STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR OAKLAND COUNTY
IN THE BUSINESS COURT

INTERNATIONAL OUTDOOR, INC.,

Plaintiff,

v.

Case No. 2016-155472-CB
Hon. Martha Anderson

SS MITX, LLC and LAMAR ADVERTISING OF MICHIGAN, INC,

Defendants

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,

Plaintiffs

v.

Case No. 2016-155489-CB
Hon. Martha Anderson

INTERNATIONAL OUTDOOR, INC.,

Defendant.

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NOTICE OF HEARING

PLEASE BE ADVISED THAT SS MITX And Lamar Advertising Of Michigan's Motion For Relief From Judgment Under MCR 2.621(C)(1)(c) will come for hearing before the Honorable Martha Anderson in her courtroom on Wednesday, June 19, 2019 at 8:30 a.m.

Respectfully submitted,

ALTIOR LAW, P.C.

/s/ Stephen T. McKenney
Stephen T. McKenney (P65673)
Attorneys for Lamar Advertising of Michigan, Inc.

STARK REAGAN, PLC

/s/ Christopher E. LeVasseur
Christopher E. LeVasseur (P35981)
Attorneys for SS MITX, LLC

Dated: June 6, 2019

CERTIFICATE OF SERVICE

I certify that on June 6, 2019 I electronically filed the forgoing paper with the Clerk of the Court using the Court's MiFile True Filing system and EFS (e-file and serve) option, which will send notification of such filing to the individuals listed on the Case Service List.

/s/ Denise L. Ward
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FEE

SS MITX AND LAMAR ADVERTISING OF MICHIGAN'S MOTION FOR RELIEF FROM JUDGMENT UNDER MCR 2.612(C)(1)(c)

SS MITX, LLC[1] and Lamar Advertising of Michigan, Inc., for their Motion for Relief from Judgment under MCR 2.612(C)(1)(c), for the reasons stated in the brief in support of this motion, request that this Court: (1) grant the motion by vacating the judgment; (2) alternatively, if it deems necessary, order an evidentiary hearing on the issue of whether the judgment should be set aside for fraud, misrepresentation, and perjury; (3) if necessary, allow for a brief discovery period prior to that hearing; and (4) grant any other relief that this Court deems appropriate, just and equitable.

Respectfully submitted,

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Stephen T. McKenney (P65673)
Attorneys for Lamar Advertising of Michigan, Inc.

STARK REAGAN, PLC

/s/ Christopher E. LeVasseur
Christopher E. LeVasseur (P35981)
Attorneys for SS MITX, LLC

Dated: June 6, 2019

[1] SS MITX has asserted, and continues to assert, that, as to SS MITX, no adverse finding was made by the jury and no judgment was entered against it after the trial of this action. However, the serious misconduct, misrepresentation and fraud committed by International Outdoor, Inc. and its president Randy Oram, as described more fully in the attached brief, compels it to join in the instant motion. In doing so, SS MITX does not waive its contention that no judgment was entered in favor of International Outdoor as to SS MITX.

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BRIEF IN SUPPORT OF SS MITX AND LAMAR ADVERTISING OF MICHIGAN'S MOTION FOR RELIEF FROM JUDGMENT UNDER MCR 2.612(C)(1)(c)

I. INTRODUCTION

> When the truth is concealed or deliberately distorted, the reaction must be outrage. Anything less accepts dishonesty and by accepting it encourages it . . . It tears at the very fabric of the legal system and at the objective of the rule of law, which is to keep peace in the community by fairly resolving the disputes endemic to communal life. Reverence for the truth is an essential component of fairness. If the public ever comes to believe that the courts do not abhor dishonesty, they will not accept the courts' decisions as fair and will not be willing to submit their disputes to them. [*Traxler v Ford Motor Co*, 227 Mich App 276, 290 n.1, 576 NW2d 398 (1998) (citations omitted)]

This motion is about the truth - belatedly discovered - by the defendants SS MITX, LLC ("Simply Self Storage") and Lamar Advertising Company of Michigan, Inc. ("Lamar") – and the extraordinary efforts plaintiff International Outdoor, Inc. ("IO") employed to conceal the truth; to directly and unashamedly lie to this Court and the jury that tried this case. Mere days ago, former IO employee Patrick Depa, on his own and without any solicitation, approached counsel for Simply Self Storage to say that he had personal knowledge that the alleged lease renewal letter – the very core piece of evidence on which the trial in this action turned; the document that the jury specifically found had been timely sent by IO's president, Randy Oram - "was not sent in December 2013. I know this because I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016. Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time."

Depa's affidavit establishes that Oram's testimony was perjured and the document IO submitted into evidence in support of its claims was fabricated and falsified. Consequently, Lamar and Simply Self Storage bring this motion for relief from judgment under

MCR 2.612(C)(1)(c) and ask this Court to vacate this judgment, or, alternatively to conduct an evidentiary hearing on whether to vacate this judgment, based on IO's fraud, misrepresentation, and other misconduct.

II. BACKGROUND

A. The Core Facts In Dispute In The Case

This case involves competing claims between IO and Lamar to the right to erect a billboard on property owned by Simply Self Storage in Auburn Hills. There is no dispute that the first-in-time lease was signed between IO and Simply Self Storage on March 17, 2009. (Ex. 1; the "IO Lease"). The IO Lease was effective for a five-year period and expired by its own terms on March 17, 2014. (Ex. 1). The IO Lease provided that IO could renew the lease by sending a written notice of renewal. (*Id.*). IO claimed that it did send the notice of renewal and supported that claim at trial through the testimony of Oram and the introduction of a letter it claimed was a photocopy of the renewal it sent. (Ex. 2; Trial Tr. at II:105:18-106:11); (Ex. 3; Alleged Renewal Letter). Simply Self Storage and Lamar contested IO's story about the lease renewal supporting their position with, *inter alia*, testimony from Simply Self Storage employees that searched diligently and could not find any evidence of the renewal. (Ex. 2 at I:212:10-213:25; II:30:18-31:8; II:87:14-88:6). Put simply, the key question at the trial was whether or not IO sent the renewal to Simply Self Storage. In fact, the first question the jury was asked was: "Did IO send written notice to Simply Self Storage to renew its lease prior to March 16, 2014?" (Ex. 4; Verdict Form).

B. The Affidavit Of Patrick Depa Demonstrates That Randy Oram Committed Perjury And Fabricated Evidence.

Patrick Depa is the former Real Estate Director for IO. (Ex. 5; Depa Aff. at ¶2). Depa worked for IO between September 2010 and July 2018. (*Id.*) Depa was responsible for procuring

leases for new billboard sites, upgrading static billboards to digital, acting as liaison to all maintenance contractors to maintain current billboard inventory, and presenting staff reports for all zoning board of appeals and planning commission meetings. (*Id.*). Given his role at IO and the time frame in which he worked there, Depa had first-hand knowledge of the IO Lease, the alleged renewal of the IO Lease and the Lamar Lease. (*Id.* at ¶¶3-5). Depa was aware of this action between IO and Lamar and Simply Self Storage and the critical issue of whether the IO Lease was or was not renewed. (*Id.* at ¶5).

Based on this knowledge, Depa has sworn that:

> I have personal knowledge **that the lease renewal letter was <u>not sent in December 2013</u>**. I know this because **I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. <u>This occurred in or about late July 2016.</u> <u>Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time</u>.** [(*Id.* at ¶6) (Emphasis added)].

Depa tried to raise the issue of Oram's fabrication of the renewal letter with IO's general counsel, Jeffrey Sieving, but Sieving – who acknowledged that Oram had created and backdated the letter – refused to take any action. (*Id.* at ¶¶7-9).[2]

Depa stated that the issue of the IO Lease did not re-surface until January or February 2016, when IO learned that non-party Adams Outdoor had used the Planned Unit Development ("PUD") process to obtain approval for a billboard in Auburn Hills. (*Id.* at ¶¶12-13). Oram then asked Depa to search IO's files for the IO Lease, so that IO could pursue a billboard in Auburn Hills. (*Id.* at ¶13). Depa "reviewed the file, and learned that the Simply Self Storage lease had expired, and I advised Randy Oram of that fact." (*Id.*). In response, Oram asked Depa to contact

[2] Although he was not counsel of record and did not testify at the trial, Sieving was present for the entire trial. Depa's affidavit raises serious concerns about Sieving's knowledge of the perjured testimony and fabricated evidence and his willingness to allow the false testimony and exhibits to be used at the trial.

Simply Self Storage to see if they would belatedly renew the IO Lease, but Depa was never able to connect with Simply Self Storage. (*Id*. at ¶¶13-14).

After unsuccessfully trying to contact Simply Self Storage about a belated lease renewal, in 2016 Depa was reviewing the City of Auburn Hills website and learned that Lamar had applied for a PUD to erect a billboard on the Simply Self Storage property in Auburn Hills (*Id*. at ¶16). Depa then "advised Randy Oram of this development, which caused him to become extremely upset. He insisted that Alan White must have sent a renewal letter before the lease had expired. **We looked at every file, every server, and every computer, and found no such letter.**" (*Id*. at ¶16) (Emphasis added). Depa specifically recalled Oram emphasizing that he "never claimed to us at this time that *he* wrote a renewal letter; rather, he stated only that he hoped Alan White had done so. **Oram made us double and triple check, and no renewal letter was found.**" (*Id*. at ¶17) (Emphasis added). Depa stated that once it became clear that there was no renewal of the IO Lease, he "witnessed Randy Oram create and backdate a renewal letter." (*Id*. at ¶18).

1. Depa's Affidavit Exposes Randy Oram's Perjury.

Depa's affidavit stands in stark contrast to the testimony of Oram at trial. The contradictions are clear and leave no room for reconciliation; Oram perjured himself on these key issues at trial:

Depa's Affidavit	**Oram's Trial Testimony**
"I have personal knowledge that the lease renewal letter was not sent in December 2013." (Ex. 5 at ¶4)	"Q: Mr. Oram, did you send a renewal letter to Simply Storage in December of 2013 extending your lease? A: Yes, sir." (Ex. 2 at II:105:18-20)

"I know this because I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016." (Ex. 5 at ¶5)	"Q: . . . I understood from your testimony that there was nobody else present when you were typing the letter? A: I don't believe so. If they were, it was just in passing, but no I would have typed it on my own." (Ex. 2 at II:224:5-9)
"Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time." (Ex. 5 at ¶5).	"Q: And, you understand that the whole defense in this case is that you're – you're a liar, you understand that? A: I'm – yes I'm understanding that. Q: You're a liar and that you created this document after the fact to cover your position with IO, correct? A: It seems that way, yes. Q: Did you do that? A: Absolutely not." (Ex. 2 at II: 113:20-114:3)
"The computer Mr. Oram used to create the letter was still in his office when I left employment with IO in July 2018" (Ex. 5 at ¶6)	"Q: Now let's – that computer that that letter was sent on, do you still – are you still in possession of that computer? A: No, sir." (Ex. 2 at II:110:7-10)
"I was checking the Auburn Hills website for meeting agendas and discovered that Lamar was taking a case to the planning	"Q: And did you eventually find out about – well tell the jury how you found out – found out about the Lamar Lease . . .

commission for a new billboard to be located on the Simply Self Storage location. I advised Randy Oram of this development, which caused him to be become extremely upset. He insisted that Alan White must have sent a renewal letter before the lease had expired. We looked at every file, every server, and every computer, and found no such letter. Mr. Oram never claimed to us at this time that *he* wrote a renewal letter; rather, he stated only that he hoped Alan White had done so. Mr. Oram made us double and triple check, and no renewal letter was found. When I later spoke to Alan White about this, he confirmed that he never sent a renewal letter. He explained that there was no reason to do so because Randy Oram had decided not to move forward with the Auburn Hills site." (Ex. 5 at ¶¶16-17)	A: In mid-July it came up that we are ready to proceed with respect to – as a company in our real estate meetings, we were ready to proceed with respect to Auburn Hills. My son was interning home from college and this was the internship he had at our company . . . I instructed him to look into Auburn Hills and . . . report back to me with what's going on… He reported back to me on the Friday – it would have been the 22nd of July . . . Then I proceeded to try to get a hold of Simply Self Storage to share with them that there must be some type of a misunderstanding with respect to this particular property, here's my lease, here's my lease renewals. . ." (Ex. 2 at II:124:18-126:20)
"I reviewed the file, and learned that the Simply Self Storage lease had expired, and I advised Randy Oram of that fact . . . We	"Q: So not only do we not have the computer the only thing in your possession related to the Auburn Hills transaction was a copy of the

looked at every file, every server, and every computer, and found no such letter . . . Mr. Oram made us double and triple check, and no renewal letter was found. (Ex. 5 at ¶¶13, 16 and 17)	lease that you entered into as I understand it, correct? A: That's right a hard copy. Q: And, this 2013 renewal letter correct? A: There's another letter with this. So, there was the lease and the cover letter as well as the renewal letter. So, that's what was in the file." (Ex. 2 at II:194:6-15).

2. The Manufactured Evidence

Depa's affidavit also establishes that Oram fabricated and backdated the renewal letter. (Ex. 5 at ¶4). IO introduced the alleged renewal letter into evidence and directly represented to this Court that it was a copy of the renewal letter created and sent on December 20, 2013. (Ex. 2 at II:105:18-106:11); *see also* (Ex. 3). Thus, according to Depa's affidavit, Exhibit 26 admitted at the trial was a complete fabrication and IO misrepresented what that exhibit was, when it was created, and that it was, in fact, a timely lease renewal. *Compare* (Ex. 5 at ¶4) *with* (Ex. 2 at II:105:18-106:11); *see also* (Ex. 3). IO relied on this manufactured evidence at trial to support its key contention that it timely renewed the IO Lease, with Oram explaining that the only evidence he had to support his position was "my word . . . and the renewal letter."[3]

C. Simply Self Storage And Lamar's Attempts To Conduct Discovery Into The Relevant Facts Shows That IO Concealed Depa's Information.

[3] Oram's answer here also referenced another "letter" which was offered, but not admitted as evidence at the trial because it was hearsay; so, the only evidence at trial in support of Oram's position was "my word and . . . the renewal letter." (Ex. 2 at. II:224:3; II:108:12-109:9).

Lamar and Simply Self Storage diligently sought, through discovery, information that would prove that Oram did not send the renewal letter that he claims to have sent (and which was never received by Simply Self Storage). Lamar and Simply Self Storage conducted written discovery, depositions, and sought to inspect the computers used by IO to see if they could find proof that IO never sent the renewal letter. The evidence they sought was the very same proof Depa offered in his affidavit. But Lamar and Simply Self Storage could not find this proof - and they literally could not find Depa - because Oram and IO used deceptive and false discovery responses to conceal Depa's knowledge and further conceal Depa's knowledge of the fabrication and backdating of the letter. Thus, Lamar and Simply Self Storage did not have the opportunity to pursue evidence of this nature through discovery or present it at trial.

1. Simply Self Storage And Lamar Asked IO To Identify All People With Knowledge About The Facts And IO Failed To Identify Depa.

In its first discovery set to IO, Lamar asked and IO responded:

> 2. Identify all persons that you believe may have information regarding the facts giving rise to the claims and defenses in this action.
>
> ANSWER: Randy Oram; Alan Scott White, President and CEO of Wise Commercial Real Estate; Kurt O'Brien, President of Simply Storage; Kyle Schmutzler, SVP of Real Estate. In addition, please see all individuals identified in the documents produced in response to Defendant/Counter Plaintiff's document requests. [(Ex. 6; IO's Answers to Lamar's Interrogatories at p. 2)].

Similarly, Lamar asked IO to identify all people with information about the facts alleged in the complaint, denied in the answer, or alleged in the affirmative defenses, and IO gave the same response. (Ex. 6. at p. 3, #6). Neither of IO's answers identified Depa as someone with knowledge of the facts or allegations in the case, but Depa's affidavit clearly demonstrates that he had relevant, critical, and first-hand knowledge of both. (Ex. 5 at ¶¶4-16). Depa was also never identified on any of IO's witness lists in this action.

2. Lamar's Request For A Forensic Computer Inspection And IO's Lies About The Computer On Which The Document Was Created.

Lamar asked IO to permit an inspection of the computer on which the alleged renewal letter was created. (Ex. 7; IO Supplemental Answers to Lamar's Second Discovery Set at p. 1, #1). IO responded, on September 6, 2017, that "[w]ith regard to the computer on which the original version was created, the computer cannot be identified or located at this time." In a supplemental answer filed on November 22, 2017, IO explained that "the computer used to create the December 20, 2013 Renewal Documents was removed from service…" (*Id.* at p. 2). Lamar again followed up on this issue in Oram's February 16, 2018 deposition by asking him:

> Q: Did your IT experts search your backup systems to see if they could find the source metadata for what is Exhibits 9 and 10[4]?
>
> A: We couldn't find anything.
>
> Q: But that's not my question. Did you direct –
>
> A: The computers aren't there.
>
> Q – IT experts – let me get the question on the record. Did you direct IT experts to search the backups to your server to find the original sources of the Exhibits 9 and 10 what's known as the metadata?
>
> A: I don't know what metadata is, so I couldn't tell you. The folder is lost. The whole Auburn Hills folder is completely gone. It's not on my computer. It's not in our company, so –
>
> Q: But did you employ or ask any expert to search?
>
> A: I don't know if my wife or Jeff from our office asked anybody else. I did not, no. [(Ex. 8; Oram Dep. at 159:5-22)].

[4] Exhibit 9 of the deposition was the alleged renewal and Exhibit 10 was the letter that accompanied it.

Oram's testimony and the statements IO made in response to the request for inspection are untrue, misleading, and contradicted by Depa's affidavit in three respects: (1) Oram's statement that the computer on which the original alleged renewal document was created was no longer in IO's possession as of September or November 2017 or February 2018, is untrue because Depa says "[t]he computer Mr. Oram used to create the letter was still in his office when I left employment with International Outdoor in July 2018." *Compare* (Exs. 7 and 8) *with* (Ex. 5 at ¶6). (2) Oram's statement that IO could not search the computer on which the renewal letter was created because "the computers aren't there" is untrue both because the computer on which the document was created was there and Oram did ask Depa to search the computer for evidence of the renewal. *Compare* (Ex. 8) *with* (Ex. 5 at ¶¶4, 16-17). (3) Depa's search of the computer was not unsuccessful because there was nothing to search; Depa's search in fact revealed that there never was a renewal letter. *Compare* (Exs. 7 and 8) *with* (Ex. 5 at ¶¶16-17).

III. ARGUMENT

A. The Governing Legal Standards

MCR 2.612(C)(1) provides, "[o]n motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds … (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A motion to set aside a judgment for fraud, misrepresentation, or other misconduct of an adverse party must be filed "within one year after the judgment…."

The plain language of MCR 2.612(C)(1)(c) reflects three separate grounds for setting aside a judgment, "[f]raud (intrinsic or extrinsic), misrepresentation, <u>or</u> other misconduct of an adverse party." MCR 2.612(C)(1)(c) (Emphasis added). Because MCR 2.612(C)(1)(c) is unambiguous, it must be applied based on its plain language and meaning. *Family Independence Agency v Jefferson*

(In re KH), 469 Mich 621, 628; 677 NW2d 800 (2004). Further, because MCR 2.612(C) is remedial, it should be construed liberally. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988) ("the well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy."); *see also Hesling v CSX Transp, Inc*, 396 F3d 632, 641 (CA 5 2005) (Holding that Federal Rule of Civil Procedure 60(b)(3)[5] "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect," and, therefore, "is remedial and should be liberally construed.").

No published opinion of the Michigan courts defines what constitutes a "misrepresentation" or "other misconduct of an adverse party" for purposes of MCR 2.612(C)(1)(c). The Michigan Court of Appeals has looked to Black's Law Dictionary to define the term "misrepresentation" when it is used in a statute amongst other legal terms such as "fraud," but not defined. *In re Moiles*, 303 Mich. App. 59, 70, 840 N.W.2d 790, 796-797 (2013), *rev'd on other grounds*, *Helton v. Beaman*, 497 Mich. 1001, 861 N.W.2d 621, 621 (2015). Black's Law Dictionary defines "misrepresentation" as "[t]he act of making a false or misleading assertion about something, usu. with the intent to deceive." (Black's Law Dictionary, 9th Ed.); *In re: Moiles, supra* at 70. Consistent with this definition, the Michigan Court of Appeals has recently held that an unintentional false representation is grounds for relief from judgment as a misrepresentation under MCR 2.612(C)(1)(c). *Sullivan v Sullivan*, unpublished per curiam opinion of the Court of

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[5] MCR 2.612(C)(1)(c) is nearly identical to Rule 60(b)(3), which provides "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: … (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." The Michigan Supreme Court has expressly recognized that "we find instructive the interpretation of FR Civ P 60(b), which substantively is the same as MCR 2.612, and from which the Michigan court rule is derived." *Triplett v St Amour*, 444 Mich 170, 201; 507 NW2d 194 (1993).

Appeals dated May 17, 2018 (Docket Nos. 330543 and 333273).[6] This is consistent with opinions of the federal appellate courts regarding the meaning of "misrepresentation" under Rule 60(b)(3). *Jordan v Paccar, Inc*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued Sep. 17, 1996 (Case No. 95-3478); 97 F3d 1452 (Table) ("It is possible to give each operative word in Rule 60(b)(3) independent effect quite simply … '[m]isrepresentation' can be interpreted as an affirmative misstatement…"); *Lonsdorf v Seefeldt*, 47 F3d 893, 897 (CA 7 1995) ("Fed. R. Civ. P. 60(b)(3) applies to both intentional and unintentional misrepresentation.").

The Sixth Circuit has held that the identical "other misconduct" language in Fed. R. Civ. P. 60(b)(3), "can be interpreted to reach questionable behavior affecting the fairness of litigation other than statements or the failure to make statements." *Pacaar, Inc*., *supra.* "Failure to disclose or produce material requested in discovery can constitute "misconduct" within the purview of 60(b)(3)." *Abrahamsen v Trans-State Express*, 92 F3d 425, 428 (CA 6 1996), (citation and quotation omitted). Further, "misconduct" necessitating relief from judgment need not be intentional:

> "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions -- elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. . . We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents -- at least avoidable ones -- should not be immune from the reach of the rule. Thus, we find ourselves in agreement with the Fifth Circuit that, depending upon the circumstances, relief on the ground of misconduct may be justified "whether there was evil, innocent or careless, purpose." [*Anderson v Cryovac,* 862 F2d 910, 923 (CA 1 1988)].

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[6] A copy of this opinion is attached as Exhibit 9. *Sullivan* is cited because no published decision of Michigan appellate courts prior to *Sullivan* has addressed the sufficiency of an unintentional misrepresentation under MCR 2.612(C)(1)(c).

"Where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). "[W]here there are conflicting allegations and affidavits with respect to the question whether there has been a fraud perpetrated upon the court, the trial court is ***required*** to conduct an evidentiary hearing in order to ascertain if the fraud existed." *Id.* at 179 (emphasis added).

B. The Facts Established In Depa's Affidavit Support Vacating The Judgment.

Depa's affidavit provides credible and unbiased evidence of IO and Oram's misrepresentations and misconduct in connection with the trial in this action. (Ex. 5). The central issue at the trial was whether IO had renewed its lease with Simply Self Storage. The *only* evidence offered by IO in support of its contention that the lease had been renewed was (1) the alleged renewal letter, and (2) Oram's testimony. (Ex. 2 at II:224:3) (Oram explaining that the only evidence he had to support his position was "my word . . . and the renewal letter."). Depa's affidavit undermines both these pieces of evidence because it establishes that the renewal letter was fabricated, and that Oram perjured himself when he authenticated the renewal letter in his sworn testimony. (Ex. 5 at ¶¶4, 16-17). Further, Depa's affidavit establishes that IO and Oram gave this same misleading and untrue testimony about the scheme to backdate the renewal letter, throughout discovery in this case, by giving misleading answers about Depa's knowledge of the facts and the availability of computer evidence to support Lamar and Simply Self Storage's position that the letter was fabricated and was never received by Simply Self Storage. *Compare* (Ex. 5 at ¶¶4,6, 16, and 17) *with* (Exs. 6, 7, and 8).

Courts evaluating claims for relief from judgment based on allegations of perjury, fabrication of evidence, or discovery misconduct have routinely granted those motions, and where

they have not, appellate courts have been quick to reverse. *Fraige v American-National Watermattress Corp*, 996 F2d 295 (CA Fed 1993) is instructive. In *Fraige*, the plaintiff, Vinyl Products, sued defendant, Am-Nat, for infringement of a patent on a waterbed mattress with a certain type of fibrous construction. *Id*. at 296. Vinyl Products filed a motion for preliminary injunction, and in response Am-Nat's president submitted "false and forged documentation" in which he "altered, or had altered, a waterbed mattress advertisement of Am-Nat's predecessor to show the presence of a fibrous material inside the mattress." *Id*. The falsified advertisement made it appear that Am-Nat's advertisement using the fibrous material, "predate[d] [Vinyl Products'] patent application by several years." *Id.* It was then "shown to witnesses who testified at the preliminary injunction hearing," and Am-Nat's president "attested to the authenticity of the advertisement that had been altered and falsely stated that copies of that advertisement (as altered) had been distributed to customers several years before the filing date of [Vinyl Products'] patent application." *Id*. The district court denied the motion for preliminary injunction. *Id.*

During the jury trial later in the case, Vinyl Products discovered that Am-Nat fabricated the advertisement, but not before the jury was exposed to the fabricated evidence. *Id*. The jury returned a verdict finding Vinyl Products' patent invalid and judgment was entered. *Id.* Vinyl Products moved to set aside the judgment under Rule 60(b)(3). The trial court denied Vinyl Products' motion, despite its finding that the "forged documents and false declarations … went directly to the question of whether a particular waterbed manufactured by defendant's predecessor contained wave absorbing fiber at a time which would invalidate plaintiff's patent."

The Federal Circuit reversed, finding an abuse of discretion, and ordered a new trial on the validity of Vinyl Products' patent. *Id.* at 300. The court reasoned that Am-Nat's president's "scheme was deliberately planned and carefully executed for the purpose of interfering with the

judicial process, not only at the preliminary injunction hearing stage but also at trial." *Id.* at 298. Further, the court reasoned that it was improper for Am-Nat to argue, and for the trial court to assess, the effectiveness of Am-Nat's fraud:

> Here, Am-Nat is likewise in no position to dispute the effectiveness of its fraud. The district court should not have tried to evaluate its effect on the jury and its findings as to the patent's validity. It was impossible accurately to appraise, the extent to which the jury relied on testimony tainted by the false and forged documentation. When it became known that the jury was presented testimony based on fraudulent documentation, where that testimony was relevant and material to the issue of patent validity, all of the jury's invalidity findings became suspect. (*Id.*) (Internal citation omitted).

Having reversed for an abuse of discretion, the court concluded, "[a]ny other decision by this court would condone, and possible encourage misconduct of the type here involved…." *Id.*

Fraige is not alone. Numerous other courts have held that it is an abuse of discretion to not grant relief from judgment based on falsified evidence, perjured testimony, and/or other misconduct. In *Lonsdorf*, the Seventh Circuit held it was an abuse of discretion to not grant a new trial under Rule 60(b)(3) where the defendant had "materially altered a document admitted into evidence and relied on those alterations".[7] In *Peacock Records, Inc v Checker Records, Inc*, 365

[7] In *Lonsdorf*, the plaintiff sued Seefeldt for sexual harassment during her work training. During the case, Seefeldt admitted in evidence an altered training schedule which listed many of the alleged acts of harassment as scheduled training activities. *Id.* at 896. It was only after trial that Plaintiff discovered a carbon-copy of the training schedule, which revealed that Seefeldt had altered the document admitted in evidence. *Id.* Plaintiff then filed a motion for relief from judgment under Rule 60(b)(3) arguing "fraud" and "misconduct." The trial court denied the motion, but the Seventh Circuit reversed and ordered a new trial. It reasoned that "Fed. R. Civ. P. 60(b)(3) applies to both intentional and unintentional misrepresentation." *Id.*, at 897. Further, "[a] determination of whether the alleged misrepresentation altered the result of the case is unnecessary because Rule 60(b)(3) protects the fairness of the proceedings, not necessarily the correctness of the verdict." The court concluded that "[i]t is patently obvious that Seefeldt benefited from the use of a fraudulently altered document and Lonsdorf suffered an injustice, [for which] Fed. R. Civ. P. 60(b)(3) provides an escape valve to protect the fairness and integrity of litigation in federal courts." *Id.*, at 898.

F2d 145, 147 (CA 7 1966), the court reversed a denial of a motion for relief from judgment based on alleged perjury:

> We hold that where it appears that perjured testimony may have played some part in influencing the court to render a judgment, the perjury will not be *weighed*, on a motion to set aside the judgment. This seems self-evident. The factual question which the district court failed to answer is, "Was the judgment obtained in part by the use of perjury?" If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice.

In *Abrahamsen*, the Sixth Circuit affirmed a district court's grant of a motion under Rule 60(b)(3) based on a defendant's withholding an inculpatory statement sought by plaintiff both during discovery and at trial, reasoning that "[f]ailure to disclose or produce material requested in discovery can constitute 'misconduct' within the purview of 60(b)(3)."[8]

In *Sullivan*, the Michigan Court of Appeals held it was an abuse of discretion to deny a motion under MCR 2.612(C)(1)(c) where the judgment was based on an *unintentional* misrepresentation. *Sullivan* concerned an award of spousal support in a consent judgment. *Id.* at p. 1. The parties agreed on the amount of spousal support based on the plaintiff's representation on January 12, 2015, concerning the number of his vested shares of stock. *Id.* Upon learning that plaintiff misrepresented the number of vested shares of stock, defendant moved for partial relief from judgment under MCR 2.612(C)(1)(c). The trial court denied defendant's motion, finding that plaintiff had not *intentionally* lied, but had instead *unintentionally* misstated the actual number of his vested shares at the time of the consent judgment. *Id.* at pp. 1-2. The Michigan Court of Appeals reversed, finding it was an abuse of discretion to deny defendant's motion for partial relief

[8] The Sixth Circuit held that "a 60(b)(3) motion may be granted where the court is "reasonably well satisfied that the testimony given by a material witness is false; that, without it, a jury might have reached a different conclusion; that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial." *Id.* at 428 (citations omitted).

from judgment. *Id.* at p. 3. "Although defendant admittedly focused in her motion on deliberate and intentional fraud, her motion also referred to relief from judgment based on a "material misrepresentation." *Id.* The court reasoned "the central issue at the January 12, 2015, hearing was the distribution of vested shares." *Id.* Therefore, "regardless of whether plaintiff intended to lie or did not intend to lie, he did in fact make a material representation at this time, and this representation was false." *Id.* Consequently, "it was an abuse of discretion for the trial court to deny the motion for relief from judgment." *Id.*

IV. CONCLUSION

Applying the well-established legal framework to the facts of this case, Depa's affidavit establishes that: (1) Oram lied under oath about sending the lease renewal in December 2013; (2) Oram fabricated the lease renewal in 2016 and backdated it to 2013 and then introduced the false and backdated letter into evidence in the trial by falsely stating that the letter was created in 2013; (3) Oram lied throughout discovery to conceal the fact that the computer on which he fabricated the alleged renewal letter and backdated to 2013 was in existence, could have been inspected, was searched by Depa, and was found not to have contained any copy of the renewal letter because no such letter existed. These actions represent fraud, misrepresentation, or other misconduct of an adverse party, sufficient for this Court to set aside the judgment in this action. It would be reversible error for this Court not to do so. Therefore, Lamar and Simply Self Storage request that this Court grant the relief requested in the motion.

Dated: June 6, 2019

Respectfully submitted,

ALTIOR LAW, P.C.

/s/ Kenneth F. Neuman
Kenneth F. Neuman (P39429)
Attorneys for Lamar Advertising of Michigan, Inc.

STARK REAGAN, PLC

/s/ Christopher E. LeVasseur
Christopher E. LeVasseur (P35981)
Attorneys for SS MITX, LLC

CERTIFICATE OF SERVICE

I certify that on June 6, 2019 I electronically filed the forgoing paper with the Clerk of the Court using the Court's MiFile True Filing system and EFS (e-file and serve) option, which will send notification of such filing to the individuals listed on the Case Service List.

/s/ Denise L. Ward
Denise L. Ward, Legal Assistant
Altior Law, P.C.
dward@altiorlaw.com

EXHIBIT 1

LEASE

Lease No. I-75/Featherstone
(Auburn Hills)

AGREEMENT of Lease ("Lease") made this 17th day of March, 2009 ("Lease Execution Date"), by and between International Outdoor Inc., as Tenant, and SS MITX, LLC, a Delaware limited liability company, whose address is 7932 West Sand Lake Road, Suite 108, Orlando, Florida 32819, as Landlord.

Landlord owns the premises commonly known as 1096 Doris Road, Auburn Hills, Michigan 48124 and more particularly described on Exhibit A attached hereto (the "Premises").

Landlord does hereby Lease and demise to Tenant, the portion of the Premises particularly described on Exhibit B attached hereto (the "Leased Premises")

for the term of five (5) years, beginning and ending as set forth in this agreement (subject to any extension options hereunder), at the yearly rental set forth below.

As used in this Lease, the "Advertising Date" shall mean the first day on which all of the following conditions have been satisfied: (a) the Tenant's sign structure has been fully constructed on the Leased Premises, (b) all utilities, including electric, have been connected to the sign structure and are fully operational, and (c) Tenant has obtained all necessary permits and licenses to erect and operate the sign structure(s) and display(s) and advertise on the Leased Premises and such permits and licenses are satisfactory to Tenant. Tenant shall notify Landlord in writing of the Advertising Date promptly after such date. Landlord acknowledges that it may be necessary for Tenant to initiate litigation with the City of Auburn Hills in order to obtain permits and licenses which are satisfactory to Tenant and that Landlord shall not have the right to terminate this Lease in the event Tenant initiates any such litigation. Tenant shall not name Landlord as a party to any such litigation unless Landlord is a necessary party. If Landlord is a necessary party, Tenant shall indemnify Landlord for any costs associated with any such litigation.

In consideration of the foregoing and the mutual promises herein contained, and other good and valuable consideration, Tenant agrees to pay Landlord yearly rent in the amount of One Dollar ($1) per year for the period between the Lease Execution Date and the Advertising Date, and in the amount of Twelve Thousand and 00/100 Dollars ($12,000.00) per year beginning on the Advertising Date. Such yearly rental is to be paid in advance (subject to a 30-day delay for processing) with adjustments to be made promptly when the advertising status of the display(s) is changed. When feasible, the payment date will be adjusted to coincide with an anniversary of the effective date. Rental shall be deemed to have been made on the date(s) scheduled, unless Landlord notifies Tenant of non-receipt of payment.

Tenant shall have the right to erect, place and maintain advertising sign structures (with a minimum of two faces and measuring at least 14 feet by 48 feet (672 square feet/face)) and equipment therefor on the Leased Premises and post, paint, illuminate and maintain advertisements on such structures and for uses incidental thereto and Tenant shall also have the right to use the Leased Premises for any other purpose not prohibited by applicable law. Such use shall include, without limitation, access to the Leased Premises over those areas described and depicted on Exhibit C attached hereto as "Access Areas" (the "Access Areas"). Landlord agrees to allow Tenant full access to the Leased Premises and the Access Areas for the purpose of erecting, maintaining, changing or removing the displays at any time. In the event the City of Auburn Hills does not permit Tenant to erect sign structures with a minimum of two faces and measuring at least 14 feet by 48 feet (672 square feet/face), then the yearly rental shall be reduced in proportion to the reduction in total square feet/face of the approved sign structure. For example, in the event the City of Auburn Hills approves a two-faced structure measuring only 10 feet by 30 feet (300 square feet/face), then the yearly rental shall be reduced to $5,400 (300 square feet/face divided by 672 square feet/face multiplied by $12,000). Landlord shall not allow the construction, placement or erection of any structures on the Premises or neighboring property of Landlord which will block, obstruct, hinder or impair the visibility of any portion of Tenant's sign structures on the Leased Premises, including without limitation, the planting of any trees, shrubs or other landscaping on the Premises or neighboring property of Landlord. Tenant agrees not to allow advertising of alcohol or cigarettes on its advertising sign structures, nor will Tenant allow any advertising which contains obscene, lewd or lascivious displays or self storage

PLAINTIFF'S EXHIBIT 8

tabbies

displays. If the Tenant violates the foregoing restrictions on advertising, upon not more than 10 days notice from Landlord, Tenant shall remove such displays.

All structures, displays, equipment and materials placed upon the Leased Premises by Tenant are Tenant's trade fixtures and equipment, and shall always be and remain Tenant's property, and may be removed by Tenant at any time prior to or within a reasonable time after the expiration or earlier termination of this Lease or any extension thereof.

Unless specifically stated otherwise herein, Landlord represents and warrants that it owns the Premises, and that it has full authority to enter into this Lease. Landlord covenants and warrants that if Tenant shall pay the rental as herein provided and shall keep and perform the other covenants herein stated, Tenant shall and may, peaceably and quietly have, hold and enjoy the use of the Leased Premises and Access Areas for the term of this Lease and any extensions thereof.

If at any time the view of Tenant's displays is obstructed or obscured, or the use or installation of such displays is prevented or restricted by law or by Tenant's inability to obtain any necessary permits or licenses (each individually a "Condition" and collectively, the "Conditions"), and Landlord has not cured such Condition within thirty (30) days after receiving written notice from Tenant of such Condition, Tenant may, at its option, terminate this Lease, and Landlord agrees to refund to Tenant the rent previously paid for the unexpired portion of this Lease. If any of the Conditions shall at any time temporarily exist, then Tenant may, at its option, instead of terminating this Lease, be entitled to an abatement of rent payable hereunder during the period such conditions or any of them exist, and to the refund of any rent paid in advance for the period of such abatement. Landlord shall cooperate fully with Tenant in obtaining any necessary permits, licenses or other approvals for Tenant's use of the Leased Premises at no cost or expense to Landlord.

Tenant agrees to save Landlord harmless from any and all claims or demands on account of bodily injury or physical property damage, caused by or resulting from any negligent or willful act of Tenant's agents or employees in the construction, maintenance, repair, change or removal of Tenant's displays on the property, and agrees to carry, at its own cost and expense, adequate public liability insurance covering any such contingency so long as this Lease shall remain in effect. Landlord agrees to save Tenant harmless from any and all claims or demands on account of bodily injury or physical property damage caused by or resulting from any negligent or willful act of Landlord, its agents and employees. Notwithstanding the foregoing, the parties release each other and their respective authorized representatives from any claims for damage to any person or to the Premises that are caused by or result from risks insured against under any all-risk or fire insurance policies carried by either of the parties. Each party to the extent possible shall obtain, for each policy of insurance, provisions permitting waiver of any claim against the other party for loss or damage within the scope of the insurance and each party to the extent permitted, for itself and its insurer, waives all such insured claims against the other party.

In the event of condemnation or the threat of condemnation by any lawful government authority, Tenant shall have the right to participate in any condemnation award or settlement to the extent of Tenant's damages for the loss of the use of the sign or signs; the cost of removal or replacement from or on the Leased Premises; and the loss of the leasehold interest.

Landlord represents and warrants that, to the best of its knowledge, the Premises is in compliance with all applicable federal, state, and local laws, regulations and ordinances and that there is no existing violations nor has Landlord received any notice of any violations of any laws, court orders, ordinances, regulations, requirements of any city, county, state or federal governmental authorities, including, without limitation, departments of housing, building, fire, labor, health, or other municipal departments.

Tenant shall provide all utility service connections to the Leased Premises and shall pay any hookup charges or connection fees for such utilities and Landlord shall give Tenant access to neighboring lands under the control of Landlord for such purposes. Tenant shall pay, during the term of this Lease, all normal electricity charges for Tenant's use of the Leased Premises.

Upon request by Tenant, Landlord shall obtain and deliver to Tenant from any present or future mortgagee, trustee, fee

owner, prime landlord or any person having an interest in the Premises superior to this Lease a written nondisturbance agreement in recordable form providing that so long as Tenant performs all of the terms, covenants and conditions of this Lease and agrees to attorn to the mortgagee, beneficiary of the deed of trust, purchaser at a foreclosure sale, prime landlord or fee owner, Tenant's rights under this Lease shall not be disturbed and shall remain in full force and effect for the term of this Lease, and Tenant shall not be named or joined by the holder of any mortgage or deed of trust in any action or proceeding to foreclose thereunder. Tenant shall pay the reasonable attorney fees charged by such present or future mortgagee, trustee, fee owner, prime landlord or person having in interest in the Premises superior to this Lease in connection with the negotiation of the nondisturbance agreement, but not in excess of $500.00.

Landlord shall pay when due all real and personal property taxes and assessments with respect to the Premises and the improvements and structures thereon, including those of Tenant.

Before exercising any remedies for breach or default or failure to perform under this Lease, the nondefaulting party shall give the defaulting party thirty (30) days written notice of such default or failure to perform. If Landlord defaults or fails to perform any of its obligations under this Lease, Tenant, in addition to any other remedies available under applicable law, at Tenant's option, may perform Landlord's obligations or cause the performance of Landlord's obligations and deduct the reasonable cost thereof from the rent subsequently accruing. Tenant shall add to that sum interest at the highest rate permitted under applicable law. Tenant shall have the right to vacate or abandon the Leased Premises without it being a default, provided that Tenant continues to pay rent and perform all its other obligations under the Lease. In the event either party institutes legal proceedings against the other for breach of or interpretation of any of the terms, conditions or covenants of this Lease, the party against whom a judgment is entered shall pay all reasonable costs and expenses relative thereto, including reasonable attorneys' fees of the prevailing party.

Landlord and Tenant each represent to each other that it has dealt with no broker in connection with this Lease and that no broker has been the procuring cause of or has otherwise represented it in this transaction, and each further agrees that it shall be solely responsible and liable for any commission or claim for commission, fee or expense arising out of its communication with any broker. Landlord and Tenant each agree to indemnify and hold harmless the other for any claim, loss, cost or expense, including reasonable attorneys' fees, incurred by the other in connection with a breach of this paragraph.

Landlord and Tenant agree not to record this Lease, but each party agrees, upon request by the other, to execute and record a memorandum of this Lease in recordable form and in compliance with applicable law.

Landlord hereby grants to Tenant the exclusive and irrevocable option to renew this Lease for seven (7) additional term(s) of five (5) years each by giving Landlord written notice prior to the expiration date of this Lease or any applicable renewal period. All renewals under this paragraph shall be on the same terms and conditions of this Lease, except that the rent for first five (5) year Renewal Term shall equal one hundred five percent (105%) of the rent charged for the Initial Term, during the Second Renewal Term the rent charged shall be one hundred ten percent (110%) of the rent charged for the Initial Term, during the Third Renewal Term the rent charged shall be one hundred fifteen percent (115%) of the rent charged for the Initial Term, during the Fourth Renewal Term the rent charged shall be one hundred twenty percent (120%) of the rent charged for the Initial Term, during the Fifth Renewal Term the rent charged shall be one hundred twenty five percent (125%) of the rent charged for the Initial Term, during the Sixth Renewal Term the rent charged shall be one hundred thirty percent (130%) of the rent charged for the Initial Term, and during the Seventh Renewal Term the rent charged shall be one hundred thirty five percent (135%) of the rent charged for the Initial Term.

Neither Landlord nor Tenant shall be bound by any agreement or representation, express or implied, not contained herein. This Lease shall be deemed to have been accepted and its terms enforceable only upon the acceptance hereof by Tenant in the space provided. Following such acceptance, it shall inure to the benefit of and be binding upon the parties hereto and to their respective tenants, heirs, successors, personal representatives, executors, administrators, and assigns. Tenant shall have the right to sell, assign and set over all of Tenant's right, title and interest in this Lease to any financially responsible assignee upon the express and written assumption by the assignee of all of the obligations of Tenant herein named and upon such assumption, Tenant shall be fully discharged from any and all

obligations under this instrument. Tenant shall have the right to sublease all or any part of the Leased Premises provided Tenant is not relieved of any liability under this Lease. In the event of any change of ownership of the Premises, Landlord agrees to notify Tenant promptly of such change, and Landlord also agrees to give the new owner formal written notice of the existence of this Lease and to deliver a copy thereof to such new owner.

Additional Provisions (none if left blank):_____

In witness whereof, the undersigned have executed this Lease as of the day and year first above written.

Executed in the presence of:

LANDLORD:

SS MITX, LLC

By:_____
Kurt O'Brien
Its: Manager

ACCEPTED AND AGREED TO BY TENANT:

INTERNATIONAL OUTDOOR

Executed in the presence of:

Blank signature

Blank signature

By:_____
Latif Z. "Randy" Oram
Its: President

Initials

EXHIBIT A

DESCRIPTON OF PREMISES

Part of the Southwest ¼ of Section 23, Town 3 North, Range 10 East, Pontiac Township, (now City of Auburn Hills, Oakland County, Michigan, described as: Beginning at a point on the West Right of Way line of Interstate 75, distant North 88 degrees 38 minutes 47 seconds West, 110.00 feet from the center of said Section 23; thence South 09 degrees 52 minutes 07 seconds East, 509.66 feet; thence North 87 degrees 59 minutes 39 seconds West, 438.85 feet; thence North 09 degrees 52 minutes 07 seconds West, 504.67 feet; thence South 88 degrees 38 minutes 47 seconds East 437.83 feet to the point of beginning.

Except land described in Declaration of Taking recorded in Liber 11265, Page 30 which is recited as:

All that part of the following described Tract "A" described as: Beginning at a point on the West right of way line of Interstate I-75 distant North 88 degrees 38 minutes 47 seconds West, 110.00 feet along the East and West ¼ line of Section 23, Town 3 North, Range 10 East, Pontiac Township, (now City of Auburn Hills), Oakland County, Michigan, from the center of said Section 23; thence South 09 degrees 52 minutes 07 seconds East, 509.66 feet; thence North 87 degrees 59 minutes 39 seconds West, 75.00 feet; thence North 08 degrees 33 minutes 24 seconds West, 506.62 feet to the East and West ¼ line of said Section 23; thence South 88 degrees 38 minutes 47 seconds East, 63.00 feet along said East and West ¼ line to the point of beginning.

Together with a perpetual easement for ingress and egress, roadway and public utility purposes as contained in Grant of Easement recorded in Liber 9193, Page 101 and Easement Agreement recorded in Liber 10257, Page 349, which rights were assigned by certain Assignment of Rights under Easement Agreements recorded in Liber 9723, Page 102 and Liber 10257, Page 277.

Together with an easement for advertising sign structure and rights of ingress and egress thereof, as created under a certain Grant of Easement dated December 7, 1994 and January 18, 1995, recorded in Liber 15209, Page 466.

Tax Parcel No. 14-23-327-019

EXHIBIT B

DESCRIPTION OF LEASED PREMISES

To be mutually agreed upon by Landlord and Tenant prior to Tenant obtaining building permit for the sign structure.

EXHIBIT C

ACCESS AREAS

To be mutually agreed upon by Landlord and Tenant prior to Tenant obtaining building permit for the sign structure.

EXHIBIT 2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.

Plaintiff,

v Case No. 2016-155472-CB

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., A Michigan corporation, d/b/a, THE LAMAR COMPANIES, d/b/a, SIMPLY SELF STORAGE,

Plaintiffs,

v

INTERNATIONAL OUTDOOR, INC., a Michigan corporation,

Defendants./

JURY TRIAL - VOLUME I

BEFORE THE HONORABLE WENDY L. POTTS, CIRCUIT JUDGE

Pontiac, Michigan - Thursday, April 19, 2018

APPEARANCES:

For International Outdoor:

RICK J. PATTERSON (P55706)
STEVEN M. POTTER (P33344)
Potter Deagastino O'Dea & Patterson
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

For Lamar Advertising:	KENNETH F. NEUMAN (P39429) STEPHEN T. McKENNEY (P65673) Neuman Anderson Grieco & McKenney, PC 401 S. Old Woodward Avenue, Suite 460 Birmingham, Michigan 48009 (248) 594-5252
For SS MITX, LLC:	CHRISTOPHER E. LeVASSEUR (P35981) Stark Reagan, PLC 1111 West Long Lake Road, Suite 202 Troy, Michigan 48098 (248) 641-9955
Transcript Provided by:	Accurate Transcription Services, LLC Firm # 8493 (734)944-5818
Transcribed by:	Kara Van Dam, CER #7987

2013, exercising its first option to renew the International Outdoor lease along with a check. Do you see that?

A Yes.

Q And, it says neither admit nor deny, correct?

A Correct.

Q And, that was your answer on behalf of the corporation, correct?

A Yes.

Q So, you didn't say we didn't get the letter, correct?

A Correct.

Q You said Simply Storage has no record receiving a letter, correct?

A That's correct.

Q Which means you couldn't find the letter, correct?

A Correct.

Q But, there was -- but you're not saying it wasn't received, correct?

A Correct.

Q There's a difference, you understand that; correct?

A Yes.

Q And, in fact it's true that when you signed this you're answering on behalf of all of Simply Storage, correct?

A Yes at the direction of the company's legal department.

Q But, when you answered it on behalf of all of Simply

Storage, you yourself had only reviewed your email?
A My email?
Q Correct.
A Which email are you referring to?
Q Well, look at your deposition, page 30, 31, and 32. Actually you just need to read page 30, line 16, through page 31, line 4.
A Okay.
Q Okay. So, you're under oath at your deposition, correct?
A Yes.
Q And, at the time of your deposition you testified that you did not conduct any search beyond your own emails for this letter, correct?
A As far as emails go, correct, just my emails.
Q Right. But, what else did you search?
A The files, the property files that I told you previously that I had in my office.
Q In your office?
A Correct. My district manager Ellen Hart (ph) who was notified and was the district manager for that property. We had her check her desk, her files.
Q Okay.
A She checked her archived emails. Me personally I helped her checked for the hard copies but I didn't go through her emails.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INTERNATIONAL OUTDOOR, INC.

Plaintiff,

v Case No. 2016-155472-CB

SS MITX, LLC, a Delaware limited Liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., A Michigan corporation, d/b/a, THE LAMAR COMPANIES, d/b/a, SIMPLY SELF STORAGE,

Plaintiffs,

v

INTERNATIONAL OUTDOOR, INC., a Michigan corporation,

Defendants./

JURY TRIAL - VOLUME II

BEFORE THE HONORABLE WENDY L. POTTS, CIRCUIT JUDGE

Pontiac, Michigan - Friday, April 20, 2018

APPEARANCES:

For International Outdoor:

RICK J. PATTERSON (P55706)
STEVEN M. POTTER (P33344)
Potter Deagastino O'Dea & Patterson
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

For Lamar Advertising:	KENNETH F. NEUMAN (P39429) STEPHEN T. McKENNEY (P65673) Neuman Anderson Grieco & McKenney, PC 401 S. Old Woodward Avenue, Suite 460 Birmingham, Michigan 48009 (248) 594-5252
For SS MITX, LLC:	CHRISTOPHER E. LEVASSEUR (P35981) Stark Reagan, PLC 1111 West Long Lake Road, Suite 202 Troy, Michigan 48098 (248) 641-9955
Transcript Provided by:	Accurate Transcription Services, LLC Firm # 8493 (734)944-5818
Transcribed by:	Kara Van Dam, CER #7987

A That is correct.
Q You were present at his deposition, correct?
A Correct.
Q Mr. O'Brien's deposition?
A Yes.
Q You heard him say he doesn't know whether he got the letter or not, correct?
A That is correct.
Q And, the letter being the renewal letter from International Outdoor, correct?
A Correct.
Q And, as you indicated in your deposition you never asked Mr. O'Brien whether he got that letter, correct?
A I do not specifically remember asking him that, no.
Q And, he's the only guy the letter was addressed to, correct?
A It was addressed to our office, him at our office.
Q So, if you're going to do a search to determine whether or not somebody received a letter as their corporate counsel, wouldn't you think you'd go to the guy who the letter's addressed to and say did you get this letter?
A I went back and I asked him again, I realized how that sounds in a deposition but I've worked with Kurt O'Brien for almost 14 years. I know exactly how his standard operating procedure is. If something comes in of a legal

nature he writes my name on it, he puts it on my desk. We've been going -- that's been our standard operating procedure for almost 14 years. Mr. O'Brien is the CEO of the company. To ask him about every piece of mail that he's received, you know, I doubt he's going to remember one specific letter.

Q The point is you didn't do it, correct?

A At that time I did not do it. I have done that since.

Q And -- and -- well, your deposition -- we say at that time, you deposition was February of this year. So, in February you hadn't asked him if you'd received a letter, correct?

A Correct.

Q And, in addition to that you know that there were discovery requests out and a request to admit out in this case that that issue was a critical issue in, correct?

A Whether the letter was received?

Q Yes.

A And, to my knowledge --

Q No, I'm asking you, you understand that to be a critical issue in this case, correct?

A Correct.

Q Okay. So, even though that's a critical issue in the case as of -- and you signed -- I'll show you the request to admit, they were done in 2017, but as of the time of your

THE COURT: This is his statement. You did open the door on the payment of rent.

MR. POTTER: Thank you.

THE COURT: Bring them in.

THE CLERK: Please rise for the jury.

(At 10:15 a.m., jury entered courtroom.)

THE COURT: Please be seated everybody.

Members of the jury we're going to continue with the witness who was under oath.

Mr. Neuman.

MR. NEUMAN: Thank you, Your Honor. Very, very quickly.

BY MR. NEUMAN:

Q Simply Self Storage, do you guys maintained either on your computer system or hard -- hard copies, files for all the various billboard leases and other transactions that your company engages in?

A We do, yes.

Q And, when you were asked to do a search of the company records related to this International Outdoor lease, did you find anything?

A I found the lease.

Q You found the original lease that we've been talking about here, the 2009 lease?

A That is correct.

Q And, was that in an International Outdoor file?
A For -- for an Auburn Hills, yes, International Outdoor file.
Q Anything else in that file related to this International Outdoor Auburn Hills lease?
A There was nothing else contained in that file.
Q Any emails from Mr. Oram or his in-house attorney, Mr. Seething (ph) or his agent, Mr. White, anything like that?
A No.
Q Any letters from the International Outdoor organization to Auburn Hills, hey we really want to have a sit down and pursue a permit so that we can put of a billboard, anything like that?

MR. POTTER: Your Honor, we can go on and on about what's not there when he's already said there was nothing there. I'm sure he could think of 100 things.

THE COURT: Is there an objection?

MR. POTTER: Yes, I object to relevancy to this. It's already been handled. It's redundant evidence.

THE COURT: Move it along please.

MR. NEUMAN: I will.

BY MR. NEUMAN:
Q Did you expect to find everything that had been sent to International -- excuse me that had been sent to Simply Self Storage related to the International Outdoor lease

whole truth, and nothing but the truth?

MR. ORAM: I do.

MR. POTTER: I had these out. I apologize to the jury. I had the renewal letter out when I showed the other witness the renewal letter and I've misplaced it.

THE COURT: What exhibit number is that, six?

MR. POTTER: No the renewal letter is -- it's 25 and 26. Here they are. Okay. Thank you, Your Honor.

Mr. Oram, I'm going to do background and let you know what this jury -- get them to know who you are, but I'm going to get right to the point of what this is about.

Your Honor, at this point --

RANDY ORAM

called at 10:33 a.m., by the plaintiff and sworn by the clerk testified:

DIRECT EXAMINATION

BY MR. POTTER:

Q Mr. Oram, did you send a renewal letter to Simply Storage in December of 2013 extending your lease?

A Yes, sir.

Q I'm going to show you plaintiff's exhibit 26.

A Can I get my glasses?

Q No, you cannot have your glasses.

A Thank you.

Q Mr. Oram, is that a copy of the renewal letter that you

sent to International Outdoor in December of 2020?

A '13.

Q December 20th, 2013; sorry.

A Yes, that's correct.

MR. POTTER: Your Honor, I'd move for the admission of exhibit 26.

MR. NEUMAN: I think you've already ruled on this Your Honor, but we -- we reaffirm our objections.

THE COURT: I've ruled on it. It's admitted.

(At 10:35 a.m., plaintiff's exhibit 26 is admitted in to evidence.)

MR. POTTER: And, Misty, could you put that up on the board so they can see -- the jury can see it please?

BY MR. POTTER:

Q And, you were present at Mr. O'Brien's deposition, correct?

A Yes.

Q And, you heard him acknowledge that the address was correct, yes?

A Yes, that's correct.

Q And, you sent it to Mr. O'Brien because he executed the lease?

A That's correct.

Q And, the address which you sent this to is contained within the lease?

Q And, you had -- had you ever received any default notice from Simply Storage as to why you weren't paying the one dollar a year?

A No, sir.

Q Had you ever received any notice of default from Simply Storage indicating you were in breach of any terms of the original underlying lease?

A No, sir.

Q Now, in addition to that letter, did you also send another letter to Mr. O'Brien on that day?

A Yes.

Q I'm going to show you exhibit 25 and ask you if you sent that letter to Mr. O'Brien on exhibit 20 -- or on December 20th, 2013.

A Yes, they were attached together.

MR. POTTER: Your Honor, I would move to admit these, what was attached to the renewal letter, exhibit 25.

MR. NEUMAN: Again, Your Honor, we -- we affirm our objection but you've already ruled.

THE COURT: I don't think I've ruled on 25.

MR. NEUMAN: It's hearsay.

MR. POTTER: It's not -- it's not hearsay. It went with the renewal letter. It's -- first off the rule of completeness would require it and it's a letter that he

sent being offered to prove the course of conduct between the parties. These people have said they didn't hear from Mr. Oram at all from 2009 to 2016. Here's two letters we say that were sent.

THE COURT: I'm allowing in the alleged notice. This is clearly hearsay.

MR. POTTER: Even though the deponent's here to be examined on it?

THE COURT: It's hearsay.

MR. POTTER: Okay. All right. So, give me 26 back.

BY MR. POTTER:

Q Without telling me what was in 26, did you send a second letter to Mr. Oram (sic) at that time?

A It's in 25, yes I did.

Q I'm sorry, without telling what's in 25, did you send a second letter in -- with your letter of December -- with your letter renewing the lease?

A Yes.

Q And, why did you send that second letter?

A Just to share with Mr. O'Brien as to the changes that were taking place to this particular point in time in 2013. There was --

Q Changes with regard to what?

A There was changes -- there was conversations in 2013 with

respect to state legislation which would have been Public Act 4629 which was approved in January 28th of 2014 which dictated certain rules, state guidelines, with respect to billboards primarily. And, also just to give them an update that we were still pursuing things and those variables may impact our future also within Auburn Hills.

Q Now, let's -- that computer that that letter was sent on, do you still -- are you still in possession of that computer?

A No, sir.

Q And, how many computers are you removed from that computer?

A This is my -- the current computer that I have is my third computer since 2013.

Q And, what about your server? Do you have a server in place at International Outdoor?

A Yes we do.

Q And, that server has been in place since when?

A We've had a server, as I've mentioned in my testimony since 2004.

Q And, did you have a virus -- strike that. Was there a virus that inflicted your server in 2014?

A Yes.

Q A computer virus?

A Yes and we've probably changed our servers as well.

Q And, did you actually place it in the envelope? Is that something you would do?
A I typed the letter, I prepared the letter to be put in the envelope and had either myself, my wife, or the administrative assistant write the address on there and get it ready for mail.
Q And -- and tell us how the mail is picked up from your office back then.
A The mail, as it is today and it's been there since 2000 -- since we've been there, but a mailman -- we are on Orchard Lake in Farmington Hills and a mailman physically comes into the premises and there's a certain spot where our mail goes and there's a certain spot where our mail goes out. So, he exchanges the swap right then and there. If he's not there then -- we've had the same mailman till today.
Q So, did this letter come back for insufficient postage to you?
A No sir, it did not.
Q And, you understand that the whole defense in this case is that you're -- you're a liar, you understand that?
A I'm -- yes I'm understanding that.
Q You're a liar and that you created this document after the fact to cover your position with International Outdoor, correct?

A It seems that way, yes.
Q Did you do that?
A Absolutely not.
Q Are you the entity that entered into two leases for the same property?
A No, sir.
Q You heard Mr. Schmutzler's testimony, correct?
A That's correct.
Q You heard him say he would never entered into a lease that he entered into, yet he did with you; you heard that, correct?
A Yes, I did.
Q And, did you hear Mr. Schmutzler say that he didn't receive the letter that was sent to the resident agent?
A Yes, I did.
Q Now --

MR. POTTER: It's exhibit 16, Rick.

Your Honor -- strike that.

BY MR. POTTER:
Q Mr. Oram, after -- and I'm not going to go through with the jury everything that we just put up on the board, but you were in the courtroom when I showed the emails between you and Mr. Schmutzler, correct?
A That's correct.
Q And, in one email he says we're going with Lamar, correct?

those variables that I shared with you, they got changed as well as they put a process in place if somebody wanted to apply for a billboard they put a different process in place.

Q What was that process called if you wanted to apply for a billboard that you could do?

A It's called a Plan Unit Development that's been discussed here as a PUD, P-U-D, and it allows you a mechanism as to the process if you wanted to go through approval for a billboard here's the way that you do it. Up until January 25th of 2016 the mechanism for a billboard, there was no formal mechanism.

Q And, were you following what was going on in Auburn Hills?

A Yes, sir.

Q And, were you following what was going on in Auburn Hills because of your lease with Simply Storage?

A Yes sir, absolutely.

Q And, did you eventually find out about -- well tell the jury how you find out -- found out about the Lamar lease without -- and I'm going to caution you, I know this involves your son. You cannot tell this jury what your son said to you, okay.

A Okay.

Q You can only tell your -- tell the jury what you son did and then -- and then you can say that he reported back to

you but don't say what he said, okay.

A Okay. In mid-July it came up that we are ready to proceed with respect to -- as a company in our real estate meetings, we were ready to proceed with respect to Auburn Hills. My son was interning home from college and this was the internship that he did at our company to see if, you know, this is something that he wants to pursue. He's a -- this year he's a junior at Michigan State. So, he was interning and I said well why don't -- we have the --

Q Well first off you can't say what you said. Did you give him any instructions?

A Yes. I instructed him to look into Auburn Hills and see what the updated -- go get a copy of the ordinance, go get all the details, the modified ordinance that I knew had gotten modified, and report back to me with respect to what's going on.

Q All right. And, then he did that?

A Yes, sir.

Q And, he reported back to you?

A He reported back to me on the Friday -- it would have been the 22nd of July.

Q All right. And, did you subsequently learn after that that Lamar had business before the Auburn Hills City Council on the 25th?

A I was aware that they were going to, yes on the 22nd I was

aware of that.

Q Okay. And, what did you understand the business of Lamar -- that Lamar had in front of the Auburn -- Auburn Hills City Council to be on July 25th of 2016?

A That they were going to try to get approval with respect to potentially putting a billboard on the property at 1096 Doris Road which was the same exact property that I had under contract.

Q And, as a result of that knowledge what -- what did you do in response to gaining that knowledge?

A I first called the attorney in the law firm that prepared the paperwork.

Q And, don't tell us anything about that conversation. But, the first thing you did was to call your lawyer?

A That's correct.

Q Then what did you do?

A Then I proceeded to try to get a hold of Simply Storage to share with them that there must be some type of a misunderstanding with respect to this particular property, here's my lease, here's my lease renewals, and I think I shared with them that I think that you guys may have made a mistake and leased out the same property to two different people and, you know, would you please delay the hearing that Monday night until we figure out what's going on here. That's what I asked them to do.

A It's been mentioned in a couple of different occasions.
Q You would agree with me that backdating a document means if this was created in 2016 and you put a date of 2013 on it that would be backdating, you agree with that?
A That would be fraud, but that would be --
Q That would be fraud, I would agree with you. So, not only do we not have the computer the only thing in your possession related to the Auburn Hills transaction was a copy of the lease that you entered into as I understand it, correct?
A That's right, a hard copy.
Q And, this 2013 renewal letter, correct?
A There was another letter with this. So, there was the lease and the cover letter as well as the renewal letter. So, that's what was in the file.
Q But, you told the jury all about engineered drawings, we heard about that, correct?
A That's correct.
Q And, you did -- you did all this work in 2010, correct? Or, 2009 after the lease was signed up until the point when you ran into great resistance with Auburn Hills, right?
A I'm sorry.
Q You told us --
A I told you that I --

Q But, we didn't do any of that so we don't have any of that evidence. We just have your word for it, right?
A You have my word and the letter and the renewal letter.
Q And, you've testified that, you know, you typed the letter on a computer that we don't have any more so -- and I -- I understood from your testimony that there was nobody else present when you were typing the letter?
A I don't believe so. If they were it was just in passing, but no I would have typed it on my own.
Q So, again, we don't have any witnesses for that and then I think you testified that you folded the letter and stuffed it in the envelope so apparently nobody saw you do that. So, we don't have any witnesses for the either, right?
A It seems -- apparently.
Q I would recall today, although I don't recall from your deposition testimony, but recall today you saying that you then gave the envelope to somebody else to actually up the -- write the address on?
A No, my deposition testimony stated that either I, my administrative assistant, or my wife or another young lady named Mary Petraski (ph) which was in our office at the time, if one of us would have written the address on there. We don't use the computer to type the address on there, we handwrite the address is most all the cases that I've been involved in. And, then we would prepare the

EXHIBIT 3

INTERNATIONAL OUTDOOR

SS MITX, LLC
C/o Mr. Kurt O'Brien
7932 West Sand Lake Road, Suite 108
Orlando, Florida 32819

December 20, 2013

Re: Lease between SS MITX, LLC (collectively, "Landlord") and International Outdoor Inc., a Michigan corporation ("Tenant") dated March 17, 2009 (the "Lease") with respect to property located at 1096 Doris Road, Auburn Hills, Michigan 48124 (the "Property")

Dear Mr. O'Brien:

Pursuant to the current Lease in effect, Tenant hereby notifies Landlord that Tenant exercises its first option to renew the term of the Lease for Five (5) years at the property. A check is enclosed for the option term. Accordingly, the term of the Lease is extended from March 17, 2014 to March 16, 2019. As provided in the lease, the renewal term shall be on the terms and conditions of the Lease in effect.

International Outdoor, Inc.

By: Latif Z. "Randy" Oram
Latif Z. "Randy" Oram

Its: President

Sincerely,

Latif Z. "Randy" Oram

Latif Z. "Randy" Oram
President
International Outdoor, Inc.

MAIN OFFICE:
28423 Orchard Lake Rd. Suite 200
Farmington Hills, MI 48334
www.IOBillboard.com
Phone (248) 489-8989
Fax (248) 489-8990

SATELLITE OFFICE:
16140 James Couzens Fwy.
Detroit, MI 48221

PLAINTIFF'S EXHIBIT 26 tabbies

IOI 746

EXHIBIT 4

VERDICT FORM

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Did International Outdoor send written notice to Simply Self Storage to renew its lease prior to March 16, 2014?

Answer: yes (yes or no)

If your answer is "yes," go on to Question No. 2.
If your answer is "no," skip to Question No 4.

QUESTION NO. 2: Did Lamar tortiously interfere with International Outdoor's contractual relationship with Simply Self Storage?

Answer: yes (yes or no)

If your answer is "yes," go on to Question No. 3.
If your answer is "no," do not answer any further questions.

QUESTION NO. 3: What is the amount of damages suffered by International Outdoor as a result of Lamar's tortious interference with International Outdoor's contractual relationship with Simply Self Storage?

Answer: $ ~~355,000.00~~ 405,000.—

If you answered Question No. 3, do not answer any further questions.

QUESTION NO. 4: Did International Outdoor tortiously interfere with Lamar's contractual relationship with Simply Self Storage?

Answer: _____ (yes or no)

If your answer is "yes," go on to Question No. 5.
If your answer is "no," do not answer any further questions.

QUESTION NO. 5: What is the amount of damages suffered by Lamar as a result of International Outdoor's tortious interference with Lamar's contractual relationship with Simply Self Storage?

Answer: $_____

Signed,

Markus Runnan
Foreperson

4/24/18
Date

EXHIBIT 5

AFFIDAVIT

STATE OF OREGON)
)ss
COUNTY OF BENTON)

PATRICK DEPA, being first duly sworn, deposes and states that:

1. I am a former employee of International Outdoor, Inc. I make this affidavit on the basis of my personal knowledge of the facts stated in this affidavit. If called upon to testify, I can and will confirm each of the statements made below.

2. I was employed with International Outdoor from September 2010 until July 2018. My title was Real Estate Director and my job duties consisted of procuring leases for new billboard sites, upgrading static billboards to digital, acting as liaison to all maintenance contractors to maintain current billboard inventory, and presenting staff reports for all zoning board of appeals and planning commission meetings.

3. In the course of my employment, I became aware that International Outdoor was engaged in a dispute with SS MITX, LLC (commonly referred to as Simply Self Storage) and Lamar Advertising of Michigan, Inc. over the right to erect a billboard at Simply Self Storage's Auburn Hills, Michigan, location.

4. In connection with that dispute, I am aware that International Outdoor and my boss, Randy Oram claimed that a letter was sent to Simply Self Storage in December 2013 for the purpose of renewing a 2009 lease for the right to erect a billboard at the Auburn Hills location.

5. I have personal knowledge that the lease renewal letter was not sent in December 2013. I know this because I observed Randy Oram type the letter in question on the computer in his office, print it and sign it. This occurred in or about late July 2016. Mr. Oram backdated the letter to December 2013 so that he could falsely claim that the 2009 lease had been renewed on time.

6. The computer Mr. Oram used to create the letter was still in his office when I left employment with International Outdoor in July 2018.

7. I know that Mr. Oram made use of this falsified letter as part of International Outdoor's lawsuit against Simply Self Storage and Lamar. I was greatly troubled by Mr. Oram's actions, so I met with the Company's attorney, Jeff Sieving, to enlist his help in preventing Mr. Oram from committing a fraud by using the backdated letter.

8. During our meeting, I revealed to Jeff Sieving that I had seen Randy Oram create the backdated letter. Mr. Sieving acknowledge this information, but refused to take any action to prevent Mr. Oram from using the letter as evidence in the lawsuit.

9. As the lawsuit between International Outdoor and Lamar/Simply Self Storage proceeded, I continued to make complaints to Jeff Sieving about the letter and Mr. Oram's actions, and repeatedly asked that he intervene to stop Mr. Oram. Mr. Sieving never expressed any doubts about what I had witnessed or suggested in any way that he did not believe me. He nonetheless refused to do anything about it.

10. I am also aware that the Lamar and Simply Self Storage had taken a positon in the lawsuit that International Outdoor had abandoned any claim to the Auburn Hills location. I know the position taken by Lamar/SSS was and is true. We at International Outdoor took no further action after December 2009 to secure the right to erect a billboard on the property because of the difficulty and expense of doing so. Conversations occurred on at least two occasions but Mr. Oram always steered Alan White and myself to other sites that had better chances of success.

11. The Simply Self Storage Auburn Hills lease file stayed in a drawer and was never bought out or spoken about again until January or February 2016. Around this time, a new employee, James Faycurry, was hired. James had come to International Outdoor from Adams Outdoor, a competitor, and he advised us that changes in the law had made erecting a sign in Auburn Hills more feasible than it had been in the past.

12. Specifically, James told us that Auburn Hills had amended its zoning ordinance to allow billboards, but only as a planned unit development (PUD). As part of the PUD, Auburn Hills required that there be a public benefit to the City if they were going to allow a new digital sign in their city. James said that Adams Outdoor made a donation to the City of Auburn Hills of close to $160,000 for a new park, plus a slot of advertising on the sign. As a result, Adams Outdoor was allowed to begin constructing a digital sign in the City of Auburn Hills in late 2015.

13. This information caused Randy Oram to again become interested in exploring the possibility of building a billboard in Auburn Hills. I reviewed the file, and learned that the Simply Self Storage lease had expired, and I advised Randy Oram of that fact. He then directed me to try to reach out to Simply Self Storage to get it renewed, but I did not have a good contact number.

14. This was Alan White's lease (a former International Outdoor employee), but he left the company due to a medical condition and was not easy to contact. When I finally made contact with Alan, he was aware that the lease had expired and he tried to provide me with a current contact number for Simply Self Storage, but was unsuccessful. I even wrote letters to the legal departments at Simply Self Storage's corporate offices in Florida and/or Texas. I received no response.

15. Randy Oram then instructed a few of us employees to use the Adams Outdoors information and packets to put together similar packages for other properties in Auburn Hills that I was attempting to get leases with. We turned our attention to this project and we essentially gave up on the Simply Storage Auburn Hills location for a second time.

16. Shortly after this occurred, I was checking the Auburn Hills website for meeting agendas and discovered that Lamar was taking a case to the planning commission for a new billboard to be located on the Simply Self Storage location. I advised Randy Oram of this development, which caused him to be become extremely upset. He insisted that Alan White must have sent a renewal letter before the lease had expired. We looked at every file, every server, and every computer, and found no such letter.

17. Mr. Oram never claimed to us at this time that *he* wrote a renewal letter; rather, he stated only that he hoped Alan White had done so. Mr. Oram made us double and triple check, and no renewal letter was found. When I later spoke to Alan White about this, he confirmed that he never sent a renewal letter. He explained that there was no reason to do so because Randy Oram had decided not to move forward with the Auburn Hills site.

18. It was after the above-mentioned search for a renewal letter proved to be unsuccessful that I witnessed Randy Oram create and backdate a renewal letter, as described above.

PATRICK DEPA

Subscribed and Sworn to Before
Me this 30th day of May, 2019.

Notary Public

OFFICIAL STAMP
RUTH ANN POST
NOTARY PUBLIC-OREGON
COMMISSION NO. 977676
MY COMMISSION EXPIRES AUGUST 22, 2022

EXHIBIT 6

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

INTERNATIONAL OUTDOOR, INC.,
a Michigan corporation,

Plaintiff,

vs

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC. d/b/a THE LAMAR COMPANIES and SS MITX, LLC d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

vs

INTERNATIONAL OUTDOOR, INC.,

Defendant.

Case No. 2016-155472-CB
Hon. Wendy Potts

Case No. 16-155489-CB
Hon. Wendy Potts

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the attorney(s) of record for all parties to the above cause at their respective addresses disclosed on the pleadings on 2.9.17
by: ☐U.S. Mail ☐Hand Delivered
☐Fax ☒E-Mail

POTTER, DeAGOSTINO, O'DEA & PATTERSON

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INTERNATIONAL OUTDOOR, INC.'S ANSWERS TO LAMAR ADVERTISING OF MICHIGAN, INC.'S INTERROGATORIES

NOW COMES INTERNATIONAL OUTDOOR, INC., by and through its attorneys, POTTER, DeAGOSTINO, O'DEA & PATTERSON, and for its Answers to LAMAR ADVERTISING OF MICHIGAN, INC.'S, Interrogatories, hereby states as follows:

1. Identify any and all persons who provided information used in answering this First Discovery Set.

ANSWER:

Randy Oram, President; Jeff Sieving, Corporate Counsel; and Patrick Depa, Director, Real Estate 28423 Orchard Lake Rd., Ste. 200, Farmington Hills, Michigan 48334.

2. Identify all persons that you believe may have information regarding the facts giving rise to the claims and defenses in this action.

ANSWER:

Randy Oram; Alan Scott White, President and CEO of Wise Commercial Real Estate; Kurt O'Brien, President of Simply Storage; Kyle Schmutzler, SVP of Real Estate. In addition, please see all individuals identified in the documents produced in response to Defendant/Counter Plaintiff's document requests.

3. Have you read and reviewed the definitions and general instructions that constitute the preamble to these Interrogatories?

ANSWER:

Yes.

4. Prior to answering these Interrogatories, have you made a due and diligent search of your books, records, and papers, with a view to eliciting all information available in this action? Describe all sources of documents that you reviewed.

ANSWER:

Yes.

5. Identify each person whom Defendant may call as an expert witness at trial and, as to each person:

a. state the subject matter on which such person is expected to testify;

b. state the substance and the facts and opinions to which such person is expected to testify;

c. set forth a summary of the grounds for each such opinion;

d. describe in detail the education, experience or other background upon which you will rely in qualifying such person as an expert; and

e. identify each document reflecting such education, experience or other background, including, but not limited to, all resumes, curriculum vitae and lists of publications and produce all such documents.

ANSWER:

None have been identified at this time.

6. Identify any and all person(s) with information about the facts alleged in the complaint and/or the Defendant's denials of those facts, as alleged in the Answer and Affirmative Defenses.

ANSWER:

Randy Oram; Alan Scott White, President and CEO of Wise Commercial Real Estate; Kurt O'Brien, President of Simply Storage; Kyle Schmutzler, SVP of Real Estate. In addition, please see all individuals identified in the documents produced in response to Defendant/Counter Plaintiff's document requests.

7. Identify any and all insurance agreement(s) under which a person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

ANSWER:

None.

8. Identify any and all agents, employees or attorneys for Defendant who ever had any conversations with any employee or agent of the City of Auburn Hills between January 1, 2009 and the date on which you respond to these interrogatories, about the Property.

ANSWER:

Randy Oram and Jeff Sieving.

9. Describe in detail all conversations, about the Property, between Defendant (including any and all agents, employees or attorneys for Defendant) and the City of Auburn Hills (including any employee, agent or attorneys for the City of Auburn Hills) between January 1, 2009 and the date on which you respond to these interrogatories. For each such conversation, please identify:

a. The names of the person(s) participating in the conversation(s);

b. What was discussed in the conversation(s);

c. When the conversation(s) occurred;

d. Where the conversation(s) occurred; and

e. Whether Defendant is aware of any notes or other written documents memorializing the conversation. If Defendant is aware of any such notes or other written documents memorializing the conversation, identify those documents.

ANSWER:

Plaintiff/Counter Defendant objects to this interrogatory as overly broad and unduly burdensome. The interrogatory is unreasonable because it seeks the exact details regarding time and content of conversations over a period of more than eight years. Notwithstanding and without waiving this objection, Jeff Sieving and Randy Oram have conversed with City Counsel, Steve Cohen and Derk Beckerleg. See emails and meeting minutes in Exhibit A to Plaintiff's document production. There are no notes memorializing the conversations other than the emails.

10. Identify any and all agents, employees or attorneys for Defendant who ever had any conversations with any employee or agent of the State of Michigan Department of Transportation between January 1, 2009 and the date on which you respond to these interrogatories, about the Property.

ANSWER:

Jeff Sieving.

11. Describe in detail all conversations, about the Property, between Defendant (including any and all agents, employees or attorneys for Defendant) and the State of Michigan Department of Transportation (including any employee, agent or attorneys for the State of Michigan Department of Transportation) between January 1, 2009 and the date on which you respond to these interrogatories. For each such conversation, please identify:

a. The names of the person(s) participating in the conversation(s);

b. What was discussed in the conversation(s);

c. When the conversation(s) occurred;

d. Where the conversation(s) occurred; and

e. Whether Defendant is aware of any notes or other written documents memorializing the conversation(s). If Defendant is aware of any such notes or written documents memorializing the conversation(s), identify the documents.

ANSWER:

Plaintiff/Counter Defendant objects to this interrogatory as overly broad and unduly burdensome. The interrogatory is unreasonable because it seeks the exact details regarding time and content of conversations over a period of more than eight years. Notwithstanding and without waiving this objection, all conversations with MDOT were with respect to FOIA requests and to inquire about the improper locational approval granted Lamar. See emails between Jeff Sieving and MDOT employees.

12. If your response to Request for Admission number 1, in this First Discovery Set, is anything other than an unequivocal admission, describe in detail why the IO Lease attached as Exhibit 1 to this First Discovery Set is not a complete and accurate copy of the lease between Simply Self Storage and Defendant for the Property.

ANSWER:

The attached lease does not include IO's renewal of the lease.

13. If your response to Request for Admission number 2 is anything other than an unequivocal admission,

a. Identify the date on which each rent payment was made;

b. Identify the means by which each rent payment was made (i.e., check, wire transfer, etc.)

c. Identify how the rent was delivered to Simply Self Storage (i.e., mail, in-person delivery, etc).

ANSWER:

Not applicable.

14. If your response to Request for Admission number 3 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to obtain any permit or approval from the City of Auburn Hills to erect and operate the sign structure(s) and display(s) as described in the IO Lease;

b. Identify the date(s) on which Defendant took these acts;

c. Identify the person(s) who took the acts on behalf of Defendant;

d. Identify the person(s) employed by or affiliated with the City of Auburn Hills to whom the acts were directed.

ANSWER:

a. Plaintiff's employees communicated with city employees and agents in relation to a billboard on the subject property and participated at city council meetings after it was determined Lamar was pursuing a permit to erect a billboard on Simply Storage's property.

b. The specific dates of conversations are unknown except as reflected in emails in Exhibit A to Plaintiff's document production.

c. Jeff Sieving and Randy Oram.

d. Steve Cohen, city counsel, counsel for the city and individuals identified in Exhibit A.

15. If your response to Request for Admission number 4 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to obtain any permit or approval from the City of Auburn Hills to erect and operate the sign structure(s) and display(s) as described in the IO Lease;

b. Identify the date(s) on which Defendant took these acts;

c. Identify the person(s) who took the acts on behalf of Defendant;

d. Identify the person(s) employed by or affiliated with the City of Auburn Hills to whom the acts were directed.

ANSWER:

Not applicable.

16. If your response to Request for Admission number 5 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to construct the sign structure on the Property;

b. Identify and describe in detail all acts that Defendant took to connect utilities to the sign structure at the Property;

c. Identify and describe in detail all acts that Defendant took to obtain all necessary licenses and permits to erect and operate the sign structure(s) and display(s) at the Property;

d. Identify the date(s) on which Defendant took these acts;

e. Identify the person(s) who took the acts on behalf of Defendant;

ANSWER:

IOI objects to the form of this request and the term "conditions precedent" and that the "Advertising Date" is established by IOI. Notwithstanding and without waiving this objection, IOI admits the conditions that would trigger the "Advertising Date" do not exist.

17. If your response to Request for Admission number 6 is anything other than an unequivocal admission,

a. Identify and describe in detail all acts that Defendant took to renew the IO Lease, consistent with the renewal requirements on page 3 of the IO Lease;

b. Identify the date(s) on which Defendant took these acts;

c. Identify the person(s) who took the acts on behalf of Defendant;

d. Identify the person(s) employed by or affiliated with Simply Self Storage to whom the acts were directed.

ANSWER:

Randy Oram mailed the renewal notice to Simply Self Storage on December 20, 2013, to Kurt O'Brien, 7932 W. Sand Lake Rd., Ste. 108, Orlando, Florida 32819. See IOI 788.

18. If your response to Request for Admission numbers 7 and 9 are anything other than an unequivocal admission, then describe in detail the factual basis for this excuse. Further,

a. Identify the person(s) on behalf of Simply Self Storage who agreed to this excuse;

b. Identify the terms of this excuse;

c. Identify the date on which Defendant and Simply Self Storage agreed to the excuse.

ANSWER:

a. Kurt O'Brien and Kyle Schmutzler.

b. Pursuant to terms of the IO/Simply Self Storage Lease: "Rental shall be deemed to have been made on the date(s) scheduled, unless Landlord notifies Tenant of non-receipt of payment" and IO was never notified of

non-payment. See also Kurt Schmutzler's email dated February 26, 2009.

c. **February 26, 2009, and March 17, 2009.**

19. If you response to Request for Admission number 8 is anything other than an unequivocal admission,

a. Identify the amendment terms;

b. Identify the date of the amendment;

c. Identify all documents memorializing the amendment;

d. Identify the person(s) on behalf of Defendant who agreed to the amendment; and

e. Identify the person(s) on behalf of Simply Self Storage who agreed to the amendment.

ANSWER:

Not applicable.

POTTER, DeAGOSTINO, O'DEA & PATTERSON

RICK J. PATTERSON (P55706)
Attorney for International Outdoor, Inc.
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248)377-1700

Dated: February 9, 2017

EXHIBIT 7

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

INTERNATIONAL OUTDOOR, INC.,
a Michigan corporation,

Plaintiff,

vs

Case No. 2016-155472-CB
Hon. Wendy Potts

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,

Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC.
d/b/a THE LAMAR COMPANIES and
SS MITX, LLC d/b/a SIMPLY SELF STORAGE,

Plaintiffs,

Case No. 16-155489-CB
Hon. Wendy Potts

vs

INTERNATIONAL OUTDOOR, INC.,

Defendant.

POTTER, DeAGOSTINO, O'DEA & PATTERSON
STEVEN M. POTTER (P33344)
RICK J. PATTERSON (P55706)
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STARK REAGAN, P.C.
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NEUMAN ANDERSON GRIECO & MCKENNEY, P.C.
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INTERNATIONAL OUTDOOR, INC.'S
ANSWERS TO LAMAR ADVERTISING OF
MICHIGAN, INC.'S SECOND DISCOVERY SET TO DEFENDANT

NOW COMES INTERNATIONAL OUTDOOR, INC., by and through its attorneys, POTTER, DeAGOSTINO, O'DEA & PATTERSON, and for its Answers to LAMAR ADVERTISING OF MICHIGAN, INC.'S, Second Discovery Set, hereby states as follows:

REQUESTS FOR PRODUCTION

1. Produce for inspection any and all systems on which the .pdf version, and the original version of the file that became the .pdf version, of the documents Bates Marked "IOI 745" and "IOI 746" existed.

ANSWER:

IOI objects to the request to produce the system onto which the documents were scanned because it is overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seeks the disclosure of confidential, proprietary, and privileged material. With regard to the computer on which the original version was created, the computer cannot be identified or located at this time.

SUPPLEMENTAL ANSWER:

Pursuant to the Order entered November 8, 2017 regarding the Motion to Compel Inspection, Plaintiff IOI supplements its prior answer as follows:

1. **IOI has determined that it is not in possession or control of the computer used to create the December 20, 2013 Renewal Documents. It is possible for a computer to be swapped from one employee to another. When a computer is swapped to another employee the computer's memory is deleted and the computer is reformatted for the new user. IOI's practice is to swap equipment out of service when it becomes obsolete. When a computer is removed from service due to obsolescence, its hard drive is removed and discarded. Similarly, any computer infected with a virus is removed from service and discarded. The computer used to create the December 20, 2013 Renewal Documents was removed from service in accordance with the foregoing practice.**

2. **The provisions regarding the inspection of the computer are not applicable because the computer is no longer in IOI's possession or control.**

The foregoing Answers are true to the best of my knowledge, information and belief.

By: /s/ Katy J. "Rowe" Oram
Katie J. Oram

Prepared by:

POTTER, DeAGOSTINO, O'DEA & PATTERSON

Steven M. Potter (P33344)
Rick J. Patterson (P55706)
Attorneys for IOI
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ANSWERS was served upon the attorneys of record for all parties to the above cause by email at the addresses listed in the caption for this matter on November 22, 2017

Rick J. Patterson (P55706)

EXHIBIT 8

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE OAKLAND COUNTY

IN THE BUSINESS COURT

INTERNATIONAL OUTDOOR, INC.,
a Michigan corporation,
Plaintiff,

vs. Case No. 2016-155472-CB
Hon. Wendy Potts

SS MITX, LLC, a Delaware limited liability company, and LAMAR ADVERTISING OF MICHIGAN, INC., a Michigan corporation,
Defendants,

and

LAMAR ADVERTISING OF MICHIGAN, INC., d/b/a THE LAMAR COMPANIES, and SS MITX, LLC, d/b/a SIMPLY SELF STORAGE,
Plaintiffs,

vs. Case No. 2016-155489-CB
Hon. Wendy Potts

INTERNATIONAL OUTDOOR, INC.,
Defendant.

_____

The Deposition of LATIF (RANDY) ORAM,
Taken at 401 South Old Woodward Avenue, Suite 460,
Birmingham, Michigan,
Commencing at 9:12 a.m.,
Friday, February 16, 2018,
Before Cindy Mendenhall, CSR-5220, RPR.

APPEARANCES:

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Appearing on behalf of International Outdoor, Inc.

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Appearing on behalf of SS MITX, LLC d/b/a Simply Self Storage.

KENNETH F. NEUMAN
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Appearing on behalf of Lamar Advertising of Michigan, Inc., d/b/a The Lamar Companies.

ALSO PRESENT:
Jeff Sieving
Richard Rickert

backup. When did you implement a backup system -- that's --

A. We've had a variety of different backup systems.

BY MR. NEUMAN:

Q. Did your IT experts search your backup systems to see if they could find the source metadata for what is Exhibits 9 and 10?

A. We couldn't find anything.

Q. But that's not my question. Did you direct --

A. The computers aren't there.

Q. -- IT experts -- let me get the question on the record.

Did you direct IT experts to search the backups to your server to find the original sources of the Exhibits 9 and 10, what's known as the metadata?

A. I don't know what metadata is, so I couldn't tell you. The folder is lost. The whole Auburn Hills folder is completely gone. It's not on my computer. It's not in our company, so --

Q. But did you employ or ask any expert to search?

A. I don't know if my wife or Jeff from our office asked anybody else. I did not, no.

Q. Do you know what happened with the physical server that existed at your company in 2014? What became of that physical piece of equipment?

EXHIBIT 9

STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL SULLIVAN,

Plaintiff-Appellee,

v

DENISE SULLIVAN,

Defendant-Appellant.

UNPUBLISHED
May 17, 2018

Nos. 330543 & 334273
Livingston Circuit Court
LC No. 14-006162-DO

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Defendant appeals as if on leave granted (1) an October 22, 2015, order denying her motion for relief from judgment and granting plaintiff's motion to modify spousal support and (2) a March 28, 2016, order again modifying spousal support. This Court initially denied leave to appeal for lack of merit in the grounds presented, *Sullivan v Sullivan,* unpublished order of the Court of Appeals, issued May 19, 2016 (Docket No. 330543); *Sullivan v Sullivan*, unpublished order of the Court of Appeals, issued December 2, 2016 (Docket No. 334273), but the Supreme Court remanded for consideration as on leave granted, *Sullivan v Sullivan*, 500 Mich 957; 892 NW2d 367 (2017); *Sullivan v Sullivan*, 500 Mich App 958; 891 NW2d 477 (2017). We reverse in part and remand for further proceedings before a different judge.

Plaintiff and defendant divorced after a 36-year marriage. The divorce trial took place on October 1, 2014, and the court made a dispositional ruling from the bench on October 30, 2014. In the original dispositional ruling, the court erroneously failed to make an award regarding the vested shares of stock in plaintiff's (now former) employer, Ramco-Gershenson, Inc. On January 12, 2015, the date scheduled for entry of judgment, the parties negotiated the issue of vested shares off the record and entered into a consent judgment on that same date. The consent judgment provided, among other things, that plaintiff would provide a modifiable amount of $12,000 a month in spousal support; this was in accordance with the court's rulings after the divorce trial. The judgment also dealt with the disposition of the vested shares of stock.

On August 27, 2015, defendant filed a motion to enforce certain aspects of the judgment and a motion for partial relief from judgment based on fraud. Defendant asserted that, at the time of the January 12, 2015, negotiations, plaintiff had failed to disclose that he had resigned from his job in December 2014, that a separation agreement had changed the amount of vested Ramco stock that he owned because certain unvested shares had vested, and that he had received

a substantial lump-sum payment. Defendant asserted that plaintiff's 2014 total income was substantially higher than he had represented, the value of the concealed stock was $471,144.46, and he no longer had the employer-provided life insurance required by the divorce judgment.

Over the course of the following months, the trial court held various hearings, denied defendant's claim of fraud, ordered that plaintiff comply with certain aspects of the consent judgment, reduced (on October 22, 2015) the spousal support to $2,000 a month, and then raised (on March 26, 2016) the spousal support to $4,000 a month.

Defendant first argues that the trial court erred in denying the motion for partial relief from judgment because, before the signing of the consent judgment, plaintiff made a material misrepresentation that inured to defendant's detriment. This court reviews for an abuse of discretion a trial court's decision regarding a motion for relief from judgment. *Yee v Shiawassee Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002).

MCR 2.612(C)(1)(c) allows for relief from judgment on grounds of "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A showing of "fraud or misrepresentation" warranting relief from judgment requires the moving party to provide significant, specific allegations and strict factual proof. *Yee*, 251 Mich App at 405.

The parties agree that at the January 12, 2015, hearing, the issue of the vested shares of Ramco stock was central. Plaintiff's attorney represented that plaintiff had 33,679 vested shares.[1] Plaintiff contends that the trial court's finding that plaintiff had not lied to the court must be afforded deference and was supported by the evidence because plaintiff later testified that he believed the court was asking about the circumstances existing in October 2014 and also testified that he did not know that certain vesting had, as of January 12, already occurred. But plaintiff's testimony that he did not know that vesting had already occurred and thought it would occur in late January is belied by his testimony that he knew about the components of his severance package with Ramco. The severance agreement spoke to the vesting of the so-called "non-performance" stock shares[2] on the date of plaintiff's December 19, 2014, resignation, provided that plaintiff did not revoke (within seven days) the release and discharge provisions.[3] With regard to the so-called "performance" stock shares, the severance agreement indicated that plaintiff would be entitled to a payout for the shares, "for which vesting will be accelerated and will vest in full [sic] and plaintiff will be paid for such performance share units, based on the

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[1] Plaintiff does not argue that this statement by the attorney should not be attributed to plaintiff, arguing instead that "[plaintiff] honestly believed that he was being asked about the vested stock shares he held at the time of [the October divorce] trial."

[2] The previously-unvested shares were divided into "performance" and "non-performance" shares. In accordance with his separation agreement with Ramco, plaintiff received a payout for the vesting of 9,300 unvested performance shares; received vested shares for 15,226 of the non-performance, unvested shares; and lost 5,232 of the unvested shares.

[3] It is not disputed that plaintiff did not exercise his seven-day right to revoke.

market price of the Trust's shares on the Resignation Date, within 30 calendar days after the Release provisions . . . become effective." Plaintiff received the payment for the performance shares on January 9, 2015.[4]

The Michigan Supreme Court has stated:

> [t]he general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012) (quotation marks and citations omitted).]

In addition, the *Titan* Court noted that even misrepresentations made innocently can be actionable if the effect on the plaintiff is equally egregious. *Id.* at 556. See also *M&D, Inc v WB McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998) (discussing innocent misrepresentation in the context of a contract).[5] Although defendant admittedly focused in her motion on deliberate and intentional fraud, her motion also referred to relief from judgment based on a "material misrepresentation."

Even accepting the court's finding that plaintiff thought that the relevant period for determining the amount of vested shares was October 30, 2014, the central issue at the January 12, 2015, hearing was the *distribution of vested shares*. Keeping this in mind, regardless of whether plaintiff intended to lie or did not intend to lie, he did in fact make a material representation at this time, and this representation was false. Plaintiff's attorney said "[h]e has 33,679 . . . shares . . . that vested." Plaintiff admitted to knowledge of the separation agreement, and this agreement, viewed in context, indicated that plaintiff's non-performance shares would vest before January 12 (i.e., on the resignation date) and that the performance shares would vest at some point in the near future (in actuality, payment for these ended up being made on January 9). Under these circumstances, the assertion about having only 33,679 vested shares was made recklessly. In addition, given that the issue being negotiated at the January 12 hearing was distribution of the vested shares, plaintiff clearly made the assertion with the intention that defendant act upon it, and evidence shows that defendant did act upon it to her detriment.

Under these circumstances, it was an abuse of discretion for the trial court to deny the motion for relief from judgment. Defendant must be allowed to reopen the issue of distribution

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[4] Plaintiff testified that when he signed the Ramco separation agreement, he knew that he would be getting this payment at some point.

[5] This Court has held that "[j]udgments entered pursuant to the agreement of parties are of the nature of a contract." *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994).

of the vested stock, given that it represents a significant asset. In addition, because spousal-support factors include a consideration of the "property awarded to the parties," see *Luckow v Luckow*, 291 Mich App 417, 424; 805 NW2d 453 (2011),[6] the issue of spousal support must also be revisited.

In its October 22, 2015, order, the court held the issue of life insurance in abeyance, stating that it would revisit in March 2016 whether plaintiff needed to obtain life insurance for defendant. It does not appear that this issue was ever addressed with finality. The court referred to life insurance at a hearing on October 5, 2015, stating "you better get some life insurance,"[7] but it is not clear to whom the court was speaking, and, at any rate, the court *later* stated that it was holding the issue in abeyance. The life-insurance issue remains outstanding and must also be addressed on remand.

Defendant next argues that the October 22, 2015, order violated her constitutional rights to due process because she received inadequate notice of the hearing on that date and was erroneously denied discovery. She also argues that the court erred in modifying the spousal-support award at that time. This Court reviews constitutional (e.g., due process) issues de novo. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). This Court reviews for an abuse of discretion a trial court's decision to grant or deny discovery. *Shinkle v Shinkle*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

We review "the trial court's factual findings relating to the award or modification of [spousal support] for clear error." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* at 654-655. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655.

The lower-court record contains a notice of hearing, dated October 14, 2015, stating that plaintiff's motion to modify spousal support would be heard on October 21, 2015. The record

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[6] In *Luckow*, 291 Mich App at 424, the court stated that several factors are pertinent to spousal support, including:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, and (11) general principles of equity. [Quotation marks and citation omitted.]

[7] The register of actions, in an entry dated October 5, 2015, states "DEFT'S MOT TO ENFORCE JUDGMENT; GRANTED AS TO LIFE INSURANCE ON PLTF," but the parties point to no order, aside from the ambiguous oral statement on October 5, 2015.

contains another document, entitled "Praecipe, request for hearing" and dated October 14, 2015; this document states: "Please place on the motion calendar for Monday, November 2, 2015." But this latter document also states: "Scheduled to be Heard on Wednesday, October 21, 2015," "By Permission of Judge's Clerk, Lisa."[8] In addition, the register of actions states, in an October 13, 2015, entry, that the motion to modify spousal support would be "set for same date as evid hear 10/21[.]"

Toward the end of the October 21, 2015, hearing, the court stated that it thought the spousal-support motion was scheduled to be heard that day,[9] but defendant's attorney stated that it was not scheduled to be heard until November and that defendant had a right to discovery. The trial court stated that there was no right to discovery with regard to the motion and scheduled the hearing for the following day. On appeal, defendant contends that her rights to due process were violated because of the two dates listed on the praecipe. This argument is not tenable, however. The document labeled "Praecipe" *requests* a motion date of November 2, but then states that the motion is "Scheduled to be Heard on Wednesday, October 21, 2015," "By Permission of Judge's Clerk[.]" In addition, the notice of hearing served on defense counsel on the same date as the praecipe states that the motion would be heard on October 21, 2015. It is a stretch to argue that defense counsel had no notice, under these circumstances, that the motion would be heard on October 21, and even assuming, arguendo, that there was some ambiguity regarding the date of the hearing, at the very least defense counsel was put on notice that he needed to clarify which date was applicable.

Defendant also argues that she did not realize the hearing on spousal support would be an evidentiary hearing related to the determination of the amount of support to be paid. However, plaintiff's motion to modify spousal support clearly requested that the court do the following: "Following a hearing, determine the appropriate amount of support that should be paid due to the fact that [p]laintiff has lost his job." The notice of hearing states: "Plaintiff's Motion to Modify Spousal Support will be brought on for hearing on Wednesday, October 21, 2015." Under these circumstances, defendant should have been aware that the October 21, 2015, hearing would involve a redetermination of spousal support based on the limited issue of job loss. Defendant takes issue with the lack of discovery, and on appeal cites MCR 2.302(A)(4), which states: "After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules." But the hearing was scheduled for October 21 and defense counsel did not make his oral, on-the-record "motion" for discovery until that date, in the midst of the fraud hearing. Under these circumstances, it is difficult for us to find that the trial court erred with regard to discovery, and, at any rate, we are now remanding this case for a reevaluation of spousal support.

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[8] An October 14, 2015, proof of service indicates that both the "Praecipe" and the "Notice of Hearing" were served on defendant's attorney on October 14, 2015.

[9] The court had, earlier that day, expressed that it did not know when the motion was scheduled to be heard, but plaintiff's counsel said, "we had it set for today."

As stated in *Moore*, 242 Mich App at 654:

> The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. Alimony is to be based on what is just and reasonable under the circumstances of the case. An alimony award can be modified upon a showing of changed circumstances. The modification of an alimony award must be based on new facts or changed circumstances arising since the judgment of divorce.

Defendant contends that because plaintiff quit his job *before* entry of the consent judgment on January 12, 2015, there was no change of circumstances warranting a modification of spousal support. This argument elevates form over substance. The $12,000 a month in spousal support was based on the trial court's rulings after the divorce trial (and before the termination of employment), and the parties merely formalized this amount in the consent judgment. The trial court did not clearly err in finding a change of circumstances. Defendant also contends that the trial court's ruling was improper because the court stated that the change in circumstances happened "through no fault of [plaintiff's] own." But plaintiff did provide plausible reasons for why he terminated his employment with Ramco, stating that "it was made quite clear that neither [he nor his boss] had confidence in each other's decision[-]making ability, and the best thing would be for me to go." Accordingly, we cannot conclude that the trial court clearly erred in ruling that plaintiff's decision to quit was not made on a whim.

Defendant states: "Discussing . . . the findings on the spousal support factors is virtually meaningless in light of the fact that [defendant] did not have an opportunity to present her case." Nevertheless, she argues that the trial court failed to address many of the required spousal-support factors and erroneously imputed income to defendant while not imputing income to plaintiff. It is not entirely clear, however, that the court was imputing income to defendant. The court stated that there was no reason defendant could not work, but made no reference to imputing a certain income to defendant. In addition, it is not entirely clear that the court did *not* impute income to plaintiff, seeing as the court ordered him to pay spousal support despite his unemployment. At any rate, the issue of spousal support must be revisited on remand, as we have already noted.

Defendant next argues that the trial court erred in failing to grant her certain attorney fees. The trial court did not address this issue. In general, an issue must be raised and addressed to be preserved. *Polkton v Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). "[T]his Court may disregard the issue preservation requirements and review may be granted if failure to consider the issue would result in manifest injustice." *Id.* at 95-96. We address this issue because, while defense counsel did not discuss the attorney-fee issue during his closing argument on October 21, 2015, the fact remains that defendant did request attorney fees in her written motion that was being heard on that date.[10]

[10] In general, this Court reviews for an abuse of discretion a court's grant or denial of attorney fees. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Here, though, as noted, the

Defendant, in her August 27, 2015, motion to enforce judgment, argued that plaintiff had failed to take certain steps to enforce the judgment, such as transferring certain monies from his IRA. She requested attorney fees under MCR 3.206(C)(2)(b) "for the reason that [p]laintiff refused to comply with the Consent Judgment despite having the ability to comply and that his fraudulent misrepresentations caused [d]efendant to incur substantial attorney fees in connection with all necessary attorney fees incurred [sic] to bring this matter to the attention of this [c]ourt." Defendant claims that the court ordered plaintiff to comply with various "equalization of accounts" orders and that the court should have awarded attorney fees in conjunction with that. Although the pertinent transcript reveals that plaintiff represented that everything that needed to be done was in the process of being accomplished and the court did not explicitly "order" anything orally, the court did order certain equalization actions in its written order dated October 22, 2015.

MCR 3.206(C)(1) states: "A party [in a domestic-relations action] may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding." MCR 3.206(C)(2)(b) states that "[a] party who requests attorney fees and expenses must allege facts sufficient to show that . . . the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." Contrary to defendant's suggestion, these rules do not contain a *requirement* that attorney fees be awarded upon request even if expenses were incurred because of an unjustified refusal to comply with a court order. See, e.g., *Butler v Simmons-Butler*, 308 Mich App 195; 863 NW2d 677 (2014) (stating that MCR 3.206(C)(2)(b) *allows* attorney fees if a party refused to comply with a court order). At any rate, the court, as noted, simply did not address the request for attorney fees. This Court has held that the "failure to exercise . . . discretion" can amount to an abuse of discretion. See *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 49; 445 NW2d 186 (1989). Because it is appropriate to remand this case for further proceedings as previously discussed, we also remand the issue of attorney fees.

Defendant next argues that the case should be assigned to a different judge on remand. Defendant did not move to disqualify the trial judge below. Accordingly, this issue is not preserved. See, e.g., *Welch v District Court*, 215 Mich App 253; 545 NW2d 15 (1995). However, the Michigan Supreme Court has remanded proceedings to a different judge of its own volition, without even discussing any motions below or arguments on appeal. See *People v Smith*, 496 Mich 133, 144; 852 NW2d 127 (2014) (remanding a criminal case to a different judge because the initial judge demonstrated hostility towards the prosecution). In the divorce case of *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992), the Court remanded the matter to a different judge, based on an appearance of impropriety, without discussing any motions made below. Accordingly, the absence of a motion to disqualify does not mean that defendant's

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court simply did not address defendant's attorney-fee request, so there has been no exercise of discretion to review.

argument should be rejected automatically. As defendant points out, MCR 7.216(A)(7) allows the Court of Appeals to "grant . . . relief as the case may require[.]"[11]

MCR 2.003(C)(a) allows for judicial disqualification based on bias or prejudice. MCR 2.003(C)(b) allows for disqualification because of a failure "to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." Canon 2(A) states, in part, that a judge "must expect to be the subject of constant public scrutiny" and "must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen[.]" Canon 2(B) states that that a judge "should promote public confidence in the integrity and impartiality of the judiciary" and "should treat every person fairly, with courtesy and respect."

The record is replete with instances in which the judge treated defendant or her attorney, Bruce Sage, with apparent hostility. We will list some (but not all) of the instances. At one point, Sage thought that the judge was finished speaking and attempted to respond, stating, "I thought you were finished," and the judge said, "Oh, for heavens [sic] sake. If I take a breath that doesn't mean I stopped." The judge was discussing payment amounts to equalize accounts, and after stating "It's not rocket science" to Sage and "No frickin' way" in response to the court clerk, she stated to Sage, "every time you start saying you didn't know [in response to questions about what defendant had in her accounts] I'm gonna sanction you a $100 [sic]." When Sage presented an email purportedly from plaintiff and attempted to admit it, the judge discussed the requirement of laying a foundation and said, "I mean really." When Sage asked if the judge was ordering defendant, who lives in Florida, to appear in person for an evidentiary hearing, the judge said, "You bet I am." When the judge issued a decision at the conclusion of the October 22, 2015, hearing without first allowing or even mentioning closing arguments, Sage attempted to request a closing argument but the judge reprimanded him, stating, "Are you makin' a joke?" and suggesting that it was imperious of Sage to mention closing arguments *after* the judge's decision. Sage attempted to explain that he did not interject earlier because he "didn't want to interrupt you, Your Honor," but the judge said, "No, Mr. Sage, I'm not [allowing closing arguments]. We're done. Get the other people in here."

When defendant was attempting to explain her financial situation, the judge said, "Yeah, so do some explaining about why you only have 120 in the bank." When defendant explained that her cost for cable and her landline telephone was $250 a month and her cellular-telephone cost was $235 a month, the judge said, "that's ridiculous." Defendant explained that she had pets to care for, including a blind and elderly dog, and the judge stated, in regard to defendant's pets: "maybe you need to get rid of them" (in order to save money). The judge stated that defendant should have saved more money in 2015, but did not place this in the context of

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[11] In general, a motion to disqualify is reviewed for an abuse of discretion. See *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). But here, as discussed, defendant argues for assignment to a new judge without having argued as much below, emphasizing general principles of fairness and allegations of animosity and the appearance of impropriety. Because the issue was not raised in the lower court, there was not an exercise of discretion for this Court to review.

defendant's having been unaware for a large part of that year that plaintiff had lost his job and would not be paying spousal support of $12,000 a month into the future.

It is true that some of these remarks, viewed in isolation, are of relatively little impact or import, but it is important to view them as a pattern. Sage did not demonstrate hostility or aggressiveness throughout the proceedings but the judge displayed a pattern towards him and defendant of at least apparent hostility. It seems especially egregious for the judge to have recommended that defendant "get rid of" her pets. While there might be certain situations in which rehoming pets might indeed be a necessity (for example, if someone is destitute and living in a homeless shelter), defendant was not in that type of situation. The appearance of justice would be better served if the case is remanded to a different judge. See *Sparks*, 440 Mich at 163; see also MCR 2.003(C)(b) and Code of Judicial Conduct, Canon 2(A) and (B).

Defendant lastly takes issue with the March 2016 spousal-support hearing, stating that plaintiff did not comply with a document subpoena and effectively deprived defendant of her constitutional rights to due process and that the court erred in its spousal-support findings.

With regard to the subpoena, plaintiff unambiguously testified at the March hearing that he had no other documents to produce regarding his 2015 income. He testified that he had yet to file his tax return for 2015 but would provide defendant's counsel with a copy of the return when it was filed. As such, defendant's argument about the subpoena is without merit.

Contrary to defendant's implication, the court made no specific findings regarding imputation or non-imputation of income at the March hearing but did order plaintiff to pay defendant $4,000 a month despite his current lack of employment. The court referred to the fact that both defendant and plaintiff were earning money from stock dividends and noted that the initial support order had been set based on a high income. On appeal, defendant argues that the court was required to revisit all the spousal-support factors, but it appears that the court was properly looking at what it viewed to be the *changed* circumstances, i.e., plaintiff's loss of employment. At any rate, because the distribution of stock must be revisited, a revisiting of spousal support is also warranted, as we have already discussed.

Reversed in part and remanded for further proceedings before a different judge. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael F. Gadola
/s/ Jonathan Tukel