

# In the Supreme Court of the State of Nevada

NATIONSBUILDERS INSURANCE  
SERVICES INC., a foreign  
corporation; NBIS CONSTRUCTION  
& TRANSPORT INSURANCE  
SERVICES, INC., a foreign  
corporation;  
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT of the State of Nevada, in and  
for the County of Clark; and THE  
HONORABLE MARK R. DENTON,  
District Judge;  
Respondents.

DIANE SANCHEZ, an individual;  
Real Party in Interest.

Supreme Court Case No. 84227

Electronically Filed  
Apr 04 2022 05:02 p.m.  
District Court Case No. A-19-805351-C  
Elizabeth A. Brown  
Clerk of Supreme Court

## REAL PARTY IN INTEREST DIANE SANCHEZ'S APPENDIX TO ANSWER TO WRIT PETITION VOLUME II PAGES 251-500

DENNIS M. PRINCE

Nevada Bar No. 5092

KEVIN T. STRONG

Nevada Bar No. 12107

**PRINCE LAW GROUP**

10801 W. Charleston Boulevard, Suite 560

Las Vegas, Nevada 89135

Tel: (702) 534-7600

Fax: (702) 534-7601

Attorneys for Real Party in Interest

*Diane Sanchez*

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<b>Tab</b>	<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Page Nos.</b>
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02	Motion for Rehearing and to Alter or Amend the Judgment and Order Denying Rule 60(b) Relief	10/19/2020	1	RPI.APP.000153- RPI.APP.000167
03	Plaintiff Diane Sanchez's Second Amended Complaint	06/01/2021	1	RPI.APP.000168- RPI.APP.000205
04	Plaintiff Diane Sanchez's Opposition to Defendants NationsBuilders Insurance Services Inc. and NBIS Construction & Transport Insurance Services, Inc.'s Motion to Dismiss Second Amended Complaint, or in the Alternative, Motion to Stay Proceedings	08/05/2021	1  2	RPI.APP.000206- RPI.APP.000250  RPI.APP.000251- RPI.APP.000331
05	Plaintiff Diane Sanchez's Opposition to Non-Defendant Windhaven National Insurance Company's Motion to Stay Pending: Lifting of the Texas Injunction	09/03/2021	2  3	RPI.APP.000332- RPI.APP.000500  RPI.APP.000501- RPI.APP.000544
06	Amended Order Granting Plaintiff's Motion Pursuant to NRS 21.320 for Judicial	09/16/2021	3	RPI.APP.000545- RPI.APP.000549

	Assignment of Claims and/or Causes of Action Defendant Blas Bon Has Against ATX Premier Insurance Company, Any Other Applicable Liability Insurer, Any Third-Party Claims Administrator, Any Third-Party Adjuster, or Any Other Insurance Entity			
07	Plaintiff Diane Sanchez's Motion for Relief from Order Denying Defendant Blas Bon's Motion for Rehearing and to Alter or Amend the Judgment and Order Denying Rule 60(b) Relief and to Alter or Amend that Order Pursuant to NRCP 60(b)(3)	01/11/2022	3	RPI.APP.000550-RPI.APP.000708
08	Plaintiff Diane Sanchez's Reply in Support of Motion for Relief from Order Denying Defendant Blas Bon's Motion for Rehearing and to Alter or Amend the Judgment and Order Denying Rule 60(b) Relief and to Alter or Amend that Order Pursuant to NRCP 60(b)(3) and Opposition to Countermotion to Strike Materials in Violation of Protective Order and Cross-Motion for Relief from Void Judgment	02/08/2022	3  4	RPI.APP.000709-RPI.APP.000750  RPI.APP.000751-RPI.APP.000797

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02	Motion for Rehearing and to Alter or Amend the Judgment and Order Denying Rule 60(b) Relief	10/19/2020	1	RPI.APP.000153- RPI.APP.000167
07	Plaintiff Diane Sanchez's Motion for Relief from Order Denying Defendant Blas Bon's Motion for Rehearing and to Alter or Amend the Judgment and Order Denying Rule 60(b) Relief and to Alter or Amend that Order Pursuant to NRCP 60(b)(3)	01/11/2022	3	RPI.APP.000550- RPI.APP.000708
01	Plaintiff Diane Sanchez's Opposition to Defendant Blas Bon's Motion to Set Aside Default Judgment	02/07/2020	1	RPI.APP.000001- RPI.APP.000152



# EXHIBIT 3

No. **2309**

Exhibit D

**OFFICIAL ORDER  
of the  
TEXAS COMMISSIONER OF INSURANCE**

**Date:** FEB 22 2013

**Subject Considered:**

ATX Premier Insurance Company  
Dallas, Texas  
Sircon No. 08-75779

**ADMISSION TO DO BUSINESS IN TEXAS  
CONSENT ORDER**

**General remarks and official action taken:**

On December 31, 2012, the commissioner of insurance issued Commissioner's Order No. 2162, which approved the application of ATX Premier Insurance Company for admission to do the business of insurance in Texas pursuant to Tex. Ins. Code Chapter 982 and redomestication to Texas pursuant to Tex. Ins. Code Chapter 983.

Staff for the Texas Department of Insurance (the department) and the duly authorized representative of ATX Premier Insurance Company, have consented to the entry of this Consent Order as evidenced by the signature hereto and request the commissioner of insurance to informally dispose of this matter pursuant to the provisions of TEX. INS. CODE § 36.104, TEX. GOV'T CODE § 2001.056, and 28 TEX. ADMIN. CODE § 1.47.

As contemplated in Order No. 2162, ATX Premier Insurance Company and the department agree to the following stipulations as a requirement for ATX Premier Insurance Company doing the business of insurance in Texas:

1. ATX Premier Insurance Company will submit, prior to executing, any and all reinsurance agreements for review and approval by the department.
2. ATX Premier Insurance Company will not exceed a 2:1 ratio of net written premium to capital and surplus.
3. ATX Premier Insurance Company must at all times reserve at least the mid-point range of its actuary's estimate. ATX Premier Insurance Company will engage a CPA that will include as part of the required annual audit, an independent actuary to review ATX Premier Insurance Company's actuarial practices and related work. ATX Premier Insurance Company will notify the Department of the actuary providing services and related reserving work.
4. ATX Premier Insurance Company will deposit \$5 million with the comptroller for the protection of policyholders or creditors wherever they are located in the United States. This deposit is to be made pursuant to Texas Insurance Code Chapter 406.

Exhibit D

NBIS0064

RPI.APP.000252

2309

Exhibit D

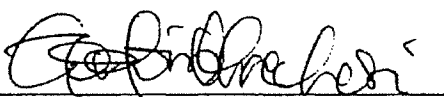
COMMISSIONER'S ORDER  
ATX PREMIER INSURANCE COMPANY  
Page 2 of 7

5. The parent company of ATX Premier Insurance Company, Nations Builders Insurance Services, Inc. shall establish a trust account for the benefit of ATX Premier Insurance Company with a minimum floor of no less than \$250,000 in a form of security acceptable to the commissioner, for the purpose of collateralizing any receivable due to ATX Premier Insurance Company from AutoTex or any other managing general agency, agency, or agent regarding commissions owed back under an MGA agreement per a sliding scale commission or other arrangement.
6. The receivable described in item 5 above shall be calculated quarterly beginning with June 30, 2013, and any required additional funds to be placed in the trust account shall be made by Nations Builders Insurance Services, Inc. no later than forty five days following the end of each calendar quarter.
7. These limitations may be adjusted in the future by order of the commissioner.

The commissioner of insurance orders that if at any time it is shown that ATX Premier Insurance Company did not comply with the aforementioned stipulations as agreed, then the commissioner of insurance may revoke the Certificate of Authority of ATX Premier Insurance Company.

ELEANOR KITZMAN  
COMMISSIONER OF INSURANCE

BY:



Godwin Ohaechesi, Director  
Company Licensing & Registration Office  
Licensing Services Section  
Financial Regulation Division  
Commissioner's Order No. 12-0052

Exhibit D

NBIS0065

RPI.APP.000253

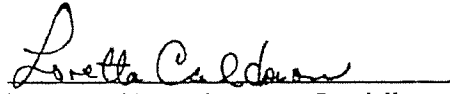


**2309**

Exhibit D

COMMISSIONER'S ORDER  
ATX PREMIER INSURANCE COMPANY  
Page 3 of 7

Recommended by:

  
Loretta Calderon, Insurance Specialist  
Company Licensing & Registration Office  
Licensing Services Section  
Financial Regulation Division

Reviewed by:

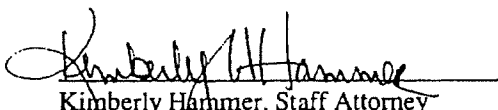
  
Kimberly Hammer, Staff Attorney  
Office of Financial Counsel  
Legal Section  
General Counsel Division

Exhibit D

NBIS0066

RPI.APP.000254

Exhibit D

**2309**

COMMISSIONER'S ORDER  
 ATX PREMIER INSURANCE COMPANY  
 Page 7 of 7

STATE OF Georgia §  
 COUNTY OF Cobb §

BEFORE ME, the undersigned notary public, personally appeared

William C. Tepe

1. "My name is William C. Tepe. I am of sound mind, am capable of making this statement, and am personally acquainted with the facts stated herein.
2. "I am the President of Nations Builders Insurance Services, Inc., which is the parent company of ATX Premier Insurance Company. As an officer of Nations Builders Insurance Services, Inc., I am authorized to make this statement, and I agree to and execute this Consent Order on behalf of Nations Builders Insurance Services, Inc..
4. "Nations Builders Insurance Services, Inc. agrees with and consents to the issuance and service of the foregoing Consent Order to be entered by the Texas Commissioner of Insurance."

William C. Tepe  
 Signature

William C. Tepe  
 Printed Name

President  
 Title

SWORN TO AND SUBSCRIBED before me, the undersigned authority, by  
William C. Tepe, President of Nations Builders Insurance Services, Inc., on this 20  
 day of February 2013.

Ruth A. Bankston  
 Signature of Notary Public

Ruth A. Bankston  
 Printed Name of Notary Public  
 Notary Public in and for the State of  
 My Commission Expires:

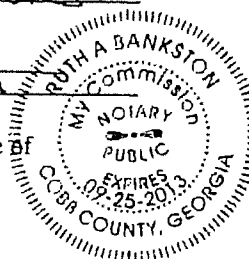


Exhibit D

NBIS0070

RPI.APP.000255

# EXHIBIT 4

## AMENDED AND RESTATED CLAIMS HANDLING AGREEMENT

This Amended and Restated Claims Handling Agreement ("**Agreement**") entered into and effective March 22, 2013, and amended April 1, 2015 12:01 am, is made and entered into by and between ATX Premier Insurance Company ("**Company**"; NBIS Construction & Transport Insurance Services, Inc. ("**CTIS**"; or, "**Pre-close Policy Claims Administrator**"; AutoTex MGA, Inc. ("**AutoTex**"; or, "**Former Administrator**"; and Safe Auto Insurance Company ("**SafeAuto**"; or, "**Post-close Policy Claims Administrator**"), collectively "**Administrator**". **SafeAuto**; **AutoTex**; **CTIS**; and, **Company** are each hereinafter referred to as a "**Party**" and collectively as the "**Parties**".

**WHEREAS**, **Company** has the authority to issue insurance policy(ies) to insureds and is responsible for claims settlement on those policies;

**WHEREAS**, NationsBuilders Insurance Services, Inc. ("**NBIS**"), the current parent company of AutoTex and **Company**, has, contemporaneously with the execution of this Agreement, closed a certain Stock Purchase Agreement (executed on March 2, 2015, "**SPA**") with Safe Auto Insurance Group, Inc. (the acquirer of AutoTex and parent company of **SafeAuto**) whereby Safe Auto Insurance Group, Inc. has acquired one hundred percent (100%) of the stock of **AutoTex**;

**WHEREAS**, pursuant to the terms and conditions of the aforementioned stock purchase agreement, Safe Auto Insurance Group, Inc. and NBIS have agreed to certain definitional guidelines regarding the ongoing treatment of business which was produced by AutoTex prior to the closing of the transaction and business which will be produced by AutoTex after the closing of such transaction, and which are applicable to the administration of this Agreement going forward and to which the Parties agree to incorporate herein:

- (A) **Pre-close Policy**. **Pre-close Policy** means any policy which was issued on or before the closing date of the sale of **AutoTex**, or which may be validly reinstated after such closing date by the policyholder during a reinstatement period. It also means any new policy written or renewed on or after the closing date which: (1) resides in the state of Arizona; (2) is produced by the LA Franchise Agency or its affiliates in any state; or (3) has been certified under the financial responsibility laws and regulations of any state.
- (B) **Post-close Policy**. **Post-close Policy** means any new or renewal policy term written after the closing date and not included in the definition of **Pre-close Policy**.

**WHEREAS**, **CTIS** wishes to assume the rights and obligations hereunder to administer **Pre-close Policies** as the **Pre-close Policy Claims Administrator**;

**WHEREAS**, **CTIS** is in the business of providing claims services on behalf of Insurance companies and is willing to provide such services on behalf of **Company** on all **Pre-close Policies** in accordance with the terms and conditions set forth herein, and as set forth in any agreed to Addenda attached to and made a part of this Agreement;

**WHEREAS**, the Parties acknowledge that the role of **CTIS** as the **Pre-close Policy Claims Administrator** will terminate and cease to exist, subject to those provisions of this Agreement which may otherwise remain in effect, upon the expiration of the last claim from any **Pre-close Policy**.

**WHEREAS**, **SafeAuto** is a property and casualty insurer licensed to conduct business in States of Arkansas, Arizona, Nevada and Texas and, wishes to assume the rights and obligations hereunder to administer **Post-close Policies** as the **Post-close Policy Claims Administrator**;

**WHEREAS**, **Company** has reviewed and accepted the qualifications of **SafeAuto** and **CTIS**, and wishes to authorize them to provide the to provide the services set forth herein;

# EXHIBIT 5

# Windhaven™ Insurance Acquires ATX Premier; Ready to Grow Local Agent Business Countrywide

NEWS PROVIDED BY  
**Windhaven™ Insurance →**  
Apr 05, 2016, 08:30 ET

MIAMI, April 5, 2016 /PRNewswire/ -- Windhaven™ Insurance has acquired ATX Premier, a Texas-based property and casualty provider, in an agreement with NationsBuilders Insurance Services, Inc. (NBIS).

Jimmy E. Whited, President and CEO of Windhaven™ Insurance, said today's acquisition is a win for local agents around the country as well as for Windhaven™.

"Local agents are at the heart of our organization," he said. "Unlike most carriers, we innovate for local agents to help them compete and grow."

Whited said Windhaven™ has both a local agent app and a consumer app. Additionally, Windhaven™ created Clutch Insurance, which offers ecommerce to local agents, who can now turn their websites into a sales channel and give potential consumers an amazing value proposition: compare auto insurance quickly and bind online while connecting to a local agent in their neighborhood for personal service. The ATX deal will now allow more local agents around the country to compete with bigger auto carriers online.

Windhaven™ Insurance has emerged from writing policies in a Miami apartment a decade ago into one of the fastest-growing carriers in the nation with the potential to scale even more rapidly into additional states.

"We have a successful data-driven business model, a strong internal culture built around core values, and a prosperous brand dedicated to local agent success," said Whited. "We look forward to leveraging this acquisition into rapid growth in new states and driving local-agent business."

GC Securities, the investment banking arm of Guy Carpenter and a division of MMC Securities LLC, is serving as exclusive financial advisor to Windhaven. Stonybrook Capital is serving as exclusive financial adviser to NBIS.

### **About Windhaven™ Insurance**

Windhaven™ Insurance is an auto insurance carrier that has written more than \$1 billion in premiums. Headquartered in Miami with offices in Tampa, the Philippines, Panama, and Dallas, and a software company, Clutch Analytics, housed in Austin, Windhaven™ Insurance provides coverage to some 200,000 policyholders through 2,000 local agents. An employer of close to 400 "Windies," South Florida Business Journal named Windhaven™ Insurance among the "Best Places to Work." [www.windhaveninsurance.com](http://www.windhaveninsurance.com)

### **About NationsBuilders Insurance Services**

NationsBuilders Insurance Services, Inc. is the premiere provider of insurance and risk management solutions to the heavy construction industry and the exclusive provider for the Specialized Carriers & Riggers Association and the American Concrete Pumpers Association (ACPA). [www.nbis.com](http://www.nbis.com)

### **About SunTx Capital Partners**

Founded in 2001, SunTx Capital Partners, LP, a Dallas-based private equity firm with more than \$600 million in assets, provides operational and financial expertise to the middle-market manufacturing and service sectors in the southern United States. SunTx capital is generated from principals, established university endowments and corporate and public pension funds. [www.suntx.com](http://www.suntx.com)

SOURCE Windhaven™ Insurance

### **Related Links**

<http://www.windhaveninsurance.com>

# EXHIBIT 6



No. **4335**

**OFFICIAL ORDER  
of the  
TEXAS COMMISSIONER OF INSURANCE**

**Date:** MAR 03 2016

**Subject Considered:**

Acquisition of  
ATX Premier Insurance Company  
Dallas, Texas  
by  
Windhaven National Holding Company  
a Florida corporation  
HCS No. 990473

Consent Order

**General remarks and official action taken:**

The commissioner of insurance considers the application of Windhaven National Holding Company, (Windhaven), for approval of its acquisition of control of ATX Premier Insurance Company, (ATX).

As shown by their signatures, the authorized representatives for Windhaven National Holding Company agree and consent to the entry of this order and request that the commissioner informally dispose of this matter pursuant to the provisions of Tex. Ins. Code §36.104, Tex. Gov't Code §2001.056, and 28 Tex. Admin. Code §1.47.

Jurisdiction

The commissioner has jurisdiction over the application under Tex. Ins. Code § 823.157 and 28 Tex. Admin. Code § 7.205.

Findings of Fact

Based upon the information submitted to and reviewed by Texas Department of Insurance staff, the commissioner makes the following findings of fact:

1. ATX is a domestic property and casualty insurance company.
2. Windhaven will acquire control of ATX through the purchase of 100% of the issued and outstanding common capital stock of ATX for \$7,500,000 cash.

RPI.APP.000262

3. No evidence was presented that any of the events or conditions listed in Tex. Ins. Code § 823.157(b) would occur or exist after the acquisition of control.
4. In signing the order, Windhaven agrees that it will not cause ATX to pay any dividends or other distributions to shareholders or accept dividends from ATX for five years from the date of the acquisition of ATX without prior written approval of the commissioner.
5. In signing this order, Windhaven agrees and represents to the commissioner that ATX will not exceed a 3:1 ratio of net written premiums to capital and surplus.

#### Conclusions of Law

Based on the findings of fact, the commissioner makes the following conclusions of law:

1. The proposed acquisition of control by Windhaven National Holding Company to acquire 100% of the issued and outstanding common capital stock of ATX Premier Insurance Company constitutes a change of control under the provisions of Tex. Ins. Code §§ 823.151 and 823.154.
2. There is no evidence that any of the events or conditions listed in Tex. Ins. Code § 823.157(b) would occur or exist after the acquisition of control.
3. Upon review of the representations and information provided, no evidence was presented on which the commissioner could predicate a denial of the acquisition of control under Tex. Ins. Code § 823.157.
4. Windhaven knowingly and voluntarily waives all procedural rights, including but not limited to notice of hearing, a public hearing, a proposal for decision, rehearing by the commissioner, and judicial review of this administrative action as provided for in Tex. Ins. Code §§ 36.201 – 36.205 and Tex. Gov't Code §§ 2001.051, 2001.052, 2001.145, and 2001.146.

The commissioner approves the acquisition of control of ATX Premier Insurance Company by Windhaven National Holding Company.

The acquisition of control of ATX must be completed not later than the 90<sup>th</sup> day from the date of this order as required by Tex. Ins. Code § 823.160(a).

If the acquisition of control of ATX Premier Insurance Company is not completed on or before the 90<sup>th</sup> day after the date of this order and Windhaven National Holding Company has not obtained an extension of time in writing to complete the acquisition of control by the commissioner as required by Tex. Ins. Code § 823.160(a), this order expires, Windhaven

Commissioner's Order  
ATX Premier Insurance Company  
HCS No. 990473  
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National Holding Company will be required to submit a new application to the commissioner for review and approval.

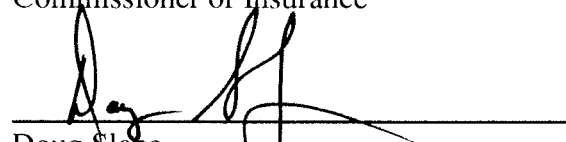
This order amends the limitations on ATX Premier Insurance Company set out in the February 22, 2013, Commissioner Order Number 2309.

The commissioner orders Windhaven not to cause ATX to pay any dividends or other distributions to shareholders and or accept dividends from ATX for five years from the date of the acquisition of ATX without prior written approval of the commissioner.

The commissioner orders ATX not to exceed a 3:1 ratio of net written premiums to capital and surplus.

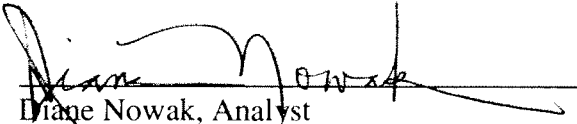
David C. Mattax  
Commissioner of Insurance

By:


  
\_\_\_\_\_  
Doug Slape  
Deputy Commissioner  
Financial Regulation Division  
Commissioner's Order No. 3632

Commissioner's Order  
ATX Premier Insurance Company  
HCS No. 990473  
Page 4 of 5 Pages


Recommended by:

  
Diane Nowak, Analyst  
Financial Analysis Section  
Financial Regulation Division

Reviewed by:

  
Teresa Saldana, Chief Analyst  
Financial Analysis Section  
Financial Regulation Division

Reviewed by:

  
Margaret Jonon, Attorney  
Office of Financial Counsel  
Legal Division

Commissioner's Order  
ATX Premier Insurance Company  
HCS No. 990473  
Page 5 of 5 Pages

Agreed as to form and content this 1<sup>st</sup> day of March 2016:

Windhaven National Holding Company

Signature

Printed Name

Title

Jimmy E. Whited  
PRESIDENT

**AFFIDAVIT**

**BEFORE ME, the undersigned notary public, personally appeared**

Jimmy E. Whited and stated the following after being sworn:

1. "My name is Jimmy Whited. I am of sound mind, capable of making this statement, and I am personally acquainted with the facts stated in this order and affidavit.
2. I am the President of Windhaven National Holding Company and I am authorized to make this statement. I agree to the terms and execute this Consent Order on behalf of Windhaven National Holding Company.
3. Windhaven National Holding Company agrees with and consents to the issuance and service of the foregoing consent order to be entered by the commissioner."

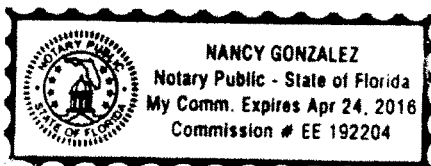
Signature

SWORN TO AND SUBSCRIBED before me the understated authority by the President of Windhaven National Holding Company on this 1<sup>st</sup> day of March 2016.

Signature of Notary Public

Notary Public in and for the State of Florida

My Commission Expires: 4-24-16



# EXHIBIT 7

1 Lawrence E. Mittin, Esq.  
2 Nevada Bar No. 005428  
3 CRAIG P. KENNY & ASSOCIATES  
4 501 S. 8th Street  
5 Las Vegas, NV 89101  
6 (702) 380-2800  
7 Fax: 702-380-2833  
8 [lmittin@cpklaw.com](mailto:lmittin@cpklaw.com)  
9 *Attorneys for Plaintiff Kelley Hayes*

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KELLEY HAYES, as Natural parent of Minor I.R.,

**CASE NO. 2:18-cv-01938-GMN-NJK**

Plaintiff,

v.

ATX PREMIER INSURANCE COMPANY;  
NATIONSBUILDERS INSURANCE  
SERVICES, INC.; DMA CLAIMS  
MANAGEMENT, INC.; DOES I through X,  
inclusive; and ROE CORPORATIONS I  
through X, inclusive

Defendants.

**PLAINTIFF'S THIRD AMENDED COMPLAINT**

COMES NOW Plaintiff Kelley Hayes, as Natural parent of Minor I.R., and hereby files her Third Amended Complaint against Defendants, and each of them, as follows:

**GENERAL ALLEGATIONS**

Plaintiff KELLEY HAYES, by and through her attorneys CRAIG P. KENNY & ASSOCIATES, hereby alleges as follows:

1. Plaintiff KELLEY HAYES, as Natural parent of Minor I.R., Kelley, hereby sues Defendants ATX PREMIER INSURANCE COMPANY; NATIONSBUILDERS INSURANCE SERVICES, INC.; DMA CLAIMS MANAGEMENT, INC., DOES I through X, and ROE CORPORATIONS I through X, for breach of contract and bad faith pursuant to the assignment given by Cesar Gutierrez as to ATX PREMIER INSURANCE COMPANY, and/or its subsidiaries, assigns, network companies, and agent companies. Minor I.R. is 11 years old and she currently resides with Plaintiff in Arizona. Minor I.R.'s father was Mario Regalado. On 11/15/14, when

1 Minor I.R. was only 7 years old, her father Mario Regalado was killed when the bike he was riding  
2 was struck by Cesar Gutierrez. Gutierrez was a permissive driver of a 1992 Acura Integra owned by  
3 Tracy Miller. At the time of the accident, Minor, Regalado, Gutierrez and Miller, were all residents  
4 of Las Vegas, Nevada. Miller had insurance of \$15,000 per person, \$30,000 per accident, and  
5 \$10,000 for property damage for the Acura with ATX. This ATX policy applied to permissive  
6 drivers such as Gutierrez.

7 2. At all times mentioned herein, Defendant ATX PREMIER INSURANCE COMPANY  
8 ("ATX") was and is a company authorized to conduct business in Clark County, Nevada. As of  
9 11/15/14, Defendant ATX was the insurance company for ATX policy number ANV000000230  
10 which covered Tracy Miller's 1992 Acura Integra. The ATX policy provided coverage of 15/30/10  
11 and the policy covered permissive drivers such as Cesar Gutierrez. As the insurer of the policy for  
12 Miller's Integra, Defendant ATX had duties under the Nevada Unfair Trade Practices Act  
13 ("NUPTA") and contractual obligations as to permissive driver Gutierrez for this 11/15/14 claim  
14 wherein Mario Regalado was killed; these obligations included the duty to defend, the duty to  
15 provide coverage, the covenant of good faith and fair dealing, and communication/disclosure duties  
16 as required by *Allstate v. Miller*. Gutierrez assigned damages to Plaintiff for ATX's violations of  
17 ATX insurance contract ANV000000230 and NUPTA.

18 3. At all times mentioned herein, Defendant NATIONSBUILDERS INSURANCE  
19 SERVICES, INC. ("NATIONSBUILDERS") was and is an insurance company authorized to  
20 conduct business in Clark County, Nevada. As of 11/15/14, Defendant NATIONSBUILDERS was  
21 the parent company of Defendant ATX. As the parent company of ATX, NATIONSBUILDERS has  
22 liability for contractual damages, extra-contractual damages, and violations of NUPTA as to the  
23 ATX policy for Miller's Integra. Since the inception of the 11/15/14 wrongful death claim, Art  
24 Kirkner, VP of Claims for NATIONSBUILDERS and ATX, was personally handling Plaintiff's  
25 claim for NATIONSBUILDERS and ATX, and Kirkner was working with Third Party Administrator  
26 DMA as to the claim. On June 17, 2016, Art Kirkner represented himself as VP of claims for ATX  
27 when he signed as a true and correct copy the Miller ATX policy declaration page. VP Kirkner has  
28 continued to work up until the present time on behalf of Defendant NATIONSBUILDERS as to the



1 handling of Plaintiff's claim under the subject Miller ATX policy. The subject Miller ATX policy is  
2 a Pre-Close policy for which Defendant NATIONSBUILDERS' liability as to the 11/15/14 wrongful  
3 death claim continues to the present time. Given its status as the parent company of ATX and VP of  
4 Claims Art Kirkner's handling of Plaintiff's claim therein, NATIONSBUILDERS is subject to the  
5 assignment that Gutierrez gave to Plaintiff. As the parent company of ATX, NATIONSBUILDERS  
6 is an insurer of the Miller ATX policy and as such, it was governed by NUPTA and it had  
7 contractual obligations as Gutierrez for this 11/15/14 claim; these obligations included the duty to  
8 defend; the duty to provide coverage; the covenant of good faith and fair dealing; and  
9 communication/disclosure duties as required by *Allstate v. Miller*.

10 4. At all times mentioned herein, Defendant DMA CLAIMS MANAGEMENT, INC.  
11 ("DMA") was and is a company duly authorized to conduct business in Clark County, Nevada.  
12 DMA owns, operates and does business in Clark County as DMA Claims Services. DMA Claims  
13 Services is the entity which is the subject of the assignment of contractual rights from Cesar  
14 Gutierrez to Plaintiff. DMA is and was a claims administrator for ATX and ATX's parent company  
15 NATIONSBUILDERS as to the subject Miller policy. As the claims administrator, DMA has an  
16 indemnity and hold harmless agreement with ATX and its parent company NATIONSBUILDERS.  
17 Given that DMA was adjudicating the 11/15/14 wrongful death claim for ATX and  
18 NATIONSBUILDERS and DMA has an indemnity agreement wherein it has warrantied its works as  
19 to ATX and NATIONSBUILDERS, Plaintiff asserts that DMA was a joint venturer with ATX and  
20 NATIONSBUILDERS as to the ATX Miller Policy/Plaintiff's claim. As a joint venturer, DMA has  
21 liability for breach of contract and bad faith as to ATX insured Cesar Gutierrez for the subject claim.

22 5. The true names and capacities, whether individual, corporate, associate, or otherwise of  
23 Defendants DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive, are  
24 unknown to Plaintiff who therefore sues those Defendants by such fictitious names, but are believed  
25 to be agents, servants, employers, or employees of the other Defendants named in this complaint.  
26 Plaintiff is informed and believes, and upon such alleges, that each of the Defendants designated as a  
27 DOE and/or ROE performed many of the same insurance functions as Defendants ATX,  
28 NATIONSBUILDERS, and DMA in investigating Plaintiff's claim, as more fully set forth and

described in *Wohlers v. Bartgis*, thereby causing injury and damages directly and proximately to the Plaintiff as alleged in this Complaint; that such DOE and ROE Defendants were the agents, servants, or employees, of each other or other Defendants named in this Complaint, and in doing the things alleged in this Complaint, each were acting within the course and scope of said agency, servitude, authority, and employment, with knowledge, permission, and consent of the other Defendants.

6. Defendants ATX, NATIONSBUILDERS, and DMA, were the agents, ostensible agents, servants, employees, partners, co-owners and/or joint venturers of each other, and were acting within the color, purpose and scope of their employment, agency, ownership and/or joint ventures and by reason of such relationship, the Defendants, and each of them are vicariously and jointly and severally responsible and liable for the acts and/or omission of their Co-Defendants.

7. On 11/15/14 at 2:07 p.m., in Henderson, Nevada, Cesar Gutierrez was a permissive driver of the 1992 Acura Integra owned by Tracy Miller and insured by the ATX policy ANV000000230. Gutierrez was driving at 65 mph in a 35 mph zone and weaving through traffic on southbound Eastern Ave., south of Evansville Avenue. Gutierrez made an unsafe pass on the right at a very high rate of speed, striking bicyclist Mario Regalado from behind, killing Regalado.

8. Plaintiff submits that it is undisputed that on 11/15/14, Cesar Gutierrez killed Minor I.R.'s father Mario Regalado while driving the 1992 Acura Integra owned by Tracy Miller and which was insured by the ATX policy.

9. Tracy Miller has testified in a deposition that prior to the accident, she knew that Cesar Gutierrez was using her ATX insured vehicle, as she had heard about him driving her vehicle. In this same deposition, counsel for Gutierrez (who was also counsel for Miller) represented that Gutierrez had implied permission to use the vehicle.

10. From 11/15/14 until 9/12/17, Defendants ATX, NATIONSBUILDERS, and DMA never made any contact at all with Cesar Gutierrez regarding the 11/15/14 death claim. In failing to ever make any contact with Gutierrez, the Defendants never informed Gutierrez of his rights as an insured under the ATX policy, rights which included providing a defense and coverage for this 11/15/14 loss. Defendants never conducted any investigation as to Gutierrez having any auto insurance of his own which might apply to this loss as well as Gutierrez having any assets which might apply to any

1 claims for this loss. Further, Defendants never communicated with Gutierrez as to the three  
2 conditional settlements demands made by Plaintiff as required by *Allstate v. Miller*; as to Gutierrez's  
3 right to personally make a financial contribution to resolve the death claim pursuant to *Miller*; the  
4 consequences if the conditional settlement demands were not accepted; Gutierrez's contractual right  
5 to an attorney paid for by ATX if a lawsuit was filed against him; and the insurance coverage  
6 available under the policy for any lawsuit. Plaintiff submits that Defendants could have easily  
7 located Gutierrez and communicated with him regarding this claim, such communication to include  
8 informing Gutierrez of his contractual rights as an insured under the contract. Plaintiff alleges that  
9 Defendants deliberately chose to act as if Gutierrez did not even exist as an insured.

10 11. As of November 20, 2014, Melissa Moses, wife of Mario Regalado, made a claim  
11 against the subject ATX policy. The Moses' claim was being handled by Defendant DMA whose  
12 adjusters were reporting directly to Art Kirkner, VP of Claims for Defendants ATX and  
13 NATIONSBUILDERS. On 12/22/14, DMA took a recorded statement of Tracey Miller. In the  
14 recording, Miller stated that the address on the policy was her address and that the home was her  
15 mother-in-law's; that the driver of the insured vehicle was her brother-in-law Cesar Gutierrez; that  
16 Gutierrez on occasion would borrow the insured vehicle; and that Gutierrez was in jail.

17 12. As of 12/22/14, Defendants ATX, NATIONSBUILDERS, and DMA had actual  
18 knowledge that the Follow Fields address was the home of Gutierrez's parents and that Gutierrez  
19 was in jail in Las Vegas. Gutierrez went from jail to High Desert State Prison. Defendants knew  
20 how to get into contact with Gutierrez with regard to this claim and they just deliberately choose not  
21 to contact Gutierrez until 9/12/17.

22 13. On 1/7/15, Melissa Moses' attorney made a demand for the injury limits for Moses.  
23 ATX, NATIONSBUILDERS, and DMA were all involved in the decision to tender the \$15,000  
24 single injury limit to the attorney for Moses. None of the companies had ever been presented with  
25 any documentation showing that an Estate had been opened for Mario Regalado and that Moses was  
26 the administratrix for the Estate. None of the companies had asked if Mario Regalado had any  
27 children when he died. Clearly, all companies were panicked by the attorney's threat to file a lawsuit  
28 and they just sent the attorney a release even though they did not have any information about the

1 Estate nor any information about any children of Mario Regalado. When the release was sent, ATX,  
2 NATIONSBUILDERS, and DMA had never made any inquiry into any available insurance for  
3 Gutierrez; any additional insurance for Miller; nor whether Gutierrez and/or Miller wanted to make  
4 a financial contribution to the settlement. This \$15,000 release was never signed by Moses.

5 14. On 3/16/15, Moses's attorney made a demand for the property damage limits of \$10,000  
6 for the bicycle. On 4/3/15, DMA adjuster Rebecca Perez noted that she was "Preparing  
7 recommendation to settle PD at limits of \$10,000 without seeking retention of salvage."

8 15. From 4/3/15 until 7/20/15, DMA adjuster Perez was in contact with Moses' attorney  
9 asking for documentation about the bike, as ATX was not willing to pay the \$10,000 limit for the  
10 bicycle. On 7/20/15, ATX and NATIONSBUILDERS VP of Claims Art Kirkner emailed Perez with  
11 a "High" level of importance about the bike claim. VP Kirkner wanted Perez to "explain why this  
12 bike has a \$10K value." Kirkner wanted to know how many miles were on this bike when it was  
13 actually purchased; how long did Regalado have the bike; and he was "curious" about miles on the  
14 bike.

15 16. When ATX and NATIONSBUILDERS VP Art Kirkner sent the email, he had reviewed  
16 the police report and was aware that Gutierrez was in jail for killing Regalado. Nonetheless, VP  
17 Kirkner did not want to pay the limits on the property damage. VP Kirkner's actions show that ATX  
18 and NATIONSBUILDERS were determined to save on paying the policy limits of \$10,000 for the  
19 property damage. VP Kirkner was more concerned with overpaying on the property damage claim  
20 than in resolving the actual death claim and protecting ATX policy insureds, Gutierrez and Miller.  
21 VP Kirkner never once questioned any of the adjusters about Gutierrez, as Kirkner knew from a  
22 review of the log notes that Gutierrez had never been contacted at all. VP Kirkner's focus on this  
23 death claim was on trying to save money on the bike, not the death claim itself nor protection of  
24 ATX's insureds, Gutierrez and Miller. As of 7/20/15, ATX and NATIONSBUILDERS still had no  
25 documentation showing that an Estate had been opened; they had never inquired if Regalado had any  
26 children when he died; they had never inquired into any available insurance for Gutierrez; they had  
27 never inquired into any additional insurance for Miller; and they had never inquired into whether  
28 Gutierrez or Miller wanted to personally make a financial contribution to the settlement.

1           17. Defendants ATX and NATIONSBUILDERS, and DMA's investigation about the bike  
2 continued on for another month until 8/19/15, when Perez emailed VP Kirkner for authority to pay  
3 the property limits. Again, VP Kirkner showed his reluctance to pay the \$10,000. In an 8/20/15  
4 email, VP Kirkner wanted to know if the bike was worth over \$10,000 and the depreciation value of  
5 the bike. VP Kirkner was consumed with saving money on the bike claim, and yet on the death  
6 claim itself and the protection of ATX's insureds Gutierrez and Miller, Kirkner expressed no  
7 concern at all. Gutierrez did not ever merit any mention in any of Kirkner's log notes during the  
8 claims process. A team of DMA adjusters spent the next six weeks working with VP Kirkner on the  
9 property damage claim. Given these actions as to the bike and omissions as to the insured Gutierrez,  
10 saving money on the bike was all that mattered to VP Kirkner of ATX and NATIONSBUILDERS.

11           18. In October 2015, even though DMA finally had permission to tender to Moses the  
12 property damage limits of \$10,000, the DMA adjuster offered Moses only \$8,500 for the property  
13 damage claim. Even though the DMA adjuster had authority to pay the \$10,000 property damage  
14 limits, someone at ATX, NATIONSBUILDERS, and DMA had decided that it was very important  
15 that the companies win the negotiations and only pay \$8,500 for the bike. These Defendants had  
16 spent months on the bike claim all to save \$1,500 on the bike, as Moses signed the property damage  
17 release for \$8,500. Meanwhile, the bodily injury portion of this death claim remained open, with no  
18 investigation having been conducted by Defendants as to an Estate for Mario Regalado and if Mario  
19 Regalado had any children as heirs. Further, Defendants ATX, NATIONSBUILDERS, and DMA,  
20 had still never contacted Gutierrez; never inquired into any available insurance for Gutierrez; never  
21 inquired into any additional insurance for Miller; and they had never inquired into whether Gutierrez  
22 or Miller wanted to personally make a financial contribution to the settlement.

23           19. On 3/30/16, Plaintiff's counsel Julie Mersch sent a representation letter for Minor I.R.'s  
24 claim to adjuster Hermanese Ravasio of Defendant DMA. The letter asked "please confirm all  
25 coverage available for this accident under your insured's policy, and provide my office with a copy  
26 of the declarations page of the policy(ies) for all vehicles owned by Ms. Miller at the time of the  
27 accident."  
28

1           20. On 5/17/16, Plaintiff's counsel Mersch sent to DMA adjuster Ravasio a 30-Day Policy  
2 Limits Demand with Conditions and this demand was courtesy copied via email to VP Kirkner at his  
3 NATIONSBUILDERS email address. The letter first addressed that DMA had not sent the actual  
4 certified declaration page. The letter then demanded the policy limits for Plaintiff by 6/20/16 with  
5 the following conditions: (1) Autotex to provide a Certified Copy of the Declaration page for the  
6 Miller vehicle; and (2) Autotex to provide an "Affidavit Setting Forth Assets" of insured Miller.

7           21. On 6/2/16, a log note was entered by DMA adjuster Ravasio which stated as follows:

8                   We need a certified copy of the policy limits to be sent to claimant attorney. She is  
9                   looking for a reason to sue.

10           22. Given the log note, DMA adjuster Ravasio believed that Mersch was not genuinely  
11 seeking documents for I.R.—a minor child whose father was killed when she was 7—but instead  
12 Mersch had a more nefarious intent as to ATX and DMA. Ravasio knew from the log notes that  
13 ATX and NATIONSBUILDERS were able to win the negotiations with Moses and save \$1,500 on  
14 the property damage. As such, Ravasio was suspicious of Mersch's intentions, even though Mersch  
15 was simply asking for relevant documents for I.R. Ravasio's suspicions about Mersch were well  
16 documented in the notes, such that they colored not only her handling of the claim, but also affected  
17 the handling by subsequent adjusters at DMA and ATX and NATIONSBUILDERS VP Kirkner.  
18 These adjusters and VP Kirkner all abdicated any of their responsibilities and duties to insureds  
19 Gutierrez—a phantom in the entire claims process—and Miller. The concern of all of these adjusters  
20 and VP Kirkner was to not allow Mersch to "set up" ATX and DMA. So these adjusters and VP  
21 Kirkner decided that they would not comply with Mersch's requests for a certified copy of the  
22 declaration page, an Asset Affidavit from Miller, nor the two later requests for an Affidavit from  
23 ATX itself showing its attempts to secure an Asset Affidavit from Miller. Instead, DMA and VP  
24 Kirkner were going to handle the claim as they saw fit, irrespective of the harm they were all causing  
25 to the insureds Gutierrez and Miller.

26           23. On 6/2/16, DMA sent a letter to Miller informing her that more than her limits were  
27 being sought. However, this DMA letter did not include a copy of the 5/17/16 demand letter. The  
28 DMA letter then stated "In order for us to immediately resolve this claim it will be necessary that  
you complete and return the attached documents. Have them notarized and returned to the law firm



1 representing Mr. Regalado's daughter." The letter then gave the address for attorney Mersch.  
2 Plaintiff submits that the evidence will show that DMA never sent **with this letter an Affidavit for**  
3 **Miller to complete which had Miller's name listed as well as the date of loss of 11/15/14.**  
4 Further, neither DMA, ATX nor NATIONSBUILDERS ever attempted to call Miller during the  
5 entire time this conditional policy limit demand was pending from 5/17/16-6/20/16. The letter  
6 shows that DMA on behalf of ATX and NATIONSBUILDERS, was placing sole responsibility on  
7 Miller to complete, notarize, and send the Affidavit to Mersch. DMA never mentioned anything in  
8 the letter about a deadline for Miller to return the Affidavit to Mersch.

9         24. On 6/17/16, DMA sent a letter to Mersch which stated that "a second copy of our  
10 policyholder's insurance page was sent via certified mail on June 3, 2016." Given this statement,  
11 adjuster Ravasio believed that sending a copy of the insurance page via certified mail made a  
12 document certified. The letter then stated "we've included another copy of the declarations page for  
13 your review. On that same date, the insurance and assets affidavit was sent to our policyholder via  
14 certified mail." The letter also states that enclosed was a release. In sending the release, Ravasio  
15 believed that DMA had satisfied the conditions of the 5/17/16 letter by allegedly sending a copy of  
16 the dec page via certified letter and by informing Mersch that DMA had sent Miller an asset  
17 affidavit.

18         25. As of 6/20/16, DMA on behalf of ATX and NATIONSBUILDERS, had failed to comply  
19 with both of the conditions set forth in the 5/17/16 demand letter. DMA never sent Mersch a  
20 Certified Copy of the declarations page. Further, DMA never sent Mersch an "Affidavit Setting  
21 Forth Assets" of its insured Tracy Miller. DMA never asked for an extension of time to the 5/17/16  
22 demand.

23         26. On 9/14/16, Mersch sent via fax another 14 day conditional demand letter to DMA  
24 adjuster Ravasio. The conditional demand letter requested an Assets Affidavit of Miller or in the  
25 alternative, an Affidavit by DMA's principal ATX setting forth all efforts to obtain Miller's  
26 Affidavit and a certified copy of the Declaration Page.  
27  
28

1 27. Even though there is a faxed confirmation for the 9/14/16 demand letter, the letter itself  
 2 and any reference to said letter never made it into the DMA claims file. Instead, on 9/27/16, Ravasio  
 3 noted for the file "no response from claimant's attorney. Another certified letter sent."

4 28. DMA adjuster Ravasio sent a 9/27/16 letter to Mersch which only referenced the May  
 5 2016 demand. On 10/3/16, Mersch responded to the DMA 9/27/16 letter via fax and mail. Mersch's  
 6 10/3/16 letter was a conditional demand letter which was essentially the same as the 9/14/16  
 7 conditional demand letter. The conditional demand letter requested an Assets Affidavit of Miller or  
 8 in the alternative, an Affidavit by DMA's principal ATX setting forth all efforts to obtain Miller's  
 9 Affidavit and a certified copy of the Declaration Page.

10 29. DMA adjuster Ravasio noted in the claims file the 10/3/16 conditional demand letter.  
 11 Ravasio sent on 10/12/16, a note to DMA adjuster Church stating "Please send affidavit of insurance  
 12 letter in the attachments to the insured again. This time we need it sent certified." Then, Ravasio  
 13 emailed Rebecca Perez and stated "Need to send to Art asap."

14 30. On 10/12/16, DMA adjuster Church logged that she had sent via certified mail the  
 15 affidavit of insurance letter to Miller. Plaintiff alleges that there is no proof this letter was ever sent  
 16 to Miller. Further, Plaintiff submits that DMA never sent at any time to Miller an Affidavit which  
 17 had Miller's name listed as well as the date of loss of 11/15/14. While this demand was pending,  
 18 DMA never made any attempt to call Miller regarding an affidavit let alone sending her a copy of the  
 19 conditional demand letter which was set to expire on 10/20/16.

20 31. On 10/17/16, Ravasio emailed DMA adjuster Rebecca Perez and stated as follows:

21 This is the one we have to overnight on Thursday to comply with deadline for answer.  
 22 Any word from Art on altering release or sending a letter from him about the affidavit?

23 32. On 10/26/16, six days after the deadline date on the demand, Ravasio sent an urgent  
 24 email to Rebecca Perez and John DePompeo which stated:

25 To date we have not received a reply from Art deadline on this was 10/20....recommend  
 26 we send the check and release together to this attorney...to find a way to find some type of  
 fault so we need to stay ahead.

27 33. On 10/26/17, Defendant DMA then sent a \$7,500 check issued on the account of  
 28 Defendant NBIS Construction & Transport Insurance Services, Inc. FBO ATX Premier Insurance  
 Company via FedEx to Mersch which was received by Mersch on October 27, 2016. There was no



1 cover letter with the check. NBIS Construction & Transport Insurance Services, Inc. is a company  
2 affiliated with Defendant NATIONSBUILDERS.

3 34. On 11/4/16, Mersch filed a lawsuit on Plaintiff's behalf against Cesar Gutierrez and  
4 Tracy Miller. On 11/8/16, Mersch returned the \$7,500 check to DMA and provided DMA with a  
5 file-stamped copy of the Complaint.

6 35. On 11/18/16, Mersch sent a letter via fax, email and mail informing Ravasio that the  
7 DMA check had been returned to her. Ravasio was also provided with proof of service of the  
8 Complaint on Miller on 11/13/16.

9 36. On 11/29/16, Gutierrez was served in prison with a copy of the Complaint. On 12/4/16,  
10 Gutierrez sent to the Court an Answer to the Complaint and a Motion for Appointment of Counsel  
11 for the lawsuit. In the Motion, Gutierrez was seeking the appointment of an attorney to defend him,  
12 as he noted that he was financially unable to retain an attorney and had no training to represent  
13 himself and defend this action. Since Defendants ATX, NATIONSBUILDERS, and DMA never had  
14 contacted Gutierrez, he was not aware of his contractual right to an attorney under the ATX policy.  
15 As such, Gutierrez was trying to have the Court appoint an attorney to defend him for Plaintiff's  
16 lawsuit. On 12/15/16, the Court denied Gutierrez's Application.

17 37. On 12/14/16, Mersch sent DMA a copy of Gutierrez's Answer and Motion for  
18 Appointment of Counsel and these documents were stamped "received" by DMA on 12/19/18.

19 38. On 12/27/16, DMA adjuster Arnice Daniels entered a log note to Answer the complaint.  
20 However, neither DMA, ATX, nor NATIONSBUILDERS, ever referred the file out to counsel to  
21 provide a defense pursuant to the terms of the insurance contract. As such, an Answer was not filed  
22 for Gutierrez and Miller and thus, on 4/19/17, both Gutierrez and Miller were Defaulted.

23 39. On 9/13/17, Plaintiff made a proposal to Defendant DMA to mediate her claims against  
24 Gutierrez and Miller. The proposal was open until 10/9/17. As of 9/13/17, both Gutierrez and  
25 Miller were in Default with the next phase of litigation to be a Default Judgment.

26 40. On 9/18/17, defense counsel retained by Defendant DMA filed a Motion to Enforce  
27 Settlement. The Motion sought to have a Court find that Plaintiff had entered into a settlement with  
28 ATX for the remaining bodily injury limits of \$7,500.

1           41. Even though a DMA lawyer was now involved for Gutierrez and Miller, DMA adjuster  
2 Rita Westfall decided she was going to personally respond to the mediation proposal. In a 10/9/17  
3 letter, Westfall wrote as to Mersch's request for Tracy Miller's Asset Affidavit as follows:

4           Apparently, Ms. Miller failed to complete, sign and mail either affidavit, which is  
5 consistent with her failure to notify Auto Tex of the accident itself and her failure to  
6 forward any suit papers to Auto Tex or DMA and tender the defense of the suit to  
7 AutoTex....We suggest that since Ms. Miller has failed to voluntarily provide to us or Ms.  
8 Mersch any information regarding her other assets (or lack thereof), then it becomes  
9 incumbent upon the plaintiff's counsel to develop such assets information as will satisfy a  
10 court being asked to approve the minor plaintiff's settlement.

11           As to the handling of the claim, Westfall stated as follows:

12           Auto Tex believes that a reviewing court will see any bad faith suit as a rather transparent  
13 but meritless attempt to "set up" an insurer for a bad faith claim because it was presumed  
14 that the remaining limits of the policy purchased by the named insured are insufficient to  
15 fully compensate the minor plaintiff for the death of her father.

16           42. DMA adjuster Westfall's 10/9/17 letter ignored the fact that the September and October  
17 demands gave ATX the opportunity to submit its own Affidavit regarding its efforts to secure an  
18 Affidavit from Miller.

19           43. Westfall's opinion that a "set up" of ATX and DMA had occurred, was an opinion  
20 repeated throughout the claims file by DMA adjusters. As of 10/9/17, DMA had convinced itself  
21 that Miller and Mersch were to blame for DMA's failure to ever secure an Asset Affidavit for Miller  
22 and that DMA was the victim of a lawyer set up to create more insurance.

23           44. Given Westfall's 10/9/17 letter, it is alleged that ATX, NATIONSBUILDERS, and  
24 DMA never informed Gutierrez about the mediation proposal and the consequences if DMA failed  
25 to have a Court enforce the settlement of \$7,500. On 12/11/17, the Court denied the Motion to  
26 Enforce, but the Defaults of Gutierrez and Miller were set aside.

27           45. On 3/19/18, Gutierrez, while represented by counsel who had been retained by DMA,  
28 signed an Assignment to Plaintiff of his rights to breach of contract and bad faith as to ATX, its  
29 subsidiaries, assigns, network companies, agent companies, which includes ATX's parent company  
30 NATIONSBUILDERS, and as to DMA.

31           46. On 6/12/18, Plaintiff filed a Motion for Summary Judgment as to Gutierrez's liability to  
32 Plaintiff for a \$2.5 million dollar judgment. On 8/7/18, the Court granted Plaintiff's Motion for  
33 Summary Judgment and an Order was entered on 8/24/18.

47. Given Gutierrez's Assignment to Plaintiff of his rights for breach of contract and bad faith as to ATX and its subsidiaries, assigns, network companies, and agent companies which includes ATX's parent company Defendant NATIONSBUILDERS and Defendant DMA, and the granting of a Summary Judgment against Gutierrez for \$2.5 million, Plaintiff hereby sues (1) Defendants ATX and NATIONSBUILDERS for breach of contract, bad faith, and violation of NUPTA; and (2) Defendant DMA for breach of contract and bad faith.

**FIRST CLAIM FOR RELIEF**  
(Breach of Contract ATX and NATIONSBUILDERS)

48. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 47.

49. On 11/15/14, Cesar Gutierrez was an insured under the ATX policy for Miller's vehicle. Defendant ATX owed contractual duties to its insured Cesar Gutierrez. Defendant NATIONSBUILDERS as the parent company of ATX owed contractual duties to its insured Cesar Gutierrez. From the inception of the claim, Art Kirkner who was VP of Claims for both Defendants ATX and NATIONSBUILDERS, personally handled the claim. Defendants ATX and NATIONSBUILDERS breached the contract of insurance with Gutierrez and both Defendants are liable for all damages, including consequential damages, from such a breach.

50. Defendants ATX and NATIONSBUILDERS breached the contract of insurance by failing to ever contact Gutierrez about this death claim until September, 2017. During this period, ATX and NATIONSBUILDERS never made any attempt to inform Gutierrez that he was a covered insured and that ATX had a duty to defend him and to provide coverage. ATX and NATIONSBUILDERS never informed Gutierrez of his contractual rights; demands made against the policy of insurance; his right to make a financial contribution to resolve the claim pursuant to *Miller*; excess exposure he was facing if the claim was not settled within the limits; and communications between ATX, NATIONSBUILDERS, and Plaintiff pursuant to *Miller*. ATX and NATIONSBUILDERS abdicated their responsibilities as Gutierrez's insurer by shifting onto Tracy Miller the burden to provide a timely Asset Affidavit to Plaintiff. ATX and NATIONSBUILDERS never took any actions to comply with Plaintiff's conditional demands and protect Gutierrez from exposure. ATX and NATIONSBUILDERS never sent the certified declaration page; never sent

1 Plaintiff an Asset Affidavit from Miller; and ATX and/or NATIONSBUILDERS never sent Plaintiff  
2 its own Affidavit showing its attempts to secure an Asset Affidavit from Miller.

3 51. Defendants ATX and NATIONSBUILDERS were aware in November 2016 that  
4 Gutierrez was sued by Plaintiff; ATX and NATIONSBUILDERS were then aware in December  
5 2016 that Gutierrez had filed his own Answer and a Motion asking for the appointment of counsel.  
6 Yet ATX and NATIONSBUILDERS did nothing, allowing a Default to be entered against Gutierrez.  
7 In failing to inform Gutierrez of his contractual right to counsel as an insured and allowing him to be  
8 Defaulted, Defendants ATX and NATIONSBUILDERS breached the contract as to their insured  
9 Gutierrez.

10 52. After counsel was provided to Gutierrez after 9/12/17, ATX and NATIONSBUILDERS  
11 continued to be in breach of contract, as they never informed Gutierrez of the proposal for mediation.  
12 In rejecting mediation without ever informing Gutierrez about the proposal and the consequences,  
13 Defendants ATX and NATIONSBUILDERS continued their breach of contract and violation of the  
14 dictates of *Miller*.

15 53. Defendants ATX and NATIONSBUILDERS' multiple breaches of contract resulted in  
16 Gutierrez being exposed to damages beyond the \$7,500 in available insurance. ATX and  
17 NATIONSBUILDERS failed to protect their insured Gutierrez from an excess exposure when it was  
18 reasonably feasible to do so. As a result of the breaches of contract by ATX and  
19 NATIONSBUILDERS, a summary judgment of \$2.5 million dollars has been granted against  
20 Gutierrez. Gutierrez has assigned to Plaintiff his rights against ATX and NATIONSBUILDERS as  
21 ATX's parent company for the these breach of contract damages, which include the \$2.5 million  
22 dollar summary judgment.

23 54. As a result of this breach of contract by Defendants ATX and NATIONSBUILDERS and  
24 Gutierrez's assignment of rights against ATX and NATIONSBUILDERS, Plaintiff seeks from  
25 Defendants ATX and NATIONSBUILDERS general damages in excess of \$15,000 and special  
26 damages in excess of \$15,000.

27 55. Due to the conduct of these Defendants, it has become necessary for Plaintiff to retain  
28 counsel and Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.

**SECOND CLAIM FOR RELIEF**  
(Bad Faith ATX and NATIONSBUILDERS)

56. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 55.

57. Defendants ATX and NATIONSBUILDERS breached the implied duty of good faith and fair dealing that exists in their insurance contract with Gutierrez for this death claim. Art Kirkner, VP of Claims for both ATX and NATIONSBUILDERS, was personally handling this 11/15/14 wrongful death claim from its inception. As alleged in Paragraphs 49-53 above, ATX and NATIONSBUILDERS engaged in multiple acts and omissions which constitute bad faith under Nevada law.

58. Defendants ATX and NATIONSBUILDERS acted in bad faith when they invited a lawsuit against Gutierrez on this claim. ATX and NATIONSBUILDERS then failed to inform Gutierrez of his contractual rights. ATX and NATIONSBUILDERS sat back and watched Gutierrez appeal to the Court for a lawyer to defend him in this lawsuit. ATX and NATIONSBUILDERS did not send the file out to counsel to provide a defense; did not assign a lawyer to Gutierrez; and did not contact Gutierrez in prison and inform him of his contractual rights to counsel and to coverage. Instead, ATX and NATIONSBUILDERS allowed a Default to be entered against Gutierrez in April 2017. After counsel was provided to Gutierrez, ATX and NATIONSBUILDERS continued to act in bad faith, as it never informed Gutierrez of the proposal for mediation. ATX and NATIONSBUILDERS' multiple acts of bad faith resulted in Gutierrez being exposed to damages beyond the \$7,500 in insurance. ATX and NATIONSBUILDERS failed to protect their insured Gutierrez from an excess exposure when it was reasonably feasible to do so.

59. Defendants ATX and NATIONSBUILDERS' conduct, as described herein, was intended by Defendants to cause injury to the Gutierrez, or was carried on by ATX with such conscious disregard for the rights of Gutierrez, as to subject Gutierrez to cruel and unjust hardship, such as to constitute malice, oppression, or fraud under NRS § Section 42.005, thereby entitling Gutierrez and his assignees such as Plaintiff to punitive damages in an amount in excess of \$15,000 against Defendants ATX and NATIONSBUILDERS.





1 § Section 42.005, thereby entitling Gutierrez and assignees such as Plaintiff to punitive damages in  
2 an amount in excess of \$15,000 against ATX and NATIONSBUILDERS.

3 66. As a result of the violations of NUPTA by Defendants ATX and NATIONSBUILDERS,  
4 a summary judgment of \$2.5 million dollars has been granted against Gutierrez. Gutierrez has  
5 assigned to Plaintiff his rights for the violations of NUPTA and resultant damages which include the  
6 \$2.5. million dollar judgment. Based on these NUPTA violations and the Gutierrez assignment,  
7 Plaintiff seeks from Defendants ATX and NATIONSBUILDERS, compensatory damages in excess  
8 of \$15,000 and punitive damages in excess of \$15,000.

9 67. Due to the conduct of these Defendants, it has become necessary for Plaintiff to retain  
10 counsel and Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.

11 **FOURTH CLAIM FOR RELIEF**  
12 (Breach of Contract DMA)

13 68. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1  
14 through 67.

15 69. Defendants ATX and NATIONSBUILDERS retained Defendant DMA to act as the  
16 claims handler for the 11/15/14 death claim involving Minor I.R.'s father Mario Regalado. Given its  
17 role as claims administrator for ATX and NATIONSBUILDERS who warrantied its work for ATX  
18 and NATIONSBUILDERS via an indemnity and hold harmless agreement, Plaintiff alleges that  
19 DMA was a joint venturer with ATX and NATIONSBUILDERS as to this claim. As a joint  
20 venturer, DMA owed contractual rights and duties to Gutierrez once it began administering the  
21 claim. Defendant DMA's adjusters worked for years on this claim with Art Kirkner, VP of Claims  
22 for ATX and NATIONSBUILDERS.

23 70. As a joint venturer, Defendant DMA breached the contract of insurance by failing to ever  
24 contact Gutierrez about the claim until 9/12/17. Before 9/12/17, DMA never made any attempt to  
25 contact Gutierrez and inform him that he was a covered under the ATX policy and that ATX and  
26 NATIONSBUILDERS had a duty to defend him and to provide coverage. DMA's actions show that  
27 because Gutierrez was incarcerated, DMA did not consider Gutierrez an insured to whom DMA  
28 owed duties to under the ATX contract. DMA never informed Gutierrez of his contractual rights;  
demands made against the policy; his right to make a financial contribution to resolve the claim

1 pursuant to *Miller*; excess exposure he was facing if the claim was not settled within the limits; and  
2 communications between DMA and Plaintiff as required by *Miller*. DMA abdicated its  
3 responsibilities as Gutierrez's insurer by shifting onto Tracy Miller the burden to provide a timely  
4 Asset Affidavit to Plaintiff. DMA never took any actions to comply with Plaintiff's conditional  
5 demands and protect Gutierrez from exposure. DMA never sent the certified declaration page; DMA  
6 never sent Plaintiff an Asset Affidavit from Miller; and DMA never sent Plaintiff an Affidavit from  
7 ATX showing ATX's attempts to secure an Asset Affidavit from Miller.

8 71. Defendant DMA was aware in November 2016 that Gutierrez was sued by Plaintiff;  
9 DMA was then aware in December 2016 that Gutierrez had filed his own Answer and a Motion  
10 asking for the appointment of counsel. Yet DMA did nothing, allowing a Default to be entered  
11 against Gutierrez. As a joint venturer, in failing to inform Gutierrez of his contractual right to  
12 counsel as an insured and allowing him to be Defaulted, Defendants DMA breached the contract as to  
13 insured Gutierrez.

14 72. After counsel was provided to Gutierrez in September 2017, Defendant DMA as a joint  
15 venturer continued to be in breach of contract, as it never informed Gutierrez of the proposal for  
16 mediation. In rejecting mediation without ever informing Gutierrez about the proposal and the  
17 consequences, DMA continued its breach of contract and violation of the dictates of *Miller*.

18 73. As a joint venturer, Defendant DMA's multiple breaches of contract resulted in  
19 Gutierrez being exposed to damages beyond the \$7,500 of available insurance. DMA failed to  
20 protect its insured Gutierrez from an excess exposure when it was reasonably feasible to do so. As a  
21 result of the breaches of contract by DMA, a summary judgment of \$2.5 million dollars has been  
22 granted against Gutierrez. Gutierrez has assigned to Plaintiff his rights against DMA for the these  
23 breach of contract damages, which include the \$2.5 million dollar summary judgment.

24 74. As a result of this breach of contract by Defendant DMA and Gutierrez's assignment of  
25 rights against DMA, Plaintiff seeks from DMA general damages in excess of \$15,000 and special  
26 damages in excess of \$15,000.

27 75. Due to DMA's conduct, it has become necessary for Plaintiff to retain counsel and  
28 Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.



**FIFTH CLAIM FOR RELIEF**  
(Bad Faith DMA)

76. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 75.

77. Defendants ATX and its parent company Defendant NATIONSBUILDERS retained Defendant DMA to act as the claims handler for the 11/15/14 death claim involving Minor I.R.'s father Mario Regalado. DMA was a joint venturer with Defendants ATX and NATIONSBUILDERS as to this claim. As a joint venturer, DMA owed contractual rights and duties to Gutierrez as to the administration of this claim. DMA breached the implied duty of good faith and fair dealing as to its contractual duties owed to Gutierrez for this death claim. As alleged in Paragraphs 69-73 above, DMA engaged in multiple acts and omissions which constitute bad faith under Nevada law. Given its actions and omissions, DMA acted in bad faith and this resulted in Gutierrez being exposed to damages beyond the \$7,500 in available insurance.

78. Defendant DMA's conduct was intended by Defendant to cause injury to Gutierrez, or was carried on by this Defendant with such conscious disregard for the rights of Gutierrez, as to subject Gutierrez to cruel and unjust hardship, such as to constitute malice, oppression, or fraud under NRS § Section 42.005, thereby entitling Gutierrez and his assignees such as Plaintiff to punitive damages in an amount in excess of \$15,000 against DMA.

79. As a result of Defendant DMA's bad faith, a summary judgment of \$2.5 million dollars has been granted against Gutierrez. Gutierrez has assigned his rights to Plaintiff for the acts of bad faith and resultant damages which include the \$2.5 million dollar judgment. Based on the assignment of bad faith rights from Gutierrez, Plaintiff seeks from DMA general damages in excess of \$15,000 and special damages in excess of \$15,000.

80. Due to DMA's conduct, it has become necessary for Plaintiff to retain counsel and Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.

WHEREFORE, Plaintiff prays for a judgment against Defendants ATX, NATIONSBUILDERS, and DMA, as follows:

1. For general damages in a sum in excess of \$15,000.00;

2. For special damages in an sum in excess of \$15,000;
3. For punitive damages in a sum in excess of \$15,000;
4. For reasonable attorneys fees, costs, and prejudgment interest; and,
5. For such other and further relief as the Court may deem appropriate.

DATED this 30 day of May, 2019.

**CRAIG P. KENNY & ASSOCIATES**

By: 

**LAWRENCE E. MITTIN, ESQ.**

Nevada Bar #5428

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Attorney for Plaintiff

# EXHIBIT 8

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16 Attorneys for Third Party Defendants  
17 NATIONSBUILDERS INSURANCE SERVICES, INC.

18 **UNITED STATES DISTRICT COURT**  
19 **DISTRICT OF NEVADA**

20 KELLY HAYES, as Natural Parent of Minor  
21 I.R.,

22 Plaintiffs,

23 vs.

24 ATX PREMIER INSURANCE COMPANY;  
25 NATIONSBUILDERS INSURANCE  
26 SERVICES, INC. DMA CLAIMS  
27 MANAGEMENT, INC.; DOES I through X,  
28 inclusive; and ROE CORPORATIONS,

Defendants.

CASE NO. 2:18-cv-01938-GMN-NJK

**DEFENDANTS ATX PREMIER  
INSURANCE COMPANY AND  
NATIONSBUILDERS INSURANCE  
SERVICES, INC.'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT**

**I. Plaintiff's Framed Issue for Summary Judgment is Procedurally Improper**

Defendants ATX Premier Insurance Company ("ATX") and Nationsbuilders Insurance Services Inc. ("NBIS") submit this opposition to Kelly Hayes' ("Hayes") Motion for Summary Judgment in conjunction with their affirmative motions for Summary Judgment. Plaintiff's motion fails to demonstrate any grounds for Summary Judgment or any claim to which she is entitled to Partial Summary Judgment (FRCP 56(a)) and for that reason the motion should be denied.

The Notice of Motion states that Hayes "files this motion for summary judgment and as a matter of law that defendants failed to inform insured Cesar Gutierrez of the offers to settle within policy limits." This is not a legal issue, and it is not an application of law to fact. It does not establish a cause of action or eliminate any affirmative defense. It is simply a fact, which might be a part of a bad faith cause of action if the balance of the elements are proven, namely: (1) that there was a duty to provide notice in light of the fact that the offers to settle did not involve Gutierrez, (2) that the failure to give notice prevented Gutierrez from taking action to protect himself, or (3) that the failure led to an excess verdict. Plaintiff simply ignores the rest of the cause of action.

Partial summary judgment is inappropriate where the issue "is merely a matter of proof in the general step toward damages. It is not an end within itself." *Sparks v. England* (W.D.Mo. 1941) 1 F.R.D. 688, 688. There, the court found that a plaintiff was not entitled to have a claim of ownership of a burial plot summarily adjudicated, where the issue was merely an element of a trespass claim. Also, under the "Rules of Civil Procedure either party may move for a summary judgment in his favor as to "all or any part thereof." However, such a judgment should be granted only when the judgment is to the whole of any one of the several claims joined in the action. (*Triangle Ink & Color Co. v. Sherwin-Williams Co.*, 64 F.R.D. 536, 537 (N.D.Ill. 1974))

Here, adjudicating whether notice to Gutierrez was given is procedurally improper and the motion should be denied.

**II. Relevant Factual Background**

As set forth in Defendant ATX Premier Insurance Company ("ATX") and Nationsbuilders Insurance Services, Inc. ("NBIS") (collectively, "Defendants"), this case is postured as "bad faith" but

1 is in reality a failed “set up” to try and collect more than the contractually-agreed policy limit of the  
2 ATX policy.

3 Following the accident and notice to DMA, NBIS and ATX’ third party claim administrator,  
4 the wrongful death claim by Melissa Moses, Regalado’s widow, and the claim for property damage to  
5 his bicycle were resolved, and releases taken. Traci Miller, the Named Insured on the ATX policy  
6 was advised that there could be exposure in excess of the policy limits and that a lawyer would be  
7 hired for her if a suit was filed. (See Declaration of John H. Podesta in Support of Opposition to  
8 Plaintiff’s MSJ; Ex. 1).

9 Defendants do not dispute the delivery or the content of the three conditional settlement  
10 demands. Defendants dispute, however, that there was any legal obligation to send these to Gutierrez,  
11 since (1) the settlement demands never contained any condition that required input or consent from  
12 Gutierrez – only Traci Miller; and (2) the letters never demanded money in excess of the policy limits  
13 of the ATX policy. Therefore, not only is this motion procedurally improper and seeks inappropriate  
14 relief, but should be denied on its merits because there was no obligation to notify Gutierrez. (Ex. 2).

15 Furthermore, there are no damages to Gutierrez; when the case proceeded to litigation and a  
16 defense was being provided by ATX, Mr. Mitten proposed a settlement directly with Gutierrez that  
17 included an assignment of all his rights under the ATX policy to plaintiffs, and an agreement that a  
18 future judgment could be entered against him in the amount of \$2,500,000. In exchange for those two  
19 promises, Kelly Hayes would agree never to seek to recover against Gutierrez for the agreed judgment  
20 to be entered sometime in the future. Gutierrez signed the documents. (Exhibit 3.) Months after  
21 Gutierrez was fully protected, Plaintiff moved to enter a judgment. The motion was obviously not  
22 opposed since Gutierrez’ rights to coverage and a defense belonged to Mr. Mitten’s client by virtue of  
23 the assignment, and therefore he had no right or incentive to oppose the motion. (Exhibit 4)

### 24 **III. Allstate v Miller Confirms This Motion Should be Denied**

25 Plaintiff has placed great emphasis on *Allstate Ins. Co. v. Miller* (2009) 125 Nev. 300 [212  
26 P.3d 318] and its impact on Defendants’ liability in this case. (Ex. 5). *Miller* is important to Nevada  
27 jurisprudence relating to insurer bad faith; there are two important holdings. First, conditions placed  
28

1 on settlement demands, in order to be bad faith to reject it, must arise out of contractual obligations in  
2 the policy. Demands unrelated to the contract obligations are not 'bad faith' to reject. *Id.* at 317-320.  
3 Second, it holds that a failure to notify an insured of a settlement demand "may" be bad faith if the  
4 failure "caused" the settlement not to be consummated *and* damages to the insured result therefrom.  
5 *Id.* at 313-315.

### 6 **1. Background of Miller.**

7 As with this case, *Miller* involved an auto accident, and there was a low limits \$25,000 policy  
8 covering the insured; the loss exceeded the policy limit. Allstate offered the policy limits in settlement  
9 immediately. Allstate notified the insured of the potential excess exposure, just as AutoTex did here.  
10 The plaintiff switched attorneys, however, and the original one placed a lien on the file. Allstate  
11 offered to issue a policy-limits check with both the current and the original attorney's names on it.  
12 That offer was rejected, and current counsel suggested that Allstate interplead the policy limits to let  
13 the court determine the original counsel's proper fee. Allstate originally refused, and then agreed to  
14 file the interpleader after the settlement demand had expired. While this settlement offer was pending,  
15 however, Allstate did not advise the insured of the settlement demand that included the interpleader,  
16 and there was evidence that the insured might have contributed to the settlement or paid for the  
17 interpleader to effect the settlement.

18 Significantly, after the settlement fell through, the plaintiff's action against the insured then  
19 proceeded to trial and judgment in the amount of \$703,619.88. Prior to trial, the plaintiff offered to  
20 stipulate to a judgment if Allstate agreed, and in exchange he would cap the insured's liability;  
21 however, the stipulation was for an amount in excess of the Allstate policy limits. After trial, Miller,  
22 the insured, filed the action against Allstate, who requested special interrogatories regarding three  
23 different theories of bad faith presented by plaintiff: (1) Allstate's failure to file an interpleader  
24 complaint; (2) its failure to inform Miller of Hopkins' interpleader offer; and (3) its refusal to agree to  
25 Hopkins' excessive stipulated judgment thereby forcing the case to trial against the insured. The judge  
26 refused the special interrogatories and the jury rendered a general verdict against Allstate. Allstate  
27 appealed.  
28

1 The Supreme Court rejected the first and third theories of bad faith, since nothing in the policy  
2 required Allstate to take care of liens, and the policy limit was the extent of Allstate's contractual  
3 obligation. *Id.* at 317-20. Since Allstate had no contractual duty to perform either, there was no "bad  
4 faith" for not doing so, and the failure was therefore not an unreasonable denial. The Court felt that  
5 the "duty to notify" of the interpleader was a viable theory of bad faith, but a new trial was required  
6 because court couldn't determine which of the three theories of bad faith that the jury found credible.  
7 *Id.* at 318-23.

8 **2. Notifying Gutierrez was an idle act because he was not in a position to participate,**  
9 **the failure to notify did not result in damages to the Insured, and no condition was**  
10 **directed at Gutierrez.**

11 With regard to the second theory, the failure to inform, the Nevada Supreme Court stated:  
12 "Allstate breached its duty to inform when it failed to inform Miller of the offer. *Miller could have*  
13 *chosen at that time to hire independent counsel* to review the offer and pursue any available options,  
14 such as initiating an interpleader complaint at his expense or contributing additional funds to Allstate's  
15 \$25,000 settlement offer in return for a release from Hopkins. The failure to inform must be in the  
16 context of the insured arguably being able to do something, and to be liable there must be proof that  
17 the failure to inform (not other actions) caused any damage, i.e. the trial and judgment. *Id.* at 305.

18 This factual background shows why *Miller* doesn't apply here. First, there was no condition  
19 on settlement that was directed at Gutierrez, unlike the interpleader in *Miller*. The conditions were  
20 relative to Miller's assets, not Gutierrez. There was nothing that Gutierrez could have done to comply  
21 with the conditions of settlement. Therefore, notifying him would be an idle act, at least in terms of  
22 his ability to conclude the settlement. Further, as confirmed by Plaintiff's counsel at Gutierrez'  
23 deposition, Gutierrez was in jail. He had no assets. The underlying case did not proceed to trial and  
24 judgment, unlike in *Miller*, because Gutierrez might have been able to effect a settlement had notice  
25 been given. Therefore, there is no evidence that failing to notify caused the judgment or any damage  
26 to Gutierrez whatsoever. In fact, a cynic might observe that the failure to notify Gutierrez allowed  
27 him to enter a deal where he could settle for no money and obtain complete exoneration from Hayes.  
28



1           **3. Pursuant to *Miller*, failing to obtain an affidavit of efforts to obtain assets from Miller,**  
2           **is not based on any contractual duty of ATX and therefore cannot be the basis for**  
3           **bad faith.**

4           Aside from whether Gutierrez should have been notified in a general sense, Defendants further  
5 maintain that there was no reasonable settlement demand that was rejected. In order to be liable the  
6 insurer must have *unreasonably* rejected the terms of a *reasonable* settlement demand. A reasonable  
7 settlement term, in turn, must be one that is contract based, or that is implied in the duty of good faith.  
8 *Id.* at 317-20. It is not enough, as plaintiff implies, that compliance with the condition does not take  
9 a great deal of effort. For example, the *Miller* Court stated that Allstate was not under a contractual  
10 obligation to resolve all lien claims, and thus the claim that it failed to interplead the limits had no  
11 merit and was not a rejection of a reasonable condition. *Id.* at 318. Similarly, there was no contractual  
12 basis that Allstate agree to a stipulated judgment in excess of the policy limits and thus the refusal to  
13 do so was not bad faith. Either of these were of minimal effort, but Allstate's refusal could not be the  
14 basis of a bad faith claim. However, because the court refused the request for special interrogatories,  
15 the record didn't disclose the theory on which the verdict rested. Two of the three theories relied on  
16 failures by Allstate to comply with demands that were not based on the contract, which would not  
17 support a theory of bad faith rejection of a reasonable settlement demand.

18           As the record in this case is clear, ATX agreed to pay the policy limits and to provide a certified  
19 declarations page to establish that. It attempted to have Traci Miller fill out an asset affidavit by  
20 sending it to her at the last known address. All contract-related conditions on settlement—those that  
21 relate to defense or indemnity of the insured and attempting communications with the insured—were  
22 complied with by ATX.

23           The two conditions in Mersch's demands that were not complied with are: (1) a demand that  
24 DMA's principal declare what its efforts were to locate Traci Miller's assets without providing any  
25 guidelines or a draft of what information is required; and (2) a revised release to be drafted by DMA  
26 to Julie Mersch's satisfaction. Mersch never provided acceptable language, but a revised release was  
27 never rejected if other conditions could be met. However, the insurer signing a declaration regarding  
28

1 ATX or DMA's efforts to obtain the insured's assets information has no basis in the insurance contract  
2 and therefore, pursuant to *Miller*, could not subject ATX or NBIS to liability for bad faith.  
3 *Id.* at 317-20.

#### 4 IV. Response to Specific Portions of Motion

5 The following passages are highlighted specifically to demonstrate the red herrings in  
6 plaintiff's case and motion.

7 **MSJ at 13-16.** Plaintiff argues that Summary Judgment was *granted* in plaintiff's favor in the  
8 amount of \$2.5million. Given Cesar Gutierrez' exposure to a potential future judgment, he argues,  
9 Gutierrez entered into an assignment of his bad faith rights. As stated above, this characterization of  
10 the facts is out of sequence, and therefore misleading. Gutierrez was "exposed" to an excess judgment  
11 the moment that he got into Traci Miller's car and drove dangerously. In fact, ATX was defending  
12 Gutierrez in the *Regalado* lawsuit, when he agreed to a settlement by Plaintiff counsel here. The  
13 settlement included an agreement that a \$2.5million judgment could be entered in the future. The  
14 judgment was entered ***after the settlement*** was finalized and Gutierrez was completely protected. This  
15 action is to collect the amount of the voluntary settlement.

16 **MSJ at 3:17-4:3.** NBIS is not an insurance company, and reference to its ownership of other  
17 companies is utterly irrelevant. NBIS objects to this section of the brief on the grounds of relevance,  
18 and lack of foundation. In the context of this case, NBIS retained financial responsibility for claims  
19 relating to policies that were issued prior to the sale of ATX in 2015. However, NBIS is not a party  
20 to the contract, and it does not adjust claims – the only relevant features to liability for breach of  
21 contract or bad faith. ATX is the insurer and has never claimed otherwise.

22 **MSJ at 4:4-4:18.** Plaintiff absurdly throws mud on the corporate counsel of NBIS  
23 Construction and Transport Insurance Services, Inc. ("CTIS"). The testimony was merely that counsel  
24 had drafted a letter, but that Rita Westfall of DMA reviewed and approved the letter and sent it over  
25 her signature. The remainder is mere distraction. Mr. Mitten, the architect of the assignment and  
26 covenant not to execute, claims that he was misled by that letter into suing the wrong entity, AutoTex  
27 MGA. This feigned "deception" is itself incredible. Before this action was commenced, Mr. Mitten  
28

1 had the entire ATX policy; the assignment by Gutierrez that he sues upon and which he drafted recites  
2 that Gutierrez was an insured under the policy issued by ATX Premier Insurance Company. Exhibit  
3 11 to Plaintiff's motion includes a copy of the check issued by CTIS that clearly states it is for the  
4 benefit of ATX Premier Insurance Company. Therefore, the Court should see through this mud-  
5 slinging and not allow the record before it to be tainted. There is no deception by the Defendants.

6 **MSJ at 5:13-5:15.** Plaintiff asserts that NBIS is "handling" the claim and that Art Kirkner  
7 was "handling" the claim. This is a transparent attempt to misstate the evidence to support their  
8 otherwise unsupportable claim that NBIS is a proper party in this case. It is completely beside the  
9 point of what the motion seeks. In fact, NBIS is akin to a reinsurer that has no direct involvement in  
10 this case. It is not a party to the insurance contract, and it has no direct responsibility for handling  
11 claims.

## 12 V. Conclusion

13 First, this is an improper Motion for Partial Summary Judgment, seeking judgment relative to  
14 a "fact" that is part of a cause of action.

15 Second, Plaintiff's entire theory of liability based on *Miller* is misplaced. The condition  
16 requiring an affidavit setting for the insured's assets was not "reasonable" and therefore there is no  
17 bad faith in failing to provide one. The provision of an affidavit from a "principal" concerning assets  
18 of the insured has nothing to do with the promise of defense or indemnity from the insurer. Moreover,  
19 Plaintiff has not and cannot show that there was any damage to Gutierrez from a failure to provide  
20 notice of settlement demands.

21 Finally, plaintiff's motion is replete with mischaracterizations concerning corporate status of  
22 NBIS that are attempts to paint the defense in a negative light and have *absolutely nothing* to do with  
23 even their request for a "judgment" concerning whether Gutierrez was notified or not, such surplusage  
24 should be disregarded.


25 ///

26 ///

27 ///

1 Date: November 6, 2019

2 WILSON ELSE MOSKOWITZ  
3 EDELMAN & DICKER, LLP

4 By:   
5 John Podesta (NV Bar No. 7487)  
6 Christopher Phipps (NV Bar No. 3788)  
7 Attorneys for Defendants  
8 ATX Premier Insurance Company and  
9 NationsBuilders Insurance Services  
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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on November 6, 2019, I served a true and correct copy of the foregoing:  
as follows:

**DEFENDANTS ATX PREMIER INSURANCE COMPANY NATIONSBUILDERS  
INSURANCE SERVICES, INC'S OBJECTIONS TO EVIDENCE OFFERED IN  
SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

- ☐: by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in San Francisco, California;
- ☒: via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐: via hand-delivery to the addressees listed below
- ☐: via facsimile;
- ☐: by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

By:

  
Marilee Barlow

**SERVICE LIST**

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***Kelly Hayes***

# EXHIBIT 9

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 NATIONSBUILDERS INSURANCE SERVICES,  
 INC.

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KELLY HAYES, as Natural Parent of Minor  
 I.R.,

Plaintiffs,

vs.

ATX PREMIER INSURANCE COMPANY;  
 NATIONSBUILDERS INSURANCE  
 SERVICES, INC. DMA CLAIMS  
 MANAGEMENT, INC.; DOES I through X,  
 inclusive; and ROE CORPORATIONS,

Defendants.

CASE NO. 2:18-cv-01938-GMN-NJK

**DEFENDANT NATIONSBUILDERS  
 INSURANCE SERVICES, INC.'s MOTION  
 FOR SUMMARY JUDGMENT OR  
 IN THE ALTERNATIVE MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

Action Filed: 05/06/19  
 Trial Date: None Set

**TO PLAINTIFF AND THEIR ATTORNEY OF RECORD:**

**PLEASE TAKE NOTICE** that Defendant NATIONSBUILDERS INSURANCE SERVICES,  
 INC. ("NBIS") will and hereby does move this court for an order granting Summary Judgment or, in  
 the Alternative Partial Summary Judgment in its favor of the following issues:




1           1.       That NBIS is not a party to the insurance contract between Defendant ATX Premier  
2 Insurance Company and Traci Miller, and therefore is not liable for breach of contract with respect to  
3 Plaintiff.

4           2.       That NBIS is not a party to the insurance contract between Defendant ATX Premier  
5 Insurance Company and Traci Miller, and took no part in the claims administration of the Regalado  
6 matter, therefore is not liable for insurance bad faith.

7           3.       That NBIS is not a party to the insurance contract between Defendant ATX Premier  
8 Insurance Company and Traci Miller, and is not a claims administrator or agent of ATX Premier, and  
9 therefore is not liable for breach of NRS 686A.310.

10  
11 Dated: November 7, 2019

WILSON ELSER MOSKOWITZ  
EDELMAN & DICKER LLP

12  
13  
14 By:   
15 JOHN H. PODESTA (NV Bar No. 7487)  
16 CHRISTOPHER PHIPPS (NV Bar No. 3788)  
17 525 Market Street, 7<sup>th</sup> Floor  
18 San Francisco, California 94105-2725  
19 (415) 625-9251  
20 *Attorneys for Defendants*  
21 *ATX PREMIER INSURANCE COMPANY*  
22 *NATIONSBUILDERS INSURANCE*  
23 *SERVICES, INC.*  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Introduction/Summary of Argument**

This action is ostensibly one to recover an insurance “bad faith” judgment brought by Kelly against the insurer for the party that allegedly caused the death of Mario Regalado, the father of Isabella Regalado. This motion is brought in conjunction with defendants’ separate motions for summary judgment, which detail the claim, the claim handling, and the settlement between Hayes and Gutierrez. For purposes of this motion, however, Defendant NationsBuilders Insurance Services, Inc. (“NBIS”) merely draws the Court’s attention to the facts underlying the sole legal issue to be decided in this motion, as summarized herein. Simply, NBIS is NOT an insurance company; it is NOT a party to the insurance contract; and it is NOT a claims administrator or claims agent for ATX Premier Insurance Company (“ATX”), the company that issued the policy in question. It therefore is not a proper party to this lawsuit.

On May 3, 2019, Plaintiff filed her Third Amended Complaint against defendants, including NBIS, based on the apparent belief that NBIS was a party to the policy issued by ATX Premier Insurance Company (“ATX”). TAC ¶ 4. ATX, at the time it issued the policy, was an insurance company incorporated under the laws of Texas but licensed to do business in Nevada. In fact, NBIS was the stockholder of ATX the time of the underlying loss. However, NBIS is not and has never been an insurance company. Rather, NBIS is a holding company that, as part of the sale of ATX, agreed to indemnify ATX for losses associated with the pre-sale policies, akin to a re-insurer to insurance companies.

As set forth in response to Request for Admission, Plaintiff is fully aware of the separate nature of these two entities, and that NBIS is not a party to the contract. Specifically, she has admitted: 1) NBIS is not a party to the ATX insurance policy at issue; 2) NBIS did not issue the ATX policy; 3) NBIS is not an admitted insurance company in Nevada; 4) NBIS is not a Surplus Lines Insurance Company in Nevada; and 5) NBIS is a separate company from ATX. Plaintiff’s claims herein are, charitably, based on the notion that counsel’s difficulty in determining the corporate relationship justifies holding NBIS in the litigation. However, the claims are not based on Nevada law.

///

## II. Undisputed Material Facts and Reference to Evidence

ATX is an insurance company that issued policy number ANV00000230 to Traci Miller, in effect on November 14, 2014, covering the 1992 Acura and containing an “each person” policy limit of \$15,000 policy limit. (see copy of ATX policy, Attached to the declaration of John H Podesta, herein after labeled “Ex.” (Ex. 1) NBIS is not a party to that insurance contract and the policy was not issued by NBIS. (Exs. 1, 8).

On May 3, 2019, Plaintiff filed her Third Amended Complaint, in which she alleges that “[a]s the *parent* company of ATX, [NBIS] is an insurer of the Miller ATX policy and as such, it was governed by NUPTA and it had contractual obligations to Gutierrez for this 11/15/14 claim; these obligations included the duty to defend; the duty to provide coverage; the covenant of good faith and fair dealing; and communication/disclosure duties as required by *Allstate v. Miller*.” TAC ¶ 3.

Plaintiff’s amended responses to NBIS’ Requests for Admission confirm that: 1) NBIS is not a party to the ATX insurance policy at issue; 2) NBIS did not issue the ATX policy; 3) NBIS is not an admitted insurance company in Nevada; 4) NBIS is not a Surplus Lines Insurance Company in Nevada; and 5) NBIS is a separate company from ATX. (Ex. 2) NBIS has no claims adjusters and conducts no oversight of claims handling operations. (Declaration of John Parker ¶¶ 5, 7). NBIS is holding company that did not participate in issuing the policy or handling the claims. While NBIS-affiliated companies engage in claim oversight activities—notably NBIS Construction and Transport Insurance Services (“CTIS”)—it is a completely separate company from NBIS.

Following Plaintiff’s admissions, counsel for NBIS twice requested that NBIS be dismissed from the lawsuit, as there was no longer any basis for maintaining claims for breach of contract and bad faith where NBIS was not even a party to the contract at issue. (Exs. 3, 4). Both times Plaintiff refused to dismiss NBIS, raising incoherent arguments unsupported by the facts or the law. (Exs. 2, 5).

In light of the foregoing undisputed facts, NBIS was forced to bring the instant motion.

## III. Standard of Law

Summary judgment is appropriate when the moving party demonstrates no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary judgment practice, the

1 moving party always bears the initial responsibility of informing the district court of the basis of its  
 2 motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and  
 3 admissions on file together with affidavits, if any,” which it believes demonstrate the absence of a  
 4 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[W]here the  
 5 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment  
 6 motion may properly be made in reliance solely on the pleadings, depositions, answers to  
 7 interrogatories, and admissions on file.” *Id.* at 324 (internal quotations omitted).

8 If the moving party meets its initial responsibility, the burden then shifts to the opposing party to  
 9 establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v.*  
 10 *Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S.  
 11 253, 288–89 (1968). In attempting to establish the existence of this factual dispute, the opposing party  
 12 may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the  
 13 form of affidavits, and/or admissible discovery material, in support of its contention that the dispute  
 14 exists. Fed. R. Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material,  
 15 i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby,*  
 16 *Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a  
 17 reasonable jury could return a verdict for the nonmoving party. *Id.* at 251–52.

#### 18 IV. Legal Argument

##### 19 a. NBIS Could Not Breach Insurance Contract to Which It Is Not A Party.

20 “Nevada law requires the plaintiff in a breach of contract action to show (1) the existence of a  
 21 valid contract [between the parties]; (2) a breach by the defendant; and (3) damage as a result of the  
 22 breach.” *Saini v. Int’l Game Tech.*, 434 F.Supp.2d 913, 919-20 (D. Nev. 2006). It follows that a party  
 23 against whom breach is alleged must actually be a party to the contract, such that a duty between  
 24 promisor and promisee is established. In other words, one cannot breach a contract to which they were  
 25 not a party. *See* Restatement (Second) of Contracts § 9 (1981).

26 Plaintiff admits that NBIS is not a party to the ATX Policy, that NBIS did not issue the ATX  
 27 Policy, and that NBIS is a separate company from ATX. (Ex. 2). A matter admitted to in response to a  
 28 written request is conclusively established unless the court, on motion, permits the admission to be

1 withdrawn or amended. Fed. R. Civ. P. 36(b). Plaintiff's breach of contract claim thus fails as a matter  
2 of law.

3 **b. NBIS Cannot Have Acted in Bad Faith Absent Insurer/Insured Relationship.**

4 Plaintiff's Second Claim for Relief as to NBIS similarly fails as a matter of law. A breach or  
5 failure to perform constitutes "bad faith" only where the relationship between the parties is that of  
6 insurer and insured. *See Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 793 (1993); *Allstate Ins.*  
7 *Co. v. Miller*, 125 Nev. 300 (2009); *Drennan v. Maryland Cas. Co.*, 366 F.Supp.2d 1002, 1005-06 (D.  
8 Nev. 2005). As already mentioned, Plaintiff has admitted to the fact that NBIS is neither a party to the  
9 insurance contract nor an insurance company, a fact thus conclusively established. (**Ex. 2**)

10 Therefore, it is impossible for NBIS to have acted in bad faith with respect to Plaintiff's  
11 supposed bad-faith insurance claim. For this reason NBIS is entitled to judgment as a matter of law.

12 **c. NBIS Cannot be Liable Under NRS 686A.310 as It Is Not an Insurer and Did Not**  
13 **Participate in Claims Handling**

14 NRS 686A.310, the Nevada Unfair Claims statute proscribes certain activities of "insurers". *See*  
15 *Sonoma Springs Ltd. P'ship v. Fidelity and Deposit Co. of Maryland*, 2019 WL 3848790 at \*7 (D.  
16 Nevada August 14, 2019) (holding that the statute applies more narrowly than the common law tort and  
17 is "limited in proscribing specific actions taken by an *insurer*." (quotations omitted); *see also Zurich*  
18 *American Ins. Co. v. Coeur Rochester, Inc.*, 720 F.Supp.2d 1223, 1236 (D. Nevada June 24, 2010)  
19 ("Unlike a cause of action for bad faith, the provisions of Nev.Rev.Stat. § 686A.310 address *the manner*  
20 *in which an insurer handles an insured's claim* whether or not the claim is denied.") (emphasis added).  
21 NBIS is not an insurer (as admitted by plaintiff) and it did not issue the policy at issue, Therefore is not  
22 subject to the duties of an insurer in this context or subject to the penalty provisions in NRS  
23 686A.310(2).

24 Additionally, and notwithstanding plaintiff's claims of a "parent" relationship, or involvement,  
25 neither NBIS nor any employee of NBIS participated in this claim in any respect. The only two  
26 identified persons, Art Kirkner and John Parker, who were not employees of the third party claims  
27 handler, DMA Claims, are employees of NBIS Construction and Transport Insurance Services, Inc., a  
28 completely separate corporation. NationsBuilders Insurance Services, has neither an obligation to adjust


1 the claim, the ability to engage in any of the prescribed acts, nor any direct involvement in this claim.  
2 (Decl. of John Parker ¶¶ 5-7).

3 **V. CONCLUSION**

4 Both Plaintiff's First and Second Claims for Relief against NBIS failure as a matter of law for  
5 the simple reason that NBIS is not the insurer to Plaintiff under the insurance policy at issue. NBIS is  
6 entitled to judgment on such basis. Therefore, NBIS' motion should be granted.

7 Date: November 7, 2019

WILSON ELSEER MOSKOWITZ,  
EDELMAN & DICKER, LLP

8  
9  
10 By:   
11 JOHN H. PODESTA (NV Bar No. 7487)  
12 CHRISTOPHER PHIPPS (NV Bar No. 3788)  
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14 San Francisco, California 94105-2725  
15 (415) 625-9251  
16 *Attorneys for Defendants*  
17 *ATX PREMIER INSURANCE COMPANY*  
18 *NATIONSBUILDERS INSURANCE SERVICES,*  
19 *INC.*  
20  
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28

**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on November 7, 2019, I served a true and correct copy of the foregoing:  
as follows:

**DEFENDANT NATIONSBUILDERS INSURANCE SERVICES, INC's MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR PARTIAL SUMMARY JUDGMENT**

- ☐: by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in San Francisco, California;
- ☒: via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐: via hand-delivery to the addressees listed below
- ☐: via facsimile;
- ☐: by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

By:

  
Marilee Barlow

2:18-cv-01938-GMN-NJK

CERTIFICATE OF SERVICE

**SERVICE LIST**

Lawrence Mittin  
Craig P. Kenny & Associates  
501 S. 8<sup>th</sup> Street  
Las Vegas NV 89101  
T: 702-380-2800  
F: 702-380-2833  
E: [lmittin@cpklaw.com](mailto:lmittin@cpklaw.com)  
*Attorney for Plaintiff*  
*Kelly Hayes*

2:18-cv-01938-GMN-NJK

CERTIFICATE OF SERVICE



# EXHIBIT 10

**NBIS CONSTRUCTION & TRANSPORT INSURANCE SERVICES INC.**

FBO ATX PREMIER INSURANCE COMPANY  
PO BOX 26004  
GLENDALE, CA 91222-6004  
(323) 342-1650

FROST BANK ADDISON  
15301 N. DALLAS PKWY #100  
ADDISON, TX 76001  
30-9/1140

VOID AFTER 90 DAYS  
THIS ACCOUNT IS  
PROTECTED BY POSITIVE PAY

3514

DATE  
10/26/2016

AMOUNT

PAY

TO THE  
ORDER  
OF

COPY

MEMO

SECURITY FEATURES INCLUDED, DETAILS ON BACK.

⑈003514⑈ ⑆114000093⑆ 608876517⑈

NBIS CONSTRUCTION &amp; TRANSPORT INSURANCE SERVICES INC.

3514

Claim #: DMA-0137991

Date of Loss: 11/15/2014

Received Date: 11/20/2014

NBIS CONSTRUCTION &amp; TRANSPORT INSURANCE SERVICES INC.

3514

Claim #: DMA-0137991

Date of Loss: 11/15/2014

Received Date: 11/20/2014

RECEIVED  
OCT 27 2016  
BY: \_\_\_\_\_

## MANDATORY FRAUD STATEMENT:

ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD OR DECEIVE ANY INSURANCE COMPANY OR ITS INSURED FILES AS STATEMENT OF CLAIM CONTAINING FALSE, INCOMPLETE OR MISLEADING INFORMATION IS GUILTY OF FELONY IN THE THIRD DEGREE.

WL65111PK1

NORTHLAKE BUSINESS FORMS 116-746-9102

PRINTED IN U.S.

RPI.APP.000311

# EXHIBIT 11

1 **ORDR**  
2 DENNIS M. PRINCE  
3 Nevada Bar No. 5092  
4 KEVIN T. STRONG  
5 Nevada Bar No. 12107  
6 **PRINCE LAW GROUP**  
7 10801 West Charleston Boulevard  
8 Suite 560  
9 Las Vegas, Nevada 89135  
10 Tel: (702) 534-7600  
11 Fax: (702) 534-7601  
12 Email: [eservice@thedplg.com](mailto:eservice@thedplg.com)  
13 Attorneys for Plaintiff  
14 *Diane Sanchez*

15 **EIGHTH JUDICIAL DISTRICT COURT**  
16 **CLARK COUNTY, NEVADA**

17 DIANE SANCHEZ,  
18  
19 Plaintiff,

CASE NO. A-15-722815-C  
DEPT. NO. XXV

20 vs.

21 BLAS BON, individually; JOSEPH  
22 ACOSTA, individually; WILFREDO  
23 ACOSTA, individually; DOES I-X and  
24 ROE CORPORATIONS I-X, inclusive,  
25  
26 Defendants.

**ORDER DENYING  
DEFENDANT BLAS BON'S  
MOTION TO SET ASIDE  
DEFAULT JUDGMENT**

27 Defendant BLAS BON's Motion to Set Aside Default Judgment was brought for  
28 hearing in Department XXV of the Eighth Judicial District Court, before the Honorable  
Kathleen Delaney, on the 25th day of February, 2020, with Dennis M. Prince and Kevin  
T. Strong of PRINCE LAW GROUP, appearing on behalf of Plaintiff DIANE SANCHEZ;  
and William P. Volk of HOLLEY DRIGGS, appearing on behalf of Defendant BLAS  
BON.<sup>1</sup> The Court having reviewed the pleadings and papers on file herein, having heard  
oral argument, and being duly advised in the premises:

...  
...

<sup>1</sup> At the time of the hearing, Mr. Volk was a partner at Kolesar & Leatham. Since that time, Kolesar & Leatham ceased operations and Mr. Volk is now a partner/shareholder with Holley Driggs.

1       **THE COURT HEREBY FINDS** that NRCP 60(b) outlines the specific legal  
2 grounds for a district court to grant a party relief from a final judgment. The legal  
3 grounds outlined in NRCP 60(b) include mistake, inadvertence, surprise, or excusable  
4 neglect and any other reason that justifies relief.

5       **THE COURT FURTHER FINDS** that a district court has broad discretion to  
6 determine whether a default judgment should be set aside. *Britz v. Consolidated*  
7 *Casinos Corp.*, 87 Nev. 441, 445 (1971).

8       **THE COURT FURTHER FINDS** that the district court has “wide discretion in  
9 determining what neglect is excusable and what neglect is inexcusable” under NRCP  
10 60(b). *Durango Fire Prot., Inc. v. Troncoso*, 120 Nev. 658, 662 (2004).

11       **THE COURT FURTHER FINDS** that Plaintiff properly served her Complaint  
12 on Defendant Blas Bon through the Nevada Department of Motor Vehicles pursuant to  
13 NRS 14.070. Plaintiff exercised due diligence to locate and personally serve Bon before  
14 effectuating service through the DMV. Specifically, Plaintiff attempted to serve Bon at  
15 3900 Cambridge Street, Suite 106, Las Vegas, Nevada 89119, the address that was listed  
16 on the traffic accident report. Plaintiff’s process server attempted to locate Bon through  
17 records searches with the Clark County Assessor’s Office and Clark County Voter  
18 Registration. Plaintiff’s process server also searched local phone records and performed  
19 a registered vehicle search with the Nevada Department of Motor Vehicles and Premium  
20 Finder. The efforts made to locate and serve Bon were reasonably diligent and justified  
21 service of Sanchez’s Complaint through the DMV.

22       Sanchez also fully complied with the requirements to effectuate service through  
23 the DMV set forth in NRS 14.070. Sanchez received a letter dated November 2, 2015  
24 from the DMV acknowledging service of the Summons and Complaint on Bon. On  
25 November 9, 2015, Sanchez mailed, via certified mail, return receipt requested, a copy  
26 of the Summons, Complaint, traffic accident, report, and the November 2, 2015 DMV  
27 letter to Bon’s best last known address: 3900 Cambridge Street, Suite 106, Las Vegas,  
28 Nevada 89119.

      This Court also determined Bon was properly served when it considered Sanchez’s  
Application for Default Judgment filed on March 29, 2019. Bon has also not supplied

1 this Court with an affidavit declaring that he never received any notice of Sanchez's  
2 Complaint or otherwise has no knowledge of the suit against him. Under these  
3 circumstances, Bon cannot now claim that he was surprised or that there is excusable  
4 neglect to justify relief from the July 19, 2019 default judgment entered against him  
5 pursuant to NRCP 60(b)(1).

6       **THE COURT FURTHER FINDS** that there is ample evidence that Bon's  
7 insurer, ATX, the entity tasked to defend Bon, received notice of Sanchez's Complaint.  
8 On January 20, 2016, Sanchez sent a letter, via U.S. mail, to DeLawrence Templeton  
9 ("Templeton") of DMA Claims Services, advising him that Bon was served with the  
10 Summons and Sanchez's Complaint via the DMV.<sup>2</sup> Sanchez provided Templeton with a  
11 copy of her Complaint, November 2, 2015 DMV letter, and November 19, 2015 Affidavit  
12 of Complaine and requested ATX to file an answer to her Complaint. Sanchez  
13 specifically warned Templeton that she would request the Court to enter a default against  
14 Bon if an answer was not filed. On February 16, 2016, Sanchez again sent a letter to  
15 Templeton advising that Bon still did not file his Answer to her Complaint. Sanchez  
16 clarified that if Bon did not file his Answer to her Complaint by February 23, 2016, she  
17 would request entry of a default against Bon. ATX never filed an answer to Sanchez's  
18 Complaint on Bon's behalf despite receiving a full and fair opportunity to do so. There  
19 is no evidence to suggest that ATX never received any notice of Sanchez's lawsuit.

20       **THE COURT FURTHER FINDS** that there is no factual or legal basis to set  
21 aside the July 19, 2019 Default Judgment due to surprise, excusable neglect, or for any  
22 other reason under NRCP 60(b). The evidence presented establishes inexcusable neglect  
23 on the part of both Bon and ATX given ATX's failure to satisfy its responsibility to defend  
24 Bon against the allegations set forth in Sanchez's Complaint.  
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<sup>2</sup> DMA represented the interests of ATX in relation to the motor vehicle collision giving rise to Sanchez's Complaint for personal injuries against Bon.



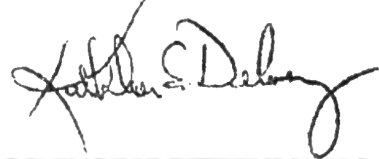
**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant Blas Bon's Motion to Set Aside Default Judgment is **DENIED** in its entirety.

**IT IS SO ORDERED.**

Dated this 19th day of September, 2020

DATED this \_\_\_\_ day of September, 2020.



DISTRICT COURT JUDGE

DD9 015 23D5 10E3

DATED this 9th day of September, 2020.

DATED this 19th day of September, 2020.

Kathleen E. Delaney

District Court Judge

Respectfully Submitted By:

Approved as to Form and Content:

**PRINCE LAW GROUP**

**HOLLEY DRIGGS**



Refused to sign

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Attorney for Defendant  
*Blas Bon*

1 **CSERV**

2  
3 **DISTRICT COURT**  
4 **CLARK COUNTY, NEVADA**

5  
6 Diane Sanchez, Plaintiff(s)

CASE NO: A-15-722815-C

7 vs.

DEPT. NO. Department 25

8 Blas Bon, Defendant(s)

9  
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 9/19/2020

15 William Volk

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18 Bernita Lujan .

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28 **RPI.APP.000317**



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William Volk	wvolk@nevadafirm.com

# EXHIBIT 12

---

A-15-722815-C      Diane Sanchez, Plaintiff(s)  
vs.  
Blas Bon, Defendant(s)

---

November 24, 2020      09:00 AM      Motion for Rehearing and to Alter or Amend the Judgment and  
Order Denying Rule 60(b) Relief

HEARD BY:      Delaney, Kathleen E.      COURTROOM: RJC Courtroom 15B

COURT CLERK: Boyle, Shelley

RECORDER:

REPORTER:      Tavaglione, Dana J.

**PARTIES PRESENT:**

Abraham G. Smith      Attorney for Cross Defendant, Defendant

Daniel F. Polsenberg      Attorney for Cross Defendant, Defendant

Dennis M Prince      Attorney for Plaintiff

William P Volk      Attorney for Cross Defendant, Defendant

**JOURNAL ENTRIES**

Counsel appeared telephonically.

Extensive arguments by counsel regarding Pltff's. attempts at service upon Deft. Bon, the contact information Mr. Bon provided following the accident, Mr. Bon's transient status, and Deft's. standing as a permissive user of the vehicle; he was not a policy holder. Additional arguments regarding the rules the Court should apply and Deft's. counsel's relationship as counsel for the insurance company.

COURT ADVISED, It is DECLINING to GRANT the Motion and STATED FINDINGS. We have assessed these efforts at different times and in different ways for different reasons questioning if there should have been a Default Judgment and if the Default Judgment should have been at the amount that it is at. Court does NOT see a sufficient basis here that due diligence was lacking. There was for the Court's prospective appropriate due diligence. COURT STATED FURTHER FINDINGS. COURT does NOT believe an Evidentiary Hearing is necessary, It does not really believe these factors into the dispute. Court does NOT FIND the judgment void, COURT FINDS that there was appropriate, diligent efforts to serve and that substitute service was appropriate based upon the totality of the circumstance here, notwithstanding the fact that there could have been additional efforts. ADDITIONAL FINDINGS STATED. Court does NOT think that there is any traction for any argument that the pleading of jurisdictional minimums now somehow now binds parties to the minimums for default. Mr. Prince is to prepare the Order, provide a copy to opposing counsel for review as form and content, and return it back to the Court within 10 days.

# EXHIBIT 13

## Kevin Strong

---

**From:** William P. Volk <wvolk@nevadafirm.com>  
**Sent:** Wednesday, April 29, 2020 5:08 PM  
**To:** Kevin Strong  
**Cc:** Dennis Prince; Angela Lee; Amy Ebinger; John H. Podesta, Esq. (john.podesta@wilsonelser.com); Suri Guzman  
**Subject:** RE: Sanchez v. Bon

Kevin:

I want to clarify that it was **NBIS Construction and Transport Insurance Services, Inc.** that retained my office. They are obviously a part of the NBIS family of companies. I should have been more precise about that point.

**William P. Volk**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

---

Tel: 702.791.0308 | Fax: 702.791.1912  
400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

Tel: 775.851.8700 | Fax: 775.851.7681  
800 S. Meadows Parkway, Suite 800, Reno NV 89521

[www.nevadafirm.com](http://www.nevadafirm.com)

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**From:** William P. Volk  
**Sent:** Wednesday, April 29, 2020 3:13 PM  
**To:** Kevin Strong <kstrong@thedplg.com>  
**Cc:** Dennis Prince <dprince@thedplg.com>; Angela Lee <aalee@thedplg.com>; Amy Ebinger <aebinger@thedplg.com>; John H. Podesta, Esq. (john.podesta@wilsonelser.com) <john.podesta@wilsonelser.com>; Suri Guzman <sguzman@nevadafirm.com>  
**Subject:** RE: Sanchez v. Bon

Kevin:

Gotcha. It is my understanding that NBIS (NationsBuilders Insurance Services, Inc.) retained Kolesar & Leatham and then my new office Holley Driggs to represent Mr. Bon. I have no information on the relationship between NBIS and Windhaven or ATX. That's as much as I know. I hope this answers your question.

**William P. Volk**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

# EXHIBIT 14

## Kevin Strong

---

**From:** Podesta, John <John.Podesta@wilsonelser.com>  
**Sent:** Wednesday, April 29, 2020 5:03 PM  
**To:** William P. Volk; Kevin Strong  
**Cc:** Dennis Prince  
**Subject:** RE: Sanchez v. Bon

And we see the reason that defense lawyers are kept in the dark about how things really work. Sorry, Bill. Mr. Volk's retention was by NBIS Construction and Transport Insurance Services, Inc., for the benefit of ATX Premier Insurance Co. who then utilized DMA Claims as the claims administrator.

ATX Premier was sold in 2015, and you have the filings on that because you asked about them. The buyer changed the name (only) to Windhaven National Insurance Company, who was then put into liquidation this year. My understanding is that claims against Windhaven National or its insureds must go through the liquidator. If there are any exceptions to this rule, I'm not aware of them but I'm not foreclosing a dialogue since I'm not an expert in this area.

John Podesta  
Attorney at Law  
Wilson Elser Moskowitz Edelman & Dicker LLP  
525 Market Street - 17th Floor  
San Francisco, CA 94105-2725  
415.625.9258 (Direct)  
415.433.0990 (Main)  
415.434.1370 (Fax)  
[john.podesta@wilsonelser.com](mailto:john.podesta@wilsonelser.com)

**From:** William P. Volk [mailto:wvolk@nevadafirm.com]  
**Sent:** Wednesday, April 29, 2020 3:13 PM  
**To:** Kevin Strong <kstrong@thedplg.com>  
**Cc:** Dennis Prince <dprince@thedplg.com>; Angela Lee <alee@thedplg.com>; Amy Ebinger <aebinger@thedplg.com>; Podesta, John <John.Podesta@wilsonelser.com>; Suri Guzman <sguzman@nevadafirm.com>  
**Subject:** RE: Sanchez v. Bon

### [EXTERNAL EMAIL]

Kevin:

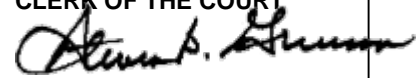
Gotcha. It is my understanding that NBIS (NationsBuilders Insurance Services, Inc.) retained Kolesar & Leatham and then my new office Holley Driggs to represent Mr. Bon. I have no information on the relationship between NBIS and Windhaven or ATX. That's as much as I know. I hope this answers your question.

**William P. Volk**  
Shareholder  
Las Vegas Office

**HOLLEY DRIGGS**

# EXHIBIT 15





Electronically Filed  
Oct 23 2020 10:28 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**NOAS**  
WILLIAM P. VOLK (SBN 6157)  
wvolk@nevadafirm.com  
**HOLLEY DRIGGS**  
400 S. Fourth Street, Suite 300  
Las Vegas, NV 89101  
Tel: (702) 791-0308  
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Daniel F. Polsenberg (SBN 2376)  
dpolsenberg@lrrc.com  
Abraham G. Smith (SBN 13250)  
Asmith@lrrc.com  
**LEWIS ROCA ROTHGERBER CHRISTIE LLP**  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169-8996  
Tel: (702) 949-8200

*Attorneys for Defendant BLAS BON*

DISTRICT COURT

CLARK COUNTY, NEVADA

DIANE SANCHEZ,

Plaintiff,

vs.

BLAS BON, individually; JOSEPH ACOSTA,  
individually; DOES I - X, and ROE  
CORPORATIONS I - X, inclusive,

Defendants.

JOSEPH ACOSTA, individually; and  
WILFREDO ACOSTA, individually,

Cross-Claimants,

vs.

BLAS BON, individually,

Cross-Defendant.

Case No. A-15-722815-C

Dept. No. 25

**NOTICE OF APPEAL**

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Please take notice that defaulted defendant Blas Bon hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;
  2. “Order Denying Defendant Blas Bon’s Motion to Set Aside Default Judgment,” filed September 19, 2020, notice of entry of which was served electronically on September 21, 2020 (**Exhibit “A”**); and
  3. All judgments, rulings and interlocutory orders made appealable by the foregoing.
- Dated this 20th day of October, 2020.

HOLLEY DRIGGS

By: /s/ William P. Volk  
 400 S. Fourth Street, Suite 300  
 Las Vegas, NV 89101  
 Tel: (702) 791-0308

DANIEL F. POLSENBERG (SBN 2376)  
 ABRAHAM G. SMITH (SBN 13,250)  
 LEWIS ROCA ROTHGERBER CHRISTIE LLP  
 993 Howard Hughes Parkway, Suite 600  
 Las Vegas, Nevada 89169  
 (702) 949-8200

*Attorneys for Defendant BLAS BON*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of October, 2020 service of the above and foregoing “Notice of Appeal” was made upon each of the parties via electronic service through the Eighth Judicial District Court’s Odyssey E-file and Serve system.

/s/ Suri Guzman  
An Employee of HOLLEY DRIGGS

# EXHIBIT 16

1 **DECLARATION OF KEVIN T. STRONG IN SUPPORT OF PLAINTIFF DIANE**  
2 **SANCHEZ'S OPPOSITION TO DEFENDANTS NATIONSBUILDERS**  
3 **INSURANCE SERVICES, INC. AND NBIS CONSTRUCTION & TRANSPORT**  
4 **INSURANCE SERVICES, INC.'S MOTION TO DISMISS SECOND AMENDED**  
5 **COMPLAINT, OR IN THE ALTERNATIVE, MOTION TO STAY**  
6 **PROCEEDINGS**

7  
8 STATE OF NEVADA     )  
9                                     ) ss.:  
10 COUNTY OF CLARK    )

11  
12 I, Kevin T. Strong, declare under penalty of perjury under the laws of the State of  
13 Nevada:

14         1.     I am an attorney duly licensed to practice law in the State of Nevada and  
15 an associate attorney at PRINCE LAW GROUP, counsel for Plaintiff Diane Sanchez  
16 ("Sanchez") in this matter.

17         2.     This Declaration is made in support of Plaintiff Diane Sanchez's Opposition  
18 to Defendants NationsBuilders Insurance Services, Inc. ("NBIS") and NBIS  
19 Construction & Transport Insurance Services, Inc.'s ("CTIS") Motion to Dismiss Second  
20 Amended Complaint, or in the Alternative, Motion to Stay Proceedings.

21         3.     This is a breach of contract, insurance bad faith, and judgment enforcement  
22 action arising from a default judgment entered against Defendant Blas Bon on July 19,  
23 2019. The default judgment was entered against Bon in the matter styled as *Sanchez*  
24 *v. Bon*, Case No. A-15-722815-C ("the personal injury action").

25         4.     On January 17, 2020, "Bon" filed his Motion to Set Aside Default  
26 Judgment. On April 29, 2020, I learned from attorney William Volk that CTIS hired  
27 him to file that motion. See **Exhibit "13."**

28         5.     Upon information and belief, after the district court's denial of the motion  
to set aside the default judgment, NBIS and/or CTIS hired appellate counsel to file a  
motion for rehearing and to alter or amend the judgment and order denying Rule 60(b)  
relief and a notice of appeal on "Bon's behalf." The motion for rehearing was filed on  
October 19, 2020. The notice of appeal was filed on October 20, 2020. See **Exhibit "15."**

...



1           6. Pursuant to NRAP 16, Attorney Dennis M. Prince and I attended a  
2 settlement conference in the personal injury action on behalf of Plaintiff Diane Sanchez  
3 on June 14, 2021. Representaives on behalf of NBIS and/or CTIS were also in  
4 attendance at the NRAP 16 settlement conference.

5           7. During the NRAP 16 settlement conference, representatives from NBIS  
6 and/or CTIS offered monies on behalf of "Bon" that substantially exceeded the minimum  
7 \$15,000.00 policy limits available under the relevant ATX insurance policy that covered  
8 Bon at the time of the subject April 28, 2015 motor vehicle collision.

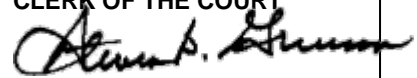
9           8. No representative from Windhaven National Insurance Company attended  
10 the NRAP 16 settlement conference. No representative on behalf of the Texas  
11 Liquidator overseeing the liquidation proceedings against Windhaven National  
12 Insurance Company attended the NRAP 16 settlement conference. The Nevada  
13 Insurance Guaranty Association representative who was in attendance did not extend  
any settlement offers at the NRAP 16 settlement conference.

14           9. In the event I am called as a witness, I will testify to all facts set forth in  
15 this Declaration based on my personal knowledge, information, and belief.

16           DATED this 5<sup>th</sup> day of August, 2021.

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KEVIN T. STRONG

5



1 **OPPM**  
2 DENNIS M. PRINCE  
3 Nevada Bar No. 5092  
4 KEVIN T. STRONG  
5 Nevada Bar No. 12107  
6 **PRINCE LAW GROUP**  
7 10801 West Charleston Boulevard  
8 Suite 560  
9 Las Vegas, NV 89135  
10 Tel: (702) 534-7600  
11 Fax: (702) 534-7601  
12 Email: [eservice@thedplg.com](mailto:eservice@thedplg.com)  
13 Attorneys for Plaintiff  
14 *Diane Sanchez*

15 **EIGHTH JUDICIAL DISTRICT COURT**  
16 **CLARK COUNTY, NEVADA**

17 DIANE SANCHEZ,

18 Plaintiff,

19 vs.

20 ATX PREMIER INSURANCE COMPANY  
21 now known as WINDHAVEN NATIONAL  
22 INSURANCE COMPANY, a foreign  
23 corporation; NATIONSBUILDERS  
24 INSURANCE SERVICES, INC., a foreign  
25 corporation; NBIS CONSTRUCTION &  
26 TRANSPORT INSURANCE SERVICES,  
27 INC., a foreign corporation; DMA CLAIMS  
28 MANAGEMENT, INC., a foreign  
corporation; BLAS BON, an individual;  
DOES I-X; and ROE CORPORATIONS I-  
X, inclusive,

Defendants.

Case No. A-19-805351-C  
Dept. No. XIII

**PLAINTIFF DIANE SANCHEZ'S  
OPPOSITION TO NON-DEFENDANT  
WINDHAVEN NATIONAL  
INSURANCE COMPANY'S MOTION  
TO STAY PENDING: LIFTING OF  
THE TEXAS INJUNCTION**

Hearing Date: September 20, 2021  
Hearing Time: 9:00 a.m.

Plaintiff DIANE SANCHEZ, by and through her counsel of record, Dennis M.  
Prince and Kevin T. Strong of PRINCE LAW GROUP, hereby submits her *Opposition to  
Non-Defendant Windhaven National Insurance Company's Motion to Stay Pending:  
Lifting of the Texas Injunction.*

...





1 This Opposition is based on the pleadings and papers on file in this action, the  
2 Memorandum of Points and Authorities set forth herein, the exhibits attached hereto,  
3 and any argument this Court wishes to entertain at the hearing of this matter.

4 DATED this 3rd day of September, 2021.

5 **PRINCE LAW GROUP**

6  
7  
8  
9 /s/ Kevin T. Strong  
10 DENNIS M. PRINCE  
11 Nevada Bar No. 5092  
12 KEVIN T. STRONG  
13 Nevada Bar No. 12107  
14 10801 West Charleston Boulevard  
15 Suite 560  
16 Las Vegas, Nevada 89135  
17 Tel: (702) 534-7600  
18 Fax: (702) 534-7601  
19 Attorneys for Plaintiff  
20 *Diane Sanchez*  
21  
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# MEMORANDUM OF POINTS AND AUTHORITIES

## I.

### INTRODUCTION

In an act of desperate defiance, Non-Defendant Windhaven National Insurance Company (“Windhaven”) misleads this Court regarding its alleged involvement in this proceeding and, in turn, the applicability of the Texas State Court’s Order Appointing Liquidator, Permanent Injunction and Notice of Automatic Stay (“Liquidation Order”). While Windhaven acquired Defendant ATX Premier Insurance Company (“ATX”) in March of 2016, the acquisition did **not** include the assumption of financial responsibility and control over ATX liability insurance policies that were underwritten, pre-sale. Instead, Defendant NationsBuilders Insurance Services, Inc. (“NBIS”), the former parent company of ATX, retained financial responsibility for **all** claims arising from ATX policies issued **before** Windhaven purchased ATX. Defendant NBIS Construction & Transport Insurance Services, Inc. (“CTIS”), an entity related to NBIS, performed claims management, claims handling, and claims oversight services for claims arising from ATX policies underwritten before the sale to Windhaven. Windhaven’s counsel, John H. Podesta (“Podesta”) uniquely understands this because he was hired by NBIS/CTIS and made these precise representations in a separate matter litigated in federal court entitled *Hayes v. ATX Premier Insurance Co.*, Case No. 2:18-cv-01938-GMN-NJK. Yet, Podesta continues to perpetuate this charade that Windhaven’s financial interests are implicated in this matter necessitating a stay under the Liquidation Order. Podesta should be made to address his obvious contradictory positions that have unfairly thwarted Plaintiff Diane Sanchez (“Sanchez”) from conducting all discovery necessary to prosecute this action.

It is unsurprising that, once again, Windhaven does not provide this Court with any documentation to prove that, as part of its purchase of ATX, it also assumed ATX’s liabilities. The limited documentation Sanchez has secured proves that CTIS retained management and control over all claims arising from ATX policies that were issued pre-sale. *See* Claims Administration Agreement between CTIS and Defendant DMA Claims Management, Inc. (“DMA”), attached as **Exhibit “1.”** In fact, the Claims

1 Administration Agreement confirms that claims files are returned back to CTIS if a  
2 Summons and Complaint is filed. *Id.* at p. 5. This includes the claims file related to  
3 Sanchez's bodily injury claim arising from the ATX policy that covered Defendant Blas  
4 Bon ("Bon") at the time of the underlying April 28, 2015 motor vehicle collision. As such,  
5 the relevant claims file is not and has never been the property of Windhaven. If the  
6 converse was true, Windhaven would have produced documents to establish the same.  
7 This further demonstrates that Windhaven's stay request based on the Liquidation  
8 Order lacks any reliable factual or legal justification.

9 Moreover, if Windhaven's financial interests were implicated by this action, the  
10 Nevada Insurance Guaranty Association ("NIGA") would have acted to preserve  
11 Windhaven's interests. *See Nev. Rev. Stat 687A.060.* To date, NIGA has not  
12 participated in this action whatsoever, which speaks to the fact that Windhaven bears  
13 no financial responsibility for Sanchez's alleged damages in this action. ATX remains a  
14 necessary party to this action because it is the underwriter of the applicable insurance  
15 policy for which NBIS and CTIS retained financial responsibility and control over, not  
16 Windhaven. If ATX was not a party to this action, NBIS and CTIS would, once again,  
17 move to dismiss Sanchez's Complaint pursuant to NRCP 19 based on the absence of a  
18 necessary party. Simply put, the distinction between ATX and Windhaven is based on  
19 ATX's former parent company, NBIS's retention of financial responsibility for claims  
20 arising from ATX pre-sale policies, including Sanchez's claim. There is no basis to  
21 impose a stay in this action based on the Liquidation Order.

22 Alternatively, if this Court is unable to deny Windhaven's stay request, a decision  
23 on the motion should be held in abeyance for Sanchez to conduct the requisite discovery  
24 to verify that ATX and Windhaven are **not** the same entity as it relates to pre-sale  
25 insurance policies. Similarly, Sanchez should also be permitted to conduct discovery as  
26 to whether Windhaven agreed, as part of its purchase of ATX, assumed financial or  
27 contractual obligations stemming from the ATX insurance policy that covered Bon.  
28 While Sanchez believes the briefs filed in the *Hayes* action and the Claims  
Administration Agreement between CTIS and DMA establish Windhaven bears no  
financial responsibility for Sanchez's damages, she deserves an opportunity to gather

1 additional documents to prevent a stay of this otherwise valid enforcement action. If  
2 not, ATX and NBIS will receive the benefit of a stay based on a Liquidation Order that,  
3 by its plain terms, does not control when Sanchez may litigate her claims.

## 4 II.

### 5 STATEMENT OF FACTS

6 Windhaven feebly tries to simplify the relevant facts by stating that simply  
7 because ATX changed its name to Windhaven after the sale, Windhaven and ATX are  
8 the same entity. Rest assured, Windhaven and ATX are **not** the same company when it  
9 comes to this action because, as detailed below, Windhaven did not assume the  
10 contractual or indemnity obligations arising from pre-sale ATX insurance policies. This  
11 explains why Windhaven and, more specifically, Podesta, have never been forthright  
12 with Sanchez or this Court regarding these facts.

#### 13 A. Bon Negligently Caused a Motor Vehicle Collision, Sanchez Sustained 14 Severe Bodily Injuries, and Sanchez Made a Bodily Injury Claim to ATX 15 and DMA

16 On April 28, 2015, a motor vehicle collision involving four cars occurred on  
17 Interstate-15 in Las Vegas, Nevada. See Default Judgment, *Sanchez v. Bon*, Case No.  
18 A-15-722815-C, at 1:23-15; p. 2, ¶ 1, attached as **Exhibit “2.”** Bon drove a 1997 Dodge  
19 Ram 2500 pickup truck directly behind Sanchez that carried two wheelbarrows in the  
20 truck bed. *Id.* at p. 2, ¶ 1. Bon negligently collided with the left side of Sanchez’s rear  
21 bumper. *Id.*; see also, Sanchez’s Second Amended Complaint (“SAC”), at p. 2, ¶ 14.<sup>1</sup> As  
22 a result of the subject collision, Sanchez suffered catastrophic injuries to her cervical  
23 spine and lumbar spine. See **Exhibit “2,”** at p. 2, ¶ 2. These extensive injuries required  
24 substantial medical treatment, including anterior artificial disc replacement surgery at  
25 the L4-5 level of Sanchez’s lumbar spine. *Id.*

26 Before Sanchez filed her personal injury lawsuit, she made a bodily injury claim  
27 with Bon’s insurer, ATX. See SAC, at pp. 9-10, ¶ 40. At the time of the subject collision,  
28

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<sup>1</sup> A third vehicle driven by non-party Joseph Acosta also struck the rear bumper of Sanchez’s vehicle. See **Exhibit “2,”** at 1:24-27. Sanchez sued Joseph Acosta and later, Wilfredo Acosta, who was the owner of Joseph Acosta’s vehicle. *Id.* Sanchez resolved her claims against the Acosta Defendants. *Id.*

1 ATX issued a personal automobile liability insurance policy to non-party Hipolito Cruz  
2 (“Cruz”) that covered the Dodge pickup truck driven by Bon. *Id.* at pp. 4-5, ¶ 19. The  
3 ATX policy was in full force and effect at the time of the subject collision because the  
4 term of the policy ran from December 16, 2014 through June 16, 2015. *Id.* at p. 4, ¶ 18;  
5 *see also*, ATX policy term and coverage, attached as **Exhibit “3.”** The applicable liability  
6 insurance coverage limits under the ATX policy were \$15,000.00 per person and  
7 \$30,000.00 per occurrence. *Id.* Bon was insured under the ATX policy when the collision  
8 occurred because he was a permissive driver of Cruz’s pickup truck. *See* SAC, at pp. 4-  
9 5, ¶ 19. This fact has never been disputed, nor can it be now because Bon’s liability for  
10 the collision is conclusively established by the default judgment. On May 21, 2015,  
11 Sanchez, through her counsel, reported her claim to ATX, via letter. *Id.* at pp. 9-10, ¶  
12 40. Sanchez included her medical records and bills for all treatment she underwent at  
13 that time. *Id.* A claim number of DMA-0147074 was already assigned to Sanchez’s  
claim when she sent the May 21, 2015 letter. *Id.*

14 **B. ATX and/or DMA, and/or NBIS, and/or CTIS’s Breach of Contract and**  
15 **Breach of the Implied Covenant of Good Faith and Fair Dealing Caused**  
**Entry of a Default Judgment**

16 On June 16, 2015, Sanchez made a two-week time limit demand for Bon’s policy  
17 limits to DMA and ATX. *See* SAC, at p. 10, ¶ 41; *see also*, 6/16/15 policy limits demand,  
18 attached as **Exhibit “4.”** At the time of the demand, Sanchez’s past medical expenses  
19 for her treatment were approximately \$8,000.00, which was already very close to the  
20 \$15,000.00 minimum policy limit. *See* **Exhibit “4.”** By that time, Sanchez was also  
21 recommended to undergo a cervical fusion surgery in the future. *Id.* Sanchez included  
22 a copy of the traffic accident report and her medical records and bills, including the  
23 record outlining her future surgical recommendations, with her demand letter. *Id.*  
24 Neither ATX, nor DMA, advised Sanchez that additional time was needed to respond to  
her policy limits demand before the June 30, 2015 deadline expired.

25 On July 10, 2015, 10 days after the demand period expired, DMA sent Sanchez a  
26 letter acknowledging it represented the interests of ATX regarding the subject collision.  
27 *See* SAC, at p. 10, ¶ 43. It was not until that time that DMA requested additional time  
28

1 to complete its investigation of Sanchez's bodily injury claim because it allegedly needed  
2 to gather additional information to determine liability. *Id.* On July 17, 2015, one week  
3 after its initial letter, DMA advised Sanchez that her bodily injury claim was denied  
4 because its insured, Bon, was not the proximate cause of the crash and therefore, was  
5 not legally liable for Sanchez's damages. *Id.* at p. 10, ¶ 44. This was a completely  
6 baseless reason to outright reject Sanchez's policy limits demand. After that date,  
7 Sanchez received no further oral or written communication from ATX, DMA, NBIS, or  
8 CTIS. *Id.* at p. 11, ¶ 45.

9 On August 7, 2015, Sanchez filed her complaint for personal injuries against Bon.  
10 *Id.* at p. 11, ¶ 46. Pursuant to the governing Claims Administration Agreement, filing  
11 the summons and complaint triggered DMA to send Sanchez's claim back to CTIS, an  
12 affiliated company of NBIS. See "Exhibit 1," at p. 5. On January 20, 2016, Sanchez  
13 mailed a letter to ATX and DMA advising Bon was served with the summons and  
14 personal injury complaint via the Nevada Department of Motor Vehicles. See SAC, at  
15 p. 11, ¶ 50. Sanchez enclosed copies of the summons and personal injury complaint with  
16 this letter. *Id.* DMA and ATX failed to respond to the letter and took no action to tender  
17 a defense on behalf of Bon in the personal injury action. *Id.* at p. 11, ¶ 51. On February  
18 16, 2016, Sanchez sent yet another letter to ATX and DMA advising Bon still had not  
19 yet filed an answer to the personal injury complaint. *Id.* at p. 12, ¶ 52. Sanchez further  
20 advised ATX and DMA if Bon did not file an answer to the personal injury complaint,  
21 she would request the district court to enter a default against Bon. *Id.* Once again,  
22 DMA and ATX failed to respond to this letter or otherwise make an appearance on behalf  
23 of Bon to defend him against Sanchez's personal injury complaint. *Id.* at p. 12, ¶¶ 53-  
24 54. The district court did not even enter a default against Bon until April 1, 2016, which  
25 means DMA and ATX had over a month and a half from the February 16, 2016 letter to  
26 provide a defense for Bon and still failed to take that necessary action. *Id.* at p. 12, ¶  
27 55. Sanchez even notified ATX and DMA that a default was entered against Bon and  
28 provided them with a copy of the same. *Id.* at p. 12, ¶¶ 56-57. Once again, no action  
was undertaken by ATX, DMA, NBIS, or CTIS at that time to request the district court  
to set aside the default or to defend Bon in any way. *Id.*

1 Due notice of the personal injury action was provided to Bon, ATX, and DMA, who  
2 admittedly represented ATX, CTIS, and NBIS's interests regarding the subject collision  
3 and Sanchez's bodily injury claim. *Id.*, at p. 9, ¶¶ 35-39; p. 12, ¶ 58. ATX, DMA, NBIS,  
4 and CTIS never even responded to Sanchez's numerous letters advising them that she  
5 filed and served her personal injury complaint on Bon. *Id.* at p. 11, ¶ 58. Therefore,  
6 ATX and/or NBIS, and/or CTIS, and/or DMA breached their respective contractual  
7 duties to defend and breached their respective duties to make reasonable settlement  
8 decisions in bad faith. *Id.* at p. 15, ¶ 75, pp. 16-17, ¶ 87. As a result, the Nevada state  
9 court entered a default judgment against Bon in the amount of \$15,212,655.73, inclusive  
10 of attorney's fees and costs. *See Exhibit "2,"* at p. 4.

11 **C. The District Court Judicially Assigned Bon's Claims Against ATX, DMA,**  
12 **NBIS, and CTIS to Sanchez and Sanchez Commenced this Action**

13 Following entry of the default judgment against Bon, the district court granted  
14 Sanchez's Motion for Judicial Assignment of Bon's claims and causes of action against  
15 ATX and any other liability insurer or entity. *See SAC*, at p. 13, ¶ 64. Subsequently,  
16 the district court granted Sanchez's motion to clarify its judicial assignment order and  
17 made clear that its judicial assignment of Bon's claims included those against any third-  
18 party claims administrator, third-party claims adjuster, or any other applicable insurer,  
19 administrator, or entity. *Id.* at p. 13, ¶ 65.

20 Sanchez initiated her insurance bad faith and judgment enforcement action in  
21 2019. After Windhaven removed this matter to federal court, the federal court remanded  
22 the case back to this Court on November 5, 2020. Shortly thereafter, this Court granted  
23 Sanchez's Motion for Leave to File Second Amended Complaint to Name ATX, NBIS,  
24 and CTIS, and to Voluntarily Dismiss Windhaven, Without Prejudice.

25 **D. NBIS and CTIS's Efforts to Set Aside the Default Judgment Entered**  
26 **Against Bon Happened Before the Liquidation Order was Entered**  
27 **Against Windhaven**

28 Once a substantial default judgment was entered against Bon, Bon's claims for  
relief were judicially assigned to Sanchez, and this judgment enforcement action was  
initiated, NBIS and CTIS, as expected, took steps in the personal injury action to  
preserve their own financial interests under the guise of protecting Bon. On January

1 17, 2020, attorney William P. Volk (“Volk”), on behalf of “Bon,” moved to set aside the  
2 default judgment. *See* Motion to Set Aside Default Judgment, *Sanchez v. Bon*, Case No.  
3 A-15-722815-C, pleading portion only, attached as **Exhibit “5.”** On February 25, 2020,  
4 the district court denied Bon’s Motion to Set Aside during the motion hearing. *See*  
5 9/18/20 Order at 1:18-20, *Sanchez v. Bon*, Case No. A-15-722815-C, attached as **Exhibit**  
6 **“6.”** One month later, Windhaven filed a Notice of Automatic Stay of Proceedings based  
7 on the March 5, 2020 entry of the Liquidation Order while this matter was pending in  
8 federal court. *See* 3/25/20 Notice of Automatic Stay of Proceedings, pleading portion  
9 only, attached as **Exhibit “7.”** On March 30, 2020, Volk filed a similar notice in the  
10 personal injury action. *See* Notice of Permanent Injunction and Automatic Stay,  
11 *Sanchez v. Bon*, Case No. A-15-722815-C, pleading portion only, attached as **Exhibit**  
12 **“8.”**

13 Sanchez’s counsel recognized it was implausible for an insurer on the brink of  
14 liquidation to hire and pay an attorney to work on setting aside the underlying default  
15 judgment. Naturally, this prompted her counsel to contact Volk to clarify the name of  
16 the insurer or entity that hired him to represent “Bon’s” interests in the personal injury  
17 action:

18 As I am sure you are aware, ATX was the relevant  
19 underwriting entity that issued the insurance policy at  
20 issue to Mr. Bon. It is not entirely clear, however, whether  
21 Windhaven acquired ATX’s claims against its insureds (*i.e.*  
22 liabilities) that were pre-existing at the time of its  
23 acquisition. **This inquiry is directly relevant to  
24 whether the stay as to Windhaven is even applicable  
25 in both the state court action and Ms. Sanchez’s  
26 federal enforcement action.**

27 In light of the foregoing, we respectfully request you  
28 identify who hired you [to] notify the state court of the  
Liquidation Order on behalf of Mr. Bon.

29 *See* 4/9/20 letter to Volk, attached as **Exhibit “9.”**

30 In response, Volk identified NBIS, not Windhaven, as the entity that hired him  
31 in the personal injury action:

32 Kevin:

33 Gotcha. It is my understanding that **NBIS**  
34 **(NationsBuilders Insurance Services, Inc.)** retained



1 Kolesar & Leatham and then my new office Holley Driggs  
2 to represent Mr. Bon. I have no information on the  
3 relationship between NBIS and Windhaven or ATX. That's  
4 as much as I know. I hope this answers your question.

5 See 4/29/20 Volk e-mail, attached as **Exhibit "10"** (emphasis added),

6 Less than two hours later, Podesta was forced to clarify Volk's e-mail regarding  
7 the entity that hired him:

8 And we see the reason that defense lawyers are kept in the  
9 dark about how things really work. Sorry, Bill. Mr. Volk's  
10 **retention was by NBIS Construction and Transport**  
11 **Insurance Services, Inc., for the benefit of ATX**  
12 **Premier Insurance Co.,** who then utilized DMA Claims  
13 as the claims administrator.

14 See 4/29/20 Podesta e-mail, attached as **Exhibit "11"** (emphasis added).

15 Five minutes after Podesta's e-mail, Volk clarified the entity that hired him to  
16 represent Bon

17 Kevin:

18 I want to clarify that it was **NBIS Construction and**  
19 **Transport Insurance Services, Inc.** that retained my  
20 office. They are obviously **part of the NBIS family of**  
21 **companies.** I should have been more precise about that  
22 point.

23 See 4/29/20 e-mail from attorney William Volk ("Volk"), attached as **Exhibit "12"**  
24 (emphasis added).

25 Notably, the e-mails from Volk and Podesta were sent **after** the March 5, 2020  
26 Liquidation Order was entered against Windhaven. These e-mails confirm Windhaven  
27 was not involved whatsoever in the retention of attorneys to set aside the default  
28 judgment, and further refute the notion that this matter should somehow be stayed now.  
29 This is particularly true as the NBIS/CTIS entities have now finally assumed the  
30 defense on behalf of Bon, which they should have years earlier. Rest assured,  
31 NBIS/CTIS are only using Bon to further their own self-interests and act for the benefit  
32 of ATX by pursuing various legal avenues to avoid the default judgment entered against  
33 Bon in the personal injury action.

34 The NBIS/CTIS entities, for the benefit of ATX, are paying multiple law firms to  
35 avoid the default judgment. NBIS/CTIS first hired Volk to file a motion to set aside the

1 default judgment, which the district court denied on September 19, 2020. *See Exhibit*  
2 **“6,”** 9/19/20 Order, at 2:10-20. Following the denial of that motion, NBIS/CTIS hired  
3 appellate counsel to file a motion for rehearing, which the Court also denied. *See*  
4 11/24/20 Minute Order denying Bon’s Motion for Rehearing and to Alter or Amend the  
5 Judgment and Order Denying Rule 60(b) Relief, *Sanchez v. Bon*, Case No. A-15-722815-  
6 C, attached as **Exhibit “13.”** NBIS/CTIS also simultaneously filed a notice of appeal on  
7 behalf of “Bon.” *See* 10/20/20 Notice of Appeal, *Sanchez v. Bon*, Case No. A-15-722815-  
8 C, attached as **Exhibit “14.”** It is certainly predictable that the only actions taken by  
9 NBIS/CTIS on Bon’s behalf occurred when their financial interests became implicated.  
10 Afterall, Windhaven lacks the financial resources to fund such a futile endeavor because  
11 it is currently subject to liquidation. *See* Windhaven’s Motion, Exhibit “C.” NBIS/CTIS’s  
12 authority to act for the benefit of ATX in this action stems from its retention of financial  
13 responsibility and control over insurance policies underwritten by ATX before its sale to  
14 Windhaven. Windhaven has no control over the so-called “defense” of Bon. These facts  
15 have never been addressed by Podesta or Windhaven, despite their knowledge of the  
16 same, because they cannot credibly dispute these facts.

17 **E. NBIS and CTIS Retained Financial Responsibility and Control Over All**  
18 **Claims Arising from Liability Insurance Policies Issued by ATX Before**  
19 **ATX was Sold to Windhaven, Including Sanchez’s Claim**

20 At the time of Sanchez’s claim, a contractual relationship existed between ATX  
21 and DMA whereby DMA provided services as a third-party claims adjuster for any  
22 claims made under policies issued by ATX. *See* SAC, at p. 6, ¶ 27. DMA was  
23 contractually obligated to carry out the duties ATX owed to Bon under the express terms  
24 of the policy. *Id.* A contractual relationship also existed between DMA and CTIS  
25 whereby DMA was required, on behalf of CTIS, to perform a variety of “claims adjusting  
26 services” for “claims and losses arising out of policies issued by affiliated companies of  
27 [CTIS].” *Id.* at pp. 6-7, ¶¶ 26-29; *see also*, **Exhibit “1,”** at pp. 1, 3-7. One of those  
28 affiliated companies was ATX because NBIS and/or CTIS retained control over ATX  
policies, which included indemnity, administrative, and handling obligations. *See* SAC,  
at pp. 8-9, ¶¶ 31-35. These factual allegations are consistent with Podesta’s April 29,

2020 e-mail wherein he confirms CTIS is acting “for the benefit of ATX,” **not** Windhaven.  
See **Exhibit “11.”**

***1. NBIS and CTIS’s reserved power over claims and indemnity obligations arising from insurance policies underwritten by ATX cannot legitimately be questioned***

As early as February 22, 2013, NBIS was the parent company of ATX. See SAC, at p. 5, ¶ 21; see also, Official Order of the Texas Commissioner of Insurance, filed as an exhibit in *Hayes v. ATX Premier Ins. Co.*, Case No. 2:18-cv-01938-GMN-NJK, at bates no. NBIS0065, ¶ 5, attached as **Exhibit “15.”** On April 1, 2015, ATX, CTIS, AutoTex MGA, Inc. (“AutoTex”), and Safe Auto Insurance Company (“Safe Auto”) entered into their Amended and Restated Claims Handling Agreement. See SAC, at p. 5, ¶¶ 22-24; see also, Amended and Restated Claims Handling Agreement excerpt, filed as an exhibit in *Hayes v. ATX Premier Ins. Co.*, Case No. 2:18-cv-01938-GMN-NJK, attached as **Exhibit “16.”** The Amended and Restated Claims Handling Agreement outlines specific “definitional guidelines” regarding the treatment of ongoing business obligations before the stock sale to Safe Auto that are relevant to this action:

(A) **Pre-close Policy.** **Pre-close Policy** means any policy which was issued on or before the closing date of the sale of **Auto Tex**, or which may be validly reinstated after such closing date by the policyholder during a reinstatement period. It also means any new policy written or renewed on or after the closing date which: (1) resides in the state of Arizona; (2) is produced by the LA Franchise Agency or its affiliates in any state; or (3) has been certified under the financial responsibility laws and regulations of any state.

See SAC, at p. 5, ¶ 23; see also, **Exhibit “16.”**

The Amended and Restated Claims Handling Agreement confirms that policies issued by ATX before the March 2, 2015 stock sale of AutoTex to Safe Auto remain with CTIS:

**WHEREAS, CTIS** wishes to assume the rights and obligations hereunder to administer **Pre-close Policies** as the **Pre-close Policy Claims Administrator**;

**WHEREAS, CTIS** is in the business of providing claim services on behalf of insurance companies and is willing to provide such services on behalf of **Company** on all **Pre-close Policies** in accordance with the terms and

1 conditions set forth herein; and as set forth in any agreed  
2 to Addenda attached to and made part of this Agreement;

3 See SAC, at pp. 5-6, ¶ 24; *see also*, **Exhibit “16.”**

4 The Amended and Restated Claims Handling Agreement defines ATX as  
5 “Company” under the contract. See SAC, at p. 5, ¶ 24; *see also*, **Exhibit “16.”** As such,  
6 the express terms of the agreement confirm NBIS and CTIS retain distinct management  
7 and control over insurance policies issued by ATX before March 2, 2015. *Id.* The ATX  
8 policy covering Bon went into effect on December 16, 2014. See SAC, at p. 4, ¶ 18; *see*  
9 *also*, **Exhibit “3.”** By definition, the ATX liability insurance policy giving rise to  
10 Sanchez’s claims in this action is a “Pre-close Policy” that has always remained under  
11 the control of NBIS and CTIS. See **Exhibit “16.”**

12 NBIS eventually sold ATX to Windhaven. The Texas Insurance Commissioner’s  
13 Order approving the acquisition references only that “Windhaven will acquire control of  
14 ATX through the purchase of 100% of the issued and outstanding common capital stock  
15 of ATX for \$7,500,000 cash.” See 3/3/16 Official Order of the Texas Commissioner of  
16 Insurance approving acquisition of ATX, at p. 1, ¶ 2, attached as **Exhibit “17.”** This  
17 Order does not articulate that Windhaven also undertakes financial responsibility and  
18 control over any of ATX’s liabilities, including pre-sale liability insurance policies issued.  
19 See *generally*, **Exhibit “17.”** Structuring the transaction in this manner makes sense  
20 given that ATX/NBIS already collected the premium payments for the insurance policies  
21 issued before the sale to Windhaven. The terms and structure of ATX’s sale to  
22 Windhaven explain why no documentation has ever been disclosed showing Windhaven  
23 ever assumed financial responsibility or control over any ATX liability insurance policies  
24 as part of its acquisition of ATX. No such evidence actually exists given the  
25 representations previously made by Podesta as counsel for ATX and NBIS in an action  
26 filed years **after** Windhaven acquired ATX.

27 ***2. Podesta’s representation of ATX and NBIS in a similar federal court***  
28 ***action proves Windhaven never maintained financial responsibility or***  
***control over Pre-Sale ATX insurance policies***

Podesta previously represented ATX and NBIS in a Nevada federal district court  
action styled as *Hayes v. ATX Premier Ins. Co.*, Case No. 2:18-cv-01938-GMN-NJK

1 (“Hayes”). As Sanchez has articulated to this Court on several occasions, the *Hayes*  
2 matter involved claims arising from an ATX insurance policy issued in 2014. *See* Third  
3 Amended Complaint filed in *Hayes*, at pp. 1-2, ¶ 1, attached as **Exhibit “18.”** The  
4 timeline for the various claims submitted by the decedent’s wife and minor child in the  
5 *Hayes* matter spanned from 2014 through 2016. *Id.* at pp. 5-10. The insurance policy  
6 at issue in *Hayes* was underwritten by ATX and in full force and effect on November 15,  
7 2014, the date of the relevant motor vehicle collision. *Id.* at pp. 1-2, ¶ 1. Here, Bon’s  
8 ATX policy was in full force and effect from December 16, 2014 through June 16, 2015.  
9 *See* **Exhibit “3.”** The similarities between the relevant coverage timeframe at issue  
10 here when compared to *Hayes* are critical because they substantiate NBIS’s financial  
11 responsibility for Sanchez’s damages and CTIS’s responsibility for the culpable conduct  
12 giving rise to Sanchez’s damages.

12 Podesta’s representations he affirmatively made on behalf of ATX and NBIS in  
13 dispositive motion practice filed in *Hayes* also establish NBIS’s financial responsibilities  
14 for the ATX insurance policy that covered Bon:

15 In the context of this case, NBIS **retained financial**  
16 **responsibility for claims relating to policies that**  
**were issued prior to the sale of ATX in 2015** [sic].

17 *See* ATX and NBIS’s Opposition to Plaintiff’s Motion for Summary Judgment filed in  
18 *Hayes*, pleading portion only, at 7:18-19, attached as **Exhibit “19”** (emphasis added).

19 Podesta confirmed NBIS’s role as indemnitor and also detailed CTIS’s role  
20 regarding claims arising from ATX policies issued in 2014 in a summary judgment  
21 motion he filed in *Hayes* on November 7, 2019:

22 NBIS is a holding company that, as part of the sale of ATX,  
23 **agreed to indemnify ATX for losses associated with**  
**pre-sale policies, akin to a reinsurer to insurance**  
**companies.**

24 . . .

25 While NBIS-affiliated companies engage in **claim**  
26 **oversight activities** – notably NBIS Construction and  
27 Transport Services (“CTIS”) – it is a completely separate  
28 company from NBIS.

1 See NBIS's Motion for Summary Judgment or in the Alternative Motion for Partial  
2 Summary Judgment filed in *Hayes*, pleading portion only, at 3:18-20, 4:17-19, attached  
3 as **Exhibit "20"** (emphasis added).

4 The prior representations made by Podesta are **wholly consistent with his**  
5 **April 29, 2020 e-mail because CTIS is still acting for the benefit of ATX.** See  
6 **Exhibit "11."** It follows that NBIS remains the indemnitor for all losses arising from  
7 pre-sale ATX policies. The prevailing circumstances in 2019 have not changed, which  
8 solidifies that Windhaven's purchase of ATX in 2016 did not include the assumption of  
9 financial responsibility or control over any pre-sale insurance policies issued by ATX.  
10 This is precisely what happened when NBIS sold AutoTex to Safe Auto. See **Exhibit**  
11 **"16."** As a result, Windhaven never assumed any contractual or indemnity obligations  
12 arising from the way Sanchez's bodily injury claim was investigated, evaluated, or  
13 adjusted by ATX, DMA, NBIS, or CTIS. In fact, CTIS issued a settlement check **for the**  
14 **benefit of ATX** in the *Hayes* matter dated October 26, 2016, over six months after  
15 Windhaven purchased ATX:

NBIS CONSTRUCTION & TRANSPORT INSURANCE  
SERVICES INC.  
FBO. ATX PREMIER INSURANCE COMPANY  
PO BOX 28004  
GLENDALE, CA 91222-0004  
(323) 342-1650

FROST BANK ADDISON  
15301 N. DALLAS PKWY #100  
ADDISON, TX 76001  
30-9/1140

VOID AFTER 90 DAYS  
THIS ACCOUNT IS  
PROTECTED BY POSITIVE PAY

3514

DATE 10/26/2016

AMOUNT [REDACTED]

PAY [REDACTED]

TO THE ORDER OF [REDACTED]

MEMO

COPY

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

00354 1 140000731 608876517

21 See 10/26/16 check issued by CTIS, filed as an exhibit in *Hayes*, attached as **Exhibit**  
22 **"21."**

23 This settlement check was tendered in relation to a claim arising from the ATX  
24 policy issued in 2014 to the owner of the car in *Hayes*, the same year that ATX issued  
25 the subject policy in Bon. See **Exhibit "18,"** at p. 2, ¶¶ 2-3. CTIS issued this settlement  
26 check for the benefit of ATX, which again reflects the precise language Podesta used in  
27 his April 29, 2020 e-mail. See **Exhibit "11."** Podesta's attempt to somehow represent  
28 that Windhaven's financial position is directly implicated by Sanchez's claim arising

1 from an ATX insurance policy that was in full force and effect during the same timeframe  
2 in *Hayes* defies logic and commonsense. Podesta has **never** addressed these  
3 inconsistent positions to this Court, which is telling because it directly undermines the  
4 legitimacy of his request for a stay.

### 5 III.

#### 6 LEGAL ARGUMENT

7 The crux of Windhaven's argument is that because it acquired ATX, the  
8 Liquidation Order applies and this matter must be stayed. The obvious defect of this  
9 argument is that Windhaven ignores the critical facts establishing its separateness from  
10 ATX, namely that Windhaven did not assume any obligations under pre-sale ATX  
11 insurance policies. This is precisely why ATX remains a valid defendant in this action,  
12 just like it was in *Hayes*. Notably, in *Hayes*, Podesta never challenged ATX's status as  
13 a defendant by suggesting Windhaven instead be named as a defendant. In fact, Podesta  
14 filed an answer on behalf of ATX in *Hayes* on June 19, 2019, **over three years** after  
15 Windhaven acquired ATX. *See* 6/19/19 ATX Answer to Third Amended Complaint filed  
16 in *Hayes*, attached as **Exhibit "22."** This further nullifies any argument that  
17 Windhaven's liquidation bears any relationship to ATX's party status necessary to  
18 impose a stay of this action.

#### 19 A. The Limited Factual Record Demonstrates that Windhaven is Not 20 Financially Responsible for Sanchez's Alleged Damages, which Defeats 21 any Need for a Stay of this Action

22 Nevada has formally adopted the Uniform Insurers Liquidation Act. *Integrity*  
23 *Ins. Co. v. Martin*, 105 Nev. 16, 18 (1989). The main purpose of the UILA is to provide  
24 "a uniform system for the orderly and equitable administration of the assets and  
25 liabilities of defunct multistate insurers." *Rose v. Fid. Mut. Life Ins. Co.*, 207 F. Supp.  
26 2d 50, 53 (E.D.N.Y. 2002). The facts demonstrate Windhaven's liabilities do not include  
27 any pre-sale liability insurance policies underwritten by ATX, including the policy that  
28 covered Bon. Therefore, the injunction imposed by the Liquidation Order or the relevant  
Texas Insurance Code provisions are not applicable because Sanchez does not seek to  
recover damages from Windhaven, an insolvent insurer. Sanchez does not even possess

1 a valid claim against Windhaven because it never undertook financial responsibility for  
2 claims arising from ATX pre-sale insurance policies.

3 The sole basis upon which Windhaven requests a stay of this action is merely  
4 because Windhaven changed ATX's name to Windhaven after its purchase. Windhaven  
5 conveniently ignores that it has produced no evidence whatsoever to establish that  
6 ATX's status as the underwriter of pre-sale liability insurance policies was altered in  
7 any way after Windhaven's March 3, 2016 acquisition. In fact, the Texas Commissioner  
8 of Insurance's Consent Order states: "2. Windhaven will acquire control of ATX through  
9 the purchase of 100% of the issued and outstanding common capital stock of ATX for  
10 \$7,500,000.00 cash." See **Exhibit "17,"** at p. 1, ¶ 2. The Texas Insurance Commissioner  
11 does not mention that Windhaven will assume any of ATX's liabilities as part of its  
12 acquisition of ATX. See generally, **Exhibit "17."** If Windhaven assumed ATX's  
13 liabilities, this information would have certainly been included in the Consent Order  
14 given its relevance to the Commission's ultimate decision to approve the acquisition  
pursuant to Texas Insurance Code § 823.157(b):

15 (b) In considering whether to approve or deny, the  
16 commissioner shall consider whether:

17 (1) immediately on the acquisition, change, or  
18 divestiture of control the domestic insurer would not  
19 be able to satisfy the requirements for the issuance  
of a new certificate of authority to write the line or  
lines of insurance for which the insurer holds a  
certificate of authority;

20 . . .

21 (3) the financial condition of the acquiring person  
22 may jeopardize the financial stability of the domestic  
insurer or prejudice the interest of the domestic  
insurer's policyholders.

23 See also, **Exhibit "17,"** at p. 2, ¶ 3.

24 The Amended and Restated Articles of Incorporation of Windhaven do not refer  
25 to Windhaven's assumption of any duties or obligations arising from any ATX insurance  
26 policies that ATX underwrote before the sale. See Windhaven's Motion, Exhibit "A," at  
27 Bates nos. EX-B000009 – 000011. In fact, the purpose for organizing Windhaven,  
28



1 formerly ATX, is to “engage in the business of underwriting and reinsuring all classes of  
2 insurance permitted pursuant to the Texas Insurance Code to be underwritten by  
3 property and casualty insurers . . . .” *Id.* at Bates no. EX-B000009. The conspicuous  
4 absence of financial documents confirming Windhaven assumed any of the contractual  
5 or indemnity obligations owed by ATX arising from claims against all pre-sale insurance  
6 policies underwritten by ATX illustrates the insignificance of Windhaven’s financial  
7 condition as it relates to this action. The limited documentary evidence demonstrates  
8 ATX remains the applicable underwriter of the 2014 insurance policy that covered Bon  
9 at the time of the underlying motor vehicle collision that gives rise to Sanchez’s claims  
10 in this action. Therefore, this Court’s jurisdiction over this action is not hindered by the  
11 Liquidation Order because Windhaven’s financial interests are not impacted by this  
12 action.

13 **B. Sanchez is Not Violating the Liquidation Order or the Relevant Texas**  
14 **Insurance Code Provisions by Pursuing this Judgment Enforcement**  
15 **Action**

16 The March 5, 2020 Liquidation Order confirms that Windhaven is insolvent  
17 pursuant to Tex. Ins. Code. § 443.004(a)(13)(B). *See* Windhaven’s Motion, Exhibit C, at  
18 p. 2, ¶ 2.2. As a result, “an automatic stay . . . with respect to actions against  
19 [Windhaven] or its property . . .” is imposed pursuant to Tex. Ins. Code § 443.008(c). *Id.*  
20 at p. 2, ¶ 2.4. Property subject to the automatic stay is broadly defined by the relevant  
21 code provision and includes, records and data, claims and claim files, litigation files,  
22 personnel records, and financial records. *See* Tex. Ins. Code § 443.004(20)(C). The  
23 automatic stay against Windhaven remains in effect for the duration of the liquidation  
24 proceedings. *See* Windhaven’s Motion, Exhibit C, at p. 10, ¶ 5.1; *see also*, Tex. Ins. Code  
25 443.008(f).

26 On its face, the Liquidation Order and its injunctive provisions do not apply to  
27 Sanchez’s insurance bad faith and judgment enforcement action against ATX, NBIS,  
28 CTIS, DMA, and Bon. Sanchez does not seek to execute upon Windhaven’s assets  
because Windhaven did not assume any indemnity obligations arising from pre-sale  
insurance policies issued by ATX. As established from the pleadings in *Hayes* and the

1 April 29, 2020 e-mail from Podesta, Windhaven's property is not implicated here because  
2 it never took control of the subject ATX insurance policy. NBIS retained both ownership  
3 and financial responsibility for the subject policy and Sanchez's claim. Thus, Windhaven  
4 is not financially responsible for Sanchez's alleged damages in this action. Moreover,  
5 the claims file and any other documents related to the handling of Sanchez's bodily  
6 injury claim or any other claims arising from ATX insurance policies underwritten  
7 before the sale of ATX remain the property of NBIS and CTIS. The Claims  
8 Administration Agreement between DMA and CTIS confirms this:

## 9 I. DEFINITIONS

10 . . .

11 D. The term "Claims Adjusting Services" as used herein  
12 shall mean the furnishing by the Claims Administrator  
13 [DMA] to the Company [CTIS] of the following services in  
14 compliance with the terms of the applicable insurance  
15 policy, the laws and regulations of the applicable state(s),  
16 and industry-wide standards:

17 . . .

18 13) Maintain files for all Qualified Claims in the  
19 Company's claims system, . . .

20 . . .

21 18) Maintain closed claim files in accordance with state  
22 regulations and/or Company requirements;

23 . . .

## 24 II. SERVICES

25 . . .

26 D. If a Summons and Complaint is filed on a Qualified  
27 Claim, the Claims Administrator shall transfer that claim  
28 and all its Features back to the Company and shall no  
longer be responsible for the further handling of the claim.

See **Exhibit "1,"** at pp. 1-5.

Windhaven's attempt to employ some sort of shell game to blur the distinct  
financial responsibilities, management, and control NBIS and CTIS reserved over pre-  
sale ATX insurance policies is nonsensical. Sanchez's claims do not implicate the

1 liquidation of Windhaven's assets or the satisfaction of its liabilities The Liquidation  
2 Order does not limit this Court's jurisdiction over this action because Windhaven's  
3 interests are not involved. In turn, this Court does not owe full faith and credit to this  
4 Liquidation Order because it simply has no bearing on the outcome of this litigation.  
5 The conspicuous absence of the Texas Liquidator's attempt to participate in these  
6 proceedings also defeats Windhaven's requested stay.

7 **C. Given that ATX Remains the Underwriter of the Subject Insurance**  
8 **Policy, Not Windhaven, ATX is a Necessary Party**

9 Sanchez properly alleges that NBIS assumed ATX's indemnity obligations for all  
10 insurance policies that were underwritten by ATX and in effect **before** the sale to  
11 Windhaven. Nevertheless, ATX must remain a party that Sanchez is required to join in  
12 this action pursuant to NRCP 19 because it is and always has been the relevant  
13 underwriting entity. NRCP 19(a)(1)(A) requires a district court to join a party to the  
14 action if "(A) in that [party's] absence, the court cannot accord complete relief among  
15 existing parties." "A major objective of this provision is to have a final and complete  
16 determination of the controversy, not to determine issues piecemeal." *University of*  
17 *Nevada v. Tarkanian*, 95 Nev. 389, 397 (1979).

18 Sanchez appropriately and reasonably named ATX as the relevant underwriting  
19 entity to preserve the validity of her claims, which Windhaven bears no financial  
20 responsibility for paying. If Sanchez dismissed ATX from this action, a second motion  
21 to dismiss would almost certainly be filed by NBIS and/or CTIS based on the fact that  
22 neither entity is the contractual underwriting entity of the subject ATX policy. The  
23 premise of that argument is flawed because NBIS reserved financial responsibility and  
24 CTIS retained control and management over claims arising from ATX insurance policies  
25 that were underwritten before ATX was sold to Windhaven in 2016. These facts were  
26 established in *Hayes* through the admissions of Windhaven's **same** counsel in this  
27 action, Podesta. ATX, like Windhaven, has no financial responsibility for any losses  
28 stemming from any pre-sale insurance policies that were underwritten in 2014 and in  
effect in 2015, including the subject policy. Under these circumstances, ATX should be  
deemed a "nominal defendant" *See SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998)

1 (“The paradigmatic nominal defendant . . . [is] joined purely as a means of facilitating  
2 collection”). An insurer that has a “direct financial interest in the outcome of litigation”  
3 is not a nominal defendant. *Tajran v. Estate of McDonald*, Case No. 19-cv-1290-BAS-  
4 KSC, 2020 U.S. Dist. LEXIS 8850, at \*11 (S.D. Cal. Jan. 17, 2020). In light of the  
5 indemnity, management, and control obligations retained by NBIS and CTIS, ATX has  
6 no financial interest in the outcome of this action. The same is true for Windhaven,  
7 which further refutes the application of the stay provisions of the Liquidation Order to  
8 this action.

9 Sanchez joined ATX as a defendant in this action not for purposes of collection,  
10 but to facilitate her judgment enforcement efforts against those financially responsible  
11 entities, namely NBIS, CTIS, and DMA. This is precisely why the relationship amongst  
12 ATX, NBIS, CTIS, and DMA concerning their respective management and control and  
13 financial responsibility over the investigation, evaluation, and authority to settle  
14 Sanchez’s bodily injury claim is directly implicated in this action. *See Albert H. Wohlers*  
15 *& Co. v. Bartgis*, 114 Nev. 1249, 1262 (1998) (A claims administrator may be held liable  
16 for its bad faith in handling a claim even though it is not technically a party to the  
17 insurance policy so long as the administrator engaged in a joint venture with the  
18 insurer). ATX remains a separate entity from Windhaven based on the insurance policy  
19 at issue in this action, a fact that Windhaven’s counsel undisputedly knows, but refuses  
20 to concede.

21 **D. The Prior Admissions Podesta Made on Behalf of ATX and NBIS**  
22 **Reinforce that Windhaven Bears No Financial Responsibility for**  
23 **Sanchez’s Alleged Damages Necessary to Trigger a Stay of this Case**

24 “Judicial estoppel prevents a party from taking a factual position that is  
25 inconsistent with his or her factual position in previous litigation.” *CHD, Inc. v. Taggart*,  
26 220 P.3d 229, 234 (Wash. Ct. App. 2009). “The central purpose of judicial estoppel is to  
27 guard the judiciary’s integrity,” which is why a court is empowered to “invoke the  
28 doctrine at its own discretion.” *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 287  
(2007).

1 In “our system of representative litigation, . . . each party is **deemed bound by**  
2 **the acts of his lawyer-agent.**” *Nev. Power v. Fluor III*, 108 Nev. 638, 647 n.9 (1992)  
3 (emphasis added). In turn, a party “cannot avoid the consequences of the acts or  
4 omissions of this freely selected agent.” *Id.* On two separate occasions in briefs filed in  
5 the 2019 *Hayes* case, Podesta, on behalf of **both** ATX and NBIS, stated unequivocally  
6 that: (1) NBIS retained financial responsibility for claims arising from ATX policies  
7 issued before its sale, (2) NBIS agreed to indemnify ATX for losses arising from pre-sale  
8 policies, like a reinsurer, and (3) CTIS engaged in claim oversight activities for ATX pre-  
9 sale policies. See **Exhibit “19,”** at 7:18-19; **Exhibit “20,”** at 3:18-20, 4:17-19. Podesta  
10 even filed an answer on behalf of ATX in *Hayes* without even once contesting ATX’s  
11 status as an appropriate party in the action. See generally, **Exhibit “22.”** The absence  
12 of any objection from Podesta at that time is particularly glaring given Windhaven was  
13 previously named as a defendant in the *Hayes* action, but was later voluntarily  
dismissed because:

14 [NBIS] as the parent company of ATX has retained liability  
15 for this November 15, 2014 wrongful death claim as a Pre-  
16 Close policy, as evidenced by Art Kirkner’s continued work  
on the claim after the sale to WINDHAVEN.<sup>2</sup>

17 See Plaintiff’s Motion to Amend Complaint to Add ATX Premier Insurance Company  
18 and NationsBuilders Insurance Services, Inc. as Defendants filed in, *Hayes*, at 4:23 –  
5:3, attached as **Exhibit “23,”**

19 Podesta never once suggested Windhaven was the appropriate party to be named  
20 even though Windhaven acquired ATX over three years before he filed the answer on  
21 behalf of ATX in *Hayes*. Now Podesta, allegedly on behalf of ATX, has conveniently  
22 decided to take a contradictory position for no other reason but to stifle Sanchez’s efforts  
23 to enforce and collect upon her default judgment. This contradictory position is aimed  
24 to procure an “unfair tactical advantage” by securing an indefinite stay of this action for  
25 the benefit of not only ATX, but also NBIS. *Marcuse*, 123 Nev. at 288. These  
26 circumstances underscore the point that Podesta is merely using Windhaven and the

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27 <sup>2</sup> Art Kirkner was the Vice President of Claims for NBIS at the time of the *Hayes* case.  
28 See **Exhibit “23,”** at 4:13-14

1 Liquidation Order as a shield to preserve the financial interests of NBIS. Otherwise, a  
2 representative on behalf of the Texas Liquidator or NIGA would have already intervened  
3 in this matter. This has not happened because Windhaven has no interest, financial or  
4 otherwise, in the outcome of this action. Therefore, Podesta should be judicially  
5 estopped from arguing that ATX cannot now be a defendant to litigation arising from an  
6 insurance policy underwritten before the Windhaven acquisition.

7 Podesta's representations made in the *Hayes* case are factually significant as it  
8 relates to this action. Podesta's April 29, 2020 e-mail regarding attorney Volk's  
9 retention to attempt to set aside the default judgment entered against Bon establishes:  
10 (1) CTIS retained Volk to use Bon's party status to attempt to set aside the default  
11 judgment solely to preserve the financial interests of NBIS and CTIS, and (2) CTIS is  
12 also acting for the benefit of ATX as the underwriter of the subject insurance policy, **not**  
13 Windhaven. *See Exhibit "11."* "Counsel retained by an insurer to represent its insured  
14 represents **both** the insurer and the insured in the absence of a conflict." *Nev. Yellow*  
15 *Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 47 (2007). CTIS and/or NBIS  
16 have assumed the legal defense on behalf of Bon in the personal injury action because  
17 their financial interests are implicated. If Windhaven had any involvement, the Texas  
18 Liquidator or NIGA would have taken some type of affirmative action with respect to  
19 the underlying default judgment. Podesta's knowledge of CTIS and/or NBIS's role as  
20 the entities that hired Volk is illuminating because he would not otherwise possess this  
21 knowledge if he only represented Windhaven's interests. Because Windhaven's  
22 interests are not at play, which Podesta knows, his constant attempts to invoke a stay  
23 of this action to protect NBIS must be seriously called into question.

24 For claims arising from ATX insurance policies issued before the sale to  
25 Windhaven, NBIS/CTIS have handled or settled those claims **for the benefit of ATX**,  
26 not Windhaven. If Windhaven actually undertook ATX's contractual and indemnity  
27 obligations arising from insurance policies issued before March of 2016, there would be  
28 no reason for NBIS and CTIS to act for the benefit of ATX in any capacity. Podesta also  
would not have made such representations in *Hayes* if Windhaven was truly involved.  
Podesta's efforts to conceal these critical facts resulted in his objection to subpoenas

1 Sanchez previously issued to NBIS and CTIS to produce documents related to their  
2 respective obligations for claims arising from ATX insurance policies. See Subpoenas to  
3 NBIS and CTIS and June 10, 2020 Podesta letter, collectively attached as **Exhibit “24.”**  
4 Podesta objected based on the farce that Windhaven “remains responsible for expressed  
5 and implied contractual covenants in the insurance policy.” *Id.* at letter, p. 1. Naturally,  
6 Podesta provided no documents to prove this assertion and, despite receiving numerous  
7 opportunities, still has not provided such documents. Of course, no such documents  
8 exist, particularly considering that two different law firms, Holley Driggs and Lewis  
9 Roca Rothgerber Christie LLP, were hired by NBIS/CTIS to try to set aside the  
10 underlying default judgment and appeal the order denying the motion to set aside.<sup>3</sup> It  
11 is impossible for an insolvent insurer, like Windhaven, to hire and pay two separate law  
12 offices for this purpose. Podesta uniquely understands this because he knows  
13 NBIS/CTIS is funding the defense of Bon in the personal injury action, not Windhaven,  
14 and was forced to inform Sanchez of the same in his April 29, 2020 e-mail. See **Exhibit**  
15 **“11.”** This further demonstrates ATX’s independence from Windhaven with respect to  
16 the ATX insurance policy covering Bon that was issued before Windhaven acquired ATX.  
17 Podesta’s contradictory position defies logic because it is directly undermined by these  
18 factual circumstances, which further validates ATX’s status as a party to these  
19 proceedings and the denial of a stay.

20 **E. NIGA’s Failure to Participate Demonstrates Sanchez’s Factual**  
21 **Allegations Do Not Impact Windhaven’s Financial Interests Thereby**  
22 **Triggering the Automatic Stay Provisions of the Liquidation Order**

23 Windhaven has been subject to the Liquidation Order for nearly a year and a half.  
24 Yet, NIGA has not once attempted to exercise its authority to adjudicate Sanchez’s  
25 claims in this action. NIGA commands a broad grant of powers that include making  
26 appearances in actions involving claims arising from insurance policies issued by  
27 insolvent insurers, hiring individuals to handle claims arising from policies issued by  
28 insolvent insurers, and filing lawsuits. See Nev. Rev. Stat. 687A.060(2)(a), (b), (c).

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<sup>3</sup> In fact, the appeal funded by NBIS/CTIS remains ongoing.

1 NIGA's lack of involvement is unsurprising given that just the limited facts in Sanchez's  
2 possession demonstrate Windhaven's complete lack of financial involvement in this  
3 action. After NBIS/CTIS used Bon to file an appeal to try and, once again, set aside the  
4 default judgment solely for their own financial benefit, the parties participated in a  
5 settlement conference pursuant to NRAP 16. Representatives from NBIS and/or CTIS  
6 not only attended this settlement conference, but they also offered money in excess of  
7 the minimum \$15,000.00 policy limits available under the relevant ATX policy to resolve  
8 all of Sanchez's claims. *See* Declaration of Kevin T. Strong, at p. 2, ¶ 6, attached as  
9 **Exhibit "25."** This further negates the applicability of the Liquidation Order entered  
10 against Windhaven because, pursuant to NIGA, covered claims against insolvent  
11 insurers may only be settled for the policy limit or \$300,000.00, whichever is less. *See*  
12 Nev. Rev. Stat. 687A.060(1)(a)(3).

13 Windhaven is not a party to this litigation. ATX's status as a party to this  
14 litigation does not alter or change this Court's analysis because Windhaven never  
15 assumed financial responsibility or control over ATX insurance policies issued before the  
16 acquisition, including the ATX policy that covered Bon. As a result, Sanchez has no  
17 viable claim to even present to the Texas Liquidator or to NIGA. There has been no  
18 documentary evidence disclosed to refute this fact or the substantive factual allegations  
19 set forth in Sanchez's Second Amended Complaint. A stay is not warranted.

20 **F. Alternatively, This Court Should Allow Sanchez to Conduct Limited**  
21 **Discovery if there are Not Enough Facts to Determine whether this**  
22 **Matter Should be Stayed**

23 From the inception of this case, Sanchez's efforts to conduct discovery have been  
24 thwarted repeatedly not just by Podesta, but also by DMA. In fact, DMA refuses to  
25 produce relevant documents in its possession under the guise that it might somehow  
26 violate the Liquidation Order. The limited facts Sanchez has gathered, in spite of the  
27 obstructive conduct perpetrated by Windhaven, Podesta and DMA, prove the  
28 Liquidation Order entered against Windhaven does not mandate a stay of this action.  
Nevertheless, if this Court needs additional facts to decide Windhaven's Motion,  
Sanchez should be allowed to conduct the requisite discovery necessary to resolve any



1 factual disputes. To date, Sanchez has not conducted any meaningful discovery in this  
2 action whatsoever. All of the relevant documents she cites in this brief were discovered  
3 through her own efforts. A court order authorizing Sanchez to conduct targeted  
4 discovery, including depositions and document production, aimed to address  
5 Windhaven's suggestion that ATX is not distinct as it relates to pre-sale insurance  
6 policies is warranted. This is particularly justified as any potential stay imposed in this  
7 action will be indefinite. If Sanchez is prohibited from litigating her claims indefinitely  
8 due to Windhaven's liquidation, there should at least be a factual basis justifying the  
9 stay as Windhaven certainly has yet to provide it.

10 Sanchez should also be allowed to gather documents detailing NBIS and CTIS's  
11 respective duties and obligations related to pre-sale ATX insurance policies, payments  
12 for any claims arising from those policies, and the manner in which they handled claims  
13 arising from those policies. All of this additional and relevant information will finally  
14 illuminate, once and for all, whether ATX's interrelationship with NBIS and/or CTIS  
15 has always remained independent of Windhaven with respect to pre-sale insurance  
16 policies underwritten by ATX. Allowing Sanchez to conduct this discovery will prevent  
17 further gamesmanship from Podesta that has always been designed to unfairly impede  
18 Sanchez from prosecuting her action. Windhaven certainly should have no objection to  
19 Sanchez's request to conduct discovery in this discrete context, particularly if it is in  
20 possession of documents to prove its financial responsibility for Sanchez's alleged  
21 damages. Therefore, Sanchez respectfully requests an order allowing her to conduct the  
22 discovery detailed in the Declaration of her attorney if this Court is unable to rule on  
23 the merits of Windhaven's stay request. *See* Declaration of Dennis M. Prince, attached  
24 as **Exhibit "26."**

25 ...

26 ...

27 ...

28 ...

...

...

1 IV.

2 **CONCLUSION**

3 Based on the foregoing facts, law, and analysis, Plaintiff Diane Sanchez  
4 respectfully requests this Court to **DENY** Non-Defendant Windhaven National  
5 Insurance Company's Motion to Stay Pending: Lifting of the Texas Injunction.  
6 Alternatively, Plaintiff Diane Sanchez requests this Court to order that she can conduct  
7 the discovery set forth in the Declaration of her counsel before this Court decides to  
8 impose a stay of this action pursuant to the Liquidation Order entered against  
9 Windhaven.

10 DATED this 3rd day of September, 2021.

11 **PRINCE LAW GROUP**

12  
13 /s/ Kevin T. Strong  
14 DENNIS M. PRINCE  
15 Nevada Bar No. 5092  
16 KEVIN T. STRONG  
17 Nevada Bar No. 12107  
18 10801 West Charleston Boulevard  
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20 Las Vegas, Nevada 89135  
21 Tel: (702) 534-7600  
22 Fax: (702) 534-7601  
23 Attorneys for Plaintiff  
24 *Diane Sanchez*  
25  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of **PRINCE LAW**  
3 **GROUP**, and that on the 3rd day of September, 2021, I caused the foregoing document  
4 entitled **PLAINTIFF DIANE SANCHEZ'S OPPOSITION TO NON-DEFENANT**  
5 **WINDHAVEN NATIONAL INSURANCE COMPANY'S MOTION TO STAY**  
6 **PENDING: LIFTING OF THE TEXAS INJUNCTION** to be served upon those  
7 persons designated by the parties in the E-Service Master List for the above-referenced  
8 matter in the Eighth Judicial District Court E-Filing System in accordance with the  
9 mandatory electronic service requirements of Administrative Order 14-2 and the  
10 Nevada Electronic Filing and Conversion Rules.

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f/k/a ATX Premier Insurance Company

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21 Megan H. Thongkham  
22 **LIPSON NEILSON P.C.**  
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Suite 120  
24 Las Vegas, Nevada 89144  
Attorneys for Defendants  
*NationsBuilders Insurance Services, Inc. and*  
*NBIS Construction & Transport Insurance Services, Inc.*

25 /s/ Kevin T. Strong  
26 An Employee of PRINCE LAW GROUP

# EXHIBIT 1

## **CLAIMS ADMINISTRATION AGREEMENT**

by and between

NBIS Construction and Transport Insurance Services, Inc.  
(hereinafter the "Company")

and

DMA Claims Management, Inc.  
(hereinafter the "Claims Administrator")

Effective Date: April 1, 2015

WHEREAS, the Company desires to employ Claims Administrator to perform claims adjustment and administrative services for certain claims and losses arising out of policies issued by affiliated companies of the Company;

WHEREAS, the parties desire to enter into a Claims Administration Agreement (hereinafter, the "Agreement") that will outline their primary duties and obligations with respect to this engagement;

NOW THEREFORE, in consideration of mutual promises and agreements, the parties agree as follows:

### **I. DEFINITIONS**

A. The term "Allocated Loss Adjustment Expense" as used herein shall mean all claims adjustment costs and expenses incurred in connection with the investigation, adjustment and settlement or defense of a claim for benefits. Allocated Loss Adjustment Expenses are limited to reasonable, customary and necessary expenses. Such expenses shall include, but shall not be limited to, the following:

- 1) attorneys fees and disbursements; and
- 2) fees to court reporters; and
- 3) all court costs, court fees and court expenses; and
- 4) costs of automobile and property appraisals and re-inspections; and

- 5) costs of any required investigations by claims adjusters in the field; and
- 6) costs of interpreters; and
- 7) fees for database searches; and
- 8) fees for service of process; and
- 9) costs of surveillance and detective services; and
- 10) costs for employing experts for the preparation of maps, professional photographs, accounting, chemical or physical analysis, diagrams; and
- 11) costs for employing experts for their advice, opinions or testimony concerning claims under investigation or in litigation or for which a declaratory judgment is sought; and
- 12) costs for independent medical examination and/or evaluation for rehabilitation and/or to determine the extent of the Company' liability; and
- 13) costs of legal transcripts of testimony taken at coroner's inquests, criminal or civil proceedings; and
- 14) costs for copies of any public records and/or medical records; and
- 15) costs of depositions and court - reported and/or recorded statements; and
- 16) costs and expenses of subrogation when referred to outside attorneys or other vendors; and
- 17) costs of engineers, handwriting experts and/or any other type of expert used in the preparation of litigation and/or used on a one-time basis to resolve disputes; and
- 18) charges for medical cost containment services, i.e., utilization review, pre-admission authorization, hospital bill audit, provider bill audit and medical case management incurred only with the prior approval of the Company.
- 19) any other similar cost, fee or expense reasonably chargeable to the investigation, negotiation, settlement or defense of a claim or loss or to the protection or perfection of the subrogation rights of the Company.

B. The term "Qualified Claim" shall mean a claim assigned by Company to Claims Administrator.

- C. The term "Feature" shall mean any separate coverage exposure within a claim. For example, one claim might have a Collision feature and one or more Bodily Injury or Property Damage features.
- D. The term "Claims Adjusting Services" as used herein shall mean the furnishing by the Claims Administrator to the Company of the following services in compliance with the terms of the applicable insurance policy, the laws and regulations of the applicable state(s), and industry-wide standards:
- 1) Review all Company's claims and loss reports; and
  - 2) Receive from Company coverage information for the applicable policy for the claim or loss reported. If authorized by Company, where coverage is in question, draft reservation of rights letters to be reviewed by the Company prior to sending to the insured. When Claims Administrator is advised by Company that no coverage exists, draft declination letters, which are to be reviewed by the Company as required, prior to sending to the insured. When appropriate, advise interested parties of the extent of coverage; and
  - 3) If instructed by the Company, establish records for incidents or occurrences reported by the insured that are not claims but may become claims at a later date; and
  - 4) Establish and adequately reserve each Qualified Claim and Feature, and code such claim in accordance with Company's statistical data requirements. Claims Administrator shall adopt and agree upon guidelines for reserving Features that comply with Company's guidelines and are consistent with industry standards; and
  - 5) Conduct a prompt and detailed investigation of each Qualified Claim. Company and Claims Administrator shall adopt and agree upon guidelines for referring claims investigation to field investigators and adjusters that comply with Company's guidelines and are consistent with industry standards; and
  - 6) Adjust Qualified Claims for Property and/or Physical Damage by obtaining itemized estimates and/or appraisals of damage; and
  - 7) Assure that there is sufficient evidence and documentation gathered and in the Company's claims system on a Qualified Claim, to allow the adjuster to properly evaluate the merits of the claim; and
  - 8) Provide, in accordance with the Company's procedures and authority, an initial report and periodic reports on the status of each Qualified Claim in excess of the reporting level or otherwise reportable; and

- 9) Perform all necessary administrative work in connection with Qualified Claims; and
- 10) Respond immediately to any inquiry, complaint or request received from an insurance department or any other regulatory agency in compliance with written instructions, if any, provided by the Company. Respond promptly to any inquiry, complaint or request received from a client, claimant, agent, broker, or other interested party in connection with the Claims Adjusting Services; and
- 11) Process each Qualified Claim utilizing industry-wide standard forms where applicable; and
- 12) Attend, where appropriate and approved by the Company, mediation, arbitration, court-related or other dispute resolution hearings and/or conferences; and
- 13) Maintain files for all Qualified Claims in the Company's claims system, that may include, where necessary, a) defense of claims; b) other litigation (such as subrogation, contribution or indemnity); c) other proceedings; d) claims handling activities; and e) expense control and disbursements; and
- 14) Pursue all reasonable possibilities of subrogation, contribution or indemnity on behalf of the Company; and
- 15) Adjust, settle or otherwise resolve claims in accordance with authority levels granted; and
- 16) Pay or recommend payment where appropriate, all Qualified Claims and Allocated Loss Adjustment Expenses, on a timely basis and in accordance with authority granted by the Company; and
- 17) Pursue recovery of third party liability deductibles; and
- 18) Maintain closed claim files in accordance with state regulations and/or Company requirements.

E. The term "Claims Files" shall mean all information and documentation in written, electronic, photographic, or audio form gathered as part of the Claims Adjusting Services.

## **II. SERVICES**



- A. In consideration of service fees paid by the Company as set forth in the Compensation Schedule attached hereto and made part of this Agreement, Claims Administrator agrees to provide Claims Adjusting Services with respect to all Qualified Claims, including those in excess of the Claims Administrator's authority level.
- B. Claims exceeding the authority level are to be immediately reported by email to the Company. Claims Administrator shall seek the Company's prior written approval on all Qualified Claim settlements in excess of the authority level. With respect to those Qualified Claims in excess of the authority level, Claims Administrator shall calculate and recommend reserves, and then, upon approval by the Company, post such reserves. However, ultimate determination of settlement and reserve amounts shall be retained by the Company.
- C. Claims Administrator warrants and represents that: 1) it shall perform all Claims Adjusting Services that are necessary and appropriate directly or through licensed independent claims adjusters; and 2) it and/or its employees hold all adjuster licenses as required by law to perform the designated services; and 3) it and its employees and persons under contract to Claims Administrator will at all times observe the requirements of laws and regulations of each state in the territory in which it operates, specifically including but not limited to the privacy laws, fair claims practices acts, and fair trade practices acts.
- D. If a Summons and Complaint is filed on a Qualified Claim, the Claims Administrator shall transfer that claim and all its Features back to the Company and shall no longer be responsible for the further handling of that claim.

### **III. TERM AND TERMINATION**

- A. This Agreement shall be effective April 1, 2015, and shall be in effect until cancelled by either party with ninety (90) days' notice.
- B. In the event any license necessary to conduct the Claims Administrator's business expires or terminates, for any reason, the Claims Administrator shall immediately notify the Company and this Agreement shall automatically terminate as of the date of such license's expiration or termination unless, within one week from the date the Company receives notice of the license expiration or termination from the Claims Administrator, the Company agrees, in writing, to modify the provisions of this paragraph so as to allow the Agreement to continue.
- C. This Agreement may be terminated immediately upon written notice to either party if there has been an event of fraud, abandonment, insolvency, or gross or willful misconduct on the part of the other party.

- D. Notwithstanding the foregoing, if the Claims Administrator shall commit any material breach of the terms of this Agreement, or fail to comply with any material instruction or direction by the Company, the Company may, in its sole discretion, immediately upon notice, suspend or terminate any or all authority of the Claims Administrator. Upon receipt of such notice, the Claims Administrator shall thereupon cease to exercise such power or powers in accordance with such notice.
- E. Notwithstanding the foregoing, if the Company shall commit any material breach of the terms of this Agreement, or fail to fulfill its obligations under the Agreement, Claims Administrator may immediately upon notice, suspend and/or terminate all claims handling under this Agreement.
- F. If the Agreement is terminated as per the provisions above, the Claims Administrator shall transfer all open Features to the Company at termination. The Company shall pay Claims Administrator all service fees earned up to the date of termination according to the Compensation Schedule attached hereto. Any time and expenses incurred by the Claims Administrator in the return of such files will be billed to the Company, with supporting documentation for such billing, and the Company shall pay such billing to the Claims Administrator within thirty (30) days from billing date.

#### **IV. DUTIES AND OBLIGATIONS OF CLAIMS ADMINISTRATOR**

- A. Claims Administrator shall maintain all industry standard claim information necessary in the jurisdictions in which Claims Administrator performs Claims Adjusting Services.
- B. Claims Administrator shall comply with reasonable requests of the Company to achieve compliance with applicable state insurance statutes and regulations regarding the creation and maintenance of a Special Investigative Unit for the business of this Agreement.
- C. Claims Administrator shall cooperate with requests of the Company to achieve compliance with the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) relative to Company's obligation to assure that illicit transactions involving target countries and Specifically Designated Nationals are not processed. To the extent that the Claims Administrator incurs out-of-pocket costs for such compliance that solely benefits the Company, the Company will reimburse prior approved expenses.
- D. Claims Administrator shall comply with the Company's Privacy Policy under the Gramm-Leach-Bliley Act of 1999, as set forth below:

NBIS does not disclose any nonpublic personal information about individual policyholders or claimants to any affiliate or any non-affiliate third party other than those permitted by law and only for the purpose of transacting the business of the policyholder's insurance coverage or claim.

Claims Administrator shall fulfill any obligation of the Company to provide claimants with a copy of the Privacy Policy of the Company as may be required by law.

- E. Claims Administrator shall at all times be an independent contractor and shall not for any purpose be deemed to be or hold itself out to be an employee of or affiliated with the Company.
- F. In any state that levies a tax on the services provided by Claims Administrator to Company, Claims Administrator shall prepare an accounting of the tax owed as required by law and submit an invoice for this tax to Company. Once Company has paid the invoice, Claims Administrator shall forward the tax to the appropriate state agency.

#### **V. DUTIES AND OBLIGATIONS OF COMPANY**

- A. Company will provide all information relevant to particular claims to Claims Administrator in order for Claims Administrator to fulfill its duties and obligations as set out in this Agreement, including applicable policy and coverage information and coverage confirmation status.
- B. Company has ultimate authority and responsibility for authorizing claims payment and settlement of claims under this Agreement.
- C. Company will provide to Claims Administrator access to Company's claims system and policy and coverage information as required by Claims Administrator to perform its authorized duties under this Agreement.
- D. Company shall be responsible for the payment of all Allocated Loss Adjustment Expenses relating to the Qualified Claims and the Claim Adjusting Services provided by Claims Administrator.

#### **VI. INSURANCE AND INDEMNIFICATION**

- A. As a condition precedent and an ongoing obligation throughout the term of this Agreement, Claims Administrator shall, no less than annually, provide the Company with evidence of a policy of insurance providing Errors and Omissions insurance coverage for services performed pursuant to this Agreement, from an

insurance carrier acceptable to the Company, with a Limit of Liability no less than \$1,000,000 per claim and \$1,000,000 in the aggregate. Claims Administrator shall immediately notify the Company in the event of any cancellation, non-renewal, or reduction of coverage on any such policy.

- B. Claims Administrator agrees to defend the Company from any and all claims, suits or demands asserted by anyone against the Company, as a result of any errors or omissions of Claims Administrator, its officers, directors, employees or successors. If the Company becomes legally obligated to pay damages due to the errors or omissions of Claims Administrator, Claims Administrator agrees to indemnify the Company and to reimburse the Company for any costs, damages and expenses, of any nature whatsoever incurred or sustained by the Company, including but not limited to attorneys fees and other expenses, in connection with investigating and defending any actions, claims or suits against the Company as a result thereof. Claims Administrator agrees to cooperate with the Company in the investigation and defense of any such claims.
- C. The Company agrees to defend the Claims Administrator from any and all claims, suits or demands asserted by anyone against the Claims Administrator, as a result of any errors or omissions of Company, its officers, directors, employees or successors. If the Claims Administrator becomes legally obligated to pay damages due to the errors or omissions of Company, Company agrees to indemnify the Claims Administrator and to reimburse the Claims Administrator for any costs, damages and expenses, of any nature whatsoever incurred or sustained by the Claims Administrator, including but not limited to attorneys fees and other expenses, in connection with investigating and defending any actions, claims or suits against the Claims Administrator as a result thereof. Company agrees to cooperate with the Claims Administrator in the investigation and defense of any such claims.
- D. Claims Administrator does not agree to defend or indemnify any claims, suits or demands where the alleged errors or omissions concern parties other than Claims Administrator or its officers, directors, employees, successors, representatives or agents, such as matters of underwriting or policy administration.

## **VII. MISCELLANEOUS PROVISIONS**

- A. This Agreement shall be interpreted in accordance with the laws of the state of Georgia. Any cause of action brought arising out of the rights or obligations of this Agreement shall be brought in Atlanta, Georgia.
- B. Any forbearance or failure by the Company or Claims Administrator to enforce any right, provision, or power established under this Agreement or by operation of law shall not operate as a modification or waiver of such right, provision or

power, and the Company or Claims Administrator may, at any time, pursue all rights or remedies available to it to enforce all terms and conditions of this Agreement.

- C. This Agreement represents the full and complete understanding of the parties as to the subject matter herein, superseding all previous agreements, whether written or verbal. This Agreement may be modified or altered only by written amendment to this Agreement signed by duly authorized representatives of the parties.
- D. Claims Administrator understands and agrees that it shall retain liability for any loss or damage arising out of any work performed by any subcontractor retained by Claims Administrator to perform its duties under this Agreement.
- E. Claims Administrator understands and agrees that it shall retain liability for any loss or damage directly or indirectly caused by or arising out of Claims Administrator's access or use of Company's claims and policy systems.
- F. To be validly given, all notices, requests, consents, and other communications arising out of this Agreement must be in writing and mailed, postage paid, to the address of the party provided for in this Agreement. As an ongoing obligation throughout the term of this Agreement, each party shall notify the other of any change of address.
- G. This Agreement shall not become effective until signed by a duly authorized representative of both the Company and Claims Administrator.
- H. Headings on titles to the several sections herein are for identification purposes only and shall not be construed as forming a part hereof.
- I. In the event that any section, sub-section, or provision of this Agreement is declared by statute or by a court of competent jurisdiction to be illegal or void, such section, sub-section, or provision shall be deemed severed from the Agreement, and all other sections, sub-sections, terms, conditions and provisions shall remain in full force and effect.
- J. During the course of this Agreement, the parties will have access to proprietary, confidential information of each other. The parties will protect such information and treat it as strictly confidential, and shall not provide it to any third party or utilize it in any fashion outside of the scope of this Agreement, except as expressly authorized in writing by the parties or as required by law. The Claims Administrator agrees to adhere to all reasonable confidentiality policies as adopted from time to time by the Company regarding the protection of the Company's information.

For purposes of this Agreement, "proprietary information" means any non-public information regarding or relating to the business operations, technology, insureds,

customers, employees, business methods and other non-public information about Company and/or Claims Administrator. Such non-public business and technical information collectively constitutes trade secrets. For purposes of this Agreement, "confidential information" shall include, without limitation, information concerning insureds or prospective insureds, claimants, and employees and agents of Company and employees, methods, claims administrative procedures, metrics and other work practices of Claims Administrator.

K. The Company, its authorized agents, officers and employees, and Claims Administrator mutually agree that until one (1) year after termination of this Agreement, they will not solicit, recruit or hire the other party's officers, employees, contractors or agents.

L. Any notice under this Agreement shall be sent, postage prepaid, to the addresses provided below:

If to the Company: NBIS Construction & Transport Insurance Service, Inc.  
800 Overlook, 2859 Paces Ferry Road  
Atlanta, GA 30339  
(770) 257-1130  
E-mail: akirkner@nbis.com  
Attention: Arthur P. Kirkner, Vice President - Claims

If to the Claims Administrator: DMA Claims Management, Inc.  
P.O. Box 26004  
Glendale, CA 91222-6004  
(323) 342-6800  
(323) 342-6850  
Attn: Thomas J. Reitze, President

M. **Dispute Resolution.** Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be addressed first by mediation between the parties. The costs of mediation shall be borne by both parties. If not resolved by mediation, the matter shall be addressed and settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. All parties to this Agreement and their authorized agents, officers and employees agree that during the dispute resolution process and afterwards, they will not at any time disparage, defame or hold up to public embarrassment or ridicule the other parties involved.

NBIS Construction and Transport  
Insurance Services, Inc.

By: [Signature]  
Its: Vice President of Insurance  
Date: 5/15/2015

DMA CLAIMS MANAGEMENT, INC.

By: Thomas Seitz  
Its: PRESIDENT  
Date: 5/9/15

## **ADDENDUM TO CLAIMS ADMINISTRATION AGREEMENT**

This Addendum incorporates by reference that certain Claims Administration Agreement effective April 1, 2015 (hereinafter referred to as the "Agreement"), by and between the Company as identified in the Agreement, and the Claims Administrator as identified in the Agreement.

Claims Administrator will receive the following compensation from Company for its services:

1. For Property Damage, Collision or Comprehensive features that are open and being handled by Claims Administrator as of April 1, 2015, \$75 per feature. Payable when the feature closes.
2. For Bodily Injury features that are open as of April 1, 2015, and are assigned to Claims Administrator by Company to handle to conclusion, \$375 per feature. \$187.50 is earned on assignment, and \$187.50 is earned when the feature is closed.
3. For new features opened after April 1, 2015, \$500 per Bodily Injury feature and \$250 per Property Damage, Collision or Comprehensive feature, with a cap of \$800 per accident regardless of the number of features arising out of the accident. Regarding Bodily Injury features, \$250 is earned on assignment, and \$250 is earned when the feature is closed.
4. \$75 for incident-only claims where no investigation is warranted.
5. For First Notices of Loss, \$12.50 per First Notice of Loss taken.
6. For administrative services including but not limited to bank and check stock setup, positive pay setup, FileHandler claims system setup, creation of Quality Control reports and testing, and setup of other required reports, \$200 per hour.
7. For one administrative employee of Claims Administrator who is assigned to this program, Claims Administrator will receive the employee's actual salary plus 20%.



8. For administration and maintenance of the FileHandler claims system, \$1,000 per month.
9. Twenty-five percent (25%) of Net Subrogation Recoveries, earned when the recoveries are received. Net Subrogation recoveries are the gross amounts recovered through subrogation efforts by the claims Administrator on behalf of the Company, less any outside costs involved in the recovery process such as attorney fees.
10. \$105 per vehicle appraisal, \$115 per vehicle appraisal for a total loss, and actual cost outside of the DMA appraisal network, all earned upon completion.
11. \$35 per desk review of an auto damage estimate, earned upon completion.
12. \$45 per damaged auto assigned to Claims Administrator's shop network, earned upon assignment.

All ALAE is passed through to the Company for payment and is not included in this fee per feature. Any feature that goes into litigation is to be returned by Claims Administrator to Company.

At the end of each month Claims Administrator will prepare an invoice itemizing the services rendered as described in 1 through 12 above, and will send the invoice to the Company by email. The Company will pay the invoice within 20 days of receipt.

NBIS Construction and Transport  
Insurance Services, Inc.

By: [Signature]

Its: [Signature]

Date: 5/15/2015

DMA CLAIMS MANAGEMENT, INC.

By: Thomas Seitz

Its: PRESIDENT

Date: 5/9/15

# EXHIBIT 2

*Steven D. Grierson*

**JUDGE**  
**DENNIS M. PRINCE**  
Nevada Bar No. 5092  
**KEVIN T. STRONG**  
Nevada Bar No. 12107  
**PRINCE LAW GROUP**  
8816 Spanish Ridge Avenue  
Las Vegas, Nevada 89148  
Tel: 702.534.7600  
Fax: 702.534.7601  
Attorneys for Plaintiff  
*Diane Sanchez*

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

**DIANE SANCHEZ,**  
Plaintiff,

Case No. A-15-722815-C  
Dept. No. XXV

vs.

**DEFAULT JUDGMENT**

**BLAS BON, individually; JOSEPH**  
**ACOSTA, individually; WILFREDO**  
**ACOSTA, individually; DOES I-X and ROE**  
**CORPORATIONS I-X, inclusive,**  
Defendants.

Plaintiff Diane Sanchez's ("Sanchez") Application for Default Judgment was brought for hearing in Department XXV of the Eighth Judicial District Court, before The Honorable Kathleen E. Delaney, on the 11th day of June, 2019, with Dennis M. Prince and Kevin T. Strong of PRINCE LAW GROUP, appearing on behalf of Plaintiff Diane Sanchez and no one appearing on behalf of Defendant Blas Bon. The Court having reviewed the application on file herein, the documents attached thereto, and being duly advised in the premises:

This matter arises from a motor vehicle collision involving four (4) cars that occurred on April 28, 2015. On August 7, 2015, Sanchez filed her Complaint for personal injuries against Defendants Blas Bon ("Bon") and Joseph Acosta. On October 13, 2016, Sanchez filed her Amended Complaint wherein she named Wilfredo Acosta as an additional defendant. On October 16, 2018, Sanchez and the Acosta Defendants filed their Stipulation and Order for Dismissal with Prejudice following their confidential settlement of Sanchez's claims.

1

<input type="checkbox"/> Voluntary Dismissal	<input type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input checked="" type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Defects	<input type="checkbox"/> Judgment of Arbitration

*mk*



Case Number: A-15-722815-C

JUL 12 2019

As to Bon, Sanchez filed her Affidavit of Due Diligence on October 22, 2015 wherein the process server described his failed efforts to personally serve Bon with the Summons and Complaint at his last known address on September 22, 2015. On March 29, 2016, Sanchez filed her Amended Affidavit of Compliance wherein she confirmed that Bon was served with the Summons and Complaint through the Nevada Department of Motor Vehicles, pursuant to NRS 14.070, on November 2, 2015. On November 9, 2015, Sanchez also sent, via certified mail, copies of the Summons, Complaint, traffic accident report, and November 2, 2015 DMV letter confirming proof of service, to Bon's last known address: 3900 Cambridge Street, Suite 106, Las Vegas, Nevada 89119. This package went unclaimed and was returned to Sanchez on November 12, 2015. On April 1, 2016, the district court entered Default against Bon for his failure to file an answer to Sanchez's Complaint or to otherwise appear in the action within twenty (20) days of service. On March 29, 2019, Sanchez filed her Application for Entry of Default Judgment pursuant to NRCP 55(b)(2). The district court's entry of default constitutes an admission by Bon of all material facts alleged in Sanchez's Complaint. *Estate of LoMastro v. Am. Family Ins. Group*, 124 Nev. 1060, 1068 (2008). As a result, entry of default against Bon resolves the issues of liability and causation for all claims for relief in Sanchez's Complaint. *Id.* The only outstanding issue is the extent of Sanchez's damages.

Based on the foregoing, this Court finds and enters judgment against Bon as follows:

1. On April 28, 2015, Sanchez traveled northbound on Interstate 15 in a 1995 BMW 325i in the #5 travel lane. Bon drove a 1997 Dodge Ram 2500 pickup truck, wherein he hauled two wheelbarrows in the truck bed, directly behind Sanchez. Bon negligently collided with the left side of Sanchez's rear bumper.

2. As a result of Bon's negligence, Sanchez sustained severe and life-altering injuries to her cervical spine and lumbar spine that required substantial medical treatment, including anterior artificial disc replacement surgery at L4-5 of her lumbar spine, as established by her medical records.

3. As a result of Bon's negligence, it is reasonably foreseeable that Sanchez will suffer ongoing pain, suffering, and loss of enjoyment of life. It is also reasonably foreseeable that Sanchez will

undergo future medical treatment to address her cervical and lumbar spine injuries and ongoing residual chronic pain complaints suffered as a result of Bon's negligence. Sanchez's need for future medical treatment and the associated costs for her future medical treatment are established by her medical records and opinions of her retained medical expert, David J. Oliveri, M.D. Dr. Oliveri offers these opinions to a reasonable degree of medical probability.

4. As a result of Bon's negligence, Sanchez suffered past economic damages and it is reasonably foreseeable that Sanchez will suffer future economic damages that consist of: (1) future medical expenses, (2) past and future loss of wages and employee benefits, (3) loss of past and future housekeeping and household management services, and (4) reduction in the value of life damages. The extent of Sanchez's past and future economic damages is established by the opinions of her retained economist, Stan V. Smith, Ph.D. Dr. Smith offers his opinions to a reasonable degree of economic probability. Sanchez's permanent functional capacity disability that will preclude her from working in the future is established by the opinions of Dr. Oliveri. Dr. Oliveri offers this opinion to a reasonable degree of medical probability.

Based upon the papers, pleadings, and evidence on file herein, judgment is hereby entered in favor of Plaintiff Diane Sanchez and against Defendant Blas Bon, jointly and severally, as follows:

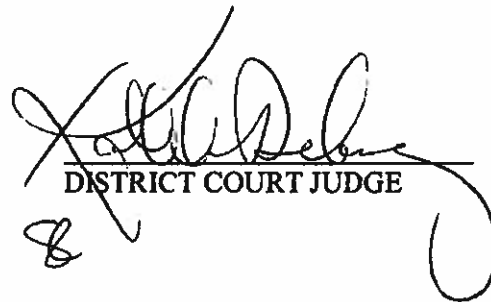
1. Past medical special damages:	\$465,285.01
2. Future medical special damages:	\$827,038.00
3. Past and future economic wage loss and employee benefits:	\$840,260.00
4. Past and future economic loss of household services:	\$446,334.00
5. Past pain and suffering:	\$2,000,000.00
6. Future pain and suffering:	\$3,000,000.00
7. Future reduction in the value of life:	\$2,685,877.00
8. Pre-judgment interest as allowed by Nevada law on past damages:	\$599,417.62
<b>Total Damages:</b>	<b>\$10,864,211.63</b>



Attorneys' fees based on a contingency fee agreement of forty percent (40%) of the total judgment award in the amount of \$4,345,684.65 ( $\$10,864,211.63 \times .40$ ) pursuant to *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Rep. 67, 429 P.3d 664, 670-71 (Nev. Ct. App. 2018).

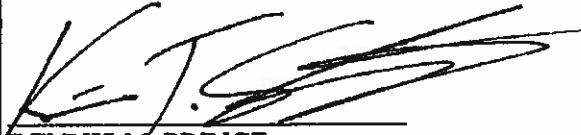
A total judgment in the amount of \$15,209,896.28, plus costs in the amount of \$2,759.45, is hereby entered in favor of Plaintiff Diane Sanchez and against Defendant Blas Bon. Plaintiff Diane Sanchez shall also be entitled to interest as allowed by Nevada law from the date of entry hereof until the judgment is fully satisfied.

DATED this 19<sup>th</sup> day of July, 2019.

  
DISTRICT COURT JUDGE

Respectfully Submitted By:

PRINCE LAW GROUP

  
DENNIS M. PRINCE  
Nevada Bar No. 5092  
KEVIN T. STRONG  
Nevada Bar No. 12107  
8816 Spanish Ridge Avenue  
Las Vegas, Nevada 89148  
Tel: 702.534.7600  
Fax: 702.534.7601  
Attorneys for Plaintiff  
Diane Sanchez



# EXHIBIT 3

ANV00003087 (A) HIPOLITO F CRUZ

Full Term: \$1,045.00 Written: \$914.00 Changed: \$0.00 Annual: \$2

Term Dates: 12/16/2014 - 6/16/2015 | Transaction Dates: 3/23/2015 12:55:10 PM - 6/16/2015

Online to Current Policy To Compare

More Links

My Navigator

ANV00003087

Policy Info

Drivers (3)

HIPOLITO F CRUZ

BARBARAINA CRUZ

MARK J CRUZ

Vehicles (3)

1999-CHEVROLET-SUBURBAN 1500

1997-DODGE-RAM 2500 XCAB 5.9L

1995-Ford-F-150 REGULAR CAB

Coverages

3rd Party Reports

Loss History (1)

Billing Info

Additional Policy Info

Policy Summary

Close

\*\* Policy is in inquiry mode. No changes will be saved. \*\*

Coverages

Vehicle Level Coverages

Bodily Injury 15/30

Property Damage 10,000

Medical Payments N/A

UMBI/UMBI N/A

Reset all combos to "N/A"

Vehicle Basic Information

	Num	Year	Make	Model	Body Type	Vin	Principal Driver	Comp Only
Select 1	1	1999	CHEVROLET	SUBURBAN 1500	SUV	3GNEC16R5XG249893	BARBARAINA CRUZ	No
Select 2	2	1997	DODGE	RAM 2500 XCAB 5.9L	Pickup	3B7KC23Z5VM536338	HIPOLITO F CRUZ	No
Select 3	3	1995	Ford	F-150 REGULAR CAB	Pickup	2FTEF15Y9SCA60315		No

Vehicle Level Coverages for 1997 DODGE RAM 2500 XCAB 5.9L Use Previous Vehicle

Comprehensive N/A

Collision N/A

Reset all combos to "N/A"



# EXHIBIT 4



June 16, 2015

VIA FAX AND U.S. MAIL  
866-291-3559

DMA Claims Services  
P.O. BOX 648  
Battle Creek, MI 49016

RE: Our Client : Diane Sanchez  
Your Insured : Hipolito Cruz  
Claim No. : DMA-0147074  
Date of Accident : April 28, 2015

To Whom It May Concern:

This letter and the attached information constitute our settlement demand in the above-mentioned matter for Diane Sanchez.

**Specials.** The medical bills of Ms. Sanchez total \$7,318 the bills and records are attached for your review.

**Futures:** Ms. Sanchez has been recommended for C6-C7 cervical decompression and fusion by Dr. Khavkin which is in Dr. Khavkin's June 4, 2015 chart note.

**Demand.** We are prepared to settle this matter on behalf of Diane Sanchez, fully and finally, for ALL APPLICABLE POLICY LIMITS. If you do not respond to this demand by **June 30, 2015**, we will file suit and seek the full measure of our client's damages, without regard to policy limits. Your response must be delivered by 5 p.m. Pacific Standard Time by either facsimile or phone call on the aforementioned date. Notice by regular mail will be insufficient notice since it is unlikely that the mail will reach my office prior to the deadline.

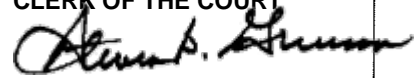
Additionally, please disclose the existence of any other applicable policies, umbrellas, or any other coverage on this claim. I look forward to hearing from you.

Thank you for your courtesy and cooperation.

Sincerely,

Paul D. Powell, Esq.

# EXHIBIT 5



1 **MSAD**

2 WILLIAM P. VOLK, ESQ.

3 Nevada Bar No. 006157

4 WILLIAM D. SCHULLER, ESQ.

5 Nevada Bar No. 011271

6 **KOLESAR & LEATHAM**

7 400 South Rampart Boulevard, Suite 400

8 Las Vegas, Nevada 89145

9 Telephone: (702) 362-7800

10 Facsimile: (702) 362-9472

11 E-Mail: wvolk@klnevada.com

12 wschuller@klnevada.com

13 Attorneys for Defendant,

14 BLAS BON

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 \* \* \*

18 DIANE SANCHEZ,

19 Plaintiff,

20 vs.

21 BLAS BON, individually; JOSEPH ACOSTA,  
22 individually; DOES I - X, and ROE  
23 CORPORATIONS I - X, inclusive,

24 Defendants.

CASE NO. A-15-722815-C

DEPT NO. XXV

HEARING REQUESTED

**MOTION TO SET ASIDE DEFAULT  
JUDGMENT**

25 JOSEPH ACOSTA, individually; and  
26 WILFREDO ACOSTA, individually,

27 Cross-Claimants,

28 vs.

BLAS BON, individually,

Cross-Defendant.

Defendant BLAS BON ("Bon"), by and through his attorneys at Kolesar & Leatham, hereby moves to set aside the \$15.2 million default judgment the Court entered in favor of Plaintiff DIANE SANCHEZ ("Sanchez") on July 19, 2019 ("Default Judgment").

///

KOLESAR & LEATHAM  
400 South Rampart Boulevard, Suite 400  
Las Vegas, Nevada 89145  
Tel: (702) 362-7800 / Fax: (702) 362-9472

1 This Motion is made and based upon NRCP 1, NRCP 55, NRCP 60, NRS 14.070, the  
2 following Memorandum of Points and Authorities, the pleadings and papers on file herein, and  
3 any argument presented at the time of hearing on this matter.

4 DATED this 17<sup>th</sup> day of January, 2020.

5 **KOLESAR & LEATHAM**

6  
7 By 

8 WILLIAM P. VOLK, ESQ.

Nevada Bar No. 006157

9 WILLIAM D. SCHULLER, ESQ.

Nevada Bar No. 011271

10 400 South Rampart Boulevard, Suite 400

Las Vegas, Nevada 89145

11 Attorneys for Defendant,  
12 BLAS BON

13 \*\*\*\*\*  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. PROCEDURAL HISTORY**

**A. Pleadings & Motion to Enlarge Time**

On August 7, 2015, Sanchez filed the Diane Sanchez Complaint ("Complaint"), which alleges negligence and negligence *per se* against Bon and Defendant JOSEPH ACOSTA ("Joseph"). The gravamen of the Complaint is that Bon caused a motor vehicle accident with Sanchez, during which Joseph also negligently crashed into Sanchez's vehicle. *Id.* at ¶ 6. Defendant Joseph Acosta's Answer to Plaintiff's Complaint and Cross-Claim Against Blas Bon ("Cross-Claim"), filed December 1, 2015, seeks contribution and indemnity against Bon. On March 3, 2016, Joseph served Bon with the Cross-Claim. *See* Defendant/Cross-Claimant Joseph Acosta's Motion to Enlarge Time to Perfect Service of Cross Claim Against Cross-Defendant Blasbon ("Motion to Enlarge Time"), filed March 7, 2017, at Ex. 1.

On October 13, 2016, Sanchez filed the Amended Complaint, which alleges negligence and negligence *per se* against unspecified Defendants and additionally alleges imposition of liability pursuant to NRS 41.440 against Defendant WILFREDO ACOSTA ("Wilfredo"). Defendants Joseph Acosta and Wilfredo Acosta's Answer to Plaintiffs' Amended Complaint and Cross-Claim Against Bon ("Amended Cross-Claim"), filed November 9, 2016, again seeks contribution against Bon. On March 7, 2017, Joseph filed the Motion to Enlarge Time, which the Court subsequently granted, allowing an additional 60 days for Joseph to serve Bon. *See* Court Minutes of April 11, 2017. Sanchez did not move to enlarge the time for service of the Amended Complaint on Bon.

**B. Attempted Service of Complaint**

On October 20, 2015, Sanchez filed an Affidavit of Due Diligence, attaching a Declaration of Diligence of process server Michael E. Clarke ("Clarke"), which states that he attempted to serve the Summons and Complaint on Bon on October 19, 2015 as follows:

///

///

///

1 Attempted to serve defendant at last known address of 3900  
2 Cambridge Street Suite 106, Las Vegas Nevada. This address is a  
3 Clark County neighborhood community center where the  
4 defendant had his mail sent; his current whereabouts are now  
5 unknown to them. A record search with the Clark County  
6 Assessor's Office reveals no records found. A search with Clark  
7 County voters [sic] registration reveals no records found. A local  
8 phone search for defendants [sic] phone number reveals no records  
9 found. A registered vehicle search with Nevada DMV and  
10 Premium Finder search reveals no records found.

11 See Plaintiff Diane Sanchez's Application for Entry of Default Judgment ("Default Judgment  
12 Application"), a true and correct copy of which is attached hereto as **Exhibit A** (without  
13 documents relating to future medical treatment/expenses (Ex. 8) and economic damages (Ex. 9)),  
14 at Ex. 4.

15 On March 29, 2016, Sanchez filed an Amended Affidavit of Compliance,<sup>1</sup> which states in  
16 pertinent part as follows:

17 That on or about October 27, 2015 [Paul D. Powell, Esq.] caused  
18 to be served upon the Director of the Department of Motor  
19 Vehicles of the State of Nevada at Carson City, Nevada, via United  
20 States Mail, a copy of the Complaint on file herein, a copy of the  
21 Summons issued following the filing of the Complaint, a copy of the  
22 Declaration of Diligence, together with the statutory fee of  
23 \$5.00, all in accordance with N.R.S. 14.070. Said documents were  
24 received by the Department of Motor Vehicles on November 2,  
25 2015 as evidenced by the letter from the Department of Motor  
26 Vehicles attached hereto as **Exhibit 2**, acknowledging receipt of  
27 said Complaint and Summons.

28 That on or about November 9, 2015 [Paul D. Powell, Esq.] caused  
to be deposited in the United States Mail at Las Vegas, Nevada,  
certified mail return receipt requested, with postage fully prepaid  
thereon, a copy of the Complaint and Summons, the traffic  
accident report and a copy of the DMV letter evidencing proof of  
service on Defendant BLAS BON at the Defendant's last known  
address of 3900 Cambridge Street, Suite 106, Las Vegas, Nevada  
89119. **The package was returned to sender on November 12,  
2015 as unclaimed. A copy is attached hereto as Exhibit 3.**

See Default Judgment Application, Ex. A hereto, at Ex. 5 (emphasis in original).

///

///

<sup>1</sup> The Affidavit is incorrectly dated March 29, 2015.

1           **C.      Default & Default Judgment**

2           On April 1, 2016, the Court filed the Default on Defendant Blas Bon (“Default”), which  
3 states that Bon was duly served through the DMV on November 2, 2015. **Over two months**  
4 **later**, on June 22, 2016, Sanchez filed the Notice of Entry of Default. **Over 33 months later**, on  
5 March 29, 2019, Sanchez moved for a default judgment. *See* Default Judgment Application, Ex.  
6 B hereto. On June 11, 2019, the Court held a hearing on the Default Judgment Application.  
7 Plaintiff’s Supplement to Application for Entry of Default Judgment (“Supplement to  
8 Application”), filed July 9, 2019, includes the Unsworn Declaration in Lieu of Affidavit Pursuant  
9 to NRS 53.045 of David J. Oliveri, M.D.<sup>2</sup> and the Unsworn Declaration in Lieu of Affidavit  
10 Pursuant to NRS 53.045 of Stan V. Smith, Ph.D.<sup>3</sup> A true and correct copy of the Supplement to  
11 Application is attached hereto as **Exhibit B** (without Oliveri Declaration exhibits).

12           On July 19, 2019, the Court issued the Default Judgment against Bon in the amount of  
13 **\$15,209,896.28** (plus \$2,759.45 in costs). Sanchez filed the Notice of Entry of Default Judgment  
14 on July 19, 2019. A true and correct copy of the Notice of Entry of Default Judgment is attached  
15 hereto as **Exhibit C**.

16           **D.      Dismissal of Co-Defendants**

17           On October 16, 2018, the Court issued a Stipulation and Order for Dismissal With  
18 Prejudice, executed by counsel for Sanchez and Joseph and Wilfredo. On February 7, 2019, the  
19 Court issued a Civil Order to Statistically Close Case by reason of the stipulated judgment.

20           **E.      Computation of Damages**

21           The Request for Exemption from Arbitration, served December 21, 2015, sets forth  
22 Sanchez’s medical specials at over **\$81,027.02**. *See* Commissioner’s Decision on Request for  
23 Exemption, filed January 15, 2016. Notably, Plaintiff’s Initial Early Case Conference Disclosure  
24 of Witnesses and Documents Pursuant to NRCP 16.1, served almost two months later on  
25 February 11, 2016, sets forth Sanchez’s total medical damages at only **\$26,876.42**. *See* Joint  
26 Case Conference Report, filed February 17, 2016, at Ex. 1. The Default Judgment Application

27 \_\_\_\_\_  
<sup>2</sup> Dr. Oliveri is Sanchez’s retained physical medicine and rehabilitation physician and life care planner.

28 <sup>3</sup> Dr. Smith is Sanchez’s retained economist.



1 filed March 29, 2019 requested the following damages:

2	• Past Medical Damages	\$465,285.01;
3	• Future Medical Damages	\$827,038.00;
4	• Past & Future Lost Wages	\$840,260.00;
5	• Past & Future Lost Household Services	\$446,334.00;
6	• Future Reduction in Value of Life	\$2,685,877.00;
7	• Past Pain & Suffering	\$2,000,000.00;
8	• Future Pain & Suffering	\$3,000,000.00;
9	• Prejudgment Interest	TBD; and
10	• Attorney's Fees and Costs	TBD
11	<b>Total:</b>	<b>\$10,264,794.01</b>

12 *See* Ex. A hereto at pp. 20-21.

## 13 **II. FACTUAL BACKGROUND**

14 1. The subject motor vehicle accident ("Accident") took place on April 28, 2015 in  
15 Clark County, Nevada. *See* Amended Complaint at ¶ 6.

16 2. The State of Nevada Traffic Accident Report ("Accident Report") lists Bon's  
17 address as 3900 Cambridge Street, Suite 106, Las Vegas, Nevada 89119 ("Cambridge Address").

18 *See* Default Judgment Application, Ex. A hereto, at Ex. 1, p. 3.

19 3. The Accident Report lists Bon's date of birth and phone number and notes that he  
20 has a Nevada driver's license. *Id.*

21 4. The Accident Report lists the owner of the vehicle Bon was driving at the time of  
22 the Accident as Hipolito Felipe Cruz ("Cruz") and Cruz's address as 4000 Abrams Avenue, Las  
23 Vegas, Nevada 89110 ("Abrams Address"). *Id.*

24 5. The Accident Report notes that Nevada Highway Patrol cited both Bon and  
25 Joseph for violation of NRS 484B.127.<sup>4</sup> *Id.* at pp. 3, 7.

26 ///

27 \_\_\_\_\_  
28 <sup>4</sup> "The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." NRS 484B.127(1).

6. The Voluntary Statement of Bon to Nevada Highway Patrol lists Bon's residence as the Abrams Address and Bon's employer as "South West Trees." *See* Default Judgment Application, Ex. A hereto, at Ex. 1.

7. South West Tree Company is located at 2901 S. Highland Drive, Las Vegas, Nevada 89109.

8. Joseph served the Cross-Claim on Bon at the Abrams Address and attempted to serve the Amended Cross-Claim on Bon at the Abrams Address. *See* Motion to Enlarge Time at Ex. 1, Ex. 2.

9. Clark County owns 3900 Cambridge Street, which is an office building zoned for offices and professional and business services. *See* Real Property Parcel Record for APN 162-15-702-011, a true and correct copy of which is attached hereto as **Exhibit D**.

10. Counsel for Sanchez and Cruz's insurer, DMA Claims Services, exchanged letters regarding the underlying claim on several occasions prior to the Default, including on June 16, 2015; July 10, 2015;<sup>5</sup> July 17, 2015;<sup>6</sup> and August 8, 2015, true and correct copies of which are attached hereto as **Exhibit E**.

11. The Certificate of Service for the Notice of Entry of Default states that counsel for Sanchez served same on Bon at the Cambridge Address via certified mail and on DeLawrence Templeton at DMA Claims Services via certified mail. *See* Default Judgment Application, Ex. A hereto, at Ex. 6.

12. The Certificate of Service for the Notice of Entry of Default Judgment states that counsel for Sanchez served same on Bon at the Cambridge Address via U.S. Postal Service; Sanchez's counsel did not serve DMA Claims Services. *See* Ex. C hereto.

13. At the April 11, 2017 hearing before the Court, counsel for Joseph stated that "Bon is very much aware of the case." *See* Court Minutes, a true and correct copy of which is attached hereto as **Exhibit F**.

///

<sup>5</sup> The July 10 letter to Sanchez's counsel was sent without a handwritten or digital signature.

<sup>6</sup> The July 17 letter to Sanchez's counsel was sent without a handwritten or digital signature.

1 14. Paul D. Powell, Esq. represented Sanchez as lead counsel in the instant litigation,  
2 from the time of filing the Complaint through the stipulated dismissal of Joseph and Wilfredo;  
3 and Dennis M. Prince, Esq. represented Sanchez as lead counsel from the time of filing the  
4 Default Judgment Application to present.

5 15. Messner Reeves LLP represented Joseph and Wilfredo in the instant litigation,  
6 from the time of answering the Complaint through stipulated dismissal.

7 16. Sanchez never set forth a legal basis for an attorney's fee award in requesting a  
8 default judgment. *See* Default Judgment Application, Ex. A hereto, generally; Supplement to  
9 Application, Ex. B hereto, generally.

### 10 III. LEGAL ARGUMENT

#### 11 A. Legal Standard for Setting Aside a Default Judgment

12 As a prefatory matter, a trial court is required to consider the underlying public policy of  
13 deciding a case on the merits whenever possible. *Moseley v. Eighth Judicial Dist. Court ex rel.*  
14 *Cty. of Clark*, 124 Nev. 654, 665-67, 188 P.3d 1136, 1144-45 (2008); *see also Scrimmer v. Eighth*  
15 *Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1196 (2000)  
16 (“good public policy dictates that cases be adjudicated on their merits”) (citations omitted).  
17 Keeping that sound public policy in mind, pursuant to NRCP 55(c), “[t]he court may set aside an  
18 entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).”  
19 A party may move to set aside a default judgment for the following reasons:

- 20 (1) **mistake, inadvertence, surprise, or excusable neglect;**
- 21 (2) newly discovered evidence that, with reasonable diligence,  
22 could not have been discovered in time to move for a new trial  
under Rule 59(b);
- 23 (3) fraud (whether previously called intrinsic or extrinsic),  
misrepresentation, or misconduct by an opposing party;
- 24 (4) the judgment is void;
- 25 (5) the judgment has been satisfied, released, or discharged; it is  
based on an earlier judgment that has been reversed or vacated; or  
applying it prospectively is no longer equitable; or
- 26 (6) **any other reason that justifies relief.**

27  
28 NRCP 60(b) (emphasis added). A motion based on NRCP 60(b) must be brought “within a

reasonable time” and for reason (1), no more than six months after the proceeding or service of the written notice of entry of the default judgment. NRCP 60(c)(1). The primary purpose of Rule 60(b) is to redress any injustice that may have resulted and as such, it should be liberally construed to effectuate such purpose. *Nevada Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987) (citation omitted).

The court may also set aside a default judgment against a defendant who was not personally served and who has not appeared if such motion is filed within six months of service of the notice of entry. NRCP 60(d)(2). Regardless of the basis for the motion, in setting aside a default judgment, the trial court is vested with broad discretion and barring an abuse of that discretion, its determination will not be disturbed on appeal. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018) citing *Cook v. Cook*, 112 Nev. 179, 181–82, 912 P.2d 264, 265 (1996).

**B. The Court Should Set Aside the Default Judgment.**

Bon moves to set aside the Default Judgment on three separate grounds: 1) surprise and excusable neglect under NRCP 60(b)(1); 2) particular circumstances which justify relief under NRCP 60(b)(6); and 3) Sanchez’s improper service on Bon under NRCP 60(d)(2). The instant Motion is timely as Sanchez filed the Notice of Entry of Default Judgment less than six months ago (on July 19, 2019).

*1. Surprise & Excusable Neglect*

Pursuant to NRCP 60(b)(1), “the court may relieve a party or its legal representative from a final judgment, order, or proceeding for...mistake, inadvertence, **surprise, or excusable neglect**” (emphasis added). *Surprise* is “[a]n occurrence for which there is no adequate warning or that affects someone in an unexpected way.” SURPRISE, Black's Law Dictionary (11th ed. 2019). And *excusable neglect* is “[a] failure – which the law will excuse – to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party’s own carelessness, inattention, or willful disregard of the court’s process, but because of some unexpected or unavoidable hindrance...” NEGLECT, Black's Law Dictionary (11th ed. 2019). In ruling on whether relief under NRCP 60(b)(1) is appropriate, the court must consider several

1 factors: (1) whether there was a prompt application to remove the judgment; (2) presence or  
2 absence of intent to delay the proceedings; (3) the moving party's knowledge of procedural  
3 requirements (or lack thereof); (4) the movant's good (or bad) faith; and (5) the public policy in  
4 favor of resolving cases on the merits. *Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 792-93  
5 (1992) *citing Yochum v. Davis*, 98 Nev. 484, 486-87, 653 P.2d 1215, 1216-17 (1982) (additional  
6 citation omitted); *see also* Rodriguez, 134 Nev. at 657, 428 P.3d at 257 *citing Yochum*  
7 (additional citation omitted).

8 Here, even assuming *arguendo* that Bon was aware of the Default filed on April 1, 2016,  
9 he would have been surprised to learn that Sanchez did not seek to obtain the Default Judgment  
10 until **three years later** (on March 29, 2019). *See, e.g., Bruno v. Schoch*, 94 Nev. 712, 714, 582  
11 P.2d 796, 797 (1978) (in suit against putative father for breach of promise to contribute to child's  
12 support, default judgment should have been vacated where mother did not seek default judgment  
13 against the putative father until almost 11 months after entry of default). Additionally, given the  
14 extent of the damage to the vehicles involved in the Accident and the fact that Sanchez did not  
15 seek medical attention at the scene, Bon would have been surprised to learn that Sanchez  
16 subsequently alleged **over \$10.2 million in damages** and was ultimately awarded **over \$15.2**  
17 **million**. Separately, as set forth in detail *infra*, the lack of proper service on Bon constitutes  
18 surprise and/or excusable neglect, thus necessitating setting aside the Default Judgment.

19 The *Yochum* factors weigh in Bon's favor as he is acting promptly to remove the  
20 judgment via the instant Motion. There was no intent to delay the proceedings as Bon was  
21 unaware of the proceedings. Bon lacked knowledge of procedural requirements as he was  
22 unrepresented during the entirety of the litigation. Bon is moving in good faith to set aside the  
23 Default Judgment. And finally, as always, public policy favors resolving cases on the merits.

24 2. *Particular Circumstances Justify Relief*

25 Pursuant to NRCP 60(b)(6), "the court may relieve a party or its legal representative from  
26 a final judgment, order, or proceeding for...any other reason that justifies relief." Rule 60(b)  
27 was amended in March of 2019 to include subsection 6. As such, there does not appear to be any  
28 case law interpreting this catchall provision for setting aside a final judgment. However, the

underlying facts and procedural posture preceding the Default Judgment in the instant litigation demonstrate a sound reason that justifies relief. The following facts, when viewed collectively, justify relief in favor of Bon:

- Other than Bon, all the parties – Sanchez, Joseph, and Wilfredo – had the adequate representation of counsel throughout the litigation.
- While Sanchez settled with Joseph and Wilfredo, the amount of the settlement (if any) was not deducted from the Default Judgment.
- Sanchez’s damages ballooned from a relatively modest \$81,027.02 pre-Default to an astonishing \$10,264,794.01 post-Default.
- Bon never had the opportunity retain his own experts or to cross-examine Sanchez’s experts, Dr. Oliveri and Dr. Smith, as to the significant damages alleged.
- There was no legal basis for the \$4,345,684.65 in attorney’s fees the Court awarded Sanchez in the Default Judgment.<sup>7</sup>
- Bon’s liability remains questionable as the Accident involved four vehicles and both Bon and Joseph were cited for “following too closely.”<sup>8</sup>
- The Amended Complaint, which was filed prior to the Default Judgment Application, does not include any charging allegations specific to Bon.<sup>9</sup>

In short, allowing the Default Judgment to stand would run counter to both Nevada’s laudable public policy of deciding cases on the merits and NRCP 60(b)’s salutary purpose of redressing injustice resulting from a final judgment.

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<sup>7</sup> See Ex. C hereto, Default Judgment at p. 4, ll. 3-5 (“Attorneys’ fees based on a contingency fee agreement of forty percent (40%) of the total judgment award in the amount of \$4,345,684.65 (\$10,864,211.63 \* .40) pursuant to *O’Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Rep. 67,429 P.3d 664, 670-71 (Nev. Ct. App. 2018).”). In *O’Connell*, the Nevada Court of Appeals held that an award of attorney’s fees on the basis of a contingency fee agreement was appropriate where plaintiff obtained a more favorable verdict at trial than her offer of judgment pursuant to NRCP 68. 134 Nev. at 551-52, 429 P.3d at 666. Here, Sanchez did not serve an offer of judgment on Bon and Sanchez’s causes of action do not provide for attorney’s fees as a measure of damages.

<sup>8</sup> See Default Judgment Application, Ex. A hereto, at Ex. 1, pp. 3, 7.

<sup>9</sup> Compare Complaint at ¶ 6 (“That on April 28, 2015, in Clark County, Nevada, [Bon] caused a crash with Plaintiff. During the same sequence of events, [Joseph] also negligently crashed into Plaintiff.”) with Amended Complaint at ¶ 6 (“On April 28, 2015, in Clark County, Nevada, [Joseph] caused a crash with Plaintiff.”).

3. *Sanchez's Improper Service on Bon*

Pursuant to NRCP 60(d)(2), the court has the power to “set aside the default judgment against a defendant who was not personally served with a summons and complaint and who has not appeared in the action, admitted service, signed a waiver of service, or otherwise waived service.” Indeed, “[a] default judgment not supported by proper service of process is void and must be set aside.” *Browning v. Dixon*, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) (emphasis added) *citing Gassett v. Snappy Car Rental*, 111 Nev. 1416, 1420, 906 P.2d 258, 261 (1995); *see also Michel v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 117 Nev. 145, 17 P.3d 1003 (2001) (faulty service of process provided good cause to set aside default judgment).

a. Sanchez Did Not Attempt to Serve Amended Complaint on Bon.

The first issue with service stems from the fact that Sanchez filed the Amended Complaint (October 13, 2016) between the time the Court issued the Default (April 1, 2016) and the time the Court issued the Default Judgment (July 19, 2019). In other words, Bon’s default was entered on the original Complaint, but the Court subsequently entered default judgment on the Amended Complaint. Under Nevada law, an amended complaint supersedes the original complaint and renders it nugatory. *Associated Aviation Underwriters, Inc. v. Vegas Jet, L.L.C.*, 106 F. Supp. 2d 1051, 1054 (D. Nev. 2000) *citing Rondono v. Ballow*, 100 Nev. 142, 143, 676 P.2d 807, 808 (1984) (“The amended complaint in this case was a distinct pleading which superseded the original complaint.”) and *McFadden v. Ellsworth Mill & Mining Co.*, 8 Nev. 57, 60 (1872) (“The amended complaint is in itself a full, distinct, and complete pleading, and entirely supersedes the original.”).

Sanchez’s Amended Complaint is the operative pleading and Sanchez had to serve Bon with same in order to enter judgment on that pleading. Pursuant to NRCP 5(a)(2), while service is usually not required on a party who is in default, “a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4” (emphasis added). The Complaint alleges “[t]hat on April 28, 2015, in Clark County, Nevada, **[Bon] caused a crash with Plaintiff**” and that “[d]uring the same sequence of events, [Joseph] also negligently crashed into Plaintiff.” *Id.* at ¶ 6 (emphases added). The Amended Complaint substitutes Joseph for Bon

1 as to the negligent act, alleging that “[o]n April 28, 2015, in Clark County, Nevada, **[Joseph]**  
2 **caused a crash with Plaintiff.**” *Id.* at ¶ 6 (emphases added). No mention whatsoever is made as  
3 to Bon’s actions (or failure to act). As to negligence, the Amended Complaint alleges that  
4 “Defendant [singular] breached that duty of care by striking Plaintiff’s vehicle on the roadway.”  
5 *Id.* at ¶ 13. The parties are left to guess as to which Defendant Sanchez is referring to. As to  
6 negligence *per se*, Sanchez alleges that “[t]he acts of Defendants **as described herein** violated  
7 the traffic laws of the State of Nevada and Clark County, constituting negligence *per se*...” *Id.* at  
8 ¶ 15 (emphasis added). Again, Bon’s acts are not described anywhere in the Amended  
9 Complaint.<sup>10</sup> As such, there is an unknown theory of negligence against Bon and thus “a new  
10 claim for relief” requiring service pursuant to NRCP 5(a)(2).

11 Therefore, the Court must set aside the void Default Judgment because it is not supported  
12 by proper service of process.

13 b. Sanchez Did Not Meet NRS 14.070’s Service Requirements.

14 The second issue with service involves the specific requirements set forth in NRS 14.070,  
15 which Sanchez attempted to utilize in serving Bon. NRS 14.070 provides a method for the  
16 service of process on operators of automobiles involved in accidents over Nevada’s public roads,  
17 streets, or highways. The operator is deemed to have appointed the Director of the Department  
18 of Motor Vehicles as attorney for service of process in any action resulting in damage or loss to  
19 person or property. NRS 14.070(1). Service is completed through the deposit of a copy of the  
20 process and the payment of the statutory fee to the Director as well as delivery by registered or  
21 certified mail of a copy of the process to the defendant at the address supplied in the accident  
22 report or the best available address. NRS 14.070(2). A return receipt signed by the defendant, or  
23 a return of the United States Postal Service stating the defendant refused to accept delivery or  
24 could not be located, or that the address is insufficient, along with the plaintiff’s affidavit of  
25

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26 <sup>10</sup> NRCP 8(a) requires that a pleading stating a claim for relief must include “a short and plain statement of the claim  
27 showing that the pleader is entitled to relief.” While Nevada is a notice-pleading jurisdiction, the complaint must  
28 “set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has  
adequate notice of the nature of the claim and relief sought.” *W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936,  
840 P.2d 1220, 1223 (1992) (citations omitted).



1 compliance, should be attached to the original process and returned and filed in the action in  
2 which it was issued. *Id.* The provisions of this statute apply to resident motorists who “cannot  
3 be found within [Nevada] following a crash which is the subject of [the] action for which process  
4 is served pursuant to this section.” NRS 14.070(6). Sanchez failed to meet several of the service  
5 requirements set forth in NRS 14.070.

6 i. Source of Address

7 As a prefatory matter, the Affidavit of Compliance and the Amended Affidavit of  
8 Compliance are defective in that neither states the source of the Cambridge Address, which  
9 Sanchez utilized as Bon’s “best known address.” *See* Default Judgment Application, Ex. A  
10 hereto, at Ex. 5. The affidavit of compliance by plaintiff must state the source of the address  
11 relied on by the plaintiff, and the affidavit must be based on facts and not mere conclusions.  
12 *Mitchell v. Second Judicial Dist. Court*, 82 Nev. 377, 381, 418 P.2d 994, 997 (1966). When  
13 notice is sent to the *best address* available to the plaintiff, “[a] sworn statement as to source will  
14 serve to establish the good faith of the plaintiff to give actual notice and will, to some extent,  
15 diminish the possibility of fraud.” *Id.*, 82 Nev. at 381, 418 P.2d at 997. Therefore, Sanchez’s  
16 attempted service via NRS 14.070 is deficient.

17 ii. Affirmative Duty to Search

18 In interpreting statutory service through the DMV, Nevada has held that “substitute  
19 service pursuant to NRS 14.070(2) is efficacious only if the plaintiff first demonstrates that, after  
20 due diligence, the resident defendant cannot be found within the state.” *Browning*, 114 Nev. at  
21 217, 954 P.2d at 743. In *Browning*, the Nevada Supreme Court concluded that the phrase *cannot*  
22 *be found* imposes “an affirmative obligation on a plaintiff to diligently search” for a resident  
23 motorist defendant to determine whether the defendant has, in fact, departed the state or cannot  
24 be located within the state. *Browning*, 114 Nev. at 216-17, 954 P.2d at 743. The *Browning*  
25 Court noted that “[a]ny other conclusion contravenes the plain meaning of the statute and  
26 violates the principles of procedural due process.” *Id. citing Sheriff v. Wu*, 101 Nev. 687, 689-  
27 90, 708 P.2d 305, 306 (1985) (“Where a statute may be given conflicting interpretations, one  
28 rendering it constitutional, and the other unconstitutional, the constitutional interpretation is

1 favored.”); *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) (“words  
2 in a statute should be given their plain meaning unless this violates the spirit of the act”).

3 For example, in *Price v. Dunn*, the Nevada Supreme Court concluded that, despite the  
4 plaintiff’s attempts to discover the defendant’s address through the telephone book, inquiries at  
5 the power company, and a conversation with the defendant’s stepmother, “her actual efforts, as a  
6 matter of law, fall short of the due diligence requirement to the extent of depriving [the  
7 defendant] of his fundamental right to due process.” *Browning*, 114 Nev. at 218, 954 P.2d at 744  
8 quoting *Price*, 106 Nev. 100, 102-03, 787 P.2d 785, 786-87 (1990). Similarly, in *Gassett*, the  
9 Nevada Supreme Court concluded that plaintiff’s attempts to locate the defendant solely through  
10 one visit to an old address and service via publication, despite knowledge of defendant’s counsel,  
11 failed to demonstrate due diligence and thus, the default judgment was void. 111 Nev. at 1420,  
12 906 P.2d at 261. Because “[w]here other reasonable methods exist for locating the whereabouts  
13 of a defendant, plaintiff should exercise those methods.” *Browning*, 114 Nev. at 218, 954 P.2d at  
14 744 quoting *Price*, 106 Nev. at 103, 787 P.2d 787.

15 Here, Sanchez’s attempted service through the DMV presupposes that a diligent effort  
16 has been made to locate Bon. However, the process server’s Declaration of Diligence fails to  
17 identify the person who told him the Cambridge Address was Bon’s mailing address. *See*  
18 Default Judgment Application, Ex. A hereto, at Ex. 4. There was no attempt to contact Cruz, the  
19 owner of the vehicle Bon was driving, despite the fact that Cruz’s address was set forth in the  
20 Accident Report. *See* Default Judgment Application, Ex. A hereto, at Ex. 1. Nor was there an  
21 attempt to contact DMA, despite the fact that Sanchez’s counsel had previously corresponded  
22 with DMA in June, July, and August of 2015. *See* Correspondence, Ex. E hereto.

23 Clarke, Sanchez’s process server, only attempted service once, at the Cambridge  
24 Address, which is an office building where family services/faith ministries are located. *See*  
25 Default Judgment Application, Ex. A hereto, at Ex. 4. Clarke did not attempt service the Abrams  
26 Address or Bon’s place of work, despite knowledge of both. *See* Default Judgment Application,  
27 Ex. A hereto, at Ex. 1. Unlike Joseph, Sanchez did not move for additional time to serve Bon.  
28 Additionally, Clarke provided no backup documentation regarding the purported searches of the

Clark County Assessor's Office, Clark County voter registration, "local phone search," registered vehicle search through Nevada DMV, and "Premium Finder." And Clarke provided no description as to what "Premium Finder" entails.

Therefore, Sanchez did not satisfy the duty to search diligently for Bon in Nevada prior to resorting to statutory service.

iii. Proof of Mailing

Another deficiency is apparent given that service requires "a return receipt signed by the defendant or a return of the United States Postal Service stating that the defendant refused to accept delivery or could not be located, or that the address was insufficient." NRS 14.070(2). Bon did not sign a return receipt as he did not receive the certified mail containing the Summons and Complaint. The U.S. Postal Service returned the certified mail Sanchez sent to the Cambridge Address as "Unclaimed." See Default Judgment Application, Ex. A hereto, at Ex. 5. There is no indication that: 1) Bon refused to accept delivery or could not be located; or 2) that the Cambridge Address was insufficient. Indeed, the *Return to Sender* stamp on the envelope could have indicated as much, as it includes the following additional options, none of which were checked:

- Undeliverable as Addressed;
- Moved, Left No Address;
- Refused;
- Attempted, Not Known;
- No Such Street;
- No Such Number;
- No Receptacle;
- Deceased; and
- Vacant.

Therefore, service is also insufficient because Sanchez did not meet this additional requirement.

///

iv. Relations with Opposing Counsel

Finally, Nevada Rule of Professional Conduct 3.5A states that “[w]hen a lawyer knows or reasonably should know the identity of a lawyer representing an opposing party, he or she should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer’s intention to proceed.” Sanchez’s counsel communicated directly with DMA on several occasions. *See* Correspondence, Ex. E hereto. Additionally, the Certificate of Service for the Notice of Entry of Default indicates that the filing was served via certified mail to DeLawrence Templeton at DMA Claims Services. *See* Default Judgment Application, Ex. A hereto, at Ex. 6. Thus, while Bon was not yet represented by counsel *per se*, Sanchez certainly violated the spirit of NRPC 3.5A in causing the Default to be entered against Bon without first inquiring of DMA’s intention to retain counsel for Bon.

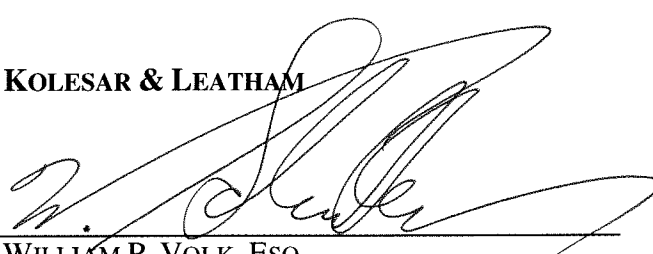
IV. CONCLUSION

Based on the foregoing, the Court should set aside the Default Judgment and order a trial on the merits.

DATED this 17<sup>th</sup> day of January, 2020.

KOLESAR & LEATHAM

By

  
WILLIAM P. VOLK, ESQ.  
Nevada Bar No. 006157  
WILLIAM D. SCHULLER, ESQ.  
Nevada Bar No. 011271  
400 South Rampart Boulevard, Suite 400  
Las Vegas, Nevada 89145

Attorneys for Defendant,  
BLAS BON

**CERTIFICATE OF SERVICE**

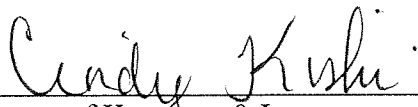
I hereby certify that I am an employee of Kolesar & Leatham, and that on the 17<sup>th</sup> day of January, 2020, I caused to be served a true and correct copy of the foregoing **MOTION TO SET ASIDE DEFAULT JUDGMENT** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities to those parties listed below.

Party: Diane Sanchez - Plaintiff  
E Service eservice@egletlaw.com

Other Service Contacts

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Dana Marcolongo .	dana@tplf.com
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An Employee of KOLESAR & LEATHAM

# EXHIBIT 6

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Attorneys for Plaintiff  
*Diane Sanchez*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

DIANE SANCHEZ,  
Plaintiff,

CASE NO. A-15-722815-C  
DEPT. NO. XXV

vs.

BLAS BON, individually; JOSEPH  
ACOSTA, individually; WILFREDO  
ACOSTA, individually; DOES I-X and  
ROE CORPORATIONS I-X, inclusive,  
Defendants.

**ORDER DENYING  
DEFENDANT BLAS BON'S  
MOTION TO SET ASIDE  
DEFAULT JUDGMENT**

Defendant BLAS BON's Motion to Set Aside Default Judgment was brought for hearing in Department XXV of the Eighth Judicial District Court, before the Honorable Kathleen Delaney, on the 25th day of February, 2020, with Dennis M. Prince and Kevin T. Strong of PRINCE LAW GROUP, appearing on behalf of Plaintiff DIANE SANCHEZ; and William P. Volk of HOLLEY DRIGGS, appearing on behalf of Defendant BLAS BON.<sup>1</sup> The Court having reviewed the pleadings and papers on file herein, having heard oral argument, and being duly advised in the premises:

\*\*\*  
\*\*\*

<sup>1</sup> At the time of the hearing, Mr. Volk was a partner at Kolesar & Leatham. Since that time, Kolesar & Leatham ceased operations and Mr. Volk is now a partner/shareholder with Holley Driggs.

1       **THE COURT HEREBY FINDS** that NRCP 60(b) outlines the specific legal  
2 grounds for a district court to grant a party relief from a final judgment. The legal  
3 grounds outlined in NRCP 60(b) include mistake, inadvertence, surprise, or excusable  
4 neglect and any other reason that justifies relief.

5       **THE COURT FURTHER FINDS** that a district court has broad discretion to  
6 determine whether a default judgment should be set aside. *Britz v. Consolidated*  
7 *Casinos Corp.*, 87 Nev. 441, 445 (1971).

8       **THE COURT FURTHER FINDS** that the district court has “wide discretion in  
9 determining what neglect is excusable and what neglect is inexcusable” under NRCP  
10 60(b). *Durango Fire Prot., Inc. v. Troncoso*, 120 Nev. 658, 662 (2004).

11       **THE COURT FURTHER FINDS** that Plaintiff properly served her Complaint  
12 on Defendant Blas Bon through the Nevada Department of Motor Vehicles pursuant to  
13 NRS 14.070. Plaintiff exercised due diligence to locate and personally serve Bon before  
14 effectuating service through the DMV. Specifically, Plaintiff attempted to serve Bon at  
15 3900 Cambridge Street, Suite 106, Las Vegas, Nevada 89119, the address that was listed  
16 on the traffic accident report. Plaintiff’s process server attempted to locate Bon through  
17 records searches with the Clark County Assessor’s Office and Clark County Voter  
18 Registration. Plaintiff’s process server also searched local phone records and performed  
19 a registered vehicle search with the Nevada Department of Motor Vehicles and Premium  
20 Finder. The efforts made to locate and serve Bon were reasonably diligent and justified  
21 service of Sanchez’s Complaint through the DMV.

22       Sanchez also fully complied with the requirements to effectuate service through  
23 the DMV set forth in NRS 14.070. Sanchez received a letter dated November 2, 2015  
24 from the DMV acknowledging service of the Summons and Complaint on Bon. On  
25 November 9, 2015, Sanchez mailed, via certified mail, return receipt requested, a copy  
26 of the Summons, Complaint, traffic accident, report, and the November 2, 2015 DMV  
27 letter to Bon’s best last known address: 3900 Cambridge Street, Suite 106, Las Vegas,  
28 Nevada 89119.

      This Court also determined Bon was properly served when it considered Sanchez’s  
Application for Default Judgment filed on March 29, 2019. Bon has also not supplied



1 this Court with an affidavit declaring that he never received any notice of Sanchez's  
2 Complaint or otherwise has no knowledge of the suit against him. Under these  
3 circumstances, Bon cannot now claim that he was surprised or that there is excusable  
4 neglect to justify relief from the July 19, 2019 default judgment entered against him  
5 pursuant to NRCP 60(b)(1).

6 **THE COURT FURTHER FINDS** that there is ample evidence that Bon's  
7 insurer, ATX, the entity tasked to defend Bon, received notice of Sanchez's Complaint.  
8 On January 20, 2016, Sanchez sent a letter, via U.S. mail, to DeLawrence Templeton  
9 ("Templeton") of DMA Claims Services, advising him that Bon was served with the  
10 Summons and Sanchez's Complaint via the DMV.<sup>2</sup> Sanchez provided Templeton with a  
11 copy of her Complaint, November 2, 2015 DMV letter, and November 19, 2015 Affidavit  
12 of Complaine and requested ATX to file an answer to her Complaint. Sanchez  
13 specifically warned Templeton that she would request the Court to enter a default against  
14 Bon if an answer was not filed. On February 16, 2016, Sanchez again sent a letter to  
15 Templeton advising that Bon still did not file his Answer to her Complaint. Sanchez  
16 clarified that if Bon did not file his Answer to her Complaint by February 23, 2016, she  
17 would request entry of a default against Bon. ATX never filed an answer to Sanchez's  
18 Complaint on Bon's behalf despite receiving a full and fair opportunity to do so. There  
19 is no evidence to suggest that ATX never received any notice of Sanchez's lawsuit.

20 **THE COURT FURTHER FINDS** that there is no factual or legal basis to set  
21 aside the July 19, 2019 Default Judgment due to surprise, excusable neglect, or for any  
22 other reason under NRCP 60(b). The evidence presented establishes inexcusable neglect  
23 on the part of both Bon and ATX given ATX's failure to satisfy its responsibility to defend  
24 Bon against the allegations set forth in Sanchez's Complaint.

25 . . .

26 . . .

27 . . .

---

28 <sup>2</sup> DMA represented the interests of ATX in relation to the motor vehicle collision giving rise to Sanchez's Complaint for personal injuries against Bon.

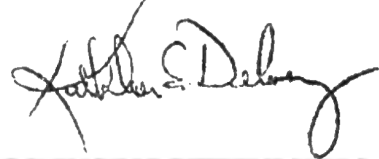
**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant Blas Bon's Motion to Set Aside Default Judgment is **DENIED** in its entirety.

**IT IS SO ORDERED.**

Dated this 19th day of September, 2020

DATED this \_\_\_\_ day of September, 2020.



DISTRICT COURT JUDGE

DD9 015 23D5 10E3

DATED this 9th day of September, 2020.

DATED this 19th day of September, 2020.

Kathleen E. Delaney

District Court Judge

Respectfully Submitted By:

Approved as to Form and Content:

**PRINCE LAW GROUP**

**HOLLEY DRIGGS**



Refused to sign

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Attorneys for Plaintiff  
*Diane Sanchez*

WILLIAM P. VOLK  
Nevada Bar No. 6157  
400 South 4th Street  
Suite 300  
Las Vegas, Nevada 89101  
Tel: (702) 791-0308  
Fax: (702) 791-1912  
Attorney for Defendant  
*Blas Bon*

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Diane Sanchez, Plaintiff(s)

CASE NO: A-15-722815-C

7 vs.

DEPT. NO. Department 25

8 Blas Bon, Defendant(s)  
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 9/19/2020

15 William Volk

wvolk@klnevada.com

16 Joanne Hybarger

jhybarger@klnevada.com

17 Lennie Fraga

lfraga@klnevada.com

18 Bernita Lujan .

blujan@messner.com

19 Dana Marcolongo .

dana@tplf.com

20 Jenny Marimberga .

jenny@tplf.com

21 Kimberly Shonfeld .

kshonfeld@messner.com

22 Lauren Pellino .

lpellino@tplf.com

23 Lindsay Reid .

lindsay@tplf.com

24 Michael Meyer .

cmeyer@messner.com

25 Renee Finch .

rfinch@messner.com

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William Schuller	wschuller@klnevada.com
Cindy Kishi	ckishi@klnevada.com
eFiling District	nvdistrict@klnevada.com
Tracey Zastrow	tzastrow@messner.com
Michael T. Nixon .	mnixon@messner.com
E Service	eservice@egletlaw.com
Suri Guzman	sguzman@nevadafirm.com
Lisa Lee	llee@thedplg.com
Eservice Filing	eservice@thedplg.com
William Volk	wvolk@nevadafirm.com

# EXHIBIT 7

John H. Podesta (NV Bar No. 7487)  
Chris Richardson (NV Bar No. 9166)  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
525 Market Street, 17th Floor  
San Francisco, CA 94105-2725  
john.podesta@wilsonelser.com  
chris.richardson@wilsonelser.com  
Tel.: (415) 433-0990  
Fax: (415) 434-1370

*Address for Personal Service Only*  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
300 South 4<sup>th</sup> Street, Ste. 1100  
Las Vegas, NV 89101

*Attorneys for Defendants*  
*Windhaven National Insurance Company,*  
*Windhaven National Insurance Company*  
*fka ATX Premier Insurance*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

DIANE SANCHEZ,

Plaintiff,

vs.

WINDHAVEN NATIONAL INSURANCE  
COMPANY, a domestic corporation;  
WINDHAVEN NATIONAL INSURANCE  
COMPANY fka ATX PREMIER INSURANCE, a  
domestic corporation; DMA CLAIMS, INC., a  
foreign corporation; BLAS BON, an individual;  
DOES I-X, inclusive, and ROE CORPORATIONS  
I-X, inclusive,

Defendants.

WINDHAVEN NATIONAL INSURANCE  
COMPANY, a foreign corporation,

Cross-Claimant,

vs.

DMA CLAIMS SERVICES, INC., a foreign  
corporation; DOES I-X, inclusive, and ROE  
CORPORATIONS I-X, inclusive,

Cross-Defendant.

CASE NO: 2:19-cv-02196

**DEFENDANT WINDHAVEN NATIONAL  
INSURANCE COMPANY'S NOTICE OF  
AUTOMATIC STAY OF PROCEEDINGS**

1 TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on March 5, 2020, The State of Texas was granted an  
3 ORDER APPOINTING LIQUIDATOR, PERMANENT INJUNCTION AND NOTICE OF  
4 AUTOMATIC STAY by the 419<sup>th</sup> Judicial District Court, District of Travis County, Texas., Cause  
5 No. D-1-GN-20-001052. [See Order, attached as **Exhibit "A"**] The effect of the Order places  
6 defendant, Windhaven National Insurance Company into liquidation pursuant to Tex. Ins. Code  
7 Chapter 443. The order permanently restrains third parties from taking any actions against  
8 Defendant or its property in violation of the Insurer Receivership Act, specifically NRS 443.008, *et*  
9 *seq.*

10  
11  
12 Dated: March 25, 2020

WILSON ELSEER MOSKOWITZ  
EDELMAN & DICKER, LLP

13  
14  
15 By: Chris Richardson

John H. Podesta (NV Bar No. 7487)

Chris Richardson (NV Bar No. 9166)

16 WILSON, ELSEER, MOSKOWITZ,

EDELMAN & DICKER LLP

17 525 Market Street, 17th Floor

San Francisco, CA 94105-2725

18 Tel.: (415) 433-0990

19 Fax: (415) 434-1370

*Attorneys for Defendant*

*Windhaven National Insurance Company,*

*Windhaven National Insurance Company*

*fka ATX Premier Insurance*

**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 25th day of March, 2020, I served a true and correct copy of the foregoing

**DEFENDANT WINDHAVEN NATIONAL INSURANCE COMPANY'S  
NOTICE OF AUTOMATIC STAY**

as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk; and/or
- ☐ via hand-delivery to the addressees listed below; and/or
- ☐ via facsimile; and/or
- ☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m. (PST/PDT).

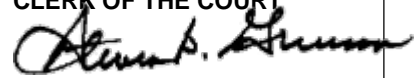
/s/ Nicole Hrustyk  
Nicole Hrustyk



**SERVICE LIST**

Dennis M. Prince, Esq. Kevin T. Strong, Esq. Jonathan A. Rich, Esq. PRINCE LAW GROUP 8816 Spanish Ridge Ave. Las Vegas, Nevada 89148 T: 702-534-7600 F: 702-534-7601 E: <a href="mailto:dprince@thedplg.com">dprince@thedplg.com</a> E: <a href="mailto:kstrong@thedplg.com">kstrong@thedplg.com</a> E: <a href="mailto:jrich@thedplg.com">jrich@thedplg.com</a> E: <a href="mailto:lee@thedplg.com">lee@thedplg.com</a> E: <a href="mailto:eservice@thedplg.com">eservice@thedplg.com</a> <i>Attorneys for Plaintiff</i> <i>Diane Sanchez</i>	Robert E. Schumacher, Esq. Wing Yan Wong, Esq. GORDON REES SCULLY MANSUKAHNI, LLP 300 South 4 <sup>th</sup> Street, Suite 1550 Las Vegas, NV 89101 Tel.: (702) 577-9300 <i>Attorneys for Defendant/Cross-Defendant</i> <i>DMA Claims Management, Inc.</i>
--	---

# EXHIBIT 8



**NOTC**  
WILLIAM P. VOLK, ESQ.  
Nevada Bar No. 006157  
**HOLLEY DRIGGS**  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: (702) 791-0308  
Facsimile: (702) 791-1912  
E-Mail: [wvolk@nevadafirm.com](mailto:wvolk@nevadafirm.com)

Attorneys for Defendant  
BLAS BON

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

\* \* \*

DIANE SANCHEZ,

Plaintiff,

vs.

BLAS BON, individually; JOSEPH ACOSTA,  
individually; DOES I - X, and ROE  
CORPORATIONS I - X, inclusive,

Defendants.

JOSEPH ACOSTA, individually; and  
WILFREDO ACOSTA, individually,

Cross-Claimants,

vs.

BLAS BON, individually,

Cross-Defendant.

CASE NO. A-15-722815-C

DEPT NO. XXV

**NOTICE OF PERMANENT  
INJUNCTION AND AUTOMATIC  
STAY RE: LIQUIDATION OF  
WINDHAVEN NATIONAL  
INSURANCE COMPANY f/k/a ATX  
PREMIER INSURANCE COMPANY**

///

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///

///

**NOTICE OF PERMANENT INJUNCTION AND AUTOMATIC STAY RE:**  
**LIQUIDATION OF WINDHAVEN NATIONAL INSURANCE COMPANY, *FORMERLY***  
***KNOWN AS ATX PREMIER INSURANCE COMPANY***

PLEASE TAKE NOTICE that on March 5, 2020, upon application of the Insurance Commissioner of the State of Texas, an Order Appointing Liquidator, Permanent Injunction and Notice of Automatic Stay was filed in the District Court of Travis County, Texas, 419<sup>th</sup> Judicial District, pertaining to WINDHAVEN NATIONAL INSURANCE COMPANY (WINDHAVEN”), *formerly known as* ATX PREMIER INSURANCE COMPANY (“ATX”). A true and correct copy of said Order is attached hereto as **Exhibit “A.”**

The above-referenced Order applies to the instant action against WINDHAVEN’s insured, Blas Bon, the Defendant herein, pursuant to Section 2.8 of the Order.

Attached as **Exhibit “B”** are the various notices of the change of name of ATX PREMIER INSURANCE COMPANY to WINDHAVEN NATIONAL INSURANCE COMPANY, EFFECTIVE August 23, 2016.

DATED this 30<sup>th</sup> day of March, 2020.

**HOLLEY DRIGGS**

By /s/ William P. Volk  
 WILLIAM P. VOLK, ESQ.  
 Nevada Bar No. 006157  
 400 South Fourth Street, Third Floor  
 Las Vegas, Nevada 89101

Attorneys for Defendant BLAS BON

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Holley Driggs, and that on the 30<sup>th</sup> day of March, 2020, pursuant to EDCR 8.05 and NRCP 5(b), I caused to be served a true and correct copy of foregoing **NOTICE OF PERMANENT INJUNCTION AND AUTOMATIC STAY RE: LIQUIDATION OF WINDHAVEN NATIONAL INSURANCE COMPANY f/k/a ATX PREMIER INSURANCE COMPANY** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities to those parties listed below.

Dennis M. Prince, Esq.  
Kevin T. Strong, Esq.  
PRINCE LAW GROUP  
10801 West Charleston Boulevard, Suite 560  
Las Vegas, NV 89135  
Email:

[dprince@thedplg.com](mailto:dprince@thedplg.com)  
[eservice@thedplg.com](mailto:eservice@thedplg.com)  
[kstrong@thedplg.com](mailto:kstrong@thedplg.com)

/s/ Kileen Watase

An Employee of Holley Driggs

# EXHIBIT 9



April 9, 2020

Via E-mail

(wvolk@nevadafirm.com)

William P. Volk  
HOLLEY DRIGGS  
400 South 4th Street  
Suite 300  
Las Vegas, Nevada 89101

**Re:** *Sanchez v. Bon et al.*  
Case No. A-15-722815  
Case No. 2:19-cv-02196-RFB-VCF

Dear Mr. Volk,

On March 30, 2020, your office filed the Notice of Permanent Injunction and Automatic Stay Re: Liquidation of Windhaven National Insurance Company f/k/a ATX Premier Insurance Company ("Windhaven"). Upon careful review of the Order Appointing Liquidation, Permanent Injunction, and Notice of Automatic Stay issued by the Texas District Court ("Liquidation Order"), we do not believe the Liquidation Order applies to ATX Premier Insurance Company ("ATX").

As I am sure you are aware, ATX was the relevant underwriting entity that issued the insurance policy at issue to Mr. Bon. It is not entirely clear, however, whether Windhaven acquired ATX's claims against its insureds (*i.e.* liabilities) that were pre-existing at the time of its acquisition. This inquiry is directly relevant to whether the stay as to Windhaven is even applicable in both the state court action and Ms. Sanchez's federal enforcement action.

10801 W. Charleston Boulevard, Suite 560, Las Vegas, Nevada 89135  
T: 702.534.7600 | F: 702.534.7601  
www.thedplg.com

RPI.APP.000419

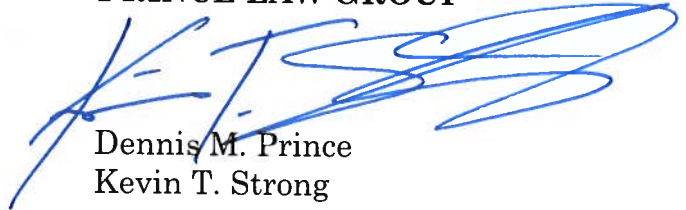
William P. Volk  
April 9, 2020  
Page 2 of 2

In light of the foregoing, we respectfully request you identify who hired you  
notify the state court of the Liquidation Order on behalf of Mr. Bon.

Thank you for your time and attention to this matter.

Sincerely,

**PRINCE LAW GROUP**



Dennis M. Prince  
Kevin T. Strong



# EXHIBIT 10

## Kevin Strong

---

**From:** William P. Volk <wvolk@nevadafirm.com>  
**Sent:** Wednesday, April 29, 2020 3:13 PM  
**To:** Kevin Strong  
**Cc:** Dennis Prince; Angela Lee; Amy Ebinger; John H. Podesta, Esq. (john.podesta@wilsonelser.com); Suri Guzman  
**Subject:** RE: Sanchez v. Bon

Kevin:

Gotcha. It is my understanding that NBIS (NationsBuilders Insurance Services, Inc.) retained Kolesar & Leatham and then my new office Holley Driggs to represent Mr. Bon. I have no information on the relationship between NBIS and Windhaven or ATX. That's as much as I know. I hope this answers your question.

**William P. Volk**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

---

Tel: 702.791.0308 | Fax: 702.791.1912  
400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

Tel: 775.851.8700 | Fax: 775.851.7681  
800 S. Meadows Parkway, Suite 800, Reno NV 89521

[www.nevadafirm.com](http://www.nevadafirm.com)

This email message (including any attachments): (a) may include privileged, confidential, proprietary and/or other protected information, (b) is sent based upon a reasonable expectation of privacy, and (c) is not intended for transmission to, or receipt by, unauthorized persons. If you are not the intended recipient, please notify the sender immediately by telephone (702.791.0308) or by replying to this message and then delete the message and all copies or portions from your system. Thank you.

---

**From:** Kevin Strong <kstrong@thedplg.com>  
**Sent:** Wednesday, April 29, 2020 3:02 PM  
**To:** William P. Volk <wvolk@nevadafirm.com>  
**Cc:** Dennis Prince <dprince@thedplg.com>; Angela Lee <alee@thedplg.com>; Amy Ebinger <aebinger@thedplg.com>; John H. Podesta, Esq. (john.podesta@wilsonelser.com) <john.podesta@wilsonelser.com>; Suri Guzman <sguzman@nevadafirm.com>  
**Subject:** RE: Sanchez v. Bon

Mr. Volk,

I apologize if my question was not clear, but it is very simple. Did Windhaven hire you to represent Mr. Bon in the state court action? Given that you notified the state court of the stay "on behalf" of Mr. Bon, I think it is safe to assume Windhaven hired you.

Sincerely,

# EXHIBIT 11

## Kevin Strong

---

**From:** Podesta, John <John.Podesta@wilsonelser.com>  
**Sent:** Wednesday, April 29, 2020 5:03 PM  
**To:** William P. Volk; Kevin Strong  
**Cc:** Dennis Prince  
**Subject:** RE: Sanchez v. Bon

And we see the reason that defense lawyers are kept in the dark about how things really work. Sorry, Bill. Mr. Volk's retention was by NBIS Construction and Transport Insurance Services, Inc., for the benefit of ATX Premier Insurance Co. who then utilized DMA Claims as the claims administrator.

ATX Premier was sold in 2015, and you have the filings on that because you asked about them. The buyer changed the name (only) to Windhaven National Insurance Company, who was then put into liquidation this year. My understanding is that claims against Windhaven National or its insureds must go through the liquidator. If there are any exceptions to this rule, I'm not aware of them but I'm not foreclosing a dialogue since I'm not an expert in this area.

John Podesta  
Attorney at Law  
Wilson Elser Moskowitz Edelman & Dicker LLP  
525 Market Street - 17th Floor  
San Francisco, CA 94105-2725  
415.625.9258 (Direct)  
415.433.0990 (Main)  
415.434.1370 (Fax)  
[john.podesta@wilsonelser.com](mailto:john.podesta@wilsonelser.com)

**From:** William P. Volk [mailto:wvolk@nevadafirm.com]  
**Sent:** Wednesday, April 29, 2020 3:13 PM  
**To:** Kevin Strong <kstrong@thedplg.com>  
**Cc:** Dennis Prince <dprince@thedplg.com>; Angela Lee <aalee@thedplg.com>; Amy Ebinger <aebinger@thedplg.com>; Podesta, John <John.Podesta@wilsonelser.com>; Suri Guzman <sguzman@nevadafirm.com>  
**Subject:** RE: Sanchez v. Bon

### [EXTERNAL EMAIL]

Kevin:

Gotcha. It is my understanding that NBIS (NationsBuilders Insurance Services, Inc.) retained Kolesar & Leatham and then my new office Holley Driggs to represent Mr. Bon. I have no information on the relationship between NBIS and Windhaven or ATX. That's as much as I know. I hope this answers your question.

**William P. Volk**  
Shareholder  
Las Vegas Office

**HOLLEY DRIGGS**

# EXHIBIT 12

## Kevin Strong

---

**From:** William P. Volk <wvolk@nevadafirm.com>  
**Sent:** Wednesday, April 29, 2020 5:08 PM  
**To:** Kevin Strong  
**Cc:** Dennis Prince; Angela Lee; Amy Ebinger; John H. Podesta, Esq. (john.podesta@wilsonelser.com); Suri Guzman  
**Subject:** RE: Sanchez v. Bon

Kevin:

I want to clarify that it was **NBIS Construction and Transport Insurance Services, Inc.** that retained my office. They are obviously a part of the NBIS family of companies. I should have been more precise about that point.

**William P. Volk**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

---

Tel: 702.791.0308 | Fax: 702.791.1912  
400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

Tel: 775.851.8700 | Fax: 775.851.7681  
800 S. Meadows Parkway, Suite 800, Reno NV 89521

[www.nevadafirm.com](http://www.nevadafirm.com)

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---

**From:** William P. Volk  
**Sent:** Wednesday, April 29, 2020 3:13 PM  
**To:** Kevin Strong <kstrong@thedplg.com>  
**Cc:** Dennis Prince <dprince@thedplg.com>; Angela Lee <alee@thedplg.com>; Amy Ebinger <aebinger@thedplg.com>; John H. Podesta, Esq. (john.podesta@wilsonelser.com) <john.podesta@wilsonelser.com>; Suri Guzman <sguzman@nevadafirm.com>  
**Subject:** RE: Sanchez v. Bon

Kevin:

Gotcha. It is my understanding that NBIS (NationsBuilders Insurance Services, Inc.) retained Kolesar & Leatham and then my new office Holley Driggs to represent Mr. Bon. I have no information on the relationship between NBIS and Windhaven or ATX. That's as much as I know. I hope this answers your question.

**William P. Volk**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

# EXHIBIT 13

Negligence - Auto

COURT MINUTES

November 24, 2020

A-15-722815-C      Diane Sanchez, Plaintiff(s)  
vs.  
Blas Bon, Defendant(s)

November 24, 2020      09:00 AM      Motion for Rehearing and to Alter or Amend the Judgment and  
Order Denying Rule 60(b) Relief

HEARD BY:      Delaney, Kathleen E.      COURTROOM: RJC Courtroom 15B

COURT CLERK: Boyle, Shelley

RECORDER:

REPORTER:      Tavaglione, Dana J.

**PARTIES PRESENT:**

Abraham G. Smith	Attorney for Cross Defendant, Defendant
Daniel F. Polsenberg	Attorney for Cross Defendant, Defendant
Dennis M Prince	Attorney for Plaintiff
William P Volk	Attorney for Cross Defendant, Defendant

**JOURNAL ENTRIES**

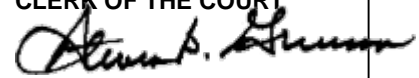
Counsel appeared telephonically.

Extensive arguments by counsel regarding Pltff's. attempts at service upon Deft. Bon, the contact information Mr. Bon provided following the accident, Mr. Bon's transient status, and Deft's. standing as a permissive user of the vehicle; he was not a policy holder. Additional arguments regarding the rules the Court should apply and Deft's. counsel's relationship as counsel for the insurance company.

COURT ADVISED, It is DECLINING to GRANT the Motion and STATED FINDINGS. We have assessed these efforts at different times and in different ways for different reasons questioning if there should have been a Default Judgment and if the Default Judgment should have been at the amount that it is at. Court does NOT see a sufficient basis here that due diligence was lacking. There was for the Court's prospective appropriate due diligence. COURT STATED FURTHER FINDINGS. COURT does NOT believe an Evidentiary Hearing is necessary, It does not really believe these factors into the dispute. Court does NOT FIND the judgment void, COURT FINDS that there was appropriate, diligent efforts to serve and that substitute service was appropriate based upon the totality of the circumstance here, notwithstanding the fact that there could have been additional efforts. ADDITIONAL FINDINGS STATED. Court does NOT think that there is any traction for any argument that the pleading of jurisdictional minimums now somehow now binds parties to the minimums for default. Mr. Prince is to prepare the Order, provide a copy to opposing counsel for review as form and content, and return it back to the Court within 10 days.



# EXHIBIT 14



Electronically Filed  
Oct 23 2020 10:28 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**NOAS**  
WILLIAM P. VOLK (SBN 6157)  
wvolk@nevadafirm.com  
**HOLLEY DRIGGS**  
400 S. Fourth Street, Suite 300  
Las Vegas, NV 89101  
Tel: (702) 791-0308  
Fax: (702) 791-1912

Daniel F. Polsenberg (SBN 2376)  
dpolsenberg@lrrc.com  
Abraham G. Smith (SBN 13250)  
Asmith@lrrc.com  
**LEWIS ROCA ROTHGERBER CHRISTIE LLP**  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169-8996  
Tel: (702) 949-8200

*Attorneys for Defendant BLAS BON*

DISTRICT COURT

CLARK COUNTY, NEVADA

DIANE SANCHEZ,

Plaintiff,

vs.

BLAS BON, individually; JOSEPH ACOSTA,  
individually; DOES I - X, and ROE  
CORPORATIONS I - X, inclusive,

Defendants.

JOSEPH ACOSTA, individually; and  
WILFREDO ACOSTA, individually,

Cross-Claimants,

vs.

BLAS BON, individually,

Cross-Defendant.

Case No. A-15-722815-C

Dept. No. 25

**NOTICE OF APPEAL**

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Please take notice that defaulted defendant Blas Bon hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;
  2. “Order Denying Defendant Blas Bon’s Motion to Set Aside Default Judgment,” filed September 19, 2020, notice of entry of which was served electronically on September 21, 2020 (**Exhibit “A”**); and
  3. All judgments, rulings and interlocutory orders made appealable by the foregoing.
- Dated this 20th day of October, 2020.

HOLLEY DRIGGS

By: /s/ William P. Volk  
 400 S. Fourth Street, Suite 300  
 Las Vegas, NV 89101  
 Tel: (702) 791-0308

DANIEL F. POLSENBERG (SBN 2376)  
 ABRAHAM G. SMITH (SBN 13,250)  
 LEWIS ROCA ROTHGERBER CHRISTIE LLP  
 993 Howard Hughes Parkway, Suite 600  
 Las Vegas, Nevada 89169  
 (702) 949-8200

*Attorneys for Defendant BLAS BON*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of October, 2020 service of the above and foregoing “Notice of Appeal” was made upon each of the parties via electronic service through the Eighth Judicial District Court’s Odyssey E-file and Serve system.

/s/ Suri Guzman  
An Employee of HOLLEY DRIGGS

# EXHIBIT 15

No. **2309**

Exhibit D

**OFFICIAL ORDER**  
*of the*  
**TEXAS COMMISSIONER OF INSURANCE**

**Date:** FEB 22 2013

**Subject Considered:**

ATX Premier Insurance Company  
Dallas, Texas  
Sircon No. 08-75779

**ADMISSION TO DO BUSINESS IN TEXAS**  
**CONSENT ORDER**

**General remarks and official action taken:**

On December 31, 2012, the commissioner of insurance issued Commissioner's Order No. 2162, which approved the application of ATX Premier Insurance Company for admission to do the business of insurance in Texas pursuant to Tex. Ins. Code Chapter 982 and redomestication to Texas pursuant to Tex. Ins. Code Chapter 983.

Staff for the Texas Department of Insurance (the department) and the duly authorized representative of ATX Premier Insurance Company, have consented to the entry of this Consent Order as evidenced by the signature hereto and request the commissioner of insurance to informally dispose of this matter pursuant to the provisions of TEX. INS. CODE § 36.104, TEX. GOV'T CODE § 2001.056, and 28 TEX. ADMIN. CODE § 1.47.

As contemplated in Order No. 2162, ATX Premier Insurance Company and the department agree to the following stipulations as a requirement for ATX Premier Insurance Company doing the business of insurance in Texas:

1. ATX Premier Insurance Company will submit, prior to executing, any and all reinsurance agreements for review and approval by the department.
2. ATX Premier Insurance Company will not exceed a 2:1 ratio of net written premium to capital and surplus.
3. ATX Premier Insurance Company must at all times reserve at least the mid-point range of its actuary's estimate. ATX Premier Insurance Company will engage a CPA that will include as part of the required annual audit, an independent actuary to review ATX Premier Insurance Company's actuarial practices and related work. ATX Premier Insurance Company will notify the Department of the actuary providing services and related reserving work.
4. ATX Premier Insurance Company will deposit \$5 million with the comptroller for the protection of policyholders or creditors wherever they are located in the United States. This deposit is to be made pursuant to Texas Insurance Code Chapter 406.

Exhibit D

NBIS0064

RPI.APP.000434

2309

Exhibit D

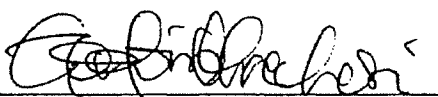
COMMISSIONER'S ORDER  
ATX PREMIER INSURANCE COMPANY  
Page 2 of 7

5. The parent company of ATX Premier Insurance Company, Nations Builders Insurance Services, Inc. shall establish a trust account for the benefit of ATX Premier Insurance Company with a minimum floor of no less than \$250,000 in a form of security acceptable to the commissioner, for the purpose of collateralizing any receivable due to ATX Premier Insurance Company from AutoTex or any other managing general agency, agency, or agent regarding commissions owed back under an MGA agreement per a sliding scale commission or other arrangement.
6. The receivable described in item 5 above shall be calculated quarterly beginning with June 30, 2013, and any required additional funds to be placed in the trust account shall be made by Nations Builders Insurance Services, Inc. no later than forty five days following the end of each calendar quarter.
7. These limitations may be adjusted in the future by order of the commissioner.

The commissioner of insurance orders that if at any time it is shown that ATX Premier Insurance Company did not comply with the aforementioned stipulations as agreed, then the commissioner of insurance may revoke the Certificate of Authority of ATX Premier Insurance Company.

ELEANOR KITZMAN  
COMMISSIONER OF INSURANCE

BY:



Godwin Ohaechesi, Director  
Company Licensing & Registration Office  
Licensing Services Section  
Financial Regulation Division  
Commissioner's Order No. 12-0052

Exhibit D

NBIS0065

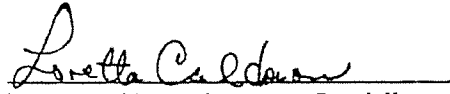
RPI.APP.000435

**2309**

Exhibit D

COMMISSIONER'S ORDER  
ATX PREMIER INSURANCE COMPANY  
Page 3 of 7

Recommended by:

  
Loretta Calderon, Insurance Specialist  
Company Licensing & Registration Office  
Licensing Services Section  
Financial Regulation Division

Reviewed by:

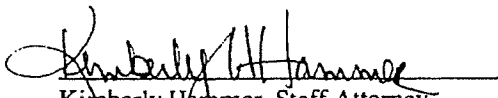
  
Kimberly Hammer, Staff Attorney  
Office of Financial Counsel  
Legal Section  
General Counsel Division

Exhibit D

NBIS0066

RPI.APP.000436



Exhibit D

2309

COMMISSIONER'S ORDER  
ATX PREMIER INSURANCE COMPANY  
Page 7 of 7

STATE OF Georgia §  
COUNTY OF Cobb §

BEFORE ME, the undersigned notary public, personally appeared

William C. Tepe

1. "My name is William C. Tepe. I am of sound mind, am capable of making this statement, and am personally acquainted with the facts stated herein.
2. "I am the President of Nations Builders Insurance Services, Inc., which is the parent company of ATX Premier Insurance Company. As an officer of Nations Builders Insurance Services, Inc., I am authorized to make this statement, and I agree to and execute this Consent Order on behalf of Nations Builders Insurance Services, Inc..
4. "Nations Builders Insurance Services, Inc. agrees with and consents to the issuance and service of the foregoing Consent Order to be entered by the Texas Commissioner of Insurance."

William C. Tepe  
Signature

William C. Tepe  
Printed Name

President  
Title

SWORN TO AND SUBSCRIBED before me, the undersigned authority, by  
William C. Tepe, President of Nations Builders Insurance Services, Inc., on this 20  
day of February 2013.

Ruth A. Bankston  
Signature of Notary Public

Ruth A. Bankston  
Printed Name of Notary Public  
Notary Public in and for the State of  
My Commission Expires:

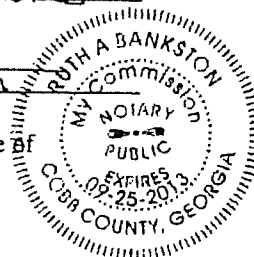


Exhibit D

NBIS0070

RPI.APP.000437

# EXHIBIT 16

## AMENDED AND RESTATED CLAIMS HANDLING AGREEMENT

This Amended and Restated Claims Handling Agreement ("**Agreement**") entered into and effective March 22, 2013, and amended April 1, 2015 12:01 am, is made and entered into by and between ATX Premier Insurance Company ("**Company**"; NBIS Construction & Transport Insurance Services, Inc. ("**CTIS**"; or, "**Pre-close Policy Claims Administrator**"; AutoTex MGA, Inc. ("**AutoTex**"; or, "**Former Administrator**"; and Safe Auto Insurance Company ("**SafeAuto**"; or, "**Post-close Policy Claims Administrator**"), collectively "**Administrator**". **SafeAuto**; **AutoTex**; **CTIS**; and, **Company** are each hereinafter referred to as a "**Party**" and collectively as the "**Parties**".

**WHEREAS**, **Company** has the authority to issue insurance policy(ies) to insureds and is responsible for claims settlement on those policies;

**WHEREAS**, NationsBuilders Insurance Services, Inc. ("**NBIS**"), the current parent company of AutoTex and **Company**, has, contemporaneously with the execution of this Agreement, closed a certain Stock Purchase Agreement (executed on March 2, 2015, "**SPA**") with Safe Auto Insurance Group, Inc. (the acquirer of AutoTex and parent company of **SafeAuto**) whereby Safe Auto Insurance Group, Inc. has acquired one hundred percent (100%) of the stock of **AutoTex**;

**WHEREAS**, pursuant to the terms and conditions of the aforementioned stock purchase agreement, Safe Auto Insurance Group, Inc. and NBIS have agreed to certain definitional guidelines regarding the ongoing treatment of business which was produced by AutoTex prior to the closing of the transaction and business which will be produced by AutoTex after the closing of such transaction, and which are applicable to the administration of this Agreement going forward and to which the Parties agree to incorporate herein:

- (A) **Pre-close Policy**. **Pre-close Policy** means any policy which was issued on or before the closing date of the sale of **AutoTex**, or which may be validly reinstated after such closing date by the policyholder during a reinstatement period. It also means any new policy written or renewed on or after the closing date which: (1) resides in the state of Arizona; (2) is produced by the LA Franchise Agency or its affiliates in any state; or (3) has been certified under the financial responsibility laws and regulations of any state.
- (B) **Post-close Policy**. **Post-close Policy** means any new or renewal policy term written after the closing date and not included in the definition of **Pre-close Policy**.

**WHEREAS**, **CTIS** wishes to assume the rights and obligations hereunder to administer **Pre-close Policies** as the **Pre-close Policy Claims Administrator**;

**WHEREAS**, **CTIS** is in the business of providing claims services on behalf of Insurance companies and is willing to provide such services on behalf of **Company** on all **Pre-close Policies** in accordance with the terms and conditions set forth herein, and as set forth in any agreed to Addenda attached to and made a part of this Agreement;

**WHEREAS**, the Parties acknowledge that the role of **CTIS** as the **Pre-close Policy Claims Administrator** will terminate and cease to exist, subject to those provisions of this Agreement which may otherwise remain in effect, upon the expiration of the last claim from any **Pre-close Policy**.

**WHEREAS**, **SafeAuto** is a property and casualty insurer licensed to conduct business in States of Arkansas, Arizona, Nevada and Texas and, wishes to assume the rights and obligations hereunder to administer **Post-close Policies** as the **Post-close Policy Claims Administrator**;

**WHEREAS**, **Company** has reviewed and accepted the qualifications of **SafeAuto** and **CTIS**, and wishes to authorize them to provide the to provide the services set forth herein;

# EXHIBIT 17

No. **4335**

**OFFICIAL ORDER  
of the  
TEXAS COMMISSIONER OF INSURANCE**

**Date:** MAR 03 2016

**Subject Considered:**

Acquisition of  
ATX Premier Insurance Company  
Dallas, Texas  
by  
Windhaven National Holding Company  
a Florida corporation  
HCS No. 990473

Consent Order

**General remarks and official action taken:**

The commissioner of insurance considers the application of Windhaven National Holding Company, (Windhaven), for approval of its acquisition of control of ATX Premier Insurance Company, (ATX).

As shown by their signatures, the authorized representatives for Windhaven National Holding Company agree and consent to the entry of this order and request that the commissioner informally dispose of this matter pursuant to the provisions of Tex. Ins. Code §36.104, Tex. Gov't Code §2001.056, and 28 Tex. Admin. Code §1.47.

Jurisdiction

The commissioner has jurisdiction over the application under Tex. Ins. Code § 823.157 and 28 Tex. Admin. Code § 7.205.

Findings of Fact

Based upon the information submitted to and reviewed by Texas Department of Insurance staff, the commissioner makes the following findings of fact:

1. ATX is a domestic property and casualty insurance company.
2. Windhaven will acquire control of ATX through the purchase of 100% of the issued and outstanding common capital stock of ATX for \$7,500,000 cash.

RPI.APP.000441

3. No evidence was presented that any of the events or conditions listed in Tex. Ins. Code § 823.157(b) would occur or exist after the acquisition of control.
4. In signing the order, Windhaven agrees that it will not cause ATX to pay any dividends or other distributions to shareholders or accept dividends from ATX for five years from the date of the acquisition of ATX without prior written approval of the commissioner.
5. In signing this order, Windhaven agrees and represents to the commissioner that ATX will not exceed a 3:1 ratio of net written premiums to capital and surplus.

#### Conclusions of Law

Based on the findings of fact, the commissioner makes the following conclusions of law:

1. The proposed acquisition of control by Windhaven National Holding Company to acquire 100% of the issued and outstanding common capital stock of ATX Premier Insurance Company constitutes a change of control under the provisions of Tex. Ins. Code §§ 823.151 and 823.154.
2. There is no evidence that any of the events or conditions listed in Tex. Ins. Code § 823.157(b) would occur or exist after the acquisition of control.
3. Upon review of the representations and information provided, no evidence was presented on which the commissioner could predicate a denial of the acquisition of control under Tex. Ins. Code § 823.157.
4. Windhaven knowingly and voluntarily waives all procedural rights, including but not limited to notice of hearing, a public hearing, a proposal for decision, rehearing by the commissioner, and judicial review of this administrative action as provided for in Tex. Ins. Code §§ 36.201 – 36.205 and Tex. Gov't Code §§ 2001.051, 2001.052, 2001.145, and 2001.146.

The commissioner approves the acquisition of control of ATX Premier Insurance Company by Windhaven National Holding Company.

The acquisition of control of ATX must be completed not later than the 90<sup>th</sup> day from the date of this order as required by Tex. Ins. Code § 823.160(a).

If the acquisition of control of ATX Premier Insurance Company is not completed on or before the 90<sup>th</sup> day after the date of this order and Windhaven National Holding Company has not obtained an extension of time in writing to complete the acquisition of control by the commissioner as required by Tex. Ins. Code § 823.160(a), this order expires, Windhaven

Commissioner's Order  
ATX Premier Insurance Company  
HCS No. 990473  
Page 3 of 5 Pages

National Holding Company will be required to submit a new application to the commissioner for review and approval.

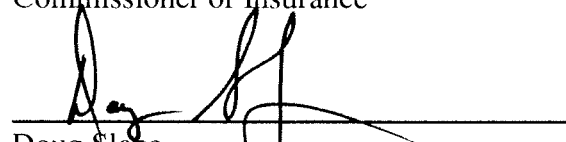
This order amends the limitations on ATX Premier Insurance Company set out in the February 22, 2013, Commissioner Order Number 2309.

The commissioner orders Windhaven not to cause ATX to pay any dividends or other distributions to shareholders and or accept dividends from ATX for five years from the date of the acquisition of ATX without prior written approval of the commissioner.

The commissioner orders ATX not to exceed a 3:1 ratio of net written premiums to capital and surplus.

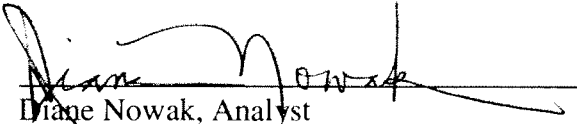
David C. Mattax  
Commissioner of Insurance

By:


  
\_\_\_\_\_  
Doug Slape  
Deputy Commissioner  
Financial Regulation Division  
Commissioner's Order No. 3632

Commissioner's Order  
ATX Premier Insurance Company  
HCS No. 990473  
Page 4 of 5 Pages


Recommended by:

  
Diane Nowak, Analyst  
Financial Analysis Section  
Financial Regulation Division

Reviewed by:

  
Teresa Saldana, Chief Analyst  
Financial Analysis Section  
Financial Regulation Division

Reviewed by:

  
Margaret Jonon, Attorney  
Office of Financial Counsel  
Legal Division



Commissioner's Order  
 ATX Premier Insurance Company  
 HCS No. 990473  
 Page 5 of 5 Pages

Agreed as to form and content this 1<sup>st</sup> day of March 2016:

Windhaven National Holding Company

Signature

Printed Name

Title

Jimmy E. Whited  
PRESIDENT

## AFFIDAVIT

BEFORE ME, the undersigned notary public, personally appeared

Jimmy E. Whited and stated the following after being sworn:

1. "My name is Jimmy Whited. I am of sound mind, capable of making this statement, and I am personally acquainted with the facts stated in this order and affidavit.
2. I am the President of Windhaven National Holding Company and I am authorized to make this statement. I agree to the terms and execute this Consent Order on behalf of Windhaven National Holding Company.
3. Windhaven National Holding Company agrees with and consents to the issuance and service of the foregoing consent order to be entered by the commissioner.

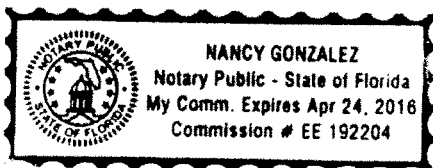
Signature

SWORN TO AND SUBSCRIBED before me the understated authority by the President of Windhaven National Holding Company on this 1<sup>st</sup> day of March 2016.

Signature of Notary Public

Notary Public in and for the State of Florida

My Commission Expires: 4-24-16



# EXHIBIT 18

1 Lawrence E. Mittin, Esq.  
2 Nevada Bar No. 005428  
3 CRAIG P. KENNY & ASSOCIATES  
4 501 S. 8th Street  
5 Las Vegas, NV 89101  
6 (702) 380-2800  
7 Fax: 702-380-2833  
8 [lmittin@cpklaw.com](mailto:lmittin@cpklaw.com)  
9 *Attorneys for Plaintiff Kelley Hayes*

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KELLEY HAYES, as Natural parent of Minor I.R.,

**CASE NO. 2:18-cv-01938-GMN-NJK**

Plaintiff,

v.

ATX PREMIER INSURANCE COMPANY;  
NATIONSBUILDERS INSURANCE  
SERVICES, INC.; DMA CLAIMS  
MANAGEMENT, INC.; DOES I through X,  
inclusive; and ROE CORPORATIONS I  
through X, inclusive

Defendants.

**PLAINTIFF'S THIRD AMENDED COMPLAINT**

COMES NOW Plaintiff Kelley Hayes, as Natural parent of Minor I.R., and hereby files her Third Amended Complaint against Defendants, and each of them, as follows:

**GENERAL ALLEGATIONS**

Plaintiff KELLEY HAYES, by and through her attorneys CRAIG P. KENNY & ASSOCIATES, hereby alleges as follows:

1. Plaintiff KELLEY HAYES, as Natural parent of Minor I.R., Kelley, hereby sues Defendants ATX PREMIER INSURANCE COMPANY; NATIONSBUILDERS INSURANCE SERVICES, INC.; DMA CLAIMS MANAGEMENT, INC., DOES I through X, and ROE CORPORATIONS I through X, for breach of contract and bad faith pursuant to the assignment given by Cesar Gutierrez as to ATX PREMIER INSURANCE COMPANY, and/or its subsidiaries, assigns, network companies, and agent companies. Minor I.R. is 11 years old and she currently resides with Plaintiff in Arizona. Minor I.R.'s father was Mario Regalado. On 11/15/14, when

1 Minor I.R. was only 7 years old, her father Mario Regalado was killed when the bike he was riding  
2 was struck by Cesar Gutierrez. Gutierrez was a permissive driver of a 1992 Acura Integra owned by  
3 Tracy Miller. At the time of the accident, Minor, Regalado, Gutierrez and Miller, were all residents  
4 of Las Vegas, Nevada. Miller had insurance of \$15,000 per person, \$30,000 per accident, and  
5 \$10,000 for property damage for the Acura with ATX. This ATX policy applied to permissive  
6 drivers such as Gutierrez.

7 2. At all times mentioned herein, Defendant ATX PREMIER INSURANCE COMPANY  
8 ("ATX") was and is a company authorized to conduct business in Clark County, Nevada. As of  
9 11/15/14, Defendant ATX was the insurance company for ATX policy number ANV000000230  
10 which covered Tracy Miller's 1992 Acura Integra. The ATX policy provided coverage of 15/30/10  
11 and the policy covered permissive drivers such as Cesar Gutierrez. As the insurer of the policy for  
12 Miller's Integra, Defendant ATX had duties under the Nevada Unfair Trade Practices Act  
13 ("NUPTA") and contractual obligations as to permissive driver Gutierrez for this 11/15/14 claim  
14 wherein Mario Regalado was killed; these obligations included the duty to defend, the duty to  
15 provide coverage, the covenant of good faith and fair dealing, and communication/disclosure duties  
16 as required by *Allstate v. Miller*. Gutierrez assigned damages to Plaintiff for ATX's violations of  
17 ATX insurance contract ANV000000230 and NUPTA.

18 3. At all times mentioned herein, Defendant NATIONSBUILDERS INSURANCE  
19 SERVICES, INC. ("NATIONSBUILDERS") was and is an insurance company authorized to  
20 conduct business in Clark County, Nevada. As of 11/15/14, Defendant NATIONSBUILDERS was  
21 the parent company of Defendant ATX. As the parent company of ATX, NATIONSBUILDERS has  
22 liability for contractual damages, extra-contractual damages, and violations of NUPTA as to the  
23 ATX policy for Miller's Integra. Since the inception of the 11/15/14 wrongful death claim, Art  
24 Kirkner, VP of Claims for NATIONSBUILDERS and ATX, was personally handling Plaintiff's  
25 claim for NATIONSBUILDERS and ATX, and Kirkner was working with Third Party Administrator  
26 DMA as to the claim. On June 17, 2016, Art Kirkner represented himself as VP of claims for ATX  
27 when he signed as a true and correct copy the Miller ATX policy declaration page. VP Kirkner has  
28 continued to work up until the present time on behalf of Defendant NATIONSBUILDERS as to the

1 handling of Plaintiff's claim under the subject Miller ATX policy. The subject Miller ATX policy is  
2 a Pre-Close policy for which Defendant NATIONSBUILDERS' liability as to the 11/15/14 wrongful  
3 death claim continues to the present time. Given its status as the parent company of ATX and VP of  
4 Claims Art Kirkner's handling of Plaintiff's claim therein, NATIONSBUILDERS is subject to the  
5 assignment that Gutierrez gave to Plaintiff. As the parent company of ATX, NATIONSBUILDERS  
6 is an insurer of the Miller ATX policy and as such, it was governed by NUPTA and it had  
7 contractual obligations as Gutierrez for this 11/15/14 claim; these obligations included the duty to  
8 defend; the duty to provide coverage; the covenant of good faith and fair dealing; and  
9 communication/disclosure duties as required by *Allstate v. Miller*.

10 4. At all times mentioned herein, Defendant DMA CLAIMS MANAGEMENT, INC.  
11 ("DMA") was and is a company duly authorized to conduct business in Clark County, Nevada.  
12 DMA owns, operates and does business in Clark County as DMA Claims Services. DMA Claims  
13 Services is the entity which is the subject of the assignment of contractual rights from Cesar  
14 Gutierrez to Plaintiff. DMA is and was a claims administrator for ATX and ATX's parent company  
15 NATIONSBUILDERS as to the subject Miller policy. As the claims administrator, DMA has an  
16 indemnity and hold harmless agreement with ATX and its parent company NATIONSBUILDERS.  
17 Given that DMA was adjudicating the 11/15/14 wrongful death claim for ATX and  
18 NATIONSBUILDERS and DMA has an indemnity agreement wherein it has warrantied its works as  
19 to ATX and NATIONSBUILDERS, Plaintiff asserts that DMA was a joint venturer with ATX and  
20 NATIONSBUILDERS as to the ATX Miller Policy/Plaintiff's claim. As a joint venturer, DMA has  
21 liability for breach of contract and bad faith as to ATX insured Cesar Gutierrez for the subject claim.

22 5. The true names and capacities, whether individual, corporate, associate, or otherwise of  
23 Defendants DOES I through X, inclusive, and ROE CORPORATIONS I through X, inclusive, are  
24 unknown to Plaintiff who therefore sues those Defendants by such fictitious names, but are believed  
25 to be agents, servants, employers, or employees of the other Defendants named in this complaint.  
26 Plaintiff is informed and believes, and upon such alleges, that each of the Defendants designated as a  
27 DOE and/or ROE performed many of the same insurance functions as Defendants ATX,  
28 NATIONSBUILDERS, and DMA in investigating Plaintiff's claim, as more fully set forth and

described in *Wohlers v. Bartgis*, thereby causing injury and damages directly and proximately to the Plaintiff as alleged in this Complaint; that such DOE and ROE Defendants were the agents, servants, or employees, of each other or other Defendants named in this Complaint, and in doing the things alleged in this Complaint, each were acting within the course and scope of said agency, servitude, authority, and employment, with knowledge, permission, and consent of the other Defendants.

6. Defendants ATX, NATIONSBUILDERS, and DMA, were the agents, ostensible agents, servants, employees, partners, co-owners and/or joint venturers of each other, and were acting within the color, purpose and scope of their employment, agency, ownership and/or joint ventures and by reason of such relationship, the Defendants, and each of them are vicariously and jointly and severally responsible and liable for the acts and/or omission of their Co-Defendants.

7. On 11/15/14 at 2:07 p.m., in Henderson, Nevada, Cesar Gutierrez was a permissive driver of the 1992 Acura Integra owned by Tracy Miller and insured by the ATX policy ANV000000230. Gutierrez was driving at 65 mph in a 35 mph zone and weaving through traffic on southbound Eastern Ave., south of Evansville Avenue. Gutierrez made an unsafe pass on the right at a very high rate of speed, striking bicyclist Mario Regalado from behind, killing Regalado.

8. Plaintiff submits that it is undisputed that on 11/15/14, Cesar Gutierrez killed Minor I.R.'s father Mario Regalado while driving the 1992 Acura Integra owned by Tracy Miller and which was insured by the ATX policy.

9. Tracy Miller has testified in a deposition that prior to the accident, she knew that Cesar Gutierrez was using her ATX insured vehicle, as she had heard about him driving her vehicle. In this same deposition, counsel for Gutierrez (who was also counsel for Miller) represented that Gutierrez had implied permission to use the vehicle.

10. From 11/15/14 until 9/12/17, Defendants ATX, NATIONSBUILDERS, and DMA never made any contact at all with Cesar Gutierrez regarding the 11/15/14 death claim. In failing to ever make any contact with Gutierrez, the Defendants never informed Gutierrez of his rights as an insured under the ATX policy, rights which included providing a defense and coverage for this 11/15/14 loss. Defendants never conducted any investigation as to Gutierrez having any auto insurance of his own which might apply to this loss as well as Gutierrez having any assets which might apply to any

1 claims for this loss. Further, Defendants never communicated with Gutierrez as to the three  
2 conditional settlements demands made by Plaintiff as required by *Allstate v. Miller*; as to Gutierrez's  
3 right to personally make a financial contribution to resolve the death claim pursuant to *Miller*; the  
4 consequences if the conditional settlement demands were not accepted; Gutierrez's contractual right  
5 to an attorney paid for by ATX if a lawsuit was filed against him; and the insurance coverage  
6 available under the policy for any lawsuit. Plaintiff submits that Defendants could have easily  
7 located Gutierrez and communicated with him regarding this claim, such communication to include  
8 informing Gutierrez of his contractual rights as an insured under the contract. Plaintiff alleges that  
9 Defendants deliberately chose to act as if Gutierrez did not even exist as an insured.

10 11. As of November 20, 2014, Melissa Moses, wife of Mario Regalado, made a claim  
11 against the subject ATX policy. The Moses' claim was being handled by Defendant DMA whose  
12 adjusters were reporting directly to Art Kirkner, VP of Claims for Defendants ATX and  
13 NATIONSBUILDERS. On 12/22/14, DMA took a recorded statement of Tracey Miller. In the  
14 recording, Miller stated that the address on the policy was her address and that the home was her  
15 mother-in-law's; that the driver of the insured vehicle was her brother-in-law Cesar Gutierrez; that  
16 Gutierrez on occasion would borrow the insured vehicle; and that Gutierrez was in jail.

17 12. As of 12/22/14, Defendants ATX, NATIONSBUILDERS, and DMA had actual  
18 knowledge that the Follow Fields address was the home of Gutierrez's parents and that Gutierrez  
19 was in jail in Las Vegas. Gutierrez went from jail to High Desert State Prison. Defendants knew  
20 how to get into contact with Gutierrez with regard to this claim and they just deliberately choose not  
21 to contact Gutierrez until 9/12/17.

22 13. On 1/7/15, Melissa Moses' attorney made a demand for the injury limits for Moses.  
23 ATX, NATIONSBUILDERS, and DMA were all involved in the decision to tender the \$15,000  
24 single injury limit to the attorney for Moses. None of the companies had ever been presented with  
25 any documentation showing that an Estate had been opened for Mario Regalado and that Moses was  
26 the administratrix for the Estate. None of the companies had asked if Mario Regalado had any  
27 children when he died. Clearly, all companies were panicked by the attorney's threat to file a lawsuit  
28 and they just sent the attorney a release even though they did not have any information about the

1 Estate nor any information about any children of Mario Regalado. When the release was sent, ATX,  
2 NATIONSBUILDERS, and DMA had never made any inquiry into any available insurance for  
3 Gutierrez; any additional insurance for Miller; nor whether Gutierrez and/or Miller wanted to make  
4 a financial contribution to the settlement. This \$15,000 release was never signed by Moses.

5 14. On 3/16/15, Moses's attorney made a demand for the property damage limits of \$10,000  
6 for the bicycle. On 4/3/15, DMA adjuster Rebecca Perez noted that she was "Preparing  
7 recommendation to settle PD at limits of \$10,000 without seeking retention of salvage."

8 15. From 4/3/15 until 7/20/15, DMA adjuster Perez was in contact with Moses' attorney  
9 asking for documentation about the bike, as ATX was not willing to pay the \$10,000 limit for the  
10 bicycle. On 7/20/15, ATX and NATIONSBUILDERS VP of Claims Art Kirkner emailed Perez with  
11 a "High" level of importance about the bike claim. VP Kirkner wanted Perez to "explain why this  
12 bike has a \$10K value." Kirkner wanted to know how many miles were on this bike when it was  
13 actually purchased; how long did Regalado have the bike; and he was "curious" about miles on the  
14 bike.

15 16. When ATX and NATIONSBUILDERS VP Art Kirkner sent the email, he had reviewed  
16 the police report and was aware that Gutierrez was in jail for killing Regalado. Nonetheless, VP  
17 Kirkner did not want to pay the limits on the property damage. VP Kirkner's actions show that ATX  
18 and NATIONSBUILDERS were determined to save on paying the policy limits of \$10,000 for the  
19 property damage. VP Kirkner was more concerned with overpaying on the property damage claim  
20 than in resolving the actual death claim and protecting ATX policy insureds, Gutierrez and Miller.  
21 VP Kirkner never once questioned any of the adjusters about Gutierrez, as Kirkner knew from a  
22 review of the log notes that Gutierrez had never been contacted at all. VP Kirkner's focus on this  
23 death claim was on trying to save money on the bike, not the death claim itself nor protection of  
24 ATX's insureds, Gutierrez and Miller. As of 7/20/15, ATX and NATIONSBUILDERS still had no  
25 documentation showing that an Estate had been opened; they had never inquired if Regalado had any  
26 children when he died; they had never inquired into any available insurance for Gutierrez; they had  
27 never inquired into any additional insurance for Miller; and they had never inquired into whether  
28 Gutierrez or Miller wanted to personally make a financial contribution to the settlement.



1           17. Defendants ATX and NATIONSBUILDERS, and DMA's investigation about the bike  
2 continued on for another month until 8/19/15, when Perez emailed VP Kirkner for authority to pay  
3 the property limits. Again, VP Kirkner showed his reluctance to pay the \$10,000. In an 8/20/15  
4 email, VP Kirkner wanted to know if the bike was worth over \$10,000 and the depreciation value of  
5 the bike. VP Kirkner was consumed with saving money on the bike claim, and yet on the death  
6 claim itself and the protection of ATX's insureds Gutierrez and Miller, Kirkner expressed no  
7 concern at all. Gutierrez did not ever merit any mention in any of Kirkner's log notes during the  
8 claims process. A team of DMA adjusters spent the next six weeks working with VP Kirkner on the  
9 property damage claim. Given these actions as to the bike and omissions as to the insured Gutierrez,  
10 saving money on the bike was all that mattered to VP Kirkner of ATX and NATIONSBUILDERS.

11           18. In October 2015, even though DMA finally had permission to tender to Moses the  
12 property damage limits of \$10,000, the DMA adjuster offered Moses only \$8,500 for the property  
13 damage claim. Even though the DMA adjuster had authority to pay the \$10,000 property damage  
14 limits, someone at ATX, NATIONSBUILDERS, and DMA had decided that it was very important  
15 that the companies win the negotiations and only pay \$8,500 for the bike. These Defendants had  
16 spent months on the bike claim all to save \$1,500 on the bike, as Moses signed the property damage  
17 release for \$8,500. Meanwhile, the bodily injury portion of this death claim remained open, with no  
18 investigation having been conducted by Defendants as to an Estate for Mario Regalado and if Mario  
19 Regalado had any children as heirs. Further, Defendants ATX, NATIONSBUILDERS, and DMA,  
20 had still never contacted Gutierrez; never inquired into any available insurance for Gutierrez; never  
21 inquired into any additional insurance for Miller; and they had never inquired into whether Gutierrez  
22 or Miller wanted to personally make a financial contribution to the settlement.

23           19. On 3/30/16, Plaintiff's counsel Julie Mersch sent a representation letter for Minor I.R.'s  
24 claim to adjuster Hermanese Ravasio of Defendant DMA. The letter asked "please confirm all  
25 coverage available for this accident under your insured's policy, and provide my office with a copy  
26 of the declarations page of the policy(ies) for all vehicles owned by Ms. Miller at the time of the  
27 accident."  
28

1           20. On 5/17/16, Plaintiff's counsel Mersch sent to DMA adjuster Ravasio a 30-Day Policy  
2 Limits Demand with Conditions and this demand was courtesy copied via email to VP Kirkner at his  
3 NATIONSBUILDERS email address. The letter first addressed that DMA had not sent the actual  
4 certified declaration page. The letter then demanded the policy limits for Plaintiff by 6/20/16 with  
5 the following conditions: (1) Autotex to provide a Certified Copy of the Declaration page for the  
6 Miller vehicle; and (2) Autotex to provide an "Affidavit Setting Forth Assets" of insured Miller.

7           21. On 6/2/16, a log note was entered by DMA adjuster Ravasio which stated as follows:

8                   We need a certified copy of the policy limits to be sent to claimant attorney. She is  
9                   looking for a reason to sue.

10           22. Given the log note, DMA adjuster Ravasio believed that Mersch was not genuinely  
11 seeking documents for I.R.—a minor child whose father was killed when she was 7—but instead  
12 Mersch had a more nefarious intent as to ATX and DMA. Ravasio knew from the log notes that  
13 ATX and NATIONSBUILDERS were able to win the negotiations with Moses and save \$1,500 on  
14 the property damage. As such, Ravasio was suspicious of Mersch's intentions, even though Mersch  
15 was simply asking for relevant documents for I.R. Ravasio's suspicions about Mersch were well  
16 documented in the notes, such that they colored not only her handling of the claim, but also affected  
17 the handling by subsequent adjusters at DMA and ATX and NATIONSBUILDERS VP Kirkner.  
18 These adjusters and VP Kirkner all abdicated any of their responsibilities and duties to insureds  
19 Gutierrez—a phantom in the entire claims process—and Miller. The concern of all of these adjusters  
20 and VP Kirkner was to not allow Mersch to "set up" ATX and DMA. So these adjusters and VP  
21 Kirkner decided that they would not comply with Mersch's requests for a certified copy of the  
22 declaration page, an Asset Affidavit from Miller, nor the two later requests for an Affidavit from  
23 ATX itself showing its attempts to secure an Asset Affidavit from Miller. Instead, DMA and VP  
24 Kirkner were going to handle the claim as they saw fit, irrespective of the harm they were all causing  
25 to the insureds Gutierrez and Miller.

26           23. On 6/2/16, DMA sent a letter to Miller informing her that more than her limits were  
27 being sought. However, this DMA letter did not include a copy of the 5/17/16 demand letter. The  
28 DMA letter then stated "In order for us to immediately resolve this claim it will be necessary that  
you complete and return the attached documents. Have them notarized and returned to the law firm

1 representing Mr. Regalado's daughter." The letter then gave the address for attorney Mersch.  
2 Plaintiff submits that the evidence will show that DMA never sent **with this letter an Affidavit for**  
3 **Miller to complete which had Miller's name listed as well as the date of loss of 11/15/14.**  
4 Further, neither DMA, ATX nor NATIONSBUILDERS ever attempted to call Miller during the  
5 entire time this conditional policy limit demand was pending from 5/17/16-6/20/16. The letter  
6 shows that DMA on behalf of ATX and NATIONSBUILDERS, was placing sole responsibility on  
7 Miller to complete, notarize, and send the Affidavit to Mersch. DMA never mentioned anything in  
8 the letter about a deadline for Miller to return the Affidavit to Mersch.

9         24. On 6/17/16, DMA sent a letter to Mersch which stated that "a second copy of our  
10 policyholder's insurance page was sent via certified mail on June 3, 2016." Given this statement,  
11 adjuster Ravasio believed that sending a copy of the insurance page via certified mail made a  
12 document certified. The letter then stated "we've included another copy of the declarations page for  
13 your review. On that same date, the insurance and assets affidavit was sent to our policyholder via  
14 certified mail." The letter also states that enclosed was a release. In sending the release, Ravasio  
15 believed that DMA had satisfied the conditions of the 5/17/16 letter by allegedly sending a copy of  
16 the dec page via certified letter and by informing Mersch that DMA had sent Miller an asset  
17 affidavit.

18         25. As of 6/20/16, DMA on behalf of ATX and NATIONSBUILDERS, had failed to comply  
19 with both of the conditions set forth in the 5/17/16 demand letter. DMA never sent Mersch a  
20 Certified Copy of the declarations page. Further, DMA never sent Mersch an "Affidavit Setting  
21 Forth Assets" of its insured Tracy Miller. DMA never asked for an extension of time to the 5/17/16  
22 demand.

23         26. On 9/14/16, Mersch sent via fax another 14 day conditional demand letter to DMA  
24 adjuster Ravasio. The conditional demand letter requested an Assets Affidavit of Miller or in the  
25 alternative, an Affidavit by DMA's principal ATX setting forth all efforts to obtain Miller's  
26 Affidavit and a certified copy of the Declaration Page.  
27  
28

1 27. Even though there is a faxed confirmation for the 9/14/16 demand letter, the letter itself  
 2 and any reference to said letter never made it into the DMA claims file. Instead, on 9/27/16, Ravasio  
 3 noted for the file "no response from claimant's attorney. Another certified letter sent."

4 28. DMA adjuster Ravasio sent a 9/27/16 letter to Mersch which only referenced the May  
 5 2016 demand. On 10/3/16, Mersch responded to the DMA 9/27/16 letter via fax and mail. Mersch's  
 6 10/3/16 letter was a conditional demand letter which was essentially the same as the 9/14/16  
 7 conditional demand letter. The conditional demand letter requested an Assets Affidavit of Miller or  
 8 in the alternative, an Affidavit by DMA's principal ATX setting forth all efforts to obtain Miller's  
 9 Affidavit and a certified copy of the Declaration Page.

10 29. DMA adjuster Ravasio noted in the claims file the 10/3/16 conditional demand letter.  
 11 Ravasio sent on 10/12/16, a note to DMA adjuster Church stating "Please send affidavit of insurance  
 12 letter in the attachments to the insured again. This time we need it sent certified." Then, Ravasio  
 13 emailed Rebecca Perez and stated "Need to send to Art asap."

14 30. On 10/12/16, DMA adjuster Church logged that she had sent via certified mail the  
 15 affidavit of insurance letter to Miller. Plaintiff alleges that there is no proof this letter was ever sent  
 16 to Miller. Further, Plaintiff submits that DMA never sent at any time to Miller an Affidavit which  
 17 had Miller's name listed as well as the date of loss of 11/15/14. While this demand was pending,  
 18 DMA never made any attempt to call Miller regarding an affidavit let alone sending her a copy of the  
 19 conditional demand letter which was set to expire on 10/20/16.

20 31. On 10/17/16, Ravasio emailed DMA adjuster Rebecca Perez and stated as follows:

21 This is the one we have to overnight on Thursday to comply with deadline for answer.  
 22 Any word from Art on altering release or sending a letter from him about the affidavit?

23 32. On 10/26/16, six days after the deadline date on the demand, Ravasio sent an urgent  
 24 email to Rebecca Perez and John DePompeo which stated:

25 To date we have not received a reply from Art deadline on this was 10/20....recommend  
 26 we send the check and release together to this attorney...to find a way to find some type of  
 fault so we need to stay ahead.

27 33. On 10/26/17, Defendant DMA then sent a \$7,500 check issued on the account of  
 28 Defendant NBIS Construction & Transport Insurance Services, Inc. FBO ATX Premier Insurance  
 Company via FedEx to Mersch which was received by Mersch on October 27, 2016. There was no

1 cover letter with the check. NBIS Construction & Transport Insurance Services, Inc. is a company  
2 affiliated with Defendant NATIONSBUILDERS.

3 34. On 11/4/16, Mersch filed a lawsuit on Plaintiff's behalf against Cesar Gutierrez and  
4 Tracy Miller. On 11/8/16, Mersch returned the \$7,500 check to DMA and provided DMA with a  
5 file-stamped copy of the Complaint.

6 35. On 11/18/16, Mersch sent a letter via fax, email and mail informing Ravasio that the  
7 DMA check had been returned to her. Ravasio was also provided with proof of service of the  
8 Complaint on Miller on 11/13/16.

9 36. On 11/29/16, Gutierrez was served in prison with a copy of the Complaint. On 12/4/16,  
10 Gutierrez sent to the Court an Answer to the Complaint and a Motion for Appointment of Counsel  
11 for the lawsuit. In the Motion, Gutierrez was seeking the appointment of an attorney to defend him,  
12 as he noted that he was financially unable to retain an attorney and had no training to represent  
13 himself and defend this action. Since Defendants ATX, NATIONSBUILDERS, and DMA never had  
14 contacted Gutierrez, he was not aware of his contractual right to an attorney under the ATX policy.  
15 As such, Gutierrez was trying to have the Court appoint an attorney to defend him for Plaintiff's  
16 lawsuit. On 12/15/16, the Court denied Gutierrez's Application.

17 37. On 12/14/16, Mersch sent DMA a copy of Gutierrez's Answer and Motion for  
18 Appointment of Counsel and these documents were stamped "received" by DMA on 12/19/18.

19 38. On 12/27/16, DMA adjuster Arnice Daniels entered a log note to Answer the complaint.  
20 However, neither DMA, ATX, nor NATIONSBUILDERS, ever referred the file out to counsel to  
21 provide a defense pursuant to the terms of the insurance contract. As such, an Answer was not filed  
22 for Gutierrez and Miller and thus, on 4/19/17, both Gutierrez and Miller were Defaulted.

23 39. On 9/13/17, Plaintiff made a proposal to Defendant DMA to mediate her claims against  
24 Gutierrez and Miller. The proposal was open until 10/9/17. As of 9/13/17, both Gutierrez and  
25 Miller were in Default with the next phase of litigation to be a Default Judgment.

26 40. On 9/18/17, defense counsel retained by Defendant DMA filed a Motion to Enforce  
27 Settlement. The Motion sought to have a Court find that Plaintiff had entered into a settlement with  
28 ATX for the remaining bodily injury limits of \$7,500.

1           41. Even though a DMA lawyer was now involved for Gutierrez and Miller, DMA adjuster  
2 Rita Westfall decided she was going to personally respond to the mediation proposal. In a 10/9/17  
3 letter, Westfall wrote as to Mersch's request for Tracy Miller's Asset Affidavit as follows:

4           Apparently, Ms. Miller failed to complete, sign and mail either affidavit, which is  
5 consistent with her failure to notify Auto Tex of the accident itself and her failure to  
6 forward any suit papers to Auto Tex or DMA and tender the defense of the suit to  
7 AutoTex....We suggest that since Ms. Miller has failed to voluntarily provide to us or Ms.  
8 Mersch any information regarding her other assets (or lack thereof), then it becomes  
9 incumbent upon the plaintiff's counsel to develop such assets information as will satisfy a  
10 court being asked to approve the minor plaintiff's settlement.

11           As to the handling of the claim, Westfall stated as follows:

12           Auto Tex believes that a reviewing court will see any bad faith suit as a rather transparent  
13 but meritless attempt to "set up" an insurer for a bad faith claim because it was presumed  
14 that the remaining limits of the policy purchased by the named insured are insufficient to  
15 fully compensate the minor plaintiff for the death of her father.

16           42. DMA adjuster Westfall's 10/9/17 letter ignored the fact that the September and October  
17 demands gave ATX the opportunity to submit its own Affidavit regarding its efforts to secure an  
18 Affidavit from Miller.

19           43. Westfall's opinion that a "set up" of ATX and DMA had occurred, was an opinion  
20 repeated throughout the claims file by DMA adjusters. As of 10/9/17, DMA had convinced itself  
21 that Miller and Mersch were to blame for DMA's failure to ever secure an Asset Affidavit for Miller  
22 and that DMA was the victim of a lawyer set up to create more insurance.

23           44. Given Westfall's 10/9/17 letter, it is alleged that ATX, NATIONSBUILDERS, and  
24 DMA never informed Gutierrez about the mediation proposal and the consequences if DMA failed  
25 to have a Court enforce the settlement of \$7,500. On 12/11/17, the Court denied the Motion to  
26 Enforce, but the Defaults of Gutierrez and Miller were set aside.

27           45. On 3/19/18, Gutierrez, while represented by counsel who had been retained by DMA,  
28 signed an Assignment to Plaintiff of his rights to breach of contract and bad faith as to ATX, its  
29 subsidiaries, assigns, network companies, agent companies, which includes ATX's parent company  
30 NATIONSBUILDERS, and as to DMA.

31           46. On 6/12/18, Plaintiff filed a Motion for Summary Judgment as to Gutierrez's liability to  
32 Plaintiff for a \$2.5 million dollar judgment. On 8/7/18, the Court granted Plaintiff's Motion for  
33 Summary Judgment and an Order was entered on 8/24/18.



48. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 47.

50. Defendants ATX and NATIONSBUILDERS breached the contract of insurance by failing to ever contact Gutierrez about this death claim until September, 2017. During this period, ATX and NATIONSBUILDERS never made any attempt to inform Gutierrez that he was a covered insured and that ATX had a duty to defend him and to provide coverage. ATX and NATIONSBUILDERS never informed Gutierrez of his contractual rights; demands made against the policy of insurance; his right to make a financial contribution to resolve the claim pursuant to *Miller*; excess exposure he was facing if the claim was not settled within the limits; and communications between ATX, NATIONSBUILDERS, and Plaintiff pursuant to *Miller*. ATX and NATIONSBUILDERS abdicated their responsibilities as Gutierrez's insurer by shifting onto Tracy Miller the burden to provide a timely Asset Affidavit to Plaintiff. ATX and NATIONSBUILDERS never took any actions to comply with Plaintiff's conditional demands and protect Gutierrez from exposure. ATX and NATIONSBUILDERS never sent the certified declaration page; never sent

1 Plaintiff an Asset Affidavit from Miller; and ATX and/or NATIONSBUILDERS never sent Plaintiff  
2 its own Affidavit showing its attempts to secure an Asset Affidavit from Miller.

3 51. Defendants ATX and NATIONSBUILDERS were aware in November 2016 that  
4 Gutierrez was sued by Plaintiff; ATX and NATIONSBUILDERS were then aware in December  
5 2016 that Gutierrez had filed his own Answer and a Motion asking for the appointment of counsel.  
6 Yet ATX and NATIONSBUILDERS did nothing, allowing a Default to be entered against Gutierrez.  
7 In failing to inform Gutierrez of his contractual right to counsel as an insured and allowing him to be  
8 Defaulted, Defendants ATX and NATIONSBUILDERS breached the contract as to their insured  
9 Gutierrez.

10 52. After counsel was provided to Gutierrez after 9/12/17, ATX and NATIONSBUILDERS  
11 continued to be in breach of contract, as they never informed Gutierrez of the proposal for mediation.  
12 In rejecting mediation without ever informing Gutierrez about the proposal and the consequences,  
13 Defendants ATX and NATIONSBUILDERS continued their breach of contract and violation of the  
14 dictates of *Miller*.

15 53. Defendants ATX and NATIONSBUILDERS' multiple breaches of contract resulted in  
16 Gutierrez being exposed to damages beyond the \$7,500 in available insurance. ATX and  
17 NATIONSBUILDERS failed to protect their insured Gutierrez from an excess exposure when it was  
18 reasonably feasible to do so. As a result of the breaches of contract by ATX and  
19 NATIONSBUILDERS, a summary judgment of \$2.5 million dollars has been granted against  
20 Gutierrez. Gutierrez has assigned to Plaintiff his rights against ATX and NATIONSBUILDERS as  
21 ATX's parent company for the these breach of contract damages, which include the \$2.5 million  
22 dollar summary judgment.

23 54. As a result of this breach of contract by Defendants ATX and NATIONSBUILDERS and  
24 Gutierrez's assignment of rights against ATX and NATIONSBUILDERS, Plaintiff seeks from  
25 Defendants ATX and NATIONSBUILDERS general damages in excess of \$15,000 and special  
26 damages in excess of \$15,000.

27 55. Due to the conduct of these Defendants, it has become necessary for Plaintiff to retain  
28 counsel and Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.



**SECOND CLAIM FOR RELIEF**  
(Bad Faith ATX and NATIONSBUILDERS)

56. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 55.

57. Defendants ATX and NATIONSBUILDERS breached the implied duty of good faith and fair dealing that exists in their insurance contract with Gutierrez for this death claim. Art Kirkner, VP of Claims for both ATX and NATIONSBUILDERS, was personally handling this 11/15/14 wrongful death claim from its inception. As alleged in Paragraphs 49-53 above, ATX and NATIONSBUILDERS engaged in multiple acts and omissions which constitute bad faith under Nevada law.

58. Defendants ATX and NATIONSBUILDERS acted in bad faith when they invited a lawsuit against Gutierrez on this claim. ATX and NATIONSBUILDERS then failed to inform Gutierrez of his contractual rights. ATX and NATIONSBUILDERS sat back and watched Gutierrez appeal to the Court for a lawyer to defend him in this lawsuit. ATX and NATIONSBUILDERS did not send the file out to counsel to provide a defense; did not assign a lawyer to Gutierrez; and did not contact Gutierrez in prison and inform him of his contractual rights to counsel and to coverage. Instead, ATX and NATIONSBUILDERS allowed a Default to be entered against Gutierrez in April 2017. After counsel was provided to Gutierrez, ATX and NATIONSBUILDERS continued to act in bad faith, as it never informed Gutierrez of the proposal for mediation. ATX and NATIONSBUILDERS' multiple acts of bad faith resulted in Gutierrez being exposed to damages beyond the \$7,500 in insurance. ATX and NATIONSBUILDERS failed to protect their insured Gutierrez from an excess exposure when it was reasonably feasible to do so.

59. Defendants ATX and NATIONSBUILDERS' conduct, as described herein, was intended by Defendants to cause injury to the Gutierrez, or was carried on by ATX with such conscious disregard for the rights of Gutierrez, as to subject Gutierrez to cruel and unjust hardship, such as to constitute malice, oppression, or fraud under NRS § Section 42.005, thereby entitling Gutierrez and his assignees such as Plaintiff to punitive damages in an amount in excess of \$15,000 against Defendants ATX and NATIONSBUILDERS.

1           60. As a result of Defendants ATX and NATIONSBUILDERS' bad faith, a summary  
2 judgment of \$2.5 million dollars has been granted against Gutierrez. Gutierrez has assigned his  
3 rights to Plaintiff for the acts of bad faith and resultant damages which include the \$2.5 million  
4 dollar judgment. Based on the assignment of bad faith rights from Gutierrez, Plaintiff seeks from  
5 Defendants ATX and NATIONSBUILDERS, general damages in excess of \$15,000 and special  
6 damages in excess of \$15,000.

7           61. Due to the conduct of these Defendants, it has become necessary for Plaintiff to retain  
8 counsel and Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.

9                                   **THIRD CLAIM FOR RELIEF**

10           (Violations of the Nevada Unfair Trade Practices Act by ATX and NATIONSBUILDERS)

11           62. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1  
12 through 61.

13           63. From the inception of this 11/15/14 wrongful death claim, Art Kirkner, VP of Claims for  
14 both Defendant ATX and NATIONSBUILDERS, personally handled this claim. Defendant ATX  
15 and its parent company Defendant NATIONSBUILDERS engaged in unfair trade practices in  
16 violation of NUTPA by failing, *inter alia*, to ever treat as an Gutierrez insured who had a contractual  
17 rights to coverage, to a defense if a lawsuit was filed against him, and to whom ATX and  
18 NATIONSBUILDERS owed duties and obligations under the law, including *Miller*, such that ATX  
19 and NATIONSBUILDERS violated NRS § 686A.310(1)(a),(b),(c),(e), and (n).

20           64. Defendants ATX and NATIONSBUILDERS owed a duty to Gutierrez under NUPTA, to  
21 fully, fairly, reasonably, and promptly inform him of his rights as an insured, including his right to an  
22 attorney for any lawsuit under the duty to defend and his rights as to coverage for this loss. ATX and  
23 NATIONSBUILDERS breached their duties under NUPTA with wanton and reckless disregard for  
24 Gutierrez's contractual rights, and in doing so acted in bad faith and in violation of NUPTA.

25           65. Defendants ATX and NATIONSBUILDERS' conduct in violating NUPTA was intended  
26 by these Defendants to cause injury to Gutierrez, or was carried on by ATX and  
27 NATIONSBUILDERS with such conscious disregard for the rights of Gutierrez, as to subject  
28 Gutierrez to cruel and unjust hardship, such as to constitute malice, oppression, or fraud under NRS

1 § Section 42.005, thereby entitling Gutierrez and assignees such as Plaintiff to punitive damages in  
2 an amount in excess of \$15,000 against ATX and NATIONSBUILDERS.

3 66. As a result of the violations of NUPTA by Defendants ATX and NATIONSBUILDERS,  
4 a summary judgment of \$2.5 million dollars has been granted against Gutierrez. Gutierrez has  
5 assigned to Plaintiff his rights for the violations of NUPTA and resultant damages which include the  
6 \$2.5. million dollar judgment. Based on these NUPTA violations and the Gutierrez assignment,  
7 Plaintiff seeks from Defendants ATX and NATIONSBUILDERS, compensatory damages in excess  
8 of \$15,000 and punitive damages in excess of \$15,000.

9 67. Due to the conduct of these Defendants, it has become necessary for Plaintiff to retain  
10 counsel and Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.

11 **FOURTH CLAIM FOR RELIEF**  
12 **(Breach of Contract DMA)**

13 68. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1  
14 through 67.

15 69. Defendants ATX and NATIONSBUILDERS retained Defendant DMA to act as the  
16 claims handler for the 11/15/14 death claim involving Minor I.R.'s father Mario Regalado. Given its  
17 role as claims administrator for ATX and NATIONSBUILDERS who warrantied its work for ATX  
18 and NATIONSBUILDERS via an indemnity and hold harmless agreement, Plaintiff alleges that  
19 DMA was a joint venturer with ATX and NATIONSBUILDERS as to this claim. As a joint  
20 venturer, DMA owed contractual rights and duties to Gutierrez once it began administering the  
21 claim. Defendant DMA's adjusters worked for years on this claim with Art Kirkner, VP of Claims  
22 for ATX and NATIONSBUILDERS.

23 70. As a joint venturer, Defendant DMA breached the contract of insurance by failing to ever  
24 contact Gutierrez about the claim until 9/12/17. Before 9/12/17, DMA never made any attempt to  
25 contact Gutierrez and inform him that he was a covered under the ATX policy and that ATX and  
26 NATIONSBUILDERS had a duty to defend him and to provide coverage. DMA's actions show that  
27 because Gutierrez was incarcerated, DMA did not consider Gutierrez an insured to whom DMA  
28 owed duties to under the ATX contract. DMA never informed Gutierrez of his contractual rights;  
demands made against the policy; his right to make a financial contribution to resolve the claim

1 pursuant to *Miller*; excess exposure he was facing if the claim was not settled within the limits; and  
2 communications between DMA and Plaintiff as required by *Miller*. DMA abdicated its  
3 responsibilities as Gutierrez's insurer by shifting onto Tracy Miller the burden to provide a timely  
4 Asset Affidavit to Plaintiff. DMA never took any actions to comply with Plaintiff's conditional  
5 demands and protect Gutierrez from exposure. DMA never sent the certified declaration page; DMA  
6 never sent Plaintiff an Asset Affidavit from Miller; and DMA never sent Plaintiff an Affidavit from  
7 ATX showing ATX's attempts to secure an Asset Affidavit from Miller.

8 71. Defendant DMA was aware in November 2016 that Gutierrez was sued by Plaintiff;  
9 DMA was then aware in December 2016 that Gutierrez had filed his own Answer and a Motion  
10 asking for the appointment of counsel. Yet DMA did nothing, allowing a Default to be entered  
11 against Gutierrez. As a joint venturer, in failing to inform Gutierrez of his contractual right to  
12 counsel as an insured and allowing him to be Defaulted, Defendants DMA breached the contract as to  
13 insured Gutierrez.

14 72. After counsel was provided to Gutierrez in September 2017, Defendant DMA as a joint  
15 venturer continued to be in breach of contract, as it never informed Gutierrez of the proposal for  
16 mediation. In rejecting mediation without ever informing Gutierrez about the proposal and the  
17 consequences, DMA continued its breach of contract and violation of the dictates of *Miller*.

18 73. As a joint venturer, Defendant DMA's multiple breaches of contract resulted in  
19 Gutierrez being exposed to damages beyond the \$7,500 of available insurance. DMA failed to  
20 protect its insured Gutierrez from an excess exposure when it was reasonably feasible to do so. As a  
21 result of the breaches of contract by DMA, a summary judgment of \$2.5 million dollars has been  
22 granted against Gutierrez. Gutierrez has assigned to Plaintiff his rights against DMA for the these  
23 breach of contract damages, which include the \$2.5 million dollar summary judgment.

24 74. As a result of this breach of contract by Defendant DMA and Gutierrez's assignment of  
25 rights against DMA, Plaintiff seeks from DMA general damages in excess of \$15,000 and special  
26 damages in excess of \$15,000.

27 75. Due to DMA's conduct, it has become necessary for Plaintiff to retain counsel and  
28 Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.

**FIFTH CLAIM FOR RELIEF**  
(Bad Faith DMA)

76. Plaintiff repeats and re-alleges each and every allegation set forth in Paragraphs 1 through 75.

77. Defendants ATX and its parent company Defendant NATIONSBUILDERS retained Defendant DMA to act as the claims handler for the 11/15/14 death claim involving Minor I.R.'s father Mario Regalado. DMA was a joint venturer with Defendants ATX and NATIONSBUILDERS as to this claim. As a joint venturer, DMA owed contractual rights and duties to Gutierrez as to the administration of this claim. DMA breached the implied duty of good faith and fair dealing as to its contractual duties owed to Gutierrez for this death claim. As alleged in Paragraphs 69-73 above, DMA engaged in multiple acts and omissions which constitute bad faith under Nevada law. Given its actions and omissions, DMA acted in bad faith and this resulted in Gutierrez being exposed to damages beyond the \$7,500 in available insurance.

78. Defendant DMA's conduct was intended by Defendant to cause injury to Gutierrez, or was carried on by this Defendant with such conscious disregard for the rights of Gutierrez, as to subject Gutierrez to cruel and unjust hardship, such as to constitute malice, oppression, or fraud under NRS § Section 42.005, thereby entitling Gutierrez and his assignees such as Plaintiff to punitive damages in an amount in excess of \$15,000 against DMA.

79. As a result of Defendant DMA's bad faith, a summary judgment of \$2.5 million dollars has been granted against Gutierrez. Gutierrez has assigned his rights to Plaintiff for the acts of bad faith and resultant damages which include the \$2.5 million dollar judgment. Based on the assignment of bad faith rights from Gutierrez, Plaintiff seeks from DMA general damages in excess of \$15,000 and special damages in excess of \$15,000.

80. Due to DMA's conduct, it has become necessary for Plaintiff to retain counsel and Plaintiff is entitled to reasonable attorney's fees and costs incurred therefore.

WHEREFORE, Plaintiff prays for a judgment against Defendants ATX, NATIONSBUILDERS, and DMA, as follows:

1. For general damages in a sum in excess of \$15,000.00;

2. For special damages in an sum in excess of \$15,000;
3. For punitive damages in a sum in excess of \$15,000;
4. For reasonable attorneys fees, costs, and prejudgment interest; and,
5. For such other and further relief as the Court may deem appropriate.

DATED this 30 day of May, 2019.

**CRAIG P. KENNY & ASSOCIATES**

By: 

**LAWRENCE E. MITTIN, ESQ.**

Nevada Bar #5428  
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# EXHIBIT 19

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Attorneys for Third Party Defendants  
NATIONSBUILDERS INSURANCE SERVICES, INC.

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KELLY HAYES, as Natural Parent of Minor  
I.R.,

Plaintiffs,

vs.

ATX PREMIER INSURANCE COMPANY;  
NATIONSBUILDERS INSURANCE  
SERVICES, INC. DMA CLAIMS  
MANAGEMENT, INC.; DOES I through X,  
inclusive; and ROE CORPORATIONS,

Defendants.

CASE NO. 2:18-cv-01938-GMN-NJK

**DEFENDANTS ATX PREMIER  
INSURANCE COMPANY AND  
NATIONSBUILDERS INSURANCE  
SERVICES, INC.'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT**



**I. Plaintiff's Framed Issue for Summary Judgment is Procedurally Improper**

Defendants ATX Premier Insurance Company ("ATX") and Nationsbuilders Insurance Services Inc. ("NBIS") submit this opposition to Kelly Hayes' ("Hayes") Motion for Summary Judgment in conjunction with their affirmative motions for Summary Judgment. Plaintiff's motion fails to demonstrate any grounds for Summary Judgment or any claim to which she is entitled to Partial Summary Judgment (FRCP 56(a)) and for that reason the motion should be denied.

The Notice of Motion states that Hayes "files this motion for summary judgment and as a matter of law that defendants failed to inform insured Cesar Gutierrez of the offers to settle within policy limits." This is not a legal issue, and it is not an application of law to fact. It does not establish a cause of action or eliminate any affirmative defense. It is simply a fact, which might be a part of a bad faith cause of action if the balance of the elements are proven, namely: (1) that there was a duty to provide notice in light of the fact that the offers to settle did not involve Gutierrez, (2) that the failure to give notice prevented Gutierrez from taking action to protect himself, or (3) that the failure led to an excess verdict. Plaintiff simply ignores the rest of the cause of action.

Partial summary judgment is inappropriate where the issue "is merely a matter of proof in the general step toward damages. It is not an end within itself." *Sparks v. England* (W.D.Mo. 1941) 1 F.R.D. 688, 688. There, the court found that a plaintiff was not entitled to have a claim of ownership of a burial plot summarily adjudicated, where the issue was merely an element of a trespass claim. Also, under the "Rules of Civil Procedure either party may move for a summary judgment in his favor as to "all or any part thereof." However, such a judgment should be granted only when the judgment is to the whole of any one of the several claims joined in the action. (*Triangle Ink & Color Co. v. Sherwin-Williams Co.*, 64 F.R.D. 536, 537 (N.D.Ill. 1974))

Here, adjudicating whether notice to Gutierrez was given is procedurally improper and the motion should be denied.

**II. Relevant Factual Background**

As set forth in Defendant ATX Premier Insurance Company ("ATX") and Nationsbuilders Insurance Services, Inc. ("NBIS") (collectively, "Defendants"), this case is postured as "bad faith" but

1 is in reality a failed “set up” to try and collect more than the contractually-agreed policy limit of the  
2 ATX policy.

3 Following the accident and notice to DMA, NBIS and ATX’ third party claim administrator,  
4 the wrongful death claim by Melissa Moses, Regalado’s widow, and the claim for property damage to  
5 his bicycle were resolved, and releases taken. Traci Miller, the Named Insured on the ATX policy  
6 was advised that there could be exposure in excess of the policy limits and that a lawyer would be  
7 hired for her if a suit was filed. (See Declaration of John H. Podesta in Support of Opposition to  
8 Plaintiff’s MSJ; Ex. 1).

9 Defendants do not dispute the delivery or the content of the three conditional settlement  
10 demands. Defendants dispute, however, that there was any legal obligation to send these to Gutierrez,  
11 since (1) the settlement demands never contained any condition that required input or consent from  
12 Gutierrez – only Traci Miller; and (2) the letters never demanded money in excess of the policy limits  
13 of the ATX policy. Therefore, not only is this motion procedurally improper and seeks inappropriate  
14 relief, but should be denied on its merits because there was no obligation to notify Gutierrez. (Ex. 2).

15 Furthermore, there are no damages to Gutierrez; when the case proceeded to litigation and a  
16 defense was being provided by ATX, Mr. Mitten proposed a settlement directly with Gutierrez that  
17 included an assignment of all his rights under the ATX policy to plaintiffs, and an agreement that a  
18 future judgment could be entered against him in the amount of \$2,500,000. In exchange for those two  
19 promises, Kelly Hayes would agree never to seek to recover against Gutierrez for the agreed judgment  
20 to be entered sometime in the future. Gutierrez signed the documents. (Exhibit 3.) Months after  
21 Gutierrez was fully protected, Plaintiff moved to enter a judgment. The motion was obviously not  
22 opposed since Gutierrez’ rights to coverage and a defense belonged to Mr. Mitten’s client by virtue of  
23 the assignment, and therefore he had no right or incentive to oppose the motion. (Exhibit 4)

### 24 **III. Allstate v Miller Confirms This Motion Should be Denied**

25 Plaintiff has placed great emphasis on *Allstate Ins. Co. v. Miller* (2009) 125 Nev. 300 [212  
26 P.3d 318] and its impact on Defendants’ liability in this case. (Ex. 5). *Miller* is important to Nevada  
27 jurisprudence relating to insurer bad faith; there are two important holdings. First, conditions placed  
28

1 on settlement demands, in order to be bad faith to reject it, must arise out of contractual obligations in  
2 the policy. Demands unrelated to the contract obligations are not 'bad faith' to reject. *Id.* at 317-320.  
3 Second, it holds that a failure to notify an insured of a settlement demand "may" be bad faith if the  
4 failure "caused" the settlement not to be consummated *and* damages to the insured result therefrom.  
5 *Id.* at 313-315.

#### 6 **1. Background of Miller.**

7 As with this case, *Miller* involved an auto accident, and there was a low limits \$25,000 policy  
8 covering the insured; the loss exceeded the policy limit. Allstate offered the policy limits in settlement  
9 immediately. Allstate notified the insured of the potential excess exposure, just as AutoTex did here.  
10 The plaintiff switched attorneys, however, and the original one placed a lien on the file. Allstate  
11 offered to issue a policy-limits check with both the current and the original attorney's names on it.  
12 That offer was rejected, and current counsel suggested that Allstate interplead the policy limits to let  
13 the court determine the original counsel's proper fee. Allstate originally refused, and then agreed to  
14 file the interpleader after the settlement demand had expired. While this settlement offer was pending,  
15 however, Allstate did not advise the insured of the settlement demand that included the interpleader,  
16 and there was evidence that the insured might have contributed to the settlement or paid for the  
17 interpleader to effect the settlement.

18 Significantly, after the settlement fell through, the plaintiff's action against the insured then  
19 proceeded to trial and judgment in the amount of \$703,619.88. Prior to trial, the plaintiff offered to  
20 stipulate to a judgment if Allstate agreed, and in exchange he would cap the insured's liability;  
21 however, the stipulation was for an amount in excess of the Allstate policy limits. After trial, Miller,  
22 the insured, filed the action against Allstate, who requested special interrogatories regarding three  
23 different theories of bad faith presented by plaintiff: (1) Allstate's failure to file an interpleader  
24 complaint; (2) its failure to inform Miller of Hopkins' interpleader offer; and (3) its refusal to agree to  
25 Hopkins' excessive stipulated judgment thereby forcing the case to trial against the insured. The judge  
26 refused the special interrogatories and the jury rendered a general verdict against Allstate. Allstate  
27 appealed.  
28

1 The Supreme Court rejected the first and third theories of bad faith, since nothing in the policy  
2 required Allstate to take care of liens, and the policy limit was the extent of Allstate's contractual  
3 obligation. *Id.* at 317-20. Since Allstate had no contractual duty to perform either, there was no "bad  
4 faith" for not doing so, and the failure was therefore not an unreasonable denial. The Court felt that  
5 the "duty to notify" of the interpleader was a viable theory of bad faith, but a new trial was required  
6 because court couldn't determine which of the three theories of bad faith that the jury found credible.  
7 *Id.* at 318-23.

8 **2. Notifying Gutierrez was an idle act because he was not in a position to participate,**  
9 **the failure to notify did not result in damages to the Insured, and no condition was**  
10 **directed at Gutierrez.**

11 With regard to the second theory, the failure to inform, the Nevada Supreme Court stated:  
12 "Allstate breached its duty to inform when it failed to inform Miller of the offer. *Miller could have*  
13 *chosen at that time to hire independent counsel* to review the offer and pursue any available options,  
14 such as initiating an interpleader complaint at his expense or contributing additional funds to Allstate's  
15 \$25,000 settlement offer in return for a release from Hopkins. The failure to inform must be in the  
16 context of the insured arguably being able to do something, and to be liable there must be proof that  
17 the failure to inform (not other actions) caused any damage, i.e. the trial and judgment. *Id.* at 305.

18 This factual background shows why *Miller* doesn't apply here. First, there was no condition  
19 on settlement that was directed at Gutierrez, unlike the interpleader in *Miller*. The conditions were  
20 relative to Miller's assets, not Gutierrez. There was nothing that Gutierrez could have done to comply  
21 with the conditions of settlement. Therefore, notifying him would be an idle act, at least in terms of  
22 his ability to conclude the settlement. Further, as confirmed by Plaintiff's counsel at Gutierrez'  
23 deposition, Gutierrez was in jail. He had no assets. The underlying case did not proceed to trial and  
24 judgment, unlike in *Miller*, because Gutierrez might have been able to effect a settlement had notice  
25 been given. Therefore, there is no evidence that failing to notify caused the judgment or any damage  
26 to Gutierrez whatsoever. In fact, a cynic might observe that the failure to notify Gutierrez allowed  
27 him to enter a deal where he could settle for no money and obtain complete exoneration from Hayes.  
28

1           **3. Pursuant to *Miller*, failing to obtain an affidavit of efforts to obtain assets from Miller,**  
2           **is not based on any contractual duty of ATX and therefore cannot be the basis for**  
3           **bad faith.**

4           Aside from whether Gutierrez should have been notified in a general sense, Defendants further  
5 maintain that there was no reasonable settlement demand that was rejected. In order to be liable the  
6 insurer must have *unreasonably* rejected the terms of a *reasonable* settlement demand. A reasonable  
7 settlement term, in turn, must be one that is contract based, or that is implied in the duty of good faith.  
8 *Id.* at 317-20. It is not enough, as plaintiff implies, that compliance with the condition does not take  
9 a great deal of effort. For example, the *Miller* Court stated that Allstate was not under a contractual  
10 obligation to resolve all lien claims, and thus the claim that it failed to interplead the limits had no  
11 merit and was not a rejection of a reasonable condition. *Id.* at 318. Similarly, there was no contractual  
12 basis that Allstate agree to a stipulated judgment in excess of the policy limits and thus the refusal to  
13 do so was not bad faith. Either of these were of minimal effort, but Allstate's refusal could not be the  
14 basis of a bad faith claim. However, because the court refused the request for special interrogatories,  
15 the record didn't disclose the theory on which the verdict rested. Two of the three theories relied on  
16 failures by Allstate to comply with demands that were not based on the contract, which would not  
17 support a theory of bad faith rejection of a reasonable settlement demand.

18           As the record in this case is clear, ATX agreed to pay the policy limits and to provide a certified  
19 declarations page to establish that. It attempted to have Traci Miller fill out an asset affidavit by  
20 sending it to her at the last known address. All contract-related conditions on settlement—those that  
21 relate to defense or indemnity of the insured and attempting communications with the insured—were  
22 complied with by ATX.

23           The two conditions in Mersch's demands that were not complied with are: (1) a demand that  
24 DMA's principal declare what its efforts were to locate Traci Miller's assets without providing any  
25 guidelines or a draft of what information is required; and (2) a revised release to be drafted by DMA  
26 to Julie Mersch's satisfaction. Mersch never provided acceptable language, but a revised release was  
27 never rejected if other conditions could be met. However, the insurer signing a declaration regarding  
28

1 ATX or DMA's efforts to obtain the insured's assets information has no basis in the insurance contract  
2 and therefore, pursuant to *Miller*, could not subject ATX or NBIS to liability for bad faith.  
3 *Id.* at 317-20.

#### 4 IV. Response to Specific Portions of Motion

5 The following passages are highlighted specifically to demonstrate the red herrings in  
6 plaintiff's case and motion.

7 **MSJ at 13-16.** Plaintiff argues that Summary Judgment was *granted* in plaintiff's favor in the  
8 amount of \$2.5million. Given Cesar Gutierrez' exposure to a potential future judgment, he argues,  
9 Gutierrez entered into an assignment of his bad faith rights. As stated above, this characterization of  
10 the facts is out of sequence, and therefore misleading. Gutierrez was "exposed" to an excess judgment  
11 the moment that he got into Traci Miller's car and drove dangerously. In fact, ATX was defending  
12 Gutierrez in the *Regalado* lawsuit, when he agreed to a settlement by Plaintiff counsel here. The  
13 settlement included an agreement that a \$2.5million judgment could be entered in the future. The  
14 judgment was entered ***after the settlement*** was finalized and Gutierrez was completely protected. This  
15 action is to collect the amount of the voluntary settlement.

16 **MSJ at 3:17-4:3.** NBIS is not an insurance company, and reference to its ownership of other  
17 companies is utterly irrelevant. NBIS objects to this section of the brief on the grounds of relevance,  
18 and lack of foundation. In the context of this case, NBIS retained financial responsibility for claims  
19 relating to policies that were issued prior to the sale of ATX in 2015. However, NBIS is not a party  
20 to the contract, and it does not adjust claims – the only relevant features to liability for breach of  
21 contract or bad faith. ATX is the insurer and has never claimed otherwise.

22 **MSJ at 4:4-4:18.** Plaintiff absurdly throws mud on the corporate counsel of NBIS  
23 Construction and Transport Insurance Services, Inc. ("CTIS"). The testimony was merely that counsel  
24 had drafted a letter, but that Rita Westfall of DMA reviewed and approved the letter and sent it over  
25 her signature. The remainder is mere distraction. Mr. Mitten, the architect of the assignment and  
26 covenant not to execute, claims that he was misled by that letter into suing the wrong entity, AutoTex  
27 MGA. This feigned "deception" is itself incredible. Before this action was commenced, Mr. Mitten  
28

1 had the entire ATX policy; the assignment by Gutierrez that he sues upon and which he drafted recites  
2 that Gutierrez was an insured under the policy issued by ATX Premier Insurance Company. Exhibit  
3 11 to Plaintiff's motion includes a copy of the check issued by CTIS that clearly states it is for the  
4 benefit of ATX Premier Insurance Company. Therefore, the Court should see through this mud-  
5 slinging and not allow the record before it to be tainted. There is no deception by the Defendants.

6 **MSJ at 5:13-5:15.** Plaintiff asserts that NBIS is "handling" the claim and that Art Kirkner  
7 was "handling" the claim. This is a transparent attempt to misstate the evidence to support their  
8 otherwise unsupportable claim that NBIS is a proper party in this case. It is completely beside the  
9 point of what the motion seeks. In fact, NBIS is akin to a reinsurer that has no direct involvement in  
10 this case. It is not a party to the insurance contract, and it has no direct responsibility for handling  
11 claims.

## 12 V. Conclusion

13 First, this is an improper Motion for Partial Summary Judgment, seeking judgment relative to  
14 a "fact" that is part of a cause of action.

15 Second, Plaintiff's entire theory of liability based on *Miller* is misplaced. The condition  
16 requiring an affidavit setting for the insured's assets was not "reasonable" and therefore there is no  
17 bad faith in failing to provide one. The provision of an affidavit from a "principal" concerning assets  
18 of the insured has nothing to do with the promise of defense or indemnity from the insurer. Moreover,  
19 Plaintiff has not and cannot show that there was any damage to Gutierrez from a failure to provide  
20 notice of settlement demands.

21 Finally, plaintiff's motion is replete with mischaracterizations concerning corporate status of  
22 NBIS that are attempts to paint the defense in a negative light and have *absolutely nothing* to do with  
23 even their request for a "judgment" concerning whether Gutierrez was notified or not, such surplusage  
24 should be disregarded.


25 ///

26 ///

27 ///

1 Date: November 6, 2019

2 WILSON ELSEER MOSKOWITZ  
3 EDELMAN & DICKER, LLP

4 By:   
5 John Podesta (NV Bar No. 7487)  
6 Christopher Phipps (NV Bar No. 3788)  
7 Attorneys for Defendants  
8 ATX Premier Insurance Company and  
9 NationsBuilders Insurance Services  
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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on November 6, 2019, I served a true and correct copy of the foregoing:  
as follows:

**DEFENDANTS ATX PREMIER INSURANCE COMPANY NATIONSBUILDERS  
INSURANCE SERVICES, INC'S OBJECTIONS TO EVIDENCE OFFERED IN  
SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

- ☐: by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in San Francisco, California;
- ☒: via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐: via hand-delivery to the addressees listed below
- ☐: via facsimile;
- ☐: by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

By: \_\_\_\_\_

Marilee Barlow

**SERVICE LIST**

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***Attorney for Plaintiff***  
***Kelly Hayes***

# EXHIBIT 20

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 ATX PREMIER INSURANCE COMPANY  
 NATIONSBUILDERS INSURANCE SERVICES,  
 INC.

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KELLY HAYES, as Natural Parent of Minor  
 I.R.,

Plaintiffs,

vs.

ATX PREMIER INSURANCE COMPANY;  
 NATIONSBUILDERS INSURANCE  
 SERVICES, INC. DMA CLAIMS  
 MANAGEMENT, INC.; DOES I through X,  
 inclusive; and ROE CORPORATIONS,

Defendants.

CASE NO. 2:18-cv-01938-GMN-NJK

**DEFENDANT NATIONSBUILDERS  
 INSURANCE SERVICES, INC.'s MOTION  
 FOR SUMMARY JUDGMENT OR  
 IN THE ALTERNATIVE MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

Action Filed: 05/06/19  
 Trial Date: None Set

**TO PLAINTIFF AND THEIR ATTORNEY OF RECORD:**

**PLEASE TAKE NOTICE** that Defendant NATIONSBUILDERS INSURANCE SERVICES,  
 INC. ("NBIS") will and hereby does move this court for an order granting Summary Judgment or, in  
 the Alternative Partial Summary Judgment in its favor of the following issues:


1           1.       That NBIS is not a party to the insurance contract between Defendant ATX Premier  
2 Insurance Company and Traci Miller, and therefore is not liable for breach of contract with respect to  
3 Plaintiff.

4           2.       That NBIS is not a party to the insurance contract between Defendant ATX Premier  
5 Insurance Company and Traci Miller, and took no part in the claims administration of the Regalado  
6 matter, therefore is not liable for insurance bad faith.

7           3.       That NBIS is not a party to the insurance contract between Defendant ATX Premier  
8 Insurance Company and Traci Miller, and is not a claims administrator or agent of ATX Premier, and  
9 therefore is not liable for breach of NRS 686A.310.

10  
11 Dated: November 7, 2019

WILSON ELSER MOSKOWITZ  
EDELMAN & DICKER LLP

12  
13  
14 By:   
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22 *NATIONSBUILDERS INSURANCE*  
23 *SERVICES, INC.*  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Introduction/Summary of Argument**

This action is ostensibly one to recover an insurance “bad faith” judgment brought by Kelly against the insurer for the party that allegedly caused the death of Mario Regalado, the father of Isabella Regalado. This motion is brought in conjunction with defendants’ separate motions for summary judgment, which detail the claim, the claim handling, and the settlement between Hayes and Gutierrez. For purposes of this motion, however, Defendant NationsBuilders Insurance Services, Inc. (“NBIS”) merely draws the Court’s attention to the facts underlying the sole legal issue to be decided in this motion, as summarized herein. Simply, NBIS is NOT an insurance company; it is NOT a party to the insurance contract; and it is NOT a claims administrator or claims agent for ATX Premier Insurance Company (“ATX”), the company that issued the policy in question. It therefore is not a proper party to this lawsuit.

On May 3, 2019, Plaintiff filed her Third Amended Complaint against defendants, including NBIS, based on the apparent belief that NBIS was a party to the policy issued by ATX Premier Insurance Company (“ATX”). TAC ¶ 4. ATX, at the time it issued the policy, was an insurance company incorporated under the laws of Texas but licensed to do business in Nevada. In fact, NBIS was the stockholder of ATX the time of the underlying loss. However, NBIS is not and has never been an insurance company. Rather, NBIS is a holding company that, as part of the sale of ATX, agreed to indemnify ATX for losses associated with the pre-sale policies, akin to a re-insurer to insurance companies.

As set forth in response to Request for Admission, Plaintiff is fully aware of the separate nature of these two entities, and that NBIS is not a party to the contract. Specifically, she has admitted: 1) NBIS is not a party to the ATX insurance policy at issue; 2) NBIS did not issue the ATX policy; 3) NBIS is not an admitted insurance company in Nevada; 4) NBIS is not a Surplus Lines Insurance Company in Nevada; and 5) NBIS is a separate company from ATX. Plaintiff’s claims herein are, charitably, based on the notion that counsel’s difficulty in determining the corporate relationship justifies holding NBIS in the litigation. However, the claims are not based on Nevada law.

///

## II. Undisputed Material Facts and Reference to Evidence

ATX is an insurance company that issued policy number ANV00000230 to Traci Miller, in effect on November 14, 2014, covering the 1992 Acura and containing an “each person” policy limit of \$15,000 policy limit. (see copy of ATX policy, Attached to the declaration of John H Podesta, herein after labeled “Ex.” (Ex. 1) NBIS is not a party to that insurance contract and the policy was not issued by NBIS. (Exs. 1, 8).

On May 3, 2019, Plaintiff filed her Third Amended Complaint, in which she alleges that “[a]s the *parent* company of ATX, [NBIS] is an insurer of the Miller ATX policy and as such, it was governed by NUPTA and it had contractual obligations to Gutierrez for this 11/15/14 claim; these obligations included the duty to defend; the duty to provide coverage; the covenant of good faith and fair dealing; and communication/disclosure duties as required by *Allstate v. Miller*.” TAC ¶ 3.

Plaintiff’s amended responses to NBIS’ Requests for Admission confirm that: 1) NBIS is not a party to the ATX insurance policy at issue; 2) NBIS did not issue the ATX policy; 3) NBIS is not an admitted insurance company in Nevada; 4) NBIS is not a Surplus Lines Insurance Company in Nevada; and 5) NBIS is a separate company from ATX. (Ex. 2) NBIS has no claims adjusters and conducts no oversight of claims handling operations. (Declaration of John Parker ¶¶ 5, 7). NBIS is holding company that did not participate in issuing the policy or handling the claims. While NBIS-affiliated companies engage in claim oversight activities—notably NBIS Construction and Transport Insurance Services (“CTIS”)—it is a completely separate company from NBIS.

Following Plaintiff’s admissions, counsel for NBIS twice requested that NBIS be dismissed from the lawsuit, as there was no longer any basis for maintaining claims for breach of contract and bad faith where NBIS was not even a party to the contract at issue. (Exs. 3, 4). Both times Plaintiff refused to dismiss NBIS, raising incoherent arguments unsupported by the facts or the law. (Exs. 2, 5).

In light of the foregoing undisputed facts, NBIS was forced to bring the instant motion.

## III. Standard of Law

Summary judgment is appropriate when the moving party demonstrates no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary judgment practice, the

1 moving party always bears the initial responsibility of informing the district court of the basis of its  
 2 motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and  
 3 admissions on file together with affidavits, if any,” which it believes demonstrate the absence of a  
 4 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[W]here the  
 5 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment  
 6 motion may properly be made in reliance solely on the pleadings, depositions, answers to  
 7 interrogatories, and admissions on file.” *Id.* at 324 (internal quotations omitted).

8 If the moving party meets its initial responsibility, the burden then shifts to the opposing party to  
 9 establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v.*  
 10 *Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S.  
 11 253, 288–89 (1968). In attempting to establish the existence of this factual dispute, the opposing party  
 12 may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the  
 13 form of affidavits, and/or admissible discovery material, in support of its contention that the dispute  
 14 exists. Fed. R. Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material,  
 15 i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby,*  
 16 *Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a  
 17 reasonable jury could return a verdict for the nonmoving party. *Id.* at 251–52.

#### 18 IV. Legal Argument

##### 19 a. NBIS Could Not Breach Insurance Contract to Which It Is Not A Party.

20 “Nevada law requires the plaintiff in a breach of contract action to show (1) the existence of a  
 21 valid contract [between the parties]; (2) a breach by the defendant; and (3) damage as a result of the  
 22 breach.” *Saini v. Int’l Game Tech.*, 434 F.Supp.2d 913, 919-20 (D. Nev. 2006). It follows that a party  
 23 against whom breach is alleged must actually be a party to the contract, such that a duty between  
 24 promisor and promisee is established. In other words, one cannot breach a contract to which they were  
 25 not a party. *See* Restatement (Second) of Contracts § 9 (1981).

26 Plaintiff admits that NBIS is not a party to the ATX Policy, that NBIS did not issue the ATX  
 27 Policy, and that NBIS is a separate company from ATX. (Ex. 2). A matter admitted to in response to a  
 28 written request is conclusively established unless the court, on motion, permits the admission to be



1 withdrawn or amended. Fed. R. Civ. P. 36(b). Plaintiff's breach of contract claim thus fails as a matter  
2 of law.

3 **b. NBIS Cannot Have Acted in Bad Faith Absent Insurer/Insured Relationship.**

4 Plaintiff's Second Claim for Relief as to NBIS similarly fails as a matter of law. A breach or  
5 failure to perform constitutes "bad faith" only where the relationship between the parties is that of  
6 insurer and insured. *See Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 793 (1993); *Allstate Ins.*  
7 *Co. v. Miller*, 125 Nev. 300 (2009); *Drennan v. Maryland Cas. Co.*, 366 F.Supp.2d 1002, 1005-06 (D.  
8 Nev. 2005). As already mentioned, Plaintiff has admitted to the fact that NBIS is neither a party to the  
9 insurance contract nor an insurance company, a fact thus conclusively established. (**Ex. 2**)

10 Therefore, it is impossible for NBIS to have acted in bad faith with respect to Plaintiff's  
11 supposed bad-faith insurance claim. For this reason NBIS is entitled to judgment as a matter of law.

12 **c. NBIS Cannot be Liable Under NRS 686A.310 as It Is Not an Insurer and Did Not**  
13 **Participate in Claims Handling**

14 NRS 686A.310, the Nevada Unfair Claims statute proscribes certain activities of "insurers". *See*  
15 *Sonoma Springs Ltd. P'ship v. Fidelity and Deposit Co. of Maryland*, 2019 WL 3848790 at \*7 (D.  
16 Nevada August 14, 2019) (holding that the statute applies more narrowly than the common law tort and  
17 is "limited in proscribing specific actions taken by an *insurer*." (quotations omitted); *see also Zurich*  
18 *American Ins. Co. v. Coeur Rochester, Inc.*, 720 F.Supp.2d 1223, 1236 (D. Nevada June 24, 2010)  
19 ("Unlike a cause of action for bad faith, the provisions of Nev.Rev.Stat. § 686A.310 address *the manner*  
20 *in which an insurer handles an insured's claim* whether or not the claim is denied.") (emphasis added).  
21 NBIS is not an insurer (as admitted by plaintiff) and it did not issue the policy at issue, Therefore is not  
22 subject to the duties of an insurer in this context or subject to the penalty provisions in NRS  
23 686A.310(2).

24 Additionally, and notwithstanding plaintiff's claims of a "parent" relationship, or involvement,  
25 neither NBIS nor any employee of NBIS participated in this claim in any respect. The only two  
26 identified persons, Art Kirkner and John Parker, who were not employees of the third party claims  
27 handler, DMA Claims, are employees of NBIS Construction and Transport Insurance Services, Inc., a  
28 completely separate corporation. NationsBuilders Insurance Services, has neither an obligation to adjust


1 the claim, the ability to engage in any of the prescribed acts, nor any direct involvement in this claim.  
2 (Decl. of John Parker ¶¶ 5-7).

3 **V. CONCLUSION**

4 Both Plaintiff's First and Second Claims for Relief against NBIS failure as a matter of law for  
5 the simple reason that NBIS is not the insurer to Plaintiff under the insurance policy at issue. NBIS is  
6 entitled to judgment on such basis. Therefore, NBIS' motion should be granted.

7 Date: November 7, 2019

WILSON ELSEER MOSKOWITZ,  
EDELMAN & DICKER, LLP

8  
9  
10 By:   
11 JOHN H. PODESTA (NV Bar No. 7487)  
12 CHRISTOPHER PHIPPS (NV Bar No. 3788)  
13 525 Market Street, 7<sup>th</sup> Floor  
14 San Francisco, California 94105-2725  
15 (415) 625-9251  
16 *Attorneys for Defendants*  
17 *ATX PREMIER INSURANCE COMPANY*  
18 *NATIONSBUILDERS INSURANCE SERVICES,*  
19 *INC.*  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on November 7, 2019, I served a true and correct copy of the foregoing:  
as follows:

**DEFENDANT NATIONSBUILDERS INSURANCE SERVICES, INC's MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR PARTIAL SUMMARY JUDGMENT**

- ☐: by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in San Francisco, California;
- ☒: via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐: via hand-delivery to the addressees listed below
- ☐: via facsimile;
- ☐: by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

By: \_\_\_\_\_

  
Marilee Barlow

2:18-cv-01938-GMN-NJK

CERTIFICATE OF SERVICE

**SERVICE LIST**

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Craig P. Kenny & Associates  
501 S. 8<sup>th</sup> Street  
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*Attorney for Plaintiff*  
*Kelly Hayes*

2:18-cv-01938-GMN-NJK

CERTIFICATE OF SERVICE

# EXHIBIT 21

**NBIS CONSTRUCTION & TRANSPORT INSURANCE SERVICES INC.**

FBO ATX PREMIER INSURANCE COMPANY  
PO BOX 26004  
GLENDALE, CA 91222-6004  
(323) 342-1650

FROST BANK ADDISON  
15301 N. DALLAS PKWY #100  
ADDISON, TX 76001  
30-9/1140

VOID AFTER 90 DAYS  
THIS ACCOUNT IS  
PROTECTED BY POSITIVE PAY

3514

DATE  
10/26/2016

AMOUNT

PAY

TO THE  
ORDER  
OF

COPY

MEMO

SECURITY FEATURES INCLUDED, DETAILS ON BACK.

⑈003514⑈ ⑆114000093⑆ 608876517⑈

NBIS CONSTRUCTION &amp; TRANSPORT INSURANCE SERVICES INC.

3514

Claim #: DMA-0137991

Date of Loss: 11/15/2014

Received Date: 11/20/2014

NBIS CONSTRUCTION &amp; TRANSPORT INSURANCE SERVICES INC.

3514

Claim #: DMA-0137991

Date of Loss: 11/15/2014

Received Date: 11/20/2014

RECEIVED  
OCT 27 2016  
BY: \_\_\_\_\_

## MANDATORY FRAUD STATEMENT:

ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD OR DECEIVE ANY INSURANCE COMPANY OR ITS INSURED FILES AS STATEMENT OF CLAIM CONTAINING FALSE, INCOMPLETE OR MISLEADING INFORMATION IS GUILTY OF FELONY IN THE THIRD DEGREE.

WL65111PK1

NORTHLAKE BUSINESS FORMS 116-746-9102

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RPI.APP.000490

# EXHIBIT 22

1 John H. Podesta  
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2 Christopher Phipps  
Nevada Bar No. 3788  
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4 525 Market Street, 17th Floor  
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7 *Address for Personal Service Only*  
**WILSON, ELSER, MOSKOWITZ,**  
8 **EDELMAN & DICKER LLP**  
300 South 4<sup>th</sup> Street, Ste. 1100  
9 Las Vegas, NV 89101

10 Attorneys for Defendant  
ATX PREMIER INSURANCE COMPANY

11  
12 UNITED STATES DISTRICT COURT

13 DISTRICT OF NEVADA

14 KELLY HAYES, as Natural Parent of Minor I.R.,

15 Plaintiff,

16 vs.

17 ATX PREMIER INSURANCE COMPANY;  
18 NATIONSBUILDERS INSURANCE  
SERVICES, INC. DMA CLAIMS  
19 MANAGEMENT, INC.; DOES I through X,  
inclusive; and ROE CORPORATIONS,

20 Defendants.

21 NATIONSBUILDERS INSURANCE  
SERVICES, INC.,

22 Cross-Claimant,

23 vs.

24 DMA CLAIMS MANAGEMENT, INC.,

25 Cross-Defendant.  
26  
27  
28

CASE NO. 2:18-cv-01938-GMN-NJK

**DEFENDANT ATX PREMIER  
INSURANCE COMPANY'S ANSWER TO  
PLAINTIFF'S THIRD AMENDED  
COMPLAINT AND CROSS-CLAIM  
AGAINST DEFENDANT DMA CLAIMS  
MANAGEMENT, INC.**

Action Filed:

05/06/19

Trial Date:

None Set



Defendant ATX Premier Insurance Company ("ATX"), by and through its counsel undersigned, hereby Answers the Third Amended Complaint filed by Plaintiff Kelly Hayes ("Plaintiff" or "Hayes"), as follows:

**GENERAL ALLEGATIONS**

1. Paragraph 1 contains conclusions and accusations that are not statements of fact to admit or deny, and the remaining facts are largely outside of knowledge of employees of ATX; ATX therefore has insufficient information at this time to either admit or deny the allegations of paragraph 1, and therefore denies it.

2. ATX admits that it issued policy ANV 0000230 to Tracy Miller and that it schedules a 1992 Acura. ATX denies the balance of the allegations in paragraph 2.

3. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 3 and therefore denies it.

4. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 4, and therefore denies it.

5. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 5, and therefore denies it.

6. ATX denies the allegations of paragraph 6.

7. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 7, and therefore denies it.

8. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 8, and therefore denies it.

9. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 9, and therefore denies it.

10. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 10, and therefore denies it.

11. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 11, and therefore denies it.

12. ATX denies that it had knowledge of the facts alleged in paragraph 12, and therefore denies it.

1 13. ATX has insufficient information at this time as to whether or when any demand was made, and  
2 denies the balance of paragraph 13 denies it entirely.

3 14. ATX has insufficient information at this time to either admit or deny the allegations of  
4 paragraph 14, and therefore denies it.

5 15. ATX has insufficient information at this time to either admit or deny the allegations of  
6 paragraph 15, and therefore denies it.

7 16. ATX denies the allegations of paragraph 16.

8 17. ATX denies that it ever had an obligation to or participated in any investigation, and has  
9 insufficient information at this time to either admit or deny the balance of the allegations of paragraph  
10 17, and therefore denies it.

11 18. ATX denies the allegations of paragraph 18.

12 19. ATX has insufficient information at this time to either admit or deny the allegations of  
13 paragraph 19, and therefore denies it.

14 20. ATX has insufficient information at this time to either admit or deny the allegations of  
15 paragraph 20, and therefore denies it.

16 21. ATX has insufficient information at this time to either admit or deny the allegations of  
17 paragraph 21, and therefore denies it.

18 22. ATX denies that it "decided" anything as alleged in paragraph 22 or took actions consistent with  
19 such a decision, and has insufficient information at this time to either admit or deny the allegations of  
20 paragraph 22, and therefore denies it.

21 23. ATX has insufficient information at this time to either admit or deny the allegations of  
22 paragraph 23, and therefore denies it.

23 24. ATX has insufficient information at this time to either admit or deny the allegations of  
24 paragraph 24, and therefore denies it.

25 25. ATX denies that any improper actions were taken with its knowledge and/or consent. It  
26 otherwise has insufficient information at this time to either admit or deny the allegations of paragraph  
27 25, and therefore denies it.

28

1 26. ATX has insufficient information at this time to either admit or deny the allegations of  
2 paragraph 26, and therefore denies it.

3 27. ATX has insufficient information at this time to either admit or deny the allegations of  
4 paragraph 27, and therefore denies it.

5 28. ATX has insufficient information at this time to either admit or deny the allegations of  
6 paragraph 28, and therefore denies it.

7 29. ATX has insufficient information at this time to either admit or deny the allegations of  
8 paragraph 29, and therefore denies it.

9 30. ATX has insufficient information at this time to either admit or deny the allegations of  
10 paragraph 30, and therefore denies it.

11 31. ATX has insufficient information at this time to either admit or deny the allegations of  
12 paragraph 31, and therefore denies it.

13 32. ATX has insufficient information at this time to either admit or deny the allegations of  
14 paragraph 32, and therefore denies it.

15 33. ATX denies that ATX Construction and Transport Insurance Services is a defendant in this  
16 action and has insufficient information at this time to either admit or deny the allegations of paragraph  
17 33, and therefore denies it.

18 34. ATX admits that a complaint was filed, but otherwise has insufficient information at this time to  
19 either admit or deny the allegations of paragraph 34, and therefore denies it.

20 35. ATX has insufficient information at this time to either admit or deny the allegations of  
21 paragraph 35, and therefore denies it.

22 36. ATX has insufficient information at this time to either admit or deny the allegations of  
23 paragraph 36, and therefore denies it.

24 37. ATX has insufficient information at this time to either admit or deny the allegations of  
25 paragraph 37, and therefore denies it.

26 38. ATX has insufficient information at this time to either admit or deny the allegations of  
27 paragraph 38, and therefore denies it.

28 ///

1 39. ATX has insufficient information at this time to either admit or deny the allegations of  
2 paragraph 39, and therefore denies it.

3 40. ATX has insufficient information at this time to either admit or deny the allegations of  
4 paragraph 40, and therefore denies it.

5 41. ATX has insufficient information at this time to either admit or deny the allegations of  
6 paragraph 41, and therefore denies it.

7 42. ATX has insufficient information at this time to either admit or deny the allegations of  
8 paragraph 42, and therefore denies it.

9 43. ATX has insufficient information at this time to either admit or deny the allegations of  
10 paragraph 43, and therefore denies it.

11 44. ATX has insufficient information at this time to either admit or deny the allegations of  
12 paragraph 44, and therefore denies it.

13 45. ATX has insufficient information at this time to either admit or deny the allegations of  
14 paragraph 45, and therefore denies it.

15 46. ATX has insufficient information at this time to either admit or deny the allegations of  
16 paragraph 46, and therefore denies it.

17 47. ATX denies the allegations of paragraph 47.

18 **FIRST CLAIM FOR RELIEF**

19 48. Answering paragraph 48, ATX incorporates its responses to paragraphs 1-47.

20 49. ATX has insufficient information at this time to either admit or deny the allegations of  
21 paragraph 49, and therefore denies it.

22 50. ATX denies that it breached any contract with plaintiff and therefore denies allegations of  
23 paragraph 50.

24 51. ATX has insufficient information at this time to either admit or deny the allegations of  
25 paragraph 51, and therefore denies it.

26 52. ATX denies that it breached any contract with plaintiff and therefore denies the allegations of  
27 paragraph 52.

28 ///

53. ATX denies that it breached any contract with plaintiff and therefore denies the allegations of paragraph 53.

54. ATX denies that it breached any contract with plaintiff, or that the assignment created any damages against Gutierrez and therefore denies the allegations of paragraph 54, and therefore denies it.

### **SECOND CLAIM FOR RELIEF**

55. Answering paragraph 55, ATX incorporates its responses to paragraphs 1-54.

56. ATX denies that it is a party to the insurance policy or that it breached any contract with plaintiff and therefore denies the allegations of paragraph 56.

57. ATX denies the allegations of paragraph 57.

58. ATX denies the allegations of paragraph 58.

59. ATX denies the allegations of paragraph 59.

60. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 60, and therefore denies it.

61. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 61, and therefore denies it.

### **THIRD CLAIM FOR RELIEF**

62. Answering paragraph 62, ATX incorporates its responses to paragraphs 1-61.

63. ATX denies that breached any contract with plaintiff and therefore denies the allegations of paragraph 63.

64. ATX denies the allegations of paragraph 64.

65. ATX denies the allegations of paragraph 65.

66. ATX denies the allegations of paragraph 66.

67. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 67, and therefore denies it.

### **FOURTH CLAIM FOR RELIEF**

68. Answering paragraph 68, ATX incorporates its responses to paragraphs 1-67.

69. ATX has insufficient information at this time to either admit or deny the allegations of paragraph 69, and therefore denies it.

1 70. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
2 70, and therefore denies it.

3 71. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
4 71, and therefore denies it.

5 72. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
6 72, and therefore denies it.

7 73. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
8 73, and therefore denies it.

9 74. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
10 74, and therefore denies it.

11 75. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
12 75, and therefore denies it.

13 **FIFTH CLAIM FOR RELIEF**

14 76. Answering paragraph 76, ATX incorporates its responses to paragraphs 1-75.

15 77. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
16 77, and therefore denies it.

17 78. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
18 78, and therefore denies it.

19 79. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
20 79, and therefore denies it.

21 80. ATX has insufficient information at this time to either admit or deny the allegations of paragraph  
22 80, and therefore denies it.

23 **PRAYER FOR RELIEF**

24 1. ATX in responding to Plaintiff's first claim for relief, deny that Plaintiff is entitled to any relief  
25 whatsoever and on that basis denies the allegation.

26 2. ATX in responding to Plaintiff's second claim for relief, deny that Plaintiff is entitled to any  
27 relief whatsoever and on that basis denies the allegation.

28 ///

3. ATX in responding to Plaintiff's third claim for relief, deny that Plaintiff is entitled to any relief whatsoever and on that basis denies the allegation.

4. ATX in responding to Plaintiff's fourth claim for relief, deny that Plaintiff is entitled to any relief whatsoever and on that basis denies the allegation.

5. ATX in responding to Plaintiff's fifth claim for relief, deny that Plaintiff is entitled to any relief whatsoever and on that basis denies the allegation.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense**

##### **(Failure to State a Claim)**

The Third Amended Complaint and each purported claim for relief alleged therein, fails to state facts sufficient to constitute any claim or cause of action upon which relief can be granted.

#### **Second Affirmative Defense**

##### **(Statute of Limitations)**

The Third Amended Complaint and each of its purported claims for relief are barred by the applicable statute of limitations.

#### **Third Affirmative Defense**

##### **(Lack of Privity)**

As a separate and distinct affirmative defense, ATX alleges that it is not a party to the insuring agreement referenced in Plaintiff's Third Amended Complaint, it owes no contractual duties to Plaintiff, and never has owed any contractual duties to Plaintiff at any time. Accordingly, ATX is not liable to Plaintiff for any of the damages alleged in the Third Amended Complaint.

#### **Fourth Affirmative Defense**

##### **(Insured's Breach of Contract)**

Plaintiff is foreclosed from seeking damages in connection with ATX's alleged breach of contract by virtue of one or all of Plaintiff's assignor's failure to perform their obligations under their policy of insurance with defendant ATX. Specifically, Plaintiff failed to satisfy the following conditions of the policy:

///



**PART E—DUTIES AFTER AN ACCIDENT OR LOSS:**

**B. A person seeking any coverage must:**

1. *Cooperate with us in the investigation, settlement or defense of any claim or suit.*
2. *Promptly send us copies of any notices or legal papers received in connection with the accident or loss.*

...

**LEGAL ACTION AGAINST US**

A. *No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under Liability Coverage, no legal action may be brought against us until:*

1. *We agree in writing that the covered person has an obligation to pay; or*
2. *The amount of that obligation has been finally determined by judgment after trial.*

**TRANSFER OF YOUR INTEREST IN THIS POLICY**

A. *Your rights and duties under this policy may not be assigned without our written consent. ...*

**Fifth Affirmative Defense**

**(Insured's Bad Faith)**

Any damages awarded against the insurer in this action must be reduced proportionately by the amount of fault attributable to Plaintiff or her assignor.

**Sixth Affirmative Defense**

**(Waiver & Estoppel)**

ATX alleges that by virtue of her own acts and conduct, Plaintiff has waived their right to, or are estopped from asserting, the causes of action alleged against ATX in the Third Amended Complaint.

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