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Electronically Filed
Jan 09 2020 01:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Petitioners,

DISTRICT COURT NOS.:

CV18-01798 and CV18-02032

COURT and BARRY L. BRESLOW, as
District Judge,

Respondents.

SHEILA MICHAELS, and KATHERYN
FRITTER, real parties in interest.

APPENDIX VOLUME 4 TRANSCRIPT 1

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

8

HONORABLE BARRY L. BRESLOW

9

JOHN WALKER,

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Plaintiff,

11

vs.

Case Nos. CV18-01798 & CV18-02032

12

SHEILA MICHAELS,

Department No. 8

13

Defendant.

14

-----/

15

RALPH ORTEGA,

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Plaintiff,

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vs.

18

KATHERYN FITTER,

19

Defendant.

20

-----/

21

TRANSCRIPT OF PROCEEDINGS

22

Evidentiary hearing

November 12, 2019

APPEARANCES:

23

24

For the Plaintiffs:

William Kendall
Attorney at law
Reno, Nevada

1 For Farmers Insurance: Adam McMillen
2 Attorney at law
3 Reno, Nevada
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24 Reported by: Isolde Zihn, CCR #87

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1 RENO, NEVADA, TUESDAY, NOVEMBER 12, 2019, 10:00 A.M.

2 THE COURT: Good morning.

3 Please be seated.

4 MR. KENDALL: Good morning.

5 THE COURT: Okay. We are on the record in two cases.

6 The case numbers are civil 18-02032 and civil 18-01798. In

7 the latter case, it's Walker versus Michaels; in the former,

8 it's Ortega versus Fitter.

9 Starting with counsel for the plaintiff and the

10 movant here, please state your appearance.

11 MR. KENDALL: William Kendall, for the plaintiffs.

12 THE COURT: Mr. Kendall.

13 And for the defense.

14 MR. MCMILLEN: Good morning, Your Honor.

15 Adam McMillen, on behalf of the defendants.

16 THE COURT: Thank you very much.

17 All right. We're here today based on two motions

18 that have been filed by counsel for plaintiff seeking to

19 strike the respective requests for trial de novo.

20 Let me say, initially, that we had a healthy

21 discussion in chambers off the record this morning for both

22 counsel to explain to the Court what the anticipated concern

23 would be about and respond to questions of the Court. The

24 Court thanks both sides for that discussion.

1 The Court has reviewed the briefing and the exhibits.

2 The Court has reviewed the guiding authority each
3 side has presented. As limited as it is in cases like this,
4 I think we all can agree that the jurisprudence from the
5 Nevada Supreme Court is fairly limited in arbitration
6 matters. Most disputes don't get all the way up there.

7 This case -- these cases present an interesting legal
8 question for the Court; that is, whether conduct, if
9 factually shown to exist, identifying Farmers, through
10 counsel, of regularly and routinely filing requests for trial
11 de novo after adverse plaintiff arbitration awards, by
12 itself, reaches a level such that it constitutes bad faith,
13 and should preclude a trial de novo from occurring.

14 Plaintiff believes there's been a systemic problem
15 with the manner in which Farmers, through counsel, exercises
16 its right to trial de novo.

17 Defense believes that, both taking its conduct as a
18 whole, as well as the unique issues of the matters that they
19 de novo'd, suggest that they have done nothing that
20 implicates a bad-faith determination from the Court.

21 So let me hear, first, if you would, just
22 Mr. Kendall, what you believe the evidence will show, just
23 summarize it for the Court briefly; and what are you asking
24 to Court to do based on what you believe the evidence will

1 show?

2 MR. KENDALL: All right. Thank you, Your Honor.

3 THE COURT: Yes.

4 MR. KENDALL: The evidence is going to show
5 this: When Farmers de novo'd the first case, Walker, I got
6 curious about what they were doing in the program as regards
7 to filing requests for trial de novo in cases that they lost
8 at arbitration.

9 THE COURT: And describe "lost at arbitration." Do
10 you mean any award?

11 MR. KENDALL: Any plaintiff award at arbitration,
12 what were they doing with them? Were they de novoing them?
13 Were they not de novoing them? What was happening?

14 So I went to washoecourts.us, and I printed out -- I
15 did a search, "Adam P. McMillen." That pulled up every case
16 that Mr. McMillen has been counsel of record on. And I went
17 back three years. I know he started somewhere around -- with
18 Farmers, around in October of '17, around there.

19 So I went way back before then, and then I tediously
20 looked at every single case that he was counsel of record on,
21 and I culled out the ones that were arbitration cases, where
22 he was representing a Farmers' insured. So I got a list of
23 those.

24 Then I went to the eFile system, and I looked at

1 every single case. And I found that, in the time that Mr.
2 McMillen has been at Farmers, he has had 11 cases -- 10 cases
3 at the time I filed the Walker motion -- 10 cases that
4 resulted in a plaintiff award, and he filed a request for de
5 novo in every single one of them. A hundred percent of the
6 cases that he lost -- i.e., a plaintiff's award -- he de
7 novo'd.

8 So I thought: That's not right. And then I started
9 doing some research on it. And I found the Gittings case,
10 which, in my opinion, is right on point on this topic of
11 bad-faith participation in the Arbitration Program. Not in
12 the individual hearings. That's not what we're here about.
13 We're talking about participation in the program as a
14 litigant overall. What are you doing? Are you using the
15 program to delay payment, to harass the other side, to
16 increase the cost of litigation, and/or to force the
17 plaintiff to take less in resolving the case?

18 So I went through all of the criteria in the Gittings
19 case. And in Gittings, the Nevada Supreme Court says that --
20 and this was the one thing that caused me to say: Yes, I
21 think they're abusing the program. I think they're
22 participating in bad faith in the program.

23 And that is where the Supreme Court says, "The
24 plaintiff alleged that Allstate Insurance Company is

1 utilizing the mandatory Arbitration Program as a method of
2 delay, and the Court must examine the statistics compiled by
3 the Discovery Commissioner of Clark County regarding the
4 request for trial de novo. The Discovery Commissioner of
5 Clark County concluded that, in a recent study, that Allstate
6 Insurance Company requests trial de novo in at least 52
7 percent of the cases it's involved with."

8 Let me stop there.

9 You can't request a trial de novo if you haven't had
10 an arbitration resulting in an award. So what the Supreme
11 Court is talking about there is the cases in which Allstate
12 participated in that resulted in an award.

13 Then you take that one step further. Who files the
14 request for trial de novo? Certainly not the winning party.
15 The losing party files a request for trial de novo.

16 THE COURT: Hold on.

17 I mean, it's not inconceivable that a party that
18 prevails at arbitration would file a request for trial de
19 novo hoping to improve the result; in other words, they got
20 an award, but they felt it was unreasonable.

21 MR. KENDALL: I concede that that's possible.

22 THE COURT: Okay.

23 MR. KENDALL: So the Supreme Court says that this
24 statistic -- meaning the 52 percent of cases -- so the

1 Supreme Court says that the statistics are showing that
2 Allstate files a request for trial de novo in 52 percent of
3 cases that they lose at arbitration.

4 "This statistic raises, in the Court's mind, as to
5 whether this percentage constitutes bad faith per se in
6 violation of the Nevada arbitration rules."

7 And the quote goes on to say, "How do we determine if
8 a litigant is participating in the program in bad faith?"

9 Now, here's what they say. It's just two paragraphs.
10 I'll just read it.

11 "Competent statistical information that demonstrates
12 that an insurance company has routinely filed trial de novo
13 requests without regard to the facts and circumstances of
14 each individual case may be used to support a claim of bad
15 faith."

16 And it says, "However, the statistics in this case
17 are incomplete. While a comparatively high percentage of de
18 novo requests are filed by Allstate, there was no analysis
19 accompanying the statistics to support a conclusion that the
20 statistics proved that Allstate automatically requests a
21 trial de novo, regardless of the arbitration process."

22 And they say, "For example, there's no correlation
23 shown between requests for trial de novo and verdicts for or
24 against the party who filed the request."

1 THE COURT: All right. Is there such evidence here;
2 and, if so, what will it show?

3 MR. KENDALL: Yes, there is.

4 Your Honor, let me tell you, first of all, the
5 statistics that I think I'm going to show you. Then I'll
6 break it down on that issue.

7 THE COURT: Okay.

8 MR. KENDALL: First of all, the cases that are
9 subject to my motion are -- I'm just going to rattle them
10 off. And they're attached to my motion as exhibits.

11 The first one is Castro-Avalos. That one resulted in
12 an arbitration award for the plaintiff. And it was settled.
13 There was no -- a de novo was requested by Mr. McMillen, and
14 apparently it got settled shortly thereafter. So it didn't
15 request a trial de novo on that one.

16 The next one, Eckert. Also an award for plaintiff.
17 Mr. McMillen filed a request for trial de novo.

18 And then I'm going to come back and tell you what the
19 short-trial results were.

20 Valdez is an award for plaintiff. De novo requested
21 by Mr. McMillen.

22 Dalmacio, award for plaintiff. Request for trial de
23 novo by Mr. McMillen.

24 Elk, award for plaintiff. Trial de novo requested by

1 McMillen.

2 Hakansson was an award for plaintiff. Request for
3 trial de novo by Mr. McMillen.

4 Hagen was an award for plaintiff. Trial de novo
5 requested by Mr. McMillen.

6 Codman was an award for plaintiff. Request for trial
7 de novo filed by Mr. McMillen.

8 Wright versus Pritchard was an award for plaintiff.
9 And request for trial de novo by Mr. McMillen.

10 And then Walker, which is the subject case, was an
11 award for plaintiff. Mr. McMillen filed a request for trial
12 de novo.

13 And then, lastly, Ortega, which was also the subject
14 of a motion here, award for plaintiff. And request for trial
15 de novo filed by Mr. McMillen.

16 Now, the system, the E-system, and the
17 washoecourts.us system, show that, as of the time I filed
18 Walker, and then, a couple of months later, Ortega, those
19 were the only cases that Mr. McMillen arbitrated, and
20 resulted in a plaintiff award. And he had de novo'd every
21 single one of them. Every one of them. A hundred percent.

22 Now, short-trial results. The Supreme Court seems to
23 say that that is some relevant evidence.

24 THE COURT: Well, of course it is, because if the

1 award was lower, or there was an award for the defense, that
2 would suggest to the Court that --

3 MR. KENDALL: -- it wasn't a bad idea.

4 THE COURT: -- trial de novo was supremely justified.

5 MR. KENDALL: So let's look at that.

6 The first one, Castro, that one got settled after the
7 de novo was filed.

8 The next one, Eckert, short-trial decision -- award
9 for the plaintiff at the arbitration was 32,606. The
10 short-trial decision was -- or verdict was 33,212. So he did
11 not better himself in that one. Plus, he ended up getting
12 \$7,000 in attorney's fees awarded against him. So that's not
13 doing better for his client.

14 Next, Valdez. Short trial -- I mean, request for
15 trial de novo by Mr. McMillen. There was no short trial. It
16 also was settled subsequently.

17 Dalmacio, there was an arbitration award for \$34,330,
18 plus \$1,969 in fees and costs, for a total of 36,299. The
19 request for trial de novo by Mr. McMillen was stricken
20 because they did not pay the arbitrator fee on time.

21 Next -- so, so far, he hasn't done better yet. We're
22 on number five already.

23 Elk versus Murphy. The arbitration award was 16,848,
24 plus -- and I'm not sure -- costs, \$4,882 in fees and costs

1 were awarded by the arbitrator, for a total of 21,731. The
2 short trial resulted in a verdict for the plaintiff for
3 exactly the same amount as the arbitration award. So that
4 one didn't get any better.

5 Next is Hakansson. The arbitration award for
6 plaintiff was 11,942. The short-trial verdict for plaintiff
7 was for 8,000, but \$5,939 in attorney's fees and costs, for a
8 total of 13,939.

9 So, Judge, if you're asking, "Did taking it to short
10 trial result in a bettering of the position of the defendant
11 on what they have to pay?" that's a "No" on that one.

12 Next one is -- so, so far, we're at number six, and
13 it hasn't done better.

14 Number seven is Hagen. And in that one the
15 arbitration award was for 11,233, plus 3,000 in fees,
16 resulting in a total of 14,233. And this is another one
17 where the short trial resulted in a verdict of 8,733, but
18 \$8,292 in fees and costs, for a total of \$17,025. Again, how
19 is that doing good for your client? You're ending up paying
20 more.

21 Next one, Codman. This one, the short trial, the
22 last time I checked, had not occurred yet. That was an
23 arbitration award for plaintiff, 19,999. And the short trial
24 was supposed to take place on September 9th, but according to

1 the eFile system, nothing has occurred since then. I don't
2 know if it's gotten continued, or if it's -- there's no stip
3 for dismissal. I'm assuming that one is still pending.

4 Next we've got Wright versus Pritchard. This is the
5 one where I was telling you that the arbitration award for
6 the plaintiff was 26,372, and in the short trial, the jury
7 verdict was for 29,827, which was a little more, but they
8 came back at 40 percent comparative. And --

9 THE COURT: That's a successful result.

10 MR. KENDALL: That's a successful one. Interestingly
11 enough, the arbitrator found no comparative, but the jury
12 did.

13 So, yes, that one he did better. And that's the only
14 one.

15 In Walker, that's the one that we're here on, so
16 there's no short trial; and Ortega, no short trial.

17 So he only bettered himself in one case.

18 Now, I know Mr. McMillen seems to think that he's
19 going to interpret this somehow differently and come up with
20 that he bettered himself in more cases, but, Your Honor, this
21 is what the eFile system shows.

22 THE COURT: Well, it's one out of seven, but it's
23 really one out of five because one they didn't pay the fees,
24 so it was stricken, and one we're not sure. Mr. McMillen can

1 hopefully clarify the status of that.

2 So in one out of the five that went to verdict, it
3 appears to the Court it was a more successful result for the
4 defense.

5 MR. KENDALL: I think that's fair.

6 THE COURT: All right. And I don't mean to knock you
7 off stride, but a question just occurred to the Court.

8 MR. KENDALL: Yes, sir.

9 THE COURT: If I grant these motions, then the
10 insureds are hurt; right? Why should the insureds be
11 precluded from their day in court because the insurance
12 carrier -- if the Court accepts everything you're suggesting,
13 and makes the -- draws the conclusions you're asking them to
14 draw -- has a systemic program of de novoing adverse
15 arbitration awards? They're at the end of the chain here.
16 Their case is 11 and 12. Why should they be penalized?

17 MR. KENDALL: Well, Your Honor, first of all, we all
18 know the insured is not out a nickel. That's why they have
19 insurance.

20 This is all about what the insurance company has to
21 pay out. We all know that.

22 The insured isn't harmed one iota.

23 THE COURT: Well, if they have an insurance policy at
24 the low end of the state requirements -- and I don't know

1 | what that is now. Twenty-five --

2 | MR. KENDALL: 25.

3 | THE COURT: What if the award goes up to 48,000, and
4 | they're uninsured? I mean --

5 | MR. KENDALL: Well, we all know what happens there.
6 | Then that insured has a cause of action against the insurance
7 | company, and one of two things happen: either the insurance
8 | company pays the excess judgment in order to protect that
9 | insurance excess judgment exposure; or it gets negotiated and
10 | settled in some manner; or, in the rare case, that insurer
11 | assigns their cause of action to the plaintiff, and then the
12 | plaintiff makes the claim. So the insured is not out.

13 | THE COURT: Well, I understand that that's custom and
14 | practice, how it usually goes.

15 | But you understand that there's a little nuance here
16 | between a big institutional client, which has occasion to be
17 | sued, and might -- if I accept your analysis and arguments,
18 | has an approach to always de novo an adverse award, versus an
19 | insurance company for their insurance. Because what effect
20 | does this have on the last person down the chain here?

21 | I'll have to give that some more thought.

22 | Please continue.

23 | MR. KENDALL: Well, Your Honor, I'd like to comment
24 | on that a little bit more, because Gittings addresses that.

1 THE COURT: I know.

2 MR. KENDALL: Gittings says this: "Turning to the
3 last issue, the use of statistics, Gittings" -- that's the
4 defendant in the case -- "asserts that the percentage of
5 times that her insurer, Allstate, requests a trial de novo
6 should not be considered in determination of whether she
7 participated in good faith in the arbitration process."

8 Supreme Court says, and Gittings goes on to also
9 argue, "That the insurer is not a party to the action, and
10 its percentage of request for trial de novo does not evidence
11 delay by the insured."

12 Well, the Supreme Court says -- and they rejected
13 that pretty summarily.

14 THE COURT: They did.

15 MR. KENDALL: They said, "We have recently rejected
16 the notion that the actions of an insurance company cannot be
17 attributable to its insured when reviewing an arbitration
18 proceeding."

19 Boom. That's the end of that. And they move on to
20 the issue.

21 THE COURT: So what happens? They're just stuck with
22 their insurer decision on trial strategy?

23 MR. KENDALL: Yeah, I think they are. I think that
24 is the nature of the beast.

1 We all know that insurers, at least in automobile
2 cases, have very little say in what happens.

3 THE COURT: I understand that. But, again, you're
4 asking the Court to say that Mr. Ortega -- excuse me -- that
5 Ms. Fitter and that Ms. Michaels have no right to de novo the
6 award against them because of actions that their insurer took
7 two years ago in another case.

8 MR. KENDALL: Yes.

9 THE COURT: That their insurer took 18 months ago on
10 another case, that they took 15 months ago in another case.

11 MR. KENDALL: Yes.

12 THE COURT: I think the Supreme Court has already
13 found that not to be sufficiently troubling to carve out any
14 kind of an exception.

15 MR. KENDALL: Absolutely.

16 THE COURT: Okay.

17 MR. KENDALL: I think that that's a consequence of
18 litigation life, is what the Supreme Court would say.

19 THE COURT: Well, for purposes of this hearing, I'm
20 going to proceed that way, unless for some reason Mr.
21 McMillen suggests another approach. I think that's the way
22 the world turns. I think that the Supreme Court has spoken,
23 and they haven't changed their mind on that.

24 MR. KENDALL: Thank you, Your Honor.

1 So --

2 THE COURT: So we've got five that were de novo'd,
3 through trial. And one resulted in -- if I accept the
4 representations that you are making, one resulted in a more
5 successful result, four did not. Is that what you're
6 informing the Court?

7 MR. KENDALL: Yes.

8 THE COURT: Okay.

9 MR. KENDALL: Yes. That's correct.

10 THE COURT: Now, what if three had resulted in a
11 better result? What if three of those five had resulted in a
12 short-trial award that was superior to the arbitrator's
13 award? Would we be here?

14 MR. KENDALL: Yes. Yes. I think that that goes to a
15 degree. So --

16 THE COURT: Well, the degree is that the defense here
17 says, "We de novo'd because we think that the arbitrator's
18 award was off."

19 MR. KENDALL: They say that in every one. Every
20 single one he's going to say that.

21 You ask him. If he was going to get up on that
22 witness stand and testify, for sure, that's what he would
23 say.

24 THE COURT: But the proof might be in the pudding if

1 they went to trial, resulted in awards more favorable to the
2 defense than was the arbitration, then wouldn't the Court
3 have sufficient evidence to suggest that they were right?

4 MR. KENDALL: Yeah, it's not a bad idea to de novo
5 those. But that's not what we've got.

6 THE COURT: Well, we've got one out of five. So
7 you're saying that -- so one of them was exactly the number;
8 right? That's because the award is read to the jury. And
9 the other one was a thousand dollars off. So if those juries
10 had just decided a couple dollars less in either of them,
11 then the three out of five would have gone for the defense.
12 And then Mr. McMillen, assuming he finds no objection to the
13 statistics you've just identified, could look the Court in
14 the eye and say, "Your Honor, more than 50 percent of the
15 ones that went to trial we did better. That shows you that
16 we were absolutely justified in taking them to trial."

17 We're just talking about two more -- two of those
18 other four, and we're talking about a thousand dollars each.

19 MR. KENDALL: What about the other six that you de
20 novo'd and ended up settling?

21 THE COURT: Well, then, again, playing devil's
22 advocate here, Mr. McMillen could say, "Judge, we picked up
23 the phone, and we explained our view that the arbitrator just
24 was a bit high, and we ended up resolving it, and the system

1 worked."

2 MR. KENDALL: No. You manipulated the system. What
3 you did was, you filed a request for trial de novo in order
4 to delay paying, in order to stretch out the -- your time to
5 pay, and in order to put some pressure on the plaintiff in
6 order to take less.

7 THE COURT: But, again, that's what you're
8 interpreting the evidence to be.

9 I'm suggesting that, if two juries had come in a
10 thousand dollars more -- excuse me -- a thousand dollars
11 less, three out of the five that went to trial would have
12 been more favorable.

13 MR. KENDALL: But they didn't. They didn't, Your
14 Honor. The point is, according to Gittings, at one factor
15 that they -- because they say, for instance, it's one factor
16 that they were interested in looking at.

17 THE COURT: Yeah, but, so, with all due respect to
18 the Gittings Supreme Court, this Court oversees the whole
19 program; right? For Washoe County, this Court has been
20 involved in the program since 1992, as a practicing attorney,
21 and this Court has been involved as an arbitrator, as
22 arbitrator's counsel, more than a hundred times. So I think
23 I have a sense of how the program is supposed to work.

24 But it's just so close here. It's so close. And,

1 again, you know, the idea of -- you know, I don't want to get
2 all Clint Eastwood here, a few dollars more, but with the few
3 thousand dollars less on the award, we would have three out
4 of the five cases that went to trial ended up where the
5 defense could proudly say that they were right, that they --

6 MR. KENDALL: Let's look at that.

7 So what good, what good did it do that defendant to
8 drag that out to short trial and end up having to pay the
9 same amount?

10 THE COURT: Why do we have the trial de novo process
11 at all? It's because we're taking away people's
12 constitutional rights to a jury trial. And the balance here
13 is to seek quick economical justice, but at the same time
14 preserve the right to have a trial.

15 Look, it's not lost on the Court that, if you
16 manipulate the system for strategic purposes only, not out of
17 good-faith dispute as to the arbitrator's award, there should
18 be severe consequences. Believe me, you have made that
19 clear. The Court is completely aligned.

20 The question is whether the evidence here suggests,
21 as strongly and persuasively as you're arguing, that such
22 abuse has occurred, such systemic abuse of this insurance
23 company's -- of the insureds here -- no; let me back up --
24 such abuse has occurred here to render the system to be

1 manipulated to the prejudice of plaintiffs here. That's what
2 you're asking the Court to find.

3 MR. KENDALL: Yes, sir.

4 THE COURT: On 11 cases, five went to trial, one was
5 a better result for the defense, and two almost were a better
6 result for the defense.

7 MR. KENDALL: Well, here's what -- let me speak to
8 the evidence.

9 Your Honor, you know more than I do that rarely do
10 you get a Perry Mason moment on that witness stand where
11 somebody confesses to intentional bad conduct. Never
12 happens.

13 We're not going to find a smoking-gun document from
14 Farmers to counsel that says, "De novo everything." We're
15 not going to find that.

16 So how do you prove that they're doing it in bad
17 faith? It has to be by circumstantial evidence.

18 And I think Gittings directs us to look at the
19 circumstantial evidence in the form of the statistics and the
20 percentages of trial de novos that the accused insurance
21 company is doing.

22 They go on to say that -- when you read the comment
23 about per se 52 percent, and you compare that to a hundred
24 percent in our case, I think that's telling us that 52

1 percent is high. And we almost think that's per se. But we
2 need more analysis of the statistics. So the analysis of the
3 statistics that I have here and that Dr. Coleman is going to
4 testify about show you that a hundred percent of the time
5 they de novo. That's not just happenstance.

6 THE COURT: What if they de novo four out of four
7 times? That's a hundred percent. Would that be systemic bad
8 faith?

9 MR. KENDALL: I don't know, Your Honor. I think
10 that, obviously, the more cases that we have that they've de
11 novo'd a hundred percent would be more and more compelling.

12 THE COURT: And you think 11 is over that line?

13 MR. KENDALL: I do.

14 And Dr. Coleman is going to testify about why -- I'm
15 going to ask him, "Is 11 cases statistically significant?"
16 "Yes." And he's going to explain to you why it is.

17 Your Honor, I want to make sure --

18 THE COURT: Hold on a second.

19 Okay. We're back on the record.

20 MR. MCMILLEN: Your Honor, if I may, just as a matter
21 of housekeeping.

22 THE COURT: Sure.

23 MR. MCMILLEN: I believe Mr. Kendall's expert is in
24 the courtroom. And I would invoke the rule of exclusion.

1 THE COURT: Well, that's -- the rule of exclusion
2 will be invoked.

3 Are there any other witnesses?

4 MR. MCMILLEN: No, Your Honor.

5 THE COURT: All right. So there's nothing to exclude
6 him from. He can hear argument. I'm not going to exclude
7 him from that.

8 If another witness were to testify, then I would ask
9 him to step outside. Unless there's another expert,
10 generally, I'll allow experts to sit in on other experts.

11 MR. KENDALL: He is the only witness.

12 THE COURT: Thank you.

13 So please proceed.

14 MR. KENDALL: I was going to say, Your Honor, I
15 wanted to make sure that we have in evidence all the exhibits
16 that I've filed with my motion.

17 Do I need to move those again into evidence, or are
18 they part of the record and in evidence due to the fact that
19 we went through the motion of the opposition, reply?

20 THE COURT: So here's how I normally handle that. If
21 there's no written objection, as opposed to -- as to their
22 authenticity or admissibility, they're in. And I allow
23 argument both in writing and at the hearing to challenge and
24 suggest to the Court that should give it little, if any,

1 consideration. But I'm inclined to admit everything that's
2 been filed by either party.

3 But, Mr. McMillen, I don't want to put words into
4 your mouth. I didn't see any request to strike that, that
5 I'm recalling.

6 Go ahead.

7 MR. MCMILLEN: I would not object to the admission of
8 the pleadings, Your Honor.

9 THE COURT: All right. Thank you.

10 For each side, the filings will be admitted.

11 MR. KENDALL: Thank you.

12 THE COURT: You're welcome.

13 So, you know, I asked about four. And, essentially,
14 you said, "More is better." But how much more? Eleven,
15 obviously, you believe is enough.

16 MR. KENDALL: Your Honor, if I was going to have to
17 draw a bright line, I don't know where I picked that number
18 up. That's a tough one for you to make the call on.

19 But I think -- I would say seven or more. I mean, if
20 you're going to press me for a number, I'm going to say
21 seven.

22 I think it is the substance of the matter. It's not
23 how many out of the total de novos. It's when you've got a
24 hundred percent of them, that is strong circumstantial

1 evidence that they have a preconceived plan that they're
2 going to file a request for trial de novo every time they
3 lose.

4 THE COURT: Well, again, I mean, that sounds good.
5 But let's whittle that down. If they de novo'd a hundred
6 percent of seven, seven out of seven, but then they went to
7 trial, and four of them resulted in a better decision for
8 them than was the arbitration's award, then the fact that
9 they de novo'd seven just meant that they picked seven --
10 those seven, in their mind, justified a trial by members of
11 this community. And, look, four of them agreed. What about
12 three of them agreed? Two? Closer, one-ish.

13 It's such a modest-sized sampling here. I've got
14 11 -- 10 or 11, depending on which time frame we use by when
15 these motions were filed -- 10 or 11 de novos that you're
16 challenging. I understand you say it's a hundred percent.
17 Or even if you give credence to the fact that the one was
18 not, so at least 91 percent, 10 out of 11. But it just seems
19 like it's such a modest number. That's the struggle the
20 Court is having.

21 MR. KENDALL: It's what we've got. There aren't
22 more.

23 You know, Your Honor, you asked me: Well, why don't
24 you wait five years and see if --

1 THE COURT: Let's make sure. I haven't asked you
2 that yet.

3 So let me ask you this: Why did you wait a year or
4 two and get a bigger sample?

5 MR. KENDALL: Well, the main reason is, the cat is
6 out of the bag. They already know that I'm watching what
7 they're doing. And wouldn't that make you want to try to
8 clean up your act a little bit?

9 I think that gives them the opportunity to skew the
10 statistics by saying: Okay. You know what? For the next
11 few years, we're not going to de novo anything.

12 THE COURT: Well, then you've gotten what you want.
13 You want them to not de novo --

14 MR. KENDALL: But it doesn't punish the bad behavior.
15 It doesn't punish the bad behavior.

16 When litigants get away with bad behavior, when
17 litigants get away with discovery abuses, it only encourages
18 them to do it more because they don't get punished.

19 THE COURT: Hold on. You're not -- that doesn't
20 resonate with the Court. Because punish bad behavior, so,
21 what? You want to go back in time, and on the first one of
22 the 11, that person should not have to resolve that case for
23 less than the award, if that's what happened? And in case
24 number two -- the people that came are numbers one through

1 10, or so, I mean, their case is over. There's no -- there's
2 nothing this Court is going to do, even if the Court agrees
3 with the movant here, that's going to affect those awards.
4 So the cat's out of the bag. If their behavior changes by
5 virtue of your watching them, isn't that -- haven't you got
6 what you wanted to get for those that you can currently
7 effect some change on?

8 MR. KENDALL: To some extent, yeah, I would have to
9 agree with that. But would it? I don't know.

10 I have found in my life that people who behave badly
11 continue behaving badly even though they get called on the
12 carpet on it, and the only time that it makes an impression
13 on them is if they get punished.

14 Look at what you do. You punish criminals for bad
15 behavior. If you would let them go, they are going to
16 continue being bad behavior. But when you punish them, some
17 of those people are, like: Man, I've got to quit being bad,
18 or Judge Breslow is going to put me in prison again.

19 Bad behavior has to be addressed. And when it
20 affects the integrity of the Arbitration Program that you and
21 I have been involved in for over 20 years, and respect the
22 integrity of that program, when it looks, to me, like there's
23 an individual or an entity out there who is abusing the
24 program for their own gotten gains, it needs to be brought to

1 the attention of the Court.

2 And the Court, in my opinion, should take action and
3 say, "We aren't going to tolerate that in our Arbitration
4 Program here in Washoe County."

5 THE COURT: Okay.

6 MR. KENDALL: That's not why it's in place.

7 THE COURT: All right. Do me a favor. Have a seat,
8 and let me hear from Mr. McMillen for a moment or two.

9 Mr. McMillen --

10 MR. KENDALL: I do want to call my witness.

11 THE COURT: Yeah, of course. But this is sort of
12 opening statement on what you anticipate this hearing is
13 about, what the evidence will show, what arguments you're
14 making.

15 Mr. McMillen, is this bad behavior that needs to be
16 punished; and, if so -- if not, why not?

17 MR. MCMILLEN: Well, as I've stated in my brief, Your
18 Honor, I believe the bad behavior, unfortunately, is coming
19 from Mr. Kendall, and if any punishment is deserved, it would
20 be for him.

21 THE COURT: And why is that?

22 MR. MCMILLEN: The statistics overwhelmingly show the
23 opposite of what Mr. Kendall is arguing.

24 THE COURT: How so?

1 MR. MCMILLEN: I understand that, from his
2 perspective, he views it differently.

3 For example, of the 10 cases that I personally filed
4 a request for trial de novo, four of those went to trial,
5 three we reduced the arb award, one the arb award was
6 confirmed. So 75 percent of the cases that I've taken to
7 trial as a result of my request for trial de novo, the arb
8 award has been reduced by the required amount in the rules,
9 which is either 10 or 20 percent, depending on the amount of
10 the arb award.

11 That alone indicates that, when we file a request for
12 trial de novo, that means the jury is seeing it differently
13 from the arbitrator.

14 THE COURT: Which four are you referring to, please?

15 MR. MCMILLEN: So the first one that went to trial
16 where the arb award was confirmed was Elk versus Murphy,
17 ARB 17-01614.

18 The next four where -- or three where they were
19 reduced was Hakansson versus Sloan, ARB 17-01939.

20 The next where the arb award was reduced, Hagen
21 versus Green, ARB 18-00457.

22 The next arb award that was reduced was Wright versus
23 Pritchard, ARB 18-01416.

24 THE COURT: Well, you just heard Mr. Kendall suggest

1 that they were not reduced. How do you come to the
2 conclusion that they were?

3 MR. MCMILLEN: Because I was there. I was trial
4 counsel. I can provide all of that documentation to you,
5 Your Honor.

6 THE COURT: Okay.

7 MR. MCMILLEN: It's a matter of public record.

8 THE COURT: Got it.

9 MR. MCMILLEN: The arb awards are in the record.

10 THE COURT: Mr. Kendall was factoring in the
11 associated fees and costs, pre-judgment interest, things like
12 that.

13 MR. MCMILLEN: Well, that's not what you look at when
14 you look at whether an arb award was reduced. You compare
15 the arb award to the verdict.

16 THE COURT: But you heard -- thank you. And were
17 they modestly reduced? Because you heard me suggest to Mr.
18 Kendall that it was just a few thousand dollars that would
19 have changed the statistics there.

20 And the same question for the defense here. If they
21 had gone a few thousand up, would you agree they would have
22 been unsuccessful trial de novos?

23 MR. MCMILLEN: I'm sorry, Your Honor. I was trying
24 to find --

1 THE COURT: No problem.

2 MR. MCMILLEN: -- the information you just asked.

3 What was your last question?

4 THE COURT: You heard me suggest to Mr. Kendall that,

5 on the ones that he suggested that the defense did not obtain

6 the more successful result, it was only within a few thousand

7 dollars, so --

8 MR. MCMILLEN: Where the defense didn't get the --

9 THE COURT: Did not.

10 MR. MCMILLEN: On the arb award, or the verdict?

11 THE COURT: Excuse me. On the verdict.

12 MR. MCMILLEN: So the one that we didn't -- so I've

13 only done four jury trials where I requested a request for

14 trial de novo. And only one of those the jury confirmed the

15 arb award.

16 THE COURT: And none were higher?

17 MR. MCMILLEN: None were higher, on the ones that I

18 personally did the request for.

19 There was one where they include in their statistics

20 where Karl Smith filed a request for trial de novo -- and

21 that happened to be my very first trial at Farmers -- where

22 the jury increased the award by about almost \$2,000.

23 THE COURT: Okay.

24 MR. MCMILLEN: I think it was a \$32,000 arb award,

1 and the jury came back at 33. It was some odd number. But
2 it was like \$1,500 more than the arb.

3 THE COURT: Then on the ones that you tried that you
4 got a more successful result than was the arbitration award,
5 was it close? Did it go from 30 to 29, or did it go from 30
6 to four?

7 MR. MCMILLEN: No, they just confirmed the award,
8 meaning they gave the exact same amount as the arbitrator.

9 THE COURT: I see.

10 MR. MCMILLEN: And so that was an interesting case.
11 That was the Elk versus Murphy case, bicycle-versus-auto
12 accident. Mr. Elk was the plaintiff. He was riding on the
13 wrong side of the road. There was an eyewitness that saw him
14 on the sidewalk, riding his bike, against the law in Sparks.
15 This happened in Sparks. The law says you can't ride on --

16 MR. KENDALL: Your Honor, I'm going to have to object
17 to Mr. McMillen testifying about what happened at an
18 arbitration.

19 THE COURT: Well, he is just providing a little
20 background.

21 MR. MCMILLEN: So, anyway, he was signed -- or cited
22 by the police at the scene of the accident. There was a
23 criminal hearing in Sparks court for his infraction of riding
24 his bike on the wrong side of the road and causing that

1 accident. It ended up being settled before the trial
2 happened. Actually, there was a trial scheduled, and right
3 before it went, it was settled. So we're not sure what
4 happened. So there's no adjudication of that actual crime.

5 However, that was the analysis made by us, as defense
6 counsel, plaintiff is more responsible than not. Michael
7 Sullivan served as the arbitrator. He provided about a
8 \$16,000 award. We de novo'd it. In the interim, the
9 plaintiff died.

10 And, so, you know, you can make the argument that
11 maybe the jury felt sorry for the family, or whatnot. Who
12 knows? However, we felt the facts were on our side. We
13 looked at the facts and circumstances of that case. And the
14 whole point of what I'm telling you is, we looked at the
15 facts and circumstances of that case when we decided to file
16 a request for trial de novo. And that's the only case where
17 the arb award wasn't reduced, when I filed the request.

18 THE COURT: So let me ask you this: On the ones that
19 the arb award was reduced, when you filed the request, and
20 you did the short trial, was it reduced a little, or was it
21 reduced a lot?

22 MR. MCMILLEN: Well, as I said before, I know it was
23 reduced by the required 10 or 20 percent. But I'll give you
24 the exact -- so Hakansson versus Sloan, the arb award was

1 \$11,942. The short trial returned a verdict in the amount of
2 \$8,000.

3 THE COURT: Got it.

4 MR. KENDALL: He's leaving out the attorney's fees
5 that were awarded there.

6 THE COURT: I understand.

7 MR. MCMILLEN: That's not the analysis.

8 MR. KENDALL: Your Honor --

9 THE COURT: Hold on, Mr. Kendall.

10 MR. MCMILLEN: I didn't interrupt you. Let me --

11 MR. KENDALL: Don't address me.

12 THE COURT: Just a minute, Mr. Kendall.

13 Keep going.

14 MR. MCMILLEN: Hagen versus Green, the arb award was
15 actually similar, \$11,233. And the jury verdict was 8,733.

16 THE COURT: Okay.

17 MR. MCMILLEN: But we did meet the requirement of
18 reducing it by the required percentage.

19 THE COURT: Yes.

20 MR. MCMILLEN: So Wright versus Pritchard, the
21 arbitrator, who happened to be Brent Harsh, awarded the
22 plaintiff \$26,372.97. That was reduced by the jury to
23 17,896.78. So almost half.

24 That's it; right?

1 THE COURT: And the other one came back exactly at
2 the award you said.

3 MR. MCMILLEN: Elk versus Murphy.

4 THE COURT: So let's take the ones that you
5 personally filed a request for trial de novo, on behalf of
6 your insurance. Those were resolved by settlement. Is that
7 accurate?

8 MR. MCMILLEN: The ones that resolved --

9 THE COURT: Yes.

10 MR. MCMILLEN: -- or didn't go to trial, yes.

11 Just talking Second Judicial --

12 THE COURT: Yes.

13 MR. MCMILLEN: -- three of them settled. One of
14 them, Codman versus Gregory, as indicated, was taken off of
15 calendar in September. It is actually scheduled for trial in
16 December.

17 THE COURT: Got it.

18 MR. MCMILLEN: So that's pending.

19 And then the other two are pending before you now.

20 THE COURT: Got it.

21 MR. MCMILLEN: So we settled three, four have gone to
22 trial, and the others are pending.

23 THE COURT: Your brief suggests that the Court should
24 look at the body of matters that are assigned to the

1 Arbitration Program, and take into account that many of them
2 are resolved before an arbitration hearing occurs.

3 MR. MCMILLEN: Yes, Your Honor.

4 THE COURT: Why is that relevant to this discussion?
5 They're complaining about adverse decisions being de novo'd.
6 You're saying, "You can't look at that snapshot. You have to
7 look at the whole film."

8 MR. MCMILLEN: Well, if you only look at the cases I
9 requested trial de novo, that doesn't tell you my rate of
10 filing a request for trial de novo in the first place, as
11 opposed to, you know, how many cases enter the Arbitration
12 Program, and how many, from me, receive a request for trial
13 de novo.

14 THE COURT: Let me hit the pause button there. Again
15 playing devil's advocate, in the other direction now.

16 Plaintiff says, "Judge, that's a red herring, because
17 we're only concerned with the defense not paying an award.
18 We're not concerned, for purposes of this hearing, with how
19 they negotiate matters that are -- lawsuits that are brought.
20 We are talking about whether they use the hearing process,
21 and then the de novo process, to inspire a settlement below
22 the amount of the award. And that's a misuse of the de novo
23 process, which is supposed to be to generally have fresh eyes
24 hear the evidence and come up with a number, because the

1 arbitrator was so wrong, that, you know, abject miscarriage
2 of justice occurred."

3 I mean, that's not what the rule says, but I'm adding
4 a little bit of the Court's own hyperbole. But that's the
5 idea here: that by de novoing everything, that the defense
6 here is manipulating the system to try to get a settlement,
7 as opposed to, generally, another look at the evidence.

8 MR. MCMILLEN: Well, that's another fatal flaw in
9 their analysis.

10 THE COURT: Why is that?

11 MR. MCMILLEN: Well, for one, 11 is not enough to
12 show what plaintiff is --

13 THE COURT: Two years.

14 MR. MCMILLEN: And then, if you --

15 THE COURT: How many years are we supposed to wait?

16 MR. MCMILLEN: Let's take it farther, Your Honor.

17 More importantly, they're not looking at all of the
18 cases that I've had after an arbitration award.

19 THE COURT: Explain that.

20 MR. MCMILLEN: They're not looking at cases that
21 settled after an arbitration award, and they're not looking
22 at all of the cases where we accepted an arbitration award.

23 So how can this be a fair analysis of when or how or
24 why we're filing a request for trial de novo?

1 THE COURT: Well, I just heard Mr. Kendall suggest
2 that, on every plaintiff award on behalf of Farmers insureds
3 that you have been involved in since roughly October of 2017,
4 that you have filed a request for trial de novo. So how many
5 is he missing?

6 MR. MCMILLEN: Several. And I'll point out one, Your
7 Honor.

8 McDonald versus Rothgeb, CV18-01749.

9 And I apologize for looking at my phone, but that's
10 where the information is.

11 THE COURT: That's okay.

12 MR. MCMILLEN: That's a case where the arbitrator was
13 Robert Jensen. And he issued an award, with medical specials
14 of \$3,990, pain and suffering of 4,500, for a total award of
15 8,490.

16 Given the facts and circumstances of that case, which
17 was a hard rear-end accident, we felt a jury would probably
18 hit it around there, maybe a little less. But given the
19 facts and circumstances of that case, we accepted that award.

20 THE COURT: When did that occur?

21 MR. MCMILLEN: That was this year. And I apologize I
22 don't have that right in front of me.

23 MR. KENDALL: So no de novo was filed.

24 MR. MCMILLEN: Exactly.

1 THE COURT: Well, hold on a second.

2 Mr. Kendall, the point that is being made to the
3 Court is that this is an exception to your argument that,
4 each time there's an award for the plaintiff, each time that
5 there's a request for a trial de novo. This is an example of
6 when it did not occur that way.

7 MR. KENDALL: I'm not aware --

8 THE COURT: Hold on.

9 MR. KENDALL: I'm not aware of that case. It's not
10 cited in his opposition.

11 Remember, Your Honor, we talked about this: that we
12 do the motion, we do the opposition, we do the reply. You
13 don't get to just say, "Oh, I forgot that. I want to present
14 that. Oh, I'm going to present this," unless you get leave
15 of Court.

16 And he's coming in here and talking about stuff that
17 he didn't have in any of these oppositions. It's improper,
18 it defies our system of motion practice, and it's ambush
19 technique.

20 THE COURT: Well, I don't put it quite there. But
21 it's to be discouraged. But under the circumstances, the
22 Court wants as much information as it can have.

23 But go ahead.

24 MR. MCMILLEN: Well, by way of responding to that,

1 Your Honor, we did make the argument that they are looking at
2 all of these types of cases. It's not my burden to prove his
3 case.

4 THE COURT: I understand.

5 MR. MCMILLEN: So they're not going in and looking at
6 every single case that is even post-arbitration award.
7 They're only cherry-picking the ones that they want to get to
8 the result that they want.

9 THE COURT: Well, what I'm hearing now is, there's an
10 additional case that resulted in a plaintiff award that was
11 not de novo'd. So instead of 10 out of 11, I'm to take away
12 it's 10 out of 12.

13 MR. MCMILLEN: Well, I know I have more than one --
14 maybe two -- this year, where we've accepted the award. But
15 the question then becomes --

16 THE COURT: Well, it would have been nice to have
17 that in the brief.

18 MR. MCMILLEN: -- what's statistically relevant?

19 THE COURT: Well, that is a good question.

20 MR. MCMILLEN: Even if you took into consideration
21 their own statistics, it doesn't prove what they're trying to
22 say it proves. That's ultimately what I'm getting at, Your
23 Honor, is I -- one thing -- their own statistics, the 11
24 cases, one of them I didn't even file a request for trial de

1 novo. That was prior defense counsel.

2 And there's just -- there's flaw after flaw after
3 flaw, to where there's no basis for bringing this motion in
4 the first place and wasting the Court's time, everyone else's
5 time, in having to deal with this.

6 Because if you actually look at the fact that I had
7 over 180 cases by the time he filed his motion, as an
8 employee of Farmers Insurance, and how many of those did I
9 file a request for trial de novo, ten in the Second Judicial
10 District; two outside of the Second Judicial District.

11 THE COURT: Mr. Kendall, please have a seat. I'll
12 give you a chance to respond in a moment.

13 MR. KENDALL: Okay. Thank you, Your Honor.

14 MR. MCMILLEN: So if you are just looking at the
15 Second JD, and including the two that I filed outside the
16 Second JD, that's seven percent of the total amount of cases
17 that I am handling.

18 If you were to do a true analysis, statistical
19 analysis of all the cases I'm handling, seven percent is
20 below even the 15 percent.

21 They're saying, from their analysis, where they're
22 saying we took the Nevada judiciary's 2015 report, and we
23 analyzed it, and put our own numbers on the Second Judicial,
24 and we took the total number of arbitration cases, and the

1 total number of requests for trial de novo, and we got 15
2 percent, they're not doing that analysis when they actually
3 look at my numbers.

4 THE COURT: Well, they are --

5 MR. MCMILLEN: All they're looking at is actual
6 requests for trial de novo, and that's it.

7 THE COURT: I understand that. But the suggestion
8 being made to the Court is, that's all the Court should be
9 looking at. This is not a case where somebody is bringing a
10 claim against Farmers for unfair claim settlement practices.
11 It's not a case where somebody -- an insured of Farmers is
12 suggesting that they haven't been treated properly. It's not
13 a case where -- an administrative case where the Insurance
14 Commissioner is suggesting that Farmers is doing something
15 wrong.

16 This is singularly the question of whether Farmers is
17 manipulating the Nevada arbitration rules, particularly the
18 request for trial de novo, as a litigation tactic in order to
19 strategically lower their liability after a plaintiff award.
20 It's as simple as that.

21 I'm concerned -- "concerned" is the wrong word. I'm
22 struggling with the limited sample of cases that movant
23 believes exists that would prove their proposition that a
24 hundred percent of seven or eight or nine or 10 or 11 would

1 be enough to establish their point. Because I'm not sure the
2 Court accepts that. It's modest. I realize that's all there
3 is, so we come, after two years, with all you have. But it's
4 just a concern.

5 But then the question is: Is it 11 out of 11, 10 out
6 of 11, 10 out of 12, 10 out of 13?

7 And then, on top of that, is: How many went to
8 trial?

9 And then, on top of that, is: How many that went to
10 trial resulted in a verdict more or less beneficial?

11 I mean, those are all factors the Court is looking
12 at.

13 So let me ask you to do this, Mr. McMillen. Have a
14 seat. I want to hear from Mr. Kendall in response to some of
15 the things you've just said. I'll give you an opportunity to
16 address the Court here again in a moment.

17 MR. MCMILLEN: Thank you.

18 THE COURT: Mr. Kendall.

19 MR. KENDALL: Thank you, Your Honor.

20 This is a very simple analogy, Your Honor, but when
21 we're hunting rabbits, we don't care about the rest of the
22 animals in the animal kingdom.

23 We're looking at trial de novo requests by Farmers in
24 cases where plaintiffs' awards were given by the arbitrator,

1 period.

2 I don't care what he's done in Justice Court. We
3 don't care what he's done in Gardnerville. We don't care how
4 many cases he's settled that didn't go into arbitration.
5 None of that is relevant.

6 The issue is: What are they doing with the trial de
7 novo requests? That's the narrow issue.

8 All the rest of his 180 cases, it doesn't have any --

9 THE COURT: You're asking the Court -- you're saying
10 all you care about is what they do after they lose an
11 arbitration.

12 MR. KENDALL: Yes, sir.

13 THE COURT: You're saying that they always de novo.

14 MR. KENDALL: Yes, sir.

15 THE COURT: And we've just heard some representation
16 from Mr. McMillen that there's at least one that they paid.

17 MR. KENDALL: Haven't seen it. Not in his
18 opposition.

19 THE COURT: Well, for purposes of this hearing, the
20 Court is accepting the representation of Mr. McMillen, as an
21 officer of the court, that it happened the way he said.

22 MR. KENDALL: Okay.

23 THE COURT: So now we are at 10 out of 11, or 10 out
24 of 12.

1 MR. KENDALL: We're still in the 90 percent range.
2 THE COURT: We are.
3 MR. KENDALL: Gittings says 52 percent is per se.
4 THE COURT: It also suggests that the Court should
5 look at other indicia of whether the de novos being made are
6 being made in bad faith as a systemic manipulation of the
7 rule, or for other reasons, like: What are juries doing once
8 the case gets to them? Are they lowering, keeping the same,
9 or increasing?
10 MR. KENDALL: Let me address that.
11 THE COURT: That's to fairly read this. That's how I
12 interpret it.
13 MR. KENDALL: Let me address that.
14 THE COURT: Yes.
15 MR. KENDALL: Mr. McMillen is using the rule about
16 getting an award of attorney's fees in a short trial, if you
17 don't do better by 20 percent or 10 percent, as a method of
18 saying, "Well, look, we did -- we did better."
19 That's not what I'm talking about, and I don't think
20 that's what Gittings is talking about.
21 Gittings is saying to a correlation between requests
22 for trial de novo and verdicts. By "verdicts," I think they
23 mean short-trial verdicts.
24 So I ask you this, Your Honor: When the Court

1 renders a verdict, it includes the -- all the damages that
2 the jury awards, and then attorney's fees and costs that the
3 Court awards on top of that.

4 What I think is important here is, and what I think
5 Gittings wants us to look at is, when they do a short trial,
6 at the end of the day, did they do better for their client?

7 And I don't -- I'm not talking about whether they got
8 under 20 percent or under 10 percent. Because in every one
9 of these short trials the plaintiffs got attorney's fees, and
10 that ended up boosting the total verdict amount above what
11 the arbitration award was.

12 And I ask you: Is that doing better? I think the
13 Supreme Court wants to know: Are they doing better in the
14 short trial? Not just: Are they doing better according to
15 the rule about 10 and 20 percent? But are they doing better?
16 Do they end up paying less than what they would have had to
17 pay in the arbitration?

18 And that's where his numbers run afoul of the true
19 verdict --

20 THE COURT: But the fact that we're even trying to
21 cut that -- make that line so narrow, isn't that indicative
22 of the fact that -- I mean, what's that indicative of? I can
23 see both sides. You say, "Look, if it's that close, they
24 should just pay the award in the first place." The defense

1 says, "If it's that close, if we're doing better, the rule
2 contemplates 20 percent. If somebody wants to change the
3 rule, change the rule. We're just playing within the rules."

4 MR. KENDALL: But they didn't get attorney's fees.
5 In none of those cases did Mr. McMillen get awarded
6 attorney's fees. It's the opposite. The plaintiff got the
7 attorney's fees in every one of them. Every one of them.

8 And so the bottom-line number that they had to pay
9 out is more than what the arbitration award was. And I think
10 that's what Gittings is saying let's look at. Let's look
11 at: Did they really do better? Did all this delay caused by
12 filing the request for trial de novo and going to short
13 trial, did it really result in them paying less money?

14 THE COURT: Certainly that's a way to look at it.

15 MR. KENDALL: It's a pragmatic way.

16 THE COURT: Another way to look at it is: Did it
17 preserve the right to a trial by jury; and did they have an
18 opportunity to challenge the award?

19 Why don't I hear -- I'll make sure everyone has a
20 chance to address the Court again. I sort of shut Mr.
21 McMillen down here. But why don't I hear from Mr. Coleman,
22 and then have him give the Court the benefit of his
23 expertise.

24 MR. KENDALL: Thank you.

1 THE COURT: You're welcome.

2 MR. KENDALL: We'll call Dr. Gilbert Coleman.

3 (Witness sworn.)

4 THE COURT: Good morning, sir.

5 MR. KENDALL: Your Honor, is it okay if I question

6 him from my seat?

7 THE COURT: Yes, you may.

8 Mr. Coleman, please make yourself comfortable.

9 THE WITNESS: Dr. Coleman.

10 THE COURT: Dr. Coleman. Beg your pardon.

11 Please make yourself comfortable.

12 MR. MCMILLEN: Your Honor, I don't know -- well, I

13 would like to object because Mr. Coleman was not disclosed

14 prior to or even prior to the reply in the briefing schedule,

15 so his --

16 THE COURT: It was a little late in the game, wasn't

17 it?

18 MR. MCMILLEN: It was very late in the game, Your

19 Honor.

20 MR. KENDALL: Well, it was two months -- three months

21 before now.

22 THE COURT: The Court will overrule the objection.

23 I think that I'll overlook the lateness, and the

24 prejudice can be mitigated here by effective

1 cross-examination.

2 Dr. Coleman, when you're comfortable, would you
3 please slide in, speak near the microphone, and please state
4 your name.

5 THE WITNESS: My name is Gilbert R. Coleman.

6 THE COURT: Thank you, Dr. Coleman.

7 Please proceed.

8 MR. KENDALL: Thank you, Your Honor.

9 GILBERT R. COLEMAN

10 called as a witness on behalf of Plaintiff,
11 first having been duly sworn,
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. KENDALL:

15 Q. Dr. Coleman, would you just run through your
16 education and qualifications for us, please.

17 A. I have a Bachelor of Arts in Economics and
18 Mathematics from the University of Southern California, a
19 Master of Science in Operations Research, and a doctorate in
20 Economics from Stanford University.

21 I've taught college-level at UNR, and at a variety of
22 places since 1984. And I have taught Statistics for most of
23 that period of time, at both the undergraduate and graduate
24 level.

1 Q. That's one of the things I was going to ask you
2 specifically, is: What education, training and experience do
3 you have in statistical analysis?

4 A. Well, it's part of my degree in Mathematics, as an
5 undergraduate. Operations Research is a statistically-based
6 field. And then you have to -- I didn't actually take
7 Statistics courses as part of my Ph.D because I challenged
8 out of it. But statistical analysis is part of economical
9 analysis.

10 Q. So I provided you with a copy of the Gittings case,
11 did I not?

12 A. Yes.

13 Q. And in the Gittings case, the Supreme Court talks
14 about -- quote -- "comprehensive, qualitative, and
15 quantitative statistic analysis." Could you tell us what
16 that means?

17 A. Well, in this case, what you're doing is, you're
18 comparing two means. What you're -- what's going on is that
19 there are two processes here to look at.

20 The one process is the average process that works
21 through the Washoe County Judicial District, which
22 means: How are these cases dealt with in Washoe County? And
23 most relevantly, what percentage of the cases that go through
24 the arbitration are then -- is there a trial de novo

1 requested?

2 And for that, you need the number that were requested
3 and the number of cases there were. And the number of that
4 value is 15 percent, as published by the Supreme Court.

5 THE COURT: For what period of time?

6 THE WITNESS: For a period of time 10 years before
7 2015, which is the last time that the Supreme Court published
8 the statistics. So it's a long-term number.

9 The other process is, what happens in cases that Mr.
10 McMillen is the attorney. And so I have the number of cases
11 that he has gone through that process. The case is filed, it
12 goes to arbitration, the arbitration award is made, there is
13 an arbitration award made for the plaintiff, and then there's
14 a request for trial de novo.

15 I've heard a lot of numbers floating around so far
16 today, but the numbers that I used is that there were 13 of
17 those cases, and in 11 of the cases he requested a trial de
18 novo, there are two cases from this year that the award was
19 accepted.

20 Once you do that, you simply compare the two means to
21 determine whether or not they are the same or significantly
22 different from one another.

23

24 BY MR. KENDALL:

1 Q. And what did you find?

2 A. They are significantly different from one another.

3 Q. Explain.

4 A. And I should also say the rate at which Mr. McMillen
5 requests trial de novo is significantly higher than the rate
6 at which trial de novo is requested on these types of cases
7 within the Second Judicial District, over the -- again, over
8 the long-term data from the process.

9 I've heard your question several times, "Is 11
10 enough?" Well, to be accurate about it, because I am a
11 mathematician, and I like to be accurate, it's not 11. It's
12 13.

13 THE COURT: Okay.

14 THE WITNESS: But the answer to that question
15 is: Yes. It's not even close.

16 You would accept that the number is significantly
17 higher if you get what is called a Z score of 2. The Z score
18 here is 6.

19 THE COURT: Sorry to interrupt, but I have a couple
20 questions.

21 The 2006 to 2015, these are matters that went through
22 the Arbitration Program, and an award was issued, and one
23 side or the other filed a request for trial de novo; is that
24 correct?

1 THE WITNESS: Yes.

2 THE COURT: And then, so, from 2016 to now, we don't
3 have that data. At least we don't have it in court today.
4 Is that also correct?

5 THE WITNESS: To my knowledge, that data does not
6 exist, it's not been published. The only organization that I
7 know of that would reliably publish that is the Supreme
8 Court, and they have not published it.

9 THE COURT: I mean, so, somebody knows. We just --
10 it hasn't been calculated, and is easily accessible for
11 people like us.

12 THE WITNESS: I think that's fair. Or maybe, rather
13 than somebody knows, somebody could know.

14 THE COURT: Somebody could know. In that 10-year
15 period, roughly, 2006 to 2015, is that 2,000 matters,
16 roughly? A couple thousand?

17 THE WITNESS: I have to calculate it quickly.

18 Fifteen percent were -- I have to turn this on, if
19 you don't mind, Your Honor.

20 Fifteen percent were -- of the cases that had trial
21 de novo requested, and that was 51. So it's 51 divided by
22 .15 is the total number of cases.

23 THE COURT: Only 51 trial de novos are requested in
24 10 years?

1 THE WITNESS: Yes.

2 THE COURT: Five one. So five per year?

3 THE WITNESS: Yeah, approximately.

4 THE COURT: So seven of 51 -- seven or eight of 51.

5 Beg your pardon. Fifty-one trial de novos were requested.

6 THE WITNESS: Out of 340 cases.

7 THE COURT: So based on your observations and

8 calculations, bringing your experience and expertise, Mr.

9 McMillen is, give or take, six times more likely to request a

10 trial de novo than other attorneys that are involved in the

11 process?

12 THE WITNESS: It's not quite that way. It's not six

13 times more likely. That number is -- it is kind of six times

14 more likely. It just happens to be irrelevant.

15 What it is, is that you're measuring how far away

16 from each other these two values are, the average value for

17 Washoe County, which I would assume is the normal process,

18 the normal way it works -- assuming this process is assumed

19 to work in Washoe County, which I guess it is because it's

20 still going on -- as opposed to the way cases that are

21 handled by Mr. McMillen operate.

22 They are far enough apart that the probability that

23 they are handled the same way is, for all intents and

24 purposes, zero. That the Farmers cases handled by Mr.

1 McMillen are trial de novo'd at a rate so much vastly higher
2 than the normal process, that you cannot say that those --
3 that that -- the Farmers cases are handled in any way even
4 reasonably close to the way it's normally handled in Washoe
5 County.

6 THE COURT: And you can make that -- you can come to
7 that determination with only 11 out of 13?

8 THE WITNESS: Yes.

9 THE COURT: Five out of six, same conclusion?

10 THE WITNESS: I'd have to do the calculation.

11 THE COURT: You understand, though -- you've sat here
12 and heard some of the Court's concerns; right?

13 THE WITNESS: Yes, I did, Your Honor.

14 THE COURT: Thirteen just seems -- so 10, 11, 12, 13
15 just seems very modest, you know.

16 THE WITNESS: With all due respect, Your Honor,
17 that's probably because you don't have a grasp of the way the
18 statistical analysis works.

19 It is a matter that you don't need a lot when they're
20 far enough apart. And it would be, if you had a smaller
21 number -- it would take me a while to do some of your
22 hypothetical calculations.

23 You said, "Is it four out of four?" Probably not.
24 Probably not four out of four, compared to 15, because the

1 variance -- term of art in Statistics -- the variance of the
2 four out of four would be so wide that it wouldn't work that
3 way.

4 But when you get to 13, then it is the case. It is
5 the case that this is not only enough, but well more than
6 enough of a sample to be able to say that what goes on with
7 Farmers is very much significantly different than what goes
8 on normally in Washoe County.

9 THE COURT: Okay. Next question.

10 MR. KENDALL: I don't have any other questions, Your
11 Honor.

12 THE COURT: Cross-examination.

13 MR. MCMILLEN: If I may step up to the podium, Your
14 Honor.

15 THE COURT: You may, of course.

16 CROSS-EXAMINATION

17 BY MR. MCMILLEN:

18 Q. Good morning. How are you?

19 A. Good morning.

20 Q. When was the first time you met Mr. Kendall?

21 A. I've known Mr. Kendall for several years.

22 Q. How many years?

23 A. I don't know. Fifteen, 20, maybe.

24 Q. Has he ever retained you before?

1 A. I think once or twice.

2 Q. When was the last time he retained you?

3 A. Prior to this, I have no recollection.

4 Q. A couple years?

5 A. A long time.

6 Q. And when did he contact you regarding this case?

7 A. Late spring, early summer, somewhere along in there,

8 of this year.

9 Q. And when he engaged you, what did he engage you to

10 do?

11 A. He asked me to read the Gittings decision, and to see

12 if I could provide the statistical analysis that was

13 described in that decision.

14 Q. So he asked you to make the same analysis?

15 A. As what?

16 MR. KENDALL: Objection. Vague.

17 THE COURT: Sustained.

18 Can you be more specific?

19 MR. MCMILLEN: Sorry.

20 BY MR. MCMILLEN

21 Q. He asked you to read Gittings and do the statistical

22 analysis as outlaid in Gittings?

23 A. No, because their statistical analysis is not laid

24 out in Gittings.

1 What they -- what the decision said was, as I
2 recall, "We see that 52 percent of the time" -- Allstate, I
3 believe was the insurance company involved in there -- "52
4 percent of the time they request trial de novo. We think
5 that's too high, but we need some statistics to demonstrate
6 whether or not it is too high."

7 I did the analysis to demonstrate whether -- not for
8 Allstate, but for Farmers, in Washoe County, is too high --

9 Q. And --

10 A. -- by doing a statistical analysis to determine
11 whether or not they are significantly different, and the
12 Farmers rate is significantly higher.

13 Q. What is the criteria that you used to determine that
14 the rate is too high with regard to Farmers?

15 A. It's a standard difference of means.

16 Q. Can you please explain it?

17 A. Yeah. I took the mean of the cases in Washoe County,
18 which is 15 percent -- it's 51 out of 340 -- over the period
19 of time for which the data was available --

20 Q. If I may --

21 A. Excuse me. Are you --

22 Q. If you can maybe take it step by step, so that we can
23 understand it. So where did you get the numbers for Washoe
24 County?

1 A. From the Supreme Court annual report in 2015.

2 Q. Did it break down Washoe County's numbers?

3 A. Break it down how?

4 Q. I'm asking you. Did the 2015 judiciary report from

5 the Nevada Supreme Court break down Washoe County's

6 Arbitration Program and request for trial de novo?

7 A. It said that there were 51 over the 10-year period.

8 There were 50 --

9 Q. Were those 51 plaintiff or defendant?

10 A. It doesn't say. It's just whether or not there was

11 trial de novo requested out of the -- over the 10-year

12 period, there were 51 out of 340.

13 Q. Do those numbers show whether or not the arbitration

14 award was favorable for the plaintiff or the defendant?

15 A. No.

16 Q. Okay. So I apologize I interrupted you.

17 So you took the 341 and the 51 numbers from the

18 judiciary report. How did you use that to make your

19 analysis?

20 A. Because that is one average that I've taken.

21 Fifty-one over 340 is 15 percent. By knowing the total

22 numbers of the data, I can then calculate what's called a

23 standard deviation, which shows how far things move away from

24 that middle.

1 Q. And so you're solely showing that, based on your
2 analysis -- which I'm not agreeing with -- but based on your
3 analysis, your conclusion is that I and Farmers deviate from
4 the normal number of requests for trial de novo; is that
5 correct?

6 A. What I'm saying is that the rate at which you
7 request -- I'm going to say "you," and "you" is Farmers,
8 however that all works out -- the rate at which the cases
9 from Farmers that you're involved with request trial de novo
10 is significantly higher than the normal rate that is
11 demonstrated in the Washoe County district.

12 Q. Does your analysis indicate anything else?

13 A. No. That's what I did.

14 Q. Okay. So if your analysis does not indicate anything
15 else, then it's fair to say that your analysis does not
16 indicate whether Farmers looks at the facts and circumstances
17 of each individual case before filing a request for trial de
18 novo; correct?

19 A. That's correct.

20 Q. And stepping away from that topic, you do not do an
21 analysis based on my total caseload; correct?

22 A. I didn't do an analysis based on your total caseload.
23 However, I did listen to you, and your explanation of the
24 analysis that you wanted to do is not accurate.

1 What you would do is, you would compare the seven
2 percent that you had from your overall cases to the overall
3 cases in Washoe County, of which there were -- I don't
4 remember the number, but somewhere -- I believe in the high
5 4,000s. So it would be 51 percent to the high 4,000s, which
6 would be a number less than two percent, compared to your
7 seven percent.

8 And without having done the analysis, so I can't
9 provide a Z score, my experience would say that your rate of
10 trial de novo, even against your entire caseload compared to
11 the entire caseload in Washoe County, is still significantly
12 higher.

13 THE COURT: Hold on.

14 Please read the question back.

15 (The court reporter read the
16 question.)

17 THE COURT: So, Dr. Coleman, it would help the Court
18 if you just would answer the question. That was a yes-or-no
19 question. If Mr. --

20 THE WITNESS: All right.

21 THE COURT: -- Kendall would like you to give more
22 direct testimony on an issue that he thinks is relevant to
23 the Court, he'll ask you, and he will have another chance to
24 examine you. But if you could just answer the question

1 asked, that would be more effective for assisting the Court
2 in reaching a decision in this case.

3 THE WITNESS: Sorry, Your Honor.

4 THE COURT: That's all right. Thank you.

5 Please proceed.

6 MR. MCMILLEN: Thank you, Your Honor.

7 BY MR. MCMILLEN:

8 Q. Mr. Coleman --

9 THE COURT: Dr. Coleman.

10 BY MR. MCMILLEN:

11 Q. Dr. Coleman, you don't do an analysis based on my
12 total cases litigated, total cases settled, settlement rate,
13 total trial de novo requested, or trial de novo rate;
14 correct?

15 A. The "or" in there is the problem. If you would have
16 changed that to "and," the answer would be no.

17 When you say "or," then the answer becomes: Well, or
18 the trial de novos, that's the analysis I did.

19 Q. And you did not do an analysis based on my total
20 cases that could potentially have a trial de novo request.

21 A. All of your cases that could potentially have? No, I
22 did not do that.

23 Q. And you do not look at the facts or circumstances of
24 any case I have been involved with to determine if I had

1 participated in good faith.

2 A. No. There's no way to evaluate good-faith statistic.

3 Q. And you don't know or you haven't even considered
4 what the actual statistics for 2018 or 2019 are for Washoe
5 County against any other participant in Washoe County, let
6 alone the other counties I practice in.

7 A. I haven't done -- the answer is no, but limited to, I
8 haven't looked at 2018 to 2019.

9 Q. And I assume you are familiar with the report that's
10 been presented in this case.

11 A. The Supreme Court?

12 Q. No. Your report.

13 A. Oh, my report. Yes, I'm familiar with my report.

14 Q. Would it be fair to say you admit in your own report
15 that the 2015 annual report for -- or from the Nevada
16 judiciary does not provide the actual number of eligible
17 cases for a trial de novo request?

18 A. That depends upon how you want to look at it.

19 THE WITNESS: And I apologize, Your Honor, for --

20 THE COURT: Explain that.

21 THE WITNESS: This is how -- this is the thing: It
22 does not have the 340 number in there. So in that case, does
23 it provide that number? No. It provides two numbers from
24 which you can calculate the 340. So since it provides

1 numbers that a statistician can use to get there -- or
2 statistician or mathematician, or, for that matter, anybody
3 who knows simple arithmetic -- can use to get to the 340,
4 then the answer is yes.

5 BY MR. MCMILLEN:

6 Q. In fact, your report says the following: "There was
7 one piece of information missing from the table. It is
8 number of cases eligible for a de novo request. There's no
9 specific heading for that information, nor is there any
10 number that corresponds to it, given the data descriptions
11 that are listed." Correct?

12 A. Yes.

13 Q. But you end up looking at cases of mine that end up
14 going to a request for trial de novo, and eliminate all my
15 other cases; correct?

16 A. Yes, I eliminated all the other cases.

17 Q. You don't have that data from the 2015 report?

18 A. I don't have what data from the 2015 report?

19 Q. You don't have similar data to look at from the 2015
20 report.

21 A. I still don't know what you mean by "similar data."

22 Q. So you look at my request for trial de novo; correct?

23 A. Right.

24 Q. In Washoe County.

1 A. Right.

2 Q. The 2015 report doesn't have the same type of
3 information. You had to create that information.

4 A. No. I had to divide 51 by .15. That's not really
5 creating. It's just observing it.

6 Q. And, again, that number doesn't tell you whether the
7 plaintiff or defendant issued a request for trial de novo.

8 A. No.

9 Q. So you're not comparing apples to apples.

10 A. I'm comparing whether or not a case, as defined by
11 the arbitrator, was -- requested trial de novo.

12 Q. But those 51 cases, you don't even know if those were
13 favorable to the plaintiff or defense; right?

14 A. I see no relevance to that to the statistics.

15 Q. Would it be fair to say that your analysis leaves out
16 all my cases that I settle after the Complaint is filed, but
17 before they're entered into the Arbitration Program?

18 THE COURT: Hold on. See, now you're making argument
19 to the Court in the form of a question. He wasn't tasked to
20 do that. That's not lost on the Court.

21 The question is whether, for purposes of this
22 hearing, the Court finds that informative; right? Whether --
23 I hate to use the hunt rabbits versus hunting something else.
24 I'll stay away from that.

1 But the question is: Should it matter to this Court,
2 if you're assigned a case after a lawsuit is filed, and it's
3 resolved, does that matter to the Court's determination
4 whether Farmers is abusing the trial de novo process for
5 strategic reasons?

6 Dr. Coleman, I'm assuming, doesn't know how many
7 cases were filed where a Farmers' insured was named as a
8 defendant, that you were involved in, that got resolved
9 before an arbitration proceeded to award.

10 You don't know the answer to that, do you?

11 THE WITNESS: I don't have the statistics. I've
12 heard what Mr. McMillen has said.

13 THE COURT: Yes, but --

14 THE WITNESS: Other than that, no, I don't.

15 THE COURT: You only know what you've heard in this
16 hearing here. You weren't asked to draw any correlations
17 from that with respect to how more often Farmers, through Mr.
18 McMillen, is to seek trial de novo than were other people in
19 Washoe County between 2006 and 2015. Is that fair?

20 THE WITNESS: That's fair.

21 THE COURT: You're asking the Court to draw certain
22 conclusions from that.

23 MR. MCMILLEN: Well, Your Honor, I am making the
24 argument that the Gittings case talks about Allstate's cases.

1 It doesn't make a delineation between only cases where an
2 arbitration award was provided, or only cases where --

3 THE COURT: That's right. Good point. So you can
4 proceed.

5 MR. MCMILLEN: I apologize, Your Honor.

6 THE COURT: That's okay. No apology necessary.
7 You're right. This is a way to read Gittings to see what the
8 Supreme Court felt was important for a District Court to
9 consider in coming to its decision.

10 MR. MCMILLEN: I'm merely trying to traverse his
11 analysis to show he's not doing the full analysis.

12 THE COURT: You may proceed.

13 MR. MCMILLEN: Thank you, Your Honor.

14 BY MR. MCMILLEN:

15 Q. So is it accurate to say that you did not consider
16 cases that I've been involved in where the Complaint is
17 filed, and then the case is settled before it's entered into
18 the Arbitration Program?

19 A. Well, I believe I have all of those. Because I
20 logged -- if you've seen my report, I've logged every case I
21 could find in Washoe County in which you've been involved.

22 Q. But that's not my -- my question is more specific.
23 Did you consider in your analysis that led to the conclusion
24 that you provided in your report the cases that settled

1 before they were entered into the Arbitration Program?

2 A. No. Those are not relevant.

3 Q. Did you consider the cases that entered the
4 Arbitration Program, but settled before an arbitration award
5 was provided?

6 A. I did not -- not in the statistics. I considered
7 them by eliminating them.

8 Q. You eliminated them?

9 A. Yes.

10 Q. You didn't even consider them in coming to the
11 conclusion that I basically do a trial de novo request 84
12 percent of the time?

13 A. No, I never said that. I said you do a trial de novo
14 after the arbitration award has been granted, decided, and
15 then have the opportunity to either accept the arbitration
16 award or move on to trial -- or request trial de novo.
17 That's the issue that I was looking at, and that's the
18 analysis that I did.

19 Q. You even excluded two -- well, you included in your
20 report two cases where I accepted the arbitration award;
21 correct?

22 A. Yes.

23 Q. Those are part of the 13?

24 A. Yes.

1 Q. But you didn't include another case that I accepted,
2 the Rothgeb case. Why not?

3 A. I don't know what that is.

4 Q. So that one is ARB 18-01749.

5 A. ARB 18 --

6 Q. -- 01749.

7 A. I have that that settled prior to -- the information
8 that I had was that that settled prior to the arbitration
9 award being --

10 Q. Before a request for trial de novo?

11 A. Yeah.

12 Q. So the arbitration award, it settled before a trial
13 de novo request; correct?

14 A. I didn't have it that there was an arbitration award.
15 The information I had didn't say that it was an arbitration.
16 It had settled prior to that.

17 Q. So if you didn't even have that information, how do
18 you know that your analysis is correct?

19 THE COURT: Well, hold on.

20 Are you making representation to the Court that an
21 award was issued adverse to your insured, and that a trial de
22 novo request was not made?

23 MR. MCMILLEN: Exactly, Your Honor.

24 THE COURT: So let's -- so, Dr. Coleman, for purposes

1 of this hearing, let's assume that it's not 11 out of 13.

2 Let's assume it's 11 out of 14.

3 THE WITNESS: It doesn't change the conclusion.

4 THE COURT: That's where I was going next.

5 THE WITNESS: These numbers aren't close.

6 But the other thing is, is the question is not

7 whether there was an arbitration award --

8 THE COURT: No, it is, though. The plaintiff is
9 suggesting here that, systematically, de novo requests are
10 being made after an adverse award.

11 And what Mr. McMillen suggests is, there's another
12 case where an adverse award occurred, but a request for de
13 novo was not made. So that suggested, to me, 11 out of 14.

14 THE WITNESS: But the question is: Was the
15 arbitration award accepted, or was the case settled outside
16 of that?

17 So the 11 out of 13 -- and you may be asking a
18 different question than what I did -- but the 11 out of 13
19 is: Did you accept the arbitration award? Not: Did you
20 settle the case, get an arbitration award, and then go settle
21 the case? But did you accept the arbitration award?

22 If that -- so that's what I did. And my information
23 on that case, which may not be accurate, but my information
24 on the case is that that case was settled not at the

1 arbitration award. The arbitration award was not accepted.

2 The case was settled. If --

3 THE COURT: Go ahead.

4 THE WITNESS: If you add that case in, and it's 11
5 out of 14, with the numbers the way they are, it doesn't
6 change things. It doesn't change the conclusion.

7 THE COURT: I don't want to go down the rabbit hole
8 of whether the award was accepted -- quote/unquote -- or
9 settled or paid or negotiated.

10 For purposes of this Court's determination of the
11 motion, I'm interested in whether a request for trial de novo
12 was filed after an adverse award.

13 All right. So I appreciate Dr. Coleman explaining
14 the nuance there, but for purposes of what I need to know,
15 it's what I've just indicated.

16 You may continue.

17 MR. MCMILLEN: Thank you, Your Honor.

18 BY MR. MCMILLEN:

19 Q. So, at the end of the day, you take 18 cases out of
20 the 106 cases that were identified by you in your report that
21 were in the Arbitration Program; correct?

22 A. I'm sorry. I have no idea -- 18 out of what? I
23 don't know what you're talking about.

24 Q. So your report includes an exhibit, a 10-page exhibit

1 of the cases that you looked at, that were identified as
2 being associated with me; correct?

3 A. I looked at the cases that were associated with you.

4 Q. And based upon your report, by my count, there were
5 106 cases in the Arbitration Program, and, of those, you
6 pulled out 18.

7 A. I pulled out 13.

8 Q. Well, you started out with 18, and then you eliminate
9 cases out of those 18.

10 A. All right.

11 Q. How did you come to the 18?

12 A. By cases that were in the Arbitration Program, that
13 went to the arbitrator.

14 Q. Did you look at all the cases I was involved in in
15 the Arbitration Program?

16 A. I looked at cases -- yes, I looked at all the
17 cases -- because as I got it from data that I had, I looked
18 at all the cases that were involved that went into the
19 Arbitration Program, because a number of them then settled.

20 Q. Again, I count 106 on your report. Why didn't you
21 use all of those?

22 A. Because you can't request trial de novo, as I
23 understand the process, unless you've gone through the
24 arbitration process, and an arbitration award has been -- has

1 | been issued.

2 | THE COURT: Entered?

3 | THE WITNESS: And -- at that point. So that's the
4 | issue, that I understand from the Gittings case, is the
5 | request for trial de novo. So if you don't get to that point
6 | in the case, then it's not relevant to the statistics that
7 | are being talked about in Gittings, to which I was
8 | responding.

9 | BY MR. MCMILLEN:

10 | Q. If that's accurate, then why do you exclude two cases
11 | where a request for trial de novo was filed by the other
12 | side?

13 | A. Because it was filed by the other side, not you. I'm
14 | trying to figure out what you're doing, not what somebody
15 | else is doing.

16 | Q. So you're not looking at the participation -- my
17 | total participation in the program.

18 | A. I'm looking at -- I am looking at, very directly,
19 | cases that went to arbitration, which there was an
20 | arbitration award given, and then you, or Farmers, or whoever
21 | that -- you know, whoever makes that decision, requests trial
22 | de novo. So if somebody else requests trial de novo, that's
23 | not you requesting it.

24 | If it settles otherwise, that's not going through the

1 process.

2 If -- you know, it has to go through the process,
3 trial de novo is requested, or goes through the process, an
4 arbitrator's award is issued, and you accepted the award.

5 Q. One of the cases that you cite is the Eckert versus
6 Mickelson case. I didn't file a request for trial de novo in
7 that case, so why would you look at that case?

8 A. Because it was Farmers.

9 Q. But as far as my participation, how does that change
10 your analysis then?

11 A. If I were to eliminate that?

12 Q. Yeah.

13 A. So if I take -- so if it's 10 out of 12, instead
14 of -- so it goes to 83 and a third instead of 84.62, compared
15 to 15. The critical value is still 2.575. And you have a Z
16 statistic. I would take a minute to calculate it, but it's
17 going to be easily above 6.

18 Q. Have you ever looked at any other attorneys'
19 participation in the program in Washoe County?

20 A. No.

21 Q. Let's say that Mr. Kendall gets an adverse award in
22 the Arbitration Program, and files a request for trial de
23 novo. Let's say he just has one case for the entire year,
24 but he files the request for trial de novo. Would that

1 indicate that his participation in the program is off?

2 Basically, doing the analysis that you're doing, what would

3 your analysis be?

4 A. For one case? Can't do statistics on one value.

5 Q. Sorry?

6 A. You would not be able to do statistics.

7 The variance of one out of one is, for all intents

8 and purposes, the entire number line.

9 Q. How about four?

10 A. I'd have to work it out. I don't know.

11 Q. Would that -- what if Mr. Kendall filed requests for

12 trial de novo a hundred percent of the time in four cases?

13 A. I said I'd have to do the analysis. I don't know.

14 Q. What would the analysis be?

15 A. The analysis would be the -- first, you'd have to

16 have something to compare it to. But I'm assuming we are

17 comparing it to the 15 percent. And then you would calculate

18 the Z statistic of the difference between a hundred percent,

19 or the sample size of four, and 15 percent, with the sample

20 size of 340.

21 Q. What about 10?

22 A. Same thing.

23 Q. But even if you did that analysis, that analysis

24 doesn't tell you whether or not Mr. Kendall is doing a

1 request for trial de novo without regard to the facts and
2 circumstances of each individual case, does it?

3 A. What it tells -- no, because statistics doesn't look
4 at individual values. It looks at trends.

5 Q. So, by itself, those numbers don't tell you whether
6 or not someone has requested a trial de novo without regard
7 to the facts and circumstances of each case.

8 A. No, it doesn't tell you that. What it tells you is
9 that they're requesting trial de novo at a rate that is
10 vastly higher than -- or extremely significantly higher than
11 what the normal process works out.

12 So the question then becomes: Are they -- you can
13 make the point that -- Statistics is always a matter of
14 percentages -- but you can make the point that either they're
15 doing something different than the rest of the group, or
16 they're extremely unlucky.

17 In the numbers the way they are, if you wanted to put
18 the "extremely unlucky" thing on it, it's, like, one out of
19 several billion that you're extreme -- that --

20 THE COURT: Well, that can't be right. The chance
21 of -- if something is 51 out of 15 -- excuse me. Fifteen
22 percent is about one out of seven. So if I gave you a
23 seven-headed dice -- die -- what are the chances of rolling a
24 certain number? Could it be -- 15 percent, one out of seven,

1 seventh to the fourth power, that's not billions.

2 THE WITNESS: No, Your Honor. It is that he is six
3 standard deviations away from the mean, and that is a number
4 that is, for all intents and purposes, zero.

5 THE COURT: That's very hard for the Court to accept.

6 The odds of coming up with the -- if four out of four
7 were filed -- if you said, "Close your eyes and pick --
8 there's a hundred marbles in this bag. Eighty-five are
9 white, 15 are black. Close your eyes and pick one," the odds
10 of me getting a black one are one out of seven. If I did it
11 twice, with another bag of a hundred, it would be seven
12 squared. If I did it the third time to get a black one, it
13 would be seven to the third power, and seven to the fourth
14 power. Extremely unlucky, sure. But that's only thousands,
15 a couple thousands. It's not in the billions. I don't
16 accept that.

17 It's not that I got 800 on math SAT, or anything, but
18 I did, so, you know, I know math. I do know math.

19 THE WITNESS: It's not -- and when I teach
20 Statistics, I walk into my classrooms, and I say, "You are
21 about to come into a series of numbers and a series of things
22 that are entirely different than anything you've ever heard,
23 from a different vocabulary to a different set of values, to
24 a different set of calculations."

1 And it will be not something that that kind of
2 analysis is easily determined.

3 But let me give you the number that you want. You
4 want one out of seven?

5 THE COURT: Well, we're talking about -- the answer
6 is: Yes, I do. We're talking about four out of four.

7 THE WITNESS: But you have to raise it to the proper
8 power.

9 THE COURT: Seven to the fourth.

10 THE WITNESS: No. Depends upon the sample of --
11 depends upon both sample sizes.

12 THE COURT: So we have a bag of 340 marbles, and 51
13 are black, and the other 290 or so are white. And the chance
14 of getting a black marble out of such a bag four times in a
15 row, it's not in the billions.

16 THE WITNESS: It's also not the test you're trying to
17 work. Because that's one mean. This is two. It's a
18 comparison of two means. It's not -- it is not, you know,
19 what's the -- it's not what's the probability of getting five
20 heads in a row. That's one out of 32. It's not that. It is
21 these differences of two means. And when you have a mean
22 here, and you have a mean here, how far apart -- are they
23 close enough together that those are the same two numbers?
24 That's the --

1 THE COURT: I understand --
2 THE WITNESS: -- difference between what we're doing.
3 THE COURT: I got you. We're doing different
4 analysis. All right.
5 THE WITNESS: Yes.
6 THE COURT: Please proceed.
7 MR. MCMILLEN: Thank you, Your Honor.
8 BY MR. MCMILLEN:
9 Q. I think I'm pretty much done, Dr. Coleman.
10 Based upon your previous testimony today, your
11 analysis does not tell the Court whether or not I or Farmers
12 file a request for trial de novo without regard to the facts
13 and circumstances of each individual case; correct?
14 A. That's correct. There's no way to do that.
15 MR. MCMILLEN: No further questions, Your Honor.
16 THE COURT: Redirect.
17 MR. KENDALL: Just one question, Your Honor.
18 THE COURT: Go ahead.
19 MR. KENDALL: I just want to make sure that we've got
20 this in the record correctly.
21 REDIRECT EXAMINATION
22 BY MR. KENDALL:
23 Q. I think that, under some questioning from Mr.
24 McMillen, you said that it wasn't relevant to look at his

1 entire caseload of everything he's done in his whole life.
2 Would you go through that again, and explain why that's not
3 relevant to the inquiry you are doing?

4 A. Well, again, the inquiry that I'm doing comes out of
5 the Gittings case. And that's what I was asked to do. The
6 Gittings case refers to the percentage of times that trial de
7 novo was filed, after the arbitration is decided. That is
8 the analysis I did.

9 It doesn't have any -- doesn't -- is not relevant, as
10 I read it, to any of the preceding process that you go
11 through to get to that point. It is what happens once you
12 get to the arbitration, and the award is -- or the decision
13 is made, and then trial de novo was requested. That's what
14 the Gittings case says. That's what I took it off of. At
15 least, that's how I understand the Gittings case, not being
16 an attorney. But the plain English of it, that's how I
17 understood the Gittings case.

18 That's what the request by the Court was, was to say,
19 52 percent per se, or maybe too high per se, but we want some
20 statistics to demonstrate whether it is or isn't. That is
21 the analysis that I did in responding to that issue.

22 MR. KENDALL: Thank you.

23 No more questions.

24 THE COURT: Anything else?

1 MR. MCMILLEN: No, Your Honor.

2 THE COURT: Before you get down, let me ask you this,
3 Dr. Coleman.

4 I'm trying to anticipate argument here from Mr.
5 McMillen based on argument he's made and some of the
6 questions he asked you.

7 You know, Gittings quotes -- the Gittings Supreme
8 Court case quotes from the District Court's decision,
9 apparently with approval. And part of the District Court's
10 decision, with approval, used this phrase, at page 391.

11 And before I read the phrase, I'll note this. I
12 believe at the time that Gittings came out 19 years ago, the
13 person who oversaw the Arbitration Program in Clark County
14 had a second role. They also were the Discovery
15 Commissioner. They were the Discovery Commissioner, and as I
16 recall, and the Arbitration Commissioner.

17 So when the District Court referred to the Discovery
18 Commissioner, I read that to be the Discovery Commissioner/
19 Arbitration Commissioner.

20 THE WITNESS: All right.

21 THE COURT: So in Gittings, quoting from the District
22 Court, the District Court found that, "The Discovery
23 Commissioner of Clark County concluded that, in a recent
24 study, that Allstate Insurance Company requests trial de novo

1 in at least 52 percent of the cases it is involved with."

2 Now, let me say that again. "52 percent of the cases
3 it is involved with."

4 Not, "52 percent of those arbitrations in which an
5 award was rendered against its interests."

6 So the comparison here of 11 out of 13, or if we back
7 one out because it was a different lawyer, 10 out of 12,
8 which you've said, for purposes of your conclusions, really
9 doesn't change them, we're comparing those amount of Farmers'
10 insureds' cases that went through the Arbitration Program
11 that Mr. McMillen sought trial de novo. And, indeed, the
12 data you looked at from 2006 to 2015 available from the
13 Nevada Supreme Court suggested 51 de novo requests out of 340
14 awards. But yet, going back to Gittings, quoting from the
15 District Court, "52 percent of cases that Allstate is
16 involved with."

17 So the questions by Mr. McMillen to you, and as
18 argued to the Court, is, essentially, "Well, you don't really
19 know how many cases I was involved with, how many cases were
20 assigned to the Arbitration Program, but did not go all the
21 way through an award, we may have" -- "we," Farmers -- "may
22 have, in good faith, settled."

23 Is that an argument, Mr. McMillen, you're asking the
24 Court to analyze as part of the decision here?

1 MR. MCMILLEN: Absolutely, Your Honor.

2 THE COURT: And so you're suggesting to the Court,
3 and you asked Dr. Coleman questions with respect to whether
4 he analyzed how many cases Farmers was involved with; right?

5 MR. MCMILLEN: Exactly.

6 THE COURT: So, Dr. Coleman, without, you know,
7 getting into whether -- what we read this to mean or how this
8 Court should interpret Gittings in reference to the District
9 Court's discussion of what "involved with" means, is it clear
10 that you didn't look at the picture of how many cases Farmers
11 started in the arbitration process, but, rather, only those
12 awards that went against its interests that they then sought
13 de novo review on? Is that fair?

14 THE WITNESS: Yeah. But that number doesn't make
15 sense. The 52 percent doesn't make sense if it's all of the
16 cases that they have. I mean, 52 percent of the time that
17 somebody has an automobile accident, and Allstate is involved
18 in, they end up in a trial?

19 THE COURT: Well, no. Involved in a court
20 proceedings.

21 THE WITNESS: Then you go to the court proceeding.
22 Fifty-two percent of the cases that are filed in court --

23 THE COURT: Hold on. Now you're acting like a
24 lawyer. You're acting like Mr. Kendall here, to tell me --

1 THE WITNESS: No. I'm trying to understand -- trying
2 to --

3 THE COURT: Here's my singular question: You didn't
4 analyze those amount of cases that were assigned to Farmers,
5 and then delegated to Mr. McMillen, that were in the
6 arbitration process, that did not go through an award; right?

7 THE WITNESS: That didn't -- I'm sorry. I lost track
8 of your question.

9 THE COURT: Sure. Cases where a Farmers' insured was
10 sued, it was assigned to Mr. McMillen, it was assigned,
11 through the Second Judicial District Court, to the
12 Arbitration Program, but it was not taken all the way through
13 an arbitration award. That was not part of your analysis.

14 THE WITNESS: No.

15 THE COURT: Mr. Kendall, why didn't you ask
16 Dr. Coleman to do that part of the analysis? It says right
17 here, "52 percent of the cases it is involved with."

18 It doesn't say -- by the way, can we thank and excuse
19 Dr. Coleman?

20 MR. KENDALL: No, not yet.

21 THE COURT: Okay.

22 MR. KENDALL: Your Honor, the reason I didn't ask him
23 to do that is because I don't think that's the correct
24 interpretation of what the Supreme Court says here.

1 First of all, you can't request a trial de novo
2 unless you've gone through the arbitration process, and
3 there's been an award. So the Supreme Court saying that
4 Allstate requests trial de novo in 52 percent of the cases
5 it's involved with, well, you can't have 52 percent of cases
6 unless they already went through the program and resulted in
7 an arbitration award; therefore, entitling you to file a
8 request for trial de novo.

9 THE COURT: Well, we're talking about the Arbitration
10 Program, clearly, as opposed to any civil case filed that's
11 exempted or removed. But how do we know they meant only the
12 52 percent where an award was rendered?

13 MR. KENDALL: Because I think, if you look at the
14 sentence structure, I think that's what is intended. Looking
15 at sentence structure, they're saying that, "Allstate
16 Insurance Company requests trial de novo in at least 52
17 percent of the cases it's involved in."

18 Well, you can't request a trial de novo unless
19 there's been an arbitration award. So I think that that
20 sentence structure tells us that the Supreme Court is talking
21 about those cases that are eligible for trial de novo.

22 THE COURT: Mr. McMillen, tell me, please, why he's
23 wrong.

24 MR. MCMILLEN: Okay. Well --

1 THE COURT: Why do you read it differently?

2 MR. MCMILLEN: The Gittings case clearly says, "52
3 percent of the cases Allstate is involved with." It doesn't
4 do a delineation between after an arbitration, before an
5 arbitration. It does not do that.

6 THE COURT: It's clear it's at least in the program.

7 MR. MCMILLEN: Exactly.

8 THE COURT: The question is if they meant after an
9 award is rendered.

10 MR. MCMILLEN: Well --

11 THE COURT: Mr. Kendall says, "It's so obvious they
12 didn't have to say it"; right?

13 You don't think it's that obvious.

14 MR. MCMILLEN: Well, I would like to use -- or at
15 least I'd like to think I'm using my logic here, Your Honor,
16 where, in order to make an analysis of what is your rate of
17 participation in the -- or in filing a request for trial de
18 novo, what is your rate, that's going to get you to the 52
19 percent. Where does the 52 percent number come from?

20 Because if it's just when they file a request for
21 trial de novo, it doesn't say that. Because, of course,
22 they're going to file it -- I mean, a hundred percent of
23 their trials de novo are going to be from an adverse order of
24 the Court; otherwise, they're not going to file one.

1 THE COURT: I have to make a determination on what
2 the reference by the District Court meant and what the
3 Supreme Court is referring to. But I see both sides here.

4 Any other questions for Dr. Coleman?

5 REDIRECT EXAMINATION

6 BY MR. KENDALL:

7 Q. Dr. Coleman, you started to say that, if you are
8 looking at every case that Allstate is involved with, first
9 of all -- well, if you're looking at every case they're
10 involved with, how does that 52 percent compare to just
11 looking at trial de novos?

12 A. Well, if it's -- if it is anything other than the
13 number that goes through the arbitration, 52 percent is --
14 makes no sense as a number of any kind of -- Mr. McMillen
15 uses the term "logic." You know, that number does not -- is
16 simply not logical.

17 Q. Why?

18 A. At 52 percent, compared to every case that they file
19 or every case that they get involved in, compared to -- I
20 mean, you see the numbers from the courts in the Supreme
21 Court decisions. You know, 4,000 cases in Washoe County, 51
22 trial de novos over a 10-year period. Now, that's, you know,
23 somewhere around one or two percent. And Allstate is 52
24 percent on that same comparable number? I mean, that is just

1 not a logical conclusion to draw, I don't see, from the
2 mathematics of it. Just doesn't make sense that the number
3 would be --

4 THE COURT: Well, it's not every filing. It's every
5 case that would be assigned to the Arbitration Program, which
6 is a lot less.

7 THE WITNESS: Okay. Then cut it down to that. It is
8 still the 52 percent, compared to every case in the
9 Arbitration Program, is still something around 52 percent of
10 them to five, or three, or whatever the number would be.
11 It's still very small.

12 THE COURT: You're saying they have to be referring
13 to --

14 THE WITNESS: Yeah. It makes no sense to be a number
15 that large.

16 THE COURT: I understand.

17 MR. KENDALL: No other questions.

18 THE COURT: All right. Thank you.

19 Anything else, Mr. McMillen?

20 MR. MCMILLEN: Well, where does 52 --

21 THE COURT: I mean, any questions of Dr. Coleman, as
22 opposed to making argument to the Court.

23 MR. MCMILLEN: No, Your Honor.

24 THE COURT: Dr. Coleman, you're excused. Thank you

1 very much.

2 THE WITNESS: Thank you.

3 THE COURT: You're welcome. If you want to sit and
4 watch this, or else you're free to leave.

5 (Witness excused.)

6 THE COURT: I think I understand the nuance -- the
7 dichotomy here. I understand the way that Mr. McMillen is
8 viewing this, asking the Court to consider it. And I
9 understand, certainly, the way that Mr. Kendall is.

10 All right. Well, let's do this. We've been going
11 for about two hours. We're due for a comfort break, anyway.

12 Can you summarize your position in a few minutes or
13 less, each side? Then I'm going to take a 15-minute break,
14 come out and put on the record the Court's decision. Or
15 would you like to break now to gather your thoughts, and then
16 come back and summarize?

17 MR. KENDALL: I'm ready to go.

18 MR. MCMILLEN: I would like to do a longer summary,
19 if I can.

20 THE COURT: Then we're going to take a 15-minute
21 break. We'll come back at 10 minutes after 12:00, and I'll
22 hear summation, and then I'll either rule from the bench,
23 take a short recess, or take it under advisement.

24 So we'll be in recess until about 10 after 12:00.

1 MR. MCMILLEN: Thank you.

2 (Recess.)

3 THE COURT: Correction. 850, I think, is the highest
4 FICO score. And I got 800. What did I tell Dr. Coleman? I
5 got 800. I think I got a 750 on math, not 800. I got 50
6 below the highest. So I don't want to overstate my
7 credentials here.

8 Okay. Mr. Kendall, what did the evidence show; and
9 why should I go your way?

10 MR. KENDALL: Well, Your Honor, I'm not going to
11 rehash everything. You've heard it already once. But to
12 summarize, the evidence shows -- let me read to you from
13 Gittings, the evidence that I think the Supreme Court wants
14 to see, and then how what I've shown you correlates to that.

15 So they say that, "Competent" -- this is on page 393,
16 at the bottom, headnote 10. It says, "Competent statistical
17 information that demonstrates that an insurance company has
18 routinely filed trial de novo requests without regard to
19 facts and circumstances of each individual case may be used
20 to support a claim of bad faith."

21 THE COURT: Well, but we just heard evidence,
22 representations, that the facts and circumstances of the
23 cases justified the trial de novo, because you heard Mr.
24 McMillen argue to the Court that on about -- first of all,

1 it's not 11 out of 13. It might be 10 out of 12 or 10 out of
2 13. And, second, that they had success on those that
3 actually went to trial.

4 I realize that you have a different view of what
5 "success" means if we added in the fees and costs. But how
6 do I --

7 MR. KENDALL: Well, you know, first of all, Your
8 Honor, allowing Mr. McMillen to testify about those things
9 that aren't even in his opposition by way of affidavit, in my
10 opinion, is not fair to me.

11 He doesn't get to just give his opinion about things.
12 If he wants to argue the evidence that's before the Court,
13 I'm all for it.

14 THE COURT: Well, hold on. He gave -- he had
15 specific -- he gave the Court a specific recitation of the
16 awards and the amounts and the name and the case number.
17 It's all -- should the Court not take judicial notice of
18 that, it's easily rectifiable.

19 MR. KENDALL: Yes. But he went well beyond it, and
20 wanted to explain to the Court about what happened in that
21 case and why they decided to -- that is not evidence before
22 the Court, and I object to it being considered in resolving
23 this dispute.

24 THE COURT: Well, if I put him under oath, and he

1 swears right now that it's the way he represented --

2 MR. KENDALL: Well, then I can cross-examine him on
3 it. And I'm all for that, too.

4 THE COURT: We're getting too far into the weeds on
5 that. He's an officer of the court, and I'll accept the
6 representation. And those things that are judicially
7 noticeable, I'll take notice.

8 MR. KENDALL: I don't have any problem with you
9 judicially noticing everything that is in the eFiling system
10 and everything that has been filed in all these cases.

11 What my objection is: Mr. McMillen offering
12 extraneous testimony, that is not verifiable through those --
13 through looking at those documents.

14 THE COURT: One case, and I gave him a little bit of
15 liberties there.

16 MR. KENDALL: Okay. So, Your Honor, whether it's 11
17 out of 13, 10 out of 13, 10 out of 10, when I filed the
18 motion, the last motion, with Ortega, it was 11 out of 11.
19 The only thing that's changed is in the last -- since filing
20 that motion, the couple of cases that they decided to not de
21 novo.

22 And I think you should look at that with a little
23 skepticism, because it was done after the motions were filed.
24 That's all I have to say about that. But I think it deserves

1 a little bit more critical look at.

2 So if it's 11 out of 13, 10 out of 13, we're still
3 talking a high percentage, compared to the average of the
4 last 10 -- 2015, 10 years before, which was 15 percent.

5 THE COURT: And I shouldn't use -- I shouldn't take
6 the denominator, and instead of saying 13, it shouldn't be
7 40, 50, 60, a hundred, because of all the cases that have
8 gone into the Arbitration Program that have been resolved
9 before an award was rendered?

10 MR. KENDALL: No, because they're irrelevant. We're
11 not looking at those cases.

12 THE COURT: You don't read Gittings to suggest the
13 Court should take that into account?

14 MR. KENDALL: You're talking about the part there
15 where it says -- that the Court quoted about --

16 THE COURT: Yeah.

17 MR. KENDALL: -- "52 percent of the cases it's
18 involved with"?

19 THE COURT: Yes.

20 MR. KENDALL: Well, the reason I think that, no,
21 that's not what you should do is because that sentence is
22 talking about de novos filed. And you can't file a de novo
23 unless the case has been through the program and resulted in
24 an award. So it's not talking about all the cases that

1 Allstate has been involved in.

2 Secondly, how would the Discovery Commissioner or the
3 Arbitration Commissioner have statistics on all the other
4 cases that they've been involved in?

5 THE COURT: Well, involved in, that were assigned to
6 arbitration, is the way Mr. McMillen is asking the Court to
7 view that.

8 MR. KENDALL: I don't think that's what that sentence
9 means.

10 THE COURT: Okay.

11 MR. KENDALL: I think that that is really stretching
12 it because it's not considering only the cases that are de
13 novo. That's what Gittings is about. The whole case is
14 about analyzing the number of de novos that the insurance
15 company files in relation to the number of verdicts or awards
16 for the plaintiff. That's what the analysis is.

17 And that's what the Supreme Court says about the
18 proof. And this is what I want to try to hone in on. And
19 that is that sentence that says, "Competent statistical
20 information that demonstrates that an insurance company
21 routinely files trial de novos."

22 So the Supreme Court is saying that -- under headnote
23 10, last page -- the Supreme Court is saying that, "Competent
24 statistical information can demonstrate that the insurance

1 company routinely files requests for trial de novo without
2 regard to the facts and circumstances."

3 THE COURT: Yes. But it also says, at 394 -- let me
4 quote this. It says, "While a comparatively high percentage
5 of de novo requests are filed by Allstate, there is --
6 while" -- let me start over.

7 "While a comparatively high percentage of de novo
8 requests are filed by Allstate, there is no analysis
9 accompanying the statistics to support a conclusion that the
10 statistics prove that Allstate automatically requests a trial
11 de novo regardless of the arbitration process. For
12 example" -- and this is the part I want everyone to focus
13 on -- "no correlation has been shown between requests for
14 trial de novo and verdicts for or against the party who filed
15 the request."

16 And that's --

17 MR. KENDALL: We looked at that.

18 THE COURT: That's important to the Court, because we
19 had five that went to verdict. And you believe, Mr. Kendall,
20 that there's one that favors -- at most, one that favors a
21 superior result. And Mr. McMillen is suggesting there are
22 four.

23 MR. KENDALL: Yeah.

24 THE COURT: And so, you know, we're talking about

1 costs and fees.

2 And I guess the point the Court tried to make earlier
3 was, if we're having that argument, if it's that close, you
4 know, does not that work in favor of the defense here?

5 MR. KENDALL: It is what it is.

6 THE COURT: It's not as though there's -- never mind.
7 Go ahead.

8 MR. KENDALL: I think the point is, is that they
9 don't -- they put the plaintiff through that entire short
10 trial process to do what: end up where they were eight
11 months ago? If that's not bad faith, if that's not just
12 doing it to delay and harass, what is? They ended up in the
13 same spot they were when that arbitration award came down.

14 THE COURT: Yet the rule contemplates exactly that.
15 No, not exactly the way you put it. They contemplate awards
16 that are pretty darn close to the underlying arbitrator's
17 award. That's why you're only financially penalized if you
18 don't exceed by 10 or 20 percent.

19 MR. KENDALL: What do you mean, "It contemplates"?

20 THE COURT: The rule on attorney's fees and costs
21 contemplates a de novant improving the result by 20 percent
22 on certain matters, and 10 percent on certain others. In
23 other words --

24 MR. KENDALL: Or they get fees against them.

1 THE COURT: Yes. So, in other words, those that put
2 together these rules recognize that there are going to be
3 cases that a de novo request occurs, and it's going to be
4 pretty close to what the underlying award was. It doesn't
5 say you have to double your award --

6 MR. KENDALL: No, it doesn't.

7 THE COURT: -- or halve it, if you're the defense.
8 It just says you have to beat it by a little.

9 If you want to change the law, that's --

10 MR. KENDALL: I'm not arguing that that's not a good
11 rule. I'm just saying that, when you go through that entire
12 process, and you end up where you were before, what was the
13 point of it? To see if we can roll the dice and do better?

14 That's not what our program anticipates. That's not
15 what our program is all about. Our program is not all about
16 giving the other side or the losing party at arbitration
17 another bite at the apple. That's not what it's about.

18 So when you de novo almost every -- I'm going to say
19 "almost," to take in that 11 out 13, whatever it is -- when
20 you de novo almost all, and you're up in the 80 to 90 percent
21 of de novo rate in cases that you lost, 90 percent of them
22 you de novo'd, then I think the Supreme Court says that that
23 fact alone can demonstrate that they're doing it without
24 regard to the facts and circumstances of the case.

1 And then the Supreme Court says: Hey, there's
2 another thing that you can look at. Because it says, "For
3 instance." And I think the Court is right. If they went to
4 short trial on all of those cases, and won every single one
5 of them, then you might take pause and say, "Well, maybe they
6 were justified in filing the de novo on those." But that's
7 not what we've got.

8 THE COURT: Mr. McMillen says, "I've got 80 percent
9 success rate."

10 MR. KENDALL: Well, he's wrong.

11 THE COURT: Five of them went to trial.

12 Now, of course, the contra to that is, if we go with
13 the 10 out of 12 that Mr. McMillen, as opposed to Farmers,
14 was involved with, we go to 10 out of 12, if there are five
15 that went to short trial, that means there are seven that
16 were resolved other ways. And I'm assuming Farmers didn't
17 pay more than the award, so.

18 MR. KENDALL: We don't know. There's no evidence
19 before the Court on what happened.

20 THE COURT: I'm going to use common sense to suggest
21 that it was negotiated down from there.

22 Well, you know what? It could have been negotiated
23 up, if the plaintiff threatened to take a de novo.

24 MR. KENDALL: We're just speculating what could

1 happen. There's no evidence before the Court about that.
2 Not in his opposition.

3 THE COURT: Well, that works in your favor. If the
4 idea is that they are systematically de novoing to put
5 pressure on the plaintiff in a small case, and five or six
6 out of the 12 settled after the defense did a de novo, I'm
7 going to just assume, common sense suggests, it would settle
8 for less.

9 MR. KENDALL: Okay.

10 THE COURT: So that's the Court's idea that this is
11 systemic.

12 MR. KENDALL: Like I said before, we're never going
13 to have the smoking-gun piece of paper that says: Your
14 instructions to Mr. McMillen from Farmer's executive office
15 is to de novo every case. We're not going to have that.
16 That's why it's circumstantial evidence to prove that.

17 And I think the circumstantial evidence is, 80 to 90
18 percent de novo rate, which is far vastly in excess of the
19 average de novo rate in Washoe County, I think that that is
20 what the Supreme Court is talking about demonstrates that
21 they're doing it without regard to the facts and
22 circumstances. It's just: We're going to do it when we
23 lose.

24 THE COURT: Okay.

1 MR. KENDALL: Enough said on that. There's nothing
2 else I can say on that to convince the Court that that's
3 correct.

4 THE COURT: Well, you convinced me that that's your
5 position. I've heard it several times. I understand it. I
6 have to decide whether I find it ultimately --

7 MR. KENDALL: I don't want to beat it anymore.

8 THE COURT: Okay.

9 MR. KENDALL: You heard Dr. Coleman testify.

10 I'll submit to you that it's important to note that
11 the defendant hasn't brought an expert to testify about the
12 statistics, which the Supreme Court seems to indicate is
13 required. You have to do a statistical analysis.

14 I don't know anybody that's capable of doing a
15 statistical analysis other than an economist. They haven't
16 brought an expert in to do that. They've chosen to just
17 cross-examine this one.

18 I think Mr. Coleman -- or Dr. Coleman -- he's careful
19 about that -- he testified that their de novo rate is vastly
20 in excess of what the norm is. And I think that's what
21 really carries the day here, Your Honor.

22 We don't care about all the other animals in the
23 species -- in the zoo. We're looking at the rabbits, which
24 are the de novos.

1 THE COURT: Thank you.

2 MR. KENDALL: I think that's all I have.

3 THE COURT: All right. Thank you very much.

4 Mr. McMillen.

5 MR. MCMILLEN: May I use the podium?

6 THE COURT: Go right ahead.

7 MR. MCMILLEN: I have a PowerPoint presentation to

8 keep me on track, Your Honor.

9 THE COURT: Do it.

10 MR. MCMILLEN: I will hopefully go as quickly as

11 possible.

12 So we know that the right to a jury trial is

13 considered sacred by the founding fathers, and, obviously,

14 it's something very important.

15 This direct quote came out of Bob Eglet's

16 presentation at the annual convention in Austin, Texas, for

17 the Nevada State Bar. And I thought it was a very good

18 quote, because it summarizes exactly what we're here for

19 today.

20 THE COURT: Well, take a step further. Thomas

21 Jefferson said, "That more important to an open and fair

22 democracy is the right to trial by jury, than even the right

23 to vote for our elected officials."

24 So they thought it was very important, as does this

1 Court.

2 MR. MCMILLEN: It's a very important part of our
3 system. It's what, at the end of the day, makes our system
4 work.

5 And Nevada litigants have the right to a jury trial
6 under the State Constitution. The right may be waived under
7 Nevada Arbitration Rule 22 for failure to participate in good
8 faith. Within this context, good faith equals meaningful
9 participation in the arbitration process.

10 The important constitutional right to a jury trial is
11 not waived simply because individuals can disagree over the
12 most effective way to represent a client at an arbitration
13 proceeding. In fact, terminating the right to participate in
14 the litigation process is considered by the State of Nevada
15 Supreme Court a severe and Draconian sanction.

16 In thinking about that, taking away my client's right
17 to a jury trial is a very severe and Draconian sanction.

18 I thought it was interesting, this quote: "Where a
19 defendant contests liability in bad faith, but also validly
20 contests damages, the severe sanction of striking a request
21 for a trial de novo is not warranted." That is in the
22 Campbell versus Maestro case.

23 As we've gone over before, in Gittings versus Hart,
24 "Competent statistical information that demonstrates that an

1 insurance company has routinely filed trial de novo requests
2 without regard to the facts and circumstances of each
3 individual case may be used to support a claim of bad faith."

4 You heard plaintiff's expert admit, under oath, his
5 analysis does not come to this conclusion.

6 THE COURT: Well, let me stop you there. I heard
7 it -- and you're right. He did admit that, and that's an
8 important factor with the Court. But what he is saying is
9 that Farmers -- his opinions are suggestive to the Court
10 this: Farmers must analyze facts and circumstances of each
11 individual case differently than the other two or 300
12 litigants who decided that only 15 percent of the time trial
13 de novo was appropriate. In other words, you guys must be
14 special.

15 How do you respond to that?

16 MR. MCMILLEN: Well, he couldn't even tell us where
17 those numbers came from, in the first place. He couldn't
18 tell us the rate of any one individual or one insurance
19 company. He couldn't tell us whether those requests for
20 trial de novo came from plaintiff, defendant, whether they
21 were adverse awards, et cetera.

22 I understand his argument that: Well, yeah, here my
23 analysis indicates 15 percent. Here my analysis indicates 85
24 percent, for me.

1 But, again, he's not comparing apples to apples. He
2 doesn't even know if -- I mean, his 341 number, where does
3 that come from?

4 THE COURT: He said it came out of the Supreme Court
5 report.

6 MR. MCMILLEN: Right. But he is saying that 341
7 comes from all the cases in the program; right? And 51 there
8 was a request for trial de novo. He doesn't do that analysis
9 against me. He doesn't say: How many cases did Adam
10 McMillen participate in in the Arbitration Program; and out
11 of those cases, how many were a request for trial de novo
12 filed?

13 THE COURT: Well, the plaintiff says he doesn't have
14 to do that here. He only has to look at those that
15 arbitration occurred, and an adverse result to Farmers
16 Insurance resulted, and a de novo request was filed. That's
17 it. Those were the vectors he --

18 MR. MCMILLEN: And as he erroneously says that I
19 didn't point it out in my brief, or in my declaration that I
20 didn't point out that we accepted two arb awards, that's in
21 my brief. The third one I pointed out today, that wasn't in
22 my brief.

23 Dr. Coleman did point out in his report that we did
24 accept two of the awards, but he didn't include those in his

1 analysis, so he is not doing a fair analysis as far as pure
2 statistics.

3 THE COURT: Okay.

4 MR. MCMILLEN: So these are the 10 cases cited.

5 In the Walker case; and then the 11, in the Ortega
6 case.

7 And, again, I would point out that the second case,
8 the Eckert versus Mickelson case, was filed by Karl Smith,
9 not by me. So that's another problem with their statistics.

10 Then, again, they ignore every other case in the
11 Arbitration Program. As a result, their statistics are
12 flawed.

13 I could go through each case individually, but I
14 don't know if that would be warranted, given --

15 THE COURT: I don't think so.

16 MR. MCMILLEN: -- our discussion.

17 THE COURT: Yeah.

18 MR. MCMILLEN: But I was going to go through the
19 facts of especially the last two cases that are before Your
20 Honor.

21 THE COURT: Go ahead.

22 MR. MCMILLEN: But, essentially, what it comes down
23 to is, we participated in good faith in each of the cases
24 cited. There's no evidence of --

1 THE COURT: Mr. Kendall has already admitted that
2 this Court is not being asked to determine whether the -- up
3 through the arbitration award the participation was in good
4 faith. There's no issue there.

5 MR. MCMILLEN: And so, again, going back to the
6 Gittings analysis, and the other analysis, by Chamberlin, for
7 example, the first thing you have to look at is whether we
8 participated in the program in good faith. That's been
9 admitted.

10 So the next analysis that we're trying to do --

11 MR. KENDALL: Your Honor --

12 THE COURT: Not being contested. It's a little
13 different.

14 MR. KENDALL: I haven't admitted that they
15 participated in the program in good faith. That's the whole
16 reason I'm here. I'm saying they're not. He misspoke.

17 THE COURT: I think he meant up to the arbitration
18 award, there's no issue there.

19 MR. MCMILLEN: I was going to go through each case to
20 show that we looked at each individual case before we filed a
21 request for trial de novo.

22 THE COURT: Well, let's do this. Can you make an
23 offer of proof that a thorough investigation was made in each
24 case to analyze risk, liability, evidence?

1 MR. MCMILLEN: Yes, Your Honor.

2 MR. KENDALL: Your Honor, before he does that, I want
3 to make an objection for the record.

4 THE COURT: Do you want him to -- well, because is
5 this all new?

6 MR. KENDALL: Yeah, this is all new.

7 MR. MCMILLEN: It's all in my declaration. It's all
8 in the opposition that I filed--

9 MR. KENDALL: Your Honor, it is not.

10 He wants to get up here and tell you what -- the
11 analysis that they went through in every single case to
12 decide whether to file a trial de novo. And that is not --
13 that is not --

14 THE COURT: Well --

15 MR. KENDALL: That's just testimony.

16 THE COURT: Well, first of all, Gittings suggests
17 that an important consideration is the thoroughness of the
18 decision whether to de novo, or not. So certainly it's
19 relevant to the Court's inquiry.

20 MR. KENDALL: It may be relevant, but he hasn't
21 presented it as evidence. It's not in his oppositions. This
22 is what I'm talking about, Your Honor. We don't get to come
23 in here --

24 MR. MCMILLEN: It is --

1 THE COURT: Hold on.

2 MR. KENDALL: -- and present new evidence at the
3 eleventh hour and say: Oh, too bad, plaintiff. We're just
4 going to let you do it.

5 THE COURT: Well, the Court recalls in the briefing
6 seeing evidence of the nature of the underlying cases that
7 were subject to the de novo request.

8 Now, did I imagine that or --

9 MR. KENDALL: No. He explained what happened, kind
10 of laying out the facts of those cases. But there's no
11 analysis in there about why they decided to do a trial de
12 novo in any of those cases. It just lays out the facts of
13 those cases.

14 THE COURT: Well, I guess, under the circumstances, a
15 fair way to address that is to keep -- if the PowerPoint, you
16 know, adds to and explains further, I probably should not
17 consider it.

18 In terms of staying in your lane, if you can describe
19 for me what's already in your affidavit, with reasonable
20 extrapolations, that would be permissible.

21 MR. MCMILLEN: So, for example, the two cases that
22 are before Your Honor --

23 THE COURT: Yes.

24 MR. MCMILLEN: -- I went in detail through each case.

1 THE COURT: Yes.

2 MR. MCMILLEN: Through the facts and circumstances of
3 each case.

4 Also demonstrated and pointed out we did written
5 discovery in each case, took the plaintiff's deposition in
6 each case, did the arbitration brief in each case, appeared
7 at the arbitration hearing, did an arbitration statement,
8 participated in good faith in the arbitration hearing, the
9 entire process.

10 I went a step further with the Ortega and Walker
11 cases that are before Your Honor with the facts and
12 circumstances in the briefing. That's all in the briefing.

13 What happened in each case? Why did we do a request
14 for trial de novo? For example, the Walker case. That
15 involves a bicycle-versus-auto accident. Mr. Kendall's
16 client is going down Arlington, crossing the bridge by the
17 river, and he is 30 to 40 feet -- in his own admission, in
18 his own testimony, 30 to 40 feet behind my client. Sees her
19 start to make a right turn when he's 30 to 40 feet behind
20 her. He admits in the record, in his deposition, and at
21 arbitration hearing, that my client is already executing her
22 turn to turn into the park. Plaintiff does nothing to stop,
23 even though he sees her, and he runs into her.

24 Mr. Galloway provided an award that was extremely

1 favorable to the plaintiff. As a result, we filed a request
2 for trial de novo.

3 What happened in Ortega, so, Ortega, auto accident.
4 My client rear-ends the plaintiff. Undisputed liability.
5 The only question is damages. Given no complaints of injury
6 at the scene; that the plaintiff continued to work as a
7 mechanic, and lift heavy objects; that he continued to ride
8 his performance stunt motorcycles; and that there was no
9 verified loss of income.

10 We requested a trial de novo because the arbitration
11 award was outside of what we would consider a reasonable
12 award that a jury would provide, because he just -- it was
13 outside of that reasonableness that we felt was comfortable.
14 So we filed a request for trial de novo in that case.

15 And I can go through the facts of every other case --

16 THE COURT: No, no. I think, because of -- these two
17 were in your brief; these two I'm familiar with. And this
18 explains the thoroughness of the analysis before the de novo
19 request was made.

20 MR. KENDALL: Your Honor, I --

21 MR. MCMILLEN: So -- there's no case where I or
22 Farmers acted in bad faith. There's no evidence of that in
23 the Arbitration Program.

24 There's no evidence that we refused to participate in

1 the arbitration process or acted in any way to impede the
2 process, or delay the process, or otherwise adversely affect
3 the proceedings. There's nothing in the record that supports
4 a view that I or Farmers ever refused to comply with any
5 court order, purposely denied plaintiffs of their ability to
6 participate fully, or even refused to discuss settlement at
7 any time. There's never been a finding, again, of bad faith.

8 I already objected to plaintiff's expert coming in.
9 I won't go over all of the flaws, because I think we've
10 already gone over those.

11 My actual statistics, I began working for Farmers
12 October 30th, 2017. As of July 23rd, when I filed my last
13 opposition in these two cases, I had been assigned over 180
14 matters. I have settled and/or resolved 54 matters outside
15 of the mandatory Arbitration Program.

16 I have settled and/or resolved 29 matters in the
17 Arbitration Program prior to an arbitration hearing. And to
18 clarify, one of those was not in Washoe County.

19 THE COURT: Okay.

20 MR. MCMILLEN: I have settled and/or resolved 11
21 matters in the mandatory Arbitration Program after an award,
22 but prior to a short trial. Two of these -- actually, this
23 information is based on what I had in my briefs that I filed
24 in July. So, as we know, three of these matters were

1 accepted, we accepted the arbitration award. Eight were
2 settled below the amount of the arbitration award. So one of
3 these matters, the award was paid after the trial de novo was
4 stricken because we failed to pay the arbitrator's fee on
5 time.

6 I tried one matter to verdict in the Short Trial
7 Program, after Karl Smith filed a request for trial de novo,
8 and not reducing the arbitration award. That was the Eckert
9 versus Mickelson matter.

10 I defended two matters in the Arbitration Program
11 where no trial de novo was filed.

12 And I've tried five matters to verdict in the Short
13 Trial Program, and reduced the arbitration award. Now, that
14 includes Las Vegas, Clark County, and also Carson City. So
15 one in Clark County, one in Carson City.

16 Since working for Farmers, I have tried one matter to
17 verdict, after plaintiff that's not the undersigned filed a
18 request for trial de novo.

19 So I've filed, personally, 12 requests for trial de
20 novo, two in other districts. Three of them settled before a
21 short trial. One, as we've discussed, the arb award was
22 confirmed. Three, the arb award was reduced. One, the short
23 trial, was still pending. And the two before Your Honor are
24 still pending.

1 Outside of this district, one settled before the
2 short trial, and then, another one, the arbitration award was
3 reduced.

4 Seven percent of all my cases I requested a trial de
5 novo. And that comes from the 180 number.

6 THE COURT: Got it.

7 MR. MCMILLEN: The actual statistics show that I and
8 Farmers settle more cases than we try in the Arbitration
9 Program or the Short Trial Program.

10 The statistics also demonstrate that I and Farmers
11 only try cases after carefully considering the facts and
12 circumstances of each case. The statistics show the exact
13 opposite of what plaintiffs are claiming. All requests for
14 trial de novo were based upon the facts and circumstances of
15 each individual case, and there's no evidence to the
16 contrary.

17 Just for an interesting statistic that was provided
18 in the Arbitration Program, in Clark County, in 2018, 61
19 percent of the short-trial verdicts reduced the arbitration
20 award; 25 percent of the short-trial verdicts reduced it to
21 zero. Overall, in Clark County, in 2018, the short-trial
22 verdicts reduced the arb award by over 85 percent of the
23 time.

24 In Washoe County -- and this is based -- I'm getting

1 the Washoe County information from information that was
2 provided to me by the Clerk of the Second Judicial Court,
3 which I filed in the record in both cases before Your
4 Honor --

5 MR. KENDALL: And, Your Honor, I'm going to make a
6 big objection to this right now.

7 On Wednesday, Mr. McMillen dumped 78 pages of raw
8 data on me, as a discovery supplement. He filed it in the
9 eFile system, which we all know we don't file discovery. But
10 why did he do that? Because he wanted it to get into the
11 court file.

12 He hasn't sought leave of Court to file any
13 supplemental opposition to his opposition, and yet he dumps
14 this on us Wednesday, before the hearing here, and expects
15 that to be okay.

16 I strenuously object to him doing any presentation
17 about this raw data that, number one, that just got dumped on
18 us, is not permitted by the Court through an order for leave
19 to file additional evidence. And there's no analysis of it.
20 He is not competent to analyze this raw data and present
21 testimony to the Court about what it means.

22 THE COURT: Okay. You're asking the Court to strike
23 it?

24 MR. KENDALL: Yes, sir.

1 THE COURT: Response.

2 MR. MCMILLEN: Your Honor, we've discussed this about
3 Dr. Coleman. Mr. Kendall filed Dr. Coleman's report in both
4 cases before Your Honor, so I thought what was good for the
5 goose is good for the gander. You've allowed that report to
6 come in. I don't know why this raw data from the Court
7 shouldn't come in, as well, Your Honor.

8 THE COURT: Okay. How do you respond to that?

9 MR. KENDALL: Well, first of all, Mr. Coleman is not
10 new evidence. The evidence that Mr. Coleman simply analyzed
11 for the Court has been before the Court since April, when I
12 filed my oppositions with that evidence.

13 Mr. McMillen, on the other hand, wants to present new
14 data and let himself analyze it, and present that evidence to
15 the Court. Totally different thing.

16 Mr. Coleman was not presenting new evidence. He was
17 analyzing the evidence already before the Court.

18 THE COURT: All right. The motion that objects to
19 the admissibility of this is granted. And this will be
20 stricken from the document -- from the docket.

21 Please proceed.

22 MR. MCMILLEN: You know, Mr. Kendall never reached
23 out to me to try and resolve any issue or either of these
24 cases before filing any of his motions in either of these

1 cases.

2 He has never reached out to me, since filing his
3 motion, to attempt to resolve any of these issues or --

4 MR. KENDALL: Objection. What is settlement relevant
5 to? In fact, it's not relevant. It's inadmissible.

6 THE COURT: It's argument to the Court as to whether
7 the -- as I understand it, whether the movant here believes
8 there's systemic problems with the manner in which Farmers
9 proceeds under the Arbitration Program, or whether or not.
10 So I'll allow it for that purpose only.

11 MR. MCMILLEN: Mr. Kendall has been heavily involved
12 in the Arbitration Program in Washoe County, and he
13 understands the purpose of the program is to resolve cases,
14 but he's never attempted to resolve these issues, or
15 attempted to settle either of these two cases that are the
16 subject of these motions.

17 He argues, "The strategy of filing trial de novo
18 requests without regard to the facts and circumstances of
19 each individual case is a tactic that is designed to increase
20 the time and expense of litigation for claimants, and uses
21 the arbitration process as a device to obstruct and delay
22 payment. This conduct is designed to frustrate the purposes
23 of the Arbitration Program, which are to provide a simplified
24 procedure for obtaining a prompt and equitable resolution of

1 certain civil matters."

2 He has not provided any evidence that this is true.
3 In fact, Mr. Kendall filed his motions without regard to the
4 facts and circumstances, and without regard to the actual
5 statistics, and, therefore, is engaging in the very behavior
6 that he is wrongfully accusing Farmers and the undersigned
7 of -- or me of.

8 In conclusion, Your Honor, thank you for your time.

9 I did want to address again the fact that I'm not a
10 billable attorney. If you look at my motives, my personal
11 motives, I have no desire to increase the time, energy, costs
12 of litigation. I have no incentive to do that. I've not
13 been instructed to do that.

14 In fact, in my 10-plus years of practicing law, I am
15 proud of Farmers. They do a good job. At least in the cases
16 that I handle. Can't, obviously, speak to the other cases
17 with other attorneys. But my experience so far has been
18 good, and that they're fair, and that they're honest. And I
19 know that that might not be acceptable to hear by people that
20 don't like insurance companies, but that's been my
21 experience.

22 The statistics show that we settle much more than we
23 try. As indicated, by July 23rd of this year, I settled 29
24 cases before an arbitration hearing, 29 cases that were in

1 the Arbitration Program, 28 of those in the Second Judicial.
2 That is much more than the 11 or 13, even if you take into
3 consideration 13, 14.

4 The fact is that the statistics show that we will
5 whittle down or funnel out the cases that we can, and we do
6 so much more than we do as far as requests for trial de novo,
7 or even trials.

8 There's no evidence of bad faith here, whether it's
9 the statistics or our actual participation in the program.

10 And going beyond that, the evidence demonstrates we
11 do look at the facts and circumstances of each individual
12 case carefully because we don't want to waste anyone's time.
13 Our clients don't like being sued. They don't like being
14 part of this process. They don't enjoy appearing at a
15 deposition or an arbitration hearing, or a trial, for that
16 matter. It's not something that's pleasant. Nobody really
17 wants to be there.

18 And so, at the end of the day, you have to look at
19 the actual evidence, not the hyperbole. And that evidence
20 demonstrates that we have not acted in bad faith.

21 Thank you for your time.

22 THE COURT: Thank you.

23 MR. KENDALL: Just a couple minutes, and I'll get out
24 of your hair.

1 THE COURT: No rush. Go right ahead.

2 MR. KENDALL: Okay. First of all, Your Honor, for
3 Mr. McMillen to stand up there and say that there isn't any
4 evidence, what have we been doing all day? We've been
5 looking at evidence. There's evidence. There's plenty of
6 evidence. And it's just going to be to the Court to
7 determine whether it's enough. But to say there's no
8 evidence is really disingenuous. There's evidence. We've
9 been looking at it.

10 I don't care what they do in Clark County. And you
11 shouldn't, either, other than from a big-picture point of
12 view of what's going on in the State of Nevada. But what
13 Clark County does with trial de novos and what their
14 statistics are has got no bearing on anything we've been
15 talking about today.

16 The same thing with what Mr. McMillen does outside
17 the cases that are arbitrated, de novo'd, where there was a
18 plaintiff verdict. That's all we're looking at. Remember,
19 we're looking at rabbits.

20 You know, I did kind of reach out to Mr. McMillen. I
21 sent to him the standard Rule 11 letter that requires a
22 21-day notice before you file the actual motion. Gave him
23 the 21 days. Plus, I said, "If you withdraw your request for
24 trial de novo, then I won't file this." No response from

1 | him, at all.

2 Then I filed the motion, with the proof of the 21-day
3 notice. I reached out to him. I said, "Look, I'll give you
4 this opportunity. Withdraw those requests for trial de novo,
5 and we're done."

6 Your Honor, thank you for listening to me.

7 I look forward to hearing your decision.

8 THE COURT: Very good.

9 Thank you.

10 The matter is submitted to the Court.

11 I'm actually going to put the Court's decision on the
12 record promptly at 1:00 o'clock.

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13         If everyone could please come back here at 1:00
14 o'clock.
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15 We'll be in recess until then.

16 MR. MCMILLEN: Thank you, Your Honor.

17 (Recess.)

18 (The Court's decision was
19 previously transcribed.)

1 STATE OF NEVADA)

2

3 COUNTY OF WASHOE)

4

5 I, ISOLDE ZIHN, a Certified Shorthand Reporter of the
6 Second Judicial District Court of the State of Nevada, in and
7 for the County of Washoe, do hereby certify:

8 That I was present in Department 8 of the
9 above-entitled court on Tuesday, November 12, 2019, at the
10 hour of 10:00 a.m. of said day, and took verbatim stenotype
11 notes of the proceedings had upon the matter of JOHN WALKER,
12 Plaintiff, versus SHEILA MICHAELS, Defendant, Case No.
13 CV18-01798, and RALPH ORTEGA, Plaintiff, versus KATHERYN
14 Fitter, Defendant, Case No. CV18-02032, and thereafter
15 reduced to writing by means of computer-assisted
16 transcription as herein appears;

17 That the foregoing transcript, consisting of pages 1
18 through 123, all inclusive, contains a full, true and
19 complete transcript of my said stenotype notes, and is a
20 full, true and correct record of the proceedings had at said
21 time and place.

22 Dated at Reno, Nevada, this 1st day of January, 2020.

23 /s/ Isolde Zihn
24 Isolde Zihn, CCR #87

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 HONORABLE BARRY L. BRESLOW

9 JOHN WALKER,

10 Plaintiff,

11 vs. Case Nos. CV18-01798 & CV18-02032

12 SHEILA MICHAELS, Department No. 8

13 Defendant.

14 -----/

15 RALPH ORTEGA,

16 Plaintiff,

17 vs.

18 KATHERYN FITTER,

19 Defendant.

20 -----/

21 TRANSCRIPT OF PROCEEDINGS

22 Judge's Decision

November 12, 2019

23 APPEARANCES:

24 For the Plaintiffs: William Kendall
Attorney at law
Reno, Nevada

1 For Farmers Insurance: Adam McMillen
2 Attorney at law
3 Reno, Nevada
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24 Reported by: Isolde Zihn, CCR #87

1 RENO, NEVADA, TUESDAY, NOVEMBER 12, 2019, 1:00 P.M.

2 ***

3 THE COURT: Thank you.

4 Please be seated.

5 We're back on the record in these two matters.

6 All right. First of all, I want to compliment both
7 counsel by the very spirited and thorough manner in which
8 this matter was litigated and presented to the Court.

9 It's a pleasure to work with attorneys that are
10 passionate about their work, and precise in their arguments,
11 and excellent in their legal briefings. So however this
12 shakes out, thank you to you both.

13 MR. KENDALL: Thank you.

14 THE COURT: Before the Court are two requests to
15 strike request for a trial de novo.

16 The argument goes that Farmers, through its legal
17 representative, Mr. McMillen, is a serial filer of de novo
18 requests, with little or no regard to the merits of the
19 underlying dispute, but, rather, as the Court understands it,
20 to gain a strategic benefit from having the case de novo'd.

21 In support of this, the movant has provided
22 statistics and analysis therefrom, and argues to the Court
23 that, in such circumstances, the Court need look no further
24 than the number of de novo requests in relation to the number

1 of adverse arbitration awards that went against the
2 requestor, apply Gittings versus Hartz, and come to the ready
3 conclusion that abuse is occurring sufficient under Nevada
4 Arbitration Rule 22 to strike the request for trial de novo.

5 In opposition, Farmers suggests to the Court, number
6 one, that Gittings, fairly read, should direct this Court to,
7 in essence, look at its full body of work, not just take a
8 snapshot of these 12 or 13 cases at issue, but look at the
9 manner in which, among other things, it handles itself in
10 cases that are assigned to the arbitration program.

11 In support of this position, Mr. McMillen suggests
12 that a fair reading of the Gittings case allows the Court to
13 analyze all cases that it is involved with in the arbitration
14 process.

15 Farmers also argues that it has had success in a
16 majority of the cases that it took to trial in the de novo
17 process, as well as the fact that it thoroughly analyzes,
18 investigates, and processes the claims before it on a
19 case-by-case basis; all, according to Farmers, as evidence
20 that it is taking its obligations seriously, respectfully,
21 and consistent with the goals as identified most particularly
22 in Rule 2 of the Nevada Arbitration Rules to proceed in a
23 program in an effort to achieve quick, economical justice.

24 The Court has considered the briefings. The Court

1 has considered Dr. Coleman's testimony. The Court has
2 considered argument.

3 While the Court has concern that Farmers' percentage
4 of de novo requests seems to greatly outpace that in the
5 community, at least over the 10-year cycle that was reported
6 and analyzed, the Court does not conclude that it has engaged
7 in bad-faith arbitration practices; and, therefore, that both
8 motions are denied, as are the commensurate motions for fees,
9 sanctions, and other remedies that the parties have sought.

10 In coming to this conclusion, the Court finds, while
11 there was evidence to suggest that Farmers was getting
12 dangerously close to the line, that, on balance, it hasn't
13 quite been proven that its business practices, legal practice
14 of seeking de novo on a very high majority of their cases,
15 based on this fairly limited sample for this limited time
16 period, and taking into account the uniqueness of the
17 individual cases, results obtained on those that went to
18 trial, and other circumstances, the Court is not convinced
19 that their actions arise to the level of bad faith.

20 Having said that, I'm only Decision on these two
21 motions. I'm not precluding this matter being brought back
22 to the arbitration judge at a later time, if additional
23 evidence suggests that, in more convincing fashion to the
24 Court, that this activity is not just a product of

1 case-by-case analysis, and is not a product of genuine desire
2 to challenge what Farmers believes is an inappropriate,
3 undeserved arbitration award. The Court will take a look at
4 it again, if and when that time arises.

5 On the other hand, the Court is not suggesting any
6 particular business practice to Farmers or its counsel. I'm
7 not suggesting for a moment that Farmers should not continue
8 to review each matter on a case-by-case basis, and make a
9 good-faith determination on how to proceed. Wouldn't
10 substitute the Court's judgment for Farmers or its counsel.

11 But I will communicate, through this oral order, that
12 the Court does have concern at the relatively high level of
13 de novos that are requested, compared to, apparently, the
14 rest of this community, over a fairly large period of time.

15 So if the Court had a larger data point, more cases,
16 more time, with a similar percentage, the results here might
17 be different. I don't know. Have to think about that. At
18 this point, the Court doesn't quite go there.

19 So it's the order of the Court that the motions are
20 denied. The Walker case -- excuse me -- the -- yeah,
21 Mr. Walker's case and Mr. Ortega's case will proceed in the
22 Short Trial Program.

23 And that will be the order of the Court.

24 If, Mr. Kendall, you'd like a written order, as

1 opposed to the transcript and the notes of the court minutes,
2 I will sign an order.

3 If you do not request one, one will not be prepared.

4 If you request one, though, I am tasking Mr. McMillen
5 to prepare it, run it by you, as to form only. Obviously,
6 you don't agree with the Court's decision. But then submit
7 it to the Court for a review and entry.

8 And if that happens, Mr. McMillen, send it to the
9 Court in Word, in case the Court has edits, along with
10 objections, if any, from Mr. Kendall, as to the form.

11 That will be the order of the Court.

12 I thank you both for being here.

13 Court is in recess.

14 MR. KENDALL: Your Honor, I might as well. I do
15 request an order.

16 THE COURT: All right. Thank you.

17 Then, Mr. McMillen, please, within 10 days, submit a
18 proposed order, having provided it to Mr. Kendall for at
19 least a couple judicial days to review and consider.

20 MR. MCMILLEN: I will, Your Honor.

21 THE COURT: Thank you very much.

22 MR. KENDALL: Thank you, Your Honor.

23 THE COURT: Thank you.

24 (Recess.)

1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

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4 I, ISOLDE ZIHN, a Certified Shorthand Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, do hereby certify:

7 That I was present in Department 8 of the
8 above-entitled court on Tuesday, November 12, 2019, at the
9 hour of 1:00 p.m. of said day, and took verbatim stenotype
10 notes of the proceedings had upon the matter of JOHN WALKER,
11 Plaintiff, versus SHEILA MICHAELS, Defendant, Case No.
12 CV18-01798, and RALPH ORTEGA, Plaintiff, versus KATHERYN
13 FITTER, Defendant, Case No. CV18-02032, and thereafter
14 reduced to writing by means of computer-assisted
15 transcription as herein appears;

16 That the foregoing transcript, consisting of pages 1
17 through 8, all inclusive, contains a full, true and complete
18 transcript of my said stenotype notes, and is a full, true
19 and correct record of the proceedings had at said time and
20 place.

21 Dated at Reno, Nevada, this 13th day of November,
22 2019.

23 /s/ Isolde Zihn
24 Isolde Zihn, CCR #87