IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE M. FLOYD, *Appellant*, vs. **CARDINAL HEALTH, INC., ET AL.**, *Respondents*.	No.: **85826**	Electronically Filed Aug 23 2023 04:01 PM Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S LIMITED OPPOSITION TO RESPONDENT NDOC'S MOTION TO EXTEND TIME TO FILE ANSWERING BRIEF

Marian L. Massey
Nevada State Bar No. 14579
TALG, NV, Ltd.
5852 S. Durango Drive
Suite 105
Las Vegas, Nevada 89113
(702) 954-3861
mmassey@talglaw.com

Counsel for Appellant Zane M. Floyd

Appellant Zane M. Floyd ("Appellant"), by and through his *pro bono* counsel of record, Marian L. Massey, hereby submits this limited opposition to Respondent State of Nevada Department of Corrections and James Dzurenda (collectively, the "NDOC") Motion to Extend Time to File Answering Brief filed on August 22, 2023. This limited opposition is based upon the following Points and Authorities, and the papers and brief filed in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

Nevada Rule of Appellate Procedure 31(b)(3) requires parties to submit motions to extend the time to file a brief "no later than the due date for the brief," and comply with the provisions of Rule 31(b)(3) and Rule 27. *See* NEV. R. APP. PRO. ("NRAP") 31(b)(1)(3). Among other requirements, a moving must explain the reasons for the extension and demonstrate "extraordinary and compelling circumstances under Rule 26(b)(1)(B), if required." NRAP 31(b)(3)(iv). Rule 26(b)(1) allows the Court to extend the time to "perform any act, or may permit any act to be done after the time expires" upon a showing of good cause. NRAP 26(b)(1).

"Good cause generally is established when it is shown that the circumstances causing the failure to act are beyond the individual's control." *Moseley v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 654, 668 n.66, 188 P.3d 1136, 1146 n.66 (2008) (citing *State v. Williams*, 120 Nev. 473, 477, 93 P.3d 1258, 1260 (2004)). Courts evaluate a number of considerations when determining whether "good cause" has been established, including the moving party's diligence, the prejudice to the nonmoving party, and whether the moving party "demonstrated that its failure to act was the result of excusable neglect." *Torremoro v. Eighth Judicial Dist. Court of Nev.*, 512 P.3d 765, 769 (Nev. 2022) (addressing good cause to modify a scheduling order pursuant to NRCP 16(b)).

Here, Appellant respectfully submits that Respondent NDOC has not demonstrated good cause exists to grant an extension to file an answering brief, but does not oppose the request for a brief extension if Appellant's deadline to file a reply to the (presumably separate) answering briefs is extended by thirty (30) days following submission of NDOC's answering brief. *McNair v. Sheriff, Clark Cty.*, 89 Nev. 434, 436, 514 P.2d 1175, 1176 (1973) ("There is no presumption that good cause exists . . . and the burden of showing good cause for delay is on

the [party seeking the extension]") (quoting *Ex Parte Morris*, 78 Nev. 123, 125, 369 P.2d 456, 457 (1962)).

First, NDOC has not demonstrated good cause to extend the deadline because it failed to use diligence. As NDOC concedes, the deadline for Respondents to file Answering Briefs was set for August 9, 2023 and NDOC filed to seek an extension to file its answering brief. *See* Order, No. 23-22151, filed July 11, 2023. NDOC's neglect of deadlines, failure to seek clarification from either Respondent Cardinal Health or the Court regarding the extension, or to consult the Court's docket does not demonstrate good cause. *See Intermountain Lumber & Builders Supply v. Glens Falls Ins. Co.*, 83 Nev. 126, 130, 424 P.2d 884, 886 (1967) (noting that while good cause includes excusable neglect, "it does not embrace inexcusable neglect" for failing to timely respond).[1]

Second, NDOC's basis for seeking the extension is neither extraordinary nor compelling. Although NDOC characterizes the situation as a "perfect storm of unusual events," the departure of

[1] The Order Granting Telephonic Extension filed on August 1, 2023 and the docket for this case specifically identify Respondent Cardinal Health, Inc. ("Cardinal Health") as the respondent seeking an extension. In the event Respondents intended to file a joint answering brief, NDOC likely would have addressed that issue prior to the August 1, 2023 order.

several attorneys, caseload, and a mistaken belief about the deadline to file an answering does not demonstrate extraordinary or compelling circumstances. *See Rusk v. Nev. State Bd. of Architecture*, Case No. 61844, 2013 WL 3969678 (July 30, 2013) (unpublished) (noting that "counsel's caseload was not a valid excuse for noncompliance with filing deadlines").

Third, Appellant may suffer prejudice prejudice by responding to two separate answering briefs due on different dates.[2] *See* NRAP 31(a)(1)(C). Nevertheless, Appellant concedes that any potential prejudice may be minimal, and the brief extension does not appear to be unreasonable or intended to cause significant delay. In the event the Court concludes good cause warrants a brief extension, Appellant respectfully requests that his deadline to file a reply brief responding to the separate answering briefs be extended in accordance with new deadline for NDOC's answering brief to avoid piecemeal reply briefing.

[2] As of the time of this filing, Appellant has not received a similar motion to extend the deadline from Cardinal Health or any communications relating to such an extension. Accordingly, Appellant anticipates Cardinal Health's answering brief will be timely filed, requiring Appellant to file his reply to Cardinal Health's answering brief within 30 days.

Based upon the foregoing, Appellant respectfully submits Respondent NDOC has not demonstrated good cause to grant an extension to the deadline, but does not otherwise oppose the request for a brief extension. Appellant respectfully requests that his deadline to file a reply brief to the separate answering briefs filed by the Respondents be extended to avoid submission of piecemeal reply briefs.

DATED this 23rd day of August, 2023.

BY: */s/ Marian L. Massey, Esq.*
MARIAN L. MASSEY, ESQ.
Nevada Bar No. 14579
TALG, NV, Ltd.
5852 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89113

Pro Bono Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that on August 23, 2023, a true and correct copy of the foregoing **APPELLANT'S LIMITED OPPOSITION TO RESPONDENT NDOC'S MOTION TO EXTEND TIME TO FILE ANSWERING BRIEF** was served on the following by United States Mail, first class, and by the Nevada Supreme Court Electronic Filing System:

Steve Morris
Rosa Solis-Rainey
Morris Law Group
801 South Rancho Drive, Ste. B4
Las Vegas, NV 89106
Attorneys for Respondent Cardinal Health, Inc.

Pro Bono Project
Legal Aid Center of Southern Nevada
725 E. Charleston Blvd.
Las Vegas, NV 89104

Aaron D. Ford
Chris Davis
Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondent NDOC

Kelly Dove
Co-chair of Pro Bono Committee
Appellate Section of State Bar of Nevada
Snell & Wilmer, LLP
3883 Howard Hughes Parkway, Ste. 1100
Las Vegas, Nevada 89169

BY: */s/ Lisa Causey*
An employee of TALG, NV, Ltd.