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.: A-18-776896-C

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME 3

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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
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Electronically Filed
8/6/2019 9:15 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON LANDESS, Plaintiff(s), vs. KEVIN DEBIPARSHAD, M.D., Defendant(s).	CASE#: A-18-776896-C DEPT. XXXII

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

APPEARANCES:

For the Plaintiff:	MARTIN A. LITTLE, ESQ. JAMES J. JIMMERSON, ESQ.
For Defendant Jaswinder S. Grover, MD Ltd:	STEPHEN B. VOGEL, ESQ. KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Docket 81596 Document 2020-29388

Case Number: A-18-776896-C

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Las Vegas, Nevada, Monday, August 5, 2019

[Case called at 9:10 a.m.]

THE COURT: All right. We're on the record and outside the presence of the jury. On Friday, we did have an off the record discussion in the conference room, where I -- and people can make a record, if you want. Any party, any lawyer can make a record as to what we did on Friday in the conference room, if you want. But just to briefly summarize it, I indicated that I had concern about the fact that the jury had seen Exhibit 56, page 00044, the two-page email dated November 15th of 2016 from Mr. Landess to Mr. Dariyanani, or at least relevant parts of it.

And I indicated that I'd be willing to, as an offer, but not mandatory, I would be willing to help the parties settle your case, if you wanted to or otherwise you all could -- maybe over the weekend or even Monday, which is now, spend time trying to figure out if you want to settle your case. And I said that because it appeared to me that you know, with the amount of time I had to deal with the issue on Friday, which was hours or less, that there was the potentiality of a genuine concern that could lead to a mistrial.

So I said that, you know, one way avoid the practicalities of a mistrial, of which one is having a whole new trial again, where we've been here for two weeks, you know, you could settle your case. So let me just stop and see.

Is there anything along those lines that anybody wants to do?

MR. VOGEL: No. We've discussed it with our client and their position has not changed.

THE COURT: Okay. All right. Well then that takes us to the next item which is this. This is a motion for mistrial that looks like it was filed last night, Sunday night or came to the Court's attention sometime around after 10:00 last night, I think. And so I saw it for the first time this morning and that's why I'm a few minutes late coming in, is because I tried to make some sense of the motion. In other words, I just tried to in my mind conceptualize the extent of what was brought up. And so I did that. Now, I, in general, I see what's in the motion for mistrial from the Plaintiffs.

Is there an opposition that the Defense has to a mistrial at this point?

MR. VOGEL: No. We just saw it this morning as well, so we would need time to --

THE COURT: Well, I mean as -- do you intend to oppose the motion or do you --

MR. VOGEL: Oh, absolutely. Yes.

THE COURT: Okay. So you oppose the idea of a mistrial?

MR. VOGEL: We do.

THE COURT: Okay. All right. So we have to reconcile that. The jury is here. So that's going to take a little while. So Dominique, I'd like for you to go tell the jury that there's an item that we have to deal with and that I do anticipate that's going to take a little while. So at the earliest, I'd ask them to return outside at 10:00.

THE MARSHAL: Okay.

THE COURT: All right. The way I see the situation is that really I think there's two essential components to what we need to do now, given that the jury is here and there's a pending motion for mistrial. I think the first item is to determine whether I would grant or not the mistrial itself. The second item, which I did see in the motion, has to do with fees and costs. I mean you could see that in the title on the motion. There's a motion for mistrial and fees/costs filed by the Plaintiffs.

So my thought is, and I want counsel to weigh in on this structural procedural thought and tell me if you agree or disagree with my thought. My thought is I should now hear argument from the Plaintiffs and Defendants about whether I should grant the mistrial. I do think that if granted, the other part of the motion, the fees and costs part of it is something that would have to wait until another day, because I think I -- well, I know I would want to give -- unless the Defense doesn't want it, but I'd be shocked if you didn't -- I would give the Defense an opportunity to file a pleading relevant to the fees and costs aspect and then have a hearing off in the future on that, in the event we got to that point of it.

In other words, I -- you know, I wouldn't say to the Defense that now as it relates to fees and costs, you have to handle that right now live, when you have a motion than came in at 10:00 Sunday night. Now, that's not to say that I criticize the timing of this. Actually, the contrary. I want you to know Mr. Little, it's true. I appreciate that you spent -- someone spent time over the weekend putting this thing together,

because I'm sure at some point, I'll tell you about my weekend.

And I'll tell you the ten hours -- ten Saturday and then the -- I don't know, probably I had to tone it down or get divorced -- seven yesterday that I spent on this myself. So I have all -- all the items I put together I have here, that I did on my own over the weekend. So I certainly anticipated that this Monday morning was going to be interesting. I did invite, in our informal meeting on Friday, I did invite trial briefs, I think is what I called it.

But I certainly invited the idea that certainly lawyers could, if they wanted to turn their attention to providing law on the obvious issues, you could. I mean, the issue became apparent late Friday, so -- just by operation of the calendar. You know, you have Saturday and Sunday and then here we are. So it could be that counsel worked on the weekend. Maybe. Maybe not, you know. I did. But that doesn't mean you have to. Sometimes it's good to take a break.

But anyway, I appreciate the idea that you put that pleading together and interestingly enough, somewhere in the neighborhood of about 90 percent of it, I came up with on my own. But the extra 10 percent, especially one of the cases relevant to the fees and cost aspect I hadn't seen before. So -- but that's left for another day no matter what, because again, unless the Defense tells me now you don't want an opportunity to file anything, the fees and costs aspect will have to wait.

So with that, let met just turn it over to counsel. Any comments on anything I've said so far? Because I'm laying out a proposed procedural construct.

MR. JIMMERSON: On behalf of the Plaintiff, you know, I know the Court has been accurate in its recitation of events on Friday and Friday afternoon and over the weekend. We did spend collectively, Mr. Little and myself and our respective offices, the weekend, hitting the books first and then writing a motion yesterday. And we thought it important and appropriate to get in our file yesterday, so that the Defense would have the opportunity to read and review and I think we served it around 10:30, 10:45 p.m. last evening and also delivered a copy to the Court at that time.

I did want to comment that in terms of making a record, the Court placed both sides on notice in the conference room immediately afterwards relative to the serious nature of the information that was read to the jury, the Court's statement that it was seriously considering a mistrial being granted, placing both parties on notice of the same and eliciting from each side any response that we or opposing counsel would have to the Court's fair comment and observation as to where were at after that.

So I think the Court should be complemented and that both sides were given fair notice and opportunity to speak with the Court Friday afternoon, after this terrible set of events was put in place to respond and to gives our viewpoint and that's where that set. We went to work as the Court noted. The Court did, too. And thank you very much in terms of the nature of this. And so there's just a few points that we would make without getting too deeply into the weeds.

First, the caselaw in Nevada as well as elsewhere cited in our

motion tells us that --

THE COURT: Well, Mr. Jimmerson, I'm going to interrupt you for a reason.

MR. JIMMERSON: No, no problem.

THE COURT: Sorry.

MR. JIMMERSON: Yes, sir.

THE COURT: I apologize for the interruption --

MR. JIMMERSON: Uh-huh.

THE COURT: -- but you know, I say that to both sides when I do it sometimes. But I'm just asking right now. I laid out a procedural --

MR. JIMMERSON: Oh, I'm sorry. Yes.

THE COURT: -- roadmap.

MR. JIMMERSON: Yes.

THE COURT: Where we handle only the motion for a mistrial, reserve the fees and costs aspect depend -- of course which would be dependent on whether I grant the motion or not --

MR. JIMMERSON: Of course.

THE COURT: -- for some other time, to give an opportunity to weigh in.

MR. JIMMERSON: No -- thank you.

THE COURT: So --

MR. JIMMERSON: On that basis, we would agree with that.

THE COURT: All right. Let me ask Mr. Vogel --

MR. JIMMERSON: I think that that --

THE COURT: -- and Ms. Gordon.

MR. JIMMERSON: -- that that needs to be where that's at. We need to address this issue now and the fees and costs issue can be delayed and give the Defense an even greater opportunity than it's had since all of us have been presented with this together. Thank you, sir.

THE COURT: Okay. Mr. Vogel.

MR. VOGEL: Thank you. Good morning. We obviously spent quite a bit researching as well. And we do -- we do appreciate you taking us back after Court on Friday and going through it and expressing your willingness to help try to settle this and expressing your view that you know, you felt that things were kind of going Plaintiff's way on this case. We discussed that with our clients and --

THE COURT: Well, I didn't actually say things were going Plaintiff's way. I said that on liability, I think -- you know, okay.

MR. VOGEL: Yeah.

THE COURT: One thing about it is, we've got to be careful, because I want to make sure everybody in the room is going to have adequate time to make their record, but I have to make mine, too, because I don't want any mystery in the record, okay? So if you don't mind, just have a --

MR. VOGEL: No, no.

THE COURT: -- just have a seat, please. Have a seat, unless you want to stand up for about five minutes or more. Okay, so now it's come up a couple times and so, you know, I just liking making a good court record. And anybody can memorialize things that happen off the record, including me. So if anybody wants to memorialize something

that happened off the record, then the answer, as you know is always yes. You can do that and there's no hurry in doing that. But at this point, it seems like I should memorialize what happened on Friday.

After the item came up in question -- that is the whole chronology of events, which at some point, let's put that all in the record again, most likely, that led to the jury now hearing from Ms. Gordon reading a couple paragraphs from this email at Exhibit 56, page 44. I offered -- this is -- and so if anybody disagrees with what I say, you're welcome to. You don't have to agree with what I say, if I memorialize something. If you disagree with some description or characterization, you're welcome to say I disagree, that's not what happened. I wouldn't be offended.

But this is what I think happened. In my mind, I obviously recognize the issue. To me, it was a rather unique issue, one I haven't really seen before. I've been here eight and a half years. I've declared no mistrials, okay? And so I just felt like well, in my heart of hearts, I really am now for the first time since I've been here, truly thinking wait a second, there's a genuine issue of potential mistrial in my mind as a judge. And of course, that is magnified, because we've been here putting a lot of effort in for a couple weeks, so it's not as though this happens on day 1 or day 2.

So in my mind I'm thinking wow, I need to deal with this. I can tell you that in my mind, too, was the idea that the email itself, as we all know and I'm sure we'll talk about, my guess is at least ten times sometime today, but I guess the first time will be right now. You know,

the email does reference words, hustling Mexicans, Blacks and rednecks and then later talks about the Mexican laborers stole everything that wasn't welded to the ground. And that, I mean immediately, once -- you know, it took a few minutes for all this to hit.

It's not like I knew the pristine, model answer, you know, within seconds or even minutes, contemporaneous with Ms. Gordon, you presenting this to the jury. It look a little while for me to process, okay, what just happened, how'd it happen. It's from an admitted exhibit. Dariyanani did put some character style testimony out. Okay. There's no objection. You know, I mean, it's not as though I had the model, you know, A+ bar exam answer ready to go.

So -- but in my mind, I guarantee you -- I'll tell you the first thing that hit me. We got a woman on the jury named Adleen Stidhum. She's African-American. We gave her a birthday card during the trial. We celebrated her birthday during the trial. We gave her cupcakes with the jury and made, I think, a respectful sort of event out of it all. And so the first thing to hit my mind was wow, how could she feel? And then the second thing to hit my mind was, as I recall, Ms. Brazil, who's also African-American, served. I think she served 20 years in the Navy, if I recall that correctly.

And I just thought about, you know, what I said early on in my pep talk to the jury, where I talked about the fact that my father served in the Army 27 years and he's buried in Arlington. I think I might even have mentioned that I served as a member of the United States Army JAG Corps, you know, where I signed up for three years and

stayed four and a half, because I was a trial lawyer and it was wonderful and I loved it. And so I -- you know, I espouse all the virtues of serving on a jury and what a legitimate call to service this is.

And it just -- I felt this feeling of illegitimacy and I felt bad. I mean, I felt bad. So I wanted to have this meeting, because I just felt like well, enough of me as a judge, enough of me as an eight and a half year judge is comfortable with having to recognize we got a problem. It's a big issue. And so I want to do, as I've always done, try to handle things in a way that make sense. You know, whether it was my time at the bar or here, I always try to do things that make sense.

You know, whether it was the time that Jack Howard called me at 1:00 in the afternoon and told me that he had a lawyer in his office who was drunk, who showed up to do a deposition at 1:00 in the afternoon on a weekday. And I went over to Jack's office. I drove over there. Sure enough, the lawyer there for the deposition was drunk. Later found out, high on meth. But I took that lawyer home and I put him on my couch.

I then called a guy named Mitch Gobiega [phonetic] and I said Mitch, can you come on over to my house. There's something I want you to help me with. He then took that lawyer that day and drove him to a place called Michael's House in Southern California, a five-hour drive from my house. That lawyer stayed in rehab for 30 days, made it through all that and still today, when I see that lawyer, he and I have to spend a moment together and both of us cry. It's happened ten times since I've been a judge. It's weird. Because he made it through.

I don't know why that story came to mind, but I can tell you it's the same thing here. It's that same sense of urgency that there's a problem that needs to be dealt with. So I invited this meeting in the jury deliberation room. And when we were back there, I said look, there is a way to avoid the continuing obvious specter of a mistrial and that is optional. Not required. I even mentioned that I thought the old style judges in the old days would get everybody together and say look, you need to settle your case, and essentially, almost order it.

But not my style, because ethically, I can't do that. A judge cannot order you to settle your trial, at least in my view, okay? But I can strongly urge it as something that's practical, that makes sense to do, when you know as a judge that there's a serious specter of a potential mistrial in the air now. Especially after two weeks and the obvious effort that now would have to be put in doing another trial. So I -- an optional way offered to give my editorial comments along these lines. And as I took it, the lawyers wanted to hear that.

And I think I even said look, if anybody doesn't want to be here or doesn't want to hear these editorial comments, all you need to do is ask and there'll be no hard feelings and we'll go off on our weekend. But the -- as I remember it, the lawyers entertained that and I hope appreciated it, but at least allowed for it or acquiesced in it or wanted it to continue, whichever way you'd like to take it.

So I said look, as an option, rather than dealing affirmatively with the mistrial issue that's in the air now in my view, what we could do is I can come in Monday and I'd be willing to sit in the conference room,

if it took all day even with the parties. That is, with the lawyers, Mr. Landess and the doctor and you know, the insurance rep or you know, the relevant parties to all this and I'd give you my opinion. I mean, it's a jury trial, so I think I can give my opinion as to the evidence I've seen. But again, I would only do that if everybody wanted me to. And so it was out there for consideration.

Now, neither client was in there. So Mr. Landess wasn't with us on Friday and Dr. Debiparshad wasn't there. So of course we all knew that before making any decisions on this, you'd have to consult with your clients and then get back. Over the weekend, actually, one of the criticisms of myself I had that really bothered me was I should have set up a protocol where we all somehow communicated over the weekend on this, but I didn't. So I -- it put in a position where I knew that first thing on Monday morning with the jury here would be this issue.

But I do -- I respect and understand, if you know -- if -- and it's really Dr. Debiparshad. If he doesn't want to do this, he's the client. I think he makes that decision. And I have to respect that. I don't hold any bad feelings as to that. You know, if he wanted to reconsider that, I'd give you as much time to talk with counsel as you wanted to here this morning right now even, because I think this mistrial issue is a serious one that has legitimate merit. But I won't make the decision on it ultimately, of course, until I hear from both sides.

But in any event, if the parties wanted to, I still would spend as much time as necessary going over what I thought the evidence was and give an opinion as to what could happen. With that said, of course,

Got only knows what the jury's going to do. Anybody can give their best estimate and then the opposite can easily happen. But you know, I've been sitting here and I have all this. I don't know, this is probably like you know, 20 some pages of my notes of everything that's happened in the trial. Every witness and the highlights of what they've all done. I could share that.

And in our Friday meeting, I think based upon either acquiescence or invitation, the parties did want to hear and I did give a -- sort of a -- I think I called it a thumbnail overview or thumbnail sketch of things and I said look -- and again, this is an opinion. And I gave this opinion, because I thought perhaps it would foster taking me up on this. I said look, my guess is that there's more -- there's enough evidence to meet the burden, the preponderance burden on the medical malpractice. I'll tell you Dr. Debiparshad, that's what I said to everybody on Friday.

In other words, it's not that I disrespect your position or Dr. Gold's position. It's just that if you were to ask me, I would say to this point, that the medical malpractice itself, though I'm sure you did the best you could and it was well-intended and you didn't do anything intentional to try to harm Mr. Landess, but that's not required in medical malpractice. It's just making a mistake that now, unfortunately, causes some effect. And you know, my view is that Plaintiffs would meet that burden. I didn't give all the reasons for that. I'd be happy to spend time doing that, though.

But I also said that I don't think the Plaintiffs would get the home run on their damages. And this is all given with totally

discounting and not considering at all this email, of course. I took it from the perspective of, if the jury didn't hear the email, here's how I would evaluate the case. And I just in a general way said I don't think they're going to get the full extent of this stock option item and I further said separate from the stock option item, my thought is that the pain and suffering wouldn't go on until age 80.

I don't think the pain and suffering would be more than what the time period from the first to the second surgery, really -- what kind of pain and suffering you have associated with those months. Whatever it is, six months. That was my opinion. So that means that if I were right, the jury would find medical malpractice. They would certainly give some damages related to the past medical bills. They would give some pain and suffering for the six month time period on a theory that had it been done correctly, he would have healed in six months, like he probably has done after the Dr. Fontes surgery. And that is just my best guess as to what would happen.

I think on the stock part, that's so nebulous, because there's so many components that go into that, including could he really work or not. But I just think that it's likely that they wouldn't do much. They'd do some, probably, but not much on the stock option part. So what's the ultimate number? I don't know. If I sat down and had a settlement conference, if I were able to do that, I'd probably give you a number. But I think that's what would happen. And that's what I said on Friday, but I've magni -- I gave a little bit more now.

But -- so -- and we left the meeting and I -- you know, I take it

that the lawyers talked with their clients. And so again, no hard feelings, if we don't do it that way. I offered that, because I felt that was a fair and reasonable approach to the situation. And this is -- I guess I'll stop in just a second. The reason -- I think the main practical reason I felt that was I un -- if there's one thing I am certain about -- certainly not positive about my opinion as to a what a jury may do, but one thing I am absolutely certain about and that is that nobody in the room wants to do this all over again from the beginning, because that would take some time to reschedule the trial, most likely with another department and start all over again.

And I'm sure you get the feel for what that mean to go through this whole thing again. So I felt the, you know, the pain associated with that, just from a human perspective, not even to mention this idea of the costs, you know, separate from who's responsible and would I award costs or not. If you have a new trial, one thing's for certain. All those costs, all these attorney's fees, all your time, your time way from two weeks of your practice, all these experts, my guess is they're not going to do it again, unless they're paid again.

I don't even know what that would be. Couple hundred thousand just in costs alone? Five hundred thousand dollars in fees and costs? I don't know. And so I'm thinking, you know, why not do something to try to avoid even the potentiality of something like that? And that's why I offered what I offered. So that's it. I made my record. Now we're back to Mr. Vogel as to the --

MR. VOGEL: Yes.

THE COURT: -- conference on Friday.

MR. VOGEL: Yes. Thanks, Judge. And we appreciate it and I -- and I understand your comments on your view on how the evidence came in was a took to talk to our clients with. And that's what we did. We talked to them. We talked to a lot of people. I talked to, you know, much wiser lawyers than I and got their take on it. We talked to a judge. We talked to several people about this. And we appreciate it. And ultimately, based on all the discussions, our review of the law and whatnot, we felt like, look, this is not actually a case for mistrial and that we want to go forward.

That was what we came to. But yes, we definitely appreciated your comments on that and I appreciate your setting out how you'd like to handle this right now going forward procedurally, so that's all I wanted to say on that point.

THE COURT: All right. Well that takes us then to the -- so I guess there's no reason to revisit the idea of potentially trying to settle your case?

MR. VOGEL: If you'd like, we can talk to our clients, but after talking to them this weekend, I don't think that they've changed their mind.

THE COURT: All right. Well, we don't know that until you've talked to them, right? So why don't we just go off the record and give you a few moments in the conference room. Do you think that's fair or do -- if you don't want to do that, you don't have to. I'm just --

MR. VOGEL: No --

THE COURT: I said a lot of things that he's heard now that he --

MR. VOGEL: Yeah.

THE COURT: -- didn't know on Friday, right -- over the weekend.

MR. VOGEL: We're happy to do it.

THE COURT: So who knows what'll happen, right?

MR. VOGEL: Right.

THE COURT: Okay. So let's go off the record and you guys talk with each other and I'll be here. Let me know when you want to resume, okay?

MR. VOGEL: Very good. Thank you.

[Recess taken from 9:40 a.m. to 11:05 a.m.]

THE COURT: Okay. We're back on the record.

Mr. Vogel?

MR. VOGEL: Yes, Your Honor. We had the opportunity to discuss. We'd still like to move forward with the motion, and hopefully with the rest of the trial.

THE COURT: Okay. All right. So the jury's probably back now at 10. So I want to hear this motion. The only thing I can think about, and give me your input, please, counsel, is tell them that it's going to be a while, 11:00. I mean, that's all I can think about at this point. Does anybody have a thought? Have them report back at 11?

MR. JIMMERSON: That should be sufficient time for the Plaintiff and Defendant to give them -- give you their views, our views.

MR. VOGEL: I agree, Your Honor.

THE COURT: Okay. Well, Dominique, let the jury know that -- is it okay if I tell Dominique to tell the jury that everybody in the room appreciates their patience, and we're dealing with something that is going to take more time, and we'd like to have them come back for an update or to come in at 11:00? Is that okay? You think that's fair?

MR. JIMMERSON: Plaintiff would stipulate to that, Your Honor. I think that's appropriate.

THE COURT: Okay.

MR. VOGEL: Yes.

THE COURT: You know, I've got to do something to -- I want to let them know that we respect them.

So okay, Dominique, let them know that.

All right. Plaintiff's motion for mistrial?

MR. JIMMERSON: May I please the Court, Your Honor. The reference is made, of course, to Plaintiff's motion for mistrial and for fees and costs filed yesterday at 10:02 p.m. But my argument is not to simply regurgitate that, which you have already read, and which the Court has already studied over the weekend through the efforts. It is to highlight what we believe to be both the law, as well as the very real practical and real setting that we're in, and the consequences that follow.

Let me begin by saying that the Plaintiff's case is essentially, you know, three elements. First, is to establish the professional negligence of the Defendant. Second, is to demonstrate the causation that that negligence caused. And third, is the damages that proximally

and reasonably flowed from the negligence of the Defendant upon the Plaintiff.

Towards that end, witnesses have been introduced now for two weeks. Most of the time I would say in terms of allocating time, speaking to the liability portion of the case, the medicine that was involved, for which we've heard from multiple physicians from the Plaintiff; Dr. Harris, Dr. Fontes, and Dr. Herr. From the Defense, Dr. Debiparshad, and Dr. Gold. So five witnesses who spent a fair amount of time on that.

In terms of the damages separate and apart from the testimony of Mr. Landess, Mr. Dariyanani was called Friday morning -- last Friday morning, following the completion of Dr. Gold's testimony, to speak to two items. One would be the reasons for his termination, and linking causally the -- his inability mentally and physically to perform his job to the loss of his employment to establish the basis for which both Mr. Landess and Dr. Smith could testify as to the lost wages, past and future. As well as the lost stock options, for which Mr. Dariyanani would speak to the value of the stock options at the time of trial, which is now.

The sequence of events, as reflected in the transcript of last Friday, day 10 of trial, reveals that the question that had been asked of Mr. Dariyanani was was it difficult for Cognotion, and/or Mr. Dariyanani individually to terminate Mr. Landess. And he answered yes. And he answered, please explain. And Mr. Dariyanani gave reasons for that, both in terms of being satisfied with Mr. Landess' work, that the termination was not through any fault or personal fault of Mr. Landess in

performance, but due to his inability to perform both mentally and physically, to make meetings, to be able to withstand the pain that he was going under, and that that continued from October 2017 through June of 2018, whereupon the necessity of Cognotion to have someone to fulfil this responsibility became so apparent and needy that he was -- a new associate counsel -- or a new general counsel was found by the name of David Kaplan.

What led to this -- what's being argued by the Defendant as to the justification is that Mr. Dariyanani was asked by me a question that did not call for in any regard character evidence at all. The question was benign. The question was did you find it difficult -- or did Cognotion find it difficult, or yourself, to terminate Mr. Landess. And he answered yes. Please explain. Mr. Dariyanani's response was in some regards very responsive to the question; in other regards, nonresponsive to the question. The obligation to move to strike testimony that is nonresponsive to the question lies with the Defendant, as well as with the Plaintiff. In the sense, it's a shared responsibility that when a witness responds in a way that in part is responsive, in other ways not, the Defense certainly has that right and obligation to move to strike that.

The point in this is just simply first of all, to be accurate in terms of the procedural posture of how we got here. Secondly is to reveal that there was no opening of any door by the Plaintiff to character evidence. Indeed, I think a fair statement can be made, and the Defense don't argue to the contrary, that there was essentially no character evidence offered by the Plaintiff or by the Defendant in this case

regarding any of the parties, including the Plaintiff and the Defendant throughout the case.

The -- filling in the dates -- filling in the circumstances then upon cross-examination, Defense counsel, Ms. Gordon, sought the introduction of a group exhibit, 122 page Exhibit 56. Plaintiff's proposed exhibit, not yet admitted, from which she sought to read two or three entries from a couple of those emails, of which there was 122 -- 79 pages. We have the exhibit here. I don't want to misstate it. I thought it was 122 pages. It began at 487 -- I'm sorry, it started at 56-001, and completed at 56-079. So I guess it's 78 pages. To the extent that I said 122, that's a mistake. I guess I was looking at the Bates number on the right. Yeah, it's about 80 pages; 79 pages in length, of which the offensive email is marked, as the Court has noted, Exhibit 56-044 and 045, which 044 being read the second and third paragraphs of that email dated Tuesday, November 15th, 2016.

And the -- and so character was never an issue in this case. It was never introduced by that. And in terms of character, you typically would have, if you were to have character evidence -- and you see that more in criminal cases than in civil. Character evidence really has no place in civil cases. It would be through opinion testimony, or the like, which was not offered in this case.

Now, as to the case law and the circumstances affecting that, this Court has already weighed in and supported by the Plaintiff, as to the radio activity, or the bombshell nature of this information. It starts with one principle. While there was, in terms of a time -- temporal time,

maybe five to ten minutes between Defendant's request for admissibility of Exhibit 56, the Plaintiff's granting the same through counsel, specifically myself, and the use of the offensive email, the Plaintiff and counsel was not aware of the content of this one specific email.

But more importantly as to the legal principle, the use of inadmissible evidence, even though admitted through inadvertence, mistake, or accident for an improper purpose is clearly improper, wrong, and should not occur. And the case law from the Nevada Supreme Court, as well as several other courts we've cited is very clear. The Court's own research revealed the same.

The other part of it is is that the -- both the Nevada Supreme Court and other cases have held that information, or evidence, or comments about race, in particular, are very much explosive, very much bomb-like, and are not capable of being reversed by curative instruction. And that I think is very clear from several cases in several courts throughout the United States. And that is exactly what was done here.

Respectfully, the Defense had in mind specifically this examination. They sought the admission of Exhibit 56. They had this particular email at their fingerprints. They prepared to read it. And they placed it onto the ELMO with highlighted language, with the intent of exposing that language to the jury. You know, it's almost as if in cross-examination the question is more important than the answer, because the question is what creates the prejudice that cannot be undone, and which it was effective here.

Furthermore, the question is truly a non sequitur. It was truly

irrelevant to the testimony of Mr. Dariyanani. The nonresponsive words of he's a beautiful man, as well as having he's both good and [indiscernible], that and flawed, giving a balanced view, would be -- would not be the predicate for which to introduce such prejudicial examination and the use of materials that are so prejudicial. I would say as a footnote to this Court, as already stated on Friday of last, that were a motion in limine submitted by the Plaintiff to the Court, or vice-versa where the roles were reversed and the Defense were to seek a motion in limine to preclude the use of the information on either side, the Court would have granted the same -- or likely have granted the same. And that clearly is the case here.

The premeditated nature of this examination by the Defendant is clear. And it's -- it cannot be reasonably argued to the contrary that the Defendant did not understand the radioactive nature of the material that they were going to introduce in front of the jury, recognizing that our jury is racially diverse, both in terms of African-Americans, as well as Hispanic jurors, which there are two of each, out of only eight regular jurors, plus two alternates. And I could be missing other overtones. But those were the four most obvious.

And so the impact of the --

THE COURT: Which four do you think?

MR. JIMMERSON: Well, I believe that for African-Americans, Juror Number 2, Ms. Brazil, and Juror Number 5, Ms. Stidhum, are African-American women. And I believe that Juror Number 4 and Juror Number 6, Ms. Asuncion and Mr. Cardoza are both Hispanics.

THE COURT: Cardoza is number 7, but okay.

MR. JIMMERSON: Is he 7? I thought he was 6. I'm sorry, I thought he was 7. You're right; he is 7. Thank you. He is 7.

THE COURT: I just want to make sure. I mean, obviously, I've already said as to Ms. Brazil and Ms. --

MR. JIMMERSON: No, no. But I will confirm --

THE COURT: I didn't think about that.

MR. JIMMERSON: Ms. Asuncion is Juror Number 4.

THE COURT: Okay.

MR. JIMMERSON: And Mr. Cardoza is Juror Number 7.

THE COURT: Right.

MR. JIMMERSON: And the case law is also explicit that a curative instruction is in most cases insufficient and not capable of undoing the harm and prejudice that's occurred to a party, in this case, the Plaintiff.

May I ask of you, Judge, that your recognition of that, and your, you know, heroic effort to try to save this was noted on Friday afternoon. But my point about the cementing of the prejudice is also accentuated by the fact that two and a half days have passed. You know, if this were on a Tuesday, and you were here Wednesday morning, it'd have a better chance at least in temporal terms, to reverse the prejudice that occurred. Here, the jury went home, and 72 hours have passed. And we're back together now on Monday morning. But that worsens an already ugly and prejudicial and irreversible sort of offense.

And the other aspect of it, I would just say is -- it calls upon

all of our common collective experience. And I call that upon opposing counsel as well. We all have practiced law for extended periods of time. We all have had life experiences that affect our being, and affect our behavior, and our intellect, and our view of the world. In the courtroom we've had many, many experiences that would guide us to our behavior that we hope is appropriate and reasonable, and certainly ethical, and within the rules.

And for the reasons that the Court noted in eight and a half years of the judicial experience of this Court, and my many years of experience, and opposing counsel's many years of experience, this is unprecedented in the sense of the extraordinary way in which a prejudicial piece of evidence that had no business ever to be admitted, and certainly, no business to ever be used, even if it was inadvertently or by accident admitted, can be undone. It's really -- because it's unprecedented, it's hard to point to other fact situations in our court system and in the administration of justice where such a taint could be articulated and explained. And because it is so extraordinary and unprecedented and devastating and outrageous, that mistrial is the only remedy.

And may I say that the Court on Friday in the off-the-record discussion, contrary to opposing representations as to what he remembers, my remembrance of the Court was not that the case was going Defendant's way, but the Court saw a mixed result; saw a leaning of the majority of jurors with the Plaintiff, but that the unwillingness, the Court perceived to grant the damages sought by the Plaintiff being a

likely result. But again, it's -- we're all speculating; we're not able to read the jurors' minds.

But irrespective of that, I don't -- I just point it out because it reminds me of the supreme court ruling about pornography; it's hard to define, but you know when you see it. This is very similar to that. It is hard -- in fact, it's impossible for me to understate the devastating irreversible nature of the prejudice that has been placed upon the Plaintiff. We'll never be able to recover from this. And it appeals to everything that's wrong about humankind, about our responsibilities as lawyers and officers of the court. It truly was inappropriate and just so extreme that it can't be reversed.

And as the Court has noted, both sides -- speaking for ourselves, the Plaintiffs, have expended more than $100,000 in out of pocket costs, approaching $150,000. We've all expended a year's effort. And certainly, both sides have worked very, very had to represent their respective clients. So it's not an easy motion to make because, you know, we have invested so much time, energy, emotion, and finances. Mr. Landess is 73 years old. His continued ability to be north of the border and breathing air is not assured. But what is assured is the absolute prejudice and irreversible harm that the Defendant's inquiry has placed upon the Plaintiff, and upon our jury.

Thank you, sir.

THE COURT: All right. Defense? Ms. Gordon?

MS. GORDON: Thank you, Your Honor. We're actually going to be breaking this down between the two of us. I'm going to get on the

record the procedural background of what occurred on Friday, and then Mr. Vogel will address some of the arguments made by Mr. Jimmerson.

As Mr. Jimmerson said today for the first time, the exhibit is not 122 pages. It's 79 pages. It consists of 23 emails that were produced by Plaintiff during the litigation in this case. I'm sorry, 32 emails total and the email issue used during Mr. Daryanani's cross is the 23rd email in that set. Those were disclosed by Plaintiff on May 29th, 2019 in its 12th supplement to the NRCP 16.1 disclosure.

That exhibit was later added to Plaintiff's pretrial disclosures, which were amended at least three times. They were paginated by Plaintiff, giving them ample opportunity upon opportunity to know what was in that exhibit, and to familiarize themselves with it, and where they could have, as Your Honor stated on Friday, then filed a motion in limine on it, if they found that prejudicial value was definitely more than any probative value that it may have. Defendant did not disclose that exhibit. That was entirely Plaintiff's exhibit.

When Mr. Daryanani was testifying, he gave a lot of character evidence. As Your Honor will remember, he talked a few times about the fact that Plaintiff had -- he was a beautiful person, he testified that he could give Mr. Landess bags of money, and expect that those bags of money would be deposited. He stated a few times that he would leave his daughter with Mr. Landess.

This is not an incident of one sentence of character evidence being given by Mr. Daryanani, and I don't believe that Plaintiff's argument that that exact testimony wasn't specifically elicited by

Plaintiff, should be well taken because certainly, with a grasp of the evidentiary rules that Mr. Jimmerson and Mr. Little, and Mr. Landess have at this point in their careers, they could have addressed it at the time.

They could have approached the bench and said, Your Honor, that sounds like he may have given some character evidence, we don't want to open the door. Mr. Jimmerson could have exerted a little more control over his witness to the extent that Mr. Daryanani would've have been offering such enormous amounts of character evidence, but none of that happened.

After that, the Plaintiffs specifically stipulated to the admission of Exhibit 56, and during the cross-examination, I would careful to ensure that Mr. Daryanani had indeed given that character evidence. I didn't immediately cross him on that evidence until the very end. I talked with him at least twice confirming that that was his evidence that he gave. That, Your Honor, gave Plaintiff's counsel another opportunity to perhaps step in. It was very clear that I was confirming character evidence that had been given by Mr. Daryanani. Plaintiff's counsel, if that was not his intention, he could have asked for a sidebar. He could have done a variety of things, Your Honor, at that point, to step in --

THE COURT: Okay.

MS. GORDON: -- and say, that's not what I intended.

THE COURT: Let me interrupt you for a reason to be --

MS. GORDON: Sure.

THE COURT: -- helpful here. I agree with the Defense that the issue of character was put into the trial by the Plaintiffs, so I do think that the Defense had a reasonable evidentiary ability to offer their own character evidence to try to show -- to impeach Mr. Daryanani, or to bring forth evidence to show that what Mr. Daryanani said about Mr. Landess being a beautiful person, the bags of money, the leaving the daughter, all that that you just mentioned. I agree with you.

MS. GORDON: Okay.

THE COURT: I mean, I don't think I could be swayed, actually, on that. I mean, I do think that the issue of character was put in, and so I think my concern is not that at all. I do think you had a right to do it. I think the issue becomes the extent to which he did do it, and so let me, in fairness to you, tell you the things that are on my mind that you wouldn't know, and this is a good seg-way for that, I think, right now, and you can take as much time to talk to me as you want.

You know, I've had the benefit of this weekend to really think about it and you indicated you talked to a judge. Well, I had two hours with Mark Dunn. Two personal hours in a room with him that I caused to occur because I wanted to talk to a better judge than myself. So I've had a lot of time to think over the weekend, so my thought is, with the item itself, I know I said on Friday in just trying to react to it as a human being and as a judge, that most likely, I would've granted a pretrial motion in limine to preclude this.

I'd like to tell you that upon reflection with an opportunity to think which judges should do. It's one hundred percent, absolutely

certain, slam dunk easy, I would've granted a motion to preclude the hustling Mexicans, blacks, and rednecks, where the Mexican labor stole everything that wasn't welt to the ground. I would've precluded that. And though not so relevant to this, but since we're having a meaningful discussion, I can tell you that I handed this to Mark Dunn, and the level of shock on his face was pulpable. And I handed it to him only asking him one thing, would you preclude this in a motion in limine.

That's how I started it, because I didn't want him to know the full extent of anything else I might have to deal with, and he told me, in no uncertain terms, what I was really already thinking, and that is that you absolutely have to preclude this because the issue of whether or not Mr. Landess is a racist or not is not relevant. And even if it relevant, if character is an issue, that's really -- that's the issue. I mean, race -- whether he's a racist or not is not relevant and is prejudicial. It's, I think, clearly what I would have to tell you, and that's the reason I would grant the pretrial motion.

So I think it's fair to say, okay, why not ask for a sidebar. I mean, certainly you have the witness in the witness box, Daryanani, and you have the item ready to go up on the ELMO. You could ask for a sidebar to discuss --

MS. GORDON: Us?

THE COURT: Yes. Us. You could ask for a sidebar to now indicate, I'm going to put this up, or for that matter, consideration could've been given to -- I mean, this is my question. I want to see if you want to answer this, to potentially redacting portions of it, because in a

motion in limine, I'll share with you that the proper way to do this would be to say, look, to the extent the Defense might want to use this to show Mr. Landess isn't a beautiful person or otherwise in the event character comes up, you want to use it to rebut character, you could say things like, I got a job working at a pool hall on weekends to supplement my regular job of working in a factory, redacting the word "sweat". Then delete or redact, "with a lot of Mexicans".

And then continue with non-redactions. "Taught myself how to play Snooker. I became so good at it I developed a route in East L.A. hustling --", redact "Mexicans, blacks, and rednecks" -- "-- on Fridays, which was usually payday." And then probably redact, "The truck stop Mexican laborers stole everything." And now what you have is you have usable evidence that he was a hustler. He taught himself to play pool, and he hustled people playing pool. Is that an indication of a beautiful person? Usable, admissible, but not overly prejudicial.

So that's the something I wanted to at least share with you that I did put down in my notes here -- these are some of my notes over the weekend. I put a note in here asking, what about a sidebar, what about redacting, you know, prejudicial parts of the usable item of evidence. So go ahead, if you want --

MS. GORDON: I appreciate that, Your Honor. I think that what that does is it certainly shifts the burden to Defendant, and what, I believe, you're saying is that it's admissible evidence, Your Honor. And as you've stated in this case and I believe in other trials you've had, admissible evidence is used for any purpose, can be used for any

purpose, and I don't think that the burden for how prejudicial a piece of evidence that Plaintiff disclosed and stipulated into evidence, the prejudicial nature of it should not be -- have to be addressed by the Defense, and out of curiosity or out of doing their job for them, I don't know, but I know that admissible evidence, it can be used for any purpose.

And I know that Plaintiff initially elicited and had impermissible and unethical character evidence. What the Defense is allowed to do in response to that, and what I actually have an ethical duty to my client, a person of color to do, is to use that evidence in impeachment. I'm allowed to do it, I should do it, and I did do it, and they did nothing about it.

THE COURT: So you think that the jury is allowed to consider whether Mr. Landess is a racist?

MS. GORDON: I think that I am allowed to use impeachment evidence that has not been objected to, and has been admitted into evidence by stipulation. I absolutely think I'm allowed to use it. I should use it on behalf of my client, and the burden should not be shifted to me to assist with eliminating or reducing the prejudicial value of that piece of evidence.

Dr. Debiparshad was asked about his race during his deposition. Mr. Daryanani went on for the first 15, 20 minutes of his testimony about his race. It's not new. Motive is always relevant in terms of Mr. Landess' reason for setting up our, you know, view on this case --

THE COURT: Um-hum.

MS. GORDON: -- setting up Dr. Debiparshad. I don't think it's completely irrelevant, and you know, it hurts. It hurts. I don't care. That's our job, and I'm sorry that it hurts and it's damaging, but it's not so prejudicial that it shouldn't be considered at all. They opened the door, and we're allowed to use it. I have an ethical obligation to use it. We're here, Your Honor, because of a cumulative effect of Plaintiff's errors. They disclosed it, they redisclosed it, they stipulated to its admission, they didn't object to it, they didn't ask for a sidebar at any point.

We're here because of their error. Trying to shift the burden for that error to us now, it's absurd. It just is, and trying to make it look like an ethical issue on the Defense side for using this piece of evidence is absurd, as well.

THE COURT: All right. Just to be sure, it sounds like what you're saying to me is that, in your view, under all of the circumstances that you've already described or that you otherwise know, that whether Mr. Landess is a racist is something the jury should weigh and it's admittable, and it's evidence that they should consider.

MS. GORDON: I think that the entirety of the passages from that email is impeachment testimony to the character evidence that was improperly and unethically elicited by Plaintiff, and I don't know that it's so much exactly what that bad character evidence consists of --

THE COURT: Um-hum.

MS. GORDON: -- it's bad character evidence that we're

allowed to use as impeachment.

I don't know, Your Honor, and perhaps you found cases that I did not, but I don't know that there is a subsection under impeachment, and what evidence we can use as impeachment that says, oh you can use impeachment evidence, but you can't if it has to do with race. You can use impeachment evidence, but you can't, if it has to do with -- I don't know. There's no, you know, subsection --

THE COURT: Okay, let me take it from a different perspective then. Let's assume you never put that item up in the questioning of Mr. Daryanani. However, it's admitted as Exhibit 56, page 44. Let's further assume that then, the first time you ever use it, is in your closing argument, and you put it up just the same way you did with Mr. Daryanani. I take it you're going to tell me that that's not -- essentially, it's already misconduct under the *Lioce* standard. In other words, you can tell me that, at least in part, you could make a closing argument that Mr. Landess is a racist and the jury ought to consider that.

MS. GORDON: I'm saying that respectfully, I don't know that that has anything to do with what we're talking about now, because we were talking about impeachment evidence for someone who improperly gave character evidence, and I was impeaching him.

THE COURT: Well, let me explain that. Let me explain. If you're telling me it's impeachment evidence, that means it is evidence, and that means you could argue the evidence. I just think this is a good illustration of the concern. I mean, you and your wisdom used it for impeachment. I get that, but it's evidence. And so I'm just trying to see

if you think, since it is evidence, you seem to say and think that the jury can now consider it because you've made a closing argument then using the item.

MS. GORDON: I think if someone wanted to argue about the prejudicial nature of that, then they had the duty to bring that to the Court's attention and they didn't, and they didn't over and over and over again. And I am going to speak to you, Your Honor, about what happened in this case, and procedurally what happened is it was used during impeachment, and it was absolutely proper given that they opened the door.

THE COURT: Okay, I understand that.

MS. GORDON: I'm sorry. I guess I --

THE COURT: Let me just try this -- I'm going to try one more thing on this. Let me hypothetically say this. Let's say you're from the jury and you say, members of the jury -- you tell me if you think this is a legitimate argument that you could've made. Members of the jury, you've heard Mr. Daryanani testify that Mr. Landess is a beautiful man, that he would give bags of money to Mr. Landess, that he would leave his daughter with Mr. Landess, but Mr. Landess is a racist.

MS. GORDON: And a hustler.

THE COURT: Could you make that argument?

MS. GORDON: I think I could use that, and as Your Honor has said, it's admitted evidence. I think that I can use it for any purpose, but if it somebody wants to limit that and allow in the hustling and not the racist part of it, then somebody had an obligation to do that.

THE COURT: All right.

MS. GORDON: And that someone is Plaintiff and he didn't do it.

THE COURT: All right. Okay. You want to add anything else --

MS. GORDON: I'd like to --

THE COURT: -- before you turn it over to Mr. Vogel?

MS. GORDON: Yeah, thanks.

MR. VOGEL: Thank you, Your Honor. Yeah, curiously absent from their motion is any reference to NRS 48.445 or 055. When you open the door on character evidence, the Defense can then, pursuant to 48.0551 on cross-examination, make inquiry to specific instances of conduct, which is exactly what was done in this case. So there's no ethical violation. There's nothing improper about what was done, and as to Ms. Gordon's point, and this Court is fully aware, the evidence was there.

THE COURT: That's why -- I didn't cite those statutes, but I looked at them over the weekend. That's why I've given you the opinion that's not going to change, that yes, there was an allowance to now bring up evidence to dispute the character testimony of Mr. Daryanani. No doubt. That's not the issue to me anymore.

MR. VOGEL: And --

THE COURT: The issue to me is what about, you know, what we have here.

MR. VOGEL: Yeah.

THE COURT: I mean, for example, you know, there are motions in limine that arguable go to character where I pretrial granted them. You can make an argument that somebody has a $400,000 gambling debt, that that goes to their character. You can make an argument that they didn't pay an obligation. It's like writing a check. A casino marker is like writing a check, they didn't pay it, and that goes to their character. They're not honest, but that's precluded, for example.

MR. VOGEL: Yeah, and I appreciate that, and they sought to exclude it. In this particular instance, they didn't seek to exclude it. So I think the issue, I think, that the Court is probably struggling with is okay, it's admitted. Is it -- is the probative value of that evidence so overly prejudicial that it has now caused, you know, irreparable damage to this trial?

I think, you know, if my understanding of what you're saying is that's your concern in the case law, and maybe you even looked at this case, *Nevada v. Battle* [phonetic], which is a 2015 case, you know, the Court was, you know, struggling with similar issues. And the Court indicated that, you know, this impeachment evidence in that case was admissible because the Plaintiff had opened the door, and the Court found that Battle couldn't establish prejudice because it was his own actions, not the actions of opposing counsel, which open the door to impeachment evidence. So in that case, the Court found that hey, you've opened it, you cannot now claim prejudice.

THE COURT: Again, I agree with that. I said character is clearly allowable for the Defense in cross-examination of Daryanani, and

for the remainder of the trial. It was put in issue by the Plaintiffs.

MR. VOGEL: So --

THE COURT: My issue is -- let me put it to you this way. You've been around a while. And I don't mean to, you know, play too much devil's advocate with you or Ms. Gordon. I would do the same with the Plaintiffs. You know, it doesn't matter who's doing it or who I have my questions for, but if I have thoughts going through my mind, I typically like to express them and ask questions about them regardless of which side I'm asking these questions to. In this case, it just happened to be your side under these circumstances.

You heard what I said with, you know, these questions I've asked Ms. Gordon, but I mean, wouldn't it occur to the Defense that -- let me put -- let's see if I can say it correctly. You say to yourself, and I agree, okay, character is now an issue.

Certainly after Mr. Dariyanani said the things he said that we've now recited a few times, we've got this piece of evidence. Is there a concern that if we just use this admitted piece of evidence, we've now interjected a racial issue into the trial. And -- and if you have that concern, why not do something to at least address it. There would be no harm in that. I mean Mr. Dariyanani is there. She's on cross examination out there. She's got Exhibit 56 in her hand. I mean why not -- I mean did it ever occur that, you know, I used this bar metaphor on Friday, on the court record, that if you're going to drop a character bomb, even if you have the right to do that, is this the type of bomb that's going to blow the whole room up?

MR. VOGEL: I see what you're saying. You know, the terms used were Mexicans, black, and rednecks. Those were the terms that were -- were used. And I guess the termination you say are those just inherently racist terms. I guess that's what the Court is struggling with. The only pejorative term in there, you know, I think is rednecks.

THE COURT: Well, actually, I don't think that. I think that there's a way you can say Mexican and have it not be taken as a racist comment. I think there's a way you can say black, Black Lives Matter, for example. And not have it be a racist comment. Redneck, I don't know. I think that one is pretty much, every time you say it, it goes in that zone. But to me it's the context of which it is said. I mean it -- they're all lumped together and I think it's the easiest conclusion to draw, if you look at the context in which these two paragraphs come together, they clearly appear to be racist.

So it's the context, not just the -- not just the words themselves, it's the context in which they're used.

MR. VOGEL: Sure. I mean it's quite clear that he was victimizing certain people. I don't dispute that. The issue comes back to is it so prejudicial as to have destroyed the ability of this jury to rule in -- I guess in an unbiased way to where justice is s till being done. And I guess that's what you're struggling with. And our view is this was, you know, character evidence. All character evidence, by its nature is prejudicial. Whether it's glowing, fabulous reviews like Mr. Landess' daughter gave, or whether it's deceiving. By its nature it is -- it is usually much more harmful type of evidence one way or the other.

And that's why we were actually quite careful making sure we had the basis to bring it in, between Mr. Dariyanani's testimony, the daughter's testimony, and Dr. Mills' testimony even. We felt that they had opened the door quite wide on character. And that it was perfectly appropriate to use it. We gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union. And, yet, I guess it -- it comes down to, you're asking could we have done something to try to remove that. I suppose in hindsight I guess we could have. But I don't think we had to. Reason being is they stipulated it in and it was -- when it's really without any sort of objection.

So now we're judging it by hindsight. And according to *Nevada vs. Battle*, they can't establish prejudice, because they didn't object to it.

THE COURT: Okay, all right. It's your motion, Mr. Jimmerson, you get the last word.

MR. JIMMERSON: Thank you, Judge. Let me have those two cups, please. Now the Nevada Supreme Court in *Hylton*, H-Y-L-T-O-N *v. Eighth Judicial District Court*, 103 Nev 418, 423, 743 Pac. 2d 622, 626, 1970 Dec. said that a manifest necessity to declare a mistrial may also arise in situations which there is interference with the administration of honest, fair, even-handed justice to either both, or any of the parties to receive. And in *State vs. Wilson*, 404 So.2d 968, 970, La. 1981, raises such a sensitive matter that a single appeal to racial prejudice furnishes grounds for a mistrial. And that a mere admonition to the jury to disregard the remark is insufficient in occult.

In listening to both opposing counsel's remarks, that of Ms. Gordon and Mr. Vogel, it is abundantly clear from what they didn't argue that we have a conceded fact as to the explosive nature of the remarks, and the prejudicial nature of the remarks. There is not an argument made by either one that this does not warrant a mistrial. There's not a argument made by either one as to the impact that this has had upon our jury. Instead, both focus upon the claim that it is the Plaintiffs' error or the Plaintiffs have opened the door. The Court has indicated that it is pretty well convinced that the Plaintiff did that.

I will simply say that if you read the transcript, the question that led to the examination was, "Was it a difficult thing for Cognotion, or yourself, to terminate Mr. Landess?" That in no way, reasonably, would call for the admission of character evidence that Mr. Dariyana -- Mr. Dariyanani responded in the way that he did, in some regards to answer the question, "Yes, it was a difficult thing to do." But they've gone beyond that to talk in terms of Mr. Landess in both positive and negative terms. The Court apparently feels that that is appropriate. But that was not an intention, both by either words, or by conduct with the Plaintiff to open any door about character.

Relative to Dr. Mills or Dr. Arambula, they introduced it first, because they went first on that. But they both testified that Mr. Landess was an honest person and that he was self-effacing and didn't exaggerate based upon psychological test results and the MMPI, multi-personal test. That wasn't a character issue. And the daughter, Ms. Lindbloom, did speak about both before and after. How he was before

the professional negligence on October 10th of 2017, and afterwards. And yes, he did say -- she did say some very kind and glowing comments about her dad, but that clearly has a place in character evidence. And that also was ten days earlier. It wasn't related to the time. So when you focus upon what was going on Friday, you have the admission by Ms. Gordon that it was an intended piece of evidence.

I disagree strongly with the statement repeated questions were asked about the email. Not at all. The email was placed upon the Elmo without a single question or preface whatsoever. And the jury saw those words before a question was asked. And then she asked the question "Is this what Mr. Landess wrote to you?" So the intent to create a prejudice was in presence in the part of the Defense. And what they didn't understand or appreciate, and should have -- reasonably should have, under *Lioce* and relative under the advice of the Court and other decisions was the impact of what they were doing, which is the whole point of our motion.

Let's be fair. The Defense sought to introduce a 79 page set of emails. Plaintiff agreed, and 10 or 15 minutes later, they place this email before the jury. Plaintiff did not appreciate the contents of this email, and perhaps should have. But the Defense most certainly did appreciate what they had in their hands and chose to use it. And the excuse that they have that because there was an admission by the Plaintiff reversed the law, which is very clearly stated that if inadmissible evidence is used ostensibly, or if admissible evidence is used for inadmissible purpose, it can be withdrawn. And this is no different than

either one of us not recognizing an attorney client privilege document mixed in with another 80 pages of documents, and then the party recognizing that there is a prejudicial document there cannot under both ethics, as well as our rules of procedure, then go forward and misuse that information.

And the questions asked by the Court are the appropriate ones in light of what the Defense knew that they had, and intended to use. There was no calling of attention to that email, Your Honor. I don't know where Ms. Gordon gets the idea that she asks repeated questions about it. She didn't. She asked no questions until she placed the words up on the Elmo, before she sprung it upon us. And the springing of it, which she concedes is the case, is the Defense premeditatedly and intentionally doing so. This -- opposing counsel also stated that Mr. -- or Dr. Debiparshad's race is acquired at depo. One single question was are you -- is your family -- are you from India. I think the answer was yes, or something like that. But at trial, not a single word was asked about that. Plaintiff did not seek upon that. The man is educated in Canada, went to school up, apparently in Canada. There's no comment upon that. There wasn't one question of Dr. Debiparshad that went anywhere near any of those issues. This record is clear of the Plaintiff's bona fides in terms of such a devastating subject matter like that. Furthermore, the Defense is bound to, and as the Plaintiffs to know, under *Lioce* what -- where the line is, and it's a fairly bright line in terms of somebody as -- you know, as astounding as this type of a question and information is this is not a negligent act. This is not something that was not appreciated by the

Defense. They intended to use it exactly in the fashion that they did.

They just didn't appreciate, I don't think, the -- the predictable response of the Court, and of the Plaintiffs relative to the misuse of this type of explosive information that had no place at trial. Mr. Landess has never placed race as an issue and the Court's asked the question directly of the Defense, do you think that race has a place in this case. And, of course, the answer has to be yes for the Defense, because they're trying to justify their -- their misbehavior. But that's not in, at least our review of the case law, warranted that there cannot be a good faith basis for the use of this document in the fashion they did.

Especially understanding that it hadn't been offered by the Plaintiffs at any time. It hadn't been the subject matter of a single question in a single deposition in which there were more than 15 depositions taken. It wasn't in -- that wasn't discussed in Mr. Landess' two different days of depositions. It wasn't examined of him on three days of direct and cross examination doing this trial. Not one subject matter came up. This was a gut shot at the end of the case, used in a premeditated way by the Defendant to gain an advantage before the jury. And in doing so, they well beyond crossed the line with the *Lioce*. They created an irreversible prejudice to the Plaintiff. And more importantly, I think, to the administration of justice and to this Court.

Thank you, sir.

MR. VOGEL: If I may, just briefly, Your Honor, you know evidence of bad acts is always prejudicial. Usually it's in the context of other crimes, violent acts ands things along those lines. But it's always

prejudicial, but it's also admissible. And in this case, Your Honor, if this Court is considering granting a mistrial, I would ask the Court to do so after the jury comes back with a verdict. At least in that instance, it would be treated more as a motion for a new trial, and there's still a chance, who knows, I mean the jury could come back in Plaintiff's favor and the issue is moot. But the parties have already spent, as everyone agrees, tens, if not hundreds of thousands of dollars getting to this point now. And to pull the plug at this point, is potentially very prejudicial to all of the litigants involved. I would say the better -- the better course would be to allow the case to go to verdict, or in the alternative, to not release the jury, and allow -- allow the parties to take an emergency writ to the Supreme Court, just to see if they would weigh in on is this something that's overly prejudicial.

MR. JIMMERSON: And my response is Plaintiff's motion is simply the Defense should have been more circumspect about this, and thought about this before they created this error in the record.

THE COURT: All right. This decision, I'll share with you. It's interesting, because in some ways it's the most difficult decision I've made since I've been a Judge, but in other ways it's the easiest decision I've ever made since I've been a Judge. I'm going to explain in detail my thoughts and make a record as to why I've reached this conclusion. But the Plaintiff's motion for mistrial is granted. At 11:00 I'll bring in the jury and I'm going to excuse me.

After they're excused, I will make a record why this is the appropriate and in my view, the only choice that can be made under the

circumstances. We'll be back in ten minutes.

[Recess at 10:57 a.m., recommencing at 11:05 a.m.]

THE COURT: Please bring in the jury.

MR. VOGEL: Your Honor, are you going give us an opportunity to speak with the jurors?

THE COURT: No. We're going to let them go. I think they've been through enough.

THE MARSHAL: Parties rise for presence of the jury.

[Jury in at 11:05 a.m.]

THE MARSHAL: All present and accounted for.

THE COURT: All right. Please have a seat, everyone. Members of the jury, well, welcome back. You might note that your notepads are not with you and that's because of what I'm about to tell you. Before I tell you what I'm going to tell you, however, I do want to look at all of you and let you all know thank you so much for the time that you've spent with us. It'll be a two weeks I know I'll never forget. You as a jury have been very attentive. You've asked wonderful questions.

I've learned to not only respect you but actually like you all and you're exactly the way juries should be, I think. Always on time, attentive, good questions. But you can get the feel for where I'm going with this, of course and that is with your notepads not being there and what have you. I guess the best I can say to you is that from time to time -- and it doesn't happen very often. But from time to time, there are things that come to a Court's attention that you have to deal with. In

other words, sometimes -- I guess a way to say it is a court and me ad a judge, since this is my court here, you can only deal with the issues that come your way.

Often times, they're not created by you whatsoever, but they come your way and you have to deal with them. Never afraid to do that. Sometimes those things can be difficult and they can be time consuming. So that type of thing did come my way. And it wasn't something that the Court created, but nonetheless, the Court has to respect that has to be dealt with. And so I want to let you know that over the last few hours -- obviously you've been waiting out there since 9:00 this morning -- I've dealt with some things.

And obviously you knew that, because I had my martial update you a couple times and you knew we were working on legal items. I do want to tell you that because of what I dealt with and the decisions that were made, the case, as far as your participation, has been resolved. And so I just want to tell you thank you for your time. It's been wonderful, in my view, to have you here for these couple weeks. I think it's allowable for me to say I'm sorry that we don't get to finish the case with you this week. You're excused. You all take care.

[Jury out at 11:09 a.m.]

THE COURT: All right. Please have a seat, everyone. Obviously I'm going to stay on the record and well, here's the decision having to deal with obviously granting that motion for mistrial. I said it was the most difficult thing I've done since I've been here and I assure you, it is. Even more difficult than the time I was covering for Abbi Silver

and probably the worse child neglect case in the history of the State of Nevada was one that sentenced someone on. I won't go into those facts, but I -- suffice to say that the lawyer presenting the case was Mary Kay Holthus, who's now a judge.

And I had to take a couple of breaks, because of the sadness I felt and the difficulty in dealing with what had happened to this child. This is worse than that for me, because in the time I've been here -- and my whole group knows this to be true -- and it -- you know, I don't even know where it came from, probably. Probably just a life of events. To me, the most important part of the process is the jury. And I can't even find the right words to describe how I really feel about those that come in and serve on juries, other than to say I have a tremendous respect for them and the mission that they're tasked with performing.

That's why this is difficult, because I really felt -- of course, we all know. We saw what happened here over two weeks. I mean, we celebrated a birthday of one of the jurors. We got so many questions from the jury and they were engaged in the process and they took -- they thought the trial was supposed to end last Friday. And they, you know, took it upon themselves to find a way to give us even up to four more days, through Thursday of this week.

Mr. Kirwan reported back and found a babysitter for the week, when he initially didn't anticipate that. And I'm sure there's untold stories as to each one of them, as to what they did to spend two weeks with us and then now find a way to extend it an extra four days. So that's why it's difficult, because I feel bad. I feel really bad that I had to

do what I just did with those ten people. But I said it was the easiest choice nonetheless, because it really was in my view.

So here's the reason why I had to do what I did and grant this motion for mistrial. The law does talk about this concept of manifest necessity. And case law is sort of repetitive with that notion and there's definitions given of manifest necessity and the cases that talk about the concept of mistrial or even new trial, but in this scenario, mistrial. And I did, in this -- going through the cases this weekend, I came up with what I think are the main definitions of the legal standard that's relevant here, this manifest necessity standard.

Manifest necessity is a circumstance, which is of such an overwhelming nature that reaching a fair verdict is impossible. It's a circumstance where an error occurs, which prevents a jury from reaching a verdict. There's a number of cases. Each side, I'm sure will -- has and will find cases having to do with this area of law. But there's an interesting one called *Glover v. Bellagio* found at 125 Nev. 691, where David Wall found himself in an interesting spot, similar to the one that I am in here.

But that case stands mostly for the proposition that the trial judge has to have the power to declare a mistrial in appropriate cases. And I think this is the appropriate case. And I really do think that unfortunately, that decision on the merits of whether I should do this or not is rather easy. Though difficult, nonetheless, I think rather easy to get to that point. Thanks a lot. All right. And that starts with the item itself. As to the chronology, as far as I understand it, I think this is a fair

assessment of what happened.

Prior to trial, of course, there's the discovery process and in that discovery process, it was relevant and necessary to cause Cognotion, the company, practically speaking through its CEO, Jonathan Dariyanani, to disclose employment-based evidence, whether it was the employment contract or information having to do with the stock options or things that may have led to the employment itself or contemporaneous with the employment itself. And if anything, I mean, it's evident to me that that discovery effort on Cognotion's part or Mr. Dariyanani's part was taken pretty seriously, because a number of items were disclosed, including emails and the item in question was in that batch of items disclosed.

It's readily apparent and admitted to and so as a finding of fact, I'm certain that though the Plaintiffs endeavored in this discovery course to disclose to the Defense the Cognotion documents and did so -- again, disclosing, you know, a vast array of documents, that for reasons that I don't need to know the full extent of, but I would say it's fair to conclude shortness in time, because of the discovery timeline and effort having to do with this damage item, which did take place closer in time to trial, volume, meaning the extent of the volume of the paperwork disclosed, I think in fairness could be something Mr. Jimmerson thinks about off into the future.

When you represent lawyers, it is difficult to not allow your client, who's a lawyer, to play a role in things. And it's evident to me that Mr. Dariyanani and Mr. Landess weren't only client and corporate

counsel by way of a relationship, but had been friends prior to that time and friends since that time. And it's never been -- it hasn't been mentioned to me and so I'm not just speculating. I wouldn't speculate. I don't want to come up with something, but I think it's reasonable to say, you know, that most likely, Mr. Landess had a hand in helping with the discovery and urging Mr. Dariyanani to, you know, participate and be here and provide documents.

And you know, maybe in some ways, there was a review duty that on behalf of the whole Plaintiff team just didn't adequately get done here. Whether it was Mr. Landess or whether it was somebody from either office or the attorneys, it's obvious to me that unfortunately -- I mean, it's okay to make mistakes and admit mistakes is even better than not admitting them. But mistakes can be made. And I think it's real clear that a mistake was made, attributable to the entire Plaintiff team.

And that mistake was make sure that somehow, some way, you do know everything specifically that has come about in discovery that could conceptually be used at trial or precluded prior to trial. And that didn't happen and that's a mistake that, again, the mistake was made by the Plaintiffs. So we have the discovery. We have the disclosure. In fact, it's fairly obvious to me that it was a mistake. Again, the mistake being that the Plaintiffs didn't catch that this particular item was in there, because they did bring pretrial motions to preclude Mr. Landess' bankruptcies, gambling debt and litigations.

And so it's obvious to me that if the Plaintiffs would have

seen this item, they would have likewise brought a pretrial motion to preclude it. Plus, Mr. Jimmerson, to his credit, has said in various context on and off the record that he made -- he, because he took responsibility as I think the lead trial lawyer here, you know, that he made this mistake. Okay.

So then what happens from there -- we then start the trial and prior to -- well, prior to trial, actually, page 44 of Exhibit 56 is marked and put into one of the many binders here as Plaintiff's Trial Exhibit 56-00044. And so the Plaintiffs have this as part of thousands of pages of exhibits that I have sitting here to my left, potential exhibits. So it's just sitting in there and the Plaintiffs don't know that it's in there, so it's part of one of their trial exhibits. The trial then progresses and during the trial, closer to the time that the item actually is used, Exhibit 56 is offered in evidence, I believe by the Defense.

And when that occurred, the Plaintiffs stipulated or agreed or didn't have an objection and the entire Exhibit 56 was admitted, including this fateful page 44. And 45, but page 44 is where the material appears that's the concern. All right. So now it's an admitted exhibit. At the time of its admission, I'll go so far as to say that the Plaintiff still at that point in time, didn't know that the item actually was in the exhibit. And when I say the item, I mean the actual language of course in question here.

So they're still proceeding, up to that point, all the discovery, all the two weeks of trial and agreeing to admit into evidence 56. They still don't know that the burning embers language is in here. All right.

Mr. Dariyanani testifies. Mr. Dariyanani does say the things that Ms. Gordon's attributed to him, I mean -- and probably more. But he did say Mr. Landess is a beautiful person, bags of money, trust him with that. He's trustworthy. I would leave my daughter with him. He's trustworthy.

And so it is my view that that did open the door to character evidence, where now the Defense in its wisdom, could bring forth evidence to show that Mr. Landess is not so honest. He's not so beautiful or -- you know, his character is now put in question by the Plaintiffs. I do believe that opened the door to that legal ability to bring forth some contrary character evidence. It might not have been just Mr. Dariyanani that brought it up. It could have been Mr. Landess himself during his testimony or for that matter, his daughter. But clearly, Mr. Dariyanani brought it up.

So I don't have a problem with that in a legal sense, that the Defense could impeach or attempt to cross-examine on this point. The problem I see with the situation, though, is in my view -- and I don't think there's even any possible potential good faith dispute with this. But I'm only one person. The email itself, I think a reasonable person could conclude only one thing. And that is that the author is racist.

> "I learned at an early age that skilled labor makes more than unskilled labor, so I got a job in a pool hall on the weekends to supplement my regular job of working in a sweat factory with a lot of Mexicans. I 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. I learned that it's not a good idea to sell something that you cannot control and protect, a lesson reinforced on in life, when an attorney friend of mine and I bought a truck stop here in Las Vegas, where the Mexican laborers stole everything that wasn't welded to the ground."

I'm not saying that as a court, I'm drawing a conclusion that Mr. Landess is racist. But what I am saying is, based upon these two paragraphs, it is clear to me anyway that the author, a reasonable conclusion would be drawn again, that the author of these two paragraphs is racist.

So that's the issue. The question for me is, as a matter of law, in this case, which is not an employment discrimination case or anything where the issue of race is clearly an element of the case, can our jury in this civil case consider the issue even with the opening of the door as to character of whether Mr. Landess is a racist?

And I think the clear answer to that is no, that that is not a basis upon which this jury should or can decide the verdict. Now I know that the issue having to do with fees and costs regarding the decision I made to grant this mistrial is left for another day because I am going to give an opportunity for the, of course, for the Defense to file a pleading on this, given that the pleading I did receive -- I didn't see it until this morning. It was filed by the Plaintiffs. And so, we'll have to establish that little briefing schedule.

But it is apparent to me, you know, especially in light of the

court session that we've had here today, that I think that my finding is the Defense had to know that the Plaintiffs made a mistake and did not realize this item was in Exhibit 56.

Again, that's evident to me I think reasonably because there were a number of motions in limine which were filed by the Plaintiffs, again, asking to preclude bankruptcies, gambling debt, prior litigations.

I think that in conjunction with the aggressiveness that we've had throughout the trial, the zealousness is real clear to me that the Defense had to know this was a mistake made by the Plaintiffs. And again, one of the many pages of Exhibit 56 was this page 44 and the Plaintiffs didn't know about it.

So, they took advantage of that mistake and I don't have a criticism in a general sense in taking advantage of mistakes of the other side. Frankly, it happens all the time. That's not the question.

And while it may be well intended to cross-examine the CEO with the item that you now have where you know the Plaintiffs made a mistake, they didn't see it. The primary, the only reason why I granted the motion for mistrial was because when putting this up on the ELMO, there was no contemporaneous objection from the Plaintiffs. And I did not sua sponte interject either, probably for the same reason that the Plaintiffs didn't and that is it just -- the timeline is short. It's on the ELMO and it's just really a matter of seconds before a human being, if you're on the jury with that TV set sitting right there in front of you. It's a matter of seconds, literally, you know, one to five seconds and that's it. It's there for them to see.

I didn't feel it was my job to sua sponte interject. And here in a little bit I'm going to talk about a legal concept that I think is very relevant to this situation. And when I do that, I am going to talk about how I do understand and sympathize in some ways with the Plaintiff's position and not being able to object to it at the time or not objecting to it at the time.

But anyway, the fact of the matter is, when this occurred, even if well intended by the Defense to cross-examine when character is now an issue, respectfully, it's my view that the mistake that then the Defense makes is that they interject the issue of racism into the trial.

Once the issue of racism is interjected into the trial and by the way, it does appear to me that even now and I'm not unduly criticizing, but even now, it appears to me that the Defense's position is that the jury can consider the issue of whether Mr. Landess is a racist or not. That I disagree with to the fiber of my existence as a person and a judge.

Ms. Brazil is an African-American. Ms. Stidhum is an African-American. The Plaintiffs have stated and for purposes of this I can agree philosophically, although I don't know for sure because I don't, that Mr. Cardoza and Ms. Asuncion is also Hispanic.

The shortcoming is me, I've never really seen that kind of stuff much. I don't know why that is. I probably should in today's world more that everybody does. But it's probably because when my dad was a chief of police when I grew up in high school, he had a partner. His partner's name was Tank Smith. And Tank was a black guy, an African-

American guy. And he was the salt of the earth.

And so, as a child growing up, I saw those two running over the county and doing good stuff. Dinner at our house all the time. I never thought anything about that.

When I was -- when you get to be a JAG when you're a lawyer in the service, they send you off to 10 weeks of intense military training at the University of Virginia Law School. Ten weeks. It's the JAG school. And they billet you. You stay in a billeting living arrangement.

And there was 109 of us in that class. And my best friend was a guy named Momeesee Mubangu [phonetic]. He was from South Africa. So, he's definitely an African-American by definition. He was my best friend. We went to dinner three or four times a week and we made good friends.

And probably halfway through his wife came to town and he wanted to go to dinner with her with me and we did. We met at a restaurant and she was a white woman.

And I remember halfway through the dinner because we were friends him remarking to me, you don't notice anything here? And I got to tell you, I really didn't. I just didn't. I just figured people were people, you know.

So, I'm not I'm not sure whether Mr. Cardoza, Ms. Asuncion are Hispanic or not. I'm never good at that kind of stuff. But it seems reasonable, I would agree with the Plaintiffs of course, the name and appearance if you want to go with that. Maybe there's some stuff in the

biography stuff that we were given. I didn't look at it. But it seems like that's the case.

And so, it is my view that since we have two African-American jurors and potentially two Hispanic jurors, given what I do think was a mistake made by the Defense in interjecting race, the issue of Mr. Landess being a racist into the case. Even if well intended to cross-examine, as I said, it is my thought that the Defense should have seen this and done something to deal with it. They should have asked for a sidebar as I tried to talk to Ms. Gordon about or I think it should have dawned upon them that you're now putting the issue of racism into the case in front of a jury that has four members arguably that fall into some of these categories, referenced in this email.

By the way, the email, if you were to ask me about offense that could be taken, certainly as Mr. Cardoza, Ms. Asuncion or anyone of heritage of coming from Mexico, they would have to be offended by it.

As to the two African-Americans, it's clear to me, because like I told Mr. Vogel, it's the lumping in of a term associated with African-Americans, with the rest, hustling Mexicans, blacks and rednecks. That is clearly an implication that these are, in the author's opinion, sort of the dredges of society who I could easily take advantage of on paydays.

And so, I do think that this coming together, this perfect storm of mistakes, the mistake the Plaintiffs made that I have described, the mistake I think that the Defense made in interjecting race into the case. I know the Defense doesn't think it's a mistake because they apparently think that the jury can consider whether Mr. Landess is a

racist or not. I have to say that surprises me, but wouldn't be the first time I guess I'll ever be surprised as a judge. But I got to say, that surprises me, which will get to the second half of my decision, which is still to come.

But for now, I'm making a specific finding that under all the circumstances that I just described, they do amount to such an overwhelming nature that reaching a fair result is impossible.

Further, this error that occurred in my view, how specific -- I am specifically fining it prevents the jury from reaching a verdict that's fair and just under any circumstance. And there's no curable instruction, in my opinion, that could un-ring the bell that's been rung, especially to those four. But let's don't focus only on those four. There's ten people sitting over there and I do think just as a normal human being, one could be offended by the comments made in this email. You don't have to be Hispanic, African-American or I don't know how to say rednecks. I don't know how that fits in. I don't even know what that really is.

But in the minimum, you don't have to be a Hispanic or African-American to be offended by this note.

So, I feel as though my decision -- well, it was manifestly necessary.

Now, over the weekend, I said I did look at some law having to do with this, and that takes me probably as a segue into some of the things that Ms. Gordon and I talked about in the court argument this morning.

I asked her a hypothetical. I said, let's assume that you didn't

use Exhibit 56, page 44 of Mr. Dariyanani. Well, unless something happened that we wouldn't anticipate that being that somehow the Plaintiffs come to discover that the item is in there and bring it to the Court's attention prior to the Defense trying to use it in some stage of the trial. Now it's in evidence.

And I asked that hypothetical question. Let's assume you didn't use it with Dariyanani, but you did use it and put it up on the ELMO in closing argument. It's my view that it's really the same philosophical thought, its use of the item in front of the jury and asking them to draw a conclusion relevant to the verdict based upon it.

My view is if that would have happened, if Exhibit 56, which was in evidence, was put up in closing, that under the definition given by the Supreme Court of misconduct in the *Lioce* case, that I think it's likely that that would be seen as misconduct because whether it's with Dariyanani or whether it's in closing or both, the clear -- and now I've heard it in court this morning, it seems like the Defense is still taking this position. They're urging the jury to at least in part, render the verdict based upon race, based upon Mr. Landess being a racist, based upon something that I think is emotional in nature. This is an emotional style piece of evidence.

The idea, I think fairly and I'm sure the Defense would disagree with this, but fairly is give us a verdict. Whether it's reducing the damages or give us the whole verdict, because Mr. Landess is a racist. That is impermissible.

Even if some universe in some universal sense, if he were a

racist and he might deserve something like that because he's a bad person, the law doesn't allow for that in this context. It's not a fair verdict, not a fair trial, not a fair result to decide it because someone happens to be a racist. If it were a racial discrimination case or if race were somehow an issue in the case, things would be different.

Now, philosophically, in spending the time over the weekend that I did, I wanted to try to find some law that gave me as a court guidance on what I may do in this situation, because -- and the reason I devoted basically my entire weekend to it was because I felt as though in the eight and a half years I've been here, I'm now being called upon to do, in my view, probably the most important thing I've done because of the respect I have for these people on the jury. They gave us two weeks of their time out of their lives. How could this -- how can anything I do be more important than deciding whether they get to continue or they have to go home and essentially, practically speaking, wasted two weeks with us. We wasted their time.

So, in doing so, I have to tell you and I don't want to get all the credit for this, because when I met with Mark Denton for probably it was about two hours, it might have been an hour and 45 minutes. It was in his office. He told me about *Lioce*. I knew about *Lioce* case, but in talking to him philosophically, he said, you know, there's some concepts in that case you might want to look at that could be helpful to you here because *Lioce* was his case. He was the trial judge.

And so, that got me to thinking and I did pull and I have it here outlined, and I think that case is illustrative philosophically. We're

not talking about obviously closing argument here, but we are talking about nonetheless bringing forth an item of evidence that could cause a concern to be at least considered.

And the other nice thing about *Lioce*, a very important thing, is this concept that wait a second, it's an admitted exhibit. In other words, this is unobjected to. And *Lioce* gives us some philosophy and guidance on dealing with the distinction between objected to items and in that case, of course, closing argument, and non-objective to closing argument.

The court goes on to talk about something -- I said I'd talk about this, so why I don't just do that right now? In *Lioce*, the idea where I said I do sympathize with Mr. Jimmerson in not objecting when the item first went up on the ELMO.

In *Lioce*, the Nevada Supreme Court says,

> "When a party's objection to an improper argument is sustained and the jury is admonished regarding the argument, that party bears the burden of demonstrating that the objection and admonishment could not cure the misconduct's effect."

Okay.

They go on to say in the next sentence, though, that they say words consistent with sympathizing with a lawyer who is in the spot now to either object or not object to something that shouldn't be happening in court. They say, "The non-offending attorney," so in this situation that'd be the Plaintiff's side.

"The non-offending attorney is placed in a difficult position of having to make objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents emphasizing the improper point."

And that's what Mr. Jimmerson said to me, I think last week when we were on the record, because I did ask a question or it came up, why didn't you object to it? And he said words consistent with this idea of, I didn't want to, you know, call further attention to it.

And it's clear in *Lioce* and the Nevada Supreme Court sympathizes with that dilemma that a trial lawyer may have when something comes up, the other sides offered something, here it's argument, of course. In our case, it's an exhibit prior to that stage of the trial.

But nonetheless, I have to say, I agree that, you know, because I know from my own experience in watching this happen, I felt my heart sink. And I remember thinking, oh boy, and I told you some of the things I immediately thought within the first few seconds.

And, you know, should I have said take that down, let's have a sidebar? I wish I would have at a time prior to the jury not seeing it. Or even seeing it quickly and maybe not realizing the full extent of what was in it and then we'd still be here and, you know, we'd be watching the Stan Smith video.

But I didn't do that. I think for the same sort of human being, non-reaction over two or three seconds that Mr. Jimmerson did. I have

to say. Especially because, again, that's even further evidence that the Plaintiffs didn't know the item was in there.

All right. But in *Lioce*, they give some guidance as to unobjected to, they call it unobjected to misconduct and that's in the context of a closing argument.

And what the Supreme Court said, so that's what we're talking about here. We're talking about unobjected to -- it's not argument, so I'm not going to go as far as today to say it's misconduct. I've said things consistent with what I think is a respectful criticism of the Defense of, you know, I would -- I got to say, I would think that you look at this and say, well, should we put race into the case? Could that be a concern?

And as I take it, the Defense's position is, well, we can and we did. Just like Ms. Gordon argued an hour ago to me. That's just where we disagree. I have to say.

But in any event, the guidance from *Lioce* is that even if it's unobjected to, so Exhibit 56 is a Plaintiff's trial exhibit, it's admitted by stipulation and then when the item is put up on ELMO, there's no contemporaneous objection.

But I think that this *Lioce* standard is applicable here where the Supreme Court says in that case that it's still a plain error style review.

Here's what they say. "The proper standard for the district court," that's me, "to use when deciding in this context a motion for new trial based upon unobjected to attorney misconduct." Now, again, I

know this is not a new trial request. This is a mistrial request. But I think that concept is similar, certainly. And I think the philosophy of this case gives guidance to the Court is all I'm saying.

So, again, the Supreme Court says,

"The proper standard the district courts to use when deciding a motion for new trial based upon unobjected to attorney misconduct is as follows; one, the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as have been waived unless plain error exists."

So, there you go. That, I think clearly sends me a message that though the Plaintiffs acquiesced in the admittance of 56 and though the Plaintiffs did not contemporaneously object when Ms. Gordon put the item up, a plain error review still has to be held.

In applying the plain error review, the next sentence in *Lioce* says,

"In deciding whether there is plain error, the district court must then determine whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error."

Again, that concept of misconduct notwithstanding. It is my specific finding that this did resolved in irreparable and fundamental error, as I have described.

The Supreme Court says in the next sentence that, the

context of irreparable and fundamental error is, "Error that results in a substantial impairment of justice or denial of fundamental rights such that but for the misconduct, the verdict would have been different."

And I get that's in the new trial context, but I think it gives guidance because my view is the dilemma as a judge, this thing first came up as a motion to strike from the Plaintiffs. And I have to say that bell can't be un-rung. That's my opinion.

Even if I granted the motion to strike, I don't know what type of contemporaneous curative instruction I could have ever come up with to ask Ms. Stidhum, especially, Ms. Brazil, especially Mr. Cardoza, especially, Ms. Asuncion, especially to now disregard the author's racial discriminatory comments.

In addition, you know, sometimes life events happen and I know, we all, as lawyers -- since we deal with fact patterns, and people more than most human beings -- I'm sure most lawyers think man, my life is just different than everybody else's. Well, I can share that with you too, from my perspective as a judge, because I deal with facts and things all the time, but not necessary to my decision, but I have to say it's lost on me that this whole situation is even more magnified given the recent events of the weekend.

I mean, think about how strange this is for me too. I'm sitting at home and so my wife is a hard worker. And I told her well, leave me alone all day Saturday. So she goes off to her office in Howard U Center at Marcus & Millichap because she does commercial realty -- commercial brokerage, so she goes there all day Saturday and works,

and leaves me alone.

I was hoping to be done to at least have a Sunday for good health reasons, but unfortunately, that didn't happen, so I talked her into going to yoga and grocery shopping without me yesterday, which she went and did. And all the while, while that's happening, while I'm at home by myself, you know, as I'm on my laptop, and I'm actually half the time corresponding with my law clerk, who was nice enough to work on Saturday with me remotely by emails and such.

It comes to my attention that on pretty much every 24/7 news station for the entire weekend there's a story about someone who drove nine hours across Texas -- nine hours across Texas to go to El Paso and picked that place because in the Walmart in El Paso there would be those from Mexico shopping -- that he was going to go shoot and kill, as a hate crime. That's what seemed to be the upshot of that circumstance.

Okay. Mr. Landess may take this as a criticism. I don't really mean it that much, but some would argue he drove nine hours to go kill Mexicans in his mind. I'm sure that's what he thought. That's exactly what I'm dealing with in this thing.

Okay. Then later that night what happens in Dayton? Are you kidding? Another one. In this situation African Americans are killed. And is that part of another hate-based incident?

None of that really matters to this decision, because it is my strong view that in this case racial discrimination can't be a basis upon which this civil jury can give their decision, but it's not lost on me that it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and

Stidhum put their heads in the sand and didn't watch any news, or have a cell phone, or a have a friend, or have a family, or go to church, or do anything, that this is out there to just aggravate what we already have as my view being a big problem.

Bottom line is, how in the world can we expect this jury, which is the verse -- and by the way, none of those people are alternates, because we decided before trial that seats 9 and 10 would be the alternates, so they're all four deliberating jurors -- how in the world can we reasonably think that they're going to give a fair verdict and not base the whole decision, at least in part, on the issue of whether Mr. Landess is a racist.

That's the basis for the decision. The Plaintiffs can draft the order. And so concludes the most difficult thing I've done since I've been here.

Anything else from either side?

MR. JIMMERSON: Yes, Your Honor. Relative to the briefing on the cost matter, in light of this, I don't see a need for an expeditious order, or shortening time. Fourteen days from today would be an approximately time for the Defense to file their opposition, and then we would file the reply in the normal course, and you would give us a hearing date sometime about 30 days from now.

THE COURT: Well, okay. Mr. Vogel, how much time do you want to respond to this pleading?

MR. VOGEL: That's fine. Two weeks is fine. I appreciate it.

THE COURT: Okay. Two weeks will be?

THE CLERK: Two weeks will be August -- oh, you're going to be gone all that week.

THE COURT: That's okay. It's a pleading deadline.

THE CLERK: Okay. August 19th.

THE COURT: Okay. So the opposition will be due by close of business on August 19th.

And then a reply?

THE CLERK: A week later August 26th.

MR. JIMMERSON: Could we have the following Monday, the 29th?

THE CLERK: Okay. We'll do it the Tuesday, September 3rd, Labor Day.

THE COURT: All right. And then the hearing, we'll probably need a couple of hours for that, given our track record.

THE CLERK: You want it on a motion day or on a Wednesday?

THE COURT: Well, I need two hours, so either way is fine with me, but it's probably going to be a separate day of a Wednesday.

THE CLERK: Okay. Let me see what we have going on here.

THE COURT: And of course, the focus of this now is the fees and costs aspect. I granted a mistrial.

MR. JIMMERSON: Yes, Your Honor.

THE COURT: Although, I do want to want to say that -- I mean, there's always the idea that you can ask for reconsideration, but I mean, to me, the focus really is the fees and costs aspect of the motion.

And I want to give some context to that too. I actually made a note here on that. Let me find that note. In covering everything else, I forgot about that one.

Oh, yeah. All right. So both sides -- here's my note -- both sides made mistakes. In other words, what I'm saying is, both sides are practically responsible for what happened. To me, the issue remains which side is legally responsible for what happened; in other words, we know the Plaintiffs made a mistake in a definitional sense if you look up the word mistake in the dictionary. You made a mistake.

The question is, given what happened, and how it actually happened, is the Defense legally responsible, or is the Plaintiff legally responsible, is it 50/50, or how does that work. So that's a technical point, but in causing a mistrial, is there a standard that applies that I should be made aware of along these lines? Because again, there's no doubt the Plaintiffs made a mistake in not catching the item and stopping its use.

The Defense used it, as they did, as we have talked about enough already, but what's the legal standard having to do with responsibility because the statute talks about fees and costs, right, if you cause a mistrial through misconduct, I think is what it says. And so that'll be part and parcel of what we'll have to figure out.

But here is Terra (phonetic). So we need two hours for a hearing on this motion for fees and costs having to do with a mistrial.

THE CLERK: How far out?

THE COURT: Well, what's the last date on there?

MR. VOGEL: The 3rd.

THE CLERK: September 3rd.

THE COURT: After September 3rd.

THE CLERK: Okay. So we've got -- you can either do the afternoon of September 10th so 1 or 1:30 start time, or we've got the 11th we can either do a 9 to noon or an afternoon setting. Those are the two days we have available.

THE COURT: Okay. September 10th or 11th work?

MR. JIMMERSON: What day of the week is the 10th, please?

THE CLERK: Tuesday is the 10th and Wednesday is the 11th.

MR. JIMMERSON: Yeah, we'd prefer the Tuesday the 10th.

THE CLERK: We could do a 1:00 start time.

THE COURT: How about the Defense? You okay with that?

MR. VOGEL: Just checking real quick. Tuesday is definitely better.

THE COURT: Okay. Let's use 1:30 on that day and we'll have the whole afternoon then, but my guess is it's a couple of hours given our track record, because most likely I'll come in and I'll give a little summary of the pleadings, and talk about issues, and what have you, put things in context, and then we'll have argument. I mean, the whole thing could be an hour, but it could be more, but we'll start at 1:30 on?

THE CLERK: On Tuesday, September 10th.

THE COURT: That'll be the hearing.

MR. JIMMERSON: All right.

THE COURT: Okay. Anything else for today?

THE CLERK: The Court hasn't decide on Court's Exhibit 37, because there was an objection by Mr. Vogel, as if it was the same copy given to -- it had to do with -- I think it has to do with some X-rays.

MR. VOGEL: Yeah. And that's still in dispute, so --

THE CLERK: Okay. So we're just going to leave that unadmitted then, correct? Or how do you want to address that?

THE COURT: Well, that's a good question.

MR. JIMMERSON: I mean, that's a Court exhibit. That's not an admissibility exhibit. In other words, it's not a Plaintiff or Defense offering it. It's a Court exhibit. Isn't that the binder, Mr. Vogel?

MR. VOGEL: It is.

MR. JIMMERSON: So we certainly, in the sense of being admissible, we certainly believe that the foundation has been laid for admissibility. I mean, the Court knows what it is. It's the document binder of X-rays delivered by --

THE COURT: Here's my question --

MR. JIMMERSON: -- the Plaintiffs to Defendant.

THE COURT: -- does it matter now anyway?

MR. VOGEL: No.

THE COURT: I mean, it really doesn't matter.

MR. JIMMERSON: No.

THE COURT: Because you're going to have a new trial anyway.

MR. JIMMERSON: Yes. That's true, Judge.

THE COURT: And it'll be decided later. So I just don't --

respectfully, I don't know if we need to do anything else on the case --

THE CLERK: Okay. I just needed to have an outcome for it.

THE COURT: -- at this point. Okay.

And then, you know, I don't want to bring up anything ugly, but within the next business day or two, if you could have, you know, somebody come get all these binders out of our courtroom, I'd appreciate it.

MR. JIMMERSON: Your Honor, would that be then Plaintiff would obtain the Plaintiff's and Defendant's would obtain Defendant's; is that fair?

THE COURT: However you do that --

MR. JIMMERSON: Would you agree, Mr. Vogel?

MR. VOGEL: Yes.

THE COURT: -- you know, is fine. I just would like to have the room, you know, cleaned up.

MR. JIMMERSON: We'll, do it this afternoon actually.

THE COURT: Okay.

THE CLERK: And then I have Exhibit 150 that still needed to be provided the CD from your side, unless you wanted to withdraw that.

MR. JIMMERSON: What is 150?

MS. POLSELLI: That's that video that was played during Jonathan's testimony.

MR. JIMMERSON: Yes, we'll provide you that. I'll say we'll do that.

THE CLERK: Okay. And that's it from me.

THE COURT: Ms. Gordon.

MS. GORDON: Your Honor, if I may. I think that the transcript will bear this out, but I was just asking Mr. Vogel also, I think that what I said was misinterpreted to an intent. I don't want this jury -- and never wanted this jury to make a decision based on race. What I was talking about was the procedural propriety of what happened.

So to the extent that there is in any way characterizing my action as misconduct, and I think the Court was clear, that that's not what's saying, but I never wanted to interject race. That's what the email said, and that's what we were using as impeachment evidence, so it was not ever my intent, or I would never hope the jury would do that. That was the content of the impeachment evidence that was never objected to, and that was offered by Plaintiff. And we certainly had no reason to think that they made this mistake. I was as surprised as anyone that they didn't object to it. Never would I think that they didn't know what was in their documents. So I just want to make that part clear.

It wasn't an ambush bomb sandbag thing. It was impeachment evidence that they gave me and I used it. It wasn't for a bad purpose.

THE COURT: All right. I think maybe where we, at this point, disagree, Ms. Gordon -- because, you know, I don't feel good about any of this, and one aspect of not feeling good is towards the lawyers. You know, I don't feel good about what this now creates for all of you. You know, it really bothers me.

You know, I've been to -- I know that there are those that

don't care what lawyers think when judges make decisions, and some of those people could be judges. I don't know, but I do care. You know, and I feel bad. I feel really bad.

And I think where we disagree is, it's just my view that, you know, seeing the, at least the potential impact of what could happen when you put racism in front of a juror is where we part company on this thing. I mean, that's my criticism. It truly is. And, you know, they call it the practice of law, because it is, and you learn in the practice of law. You know, I've always learn, you know, all the time. And it's a good thing to keep learning.

And where we probably have a difference of opinion, and where we just part company is I just think that it's one of those things where seeing the impact of what could happen if you put the fact that it looks like Mr. Landess is a racist up in front of a jury in a medical malpractice case. That's where we part company, because obviously, you now know that I really think that that was too much of a bomb that made it impossible now after all the effort we put in to have a fair trial. What else can I tell you?

MS. GORDON: No, I understand. I think that the difference is just if you're looking for misconduct, as opposed to mistakes. If you are just -- you're okay with the mistakes that we believe are cumulative on Plaintiff side, this is by no means any, you know, any worse, if it's a mistake, if that's what it is, and it's one, and it's not what have you, but when you're saying responsibility and legal responsibility for what happened, I don't believe that you can, you know, dismiss the multiple

mistakes that Plaintiff did make, and if they had not been made, we wouldn't be here right now with maybe not bringing up that this is what this bomb consists of.

THE COURT: Okay.

MS. GORDON: I think that was my distinction, because it's hard for me to hear the words attorney misconduct, attorney misconduct.

THE COURT: Yes.

MS. GORDON: I know you were citing a case --

THE COURT: I get that. I know.

MS. GORDON: -- but that's hard.

THE COURT: And that brings up something that maybe should be part of this briefing; and that is, if you look at these -- I used the Lioce case as guidance obviously, and they talk about these arguments that you shouldn't make as "attorney misconduct", and that's an interesting thing, because I don't know if you have to have bad intent to make an argument that amounts to attorney misconduct; in other words, maybe it could be a mistake, you know, you could say something in a closing argument that by definition under the law is misconduct, for purposes of improper closing argument, but we all know that misconduct when it comes to attorneys sometimes is also connoted with ethical misconduct.

Well, you know, I know in Lioce referred Mr. Emerson to the bar, because guess who prosecuted Mr. Emerson for, you know, a few days in Reno once upon a time when a guy name Dave Grundy

represented him? Me. But anyway, that's an interesting point. It's highly I think possible that certain types of argument to jury could be given without any bad intent, but yet be seen as "misconduct". Certainly, if there was bad intent, that's always misconduct.

I told you informally on Friday, Ms. Gordon, and I'm comfortable enough telling you now, I don't get a feeling -- God only knows, and you, but I don't get a feel -- I'll share with you -- that you had some bad, horrible intent. Rather, I think -- what I really think, that both you and Mr. Vogel just didn't fully realize the impact that this could have. That's a mistake. Is it misconduct for purposes of the rule that's in question having to do with attorneys' fees? Maybe looking at the argument cases that likewise use the word misconduct will give guidance as to that, because ultimately I guess I'm going to have -- well, I know I'm going to have to make a decision on this fee and cost request.

You know, I'm not -- as I sit here now, and Friday, and over the weekend, and at all times, you know, did I ever say, you know, that Ms. Gordon, what a sinister, evil, you know, I didn't do that. I didn't. I just -- I really felt like actually you were just being -- in your mind, you were being zealous, and you did what you did. I just, again, don't think you appreciated, or Mr. Vogel appreciated, the impact of what was going to happen. And I don't want to take all afternoon, but I do want to spend a couple of minutes saying something else to you now that it comes to mind.

Because I want you to know I sympathize with you. Okay. in deciding all these things that you decide as a judge, I can tell you, in my

mind, I have these little things I call traps. Every once in a while something comes your way and it's a judicial trap; meaning, at first blush, when you see the item you say, oh, my goodness, I'm definitely going to have to do this. This is the right result. I've got to do this. And every once in a while, because you're not seeing something that's maybe subtle in the law, the truth is, the answer is to do the opposite. I call that a bit of a judicial trap.

You read reported decisions? Look at the four to three decision that just came out of the Supreme Court on the issue of the duty of a common carrier bus. That's what I'm talking about. You know, this stuff cannot always be easy.

So just so you know -- and I'm glad you brought this up, actually, because I don't want you to leave here thinking oh, my God, you know, the Court thinks I did something unethical, because I don't think that. I don't think that. Rather, what I think is, in your moment of being zealous, you just failed to see -- you and the whole team respectfully, just failed to see the impact that putting Mr. Landess's -- putting evidence on that, you know -- and again, I'm not accusing him of anything, but it's -- hey, it is what it is, it's evidence that one could easily draw a conclusion that he's a racist. And I think the failure is not recognizing that now that's interjected in the trial.

That's all I can say. Okay.

Do you want to say anything else? Or --

MS. GORDON: No, that was it. I just didn't want you to --

THE COURT: Okay. All right. Anybody else want to say

anything?

MS. GORDON: -- think I wanted them in the --

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

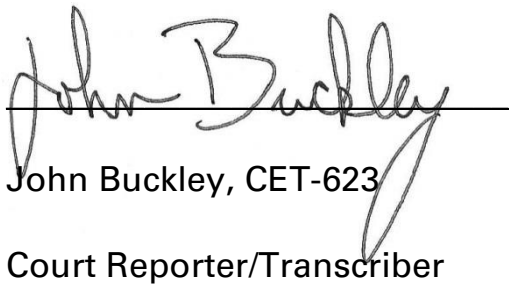
THE COURT: Take care.

MR. JIMMERSON: Appreciate all your staff for all --

[Proceedings adjourned at 12:15 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 5, 2019

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DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, aka KAY GEORGE LANDESS, an individual, Plaintiff, vs. 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	**CASE NO.: A-18-776896-C** **DEPT NO.: 32** Courtroom 3C **PLAINTIFF'S SUPPLEMENT TO MOTION FOR MISTRIAL AND FEES/COSTS**

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 "CENTENNIAL HILLS HOSPITAL," DOES I-X, inclusive, and ROE CORPORATIONS I-X, inclusive,

Defendants.

COMES NOW, Plaintiff Jason G. Landess a.k.a. Kay George Landess ("Plaintiff"), by and through his counsel, Howard & Howard Attorneys PLLC and The Jimmerson Law Firm, P.C., hereby submits this supplemental brief in support of his request for attorneys' fees and costs, relating to his Motion for a mistrial. This Supplement is made and based upon the papers and pleadings on file, the points and authorities attached hereto, and any oral arguments the Court may entertain at the time of the hearing on this matter.

DATED this 13th day of August, 2019.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Martin A. Little

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Supplemental Brief is filed in support of Plaintiff's motion for a mistrial and attorney fees and costs. The Court should, under the facts of this matter, award Plaintiff his requested attorney fees and costs, and the Court possesses at least two separate and distinct—and compelling—reasons to do so: First, NRS 18.070(2), which provides, "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." Second, this Court's inherent authority clearly supports the same. *See Emerson v. Dist. Ct.*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011) ("This broad discretion permits the district court to issue sanctions for any 'litigation abuses not specifically proscribed by statute.'") (citing *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)). These authorities, analyzed individually and applied collectively, support Plaintiff's requested relief. *See Watson Rounds v. Dist. Ct.*, 358 P.3d 228, 232 (Nev. 2015) (treating different statutes and court rules as "independent sanctioning mechanisms" when analyzing the legal grounds to award attorney fees).

In applying the rulings in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970, 2008 Nev. LEXIS 1 (2008), this Court concluded that the defense presented the jury with such highly inflammatory information regarding racial prejudice that the jury was tainted to the point that curative instructions could not remove the prejudice to

Plaintiff and that he could not thus receive a fair trial. The Court therefore ordered a mistrial on the eleventh day of trial. In doing so, the Court properly analyzed the facts and circumstances that led to the mistrial, and determined that Defendant, Dr. Debiparshad, through his counsel, was the legal cause of the mistrial.

As the following discussion will explain, the Defense purposefully caused the mistrial to occur. The Court should now order the defense (Defendant and the defense attorneys) to pay Plaintiff's reasonable attorney fees of $253,383.50 and reasonable costs of $118,606.25 for a total of $371,989.75. So the Court is aware, these attorneys' fees and costs have been limited by Plaintiff to the actual costs and fees incurred during the Trial itself, excluding the attorneys' fees and costs that were incurred either before commencement of Trial, or after the mistrial occurred. This is consistent with the directives of the Nevada Supreme Court in *Emerson v. District Court*, 129 Nev. 672, 680, 263 P.3d 224, 225 (2011). As such, a measured, reasonable and thoughtful approach, and documentation of fees and costs, has been adduced by Plaintiff for the Court's consideration.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

The Court is very familiar with the facts of this case. So Plaintiff will just focus on the pivotal events leading up to the mistrial.

[1] The result also reflects the herculean efforts by the Court and its law clerk, Ms. Savage, for the weekend work on August 3 and 4, 2019 as they, apart from the parties, prepared their thorough legal research to properly analyze the issues presented, including finding and citing to the relevant case law that supported the Court's ultimate decision to grant Plaintiff's request for a mistrial.

The Defense has known for months that Jonathan Dariyanani ("Mr. Dariyanani") was a key witness regarding Plaintiff's wage-loss claim. In preparation for taking his deposition, the Defense thus on April 4, 2019 issued and served a subpoena upon Mr. Dariyanani, requesting, *inter alia*, a copy of all correspondence between Plaintiff and Mr. Dariyanani and proof of Plaintiff's travel while employed by Cognotion, Inc. ("Cognotion"). Accordingly, on April 22, 2019, Mr. Dariyanani emailed Dr. Debiparshad's defense counsel, John Orr, a letter with a link to the 79 pages of documents that came to be marked as Plaintiff's Exhibit 56.[2] That packet of documents included the 2-page "Burning Embers" email that Ms. Katherine Gordon improperly used to infect the jury proceedings. Mr. Dariyanani copied all parties' legal counsel with that email. Notably, Plaintiff was not copied.

Mr. Dariyanani was deposed on April 30, 2019; and no reference was made by anyone to any of the documents sent to Mr. Orr on April 22nd, including the Burning Embers letter. That packet of documents, however, trickled unnoticed into the thousands of pages of other discovery documents Plaintiff had assembled and was duly Bates stamped P00440-P00522.

There are at least two good reasons for that oversight: First, Plaintiff was not copied on Mr. Dariyanani's email, nor did his counsel forward it to him. Second, at that time Plaintiff's lead counsel, Mr. Jimmerson, was dealing with a personal matter that took him out of his office. So, because of that oversight, the Plaintiff did not

[2] *See* Mr. Dariyanani's Declaration (**Exhibit 1**) and the email (**Exhibit 2**).

address the serious implications and obvious prejudice of the Burning Embers letter in any pretrial motion *in liminie*, a mistake that Mr. Jimmerson fully acknowledged to this Court.

On May 16, 2019, Plaintiff disclosed those documents as item #55 in the Twelfth Supplement to Plaintiff's Initial Early Case Conference Disclosure of Documents and Witnesses.[3] And on May 30, 2019, Dr. Debiparshad in turn disclosed those same documents as item #84 in his Seventh 16.1 Disclosure.[4]

As trial approached, Plaintiff's counsel made repeated abortive attempts to meet and confer with the Defendants' counsel to compile a joint trial exhibit list. When such cooperation was not forthcoming, Plaintiff on July 1, 2019 filed and served a Trial Exhibit List[5], with the packet of documents containing the Burning Embers letter listed as proposed Exhibit 56. Of critical note, Dr. Debiparshad's counsel then on July 1st *knew* that Plaintiff had mistakenly listed an unredacted, highly-prejudicial, explosive document as one of his proposed exhibits, and also knew beyond any shadow of a doubt that Plaintiff's counsel would never, ever, under any circumstances, introduce that unredacted document into evidence.

But, as demonstrated by past events, the Defense wanted the jury to read that letter—their proverbial smoking gun—in the worst way. They just needed to figure out a way to divert blame away from them to avoid being sanctioned by the Court

[3] **Exhibit 3**.
[4] **Exhibit 4**.
[5] **Exhibit 5.**

should things spiral out of control, which it did. So they devised a surreptitious plan and, as Ms. Gordon said, "did it."

And this is what they did:

First, they waited until *one day before trial* to file their own Fifth Amended Trial Exhibit List[6] to see if Plaintiff caught the mistake. When Plaintiff failed to file a last-minute motion *in limine* or amend his list, the Defense filed their own exhibit list, **intentionally omitting any reference whatsoever to the radioactive Burning Embers letter** that they were anxious to selectively read to the jury. In an effort to hedge their bet, they did however list two other emails contained in that 79-page packet of documents—Defense Exhibits 463 & 464. That unequivocally demonstrates that the Defense lawyers carefully parsed through that packet and culled out and listed two less explosive documents that they perhaps would introduce at trial.

Plaintiff then proceeded to put his case on. He was on the stand for 3 days. Yet not once during cross examination did the Defense make reference to the Burning Embers letter, electing instead to save their smoking gun for Mr. Dariyanani. And, as normally occurs, during trial Plaintiff's counsel offered their own proposed exhibits into evidence when examining a witness, and the Defense did the same—*with one important exception*.

[6] **Exhibit 6.**

When Mr. Dariyanani was on the stand, Ms. Gordon commenced cross examination and suddenly presented for use not one of her own exhibits, but the radioactive Plaintiff's Exhibit 56, which includes the Burning Embers letter that she had in advance highlighted in yellow. She then engaged in the following charade to feign ignorance of the admission status of that document—the most inflammatory, and explosive, and prejudicial document, ostensibly for "impeachment," in the Defense's entire collection of documents:

> MS. GORDON: I'm going to show you an email from Plaintiff's -- **I think it's admitted, but it might still just be** –
> MR. DARIYANANI: Uh-huh.
> MS. GORDON-- Plaintiff's Proposed Exhibit 56.
> So you know what? Let me –
> THE COURT: All right. Is 56 in those?
> THE CLERK: 56 is not in the book.
> THE COURT: All right. Not admitted.
> MS. GORDON: **I don't think it's admitted yet. I'm not 100 percent sure**.
> THE COURT: Yeah. It's -- I'm sorry. I just want –
> MR. JIMMERSON: The answer; I would have no objection to that email. I'd just know the date, if I could?
> MS. GORDON: And I have a view from 56, so –
> MR. JIMMERSON: All right. I have the exhibit.
> MS. GORDON: Can I –
> MR. JIMMERSON: Sorry.
> MS. GORDON: Can I move to admit Plaintiff's Proposed Exhibit 56?
> MR. JIMMERSON: No objection, Judge.
> THE COURT: All right. 56 is admitted.
>
> *Recorder's Transcript of Trial-Day 10*, p.144, line 6 –p.145, line 1 (**Exhibit 7**) (emphasis supplied).

Having finessed Mr. Jimmerson to stipulate to the admission of one of his own client's exhibits that the record clearly shows he was unfamiliar with, Ms. Gordon then sets up her coup de grâce with the Burning Embers letter by asking

questions about a few insignificant documents in that same exhibit, with the prejudicial blow saved for last by suddenly projecting the highlighted inflammatory language upon the television screen for emphasis as she asks the following nuclear questions:

> MS. GORDON: Mr. Dariyanani, you testified earlier that Mr. Landess is a beautiful person in your mind.
> MR. DARIYANANI: We're all beautiful and flawed. He's beautiful and flawed.
> MS. GORDON: And you respect him a great deal?
> MR. DARIYANANI: I do.
> MS. GORDON: 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?
> MR. DARIYANANI: 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.
> MS. GORDON: And that was before five years ago, correct?
> MR. DARIYANANI: I think so.
> MS. GORDON: 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.
> MR. DARIYANANI: Uh-huh.
> MS. GORDON: 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.
> MR. DARIYANANI: Uh-huh.
> MS. GORDON: "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?
> * * *
> MS. GORDON: **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**?
> * * *

> MS. GORDON: 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**? *Recorder's Transcript of Trial-Day 10*, p.161, line 3 –p.163, line 8 (**Exhibit 8**) (emphasis supplied).

That astounding, reprehensible, explosive, staged, strategic, and irreversible display of unprofessional conduct imposed upon this Court the heavy burden of declaring a mistrial and sent ten committed citizens home without being able to finish their civic duty, all of whom are probably forever disenchanted with the justice system. Two weeks of diligent and conscientious work by all involved was for naught. And when this Court politely confronted Ms. Gordon about it three days later, she defiantly stated:

> MS. GORDON: I appreciate that, Your Honor. I think that what that does is it certainly shifts the burden to Defendant, and what, I believe, you're saying is that it's admissible evidence, Your Honor. And as you've stated in this case and I believe in other trials you've had, **admissible evidence is used for any purpose, can be used for any purpose**, and I don't think that the burden for how prejudicial a piece of evidence that Plaintiff disclosed and stipulated into evidence, the prejudicial nature of it should not be -- have to be addressed by the Defense, and out of curiosity or out of doing their job for them, I don't know, **but I know that admissible evidence, it can be used for any purpose**. And I know that Plaintiff initially elicited and had impermissible and unethical character evidence. **What the Defense is allowed to do in response to that, and what I actually have an ethical duty to my client, a person of color to do, is to use that evidence in impeachment. I'm allowed to do it, I should do it, and <u>I did do it, and they did nothing about it</u>**.
>
> THE COURT: So you think that the jury is allowed to consider whether Mr. Landess is a racist?
>
> MS. GORDON: **I think that I am allowed to use impeachment evidence that has not been objected to, and has been admitted into evidence by stipulation. I absolutely think I'm allowed to use it. I should use it on behalf of my client, and the burden should not be shifted to me to assist with eliminating or reducing the prejudicial value of that piece of evidence.**

> Dr. Debiparshad was asked about his race during his deposition. **Mr. Daryanani went on for the first 15, 20 minutes of his testimony about his race.** It's not new. Motive is always relevant in terms of Mr. Landess' reason for setting up our, you know, view on this case—
> THE COURT: Um-hum.
> MS. GORDON: -- setting up Dr. Debiparshad. I don't think it's completely irrelevant, and you know, it hurts. **It hurts. I don't care**. **That's our job, and I'm sorry that it hurts and it's damaging, but it's not so prejudicial that it shouldn't be considered at all. They opened the door, and we're allowed to use it. I have an ethical obligation to use it.**
> * * *
> I don't know, Your Honor, and perhaps you found cases that I did not, but I don't know that there is a subsection under impeachment, and what evidence we can use as impeachment that says, oh you can use impeachment evidence, **but you can't if it has to do with race.**
> *Recorder's Transcript of Trial-Day 11*, p.33, line 21 –p.36, line 5 (**Exhibit 9**) (emphasis supplied).

Indeed, Ms. Gordon's statement that Plaintiff "did nothing about it" is echoed in her comments during the off the record discussion on August 2, 2019, when Mr. Jimmerson initially moved to strike the email. At that time, Ms. Gordon stated that she "kept waiting" for the Plaintiff to object to her use of Exhibit 56, page 44, and "when the Plaintiff did not object," the Defendant then went forward to use the email. Mr. Vogel echoed that sentiment on Monday, August 5, 2019, stating "We gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union. And, yet, I guess it -- it comes down to, you're asking could we have done something to try to remove that. I suppose in hindsight I guess we could have. But I don't think we had to." *Tr. 42:5-9.*

The Defendants' statements led the Court to believe that the Defendants ***knew*** that their use of the Exhibit was objectionable, and would be objectionable to the

Plaintiff, and to the Court, and nevertheless the Defendants continued to use and inject the email before the jury in the fashion that precluded Plaintiff from being able to effectively respond. Regarding her comment that she doesn't "know that there is a subsection under impeachment, and what evidence we can use as impeachment that says, oh you can use impeachment evidence, but you can't if it has to do with race," Ms. Gordon must not have spent much time looking for cases about this subject because, as the following discussion demonstrates, there are numerous cases that make it crystal clear that what she did was highly improper. In addition, NRS 18.070(2) expressly prohibits an attorney from purposefully causing a mistrial, which is what she did. What is important to note is that the Defendants' counsel Vogel and Gordon, together and separately, in arguing to the Court that they "waited for Plaintiff to object" and that Plaintiff "did nothing about it," evidence a consciousness of guilt, and a consciousness of wrongdoing. That consciousness of wrong doing is proof that Defendants and their counsel were the legal cause of the mistrial.

III. STATEMENT OF ARGUMENT

A. *Prejudicial Comments Made by an Attorney to a Jury Constitutes Misconduct.*

Ms. Gordon read the inflammatory language in front of the jury and then asked Mr. Dariyanani if he thought those comments were racist, the clear intent being to

convince the jury that Plaintiff is a racist[7]. It is universally accepted that an attorney cannot inject the type of racist remarks that Ms. Gordon made into a jury trial in order to prejudice the jury against Plaintiff. "Making improper comments by counsel which may prejudice the jury against the other party, his or her counsel, or witnesses, **is clearly misconduct by an attorney**. Cases that have dealt with similar situations have uniformly condemned such statements as fundamentally prejudicial." *Born v. Eisenman,* 114 Nev. 854, 862, 962 P.2d 1227, 1232, 1998 Nev. LEXIS 105, *15 (1998) (emphasis supplied). "Appeals to racial prejudice are of course prohibited. . . . They are 'universally condemned.' *See* Annotation, *Statement by Counsel Relating to Race, Nationality, or Religion in Civil Action as Prejudicial*, 99 A.L.R.2d 1249, 1254 (1965)." *Texas Employers' Ins. Ass'n v. Guerrero,* 800 S.W.2d 859, 862, 1990 Tex. App. LEXIS 3172, *8 (Ct. App. Tex. 1990) (citation omitted).

Given today's cultural context of racial unrest and violence, Ms. Gordon's conduct is even more reprehensible. One would expect that she watches the news. Almost every week there is some new catastrophe involving racism. For example, the Charleston church shooting in June 2015 was a mass shooting in which a 21-

[7] Ms. Gordon evidently found no pause in making such an incendiary accusation even though she knew that: (1) Plaintiff's adopted son, Justin, sat in the courtroom during the entire trial, and Justin's skin color is much darker than Plaintiff's skin color because Justin's deceased biological father was Iranian; (2) Plaintiff spoke with and consented to Dr. Debiparshad (who Ms. Gordon characterized as a "person of color") operating upon him; and (3) Plaintiff revealed during direct examination that early in his career he took a 2-year sabbatical from the practice of law to help impoverished, indigenous people in such countries as Africa, Haiti, Honduras, and the Philippines. Those facts alone would make Plaintiff one of the most racially tolerant "racists" in modern history.

year-old white supremacist murdered nine African Americans during a prayer service in downtown Charleston, South Carolina. The Pittsburgh synagogue shooting in October 2018 was a mass shooting that occurred at the Tree of Life – Or L'Simcha Congregation in the Squirrel Hill neighborhood of Pittsburgh, Pennsylvania, with eleven people killed by an anti-Semite. And just one day after Ms. Gordon made her inflammatory pitch to the jury, a mass shooting occurred at a Walmart store in El Paso, Texas by a lone gunman determined, in his own words, "to kill Mexicans." 22 people were killed and 24 others injured. It is therefore virtually impossible for Ms. Gordon to credibly claim that she was not aware of the volatile environment or could not reasonable foresee that this Court would declare a mistrial. In fact, the moment she read the above-referenced excerpts from the Burning Embers email a mistrial was the *only* logical option available to this Court to maintain the integrity of the justice system.

And our high court explained the obligation of the trial court when such misconduct occurs: "When such conduct is brought to the district court's attention by objection or motion for a mistrial, it is incumbent upon the district court to determine whether the remark was made and heard by the jury. . . . [I]f there is a reasonable indication that prejudice may have occurred to one party, **the district court is obligated to declare a mistrial**. Of course, the matter should be referred by the district court to the State Bar of Nevada pursuant to Canon 3(D)(2) of the Nevada Code of Judicial Conduct, if an attorney has committed misconduct in his

or her courtroom." *Born* at 862, *16 (emphasis supplied). "Manifest necessity to declare a mistrial may also arise in situations in which there is an interference with 'the administration of honest, fair, even-handed justice to either, both, or any of the parties to the proceeding.'"*Hylton v. Eighth Judicial Dist. Court, Dep't IV*, 103 Nev. 418, 423, 743 P.2d 622, 626, 1987 Nev. LEXIS 1660, *11 (1987), citing to *People v. Clark*, 705 P.2d 1017, 1019 (Colo.Ct.App. 1985).

Ms. Gordon therefore engaged in professional misconduct that obligated this Court to as a matter of law declare a mistrial.

B. *The Prohibition Also Applies to Impeachment.*

In argument on Plaintiff's Motion for Mistrial, Ms. Gordon nevertheless argued that Mr. Dariyanani opened the door to character evidence and that impeachment was thus allowed. This Court agreed that relevant impeachment evidence would be permissible, but accurately pointed out that impeachment evidence about a person being a racist is impermissible because it is inherently irrelevant, especially in a case totally unrelated to race or racial discrimination: "And even if it is relevant, if character is an issue, that's really -- that's the issue. I mean, race -- whether he's a racist or not is not relevant and is prejudicial." *Recorder's Transcript of Trial-Day 11*, p.32, lines 12-14 (**Exhibit 10**). Ms. Gordon disagreed by stating that once she succeeded in finessing Mr. Jimmerson to stipulate to admit Exhibit 56 into evidence, she could then use it "for any purpose" and actually had an ethical obligation to do so. She's dead wrong.

First, by statute not all relevant evidence is admissible: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS § 48.035(1). Second, courts "have firmly rejected the notion that any evidence introduced by defendant of his 'good character' will open the door to any and all 'bad character' evidence . . . ." *People v. Loker*, 44 Cal. 4th 691, 709, 188 P.3d 580, 597, 2008 Cal. LEXIS 9275, *26 (Ct. App. Cal. 2008).

Most importantly, our high court over two decades ago adopted this bright-line rule for the use of racist evidence for impeachment: "From [the United States Supreme Court case of *Dawson v. Delaware*, 503 U.S. 159 (1992)], we derive the following rule: Evidence of a constitutionally protected activity **is admissible only if it is used for something more than general character evidence**." *Flanagan v. State*, 109 Nev. 50, 53, 846 P.2d 1053, 1056, 1993 Nev. LEXIS 10, *5 (1993) (emphasis supplied). In *Dawson*, the United States Supreme Court held that the State violated Dawson's First and Fourteenth Amendment rights by admitting evidence of Dawson's membership in the Aryan Brotherhood. Hence, in *Flanagan* the State was not allowed to impeach the defendants' character with evidence that they believed in witchcraft. As incongruous as it seems, in this country the radical views held by a racist/White Nationalist are constitutionally protected and, thus, cannot *ever* be used as general character evidence against the person holding such views. Hence, by electing to use the Burning Embers email to try and prove to the

jury that Plaintiff is not a beautiful person because he is a purported racist, the Defense ironically fell into their own reptilian trap.

Indeed, just a few weeks ago the California Supreme Court issued its decision in *People v. Young*, 2019 Cal. LEXIS 5332, 2019 WL 3331305 (2019), which addressed the same issue of the use of racist evidence to prove bad character. The prosecutor openly and repeatedly invited the jury to do precisely what the law does not allow: to weigh the offensive and reprehensible nature of defendant's abstract beliefs as a racist in determining whether to impose the death penalty. In criticizing the use that evidence, the court, citing to both *Dawson* and *Flanagan*, stated: "[E]vidence of a defendant's racist beliefs is not relevant if offered merely to show the moral reprehensibility of the beliefs themselves—which is to say, evidence of the defendant's abstract beliefs is not competent general character evidence." *Id*. at *77. Ms. Gordon cannot thus justify her conduct by claiming that she was just trying to show that Plaintiff was not a beautiful person because he harbors racist thoughts and tendencies. Even if that is true (which it is not), such abstract thoughts and ideas are constitutionally protected.

C. *The Defense Acted Deliberately and Purposefully Caused a Mistrial*.

1. Brent Vogel Recently Petitioned for a Mistrial on Far Less Compelling Facts.

This scenario is nothing new to the Defense. In *Zhang v. Barnes*, 2016 Nev. Unpub. LEXIS 701, 382 P.3d 878 (2016) (unpublished), Mr. Vogel represented a

defendant doctor in a medical malpractice case that had a judgment of $2,243,988 in damages entered against him. *Id*. at *1. In that case, both sides inadvertently stipulated to an exhibit which contained inadmissible insurance evidence. When Mr. Vogel discovered the error (after the post-verdict interview with the jury), he moved for a new trial. The court denied the motion (the order is attached as **Exhibit 11**). The insurance declaration page was attached to the doctor's credentialing file, which was (like here) admitted by the defense upon stipulation of the plaintiff and used and relied upon by them. The Nevada Supreme Court affirmed the judgment, but held that the inadvertent submission of the insurance document was improper and could establish justification for a new trial, but because the insurance document was not submitted by the Defendant's counsel to the Nevada Supreme Court as part of the appellate record, the judgment was affirmed.

What that case teaches is that Mr. Vogel clearly understands that it is not how a prejudicial piece of evidence gets into evidence, even if by mutual mistake, but rather what the nature of the evidence is and the prejudicial impact that evidence has upon the jury. If Mr. Vogel thought he was entitled to a mistrial on those mundane facts, surely he cannot credibly fault Plaintiff for requesting a mistrial based upon these outrageous facts. After all, blowing up a case with racial prejudice poses a far greater threat to the fair and orderly administration of justice than a jury reading a document about insurance coverage that they repeatedly heard about from witnesses during trial.

2. The Defense's Actions Were Deliberate and Deceiving.

The deviousness displayed by the Defense is stunning, but not surprising given that past is indeed prologue[8]. The trickery they employed is self-evident in failing to mark their most prized piece of evidence (the Burning Embers letter) as a proposed trial exhibit. What experienced trial attorney would do that if he or she was not playing games?

And during argument on the mistrial motion, Ms. Gordon constantly tried to point the finger of blame at the Plaintiff, repeatedly exclaiming that Plaintiff "disclosed" the documents she used to derail the trial. But as the factual discussion above clearly demonstrates, Mr. Dariyanani sent the 47-page packet of documents directly to Dr. Debiparshad's counsel, John Orr. They are the ones who therefore requested and surfaced that document. They are the ones who strategically opted not to list their smoking gun as a trial exhibit to divert attention away from them. They are the ones who in advance highlighted the inflammatory language in yellow for the jury to see. They are the ones who manipulated the admission of those documents by casually pretending to not know whether or not Plaintiff's Exhibit 56 had been admitted into evidence. They are the ones who elected to put everything at risk by

[8] Witness, *e.g.*, Mr. Orr misrepresenting to this Court that the January 3, 2019 termination letter mistakenly dated January 3, 2018 was indeed crafted a year earlier and concealed from everyone; Mr. Vogel putting the phony white-on-white boards before the jury and telling them that those were blow-ups of the March 1, 2018 x-rays; and Ms. Gordon prompting this Court to have to make a corrective instruction about the mysterious "portal x-rays" after being told twice in bench conferences that that subject was off limits (prompting another request for a mistrial). There seems to be no end to Defendant's puffery, prevarication, and dirty tricks.

not having a bench conference before igniting that bomb. They are the ones who carefully plotted to wait until Mr. Dariyanani said something complementary about Plaintiff before exploding that bomb. And they are the ones who then stood there with a straight face and tried to escape culpability for their outrageous, intentional acts by ridiculously pointing the finger of blame at Plaintiff for "disclosing" those documents in his 12th 16.1 disclosure and falsely stating that the topic of race was fair game because, "Dr. Debiparshad was asked about his race during his deposition. **Mr. Daryanani went on for the first 15, 20 minutes of his testimony about his race**." *Recorder's Transcript of Trial-Day 11*, p.34, lines 21-23 (**Exhibit 12**) (emphasis supplied)[9].

3. The Defense Purposefully Caused a Mistrial as Prohibited by NRS 18.070(2).

The Court should apply NRS 18.070(2) to award Plaintiff's requested attorney fees and costs against Defendant and the defense attorneys. "The purpose of sanctions is to 'command obedience to the judiciary and to deter and punish those who abuse the judicial process.'" *Emerson v. Dist. Ct.*, 127 Nev. 672, 678, 263 P.3d 224, 228 (2011) (citing *Red Carpet Studios Div. of Source Advan. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006)).

[9] In reality, Mr. Dariyanani described his ethnicity in about 15 seconds. *See Transcript of Trial-Day 10*, p.81, lines 3-9 (**Exhibit 13**). Further, Defendants knowingly injected the issue of racism into the trial and took the gamble that the Court would not grant a mistrial, the first such Order issued by the Court during its 8 ½ year tenure on the bench. Defendants' premeditation and calculation resulted in a gamble that Defendant lost. And one should <u>always</u> lose when such dirty tactics are deployed.

NRS 18.070(2) provides an initial, independent basis for this Court to award Plaintiff's requested attorney fees and costs against Defendant and the defense attorneys: "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." The term "purposely" is defined as "[i]ntentionally; designedly; consciously; knowingly. An act is done 'purposely' if it is willed, is the product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences." BLACK'S LAW DICTIONARY, 1236 (6th ed. 1990). As the Nevada Supreme Court has clarified, even if the Court were to somehow determine that the events precipitating the mistrial were "unintentional," they still amount to misconduct, and are consistent with the BLACK'S LAW DICTIONARY definition of "purposely," which includes "awareness of probable consequences." *See Lioce v. Cohen*, 124 Nev. 1, 25, 174 P.3d 970, 985 (2008).

The *Lioce* decision supports Plaintiff's position that the lawyer need not know that they are committing misconduct in order to be sanctioned. **A lawyer can thus purposefully do an act that leads to a mistrial without having bad intent**. All that is needed is that the attorney knowingly act improperly (intending to do what is done, not necessarily intending to break the rules). "**A claim of misconduct cannot be defended with an argument that the misconduct was unintentional. Either deliberate or unintentional misconduct can require that a party receive a new trial. The relevant inquiry is what impact the misconduct had on the trial, not**

whether the attorney intended the misconduct." *Lioce v. Cohen*, 124 Nev. 1, 25, 174 P.3d 970, 985, 2008 Nev. LEXIS 1, *44 (2008). Of equal importance, the language of NRS 18.070(2) cannot possibly mean that a party and/or an attorney must be the sole causational link between the actions giving rise to the mistrial and the mistrial itself because only the court has the power to declare a mistrial. In other words, the statute automatically includes the assumption that something happens that prompts a court to exercise its power to declare a mistrial.

A logical and reasonable interpretation of that statute then is that a party and/or an attorney who is the primary moving force behind actions or events that lead a court to declare a mistrial may be ordered to pay the costs and attorney's fees. And that is what happened here: Ms. Gordon in the matter of a few seconds took it upon herself to burn down the village. As she stated, she did what she did because she thought she was duty-bound to do so. But, as the above-cited authorities teach, she was sorely mistaken. And Nevada courts have long recognized the maxim that one cannot "unring a bell." *See Zana v. State*, 125 Nev. 541, 545–546, 216 P.3d 244, 247 (2009).

The Defense may in fact have anticipated that a heated reaction from Plaintiff and/or the Court would draw a cautionary instruction. What they did not, however, anticipate was that the Court would view that suggestion as tantamount to throwing a skunk into the jury box and then asking the jury to disregard the smell. One thing is for sure though: they were certainly aware of the probable consequences of their

actions as evidenced by the extreme and unusual measures they employed to distance themselves from the bomb they unilaterally exploded.

D. *The Court also has Inherent Authority to Award Attorney's Fees.*

This Court's inherent authority provides a second, independent basis to award Plaintiff's requested attorney fees and costs. *See Emerson v. Dist. Ct.*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011) ("This broad discretion permits the district court to issue sanctions for any 'litigation abuses not specifically proscribed by statute.'") (citing *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)); *N. Am. Properties v. McCarran Int'l Airport*, No. 61997, 2016 WL 699864, at *2 (Nev. Feb. 19, 2016) (unpublished) ("District courts in Nevada may sanction abusive litigation practices through their inherent powers"); *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597, 691 P.2d 421, 424 (1984) ("[W]e have not so limited the power of the courts of this state to seek and do equity."). The United States Supreme Court has determined that a federal district court has the inherent power to impose attorney fees as sanctions. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46, 62, 111 S.Ct. 2123 (1991); *see Couch v. Private Diagnostic Clinic*, 554 S.E.2d 356, 362–364 (N.C. App. 2001) (applying *Chambers* to state trial courts). Notably, the stated purpose of the Court's inherent authority to issue sanctions is when there are litigation abuses, but the particular language of a statute or rule does not perfectly fit the situation. *See Emerson*, 127 Nev. at 680, 263 P.3d at 229. The reason behind the Court's inherent authority focuses on "the infinite variety of misconduct and of

aggravating and mitigating factors." *Id.*, 127 Nev. at 681, 263 P.3d at 230 (citing *Matter of Disciplinary Pro. Against Noble*, 100 Wash.2d 88, 667 P.2d 608, 612 (1983)). "The ability to impose such sanctions serves the dual purposes of deterring flagrant misbehavior…and compensating the innocent party for the attorney fees incurred during the mistrial." *Persichini v. William Beaumont Hosp.*, 607 N.W.2d 100, 109 (Mich. App. Ct. 1999).

There is no doubt here that the Defense committed "flagrant misbehavior" and that Plaintiff is the "innocent party." Thus, if the Court believes that NRS 18.070(2) does not provide the necessary legal basis to grant Plaintiff's requested attorney fees and costs, the Court can, alternatively, rely upon its inherent authority. Certainly, the Court can also base its decision to award attorney fees and costs to Plaintiff on both of these authorities. Therefore, Plaintiff respectfully requests that the Court apply NRS 18.070(2) and this Court's inherent authority to award Plaintiff's requested attorney fees and costs against Defendant and/or his attorneys.

IV. PLAINTIFF'S REQUESTED ATTORNEY FEES ARE REASONABLE IN LIGHT OF THE MISTRIAL PURPOSEFULLY CAUSED BY THE DEFENSE.

At trial, Plaintiff was represented by lead counsel, James J. Jimmerson of The Jimmerson Law Firm, and co-counsel, Martin Little of Howard and Howard. Mr. Jimmerson is the Principal and Senior Partner of The Jimmerson Law Firm, P.C., an AV rated law firm, named in the Preeminent Attorneys and Law Firms in Martindale Hubbell for more than three decades. Mr. Jimmerson has long been recognized as

one of the country's better attorneys through several professional societies and nationally-known organizations, having been awarded "Top 100 Trial Lawyers" by the National Trial Lawyer Association; repeatedly noted in Steven Naifeh's "Best Lawyers"; elected to "Super Lawyers Business Litigation"; a Fellow in the American College of Family Trial Lawyers, and Diplomat of the American Academy of Matrimonial Lawyers. *See Declaration of James J. Jimmerson, attached hereto as* **Exhibit 14.**

Mr. Little is a partner with Howard & Howard, a nationally-prominent law firm, and is an experienced personal injury trial attorney, having practiced law since 1999. He is AV Preeiminent rated and has considerable trial experience. He has been licensed in Nevada since 1999, and was a named partner with Jolley Urga Woodbury & Little until he joined Howard & Howard Attorneys PLLC in 2017. *See Declaration of Martin A. Little, attached hereto as* **Exhibit 15.**

During trial, the Court saw firsthand the enormous amount of work performed by both Mr. Jimmerson and Mr. Little. This Motion asks the Court to award Mr. Jimmerson's attorney fees related to trial preparation and trial, as well as Mr. Little's attorney fees for this same period. Mr. Jimmerson incurred attorney fees for this period is $152,121. Mr. Little's incurred fees for this same period amount to $101,262.50, for a total requested attorney fees award of $253,383.50, due to the defense's misconduct. To determine the reasonableness of this total amount of requested attorney fees, the Court must necessarily analyze the factors outlined in

Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349–350, 455 P.2d 31, 33 (1969): (1) qualities of the advocate; (2) the character of the work; (3) the work actually performed; and (4) the result. However, before analyzing the *Brunzell* factors, the Court should put this total requested number in context.

As the Nevada Supreme Court has explained, "[T]he fact that no other court has imposed like sanctions for such behavior does not mandate a conclusion that the trial court has abused its discretion in ordering such sanctions...." *See Emerson*, 127 Nev. at 681, 263 P.3d at 230 (citing *Couch v. Private Diagnostic Clinic*, 146 N.C.App. 658, 554 S.E.2d 356, 364 (2001)). The Nevada Supreme Court also explained that "[s]uch comparisons will seldom be determinative, given the infinite variety of misconduct and of aggravating and mitigating factors." *Id.* (citing *Matter of Disciplinary Pro. Against Noble*, 100 Wash. 2d 88, 667 P.2d 608, 612 (1983)). Thus, the Court is not limited by other assessments of sanctions, particularly where there are no factual similarities, which is not surprising due to the outrageousness of the conduct in question.

With respect to the *Brunzell* factors, Plaintiff's counsel satisfies each of the four factors for a full award of attorney fees in this case. This is demonstrated by **Exhibits 14** and **15,** hereto. The fees requested, and the limited scope of the same to the time of Trial, are reasonable and were necessarily incurred. Copies of the redacted invoices of The Jimmerson Law Firm, PC and Howard & Howard Attorneys are attached hereto as **Exhibit 16** and **17.**

Additionally, Plaintiff incurred substantial costs during Trial, totaling $118,606.25, which he will be forced to incur again. These include the following costs, the backup for which is provided at **Exhibit 18**, specifically **18-1** through **18-29**:

DESCRIPTION	**JLF**	**HH**	**TOTAL**	**EX**
Fees for Trial	**$152,121.00**	**$101,262.50**	**$253,383.50**	**16-17**
Costs				**18**
Deposition Transcripts (Stan Smith only)	$3,571.60			1
Hearing Recording Fee	$80.00			2
Hearing Transcripts	$275,19			3
Trial Recording Fee	$1,140.00			4
Trial Transcripts	$6,308.32			5
Photocopies and Printing	$11,271.20			6
Filing Fees	$119.00			7
Westlaw Research	$2,007.44			8
Hand Delivery	$70.00			9
Shipping cost	$585.82			10
Shipping cost	$198.50			11
Witness Fee	$26.00			12
Meals	$303.80			13
Travel Expense to Chicago (Smith)	$3,427.10			14
Investigations service (Triccoli)	$2,041.65			15
Jury Expert Selection plus expense	$6,988.71			16
Service of trial subpoenas and witness fees		$1,344.90		17
Court Recorder		$2,280.00		18
Trial Technician		$7,400.00		19

Denis Harris, MD – expert witness fee		$15,168.00		20
Roger Fontes, MD – ½ expert witness fee		$3,750.00		21
John Herr, MD – witness fee		$13,500.00		22
MeCo Visuals – animations and illustrations		$6,000.00		23
Travel expense – Barbara Lambson to Las Vegas		$497.96		24
Photocopies and Printing		$22,867.49		25
Trial Transcripts		$6,206.00		26
Travel expenses – Dr. Harris to Las Vegas		917.60		27
Shipping Costs		195.97		28
Hand Delivery		64.00		29
Total Costs	**$38,414.33**	**$80,191.92**	**$118,606.25**	
Total	**$190,535.33**	**$181,454.42**	**$371,989.75**	

Each of these costs were reasonably and necessarily incurred, and each of the costs is supported by the documentation at Exhibit 18, and the Declarations of Counsel at Exhibits 14-15.

V. CONCLUSION

In summary, the Court should order the defense (Defendant and his defense attorneys) to pay Plaintiff's reasonable attorney fees of $253,383.50 and reasonable costs of $118,606.25, for a total of $371,989.75. As the Court already concluded, Ms. Gordon's inflammatory statements to the jury caused the mistrial. As a matter of law, those statements constitute professional misconduct. The Court's award of

attorney fees and costs in favor of Plaintiff and against the Defense is justified by NRS 18.070(2) and this Court's inherent authority. Plaintiff's requested attorney fees are reasonable under the *Brunzell* factors. Therefore, Plaintiff respectfully requests that the Court order the Defense to pay the $371,989.75 for purposefully causing the mistrial.

DATED this 13th day of August, 2019.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Martin A. Little

Martin A. Little (#7067)
Alexander Villamar (#9927)
3800 Howard Hughes Parkway, #1000
Las Vegas, Nevada 89169

THE JIMMERSON LAW FIRM, PC
James J. Jimmerson, Esq. (#264)
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101

Attorneys for Plaintiff

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 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, NV 89169.

On the 13th day of August, 2019, I served the foregoing PLAINTIFF'S SUPPLEMENT TO 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:

S. Brent Vogel, Esq.
John Orr, Esq.
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
Attorneys for Defendants,
Kevin Paul Debiparshad, M.D.,
Kevin P. Debiparshad PLLC d/b/a
Synergy Spine and Orthopedics,
Debiparshad Professional Services
d/b/a Synergy Spine and Orthopedics, and
Jaswinder S. Grover, M.D., Ltd. dba Nevada Spine Clinic

I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on August 13, 2019, at Las Vegas, Nevada.

/s/ Karen R. Gomez
An Employee of HOWARD & HOWARD ATTORNEYS PLLC

S. BRENT VOGEL
Nevada Bar No. 6858
Brent.Vogel@lewisbrisbois.com
KATHERINE J. GORDON
Nevada Bar No. 5813
Katherine.Gordon@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
TEL: 702.893.3383
FAX: 702.893.3789
Attorneys for Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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.

CASE NO. A-18-776896-C
Dept. No. 32

DEFENDANTS' MOTION TO DISQUALIFY THE HONORABLE ROB BARE ON ORDER SHORTENING TIME

TO BE HEARD BEFORE DEPARTMENT ____

Date of Hearing: 9/4/19

Time of Hearing:: 9AM

AUG 23 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

COME NOW Defendants, by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon, and hereby move to disqualify the Honorable Rob Bare pursuant to N.R.S. 1.235 and Nevada Code of Judicial Conduct (N.C.J.C.) Canons 1 and 2 on the grounds that Judge Bare has actual or implied bias or prejudice, and his impartiality is reasonably questioned.

This Motion is made and based on the Memorandum of Points and Authorities, the Certifications and Affidavits of S. Brent Vogel and Katherine J. Gordon, the papers and pleadings on file herein, and such oral argument at the time of the hearing on this matter.

Dated this 16th day of August 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Katherine J. Gordon

S. BRENT VOGEL
Nevada Bar No. 6858
KATHERINE J. GORDON
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6385 S. Rainbow Boulevard, Suite 600
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Tel. 702.893.3383

Attorneys for Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic

ORDER SHORTENING TIME

FOR GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the time and date for the hearing on **DEFENDANTS' MOTION TO DISQUALIFY THE HONORABLE ROB BARE** is hereby shortened to the 4th day of September, 2019 at the hour of 9 AM a.m., or as soon thereafter as counsel may be heard in Department XX, courtroom 14A

DATED this _____ day of August, 2019

DISTRICT COURT JUDGE

Respectfully submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Katherine J. Gordon
S. BRENT VOGEL
Nevada Bar No. 006858
KATHERINE J. GORDON
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6385 S. Rainbow Boulevard, Suite 600
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Tel. 702.893.3383

Attorneys for Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

DECLARATION OF KATHERINE J. GORDON IN SUPPORT OF ORDER SHORTENING TIME

1. I am an attorney duly licensed to practice law in the State of Nevada and a Partner with Lewis Brisbois Bisgaard & Smith LLP, counsel of record for Defendants in the above-entitled matter. This Declaration is made and based upon my personal knowledge and I am competent to testify to the matters contained herein;

2. Trial in this matter commenced on July 22, 2019 and resulted in a mistrial being declared by Judge Bare on August 5, 2019;

3. Judge Bare is set to hear the portion of Plaintiff's Motion for Mistrial regarding attorneys' fees and costs, and Defendants' Opposition and Counter-Motion for Attorneys' Fees and Costs, on September 10, 2019;

4. It is Defendants' position the declaration of mistrial was the result of a misapplication of the law by the Court, and was part of the Court's pattern of bias and partiality toward Plaintiff to the detriment of Defendants throughout the course of the trial;

5. In order to remove the appearance of partiality, and in an effort to provide Defendants with a fair hearing of the outstanding Motions for Attorneys' Fees and Costs, Defendants respectfully request this case be reassigned to another Department prior to the hearing, and for all continued action in this matter, including re-trial; and

6. Insufficient time exists for this matter to be heard in the normal course prior to the hearing on the outstanding Motions for Attorneys' Fees and Costs.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated this 16th day of August 2019.

KATHERINE J. GORDON

AFFIDAVIT AND CERTIFICATE OF S. BRENT VOGEL

IN COMPLIANCE WITH N.R.S. 1.235

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

S. BRENT VOGEL, being first duly sworn, deposes and states:

1. I am an attorney duly licensed to practice law in the State of Nevada and an Equity Partner with Lewis Brisbois Bisgaard & Smith LLP, counsel of record for Defendants in the above-entitled matter. This Affidavit and Certificate are made and based upon my personal knowledge and I am competent to testify to the matters contained herein;

2. Trial in this matter commenced on July 22, 2019 and resulted in a mistrial being declared by Judge Bare on August 5, 2019;

3. The declaration of mistrial was the result of an egregious misapplication of the law by the court, and demonstrated the court's continued pattern of partiality to Plaintiff to the detriment of Defendants throughout the course of the trial;

4. The court specifically expressed its favoritism of Plaintiff's counsel on the record, leaving no doubt of Judge Bare's bias toward Plaintiff and inability of Defendants to receive a fair and impartial trial;

5. Judge Bare also expressed—both on the record and in private to the parties—his opinion that Defendants were going to be found liable in this matter and strongly suggested Defendants make an offer to settle the case;

6. The parties have pending competing Motions for Fees and Costs. In order to remove the appearance of partiality, and in an effort to ensure Defendants obtain a fair hearing, Defendants respectfully request this case be reassigned to another Department prior to the hearing, and for all continued action in this matter, including re-trial; and

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7. This Affidavit and Certificate is filed in good faith and not interposed for the purposes of delay.

FURTHER AFFIDANT SAYETH NAUGHT

S. BRENT VOGEL

SUBSCRIBED AND SWORN to before me
this 15th day of August 2019.

Notary Public in and for said County and State

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
SHERRY A. RAINEY
Appt. No. 11-5795-1
My Appt. Expires Sept. 19, 2019

AFFIDAVIT AND CERTIFICATE OF KATHERINE J. GORDON

IN COMPLIANCE WITH N.R.S. 1.235

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

KATHERINE J. GORDON, being first duly sworn, deposes and states:

1. I am an attorney duly licensed to practice law in the State of Nevada and an Equity Partner with Lewis Brisbois Bisgaard & Smith LLP, counsel of record for Defendants in the above-entitled matter. This Affidavit and Certificate are made and based upon my personal knowledge and I am competent to testify to the matters contained herein;

2. Trial in this matter commenced on July 22, 2019 and resulted in a mistrial being declared by Judge Bare on August 5, 2019;

3. The declaration of mistrial was the result of an egregious misapplication of the law by the court, and demonstrated the court's continued pattern of partiality to Plaintiff to the detriment of Defendants throughout the course of the trial;

4. The court specifically expressed its favoritism of Plaintiff's counsel on the record, leaving no doubt of Judge Bare's bias toward Plaintiff and inability of Defendants to receive a fair and impartial trial;

5. Judge Bare also expressed—both on the record and in private to the parties—his opinion that Defendants were going to be found liable in this matter and strongly suggested Defendants make an offer to settle the case;

6. The parties have pending competing Motions for Fees and Costs. In order to remove the appearance of partiality, and in an effort to ensure Defendants obtain a fair hearing, Defendants respectfully request this case be reassigned to another Department prior to the hearing, and for all continued action in this matter, including re-trial; and

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7. This Affidavit and Certificate is filed in good faith and not interposed for the purposes of delay.

FURTHER AFFIDANT SAYETH NAUGHT

KATHERINE J. GORDON

SUBSCRIBED AND SWORN to before me this 15th day of August 2019.

Notary Public in and for said County and State

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
SHERRY A. RAINEY
Appt. No. 11-5795-1
My Appt. Expires Sept. 19, 2019

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a medical malpractice action in which Plaintiff alleges Defendant Dr. Debiparshad failed to properly reduce a tibia fracture during surgery on October 10, 2017. The case was rushed to trial commencing on July 22, 2019, following only six (6) months of discovery, pursuant to Plaintiff's Preferential Trial Setting. Following two weeks of trial, Judge Bare granted Plaintiff's request for a mistrial in the absence of any proper basis to do so.

During both pre-trial litigation and trial, Judge Bare exhibited bias and prejudice in favor of Plaintiff, to the detriment of Defendants who were ultimately denied their right to a fair trial held before an impartial judicial officer. Specific instances of Judge Bare's bias are set forth in detail below. However, the most obvious evidence of his partiality concerning Plaintiff, who is a lawyer, and Plaintiff's lawyer (Jim Jimmerson) warrants immediate citation as it, taken alone, supports the instant Motion for Disqualification.

During discussions regarding evidence contained in an exhibit offered by Plaintiff that was ultimately damaging to Plaintiff's case, but was stipulated into evidence without objection, Judge Bare stated the following on the record[1]:

> THE COURT: Okay. Well, that gives me further context, as to where I'm going with this at this point. And I've got to say, Mr. Jimmerson. This comes to exactly what I would expect from you, and if I say something you don't want me to say, then you stop me. Okay. But what I would expect from you, based upon all my dealings with you over 25 years, and all the time I've been a judge too, is frank candor -- just absolute frank candor with me as an individual and a judge. It's always been

[1] This particular portion of the discussion centered on Judge Bare offering Plaintiff counsel an excuse for his failure to object to the use of an admitted document during cross examination of a witness.

that way. You know, **whatever word you ever said to me in any context has always been the gospel truth**.

I mean, without, you know, calling my colleagues, lawyers that worked with me at the bar, or my wife as testimonial witnesses, I've told all those people many times about the level of respect and admiration I have for you. **You know, you're in -- to me, you're in the, sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers that I've dealt with in my life**. I've got a lot of respect for you. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is -- and again, interrupt me anytime if you want -- is, well, in a multi-page exhibit, we just didn't see it.

MR. JIMMERSON: **That's exactly right, Judge. You're 100 percent right.**

THE COURT: **Okay. Well, there you go**. And you know, nobody is perfect. We all do these things.

MR. JIMMERSON: I already said I was mad at myself.

THE COURT: I know. You did say that.[2]

It does not matter whether Judge Bare shared his opinions of Plaintiff's counsel in an attempt to excuse Plaintiff's procedural error, or to draw a distinction between his appreciation for Plaintiff's counsel as opposed to defense counsel, or both. A determination of Judge Bare's particular purpose for waxing poetic about Plaintiff's counsel to the point of being obsequious is unnecessary for purposes of the current Motion. It is enough that Judge Bare made these comments which would clearly cause a reasonable person, in this case Dr. Debiparshad and his counsel, to question his impartiality.

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[2] *See* Trial Transcript, Day 10, pp. 178-79, attached hereto as Exhibit "A" (emphasis added).

Following the above statements by Judge Bare, he asked the parties' attorneys to participate in a meeting with him "off the record" in a conference room located behind the courtroom. During the meeting, Judge Bare communicated his substantial concern regarding the potential damage to Plaintiff's case resulting from Defendants' recent—and entirely proper—use of an admitted document during the cross examination of one of Plaintiff's witnesses. Judge Bare's concern was so great that he advised the parties they should strongly consider settling the case in order to avoid a mistrial. His suggestion of settlement to Defendants included his proffered opinion that malpractice had been proven by Plaintiff and the jury was likely going to award damages against Defendants.

Judge Bare invited the parties to file motions over the weekend (clearly implying a potential Motion for Mistrial by Plaintiff). Plaintiff filed a Motion for Mistrial on Sunday, August 4, 2019 at 10:02 p.m. Judge Bare granted Plaintiff's Motion the following court day, without allowing Defendants an opportunity to file opposing Points and Authorities.

During argument regarding the requested mistrial, defense counsel attempted to place portions of the back room meeting discussions on the record. Judge Bare immediately interrupted defense counsel and prevented him from speaking.[3] However, Judge Bare ultimately placed many of the important aspects of the discussion on the record himself. He admitted telling the parties during meeting that he thought liability had been established. He then reiterated this opinion on the record and stated there was "enough evidence to meet the burden, the preponderance burden on the medical malpractice."[4] Judge Bare turned directly to Dr. Debiparshad and stated:

> In other words, it's not that I disrespect your position or Dr. Gold's [Defendants' orthopedic surgeon expert witness] position. **It's just that if you were to ask me**, I would say to this point, that the medical malpractice itself, though I'm sure you did the best you could and it was well-intended and you didn't do anything intentional to try and

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[3] *See* Trial Transcript, Day 11, p. 9, attached hereto as Exhibit "B" (emphasis added).
[4] *See* Trial Transcript, Day 11, pp. 15-17, attached hereto as Exhibit "C".

> harm [Plaintiff], but that's not required in medical malpractice. It's just making a mistake that now, unfortunately, causes some effect. And you know, my view is that Plaintiffs [sic] would meet that burden. I didn't give all the reasons for that. I'd be happy to spend time doing that, though.[5]

Defendants could not disagree more strenuously with Judge Bare's interpretation of the evidence and his opinion that Plaintiff had met his burden of proof.[6] More concerning, however, was Dr. Debiparshad's reaction to this insulting—and entirely unrequested[7]—opinion being proffered by a Judge who is expected to be impartial and unbiased. Dr. Debiparshad and his retained expert Dr. Gold (who is recognized as one of the top 10 tibia surgeons in the world) vigorously disagree that Dr. Debiparshad made a "mistake". Dr. Debiparshad was stunned by the Court's comments and understandably offended.[8]

Judge Bare's glowing testimonial of Plaintiff counsel, his volunteered opinion that Dr. Debiparshad breached the standard of care, and his many rulings before and during trial (set forth in detail below) all display a deep-seated favoritism of Plaintiff which nullifies Defendants' expectation that Judge Bare can render fair judgment. Under these circumstances, Judge Bare should be disqualified from any further proceedings in this matter.

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[5] *Id.* (Emphasis added).

[6] Interestingly, Judge Bare denied Defendants' request to speak with the jurors after the mistrial was granted. The jury would certainly have been able to shed light on the accuracy of Judge Bare's opinions regarding the likelihood of a malpractice finding and award of damages.

[7] During the back room meeting, Judge Bare offered numerous times to share his opinion regarding liability and damages. Defense counsel never accepted these offers. However, Judge Bare ultimately voiced his opinions at Plaintiff counsel's urging.

[8] *See* Declaration of Kevin Debiparshad, M.D. in Support of Motion to Disqualify the Honorable Rob Bare, attached hereto as Exhibit "D".

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Pre-Trial Procedural Background

Plaintiff filed an Amended Complaint against Dr. Debiparshad, his current practice (Synergy Spine and Orthopedics), his prior employer (Nevada Spine Clinic), and Centennial Hills Hospital on July 2, 2018. The claims against Centennial Hills Hospital included false imprisonment, elder abuse, and deceptive trade practices based on Plaintiff leaving the hospital early Against Medical Advice.[9]

On July 13, 2018, Plaintiff filed a Motion for Preferential Trial Setting pursuant to N.R.S. 16.025 on the stated bases that he is: (1) over the age of 70; and (2) suffers from illnesses and conditions that raise a substantial medical doubt Plaintiff will survive more than six months. Defendants opposed the Motion for Preferential Trial Setting based upon the absence of required clear and convincing medical evidence that Plaintiff suffers from any illness or condition that could end his life, especially not within the statute's stated six month timeframe.[10] However, the Court was in favor of providing Plaintiff the preferential trial date and, on September 13, 2018, the Court set a firm trial date of July 22, 2019.

Dispositive motions were filed by Defendants in July and August 2018, but were not heard by Judge Bare until October 2018. Judge Bare denied each dispositive motion filed by Defendants. The Joint Case Conference Report was not filed until December 11, 2018. The Scheduling Order was filed on December 14, 2018 and provided for a discovery cut-off date of April 23, 2019 (allowing for only four (4) months of discovery). The Scheduling Order also provided for initial expert disclosures to be served on January 23, 2019 (allowing for slightly more than one month of discovery prior to initial disclosures). The discovery deadline was ultimately extended until June 3, 2019, which provided for a total of six (6) months of discovery in a

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[9] A settlement was reached between Plaintiff and Centennial Hills Hospital approximately one week before trial commenced.

[10] Defendants' skepticism was confirmed four months later when Plaintiff submitted the initial expert report of his economist which supported a wage loss claim for Plaintiff until the age of 85.

complicated medical malpractice case.

Several of the medical records available to Defendants during the early stages of discovery indicated that Plaintiff was retired. However, when initial expert disclosures were served on January 23, 2019, Defendants learned Plaintiff was claiming millions of dollars in damages based on alleged lost wages, loss of earning capacity and loss of the value of stock options. Defendants tried without success between February and May 2019 to obtain the evidence and documents necessary to properly evaluate Plaintiff's lost wage/earning capacity/stock option claims.

Based on the limited access to evidence regarding Plaintiff's lost wage/earning capacity/stock option claims, Defendants filed a Motion to Continue Trial which was denied by the Court on June 13, 2019. Judge Bare ruled that a trial continuance (of any unspecified length), would result in "significant prejudice" to Plaintiff. He allowed, however, for limited additional discovery concerning Plaintiff's wage loss claims to take place until 21 days before the start of trial. This provided for only 18 additional days of discovery regarding Plaintiff's multi-million dollar damage claim.

Judge Bare's granting of Plaintiff's Motion for Preferential Trial Setting in the absence of clear and convincing medical evidence, coupled with his disregard for the prejudicial effect on Defendants of being unable to fully and adequately defend against Plaintiff's multi-million dollar wage loss claims, raised concerns of Judge Bare's possible bias and partiality toward Plaintiff. This is especially true when Plaintiff's supposed need for a preferential trial setting was quickly dispelled by his subsequent claim for work-related damages through the age of 85. At the least, Judge Bare should have acknowledged the fallacy of Plaintiff's need for an expedited trial and provided Defendants with adequate time for discovery. However, it was not until trial that Defendants' concerns about Judge Bare's partiality and bias were confirmed.

B. Judge Bare's Trial Rulings

Trial commenced on July 22, 2019. It lasted two weeks until, on Monday, August 5, 2019, Judge Bare granted Plaintiff's Motion for Mistrial. Throughout trial, Judge Bare's rulings were issued with obvious bias and favoritism toward Plaintiff, and often included a gross misapplication of the law in order to hold in favor of Plaintiff. Below is a brief summary of the most egregious

and prejudicial rulings by Judge Bare.

1. **Judge Bare Refused Defendants an Opportunity to File an Opposition to Plaintiff's Motion for Mistrial**

On Friday, August 2, 2019, Plaintiff called witness Jonathan Dariyanani to the stand. Mr. Dariyanani is the President and CEO of Cognotion, Inc., the company where Plaintiff was working in October 2017 when he underwent tibia repair surgery by Dr. Debiparshad. Plaintiff was terminated from Cognotion 15 months later, in January 2019. Plaintiff claimed his termination was the result of a physical and mental disability/impairment caused by the tibia repair surgery.

Despite the termination, Plaintiff and Mr. Dariyanani remained close friends.[11] In response to Plaintiff counsel's direct examination, Mr. Dariyanani offered testimony that Plaintiff was a "beautiful person" who "is still supporting his ex-wife after 22 years and doesn't have to, and he cares", constituting improper good character evidence pursuant to N.R.S. 48.045(1)(evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion).[12] Mr. Dariyanani's good character testimony was expanded during Defendants' cross examination wherein he would "leave [his] children with [Plaintiff]" and would "give [Plaintiff] a bag of cash and tell him to count it and deposit it."[13]

Because Plaintiff had opened the door to character evidence, Defendants were entitled to rebut his testimony with negative character evidence. Defendants did not have to look far for this rebuttal evidence.

During discovery, Plaintiff disclosed a set of emails between Plaintiff and other employees at Cognotion, Inc. dated between 2016 and 2018. The emails were first disclosed by Plaintiff in his 12th N.R.C.P. 16.1 Supplement to Early Case Conference Disclosure of Documents on May 16, 2019 (Bates stamped P00440-453 and P00479-513). The emails were disclosed again by Plaintiff

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[11] *See* Trial Transcript, Day 10, p. 99, attached hereto as Exhibit "E".

[12] *Id.* at p. 109.

[13] *See* Trial Transcript, Day 10, p. 159, attached hereto as Exhibit "F".

in his Pre-Trial Disclosures, and for a third time as an identified trial exhibit (marked by Plaintiff as proposed trial exhibit No. 56). Plaintiff's proposed Exhibit 56 consisted of 21 emails, and was a total of 49 pages.[14] Twenty-five of these pages were either blank or lengthy print outs from travel websites. Only 24 of the 49 pages included substantive text from emails.[15]

Not only did Plaintiff disclose the emails in Exhibit 56 on several occasions, he did not file a Motion in Limine, or otherwise request that the Court preclude or limit the use of any of the emails during trial.

Defendants utilized several emails contained in Plaintiff's proposed Exhibit 56 during the cross examination of Mr. Dariyanani to impeach his testimony regarding Plaintiff's ability to work. Emails from Exhibit 56 were also used to reveal the collusion between Plaintiff and Mr. Dariyanani regarding Mr. Dariyanani's deposition testimony in April 2019, and to establish that Cognotion allowed Plaintiff to dictate the scope of Cognotion documents disclosed to Defendants during the current litigation (thus resulting in Defendants' difficulty in obtaining Plaintiff's work-related documents).

Prior to the use of the emails during Mr. Dariyanani's cross examination, Defendants moved to admit Plaintiff's proposed Exhibit 56 into evidence. Plaintiff stipulated to its admission.

Plaintiff's Exhibit 56 also included an email from Plaintiff to Mr. Dariyanani dated November 15, 2016 (Bates stamped P00487-88). Plaintiff titled the email "Burning Embers".

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[14] Plaintiff initially informed the Court that Exhibit 56 was 122 pages. He later told the Court it was 79 pages based on Plaintiff's Trial Exhibit Bates stamping of 56-001 to 56-079.

The pre-trial disclosures produced to Defendants for Plaintiff's proposed Exhibit 56 was only 49 pages and consisted of Bates stamped documents P00440-453 and P00479-513. Plaintiff's Third Amended Trial Exhibit List also referenced Exhibit 56 as consisting of "Emails to and from Jason Landess", Bates stamped P00440-453 and P00479-513 (the actual documents that were produced for Exhibit 56 are Bates stamped P00441-454 and P00479-513).

Defendants no longer have a copy of Plaintiff's trial exhibits and cannot verify the number of pages in Plaintiff's Exhibit 56 to the extent those differed from Plaintiff's pre-trial disclosures submitted to Defendants. During oral argument on August 5, 2019, when Defendants still had access to Exhibit 56, Defendants referenced the fact Exhibit 56 consisted of 79 pages and included 32 emails. However, the number of pages in Exhibit 56—whether it is 49 pages or 79 pages—is not so vast that Plaintiff should be readily excused from knowing its contents.

[15] *See* Plaintiff's Third Amended Trial Exhibit List attached hereto as Exhibit "G" and proposed Exhibit No. 56, attached hereto as Exhibit "H".

The email began: "Lying in bed this morning I rewound my life…" It continued with Plaintiff (70 years old at the time) providing a summary of past jobs and the significance of each. In the second and third paragraphs of the "Burning Embers" email, Plaintiff wrote to the witness on the stand, Mr. Dariyanani:

> I learned at an early age that skilled labor makes more than unskilled labor. So I got a job working in a pool hall on the weekends 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 I went to Thailand, I took a suitcase full of colored sun glasses to sell. They were a huge success. But one day in a bar a young Thai pretended to be interested in talking to me while his friends behind my back stole all my merchandize. From that lesson I learned that it's not a good idea to sell something that you cannot control and protect, a lesson reinforced later on in life when an attorney friend of mine and **I bought a truck stop here in Las Vegas where the Mexican laborers stole everything that wasn't welded to the ground**.[16]

Defense counsel showed the "Burning Embers" email to Mr. Dariyanani during cross examination and asked if his glowing opinions of Plaintiff's character—as relayed to the jury earlier—were affected by the content of the email when he received it in November 2016 (particularly the portions set forth above in bold).[17] Mr. Dariyanani testified that his opinions

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[16] *See* Exhibit "H", Bates stamped pages P00487-88.

[17] *See* Trial Transcript, Day 10, pp. 161-63, attached hereto as Exhibit "I".

were not negatively affected.[18]

Plaintiff did not object to Defendants' use of the "Burning Embers" email (which was previously admitted into evidence by stipulation).

After Mr. Dariyanani was excused, Judge Bare ordered a comfort break for the jury. During the break, Judge Bare told the parties he had concerns regarding his perception of prejudicial effect of the "Burning Embers" email. Judge Bare raised the issue of Plaintiff's failure to object to the email, but then, stunningly, he volunteered to Plaintiff the excuse that his counsel likely "just didn't see [the email]" in the "multi-page exhibit". [19] He went on to say Plaintiff's prior Motions in Limine to exclude his bankruptcies and gambling debt "are evidence of the fact they just missed it."[20] Judge Bare also stated that Plaintiff missed the document "in good faith".[21] *Plaintiff had not yet even made this argument to the Court*; Judge Bare was making—and then accepting—his own arguments on behalf of Plaintiff.

This is the same discussion wherein Judge Bare made his gratuitous compliments about Plaintiff's counsel, including that Plaintiff's counsel only tells the "gospel truth" and that he was in Judge Bare's personal "hall of fame or Mount Rushmore" of attorneys.[22]

Plaintiff requested the testimony concerning the email be stricken. Judge Bare told Plaintiff that might only draw further attention to the email, and he denied Plaintiff's request. No further request or motion was made by Plaintiff that day regarding Defendants' stipulated and un-objected to use of the email. However, after the jury was excused for the day, Judge Bare called the attorneys into the back room meeting, detailed above, to discuss possible settlement and offered his opinion that the jury would find malpractice and award damages.

On Sunday, August 4, 2019, at 10:02 p.m., Plaintiff filed a Motion for Mistrial based on

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[18] *Id.*

[19] *See* Exhibit "A", p. 179.

[20] *Id.* at p. 184.

[21] *Id.*

[22] *Id.* at pp. 178-79.

Defendants' use of the stipulated into evidence "Burning Embers" email during the cross examination of Mr. Dariyanani. Defendants did not see the Motion until the following morning when trial was set to resume at 9:00 a.m. Judge Bare also had not reviewed the Motion until that morning. He raised the issue of the Motion immediately with the parties, outside the presence of the jury, and asked if Defendants intended to oppose it.[23] Defense counsel stated he "absolutely" intended to oppose the Motion but needed time to file the brief.[24] Judge Bare did not allow time for Defendants to file opposing Points and Authorities and, alternatively, entertained argument and granted the Motion that morning.

Defendants were clearly prejudiced by the inability to file an Opposition to Plaintiff's Motion for Mistrial. Judge Bare and Plaintiff were seemingly of the same mind to rush the matter to mistrial, despite the late filing of the Motion and critical nature of properly evaluating the parties' positions. At the time Plaintiff filed his Motion for Mistrial, the parties and Court had spent over two weeks in trial, including the expense of producing multiple expert witnesses. The trial itself was at least 80% completed, with only three witnesses and closing arguments remaining. Under these circumstances, it was certainly incumbent upon Judge Bare to allow Defendants adequate time to respond to Plaintiff's Motion, which he failed to do.

2. Judge Bare Granted Plaintiff's Motion for Mistrial in the Absence of Proper Foundation

The Court agreed with Defendants that the "issue of character was put into the trial by the Plaintiffs [sic]."[25] The Court also agreed that Defendants "had a reasonable evidentiary ability to offer their own character evidence" to rebut Mr. Dariyanani's proffered good character testimony that Plaintiff was a beautiful person and could be trusted with bags of money.[26] However, Judge Bare also stated he would have likely precluded use of some portions the "Burning Embers" email

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[23] *See* Trial Transcript, Day 11, p. 4, attached hereto as Exhibit "J".

[24] *Id.*

[25] *See* Trial Transcript, Day 11, pp. 31 and 55, attached hereto as Exhibit "K".

[26] *Id.*

if Plaintiff had filed a Motion in Limine (to exclude his own exhibit).[27]

Judge Bare mentioned that he discussed the matter with Judge Mark Denton for two hours and that Judge Denton agreed the email, and whether its author is a racist, was likely not relevant.[28] Based on Judge Bare's clearly erroneous perception that the matter reached the level of manifest necessity on behalf of the Court, he granted the requested mistrial.[29] Judge Bare's interpretation of the manifest necessity centered on his perception of prejudicial effect to Plaintiff from Defendants' use of the "Burning Embers" email, including the fact two of the jurors were African American and two were possibly Hispanic.[30]

Judge Bare's basis for granting the mistrial was patently erroneous and improper. First, his focus on the prejudicial effect of the "Burning Embers" email was misplaced. It is not necessary to conduct an analysis of prejudicial effect versus probative value of rebuttal bad character evidence (which, by its very nature, is prejudicial). Judge Bare also incorrectly ignored the fact the "Burning Embers" email was *admitted evidence*, which under Nevada law *can be used for any purpose*. Second, in evaluating the propriety of Plaintiff's requested mistrial, Judge Bare failed to take into consideration Plaintiff's cumulative errors in disclosing the "Burning Embers" email and subsequently failing to object to its use. Third, Judge Bare's tortured (mis)application of the holding in *Lioche v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) to the facts of this matter was clearly erroneous.

a. Bad Character Rebuttal Evidence is Not Subject to a Probative Value versus Prejudicial Effect Analysis

Judge Bare's focus on whether the "Burning Embers" email was relevant, and further whether its prejudicial effect outweighed its probative value, is misplaced and inapplicable to the facts of this manner. That analysis would only be appropriate if Defendants sought to introduce

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[27] *Id.* at pp. 31-32.

[28] *Id.* at p. 32.

[29] *Id.* at p. 47.

[30] *Id.* at pp. 51, 60, and 69-70.

the email and admit it into evidence pursuant to one of the exceptions set forth in N.R.S. 48.045(2)(evidence of other crimes, wrongs or acts may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). "Before **admitting** prior bad act evidence, the district court must determine whether the evidence is relevant and proven by clear and convincing evidence. Additionally, the evidence is inadmissible 'if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Bongiovi v.* Sullivan, 122 Nev. 556, 575, 138 P.3d 433 (2006)(*quoting Taylor v. Thunder*, 116 Nev. 968, 973, 13 P.3d 43 (2000)(emphasis added).

However, in the instant matter, Defendants used the email as rebuttal bad character evidence during the cross examination of a witness whom Plaintiff had improperly prompted to offer good character evidence. Under these circumstances, there is no requirement or justification for the Court to perform an analysis of the email's prejudicial effect versus its probative value. Plaintiff opened the door by offering good character evidence, therefore, Defendants are entitled to offer rebuttal bad character evidence. *See Taylor v. State*, 109 Nev. 849, 860, 858 P.2d 843 (1993)(Shearing, J., concurring in part and dissenting in part)(under the rule of curative admissibility, or the opening of the door doctrine "the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulting from the earlier admission")(*quoting United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988)).

Similarly, in *Western Show Co. Inc. v. Mix,* 173 A. 183, 184 (Pa. 1934), the Pennsylvania Supreme Court stated:

> The injection by (appellant) of the 'irrelevant and collateral matter' into the case left plaintiff but a single choice. It had either to offer no evidence in answer to it, and thereby risk its possible effect on the jury, which it had no way of measuring; or it could offer the rebutting evidence and take the risk of reversal because of the doctrine now advanced by appellant. No court of justice should put a litigant to such an alternative; rather, it should permit him, by means

> of contradictory evidence he had on hand, to rebut, as far as he could, the erroneous evidence elicited by his antagonist. Anything short of this would not even savor of fairness.

Also, an inquiry regarding the admissibility of the "Burning Embers" email was not necessary because it had already been admitted by stipulation. It is axiomatic that, *absent any limitations applied by the Court, admitted evidence may be used for any purpose*. This finding alone should have ended the Court's analysis of Plaintiff's Motion for Mistrial.

Further, all character evidence, whether good or bad, is prejudicial by its very nature. Notably, Judge Bare was not concerned with the prejudicial effect of Mr. Dariyanani's testimony that Plaintiff was a "beautiful person" who can be trusted with bags of money. Judge Bare was equally undisturbed by the prejudicial effect to Defendants of the testimony of Plaintiff's daughter which was improperly filled with flattering character evidence of her father.

Judge Bare's flawed interpretation of the underlying evidentiary issue was highlighted by his suggestion that Defendants should have requested a sidebar meeting before using the "Burning Embers" email to allow Plaintiff counsel and the Court the opportunity to redact certain prejudicial portions of the email (according to Judge Bare, he would have redacted Plaintiff's racist statements, but allowed Plaintiff's statements about hustling people on payday to remain).[31] There is no legal authority to support this suggested course of action. Rebuttal character evidence is not subject to a sliding scale of prejudicial effect analysis to determine whether it can be used and/or whether certain portions of the evidence should be redacted.

Judge Bare also based his decision to grant the mistrial on the fact the jury in this matter included two African American and possibly two Hispanic members. According to Judge Bare, the prejudicial effect of the racist comments in Plaintiff's email was heightened based on the particular racial constitution of the jury. Under this flawed analysis, if the jury had consisted of all Caucasian members, the "Burning Embers" email may not have been considered so prejudicial

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[31] *Id.* at p. 32-33.

and, perhaps, a mistrial could have been avoided. Defendants disagree with Judge Bare and believe Caucasian jury members can, and should, be equally offended by the racist remarks in Plaintiff's email. There is no authority to support Judge Bare's position that the particular constitution of a jury, including the jury members' race, needs to be taken into consideration for a determination of the potential prejudicial effect of rebuttal character evidence. Again, it must be pointed out that bad character evidence is supposed to be harmful to the party it is offered against. Judge Bare improperly declared a mistrial based on the unfounded and erroneous belief that rebuttal bad character evidence involving racist comments is forbidden.

b. Judge Bare Completely Excused and Failed to Consider Plaintiff's Multiple Errors in Disclosing the Email and Failing to Object to its Use During Trial

As set forth above, Plaintiff repeatedly disclosed the "Burning Embers" email prior to trial and as a proposed trial exhibit. Plaintiff did not attempt to limit the use of the email within a Motion in Limine and, conversely, stipulated to its admission into evidence. Plaintiff also did not object to Defendants' use of the email as rebuttal character evidence during the cross examination of Mr. Dariyanani. However, these cumulative errors by Plaintiff did not affect the Court's decision to grant the mistrial based on Defendants' use of the email.

To the contrary, Judge Bare gratuitously raised the possibility that Plaintiff's counsel simply missed the existence of the email in Plaintiff's multiple disclosures and trial exhibits. While Judge Bare at one point described Plaintiff's failure to notice the email as a mistake attributable to the entire Plaintiff team, he quickly negated any effect this mistake may have on determining the propriety of a mistrial.[32]

Shockingly, instead of holding Plaintiff accountable for failing to know the contents of his own trial exhibits, Judge Bare stated *Defendants* must have known "Plaintiffs [sic] made a mistake and did not realize [the "Burning Embers" email] was in Exhibit 56" based on the "zealousness" otherwise shown by Plaintiff's counsel throughout the trial.[33] He further stated Defendants "took

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[32] *Id.* at p. 53.

[33] *Id.* at p. 57.

advantage of that mistake."[34] Judge Bare's attempt to place blame on Defendants for Plaintiff's mistake, and hold Defendants to an entirely different standard than Plaintiff, is yet another example of his clear bias toward Plaintiff.

Judge Bare also raised the expedited nature of the discovery process as an excuse for Plaintiff's oversight.[35] The irony of this excuse was not lost on Defendants in light of Judge Bare's earlier denial of Defendants' Motion to Continue Trial based on Judge Bare's belief that any continuance would result in supposed, but unidentified, undue prejudice to Plaintiff. Judge Bare's mindset regarding prejudice in this matter is simple: Plaintiff is capable of suffering from it, but Defendants are not. This is the very definition of impartiality.

Plaintiff's cumulative errors regarding the "Burning Embers" email are not irrelevant or otherwise superfluous to an analysis of whether a mistrial is warranted. Likewise, Plaintiff should be held accountable for initially opening the door to character evidence. Judge Bare readily excused and overlooked the entirety of Plaintiff's actions in causing the circumstances which resulted in the mistrial. For this reason, Defendants are particularly—and understandably—concerned about Judge Bare's ability to fairy and impartially rule on the parties' outstanding Motions for Attorneys' Fees and Costs.

c. Judge Bare's Forced Application of the *Lioche v. Cohen* Holding was Improper

Judge Bare continually interrupted Defendants' argument in opposition to the requested mistrial. By contrast, Plaintiff counsel was allowed to argue without interruption. With his interruptions, Judge Bare repeatedly asked that Defendants address a hypothetical situation wherein Defendants attempted to use the "Burning Embers" email for the first time during closing argument (as opposed to during the cross examination of Mr. Dariyanani).[36] Judge Bare wanted to know if Defendants believed such a hypothetical situation would be appropriate.[37] In response,

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[34] *Id.*

[35] *Id.* at p. 52.

[36] *Id.* at pp. 34-37.

[37] *Id.*

Defendants respectfully requested to alternatively address the circumstances that occurred in this case; *i.e.* the use of rebuttal bad character evidence (which was admitted by stipulation) during cross examination of Plaintiff's witness who offered good character evidence.[38]

Judge Bare did not appear particularly interested in Defendants' proffered argument. He seemed focused on misapplying the holding of *Lioche v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) wherein the Nevada Supreme Court upheld the plaintiffs' right to a new trial based on the defense attorney's misconduct in interjecting improper argument during closings. However, the facts of *Lioche* are clearly inapplicable to this matter.[39]

Judge Bare also incorrectly assumed that because Defendants believed it was proper to use the "Burning Embers" email, Defendants also believed it would be proper for the jury to decide this case on the basis that Plaintiff is a racist.[40] That is not Defendants' position. Perhaps if Judge Bare had allowed Defendants to prepare an Opposition to Plaintiff's Motion for Mistrial, or provided Defendants an opportunity to argue uninterrupted, he would have gleaned a better understanding of Defendants' position.

3. Judge Bare Allowed Plaintiff to Raise Two New Alleged Breaches of the Standard of Care for the First Time During Opening Statement

The fact Judge Bare granted Plaintiff's Motion for Mistrial, in the absence of any appropriate basis, is the most egregious example of Judge Bare's bias toward Plaintiff. However, other instances of Judge Bare's favoritism—and manifestation of his belief that Defendants were not worthy of protection from clear prejudice when it would benefit Plaintiff—also occurred earlier during trial.

Plaintiff gave his opening statement on July 23, 2019. During his opening statement, Plaintiff informed the jury that Dr. Debiparshad breached the standard of care in failing to properly reduce the tibia fracture. More specifically, Plaintiff stated Dr. Debiparshad's breach was

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[38] *Id.* at p. 36.

[39] *Id.* at pp. 62, 64, and 66.

[40] *Id.* at p. 35, 60-62, and 66.

evidenced by: (1) malalignment; (2) translation (a resulting cliff-like appearance of the two pieces of repaired bone); and (3) gapping (a space between the two pieces of repaired bone).

However, during the pendency of the case, Plaintiff had only claimed that Dr. Debiparshad's alleged malpractice was based on a malalignment of the fracture. Plaintiff had never before claimed that malpractice was evidenced by resulting translation and/or gapping. To the contrary, the expert witness reports of Plaintiff's orthopedic surgeon expert witness, Denis Harris, M.D., were limited to a discussion of the *alignment* of the fracture repair. Dr. Harris also specifically testified during his deposition that he had no criticism regarding the resulting translation (also referred to as apposition) of the fracture repair. He further confirmed on several occasions during his deposition that he had no criticism of Dr. Debiparshad's fracture repair beyond the alleged malalignment.

Following Plaintiff's opening statement, and outside the presence of the jury, counsel for Defendants objected to Plaintiff raising two new alleged breaches of the standard of care for the first time during his opening statement. Because it was the end of the day, Judge Bare asked that the parties submit documents that evening that revealed the scope of Plaintiff's previously alleged breach of the standard of care to assist Judge Bare in resolving Defendants' objection. Defendants submitted Plaintiff's expert reports and excerpts from the deposition of Dr. Harris.[41]

Plaintiff submitted excerpts from the deposition of Dr. Debiparshad wherein the concept of translation of a fracture was discussed generally (not with regard to the fracture repair in the instant case), the deposition of Roger Fontes, M.D. wherein the concept of translation was discussed generally (not with regard to the fracture repair that occurred in the instant case), and Plaintiff's expert reports.[42] Plaintiff failed to submit any documentation from the case that showed he had previously alleged that any resulting translation or gapping of the fracture site constituted breaches of the standard of care.

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[41] *See* Defendants' submission to Judge Bare dated July 23, 2019, attached hereto as Exhibit "L".

[42] *See* Plaintiff's submission to Judge Bare dated July 23, 2019, attached hereto as Exhibit "M".

The following morning, Judge Bare heard additional argument of the parties on the issue of whether Plaintiff could properly argue the two new alleged breaches of the standard of care. Defendants again highlighted the absence of these claims during litigation and the prejudicial effect of being force to defend two new claims for the first time during trial. Plaintiff argued that Defendants had adequate notice of the allegations by virtue of the terms "translation" and "apposition" being discussed—as general topics—during depositions. Not surprisingly, Judge Bare agreed with Plaintiff.

In addition to agreeing that Defendants somehow had notice of the new allegations, Judge Bare also stated the different terminology of fracture displacement (alignment, translation, apposition, rotation and distraction (gapping)) was interrelated and/or confusing.[43] Therefore, according to Judge Bare, because Plaintiff had raised one particular allegation regarding *alignment*, Defendants should have known that Plaintiff may raise other allegations concerning *translation* and *gapping* given the interrelated and confusing nature of the terms.[44]

Judge Bare's rationalization is directly contrary to the science of fracture displacement. The terms are not so interrelated that finding fault with one automatically includes criticisms regarding the others. Indeed, the finding of an alleged malalignment (measured in degrees) versus too much translation (measured in percentages) involves the application of completely different measurements and standards. The terms are also not confusing. At the least, Judge Bare should have refrained from attributing confusion of fracture termination to Plaintiff's orthopedic surgery expert witness, Dr. Harris.

Because of Judge Bare's ruling regarding the newly alleged breaches of the standard of care, Defendants were forced to defend two new theories of liability for the first time during trial. The ruling was factually and legally unsupported, and resulted in clear prejudice to Defendants. It is clear Judge Bare based the crucial ruling on his partiality and bias toward Plaintiff, as opposed to an impartial analysis of the issue.

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[43] *See* Trial Transcript, Day 3, 32-40, attached hereto as Exhibit "N".

[44] *Id.*

4. Judge Bare Allowed Plaintiff to Claim Permanent Physical Disability in the Absence of Expert Medical Testimony

Defendants filed a Motion in Limine to exclude certain opinions of Plaintiff's economist expert, Stan Smith, Ph.D., as too speculative. On July 19, 2019, Defendants filed a Supplemental Motion to exclude Dr. Smith's opinions regarding Plaintiff's work-related damages based on the absence of proximate causation. The Supplemental Motion argued that Plaintiff may not maintain a claim for damages premised upon an alleged disability/impairment that affects his ability to work in the absence of required proximate causation evidence; *i.e.* expert medical testimony.

Defendants' Supplement was supported by clear Nevada law which provides that a plaintiff must establish proximate causation by showing the claimed injury is the natural and probable consequence of the negligence. *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661 (1998). Nevada law also clearly states that medical malpractice matters require expert medical testimony to make this showing. *Bronneke v. Rutherford*, 120 Nev. 230, 235, 89 P.3d 4 (2004). This rule is further set forth in Nevada Revised Statute 41A.100 which requires the use of expert medical testimony to prove causation in medical malpractice cases.[45]

Defendants' Supplement also provided citations to case authority in *each* of the remaining 49 states which all require that proximate causation be established by expert medical testimony when the issues are medically complex and outside the common knowledge of lay witnesses.

In the instant matter, no qualified medical expert opined that Dr. Debiparshad's alleged negligence caused Plaintiff to suffer an impairment or disability—at any time—that limited Plaintiff's ability to practice law. Plaintiff's expert economist merely accepted Plaintiff's statement that he is currently 60-80% disabled and is not able to work.

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[45] N.R.S. 41A.100(1) states "Liability for personal injury or death is not imposed upon any provider of health care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death."

Defendants further informed the Court that Plaintiff's anticipated lay witness testimony (from Plaintiff's prior employer) regarding Plaintiff's perceived inability to work was insufficient to prove either the *existence* of a recognized impairment/disability, or what *caused* the impairment/disability. Based on the lack of proper proximate causation evidence, Defendants requested the Court preclude Plaintiff from submitting his multi-million dollar claim for damages premised upon lost wage/loss of earning capacity.

Plaintiff opposed Defendants' Supplemental Motion by citing to a single case from West Virginia. Plaintiff failed to cite any legal authority from Nevada (or any state west of the Mississippi River) to support his position that expert medical testimony was not required to support his claim for damages premised upon an alleged disability that renders him unable to work.

Perhaps because Plaintiff was unable to provide adequate legal authority in opposition to Defendants' Motion, Judge Bare assisted in this process and conducted his own legal research. Judge Bare ultimately located a Nevada Supreme Court case from 1961 (issued decades before the enactment of N.R.S. Chapter 41A which governs medical malpractice cases). He provided the case citation to the parties, *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 358 P.2d 892 (1961), and stated his belief the holding supported Plaintiff's position. Judge Bare provided a lengthy summary of the facts of the case and invited the parties to review the decision for arguments to be held the next day.[46]

The Motion was argued the following morning. Defendants argued the applicable Nevada law cited in their Supplement. Defendants also respectfully highlighted the distinctions between the holding of *Sierra Pac. Power v. Anderson* and the facts of the current matter, including the fact the plaintiff in *Anderson* presented expert medical testimony in support of his claimed disability. Plaintiff argued the holding of the single West Virginia case and his belief that lay witness testimony is sufficient to support a claim for lost wages premised upon a physical disability.

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[46] *See* Trial Transcript, Day 3, pp. 42-45, attached hereto as Exhibit "O".

Ultimately, and not surprisingly by this point in the trial, Judge Bare could not be dissuaded from ruling in favor of Plaintiff, despite the abundance of Nevada law holding otherwise.[47] Judge Bare's denial of Defendants' Motion allowed Plaintiff to present a claim for millions of dollars in damages in the absence of required proximate causation evidence. In order to arrive at this decision, Judge Bare had to ignore clearly established Nevada law solely in an effort to please Plaintiff and Plaintiff's counsel.

III.

LEGAL ARGUMENT

A. Applicable Law Regarding Disqualification

A judge has a duty to uphold and apply the law, and to perform judicial duties fairly and impartially. N.C.J.C. 2.2 "Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." *Id.* at Cmt. 1. Thus, not just actual impartiality, but *perceived* partiality is justification for disqualification.

"A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." N.C.J.C. 1.2. The appearance of impropriety occurs whenever "the conduct would create in reasonable minds a perception that the judge violated the Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." *Id.* at Cmt. 5.

To avoid even the appearance of impropriety, a Nevada judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned..." N.C.J.C. 2.11(A). "Whether a judge's impartiality can reasonably be questioned is an objective question that this court reviews as a matter of law using its independent judgment of the undisputed facts." *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 116 Nev. 640, 644, 5 P.3d 1059 (2000).

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[47] *See* Trial Transcript, Day 4, pp. 10-16, attached hereto as Exhibit "P".

The judge's actual impartiality or bias is not the issue. *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 438, 894 P.2d 337 (1995)(overruled on other grounds by *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 112 P.3d 1063 (2005)). Instead, the Court must decide "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [a judge's] impartiality." *Id.* The Nevada Supreme Court recognized that "an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102 (1996)(*citing Liteky v. United States*, 510 U.S. 540 (1994)).

Pursuant to N.R.S. 1.235(1), the party seeking disqualification must file an affidavit specifying the facts upon which the disqualification is sought, and the affidavit must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Normally, the motion for disqualification must be filed not less than 20 days before the date set for trial or hearing the case, or three days before the date set for the hearing of any pretrial matter. N.R.S. 1.235(1)(a)-(b). However, a party may seek disqualification when the grounds underlying the disqualification are not discovered, or could not have reasonably been discovered, until after the deadlines imposed by Section 1.235. *Towbin Dodge, LLC,* 121 Nev. at 260. ("If new grounds for a judge's disqualification are discovered after the time limits in N.R.S. 1.235(1) have passed, then a party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information.")

Canon 3E (Rule 2.11 of the N.C.J.C.) provides, in pertinent part, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" including but not limited to when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in a proceeding."

Defendants seek disqualification of Judge Bare premised on his violation of N.C.J.C. 1.2, 2.2 and 2.11. Judge Bare has not acted at all times in a manner that promotes public confidence in

the independence, integrity, and impartiality of the judiciary, and he has not avoided impropriety or the appearance of impropriety. Judge Bare's impartiality is reasonably questioned by Defendants based on his exhibited personal bias toward Plaintiff and Plaintiff's counsel.

B. Judge Bare Must be Disqualified Based on Actual and Perceived Impartiality

Judge Bare's insistence that the case proceed to trial so quickly (despite the obvious prejudice to Defendant), and his denial of nearly every pre-trial motion filed by Defendants, raised concerns about his partiality. However, his obvious bias toward Plaintiff and Plaintiff's counsel was not grossly evident until the trial. The bias became undeniable upon the granting of Plaintiff's request for a mistrial. Judge Bare's stated opinion that Plaintiff's counsel tells only the "gospel truth" and is worthy of representation on Mount Rushmore leaves no doubt that he has formed "an opinion...on the basis of facts introduced or events occurring in the court of the current proceedings, or of prior proceedings" that "displays a deep-seated favoritism...that would make fair judgment impossible." When a judge forms these opinions—and especially when he feels it is appropriate to state such opinions on the record—sufficient grounds exist to seek disqualification of the judge. *See Kirksey v. State*, 112 Nev. at 1007.

Judge Bare has violated section 1.2 of the Nevada Code of Judicial Conduct which mandates that a judge act, at all times, "in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." N.C.J.C. 1.2. Defendants have lost all confidence in Judge Bare's independence and impartiality in this matter. He has failed to avoid impropriety or even the appearance of impropriety. To the contrary, Judge Bare broadcast his impartial opinions of Plaintiff's counsel on the record.

At the very least, Judge Bare's conduct "would create in reasonable minds a perception that the judge violated the Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge" which constitutes the appearance of impropriety according to N.C.J.C. 1.2. A reasonable person would certainly harbor doubts about Judge Bare's impartiality. Under these circumstances, Judge Bare's disqualification is appropriate.

Judge Bare is currently slated to decide the parties' competing Motions for Attorneys' Fees and Costs related to the mistrial. Each Motion requests hundreds of thousands dollars in fees and costs. Given the lack of foundation to grant the mistrial in the first place, coupled with Judge Bare's exhibited bias and partiality, Defendants understandably seek to disqualify Judge Bare prior to a ruling on the outstanding Motions. It is critical that the outstanding Motions be heard by an impartial and unbiased judicial officer.

IV.

CONCLUSION

For the reasons set forth herein, Defendants request the Court grant its Motion to Disqualify Judge Bare and reassign this matter to a new Department.

Dated this 16th day of August 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Katherine J. Gordon

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August 2019, a true and correct copy of **DEFENDANTS' MOTION TO DISQUALIFY THE HONORABLE ROB BARE ON ORDER SHORTENING TIME** was served by electronically filing with the Clerk of the Court, using the Odyssey File and Serve system, and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

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COURTESY COPY VIA MESSENGER

By /s/ *Johana Whitbeck*
Johana Whitbeck, an Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

Exhibit A

Landess has a good character. And you know, no objection was made by that, by the way, by the Defense when he's offering these good character traits.

And so now it's the flow of things, we now have an admitted exhibit that's there, not referenced yet. Now we have a reason to bring up character-type traits, because the Plaintiff has put it in issue through Dariyanani.

We then have, of course, that moment in time where Ms. Gordon puts on the ELMO and highlights with a yellow highlighter this paragraph about--

MR. JIMMERSON: That I didn't even notice until she just put it up there. What was I going to do, object to an admitted document, suggesting that I'm afraid of it. I was outraged when I read it. I just was -- I was blown away. I was stunned actually.

THE COURT: Okay. Well, that gives me further context, as to where I'm going with this at this point. And I've got to say, Mr. Jimmerson. This comes to exactly what I would expect from you, and if I say something you don't want me to say, then you stop me. Okay. But what I would expect from you, based upon all my dealings with you over 25 years, and all the time I've been a judge too, is frank candor -- just absolute frank candor with me as an individual and a judge. It's always been that way. You know, whatever word you ever said to me in any context has always been the gospel truth.

I mean, without, you know, calling my colleagues, lawyers that worked with me at the bar, or my wife as testimonial witnesses, I've

told all those people many times about the level of respect and admiration I have for you. You know, you're in -- to me, you're in the, sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers that I've dealt with in my life. I've got a lot of respect for you. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is -- and again, interrupt me anytime if you want -- is, well, in a multi-page exhibit, we just didn't see it.

MR. JIMMERSON: That's exactly right, Judge. You're 100 percent right.

THE COURT: Okay. Well, there you go. And you know, nobody is perfect. We all do these things.

MR. JIMMERSON: I already said I was mad at myself.

THE COURT: I know. You did say that.

Okay. So --

MR. JIMMERSON: But I think all of us have an ethical obligation to practice law the right way and Kathy Gordon did not do so.

MS. GORDON: Your Honor, I would --

THE COURT: Okay. Hold on a second, if you don't mind.

MS. GORDON: That's smearing.

THE COURT: Okay. Go ahead. I'm sorry. I should --

MS. GORDON: And truly --

THE COURT: -- he's interjected, so you can too.

MS. GORDON: -- it's my witness, right? I'm the one who questioned Mr. Dariyanani about it, and I frankly had every right to do

underhanded like that.

THE COURT: I've known you for two weeks.

MS. GORDON: It just, it was admitted. It wasn't objected to. It was their exhibit and I used it.

THE COURT: All right. So one of the other reasons I brought all that up was, is I look at the pretrial motion practice, the motion in limine practice, that the Plaintiffs asked me to preclude Mr. Landess's gambling history. Remember the $400,000 marker that he had? His bankruptcies, and this other litigation that he was in. They did not ask to preclude this item in question now, so that's further, I think, evidence of the fact that they just missed it. What else can I tell you?

So the issue for the Court is this: in a situation where the Plaintiffs, in good faith, miss something like that, but the Defense didn't obviously, then the Defense uses it, I don't want to get into whether it was good or bad faith either, because I don't feel -- I don't feel that you did something with an intent that was bad in an ethical, you can't do this as a lawyer sense.

I think what I think is that you felt as though you had a bit of a bomb here, because you had known this was in the exhibit, and you dropped it at an appropriate time, in your view. That all happened. Okay. For me though, as a judge, now presiding over a trial with, you know, two black jurors, and I'm using Mr. Landess's word, that's what he said in the email describing African-Americans -- and I don't know if the other item -- the Mexican item would be relevant to the ethnicity of other jurors, because I'm not good at that kind thing.

Exhibit B

MR. JIMMERSON: -- that that needs to be where that's at. We need to address this issue now and the fees and costs issue can be delayed and give the Defense an even greater opportunity than it's had since all of us have been presented with this together. Thank you, sir.

THE COURT: Okay. Mr. Vogel.

MR. VOGEL: Thank you. Good morning. We obviously spent quite a bit researching as well. And we do -- we do appreciate you taking us back after Court on Friday and going through it and expressing your willingness to help try to settle this and expressing your view that you know, you felt that things were kind of going Plaintiff's way on this case. We discussed that with our clients and --

THE COURT: Well, I didn't actually say things were going Plaintiff's way. I said that on liability, I think -- you know, okay.

MR. VOGEL: Yeah.

THE COURT: One thing about it is, we've got to be careful, because I want to make sure everybody in the room is going to have adequate time to make their record, but I have to make mine, too, because I don't want any mystery in the record, okay? So if you don't mind, just have a --

MR. VOGEL: No, no.

THE COURT: -- just have a seat, please. Have a seat, unless you want to stand up for about five minutes or more. Okay, so now it's come up a couple times and so, you know, I just liking making a good court record. And anybody can memorialize things that happen off the record, including me. So if anybody wants to memorialize something

Exhibit C

Got only knows what the jury's going to do. Anybody can give their best estimate and then the opposite can easily happen. But you know, I've been sitting here and I have all this. I don't know, this is probably like you know, 20 some pages of my notes of everything that's happened in the trial. Every witness and the highlights of what they've all done. I could share that.

And in our Friday meeting, I think based upon either acquiescence or invitation, the parties did want to hear and I did give a -- sort of a -- I think I called it a thumbnail overview or thumbnail sketch of things and I said look -- and again, this is an opinion. And I gave this opinion, because I thought perhaps it would foster taking me up on this. I said look, my guess is that there's more -- there's enough evidence to meet the burden, the preponderance burden on the medical malpractice. I'll tell you Dr. Debiparshad, that's what I said to everybody on Friday.

In other words, it's not that I disrespect your position or Dr. Gold's position. It's just that if you were to ask me, I would say to this point, that the medical malpractice itself, though I'm sure you did the best you could and it was well-intended and you didn't do anything intentional to try to harm Mr. Landess, but that's not required in medical malpractice. It's just making a mistake that now, unfortunately, causes some effect. And you know, my view is that Plaintiffs would meet that burden. I didn't give all the reasons for that. I'd be happy to spend time doing that, though.

But I also said that I don't think the Plaintiffs would get the home run on their damages. And this is all given with totally

Exhibit D

DECLARATION OF KEVIN P. DEBIPARSHAD, M.D. IN SUPPORT OF MOTION TO DISQUALIFY THE HONORABLE ROB BARE

1. I am a licensed physician in the state of Nevada and specialize in orthopedic surgery. I am a named Defendant in this matter and my counsel of record is Lewis Brisbois Bisgaard & Smith LLP. This Declaration is made and based upon my personal knowledge and I am competent to testify to the matters contained herein;

2. Plaintiff alleges that I fell below the applicable standard of care when I surgically repaired Plaintiff's fractured tibia on October 10, 2017. I strongly deny this allegation;

3. Trial started on July 22, 2019 and ended more than two weeks later, on August 5, 2019, when Judge Bare granted Plaintiff's request for a mistrial;

4. During the final day of trial, Judge Bare told the parties that he personally believed Plaintiff had met his burden of proof to establish a claim of medical malpractice against me. He also stated his belief that the jury would likely award damages against me. More particularly, Judge Bare stated he believed that I "did the best [I] could" and "didn't do anything intentional to try and harm [Plaintiff]", but that I had made a "mistake" in my rendering of care and treatment of Plaintiff which resulted in "some effect";

5. At first, I was surprised by Judge Bare's statements because I had not heard anyone ask him for his opinion and it did not seem relevant to any discussions taking place at the time. I was then stunned by the content of his statement that I had made a "mistake" in my care and treatment of Plaintiff. I could not disagree more with this opinion. No part of my care and treatment of Plaintiff fell below the standard of care;

6. Given the disparity of qualifications and testimony provided by the parties' expert witnesses, Judge Bare's opinion that Plaintiff had somehow proven malpractice to the jury made absolutely no sense to me. It was almost as though Judge Bare and I must have been sitting through two entirely different trials for him to arrive at his opinions;

7. As a person of color, I was also insulted by Judge Bare's decision to grant a mistrial because the jury was made aware of Plaintiff's email wherein he makes racial comments. Several of Plaintiff's witnesses had testified about Plaintiff's good character. It seems they should

also be able to consider contrary evidence, such as that contained in the email, that shows Plaintiff may not have such a great character;

8. Judge Bare seemed committed to protecting Plaintiff from his own racial comments, to the point of granting a mistrial after two weeks of trial (during which I essentially closed my medical practice to attend trial). Again, as a person of color, I found Judge Bare's protection of Plaintiff, and his racial comments, particularly offensive;

9. During trial, I heard Judge Bare: (1) make awkward flattering comments about Plaintiff's counsel, Mr. Jimmerson; (2) rule in favor of Plaintiff again and again, even when the ruling made no sense such as when Judge Bare stated the medical terminology for proper tibia reduction is interrelated and confusing; (3) offer excuses for Plaintiff's counsel regarding counsel's failure to know the content of his own trial documents; and (4) interrupt my attorneys when they were arguing, or read papers while they were arguing, which did not occur when Plaintiff's attorneys were arguing; and

10. Based on what I observed during trial, I strongly question Judge Bare's impartiality. I do not reasonably believe Judge Bare is able to fairly preside over this case, or that I could have a fair trial if he remained the judge. For that reason, I believe he should be disqualified and a new judge appointed.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated this 18th day of August 2019.

Dr. [signature]

KEVIN P. DEBIPARSHAD, M.D.

Exhibit E

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

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

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

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

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

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

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

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BY MR. JIMMERSON:

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

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

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

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

MR. JIMMERSON: Thank you.

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

BY MR. JIMMERSON:

Q You may continue.

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

Exhibit F

protective order in place, I was under confidentiality obligations to my partners, and when you all finally got me a protective order, I gave it to you.

Q You were okay with Cognotion disclosing the documents that Mr. Landess felt okay disclosing, but nothing beyond that; is that your testimony?

A My testimony is I did not want anything to come into a public record that I thought was damaging, and I guess if your question is did I trust Mr. Landess' judgment and discretion even as an ex-employee not to release anything that would be harmful to us, the answer is, yes, and I still trust him to this day.

Q Even though he was no longer part of Cognotion, correct?

A I'd leave my children with Mr. Landess. I'd give him a bag of cash and tell him to count it and deposit it.

Q The -- working with Mr. Landess during this litigation process extended to April of this year. This is again part of admitted Exhibit 56. It's an email from Mr. Landess to you dated April 5th, 2019, and it was, I'll represent to you, after Mr. Landess was deposed and before you were deposed.

A Uh-huh.

Q And the beginning of the email states,

"But in an effort to avoid the nightmare of having to reconstruct exactly how I was paid monthly, here's what I said in my deposition. I was paid $10,000 a month. Some of it subtracted from investor payments and got sent to

Exhibit G

PLAINTIFF'S *THIRD AMENDED* TRIAL EXHIBIT LIST

PLAINTIFF: Jason George Landess aka
Kay George Landess
DEFENDANT: Kevin Paul Debiparshad, MD
DEFENDANT: Jaswinder Grover, MD, et al
DEFENDANT: Valley Health System, et al

PLAINTIFFS' ATTORNEY: Martin A. Little

DEFENDANT'S ATTORNEY: S. Brent Vogel
DEFENDANTS' ATTORNEY: S. Brent Vogel
DEFENDANTS' ATTORNEY: Kenneth M. Webster

CASE NO.: A-18-776896-C
DEPT. 32

EX NO	DESCRIPTION	BATES NUMBER	DATE OFFERED	OBJECTION	DATE ADMITTED
51.	Cinematic Health Education executed documents, Bylaws, Certificate of Incorporation, Stock Ledger	P00266-P00387			
52.	CNA Skills Guideline	P00388-P00389			
53.	Cognotion letters to Jason Landess	P00390-P00393			
54.	Excel spreadsheet (ContinuEdSpreadsheet)	P00394-P00436			
55.	Cover Memorandum for Spreadsheet Regarding CNA CEU in Nevada	P00437-P00439			
56.	Emails to and from Jason Landess	P00440-P00453; P00479-P00513			
57.	Cinematic Health Education, Inc. Action by Written Consent of the Board of Directors in Lieu of Organizational Meeting dated March 15, 2018	P00226-P00284			
58.	Cognotion - Series Pre-Seed Preferred Stock Investment Agreement dated March 20, 2018	P00309-P00332			
59.	*Exhibit 1* (2017 1099), *Exhibit 2* (2016 1099), *Exhibit 3* (redacted Bank of America statement showing 3/21/18 wire from Cognotion), *Exhibit 4* (redacted Bank of America statement showing 1/12/18 wire from Cognotion), *Exhibit 5* (redacted Bank of America statement showing 5/3/18 wire from Cognotion)	P000454-P00478			
60.	Accounting summary, letter and email between Jason Landess and John Truehart regarding income and salary and attachments (Cognotion letter dated July 12, 2018, regarding salary paid to Jason Landess in 2017 and 2018; ProDox request for Cognotion employment and payroll records regarding Jason Landess)	P00514-P00539.			
61.	SME Lawyer questions for CNA	P00540			
62.	Video – *"Close Up – Meet Your Faculty"*	P00541			
63.	Email from Jonathan Dariyanani to John Orr, Esq. dated 6/1/19, Bates labeled	P001751-P001753			
64.	ACH Payment to Jason Landess on March 18, 2019, Chase for Business account	P00220			

Exhibit H

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason

Jason Landess <jland702@cox.net> Sun, Jun 10, 2018 at 10:41 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>

Please give me your address. I'm listing you as a prospective witness. And I need to include your address.

Thanks!

Gmail

Jonathan Dariyanani <jdariyanani@gmail.com>

(no subject)

Jason Landess <jland702@cox.net> Sat, Aug 18, 2018 at 8:17 PM
To: tim@cinematichealtheducation.com
Cc: Jonathan Dariyanani <jonathan@cognotion.com>, justin@cognotion.com

Hi Tim—

Jonathan asked me to forward the attached documents to you so you can see what we've done so far to map out CNA assets for obtaining state approval for being a provider for CNA continuing education in Nevada. If this template is acceptable, we can do the same for other states.

Although every state differs in its specific requirements, they all follow the same general pattern of a combination of class-room and clinical subjects. As you can see from my Memo, Nevada requires 24 hours of training within the past two years of employment.

The training has to fall within the purview of the attached "CNA Skills Guidelines." Other states' guidelines may slightly vary, with states like California, Illinois, Texas, etc., having more stringent requirements.

For submitting an application in Nevada, you just need to submit a one-hour sample of your curriculum with an application. The person submitting the application has to be a registered nurse.

The hard part was to break out various video vignettes and catalogue the content, with appropriate video links for each one. You can see from the attached spreadsheet that Justin and Riley have done that for numerous subjects. Now all Justin and Riley need to do is insert the corresponding Nevada skill alongside each vignette, which could easily be done for every state. I told them to hold off doing that for Nevada until we've obtained some feedback from you.

Let me know if you think we're headed in the right direction. Obviously, this is still a bit rough because it's the first draft.

Regards,

Jason G. Landess

3 attachments

ContinuEdSpreadsheet_5-Aug-2018.xlsx
45K

COVER MEMORANDUM FOR SPREADSHEET REGARDING CNA CEU IN NEVADA.DOCX
18K

CNA skills guidelines.pdf
55K

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

FW: From Jason Landess, Esq. re Cognotion, Inc.

Jason Landess <jland702@cox.net> Wed, Aug 30, 2017 at 2:20 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>

FYI.....

From: Jason Landess [mailto:jland702@cox.net]
Sent: Wednesday, August 30, 2017 11:20 AM
To: 'mjwu@cpe.state.nv.us'
Subject: From Jason Landess, Esq. re Cognotion, Inc.

Ms. Wu:

Good morning! About a week ago you were gracious enough to speak at length with me about licensing for my client, Cognotion, Inc. (http://www.cognotion.com/). I forwarded the application to my client and explained that the first step would be to attend a pre-application seminar.

While my client is exploring that option, they asked me to inquire of you if you would know of any licensed schools that, due perhaps to limited resources or other constraints, may be good candidates for a joint venture with Cognotion. They would provide the structure; and Cognotion would provide its unique curriculum and financial assistance. It could easily be a win/win situation.

Your thoughts?

Regards,

Jason G. Landess, Esq.

Senior Counsel for Cognotion, Inc.

Jason G. Landess, Esq.

7054 Big Springs Court

Las Vegas, NV 89113

Phone: 702-232-3913

Fax: 702-248-4122

Email: Jland702@cox.net

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason Landess

Jason Landess <jland702@cox.net> Wed, Dec 23, 2015 at 5:34 PM
To: Michael Goldberg <michael@cognotion.com>, Jonathan Dariyanani <jonathan@cognotion.com>

Michael,

My engagement agreement includes Cognotion paying for my monthly LexisNexis at $220. I forgot to include that in the invoice I just sent you earlier today. Right now I need that service. If I don't need it in the future, I'll let you know so you can subtract that amount from my monthly payment.

And should I incur any reimbursable expenses, I'll submit a statement to you.

Thanks!

Jason

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Payment

Jonathan Dariyanani <jonathan@cognotion.com> Tue, May 17, 2016 at 9:38 AM
To: Michael Goldberg <michael@cognotion.com>, Jason Landess <jland702@cox.net>

Michael,
Please ACH Jason his $10,000 for April today.

Thanks,
J

--
Sent from Gmail Mobile...please excuse booboos and terse incomprehensibility!
Jonathan Dariyanani
540-841-0226

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Invoice/Balance

jland702 <jland702@cox.net> Fri, Oct 27, 2017 at 2:37 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>, John Truehart <john@cognotion.com>

John/Jonathan:

If my services were terminated effective October 31st, Cognition would owe me $45,000. I am presently paid thru June 15th.

Jason

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: Jonathan Dariyanani <jonathan@cognotion.com>
Date: 10/27/17 10:54 AM (GMT-08:00)
To: Jason Landess <jland702@cox.net>, John Truehart <john@cognotion.com>
Subject: Invoice/Balance

Jason,
I am preparing the closing schedules for Rick Segal of what we owe. Can you make sure that you and John are in agreement about the balance owed to you at as it would be on October 31, 2017 and send me that number?

Thanks!

--
Jonathan Dariyanani
President
Cognotion, Inc.
Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

457987-002

Sara N. McCall <snmccall@prodox.net> Tue, Jun 12, 2018 at 10:50 AM
To: "jonathan@cognotion.com" <jonathan@cognotion.com>

Hello,

Please see attached request and let me know if you have any questions.

Thank you,

Sara N McCall

ProDox LLC

2450 W Osborn Rd

Phoenix, AZ 85015

Ph#: 602-322-0200 ext 3436

Fax#: 602-322-0111

Orders_20180612071626.pdf
121K

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason

1 message

Jason Landess <jland702@cox.net> Fri, Apr 5, 2019 at 1:03 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>

Jonathan:

But in an effort to avoid the nightmare of having to reconstruct exactly how I was paid monthly, here's what I said at my deposition: I was paid $10,000 per month. Some of it was subtracted from investor payments and not sent to Cognotion, just to have Cognotion turn around and send it back to me. Some of that was then loaned to Cognotion interest-free to help the company and I elected to defer those loaned monies to claim as wages when Cognotion repaid the loan in early 2018 when ReThink invested in CHE.

When that happened in early 2018, Cognotion paid me all accrued salary and all the money I had loaned to Cognotion. From Cognotion's perspective, $50k of the 3/21/2018 $100k payment was loan repayment by Cognotion (which is true) and $50k was payment of accrued salary to me, which is also true.

But from my perspective, the whole $100k was income to be reported on my 2018 return in September of this year, with $50k of it being deferred income. I did that because the tax rates are more favorable in 2018, which is also true.

So to support the entire $300k that Cognotion has paid me in wages, I've produced the attached documents:

- 2016 1099 from Cognotion for $85k
- 2017 1099 from Cognotion for $75k
- 3/21/2018 wire for $100k from Cognotion, which underneath the redaction says $50k is for salary and $50k for loan repayment (I sent Michael an unredacted copy, which he they may produce at their deposition)
- 1/12/2018 wire for $10k from Cognotion, which I told Michael Lindbloom was all wages ($5k for 2017 arrearages and $5k towards 2018)
- 5/3/2018 wire for $30k from Cognotion for 2018 wages

That totals $300k and jibes with what Cognotion has sent me in the 2016 & 2017 1099's, the attached letter John sent to Dropbox stating I was paid $90k in wages in 2018 (which has been produced to the defense), me treating the whole $100k from 3/21/2018 as 2018 income, the other two 2018 wires totaling $40k, and what I reported on, and will report on, my tax returns.

So in terms of corroboration, all you need to do from your end is produce the 2016 & 2017 1099's, John's letter, and the matching 3/21/2018 wire from Cognotion's bank, $50k of which from Cognotion's perspective was loan repayment but which from my side of the table was deferred income. That totals $300k.

If they want to debate the nuance of me treating the $50k as income and Cognotion treating it as a loan, so be it; because it's a nothing-burger. And certainly Cognotion has properly characterized all its distributions to me as Cognotion sees and booked them.

The absolute truth is Cognotion paid me $10k per month in salary from January 2016 thru June 2018.

---

6 attachments

- **Exhibit 5.pdf**
  105K
- **Exhibit 1.pdf**
  69K
- **Exhibit 2.pdf**
  310K
- **Exhibit 3.pdf**
  109K
- **Exhibit 4.pdf**
  116K
- **Letter from John Truehart.pdf**
  68K

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Termination Letter

Jonathan Dariyanani <jonathan@cognotion.com> Thu, Jan 3, 2019 at 3:34 PM
To: Jason Landess <jland702@cox.net>
Bcc: 843937@bcc.hubspot.com

Jason,

It is with a heavy heart that I must send you the attached termination letter. I wish you health and prosperity and I hope that you are able to recover fully from this terrible situation.

My apologies and I hope things improve in the future for you,

--
Jonathan Dariyanani
President
Cognotion, Inc.
Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

Cognotion Landess Termination Letter 1-3-18.pdf
68K

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Jason's Payment

Jonathan Dariyanani <jonathan@cognotion.com> Fri, Jan 29, 2016 at 5:24 PM
To: Jason Landess <jland702@cox.net>, Michael Goldberg <michael@cognotion.com>

Michael,
Please initiate an ACH payment to Jason Landess on Monday for his $10,000 for January.

Thanks!

--
Jonathan Dariyanani
President

Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

Gmail

Jonathan Dariyanani <jdariyanani@gmail.com>

Wire February 2016 fee

1 message

Michael Goldberg <michael@cognotion.com> Fri, Apr 15, 2016 at 3:11 PM
To: Jason Landess <jland702@cox.net>, Jonathan Dariyanani <jonathan@cognotion.com>

Jason,

Attached, please see the confirmation of the $10,000 wire we sent to you today.

Wire Details

Account Details

Wire to	Jason Personal(...3731)
Wire from	PLAT BUS CHECKING (...3865)

Wire Details - Sender

Wire amount	10000.00 U.S. Dollars (USD)
Scheduled On	04/15/2016 at 03:05 PM ET
Wire date	04/15/2016
Message to recipient	February 2016 Cognotion
Message/instructions to recipient bank	February 2016 Cognotion
Memo	February 2016 Cognotion
Transaction number	4994486434
Fed reference number	N/A
Status	In Transit
Submitted by	Administrator on 4/15/2016 3:05:41 PM
Last modified by	Administrator on 4/15/2016 3:05:41 PM
Approved by	Not Available

Best,

--
Michael Goldberg
Chief Financial Officer
335 Madison Avenue, 16th floor
New York, NY 10017
www.cognotion.com
O: 347 692 0640
M: 917 805 9153

From: Jason Landess
To: "John Truehart"
Cc: "Jonathan Dariyanani"
Subject: From Jason Landess
Date: Thursday, February 22, 2018 12:20:00 PM

John,

To bring the accounting for me up to date, you will recall that you agreed that as of October 31, 2017 I was owed $45,000 by Cognotion. Since then the only payments I have received from Cognotion is $50,000 on 12/13/2017 and $10,000 on 1/12/2018.

The $10,000 is for accrued salary. The $50,000 is for a partial loan repayment, which Jonathan will explain to you.

Hence, what I will be owed in accrued salary as of 2/28/2018 is $75,000. That is for all work done from July 15, 2015 through February 28, 2018.

That number also reconciles with the tax statement you just sent showing Cognotion paid me $65,000 in salary in 2017. It should have been $120,000. So you just subtract the $65,000 from the $120,000, and add the balance of $55,000 to the $20,000 for the first two months of 2018.

Regards,

Jason G. Landess, Esq.

Gmail

Jonathan Dariyanani <jdariyanani@gmail.com>

Delta Itinerary

Jonathan Dariyanani <jonathan@cognotion.com> Thu, Apr 14, 2016 at 6:23 PM
To: Jason Landess <jland702@cox.net>

--
Jonathan Dariyanani
President

Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

Jason Flight Augusta.pdf
143K

DELTA

LAS > AGS

Las Vegas, NV to Augusta, GA
SAT, 16 APR 2016 - MON, 18 APR 2016

FLIGHT CONFIRMATION # G2NS8O

SKY PRIORITY ROUND TRIP | 1 PASSENGER

FLIGHTS

FLIGHT DL 1402

SAT, 16 APR 2016 — 2 DAYS FROM DEPARTURE

LAS > ATL — ON TIME — SEAT: 4C

DEPART:**1:15 PM** — ARRIVE:**8:10 PM** — FIRST (A)

TERMINAL 1 — DOMESTIC TERM-SOUTH

MEAL SERVICE: Lunch
In-Flight services and amenities may vary and are subject to change.

Find Sky Club Locations :
Mc Carran Intl - LAS
Hartsfield-Jackson Atlanta Intl - ATL

Airport Map: LAS | ATL

Aircraft: Boeing 757
Flight Time: 3HR 55M
On Time %: 100
Miles Flown: 1742

BAGGAGE & SERVICE FEES

LAYOVER IN ATLANTA, GA 1HR 56M

FLIGHT DL 806

SAT, 16 APR 2016 — 2 DAYS FROM DEPARTURE

ATL > AGS — ON TIME — SEAT: 3B

DEPART:**10:05 PM** — ARRIVE:**11:01 PM** — FIRST (A)

MEAL SERVICE: No Meal
SP
In-Flight services and amenities may vary and are subject to change.

Find Sky Club Locations :
Hartsfield-Jackson Atlanta Intl - ATL
Bush Field - AGS

Airport Map: ATL | AGS

Aircraft: Boeing 717-200
Flight Time: 56M
On Time %: N/A
Miles Flown: 143

BAGGAGE & SERVICE FEES

FLIGHT DL 5193 Operated by: ExpressJet DBA Delta Connection

MON, 18 APR 2016 — 4 DAYS FROM DEPARTURE

AGS > ATL — ON TIME — SEAT: 2C

DEPART:**5:27 PM** — ARRIVE:**6:35 PM** — FIRST (A)

MEAL SERVICE: No Meal
SP
In-Flight services and amenities may vary and are subject to change.

Find Sky Club Locations :
Bush Field - AGS
Hartsfield-Jackson Atlanta Intl - ATL

Airport Map: AGS | ATL

Aircraft: CRJ 900
Flight Time: 1HR 8M
On Time %: N/A
Miles Flown: 143

BAGGAGE & SERVICE FEES

LAYOVER IN ATLANTA, GA 1HR 36M

FLIGHT DL 1100

MON, 18 APR 2016 — 4 DAYS FROM DEPARTURE

ATL > LAS — ON TIME — SEAT: 4B

DEPART:**8:05 PM** — ARRIVE:**9:41 PM** — FIRST (A)

MEAL SERVICE: Snack
SP
In-Flight services and amenities may vary and are subject to change.

Find Sky Club Locations :
Hartsfield-Jackson Atlanta Intl - ATL
Mc Carran Intl - LAS

Airport Map: ATL | LAS

Aircraft: Boeing 737-900
Flight Time: 4HR 36M
On Time %: N/A
Miles Flown: 1742

BAGGAGE & SERVICE FEES

PASSENGER INFORMATION

	NAME	FLIGHT	SEATS	TRIP EXTRAS	SPECIAL REQUESTS
1	KAY LANDESS eTicket # 0067792016286	LAS > ATL	First (A) 4C		
		ATL > AGS	First (A) 3B		
		AGS > ATL	First (A) 2C		
		ATL > LAS	First (A) 4B		

Complete Delta Air Lines Baggage Information
Baggage fees will be assessed at the time you check in.

Final baggage fees will be assessed and charged at time of check-in. Baggage fees may change based on the class of service or frequent flyer status.
All prices are (USD) unless otherwise noted. If your itinerary qualifies for Trip Insurance, you will be able to add it before you purchase your ticket.

View Changes & Cancellation Polices | This Ticket is Changeable / Nonrefundable. Fees May Apply.

Gmail

Jonathan Dariyanani <jdariyanani@gmail.com>

Your priceline itinerary for New York, NY - Tuesday, May 03, 2016 (Itinerary# 110-610-943-40)

Priceline Customer Service <hotel@trans.priceline.com> Mon, May 2, 2016 at 4:14 PM
Reply-To: no-reply@priceline.com
To: JONATHAN@firebook.com

To view this email as web page, go here

Hotels Cars Flights Packages Cruises

Your Hotel Reservation for Tuesday, May 03, 2016

Priceline Trip Number: 110-610-943-40
To view your full itinerary, click here.

Print Itinerary Email Itinerary Download our App

Conrad New York
2 Nights, 1 Room

Check-in:	**Tuesday, May 03, 2016** (03:00 PM)
Check-out:	**Thursday, May 05, 2016** (12:00 PM)
Hotel Address:	102 North End Avenue New York NY, 10281, United States
Hotel Phone Number:	212-945-0100
Number of Rooms:	1 Room
Reservation Name:	Room 1: Kay Landess
Hotel Confirmation Number:	3246784388
Room Type:	1 King Bed - Accessible Suite With River View


See Hotel Details


Map/Directions

Max 2 guests. Hotels may charge for additional guests.

See all Policies

Add a Room Add a Night

Summary of Charges

Total Charged: $944.40

Billing Name:	Jonathan Dariyanani
Room Price:	$383.00/night
Number of rooms:	1 Room
Number of nights:	2 Nights
Room Subtotal:	$766.00
Taxes & Fees:	$178.40
Total Charged:	$944.40 Paid in full

Prices are in USD

Charges will be from "Priceline.com"

Need a Car for Your Trip?

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Pick-up: **Tue May 03 - 12:00 PM**
Drop-off: **Thu May 05 - 12:00 PM**
Location: **Newark Liberty Intl Airport (EWR)**

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Kia Rio or similar†

4 2 auto ac

Choose

$16/day

Mid-Size Car
Dodge Avenger or similar†

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Choose

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Responses to this e-mail will not go to a customer service representative. To contact our customer service team directly, please go to the customer service page of our website.

This is a transactional email from priceline.com LLC - 800 Connecticut Ave. Norwalk, CT 06854

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Burning Embers

Jason Landess <jland702@cox.net> Tue, Nov 15, 2016 at 12:07 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>

Lying in bed this morning I rewound my life and counted the mountains I've climbed or, in most cases dealing with entrepreneurialism, attempted to climb. As far back as I can remember there's been this burning desire inside of me to make something out of what resources were at my disposal. When you're young and poor it's walking a mile to a donut shop to get a canvas bag full of donut packages so you can walk door-to-door selling them for a quarter and make a nickel. From that lesson I learned about profit sharing and what manual labor is all about. The same was true with my paper route and making and selling customized jewelry from corks, glue, and sequins.

I learned at an early age that skilled labor makes more than unskilled labor. So I got a job working in a pool hall on the weekends 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 I went to Thailand, I took a suitcase full of colored sun glasses to sell. They were a huge success. But one day in a bar a young Thai pretended to be interested in talking to me while his friends behind my back stole all my merchandize. From that lesson I learned that it's not a good idea to sell something that you cannot control and protect, a lesson reinforced later on in life when an attorney friend of mine and I bought a truck stop here in Las Vegas where the Mexican laborers stole everything that wasn't welded to the ground.

But even though I became an attorney and got a good job working as a Deputy District Attorney, those embers of wanting to build something still burned inside of me. So Tim and I put a little partnership together and started building custom houses. We loved it; but our wives hated it. Tim's wife was so bothered by it that she insisted he stop doing business with me, which to my deep disappointment he did. Shortly thereafter I moved to Las Vegas with Carolyn and my young family.

Back then you had to be a resident of Nevada for a year before you could take the Bar. So I set out finding a piece of property to rezone and develop. My wife hated it. But after about 10 months I flipped a 5-acre piece of ground for $100,000 profit, big money in those days. I was so proud, and so was Larry Speiser, my former law-school classmate and law partner. But not one word of congratulations from Carolyn. From that lesson I learned that I had the skill and fortitude to push a project through to success despite having a lot of outside resistance. But if you really have no one to celebrate your successes with, what good are they? That lesson was reinforced the night I came home from court after winning the case against Dr. Gordon and Marilyn Miglin and had no one to celebrate with.

That desire to build something successful was what caused me to embrace Dr. Gordon's invention and serve as the company's president for two years until my office was burglarized. From that lesson I learned that no matter how skillful and clever you are, you truly just cannot do a good deal with a bad man—in my case several bad men and one naïve woman. I also again experienced the toxicity of greed. Finally, after five long years of litigation and prevailing, I learned that life really isn't worth living if you don't stand up for yourself and your family when you're pushed to the wall. Liking who you are as a man makes all the other hardships in life more bearable.

Having by that time learned those lessons made it easy to just turn and walk away from Mike Macris. I was prepared to do that even if I didn't break even.

So then at about 66 years old my enterprizing friend Jonathan sat in my living room and painted a verbal dream of a start-up education company. The idea was to build something—what that would be was not that clear. But something marketable, edgy, cool, and novel. And once again those embers started to burn inside me. Now four years later look where that dream is.

What I realized this morning is that my life's journey has prepared me to be a good component of the Cognotion endeavor. Those many painful failures sowed the seed of a success that was impossible to foresee at the time. Although I'm old and limited at times in the amount of energy I have, what I lack there is offset by many insights and skills The Lord has cultivated in me over those many years. I am thus this morning MOST grateful to be alive, to be who I am, and to have the privilege of being a part of this remarkable journey. And what excites me the most is the best is yet to come.

Thank you my dear friend for the dream you had and for letting me be a part of it.

Jason

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

missing 2016 payment

Jonathan Dariyanani <jonathan@cognotion.com> Fri, Feb 10, 2017 at 5:32 PM
To: Michael Goldberg <michael@cognotion.com>

Yes

On Fri, Feb 10, 2017 at 4:51 PM Michael Goldberg <michael@cognotion.com> wrote:

> Jonathan,
>
> Just to clarify, according to our conversation about Jason's $50k loan, we would have paid two separate $10,000 interest payments on it...one in August 2016 and one in January 2017 for a total of $20,000 on $50,000. Is that correct?
>
> Thanks,
> Michael
>
> ---------- Forwarded message ----------
> From: **Jason Landess** <jland702@cox.net>
> Date: Tue, Feb 7, 2017 at 3:37 PM
> Subject: RE: missing 2016 payment
> To: Michael Goldberg <michael@cognotion.com>
> Cc: Dariyanani Jonathan <jonathan@cognotion.com>
>
> Michael:
>
> I have gone through my bank statements and compiled the attached accounting. I believe this is accurate. To answer your question, yes I did receive a $10K advance from Jonathan on 8/15/2016. You'll see that included in the attached document in bold. And, yes, you should send me an amended 1099 for a total of $85K instead of $75K.
>
> Let me know if your records reflect anything different. Sorry if I did anything to create any confusion.
>
> Thanks!
>
> Jason
>
> **From:** Michael Goldberg [mailto:michael@cognotion.com]
> **Sent:** Monday, February 06, 2017 2:40 PM
> **To:** Jason Landess
> **Cc:** Dariyanani Jonathan
> **Subject:** missing 2016 payment
>
> Jason,

I am reviewing some emails and year end accounting and noticed that Jonathan wrote me the following:

"I advanced to Jason Landess $10,000 on 8/13/16 toward his balance. I asked him to send you an email confirmation to that effect."

I don't have a record of this email from you and therefore it was not properly accounted for in 2016. Can you please confirm that you did in fact receive this $10,000 and that we should apply this to your outstanding balance and likely issue you a revised 1099 for 2016 to include this amount.

Thanks,

--

Michael Goldberg

Chief Financial Officer

New York, NY

www.cognotion.com

O: 347 692 0640

M: 917 805 9153

--

Michael Goldberg
Chief Financial Officer
New York, NY
www.cognotion.com
O: 347 692 0640
M: 917 805 9153

--

Sent from Gmail Mobile...please excuse booboos and terse incomprehensibility! Jonathan Dariyanani 540-841-0226

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Lawyer for Filming-Introduction

3 messages

Jonathan Dariyanani <jonathan@cognotion.com> Tue, May 3, 2016 at 4:44 PM
To: Philip Price <philip@cognotion.com>, Jason Landess <jland702@cox.net>, Joanna Schneier <joanna@cognotion.com>, Doug Lynch <doug@cognotion.com>, Mark J Mills <mjmillsjdmd@gmail.com>

Jason,
Please meet Phil Price, who is at the core of our learning team and has been the heart and soul of this project. Phil will be doing the filming of you tomorrow afternoon. I wanted to put the two of you in contact so that you can communicate directly regarding tomorrow.

I expect that Phil will want you to arrive at noon and then start your filming at around 3:00 PM. You should be done by 5:00 PM. The address where the filming takes place is 29 Tiffany Place, Apartment 6G, Brooklyn, NY which is right near the Brooklyn Navy Yard in the Cobble Hill neighborhood. It should take you no more than 20 minutes to get there. It is 3.6 miles away by taxi.

Phil-meet Jason Landess, a lawyer of extraordinary integrity and ability who has been doing complex civil litigation for more than 30 years and who has tried dozens of cases. He is also a dear friend, shareholder of Cognotion, has been our counsel and is the person who referred us to the amazing Dr. Mark Mills. I know he will be a dynamic and engaging resource for our learners.

Jason's cell number is 702-232-3913. Phil's cell number is 202-669-4411.

Phil, please feel free to send in advance by email at questions to Jason that you think might help him to think about his session.

Thanks to Jason for doing this!

Warmest regards,
Jonathan

--
Sent from Gmail Mobile...please excuse booboos and terse incomprehensibility!
Jonathan Dariyanani
540-841-0226

Philip Price <philip@cognotion.com> Tue, May 3, 2016 at 5:10 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>
Cc: Jason Landess <jland702@cox.net>, Joanna Schneier <joanna@cognotion.com>, Doug Lynch <doug@cognotion.com>, Mark J Mills <mjmillsjdmd@gmail.com>

Hello Jason,

It is a pleasure to meet you (virtually)! Attached is a draft of the questions that we will cover tomorrow. We can certainly add/subtract or modify these depending in your thoughts/reaction and experience. Ideally, these should get us started.

I think a 12 PM call time is great!

Please let me know if you have questions.

I am looking forward to meeting you in person tomorrow!

Phil
[Quoted text hidden]

SME Lawyer.docx
95K

Philip Price <philip@cognotion.com> Thu, May 5, 2016 at 7:49 AM
To: Jason Landess <jland702@cox.net>
Cc: Doug Lynch <doug@cognotion.com>, Mark J Mills <mjmillsjdmd@gmail.com>, Joanna Schneier <joanna@cognotion.com>, Jonathan Dariyanani <jonathan@cognotion.com>

Jason -

Thanks so much for sharing your time and wisdom with us yesterday. We got some great footage, which will be really helpful to our participants. I hope that your trip back home is uneventful (and does not involve delays!)

Thanks again!

Phil
[Quoted text hidden]

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason Landess re Cognogtion

John Truehart <john@cognotion.com> Fri, Jul 14, 2017 at 1:17 PM
To: Jason Landess <jland702@cox.net>
Cc: Jonathan Dariyanani <jonathan@cognotion.com>

OK, thanks very much, Jason.

Have a great weekend!

John

On Fri, Jul 14, 2017 at 1:15 PM, Jason Landess <jland702@cox.net> wrote:

> John:
>
> Today $100,000 credited to my account from Fred Hallier's payment for his stock subscription. I am withholding $20,000 of that as payment against my account and depositing the rest into Cognotion's account in a few hours. That will bring my account current through May 31st. Since I have been operating on a net-30 basis from the date of my engagement (January 1, 2016), the only amount due and owing to me today from Cognotion would be for June 2017, which I anticipate will be dealt with on August 1st.
>
> Regards,
>
> Jason G. Landess, Esq.

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Our Off Site

Jonathan Dariyanani <jonathan@cognotion.com> Wed, Jul 5, 2017 at 6:30 PM
To: Eliza Tutellier <etutellier@gmail.com>, Patrick Hughes <phughes@centralrecovery.com>, Jason Landess <jland702@cox.net>, "warnerkona@hotmail.com" <warnerkona@hotmail.com>, dennis brooks <Dennis@cognotion.com>, Jo Schneier <jo@cognotion.com>

Hello Team! Dennis and I are excited to meet y'all in Las Vegas for our two day offsite. We will be arriving late Friday night and leaving Monday morning, so we will have all day Sat and Sun to meet. I haven't yet found a venue, but I will shortly! I haven't determined if Jo will be joining us, but she and I will work on that and let you know shortly. Jason will probably join for dinner Saturday night but may not join during the day. I'm still working on Vance's travel.

Here is the proposed schedule:

10:00 AM through to the end of dinner on Saturday, July 8.
10:00 AM through to the end of dinner on Sunday, July 9.

Please let me know if this works for you. I am very excited and have been doing lots of reading!

Can't wait!

--
Jonathan Dariyanani
President
Cognotion, Inc.
Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Regulatory Counsel

Jonathan Dariyanani <jonathan@cognotion.com> Fri, Aug 26, 2016 at 6:04 PM
To: Jason Landess <jland702@cox.net>, Stephen Stocksdale <Stephen@cognotion.com>, Joanna Schneier <joanna@cognotion.com>

Jason and Stephen,
As you know, Jason is our dear friend, supporter, strategist and enormously talented regulatory counsel. He has handled CMS fraud cases as well as numerous administrative proceedings over his 40 year career as a CNA, entrepreneur and litigator. He has done done great regulatory work for us on ReadyCNA but he's about to dive in with a vengeance, staring with Iowa and Indiana.

After Labor Day, Id like to get together with him, you, Mary and Lori to map out a 50 state approval plan.

In the meantime, please Jason and Stephen, work together to make sure we are nailing the regulatory issues.

Joanna and I are proud to have you both as our team mates. Please get on the phone together ASAP and begun your collaboration.

Warmest regards,
Jonathan and Joanna

--
Sent from Gmail Mobile...please excuse booboos and terse incomprehensibility!
Jonathan Dariyanani
540-841-0226

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

FW: Hotel info

Jason Landess <jland702@cox.net> Mon, Feb 13, 2017 at 3:08 PM
To: Dariyanani Jonathan <jonathan@cognotion.com>

Can you book me for the nights of the 21st and the 22nd at this hotel?.....Thanks!

So excited about the baby!.....:o)

From: Dennis Brooks [mailto:dennis@cognotion.com]
Sent: Monday, February 13, 2017 11:27 AM
To: jland702@cox.net
Subject: Hotel info

Sheraton San Diego Hotel and Marina

1380 Harbor Island Drive San Diego CA, 92101, United States

619-291-2900

Check in: Feb 21

Check out: Feb 23

Confirmation number:

792006284

--

Dennis Brooks

Vice President of Sales

COGNOTION

Mobile/Text: 502.639.3848

Email: dennis@cognotion.com

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Orbitz travel confirmation - Jan 15 - (Itin# 7235183277027)

Orbitz <support@mailer.orbitz.com> Fri, Jan 6, 2017 at 7:43 PM
Reply-To: support@mailer.orbitz.com
To: jonathan@firebook.com

ORBITZ

Thanks!

Your reservation is booked and confirmed. There is no need to call us to reconfirm this reservation.

Helena

Jan 15, 2017 - Jan 17, 2017

Because you booked a flight, you qualify for up to 55% off Helena hotels.

Expires Tue, January 17

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- **E-ticket:** This email can be used as an E-ticket.

- Remember to bring your itinerary and government-issued photo ID for airport check-in and security.

Contact the airline to confirm:

- specific seat assignments
- special meals
- frequent flyer point awards
- special assistance requests

Flight overview

Travel dates
Jan 15, 2017 - Jan 17, 2017

Itinerary #

7235183277027

Your reservation is booked and confirmed. There is no need to call us to reconfirm this reservation.

Confirmation
HCGYL2 (Delta)

Booking ID
ZM22M7

Ticket #
0067982881367 (Kay Landess)

Change or cancel this reservation

Departure Sun, Jan 15

Delta 959

Las Vegas (LAS)
4:50PM
Terminal: 1

→

Salt Lake City (SLC)
7:15PM

Terminal: 2

Cabin: Economy / Coach (M)

1h 25m duration
Seat: 08A | Confirm or change seats with the airline*

1h 1m stop Salt Lake City (SLC)

Delta 4783 operated by SKYWEST DBA DELTA CONNECTION

Salt Lake City (SLC)
8:16PM
Terminal: 2

→

Helena (HLN)
9:57PM

Cabin: Economy / Coach (M)
1h 41m duration
Seat: 13B | Confirm or change seats with the airline*

Total Duration

4h 7m

Return Tue, Jan 17

Delta 4714 operated by SKYWEST DBA DELTA CONNECTION

Helena (HLN)
1:11PM

→

Salt Lake City (SLC)
2:39PM

Terminal: 2

Cabin: Economy / Coach (K)
1h 28m duration
Seat: 12B | Confirm or change seats with the airline*

2h 20m stop Salt Lake City (SLC)

Delta 244

Salt Lake City (SLC)
4:59PM
Terminal: 2

→

Las Vegas (LAS)
5:24PM

Terminal: 1

Cabin: Economy / Coach (K)
1h 25m duration
Seat: 25E | Confirm or change seats with the airline*

Total Duration

P00499

5h 13m

Traveler(s)

Kay Landess

No frequent flyer details provided

Frequent flyer and special assistance requests should be confirmed directly with the airline.

Price summary

Traveler 1: Adult $897.60

Flight: $792.56

Taxes and Fees: $105.04

Flight Total: $897.60
All prices are quoted in USD

ORBITZ REWARDS

$8.98 in Orbucks
for this trip

See all your rewards

Travel protection

You have not bought travel protection.

Additional information

Additional fees

The airline may charge additional fees for checked baggage or other optional services.

Please read the complete penalty rules for changes and cancellations applicable to this fare.

Tickets are nonrefundable, nontransferable and name changes are not allowed.

Please read important information regarding airline liability limitations.

More help

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For faster service, mention **itinerary #7235183277027**

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Find a hotel

Tickets sell out fast!

Book your Helena activities now.

Get Activities

Avoid the stress of traffic!

Let someone else do the driving

Get a ride

How will you get around Helena?

Explore Helena with your own set of wheels.

Rent a car

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Gmail

Jonathan Dariyanani <jdariyanani@gmail.com>

Orbitz travel confirmation - Jan 15 - (Itin# 7235182696982)

Orbitz <support@mailer.orbitz.com>
Reply-To: support@mailer.orbitz.com
To: jonathan@firebook.com

Fri, Jan 6, 2017 at 7:31 PM

ORBITZ

Thanks!

Your reservation is confirmed. No need to call to reconfirm.

Best Western Premier Helena Great Northern Hotel, Helena

Jan 15, 2017 - Jan 17, 2017

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Hotel overview

Best Western Premier Helena Great Northern Hotel

835 Great Northern Boulevard, Helena, MT, 59601-3315 United States of America

View hotel Map and directions

Reservation dates
Jan 15, 2017 - Jan 17, 2017

Itinerary #
7235182696982

Check-in and Check-out

Check-in time
3:00 PM

Check-out time
noon

Check-in policies
Check-in time starts at 3:00 PM
Minimum check-in age is 21
Your room/unit will be guaranteed for late arrival.

Special instructions
24-hour airport shuttle service is available. Contact the property in advance to get details.

Room 1

Guests
Reserved for Jonathan Ram Dariyanani
1 adult

Room
Standard Room, 2 Queen Beds, Non Smoking, Refrigerator & Microwave - Flexible Rate

Included amenities
Full Breakfast, Free High-Speed Internet

Room requests
2 queen beds
Non-smoking room

Room 2

Guests
Reserved for Kay George Landess
1 adult

Room
Standard Room, 2 Queen Beds, Non Smoking, Refrigerator & Microwave - Flexible Rate

Included amenities
Full Breakfast, Free High-Speed Internet

Room requests
2 queen beds
Non-smoking room

Room 3

Guests
Reserved for Vance Walle
1 adult

Room
Standard Room, 2 Queen Beds, Non Smoking, Refrigerator & Microwave -

Included amenities
Full Breakfast, Free High-Speed Internet

Flexible Rate

Room requests
2 queen beds
Non-smoking room

Price summary

Price breakdown
Room 1 price: $292.51
2 nights: $135.74 avg./night
1/15/2017 $128.22
1/16/2017 $143.25
Taxes & fees : $21.04

Room 2 price: $292.51
2 nights: $135.74 avg./night
1/15/2017 $128.22
1/16/2017 $143.25
Taxes & fees : $21.04

Room 3 price: $292.51
2 nights: $135.74 avg./night
1/15/2017 $128.22
1/16/2017 $143.25
Taxes & fees : $21.04

Total $877.53
Collected by Orbitz

Unless specified otherwise, rates are quoted in US dollars.

ORBITZ REWARDS

$26.33 in Orbucks
for this trip

Additional hotel fees

The below fees and deposits only apply if they are not included in your selected room rate.

The following fees and deposits are charged by the property at time of service, check-in, or check-out.

- Pet fee: USD 15.00 per pet, per night

The above list may not be comprehensive. Fees and deposits may not include tax and are subject to change.

Rules and restrictions

Cancellations and changes

We understand that sometimes plans fall through. We do not charge a cancel or change fee. When the property charges such fees in accordance with its own policies, the cost will be passed on to you. Best Western Premier Helena Great Northern Hotel charges the following cancellation and change fees.

Cancellations or changes made after 4:00PM (Mountain Daylight Time (US & Canada)) on Jan 15, 2017 or no-shows are subject to a hotel fee equal to the first nights rate plus taxes and fees.

In the case of multiple rooms booked together, fees charged by the hotel apply to each room that is canceled or changed.

Pricing and Payment

Hotel fees

The price above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Pricing

Your credit card is charged the total cost at time of purchase. Prices and room/unit availability are not guaranteed until full payment is received.

Some properties request that we wait to submit guest names until 7 days prior to check in. In such a case, your room/unit is reserved, but your name is not yet on file with the property.

Guest Charges and Room Capacity

Base rate is for 1 guest.

Total maximum number of guests per room/unit is 4.

Maximum number of adults per room/unit is 4.

Maximum number of children per room/unit is 3.

This property considers guests aged 18 and under, at time of travel, to be children.

Availability of accommodation in the same property for extra guests is not guaranteed.

More help

About the Hotel

For special requests or questions about the property, please call the hotel directly at
Tel: 1 (406) 457-5500, Fax: 1 (406) 457-5501

About your Reservation

Visit our Customer Support page.

Call Orbitz customer care at 844-663-2266

For faster service, mention **itinerary #7235182696982**

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emlcid=PT-ETM-ENSPC-teid70201.0-issu2-testX-lang1033-verX-mcidX-segaX-segbX-segmX-key-paid-date20170106000000-link-wave0

Gmail

Jonathan Dariyanani <jdariyanani@gmail.com>

Flight reservation (BVZ9IB) | 16OCT16 | LAS-SDF | Landess/Kay

Southwest Airlines <SouthwestAirlines@luv.southwest.com> Wed, Oct 12, 2016 at 8:56 PM
Reply-To: Southwest Airlines <reply@wnco.com>
To: jonathan@firebook.com

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Ready for takeoff!

Thanks for choosing Southwest® for your trip. You'll find everything you need to know about your reservation below. Happy travels!

Air itinerary

AIR Confirmation: BVZ9IB Confirmation Date: 10/12/2016

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
LANDESS/KAY	Join or Add #	5262455541485	Oct 12, 2017	5343

Rapid Rewards points earned are only estimates. Not a member - visit **Southwest.com/rapidrewards** and sign up today!

Date	Flight	Departure/Arrival
Sun Oct 16	2895	Depart **LAS VEGAS, NV** (LAS) on Southwest Airlines at **10:50 AM** Arrive in **LOUISVILLE, KY** (SDF) at **5:20 PM** Travel Time 3 hrs 30 mins Anytime

Check in for your flight(s): 24 hours before your trip on Southwest.com or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.

Bags fly free®: First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.

30 minutes before departure: We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

10 minutes before departure: You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's

scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

If you do not plan to travel on your flight: In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Air Cost: 588.48

Fare Rule(s): 5262455541485: NONTRANSFERABLE.
Valid only on Southwest Airlines. All travel involving funds from this Confirmation Number must be completed by the expiration date. Unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket. Any changes to this itinerary may result in a fare increase.

LAS WN SDF534.31YLN 534.31 END ZPLAS XFLAS4.5 AY5.60$LAS5.60

Learn about our boarding process

Learn about inflight WiFi & entertainment

Cost and Payment Summary

AIR - BVZ9IB

Base Fare	$ 534.31	**Payment Information**
Excise Taxes	$ 40.07	Payment Type: Visa XXXXXXXXXXXX9758
Segment Fee	$ 4.00	Date: Oct 12, 2016
Passenger Facility Charge	$ 4.50	Payment Amount: $588.48
September 11th Security Fee	$ 5.60	
Total Air Cost	**$ 588.48**	

Useful Tools

Check In Online
Early Bird Check-In
View/Share Itinerary
Change Air Reservation
Cancel Air Reservation
Check Flight Status
Flight Status Notification
Book a Car
Book a Hotel

Know Before You Go

In the Airport
Baggage Policies
Suggested Airport Arrival Times
Security Procedures
Customers of Size
In the Air
Purchasing and Refunds

Special Travel Needs

Traveling with Children
Traveling with Pets
Unaccompanied Minors
Baby on Board
Customers with Disabilities

Legal Policies & Helpful Information

Privacy Policy
Notice of Incorporated Terms
Customer Service Commitment
FAQs
Contact Us

[1] All travel involving funds from this Confirmation Number must be completed by the expiration date.

[2] Security Fee is the government-imposed September 11th Security Fee.

See Southwest Airlines Co. Notice of Incorporation
See Southwest Airlines Limit of Liability

Southwest Airlines
P.O. Box 36647-1CR
Dallas, TX 75235

Contact Us

Gmail

Jonathan Dariyanani <jdariyanani@gmail.com>

Flight reservation (BTI9IZ) | 18OCT16 | SDF-LAS | Landess/Kay

Southwest Airlines <SouthwestAirlines@luv.southwest.com> Wed, Oct 12, 2016 at 8:58 PM
Reply-To: Southwest Airlines <reply@wnco.com>
To: jonathan@firebook.com

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Southwest

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Check In Online | Check Flight Status | Change Flight | Special Offers | Hotel Offers | Car Offers

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Air itinerary

AIR Confirmation: BTI9IZ Confirmation Date: 10/12/2016

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
LANDESS/KAY	Join or Add #	5262455542299	Oct 12, 2017	5343

Rapid Rewards points earned are only estimates. Not a member - visit **Southwest.com/rapidrewards** and sign up today!

Date	Flight	Departure/Arrival
Tue Oct 18	2805	Depart **LOUISVILLE, KY** (SDF) on Southwest Airlines at **5:20 PM** Arrive in **LAS VEGAS, NV** (LAS) at **6:20 PM** Travel Time 4 hrs 0 mins Anytime

Check in for your flight(s): 24 hours before your trip on Southwest.com or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.

Bags fly free®: First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.

30 minutes before departure: We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

10 minutes before departure: You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's

scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

If you do not plan to travel on your flight: In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Air Cost: 584.98

Fare Rule(s): 5262455542299: NONTRANSFERABLE.
Valid only on Southwest Airlines. All travel involving funds from this Confirmation Number must be completed by the expiration date. Unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket. Any changes to this itinerary may result in a fare increase.

SDF WN LAS534.31YLN 534.31 END ZPSDF XFSDF1 AY5.60$SDF5.60

Learn about our boarding process

Learn about inflight WiFi & entertainment

Cost and Payment Summary

AIR - BTI9IZ

Base Fare	$ 534.31	**Payment Information**
Excise Taxes	$ 40.07	Payment Type: Visa XXXXXXXXXXXX9758
Segment Fee	$ 4.00	Date: Oct 12, 2016
Passenger Facility Charge	$ 1.00	Payment Amount: $584.98
September 11th Security Fee	$ 5.60	
Total Air Cost	**$ 584.98**	

Useful Tools

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Early Bird Check-In
View/Share Itinerary
Change Air Reservation
Cancel Air Reservation
Check Flight Status
Flight Status Notification
Book a Car
Book a Hotel

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See Southwest Airlines Limit of Liability

Southwest Airlines
P.O. Box 36647-1CR
Dallas, TX 75235

Contact Us

Exhibit I

et cetera, to what the numbers he gave were.

A No.

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?

A Not at all. He had told me. I knew -- I knew about Jason's life. I knew that he dropped out of high school. You know, I have people that work at my company that are convicted felons. Look, I believe that everybody is worthy. Mr. Landess was very honest with me about every aspect of his life and I leave my children -- I left my daughter with him. So that's the answer to your question.

Q Did he sound apologetic in this email about hustling people before?

A I think when you're 70 years old, you reflect on your life, and not all of it's beautiful. Not all of it's beautiful. He doesn't feel like his divorce was beautiful. I think, you know, he doesn't feel like his -- I don't think Mr. Landess would sit here and tell you every moment of his life was great. You know, but I know him to be a person who loves people and cares for them and I feel like I know his heart and that didn't bother me because I -- I know him and I saw that it's reflected back on, you know, what a provincial fool he was at the time, and he was.

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?

A Not at all. I think he feels -- I think he's very circumspect about that whole period of his life. And if you're asking me, like, did I read this as Mr. Landess being a racist and a bragger, I absolutely did not and I don't read it that way now, and I wouldn't have such a person in my employ.

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?

A I look at that as him reflecting back on his life and the way that he saw things then, growing up in L.A. the way that he did. I don't think that that -- I don't think it's representative of how -- I think he channeled himself then. I don't think it's representative of who he is now, and it's not who -- it's not the person that I've seen and know.

Q Thank you, Mr. Dariyanani. I appreciate it.

THE COURT: Thank you, Ms. Gordon.

MR. JIMMERSON: Is she done? Okay.

THE COURT: Any redirect, Mr. Jimmerson?

MR. JIMMERSON: Yeah, very briefly.

REDIRECT EXAMINATION

BY MR. JIMMERSON:

Q The -- this past was Mr. Landess 54 years ago when he was 19 years old; is that right?

A Yes.

Q In your observation, do people change over the course of 54 years?

Exhibit J

MR. VOGEL: No. We've discussed it with our client and their position has not changed.

THE COURT: Okay. All right. Well then that takes us to the next item which is this. This is a motion for mistrial that looks like it was filed last night, Sunday night or came to the Court's attention sometime around after 10:00 last night, I think. And so I saw it for the first time this morning and that's why I'm a few minutes late coming in, is because I tried to make some sense of the motion. In other words, I just tried to in my mind conceptualize the extent of what was brought up. And so I did that. Now, I, in general, I see what's in the motion for mistrial from the Plaintiffs.

Is there an opposition that the Defense has to a mistrial at this point?

MR. VOGEL: No. We just saw it this morning as well, so we would need time to --

THE COURT: Well, I mean as -- do you intend to oppose the motion or do you --

MR. VOGEL: Oh, absolutely. Yes.

THE COURT: Okay. So you oppose the idea of a mistrial?

MR. VOGEL: We do.

THE COURT: Okay. All right. So we have to reconcile that. The jury is here. So that's going to take a little while. So Dominique, I'd like for you to go tell the jury that there's an item that we have to deal with and that I do anticipate that's going to take a little while. So at the earliest, I'd ask them to return outside at 10:00.

Exhibit K

Plaintiff, should be well taken because certainly, with a grasp of the evidentiary rules that Mr. Jimmerson and Mr. Little, and Mr. Landess have at this point in their careers, they could have addressed it at the time.

They could have approached the bench and said, Your Honor, that sounds like he may have given some character evidence, we don't want to open the door. Mr. Jimmerson could have exerted a little more control over his witness to the extent that Mr. Daryanani would've have been offering such enormous amounts of character evidence, but none of that happened.

After that, the Plaintiffs specifically stipulated to the admission of Exhibit 56, and during the cross-examination, I would careful to ensure that Mr. Daryanani had indeed given that character evidence. I didn't immediately cross him on that evidence until the very end. I talked with him at least twice confirming that that was his evidence that he gave. That, Your Honor, gave Plaintiff's counsel another opportunity to perhaps step in. It was very clear that I was confirming character evidence that had been given by Mr. Daryanani. Plaintiff's counsel, if that was not his intention, he could have asked for a sidebar. He could have done a variety of things, Your Honor, at that point, to step in --

THE COURT: Okay.

MS. GORDON: -- and say, that's not what I intended.

THE COURT: Let me interrupt you for a reason to be --

MS. GORDON: Sure.

THE COURT: -- helpful here. I agree with the Defense that the issue of character was put into the trial by the Plaintiffs, so I do think that the Defense had a reasonable evidentiary ability to offer their own character evidence to try to show -- to impeach Mr. Daryanani, or to bring forth evidence to show that what Mr. Daryanani said about Mr. Landess being a beautiful person, the bags of money, the leaving the daughter, all that that you just mentioned. I agree with you.

MS. GORDON: Okay.

THE COURT: I mean, I don't think I could be swayed, actually, on that. I mean, I do think that the issue of character was put in, and so I think my concern is not that at all. I do think you had a right to do it. I think the issue becomes the extent to which he did do it, and so let me, in fairness to you, tell you the things that are on my mind that you wouldn't know, and this is a good seg-way for that, I think, right now, and you can take as much time to talk to me as you want.

You know, I've had the benefit of this weekend to really think about it and you indicated you talked to a judge. Well, I had two hours with Mark Dunn. Two personal hours in a room with him that I caused to occur because I wanted to talk to a better judge than myself. So I've had a lot of time to think over the weekend, so my thought is, with the item itself, I know I said on Friday in just trying to react to it as a human being and as a judge, that most likely, I would've granted a pretrial motion in limine to preclude this.

I'd like to tell you that upon reflection with an opportunity to think which judges should do. It's one hundred percent, absolutely

certain, slam dunk easy, I would've granted a motion to preclude the hustling Mexicans, blacks, and rednecks, where the Mexican labor stole everything that wasn't welt to the ground. I would've precluded that. And though not so relevant to this, but since we're having a meaningful discussion, I can tell you that I handed this to Mark Dunn, and the level of shock on his face was pulpable. And I handed it to him only asking him one thing, would you preclude this in a motion in limine.

That's how I started it, because I didn't want him to know the full extent of anything else I might have to deal with, and he told me, in no uncertain terms, what I was really already thinking, and that is that you absolutely have to preclude this because the issue of whether or not Mr. Landess is a racist or not is not relevant. And even if it relevant, if character is an issue, that's really -- that's the issue. I mean, race -- whether he's a racist or not is not relevant and is prejudicial. It's, I think, clearly what I would have to tell you, and that's the reason I would grant the pretrial motion.

So I think it's fair to say, okay, why not ask for a sidebar. I mean, certainly you have the witness in the witness box, Daryanani, and you have the item ready to go up on the ELMO. You could ask for a sidebar to discuss --

MS. GORDON: Us?

THE COURT: Yes. Us. You could ask for a sidebar to now indicate, I'm going to put this up, or for that matter, consideration could've been given to -- I mean, this is my question. I want to see if you want to answer this, to potentially redacting portions of it, because in a

motion in limine, I'll share with you that the proper way to do this would be to say, look, to the extent the Defense might want to use this to show Mr. Landess isn't a beautiful person or otherwise in the event character comes up, you want to use it to rebut character, you could say things like, I got a job working at a pool hall on weekends to supplement my regular job of working in a factory, redacting the word "sweat". Then delete or redact, "with a lot of Mexicans".

And then continue with non-redactions. "Taught myself how to play Snooker. I became so good at it I developed a route in East L.A. hustling --", redact "Mexicans, blacks, and rednecks" -- "-- on Fridays, which was usually payday." And then probably redact, "The truck stop Mexican laborers stole everything." And now what you have is you have usable evidence that he was a hustler. He taught himself to play pool, and he hustled people playing pool. Is that an indication of a beautiful person? Usable, admissible, but not overly prejudicial.

So that's the something I wanted to at least share with you that I did put down in my notes here -- these are some of my notes over the weekend. I put a note in here asking, what about a sidebar, what about redacting, you know, prejudicial parts of the usable item of evidence. So go ahead, if you want --

MS. GORDON: I appreciate that, Your Honor. I think that what that does is it certainly shifts the burden to Defendant, and what, I believe, you're saying is that it's admissible evidence, Your Honor. And as you've stated in this case and I believe in other trials you've had, admissible evidence is used for any purpose, can be used for any

purpose, and I don't think that the burden for how prejudicial a piece of evidence that Plaintiff disclosed and stipulated into evidence, the prejudicial nature of it should not be -- have to be addressed by the Defense, and out of curiosity or out of doing their job for them, I don't know, but I know that admissible evidence, it can be used for any purpose.

And I know that Plaintiff initially elicited and had impermissible and unethical character evidence. What the Defense is allowed to do in response to that, and what I actually have an ethical duty to my client, a person of color to do, is to use that evidence in impeachment. I'm allowed to do it, I should do it, and I did do it, and they did nothing about it.

THE COURT: So you think that the jury is allowed to consider whether Mr. Landess is a racist?

MS. GORDON: I think that I am allowed to use impeachment evidence that has not been objected to, and has been admitted into evidence by stipulation. I absolutely think I'm allowed to use it. I should use it on behalf of my client, and the burden should not be shifted to me to assist with eliminating or reducing the prejudicial value of that piece of evidence.

Dr. Debiparshad was asked about his race during his deposition. Mr. Daryanani went on for the first 15, 20 minutes of his testimony about his race. It's not new. Motive is always relevant in terms of Mr. Landess' reason for setting up our, you know, view on this case --

THE COURT: Um-hum.

MS. GORDON: -- setting up Dr. Debiparshad. I don't think it's completely irrelevant, and you know, it hurts. It hurts. I don't care. That's our job, and I'm sorry that it hurts and it's damaging, but it's not so prejudicial that it shouldn't be considered at all. They opened the door, and we're allowed to use it. I have an ethical obligation to use it. We're here, Your Honor, because of a cumulative effect of Plaintiff's errors. They disclosed it, they redisclosed it, they stipulated to its admission, they didn't object to it, they didn't ask for a sidebar at any point.

We're here because of their error. Trying to shift the burden for that error to us now, it's absurd. It just is, and trying to make it look like an ethical issue on the Defense side for using this piece of evidence is absurd, as well.

THE COURT: All right. Just to be sure, it sounds like what you're saying to me is that, in your view, under all of the circumstances that you've already described or that you otherwise know, that whether Mr. Landess is a racist is something the jury should weigh and it's admittable, and it's evidence that they should consider.

MS. GORDON: I think that the entirety of the passages from that email is impeachment testimony to the character evidence that was improperly and unethically elicited by Plaintiff, and I don't know that it's so much exactly what that bad character evidence consists of --

THE COURT: Um-hum.

MS. GORDON: -- it's bad character evidence that we're

allowed to use as impeachment.

I don't know, Your Honor, and perhaps you found cases that I did not, but I don't know that there is a subsection under impeachment, and what evidence we can use as impeachment that says, oh you can use impeachment evidence, but you can't if it has to do with race. You can use impeachment evidence, but you can't, if it has to do with -- I don't know. There's no, you know, subsection --

THE COURT: Okay, let me take it from a different perspective then. Let's assume you never put that item up in the questioning of Mr. Daryanani. However, it's admitted as Exhibit 56, page 44. Let's further assume that then, the first time you ever use it, is in your closing argument, and you put it up just the same way you did with Mr. Daryanani. I take it you're going to tell me that that's not -- essentially, it's already misconduct under the *Lioce* standard. In other words, you can tell me that, at least in part, you could make a closing argument that Mr. Landess is a racist and the jury ought to consider that.

MS. GORDON: I'm saying that respectfully, I don't know that that has anything to do with what we're talking about now, because we were talking about impeachment evidence for someone who improperly gave character evidence, and I was impeaching him.

THE COURT: Well, let me explain that. Let me explain. If you're telling me it's impeachment evidence, that means it is evidence, and that means you could argue the evidence. I just think this is a good illustration of the concern. I mean, you and your wisdom used it for impeachment. I get that, but it's evidence. And so I'm just trying to see

if you think, since it is evidence, you seem to say and think that the jury can now consider it because you've made a closing argument then using the item.

MS. GORDON: I think if someone wanted to argue about the prejudicial nature of that, then they had the duty to bring that to the Court's attention and they didn't, and they didn't over and over and over again. And I am going to speak to you, Your Honor, about what happened in this case, and procedurally what happened is it was used during impeachment, and it was absolutely proper given that they opened the door.

THE COURT: Okay, I understand that.

MS. GORDON: I'm sorry. I guess I --

THE COURT: Let me just try this -- I'm going to try one more thing on this. Let me hypothetically say this. Let's say you're from the jury and you say, members of the jury -- you tell me if you think this is a legitimate argument that you could've made. Members of the jury, you've heard Mr. Daryanani testify that Mr. Landess is a beautiful man, that he would give bags of money to Mr. Landess, that he would leave his daughter with Mr. Landess, but Mr. Landess is a racist.

MS. GORDON: And a hustler.

THE COURT: Could you make that argument?

MS. GORDON: I think I could use that, and as Your Honor has said, it's admitted evidence. I think that I can use it for any purpose, but if it somebody wants to limit that and allow in the hustling and not the racist part of it, then somebody had an obligation to do that.

prejudicial, but it's also admissible. And in this case, Your Honor, if this Court is considering granting a mistrial, I would ask the Court to do so after the jury comes back with a verdict. At least in that instance, it would be treated more as a motion for a new trial, and there's still a chance, who knows, I mean the jury could come back in Plaintiff's favor and the issue is moot. But the parties have already spent, as everyone agrees, tens, if not hundreds of thousands of dollars getting to this point now. And to pull the plug at this point, is potentially very prejudicial to all of the litigants involved. I would say the better -- the better course would be to allow the case to go to verdict, or in the alternative, to not release the jury, and allow -- allow the parties to take an emergency writ to the Supreme Court, just to see if they would weigh in on is this something that's overly prejudicial.

MR. JIMMERSON: And my response is Plaintiff's motion is simply the Defense should have been more circumspect about this, and thought about this before they created this error in the record.

THE COURT: All right. This decision, I'll share with you. It's interesting, because in some ways it's the most difficult decision I've made since I've been a Judge, but in other ways it's the easiest decision I've ever made since I've been a Judge. I'm going to explain in detail my thoughts and make a record as to why I've reached this conclusion. But the Plaintiff's motion for mistrial is granted. At 11:00 I'll bring in the jury and I'm going to excuse me.

After they're excused, I will make a record why this is the appropriate and in my view, the only choice that can be made under the

circumstances. We'll be back in ten minutes.

[Recess at 10:57 a.m., recommencing at 11:05 a.m.]

THE COURT: Please bring in the jury.

MR. VOGEL: Your Honor, are you going give us an opportunity to speak with the jurors?

THE COURT: No. We're going to let them go. I think they've been through enough.

THE MARSHAL: Parties rise for presence of the jury.

[Jury in at 11:05 a.m.]

THE MARSHAL: All present and accounted for.

THE COURT: All right. Please have a seat, everyone. Members of the jury, well, welcome back. You might note that your notepads are not with you and that's because of what I'm about to tell you. Before I tell you what I'm going to tell you, however, I do want to look at all of you and let you all know thank you so much for the time that you've spent with us. It'll be a two weeks I know I'll never forget. You as a jury have been very attentive. You've asked wonderful questions.

I've learned to not only respect you but actually like you all and you're exactly the way juries should be, I think. Always on time, attentive, good questions. But you can get the feel for where I'm going with this, of course and that is with your notepads not being there and what have you. I guess the best I can say to you is that from time to time -- and it doesn't happen very often. But from time to time, there are things that come to a Court's attention that you have to deal with. In

do what I just did with those ten people. But I said it was the easiest choice nonetheless, because it really was in my view.

So here's the reason why I had to do what I did and grant this motion for mistrial. The law does talk about this concept of manifest necessity. And case law is sort of repetitive with that notion and there's definitions given of manifest necessity and the cases that talk about the concept of mistrial or even new trial, but in this scenario, mistrial. And I did, in this -- going through the cases this weekend, I came up with what I think are the main definitions of the legal standard that's relevant here, this manifest necessity standard.

Manifest necessity is a circumstance, which is of such an overwhelming nature that reaching a fair verdict is impossible. It's a circumstance where an error occurs, which prevents a jury from reaching a verdict. There's a number of cases. Each side, I'm sure will -- has and will find cases having to do with this area of law. But there's an interesting one called *Glover v. Bellagio* found at 125 Nev. 691, where David Wall found himself in an interesting spot, similar to the one that I am in here.

But that case stands mostly for the proposition that the trial judge has to have the power to declare a mistrial in appropriate cases. And I think this is the appropriate case. And I really do think that unfortunately, that decision on the merits of whether I should do this or not is rather easy. Though difficult, nonetheless, I think rather easy to get to that point. Thanks a lot. All right. And that starts with the item itself. As to the chronology, as far as I understand it, I think this is a fair

assessment of what happened.

Prior to trial, of course, there's the discovery process and in that discovery process, it was relevant and necessary to cause Cognotion, the company, practically speaking through its CEO, Jonathan Dariyanani, to disclose employment-based evidence, whether it was the employment contract or information having to do with the stock options or things that may have led to the employment itself or contemporaneous with the employment itself. And if anything, I mean, it's evident to me that that discovery effort on Cognotion's part or Mr. Dariyanani's part was taken pretty seriously, because a number of items were disclosed, including emails and the item in question was in that batch of items disclosed.

It's readily apparent and admitted to and so as a finding of fact, I'm certain that though the Plaintiffs endeavored in this discovery course to disclose to the Defense the Cognotion documents and did so -- again, disclosing, you know, a vast array of documents, that for reasons that I don't need to know the full extent of, but I would say it's fair to conclude shortness in time, because of the discovery timeline and effort having to do with this damage item, which did take place closer in time to trial, volume, meaning the extent of the volume of the paperwork disclosed, I think in fairness could be something Mr. Jimmerson thinks about off into the future.

When you represent lawyers, it is difficult to not allow your client, who's a lawyer, to play a role in things. And it's evident to me that Mr. Dariyanani and Mr. Landess weren't only client and corporate

counsel by way of a relationship, but had been friends prior to that time and friends since that time. And it's never been -- it hasn't been mentioned to me and so I'm not just speculating. I wouldn't speculate. I don't want to come up with something, but I think it's reasonable to say, you know, that most likely, Mr. Landess had a hand in helping with the discovery and urging Mr. Dariyanani to, you know, participate and be here and provide documents.

And you know, maybe in some ways, there was a review duty that on behalf of the whole Plaintiff team just didn't adequately get done here. Whether it was Mr. Landess or whether it was somebody from either office or the attorneys, it's obvious to me that unfortunately -- I mean, it's okay to make mistakes and admit mistakes is even better than not admitting them. But mistakes can be made. And I think it's real clear that a mistake was made, attributable to the entire Plaintiff team.

And that mistake was make sure that somehow, some way, you do know everything specifically that has come about in discovery that could conceptually be used at trial or precluded prior to trial. And that didn't happen and that's a mistake that, again, the mistake was made by the Plaintiffs. So we have the discovery. We have the disclosure. In fact, it's fairly obvious to me that it was a mistake. Again, the mistake being that the Plaintiffs didn't catch that this particular item was in there, because they did bring pretrial motions to preclude Mr. Landess' bankruptcies, gambling debt and litigations.

And so it's obvious to me that if the Plaintiffs would have

seen this item, they would have likewise brought a pretrial motion to preclude it. Plus, Mr. Jimmerson, to his credit, has said in various context on and off the record that he made -- he, because he took responsibility as I think the lead trial lawyer here, you know, that he made this mistake. Okay.

So then what happens from there -- we then start the trial and prior to -- well, prior to trial, actually, page 44 of Exhibit 56 is marked and put into one of the many binders here as Plaintiff's Trial Exhibit 56-00044. And so the Plaintiffs have this as part of thousands of pages of exhibits that I have sitting here to my left, potential exhibits. So it's just sitting in there and the Plaintiffs don't know that it's in there, so it's part of one of their trial exhibits. The trial then progresses and during the trial, closer to the time that the item actually is used, Exhibit 56 is offered in evidence, I believe by the Defense.

And when that occurred, the Plaintiffs stipulated or agreed or didn't have an objection and the entire Exhibit 56 was admitted, including this fateful page 44. And 45, but page 44 is where the material appears that's the concern. All right. So now it's an admitted exhibit. At the time of its admission, I'll go so far as to say that the Plaintiff still at that point in time, didn't know that the item actually was in the exhibit. And when I say the item, I mean the actual language of course in question here.

So they're still proceeding, up to that point, all the discovery, all the two weeks of trial and agreeing to admit into evidence 56. They still don't know that the burning embers language is in here. All right.

Mr. Dariyanani testifies. Mr. Dariyanani does say the things that Ms. Gordon's attributed to him, I mean -- and probably more. But he did say Mr. Landess is a beautiful person, bags of money, trust him with that. He's trustworthy. I would leave my daughter with him. He's trustworthy.

And so it is my view that that did open the door to character evidence, where now the Defense in its wisdom, could bring forth evidence to show that Mr. Landess is not so honest. He's not so beautiful or -- you know, his character is now put in question by the Plaintiffs. I do believe that opened the door to that legal ability to bring forth some contrary character evidence. It might not have been just Mr. Dariyanani that brought it up. It could have been Mr. Landess himself during his testimony or for that matter, his daughter. But clearly, Mr. Dariyanani brought it up.

So I don't have a problem with that in a legal sense, that the Defense could impeach or attempt to cross-examine on this point. The problem I see with the situation, though, is in my view -- and I don't think there's even any possible potential good faith dispute with this. But I'm only one person. The email itself, I think a reasonable person could conclude only one thing. And that is that the author is racist.

> "I learned at an early age that skilled labor makes more than unskilled labor, so I got a job in a pool hall on the weekends to supplement my regular job of working in a sweat factory with a lot of Mexicans. I 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. I learned that it's not a good idea to sell something that you cannot control and protect, a lesson reinforced on in life, when an attorney friend of mine and I bought a truck stop here in Las Vegas, where the Mexican laborers stole everything that wasn't welded to the ground."

I'm not saying that as a court, I'm drawing a conclusion that Mr. Landess is racist. But what I am saying is, based upon these two paragraphs, it is clear to me anyway that the author, a reasonable conclusion would be drawn again, that the author of these two paragraphs is racist.

So that's the issue. The question for me is, as a matter of law, in this case, which is not an employment discrimination case or anything where the issue of race is clearly an element of the case, can our jury in this civil case consider the issue even with the opening of the door as to character of whether Mr. Landess is a racist?

And I think the clear answer to that is no, that that is not a basis upon which this jury should or can decide the verdict. Now I know that the issue having to do with fees and costs regarding the decision I made to grant this mistrial is left for another day because I am going to give an opportunity for the, of course, for the Defense to file a pleading on this, given that the pleading I did receive -- I didn't see it until this morning. It was filed by the Plaintiffs. And so, we'll have to establish that little briefing schedule.

But it is apparent to me, you know, especially in light of the

court session that we've had here today, that I think that my finding is the Defense had to know that the Plaintiffs made a mistake and did not realize this item was in Exhibit 56.

Again, that's evident to me I think reasonably because there were a number of motions in limine which were filed by the Plaintiffs, again, asking to preclude bankruptcies, gambling debt, prior litigations.

I think that in conjunction with the aggressiveness that we've had throughout the trial, the zealousness is real clear to me that the Defense had to know this was a mistake made by the Plaintiffs. And again, one of the many pages of Exhibit 56 was this page 44 and the Plaintiffs didn't know about it.

So, they took advantage of that mistake and I don't have a criticism in a general sense in taking advantage of mistakes of the other side. Frankly, it happens all the time. That's not the question.

And while it may be well intended to cross-examine the CEO with the item that you now have where you know the Plaintiffs made a mistake, they didn't see it. The primary, the only reason why I granted the motion for mistrial was because when putting this up on the ELMO, there was no contemporaneous objection from the Plaintiffs. And I did not sua sponte interject either, probably for the same reason that the Plaintiffs didn't and that is it just -- the timeline is short. It's on the ELMO and it's just really a matter of seconds before a human being, if you're on the jury with that TV set sitting right there in front of you. It's a matter of seconds, literally, you know, one to five seconds and that's it. It's there for them to see.

I didn't feel it was my job to sua sponte interject. And here in a little bit I'm going to talk about a legal concept that I think is very relevant to this situation. And when I do that, I am going to talk about how I do understand and sympathize in some ways with the Plaintiff's position and not being able to object to it at the time or not objecting to it at the time.

But anyway, the fact of the matter is, when this occurred, even if well intended by the Defense to cross-examine when character is now an issue, respectfully, it's my view that the mistake that then the Defense makes is that they interject the issue of racism into the trial.

Once the issue of racism is interjected into the trial and by the way, it does appear to me that even now and I'm not unduly criticizing, but even now, it appears to me that the Defense's position is that the jury can consider the issue of whether Mr. Landess is a racist or not. That I disagree with to the fiber of my existence as a person and a judge.

Ms. Brazil is an African-American. Ms. Stidhum is an African-American. The Plaintiffs have stated and for purposes of this I can agree philosophically, although I don't know for sure because I don't, that Mr. Cardoza and Ms. Asuncion is also Hispanic.

The shortcoming is me, I've never really seen that kind of stuff much. I don't know why that is. I probably should in today's world more that everybody does. But it's probably because when my dad was a chief of police when I grew up in high school, he had a partner. His partner's name was Tank Smith. And Tank was a black guy, an African-

biography stuff that we were given. I didn't look at it. But it seems like that's the case.

And so, it is my view that since we have two African-American jurors and potentially two Hispanic jurors, given what I do think was a mistake made by the Defense in interjecting race, the issue of Mr. Landess being a racist into the case. Even if well intended to cross-examine, as I said, it is my thought that the Defense should have seen this and done something to deal with it. They should have asked for a sidebar as I tried to talk to Ms. Gordon about or I think it should have dawned upon them that you're now putting the issue of racism into the case in front of a jury that has four members arguably that fall into some of these categories, referenced in this email.

By the way, the email, if you were to ask me about offense that could be taken, certainly as Mr. Cardoza, Ms. Asuncion or anyone of heritage of coming from Mexico, they would have to be offended by it.

As to the two African-Americans, it's clear to me, because like I told Mr. Vogel, it's the lumping in of a term associated with African-Americans, with the rest, hustling Mexicans, blacks and rednecks. That is clearly an implication that these are, in the author's opinion, sort of the dredges of society who I could easily take advantage of on paydays.

And so, I do think that this coming together, this perfect storm of mistakes, the mistake the Plaintiffs made that I have described, the mistake I think that the Defense made in interjecting race into the case. I know the Defense doesn't think it's a mistake because they apparently think that the jury can consider whether Mr. Landess is a

racist or not. I have to say that surprises me, but wouldn't be the first time I guess I'll ever be surprised as a judge. But I got to say, that surprises me, which will get to the second half of my decision, which is still to come.

But for now, I'm making a specific finding that under all the circumstances that I just described, they do amount to such an overwhelming nature that reaching a fair result is impossible.

Further, this error that occurred in my view, how specific -- I am specifically fining it prevents the jury from reaching a verdict that's fair and just under any circumstance. And there's no curable instruction, in my opinion, that could un-ring the bell that's been rung, especially to those four. But let's don't focus only on those four. There's ten people sitting over there and I do think just as a normal human being, one could be offended by the comments made in this email. You don't have to be Hispanic, African-American or I don't know how to say rednecks. I don't know how that fits in. I don't even know what that really is.

But in the minimum, you don't have to be a Hispanic or African-American to be offended by this note.

So, I feel as though my decision -- well, it was manifestly necessary.

Now, over the weekend, I said I did look at some law having to do with this, and that takes me probably as a segue into some of the things that Ms. Gordon and I talked about in the court argument this morning.

I asked her a hypothetical. I said, let's assume that you didn't

use Exhibit 56, page 44 of Mr. Dariyanani. Well, unless something happened that we wouldn't anticipate that being that somehow the Plaintiffs come to discover that the item is in there and bring it to the Court's attention prior to the Defense trying to use it in some stage of the trial. Now it's in evidence.

And I asked that hypothetical question. Let's assume you didn't use it with Dariyanani, but you did use it and put it up on the ELMO in closing argument. It's my view that it's really the same philosophical thought, its use of the item in front of the jury and asking them to draw a conclusion relevant to the verdict based upon it.

My view is if that would have happened, if Exhibit 56, which was in evidence, was put up in closing, that under the definition given by the Supreme Court of misconduct in the *Lioce* case, that I think it's likely that that would be seen as misconduct because whether it's with Dariyanani or whether it's in closing or both, the clear -- and now I've heard it in court this morning, it seems like the Defense is still taking this position. They're urging the jury to at least in part, render the verdict based upon race, based upon Mr. Landess being a racist, based upon something that I think is emotional in nature. This is an emotional style piece of evidence.

The idea, I think fairly and I'm sure the Defense would disagree with this, but fairly is give us a verdict. Whether it's reducing the damages or give us the whole verdict, because Mr. Landess is a racist. That is impermissible.

Even if some universe in some universal sense, if he were a

not talking about obviously closing argument here, but we are talking about nonetheless bringing forth an item of evidence that could cause a concern to be at least considered.

And the other nice thing about *Lioce*, a very important thing, is this concept that wait a second, it's an admitted exhibit. In other words, this is unobjected to. And *Lioce* gives us some philosophy and guidance on dealing with the distinction between objected to items and in that case, of course, closing argument, and non-objective to closing argument.

The court goes on to talk about something -- I said I'd talk about this, so why I don't just do that right now? In *Lioce*, the idea where I said I do sympathize with Mr. Jimmerson in not objecting when the item first went up on the ELMO.

In *Lioce*, the Nevada Supreme Court says,

> "When a party's objection to an improper argument is sustained and the jury is admonished regarding the argument, that party bears the burden of demonstrating that the objection and admonishment could not cure the misconduct's effect."

Okay.

They go on to say in the next sentence, though, that they say words consistent with sympathizing with a lawyer who is in the spot now to either object or not object to something that shouldn't be happening in court. They say, "The non-offending attorney," so in this situation that'd be the Plaintiff's side.

to say. Especially because, again, that's even further evidence that the Plaintiffs didn't know the item was in there.

All right. But in *Lioce*, they give some guidance as to unobjected to, they call it unobjected to misconduct and that's in the context of a closing argument.

And what the Supreme Court said, so that's what we're talking about here. We're talking about unobjected to -- it's not argument, so I'm not going to go as far as today to say it's misconduct. I've said things consistent with what I think is a respectful criticism of the Defense of, you know, I would -- I got to say, I would think that you look at this and say, well, should we put race into the case? Could that be a concern?

And as I take it, the Defense's position is, well, we can and we did. Just like Ms. Gordon argued an hour ago to me. That's just where we disagree. I have to say.

But in any event, the guidance from *Lioce* is that even if it's unobjected to, so Exhibit 56 is a Plaintiff's trial exhibit, it's admitted by stipulation and then when the item is put up on ELMO, there's no contemporaneous objection.

But I think that this *Lioce* standard is applicable here where the Supreme Court says in that case that it's still a plain error style review.

Here's what they say. "The proper standard for the district court," that's me, "to use when deciding in this context a motion for new trial based upon unobjected to attorney misconduct." Now, again, I

and leaves me alone.

I was hoping to be done to at least have a Sunday for good health reasons, but unfortunately, that didn't happen, so I talked her into going to yoga and grocery shopping without me yesterday, which she went and did. And all the while, while that's happening, while I'm at home by myself, you know, as I'm on my laptop, and I'm actually half the time corresponding with my law clerk, who was nice enough to work on Saturday with me remotely by emails and such.

It comes to my attention that on pretty much every 24/7 news station for the entire weekend there's a story about someone who drove nine hours across Texas -- nine hours across Texas to go to El Paso and picked that place because in the Walmart in El Paso there would be those from Mexico shopping -- that he was going to go shoot and kill, as a hate crime. That's what seemed to be the upshot of that circumstance.

Okay. Mr. Landess may take this as a criticism. I don't really mean it that much, but some would argue he drove nine hours to go kill Mexicans in his mind. I'm sure that's what he thought. That's exactly what I'm dealing with in this thing.

Okay. Then later that night what happens in Dayton? Are you kidding? Another one. In this situation African Americans are killed. And is that part of another hate-based incident?

None of that really matters to this decision, because it is my strong view that in this case racial discrimination can't be a basis upon which this civil jury can give their decision, but it's not lost on me that it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and

Stidhum put their heads in the sand and didn't watch any news, or have a cell phone, or a have a friend, or have a family, or go to church, or do anything, that this is out there to just aggravate what we already have as my view being a big problem.

Bottom line is, how in the world can we expect this jury, which is the verse -- and by the way, none of those people are alternates, because we decided before trial that seats 9 and 10 would be the alternates, so they're all four deliberating jurors -- how in the world can we reasonably think that they're going to give a fair verdict and not base the whole decision, at least in part, on the issue of whether Mr. Landess is a racist.

That's the basis for the decision. The Plaintiffs can draft the order. And so concludes the most difficult thing I've done since I've been here.

Anything else from either side?

MR. JIMMERSON: Yes, Your Honor. Relative to the briefing on the cost matter, in light of this, I don't see a need for an expeditious order, or shortening time. Fourteen days from today would be an approximately time for the Defense to file their opposition, and then we would file the reply in the normal course, and you would give us a hearing date sometime about 30 days from now.

THE COURT: Well, okay. Mr. Vogel, how much time do you want to respond to this pleading?

MR. VOGEL: That's fine. Two weeks is fine. I appreciate it.

THE COURT: Okay. Two weeks will be?

Exhibit L

Gordon, Katherine

From: Gordon, Katherine
Sent: Tuesday, July 23, 2019 10:16 PM
To: Gordon, Katherine
Subject: FW: Landess v. Debiparshad, et al.; Case No. A-18-776896-C
Attachments: Extractions from Dr. Harris' deposition re no criticisms on apposition.pdf; Dr. Harris initial report.pdf; Dr. Harris' first rebuttal report.pdf; Dr. Harris' second rebuttal report.pdf; Dr. Herr's evaluation record.pdf; Fracture displacement definitions.pdf

Katherine J. Gordon
Partner
Las Vegas Rainbow
702.693.4336 or x7024336

From: Gordon, Katherine
Sent: Tuesday, July 23, 2019 10:02 PM
To: 'robbare32@gmail.com'
Cc: Vogel, Brent; 'Little, Martin A.'; jjj@jimmersonlawfirm.com
Subject: Landess v. Debiparshad, et al.; Case No. A-18-776896-C

Judge Bare:

We appreciate the opportunity to provide the documents we believe will be helpful to your determination of whether Plaintiff provided Dr. Debiparshad with notice of a claim (with the required expert medical opinion) that the degree of translation/apposition following Plaintiff's surgery by Dr. Debiparshad is evidence of a breach of the standard of care.

As you will see, Plaintiff's orthopedic surgery expert witness, Denis Harris, M.D., did not raise translation/apposition, or rotation, as a criticism during his deposition. To the contrary, Dr. Harris specifically testified he had no criticism regarding apposition. Dr. Herr's evaluation report also fails to address either translation, apposition, or rotation. The entirety of criticism in this matter involves alignment, not translation (the "cliff" or overhang shown on the x-rays as described by Plaintiff during his opening statement.

We have also attached general definitions for your consideration.

Thank you-

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In the Matter Of:

Landess, Jason vs Debiparshad, M.D.

DENIS ROBERT HARRIS, M.D. ROUGH DRAFT

March 14, 2019

Job Number: 525645

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years I have some experience and also have read a bunch of books, and which books, I mean, there are multiple over the years. And we have M & M, Morbidity and Mortaility conferences monthly and you want to keep the standard of care, and to do that you review all the cases and if you see this and we talk about it, we meaning the faculty of Sibley and Hopkins, and try to teach the residents saying this is wrong.

Q. So what do you estimate the degree of angle in in this case to be?

A. I tried it at least five or six times and it's a little above ten degrees. It's probably 11 but I got from 10 to 12 degrees of angulation.

Q. And how do you come up with that figure?

A. I had protractor and, you know, there are ways to measure, you can eyeball it. You can draw a line across the tibial plateau and go 90 degrees to that. You can look at the tibial spines and each one of these -- that's why we've got different numbers.

Q. Which film did you use to --

A. The film that I showed you on page.

Q. Thirty-five?

A. Thirty-five.

Q. Did you do the same measurements on any of the other films?

A. No, I mean, when you're doing a fracture, one of the other I things you teach is that you always look for the worst case scenario; so if I have -- my paper's bent. When I look at it and somebody, you won't see the bend, so you see the one angle that looks perfect, that's not the one you measure. You look for the worst one, and this was the worst one that I could find.

Q. So my question was, okay, that was the worst one that you can find. Did you do this measurement on any other films that may have been useful to you?

A. No.

Q. For the record, the film on page 35 is dated --

A. That's the 25th. I will state it because it's not showing in the picture. That's the first office visit.

Q. So, looking at it, it's about 10 or 12 degrees; so in looking at the films, is there a certain amount of percentage of translation that also exists in those films in your opinion?

A. If you are talking -- you're talking about alignment, apposition and alignment.

Q. Right.

A. Apposition and alignment. Apposition, if you look at at the lateral on page 33, I guess that would be