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JAN 10 2024

NEVADA COMMISSION OF APPRAISERS

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11 STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY REAL
12 ESTATE DIVISION - APPRAISERS

13 STATE OF NEVADA

14 SHARATH CHANDRA, Administrator,
15 REAL ESTATE DIVISION,
16 DEPARTMENT OF BUSINESS AND
17 INDUSTRY, STATE OF NEVADA,

18 Petitioner,

19 vs.

20 THOMAS L. WITHERBY
21 (License No. A.0001528-CR),

22 Respondent.

Case No. 2020-492, AP21.045.S

**RESPONDENT'S OPPOSITION TO
MOTION TO DISMISS
RESPONDENT'S PETITION FOR
REHEARING**

23 Thomas Witherby ("Mr. Witherby"), by and through his attorney,
24 Lesley Miller of the law firm of Kaempfer Crowell, hereby submits this opposition
to Petitioner Real Estate Division of the Department of Business and Industry of the
State of Nevada ("Division") Motion to Dismiss Respondent's Petition for
Rehearing. Mr. Witherby responds to the Motion to Dismiss as follows:

1 **I. ARGUMENT**

2 **A. Mr. Witherby's 15-Day Response Window Did Not Run Because**
3 **Service Was Ineffective and Lacked Proper Procedure.**

4 NRS 233B.130(4) Sets forth the requirements for a petition for
5 rehearing:

6 A petition for a rehearing or reconsideration must be filed
7 within 15 days after the date of service the final decision. An order
8 granting or denying the petition must be served on all parties at
9 least 5 days before the expiration of the time for filing the petition
for judicial review. If the petition is granted, the subsequent order
shall be deemed the final order for the purpose of judicial review.

10 Mr. Witherby disputes the incorrectly calculated deadline of
11 October 31, 2023 set by the Division. *See* NRED Motion to Dismiss, at P. 5:6-7.
12 According to the Division, service was completed on Mr. Witherby's "agent" on
13 October 16, 2023; however, Mr. Witherby did not have an "agent" at any point
14 during these proceedings until he retained Kaempfer Crowell. Apparently, the
15 Division served an "agent" for final delivery in Winnetka, Illinois, based on the
16 USPS Tracking (*See* NRED Motion to Dismiss, Bates #000035). However, Mr.
17 Witherby resides in Florida. Presumptively, service in Illinois was to serve Mr.
18 Capilla, who is national claims counsel for OREP, not Mr. Witherby's personal
19 counsel. Of note, there is no indication by the Division of who this "agent" is and no
20 proof of whether Mr. Capilla actually ever received a copy of the Order from the
21 "agent". The USPS Tracking Record itself states, "Delivered to Agent for Final
22 Delivery." There is no proof that "Final Delivery" was ever made. The Order was
23 not delivered to its intended recipient, Mr. Capilla. In fact, Mr. Capilla's address is
24 181 Waukegan Road, Suite 205, Northfield, IL 60093. His offices are not even in

1 Winnetka, Illinois, which is the last location of “delivery” to an “agent”. *See* USPS
2 Tracking Record at NRED Motion to Dismiss, Bates #000035. Mr. Capilla
3 represented to the Division on July 13, 2023, that he was “in the process of vetting
4 claims and assigning him local counsel.” *See* Mot. at Exhibit 3, NRED Motion to
5 Dismiss Bates #000042. He never represented that he was Mr. Witherby’s attorney,
6 rather that he was national counsel for OREP and he was helping him secure local
7 counsel. *See* NRED Motion to Dismiss at P. 2:25-27. *See also* NRED Motion to
8 Dismiss Bates #000023. Local counsel was not secured until Kaempfer Crowell’s
9 representation. The Division should have reattempted service on Mr. Witherby to
10 ensure proper service was completed. Therefore, service of the Order that triggered
11 ticking of the rehearing request clock was improper and procedurally defective.

12 The Nevada Rules governing Boards and Commissions require
13 “reasonable notice” be afforded licensees facing disciplinary action. *See* NRS
14 233B.121; NRS 622A.300; NRS 241.033(2)(a)(2) and NRS 241.034(1)(b)(2).
15 Further, notice of disciplinary action must be by personal service pursuant to NRS
16 241.034(1)(b)(1) and by Certified Mail to the last known address of the licensee
17 pursuant to NRS 241.034(1)(b)(2). Further, an extra copy could have been sent by
18 regular mail. Under the statutes governing the Division, notice is contemplated and
19 described as being made only “by personal delivery to the registrant, or by certified
20 mail to the registrant’s last known business or residential address.” *See* e.g., NRS
21 645C.667; NRS 645.680 further provides that: “1. The procedure set forth in this
22 section and NRS 645.690 must be followed before the Commission revokes,
23 suspends or denies the renewal of any license, permit or registration of an owner-
24 developer issued pursuant to this chapter.”

1 **B. Denying Mr. Witherby a Rehearing Violates His Right to Due**
2 **Process.**

3 Revoking a Nevada Appraiser’s license without proper notice of the
4 Order is tantamount to a violation of the due process rights afforded Mr. Witherby
5 under Nevada law. A state-issued license to practice a profession carries a
6 constitutionally protected property interest. *Gilman v. State Board of Veterinary*
7 *Medical Examiners*, 120 Nev. 263, 269, 89 P.3d 1000, 1004 (2004).

8 The Due Process clause prevents the state from depriving an individual
9 of his protected property interest without a “fair trial in a fair tribunal.” *In re*
10 *Murchison*, 349 U.S. 133, 142 (1955).

11 Due process of law is required whenever the state deprives a person of
12 “life, liberty, or property.” U.S. Const. amend. XVI, § 1; Nev. Const. art. 1, § 8. Due
13 Process requires reasonable notice to the Respondent, which informs them of the
14 pending legal and factual issues. Due Process also requires an opportunity for a
15 hearing, including the opportunity to present evidence, call witnesses, and cross-
16 examine opposing witnesses. *See* NRS 233B.121. Here, not only was Mr. Witherby
17 not properly noticed, he was not afforded an opportunity to present his case. He was
18 in the process of obtaining local counsel, as the Division was made aware, and was
19 deprived of the opportunity to present facts in favor of denial of discipline.

20 In Nevada, default judgments are disfavored, and cases should be
21 decided on their merits whenever reasonably possible. *Pena v. Sequros La*
22 *Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). An appellate court is more likely
23 to affirm a lower court ruling setting aside a default judgment than it is to affirm a
24 refusal to do so. In the former case, a trial upon the merits is assured, whereas in the

1 latter it is denied forever. *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79
2 Nev. 150, 380 P.2d 293 (1963). Further, a state-issued license to practice a
3 profession carries a constitutionally protected property interest. *Gilman v. State*
4 *Board of Veterinary Medical Examiners*, 120 Nev. 263, 269, 89 P.3d 1000, 1004
5 (2004). Accordingly, Nevada’s Due Process clause prevents the state from depriving
6 an individual of his protected property interest without a “fair trial in a fair tribunal.”
7 *In re Murchison*, 349 U.S. 133, 142 (1955).

8 While the Division argues that it has an interest in not rehearing this
9 matter, Mr. Witherby has the right to due process especially when a privileged
10 license is involved. Here, the analyses should not revolve around the monetary cost
11 to the Division, rather, it should weigh in favor of effective notice and an opportunity
12 to be heard. As argued above, Mr. Witherby was not properly served with the order
13 and was not able to file a timely request for a rehearing. Consequently, he received
14 the highest level of violations including \$63,897.22 in fines because of a default
15 conclusion. Depriving Mr. Witherby an opportunity to have his case heard on the
16 merits would be a clear violation of his due process rights.

17 **C. Mr. Witherby Should Not Be Penalized For An Attorney’s**
18 **Excusable Neglect.**

19 Although there is no proof of Mr. Capilla’s receipt of the Division’s
20 Order, he never made Mr. Witherby aware of an Order entered against him. In
21 *Pioneer Inv. Servs, Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993),
22 the Supreme Court analyzed the circumstances under which missing a filing deadline
23 was “excusable neglect”. The Court stated that Rule 60(b) “excusable neglect” is
24 understood to encompass situations in which the failure to comply with a filing

1 deadline is attributable to negligence.” *Id.* at 394. It added that “at least for purposes
2 of Rule 60(b), ‘excusable neglect’ is understood to encompass situations in which
3 the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394.
4 “Neglect” has its normal, expected meaning, i.e., negligence, carelessness,
5 inadvertent mistake. *Briones v. Riviera Hotel Casino*, 116 F.3d 379 (9th Cir. 1997)
6 (citing *Pioneer*). The Supreme Court stated that the determination of whether neglect
7 is excusable is a flexible and equitable concept taking into account all relevant
8 surrounding circumstances of the party's omission including at least four factors: (1)
9 the danger of prejudice to the opposing party; (2) the length of the delay and its
10 potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether
11 the movant acted in good faith. *Id.* (citing *Pioneer* at 395).

12 The Division would not be prejudiced by granting Mr. Witherby a new
13 hearing. It is presumed that the investigation against Mr. Witherby is completed and
14 limited preparation would be required for a rehearing. Additionally, the length of the
15 delay was minimal and is not impacting any proceedings. Alternatively, the danger
16 of prejudice to Mr. Witherby is substantial, impacting his ability to make a living.
17 Here, the reason for the delay was because Mr. Witherby was not on notice of the
18 Order filed against him because Mr. Capilla did not notify him of it and he did not
19 personally receive a copy of the Order, either.

20 Additionally, Mr. Witherby has been acting as his parents’ caretaker
21 including his father who is suffering from dementia in Florida. Therefore, good
22 cause exists to allow this matter to proceed on the merits as there is no evidence in
23 the record that Mr. Witherby willfully acted in bad faith or that he ever received
24 notice of the Order.

1 **II. CONCLUSION**

2 For the reasons set forth above, Mr. Witherby requests that the
3 Division's Motion to Dismiss be denied and that Mr. Witherby's Request for
4 Rehearing be granted.

5 KAEMPFER CROWELL

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CERTIFICATE OF SERVICE

I served the attached **RESPONDENT’S OPPOSITION TO MOTION TO DISMISS PETITION FOR REHEARING** by electronic mail and by placing a true copy of it in a sealed envelope with postage prepaid in the U.S. Mail addressed to:

CHARVEZ FOGER
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DATED January 10, 2024

s/Kimberly Rupe
Kimberly Rupe
An employee of Kaempfer Crowell