

**CASE NOS: 11-15646, 11-15761**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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GERALD HESTER,  
*Plaintiff-Appellee/Cross-Appellant,*

v.

VISION AIRLINES, INC.,  
*Defendant-Appellant/Cross-Appellee.*

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Appeal from the United States District Court of Nevada  
Civil Case No. 2:09-CV-00117 RLH (Hon. Roger L. Hunt)

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**RESPONSE AND INITIAL BRIEF ON CROSS-APPEAL OF  
PLAINTIFF/APPELLEE/CROSS-APPELLANT**

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## **SUPPLEMENTAL STATEMENT OF JURISDICTION**

The District Court entered final judgment on February 22, 2011, which did not include punitive damages, per the District Court's Order of November 8, 2010 (SER-44). The Class timely filed its Notice of Cross Appeal on March 28, 2011 (DE-279). Otherwise the Class agrees with Vision regarding jurisdiction.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Can Vision Airlines, Inc. ("Vision") demonstrate that the District Court abused its discretion and set aside the default judgment where Vision's culpable conduct led to the entry of the default?
2. If so, are the well-pled allegations in the Complaint sufficient to raise the Class' right to relief above the speculative level?
3. Did the District Court abuse its discretion in certifying the Class?
4. Did the District Court err in denying the Class' claim for punitive damages?

## **STATEMENT OF THE CASE**

A wrongdoer should not profit from his misdeeds. Yet that is what the present appeal by Vision seeks to do – to allow Vision to evade

responsibility for its egregious discovery violations, where it withheld and destroyed key documents that would have laid bare its deceitful, unlawful conduct. As the District Court held, during numerous proceedings, “and in various other court documents, Vision . . . represented to the Court that it had completed its discovery obligations by delivering all responsive documents that Vision could access to the Class. These assertions turned out to be false” (SER-34).<sup>1</sup> Rather, “Vision did not act to preserve documents when this litigation began” and “some of Vision’s officers continue, even now, to erase email” relevant to the litigation, and intentionally destroyed other critical documents (SER-39). The District Court concluded that, “the above clandestine actions and misrepresentations are representative of Vision’s conduct, but are only a portion of Vision’s discovery abuses,” (SER-34), which “ensure[d] that an accurate and fair trial on the merits of this case will never happen” (SER-38).

Despite the length of this Answer Brief – necessitated only by Vision’s inclusion of many meritless arguments in its Opening Brief, and exclusion of many key facts – the Class can summarize this case in a few sentences. The Class members are pilots and flight attendants hired to support the United States Government (“Government”) by flying dangerous

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<sup>1</sup> SER refers to the Class’ supplemental record excerpts.

air transport missions into and out of the war zones in Iraq and Afghanistan. The Government did not hire the Class members directly; rather it contracted with various companies, who then subcontracted with Vision, who in turn hired the Class members. The upstream contractors provided Vision with funds for both base pay and hazard pay (the latter to account for the danger the Class members faced), and expected Vision to pay its pilots and flight attendants both. In fact, Vision even specifically invoiced the upstream contractors for the hazard pay. Instead of paying the Class the hazard pay, Vision quietly stuck the hazard pay – amounting to many millions of dollars – into its own pocket. Plaintiff Gerald Hester (“Hester”) brought this Class action on behalf of himself and the other Class members to recover the hazard pay due them.

However, Vision’s chicanery continued. In a flagrant abuse of the discovery process – and in defiance of multiple Court orders – Vision refused to produce numerous categories of documents, despite acknowledging responsive documents existed. Those documents would have conclusively exposed Vision’s scheme, rather than forcing the Class to prove the truth by other, more indirect means. After repeated warnings and affording Vision multiple opportunities to comply with its orders, the District Court ultimately sanctioned Vision for its violations by striking its

Answer. Hamstrung by Vision's abusive litigation tactics, the Class nevertheless soldiered on and presented its damages case to a jury, which awarded the Class approximately \$5 million – less than what the documents withheld or destroyed would have demonstrated the Class was actually owed.

On appeal, Vision does not seriously try to defend its indefensible litigation misconduct (it merely restates its baseless excuse about “national security concerns”). Instead, it contends, that the District Court's remedy was too harsh. That is wrong, as a complete recitation (rather than Vision's selective presentation) of the facts demonstrates. The District Court considered various alternative sanctions and acted well within its ample discretion in fashioning the appropriate sanction for Vision's misconduct.

Vision also lodges a variety of attacks on the pleading sufficiency of the Complaint, all predicated on Vision's fundamentally flawed assertion that Hester had an employment contract with Vision, and thus the Class is precluded from asserting equitable claims. Vision also repackages this faulty assertion to attack class certification. None of these arguments has merit.

The District Court was not too harsh on Vision – indeed in one respect it was too gentle. It erroneously precluded the jury from awarding punitive damages against Vision, a legal error this Court should remedy. Apart from

the punitive damages ruling, the District Court's rulings were carefully considered and justified, and certainly do not reflect an abuse of discretion.

## **STATEMENT OF THE FACTS**

### **A. Facts As Alleged In The Complaint.**

From approximately May 1, 2005, Vision operated, under subcontracts, flights to Kabul, Afghanistan and Baghdad, Iraq using 737 and 767 aircraft (ER-383). Funding for the program, known as the Air Bridge, came from the Government (for whom these services were provided) through one of several upstream contractors (depending on the timeframe, including Capital Aviation, Inc., ("Capital"), Computer Science Corporation ("CSC") and/or McNeil Technologies, Inc. ("McNeil")) (*See* ER-387-88, 391, 393). During the time that Vision operated these flights into and out of Kabul and Baghdad they were active combat zones with attendant risks to slow, large commercial airliners from missiles and ground fire (ER-384).

The contractors above Vision paid it hazard pay on behalf of the Class members (ER-382-83, 387-95, 399-400). Pursuant to the contracts between Vision and the upstream contractors, Vision committed, and was required, to pay the Air Bridge flight deck and cabin crews the hazard pay it collected on their behalf because they were the individuals who took the risks in

operating the flights (*Id.*). The hazard pay was earmarked specifically for the Class and was paid for the Class' benefit (ER-382-83, 385-95, 399-400).

The Government provided funds "in the following manner: (1) payment for air transport services to Baghdad and Kabul twice weekly; and (2) hazard pay for the crew members on the flights to and from Baghdad and Kabul." (ER-387-88). Capital provided Vision with a specific sum per week in hazard pay meant for Vision's Air Bridge crews (ER-390). Later, once McNeil took over the Government contract, Vision collected a specific sum per week in hazard pay from McNeil, which the Government provided to McNeil for the benefit of, and payment to, Vision's Air Bridge employees (ER-393). Instead of paying its employees the hazard pay it collected on their behalf and for which they risked their lives, Vision wrongfully retained it for its own benefit (ER-382-83, 393, 399, 403).

**B. Additional Facts Established Prior To Or At Trial.<sup>2</sup>**

The Air Bridge flights to Kabul required the aircraft to fly a tight approach between a narrow opening in a mountain range, exposing the aircraft to attack from ground fire and rocket propelled grenades (DE-135-3 at 36-37). To avoid attack, the Air Bridge crews flew into Kabul at night without any cockpit lighting (DE-135-5 at 31). These crews routinely

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<sup>2</sup> Despite Vision's discovery violations, the Class developed some evidence through subpoenas and depositions of third parties.

encountered hazardous conditions (DE-135-3 at 37-38). For example, after landing in Kabul, an Air Bridge captain was informed by military personnel that a rocket attack at the airport was imminent and that he had fifteen minutes to either move his passengers and crew to a bomb shelter or leave (*Id.*).

The Air Bridge flights to Baghdad were equally hazardous (DE-135-4 at 28-29). The crews employed certain procedures to reduce their risk of being shot down (DE-135-4 at 26-37, DE-135-5 at 32). They routinely witnessed explosions and light arms fire on the ground as they arrived and departed Baghdad (DE-135-5 at 32-33).

In each phase of the Air Bridge,<sup>3</sup> Vision collected hazard pay on behalf of the Air Bridge crews (DE-135-21). Hazard pay was allocated for the Class and paid to Vision on its behalf by the upstream contractors (DE-135-1 at 33). CSC's corporate representative testified that Vision was expected to pay the Air Bridge crews the full amount of salary and hazard pay identified on Vision's bid and incorporated into the Government contract (DE-135-1 at 22-37). Had she learned that Vision was not doing so,

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<sup>3</sup> The Air Bridge Program is divided into four phases that correspond with the following time periods: Phase I – June 2005 – April 30, 2006; Phase II – May 1, 2006 -- July 14, 2006; Phase III – July 15, 2006 -- July 31, 2007; and Phase IV August 1, 2007 -- July 31, 2011. Capital and CSC were the upstream contractors in Phases I-III, and McNeil filled that role in Phase IV.

she would have reported that to her management as “possible ethics violations” (DE-135-1 at 37).

Nonetheless, throughout the Air Bridge, even though Vision invoiced for and collected hazard pay on behalf of its Air Bridge employees, it retained those funds and did not pay them to the Class members (DE-135-23 at 4-8, DE-135-24 at 4-6). In fact, as Vision’s own Air Bridge Program Manager testified, Vision intentionally excluded payment of hazard pay in the Class’ wages (DE-135-5 at 96-97). In Phases II through IV of the Air Bridge,<sup>4</sup> Vision collected a total of \$4,509,268 in hazard pay, all of which it failed to pay to the Class (SER-49, 55-56).

#### **STATEMENT OF THE PROCEDURAL HISTORY**

Hester filed the Complaint on January 20, 2009 (ER-413). The next day, Hester sent Vision a letter requesting Vision confirm it “implemented an effective litigation hold on all materials relevant to matters set forth in the Complaint styled *Gerald Hester v. Vision Airlines, Inc.*, Case No. 2:09-CV-00117, and all other discoverable materials in its possession, custody or control . . . .” (DE-180-39).<sup>5</sup>

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<sup>4</sup> The Class was unable to prove its damages for Phase I of the Air Bridge because Vision never produced the documents necessary to make those calculations.

<sup>5</sup> For the sake of brevity, the Class presents a summary of Vision’s discovery misconduct. A complete recitation is found in the Class’ Motion for Sanctions (SER-213-42).

**A. Vision From The Outset Fails To Offer Any Evidence In Support Of Its Claim That This Case Involves Sensitive National Security Information.**

Vision requested that the Complaint be sealed because it allegedly contained confidential national defense information (DE-6). The Class joined in a Motion to Temporarily Seal the Complaint based on Vision's representations, subject to Vision providing the Court with evidence supporting its assertions (*Id.*). After Vision failed to provide any support for its claim, the District Court *sua sponte* unsealed the Complaint (DE-16).

**B. Vision Attempts To Defeat Class Certification By Withholding Discovery.**

The Court entered a Scheduling Order, requiring that Class certification and merits discovery proceed simultaneously and that the Class file its motion for class certification on or before July 31, 2009 (DE-44). Vision refused to provide discovery based on the State Secrets Privilege and "the *Reynolds* doctrine" (DE-180-41).

Hester filed a Motion for Enlargement of Time (DE-50) and an Emergency Amended Motion for Enlargement of Time (DE-61 at 3) ("Vision is engaged in an effort to delay and deny Plaintiff discovery, in the hope that it can run out the clock for class certification and force Plaintiff to file his motion without the benefit of any meaningful discovery

whatsoever.”). Vision opposed both (DE-57, 62). Despite the lack of discovery, the Class timely filed its Motion for Class Certification (DE-63).

**C. Vision Asserts The State Secrets Privilege In Withholding Documents From The Class After the Magistrate Judge Directs That It May Not Do So.**

The Class filed its Motion to Compel on June 9, 2009 (DE-49). The Magistrate Judge heard the Class’ Motion to Compel on October 23, 2009 (SER-1-7). During that hearing, Vision represented to the Court that “there is no hazard pay” (SER-3-4). Based on Vision’s false representation, the Magistrate Judge stated that the Class is “talking about a fishing expedition for discovery here” (SER-5). The Magistrate Judge also overruled Vision’s use of the State Secrets Privilege in response to producing documents (SER-7). The Court denied the Motion to Compel and ordered the parties to confer further (SER-6).

**D. Vision Reneges On Its Promise To Produce Documents In Response To The Class’ Narrowed Requests.**

During the exhaustive meet and confer process (DE-93-10-19), the Class agreed to hold a number of its document requests in abeyance in order to expedite Vision’s production, and narrowed its remaining document requests (SER-189) (“Narrowed Requests”). Vision agreed to produce all documents responsive to the Narrowed Requests (DE-93-10). During the last conference on December 18, 2009, Vision reaffirmed this agreement and

that it would produce documents on a rolling basis and complete its production no later than January 7, 2010 (DE-93-16).

Vision did not produce any documents responsive to the Narrowed Requests by January 7, 2010 (DE-93-17-18). On January 20, 2010, the Class filed its Renewed Motion to Compel (SER-184), and Vision responded, admitting, “Defendant VISION agreed to produce all items responsive to these narrowed requests which existed and were in Defendant Vision’s possession” (DE-98 at 3).

**E. Vision Refuses To Produce The Documents Responsive To The Narrowed Requests Even After Ordered By The Magistrate Judge.**

The Magistrate Judge heard oral argument on the Class’ Renewed Motion to Compel (SER-8) on March 2, 2010. During that hearing, Vision informed the Court that the delay in its document production was because its records were kept “very poorly” (SER-12). The Magistrate Judge told Vision that there “needs to be complete, the production. . . .” (SER-15). The Court explained to Vision’s counsel that “you just need to speak [with] your client and let them know that they got – they got to move forward on this” (SER-16). With respect to the Class’ Renewed Motion to Compel, the Magistrate Judge stated, “I’ll rule on the motion right away – the renewed motion, and give you that – that help there” (SER-15).

**F. Vision Refuses To Produce Discovery The Class' Expert Needed To Complete His Damages Calculations, Which Requires The Class To Pursue Third-Party Discovery.**

In mid-April, the Class was forced again to file a Motion to Extend Time because its expert was “unable to complete his expert report by the April 29, 2010 deadline, because he d[id] not have all of the documents necessary to complete his report” (DE-110 at 3). Vision opposed it, seeking strategic advantage from its ongoing obstruction of discovery (DE-111). In an effort to obtain discovery withheld by Vision, the Class served third-party McNeil with a subpoena for documents (DE-180-43). Shortly thereafter, McNeil filed a Motion to Quash the Class’ subpoena in the District Court for the Eastern District of Virginia (Case No. 1:10-MC-00021-GBL-TRJ). Finally, after approximately three months of vigorous litigation (SER-220-21), the Class obtained an affidavit from William Vigil, McNeil’s Air Bridge Program Manager, and a heavily redacted version of Vision’s Aircraft Quote, a critical document prepared by Vision and submitted by McNeil (but never produced by Vision to the Class) to the Government (DE-135-21).

**G. Vision Refuses To Comply With The Magistrate Judge’s And District Court’s Orders To Produce All Documents Responsive To The Narrowed Requests.**

The Magistrate Judge issued his written order granting the Class’ Renewed Motion to Compel on September 10, 2010, and ordered Vision to

complete its document production responsive to the Narrowed Requests by September 17, 2010 (DE-152). The day after the Magistrate Judge's order, the Class noticed a Rule 30(b)(6) deposition to determine what efforts Vision undertook to search for, produce, and preserve documents (DE-177 at 2). Vision never appeared for that deposition (D.E. 165). Vision filed an Objection to the Magistrate Judge's Order Granting the Class' Renewed Motion to Compel stating that it "provided production pursuant to the agreed upon narrowed requests" (DE-158 at 11). The Class responded that it was, "missing, among other things, all of the Air Bridge Program flight logs for 2010, at least 24 written modifications to the [McNeil] contract, communications and e-mails relating to the McNeil Phase of the Air Bridge Program, Vision's Aircraft Quote that it submitted to McNeil for the McNeil Phase . . . and James Maguire's calculations of Vision's 2007 pay scale . . ." (DE-160 at 2).

The District Court rejected Vision's objections and affirmed the Magistrate Judge's Order on September 21, 2010 (DE-172). As of that date, Vision had not produced a single new or non-redacted document to the Class (DE-177 at 2). Nonetheless, Vision did not comply with the Court's Order. On September 29, 2010 – a week after affirming the Order to compel – the Court held its pretrial conference (DE-179). The Court heard argument on

Vision's failure to comply with that Order, and issued another written order, directing Vision in no uncertain terms to "comply with the order to compel discovery forthwith." (*Id.*) (emphasis in original.)

**H. Vision's Open Defiance Of Court Orders Forces The Class To File Its Motion For Sanctions.**

Yet another week passed without Vision's compliance. On October 5, 2010, the Class filed its Motion for Sanctions (SER-213-42). The Class noted that Vision failed to produce all documents responsive to the Narrowed Requests (SER-218-19); failed to produce an adequately prepared 30(b)(6) representative to testify about its efforts to gather and preserve responsive documents (SER-221-23); unilaterally redacted pertinent documents (SER-223-26); and failed to preserve crucial documents (SER-227-233). On October 8, 2010, the Court entered an Order to Show Cause stating: "The Court believes that Vision's conduct has interfered with the Court's ability to hear this case, delayed litigation, disrupted the Court's timely management of its docket, wasted judicial resources, and threatened the integrity of the Court's orders and the orderly administration of justice" (SER-18). The Court set an expedited briefing schedule on the Class' Motion for Sanctions and scheduled a hearing for two weeks later (*Id.*).

Vision filed its Response to the Class' Motion for Sanctions and represented to the Court that it "provided production pursuant to the agreed

upon narrowed requests” (DE-184 at 4). Vision filed a Supplement in Support of its Opposition, in which it stated that “[o]n October 15, 2010, Defendant VISION shipped via Federal Express to Counsel for the Class the balance of its remaining discovery consisting of Bates Stamped flight logs for 2010, Bates Stamped Payroll from ADP and a letter from ADP denying Defendants request for such payroll data in native (raw) form as impossible . . . This completes Defendant VISION’S production pursuant to Plaintiff’s Request for Production and the later Order to Compel” (DE-186 at 2).

The Class filed its Reply in Support of its Motion for Sanctions alleging that Vision misrepresented the status of its production to the Court (SER-246-52). Vision filed its Second Supplement and attached a letter sent to the Class dated October 22, 2010 purporting to include “Funding Modifications for McNeil” and “Interim reviewed financials” (DE-188 Ex. 1 at 1). Vision again falsely informed the Court that “[t]his completes Defendant VISION’S production pursuant to Plaintiff’s Request for Production and the later Order to Compel” (DE-188 at 2).

**I. The District Court Sanctions Vision And Strikes Its Answer For Failing To Comply With Numerous Discovery Orders And For Its False Representations.**

The District Court heard oral argument on the Class’ Motion for Sanctions on October 25, 2010 (DE-189). At that hearing, Vision again

represented to the Court that “everything that we have has been provided” (SER-22). The Class demonstrated that there were numerous categories of documents responsive to the Narrowed Requests that Vision did not produce. Citing one important example, the Class showed the Court a document Bates labeled SUPP001, a heavily redacted version of which was produced by Vision, which itself was page 20 of a larger document that set forth Vision’s obligations under the Air Bridge contract (SER-23-24). The District Court ordered Vision to produce a non-redacted copy of the document SUPP001 by the end of the day (SER-25).

With respect to certain Air Bridge funding modifications and bid proposals, Vision represented to the Court that, “nothing in these things relate to the pilots per se. We’re talking about other issues in here.” (SER-26) In response, the Court stated that Vision’s “history in this case does not give either the plaintiff or the Court a great deal of confidence that what they’re telling us is accurate. Then they say this is all there is when, in fact, the document itself refers to more, it’s hard to buy that argument” (SER-26-27).

The Court also addressed the fact that Vision asserted various privileges, including attorney-client, in unilaterally redacting documents but never produced a privilege log (SER-28). Vision explained that “there’s

nothing in there that relates to this case even remotely.” (*Id.*) The Court, however, informed Vision “we don’t know that. That’s why a privilege log is required . . . . The rules require that when you do that, you give a log to the other side so they know what it is you’re claiming should not be disclosed so that they can challenge it, if necessary. They don’t know what’s under there, neither do I. All we have is your representations and that isn’t sufficient. It takes a log, with respect to each of them.” (*Id.*) Vision finally admitted that it was “at fault for not producing the log. In hindsight, [Vision] should have produced the log. [Vision] did not” (SER-29). But even after the hearing, Vision never produced a privilege log.

Nor did Vision comply with the District Court’s directive to produce document SUPP001. Vision claimed it could not “locate today a copy of the un-redacted one (1) year price basis,” even though it previously produced the same document heavily redacted (SER-267). Vision instead produced an entirely new and different document not previously produced that identified amounts for hazard pay, and is Section 6.3.3 of a larger document that Vision also never produced (SER-262-63, 267). Based on this ongoing noncompliance, the Class filed a Supplement in Support of its Motion for Sanctions (SER-262-69) (DE-246 (Cost Combined Detail under seal)).

On October 27, 2010, the District Court held a telephonic pretrial conference and advised the parties that it would grant the Class' Motion for Sanctions and would "strik[e] . . . Defendant's Answer" (DE-192). The Court informed the parties that it had reviewed the Class' Supplement in Support of its Motion for Sanctions and "found the information contained in the Supplement disturbing" (*Id.*). "Accordingly, default will be entered as to liability. The trial will proceed *as to the amount of damages to the Class only*" (*Id.*) (emphasis in original minute entry).

On November 3, 2010, the Court entered its written Order granting the Class' Motion for Sanctions (SER-31-42). The Court found that Vision's 30(b)(6) witnesses "failed to prepare themselves regarding what efforts Vision took to search for and produce responsive documents" (SER-33-34). The Court also found that during the hearing on the Motion for Sanctions "and in various other court documents, Vision again represented to the Court that it had completed its discovery obligations by delivering all responsive documents that Vision could access to the Class. These assertions turned out to be false" (*Id.*). "The above clandestine actions and misrepresentations are representative of Vision's conduct, but are only a portion of Vision's discovery abuses." (*Id.*) The Court concluded, "Vision has intentionally delayed production of documents, misrepresented its

current and past production to both the Court and the Class, and otherwise engaged in bad faith conduct . . . Vision has attempted to ensure that an accurate and fair trial on the merits of this case will never happen.” (SER-38). Pursuant to the Court’s order, the Clerk of the Court entered a default against Vision (DE-206).

**J. The Jury Awards The Class Approximately \$5 Million In Damages.**

A jury trial proceeded on the amount of the Class’ damages on November 8, 2010 (SER-43). Although hamstrung by Vision’s defiance of the District Court’s discovery orders, the Class nevertheless maintained that it possessed adequate proof to entitle it to punitive damages. The Court ruled prior to trial that the jury would not be permitted to consider punitive damages (SER-44). The jury returned a verdict in favor of the Class in the amount of \$4,509,268 (DE-221) and final judgment was entered on February 22, 2011 (DE-264).

**K. The District Court Denies Vision’s Motion To Set Aside Judgment.**

On March 9, 2011, the District Court denied Vision’s Motion to Set Aside Judgment, finding:

During the trial, there was uncontroverted testimony that Vision received, from the contractors above it, money identified as being earmarked as hazard pay for flight crews flying into and out of Afghanistan and Iraq. The testimony further showed that

the money paid to the flight crews could not have included the amounts identified for hazard pay . . . As noted in this Court's Order striking Vision's Answer, Vision engaged in misrepresentations to the Class and to this Court, refused and failed to provide discovery it was ordered to produce and generally attempted to stonewall the discovery efforts of the Plaintiff and then claimed that the Plaintiff Class could not prove its case (because it did not have the documents it needed). The Class was required to proceed on its damage claims without certain evidence that likely would have increased the measure of damages awarded by the jury."

(DE-271 at 2). On March 17, 2011, Vision filed its Notice of Appeal (DE-274), and the Class timely filed its Notice of Cross Appeal on March 28, 2011 (DE-279).

### **SUMMARY OF THE ARGUMENT**

The District Court did not abuse its discretion when it struck Vision's Answer for its numerous discovery violations after multiple warnings that Vision needed to comply with its orders. The District Court properly found that Vision's discovery violations were willful, considered the five factors set forth in *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995), and properly determined that those factors all favored striking Vision's answer. The District Court explicitly considered lesser alternative sanctions, but rejected them because Vision's discovery violations were so widespread that they ensured "that an accurate and fair trial on the merits of this case will never happen" (SER-38).

Vision also has not shown that the District Court abused its considerable discretion in denying its motion to set aside the default judgment. *See Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1292-93 (9th Cir. 1982)(holding that on Rule 60(b) motion that “it is not enough to show that a grant of the motion might have been permissible or warranted; rather the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion.”). The District Court correctly found that Vision cannot satisfy either prong of the two prong test to set aside the default judgment. First, Vision cannot demonstrate the good cause necessary to set aside the default judgment, because the default was entered as a sanction for Vision’s discovery abuses and its violations of the District Court’s orders. Even if it could, Vision cannot satisfy the second prong because all of the counts in the Class’ Complaint state causes of action.

Nor did the District Court abuse its discretion in certifying the Class. Hester is an adequate representative and his claims are typical because he worked without an employment agreement, just like every other Class member. For similar reasons, common issues predominate. Most importantly, both as a matter of law (because of the subsequent default resulting from its discovery misconduct) and its failure of proof at the time

of briefing class certification, Vision offered no evidence to rebut the Class' certification evidence.

Regarding the Class' cross-appeal, the District Court erred in dismissing the Class' claim for punitive damages. The District Court was required to allow the Class to use all record evidence to establish its claim for punitive damages and committed reversible error by limiting the Class solely to the allegations in the Complaint.

## **ARGUMENT AND CITATION OF AUTHORITY**

### **I. THE DISTRICT COURT PROPERLY STRUCK VISION'S ANSWER AS A SANCTION FOR ITS DISCOVERY VIOLATIONS**

District courts have substantial latitude in imposing sanctions for discovery abuses. *See Dahl v. City of Huntington Beach*, 84 F.3d 363, 367 (9th Cir. 1996); *In re Akros Installations, Inc.*, 834 F.2d 1526, 1530 (9th Cir. 1987); *Reygo Pac. Corp. v. Johnston Pump Co.*, 680 F.2d 647 (9th Cir. 1982). "By the very nature of its language, sanctions imposed under Rule 37(b) must be left to the sound discretion of the trial judge." *David v. Hooker, Ltd.*, 560 F.2d 412, 418 (9th Cir. 1977), quoting *von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844 (9th Cir. 1976). Even if it means outright dismissal or default, district courts must be given leeway to penalize the offending party and to deter any such future conduct by other parties.

*See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976). Therefore, the question on review is not whether this Court would apply the same sanction, but whether the district court's sanction was an abuse of discretion. *Id.* at 642; *David*, 560 F.2d at 418-19.

“Courts need not tolerate flagrant abuses of the discovery process.” *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980). If a party fails to obey an order to provide discovery, the court may enter a default judgment. *Tobin v. Granite Gaming Group II, LLC*, 2008 WL 728337 (D. Nev. Mar. 17, 2008) (citing Fed. R. Civ. P. 37(b)(2)(A)); *Harry and David v. Pathak*, 2010 WL 2432071, at \*6 (D. Or. Apr. 7, 2010) (noting that court may enter a default judgment under Fed. R. Civ. P. 55 for discovery violations). The District Court did not abuse its discretion when it sanctioned Vision.

Vision blames its repeated discovery violations on “security concerns” (Br-8). Vision tried to avoid its discovery obligations by invoking these concerns below, none of which is valid. Vision requested that the Complaint be sealed because it allegedly contained national defense information, but never supported its claim, and the District Court *sua sponte* unsealed the Complaint (DE-16). Vision refused to provide discovery based on the State Secrets Privilege (DE-180-41), but only the Government may invoke that

privilege, as the District Court advised Vision (SER-7); *United States v. Reynolds*, 345 U.S. 1, 7-8(1953). In any event, Vision had no classified documents to provide (DE-187-12 at CAI25530) (Air Bridge Contract Closeout Certification: “Classified material . . . was not furnished by Contractor [CSC] or developed by Subcontractor [Capital] under this Document.”). Vision’s current Air Bridge Program Manager testified that since his employment at Vision began, Vision was not in possession of any classified information and does not have any procedures to handle or store classified material (DE-180-19 at 119). Vision’s “national security” fig leaf was a charade from the outset.

**A. The District Court Made Specific Findings Of Fact Regarding Vision’s Discovery Violations.**

After extensive briefing and hearings, the District Court determined that Vision violated multiple discovery orders. A district court’s findings that its orders were violated are given “considerable weight” because “the district court is in the best position to make that determination.” *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1115-16 (9th Cir. 2004), quoting *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). The District Court made the following specific factual findings:

- “After having again told the Court that it had completed its discovery production in its Response (#184), Vision provided new documents as part of its Supplement (#186) to its Response (#184).

Some of these documents also showed recent efforts by Vision to obtain documents that it should have obtained and produced months earlier” (SER-33);

- At the hearing on the Motion for Sanctions, “Vision again represented to the Court that it had provided everything it had access to – despite directly contradictory deposition testimony by Vision’s own witnesses. High-level Vision employees (such as Vision’s chief executive officer, Vision’s chief financial officer, the person in charge of the Air Bridge Program, and others) testified to the existence of various documents that have still not been produced” (*Id.*);
- Many of Vision’s “deposition witnesses testifying pursuant to Fed. R. Civ. Pro. 30(b)(6) as the people most knowledgeable . . . failed to prepare themselves on noticed topics. They particularly failed to prepare themselves regarding what efforts Vision took to search for and produce responsive documents. Many of these witnesses testified that they had no knowledge of any discovery efforts beyond their own, minimal actions” (SER-33-34);
- “[T]he Class used a particular document (Bates Number SUPP001) as a representative example of Vision’s noncompliance during the Oct. 25 hearing. This document is labeled page 20, but page 20 of what, the Court and the Class do not know as the rest of the document has not been produced. Vision provided the document to the Class in redacted form and without a privilege log, the same manner in which it produced many other documents. The Court asked whether Vision could provide this document unredacted. Vision replied that it could. The Court then ordered that Vision produce the document, in unredacted form, that same day after the hearing . . . Also during that proceeding, and in various other court documents, Vision again represented to the Court that it had completed its discovery obligations by delivering all responsive documents that Vision could access to the Class. These assertions turned out to be false” (SER-34);
- Despite being ordered to produce the non-redacted version of SUPP001, “Vision informed the Class that it no longer had an unredacted copy of the Bates Number SUPP001 document

notwithstanding the Court's order during the hearing and Vision's own representation. Instead, however, Vision sent the Class a different, similar document that had never before been produced despite it being responsive to discovery requests and relevant to this litigation. This document is labeled Section 6.3.3, meaning that it is part of a larger document that has still not been produced to the Class. In attempting to justify production of this document rather than the SUPP001 document, Vision claims that this document is even more detailed than the SUPP001 document." (*Id.*);

- "Vision, amongst other things, also forced the Class to litigate in a different district against McNeil, one of Vision's up-stream contractors, to obtain some of the documents that Vision itself would not produce." (SER-34-35);
- "Vision did not act to preserve documents when this litigation began . . . Additionally, some of Vision's officers continue, even now, to erase email . . . and other documents are no longer available such as James Maguire's crew salary computation spreadsheet . . ." (SER-39).

As the District Court noted, "the above clandestine actions and misrepresentations are representative of Vision's conduct, but are only a portion of Vision's discovery abuses," (SER-34), which has "ensured[d] that an accurate and fair trial on the merits of this case will never happen" (SER-38). None of these findings of fact are clearly erroneous. Nor is Vision's appeal to "due process" (Br-42) well taken. The record clearly shows, and the District Court's findings demonstrate, that Vision received all of the process to which it was arguably entitled.

**B. The District Court Did Not Abuse Its Discretion  
When It Sanctioned Vision And Struck Its Answer.**

For discovery violations to result in the striking of a disobedient party's answer, they must be the result of willfulness, bad faith, or fault. *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003). Once a party's conduct is found willful, the district court analyzes several factors to determine if a party's answer should be stricken for discovery abuse: (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its docket, (3) the risk of prejudice to the non-offending party, (4) the public policy favoring disposition of cases on their merits, and (5) the availability of less drastic sanctions. *Anheuser-Busch*, 69 F.3d at 348.<sup>6</sup> In determining whether prejudice occurred, the court "examine[s] whether the [party's] actions impair the [other party's] ability to go to trial or threaten to interfere with the rightful decision of the case." *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987). "These factors are not a series of conditions precedent before the judge can do anything, but a way for a district judge to think about what to do." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006) (citations and

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<sup>6</sup> "Although this five-factor test is usually used to review the propriety of Rule 37 sanctions, this same test was applied in [*Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir.1995)] to review sanctions granted under a court's 'inherent power.'" *Leon v. IDX Sys. Corp.*, 464 F. 3d 951, 958 n.4. (9th Cir. 2006).

internal quotations omitted); *see also* *IDX Sys.*, 464 F.3d at 958 (noting district court need not make explicit findings as to each of these factors, and upholding terminating sanction where court considered only plaintiff's level of culpability, the prejudice suffered by defendant, and availability of lesser sanctions).

The District Court found that Vision "acted willfully and in bad faith" for the reasons stated in § I(A) *supra*, that Vision's actions severely impaired the Class' ability to go to trial and would interfere with the rightful decision of the case (SER-34-41). Moreover, the District Court made explicit findings regarding each factor.

The Court finds that the public interest in the expeditious resolution of cases and the Court's interest in managing its docket are best served by striking Vision's answer and entering a default against it. Vision's conduct has prejudiced the Class and limited the Class' ability to try this case through intentional, bad faith conduct in the discovery process. This has led to multiple hearings and motions before this Court which have nothing to do with the merits of this case, but have been necessary due to Vision's misconduct. These extra motions and hearings have interfered with the Court's ability to efficiently manage its docket in a manner fair to all parties with pending cases. While public policy favors that cases be heard on their merits, Vision has done everything it can to prevent such resolution. Through its conduct, Vision has attempted to ensure that an accurate and fair trial on the merits of this case will never happen. Therefore, each of these three factors weigh toward striking Vision's Answer (#47) and entering a default.

(SER-38).

The District Court considered lesser alternatives and concluded that “no less drastic, alternative sanction would be sufficient because of the prejudice Vision has already caused to the Class” (*Id.*). The District Court considered a discovery extension but determined that would be ineffective because, “Vision did not act to preserve documents when this litigation began . . . Additionally, some of Vision’s officers continue, even now, to erase email . . . and other documents are no longer available such as James Maguire’s crew salary computation spreadsheet . . .” (SER-39). Furthermore, based on Vision’s conduct throughout the litigation, the Court found that:

Vision will act to delay this litigation and prevent discovery by any means necessary. The Court has no reason to believe that given an extension Vision would now begin to adhere to its obligations and comply with the Court’s orders. Nor does the Court believe that Vision could rectify the harm that it has already caused by not preserving documents. To extend discovery would merely give Vision what it desires – further delay – and would simply validate Vision’s misconduct.

(SER-39-40).

The District Court also considered an adverse inference instruction as an alternative sanction but rejected it. A district court has the “power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence.” *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). This Court has held that adverse inferences are ineffective

where “a party’s refusal to provide certain documents forced the [non-sanctioned party] to rely on incomplete and spotty evidence at trial.” *Id.* at

959. As the District Court found below:

Vision’s refusal to provide discovery forced the Class to sue a third party which had relevant documents, which Vision also had or has, to obtain the Class’ evidence. Even with the evidence obtained from McNeil, Vision’s conduct would force the class to ‘rely on incomplete and spotty evidence at trial.’ Here, an adverse inference instruction would be insufficient and likely ineffective. Vision has taken limited, if any, effort to preserve, search for, or produce documents relevant to this litigation. It has also become evident that Vision is willing to mislead the Court time after time in order to keep from producing relevant, possibly critical, discovery material. This is further demonstrated by Vision’s production of a new, never before produced document instead of the Court ordered document after the Court’s hearing on the Motion for Sanctions. As a result, neither the Class nor the Court has any idea what else Vision has failed to produce . . . While the Court is aware of certain categories of documents that Vision has failed to produce, such as abundant email and contract modifications, Vision’s conduct makes the Court believe that more is likely available. Because Vision has produced so little to the Class and because of the limited information Vision has made available to the Court, a mere adverse inference instruction would be insufficient and would not remedy the great prejudice to the Class. A jury would not be able to determine, nor would the Class be able to show, what documents have been withheld or spoliated or what type of information such non-produced documents might contain. Any jury instruction that the Court can conceive would be too broad and amorphous to be actually effective in helping the jury deliberate.

(SER-40-41).

**C. Vision's Argument That The District Court Abused Its Discretion By Failing To Consider Lesser Alternative Sanctions Is Without Merit.**

Despite the District Court's analysis of lesser alternative sanctions, Vision argues that the District Court abused its discretion by not considering two more additional lesser sanctions that Vision never proposed: (1) establishing that certain facts were true; and (2) prohibiting Vision from offering evidence with respect to certain claims or defenses (Br-44-47). Vision claims that these two lesser alternative sanctions were appropriate given that: (1) the time period between the written order granting the Renewed Motion to Compel and the Order to Show Cause was approximately six weeks; and (2) the documents Vision withheld were not relevant to the Class' claims. (*Id.*)

Vision's argument is fatally flawed because "there is no requirement that every single alternate remedy be examined by the court before the sanction" is imposed, only that a "reasonable exploration of possible and meaningful alternatives" are explored. *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976). Furthermore, "it is appropriate to reject lesser sanctions where the Court anticipates continued deceptive misconduct." *Anheuser-Busch*, 69 F.3d at 352. Here, the District Court explicitly stated its

belief that Vision would continue its deceptive and dilatory ways. *See* (SER-39-40).

1. *Vision knew eight months prior to being sanctioned that the District Court would require it to produce all documents responsive to the Narrowed Requests.*

Vision claims the “Court’s involvement [in the discovery dispute] occurred over a relatively compressed six-week time period on the eve of trial,” (Br-44), but this is not true. Further, Vision cites no case law that supports its argument that the length of time matters in determining whether lesser sanctions are appropriate.

Vision agreed on and after November 19, 2009 – nearly a year before it was ultimately defaulted – to produce all documents responsive to the Narrowed Requests (DE-93-16), but consistently refused to do so. The Magistrate Judge heard the Class’ Renewed Motion to Compel on March 2, 2010 (SER-8). The Court informed Vision that “they got to move forward on this [production]” (SER-16), because Vision’s production “needs to be complete . . . that’s what the rule requires . . .” (SER-15). The Court informed Vision that it would “rule on the motion [Class’ Renewed Motion to Compel] right away – the renewed motion, and give [the Class] that – that help there” (*Id.*). Still Vision obstructed discovery.

The District Court afforded Vision three separate opportunities to make a complete production in September and October 2010. The Magistrate Judge issued his written order on the Class' Renewed Motion to Compel on September 9, 2010 and ordered Vision to produce the documents responsive to the Narrowed Requests by September 17, 2010 (DE-152). Vision did not produce any responsive documents. The District Court affirmed the Magistrate Judge's Order on September 21, 2010 (DE-172). Vision refused to act. The Class again raised Vision's non-compliance with the District Court's prior two discovery orders at the September 29, 2010 pretrial conference. The District Court then gave Vision a third opportunity to produce the documents (DE-179) (instructing Vision to "comply with the order to compel discovery forthwith") (emphasis in original). Vision again refused to comply. The Class filed its Motion for Sanctions on October 5, 2010 (SER-213). The Court did not hear oral argument on the Class' Motion for Sanctions until October 25, 2010, giving Vision 20 more days to produce. Vision serially represented to the Court that it had produced all documents responsive to the Narrowed Requests, even though it had not (SER-34). Vision's obstructive behavior was not confined to six weeks. Instead, it spanned nearly a year.

2. *The documents Vision withheld and destroyed related to the Class' claims.*

Vision next argues that “the discovery sanction that would have been consistent with the claimed injury suffered by the Class would have been focused on the facts related to Vision’s relationship with its upstream contractors.” (Br-46). Vision cites nothing in the record establishing that its violations were limited to this body of evidence, and the District Court’s findings are to the contrary. Moreover, “the relevance of . . . [destroyed] documents cannot be clearly ascertained because the documents no longer exist,” and a party “can hardly assert any presumption of irrelevance as to the destroyed documents.” *See Leon*, 464 F.3d at 959 (internal quotations omitted).

Vision cites *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376 (9th Cir. 2010). That case, however, further illustrates why the District Court did not abuse its discretion here. In *Oracle*, the defendants failed to preserve certain email files and materials of Larry Ellison, Oracle’s CEO, on a discrete issue within the litigation. *Id.* at 385. Despite that failure, the defendants produced more than 2.1 million pages of documents related to the other issues and accommodated more than 134 deposition days. *Id.* The district court ruled that the plaintiffs “would be entitled to an inference that the spoliated evidence would demonstrate Ellison’s knowledge of any material

facts that Plaintiffs could otherwise establish.” *Id.* In upholding that sanction, this Court held, “[a]lthough Ellison’s email account files were not produced, the documents that were produced contained numerous email chains in which Ellison’s correspondence was contained.” *Id.* at 386.

Unlike *Oracle*, the widespread discovery abuses in this case were not limited to any particular issue, individual, or discrete set of documents. Vision concealed the full extent of its discovery abuses by refusing to produce an adequately prepared 30(b)(6) witness to testify about the types of documents that existed or were gathered (SER-33-34). Furthermore, there was none of the extensive discovery in this case like that in *Oracle*, and the District Court’s findings document the holes in the evidentiary record created by Vision’s misconduct. Indeed, the District Court found that Vision withheld or destroyed documents that related to the very figures it used to calculate the Class’ pay (SER-39); that throughout the litigation its top executives deleted crucial emails that related to the Class’ claims (*id.*); that document SUPP001, which set forth the amount of hazard pay Vision collected on behalf of its employees, was not produced as ordered by the Court, and that the remainder of the document of which SUPP001 was page 20 was never produced (SER-34-35); and the document that Vision produced in lieu of SUPP001 had never been previously produced and was

itself Section 6.3.3 of a larger document also never produced (*id.*). See *Leon*, 464 F.3d at 951 (entering default where party “knew he was under a duty to preserve all data on the laptop, but intentionally deleted many files”); *Anheuser-Busch*, 69 F.3d at 349. While this is only a representative sample of the documents that Vision withheld or destroyed, they relate to multiple individuals and issues and permeate the case.

**II. VISION CANNOT DEMONSTRATE THE GOOD CAUSE REQUIRED TO SET ASIDE THE DEFAULT BECAUSE IT WAS ENTERED AS A RESULT OF VISION’S CULPABLE CONDUCT**

This Court reviews “the district court’s factual findings for clear error and, if those findings are not clearly erroneous, we review the court’s decision to deny . . . [the] Rule 55(c) motion for an abuse of discretion.” *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 925 (9th Cir. 2004); see also *Plotkin*, 688 F.2d at 1292-93. A default judgment may be set aside only where a party can demonstrate “good cause,” Fed. R. Civ. P. 55(c), and “will not be disturbed if (1) the defendant’s culpable conduct led to the default; (2) the defendant has no meritorious defense; or (3) the plaintiff would be prejudiced if the judgment is set aside.” *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (emphasis added) (citing *Meadows v. Dominican*

*Republic*, 817 F.2d 517, 521 (9th Cir. 1987). Where “a default judgment is entered as the result of a defendant’s culpable conduct, however, we need not consider whether a meritorious defense was shown, or whether the plaintiff would suffer prejudice if the judgment were set aside.” *Meadows*, 817 F.2d at 521.

Culpable conduct is the equivalent of willful, deliberate, or bad faith behavior. *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001). “[B]ecause the Ninth Circuit penalize[s] for the mere failure to respond – regardless of surrounding circumstances – the Ninth Circuit is more likely than other circuits to find culpable conduct.” *Fed. Trade Comm’n v. Int’l Charity Consultants*, 1997 WL 527667, \*5 (D. Nev. May 30, 1997). *See also Info. Sys. & Networks Corp. v. U.S.*, 994 F.2d 792, 796 (Fed. Cir. 1993) (noting the Ninth Circuit’s lower standard for finding culpable conduct). For example, this Court affirmed the district court’s finding in *Marquez v. Foley*, 2007 WL 786404, at \*1 (9th Cir. Mar. 12, 2007), that good cause could not be shown to set aside a default judgment where the defendant’s culpable conduct (discovery abuse) caused the default. *See also Am. Ass’n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1109 (9th Cir. 2000)(upholding default judgment for culpable conduct).

Vision cannot demonstrate good cause because the default resulted from its culpable conduct. *See Meadows*, 817 F.2d at 521. In striking Vision’s pleadings, the District Court concluded that “Vision has acted willfully and in bad faith.” (SER-38). The Court found that Vision made numerous “false” assertions to the Court about the status of its document production and whether it had complied with its discovery obligations (SER-34). Vision’s discovery abuses “ensure[d] that an accurate and fair trial on the merits of this case will never happen.” (SER-38). Nor can Vision show that these findings of fact are clearly erroneous.

Vision urges the Court to apply the incorrect legal test when it argues that the Court should ignore the good cause prong in determining whether to set aside the default judgment and focus solely on the second prong — whether the Class’ Complaint states a cause of action (Br-17). The flaw in Vision’s argument is illustrated by the very cases it cites. *Knievel v. ESPN*, 393 F.3d 1068, 1071-72 (9th Cir. 2005), did not involve a default judgment, but rather the Court held that the *de novo* standard of review is appropriate in reviewing an order granting a 12(b)(6) motion to dismiss with prejudice. In *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 851 (9th Cir. 2007), unlike here, the good cause requirement was not at issue, because the appeal was brought by the party that obtained the default judgment and the defendant

had not engaged in any culpable conduct. *Cripps v. Life Insurance Co. of N.A.*, 980 F.2d 1261, 1267-68 (9th Cir. 1992), was an interpleader action where the party did not originally receive notice of the cross-claim and the default was entered based on its failure to answer, not culpable conduct. *Id.* at 1262, 1266-67. In *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388 (9th Cir. 1988), the Court found that the defendant engaged in culpable conduct but nonetheless set aside the RICO claim, because this Court strictly enforces RICO pleading standards. *Id.* at 1393. In *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267 (11th Cir. 2005), the Eleventh Circuit set aside the default judgment for discovery violations because plaintiff's complaint failed to state a cause of action. *Id.* at 1277-78. *Cotton* is in direct conflict with controlling Ninth Circuit case law. *See DirectTv*, 503 F.3d at 854. Indeed, the Ninth Circuit addressed the exact same issue in *Marquez* and held that the defendant could not demonstrate the good cause necessary to contest the sufficiency of the complaint's allegations because his discovery violations constituted culpable conduct. *Marquez*, 2007 WL 786404, at \*1.

### **III. THE CLASS' COMPLAINT STATES CAUSES OF ACTION**

Even assuming that Vision could demonstrate good cause and that the District Court's findings of fact were clearly erroneous, the default judgment

cannot be set aside because the Class' Complaint states causes of action. A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the Complaint. *N. Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). To withstand a motion to dismiss, a complaint must set forth factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 555 (2007). A court considering a motion to dismiss must accept as true the complaint's allegations, *Hospital Building Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976), and must construe the pleading in the light most favorable to the non-moving party and resolve factual disputes in the pleader's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 *reh'g denied*, 396 U.S. 869 (1969); *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009)). Each of the Class' counts state a cause of action. Recognizing this, Vision goes outside the four corners of the Complaint to make its arguments, which it may not do.

#### **A. Unjust Enrichment**

Unjust enrichment occurs "whenever a person has and retains a benefit which in equity and good conscience belongs to another." *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (internal quotations omitted). The essential elements for a claim of

unjust enrichment are: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation by the defendant of that benefit; and (3) the defendant's acceptance and retention of that benefit. *Topaz Mut. Co. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992). The Restatement elaborates upon when a retained benefit is one that "in equity and good conscience belongs to another," stating: "[i]f a payment to defendant is an asset to which the claimant (as against defendant) has the paramount entitlement, the law of restitution and unjust enrichment supplies a claim to recover the amount in dispute." Restatement (Third) of Restitution and Unjust Enrichment (Tentative Drafts) § 48 (T.D. No. 5, 2007). Courts in Nevada and in other states have applied this rule. *See e.g. Custom Teleconnect, Inc. v. Int'l Tele-Services, Inc.*, 254 F. Supp. 2d 1173 (D. Nev. 2003) (finding unjust enrichment where a provider of telecommunications services delivered a customer to a competitor with the understanding they would service client together but competitor stole customer); *Wayne County Produce Co. v. Duffy-Mott Co.*, 155 N.E. 669 (N.Y. 1927) (defendant must refund "war tax" it collected from plaintiffs on behalf of the government after the government refunded the tax to the defendant); *Cohon v. Oscar L. Paris Co.*, 149 N.E. 2d 472, 475 (Ill. App. Ct. 1958) (requiring defendant to refund tax collected on

behalf of the state when it was refunded because money did not belong to defendant).

In *Klein v. Arkoma Production Co.*, 73 F.3d 779 (8th Cir. 1995), the Eighth Circuit prevented a lessee from becoming unjustly enriched when it received settlement proceeds to which the landowner had superior entitlement. There, a royalty agreement entitled the landowner to a certain percentage of the proceeds from the natural gas produced by the lessee on the owner's land. *Id.* at 782. For a period of time, due to an unfavorable term in the lessee's contract with one of its natural gas purchasers, it received reduced proceeds for the natural gas produced from the land. *Id.* at 782-83. As a result, a claim accrued which allowed the lessee to potentially recoup some of its losses. *Id.* at 783. When the lessee recovered some of its lost profits, the court held that the landowner was entitled to a portion of the settlement because of its superior entitlement. *Id.* at 786-87.

Likewise, in *Town of New Hartford v. Connecticut Resources Recovery Authority*, 970 A.2d 592, 615 (Conn. 2009), the court followed the reasoning in *Klein* and required defendant to pay back portions of a "tip fee" it collected from plaintiffs under a claim for unjust enrichment. The "tip fee" was based, in part, on the "cost of operations" of defendant's facility. *Id.* at 602. During several years, the defendant's "cost of operations" went

up, causing plaintiffs' "tip fee" to go up to cover loan losses. *Id.* at 605-06. However, when loan proceeds were recovered from a third-party, the court found that "under the circumstances," the settlement premiums "rightly belonged to the plaintiffs." *Id.* at 611-12. In both *Klein* and *Town of New Hartford*, the settlement monies were paid to defendant on behalf of plaintiffs, who had a superior entitlement to the monies.

Here, the Complaint alleged that pursuant to the contracts between Vision and the upstream contractors, Vision was required to pay the Air Bridge crews the hazard pay that Vision collected on their behalf, and "Vision only received the benefit of the hazard pay because Plaintiff and the Class members were willing to risk their lives as crew members on the flights to the airports in Baghdad and Kabul." (ER-382-83, 385-95, 399-400). "Vision knew and understood it received" hazard pay "for the benefit of [its] employees," but "wrongfully retained that money for its own benefit" (ER-399). "The hazard pay compensation was specifically provided by the United States government for the benefit of Vision's employees . . ." (*Id.*).

A plaintiff's claim for recovery is particularly strong where, as here, the amount was earmarked and set aside for plaintiff's benefit. For example, in *Wayne County Produce*, the court noted that the "war tax" plaintiffs paid to the defendant was specifically itemized, showing that plaintiffs paid it for

the purposes of being passed along to the Government, and the Government, in turn, refunded it so that it would be returned to plaintiffs. 155 N.E. at 669. The court stated that “[t]his is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events.” *Id.* Similarly, in *Cohon*, the court noted the importance that the tax collected by the defendant was earmarked for a particular purpose, and when the State refunded plaintiffs’ money to defendant, it was for plaintiffs’ benefit and not the defendant’s. 149 N.E.2d at 476.

Nor are the Class’ unjust enrichment allegations conclusory. The Complaint states specific facts demonstrating why Vision’s conduct is inequitable and wrongful:

The United States government provided [Capital] and other government contractors hazard pay for the benefit of Vision’s employees. [Capital] and the other contractors provided Vision . . . hazard pay for its employees, which Vision knew and understood it received for the benefit of those employees who served as crew members on-board the flights to Baghdad and Kabul. Instead of paying its employees the hazard pay it collected on their behalf, Vision wrongfully retained that money for its own benefit.

(ER-399).

Nor was the Class required to allege that Vision “misled or deceived Class members about their pay” (Br-24). This is not an element of unjust enrichment. Even if it were, the Complaint alleges “Vision fired all of the

crew members that knew about, or had previously received, hazard pay for flying into Kabul, and replaced them with employees who did not know they were entitled to receive hazard pay” (ER-390). That was Vision’s method of deception.

Vision cites five inapposite cases in support of its argument that the Class’ allegations are conclusory. None deals with unjust enrichment under Nevada law. *DirectTv*, 503 F.3d at 852, and *Telasaurus VPC LLC v. Power*, 623 F.3d 998, 1003-05 (9th Cir. 2010), involved complaints dismissed for failure to state a cause of action under the Federal Communications Act. *Alan Neuman*, 862 F.2d 1388, involved the dismissal of a claim under RICO, and *Wise v. Verizon Communications, Inc.*, 600 F.3d 1180, 1189 (9th Cir. 2010), involved the dismissal of an ERISA claim. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009), dismissed a class action against Wal-Mart on behalf of foreign workers that were employed by companies that sold goods to Wal-Mart because of the “lack of any prior relationship between Plaintiffs’ and Wal-Mart precludes” plaintiffs’ claims. *Id.* at 685.

Vision argues that an express employment contract bars the Class’ equitable claims (Br-20, 25). Vision’s argument, however, is directly contradicted by the plain language of the Complaint: “[t]here is no employment contract between Vision and any of the Class members who

served as crew members on the flights to and from the airports in Baghdad and Kabul.” (ER-399). The Class need not allege further in establishing a negative. Despite its default, Vision inappropriately goes outside the Complaint and speculates that Class members had “an understanding or expectation of the compensation they would receive from Vision for providing” flight services (Br-21), but is unable to tie its speculation to language in the Complaint because there is none. Vision argues that Class members are at-will, which is not pled in the Complaint, and then tries to convert at-will employment into an express written contract.<sup>7</sup> However, even if the Court looked past Vision’s self-inflicted default, Vision is wrong.

The Nevada Supreme Court held that an at-will employment relationship does not create an express or implied contractual relationship between the parties, *Bally’s Grand Employees’ Fed. Credit Union v. Wallen*, 779 P.2d 956, 957 (Nev. 1989), and works affirmatively to prevent a contractual relationship from arising. *Ringle v. Bruton*, 86 P.3d 1032, 1037 (Nev. 2004). In *Bally’s*, 779 P.2d at 957, the Nevada Supreme Court held that the plaintiff could only recover on her contract-based employment

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<sup>7</sup> Vision argues that the Nevada Supreme Court in *Ewing v. Sargent*, 482 P.2d 819, 823 (Nev. 1971), cited the holding in *Keith v. Kottas*, 172 P.2d 306 (Mont. 1946), with approval. The *Ewing* court did not adopt *Keith*’s holding, and specifically said that its own ruling was not grounded on the principles in *Keith* or the other cases cited. *Id.* at 823. *Keith* is not the law of Nevada. *See id.*

claims if she was “other than an at-will employee; *i.e.*, it was required to find that [defendant] employed [plaintiff] under either an express or an implied contract . . . .” *See also Am. Bank Stationary v. Farmer*, 799 P.2d 1100, 1101-02 (Nev. 1990) (“We note that all employees in Nevada are presumed to be at-will employees. An employee may rebut this presumption by proving by a preponderance of the evidence that there was an express or implied contract between his employer and himself . . . .”); *S.W. Gas Corp. v. Vargas*, 901 P.2d 693, 697 (Nev. 1995) (same). As such, “at-will employees have no contractual rights arising from the employment relationship that limit the employer’s ability to prospectively hire and fire employees, and to change the terms of employment.” *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 106 (Nev. 2008).<sup>8</sup> Thus, a group of employees’ “at-will . . . status precluded any challenge to the employment policy on breach of contract grounds.” *Id.* at 98, 105 n.39.

Each of Vision’s cases is inapposite. In *Rogers v. American President Lines, Ltd.*, 291 F.2d 740 (9th Cir. 1961), there was an express employment contract between the plaintiff and defendant. *Id.* at 741 (complaint alleged

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<sup>8</sup> The mere fact that the at-will employment relationship may be governed by contract-like principles does not convert at-will employment into an implied or express contractual relationship. *See Reeves v. Alyeska Pipeline Service Co.*, 926 P.2d 1130 (Alaska 1996) (holding that “quasi-contracts are judicially created obligations to do justice . . . the obligation to make restitution that arises in quasi-contract is not based upon any agreement between the parties, objective or subjective.”).

plaintiff “was employed under the terms of a labor contract negotiated through collective bargaining,” and prior to each voyage plaintiff and defendant “entered into written shipping articles before a shipping commissioner.”). So too with *United States for the use of Westinghouse Elec. Supply Co. v. Ahearn*, 231 F.2d 353, 356 (9th Cir. 1955) (“[t]he terms of the express contract control”). In *Triangle Mining Co., Inc. v. Stauffer Chemical Co.*, 753 F.2d 734 (9th Cir. 1985), the plaintiff appealed from an order granting defendant summary judgment to recover additional costs which were addressed in an express written contract between the parties. *Id.* at 742-43 (plaintiff “made its advance expenditures to enhance its position under the contract” and “therefore must be held to the contract”). *Clapp v. Goffstown School Dist.*, 977 A.2d 1021 (NH 2009), is inapposite because it dealt with a union school employee employed pursuant to an express contract. *Id.* at 1023-25 (“The parties do not contest the validity of [plaintiff’s] employment contracts, and we assume that each contract was valid and fully enforceable. Nor is there any dispute about whether [plaintiff’s] retirement plan was part of her employment contract.”).<sup>9</sup>

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<sup>9</sup> Here, even if the Court considered the “memo regarding the Revised Pay Structure and Guidelines for Boeing Pilots” (the “Memo”) (DE-135-42), the only document Vision attempted to argue below was “the contract,” it still does not cover any amounts for hazard pay.

Vision's argument with respect to Restatement of the Law of Restitution Section 107(1), and Unjust Enrichment (Tentative Draft No. 7, 2010) § 2(2), fail for the same reason – the Restatement prefaces its conclusions on the existence of an express contract between the parties.

Before the default, Vision raised the same argument in its Motion for Summary Judgment and the District Court rejected it:

Vision argues that these claims must be dismissed because there is an express contract between the parties. Vision fails in this argument. Although a court will not imply an agreement where an express agreement exists, Vision has failed to show an express employment contract. What Vision has shown are some of its policies, including payment policies, *which Vision expressly stated in its employment manual are not contracts*. Therefore there is no express contract covering the relevant subject matter even though employment at will is a contractual relationship. Since no express contract between Vision and Class members is relevant to these issues, Vision's argument fails.

(DE-159 at 4-5) (internal citations omitted) (emphasis added).

### **B. Money Had and Received**

A claim for money had and received requires the plaintiff to demonstrate that the defendant received or obtained possession over the plaintiff's money, which the defendant in equity and good conscience is required to return to the plaintiff. *Giorgetti v. Peccole*, 241 P.2d 199, 199 (Nev. 1952); *White Pine County Bank v. Sadler*, 6 P. 941, 943 (1885). There

is no requirement of privity between the parties, or any promise to pay. *Kondas v. Washoe County Bank*, 271 P. 465, 466 (1928). Rather, the court implies the promise from one individual's having another's money. *Id.*<sup>10</sup>

Claims for money had and received have long been used to recover money paid by a third-party to a defendant on behalf of a plaintiff. *See Leete v. Pac. Mill & Mining Co.*, 88 F. 957, 969 (C.C.D. Nev. 1898) *aff'd*, 94 F. 968 (9th Cir. 1899). For example, in *Leete*, the court found that even if a contract between the parties did not require defendant to return money recovered from the Government to the plaintiff, because it was the understanding among the parties that the plaintiff was entitled to the recovered money, the plaintiff nonetheless stated a cause of action for money had and received. *Id.* More recently in *Cannon v. Cannon*, 868 N.E. 2d 636, 643-44 (Mass.App.Ct. 2007), the court found that the decedent's children from a prior marriage were entitled to their share of the decedent's life insurance policy even where the decedent failed to properly execute the change in beneficiary form to include their names. The fact that the decedent attempted to change the beneficiary designation and the estranged wife knew that the money was intended for his children was sufficient. *Id.*

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<sup>10</sup> *Vision* cites nothing to support its baseless position that a claim for money had and received requires proof of deceit, coercion, or duress (Br-30).

The Class' claim for money had and received fits comfortably within these precedents, and once again, there was no express contract to preclude this quasi-contractual remedy. Nor are the Class' allegations conclusory. “[Capital] provided Vision the hazard pay that the United States government gave [Capital] for the benefit of Vision’s employees, which Vision was required to distribute to those crew members on the flights to Baghdad and Kabul.” (ER-388-89). “Vision decided that it could capture a financial windfall if it simply retained all of the hazard pay it collected from [Capital] for its own benefit.” (ER-390). Similarly, Vision “wrongfully retained all of that hazard pay [that it received from McNeil] and never paid any of it to its employees” (ER-393). These allegations properly state facts.<sup>11</sup>

### C. Conversion

Conversion is “a distinct act of dominion wrongfully exerted over personal property in denial of, or inconsistent with, title or rights therein or in derogation, exclusion or defiance of such rights.” *Edwards v. Emperor’s Garden Rest.*, 130 P.3d 1280, 1287 (Nev. 2006) (citing *Wantz v. Redfield*, 326 P.2d 413 (Nev. 1958)). A plaintiff “must demonstrate that [defendant] exerted an act of dominion over [plaintiff’s] property, in derogation of his

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<sup>11</sup> Vision’s argument that the Class’ claim for money had and received fails because there was an express employment agreement with the Class (Br-30-32), is wrong for the reasons discussed in III(A), *supra*.

rights in the property.” *Winchell v. Schiff*, 193 P.3d 946, 950 (Nev. 2008). Additionally, “conversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.” *M.C. Multi-Family Development, LLC v. Crestdale Assocs., Ltd.*, 193 P.3d 536, 542-43 (Nev. 2008) (citing *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1048 (Nev. 2000)).

Numerous cases recognize that under Nevada law money can be the subject of a conversion claim. *See Lopez v. Javier Corral, D.C.*, 2010 WL 5541115, at \*6 (Nev. Dec. 20, 2010); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025 (Nev. 1998); *Larson v. B.R. Enters., Inc.*, 104 Nev. 252, 254-55 (Nev. 1988); *Cooper v. Nevada Bank of Commerce*, 81 Nev. 344, 349-50 (Nev. 1965).<sup>12</sup> *See also Gulf Ins. Co. v. First Bank*, 2010 WL 4069086, at \*1 (9th Cir. Oct. 18, 2010).

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<sup>12</sup> In order to avoid controlling Nevada law, *Vision* cites cases from other jurisdictions, but these fail help its cause. *See Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 732 F.2d 859, 862 (11th Cir. 1984) (applying Alabama law, but noting that money can be the subject of a conversion claim where it is “specific money capable of identification”); *Reliance Ins. Co. v. U.S. Bank of Washington, N.A.*, 143 F.3d 502, 506 (9th Cir. 1998) (applying Washington law but noting “money or a check could in some circumstances be the subject of conversion”); *Lockerby v. Sierra*, 535 F.3d 1038, 1043-44 n.5 (9th Cir. 2008) (“[i]f the money that Sierra owed Lockerby was the proceeds of the sale of an item in which Lockerby held a possessory interest, a conversion action would lie.”); *Taylor v. McNichols*, 243 P.3d 642, 662 (Idaho 2010) (applying Idaho law). *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 490 F.Supp.2d 1091 (D. Nev. 2007), did not apply Nevada law. *Id.* at 1115 (denying motion to dismiss Nevada law conversion claim because defendants presented no law in support of their position).

While no Nevada court has directly addressed the concept of earmarked funds within the context of conversion, courts outside of Nevada have held that “[e]armarking overcomes the presumption that one in possession of money has title to it.” *Hercules Automotive Prods., Inc. v. Tidwell*, 245 B.R. 903, 912 (M.D. GA 1999) (applying Georgia law) (citing *Adler v. Hertling*, 451 S.E.2d 91, 96-97 (Ga. 1994) (“specific and identifiable” nature of funds necessary to establish plaintiff’s title and right to possess)). Applying this concept, the court held in *Security State Bank v. Valley Wide Electric Supply, Co., Inc.*, 752 S.W. 2d 661, 665 (Tex.Ct.App. 1988), that the defendant bank converted the plaintiff supplier’s funds where those funds were earmarked for plaintiff supplier. There, a general contractor was awarded a contract to build a high school pursuant to which the general contractor awarded a subcontract to a subcontractor. *Id.* at 664. The subcontractor purchased supplies from plaintiff supplier, but the subcontractor failed to make all of the payments owed to plaintiff. *Id.* The general contractor was informed of the subcontractor’s failure to pay plaintiff supplier’s invoices and, to remedy the subcontractor’s delinquency, the general contractor earmarked certain portions of its payments to the subcontractor for plaintiff supplier. *Id.* The defendant bank agreed to extend credit to the subcontractor, and as collateral accepted the assignment

of the subcontract. *Id.* The defendant bank received payments from the general contractor, but put them in a single account despite the earmark, and applied the payments against the subcontractor's debts owed to defendant bank. *Id.* The court held that defendant bank converted plaintiff supplier's funds. *Id.* at 665. "When a person has designated a particular use for proceeds from a check, those proceeds count as 'specific money' capable of conversion." *Id.* (internal quotations omitted.) This occurs because "[w]hen one person delivers money to another for a specific purpose, the person accepting the money becomes a trustee and the transaction becomes a trust." *Id.*

Similarly, the Class' claim for conversion is adequately pled because the Complaint states Vision wrongfully exerted control over ascertainable, identifiable, and specifically earmarked funds, paid by the upstream contractors to Vision, for the Class' benefit to compensate them for the additional risks (ER-388-390, 393, 403). The Government contract provided funds "in the following manner: (1) payment for air transport services to Baghdad and Kabul twice weekly; and (2) hazard pay for the crew members on the flights to and from Baghdad and Kabul." (ER-387-88). "Vision agreed to pay every captain, first officer and international relief officer" and "every additional crew member" specific sums of hazard pay (ER-388-89;

*see also* ER-393). The upstream contractors provided Vision the hazard pay for the Class' benefit, and Vision wrongfully retained it for its own use.

Vision argues that the Class alleged no facts establishing "title" to the hazard pay (Br-33). This argument is directly contradicted by the Complaint's plain language. The Complaint alleged the Government gave each upstream contractor hazard pay for the Class' benefit, which Vision was required to distribute to them (ER-388-89, 393). The basis for this obligation came from the contract between the upstream contractors and the Government, and the contracts between Vision and the upstream contractors (ER-387-89).<sup>13</sup>

Vision's argument that the hazard pay is "a debt" is similarly incorrect. Vision did not borrow the hazard pay from the Class; the hazard pay was specifically identified and earmarked for the Class. The Complaint alleges that specific amounts of hazard pay were converted by Vision during specific time periods (ER-391-94). Vision's reliance on *Florida Desk, Inc. v. Mitchell International, Inc.*, 817 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2002), is misplaced because in that case there was "no evidence that there was any obligation on [the agent's] part to keep intact or to hold the specific

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<sup>13</sup> Vision argues that this claim presents the possibility of subjecting it to double liability (Br-39-40). However, when Vision pays the Class the hazard pay to which it is entitled it will no longer have any liability to the upstream contractors because it will have fulfilled its legal obligations.

funds to deliver to Florida Desk.” Here, by contrast, the Complaint alleged that Vision received the hazard pay as a separate and distinct payment for its employees and was obligated to keep it intact to deliver to them (ER-387-90, 393).<sup>14</sup>

#### D. *Quantum Meruit*<sup>15</sup>

The doctrine of *quantum meruit* applies in the absence of an express agreement where defendant promises to compensate plaintiff for the fair value of plaintiff’s labor. *Sack v. Tomlin*, 871 P.2d 298, 302 (Nev. 1994). Accordingly, “[w]hen an express agreement cannot be found or provisions for payment are uncertain, and when a right to reasonable compensation is placed in issue by the pleadings or is litigated by express or implied consent of the parties, a recovery in *quantum meruit* may be allowed if necessary to prevent unjust enrichment.” *Id*; see also *Bangle v. Holland Realty Inv. Co.*, 393 P.2d 138, 140-41 (Nev. 1964). “As for quantum meruit, or quasi contract, a plaintiff must show she conferred a benefit on the defendant, and

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<sup>14</sup> Vision also incorrectly argues that the Class’ conversion claim fails because the Class is attempting to use a tort claim to rewrite its “compensation agreement” with Vision. (Br-38). As discussed in III(A), *supra*, the Complaint alleged no express employment agreement, and there was none.

<sup>15</sup> While the Court granted summary judgment against the Class on its *quantum meruit* and constructive trust claims, because the default goes back to the original Complaint, these claims remain viable. See *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 916, 917-18 (9th Cir. 1987) (holding allegations of the complaint are taken as true).

the defendant appreciated, accepted, and retained the benefit under circumstances such that it would be inequitable for him to retain the benefit without paying for it.” *In re Wal-Mart*, 490 F. Supp.2d at 1125 (permitting overtime wage claim to proceed under Nevada law on theory of unjust enrichment and *quantum meruit*). Here, Vision was required to compensate the Class for the fair value of its labor, which includes compensation for the addition risk undertaken in completing the work (ER-386 ¶17).<sup>16</sup>

### **E. Constructive Trust**

Vision does not substantively address the constructive trust claim in its initial brief, other than to say that it is a remedy and not a cause of action.<sup>17</sup> Vision is wrong. Constructive trust can be a cause of action, and is sufficient to sustain the judgment below. *See Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (“the seventh claim for relief, which alleges a constructive trust, states an equitable cause of action and seeks equitable relief”); *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987) (“FSLIC has the right . . . to pursue equitable causes of action such as a constructive trust. . .”); *Dolmetta v. Uintah Nat. Corp.*, 712

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<sup>16</sup> Vision did not object below, and may not argue now (Br-40), the Court erred in failing to instruct the jury with regard to the value of the Class’ labor.

<sup>17</sup> Vision therefore has waived any challenge to the sufficiency of its allegations. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999) (arguments not raised in the opening brief are waived).

F.2d 15, 19 (2d Cir. 1983) (reinstating “cause of action for a constructive trust” under NY law); *Locken v. Locken*, 98 Nev. 369, 372 (Nev. 1982).<sup>18</sup>

#### **IV. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION AND CERTIFIED THE CLASS**

Vision argues that class certification was improperly granted because Hester is not a proper class representative because he allegedly had an express employment agreement – which also rendered him inadequate and

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<sup>18</sup> The Class’ evidence, obtained largely from third-parties, confirms the Complaint’s allegations. The Air Bridge employees were the procuring cause for the payment of hazard pay from the upstream contractors to Vision (DE-135-1 at 22-37, DE-135-33 at CAI27885-CAI27891). In Phase III of the Air Bridge Program, for example, Vision’s Vice President, earmarked \$1,250,000 of hazard pay to be allocated for Vision’s Air Bridge employees and submitted that information in the form of a quote to Capital and CSC (DE-135-33 at CAI27885-CAI27891), which was incorporated into CSC’s bid proposal to the Government (DE-135-7 at CSC0033, DE-135-8 at CSC0057). Vision submitted invoices to CSC and Capital specifically identifying and billing for flight deck and cabin crew hazardous duty bonus (SER-124), and CSC paid those invoices in reliance on Vision’s invoices, expecting the hazard pay to be paid to Vision’s employees (DE-135-1 at 22-37). Similarly for Phase IV, Vision’s Aircraft Quote to McNeil contained specific amounts of funds earmarked for Vision’s Air Bridge crews for hazardous duty bonus on a 52-week annualized basis in the amounts of \$647,500 and \$350,000, respectively (DE-135-21 Ex. A)). Even though McNeil, like CSC, paid those specifically earmarked amounts (DE-135-21 at 2), Vision failed to pay the Air Bridge Program employees any of the hazard pay that it received in Phases II, III, and IV (DE-135-23 at 4-7; DE-135-24 at 4-6). Vision was aware that the money was intended for the Class, and even wrongfully represented that the Class was being compensated (DE-135-2 at 246-47). There is no express employment agreement between Vision and the Class members, as all of Vision’s employees are required to execute documents that acknowledge that there is no employment contract, either express or implied, between them and Vision (DE-135-5 at 871; DE-135-34 at 458; DE-135-44).

his claims atypical, and caused individual issues to predominate over common ones. Vision is wrong.

The District Court's decision to certify the Class is reviewed for abuse of discretion. *Marlo v. United Parcel Service, Inc.*, 639 F.3d 942, 946 (9th Cir. 2011); *see also In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008) ("When reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification.") (*cited in Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010)). Indeed, "[a] ruling on class certification 'is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion.'" *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 937 (9th Cir. 2009) (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461 (9th Cir. 2000)). Further, "[t]o the extent that a ruling on a Rule 23 requirement is supported by a finding of fact,' we review that finding for clear error." *Wolin*, 617 F.3d at 1171 (quoting *In re Salomon Analyst*, 544 F.3d at 480).

**A. Vision's Failure To Offer Evidence To Rebut Certification, Its Own Misconduct, And The Entry Of Default Preclude Its Argument On Appeal.**

Vision argues that its discovery violations and the entry of a default do not prevent it from arguing the District Court abused its discretion in certifying the Class (Br-51-52). However, the very case it cites recognizes a key exception to that proposition. In *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992), the court held that class certification can be challenged on appeal after entry of a default, “except to the extent that [the challenge] depends upon the court’s resolution of factual issues which defendants could have addressed at the scheduled hearings or in the required filings had they not defaulted.” Here, given Vision’s default, it is not permitted to contest the factual findings of the District Court in certifying the Class.

Nonetheless, Vision does precisely that. It argues that Hester offered “little in support of his motion for class certification.” (Br-50). This is both untrue and another cynical attempt by Vision to exploit its own misconduct below. The prejudice to the Class from this approach is patent. *See* DE-49, 50, 54, 61; SER-57 (“Plaintiff file[d] his Motion for Class Certification in an abundance of caution without the benefit of any substantive discovery from

Defendant and with two Motions to Extend the Court's Schedule by 90 days currently pending before th[e] . . . Court.”).

Moreover, Vision should not be heard to assign error to the District Court's certification decision because of its independent failure to actually offer evidence below to support its arguments against certification. Hester bore the burden of establishing that the Fed. R. Civ. P. 23 requirements were satisfied. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). To satisfy this burden, Hester introduced evidence demonstrating the propriety of class certification. Once Hester introduced evidence sufficient to set forth a *prima facie* case for certification, Vision could rebut this presumption only by introducing evidence sufficient to create a conflict as to at least one of the necessary Rule 23 requirements. *See Shariff v. Goord*, 235 F.R.D. 563, 569 n.3 (W.D.N.Y. 2006); *Arden Architectural Specialties, Inc. v. Washington Mills Electro Minerals Corp.*, 2002 WL 31421915, at \*1 n.2 (W.D.N.Y. Sept. 17, 2002); 3 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 7.17 (4th ed. 2002). Only then was the District Court required to weigh the competing evidence, resolve the conflict, and utilize its discretion to determine whether to certify. *See Tenuto v. Transworld Sys. Inc.*, 2000 WL 1470213, at \* 3 n.3 (E.D. Pa. Sept. 29, 2000) (“A defendant must produce some evidence to defeat a

plaintiff's *prima facie* showing that a proposed class meets the requirements of Rule 23."); *see also O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 321 n.12 (C.D. Cal. 1998) (certification appropriate because defendants failed to rebut plaintiff's evidence). However, even prior to the entry of the default (which occurred more than nine months after certification), the District Court concluded that Vision offered no evidence to rebut Hester's facts. *See, e.g.*, (ER-25-27, 29). Nor has Vision demonstrated on appeal that this or any other factual conclusion by the District Court was clearly erroneous.

#### **B. Hester's Claims Are Typical.**

Vision's typicality argument fails to even get out of the gate. "Vision believes that Mr. Hester is in fact typical of the Class members." (Br-14). This is quite true. As discussed above, and as alleged in the Complaint, neither Hester nor any Class member had an express employment agreement with Vision. All were in the same position as a matter of law. Indeed, Vision's arguments on appeal implicitly recognize this fact, making no effort to differentiate among Hester and Class members in its argument that the Class' equitable claims are precluded by Vision's fictitious express employment contract. *See* (Br-16-41).

“The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Wolin*, 617 F.3d at 1175 (citations and quotations omitted). “Like the commonality requirement, the typicality requirement is permissive and requires only that the representative’s claims are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citations and quotations omitted). Hester’s claims meet that test, and his interests are perfectly aligned with the Class.

Vision argues that Hester had an employment agreement with Vision, while other Class members did not, or perhaps had a different one. The Class already exposed the faulty premise of this argument; Hester did not have an employment agreement with Vision. And, in any event, this argument is waived because Vision never argued below that certification was inappropriate because it had an express employment agreement only

with Hester, subjecting him to a unique defense.<sup>19</sup> *Smith*, 194 F.3d at 1052; *Sofamar Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1186 n.4 (9th Cir. 1997).

In any event, while this Court need not proceed further to affirm, and in fact must limit its review to the Complaint, the record – even artificially truncated by Vision’s misconduct, exposes the truth that Vision has labored to obscure. The Memo – which is the only document that Vision ever asserted constituted an employment agreement – applied, if at all, to *all* of the Class members, including Hester, rendering him typical. Vision offered no proof of an employment agreement unique to Hester. Further, as noted above, neither the Memo nor any other document is an employment agreement between Vision and its employees (DE-159 at 4-5) (*supra* III(A)); (*see also* DE-135-44) (“[t]his Handbook should not be construed, nor does it constitute, any kind of “employment contract,” and “[a]ll employment with the Company [Vision] is at-will.”) (emphasis in original)). Even if Vision could overcome its own misconduct, the default, the striking of its Answer, and its failure to raise this argument below, Vision still could not

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<sup>19</sup> Vision argued below that it had other counterclaims against Hester (having to do with disclosure of allegedly classified information) as an impediment to typicality (DE-67 at 14-18). The District Court rejected these (DE-159 at 9) (“Vision has presented no material factual evidence to support its amended counterclaims.”). Vision abandoned that and its other objections to class certification by not raising them in its initial brief. *Powell v. California*, 408 Fed. Appx. 96, 98 (9th Cir. 2011).

demonstrate that the factual findings of the District Court were clearly erroneous.

**C. Hester Is An Adequate Class Representative.**

Vision relies on the same arguments here as it does with regard to typicality, and they must be rejected for the same reasons. The Court must be satisfied that the “representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This requirement is satisfied when (i) the class representatives have no interests conflicting with the class; and (ii) the representatives and their attorneys will properly prosecute the case. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). “Whether the class representatives satisfy the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.” *Rodriguez*, 591 F.3d at 1125 (citations and quotations omitted). Vision implicitly concedes that these requirements are met. “Instead, they challenge [Plaintiffs] adequacy only by re-asserting their commonality and typicality arguments.” *Id.* As in *Rodriguez*, that argument fails.

**D. Common Issues Predominate.**

“Common issues of fact and law predominate if they have a direct impact on every class member’s effort to establish liability and on every class member’s entitlement to injunctive and monetary relief.” *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) (quotations omitted); *see also Moore v. Painewebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (common issues predominate “if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.”). It is not necessary that all questions of law or fact be common; only some questions must be common, and they must predominate over individual questions. *Klay*, 382 F.3d at 1254; *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001). The predominance requirement is satisfied where the claims are “uniformly premised” on a “shared factual predicate” which gives rise to common legal issues. *In re Napster, Inc. Copyright Litig.*, 2005 WL 1287611, at \*7 (N.D. Cal. June 1, 2005).

Vision again argues that Hester “had a compensation agreement with Vision” and, without any proof whatsoever, that this “suggests that other

Vision employees had compensation agreements” (Br-54). Vision did not raise this argument below as an objection to class certification, and thus waived it, but this does not stop it from faulting the District Court for failing to address the issue (Br-57). Rather than pointing to evidence, Vision merely engages in rank speculation, and does so with the full knowledge of the truth – that none of Vision’s employees had a “compensation agreement,” and that the Memo applied, if at all, to everyone operating the Air Bridge.<sup>20</sup> Had Vision properly preserved this argument by making it below, and had default not been entered against it as a result of its discovery misconduct, Vision would at most raise a question common to all Class members, demonstrating, not undermining, predominance.

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<sup>20</sup> Vision’s pilots and cabin crew members were paid at different rates, and flew varying numbers of trips into the war zones. This does not affect their entitlement to hazard pay, but pertains only to damages. *See Klay*, 382 F.3d at 1259-60 (footnotes omitted) (“[W]here damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification.”); *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (commonality can be met even though members of the proposed class have different methods of compensation); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (“The amount of damages is invariably an individual question and does not defeat class action treatment.”). Moreover, the presence of different types of employees presents no impediment to certification. *See Grays Harbor Adventist Christian Sch. v. Carrier Corp.*, 242 F.R.D. 568, 571 (W.D. Wash. 2007) (certifying class of both “individuals” and “entities” that purchased furnaces); *Satchell v. FedEx Corp.*, 2005 WL 2397522, at \* 6 (N.D. Cal. Sept. 28, 2005) (certifying class of employees working in Domestic Ground Operations, Air Ground Freight Services, Air Operations Division, and customer call centers).

In short, the Complaint alleged, and the evidence presented by Hester at class certification showed, Vision had a corporate policy of accepting hazard pay from its upstream contractors for the benefit of its employees, agreeing to pay those sums to its employees, and instead kept that money for itself. Where corporate policies like this one “constitute the very heart of the plaintiffs’ . . . claims,” common issues predominate because those policies “would necessarily have to be re-proven by every plaintiff.” *Klay*, 382 F.3d at 1257; *see also Allapattah Servs.*, 333 F.3d at 1261, *aff’d*, 545 U.S. 546 (2005).

**V. THE CLASS’ CROSS APPEAL: THE DISTRICT COURT ERRED IN DISMISSING THE CLASS’ PUNITIVE DAMAGES CLAIM**

The District Court’s decision to dismiss the Class’ claim for punitive damages is reviewed *de novo*. *U.S. v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998). On the first day of trial, before the jury was selected and the Class permitted to present any evidence, the District Court informed the parties: “The Court revisited the complaint and the Nevada Revised Statutes after its discussion with counsel. **THE COURT FINDS** the complaint does not establish sufficient evidence, nor clear and convincing evidence as required by the Nevada Revised Statutes. **ACCORDINGLY, the jury will not be permitted to entertain punitive damages**” (SER-44) (emphasis in

original). This was erroneous. The District Court should have permitted the Class to proffer evidence to support its punitive damages claim, rather than ruling merely on the allegations themselves.

Upon entry of a default judgment, the well-pled allegations of the complaint relating to the defendant's liability are taken as true, with the exception of the allegations as to the amount of damages. Fed. R. Civ. P. 55; *see also TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). If the damages are not for a "sum certain or for a sum which can by computation be made certain," Fed. R. Civ. P. 55(b)(1), the "court may conduct such hearings or order such references as it deems necessary and proper." Fed. R. Civ. P. 55(b)(2); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990) ("a default judgment generally precludes a trial of the facts except as to damages"). In proving its damages, a party is not limited solely to the allegations in the complaint, but may present all appropriate evidence supporting its claims. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 907 (9th Cir. 2002) (upholding district court's award of punitive damages after entry of default judgment where district court reviewed "the full record" in determining that punitive damages award was appropriate); *Thoeren*, 913 F.2d at 1415 (same); *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1152-1153 (3d Cir. 1990) (same).

*Combs* is particularly instructive. There, the district court entered a default judgment against the defendant because the defendant “repeatedly flouted even his basic discovery obligations, often violating court orders.” In determining whether plaintiff was entitled to punitive damages, “the district court . . . look[ed] to the full records before it” and awarded the plaintiff punitive damages. *Id.* at 907. In upholding the district court’s award of punitive damages, this Court found that “[t]he full records shows that Combs’ conduct met at least the reckless or callous indifference standard for punitive damages and is sufficient to satisfy and uphold the district court’s punitive damages award.” *Id.*

Here, the District Court was required to allow the Class to use the “full record” developed through discovery to demonstrate the “clear and convincing evidence” required for an award of punitive damages. *See id.* That evidence shows that Vision knew it was obligated to pay its employees hazard pay (DE-135-2 at 135-40, 246-47), represented to the upstream contractors and the Government that it paid its employees the hazard pay it collected for their benefit (DE-135-2), fired those employees who inquired about hazard pay (DE-1 at 11), and knowingly elected not to pay its employees hazard pay (DE-135-2 at 246-47, DE-135-5 at 96-99).

## CONCLUSION

The Class respectfully requests that the Court affirm the judgment entered by the District Court, reverse its determination as to punitive damages, and remand this matter for trial on punitive damages only.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE  
REQUIREMENTS**

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 16,441 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced type face using Word 2003 in 14 point Times New Roman.

/s/David M. Buckner  
Attorney for Appellees  
August 10, 2011

### **STATEMENT OF RELATED CASES**

Appellee/Cross-Appellant is aware of no cases currently pending before this Court that may be deemed a related case under Ninth Circuit Rule 28-2.6.

/s/David M. Buckner

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 10, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/David M. Buckner