ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Samuel C. Sneed (SBN 289205)
HAHN LOESER & PARKS LLP
600 West Broadway, Suite 1500
San Diego, California 92101
TELEPHONE NO.: 619.810.4300 FAX NO. (Optional): 619.810.4301
E-MAIL ADDRESS (Optional): ssneed@hahnlaw.com
ATTORNEY FOR (Name): Defendant Fidelity National Home Warranty Co.

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 300 W. Broadway
MAILING ADDRESS: 300 W. Broadway
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central Division

PLAINTIFF/PETITIONER: Fidelity National Home Warranty Cases
DEFENDANT/RESPONDENT:

NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER: JCCP 4806

(Check one): ☑ **UNLIMITED CASE** (Amount demanded exceeded $25,000) ☐ **LIMITED CASE** (Amount demanded was $25,000 or less)

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: April 2, 2018

2. A copy of the judgment, decree, or order is attached to this notice.

Date: April 4, 2018

Samuel C. Sneed
(TYPE OR PRINT NAME OF ☑ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

(SIGNATURE)

Form Approved for Optional Use
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CIV-130 [New January 1, 2010]

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FILED
Clerk of the Superior Court
APR 02 2018
By: P. Ashworth, Clerk

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

Coordination Proceeding: **FIDELITY NATIONAL HOME WARRANTY CASES** Included Actions: *Kaplan v. Fidelity National Home Warranty Company* *Fistolera v. Fidelity National Home Warranty Company*	**JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4806** **FINAL JUDGMENT IN *KAPLAN*** Judge: Hon. Judge Eddie C. Sturgeon Dept.: C-67 Superior Court of California, County of San Diego, Case No. 37-2008-00087962-CU-BT-CTL (Consolidated with Case No. 37-2008-00088433-CU-BT-CTL) Action Filed: July 18, 2008 Superior Court of California, County of San Joaquin, Case No. 39-2012-00286479-CU-BT-STK) Action Filed: August 30, 2012

Defendant Fidelity National Home Warranty Company's ("Fidelity") Motion for Mandatory Dismissal for Failure to Bring to Trial in *Kaplan v. Fidelity National Home Warranty Company*, Superior Court of California, County of San Diego, Case No. 37-2008-00087962-CU-BT-CTL (Consolidated with Case No. 37-2008-00088433-CU-BT-CTL) ("*Kaplan*") came on regularly for hearing before the undersigned on December 8, 2017 upon notice duly and regularly given. Steven Goldfarb, Erica Calderas, and Sam Sneed appeared on behalf of Fidelity. Francis Bottini, Yury Kolesnikov, and Anne Marie Murphy appeared on behalf of the *Kaplan* Plaintiffs Dan Kaplan, James Baker, and the certified class in *Kaplan*. Following oral argument, the Court took the matter under submission.

Having carefully considered all of the papers, declarations, and exhibits filed in support of and in opposition to the motion and oral argument presented at the hearing, on December 15, 2017, this Court issued its Minute Order ("Order") which **GRANTED** the Motion and ordered dismissal. The Order is attached hereto as Exhibit A. Upon the dismissal of the action, no claims will remain pending against Fidelity in *Kaplan*.

Notice of this dismissal will be provided to any class members who did not opt out. Notice will be provided by posting notice on the website hosted by the class administrator.

This Court **FINDS** that Fidelity is the prevailing Fidelity party in *Kaplan* and, as such, is awarded its costs in the *Kaplan* action and the *Baker* action with which the *Kaplan* action was consolidated, from Plaintiffs Dan Kaplan and James Baker in the amount of $ TBA .

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

Judgment shall be and hereby is entered as follows:

1. Judgment of dismissal in favor of Fidelity and against the *Kaplan* Plaintiffs Dan Kaplan, James Baker, and the certified class in the *Kaplan* action.;
2. Judgment in favor of Fidelity and against the *Kaplan* Plaintiffs Dan Kaplan, James Baker for costs in the amount of $ TBA together with interest on that principal amount as the statutory rate of 10% from the date of the entry of this Judgment forward.

IT IS SO ORDERED

Dated: 02 APR 2018, 2018

By: Eddie C. Sturgeon

Hon. Eddie C. Sturgeon

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER [X] Amended on 12/15/2017

DATE: 12/15/2017 TIME: 11:20:00 AM DEPT: C-67

JUDICIAL OFFICER PRESIDING: Eddie C Sturgeon
CLERK: Patricia Ashworth
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **JCCP4806** CASE INIT.DATE: 09/05/2014
CASE TITLE: **Fidelity National Home Warranty Cases [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

APPEARANCES

The Court, having taken the above-entitled matter under submission on 12/08/2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Defendant Fidelity National Home Warranty Company's motion to dismiss the *Kaplan* sixth amended complaint is granted. *Kaplan* was filed on July 18, 2008, over 8 years ago. The court declines to exercise its discretion to extend the time for trial. It has been over three years since the Fourth District Court of Appeal, Division One issued a remittitur on April 15, 2014. (*Kaplan v. Fidelity National Home Warranty Company*, 2013 Cal. App. Unpub. LEXIS 9069 at *34.) Thus, the *Kaplan* plaintiffs had three years in which to proceed to trial under Code of Civil Procedure sections 583.310 and 583.320. The court finds that the case was only tolled for 45 days (6 days for a peremptory challenge, and 39 days for the coordination assignment.) Plaintiffs did not request any other stays.

The court dismisses plaintiffs Janice Fistolera, Fernando Palacios, and Hamid Aliabadi's ("Fistolera Ps") complaint for failure to prosecute the case within five years. The court disagrees with the Fistolera Ps' arguments that an additional 172 days must be added due to the coordination proceedings because plaintiffs would not have been able to proceed to trial on this matter. This argument was specifically rejected by the Fourth District Court of Appeal, Division One case *Gordon's Cabinet Shop v. State Comp. Ins. Fund* (1999) 74 Cal.App.4th 33, 40–41, which involved the predecessor to California Rules of Court, rule 3.515.

Plaintiffs have failed to meet their burden to extend the computation of time pursuant to Code of Civil Procedure section 583.340. Plaintiffs were required to show they exercised reasonable diligence in preparing for trial. As set forth in *Jordan v. Superstar Sandcars* (2010) 182 Cal.App.4th 1416, 1422, where the court did not find due diligence in preparing for trial even during the moratorium in Sacramento County stated:

A plaintiff has an obligation to monitor the case in the trial court, to keep track of relevant dates, and to determine whether any filing, scheduling, or calendaring errors have occurred. This obligation of diligence increases as the five-year deadline approaches. (*Wilshire Bundy Corp. v. Auerbach* (1991) 228

Cal.App.3d 1280, 1286; see also *Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 336.)

Plaintiffs failed to request a stay at *any* time pursuant to California Rules of Court, rule 3.515(a). Plaintiffs' sixth amended complaint had been stabilized and the ruling denying the motion to consolidate was finalized since April 2, 2016. And yet, currently plaintiffs have a motion to amend to substitute in new plaintiffs set for January 2018, and only at this hearing did plaintiff indicate a date for the class certification had been reserved. However, no pleadings have been filed on the class certification motion, and there is no current representative plaintiff. Plaintiffs blame the lack of discovery result are due to defendants' actions. However, plaintiffs did not pursue motions to compel. Plaintiffs assert they had to wait for the court's ruling on the appeal, but they had the ability to request a stay if they actually believed the issues were intertwined.

The court grants the dismissals for both actions.

Eddie C. Sturgeon

Judge Eddie C Sturgeon