

CASE NO. _____
IN THE SUPREME COURT FOR THE STATE OF NEVADA

PHILLIP J. FAGAN, JR. an individual and as Trustee of the PHILLIP J. FAGAN, FR. 2001 TRUST

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR, THE COUNTY OF CLARK, AND THE HONORABLE ERIKA BALLOU, DISTRICT JUDGE

Respondent,

and

AAL-JAY, INC., a Nevada corporation

Real Party in Interest.

APPELLANT'S APPENDIX

Appendix to Petition from the Eighth Judicial District Court, Clark County, Nevada, District Court Case No. A-21-832379-C, the Hon. Erika Ballou

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3	Plaintiff's Opposition to Motion for Preferential Trial Setting	1/10/24	AA000180-000204
3	Defendants' Reply in Support of Motion for Preferential Trial Setting	1/22/24	AA000205-000213
3	Order Granting in Part and Denying in Part Motion for Preferential Trial Setting	2/8/24	AA000214-000219
3	Amended Order Re-setting Civil Jury Trial	3/5/24	AA000220-000224

CERTIFICATE OF SERVICE

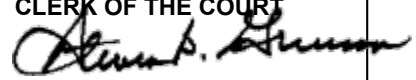
I HEREBY CERTIFY that on the 28th day of March, 2024, I served via the Eighth Judicial District Court's electronic filing and service system ("Odyssey") and via e-mail a true and correct copy of the foregoing APPELLANTS' APPENDIX, postage prepaid and addressed to:

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s/ Aisha Rincon

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**DISTRICT COURT
COUNTY OF CLARK, NEVADA**

AAL-JAY, INC., a Nevada Corporation.

Case No. A-21-832379-C

Plaintiff,

Dept. No. 24

v.

PHILIP J. FAGAN, JR., an individual, and
as Trustee of the PHILIP J. FAGAN, JR.
2001 TRUST; DOES I through X, inclusive,
and ROE CORPORATIONS I through X,
inclusive,

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
PREFERENTIAL TRIAL SETTING**

Defendants.

**Date of Hearing: January 29, 2024
Time of Hearing: 9:30 a.m.**

Judge: Hon. Erika Ballou

PHILIP J. FAGAN, JR., as Trustee of the
PHILIP J. FAGAN, JR. 2001 TRUST,

Counterclaimant,

Vs

AAL-JAY, INC., a Nevada corporation,

Counterdefendants.

COMES NOW, Plaintiff AAL-JAY, Inc. ("AAL-JAY" or alternatively, "Plaintiff"), by and
through its counsel of record, Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber
Christie LLP, hereby files its Opposition ("Opposition") to Defendants' Motion for Preferential
Trial Setting ("Motion").

1 This Opposition is based upon the following grounds and the following reasons: (1) allowing
2 an expedited trial without sufficient time for discovery will not be in the interest of justice as required
3 pursuant to NRS 16.025, and (2) allowing an expedited trial without sufficient time for discovery
4 will unduly prejudice Plaintiff, resulting in a violation of Plaintiff's due process rights.

5 This Opposition is supported by the Declaration of Lail Leonard, the President of AAL-JAY,
6 Inc. ("Leonard Decl."), a true and correct copy of which is attached hereto as **Exhibit "A."** This
7 Opposition is further made and based upon the papers and pleadings on file, the following
8 Memorandum of Points and Authorities, and any oral argument entertained by the Court at the
9 hearing on the Opposition.

10 DATED this 10th day of January, 2024

11 LEWIS ROCA ROTHGERBER CHRISTIE LLP

12 /s/ Ogonna M. Brown
13 OGONNA M. BROWN (SBN 7589)
14 3993 Howard Hughes Parkway, Suite 600
15 Las Vegas, Nevada 89169
16 Email: obrown@lewisroca.com
17 Attorneys for Plaintiff AAL-JAY, Inc.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I.**

20 **FACTUAL BACKGROUND**

21 **A. Procedural Overview**

22 Plaintiff filed its Verified Complaint on April 6, 2021, and its First Amended Complaint on
23 May 3, 2021. Defendants were both served with a copy of the Summons and Complaint on May 4,
24 2021. On May 18, 2021, Defendants filed their Answer to Plaintiff's Amended Complaint and
25 Counterclaim.

26 On May 18, 2021, Plaintiff filed an Emergency Motion for Specific Performance of
27 Purchase Agreement, on an Order Shortening Time ("Motion for Specific Performance") relating
28 to Plaintiff's purchase of the real property located at 1 Grand Anacapi Drive, Henderson, Nevada,
89011 (APN 162-22-810-011) (the "Property"). On June 22, 2021, this Court granted Plaintiff's

1 Motion for Specific Performance. On August 26, 2021, this Court entered its formal Order to grant
2 the Motion for Specific Performance. Fagan filed their Second Stay Motion on August 30, 2021,
3 to challenge the Order. This Court ruled in favor of Fagan and granted their Second Stay Motion,
4 staying the enforcement of the Specific Performance Order. Instead of proceeding with an order to
5 show cause hearing in order to address why Defendants should not be held in contempt for refusing
6 to sign the Purchase Agreement, on June 6, 2022, this Court granted Fagan's request to stay the
7 entire case, which resulted in a stay of the contempt proceedings against Fagan and discovery.

8 On August 31, 2021, Defendants filed a Petition for Writ of Mandamus or, in the
9 Alternative, Writ of Prohibition in the Supreme Court of Nevada, as well as filed a Motion for Stay
10 Pending Adjudication of Writ of Mandamus and/or in the Alternative, Writ of Prohibition.

11 On September 3, 2021, Fagan requested a stay of the entire case pending appeal of this
12 Court's order denying Fagan's Motion for Injunctive Relief and Request for Relief from Specific
13 Performance Order. Fagan's stay request arose in the context of an Order to Show Cause hearing
14 to determine why Defendants should not be held in contempt of this Court's Specific Performance
15 Order for failure and refusal to sign the Purchase Agreement. On September 30, 2021, the Court
16 denied Fagan's Motion for Stay.

17 On January 13, 2022, AAL-Jay and Fagan filed a joint case conference report ("JCCR"),
18 which provided that "[I]n an effort to foster judicial efficiency and keep attorneys' fees and costs
19 from rising while the appeal is pending, the Parties request that the requirement to proceed with
20 discovery be waived at this time until the ruling is issued by the Nevada Supreme Court, as the
21 ruling will substantially shape the remaining proceedings and the nature and scope of discovery
22 that will be necessary in connection with the case."

23 On March 15, 2022, AAL-Jay filed an Emergency Motion for First American Title
24 Insurance Company to Turnover Funds in Escrow to the Buyer AAL-Jay, LLC and Motion for
25 Order to Show Cause Why This Court Should Not Hold Philip J. Fagan, Jr., as Trustee of the Philip
26 J. Fagan, Jr. 2001 Trust in Contempt for Violating This Court's Sale Order On Order Shortened
27 Time ("Turnover Motion"). In the Turnover Motion, AAL-Jay sought the entry of an order from
28 this Court for First American to distribute the full \$170,000 amount to Buyer to be used toward the

1 close of escrow for the purchase of the Property in compliance with this Court's August 26, 2021,
2 order. AAL-Jay also sought order from this Court requiring Phillip J. Fagan, Jr. as Trustee of the
3 Fagan Trust the Seller, to show cause as to why he should not be held in contempt for violating this
4 Court's sale order, and why Seller should not be sanctioned, in addition to their Answer and
5 Counterclaim stricken for contempt of this Court's Order.

6 On March 17, 2022, the Nevada Supreme Court denied Fagan's original petition for writ of
7 mandamus, or in the alternative, writ of prohibition, challenging this Court's order granting specific
8 performance on an order shortening time.

9 On May 6, 2022, this Court granted AAL-Jay's Turnover Motion, and ordered the
10 following:

- 11 (i) \$170,000 turned over to AAL-Jay;
- 12 (ii) First American is hereby discharged from further liability with respect to the funds
13 turned over to the Buyer in compliance with this Court's Order Granting Buyer's Emergency
14 Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time, entered
15 by this Court on August 26, 2021;
- 16 (iii) In response to Fagan's request for clarification of the Specific Performance Order,
17 this Court ordered Fagan to comply with the Specific Performance Order and sign the Purchase
18 Agreement and provide necessary closing documents and information for AAL-Jay to close;
- 19 (iv) Continuing the hearing on the Motion for Phillip J. Fagan, Jr. as Trustee of the Fagan
20 Trust, for an order to show cause why Fagan and the Fagan Trust should not be held in contempt
21 for violating this Court's Order, and why Fagan and the Fagan Trust should not be sanctioned and
22 their Answer and Counterclaim stricken for contempt of this Court's Specific Performance Order
23 entered on August 26, 2021, from April 5, 2022, at 9:00 a.m. to a continued hearing date of June
24 14, 2022, at 9:00 a.m. due to this Court having taken additional time to review Fagan's Objection
25 to the proposed order and AAL-Jay's Response;
- 26 (v) Fagan's ongoing mortgage payments and any other payments made in connection
27 with the Property are a result of Fagan's refusal to comply with this Court's Specific Performance
28 Order;

- (vi) Deny Fagan's request for injunctive relief; and
- (vii) Deny Fagan's request for relief from this Court's Specific Performance Order pursuant to NRCP 60.

On May 17, 2022, eleven days (11) days after this Court set the Order to Show Cause hearing for contempt for June 14, 2022, Fagan filed a Motion to Stay the entire State Court Case on the basis that Fagan filed an appeal, and that Fagan intended to file a petition to the Nevada Supreme Court for a Writ of Mandamus or Prohibition related to the written Order. AAL-Jay objected because it wanted to proceed with the contempt proceedings to finalize the closing of the sale, but this Court granted Fagan's Stay Motion. On June 3, 2022, this Court entered an Order Granting the Stay Motion ("Stay Order").

Notwithstanding the Stay Order entered by this Court on June 6, 2022, one month later, on July 7, 2022, Fagan improperly served a Notice of Issuance of Subpoena upon AAL-Jay in this Action, seeking to issue a Subpoena upon First American Title Company. On July 14, 2022, AAL-Jay filed the Motion to Quash and Objection to the Notice of Issuance of Subpoena Pursuant to NRCP 45, on the basis that the FATCO Subpoena flagrantly violated the Stay Order, which stayed all discovery, and was also in direct violation of the joint case conference report approved by this Court. AAL-Jay argued that Fagan's FATCO Subpoena should be quashed because Fagan filed no motion to lift the stay, which is the proper procedure prior to serving third-party subpoenas in a stayed action. On August 25, 2022, this Court granted AAL-Jay's Motion to Quash the FATCO Subpoena, ruling as follows:

(i) The FATCO Subpoena violated both this Court's Stay Order and the agreement to waive discovery until a ruling by the Supreme Court is issued;

(ii) Discovery in this Court matter will continue once a ruling has been issued by the Nevada Supreme Court on the pending appeal filed by Defendants; and

(iii) Order granting AAL-Jay's Motion to Quash and Objection to Defendants/Counterclaimants Issuance of Subpoena to First American Title Company.

i. State Court Denied Fagan's Motion To Terminate Stay

On November 23, 2022, Fagan filed a Motion to Lift Stay and for Preferential Trial Setting

1 seeking to lift the stay of discovery and to accelerate the trial. AAL-Jay opposed Fagan's request
2 to terminate the stay on the basis that AAL-Jay would suffer extreme prejudice and a violation of
3 its due process rights if a preferential trial date was set given the nature and size and complexity of
4 legal issues in this Court case and the amount of evidence it is a virtually impossible task for AAL-
5 Jay to adequately prepare for trial in such a short amount of time. AAL-Jay also argued that it would
6 unfairly prejudicial that AAL-Jay would be required to simultaneously prepare for trial and
7 continue discovery, conduct depositions, fact witnesses interviews, and obtain additional records,
8 all the while Fagan received the stay they requested while the appeal was pending. Fagan also
9 received an extension to file their opening brief from the Nevada Supreme Court to pursue their
10 appeal and at the same time sought to terminate the stay and accelerate the trial, which AAL-Jay
11 argued would be prejudicial to AAL-Jay. On January 26, 2023, this Court denied Fagan's Stay
12 Motion, finding, among other things, that trial was set for September 5, 2023, leaving the parties
13 less than nine months to complete discovery and prepare for trial following the outcome of the
14 appeal, and finding that Fagan failed to meet their burden under NRS 16.025.

15 **ii. Fagan's Federal Action against FATCO and Discovery on AAL-JAY in Direct**
16 **Violation of State Court Stay Order**

17 On March 9, 2023, Fagan commenced an action in the United States District Court, District
18 of Nevada, pending as Case No. 2:23-cv-00371-RFB-DJA ("Federal Action") against FATCO
19 asserting claims for: (1) breach of fiduciary duty; (2) negligence; (3) deceptive trade practices; (4)
20 misrepresentation; and (5) consumer fraud.

21 On June 14, 2023, Fagan filed the Notice of Issuance of Subpoenas for Christiano DeCarlo,
22 Lail Leonard and AAL-Jay ("Subpoenas") as Docket No. 36, in the Federal Action which
23 Subpoenas are the subject of the Motion for Protective Order filed with the Federal Court for AAL-
24 Jay, Mr. DeCarlo or Ms. Leonard.

25 **iii. Motion for Contempt**

26 On July 3, 2023, Plaintiff filed its Emergency Motion for Contempt for Violation of this
27 Court's Stay Order and for Sanctions on Order Shortening Time ("Motion for Contempt") against
28 Defendant PHILIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP J. FAGAN, JR.

2001 TRUST (collectively, “Fagan”), pursuant to NRS 22.010, NRS 22.100(2) and otherwise under Nevada law, arising from Subpoenas issued to AAL-Jay, Christiano DeCarlo and Lail Leonard, by Fagan and the Fagan Trust in the Federal Action pending in the United States District Court in the District of Nevada as *Philip J. Fagan, Jr. v. First American Title Insurance Company*, pending as Case No. 2:23-cv-00371-RFB-DJA. *See* Docket.

On July 7, 2023, Defendants filed an Opposition to the Motion for Contempt. *See* Docket. On July 10, 2023, Plaintiff filed its Reply in support of its Motion for Contempt. *See* Docket. On July 26, 2023, Plaintiff filed a Status Report to apprise this Court of the outcome of the Motion for Protective Order and Motion to Quash the Subpoenas in the Federal Action. *See* Docket.

As set forth in the Minute Order, Judge Erika Ballou granted Plaintiff’s Motion for Contempt against Defendant Philip J. Fagan, Jr., individually and as trustee of the Philip J. Fagan Trust in its entirety on August 3, 2023, and ordered Fagan and the Fagan Trust to pay Plaintiff’s attorneys’ fees and costs for bringing the Motion for Contempt.

On August 21, 2023, this Court entered the Order Granting Motion for Contempt, ordering Fagan and the Fagan Trust to pay Plaintiff’s attorneys’ fees and costs for bringing the Motion for Contempt, ordering Fagan and the Fagan Trust to pay a fine of \$500.00 to Legal Aid Center of Southern Nevada.

On December 5, 2023, this Court ruled on Plaintiff’s Motion for Attorneys’ Fees and Costs, and ordered that as a result of the Fagan Defendants’ violation of this Court’s Stay Order entered on June 3, 2022, Plaintiff is awarded reasonable attorneys’ fees in the amount of \$11,532.50 and costs in the amount of \$85.60 from Defendants Philip J. Fagan, Jr. and the Philip J. Fagan, Jr. 2001 Trust for bringing the Contempt Motion before this Court, totaling \$11,618.10, to be paid in certified funds and made payable to “Lewis Roca”.

To date, the Fagan Defendants have failed to remit the State Court Sanctions to Lewis Roca and have likewise failed to pay a fine of \$500.00 to Legal Aid Center of Southern Nevada.

iv. **Defendants’ Request to Stay Discovery During Their Unsuccessful Appeal at the Nevada Supreme Court**

Defendants filed multiple petitions in the Nevada Supreme Court. *See* Nevada Case no.

1 84699.¹ The Court specifically found in dismissing Defendant’s appeal, “[a]lthough appellants . .
2 . frame the challenged order as one denying a motion for an injunction, the record reflects that the
3 motion challenged an earlier district court order granting specific performance and/or sought
4 clarification of that order . . . Such an order is not appealable.” *See* Nevada Supreme Court Order
5 Dismissing Appeal filed August 17, 2023. Thereafter, on September 19, 2023, Defendants filed
6 their Petition for Rehearing. The Nevada Supreme Court denied the petition. On October 19, 2023,
7 Defendants filed their Petition for En Banc Reconsideration. The Court again denied Defendants’
8 petition.

9 During the numerous attempts to appeal this Court’s order granting specific performance,
10 Defendants requested to Stay this State Court matter. *See* Docket. Defendants sought to stay
11 discovery for over a year in this matter. *See* Docket. However, now that their petitions in the
12 Nevada Supreme Court have been denied, they seek to accelerate trial proceedings. *See* Motion
13 for Preferential Trial Setting.

14 The Nevada Supreme Court denied Defendants’ petition on December 6, 2023. Remittitur
15 was issued and received on January 2, 2024, placing this matter back into the jurisdiction of this
16 Court. *See* Remittitur filed January 9, 2024. Accordingly, plaintiff’s motion is premature and
17 violated this Court’s stay order as it was filed before this Court received the remittitur. *See Branch*
18 *Banking & Tr. Co. v. Gerrard*, 134 Nev. 871, 874, 432 P.3d 736, 739 (2018) (“In Nevada, an appeal
19 concludes and appellate jurisdiction ends upon issuance of the remittitur from this court to the
20 district court.”); *see also* NRAP 41. As such, Plaintiff is entitled to proceed with an order to show
21 cause hearing in order to address why Defendants should not be held in contempt for refusing to
22 sign the Purchase Agreement, on June 6, 2022.

23 . . .

24 . . .

25 . . .

26 ¹ This Court may take judicial notice pursuant to Chapter 47 of the Nevada Revised Statutes
27 under the Nevada Rules of Evidence. *See* Nev. Rev. Stat. §§ 47.130-.170; *see also Breliant v.*
28 *Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (allowing Nevada
courts to take judicial notice of matters of public record); *FGA, Inc. v. Giglio*, 128 Nev. 271, 286,
278 P.3d 490, 500 (2012) (same).

II.

LEGAL ARGUMENT

A. Order to Show Cause Hearing Should be Re-Set and Sanctions Should be Paid First as a Condition of Proceeding

As a preliminary matter, given the procedural posture of the case and the last matter pending before this Court prior to the entry of the Stay Order obtained by the Fagan Defendants, the Fagan Defendants should not be permitted to proceed with this case in any manner, let alone a preferential trial setting, until this Court first re-sets for hearing the Order to Show Cause. Nearly two years ago, this Court set a hearing for April 5, 2022, at 9:00 a.m. on an order to show cause why Fagan and the Fagan Trust should not be held in contempt for violating this Court's Order, and why Fagan and the Fagan Trust should not be sanctioned and their Answer and Counterclaim stricken for contempt of this Court's Specific Performance Order entered two and a half years ago on August 26, 2021. During that hearing, this Court was by informed by Plaintiff's counsel of Dr. Fagan's refusal to sign off on documents, including refusing to sign a release in order to get payoff mortgage insurance.² This Court continued the Order to Show Cause hearing from April 5, 2022, to June 14, 2022, at 9:00 a.m. due to this Court having taken additional time to review Fagan's Objection to the proposed order and AAL-Jay's Response.

On May 17, 2022, eleven days (11) days after this Court set the continued Order to Show Cause hearing for contempt from April 5, 2022 to June 14, 2022, Fagan filed a Motion to Stay the entire State Court Case on the basis that Fagan filed an appeal, and that Fagan intended to file a petition to the Nevada Supreme Court for a Writ of Mandamus or Prohibition related to the written Order. AAL-Jay objected because it wanted to proceed with the contempt proceedings to finalize the closing of the sale, but this Court granted Fagan's Stay Motion. On June 3, 2022, this Court entered an Order Granting the Stay Motion ("Stay Order").

² Defendants refused to obtain the mortgage payoff and necessary releases required to close on the sale of the Property. Furthermore, Defendants have failed to make mortgage payments on the Property since September 1, 2023. *See* Default Notice and Notice of Intent to Foreclose, a true and correct copy of which is attached as **Exhibit "1"** to Leonard Decl.

1 The Fagan Defendants have concluded their efforts to pursue various appeals. As stated
2 above, Remittitur was issued and received on January 2, 2024, placing this matter back into the
3 jurisdiction of this Court. *See* Remittitur filed January 9, 2024. This matter should continue on its
4 ordinary course. Thus, Plaintiff requests that this Court re-set the hearing on the Order to Show
5 Cause why the Fagan Defendants should not be held in contempt of this Court Specific Performance
6 Order entered August 26, 2021.

7 By way of reminder, during the hearing held on April 5, 2022, on Plaintiff's Emergency
8 Motion for First American Title to Turnover Funds in Escrow to the Buyer AAL-Jay, LLC and
9 Motion for Order to Show Cause Why this Court Should Not Hold Philip J. Fagan, Jr., as Trustee
10 of the Philip J. Fagan, Jr. 2001 Trust in Contempt for Violating This Court's Sale Order, this Court
11 granted the Motion for Turnover and ordered Dr. Fagan to sign the following closing documents
12 (collectively, the "Closing Documents"):

- 13 1. Seller Document Package,
- 14 2. Statement of Information,
- 15 3. RPA Addendum One 1 Grand Anacapi Dr. Henderson, NV 89011; and
- 16 4. Request for Seller Information.

17 As of the date of this filing, the Fagan Defendants have failed to sign any of the Closing
18 Documents, and the title company's refused to issue a title policy, after Plaintiff lost the pre-
19 approved lending with Zions bank, who refused to underwrite a loan with no title policy as
20 evidenced in the Zion's Bank November 15, 2021 email, a true and correct copy of which is
21 attached as Exhibit "2" to the Brown Decl., Exhibit "B" in Support of the Motion for OSC filed
22 March 15, 2022. As a result of the Fagan Defendants' refusal to cooperate with and comply with
23 this Court's Specific Performance Order, Plaintiff was required to seek a signature from the Clerk
24 of the Court, as expressly permitted in the Specific Performance Order, on the purchase agreement
25 to close the sale after presenting it to the Fagan Defendants, causing even further delay until
26 Plaintiff received the fully executed Purchase Agreement on October 11, 2021, attached as Exhibit
27 "1" to the Brown Decl., Exhibit "B" in Support of the Motion for OSC filed March 15, 2022.
28

1 To the extent this Court finds that cause exists to find the Fagan Defendants in contempt of
2 its Specific Performance Order entered over two years ago, then this Court has the discretion to
3 issue case concluding sanctions against the Fagan Defendants, which would entirely moot the
4 Fagan Defendants' request for a preferential trial setting.

5 Further, the Fagan Defendants should likewise not be permitted to proceed with this matter
6 until they tender proof to this Court that they have complied with this Court's August 21, 2023,
7 Order Granting Motion for Contempt, ordering Fagan and the Fagan Trust to pay Plaintiff's
8 attorneys' fees and costs for bringing the Motion for Contempt. This Court ordered Fagan and the
9 Fagan Trust to pay a fine of \$500.00 to Legal Aid Center of Southern Nevada, and subsequently
10 entered an Order dated December 5, 2023, ordering the Fagan Defendants to pay Plaintiff's
11 reasonable attorneys' fees in the amount of \$11,532.50 and costs in the amount of \$85.60 for a total
12 of \$11,618.10, arising from Defendants' violation of this Court's Stay Order entered on June 3,
13 2022. To date, the Fagan Defendants have failed to remit the State Court Sanctions to Lewis Roca
14 and have likewise failed to pay a fine of \$500.00 to Legal Aid Center of Southern Nevada. *See*
15 Leonard Decl. The Fagan Defendants' failure to pay the fine to Legal Aid or the attorneys' fees to
16 Lewis Roca as order warrant a finding of contempt giving rise to case concluding sanctions separate
17 and apart from Plaintiff's relief requested in the Order to Show Cause arising from the Fagan
18 Defendants' contempt of this Court's Specific Performance Order.

19 **B. Defendants' Motion for Preferential Trial Setting Should Be Denied Pursuant to NRS**
20 **16.025**

21 The Fagan Defendants seek a preferential trial setting pursuant to NRS 16.025, which
22 provides in relevant part as follows:

23 Upon the motion of a party to an action who is 70 years of age or older, the court
24 may give preference in setting a date for the trial of the action, unless the court finds
25 that the party does not have a substantial interest in the case as a whole . . . A court
26 may grant a motion for preference in setting a date for the trial of an action if the
27 court determines that based upon clear and convincing medical evidence, a party to
28 the action suffers from an illness or condition which raises a substantial medical
doubt that the party will survive for more than 6 months, and the court determines
that the **interests of justice would be served by granting the motion.**

1 NEV. REV. STAT. 16.025 (emphasis added).

2 Here, Defendants argue, for the second time, that a preferential trial date is necessary due
3 to Dr. Fagan's health condition, but Defendants completely ignore Plaintiff's prior motion for an
4 order to show cause, filed nearly two years ago on March 15, 2022. It is dubious that now after
5 Defendants numerous petitions at the Nevada Supreme Court have failed, concerns for Dr. Fagan's
6 health condition rise to the level of requesting an expedited trial setting for a second time. Even
7 though Defendants sought a stay from this Court on May 16, 2022, which this Court granted, and
8 enjoyed the imposition of the stay for nearly two years after appealing this Court's turnover order,
9 the Fagan Defendants now raise a sense of urgency even though they delayed the proceedings.
10 Defendants previously made this request on November 23, 2022, for similar reasons. *See* Docket.
11 This Court denied the request, finding there were no facts presented by Defendants to reasonably
12 justify the trial dates be moved. *See* Docket.

13 If this Court grants Defendants' Motion, justice will not be served, for it will result in
14 insufficient time for Plaintiff to conduct necessary discovery prior to trial. There has not been any
15 discovery in this case. Plaintiff is entitled to proceed with unabridged discovery that includes, but
16 is not limited to:

- 17 1) Propounding written discovery regarding the facts underlying AAL-Jay's eleven causes
18 of action; 2) depositions of Mr. Fagan;
19 3) Depositions of Defendant Mr. Fagan;
20 4) Depositions of fact witnesses (at least 8 fact witnesses have been disclosed to date); and
21 5) Retain any experts, exchange expert reports, and conduct expert depositions.

22 There is no persuasive reason to expedite these matters, especially given Fagan's repeated appeal
23 efforts from the inception of this case, resulting in substantial delay and a stay imposed at
24 Defendants' request. Defendant should not be permitted to use its prior delay tactics as a sword and
25 a shield. This is clearly not in accordance with NRS 16.025, and thus Defendants' Motion for
26 Preferential Trial Setting must fail.

27 . . .

28 . . .

C. Insufficient Time for Discovery Will Result in a Due Process Violation

Due process requires that no one can be deprived of life, liberty, or property without due process of law; procedural due process requires notice and an opportunity to be heard. *See Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 481 P.3d 853 (2021); U.S. Const. amend. XIV, § 1. To force parties to trial before they have had the opportunity to prepare their evidence is tantamount to a denial of due process. *Riglander v. Star Company*, 90 N.Y.S. 772, 777(N.Y. App. 1904); *see City of Mitchell v. Graves*, 612 N.E.2d 149, 152 (Ind. Ct. App. 1993) (when a party has insufficient time to prepare a defense, a denial of a continuance constitutes a denial of due process). Additionally, to allow inadequate time to prepare for trial results in clear prejudice. *Johnson v. Young*, No. 314CV00178RCJVPC, 2016 WL 923094, at *2 (D. Nev. Mar. 10, 2016).

Discovery has not yet commenced in this matter. As stated above, necessary discovery prior to trial includes, but is not limited to, the following: 1) propounding written discovery regarding the facts underlying AAL-Jay's eleven causes of action, 2) depositions of Mr. Fagan, 3) depositions of AAL-Jay, 4) depositions of fact witnesses, and 5) expert designations, reports, and depositions. Thus, to effectively deny Plaintiff the right to conduct adequate discovery prior to trial would be a clear violation of Plaintiff's due process rights.

This matter has been pending for 33 months. During that time, Defendants requested to stay discovery pending their numerous petitions at the Nevada Supreme Court. Defendants cannot seek to delay this matter when it suits them, challenging this Court's Order over and over again, and now, after failing to succeed at the Nevada Supreme Court, claim an expedited trial again warranted. This is nothing short of a ruse to prejudice Defendants.

III.

CONCLUSION

For the aforementioned reasons, Plaintiff respectfully requests this Court deny Defendant's Motion for Preferential Trial Setting, as sufficient time is necessary in order to conduct outstanding discovery, and to set a time for the hearing on Plaintiff's Order to Show Cause, and require the Fagan Defendants to pay \$11,618.10 to Lewis Roca arising from Defendants' violation of this

1 Court's Stay Order entered on June 3, 2022, and to pay a fine of \$500.00 to Legal Aid Center of
2 Southern Nevada.

3
4 DATED this 10th day of January, 2024

5 LEWIS ROCA ROTHGERBER CHRISTIE LLP

6 /s/ Ogonna M. Brown
7 OGONNA M. BROWN (SBN 7589)
8 3993 Howard Hughes Parkway, Suite 600
9 Las Vegas, Nevada 89169
10 Email: obrown@lewisroca.com
11 *Attorneys for Plaintiff AAL-JAY, Inc.*
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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on this date, I served a copy of the foregoing ***PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PREFERENTIAL TRIAL SETTING*** upon on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system via the Odyssey Court e-file system;

☐ E-mail – By serving a copy thereof at the email addresses listed below; and

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below.

DATED this 10th day of January 2024.

/s/ Annette Jaramillo

An Employee of
Lewis Roca Rothgerber Christie LLP

EXHIBIT A

EXHIBIT A

DECL

Ogonna M. Brown, Esq.
Nevada Bar No. 7589
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
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Attorneys for Plaintiff AAL-JAY, Inc.

**IN THE EIGHTH JUDICIAL DISTRICT COURT
FOR THE COUNTY OF CLARK, STATE OF NEVADA**

AAL-JAY, INC., a Nevada Corporation.

Plaintiff,

v.

PHILIP J. FAGAN, JR., an individual, and as
Trustee of the PHILIP J. FAGAN, JR. 2001
TRUST; DOES I through X, inclusive, and
ROE CORPORATIONS I through X,
inclusive,

Defendants.

PHILIP J. FAGAN, JR., as Trustee of the
PHILIP J. FAGAN, JR. 2001 TRUST

Counterclaimant,

v.

AAL-JAY, INC., a Nevada Corporation;
CHRISTIANO DE CARLO, an individual and
LAIL LEONARD,

Counterdefendants.

Case No. A-21-832379-C

Dept. No. 24

**DECLARATION OF LAIL LEONARD IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO FAGAN DEFENDANTS'
MOTION FOR PREFERENTIAL TRIAL
SETTING**

**Date of Hearing: January 29, 2024
Time of Hearing: 9:30 a.m.**

Judge: Hon. Erika Ballou

I, LAIL LEONARD being duly sworn states as follows:

1. I am the President of AAL-JAY, Inc. ("Plaintiff", "AAL-JAY" or "Buyer"), the
Plaintiff in this action.

...

2. I am over the age of eighteen (18) years and competent to testify to the matters set forth herein.

3. This Declaration based on my personal knowledge of the facts and matters of this action.

4. I make this Declaration in support Plaintiff's Opposition to Defendants' Motion for Preferential Trial Setting.

5. On April 6, 2021, AAL-Jay filed an Amended Complaint against the Defendants to enforce its right to purchase the property under the Purchase and Sale Agreement. *See* Compl. filed April 6, 2021.

6. AAL-Jay subsequently filed its Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time ("Motion for Specific Performance") on May 18, 2021, in an effort to obtain an adjudication for specific performance of the Purchase Agreement from this Court before Defendants pursued further eviction efforts after Defendants' first request for summary eviction was denied. *See* Mot. for Specific Performance, filed May 18, 2021.

7. A hearing was set for 9:00 am on June 1, 2021. *See id.* However, the hearing was continued at Defendants' request by stipulation to June 22, 2021. *See* Stipulation and Order to Continue Hearing, filed May 28, 2021 (acknowledging Defendants' agreement to not conduct eviction proceedings prior to the hearing on the Motion for Specific Performance).

8. On August 26, 2021, this Court entered its formal Order to grant the Motion for Specific Performance. *See* this Court's August 26, 2021 Order.

9. On August 31, 2021, Defendants ("Defendants" or "Fagan") filed a Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition in the Supreme Court of Nevada, as well as filed a Motion for Stay Pending Adjudication of Writ of Mandamus and/or in the Alternative, Writ of Prohibition.

10. On September 3, 2021, Defendants requested a stay of the entire case pending appeal of this Court's order denying Defendants' Motion for Injunctive Relief and Request for Relief from Specific Performance Order. Fagan's stay request arose in the context of an Order to

Show Cause hearing to determine why Defendants should not be held in contempt of this Court's Specific Performance Order for failure and refusal to sign the Purchase Agreement.

11. On September 30, 2021, the Court denied Defendants' Motion for Stay.

12. On January 13, 2022, AAL-Jay and Fagan filed a joint case conference report ("JCCR"), which provided that "[I]n an effort to foster judicial efficiency and keep attorneys' fees and costs from rising while the appeal is pending, the Parties request that the requirement to proceed with discovery be waived at this time until the ruling is issued by the Nevada Supreme Court, as the ruling will substantially shape the remaining proceedings and the nature and scope of discovery that will be necessary in connection with the case."

13. On March 15, 2022, AAL-Jay filed an Emergency Motion for First American Title Insurance Company to Turnover Funds in Escrow to the Buyer AAL-Jay, LLC and Motion for Order to Show Cause Why This Court Should Not Hold Philip J. Fagan, Jr., as Trustee of the Philip J. Fagan, Jr. 2001 Trust in Contempt for Violating This Court's Sale Order On Order Shortened Time ("Turnover Motion"). In the Turnover Motion, AAL-Jay sought the entry of an order from this Court for First American to distribute the full \$170,000 amount to Buyer to be used toward the close of escrow for the purchase of the Property in compliance with this Court's August 26, 2021, order. AAL-Jay also sought order from this Court requiring Phillip J. Fagan, Jr. as Trustee of the Fagan Trust the Seller, to show cause as to why he should not be held in contempt for violating this Court's sale order, and why Seller should not be sanctioned, in addition to their Answer and Counterclaim stricken for contempt of this Court's Order.

14. On March 17, 2022, the Nevada Supreme Court denied Defendants' original petition for writ of mandamus, or in the alternative, writ of prohibition, challenging this Court's order granting specific performance on an order shortening time.

15. On May 6, 2022, this Court granted AAL-Jay's Turnover Motion.

16. On May 17, 2022, eleven days (11) days after this Court set the Order to Show Cause hearing for contempt for June 14, 2022, Fagan filed a Motion to Stay the entire State Court Case on the basis that Defendants filed an appeal, and that Defendants intended to file a petition

1 to the Nevada Supreme Court for a Writ of Mandamus or Prohibition related to the written Order.
2 AAL-Jay objected because it wanted to proceed with the contempt proceedings to finalize the
3 closing of the sale, but this Court granted Fagan's Stay Motion. On June 3, 2022, this Court entered
4 an Order Granting the Stay Motion ("Stay Order").

5 17. Notwithstanding the Stay Order entered by this Court on June 6, 2022, one month
6 later, on July 7, 2022, Defendants improperly served a Notice of Issuance of Subpoena upon AAL-
7 Jay in this Action, seeking to issue a Subpoena upon First American Title Company. On July 14,
8 2022, AAL-Jay filed the Motion to Quash and Objection to the Notice of Issuance of Subpoena
9 Pursuant to NRCP 45, on the basis that the FATCO Subpoena flagrantly violated the Stay Order,
10 which stayed all discovery, and was also in direct violation of the joint case conference report
11 approved by this Court. AAL-Jay argued that Defendants' FATCO Subpoena should be quashed
12 because Defendants filed no motion to lift the stay, which is the proper procedure prior to serving
13 third-party subpoenas in a stayed action. On August 25, 2022, this Court granted AAL-Jay's
14 Motion to Quash the FATCO Subpoena.

15 i. **State Court Denied Fagan's Motion To Terminate Stay**

16 18. On November 23, 2022, Defendants filed a Motion to Lift Stay and for Preferential
17 Trial Setting, seeking to lift the stay of discovery and to accelerate the trial. AAL-Jay opposed
18 Fagan's request to terminate the stay on the basis that AAL-Jay would suffer extreme prejudice
19 and a violation of its due process rights if a preferential trial date was set given the nature and size
20 and complexity of legal issues in this Court case and the amount of evidence it is a virtually
21 impossible task for AAL-Jay to adequately prepare for trial in such a short amount of time. AAL-
22 Jay also argued that it would unfairly prejudicial that AAL-Jay would be required to
23 simultaneously prepare for trial and continue discovery, conduct depositions, fact witnesses
24 interviews, and obtain additional records, all the while Fagan received the stay they requested
25 while the appeal was pending. Defendants also received an extension to file their opening brief
26 from the Nevada Supreme Court to pursue their appeal and at the same time sought to terminate
27 the stay and accelerate the trial, which AAL-Jay argued would be prejudicial to AAL-Jay. On
28

January 26, 2023, this Court denied Defendants’ Stay Motion, finding, among other things, that trial was set for September 5, 2023, leaving the parties less than nine months to complete discovery and prepare for trial following the outcome of the appeal, and finding that Defendants failed to meet their burden under NRS 16.025.

ii. Fagan’s Federal Action against FATCO and Discovery on AAL-JAY in Direct Violation of State Court Stay Order

19. On March 9, 2023, Fagan commenced an action in the United States District Court, District of Nevada, pending as Case No. 2:23-cv-00371-RFB-DJA (“Federal Action”) against FATCO asserting claims for: (1) breach of fiduciary duty; (2) negligence; (3) deceptive trade practices; (4) misrepresentation; and (5) consumer fraud.

20. On June 14, 2023, Fagan filed the Notice of Issuance of Subpoenas for Christiano DeCarlo, Lail Leonard and AAL-Jay (“Subpoenas”) as Docket No. 36, in the Federal Action which Subpoenas are the subject of the Motion for Protective Order filed with the Federal Court for AAL-Jay, Mr. DeCarlo or Ms. Leonard.

iii. Motion for Contempt

21. On July 3, 2023, Plaintiff filed its Emergency Motion for Contempt for Violation of this Court’s Stay Order and for Sanctions on Order Shortening Time (“Motion for Contempt”) against Defendant PHILIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST, pursuant to NRS 22.010, NRS 22.100(2) and otherwise under Nevada law, arising from Subpoenas issued to AAL-Jay, Christiano DeCarlo and Lail Leonard, by Fagan and the Fagan Trust in the Federal Action pending in the United States District Court in the District of Nevada as *Philip J. Fagan, Jr. v. First American Title Insurance Company*, pending as Case No. 2:23-cv-00371-RFB-DJA.

22. On July 7, 2023, Defendants filed an Opposition to the Motion for Contempt. On July 10, 2023, Plaintiff filed its Reply in support of its Motion for Contempt. On July 26, 2023, Plaintiff filed a Status Report to apprise this Court of the outcome of the Motion for Protective Order and Motion to Quash the Subpoenas in the Federal Action.

23. As set forth in the Minute Order, Judge Erika Ballou granted Plaintiff’s Motion for

Contempt against Defendant Philip J. Fagan, Jr., individually and as trustee of the Philip J. Fagan Trust in its entirety on August 3, 2023, and ordered Fagan and the Fagan Trust to pay Plaintiff's attorneys' fees and costs for bringing the Motion for Contempt.

24. On August 21, 2023, this Court entered the Order Granting Motion for Contempt, ordering Fagan and the Fagan Trust to pay Plaintiff's attorneys' fees and costs for bringing the Motion for Contempt, ordering Fagan and the Fagan Trust to pay a fine of \$500.00 to Legal Aid Center of Southern Nevada.

25. On December 5, 2023, this Court ruled on Plaintiff's Motion for Attorneys' Fees and Costs, and ordered that as a result of the Fagan Defendants' violation of this Court's Stay Order entered on June 3, 2022, Plaintiff is awarded reasonable attorneys' fees in the amount of \$11,532.50 and costs in the amount of \$85.60 from Defendants Philip J. Fagan, Jr. and the Philip J. Fagan, Jr. 2001 Trust for bringing the Contempt Motion before this Court, totaling \$11,618.10, to be paid in certified funds and made payable to "Lewis Roca".

26. To date, Defendants have failed to make any of the payments ordered by this Court.

iv. Defendants Have Failed to Make Mortgage Payments on the Property

27. Defendants have failed to make mortgage payments on the real property located at 1 Grand Anacapri Drive, Henderson, Nevada, 89011 (APN 162-22-810-011) (the "Property") since September 1, 2023. *See* Default Notice and Notice of Intent to Foreclose, a true and correct copy attached hereto as **Exhibit "1"**.

28. AAL-Jay respectfully requests that this Court enter an Order dismissing Defendants' Motion for Preferential Trial Setting.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated: January 10, 2024.

/s/ Lail Leonard

LAIL LEONARD

EXHIBIT 1

Part of the Commission's duty
is to ensure that the public
has access to the information
it holds.



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* U79A79L 000033300 091262 0046=01

PHILIP J FAGAN DR
140 RAND ANCAPRI
HENDERSON NY 12521-2601

$$[H_2][H_4][H_6][H_8][H_{10}][H_{12}][H_{14}][H_{16}][H_{18}][H_{20}][H_{22}][H_{24}][H_{26}][H_{28}][H_{30}][H_{32}][H_{34}][H_{36}][H_{38}][H_{40}][H_{42}][H_{44}][H_{46}][H_{48}][H_{50}][H_{52}][H_{54}][H_{56}][H_{58}][H_{60}][H_{62}][H_{64}][H_{66}][H_{68}][H_{70}][H_{72}][H_{74}][H_{76}][H_{78}][H_{80}][H_{82}][H_{84}][H_{86}][H_{88}][H_{90}][H_{92}][H_{94}][H_{96}][H_{98}][H_{100}]$$

October 17, 2014

Re: SI 5 Loan Number: 1017526714
Property Address: 1 Grand Anacapi
Henderson, NV 89011

Default Notice and Notice of Intent to Foreclose

Dear Philip J. Henson Jr.,

The Note on the above-referenced loan is now in default as a result of your failure to pay the 09/01/23 payment and the payments due each month thereafter, as provided for in said Note. You are hereby notified that to cure such default you are required to pay to this office all past due payments plus late charges and any payments that may become due between the date of this notice and the date the default is cured. The amount required to cure the arrears as of 10/17/23 is \$23,410.96. You have thirty-three (33) days from the date of this letter to cure the default. We urge you to immediately, upon receipt of this letter, contact our Customer Assistance Department at the number provided below to obtain the updated amount required to reinstate your loan.

This notice does not affect your ability to apply for or be evaluated for a foreclosure prevention option or any pending loss mitigation option that may have been extended.

Failure to pay the total amount due under the terms and conditions of your Deed of Trust/Mortgage by 11/19/23 may result in acceleration of the entire balance outstanding under the Note including, but not limited to, the principal, interest and all other outstanding charges and costs, and commencement of foreclosure of the Trust Deed/Mortgage which is security for your Note. Please be advised that any extension of time or forbearance in the exercising of any right or remedy as provided for in the Deed of Trust/Mortgage shall not constitute a waiver of or preclude the exercising of any right or remedy.

You have the right to rescind the Note after acceleration as provided by law and you have the right to bring court action to assert the nonexistence of default or any other defense you have to acceleration and sale.

If your loan is not brought current, inspections of your property will be made and you will be assessed fees for that purpose as permitted under state law. Additionally, if your property is found to be vacant and unsecured, the mortgage holder will have it secured and will charge you for the cost of securing. You may also be liable for reasonable attorney fees and costs incurred in connection with any proceedings on the Note and Trust Deed and such other costs as may be allowed by law. In addition, you may be liable for any deficiency that may be established as a result of the foreclosure action unless precluded by a bankruptcy discharge.

In accordance with the Fair Debt Collection Practices Act, you are hereby given notice of the following:

- Although you are not required to pay the total debt (or balance) of the Account prior to its maturity or acceleration, Federal law requires Specialized Loan Servicing LLC ("SLS") to provide you with the amount of the debt. As of 10/17/23, the amount of the unpaid principal balance is \$1,018,618.88. This notice is in no way intended as a payoff statement and you must not rely upon this letter for purposes of paying off your mortgage.
- Specialized Loan Servicing LLC is the current servicer for the current owner of the loan. If you request in writing within thirty (30) days after you receive this notice, we will provide you with the name and address of the original owner if different than the current owner.
- Unless within 30 days after you receive this notice you dispute the validity of the debt or a portion thereof, the debt will be assumed to be valid. If you notify us in writing within 30 days after you receive this notice that you dispute the debt or a portion thereof, we will obtain and mail to you verification of the debt.
- THIS COMMUNICATION IS FROM A DEBT COLLECTOR. PLEASE BE ADVISED THAT THIS LETTER IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

IF YOU ARE A CUSTOMER IN BANKRUPTCY OR A CUSTOMER WHO HAS RECEIVED A BANKRUPTCY DISCHARGE OF THIS DEBT, PLEASE BE ADVISED THAT THIS LETTER CONSTITUTES NEITHER A DEMAND FOR PAYMENT OF THE CAPTIONED DEBT NOR A NOTICE OF PERSONAL LIABILITY TO ANY RECIPIENT HEREOF WHO MIGHT HAVE RECEIVED A DISCHARGE OF SUCH DEBT IN ACCORDANCE WITH APPLICABLE BANKRUPTCY LAWS OR WHO MIGHT BE SUBJECT TO THE AUTOMATIC STAY OF SECTION 362 OF THE UNITED STATES BANKRUPTCY CODE.

If you believe that you are entitled to the benefits as outlined in the Servicemembers' Civil Relief Act, you should promptly provide us with evidence of your active duty status.

Specialized Loan Servicing LLC would like you to be aware if you are unable to make payments or resume payments within a reasonable period of time due to a reduction in your income resulting from a loss or reduction in your employment, you may be eligible for Homeownership Counseling. Please contact HUD toll free number (800) 568-4287 to obtain a list of HUD approved nonprofit organizations serving your area.

If you have any questions regarding this letter, please contact Specialized Loan Servicing LLC at 1-800-906-6062 Monday through Friday, 9:00 a.m. until 7:00 p.m. MT, and Saturday 9:00 a.m. until 12:00 p.m. MT. We accept calls from relay services on behalf of hearing impaired borrowers.

Specialized Loan Servicing LLC requests that all payments be made in certified funds, cashier's check or money order(s) payable to and mailed to Specialized Loan Servicing LLC, Attention: Customer Assistance Department to one of the below addresses (always include Loan Number with your payment):

VIA Regular Mail

Specialized Loan Servicing LLC
PO Box 60545
City of Industry, CA 91716-0545

VIA Overnight Address

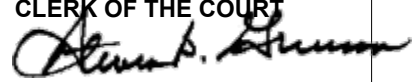
Specialized Loan Servicing LLC
6200 S. Quebec St., Suite 300
Greenwood Village, CO 80111

VIA Western Union Quick Collect

Code City: PAYSLS
Code State: CO
Reference: Loan Number

The notices discussed herein are of extreme importance. We trust you will give them appropriate attention.

SPECIALIZED LOAN SERVICING LLC
Customer Assistance Department



RPLY

Allison R. Schmidt, Esq.
BLACK & WADHAMS
Nevada Bar No. 10743
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Telephone: (702) 869-8801
Facsimile: (702) 869-2669
E-mail: aschmidt@blackwadhams.com
Attorney for Defendants/Counterclaimants

DISTRICT COURT
CLARK COUNTY, NEVADA

<p>AAL-JAY, INC., a Nevada corporation,</p> <p>Plaintiff,</p> <p>v.</p> <p>PHILIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST,</p> <p>Defendants.</p>	<p>Case No. A-21-832379-C Dept. No.: 24</p> <p>DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PREFERENTIAL TRIAL SETTING</p>
<p>PHILIP J. FAGAN, JR., as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST,</p> <p>Counterclaimant,</p> <p>v.</p> <p>AAL-JAY, INC., a Nevada corporation;</p> <p>Counter-Defendants.</p>	

Defendants/Counterclaimants PHILIP J. FAGAN, JR., as Trustee of the PHILIP J. FAGAN, JR., 2001 TRUST (hereinafter "Fagan" or "Defendants"), by and through its attorneys of record of the law firm of Black & Wadhams, hereby move for a preferential trial setting pursuant to NRS 16.025(1) and (2).

1 Dr. Fagan is 79 years old and suffering from serious heart disease. Similarly, he recently
2 suffered a serious injury which has exacerbated his medical conditions.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **INTRODUCTION**

5 Plaintiff's lengthy opposition attempts to muddy clear waters – the Defendant is entitled
6 to a preferential trial setting BOTH because of his age and his documented health issues.
7 Plaintiff does not disagree with the fact that Dr. Fagan is 79 years old – this alone entitles Dr.
8 Fagan to the preferential trial setting. Further, Plaintiff has offered no evidence to refute the
9 declarations provided by Dr. Fagan and his Cardiologist which provides a separate, additional
10 basis upon which Dr. Fagan is entitled to an expedited trial under NRS 16.025.
11

12 Plaintiff simply reiterates the purported strength of their case – for which a de facto
13 judgment was already been entered, while simultaneously arguing that too much discovery must
14 be done in order to bring this case to trial. However, Plaintiff has thwarted each and every
15 attempt of the Defendants to complete *any* discovery – indeed, Plaintiff sought and obtained a
16 “stay of discovery” which lasted more than 2 years.
17

18 In the meantime, one of the chief witnesses to this case – Richard Scott, Esq. has passed
19 away. *See* EXHIBIT A- Obituary. Lail Leonard, the president of AAL-JAY, Inc is now 83
20 years old, and the Defendant is 79 years old and in failing health.
21

22 Plaintiff's complaint that it would be “hard” to bring this case to trial in 120 days is
23 inapposite – the legislature was aware of those challenges when it implemented NRS 16.025 in
24 1987¹. The interests of senior citizens, and their substantive right to have their cases heard
25

26
27 ¹ Indeed, the legislative history demonstrates that NRS 16.025 was proposed by Attorneys on the Senate
28 Judiciary Committee. *See* Minutes of the Senate Committee on Judiciary, June 3, 1987

1 within their lifetime outweighs the difficulty that might present from expediting trials².

2 LEGAL ARGUMENT

3 **A. The Nevada Legislature Intended Senior Litigants to Have Their Cases Hears**

4 **During their Lifetime, *Despite* the Practical Difficulties of Expedited Trials.**

5 Nevada law permits this Court to order an expedited trial. NRS 16.025. The purpose of
6 NRS 16.025 is set forth in the legislative history from 1987:

7
8 Assemblyman Bill Kissam, Assembly District No. 4, reviewed the
9 bill, saying that the original intent of the bill was to address a
10 problem senior citizens had in obtaining a timely date for trial on a
11 civil action. The bill drafters had also added language relating to a
party suffering from a terminal illness also receiving preferential
settings.

12 *See* Minutes of the Nevada State Legislature Assembly Committee on Judiciary, May 20, 1987

13 Assemblyman Kissam went on to explain his reasoning for proposing the law:

14 Mr. Kissam said, "The history behind my bill is it was brought to
15 my attention by a senior citizen who knew of the California
16 method of doing this very same thing for the last two years...there
17 were attorneys on the Assembly Judiciary committee who felt the
18 judge should have the latitude to provide for senior citizens who
19 are over 70 if they have a disability or illness...any continuances
20 requested during these preferential setting of these trials could only
be for 120 days...**I respectfully request you to consider this bill
in that the senior citizens will be greatly impacted by this
because what is happening now with continuances and delayed
court settings...the seniors are dying.**"

21 *See* Minutes of the Senate Committee on Judiciary, June 3, 1987. California, which has a
22 substantially similar preferential trial setting law has discussed the public policy considerations
23 behind preferential trial settings as well. In one case, the Court noted that the legislative history
24 comments "reflect the purpose of subdivision (a) to safeguard to litigants beyond a specified age
25 against the legislatively acknowledged risk that death or incapacity might deprive them of the
26

27 ² It bears mentioning that Counsel for the Plaintiff has 36 attorneys at their disposal in their Las Vegas
28 office, who could surely shoulder the burden of expedited discovery.

1 opportunity to have their case effectively tried and the opportunity to recover their just measure
2 of damages or appropriate redress.” *Rice v. Superior Court*, 136 Cal. App. 3d 81, 88-89, 185 Cal.
3 Rptr. 853, 856-57 (1982). Another California Court has noted that “[t]he express legislative
4 mandate for trial preference is a substantive public policy concern which supersedes any
5 balancing considerations.” *Ebers v. Parks*, 2022 Cal. Super. LEXIS 101607, *3.

6
7 Plaintiff’s manufactured “due process” concerns should, according to the Courts in
8 California, not even be taken into consideration on a motion for preferential trial setting:

9 Defendants make several arguments about the difficulty of
10 preparing for trial on an expedited basis, how the shortened
11 timeframe violates due process, and even that their demurrer hasn't
12 been heard yet. **[The Preferential Trial Setting Statute] was
13 enacted with full knowledge that the discovery process and
summary judgment timelines would be affected.** Nothing in
[The Preferential Trial Setting Statute] permits these issues to be
weighed by the Court when granting a preferential trial date.

14 *Hansen v. San Demente Villas by the Sea*, 2019 Cal. Super. LEXIS 28755, *10 (emphasis added)

15 Defendant Dr. Fagan, at 79 years of age is 6 years older than the life expectancy for a
16 male in the United States. See <https://www.cdc.gov/nchs/fastats/life-expectancy.htm>. Plaintiff’s
17 primary witness and President, Lail Leonard, is 83 years old, and four years older than the
18 average life expectancy for females in the U.S. *Id.* The other integral witness to this case,
19 Richard Scott, Esq. passed away in 2022 while Dr. Fagan awaited his day in Court. See Ex. A.

20
21 The difficulties of counsel must be set aside so that Dr. Fagan may have his day in court
22 and before any more of the major parties and witnesses in this case die.

23 **B. The Evidence Shows that DR. Fagan May Not Be Able to Participate in This**
24 **Case in 6 Months**

25 Plaintiff claims, without any evidence or basis, that the declarations provided by Dr.
26 Fagan and his Cardiologist are somehow suspicious. Plaintiff’s baseless suspicions forget, as a
27 preliminary matter, that Dr. Fagan is not required to have health problems to qualify for a
28

1 preferential trial setting. His health problems provide a separate and additional basis upon which
2 he is entitled to a preferential trial setting. Nonetheless, Plaintiff provides zero evidence to refute
3 the testimony of Dr. Fagan and his Cardiologist. Zero. If the Court has any questions it could
4 certainly request Dr. Economides provide testimony and submit to cross examination. There is
5 simply no rational basis to question the veracity of a disinterested cardiologist.

6 **C. This Case Has Not Complied With EDCR 1.90**

7
8 According to EDCR 1.90 “Unless the case is extraordinarily complex, a judge or other
9 judicial officer shall order the prevailing party to prepare a written judgment and findings of fact
10 and conclusions of law and submit the same not later than 21 days following trial. In
11 extraordinarily complex cases, the attorney for the prevailing party shall submit a written
12 judgment and findings of fact and conclusions of law to the judge or judicial official not later
13 than 28 days following the conclusion of trial.” This is not complete litigation. This is not a
14 business court case. This is a run of the mill breach of contract case.

15
16 Despite the JCCR being required to be convened on or before June 18, 2021, Plaintiff
17 failed to convene the 16.1 conference until January of 2022. Thus the JCCR was filed on
18 January 13, 2022. Under EDCR 1.90, the discovery was mandated to be completed no later than
19 July 13, 2023. Discovery has not even started due to delay tactic after delay tactic on the part of
20 the Plaintiffs.

21
22 Additionally, EDCR 1.90(b)(4) requires that “Cases shall be set for trial no later than 6
23 months from the date of the discovery cut-off date.” If the discovery close was required to be no
24 later than July 13, 2023, this case was required to go to trial no later than January 14, 2024.
25 Another date that has already passed.

26 **D. Dr. Fagan’s Due Process Rights Are Being Violated**

27 Dr. Fagan has not been permitted to do any of the discovery guaranteed by the Nevada
28

Rules of Civil Procedure. As Witness memories have been allowed to fade for three years, a crucial witness has died, and documents are almost certainly being lost, Plaintiff occupies Dr. Fagan's home, without payment. The parties do not dispute that Dr. Fagan never signed the purported "purchase and sale agreement" that Plaintiff has sought to enforce. Should this case be delayed any further, Dr. Fagan will not be able to participate in its defense, and will likely not live long enough to provide any testimony or be cross examined about whether a legally enforceable agreement exists.

Plaintiff failed to timely convene an early case conference and timely file a JCCR. Plaintiff sought and obtained a 2 year stay of discovery -without filing a motion or posting bond. Plaintiff has done nothing but attempt to hide the fact and prevent any evidence in this case from coming to light. Plaintiff instead hopes to delay the case long enough until such time as the defense is an empty chair. It is Dr. Fagan whose due process rights are being violated.

CONCLUSION

Based upon the foregoing, Defendants respectfully requests the Court grant the Motion and set a preferential trial date within 120 days of entry of order, along with corresponding expedited discovery deadlines.

DATED this 22nd day of January, 2024

BLACK & WADHAMS

s/ Allison R. Schmidt

Allison R. Schmidt, Esq.

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Las Vegas, Nevada 89135

Attorney for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I certify that I am an employee of BLACK & WADHAMS and that on the 22rd day of January, 2024, I caused the above and foregoing document entitled **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PREFERENTIAL TRIAL SETTING** to be served as follows:

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

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed on the Master filing list with the court for this case

Ogonna Brown, Esq.
Nevada Bar No. 7589
3993 Howard Hughes Parkway, Ste. 600
Las Vegas, NV 89169
Attorneys for Plaintiff/Counterdefendant
OBrown@lewisroca.com

/s/ Allison R. Schmidt
An Employee of Black & Wadhams

EXHIBIT A

RICHARD NEAL SCOTT



RICHARD NEAL SCOTT Richard Neal Scott, age 88, of Henderson, passed away on Sunday, January 30, 2022. Richard was born December 16, 1933 in Long Beach, CA to Raymond Neal Scott and Helen Dean Curry. He attended El Monte High School and later Mt. San Antonio Jr. College. Richard proudly served in the United States Army from August, 1956 to August, 1958. He married his first wife Martha Young in 1953. He had been with his current wife, Vicki Hafen Scott since 1987. Richard worked in the construction industry for many years. He was the manager at Penny Company, co-owner of Klein Construction, owner of Scott Machinery, Western Equipment and Western Construction Auctions. He specialized in construction equipment sales, rentals and auctions. Richard is survived by his wife, Vicki Hafen-Scott, children; Kristyn L. Scott Kassity, Richard N Scott, Jr., Gregg Alan Scott and sister; Rae Ann Scott. Also, his grandchildren, Steven Kassity, Johnathan Kassity, Britnee Scott-Heckman, Jacob Scott, Kevin Scott, Tyler Scott and A.J. Scott. As well as two great-grandsons, Colton and Owen Scott. He lived life to the fullest including his love for flying, hunting, fishing, golf and traveling the world. He made lifelong friends wherever he went. He will be missed by all.

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No Events Scheduled At This
Time

ORDR
OGONNA BROWN, ESQ.
Nevada Bar No. 7589
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Facsimile: (702) 949-8398
E-Mail: OBrown@lewisroca.com
Attorneys for Plaintiff AAL-JAY, INC.

**DISTRICT COURT
COUNTY OF CLARK, NEVADA**

AAL-JAY, INC., a Nevada Corporation.

Case No. A-21-832379-C

Plaintiff,

Dept. No. 24

v.

PHILIP J. FAGAN, JR., an individual, and
as Trustee of the PHILIP J. FAGAN, JR.
2001 TRUST; DOES I through X, inclusive,
and ROE CORPORATIONS I through X,
inclusive,

**ORDER GRANTING IN PART AND
DENYING PART DEFENDANTS' MOTION
FOR PREFERENTIAL TRIAL SETTING**

[In Chambers January 25, 2024]

Defendants.

Judge: Hon. Erika Ballou

PHILIP J. FAGAN, JR., as Trustee of the
PHILIP J. FAGAN, JR. 2001 TRUST,

Counterclaimants,

Vs

AAL-JAY, INC., a Nevada corporation,

Counterdefendants.

This Court having considered Defendant Philip Fagan, Jr., an individual and as Trustee of the Philip J. Fagan, Jr., 2001 Trust's ("Fagan" or alternatively "Defendants") Motion for Preferential Trial Setting ("Motion") filed on December 27, 2023, Plaintiff AAL-JAY, Inc.'s ("AAL-JAY" or alternatively, "Plaintiff") Opposition to the Motion for Preferential Trial Setting and Defendants' Reply in Support of Motion for Preferential Trial Setting, and the Court having considered the papers and pleadings on file, and this Court having determined that no hearing is necessary and ruled on

1 the Motion in chambers on January 25, 2024, as set forth in the Minute Order, and good cause
2 appearing therefore, this Court finds as follows as to Defendants' Motion to Lift Stay and For
3 Preferential Trial Setting:

4 NRS 16.025 (1) states that "upon the motion of a party to an action who is 70 years of age
5 or older, the court may give preference in setting a date for trial of the action, unless the court finds
6 that the party does not have a substantial interest in the case as a whole." Further, Section 16.025
7 merely permits litigants to move for earlier trial dates; it is not "outcome-determinative." *See*
8 *Orlando v. Gov't Emps. Ins. Co.*, No. 220CV01904JADVCF, 2021 WL 1342521, at *2 (D. Nev.
9 Apr. 9, 2021).

10 On January 13, 2022, AAL-Jay and Fagan filed a joint case conference report ("JCCR")
11 that requested that the requirement to proceed with discovery be waived while the Nevada Supreme
12 Court reviewed the appeal.

13 On May 17, 2022, Fagan filed a Motion to Stay the entire State Court Case on the basis that
14 Fagan filed an appeal.

15 On June 3, 2022, this Court entered an Order Granting the Stay Motion ("Stay Order").

16 On November 23, 2022, Fagan filed a Motion to Lift Stay and for Preferential Trial Setting
17 seeking to lift the stay of discovery and to accelerate the trial.

18 On January 26, 2023, this Court denied Fagan's Motion. As this Motion stands, there are
19 no further appeals that this Court is aware of.

20 Defendant Fagan again requests Preferential Trial Setting and requests that the trial be set
21 in 120 days. Since the time of the Stay, Fagan, who is 79 years old, has also suffered serious medical
22 issues.

23 On August 27, 2023, he sustained serious injuries after a fall. Further, Mr. Fagan has
24 numerous preexisting conditions that have been exacerbated by his injuries.

25 The Court agrees that a Preferential Trial Setting is necessary at this time, therefore, the
26 Motion is GRANTED as to this issue.

27 However, given the nature of this case, the Court does not find 120 days sufficient to
28 conduct the necessary discovery.

The motion is, therefore, DENIED as to this issue. The Court will set this matter for trial on November 12, 2024.

Further, Plaintiff's Order to Show Cause that was VACATED due to the Stay will be placed back on Calendar for March 12, 2024, at 9:30 am.

Due to the aforementioned reasons, Defendant's Motion for Preferential Trial Setting is hereby GRANTED in Part and DENIED in Part.

ORDER

IT IS HEREBY ORDERED that Defendants' Motion for Preferential Trial Setting is hereby **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED that pursuant to NRS 16.025(1), the Court finds that a Preferential Trial Setting is necessary at this time due to Defendant Philip J. Fagan, Jr.'s age and medical issues.

IT IS FURTHER ORDERED that Defendants' request to conduct discovery in 120 days is an insufficient amount of time for the parties to conduct necessary discovery in this matter.

IT IS FURTHER ORDERED that this matter is set for trial on November 12, 2024.

IT IS FURTHER ORDERED Plaintiff's Order to Show Cause will be placed back on Calendar for March 12, 2024, at 9:30 am.

IT IS FURTHER ORDERED that the hearing on the Defendants' Motion for Preferential Trial Setting set for January 29, 2024, at 9:30 a.m. is hereby **VACATED**.

IT IS SO ORDERED.

Dated this 8th day of February, 2024



981 39C CA70 F649
Erika Ballou
District Court Judge

Respectfully submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Ogonna M. Brown, Esq.

OGONNA M. BROWN (SBN 7589)

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Attorneys for Plaintiff/Counterdefendant AAL-JAY, Inc.

1 **Approved as to Form and Content, all rights reserved:**

2 **BLACK & WADHAMS**

3 /s/ Allison R. Schmidt, Esq.

4 ALLISON R. SCHMIDT, ESQ. (SBN 10743)

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8 *Attorneys for Defendants/Counterclaimants*

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 AAL-JAY, INC., Plaintiff(s)

CASE NO: A-21-832379-C

7 vs.

DEPT. NO. Department 24

8 Philip Fagan, Jr., 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: 2/8/2024

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4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**

6
7 **AAL-JAY, INC.,**
8 **Plaintiff(s),**

CASE NO. A-21-832379-C

DEPT NO. XXIV

9 **v.**

10 **Philip Fagan, Jr.,**
11 **Defendant(s),**

AMENDED ORDER RE-SETTING CIVIL
JURY TRIAL

12
13
14
15 **IT IS HEREBY ORDERED** that:

16 The Trial date previously set in this matter for **September 5, 2023**, and all dates associated therewith
17 are hereby **VACATED**; and

18 **IT IS FURTHER ORDERED** that:

- 19 **A.** The Above entitled case is set to be tried by a jury, 3-5 days setting, on a five week stack. The
20 trial is set to begin on **Tuesday, November 12, 2024, at 1:00 pm.**
- 21 **B.** A Calendar Call will be held on **Tuesday, October 29, 2024, at 9:30 a.m.** The trial attorney
22 must be in attendance at this hearing and should have access to his/her calendar availability
23 for trial dates during the next six months. Be prepared to discuss in detail how much time you
24 will require for your trial.
- 25 **C.** The Pre-Trial Memorandum must be filed no later than **Monday, October 28, 2024, by 4:00**
26 **pm**, with a courtesy copy delivered to chambers. EDCR 2.67 must be complied with.
- 27 **D.** All discovery deadlines, deadlines for filing dispositive motions and motions to amend the
28 pleadings or add parties are controlled by the previously issued Scheduling Order, and/or any

1 amendments or subsequent order, or Special Hearing Master case Agenda. If no Scheduling
2 Order or special Hearing Master Case Agenda addresses these or other motions, paragraph E
3 applies.

4 **E.** Pursuant to EDCR 2.47(b), counsel shall meet and confer in good-faith no later than TWO
5 WEEKS prior to the filing date of all motions in Limine. All motions in Limine **(limited to**
6 **ten (10) per side)** must be in writing and filed no later than 45 days prior to trial start date.
7 All pretrial motions shall be heard and decided no later than 14 days before the date
8 scheduled for trial. Any oppositions to Pre-Trial Motions and Motions in Limine have to be
9 filed 25 days before trial. The Replies to Oppositions have to be filed 20 days before trial.
10 **Omnibus Motions in Limine will not be accepted.**

11 **F.** Stipulation to continue a trial date will not be considered by the court. Pursuant to EDCR
12 2.35, a motion to continue trial due to any discovery issues or deadlines must be made before
13 the Discovery Commissioner.

14 **Counsel is asked to notify the court recorder at least two weeks in advance if they are going to**
15 **require daily copies of the transcripts or CDs of this trial. Failure to do so may result in a**
16 **delay in production of the transcripts and/or CDs.**

17 **G.** Orders shortening time will not be signed except in extreme emergencies.

18 **AN UPCOMING TRIAL DATE IS NOT AN EXTREME EMERGENCY**

19 Failure of the designated trial counsel or any party appearing in proper person, to appear for
20 any court appearances or to comply with this Order shall result in any of the following: (1) dismissal
21 of the action; (2) default judgment; (3) monetary sanctions; (4) a reset or vacated trial date; and/or
22 (5) any other appropriate remedy or sanction.

23 Counsel is required to advise the Court immediately, in writing, if the case settles or is
24 otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall indicate
25 any date(s) to be vacated

26 ///

27 ///

28 ///

1 If the Parties are interested in a settlement conference conducted by a District Court Judge
2 Sitting as Mediator, please contact DC30 Judicial Executive Assistant, at (702)671-3633.

3
4 Dated this 5th day of March, 2024

5 
6

7 577 CA4 0BD1 134A
8 Erika Ballou
9 District Court Judge

10 **CERTIFICATE OF SERVICE**

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

15 **ALL REGISTERED COUNSEL/PARTIES SERVED VIA E-SERVICE**

16
17 /s/ Chapri Wright

18 CHAPRI WRIGHT
19 Judicial Executive Assistant
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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 AAL-JAY, INC., Plaintiff(s)

CASE NO: A-21-832379-C

7 vs.

DEPT. NO. Department 24

8 Philip Fagan, Jr., Defendant(s)

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10 **AUTOMATED CERTIFICATE OF SERVICE**

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12 Court. The foregoing Amended Scheduling Order was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

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