

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN PAUL DEBIPARSHAD, M.D.,
AN INDIVIDUAL; KEVIN P.
DEBIPARSHAD PLLC, D/B/A
SYNERGY SPINE AND
ORTHOPEDICS; DEBIPARSHAD
PROFESSIONAL SERVICES, LLC,
D/B/A SYNERGY SPINE AND
ORTHOPEDICS; ALLEGIANT
INSTITUTE INC., A NEVADA
DOMESTIC PROFESSIONAL
CORPORATION DOING BUSINESS AS
ALLEGIANT SPINE INSTITUTE;
JASWINDER S. GROVER, M.D., AN
INDIVIDUAL; JASWINDER S.
GROVER, M.D., LTD., D/B/A NEVADA
SPINE CLINIC,.

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
ex rel. THE COUNTY OF CLARK, AND
THE HONORABLE JUDGE KERRY
EARLEY

Respondent,

and

JASON GEORGE LANDESS A.K.A.
KAY GEORGE LANDESS

Real Party In Interest.

Supreme Court No.:

District Court No. **Electronically Filed**
Aug 10 2020 03:56 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS
VOLUME 2**

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of August, 2020, I served the foregoing **PETITIONER'S APPENDIX – VOLUME I** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

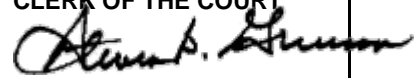
The Honorable Kerry Earley
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY
GEORGE LANDESS, as an individual;

CASE No. A-18-776896-C
DEPT. No. XXXII

Plaintiffs,

vs.

MOTION FOR MISTRIAL AND FEES/COSTS

HEARING REQUESTED

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D. Ltd. doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTINNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive, Defendants.

Defendants.

1 Jason George Landess, aka Kay George Landess (“Landess” or “Plaintiff”) moves the
2 court for a mistrial, and for an award of fees and costs associated with trial expenses up through
3 this point in the proceedings.

4 DATED this 4th day of August, 2019.

5
6 **HOWARD & HOWARD ATTORNEYS PLLC**

7
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POINTS AND AUTHORITIES

In a premeditated tactical ambush, Defense counsel introduced inadmissible character evidence to persuade the jury that Landess is a racist. This issue is obviously completely irrelevant to a medical malpractice case—its only utility was to poison a racially diverse jury against Landess. Defendants intended to prevent Landess from getting a fair trial, and they have succeeded; the jury’s perception of him has been irreparably tarnished based upon irrelevant and inadmissible information, and no curative instruction can undo the damage. The Court should declare a mistrial and award Plaintiff fees and costs associated with the time and expense wasted by Defendants’ conduct.

I. FACTS

The Medical Malpractice Incident

This is a medical malpractice case arising from Defendants’ negligent treatment of Mr. Landess following a golf cart accident. Defendants conducted a closed reduction of Landess’s left tibia, in which they misaligned the bone and failed to properly reduce the fracture. These errors required a second surgery, and they caused Landess significant pain and suffering.

Dariyanani Testifies Regarding Landess’s Wages Claim

Landess’s debilitation following the botched surgery also cost him his job at Cognotion, and his claims therefore include lost wages. Cognotion’s CEO, Johnathan Dariyanani, therefore testified at trial. In order to establish that Landess lost his job as a result of the incident rather than any reason based on poor job performance, Plaintiff’s counsel asked Dariyanani to elaborate on the reason for Landess’s termination:

BY MR. JIMMERSON:

Q. Was the termination of Mr. Landess a hard decision for Cognotion or for yourself?

A. Very much.

Q. Please explain why.

A. Well, I cared about Mr. Landess, and everybody has good qualities and bad qualities, right. So if you ask Mr. Landess to tell

1 you Little Red Riding Hood, after three days you wouldn't get to
2 the wolf, but he's also a beautiful person who, like, is still
3 supporting his ex-wife after 22 years and doesn't have to, and he
4 cares. And we do our courses, the number one -- so you know, we
5 have General Casey and the cardiologist on the ACC Board of
6 Governors, and the number one speaker consistently is Mr.
7 Landess. And I cared about him as a person, and I feel like he was
8 genuinely wronged. I mean, I don't -- you know, to me, no one
9 could have done a better job in physical therapy, and yet, you
10 know, from my perspective, because of essentially the same
11 neglect I see of elder people in the work that I do in day-to-day
12 basis, here we are.

13 And so --

14 MS. GORDON: Objection, Your Honor. There's no foundation for
15 that comment.

16 [Colloquy omitted.]

17 Q. You may continue.

18 A. Yeah, so that was hard because I didn't feel like he did
19 anything wrong, but I have responsibilities to 40 shareholders, and
20 just because I'm friends with Mr. Landess, work has to get done,
21 and work was not getting done. And I had someone who was
22 qualified, Harvard educated lawyer who could do the work, in
23 many ways who was faster, as many young people are, was faster
24 and put out more output that was, sort of more cutting edge than
25 Mr. Landess. But he didn't have the depth and wisdom and heart
26 and character.

27 And so it was a loss for the company. It was a loss for me, and I
knew -- I knew what a loss it would be for him because he was not
getting hired by another startup. They were not going to hire some
shaky-headed verbally incontinent person to -- you know, and see
his inner greatness. And I despaired for him, but you know, I have
a business to run, and ultimately October, November, December,
January, February, March, April, May, June was enough. And so
it was very difficult.

(Trial Transcript, attached as **Exhibit A**, at 108:20–110:15.) Although Dariyanani expressed
opinions that Landess is a “beautiful person” whom he cared about, those comments were off-
handed asides in response to a question aimed at the reason behind Landess’s termination.

...

...

...

Defendants' Counsel Springs Their Trap: The Inadmissible Character Evidence

Defendant's counsel had been waiting for this. During cross examination, counsel exhumed Dariyanani's off-handed comments as an ostensible excuse to introduce evidence concerning Landess's character:

Q. Mr. Dariyanani, you testified earlier that Mr. Landess is a beautiful person in your mind.

A. We're all beautiful and flawed. He's beautiful and flawed.

Q. And you respect him a great deal?

A. I do.

Q. And this was, that portion any way is consistent with your impression of Mr. Landess for at least the past five years, I believe you said?

A. Yeah, and he's had -- he's had tough periods as, you know, as everybody has had. You know, as I've had tough periods.

Q. And that was before five years ago, correct?

A. I think so.

Q. This is -- I'm going to try to blow it up, but this is an email that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated November 15th, 2016. It's quite long, but the part I'm interested in is Mr. Landess appears to be giving a summary of his prior work experience and some experiences that he has gone through in his life.

A. Uh-huh.

Q. And the highlighted portion starts, "So I got a job working in a pool hall on weekends." And I'll represent to you, Mr. Landess testified earlier about working in a pool hall.

A. Uh-huh.

Q. "To supplement my regular job of working in a sweat factory with a lot of Mexicans, and taught myself how to play Snooker. I became so good at it, that I developed a route in East L.A. hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday. From that lesson, I learned how to use my skill to make money by taking risk, serious risk." When you read this, did that change your impression of Mr. Landess at all?

(Ex. A at 161:3–162:6.) In an apparent effort to drive the point home to the jury, counsel twice returned to the theme of racism during follow-up questioning:

Q. Does it sound to you at all from this email that he’s bragging about his past as a hustler, and particularly hustling Mexicans, blacks, and rednecks on payday?

[* * *]

Q. He talks about a time when he bought a truck stop here in Las Vegas when the Mexican laborer stole everything that wasn’t welded to the ground. You still don’t take that as being at all a racist comment?

(Ex. A at 162:23–163:8.) This subject matter was completely irrelevant to the merits of the case, and its only potential use was to poison the jury’s perception of Landess, as it almost certainly did.¹

Plaintiff now moves for a mistrial, and for an award of his fees and costs associated with the first trial.

II. LEGAL ARGUMENT

The issues relevant to this medical malpractice case are those related to Defendants’ treatment of Landess, and Landess’s resulting damages. His character is completely irrelevant, as are his views on race. Defendants nevertheless presented evidence on this point, and they knew exactly what they were doing: They had the exhibit ready with the relevant language highlighted, and they questioned Dariyanani about whether he believed that the highlighted language constituted “racist comment[s].” The only potential impact of this line of questioning is to persuade the jury that Landess is a racist, which may in turn affect the jury’s adjudication of his case based on irrelevant information. This is nothing short of an invitation for jury nullification, and it cannot be undone through a curative instruction. A mistrial is warranted, as is a fees and costs award.

¹ Two of the jurors are Mexican American, and two are African American. Although the materials at issue are likely to be upsetting to the entire jury, the four jurors who are members of the ethnic groups raised in those materials may feel particularly acute outrage.

1 **A. Legal Standard**

2 The decision to grant a mistrial is within the sound discretion of the trial court and will
3 not be overturned absent an abuse of that discretion. *Khoury v. Seastrand*, 132 Nev. Adv. Op.
4 52, 377 P.3d 81, 86 (2016). “A defendant's request for a mistrial may be granted for any number
5 of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial.”
6 *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). A district court may also declare a
7 mistrial *sua sponte* where inherently prejudicial conduct occurs during the proceedings. *See*
8 *Baker v. State*, 89 Nev. 87, 88, 506 P.2d 1261, 1261 (1973).

9 The Nevada Supreme Court has held that “[g]reat deference is due a trial judge’s decision
10 to declare a mistrial based on his assessment of the prejudicial impact of improper argument on
11 the jury.” *Glover v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 125 Nev. 691,
12 703, 220 P.3d 684, 693 (2009), *as corrected on denial of reh'g* (Feb. 17, 2010) This is so
13 “[b]ecause the trial judge is in the advantageous position of listening to the tone and tenor of the
14 arguments and observes the trial presentation firsthand, the trial judge is in the best position to
15 assess the impact on the jury.” *Moore v. State*, 67281, 2015 WL 4503341, at *2 (Nev. App. July
16 17, 2015) (citing *Glover*, 165 Nev. at 703, 220 P.3d at 693); *see also Payne v. Fiesta Corp.*, 543
17 S.W.3d 109, 123 (Mo. Ct. App. 2018) (“We recognize that the trial court is better positioned to
18 assess the prejudicial effect that improper evidence has on the jury.”).

19 **B. A Mistrial Is Necessary to Prevent Unfair Prejudice**

20 Defendants made irrelevant, character-based arguments that Landess is a racist, which
21 were intended only to poison the jury. The only viable remedy is a mistrial.

22 **1. The Evidence at Issue is Irrelevant and Inadmissible Character Evidence**

23 Only relevant evidence is admissible. “Relevant evidence means evidence which has any
24 tendency to make the existence of any fact that is of consequence to the determination of the
25 action more or less probable than it would be without the evidence.” NRS 48.015. Here,
26 Defendant’s suggestion that Landess is a racist has absolutely no bearing on any fact of
27 consequence in this medical malpractice case. Even if this suggestion had some conceivable

1 relevance, its probative value would be far outweighed by the unfair prejudice that it presents.
2 *See* NRS 48.035(1).

3 Moreover, “character evidence is generally inadmissible in civil cases.” *In re Janac*, 407
4 B.R. 540, 548 (Bankr. S.D.N.Y. 2009). To whatever extent Defendants were attempting to
5 impugn Landess’s character, that attempt was improper in the absence of any opening of the door
6 by Landess himself.

7 **2. Landess Did Not Open the Door to Character Evidence**

8 A party may open the door to character evidence when he chooses to place his own good
9 character at issue. *See Newman v. State*, 129 Nev. 222, 235, 298 P.3d 1171, 1180 (2013).
10 However, “[a]n inadvertent or nonresponsive answer by a witness that invokes the [party’s] good
11 character . . . does not automatically put his character at issue so as to open the door to character
12 evidence.” *Montgomery v. State*, 828 S.E.2d 620, 624 (Ga. Ct. App. 2019) (citing Christopher
13 B. Mueller et al., FEDERAL EVIDENCE § 4:43 (4th ed. updated July 2018) (“It seems that if a . . .
14 witness gives a nonresponsive answer that contains an endorsement of the good character of the
15 defendant . . . the [opposing party] should not be allowed to exploit this situation by cross-
16 examining on bad acts or offering other negative character evidence.”).

17 Here, Landess did not place his own character at issue, and Dariyanani’s statement
18 regarding his character was gratuitously offered and irrelevant. Landess’s line of questioning to
19 Dariyanani was intended to establish that Landess was not terminated from his job for reasons
20 related to his performance. Dariyanani’s statement that he believed Landess to be a “beautiful
21 person” was a gratuitous addition. If Defendants wanted the jury to disregard this statement,
22 their remedy was a simple motion to strike. *See Wiggins v. State*, 778 S.W.2d 877, 892 (Tex.
23 App. 1989) (holding that motion to strike—and not introduction of rebuttal evidence—was
24 proper non-responsive statement from witness attesting to party’s good character). However, it
25 appears clear that defendants preferred to allow the irrelevant statement to stand and to attempt
26 to use it as an excuse to put *more* irrelevant evidence in front of the jury. The Court should not
27 countenance this kind of gamesmanship.

1 **3. No Waiver of Objection by Stipulating to Admission of the Document**

2 Counsel stipulated to the admission of Exhibit 56, which contained the language in
3 question in one of its 122 pages. Counsel was unaware of the content contained in the particular
4 page at issue until Defendant's counsel presented it at trial.

5 However, stipulating to the admission of a document does not entail stipulating to its use
6 for any conceivable purpose, including an improper purpose. "Evidence which is admitted may
7 generally be considered for any legal purpose *for which it is admissible*["] *Westland Nursing*
8 *Home, Inc. v. Benson*, 517 P.2d 862, 866 (Colo App. 1974) (emphasis added); *see also Morse*
9 *Boulger Destructor Co. v. Arnoni*, 376 Pa. 57, 65 (1954) ("[E]vidence may be considered for any
10 purpose for which it is competent."). Evidence may *not*, however, be considered for an
11 *inadmissible* purpose, nor may it be used for an improper purpose. Irrelevant evidence is never
12 admissible, and using irrelevant evidence for the sole purpose of causing unfair prejudice is
13 improper.

14 Nor did Landess waive any objection to Defendants' use of this evidence by inadvertently
15 admitting the document upon which it was contained. "Waiver requires the intentional
16 relinquishment of a known right." *Nevada Yellow Cab Corp. v. District Court*, 123 Nev. 44, 49,
17 152 P.3d 737, 740 (2007). "[T]o be effective, a waiver must occur with full knowledge of all
18 material facts." *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 987, 103 P.3d 8, 18
19 (2004). A sister court applied this principle to a situation where a party had inadvertently
20 acquiesced to the admission of a document containing objectionable material and held that no
21 waiver took place, reasoning as follows:

22 [T]his Court concludes that the Appellant's counsel's failure to
23 object to the introduction of R.C.'s statement cannot be
24 characterized as a knowing and intentional waiver. The
25 Appellant's ***counsel contends that he was unaware of the***
26 ***existence of the final page upon which the reference was***
27 ***contained.*** In his brief to this Court, Appellant's counsel
theorized that the inadvertent admission was likely caused by a
clerical error and contends that the copy of the victim statement in
Appellant's counsel's file did not include a final page. For
purposes of this discussion and based upon the record before this
Court, ***we accept the declaration of Appellant's counsel***
regarding his lack of knowledge of the existence of the reference

1 *to Appellant's status as a sex offender.* Assuming such veracity
2 of Appellant's counsel, *we must acknowledge that one cannot*
3 *knowingly and intentionally waive something of which one has*
4 *no knowledge.* As Justice Miller astutely articulated in his
5 dissent in *State v. Layton*, 189 W.Va. 470, 432 S.E.2d 740 (1993),
with regard to waiver of a right to be present at trial, “the defendant
could not waive what he did not know had occurred.” 189 W.Va.
at 500, 432 S.E.2d at 770 (Miller, J., dissenting).

6 *State v. White*, 678 S.E.2d 33, 37 (W. Va. 2009) (emphases added). So it is here: Landess’s
7 counsel was, in good faith, unaware that Exhibit 56 contained a statement which was irrelevant,
8 clearly prejudicial, and inadmissible for any purpose in this case. Landess’s stipulation to
9 admit the document for *proper* purposes does not amount to a stipulation that it be used for
10 *improper* purposes of which Landess was not aware.

11 **4. A Mistrial is Necessary to Correct Unfair Prejudice**

12 A mistrial is necessary where unfair prejudice is so drastic that a curative instruction
13 cannot correct the damage. *Pope v. Babick*, 178 Cal. Rptr. 3d 42, 50 (2014). In particular,
14 misconduct and inflammatory statements from opposing counsel are sufficient basis for granting
15 a new trial where the district court concludes that they create substantial bias in the jury. *See,*
16 *e.g., Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008); *Commil USA, LLC v. Cisco Sys.,*
17 *Inc.*, 720 F.3d 1361, 1370 (Fed. Cir. 2013), *vacated in part on other grounds*, 135 S. Ct. 1920
18 (2015). For example, in *Commil USA*, counsel for one of the parties attempted to instill in the
19 jury, through irrelevant references to ethnicity and religion, an “us versus them” mentality by
20 making repeated references to the opposing party’s Jewish faith. *Id.* at 1370. The district court
21 granted a new trial, even though the offending statements drew no objection during trial. *Id.* The
22 United States Court of Appeal for the Federal Circuit affirmed, holding that the improper and
23 irrelevant arguments raised below tainted the jury and placed substantial justice at stake. *Id.* at
24 1370–71. The appellate court additionally reasoned that it would not substitute its judgment for
25 that of the district court, “whose on-the-scene assessment of the prejudicial effect, if any, carries
26 considerable weight.” *Id.* at 1371 (citing *United States v. Munoz*, 150 F.3d 401, 415 (5th
27 Cir.1998).

Here, Defendants’ tactic in raising the irrelevant and improper character evidence at issue taints the entire trial. *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 26 (Tex. 2008) (affirming grant of new trial where a memorandum referencing “illiterate Mexicans” was “never used . . . in any relevant way [except] to create unfair prejudice.”). *Coastal Oil* was a case involving claims subsurface trespass, breach of duty, and breach of implied covenants to develop, market, and protect against drainage. At trial, the plaintiffs introduced a memorandum from the defendants’ files in which the defendants attributed title problems which delayed the project to the fact that the owners’ ancestors were, in their words, “mostly illiterate Mexicans.” *Id.* at 8. The district court admitted the document, the jury ultimately awarded damages to the plaintiff. Defendant appealed, alleging (among other things) that the district court had erred by admitting the memorandum. The Texas Supreme Court reversed and ordered a new trial, reasoning as follows:

Evidentiary rulings are committed to the trial court's sound, not boundless, discretion. Because the significant danger of unfair prejudice presented by the memo substantially outweighed its probative value, which was zero, the trial court abused its discretion in admitting the memo in evidence.

[* * *]

[Respondents] never used the memo in any relevant way, only in a way calculated to create unfair prejudice. We think [respondents] succeeded. We therefore conclude that the trial court’s abuse of discretion in admitting the 1977 memo was harmful error and requires a new trial.

Coastal Oil, 268 S.W.3d at 26. Writing in concurrence, three justices of the court noted that “[respondent] ha[d] not claimed that the offensive phrase was relevant to an issue regarding race, such as discrimination, or that [appellant’s] . . . actions were racially motivated.” *Id.* at 50 (concurring in part and dissenting in part).

So it is here: The e-mail at issue here presents significant danger of unfair prejudice, which is substantially outweighed by its probative value, which is zero. Defendants cannot claim that the offensive material at issue is relevant to an issue regarding race—no such issue exists in this case—and its only potential utility is to poison the jury. *See Capital Loan Co. v. Keeling*,

259 N.W. 194, 196 (Iowa 1935) (“Attorneys have no right to go outside of the record and make . . . remarks and try to inject racial prejudice into a case[.]”). This danger is particularly acute as to the Mexican American and African American members of the jury, who may reasonably find the material at issue to be particularly offensive. Landess has no realistic possibility of obtaining substantial justice under these circumstances, and a mistrial is warranted.

C. The Court Should Award Plaintiff Fees and Costs

Nevada Revised Statute 18.070(2) provides as follows:

A Court may impose costs and reasonable attorney’s fees against a party or an attorney who, in the judgment of the court, purposely caused a mistrial to occur.

Here, Defendants’ counsel knew exactly what they were doing. They had the e-mail at issue ready, with the offending sentence highlighted. They were waiting for what they perceived to be an opportunity to shoehorn it into the case, and when such an opportunity arose, they seized upon it. Defendants performed the act which necessitated a mistrial in a calculated and tactical manner, and for their own benefit.

Moreover, this is not the first time that Defendants’ counsel has improperly indoctrinated the jury. They had previously misled the jury about the quality of the x-rays that were reviewed showing Landess’s broken hardware, and they had improperly informed the jury about the alleged “portal” through which the x-rays were reviewed in spite of a prior order by the court precluding them from doing so. The cumulative effect of these tactics renders the conduct at issue even more egregious, and it strengthens the justification for a mistrial. *See Lioce v. Cohen*, 124 Nev. 1, 15, 174 P.3d 970, 979 (2008).

In preparation and presentation of the Plaintiff’s case at trial, Plaintiff’s attorneys spent hours of time preparing and conducting their case which are now essentially time wasted. These hours were spent preparing for the testimony of the witnesses, pre-trial interview of witness and medical professionals, drafting direct and cross examination, and being present in Court to present the case. As a result, Plaintiff’s counsel was unable to perform other functions or service

1 other clients in the firm. None of those hours can be recouped. If this matter goes to trial again,
2 all of that work will need to be duplicated.

3 Plaintiff has also incurred substantial costs in order to present his case. Witnesses had to
4 be subpoenaed and served. All of the medical providers who were to testify had cleared their
5 schedules and required up-front payment for their appearance. These are costs which the Plaintiff
6 was required to pay once, and will be required to pay again if this matter is retried.

7 **III. CONCLUSION**

8 The Court should declare a mistrial and award fees and costs associated with the trial
9 proceedings up through this point.

10 DATED this 4th day of August, 2019.

11
12 HOWARD & HOWARD ATTORNEYS PLLC

13 By: /s/Martin A. Little
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CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, 10th Floor, Las Vegas, Nevada, 89169.

On this day I served the preceding **PLAINTIFF'S MOTION FOR MISTRIAL AND FEES/COSTS** in this action or proceeding electronically with the Clerk of the Court via the Odyssey E-File and Serve system, which will cause this document to be served upon the following counsel of record:

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...

1 I certify under penalty of perjury that the foregoing is true and correct, and that I executed
2 this Certificate of Service on **4th day of August**, at Las Vegas, Nevada.

3
4 */s/ Martin A. Little*

5 An Employee of Howard & Howard Attorneys PLLC
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EXHIBIT A

1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 JASON LANDESS,

8 Plaintiff(s),

9 vs.

10 KEVIN DEBIPARSHAD, M.D.,

11 Defendant(s).

CASE#: A-18-776896-C

DEPT. XXXII

12
13 BEFORE THE HONORABLE ROB BARE
14 DISTRICT COURT JUDGE
15 FRIDAY, AUGUST 2, 2019

16 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 10**

17 APPEARANCES:

18 For the Plaintiff:

MARTIN A. LITTLE, ESQ.
JAMES J. JIMMERSON, ESQ.

19
20 For Defendant Jaswinder S.
21 Grover, MD Ltd:

STEPHEN B. VOGEL, ESQ.
KATHERINE J. GORDON, ESQ.

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25 RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

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Las Vegas, Nevada, Friday, August 2, 2019

[Case called at 8:03 a.m.]

THE COURT: Please bring in the jury. I may say something about reminding you that you're under oath, but I do that with everybody, okay? I've done it with Mr. Landess three times, I think, in the trial, so --

[Pause]

THE MARSHAL: Parties rise for the presence of the jury.

[Jury in at 8:05 a.m.]

THE MARSHAL: All present and accounted for.

THE COURT: All right. Please have a seat everyone. All right, well members of the jury, I think there's more literal meaning to what I say now. Good morning.

GROUP RESPONSE: Good morning.

THE COURT: It is morning, isn't it? Okay. We know where we're at. Mr. Jimmerson, please continue and Dr. Gold, I always tell witnesses when there's a break, especially overnight, so every witness, including you, Mr. Landess a few times, I'll remind you respectfully you're still under oath and go ahead, Mr. Jimmerson.

STUART GOLD, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

THE WITNESS: Could I just say one thing to the jury? I wasn't planning to spend two nights. I'm sorry I'm in the same clothes. I did wash my shirt.

THE COURT: Okay. Fair enough.

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CROSS-EXAMINATION (RESUMED)

BY MR. JIMMERSON:

Q I plan on getting after you, but not on your clothes. It's okay.
And thank you, sir. Welcome back, sir. Doctor Gold, you learned that
Mr. Landess had some doubts about his care from Dr. Debiparshad that
led him to see Dr. Herr on February 12th of 2018. Is that right?

A Yes.

Q Now, prior to that, we had -- and last evening, we had gone
through x-rays through October and maybe November. I just wanted to
show you the x-rays from December and then bring us to our current
date.

MR. JIMMERSON: So if we could go with 16-51 and 16-43,
please.

BY MR. JIMMERSON:

Q And have you seen these x-rays before, Doctor?

A So what are the dates on these ones? 12/20?

Q To help you, they're 12/20 of 2017.

A Yeah.

Q All right. Do you observe a broken screw there, please?

A Yes. And I think that this is when things changed a little bit
for Mr. Landess and that's when he started to feel that something wasn't
going right.

Q And as I guess you -- because you didn't see my client, did
you ever read his deposition?

A I did read his deposition. I can't you know, specifically recall

1 it, but I did read it.

2 Q Yeah. I'm not -- there's not going to be a test about what did
3 he say at page 17, okay, but do you recall that he reported to Dr.
4 Debiparshad in December clicking and popping in terms of what's his
5 knee {sic}?

6 A Yes, I did.

7 Q All right. Now, just moving along. The x-ray on the left is
8 the AP and the x-ray on the right is the lateral, sir?

9 A AP on the left -- there's not an AP here. There's kind of a --
10 kind of between. This is isn't a big an internal oblique. That's an oblique
11 on the left, okay, because you can tell by the -- again, where the fibula is
12 sitting and where the rod's sitting --

13 Q Okay.

14 A -- on the x-ray and on the right is the -- again, much closer to
15 an AP. But you know, not perfect, but very close.

16 Q Okay. All right. Thank you. Now, when you look at this x-
17 ray and having taken your deposition, you can easily see at least one
18 broken screw in this x-ray. Is that right?

19 A I agree.

20 Q All right. And you still do some treatment in terms of head of
21 your own clinic, I mean, where you see patients, correct?

22 A Well, the answer is yes. You made me out to be just a
23 medical legal doctor yesterday, but 75 percent of my practice is still
24 active treatment of patients.

25 Q And if you had a patient in -- like Doctor -- like Mr. Landess

1 and you observed this x-ray and you, you know, had a chance to talk
2 with him, would you advise him that there was a broken screw showing
3 up now on December 20th of 2017?

4 A I would have.

5 Q Now, let's just look to the next set of x-rays, which is 16-31
6 and 16-56. These are the x-rays of the following month, sir, January 31
7 of 2018. Have you seen those before, sir?

8 A Yes.

9 Q Okay. Thank you. And do you see that there's also further
10 evidence of broken screw or screws?

11 A Now it looks like there could be two screws broken, yes.

12 Q All right. Now, when you wrote your report on January 22nd
13 of 2019, you only reported one. But with the benefit of you know, being
14 pushed by myself or by Mr. Little and doing your own work, you see that
15 there's two. Fair statement?

16 A Yes.

17 Q All right. I'm not going to fault you for saying one versus
18 two. And are these also easily observable?

19 A Like I said, it's observable, but there's, you know, definitely
20 one broken screw. There's overlap and at this point, there seems to be
21 little difference from the previous x-rays, so I could talk myself into two
22 broken screws.

23 Q Because it looks like more damage there in terms of the
24 hardware. Would you agree?

25 A Well again, it's not more damage in the hardware. What's

1 happening is this is axially -- axially, it's up, down, trying to compress.

2 Q Right.

3 A And so that's why the screws broke, because they got
4 stressed to the point that they couldn't handle that axial stress anymore.
5 But again, in this -- this is an axial loading that the body's trying to do
6 and -- but the alignment is barely changing, so that's my point.

7 Q And would have told your patient that he had broken screws,
8 had you met with him or had an opportunity to talk with him after seeing
9 the January 31, 2018 films?

10 A Right. And I probably would have explained that his -- the
11 clicking was probably due to the dynamization that this has occurred on
12 its own.

13 Q All right. Thank you.

14 MR. JIMMERSON: Now, if I could just go to the March 1,
15 2018 films.

16 BY MR. JIMMERSON:

17 Q And can you also see now the broken screws on this film as
18 well?

19 A Again, it looks like there's two broken screw that to me is still
20 hard to tell on one of them, but it looks like there's two broken screws.

21 Q Thank you, sir.

22 MR. JIMMERSON: Now let's return to the February 14 -- or
23 February 12th time period.

24 BY MR. JIMMERSON:

25 Q All right. You told us you had the opportunity, I think you

1 said, to review the trial testimony of Dr. John Herr after he came and
2 testified this week?

3 A Yes, I read that quickly --

4 Q All right.

5 A -- the -- yesterday morning.

6 Q All right. Thank you, sir. Now, because he had the
7 opportunity to personally, you know, clinically observe Mr. Landess, do
8 you recall what he reported to us all in terms of his medical note as well
9 as his trial testimony?

10 A His main observation was angulatory deformity in the lateral
11 view causing an apex anterior deformity.

12 Q Okay. Thank you.

13 MR. JIMMERSON: Could we switch to the ELMO now? And
14 then we'll go back to the x-rays in just a moment. All right. This is a
15 little hard to see, because it's such small print.

16 BY MR. JIMMERSON:

17 Q This is the, I call it medical note of Dr. Herr from February 12,
18 2018. Have you seen this document before?

19 A Yes.

20 Q All right. Thank you. And he gives a history, as least as been
21 revealed to him by his new patient,

22 "Mr. Landess, a 71 year-old retired attorney, who came in
23 today for an evaluation of the left leg. Jason states that he
24 fractured his left tibia while riding a golf cart on or about
25 October 9th, 2017. Jason states that he had his left leg

1 outside of the cart, at which time the cart passed an object
2 immediately next to the cart, which caught his left foot and
3 externally rotated his left lower extremity. At the time, Jason
4 experienced acute onset of pain to his left shin."

5 And then he indicates he went through a surgery and a
6 nailing. And I think that the date is actually an error. I think the surgery
7 was actually October 10th, but it's okay. "Jason underwent an IM nailing
8 at the left shin."

9 And then he says physical examination.

10 "Jason walks with a tentative gait, favoring the left lower
11 extremity. The neurovascular status left lower extremity is
12 intact. There is an obvious step-off deformity over the
13 anterior aspect of the left leg at the juncture of the proximal
14 and middle one-thirds of the left tibia. There is a slight varus
15 alignment of the left tibia. There is good knee rotation to
16 good knee motion and good left ankle motion. There is
17 tenderness at the level of the fractured site."

18 And then he speaks about the x-rays.

19 "On the left tibia were obtained today in our office. These x-
20 rays demonstrate the placement of a statically locked 1 m rod
21 in the left tibia. There is a transverse fracture at the junction
22 of the proximal and middle one-third of the left tibia. On the
23 AP x-ray, there is an approximate five degrees of varus
24 angulation at the fracture site and on the lateral view, there is
25 an approximately 25 degrees of apex angular -- anterior

1 angulation. There are signs of callous formation at the
2 fracture site, but the fracture is clearly not healed."

3 And then he gives his impression. Persistent angular
4 deformity of the --

5 A Can you push it up a little bit?

6 Q Yeah. I'm sorry.

7 A That's okay. Thanks.

8 Q Of course I'd want the jury to see as well, so thank you for
9 the help in just reading. Persistent. Impression is, "Persistent angular
10 deformity of the left leg at the fracture site at the junction of the proximal
11 and middle one-thirds of the left tibia with leg healing." Have I
12 recommended that -- have I read that correctly?

13 A Yeah.

14 Q And then the recommendation is send him on to Dr. Roger
15 Fontes.

16 MR. JIMMERSON: Now if we could now look at the x-ray,
17 please, so we'll go back to the other --

18 BY MR. JIMMERSON:

19 Q And this x-ray is what please? Taken February 12 by Dr.
20 Herr?

21 A That's a lateral x-ray.

22 Q All right.

23 MR. JIMMERSON: And then the next one, please. Do we
24 have the other one from Dr. Herr's office?

25 ///

1 BY MR. JIMMERSON:

2 Q And that, please?

3 A That's an AP that's a little bit underexposed.

4 Q Okay. And when you use the term underexposed from a
5 radiological point of view, what do you mean by that?

6 A Because it didn't have enough penetration. That's why it's a
7 little whiter than we want, so it's harder to see some of the details.

8 Q All right.

9 MR. JIMMERSON: And now we can go back to the ELMO,
10 please.

11 BY MR. JIMMERSON:

12 Q With -- in February of 2018, of course, there was no lawsuit
13 pending. No one's thinking about a lawsuit. Jason is now learning for
14 the first time of maybe an answer for why he's having clicking and
15 popping and bowing and so Dr. Herr physically sees him and then writes
16 what we see that he writes. Then Dr. Herr spoke to us on Friday --
17 excuse me -- on Wednesday, I guess. And he told us a couple of things.

18 And the question for the ladies and gentlemen of the jury it's
19 in highlights.

20 "Can you talk to the jury first about your physical exam?"

21 And then he gives his response.

22 "Sure. As you all know, we take a history. We talk to our
23 patients and then the next step in this evaluation process is
24 to examine them. And first I wanted to verify or deny Mr.
25 Landess' concern that his left leg was crooked, and so in the

1 examination room, I had him stand up and I looked at his left
2 -- his leg from both a front view and a side view and much to
3 my dismay, on the side view, I was able to see more of an
4 angle than I would -- then I thought we should see.
5 And he pointed out -- he, Mr. Landess that there was a bump
6 on the front of his shin bone and that bump was tender. And
7 it appeared on the -- to me on the side view, that where the
8 bump was was that area in which his tibia, the shin bone,
9 kind of bent a little bit and it was more than we would call a
10 physiological angle. In other words, it wasn't normal. I
11 compared it to the opposite leg in both the front view and the
12 side view and that confirmed my concern that this left leg
13 was not normal from the standpoint of the alignment."
14 Do you see that?

15 A I see that, sir.

16 Q Now, he then went on -- and I'm not going to read all his
17 testimony, of course, but he went on to do the calculation of 25 degrees
18 from the lateral view of an apex angulation. Do you recall that?

19 A Yes, sir.

20 Q And yesterday you shared with us your calculation and your
21 measurement. And a criticism that you lodged against Dr. Herr, as I
22 understand it, being a layperson, was that he measured from the
23 posterior slope and not from another location. Is that right?

24 A He didn't measure along the mechanical axis.

25 Q Okay. And I've talked with Dr. Herr about that last evening

1 and he indicates that even if --

2 MR. VOGEL: Objection, Your Honor. That's hearsay.

3 MR. JIMMERSON: I didn't -- okay --

4 THE COURT: Yeah, I agree.

5 MR. JIMMERSON: -- I'll revise the question. It's not a
6 problem.

7 THE COURT: The discussion with Dr. Herr last night,
8 respectfully, let's stay away from that.

9 MR. JIMMERSON: Agreed.

10 BY MR. JIMMERSON:

11 Q So let me then ask a question. If the measurement that you
12 performed yesterday, would be from what angle, so I use the right
13 words? If not from the posterior slope, then from what, so I'll
14 understand?

15 A It's the mechanical axis of the tibia on the lateral view.

16 Q Okay. And what -- your experience -- would the difference in
17 calculated degrees be from measuring from the posterior slope versus
18 the mechanical axis?

19 A Again, it's dependent on the patient and it could be
20 anywhere from 25 to 15 degrees difference. So people have posterior
21 slopes. Everybody's is different. Some people have a 15 degree
22 posterior slope. Some people have a 25 degree posterior slope.

23 Q It wouldn't be five degrees, three degrees or eight degrees?

24 A No.

25 Q All right. That's your view?

1 A It's not that small on most people.

2 Q All right. Thank you. And would you agree that 25 degrees
3 apex angular -- angulation is improper, is below the standard of care?

4 A If it was a true measurement, yes.

5 Q All right.

6 A But it's not below -- I mean, again, you're talking below the
7 standard of care. This has shifted a little bit, okay? So I mean, what -- as
8 far as the exam and what you read, what Dr. Herr felt and the pain Mr.
9 Landess was feeling was from the anterior translation of the tibia, so I
10 have no disagreement with the exam as far as where he had a bump and
11 where it was painful. It's just this was more of a translational, again,
12 deformity, that had shifted a little bit more than it was once the screws
13 broke than an angulatory deformity.

14 Q And did you understand that he observed physically a
15 bowing of Jason's left leg?

16 A Right. So that's the part to I understand, because when he's
17 looking at the lateral, if he's saying it's bowing and it's flexing in the
18 lateral view, that wouldn't be called bowing. It would be more if it was
19 going in like the varus we're talking about. So again, in either case,
20 because the fibula is still intact and not broken, that can happen a little
21 bit. And I have no question. If they examined him and they felt that
22 there was some movement, this was not fully healed yet.

23 So again, it's pistoning down along the rod and I have no
24 question that they could have seen some movement, but I find it hard to
25 understand when he said bowing when he's talking about the deformity

1 on the lateral view as opposed to the AP view.

2 Q Having read Dr. Debiparshad's medical notes, did Dr.
3 Debiparshad ever observe movement?

4 A He talked about the clicking, but he didn't mention
5 movement.

6 Q Did he talk about bowing?

7 A Didn't talk about bowing, because again, I don't think it was
8 really bowing.

9 Q All right.

10 MR. JIMMERSON: May I go back to now the x-ray, please, of
11 Dr. Fontes? The lateral view please.

12 MR. LITTLE: Fontes or Herr?

13 MR. JIMMERSON: Excuse me?

14 MR. LITTLE: Her or Fontes?

15 MR. JIMMERSON: Oh, Herr. Did I say Fontes? I meant Herr.

16 MR. LITTLE: Yes.

17 MR. JIMMERSON: Thank you.

18 BY MR. JIMMERSON:

19 Q And is the lateral view, Doctor?

20 A Yeah, that's the -- back to the lateral view --

21 Q All right.

22 A -- of Dr. Herr's, I think.

23 Q And Dr. Herr spoke about this x-ray to this jury on
24 Wednesday of this week as follows.

25 "Here's the break. This piece should be straight on top of the

1 distal fragment, the end fragment. And in my mind, if you
2 would like, I can -- we can draw these angles. But this top
3 bone is not parallel with the bottom one. It's bent. And so
4 that is what shocked me when this -- when I first saw this
5 view, so that was a big concern.

6 There's a couple of smaller, subtle but very important points
7 that one can see on this x-ray, too, that raised my concerns.
8 And one is this gap here, this fracture. We like to try to get
9 the bone to sit right on top of that bone. That encourages
10 bony healing. That bugged me. This top piece of bone, this
11 top fragment is too anterior, too far forward. So there is a
12 step-off there and this is in the area where Mr. Landess
13 pointed out to me and told me that he had pain. And it was a
14 noticeable bump on the front of the shin. And so that
15 corresponds with that.

16 Last but not least, there are two screws up there. And these
17 screws are both broken and there's a somewhat of an
18 ominous sign and that is a sign of what we call instability.
19 An instability means increased likelihood for the bone or the
20 hardware to move. And so we can't, well, but for the fact
21 that they are -- these are broken now, this rod can rotate
22 within the top fragment."

23 Would that be a fair observation from Dr. Herr, based upon
24 what you see of this x-ray, sir?

25 A I would agree with very little of it, but wouldn't disagree with

1 all of it.

2 Q And you did not have the ability, of course, to see Mr.
3 Landess. Is that right?

4 A That's correct.

5 Q You're basing it just on records. Is that right?

6 A That's correct.

7 Q Thank you, sir. Now, continuing, after February 12th, by
8 virtue of the referral that I've gone over with you and that you've seen,
9 Mr. Landess then proceeded at Dr. Herr's recommendation to see
10 Dr. Fontes; is that true?

11 A Yes.

12 Q And that examination occurred on February 15; is that right?

13 A Again --

14 Q I can help you. It's okay. February 15, 2018.

15 MR. JIMMERSON: Do we have that -- get ready to show that
16 x-ray, but I want to talk further before we do.

17 BY MR. JIMMERSON:

18 Q And now did you say that you had the opportunity to read --

19 A Weren't we just looking at the February 15th x-rays though?

20 Q No. That was Dr. Herr's x-rays.

21 A Okay. But was it the same as --

22 Q No. They're different.

23 A They're different. Okay. They're just --

24 Q No problem. Did you not know that they were two different
25 sets of --

1 A No, I did. But I thought -- you just February 15th. I thought
2 that last x-ray said February 15th.

3 Q February 12th.

4 A Okay. Thank you.

5 Q No problem. That's -- it's okay. And then, Dr. Fontes, of
6 course, does some of the similar things in a sense of you get a history,
7 it's a new patient, you want to learn, you know, your -- your patient, how
8 he got here, why he's here, and make his own observations. And then
9 you indicated that you had the opportunity to read Dr. Fontes' trial
10 testimony; is that right?

11 A Well, I've indicated that I didn't -- I actually hadn't read it. I
12 wasn't sure.

13 Q Okay. All right. One of the points that Dr. Fontes made was
14 the, "Obvious instability could be easily observable by any qualified
15 orthopedic surgeon,". Were you familiar with that?

16 A Yes. And again, if this is going on to a delayed union, then
17 that's a perfectly appropriate comment to make.

18 Q And you -- and you try to use your words in your medical
19 sense accurately like we lawyers try to do the same thing in the legal
20 world. And so yesterday when I listened to your testimony on direct,
21 you pointed out to what I think I've tried to show the ladies and
22 gentlemen of the jury the difference between nonunion and malunion.
23 Okay. First, it means it hasn't healed together? Either term, it hasn't
24 healed together?

25 A No, that's not true. See, in a malunion, it has healed.

1 That's --

2 Q Okay. It has --

3 A That's the --

4 Q -- healed. And -- but it's healed --

5 A Correct.

6 Q -- in a malalignment way?

7 A Correct.

8 Q Okay. So malunion means it's healed, but in a -- but in an
9 improper way?

10 A Correct.

11 Q All right. And so that's why I could say or you could say, in
12 this case, involving Mr. Landess, there never was a malunion, because it
13 never healed?

14 A Correct.

15 Q Okay. So -- but the fact that it never healed doesn't mean
16 that there wasn't a malalignment or there was malalignment, it just
17 means it never healed. Fair statement?

18 A A nonunion could be malaligned below the standard of care,
19 correct.

20 Q Okay. So a nonunion; therefore it could be malaligned above
21 or below the standard of care?

22 A Correct.

23 Q All right. Very good. So in this case, we have a nonunion?
24 No question about that, right?

25 A Correct.

1 Q All right. The issue is liability. Did the doctor perform below
2 the standard of care, as will be decided by this jury. Fair --

3 A Correct.

4 Q -- statement? All right.

5 A Yes.

6 Q Now, Dr. Fontes noted the obvious instability, and he
7 indicated that surgery was required. He disagreed respectfully with your
8 written report?

9 A I --

10 Q Do you agree with that?

11 A I just said I might have waited -- would have waited longer. I
12 didn't say that it wouldn't have necessarily been needed, correct.

13 Q All right. Dr. Fontes also stated that the fracture lines were
14 visible and there clearly were broken screws, things you agree with?

15 A Yes.

16 Q All right. Now, he also said something -- a new factor that --
17 for us, at least for me -- was he also saw signs of lucency, which he's
18 indicated would be indicative of instability or a movement. Do you
19 concur with that?

20 A If there were significant signs of lucency, I thought they were
21 minimal, at best, if they were even there.

22 Q Okay. All right. And he also indicated that it was clear to
23 him it was never going to heal. Do you recall that?

24 A Again, so that -- that's again where we disagree. I think it, as
25 we talked about yesterday, had the potential that it still could have

1 healed. But that's -- keeping the patient patient and the doctor less
2 aggressive is -- that's a surgeon and patient call.

3 Q And Dr. Fontes visibly stated that because of the obviousness
4 of the nonhealing and the need for revision, that surgery was required?

5 A That was his decision, yes.

6 Q And I think you've indicated on direct examination, if I
7 listened to your words correctly, that you had no criticism of the surgery
8 or the outcome; is that correct?

9 A No. I thought the -- the outcome was fine. I guess had some
10 issues with the -- the starting point, which we talked a little bit about
11 yesterday. But again, it's lined up well and formally it's healed. So
12 good.

13 Q And did you have a chance to look at the August 8th x-rays,
14 which were four months and five days from the surgery of April 3rd of
15 2018?

16 A I did look at them. And they again were -- were a little bit
17 underexposed. So hard to be definitive if all the healing is completed.
18 But it looked like it had a nice callous ball around the -- the site. But
19 again, it was a little underexposed, so it -- it's -- you can't -- I couldn't
20 give you a definitive yes, that it's 100 percent healed.

21 Q And that would be in stark contrast to the April 15th x-ray,
22 four months and five days from the surgery of Dr. Debiparshad, which
23 showed, as you've already told us, a substantial nonhealing, correct?

24 A Well, I thought again there was some healing. He didn't
25 think there was that healing. I thought that it was attempting to heal.

1 And it looked like in Dr. Herr's comments and his radiographic report and
2 his study, that you read this morning, he also noted that there was
3 callous and some callous formulation --

4 Q Okay.

5 A -- and it was attempting to heal.

6 Q And Dr. Debiparshad also concluded on March 1 that there
7 was no substantial healing. Agreed?

8 A Agreed.

9 Q Okay. So I'm trying to rule out, and maybe have you rule out
10 and agree with me, that Mr. Landess' physiological condition, his
11 biological factors, so to speak, were not in play here because he healed
12 quite readily four months after the second surgery. Agreed?

13 A Nobody can answer that question. That's a -- an unknown
14 factor.

15 Q Well, if we know that he was able to heal quite well after the
16 second surgery and he was the same human being four months earlier,
17 you would expect that had the surgery been done properly, he would
18 have healed by February; isn't that right?

19 A No, I can't say that.

20 Q Okay. Thank you, sir.

21 MR. JIMMERSON: Can I just show the ladies and gentlemen
22 of the jury the operative note of April 3rd?

23 BY MR. JIMMERSON:

24 Q Dr. Fontes dictated an operative note. I guess you -- you all
25 do that just to kind of memorialize what you did, have some written

1 record?

2 A Yes.

3 Q All right. And have you seen that note before?

4 A I have.

5 Q All right.

6 MR. JIMMERSON: May I have the ELMO, please?

7 This, ladies and gentlemen of the jury, is Plaintiff's Exhibit
8 11-32. It comes in the records of Dr. Fontes. And it's also within the
9 records of St. Rose Dominican Hospital. And it's dated April 3rd of 2018,
10 which is the day of the surgery -- the second surgery by Dr. Fontes of
11 Mr. Landess.

12 So let's just -- again, this is just small type. It's just so unfair
13 to the jury, but --

14 Am I able to blow that up at all?

15 JUDICIAL ASSISTANT: Uh-huh. Just hit the plus button.

16 MR. JIMMERSON: Like that?

17 JUDICIAL ASSISTANT: Yep.

18 THE COURT: Okay.

19 MR. JIMMERSON: I may have did it a little too much.

20 BY MR. JIMMERSON:

21 Q Can you see that, Doctor?

22 A Yes.

23 Q All right.

24 THE COURT: One second. I think there's a way to -- if you
25 look on that little, tiny screen right in front --

1 MR. JIMMERSON: Yeah.

2 THE COURT: -- you can actually see what's on the one over
3 here.

4 MR. JIMMERSON: Oh, okay. Great. Well, then I can see that
5 I didn't do very good here. Yeah. Thanks. Not very good. That's for
6 sure.

7 BY MR. JIMMERSON:

8 Q It just starts -- well, I don't have the right page. I don't have
9 the starting place. Yeah. The front of the page document, sir, looks like
10 this. And it -- it's the operation -- operative procedure report. Do you
11 see that?

12 A Yes, sir.

13 Q All right. And it outlines that the surgical time is four hours,
14 right, and the procedure is treatment, left tibia nonunion with autograph
15 -- autograft -- maybe that's a grafting -- using BMP as well as femur
16 bone; is that right?

17 A They -- they used some of his femur bone, correct.

18 Q All right. And then he installed a new nail; had to remove the
19 old one and install a new one?

20 A Correct.

21 Q And then there was removal of the deep hardware, multiple.
22 Okay. And then he speaks about that, which I will show you now.

23 So he's describing the surgery, and it begins -- it began with
24 the hardware removal. And of course, just so we understand, you open
25 up the leg about this area. And of course, there's hardware already

1 there. So the first thing is to remove that hardware, right, both in terms
2 of the broken screws but also to remove the tibial nail and the Stryker
3 nail; is that correct?

4 A Correct. So you've got -- you've got two screws down by the
5 ankle that need --

6 Q That's the distal side --

7 A -- to be removed.

8 Q -- right?

9 A Yep. And then you're going to take out the two broken head
10 parts up top.

11 Q Right.

12 A You're not going to get the back side screws out first. So
13 then the next move is to attach the -- the device to remove the nail. So
14 then the nail's brought out. And then -- then they'll go after and see if
15 the remaining portions of those two broken screws are going to be in the
16 way of what needs to be done with the new nail, which ultimately they --
17 they left them because they were in the way and they weren't going to --
18 it was going to cause more damage to remove them than to -- to leave
19 them.

20 Q All right. So let's -- let's explain what he's now doing.
21 Because you can see it -- it consumes a fair amount of time. And this is
22 the point where he thought it was significant to write a note about it?

23 A It's actually a pretty short op report for a four-hour operation,
24 but --

25 Q I was surprised about that as well. I've seen them much

1 longer.

2 But you can see, at least as it relates to the four hours, he
3 devoted a fair -- fair amount of time to the hardware and removing the
4 hardware.

5 So let's just continue.

6 "Utilized the previous incision at the knee, extending this
7 down and the paramedian to the 10, dissection was
8 performed down into the top of the nail, which was sighted
9 with the radiographic guidewire."

10 Is that like an x-ray that's being used to find the nail? Is that
11 the --

12 A Right. So they're --

13 Q -- reason?

14 A Yeah. They're localizing it to try to limit the amount of bone
15 that they're going to damage.

16 Q Okay.

17 "We then introduced the conical extraction screw into the top
18 of the nail. Once we had" -- "when we had firmly engaged
19 the nail, the remaining interlocutory screws distally were
20 now removed" --

21 So those are the ones at the bottom --

22 A Correct.

23 Q -- right? Okay. Very good.

24 "through separate incisions. The nail was then removed
25 without difficulty. We then spent quite a bit of time fishing

1 part of the broken screws out of as they were going to block
2 some of our future fixation."

3 Which would be the future nail and the future screws in that
4 work; is that right?

5 A Correct.

6 Q Okay. "The screw heads" -- I'm sorry.

7 UNIDENTIFIED SPEAKER: Mr. Jimmerson?

8 MR. JIMMERSON: Yeah.

9 UNIDENTIFIED SPEAKER: I think you hit a freeze button
10 because you should be moving and it's not.

11 MR. JIMMERSON: Okay. The freeze is off.

12 UNIDENTIFIED SPEAKER: Thank you.

13 MR. JIMMERSON: Thank you.

14 And are you able to see this, ladies and gentlemen, as we're
15 moving along?

16 UNIDENTIFIED JUROR: Yeah.

17 MR. JIMMERSON: I know it's not easy, because it's small
18 print.

19 And thank you.

20 BY MR. JIMMERSON:

21 Q So I just want to continue. So at the beginning. "We then
22 spent quite a bit of time fishing part of the broke screws" -- "broken
23 screws out as they were going to block some of our future fixation."
24 Which I believe is the new nail and the new hardware.

25 "The screw heads were partially under bones. We spent

1 quite a fair amount of time getting those out of the back side,
2 and the screws which were broken were left in place. It did
3 appear that at this point at least, to be in the way, and we
4 required extensive dissection to get them out."

5 Dissection I presume, from my frog days, is a scalpel kind of
6 digging things out. Is that the idea?

7 A Well, this is in the middle of the bone. So he's probably
8 using a curette as opposed to a scalpel on this in trying to the screw.

9 But again, I -- I was a little confused by part of that because,
10 you know, two -- two of the backside screws were still left in place. He
11 took out the -- the front -- the front part.

12 Q And as Dr. Fontes explained to us, you actually use a
13 guidewire to help direct some of the hardware. And he also -- we
14 showed the ladies and gentlemen of the jury. But it's almost like going
15 to Home Depot with some of the hardware that you guys have, the
16 screwdriver and the hammer and --

17 A That's the work we do.

18 Q You know, that's the -- the whole carpentry idea in medicine.
19 So I appreciate that, sir.

20 Look, I have to maybe take you to task or at least ask you
21 about it. When you have pain, that is reported by Mr. Landess,
22 contemporary to a broken screw on December 20th that hadn't been
23 there from the, you know, October 10th surgery, but it broke sometime
24 between October and December -- and I think between November 22nd
25 and December 20th, because when we look at the November film, I don't

1 see a broken screw, and I don't think you do either -- and you have then
2 certainly by -- you see the broken screws again on January 31, and then
3 in that time period of December and January, a two-month time period,
4 there's this movement instability that Jason is hearing and the clicking
5 and popping. So he goes to see Herr and he goes to see Fontes, and he
6 goes back to see Debiparshad. And all of which we see the screws. But
7 Debiparshad, as you know, never told him about it.

8 My concern or my criticism listening to you is how do you
9 say, when you listen {sic} to an operative report like Dr. Fontes about the
10 amount of time he spent, that broken screws are irrelevant?

11 A Well --

12 Q That shocked me when I heard that.

13 A Yeah. I mean, they're irrelevant in -- in this case, and in
14 many of the cases that go on to a delayed or a nonunion because, again,
15 the body is trying to compress this fracture, okay, that little gap that
16 everybody is talking about. The body's very smart and he's trying to
17 compress that fracture. So the screws broke sequentially. And again,
18 we don't know exactly when they broke; one broke and then the other
19 one broke. But the overall alignment, okay, of the fracture site stayed
20 within applicable numbers.

21 This was pistoning axially, like I said. That was the clicking
22 that he was feeling. I have no question that he was having pain. So I
23 don't doubt that at all. The question just became, this is developing into
24 a delayed union now, possibly on its way to a nonunion, which isn't
25 malaligned, and it's got a chance to heal or it doesn't. The surgeon

1 decided to treat the nonunion with a little bit of that translation, and line
2 it up. And did a -- and did a wonderful job.

3 So that's just, again, a decision respect to the development
4 of a nonunion, which occurs in, as we talked yesterday, a certain
5 percentage of these cases. There was nothing wrong done initially. This
6 just went on to a nonunion that required further treatment.

7 Q The -- the screws broke because there was a malalignment
8 right from the beginning on October 10th by Dr. Debiparshad; isn't that
9 right?

10 A No, that's not right. That's where --

11 Q In fact, you --

12 A -- we disagree.

13 Q -- you used the term, there's a race. Do you remember that?

14 A Yes.

15 Q There would be no race if it had been done properly? You
16 wouldn't have to worry about whether or not healing would come ahead
17 of finish first against broken screws or whether broken screws would
18 finish first against healing if Dr. Debiparshad had done it right in the first
19 place; isn't that right?

20 A The procedure was done correctly within the standard of care
21 and the parameters that we go by.

22 Q I understand that's your view. Thank you, sir.

23 Did you observe Dr. Debiparshad taking any action or doing
24 anything to address the broken screws that Jason had?

25 A Again, at that point, there was no reason --

1 Q Yes or no. Did you -- did he do anything?

2 A He -- he felt it was going on to a -- potentially a delayed
3 union. So he offered potentially a bone stimulator, and he also said that
4 this might need a bone graft.

5 Q I'm not talking about -- that was March 1. I'm not talking
6 about a bone stimulator. I'm talking about, did he take any action to
7 address the patient's stated concerns regarding the broken screws
8 starting in December, January, and March?

9 A He didn't. And I don't think there was any need to at that
10 point.

11 Q Okay. All right. So you would -- you would defend his
12 failure to report to the patient --

13 A That's --

14 Q -- broken screws --

15 A That's --

16 Q -- three different times?

17 A That's a different question.

18 Q All right. And is it a different answer then?

19 A Well, I said if I had seen the broken screws, I would have
20 reported it to the patient.

21 Q And you also observed Jason described Dr. Debiparshad's,
22 you know, behavior -- and -- and he -- Jason I think was trying to be fair
23 -- as dismissive. You know, like sort of, the modern for that, blowing you
24 off. Okay? With -- with the absence of Dr. Debiparshad taking any action
25 to address the complaints of a patient that there's pain, there's clicking,

1 there's popping, how do you excuse that kind of behavior?

2 A Again, I -- I can't -- I can't answer that other than that if
3 Mr. Landess knew the screws were broken and he went back to
4 Dr. Debiparshad for a reevaluation, why didn't he say, I've been told the
5 screws are broken. Is that something that we need to do something
6 about?

7 Q He answered the question that -- opposing counsel asked
8 that very question, and he said, I wanted to see if the doctor was going
9 to tell me the truth or whether he was going to continue to --

10 A Yeah. Okay.

11 Q -- misstate --

12 A So I mean, that -- that part, I -- I don't understand.

13 Q All right. Thank you, sir. Basically if you were Doctor -- if
14 you were Mr. Landess and you know what you know now, would you
15 also agree with him that Dr. Debiparshad's behavior would have caused
16 you to lose confidence in Dr. Debiparshad?

17 A That's a really hard question to answer.

18 Q Thank you, sir. Okay. I'm going to change subject matters
19 here. Dr. Harris, of course, is your counterpart, retained by Mr. Vogel's
20 firm, my firm to speak on behalf of the breaches of standard of care on
21 behalf of the Plaintiff. You understand that?

22 A [No verbal response].

23 Q And you and he, as you've told us, certainly collide with
24 regard to your views, right?

25 A Correct.

1 Q Okay. One of the things that Dr. Fontes had told us was that
2 any concerns about rotation that he had would be resolved by the need
3 for the realignment. And so there was a -- there was definitely a
4 difference of opinion between Dr. Harris, who found rotation both in
5 January and February, ahead of your deposition, and your view.

6 Let's talk a little bit about some, you know, direct causation.
7 When you see apposition, when you see the cliff, would you agree that
8 you will frequently have rotation or rotational deformity present?

9 A That's a totally inaccurate statement.

10 Q All right. Thank you.

11 A It's -- it's independent.

12 Q All right. It's independent. Okay. Are you familiar with the
13 Orthopedic Trauma Association?

14 A Yes.

15 Q Okay.

16 A I'm a member of it.

17 Q All right. And I'd like to show you a presentation that was
18 made by that organization in 2017.

19 MR. VOGEL: What exhibit? What exhibit is it?

20 MR. JIMMERSON: It's not an exhibit.

21 MR. VOGEL: May we approach, Your Honor?

22 THE COURT: Sure.

23 [Bench conference - not recorded]

24 MR. JIMMERSON: Thank you. Thank you, Judge, very
25 much.

1 BY MR. JIMMERSON:

2 Q Hi, Doctor. In addressing the relationship of translation to
3 malrotation, would you agree with this statement? "With any
4 translational deformity, there is almost always a compensatory
5 malrotation."

6 A Now if it gets their independent factors, then it can be
7 related, but in most cases, again, each one of the malalignments we
8 talked about can be totally independent of each other.

9 Q And I have one additional comment, and then we'll address
10 that. Would you agree with this statement? "With any translational
11 deformity, there almost always is a compensatory malrotation,
12 especially in the tibia."

13 A It doesn't make any difference which bone it is.

14 Q All right. Thank you, sir. And you, of course, know Dr.
15 Harris' view that there is significant rotation, right?

16 A I just don't understand. I know that's his view.

17 Q Okay, thank you. How many hours have you billed your
18 client or the law firm, or Dr. Debiparshad for this assignment, for your
19 work, since you were retained in November or December 2018?

20 A This past week, nine days, I don't even have a clue. I've got
21 to add it all up. I mean, there's been -- that's when most of the work has
22 been done. I initially only did several hours, as I believed that this
23 wouldn't even come this far, and then I, prior to my deposition -- I mean,
24 I guess I could look in my bag. You had the billing up until the time of
25 my deposition, and then so following the deposition, there was about six

1 hours of work, I remember, and then I -- again, I have not added up what
2 I've done in the last week, which is unfortunately, quite a bit.

3 Q And quite a bit more than you'd done before your
4 deposition?

5 A Well, I think I billed for that, what we had done for the
6 deposition.

7 Q Right, right. Just trying to help you in terms of --

8 A Yeah.

9 Q -- quantity of work. At your deposition, you told us that you
10 had performed about 10 hours' worth of work; do you recall that?

11 A That's correct.

12 Q Okay. And now you've told us that you did six after that, and
13 then in the last week or so, more than that. So my question was, is it
14 greater or lesser than the 10 hours that you've spent --

15 A Oh, it's --

16 Q -- leading up to your deposition?

17 A It's been more.

18 Q Okay. So maybe 30 hours?

19 A I don't think quite that much, but probably somewhere
20 between 50 and 25.

21 Q Well, if you add 10 -- or I mean, 15 and 25 afterwards?

22 A Yes.

23 Q So 25 to 35 hours total?

24 A Correct.

25 Q And the hourly rate is \$2,000 an hour?

1 A No, \$600 an hour for a record review.

2 Q Okay. I didn't know. Okay. So --

3 A It'd be nice to get \$2,000 an hour for having to do that, but --

4 Q Well, I saw your schedule, so I'm sorry. He said \$2,000, in
5 that area. So again, 25 times 600 would be \$15,000, right?

6 A Correct.

7 Q So \$30,000 plus for your efforts; is that right?

8 A Doing my job.

9 Q Okay. Very good, sir. Thank you. And you -- just to revisit
10 the issue, the district -- the discovery commissioner actually entered a
11 report and a recommendation compelling you to produce any records
12 you would have about Plaintiff's work involving a tibia that you have
13 given; is that right?

14 A That's correct.

15 Q All right. And you reported that -- two things. First, you
16 destroy your records after a length of time, and two, you don't have any
17 records where you served as a Plaintiff's expert involving a tibia in your
18 possession; is that right?

19 A That's correct.

20 Q Okay. And you understood the purpose for that was to see
21 whether or not Dr. Gold changes his testimony when he's testifying on
22 behalf of a Plaintiff, versus his more traditional role, his 70 percent role,
23 of testifying on behalf of Defendants; is that right?

24 A Yep, I understand.

25 Q All right. All right. Dr. Gold, thank you. It was a pleasure

1 working with you, sir.

2 A Thank you, sir.

3 THE COURT: Thank you, Mr. Jimmerson.

4 MR. JIMMERSON: And I wish you Godspeed with regard to
5 your own matter.

6 THE WITNESS: Thank you.

7 THE COURT: Mr. Vogel, any redirect?

8 MR. VOGEL: Yes, please.

9 REDIRECT EXAMINATION

10 BY MR. VOGEL:

11 Q I performed some surgery last night and put this back
12 together.

13 A Excellent.

14 Q So Doctor, there's a few things I want to go through with
15 respect to what you were asked by Mr. Jimmerson to help explain your
16 opinions in this case. The first one has to do with the timing of reports in
17 this case, and Mr. Jimmerson had shown you a January 28th, 2019 letter
18 from Dr. Harris, as well as a February 6th, 2019 letter from Dr. Harris,
19 where he puts in the first time, the issue of malrotation.

20 MR. JIMMERSON: Objection, Your Honor. That was the only
21 time. It isn't the first time he had it. It was the first report, he included
22 rotation. January 28th, 2019. Not --

23 MR. VOGEL: I agree. I agree that was the first report where
24 he put malrotation.

25 THE COURT: All that. That --

1 MR. VOGEL: It was not, however, his first report.

2 THE COURT: All right. Go ahead.

3 BY MR. VOGEL:

4 Q Doctor, do you recall reviewing a declaration -- and I went
5 over this with Dr. Harris on the stand, as well. Do you recall reviewing a
6 declaration from Dr. Harris dated June 7th, 2018?

7 A Yes.

8 Q And you reviewed the opinions that he held at that point in
9 time in this case?

10 A Yes.

11 Q And in this report, this two-page report where he goes
12 through, he starts out with his educational background and he talks
13 about the records that he reviewed. On the second page, he talks about
14 an ensuing malunion occurred. Did you see, anywhere in this June 7th
15 report, anything about malrotation?

16 A No.

17 Q It wasn't his only opinion in that report. "It is my
18 professional opinion to a degree of medical certainty that the reason Mr.
19 Landess had the malunion was the fracture was never adequately
20 reduced at the time of the initial surgery." I believe Mr. Jimmerson just
21 admitted that there never was a malunion in this case, was there?

22 A That's correct.

23 Q But that was Dr. Harris' opinion at first, wasn't it?

24 A Yes.

25 Q And that was the opinion you were responding to in your

1 January 22nd report?

2 MR. JIMMERSON: Objection, Your Honor. This is all
3 leading. We'd like to hear from the doctor.

4 THE COURT: Well --

5 MR. VOGEL: I'll rephrase it.

6 THE COURT: Okay, go ahead.

7 MR. VOGEL: Sure.

8 BY MR. VOGEL:

9 Q Was that the opinion that you were responding to in your
10 January 22nd report?

11 A Yes.

12 Q Now, this wasn't the only report that he did before you did
13 yours, is it?

14 A No.

15 Q I went through this with Dr. Harris in front of this jury. He
16 also authored a letter report that he didn't date. Did you review this
17 report?

18 A I did.

19 Q And in this report on the second page -- it's a pretty short
20 report, I believe just a little over a page -- he states that it's his opinion --
21 "It is my opinion to a reasonable degree of medical probability that Dr.
22 Debiparshad did not adequately reduce the fracture, resulting in
23 subsequent angular deformity." What does that mean?

24 A Angular deformity is the number that he's calling vagus,
25 which we disagree with, because of the x-ray that he measured it on.

1 Q All right. So it wasn't until his report after yours that he
2 came up with the malrotation?

3 A Yeah. That's where I was in error. I thought it was at the
4 deposition, and it was after my report. It was after my initial report.

5 Q And there's also some discussion about x-rays that Dr. Harris
6 had taken, and you were told, I believe, that they were told, I believe, that
7 they were before your report in May of 2018; do you recall that on the
8 cross?

9 A I recall, and there again, I remember it was May, not March,
10 and it was after my deposition.

11 Q Doctor, I want to show you what's already in evidence,
12 Exhibit 16, page 54. I don't know if you can see that. It's very difficult to
13 read.

14 A I can't see it on here.

15 Q Let me see if I can find a better one. Oh, this --

16 THE COURT: You can make an offer of proof as to what it
17 says. That's fine.

18 MR. VOGEL: Sure. This one is a little bit better.

19 BY MR. VOGEL:

20 Q 5/16/19, is that correct?

21 A That's correct.

22 Q So about two months ago?

23 A Yes.

24 Q Are these the x-rays you were referring to when you
25 indicated that Dr. Harris was trying to prove his opinion by having

1 additional x-rays taken of the opposite leg?

2 A Yes, I did.

3 Q Can you explain that, again, for the jury, please?

4 A Again, he was trying to figure out if he could get views on
5 Mr. Landess' non-injured leg, and he went through the leg that had the
6 knee replacement to match the views to then prove that he had a
7 rotatory deformity, meaning on one part of the x-ray it was an AP, and
8 on the lower part of the x-ray, it showed rotation. As I showed you
9 yesterday and we put the two x-rays up side by side, that they prove the
10 exact opposite. It proves that there is no malrotation, and the rotation on
11 his unaffected, traumatized leg is the same as it is on his corrected leg
12 with the rod, and that was the same, both, with Dr. Debiparshad's
13 surgery, and then subsequently the same rotational angles with Dr.
14 Fontes' surgery. And again, the only difference was the change in the
15 translational deformity with the second surgery that was carried out.

16 Q And now that we have our repaired leg, if you could, could
17 you explain to the jury --

18 MR. VOGEL: May I have the witness come up in front of the
19 jury?

20 THE COURT: Sure.

21 MR. VOGEL: We have this together.

22 THE WITNESS: So what I was trying to do yesterday which
23 was difficult to do when this wasn't connected -- again, the fibula, okay,
24 is connected through a joint at the top of the tibia and at the bottom of
25 the tibia. If this bones remains intact, it's very difficult to have a lot of

1 displacement period with this type of fracture. The one that's the most
2 difficult to have displacement is rotation.

3 As you can see here, and you guys can play with this after,
4 it's very hard to get any rotational deformity if the fibula is intact. It's
5 virtually impossible. Maybe a degree, maybe three degrees. Not 20, not
6 30, and not even the 10 which is acceptable, even if it happens. So that
7 is prevented it, and the same way they're blocking this is one of the
8 factors that's preventing some of that compression, which is ultimately
9 what the rod and the screws ended up doing.

10 You can barely -- even when -- because again, there's a thick
11 ligament that goes between these two bones, as well, so again, you can
12 only get too much varus valgus, or so much angulation this way for the
13 same reason. Okay, but rotation is virtually impossible.

14 BY MR. VOGEL:

15 Q Now, one of the ways you analyzed rotation, I believe you
16 gave, was clinically?

17 A Yes.

18 Q Basically just looking at the patient?

19 A Well, clinically and then again, we have the advantage now
20 in the operating room, we can do it fluoroscopy, but clinically is the way
21 we start.

22 Q And we have admitted into evidence Exhibit 18, page 14. I
23 just want to show you, this is the photo that Mr. Landess had taken of his
24 leg shortly after the surgery. Zoom out a little bit there so you can see
25 the foot. Do you see any rotational deformity in that photo?

1 A I can't tell you a hundred percent any rotation deformity. I
2 can tell you if there is any, it's like non-existent.

3 Q And there's also a discussion having to do with the screws,
4 whether they tell a patient about screws. Is that a standard of care
5 issue?

6 A It's not a standard of care issue. That's something that a
7 surgeon can discuss with a patient, explain to him why things are going
8 on. Some patients are interested, some aren't. Maybe Dr. Debiparshad
9 should have discussed it with Mr. Landess in this case, but it's not a
10 standard of care issue.

11 Q So it's not something that you would look at and say, okay,
12 this is something that you determine breach of the standard of care,
13 causation, and injury from?

14 A Correct.

15 Q It's just something that's private practice? You either talk
16 about it, maybe not?

17 A Again, everybody is different. In my case, I would talk about
18 it. I said that.

19 Q And I will represent to you that Dr. Fontes was here the other
20 day. He said, sometimes I do, sometimes I don't, it depends on the
21 patient. You agree --

22 MR. JIMMERSON: Objection, Your Honor. That misstates
23 Dr. Fontes' testimony.

24 MR. VOGEL: The jury can decide on that.

25 MR. JIMMERSON: I'd like to see the page and line number.

1 THE COURT: I think it's a fair question. Go ahead.

2 BY MR. VOGEL:

3 Q Now, one of the things that did come up with respect to
4 screws was Dr. Herr. And counsel just showed you Plaintiff's Exhibit 7,
5 page nine. This was Dr. Herr's February 12th, 2018 report, and he's got a
6 section there on x-rays. Can you see that?

7 A I can see that. He hadn't mentioned that the screws were
8 broken.

9 Q Exactly right. He didn't mention broken screws in there, did
10 he?

11 A He did not.

12 Q And you met with him again a few days later on February
13 19th. Once again, there's no mention of screws in there either?

14 A That's correct.

15 Q Now, okay, I have it in my notes here. Dr. Herr testified to
16 this jury that broken screws are an ominous sign. Do you agree with
17 that?

18 A Well, it depends on the situation, and it depends on what,
19 again, the body is trying to do. In this case, it was a sign that this needed
20 some help healing, that there wasn't enough compression. So again, at
21 this point in this case, I take it as a sign that the body is trying to heal
22 itself, and by dynamizing the nail without having to have any surgery is
23 what's happening.

24 Q Now, I guess another one of the issues on this screw issue,
25 would you say this is more of a red herring issue, the screws?

1 A Again, it's the adjuvant hardware, and you need to analyze
2 and look at it, and see what it's doing or what it's not doing, and again,
3 in some cases if you have a plate, which is more significant, and, you
4 know, you've got a plate which has let's say eight screws in it, and all
5 eight screws are broken, that's a problem, because the plate can't just
6 hold the bone without the screws attaching it. The rod, when we use
7 rods, are down to the bone, so they provide stability alone themselves,
8 and what the screws just do is provide a little more stability of the rod,
9 you know, particularly at the initial phases, but again, in this case, since
10 there was minimal change in the alignment, okay, for multiple reasons,
11 mostly because the fibula was still intact, it's just a dynamization
12 process.

13 Q So if you're talking about the standard of care issues in this
14 case, the ones that the jury is to decide, are we talking about the October
15 10th surgery?

16 A Yes.

17 Q And your opinion is that surgery was done properly?

18 A It was done well within the standards of care.

19 Q All right. And I don't want to go over everything again, but
20 that's based on your review of the x-rays?

21 A Review of the x-rays. Again, the alignment was well within
22 any standards which we do, and the translation was also within the
23 standard.

24 Q Now on cross-examination, you were shown part of what
25 was described as Exhibit 23. I want to show you the whole thing. Can

1 you see that?

2 A Yes.

3 Q All right. Now, this is something that Dr. Harris said is an AP
4 view, and that's why he says there's 11 degrees of angulation.

5 MR. JIMMERSON: Objection, Your Honor. That is a
6 misstatement of Dr. Harris. He did not say an AP view.

7 THE COURT: Do you want to rephrase it or --

8 MR. VOGEL: No, because that's my recollection of what he
9 said.

10 THE COURT: Okay, all right.

11 MR. VOGEL: It was that it was an AP view.

12 THE COURT: All right. Then I need both counsel to come up
13 here, please.

14 [Bench conference - not recorded]

15 THE COURT: All right, go ahead, Mr. Vogel.

16 MR. VOGEL: Thank you, Your Honor.

17 BY MR. VOGEL:

18 Q Doctor, my recollection of Dr. Harris' testimony is he
19 described to this jury that the x-ray view on the left, which is an oblique
20 view -- it's labeled as an oblique view, is actually more akin to an AP
21 view?

22 A Okay, and I think I can help out the dispute here is that -- and
23 what I remember he said is that, again, this was an AP view, but he's
24 saying it's an AP view for either the proximal tibia or the distal tibia. And
25 because of the malrotation, that's why it's not an AP view all over. And

1 that's what the discrepancy is. So this is an oblique view. Because there
2 is no malrotation, it's an oblique view of the proximal tibia and of the
3 distal tibia.

4 Q And as you can see in the drawing on the right, is this the
5 patella up here?

6 A Correct, so the patella is coming in a rotational view. The
7 patella is going to look medial around the inside. If it's an AP view it's
8 going to look dead in the middle, because that's the way we set it.

9 Q So, I mean you look for landmarks in an AP, do you not?

10 A Yeah, yes, and this -- and again this is an oblique view. And
11 there's no malrotation, so it's an oblique view of both ends of the bone.

12 Q Now one of the questions Mr. Jimmerson asked you at this
13 point was well, the -- if Dr. D had done this surgery correctly the first
14 time, he never would have needed the second surgery, and you
15 indicated you disagreed with that. Please explain.

16 A In these, that standard of care is -- for this type of fracture,
17 this needs to be lined up within a certain degree of the angulation of
18 both the AP and lateral views, which it was. Because the angulation was
19 minimal, by a few degrees. The translation, okay, if you're going by
20 what the experts are saying, and using the ortho bullets, they say it only
21 needs to be 50 percent opposed. I actually disagreed with that, because
22 it's a proximal tibia. But 10 percent, okay, it's well within the standard.
23 Especially, if you're using those -- those guides. And so this is lined up
24 properly. Maybe the factors that have led this on to a delay or a non-
25 union, or the combination of the attacked fibula, the size and age of Mr.

1 Landess.

2 Q Now, with respect to the second surgery done by Dr. Fontes,
3 he indicated that he did a different hole, a little bit lateral. Do you recall
4 hearing about that?

5 A I heard about that after. I was kind of surprised because on
6 the x-ray at exactly the same spot is the one Dr. D used, and more
7 importantly, he did not make mention of that at all in his operative
8 report. And if you're doing that, you would have made mention that
9 you changed the hole. So there was no change of any starting position.
10 What he did, and what he mentioned, I can't look at his deposition or his
11 transcript, he just put the rod in a little bit further down. The reason why
12 he wanted to do that is to -- if you put that in exactly same height, then
13 where the lock-in screws go through, he might have ended up being in
14 one of the old holes, so he wouldn't have had as good fixation. So if
15 you put it in probably an extra centimeter down, which is the way I read
16 that portion of the transcript, and then that way the holes for the lock-in
17 screws are now in bone that haven't had a screw in it. So it gives you
18 better fixation.

19 Q And when you are putting a rod into the tibia, is there
20 enough room in there to do two holes?

21 A Well, you can -- you can alter the position if you think that the
22 initial hole is off. And again, sometimes when we do corrective surgery
23 we have to do that. But in order to change the position, the only way
24 you can do it and have the rod, and stay in the new position you put is
25 one of two things. Either you have to put something in the way, like a

1 piece of bone. Sometimes we take some bone graft, a part of the fibula,
2 from a dead person, it's called a allograft. And we put it in the old hole
3 and then re next to it, so it can shift over, so it doesn't slide back into the
4 original hole. That's one way. Or you can put in some of these polar, or
5 blocking screws in order to redirect the position. But in this case, there
6 was no need to redirect it. The initial direction was adequate as a
7 starting position. What he did to direct the translation, was he put one of
8 those blocking screws on the side view to put the road further forward,
9 which brings -- takes out that translation.

10 Q And now one of the things that Mr. Jimmerson said to you as
11 well, but it didn't -- it didn't heal the first time, because he didn't do the
12 surgery correctly. It healed the second time because that surgery was
13 done correctly. These were different procedures, right?

14 A Again, it was a primary procedure, which went on to a
15 delayed or non-union, which happens, versus a non-union surgery,
16 which was done open, lots of bone graft, lots of expensive bone
17 morphogenetic protein, which is as stimulant to get things to heal, which
18 is something we use on people that need help, stimulating to get their
19 bone to heal. And that might have been a biologic issue that Mr.
20 Landess' age was part of the problem.

21 Q And that's not something you would have used primarily
22 after the initial injury?

23 A Number 1, you want to try to do it closed, get it in accepted
24 standards. If you did bone graft it for whatever reason, or did it open the
25 first time, or if you made an incision to line that translation off, you

1 would not use a bone graft, or a particular bone morphogenetic protein
2 in the first surgery.

3 Q Is that what you teach your students and residents?

4 A Exactly.

5 Q Is that also what you teach other Board Certified orthopedic
6 surgeons?

7 A Yes, sir.

8 Q Is that the standard of care?

9 A That's the standard of care.

10 Q Is that what Dr. Debiparshad did in this case?

11 A In this case the surgery performed was in the standard of
12 care.

13 Q And a non-union that's a known risk, correct?

14 A It's a known risk.

15 Q All right. And on the risk of beating a dead horse here, so I'm
16 going to shut things down. Thank you, very much for your time. I
17 appreciate you coming out.

18 A Thank you, sir.

19 MR. JIMMERSON: Judge, I have just four minutes, five
20 minutes.

21 THE COURT: Okay, go ahead.

22 MR. JIMMERSON: Thank you.

23 RECROSS-EXAMINATION

24 BY MR. JIMMERSON:

25 Q You're so quick to says non-union is a known risk. Is non-

1 union a known risk -- is -- is -- in your definition of malpractice a known
2 risk?

3 A No, non-union is not a malpractice issue.

4 Q So if non-union occurs because of the substandard
5 performance by Dr. Debiparshad, that's a different issue than the concept
6 of non-union as a known risk; would you agree?

7 A Again, this goes down as substandard, then I agree with you.

8 Q So it's not -- the non-union, we agree there's a non-union.
9 It's why there was a non-union? Fair -- fair statement?

10 A Right. In this case it wasn't because of the substandard
11 operation.

12 Q Thank you. Now, if you were reviewing x-rays and then write
13 a report to memorialize what you're observing, and you ever had a
14 situation, Dr. Gold, where you saw -- you had your films were not clear
15 enough to make a conclusion, would you note that in your report?

16 A I would note that the films were of poor quality and I'd like to
17 get them repeated, yes.

18 Q All right. Did you, in reviewing Dr. Debiparshad's notes,
19 records, did he ever report in his notes that the x-rays that he was
20 looking at were not clear enough to read?

21 A I didn't see a written portion of the notes. It was just
22 discussed in a different way from the transcript.

23 Q So he never noted that he had to deal with x-rays he couldn't
24 read?

25 A I --

1 Q If in fact that be the case.

2 A I did not see that.

3 Q And then, if I could just have the ELMO. I guess we have
4 that. There were five breaches found by Dr. Harris. Now we talked the
5 major three, I call it the major three, misalignment, the cliff leading to
6 rotation, and the third being gap. But he also criticized the failure to use
7 a long view x-ray that you've spoken to, and the last was the failure to
8 discover the instability and the problems that they were having at an
9 earlier date.

10 With regard to the first three, which was the misalignment,
11 the rotation and the gap, that we call, a distraction. Any one of those
12 would be -- would result, if true, if a jury were to find these to be true,
13 would lead to a below the standard finding. Isn't that right?

14 A If they were outside the focal --

15 Q Outside the ortho points that we've established and
16 introduced, very good. Now, if I could just call your attention to three
17 sections of Dr. Harris' testimony, beginning with page 13. I just have a
18 few questions about those, and then we'll be done.

19 All right. The question at line 13, page 13 of his trial
20 testimony is:

21 "Q What are your opinions with regard to Dr.

22 Debiparshad's breaches of the standard of care?

23 "A Well, I'm going to come back to this later, so I'll
24 translate medicine into English, but basically the position of
25 this fracture was just wrong. The indication to do the

1 surgery is if it's best -- if it's bent four or five degrees in one
2 plane, or ten degrees in another plane, you're supposed to
3 fix it. And you want to achieve those results. You want to
4 better than five degrees means less and -- less than ten
5 degrees on a side view.

6 And he didn't achieve that initially referring, I think, to Dr.
7 Debiparshad. So if you look at the operative pictures."

8 I think referring again to the October 9th -- 10th and October
9 25 photos,

10 "right from the get-go you show rotary abnormality. You
11 show a gap between the bones and you show that the bone
12 was -- had been rotated. I also fault him on not taking
13 approximate x-rays. When you look at the broken bone, you
14 just look at the fracture."

15 It doesn't show a response.

16 "So here's a leg, we're going to go into detail, and you just
17 look from here to here --"

18 A Are you reading that now?

19 THE COURT: You have to move it down.

20 MR. JIMMERSON: the next page. Just the continuation of
21 the answer.

22 THE WITNESS: Okay. Okay.

23 THE COURT: He has to move it down.

24 MR. JIMMERSON: Yeah, I just wanted to -- well, thank you,
25 Judge.

1 THE WITNESS: Yeah, I didn't see that there.

2 BY MR. JIMMERSON:

3 Q I just want to show you this. You know, it's just a
4 continuation. And so he says,

5 "A -- so there -- there -- so here's a leg we're going to get -
6 - go into detail. And you just look from here to here. And
7 you couldn't see anything else. It would be hard to see if
8 you had rotate or -- and sideways, or whatever. "

9 Then, speaking on the issue of rotation, he states. Where are
10 my notes. Page 23, it's down. There you go.

11 "A Now by definition, you have a rotary deformity. A
12 twisting of the leg. You come down to what's a front-on
13 view of the leg. Because when the ankle is pointed straight
14 up, or the knee is pointed straight up, in the case of Mr.
15 Landess, since his leg was twisted. If you put the knee
16 forward, the foot's going to be out. If you put the foot
17 forward, you get the deformity of the next picture."

18 Are you familiar with that testimony?

19 A Yes, sir.

20 Q Okay. And as we've shown with a skeleton, you have the
21 toes pointed up, and with rotation, the knee will be not also pointed up.
22 It will be either to the left or the right. Or if you were to put the beam on
23 the knee, and the knee is pointed up, the foot would be either to the left
24 or the right. In a rotational situation. Is that right?

25 A If it's rotated, correct.

1 Q Okay. Thank you. And then lastly then, Dr. Harris wrote
2 about at line 5, page 25 of this transcript.

3 "Okay, and so it's a way of deceiving -- trying to hide the
4 deformity. And so I'm making a point that the alignment
5 which you saw initially that hey, it's great. It looks like a
6 Good Ship Lollypop is totally bogus. And you have the foot
7 twisted way out to make it look good. Here's when you put
8 the foot -- here, when you put the foot straight up, you can
9 see the deformity. So I don't call this an oblique, okay. I call
10 it an AB oblique, because the beam actually is supposed to
11 be right in the middle of the leg, okay. And when you do
12 that, you have a deformity. You're going to see how it's sort
13 of bent here. Okay. That's called a valgus deformity. And
14 we have another way of showing that. To have the one with
15 a rod. You wanted to see it, since I brought it up."

16 And that concluded with the 11 degree valgus deformity,
17 which apparently you disagree with. Is that right?

18 A Well, I disagree with it, because again it's -- he's measuring
19 on an oblique x-ray and there's -- there's no rotational deformity in this --
20 in this case.

21 Q Are you familiar with Dr. Fontes' testimony, also finding the
22 AP of October 25, 2017 to not be a true AP x-ray?

23 MR. VOGEL: Object, it misstates testimony --
24 BY MR. JIMMERSON:

25 Q Are you familiar with Dr. Fontes' testimony with regard to his

1 observation of the October 25, 2017?

2 A I believe Dr. Fontes felt in the AP that there was a little bit of
3 error.

4 Q Thank you, sir. Thank you for your time, sir.

5 MR. JIMMERSON: Nothing further. I'd like to thank the
6 Doctor.

7 THE COURT: All right. Members of the jury, do you have
8 any questions for Dr. Gold? It looks like there will be some questions.

9 [Pause]

10 THE COURT: All right, Dr. Gold. I received some questions
11 from the jury. I'll ask all of them. And let's see, Juror 5 has a question.
12 So, of course, I'll read it, and then you just answer it to the jury.

13 "Dr. Gold, for testimony, Mr. Landess voluntarily released
14 himself from the hospital the day after the surgery. In your
15 opinion, could a patient run the risk of not getting proper
16 post-operative instruction by the surgeon, and possibly
17 cause delay in healing or risk further fracturing the repair?"

18 THE WITNESS: I mean a simple answer to that question is
19 yes. It probably didn't occur in this case. I think Mr. Landess was just
20 antsy and wanted to be out of the hospital. And I think that let people
21 weight-bear as tolerated for the most part, with most fractures. So if he
22 were given instructions to maybe partial weight-bear which is what Dr. D
23 might have given him, then that could have sped up the screw breakage.
24 But in general, we let people weight-bear as tolerated. And I think it's
25 not a good idea to ever sign out against medical advice, and without

1 instructions. But I don't think it caused any major harm there. The
2 specific cause is non-union. That probably was going to happen
3 anyway.

4 THE COURT: All right. And then Juror Number 5 has
5 another question. Now this one, I'm going to read the whole page. And
6 of course, if you would like me to re-read it, or break it apart, just let me
7 know.

8 "Dr. Gold, we have heard testimony that as a result of the
9 October 10, 2017 surgery performed by Dr. Debiparshad on
10 Mr. Landess' broken tibia, resulted in some testimony there
11 was alignment deformity and broken screws. In your
12 opinion, if a patient experiences quote, leg bowing, end
13 quote, what could or may cause the leg to bow after a broken
14 tibia surgery? Example, falling during the post-operative --
15 operative stage of healing?"

16 THE WITNESS: Is that it? So any -- any extra trauma can
17 cause the screws to break, or cause them to speed up and break faster.
18 Once the clipping started, which again, it took about two months, which
19 isn't unusual, given the size, and given the fact that the fibula is intact,
20 and of these -- these things can cause problems. The -- any extra trauma
21 is definitely going to be another factor. And maybe that possibly
22 occurred here. I don't think it probably changed the end result. That he
23 still might have had the non-union. But the bottom line is, the
24 reasonable alignment and the acceptable alignment that was achieved
25 with the first surgery, okay, was appropriate. And the non-union could

1 have occurred for multiple reasons, other than just that non-unions occur
2 in a certain percentage, extra trauma, things like that. So when he
3 started to feel the clicking, you know, this was the -- the sign that maybe
4 this wasn't going to heal, okay, as quickly as we wanted to, but still
5 wasn't a sign that it couldn't heal. Does that answer it?

6 THE COURT: All right. Juror 6 has a couple of questions.
7 The first one might involve pulling up Exhibit 16-47. Does somebody
8 have Exhibit 16-47?

9 MR. VOGEL: Yes, Your Honor.

10 MR. JIMMERSON: We can also help, Judge.

11 THE COURT: Okay, looks like the ELMO. Okay. Here's the
12 question then. "Dr. Herr said in Exhibit 16-47, the tibia was angled or
13 bent. Does the structure or shape of the nail prevent rotation or
14 angulation? If yes, how?"

15 THE WITNESS: So, the nail, when it's put in initially, okay,
16 provides stability by going down the canal, okay. But the fit in the
17 middle of the canal provides more stability than the nail itself up top.
18 Again, because there's more room and it's not as tight. After the first six
19 to ten weeks, that nail's not shifting anymore or the -- or there's going to
20 be no rotational issues anymore. There will just be axial issues, which is
21 why the screws ultimately broke, and it just started pistoning on itself.
22 But there's no rotational issue here . A, because the fibular was attached
23 to it and couldn't rotate, but the activity also is one of the potential risk
24 factors why it wasn't getting enough compression. So the nail itself
25 initially is put in, rotational control and bending control, okay, are aided

1 by the locking screws. But before we had locking screws, which came
2 into vogue about 1988, we used to just put nails in, without any screws,
3 because we didn't have holes in the nails. And we could still get things
4 to work.

5 Once you get further away from the shaft, like in a proximal
6 tibia, that's where you need screws initially in the first part to give you
7 that initial stability. But again, in this case, rotational stability wasn't
8 ever an issue.

9 THE COURT: All right, thank you, Mr. Vogel. And then the
10 next question from Juror 6. "Why is it difficult to compare the healing
11 after each surgery?"

12 THE WITNESS: Okay, so people heal in different ways. And
13 sometimes we get primary bone healing, when something is really
14 completely opposed, which again, we all agree this wasn't completely
15 opposed for the reasons we discussed. And then there's secondary
16 healing. So primary healing, literally, you don't see that big wad of extra
17 white bone and we call callous. And you get more primary bone to bone
18 healing without much of that. That's more indicative of when we use a
19 plate than when we use a nail. With a nail, because there always is that
20 little bit of axial motion, you see the callous build up and the forming,
21 and everybody does it at a different rate. So some people would throw
22 callous in and heal this fracture in four months. And other people are
23 going to take eight.

24 The natural tendency of healing for this type of fracture, if
25 you made a bell curve, is four months is the quickest that anybody is

1 going to heal, and eight months, okay, is when we start to worry that it's
2 going to be a delayed or a non-union. And you have that -- that range.
3 And that depends on all the different factors. And everybody is different.

4 So what I saw on the film in February was that there was
5 callous in several areas. Maybe not as much as we want to after that
6 time, which is about four months, but it's attempting to heal. The body's
7 trying to heal, and it's trying to do the things to get it to heal. In this
8 case, either it wasn't going to, or with the additional treatment, it did.
9 And so everybody was happy.

10 THE COURT: All right. any further questions from the jury
11 for Dr. Gold, at this point? Apparently not. Of course, counsel, any
12 questions based upon the ones posed by Jurors 5 and 6?

13 MR. VOGEL: Yes, Your Honor.

14 MR. JIMMERSON: Your Honor, I thank you, so much.

15 THE COURT: Okay, go ahead, Mr. Vogel.

16 MR. VOGEL: Thank you. Doctor, following up on Juror
17 Number 6, Mr. Cowan's question, I'd like to show you the February 15th
18 x-ray that Dr. Fontes had taken. And with respect to the healing that had
19 occurred after the surgery done by Dr. Debiparshad, what are you talking
20 about as far as the healing that's occurred?

21 THE WITNESS: Can I look at it?

22 THE COURT: Sure.

23 THE WITNESS: So this is where you're seeing some callous.
24 And again, callous in a tibia is going to be mostly in the back, okay. And
25 on the lateral side. So we'll put AP in a second and I'll show you that.

1 Because there's more muscle, more blood supply and more soft tissue
2 there. When you feel your shin, okay, there's very little meat here.
3 Okay, so there's very poor blood flow. This is the last place. There's a
4 little bit of callous forming there, but this is the last place that you're
5 going to see fusion of the bone. And on the AP view here, this is --

6 MR. VOGEL: This is Exhibit 16, page 56.

7 THE WITNESS: This is where all the bone, and you're seeing
8 some bone callous here. So this is what I said, to me, it's trying to heal.
9 Okay, if they didn't do anything there, I'd be concerned. The only place
10 you're not seeing much is on that side view where it's translated. Like I
11 said if it doesn't heal in that bony little spot. This -- this doesn't have to
12 heal 360 degrees around for it to heal. If this heals 300 degrees around,
13 270 degrees around, that's healed. And that's why sometimes that little
14 bump that you saw, if everything is healed, and it bothers him, we just
15 go in and kind of shave it off.

16 MR. VOGEL: That's all I have, thank you.

17 THE COURT: Mr. Jimmerson.

18 MR. JIMMERSON: I have just one question. You're aware
19 that Dr. Herr and Dr. Fontes concluded that because of the way that the
20 bone was there, which I characterize it as malaligned or improper that it
21 was not going to be healing, ever going to occur. Do you understand
22 that?

23 THE WITNESS: Well, that was their opinion. But which is
24 why Dr. Fontes want to proceed with surgery.

25 MR. JIMMERSON: Yeah, when you have that kind of

1 situation, as I asked Dr. Fontes, I know it's not very much of a choice.
2 You could choose not to have a surgery and maybe be hobbled or
3 crippled, or you could choose to have the surgery and have a
4 realignment; is that right?

5 THE WITNESS: No, because the choice at that point was
6 we're still at the four or six month, whichever. Remember, we're saying
7 when he operated and when he evaluated him. And again, not
8 everybody, as we see here, but there's lots of surgeons that would wait
9 until that 8 or 9 month period of time.

10 MR. JIMMERSON: All right. Thank you, time.

11 THE COURT: All right, members of the jury any more
12 questions -- any other questions for Dr. Gold? Apparently not, Dr. Gold.

13 THE WITNESS: Thank you, sir. Thank you, very much.

14 THE COURT: Thank you, so much for your time and your
15 testimony. Travel safe.

16 MR. JIMMERSON: Thank you, so much. Appreciate it.

17 THE COURT: All right. This is a good time to take a comfort
18 break. Before we do that, though, what do we anticipate for the
19 remainder of today? Just by way of a preview.

20 MR. JIMMERSON: Thank you, Judge. Jonathan Dariyanani
21 and Stan Smith by video.

22 THE COURT: Okay, we'll all take a comfort break. And, of
23 course, members of the jury you know I'm always duty bound to tell you
24 that please do not talk to each other, or anyone else on any subject
25 connected with the trial. Don't read, watch or listen to any reports of the

1 trial, and please form no opinions on the subject connected with the trial,
2 until the end of it.

3 Have a nice comfort break, and we'll be back in 15 minutes.

4 [Jury Exits at 9:40 a.m.]

5 THE COURT: All right. We have privacy, anything for the
6 court record from either side?

7 MR. JIMMERSON: No, Your Honor.

8 MR. VOGEL: No, Your Honor.

9 THE COURT: Okay, just one thing for me. You might want to
10 -- both sides that continue to use the ELMO might want to take the
11 opportunity and Jessica can help to train on the ELMO.

12 MR. JIMMERSON: Okay.

13 THE COURT: Because we have had this thing happening it
14 freezes and turn off the light and all that. But also, in all sincerity, I do
15 want to say that counsel has adjusted the brightness. There's a way to
16 adjust the brightness. And I'm -- I'm noticing that when you adjust the
17 brightness, the x-rays, if you're using x-rays on the ELMO they -- they
18 visibly change, by just adjusting the brightness. Sometimes you can see
19 the bone. And then you change the brightness, you only can see the rod,
20 for example. So I just want people to be aware that you can change the
21 brightness on that machine. So going forward with witnesses, closing
22 argument, what have you, feel free to learn that machine. I'm not going
23 to tell you, you can't change the brightness with an admitted exhibit,
24 because you can.

25 MR. JIMMERSON: Right.

1 THE COURT: But be aware that you can, and the other side
2 might, and then you might want to change it, too. It's the nature of
3 what we have here with these x-rays. I just want to make sure I say that
4 to you.

5 MR. VOGEL: Okay.

6 THE COURT: Okay.

7 MR. JIMMERSON: Thank you, Judge.

8 THE COURT: All right. Have a nice comfortable break.

9 [Recess at 9:42 a.m., recommencing at 10:03 a.m.]

10 THE COURT: All right. On the record then. Ms. Gordon.

11 MS. GORDON: I have a couple of issues, Your Honor, I
12 would like to bring up before Mr. Dariyanani testifies. The first is to
13 renew our objection. I'm not sure that it was ever fully resolved. Want
14 to renew our objection to any testimony by Mr. Dariyanani regarding
15 events that had occurred within the past, you know, couple of weeks. I
16 would say any time after he produced the documentation of the value of
17 Cognotion, which was, I think a couple of weeks before trial.

18 THE COURT: Okay.

19 MS. GORDON: So under the *FCH1* case, that has been, you
20 know, referred to many times in this trial, a couple with Your Honor's
21 statement that if it's not disclosed before trial, you can't use it. And that
22 was, I think most recently about Defendant's request to use the portal to
23 show the March 1st, 2018 x-rays. And my argument is certainly that
24 should be applicable to the evidence that Defendants would like to show
25 also. And in this case, it would be much more prejudicial, because we

1 don't have any way to verify that information. We can't confirm it. We
2 can't conduct any discovery on it, and it would really just be a free for all
3 for Plaintiff to come in here and say we know we showed you profit and
4 loss statements that show a negative value of the company, but let us
5 tell you what happened in this past, you know, week, week and a half.

6 THE COURT: Okay.

7 MS. GORDON: Your Honor, said you wouldn't accept any
8 documentation of it, and I appreciate that. But I think that should also
9 go to testimony by people.

10 THE COURT: Okay.

11 MS. GORDON: Especially Mr. Dariyanani, because he is
12 purporting himself to a disinterested third party, as opposed to Plaintiff
13 who I -- I could cross examine on the issue.

14 THE COURT: All right. I understand that. Do you have
15 another item?

16 MS. GORDON: I do.

17 THE COURT: Okay, let me -- if you would be willing to hold
18 that second item.

19 MS. GORDON: Sure.

20 THE COURT: Let's just deal with the first one. Mr. -- or
21 Plaintiffs do you have a position on --

22 MR. JIMMERSON: This is the first I'm hearing it. But this is
23 what I understand is the request, is that Mr. Dariyanani not speak to any
24 events or updates beyond July 11th, the date that he produced the
25 documents before. And based upon our earlier conversation early this

1 week, there will be no new documents introduced at all. Period. I mean
2 that was what I understood to be --

3 THE COURT: Okay.

4 MR. JIMMERSON: -- a consent --

5 THE COURT: Okay.

6 MR. JIMMERSON: -- so both of which are acceptable to us.

7 THE COURT: All right, let me go ahead and reconcile this
8 first item. You're correct, and that refreshes my memory on this, but it's
9 not like it needed a lot of refreshing going on. I did say that documents
10 that aren't disclosed can't be used. So in other words, you know, in the
11 event there's a more recent contract or something going on by way of
12 dealings Cognotion has in the works, then the documents that support
13 that, unless both sides decide to admit them, even upon reviewing them,
14 but upon any objection, they'll not used. Cannot be used, because my
15 view is they would have to be disclosed.

16 However, I do think that the issue as to the ongoing success
17 in a financial way, or lack thereof, in a financial way of Cognotion is part
18 of the case. I mean it really is part of the case. And nobody, I think,
19 reasonably could control that here we are on August 2nd, 2019. So I
20 think Mr. Dariyanani can talk about what -- from the beginning of time
21 that Cognotion existed until today, August 2nd, of 2019, you know, the
22 company, and as I understand it, it's a, you know, start up, you know,
23 kind of a novel type company. And I heard testimony that initially it's
24 expected that these type of companies lose money for a while, and then
25 they get to a point where they don't. You know, and these stock options

1 were ones that go off into the future.

2 So the bottom line is I do think that Mr. Dariyanani can testify
3 in his view as the CEO of, you know, person most knowledgeable of
4 Cognotion, as he sits here on August 2nd, 2019, where the company is,
5 how he would value his own company, and talk about the stock options.
6 I mean he's well aware of the stock options that were given and lost,
7 frankly, to the Plaintiff in this case. So I think he can testify as to his
8 opinions on all this. I just, again, in trying to balance the fairness on this,
9 and apply the law that I think applies.

10 Standalone documents of some new contract or deal in the
11 works, I would prevent that, unless both sides look at them and want to
12 use them. So I know that's not what you want to hear. I can tell by your
13 physical reaction.

14 MS. GORDON: No, I'm trying to --

15 THE COURT: But I -- you know, as a Judge, you know, I think
16 you all know, you've got to make calls on things as they -- as they come
17 up. And I really think that the correct call, you know, 272 for me here, on
18 this item, is that Mr. Dariyanani can testify about the financial wellbeing,
19 or lack thereof, what's in the works, all relevant to the stock option issue
20 in the case. I think he can testify, give his opinion on it. And I do -- I do
21 understand there's a potentiality he might say, you know, yesterday, you
22 know, this happened, and I'm working on this, I'm working on that. Well,
23 I mean nobody, again, can control we're here on August 2nd. I'm trying
24 to find a fair accommodation to this. You know, if something happens
25 that I now have to further deal with, well, so be it. I mean but going into

1 his testimony, the best call I can make, again, is that he can testify about,
2 he's a CEO, he can testify. But I did allow for depositions right up until
3 the time of trial for him, you know. And that was in fairness because of
4 all this, you know.

5 But anyway, I think I said enough on that -- on that point.
6 What's your next point?

7 MS. GORDON: That when Plaintiff was testifying, a jury
8 member asked him if he had any current shares or stocks of Cognotion
9 and he said that yes, he had 80,000 shares of stock.

10 THE COURT: Okay.

11 MS. GORDON: And we did not -- we raised the issue of
12 wanting additional information about it. And then there was just kind of
13 like a stalemate for a second. I think we didn't know where to go or what
14 to do with it. And -- and it's my memory that it was tabled, to an extent.

15 So I plan to, in my cross examination, seek from Mr.
16 Dariyanani additional information about that.

17 THE COURT: Okay, that's --

18 MS. GORDON: Because we've not forgotten about that.

19 THE COURT: -- I think that's fair.

20 MR. JIMMERSON: About what please?

21 THE COURT: About that --

22 MS. GORDON: The 80,000 shares of Cognotion that Plaintiff
23 currently owns.

24 MR. JIMMERSON: I do apologize.

25 MS. GORDON: Okay.

1 MR. JIMMERSON: I learned about it like you did. He
2 apparently got it as a bonus or something, for having found an investor
3 who made investments, is what I understand.

4 MS. GORDON: Yeah, me, too.

5 MR. JIMMERSON: A local Las Vegas business is what I
6 heard.

7 MS. GORDON: Right.

8 MR. JIMMERSON: And, so --

9 MS. GORDON: Thanks.

10 THE COURT: Okay, anything else?

11 MS. GORDON: The third issue, the final one, we will be
12 objecting to playing the video. It's my understanding that is a video of a
13 product of Cognotion. It has no relevance in this case. It's not probative
14 of any issue in this matter. It's a product of Cognotion. It -- we don't --

15 THE COURT: A video?

16 MS. GORDON: Correct. It 's --

17 THE COURT: Oh, that's the one they were just testing?

18 MS. GORDON: Exactly right.

19 THE COURT: Okay.

20 MS. GORDON: We didn't know they were going to play it.

21 THE COURT: But, well, here's my question on that. Has it
22 been disclosed?

23 MR. JIMMERSON: Yes, of course. Before the cutoff in
24 discovery.

25 MS. GORDON: I'm not contesting, Your Honor, that it's been

1 disclosed.

2 THE COURT: Okay.

3 MS. GORDON: I am asking for the Court to not admit it and
4 play it to the jury because it doesn't have any --

5 THE COURT: Okay.

6 MS. GORDON: -- value.

7 THE COURT: Fair enough, I understand.

8 MS. GORDON: Thanks.

9 THE COURT: I wanted to cover disclosure issue.

10 MS. GORDON: No, I --

11 THE COURT: It's been disclosed, right?

12 MS. GORDON: Yes.

13 THE COURT: The video has been disclosed. You agree with
14 that?

15 MS. GORDON: Yes.

16 THE COURT: Okay. Mr. Jimmerson, can you make an offer
17 of proof as to what the video depicts and what purpose you intend to
18 use it for relevance to your case?

19 MR. JIMMERSON: Yes. The testimony will be that
20 Cognotion invested approximately \$6,000,000 to develop a CNA course,
21 certified nurse assistant course, and it's licensed in many if not all the
22 other states in the United States for teaching purposes. I think it's
23 approximately a 50 or 60 hour course. This is a three-minute trailer, to
24 use the word, an overview of that course. That course, as you heard
25 from Mr. Landess is a significant component of the current value of

1 Cognition.

2 THE COURT: Okay.

3 MR. JIMMERSON: And it is the product that is the asset of
4 Cinematic Health Education, CHE, the subsidiary of Cognition, which
5 Cognition was 80 percent, and a Wall Street firm, called Rethink
6 Education was 20 percent.

7 THE COURT: Okay, what context would somebody see the
8 video?

9 MR. JIMMERSON: It would be a summary of the product.

10 THE COURT: No, I mean in the world. In what context is it
11 available? The video.

12 MR. JIMMERSON: Other than being online, I don't know the
13 answer. Is Mr. Dariyanani here? I'd have to ask him.

14 THE COURT: Oh, it's an online -- an online item?

15 MR. JIMMERSON: I believe it is.

16 THE COURT: So if you look up the company, you can watch
17 it?

18 MR. JIMMERSON: I don't want to misstate it. I think it is,
19 but I don't want to misstate it.

20 THE COURT: Okay.

21 MR. JIMMERSON: Do you know, Jason?

22 THE PLAINTIFF: If you look it up online on the Cognition
23 website it's on there.

24 MR. JIMMERSON: Yeah, if you look online on the Cognition
25 website, you'll find it.

1 THE COURT: Okay, all right. And I remember Mr. Landess
2 talking about his role, and it had to do with actors and all that.

3 MR. JIMMERSON: He's part of the faculty. He was part of
4 the faculty.

5 THE COURT: So is this a product -- a -- is this a work product
6 of Cognotion, which would be essentially what the actors and all --

7 MR. JIMMERSON: Yes.

8 THE COURT: -- did?

9 MR. JIMMERSON: Exactly.

10 THE COURT: Okay. All right. I think I saw ten seconds of it
11 when it was being tested, and it looked like acting to me. Like a video of
12 actors.

13 MALE SPEAKER: It's Netflix for registration. Really, it is.

14 THE COURT: Okay.

15 MR. JIMMERSON: That's a good way to summarize it.

16 THE COURT: All right. Anything -- anything else on this?

17 MS. GORDON: Other than it doesn't have any bearing on
18 any issue in this case, because it doesn't say what the value of the
19 product is, nor has --

20 THE COURT: Okay.

21 MS. GORDON: -- that product been evaluated in the whole,
22 in terms of Cognotion value, for purposes of Plaintiff's share value.

23 THE COURT: All right.

24 MS. GORDON: So it's quite the -- the leap.

25 MR. JIMMERSON: I wish to respond to that. The issue for

1 Mr. Dariyanani is the value of Cognotion. So the purpose is for the jury
2 being able to calculate if there's a spread between a strike price of ten
3 cents and a higher number, and this is qualitatively I think you'll see
4 when you look at it, very different than you'll find if you would go online
5 with ASU or any other university where you're taking online courses.
6 This is acting, emulating what you would find at Centennial Hills or
7 Sunrise Hospital or anywhere else --

8 THE COURT: All right.

9 MR. JIMMERSON: -- and the tasks that a CNA would have to
10 perform.

11 THE COURT: All right. So my thought on it is, I have to tell
12 you I think it's relevant for a number of purposes, so it can be used. One,
13 as to Cognotion, the business itself. I do think it's relevant in the further
14 efforts to explain what Cognotion is, as a company, to the jury. I mean
15 this is one of their items of work product. And so, Mr. Landess has
16 talked about actors and his role as an attorney in dealing with
17 legitimacies, I remember the testimony to be. The legitimacy of the
18 things that are depicted in this vignettes, or these videos. And forget
19 what item he talked about, but he talked about some item that he -- some
20 states have certain requirements, gloves I think it was, or something like
21 that. But you know, so it's relevant to show the work product of
22 Cognotion, so the jury has a better understanding what the company
23 does, and what its work product is. Consistent with all of these financial
24 documents of the company.

25 Further, I think it gives some further insight as to what Mr.

1 Landess was doing as a lawyer in dealing with the work product.

2 Because Mr. Landess did testify as to his role in helping with the -- I took
3 it to be sort of a theatrical creation of making this type of video, or
4 vignettes for training purposes.

5 Further, it's relevant because the CNA issue has already been
6 testified to, and it has been suggested to the jury that this is an indication
7 of financial goodness of Cognotion. And the whole idea of Cognotion, as
8 I understand it, from watching all the testimony, is that, you know, it's
9 start of like a startup company. It's a intellectual's kind of interesting
10 style company. And it's -- I think it's been suggested, at a minimum
11 implied that initially the company wouldn't be doing so well on the
12 balance sheet because of the nature of the type of intellectual property,
13 you know, on -- online training type company that it is. But the hope is --
14 the hope is that over time it goes -- because no company is going to
15 survive losing two million a year for long. But that's why you get all this
16 investing and people, you know, hope that obviously to go from that to
17 now a profitable company.

18 We've heard testimony about none of the CNA issue, but the
19 Red Cross, and then the SEALS and, you know, and -- and that's all
20 relevant here, because as fate would have it, we've got a Plaintiff who's
21 alleging, it's not my providence, of course, to decide the legitimacy of
22 this claim, but he's alleging, and that's relevant to me. He's alleging that,
23 look, this is what happened to me. I was golfing, I broke my tibia. I went
24 to the emergency room. I happened to encounter a guy named Dr.
25 Debiparshad with a broken tibia problem. And unfortunately, it was not

1 reduced correctly, and it amounted to medical malpractice. I didn't
2 initially know that.

3 It took time for me to figure that out. But during the time that
4 it took me to figure out and get it corrected, I was disabled enough, at
5 least temporarily to where I couldn't be a lawyer anymore. And it got to
6 a point where I couldn't work as a lawyer anymore, in this type of
7 company environment, or Cognotion, because that required travel. And I
8 couldn't really travel. And so as it turned out, I was -- I don't work
9 anymore. And as it further turned out, I would have worked up to age
10 80, and it turned out that I got certain stock options as a benefit to my
11 employment. The first set I invested in. The second set I partially
12 invested in. I got 250,000, but I did invest in 750,000 stock options, and
13 that's a -- a proximate cause of the injury for medical malpractice.

14 Up to the jury to figure all that out. But the point is, it is what
15 we have. We have a Plaintiff who has, in my view, as far as claims, a
16 legitimate claim. And you might notice if you look at the early parts of
17 the records, even I, initially wondered what that was really about, and
18 the approximate cause since. But since I've come to see that it's at least
19 a legitimate claim up to the jury to figure out.

20 So the value of Cognotion in this, you know, multi-level fact
21 pattern now becomes relevant, because we have a Plaintiff who had
22 some stock options, that he says he lost. That he would not have lost,
23 but for the fact that he was temporarily disabled because the tibia was
24 not initially reduced correctly. What else can I tell you? It's up to the
25 jury. But that's the issue, and that's why I think this is all allowable.

1 MS. GORDON: Thank you.

2 THE COURT: Okay. All right. Anything else from either side
3 before we check on the jury?

4 All right. Did we get the video fixed? Can we test it, please?
5 What's your name?

6 UNIDENTIFIED SPEAKER: My name?

7 THE COURT: Yes.

8 UNIDENTIFIED SPEAKER: Eddie.

9 THE COURT: Eddie?

10 UNIDENTIFIED SPEAKER: Yeah.

11 THE COURT: Thanks for being here, Eddie, we appreciate
12 you coming down and helping us out.

13 UNIDENTIFIED SPEAKER: No problem, Judge.

14 (Video recording played at 10:20 a.m., not transcribed)

15 THE COURT: That's better. Well, we can turn it down a little
16 bit, maybe. That's good. I think that's good.

17 MR. JIMMERSON: That's much better than it was.

18 THE COURT: Okay. It's about three minutes, you said?

19 MS. GORDON: Yes, three minutes and 5 second, 10 seconds.

20 THE COURT: All right. So it looks like it could be a little
21 brighter. Okay, the volume is good. Okay, we're good to go on that.
22 All right.

23 UNIDENTIFIED SPEAKER: Okay.

24 THE COURT: Do you have it ready? What's your IT guy's
25 name? What's your name?

1 MR. TAGGERT: Allen Taggert.
2 THE COURT: Alex?
3 MR. TAGGERT: Allen.
4 MR. JIMMERSON: Allen Taggert.
5 THE COURT: Okay, Allen, you got it ready to go when we
6 need it, right?
7 MR. TAGGERT: Okay, Judge, thank you.
8 THE COURT: Eddie, thanks again.
9 UNIDENTIFIED SPEAKER: No problem.
10 THE COURT: Okay, I didn't say one thing I need to say. It
11 will be quick. Of course, some foundation still has to be laid for that
12 item.
13 MR. JIMMERSON: Of course, Judge.
14 THE COURT: I mean you have to lay a foundation.
15 MR. JIMMERSON: Right.
16 THE COURT: Other than that, I think you can use it. Okay.
17 MR. JIMMERSON: Thank you.
18 THE COURT: All right. Let's bring the jury in.
19 THE MARSHAL: Parties rise in the presence of the jury.
20 [Jury in at 10:23 a.m.]
21 THE MARSHAL: All present and accounted for.
22 THE COURT: All right.
23 Thanks a lot; please have a seat everyone.
24 All right. Members of the jury, sorry about that little delay.
25 There was a little issue, I do know from time to time issues come up,

1 they're legal in nature and I have to deal with them. So we did that.

2 Also, there was a little IT issue. We had to call a guy named
3 Eddie in, from IT, he came in and he helped out, because there's a
4 potentiality that a video might be played, during the course of the next
5 witness' testimony. I think it's about a three-minute video.

6 But we tested it and it was really loud. And so we had to not
7 put you through that. So we had to bring somebody in to get the
8 volume fixed, in the event it's played. I'm not sure it's going to be
9 played but it might be. So we fixed that; so here we are.

10 Mr. Jimmerson, please call your next witness.

11 MR. JIMMERSON: Thank you, Your Honor.

12 Ladies and gentlemen of the jury, we spent the last three
13 days, all of us together as a team, examining the medicine and the
14 liability portion. We're now going to call Mr. Jonathan Dariyanani, the
15 chief executive officer of Cognotion, Jason Landess' former employer, as
16 you recall.

17 Mr. Dariyanani, please.

18 THE COURT: All right. Mr. Dariyanani, when you get to the
19 witness box area, if for just a moment, please, if you could remain
20 standing and turn your attention to our clerk, she'll swear you in.

21 THE WITNESS: Sure.

22 THE CLERK: Raise you right hand.

23 JONATHAN DARIYANANI, PLAINTIFF'S WITNESS, SWORN

24 THE CLERK: Please have a seat and state and spell your
25 name for the record.

1 THE WITNESS: Sure. Jonathan J-O-N-A-T-H-A-N, Ram R-A-
2 M; last name, Dariyanani D-A-R-I-Y-A-N-A-N-I.

3 THE COURT: All right, Mr. Jimmerson.

4 DIRECT EXAMINATION

5 BY MR. JIMMERSON:

6 Q Good morning, Mr. Dariyanani, how are you sir?

7 A Good.

8 Q Thank you for coming to Court this morning. Would you tell
9 us your position with Cognotion, and maybe why you're here, please?

10 A Sure. So I'm the founder and president and CEO.

11 Q Please keep your voice up.

12 A Sure. I'm the founder, president, and CEO of Cognotion, and
13 I'm here to talk about, I think, Mr. Landess' employment and his
14 termination.

15 Q Okay. Thank you. Tell us what is Cognotion, please?

16 A Sure. So Cognotion is a software company, kind of like
17 Netflix for careers. So we make movies that train people to do new jobs,
18 and they watch them, and that trains them in the job, rather than sitting
19 there with a textbook. And employers pay us, per student, sort of like a
20 digital textbook. But they buy a subscription, people watch the movies,
21 and we train them. And so we have clients, like, the American Red
22 Cross, and Panera, and Firestone, the tire shop, and we love it because it
23 takes somebody from minimum wage to 12, 15, \$20 an hour. It really
24 changes their life. So I find it very satisfying work.

25 Q All right. Thank you. And first, before you move to that, just

1 give us a bit about your background, including your years here in Las
2 Vegas.

3 A Sure. So I'm originally from Detroit. My dad is a
4 Indian/Indo-Pakistani/Hindu who, like, basically dropped out of school in
5 the 5th grade, and my mom is a, like, Russian/Romanian/German/Jew
6 who grew up in the Detroit suburbs. So I'm, like, a Indo-
7 Pakistani/HinJew. And --

8 Q Is that a mutt?

9 A It's a mutt, yeah. I mean, my poor -- and my kids, my wife is
10 from West Virginia, half Methodist; half Catholic, German, Irish. So my
11 kids are, like, everything. But, yeah, I grew up in Detroit. My mom was a
12 Kindergarten teacher, like, inside Detroit. And my parents lived together
13 until they got divorced when I was about 12, because my dad had, what
14 you would kind of call, like, a schizophrenic episode, and he took out a
15 second mortgage on the house and basically stood on the street corner
16 and gave the money away, to people, in cash. And so, we lost the
17 house, my parents got divorced, and at that time my mom -- Detroit was,
18 like, imploding. There's no jobs anywhere. So, she though, oh, well
19 we'll move to Las Vegas and I'll get a job teaching there, because they're
20 hiring. So my sister and I and my mum, got on a Greyhound bus in
21 1981, and came out to Las Vegas.

22 And, you know, I'll never forget, we were on this bus, and
23 there was woman, named Ruth -- she was about my mum's age at this
24 time, I'd say about maybe 40. And her husband of 20 years got gastric
25 bypass surgery and went from, like, 400 pounds to 200 pounds and got a

1 toupee and he left her for this younger woman. And she was going
2 crazy. So here we are, two days on a Greyhound bus, and I'm 11 years
3 old. In the middle of the desert she starts screaming that everyone's
4 trying to kill her and she gets off the Greyhound bus and starts walking
5 down the side of the road in the middle of the desert. And my mum's,
6 like, go get her. So all the people in the bus waited and I went and got
7 this woman, and 12 hours later we arrived in Las Vegas, and that's pretty
8 much the first time I had ever been here.

9 Q Okay. And how long did you reside in Las Vegas?

10 A We were here for two years; so at first, my mom was really
11 close to starting at Clark County. And then a week before the semester
12 started, there was a hiring freeze, and they delayed for a year. And so,
13 we were in bad shape. We ended up staying at this place at the time, it
14 was called Paradise Resort Inn at Paradise and Harmon. It's now called, I
15 think, Chalet Vegas, across from the Holiday Royale. A 250 square foot,
16 cinder block, one bed, my mum and my sister and I. And there was a
17 woman, an African American woman named Pearly [phonetic]; she had
18 three kids. And she blew her rent money on the slots. And that kind of
19 place, if you don't pay in one day -- thing on the door (indicating), and
20 you're out. And so, for seven months, Pearly -- my mum invited Pearly
21 and her three kids to stay with us. So my mum and I and my sister and
22 Pearly and her three kids lived in that place. And --

23 Q And for how long did the seven of you live there?

24 A Seven months. And my mum babysat -- like, there were
25 women there who were, like, were ladies of the evening. And my mum

1 babysat for them. That's how she made money until the school position
2 opened and we were able to move out of there.

3 And that summer, I'll never forget, so I was going to Roy
4 Martin Junior High, after we left, which is not in a great area. Living at
5 Stewart Plaza Apartments. And I got a scholarship to go to Yale for
6 summer school; so I was 12.

7 And so that same year I went from the cinder block
8 apartment to Yale. And I thought, you know, the only difference
9 between the kids at Yale and the kids at Paradise Resort Inn, were that
10 some had money, some had parental support, and some didn't. So I
11 resolved if I were ever to make something of myself, I would come back
12 here and try to do something to be helpful. And we left Las Vegas in '84
13 because my mom got a job at Fort Irwin, teaching. And that was my --
14 and after that I went to Berkley, undergrad, and then went to Duke Law
15 School.

16 Q All right. And so by training, at least, you went to a college
17 and to law school. Is that right?

18 A Yes.

19 Q And for a period of time after graduating from law school,
20 did you practice law?

21 A I did.

22 Q And what did you do?

23 A So I was a venture capital technology lawyer. For example --

24 Q What does that mean?

25 A That means that we would represent companies that did

1 medical devices, software -- for instance, we represented Stryker, the
2 company that makes the, you know, tibia nail thing that you guys have --
3 there's binder about that. I saw it in the little holding room. So we
4 represented them, we represented Google and Pixar and Apple. I mean,
5 we were the place that Steve Jobs came in with his 50 bucks to
6 incorporate Apple.

7 So it was a lot of having startups, people with ideas and
8 passion, they would come in, and I loved that. I mean, my first company
9 I ever worked on with this company, called Illumina, and they came in
10 and they had raised -- cobbled together, \$750,000 to license this genomic
11 sequencing technology from U.C. Berkley. And I handled the whole file
12 myself. I think I had been out of law school for, like, three months. And I
13 remember thinking, this company is really cool. Someday people are
14 going to want to do genetic testing and get a DNA profile. So I went to
15 my wife at the time, who is now my ex. They said I could invest \$15,000
16 in this thing; we should invest \$15,000 in this thing. She's, like, are you
17 kidding? That's a crazy idea. We're going to invest in Washington
18 Mutual, because that's a stable, safe investment, like, a bank that'll never
19 fail.

20 So, of course, we invested our \$15,000 in Washington Mutual
21 which went bankrupt and we lost it all, and the shares of Illumina would
22 have been worth \$156 million. So we got divorced but not over that. So
23 anyway, Illumina ended up selling for \$5.5 billion, and I got to see how
24 that could happen. That didn't happen with everybody. We had some
25 companies where people put everything in and it went blah (indicating),

1 and they declared bankruptcy and lost it all. And so, I loved that. I got to
2 work on lots of really cool stuff. And then since 2003 I've been, you
3 know, an entrepreneur in this education space.

4 Q Okay. So you knew at least to get out of the law business, I
5 guess, huh?

6 A Yeah, and I would never -- I appreciate the great work you all
7 do, and I am grateful to God every day that I don't have to do it.

8 Q Okay. Thank you. Following your work -- so just in terms of
9 year, when did you cease being a traditional lawyer; working in a law
10 firm.

11 A February of 2000.

12 Q Okay.

13 A It's been a long time. It's either February of 2000 or late in
14 '99, I don't really remember. Sometime around that time.

15 Q So take us now from 2000 to 2019.

16 A So I went and worked at a startup that did x-ray imaging,
17 called DICOM imaging. It was the first startup to automate the software
18 in a dentist office. Because before that you had to have, like, a actual
19 film x-ray. And this was x-rays on computer. And that company sold to
20 Kodak and I did invest my \$15,000 in that one. And then it ended up
21 being north, like, I think I sold the stock for, like, \$2 million. So I'm 29
22 years old, working at that company. I think I have lots of money and I'm,
23 like, buying the receptionist a used car or whatever.

24 And then the next one I did was a complete disaster. And so,
25 you can't -- I thought I was smart; I wasn't as smart as thought. The next

1 one was doing health, fitness, exercise, nutrition startup with Lindsay
2 Wagner and Dyan Cannon, Ali MacGraw, kind of the Time 50 something.

3 I really liked working with Lindsay Wagner, cause when I was
4 a little kid I watched The Bionic Woman and thought she was really cool,
5 and asked, her, like, in that Adrenalizine episode where you have your
6 twin, and she's, like, taking that stuff, what were you eating? She was,
7 like, pink fudge. It just was, like, such a cool thing from my childhood; so
8 -- but that's -- I just lost. So after that, 2003, I started my first real
9 educational company. And that was the one that I sold to LeapFrog, the
10 children's toy company. So I started it in 2003 and it sold in 2003.

11 Q It has some relation to Cognotion because of the subject
12 matter, the product -- products that are being sold. And so tell us a little
13 bit more about that.

14 A Yeah, so, you know, I had -- the way I came up with -- the
15 company was called FireBook -- is, you know, when I was in law school,
16 like, I wasn't getting parental support or whatever, and Duke was very
17 expensive. And so, I had to work, like, all kinds of jobs. I worked, I was
18 an LSAT instructor, I leased cell phone tower space, I was a waiter at
19 Outback, and -- but you can get a summer clerkship in law school and it
20 pays really well. Of course, what they don't tell you is, they take you out
21 to dinner and pay you really well over the summer, and when you join,
22 you work 3,000 hours a year and never see the light of day. But the
23 summer is all fun, Hootie & The Blowfish and restaurants and all that.

24 So I was making -- I was barely making \$1,500 a month
25 working my butt off -- and we got two grand a week being summer

1 clerks. So I was, like, ah, if I could continue this for another month, that
2 would be, like, the year.

3 And so I said, if I went on an abroad program my third year
4 of law school, would you guys keep me here at the firm for another
5 month? And they're, like, sure. So I said, okay, well, what program has
6 the latest start date. And Paris, doing your third year of law school in
7 Paris, started on October 23rd. So I could get -- I could really work. So I
8 said great, I'll go to Paris. But I didn't speak any French. And you have
9 to take your law classes in French.

10 And so necessity is -- I might have had one semester of
11 French in high school. And so, necessity is the mother of invention. And
12 I invented this, like, way to teach myself French. Which was kind of Dora
13 for adults, right? So I started reading these little children's books and I
14 substitute in the words, like, you know, little rouge riding hood. And I
15 kind of built a system of how to do that. So you could listen to an audio
16 book. And just by listening, eventually, you would be able to pick up the
17 language and understand things. And I built this kind of system around
18 it. And that's what got me, you know, by the end, I mean, I didn't flunk
19 out of school, which was great.

20 And so, I just kept working on that system, and that's the
21 system that I sold to LeapFrog. Which was how to teach somebody a
22 language, just by listening. And think of it, like, systematic Dora for
23 adults. More, and more, and more language until you just get it. And
24 so, I had only invested, like, maybe three months and \$3,000 into
25 FireBook. Nobody worked there. I just had a patent application and a

1 PowerPoint and HP and the Four Seasons, who agreed to be beta
2 customers. But I had been thinking about it for, like, 10 years. And so,
3 yeah, three months I got introduced to the CEO of LeapFrog, and they
4 bought FireBook. And I became the head of International product at
5 LeapFrog.

6 Which at that time, we had 20 million LeapPads at different
7 houses. I mean, I built, English learning products, soap operas for fast
8 food workers at McDonalds, and that was the project that turned me on
9 to this. Because we took the LeapPad, which was, like, a kids toy, and we
10 were, like, why can't you just put this in McDonalds, and make a soap
11 opera, and teach the people English while they're on their breaks. And
12 so, I fell in love with teaching, like, regular working people, using
13 technology, and I pretty much never stopped doing it since that.

14 Q All right. Following your work with LeapFrog, what
15 happened next?

16 A So, Mike, who was the CEO of LeapFrog. And LeapFrog was
17 amazing. You know, he was a lawyer. He left the law. He decided to
18 start this children's toy company because he didn't think there were
19 good educational toys. He raised \$100,000. Five grand from his dad,
20 5,000 from his brother -- and everybody who invested, for every \$1,000
21 they invested in LeapFrog, they made a million dollars in IPO. So his
22 dad invested \$5,000, he made \$5 million dollars in the IPO. It was -- it
23 was the best performing IPO in the country that year. And Mike is a
24 genius. And so, Mike retired from LeapFrog.

25 And he's, like, Jonathan, look, I have money, you have talent,

1 let's go take this device and help illiterate, like, girls in villages in Africa
2 and India, and other places, learn to read. If you'll take two years off and
3 volunteer, I'll put up the money. And then we got a million dollars from
4 Michael and Susan Dell and help from The World Economic Forum,
5 and --

6 Q Is that of the Dell computer company?

7 A Yeah. And HP, and I went around for two years in villages in
8 Africa and India, with a LeapPad, right? Saying to parents, look, we'll
9 give you this thing and you can teach your little girl how to read. And
10 the dad would say with a translator, why does she need to learn to read
11 to say yes to my husband? You know, what if you're in the village and
12 somebody's trying to cheat you in selling your grain, she can do math,
13 and she can do reading, and she can read the bill, and she can protect
14 you. And so he decided, okay.

15 And then I give her this LeapPad, and show her how to use it.
16 And come back to the village, five hours down this dirt road, two weeks
17 later, and she'd be using the LeapPad on her head, to carry a bunch of
18 bricks, because it had a spring in it.

19 But, you know what, eventually, we trained 50,000 little girls
20 who were never sent to school, to learn to read, and eventually my wife
21 is, like, this is very nice but you need to make some money. And so, that
22 was was when I did my next company, with Mike, which was
23 Powerspeak, which we sold to K12, which was another foreign language
24 learning company. Ended up being partners with Middlebury College,
25 did all this film -- and the idea behind, like, FireBook was all audio book;

1 Dora for adults. Powerspeak was, what if you did, like, the Sopranos to
2 teach people Italian, and you just increased Italian more, and more, and
3 more. But it was, like, so engaging. That was Powerspeak. Can you use
4 drama to teach people a foreign language?

5 So we sold that company and I moved to the Middle East for
6 a little while and ran a project there for K12. I did the Middlebury project
7 after the acquisition, and then I left there in 2012, after my non-compete
8 was over, and started Cognotion.

9 Q All right. And so, let's talk about Cognotion. What is it and
10 how has it grown to the present day?

11 A Sure. So basically, the way we make money is we spend a
12 lot of money building a beautiful product that people love, that --
13 because most people do not learn by reading a book and then reciting it
14 on a test. They actually forget after the test. They don't even remember.
15 Most people learn by story and by following someone, like shadowing
16 them, an apprenticeship and see.

17 So we're like great. We'll create this compelling drama, and
18 that's how people will learn a new -- so even if they didn't do well in
19 school, they can do well with our product. But it costs a lot of money.
20 So we hired the person that funds the blacklist to do our shooting. And
21 we hired the HBO screenwriters. And we're like you know what, working
22 people deserve something that's not garbage, that's actually good.

23 And so, our basic business model -- we use the CNA training
24 course, for example. So the second biggest profession in healthcare,
25 nurses 2.4 million, certified nurse aides 1.7 million. They are the people

1 that work in nursing homes. They change the bed pans. They change
2 adult diapers. They bathe people. They feed them. It's back breaking
3 really hard work. They get terrible training. They are low wages. And
4 even though there are 1.7 million people in the profession, 400,000 leave
5 it every year because the working conditions and the training are so bad.
6 In the meantime, our elders get this terrible care.

7 I mean we went to this nursing home. You can imagine.
8 Here's this old woman, and she had a fascia, meaning she had a stroke
9 and she couldn't really speak. But she could go uhhh. And so, she was
10 in the bed going uhhh. And they kept shooting her full of antipsychotic
11 medication, so she would be like this. And finally, because she just had
12 such a stench, someone had the bright idea of pulling back the covers
13 and seeing that her pressure ulcer had maggots. And that's why she
14 was screaming. And instead of giving her relief, they kept filling her full
15 of antipsychotics. And I thought you know what? We could build a
16 training product. It would get people from a 7.50 an hour job at Arby's to
17 a 12 or \$13 an hour being a CNA, and they were going to do a better job
18 taking care of people, so that this wouldn't happen to old ladies like this.

19 So we raised \$6 million and spent almost four years building
20 and testing that product. And the normal pass rate for CNAs was like 60,
21 70 percent on the exam. We had 90 -- we had classes that had 100
22 percent pass rate, where every single person in the class passed. So
23 now the Red Cross distributes that product, and employers who want to
24 fill those positions pay us \$600 for each person that goes through the
25 course. We give them a password. We get \$600. The person watches

1 the course on an iPad, and they get a new job.

2 And so, it costs a lot to build the product. But now that it's
3 built, every time it's used, we now get the revenue to offset those costs.
4 And then once those costs are offset, we're in the black. So we've raised
5 about \$10 million since inception. We're now approaching \$8 million in
6 revenue since inception. And we've gotten to work on some amazing
7 products.

8 I mean I'll give you another example. So I don't know how
9 many of you know much about Saudi Arabia. I didn't know much about
10 Saudi Arabia, and I'm like a half Hindu, half Jewish person. And it's the
11 last place I'd want to go. But before this king, who is the guy that cut
12 people up, there was a kind of liberalization there. And there -- they had
13 wanted this woman to be the head of educational -- occupational
14 licensing for all of Saudi. And you have to understand, there, if you're a
15 woman, if your husband says I divorce you, he can push you out the
16 door, close the door, and you get nothing, not a dollar. You don't get
17 custody of the kids. He transfers you on an app to your father, and your
18 father now controls you, when you can travel and your bank account.
19 And you're not trained for working. And you're like at the mercy of your
20 parents.

21 And so, this woman got appointed to be the deputy labor
22 minister in Saudi Arabia even though there was no woman's bathroom
23 in the whole ministry. And she called me. We've seen your stuff. It's
24 amazing. How would you like to have a shot at training women in Saudi
25 Arabia to work, so they're not economically dependent on their

1 husbands? I was like you're kidding, right? I run a company where my
2 co-founder is a transgender Israeli. I'm like a Hindu-Jew. You want me
3 to come to Saudi Arabia and work on women's education? Yes.

4 So sure enough, I show up in Saudi. We build this product.
5 We educate almost 100,000 people in Saudi. Made a million dollars in
6 profit. Did good work. But then the king died, and this new king came
7 in. And they threw the labor minister in the jail at the Ritz Carlton, and
8 that was the end of that.

9 Q Did you write a book?

10 A I mean not really. I wrote my only little like autobiography
11 that like five people have read.

12 Q Okay. Did you give it a title?

13 A The Color of November.

14 Q All right. So now let's speak about modern-day Cognotion if
15 we can, please?

16 A Sure.

17 MR. JIMMERSON: I would like to play Proposed 150, Judge.

18 THE WITNESS: Sure.

19 BY MR. JIMMERSON:

20 Q It is the three-minute trailer --

21 A Sure.

22 Q -- of the CNA course.

23 A Sure.

24 Q Are you familiar with it?

25 A Yes.

1 Q Just to lay foundation before --

2 A Sure.

3 Q -- we move it into evidence --

4 A Sure.

5 Q -- what is it, please?

6 A Sure.

7 Q No. What is it though?

8 A Oh, sure. So this is what we use when -- so, for example, we
9 have one nursing home in Indiana that pays us a million dollars a year to
10 use Ready CNA. This is what we use to convince them to buy it.

11 Q And it was produced by your company?

12 A We did everything. We filmed it. We shot it. We edited it.
13 Those are our actors. Everything in it is either from the course or things
14 that we added to it to make the trailer.

15 Q And that's where you said that you spent the \$6 million for
16 this product?

17 A For the 60-hour course of which this three minutes is like an
18 advertisement.

19 MR. JIMMERSON: Move for admission of Exhibit 150, Your
20 Honor.

21 MS. GORDON: It's the same objection we had before, Your
22 Honor, in terms of relevance.

23 THE COURT: All right. You've perfected that, but I'm going
24 to admit Exhibit 150.

25 [Plaintiff's Exhibit 150 admitted into evidence]

1 MR. JIMMERSON: Would you play it now, please, Alan?

2 [Plaintiff's Exhibit 150 was played at 10:49 a.m., not transcribed]

3 MR. JIMMERSON: Thank you.

4 BY MR. JIMMERSON:

5 Q And when did the Red Cross agree to distribute this product?

6 A In January of this year.

7 Q And how's it going?

8 A Well, it's great. It's slow, right? So we had to build the
9 product. Part of why we had to spend so much money and takes much
10 time is every single state of the 50 states has a different standard. So if
11 you going to build a product to sell in all 50 states, you have to build 50
12 versions of the product and submit 50 versions for regulatory approval.
13 So we got to for, and the Red Cross was like great, okay, let's start. Now
14 we're at 12 and, you know, we're getting \$1 million for one customer in
15 Indiana. About, you know, I would say this year will do between 1.5 and
16 \$2 million in those 12 states. California just passed a law three months
17 ago that allows computer-based learning, because before that, they
18 didn't for the CNA. That's our big -- so we're doing that.

19 We'll do 2 -- let's 2 million. No California. No Texas. No
20 Florida. No New York, which are our biggest market. So next year,
21 when we have approval in California, Texas, Florida, and New York, then
22 we should be doing the 8 million that the Red Cross footprint as it exists
23 currently, without expanding, would give us.

24 Q All right.

25 A And our cost of goods in that is a password. And our

1 responsibility is to supply the customer with a password to that course.

2 Q So you've already invested the cost, and there's not an
3 ongoing cost for that?

4 A Well, you have like maintain and make corrections. So this
5 year we'll spend about a quarter of a million dollars. Like sometimes, for
6 example, the like wound care standard changes. Or in Indiana, they now
7 added that you have to clean eyeglasses as part of the CNA exam. So
8 you have to make these little modifications every year.

9 Q All right. Exhibit 50 is a overview of Cognotion. It's two
10 pages. Are you familiar with that?

11 A Well, I don't know.

12 Q Let me -- I don' have it in my book for some reason.

13 MR. JIMMERSON: Exhibit 50.

14 Could I ask you, Ms. Clerk, if you find Exhibit 50 for us? My
15 company is not as --

16 THE COURT: We do have the binders up around the area
17 here.

18 MR. JIMMERSON: Are they up here?

19 THE COURT: Yeah.

20 MR. JIMMERSON: I'll find it for him.

21 [Counsel confer]

22 MR. JIMMERSON: It's not introduced. So don't show it yet,
23 because, you know, I have to get it admitted first.

24 [Pause]

25 THE COURT: It's in volume 5 of 12.

1 UNIDENTIFIED SPEAKER: Yeah. I think it is, Judge.

2 [Pause]

3 BY MR. JIMMERSON:

4 Q First, are you familiar with that document?

5 A I am.

6 Q And what role did you have in its preparation?

7 A I probably drafted 99 percent of it.

8 Q And it's called Cognotion overview?

9 A I mean yes.

10 Q Okay. And when did you do so?

11 A I don't recall.

12 Q Not recently?

13 A Not recently.

14 Q Maybe a year or two ago?

15 A Yeah.

16 Q All right.

17 MR. JIMMERSON: More for its admission, Your Honor. And
18 we had discussed this with Mr. Landess, as you recall, but opposing
19 counsel wanted to wait until Mr. Dariyanani appeared before we
20 introduced it.

21 THE COURT: All right. Any objection to it at this point?

22 MS. GORDON: No, Your Honor, other than the fact it looked
23 to me, when I first read it, that it may be incomplete. But if he can
24 confirm that it's complete, that's fine.

25 THE COURT: Okay. I have two pages here. Is that the

1 complete document, those two pages?

2 THE WITNESS: Yes.

3 THE COURT: All right. Any objection at this point then?

4 MS. GORDON: No, Your Honor. Thank you.

5 THE COURT: All right. Exhibit 50 is admitted.

6 [Plaintiff's Exhibit 50 admitted into evidence]

7 MR. JIMMERSON: Thank you.

8 Would you put it up now, please?

9 BY MR. JIMMERSON:

10 Q I don't want to spend a lot of time on it, but I just -- would
11 you tell us what this document is? And the jury can certainly look at it,
12 should they choose to do so, in deliberations.

13 A Sure. It was just something I wrote to summarize the
14 company and, you know, what our plan was. And I think it was probably
15 January 2019 that this was written just based on looking at it and what is
16 in it. But yeah, I wrote it, so that our potential partners and others could
17 understand what our business model was.

18 Q And you provided it pursuant to both my request and
19 opposing counsel's request?

20 A I believe so.

21 Q Okay. All right. Thank you. Next, now this is related to Mr.
22 Landess. Okay. How did Mr. Landess come to be a part of Cognotion in
23 2015 or '16?

24 A Well, I'd known Mr. Landess -- oh, gosh -- for at least 10
25 years before that. And I really respect his intellect ability. And

1 Cognotion has more than half of its advisors/consultants are over 65,
2 because I think tech companies like mine normally only hire people
3 under 30. And I think they don't know what they're doing. And I love
4 having people that have some lived experience. So I particularly enjoy
5 working with -- you know, my closest circle of advisors are all people
6 over 65. And I really respected Mr. Landess. I would say initially in our
7 relationship, as he was a mentor to me and then, later, you know, I
8 became his boss and I hired him. But yeah, I respected his skills. He's a
9 great lawyer. But even more than a lawyer, you know, he's very -- he's
10 incredibly emotionally intelligent, creative, visionary, giving person.

11 Q And so, would it be a fair state that in addition to your
12 employer/employee relationship, you, on behalf of Cognotion and he for
13 himself, that you're also a friend of his?

14 A Oh, no. I wouldn't say a -- I would say a very good friend.
15 Like I am his close friend.

16 Q All right. Thank you. And then did there come a time when
17 you formally retained Mr. Landess?

18 A Yeah. I think December of '15, roughly.

19 Q Let me show you what's been already admitted into evidence
20 as Exhibit 46, Cognotion offer of employment, dated December 18, 2015.

21 MR. JIMMERSON: Would you put it up on the board, please?
22 The ladies and gentlemen of the jury have seen this once before, I
23 believe.

24 ///

25 BY MR. JIMMERSON:

1 Q And what is this document, sir?

2 A That was the terms of the offer of engaging Mr. Landess.

3 Q All right. And the jury is familiar with the terms, generally.

4 Would you identify the highlights, please?

5 A All right. So Mr. Landess received \$10,000 a month in stock
6 in the company and the possibility of earning a bonus for, you know,
7 functioning as sort of senior advisor, general counsel, and really
8 consiglieri to me.

9 THE COURT: All right. Just a point of order. Pardon the
10 interruption. But if counsel could come up here for a moment, please.

11 MR. JIMMERSON: Yes, sir. Of course.

12 [Bench conference - not recorded]

13 MR. JIMMERSON: Judge, to the extent that it has not been
14 formally admitted, which I do believe it was -- but if not, I do move for its
15 admission at this time, sir.

16 THE COURT: Exhibit 46?

17 MR. JIMMERSON: Yes, sir.

18 THE COURT: All right. And there's no objection?

19 MS. GORDON: Correct.

20 THE COURT: All right. So that's admitted.

21 [Plaintiff's Exhibit 46 admitted into evidence]

22 MR. JIMMERSON: Thank you so much.

23 BY MR. JIMMERSON:

24 Q And when you talk about stock options, what does that
25 mean?

1 A Well, so for start-ups, we can't pay people big salaries,
2 because every dollar that we take we use to either build product or
3 market product. So what we do instead is we tell people if the company
4 prospers and increases in value, you will benefit from that. You don't
5 have to put out any money. You only have upside. So if it goes up, say
6 your option is at a dollar, and the company goes up to \$10 a share. You
7 get \$9 a share, and you don't come out of pocket anything. If the
8 company goes down to a penny, you don't lose anything. So on the one
9 hand you take a lower salary. On the other hand, you get this potential
10 upside. And there's no tax consequences to options as long as you
11 follow this process, this certain process. You only pay the taxes when
12 you actually get the money. So it's very favorable to the employee, and
13 it allows us to have people have a vest interested in the business and
14 also conserve money. So that's basically how it works.

15 Q Now in the traditional sense, Mr. Landess was not an
16 employee. He was an independent contractor; is that right?

17 A Yes.

18 Q Okay. The difference between you were not doing
19 withholding, FICA, that type of thing, right?

20 A Yes.

21 Q Just paying him the 10,000 as he went along --

22 A Yes.

23 Q -- plus the stock options that you mentioned. Initially, in
24 2016, what were the -- how many stock options did Mr. Landess enjoy?

25 A A million.

1 Q Okay. And the strike price was 20 cents?

2 A Yes.

3 Q All right. And that he's fully invested in those?

4 A Yes.

5 Q All right. But he would have the obligation, at some point, to
6 actually pay for them; is that right?

7 A Well, as long as you are still working for the company, you
8 have 10 years to exercise those options. But if you're terminated or you
9 leave, it goes down to a year.

10 Q All right. And with -- going to the -- fast forward to the end
11 with Mr. Landess being formally terminated on 12/31 of '18, he would
12 have just one year, until 12/31 of this year, '19, to contribute \$200,000 to
13 buy that 1 million shares; is that right?

14 A Correct.

15 Q Absent that, he loses that opportunity to buy those million
16 shares; is that right?

17 A Correct.

18 Q All right. So what were his duties and responsibilities
19 starting January 1 of 2016 up to the point where he wasn't able to
20 perform?

21 A Well, he did a huge variety of things. So, for example, we
22 had a customer that didn't pay. They were the leasing/training product
23 for us to train department agents in how to lease. And then we built it,
24 and then they were like ah, and didn't pay the bill. So Mr. Landess got
25 money. Mr. Landess appeared in the litigation section of our course. So

1 when -- CNAs understand like your nursing home can get sued. This is
2 how you provide -- you know, there are sort of two ways you can
3 approach litigation. You can like not care that much, not be that
4 responsible. No one is a bad person, right? But you can just sort of not
5 care and then hire a bunch of lawyers to defend you. Or you can just try
6 to do the right thing. So we used to Mr. Landess and other people, of
7 course, to say you know what, just do the right thing. Go the extra mile
8 rather than, you know, end up in court. And he actually appeared in the
9 course doing that. And he participated in -- essentially, every strategic
10 negotiation that I did through October, when he had his surgery, every
11 significant negotiation Mr. Landess was a part of. And he probably
12 raised a million dollars for the company from just his friends.

13 Q His surgery was October 10 of 2017. So that'd be a year and
14 9 months plus a few days, right? All of '16 and the first nine months, till
15 October 10th of 2017?

16 A Correct.

17 Q All right. Did he also assist with regard to the certification of
18 the course in different states?

19 A Yes. So he was the person -- so you got to remember we
20 had to build something that worked in all 50 states and make sure that,
21 while we were building it, it didn't change. So he had to master the CNA
22 regulations in 50 different states. Sometimes it's the state board of
23 nursing. Sometimes it's the state board of health. So he was in charge
24 of all of that and making sure that we passed. And by the way, we've
25 done -- off of his work, we've submitted to 12 states, and we have 100

1 percent approval rate. And that was because of the quality of the work
2 that he did.

3 Q All right. And did there come a time when -- so what
4 happened then with regard to his surgery or his even in October 2017
5 now?

6 A So he calls me from the golf course. He's like I broke my leg.
7 He has his surgery. And of course, I was very sympathetic. And Mr.
8 Landess is my friend, and I care about him. And so, you know, it's like
9 look, that could happen to anybody. He has the surgery. And he was
10 really diligent about his physical therapy. I mean he would put this
11 machine on to make the bones. And he struggled. And I'd come to see
12 him, and he'd be crawling from his bed to the couch to get on the couch
13 to meet with me. And like, you know, he had to pee in a bottle. But he
14 was like determined to get back to work.

15 And so, you know, we'd have a business lunch. And I'd like
16 help him get to the car. And I'd put the wheelchair in the back of the car.
17 And I'd drive to lunch. And we'd have to park in the front. Then we'd
18 have to go to Mastrioni's or someplace where you could park up front.
19 And then I would -- I'd take the wheelchair out. I'd put him in the
20 wheelchair. I'd push him to lunch. We'd go have lunch with someone.
21 I'd put him back in the wheelchair. I'd push the wheelchair back to the
22 car. I'd help him get in the car. I'd put the wheelchair in the trunk.

23 And I want to say I scheduled meetings and flew to Las
24 Vegas and was away from my three children no fewer than 12 times
25 support Mr. Landess during his recovery. And he was very optimistic

1 that he was going to recover. But you could tell by end of February -- I
2 mean you'd watch him. Why he wants to wear these gray sweatpants.
3 And his leg looked like it was like -- you know, like he was standing on a
4 metal clothes hanger. And it was not getting -- he was -- it was not
5 getting better. I would -- I remember like walking to this Thai restaurant
6 in the Summerlin with him and having him -- supporting him with my
7 arm. And it was harder to support him at the end of February than it was
8 in -- at the end of January. So something was not right. So nobody
9 should be working that hard and it's worse not better.

10 Q Now there is a natural brightness in all of us, a natural
11 intelligence in all of us. Certainly, I would believe that'd be true of Mr.
12 Landess. But how did his mental functions change after October from
13 what you observed through your working relationship prior to that?

14 A Well, it was very difficult for him. I mean he was never --
15 from October when he had the surgery, he was not able to perform his --
16 I mean he could do maybe 10 percent, maybe 10 percent of what -- so
17 when he used to work 12 to 15 hours a day, maybe he could work like an
18 hour a day. He was good for a lunch. That was it. Couldn't -- didn't do
19 any -- like really do any draft. Couldn't get up to the top of his house.
20 Couldn't really type. Couldn't concentrate. And that was -- I was sort of
21 willing to role with that through March. So that was some part of
22 October, November, December, January, February. Then once he had --
23 he found out that he had to have the surgery again and all that was for
24 nothing, it just -- yeah. I mean he never -- he never was the person that
25 he was in terms of his ability to do work again. He never was. During

1 the time that we worked together, that he was never the same.

2 Q You related an affidavit that's been provided to both sides
3 and provided to the Court. You know, honestly, some very embarrassing
4 movements with Mr. Landess but, you know, to demonstrate, I think,
5 your commitment to try to have him work out with the company. Would
6 you explain that to the jury, please?

7 A Sure. So essentially, the circumstances of that affidavit
8 were -- is Mr. Vogel the gentleman with the glasses who's flipping
9 through the book? Is that him?

10 Q Yes, it is.

11 A All right. So -- and then I've never met him before. But Mr.
12 Vogel sends me this letter. You have to understand. I --

13 MR. VOGEL: I'm going to object, Your Honor. Can we
14 approach?

15 THE COURT: Sure.

16 [Bench conference - not recorded]

17 THE COURT: All right. Mr. Jimmerson, go ahead.

18 BY MR. JIMMERSON:

19 Q Thank you. Mr. Dariyanani, the Court has asked us to not
20 speak about your written communications from Mr. Vogel to yourself or
21 vice versa.

22 A Sure. Sure.

23 Q I don't know how that turned out. So do respond to my
24 answer --

25 A Sure.

1 Q -- but don't include that exchange.

2 A Sure. So I prepared this affidavit, and the affidavit was really
3 to address the issue of why was Mr. Landess terminated and was he
4 terminated because we didn't, like, like having disabled people work for
5 us. And nothing could be more offensive to me than that. That's the
6 business that I work in. That's what I do. You know, I supported two
7 people through full transgender M to F surgery, right. Everything they
8 went through. Where a small company of less than 10 people. Right.

9 I've got people that are bipolar, schizophrenic, manic-
10 depressives, out on, like, parole, probation, because if you're going to
11 work with this population, you've got to actually hire people from this
12 population, and people deserve a shot. And so for someone to insinuate
13 that the reason -- after I -- after I, like, stay away from my family, like
14 cleaned up the poop on the couch that he left there and didn't say
15 anything so he can maintain his dignity, that you're going to tell me that
16 I fired him because I don't like disabled people was very offensive to me.
17 And that's why I wrote that affidavit.

18 Q And --

19 MS. GORDON: Your Honor, may we approach?

20 THE COURT: Sure.

21 [Bench conference - not recorded]

22 THE COURT: All right. Members of the jury, I want to give
23 you an instruction at this point, and I know you'll respect this decision.
24 The last question and answer back and forth, I'll start with the general,
25 sort of upshot of what the witness said that you can consider. So you

1 can consider the answer that was given as it may be relevant to what
2 Cognotion and this witness, as CEO of Cognotion, did to accommodate
3 Mr. Landess. So you can certainly consider the answer for that purpose.

4 However, I would like to strike, in other words, have you not
5 consider for any purpose, in other words, foresee it as if you never heard
6 it, anything that in contained that last answer that may be, may be
7 something that Mr. Vogel did by way of sending a correspondence. So
8 please do not draw any conclusion regarding that aspect of it.

9 In other words, I'd like to strike that part of the answer. So
10 what Mr. Vogel did, even if it's attributable to the whole Defense team or
11 side, please don't consider that aspect of the last answer. That's the
12 decision, I think is the better one. I think you get that, given that limit.
13 And also, of course, respectfully, this is not a criticism of you at all;
14 however, part of the process is, you know, I have to make decisions as to
15 what the law requires, so I will ask you to stay away from that again,
16 okay, as far as what Mr. Vogel did by sending you things and that, if he
17 did.

18 THE WITNESS: Understood. I understand.

19 THE COURT: All right. Let's go.

20 BY MR. JIMMERSON:

21 Q Was the termination of Mr. Landess a hard decision for
22 Cognotion or for yourself?

23 A Very much.

24 Q Please explain why.

25 A Well, I cared about Mr. Landess, and everybody has good

1 qualities and bad qualities, right. So if you ask Mr. Landess to tell you
2 Little Red Riding Hood, after three days you wouldn't get to the wolf, but
3 he's also a beautiful person who, like, is still supporting his ex-wife after
4 22 years and doesn't have to, and he cares. And we do our courses, the
5 number one -- so you know, we have General Casey and the cardiologist
6 on the ACC Board of Governors, and the number one speaker
7 consistently is Mr. Landess. And I cared about him as a person, and I
8 feel like he was genuinely wronged. I mean, I don't -- you know, to me,
9 no one could have done a better job in physical therapy, and yet, you
10 know, from my perspective, because of essentially the same neglect I
11 see of elder people in the work that I do in day-to-day basis, here we are.
12 And so --

13 MS. GORDON: Objection, Your Honor. There's no
14 foundation for that comment.

15 MR. JIMMERSON: This is you. I -- I haven't offered any
16 foundation and this is just him being responsive to the question pending.

17 THE COURT: All right. My thought is this is his perception
18 based upon his friendship and dealings with Mr. Landess that he
19 observed reasonably, so I think it's fair.

20 MR. JIMMERSON: Thank you.

21 THE COURT: I think a lay witness can give this kind of
22 testimony, so go ahead.

23 BY MR. JIMMERSON:

24 Q You may continue.

25 A Yeah, so that was hard because I didn't feel like he did

1 anything wrong, but I have responsibilities to 40 shareholders, and just
2 because I'm friends with Mr. Landess, work has to get done, and work
3 was not getting done. And I had someone who was qualified, Harvard
4 educated lawyer who could do the work, in many ways who was faster,
5 as many young people are, was faster and put out more output that was,
6 sort of more cutting edge than Mr. Landess. But he didn't have the
7 depth and wisdom and heart and character.

8 And so it was a loss for the company. It was a loss for me,
9 and I knew -- I knew what a loss it would be for him because he was not
10 getting hired by another startup. They were not going to hire some
11 shaky-headed verbally incontinent person to -- you know, and see his
12 inner greatness. And I despaired for him, but you know, I have a
13 business to run, and ultimately October, November, December, January,
14 February, March, April, May, June was enough. And so it was very
15 difficult.

16 Q So did you terminate his -- cease or terminate his salary as of
17 June 30th -- or May 31, or June 30th of 2018?

18 A Approximately that timeframe.

19 Q Okay. And what did you -- and, I guess, I think you
20 answered, but just so I have a good record and the ladies and gentlemen
21 have the record, why did you do that?

22 A Because he was incapable of performing his duties.

23 Q And was that incapability both mental as well as physical?

24 A It was primarily not physical. It was primarily endurance,
25 ability to pay attention and focus, quality and coherence, thinking,

1 attention span, appropriateness of conduct within a business context. I
2 would have pushed him in a wheelchair until the cows came home if that
3 was the problem.

4 Q And ultimately -- but you chose not to formally terminate him
5 until the end of the year, until the end of 2018, and why did you delay
6 the, shall we say the drop date, the formal termination as opposed to the
7 practical termination that occurred mid-year?

8 A Because I wanted the rest of his options to vest. If he -- not
9 the rest, but I wanted him to vest through at least through December 31.
10 At that time, we were in negotiations with a few different people and
11 there was a possibility that Cognotion or some part of Cognotion may
12 sell, and so you know, I wanted him to benefit from that, and so I didn't
13 drop the axe, if you will, fully until December. But Mr. Kaplan started
14 working for free August, September, and by October he was fully
15 engaged, and he's done -- he's done a spectacular job, so --

16 Q Okay. Thank you. Showing you what has been admitted, I
17 believe, as Exhibit 48, the termination letter. I've shown the ladies and
18 gentlemen of the jury this earlier.

19 MR. JIMMERSON: Can we just put it on the board quickly,
20 please, 48? Thank you.

21 BY MR. JIMMERSON:

22 Q Some of the jurors also had questions about this letter. They
23 asked, you know, as a termination formerly dated January 3 of 2019, had
24 the typo; was that a typographical error?

25 A Yeah. I mean, I always do this every year when the year

1 changes. My checks that I write and everything. It takes me like three
2 weeks to realize that it's the new year.

3 Q But there's no doubt that it was written and delivered
4 effective January 3, 2019?

5 A Well, effective December 31, 2018, delivered January 3rd,
6 2019.

7 Q Very good. And the ladies and gentlemen of the jury have
8 seen that document. I won't repeat it. I want to intervene an event,
9 despite his incapability of performing, in March of '18, which was, what,
10 five months after there, or six months after the surgery, you awarded
11 him with a million new shares of options. They weren't shares; they
12 were options, that could be converted under the circumstances of the
13 grant to shares. Would you explain that to the jury, please?

14 A Yeah. I wanted him to get better, and I had seen people get
15 better. I had seen people recover from strokes and all kinds of other
16 things, and so I thought, you know what, I'm going to put a vote of
17 confidence in him. He's going to get better. He's going to grow with us,
18 but he didn't.

19 Q All right. Now, the main shares then would have vested 25
20 percent, or 250,000 shares between March 1 and December 31 of 2018; is
21 that right?

22 A They would have not -- yes, 9/36th of them would have
23 vested, so yes, 25 percent.

24 Q It was just reduced to fractions, 1/4th?

25 A Yes. Yes. Yes.

1 Q Twenty-five.

2 A Math is not my subject, but, yes.

3 Q Twenty-five percent of a million is 250,000?

4 A Yes.

5 Q Okay. So in terms of, the jury must, of course, decide liability
6 in Mr. Landess' favor and against Dr. Debiparshad; assuming they do
7 and they find causation between that and this loss, he's asking the jury
8 to consider the damages associated with, not only loss of wages, but
9 750,000 shares of the options that were lost because of the termination,
10 right?

11 A That's my understanding.

12 Q Now -- okay. I understand. But what I meant by that was
13 why did he lose the 750,000 options?

14 A Because we terminated him.

15 Q And it was over a 36th-month time period of vesting, 1/36th
16 of the month?

17 A Correct.

18 Q So three-fourths of the million were lost with the termination
19 effective 12/31 of '18?

20 A Correct.

21 Q All right. Thank you. Now, you had it there that the fair
22 market value of the strike price was 10 cents; is that right?

23 A Yes.

24 Q Now, is that the fair market value of the company,
25 Cognotion?

1 A No.

2 Q Okay. So tell us, Mr. Landess phrased it in terms of this was
3 my retirement. But tell us how that works, please.

4 A Okay. So here's how it works, when you're a cash investor in
5 the company, okay, let's say you invest \$1 million into a company, you
6 know you're getting some shares for that million dollars. But you know
7 other people have sweat equity, like Mr. Landess; they don't get a salary
8 of X. They take less than that and they get some options. One of the
9 things you insist on, as the cash investors, you say I don't mind them
10 making money with me, but I've got to get my money back and make
11 some money first. As long as I'm getting my money back and make
12 some money first, then it's all good.

13 So if I buy shares at 37 cents and I get a dollar, I don't mind if
14 Mr. Landess gets a dollar. But, as an example, right, but if I invested 37
15 cents and there's only .20 cents when the company sells, he doesn't get
16 anything because I put up real cash and he put up sweat. So what you
17 do is you create two classes of stock, one called preferred and one called
18 common. Like, I have common because I have sweat equity, right? Mr.
19 Landess has common. And so there's a price differential between
20 common and preferred.

21 In our case, preferred normally gets two times the money
22 before any common gets anything. So if you buy at 37 cents, you've got
23 to get your .73 cents or whatever it is.

24 Q Seventy-four cents.

25 A Seventy-four cents. You got to get your 74 cents before we,

1 the common, get anything. But if you can get above 74 cents, then we
2 all share together. So they become the same above 74 cents. So that's
3 why you say, okay, well, we know what a share preferred stock is
4 because people are paying 37 cents for it, so it's worth 37 cents. But
5 what's a share of common that doesn't have that right? Well, it's worth
6 less than 37 cents, so what the IRS requires the board to do is to just
7 make a guestimate of what do you think the common shares are really
8 worth? And you just -- I make that decision myself with consultation of
9 my lawyers, and the goal is to make it as low as possible because you
10 want your employees to get as much benefit as you can. So you just ask
11 your lawyers, what's the lowest I can possibly make this? And they give
12 you a number and that's what you use.

13 Q And in 2016, that was .20 cents, and in 2018 it was 10 cents?

14 A Correct.

15 Q All right. All right. Now, I want to spend the balance of our
16 time focusing upon what is the value of a Cognotion share --

17 A Sure.

18 Q -- so that they can decide what damages, if any; it's up to the
19 jury, is above 10 cents to multiply times 750,000 to equal a number,
20 okay?

21 A Okay.

22 Q All right. So I just want to tell you how we're going to spend
23 the next 15 to 20 minutes and then I'll sit down.

24 A Sure.

25 Q I want to start with what is your opinion of chief executive

1 officer and major shareholder of the value of Cognotion?

2 A I mean, shares of Cognotion today or do I think that they will
3 be worth in the near term?

4 Q How would I say both. I'd like the jury to hear both.

5 A I think shares of Cognotion today are worth between 37 and
6 .50 cents, and I expect, as do the investors who are paying that much,
7 that they'll be worth 2 to \$3 within the next two years.

8 Q Okay. Mr. Landess indicated it was his view that they were
9 worth about \$1 now or in the near future, right?

10 A It depends on how you define the near future.

11 Q All right. So let's break it down. You said it's worth 37 to .50
12 cents now. Please tell us why.

13 A Well, I'll give you some datapoints. We -- people are sending
14 us, and we got a check last week from our largest investor at 37 cents a
15 share.

16 MS. GORDON: And, Your Honor, I'm going to renew my
17 objection that this is all new information and we object to Mr. Dariyanani
18 bringing this testimony now for the first time during trial.

19 MR. JIMMERSON: Okay.

20 THE COURT: All right. I'm going to allow for the question
21 and answer, as I think it is relevant to the value of the Cognotion share
22 price.

23 So go ahead.

24 THE WITNESS: Your Honor, may I -- can I just interject
25 something for --

1 THE COURT: Well, what I'd rather you do is just answer Mr.
2 Jimmerson's questions.

3 THE WITNESS: Sure.

4 BY MR. JIMMERSON:

5 Q All right. So Mr. Dariyanani, because we've been in trial, I
6 don't want any surprises. If you signed a \$10 million deal yesterday, you
7 know, I just don't want --

8 A Sure.

9 Q -- I don't want to prejudice. I want a fair result; you know
10 what I'm saying? So in terms of an arbitrary date, anything after July
11 11th, because --

12 A I was asked this question in my deposition, Mr. Jimmerson,
13 and I answered this question in my deposition.

14 Q Okay.

15 A So this is not new information. I was asked the question in
16 my deposition.

17 THE COURT: Okay.

18 MS. GORDON: And I will just -- just to reiterate, I do believe
19 he said we just got a check in last week. That was my objection.

20 THE WITNESS: From the same person that did it in the
21 deposition when you guys asked me the question --

22 MS. GORDON: I'm not going to argue it with a witness.

23 THE WITNESS: -- back in April.

24 THE COURT: All right.

25 MR. JIMMERSON: All right.

1 THE COURT: Let's go ahead and just get back to the idea.

2 MR. JIMMERSON: You got it.

3 THE COURT: You ask a question and you answer to the best
4 of your ability.

5 THE WITNESS: Sure.

6 BY MR. JIMMERSON:

7 Q They can't respond to something that happened in the last 20
8 days.

9 A Sure.

10 Q That's what they're saying. So try to stay away from that.

11 A Sure. Understood.

12 Q But they all had two chances to take your deposition, so
13 that -- before that, you --

14 MS. GORDON: Objection, Your Honor. Stop the
15 commentary, please, and let's just --

16 MR. JIMMERSON: Fair enough. That's fair.

17 MS. GORDON: -- go on with the witness.

18 THE COURT: Well, it -- okay.

19 MR. JIMMERSON: But I'm trying to be fair and tell the jury
20 what's going on and being fair to you as well, Ms. Gordon.

21 MS. GORDON: Thanks.

22 MR. JIMMERSON: All right.

23 THE COURT: All right. It could be that the dates in the
24 deposition will come out. But again, just as a respectful form of order,
25 Mr. Jimmerson, please continue your questioning.

1 MR. JIMMERSON: Thank you.

2 BY MR. JIMMERSON:

3 Q Did you give a deposition taken by the Defendants?

4 A I did.

5 Q All right. And was that on April 30th, 2019?

6 A It was.

7 Q And was the -- did you also agree to sit for a second
8 deposition on July 16, just 10 days, 15 days ago?

9 A I agreed to do -- sit down for two depositions.

10 Q Right. And you gave one, and the Defendants chose not to
11 take the second; is that right?

12 A That's correct.

13 Q Okay. Now, back to the issue of the stock now or in the near
14 future. So there's been actual transactions in the past at 37 cents?

15 A Correct.

16 Q All right. And so why do you round it up, if you will, to 50
17 cents?

18 A Well, as I said in my April deposition, we were approached
19 by Career Step, you know, regarding do you want to be acquired. And I
20 asked Mr. Windshell [phonetic], who's our largest investor, who was the
21 angel investor in Guitar Hero, do you want to take this, it's roughly
22 double your money, it's in the 70s. And he said no, I didn't invest with
23 you to make double my money, say no. So that gives me a pretty good
24 idea that he certainly think it's worth more than 37 cents. And that view
25 was shared by my investors generally. I couldn't have gotten their votes.

1 I polled people informally, and I couldn't have gotten the votes do that.

2 Q To sell at 74 cents?

3 A I couldn't have gotten the votes. Yeah.

4 Q All right. Thank you. Now, why do you believe it to be in the
5 near future at 2 to \$3?

6 A Well, these investors made the sacrifice to fund \$6 million
7 worth of development. Now we're only in 12 states. And we're going to
8 be in 50 states with this product. We have one customer who's paying a
9 million dollars a year. Why would you sell now when you've taken all
10 the risk, instead of having a product that's going to last for 10 or 12
11 years? So I think they expected -- and they were very clear with what
12 they told me their expectations were. And I intend to deliver on those
13 expectations.

14 Q Now, you were also -- excuse me, Mr. Landess also spoke to
15 opportunity in 2019 with a company called TechWorks?

16 A Yes.

17 Q And what type of training or educational product is that, sir?

18 A So we -- I started working with General Casey in, I want to
19 say October. And General Casey --

20 Q And who is he just so we know?

21 A All right. So General Casey's father was -- went to West
22 Point. He was a general in the Army. And General Casey was, like, 17
23 years old. He was shot over in Vietnam, and killed on his way to visit
24 troops. And so General Casey got a job being assistant coach for Vince
25 Lombardi. And then Vince Lombardi died of colon cancer. And then he

1 joined the Army and went to West Point, thinking he would be able to
2 follow in his father's footsteps. But he washed out of West Point; ended
3 up having to go somewhere else for school. And -- but he worked his
4 way up in the Army for four years, and he married his high school
5 sweetheart.

6 And in 2004, President Bush appointed him head of the
7 Multi-National Force in Iraq. And in 2007, I believe, President Bush
8 appointed him the head of the Army. And he continued in that tenure
9 through -- with President Obama. So he ran the most complex
10 organization in the world. And at one point, one-million employees, and
11 a \$256 billion budget.

12 And one of the things he did was to do resilience training
13 because what he observed in Iraq was you'd have 20 guys and a
14 roadside bomb would go off and three of them die. And then you have
15 some of them that became suicidal, they got -- they beat their spouses,
16 they got dumped from the Army. But then you have other people that
17 lost weight, were better husbands and wives, who were, like, God's
18 given me a second chance. And so General Casey was like, is this
19 trainable, and if we can train people to respond in that way, we can make
20 the Army better. And so he spent \$300 million on this resilience training
21 program.

22 And my wife works with General Casey's wife. And this
23 gives you an idea of how humble they are. So I met Sheila and I said, oh
24 tell me about you. Well, my husband was in the Army, he's retired, oh
25 yeah, he's a soldier, like his life. I said, oh okay. Well, her husband is

1 General Casey, but she didn't say anything. And I'm listening to this
2 podcast one day in the car, Martin Seligman, he's the father of positive
3 psychology. And he says, General Casey, blah, blah, blah. The thought
4 occurs to me, oh my gosh, is Sheila's husband the General Casey. So I
5 ask Krystal, is Sheila's husband the General Casey? She's like, I don't
6 know; is your husband the General Casey? Yes. I was like, tell her -- ask
7 her if I can meet him.

8 So he meets me at the Metro Diner in Arlington and we talk.
9 And I tell him about this work that we've been doing in Las Vegas. One
10 of the things I've been doing over the last two years when I fly here is we
11 put on these free courses for recovering addicts, and homeless people,
12 and people in job transition. We actually pay them somewhere between 250
13 and \$1,000 to take a job training course. We get data to show how
14 effective our solutions are, but they get a new lease on life. And it's one
15 of my most fulfilling things. And I realized in those courses that we were
16 basically doing the Army's resilience training plus health careers. And
17 that's why it made people so much better.

18 So I told him about that work. And he said, you know what, I
19 spent 40 years in the Army and I consider myself to have two legacies;
20 one was the modernization of the Army, and the second was this
21 resilience program. If you are willing to build a product to bring that
22 resilience training to the private sector, I will do everything I can to help
23 you. I will come work at Cognotion. I was like, really? He says, yeah. I
24 said well, you know, we don't have lots of money. He's like, I will take
25 whatever you pay me. I said how about \$40,000 a year to be the

1 chairman. He said great.

2 So General Casey became the chairman. And he sees me,
3 like, once a week when I'm in town. And this man, like, he -- they used to
4 fly a C-130 for him to transport him somewhere. And he sits next to me
5 in coach to fly to Las Vegas to save the company money so that he can
6 go to a church full of homeless people and drug addicts and give them
7 job skills because I asked him to and because he cares. And then he
8 stops at the -- he's also the chairman of USO. He stops at the USO club
9 in McCarran Airport just to show people that he actually cares. You
10 know, I'm talking to my daughter on the phone and he, like, grabs my
11 bag to carry it for me. He is the real deal.

12 And so he said to me, look, I think you're going to have a
13 hard time as Cognotion selling resilience training just because you think
14 it works. I'm going to find a company for you to acquire that I know.
15 He's a lieutenant colonel that worked for me, they have a contract to do
16 resilience training for the Navy Seals and their family pre-deployment,
17 and the Air Force, and et cetera. And so since, I think, December, we've
18 been working on that deal. And sometimes it looked good, and
19 sometimes it didn't. And then eventually, we were able to --

20 Q All right.

21 A -- consummate that transaction. And so I feel good about
22 that product. It's part of the future of Cognotion.

23 Q And it also provides instantaneously substantial cashflow to
24 the company?

25 A Yes.

1 Q All right. And to what order, please?

2 A \$2.5 million of gross revenue and \$500,000 of free cashflow,
3 growing at 20 percent a year.

4 Q Now, how has Cognotion done financially in the past?

5 A Some years, we're profitable. So in 2014 and '15, we were
6 profitable. But ever since we started working on the CNA product, as I
7 told you before, we had to build it before we could sell it. So we
8 incurred substantial losses in those years. And this year, thank God, is
9 the first year that we're actually going to be able to turn up profit on that
10 product.

11 Q The jury was shown -- and I believe --

12 MR. JIMMERSON: Katherine Gordon or Mr. Vogel, if you
13 would help me. I believe it to be Exhibit 454, 457, 458, 459, which are the
14 profit and loss statements and balance sheet for the last couple of years,
15 and 460.

16 So first, if they're not yet admitted, I'd move for their
17 admission now, Your Honor.

18 MS. GORDON: They're admitted, I believe.

19 MR. JIMMERSON: Are all of them admitted?

20 THE CLERK: Which numbers -- what numbers?

21 MR. JIMMERSON: I'm happy to do that. I'll just say it's
22 inclusive, 454 through 460.

23 THE CLERK: I don't think I have numbers that high. They go
24 up to 150.

25 MR. JIMMERSON: That's the Plaintiff's exhibits. These are

1 Defense exhibits.

2 THE CLERK: Oh I'm so sorry.

3 MR. JIMMERSON: No problem.

4 THE COURT: 454 through 460.

5 MR. JIMMERSON: Whether they're admitted or not, Judge,
6 I'd like to admit them now --

7 THE COURT: Well, I do have in my notes --

8 MR. JIMMERSON: -- and then we'll have it confirmed.

9 THE COURT: You know, I some of these are admitted. 456,
10 57, 58, 59, and 460, I have the note that they're admitted. That would
11 leave 455 and 454. Anyways, she'll figure it out.

12 MR. JIMMERSON: All right. Thank you. And then I'd also
13 move for the admission of Exhibit 461, Judge, which is Cinematic Health
14 Education generally accepted accounting prin -- profit and loss trend.

15 THE COURT: Okay.

16 [Court and clerk confer]

17 MR. JIMMERSON: May I continue, Your Honor.

18 THE COURT: Well, just not yet. I mean, we're trying to figure
19 out what's admitted and what's not at this time.

20 MR. JIMMERSON: Okay.

21 THE COURT: All right. Let's approach it from this. 454 and
22 455, what are those?

23 MR. JIMMERSON: 454 and 455 are -- where's our list? 454 is
24 Cognotion Inc.'s stock ledger options as of May 18th, 2018 for Jason
25 Landess. 455 is Cognotion's board minutes from May 3, 2016. 456 is

1 Cognotion's board minutes from May 30th, 2018. 457 and 458 are the
2 profit and loss statements.

3 THE COURT: Those I don't need. I just need 454 and 455.

4 MR. JIMMERSON: Yes. Thank you.

5 THE COURT: Are you familiar with 454 and 455?

6 MS. GORDON: We are, Your Honor. And we're fine with
7 admitting them.

8 THE COURT: All right. So 454, 455 would be admitted.

9 [Defendant's Exhibits 454, 455 admitted into evidence]

10 MR. JIMMERSON: And 456, Judge, is Cognotion's board
11 minutes from May 30th, 2019.

12 THE COURT: Okay. So 456, 457, 58, 59, and 60 are all --
13 they're all admitted already.

14 MR. JIMMERSON: All right. Excellent. Very good. And so
15 I --

16 THE COURT: So what about 461? What is that?

17 MR. JIMMERSON: That's what I just wanted -- that is
18 Cinematic Health Education's profit and loss trend.

19 THE COURT: All right. Have you seen 461?

20 MS. GORDON: No objection, Your Honor.

21 THE COURT: Okay. 461 is admitted. So now all those items
22 are admitted.

23 Please proceed.

24 [Defendant's Exhibit 461 admitted into evidence]

25 MR. JIMMERSON: Thank you.

1 BY MR. JIMMERSON:

2 Q The results because of the investment that the company has
3 made in these products has resulted in one-year, I think \$2 million in
4 losses, and another year, maybe \$4 million in losses after you were
5 profitable in these last couple of years, referring to Exhibits 455 and 456.
6 So commonsense question seems to me is well, how can a company
7 that loses \$2 million be worth a dollar a share, or 74 cents a share. So
8 would you explain, please?

9 A Sure. It's the same thing as if you built a hotel, right. Every
10 -- as you're building a hotel, you're losing money because you're
11 building a hotel and no one can stay there. But the minute that the hotel
12 opens, then you start making money. So we had to build the course and
13 get regulatory approval. Those are losses. And then now that the
14 course is working and people are buying it and paying, we -- you know,
15 we have something that's worth. Any time you can sell a password for
16 \$300, that costs you essentially nothing, that's a good business to be in.
17 That's the -- meaning the software business is the most lucrative
18 business in the world. So -- it's even more lucrative than gaming. So if
19 you can do that, it's -- enterprise software companies have the highest
20 multiple of any startups.

21 Q And what would that multiple typically be?

22 A Well, sometimes they sell -- I mean, if you take Uber, you go
23 public with massive losses and they've never made a dollar. Many of
24 the companies that I represented when people, like, incurred substantial
25 losses with inception. And that -- Amazon, I think lost a ton of money

1 before it ever went -- so the whole idea is not what are you doing today,
2 it's where are you going, what does the future look like. That's what
3 people invest in. It's not today. No one cares about -- you know, the
4 hotel's not open yet, how much money is it making, no one cares. They
5 care about how much money the hotel's going to make once it's open.

6 THE COURT: All right. Pardon the interruption.

7 But counsel, if I could have you come up here, please.

8 [Bench conference - not recorded]

9 THE COURT: All right. Members of the jury, I don't think for
10 this stage of the hearing it's going to take Mr. Jimmerson much longer
11 before he stops this initial phase of questioning. But nonetheless, it is
12 my thought since we started at 8 a.m., let's go ahead and take a lunch
13 break. And so let's take a lunch break and come back at 1:00.

14 So as between now and 1:00, please, of course, don't talk to
15 each other or anyone else about anything having to do with the case.
16 Please do not consult any reports of the case, and form no opinions,
17 please, on anything having to do with the case until the end of it.

18 Have a nice lunch break. We'll reconvene at 1:00.

19 [Jury out at 11:47 a.m.]

20 THE COURT: All right. Any -- well, I do have something on
21 the record that I want to clear up. I don't know what happened on these
22 exhibits, but I want to talk about it for a minute. So if everybody can
23 have a seat and relax.

24 You can take lunch until 1:00.

25 THE WITNESS: Great. Thank you very much.

1 THE COURT: We'll see you at 1:00.

2 All right. Okay. So what happened apparently was our clerk
3 couldn't find the binder contemporaneous with referencing these
4 exhibits 454 through 461. But we now have that. Okay. And so no
5 problem there.

6 I just want to make sure I got it right, because what I decided
7 to do, you know, I did, was just look at my notes when it was evident to
8 me that we weren't sure as a team here as to what was admitted or not.
9 But I see my notes -- I looked at my notes. And I do have -- it's on page
10 13 of my notes of Mr. Landess' testimony where we admitted 456, 457,
11 458, 459, and 460. So I tell myself that here so I'm comfortable -- that's
12 why I was comfortable representing they were admitted.

13 I didn't know about 454 and 455 from my notes, nor did I
14 know about 461 from my notes. That's why I put you through a little,
15 you know, sort of covering what 454, 55, and 61 were. But they all got
16 admitted.

17 So now what I want to do is make sure since we have the
18 binder, was I right; was 456 through 460 admitted? I was correct, thank
19 God. Okay. So we're good to go. 454 through 61 are admitted. That's
20 all that matters at this point anyway on that item.

21 All right. Anything else for the record?

22 MR. JIMMERSON: I was just going to say we shortened up
23 our direct quite a bit, so we'll be done in 15 minutes.

24 THE COURT: Very good.

25 Anything else for the record?

1 MS. GORDON: I don't know if you'd prefer to cover this now
2 or before they show Dr. Smith's videotape deposition. But we do want
3 to ask if maybe the jury would like -- I'm sorry, if the Court would like to
4 give the jury an instruction about your ruling on Mr. Landess' shares that
5 are moot at this time, the 1.25 or -- I don't even remember frankly. But it
6 was -- they're moot because they haven't yet -- the timeframe --

7 THE COURT: Well, because they vested.

8 MS. GORDON: -- hasn't expired.

9 THE COURT: They vested. That's the better word, I think.

10 MS. GORDON: Right.

11 THE COURT: So he got two million total shares, 1,250,000
12 vested --

13 MS. GORDON: Right.

14 THE COURT: -- so he's not making a claim as to those.

15 MS. GORDON: Correct.

16 THE COURT: I haven't seen the Smith video, okay.

17 MS. GORDON: I'll represent, Your Honor, that he did discuss
18 those because it was before --

19 THE COURT: Okay.

20 MS. GORDON: -- your ruling on the only ones at issue were
21 the 750.

22 THE COURT: Okay. So Smith -- you're making an offer of
23 proof that if we were to look at Smith's video, he talks about the value of
24 the whole two million, I guess?

25 MR. JIMMERSON: He does, Your Honor, except that -- well,

1 he does. But I've provided the transcript of his revised deposition to Mr.
2 Vogel last Friday, a week ago. And while he mentions the 1.2 million,
3 and I didn't -- you know, I didn't delete it, what I did do I think is certainly
4 with the consent of the Defense, is I deleted in the damage chart that's
5 an exhibit to his deposition that we moved into evidence.

6 THE COURT: Okay.

7 MR. JIMMERSON: And I can show that to Ms. Gordon or Mr.
8 Vogel to show that I am not going to submit something to the jury that
9 has the 1.2 million shares. We deleted that. And so the damage claim is
10 not the full two million shares, but only 750,000 shares.

11 THE COURT: All right. As you probably get a feel for, I'm all
12 about making sure the jury's never confused.

13 MR. JIMMERSON: Right.

14 THE COURT: And so if something comes up that could
15 confuse them, I think we need to fix it.

16 MR. JIMMERSON: I have no problem with that, Judge. I
17 just --

18 THE COURT: So here's my thought on the item. Can -- I
19 don't want to take away from your lunch. But if you want to give me
20 something to read that both sides see ahead of time, I'll read it along
21 these lines. If you write something up -- even in handwriting is fine.

22 Is that okay?

23 MS. GORDON: Yeah. That's fine. Thanks.

24 THE COURT: Yeah. So just give me something you want me
25 to read before the Smith video, and I'll read it. That way both sides know

1 exactly what I'll say on something like that. Okay.

2 MR. JIMMERSON: And we'll also share the revised chart that
3 deletes the 1.25 million shares.

4 THE COURT: Okay. So again, you know, maybe it's a lunch
5 project along with having lunch. Give me a little writing that I read
6 before Smith's video is played. Okay?

7 MS. GORDON: Okay.

8 MR. JIMMERSON: Okay.

9 THE COURT: All right. Good. Have a nice lunch. We'll see
10 you at 1:00.

11 MR. JIMMERSON: You bet. Thank you, Judge.

12 [Recess at 11:52 a.m., recommencing at 1:03 p.m.]

13 THE COURT: All right, Mr. Dariyanani?

14 THE WITNESS: Yes, sir.

15 THE COURT: You come into the witness box here.

16 THE WITNESS: Okay.

17 THE MARSHAL: Parties rise for presence of the jury.

18 [Jury in at 1:04 p.m.]

19 THE MARSHAL: All present and accounted for.

20 THE COURT: All right. Thanks a lot. Of course have a seat
21 everyone. All right, members of the jury, I did allude to the idea that we
22 would try to stop by 4:00 today and so I wanted to let you know that we
23 are going to do that. In fact, we might stop sometime prior to 4:00.
24 What'll most likely be happening around that time is you'll be watching
25 the video deposition of Mr. Smith, Stan Smith, right?

1 MR. JIMMERSON: Dr. Smith, uh-huh.

2 THE COURT: Okay. We may take a comfort break, one more
3 comfort break before we stop for the day. As we go with this witness,
4 we'll see how that goes. But anyway, I just want to let you know that we
5 are going to -- well, I feel -- I shared it with the lawyers, but I feel like we
6 owe that one to you, so we're going to make sure we leave at the latest,
7 4:00 today, okay? All right. Go ahead.

8 MR. JIMMERSON: Did you notice the smiles, Judge?

9 THE COURT: Well, I know someone else who probably has
10 an internal smile, because somebody has a final exam.

11 MR. JIMMERSON: All right.

12 THE MARSHAL: Angelica.

13 THE COURT: Yeah, coming up.

14 MR. JIMMERSON: Good for you.

15 THE COURT: She's got a final exam in school coming up, so
16 she could use the time to -- so here we go.

17 MR. JIMMERSON: All right. Thank you.

18 BY MR. JIMMERSON:

19 Q Good morning, Mr. Dariyanani, how are you, sir?

20 A Good.

21 Q We had a pleasant lunch. We did not speak after you left and
22 I want to just cover four more subjects and then sit down. There is a
23 defense person named Kirkendall, who claims that because of the losses
24 sustained in two -- the last two years or three years, that Cognotion is
25 insolvent. He uses the words -- let me just -- he uses the words that

1 because the financial statements show a loss of \$655,000 in 2016 and a
2 loss of \$2,400,000 in 2017 and a loss of \$494,000 in 2018, that the
3 company is insolvent. Would you agree with that observation or
4 criticism?

5 A No.

6 Q And please explain to the jury why you believe Mr. Kirkendall
7 is mistaken.

8 A Sure. And I read that supplemental report, but you know, the
9 supplemental report of things he cites to, they never asked me who are
10 your debts to. They never asked me what are your 2019 numbers. They
11 never asked me what kind of contracts do you have for people to buy the
12 product. So of course is no one's ever going to stay in your hotel, you're
13 never going to get any money. That would be one thing, but how could
14 make a determination like that, when you don't even that basic
15 information?

16 So it's just not informed, right? Doesn't have the
17 information. There just would be no way to know. How would you
18 know, if you don't know who the debts are owed to, you don't know
19 what the income is, you never asked for copies of the contract? How are
20 you going to know? So it's completely uninformed.

21 Q So what is the correct position of Cognotion?

22 A Well, I think it's best reflected in the fact that our -- that we've
23 been supported by our investors since 2013, so 2016 losses, 2017 losses,
24 2018 losses. And these are very, very sophisticated people. You know, I
25 mentioned previously in my deposition, Mr. Winchell [phonetic]. You

1 know, it's a matter of public record that even after Guitar Hero was sole
2 to Viacom, Mr. Winchell got a -- and it's published -- \$300 million true-up
3 verdict against Viacom just in the royalty calculations for Guitar Hero, so
4 he's not a fool.

5 And in fact, he enrolled in Harvard Law School and MIT
6 Engineering School at the same time as a full time student, went to both,
7 and the reason that it ever came out was because he had won an award
8 and the graduation day was the same for both of them. They tried to
9 kick him out. He's like look, I passed both. So he's not a fool and he's
10 supported us the entire time, as have the rest of our shareholders, so we
11 can meet our obligations when they come due.

12 And I'll use that as an example, one thing that you know
13 probably the -- with the financial statements we supplied that the
14 Defense didn't highlight was that there was 700 and something thousand
15 dollars in cash on the financial statements at December 31, 2018. Never
16 asked us how much did you take in in 2019. Never asked us about the
17 sales and the payments. Never asked us, well, what's your monthly debt
18 service? If they had asked the an -- if they had given us the answer, I
19 would have said our monthly interest is \$3,200 a month. So if you don't
20 ask those questions, you can't make a conclusion about that. So it's not
21 true at all.

22 Q All right. Thank you, sir. Crystal Dariyanani -- Crystal Ball, I
23 believe her maiden name, who is she?

24 A Well, she doesn't -- she would not go by -- she has nothing to
25 do with Crystal Dariyanani.

1 Q Okay. Well, who is she?

2 A She's my wife.

3 Q All right. And how does she affect Cognotion's value?

4 A Well, Crystal has been responsible for a lot of the positive
5 developments in Cognotion. So not only did she introduce us to General
6 Casey, but when she had her television show on MSNBC, she would
7 basically book the guests that we asked her to book, if there were people
8 that we wanted to meet. So for example, I wanted to meet Tony Hsieh,
9 who has the downtown project, so I said to Crystal --

10 Q Here in Las Vegas?

11 A Yeah. So I say can you interview Tony? She's like sure, Your
12 Honor. Her co-host was Abby Huntsman, whose father, John Huntsman,
13 was the governor of Utah. So I said oh, I'd like to have John Huntsman
14 as an advisor and so we got to go to Ambassador Huntsman's house.
15 You know, I -- whenever I need to -- you know, I really like Carole King,
16 you know, Tapestries and Natural Woman and all that and so I'm like,
17 can you get me a meeting with Carole King and she said sure.

18 Can you get me a meeting with Rob Reiner, who's the
19 director of When Harry Met Sally, who I wanted to get some film advice
20 from. Sure. I got to have lunch with Rob Reiner, which was really also
21 cool. And he made me pay and he ate off Crystal's plate. But you know,
22 she's of -- you know, when you're married to someone for more than 12
23 years and you have three small children and you're doing a startup and
24 she's got a television show, life can be very stressful. And she supports
25 like me emotionally and helps us in all sorts of ways, big and small.

1 Q Cinematic Health. Mr. Landess explained the relationship,
2 Cinematic Health Education being a subsidiary of Cognotion, where
3 Cognotion, where Cognotion owns 80 percent of the shares or stock of
4 Cinematic Health and a Wallstreet Firm named Rethink Education owns
5 20 percent. Would you explain that, please?

6 A Sure. So in 2018, we had a relationship with this very large
7 German publisher named Bertelsmann. And Bertelsmann, I think might
8 be the largest publisher in the world. I'm not sure. By they own Penguin
9 and Random House and a bunch of television stations in Europe and all
10 kinds of stuff, right? And so they were our partner. And we entered in
11 negotiations to try to sell Ready CNA to Bertelsmann. In order to do that,
12 I wanted to have a deep pocketed partner, because you know, if you're
13 going to go up against a big company, you want somebody who's got
14 \$300 million of dry powder.

15 So we agreed basically to put Ready CNA into a separate
16 company that would make it very easy for Bertelsmann to buy if, they
17 wanted to. And Rethink bought 20 percent of that company. That
18 allowed us to have a negotiation with Bertelsmann from a position of
19 strength.

20 Q All right. And they paid 82 and a half cents a share for the
21 two million shares, \$1,650,000, all of which has been put into evidence. I
22 just want to confirm it with you.

23 A Yes, that's right.

24 Q All right. And the third subject is -- the last thing would be,
25 rather than arrange -- I'd like to have you provide some guidance to the

1 jury. They are going to make the final decision on a dollar mount for the
2 fair market value of Cognotion for Mr. Landess' lost shares, but would
3 you help us narrow it down, so that they have some choices, where
4 they'll make the final decision? Not you and not me, not the Judge.

5 A Sure.

6 Q They will.

7 A Sure. And I want to clarify something in the last question
8 you asked me. Yes, Rethink paid 82 and a half cents a share. Those
9 were shares in Cinematic Health. You can't infer the value of a share of
10 Cognotion from that figure, but what you can infer it from is you know,
11 my asking our investors would you approve a sale a 74 cents, them
12 saying no and so you know, I think the answer is I don't I could get
13 anything approved at less than a \$1.50 today. That would -- in order to
14 get more than 51 percent of the shares to vote to sell the company, I'd
15 have to have an offer of \$1.50 or more on Cognotion.

16 Q In January of 2019, this year, but seven months ago --

17 A Yes.

18 Q -- six months ago --

19 A Yes.

20 Q -- Mr. Landess had told Dr. Smith, the economist for the
21 Plaintiff that he felt that the fair market value at that time, January, 2019
22 was one dollar. Are you aware of that?

23 A I think so.

24 Q Okay. All right. I have nothing further. Turn you over to the
25 other side. Thank you, sir.

1 A Sure. Thank you.

2 THE COURT: All right. Thanks, Mr. Jimmerson and it looks
3 like Ms. Gordon has questions.

4 CROSS-EXAMINATION

5 BY MS. GORDON:

6 Q Good afternoon, Mr. Dariyanani.

7 A Good afternoon.

8 Q I really -- I don't have that much for you today. Just a couple
9 of follow up questions.

10 A Sure.

11 Q You testified earlier that Mr. Landess was offered his position
12 at Cognotion in January of 2016, correct?

13 A I thought it was December, 2015.

14 Q I don't think he started until that -- I agree with you, but I
15 think his start date in that offer letter was January 1st, 2016.

16 A That may be true. I don't --

17 Q Okay.

18 A I don't recall.

19 Q Before he started as senior counsel with Cognotion on
20 January 1st, 2016, what relationship did he have with Cognotion?

21 A He's been a mentor and supporter of mine since the very
22 beginning, but he didn't have like at -- you know, an official paid
23 relationship.

24 Q Okay. I know you have testified you think very highly of Mr.
25 Landess, correct?

1 A I do.

2 Q And that's an evaluation that you've had of him the entire
3 time you've known him, correct?

4 A No, I would not say the entire time I've known him. I think
5 Jason went through a difficult period between when I first met him, you
6 know. I think he went through a difficult period and he had some time
7 where he was kind of struggling. I think that happens to a lot of people
8 as they get older. And then he came through that period just like -- and I
9 told Crystal this, that was my wife, impressed me so much, because how
10 many people like reinvent themselves at that time, 60 something?

11 And that's part of why I brought him onto Cognotion,
12 because I saw some serious growth in Mr. Landess and you know, I
13 always admired him, but he really stepped up. So I would say I always
14 had affection and care for him and respect for him, but it's the last
15 maybe five years that I've really had a very high opinion of him.

16 Q Thank you.

17 MS. GORDON: Could I have the ELMO, please? Thanks.

18 BY MS. GORDON:

19 Q Did Mr. Landess have any kind of financial relationship with
20 Cognotion before he started working there as legal counsel in January,
21 2016?

22 A Yeah. He helped me find investors and also, you know, there
23 were times -- well, when I was borrowing money from everybody I knew.
24 My in-laws, my -- and Jason was right up there with anybody and
25 everybody who helped Cognotion in its hour of need.

1 Q Did he loan money to Cognotion prior to January, 2016?

2 A I think so, but I'm not 100 percent sure.

3 Q Let's see if this is part of that.

4 A Sure.

5 Q This -- it's already been admitted as Exhibit 70.

6 A Uh-huh.

7 Q I'll zoom in on it. These are -- this Mr. Landess' tax return --

8 A Uh-huh.

9 Q -- from 2015.

10 A Uh-huh.

11 Q And you can see on there under taxable interest --

12 A Yes.

13 Q -- \$44,000?

14 A Uh-huh.

15 Q And then Schedule B to that tax return, it states that that
16 \$44,000 in interest came from Cognotion. Do you see that?

17 A Yes.

18 Q Where did that taxable interest income come from? Was it a
19 repayment of a loan or did he own or stocks --

20 A Yeah.

21 Q -- at the time?

22 A So Mr. Landess had a longtime friend and I don't remember
23 his last name, but his first name was Eric. And this was when we were,
24 you know, trying to finance \$3 million worth of Saudi work and Eric lent
25 us, I'm going to say \$400,000 or so and it went through Mr. Landess'

1 trust account. We repaid Mr. Landess. We issued the 1099 to Mr.
2 Landess. I don't know what the relationship -- I have no idea what the
3 relationship between him and Eric was. I had no idea whether they -- I
4 didn't know. It didn't matter to me. He facilitated the loan. We paid it.
5 We paid the interest to him and I had no idea how the proceeds were
6 divided and it didn't matter to me. But we paid -- I think the rough
7 amount was -- if I'm not mistaken, I think the rough amount was
8 \$350,000 of the loan.

9 Q And it's your understanding that that amount was initially
10 given to Mr. Landess, who then turned around and gave it to Cognotion?

11 A Correct.

12 Q Okay. That's not the only time that that happened with Mr.
13 Landess, correct?

14 A Correct.

15 Q He would procure investments for Cognotion. If that investor
16 paid Mr. Landess directly, he would at times retain an amount of that
17 investment as salary to himself, correct?

18 A Yes.

19 Q Okay. And he also loaned money to Cognotion after 2015,
20 correct?

21 A Yes.

22 Q Upwards of \$100,000?

23 A Yes.

24 Q And Mr. Landess, he would defer his salary at times, correct?

25 A Yes.

1 Q When Cognotion was going through some lean times?

2 A Yes.

3 Q I believe you said that you also did that as well, correct?

4 A Yes.

5 Q Mr. Landess continued to defer his salary through 2017,
6 correct, at times?

7 A Yes.

8 Q Okay. You and Mr. Landess both testified that Mr. Landess
9 was paid on -- or put on unpaid leave in July of 2018; is that correct?

10 A Yes.

11 Q Do you have any -- did you give him any written notice or
12 anything like that about being placed on unpaid leave?

13 A No. No, it wasn't my -- it was never my practice, with Mr.
14 Landess or any of the other, like, roughly 10 people that we had, to do
15 much communication like that, in writing, unless it was absolutely
16 necessary, because we were very close and talked every day.

17 Q It was just generally understood that he was going to be
18 placed on unpaid leave?

19 A No. I -- I remember very vividly the conversation, and I
20 thought it would be a terrible conversation. And it wasn't that terrible,
21 because he knew he wasn't able to -- he wasn't able to do what we
22 needed done. So it wasn't as hard as I thought it would be.

23 Q And you anticipated my next question which was --

24 A Uh-huh.

25 Q -- the reason he was placed on unpaid leave, is that he was

1 unable at that time to fulfill his job duties as an attorney for Cognotion; is
2 that right?

3 A Well, as an attorney, and the other different functions --

4 Q Okay.

5 A -- that he did for us. That's right.

6 Q I'm going to show you an email from Plaintiff's -- I think it's
7 admitted, but it might still just be --

8 A Uh-huh.

9 Q -- Plaintiff's Proposed Exhibit 56.

10 So you know what? Let me --

11 THE COURT: All right. Is 56 in those?

12 THE CLERK: 56 is not in the book.

13 THE COURT: All right. Not admitted.

14 MS. GORDON: I don't think it's admitted yet. I'm not 100
15 percent sure.

16 THE COURT: Yeah. It's -- I'm sorry. I just want --

17 MR. JIMMERSON: The answer; I would have no objection to
18 that email. I'd just know the date, if I could?

19 MS. GORDON: And I have a view from 56, so --

20 MR. JIMMERSON: All right. I have the exhibit.

21 MS. GORDON: Can I --

22 MR. JIMMERSON: Sorry.

23 MS. GORDON: Can I move to admit Plaintiff's Proposed
24 Exhibit 56?

25 MR. JIMMERSON: No objection, Judge.

1 THE COURT: All right. 56 is admitted.

2 [Plaintiff's Proposed Exhibit 56 admitted into evidence]

3 BY MS. GORDON:

4 Q This is an email dated August 18th, 2018, between -- it looks
5 like from Mr. Landess to Tim -- is that Tim Murray at Cinematic Health?

6 A Yes.

7 Q And copied you on it. And this is after the time period that
8 Mr. Landess was on unpaid leave, correct?

9 A Yes.

10 Q And he's forwarding information about CNA. I'm assuming
11 he's referring to the ReadyCNA product?

12 Q Sending it to Tim so he can take a look at it to see what the
13 status of that product is, and in particular, he's talking about the status of
14 the product as it might be approved in Nevada, correct?

15 A Yes.

16 Q So in August of 2018, Mr. Landess was at least able to
17 perform functions such as this, correct?

18 A He's writing that email, yes.

19 Q Thanks. And you sent the termination letter to Mr. Landess
20 on January 3rd, 2019, right?

21 A Yes.

22 Q And I think you actually attached it. This is Plaintiff's
23 admitted -- I think it's admitted separately. This is from Exhibit 56. You
24 sent him the termination letter as an attachment to an email, correct?

25 A Yes.

1 Q Dated the same date, January 3rd, 2019?

2 A No. That's the one that I dated by mistake on 2018, but it's
3 the same letter, yes.

4 Q Yeah. I knew your letter has --

5 A Yeah.

6 Q -- has the wrong year, but it was attached to this email --

7 A Correct.

8 Q -- that has the right year?

9 A Yes.

10 Q On January 3rd, 2019, you also spoke with Plaintiff's retained
11 economy expert, Stan Smith, correct?

12 A Yes.

13 Q Do you recall being interviewed by Dr. Smith?

14 A Yes.

15 Q And parts of that interview centered on what Mr. Landess'
16 salary was, right?

17 A Are you talking -- because I wasn't interviewed by Mr. Smith
18 in January of 2018, it was somebody on his staff.

19 Q And I think you're absolutely right. It was somebody who
20 worked for his company.

21 A Yeah. That's right, yeah. But yes. Yeah, I mean, I don't
22 recall -- I'm sure that that seems logical that that was the topic of the
23 conversation, but I really don't remember what he asked me.

24 Q His salary, the bonus he missed out on?

25 A Okay. Those things all sound very plausible.

1 Q Okay. And they're actually the same things that you put in
2 your termination letter to Mr. Landess --

3 A Yes.

4 Q -- right? You very specifically set forth, in your termination
5 letter, what Mr. Landess' salary had been?

6 A Uh-huh.

7 Q What the amount of his bonus would have been?

8 A Uh-huh.

9 Q The very bottom there, you went over the shares that he
10 would've had the right to, had he remained employed?

11 A Uh-huh.

12 Q And then you were also putting in there that what, at that
13 time, the value, in your mind, of the shares were, correct?

14 A Correct. That's right.

15 Q Mr. Dariyanani, are those pieces of information that you
16 typically put in a termination letter?

17 A I've never terminated anyone under the circumstances like
18 Mr. Landess', but my closest analogy was my CFO, Michael Goldberg,
19 and that's actually where I got the form of that letter. So I took Mr.
20 Goldberg's termination letter, which laid out all his options, and all this
21 stuff, and all that, and I basically stuck in Mr. Landess' term, because Mr.
22 Goldberg also had options. Mr. Goldberg had also deferred salary, et
23 cetera, et cetera. So that's where the form of that letter came from.

24 And that was probably my only -- besides Jason. Oh, I did
25 have one other. I had two other formal terminations. One was this PhD.

1 I used the same letter. And then the other was my -- when I separated
2 from my cofounder, which was -- we're still very close friends and talk
3 weekly, but technically I terminated him. And I did a similar letter,
4 because it's important for people to know, like, where things stand.
5 Things were very dynamic at that time with Cognotion, so we had lots of,
6 you know, hopes that people would find the information helpful and
7 valuable to them.

8 Q I appreciate that. Letters that say, in effect, like this one, I'm
9 sorry to see you go, and by the way, here's what you're missing out on?

10 A Well, here's the reason that you do those letters. Because
11 here's what you don't want to do. What you don't want to do is, you
12 terminate someone. They don't pay any attention to anything. The
13 company ends up selling, right? And then they come back to you, and
14 say, oh, where's my piece? And you say, you know what? Your options
15 actually expired after a year. You don't get any piece.

16 And so if you're going to separate with someone, you've got
17 to make it really clear. Here's the opportunity, here's what it is, here's
18 what you can do. Otherwise, you have no way to refer back to, like, what
19 the information was. So, you know, it's -- it's not designed to be, like,
20 thumbing your nose at people. It's just designed to lay out, like, here's
21 where things are. And the language from that letter came from Mr.
22 Goldberg's termination letter.

23 Q I appreciate that. Did you provide Mr. Landess 30 days'
24 notice of his termination?

25 A I told him, in July of 2018, what was going to happen.

1 Q Did you provide Mr. Landess 30 days' notice before your
2 letter of January 3rd, 2019 --

3 A All right. We --

4 Q -- 30 days before that?

5 A We talked every -- probably, if not every day, every other
6 day. So it's not like we had this formal conversation where I said, oh, by
7 the way, I've noticed on the calendar that it's day 31. I was, like, you
8 know what? This is all coming, so -- no, I did -- I did not provide him, nor
9 under our terms was I required to, with 30 days' formal written notice
10 between the trans -- if your question is, did I provide him 30 days' formal
11 written notice in the transition from unpaid leave to termination, I did
12 not.

13 Q Thank you. You -- because you agree with me that the
14 employment offer -- position offer letter indicates in there that
15 Cognotion, or Mr. Landess, would have to provide the other party with
16 30 days' notice before termination, correct?

17 A Right. But it doesn't say a written notice, and he had well
18 over 30 days --

19 Q You got me.

20 A -- notice --

21 Q Okay.

22 A -- that he was going to be terminated.

23 Q Thanks. One of the reasons that Mr. Landess was
24 terminated, was his inability to travel, correct?

25 A Yes.

1 Q And as part of our -- looking into that, we wanted to know
2 how often did Mr. Landess travel for Cognotion while he was still
3 employed with Cognotion?

4 A Uh-huh.

5 Q And in that vein, we requested some documents from
6 Cognotion --

7 A Yes.

8 Q -- and I'm going to show you what it is that we received --

9 A Uh-huh.

10 Q -- in response.

11 A Uh-huh.

12 Q And this is, again, part of Exhibit 56.

13 A Uh-huh.

14 Q So we have one trip in April 2016.

15 A Uh-huh.

16 Q And these are documents that Mr. Landess submitted to
17 Cognotion for reimbursement, correct?

18 A Uh-huh.

19 Q So that's one. The next one is in May of 2016, correct?

20 A Yes.

21 Q The next one is October of 2016?

22 A Yes.

23 Q And then the last one we were provided with was for a trip in
24 February of 2017; do you see that?

25 A Yes.

1 Q So that's four trips total. And his tenure with Cognotion
2 lasted three years. So that's just a little over one time a year?

3 A If your question is, is that what those papers that he
4 requested reimbursement say? Yes, it's true.

5 If your question is, are those the number of times that he
6 traveled? Then the answer is, no.

7 Q Well, we can only go by what information we're provided.

8 A Well, you all asked me that question in my deposition. And if
9 you had asked the follow-up question, what I wouldn't told you is that
10 Mr. Landess had a corporate card issued by Cognotion. So the only
11 times he requested reimbursement is when he was not able to put things
12 on his corporate card. And when you all requested the documents, I
13 went back to Chase, looking for his separate credit card statements on
14 those card (sic). But there's only a time of, like, X months when Mr.
15 Landess' charges were available, and they were not available. I went to
16 Chase. I looked at it. So I could have pulled all the company charges,
17 but if you look at the card statements for -- you know, Cognotion, they
18 spent a million dollars on that card. It just says American Airlines Flight,
19 this time. It doesn't say who it is. And I'm -- I was very clear with the
20 person who examined me in the deposition, that we -- I would give you
21 the records that we maintained that were specific to Mr. Landess, and
22 that's what I did.

23 Q I understand. But you don't have any reason to contest that
24 these are all the documents that you did send --

25 A Correct.

1 Q -- that verify the number of times --

2 A That was everything --

3 Q -- that was --

4 A -- in my possession, yes. That's right.

5 Q Thanks. And you know, because you're an attorney also, I
6 don't mean to be rude, but we can't step on each other's words --

7 A I'm sorry.

8 Q -- for the -- it's okay -- for the court reporter.

9 A Sure.

10 Q Do you recall correspondence between you and other
11 attorneys in my office, concerning Cognotion having to send documents
12 about Mr. Landess' employment?

13 A Yes.

14 Q And you know that Mr. Landess filed a lawsuit in July of
15 2018, correct?

16 A Yes.

17 Q Okay. And after that lawsuit was filed -- this is still Exhibit 56,
18 and these kind of go backward, because they're emails --

19 A Sure.

20 Q -- there was an email to you from a document collection
21 company -- and I'll represent to you that they were working on behalf of
22 an attorney's office -- stating, "We emailed you a request for employee
23 payroll records on person named Jason Landess, on June 12th, 2018.
24 Can you please provide a status of this request." Do you recall receiving
25 that email?

1 A Yes.

2 Q And you then forwarded it to John Truehart?

3 A Yes.

4 Q Who is John Truehart in that --

5 A The -- the CFO of Cognotion.

6 Q Thanks. And then you told John to work with Jason to
7 respond to this request --

8 A Yes.

9 Q -- do you recall that?

10 A Yes.

11 Q And then John responds to both you and Mr. Landess, "Sure,
12 Jonathan, Jason. I never received any email or anything from Prodocs
13 [phonetic], but please let me know how you want to proceed."

14 A Yes.

15 Q So Cognotion is specifically inviting Mr. Landess to
16 participate in this process of providing his employment documents,
17 right?

18 A Yes. Absolutely. He got handed the situation, so yeah.

19 Q He got a us all to do it. These are the same set of emails --

20 A Uh-huh.

21 Q -- a couple days later. Mr. Landess writes back to your CFO --

22 A Uh-huh.

23 Q -- and says, "Just send them information for 2017 and '18.

24 My records show that I was paid \$65,000 in 2017, and 80,000 so far in

25 2018." He's kind of telling your CFO what it is that he was earning, right?

1 A He's telling us what his records show, yes.

2 Q Doesn't Cognotion keep separate records of what they paid
3 to --

4 A Yes.

5 Q -- Mr. Landess?

6 A And I sent you all the bank transactions showing every
7 transfer to Mr. Landess, so --

8 Q Is there a reason that you didn't just trust to send on the
9 Cognotion documents, without involving Mr. Landess?

10 A You know, there is a reason. And the reason was, I thought if
11 I just sent the bank statements, then someone like you would get up here
12 and be, like, well, what was this \$70,000 for, and whatever, so -- I don't
13 have time to parse together what each \$10,000 is for, and then we paid
14 him \$290,000. I knew he had the transfers. I was, like, you guys figure it
15 out, for exactly the reason that we're sitting here right now, that I don't
16 have -- I didn't have time to be, like, you know -- I -- I was not interested
17 in spending any more time than necessary to respond to this request.
18 And if Jason could help find the paperwork, that was great. He wasn't
19 going to be able to make up any Chase wire transfers.

20 Q You knew at the time of these emails that Mr. Landess had
21 either filed a lawsuit or -- actually, he already had filed a lawsuit -- and
22 you knew that that's why these documents were being requested, right?

23 A Yeah. I wanted to get them as right as I could. So if your
24 question is, did I ask Mr. Landess to help so we could get things right?
25 Absolutely.

1 If your question is, did Mr. Landess and I somehow conspire
2 to whatever? The answer is no.

3 Q So your CFO writes back to Mr. Landess, saying, "I'm
4 thinking we should just tell them the amounts that were paid to you,
5 ignoring what's owed, unless you need that. I'm showing that we made
6 the following payments to you in 2018; \$10,000 in January, \$100,000 in
7 March, 50 percent of which was for a loan repayment, and then \$30,000
8 in June." Do you see that?

9 A Uh-huh.

10 THE COURT: Okay. May --

11 BY MS. GORDON:

12 Q I apologize. These are kind of cut off, but then Mr. Landess
13 writes back and says, "No. The whole \$100,000 paid in March was a loan
14 repayment."

15 A Uh-huh.

16 Q Same day? The next day, your CFO writes back to Mr.
17 Landess, "So then we paid you \$40,000 for fees this year, not 80?"

18 Mr. Landess writes back, "Technically, I've been paid \$35,000
19 so far this year. The other 5,000 is balance due."

20 Later that same day, your CFO writes back, "Please see the
21 attached. I put down what we paid you in each year for your services,
22 regardless of when the payment was for." I think he means, "what" the
23 payment was for. "Feel free to make whatever changes you want. And I
24 can sign the letter and I can get the form notarized on Monday."

25 So in response to the request for documents to Cognotion --

1 A Uh-huh.

2 Q -- Mr. Truehart puts this together, stating, Jason Landess was
3 paid \$120,000 in 2017, \$35,000 a year to date in 2018. But invites Mr.
4 Landess to check it out, make whatever changes he wants, and send it
5 back, right?

6 A Yes. That's right. In order to get it right.

7 Q I understand your testimony. Mr. Landess checks it out and
8 he writes back to Mr. Truehart, and says, "This is a more accurate
9 accounting statement. Please notarize the document" -- that he's
10 attaching --

11 A Uh-huh.

12 Q -- "and forward it to my legal counsel."

13 And the document that Mr. Landess proposes that Cognotion
14 send, in support of his damages claim in this case, revised Mr. Truehart,
15 the CFO's letter, to state, "Please be advised that our company has paid
16 Jason Landess \$65,000 in 2017, \$90,000 year to date in 2018." See that?

17 A Yes.

18 Q Mr. Truehart writes back that same day, after looking at
19 Jason's changes -- hold on one second -- and says, "I understand that we
20 have an obligation to pay you \$120,000 for 2017. However, I'm not sure
21 we should state that we paid you that amount, as it seems to state that
22 we actually paid that amount of cash during the year."

23 Then Mr. Landess writes back,

24 "John, you are correct. I think I muddled things, for which I
25 apologize. Skipping down a bit. Then, on April 30th, 2018, I

1 deposited \$73,000 into Cognotion's account. That was
2 James Austin's final payment for his stock. On May 3rd,
3 2018, Cognotion paid me \$30,000. That was credited against
4 my salary. And then hence, as of June, Cognotion owes me
5 \$35,000."

6 A Uh-huh. Based on that information --

7 A Uh-huh.

8 Q -- Mr. Landess then revised the letter again, sent it back to
9 John Truehart, and that's what he sent out, correct?

10 A Yes. I think so.

11 Q And you, a CFO, and president, and the only member of the
12 board of directors of Cognotion, you felt comfortable with this process?

13 A Yes. Because one of the problems that we had was, our
14 accounting system, when someone in -- makes a loan and there's no
15 promissory note, and then the loan gets paid off, it just disappears. It
16 stays in the system until the loan is gone. So I have no way of knowing,
17 what was the loan, and what was the salary. I knew we paid him
18 \$290,000. I knew we didn't owe him anything. But as to the which-was-
19 which, he was the best person to provide a truthful accounting, because
20 he certainly knew what was a loan and what was a payment. And that's
21 logical. So that's why I did it. But I did -- I feel very comfortable about it,
22 and I think Mr. Landess conducted himself with, you know, the most
23 integrity and -- as he does.

24 Q In February of 2019, Mr. Landess was no longer working for
25 Cognotion, correct?

1 A Yes, that's right.

2 Q Okay. I will represent to you that in February 2019, we
3 requested some documents from Mr. Landess as a Plaintiff in this case.
4 In response to that request for certain -- part of the request was for
5 certain Cognotion documents.

6 A Sure.

7 Q In response to our request for production of documents from
8 Mr. Landess, this is what we got, a declaration from Mr. Landess stating
9 he was terminated on January 3rd, 2019, that on February 12th, 2019, he
10 called you and asked if you would supply the copy of the documents
11 from his employment file as well as other Cognotion documents -- sorry,
12 I'll get a better -- other Cognotion documents and records described in
13 our request for production. You stated that you told him you were
14 sympathetic to the legal action in Nevada, but you respectfully decline to
15 give us those documents because Cognotion was presently involved in
16 many confidential high-level business negotiations, and thus, you did
17 not want any business records unnecessarily becoming a matter of
18 public record. Is that your recollection of events in February of 2019?

19 A Yes. Except for that he made a mistake on the January 3rd,
20 2019 date. That's when he got the letter. That's not the effective date. It
21 was December 31, but otherwise, yes.

22 Q And you -- so you allowed Mr. Landess to speak for
23 Cognotion in terms of what documents Cognotion would be sending and
24 what documents they would not be sending?

25 A Well, I was very clear with him, that unless there was a

1 protective order in place, I was under confidentiality obligations to my
2 partners, and when you all finally got me a protective order, I gave it to
3 you.

4 Q You were okay with Cognotion disclosing the documents that
5 Mr. Landess felt okay disclosing, but nothing beyond that; is that your
6 testimony?

7 A My testimony is I did not want anything to come into a public
8 record that I thought was damaging, and I guess if your question is did I
9 trust Mr. Landess' judgment and discretion even as an ex-employee not
10 to release anything that would be harmful to us, the answer is, yes, and I
11 still trust him to this day.

12 Q Even though he was no longer part of Cognotion, correct?

13 A I'd leave my children with Mr. Landess. I'd give him a bag of
14 cash and tell him to count it and deposit it.

15 Q The -- working with Mr. Landess during this litigation process
16 extended to April of this year. This is again part of admitted Exhibit 56.
17 It's an email from Mr. Landess to you dated April 5th, 2019, and it was,
18 I'll represent to you, after Mr. Landess was deposed and before you were
19 deposed.

20 A Uh-huh.

21 Q And the beginning of the email states,
22 "But in an effort to avoid the nightmare of having to
23 reconstruct exactly how I was paid monthly, here's what I
24 said in my deposition. I was paid \$10,000 a month. Some of
25 it subtracted from investor payments and got sent to

1 Cognition, just to have Cognition turn around and send it
2 back to me. Some of that was on loan to Cognition, interest
3 free to help the company, and I elected to defer those loan
4 monies to claim as wages when Cognition repaid the loan in
5 early 2018 when Refaith [phonetic] invested."

6 And if you go down to the end of it, the last paragraph, "So in
7 terms of corroboration, all you need to do from your end is produce a
8 2016 and 2017 1099s. John's letter," John Truehart's letter, "and the
9 matching 321 2018 wire from Cognition's bank, 50,000 of which from
10 Cognition's perspective was loan repayment, but which from my side of
11 the table was deferred income. That totals \$300,000."

12 At the very end, Mr. Landess remarks, "If they wanted to beat
13 the nuance and be treating the \$50,000 of income in Cognition treating it
14 as a loan, so be it because it's a nothing burger." Do you recall receiving
15 this email?

16 A I do.

17 Q And it was helpful to you to know how Mr. Landess testified
18 in his deposition in order to corroborate the same in your deposition?

19 A No, I looked at him sending that letter as I'm trying to
20 minimize the amount of -- because I was, at this point, very annoyed.
21 You know, my view of this whole case kind of changed.

22 Q I didn't -- I'm sorry, but I didn't ask for your view of the whole
23 case or how it changed. I just wanted to confirm the purpose for this
24 email from Mr. Landess to you was to make sure that your numbers
25 lined up when you gave your deposition testimony about his wage loss,

1 et cetera, to what the numbers he gave were.

2 A No.

3 Q Mr. Dariyanani, you testified earlier that Mr. Landess is a
4 beautiful person in your mind.

5 A We're all beautiful and flawed. He's beautiful and flawed.

6 Q And you respect him a great deal?

7 A I do.

8 Q And this was, that portion any way is consistent with your
9 impression of Mr. Landess for at least the past five years, I believe you
10 said?

11 A Yeah, and he's had -- he's had tough periods as, you know,
12 as everybody has had. You know, as I've had tough periods.

13 Q And that was before five years ago, correct?

14 A I think so.

15 Q This is -- I'm going to try to blow it up, but this is an email
16 that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated
17 November 15th, 2016. It's quite long, but the part I'm interested in is Mr.
18 Landess appears to be giving a summary of his prior work experience
19 and some experiences that he has gone through in his life.

20 A Uh-huh.

21 Q And the highlighted portion starts, "So I got a job working in
22 a pool hall on weekends." And I'll represent to you, Mr. Landess testified
23 earlier about working in a pool hall.

24 A Uh-huh.

25 Q "To supplement my regular job of working in a sweat factory

1 with a lot of Mexicans, and taught myself how to play Snooker. I
2 became so good at it, that I developed a route in East L.A. hustling
3 Mexicans, blacks, and rednecks on Fridays, which was usually payday.
4 From that lesson, I learned how to use my skill to make money by taking
5 risk, serious risk." When you read this, did that change your impression
6 of Mr. Landess at all?

7 A Not at all. He had told me. I knew -- I knew about Jason's
8 life. I knew that he dropped out of high school. You know, I have people
9 that work at my company that are convicted felons. Look, I believe that
10 everybody is worthy. Mr. Landess was very honest with me about every
11 aspect of his life and I leave my children -- I left my daughter with him.
12 So that's the answer to your question.

13 Q Did he sound apologetic in this email about hustling people
14 before?

15 A I think when you're 70 years old, you reflect on your life, and
16 not all of it's beautiful. Not all of it's beautiful. He doesn't feel like his
17 divorce was beautiful. I think, you know, he doesn't feel like his -- I don't
18 think Mr. Landess would sit here and tell you every moment of his life
19 was great. You know, but I know him to be a person who loves people
20 and cares for them and I feel like I know his heart and that didn't bother
21 me because I -- I know him and I saw that it's reflected back on, you
22 know, what a provincial fool he was at the time, and he was.

23 Q Does it sound to you at all from this email that he's bragging
24 about his past as a hustler, and particularly hustling Mexicans, blacks,
25 and rednecks on payday?

1 A Not at all. I think he feels -- I think he's very circumspect
2 about that whole period of his life. And if you're asking me, like, did I
3 read this as Mr. Landess being a racist and a bragger, I absolutely did
4 not and I don't read it that way now, and I wouldn't have such a person
5 in my employ.

6 Q He talks about a time when he bought a truck stop here in
7 Las Vegas when the Mexican laborer stole everything that wasn't welded
8 to the ground. You still don't take that as being at all a racist comment?

9 A I look at that as him reflecting back on his life and the way
10 that he saw things then, growing up in L.A. the way that he did. I don't
11 think that that -- I don't think it's representative of how -- I think he
12 channeled himself then. I don't think it's representative of who he is
13 now, and it's not who -- it's not the person that I've seen and know.

14 Q Thank you, Mr. Dariyanani. I appreciate it.

15 THE COURT: Thank you, Ms. Gordon.

16 MR. JIMMERSON: Is she done? Okay.

17 THE COURT: Any redirect, Mr. Jimmerson?

18 MR. JIMMERSON: Yeah, very briefly.

19 REDIRECT EXAMINATION

20 BY MR. JIMMERSON:

21 Q The -- this past was Mr. Landess 54 years ago when he was
22 19 years old; is that right?

23 A Yes.

24 Q In your observation, do people change over the course of 54
25 years?

1 A Yes.

2 Q Has Mr. Landess, at any time, and this jury certainly has seen
3 him for two-and-a-half days, ever evidenced any crass views?

4 A You mean of -- he doesn't have -- he has evidenced crass
5 views, but not on a racial basis.

6 Q No, but I'm talking about versus people, human kind, the
7 human condition?

8 A No. He's a very empathetic, kind person. Sometimes he has
9 a potty mouth, but he's a -- he's a very empathetic, kind person.

10 Q Okay.

11 A And he loves people and he cares for them.

12 Q And these emails were 122 pages. You produced them
13 voluntarily, willingly.

14 A Yes.

15 Q And they cover the range of communication between
16 Cognotion on the one hand and Mr. Landess on the other; is that right?

17 A Yes.

18 Q And only one had anything to do with a smidgen of work
19 August of 2018; everything else predated that, right?

20 A That's right.

21 Q And you paid the full \$10,000 per month all before the
22 lawsuit was every commenced; isn't that right?

23 A That's right.

24 Q And Mr. Landess has already told us, but Mr. Landess is not
25 owed any money by Cognotion?

1 A That's right.

2 Q Cognition has paid its obligation to Mr. Landess prior to the
3 commencement of the lawsuit?

4 A That's right.

5 Q All right. Okay. I don't think Ms. Gordon was quite, maybe
6 careful to provide the second request in February asked for confidential
7 information of the company as distinguished from payroll records or
8 stock option records involving Mr. Landess; is that right?

9 A It asked for everything.

10 MS. GORDON: I'm going to object. I don't believe that
11 they're referring to the same. I was referring to request for production of
12 documents within the litigation of this matter, and they absolutely were
13 not everything. They were all the Cognition employment records in
14 order to support Mr. Landess' claims. It's very simple.

15 THE COURT: Do you want to accept that, or should we talk
16 further about it?

17 MR. JIMMERSON: I -- that's not close to being accurate, but
18 I --

19 THE COURT: All right. Well, then --

20 MR. JIMMERSON: You know --

21 THE COURT: Well, I mean, if you want to --

22 BY MR. JIMMERSON:

23 Q Here's the point, there's a distinction between the Defense
24 being entitled to have wage records and stock option records for Mr.
25 Landess because it's a damage claim that he's freely seeking this jury to

1 award to him, right?

2 A Yes.

3 Q As opposed to the proprietary and confidential information,
4 the business dealings transactions of Cognotion?

5 A Yes. And from the very first time I spoke with Mr. Orr, I have
6 bent over backwards to give those people everything they needed,
7 despite the fact that I didn't think it was done in good faith, I have bent
8 over backwards. I made myself available for three depositions. I cleared
9 my calendar. I submitted a four-document request. I did everything they
10 asked and the idea that I should have to do that with no protective order
11 is -- is abusive and I'm glad I do have one, frankly.

12 Q Okay. In any event, once you received that to protect your
13 shareholders, as well as ongoing transactions that you testified about,
14 you provided all the documents?

15 A Correct.

16 Q All right. As well as yourself personally on multiple times?

17 A Correct.

18 Q All right. Okay. And I think you've indicated, you have a
19 larger interest than that of Mr. Landess?

20 A I mean --

21 Q As a chief executive officer of Cognotion, I assume you have
22 wider responsibilities than just supporting Mr. Landess or explaining the
23 circumstances for his termination, right?

24 A That's right.

25 Q All right. Now -- okay. I -- I -- okay. The -- you were talking

1 about the distinction of trips. Those emails evidenced four trips or five
2 trips during that time period. But that certainly wasn't all the trips that
3 Mr. Landess took or made?

4 A That's right.

5 Q And the distinction was having to deal with records that
6 would show reimbursement, four or five?

7 A That's right.

8 Q Versus the many that he took that he paid for out of his --
9 that the company paid for by virtue of his possessing a company card?

10 A That's right.

11 Q That's what I understood your testimony to be; is that right?

12 A That's right.

13 Q All right.

14 A That's right.

15 Q And in fact, you accommodated Mr. Landess in the fall of
16 2017 and early part of 2018 when he was going through this horrific time
17 by setting meetings in Las Vegas; is that right?

18 A That's right.

19 Q Would you explain to the jury a little bit about that, please?

20 A Yeah. I mean, he couldn't travel, so I brought sometimes
21 four people here. The people traveled to Las Vegas for the purpose of
22 meeting Mr. Landess because he couldn't travel and it costs tens of
23 thousands of dollars and inconvenienced a lot of people. But we loved
24 Jason, and so there wasn't -- nobody ever -- I never got any grief from
25 anyone about Jason can't travel. Even when they got here and he was

1 only able to participate in the meeting for an hour and then he had to go
2 and we're sitting here in Las Vegas that everyone flew to with no Jason, I
3 never had people complain because that's not the kind of company we
4 are.

5 MR. JIMMERSON: I'd like to look at Exhibit 48. Can you put
6 up 48, please?

7 BY MR. JIMMERSON:

8 Q You write in the first paragraph, "It is with a heavy heart that I
9 must inform you that we are terminating your relationship with
10 Cognotion;" is that right?

11 A That's right.

12 Q You had told him that in that June, July time period when he
13 stopped being paid; is that right?

14 A Yes, that's right.

15 Q And you paid his full wages at \$10,000 a month through that
16 date; is that right?

17 A That's right.

18 Q All right. Now, you indicated in the second paragraph, first
19 sentence, "We regret this action deeply. You have served us faithfully
20 since January 1, 2016 in a full-time capacity," and then you outline what
21 his compensation was. You outlined he was entitled to a bonus, but for
22 the fact that he wasn't employed, which is an element of Mr. Landess'
23 damages. The third paragraph speaks about a stock option, so I'm not
24 repeating that. And then you talk about the fact that -- for the ones he
25 had already earned, he only had a year, calendar year, to redeem, and

1 for the 750,000, he was losing those as a result of not being employed; is
2 that right?

3 A That's right, yes.

4 MR. JIMMERSON: All right. Then the last paragraph, page
5 2, please, next to the last paragraph. "I want to make it clear;" if you
6 would. Now, the second paragraph there. Could you blow that up a
7 little bit, the second paragraph? Yeah.

8 MR. JIMMERSON:

9 Q "I want to make it clear that this termination has nothing to
10 do with any voluntary fault in your performance. Since you had your
11 surgery go so horribly wrong, you have not been well enough to perform
12 your duties." Now, this must have been difficult for you to write?

13 A Yes, and that was not from Mr. Goldberg's letter.

14 Q Okay.

15 "And you performed admirably up until your surgery, but
16 you know that you have not been able to perform your duties
17 since that time. Despite every effort to provide a reasonable
18 accommodation to you, you have not been able to return to
19 full productivity due to the aftermath of your surgery. We
20 put you on unpaid leave effective July 1, 2018, in hopes that
21 you would return to full time work, but unfortunately, we
22 cannot wait any longer and have replaced you with a new
23 advisor and attorney. We wish you the very best and are
24 happy to provide you a reference letter should you be well
25 enough to return to full time work. Although we have no

1 outstanding amounts owed to you and have paid you in full
2 for your work, as a special accommodation, we will pay for
3 your Lexis research subscription through June 30th, 2019 as
4 a gesture of goodwill."
5 Have I read that accurately?
6 A Yes.
7 Q And did that subscription end as of last month, June 30th,
8 2019?
9 A Yes, and we paid for it through June 30th, 2019.
10 Q Mr. Dariyanani, I thank you for your time. I know this has
11 been an inconvenience to you. Thank you, sir.
12 MR. JIMMERSON: No further questions.
13 MS. GORDON: Nothing further, Your Honor.
14 THE COURT: All right. Members of the jury --
15 Can you do me a favor and pronounce your last name?
16 THE WITNESS: Sure. Dariyanani.
17 THE COURT: Dariyanani. Does the jury have any questions
18 for Mr. Dariyanani? At least some.
19 [Bench conference - not recorded]
20 THE COURT: All right. Mr. Dariyanani, I received a number
21 of questions from the jury. I'll read all of them. First one comes from
22 Juror 2. How long will it be before CNA program is in all 50 states?
23 THE WITNESS: We'll be at 25 by the end of 2019, and all 50
24 states by the end 2020.
25 THE COURT: The end of what?

1 THE WITNESS: 2020.

2 THE COURT: Okay. Juror 6 has a couple of questions. They
3 go like this: Before, during, or after you initiated the termination without
4 pay to Mr. Landess, was he given any conditions to meet to return to
5 work?

6 THE WITNESS: It's a good question, and before definitely.
7 Before, I said to him, you know -- and he actually proactively came to
8 me, look, I know I'm not getting the job done. Can you give me a little bit
9 more time? And I mean, I never expressed it in numerical terms like he
10 was doing about ten percent of his job and I think I would have accepted
11 half. I could have kept him on at half. But the way I expressed that was
12 just I need you to be able to do the work so that I don't have to do it,
13 because I was having to do my work and his work, and I just didn't have
14 enough time. So I think the way that I expressed it to him before was I
15 have to be able to have you do at least some of the work that you used
16 to do, but I never put it in terms of like a specific amount.

17 And then at -- around the summertime, and I can't remember
18 whether this was exactly, July 30th or July 15th or whatever, I knew it
19 wasn't working and he knew it wasn't working, and neither one of us
20 thought that there was -- it was very likely that it was going to turn
21 around in the near term, but if Mr. Kaplan didn't work out and Mr.
22 Landess could get better in like five or six months, I always hoped that I
23 could revisit. And Mr. Kaplan was fantastic and so -- yeah. I guess the
24 best way I can answer your question is we talked about it in terms of he
25 had to at least be able to carry some of the load that, you know, I was

1 carrying. And that was a -- that was as specific as I got.

2 THE COURT: All right. And the next one from Juror 6 -- this
3 is a longer one, so I'll read it and then if you want me to reread or break
4 it up for us, I would.

5 THE WITNESS: Sure. Sure.

6 THE COURT: You previously made comments about the man
7 who replaced Mr. Landess. You also made comments about what you
8 think Mr. Landess' effectiveness and performance would be post-
9 surgery. It sounds as though you replaced him with someone you
10 believed will perform better in the role, opposed to replacing him
11 because the surgery made him unable to perform in the role. Is this an
12 accurate statement?

13 THE WITNESS: I think I understand the question, and I think
14 the answer is this, everybody has different talents. There's some ways
15 in which David Kaplan is better. There's some ways in which he's worse.
16 But I never would have replaced Jason if he could even have hit half the
17 bar. He -- you know, and I think that the other part of the question, which
18 is a good one is do I think that overall Mr. Kaplan is better than Mr.
19 Landess? No. I would take Mr. Landess of two years ago back in a
20 heartbeat, but I wouldn't fire somebody with two kids whose done a
21 great job too. And I can't, as much as it breaks my heart about Jason, I
22 can't fire a guy whose done a perfect job and done everything I asked
23 and has two school-aged children because I feel badly for my friend. I
24 just can't do that. It wouldn't be right.

25 THE COURT: All right. And Juror 9 has a question. Please

1 clarify, if Mr. Landess was hired as an independent contractor for
2 Cognotion, why did Cognotion feel the need to terminate Mr. Landess
3 instead of retaining him for future assignments as an independent
4 contractor who could perform duties within his home office?

5 THE WITNESS: I think it's a good question. So for a small
6 company like us, we only need one lawyer. That's it. That would be that
7 Kaplan is that lawyer, or Jason used to be that lawyer. I only need one
8 lawyer. If I had the work for two lawyers, I would consider hiring Mr.
9 Landess on a part-time basis, if he could do the work, but you know, we
10 could triple in size and I would only need one lawyer. So I don't see
11 that -- I don't see the need for two lawyers happening any time in the
12 near future.

13 THE COURT: All right. Any other questions from the jury at
14 this juncture for Mr. Dariyanani? Apparently not. Of course, counsel,
15 any questions based solely upon the jury's questions?

16 MR. JIMMERSON: No. I thought the questions were
17 excellent. I have no further -- no follow-up, Judge.

18 MS. GORDON: Nothing further, Your Honor. Thank you.

19 THE COURT: All right. Mr. Dariyanani, thank you so much
20 for your time and your testimony.

21 THE WITNESS: Thank you.

22 THE COURT: You're excused.

23 THE WITNESS: Thank you.

24 THE COURT: All right. My guess is -- well, I don't know for
25 sure, so let's talk. If counsel can come on up here and talk about what

1 our plan is for the rest of today then?

2 [Bench conference - not recorded]

3 THE COURT: All right. We're just talking about the schedule
4 to make sure we don't back up anything next week, and we think that the
5 best thing to do now would be to take a comfort break, come back at
6 2:30, so that's a 15-minute break, and then stop at 3:30 today, right. So
7 in other words, we're going to watch one hour of Mr. Smith and then
8 that will be it at that point, then come back and finish up with the video
9 of Mr. Smith on Monday and carry on from there.

10 So a friendly reminder, my prior comments, of course, about
11 not talking about the case or referencing reports of it or forming opinions
12 always apply. A 15-minute comfort break, come back, and we'll watch
13 the video for an hour and then that will be it for today. We'll see you in
14 15 minutes.

15 [Jury out at 2:15 p.m.]

16 THE COURT: All right. We're off the record, and a comfort
17 break.

18 [Recess at 2:15 p.m., recommencing at 3:45 p.m.]

19 THE COURT: All right. During that last break, the reason I
20 took a few extra minutes -- sorry about that -- is, you know, it really is on
21 my mind this whole thing with the passage that was read and I just --
22 you know, first, I want to say this to be sure for the record and for
23 everybody's edification: the motion to strike is denied at this time -- at
24 this time. So I want to be clear that if lawyers file something -- trial brief,
25 law on the point, then you can do that.

1 I do want to share with you that during that last break I really
2 thought only about this. And you know, I don't know what do to do with
3 it. I really don't know what to do with it. I mean, because, you know, I
4 look at the jurors and Ms. Brazil, Ms. Stidhum -- well, they're black, and
5 I'm using the terminology that was in that email, they're black people --
6 African American people, but again, taking the word that is attributed
7 now to Mr. Landess, they're black people.

8 As far as the, you know, comment about Mexicans, I don't
9 know. I frankly, don't really know. You might think this is a little odd,
10 but I don't really even notice any of this stuff. I just, you know -- it's just
11 the way that I was raised probably. You know, I've got the most loving
12 mom. This person that I have as a mom you wouldn't even believe. I
13 oftentimes say to myself, when we all get up to heaven, there she is --
14 and I'm going to say, I knew it, I knew she was a saint, I knew it, but
15 anyway, doesn't matter.

16 I got to tell you, during that break this just -- I mean, it almost
17 -- I don't want to say it made me ill, but it's really starting to percolate in
18 me, you know, because as a judge, you know, I think one of the primary
19 things here is when that verdict comes in I want to be able to say I did
20 everything to make sure justice was had. And I've got to say, I'm not
21 sure we're in a position now that the jury has heard that to be confident
22 in justice. I mean, I've just got to tell you. I don't know what to do with it.
23 I'm not that smart. I'm just not, but I don't know what to do with it, and
24 it's the chronology of what occurred.

25 No criticism -- and I'm going to talk for a minute -- sorry -- no

1 criticism to anybody, and that includes Mr. Jimmerson, but I don't recall
2 there ever being a pretrial motion to preclude it.

3 MR. JIMMERSON: There was not, Judge.

4 THE COURT: No. Okay.

5 So if there would have been, God only knows what I would
6 have done. I mean, I don't know what definitively I'll say what I would
7 have done. I share that most likely I would have precluded it on a theory
8 that under the legal relevancy balancing test, though it might have some
9 relevance to his character, which Mr. Dariyanani put in evidence, I get.

10 As y'all know on the legal relevancy balancing test, if it's too
11 prejudicial, then you, even if relevant, even if probative, you exclude it.
12 So I'm sharing with you that most likely -- and again, I don't know what I
13 would have done. I really don't know, because I don't have a crystal ball
14 looking at the past, but I would have had, of course, as the benefit of
15 pleadings from the lawyers, which I don't have now, and I would have
16 had the benefit of argument from lawyers on the point after pleadings,
17 based upon the law that now comes about in the pleadings, but I did say
18 words consistent with what comes to mind here, and that is, I think it's
19 likelier than highly likely that I would have precluded that, because it just
20 seems to me it has a prejudicial effect that you can't just -- especially in
21 light of the constitution of this jury that you can't get around.

22 So like I said, I don't know what to do about it. I mean, if
23 there motion in limine, then we would have known. And if I would have
24 -- I'm saying it's likely I'd granted it, because most of the -- as I sit here
25 now, feels like that's the right choice, because it's so prejudicial.

1 So that didn't happen, so then we have the trial. Now here
2 comes Exhibit 56. How many pages are in Exhibit 56?

3 MR. JIMMERSON: About 122.

4 THE COURT: 122-page exhibit comes in. I did ask the clerk
5 who offered it. She doesn't keep that kind of record. That's not a
6 criticism of the clerk.

7 MR. JIMMERSON: The Defendant offered it today.

8 THE COURT: But I just was going to say, it's my thought and
9 my recollection now, based upon the back and forth here, so the Defense
10 offers a disclosed, you know, set of documents, disclosed from the
11 Plaintiff to the Defendant -- Exhibit 56 with the items that ultimately end
12 up in Exhibit 56: the 122 pages.

13 So at trial now the Defense says we want to offer 56. I don't
14 remember what context it was offered in, but it was offered, and it was
15 stipulated, and agreed to be admitted. All right. So now it's an admitted
16 exhibit; one of 122 pages, but nonetheless admitted, and then we carry
17 on.

18 After it's admitted, Mr. Dariyanani testifies -- and I'll give --
19 Mr. Vogel made a great point -- in part, what Dariyanani did was he
20 provided some character evidence, is what I would say it would have to
21 fairly be called -- character evidence as to the good attributes of Mr.
22 Landess, and he said some other things too. You know, he said we all
23 had faults, and he said some other things. I don't remember if it was all
24 after the item came up, or before and after, but I would say the fair sum
25 and substance of Dariyanani's comments on this point was that Jason

1 Landess has a good character. And you know, no objection was made
2 by that, by the way, by the Defense when he's offering these good
3 character traits.

4 And so now it's the flow of things, we now have an admitted
5 exhibit that's there, not referenced yet. Now we have a reason to bring
6 up character-type traits, because the Plaintiff has put it in issue through
7 Dariyanani.

8 We then have, of course, that moment in time where Ms.
9 Gordon puts on the ELMO and highlights with a yellow highlighter this
10 paragraph about--

11 MR. JIMMERSON: That I didn't even notice until she just put
12 it up there. What was I going to do, object to an admitted document,
13 suggesting that I'm afraid of it. I was outraged when I read it. I just was
14 -- I was blown away. I was stunned actually.

15 THE COURT: Okay. Well, that gives me further context, as to
16 where I'm going with this at this point. And I've got to say, Mr.
17 Jimmerson. This comes to exactly what I would expect from you, and if I
18 say something you don't want me to say, then you stop me. Okay. But
19 what I would expect from you, based upon all my dealings with you over
20 25 years, and all the time I've been a judge too, is frank candor -- just
21 absolute frank candor with me as an individual and a judge. It's always
22 been that way. You know, whatever word you ever said to me in any
23 context has always been the gospel truth.

24 I mean, without, you know, calling my colleagues, lawyers
25 that worked with me at the bar, or my wife as testimonial witnesses, I've

1 told all those people many times about the level of respect and
2 admiration I have for you. You know, you're in -- to me, you're in the,
3 sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers
4 that I've dealt with in my life. I've got a lot of respect for you. So I say
5 that now because I think what you're really saying doesn't surprise me.
6 And I think what you're really saying is -- and again, interrupt me
7 anytime if you want -- is, well, in a multi-page exhibit, we just didn't see
8 it.

9 MR. JIMMERSON: That's exactly right, Judge. You're 100
10 percent right.

11 THE COURT: Okay. Well, there you go. And you know,
12 nobody is perfect. We all do these things.

13 MR. JIMMERSON: I already said I was mad at myself.

14 THE COURT: I know. You did say that.

15 Okay. So --

16 MR. JIMMERSON: But I think all of us have an ethical
17 obligation to practice law the right way and Kathy Gordon did not do so.

18 MS. GORDON: Your Honor, I would --

19 THE COURT: Okay. Hold on a second, if you don't mind.

20 MS. GORDON: That's smearing.

21 THE COURT: Okay. Go ahead. I'm sorry. I should --

22 MS. GORDON: And truly --

23 THE COURT: -- he's interjected, so you can too.

24 MS. GORDON: -- it's my witness, right? I'm the one who
25 questioned Mr. Dariyanani about it, and I frankly had every right to do

1 so. It was underhanded. This is an exhibit that Plaintiff disclosed during
2 discovery. It's an exhibit that they listed on their trial exhibits.

3 THE COURT: Right. It's a Plaintiff's proposed exhibit.

4 MS. GORDON: Exactly. And --

5 THE COURT: I get it. I see that.

6 MS. GORDON: -- I --

7 THE COURT: It's Plaintiff's proposed 56.

8 MS. GORDON: -- it's unfortunate that there isn't a note from
9 the clerk, because as Mr. Jimmerson will recall, when I asked has it been
10 admitted, you know, do you stipulate to it, he said I thought it already
11 had been, and I also thought it had been, but it hadn't, so I moved for the
12 admission because I had already referred to other emails in there.

13 THE COURT: All right. So --

14 MS. GORDON: And just one second, please, because this
15 has taken on this --

16 THE COURT: Okay. Sure. I didn't mean to interrupt.

17 MS. GORDON: -- scope of about me, and there's no reason
18 for the Court to think that I would do something underhanded by any
19 means, or to try to do that Plaintiff's case. They've disclosed multiple,
20 you know, multi-page exhibits, and I would be shocked if the Court told
21 me that I should have known something on page 300 and something of
22 an exhibit that's been in evidence for however long. That's my
23 responsibility, especially if it's an exhibit that I disclosed.

24 So it was stipulated to. It was admitted. And then when I
25 used it in the impeachment of Mr. Dariyanani's glowing -- I'm just going

1 to wait, because it's really important to me that you hear this, and that I
2 make a good record, because somehow it's become personal that Mr.
3 Jimmerson is Mount Everest --

4 THE COURT: You don't have to worry. I'm listening.

5 MS. GORDON: -- and I'm not, right?

6 THE COURT: I can look through a piece of paper and listen to
7 you at the same time. Go ahead.

8 MS. GORDON: Well, so it was stipulated to. Mr. Jimmerson
9 thought it had previously been stipulated to. I used it to impeach Mr.
10 Dariyanani. I had every right to do that. At least half of his testimony
11 was about the character of Mr. Landess. I understand it. He has a right
12 to say it. I have a right, on behalf of my client, to impeach that, and I did,
13 and I used a document that they disclosed and they didn't object to, and
14 they stipulated to the admission of. That's where this starts and ends,
15 Your Honor.

16 They had all these different occasions to do something about
17 it and they didn't. And I understand what you're saying. It's harmful to
18 them, but harmful things happen in a course of a trial --

19 THE COURT: Okay.

20 MS. GORDON: -- and that's what we're left with. I don't
21 think that there really is any reason to, you know, hope that the Plaintiffs
22 file something and what have you. If that happens, it's fine. I think that
23 we have an extremely clear record, but if this is going to go at all about
24 my credibility for admitting a document, or using a document that was
25 admitted, I have to draw the line. There's no reason to think that at all. I

1 did my job with the exhibit they gave me.

2 THE COURT: Okay. Let me say what the starting point for
3 me on something like this is I don't have a feeling that you did
4 something with some bad intent, bad faith, you know --

5 MS. GORDON: Well, that's what it sounds like. You
6 appreciate them.

7 THE COURT: -- I think that you, as a lawyer, felt as though
8 you had a bit of a bomb here, because obviously you saw the item, and
9 what I think is, most likely the Plaintiffs, for whatever reason, just didn't
10 see it.

11 MS. GORDON: Okay.

12 THE COURT: All right. I get it. That's probably what
13 happened. Okay. And you had, you know -- and when a lawyer has a
14 bomb and it's an admitted into evidence bomb, almost all lawyers are
15 going to use it.

16 MS. GORDON: And no objection when it is used.

17 THE COURT: I get it.

18 MS. GORDON: Right.

19 THE COURT: But here is my concern: is it at this point, too
20 much of a bomb to where it might have went further than blowing up
21 maybe the evidentiary item in question and blew up the whole trial. I
22 mean, that's what I'm worried about at this point. You see what I'm
23 saying? I mean, I can't fault you. I won't. I'll go as far as say, I'm
24 convinced, Ms. Gordon, you're looking at me, you're talking to me, I
25 don't think that you felt like what you were doing was some sort of

1 unethical thing -- okay -- to go that far, but now I have to deal with what
2 did happen under the circumstances. Okay.

3 MS. GORDON: I'm just asking the Court -- I understand that,
4 and I appreciate it. I'm just wondering if perhaps we could that and talk
5 about what happened without talking about how Mr. Jimmerson
6 somehow is above reproach, which clearly is making some kind of
7 distinction about the party who used the document. I don't think --

8 THE COURT: Well --

9 MS. GORDON: -- that's necessary.

10 THE COURT: -- I mentioned those -- you're criticizing what I
11 said. I mentioned it for a reason that I think made sense and that is, I
12 was about to ready to say that I had drawn a conclusion that Mr.
13 Jimmerson just didn't have it in his mind that this item was in one of the
14 122 pages. He might not have seen it, and that's why I mentioned my
15 thoughts about Mr. Jimmerson in that context. Okay.

16 Do you have a problem with what I said about him?

17 MS. GORDON: No. I just wish that we could focus more on
18 the procedural part of it than the personal aspects of the attorneys who
19 did it. I don't have a problem with what you said about Mr. Jimmerson.
20 I think I just took it as perhaps making a distinction.

21 THE COURT: Okay. Well, I mean, if I had dealt with you for
22 25 years, my guess is, consistent with what I've seen with you, I mean,
23 you really do care about what you're doing. It's evident in anybody who
24 watches you as an attorney, you know.

25 MS. GORDON: I think and I just wouldn't do something

1 underhanded like that.

2 THE COURT: I've known you for two weeks.

3 MS. GORDON: It just, it was admitted. It wasn't objected to.
4 It was their exhibit and I used it.

5 THE COURT: All right. So one of the other reasons I brought
6 all that up was, is I look at the pretrial motion practice, the motion in
7 limine practice, that the Plaintiffs asked me to preclude Mr. Landess's
8 gambling history. Remember the \$400,000 marker that he had? His
9 bankruptcies, and this other litigation that he was in. They did not ask to
10 preclude this item in question now, so that's further, I think, evidence of
11 the fact that they just missed it. What else can I tell you?

12 So the issue for the Court is this: in a situation where the
13 Plaintiffs, in good faith, miss something like that, but the Defense didn't
14 obviously, then the Defense uses it, I don't want to get into whether it
15 was good or bad faith either, because I don't feel -- I don't feel that you
16 did something with an intent that was bad in an ethical, you can't do this
17 as a lawyer sense.

18 I think what I think is that you felt as though you had a bit of
19 a bomb here, because you had known this was in the exhibit, and you
20 dropped it at an appropriate time, in your view. That all happened.
21 Okay. For me though, as a judge, now presiding over a trial with, you
22 know, two black jurors, and I'm using Mr. Landess's word, that's what he
23 said in the email describing African-Americans -- and I don't know if the
24 other item -- the Mexican item would be relevant to the ethnicity of other
25 jurors, because I'm not good at that kind thing.

1 Does anybody know that?

2 MR. JIMMERSON: Yes, Your Honor. Mr. Cardoza [phonetic]
3 is Hispanic.

4 THE COURT: Okay. All right.

5 MR. JIMMERSON: And Ms. Ascuncion may also be,
6 although, she's not Mexican, I wouldn't think. I would think she might be
7 Filipino, or something like that.

8 THE COURT: Okay. So we have four jurors, potentially, that
9 fall into reasonably, you know, a situation where when they see that,
10 they would be offended, because it has to do with their ethnicity, or their
11 race. We got a problem and I just don't know how to fix it. You know,
12 that's what I did over this last break. I mean, this kind of came and went.
13 This about as big a problem as we could have, because of the way this
14 happened. I mean, it's an admitted exhibit.

15 And what I wanted to say too, I've said it a few times, when
16 Ms. Gordon is using it -- I appreciate what you're saying, Mr. Jimmerson,
17 but you know, you could have said sidebar. You could have just said
18 hold on a second, sidebar. You know, I mean, you could have.

19 MR. LITTLE: But it was put up in front of the jury, Judge,
20 with yellow highlighting on two sentences. I mean, it's there. They're
21 looking right at it.

22 THE COURT: I get it, but at some point, as soon as you
23 realize what's going on, you could say "sidebar", you know; you know?
24 But what I'm trying to say is, here's the construct. All right. Let me put it
25 to you this way, you know, I'm at the judicial college, hypothetically. I'm

1 there, and there's 200-and-some judges in the audience. And maybe I'm
2 part of a panel, presenting. And I say, okay, here's what we have.

3 In pre-trial disclosures, the plaintiffs provide to the defense a
4 number of emails that their client -- that the plaintiff sent. And in one of
5 the emails is a passage where he relates that when he was younger, he
6 learned to play pool. And he hustled Blacks, Mexicans, and rednecks, on
7 payday. And there's an email that says that. And maybe I didn't give the
8 context of the case. I don't need to do that now, but -- and then, for
9 some reason, is -- well, it's disclosed. It's disclosed to the defense. And
10 then it's a -- for some reason, it's in a plaintiff's proposed exhibit, pre-
11 trial and during the trial. In front of the jury, the defense moves to admit
12 it. No objection. It's admitted by stipulation, the whole 122 pages.

13 MR. JIMMERSON: The reason that it is in Plaintiff's list is, in
14 my understanding, is that Mr. Dariyanani provided it to the Defendant.

15 THE COURT: Okay. Well, there you go. And so -- right. He's
16 trying to disclose everything. And he -- even though he's a lawyer, he
17 disclosed that, but he should've probably disclosed everything. And the
18 issue becomes, is it usable or not?

19 MR. JIMMERSON: That's right.

20 THE COURT: Okay. So then, now it's in evidence. And then,
21 not objected to, as entered by the defense. And then when the defense
22 uses it. No objection. And then in retrospect, but in short-time
23 retrospect, I guess you could say, within, I don't know, a half hour after a
24 break, the plaintiffs say, strike it. It's too prejudicial. And then I say to
25 the 200 judges in class there at the college, what do you do? I doubt any

1 one of those 200 judges are going to give the model answer. So I need
2 help on this. I'm just telling you, I have no idea what to do, but I'm
3 sharing with you that, given the jury that we have, and even if it wasn't
4 the jury we have, that's not so significant to me. Although, I have -- I
5 think it does have a higher level of significance when you have people
6 that fall into these -- into what is clearly, at least, you know, without any
7 context being given to it, it's a racial comment.

8 So now you have jurors who could draw a conclusion that
9 he's a racist. And that's why I -- and I'm the one that mentioned it,
10 nobody else did, that's okay -- I mentioned this idea of jury nullification.
11 I realized that that's a concept that usually comes up after a verdict. And
12 it's, you know, a basis for a new trial. You know, if it happens in a
13 criminal case, well, so be it. You cannot do anything about that. But if it
14 happens in a civil case -- because of double jeopardy -- but if it happens
15 in a civil case, it's grounds for a new trial. I just think of -- that
16 philosophy comes to mind here.

17 Do we have a situation that's curable? Should I do anything?
18 Or should I do something? I mean, and it -- you know, without the
19 benefit of further briefing and all that, like I say, most of me, as I sit here,
20 thinks I need to do something. I denied a motion to strike it. I don't
21 know what to do about it. I mean, I -- the --

22 MR. JIMMERSON: Well, why don't we give ourselves the
23 weekend to think about? I did want to mention though that the
24 Defendant's also put, in front of Mark Mills, a PT record, where he said
25 he'd fallen twice, and then ripped it off. And just by his quick brain, he

1 saw the very next entry, which was, I was not hurt. It's just -- I'm very
2 concerned about this. But this is -- this is so much more dimensionally
3 more powerful and more prejudicial than any other parlor tricks.

4 THE COURT: Okay. This is serious.

5 MR. JIMMERSON: This is serious.

6 THE COURT: I do want to say, I'd like to stay away from the
7 idea of lawyers doing things with bad intent. I know, Mr. Jimmerson,
8 you mentioned that a few times. To me, the real issue now is not that.
9 To me, the real issue is, fair trial, jury nullification. We've got something
10 in that may be unduly prejudicial.

11 MR. JIMMERSON: Let's focus on that, Judge.

12 THE COURT: You know, and what to do about that if you
13 were me at this point.

14 MR. JIMMERSON: Yes, sir.

15 THE COURT: I mean, I guess the last thing I'll say -- and I'll
16 shut up for now, then you all can say what you want and we'll see where
17 it goes -- I don't know that it's curable. I've got to tell -- I'm just going to
18 share that with you. I don't know if the fact -- when I mean, "it", that's a
19 pronoun, so let me not use pronouns. I don't know if the situation
20 concerning the fact that we've got this jury that's heard that, is curable.
21 Because even if I came in and said, I grant your motion to strike. Okay. I
22 mean, if Judge Ito said, members of the jury, disregard everything
23 Fuhrman said. I decided to strike it. Okay. I mean, that just comes to
24 mind.

25 MR. JIMMERSON: Yes, sir.

1 THE COURT: How do you unring this kind of bell, is my
2 question. I -- you know, what else can I tell you? I said I'd stop talking.
3 You know, I just guess as more and more goes on, this is just bothering
4 me. But I will stop on this point now. But anybody want to say anything
5 on this point before we do the deposition?

6 MR. JIMMERSON: Your Honor, the Plaintiff reserves his
7 rights. We'll address it on Monday.

8 THE COURT: And by the way, I just did all that without your
9 clients here.

10 MR. JIMMERSON: All right.

11 THE COURT: So I -- nobody stopped me on that, so I
12 assumed their waiving their presence at this point.

13 MR. JIMMERSON: Yeah. He just is tired and went on,
14 Judge.

15 THE COURT: Okay.

16 MR. JIMMERSON: Exhausted.

17 MR. VOGEL: I mean, my only comment would be, you know,
18 and you brought it up earlier, Your Honor, is, you know, this was a
19 Cognotion document. There was a motion to continue trial. That was
20 denied -- proposed and denied. Perhaps if there had been more time,
21 continuance granted, maybe this wouldn't have happened. And again,
22 that goes back on them.

23 MR. JIMMERSON: It doesn't make it right, Judge. I'll just
24 wait until Monday.

25 THE COURT: All right. Well, I said I'd stop, so I will. All

1 right. That takes us to -- oh, not coming on the merits of it anymore, I do
2 want to let you know that I told my law clerk, because I get to have a free
3 lawyer in the job, known as my law clerk, and I told her to do nothing but
4 work on this issue. I'm -- I mean, and she's back there now. All I want to
5 do is see, is there some kind of law -- is there a law that I don't know
6 about that talks about this? I don't think we're going to find something
7 perfectly on point with the events that did happen, especially, you know,
8 the admitted exhibit. You know, are we going to find a case where the
9 plaintiffs disclosed something like this, they don't see it, defense has it,
10 then it's admitted by stipulation, then it's used and not objected to, and
11 then later albeit contemporaneous, the motion to strike comes up?

12 Or otherwise known as the issue that we now have
13 something unduly prejudicial to potentially cause jury nullification
14 philosophy, you know, in the air. I mean, chances are, she's not going to
15 find something on point, but I am trying to see if I could find something
16 as to something, you know, has something like this ever happened
17 where you have an admitted exhibit and then it comes to light that
18 something in the admitted exhibit is too prejudicial? I think that's all we
19 can hope to find, a case where something was admitted in the course of
20 a trial, and then it became -- hypothetically, it became obvious that it's
21 unduly prejudicial and it's stricken. You have to throw into that that the
22 jury's seen it somewhere along the way, too. So maybe she'll find
23 something. Maybe you'll find something. But I just -- that's how serious
24 I need to take it. I've got her working on it, and I told her I'd give her a
25 comp day if she worked on the weekend on it. But that became not

1 relevant, because she's leaving anyway. She's going to go work for Tony
2 Scrow [phonetic] in a week. And she has to be here all next week to train
3 her replacement, so she doesn't get to get a comp day, I guess. She's a
4 sandwich.

5 Okay, turning to the Stan Smith item.

6 MR. VOGEL: Yes, Your Honor. We are ready to kind of fly
7 through it, if you'd like.

8 THE COURT: Okay, what we're going to probably have to do
9 -- this is a minor point -- we're going to have to lock the courtroom doors
10 because our marshal has to leave. And then she has a final exam in law
11 school to go take. And we don't have anybody to cover, because it's
12 Friday and they're all gone. So I'm going to -- did you lock the door?

13 THE CLERK: Yeah.

14 THE COURT: Okay. So nobody can get in. It's -- you can get
15 out, but you can't get in, so if you -- if somebody wants to get in, they're
16 going to have to call you. Is there anybody you're expecting to come in?

17 MR. JIMMERSON: No, Your Honor.

18 MR. VOGEL: No objection, Your Honor.

19 THE COURT: And we'll let them in. Otherwise, that's it.
20 We're going to be without a marshal. If anybody has a concern about
21 that, then I'll see you later. We'll just leave. I don't have a concern about
22 it.

23 MR. VOGEL: I don't either.

24 MR. JIMMERSON: No, Judge.

25 THE COURT: Okay. So we'll just -- we'll carry on without a

1 marshal. Good luck on your exam.

2 [Court and marshal confer]

3 THE COURT: Okay. All right. Does the Defense not -- I guess
4 you now know which items you object to, the exhibits, the Stan Smith
5 depo?

6 MR. VOGEL: Right. We shared it with Plaintiff's counsel. So
7 if you'd like, do you want me to just start going through?

8 THE COURT: Yes.

9 MR. VOGEL: Okay.

10 THE COURT: And away we go.

11 MR. VOGEL: So, you know, Exhibit 1 is the CV of Stan Smith.
12 I think we agreed that doesn't come in.

13 Exhibit 2 is a list of exhibits to his deposition. Yeah, I don't
14 think that's relevant, but if they really want it in, I guess they can argue
15 for that.

16 MR. JIMMERSON: Okay. I'm going along with it. So Exhibit
17 2?

18 MR. VOGEL: The -- yeah, I would object to Exhibit 1, 2, 3, 4,
19 5, and 6, as basically being the ex -- part of the expert report.

20 MR. JIMMERSON: All right. Hold on. Exhibit 1 is -- well,
21 Exhibit 1 is an inventory of all the potential exhibits. That's what I have.

22 MR. VOGEL: I have it as a CV of Stan Smith.

23 MR. JIMMERSON: Not what I have. Exhibit --

24 MR. VOGEL: 74?

25 MR. JIMMERSON: Is it Exhibit 1-A, maybe?

1 MR. VOGEL: May I approach?
2 MR. JIMMERSON: Yeah.
3 MR. VOGEL: Thank you.
4 THE COURT: Do you want to see what I have here?
5 MR. VOGEL: What I have is -- oh, okay. So I have -- I'm just
6 going through the exhibit list. Got 1, 2, 3, 4.
7 THE COURT: Yeah.
8 MR. VOGEL: 1's CV.
9 THE COURT: Well, I had the actual --
10 MR. VOGEL: 2 is a list of exhibits.
11 THE COURT: -- exhibits right here, all of them.
12 MR. VOGEL: So why isn't this here?
13 THE COURT: No, it's an inventory.
14 MR. VOGEL: That should be 2.
15 THE COURT: Okay. Let me see it. Oh, yeah. Well, Exhibit 1
16 -- so I guess the --
17 MR. VOGEL: Yeah.
18 THE COURT: Okay. So what they did was, they put the
19 exhibit tab after the exhibit.
20 MR. VOGEL: Okay.
21 THE COURT: Great. Another first. Okay, we figured that out.
22 The copy I have, the exhibit tabs are after the exhibit, as opposed to
23 before them.
24 THE COURT: Judge, it's in this book, too.
25 MR. JIMMERSON: I see.

1 THE CLERK: In the order.

2 THE COURT: I've got it here, but thanks.

3 Okay, so Exhibit 1 is the CV. And we are -- I already decided
4 that we wouldn't put that in.

5 MR. VOGEL: Right.

6 THE COURT: Okay.

7 MR. VOGEL: Exhibit 2 is an inventory of the exhibits that
8 Stan Smith reviewed.

9 THE COURT: Got it. And --

10 MR. VOGEL: Exhibit 3 is --

11 THE COURT: -- of course, we don't want that. It's never
12 good to give inventories that were some of the items, unless we redact
13 them.

14 MR. VOGEL: Right.

15 THE COURT: I'd be okay with the redacted, but if --

16 MR. VOGEL: I'm not sure how hard they're fighting for it,
17 so --

18 THE COURT: Okay. I would give you Exhibit 2, which is an
19 inventory of all the items that are exhibits, if you redact the ones that
20 aren't admitted. You can have that. That would just be helpful to the
21 jury, it seems to me. But you have to redact the ones that they don't get.

22 MR. JIMMERSON: I need to know where you're at, Judge.
23 Sorry.

24 THE COURT: Okay. Exhibit 2 to the deposition --

25 MR. JIMMERSON: Yeah.

1 THE COURT: -- is a --

2 MR. JIMMERSON: Did we sign it?

3 THE COURT: -- well, it's an inventory of all the exhibits to the
4 deposition itself.

5 MR. JIMMERSON: Right.

6 THE COURT: -- is what it is.

7 [Counsel confer]

8 THE COURT: And what I've said is, well, for example, we
9 know already Exhibit 1 would have to be redacted since they're not
10 getting it.

11 MR. JIMMERSON: Right.

12 THE COURT: So I would allow for this to be in there if items
13 not -- are these being admitted, by the way?

14 MR. JIMMERSON: Yes.

15 THE COURT: The --

16 MR. VOGEL: That's what they're seeking, yes.

17 THE COURT: Okay. All right. So yeah, we'd have to redact
18 that. Exhibit 1 would have to be redacted on the inventory list.

19 MR. JIMMERSON: Judge, just so that we don't have a
20 misunderstanding, the marked exhibits in our trial book, 74, is an over-
21 inclusive list of documents beyond that which was spoken about during
22 the deposition. So I think, that to be on a, shall I say, safer side, we
23 should speak about what was addressed during the deposition, and then
24 you would admit, or not, those. And then those that are beyond that, I'll
25 either -- I just won't introduce it, because I won't have a witness to do

1 that. But because the exhibits, sort of the whole flood of documents that
2 we showed Dr. Smith as part of our overall production, we didn't
3 reference all of the marked exhibits in his deposition. So I think we
4 should stay with the deposition exhibits that were talked about that I did
5 say, Your Honor, I move for its admission, and just address that.

6 THE COURT: Okay. Good.

7 MR. JIMMERSON: Okay.

8 MR. VOGEL: All right.

9 THE COURT: That makes sense to me.

10 MR. VOGEL: That -- and that's fine. Exhibit 1, 3, 4, 5, 6, 7, 8,
11 9, 10, 11, 12, 13, are all listed so --

12 MS. GORDON: Yeah, and 19.

13 MR. JIMMERSON: Sorry, what?

14 MR. VOGEL: We can start with those.

15 MR. JIMMERSON: Okay. Again, we talked about 1. We
16 talked about 2.

17 Exhibit 3 is his fee schedule. I don't know.

18 MR. JIMMERSON: If they don't want to talk about it, that's
19 fine. It's just a matter of, you know, being transparent, in terms of what
20 the man was paid, so --

21 THE COURT: Okay. Exhibit 3 is his fee schedule?

22 MR. JIMMERSON: So they want out, it's okay. I'm not going
23 to fight for it. It's all right.

24 THE COURT: Okay.

25 MR. VOGEL: Yeah. I don't want it.

1 THE COURT: So far, 1, 2, and 3, are out, except 2 is the
2 inventory that will be redacted.

3 MR. VOGEL: Exhibit 4 is just the engagement letter.

4 [Counsel confer]

5 THE COURT: Exhibit 4, okay, the engagement letter?

6 MR. JIMMERSON: It's okay if they want to delete it. It's fine.

7 THE COURT: What about this Exhibit 3 that says "prior
8 cases" and all that? A list of about four years of Stan Smith cases.

9 UNIDENTIFIED SPEAKER: I think that --

10 MR. JIMMERSON: Yes, Your Honor.

11 UNIDENTIFIED SPEAKER: Yeah, I think that was part of the
12 fee schedule expert --

13 THE COURT: Is that part of the fee schedule?

14 UNIDENTIFIED SPEAKER: -- disclosure.

15 MR. JIMMERSON: That was part of the --

16 UNIDENTIFIED SPEAKER: Part of the expert disclosure.

17 MR. JIMMERSON: -- CV and part of the testimony
18 experience.

19 THE COURT: Okay. So that -- all right. So that's out.

20 MR. JIMMERSON: Yeah.

21 THE COURT: So now, we're on Exhibit 4.

22 MR. VOGEL: Exhibit 4 is --

23 THE COURT: Is engagement letter?

24 MR. VOGEL: Right.

25 THE COURT: Okay.

1 MR. VOGEL: Yeah.

2 THE COURT: You object to that?

3 MR. VOGEL: Yeah.

4 THE COURT: All right. And what are the Plaintiff's reasons
5 for wanting to admit it?

6 MR. JIMMERSON: I don't need to. It's just a matter of
7 disclosure. I just -- you know, since I'm going to be cross-examine how
8 much have you been paid? The kind of questions I asked Dr. Gold this
9 morning. I want to have a transparent point. So if they are not -- you
10 know, they're not going to raise those issues and they don't want it in,
11 I'm happy to go along with that. It's okay.

12 MR. VOGEL: Okay. Exhibit 5 is the report.

13 THE COURT: All right. So that means 4 is out based upon
14 that little colloquy.

15 Okay, Exhibit 5 is the report.

16 MR. JIMMERSON: Yes. It is.

17 THE COURT: The January 23rd report.

18 MR. JIMMERSON: Yeah. Exactly. So that's out.

19 THE COURT: So obviously that's out.

20 MR. JIMMERSON: Right.

21 THE COURT: Hold on a second. When we say it's "out",
22 that's why I was asking what you want to do.

23 MR. JIMMERSON: No. Just the narrative. All the tables are
24 marked exhibits.

25 THE COURT: Okay. Let me just finish this point, because I

1 don't know if we're clear on this. This report in Exhibit 5 -- because I
2 haven't seen the video -- if it's referenced to him in the video, that's fine.

3 MR. VOGEL: Right. I --

4 THE COURT: It's just not going to be an admitted exhibit to
5 go to the jury.

6 MR. JIMMERSON: Right.

7 MR. VOGEL: We're on the same page, yes.

8 THE COURT: Okay. All right. So then 6?

9 MR. VOGEL: I think this also is still related to some expert --
10 it's an expert disclosure from Howard & Howard, so I'm not sure why a
11 disclosure statement of experts is relevant.

12 THE COURT: All right. Initial expert disclosure; Plaintiffs, do
13 you want to use it, or --

14 MR. JIMMERSON: No.

15 THE COURT: Okay.

16 MR. JIMMERSON: No. We don't need it.

17 THE COURT: Okay. That takes us to 7.

18 MR. VOGEL: We're fine with 7.

19 THE COURT: All right. Plaintiffs, do you want to use 7?

20 MR. JIMMERSON: Yes.

21 THE COURT: Okay. So Exhibit 7 is admitted. I'm telling our
22 clerk that. Exhibit 7 to the deposition is admitted.

23 [Plaintiff's Exhibit 7 admitted into evidence]

24 THE COURT: Okay.

25 MR. JIMMERSON: Can we speak to that, Mark?

1 MR. VOGEL: Yeah. We're fine --
2 THE COURT: Are we --
3 MR. VOGEL: with 8.
4 THE COURT: Oh, I'm sorry. What -- how do we -- what do
5 we call that then?
6 THE CLERK: It's going to --
7 UNIDENTIFIED SPEAKER: It is also --
8 THE CLERK: -- be Exhibit 74, part --
9 UNIDENTIFIED SPEAKER: Trial Exhibit 8.
10 THE CLERK: -- 7.
11 THE COURT: Okay. So that's admitted as 74, just so you
12 know. Yeah, I needed to know. So this is 74, what, dash 7?
13 THE CLERK: Uh-huh.
14 THE COURT: Okay. 74-7 is admitted.
15 [Trial Exhibit 74-7 admitted into evidence]
16 MR. JIMMERSON: It's also Trial Exhibit marked 86
17 previously -- separately.
18 THE COURT: Okay.
19 THE CLERK: 86 isn't admitted.
20 THE COURT: Okay. What do you need to do that?
21 MR. JIMMERSON: We don't need to have duplication. Let's
22 just keep it together. So 74-7 is admitted. And we'll just use 74-7, 74-8
23 going forward.
24 [Plaintiff's Exhibit 74-8 admitted into evidence]
25 THE COURT: All right. Let's move on.

1 Okay. 74-7 is admitted. Go. What's the next one, 8?

2 MR. VOGEL: 8 and 9 are fine. Those are just the notice of
3 deposition and the admitted notice.

4 THE COURT: Okay. Do you want to use those?

5 MR. JIMMERSON: It's in the depo. I don't really need it, and
6 I don't think we really need them.

7 MR. VOGEL: You don't want them? Okay.

8 THE COURT: Okay. So that means -- let's see, what, 8 and 9;
9 is that what that was?

10 Okay. So 8 and 9 are not going to be admitted.

11 That takes us to 10.

12 MR. VOGEL: I don't have a problem with 10, but it's just
13 emails about scheduling the depo.

14 MR. JIMMERSON: I agree. I should not is confusing.

15 THE COURT: I didn't quite get that. 10?

16 MR. JIMMERSON: No to 10. It's emails between Mr. Vogel's
17 office and my office, scheduling the depo.

18 THE COURT: Okay.

19 MR. JIMMERSON: Or Mister --

20 THE COURT: So 10 is not admitted, taking us to 11.

21 MR. JIMMERSON: 11 is --

22 MR. VOGEL: Is, yeah, just the records that were sent to him
23 to review.

24 MR. JIMMERSON: Right, so that's in.

25 MR. VOGEL: Yeah, I don't care.

1 THE COURT: Okay. 11 is admitted as 74-11.

2]Plaintiff's Exhibit 74-11 admitted into evidence]

3 MR. JIMMERSON: Now, can I just ask you where we are?

4 Can you just review quickly where we're at? 74 -- 20 -- 7 is in. What
5 about 8?

6 MR. VOGEL: You said you didn't want it. It was the notice of
7 the depo.

8 MS. GORDON: No, no 8.

9 MR. JIMMERSON: Fine. No 9 and no 10?

10 MS. GORDON: Yeah, 7 and 11 are in.

11 MR. JIMMERSON: All right. Very good. Thank you, Judge.
12 Go ahead.

13 THE COURT: Okay. Now we're on 12.

14 MR. VOGEL: And our objection to 12 is that it's a no
15 disclosure statement. It's got a computation. It's got the 16.1
16 computation of damages, things like that in it.

17 THE COURT: All right. 12, do you want to take that out?

18 MR. JIMMERSON: Yeah, I think so. It's been replaced with --

19 THE COURT: Okay.

20 MR. JIMMERSON: -- two others.

21 THE COURT: 13? There's 66 of these, so we're on 13.

22 MR. JIMMERSON: Yeah.

23 MR. VOGEL: I have no problem with 13.

24 THE COURT: All right.

25 MR. VOGEL: I think the next one --

1 THE COURT: Well, hold on. Unfortunately, perhaps, maybe
2 because of the volume, you know, I asked the Plaintiffs -- well, they
3 initially said you want all of them, but now some of them are falling out.
4 So do the Plaintiffs want 13 still?

5 MR. JIMMERSON: Judge, I want to revisit Number 13.

6 MR. LITTLE: That's what we're talking about.

7 MR. JIMMERSON: Okay.

8 MR. LITTLE: We're fine.

9 MR. JIMMERSON: Yeah, I don't want to have it used.

10 THE COURT: Okay. So no 13, takes us to 14.

11 MR. VOGEL: And they're not asking for 14, 15, 16, 17, or 18,
12 so the next one would be 19.

13 THE COURT: Okay. Good. Is that right, Mr. Jimmerson?

14 MR. JIMMERSON: Yes, it is.

15 THE COURT: 19.

16 MR. VOGEL: Exhibit 19 is the Cognotion offer of engagement
17 letter. It's already been admitted into evidence.

18 MR. JIMMERSON: We don't need it.

19 THE COURT: Okay. But it's for clarity. I mean, if the
20 Plaintiffs want to have it in as a deposition exhibit --

21 MR. VOGEL: I have no objection.

22 THE COURT: -- you can do that.

23 MR. VOGEL: Yeah, no objection.

24 THE COURT: So 74-19, you want to have that?

25 MR. JIMMERSON: Yes, sir.

1 THE COURT: Okay. 74-19 is admitted.

2]Plaintiff's Exhibit 74-19 admitted into evidence]

3 THE COURT: Okay.

4 MR. VOGEL: The next one is Exhibit 36.

5 THE COURT: So what about 21 up to 36?

6 MR. VOGEL: None of those are referenced in the deposition.

7 THE COURT: Oh, good. Okay. So none of those are relevant
8 to our discussion. Great. That knocked out a bunch of them. Good. So
9 36.

10 MR. VOGEL: That is the Cognotion termination letter, which
11 is already admitted, so I have no problem.

12 THE COURT: Right. So if you wanted to admit it so that the
13 jury can understand it in context of the deposition as 74-36, that's fine.

14 MR. JIMMERSON: Yeah.

15 THE COURT: Do you want to do that?

16 MR. JIMMERSON: Yes.

17 THE COURT: Okay. 74-36 is admitted.

18]Plaintiff's Exhibit 74-36 admitted into evidence]

19 THE COURT: Okay.

20 MR. JIMMERSON: Okay.

21 THE COURT: And --

22 MR. VOGEL: And the next one is 47.

23 THE COURT: All right. The next one is 47. So I take it we're
24 skipping 41 through 46?

25 MR. VOGEL: Correct. They are not referenced in the

1 deposition.

2 THE COURT: Okay. So 47.

3 MR. VOGEL: And we object to 47. It has no description on it.
4 It is just something discussing called, "Gold standards."

5 MR. JIMMERSON: Right.

6 MR. VOGEL: I don't -- yeah, I don't know if what they're
7 considering a learned treatise or what it is exactly, but it wouldn't be
8 something that comes in in my view.

9 MR. JIMMERSON: What this is, is a produced -- a self-
10 produced that is a -- Dr. Smith produced this document as what he
11 believes to be the gold standards of an expert in any field, which he
12 believes he satisfies. He speaks about it orally, or verbally within the
13 deposition.

14 THE COURT: Okay. So it's relevant to his qualifications?

15 MR. JIMMERSON: That's right.

16 THE COURT: And he mentions it in the deposition?

17 MR. JIMMERSON: That's right.

18 THE COURT: Okay. I think it's fine. Under that, given that
19 offer of proof, do you want to use this then, Plaintiff?

20 MR. JIMMERSON: Yes.

21 THE COURT: Okay. That will be admitted as 74-47.

22]Plaintiff's Exhibit 74-47 admitted into evidence]

23 MR. JIMMERSON: Right.

24 THE COURT: So we get another gold standard.

25 MR. JIMMERSON: Are you on 48 now?

1 MR. VOGEL: Yeah, I object to Exhibit 48. It's part of his
2 report.

3 MR. JIMMERSON: Agreed. So it's okay. I mean, if the
4 report doesn't come in, this should not come in.

5 THE COURT: Okay. So 48 is not in. Go -- what's next?

6 MR. VOGEL: 49 is something -- I think it's called like a
7 hedonic damages table.

8 MR. JIMMERSON: Yes.

9 MR. VOGEL: Value of statistical life summary table.

10 THE COURT: Okay. I'm sorry to do this, but something has
11 occurred to me. Sorry. I haven't seen the video, but if in the video he's
12 handed his deposition -- his reports and counsel covers reports with him,
13 I mean, is any -- I don't know what you do with the deposition, but is
14 anything tantamount to how -- what was done in court or the report was
15 put up on the Elmo type of thing?

16 MR. JIMMERSON: No.

17 MR. VOGEL: No.

18 THE COURT: Okay. Good.

19 MR. JIMMERSON: But I do discuss the report and
20 statements in the report like loss of wages or whatnot, you know.

21 THE COURT: Okay.

22 MR. VOGEL: And I think that's fine, you know, to discuss the
23 report.

24 THE COURT: Okay.

25 MR. VOGEL: It's just the initial --

1 THE COURT: But in the trial, we -- this is subtle point, but
2 you know, I don't want to make a mistake on this one, so in the trial,
3 when experts opinion in court, of course at times their report has been
4 put up in front of the jury.

5 MR. JIMMERSON: Right.

6 THE COURT: That's a way to look at it.

7 MR. JIMMERSON: Right.

8 THE COURT: I haven't seen the Smith video, but is there
9 something like that that happened where his report was put up like that
10 so to speak in fairness?

11 MR. JIMMERSON: In my recollection, no.

12 THE COURT: Okay.

13 MR. VOGEL: I don't think so.

14 THE COURT: Well, then let's just keep going. Go ahead.

15 MR. JIMMERSON: Now, we just want to have you insert
16 48-A; you just know that.

17 THE COURT: 48-A?

18 MR. JIMMERSON: 48 was talking about, I believe -- 48-A --
19 48 was the loss of stock options, and this was the report, and orally he
20 discusses his computations and the like. And including, by the way, the
21 1.25 million shares that we're not claiming during this trial. So I can't
22 delete the video because it discusses the underlying values of concepts
23 that Mr. Vogel is not objecting. But we did change the chart, the damage
24 chart, to 48-A, which omits any calculation or reference to the 1.25
25 million shares so that the damages were based only on the 750,000

1 shares. And he's been provided that and has no objection to that.

2 So I just would say that instead of 48, it would -- strike that,
3 but insert 48-A in lieu of 48 as the Plaintiff's damages for loss of stock
4 options or 750,000 based upon three different strike prices -- I'm sorry,
5 three different fair market value prices.

6 THE COURT: Okay. This -- the -- Defense, have you seen this
7 48-A?

8 MR. VOGEL: Yes, we have.

9 THE COURT: Do you object to it?

10 MR. VOGEL: No.

11 THE COURT: Okay. So then that will be admitted as 74-48-A.

12]Plaintiff's Exhibit 74-48-A admitted into evidence]

13 MR. JIMMERSON: And just so you know, Judge, the
14 calculations are based upon a dollar and based upon .50 cents. The jury
15 can decide any number they want, do their own calculation.

16 THE COURT: Okay. All right.

17 MR. JIMMERSON: All right.

18 MR. VOGEL: The next one is 49, which is described as a
19 value of statistical like summary table. It's not a governed table; it's
20 really just part of his report.

21 MR. JIMMERSON: These -- this is the -- it's a chart that he
22 used for hedonic damages. It's necessary. We certainly need to have it
23 in there.

24 MR. VOGEL: I'm not sure that's a valid foundational basis
25 that I really need it in there.

1 MR. JIMMERSON: No. No. I -- you're right.

2 MR. VOGEL: It's a --

3 MR. JIMMERSON: He speaks about it in his depo -- in his
4 deposition. If we need to go to his transcript, we can do that.

5 MR. VOGEL: And I don't mind -- I don't have a problem with
6 him testifying about it, but in my view, this is still just part of his report.

7 MR. JIMMERSON: Well, one of the jury instructions that
8 we've stipulated to is that one or more of the parties have used chart
9 summaries. This is chart summary that summarizes multiple treatises
10 and economic analysis and federal studies that value a person's life at
11 about \$4.6 million and \$2,005. And they adjust this for the current time
12 period.

13 THE COURT: And that's what he says in his deposition?

14 MR. JIMMERSON: Yes.

15 THE COURT: Okay. I mean, it seems like it's a learned
16 treatise reference to me.

17 MR. JIMMERSON: He has five treatises with five sources.

18 THE COURT: That's what it looks like. I'm not -- I mean, it
19 talks about there's a category here called studies and there's five of
20 them. And as we know, NRS 51.255 entitled learned treatises says to the
21 extent called the detention of an expert, basically you could admit them
22 as long as it's reliable authority. And so if he says that's what it is in his
23 deposition and now -- then I'll -- and that's an offer of proof the Plaintiffs
24 are making, right?

25 MR. JIMMERSON: Yes, it is.

1 THE COURT: Okay. So I'll admit 74-49.

2]Plaintiff's Exhibit 74-49 admitted into evidence]

3 MR. VOGEL: And I don't believe he actually does say that,
4 but I could be wrong. I would just retain my objection.

5 MR. JIMMERSON: Okay.

6 THE COURT: All right.

7 MR. JIMMERSON: You know, give it a [indiscernible]. I don't
8 understand any of that. I know he spoke about it.

9 MR. VOGEL: And then Exhibits 50 through 65 are all
10 computations and tables that Dr. Smith put together related to Mr.
11 Landess. Again, this is part of his report in our view.

12 MR. JIMMERSON: These are the exhibits to his report.
13 They're not part of the narrative. And each one speaks to calculations.
14 So these are all summaries, if you will, of his calculations, and he goes
15 through, in his narrative, he'll talk about table one says this, table two
16 says that. Table three subtracts system credit to --

17 THE COURT: Okay. I see what they are. So that takes us
18 through how many? To which page now?

19 MR. JIMMERSON: 15 of those.

20 MR. VOGEL: There's 50 through 65.

21 THE COURT: Okay. I'm going to allow for those; here's why:
22 To me, it's the same thing as if he were here live in court and he put it up
23 on the board or an easel and he put, you know -- it says -- it -- he's -- this
24 is not really so much part of his report. I think it's part of his -- it's a
25 summary of his testimony, bottom-line damages testimony. And so he

1 could -- if he were here live in court, he could get up and write all this on
2 a piece of paper, and it could be admitted for that, at that point.

3 MR. JIMMERSON: It ends at 65, Judge.

4 THE COURT: It ends at 65. Okay. I think it's -- it helps the
5 jury instead of having them all take notes as to all this, they'll have a
6 reference point that's better than that.

7 MR. JIMMERSON: Now, let me help you.

8 THE COURT: So I'll agree to that.

9 MR. JIMMERSON: Let me call this table number 65. It needs
10 to be redacted, Shawwna.

11 THE CLERK: Yeah, I just realized that, too.

12 MR. LITTLE: It does.

13 THE CLERK: And I'm going to --

14 THE COURT: Okay. So which -- lead us in -- I just decided to
15 admit, I think --

16 MR. JIMMERSON: Through 65.

17 THE COURT: 50 dash -- oh, I'm sorry, 74-50 through 74-65.

18]Plaintiff's Exhibit 74-50 through 74-64 admitted into evidence]

19 MR. JIMMERSON: That's right. But 65 needs to be adjusted.

20 THE COURT: But 65 needs a redaction.

21 MR. JIMMERSON: It's a summary, Judge, and so we did --
22 we need to correct the loss of stock purchase options, scenario A and B
23 and C --

24 THE COURT: Oh, I see it there, yeah.

25 MR. JIMMERSON: -- to the 48-A numbers.

1 THE COURT: Okay. All right. This is consistent with the idea
2 he vested in 1.25 million shares and --

3 MR. JIMMERSON: Right. Which needs to be deleted.

4 THE COURT: -- the -- that of the shares. Okay. How are you
5 going to do that?

6 MR. JIMMERSON: I was going to retype 65 and make it 65-A.

7 THE COURT: Okay.

8 MR. JIMMERSON: All the numbers will be the same except
9 for the section that says loss of stock.

10 THE COURT: Okay. That's fine. So that will be admitted
11 once provided to the clerk as 74-65-A.

12 MR. JIMMERSON: Right.

13 THE COURT: In lieu of 65.

14 MR. JIMMERSON: That's right.

15 THE COURT: Okay.

16 MS. GORDON: 65 is not in?

17 THE COURT: Right. This 65 is not. The Plaintiffs are -- they
18 have to give the clerk 74-65-A. It's a -- they're structuring it so it wouldn't
19 be confusing to the jury. Okay. Okay. And then 66 is the last one. What
20 about it?

21 MR. JIMMERSON: Yes, it is.

22 THE COURT: And I don't have any other 66. My 66 doesn't
23 have a 66.

24 MR. JIMMERSON: It's the *Terra vs. Lopez* case, and I -- in
25 light of the ruling you've made, I think it should be out, don't you?

1 THE COURT: Okay. Good. It's out. And that's it. We're
2 done with that.

3 MR. JIMMERSON: That's right.

4 THE COURT: Anything else we need to do for this deposition
5 to be read?

6 MR. VOGEL: No. There are three Defense exhibits, but I
7 assume they would be out as well. They're all orders excluding Stan
8 Smith, so --

9 THE COURT: Okay. Good. So that's it for -- is there anything
10 else I need to do by way of designations, calmer [phonetic]
11 designations?

12 MR. JIMMERSON: No.

13 THE COURT: Okay. Anything else?

14 MR. JIMMERSON: We'll supply 65-A.

15 THE COURT: Anything else for the court record?

16 MR. JIMMERSON: No. We'll supply 65-A Monday morning.
17 That's all, Judge.

18 THE COURT: Okay. The clerk has something to talk about.
19 The clerk has something to talk about.

20 THE CLERK: Counsel, I have a note that says Court's Exhibit
21 37 is pending, counsel to work together. Do you know anything about
22 37?

23 MR. JIMMERSON: Let me look at it.

24 MR. VOGEL: Yeah, I remember you reminded us about that
25 last night and probably a week ago.

1 THE CLERK: That would be the binder.

2 MR. JIMMERSON: That's the binder.

3 THE CLERK: Yes.

4 MR. JIMMERSON: Right. Well, we marked the binder as a
5 Court exhibit, have we not?

6 THE CLERK: That's what -- that's what he's saying. It's
7 marked as Court Exhibit 37, but it's pending.

8 MR. VOGEL: Yeah, it's pending.

9 MR. JIMMERSON: Well, I don't know what you mean by
10 pending. It's --

11 MR. VOGEL: No, this is the issue of delivering of the binder,
12 the x-rays, all that fun stuff.

13 THE COURT: All right. Anything else for the court record
14 today?

15 MR. JIMMERSON: Yes, Judge. I'd like to mark as the Court's
16 next exhibit, we'll get you a copy, Mr. Little's office went so far as to get
17 the courier charge that Howard & Howard was charged for delivering the
18 binder of x-rays in April.

19 THE COURT: Okay.

20 MR. JIMMERSON: So now, does that mean, Ms. Gordon,
21 that you're contesting the contents it was delivered to you in April and
22 signed for by your office?

23 MR. VOGEL: Yes, that's exactly -- that's exactly it.

24 MR. JIMMERSON: I see. Well --

25 THE COURT: Anything else for the court record today?

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MR. JIMMERSON: No, sir.

THE COURT: Defense?

MS. GORDON: No.


MR. VOGEL: No, Your Honor. Thank you.

THE COURT: Okay. Let's go off the record.

[Proceedings adjourned at 4:45 p.m.]

* * * * *

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


John Buckley, CET-623
Court Reporter/Transcriber

Date: August 2, 2019