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TARRANT COUNTY
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THOMAS A. WILDER
DISTRICT CLERK

CAUSE NO. 067-270669-14

JAMES MCGIBNEY, and VIAVIEW, INC.,	§	IN THE 67th JUDICIAL
Plaintiffs,	§	
v.	§	DISTRICT COURT
THOMAS RETZLAFF, LORA LUSHER, JENNIFER D'ALLESANDRO, NEAL RAUHAUSER, MISSANNONEWS AND DOES 1 - 5	§	
Defendants.	§	TARRANT COUNTY, TEXAS

PLAINTIFFS' RESPONSE TO DEFENDANT'S REQUEST FOR A FOURTH EXTENSION

This Motion is brought by James McGibney and ViaView, Inc., Plaintiffs, who show in support:

Background

(A) Defendant mischaracterizes the purpose of the briefing

1. Defendant is incorrect in his assertion that this Court originally ordered briefing on the issues of fees *and sanctions* to be submitted by February 11, 2019. The Court, in its oral order, did set a February 11, 2019 deadline for briefing and settlement attempts, but the briefing was only to be on the issue of attorney's fees, in accordance with the mandate from the Court of Appeals, which states only that they, "**remand this case to the trial court to conduct a hearing on attorney's fees consistent with this opinion**." (*See* Mandate Accompanying Order of April 19, 2018 — *McGibney v. Rauhauser*, 549 S.W.3d 816 (Tex. App. 2018), attached as Exhibit A) The *only* mention of sanctions in the Court of Appeals' mandate is included in its list of the numerous **portions of the judgment that were vacated**, as follows, "We vacate the portions of the trial court's judgment regarding the imposition of non-monetary sanctions, the $150,000

sanctions award, the "willfulness and maliciousness" findings, and the improper conditioning of appellate attorney's fees." *Id*. No part of the mandate asks this Court to hear arguments regarding sanctions. The sanctions award was quite explicitly vacated, with no instruction to reinstate it.

(B) The briefing deadline has already been extended three times

2. Plaintiffs note that the original briefing deadline was first postponed from February 11, 2019 to April 30, 2019, by agreement. The deadline was extended *again* to May 30, 2019, in consideration of Mr. Dorrell's medical condition. When Defendant could not meet this deadline either, Plaintiffs **agreed to a *third* extension**, to June 10, 2019, out of continued consideration for Mr. Dorrell's medical condition. Plaintiffs could not dream of opposing counsel failing to take precautions to ensure that he could meet this deadline rather than having to request **a fourth extension**. Plaintiffs likewise could not imagine this Court granting yet another extension without agreement of the parties, and Plaintiffs therefore dutifully filed their brief and controverting affidavit in a timely fashion.

Argument

(C) Plaintiffs will be prejudiced by a fourth extension

3. Plaintiffs note that their controverting affidavit is over 100 pages long and it breaks down Mr. Dorrell's billing practices in excruciating detail. Plaintiffs spent immense effort in analyzing opposing counsel's billing records, while keeping in mind each of the **eviscerating criticisms** levied by the Court of Appeals against these records and Mr. Dorrell's billing practices. Opposing counsel now has Plaintiffs' controverting affidavit and, on information and belief, is **planning to rewrite his invoice and fee affidavit,** and proposes *an additional month* to write his brief after having seen Plaintiffs' controverting affidavit.

4. No. That ship has sailed. This case is far beyond the point of submitting new evidence **or rewriting existing evidence**. And for Defendant to claim that he is prejudiced by his attorney's

failing health is nonsensical—Defendant has shown no signs of involvement in this case in years. Moreover, there is no dispute that Mr. Dorrell's engagement letter states that this case would be handled *on contingency* and therefore Defendant Rauhauser has not, in fact, even incurred any fees. During our last status conference, the mere suggestion by Plaintiffs of Rauhauser appearing as a witness at the fee hearing was met with vehement opposition.

5. Defendant and his counsel have been aware of Mr. Dorrell's medical condition for several months. Mr. Dorrell is a partner in a firm with several other attorneys who have been aware of this case for many years. Plaintiffs are sympathetic to Mr. Dorrell's medical condition, but further medical complications should have been clearly foreseeable by Defendant, or his counsel, and precautions should have been taken long ago to ensure that deadlines were met.

Prayer

6. Plaintiff McGibney has been living with the proverbial Sword of Damocles over his head for long enough. In footnote 33 of the Court of Appeals' opinion, the Court said, "[W]e will leave it to the trial court to do its job by performing the necessary review of the remainder of the billing evidence to determine which charges are "moderate or fair" in this case." *Id*. Plaintiffs implore the Court to do exactly that. Plaintiffs pray the Court deny Defendant's request for a fourth extension and move forward with a hearing on the issue of attorney's fees, as well as for any other relief to which Plaintiffs may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on Defendant on June 19, 2019 in accordance with the Texas Rules of Civil Procedure.

Exhibit A

Mandate from Court of Appeals

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

MANDATE

THE STATE OF TEXAS

To the 67th District Court of Tarrant County, Greetings:

On April 19, 2018, the Court of Appeals for the Second District of Texas affirmed in part, reversed in part and vacated in part your judgment in the following case:

James McGibney and ViaView, Inc. v. Neal Rauhauser, No. 02-16-00244-CV (067-270669-14).

The Court of Appeals entered the following judgment or order:

> This court has considered the record on appeal in this case and holds that there was error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed in part and reversed in part. We affirm that some amount of attorney's fees should be awarded to Neal Rauhauser, but we reverse the trial court's judgment as to the amount of attorney's fees awarded and remand this case to the trial court to conduct a hearing on attorney's fees consistent with this opinion. We vacate the portions of the trial court's judgment regarding the imposition of non-monetary sanctions, the $150,000 sanctions award, the

"willfulness and maliciousness" findings, and the improper conditioning of appellate attorney's fees.

It is further ordered that Appellee Neal Rauhauser shall pay all of the costs of this appeal, for which let execution issue.

Accordingly, we command you to observe the order of the Court of Appeals.

BY ORDER OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS, with the seal thereof annexed, at the City of Fort Worth, on November 20, 2018.

COURT OF APPEALS
OF THE STATE OF TEXAS

DEBRA SPISAK, CLERK

Debra Spisak