion meritorious based upon the citations in the Motion;
4. Pursuant to NRS 21.230, "rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment." *Gallegos v. Malco Enterprises of Nevada, Inc.*, 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011). As a result, such rights of action "may be judicially assigned in satisfaction of a judgment." *Id.*;
5. In *Gallegos*, the Nevada Supreme Court specifically authorized district court judges to judicially assign claims held by judgment debtors against any insurance carriers "for breach of contract, breach of fiduciary duties, and breach of duty of good faith and fair dealing." *Id.* at 1288;
6. Plaintiff Philip Bouchard currently has a judgment against Defendant Efren Sotelo in the amount of \$385,108.17 plus post-judgment interest dating back to September 27, 2019;
7. Based upon the unrefuted facts set forth in the Motion, Efren Sotelo potentially has causes of action against National Casualty Company (NCC), Civil Service Employee Insurance Group (CSE) and Foremost Insurance Group (Foremost) for breach of contract and/or breach of the covenant of good faith and fair dealing (tortious and contractual) if the alleged facts are true;
8. Based upon the unrefuted facts set forth in the Motion, Efren Sotelo potentially has causes of action Stephenson & Dickinson (as agents of NCC) and Selman Breitman (as agents of NCC) for breach of the covenant of good faith and fair dealing (tortious and/or contractual) if the alleged facts are true. *See Liberty Mutual Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482 (Tex. 1998); *Taylor v. Nationwide Mutual Ins. Co.*,

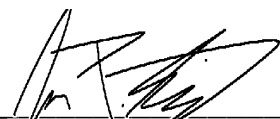
- 1 589 S.E.2d 55 (W. Va. 2003); *Morvay v. Hanover Ins. Companies*, 127 N.H. 723, 726  
2 (1986); *Brown v. State Farm Fire & Cas. Co.*, 58 P.3d 217 (Okla. Civ. App. 2002);  
3 *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 287-88 (Alaska 1980).  
4 9. The Court does not take any position regarding whether the Nevada Supreme Court  
5 would allow such causes of action against parties acting as agents of an insurer;  
6 10. Plaintiff is not requesting assignment of any causes of action for legal malpractice and  
7 no such causes of action are assigned by this Order;  
8 11. It is therefore Ordered that Plaintiff is judicially assigned all of Efren Sotelo's causes  
9 of action for breach of contract and breach of the duty of good faith and fair dealing  
10 (contractual and tortious) against NCC, CSE and Foremost;  
11 12. It is therefore Ordered that Plaintiff is judicially assigned all of Efren Sotelo's causes  
12 of action, to the extent they exist under Nevada law, against Selman Breitman and  
13 Stephenson & Dickinson for breach of the covenant of good faith and fair dealing  
14 (tortious and/or contractual) for their actions as agents of NCC.

15 **IT IS SO ORDERED**

16 DATED this 2nd day of April 2020.

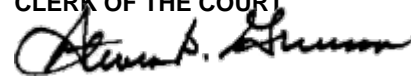
17  
18  
19   
20 District Court Judge

21 Respectfully Submitted by:

22  
23 BY:   
24 Jordan P. Schnitzer, Esq.  
25 THE SCHNITZER LAW FIRM  
26 9205 W. Russell Road, Suite 240  
27 Las Vegas, NV 89148  
28 Attorney for Plaintiff

Approved as to form and content:

BY: Did Not Respond  
Marsha L. Stephenson, Esq.  
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Attorney for Defendant,  
Efren Issac Sotelo



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[Jordan@TheSchnitzerLawFirm.com](mailto:Jordan@TheSchnitzerLawFirm.com)  
*Attorney for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

PHILIP BOUCHARD, an individual;  
  
Plaintiff,

Case No.: A-20-813355-C

Dept. No.: 13

vs.

NATIONAL CASUALTY COMPANY, a foreign  
corporation; COAST NATIONAL INSURANCE  
COMPANY dba FOREMOST INSURANCE  
GROUP, a foreign entity; SELMAN BREITMAN  
LLP, a foreign limit liability partnership;  
STEPHENSON & DICKINSON, a Nevada  
professional corporation; DOES 1 through 10, and  
ROE CORPORATIONS 1 through 20, inclusive,  
  
Defendants.

**AMENDED COMPLAINT**

**EXEMPT FROM ARBITRATION  
(CLAIM FOR DECLARATORY  
RELIEF)**

COMES NOW, Plaintiff, PHILIP BOUCHARD, by and through the attorney of record,  
THE SCHNITZER LAW FIRM, a Professional Limited Liability Company, prays and alleges  
against Defendants, NATIONAL CASUALTY COMPANY, COAST NATIONAL INSURANCE  
COMPANY dba FOREMOST INSURANCE, SELMAN BREITMAN LLP, and STEPHENSON  
& DICKINSON, as follows:

**JURISDICTIONAL ALLEGATIONS**

1. Plaintiff, PHILIP BOUCHARD, (hereinafter "BOUCHARD") is, and at all times  
mentioned herein was, a resident of the State of Nevada.
2. Defendant, NATIONAL CASUALTY COMPANY, (hereinafter "NCC") is, and





at all times mentioned herein was a foreign corporation licensed to do business in the County of Clark, State of Nevada.

3. Defendant, COAST NATIONAL INSURANCE COMPANY dba FOREMOST INSURANCE GROUP, (hereinafter "Foremost") is, and at all times mentioned herein was a domestic corporation licensed to do business in the County of Clark, State of Nevada.

4. Defendant, SELMAN BREITMAN LLP, is and at all times mentioned herein was, a foreign limit liability partnership.

5. Defendant, STEPHENSON & DICKINSON, is and at all times mentioned herein was, a Nevada professional corporation.

6. The true names or capacities, whether individual, corporate, associate or otherwise of Defendants DOES I - X and/or ROES CORPORATIONS I - X, inclusive, are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names. Plaintiff is informed, believe and allege that Defendants designated herein as a DOE and/or ROE CORPORATION are any one of the following:

a. A party responsible in some manner for the events and happenings hereunder referred to, and in some manner proximately caused injuries and damages to the Plaintiffs as herein alleged including, but not limited to: responsible for issuing the insurance policies, responsible for failing to agree to defend Sotelo in accordance Nevada law, failing to communicate settlement offers, failing to attempt to settle the matter and failing to indemnify Sotelo;

b. Parties that were the agents, servants, authorities and contractors of the Defendants, each of them acting within the course and scope of their agency, employment, or contract;

c. Parties that own, lease, manage, operate Defendants and/or are responsible for the actions alleged below; and/or

d. Parties that have assumed or retained the liabilities of any of the Defendants by virtue of an agreement, sale, transfer or otherwise.

#### **GENERAL ALLEGATIONS**

7. Plaintiff repeats and realleges each and every allegation contained in the previous paragraphs and incorporates herein by reference as fully set forth herein.

1           8.       The Eighth Judicial District Court has jurisdiction over this civil tort action  
2 pursuant to NRCP 8(a)(4), NRS 4.370, NRS 13.010 and NRS 13.040 based upon the allegations  
3 above and as the occurrence giving rise to this case took place in Clark County, Nevada and the  
4 amount in controversy exceeds \$15,000.00.

5           9.       At all relevant times, Efren Sotelo (“SOTELO”) was an insured under policies of  
6 insurance issued by NCC, policy number CA07761784 and Foremost, policy number  
7 G00681241600 (the “INSURANCE COMPANIES”).

8           10.      On or about December 12, 2014, Plaintiff, BOUCHARD was driving his Pick-Up  
9 Truck in Travel Lane No. 3, Eastbound on Lake Mead Boulevard and stopped for traffic, in Las  
10 Vegas, Clark County, State of Nevada.

11           11.      At the same time and place, SOTELO was behind BOUCHARD, SOTELO caused  
12 his vehicle to strike the rear of BOUCHARD’s vehicle.

13           12.      SOTELO failed to follow the rules of the road when Defendant failed to use due  
14 care and did not slow for traffic and struck the rear of BOUCHARD’s vehicle.

15           13.      BOUCHARD was not at fault for causing the subject crash.

16           14.      BOUCHARD filed suit against SOTELO.

17           15.      The INSURANCE COMPANIES refused to provide a defense for SOTELO,  
18 contrary to Nevada law.

19           16.      The INSURANCE COMPANIES refused to provide SOTELO with independent  
20 counsel, pursuant to Nevada law, due to the existing conflict of interest.

21           17.      The INSURANCE COMPANIES were provided with multiple opportunities to  
22 resolve the matter with BOUCHARD within policy limits, including through their agents Selman  
23 Breitman and Stephenson & Dickinson (“INSURER AGENTS”).

24           18.      The INSURANCE COMPANIES, and the Insurer Agents, failed to communicate  
25 settlement offers to SOTELO, contrary to Nevada law.

26           19.      The INSURANCE COMPANIES failed to accept the several reasonable settlement  
27 offers.

28           20.      BOUCHARD obtained a default judgment against SOTELO on September 27,

2019 in the amount of \$219,193.02, which also deemed all of BOUCHARD's allegations accurate including that SOTELO was operating the vehicle with the knowledge and consent of the owner.

21. BOUCHARD also obtained an Order partially granting attorneys' fees, costs and interest, for a total judgment of \$385,108.17 plus post-judgment interest dating back to September 27, 2019.

22. Efren Sotelo's causes of action against Defendants were judicially assigned on April 3, 2020.

### **FIRST CLAIM FOR RELIEF**

#### **(Breach of Contract - Against the INSURANCE COMPANIES)**

23. BOUCHARD repeats and realleges each and every allegation contained in the prior paragraphs and incorporates herein by reference as though fully set forth herein.

24. SOTELO had valid and existing contracts with The INSURANCE COMPANIES and/or was a beneficiary/insured under the policies.

25. SOTELO made valid covered claims under his insurance policies.

26. The INSURANCE COMPANIES refused to defend SOTELO in accordance with the policies and Nevada law.

27. The INSURANCE COMPANIES refused to indemnify SOTELO pursuant to the insurance policies and Nevada law.

28. SOTELO sustained damages as a result of The INSURANCE COMPANIES refusal to defend and indemnify him, which rights have been assigned to BOUCHARD.

29. It has become necessary for BOUCHARD to engage the services of an attorney to commence this action and therefore the BOUCHARD is entitled to reasonable attorneys' fees, costs and interest as damage in this action pursuant to Nevada law.

### **SECOND CLAIM FOR RELIEF**

#### **(Breach of the Implied Covenant of Good Faith and Fair Dealing – Tortious)**

#### **(Against All Defendants)**

30. BOUCHARD repeats and realleges each and every allegation contained in the prior paragraphs and incorporates herein by reference as though fully set forth herein.

1           31.     SOTELO entered into a contract for automobile insurance with THE INSURANCE  
2 COMPANIES and/or was a beneficiary/insured under the policies.

3           32.     The Insurance Companies owed SOTELO a duty of good faith and fair dealing  
4 arising from their relationship as insurer and beneficiary.

5           33.     The INSURER AGENTS, in carrying out the duties of The INSURANCE  
6 COMPANIES, owe a duty of care and to deal in good faith and fairly with an insurer's insured.

7           34.     A special element of reliance existed between SOTELO, The INSURANCE  
8 COMPANIES and the INSURER AGENTS where The INSURANCE COMPANIES and  
9 INSURER AGENTS were in a superior and/or entrusted position.

10          35.     The INSURANCE COMPANIES and INSURER AGENTS breached the duties  
11 owed by engaging in misconduct.

12          36.     The INSURANCE COMPANIES refused to provide a defense for SOTELO.

13          37.     The INSURANCE COMPANIES refused to indemnify SOTELO.

14          38.     The INSURANCE COMPANIES refused to provide independent counsel for  
15 SOTELO.

16          39.     The INSURANCE COMPANIES and INSURER AGENTS refused to search for  
17 additional policies that might provide coverage for SOTELO.

18          40.     The INSURANCE COMPANIES and INSURER AGENTS failed to communicate  
19 settlement offers to SOTELO.

20          41.     The INSURANCE COMPANIES failed to accept reasonable settlement offers  
21 from BOUCHARD.

22          42.     The INSURANCE COMPANIES failed to attempt in good faith to effectuate a  
23 prompt, fair and equitable settlement of claims asserted against SOTELO.

24          43.     The INSURANCE COMPANIES deliberately denied benefits they knew were  
25 owed under the policies in conscious disregard of SOTELO's known rights and established Nevada  
26 law.

27          44.     The INSURANCE COMPANIES failed to give equal consideration to the interests  
28 of SOTELO as they did to their own.

45. The INSURANCE COMPANIES failed to search for additional coverages and policies that may have provide additional defense and indemnity to SOTELO.

46. Based upon information and belief, The INSURANCE COMPANIES conspired with legal counsel to steer litigation to allegations against SOTELO that possibly would not be covered under the policies;

47. BOUCHARD is also informed and believe and thereon allege that Defendants breached their duty of good faith and fair dealing owed to SOTELO by other acts or omissions of which BOUCHARD is presently unaware. BOUCHARD will seek leave of the Court to amend this Complaint at such times as it discovers the other acts or omissions of Defendants constituting such breach and to name such additional Defendants as may be identified during discovery.

48. Because of these actions, The INSURANCE COMPANIES and INSURER AGENTS have acted in bad faith; thus, breaching its duty of good faith and fair dealing.

49. By reason of the aforementioned facts, SOTELO's justified expectations that The INSURANCE COMPANIES and INSURER AGENTS would act in good faith and deal fairly with Plaintiff was denied.

50. SOTELO has suffered damages as a result of The INSURANCE COMPANIES and INSURER AGENTS' bad faith breach of its duty of good faith and fair dealing.

51. The acts referenced above were committed intentionally, with malice and/or with conscious disregard for the rights of SOTELO, entitling Plaintiff to punitive damages.

52. It has become necessary for BOUCHARD to engage the services of an attorney to commence this action, as assignee of SOTELO, and therefore BOUCHARD entitled to reasonable attorneys' fees, costs and interest as damage in this action pursuant to Nevada law.

### **THIRD CLAIM FOR RELIEF**

#### **(Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing – Against the INSURANCE COMPANIES)**

53. BOUCHARD repeats and realleges each and every allegation contained in the prior paragraphs and incorporates herein by reference as though fully set forth herein.

//

54. SOTELO entered into a contract for automobile insurance with The INSURANCE COMPANIES and/or was a beneficiary/insured of the policies.

55. The INSURANCE COMPANIES owe SOTELO a duty of good faith and fair dealing arising from their relationship as insurer and beneficiary.

56. Every contract in Nevada imposes upon the contracting parties, including The INSURANCE COMPANIES, a duty of good faith and fair dealing.

57. The INSURANCE COMPANIES breached the duties owed by performing in a manner that was unfaithful to the purpose of the contract.

58. SOTELO's justified expectations that The INSURANCE COMPANIES would be faithful to the contract, and not act in an arbitrary and unfair way that disadvantaged SOTELO was denied.

59. The INSURANCE COMPANIES refused to provide a defense for SOTELO.

60. The INSURANCE COMPANIES refused to indemnify SOTELO.

61. The INSURANCE COMPANIES refused to provide independent counsel for SOTELO.

62. The INSURANCE COMPANIES refused to search for additional policies that might provide coverage for SOTELO.

63. The INSURANCE COMPANIES failed to communicate settlement offers to SOTELO.

64. The INSURANCE COMPANIES failed to accept reasonable settlement offers from BOUCHARD.

65. The INSURANCE COMPANIES failed to attempt in good faith to effectuate a prompt, fair and equitable settlement of claims asserted against SOTELO.

66. The INSURANCE COMPANIES deliberately denied benefits they knew were owed under the policies in conscious disregard of SOTELO's known rights and established Nevada law.

67. The INSURANCE COMPANIES failed to give equal consideration to the interests of SOTELO as they did to their own.



68. The INSURANCE COMPANIES failed to search for additional coverages and policies that may have provide additional defense and indemnity to SOTELO.

69. Based upon information and belief, The INSURANCE COMPANIES conspired with legal counsel to steer litigation to allegations against SOTELO that possibly would not be covered under the policies;

70. BOUCHARD is also informed and believe and thereon allege that Defendants breached their duty of good faith and fair dealing owed to SOTELO by other acts or omissions of which Bouchard is presently unaware. BOUCHARD will seek leave of the Court to amend this Complaint at such times as it discovers the other acts or omissions of Defendants constituting such breach and to name such additional Defendants as may be identified during discovery.

71. Because of these actions, The INSURANCE COMPANIES have acted in bad faith with regards to SOTELO; thus, breaching its duty of good faith and fair dealing.

72. SOTELO has suffered damages as a result of The INSURANCE COMPANIES' bad faith breach of its duty of good faith and fair dealing, which causes of action have been assigned to BOUCHARD.

73. The acts referenced above were committed intentionally, with malice and/or with conscious disregard for the rights of SOTELO, entitling Plaintiff to punitive damages.

74. It has become necessary for BOUCHARD to engage the services of an attorney to commence this action and therefore BOUCHARD entitled to reasonable attorneys' fees, costs and interest as damage in this action pursuant to Nevada law.

#### **FOURTH CLAIM FOR RELIEF**

#### **(DECLARATORY RELIEF)**

75. BOUCHARD repeats and realleges each and every allegation contained in the prior paragraphs and incorporates herein by reference as though fully set forth herein.

76. That pursuant to NRS 30.040, jurisdiction of this matter rests with this court. That the Plaintiff is therefore asking this court to adjudicate the rights of the parties herein under the applicable contract of insurance.


//

80. Accordingly, Plaintiff respectfully requests that this Court declare SOTELO was and is entitled to all benefits due under the insurance policies including defense and indemnity.

WHEREFORE, Plaintiff, as assignee of Efren Sotelo, prays for judgment against Defendant, as follows:

1. General and special damages in the amount in excess of \$15,000.00;
2. For declaratory relief as set forth above;
3. For punitive damages;
4. For reasonable attorney's fees and costs of suit;
5. For prejudgment and post judgment interest, and
6. For such other and further relief as this Court may deem just and proper under the circumstances.

DATED this 7<sup>th</sup> day of April 2020.

BY:   
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 9205 W. Russell Road, Suite 240  
 Las Vegas, Nevada 89148  
 Telephone: (702) 960-4050  
*Attorney for Plaintiff*



UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

NATIONAL CASUALTY COMPANY,

Plaintiff,

v.

EFREN ISAAC SOTELO, *et al.*,

Defendants.

Case No. 2:17-cv-02456-KJD-DJA

ORDER

Presently before the Court is Plaintiff's Motion to Lift Stay (#71). Defendant Philip Michael Bouchard filed a response (#72) asserting that he does not oppose the Court lifting the stay.

Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion to Lift Stay (#71) is **GRANTED**;

IT IS FURTHER ORDERED that any dispositive motions be filed no later than May 20, 2020;

IT IS FINALLY ORDERED that the Proposed Joint Pre-trial Order be filed no later than twenty-eight (28) days after any non-dispositive order on the motion(s).

Dated this 23rd day of April, 2020.



Kent J. Dawson  
United States District Judge

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*Attorney for Defendant,*  
PHILIP MICHAEL BOUCHARD

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

NATIONAL CASUALTY INSURANCE, a  
Wisconsin Corporation,

Plaintiff,

vs.

EFREN ISAAC SOTELO, and individual, and  
PHILIP MICHAEL BOUCHARD, and individual,

Defendants.

Case No.: 2:17-cv-02456-KJD-CWH

**DEFENDANT, PHILIP MICHAEL**  
**BOUCHARD'S MOTION TO**  
**DISMISS**

COMES NOW, Defendant, PHILIP MICHAEL BOUCHARD, by and through his attorney  
of record, Jordan P. Schnitzer, Esq. of The Schnitzer Law Firm, and hereby files this Motion to  
Dismiss.

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1 This Motion is made based on Points and Authorities submitted herewith, together with the  
2 papers and pleadings on file herein, exhibits attached hereto and oral arguments this Court may  
3 allow.

4 DATED this 20<sup>th</sup> day of May 2020.

6  
7 BY:   
8 JORDAN P. SCHNITZER, ESQ.  
9 Nevada Bar No. 10744  
10 THE SCHNITZER LAW FIRM  
11 9205 W. Russell Road, Suite 240  
12 Las Vegas, Nevada 89148  
13 *Attorneys for Defendant,*  
14 *PHILIP MICHAEL BOUCHARD*



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

Federal courts have the discretion on whether to hear declaratory claims. There is currently pending in state court a breach of contract claim, a bad faith claim, and a declaratory action. Accordingly, continuing with this case only would have this Court determine state law issues, have this court render a decision that does nothing to resolve the entirety of the state court action, promote forum shopping, and needlessly entangles the state and federal courts. Therefore, the Court should dismiss this case.

**II. PROCEDURAL AND FACTUAL HISTORY**

1. On July 27, 2016, Philip Michael Bouchard (“Bouchard”) filed a complaint against Efren Isaac Sotelo (“Efren”), Juan Sotelo (“Juan”) and Now Services of Nevada, LLC dba Cool Air Now (“Cool Air”) Nevada State Court Case No. A-16-740711-C (“State Action”). *See Exhibit “A”*. The basis for the State Action was that Efren negligently caused an accident where Bouchard was seriously injured. Efren was driving a pick-up truck owned by Cool Air. National Casualty Insurance (“National”) was the insurer for said vehicle.

2. Specifically, the Complaint alleged:

12. Upon information and belief, SOTELO was employed by COOL AIR NOW and, at all relevant times, SOTELO was operating the Pick- Up Truck with the express or implied permission of his employer.

*Id.*

3. Additionally, the Complaint contains additional allegations that Efren had permission to use the truck:

30. COOL AIR NOW, J. SOTELO and DOE I breached that duty by knowing entrusting their dangerous vehicle to another whom they knew or should have known was likely to use it in a manner involving unreasonable risk of harm to others...

41. COOL AIR NOW, J. SOTELO and DOE I breached that duty by failing to properly supervise SOTELO by allowing him to operate the vehicle and do so in the manner described above.

*Id.*



- 1           4.       The allegations in the Complaint, if true, would trigger the duty to indemnify.
- 2           5.       On September 9, 2016, Bouchard filed a “Three Day Notice of Intent to Default”.
- 3       See **Exhibit “B”**.
- 4           6.       National’s counsel was served with this notice of intent to Default. *Id.*
- 5           7.       The insurer refused to initially defend Efren Sotelo, resulting in a default. *See*
- 6       **Exhibit “C”**.
- 7           8.       National eventually attempted to defend Efren Sotelo, but the district court denied
- 8       Efren’s attempt to set aside the default. *See* **Exhibit “D”**.
- 9           9.       In the state court case, there was also evidence supporting the allegations against
- 10       Efren Sotelo:
  - 11               a.       Mr. Bouchard testified that Juan Sotelo stated at the scene that he should
  - 12               have taken the keys from Efren Sotelo. *See* **Exhibit “E”**, at pp. 82, 10-
  - 13               12.
  - 14               b.       Efren Sotelo’s employee file stated that he was employed on December
  - 15               12, 2014, the date of the incident. *See* **Exhibit “F”**.
- 16       10.       On September 8, 2017, National filed the current action. (ECF 1) seeking declaratory
- 17       relief on two issues: (1) whether it owed a duty to defend Efren Sotelo; and (2) whether it owed a
- 18       duty to indemnify Efren Sotelo.
- 19       11.       On April 9, 2019, this Court stayed the current action. (ECF 65).
- 20       12.       The State Action against Juan and Cool Air was dismissed before trial. *See* **Exhibit**
- 21       **“G”**.
- 22       13.       On September 26, 2019, after a multi-day default prove-up hearing on the amount
- 23       of damages, where Efren Sotelo’s counsel was permitted to participate, the State Court issued an
- 24       order granting total monetary judgment against Efren in the amount of \$219,193.02. *See* **Exhibit**
- 25       **“H”**.
- 26       14.       Efren was represented by Marsha Stephenson, an attorney paid for by National, and
- 27       was allowed to cross-examine witnesses and give a closing argument. *Id.*
- 28       15.       The Order specifically deemed all allegations in the Complaint as true. *Id.*

16. The deadline to appeal the Default Judgment has passed pursuant to Nevada Rules of Appellate Procedure 4(a)(1).

17. The Court subsequently granted Philip Bouchard's request for attorneys' fees, costs and interest, bringing the total judgment to \$385,108.17 plus accruing post-judgment interest. *See Exhibit "I"*.

18. On April 8, 2020, National filed an appeal only as to the Order granting attorney's fees, costs and interest. *See Exhibit "J"*.

19. On April 12, 2020, this Court lifted the stay on this case. (ECF 73).

### III. LEGAL ARGUMENT

#### A. The Court Should Dismiss this Case

"[A] district court is authorized, in the sound exercise of its discretion, to stay or *to dismiss* an action seeking a declaratory judgment before trial or after all arguments have drawn to a close." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (emphasis added). The [Declaratory Judgment] Act gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Government employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (quoting *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962)).

"The appropriate inquiry for a district court in a Declaratory Judgment Act case is to determine whether there are claims in the case that exist independent of any request for purely declaratory relief, that is, claims that would continue to exist if the request for declaration simply dropped from the case." *Snodgrass v. Provident Life and Acc. Ins. Com.*, 147 F.3d 1163, 1197–68 (9th Cir. 1998). "As a general rule, insurance coverage actions belong in state rather than federal court." *Capitol Indemnity Corp. v. Global Property Management Group, Inc.*, 2006 WL 8441303, 3 (D. Nev.).

"The district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." *Dizol*, 133 F.3d at 1225. The Ninth Circuit has also suggested other relevant factors district courts may consider:

whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of



procedural fencing or to obtain a ‘res judicata’ advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems.

*Id.* at 1225 n. 5 (quoting *American States Ins. Co. v. Kearns*, 15 F.3d 142, 145 (9th Cir. 1994)).

**i. This action needlessly asks this Court to determine state law issues**

“Courts should generally decline to assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court.” *Continental Cas. Co. v. Industries*, 947 F.2d 1367, 1374 (9th Cir. 1991) (overruled on other grounds in *Government employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998)).

In *Great American Assur. V. McCormick*, the insurer sought a declaration that the at fault party to an accident did not have the vehicle owner’s permission to drive the vehicle and therefore that the insure did not owe coverage. 2005 WL 3095972, 1 (N.D. Cal.). There existed a state court action in *McCormick* dealing with the liability of the driver and the liability of the owner of the vehicle. *Id.* The *McCormick* Court dismissed the declaratory action in part due to the fact that the declaratory request dealt with state law and issues. *Id.* at 1–3 (“It could have filed a declaratory relief action in state court...where such action could have been related to and coordinated with the pending state court actions.”); *see also Great American Assur. Co. v. Bartell*, 2008 WL 1927333 (D. Ariz.) (declining to hear a declaratory action in part because the issues were governed strictly governed by state law.).

Similarly, in *Capitol Indemnity Corp. v. Global Property Management Group, Inc.*, this Court declined to exercise jurisdiction on a declaratory action that involved a question of insurance coverage in an ongoing state court case for negligence. 2006 WL 8441303, 4 (D. Nev.). This Court held in that case: “the state court, which will determine the facts, is in a better position to render an opinion on insurance coverage, which is, after all, a state law question.”

This requested relief here deals strictly with a determination of Nevada State law, including addressing portions of Nevada’s public policy as it relates to its statutory minimum insurance. This evidenced by National’s *Complaint* [ECF 1] as all the allegations deal directly with the original State Action. National is asking this Court to make the same declarations as the insurer in



1 *McCormick* and *Global Property Management*. Just as in *McCormick* and *Global Property*  
 2 *Management*, the State Action will determine the factual issues between the parties and all of the  
 3 legal issues, including, the now declaratory relief claim and bad faith issues now raised in the State  
 4 Action.

5 Nevada State law also determines the interpretation of the insurance policy at issue, and its  
 6 public policy regarding exclusions, making it appropriate for the State Action to determine this  
 7 case, especially with a pending declaratory action in the State Action. Therefore, “the state court,  
 8 which will determine the facts, is in a better position to render an opinion on insurance coverage,  
 9 which is, after all, a state law question” making dismissal appropriate.

10 **ii. This action was an attempt to forum shop**

11 “[F]ederal courts should generally decline to entertain reactive declaratory actions.” *Dizol*,  
 12 133 F.3d at 1225. The *McCormick* Court found the action before it was “a reactive declaratory  
 13 action” because the insurer’s complaint sought “a declaration that the insurance policy does not  
 14 provide coverage for the claims made by the state plaintiffs against [the insurer].” 2005 WL  
 15 3095972 at 2. That court further stated: “[The insurer] could have filed a declaratory relief action  
 16 in state court.... where such action could have been related to and coordinated with the pending  
 17 state court actions.” *Id.*

18 Here, National brought this action in direct response to the State Action, similar to the  
 19 insurer in *McCormick*. Just as the Court in *McCormick* dismissed that declaratory action, so should  
 20 this Court dismiss this case.

21 **iii. This action is duplicative to the underlying state action**

22 “If there are parallel state proceedings involving the same issues and parties pending at the  
 23 time the federal declaratory action is filed, there is a presumption that the entire suit should be heard  
 24 in state court.” *Dizol*, 133 F.3d at 1225.

25 The *McCormick* Court declined jurisdiction because the “declaratory relief claim is  
 26 predicated on the same factual transaction involved in the state court proceeding.” 2005 WL  
 27 3095972 at 3. Similarly, this Court dismissed the declaratory action in *Global Property*  
 28 *Management* because that action required “this court to resolve issues that [were] similar to those



1 before the state court in the underlying action. The ultimate legal determination in each case  
2 depend[ed] on the determination of the same facts.” 2006 WL 8441303 at 4.

3 Here, all of the allegations in the *Complaint* are directly related to factual issues in the State  
4 Action. This Court in *Global Property Management* and another neighboring federal district court  
5 in *McCormick* found that dismissal was warranted under the same substantive facts as those found  
6 here. Further, the State Action now has a pending declaratory claim and bad faith issues as well.  
7 Therefore, this Court should dismiss this action.


8 **iv. The other factors also weigh in favor of dismissal**

9 Here, all of the other factors the Ninth Circuit has suggested this consider weigh in favor  
10 of dismissal. The declaratory action cannot settle all the aspects of the controversy because the  
11 State Action has all those issues before it, including a declaratory action. This action will not serve  
12 a useful purpose in clarifying the legal relations at issue because the legal relations at issue are  
13 completely dependent on the State Action. Lastly, not dismissing this case will only further  
14 entangle the federal and state court cases and systems. The factual and legal questions in this case  
15 need to be decided in State Court. Therefore, this Court should dismiss this case.

16 **IV. CONCLUSION**

17 Base on the foregoing, the Court should dismiss this case.

18 DATED this 20<sup>th</sup> day of May 2020.

19  
20 BY:   
21 JORDAN P. SCHNITZER, ESQ.  
22 Nevada Bar No. 10744  
23 THE SCHNITZER LAW FIRM  
24 9205 W. Russell Road, Suite 240  
25 Las Vegas, Nevada 89148  
26 Attorneys for Defendant,  
27 PHILIP MICHAEL BOUCHARD  
28

**CERTIFICATE OF SERVICE**

Pursuant to F.R.C.P. 5(b), I certify that I am an employee of The Schnitzer Law Firm and that on the 20<sup>th</sup> day of May 2020, the foregoing **DEFENDANT, PHILIP MICHAEL BOUCHARD'S MOTION TO DISMISS** was served via electronic service by the U.S. District Court CM/EMF system to the parties on the Electronic Mail Notice List.

Gil Glancz, Esq.  
SELMAN BREITMAN LLP  
3993 Howard Hughes Parkway, Suite 200  
Las Vegas, NV 89169-0961



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An Employee of  
THE SCHNITZER LAW FIRM



UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

NATIONAL CASUALTY CO., a Wisconsin  
corporation,  
  
Plaintiff,  
  
v.  
  
EFREN ISAAC SOTELO, an individual; and  
PHILIP MICHAEL BOUCHARD, an  
individual,  
  
Defendants.

Case No. 2:17-cv-02456-KJD-CWH

**ORDER DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO DISMISS**

This is an action for declaratory relief with respect to an insurance policy issued by Plaintiff National Casualty Company ("NCC"). Presently before the Court are Defendant Philip Michael Bouchard's ("Bouchard") Motion for Summary Judgment (#74) and Motion to Dismiss (#77). Plaintiff responded (#79/80) to which Defendant replied (#82/85).

I. Factual and Procedural History

In July 2016, Bouchard filed a negligence suit in state court after suffering injuries in a car accident with Efren Sotelo ("Efren"). (#74 at 4). Efren was driving a pick-up truck owned by his father, Juan Sotelo's ("Juan") company Now Services of Nevada, LLC dba Cool Air Now ("Cool Air"). Id. Plaintiff provided commercial automobile insurance to Cool Air. (#1 at 2). The policy covered as insureds the named insured and "anyone else while using with [the named insured's] permission a covered 'auto.'" Id. at 3. Whether Efren was a permissive user of the truck is the main issue in this case. NCC alleges that Efren was not a permissive user because he

1 was driving a stolen truck after Cool Air fired him two days prior to the accident. Id. Juan filed a  
2 police report for the stolen truck on the day of the accident. Id. at 4. Bouchard alleges Efren was  
3 a permissive user because his termination paperwork shows that his final day of work would  
4 have been after the day of the accident. (#74 ex. 5). Because NCC alleged that Efren did not have  
5 permission to use the truck, it did not defend him in the original state court action. (#1 at 4).  
6 Efren failed to respond to the complaint and the state court entered default judgment against him.  
7 Id. NCC filed this suit seeking declaratory judgment in September 2017. Id. at 5.

8  
9 This Court stayed the proceedings pending resolution of the state action in April 2019.  
10 (#65). The question of whether Efren was a permissive user of the truck and therefore whether  
11 NCC owed Efren a duty to defend and indemnify would have been resolved during that trial. Id.  
12 at 2. However, Bouchard dismissed Juan and Cool Air the day before trial began. (#80 at 2).  
13 Without Juan and Cool Air as parties, the state court could not answer the permissive use  
14 question. Id. In April 2019, after receiving the default judgment, Bouchard filed a complaint in  
15 state court alleging breach of contract, breach of implied covenants of good faith and fair  
16 dealing, and declaratory judgment against NCC, another insurance company, and two law firms.  
17 (#87-1). The claims arose from the same set of facts as the original action and NCC's alleged bad  
18 faith in not defending Efren. Id.

## 19 II. Legal Standard

20  
21 Declaratory judgment allows the Court to adjudicate a party's rights or obligations before  
22 it seeks a coercive remedy. Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir.  
23 1996). However, the Declaratory Judgment Act does not expand the Court's jurisdiction. Id.; see  
24 also Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). Rather, a claim for  
25 declaratory relief is subject to the same federal jurisdictional requirements as any other case; it  
26  
27  
28

1 must be “brought by [an] interested party,” and it must involve an actual controversy. See 28  
 2 U.S.C. § 2201; Moseley, 80 F.3d at 1405. A declaratory judgment action that seeks clarification  
 3 of an insurer’s coverage obligation or duty to defend is ripe for judicial review. See Govt. Emp.s  
 4 Ins. Co. v. Dizol, 133 F.3d 1120, 1222 n.2 (9th Cir. 1998); AAA Nev. Ins. Co. v. Chau, No.  
 5 2:08-cv-00827-RCJ-LRL, 2010 WL 1756986, at \*3 (D. Nev. Apr. 30, 2010).

7 Summary judgment is appropriate where there exists no genuine issue of fact and when  
 8 the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Celotex  
 9 Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of showing the  
 10 absence of genuine issues of material fact. Celotex, 477 U.S. at 323. The burden then shifts to the  
 11 nonmoving party to show specific facts demonstrating a genuine factual dispute for trial. See  
 12 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court makes  
 13 all justifiable inferences in favor of the nonmoving party. Matsushita, 475 U.S. at 587. However,  
 14 the nonmoving party may not merely rest on the allegations of his pleadings. Rather, he must  
 15 produce specific facts—by affidavit or other evidence—showing a genuine issue of fact.  
 16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Summary judgment is not  
 17 appropriate if a reasonable jury could return a verdict for the nonmoving party. Id. at 248.

### 20 III. Analysis

21 Defendant filed a motion to dismiss and a motion for summary judgment. The court  
 22 analyzes each individually.

#### 24 A. Motion to Dismiss

25 When determining if a declaratory judgment action should be dismissed, “[t]he Brillhart  
 26 factors remain the philosophical touchstone for the district court.” Dizol, 133 F.3d at 1225. The  
 27 court has three main considerations: it “should avoid needless determination of state law issues;  
 28

1 it should discourage litigants from filing declaratory actions as a means of forum shopping; and  
 2 it should avoid duplicative litigation.” Id. These factors are not exhaustive, and the district court  
 3 may make other considerations, such as:

4  
 5 “Whether the declaratory action will settle all aspects of the controversy; whether  
 6 the declaratory action will serve a useful purpose in clarifying the legal relations  
 7 as issue; whether the declaratory action is being sought merely for the purposes of  
 8 procedural fencing or to obtain a ‘res judicata’ advantage; or whether the use of a  
 9 declaratory action will result in entanglement between the federal and state court  
 10 systems. In addition, the district court might also consider the convenience of the  
 11 parties, and the availability and relative convenience of other remedies.”

12 Dizol, 133 F.3d at 1225 n.5. The Brillhart factors and the additional considerations weigh in  
 13 favor of not dismissing.

14 i. Needless determination of state law issues

15 When “parallel state proceedings involving the same issues and parties [are] pending at  
 16 the time the federal declaratory action is filed, there is a presumption that the entire suit should  
 17 be heard in state court.” Id. When NCC filed this suit, there was a parallel state proceeding. To  
 18 avoid a needless determination of a state law issue, this Court stayed the case pending resolution  
 19 of the state law claim. However, Bouchard dismissed Juan and Cool Air which prevented the  
 20 state court from making the necessary state law determination. This case focuses on a single  
 21 question, whether Efren was a permissive user of the truck on the day of the accident. That  
 22 question would have been answered had Bouchard continued to trial. Bouchard’s actions created  
 23 a need for this Court to make a determination of state law. The state tort case did not involve the  
 24 same issues as this federal declaratory action, which centers on the coverage dispute, not  
 25 liability. As the Ninth Circuit has held, when “the state court case did not include the coverage  
 26 issue, and because the coverage issue in the federal action [is] not contingent on any further state  
 27 court proceedings, the district court [finds] good cause to continue to exercise jurisdiction.” Am.

1 Cas. Co. of Reading, Penn. V. Krieger, 181 F.3d 1113, 1119 (9th Cir. 1999). This is not a case in  
 2 which the federal court is faced with a request for a needless determination of state law issues.

3 ii. Forum shopping

4 “This factor usually is understood to favor discouraging an insurer from forum shopping,  
 5 *i.e.*, filing a federal court declaratory action to see if it might fare better in federal court at the  
 6 same time the insurer is engaged in a state court action.” Id. However, defendants can also  
 7 offend this factor by attempting to restart in state court after the case has proceeded in federal  
 8 court. See id. By staying the case pending the resolution of the state law action, this Court made  
 9 sure NCC was not forum shopping. However, Bouchard dismissed certain defendants, obtained a  
 10 default judgment while avoiding the resolution of the main question, and then filed a similar case  
 11 in state court. His actions appear to be more of an effort to forum shop than Defendant’s as he  
 12 wishes to proceed in state court after three years of litigation in federal court. This factor weighs  
 13 in favor of the Court retaining jurisdiction and against dismissing.

14 iii. Duplicative litigation

15 This case is similar to the previously mentioned case Am. Cas. Co. of Reading, PA v.  
 16 Krieger, 181 F.3d 1113 (9th Cir. 1999). In Krieger, when a motion to dismiss was filed in federal  
 17 court, “the state court litigation had concluded without deciding the coverage issue before the  
 18 district court in the declaratory relief action.” Id. at 1119. Similarly, the original state action in  
 19 this case concluded without deciding the coverage issue. The federal court action was not  
 20 duplicative in Krieger and it is not duplicative here.

21 iv. Additional considerations

22 The additional considerations that the Ninth Circuit permits the district court to look at  
 23 also weigh against dismissal. A decision in this declaratory action will settle the controversy that  
 24

1 has not been resolved during this three-year-long litigation process. It will also clarify the legal  
2 relations at issue. Additionally, the Court does not find any evidence that NCC filed this case to  
3 obtain a *res judicata* advantage.<sup>1</sup> Retaining jurisdiction in this declaratory judgment action will  
4 not result in entanglement between the federal and state court systems as this will answer the  
5 question that neither court has been able to answer to date. There is a vast docket in the federal  
6 action that has been ongoing since 2017 and a dismissal now would offend judicial economy and  
7 promote the waste of judicial resources.  
8

9 Because the Brillhart factors and additional considerations weigh in favor of this Court  
10 retaining jurisdiction, dismissal is inappropriate.  
11

12 B. Summary Judgment

13 Defendant's motion for summary judgment fails for the same reason that NCC's motion  
14 for summary judgment failed in November 2018. The same genuine issue of material fact exists  
15 today that existed three years ago when this case began. Whether Efren was a permissive user of  
16 the truck has not come any closer to resolution since the last time this Court ruled on a motion  
17 for summary judgment. Because this same genuine issue of material fact exists, summary  
18 judgment is improper.  
19

20 Bouchard also argues that this claim is precluded under *res judicata* principles. For claim  
21 preclusion to apply "the following factors must be met: 1) the same parties or their privies are  
22 involved in both cases, 2) a valid final judgment has been entered, and 3) the subsequent action  
23 is based on the same claims or any part of them that were or could have been brought in the first  
24 case." Five Star Cap. Corp. v. Ruby, 194 P.3d 709, 714 (Nev. 2008). Bouchard argues that the  
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27  
28 <sup>1</sup> While NCC is not seeking a *res judicata* advantage, Bouchard is. In the Court's opinion, this weighs against Bouchard in his motion to dismiss.



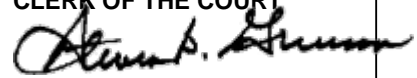
1 default judgment is a judgment on the merits because “the facts alleged in the pleadings will be  
 2 deemed admitted.” Foster v. Dingwall, 227 P.3d 1042, 1049 (Nev. 2010). The Court disagrees.  
 3 The next line in Foster states: “Thus, during an NRCP 55(b) prove-up hearing, the district court  
 4 shall consider the allegations deemed admitted *to determine whether the nonoffending party has*  
 5 *established a prima facie case for liability.*” Id. (emphasis added). A court should only consider  
 6 the allegations deemed admitted to determine if the nonoffending party has established a prima  
 7 facie case of liability in a prove-up hearing. This is further supported by the Nevada Court of  
 8 Appeals, which stated that with a default, “the well-pleaded allegations of a complaint *relating to*  
 9 *liability* are taken as true.” Seefeldt v. Griffie, 2019 WL 6972230, \*2 (Nev. Ct. App. 2019)  
 10 (quoting VLM Food Trading Int’l Inc. v. Ill. Trading Co., 811 F.3d 247, 255 (7th Cir. 2016))  
 11 (emphasis added). The allegations are only taken as true when they relate to liability. Whether  
 12 Efren was a permissive user of the truck is the main question; liability for the accident is not at  
 13 issue in this action. The default judgment is silent to the question and claim preclusion is  
 14 improper. Because Defendant cannot satisfy the final judgment prong of claim preclusion  
 15 analysis, it is unnecessary to analyze the other two factors.

#### 19 IV. Conclusion

20 Accordingly, IT IS HEREBY ORDERED that Defendant Philip Michael Bouchard’s  
 21 Motion for Summary Judgment (#74) and Motion to Dismiss (#77) are **DENIED**.  
 22 Dated this 23rd day of September, 2020.



25  
 26 Kent J. Dawson  
 27 United States District Judge  
 28



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Attorneys for National Casualty Company

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

10 PHILIP BOUCHARD, an individual,  
11 Plaintiff,  
12 vs.

CASE NO.: A-20-813355-C

DEPT.: 13

13 NATIONAL CASUALTY COMPANY, a  
foreign corporation; COAST NATIONAL  
14 INSURANCE COMPANY dba FOREMOST  
INSURANCE GROUP, a foreign entity;  
15 SELMAN BREITMAN LLP, a foreign limit  
liability partnership corporation;  
16 STEPHENSON & DICKINSON, a Nevada  
professional corporation, DOES 1 through 10,  
17 and ROE CORPORATIONS 1 through 20,  
inclusive,

**NATIONAL CASUALTY COMPANY'S  
MOTION TO DISMISS, OR  
ALTERNATIVELY, MOTION TO STAY  
CLAIMS AGAINST NATIONAL  
CASUALTY COMPANY**

HEARING REQUESTED

18 Defendants.  
19  
20

21 Defendant National Casualty Company ("NCC"), by and through its counsel of record,  
22 Lewis Brisbois Bisgaard & Smith LLP, by and through its counsel LEWIS BRISBOIS  
23 BISGAARD & SMITH LLP, submits its Motion to Dismiss, or Alternatively, Motion to Stay  
24 Claims Against National Casualty Company ("Motion").

25 ///

26 ///

27 ///

28 ///

1 This Motion is based upon the attached Memorandum of Points and Authorities, the papers  
2 and pleadings on file, and any evidence and/or argument that may be taken at the time of the  
3 hearing on this matter.

4 DATED this 26th day of February, 2021.

5 LEWIS BRISBOIS BISGAARD & SMITH LLP  
6

7 BY /s/ Priscilla L. O'Briant

8 ROBERT W. FREEMAN

9 Nevada Bar No. 3062

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6385 S. Rainbow Boulevard, Suite 600

11 Las Vegas, Nevada 89118

*Attorneys for Defendant National Casualty Company*  
12

### 13 NOTICE OF MOTION

14 PLEASE TAKE NOTICE that the undersigned will bring **NATIONAL CASUALTY**  
15 **COMPANY'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY**  
16 **CLAIMS AGAINST NATIONAL CASUALTY COMPANY** on for hearing in Department 13  
17 on the \_\_\_ day of \_\_\_\_\_, 2021, at \_\_\_ a.m. or as soon thereafter as counsel may be heard.

18 DATED this 26th day of February, 2021.

19 LEWIS BRISBOIS BISGAARD & SMITH LLP  
20

21 BY /s/ Priscilla L. O'Briant

22 ROBERT W. FREEMAN

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26

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**INTRODUCTION**

This case involves claims by Philip Bouchard (“Bouchard”) brought pursuant to a judicial assignment of the rights of Efren Sotelo (“Efren”) against NCC, among others. The claims against NCC, which are the subject of this litigation all arise from NCC’s alleged failure to defend Efren in litigation brought by Philip Bouchard against Efren, among others, in Clark County District Court, case number A-16-740711-C (the “Underlying Action”). The subject matter of the instant litigation against NCC is duplicative of the Declaratory Relief action filed by NCC against Efren and Bouchard in the United States District Court for the District of Nevada, case number 2:17-cv-02456-KJD-DJA (the “Dec Action”), which has been pending since 2017. Indisputably, Bouchard’s Complaint in this matter seeks relief from the very same claim, based on the very same facts, as the action pending in federal court. Despite being a part to the Dec Action, Bouchard filed the instant action. For all the reasons discussed herein, the claims in this action against NCC should either be dismissed or stayed pending resolution of the parallel action pending in federal court. The Dec Action was properly filed in federal court, the federal court has jurisdiction, the parties have been litigating that action for over three years, and the ends of justice would be best served by allowing the federal court case to resolve the issues.

**II.**

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

This case arises from litigation by Philip Bouchard (“Bouchard”) against Now Services of Nevada LLC, dba Cool Air Now (“Now Services”), NCC’s insured, as well as NCC’s Managing Member, Juan Sotelo (“Juan”), and his son Efren Sotelo (“Efren”) in Clark County, Nevada, case number A-16-740711-C (the underlying action). The underlying action arose from a December 12, 2014 motor vehicle accident involving a Now Services vehicle driven by Efren and insured by NCC (the “Accident”). Prior to the Accident, on December 10, 2014, Now Services fired Efren for embezzlement of company funds and relieved him of the company gas card and vehicle keys.

1 On December 12, 2014, Juan admittedly stole the Now Services truck and was driving the vehicle  
2 without permission when he was involved in the motor vehicle accident with Bouchard.

3 **A. The Underlying Action**

4 On July 27, 2016, Bouchard filed the underlying action against Efren, Juan and Cool Air  
5 Now, seeking damages related to the accident. NCC provided a defense to Juan and Now  
6 Services. Efren did not tender his defense to NCC and NCC did not provide a defense to Efren as  
7 he admittedly stole the vehicle (and in fact was prosecuted and incarcerated for the theft) and was  
8 therefore not an insured under the policy. Thereafter, termination paperwork was produced in the  
9 underlying action which indicated that Efren's *effective* termination date was December 20, 2014  
10 rather than December 10, 2014. NCC agreed to defend Efren under a reservation of rights,  
11 including the right to file a declaratory relief action. Stephenson & Dickinson was retained to  
12 defend Efren. However, default had already been entered against Efren and in May, 2017, the  
13 Court in the Underlying Action denied the motion to set aside the default. The Underlying Action  
14 proceed as to the claims against Now Services and Juan. However, Plaintiff thereafter dismissed  
15 Now Services and Juan.

16 After a bench trial in September, 2019, the court awarded Bouchard damages in the  
17 amount of \$219,193.02. In March, the court awarded fees and costs resulting in an amended  
18 default judgment of \$386,703.14. The amended default judgment is the subject of an appeal  
19 currently pending before the Nevada Supreme Court. Thereafter, the court in the underlying  
20 action judicially assigned to Bouchard any rights that Efren may have against any party arising  
21 from the underlying action.

22 **B. The Declaratory Relief Action**

23 In September, 2017, NCC filed the action for declaratory relief against Efren and Bouchard  
24 in the United States District Court for the District of Nevada, case number 2:17-cv-02456-KJD-  
25 DJA seeking a judicial determination that it had no duty to defend or indemnify Efren in  
26 connection with the underlying action. See Exhibit A. Bouchard filed an Answer. Efren did not  
27 appear and was defaulted. NCC moved for summary judgment on the issue that Efren was not an  
28 insured under the policy and NCC therefore had no duty to defend him in the underlying action.

1 Bouchard opposed the motion arguing that there was a question of fact as to whether Efren was  
2 employed by Now Services on the date of the accident, and that question was being litigated in the  
3 underlying action against Efren, Now Services and Juan. Based on this, the Dec Action was  
4 stayed pending resolution of this factual issue in the underlying action. In April, 2020, the stay  
5 was lifted.

6 **C. The Present Action**

7 In April, 2020, despite the fact that the Dec Action had been pending in federal court for  
8 over three years, Bouchard filed the instant action seeking declaratory relief – a judicial  
9 determination that Efren was entitled to benefits under the policy, including defense, independent  
10 counsel and indemnity relating to the underlying action - and asserting claims against NCC for  
11 breach of contract and bad faith arising from its alleged breach of the duty to defend Efren. See  
12 Exhibit B.

13 **D. Motion to Dismiss**

14 Subsequent to filing the present action, Bouchard filed a motion to dismiss the Dec Action.  
15 See Exhibit C. Bouchard argued that the federal court should dismiss the action based on the  
16 existence of the present action. Bouchard asserted that the present action involved the same  
17 factual issues and legal issues as the Dec Action, including the declaratory relief claim and bad  
18 faith issues now raised. Exhibit C, 7:2-4. Bouchard asked the federal court to dismiss the Dec  
19 Action in favor of the present action. Bouchard argued that the Dec Action 1) “needlessly” asked  
20 the court to determine state law issues, 2) was an attempt to forum shop, and 3) was duplicative of  
21 the underlying state court action.

22 On September 23, 2020, the federal court entered an order denying Bouchard’s motion to  
23 dismiss the Dec Action. See Exhibit D. The Court addressed each of Plaintiff’s arguments and  
24 determined that the factors weighed in favor of not dismissing the action. The Court specifically  
25 found that the claims in the present action arose from the same set of facts as the Underlying  
26 Action and NCC’s alleged bad faith in not defending Efren. Exhibit D, p. 2:19-20. In analyzing  
27 the factors set forth in *Brillhart*, the federal court made the following determinations: 1)  
28 Bouchard’s actions in dismissing Now Services and Juan prevented the state’s court determination

1 on liability and thus the coverage issues in the Dec Action were not contingent on any further state  
2 court proceedings, Exhibit D, §III.A.i; Bouchard’s filing of the present action appeared to be more  
3 of an effort to forum shop as he wished to proceed in state court after three years of litigation in  
4 federal court, Exhibit D, §III.A.ii; and 3) that the Dec Action was not duplicative of the  
5 Underlying Action as the Underlying Action concluded without deciding the coverage issue ,  
6 Exhibit D, §III.A.iii. Finally, the court noted that there was a “vast docket” in the federal action  
7 that had been ongoing since 2017 and a dismissal now (in favor of the present action) would  
8 offend judicial economy and promote the waste of judicial resources. Exhibit D, §III.A.iv.

### 9 III.

### 10 LEGAL ARGUMENT

#### 11 A. Motion to Dismiss

12 The Amended Complaint in this matter seeks declaratory relief relating to the very same  
13 claim, based on the very same facts, as the action pending in federal court. NCC’s Complaint for  
14 Declaratory Relief was properly filed in federal court, the federal court has jurisdiction, has been  
15 exercising that jurisdiction for over three years, and the ends of justice would be best served if the  
16 dispute continues and is tried in that court.

17 The facts at issue in both the present action and the Dec Action involve the facts of the  
18 Accident and Underlying Action. The legal issues include the determination of whether NCC had  
19 a duty to defend Efren and breached that duty. These are the exact same facts and legal issues  
20 addressed in the Dec Action. NCC and Bouchard are parties to both actions. As such, the  
21 determination of these issues in either action will have a preclusive effect in the other action. *Five*  
22 *Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008). However, to allow both actions  
23 to proceed simultaneously will result in unnecessary vexation and expense to the parties and  
24 wasted judicial resources. Indeed, Nevada has long recognized that it is contrary to fundamental  
25 judicial procedure to permit two actions to remain pending between the same parties upon the  
26 identical cause. *Fitzharris v. Phillips*, 74 Nev. 371, 376, 333 P.2d 721, 724 (1958) (noting that  
27 prior to adoption of the Nevada Rules of Civil Procedure such situation was a special ground of  
28 demurrer).



1       When duplicate actions exist, Nevada courts will follow the “first to file” rule to determine  
2 which action should proceed. See *Fitzharris*, Nev. 371 at 376-77, 333 P.2d at 724 (1958)  
3 (providing that when identical causes of action are pending, involving the same parties, a trial  
4 court may properly dismiss the second action), abrogated on other grounds by *Lee v. GNLV Corp.*,  
5 116 Nev. 424, 996 P.2d 416 (2000); see also *Gabrielle v. Eighth Judicial Dist. Court*, 130 Nev.  
6 1178 (2014) (unpublished) (finding that because the two actions were substantially similar and  
7 sought the same relief, albeit through different legal means, the court exceeded its jurisdiction by  
8 entertaining the action without considering whether it was appropriate to proceed in accordance  
9 with the first-to-file rule). The *Gabrielle* court noted the first-to-file rule provides that “where  
10 substantially identical actions are proceeding in different courts, the court of the later-filed action  
11 should defer to the jurisdiction of the court of the first-filed action by either dismissing, staying, or  
12 transferring the later-filed suit.” (citing *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d  
13 1081, 1089 (S.D. Cal. 2002) and noted that the two actions need not be identical, only  
14 substantially similar for the first-to-file rule to apply (citing *Inherent.com v. Martindale-Hubbell*,  
15 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006)).

16       Federal courts also apply the first-to-file rule, and in doing so consider three factors: (1) the  
17 chronology of the two suits; (2) the similarity of the parties; and (3) the similarity of the issues.  
18 See *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015).  
19 “When applying the first-to-file rule, courts should be driven to maximize economy, consistency,  
20 and comity.” *Kohn Law*, 787 F.3d at 1240. The policy rationales behind the first-to-file rule—  
21 economy, consistency, and comity—are “just as valid when applied to the situation where one suit  
22 precedes the other by a day as they are in a case where a year intervenes between the suits.  
23 *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 939 (Fed. Cir. 1993), abrogated on other grounds  
24 by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995).” In  
25 *Pacesetter Sys., Inc. v. Medtronic, Inc.*, the 9th Circuit explained the rationale for the first-to-file  
26 rule by stating, “[n]ormally sound judicial administration would indicate that when two identical  
27 actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction

28       ///

1 should try the lawsuit and no purpose would be served by proceeding with a second action.” 8  
2 F.2d 93, 95 (9th Cir. 1982).

3 Here, the Dec Action was filed first, has proceeded for over three years and is likely to  
4 proceed to trial this year.<sup>1</sup> NCC and Bouchard are parties to both actions and the issues are  
5 identical. The federal court acquired jurisdiction of the Dec Action in 2017. The present action  
6 was filed in 2020. Thus, the issues involved in this litigation should be tried in the Dec Action and  
7 there is no purpose served by proceeding with the present action against NCC. Thus, NCC  
8 respectfully requests this Court to dismiss the claims against NCC. Dismissal of claims under the  
9 first-to-file rule are without prejudice.

10 **B. Motion to Stay Action Against NCC**

11 Should this Court not be willing to dismiss the claims against NCC in their entirety, NCC  
12 alternatively requests that the claims against it in the present action are stayed pending the  
13 outcome of the Dec Action, as it will decide the dispositive issue of the claims against NCC –  
14 whether NCC had a duty to defend Efren. The Nevada Supreme Court has indicated that a refusal  
15 to stay an action violates the first-to-file rule. See *Tonopah Solar Energy v. Fifth Judicial Dist.*  
16 *Court of Nev.*, 464 P.3d 124 (Nev. 2020) (unpublished) (when bond and contract claims were  
17 “fundamentally ... the same”, district court’s refusal to stay litigation of bond claim pending  
18 resolution of contract claims in federal court was abuse of discretion).

19 Notwithstanding the first-to-file rule, the claims against NCC should be stayed. The  
20 Nevada state courts have cited the United States Supreme Court’s *Landis* framework when  
21 analyzing a motion to stay. “The power to stay proceedings is incidental to the power inherent in  
22 every court to control the disposition of the causes of its docket with economy of time and effort  
23 for itself, for counsel, and for litigants. How this can best be done calls for the exercise of

24 \_\_\_\_\_  
25 <sup>1</sup> On April 23, 2020, the federal judge lifted the stay, set a deadline for dispositive motion and  
26 ordered that the pre-trial order be filed no later than 28 days after any non-dispositive order on the  
27 motions. Bouchard thereafter filed a motion for summary judgment which was denied. However,  
28 rather than proceed with the pre-trial order, Bouchard filed a motion for reconsideration which  
remains pending. See Exhibit E. The Motion for Reconsideration has been denied. Exhibit F. As  
such, the parties in the Dec Action must now file a pre-trial order within 28 days.

1 judgment which must weigh competing interests and maintain an even balance.” *Maheu v. Eighth*  
2 *Judicial Dist. Court in & for Clark Cty., Dep’t. No. 6*, 89 Nev. 214, 217 (1973) (quoting *Landis v.*  
3 *N. Am. Co.*, 299 US 248, 254-55 (1936)); see also *Jordan v. State ex. rel. DMV and Public Safety*,  
4 110 P.3d 30,41 (2005).

5 Courts have “broad” discretionary power to stay proceedings that are “incidental to the  
6 power inherent in every court to control the disposition of the causes of its docket with economy  
7 of time and effort for itself, for counsel, and for litigants..” *Clinton v. Jones*, 520 U.S. 681, 706  
8 (1997); *Landis*, 299 U.S. at 254.

9 Court have set out the following framework for a *Landis* stay:

10 Where it is proposed that a pending proceeding be stayed, the competing interests  
11 which will be affected by the granting or refusal to grant a stay must be weighed.  
12 Among those competing interests are the possible damages which may result from  
13 the granting of a stay, the hardship or inequity which a party may suffer in being  
14 required to go forward, and the orderly course of justice measured in terms of the  
simplifying or complicating issues, proof, and questions of law which could be  
expected to result from a stay.

15 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9<sup>th</sup> Cir. 2005). Courts should also consider “the  
16 judicial resources that would be saved by avoiding duplicative litigation.” *Pate v. Depuy*  
17 *Orthopaedics, Inc.*, No. 2:12-cv-01168-MMD-CWH, 2012 WL 3532780, at \*2 (D. Nev. Aug. 14,  
18 2012).

19 **1. No Possible Damage Will Result From Granting a Stay**

20 Bouchard will not be prejudiced by a stay because a stay will not delay any relief to which  
21 he may be entitled – and even such a delay would not be grounds for refusing a stay. In weighing  
22 the competing interests, a court should consider the possible damage to the non-moving party.  
23 *Lockyer*, 398 F.3d at 1110, See *In re Am. Apparel, Inc. Shareholder Derivative Litig.*, No. cv 10-  
24 06576 MMM, 2013 WL 9506072, at \*43 (C.D. Cal. July 31, 2012) (noting “courts generally  
25 consider whether doing so would cause undue prejudice or present a clear tactical disadvantage to  
26 the non-moving party”) (citation omitted).

27 For example, courts have found that a stay is appropriate when the non-moving party’s  
28 damage was only a delay in recovering money damages. See, e.g., *CMAX, Inc. v. Hall*, 300 F.2d

1 265, 268-269 (9<sup>th</sup> Cir. 1962; see also Lockyer, 398 F.3d at 1110. In *CMAX*, the non-moving party  
2 sought to recover \$12,696.09 for its services as an air freight forwarder. *Id.* at 266. Because the  
3 non-moving party sought an exact damage amount, the Ninth Circuit affirmed the stay noting that  
4 the non-moving party “alleged no continuing harm and sought no injunctive or declaratory relief.”  
5 *Lockyer*, 398 F.3d at 1110 (recognizing delay of CMAX’s suit would result, at worse, in a delay in  
6 its monetary recovery”).

7 Similarly here, Bouchard will not be damaged in that he is seeking monetary relief – he  
8 alleges that NCC has a duty to defend Efren and to indemnify him for the amount of the default  
9 judgment entered in favor of Bouchard. As a result, a stay would not result in any continuing  
10 harm. Although Bouchard also seeks declaratory relief, that is the exact cause of action that is  
11 pending in the Dec Action and which should be determined in that action. The determination of  
12 the duties owed by NCC to Efren in the Dec Action will be dispositive of Bouchard’s entitlement  
13 to the damages sought in this litigation.

14 Moreover, Bouchard will not be damaged or prejudiced by a stay given that discovery is in  
15 its infancy in the present action. Courts have found that no clear prejudice exists from the granting  
16 of a stay when a case is still in its earlier stage, and significant discovery has not yet begun. *See*  
17 *e.g.*, *Schwartz v. Nugent*, No. 17-9133 (FLW) (TJB), 2018 WL 3069220 at \*6 (D.N.J. June 21,  
18 2018); *Knapp v. Reid*, No. C15-1769-RSM, 2016 WL 561734 at \*2 (W.D. Wash Feb. 12, 2016);  
19 *Card Activation Techs., Inc. v. 7-Eleven, Inc.*, No. 1:10-cv-4984, 2011 WL 663960 at \*3 (N.D. Ill  
20 Feb. 10, 2011). Here, discovery is in its infancy;<sup>2</sup> no depositions have taken place, and the parties  
21 have yet to exchange significant documentation.

22 2. **NCC Will Face Hardship and Inequity if Forced to Proceed with Litigation**  
23 **While the Dec Action is Being Determined**

24 Although a stay will not cause Bouchard any harm, allowing this case to move forward  
25 will cause hardship and inequity to NCC. Given the fact that NCC’s defenses in this action are  
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27 <sup>2</sup> The Early Case Conference in this matter was held on January 20, 2021.  
28

1 inextricably linked to the obligations under the policy, which are being determined in the Dec  
2 Action, this Court should stay the proceedings against NCC. Bouchard’s claims against NCC are  
3 also intrinsically tied to the claims in the Dec Action as they are all dependent on the  
4 determination that NCC had a duty to defend Efren and breached that duty. Given that Bouchard  
5 will have to prove this before any of the claims can be determined in his favor, it makes little sense  
6 to proceed against NCC in separate litigation while the federal court is making this determination  
7 in the Dec Action. Additionally, if Bouchard is allowed to proceed against NCC while the federal  
8 court action is pending, there would be significant risk of conflicting decisions and unjust results  
9 against the orderly course of justice.

10 Courts in Nevada and elsewhere have stayed proceedings pending resolution of a related  
11 claim. For example, in *Specrite Design, LLC v. Elli N.Y. Design Corp.*, No. 16 Civ. 6154 (ER),  
12 2017 WL 3105859 (S.D.N.Y. July 20, 2017) a subcontractor sued, in federal court, the prime  
13 contractor and lien fund holder on a project, alleging that the contractor did not pay for labor  
14 performed and materials the subcontractor furnished. In addition to the federal case, there was a  
15 related state court lawsuit for breach of the subcontract. *Id.* at \*1. The contractor moved to stay  
16 the federal case pending resolution of the state court action because that would determine if the  
17 contractor had defaulted. *Id.* at \*2. The court granted the motion to stay, finding “the right to a  
18 lien can only be enforced to the extent of the amount due or to become due to the contractor or  
19 subcontractor on whose credit the labor or materials are furnished under his contract.” *Id.* at \*4.  
20 The court went on to find that “even though the Lien was discharged by the issuance of [the surety  
21 bond] the same test for the validity of the lien and the amount of the lien fund applies.” *Id.* Thus,  
22 because “an action to enforce a discharged lien is in substance an action to test the validity of the  
23 lien and to enforce the lien to the extent it is valid”, the court first needed to determine in the state  
24 court action whether the contractor defaulted. *Id.* As a result, the court found that granting the  
25 stay would balance the interests and prejudice that would result if it had not been granted, as well  
26 as promote judicial efficiency and minimized the possibility of conflicts between different courts;  
27 indeed, not granting a stay “would lead to the unnecessary litigation that is time-consuming for  
28 this Court and for the parties.” *Id.* at \*5.

1 Similarly here, the federal court must first determine whether NCC had a duty to defend  
2 Efren. If the federal court determines that NCC had no duty to defend Efren, then Bouchard  
3 cannot succeed on any of Efren's claims under which he seeks recovery as a judicial assignee. As  
4 discussed above, the federal court recently refused Bouchard's motion to dismiss that action  
5 noting that the litigation was three years in and that Bouchard appeared to be forum shopping.  
6 The federal court ordered the parties to file a pre-trial report after the ruling on the dispositive  
7 motion, which Bouchard avoided by filing a Motion for Reconsideration. However, on February  
8 26, 2021, the federal court denied Bouchard's motion for reconsideration. As such, the parties to  
9 the Dec Action will now proceed with filing the pre-trial report. As such, after more than three  
10 years of litigation, the Dec Action is likely to proceed to trial this year.

11 NCC will be irreparably harmed if it is forced to litigate the same issues in the present  
12 action that it has been litigating in the Dec Action for over three years. Bouchard is unlikely to  
13 suffer any prejudice as the Dec Action is likely to resolve before this action.

14 3. **A Stay Will Promote the Orderly Course of Justice While The Dec Action is**  
15 **Pending**

16 In determining whether to grant a stay, the court considers "the orderly course of justice  
17 measures in terms of the simplifying or complicating of issues, proof, and questions of law which  
18 could be expected to result from a stay." CMAX, 300 F.2d at 268 (citing *Landis*, 299 U.S. at 254-  
19 55). For example, court have granted stays where there is a pending decision which would narrow  
20 the issues in a case. See, e.g., *Brown v. Credit One Bank, N.A.*, No. 2:17-cv-00786-JAD-VCF,  
21 2018 WL 1697801 at \*4 (D. Nev. Apr. 6, 2018) (granting motion to stay pending decision from  
22 the D.C. Circuit's decision would help to "simplify and streamline the proceedings and promote  
23 the efficient use of the parties' and the court's resources"); *Bank of N.Y. Mellon v. 4655*  
24 *Gracemont Ave. Trust*, No. 2:17-cv-00063-JAD-PAL, 2018 WL 1697800 at \*3 (D. Nev. Apr. 5,  
25 2018) (granting motion to stay pending the Nevada Supreme Court's acceptance of a certified  
26 question of statutory interpretation which will "will prevent unnecessary briefing and the  
27 expenditures of time, attorney's fees, and resources that could be wasted"). Staying the claims as  
28 to NCC will promote the orderly course of justice and simplify issues as the Dec Action will

1 decide the dispositive issue in the claims against NCC in the present action - whether NCC had a  
2 duty to defend Efren.

3 Court have granted motions to stay “pending resolution of independent proceeding which  
4 bear upon the case.” *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9<sup>th</sup> Cir.  
5 1979). Where a stay is sought pending the resolution of another action, the court need not find  
6 that the two cases possess identical issues; a finding that the issues are substantially similar is  
7 sufficient to support a stay. See *Landis*, 299 U.S. at 254. Courts should weigh the competing  
8 interests of the parties. See *id.* at 254-255. The issues involved in the pending proceedings need  
9 not be “controlling of the action before the court” for a stay to be ordered. See *Leyva*, 593 F.2d at  
10 864.

11 Given that NCC and Bouchard are both parties in the Dec Action, in which the critical  
12 issue in the present action – whether NCC had a duty to defend Efren – is being litigated, this  
13 Court should grant NCC’s motion to stay. As noted, the federal court properly has jurisdiction  
14 over the Dec Action and had been exercising that jurisdiction for over three years. As the federal  
15 court implicitly recognized in denying Plaintiff’s motion to dismiss the Dec Action, it does not  
16 serve the purposes of judicial economy or fairness to the parties, to dismiss litigation that has been  
17 ongoing for 3 years to allow litigation in which discovery is *about* to commence to determine the  
18 issues. As such, this Court should stay the claims against NCC. Doing so will simplify the issues  
19 and promote efficiency because all parties and the issues critical to the claims are in the same  
20 court, before the same judge, and will be proceeding to trial. Thus, the claims against NCC should  
21 be stayed, as allowing the dispositive issue to be determined in the long-standing Dec Action will  
22 promote the orderly course of justice, by simplifying, or removing, the issues in this case.

#### 23 4. Judicial Resources

24 Moreover, the claims against NCC should be stayed to avoid unnecessary duplicative  
25 discovery and the risk of conflicting decisions. See, E.g. *Knepper v. Equifax Info. Servs.*, No.  
26 2:17-cv-02368-KJD-CWH, 2017 WL 4369473 at \*3 (D. Nev. Oct. 2, 2017) (granting a motion to  
27 stay the action, which would “limit hardship or inequity to [defendant] from unnecessary  
28 proceedings, inconsistent rulings, duplicative discovery, and having to re-litigation claims in



1 multiple jurisdictions”); *Tobler v. DePuy Orthopedics, Inc.*, No. 2:12-cv-01167-LDG (RJJ), 2012  
2 WL 3592891 at \*2-3 (D. Nev. Aug. 17, 2012) (granting a stay pending an multi-district litigation  
3 transfer order to avoid duplicative discovery and pretrial management efforts). In *Knepper*, the  
4 court granted a stay when plaintiffs in related cases filed a motion for consolidation and transfer.  
5 The court granted the stay, finding that doing so would limit hardship and inequity to defendants  
6 from “unnecessary proceedings, inconsistent rules, duplicative discovery, and having to re-litigate  
7 claims in multiple jurisdictions.” *Id.* at \*3. Courts have similarly stayed cases when doing so is  
8 the most efficient way to allow [ ] uncertainties to resolve”, especially when the parties face  
9 “duplicative discovery” where there was a potential to need to “re-open discovery and coordinate  
10 two or more cases.” *Honghui Deng v. Nevada ex rel. Bd. of Regents*, No. 2:17-cv-03019-APG-  
11 VCF, 2019 U.S. Dist. LEXIS 36716 at \*6 (D. Nev. Mar. 7, 2019) (granting a motion to stay when  
12 a state court case contained a federal claim and removal was possible and there were already  
13 similar cases).

14       Discovery in this case is about to commence. However, the issue of whether NCC had a  
15 duty to defend Efren has been litigated in federal court for over three years. If this Court does not  
16 stay the claims against NCC, NCC will face “duplicative discovery”. Moreover, if Bouchard’s  
17 assigned claims against NCC proceed in this matter, while the Dec Action proceeds  
18 simultaneously in federal court, the parties face the risk of inconsistent and conflicting rulings.  
19 Because such cost is unnecessary, this Court should stay the proceedings against NCC.

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IV.

**CONCLUSION**

Based upon the foregoing, NCC respectfully requests that the Court grant this Motion to Dismiss. Alternatively, NCC requests this Court stay the claims against NCC as set forth above, and grant such other relief as the Court deems just and proper.

DATED this 26th day of February, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

BY           /s/ Priscilla L. O'Briant            
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PRISCILLA L. O'BRIANT  
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Las Vegas, Nevada 89118  
*Attorneys for Defendant National Casualty Company*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.E.F.C.R. 9, I certify that I am an employee of, and that on this 26th day of  
3 February, 2021, I did cause a true copy of **NATIONAL CASUALTY COMPANY'S MOTION**  
4 **TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY CLAIMS AGAINST**  
5 **NATIONAL CASUALTY COMPANY** to be served via electronic service by the above-entitled  
6 Court to the parties on the Electronic Filing System.

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18 Attorney for Coast National Insurance  
Company dba Foremost Insurance Group

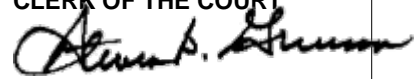
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25 By /s/ Anne Cordell  
26 An Employee of  
27 LEWIS BRISBOIS BISGAARD & SMITH LLP  
28

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**EXHIBIT LIST**

- EXHIBIT A** *National Casualty Company v. Efren Isaac Sotelo, et al.,*  
Case No. 2:17-cv-02456-KJD-DJA  
Complaint for Declaratory Relief
- EXHIBIT B** *Bouchard v. National Casualty Company, et al.,*  
Case No. A-20-813355-C  
Amended Complaint
- EXHIBIT C** *National Casualty Insurance v. Efren Isaac Sotelo, et al.,*  
Case No. 2:17-cv-02456-KJD-CWH,  
Defendant Philip Michael Bouchard’s Motion to Dismiss
- EXHIBIT D** *National Casualty Company v. Efren Isaac Sotelo, et al.,*  
Case No. @-17-cv-02456-KJD-CWH  
Order Denying Defendant’s Motion for Summary Judgment and  
Motion to Dismiss
- EXHIBIT E** *National Casualty Company v. Efren Isaac Sotelo, et al.,*  
Case Number 2:17-cv-02456-KJD-DJA  
Order
- EXHIBIT F** *National Casualty Insurance v. Sotelo, et al.,*  
Case No. 2:17-cv-02456-KJD-CWH  
Order Denying Defendant’s Motion for Reconsideration



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*Attorney for Plaintiff*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

PHILIP BOUCHARD, an individual;  
  
Plaintiff,

vs.

NATIONAL CASUALTY COMPANY, a foreign  
corporation; COAST NATIONAL INSURANCE  
COMPANY dba FOREMOST INSURANCE  
GROUP, a foreign entity; SELMAN BREITMAN  
LLP, a foreign limit liability partnership;  
STEPHENSON & DICKINSON, a Nevada  
professional corporation; DOES 1 through 10, and  
ROE CORPORATIONS 1 through 20, inclusive,  
  
Defendants.

Case No.: A-20-813355-C

Dept. No.: 13

**PLAINTIFF'S OPPOSITION TO**  
**DEFENDANT, NATIONAL**  
**CASUALTY COMPANY'S MOTION**  
**TO DISMISS, OR**  
**ALTERNATIVELY, MOTION TO**  
**STAY CLAIMS AGAINST**  
**NATIONAL CASUALTY COMPANY**

Hearing Date: March 29, 2021  
Hearing Time: 9:00 a.m.

COMES NOW, Plaintiff, PHILIP BOUCHARD, by and through his attorney of record,  
Jordan P. Schnitzer, Esq. of The Schnitzer Law Firm, and hereby files this Opposition to  
Defendant, National Casualty Company's Motion to Dismiss, or Alternatively, Motion to Stay  
Claims Against National Casualty Company.

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1 This Opposition is made based on the Points and Authorities submitted herewith, together  
2 with the papers and pleadings on file herein, exhibits attached hereto and oral arguments this  
3 Court may allow.

4 DATED this 15<sup>th</sup> day of March 2021.

THE SCHNITZER LAW FIRM

5  
6 BY:   
7 JORDAN P. SCHNITZER, ESQ.  
8 Nevada Bar No. 10744  
9 9205 W. Russell Road, Suite 240  
10 Las Vegas, Nevada 89148  
11 *Attorneys for Plaintiff,*  
12 *Philip Bouchard*



## MEMORANDUM OF POINTS AUTHORITIES

### **I. LEGAL ARGUMENT**

The “first to file” rule is a discretionary rule, not mandatory rule. *Galindo-Milan v. Hammer*, 438 P.3d 341 (Nev. 2019). Additionally, the rule “is not a rigid or inflexible rule to be mechanically applied” *Tenas v. Progressive Preferred Ins. Co.*, 124 Nev. 1513, 238 P.3d 860 (2008) citing *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982)

Here, the entirety of the actions are not substantially similar and neither are the parties. Additionally, the current action was consolidated in the same department with the 2017 Dec Action and then remanded by the federal court due to lack of subject matter jurisdiction. *See Exhibit 1 and 2*. Given that the federal court has declined jurisdiction over this matter, it would be improper and unjust to dismiss the case.

Additionally, NCC only asked for declaratory relief. Plaintiff’s action is for bad faith. More importantly, the current action involves additional parties, as well as a potential determination of primary/secondary coverage between NCC and Coast National. NCC is the only party in the 2017 Dec Action in federal court.

Similarly, there is no reason to stay this action at this time as it involves many more parties than just NCC. None of the other parties filed a timely joinder to NCC’s motion. Unnecessarily staying this case will cause unnecessary delays for the other parties, as well as run the risk of losing evidence due to fading memories and document retention policies. At a minimum, this Court should deny the motion without prejudice, allow discovery to proceed and perhaps revisit the issue if trial arrives and the Dec Action is still pending.

Importantly, a claim for breach of the implied covenant of good faith and fair dealing does not fail in the absence of insurance coverage. *Turk v. TIG Ins. Co.*, 616 F. Supp.2d 1044, 1054 (D. Nev. 2009) (denying a dismissal of the implied covenant of good faith and fair dealing cause of action when the insurer contended there was no coverage under the policy). Therefore, the federal Dec Action will not be dispositive of all claims against NCC. As a result, staying the case will only serve to further crowd the Court’s docket without getting the parties discovery needed to potentially discuss resolution of the case.

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Based upon the foregoing, Defendant’s Motion should be denied.

DATED this 15<sup>th</sup> day of March 2021.

THE SCHNITZER LAW FIRM

BY: 

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Las Vegas, Nevada 89148  
*Attorneys for Plaintiff,*  
*Philip Bouchard*



**CERTIFICATE OF SERVICE**


In accordance with Rule 9 of the N.E.F.C.R., I, the undersigned hereby certify that on the 15<sup>th</sup> day of March 2021, I served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT, NATIONAL CASUALTY COMPANY'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY CLAIMS AGAINST NATIONAL CASUALTY COMPANY** to the above-entitled Court for electronic service upon the Court's Service List to the following counsel:

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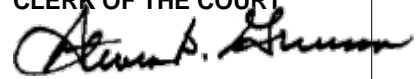
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*Attorneys for Defendant, Stephenson & Dickinson*

BY:   
An employee of  
THE SCHNITZER LAW FIRM



# Exhibit 1

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*Attorney for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

PHILIP BOUCHARD, an individual;

Plaintiff,

vs.

NATIONAL CASUALTY COMPANY, a foreign  
corporation; COAST NATIONAL INSURANCE  
COMPANY dba FOREMOST INSURANCE  
GROUP, a foreign entity; SELMAN BREITMAN  
LLP, a foreign limit liability partnership;  
STEPHENSON & DICKINSON, a Nevada  
professional corporation; DOES 1 through 10, and  
ROE CORPORATIONS 1 through 20, inclusive,

Defendants.

Case No.: A-20-813355-C

Dept. No.: 13

**NOTICE OF REMAND FROM  
FEDERAL COURT**

**TO THE CLERK OF THE DISTRICT COURT FOR CLARK COUNTY, NEVADA,  
AND ALL PARTIES AND THEIR ATTORNEYS OF RECORDS HEREIN:**

Please take notice that on October 2, 2020, the Honorable Kent J. Dawson ordered that this  
action be remanded back to the Eighth Judicial District Court from Federal District Court.

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A copy of the Order is attached hereto.  
DATED this 21<sup>st</sup> day of October 2020.

THE SCHNITZER LAW FIRM

BY:   
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Las Vegas, Nevada 89148  
*Attorneys for Plaintiff,*  
*Philip Bouchard*



## **CERTIFICATE OF SERVICE**


In accordance with Rule 9 of the N.E.F.C.R., I, the undersigned hereby certify that on the 21<sup>st</sup> day of October 2020, I served a true and correct copy of the foregoing **NOTICE OF REMAND FROM FEDERAL COURT** to the above-entitled Court for electronic service upon the Court's Service List to the following counsel:

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*Attorneys for Defendant, Stephenson & Dickinson*

BY:   
An employee of  
THE SCHNITZER LAW FIRM

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

PHILIP BOUCHARD, an individual

Plaintiff,

v.

NATIONAL CASUALTY COMPANY, a  
foreign corporation; COAST NATIONAL  
INSURANCE COMPANY dba FOREMOST  
INSURANCE COMPANY, a foreign entity;  
SELMAN BREITMAN LLP, a foreign liability  
partnership; STEPHENSON & DICKINSON, a  
Nevada professional corporation; DOES 1  
through 10, and ROE CORPORATIONS 1  
through 20, inclusive,

Defendants.

Case No. 2:20-cv-01084-KJD-BNW

**ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND**

Before the Court is Plaintiff's Motion to Remand to State Court (#10). Defendants responded (#26/28) in opposition, to which Plaintiff replied (#31).

I. Factual History

This action arises from a car accident involving Philip Bouchard ("Bouchard") and Efren Sotelo ("Sotelo") on or about December 12, 2014. (#1-1 at 5). Defendant National Casualty Company ("NCC") alleged that Sotelo was not a permissive user of the work truck he was driving at the time of the accident and refused to represent him in the original action. Id. The state court entered default judgment against Sotelo and assigned his potential causes of action to Bouchard. Id. at 5–6. With the causes of action now assigned to him, Bouchard filed this suit in state court on April 7, 2020. Id. at 11. Defendants removed the action to federal court, alleging that the law firm defendants, one of which is a Nevada resident, were fraudulently added to obstruct federal diversity jurisdiction. (#1 at 3).

1           II.     Legal Standard

2           A defendant may remove a civil action “brought in a State court of which the district  
3 courts of the United States have original jurisdiction.” 28 U.S.C. § 1441(a). Removal based on  
4 diversity jurisdiction requires complete diversity where “the citizenship of each plaintiff is  
5 diverse from the citizenship of each defendant.” Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68  
6 (1996). To determine whether complete diversity exists, “district courts may disregard the  
7 citizenship of a non-diverse defendant who has been fraudulently joined.” Grancare, LLC v.  
8 Thrower by and through Mills, 889 F.3d 543, 548 (9th Cir. 2018) (citing Chesapeake & Ohio Ry.  
9 Co. v. Cockrell, 232 U.S. 146, 152 (1914)).

10          There are “two ways to establish improper joinder: ‘(1) actual fraud in the pleading of  
11 jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-  
12 diverse party in state court.’” Hunter v. Philip Morris USA, 582 F.3d 1039, 1044 (9th Cir. 2009)  
13 (quoting Smallwood v. Illinois Central R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004)). A defendant  
14 must show that a party “joined in the action cannot be liable on any theory” to prove fraudulent  
15 joinder. Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998). However, “if there is  
16 a possibility that a state court would find that the complaint states a cause of action against any  
17 of the resident defendants, the federal court must find that the joinder was proper and remand the  
18 case to the state court.” Hunter, 582 F.3d at 1046 (quoting Tillman v. R.J. Reynolds Tobacco,  
19 340 F.3d 1277, 1279 (11th Cir. 2003)). A defendant opposing remand bears a heavy burden as he  
20 faces a “strong presumption against removal jurisdiction and the general presumption against  
21 fraudulent joinder.” Id. (citation omitted).

22          III.    Analysis

23          Bouchard argues that the removal was procedurally deficient and that complete diversity  
24 of parties does not exist.

25          A.   Procedurally Deficient

26          Bouchard alleges that the case was removed without consent from the other defendants.  
27 When an action is removed, “all defendants who have been properly joined and served must join  
28 in or consent to the removal of the action.” 28 U.S.C. § 1446(b)(2)(A). Defendants do not

1 dispute that they did not comply with this rule. However, they have since cured the defect and  
 2 argue that the district court may accept the removal if the deficiency is cured prior to a final  
 3 judgment. Bouchard argues that this rule only applies during appellate review and that district  
 4 courts may not ignore the procedural rules. The Court agrees with Defendants.

5 “[A] procedural defect existing at the time of removal but cured prior to the entry of  
 6 judgment does not warrant reversal and remand of the matter to state court.” Destfino v. Reiswig,  
 7 630 F.3d 952, 957 (9th Cir. 2011). The Ninth Circuit makes clear that this rule applies to district  
 8 courts. If all defendants have not joined a petition for removal “when the notice of removal is  
 9 filed, the *district court* may allow the removing defendants to cure the defect by obtaining  
 10 joinder of all defendants prior to the entry of judgment.” Id. (emphasis added). District courts  
 11 have discretion to permit defendants to cure their procedural deficiencies so long as there has  
 12 been no final judgment.

13 Because district courts have such discretion, the Court denies Plaintiff’s motion based on  
 14 this argument alone.

#### 15 B. Fraudulent Joinder

16 There is a strong presumption against making a finding of fraudulent joinder. Hunter, 582  
 17 F.3d at 1046. To satisfy the fraudulent joinder standard, there must be no possibility that a state  
 18 court would find that the claim against the resident defendant is valid. Defendants argue that  
 19 there is no possible cause of action against an insurance company’s agent-attorney because “a  
 20 general agent-principal relationship . . . is distinguishable from an attorney-client relationship.”  
 21 Dezzani v. Kern & Associates, Ltd., 412 P.3d 56, 61 (Nev. 2018).

22 The Court tends to agree with Defendants that the attorney-client relationship is  
 23 distinguishable from a typical agent-principal relationship and that there is no cause of action  
 24 against the resident law firm. However, “[w]hether an attorney is liable under an agency theory  
 25 hinges on whether the attorney is acting solely as an agent for the client, i.e., as a debt collector,  
 26 or whether the attorney is providing legal services to a client.” Id. at 62. It is possible for an  
 27 attorney to be liable under an agency theory, depending on the services provided. Additionally,  
 28 the Court is unaware of any Nevada authority that affirmatively answers the specific questions



1 raised by Plaintiff in this case. The Court cannot hold that there is no possibility that a state court  
2 could find Plaintiff's claims against the resident law firm are valid causes of action.

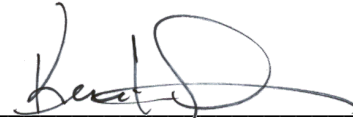
3 Therefore, fraudulent joinder cannot be established, and the action must be remanded to  
4 state court. However, if the state court dismisses or severs the action against the resident law  
5 firm, the parties may remove the case.

6 IV. Conclusion

7 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (#10) is  
8 **GRANTED.**

9 IT IS FURTHER ORDERED that Defendant's Motion to Consolidate (#19) is **DENIED**  
10 as moot.

11 Dated this 2nd day of October, 2020.

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15 Kent J. Dawson  
16 United States District Judge  
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# Exhibit 2

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**United States District Court  
District of Nevada (Las Vegas)  
CIVIL DOCKET FOR CASE #: 2:17-cv-02456-KJD-DJA**

National Casualty Company v. Sotelo et al

Assigned to: Judge Kent J. Dawson

Referred to: Magistrate Judge Daniel J. Albregts

Case in other court: Clark County District Court, A-16-740711-C

Cause: 28:1332 Diversity-(Citizenship)

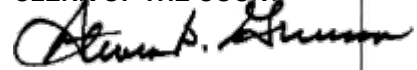
Date Filed: 09/20/2017

Jury Demand: Defendant

Nature of Suit: 110 Insurance

Jurisdiction: Diversity

10/02/2020	98	MINUTE ORDER IN CHAMBERS of the Honorable Judge Kent J. Dawson on 10/2/2020. Presently before the Court is Plaintiff National Casualty Companys Motion to Consolidate (#87). Having read and considered the briefing, both courts agree that the actions should be consolidated. However, due to the pending motion to remand, the Court believes that the same purposes can be achieved by transferring the case to the department with the lower case number, pending resolution of the motion to remand. Accordingly, the motion is granted to the extent that Case No. 2:20-cv-1084-JCM-BNW is transferred to Judge Dawson. <b>IT IS SO ORDERED. (no image attached)</b> (Copies have been distributed pursuant to the NEF - DXS) (Entered: 10/02/2020)
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SCHTO

DISTRICT COURT

CLARK COUNTY, NEVADA

PHILIP BOUCHARD,

Plaintiff(s),

vs.

STEPHENSON & DICKINSON, et al.,

Defendant(s).

CASE NO. A-20-813355-C

DEPT. NO. XIII

**ORDER SETTING CIVIL JURY TRIAL,  
PRE-TRIAL, CALENDAR CALL, AND DEADLINES FOR MOTIONS;  
DISCOVERY SCHEDULING ORDER**

1. A **jury trial** of the above-entitled case is set on a four week stack to begin,  
**Tuesday, June 21, 2022 at 9:00 a.m.**

2. In accordance with EDCR 2.68, a **pre-trial conference** with the designated  
attorneys and/or parties in proper person will be held on **Tuesday, May 31, 2022 at 2:35 p.m.**  
In addition to the matters referred to in such rule, the items to be brought to the calendar call (see  
below) with reference to EDCR 2.69 will be discussed.

3. A **calendar call** will be held on **Monday, June 13, 2022 at 2:00 p.m.**

4. All parties (attorneys and parties in proper person) **MUST** comply with **ALL**  
**REQUIREMENTS** of EDCR 2.67 prior to the pre-trial conference except that the due date for  
the Pre-Trial Memorandum will be established at the pre-trial conference. As to the Pre-trial  
Memorandum, counsel should be particularly attentive to their exhibit lists and objections to  
exhibits, as exhibits not listed or objections not made will not be admitted/allowed over objection  
based on non-compliance with the Rule's requirements. **(Also, it is helpful to the Court when**

**counsel list pertinent pre-trial motions and orders pertaining thereto if it is likely that they will be focused on during trial.)**

5. All parties shall complete discovery on or before January 20, 2022.

6. All parties shall file motions to amend pleadings or add parties on or before October 21, 2021.

7. All parties shall make initial expert disclosures pursuant to NRCP 16.1(a)(2) on or before October 21, 2021.

8. All parties shall make rebuttal expert disclosures pursuant to NRCP 16.1(a)(2) on or before November 22, 2021.

9. All parties shall file dispositive motions on or before February 21, 2022.

10. Counsel/parties in proper person are also directed to abide by EDCR 2.47 concerning the time for filing and noticing motions *in limine*. Except upon a showing of unforeseen extraordinary circumstances, the Court will not shorten time for the hearing of any such motions.

11. Miscellaneous

Certain dates from your case conference report(s) may have been changed to bring them into compliance with N.R.C.P. 16.1.

Unless otherwise directed by the court, all pretrial disclosures and objections thereto shall be in accordance with N.R.C.P. 16.1(a)(3).

Motions for extensions of discovery shall be made in accordance with E.D.C.R. 2.35.

Unless otherwise ordered, all discovery disputes (except disputes presented at a pre-trial conference or at trial) must first be heard by the Discovery Commissioner. EDCR 2.34.

**Failure of the designated trial attorney or any party appearing in proper person to**

1 appear for any scheduled court hearing or conference or to comply with this Order will  
2 result in any of the following: (1) dismissal of the action and/or claims; (2) striking of  
3 answer and entry of default judgment; (3) monetary sanctions; (4) vacation of trial date;  
4 and/or (5) any other appropriate remedy or sanction. EDCR 7.60; 2.68(c).  
5

6 Counsel are required to advise the Court immediately when the case settles or is  
7 otherwise resolved prior to trial.

8 DATED this 19<sup>th</sup> day of March, 2021.

9  
10 

11  
12 MARK R. DENTON  
DISTRICT JUDGE

13  
14 CERTIFICATE

15 I hereby certify that on or about the date filed, this document was e-served or a copy of  
16 this document was placed in the attorney's folder in the Clerk's Office or mailed to:

17 THE SCHNITZER LAW FIRM  
18 Attn: Jordan P. Schnitzer, Esq.

19 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER  
20 Attn: Sheri M. Thome, Esq.

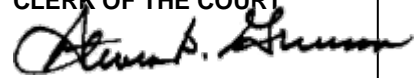
21 THE FELDMAN FIRM  
22 Attn: John C. Dorame, Esq.

23 LEWIS BRISBOIS BISGAARD & SMITH  
24 Attn: Priscilla L. O'Briant, Esq.

25 SELMAN BREITMAN  
26 Attn: Casey J. Quinn, Esq.

27 

28 LORRAINE TASHIRO  
Judicial Executive Assistant  
Dept. No. XIII



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6 E-Mail: [Priscilla.Obriant@lewisbrisbois.com](mailto:Priscilla.Obriant@lewisbrisbois.com)  
Attorneys for National Casualty Company

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

10 PHILIP BOUCHARD, an individual,  
11 Plaintiff,  
12 vs.

CASE NO.: A-20-813355-C  
DEPT.: 13

13 NATIONAL CASUALTY COMPANY, a  
foreign corporation; COAST NATIONAL  
14 INSURANCE COMPANY dba FOREMOST  
INSURANCE GROUP, a foreign entity;  
15 SELMAN BREITMAN LLP, a foreign limit  
liability partnership corporation;  
16 STEPHENSON & DICKINSON, a Nevada  
professional corporation, DOES 1 through 10,  
17 and ROE CORPORATIONS 1 through 20,  
inclusive,  
18 Defendants.

**REPLY IN SUPPORT OF NATIONAL  
CASUALTY COMPANY'S MOTION TO  
DISMISS, OR ALTERNATIVELY,  
MOTION TO STAY CLAIMS AGAINST  
NATIONAL CASUALTY COMPANY**

20 Defendant National Casualty Company ("NCC"), by and through its counsel of record,  
21 Lewis Brisbois Bisgaard & Smith LLP, by and through its counsel LEWIS BRISBOIS  
22 BISGAARD & SMITH LLP, submits this Reply in support of its *Motion to Dismiss, or*  
23 *Alternatively, Motion to Stay Claims Against National Casualty Company* ("Motion"). This reply  
24 is based on the attached memorandum of points and authorities and exhibits hereto, the originating  
25 motion and exhibits, and the pleadings and papers contained within the Court's file.

26 ///

27 ///

28 ///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 As set forth in full in NCC's Motion, the subject matter of the instant litigation against  
5 NCC is duplicative of the Declaratory Relief action filed by NCC against Efren and Bouchard in  
6 the United States District Court for the District of Nevada, case number 2:17-cv-02456-KJD-DJA  
7 (the "Dec Action"), which has been pending since 2017. Indisputably, Bouchard's Complaint in  
8 this matter seeks relief from the very same claim, based on the very same facts, as the action  
9 pending in federal court. For all the reasons discussed in NCC's Motion, the claims in this action  
10 against NCC should either be dismissed or stayed pending resolution of the parallel action pending  
11 in federal court. The Dec Action was properly filed in federal court, the federal court has  
12 jurisdiction, the parties have been litigating that action for over three years, and the ends of justice  
13 would be best served by allowing the federal court case to resolve the issues.

14 **II.**

15 **LEGAL ARGUMENT**

16 **A. Motion to Dismiss**

17 In Opposition to NCC's Motion, Plaintiff asserts that the "first to file" rule is discretionary  
18 and not mandatory, citing *Galindo-Milan v. Hammer*, 438 P.3d 341 (Nev. 2019). In *Hammer*, the  
19 Nevada Supreme Court affirmed the district court's dismissal of the underlying action and  
20 specifically noted:

21 Having considered the parties' arguments and the record on appeal, we conclude  
22 the district court did not abuse its discretion in dismissing the underlying action, as  
23 the action in Clark County involved identical issues. See *Fitzharris v. Phillips*, 74  
24 Nev. 371, 376-77, 333 P.2d 721, 724 (1958) (providing that when identical causes  
25 of action are pending, involving the same parties, a trial court may properly  
26 dismiss the second action), abrogated on other grounds by *Lee v. GNLV Corp.*, 116  
27 Nev. 424, 996 P.2d 416 (2000); see also *SAES Getters S.p.A. v. Aeronex, Inc.*, 219  
28 F. Supp. 2d 1081, 1089 (S.D. Cal. 2002) (explaining that the first-to-file rule  
provides that "where substantially identical actions are proceeding in different  
courts, the court of the later-filed action should defer to the jurisdiction of the court  
of the first-filed action by either dismissing, staying, or transferring the later-filed  
suit"); *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal.  
2006) (providing that the two actions need not be identical, only substantially



1 similar for the first-to-file rule to apply). While appellant argues that Nye County  
2 was the only court considering the paternity issue, this argument is belied by the  
3 record, which specifically notes that the Clark County matter addressed paternity.  
Thus, we affirm the district court's order dismissing the underlying matter.

4 *Galindo-Milan v. Hammer*, 438 P.3d 341, \*1-2 (Nev. 2019). As the Nevada Supreme Court set  
5 forth, although dismissal is discretionary it is proper when there are substantially similar actions.  
6 The Nevada Supreme Court has long recognized that it is contrary to fundamental judicial  
7 procedure to permit two actions to remain pending between the same parties upon the identical  
8 cause. *Fitzharris v. Phillips*, 74 Nev. 371, 376, 333 P.2d 721, 724 (1958) (noting that prior to  
9 adoption of the Nevada Rules of Civil Procedure such situation was a special ground of demurrer).

10 Plaintiff next argues that the “entirety of the actions are not substantially similar and neither  
11 are the parties.” *Opposition*, p 3:7. Here, the facts at issue in both the present action and the Dec  
12 Action involve the facts of the Accident and Underlying Action. The legal issues include the  
13 determination of whether NCC had a duty to defend Efren and breached that duty. These are the  
14 exact same facts and legal issues addressed in the Dec Action. NCC and Bouchard are parties to  
15 both actions. As such, under Nevada law the determination of these issues in either action will have  
16 a preclusive effect in the other action. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d  
17 709 (2008). Thus, the actions are substantially similar and this present action should be dismissed  
18 or stayed. Plaintiff’s argument that the claims against NCC should not be dismissed because there  
19 are other parties involved in the present action is not well founded. The claims against the other  
20 parties can proceed without NCC and NCC’s presence is not required for the Court to make any  
21 determinations regarding the claims against Coast National or the Stephenson & Dickinson law  
22 firm.

23 Next, Plaintiff notes that the present action was consolidated in the same department with  
24 the Dec Action and then remanded by the federal court due to lack of subject matter jurisdiction,  
25 seemingly to suggest that the federal court would not have jurisdiction over the claims asserted  
26 against NCC. However, as the Order remanding the present action makes clear, the case was  
27 remanded to state court only because the presence of Defendant Stephenson & Dickinson destroyed  
28 diversity jurisdiction. See *Opposition*, Exhibit 1, *Order Granting Plaintiff’s Motion to Remand*.

1 In fact, the federal court has determined that the Dec Action and the present action are  
2 substantially similar. See *Motion*, Exhibit D. After filing the present action, Plaintiff sought to  
3 have the Dec Action dismissed as duplicative. The federal court denied the motion. The federal  
4 court specifically found that the claims in the present action arose from the same set of facts as the  
5 Underlying Action and NCC's alleged bad faith in not defending Efren. *Motion*, Exhibit D, p. 2:19-  
6 20. In analyzing the factors set forth in *Brillhart*, the federal court made the following  
7 determinations: 1) Bouchard's actions in dismissing Now Services and Juan prevented the state's  
8 court determination on liability and thus the coverage issues in the Dec Action were not contingent  
9 on any further state court proceedings, *Motion*, Exhibit D, §III.A.i; Bouchard's filing of the present  
10 action appeared to be more of an effort to forum shop as he wished to proceed in state court after  
11 three years of litigation in federal court, *Motion*, Exhibit D, §III.A.ii; and 3) that the Dec Action  
12 was not duplicative of the Underlying Action as the Underlying Action concluded without deciding  
13 the coverage issue, *Motion*, Exhibit D, §III.A.iii. Finally, the court noted that there was a "vast  
14 docket" in the federal action that had been ongoing since 2017 and a dismissal now (in favor of the  
15 present action) would offend judicial economy and promote the waste of judicial resources. *Motion*,  
16 Exhibit D, §III.A.iv. Thus, the federal court did not decline jurisdiction over this matter and it  
17 would not be improper and unjust to dismiss the claims against NCC.

18 Plaintiff also argues that a stay of discovery on the claims against NCC would cause  
19 unnecessary delays for the remaining parties, however, there is no reason that a stay of discovery as  
20 to the claims against NCC should delay discovery as to the claims against NCC's co-defendants.  
21 Plaintiff's last argument, that a stay runs the risk of losing evidence due to fading memories and  
22 document retention policies actually supports NCC's claim for a dismissal of this action in favor of  
23 the Dec Action. Discovery in the Dec Action has proceeded for several years, was conducted closer  
24 in time to the accident and events at issue, and there is no need to duplicate it at a time when, as  
25 Plaintiff points out, memories may have faded.

26 Finally, Plaintiff argues that the federal Dec Action will not be dispositive of all claims  
27 against NCC. As set forth in the *Motion* and above, under Nevada law, the determination of the  
28 legal issues in the Dec Action will have a preclusive effect in the present action. *Five Star Capital*

1 *Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008). The determinations in the Dec Action will  
2 apply to all claims against NCC, however styled. Thus, the issues involved in this litigation  
3 should be tried in the Dec Action and there is no purpose served by proceeding with the present  
4 action against NCC. Thus, NCC respectfully requests this Court to dismiss the claims against  
5 NCC. Alternatively, NCC requests this Court stay discovery as to NCC to allow the issues  
6 involved in the claims against NCC to be tried in the Dec Action, after which it may determine  
7 whether any cognizable claims against NCC remain.

8 **III.**

9 **CONCLUSION**

10 Based upon the foregoing, NCC respectfully requests that the Court grant this Motion to  
11 Dismiss. Alternatively, NCC requests this Court stay the claims against NCC as set forth above,  
12 and grant such other relief as the Court deems just and proper.

13 DATED this 23<sup>rd</sup> day of March, 2021.

14 LEWIS BRISBOIS BISGAARD & SMITH LLP

16 BY /s/ Priscilla L. O'Briant

17 ROBERT W. FREEMAN

18 Nevada Bar No. 3062

19 PRISCILLA L. O'BRIANT

20 Nevada Bar No. 10171

21 6385 S. Rainbow Boulevard, Suite 600

22 Las Vegas, Nevada 89118

23 *Attorneys for Defendant National Casualty Company*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.E.F.C.R. 9, I certify that I am an employee of, and that on this 23<sup>rd</sup> day of  
3 March, 2021, I did cause a true copy of **NATIONAL CASUALTY COMPANY'S MOTION**  
4 **TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY CLAIMS AGAINST**  
5 **NATIONAL CASUALTY COMPANY** to be served via electronic service by the above-entitled  
6 Court to the parties on the Electronic Filing System.

8 Jordan P. Schnitzer, Esq.  
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9 9205 W. Russell Road, Suite 240  
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12 Attorney for Philip Bouchard, Plaintiff

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Attorneys for Selman Breitman LLP

21 By /s/ Priscilla L. O'Briant  
22 An Employee of  
23 LEWIS BRISBOIS BISGAARD & SMITH LLP  
24  
25  
26  
27  
28

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*Attorney for Plaintiff*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

PHILIP BOUCHARD, an individual;  
  
Plaintiff,

Case No.: A-20-813355-C

Dept. No.: 13

vs.

NATIONAL CASUALTY COMPANY, a foreign  
corporation; COAST NATIONAL INSURANCE  
COMPANY dba FOREMOST INSURANCE  
GROUP, a foreign entity; SELMAN BREITMAN  
LLP, a foreign limit liability partnership;  
STEPHENSON & DICKINSON, a Nevada  
professional corporation; DOES 1 through 10, and  
ROE CORPORATIONS 1 through 20, inclusive,

Defendants.

**ORDER DENYING DEFENDANT, NATIONAL CASUALTY COMPANY'S MOTION**  
**TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY CLAIMS AGAINST**  
**NATIONAL CASUALTY COMPANY**

This matter came on for decision and oral argument before this Court on March 29, 2021. Plaintiff, Phillip Bouchard appeared by and through their counsel, Jordan P. Schnitzer, Esq. of THE SCHNITZER LAW FIRM, Defendant, National Casualty Company appeared by and through their counsel, Priscilla L. O'Briant, Esq. of the law firm LEWIS BRISBOIS BISGAARD & SMITH, LLP. and Defendant, Stephenson & Dickinson by and through their counsel, Sheri M. Thome of the law firm WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP. The



Court, having read and considered the pleadings and papers on file herein, having heard the arguments of counsel, and being fully advised on the premises, rules as follows:

**THE COURT HEREBY FINDS** Defendant, National Casualty Company's Motion to Dismiss, or Alternatively, Motion to Stay Claims Against National Casualty **DENIED**; If things develop and counsel believes there is a problem with discovery being sought in conjunction with the pending federal action, counsel can proceed accordingly with motion practice going to that.

**IT IS SO ORDERED.**

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

Dated this 12th day of April, 2021



DISTRICT COURT JUDGE  
5DA 1A4 8082 B02A  
Mark R. Denton  
District Court Judge

DATED this 12 day of April 2021.

Respectfully submitted:  
THE SCHNITZER LAW FIRM

By: /s/ Jordan P. Schnitzer, Esq.  
JORDAN P. SCHNITZER, ESQ.  
Nevada Bar No. 10744  
9205 W. Russell Road, Suite 240  
Las Vegas, Nevada 89148  
*Attorney for Plaintiff*

DATED this 12 day of April 2021.

Approved as to Form and Content:  
LEWIS BRISBOIS BISGAARD  
& SMITH, LLP.

By: /s/ Priscilla L. O'Briant, Esq.  
PRISCILLA L. O'BRIANT, ESQ.  
Nevada Bar No. 10171  
6385 S. Rainbow Blvd., Suite 600  
Las Vegas, NV 89119  
*Attorney for Defendant, National Casualty Company*

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

WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP

By: /s/ Sheri M. Thome, Esq.  
SHERI M. THOME, ESQ.  
Nevada Bar No.: 8657  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, Nevada 89119  
*Attorneys for Defendant, Stephenson & Dickinson*

**RE: Bouchard v. National Casualty Company, et al. Case No.: A-20-813355-C ORDER on National Motion to Dismiss**

Thome, Sheri <Sheri.Thome@wilsonelser.com>

Fri 4/9/2021 11:29 AM

To: Melisa Gabhart <Melisa@TheSchnitzerLawFirm.com>; O'Briant, Priscilla <Priscilla.Obriant@lewisbrisbois.com>

Cc: Jordan Schnitzer <Jordan@TheSchnitzerLawFirm.com>

Ok by me

---

**From:** Melisa Gabhart [mailto:Melisa@TheSchnitzerLawFirm.com]

**Sent:** Friday, April 9, 2021 11:23 AM

**To:** O'Briant, Priscilla <Priscilla.Obriant@lewisbrisbois.com>; Thome, Sheri <Sheri.Thome@wilsonelser.com>

**Cc:** Jordan Schnitzer <Jordan@TheSchnitzerLawFirm.com>

**Subject:** Re: Bouchard v. National Casualty Company, et al. Case No.: A-20-813355-C ORDER on National Motion to Dismiss

**[EXTERNAL EMAIL]**

Hello-

Following up in my email below. Please advise?

Sincerely,

*Melisa Gabhart*

Paralegal to Jordan P. Schnitzer, Esq.



TheSchnitzerLawFirm.com

Tel 702.960.4050 | Fax 702.960.4092

Email [Melisa@TheSchnitzerLawFirm.com](mailto:Melisa@TheSchnitzerLawFirm.com)

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**From:** Melisa Gabhart

**Sent:** Monday, April 5, 2021 10:13 AM

**To:** O'Briant, Priscilla <[Priscilla.Obriant@lewisbrisbois.com](mailto:Priscilla.Obriant@lewisbrisbois.com)>; Thome, Sheri <[Sheri.Thome@wilsonelser.com](mailto:Sheri.Thome@wilsonelser.com)>

**Cc:** Jordan Schnitzer <[Jordan@TheSchnitzerLawFirm.com](mailto:Jordan@TheSchnitzerLawFirm.com)>

**Subject:** Bouchard v. National Casualty Company, et al. Case No.: A-20-813355-C ORDER on National Motion to Dismiss

Good Morning-

Please see the attached Order on Defendant, National Casualty Company's Motion to Dismiss, or Alternatively, Motion to Stay Claims Against National Casualty in the above-referenced case. If you agree as to form and content, please grant permission for the use of your e-signature and we will get the Order filed with the Court.

If you need anything further, please let me know.

Sincerely,

*Melisa Gabhart*

Paralegal to Jordan P. Schnitzer, Esq.



TheSchnitzerLawFirm.com

Tel 702.960.4050 | Fax 702.960.4092

Email [Melisa@TheSchnitzerLawFirm.com](mailto:Melisa@TheSchnitzerLawFirm.com)

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**RE: Bouchard v. National Casualty Company, et al. Case No.: A-20-813355-C ORDER on National Motion to Dismiss**

O'Briant, Priscilla <Priscilla.Obriant@lewisbrisbois.com>

Mon 4/12/2021 11:22 AM

To: Melisa Gabhart <Melisa@TheSchnitzerLawFirm.com>; Thome, Sheri <Sheri.Thome@wilsonelser.com>

Cc: Jordan Schnitzer <Jordan@TheSchnitzerLawFirm.com>

Approved to submit with my electronic signature.



**Priscilla L. O'Briant**

**Partner**

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**From:** Melisa Gabhart <Melisa@TheSchnitzerLawFirm.com>

**Sent:** Monday, April 5, 2021 10:14 AM

**To:** O'Briant, Priscilla <Priscilla.Obriant@lewisbrisbois.com>; Thome, Sheri <Sheri.Thome@wilsonelser.com>

**Cc:** Jordan Schnitzer <Jordan@TheSchnitzerLawFirm.com>

**Subject:** [EXT] Bouchard v. National Casualty Company, et al. Case No.: A-20-813355-C ORDER on National Motion to Dismiss

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Good Morning-

Please see the attached Order on Defendant, National Casualty Company's Motion to Dismiss, or Alternatively, Motion to Stay Claims Against National Casualty in the above-referenced case. If you agree as to form and content, please grant permission for the use of your e-signature and we will get the Order filed with the Court.

If you need anything further, please let me know.

Sincerely,

*Melisa Gabhart*

Paralegal to Jordan P. Schnitzer, Esq.

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Philip Bouchard, Plaintiff(s)

CASE NO: A-20-813355-C

7 vs.

DEPT. NO. Department 13

8 Stephenson & Dickinson,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 4/12/2021

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

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Attorneys for Plaintiff  
NATIONAL CASUALTY COMPANY

DESIGNATED LOCAL COUNSEL FOR SERVICE  
PER L.R. IA 11-1(b)

Gary L. Compton, State Bar No. 1652  
2950 E. Flamingo Road, Suite L  
Las Vegas, Nevada 89121

**UNITED STATES DISTRICT COURT**

**NEVADA**

NATIONAL CASUALTY COMPANY,

Plaintiff,

vs.

EFREN SOTELO et al.,

Defendants.

Case No.: 2:17-cv-2456-KJD-DJA

**JOINT PRETRIAL ORDER**

[Honorable Kent J. Dawson]

Following pretrial proceedings in this cause,

**IT IS ORDERED:**

**I. STATEMENTS OF THE CASE**

Efren Sotelo was defaulted and has not appeared, and therefore makes no statement.

**A. NATIONAL CASUALTY COMPANY'S STATEMENT OF THE CASE**

The only issue remaining in this action is whether National Casualty Company (NCC) owes a duty to pay the judgment Philip Bouchard obtained against Efren Sotelo (Efren) in the Underlying Action, *Bouchard v. Sotelo*, Eighth Judicial District Court case no. A-16-740711-C, presently on appeal on post-judgment issues. NCC does not, because Efren was not NCC's insured.

1 Efren stole his former employer's truck and while driving the stolen truck he rear-ended  
2 Bouchard's vehicle. The stolen truck belonged to Now Services of Nevada, LLC dba Cool Air Now  
3 ("Cool Air Now"); the named insured under the subject insurance policy issued by NCC.

4 Efren was not an insured under the policy. Efren would only qualify as an insured under the  
5 policy if he was using the truck with the permission of Cool Air Now. He was not – he stole the  
6 truck.

7 All the evidence supports the same. Juan Sotelo, ("Juan") owner of Cool Air Now, reported  
8 the truck as stolen. When the police arrived at the scene of the accident, Efren was arrested and  
9 criminally charged for theft of the vehicle. Efren pled guilty to a lesser charge, petit larceny, and  
10 was sentenced. Efren also swore in a signed affidavit that he stole the truck and did not have  
11 permission to use it.

## 12 **B. PHILIP BOUCHARD'S STATEMENT OF THE CASE**

13 Bouchard disagrees with NCC's statement of the case. Efren Sotelo was given permission  
14 to drive the truck as part of his work vehicle. His employee file shows he was still an employee on  
15 the date of the incident. At the scene, Juan Sotelo told Philip Bouchard that he should have taken  
16 his son's keys away. The truck was not reported stolen until after the incident. Efren Sotelo was  
17 not an excluded driver on the insurance policy until after the incident.

18 Bouchard's Complaint alleged Efren was driving the vehicle with permission, triggering  
19 the duty to defend. The default deemed all allegations as true. Once Efren became liable for the  
20 judgment, NCC owed indemnity.

## 21 **II. JURISDICTION**

22 Plaintiff alleges this Court has subject matter jurisdiction over this action pursuant to 28  
23 U.S.C. § 1332 and § 2201. NCC is a Wisconsin Corporation with its principal place of business in  
24 Scottsdale, Arizona. Bouchard and Sotelo are both citizens of Nevada. There is an actual,  
25 justiciable controversy, and the amount in controversy exceeds the minimum threshold in 28  
26 U.S.C. § 1332.

27 Bouchard believes this Court should exercise its discretion to dismiss the matter, as  
28 previously argued.

1 **III. STIPULATED FACTS**

2 The parties have stipulated that:

- 3 1) On July 27, 2016, Philip Michael Bouchard (“Bouchard”) filed a complaint against  
4 Efren Isaac Sotelo (“Efren”), Juan Sotelo (“Juan”), and Now Services of Nevada, LLC  
5 dba Cool Air Now (“Now Services”) Nevada State Court Case No. A-16-740711-C  
6 (“State Action”).  
7  
8 2) The basis for the State Action was that Efren negligently caused an accident in which  
9 Bouchard was injured.  
10  
11 3) Efren was driving a pick-up truck owned by Now Services.  
12  
13 4) In the relevant time period, National Casualty Insurance (“National”) issued a policy  
14 of commercial automobile insurance naming Now Services as the named insured.  
15  
16 5) The Now Services truck qualified as a covered auto under the NCC policy.  
17  
18 6) Efren was not a named insured on the NCC policy.

19 **IV. CONTESTED ISSUES OF FACT**

20 **A. NCC’S ISSUES OF FACT**

21 NCC submits there is only one issue of fact: whether Efren Sotelo had permission to use  
22 the truck at the time of the accident.

23 **B. BOUCHARD’S ISSUES OF FACT**

24 Bouchard alleges:

- 25 1) The truck in question was Efren Sotelo’s work truck that he was free to take home.  
26 2) Efren was living at the same house as his parents on the day of the incident.  
27 3) Mr. Sotelo was aware that Efren was using heroin prior to the date of the incident.  
28 4) Mr. Sotelo was aware that Efren had embezzled/stolen money prior to the date of the  
incident.  
5) Mr. Sotelo was aware that Efren had been an at fault driver in at least two prior accidents  
before the date of this incident.  
6) The car was left at Efren and Mr. Sotelo’s house the morning of the incident.

1 7) Efren had been previously given permission to use the car. The dispute in this case  
2 involves permission on the date of the incident.

3 8) Efren was not an excluded driver under the policy at the time of the incident with  
4 Bouchard.

5 9) Ms. Sotelo testified Cool Air Now is supposed to notify the insurance company  
6 regarding any drivers of the vehicle and when he has revoked permission from a  
7 driver.

8 10) Efren was not excluded from the policy until approximately a month after the  
9 accident, which is important to the issue of permission in this case.

10 11) Bouchard's Complaint alleged:

11 12. Upon information and belief, SOTELO was employed by COOL  
12 AIR NOW and, at all relevant times, SOTELO was operating the  
13 Pick- Up Truck with the express or implied permission of his  
14 employer.

15 12) Additionally, the Complaint contains additional allegations that Efren had permission to  
16 use the truck:

17 30. COOL AIR NOW, J. SOTELO and DOE I breached that duty by  
18 knowing entrusting their dangerous vehicle to another whom they  
19 knew or should have known was likely to use it in a manner  
20 involving unreasonable risk of harm to others...

21 41. COOL AIR NOW, J. SOTELO and DOE I breached that duty by  
22 failing to properly supervise SOTELO by allowing him to operate  
23 the vehicle and do so in the manner described above.

24 *Id.*

13) On September 9, 2016, Bouchard filed a “Three Day Notice of Intent to Default.”

14) National’s counsel was served with this notice of intent to Default.

15) The insurer refused to initially defend Efren Sotelo, resulting in a default.

16) National eventually attempted to defend Efren Sotelo, but the district court denied

Efren’s attempt to set aside the default.

17) In the state court case, there was also evidence supporting the allegations against

Efren Sotelo:

a. Mr. Bouchard testified that Juan Sotelo stated at the scene that he should have taken the keys from Efren Sotelo.

b. The termination paperwork for Efren noted that his last day would be December 20, 2014.

18) On September 8, 2017, National filed the current action. (ECF 1) seeking declaratory relief on two issues: (1) whether it owed a duty to defend Efren Sotelo; and (2) whether it owed a duty to indemnify Efren Sotelo.

19) The State Action against Juan and Cool Air was dismissed before trial.

20) On September 26, 2019, after a multi-day default prove-up hearing on the amount of damages, where Efren Sotelo’s counsel was permitted to participate, the State Court issued an order granting total monetary judgment against Efren in the amount of \$219,193.02.

21) The Order specifically deemed all allegations in the Complaint as true.

22) The deadline to appeal the Default Judgment has passed pursuant to Nevada Rules of Appellate Procedure 4(a)(1).



23) The Court subsequently granted Philip Bouchard's request for attorneys' fees, costs, and interest, bringing the total judgment to \$385,108.17, plus accruing post-judgment interest.

24) On April 8, 2020, National filed an appeal only as to the Order granting attorney's fees, costs, and interest.

25) Juan Sotelo gave his insurance company different information than he has given under oath including:

- a. where the keys were before the keys were allegedly stolen;
  - i. Juan told his insurance company the keys were on a board at work. Juan testified in deposition he had his keys on his person.
- b. where the car was before it was allegedly stolen;
  - i. Juan told his insurance company the car was at the office. Juan testified in deposition the car was taken from his home where Efren also lived; and
- c. the date Efren Sotelo was allegedly fired
  - i. Juan told the insurance company Efren was fired December 8, 2014. Juan testified he was fired December 10, 2014.

26) Juan was also under threat of a 10% premium surcharge on a \$36,240.00 premium for allowing an unreported driver to take the vehicle.

27) At the scene, Juan Sotelo told Bouchard he should have taken Efren's keys away.

**1. Whether the Sotelo's Testimony is truthful or should be disregarded**

The Sotelo's are not to be believed.

Efren admitted he used the company card to buy gift cards to acquire heroin:

Q: Now your dad believes the reason you used the company card to buy gift cards was to buy drugs. Are you aware of that?

A: Yeah, I'm aware of that.

Q: Is that true?

A: I guess you could say that.

Q: Yes?

A: Yes.

1           Additionally, Mr. Sotelo knew his son was a heroin addict:

2           Q: So my question is, prior to the day of the accident, did they try to do anything  
3           to help you with the fact that they thought you were on drugs?

4           A: I mean, yeah. They've tried.

5           Q: Like what?

6           A: Clinics.

7           Q: What kind of clinics?

8           A: Methadone clinics

9           Q: This was before the accident?

10          A: Yeah.

11          Q: When approximately?

12          A: I couldn't tell you the dates. I couldn't tell you--

13          Q: I understand. Approximately, was it the same year?

14          A: No, I think it was the year before.

15          Q: Just one time?

16          A: No. Three or twice, I think. Might have been three times.

17          Q: Before the accident?

18          A: Mm-hmm.

19          Q: And all three were methadone clinics?

20          A: Yeah.

21          Q: Methadone is specifically for heroin users, correct?

22          A: Yeah.

23          Q: So, no one's there because they're addicted to marijuana, correct?

24          A: No.

25          Q: Okay. No one's there because they're alcoholics, correct?

26          A: No.

27          Q: It's specifically heroin?

28          A: Yeah. Opiate use.

          Q: Okay. Pills or heroin?

          A: Yeah.

          In fact, Mr. Sotelo helped pay for his rehab:

          Q: When you went to rehab the three times out here in Vegas, did your dad pay for  
          those?

          A: The clinics, I paid for some of them.

          Q: Did your dad pay for some of them?

          A: He paid. I mean, there was times...because it was weekly, so we have weeks  
          where I would pay, If I didn't have money, I would ask them If they had it, they  
          would help me out.

          Q: So at least part of it, he paid for you?

          A: Yeah.

          Mr. Sotelo was also aware of several of Efren's arrests:

          Q: Is your dad aware... I want to talk about on the date of the accident. Was your  
          dad aware of the burglary charges against you?

A: From before?

Q: On the date of the accident, did your dad know that you had the burglary charges from 2008?

A: Well, yeah. He would know.

Q: What about the pills charge?

A: Well, yeah.

Q: The firearms charges?

A: Yes.

Q: In some of these police reports, your dad said that he believed you were on drugs.

A: Mm-hmm.

Q: You said I was, I was doing heroin.

A: Yeah, I was that time.

Yet, Mr. Sotelo denied any knowledge of heroin use:

Q: And it talks about drug history. On the day of the accident, were you aware that Efren had some type of drug history?

A: I was not aware. Well, I was aware of history, but not here.

Q: What history are you referring to?

A: I mean, when he was a teenager, he hung around with the wrong crowd, and I guess they were doing – smoking marijuana.

Q: Any other drugs?

A: Not that I know of.

Q: Just marijuana?

A: That's what I know...

In fact, one of the first answers out of Efren's mouth was untrue – for seemingly no reason other than to hide the truth:

Q: Okay, how did you get here today?

A: An Uber.

Q: You got an Uber?

A: Mm-hmm.

Q: I saw you get out of a truck that said Cool Air Now in the parking lot.

A: Mm-hmm.

Q: That was an Uber?

A: Oh no that was my mom, I'm leaving in an Uber.

Similarly, Efren Sotelo provided a false statement to the state court regarding something more substantive in his affidavit when he tried to have his default set aside. In the Affidavit, he stated he was visiting his great-grandmother in Mexico. The truth was that he was in rehab. Even in his deposition, he did not admit the truth until presented with the evidence:

Q: Were you in rehab when you were there?

A: No.

1 Q: Are you aware that your dad told Ms. Stephenson you were in rehab when you  
2 were in Tijuana?

3 A: No. I was not aware...

4 Q: If your dad said you were in rehab, is that not true?...

5 A: I don't get what's going on her.

6 Q: You were in rehab, correct?

7 A. Okay. For a period, I was there in rehab for a while.

8 Q: In Tijuana?

9 A: MM-hmm.

10 Q: Yes?

11 A: Yes.

## 12 2. Whether NCC has met its burden of proving no coverage

### 13 V. ISSUES OF LAW

14 The following issues of law remain in dispute for trial:

#### 15 A. NCC'S ISSUES OF LAW

16 1) Which party has the burden of proof to prove that Efren is an insured under the NCC  
17 Policy?

18 a. NCC submits that the party seeking coverage – here, Bouchard – has the  
19 burden of proving that Efren qualified as an insured.

20 i. *Liberty Ins. Corp. v. Brodeur*, 462 F. Supp. 3d 1092, 1098 (D. Nev.  
21 2020) (“The Insured bears the burden of proving that the claim for  
22 which coverage is sought falls within the policy's coverage. *Nat'l Auto.*  
23 *& Cas. Ins. Co. v. Havas*, 75 Nev. 301, 339 P.2d 767, 768 (1959)"); *see*  
24 *also Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, No.  
25 215CV00460JADPAL, 2017 WL 3666298, at \*2 (D. Nev. Aug. 24,  
26 2017) (same).

27 ii. “[T]he Ninth Circuit has further noted that assigning the burden to the  
28 insured is consistent with the general principal that the insured has the  
burden to prove that a covered claim falls within the scope of basic  
coverage. *Id.* Nevada, of course, places the burden on the insured to do

just that.” *Ace Prop. & Cas. Ins. Co. v. Vegas VP, LP*, No. 2:07CV00421BESPAL, 2008 WL 2001760, at \*4 (D. Nev. May 7, 2008), *aff’d sub nom. Ace Prop. And Cas. Ins. Co. v. Vegas VP, LP*, 349 F. App’x 232 (9th Cir. 2009); *citing Nat’l Auto & Cas. Ins. Co. v. Havas*, 75 Nev. 301, 303, 339 P.2d 767, 768 (1959).

- 2) Has Bouchard, the party seeking coverage proven that Efren Sotelo qualified as an insured under the NCC Policy?
  - a. NCC submits that Bouchard cannot meet his burden to prove that Efren qualified as an insured.
  - b. Pursuant to the terms of the policy, Efren could only qualify as an insured if he was a permissive user of the subject truck.
  - c. Efren has not sought coverage; and he admitted that he did not have permission to use the truck and stole it.

## **B. BOUCHARD’S ISSUES OF LAW**

### **1. WHO HAS THE BURDEN OF PROOF**

Bouchard asserts that NCC bears the burden of proof. All of the cases cited by NCC involve summary judgment motion, not trial, and address the duty to present issues of fact to defeat summary judgment. There appears to be no dispute the allegations in the underlying complaint, if true, trigger coverage:

In resolving the question of whether a duty to defend exists—tendered in the context of a summary adjudication/summary judgment motion in a declaratory relief action—the insurer has a higher burden than the insured. “[T]he insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot”; the insurer, in other words, must present undisputed facts that eliminate any possibility of coverage.

*Am. States Ins. Co. v. Progressive Cas. Ins. Co.*, 102 Cal. Rptr. 3d 591, 598 (2009)

The burden is on the insurer to show that the allegations in the pleadings fall clearly outside the scope of coverage; any ambiguity in the policy is construed in favor of coverage; and if any part of the pleadings “potentially or arguably” falls within the policy’s coverage, then the insurer must either seek a declaratory judgment

on its duty to defend or undertake the defense while reserving its right to later contest coverage based on facts developed at the trial on the merits.

*Scherschligt v. Empire Fire & Marine Ins. Co.*, 662 F.2d 470, 472 (8th Cir. 1981)

The duty to defend “arises if facts in a lawsuit are alleged which if proved would give rise to the duty to indemnify, which then the insurer must defend.” (emphasis in original)). *Century Surety Company v. Andrew*, 432 P.3d 180, 184 (Nev. 2018).

Thus, once the duty to defend is established, the insurer bears the burden to defeat the duty to indemnify:

“[I]n a declaratory judgment action, the burden is on the insurance company to prove lack of coverage. *Houston Specialty Ins. Co. v. Rodriguez Corp.*, 3:18-CV-1886-YY, 2020 WL 362641, at \*1 (D. Or. Jan. 22, 2020).

In a declaratory relief action to determine the insurer's obligations under the policy, the burden is on the insured initially to prove an event is a claim within the scope of the basic coverage. The burden then shifts to the insurer to prove the claim falls within an exclusion.

*Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 277 (Ct. App. 1989)

It is well established that when an insured has proved a loss apparently within the terms of the policy, the burden is on the insurer to show that such loss was produced by a cause which is excepted from the coverage.

*Nat'l Auto. & Cas. Ins. Co. v. Havas*, 75 Nev. 301, 303, 339 P.2d 767, 768 (1959).

## **2. Whether the Duty to Defend Existed**

It is a well-established principle of Nevada law that “[t]he duty to defend is broader than the duty to indemnify” and that the duty to defend “exists when there is arguable or possible coverage.” *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 99 P.3d 1153, 1158 (Nev. 2004).

1 “[T]he duty to defend arises when there is a potential for coverage based on the  
2 allegations in a complaint.” *United Nat’l Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678, 681, 99  
3 P.3d 1153, 1155 (2004)

4 “[A]n insurer’s duty to defend is triggered whenever the potential for indemnification  
5 arises, and it continues until this potential for indemnification ceases.” *Benchmark Ins. Co. v.*  
6 *Sparks*, 254 P.3d 617, 621 (Nev. 2011); *Kazi v. State Farm Fire and Cas. Co.*, 24 Cal.4th 871,  
7 879, 103 Cal. Rptr. 2d 1, 15 P.3d 223 (2001) (“[T]he duty to defend may exist even where  
8 coverage is in doubt and ultimately does not develop.”).

9 Additionally, “an insurer owes a duty to defend its insured ‘whenever it ascertains facts  
10 which give rise to the potential of liability under the policy.’” *N. Ins. Co. of New York v. Nat’l*  
11 *Fire & Marine Ins. Co.*, 953 F. Supp. 2d 1128, 1134 (D. Nev. 2013) (quoting *United Nat’l Ins.*  
12 *Co.*, 99 P.3d at 1158) (emphasis added).

13 The allegations in the pending State of Nevada District Court Case, the Complaint clearly  
14 trigger coverage under the policy. Specifically, the Complaint alleges that Efren Sotelo:

15 12. Upon information and belief, SOTELO was employed by COOL AIR  
16 NOW and, at all relevant times, SOTELO was operating the Pick-Up Truck with  
17 the express or implied permission of his employer.

18 Additionally, the Complaint contains additional allegations that Efren had permission to  
19 use the truck:

20 30. COOL AIR NOW, J. SOTELO and DOE I breached that duty by knowing  
21 entrusting their dangerous vehicle to another whom they knew or should have  
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23 others.

24 41. COOL AIR NOW, J. SOTELO and DOE I breached that duty by failing to  
25 properly supervise SOTELO by allowing him to operate the vehicle and do so in  
26 the manner described above.

27 *Id.*  
28

As a result of the allegations in the Complaint, the insurance company owes a duty to Defend Efren Sotelo under Nevada law.

**3. Whether Nevada's Absolute Liability Statute Mandates at least \$15,000 in Indemnity**

"In Nevada, all motor vehicles must be insured for at least \$15,000 bodily injury or death liability per incident, and \$10,000 in property damage liability. NRS 485.185; NRS 485.3091(1)(b)(1), (1)(b)(3). NRS 485.3091 also contains an absolute-liability provision." *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1207 (2015). As a result, there are no circumstances where an insurer can completely disclaim coverage for an automobile accident. It must provide \$15,000 in coverage in all circumstances.

In fact, the Nevada Supreme Court has consistently refused to allow an insurance company to escape paying at least statutory minimums on a claim. In *Federated American Ins. Co.*, the Nevada Supreme Court required statutory minimums on a policy where the driver had been specifically excluded under the policy, noting:

We have previously held that this provision invalidates certain exclusions for claims less than the statutory minimum amount. For instance, in *Baker v. Criterion Ins. Co.*, 107 Nev. 25, 805 P.2d 599 (1991) we noted that, under NRS 485.3091(1), a household exclusion clause is valid only for claims in excess of the \$15,000/\$30,000 minimum liability insurance required by statute. See also, *Estate of Neal v. Farmers Ins. Exchange*, 93 Nev. 348, 566 P.2d 81 (1977) (concluding that a household exclusion clause for less than the statutory minimum amount is void). We not hold that ... an insurance company must provide minimum coverage to all persons... regardless of whether the permissive drive has been explicitly excluded from coverage."

*Federated Am. Ins. Co. v. Granillo*, 108 Nev. 560, 562, 835 P.2d 803, 804 (1992).

In this case, Efren was not excluded as a permissive driver under the policy until after the incident, on January 8, 2015. **Even if he was excluded prior to the accident, Nevada law would require the insurer to at least provide minimum coverage.** Therefore, even if this Court finds Efren stole the vehicle, Nevada requires the insurance company to provide at least \$15,000 in liability coverage.



#### 4. Whether the Initial Permission Rule Requires Coverage

In Nevada, “[o]nce an owner voluntarily hands over the keys to his car, the extent of permission he actually grants is irrelevant. Making coverage turn on the scope of permission given in the first instance renders coverage uncertain in many cases. Such practice fosters litigation regarding the existence or extent of any possible deviation, and it obstructs achievement of the policy declared by the Legislature.” *U. S. Fid. & Guar. Co. v. Fisher*, 88 Nev. 155, 160, 494 P.2d 549, 552 (1972).

*U.S. Fidelity & Guaranty Co.* involved a substantially similar permissive use clause in the insurance agreement. The owner of the vehicle asked his neighbor to take him to the airport and then park the vehicle in the owner’s driveway. The Court noted that “on several prior occasions given David permission to use the car in going to and from his place of employment and also on shopping tours.” *Id.* at 550 (1972). As a result of the initial permission, the Court held that the neighbor’s use of the car after that was a permissive use under the policy, requiring full coverage under the policy. *Id.* at 552.

Here, the initial permission rule mandates coverage. In fact, the truck in question was Efren Sotelo’s work truck that he was free to take home. Efren was living at the same house as his parents on the day of the incident. The car was left at Efren and Mr. Sotelo’s house the morning of the incident. Mr. Sotelo did not report the car stolen until after the accident.

The termination paperwork for Efren noted that his last day would be December 20, 2014, not December 10, 2014.

Mr. Sotelo told Plaintiff at the scene that he “should have taken his keys away.” *See Exhibit “B”* at pp. 82:6-83:21. If that statement is true, then the initial permission rule would require the insurance company to provide coverage for the full extent of the policy.

Efren Sotelo testified he made a spare key while he was employed in case he got locked out of his truck. Ms. Sotelo testified that employees routinely and permissively made these spare keys. Even though employees made these spare keys, the owner of the truck never asked Efren Sotelo for the extra key. As a result, the initial permission rule requires full coverage in this case.

1                   **5.       Whether NCC Must Indemnify Due to Efren's Default**

2                   “The duty to indemnify arises when an insured ‘becomes legally obligated to pay damages  
3 in the underlying action that gives rise to a claim under the policy.’” *United Nat'l Ins. Co. v.*  
4 *Frontier Ins. Co., Inc.*, 120 Nev. 678, 686, 99 P.3d 1153, 1157 (2004). The insurer’s only objection  
5 to indemnification is that Efren Sotelo did not have permission to take the car, contrary to the  
6 allegations in the complaint. Therefore, there is no dispute that, if the allegations in the state court  
7 complaint are accepted by the trier of fact in the state court action, then Nautilus owes a duty to  
8 indemnify.  
9

10                  Under *United Nat'l Ins. Co.*, this Court’s analysis is not whether National is bound by the  
11 doctrine of *res judicata*. Rather, the analysis is simply whether the Efren Sotelo as become  
12 obligated to pay.  
13

14                  Here, Efren Sotelo became “legally obligated to pay damages in the underlying action that  
15 gives rise to a claim under the policy” when the default judgment became final, which was 30  
16 days after the notice of entry of order on March 9, 2020.  
17

18                   **6.       Whether NCC's Breach of Duty to Defend Renders it Liable for**  
19                   **Consequential Damages i.e. The Judgment and If the Declaratory Relief**  
20                   **Action Seeks A Response to this Question**

21                  NCC’s complaint is unclear whether the declaratory relief would require the Court to  
22 address this issue. NCC’s complaint sought a declaration it owed no indemnity. Such a declaration  
23 should have no affect on breach of contract damages for the failure to defend. However, to the  
24 extent the Court believes such issues are raised in this action, the issue of law is well-settled in  
25 Bouchard’s favor.  
26

27                  In the recent case *Century Surety Company v. Andrew*, the Nevada Supreme Court  
28 examined the damages that an insured is entitled to for breach of the duty to defend. 432 P.3d 180,

186 (Nev. 2018). The *Andrew* Court determined that an insured is entitled to “consequential damages resulting from the insurer’s breach of its contractual duty to defend.” *Id.*

“The objective is to have the insurer ‘pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract.’ *Id.* at 185 (quoting *Burgraff v. Menard, Inc.* 875 N.W.2d 596, 608 (Wis. 2016)). The Court further explained: “An insurer that refuses to tender a defense for ‘its insured takes the risk not only that it may eventually be forced to pay the insured’s legal expenses but also that it may end up having to pay for the loss that it did not insure against.’ ... Accordingly, *the insurer refuses to defend at its own peril.*” *Id.* (emphasis added) (quoting *Hamlin Inc. v. Hartford Acc. And Indem. Co.*, 86 F.3d 93, 94 (7th Cir. 1996)).

## VI. WITNESSES

### A. NCC

NCC does not believe there is a need for live testimony. NCC intends to offer the sworn affidavit of party-opponent Efren Sotelo, as well as Deposition testimony of Efren Sotelo taken in the Underlying Action. NCC also intends to offer certain exhibits and criminal records into evidence, which NCC believes should be admitted by stipulation. If Bouchard disputes their authenticity, NCC may need to authenticate them via testimony or, where appropriate, judicial notice.

### B. BOUCHARD

1. Philip Michael Bouchard
2. Efren Sotelo
3. Juan Sotelo
4. Delia Sotelo
5. Tara Lindsay-Smith
6. Lisa McClelland
7. Jonathan Martineau

8. Philip Crawford
9. Erin Smith
10. Connie Cheng
11. Rachel Scoville
12. Brenda Green
13. Joy Spearman Brown
14. Audrey Jescheling
15. Christene Sims
16. Mathew Willis

## **VII. EXHIBITS**

### **A. NCC'S EXHIBITS**

#### **1) The NCC Policy**

- a. Bouchard objects to authenticity, foundation, relevance, materiality, hearsay, as well as for any other reason set forth within the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

#### **2) Efren Sotelo's August 17, 2017 Sworn Affidavit**

- b. Bouchard objects to authenticity, foundation, relevance, materiality, hearsay, as well as for any other reason set forth within the Federal Rules of Evidence and the Federal Rules of Civil Procedure, including but not limited to, the failure to disclose the document.

#### **3) The Police Report for the Subject Accident**

- c. Bouchard objects to authenticity, foundation, relevance, materiality, hearsay, as well as for any other reason set forth within the Federal Rules of Evidence the Federal Rules of Civil Procedure, including but not limited to, the failure to disclose the document.

#### **4) The Criminal Complaint against Efren Sotelo in *State v. Sotelo*, Las Vegas Justice Court Case No. 14F19296X (the "Criminal Action").**

1 d. Bouchard objects to authenticity, foundation, relevance, materiality, hearsay, as  
2 well as for any other reason set forth within the Federal Rules of Evidence the  
3 Federal Rules of Civil Procedure, including but not limited to, the failure to  
4 disclose the document.

5 5) The record of the proceedings of the Criminal Action.

6 e. Bouchard objects to authenticity, foundation, relevance, materiality, hearsay, as  
7 well as for any other reason set forth within the Federal Rules of Evidence the  
8 Federal Rules of Civil Procedure, including but not limited to, the failure to  
9 disclose the document.

10 6) The Disposition Notice and Judgment against Efren in the Criminal Action.

11 f. Bouchard objects to authenticity, foundation, relevance, materiality, hearsay, as  
12 well as for any other reason set forth within the Federal Rules of Evidence the  
13 Federal Rules of Civil Procedure, including but not limited to, the failure to  
14 disclose the document.

15 **B. BOUCHARD'S EXHIBITS**

16 **1. Complaint**

17 **a.** NCC objects to this document as it is irrelevant.

18 **2. Three Day Notice**

19 **a.** NCC objects to this document as it is irrelevant.

20 **3. Default**

21 **a.** NCC objects to this document as it is irrelevant.

22 **4. Order Denying Motion to Set Aside Default Judgment**

23 **a.** NCC objects to this document as it is irrelevant.

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- 5.** Deposition Testimony of Philip Bouchard
  - a.** NCC objects to this document as it is irrelevant, and because it constitutes inadmissible hearsay.
- 6.** Efren Sotelo’s Employee File
  - a.** NCC objects to this document as it is irrelevant and constitutes inadmissible hearsay.
- 7.** Dismissal of Juan Sotelo and Cool Air Now.
- 8.** Default Judgment
  - a.** NCC objects to this document as it is irrelevant.
- 9.** Order Grating Attorneys’ fees, costs and interest
  - a.** NCC objects to this document as it is irrelevant.
- 10.** Appeal
  - a.** NCC objects to this document as it is irrelevant.
- 11.** Deposition of Philip Michael Bouchard.
- 12.** Deposition of Efren Sotelo.
- 13.** Deposition of Juan Sotelo.
- 14.** Deposition of Delia Sotelo.
- 15.** All Pleadings in the Underlying Claim.
  - b.** NCC objects to this designation as it is overbroad.
- 16.** All Written Discovery Exchanged in the Underlying Claim.
  - a.** NCC objects to this designation as it is overbroad.
- 17.** All correspondence between the parties in the Underlying Claim.
  - a.** NCC objects to this designation as it is overbroad.

1                   **18.**     National Casualty Insurance’s Entire Claims File.

- 2                   **a.**     NCC objects to this designation as it is overbroad, irrelevant, and  
3                                 contains privileged information, which was the subject of discovery  
4                                 motions that Bouchard already lost.

5     **VIII. TRIAL DATE**

6             The Court has not yet set a date for trial in this action. Counsel for Bouchard has advised  
7     that he has trials scheduled throughout the summer and fall of 2021 as a result of the courts being  
8     closed in 2020 due to COVID-19. Specifically, Plaintiff’s counsel has the following matters  
9     currently scheduled for trial stacks (dates are not firm, but are set on 5 week stacks), short trial or  
10    arbitration hearings beginning in June 2021 through the end of the year:

	6/9/2021-
Mazza, Robert v. Raudel, Banuelos Christian, et al. Case No.: A-17-760368-C	7/17/2021
Delapa, Teri v. Diaz, Aura Case No.: A-19-802975-C <b>SHORT TRIAL</b>	6/11/2021
Whittemore, Samantha v. Chirdo, Vincent, et al. Case No.: A-20-820380-C	
<b>ARBITRATION</b>	7/14/2021
	8/2/2021-
Scharringhausen, Kevin v. Venture Point, LLC Case No.: A-18-777160-C	9/6/2021
Jametsky, Walter v. Gabriel Soto Garcia, et al. Case No.: A-20-813443-C	
<b>ARBITRATION</b>	8/4/2021
	8/9/2021-
Drissi, Tony v. Shrader, James Case No.: A-18-776904-C	10/8/2021
Mirich, Heather v. Costco Wholesale Corporation Case No.: A-20-814500-C	
<b>ARBITRATION</b>	9/3/2021
Silva, Rosa v. Gustafson, Andrew Paul, et al. Case No.: A-19-804862-C <b>SHORT</b>	
<b>TRIAL</b>	9/10/2021
	10/4/2021-
Hutton, Kiva v. Geico General Insurance Case No.: A-18-785834-C	11/5/2021

1	Chumley, Felicia v. A One Carpet Cleaning Las Vegas, et al. Case No.: A-19-	10/18/2021-
2	793339-C	11/22/2021
3		10/25/2021-
4	Egnor, Anitra v. Circle K Stores, Inc. Case No.: A-18-786255-C	11/29/2021

5  
6 As a result, Plaintiff requests a trial date the week of January 10, 2022. Counsel for NCC is  
7 available that week and the parties agree to that date.

8 NCC does not request a jury trial and believes that, given the predominantly legal issues,  
9 the matter is better suited for a Court trial. Bouchard has not made a jury demand.

10 **IX. TRIAL ESTIMATE**

11 NCC believes that the trial should take 1-2 days.

12 Bouchard believes 2 days is likely sufficient but perhaps a third day would be necessary.

13 **X. SCHEDULING**

14 1) The case is set for Court trial on the stacked calendar on January 10, 2022 at 9:00 a.m..

15 Calendar call shall be held on December 28, 2021 at 9:00 a.m.

16 2) Each party's trial brief shall be submitted by no later than December 29, 2021.

17 3) Proposed findings of fact and conclusions of law shall be filed no later than  
18 December 29, 2021.

19 The foregoing is approved by the parties to the action as signed by their counsel of record, below.

20  
21 Dated: May 26, 2021

SINCLAIR BRAUN LLP

22  
23 By: /s/-Nathaniel S.G. Braun  
NATHANIEL S.G. BRAUN  
Attorneys for Plaintiff  
NATIONAL CASUALTY COMPANY

24  
25 Dated: May 26, 2021

THE SCHNITZER LAW FIRM

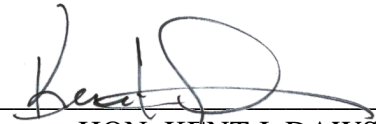
26  
27 By: /s/-Jordan Schnitzer  
JORDAN SCHNITZER  
Attorneys for Defendant



PHILIP BOUCHARD

**IT IS SO ORDERED.**

Date: 9/1/2021



HON. KENT J. DAWSON  
United States District Court Judge