So I don't see any good cause, particularly -- Mr. Baker is not even previously mentioned anywhere, okay. So the Court doesn't find it would be appropriate because I find it prejudicial when I have an affidavit that has substantive information and yet there was ample time, almost a month. And even under the May 20th you still have a couple weeks. And given the shortened notice in which you were able to get it, as much as I appreciate you have been scrambling and probably not had a week that you ever want to repeat, but it does indicate that if the information was sought on a quick turnaround it could have been provided to the Court prior to the last hearing.

So the Court is inclined to exclude the affidavit of Lloyd Baker. I'm inclined to make this -- well, I'm going to make it Court's Exhibit 1 for today because we've got to know what I'm excluding, okay. Now, that's the Court's inclination. If anyone wants, I'll give you three minutes each for any response because you all have had a lot of time already to argue it. Anything you wish to be heard further on Mr. Baker?

MR. CHURCHILL: Just this, Your Honor.

THE COURT: Sure.

MR. CHURCHILL: The whole purpose when Ms. Manke sent out the letter --

THE COURT: Which letter? Just so we're clear, the June 6th --

MR. CHURCHILL: Advising Your Honor and counsel that I had this sudden trial thrust upon me.

THE COURT: Sure.

MR. CHURCHILL: And the whole purpose was to do this, Your Honor. The motion to disqualify takes precedence over everything. Because why? Because

Mr. Shpirt's conflict is imputed to Mr. Lavery, Mr. Avakian.

THE COURT: We can't get -- honestly, counsel --

MR. CHURCHILL: I understand.

THE COURT: -- I appreciate you're trying to go to the merits. Do you have anything with regards to Mr. Baker on why there's some factor the Court hasn't taken into account that he should be able to have his affidavit utilized today?

MR. CHURCHILL: Here's -- well, here's my point, Your Honor. I was just trying to get -- this is all I wanted for today was to get the motion heard for today, let Your Honor determine whether or not an evidentiary hearing was necessary. And I don't know if it came across that way, but that was my directive, okay. That's what I wanted to have happen. And then ultimately if Your Honor determined after hearing both sides on the motion that an evidentiary hearing was necessary, then we would go forward with an evidentiary hearing on this matter.

THE COURT: Excuse me. There was -- okay. I really don't want to put Ms. Manke on the spot, but I think anyone who was a party to that conversation knows this Court said it on Monday. Nobody requested an evidentiary hearing, because I said, surprise, isn't this a concern with two days beforehand; words to that effect. I'm paraphrasing, obviously. But there was no time at that point anyone said we are now requesting an evidentiary hearing or we do the motion to disqualify and then we would determine whether an evidentiary hearing, or anything to that effect. And between this letter and that telephonic conference and today, no one has provided this Court with any of that request. I mean, so you do understand the concern for it to come up today.

MR. CHURCHILL: I understand.

THE COURT: The only thing from a timing standpoint was that you had to be in trial. It wasn't clear completely on your trial schedule that you all were doing your due diligence to try to speak among yourselves, but that you were in trial, okay, and so trying to get the information. And I even said a couple of times, Ms. Manke, I was trying to not to put her on the spot, I appreciate that she didn't have all the information, but I had to do scheduling.

MR. CHURCHILL: Sure.

THE COURT: And I kept on saying this was procedural and scheduling for timing standpoint. And then at the end of the conversation is, well, we're where we were before. And I believe Mr. Aicklen then asked the question, well, Your Honor, which order are you doing the two because you needed to know for your subpoenaed witnesses. My recollection is that the Court said, well, since we're back where we were, we are doing it in the same order because that's in fairness to all parties. This is what you originally anticipated, this is what you all agreed to, and so that's the order that we're doing it. So once again, there was ample opportunity, at least from this Court's understanding, if somebody was making a request. I kept on asking. So that presents quite a challenge because it wouldn't be fair to change their motion to dismiss hearing with no notice and then say all of a sudden now you want an evidentiary hearing.

MR. CHURCHILL: And, Your Honor, to be fair, when they first brought their motion to dismiss, they didn't ask for an evidentiary hearing. Your Honor determined that an evidentiary hearing was necessary.

THE COURT: Which is why I asked all parties when you had a hearing to make sure if anyone wanted any further request. If somebody else wanted -- it's

clear I'm more than willing to do one evidentiary hearing if anyone requested another one. And just so we're clear, terminating sanctions, in fairness, really, you know what I mean? I can do that on a motion, but terminating sanctions, generally we want to give plaintiff -- the party which is potentially being subject to terminating sanctions have a full opportunity to present any additional information so that we can go over everything. No one objected to the evidentiary hearing.

MR. CHURCHILL: Your Honor, we didn't object to the evidentiary hearing. The point is simply this. When they brought their motion to dismiss, they weren't requesting an evidentiary hearing. Your Honor set one because there were facts that needed to be fleshed out. And when we brought our motion to disqualify, we were -- I was under the same impression because an evidentiary hearing was not requested at that time. And I'm at a disadvantage because I don't even know how the discussion came about of presenting evidence here today.

But what we were seeking or what my intent was was to bring to Your Honor's attention that let's hear the motion on the motion to disqualify and if Your Honor needs an evidentiary hearing to flesh out more information, then request it. But as of Monday, Your Honor, we weren't planning on going forward with an evidentiary hearing. So as of Monday we're trying to scramble to get the affidavits of Mr. Baker -- and I don't know why Mr. Baker's name wasn't brought up at the time, but we were trying to get Mr. Baker's affidavit or we scrambled to get Mr. Baker's affidavit and Mr. Barrus' affidavit. So that's the thing, and --

THE COURT: You understand you never said this to the Court until today, right?

MR. CHURCHILL: Your Honor, I didn't get a chance to talk to the Court.

I was in trial. That was the problem.

THE COURT: Excuse me. Counsel, when we had the prior hearing when we set up these --

MR. CHURCHILL: The prior hearing -- Your Honor, the prior hearing, this was not part of it. Okay, we had the prior hearing. Mr. Aicklen said some things and it tips me off that there may be more information out there. That's when I started doing some phone calls. And after that prior hearing is when we brought our motion on an OST, okay. That was -- it was not -- this hearing was not discussed at the prior hearing because the motion hadn't even been filed yet. It wasn't until after that hearing when Mr. Aicklen made his arguments about all the things that he knew that tipped me off he may know things that he shouldn't know. And that -- within a couple of days of that, sure enough I find out Mr. Shpirt previously represented X'Zavion Hawkins. Signed the fee agreement, Your Honor. And that's how this comes about. This hearing was never discussed at the prior hearing because it wasn't even filed yet.

THE COURT: Okay. Go ahead, counsel. I mean, I've got a ruling to decide. I mean, I'm now having a request for an evidentiary hearing regarding the motion to disqualify, which I now need to take that into consideration. So I appreciate you all are somewhat -- different people have been appearing at different things, so.

MR. LAVERY: Well, in response to the statements that were made, I don't think -- I mean, no disrespect to counsel, I don't think your question was ever answered. With respect to the necessity of an evidentiary hearing for purposes of the motion to dismiss, Mr. Aicklen specifically said the defendants stand ready to present irrefutable evidence proving Hawkins' discovery abuses if the Court is

inclined to hold an evidentiary hearing. That's in their pleading or in our pleading of March 23rd of 2016. And the Court indicated you were inclined to have an evidentiary hearing, which is why one was set. And if I understand from your comments correctly, you gave everybody more than ample opportunity two days ago to say, hey, if you guys want an evidentiary hearing, somebody needs to tell me because I've asked and everybody said no. You asked for time limitations and the limitations were just that, very limited in terms of arguing a motion.

And as everybody in this room is very well aware, arguing a motion is substantially different than putting on an evidentiary hearing. And given the time constraints, the Court having previously indicated with respect to the motion to dismiss that you wanted to do an evidentiary hearing. Everybody had full and ample notice of that fact and in fact it was set here today with the necessary time limits. Now we're coming in past the 12th hour and saying, well, it was our intention to have an evidentiary hearing, despite the fact that we were given any number of opportunities to ask for one. We haven't done what we were supposed to do up to this point. We're now caught in a corner of having affidavits stricken from people that either weren't involved in this or have submitted two prior affidavits that don't say what they want to say, so the only way we're going to get there if you're going to exclude our affidavits is to have an evidentiary hearing, so now we want an evidentiary hearing.

That's simply not appropriate under any set of circumstances. It wasn't the Court's inclination. It wasn't the Court's direction. It wasn't the request of the parties. Most importantly, the people who are now standing in front of you saying we want an evidentiary hearing. They've had this opportunity any number

of times and didn't take advantage of it. And now that they realize that that's not going to enure to their benefit, they're jumping out of one boat in the middle of the river and trying to jump into another.

THE COURT: Here's what the Court's going to do. The Court is cognizant, and thank you for the reminder, that on page 23 of the initial motion to dismiss that was filed on March 23rd, 2016 it does say: "The Court, like the court in Johnny Ribeiro, should dismiss the case outright. However, defendants stand ready to present irrefutable evidence proving Hawkins' discovery abuses if this Court is inclined to hold an evidentiary hearing." What this Court does, when I get inferences like that, you know, evaluate it; it seems like somebody really wants me to hold an evidentiary hearing. Johnny Ribeiro does give that as the better guidance. I recall that the argument was we don't really need to have it; you can rule today. The Court said, no, I think it makes more appropriate because this is terminating sanctions, why don't I make sure all fair and full due process rights happen and have an opportunity to be heard, which really -- that one really enures to plaintiff's advantage, although it's a fair and equal playing field, to hold a full evidentiary hearing before making a ruling on terminating sanctions in this particular case.

And so the Court found it was appropriate. It was requested. I do see a distinction between it never being requested, the Court keeping on asking, and even when I have an intervening telephonic phone call, which normally wouldn't have happened, this hearing would have just started today but for the letter from your firm and trying to accommodate your trial schedule to get this all balanced out.

Here's what the Court is going to do. The Court finds it's appropriate that I'm going to hear the oral argument. If the Court determines based on the

oral argument that the Court feels that there needs to be an additional proceeding, I'm going to notify the parties. If I feel I can rule appropriately with regards to the information evidence I have available to me, then I'm going to do so.

I've ruled on regards to the Lloyd Baker affidavit for the reasons stated. That's just completely unfair and prejudicial to defendants, incorporating all my prior statements. With regards to the affidavit of Jason Barrus, there's -- most of this, the paragraphing is very similar to the two prior affidavits, and so the Court doesn't find that it's prejudicial. To the extent that there's a portion that's going to be argued, I'm going to hear the argument with regards to any differences in this affidavit versus the other affidavit and then hear any objection to the Court considering it, and then I'm going to make a ruling in the middle, I guess, of your motion with that regard to see if that information -- to see why it would be different, new, unique, okay?

MR. LAVERY: Very well, Your Honor.

THE COURT: Because they both reference the December 18th conversation. So I think since I have -- when I say both, I'm referencing the combination of the prior two that you were appropriately put on notice on and this one. So I'm reserving ruling on the Jason Barrus.

So at this juncture we're now going to move forward with the motion to disqualify. You are the moving party. Go ahead, counsel.

MR. CHURCHILL: Thank you, Your Honor.

MR. LAVERY: Judge, may I make one more brief point? Just simply the Court indicated that if you were inclined to grant an evidentiary hearing after argument on this motion that you would do so. Given the fact that you have stricken

Mr. Baker's affidavit, I'm assuming that Mr. Baker would not be subject to call or examination during the course of that evidentiary hearing.

THE COURT: I am -- That's a couple of moves on the chess board before we even get there. Let's see what needs to be done and then I'll make that determination if we get to that point. Okay?

MR. LAVERY: Very well. I just wanted to make a record, Judge.

THE COURT: If you -- yeah, just reserve your objection and remind me of it.

MR. LAVERY: Thank you, Judge.

THE COURT: Let's get to substance. Okay, go ahead, counsel.

MR. CHURCHILL: Thank you, Your Honor.

THE COURT: Now you know we're going to be in the predicament of you're going to start your motion, I'm going to have to come back. And I've got you with your issue of 1:30. So how timing am I going to get this done for you all? Because my staff needs -- Federal, State, they need a lunch.

MR. LAVERY: Understood. I don't --

THE COURT: We don't mess with that.

MR. LAVERY: Understood.

THE COURT: The latest they can go is 12:10, 12:15 at the latest because of when we started. So how long is your oral presentation?

MR. CHURCHILL: It's quite lengthy.

THE COURT: Estimate?

MR. CHURCHILL: Forty-five minutes.

THE COURT: Okay. We'll let you start and we'll break it up. What are we going to do about you with your response and you have to be at 1:30?

MR. LAVERY: Depending on the time that you're going to excuse everybody for lunch, if he's going to go -- again, I don't want to put anybody on the spot here. Are we going to go the full 45 minutes and then break, or are we going to go --

THE COURT: No, we cannot. My staff will not have had an opportunity to have their mandated State and Federal lunch, which we don't mess with.

MR. LAVERY: I just didn't know at what point we were going to take that lunch.

THE COURT: 12:15 is the latest I can take lunch. And if that means part-way through your argument, I'm giving you a heads up. And you all kind of --

MR. LAVERY: Well, that's the thing. I didn't know whether -- if counsel wants to start his argument and stop or if he wants to start his argument in its entirety because we've only got about fifteen minutes at this point now.

THE COURT: That's what I'm asking. I'm asking what you would like to do. But you also have to be at the court of appeals at 1:30, so timing --

MR. LAVERY: Yes, but, I mean, the light goes on, the light goes off. I'll be back -- I'll be done at two o'clock.

THE COURT: So, do you want to break for lunch now, come back at -- well, one -- see, the problem is my timing here.

MR. LAVERY: Right. Right, and that's why I'm asking the question because I don't want to put --

THE COURT: Do you want to come back at two o'clock and do you all want to continue your motion to dismiss? See if we can get that done today, or if not, finish that off a different day?

MR. LAVERY: I can represent to everybody that I will be standing back down

here as close to two o'clock as it takes me to get from the 17th floor to the third floor and I can do this for the remainder of the day if you want.

THE COURT: But you also, depending --

MR. LAVERY: I can't speak to the motion to dismiss.

THE COURT: I'm going to ask both the firms and the joinder thereto. I mean, once again this is an unexpected consequence that --

MS. RENWICK: We're fine with whatever -- however counsel wants to --

MR. AVAKIAN: We'll just let the police officers know when they get here that the timing will be a little shuffled up. We had to give them a time to come today. What we understood was going to be about an hour and a half, maybe two hours, so we told them to come at 12:30, thinking maybe we'd get on around 1:00.

THE COURT: Do you all -- okay, there's another option. If you all want this done out of order and you want the police officers to give their testimony on the motion to dismiss and then when they're done either start back with the motion to disqualify or do the motion to dismiss. I mean, the Court's going to -- what makes sense? I'm trying to accommodate everyone's needs --

MR. LAVERY: Understood, Your Honor.

THE COURT: -- but fair and equal to everyone. So does that work for the parties?

MR. AVAKIAN: Your Honor, our preference would be to have the evidentiary hearing all together on the motion to dismiss so that all the testimony is presented together in a sort of cogent method.

MR. LAVERY: At this point it would seem to make sense to just start this whole program back at two o'clock. That's my two cents worth just on timing. That

gives your staff time to have lunch, gives Mr. Churchill the opportunity to make an uninterrupted, continuous argument without having to start and stop. Gives me the opportunity to go upstairs and do what I need to do and come back. And I realize we're -- I apologize. It's me that's throwing the monkey wrench into it at this point.

THE COURT: Well, that's just -- everyone has their own -- this has been an interesting week for everyone, I'm sure, so we're trying to accommodate everyone to the extent possible.

So, counsel for plaintiff, Mr. Churchill.

MR. CHURCHILL: I concur with Mr. Lavery. And, Your Honor, I would also object to Lewis Brisbois' involvement in calling any witnesses in an evidentiary hearing, given the imputed nature of the --

THE COURT: Like I said, I'm just trying to see -- I was trying to meet as many people's needs as possible, trying to throw different things out as potential suggestions to assist the parties.

So here's what I understand. And counsel for GGP, here's what I understand that everybody is asking me to do, okay. You want to come back at two o'clock, start with the motion to disqualify, and then counsel will notify their subpoenaed witnesses with regards to the motion to dismiss, however you notify them. Is that what the parties are requesting? Are the joinder parties okay with that?

MR. LAVERY: I guess it begs the question, are we going to be able to get both of them done this afternoon? I don't think there's going to be --

THE COURT: You all would know the answer to that better than I would.

MR. LAVERY: I don't think there's going to be any problem with argument

on the motion to disqualify. Counsel said he's got about 45 minutes. I can't imagine -- I can't speak for 45 minutes, so it's not going to take me 45 minutes to do that. It's -- that ends my involvement in the proceedings. But the Court -- whatever the Court's pleasure is with respect to the underlying motion to dismiss.

THE COURT: At this juncture I'm just trying to do you all's scheduling to minimize any disruption from all parties. I'm going to be here, okay.

MS. RENWICK: Your Honor --

THE COURT: I think I have this courtroom until five o'clock. That's the thing I have to make sure, which my marshal is very quickly going to go and check with Department 7 to make sure that we can have the courtroom until five o'clock, because based on you all's -- remember, we're in somebody else's courtroom based on what you all told us you needed, so we're going to make sure at that end. But if they're okay with it, I'm here until end of business. I can't go past 4:50, okay, because remember, staff has to clean up.

MR. LAVERY: Right.

THE COURT: For overtime purposes.

MR. LAVERY: I don't think you're going to -- candidly, I don't think you're going to get them both done. Whatever that --

MR. ROSENTHAL: Your Honor, Harry Rosenthal for the defense. We can start the cops at 3:30, let's say, so that way we don't screw up another one of the police officer's days. And then if we don't get through it all, at least we got the cops in and then we can come back at another session.

Is the plaintiff agreeable to that scenario?

MR. CHURCHILL: No, Your Honor. Again, I'll say it again, we object.

MR. AVAKIAN: This is after.

MR. ROSENTHAL: I mean, the other firm could do it --

MR. AVAKIAN: This is after.

MR. ROSENTHAL: -- after the disqualification, I'm saying, Your Honor.

MR. AVAKIAN: After the disqualification hearing, we could put it on.

MR. ROSENTHAL: If that finishes by 3:30, the cops will go first. It would not interrupt another one of the cop's -- the detective's days.

MR. CHURCHILL: Oh. I have no objection.

MR. AVAKIAN: Yeah, after the disqualification hearing then we would put on the police officers.

MS. RENWICK: And if I may, Your Honor, during that telephonic call I did represent that in the event that counsel wasn't going to be able to go forward with the evidentiary hearing on the motion to dismiss, that our firm would be prepared to go forward it, so.

THE COURT: And they have a substantive joinder. Well, they're co-counsel on two of the overlapping --

MS. RENWICK: We're co-counsel for two defendants.

THE COURT: -- and a substantive joinder on the third. Do you have any objection with that game plan?

Here's what I understand what you're asking. Two o'clock, motion to disqualify. Motion to disqualify is done, prior to any oral argument have the two witnesses, which would be the first two called witnesses by defense anyway on their motion to dismiss for the evidentiary hearing. They get taken care of by whomever is the appropriate counsel based on what ruling may or may not happen by the

Court. And if the Court defers ruling on the motion to disqualify, then counsel from the Lee Hernandez firm, I'm just making my life easier by now switching firm names, you know, counsel from the Lee Hernandez because I'm not limiting it to one to the other, but whoever counsel from the Lee Hernandez firm will be taking over at least that portion to the motion to dismiss if the Court deferred ruling or made a negative ruling in regards to the Lewis Brisbois firm.

Does that meet everybody's needs?

MR. ROSENTHAL: Yes, ma'am.

MS. RENWICK: Yes, Your Honor.

MR. CHURCHILL: Your Honor, my preference would be if Your Honor defers ruling, if Your Honor wants an evidentiary hearing, you want to hear from the witnesses, live testimony, that we postpone all involvement with Lewis Brisbois. I understand that they may not be asking the questions, but they're still counsel of record, and I do object to that.

THE COURT: But they're not -- okay. I'm going to have to rule on that when we get back. I mean, honestly, at this juncture I'm not -- What do you mean participate? If the witnesses are being taken by the Lee Hernandez firm -- I'm just trying to understand.

MR. CHURCHILL: Yeah.

THE COURT: Are you saying they don't -- you don't want them present, sitting in the courtroom?

MR. CHURCHILL: Well, that's a good start.

THE COURT: No.

MR. CHURCHILL: I don't want them --

THE COURT: On what basis? What legal basis would they be precluded from sitting in a public courtroom?

MR. CHURCHILL: Because, Your Honor, the conflict of Mr. Shpirt is imputed to all of them. Mr. Shpirt's knowledge is imputed to every single one of them. And if they're still counsel of record in this case, they should have -- it's highly prejudicial to my client. They should have -- there should be no involvement whatsoever from them.

THE COURT: Well, since the Court obviously doesn't make advisory rulings, I don't make three stages down the road advisory rulings, what we are going to do is we're going to come back at two o'clock. That portion was agreed to by all parties. At two o'clock we'll do the motion to disqualify and then we'll go step by step thereafter. Okay?

MR. CHURCHILL: Perfect. Thank you, Your Honor.

MR. LAVERY: Very well. Thank you.

COUNSEL IN UNISON: Thank you, Your Honor.

THE COURT: I do appreciate it. So here's what I need to do.

(The Court confers with the marshal)

THE COURT: We have it until 5:00, so that timing issue is resolved. They don't have anyone coming in the interim so they can leave whatever stuff they want to, right? Okay.

Now you know my staff all needs their lunch break, so we politely have to ask you not to be physically in the courtroom because they all need to get their mandated lunch break, but be back here at two o'clock and I'll be back here by a quarter of 2:00 so it's not a worry if you all are ready and you see that you're done

or whatever. I'm not saying you are or are not, okay. And we'll get this taken care of, okay?

COUNSEL IN UNISON: Thank you, Your Honor.

THE COURT: I do appreciate it. Thank you so very much.

Does your client need any assistance getting out of the courtroom or you can assist?

MR. CHURCHILL: No, Your Honor, we don't need any assistance.

THE COURT: Okay, perfect.

MR. LAVERY: Thank you, Judge.

THE COURT: Thank you so very much.

THE MARSHAL: All rise. Court is in recess until 2:00 p.m.)

(Court recessed from 12:00 p.m. until 2:20 p.m.)

THE COURT: Let's go on the record. I am, since we took the break, I am going to ask for appearances again if you don't mind, okay. So I do appreciate it. Case Number 717577, Hawkins versus GGP Meadows Mall, et seq.

Counsel, can I get your appearances, please.

MR. CHURCHILL: Yes, Your Honor. David Churchill for the plaintiff, X'Zavion Hawkins.

MR. LAVERY: John Lavery on behalf of Lewis, Brisbois, Bisgaard & Smith.

MR. AVAKIAN: David Avakian on behalf of Mydatt and Mark Warner.

MR. ROSENTHAL: Harold Rosenthal for Mydatt and Mark Warner.

MS. RENWICK: Charlene Renwick and David Lee on behalf of GGP Meadows Mall, Mydatt and Mark Warner.

THE COURT: Okay. Thank you so very much, appreciate it. Based on the

agreement of the parties that we would commence at two o'clock, counsel for plaintiff, if you don't mind, it's your motion so I'll let you begin at your convenience.

MR. CHURCHILL: Thank you, Your Honor.

THE COURT: Thank you so much.

MR. CHURCHILL: Your Honor, to begin with I'd like to go back briefly to the May 3rd hearing. Your Honor, Mr. Aicklen argued that day and he -- as you may recall, he was quite colorful. He talked at some length about some death row inmates that he had deposed over the years and he went on to say some things that I thought were quite fascinating. He told Your Honor that because of his years of practice he just knew that Mr. Hawkins was going to lie. He was going to lie. And he said it over and over again. He said, Your Honor, you know, I've been practicing for 26 years and because I knew he was going to lie about certain things I decided to have his video -- his deposition videotaped.

And the more he spoke about all this information he had about Mr. Hawkins, it became disturbing. And after the hearing I made some phone calls, I called around. One of the persons I spoke to was Jason Barrus. And obviously Jason Barrus is an important attorney in this matter because he previously represented Mr. Hawkins and he referred the case to -- specifically to Mr. Shpirt. He referred it to him while Mr. Shpirt was working for the Eglet Law Group. And that is -- Your Honor, just imagine for a second, we find out after that hearing that Mr. Shpirt -- Shpirt -- I apologize if I'm mispronouncing his name -- did an intake with Mr. Hawkins, asked him questions, signed a retainer agreement, signed a fee sharing agreement, obtained a flash drive containing all of Mr. Hawkins' confidential information, and represented Mr. Hawkins for about three months. And Mr. Barrus

indicates that Mr. Shpirt was the only attorney that he had contact with during those three months regarding the case.

After three months Mr. Barrus receives a phone call from Mr. Shpirt and indicates, hey, we are no longer willing to take this case or represent Mr. Hawkins, we're going to decline representation at this time, and sends him a letter and an email confirming that. Sometime after that -- and all the dates are provided and I'll get into that maybe a little bit more later, but sometime after that Mr. Shpirt leaves Eglet Law Group to go work for Lewis Brisbois.

Now, what's interesting, Your Honor, is Lewis Brisbois and Eglet Law Group had several cases together and they provided for Your Honor as an exhibit, I think it was eight cases where Mr. Aicklen personally -- and I think this is -- I don't want to belabor this but I think it's an important point. When Mr. Shpirt went back to Lewis Brisbois, he went back to Mr. Aicklen, Mr. Aicklen specifically. You'll see in Mr. Aicklen's affidavit he specifically says all the contact was with him, that Tracy Eglet called him, Paul Shpirt called him to say, hey, I don't know the exact dynamic but he wants to come back and work with you again. And he says over a period of time they did some negotiations and they worked it out. And Mr. Aicklen says we sent Tracy Eglet a letter saying these are the eight cases that we have in conflict. Well, at that time it was before -- it was before Mr. Hawkins had even filed a complaint, so this case was not included in that letter.

But the point is this, Your Honor. They knew the rule. How do we know they knew the rule? They knew the rule because they did it with Tracy Eglet. Mr. Shpirt and Mr. Aicklen complied with the Rules of Professional Conduct with Tracy Eglet. But then again, Your Honor, Tracy Eglet knew, she had actual knowledge of

the cases that were at her firm that were specifically against Lewis Brisbois. And if I had to guess, Your Honor -- it's not in the pleadings but if I had to guess, when Eglet Law Group hired Mr. Shpirt I'm sure they did a reciprocal thing as well, that they identified the cases that they had in conflict and made sure that there would be no kind of communication, both when Mr. Shpirt left and when he came back. I don't know that to be true, but I'd assume it's true.

In any event, Lewis Brisbois found out about this conflict in October of 2015. And unlike what they did with Tracy Eglet where they immediately notified her these are the eight cases that are in conflict, they don't make a phone call, they don't send a letter, they do nothing. Now, I'm not here to disparage any attorney, but I'm going to say this. It seems very underhanded to me that when they know the rule, they know disclosure is mandatory -- it's mandatory -- and they don't do it to Mr. Hawkins, I'm not here to disparage anybody but I will say this, Your Honor. It raises a red flag. I'm going to leave it at that. It raises a red flag.

Your Honor, before we filed this motion, as you'll see in Ms. Manke's affidavit, this is not something -- this is not something we took lightly. We contacted the State Bar of Nevada, spoke with Phil Patted, gave him the very scenario that was presented to us that's undisputed that Mr. Shpirt had contact with X'Zavion Hawkins, personally represented him, met with him, signed the retainer agreement, signed the referral fee agreement and signed the drop letter. Mr. Patted was very clear it's a conflict, unwaivable unless the client waives it.

MR. LAVERY: Your Honor, at this point there's absolutely no evidence of that before the Court. We're arguing well outside the record that's before you. The only statement with respect to contacting the State Bar was in Ms. Manke's affidavit

where she said she did it. There was no statement -- you have nothing from the State Bar counsel, you have nothing in Ms. Manke's affidavit that indicates any of what counsel has just represented to the Court as part of the record.

THE COURT: Okay. Counsel, were you on that phone call?

MR. CHURCHILL: I was not on that phone call.

THE COURT: Okay. Then I'm going to have to sustain their objection because it's based on the affidavit and it hasn't been presented to the Court. And since you weren't on the phone call it would be hearsay as well. Okay?

MR. CHURCHILL: Fair enough.

MR. LAVERY: Move to strike the comments with respect to that.

THE COURT: The Court will disregard the content of the communication, not the fact that the State Bar was contacted because that was properly placed in an affidavit.

Okay, go ahead.

MR. CHURCHILL: Thank you. In any event, Your Honor, I think it's clear subsequent to that phone call we filed the subject motion.

Now, Your Honor, in terms of controlling case law, the controlling case law for this particular matter involving attorneys, not non-attorney support staff and not settlement judges -- (indiscernible) -- that had become an issue in 2012, but the controlling case law specifically regarding attorneys is Nevada Yellow Cab and Vannah, Costello, Vannah and Ganz v. Eighth Judicial District. This is the controlling case law. The pinpoint cite is 123 Nev. 44 and this is a 2007 case. I'm going to discuss this case briefly because after this case the State Bar of Nevada issued an advisory opinion in 2008. And the two -- both the advisory opinion and

the Nevada Yellow Cab case, they dovetail very, very well together. And the Nevada Supreme Court gives us three elements, three elements of attorney-client conflict, okay. This is what the Nevada Supreme Court said and this is page 741 of the Pacific Reporter. And they make it very clear. They say, "Thus, for a potentially disqualifying conflict to exist, the party seeking disqualification must establish three elements. Number 1, that it had an attorney-client relationship with the lawyer. Number 2, that the former matter and the current matter are substantially related. And Number 3, that the current representation is adverse to the party seeking disqualification."

Well, let's analyze that in this setting based on what we know from all of the affidavits. Number one, did an attorney-client relationship exist between X'Zavion Hawkins and Paul Shpirt? The answer to that question undoubtedly, unquestionably, and Lewis Brisbois admits it, is yes. He signed a retainer. He met with him, signed a drop letter. Had communications with Mr. Barrus specifically why they were dropping the case. And sends an email, and I'll get to that more later, saying, hey, Mr. Barrus, if you have any more questions give me a call and I'll answer them for you. Call me. It's undisputed Mr. Shpirt and Mr. Hawkins had an attorney client relationship.

Number two, that the former matter and the current matter are substantially related. They're not even substantially related, Your Honor, it's identical. It's the exact same case. Identical.

And then number three, that the current representation is adverse to the party seeking disqualification. Well, let's look at that. Mr. Hawkins is the plaintiff. He is suing Mydatt and Mr. Warner. They are on opposite sides of the "v" and he

is -- Mr. Hawkins is seeking disqualification against Lewis Brisbois, who represents the defendants in this matter against the plaintiff. Your Honor, based on those three criteria, the Nevada Supreme Court upheld disqualification of Mr. Vannah in the case. And what's important about the Nevada Supreme Court upholding disqualification is, number one, Mr. Vannah indicated that an attorney by the name of Mike Rubino and Denise -- I forget her last name -- Osmond, were the ones who handled the Nevada Yellow Cab case and he had no involvement with it, but yet the conflict was imputed to Mr. Vannah.

And another interesting thing that I want Your Honor to consider about the Nevada Yellow Cab case is this. The defendant in that matter knew about the conflict, okay, and sent to Mr. Vannah a letter. He made a phone call and said, hey, Mr. Vannah, I think you have a conflict in this case. And he said I'll look into it. And Mr. Vannah comes back later and says, you know, I don't think I have a conflict, I'm willing to go forward. And the defendant at that time says, okay, why don't we do this. Let's put the case into a mediation. So they go to a mediation. The case doesn't settle. Two years later after the defendant was fully aware of the conflict for two years, brings a motion to disqualify Mr. Vannah from the case. And the judge says, yeah, that's okay, and the Nevada Supreme Court said, you know, maybe a little bit longer than you'd like, but we find no error in that, and they upheld disqualification even though the motion wasn't brought for two years.

I think the most important language, though, that comes out of the Nevada Yellow Cab case is this, and I'm going to quote it. It says -- well, the Nevada Supreme Court, they instruct the district courts that any doubts should be resolved in favor of disqualification. So, Your Honor, any doubts must be judged

in favor of disqualification.

We've addressed the Nevada Supreme Court's holding and that's -- like I said, Your Honor, this is a 2007 case. We got additional guidance from the State Bar of Nevada and this came out in 2008. And there are very, very specific ethical rules and let's start with ethical rule 1.9. Ethical Rule 1.9(a) says this. "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

Well, Your Honor, let's look at Rule 1.9. Rule 1.9 says if there's an attorney-client relationship. And we've already established there was. They met, they signed a retainer, they signed a fee sharing agreement, signed a drop letter, took a flash drive full of confidential information. The attorney-client relationship is clearly established. Only the client can waive that conflict. The attorney can't waive it. Lewis Brisbois can't waive it. Only X'Zavion Hawkins can waive that conflict and that conflict must be confirmed in writing. And, Your Honor, that's Rule 1.7. Rule 1.7. Conflicts of Interest: Current Clients. It goes on to say, "Each affected client gives informed consent, confirmed in writing." Your Honor, we're going to come back to Rule 1.7 and the reason why Rule 1.7 is very important and I'll give you a preview now, what Lewis Brisbois is doing, it's a little bit of slight of hand and it will make more sense later. There's confirmed in writing and then there's also a notice requirement under Rule 1.10(e).

And so let's look at Rule 1.10(e) and see what's required. And to be clear, Rule 1.10(e) would disqualify the entire firm of Lewis Brisbois based on

Mr. Shpirt's representation of Mr. Hawkins. There are three criteria to Rule 1.10(e) and this is -- I'll just read them, okay. It says, "When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the lawyer is disqualified under Rule 1.9 unless" -- so there's three criteria and it's an "and." Conjunction is "and." All three criteria must be met. Number one, "The personally disqualified lawyer did not have a substantial role in or a primary responsibility for the matter that causes the disqualification under Rule 1.9." Number two, "The personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and" -- and this is the key, number three, "Written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule."

Your Honor, this is an "and" statute. All three must be met. It's undisputed in this case. Lewis Brisbois admits it. They may dispute number one, they may dispute number two, but what's undisputed is that written notice was never given to Mr. Hawkins that Mr. Shpirt now works for the very person or for the very firm that's defending the entity that Mr. Hawkins is suing.

Why is written notice required to be prompt? So there's no appearance of impropriety. So I can't stand in front of Your Honor -- by the way, they knew about this conflict in October of 2015, we're in June of 2016 -- that an attorney such as myself couldn't come back nine months later, however long it's been, and say, hey, I think you had improper communications based on the things that you're saying when you're arguing a motion to the Court. All these things that you're telling the Court that you knew about, it's a red flag. There should be no red flags. They have to provide notice to Mr. Hawkins, okay. Why do they have to provide the notice?

Why does it have to be prompt? So it allows the client to ascertain compliance with the provisions of this rule.

Here's the question, Your Honor, a question for Mr. Lavery. Was Mr. Hawkins ever afforded the opportunity to ascertain compliance with Rule 1.10(e)? He'll tell you -- or I'm telling you the answer is no, he was never given that opportunity.

Now, here's the slight of hand and it will become more clear when I go through the opinions from the Nevada Bar. This requirement, the written notice, you can't waive that and there is no exception to that. They want you to believe there's an exception. Your Honor, there's no exception whatsoever to providing the written notice to the client. There is under one circumstance a very limited exception to the screening process -- not that they don't have to give him notice, that is mandatory -- that they don't have to get his informed consent.

Let's go through -- and I'm sorry if this is tedious but it's important because there are steps and tiers and we have to make sure very "t" is crossed and every "i" is dotted. The State Bar is asked to look at or I don't know if they're asked to look at, but they chose to address several questions after the Nevada Yellow Cab case and here are the questions. And they answer them and the answer is clear and simple, but we're going to go through them. Question number one: "When a lawyer leaves one private firm and joins another, i.e., lateral movement of a lawyer in private practice, may that lawyer represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client represented by that lawyer while in the former firm?"

Here's their answer. Here's the clarification that they give. Number

one. "If the laterally-moving lawyer had, quote -- this is important -- "no role," no role in the case at the former firm and did not otherwise acquire confidential information material to the matter, the moving lawyer is not personally disqualified from representing Client B while at the new firm."

Okay. Well, let's ask. Did Mr. Shpirt have no role? Well, we know from Mr. Shpirt's affidavit and Mr. Barrus' affidavit he absolutely had a role. What was his role? He was the, quote, "intake specialist" for the firm. In addition to that, he was also the attorney that Mr. Barrus contacted directly to refer the case to. He meets with him, he signs the retainer, he signs a fee sharing agreement, and three months later after all -- after the firm has a full and fair opportunity to go through all the confidential information provided to them, Mr. Shpirt contacts Mr. Barrus and Mr. Hawkins and send them a declination letter. We're no longer willing to take your case. It's very obvious that he had a role, okay, and he is therefore disqualified from representing Mydatt in this particular case. And Lewis Brisbois acknowledges that. And so what they're saying is, well, we set up a screen, we screened him off, and that's okay under the rule. Your Honor, it's not.

We'll keep going. Question number two: "When a lawyer leaves one private firm and joins another, may the lawyer represent a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a client of the moving lawyer's firm if the moving lawyer received material, confidential information about the matter while in the firm?"

Number two, here's their answer. What do they say? The State Bar of Nevada says: "All lawyers in the new firm are also disqualified by imputation. None of the lawyers in the new firm may represent another person in the same or

a substantially related matter in which that person's interests are materially adverse to the interests of a former client represented by the former firm, unless the former client gives informed consent, confirmed in writing." Your Honor, that's Rule 1.7 that we've already gone through. They make a clarification and they say: Of course there is no imputed disqualification affecting the firm unless the moving lawyer is personally disqualified. If the lawyer changing firms had, quote, "no role" in the case at the former firm and did not otherwise acquire confidential information material to the matter, neither the moving lawyer nor the new firm are disqualified from representing Client B while at the new firm.

Well, again, we've already established Mr. Shpirt had a role, okay. Here the requirement is no role, no information. But if he had a role and information, the requirement is that Mr. Hawkins has to give informed consent, confirmed in writing, that Lewis Brisbois is allowed to represent Mydatt Services. Otherwise, Mr. Shpirt's confidential information is imputed to all of them.

Now, you're going to hear a lot about screening and, Your Honor, I'm going to show you that's -- it's a red herring. Question number five: "May screening be employed to avoid imputed disqualifications in situations other than a laterally moving lawyer" -- I'm sorry. Number four: "Does imputed disqualification apply to all members of the firm of a laterally moving lawyer who formerly participated personally and substantially in a matter? For example, can other members of the laterally moving lawyer's new firm participate in a matter in which the lawyer personally and substantially participated if the personally disqualified lawyer is screened from the matter within the firm?"

They're going to tell you, well, we screened him. Well, let's see if they

did or not. In answering that question, here's what the State Bar said. They said, "In 2006 Nevada adopted Rule 1.10(e), which authorizes limited screening as a means of eliminating imputed disqualification. Under Rule 1.10(e), a limited exception to the imputed disqualifications of all members of the new firm of a laterally moving lawyer may apply when" -- okay, when, and here's the -- let's look at number four -- he may be screened, okay, when all four of these criteria are met. Okay. It's again the conjunction is "and." It's not an "or." All of these must be met. Let's look at number four: "Written notice is promptly given to any affected client to enable it to ascertain compliance with the provisions of this rule."

Again, Your Honor, it is undisputed in this case Lewis Brisbois, they knew better but they never gave Mr. Hawkins written notice that Mr. Shpirt left Eglet Group and is now working for Lewis Brisbois, the very firm that is representing an entity Mr. Hawkins is suing, okay. And again, I said it before, but the purpose of this is to allow the client the opportunity to ascertain compliance with the provisions of this rule.

Now, Your Honor, the State Bar makes it extremely clear in this next portion. They say, "Thus, screening cannot remove the imputed disqualification -- the disqualification bar against all members of the laterally moving lawyer's new firm if any of these have not happened. If, number three, written notice is not promptly given to the affected former client to enable it to ascertain compliance with the provisions of this rule." It cannot be more clear, screening is not allowed at all unless all three of those criteria are fulfilled, okay, all three, and if any one of them -- the Nevada State Bar is saying you cannot screen. In this case it's undisputed written notice was not promptly given to Mr. Hawkins.

Now, Your Honor, this is the language that Lewis Brisbois is relying upon, okay. Now, let's take a step back before I read this. The Nevada State Bar just made it clear that if they do not provide Mr. Hawkins written notice, screening is not even a possibility, okay. It's a requirement. This is the language that they're relying upon, and it says, "On the other hand, suppose the laterally moving lawyer had, quote, "no direct role" in Case A versus B while the lawyer is with the former firm, White & Brown, but did possess confidential information from the former firm so as to be personally disqualified under Rule 1.9(b), and then moves to firm Red & Green, which represents Client B in the same or a related case. In that situation the lawyer's new firm, Red & Green, could continue representing Client B without Client A consent." Okay, without the consent. That's Rule 1.7. They're saying, hey, you can continue to represent them without the client's consent under Rule 1.7, okay, but to get there you must comply first with 1.10(e).

Consent and notice are different and distinct and it's not a distinction without a difference. The notice is to allow Mr. Hawkins the opportunity to ascertain compliance with the rule. He's never been afforded that opportunity, okay. So let's just say they -- let's pretend for a second they complied with the rule. They gave -- let's pretend they gave him notice and Mr. Hawkins says, you know what, I don't agree to this, I'm not going to give informed consent under Rule 1.7. What this says is, well, even if he doesn't give informed consent, as long as he had no direct role in the case, even if he obtained some information, he could be screened without Mr. Hawkins' consent to the screening, okay. Consent would not be required. The notice is and always has been required to be given to the client. They're confusing or misdirecting Rule 1.7 with Rule 1.10(e), and they're different and distinct. One

is consent and one is notice. They can get around, if the client doesn't consent, as long as they provided notice. But under no circumstance are they allowed to get beyond providing him notice.

Your Honor, one other thing I want to point out, it says, "Suppose the laterally moving lawyer had no direct role in Case A versus B." I'm not going to ask you to take my word for it that Mr. Shpirt had a direct role with Mr. Hawkins. Let's go to the affidavits. Your Honor, we have two affidavits from Jason Barrus and you wanted me to point out the differences. Do you want me to do that now?

THE COURT: The Court wasn't telling anyone what they should or should not do. The Court was deferring ruling on the affidavit presented today, say affidavit number three of Mr. Barrus, subject to what you're trying to present and subject to an objection raised by defendant --

MR. CHURCHILL: Okay.

THE COURT: -- because of the overlap of information that had been previously presented in the pleadings.

MR. CHURCHILL: Well, here's Mr. Barrus' -- well, before I get to Mr. Barrus, Mr. Shpirt, we'll get to his affidavit, says, you know, I don't really have much of a recollection of this, okay. Now, you'll hear later today perhaps my client doesn't have much of a recollection of some things that happened in the past. My client has got a litany of medical issues. He's on pretty high medications. Mr. Shpirt, we'll take him at his word that he doesn't have much of a recollection.

So why don't we do this. Let's look at the people who do have a recollection. This is Jason Barrus.

(Buzzing noise in courtroom)

THE COURT: Is that our recording system or a phone? It sounds like someone's phone just buzzed. Did everyone make sure that their phones were completely off, please, because it interferes with the system if you all want a clear record.

Okay. Counsel.

MR. CHURCHILL: I turned -- I know mine is off.

Okay. Here is Mr. Barrus' affidavit.

THE COURT: Okay. Can we just identify, there's affidavit one, affidavit two and affidavit three, just so that I'm clear which one you're referencing.

MR. CHURCHILL: This is the affidavit --

THE COURT: Or give me the dates.

MR. CHURCHILL: Yeah. This is the affidavit dated May 9th of 2016. And for the record, I suppose, it's Exhibit 3 of the motion to disqualify. This is what Mr. Barrus says. He says: "On December 18th, 2014, X'Zavion and I met with Tracy Eglet and Paul Shpirt of Eglet Law Group regarding referring X'Zavion's matter to Eglet Law Group. Eglet Law Group accepted the referral of X'Zavion's matter and a retainer and fee division agreement were signed." Your Honor, these were signed by Mr. Shpirt. "During this meeting Mr. Shpirt had the opportunity to speak with X'Zavion Hawkins -- X'Zavion about the incident and the nature and extent of X'Zavion's injuries. I provided Mr. Shpirt a zip drive contained privileged work product materials." He goes on to say that Mr. Shpirt and Eglet Law Group, they handled Mr. Hawkins' case for approximately three and a half months. "When Mr. Shpirt called Jason Barrus to say Eglet Law Group would not be able to continue representing X'Zavion, the same day, March 16th, 2015, Mr. Shpirt sent an email

memorializing our conversation that Eglet Law Group would not be able to continue representing X'Zavion because of some -- in quotes, "some of the problems we see with liability in this case" and because, quote, "the police report creates a lot of issues for us."

Now, Your Honor, let me ask you, is that a direct role? Because it doesn't say, you know, substantial -- the rule from the State Bar of Nevada says nothing about a substantial role, it says any direct role, okay. That's a direct role. He's interviewing the client, he's signing a fee agreement, he's signing a fee sharing agreement, and he's notifying Mr. Barrus of the reasons that his firm is no longer willing to continue representing Mr. Shpirt (sic).

Let's look at Mr. Shpirt's affidavit. Mr. Shpirt says: "In December of 2014, I was present at a new client meeting with X'Zavion Hawkins, his mother, Lloyd Baker, Jason Barrus, Tracy Eglet, and Johanna, last name unknown, Eglet Law Group's intake specialist. The meeting lasted approximately one hour. I remember very little, if anything, about the meeting, as we met with a lot of potential clients." He goes on to say: "I was directed to sign the fee splitting agreement. It was my understanding that Eglet Law Group's staff with senior partners would review the materials and make a decision to continue working on the case." He states: "Mr Barrus also sent me a copy of his file on a zip drive sometime at the end of December." Paragraph 7 he states: "I was directed to reach out to Mr. Barrus and let him know that the firm will not work on his case. On March 16th, 2015, I called Mr. Barrus to let him know that the Eglet Law Group will not be able to take on this matter. I also sent him an email to that effect."

Mr. Shpirt is admitting it. He had a direct role in the case. He met

with the client. He signed agreements with the client. He obtained confidential information from the client. And he's communicating the decision to no longer pursue the case.

We also have Mr. Shpirt's email. Take a look at that. It says: "Dear Lloyd and Jason, I spoke to Jason this afternoon and discussed some of the problems we see with liability in this case. Although the client is a very nice young man, unfortunately the police report creates a lot of issues for us. As a result, we are unable to represent X'Zavion in this case. We will send him a letter and let him know that as well." Who sent the letter? Mr. Shpirt did. "Thank you for thinking of us in this case. We hope to be able to help with other cases in the future." And then this is important: "Please call me or Tracy if you have any questions." He's not saying, hey, I have no involvement in this case, I have no direct involvement in this case; call Tracy if you have any questions. He's saying call me. If you have any questions, Jason or Lloyd, give me a call. Give me a call; I'll tell you why we're doing this. And in fact, that's exactly what they did.

Now let's look at what Mr. Aicklen knew. Paragraph 5 of Mr. Aicklen's affidavit. "On October 14th, 2015, I was contacted by Star Insurance Company, the excess policy for SMS Holdings, Inc., about being retained as monitoring counsel for the Hawkins matter." Okay, now this is important. "Before I had even sent the matter for a conflict check, Mr. Shpirt informed me that in December of 2014 he had met with Mr. Hawkins, Mr. Hawkins' mother, Jason Barrus, Lloyd Baker, Tracy Eglet and an intake specialist at the Eglet law firm regarding the possibility of Eglet Law Group representing Mr. Hawkins." He said -- anyway -- "As a result, even before I ran the conflict check, I informed my office manager that Paul Shpirt would need

to be screened off the Hawkins case."

Now, Your Honor, we know now -- when does a law firm do a conflict check? As soon as they receive the case. When did they receive the case? October 14th of 2015. What did Mr. Shpirt, what did Mr. Dennis, what did Mr. Aicklen do after they found out about the conflict? He says, well, we screened him off. What they didn't do is provide Mr. Hawkins written notice of the conflict and allow Mr. Hawkins the prompt opportunity to address this in October of 2015. Your Honor, it's inexcusable. The State Bar said it's a requirement. Screening is an impossibility -- under the State Bar of Nevada, under their opinion, screening is an impossibility when -- I'll read it again -- "Thus, screening cannot remove the imputed disqualification bar against all members of the laterally moving lawyer's new firm if written notice is not promptly given to the affected former client to enable it to ascertain compliance with the provisions of this rule." Black and white. Plain as day.

Your Honor, they didn't do it. They did it with Tracy Eglet. Tracy knew about the conflict. They let this one fly on the down low. They didn't notify him. And, Your Honor, they didn't notify him going back to October of 2015. We sit here today, June of 2016, they've still never provided Mr. Hawkins the required notice. End of story. End of discussion.

They're going to get up here and they're going to want to talk about substantial compliance. Your Honor, you know this, I know this, they know this. The rules of confidentiality, the Nevada Supreme Court has said it, we hold those rules inviolate; safe from violation. Completely safe from violation. There is no such thing as substantial compliance to an inviolate law. You cannot violate it,

and they did. Thank you, Your Honor.

THE COURT: Thank you so very much.

Okay. Counsel for defense, your response.

MR. LAVERY: Thank you, Your Honor. In a nutshell, that's wrong factually and it's wrong legally. I'll let Mr. Churchill finish what he's doing there. Thank you.

You're being asked to presuppose or subsume from what's been presented to you that Mr. Shpirt had all this knowledge, used it, knew it, etcetera, etcetera. When you go back and look at those very same affidavits, and I'm not going to pull them out and show them to you, you've read them, you know what they say, what's conspicuously absent in all of this -- and let me read something to you because I think it's sort of interesting because this whole thing is built somewhat on a false premise. And I cited it to you in my pleadings but I'm going to read this part to you. "An affidavit based upon belief alone is insufficient to establish a material fact. Facts alleging an understanding like those based upon belief or information and belief are not sufficient to create a genuine issue of fact."

And I say that because you go back and you look at the affidavit of Ms. Manke and she says at number nine in her affidavit: "I believe Lewis Brisbois has used X'Zavion's privileged communications with Mr. Shpirt and Mr. Shpirt's access to attorney work product against X'Zavion to cause great prejudice." I believe it, so it must be true. You know what you don't have? You don't have an affidavit from Tracy Eglet saying we went through all these things and, yeah, Paul Shpirt knew everything there was to know about X'Zavion and his case. You don't have anything from the intake specialist, the person who was sitting -- and by the way, Mr. Shpirt was not the intake specialist that was sitting there. Mr. Shpirt is

a litigation attorney. He was asked to sit in on a meeting.

This whole meeting lasted an hour. We spent more than an hour this morning just trying to figure out what we were going to do today. But somehow Mr. Shpirt in this one hour period of time where these fee agreements are negotiated and entered into, the introductions are made -- it's undisputed, undisputed it's an hour's worth of time, so in an hour's worth of time Mr. Shpirt has gleaned what? Because it's never been told to you what this great knowledge is, what this privileged communication is that he has that now prevents him from -- from the firm of Lewis Brisbois now being involved in this case. We have these naked allegations, we're not going to cast aspersions at anybody. We cast aspersions at Mr. Shpirt, we cast aspersions at Lewis Brisbois, at Josh Aicklen. So for not casting aspersions, we're doing a lot of aspersion-casting.

But nonetheless, you go on in that same affidavit: "I don't believe it was a coincidence that defendants initially noticed the deposition," etcetera, etcetera." You have the affidavit of Mr. Barrus. "I believe that Mr. Shpirt engaged in privileged communication with Ms. Eglet and others." Do you have anything in that affidavit that tells you what or how or why or what this knowledge is based on? Because he certainly doesn't say that it occurred during the course of this one hour meeting. So implicit in that is it occurred some other time, because he doesn't say I sat there and watched him engage in this, he says I believe that this happened. He doesn't state it as a fact, he states it as supposition. I believe that these things occurred. Well, that's not enough.

So when we start looking at Mr. Shpirt's involvement in this and go back to the rules, Rule 1.9 says, "A lawyer who has formerly represented a client in

a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives consent." Well, you have to, one, establish that Mr. Shpirt actually did these things, that he was actually materially involved in the representation, that these things even occurred. We make these arguments under the umbrella of, well, you just have to accept the fact that Mr. Shpirt was involved in these things, he knew these things were there, he had all this confidential and privileged information. Says who? You read Mr. Shpirt's affidavit, Mr. Shpirt says they gave me a zip drive, I never looked at it. They asked me for it, I said I'd see if I could find somebody to find it and give it back.

So when you start talking about what did Mr. Shpirt know, what did Mr. Shpirt do, you don't have that. You don't have the material underpinnings of Mr. Shpirt's purported conduct to start raising these issues in the first place. Yes, he worked for Eglet. I don't dispute that. There's absolutely no basis to dispute that. But what was his involvement in Mr. Hawkins' case? Hi, nice to meet you. This is your mom. We've got a fee arrangement agreement. I'm going to be the guy to go to court if we're going to go to court. We talk about these things. Oh, by the way, here's a zip drive with everything on it. Did you ever look at it? No. Does Tracy Eglet say he ever looked at it? No. The intake specialist say he ever looked at it? No. Mr. Hawkins ever say he looked at it? Do you have an affidavit from Mr. Hawkins, by the way, that says, hey, during the course of this meeting I told him this and I told him that, told him all this super-secret confidential stuff in the meet and greet? Because that's all this was was a meet and greet. I don't think there's much dispute about that. But you don't have anything from anybody saying we disclosed

all this material information that now makes Paul Shpirt in a position of somebody who has to be cordoned off from this. Now, granted, he worked at Eglet, so when he got to my firm we segregated him away, as we should.

It's interesting that we point to Rule 1.10 as the imputation of the conflict, that because Paul Shpirt worked for the Eglet law firm -- and we start talking about notice because that's where everybody is hanging their hat. We went through the three segments of section 1.10. And by the way, Mr. Shpirt has never been involved in and it hasn't been alleged and there's certainly no basis to make such an allegation, Mr. Shpirt has done nothing in terms of representing any of the defendants in this case while he's been at Lewis Brisbois, or any other time for that matter. I'm not disputing that he worked for Eglet. I can't. It doesn't make any sense. But to suggest in any way, shape or form that Mr. Shpirt came to Lewis Brisbois and had spoken to anybody in this firm for any reason about anything related to Mr. Hawkins' case is patently false and unsubstantiated, completely unsubstantiated, has absolutely no foundation whatsoever. None. And I can't be more emphatic about that.

So then we turn to 1.10 and we say, okay, well, there's this -- the personally disqualified lawyer didn't have a substantial role in or primary responsibility for the matter that causes the disqualification. Certainly you don't have anything to suggest that. Certainly you don't have anything to support that. And in fact, during the course of argument it was kind of conceded that, look, the first two elements, you agree, you disagree, fine, whatever. We want to get down to written notice is promptly given to the affected former client to enable him to ascertain compliance with the provisions of the rule.

And then we turn around and we put up on the screen here Rule 39 and we read the section for Rule 39 and the opinion that's given. By the way, these are State Bar opinions. These are not supreme court opinions, they're Bar opinions, but I understand the Court will give them the weight that you feel they are appropriate. The State Bar didn't draw any conclusion and I've set it out in my pleadings. The State Bar concluded that if an attorney had no direct role in a case -- and I guess that's part of what you're just going to have to decide is what Mr. Shpirt's role, if any, much less a direct role, and I've given you Webster's definitions and Black's Law definitions of substantial role and role and all of those things, but it says that if he had no direct role in a case while with the former firm, even where he possesses confidential information. So, guess what? All this other argument about whether or not he's got confidential information doesn't seem to matter. From the former client. His or her new law firm can continue to represent client in a case without Client A's consent if personally disqualified lawyer is ethically screened from the case.

So then we try and draw the distinction between consent -- let me try to say this correctly. We try and draw the distinction between notice and consent. Well, how do you have -- how can you consent to something you don't have notice of? So if you don't need the consent, you'd have the notice. Just because the State Bar opinion has taken the language and used the language as they see fit, under the rule you certainly can't consent to something you don't have notice of. So if you don't have to have the consent, why do you need to have the notice? But at the same time, if you don't have to have -- even if you have the privileged information, which we can't even establish that we have, the question becomes do you have a

substantial role, because that's what the rule requires.

There's no substantial role because, again, that's the underpinning of all of this. You've got Mr. Shpirt doing what he's doing at Eglet. And the Court as the trier of fact is simply going to have to decide what was his involvement in this, because all you've gotten is speculation. I believe that this happened, I believe that that happened, I believe that this, that and the other thing. Again, you have nothing from the principal parties at all. You have nothing from the defendant -- or from the plaintiff himself. You have nothing from Ms. Eglet. You have nothing from the intake specialist.

(Computer noise at defense counsel table)

MR. LAVERY: I believe that was a computer that just --

THE COURT: It's up to you if you want a clear record on your own argument.

Go ahead, counsel.

MR. LAVERY: When you come back to the role that Mr. Shpirt played in this, and what we're doing is we're saying, look, Mr. Shpirt had this role, the Court is going to have to decide what that role is for purposes of imputing disqualification by virtue of Mr. Shpirt's relationship with my firm, with Lewis Brisbois, and with Eglet and his association, his having whatever limited role he had in meeting Mr. Hawkins one time for an hour as part of a group meeting, setting up these set of circumstances.

But much ado has been made about the imputation of disqualification and I want to read to you what the supreme court has said about imputing disqualification. "In Nevada imputed disqualification is considered a harsh remedy that should be invoked if and only if the court is satisfied that real harm is likely

to result from failing to invoke it." You haven't heard word one what this harm is. What is it that Mr. Shpirt knew from this one hour meeting that he's taken over and dropped at the feet at Lewis Brisbois and said, hey, wink, wink, nod, nod, I know this and here's how you get this guy, here's what you need to do? Because quite candidly, I'm offended by that notion that my firm, that any attorney in my firm, quite frankly that any attorney, period, would be -- there's nothing in Mr. Hawkins' case that's worth jeopardizing careers, livelihoods, integrity, values, the good name of my firm, quite frankly. To do what? Because you still haven't heard what that is. What the Nevada Supreme Court has adopted, and it came out of the Seventh Circuit Court of Appeals, that disqualification is a prophylactic device for protecting the attorney-client relationship is a drastic measure which courts should hesitate to impose except when absolutely necessary. Absolutely necessary.

So again, we go back to -- I'll concede the point, Mr. Shpirt worked for the Eglet firm. Did he have a substantial role? Because that's -- again, we go back to the rule, the rule says substantial role. I'm talking about Rule 1.10. Did he have a substantial role or primary responsibility for the matter? That's a question of fact that's going to be left to you to decide, but look at the circumstances. Look at the basis upon which the allegation is being made, which are the affidavits that you have before you that set forth absolutely no basis.

And it's as much telling of what you don't have as what you do have. Tracy Eglet was there. We've jumped up and down all morning and said, hey, Tracy Eglet is going to do this, Tracy Eglet is going to do that, we spoke to Tracy Eglet, blah, blah, blah. We've certainly had plenty of time. If we thought Tracy Eglet was going to stand up or reduce to paper and say, look, Paul Shpirt did this, this, this

and this, he knew A, B, C and D and it can materially interrupt your case, he's got the goods on you, he knows all this information that he needs to know and you're going to get sent down the river if this guy is over there -- it doesn't exist.

Mr. Barrus, who was in the meeting, you've got three different affidavits from the guy at this point. We still can't get it right. We can't get it right because there's nothing to get, because at the end of the day if Mr. Barrus came in here and said, look, we told him this, we told him that, we disclosed this, we disclosed that -- again, during the course of this one hour meeting here's what happened. He certainly didn't do that in his first affidavit. He certainly didn't do it in his second affidavit. As the Court has already noted, the third affidavit tries to do I guess what the first two affidavits didn't do. But again, you don't have any of that.

What is this substantial role that Mr. Shpirt played in all of this? What is it that Mr. Shpirt did or knows? But see, you start running into the problem that even if he did know it and you go back and look at Nevada Bar Opinion No. 39, it doesn't seem to matter because if you segregate him away, and there's no dispute that we did -- well, there is some dispute, I guess, that we did that, but we did and we followed the rules and we gave everybody notice -- that somehow now Mr. Shpirt has all this information that you still haven't been told, I haven't been told, my client hasn't been told, Mr. Shpirt hasn't been told, Mr. Aicklen hasn't been told what this information is. There's not even a suggestion of what the information is. I mean, fine, don't come into court and lay your whole hand at the feet of everybody and disclose what's going on. I understand that. There's certain privileges that clients have with their attorneys. We don't want to throw this all out there and have

somebody look at it and say, okay, well here's where we're coming from.

But what is this substantial role that Mr. Shpirt had in this? Because when you start -- when you piece this whole thing together, when you take the whole argument that's put forth to you by plaintiff in this matter, it all starts with look what Mr. Shpirt knew. Here's why we have to get rid of Lewis Brisbois, because Mr. Shpirt not only knew but Mr. Shpirt knew what he knew and told it to Lewis Brisbois. It's not in any of the affidavits. It hasn't been in any of the argument. And there has to be a substantial role because the rules don't apply if there's not. Mr. Shpirt has taken on no active -- again, no active representation of anybody in this after he left Eglet; certainly nobody involved in this. So you have to start with the premise, you have to satisfy -- and this is their obligation, by the way, that there's been this substantial role, this direct role in his representation. He met the guy an hour and he was gone. He never dealt with Mr. Hawkins again ever in any way, shape or form. There's absolutely nothing in the record. You have nothing from Mr. Hawkins, you have nothing from Ms. Eglet, you have nothing from --

You look like you're getting ready to say something.

THE COURT: I'm going to ask you a question once you're finished your --

MR. LAVERY: Go ahead. No, by all means.

THE COURT: Well, therein lies today's affidavit, doesn't it?

MR. LAVERY: Correct.

THE COURT: In today's affidavit there is a sentence in there that says -- paragraph 7 on page 2. And when I refer to today's affidavit, I'm referring to the affidavit that was not filed and attached to anything but was presented this morning in court, which the Court was deferring ruling on.

MR. LAVERY: Correct.

THE COURT: Which you all asked me to read it so that I could evaluate whether I should or should not, how I should rule.

MR. LAVERY: Understood.

THE COURT: Paragraph 7: "Mr. Shpirt was the main person at Eglet Law Group that I communicated with during the four months while X'Zavion's matter was with the Eglet Law Group."

MR. LAVERY: And yet he does not say how, he does not say why, he does not say when. He does not say anything other than make this assertion, again in the third affidavit that's been provided to you. So you have to keep that -- you have to keep this affidavit in the context of the two affidavits that came before it. And when you take the affidavits that came before it, and it just so happens I wrote it down so I'll read it back to you, he says, "I believe Mr. Shpirt engaged in privileged communication with Ms. Eglet and others at Eglet Law Group to develop strategy and analyze strengths and weaknesses related to X'Zavion's matter because on March 2015 after working on X'Zavion's matter for approximately three and a half months" -- and by the way, you have nothing from Ms. Eglet or anybody else saying that Mr. Shpirt ever touched this file again -- "Mr. Shpirt called me to say that the Eglet Law Group would not be able to continue representing X'Zavion."

At no point anywhere in the first two affidavits and including this affidavit does Mr. Barrus ever say I discussed this, this, this and this, so therefore he knew this information, first and foremost. But guess what? When you go back to the supreme court or to the Bar rule, it says even if you have privileged communications it doesn't matter, you can still work around it. When you go back

to Rule 39, it says that if an attorney had no direct role -- so again, we're back to the question of whether it's a direct role or not -- while at the former law firm, even where he or she possesses confidential information about a client from a former firm, his or her new law firm could "continue to represent Client B in a case without Client A's consent if the personally disqualifying lawyer is ethically screened from the case." So you've got to clear two hurdles in that analysis to come to the conclusion that the Nevada Supreme Court says is only imposed in the most harsh of circumstance.

Take the affidavit. But you can't take the affidavit in a vacuum, you have to take the affidavit in the context of the entirety of this record. More importantly, you have to take the affidavit in the context of the two affidavits that came before it. So now all of a sudden at the 11th hour walking in here, which is why I'm objecting to it, why I objected to it in the first place, we come walking in here with an affidavit that says, oh, yeah, I recall that we discussed these things. Really? What things? It's an affidavit. The affidavit is being submitted in lieu of your testimony. I can't cross-examine this guy. I didn't cross-examine and say, what did you know?

We come walking in at the 11th hour and we toss this across the table to the Court and we toss it across the table to me, and we say, hey, look, this guy says he had all these privileged communications, etcetera, etcetera. One, that's not dispositive of the issue anyway, but again, go back and look at the affidavits from Mr. Barrus himself and from Ms. Manke, because all this was premised on we believe this happened, we think this happened, this is what we feel, this is the way it's got to be. It just has to. You're just going to have to take our word

for it. And in fact, that's all that affidavit says. I did these things, we had some conversation. What was the conversation? Don't know. There's no specificity to this. It's a naked allegation at the 11th hour trying to cast aspersion at Mr. Shpirt and my law firm, and I take great exception with both.

So when you review the motion you have to first start with the premise that the supreme court looks upon these things with great disfavor, and you certainly heard nothing to the contrary because nothing exists. So understand that these motions and this type of sanction -- and it has a chilling effect on the remaining defendants in this case because they have a right to choose their counsel, too. It's a balancing process. And that's what the supreme court said, that this is not just simply a matter of Mr. Hawkins saying, well, I think he may know something and I don't like it, so here's what we're going to do.

Look when this motion was filed, by the way. I guess you have to keep the timing of the motion to disqualify my law firm in the context of the entirety of this record, too. Look at the timing of when -- you know, we're sort of backed into a corner, we've got a motion to dismiss; oh, God, what do we do? Oh, I know what we can do, let's try and get rid of Lewis Brisbois because they have some super secret information that, again, nobody has disclosed, but we're facing dismissal of our case based upon -- and I'm not going to get into the merits of that because it's not the appropriate time to do it.

But again, when you review this record you have to keep it in its context, not only the timing of the motion, look what's been put in the affidavits. Look what hasn't been put in the affidavits. Look what hasn't been submitted to you. We make these naked general assertions and suppositions that are

unfounded. If you've got all this information and all these bad things that my firm has done and Mr. Shpirt has done, provide it to you in camera. I don't care. Tell somebody what they are. Instead, you make me stand -- and when I say you, I mean them -- make me stand here and defend something on the fly, because that's what's going on here. I'm having to respond to this affidavit on the fly at the last minute because despite the other two affidavits that have been submitted we're going to try and put a wrinkle in this one and make it say something that it really doesn't say. It doesn't match with the prior two affidavits, it doesn't match with the entirety of the remainder of the record.

I'm beginning to repeat myself at this point, so I am not going to belabor the point. The Court looks at these motions with great disfavor. Great disfavor. It's up to you to make the factual determination as to what Mr. Shpirt's involvement -- I don't want to say if any because I don't think that's a fair characterization. Clearly Mr. Shpirt has met the plaintiff before and he didn't meet him working for Lewis Brisbois. I freely acknowledge that. Beyond that, it's going to be left to the Court. I'd just simply ask you to look at these affidavits and keep them in their proper context. Look at the argument that's being made in the motion itself. Look at the statements that are being made in the affidavits. Remember the supreme court's admonishment that supposition and belief is not enough. You've got to state with specificity what these facts are. They're not there. So before we start trying to apply some of these other rules, we've got to clear the first hurdle. Now, I've addressed 1.9, I've addressed 1.10, I've addressed the Bar opinion. When you look at this you've got to keep it in its proper context.

I'll submit it on that basis. Thank you, Judge.

THE COURT: Thank you so very much.

Since you're the moving party, you get the last word.

MR. CHURCHILL: Thank you, Your Honor.

MS. RENWICK: Your Honor, if I could interrupt for just a moment.

THE COURT: Oh, I'm sorry, you had a joinder. Yes.

MS. RENWICK: Your Honor, I don't have substantive --

THE COURT: Actually you don't have a joinder to this. Sorry, go ahead.

MS. RENWICK: Sorry. I was just interrupting with respect to the witness that we are intending to call in the evidentiary hearing for the motion to dismiss. He has to pick up his children by 4:30, and so I just don't think we're going to be able to start with Detective Majors today.

THE COURT: What do you all want to do?

MR. ROSENTHAL: Mr. Churchill, do you have any expectation of how long you're going to go right now?

MR. CHURCHILL: Fifteen.

MR. ROSENTHAL: Fifteen minutes. We should probably let Mr. Majors go, or Detective Majors.

MS. RENWICK: Only because -- it's not that he has to leave by 4:30, he has to pick his kids up by 4:30. And so I just don't -- I don't want to leave him hanging.

THE COURT: That's fine. I mean --

MR. AVAKIAN: If he's got to go, he's got to go.

MS. RENWICK: Okay.

THE COURT: It's whatever the parties wish to do.

MR. RENWICK: I think we'll have to continue the --

MR. AVAKIAN: The hearing.

MS. RENWICK: -- the evidentiary hearing.

THE COURT: Okay. Feel free -- do you need to be in here while he's doing his rebuttal? Shall I wait a moment, or can you step outside?

MS. RENWICK: No, I can step out. I'll step out. I just wanted to let the Court know. I apologize for interrupting. However, we've had him waiting all day.

THE COURT: Do appreciate it. Thank you so very much.

MS. RENWICK: Thank you, Your Honor.

THE COURT: Co-counsel, Mr. Lee, do you wish to wait for your colleague or should he continue with his response?

MR. LEE: Your Honor, we don't have any position on this motion. So I just wanted to -- we needed to do that clerically so that we don't have a witness waiting.

THE COURT: No worries. So you're fine if he continues?

MR. LEE: Yes, Your Honor.

THE COURT: Okay, thank you so very much.

Go ahead, counsel.

MR. CHURCHILL: Thank you, Your Honor.

As I predicted, Your Honor, Mr. Lavery kept focusing on material involvement and he said several times where is the affidavit saying this is what was discussed and this is what happened? Your Honor, I know you understand this. I know Mr. Lavery understands this. Your Honor, Mr. Barrus and Ms. Manke and Mr. Hawkins, none of them can come put in an affidavit at this time, without violating attorney-client privilege, exactly what was discussed. I guess that would be the purpose -- Your Honor, if that was a concern to you, that would be something for an

evidentiary hearing where it's sealed from the public to know what exactly was said, what exactly was done. But Mr. Barrus is an attorney that represented Mr. Hawkins and he's actually abiding by his ethical duties. I hope Your Honor appreciates that.

THE COURT: But, counsel, I was going to say -- I interrupted opposing counsel, I'm going to interrupt you as well with a question. Isn't there a concern that I have three different affidavits from the same person as to what happened during an hour meeting, during a short period of time?

MR. CHURCHILL: Not at all.

THE COURT: An experienced attorney, shouldn't he have --

MR. CHURCHILL: I think the real question is should the affidavit regarding -- should the -- I'm assuming it's the second affidavit, the one that's attached to the motion to disqualify, should that have been more complete? Probably. Probably. It's not my affidavit. But I can tell you this much, after Mr. Barrus did the third affidavit after reading Mr. Shpirt's affidavit, and he was like, hey, there's some issues here. He's saying he doesn't recall a lot of things that were going on. And so he's kind of stepping up to the plate right now saying, wait a second, this is what was going on. And he goes on to say that he made the referral directly to Mr. Shpirt, not Tracy Eglet. He called Mr. Shpirt to organize this meeting, okay. That's a big distinction, okay. It's not inconsistent with any of his prior affidavits. Is it more complete? Sure. Inconsistent? Absolutely not.

THE COURT: But the timing, counsel? I mean, it was raised by defense counsel. You heard him throughout his argument. You had Mr. Shpirt's, it's dated May 18th. The opposition was filed on May 18th at 12:13 p.m.

MR. CHURCHILL: Yeah, Your Honor.

THE COURT: And then he doesn't review anything until -- and gives a new affidavit the day of a hearing on June 8th when there's an intervening hearing that was supposed to happen on May 26th, I believe; I'm within a day or two.

MR. CHURCHILL: Well, I don't recall when the exact date that Mr. Barrus received Mr. Shpirt's affidavit, but the hearing, the prior hearing was continued right around that time. I don't know Mr. Barrus' vacation schedule, you know, things like that. And I don't want to mislead the Court in any way whatsoever. But I'll candidly tell you this much, and Your Honor, I don't want to rehash what we talked about before. The misunderstanding may have been mine because unfortunately I was unable to communicate with Your Honor and counsel and maybe Ms. Manke and I got our lines crossed, so.

THE COURT: I'm going back to May, which is way before the June 6th teleconference.

MR. CHURCHILL: Yeah.

THE COURT: From looking at my continued memo notes, it looks like it was May 26th at 1:00 p.m. was the time that this hearing was originally set.

MR. CHURCHILL: Right.

THE COURT: And then the Court -- I mean, I can go look into the underlying case what day we sent the memo. I'm sure it was a day or two before then. If you want me to, I'll find the exact date, but where I'm going is you knew by May 26th because that was going to be -- 1:00 p.m. on May 26th was the original hearing date.

MR. CHURCHILL: Right.

THE COURT: And you knew it was continued a day or so before then

because of the call in order to accommodate. So that's why I'm asking the question. Why no supplement --

MR. CHURCHILL: Why the affidavit wasn't produced, Your Honor? Your Honor, candidly, let me just say this. I don't -- I don't know if Mr. Barrus and I ever discussed him doing a supplemental affidavit sooner and I don't know what his work schedule was. I know mine has been pretty crazy over the past month. Whether that's an excuse or not, you know, that's for Your Honor to decide.

But the bottom line is there's nothing in this affidavit that is inconsistent with the prior affidavits. It's consistent. Is he providing more detail? Sure. Why is he providing more detail? He's providing more detail because Mr. Shpirt didn't have much of a memory of what actually happened, and so he's saying, hey, this is what -- this is exactly what happened. And he's saying I referred the case directly to him. I called him. I had a relationship with him. Mr. Shpirt set up the relationship, he participated, he signed the fee agreement, he signed the contingency fee agreement, the retainer agreement, signed the fee sharing agreement. And, Your Honor, he emphasizes again, and this was in the prior affidavit, that he had a conversation with him after, you know, three and a half months of representation where Mr. Shpirt tells him exactly why Eglet Law Group is no longer interested in representing the case.

And so, yeah, Mr. Barrus has very important information. Is that inconsistent? Absolutely not. Your Honor, let's just -- as Your Honor was asking me those questions, here's the affidavit -- or not the affidavit, here's the email from Mr. Paul Shpirt. Here it is. He confirms this. He says I spoke to Jason this afternoon and discussed some of the problems we see with liability in this case.

Okay. He's not saying, hey, Tracy Eglet is telling me to write this to you. That's nowhere in here, okay. He's saying I spoke to Jason and discussed liability issues in this case. Not Tracy. He didn't discuss it with Tracy, he discussed it with Paul. He goes on to say, "Although the client is a very nice young man, unfortunately the police report creates a lot of issues for us. As a result, we are unable to represent X'Zavion in this case." It's his second affidavit, Your Honor. It's completely consistent. Is there new information, is it more complete? Sure. Is there anything outlandish in it? Absolutely not. It's more complete. And should the prior one have been more complete? I would certainly hope so, but, Your Honor, I didn't have the advantage like Mr. Shpirt and Mr. Barrus, Mr. Baker, Ms. Eglet of actually being there, so I don't know exactly what was discussed.

But, Your Honor, let me switch gears for a second. Let me address something that counsel said in my rebuttal. He kept using the term materially involved, substantial role, things like that. Your Honor, let's be clear about something. It's the same argument that Robert Vannah made in the Nevada Yellow Cab case. This is on page 739 of the Pacific Reporter and this is from the Nevada Supreme Court. The Nevada Supreme Court notes: "Almost all of VCCRR's work on these matters was performed by partner Michael Rubino and associate Denise Cooper Osmond." Mr. Vannah himself, who was representing the plaintiff in this matter against ICW Group, he didn't have any involvement in that prior matter.

You know, they're saying he didn't have a material involvement, it wasn't substantial. We'll address that as well. That's not the standard. It's not the standard. What the Nevada Supreme Court said is even though Mr. Vannah himself did not have material involvement in the case, because they recognize

almost all matters were performed by two other attorneys, Michael Rubino and Denise Cooper Osmond, yet the Nevada Supreme Court upheld disqualification because there are three elements. Did they have an attorney-client relationship? Element number one. Undisputed they did. Mr. Shpirt signed the retainer agreement. Number two, that the former matter and the current matter are substantially related. Undisputed that they are. Number three, that the current representation is adverse to the party seeking disqualification. Again undisputed, Mr. Hawkins and Mydatt, they're adverse to each other. That's what the Nevada Supreme Court went by. No discussion whatsoever of material involvement because the Nevada Supreme Court specifically found that Mr. Vannah did not have material involvement in the case. They said almost all work was done by two other attorneys. They disqualified Vannah, okay.

Mr. Lavery asked the question, well, gosh, how can a client consent if they don't even have notice? And when he asked that question, I actually starting nodding my head like, that's a good point. How could Mr. Hawkins ever object -- ever object to Lewis Brisbois' representation of Mydatt when Lewis Brisbois never sent Mr. Hawkins notice of it? How could he ever consent to it? They never gave him notice. And he tries to shoo-shoo that like, oh, you know, that's no big deal, we never gave him notice. But what does the Nevada State Bar say about that? I'm going to quote it again. "Thus, screening cannot remove the imputed disqualification bar against all members of the laterally moving lawyer's new firm if written notice is not promptly given to the affected former client to enable it to ascertain compliance with the provisions of this rule." You don't even get to screening if they don't give him notice. It's undisputed, they never gave him notice. And notice, it's not

something that you can shove under the rug. He has an absolute right under the law, even if he doesn't give consent, to make sure they are complying with the ethical screen.

And it was a little shocking to me that Mr. Lavery went on about all the information that's not contained in the affidavits, okay. Well, why don't we look at their ethical screen and look at the requirements of the State Bar of Nevada as to what constitutes an ethical screen. Your Honor, it's found on page 6, or is it page 7. It's found on page 7. I'll put it up here. These are the requirements of an effective ethical screening, okay, and these are the minimum requirements. Minimum.

THE COURT: You're referencing page 7 of what, counsel?

MR. CHURCHILL: Of the Opinion 39, Your Honor.

THE COURT: Okay, thank you. Okay, go ahead.

MR. CHURCHILL: "The elements of an effective ethical screen should at a minimum include the personally disqualified lawyer must agree in writing not to participate in the representation and not to discuss the matter with any employee of or person affiliated with the firm." Your Honor, let me ask you, I've read their opposition in great detail, I went through their exhibits in great detail, where's that? Where is Mr. Shpirt agreeing in writing not to represent, not to discuss with any employee of Lewis Brisbois any of the matters related to this case? It's not in there; nowhere.

Number two. "All employees of and persons affiliated with the firm must be advised in writing that the personally disqualified lawyer is personally disqualified and screened from the matter to not discuss the matter with any personally disqualified lawyer." So they have to tell the entire firm, hey, you can't

discuss X'Zavion Hawkins' matter in any way, shape or form with Mr. Shpirt. That's not in there. And, Your Honor, that's not -- that's not the end of it. It actually says, "The writings described in (1) and (2) should be periodically re-sent so long as the screen is necessary, and at appropriate times the personally disqualified lawyer should swear or affirm to a tribunal, if any, that she has not breached the agreement described in (1) above."

Well, they haven't provided this Court any notice that the writings described in (1) and (2) have been periodically re-sent. And that's a big deal, Your Honor. Lewis Brisbois is a big, national firm. I don't know how many attorneys work there. They've got a huge building, I'll tell you that much. They probably get some turnover just like every other firm. This needs to be sent out periodically so everybody knows, but yet they didn't provide any of that to Your Honor.

So, yeah, Your Honor, we do dispute that they ethically screened this because when they're challenged on it they are vague and they don't provide one thing required by the Nevada State Bar. Not one is attached as an exhibit. So, yeah, we do have a dispute with them saying that Mr. Shpirt was ethically screened because the ethics require Mr. Shpirt to agree to these things in writing and the entire firm to be notified in writing, yet it's nowhere in their opposition.

Your Honor, let me close with this. The standards set forth by the State Bar of Nevada, okay, are these. No role -- no role and no direct role. Those are the standards. I mean, it's clear that Mr. Shpirt had a role and had a direct role. It's unfathomable to me, if they want to come in in front of Your Honor and say that the person who met with X'Zavion Hawkins, who was referred the case by another attorney, who met with him, signed the fee agreement, signed the retainer

agreement and signed the drop letter, and saying, by the way, if you have any questions regarding this drop letter, please call me because I'm going to answer them for you, had no role in the case. It's an absurd argument, Your Honor. It's a direct role, okay.

All of this substantial role and that talk regarding screening from Rule 1.10(e) does not apply in this case because Lewis Brisbois did not comply with the written notice promptly being given to the former client. I'll put it back up there. I mean, it's just so clear. They don't want to acknowledge this to Your Honor, but this is the law or this is what the State Bar of Nevada has attempted to clarify the decision from the Nevada Supreme Court from 2007. This is their clarification. It's as clear as day. "Thus, screening cannot remove the imputed disqualification bar against all members of the laterally moving lawyer's new firm if, number (3), written notice is not promptly given to the affected former client to enable it to ascertain compliance with the provisions of this rule."

Notice cannot be waived. He did not waive it. Because let's just say, Your Honor, they gave him notice, he challenged it and Your Honor ended up saying, you know what, I don't find there was a substantial -- there was a substantial role, I'm going to allow Lewis Brisbois to continue representing Mydatt. Okay. It could have happened in theory if they would have sent the notice. Does that end the story? Absolutely not, because Mr. Hawkins at that point in time would still be allowed to monitor. I mean, the purpose of the notice is to enable him to ascertain compliance. So he could say, Your Honor, I have some concerns, let's talk about these concerns. Did Mr. Shpirt sign a written agreement to never discuss this case? Because that's what's required by the Nevada State Bar. And he could insure that

compliance and they would have to produce that to Mr. Hawkins. They never did that. Mr. Hawkins could say, Your Honor, I have some concerns there may have been some turnover at the firm, I want to make sure that all the members of that firm, support staff, attorneys included are all notified periodically that Mr. Shpirt is to be walled off from the case.

That's his right to do, Your Honor. They didn't give him the opportunity to do it. Under the supreme court decision in the Nevada Yellow Cab case it's simple. Three elements. We established the three elements. Even when we look at the Nevada State Bar ethical opinion, it's clear as day screening never even becomes an option if they don't give written notice. Written notice and consent are two different things and it's a distinction with a difference. Even if -- even if there was -- even if Your Honor would have said, you know what, I don't find a substantial role so I'm going to allow the representation, they still had to give the notice. Why? So Mr. Hawkins could ensure compliance with the rules of the screening. They didn't do it.

Your Honor, one other thing. Yes, the Nevada Supreme Court has said be careful. People have the right to pick an attorney. Be careful disqualifying firms. But there's also a greater interest and that's the public interest. If the jury were to find out in this particular case that Mr. Shpirt represented him and now his firm represents Mydatt, that doesn't look good for our profession. That's a red flag for our entire profession. So what does the supreme court say? The supreme court says if there's any doubt, any doubt whether a disqualification should be made, you make the disqualification. That's the directive the Nevada Supreme Court gives to the district court judges.

Your Honor, I know you're going to comply with the law, but you have no alternative here. Under the rules, the ethical rules and the decision from the State -- from the supreme court, disqualification is mandatory. They didn't comply with the most basic rules.

THE COURT: Okay, thank you. Okay, I'm going to make the offer one more time. Does anybody want an evidentiary hearing to clarify what the parties' positions are that have been asserted vaguely or not vaguely, and it would be limited to the parties and the witnesses that are already before the Court. I'm asking. I'm not requiring, I'm asking. I'm ready to rule right now if the parties wish. I'm just making it abundantly clear, asking if somebody wishes an evidentiary hearing because I think you both have brought out various issues on lack of clarity in various people's affidavits.

MR. LAVERY: Court's indulgence.

THE COURT: Sure, if you need a moment.

(Mr. Lavery confers with Mr. Avakian)

THE COURT: If it helps the parties, do you want me to tell you why I'm asking -- well, I'm asking the question to make sure everyone has full due process. But if either side is asking me a couple of questions that the Court has, I have no problem saying that if that helps you with your strategic decisions.

MR. LAVERY: At this point, Your Honor, I do not request an evidentiary hearing.

MR. CHURCHILL: Your Honor, I believe the standards that I've set forth are clear on their face.

THE COURT: So is that a yes or a no?

MR. CHURCHILL: No, I'm not requesting one, but if you --

THE COURT: Okay. I'm just asking.

Okay. This is a very challenging decision for a lot of reasons. I have an objection to the new affidavit of Mr. Barrus that was presented this morning, and the Court is not going to consider that in its decision. I'm not -- let me be clear. I'm not considering any new portions that were not previously contained in his prior affidavits. So to the extent that there was information related to what was previously presented in affidavits or arguments it's going to be considered. To the extent that there is new information, it's not being considered in my ruling, okay. And the Court finds that that's appropriate for a multitude of reasons. The Court finds that -- I've already gone through them, I can go back through the litany of what the chronology of this is as far as the dates in this hearing. It was originally supposed to be on May 26th. If somebody wished to present something, while I can appreciate an OST at the beginning, from May 11th through May 26th there could have been additional information provided. This is not, quote, "new information." This would be actually a third affidavit from the very same person. So -- and when I say third affidavit, I'm appreciative one is in the motion to dismiss and one is in the motion to disqualify. But the Court also finds that it's unfair.

There was not any determination whether today would or would not lead to an evidentiary hearing, even if there was any, quote, "confusion," the Court has offered it again. I've given each party an opportunity to request an evidentiary hearing in which the information could be fully fleshed out. I even said because of the affidavits, to give both sides a full opportunity to understand. The Court was also saying there were some issues relating to the affidavits. So in light of that,

I think in fairness to all parties it would not be appropriate for the Court to review that new information that could not be looked at by the opposing side for purposes of today's hearing.

So then we're back to what was properly before the Court from a timing standpoint, from an equity standpoint, etcetera, and we've got the rules. I will tell you I've got an email from Paul Shpirt. Nobody is telling me that it's not authentic, okay. In fact, both sides seem to confirm. That email is dated March 16th, 2015. So when I look at everyone seems to agree that there was a meeting on December 18th, 2014 that involved Mr. Hawkins, his mother, Mr. Baker, Mr. Barrus, Ms. Eglet and Mr. Shpirt, and then I've also got an email on March 16th, and I think the email is a very important part of this Court's ruling.

In here it says, "I spoke to Jason this afternoon and discussed some of the problems we see with liability in this case." It's not to further communicate a statement with regards to, you know, we're not taking the case, okay, it's some of the problems we see with liability in a general context. "Although the client is a very nice young man, unfortunately the police report creates a lot of issues for us." Once again, I don't have any clarification of -- I mean, for Mr. Shpirt to be referencing a police report, it usually gives a general indication that he has some understanding of what's in that police report. And so -- or at least he is tying it to liability, or at least it's some reference to the earlier conversation between him and Mr. Barrus in which there was a discussion of liability and the police report. "So as a result, we are unable to represent X'Zavion in this case. We will send him a letter and let him know that as well. Thank you for thinking of us in this case. We hope we will be able to help with other cases in the future. Please call me or Tracy if you have

any questions."

At least as of March 16th, 2015, Mr. Shpirt had some knowledge there were issues relating to a police report and the issues of liability in this case. And as a basis for not -- where the Eglet law firm of which he was a member at the time -- now I'll call it Eglet & Prince -- it's a basis for them not deciding to continue with the representation of Mr. Hawkins. When I look at that and then I look at the prior affidavit and I take both the affidavit of Mr. Shpirt who says he has no -- well, let me read that directly. One moment, please. "On December 14th I was present at the new client meeting." And he names the same people. "The meeting lasted approximately an hour. I remember very little, if anything, about that meeting, as we met with a lot of potential clients." So I don't have any dispute of what was or was not occurring at that meeting. I have a lack of knowledge of what happened in that meeting.

In contrast, I have from Mr. Barrus, which was properly attached to the first motion to disqualify and that's all I'm relying on, is he states, paragraph 5: "During this meeting Mr. Shpirt had the opportunity to speak with X'Zavion about the incident and the nature and extent of X'Zavion's injuries." So I don't have a dispute. And I appreciate the veracity. This is nothing about people's veracity. This has to do with the information presented to the Court and which you all are asking me to rule on based on information presented to the Court. So I don't have any dispute by Mr. Shpirt. And Mr. Shpirt had the benefit of Mr. Barrus', so it's not like he didn't have it, so he could have disputed if he didn't have that opportunity, but he chose not to in his affidavit. He just says he doesn't really recall. And that was really his choice. So I don't have any dispute that during the meeting he had the opportunity

to speak with X'Zavion about the incident and the nature of the injuries.

Now, I'm not taking into account the I believes and the must haves, okay, of what may or may not have happened after December 18th, but I do have December 18th. Clearly both parties say that they were at the meeting. And I have one party's statement under oath that this is what happened and I have the other individual, Mr. Shpirt saying he doesn't really remember, so he's not refuting it. And then I have the March 16th email where he clearly discusses problems with liability and a specific police report. So it doesn't look like he's just relaying the message I spoke with Tracy and, you know, we're not taking the case or anything like that. And it doesn't say anything about relaying the information. It appears -- I have to read it on its face because I've got -- you all don't want an evidentiary hearing, so I've got no context to it. And don't take that statement, my last statement out of context about no context, it's just that's the evidence before this Court, so I look at that.

So then I have to go to the analysis and both parties agree this is pre-litigation, this is prior to filing the complaint. The complaint wasn't filed until April of the following year and that was approximately about a month after the March -- the litigation was filed on 4/27, so it's a little bit more than a month after the conversation slash email between Mr. Shpirt and Mr. Barrus. So this was pre-litigation. So is pre-litigation substantial or not? The concern the Court really has is I have the context of one person saying there was a specific discussion of injury, liability and damages and the extent of what happened, so I have facts, the extent of damages, etcetera discussed at one meeting and then a follow-up that there was some type of discussion or some type of information at least relayed to Mr. Shpirt

under the most neutral sense of it with regards to liability and reasons for not taking the case and specifically to a police report, which we all know, stay tuned, is part of your motion to dismiss on what was known and not known. It seems to be a key issue in this.

That all leads to that Mr. Shpirt, at least from the Nevada Supreme Court be viewed to have participated in this case. And also I have the fact that he signed the fee agreement and the sharing agreement, so those are also per se evidences of his involvement. I appreciate that his affidavit said he was asked to sign it, but he still did sign it. So when the Court looks at that and then the Court looks at the Rules of Professional Conduct, looks at Yellow Cab, looks at the totality of the circumstances, we really walk into the issue of whether I treat this as non-substantial, and I believe that the Rules of Professional Conduct is clear. It says written notice is promptly given. So that even to get to the screening factor, you would at least give some kind of written notice. While I appreciate the argument that you don't have to give consent if you don't have notice, the opinions -- and I appreciate they're not precedential, the Court needs to take them for the value of which the Court needs to take them, but it is the very guidance which the court is giving and it's interpreting Nevada Supreme Court law. It's not a situation where you're kind of comparing two different divisions, who may or may not have responsibility. It's the very entity that's supposed to answer these type of questions.

So the Court does give it some weight in looking at that and it does, without reiterating, State Bar of Nevada Standing Committee on Ethics and Professional Responsibility Formal Opinion 39, relied on by both parties of April 24th, 2008. It has the Q&A's. Under the Q&A's, at least you needed to have notice,

and if you got the notice you might get the screening. Even if I went the other route and said, well, even if you disregard that portion, you have to look at substantial, is it substantial or not, this Court is hard pressed with the term, and I appreciate dictionary definitions, but when you're discussing facts, damages, reasons for liability and specific pieces of evidence that relate to liability, that appears to be substantial.

And so, as much as the Court is aware of the cautionary aspect about disqualifying, the Court -- and appreciates -- I mean, this is more of a procedural issue, but the Court has to disqualify the law firm of Lewis Brisbois in this case. And the Court in taking so consideration also is supposed to take into account the preference of the client, yes, but I also have to take into account that this is not a case where there isn't other counsel representing the same clients. So it's not a case like I'm a month before trial and this was delayed.

This was presented -- I mean, you had an October 2015, as referenced in the affidavits of Mr. Aicklen and Mr. Shpirt about the first time of notification. So at that juncture there's things that potentially could have been done. The Court is not in any way criticizing or saying that things should have been done, but I don't see a delay on plaintiff's counsel's part because there's not any statement that there was any notification on plaintiff's part about the aspect of the change of the employment. Because, once again, I don't have clear dates and here's where the affidavits aren't necessarily clear. It says recently, you know, at the courthouse, knew that he changed firms. And so I have representations by counsel both in affidavits and in arguments as officers of the court that just found about this, which is why the motion was filed when it was. And although this is a 2015 case, the Court wouldn't see an

undue delay here.

And so then the Court looks at, well, should there be an analysis of whether or not they should have done some due diligence to see if there was such a conflict and should have raised it earlier and is that something that's prejudicial to defendants and what the Court should take into account. Under what's been presented to the Court, what I'm allowed to take into account, I don't see that they were put on notice or should have been put on notice to have then somehow brought this motion sooner. And the Court finds and the Court not taking into account the third affidavit of Mr. Barrus and Mr. Baker, by not taking those into account, I have in no way prejudiced defendants by adding any new information or any new evidence that the Court took into consideration for today's purposes.

So it is so ordered. Sorry, I hate to do that, but I think this is the right decision in this case. That email is just very telling.

MR. LAVERY: Thank you, Judge.

THE COURT: I think it falls within the --

MR. LAVERY: I understand. Thank you, Judge.

THE COURT: Okay. So at this juncture, what do the parties -- it's 4:15, are we going to the motion to dismiss? What do the parties wish to do? I mean, as you know, nothing is effective until I sign a written order, but you all decide what you wish to do, if you wish to waive that and move forward with some portion of your next part or what you want to do. Appreciate your time.

MR. LAVERY: In light of the Court's ruling, we don't have a position.

MR. AVAKIAN: You'd have to ask counsel.

MR. LEE: Your Honor, I think it probably makes the most sense, although

we're prepared to go forward if the Court pleases, but I think at this hour of the day and the witnesses that we've already excused, those would be the first people we intend to call, I think we probably need to find a date to reset it.

COURT RECORDER: I'm sorry. Can you come to a microphone?

MR. LEE: I apologize.

Good afternoon, Your Honor. David Lee on behalf of Mydatt and GGP. At this point in time, although we are prepared to go forward, as we said we would be -- as Your Honor knows because of the interruption in the proceeding we've already excused the witness that we intended to call first, based on his -- we had him ready to go earlier this afternoon, so I believe we need to reschedule the hearing at this point.

THE COURT: Okay. Is that -- plaintiff's counsel, are you in agreement with that?

MR. CHURCHILL: That's -- yeah, that's fine, Your Honor.

THE COURT: Okay. I am more than glad to reschedule this to a date convenient to the parties, okay. So we don't have -- I am more than glad to get a courtroom that insures that we have a lift for ADA compliance. As you notice, I've already gotten it once. I am more than glad and all my colleagues are more than glad to help me out and get that taken care of. I just -- and so I just need to know, in light of recent statements that it's not really being requested, I just need to know if it is or isn't. And it's perfectly fine whether it is and it's perfectly fine if it's not. This Court is more than glad to accommodate; I just need to know what is being requested.

MR. CHURCHILL: Your Honor, you know, I can ask Mr. Hawkins right now

if he has a preference, but I don't think anybody from my law firm ever requested it.

THE COURT: Okay.

MR. CHURCHILL: It may be something -- but I just wanted to make sure. I'll ask him.

THE COURT: Okay. There's nothing negative here. I'm just -- honestly, what date I give you is going to be either, A) contingent upon just my schedule, or B) -- and obviously your schedules, or B) contingent upon my also seeing the availability of a different courtroom. And that's really just a factor and I'm more than glad, everyone is more than glad to get that taken care of. It should not be any issue with regards to any of your decision process. Have I made that clear enough? We will accommodate, we want to accommodate, we shall accommodate.

(Mr. Churchill confers with Mr. Hawkins)

MR. CHURCHILL: Your Honor, Mr. Hawkins is inquiring that when he's examined if he could just sit at this table and your courtroom would be fine. If he can just sit as this table as opposed to going up there.

Mr. Lee, I don't know if you have an objection to that?

MR. LEE: I have no objection, Your Honor.

THE COURT: Okay. We should be able to do that. The only caveat, just FYI, if he's going to do that I will probably -- I've had that request one other time and what was requested is that counsel actually not be at the counsel table when the individual is acting as a witness. Do you understand what I'm saying?

MR. CHURCHILL: I do.

THE COURT: So that now that -- I don't know if I'm hearing that request here, but that's just the friendly heads up I got the request in the past and, you

know, counsel for the other party was perfectly fine with it because what the point is is they would be treated as if they were in a witness box, meaning you can't have anything on the counsel table --

MR. CHURCHILL: Sure.

THE COURT: -- that provides any information and you can't have anyone near the person. So that's fine by the Court's standpoint, and I'm also more than glad to get a courtroom. I mean, we have enough of them. I have colleagues that are incredibly cooperative, so that should be a non-issue.

MR. LEE: I'm willing to accommodate either way, Your Honor.

THE COURT: Okay.

MR. CHURCHILL: I think, Your Honor, for scheduling purposes, and I don't know Mr. Lee's schedule, I know my June is a little hectic. I don't know Your Honor's vacation schedule and things of that nature. But I think going in your courtroom would help resolve one of these hurdles. You know, that way we're not factoring in --

THE COURT: But that shouldn't be -- it really should not be a factor. Compliance with State and Federal law is always foremost, as you notice. I got two back-ups here. That's a non-issue.

Okay, let's just pick a date and I'll see what you all want to do. I'll just tell you to tell me a different day. Do you wish to pick a date today or do all need to check your schedules? Because I can tell you, I can do it tomorrow, but I don't think you can probably get your witnesses back for tomorrow.

MR. CHURCHILL: Yeah.

THE COURT: I don't know if you can or can't. I don't know what your

statement is. But I could do it tomorrow afternoon after my motion calendar in the morning. I've got some time next week as well. What do you all want to do? Do you want to check your respective schedules and talk among yourselves and let me know tomorrow? Do you want to do it today? What do you want to do?

MR. LEE: Can we look at our -- David, do you mind?

MR. LEE: Your Honor, if you give us some available times, we could pick one of those. We likely -- we probably need to talk to the witnesses as well.

THE COURT: Okay. Monday, the 13th? Now, what is your current time estimate under this new format, so that we don't get ourselves in a situation here. Total time, start to finish.

MR. CHURCHILL: I can tell you I'm out of town on Monday and Tuesday of next week.

THE COURT: Oh, you're out of town the 13th and the 14th?

MR. CHURCHILL: But I'm back on Tuesday night, so I don't know if that helps.

THE COURT: Okay. It looks like I could do -- I've got time in the afternoon on the 16th and I've got time on the 17th. I don't want to put you on the 15th, given the number of motions I have on my C.D. calendar and that's going to be lengthy the next couple of weeks. The 16th or the 17th work for the parties?

MR. LEE: One moment, Your Honor.

THE COURT: Sure.

MR. LEE: From our perspective we could accommodate the 16th or the 17th.

THE COURT: Okay. Counsel, you're back in town?

MR. CHURCHILL: I am definitely back in town those days. Let me -- I'm turning on my --

THE COURT: Sure, no worries. As long as no one is talking that you all need a clear record, it's not much of an issue.

MR. CHURCHILL: Okay. So the 16th, I've got an arbitration in the afternoon and motions in limine with Judge Weise in the morning that I think will take a couple of hours. And did you say the 17th, Your Honor?

THE COURT: Yeah, Friday the 17th. It's usually a popular day because most judges aren't holding hearings on that day so it allows for special settings.

MR. CHURCHILL: The 17th appears to work for me pretty well.

THE COURT: Here's what I need to do. For client purposes, the intention obviously on a motion to dismiss is to give everyone a full opportunity. Should I be delaying this for any new additional counsel coming in? I mean, now that you all are both wanting to get this on a different date, does that change your structure on -- I don't know and I'm not trying to put anyone on the spot, I don't know if you all are going to have writ practice. You could. I mean, I'm trying to make sure everyone has a full opportunity to do it. I'm neither encouraging or discouraging anything. I'm trying to make sure everyone has a full opportunity to do whatever you think you need to do.

MS. RENWICK: I think we're prepared to go forward on the 17th, Your Honor. Like I said, we'll just confirm with the witnesses. If there is a problem with their availability, of course that would impact our ability to go forward on the 17th.

THE COURT: Let me give you a back up. The morning of the --

MR. CHURCHILL: I take that back. I am unavailable on the 17th. I apologize. I can tell you exactly where we're going and it's not on my calendar. We're going to see a country music fast in Grand Junction and we've already bought tickets and

everything.

THE COURT: Do you want to do it the 15th at 1:00 p.m.? My C.D. calendar should be done. I can give you the 15th at 1:00 p.m. I can also give you the morning of the 20th. I have to be done by 1:00 p.m on the 20th.

MR. CHURCHILL: The 15th at 1:00 p.m. actually does work.

MS. RENWICK: The 15th is fine.

THE COURT: At 1:00 p.m. Do you want to check with your witnesses? Let me tell you the backup day. The backup day is the 20th at 9:00 a.m., but do realize I have a calendar call at 1:00 p.m., so you can have the morning before the lunch break, but obviously my staff needs -- you don't need me to --

MR. LEE: Your Honor, I know that I'm not available on the 20th.

THE COURT: Okay.

MR. LEE: So I think we should --

MS. RENWICK: Aim for the 15th.

MR. LEE: -- make the 15th the first choice and the second choice.

THE COURT: Okay, the 15th at 1:00 p.m., does that --

MS. RENWICK: Yes, please.

THE COURT: Should I anticipate it works for all parties? Give me one second. If I pushed it to 1:30 because -- hold on one second. I'm hopeful that a motion to dismiss on the One Queensridge case, as well as the motions on my Southwest Lofts case, which are really big substantive issues on that morning on my C.D. calendar should be done by noon, get my staff their lunch from noon to 1:00, and then start at 1:00. If anyone has any knowledge on any reason why I shouldn't be so optimistic and I should start you all at 1:30, please let me know.

MR. LEE: Is that the same day you were asking, Your Honor --

THE COURT: You're in Friday on Queensridge. This Friday, 8:30 is Queensridge for nine hearings and then they have the one other motion to dismiss that the parties did not agree to hear on the 10th that the parties are coming back on the 15th to hear.

MR. LEE: I do have relative knowledge of both of those. I did check during the break on how long people anticipated going on Friday and they said that we should plan on the morning. So I don't know that Your Honor could schedule anything else in there. As far as that motion to dismiss, that's a much more limited issue.

THE COURT: I'm not asking for anything substantive.

MR. LEE: It's much more --

THE COURT: I'm just -- my schedule.

MR. LEE: It's a much more limited issue, so I would --

THE COURT: So you think one o'clock is not overly optimistic?

MR. LEE: I think that's quite fine, Your Honor. I don't know anything about the Southwest Lofts.

THE COURT: I'm just trying to -- rather than find out that all of a sudden people say that they need more time, I'd rather tell you now 1:30 if you think 1:30. Will 1:30 get everyone done in time?

MR. CHURCHILL: I think 1:30 works.

MS. RENWICK: I think 1:30 would be fine, Your Honor.

THE COURT: Okay, let's do 1:30 to play it safe. Okay, 1:30 on the 15th. If that is a problem with the witnesses, if they're out of state, on vacation, etcetera,

please let the Court know and I would find you a back-up date. And I'll tell you -- well, if you want to do it as soon as the 10th, I could do it the 10th at 1:30 as well. That's this Friday at 1:30. My only concern there is I do have a heavy morning calendar and that may be being optimistic on my side.

MR. LEE: Unfortunately, Your Honor, that does not work.

THE COURT: Okay. Well, then the 15th at 1:00 p.m.?

MS. RENWICK: Yes, Your Honor.

MR. LEE: Thank you, Your Honor.

THE COURT: That works, plaintiff?

MS. RENWICK: 1:30, correct?

MR. CHURCHILL: Yeah.

THE COURT: Sorry. Thank you. Thank you; 1:30. I will say it one more time since I've incorrectly just said it a second ago. The 15th at 1:30. Okay?

MS. RENWICK: Thank you, Your Honor.

THE COURT: Thank you so very much.

(PROCEEDINGS CONCLUDED AT 4:26 P.M.)

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

Case No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

X'ZAVION HAWKINS, an Individual,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE Joanna Kishner, DISTRICT JUDGE,

Respondent,

-and-

GGP MEADOWS MALL, a Delaware Limited Liability Company; MYDATT SERVICES, INC. D/B/A VALOR SECURITY SERVICES, an Ohio Corporation; and MARK WARNER, an Individual.

Real Parties in Interest.

District Court Case No. A-15-717577-C

PETITION'S APPENDIX VOLUME V

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15.	Defendants Mydatt Services, Inc. d/b/a Valor Security Services and Mark Warner's Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint and Opposition to Plaintiff's Countermotion for Sanctions, filed on April 26, 2016	2	0339-0453
16.	Plaintiff's Motion to Disqualify Lewis Brisbois Bisgaard & Smith and for Sanctions on Order Shortening Time, filed on May 11, 2016	2	0454-0489
17.	Proposed Order on Defendants' Motion to Dismiss Plaintiff's Complaint and Plaintiff's Countermotion for Sanctions; Defendants' Motion for Leave to File Third-Party Complaint; and Plaintiff's Countermotion to Bifurcate Trial, filed on May 16, 2016	2	0490-0493
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22.	Substitution of Attorneys, filed on July 6, 2016	3	0705-0709
23.	Defendants' Motion for Attorneys Fees and Costs, filed on August 19, 2016	4	0710-0814
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Ex.	Title	Vol.	Pages
25.	Findings of Fact, Conclusions of Law and Order re: Plaintiff's Motion to Disqualify Lewis Brisbois Bisgaard & Smith and for Sanctions on Order Shortening Time, filed on August 30, 2016	4	0823-0829
26.	Notice of Entry of Order, filed on September 7, 2016	4	0830-0838
27.	Plaintiff's Opposition to Defendants' Motion for Attorneys Fees and Costs and Countermotion for Attorneys Fees and Costs re: Motion to Disqualify Lewis Brisbois Bisgaard & Smith, filed on September 7, 2016	4	0839-0852
28.	Defendants' Opposition to Plaintiff's Countermotion for Attorneys Fees and Costs re: Motion to Disqualify Lewis Brisbois Bisgaard & Smith, filed on September 13, 2016	4	0853-0868
29.	Defendants' Reply to Plaintiff's Opposition to Motion for Attorney's Fees and Costs, filed on September 13, 2016	4	0869-0888
30.	Plaintiff's Supplemental Brief in Opposition to Defendants' Motion for Attorneys Fees and Costs, filed on September 26, 2016	4	0889-0921
31.	Defendants' Mydatt Services, Inc. and Mark Warner's Reply to Plaintiff's Supplemental Brief in Opposition to Motion for Attorney's Fees and Costs, filed on October 3, 2016	4	0922-0931
32.	Order re: Defendants' Motion for Attorney's Fees and Costs, filed on October 3, 2016	4	0932-0937
33.	Notice of Entry of Order re: Defendants' Motion for Attorney's Fees and Costs, filed on October 4, 2016	4	0938-0947
34.	Order Denying in Party and Granting in Part Motion for Attorney's Fees and Costs Related to Motion to Dismiss, filed on October 17, 2016	4	0948-0951
35.	Notice of Entry of Order, filed on October 18, 2016	4	0952-0959
36.	Defendants, Mydatt Services, Inc. d/b/a Valor Security Services and Mark Warner, Motion to Strike Plaintiff's Complaint and Dismissal, filed on November 18 2016	4	0960-0987

Ex.	Title	Vol.	Pages
37.	Reporter's Transcript of Proceedings All Pending Motions, from May 3, 2016	5	0988-1029
38.	Reporter's Transcript re: Evidentiary Hearing: Defendants' Motion to Dismiss Plaintiff's Complaint/Defendant GGP Meadows Mall LLC's Joinder to Defendants' Mydatt Services, Inc. and Mark Warner's Motion to Dismiss Plaintiff's Complaint/Plaintiff's Opposition to Defendants' Motion to Dismiss Complaint Plaintiff's Motion to Disqualify Lewis Brisbois Bisgaard & Smith and for Sanctions on Order Shortening Time, from June 8, 2016	5	1030-1129
39.	Reporter's Transcript of Proceedings – Evidentiary Hearing: Defendants' Motion to Dismiss Plaintiff's Complaint/Defendant GGP Meadows Mall, LLC's Joinder to Defendants Mydatt Services, Inc. and Mark Warner's Motion to Dismiss Plaintiff's Complaint/Plaintiff's Opposition to Defendants' Motion to Dismiss Complaint, from July 21, 2016	6	1130-1331
40.	Reporter's Transcript of Proceedings on Defendants' Motion for Attorneys' Fees and Costs; Plaintiff's Opposition to Defendants' Motion for Attorneys' Fees and Costs and Countermotion for Attorneys' Fees and Costs re: Motion to Disqualify Lewis, Brisbois, Bisgaard & Smith, from September 20, 2016	6	1332-1359

CERTIFICATE OF SERVICE

I certify that I am an employee of Injury Lawyers of Nevada and that on the 21st day of November, 2016, service of the foregoing Petitioners' Appendix Volume I of II was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT 37

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

X'ZAVION HAWKINS, Plaintiff, vs. GGP MEADOWS MALL, LLC, MARK WARNER, MYDATT SERVICES, INC., Defendants.	CASE NUMBER: A-15-717577 DEPT. NUMBER: XXXI **Transcript of Proceedings**

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

TUESDAY, MAY 3, 2016

APPEARANCES:

For the Plaintiff: DAVID J. CHURCHILL, ESQ.

For the Defendants: JOSH C. AICKLEN, ESQ.
DAVID B. AVAKIAN, ESQ.
CHARLENE RENWICK, ESQ.

RECORDED BY: RACHELLE HAMILTON, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

TUESDAY, MAY 3, 2016 AT 10:05 A.M.

THE COURT: *Hawkins versus GGP Meadows Mall*, 717577.

MR. CHURCHILL: Good morning, Your Honor. David Churchill for the plaintiff.

MR. AICKLEN: Good morning, Your Honor. Josh Aicklen for defendants Mark Warner and Mydatt Services DBA Valor Security.

MS. RENWICK: Good morning, Your Honor. Charlene Renwick on behalf of defendants GGP Meadows Mall as well as Mydatt and Mark Warner.

MR. AVAKIAN: Good morning, Your Honor. David Avakian on behalf of defendants Mydatt and Mark Warner.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: [Indiscernible], paralegal for Josh Aicken.

THE COURT: Oh no worries. Just want to make sure.

[Colloquy on another case]

THE COURT: Okay. So we have all the appearances. I have Defendants Mydatt Services and Mark Warner's Motion to Dismiss, Plaintiff's Countermotion for Sanctions, Defendants' Motion for Leave to File Third Party Complaint, and Plaintiff's Countermotion to Bifurcate the Trial.

So, --

MR. AICKLEN: I suggest we deal with the Motion to Dismiss first, Your Honor. I think it will moot out the other issues.

THE COURT: Go ahead, counsel.

MR. AICKLEN: Your Honor, with your indulgence, have you looked at the videotape of the deposition and also listened to the audio recording of the plaintiff's statement?

THE COURT: Just that were provided I have reviewed.

MR. AICKLEN: You've listened to them and watched them?

I have my paralegal here prepared to connect to the computer system if you think it would be helpful to you during the course of argument.

THE COURT: Counsel, whatever you'd like.

MR. AICKLEN: Well let's do it this way first, Your Honor. Let's just talk about it as the dry record since you've heard the actual testimony.

Twenty-eight years I have been involved in the law of business, 26 of which I've been a litigator. I've taken depositions on death row at the California gas chamber when I was a kid. I have never had a witness lie the way this plaintiff is lying. I've taken murderers' depositions and

never had them lie the way this plaintiff has lied.

This plaintiff lied to calculate, to make it look like he was the innocent victim of violence that was generated from the type of crowd that was drawn to a shoe release. That was their theory all along, that he's just there with his cousin and happens to be the victim of two gang members that come up and shoot him, that he doesn't know, and he's a random victim of violence from the Michael Jordan shoe release at the Meadows Mall, which they allege has this high crime.

So, that's the way we look at the case in the beginning and then we find out that that is not the truth. In fact, what the truth is is this is violence that goes way back between this plaintiff and a man named Ashley Bernard Christmas and a man named Zach Barry [phonetic] who he knew in high school and who robbed him at gunpoint in a park two years before the shooting. How do we know that? We don't know it from the plaintiff because he lied in his discovery responses. So how do we find out?

I substitute into the case and co-counsel and I set a meeting with the investigating police officer, Detective Majors. And in that meeting, we learn that there is a statement, the plaintiff has given a statement about what happened that day at the Meadows Mall and he names names, multiple names. We know that the shooter's name is

Zach. The police officer identifies him as Zach Barry. The man that first accosted him, his name is Ashley Bernard Christmas. How do the police know that name? Because the plaintiff told them that name five days post shooting. The plaintiff said to them: He yelled out: Get him, Zach.

He knew these two people. They had robbed him at a park of $150 two years before the shooting incident. So he gives that statement -- recorded statement to the police officer, Detective Majors.

THE MARSHAL: Make sure your phones are turned completely off.

MR. AICKLEN: He gives that recorded statement to the police officer to Detective Majors.

THE COURT: Just a sec. I just want to make sure we get -- okay. Sorry, anytime anybody has a phone, I have to stop because it interferes with the recording. You presumably want a clear record.

MR. AICKLEN: Yes, ma'am.

THE COURT: So, --

MR. AICKLEN: Thank you.

THE COURT: Appreciate it. Thank you so very much. Go ahead.

MR. AICKLEN: He gives that information to the police and then he refuses to cooperate thereafter because if you read Detective Majors' deposition -- did you read

it? The police officer?

THE COURT: Counsel, I've read everything in every single --

MR. AICKLEN: Okay.

THE COURT: -- case that is before me that you all present.

MR. AICKLEN: I'm just asking because I don't want to go over things that you've already done. But to highlight, --

THE COURT: Okay.

MR. AICKLEN: -- the reason that they know who the shooter is and who the initial man that accosted him is is because he tells Majors five days after with -- Majors and his partner at the hospital. He does not follow through on the prosecution. He refuses to cooperate. He does not call Majors back. He does not return his phone calls because his family is threatened by these two members of the Gerson Park Street gang.

So then, two years down the road, he files this lawsuit. He doesn't name Christmas; he doesn't name Barry. He doesn't tell anyone that he knows these names. In the Complaint, he says: And I heard the man yell out, get him Zach, before I was shot. That's all he puts in a name.

Prior counsel sends out written discovery and asks him: What is the name of the shooter? I have no idea.

Admit the name of the shooter is -- or the shooter's nickname is Poohman [phonetic]? I don't know. He lies in his written discovery responses.

So then when counsel and I meet with Detective Majors and find out all this information, information, by the way, that is no surprise to the plaintiff because he is the one that gave it to the police, he's the one that gave them the names and the facts that occurred. We find this out and I take his deposition and based upon his written discovery responses, I think he's going to lie to me. And based on 26 years practicing law, I think he's going to lie in his depo, but I had no idea how much he was going to lie. Other than his name, I don't believe the man spoke the truth throughout the entire time of his reported deposition.

He -- I asked him: Who is Ashley Christmas? Who? I don't know who that is. I asked him five times. As a matter of fact, I asked him so many different times in so many ways and he lied to me every time that after a while, his lawyer started saying: Asked and answered. And I thought in my mind: Yeah, because every time he does, it's called perjury. It's a crime. It's a class D felony. You go to prison for it.

Asking to dismiss the man's case is the least of what should occur here. He should be facing about 30

counts of felony perjury. Dismissing his case is doing him a favor. If we have an evidentiary hearing on the issue, theoretically, what are you going to do? Are you going to look at him and say, you have the right to remain silent? Anything you say can and will be used against you in a court of law? Is he going to get on the stand and say: I assert the 5th Amendment? Because every time I lied in my deposition I committed a class D felony which can put me in the state penitentiary for one to four.

Thirty times: I don't know who Ahsley Christmas is. I don't know who Zach is. I never saw the shooter before he shot me. I have no idea who he is. I never through a Snapple bottle. I never took a swing. I never squared up to fight with these men.

Why did he lie like this, Judge? He lied just like the party did in *Young versus Johhny Ribiero*. He lied to help his case. He lied to look like the innocent victim of a gang shooting. He crafted his lies to look like the innocent victim of a gang shooting. He looked at me halfway through his depo and he said: I'm telling you the truth. Don't you believe me? That was a lie.

I never talk about my work with my family. Reason being you come home and your wife says: How was work yesterday? Oh it was great. I took the coroner's deposition. I was at an autopsy. I was at a crime scene.

I don't talk about my work. My wife this morning said: What are you doing today? You've got your suit on. I said: I'm going down to get justice. I'm going down to get a case dismissed of a perjurer, a liar, a man who crafted his lies to try and get money under oath.

If you go through *Young versus Ribiero* there is no need for -- in fact, what are we going to do if we put this to an evidentiary hearing because I've been in front of this Court on similar issues, never this egregious, and I know that the Court wants to set evidentiary hearings to go through because in *Young versus Ribiero*, they said: Well, the best way to do it is to do an evidentiary hearing, but it's not necessary.

Young versus Ribiero was granted without an evidentiary hearing and was upheld by the Nevada Supreme Court. So what are we going to do if we have an evidentiary hearing to dismiss this case? Is he going to get on the stand? Which thing will he say is true? The statement that he made to the police is a crime if he lied. I cited the statute. Right? If you lie to the police during an active investigation, you commit a crime.

Getting on the witness stand at deposition and lying is a class D felony. That is a crime. If you read the errata to his deposition transcript, that is not only another crime, it's insulting. It is gibberish and it's

clearly gibberish that was written by one of his lawyers because if you look at the signature block on his deposition transcript and you look at the writing on the errata, they are not the same person.

Twenty-six years, I've never heard an errata sheet like this. At -- the last exhibit to my Reply, at page 12, -- or strike that. At page 26, line 15 to 16, he changes his answer to:

> I don't have an independent recollection at this time, however I believe at one time I believed Poohman's real name was Ashley Christmas.

That is gibberish. He does it -- I believe at one time I believed -- that's the next one. 28. 29:

> I believe at one time I believed.

31: I believe at one time I believed. I don't dispute that I threw a Snapple bottle.

Then why did you lie about it in your deposition multiple times?

> However, I believe at one time I believed.

That's page 35, line 6.

> I don't dispute. I don't dispute. I believe at one time I believed.

Lastly, this is the best one: I believe at one time I believed Poohman's real name was Ashley Christmas.

That's the seventh time that he lied under oath about that name. And why did he lie about it? he lied about it to hide it from us so that we couldn't amend the Complaint, so that we would just look like that we ran a -- either security or a property that was done negligently, it was calculated. His lies were calculated.

So if you look at the *Young versus Ribiero* factors, if you look at them, and you go through each one, it mandates dismissal without an evidentiary hearing, that's what I propose to you. Let me go through them and let's look at them because this is what the Supreme Court is going to look at.

Number one, the degree of willfulness of the offending party. The only thing plaintiffs offer to mitigate that is they say: Well, he was taking pain meds in the hospital. He was taking pain meds the day of his depo. So he's confused.

Well, Your Honor, if you're that confused -- first of all, if you listen to them, you can hear: He isn't slurring his speech. He is answering immediately. He is giving responses. Majors said the same thing. The Detective said: I've questioned people that were under the influence of pain meds and I knew I could not question them. He exhibited nothing of that. Okay?

But even if -- let's say we take that into

account, he was drugged at the hospital, he was drugged in his depo, which if you watch the video clearly is not the case, and in his depo, I said to him -- I said: Is there anything that might affect your testimony today? He said: I'm on pain medications. I said: All right. Here's what I want you to do. If at any time during your deposition you feel that those pain medications are affecting your ability to give your best testimony, I want you to tell me. And he said: I understand.

And, thereafter, I would ask him a question and he would give me an immediate answer. It was a lie but he exhibited nothing of what somebody who is intoxicated on drugs exhibits.

And then after we took the break and he came back in, I said: Do you understand that you're still under oath? And he says: Oh you mean that we're talking? I said: No, no, no. It's just like you're in a courtroom and you're under oath under the penalty of perjury. Yes, I do understand.

So he knew it when he was giving the testimony. I do not buy the drugs -- by the way, if somebody is that confused, then where is their conservator? How could they even make decisions for themselves in a lawsuit? If plaintiff's counsel really believed that his client was that screwed up on drugs, then where is the conservator who

can make decisions for him? Plaintiff's counsel doesn't believe that. He believes that his client impeached and perjured himself and he's doing the best that he can do to avoid getting the case dismissed and maybe having the man prosecuted for perjury, which would be justice.

If you look at the next element of *Young versus Ribiero* that the Nevada Supreme Court will look at, the extent to which the non-offending party would be prejudiced by a lesser sanction. Well, first of all, you'll note that we filed our Motion for Leave to Amend on the very last day because he hid these names of Barry and Christmas from us. We had to scramble. First of all, they didn't name them because God help them if they sue the people that actually shot him as opposed to the mall, the big bad mall. Right?

What is the prejudice? Barry is not in the case. he pulled the trigger. Well, by the way, when he was 13, Barry killed somebody else. They just can't prosecute him because nobody will testify against him just like this plaintiff won't testify against this street gang member.

Christmas is not in the case. He knew Christmas' name all along: I believed that at one time I believed I recall, I do not dispute. He knew it all along. He knew it five days after. He looked the man in the eye. He said he put his hand out to shake at him and the man took a swing at him and he knew who he was. He lied about it.

Why did he lie about it? He lied about it because if it's a targeted attack against him for bad blood going back to this incident in the park when they stole money from him at gunpoint that he's not the random victim of negligent security or a negligent landowner. The prejudice is the real people that harmed this man aren't in the case and we're two years into it and they did it on purpose.

Number three, the severity of the sanction of dismissal relative to the severity in the discovery abuse. I ask rhetorically: Have you ever read a depo where somebody lied more? Because I have not. The severity of the discovery abuse both in the written and his deposition testimony is the worst. Steven Livaditis killed three people at the Van Cleef and Arpels in Beverly Hills, California, 1987. I went and took his deposition at death row at San Quentin. That man told me to go F myself every time I asked him a question, but he didn't lie to me and he certainly didn't lie as much as this plaintiff did.

I've taken other murderers' depositions who will tell me I take the 5th but they didn't lie as bad as this man did and he calculated his lies. The severity of the discovery abuse is the highest, calculated lies, crimes, perjury. Whether any evidence has been irreparably lost? Well, we know we don't have Christmas and Barry in the case. We moved, out of an abundance of caution, to bring

them in, but they haven't participated, they haven't been served.

What about the gun that they shot him with? What about what the whole reason for this shooting was? This armed robbery that went bad. All that -- are Barry and Christmas still alive because in the business that they're in, street gang member, you have a very short shelf life? Detective Majors testified to that. He said that he had a man named Patrick who was feeding him information about the case as a good citizen. Patrick was murdered in North Las Vegas. He was a gang member, too.

So what evidence has been irreparably lost? I can't tell you exactly, Your Honor, because they hid the witnesses and the evidence from me. That is the worst.

The feasibility of fairness of alternative less severe sanctions such as an order deeming facts relating to property withheld or destroyed evidence to be admitted. Do you know what plaintiffs ask you in a Countermotion? They say: Well, Aicklen didn't give these documents to us for 21 days so we want you to ask like he never perjured himself. That's their idea of justice, to just say that his two and a half hours in his deposition under oath where he lied to me about everything other than my name is X'Zavion Hawkins will be swept off the books like it never happened. That's their idea of justice.

The policy favoring adjudication on the merits. Well, that's true. That's true. This man has been injured severely. There's no question about it. He is in a wheelchair. He was shot. He is a perjurer. He is a criminal. He is a criminal liar, calculated to harm the rights of my client.

So, I would say that the policy of trial on the merits, how about my clients' rights to find out: Who actually shot you? What was it about? Do you know the names of the people? Can we bring them into the case? Can we find out if they own a home and have homeowners? Something like that. How about trial on the merits of the defendant instead of having somebody lie so much that you can't figure out how the case is going?

I'm wrapping up right now.

THE COURT: Yeah, because in fairness, we've got other counsel who are waiting for their case and --

MR. AICKLEN: Absolutely. Right.

And it's -- whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney. Now, the -- that errata sheet was the attorney's. No question. But the actual lies were the plaintiff's. He's the one that did it, just like in *Young versus Ribiero*. Bill Young is the one who changed the entries and lied about it under oath. Here it's the plaintiff that did it,

not his lawyers. I don't think Mr. Churchill knew what the guy was doing because he kept objecting, asked and answered, he didn't know what I was doing when I was impeaching him. It was the plaintiff himself that did it willfully.

And, lastly, the need to deter both the parties and future litigants from similar abuses. If you do not dismiss this man's case, the statement is made: You can go into deposition, you can lie dozens of times. This is 12 times worse than *Young versus Ribiero*. This man lied about everything. Every single substantive answer and then in the middle of it, looked at me, see it on the video, and said: Why don't you believe me? Well I don't believe you -- internally, I said: Well, I don't believe you because you're lying to me. This is much more egregious than *Young versus Ribiero*. Their sanctions motion is just the old: Well, if I can't attack the case, I'm going to attack Aicklen.

And, in fact, Your Honor, they never addressed the substantive *Young versus Ribiero* elements. They never talk about the elements of the case. They never talk about -- they never address the man's perjury at all. You have to dismiss this case. An evidentiary hearing is a waste of time. He's either going to have to get Miranda or take the 5th because that will be the fourth time he says something

different under oath.

Thank you.

THE COURT: Thanks. Okay. Anything from adjoining party?

MS. RENWICK: Counsel for GGP, Your Honor. We join the Motion.

THE COURT: Okay.

MS. RENWICK: But there's nothing substantive to add.

THE COURT: Okay. Thank you so very much. Go ahead, counsel.

MR. CHURCHILL: Thank you, Your Honor.

Your Honor, the Motion to Dismiss fails for numerous, numerous reasons. To begin with, from the very beginning, page 7 of Mr. Hawkins' deposition, he clearly indicates that he's on very, very high dosages of morphine, hydrocodone, Bacophen, and Gabapentin. Obviously, the most severe of those is the morphine, 100 milligrams. He follows that up by saying that he would have a hard time giving his deposition because his medications and his experience has made him forgetful. Okay? That's how he starts his deposition. He has a difficult time remembering things because of his medications. That's to begin with.

THE COURT: Okay. And, counsel, I'm stopping you here because I was trying to -- forgetful versus, as

defense counsel puts it, not accurate. He phrases it a little bit differently. I'm the Court, I phrase is accurately. I mean, I didn't see in the depo that he said: I don't know, I don't remember. It was answers and the issues are that the answers raised by defendant, he is asserting were not accurate answers.

MR. CHURCHILL: Well, he --

THE COURT: So isn't that a distinction versus a - - you know what I mean?

MR. CHURCHILL: Yeah, --

THE COURT: He breaks because I'm too tired or I don't remember or I'm forgetful, but he answers the questions.

MR. CHURCHILL: He does answer questions, but he also answers them by saying: I don't remember. He initially says: I don't remember and then he'll give an answer.

But let me ask you this, Your Honor.

THE COURT: Mine's just a question. I don't --

MR. CHURCHILL: Yeah.

THE COURT: Is there a distinction --

MR. CHURCHILL: But, yeah, he does --

THE COURT: -- that the Court should be taking into account there?

MR. CHURCHILL: There -- yeah. There is a

distinction there. To begin with, a deponent -- let me ask you this, Your Honor. Can a deponent have -- or can a witness on the witness stand have their recollection refreshed through another document?

THE COURT: You know the Court can't answer questions. The Court only has to ask questions in this --

MR. CHURCHILL: Of course. But, Your Honor, the answer to that is an obvious yes. Okay.

From the very beginning of Mr. Hawkins' deposition, he tells them: I'm on high doses of -- high dosages of medications. They make me forgetful. He does answer numerous times: I don't remember. They push him. He says -- and he give an answer. But numerous times he tells them: I don't remember.

The -- all of the items that Mr. Aicklen has argued about are not to prejudice the defendant. If anything, they would help the plaintiff. If his memory was better and he could say: Mr. Christmas was -- you know, was the one who was involved -- and what he testified is: I remember him by his nickname. Okay? And then he also tells them: I identified Mr. Christmas, who he calls Poohman, to the police. Okay? He circled the person's face in the -- when the police officer brought him the pictures of who the suspects could be, he very clearly and unmistakably circled Mr. Christmas. Okay?

He tells them in his deposition: I circled his face. I don't -- his name, I know him as Poohman, but that's the one that I circled. That's not being evasive, Your Honor. That's simply not remembering his name. He remembered it as Poohman and he circles his name allowing all of us the opportunity to find out exactly the name of who he circled.

We knew this -- let me put it this way, Your Honor. We knew -- the plaintiff knew that Detective Majors' deposition was coming up a short time after this deposition. Okay? His deposition -- Mr. Majors' deposition had already been set and it was continued. Okay? He knew this deposition was coming up and as clear as day he tells everybody: I circled his face. We knew we were going to get that information of that person's name eventually when we took Mr. Majors' deposition. He just didn't remember it.

He goes back and he clarifies that, which all deponents are entitled to do under the law. If they testify inaccurately, they are given the possibility to go back and change the answer.

Now as this gentleman sits here today, and Your Honor let's be clear about one thing, this gentleman was shot eight or nine times. He's paralyzed from the waist down, numerous injuries. He's had countless times he's

gone back to the hospital for infections related to bed sores. This man has -- for a couple of years, has been wasting away physically and if you see the deposition and you look at him, it's clear. He is wasting away physically.

He -- after he gets the information, he can now say: My recollection is refreshed. He goes and he changes his testimony to say exactly as Mr. Aicklen said, that: As I sit here today, I still don't remember this person's name, but at one time I believed his name was Ashley Christmas. It's not my recollection today, but at one time I believed that was his name. Okay?

He still doesn't know the actual shooter's name and he makes that clear as well, but, Your Honor, that's consistent because he didn't know the shooter's name back then either other than to say Zach. Okay?

Your Honor, to be clear on one other thing, he couldn't remember saying or hearing somebody say: Get him, Zach. It's in the Complaint. He remembered it at that time. He doesn't remember it today.

There's -- and let me wrap up with this, Your Honor. Rule 37 is -- they're basing this Motion on Rule 37, which is failure to comply with a Court order. Okay? At this -- as we sit here today, there's been no Court order directing Mr. Hawkins to change his testimony, to be

-- to answer a particular question. He answered the questions the best that he could at the time. After that, more information becomes available which refreshes his recollection and he, as every deponent is allowed to do, modifies his answers to his deposition to reflect his refreshed recollection.

Your Honor, that is 100 percent appropriate under the law. He didn't violate any Court order in doing so. Every deponent is afforded the opportunity to modify their answer.

Your Honor, what this really is, what this really is, this is a desperate attempt. Your Honor, think about this for a second. The Meadows Mall -- and you're going to get a motion similar to this upcoming against them. The Meadows Mall has a violent crime occur at their property once every four days. They knew or should have known because every deponent that we've taken the deposition of so far has all testified that at these Nike shoe releases there is violence occurring every single time and yet they did nothing. They never had security monitor the line. You can see on the video that they're not even paying attention to the line. They're focused on the parking lot and all of a sudden people go running when shots are fired. Not just fired at him, but deponents are saying fired into the crowd as well. It's insane, Your Honor, what they

allowed to have happen on their property.

But as far as Mr. Hawkins is concerned, he did everything proper. He answered the best that he could. He -- when his recollection was refreshed, he supplemented his response and most importantly, Your Honor, he's not hiding anything. He knew Detective Majors' deposition was upcoming. He tells the entire world: I circled his face. You're going to get the information. I don't know his -- I knew him as Poohman but whoever that Poohman is, I circled his face clear as day. He's not hiding anything, Your Honor.

But, Your Honor, there were some shenanigans pulled in this case. They did have Detective Majors' interview with the plaintiff almost a month before this deposition and they failed to supplement it.

THE COURT: Do you also want to address their Motion to -- for Leave to Amend?

MR. CHURCHILL: Your Honor, briefly.

THE COURT: Yeah, because -- just because, in fairness, this -- I've got other counsel waiting very patiently.

MR. CHURCHILL: Yeah.

THE COURT: And you all did not ask for special setting for additional time. So, --

MR. CHURCHILL: Yeah.

THE COURT: -- we're really pushing on the niceness of the people waiting. Thank you so much.

MR. CHURCHILL: With regards to leave to amend, Your Honor, let me just say this. We are now at the point in discovery, we have expert disclosures due this month, we've already continued that one time on their behalf. If we were to allow these people to come in, Your Honor I think that's their right. They can have them come in. However, I think the appropriate thing here would be to bifurcate that particular issue, otherwise we would be restarting all of the discovery all over again.

And we are well into discovery, Your Honor. Like I said, we've already continued it one time and we have expert disclosures due this month. It would set everything back probably a year.

THE COURT: Thanks very much.

MR. AICKLEN: Real quick.

THE COURT: Brief -- yes.

MR. AICKLEN: Real quick.

THE COURT: Real, real quick.

MR. AICKLEN: Again, with the drug issue, the drugs would be worse in the hospital. You listen to the recording. There's no hesitation in his answers. The drug issue is a red herring.

He remembered everything five days post shooting.

He told it to the police. His lies in his depo were meant to not let us find this information out.

And remember what he says is: Oh, for five minutes I was screaming I need security. His lies were meant to further his case.

Counsel says that he identified Poohman in a lineup. He did not. He testified that in his depo. That was a lie. If you read Detective Majors' depo -- I took his depo. I asked him: Did he identify anybody in the visual lineup or the photographic lineup? He said: No, he did not identify anybody.

So, this statement, oh well we knew you were going to find out about Poohman because you take Detective Majors' depo, yeah because Detective Majors would tell the truth. We didn't find out about Poohman because of you. You lied.

Lastly, I did not hide documents from them. How could it be a surprise? First of all, Majors told me that he had given this stuff to the prior counsel, [indiscernible]. But, nonetheless, -- so I thought they had it. But, nonetheless, we turned it over to them immediately. Rule 16 and 26 says: Seasonably supplement so that you don't have trial by ambush. We are nine months away from trial. I gave them these docs 21 days later.

They took Majors -- and, by the way, I'm not the

custodian of records for Las Vegas Metro. Right? They took Majors' depo. He turned these records over to them a couple of days after plaintiff's depo. So this -- the deal is let's try to attack Aicklen because we can't deal with the plaintiff's perjury in his depo.

Last point about *Young versus Ribiero* and bringing a Rule 37 Motion to Dismiss the Plaintiff's Complaint. The Nevada Supreme Court dealt with that in the *Young versus Ribiero* because there was not a written Court order and at page 92, in *Young versus Ribiero*, the Nevada Supreme Court says:

> Two sources of authority support the District Court's judgment of sanctions. First, NRCP 37(b)(2) authorizes as discovery sanctions dismissal of a Complaint, entry of a default, yada, yada, yada, yada. Generally, NRCP 37 authorizes discovery sanctions only if there has been willful compliance with the discovery order of the Court.
>
> That's what the Court said. But it continues:
>
> The Court's express oral admonition in Young to rectify any inaccuracies in his deposition testimony suffices to constitute an order to provide or permit discovery under 37(b)(2).

But then the Court goes even further and says you don't need an order. It says:

Second, courts have the inherent equitable powers to dismiss actions or enter default judgments for abusive litigation practices. Litigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses, not specifically proscribed by statute.

So *Young versus Ribiero* says there does not have to be a standing Court order for discovery for you to strike his Complaint.

Lastly, I would say that anything other than striking his Complaint -- I recognize that the man is in a wheelchair, but that doesn't change the fact that he lied over and over again willfully and tried to hide this evidence for his own economic benefit. He's lucky he's not being prosecuted for perjury and he's just having his case dismissed.

THE COURT: Okay. Thank you very much.

MR. CHURCHILL: Your Honor, I hate to do this, but just because it's very false what he just testified about Detective Majors. Can I just read the actual deposition transcript? It will take less than a minute.

THE COURT: Go ahead.

MR. CHURCHILL: Okay. This is -- so he did -- X'Zavion did identify Mr. Christmas in the lineup and this is the testimony of the officer and this is on page 83:

Who was in the lineup? Did you do one or two lineups?

I believe I did two. One on Kincaid [phonetic] and one for Ashley.

Question: Bernard Christmas?

Answer: Yes.

Did he identify Kincaid?

No.

How about Ashley Bernard Christmas? Did he identify him?

Let me take a look at my case notes once more. Okay. Yeah -- or yes. Sure, yes.

Answer: So, I did a photo lineup of Ashley Bernard Christmas where he positively identified Christmas as the subject that started the argument with him and said: Get him, Zach.

So he absolutely did identify Christmas and counsel, he's lying to you, Your Honor, --

MR. AICKLEN: Wait, wait, wait.

THE COURT: There's no personal attacks. Let's keep it neutral. Let's keep it with regards to --

MR. CHURCHILL: It's incorrect that --

THE COURT: -- the Court can -- the Court addresses the evidence before the Court on the issues presented to the Court, nothing from personal attacks from

anyone in courtesy of letting people finish.

MR. CHURCHILL: It's a false representation to Your Honor.

THE COURT: A difference of opinion of the interpretation of the deposition in different sections.

MR. AICKLEN: And I apologize. That is a mistake. He did not identify anybody in the first one. In the second one, he did, and I apologize. I was wrong. First one, he did not. Second one, he did.

THE COURT: Okay.

MS. RENWICK: Your Honor, if I may just make two points. I don't mean to belabor the point, but you made a very interesting point about the difference between an accurate statement versus one that's --

THE COURT: Questions. I don't make points.

MS. RENWICK: Question, I'm sorry.

THE COURT: I'm only a judge.

MS. RENWICK: You pointed out a question, Your Honor, which I think needs to be expanded on a little.

Counsel went to great lengths to describe how the medication was impacting his client's testimony. It's interesting that throughout the course of his deposition, plaintiff repeatedly stated that he continued to look around for security, that he specifically recalls looking for security and calling for security, however, somehow the

remainder of his deposition was entirely inaccurate or he did not properly recall. I questioned him and I specifically asked him what it was that he called out.

Someone call for help. I need security. He's getting aggressive with me. He's talking reckless.

And those were your exact words?

Yes. Everyone heard me.

So, I think there's that distinction to acknowledge here that this is an issue of accuracy, not his recollection.

And with respect to the bifurcation, Your Honor, plaintiff has supported -- has not supported at all their argument. They've not demonstrated and not even argued that there would be any prejudice to plaintiff with respect to the bifurcation or that it would -- it would be economical or expeditious to the Court.

THE COURT: Here's what the Court is going to do. I'm going to very nicely rule now. So I appreciate -- very patient people waiting. Okay? They need to have their turn as well, plus I've heard enough. You all gave me a lot of briefing. Okay? I've got video, I've got written, I've got a lot, and I do appreciate it.

So, defendants, Mydatt Services, Inc. and Mark Warner's Motion to Dismiss, the Court does find that it's appropriate that the Court does need to set an evidentiary

hearing. Given the seriousness of the allegations, the Court finds consistent with NRCP 37, even though there has not been a specific written order of the Court with regards to discovery, the general discretionary aspect of the Court, the Court finds it is appropriate to have an evidentiary hearing to flesh those out. We will set a date and time and I'll get an estimate from each of you all how much time you need with regards to the evidentiary hearing.

I'm going to also ask plaintiff's counsel, specifically, since this Court does not have a lift in its witness box, since it would just be an evidentiary hearing in front of the Court, it won't be in front of a jury, but if you request that that hearing be held in a courtroom that does have a lift, I will find a way to trade courtrooms with someone for that hearing, but I need to have that way in advance of the hearing if you want that. Otherwise we can easily accommodate with the portable mic, etcetera. I mean, we can do it structurally, I just want to make sure that you have a full opportunity that if there is a --

MR. CHURCHILL: Yeah.

THE COURT: -- distinction, that we will trade courtrooms. Okay? So stay tuned.

Let me rule on the rest and then we're going to circle back on dates and times. Okay?

So that is going to be necessary to do and we will grant that accommodation to a date and time convenient to the parties which will -- we'll find a date and time.

Plaintiff's Countermotion for Sanctions. Seriously, I can rule on that on the pleadings today. There is no basis for the Countermotion for Sanctions. I am appreciative. I'm not in any way saying it was filed frivolously. I'm just saying that there is not the appropriate support for Plaintiff's Countermotion.

The Court finds -- I mean, with regards that these were not documents that were held for a long time. They were not documents that would necessarily be in the custody and control -- I mean, you have general supplementary obligations and the time which they were provided. To the extent that there is a concern that they should have been provided before the depo, you could've subpoenaed them. You could have gotten them. There's really -- you know, so the Court doesn't find that there is a basis for Defendants' [sic] Countermotion for Sanctions and does deny Plaintiff's Countermotion for Sanctions.

With regards to Defendants' Motion for Leave to File a Third Party Complaint, it's within the appropriate time period. The Court finds that it is appropriate and, in fact, it could have been other motions, but the Court does grant the Motion for a Third Party Complaint.

With regards to Plaintiff's Countermotion to Bifurcate the Trial, the Court's going to deny that without prejudice because at this time I don't have enough of the -- well, there's two bases. One, I've got to see what's left -- what part of the case is or is not in existence. But, B, I also need to see what impact that will have. I can't kind of make an anticipatory decision at this time. As you know, under *Shuffle Master*, I need to evaluate whether or not a bifurcation would be appropriate and I need to take into account whether there's a difference of the witnesses, etcetera, with my granting the Motion for the Third Party Complaint. That means I need to know what's going on with this case before I rule. So that's why I'm denying it without prejudice to be brought back if you feel it's appropriate after we have some more information.

I do think there's plenty of time because you don't have a jury trial set until the five week stack of November 14th. So think there's sufficient time and that can be revisited.

So, I now need, A, a date for a hearing, but what my inclination really is to do is to give you all a few moments to talk about dates and timings in the hallway. Let me call the other case that's waiting patiently so that you're not discussing schedules while they're waiting and

let them get taken care of and then you can come back in and tell me one of three things: Your Honor, we've -- you know, like to -- you know, here's a Tuesday or Thursday that we -- meets for all of our needs. You know, we estimate it's going to be X amount of time. We'd like to call so many witnesses and, A, we're fine doing it in this courtroom or, B, we'd like an accessible courtroom. Or, B, you're going to tell me: Your Honor, we need to check with our respective clients' offices etcetera and can we write you, you know, a letter agreed upon by the parties or a stipulation of the parties, you know, and get it to you by the end of the week. Either of those answers are going to be fine with me, but it seems to me that you need to take a moment to discuss it among yourselves.

Okay? Does that work for the parties?

MR. CHURCHILL: Yes, Your Honor.

MR. AICKLEN: Yes, Your Honor.

THE COURT: Okay.

[Case trailed at 10:48 a.m.]

[Case recalled at 11:23 a.m.]

THE COURT: *Recalling Hawkins versus GGP Meadows Mall*, 717577. I think a couple of parties may be anteroom maybe?

[Pause in proceedings]

THE COURT: So I gave you all enough time to

settle the case while you were waiting out there? It was worth a shot. Right? Okay.

So, counsel, do you need me to have -- redo appearances for clarity of the record? Okay. They don't need appearances.

So did you all come to an agreement on dates and times or do you need to check with respective offices and do --

MR. AICKLEN: I think we did. Can I speak for us? We're looking at four hours necessary, Your Honor.

THE COURT: Oh, okay.

MR. AICKLEN: And that's for both plaintiff and defense.

THE COURT: Okay.

MR. AICKLEN: And we're looking -- if it works for the Court, the afternoon of May 26.

THE COURT: May -- okay. Hold on a second. May -- actually -- well because my 10-week trial starts on the 31st. Let me make sure I'm doing their --

[Colloquy between the Court and the Clerk]

THE COURT: Thursday, if I did four hours, you would want 1 o'clock. Let me look real quickly.

[Pause in proceedings]

THE COURT: That 130 motions that we mentioned a little bit earlier in the day is also -- it might move from

the 19th to the 26th. That's why I'm trying to see real quickly.

[Pause in proceedings]

THE COURT: That is a very busy day.

MR. AICKLEN: We also agreed on the morning of June 9 if that works better for the Court.

THE COURT: Well, here's what I'm going to do. I'm going to -- they're coming in at 1:30 today on that other case, the one I mentioned, the 10-week case. So we're going to have to make some decisions on their scheduling and things like that. They'll be here for several hours this afternoon. So, I will keep May -- either May 26th you want at 1 p.m. or you want June 9th at -- June 9th. Okay. So, June 9th you'd want at what time?

MR. AICKLEN: 9 a.m.

MS. RENWICK: 9 a.m.

MR. AICKLEN: Or 8, if it's better for you.

THE COURT: I'd say 9:30 because I've got motion calendar.

MR. AICKLEN: Oh, 9:30?

THE COURT: Then we have to break for lunch and go back and forth on that one. Okay.

Let me keep those two dates and times and we should know by end of day today if not first thing tomorrow morning.

MR. AICKLEN: Thank you.

MS. RENWICK: Thank you, Your Honor.

MR. AICKLEN: Thank you.

THE COURT: Now let me throw one other date at you and it's not a Tuesday or a Thursday. On -- if I were to do the -- I have a CD case. Hold on a second.

I think the afternoon of the 25th is where I'm heading to, but I have to check one other thing.

MR. AICKLEN: Of May?

THE COURT: So the 26th, which is not a Tuesday or a Thursday, I appreciate that. It's just I might be able to balance them and you by doing it that way.

I have to check one other case that's supposed to be in trial that week, but it may have resolved. So I have --

MR. AICKLEN: Oh I have a plaintiff's videotaped depo that I have to take on the 25th, Your Honor.

THE COURT: Okay. Let me see if I can put this other case on the 25th after them and then I can give you the 26th afternoon, but I should know that by early --

MR. AICKLEN: Thank you very much. We appreciate it.

THE COURT: -- end of day or first thing tomorrow, depending on if they tell me they need some time to check back with their offices when they're here this afternoon.

MR. AICKLEN: Thank you, Your Honor.

MR. CHURCHILL: Thank you, Your Honor.

THE COURT: So if you don't hear from us by like about 10 or 11 o'clock, feel free to [indiscernible] tomorrow. Meaning if you don't get some written -- something in writing saying that we've set it for a particular date and time, my all intention is to have my staff send you a memo by about 10 or 11 o'clock tomorrow morning with the date and the time.

MR. AICKLEN: That's great. I'm actually going to be here. I'll just pop in and see where we're at.

THE COURT: Okay. Now, do you request that I move it to a different courtroom?

MR. CHURCHILL: No, Your Honor. If -- I'm sure a mobile microphone will work just fine.

THE COURT: I just want to make sure that he has no concerns about being -- because what we'd need to do is one of two things, depending on if he's completely paralyzed, you can either request that he be in the well or if he's somewhat mobile and could get to the witness stand -- I'm just saying that is -- or the third choice, like I said, I can easily check with another department and see if they will switch with me for the afternoon.

MR. CHURCHILL: Your Honor, the well is fine and with a mobile microphone, he should be fine. But, yeah,

he's completely paralyzed.

THE COURT: I'm just trying to be cognizant and take into account any ADA accommodations if they're being requested, we're more than glad to grant them. Okay. Not being requested?

MR. CHURCHILL: Not being requested, Your Honor.

THE COURT: Okay. Defense counsel, do you have any objection of him in the well because it's just going to be the Court making a determination?

MR. AICKLEN: No, ma'am.

MS. RENWICK: No objection, Your Honor.

THE COURT: Okay. Do appreciate it. So you should hear from us by -- like I said, by like 10 or 11 o'clock tomorrow morning and maybe even sooner. Okay. And we're looking at probably the 26th at 1 p.m. as long as I can switch my other case.

MS. RENWICK: Did you want us to prepare the order on the third party Complaint?

THE COURT: I would like you to prepare the order on the third party Complaint.

MR. AICKLEN: Do you want us to prepare a draft order for everything?

THE COURT: Yeah, because then you're going to set the -- he's going to --

MR. AICKLEN: And we'll run it by Mr. Churchill.

MS. RENWICK: Of course.

THE COURT: Do you mind if it's just one combined order --

MR. CHURCHILL: Yeah, that's fine, Your Honor.

MS. RENWICK: Okay.

THE COURT: And then you can just --

MS. RENWICK: Thank you, Your Honor.

THE COURT: -- start with a blank on the date and time for the evidentiary. Thank you so very much. Okay.

PROCEEDING CONCLUDED AT 11:28 A.M.

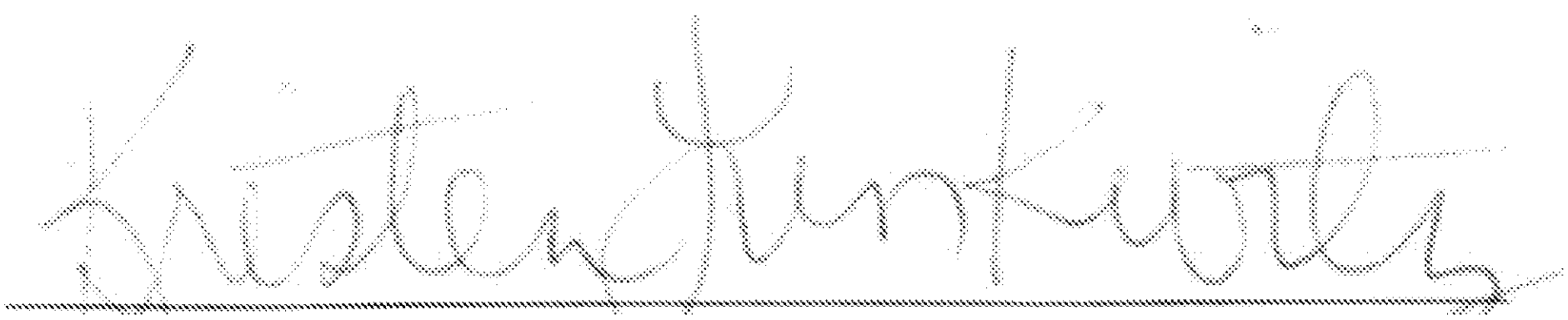
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



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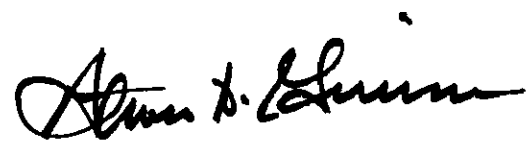

CLERK OF THE COURT

TRAN

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

X'ZAVION HAWKINS, Plaintiff, vs. GGP MEADOWS MALL, LLC, et al, Defendants.	)	CASE NO. A-15-717577 DEPT. NO. XXXI

BEFORE THE HONORABLE JOANNA KISHNER, DISTRICT COURT JUDGE

WEDNESDAY, JUNE 8, 2016

TRANSCRIPT RE:

EVIDENTIARY HEARING: DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT / DEFENDANT GGP MEADOWS MALL LLC'S JOINDER TO DEFENDANTS' MYDATT SERVICES, INC. AND MARK WARNER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT / PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

PLAINTIFF'S MOTION TO DISQUALIFY LEWIS BRISBOIS BISGAARD & SMITH AND FOR SANCTIONS ON ORDER SHORTENING TIME

APPEARANCES:

For the Plaintiff:	DAVID J. CHURCHILL, ESQ. JOLENE J. MANKE, ESQ.
For Defendants Mydatt Services, Inc. Mark Warner, and Lewis, Brisbois, Bisgaard & Smith:	JOHN P. LAVERY, ESQ. DAVID B. AVAKIAN, ESQ. HAROLD ROSENTHAL, ESQ.
For Defendants GGP Meadows Mall, LLC, Mydatt Services, Inc., and Mark Warner:	CHARLENE RENWICK, ESQ. DAVID S. LEE, ESQ.
ALSO PRESENT:	X'ZAVION HAWKINS

RECORDED BY: Rachelle Hamilton, Court Recorder

CLARK COUNTY, NEVADA WEDNESDAY, JUNE 8, 2016

PROCEEDINGS

(PROCEEDINGS BEGAN AT 10:59 A.M.)

THE COURT: Calling Case 717577, Hawkins versus GGP Meadows Mall, et al. Counsel, can I get your appearances, please.

MR. CHURCHILL: Yes. David Churchill for the plaintiff, X'Zavion Hawkins.

MR. LAVERY: Jon Lavery on behalf of Lewis Brisbois, as well as the defendants.

MR. AVAKIAN: David Avakian on behalf of Mydatt and Mark Warner.

MR. ROSENTHAL: Harold Rosenthal for Mydatt and Mark Warner.

THE COURT: Are we doing appearances in the back?

MS. RENWICK: Charlene Renwick on behalf of GGP Meadows Mall, Mydatt and Mark Warner.

MR. LEE: Good morning, Your Honor. David Lee on behalf of those parties as well.

THE COURT: Okay, thanks.

Just assisting?

UNKNOWN SPEAKER: I'm their paralegal.

THE COURT: Assisting?

MR. AVAKIAN: Yes. She's a paralegal.

THE COURT: Okay. So for purposes of argument, do we have it okay that all counsel -- you can see, since this isn't my regular courtroom, I don't really have as much flexibility. Do you need an extra chair at counsel table?

MS. RENWICK: I think we're fine here, Your Honor.

THE COURT: Are you? Okay.

MR. LEE: That's fine, Your Honor.

MR. LAVERY: I think we're good.

THE COURT: So then if you need to, you can come forward if you need to the podium. Madame Court Recorder, can you hear okay when they make their appearances from where they're at?

COURT RECORDER: A little bit, yeah.

THE COURT: Okay. The only thing I ask is if you're going to -- it's going to be a little bit awkward, I guess for objections. I shouldn't use the word awkward, I mean challenging. If you are wishing to make an objection, the only thing is if you don't mind please speak a little loudly, and if for some reason my court recorder cannot hear it we might just have to ask you to repeat the objection, okay, so we get a clear record. Okay, and you're set on your side.

Okay. So as we discussed on the telephonic, I appreciate -- now, your case resolved, right?

MR. CHURCHILL: It did, Your Honor.

THE COURT: Okay. So you're fine with your scheduling and everything is taken care of on that end?

MR. CHURCHILL: Correct.

THE COURT: Okay. So here's what the Court is anticipating doing. Starting with the motion to disqualify, as we stated on the telephonic and as was previously stated in the last hearing because it made the most sense from a procedural standpoint, and then move on to the motion to dismiss hearing. Now, for the motion to disqualify, we are of course going to have to break at the lunch hour because

I appreciate although you all are starting at 11:00, I'm sure you can appreciate my staff, we started at 8:15, 8:30. We were finishing up a bench trial in order to make sure to accommodate you all. So we just need to make sure we're going to break -- I'm going to tell you no later than 12:10 for the lunch break, so however that timing is with regards to where we are in the motion to disqualify.

And defense, once again I have to ask you if you're going to have witnesses for that because that seems to be a question, and so just timing-wise I'm just giving you a heads-up of when we're going to break for lunch so you can accommodate.

MR. CHURCHILL: Your Honor, this was never set as an evidentiary hearing. What we did do, however -- for the purposes of the motion to disqualify it was not set as an evidentiary hearing but what we did do, we obtained a supplemental affidavit from Jason Barrus and an affidavit from Lloyd Baker that we will provide to Your Honor that deals specifically with what occurred at the meeting with Mr. -- is it Shpirt? I don't --

MR. LAVERY: Shpirt.

MR. CHURCHILL: Shpirt.

THE COURT: Has that been provided to defendants prior to today?

MR. CHURCHILL: I just got it. I just got it yesterday evening, Your Honor, and I'm happy to provide them right now.

THE COURT: The Court doesn't have it either?

MR. CHURCHILL: It does not, Your Honor.

THE COURT: Okay. I just need a point of clarification. Some of you were on the telephonic, some of you weren't, so I'm just going to go back. During the

telephonic for the first time it was stated to the Court that there was going to be potentially three live witnesses. One was your client, who's here. No worries, you're fine. And then it was also either going to be Mr. Adams and Ms. Eglet and then also potentially Mr. Barrus. So is it still the intention? Because we hadn't discussed whether there was objections because Mr. Lavery wasn't on the phone.

MR. LAVERY: I was not.

THE COURT: And as Mr. Avakian said that you were handling this portion of it --

MR. LAVERY: That's correct.

THE COURT: -- and so since that was new information that was -- I don't want to get -- I want you all to have an opportunity to speak the merits of what you're here for today, but that procedural issue really I was going to take care of first thing this morning because that made the most sense. So any live witnesses?

MR. CHURCHILL: The only live witness -- and, Your Honor, it may not even be necessary to call him as a live witness, Mr. Hawkins will simply tell you -- it's in the record -- he never --

THE COURT: Not getting to the merits, just --

MR. CHURCHILL: Yeah.

THE COURT: It's a simple yes or no. Sorry. Is there any live witnesses?

MR. CHURCHILL: The only live witness would be Mr. Hawkins.

THE COURT: Okay. So, counsel, you're standing up, so I'm assuming you have a position.

MR. LAVERY: I am standing. I have several positions, Your Honor, quite frankly.

THE COURT: Sure.

MR. LAVERY: One, as counsel correctly stated, this was not set for an evidentiary hearing for purposes of the motion to disqualify.

THE COURT: Just to be clear, no one requested it. That's the reason why it wasn't set. If either side had requested it, the Court would have done so.

MR. LAVERY: Exactly. That's my point. It's never been requested to be one, it was never set as one. So with respect to live witnesses for something that wasn't set for an evidentiary hearing, I'd obviously object. I'm now being told that they're going to submit affidavits of individuals who I've had no knowledge of. I have not seen these affidavits. Apparently the Court hasn't seen those affidavits. And now I'm going to potentially be placed in the position of having to respond to information in those affidavits that I was unaware of. It's untimely, it's improper, it's objectionable and I object.

THE COURT: Okay. Counsel, I'm going to let you respond and then I'm going to ask a quick question because the Court also received in the fair is fair late information issue, and you know where I'm going with this one --

MS. RENWICK: Yes, Your Honor.

THE COURT: -- where I'm going. Just so we're clear because even though everybody here -- a transcript is not going to read what you are correctly interpreting is we received this morning in our box defendant GGP Meadows Mall, LLC's supplemental exhibit to joinder to defendants Mydatt Services, Inc. and Mark Warner's motion to dismiss plaintiff's complaint. So the Court's general question is, is this going to be what's fair for the goose is fair for the gander, so that if you all want me to read and take into consideration everything, regardless of if it was

provided for the first time today, or are you all going to have different positions on your different aspects? And since it came from counsel who's representing an overlap with the same client, I wasn't sure if you were aware of the supplement, so I'm trying to make it clear to everyone what the Court --

MR. LAVERY: I have -- I'm sorry, Judge, I didn't mean to interrupt.

THE COURT: That's okay.

COURT RECORDER: I'm sorry, could you move the microphone?

MR. LAVERY: Sorry.

THE COURT: I appreciate you setting it over there so they can talk and then --

MR. LAVERY: Correct, and I just didn't bother to step back. I'm sorry. I have not seen the document that you have just referenced, either. I don't know if there's anything substantive in it or whether it is simply argument. If it is simply argument, it's clearly distinguishable from substantive affidavits that I'm being called upon to respond to today. So in the form of a pleading and whether or not the Court is inclined to consider a proceeding -- a pleading that's being filed at the last moment versus substantive affidavits that bear on the underlying issue, I think there's a distinction to be drawn there. But I saw counsel stand up, so --

THE COURT: Let me put it this way. It's this thick and it includes -- Now, granted, it was in our box --

MR. LAVERY: I may be able to make this easier for you.

THE COURT: -- at 7:54.

MR. LAVERY: I may be able to make this easier for you.

THE COURT: Okay.

MR. LAVERY: Again, I apologize, I didn't mean to interrupt. I think counsel is going to withdraw that document.

MS. RENWICK: Well, Your Honor, if I may respond to it first.

THE COURT: Sure.

MS. RENWICK: The document that we provided yesterday in our exhibit is actually just a summary of all of the exhibits that were already attached in the underlying motion. That would be the voluntary statement of the plaintiff, that would be the plaintiff's deposition testimony, as well as the plaintiff's errata. And all it is is a summary of specific portions of each three of those documents for purposes of helping the Court to follow along during oral argument. So to the extent that it's objectionable, we're happy to withdraw it. However, all it does is reference records that have already been submitted with the underlying motion and are in the record already.

THE COURT: Okay. Because you understand the easy answer is if all parties wish this Court to take into consideration everything that was submitted today, if everyone --

MS. RENWICK: Your Honor, if I may also -- we did serve that yesterday on all parties. We electronically served it.

THE COURT: The Court didn't have it in its box until 7:54.

MS. RENWICK: I apologize, Your Honor. We had a runner come down.

THE COURT: Okay.

MR. CHURCHILL: I've never seen it, Your Honor.

THE COURT: You've never seen that. Okay. So we don't get caught up in hours of procedural aspects, the reason why I referenced the motion to dismiss,

just so that we're clear, is that if all parties said, you know what, Judge, we appreciate each side submitted some late things, we want you to consider everything, that could be an easy answer. Is the easy answer what the parties are going to want this Court to do?

MR. CHURCHILL: I'm fine with the easy answer, Your Honor.

(Mr. Lavery confers with Mr. Avakian)

MR. LAVERY: Sorry, Judge.

THE COURT: No worries.

MR. LAVERY: The question -- again, I haven't seen the documents so I don't know what it's being offered for. If it addresses the motion to dismiss, that's one thing. If it's addressing the motion to disqualify, those are two separate and distinct motions, two separate and distinct issues. I am --

THE COURT: You're at a loss because you don't have either of the things that you're being asked to give an opinion on.

MR. LAVERY: Right. And I don't want to be put in the position and I don't want to make a representation to the Court that I am satisfied with addressing a document that even as we stand here I still haven't seen. It hasn't been handed to me to even look at it and tell you, yeah, I'm fine with going forward with a motion to disqualify my law firm based upon representations of people on statements I've never seen before.

THE COURT: So it seems to me that it's going to make the most sense, without waiving any of your objections -- Counsel, would it make sense to show him the affidavits --

MR. CHURCHILL: Yeah.

THE COURT: -- to see if there is an issue? And it would really be helpful if the Court actually had a copy, too, because if somebody is asking me to rule on something, I cannot do so unless I have actually seen it.

MR. LAVERY: Well, that was part of my point.

(Mr. Churchill hands documents to Mr. Lavery)

THE COURT: My marshal will get a copy to me. Thank you.

MR. CHURCHILL: That's --

THE COURT: Do you have copies?

MR. CHURCHILL: Those are both.

THE COURT: Pardon?

MR. CHURCHILL: There's -- that's one for -- please give that to the marshal. That's the second affidavit. And now, Mr. Lavery, I'll give you the same things that have been given to the Court right now.

(Colloquy while Mr. Churchill hands copies of affidavits to Mr. Lavery and to the Court)

THE COURT: I have a two-page document that says Affidavit of Jason W. Barrus on the first page. On the second page it says subscribed as sworn to me on the 7th day of June, 2016. I have an affidavit of Lloyd Baker. On the first page it's typed and on the second page it says subscribed as sworn to me this 6th day of June, 2016. Is that the two documents?

MR. CHURCHILL: Yes, Your Honor.

THE COURT: Okay. So what the Court is going to do, the Court is not going to read these yet. I'm going to let counsel for defense -- Now, counsel for defense, the other counsel for defense, do you want the Court's copy? Because I'm not

going to write on them yet. I'm just going to see if there's an objection first and if there's an objection I'm going to take a moment and review them.

MR. LAVERY: If we may have the Court's indulgence, I'll just let everybody look over my shoulder here.

MR. CHURCHILL: I have an extra copy.

MS. RENWICK: I think that's fine, Your Honor, we'll just share.

MR. CHURCHILL: Charlene, I have an extra copy.

MS. RENWICK: Great. Perfect. Thank you.

THE COURT: Okay, no worries. Okay.

MR. LAVERY: Thank you, Judge.

THE COURT: Sure.

(Mr. Churchill hands copies of documents to Ms. Renwick)

(Pause in the proceedings)

MR. LAVERY: Your Honor, I've read the documents.

THE COURT: Okay. So --

MR. LAVERY: I'm going to stand by my objection. The information that's contained in these affidavits would have been or should have been available since the inception of this case to voice them. They materially changed some of the nature and extent that the allegation made against Mr. Shpirt and my law firm. And to present them past the 11th hour at the 12th hour and ask the Court to consider them in light of what's been presented up to this point, I'm going to object. They're prejudicial, they're untimely, and they certainly could have been secured long before now. They were created two days ago and yet they're being handed to me today and to the Court today. Certainly if they were created two days ago they could have

been produced to both of us two days ago but they weren't. And to walk in here now and expect me or anybody else to respond to them I think is inappropriate.

THE COURT: Okay. The position of co-counsel, go ahead.

MS. RENWICK: Your Honor, we certainly didn't take a position on this motion. We agree with counsel. However, to assist the Court in making its decision, GGP will withdraw its exhibit which was filed yesterday and which the Court received this morning.

THE COURT: And that's not determinative of my decision, it's just oftentimes when both parties provide things late, they say guess what, Judge, we'd like you to review it all. Okay. In light of that there's an objection, let me have -- without going into the substance of the motion --

MR. CHURCHILL: Yeah.

THE COURT: -- I need to go for the procedural aspect of why the day of the hearing. And remember what the Court has to take into consideration. This was originally previously set in late May. And I know there's a difference of opinion, but it doesn't matter. We're here in an ADA accessible courtroom to insure all parties have a full opportunity to participate to the extent they wish to do so in today's proceedings. So, what do I do about the fact that this was previously set and then now I have new affidavits?

MR. CHURCHILL: Well, Your Honor, the simple answer to that is this. This motion was brought on an order shortening time, okay, after our prior hearing where Mr. Aicklen made some pretty wild accusations, in our opinion. And based on those accusations my firm had to start doing a little bit of research. Lo and behold, Your Honor, what do we find out? We find out that the very attorney that handled this

case at a prior firm is now working for the defense firm, okay. It's a huge conflict of interest. Your Honor, we bring --

THE COURT: Remember, we're not going to do the arguments.

MR. CHURCHILL: I understand.

THE COURT: I'm doing just the dates because your OST was filed on May 11th.

MR. CHURCHILL: Right.

THE COURT: Because you asked for an OST, we set it at the same time --

MR. CHURCHILL: Correct.

THE COURT: -- it was going to be the motion to dismiss.

MR. CHURCHILL: And it was for a motion, Your Honor. Then what happens, what happens is this, Your Honor. What typically happens with these motions to disqualify in my understanding, and I've actually reviewed one of your prior orders regarding a motion to disqualify, what typically happens is you have a motion and if you're able -- if your Court is able to decide right then and there on the merits you will issue a decision; otherwise what you would do is hold an evidentiary hearing. That was our understanding going forward.

That changed a little bit, Your Honor, on Monday. On Monday it's my understanding -- and here's the problem. If you want to talk about an 11th hour, on Sunday evening I find out that one of the firms that referred us a case has backed out of a trial and I need to step in Monday morning, so I'm unable to participate in the telephone conference with Your Honor. But this is what happened.

THE COURT: But counsel, Ms. Manke said that you were notified on Friday that that case was going. But didn't you have --

MR. CHURCHILL: I wasn't involved in the case. It was Jared Anderson's case. They brought in Jared Anderson to assist with the trial. Then on Sunday they tell Jared Anderson we're out, we're not doing it, we're not putting up our portion of anything.

THE COURT: Things I can't hear about.

MR. CHURCHILL: Just -- it was crazy stuff, Your Honor. So I'm brought in Sunday evening to try and get ready for a case Monday morning and the havoc that ensued because of that, I don't even want to get into. But, Your Honor, the point is there's then a telephone conference to advise Your Honor that this is what just happened to me. Luckily after we picked a jury the case resolved yesterday.

Now, that being said it came to my attention on Monday during a break, Ms. Manke called me and said this is what happened. Present your evidence at the time of the hearing. Present your evidence. So that means -- and that we have a limited time. So what I'm doing on Monday is trying to scramble to get the affidavits. In fact, one of the people that I was trying to get the affidavit from, who said he would provide me one, he never responded to me, and I was able to get a hold of Mr. Barrus and Mr. Baker at that time. So, Your Honor, that's the -- that is the purpose or the reason why they're being provided at this time because we found out on Monday that Your Honor wanted to hear evidence, like an evidentiary hearing today.

THE COURT: Excuse me. That's completely not accurate.

MR. CHURCHILL: That's the information being relayed to me.

THE COURT: I mean, I didn't say I wanted an evidentiary hearing. Let's be clear. This Court -- okay, let's back up a couple of steps --

MR. CHURCHILL: Sure.

THE COURT: -- so that we're clear on what the Court had knowledge of. Let's focus on this case, because on the other case what I understood is that it got transferred from Judge Cory to Judge Gonzalez. She met with you around 10:00 a.m. on Monday morning, offered you the opportunity, either she could take the case to go forward, find another department, or you all could continue the case.

MR. CHURCHILL: Correct.

THE COURT: You all decided on that other case to go forward on that day, knowing full well that you already had this hearing set up in this department, okay. That's one factor the Court was aware of. The Court didn't become aware of that until a little bit later but I'm one of the judges who got the email, can you take a case.

MR. CHURCHILL: Sure.

THE COURT: I went to look up to see which case it was and I was like, well, no, I can't because I've got this huge pre-scheduled, pre-arranged, switched courtrooms, had two judges on standby. Obviously, you know, anticipating that one judge's docket may change, so we had two courtrooms available to insure we could have it for ADA compliance, okay. And I appreciate now that people have different positions on whether they really needed it or not, but the bottom line is we are going to comply with every state and federal law and we want to make sure and insure that everyone has a full opportunity to be heard, okay.

And we heard about the ADA issue the other week, which is why when you guys got the memo and you had two dates -- let's go back a step. When somebody called, and we're not going to get into who called, okay, somebody

called, mentions ADA to any department, okay, particularly our department, given my background and experience, someone mentions those words, even if somebody said something at a hearing, we're not going to go and investigate, are they really making a formal request, are they just checking, are they just inquiring. No, we're going to -- of course we're going to step ahead of the game and make sure that we are fully compliant and assuring that everyone feels comfortable. We're not going to go back and ask for further investigation. It doesn't really matter. If somebody says it, boom, we're going to get it taken care of for you all, okay. That meant we then had to get a different courtroom because, as I had told the parties and you know, the older courtroom, a B courtroom on a higher floor does not have a lift. So we checked with other departments. Two departments -- we could have gotten more, but two departments volunteered immediately, so we had a first Plan A and we had a Plan B on two courtrooms. And we're in the Plan B courtroom today but we had those two courtrooms ready.

We then sent you a memo that gave two other dates in two separate weeks, appreciating that you all had trial schedules and we didn't know what people's trial schedules may be the week of May 31st and the week of this week. So we gave a date within each week to try and do it and we were going to balance it with a trial that I had going on that has now resolved. So we thought that we were trying to make sure you had sufficient opportunities, realizing there would be some change, realizing that parties may need to take care of different situations.

So we did all of that before the Memorial holiday, which is after we already had the pleadings. We had your reply, we had the OST filed on 5/11, opposition 5/18, reply on 5/20. Nobody in any of that intervening time made any

request of this Court for supplemental information. No one made any request at all, at least to this Court's knowledge, to hold any evidentiary hearing with regards to a motion to disqualify, which is the normal process. We always say if you're allocating time -- and if you all recall, when we were allocating the time for the hearing it was because of certain witnesses with regards to the motion to dismiss, and no one mentioned in court, and you were there, that anybody wanted an evidentiary hearing. Since that time we got no request that I'm aware of with regards to any evidentiary hearing with regards to the motion to disqualify or to call any witnesses. In fact, the only thing that we received -- you got the memo, one phone call to my knowledge about ADA, one phone call about tech, which isn't something -- and I think that phone call came in yesterday or today about tech setup because we're in a different courtroom.

And then the next thing we received is the June 6th letter. Now, obviously, once again, it's June 6th. Knowing that I've already seen some subpoenas go out, knowing that you all have probably blocked a good part of your day and have other things going on, at this juncture we weren't aware that it was -- the other case was your case, but we immediately tried to set up a telephonic. I cleared my whole day pretty much and 8:45 the following day to make sure I could get you all taken care of to set up time to do a telephonic to see what the parties needed, because one again, in the intervening time frame this Court doesn't know if you all have met and conferred, have a different viewpoint, maybe have agreed on certain things, etcetera. So as of June 6th the telephonic was to insure whether the parties had some kind of agreement that they didn't wish to go forward. If they did want to go forward, did they want one hearing versus the other hearing. Once

again, the Court -- I have a couple sentence letter that says -- with this issue.

During that telephonic this Court said that the first news I was receiving of witnesses was on that telephonic, which is an accurate statement. Nobody told me before that anyone was expecting any witnesses for the motion to disqualify purposes. Trying to coordinate around your trial schedule to take into account that there are subpoenaed witnesses by defendants, taking into account there was three individuals named that may be coming in, to give them some idea of their time if they were coming in, and the Court really was going to deal with it today to see if I even had an objection because in fairness the counsel who was on the phone, the two counsel from Lewis Brisbois specifically stated -- there was only two counsel, I think it was only Ms. Manke and Mr. Aicklen -- specifically stated that they were not the ones handling the motion to disqualify, counsel who's now here was going to be handling it. And so -- and you weren't on the phone, so the Court wasn't going to make any decision until I had the two main people handling this issue before me and give you each an opportunity to set forth your position and the Court can make a determination, which is why you heard me first thing today was from a procedural standpoint to see if there are any issues, to make sure that the parties that are fully versed in this case have an opportunity to set that forth.

There was no reason not to go forward today because even after we set that, just in case there was any potential issue you could have argued the motion to disqualify at the beginning, realizing fully from Judge Gonzalez your initial trial time for today wasn't until one o'clock. So by giving you the amount of time that we were giving you, you would have a full -- Ms. Manke represented on the phone she was familiar with the case and defense counsel stated that she was

familiar with the case and had briefed the underlying issues. And so if you had any objection when you came in person, rather than disturbing you from your trial, I could have dealt with it when you got here. So just so you understand from the Court's position we are trying everything to make sure that everyone has a full opportunity to be heard.

So this Court didn't require an affidavit, didn't say it would or would not do anything about an evidentiary hearing, expressed its concern why for the first time it was being told on a telephonic in the afternoon of June 6th that there was going to be three witnesses, but yet being told that you had very limited availability, fully understanding that you and Ms. Manke may not have had an opportunity to fully speak because you were in the midst of a trial, she was trying to cover certain things. But yet to be fair to everyone, Mr. Lavery wasn't on the phone, and to allow you all to appear, set your things on the record in person.

So that's the end of my -- so you have an understanding from the background standpoint from the Court, I'm not requiring or not requiring anything. I'm here holding the hearing at the time and date that all parties asked this Court to hold two hearings.

MR. CHURCHILL: Your Honor, here's the thing. The affidavits of Mr. Barrus and Mr. Baker, okay, are exactly what they would testify if they were called here today. The only thing we're doing is saving time. That is the only thing that we're doing by producing the affidavits of them instead of bringing them here in person, is to save this Court time because it was my understanding that we have a narrow window today. We have to be done by three o'clock, two hearings that are both substantial in nature. And so we were -- we decided the best thing to do to get all

of the evidence in front of Your Honor is to get the affidavits from Mr. Baker and Mr. Barrus and Mr. Adams. And Mr. Adams unfortunately did not -- he responded but ultimately didn't give us the affidavit yet.

So it's -- this isn't an unfair surprise to them. They were apprised that these gentlemen would be providing testimony here today. And all they're doing is setting forth on paper in less than two full pages exactly what happened between Mr. Shpirt and X'Zavion Hawkins. And I think it's important to realize, Your Honor, that according to Mr. Shpirt's affidavit he doesn't really remember what happened. So we need to get the people there or you need to understand from the people that were there what actually happened.

THE COURT: Okay, thank you.

MR. LAVERY: Your Honor, that makes, quite candidly, absolutely no sense to me whatsoever. Mr. Barrus has submitted two prior affidavits. None of the information that's contained in this affidavit was in those other affidavits, so we've had that opportunity. To say that we're going to save the Court time by giving you an affidavit and thus depriving me of the opportunity to cross-examine these people, when we've already acknowledged that there wasn't an evidentiary hearing set, we didn't ask for an evidentiary hearing, we weren't requiring these people or asking these people to be present for such a hearing, we were arguing a motion.

So to come in and say, well, we're trying to save the Court time so that we can put in whatever evidence we want, late, despite the fact we've had two other opportunities to do it, we've had Mr. Shpirt's affidavit for well over a month, we've had two different conferences and a different hearing set with the Court. And by the way, Mr. Lavery is not going to get an opportunity to cross-examine either one

of these people for something that we weren't set to cross-examine them for in the first place. If that makes sense to the Court, so be it. It doesn't make sense to me. And my client is materially prejudiced by that.

THE COURT: I need a point of clarification from those of you who were on the conference call, okay. I know the Court asked the question, i.e., I asked the question, the Court, about whether or not defense counsel was going to have -- want an opportunity to cross-examine these witnesses. I was talking about pure timing, because the only thing I was doing on the telephonic phone call was timing. Now, I don't want to put anyone on the spot, but that is an issue that this Court has to address with regards to the request, okay, and I know you all are spending a lot of time on this and we haven't even moved forward to where we need to get to go.

So I'm going to ask -- you look like --

MS. MANKE: Your Honor, I'm Jolene Manke.

THE COURT: Sure.

MS. MANKE: And I was on the conference call.

THE COURT: Right.

MS. MANKE: Mr. Aicklen, I believe, and I could be wrong, it could have been Mr. Avakian, might have responded to the question when I said that we needed an hour and a half for the motion to disqualify, and Mr. Aicklen represented that he needed fifteen minutes. I don't remember whether or not he said that included cross-examination.

THE COURT: Because they went first and they gave their estimate and then you mentioned the witnesses for the timing.

MS. MANKE: That's correct, Your Honor.

THE COURT: And then I did ask that question.

MR. AVAKIAN: Right.

THE COURT: So I'm going to ask everyone's recollection because -- I'm asking the people who were on the phone call because --

MR. CHURCHILL: Yeah. Well, I just wanted to make a point of clarification. And this isn't the first time, but, Your Honor, Mr. Lavery just said we've had well over a month to review --

THE COURT: May 18th. I appreciate the May 18th affidavit. I know dates.

MR. CHURCHILL: Yeah, so if he means well over two weeks, then maybe.

MR. AVAKIAN: My understanding of the phone call, Your Honor, is that Mr. Aicklen said first fifteen minutes. That's when we were just talking about a motion. Ms. Manke then brings up, oh, we plan to have live witnesses. You said, well, that's the first the Court has heard of it. You asked Ms. Manke a very direct question, Ms. Manke, did you put into your moving papers a request for an evidentiary hearing? Ms. Manke said no, I don't believe that's the case. We said, well, obviously we would object to having an evidentiary hearing. We said we'd like to know who you plan to call. Ms. Manke said we plan to call either Tracy Eglet or Bob Adams, who I don't see here, Jason Barrus, don't see him here, and potentially the plaintiff, who I do see here. And that's exactly -- there wasn't any questioning after that about timing of the evidentiary hearing. She said an hour and a half. Mr. Aicklen had put forth fifteen minutes when we were talking about the motion.

THE COURT: Counsel --

MR. AVAKIAN: And there was no mention of Lloyd Baker -- I'm sorry --

THE COURT: Yeah.

MR. AVAKIAN: -- as being a potential witness.

THE COURT: Lloyd Baker was not mentioned on the phone.

MR. AVAKIAN: Correct.

MS. RENWICK: Your Honor, Charlene Renwick. I was on the call as well and I agree with Mr. Avakian. The initial fifteen minutes was Mr. Aicklen referring to the motion and he did specifically inform the Court that he had -- until that call he had absolutely no idea that plaintiff intended to call three witnesses and turn this into an evidentiary hearing, which was never requested.

THE COURT: But after Ms. Manke said the hour and a half, I believe I said from scheduling purposes, and I then said are you all going to want an opportunity for cross-examination, appreciating the fact that Mr. Averly --

MR. LAVERY: Laverly.

THE COURT: -- Laverly. I'm sorry. I keep on saying it a soft A instead of a hard A, so I'm -- and the reason why -- normally I would call everyone counsel. The reason why I'm specifically doing it a little bit differently here today and I'm trying to do it equally for everyone is because of the individuals who are on the phone versus not on the phone. And so if I just say plaintiff's counsel and defense counsel, then it may not clarify who's there. Does anyone oppose the fact that I'm using some of your names just for that clarification point?

MR. AVAKIAN: That's fine, Your Honor.

MR. LAVERY: No. And I'll acknowledge that I was not part of the telephone conf-- just for purposes of the record.

THE COURT: Okay. So, then I asked -- I did ask the cross-examination question after that in light of that estimate because I was trying to get timing,

because then I believe I said something to the effect of mathematically that does not work out for a particular day --

MR. AVAKIAN: Correct.

THE COURT: -- you know what I mean, that by my math -- I believe I said something to the effect of by my math that doesn't get this all done in a day and that you all had specifically requested four hours for both of these to take place. That's where we got the four hours. The three o'clock is because you all's original estimate was four hours, eleven o'clock to three o'clock is four hours, but it really wasn't going to be exactly that because we have the lunch break, obviously. But --

MS. RENWICK: I believe in response to that, Your Honor, that's when we shortened our time with respect to the second motion, so as to be able to address the evidentiary nature of the first hearing, to be able to do it all in four hours. So you'll recall that I lessened my time to about thirty minutes or less and Mr. Avakian I believe said that he would shorten the second motion to approximately an hour, an hour and a half.

MR. AVAKIAN: And Your Honor --

THE COURT: I just don't -- my question really is does anyone recall directly answering the question the Court had asked about cross-examination, or did the timing issue get shortened and so that question really did go not fully answered?

MR. AVAKIAN: I believe we did say that, you know, depending on the direct testimony that there would likely be some follow-ups on cross-examination. However, we also said, and I believe my understanding after the call was that the entirety of this first motion would be an hour and a half, which is why we informed the police officers to be at the courtroom at 12:30, you know, to make sure --

THE COURT: Well, I did tell you we were having lunch, so.

MR. AVAKIAN: Right. Exactly. And to be there a little bit early just to make sure that they were in fact here. And I do believe that we can keep that schedule. I don't think that that's going to be an issue, and I think that we can get done what we need to in the afternoon as well. We have shortened things up and I think we can keep that schedule, Your Honor.

MR. LAVERY: Your Honor, just to convolute the matter just slightly even further, I have an argument in front of the court of appeals at 1:30. I'm not involved in the second motion, I'm just involved with this motion.

THE COURT: Okay.

MR. LAVERY: So I anticipate that -- which is why I agreed to this date because I figured I'd be done long before my 1:30 time to be upstairs.

THE COURT: Let me tell you where the Court's inclination is to go. I have strong concerns about a brand new affidavit of Mr. Baker that wasn't ever mentioned in pleadings, not previously presented and not even mentioned on the telephonic on June 6th, for a new affidavit to come in on an individual whose name was not even specifically mentioned even under the broadest brush of trying to say that there was witnesses anticipated, okay. Now, I am appreciative this originally came for an OST and the arguments made as to if this was originally set in the end of May taken into consideration, but the OST is now almost a month because 5/11 to today, June 8th, almost a month. And so I don't see any good cause for not obtaining it if you chose to obtain, particularly since I don't have a reply until May 20th, or asking leave of the Court sometime after May 20th that there is additional information in light of reviewing for the hearing to add in an affidavit or to add in some witness, okay.