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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JOHN ILIESCU, JR. and SONNIA SANTEE ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, JR., M.D., individually; SONNIA SANTEE ILIESCU, individually, Plaintiffs, vs. JOHN SCHLEINING; and DOES I thru XX, Defendants.	CASE NO.: 3:18-cv-00601-LRH-CBC **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT**

COME NOW, Plaintiffs, as identified in the caption (jointly hereinafter "Plaintiffs" or the "Iliescus"), by and through their undersigned counsel of record, and hereby oppose the Motion to Dismiss (Doc. 9) filed by Defendant John Schleining (hereinafter "Schleining"), based upon the Opposition Points and Authorities set forth below, the numbered Exhibits attached to Defendant's Motion for Judicial Notice (Doc. 8) which are referenced herein, and the lettered Exhibits to this Opposition filed concurrently herewith, together with the papers and pleadings on file herein.

OPPOSITION POINTS AND AUTHORITIES

I. INTRODUCTION AND OVERVIEW

This case is an attempt by Plaintiffs, the Iliescus, to enforce a written Indemnity Agreement signed by Defendant Schleining, promising to indemnify Plaintiffs from the costs and attorneys'

fees they would (and did) incur, in contesting and successfully defending against an architect's mechanic's lien recorded against their property.

This is the third suit the Iliescus have brought against Schleining to enforce his written indemnity promises. The first suit (hereinafter the "First Suit") was a Third-Party Complaint, filed as part of the Iliescus' Answer to the lien claimant's lien foreclosure lawsuit, in Nevada state court. That First Suit was dismissed by the state court, without prejudice, via the judge issuing an order granting a motion to dismiss filed and initiated by Schleining, under erroneous legal reasoning which the court had then recently accepted, but would later abandon. The Iliescus thereafter filed a second Nevada state court suit against Schleining (the "Second Suit"), which the Iliescus later dismissed via a notice of voluntary dismissal filed under Nevada Rule of Civil Procedure 41(a)(1).

Under certain circumstances, as outlined and governed by Rule of Civil Procedure 41(a)(1), a third suit by the same plaintiff against the same defendant upon the same claim, may be dismissed under the so-called "two dismissal" rule established under the concluding language of Rule 41(a)(1). In order for that "two dismissal" rule to so apply, two prerequisites must be present: (1) first, the plaintiff(s) must *themselves* have previously dismissed their First Suit, before dismissal of the Second Suit. (2) Second, the Second Suit must also be dismissed by the Plaintiffs themselves, but only via a Rule 41(a)(1) notice of voluntary dismissal, and not through any other means.[1]

There is no dispute between the parties that the second precedent is met.

Therefore, Defendant's Motion raises but one dispositive issue: whether the First Suit was dismissed by the Plaintiffs themselves, within the meaning of NRCP 41(a)(1), so as to render the second dismissal a dismissal on the merits, *i.e.*, with prejudice, barring a third suit.

Movant contends that the Plaintiffs should be treated *as though* they had themselves dismissed their First Suit, such that the first prerequisite is met, even though they didn't, because they did not contest the legal arguments in a motion to dismiss filed in that First Suit by Schleining,

[1] *See, e.g.,* the then extant version of the last sentence under NRCP 41(a)(1)(ii): ". . . **a notice of dismissal** operates as an adjudication upon the merits when filed by *a plaintiff who has once dismissed* in any court of the United Sates or of any state an action based on or including the same claim." [Underlined and italicized emphasis of language creating the first prerequisite added; bolded emphasis of language creating the second prerequisite added.] *See also*, FRCP 41(a)(1)(B) "(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if *the plaintiff previously dismissed* any federal- or state-court action based on or including the same claim, **a notice of dismissal** operates as an adjudication on the merits." [Underlined and italicized emphasis of language creating the first prerequisite added, bolded emphasis of language creating the second prerequisite added.]

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as a third-party defendant therein, which motion led to the court order dismissing the First Suit against Schleining without prejudice. But Schleining cites no authority supporting this argument. Moreover, this argument is false and inaccurate. *See, e.g., Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 727 (9th Cir. 1991)(plaintiff could have avoided application of the two dismissal rule, barring its third suit, by allowing the defendant to file a motion to dismiss the plaintiff's first suit, pursuant to the grounds which then required such dismissal, without prejudice, instead of filing its own notice of voluntary dismissal of that first suit.) *Hughes Supply, Inc. v. Friendly City Elec. Fixture Co.,* 338 F.2d 329, 330-31 (5th Cir. 1964)(dismissal of first state court case (which was dismissed because plaintiff responded to a defendant filed motion to dismiss, by filing an admission of improper venue), was not a voluntary plaintiff dismissal for purposes of the two dismissal rule, and third suit filed in federal court would therefore not be barred by that two dismissal rule).

The First Suit at issue herein was dismissed by the district court judge (not by the Iliescus), via an order entered by that judge (not by the Iliescus), granting a motion filed by the third-party defendant therein, Schleining (not by the Iliescus). The Iliescus did not file a notice of voluntary dismissal of the First Suit under NRCP 41(a)(1)(i), and they did not sign a stipulation to dismiss that First Suit under NRCP 41(a)(1)(ii) and they did not move for dismissal of that suit, including under NRCP 41(a)(2). Thus, the Plaintiffs themselves did not dismiss their First Suit.

Defendant's Motion to dismiss must therefore be denied.

II. STATEMENT OF UNDERLYING FACTS

Defendant Schleining's Motion to Dismiss, which is based solely on procedural grounds, so as to avoid any adjudication on the merits, does not address or contest the underlying facts of this matter, as alleged in the Complaint initiating this suit, which allegations are incorporated herein by reference.

In greatly condensed summary, those allegations contend that the Plaintiffs, the Iliescus, agreed in 2005 to sell certain of their real estate in downtown Reno, Nevada, as described in the Complaint (the "Property"), for $7,500,000.00 to a company known as Consolidated Pacific Development (hereinafter "Consolidated"), which intended to develop a multi-use condominium

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tower, to be known as Wingfield Towers, thereon. Complaint at ¶¶1-17.

While the Property was in escrow, Consolidated came to own part of an entity known as BSC Investments, LLC, which did business as BSC Financial (hereinafter "BSC"). BSC was also owned, in part, by Baty Schleining Investments, and apparently intended to take an assignment of Consolidated's rights under the Purchase Agreement. Complaint at ¶¶18-29, 44.

BSC hired a California architectural firm, by contracting with its sole Nevada licensed architect, Mark Steppan (hereinafter "Steppan" or the "Architect"), to provide off-site architectural services for the Wingfield Towers designs. When BSC failed to pay the architectural firm's flat fee invoices, tied to the anticipated construction costs of the phantom Wingfield Towers project, it recorded a mechanic's lien in Steppan's name against the Iliescus' Property, in November 2006, in the initial sum of approximately $1.8 million dollars, to bear interest at 18% per annum based on the terms of a backdated AIA Agreement BSC had signed with the Architect (hereinafter, and as amended, the "Mechanic's Lien"). Complaint at ¶¶30-38.

Thereafter, on or about December 8, 2006, in order to keep the Property owners cooperative in ongoing zoning entitlements extension efforts, BSC, Calvin Baty, and Defendant herein, John Schleining, individually and jointly and severally, executed an Indemnity Agreement in favor of the Iliescus, which indicated, in pertinent part, as follows:

> 1. Indemnity. Baty, **Schleining** and BSC hereby, jointly and **severally**, agree to indemnify, defend, protect and hold Iliescu harmless against all . . . losses, **expenses**, **costs**, . . . including, without limitation, payments . . . which may be due to the Architect arising out of services performed pursuant to the AIA Contract or any change order or extras related thereto, ...
>
> 2. Attorney's Fees. Baty, **Schleining** and BSC hereby jointly **and severally agree to pay all attorney's fees and costs incurred to contest and discharge the Mechanic's Lien**. . . . [Emphasis added.]

See, Plaintiff's [lettered] Exhibits in Support of this Opposition, filed concurrently herewith, at **Exhibit "A"** thereto. *See also*, Defendant's [numbered] Exhibits, attached to Defendant's Motion for Judicial Notice, at **Exhibit 4-C** thereto, ¶¶ 1 and 2. *See also*, Complaint at ¶¶39-41.

Ultimately, the purchaser failed to obtain financing, and its hoped-for purchase transaction with the Iliescus never closed. The Iliescus then received their still completely unimproved and still

vacant Property out of escrow, but now subject to and encumbered by the Architect's seven figure Mechanic's Lien, on which 18% interest was accruing. Complaint at ¶41.

In order to contest and obtain a discharge of this Architect's Mechanic's Lien, the Iliescus filed an action in Washoe County Court against Steppan, seeking a release thereof, in February of 2007. **Defendant's Exhibit 1**. Steppan then filed a Complaint to foreclose on his Mechanic's Lien (**Defendant's Exhibit 2**), and the two cases were consolidated. **Defendant's Exhibit 3**. These two consolidated cases are referred to hereinafter as the "Steppan Lien Litigation." The Iliescus thereafter spent hundreds of thousands of dollars to fight the Steppan Lien Litigation for many long years. Complaint at ¶¶42-46, 49-50.

Indemnitor BSC was later dissolved. Indemnitor Calvin Baty later obtained a Bankruptcy discharge. Schleining, however, is still liable under the Indemnity Agreement, which he signed in his individual capacity, jointly and severally. Complaint at ¶¶47-48.

The Steppan Lien Litigation was litigated through certain partial summary judgment motions, and was then tried at a bench trial, all of which the Iliescus lost. On February 26, 2015 an over $4.5 Million Judgment was entered against the Iliescus (Plaintiff's **Exhibit "B"** filed separately and concurrently herewith), upholding Steppan's architectural Mechanic's Lien. Post-trial motions to overturn the result at trial, filed both before and after entry of the Judgment, were denied. The Iliescus then appealed, and on May 25, 2017, the Judgment was reversed by the Nevada Supreme Court. *See*, *Iliescu v. Steppan*, 133 Nev. Adv. Op. 25, 394 P.3d 930 (Nev. 2017). Based on this reversal, the Iliescus then obtained a new "Judgment Upon Remand in Favor of the Iliescus Releasing Steppan's Mechanic's Lien and Vacating Prior Judgment Thereon" on January 3, 2018. *See*, Plaintiff's **Exhibit "C."** Complaint at ¶¶51-57.

Later that same year, this present Complaint was filed, as the third suit seeking to enforce the Indemnity Agreement and seek reimbursement from Defendant Schleining, for "**all attorney's fees and costs incurred to**" successfully "**contest and discharge the Mechanic's Lien**" which Schleining had promised to pay. Complaint at ¶¶58-71.

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III. STATEMENT OF PROCEDURAL FACTS

A. Initiation of the Iliescus' First Suit Against Schleining.

In responding to Steppan's lien foreclosure suit, the Iliescus filed a Third-Party Complaint, on September 27, 2007, naming, among others, the law firm of Hale Lane Peek Dennison and Howard (hereinafter "Hale Lane") on a malpractice claim, as well as Schleining, to enforce the Indemnity Agreement. **Defendant's Exhibit 3**. On September 2, 2009, Schleining filed his Answer to the Third-Party Complaint. Plaintiff's **Exhibit "D."** Thereafter, on October 7, 2009, Hale Lane filed its Answer to the Third-Party Complaint.

B. Dismissal of the First Suit on an Order by the State District Court Granting a Motion Brought by Schleining, on Erroneous Procedural Grounds which Were Later Vacated.

The Honorable Judge Brent Adams, was the first of at least three judges to preside over the Steppan Lien Litigation. Under the Nevada Rules of Civil Procedure then in effect, litigants were normally required to hold an early case conference pursuant to NRCP 16.1, and file a Joint Early Case Conference Report (hereinafter a "JCCR"), setting forth the proposed discovery schedule, unless exempted from these requirements, such as through an NRCP 16.1(f) designation of the matter as complex, in which case the judge would hold the initial discovery conference(s), and manage discovery deadlines. During the initial years of the Steppan Lien Litigation, Judge Brent Adams did not require any of the litigants to file any JCCR, but instead held his own judicial case conference(s), and managed and directed the discovery, and related deadlines, thereby essentially treating the matter as complex (albeit without a formal declaration), during which years, discovery and depositions took place, motions were filed, and settlement conference(s) were held. *See, e.g.*, *Affidavit of Hon. Judge Brent Adams in Support of Motion for Reconsideration,* dated November 8, 2011. Plaintiff's **Exhibit "E."**

Dismissal of this First Suit against Schleining then occurred as follows:

1. Almost one year after Hale Lane's and Steppan's answers were filed, Judge Adams recused himself, on August 10, 2011, after having presided over numerous attempted settlement conferences. *See*, Plaintiff's **Exhibit "F,"** Order of Recusal and Random Reassignment. The matter was then reassigned to a new department and judge, the Honorable Steven P. Elliott.

2. On or about March 30, 2011, Third-Party Defendant Hale Lane filed a Motion for Summary Judgment Dismissal of the Iliescus' third-party legal malpractice claims against it. Hale Lane thereafter filed a Supplement to that motion, which argued that the Iliescus' third-party claims should also be dismissed, on the independent grounds that the Iliescus had failed to comply with NRCP 16.1(e)(2), in that they had never filed a joint early case conference report within the deadline to do so after Hale Lane's Answer. *See,* Hale Lane's July 22, 2011 Supplement to its Motion for Summary Judgment, which is Plaintiff's **Exhibit "G"** hereto, filed separately concurrently herewith. That Hale Lane motion was ultimately granted by Judge Elliott, on September 1, 2011, including on the basis of this procedural argument (the "Late JCCR Argument"). *See*, Plaintiff's **Exhibit "H"** at pp. 8-9. This reasoning of said Order essentially established, as the law of the case at that time, that any of the claimants' prior failures to abide by NRCP 16.1(e)(2) would be grounds for dismissal (hereinafter the "Temporary Law of the Case").

3. Shortly after the entry of this Order, establishing this new Temporary Law of the Case, the Iliescus' then counsel, Thomas Hall, filed a Motion to Dismiss Steppan's Lien Foreclosure suit, on September 3, 2011 (**Exhibit "I"** hereto) seeking to have the court hold Steppan to the same standard and consequences to which the Iliescus had been subjected, pursuant to this same Late JCCR Argument, which had been applied against the Iliescus, and was now the law of the case, which Motion was based on Steppan having also never timely filed a JCCR, with respect to his lien foreclosure complaint, which JCCR was much further past due than the Iliescus' had been. Plaintiffs' **Exh. "I"** at pp. 6-7.

4. This Motion to Dismiss Steppan's Lien Foreclosure Suit was then granted by Judge Elliott in an October 25, 2011 Order in the Iliescus' favor. *See*, Plaintiff's **Exhibit "J."**

5. Based on those two prior orders, Schleining then filed his own Motion to Dismiss (**Defendant's Exhibit 5**), which also made the Late JCCR Argument which was then the Temporary Law of the Case, asserting that the court should dismiss the Iliescus' claims against Schleining on these same grounds, for their failure to have ever filed a JCCR on their Third-Party Complaint, on which grounds the court had also already granted Schleining's co-Third Party Defendant's, Hale Lane's, supplemental motion, as well as the Iliescus' subsequent motion against Steppan.

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Defendant's Exhibit 5, at p. 6.

6. Furthermore, Schleining asserted that the Iliescus were now judicially estopped from opposing his motion to dismiss because, in order to do so, they would have to "knowingly take two 'totally inconsistent' positions" in the litigation, and now argue against the very same dismissal theories which (after they had first been used against them) they had successfully employed against Steppan. **Defendant's Exhibit 5**, at pp. 6-7, citing *Southern California Edison v. District Court*, 255 P.3d 231, 237 (Nev. 2011).

7. The Iliescus' then counsel, Mr. Hall, having himself relied on the Temporary Law of the Case as it then existed, which had first been established in a motion filed against, not by, the Iliescus, agreed in his response to this Schleining motion to dismiss, that "**in order to be consistent with prior rulings** regarding NRCP 16.1," as the same then existed, the court would also need to grant the Schleining motion at that time. (Those prior rulings would however be subsequently abandoned.) The response noted that this should be "all without prejudice" as required by NRCP 16.1(e)(2), which was the authority for Schleining's motion. *See*, **Defendant's Exhibit 6**, at p.3.

8. Schleining then requested submission of his motion to the court, without filing any reply contesting the assertion that the order should be without prejudice. Judge Elliott entered an Order granting Schleining's motion, but "without prejudice" on November 22, 2011. *See*, **Defendant's Exhibit 7**. Said order was *not* based simply or solely on any Iliescu concessions, but also set forth and independently discussed the same Late JCCR Argument, as had previously been accepted and established as the Temporary Law of the Case, by the same judge in his Order against the Iliescus in favor of Hale Lane. *Id*., at pp. 4-5. In any event, this order of dismissal was entered *by the court*, not by the Iliescus, on the basis of a motion filed *by Schleining*, not by the Iliescus, seeking this relief under the then existing Temporary Law of the Case with respect to NRCP 16.1(e)(2) (which Temporary Law of the Case had first been established based on a motion filed *against* and not *by* the Iliescus).

9. While certain appeals from this sequence of events were pending, certain motions for leave of court to file motions seeking reconsideration of certain of the court's prior dismissals were considered. Steppan's motions for reconsideration were based, in part, on an affidavit which his

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lawyers obtained from the original judge who had first presided over the litigation, Judge Brent Adams, which affidavit essentially indicated that Judge Adams had met with the parties to the Steppan Lien Litigation during the time he was presiding over the same, and had instructed the parties with respect to how to proceed with discovery, in a manner which prevented any of the parties from being required to ever file a JCCR. *See, e.g.,* Steppan's reconsideration Motion, filed November 8, 2011, which is Plaintiff's **Exhibit "K"** hereto, at Exhibit 2 thereto. (This affidavit is also separately submitted as Plaintiff's **Exh. "E."**)

10. Ultimately, the second district court judge to preside over the matter then issued certain orders regarding his intent to grant reconsideration, which led to Nevada Supreme Court orders of remand, and a subsequent order by Judge Elliott, in September of 2012, which actually did reconsider and set aside the orders dismissing Steppan's claims against the Iliescus, as well as the Summary Judgment Order dismissing the Iliescus' claims against Hale Lane. Plaintiffs' **Exhibit "L"** hereto.

11. For reasons which are not clear, no motion was filed seeking to overturn the order granting Schleining's motion to dismiss, at that time, perhaps because this did not matter as said order, granting Schleining's motion, had been "without prejudice" in any event.

12. Based on the foregoing, after the dust settled with respect to this odd little episode in the procedural history of the Steppan Lien Litigation, the only party to remain dismissed from that litigation, after late 2012 was Schleining, albeit without prejudice.

13. The Steppan Lien Litigation then continued as previously described above, but with a stipulation in place staying the claims against Hale Lane, until Steppan's lien claims were resolved. As previously indicated, a Judgment was eventually entered against the Iliescus, which was then reversed on appeal, and finally released in 2018. (As soon as the Judgment was reversed on appeal, Hale Lane moved for summary judgment dismissal of the previously stayed third-party claims against it, which motion was granted and then appealed by the Iliescus, which appeal currently remains pending.)

C. <u>Second Suit and Its Voluntary Dismissal</u>.

The procedural history of the Second Suit can be briefly summarized as follows: In 2015,

during the pendency of the appeal from the Judgment in favor of Steppan on his lien claim, and before it was known whether that appeal would succeed, the Iliescus sought to revive or initiate certain claims by filing a new suit against persons who had been dismissed without prejudice from the Steppan Lien Litigation, to include certain of the individual attorneys at Hale Lane as well Schleining. This was the "Second Suit" as referenced previously herein. **Defendant's Exhibit 8**.

Most of the Defendants named in the Second Suit were dismissed, including based on a court order granting a motion to dismiss filed by certain of Schleining's co-defendants. *See, e.g.*, **Defendant's Exhibit 11**. Schleining appeared early in the Second Suit, in order to file a peremptory challenge of the judge first assigned thereto (**Defendant's Exhibit 9**), but never filed any Answer or Motion for Summary Judgment therein, and the claims against him were not dismissed at the time of his co-defendants' motion, with the case against him remaining dormant over the next few years. After the Iliescus prevailed in their appeal in the Steppan Lien Litigation, they attempted to revive and move forward with their Second Suit against Schleining. *See, e.g.,* **Defendant's Exhibits 13-17**. But the Iliescus' undersigned counsel ultimately became wary of doing so within the context of that case, for various procedural reasons. The Iliescus then voluntarily dismissed that Second Suit on or about August 29, 2018. **Defendant's Exhibit 18**.

The Motion to Dismiss describes these events using disparaging rhetoric, designed to prejudice this Court against the Iliescus, with respect to the purpose of the Second Suit and of its dismissal. Movant contends for example that the Iliescus were or are engaged in forum shopping, even though it was *Schleining* and *not the Iliescus*, who filed a peremptory challenge of the first department to whom the Second Suit was assigned, and even though the Iliescus did not then file their own peremptory challenge when the case was reassigned to the same department in which the Steppan Lien Litigation was then pending, and, indeed, sought to consolidate the Second Suit with that earlier litigation, which would also have brought the case within the purview of that same department.

However, none of these or the Movant's other disparaging assertions or innuendo matter at this time, as any question as to the reasons for voluntary dismissal of the Second Suit are wholly irrelevant: The Plaintiffs concede that the Second Suit was voluntarily dismissed under Nevada's

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equivalent to FRCP 41(a)(1), such that the only question to be reviewed by this Court is whether, at the time of that dismissal of the Second Suit, the Plaintiffs had already "once" or "previously" themselves "dismissed" an earlier action against Schleining (which they had not, said prior dismissal having been effected by an order entered by the court, not by the Iliescus, granting a motion filed by Schleining, not by the Iliescus, under NRCP 16.1, not under NRCP 41(a)).

As explained by the 9th Circuit in *Commercial Space Management Co. Inc. v. Boeing Co. Inc.*, 193 F.3d 1074, 1077-78 (9th Cir. 1999):

> It is well settled that under Rule 41(a)(1)(i), "a plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant of an answer or a motion for summary judgment." *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir.1997) . . . .
>
> . . . .
>
> Because the dismissal is effective on filing and no court order is required, the filing of a notice of voluntary dismissal with the court automatically terminates the action as to the defendants who are the subjects of the notice. . . . **The effect is to leave the parties as though no action had been brought.**
>
> . . . . Thus, it is beyond debate that a dismissal under Rule 41(a)(1) is effective on filing, no court order is required, **the parties are left as though no action had been brought, the defendant can't complain**, and the district court lacks jurisdiction to do anything about it.

Id. at 1077-78 [internal citations and quotations omitted; emphasis added]. *See also*, *Lerer v. District Court*, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995)(a Rule 41(a)(1) notice of dismissal is "a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court" [citations omitted]).

The Defendant's/Movant's disparaging rhetoric about the Second Suit and its dismissal is irrelevant. The only question before this Court is to determine the nature of the dismissal of the First Suit, as the Defendant had an absolute right to dismiss the Second Suit, and concedes that said dismissal was pursuant to NRCP 41(a)(1)(i). However, that second dismissal would only be with prejudice if the dismissal of the First Suit was *by the Plaintiffs*, under the concluding language of Nevada Rule 41(a)(1), the Nevada equivalent to Federal Rule 41(a)(1)(B). It was not.

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IV. LEGAL ANALYSIS

Whether or not the voluntary dismissal of a second suit against a defendant under Rule 41(a)(1) is with prejudice, as "on the merits" under Rule 41(a)(1), is governed by the text of that rule itself, and the nature of the first dismissal, even though that issue will only become ripe for determination once a third suit is filed. *Commercial Space Management Co. Inc. v. Boeing Co. Inc.*, 193 F.3d 1074, 1076 (9th Cir. 1999) ("once a notice of voluntary dismissal is filed, the district court in which the action is pending loses jurisdiction [and cannot rule] on whether the plaintiff's notice of dismissal in a second action is with prejudice or without prejudice. . . . Rather, Rule 41 itself prescribes the effect of Rule 41(a)(1) dismissals. Accordingly, whether the second voluntary dismissal is subject to the two dismissal rule such that it operates with prejudice as an adjudication upon the merits is an issue that becomes ripe (and can be determined) only in a third action, if and when one is filed.")

No question of fact exists herein with respect to whether or not the dismissal of the Iliescus' Second Suit against Schleining was a dismissal by Plaintiffs, via notice of voluntary dismissal, pursuant to the Nevada equivalent to FRCP 41(a)(1)(A)(i). Thus, the only dispositive question upon which this Court need rule in order to grant or deny the Motion to Dismiss is whether or not the Plaintiffs had themselves previously dismissed Schleining from the First Suit, so as to invoke the two dismissal rule as established by Nevada's equivalent to FRCP 41(a)(1)(B). They had not.

A. Dismissal is Not Warranted under the Plain and Actual Language of Rule 41(a)(1).

The Motion to Dismiss indicates that it is based on FRCP 41(a)(1)(B). However, the Second Suit was a state court case dismissed under *NRCP* 41(a)(1), and the issue is whether that dismissal is to be treated as on the merits and with prejudice, so as to bar this third suit. Thus, technically, the question now before this Court would more properly be worded as, whether the voluntary dismissal of the Second Suit, at the time it occurred, would be treated as a dismissal with prejudice on the merits, not under *FRCP* 41(a)(1)(B), but rather under *NRCP* 41(a)(1), which was invoked when the Second Suit, pending in Nevada, was dismissed, under that Nevada rule. Although this question only ripened when this third suit was filed, and although this third suit happens to be in Federal Court, disposition of Defendant's Motion would still be controlled by the facts and Nevada law applicable

as of the time the Second (Nevada) Suit was dismissed under Nevada's version of Rule 41(a)(1).

This is largely a distinction without a difference herein, given that the Nevada Rules of Civil Procedure are modelled on the Federal Rules, the relevant provisions of NRCP 41(a)(1) at issue herein are essentially identical to their federal rules counterpart, and given that Nevada courts routinely look to Federal decisions in ascertaining the proper construction and interpretation of Nevada's similar civil procedure rules, such that the outcome of this motion would be the same in either event. *See, e.g.*, *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005)("We have previously recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules"); *Lerer v. District Court*, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995)(citing Federal 5th Circuit case law under FRCP 41(a)(1) in regard to review of NRCP 41(a)(1) issues); *Venetian Macau Ltd. v. District Court*, 2016 WL 1092340 (Unpublished Disposition)(Nevada Supreme Court Docket No. 69090, March 17, 2016)(citing and applying Federal 9th Circuit case law under FRCP 41(a)(1) in reviewing construction of NRCP 41(a)(1) issues). *See also*, Footnote 4 to Defendant's Motion to Dismiss (noting that the two dismissal rule will only be applied after a state court dismissal if the state court has a rule similar to FRCP 41).

Nevertheless, to the extent that it may become important to be precise in regard to which version of Rule 41(a)(1) actually needs to be construed herein, it would be the pre-March 1, 2019 Nevada version, as Nevada would construe the same by looking to Federal case law (including but not limited to the Ninth Circuit) interpreting the Federal version of that rule.

The version of NRCP 41(a)(1) which existed at the time the Second Suit was voluntarily dismissed (having since been amended on March 1, 2019, to track the latest version of FRCP 41) read at that time as follows (in a manner which was highly similar to a prior version of the Federal version of the rule):

> **[NRCP] Rule 41. Dismissal of Actions**
>
> (a) *Voluntary dismissal: Effect thereof.*
>
> *(1) By Plaintiff; by Stipulation.* . . . an action may be dismissed by the Plaintiff upon repayment of Defendants' filing fees, without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment, which ever first occurs, or

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> (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that **a notice of dismissal** operates as an adjudication upon the merits when filed **by *a plaintiff* who has once dismissed** in any court of the United Sates or of any state an action based on or including the same claim.

NRCP 41(a)(1). [Effective between January 1, 2005 and February 28, 2019; emphasis of language creating the first and the second prerequisites to application of the two dismissal rule, as described above herein, added.]

Likewise, and essentially identical in concept if not in language, the relevant language of FRCP 41(a)(1)(A) and (B) currently reads in pertinent part as follows:

> **[FRCP] Rule 41. Dismissal of Actions**
>
> (a) *Voluntary Dismissal*.
> (1) *By the Plaintiff*.
> (A) *Without a Court Order*. . . . . the plaintiff may dismiss an action without a court order by filing:
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
> (ii) a stipulation of dismissal signed by all parties who have appeared.
> (B) *Effect*. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. **But if *the plaintiff* previously dismissed** any federal- or state-court action based on or including the same claim**, a notice of dismissal operates** as an adjudication on the merits**.**

FRCP 41(a)(1). [Emphasis of language creating the first and second prerequisites to the two dismissal rule, as described above, added.]

Under the plain language of both versions of this rule, it is clear that, for a second dismissal to be prejudicial as "on the merits" under the so-called "two dismissal" rule, so as to prohibit any third suit, (1) the Plaintiff must itself have previously dismissed the first suit (the first prerequisite, that the first dismissal must have been by Plaintiff); and (2) the second dismissal must also be by Plaintiff, but must solely be through a notice of dismissal, not via other means. In the present case, the first prerequisite is not met. Although the second prerequisite is met, which fact is not disputed, that is irrelevant. Both prerequisites must be met to bar a third suit.

It might also be noted that both FRCP 41(a) and the applicable version of NRCP 41(a), also contemplate, in their next subsection, Rule 41(a)(2), that a plaintiff may also seek dismissal via a "plaintiff's motion to dismiss" filed "at the Plaintiff's instance" or at "the plaintiff's request" on

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grounds the court determines to be proper. An order granting such a "plaintiff's motion to dismiss" will be without prejudice unless otherwise stated therein. Rule 41(a)(2) does not, however, end with language creating a two dismissal rule.

In the present case, *the Plaintiffs* had not, upon filing their notice of voluntary dismissal of the Second Suit, *themselves* previously dismissed their First Suit against Schleining. Said suit against Schleining was not for example dismissed via a notice of voluntary dismissal under NRCP 41(a)(1)(i); nor via a stipulation signed by Plaintiffs under NRCP 41(a)(1)(ii). Nor was the order dismissing Schleining obtained via a motion by Plaintiffs to voluntarily dismiss Schleining from their First Suit pursuant to NRCP 41(a)(2) (not that doing so would necessarily have mattered in any event). Rather, their First Suit against Schleining was dismissed, not by the Iliescus, but *by the Nevada state district court*, when it granted a motion seeking dismissal *filed by Schleining*, **not** *by the Plaintiffs*, which was therefore obviously not filed under NRCP 41(a)(2), but on the basis of NRCP 16.1(e)(2), as interpreted under the court's own Temporary Law of the Case, which was first established when that court granted a motion filed against, not by, the Iliescus, and which the court subsequently abandoned.

Thus, pursuant to the plain language of the Rule of Civil Procedure relied upon in the Motion, and under the undisputed facts of this case, the current Motion to Dismiss must be denied. Movant's Motion would be valid only if "the Plaintiff[s]" had *themselves* "once [or previously] dismissed" their First Suit against Schleining. They did not do so. The court did so, by granting a motion filed by Schleining, not by the Iliescus.

B. <u>No Authority Has Been Cited by Movant to Support His Novel Argument; But a Great Deal of Authority Exists to Reject it.</u>

(i) <u>Schleining Has Provided No Authority in Support of His Theory</u>.

Movant has cited no authority to support his proposition that the Iliescus' response to the Schleining Motion to Dismiss, conceding that that motion needed to be granted, to be consistent with the then extant (but subsequently abandoned) law of that case, means the Iliescus should be treated as "Plaintiff[s] who [had] once dismissed" that prior action, at the time they filed their dismissal of the Second Suit, under the language of NRCP 41(a)(1) applicable to his Motion.

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No Nevada case law seems to have ever indicated that a plaintiff's failure to fully oppose a prior motion to dismiss *filed by a defendant* which motion leads to an order of dismissal entered by the court, is somehow equivalent to the plaintiff having itself dismissed a prior action, for purposes of the two dismissal rule. If any Federal case law exists agreeing with Defendant's novel argument, Defendant has not cited it.

Beyond cases which describe the two dismissal rule generally, the only case which the Defendant's Motion seems to cite in support of the premise of that motion, is *Bala v. Bank of America, N.A.*, 2015 U.S. Dist. LEXIS 107434 at *13, Case No. CV-15-3305-MWF (C.D. Cal. 2015). In *Bala*, the court granted a motion to dismiss a fourth suit, where the plaintiffs indicated they had stipulated to the dismissal of their initial suit. However, no such stipulation for dismissal was signed herein. *Bala* simply makes no reference to the effect of a first dismissal by court order granting a *defendant's* motion. The case provides no support for the central premise of the Defendant's motion, that *a court order* granting a *defendant's motion* to dismiss may be twisted and construed into a prior voluntary dismissal by the plaintiff, depending on how the plaintiff responded to that motion. Nor does *Bala* even address that question.

The only quotation from *Bala* the Movant felt was significant enough to include in his Motion, merely states that the two dismissal rule makes no distinction between a stipulated or a noticed dismissal under Rule 41(a)(1) in the first action, but does require that the second action be only through a notice of dismissal. However, the First Suit at issue in the present matter was not dismissed by *either* a signed Rule 41(a)(1) stipulation, *or* by a Rule 41(a)(1) notice, and the method of dismissal of the Second Suit is not at issue herein.

(ii) <u>The Courts Have Rejected Schleining's Theory</u>.

The Ninth Circuit has indicated that an order granting a defendant-filed motion to dismiss a first lawsuit, without prejudice, would not be considered a dismissal by the plaintiff, so as to count against the plaintiff under the two dismissal rule, even if such a motion were brought on grounds the plaintiff was compelled to accept. In *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 727 (9th Cir. 1991), the Circuit upheld a Nevada U.S. District Court order dismissing a third lawsuit brought by a plaintiff whose first and second suits had both

been dismissed by the plaintiff's filing of notices of voluntary dismissal under NRCP 41(a)(1), and then under FRCP 41(a)(1), respectively. The Circuit rejected one of the plaintiff's subsequent appeal arguments, that its first dismissal should not count against it, so as to invoke the two dismissal rule, because the plaintiff had been compelled to file that notice of dismissal due to a Nevada statute which prohibited suits by non-Nevada registered foreign corporations, and which, under the Nevada case law applicable at that time, required dismissal of any suit so filed.[2] In rejecting this argument, the Ninth Circuit noted that the plaintiff's fate, and application of the two dismissal rule against it, could have been easily avoided, for example, "[i]f [the plaintiff] **had allowed *the defendants to move for dismissal*** [which] would have been **without prejudice** under Nevada law [if the proper procedures to ensure this treatment were then followed]. . . ." *Id.* [Emphasis added.]

Thus, according to this Ninth Circuit precedent, if the dismissal of a first suit were to take place **in exactly the same manner that the dismissal of the First Suit at issue herein *did in fact take place***, by a defendant "allowing" a defendant-filed motion to dismiss, then, according to the Ninth Circuit, the motion to dismiss the third suit would have been denied (exactly as Defendant Schleining's herein Motion to Dismiss should be denied). In other words, the very scenario actually involved in the present matter, a plaintiff allowing a defendant's motion to dismiss to be granted but without prejudice, has been utilized by the Ninth Circuit to illustrate the type of initial dismissal which will *not* count as a dismissal by plaintiff so as to implicate the two dismissal rule.

In explaining its reasoning for this assertion, the Ninth Circuit explained that the two dismissal rule applies only to voluntary plaintiff dismissals, meaning those obtained by a plaintiff under NRCP 41(a)(1) (*i.e.*, by a plaintiff either filing a notice of dismissal or signing a stipulation of dismissal under that subsection). *Id.* The motion to dismiss the First Suit at issue in this case, relied on by Schleining in his present Motion, was not filed by the Plaintiffs, but by the Defendant, and certainly did not involve any NRCP 41(a)(1) notice of dismissal or NRCP 41(a)(1) stipulations to dismiss, signed by the Plaintiffs.

[2] The Nevada Supreme Court would later rule that such suits could be held in abeyance pending a claimant's becoming registered, rather than dismissed. *See*, *Executive Management, Ltd. v. Tico Title Ins. Co.*, 38 P.3d 872, 118 Nev. 46 (2002).

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Similarly, the Fifth Circuit has also rejected the Defendant's argument raised herein. In *Hughes Supply, Inc. v. Friendly City Elec. Fixture Co.,* 338 F.2d 329, 330-31 (5th Cir. 1964), a case whose procedural history parallels the instant case, the plaintiff filed an initial suit in state court, and the defendants filed a motion to dismiss based on improper venue and other grounds. In response, the plaintiff was constrained to "necessarily assume" the improper venue arguments "to be meritorious" and therefore filed an admission of improper venue, which led to a court dismissal of that first action. The plaintiff then filed a second state court case, which the plaintiff later voluntarily dismissed. The plaintiff then filed a third suit, this time in federal court, which the defendants attacked under the two dismissal rule. The federal district court examined the Florida rule of civil procedure creating the two dismissal rule within that state (which, as footnote 1 to the *Hughes Supply* decision demonstrates, contained language which was essentially identical to the relevant portions of the version of NRCP 41(a)(1) at issue herein), and determined that the plaintiff's response to the defendant-filed motion was not a voluntary dismissal by the plaintiff thereunder, and therefore would not bar the third suit. The Fifth Circuit then upheld this ruling. *Id.*

(iii) <u>An Initial Dismissal By Court Order Granting a *Defendant* Filed Motion to Dismiss Is Not a Voluntary Plaintiff Dismissal for Purposes of the Two Dismissal Rule.</u>

Defendant, quoting a small sliver of 8 Moore's Federal Practice – Civil § 41.33[7][g] (2019), out of context, contends that the "plain language of Rule 41(a)(1)(B) indicates that any type of dismissal—by notice, stipulation, or court order—may qualify as the first dismissal under the two dismissal rule" so long as the "plaintiff . . . has 'previously' dismissed" the initial action. Motion at p. 7. However, this clearly means that the court order *must be procured by the plaintiff*, *not* by the defendant, and that is not what happened in this case.

Dismissal of an initial suit by court order which grants a motion not brought or initiated by the plaintiffs, simply does not count as a prior plaintiff dismissal, for purposes of the two dismissal rule. *See e.g. Dee–K Enterprises, Inc. v. Heveafil Sdn. Bhd.,* 177 F.R.D. 351, 355 (E.D.Va.1998) ("when, as here, the first dismissal was involuntary, that is, **when the plaintiff did not move for, stipulate to, or notice the dismissal**, the two-dismissal rule is **not** implicated.")[emphasis added]; *Loubier v. Modern Acoustics, Inc.*, 178 F.R.D. 17, 20-21 (U.S. Dist. Ct. Conn. 1998)(state court

dismissals by prior court orders, presumably *upon the court's own motion*, for want of prosecution, were not unilateral voluntary plaintiff dismissals, for purposes of invoking the two dismissal rule). Similarly, in the present action, the first dismissal was not by a Plaintiffs-filed notice of dismissal under NRCP 41(a)(1), nor by a Plaintiffs-signed stipulation of dismissal, under NRCP 41(a)(1), nor by a Plaintiff filed motion to dismiss, such as under NRCP 41(a)(2). Based thereon, the two dismissal rule was not implicated by the dismissal of the First Suit.

Indeed, it has been held that even a court order dismissing an initial suit, which *is* procured by a *plaintiff's* motion to dismiss will **not** count towards the two dismissal rule. This was the decision of the Eleventh Circuit in *ASX Investment, Corp. v. Newton*, 183 F.3d 1265, 1269 (11th Cir. 1999) which "conclude[d] the Rule 41(a)(1) two dismissal rule is not implicated where a first dismissal is **by a *plaintiff's motion* and order of the court**." [Emphasis added.]

The Ninth Circuit also agrees with the holding of *ASX*. In its *Lake at Las Vegas Investors* decision the Circuit noted, as part of its analysis of the first dismissal, and still under the heading related to that dismissal, that, in addition to waiting for the defendant to file a motion to dismiss, in order to avoid a first dismissal which might later count against it under the two dismissal rule, the plaintiff, "could have registered [as a foreign corporation in Nevada] and then moved to have its case dismissed pursuant to Rule 41(a)(2)" to avoid such treatment of its first dismissal. *Lake at Las Vegas Investors*, 933 F.2d at 727.

Given such rulings, Schleining's novel argument, that a court order granting a motion to dismiss, which is **not** even brought by the plaintiff, but *by the defendant,* should somehow be treated as counting as a first voluntary dismissal by a plaintiff under the two dismissal rule, is especially non-compelling. Schleining's extraordinary arguments raised herein, seek to broaden the scope of Rule 41(a)(1) far beyond what the language of that Rule, properly construed, would allow:

> In construing the two dismissal rule, we look to the plain language of the rule and read it as a whole, being mindful of the linguistic choices made by the drafters. We **take care not to construe the rule too broadly**, as it is an exception to the general principle, contained in Rule 41(a)(1) and honored in equity prior to the adoption of the Federal Rules, that a voluntary dismissal of an action does not bar a new suit based upon the same claim.
>
> The two dismissal rule does not state the specific means by which the first dismissal must have been obtained to implicate the rule. **It does, however, state the**

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> **rule is implicated when "a *plaintiff* ... has once dismissed" a claim**. Rule 41(a)(1), in which the two dismissal rule appears, provides for dismissal by a plaintiff without order of court by the filing of a timely notice of dismissal or a stipulation of dismissal signed by all parties. [The] last sentence [of that subsection] includes the two dismissal rule. There is no two dismissal rule set out in Rule 41(a)(2) [which discusses voluntary dismissal by plaintiff motion, rather than by plaintiff notice or stipulation] and **we see no basis for reading the two dismissal rule to apply where the first dismissal is achieved by motion and order of the court**. Although dismissal under Rule 41(a)(2) is, as the rule says, "at the plaintiff's instance," **the actual dismissal is by the court** and therefore does not implicate the Rule 41(a)(1) two dismissal rule.

ASX at 1267-68 [emphasis added; internal citations and quotation marks omitted].

Likewise, in the present case, Defendant seeks to have this Court read the provisions of the rule "too broadly" even though a narrow reading is more appropriate, based on the historical basis for the Rule. Also, as in *ASX*, dismissal of the First Suit was "by the court" not by the Plaintiffs, herein.

Moreover, unlike in *ASX*, the motion granting dismissal of Schleining from the First Suit in the instant case was not even filed by the Plaintiffs, such that Schleining's arguments are far weaker and less compelling than even the defense arguments which were *rejected* in *ASX*. In this case, the defendant, not the plaintiffs, filed the motion to dismiss the First Suit, and did so under NRCP 16.1(e)(2), and not under Rule 41(a)(2). Thus, this Court need not even reach the question of whether it agrees with the *ASX* outcome, to nevertheless recognize that the Movant's extraordinarily broad reading of Rule 41 (far broader than that sought by the *ASX* defendant), is unsupportable and must be rejected herein.

No case law appears to support Schleining's contention, that a mere concession by plaintiff that a defendant's motion to dismiss an initial suit will need to be granted under the law, means that the plaintiff has itself voluntarily dismissed that suit, for purposes of the two dismissal rule. Instead, at least two federal circuits have expressly rejected that contention, and the thrust of other cases would likewise require its rejection.

C. <u>This Court Should Not Countenance any Departure from the Actual Language of Rule 41(a)(1)</u>.

Defendant's Motion essentially seeks to rewrite that portion of the language of Rule 41(a)(1) which establishes the first prerequisite to dismissal of this case, so that, instead of saying what it

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actually says, its relevant language would instead be read as follows: . . . *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has ~~once dismissed [/previously dismissed]~~* ***ever had a prior case*** *in any court of the United States or of any state based on or including the same claim,* ***dismissed by the court via an order granting a motion to dismiss filed by the defendant which the plaintiff failed to oppose, or agreed was legally required***.

But that is not what the Rule says, and the Defendant's invitation for this Court to engage in such rewriting of the actual language of the Rule, is not supportable. For example, in *Sutton Place Development, Co. v. Abacus Mortgage Investment, Co.*, 826 F.2d 637 (7th Cir. 1987) the Seventh Circuit court reversed a district court ruling which had dismissed a third lawsuit, under the "two dismissal" rule, even though the Plaintiffs had dismissed the second suit via a motion for voluntary dismissal, and not by notice, as the second prerequisite to invocation of the two dismissal rule requires. The district court had therefore essentially stricken and rewritten the language of the Rule which creates that second prerequisite, reasoning that, as both of the prior dismissals were initiated by the plaintiffs, the second dismissal should be treated as essentially equivalent to a notice of dismissal, since refusal to apply the two dismissal rule would permit plaintiffs to circumvent the policy of the rule by moving to dismiss rather than simply filing a notice of dismissal.

Even if this reasoning were correct, it would not have applied to dismiss *this* case, where the Plaintiff did not initiate the motion of dismissal of the First Suit. But this reasoning was not correct, and was rejected and reversed by the appellate court, the Seventh Circuit explaining that the district court was not free to ignore the actual language of Rule 41, in order to elide one of the prerequisites to application of the two dismissal rule established thereby: "There is no question that, if this case were decided according to the precise language of Fed.R.Civ.P. 41(a)(1), the action of the district court in dismissing the appellant's case could not stand. By its own clear terms the 'two dismissal' rule applies only when the second dismissal is by notice under Rule 41(a)(1). It does not apply to a [second] dismissal by stipulation . . . nor to a [second] dismissal by court order under [a motion for voluntary dismissal pursuant to] Rule 41(a)(2)." *Id.* at 640 [internal citations and quotation marks omitted; clarifying bracketed language added].

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In the present case, the alteration to, and new and novel misreading of, Rule 41, sought by Movant is not the same as the misreading which was improperly utilized by the district court in the *Sutton Place* decision. In this case, the Movant seeks to ignore, rewrite, and broaden that language of Rule 41 which establishes the first, rather than the second, prerequisite to the two dismissal rule. Nevertheless, this creative re-write should also be rejected herein, and on the same grounds.

As the *Sutton Place* decision explained: "it must be remembered that the federal rules are carefully-crafted instruments designed to achieve, by their uniform application, fairness and expedition in the conduct of federal litigation. Therefore, when a party contends that a court should disregard the express language of a carefully-drawn rule of procedure, **that party bears a heavy burden** of showing that a departure from the plain language is justified. That burden is especially heavy in the case of the 'two dismissal' rule because, by disregarding the plain wording of the rule, the court also disregards the **over-arching policy concern of the federal rules in favor of a decision on the merits**." *Id*. [Emphasis added.] Moreover, the circuit explained: "the two dismissal rule is an exception to the general principle, . . . honored in equity prior to the adoption of the federal rules, that a voluntary dismissal of an action does not bar a new suit based upon the same claim. . . . We should be especially careful **not to extend the scope** of such **a narrow** exception when the purpose for the exception would not be served." *Id*. [Emphasis added; internal citations and quotation marks omitted.]

Similarly, in this case, the language of Rule 41 should not be broadened, nor its scope extended, and for the same reasons. Furthermore, the *Sutton Place* court noted that that purpose of the two dismissal rule, which created an exception to the prior rule in equity, "is to prevent unreasonable abuse and harassment." (This does not mean that it is necessary for a movant to demonstrate abuse and harassment as an element of a motion to dismiss brought under the two dismissal rule, in a case where the first two dismissals "fall squarely within the rule" but rather, that where a movant seeks a broader reading of the rule, than the language of Rule 41(a)(1) would allow or suggest, one of the many reasons why such a broad interpretation should be rejected, is if it would not advance the purpose of the rule, which is to avoid such abuse and harassment. *See, e.g., Lake of Las Vegas Investors,* 933 F.2d at 727.)

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It can hardly be said, in the present case, that Defendant Schleining was subjected to unreasonable abuse and harassment, because of the First Suit against him having been dismissed, instead of his remaining as a third-party defendant therein during the many subsequent years that the Steppan Lien Litigation was pending, given that *he himself initiated* the process which led to that dismissal, *he himself* filed the motion seeking that dismissal, in which *he himself requested* that dismissal, and given that *he himself* did not object to that dismissal being without prejudice. Moreover, Schleining then managed to stay out of that case for the duration of its lengthy subsequent history, even though the claims against his co-third party defendant, Hale Lane, dismissed on exactly the same (erroneous and subsequently vacated) grounds, was later reinstated, and the claims against him were not. That's not abuse and harassment of Schleining, that's great good fortune enjoyed by Schleining.

Nor can it be contended herein that Schleining suffered abuse and harassment during the Second Suit (even were that a relevant question, which it is not), or as a result of the existence or dismissal of that Second Suit, given that, during its pendency, he himself never sought any adjudication of that suit, and never incurred substantial attorneys' fees to take discovery or file dispositive motions (or even to file an answer); and given that, pursuant to the mandates of the Nevada version of NRCP 41(a)(1)(i) then in effect, Schleining's filing fees incurred in entering an appearance and filing a peremptory challenge were repaid to him in conjunction with the filing of the notice of voluntary dismissal of the Second Suit.

If there is a case where the equities would favor broadening the Rule's plain language, in favor of preventing a third suit, this case (in which the first suit was dismissed on the basis of legal reasoning which was so erroneous that the same judge who developed it later abandoned it) isn't it. Defendant's efforts to broaden the scope of Rule 41(a)(1), so that "plaintiff[s]" can be construed to have "once [or previously] dismissed" their First Suit, even though that did not actually happen, must be rejected.

The Plaintiffs in this suit did not sign an NRCP 41(a)(1) notice of voluntary dismissal of their First Suit; they did not file an NRCP 41(a)(1) stipulation to dismiss their first suit; and they did not file a motion to dismiss their first suit, including under NRCP 41(a)(2)(not that it would necessarily

matter if they had). In short, the First Suit was not dismissed by Plaintiffs, but was dismissed by the court, via the granting of a motion filed by Defendant, on the basis of (erroneous and subsequently vacated) legal reasoning which was first developed when the court granted and earlier Defendant's prior motion against the Plaintiffs. Under these circumstances, the two dismissal rule simply does not apply.

V. CONCLUSION

For the reasons set forth above, the Defendant's Motion to Dismiss should be denied.

DATED this 3rd day of April, 2019.

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 3rd day of April, 2019, service was made by the following mode/method a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT** to the following person(s):

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