THE SUPREME COURT OF THE STATE OF NEVADA

JAIME ROBERTO SALAIS, AND TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE RONALD J. ISRAEL,

Respondents,

and

MAIKEL PEREZ-ACOSTA, AND ROLANDO BESSU HERRERA,

Real Parties in Interest.

Case No._____

APPENDIX TO PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, PROHIBITION

VOLUME 4

ROBERT L. EISENBERG (SBN 950)
rle@lge.net
SARAH M. MOLLECK (SBN 13830)
smm@lge.net
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada, 89519
(775) 786-6868 telephone

ATTORNEYS FOR PETITIONERS

CHRONOLOGICAL INDEX TO PETITIONER'S APPENDIX

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EXHIBIT B

From: Joel D. Odou
Sent: Tuesday, April 21, 2020 2:01 PM
To: 'NANCY ESPINOZA'
Cc: 'Todd Jones'
Subject: RE: Rolando Bessu Herrera Case (Perez-Acosta et al., v. Trench Shoring Co.) (ORI-002)
Attachments: Amd Not. of Cont. Videotaped Depo - Nancy Espinoza -4-22-20.pdf

Dear Ms. Espinoza

I am working with Todd Jones and wanted to follow up to confirm your deposition for tomorrow, April 22, 2020, at 10 a.m. at Esquire Depositions Solutions at 2300 West Sahara Avenue, Suite 770, Las Vegas Nevada 89102.

Due to the social distancing recommendations, the deposition is being taken via video conference. The court reporter and the attorneys will not be in the room with you.

If you can no longer make the deposition tomorrow, please let me know and I can provide additional dates to you to reschedule.

Please let us know.

Thank you.

Joel D. Odou
Partner | Wood, Smith, Henning & Berman LLP
2881 Business Park Court, Suite 200 | Las Vegas, NV 89128-9020
jodou@wshblaw.com | **T** (702) 251-4101 | **M** (702) 498-2134

CALIFORNIA • NEVADA • ARIZONA • COLORADO • WASHINGTON • OREGON • NEW JERSEY • CONNECTICUT • PENNSYLVANIA • GEORGIA • ILLINOIS • NORTH CAROLINA • NEW YORK • FLORIDA • TEXAS

From: Todd Jones [mailto:tjones@mvjllp.com]
Sent: Tuesday, March 31, 2020 8:58 AM
To: NANCY ESPINOZA
Cc: Todd Jones
Subject: RE: Rolando Bessu Herrera Case (Perez-Acosta et al., v. Trench Shoring Co.) (ORI-002)

Hi Nancy,

Here is a copy of your Amended Deposition Notice for April 22, 2020 at 10AM for your records. Please let me know if you have any questions. Thanks.

Todd A. Jones
Partner | Admitted in: CA, NV
MOKRI VANIS & JONES, LLP
2251 Fair Oaks Blvd., Suite 100

Sacramento, CA 95825
Main 916.306-0434 | **Fax** 949.226.7150
Direct: 916.306.0444
Cell: 925.366.7391
email: tjones@mvjllp.com
www.mvjllp.com

From: Todd Jones
Sent: Wednesday, March 25, 2020 12:22 PM
To: NANCY ESPINOZA <naymespin80@gmail.com>
Cc: Todd Jones <tjones@mvjllp.com>
Subject: RE: Rolando Bessu Herrera Case (Perez-Acosta et al., v. Trench Shoring Co.) (ORI-002)

Thank you Nancy. We will reschedule your deposition for Wednesday, April 22, beginning at 10AM. I will send you an updated deposition notice shortly with this new start time/date and location. In the event the current coronavirus conditions/Order of the Court continues through that timeframe, we will contact you ahead of time to make arrangements to move the deposition date further out.

Todd A. Jones
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Direct: 916.306.0444
Cell: 925.366.7391
email: tjones@mvjllp.com
www.mvjllp.com

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, March 25, 2020 11:27 AM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: Rolando Bessu Herrera Case (Perez-Acosta et al., v. Trench Shoring Co.) (ORI-002)

You can reschedule, Im available april 21,22 from 10-2 pm

On Mon, Mar 23, 2020 at 11:53 AM Todd Jones <tjones@mvjllp.com> wrote:

> Dear Ms. Espinoza:
>
> Thank you for your email below. Please let me clarify a few items for you regarding the current legal proceedings. First and foremost, you have now been formally and properly served with a deposition subpoena to appear for your deposition on Thursday, March 26, 2020 at Esquire Court Reporting in Las Vegas, Nevada. The deposition subpoena is the equivalent of a court order which requires you to appear by law. You yourself do not get to decide whether you are a witness or not- that is not how this process works. You have been identified as a witness in this case by both Mr. Herrera and in the disclosures made by his attorneys, and as such you are now required to give deposition testimony which is required by law. You're also legally obligated to provide any documents responsive to our deposition subpoena requests. For instance, you clearly have documents related to Mr. Herrera's 2nd accident in 2018 which you are involved with and for which insurance claims are made. Under the law, my client is entitled to any such documents.

At this time, I am writing to request that due to the ongoing coronavirus pandemic and various governmental authorities instructions/orders to stay at home and limit social contacts, I am writing to request that we continue your deposition for approximately 30 days. Understanding that you're also a nurse, I am also sympathetic that your current work schedule may or may not be very demanding. In an effort to be accommodating to you and your schedule, please confirm: (1) you are agreeable to continuing and appearing at your deposition approximately 30 days from now without the need for our office to issue a new deposition subpoena; and (2) please provide dates/times of your availability during the week of April 20, 2020 is that we can reschedule your deposition for the appropriate timeframe.

Please confirm your availability for your continued deposition at your earliest opportunity. If you refuse to agree to continue your deposition to a new, mutually agreeable date (as discussed above) and/or refuse to appear for your deposition at all (as you indicate in your email below), we will be forced to go forward with deposition on March 26 and take a "Notice of Nonappearance". The Notice of Nonappearance in conjunction with your email below stating your intention to completely disregard a lawful deposition subpoena will allow my client to go to the Court to file a Motion to Compel to force your appearance at deposition and seek sanctions against you for time/money spent to enforce my client's deposition subpoena. Again, our office would much rather not have to go through this process and we simply need your written consent that you will appear at your deposition at a later, mutually agreeable time and date.

Thank you for your prompt attention to this matter and I look forward to hearing back from you.

Todd A. Jones
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From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Saturday, March 14, 2020 5:53 PM
To: Todd Jones <tjones@mvjllp.com>
Subject: Rolando Bessu Herrera Case

I dont have any of the requested documents, pictures of any videos requested. I dont have anything to do with that case. I will not be attending deposition, I will not waste your time or expenses or mine. I am giving you advance notice so you may cancel and not waste your time. I do not have any of the requested items in possession or if they exist. I am not a witness to the accident 7-12-2016.

ELECTRONICALLY SERVED
3/25/2020 12:42 PM

NTTD

Todd A. Jones, Esq.
Nevada Bar No. 12983
MOKRI VANIS & JONES, LLP
2251 Fair Oaks Blvd., Suite 100
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Araba Panford, Esq.
Nevada Bar No. 11235
MOKRI VANIS & JONES, LLP
8831 West Sahara Avenue
Las Vegas, Nevada 89117
Telephone: 702.880.0688
Facsimile: 949.226.7150
apanford@mvjllp.com

Attorneys for Defendants
TOM MALLOY CORPORATION dba TRENCH SHORING COMPANY and JAIME ROBERTO SALAIS

DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, individually, ROLANDO BESSU HERRERA, individually,

Plaintiffs,

v.

JAIME ROBERTO SALAIS, individually, TOM MALLOY CORPORATION, aka/dba TRENCH SHORING COMPANY, a foreign corporation, DOES I through V, inclusive, and ROE CORPORATIONS I through V, inclusive,

Defendants.

Case No. A-18-772273-C

DEPT NO.: XXVIII

Action Filed: April 4, 2018

AMENDED NOTICE OF CONTINUED VIDEOTAPED DEPOSITION OF NANCY ESPINOZA

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Case Number: A-18-772273-C

TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants TOM MALLOY CORPORATION dba TRENCH SHORING COMPANY and JAIME ROBERTO SALAIS (collectively referred to as "Defendants") by and through thier counsel of record, Todd A. Jones and Araba Panford of the law offices of Mokri, Vanis & Jones, LLP, hereby give notice to the parties listed below of Defendants' intent to take the oral deposition of:

DEPONENT: NANCY ESPINOZA

DATE: April 22, 2020

TIME: 10:00 a.m.

LOCATION: Esquire Deposition Solutions
2300 West Sahara Avenue, Suite 770
Las Vegas, NV 89102

This deposition is to be recorded by stenographic transcription and videotaped, in addition to recording the testimony through instant visual display of the testimony, before a Notary Public or other officer duly authorized to administer oaths in the State of Nevada, pursuant to NRCP 28, 30 and 45.

If an interpreter / translator is needed by any or all of the deponents, you are required to provide notice of such need as well as the specific language and /or dialect to the noticing party no less than ten (10) days prior to the date of the scheduled deposition.

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Counsel invited to attend and cross-examine. In the event that the deposition is not completed on the date and time specified, Defendants reserves the right to continue the deposition at the next available date and time until completed.

Dated this 25th day of March, 2020

MOKRI VANIS & JONES, LLP.

/s/ Araba Panford

Todd A. Jones, Esq.
Nevada Bar No. 12983
Araba Panford, Esq.
Nevada Bar No. 11235
MOKRI VANIS & JONES, LLP.
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117
Telephone: 702.880.0688
Facsimile: 949.226.7150
Attorneys for Defendants
TOM MALLOY CORPORATION dba
TRENCH SHORING COMPANY and JAIME
ROBERTO SALAIS

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2020, I served a true and correct copy of the foregoing AMENDED **NOTICE OF CONTINUED VIDEOTAPED DEPOSITION OF NANCY ESPINOZA** by electronic service through Odyssey to all parties on the Court's e-service list for the above-referenced matter.

/s/ Yolanda Bullock

Employee of Mokri Vanis & Jones, LLP

4P.App.739

SERVICE LIST

Michael C. Kane, Esq. Bradley J. Myers, Esq. Jason Barron, Esq. THE 702 FIRM 400 South 7th St., Suite/Floor 4 Las Vegas, NV 89101	Counsel for Plaintiff, **Maikel Perez-Acosta** Telephone: (702) 776-3333 Fax: 702-505-9787 Email: Michael Kane (mike@the702firm.com) Bradley Myers (Brad@the702firm.com) Jason Barron (jason@the702firm.com) Adam Kutner (askadamkutner@yahoo.com) Venessa Patino (vpatino@adamskutner.com)
Craig W. Drummond, Esq. Liberty A. Ringor, Esq. DRUMMOND LAW FIRM 810 S. Casino Center Bl., Suite 101 Las Vegas, NV 89101	Counsel for Plaintiff, **Rolando Bessu Herrera** Telephone: 702-366-9966 Email: Craig Drummond (craig@drummondfirm.com) Gaylynn McCullough (gaylynn@drummondfirm.com) Liberty Ringor (liberty@drummondfirm.com)

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, March 11, 2020 5:21 PM
To: Todd Jones
Subject: Re: insurance fraud, trench shoring company case

Well Im afraid I wont be much help, The tips I gave should be enough for you to investigate, simple as him playing on a baseball team all you had to do was google his name. I will attend however becase you subpoena me, that is all I will do

On Wed, Mar 11, 2020 at 5:14 PM Todd Jones <tjones@mvjllp.com> wrote:

> Nancy, I completely understand your position and I am very sympathetic. The problem is Maikel and Rolando are literally making a claim against my client for millions of dollars each based on a fraudulent/fabricated car accident. You have personal knowledge of them discussing the "accident" and I am not aware of any other way to introduce evidence of this set-up without your help. If there was another way to establish this information I would be happy to do so, but I'm not aware of any other evidence at this time.
>
> Also, unrelated to the actual accident, I understand that you have personal knowledge that Maikel and Rolando were in the same physical condition before the accident as they were after the accident. They have both denied having any pre-accident injuries or issues. Again I am extremely appreciative of your help – I'm just trying to make sure the truth comes out. Thank you,

Todd A. Jones
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Direct: 916.306.0444

Cell: 925.366.7391
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www.mvjllp.com

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, March 11, 2020 5:00 PM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

I had requested to remain anonymous for the tip I gave.

On Wed, Mar 11, 2020 at 4:58 PM NANCY ESPINOZA <naymespin80@gmail.com> wrote:

I am not a witness to your case, I was not involved in that and all I gave you was a tip for your case. The accident I was involved in has nothing to do with your case. I will attend but will not answer no questions as that is my right. thank you

On Wed, Mar 11, 2020 at 4:39 PM Todd Jones <tjones@mvjllp.com> wrote:

Also- I wanted to give you a heads up that we are issuing a deposition subpoena to take your deposition (i.e., a question and answer session) as third party witness in this case/accident, as well as your involvement in the 2nd accident with Rolando in 2018. Rolando recently identified you as witness several times during his deposition. I didn't want you to be blind-sides with this so please feel free to call me if you have any questions.

Thanks you,

Todd A. Jones
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From: Todd Jones
Sent: Wednesday, March 11, 2020 2:38 PM
To: NANCY ESPINOZA <naymespin80@gmail.com>
Subject: RE: insurance fraud, trench shoring company case

Thank you. Was he with a prior baseball team before that? If so, what was their name and when did he start playing?

Todd A. Jones
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email: tjones@mvjllp.com
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From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, March 11, 2020 2:36 PM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

winter of 2018 with this team

On Wed, Mar 11, 2020 at 1:35 PM Todd Jones <tjones@mvjllp.com> wrote:

Nancy, can you please tell me when Rolando first started playing baseball for the Cuban Missiles? That is important information to have. Thank you.

Todd A. Jones
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Direct: 916.306.0444

Cell: 925.366.7391
email: tjones@mvjllp.com
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From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, January 15, 2020 3:58 PM

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Thursday, January 16, 2020 9:04 PM
To: Todd Jones
Subject: Re: insurance fraud, trench shoring company case

I can call you around 2

On Thu, Jan 16, 2020 at 10:09 AM Todd Jones <tjones@mvjllp.com> wrote:

Hi Nancy,

I just happen to be flying into Las Vegas this morning and I am flying out tomorrow afternoon at 5pm. Any chance you cold meet up around 2 pm or so tomorrow? - Feel free to pick a meeting place and I will be there. Otherwise, we can plan on talking on the phone around that time. My cell number is listed below. Thanks again for your help.

Todd A. Jones
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Direct: 916.306.0444

Cell: 925.366.7391
email: tjones@mvjllp.com
www.mvjllp.com

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, January 15, 2020 3:58 PM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

Im off Friday or next week wednesday thru friday

To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

Im off Friday or next week wednesday thru friday

On Mon, Jan 6, 2020 at 5:58 PM Todd Jones <tjones@mvjllp.com> wrote:

Thank you Nancy, much appreciated. Could you please let me know a good date and time that we can talk privately this week? Thanks again,

Todd A. Jones
Partner | Admitted in: CA, NV
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From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Sunday, January 05, 2020 6:25 PM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

I have another tip for you Rolando since accident has been playing baseball, if he was that injured he couldn't play right its all over facebook his team name is Cuban Missile baseball team there also videos on youtube of him playing. hope it helps.

On Fri, Oct 18, 2019 at 5:07 PM Todd Jones <tjones@mvjllp.com> wrote:

Hi Nancy,

I still need to speak with you about this matter. Please call me or let me now a convenient time for us to talk. Thank you.

Todd A. Jones
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Direct: 916.306.0444

Cell: 925.366.7391
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www.mvjllp.com

From: Todd Jones
Sent: Thursday, August 29, 2019 5:26 PM
To: 'NANCY ESPINOZA' <naymespin80@gmail.com>
Subject: RE: insurance fraud, trench shoring company case

Hi Nancy,

I just wanted to check in with you on this case, so please give me a call when you have a moment. You can either reach me at the office (916.306.0444) during regular business hours or anytime on my cell phone at 925.366.7391. Or if it's better for me to reach out to you, please let me know of good time and phone number to reach you at (I tried to leave a message on your cell phone, but the voicemail was full). Thank you for your help in this matter and I look forward to speaking with you.

Todd A. Jones
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MOKRI VANIS & JONES, LLP
2251 Fair Oaks Blvd., Suite 100
Sacramento, CA 95825
Main 916.306-0434 | **Fax** 949.226.7150

Direct: 916.306.0444

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Friday, May 31, 2019 8:30 AM
To: Todd Jones
Subject: Re: Perez-Acosta/Herrera v. Trench Shoring Company (ORI-002)- Insurance fraud

Ill be out of town tuesday and I work Wednesday

On Thu, May 30, 2019 at 3:55 PM Todd Jones <tjones@mvjllp.com> wrote:

Hi Nancy,

I wanted to let you know I will be in our Las Vegas office next Tuesday, June 4 and Wednesday, June 5 and was wondering if you would have time to briefly meet on either day? We could either meet at my office (8831 W. Sahara Ave.) or any other location of your choice-such as a Starbucks, a nearby restaurant, etc. Essentially, I would like to sit down and obtain a complete record of what you know about this fraudulent accident, etc. Any information and assistance you can provide is greatly appreciated. Thanks again and please let me know what I can do to set up such a meeting.

Todd A. Jones
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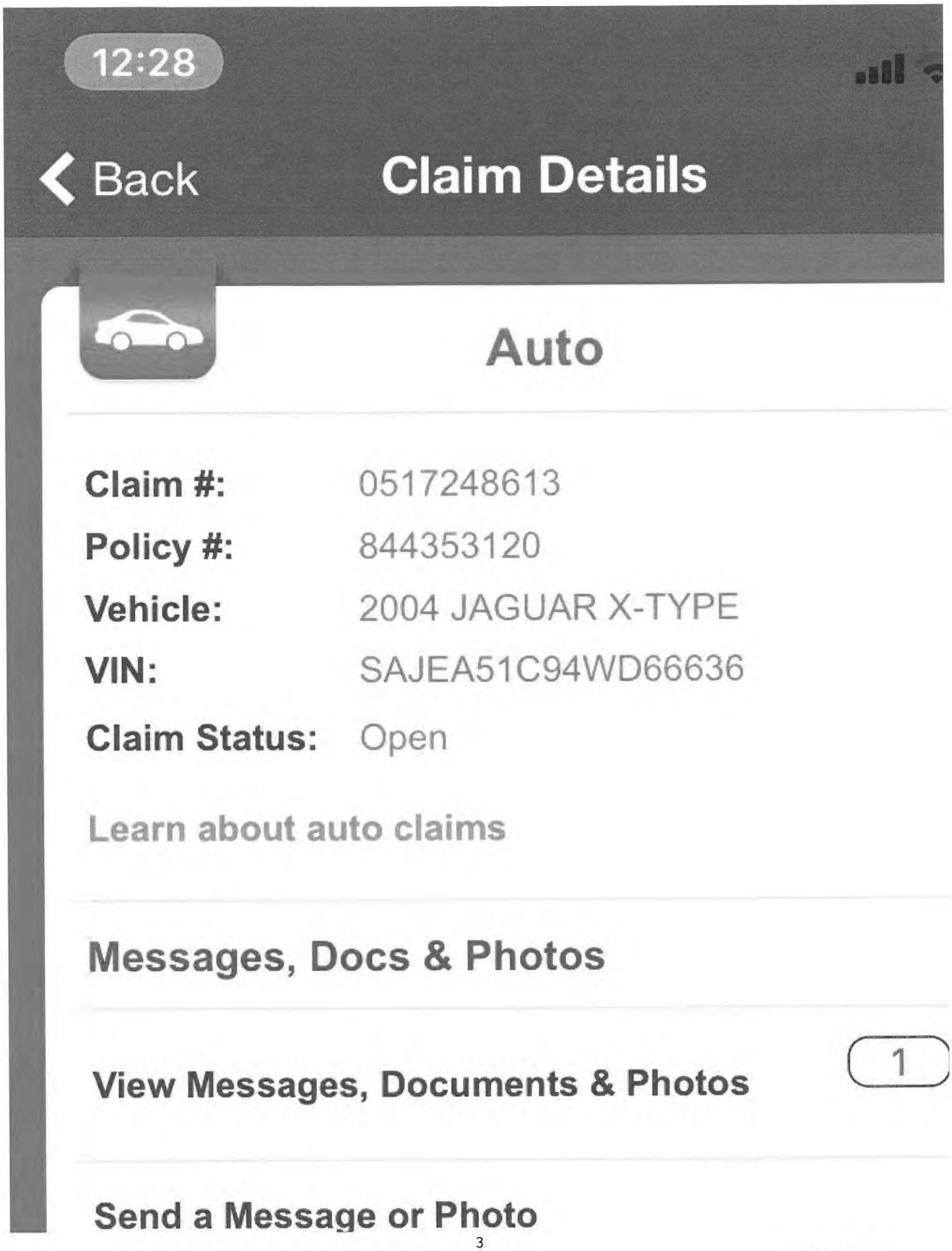
to look them up.


12:28
Back
Claim Details
Auto
Claim #: 0517248613
Policy #: 844353120
Vehicle: 2004 JAGUAR X-TYPE
VIN: SAJEA51C94WD66636
Claim Status: Open
Learn about auto claims
Messages, Docs & Photos
View Messages, Documents & Photos
1
Send a Message or Photo

4P.App.748

Cell: 925.366.7391
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From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Monday, April 29, 2019 12:30 PM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

here is info on last accident

On Mon, Apr 29, 2019 at 10:03 AM NANCY ESPINOZA <naymespin80@gmail.com> wrote:

Like I said I was in that accident not knowing what was happening til after the fact and I stopped going to doctor and therapy once I found out it was a scam, so I dont think they had enough of anything to file exept loss of car, I will try get info

On Mon, Apr 29, 2019 at 9:58 AM Todd Jones <tjones@mvjllp.com> wrote:

Thanks Nancy, I understand your situation. Do you happen to have the name of the company that Herrera made a claim against when he was using Steven Parke Law? Was a lawsuit filed in that matter? If so, do you happen to have the Court case number for that one? I was trying to have one of my paralegals look up any other civil cases with Herrera in Clark County, but she didn't see anything.

I will give you a call this afternoon. I appreciate it.

Todd A. Jones
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Cell: 925.366.7391
email: tjones@mvjllp.com
www.mvjllp.com

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Monday, April 29, 2019 9:51 AM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

Sure, no problem I would like to remain anonymous if I can because I still am in a relationship with these people however I think its wrong what they are doing... my number is(559) 804-8216

On Mon, Apr 29, 2019 at 8:21 AM Todd Jones <tjones@mvjllp.com> wrote:

Hi Nancy,

Thank you very much for your email and for reaching out to my office. We suspected that this accident may have been a set-up (this type of scam has been ongoing in the Las Vegas area in recent years), but until now we have not had any proof this was the case here. Can you please send me your contact information when you have a moment? I would like to give you a call later today (or whatever time works for you) so I can get a little bit more detail. You can also call me today at my office any time from 10am onward. Thanks again and I look forward to talking with you.

Todd A. Jones
Partner | Admitted in: CA, NV
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Direct: 916.306.0444

Cell: 925.366.7391
email: tjones@mvjllp.com
www.mvjllp.com

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Sunday, April 28, 2019 7:25 AM

To: John Dorame <jdorame@mvjllp.com>; Todd Jones <tjones@mvjllp.com>
Subject: insurance fraud, trench shoring company case

Hi I reported this case anonymously thru insurance fraud however nothing has been done, I found your information finally and decided to be direct with it instead... My name is Nancy Espinoza I was in a relationship with Rolando Bessu Herrera for the past 3 years and friend of Maikel Acosta Perez both where fresh from Cuba and where in the same condition they claim this accident caused or worsen... wrong. First of all, the accident was planned they picked that truck and intentionally slammed there brakes due to the rabbit car in front of them slamming their brakes then fleeing the scene. Second tge already had those conditions prior to the accident,Im not sure of Maikel seeing a doctor prior however Rolando Bessu had just started seeing doctor Serru on eastern ave for the same complaints and problems prior to the accident. Why am I giving you this information? Because the its wrong and these are why our cost of insurance is so high in nevada.... Rolando Bessu repeated this scammed again with his own car and me as a passenger, I was disgusted and apalled he made me part of a scam and I didnt want any part of it he used Steven parke law with that one so you can see how similar the cases are... I am willing to be a witness and help in any way for finders fee which will save your company alot of money then paying out to those that don't deserve it. thank you for time i added case number so it's easier to look them up.

JCCR
MICHAEL C. KANE, ESQ.
Nevada Bar No. 10096
BRADLEY J. MYERS, ESQ.
Nevada Bar No. 8857
JASON BARRON, ESQ.
Nevada Bar No. 7270
THE702FIRM
400 South 7th Street, #400
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an Individual, ROLANDO BESSU HERRERA, Individually,

Plaintiffs

vs.

JAIME ROBERTO SALAIS, an Individual, TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, foreign corporation, DOES I through V, inclusive; and ROE CORPORATIONS I through V, inclusive,

Defendants.

Case No.: A-18-772273-C
Dept No.: 28

Date: Monday, July 30, 2018
Time: 10:00 a.m.

JOINT CASE CONFERENCE REPORT

Pursuant to Administrative Order 14-2, which took effec
mandated, the parties consent to service of all documents in this case t
recipients:

The702Firm Electronic Service address: jason@the702firm.c

Law Offices of MOKRI VANIS & JONES, LLP. Electronic S
jdorame@mvjllp.com and dsteinhauer@mvjllp.com

The parties agree to update the E-Service Master List to reflec
posthaste.

Dated on this 20 day of August, 2018.

Dated on this 1

THE702FIRM

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Las Vegas, Nevada
Attorneys for Defen
CORPARATION dl
TRENCH SHORIN
ROBERT SALAIS

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Sunday, January 05, 2020 6:25 PM
To: Todd Jones
Subject: Re: insurance fraud, trench shoring company case

I have another tip for you Rolando since accident has been playing baseball, if he was that injured he couldn't play right its all over facebook his team name is Cuban Missile baseball team there also videos on youtube of him playing. hope it helps.

6:25 LT

Cuban Missiles Baseball Team

Cuban Missiles Baseball Team

Amateur Sports Team

Send Message

Felicia and 69 others like this

From: Todd Jones <tjones@mvjllp.com>
Sent: Friday, January 17, 2020 1:16 PM
To: NANCY ESPINOZA
Subject: Re: insurance fraud, trench shoring company case

Hi Nancy, my flight schedule changed so if you can call me around 3:30 that would work best. Thank you.

Todd A. Jones
Partner | Admitted: CA, NV
Mokri, Vanis & Jones, LLP
Cell: 925.366.7391

Sent from my iPad

On Jan 16, 2020, at 9:04 PM, NANCY ESPINOZA <naymespin80@gmail.com> wrote:

> I can call you around 2
>
> On Thu, Jan 16, 2020 at 10:09 AM Todd Jones <tjones@mvjllp.com> wrote:
>
> Hi Nancy,
>
> I just happen to be flying into Las Vegas this morning and l am flying out tomorrow afternoon at 5pm. Any chance you cold meet up around 2 pm or so tomorrow? - Feel free to pick a meeting place and I will be there. Otherwise, we can plan on talking on the phone around that time. My cell number is listed below. Thanks again for your help.
>
> Todd A. Jones
> Partner | Admitted in: CA, NV
> MOKRI VANIS & JONES, LLP
> 2251 Fair Oaks Blvd., Suite 100
> Sacramento, CA 95825
> **Main** 916.306-0434 | **Fax** 949.226.7150
>
> **Direct**: 916.306.0444
>
> **Cell**: 925.366.7391
> **email**: tjones@mvjllp.com
> https://protect-us.mimecast.com/s/0bShCZ6rMoT5N1mnIzNEo7?domain=mvjllp.com

From: Todd Jones <tjones@mvjllp.com>
Sent: Tuesday, January 28, 2020 11:15 AM
To: NANCY ESPINOZA
Subject: RE: insurance fraud, trench shoring company case

Hi Nancy,

Sorry I missed connecting with you last week. Do you have time to talk today or alter this week? Thank you.

Todd A. Jones
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From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, January 15, 2020 3:58 PM
To: Todd Jones <tjones@mvjllp.com>
Subject: Re: insurance fraud, trench shoring company case

Im off Friday or next week wednesday thru friday

On Mon, Jan 6, 2020 at 5:58 PM Todd Jones <tjones@mvjllp.com> wrote:

Thank you Nancy, much appreciated. Could you please let me know a good date and time that we can talk privately this week? Thanks again,

Todd A. Jones
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From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Wednesday, March 11, 2020 10:03 PM
To: Todd Jones
Subject: Re: insurance fraud, trench shoring company case

you have not found anything because its all based on no evidence, I was seperated at the time I sent you a false statement about things I have no evidence of, because I wanted to ruin his case. However you guys suck as investigators. And I will state same thing at deposition, I made a statement with out evidence or proof of truth or worthness. Sorry

On Wed, Mar 11, 2020 at 5:21 PM NANCY ESPINOZA <naymespin80@gmail.com> wrote:
Well Im afraid I wont be much help, The tips I gave should be enough for you to investigate, simple as him playing on a baseball team all you had to do was google his name. I will attend however becase you subpoena me, that is all I will do

On Wed, Mar 11, 2020 at 5:14 PM Todd Jones <tjones@mvjllp.com> wrote:

Nancy, I completely understand your position and I am very sympathetic. The problem is Maikel and Rolando are literally making a claim against my client for millions of dollars each based on a fraudulent/fabricated car accident. You have personal knowledge of them discussing the "accident" and I am not aware of any other way to introduce evidence of this set-up without your help. If there was another way to establish this information I would be happy to do so, but I'm not aware of any other evidence at this time.

Also, unrelated to the actual accident, I understand that you have personal knowledge that Maikel and Rolando were in the same physical condition before the accident as they were after the accident. They have both denied having any pre-accident injuries or issues. Again I am extremely appreciative of your help – I'm just trying to make sure the truth comes out. Thank you,

Todd A. Jones
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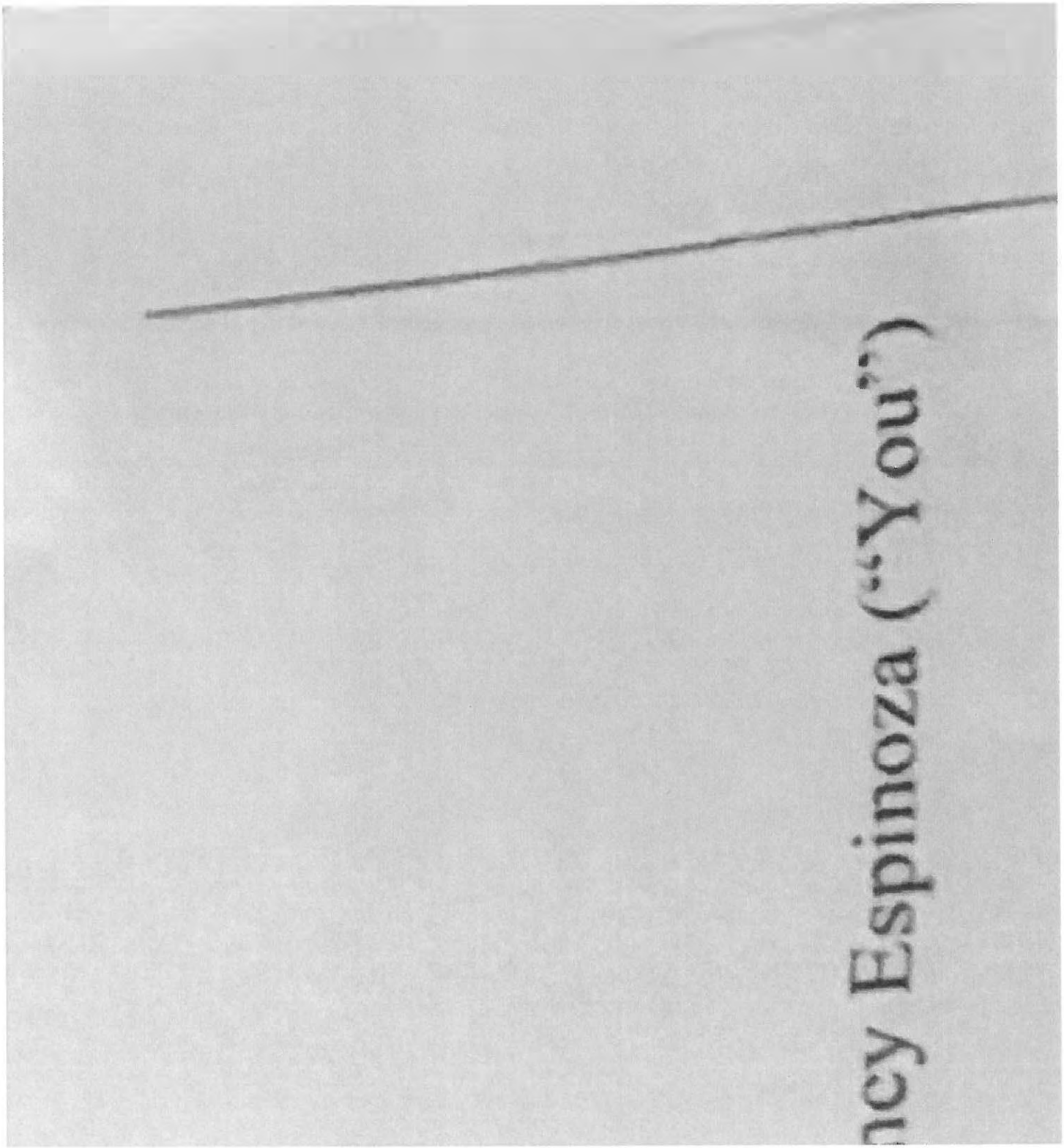
Cell: 925.366.7391
email: tjones@mvjllp.com
https://protect-us.mimecast.com/s/0bShCZ6rMoT5N1mnIzNEo7?domain=mvjllp.com

From: NANCY ESPINOZA <naymespin80@gmail.com>
Sent: Saturday, March 14, 2020 5:53 PM
To: Todd Jones
Subject: Rolando Bessu Herrera Case



I dont have any of the requested documents, pictures of any videos requested. I dont have anything to do with that case. I will not be attending deposition, I will not waste your time or expenses or mine. I am giving you advance notice so you may cancel and not waste your time. I do not have any of the requested items in possession or if they exist. I am not a witness to the accident 7-12-2016.

Electronically Filed
9/1/2020 2:06 PM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual; ROLANDO BESSU HERRERA, an individual; Plaintiffs, vs. JAIME ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES I-V; and ROE CORPORATIONS VI-X, inclusive, Defendants.	Case No.: A-18-772273-C Dept. No.: 28 **Hearing Date: September 22, 2020** **Hearing Time: 10:00 a.m.**

RESPONSE TO DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER

COMES NOW, Plaintiff ROLANDO BESSU HERRERA, by and through his attorneys,

Case Number: A-18-772273-C

CRAIG W. DRUMMOND, ESQ., and LIBERTY A. RINGOR, ESQ., of the DRUMMOND LAW FIRM, P.C. and hereby files his Response to Defendant's Supplemental Opposition to Plaintiff Rolando Bessu Herrera's Motion to Strike Defendants' Answer.

Defense counsel's supplement is hollow, brazen, and demonstrates why a significant sanction is necessary.

Ever since defense counsel sprung the email statements from Nancy Espinoza during her deposition—after sitting on them for a year—they claimed the concealment was justified as attorney work-product. At the July 14, 2020 hearing, this Court expressed disagreement but gave them an opportunity to submit a brief providing some authority for that contention.

Now, defense counsel essentially rebuff that opportunity. They make no effort to justify the concealment as attorney work-product. Rather, they muster only a half-hearted and inconsistent argument that they believed the witness's email statement was not *discoverable* because they doubted its accuracy and were unsure whether or how they would use it. But that analysis is *clearly* unsustainable under NRCP 16.1, as it ignores the provisions of NRCP 16.1 that require disclosure of certain items regardless of whether the possessing party intends to use them and conflates discoverability with admissibility—a difference recognized by any first-year lawyer. Put simply, their evolving pretexts are silly.

Worse, even after the Court gave defendants this opportunity for further research and analysis, and they came up empty handed (proving themselves wrong), they still contend the decision was correct and suggest *they would do the same again.* Why? Because they cannot find a case in which a party has been punished for violating this particular rule. Thus, they require this Court to tell them they were wrong and, sadly, make an example of this case for other parties and attorneys who obey only the discovery rules that may lead to noteworthy sanctions.

I.

DEFENDANTS EVOLVING EXCUSES ARE MANIFESTLY ERRONEOUS

Defense counsel does not pretend to justify their contention of attorney work-product. And the new excuse is so incorrect as to betray a lack of seriousness.

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A. They Provide No Authority Regarding the Attorney Work-Product Doctrine

Defense counsel presents no authority or argument whatsoever to substantiate its contention of attorney work-product. That's not surprising, as there is none. Yet, they apparently learn nothing by proving themselves wrong. They acknowledge only that the contention of attorney work-product is "perhaps incorrect[]." (Supp. 11:1.)

It is clear the excuse was a mere pretext, moreover, as they never provided a privilege log to disclose even the existence of the documents. If defense counsel honestly believed the emails were confidential attorney work-product, they would have done that.

B. Defendants Ignore Applicable Obligations Under Rule 16.1

Defense counsel now contend "the initial identity of Nancy Espinoza and her emails were not likely to be discoverable information under NRCP 16.1." (Supp. 6:16.) Specifically, they argue (without authority) that Espinoza's statement to them in the *documented* email somehow was not discoverable merely because they doubted the veracity of the "information" therein and that—even after they had convinced themselves that Espinoza's canard about fraud was true—they had the right to withhold it until the end of discovery to spring it during Espinoza's deposition.

Although they cite to more authority for this argument than the attorney work-product excuse (one rule, NRCP 16.1 itself), it clearly does not hold water. First, they withheld email ***documents*** purporting to report recollections of a self-identified witness, not merely the alleged "information" therein. They had an obligation to share those documents with plaintiffs *immediately*, as the initial disclosure requirement of Rule NRCP 16.1(a)(1)(A)(ii) obligates parties to provide voluntarily at the beginning of discovery, copies of *both* anything they intend to use affirmatively at trial "...including for impeachment and rebuttal, *and*, unless privileged or protected from disclosure, *any record, report, or witness statement, in any form*, concerning the incident..." Second, a party is not allowed to withhold any such record, reports, or witness statement merely because they doubt the veracity of their contents. Although this is the crux of defense counsel's argument, they provide no authority for obscuring this line between documents and mere information—and there is none. Third, even by their rationale that the emails became

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discoverable only after they found a video they think corroborated it, they still waited months longer before springing it at the deposition.

Fourth, and most glaring, defense counsel ignores the clear difference between discoverability and admissibility. "Information within this scope of discovery need not be admissible in evidence to be discoverable." NRCP 26(b)(1). The difference is so fundamental and familiar to every law-school graduate that we cannot believe defense counsel is serious.

II.

DEFENDANTS' ARGUMENTS DEMONSTRATE WHY A SEVERE SANCTION IS NECESSARY UNDER THE CIRCUMSTANCES

Defendants never had a good-faith basis to believe they were justified in withholding the emails from Espinoza. (See above.) Their explanation, such as it is, tacitly admits the prejudicial nature of the non-disclosure. The attempt to distance the defendants is unavailing and strains credulity. And they brazenly stand by the decision (even after mustering only silly arguments to justify it) because they do not see a sanction case punishing anyone for violating this particular rule, calls out for significant sanction.

A. They Admit to Sitting on the Information so they Could Quietly Build Up a Cockamamie Fraud Defense While Keeping Plaintiff in the Dark About their Intention for Trial

The explanation for the delay tacitly admits the deep prejudice to the plaintiffs. Defendants withheld the discoverable email documents in order to conceal the information therein, that Espinoza might testify that plaintiffs acted fraudulently. They wanted to use the time period of discovery to foster a relationship with Espinoza and to develop a new defense around her promised allegation of fraud, hoping to find corroborating evidence, while keeping plaintiffs in dark about that potential new defense until the end of discovery.

Litigants can't do that. The precious time of discovery is not just for defendants' benefit; plaintiffs too are entitled to that time to prepare to rebut defendants' defenses. Indeed, this is why NRCP 8 requires defendants to list all defenses in their answers. Litigants must be transparent about theories and defenses early, so that evidence and expert testimony can be developed during

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discovery to rebut them. Ironically, defendants' rationale for withholding the documents shows why the decision was no technical mishap. Put simply, when defendants finally revealed these emails at the Espinoza deposition, they sprang not just documents; they sprang a *new defense* at the end of the discovery period. Thus, this discovery abuse violated the letter and spirit of NRCP 16.1, as well as the underlying purpose of the discovery phase of litigation.

B. Under the *Young* Factors, this Wrong Cries Out for a Significant Sanction

We do not reiterate all of the points raised in our prior motion and reply regarding the *Young* factors but, rather, address what is new in defense counsel's supplemental opposition.

1. Defendants Not Only Withheld the Material Willfully, they Indicate they'd Do it Again

Defendants kept Espinoza's email to them secret for a year. And the supplement indicates defense counsel never would have revealed it at all had Espinoza's deposition gone differently. And despite the additional time for legal research and analysis that defendants have enjoyed to reflect on the impropriety of their decision—and despite finding no authority for withholding the documents—they stand by it. They refuse to read the rules responsibly. They will head only a stiff rebuke from this Court.

2. It Appears the Defendant and Insurance Carrier Were Aware and Complicit

The supplemental opposition repeats a curious representation that defendants themselves had no "*personal* knowledge" or direct "communication" with Ms. Espinoza herself. (Supp. Opp. at 13:3; *see also* 3:15, 6:2, 8:11, 8:14). That cagey terminology speaks volumes.

The supplement does not attach affidavits from the defendants or the liability carrier that retained defense counsel. That is telling but not surprising. The conspicuous adjective "personal" and the comment that defendants did not communicate with Ms. Espinoza themselves implies that someone at defendant Tom Mallory Corporation, and almost certainly the insurance carrier directing the defense, were aware that a potential witness who claimed to know that plaintiffs were behaving fraudulently had reached out secretly to defense counsel, that defense counsel was working to develop a defense around this fraud theory, and that he was not turning everything over to plaintiffs' counsel. It is unimaginable that a defense attorney would receive a call from a

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purported whistleblower claiming that plaintiffs' entire theories of liability and damages are based on "fraud" and not pass it on to the commercial client (whose engaged corporate counsel attended the company's PMK deposition) and insurance company that retained him, along with a plan of action for developing admissible evidence and a defense around that theme. And it is extremely unlikely they would not have been in the loop on timing the disclosure of that communication—if ever.

It does not matter, moreover, if defendants and liability carrier were not the first-hand recipients of the emails or that they never communicated with her directly. Parties and insurers cannot insulate themselves so easily. Attorneys are agents who bind their clients by the actions they take and representations they make. *See Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 434 (2014) ("an attorney's act is considered to be that of the client in judicial proceedings when the client has expressly or impliedly authorized the act"), *citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396–97 (1993) (noting that in a representative litigation system, "clients must be held accountable for the acts and omissions of their attorneys").

3. Sanctioning this Conduct is Absolutely Critical to Deterring it in the Future

"Mr. Jones believed (perhaps incorrectly) was attorney work-product (investigation) activity and Defendant's counsel made a judgment call that such preliminary but unreliable information was non-discoverable." (Supp. at 11:1.) "*Perhaps* incorrectly"? The supplement goes on to state that "[i]ssuing the sanctions sought by Plaintiff Herrera would not curb or prevent future abuses because the Defendants themselves did not engage in any purported discovery issues" because they "did not have any *contact* with and/or *personal* knowledge of Ms. Espinoza . . ." (Supp. at 13:11 (emphasis added).). They say, "[a]s for counsel, ***if*** it is determined that this judgment call is incorrect, it will never happen again." (Supp at 13:15 (emphasis added).) And they say that even now, realizing the legal arguments for withholding the emails are ridiculous.

This recalcitrance shows defendants to be incapable of self-regulation. They literally need the Court to tell them they were wrong. They say so expressly: "...if it is determined that this judgment call is incorrect, it will never happen again." (Supp. at 13:15.)

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4P.App.766

Sadly, it also falls to the Court to make an example. The supplement discusses at length several cases in which the Nevada Supreme Court upheld sanctions (which it typically does), attempting to distinguish them on the grounds they enforce different discovery rules and obligations. But they miss the broader point of those cases, that all discovery rules and obligations must be respected. Unfortunately, the outlook appears to be that a rule does not have teeth unless a judge has punished someone for violating it. And that philosophy is too common in the bar. So, the Court should take this opportunity to demonstrate that this rule also has teeth.

III.

CONCLUSION

As such, Plaintiff Bessu Herrera respectfully requests that the Answers filed by Defendants JAIME ROBERTO SALAIS and TOM MALLOY CORPORATION be stricken and that this matter be set for a prove-up hearing as to damages, or for other relief as just and appropriate under the circumstances of this case.

DATED this 1st day of September, 2020.

DRUMMOND LAW FIRM, P.C.

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9 and Administrative Order 14-2, the undersigned does hereby certify that on this 1st day of September, 2020, service of a true and correct copy of the foregoing **PLAINTIFF ROLANDO BESSU HERRERA'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER** was duly made on all parties herein by causing a true copy thereof to be filed and/or served with the Clerk of Court using the Odyssey E-File & Serve system, which was served via electronic transmission per Service List.

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DISTRICT COURT
CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an Individual, ROLANDO BESSU HERRERA, Individually, Plaintiffs vs. JAIME ROBERTO SALAIS, an Individual, TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, foreign corporation, DOES I through V, inclusive; and ROE CORPORATIONS I through V, inclusive, Defendants.	Case No.: A-18-772273-C Dept No.: 28 **Hearing Date: September 22, 2020** **Hearing Time: 10:00 a.m.**

PLAINTIFF PEREZ-ACOSTA'S JOINDER TO PLAINTIFF BESSU HERRERA'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL OPPOSITION TO PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER

Plaintiff PEREZ-ACOSTA, by and through his attorney, MICHAEL C. KANE, ESQ., of THE 702FIRM, hereby files the above-stated Joinder as follows. The arguments set forth in

Plaintiff BESSU HERRERA'S Response on file are hereby incorporated and adopted by reference as if fully set forth herein at length. For the purposes of judicial economy, the Joinder is hereby filed.

DATED this 1st day of September, 2020.

THE702FIRM

/s/ Michael Kane

_____

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Document: **PLAINTIFF PEREZ-ACOSTA'S JOINDER TO PLAINTIFF BESSU HERRERA'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL OPPOSITION TO PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER**

I hereby certify that I caused service of a true and correct copy of the above-referenced document to be made by the Eighth Judicial District Court's Odyssey E-File and Serve program, upon all parties registered to use this service, in accordance with the Clark County District Court's Administrative Order No. 14-2, issued 5/9/14:

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on this date: September 1, 2020.

/s/ Amber Casteel

An Employee of THE702FIRM

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A-18-772273-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**October 01, 2020**

A-18-772273-C Maikel Perez-Acosta, Plaintiff(s)
vs.
Jaime Salais, Defendant(s)

October 01, 2020 **10:00 AM** **All Pending Motions (10/01/2020)**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Craig W. Drummond	**Attorney for Plaintiff**
Joel D. Henriod	**Attorney for Plaintiff**
Joel D. Odou	**Attorney for Defendant**
Michael C Kane	**Attorney for Plaintiff**
Todd A. Jones	**Attorney for Defendant**

JOURNAL ENTRIES

PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER...HEARING RE: MOTION TO STRIKE ANSWER // SANCTIONS

Also present, Nicolas Adams. a representative for Defendants and David Lee, Esq. Counsel on behalf of Todd Jones, Esq. the original counsel for Defendants. Argument by Mr. Drummond in support of his motion. Mr. Drummond noted the Defendants were hiding the witness, Ms. Espinoza, and referred to her deposition held on 04/29/19 and the 03/11/19 e-mail from Mr. Jones regarding Ms. Espinoza s personal knowledge. Court noted current counsel, Mr. Odou, did not supplement and the work product issue did not hold up, Court found no legal grounds and inquired of prior Defense counsel. Mr. Jones addressed the Court regarding the issue; Mr. Jones explained, Ms. Espinoza reached out to him requesting he pay her for testimony and when he told her "no" she did not contact Mr. Jones for 9 months in until April. Upon Court's inquiry of the e-mails, Mr. Jones noted he disclosed one of the e-mails. Court admonished Counsel for not disclosing the information. Mr. Odou argued against the Motion and noted when they had no communication with Ms. Espinoza they proceeded with discovery. Then Ms. Espinoza, (Plaintiff's X-girl friend) informed them of Plaintiff's actions and they were able to finally schedule her deposition and the e-mail was attached as an exhibit to the deposition. Further arguments by counsel. Court noted it is not up to counsel to determine if a witness or potential witness should not be disclosed; Pursuant to the rule, Counsel is to disclose all potential witnesses. Court referred to the 16.1 and Early Case Conference (ECC).

Court Directed All Defense Counsel to turn over, IN CAMERA, All communication by Corporate Counsel and Counsel and Carrier, and the reports and documents related to these communications; from when the letter came in until Ms. Espinoza's Deposition; In Camera documents to be received in chambers within 30 days. In addition, Court included counsel to turn over the billing records during that time. Documents to remain sealed.

Court allowed the Plaintiff rebuttal argument and the parties to address alternative sanctions.

Arguments by Counsel. COURT ORDERED, Matter CONTINUED to Chambers for DECISION. Court noted the Courts decision would include the striking of Ms. Espinoza's deposition, testimony and no reference to testimony as a minimal sanction.

11/19/2020 (CHAMBERS) DECISION RE: PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER

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CLERK OF THE COURT

JUDGE RONALD J. ISRAEL
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 28
Regional Justice Center
200 Lewis Avenue, 15th Floor
Las Vegas, Nevada 89155

DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual; Rolando Bessu-Herrera, an individual,

Plaintiff(s),

v.

JAMIE ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES 1 through V, inclusive, and ROE CORPORATIONS I through V, inclusive,

Defendant(s).

Case No.: A-18-772273-C

Dept.: XXVIII

ORDER TO TURN OVER COMMUNICATION AND RECORDS IN CAMERA

ORDER

This Matter having come before the Court on October 12, 2020, and after hearing argument and reviewing the papers and pleadings on file the Court has determined the following:

Todd Jones and Joel Henriod (Defense Counsel) shall turn over, IN CAMERA, ALL communication between Defense Counsel and Defendant Jamie Salais, Defense Counsel and Defendant Tom Malloy Corporation, and Defense Counsel and Defendants' insurance company (including corporate counsel) from the date of the first email received by Mr. Jones from Ms.

Espinoza until now. Additionally, all Defense Counsel shall turn over, IN CAMERA, all billing records during the same period.

Defense Counsel must submit these communications and documents to the Court by November 2, 2020.

IT IS SO ORDERED.

Dated this 16th day of October, 2020

Ronald J. Israel

EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT TWENTY EIGHT
JUDGE RONALD J. ISRAEL
Case No. 18-372773-C
Ronald J. Israel
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Maikel Perez-Acosta, Plaintiff(s)	CASE NO: A-18-772273-C
vs.	DEPT. NO. Department 28
Jaime Salais, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 10/16/2020

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A-18-772273-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**October 23, 2020**

A-18-772273-C Maikel Perez-Acosta, Plaintiff(s)
vs.
Jaime Salais, Defendant(s)

October 23, 2020 **Minute Order**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Keri Cromer

JOURNAL ENTRIES

- On October 16, 2020 this Court entered an Order directing Defense Counsel to turn over communications and records in camera. Line 23 of the first page incorrectly names Joel Henriod, ESQ. as Defense Counsel instead of Joel Odou ESQ. Joel Odou shall comply with the October 16, 2020 Order as Defense Counsel in the case and Joel Henriod is absolved of any requirements in the October 16, 2020 Order.

CLERK'S NOTE: The above minute order has been distributed to counsel by the Court Clerk via electronic service. kc//10-23-20

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Steven D. Grierson
CLERK OF THE COURT

MOT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, individually, ROLANDO BESSU HERRERA, individually,

Plaintiffs,

v.

JAIME ROBERTO SALAIS, individually, TOM MALLOY CORPORATION, aka/dba TRENCH SHORING COMPANY, a foreign corporation, DOES I through V, inclusive, and ROE CORPORATIONS I through V, inclusive,

Defendants.

Case No. A-18-772273-C
Dept. No.: 28

MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME

[ORAL ARGUMENT REQUESTED]

Defendants JAIME ROBERTO SALAIS and TOM MALLOY CORPORATION, through their counsel, the Law Firm of Wood Smith Henning & Berman, LLP, submit their Motion for Reconsideration of Order for Production of Defense Correspondence and Billing Records. This Motion is made and based upon the following Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument the Court may hear on this matter.

DATED this 23rd day of October, 2020

WOOD, SMITH, HENNING & BERMAN LLP

By */s/ Joel D. Odou*

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ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefore,

IT IS HEREBY ORDERED that the foregoing Motion _____ shall be heard on the _____ day of _____, 20___, at ___:_____ a.m., before the District Court in Department _____.

Dated this ___ day of _____, 20_____.

_____
DISTRICT COURT JUDGE

Respectfully Submitted By:

WOOD, SMITH, HENNING & BERMAN LLP

/s/ Joel D. Odou

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DECLARATION OF JOEL D. ODOU IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME

I, Joel D. Odou, Esq., declare as follows:

1. I am an attorney at law, duly licensed before all of the courts of Nevada, and am a partner with the law firm of Wood, Smith, Henning, & Berman, LLP, attorneys of record for Defendants, Tom Malloy Corporation d/b/a Trench Shoring Company and Jaime Roberto Salais. I know the following facts to be true of my own knowledge, and if called to testify, I could competently do so.

2. I make this Declaration in support of a Defendant's Motion for Reconsideration of Oder for Production of Defense Correspondence and Billing Records on Order Shortening Time.

3. Plaintiffs filed a Motion to Strike Defendants' Answer alleging defendants failed to timely produce information received via an unsolicited e-mail from Plaintiff Rolando Bessu Herrera's former girlfriend, Nancy Espinoza, that the accident was a fraudulent set up.

4. The Plaintiffs' Motion to Strike was briefed by counsel, a supplemental brief was filed by attorney Jones, and a hearing was held on October 12, 2020.

5. At the hearing, the Court took the issue under consideration but has preliminarily ordered that Ms. Espinoza will not be allowed to testify at trial.

6. The Court further ordered Defendants to produce *in camera*, all attorney communications between counsel, the clients, and the insurance carrier and all attorney billing records from the time of the unsolicited Nancy Espinoza e-mail of April of 2019 up through the date of her deposition in March of 2020. These communications were not the subject of the prior briefing.

7. Defendants respectfully request the opportunity to address that legal issue since it was not briefed before the Court issued its decision.

8. Since the Court has ordered Defendant to produce attorney correspondence and attorney billing records by November 2, 2020, it is necessary that this Motion be heard as soon as possible or that stay of compliance with this Order be permitted.

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9. This Order for Shortening Time is brought in good faith and in order to have this matter heard as soon after as possible.

10. Although Defendants are entitled to ex parte relief, I certify that promptly upon filing this document I will cause the same to be served on counsel for the Plaintiffs by e-service and will also send it by way of personal email to counsel.

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

Executed this 23rd day of October, 2020

/s/ Joel D. Odou
Joel D. Odou, Esq.

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants have been ordered to produce privileged attorney correspondence and attorney billing records to the Court, records that will thereafter be reviewed by the trial judge in advance of trial and pre-trial motions practice. The attorney client privilege has not been waived. In addition to privileged correspondence, these records contain the mental impressions and trial strategy relayed between Defense Counsel and Defendants and their insurance carrier in the course of litigation.

This Court generally takes the position that it will reconsider matters in the interest of reaching a fair and equitable decision. Defendants appreciate that approach, and respectfully submit this matter for the Court's reconsideration to ensure protection of the sanctity of the attorney-client privilege and protected attorney work product, as the materials at issue contain facts and mental impressions of the case well beyond the issues of the disputed and now disallowed witness, Nancy Espinoza.

I. RELEVANT FACTS

Plaintiffs filed a Motion to Strike Defendants' Answer due to the alleged failure to timely produce information allegedly helpful to the defense regarding communications with Plaintiff Rolando Bessu Herrera's former girlfriend, Nancy Espinoza. Defendants maintained that these communications were privileged, and this court has now over-ruled that objection. The Plaintiffs' Motion to Strike was briefed by counsel, a supplemental brief was filed by attorney Jones, and a hearing was held on October 12, 2020. At the hearing, the Court took the issue under consideration but has preliminarily ordered that Ms. Espinoza will not be allowed to testify at trial.

The Court further ordered Defendants to produce privileged materials *in camera*, including attorney correspondence and attorney billing records that were not the subject of the briefing for production. The Court's Order from the bench was also reduced to a written Order, filed on October 16, 2020, which is brief and does not include the Court's findings of fact, conclusions of law, or set forth an analysis as to why these materials are not protected from production, even *in camera*:

/ / /

/ / /

/ / /

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> This Matter having come before the Court on October 12, 2020, and after hearing argument and reviewing the papers and pleadings on file the Court has determined the following:
>
> Todd Jones and Joel Henriod [sic] (Defense Counsel) shall turn over, IN CAMERA, ALL communication between Defense Counsel and Defendant Jamie Salais, Defense Counsel and Defendant Tom Malloy Corporation, and Defense Counsel and Defendants' insurance company (including corporate counsel) from [April 28, 2019] until now. Additionally, all Defense Counsel shall turn over, IN CAMERA, all billing records during the same period. Defense Counsel must submit these communications and documents to the Court by November 2, 2020.

See, Order to Turn Over Communications and Records In Camera (A-18-7722273-C), filed October 16, 2020. Specifically, the court ruled from the bench "You—I—there is no problem with attorney-client privilege, since you're only turning it over to me in-chambers and I will review it as to what was communicated."[1] Defendants respectfully request the opportunity to address that legal issue since it was not briefed before the Court issued its decision.

II. LEGAL STANDARD

The court may grant leave for any matter to be renewed in the same cause of action. EDCR 2.24(a). A party who seeks reconsideration must file a motion within 14 days of service of the written order. EDCR 2.24(b). In the event the motion for rehearing is granted, the court may permit rehearing, hear additional oral argument, or "make such other orders as are deemed appropriate under the circumstances of the particular case." EDCR 2.24(c). While EDCR 2.24 does not provide a specific standard for rehearing, "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry and Title v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, P.2d 486 (1997) (internal citations omitted).

A ruling "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortgage and Equity Trust v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1271 (1981) (internal quotations omitted). Likewise, the Nevada Supreme Court has held that

[1] Transcript, page 21 attached hereto as **Exhibit "A."**

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reconsideration may be appropriate even if the facts and law remain unchanged if the judge is subsequently more familiar with the matter at the time of a rehearing. *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 217, 217-18, 606 P.2d 1095 (1980).

III. LEGAL ARGUMENT

Absent findings of fact or conclusions of law in the Court's Order, Defendants set forth the following legal arguments which individually, and cumulatively, show that the Court's Order in this matter was unfortunately in error. The Court here has not found that there was a waiver of attorney-client privilege or attorney work-product privilege as to all written communications and billings, and thus the Order for production of records constituting the same is "clearly erroneous."

A. The attorney-client privilege and attorney work product doctrine have not been waived and waiver cannot be compelled even for *in camera* review.

The attorney-client privilege is a long-standing privilege at common law that protects communications between attorneys and clients. *See Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). "The purpose of the attorney-client privilege is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017) *citing* Upjohn, supra.

"The attorney-client privilege, codified in NRS 49.095, protects communications between **clients or client representatives and lawyers** when made in furtherance of legal services and "appl[ies] at all stages of all proceedings." *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 131 Nev. 140, 145, 347 P.3d 267, 270 (2015) (emphasis added).

Even judicially compelled disclosures cannot operate as a waiver of the attorney client privilege. *See Miller v. Anderson*, 30 Conn. Supp. 501, 504, 294 A.2d 344, 346 (Com. Pl. A.D. 1972) (reversing trial court that required client to divulge advice which his attorney gave him).

Here, there is simply no evidence that the attorney-client privilege has been waived in this case such that defendants' confidential attorney-client communications, including those between defendants' insurance carrier, are subject to disclosure. Absent such a waiver, disclosure cannot be

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compelled, even *in camera*.

The Rules of Evidence, as set forth in Title 4 of the Nevada Revised Statutes, supports the Court's broad discretion in evidentiary rulings at all stages of litigation except rulings involving privilege, which are specifically governed by NRS 49. NRS 47.020(2) (emphasis added). The privileges afforded by NRS 49, and in legal matters in all jurisdictions, exist to ensure the fair and equitable adjudication of both criminal and civil claims.

Given the vital role these privileges play in the practice of law, it is unsurprising that the United States Supreme Court has weighed in on production of privileged records for *in camera* review, albeit in the context of the applicability of the crime-fraud exception. However, the reasoning of the nation's highest court is instructive. Essentially, the Court concluded that allowing *in camera* review of privileged material as a matter of course "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk" and could raise due process concerns if used routinely. *United States v. Zolin*, 491 U.S. 554, 571, 109 S. Ct. 2619, 2630, 105 L. Ed. 2d 469 (1989); *see also*, *United States v. Reynolds*, 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953). "There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." *Id*. The Supreme Court concluded in that case that *in camera* review should **only** be performed after "a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim…." *Id*. at 572 (internal quotations omitted).

In addition, other jurisdictions have held that a court itself cannot compel disclosure of attorney-client privileged documents to determine if the information contained therein is privileged. The California Supreme Court's analysis in *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 736, 219 P.3d 736, 743 (2009) is instructive. In *Costco*, the plaintiff sought to compel disclosure of a written letter to Costco's corporate counsel that was prepared by outside counsel in a wage and hour dispute. The outside counsel had interviewed two Costco managers in the course of her investigation and prepared an attorney-client communication that contained both factual recitation of the interview with the witnesses and the attorney's mental impressions and conclusions.

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Id. at 730-31. The trial court ordered Costco to produce the communication *in camera* to a referee, who then recommended production of a redacted version of the letter that contained the factual recitations. *Id.*

In reversing the trial court's decision to compel disclosure *in camera*, the California supreme court held that the attorney-client privilege attached to the attorney's opinion letter "in its entirely." *Id.* at 731. It concluded that without evidence of waiver, "The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material." *Id.* at 734. The court also held that Costco was not required to demonstrate that its ability to present its case would be prejudiced by the disclosure of the opinion letter because the court's order wrongfully invaded the attorney-client relationship. *Id.* at 732, 741. The court concluded that the trial court could not "demand in camera disclosure" of the allegedly privileged information to determine whether it was indeed privileged. *Id.* at 737; *see Cty. of San Bernardino v. Pac. Indem. Co.*, No. EDCV1301137PSGSS, 2014 WL 12501478, at *1 (C.D. Cal. July 11, 2014).

Here, there is no factual basis upon which to order the production of privileged attorney work-product and attorney-client correspondence and records, there is no "reasonable" expectation that production of the same will establish any claim that has not already been addressed by the Court by way of other sanctions ordered (exclusion of Ms. Espinoza). Instead, the production of billing records from the time of the communication, April of 2019 through March of 2020, will disclose to this Court the discovery and trial strategy of Defendants and will irreparably harm the Defendants should this matter proceed to trial.

At the hearing of this matter, Plaintiff's counsel speculated that Defendants chose to sit on the communications and "build their case." However, this was not only speculation, this is not true as shown by the actual communications. These clearly show that there was no communication for months after the initial unsolicited e-mail. This was confirmed by the Deposition of Nancy Espinoza and set forth extensively in the Supplemental Opposition to the motion to strike filed by Defendants on August 11, 2020, and the Affidavit Pursuant to NRS 53.045 of Todd Jones, Esq., filed in support of the same incorporated herein by reference.

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Further, the affidavit of Todd Jones confirms Defendants Jamie Salais and Tom Malloy Corp. have not had any contact with Ms. Espinoza (paragraph 20). Accordingly, the production of communications from Mr. Jones to the Defendants along with his billing records and those of subsequent counsel, appear to go well beyond the issues at hand. The production of these materials will provide this Court with defense counsel's mental impressions of witnesses unrelated to Ms. Espinoza, analysis of medical records and damages unrelated to this witness, and even analysis of the medical claims in this case. The billings will show the amount of time spent as to these tasks that are again, completely unrelated to the issue at hand. As this Court is well aware, considering the Court's prior background in insurance defense litigation, the disclosure of this information will prejudice the defendants' ability to present their defenses at trial since this Court will be intimately familiar with the defense view of the case beyond any issues related to disqualified witness Nancy Espinoza.

In particular, the Court's Order seeks all communications regarding Defense counsel's strategy for trial and discovery, evaluation of strengths and weaknesses of witnesses and exhibits, potential jury verdict ranges, settlement evaluations, and other analyses conducted by Defense counsel since the initial unsolicited email from April 28, 2019 until October 16, 2020. Disclosure of such information to the Judge, who will be overseeing this trial, is wholly prejudicial to Defendants and has no significance to the issue of any additional sanction, if one is awarded, as to the untimely disclosure of information helpful to the defense in the form of disqualified witness Nancy Espinoza.

Further, the Court's request for billing records is also beyond information related to the Espinoza dispute. Unless there is a dispute about dates of communications (which are shown in the e-mails and covered in the previously produced affidavit), these could be clarified by counsel's supplemental declaration if one was needed. Instead, the Court's Order in effect would prejudice Defendants by revealing preparation time for other hearings, time spent with clients preparing them for depositions, time strategizing or analyzing particular unrelated issues, and research into particular issues which will come before this Court. Such information sought by the Court is well beyond the issues that were addressed in the parties' briefings.

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There has been no finding that the Defendants specifically waived attorney work-product privilege or attorney-client correspondence privilege with respect to the documents ordered for production.

B. Attorney client communications will not assist this Court in determination of possible sanctions under *Young*.

This Court requested all correspondence exchanged between all defense attorneys, their defense counsel, and their corporate counsel in this case, in addition to all billing records, from the date of Mr. Jones' first email to Espinoza's deposition. The court's review of this information, however, will not assist it in determining whether sanctions are warranted under *Young*, including prejudice to the non-offending party by not being able to use the evidence.

In this case, Nancy Espinoza's anticipated testimony was that the Plaintiff fabricated the car accident at issue here. If this fact was true, as defendants attempted to investigate, it is information that would harm Plaintiffs' case and help the defense. It is not information that the defense seek to suppress and, conversely, plaintiffs would seek to *exclude* this evidence from being admitted.

Considering Ms. Espinoza was equally available as a witness to Plaintiff (he resided with her during the relevant time period) and Plaintiff did not timely disclose Espinoza as a witness who had potential knowledge of his injury claims and the accident, there is simply no prejudice to Plaintiff in this case.

This Court has already determined that the testimony of Espinoza in this case is precluded. Thus, prejudice to Plaintiffs, if any at all, is removed. Inquiry into protected attorney-client communications and attorney-work product regarding Espinoza will not assist this Court in its analysis of whether further sanctions are warranted because any and all evidence related to Espinoza has already been excluded.

IV. CONCLUSION

In this case, the privilege afforded the correspondence and billing records has not been waived. Briefing regarding that privilege, not the privilege afforded to the Espinoza Correspondence, was never had and Defendants were never provided notice and the opportunity to object to the order for production issued by the Court. As such, to protect Defendants' due process

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rights, it is respectfully requested that this court allow reconsideration of the prior order and argument as to the same.

DATED this 23rd day of October, 2020

WOOD, SMITH, HENNING & BERMAN LLP

By */s/ Joel D. Odou*

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2020, a true and correct copy of **MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

By */s/ Michelle Ledesma*
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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

MAIKEL PEREZ-ACOSTA, ROLANDO BESSU HERRERA, Plaintiffs, vs. JAIME ROBERTO SALAIS, TOM MALLOY COPRORATION, Defendants.	)	CASE NO. A-18-772273 DEPT. NO. XXVIII **Transcript of Proceedings**

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

PLAINTIFF HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER; HEARING REGARDING MOTION TO STRIKE ANSWER/SANCTIONS

THURSDAY, OCTOBER 1, 2020

APPEARANCES:

For the Plaintiffs: CRAIG W. DRUMMOND, ESQ.
JOEL D. HENRIOD, ESQ.
MICHAEL KANE, ESQ.
(Live in court)

For the Defendants: TODD A. JONES, ESQ.
JOEL D. ODOU, ESQ.
DAVID LEE, ESQ.
(Via Bluejeans)

RECORDED BY: JUDY CHAPPELL, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

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Case Number: A-18-772273-C

THURSDAY, OCTOBER 1, 2020 AT 9:59 A.M.

THE CLERK: Case number A772273, *Perez-Acosta versus Salais*.

THE COURT: All right, counsel. State your appearances. Start with the plaintiff.

MR. DRUMMOND: Good morning, Your Honor. Craig Drummond and Joel Henriod on behalf of plaintiff, Bessu Herrera. Mr. Michael Kane is here on behalf -- as well with Mr. Henriod, on behalf of plaintiff Perez-Acosta.

MR. HENRIOD: Good morning, Your Honor.

MR. KANE: Good morning, Your Honor.

THE COURT: Defendants, let's start off with counsel -- the original counsel.

MR. JONES: Good morning, Your Honor. Todd Jones of Mokri, Vanis, and Jones appearing for defendants Tom Malloy Corporation DBA Trench Shoring Company and Jaime Roberto Salais.

THE COURT: Then the current counsel.

MR. ODOU: Good morning, Your Honor. Joel Odou from Wood Smith on behalf of all of the defendants.

THE COURT: And is corporate counsel also here?

MR. LEE: Your Honor, David Lee is here from Lee Law Firm on behalf of Mr. Jones and his firm at your suggestion in the last hearing.

THE COURT: Okay. So, you're representing the corporation now but my question -- the original corporate counsel who attended the deposition, at least that's my understanding, that corporate counsel attended the deposition that we're talking about or -- is he or she present?

MR. ODOU: Your Honor, Joel Odou on behalf of the defendants. I took the deposition of Nancy Espinoza [phonetic]. There wasn't a corporate --

THE COURT: Oh, I thought the plaintiffs -- somewhere, I thought that they said that corporate counsel actually appeared.

MR. DRUMMOND: Your Honor, this is Craig Drummond. We did in one of our -- actually in the most recent briefing, mention that they had their -- I believe it would be the Risk Manager present at some of the depositions of the parties. So, there was a corporate representative, which we did state, and that's what -- there was a question about what the company knew --

THE COURT: Oh, okay. Not --

MR. DRUMMOND: -- we stated they were actively present at some of these depositions.

THE COURT: All right. That's where I must have gotten it. Okay. Although we went through some of this already, let's -- plaintiff, it's your Motion to --

MR. DRUMMOND: Thank you, Your Honor.

Related to this matter, I think everyone in this case are all litigators and Your Honor is obviously a very experienced litigator. We all know that you can have trial strategies and tactics. For example, some sort of argument, some sort of question that you reserve for trial and then you use that at trial and hope the other side hasn't figured it out so they're not able to either defend or prosecute against it. That's fine. What is not fine is, during litigation, hiding evidence. In this case, hiding witness statements.

Now, we know this was a tactical decision. How do we know it? We know it because there are changing stories as to why this was never timely or properly disclosed as a 16.1, in response to Request for Production from both plaintiffs where we were asking for witness statements, as well as during the deposition of Ms. Espinoza where they are talking about an e-mail that, one, they've never previously produced and, two, wouldn't even produce during the deposition so that plaintiffs' counsel on both sides could ask her about it.

We also know that there is a changing story about why this was done. At the 234 conference, we hear this was done for the safety of Ms. Espinoza. Some sort of issue about -- that she needs to be protected. We asked: Is

there a protective order in place? Did you do anything? No, we didn't.

Then, the EDCR 2.34 goes into: Well, we didn't give this to you because it was work product. Okay. Fine. We then have a hearing in front of Your Honor where Your Honor very clearly said: I don't see this as work product. Can anybody give me a case? And no one has ever given you a case. There has been no briefing at the motion hearing, there's been no briefing at -- subsequent to that that gives you a case.

Now, we have the argument: Well, we were vetting Ms. Espinoza. We were vetting her for a year and 27 e-mails and we needed to vet her before we could provide her information to the plaintiff. Well, we respectfully don't think that is a credible argument. Here is why. What they were actually doing was building a defense for a year behind the scenes without properly giving the name of this one witness who was the stalwart behind it. They're not vetting her. They're building a defense without knowledge to the plaintiffs. That is what's going on and that is the egregiousness of the actions in this case. Now, we know that -- that they knew about that because if you look through our -- and it's -- in our original pleadings -- well, actually in the Reply that we filed, there is an e-mail from Mr. Jones. And I'll -- just so everybody knows,

I'm looking at bate stamp TMC002823, dated April 29th, 2019, where Mr. Jones tells Ms. Espinoza, quote:

> Thank you very much for your e-mail and for reaching out to my office. We suspected that this accident may have been a setup. This type of scam has been ongoing in the Las Vegas area in recent years. But, until now, we have not had any proof this was the case here.

That statement shows that this individual, Ms. Espinoza, has factual information and that is confirmed by the counsel for both defendants in this case, Mr. Jones. And that is dated April 29th, 2019.

Now, we also know that later, jump forward a year, 27 e-mails forward, we have Mr. Jones on March 11th. And this is TMC002814, all of these are our exhibits that are among the record. We have Mr. Jones stating that Ms. Espinoza has personal knowledge, quote:

> You have personal knowledge of them discussing the accident and I'm not aware of any other way to introduce evidence of this setup without your help, end quote.

His words: Personal knowledge. Now, clear admission that this was a witness with information.

We go on to the next paragraph of the same e-mail:

Also, unrelated to the actual incident, I

understand that you have personal knowledge that Maikel and Rolando were in the same physical condition before the accident as they were after the accident, end quote.

Well, this personal knowledge is exactly what Ms. Espinoza said to them back in April. It's the same facts. They chose to sit on it. They chose to build this defense. They chose to hide this evidence. They chose to not respond when we requested a Request for Production with this. They chose not to file a privilege log.

Your Honor, we've never seen something egregious like this and to spring it a year later, thousands -- in fact, tens of thousands of dollars in costs, expert witnesses, expert depositions, witness depositions, party depositions, all of this occurred in this year of the 27 e-mails as they're building their secret defense. We ask for the most egregious sanctions possible. If Your Honor does have any questions about what we believe would be the appropriate sanction, I will defer that to Mr. Henriod. He's much more experienced in the area of sanctions and what the courts look at and the analysis, and he's here and able to assist and hopefully guide the Court on that issue. Thank you, Your Honor.

THE COURT: All right. Let's -- well, current counsel has already made their argument regarding work

product and although -- maybe they didn't understand that they could supplement, there has been none. I'm not aware of any and, quite frankly, the argument that it's work product doesn't hold any water. They didn't go out and discuss -- if there were notes that they went out and found somebody, that's work product. This is an e-mail -- I don't think there's any contention, an e-mail, an unsolicited e-mail from a prospective witness. So, there are absolutely no legal grounds that this should have been withheld as work product. And I think we addressed that sufficiently last time. If you have any cases, if there is something that -- somehow, even though I gave you time, you can address that.

So, we're going to go to prior counsel whose -- and I've read all this, whose argument is that somehow you thought it was appropriate to vet this information.

Go ahead.

MR. JONES: Thank you, Your Honor. Todd Jones for the defendants.

As the word -- you know, use of work product may be a little bit inartful, but I did view this as an investigation period because of the unique nature of this contact by an unknown person who was demanding money in exchange for information in this case, which I've never encountered in my 22 years of lawyering. And, after

getting this initial e-mail from Ms. Espinoza, I reached out to her to try to verify this information, who she was, and what she had to say, and she gave me very limited information on who she was. She demanded payment for the information and in the one and only phone call I had with her, following those -- that initial e-mail, she -- I told her that we could not pay her, the clients could not pay her, and she cut off all further contact -- any substantive contact with me for nine months because my whole point was I didn't know what type of witness this was, whether she was even a witness. I had never met her in person.

And, as you see from the e-mail exchange, and the documents produced, this was a situation where we had no idea who she was or the reason for sending us this information, other than she wanted money, which is not a -- it's not appropriate. That's not -- say what you will, as far as what kind of conduct that is, but that gave pause to me, as counsel, as to whether anything she was providing was like -- would allow us to even -- allow to use her as a witness. You can't predicate, you know, payment -- you can't predicate witness testimony in exchange for payment, which is exactly what she was proffering. And once I told her no, nine months she bailed, which led me to believe, yes, she isn't an actual witness in this case because she was looking for money.

And, in fact, I gave up trying to contact her after October of 2019, at which point she then reached out to me a second time unsolicited in January 2020. And the argument I -- we have made in the arguments is that was work product because we didn't know if this, under 16.1, if this was a witness that was likely to lead to discoverable or admissible evidence and that, you know, -- plaintiffs' counsel talks about building a case for a year. There was no communications for nine months, for almost a year. There was nothing to build. We -- despite my efforts to contact this witness to verify who she was and what information she actually had, and I had never met with the witness. She never received any payments from my client or from my office or anyone, for that matter.

And, for nine months, trying to actually confirm who this person was and what they had to say, and, as I said in my papers, we were basically ghosted. And I essentially gave up in trying to hunt down Ms. Espinoza at that point. And, then, she reached out, again, a second time, unsolicited in January of 2020.

And, for the record, I think -- I'm sorry, Your Honor.

THE COURT: Nobody disclosed even in January or April, until the depo.

MR. JONES: Yes, but --

THE COURT: It hadn't --

MR. JONES: The disclosure -- well, the disclosure of the witness took place before the depo.

THE COURT: I understand --

MR. JONES: And --

THE COURT: -- that the disclosure -- you know, obviously, you set a depo, you have to tell them who it is. But I'm talking about the apparently 27 e-mails back and forth that weren't disclosed until, I guess, the middle of the depo or after the depo.

MR. JONES: And Mr. Odou can answer that as far as the timing of that, but, again, we ended up producing all of those documents -- the initial document, I believe, during the depo and the rest of the e-mails, which are -- the vast majority are just nonsubstantive. It's me trying to get into contact with Ms. Espinoza and her basically ignoring me.

THE COURT: Anything else?

MR. JONES: I don't think Mr. Odou had an opportunity to speak as to the substance of the Motion at the last hearing, Your Honor.

THE COURT: I'm going to get to him now. Anything else from you?

MR. JONES: Unless Your Honor had -- not unless Your Honor had any questions specifically for me.

THE COURT: I don't necessarily. I am, if you will, saddened because I know you're a reputable and good lawyer. I think this was a huge mistake. You can't decide in -- and in your papers, you said it was -- and plaintiffs' counsel used vetting, you used a different word. You can't make a determination as to the credibility of a witness before you disclose it. That's not your job and certainly -- let's -- I always use examples. If you're representing a manufacturer and you have a letter from an employee saying this -- our product kills people and you don't turn it over because you want to investigate whether he has mental issues, it's not -- that's just not appropriate, to make it to be as tactful as I can. That's pretty outrageous.

And I can't understand or -- and, for over almost 10 years now, Nevada has been very much disclose everything and we don't do -- and the Supreme Court has said multiple times, we don't do trials by ambush. We don't withhold evidence. And 16.1 says: Turn it over at the beginning. Everything, if it's not attorney-client privilege, and this clearly wasn't attorney-client privilege.

All right. Mr. Odou -- is it Odou?

MR. ODOU: Odou.

THE COURT: Odou. Mr. Odou.

MR. ODOU: Thank you, Your Honor. It's easier

than it looks.

THE COURT: I know you've been in front of me, but I don't recall. So, go ahead.

MR. ODOU: No, no, no. I -- no offense at all, Your Honor. I appreciate the effort to get it right.

There's not 27 e-mails, Your Honor. They're counting e-mails from the paralegal who printed the documents that were produced for discovery and, you know, they made a big deal out of: Who is this Sarah Doering [phonetic] and what contact did she have with the plaintiff? Well, none. She is a paralegal that works at my law office that printed the e-mails that were produced.

To go back to the timeline, Your Honor, because I think that's very critical, Mr. Jones gets an unsolicited e-mail from a person identifying themselves as the ex-girlfriend of the plaintiff. We have no way of knowing who this person is. We get unsolicited e-mails from people trying to get money all the time. There are numerous scams.

Now, to get an e-mail from somebody that you don't know who it is and try to figure out who they are takes time and, in fact, if we look at the affidavit and the -- all of the e-mails were filed on August 8th -- August 11th. From Mr. Jones in his Supplemental Declaration, if we look at it, what we see is we have an e-mail from the plaintiff

-- or, I'm sorry, from Ms. Espinoza, who is reaching out and asking for money. She is told she is not going to get money for her testimony. And, then, we have three subsequent e-mails asking to talk to her that she ignores. And this goes on for May, June, July. There's no contact from her. And, in fact, it appears that this is a person that does not have personal knowledge and then goes away.

And, so, that first piece of information that is provided is: This accident is a setup. Okay. Who are you and what proof do you have that there's a setup? There has never, even as of this day in taking her deposition, been any verified information provided to that. And, so, off we go to move forward on discovery and then, in January, there's another unsolicited e-mail that the plaintiff was lying to you and he's playing baseball. Okay. Well, that information was disclosed. And, in fact, the videos from plaintiff playing baseball was disclosed. And his deposition was taken and we acknowledge now that he was playing baseball and he's not as injured as he claimed.

So, if we look at exactly what happens is there's this information, it's a setup. That's never verified. No information is ever provided confirming that she has any knowledge or personal knowledge of that until we finally get her deposition in April. And counsel's mistaken. That e-mail was produced at her deposition. That's where my

paralegal's name came from because she was the one who printed it. And, so, it had her name on it and then they made a big deal: Oh, look, they redacted something. We redacted the name of the person who printed it because it wasn't relevant and this exhibit was attached to her deposition. All sides were given the opportunity to cross-examine Ms. Espinoza about the contents of her e-mail.

If we looked at every single case that talks about misconduct and sanctions, every single case talks about the evidence is hidden from the plaintiff, that the plaintiff cannot get. And this is the ex-girlfriend of the plaintiff. We have no -- we still, even as of today, have no ability to vet whether or not she is working with him, working against him. All we know is what she put in her e-mails. And when we took her deposition, she admitted in cross-examination that she's mad at him and that's why she sent this e-mail.

In fact, all of this came out in her deposition. They were given an opportunity to cross-examine her at the deposition. It was taken via Zoom because of Covid, but I e-mailed around the copy of the e-mail that Mr. Jones had received from her. And, moreover, the remedy, if they claim that there's some prejudice here, they certainly haven't shown it in their papers from their experts because the experts go to other issues. There's no expert, there's

no doctor, there's no accident reconstructionist that talks about the fact that he was playing baseball or that this accident was a setup. So, the prejudice claim doesn't happen.

If we go to the cases that talk about sanctions, those cases are where counsel has regrettably lied to this Court, as this Court is very well familiar with. The *Valley Healthcare Systems* case is an example where the party and the attorneys misrepresented themselves to the Court. We don't have that here. Here, what we have, is evidence that is not harmful to the defendants. It's evidence that's potentially harmful to the plaintiff that was never able to be verified, that was produced in discovery. They were given this evidence at the deposition and afterwards. And their argument is: Well, that's too late. Well, we tried -- Mr. Jones tried to get some verification for this, who this person was, what they know, and how they know it, and we never got it.

And, then, finally, Your Honor, none of the cases talk about the fact that this is a witness known to Mr. Herrera. This is his ex-girlfriend, who he never listed in discovery or disclosures. And why he never listed this person that he lived with as having knowledge of his injuries, at a minimum, is an issue.

And, so, yes, the criticism of the plaintiff is:

Well, you took too long to investigate who this person was and disclose her. And the reason why they took too long is because she refused to cooperate. It's really [indiscernible] of a witness saying: I'm not going to talk to you if you're not going to pay me. We can't pay her. So, she disappears. And, then, out of the blue, she comes back and says: Well, go on YouTube. And, yeah, we went on YouTube. We found the videos. Those videos were disclosed timely. Those videos were testified by Mr. Herrera, and discovery went forward, and there is no prejudice.

So, if we look at all of the factors here, this is not a case where the defendant was hiding something or building a case. There is absolutely no evidence of that, or hiding something that is harmful to the defense to prejudice the plaintiff. This is information that was potentially beneficial to the defense that just was never panned out and there are -- certainly if this Court believes that it took too long to disclose it, the remedy for that is Ms. Espinoza can be re-deposed or, perhaps, the Court even goes so far to say: Yeah, the defense can't use Ms. Espinoza as a witness. But that's the appropriate remedy here, not striking the Answer, not sanctioning counsel for not being able to get somebody to cooperate, who was refusing to cooperate.

And, in fact, I even e-mailed Ms. Espinoza the day

before her deposition to see if she was going to show up and she never responded. And that's been produced. So, again, we had no idea that she was even going to show up for her deposition until we were on Zoom and she logged in.

THE COURT: I -- I'll certainly --

MR. JONES: Your Honor?

THE COURT: Yes.

MR. JONES: Todd Jones. One or two more points on that is, you know, I tried to do this vetting process and it was my judgment call after getting that initial information and her on -- her unresponsiveness that she was not likely to provide -- be a likely witness in this case. And, if that judgment call was wrong, that's on me. But it was made in good faith.

And, to back that up, prior to her deposition, trying to set her up for a deposition, if you look in the exhibits, she sent out e-mails saying everything I told you before is false. She then turned around, which was my worst fear the whole time is trying to confirm what she had to say was true or was she simply after money? And the e-mails from Ms. Espinoza show she tried to recant everything she had said previously, which was one of the fears I had in trying to investigate this potential witness.

THE COURT: I understand that, but defense counsel, and I use that in all three, aren't getting the

point. And that is: It's not up to you to investigate or determine whether or not these individuals or an individual is a psychotic witness. You disclose when you get a potential witness, somebody comes up to you after a car accident and says, I saw the accident, you disclose. That's the rules. Not: Oh, I need to find out what their relationship is, whether they're credible, whether they're psychotic, whatever it might be. That is not the rule.

And that is -- you guys all know you disclose and, if you don't get that, then I just -- you have to know that that's the rule. And I use the example of the -- in a manufacturing company. You can't decide: Well, let me investigate whether or not my employee was smoking marijuana when he sent the letter saying our product kills people. You have to disclose it when you get it, not six months, not nine months. Thirty days I could see, but this is -- it's just inexcusable. I'm sorry. That's not how we do trials, that's not how we do discovery, that's not how we do production of documents. It's totally unacceptable.

You have to disclose it. Let them decide. You can do your investigation for nine months after you disclose it. They can do their investigation for nine months after they -- or you disclose it. But you don't hold on to a document, a letter, a whatever it might be. It's not your call. I can't make that more clear and I

know all of you either know or should know that that's wrong.

And the fact that this woman is clearly a disgruntled or current or -- I see that every -- well, almost every day where, in my criminal stack, when they're claiming assault and then, of course, they fail to show up because now they're back together. All of that happens. Of course. But it is not for one side or the other to make a determination as to the credibility, viability, whatever of the witness. And we wouldn't be here spending all this time.

I do agree that none of the expert witnesses regarding liability are affected at all. Well, actually even that could be because now the -- her testimony, oh, he's not as hurt, but he's already testified he played baseball. In any event, I'm getting off track.

Clearly, 16.1 has -- we're -- this isn't new stuff. This has been around. Nevada has supported, endorsed, whatever adjectives you could use, disclosure of all information up front, at the early 16.1 case conference and to be supplemented thereafter. And, so, I am extremely distressed that, first, the argument would be: Oh, well, it's work product, and that was clearly fallacious, and, quite frankly, frivolous. And, then, now: Well, I decided -- and I appreciate your falling on your sword, but I am

more concerned or as concerned -- your argument is that the defendant, and this being the corporate defendant, and, by the way, and/or the insurance carrier, which, as all of you, I'm sure, know, is under Nevada law the secondary defendant, if you will; that both the insurance carrier and the defendant themselves are considered under similar circumstances in Nevada.

All I'm seeing is the affidavit and I am, as I said, concerned as to what, if any, participation the defendant and/or knowledge because after the initial -- after you got this, there were interogs, there were depositions, there were times when you certainly could have disclosed this. And I think it's appropriate to know what knowledge -- because the entirety -- or, not the entirety, a substantial part of the defendants' Opposition is that the client, the defendant, would be prejudiced by the conduct of the attorney, which is why I suggested corporate counsel needs to be available, if you will. If I do strike the Answer, certainly one of the issues is: Did the corporation know what was going on? And either take an active role or knowingly -- and, again, assuming potentially this was approved by corporate counsel, that would change the playing field.

So, I will let the plaintiffs, because this is their Motion, have the last argument, but I think it's

appropriate to get communications by both counsel with the corporation to be turned over in-camera so there is a -- there is information one way or the other as to their total lack of participation versus active participation in this decision. So, I'm going to order defense counsel, and that's all of them, to turn over all communication between counsel, and the corporation, and/or the carrier regarding -- or starting from when this letter came in until the deposition of the Espinoza. You -- I -- there is no problem with attorney-client privilege, since you're only turning it over to me in-chambers and I will review it as to what was communicated.

I did insurance defense. I know that there are reporting requirements. And, so, I am -- as the plaintiffs suggested, that is a huge part of a significant sanction, whether it's appropriate or not, as far as potential lesser sanctions. So, that will be today. I'll give you 30 days to do that and, so, plaintiff, I'll give you the last word -- well, almost the last word because I'm going to ask -- you offered somebody to address alternative sanctions, which are always -- and defendants mentioned some alternative sanctions. I'll let you address that and I'll let the defendants briefly address that.

So, go ahead.

MR. DRUMMOND: Thank you, Your Honor.

I would note one thing. Mr. Jones is still an active defense attorney on this case. My understanding is they have this company and this carrier, even with all of this pending, has kept Mr. Jones as an active defense attorney. Now they just also brought in, you know, Mr. Odou, as well, but he's still one of their attorneys. So, there is also, for what it's worth, a position that they have acquiesced and agreed to keep him on, even with knowledge of this.

Nonetheless, we really do appreciate your analysis of this. We would just ask that in addition to the correspondence that the billing records be provided to Your Honor in-camera, to include from the paralegal, as they made mention who they were talking to and when. And that would certainly put this carrier and/or the company, depending on their detailed involvement, on more notice of what exactly was going on.

And, with that, Your Honor, I'll turn it over to Mr. Henriod, who can answer any questions you may have on alternative sanctions. Thank you, Your Honor.

MR. HENRIOD: Yes, Your Honor. And thank you for allowing us to divide it up this way.

We don't need to get into too much detail because I imagine that the Court envisions having further discussion about this after the Court has had an

opportunity to review those billing records and the correspondence, in light of what appears to be an advice of counsel defense.

My concern on the alternative sanction -- and I think there are, a lot of times, a default to the *Goodyear Bahena* type model where instead of striking an Answer, just the liability is stricken and then -- or the liability is established and then there's a full trial on damages. I generally think that works. Here, the problem is that the -- I think the sanctionable conduct and conduct that needs to be sanctioned in order to prevent it in the future, since we keep hearing this argument that they didn't really think it was wrong since they don't find a case precisely on point. Until some court says this rule too must be obeyed, I don't know why we would see an end to this type of conduct. So, I do think that, unfortunately, an example needs to be set.

But, here, the conduct also affects the damages issues. What they were attempting to do is not just withhold this particular person, but that they were trying to corroborate for a year, to build up this fraud defense, in general, to try to corroborate it.

It reminds me of a criminal investigator who get something, recognize they got it without a warrant. They can't use it because it's fruit from poisonous tree, but

then don't even disclose it to the defense so that they can spend the entire time of investigation trying to build up the prosecution by some other means. And, then, the defendant doesn't know either about the thing itself that should have been turned over or that that thing that was never turned over led them to be investigating some other theory.

Here, a big part of the defense to the damages is this idea that the defendant -- or the plaintiffs are just making it up, that this is all fraud. And, so, here, I think that even the defense on damages needs to be stricken, that we need to go to a prove-up hearing. But, if it's not, at the very least, I think that the fraud defense, as it relates to both liability and damages, would have to be out. It's certainly not enough to just say this witness, who everybody now knows is crazy, can't be allowed to testify. It's that this entire theory that they were trying to spend this year developing, as it relates to both liability and damages, has to be out.

But, again, I think under the circumstances, the Court would be well within its discretion to strike the Answer entirely. Thank you, Your Honor.

THE COURT: Thank you.

Briefly from the defense, one of you. If you have any comments, although all they did was talk about

potential alternatives, but --

MR. ODOU: Your Honor, Joel Odou on behalf of the defendants. Just very briefly and then I have a question for the Court.

The *Bahena* case, the *Kelly Broadcasting* case, the *Valley Healthcare Systems* case, all of those cases involve defendants violating an order of the Court to do something. And that is not the situation that we have here. This case is vastly distinguishable from that.

Moreover, all of those cases involve information that was not available to the plaintiffs. This information and this witness was known to the plaintiff. And, in fact, the Court's example of a person or an employee of the defendants who has information, and you don't confer with that employee, that is a much different case. We don't know, and never did know until we took her deposition, who this person was and the fact that she was the ex-girlfriend. All we know was what she claims.

So, I think there is a distinction there, but I appreciate the Court's argument. I just wanted to note there's a distinction there and I'm not trying to second-guess the Court --

THE COURT: I don't disagree with you. It isn't the best analogy. It was just an example or a whatever off the top of my head.

I had thought about, and I'll let you -- I had thought about also the billing records in order to confirm who is -- who has knowledge on this. So, I certainly think in order to verify what -- who knew what and when, that you should be turning over, and that's both, -- well, actually it really doesn't -- I'm trying to think of it, it needs to be the new counsel because, I hate to say it, but it goes back. The first -- Mr. Jones, that this is, as I said, the most troubling, although taking over and seeing this, again, you collectively either are intentionally ignoring 16.1 or have a totally inappropriate version of what turning over all information means. And I am shocked that you could take the position that it should be delayed until you investigate. And, so, anyway, I will require the billing records also and, so, I'll give you 30 days to turn that over to me. I don't see any new argument that needs to be made. So, -- and I will do a written decision and order.

I can tell you at the very least that Ms. Espinoza, her depo, her testimony is all going to be stricken. Any reference to her, she's out. It's -- that's the most minimal and I don't know if that's helpful. Actually, I think it doesn't -- it -- neither side would be beneficial in using her testimony, but she is clearly out. She has clearly tried to profit and whether she has

committed a crime or not is not a decision I need to make at this time, but her testimony and anything -- any reference to her testimony is all going to be stricken.

Again, I will review all of the options once I get the information. So, unless there's anything else -- and that will be -- we'll have to do a written order. I'm guessing two weeks after I receive the information.

MR. ODOU: Your Honor, Joel Odou for the defendants.

I had a question about the scope of what we are required to produce, with the Court's indulgence. Just bear with me.

THE COURT: Go ahead.

MR. ODOU: The Court said communications from the date of Ms. Espinoza's e-mail until the date of her deposition and I wanted to make sure I understood that. Is that all communications that the Court is asking for? In other words, if there is a report that says: Hey, the trial date has been moved. Do you still want that as part of this review?

THE COURT: I -- again, I don't think it's appropriate for counsel go through that and, yes, if -- I can't imagine that it would be that voluminous. So, all communications of any kind, e-mail, etcetera, a report, whatever. You know, yes.

MR. ODOU: Okay. Thank you, Your Honor.

THE COURT: It's going to be there, but I'm not going to read it because it's not important, but I cannot imagine that we're talking an incredible amount of paperwork, but it -- whatever it is and then -- and, as I said, communications from the defendant and from the carrier to any counsel. And, of course, those are confidential and only to be turned over to me in-camera.

MR. ODOU: Thank you, Your Honor. I wasn't trying to argue, I just wanted to make sure --

THE COURT: No. I get it. I get it that there's going to be some absolute superfluous, unimportant communications in this regard, but it certainly -- this way I will be the one filtering and, should there be something of consequence, we'll have to worry about sealing that or whatever, as a Court's Exhibit.

THE CLERK: Okay. Thirty days would be -- oh, Judge. Thirty days will be November 2nd. That's going to fall on a Monday because of holidays and things coming up. And, then, it will be set in-chambers for November 19th for a decision.

THE COURT: All right. Thank you.

MR. DRUMMOND: Thank you, Your Honor.

MR. KANE: Thank you, Your Honor.

MR. ODOU: Thank you, Your Honor.

THE COURT: All right. Have a good day.

PROCEEDING CONCLUDED AT 10:49 A.M.

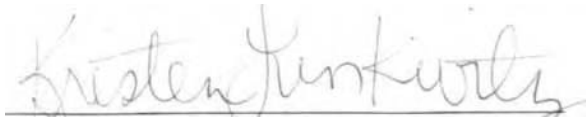
* * * * *

CERTIFICATION

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

AFFIRMATION

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



KRISTEN LUNKWITZ
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DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, individually, ROLANDO BESSU HERRERA, individually,

Plaintiffs,

v.

JAIME ROBERTO SALAIS, individually, TOM MALLOY CORPORATION, aka/dba TRENCH SHORING COMPANY, a foreign corporation, DOES I through V, inclusive, and ROE CORPORATIONS I through V, inclusive,

Defendants.

Case No. A-18-772273-C
Dept. No.: 28

MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME

[ORAL ARGUMENT REQUESTED]

Defendants JAIME ROBERTO SALAIS and TOM MALLOY CORPORATION, through their counsel, the Law Firm of Wood Smith Henning & Berman, LLP, submit their Motion for Reconsideration of Order for Production of Defense Correspondence and Billing Records. This Motion is made and based upon the following Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument the Court may hear on this matter.

DATED this 23rd day of October, 2020

WOOD, SMITH, HENNING & BERMAN LLP

By */s/ Joel D. Odou*

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ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefore,

IT IS HEREBY ORDERED that the foregoing Motion _____ shall be heard on the 5th day of November, 20 20, at chambers a.m., before the District Court in Department 28.

Dated this ___ day of _____, 20___

Dated this 26th day of October, 2020

Ronald J. Israel

DISTRICT COURT JUDGE

SC

779 935 0294 C5E2
Ronald J. Israel
District Court Judge

Respectfully Submitted By:

WOOD, SMITH, HENNING & BERMAN LLP

A-18-772273-C

/s/ Joel D. Odou

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DECLARATION OF JOEL D. ODOU IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME

I, Joel D. Odou, Esq., declare as follows:

1. I am an attorney at law, duly licensed before all of the courts of Nevada, and am a partner with the law firm of Wood, Smith, Henning, & Berman, LLP, attorneys of record for Defendants, Tom Malloy Corporation d/b/a Trench Shoring Company and Jaime Roberto Salais. I know the following facts to be true of my own knowledge, and if called to testify, I could competently do so.

2. I make this Declaration in support of a Defendant's Motion for Reconsideration of Oder for Production of Defense Correspondence and Billing Records on Order Shortening Time.

3. Plaintiffs filed a Motion to Strike Defendants' Answer alleging defendants failed to timely produce information received via an unsolicited e-mail from Plaintiff Rolando Bessu Herrera's former girlfriend, Nancy Espinoza, that the accident was a fraudulent set up.

4. The Plaintiffs' Motion to Strike was briefed by counsel, a supplemental brief was filed by attorney Jones, and a hearing was held on October 12, 2020.

5. At the hearing, the Court took the issue under consideration but has preliminarily ordered that Ms. Espinoza will not be allowed to testify at trial.

6. The Court further ordered Defendants to produce *in camera*, all attorney communications between counsel, the clients, and the insurance carrier and all attorney billing records from the time of the unsolicited Nancy Espinoza e-mail of April of 2019 up through the date of her deposition in March of 2020. These communications were not the subject of the prior briefing.

7. Defendants respectfully request the opportunity to address that legal issue since it was not briefed before the Court issued its decision.

8. Since the Court has ordered Defendant to produce attorney correspondence and attorney billing records by November 2, 2020, it is necessary that this Motion be heard as soon as possible or that stay of compliance with this Order be permitted.

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9. This Order for Shortening Time is brought in good faith and in order to have this matter heard as soon after as possible.

10. Although Defendants are entitled to ex parte relief, I certify that promptly upon filing this document I will cause the same to be served on counsel for the Plaintiffs by e-service and will also send it by way of personal email to counsel.

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

Executed this 23rd day of October, 2020

/s/ Joel D. Odou
Joel D. Odou, Esq.

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants have been ordered to produce privileged attorney correspondence and attorney billing records to the Court, records that will thereafter be reviewed by the trial judge in advance of trial and pre-trial motions practice. The attorney client privilege has not been waived. In addition to privileged correspondence, these records contain the mental impressions and trial strategy relayed between Defense Counsel and Defendants and their insurance carrier in the course of litigation.

This Court generally takes the position that it will reconsider matters in the interest of reaching a fair and equitable decision. Defendants appreciate that approach, and respectfully submit this matter for the Court's reconsideration to ensure protection of the sanctity of the attorney-client privilege and protected attorney work product, as the materials at issue contain facts and mental impressions of the case well beyond the issues of the disputed and now disallowed witness, Nancy Espinoza.

I. RELEVANT FACTS

Plaintiffs filed a Motion to Strike Defendants' Answer due to the alleged failure to timely produce information allegedly helpful to the defense regarding communications with Plaintiff Rolando Bessu Herrera's former girlfriend, Nancy Espinoza. Defendants maintained that these communications were privileged, and this court has now over-ruled that objection. The Plaintiffs' Motion to Strike was briefed by counsel, a supplemental brief was filed by attorney Jones, and a hearing was held on October 12, 2020. At the hearing, the Court took the issue under consideration but has preliminarily ordered that Ms. Espinoza will not be allowed to testify at trial.

The Court further ordered Defendants to produce privileged materials *in camera*, including attorney correspondence and attorney billing records that were not the subject of the briefing for production. The Court's Order from the bench was also reduced to a written Order, filed on October 16, 2020, which is brief and does not include the Court's findings of fact, conclusions of law, or set forth an analysis as to why these materials are not protected from production, even *in camera*:

/ / /

/ / /

/ / /

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> This Matter having come before the Court on October 12, 2020, and after hearing argument and reviewing the papers and pleadings on file the Court has determined the following:
>
> Todd Jones and Joel Henriod [sic] (Defense Counsel) shall turn over, IN CAMERA, ALL communication between Defense Counsel and Defendant Jamie Salais, Defense Counsel and Defendant Tom Malloy Corporation, and Defense Counsel and Defendants' insurance company (including corporate counsel) from [April 28, 2019] until now. Additionally, all Defense Counsel shall turn over, IN CAMERA, all billing records during the same period. Defense Counsel must submit these communications and documents to the Court by November 2, 2020.

See, Order to Turn Over Communications and Records In Camera (A-18-7722273-C), filed October 16, 2020. Specifically, the court ruled from the bench "You—I—there is no problem with attorney-client privilege, since you're only turning it over to me in-chambers and I will review it as to what was communicated."[1] Defendants respectfully request the opportunity to address that legal issue since it was not briefed before the Court issued its decision.

II. LEGAL STANDARD

The court may grant leave for any matter to be renewed in the same cause of action. EDCR 2.24(a). A party who seeks reconsideration must file a motion within 14 days of service of the written order. EDCR 2.24(b). In the event the motion for rehearing is granted, the court may permit rehearing, hear additional oral argument, or "make such other orders as are deemed appropriate under the circumstances of the particular case." EDCR 2.24(c). While EDCR 2.24 does not provide a specific standard for rehearing, "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry and Title v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, P.2d 486 (1997) (internal citations omitted).

A ruling "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortgage and Equity Trust v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1271 (1981) (internal quotations omitted). Likewise, the Nevada Supreme Court has held that

[1] Transcript, page 21 attached hereto as **Exhibit "A."**

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reconsideration may be appropriate even if the facts and law remain unchanged if the judge is subsequently more familiar with the matter at the time of a rehearing. *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 217, 217-18, 606 P.2d 1095 (1980).

III. LEGAL ARGUMENT

Absent findings of fact or conclusions of law in the Court's Order, Defendants set forth the following legal arguments which individually, and cumulatively, show that the Court's Order in this matter was unfortunately in error. The Court here has not found that there was a waiver of attorney-client privilege or attorney work-product privilege as to all written communications and billings, and thus the Order for production of records constituting the same is "clearly erroneous."

A. The attorney-client privilege and attorney work product doctrine have not been waived and waiver cannot be compelled even for *in camera* review.

The attorney-client privilege is a long-standing privilege at common law that protects communications between attorneys and clients. *See Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). "The purpose of the attorney-client privilege is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017) *citing* Upjohn, supra.

"The attorney-client privilege, codified in NRS 49.095, protects communications between **clients or client representatives and lawyers** when made in furtherance of legal services and "appl[ies] at all stages of all proceedings." *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 131 Nev. 140, 145, 347 P.3d 267, 270 (2015) (emphasis added).

Even judicially compelled disclosures cannot operate as a waiver of the attorney client privilege. *See Miller v. Anderson*, 30 Conn. Supp. 501, 504, 294 A.2d 344, 346 (Com. Pl. A.D. 1972) (reversing trial court that required client to divulge advice which his attorney gave him).

Here, there is simply no evidence that the attorney-client privilege has been waived in this case such that defendants' confidential attorney-client communications, including those between defendants' insurance carrier, are subject to disclosure. Absent such a waiver, disclosure cannot be

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compelled, even *in camera*.

The Rules of Evidence, as set forth in Title 4 of the Nevada Revised Statutes, supports the Court's broad discretion in evidentiary rulings at all stages of litigation except rulings involving privilege, which are specifically governed by NRS 49. NRS 47.020(2) (emphasis added). The privileges afforded by NRS 49, and in legal matters in all jurisdictions, exist to ensure the fair and equitable adjudication of both criminal and civil claims.

Given the vital role these privileges play in the practice of law, it is unsurprising that the United States Supreme Court has weighed in on production of privileged records for *in camera* review, albeit in the context of the applicability of the crime-fraud exception. However, the reasoning of the nation's highest court is instructive. Essentially, the Court concluded that allowing *in camera* review of privileged material as a matter of course "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk" and could raise due process concerns if used routinely. *United States v. Zolin*, 491 U.S. 554, 571, 109 S. Ct. 2619, 2630, 105 L. Ed. 2d 469 (1989); *see also*, *United States v. Reynolds*, 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953). "There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." *Id*. The Supreme Court concluded in that case that *in camera* review should **only** be performed after "a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim…." *Id*. at 572 (internal quotations omitted).

In addition, other jurisdictions have held that a court itself cannot compel disclosure of attorney-client privileged documents to determine if the information contained therein is privileged. The California Supreme Court's analysis in *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 736, 219 P.3d 736, 743 (2009) is instructive. In *Costco*, the plaintiff sought to compel disclosure of a written letter to Costco's corporate counsel that was prepared by outside counsel in a wage and hour dispute. The outside counsel had interviewed two Costco managers in the course of her investigation and prepared an attorney-client communication that contained both factual recitation of the interview with the witnesses and the attorney's mental impressions and conclusions.

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Id. at 730-31. The trial court ordered Costco to produce the communication *in camera* to a referee, who then recommended production of a redacted version of the letter that contained the factual recitations. *Id.*

In reversing the trial court's decision to compel disclosure *in camera*, the California supreme court held that the attorney-client privilege attached to the attorney's opinion letter "in its entirely." *Id.* at 731. It concluded that without evidence of waiver, "The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material." *Id.* at 734. The court also held that Costco was not required to demonstrate that its ability to present its case would be prejudiced by the disclosure of the opinion letter because the court's order wrongfully invaded the attorney-client relationship. *Id.* at 732, 741. The court concluded that the trial court could not "demand in camera disclosure" of the allegedly privileged information to determine whether it was indeed privileged. *Id.* at 737; *see Cty. of San Bernardino v. Pac. Indem. Co.*, No. EDCV1301137PSGSS, 2014 WL 12501478, at *1 (C.D. Cal. July 11, 2014).

Here, there is no factual basis upon which to order the production of privileged attorney work-product and attorney-client correspondence and records, there is no "reasonable" expectation that production of the same will establish any claim that has not already been addressed by the Court by way of other sanctions ordered (exclusion of Ms. Espinoza). Instead, the production of billing records from the time of the communication, April of 2019 through March of 2020, will disclose to this Court the discovery and trial strategy of Defendants and will irreparably harm the Defendants should this matter proceed to trial.

At the hearing of this matter, Plaintiff's counsel speculated that Defendants chose to sit on the communications and "build their case." However, this was not only speculation, this is not true as shown by the actual communications. These clearly show that there was no communication for months after the initial unsolicited e-mail. This was confirmed by the Deposition of Nancy Espinoza and set forth extensively in the Supplemental Opposition to the motion to strike filed by Defendants on August 11, 2020, and the Affidavit Pursuant to NRS 53.045 of Todd Jones, Esq., filed in support of the same incorporated herein by reference.

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Further, the affidavit of Todd Jones confirms Defendants Jamie Salais and Tom Malloy Corp. have not had any contact with Ms. Espinoza (paragraph 20). Accordingly, the production of communications from Mr. Jones to the Defendants along with his billing records and those of subsequent counsel, appear to go well beyond the issues at hand. The production of these materials will provide this Court with defense counsel's mental impressions of witnesses unrelated to Ms. Espinoza, analysis of medical records and damages unrelated to this witness, and even analysis of the medical claims in this case. The billings will show the amount of time spent as to these tasks that are again, completely unrelated to the issue at hand. As this Court is well aware, considering the Court's prior background in insurance defense litigation, the disclosure of this information will prejudice the defendants' ability to present their defenses at trial since this Court will be intimately familiar with the defense view of the case beyond any issues related to disqualified witness Nancy Espinoza.

In particular, the Court's Order seeks all communications regarding Defense counsel's strategy for trial and discovery, evaluation of strengths and weaknesses of witnesses and exhibits, potential jury verdict ranges, settlement evaluations, and other analyses conducted by Defense counsel since the initial unsolicited email from April 28, 2019 until October 16, 2020. Disclosure of such information to the Judge, who will be overseeing this trial, is wholly prejudicial to Defendants and has no significance to the issue of any additional sanction, if one is awarded, as to the untimely disclosure of information helpful to the defense in the form of disqualified witness Nancy Espinoza.

Further, the Court's request for billing records is also beyond information related to the Espinoza dispute. Unless there is a dispute about dates of communications (which are shown in the e-mails and covered in the previously produced affidavit), these could be clarified by counsel's supplemental declaration if one was needed. Instead, the Court's Order in effect would prejudice Defendants by revealing preparation time for other hearings, time spent with clients preparing them for depositions, time strategizing or analyzing particular unrelated issues, and research into particular issues which will come before this Court. Such information sought by the Court is well beyond the issues that were addressed in the parties' briefings.

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There has been no finding that the Defendants specifically waived attorney work-product privilege or attorney-client correspondence privilege with respect to the documents ordered for production.

B. Attorney client communications will not assist this Court in determination of possible sanctions under *Young*.

This Court requested all correspondence exchanged between all defense attorneys, their defense counsel, and their corporate counsel in this case, in addition to all billing records, from the date of Mr. Jones' first email to Espinoza's deposition. The court's review of this information, however, will not assist it in determining whether sanctions are warranted under *Young*, including prejudice to the non-offending party by not being able to use the evidence.

In this case, Nancy Espinoza's anticipated testimony was that the Plaintiff fabricated the car accident at issue here. If this fact was true, as defendants attempted to investigate, it is information that would harm Plaintiffs' case and help the defense. It is not information that the defense seek to suppress and, conversely, plaintiffs would seek to *exclude* this evidence from being admitted.

Considering Ms. Espinoza was equally available as a witness to Plaintiff (he resided with her during the relevant time period) and Plaintiff did not timely disclose Espinoza as a witness who had potential knowledge of his injury claims and the accident, there is simply no prejudice to Plaintiff in this case.

This Court has already determined that the testimony of Espinoza in this case is precluded. Thus, prejudice to Plaintiffs, if any at all, is removed. Inquiry into protected attorney-client communications and attorney-work product regarding Espinoza will not assist this Court in its analysis of whether further sanctions are warranted because any and all evidence related to Espinoza has already been excluded.

IV. CONCLUSION

In this case, the privilege afforded the correspondence and billing records has not been waived. Briefing regarding that privilege, not the privilege afforded to the Espinoza Correspondence, was never had and Defendants were never provided notice and the opportunity to object to the order for production issued by the Court. As such, to protect Defendants' due process

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rights, it is respectfully requested that this court allow reconsideration of the prior order and argument as to the same.

DATED this 23rd day of October, 2020

WOOD, SMITH, HENNING & BERMAN LLP

By */s/ Joel D. Odou*

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2020, a true and correct copy of **MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

By */s/ Michelle Ledesma*
Michelle N. Ledesma, an Employee of
WOOD, SMITH, HENNING & BERMAN LLP

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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

MAIKEL PEREZ-ACOSTA, ROLANDO BESSU HERRERA, Plaintiffs, vs. JAIME ROBERTO SALAIS, TOM MALLOY COPRORATION, Defendants.	CASE NO. A-18-772273 DEPT. NO. XXVIII **Transcript of Proceedings**

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

PLAINTIFF HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER; HEARING REGARDING MOTION TO STRIKE ANSWER/SANCTIONS

THURSDAY, OCTOBER 1, 2020

APPEARANCES:

For the Plaintiffs: CRAIG W. DRUMMOND, ESQ.
JOEL D. HENRIOD, ESQ.
MICHAEL KANE, ESQ.
(Live in court)

For the Defendants: TODD A. JONES, ESQ.
JOEL D. ODOU, ESQ.
DAVID LEE, ESQ.
(Via Bluejeans)

RECORDED BY: JUDY CHAPPELL, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

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

Case Number: A-18-772273-C

THURSDAY, OCTOBER 1, 2020 AT 9:59 A.M.

THE CLERK: Case number A772273, *Perez-Acosta versus Salais*.

THE COURT: All right, counsel. State your appearances. Start with the plaintiff.

MR. DRUMMOND: Good morning, Your Honor. Craig Drummond and Joel Henriod on behalf of plaintiff, Bessu Herrera. Mr. Michael Kane is here on behalf -- as well with Mr. Henriod, on behalf of plaintiff Perez-Acosta.

MR. HENRIOD: Good morning, Your Honor.

MR. KANE: Good morning, Your Honor.

THE COURT: Defendants, let's start off with counsel -- the original counsel.

MR. JONES: Good morning, Your Honor. Todd Jones of Mokri, Vanis, and Jones appearing for defendants Tom Malloy Corporation DBA Trench Shoring Company and Jaime Roberto Salais.

THE COURT: Then the current counsel.

MR. ODOU: Good morning, Your Honor. Joel Odou from Wood Smith on behalf of all of the defendants.

THE COURT: And is corporate counsel also here?

MR. LEE: Your Honor, David Lee is here from Lee Law Firm on behalf of Mr. Jones and his firm at your suggestion in the last hearing.

THE COURT: Okay. So, you're representing the corporation now but my question -- the original corporate counsel who attended the deposition, at least that's my understanding, that corporate counsel attended the deposition that we're talking about or -- is he or she present?

MR. ODOU: Your Honor, Joel Odou on behalf of the defendants. I took the deposition of Nancy Espinoza [phonetic]. There wasn't a corporate --

THE COURT: Oh, I thought the plaintiffs -- somewhere, I thought that they said that corporate counsel actually appeared.

MR. DRUMMOND: Your Honor, this is Craig Drummond. We did in one of our -- actually in the most recent briefing, mention that they had their -- I believe it would be the Risk Manager present at some of the depositions of the parties. So, there was a corporate representative, which we did state, and that's what -- there was a question about what the company knew --

THE COURT: Oh, okay. Not --

MR. DRUMMOND: -- we stated they were actively present at some of these depositions.

THE COURT: All right. That's where I must have gotten it. Okay. Although we went through some of this already, let's -- plaintiff, it's your Motion to --

MR. DRUMMOND: Thank you, Your Honor.

Related to this matter, I think everyone in this case are all litigators and Your Honor is obviously a very experienced litigator. We all know that you can have trial strategies and tactics. For example, some sort of argument, some sort of question that you reserve for trial and then you use that at trial and hope the other side hasn't figured it out so they're not able to either defend or prosecute against it. That's fine. What is not fine is, during litigation, hiding evidence. In this case, hiding witness statements.

Now, we know this was a tactical decision. How do we know it? We know it because there are changing stories as to why this was never timely or properly disclosed as a 16.1, in response to Request for Production from both plaintiffs where we were asking for witness statements, as well as during the deposition of Ms. Espinoza where they are talking about an e-mail that, one, they've never previously produced and, two, wouldn't even produce during the deposition so that plaintiffs' counsel on both sides could ask her about it.

We also know that there is a changing story about why this was done. At the 234 conference, we hear this was done for the safety of Ms. Espinoza. Some sort of issue about -- that she needs to be protected. We asked: Is

there a protective order in place? Did you do anything? No, we didn't.

Then, the EDCR 2.34 goes into: Well, we didn't give this to you because it was work product. Okay. Fine. We then have a hearing in front of Your Honor where Your Honor very clearly said: I don't see this as work product. Can anybody give me a case? And no one has ever given you a case. There has been no briefing at the motion hearing, there's been no briefing at -- subsequent to that that gives you a case.

Now, we have the argument: Well, we were vetting Ms. Espinoza. We were vetting her for a year and 27 e-mails and we needed to vet her before we could provide her information to the plaintiff. Well, we respectfully don't think that is a credible argument. Here is why. What they were actually doing was building a defense for a year behind the scenes without properly giving the name of this one witness who was the stalwart behind it. They're not vetting her. They're building a defense without knowledge to the plaintiffs. That is what's going on and that is the egregiousness of the actions in this case. Now, we know that -- that they knew about that because if you look through our -- and it's -- in our original pleadings -- well, actually in the Reply that we filed, there is an e-mail from Mr. Jones. And I'll -- just so everybody knows,

I'm looking at bate stamp TMC002823, dated April 29th, 2019, where Mr. Jones tells Ms. Espinoza, quote:

> Thank you very much for your e-mail and for reaching out to my office. We suspected that this accident may have been a setup. This type of scam has been ongoing in the Las Vegas area in recent years. But, until now, we have not had any proof this was the case here.

That statement shows that this individual, Ms. Espinoza, has factual information and that is confirmed by the counsel for both defendants in this case, Mr. Jones. And that is dated April 29th, 2019.

Now, we also know that later, jump forward a year, 27 e-mails forward, we have Mr. Jones on March 11th. And this is TMC002814, all of these are our exhibits that are among the record. We have Mr. Jones stating that Ms. Espinoza has personal knowledge, quote:

> You have personal knowledge of them discussing the accident and I'm not aware of any other way to introduce evidence of this setup without your help, end quote.

His words: Personal knowledge. Now, clear admission that this was a witness with information.

We go on to the next paragraph of the same e-mail:

Also, unrelated to the actual incident, I

understand that you have personal knowledge that Maikel and Rolando were in the same physical condition before the accident as they were after the accident, end quote.

Well, this personal knowledge is exactly what Ms. Espinoza said to them back in April. It's the same facts. They chose to sit on it. They chose to build this defense. They chose to hide this evidence. They chose to not respond when we requested a Request for Production with this. They chose not to file a privilege log.

Your Honor, we've never seen something egregious like this and to spring it a year later, thousands -- in fact, tens of thousands of dollars in costs, expert witnesses, expert depositions, witness depositions, party depositions, all of this occurred in this year of the 27 e-mails as they're building their secret defense. We ask for the most egregious sanctions possible. If Your Honor does have any questions about what we believe would be the appropriate sanction, I will defer that to Mr. Henriod. He's much more experienced in the area of sanctions and what the courts look at and the analysis, and he's here and able to assist and hopefully guide the Court on that issue. Thank you, Your Honor.

THE COURT: All right. Let's -- well, current counsel has already made their argument regarding work

product and although -- maybe they didn't understand that they could supplement, there has been none. I'm not aware of any and, quite frankly, the argument that it's work product doesn't hold any water. They didn't go out and discuss -- if there were notes that they went out and found somebody, that's work product. This is an e-mail -- I don't think there's any contention, an e-mail, an unsolicited e-mail from a prospective witness. So, there are absolutely no legal grounds that this should have been withheld as work product. And I think we addressed that sufficiently last time. If you have any cases, if there is something that -- somehow, even though I gave you time, you can address that.

So, we're going to go to prior counsel whose -- and I've read all this, whose argument is that somehow you thought it was appropriate to vet this information.

Go ahead.

MR. JONES: Thank you, Your Honor. Todd Jones for the defendants.

As the word -- you know, use of work product may be a little bit inartful, but I did view this as an investigation period because of the unique nature of this contact by an unknown person who was demanding money in exchange for information in this case, which I've never encountered in my 22 years of lawyering. And, after

getting this initial e-mail from Ms. Espinoza, I reached out to her to try to verify this information, who she was, and what she had to say, and she gave me very limited information on who she was. She demanded payment for the information and in the one and only phone call I had with her, following those -- that initial e-mail, she -- I told her that we could not pay her, the clients could not pay her, and she cut off all further contact -- any substantive contact with me for nine months because my whole point was I didn't know what type of witness this was, whether she was even a witness. I had never met her in person.

And, as you see from the e-mail exchange, and the documents produced, this was a situation where we had no idea who she was or the reason for sending us this information, other than she wanted money, which is not a -- it's not appropriate. That's not -- say what you will, as far as what kind of conduct that is, but that gave pause to me, as counsel, as to whether anything she was providing was like -- would allow us to even -- allow to use her as a witness. You can't predicate, you know, payment -- you can't predicate witness testimony in exchange for payment, which is exactly what she was proffering. And once I told her no, nine months she bailed, which led me to believe, yes, she isn't an actual witness in this case because she was looking for money.

And, in fact, I gave up trying to contact her after October of 2019, at which point she then reached out to me a second time unsolicited in January 2020. And the argument I -- we have made in the arguments is that was work product because we didn't know if this, under 16.1, if this was a witness that was likely to lead to discoverable or admissible evidence and that, you know, -- plaintiffs' counsel talks about building a case for a year. There was no communications for nine months, for almost a year. There was nothing to build. We -- despite my efforts to contact this witness to verify who she was and what information she actually had, and I had never met with the witness. She never received any payments from my client or from my office or anyone, for that matter.

And, for nine months, trying to actually confirm who this person was and what they had to say, and, as I said in my papers, we were basically ghosted. And I essentially gave up in trying to hunt down Ms. Espinoza at that point. And, then, she reached out, again, a second time, unsolicited in January of 2020.

And, for the record, I think -- I'm sorry, Your Honor.

THE COURT: Nobody disclosed even in January or April, until the depo.

MR. JONES: Yes, but --

THE COURT: It hadn't --

MR. JONES: The disclosure -- well, the disclosure of the witness took place before the depo.

THE COURT: I understand --

MR. JONES: And --

THE COURT: -- that the disclosure -- you know, obviously, you set a depo, you have to tell them who it is. But I'm talking about the apparently 27 e-mails back and forth that weren't disclosed until, I guess, the middle of the depo or after the depo.

MR. JONES: And Mr. Odou can answer that as far as the timing of that, but, again, we ended up producing all of those documents -- the initial document, I believe, during the depo and the rest of the e-mails, which are -- the vast majority are just nonsubstantive. It's me trying to get into contact with Ms. Espinoza and her basically ignoring me.

THE COURT: Anything else?

MR. JONES: I don't think Mr. Odou had an opportunity to speak as to the substance of the Motion at the last hearing, Your Honor.

THE COURT: I'm going to get to him now. Anything else from you?

MR. JONES: Unless Your Honor had -- not unless Your Honor had any questions specifically for me.

THE COURT: I don't necessarily. I am, if you will, saddened because I know you're a reputable and good lawyer. I think this was a huge mistake. You can't decide in -- and in your papers, you said it was -- and plaintiffs' counsel used vetting, you used a different word. You can't make a determination as to the credibility of a witness before you disclose it. That's not your job and certainly -- let's -- I always use examples. If you're representing a manufacturer and you have a letter from an employee saying this -- our product kills people and you don't turn it over because you want to investigate whether he has mental issues, it's not -- that's just not appropriate, to make it to be as tactful as I can. That's pretty outrageous.

And I can't understand or -- and, for over almost 10 years now, Nevada has been very much disclose everything and we don't do -- and the Supreme Court has said multiple times, we don't do trials by ambush. We don't withhold evidence. And 16.1 says: Turn it over at the beginning. Everything, if it's not attorney-client privilege, and this clearly wasn't attorney-client privilege.

All right. Mr. Odou -- is it Odou?

MR. ODOU: Odou.

THE COURT: Odou. Mr. Odou.

MR. ODOU: Thank you, Your Honor. It's easier

than it looks.

THE COURT: I know you've been in front of me, but I don't recall. So, go ahead.

MR. ODOU: No, no, no. I -- no offense at all, Your Honor. I appreciate the effort to get it right.

There's not 27 e-mails, Your Honor. They're counting e-mails from the paralegal who printed the documents that were produced for discovery and, you know, they made a big deal out of: Who is this Sarah Doering [phonetic] and what contact did she have with the plaintiff? Well, none. She is a paralegal that works at my law office that printed the e-mails that were produced.

To go back to the timeline, Your Honor, because I think that's very critical, Mr. Jones gets an unsolicited e-mail from a person identifying themselves as the ex-girlfriend of the plaintiff. We have no way of knowing who this person is. We get unsolicited e-mails from people trying to get money all the time. There are numerous scams.

Now, to get an e-mail from somebody that you don't know who it is and try to figure out who they are takes time and, in fact, if we look at the affidavit and the -- all of the e-mails were filed on August 8th -- August 11th. From Mr. Jones in his Supplemental Declaration, if we look at it, what we see is we have an e-mail from the plaintiff

-- or, I'm sorry, from Ms. Espinoza, who is reaching out and asking for money. She is told she is not going to get money for her testimony. And, then, we have three subsequent e-mails asking to talk to her that she ignores. And this goes on for May, June, July. There's no contact from her. And, in fact, it appears that this is a person that does not have personal knowledge and then goes away.

And, so, that first piece of information that is provided is: This accident is a setup. Okay. Who are you and what proof do you have that there's a setup? There has never, even as of this day in taking her deposition, been any verified information provided to that. And, so, off we go to move forward on discovery and then, in January, there's another unsolicited e-mail that the plaintiff was lying to you and he's playing baseball. Okay. Well, that information was disclosed. And, in fact, the videos from plaintiff playing baseball was disclosed. And his deposition was taken and we acknowledge now that he was playing baseball and he's not as injured as he claimed.

So, if we look at exactly what happens is there's this information, it's a setup. That's never verified. No information is ever provided confirming that she has any knowledge or personal knowledge of that until we finally get her deposition in April. And counsel's mistaken. That e-mail was produced at her deposition. That's where my

paralegal's name came from because she was the one who printed it. And, so, it had her name on it and then they made a big deal: Oh, look, they redacted something. We redacted the name of the person who printed it because it wasn't relevant and this exhibit was attached to her deposition. All sides were given the opportunity to cross-examine Ms. Espinoza about the contents of her e-mail.

If we looked at every single case that talks about misconduct and sanctions, every single case talks about the evidence is hidden from the plaintiff, that the plaintiff cannot get. And this is the ex-girlfriend of the plaintiff. We have no -- we still, even as of today, have no ability to vet whether or not she is working with him, working against him. All we know is what she put in her e-mails. And when we took her deposition, she admitted in cross-examination that she's mad at him and that's why she sent this e-mail.

In fact, all of this came out in her deposition. They were given an opportunity to cross-examine her at the deposition. It was taken via Zoom because of Covid, but I e-mailed around the copy of the e-mail that Mr. Jones had received from her. And, moreover, the remedy, if they claim that there's some prejudice here, they certainly haven't shown it in their papers from their experts because the experts go to other issues. There's no expert, there's

no doctor, there's no accident reconstructionist that talks about the fact that he was playing baseball or that this accident was a setup. So, the prejudice claim doesn't happen.

If we go to the cases that talk about sanctions, those cases are where counsel has regrettably lied to this Court, as this Court is very well familiar with. The *Valley Healthcare Systems* case is an example where the party and the attorneys misrepresented themselves to the Court. We don't have that here. Here, what we have, is evidence that is not harmful to the defendants. It's evidence that's potentially harmful to the plaintiff that was never able to be verified, that was produced in discovery. They were given this evidence at the deposition and afterwards. And their argument is: Well, that's too late. Well, we tried -- Mr. Jones tried to get some verification for this, who this person was, what they know, and how they know it, and we never got it.

And, then, finally, Your Honor, none of the cases talk about the fact that this is a witness known to Mr. Herrera. This is his ex-girlfriend, who he never listed in discovery or disclosures. And why he never listed this person that he lived with as having knowledge of his injuries, at a minimum, is an issue.

And, so, yes, the criticism of the plaintiff is:

Well, you took too long to investigate who this person was and disclose her. And the reason why they took too long is because she refused to cooperate. It's really [indiscernible] of a witness saying: I'm not going to talk to you if you're not going to pay me. We can't pay her. So, she disappears. And, then, out of the blue, she comes back and says: Well, go on YouTube. And, yeah, we went on YouTube. We found the videos. Those videos were disclosed timely. Those videos were testified by Mr. Herrera, and discovery went forward, and there is no prejudice.

So, if we look at all of the factors here, this is not a case where the defendant was hiding something or building a case. There is absolutely no evidence of that, or hiding something that is harmful to the defense to prejudice the plaintiff. This is information that was potentially beneficial to the defense that just was never panned out and there are -- certainly if this Court believes that it took too long to disclose it, the remedy for that is Ms. Espinoza can be re-deposed or, perhaps, the Court even goes so far to say: Yeah, the defense can't use Ms. Espinoza as a witness. But that's the appropriate remedy here, not striking the Answer, not sanctioning counsel for not being able to get somebody to cooperate, who was refusing to cooperate.

And, in fact, I even e-mailed Ms. Espinoza the day

before her deposition to see if she was going to show up and she never responded. And that's been produced. So, again, we had no idea that she was even going to show up for her deposition until we were on Zoom and she logged in.

THE COURT: I -- I'll certainly --

MR. JONES: Your Honor?

THE COURT: Yes.

MR. JONES: Todd Jones. One or two more points on that is, you know, I tried to do this vetting process and it was my judgment call after getting that initial information and her on -- her unresponsiveness that she was not likely to provide -- be a likely witness in this case. And, if that judgment call was wrong, that's on me. But it was made in good faith.

And, to back that up, prior to her deposition, trying to set her up for a deposition, if you look in the exhibits, she sent out e-mails saying everything I told you before is false. She then turned around, which was my worst fear the whole time is trying to confirm what she had to say was true or was she simply after money? And the e-mails from Ms. Espinoza show she tried to recant everything she had said previously, which was one of the fears I had in trying to investigate this potential witness.

THE COURT: I understand that, but defense counsel, and I use that in all three, aren't getting the

point. And that is: It's not up to you to investigate or determine whether or not these individuals or an individual is a psychotic witness. You disclose when you get a potential witness, somebody comes up to you after a car accident and says, I saw the accident, you disclose. That's the rules. Not: Oh, I need to find out what their relationship is, whether they're credible, whether they're psychotic, whatever it might be. That is not the rule.

And that is -- you guys all know you disclose and, if you don't get that, then I just -- you have to know that that's the rule. And I use the example of the -- in a manufacturing company. You can't decide: Well, let me investigate whether or not my employee was smoking marijuana when he sent the letter saying our product kills people. You have to disclose it when you get it, not six months, not nine months. Thirty days I could see, but this is -- it's just inexcusable. I'm sorry. That's not how we do trials, that's not how we do discovery, that's not how we do production of documents. It's totally unacceptable.

You have to disclose it. Let them decide. You can do your investigation for nine months after you disclose it. They can do their investigation for nine months after they -- or you disclose it. But you don't hold on to a document, a letter, a whatever it might be. It's not your call. I can't make that more clear and I

know all of you either know or should know that that's wrong.

And the fact that this woman is clearly a disgruntled or current or -- I see that every -- well, almost every day where, in my criminal stack, when they're claiming assault and then, of course, they fail to show up because now they're back together. All of that happens. Of course. But it is not for one side or the other to make a determination as to the credibility, viability, whatever of the witness. And we wouldn't be here spending all this time.

I do agree that none of the expert witnesses regarding liability are affected at all. Well, actually even that could be because now the -- her testimony, oh, he's not as hurt, but he's already testified he played baseball. In any event, I'm getting off track.

Clearly, 16.1 has -- we're -- this isn't new stuff. This has been around. Nevada has supported, endorsed, whatever adjectives you could use, disclosure of all information up front, at the early 16.1 case conference and to be supplemented thereafter. And, so, I am extremely distressed that, first, the argument would be: Oh, well, it's work product, and that was clearly fallacious, and, quite frankly, frivolous. And, then, now: Well, I decided -- and I appreciate your falling on your sword, but I am

more concerned or as concerned -- your argument is that the defendant, and this being the corporate defendant, and, by the way, and/or the insurance carrier, which, as all of you, I'm sure, know, is under Nevada law the secondary defendant, if you will; that both the insurance carrier and the defendant themselves are considered under similar circumstances in Nevada.

All I'm seeing is the affidavit and I am, as I said, concerned as to what, if any, participation the defendant and/or knowledge because after the initial -- after you got this, there were interogs, there were depositions, there were times when you certainly could have disclosed this. And I think it's appropriate to know what knowledge -- because the entirety -- or, not the entirety, a substantial part of the defendants' Opposition is that the client, the defendant, would be prejudiced by the conduct of the attorney, which is why I suggested corporate counsel needs to be available, if you will. If I do strike the Answer, certainly one of the issues is: Did the corporation know what was going on? And either take an active role or knowingly -- and, again, assuming potentially this was approved by corporate counsel, that would change the playing field.

So, I will let the plaintiffs, because this is their Motion, have the last argument, but I think it's

appropriate to get communications by both counsel with the corporation to be turned over in-camera so there is a -- there is information one way or the other as to their total lack of participation versus active participation in this decision. So, I'm going to order defense counsel, and that's all of them, to turn over all communication between counsel, and the corporation, and/or the carrier regarding -- or starting from when this letter came in until the deposition of the Espinoza. You -- I -- there is no problem with attorney-client privilege, since you're only turning it over to me in-chambers and I will review it as to what was communicated.

I did insurance defense. I know that there are reporting requirements. And, so, I am -- as the plaintiffs suggested, that is a huge part of a significant sanction, whether it's appropriate or not, as far as potential lesser sanctions. So, that will be today. I'll give you 30 days to do that and, so, plaintiff, I'll give you the last word -- well, almost the last word because I'm going to ask -- you offered somebody to address alternative sanctions, which are always -- and defendants mentioned some alternative sanctions. I'll let you address that and I'll let the defendants briefly address that.

So, go ahead.

MR. DRUMMOND: Thank you, Your Honor.

I would note one thing. Mr. Jones is still an active defense attorney on this case. My understanding is they have this company and this carrier, even with all of this pending, has kept Mr. Jones as an active defense attorney. Now they just also brought in, you know, Mr. Odou, as well, but he's still one of their attorneys. So, there is also, for what it's worth, a position that they have acquiesced and agreed to keep him on, even with knowledge of this.

Nonetheless, we really do appreciate your analysis of this. We would just ask that in addition to the correspondence that the billing records be provided to Your Honor in-camera, to include from the paralegal, as they made mention who they were talking to and when. And that would certainly put this carrier and/or the company, depending on their detailed involvement, on more notice of what exactly was going on.

And, with that, Your Honor, I'll turn it over to Mr. Henriod, who can answer any questions you may have on alternative sanctions. Thank you, Your Honor.

MR. HENRIOD: Yes, Your Honor. And thank you for allowing us to divide it up this way.

We don't need to get into too much detail because I imagine that the Court envisions having further discussion about this after the Court has had an

opportunity to review those billing records and the correspondence, in light of what appears to be an advice of counsel defense.

My concern on the alternative sanction -- and I think there are, a lot of times, a default to the *Goodyear Bahena* type model where instead of striking an Answer, just the liability is stricken and then -- or the liability is established and then there's a full trial on damages. I generally think that works. Here, the problem is that the -- I think the sanctionable conduct and conduct that needs to be sanctioned in order to prevent it in the future, since we keep hearing this argument that they didn't really think it was wrong since they don't find a case precisely on point. Until some court says this rule too must be obeyed, I don't know why we would see an end to this type of conduct. So, I do think that, unfortunately, an example needs to be set.

But, here, the conduct also affects the damages issues. What they were attempting to do is not just withhold this particular person, but that they were trying to corroborate for a year, to build up this fraud defense, in general, to try to corroborate it.

It reminds me of a criminal investigator who get something, recognize they got it without a warrant. They can't use it because it's fruit from poisonous tree, but

then don't even disclose it to the defense so that they can spend the entire time of investigation trying to build up the prosecution by some other means. And, then, the defendant doesn't know either about the thing itself that should have been turned over or that that thing that was never turned over led them to be investigating some other theory.

Here, a big part of the defense to the damages is this idea that the defendant -- or the plaintiffs are just making it up, that this is all fraud. And, so, here, I think that even the defense on damages needs to be stricken, that we need to go to a prove-up hearing. But, if it's not, at the very least, I think that the fraud defense, as it relates to both liability and damages, would have to be out. It's certainly not enough to just say this witness, who everybody now knows is crazy, can't be allowed to testify. It's that this entire theory that they were trying to spend this year developing, as it relates to both liability and damages, has to be out.

But, again, I think under the circumstances, the Court would be well within its discretion to strike the Answer entirely. Thank you, Your Honor.

THE COURT: Thank you.

Briefly from the defense, one of you. If you have any comments, although all they did was talk about

potential alternatives, but --

MR. ODOU: Your Honor, Joel Odou on behalf of the defendants. Just very briefly and then I have a question for the Court.

The *Bahena* case, the *Kelly Broadcasting* case, the *Valley Healthcare Systems* case, all of those cases involve defendants violating an order of the Court to do something. And that is not the situation that we have here. This case is vastly distinguishable from that.

Moreover, all of those cases involve information that was not available to the plaintiffs. This information and this witness was known to the plaintiff. And, in fact, the Court's example of a person or an employee of the defendants who has information, and you don't confer with that employee, that is a much different case. We don't know, and never did know until we took her deposition, who this person was and the fact that she was the ex-girlfriend. All we know was what she claims.

So, I think there is a distinction there, but I appreciate the Court's argument. I just wanted to note there's a distinction there and I'm not trying to second-guess the Court --

THE COURT: I don't disagree with you. It isn't the best analogy. It was just an example or a whatever off the top of my head.

I had thought about, and I'll let you -- I had thought about also the billing records in order to confirm who is -- who has knowledge on this. So, I certainly think in order to verify what -- who knew what and when, that you should be turning over, and that's both, -- well, actually it really doesn't -- I'm trying to think of it, it needs to be the new counsel because, I hate to say it, but it goes back. The first -- Mr. Jones, that this is, as I said, the most troubling, although taking over and seeing this, again, you collectively either are intentionally ignoring 16.1 or have a totally inappropriate version of what turning over all information means. And I am shocked that you could take the position that it should be delayed until you investigate. And, so, anyway, I will require the billing records also and, so, I'll give you 30 days to turn that over to me. I don't see any new argument that needs to be made. So, -- and I will do a written decision and order.

I can tell you at the very least that Ms. Espinoza, her depo, her testimony is all going to be stricken. Any reference to her, she's out. It's -- that's the most minimal and I don't know if that's helpful. Actually, I think it doesn't -- it -- neither side would be beneficial in using her testimony, but she is clearly out. She has clearly tried to profit and whether she has

committed a crime or not is not a decision I need to make at this time, but her testimony and anything -- any reference to her testimony is all going to be stricken.

Again, I will review all of the options once I get the information. So, unless there's anything else -- and that will be -- we'll have to do a written order. I'm guessing two weeks after I receive the information.

MR. ODOU: Your Honor, Joel Odou for the defendants.

I had a question about the scope of what we are required to produce, with the Court's indulgence. Just bear with me.

THE COURT: Go ahead.

MR. ODOU: The Court said communications from the date of Ms. Espinoza's e-mail until the date of her deposition and I wanted to make sure I understood that. Is that all communications that the Court is asking for? In other words, if there is a report that says: Hey, the trial date has been moved. Do you still want that as part of this review?

THE COURT: I -- again, I don't think it's appropriate for counsel go through that and, yes, if -- I can't imagine that it would be that voluminous. So, all communications of any kind, e-mail, etcetera, a report, whatever. You know, yes.

MR. ODOU: Okay. Thank you, Your Honor.

THE COURT: It's going to be there, but I'm not going to read it because it's not important, but I cannot imagine that we're talking an incredible amount of paperwork, but it -- whatever it is and then -- and, as I said, communications from the defendant and from the carrier to any counsel. And, of course, those are confidential and only to be turned over to me in-camera.

MR. ODOU: Thank you, Your Honor. I wasn't trying to argue, I just wanted to make sure --

THE COURT: No. I get it. I get it that there's going to be some absolute superfluous, unimportant communications in this regard, but it certainly -- this way I will be the one filtering and, should there be something of consequence, we'll have to worry about sealing that or whatever, as a Court's Exhibit.

THE CLERK: Okay. Thirty days would be -- oh, Judge. Thirty days will be November 2nd. That's going to fall on a Monday because of holidays and things coming up. And, then, it will be set in-chambers for November 19th for a decision.

THE COURT: All right. Thank you.

MR. DRUMMOND: Thank you, Your Honor.

MR. KANE: Thank you, Your Honor.

MR. ODOU: Thank you, Your Honor.

THE COURT: All right. Have a good day.

PROCEEDING CONCLUDED AT 10:49 A.M.

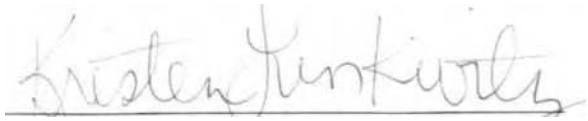
* * * * *

CERTIFICATION

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

AFFIRMATION

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



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Maikel Perez-Acosta, Plaintiff(s)	CASE NO: A-18-772273-C
vs.	DEPT. NO. Department 28
Jaime Salais, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual; ROLANDO BESSU HERRERA, an individual; Plaintiffs, *vs.*	Case No. A-18-772273-C Dept. No. 28

Case Number: A-18-772273-C

JAIME ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES 1-V; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

RESPONSE TO "MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS"

We are all officers of the court and respect the attorney-client privilege. But defendants misapprehend or overlook a few points. First, by asserting that defendants themselves "did not know of" Nancy Espinoza during the year they withheld her statements, defense counsel waived the privilege as to all communications surrounding her statements and the subject matter therein. Second, they misstate "the issue at hand." The sanctionable conduct goes beyond withholding Espinoza's statements per se; defendants tried to sandbag plaintiffs with a new *fraud defense* for which they hoped Espinoza would be a star witness. Third, it must be clear that defendants cannot have it both ways. If defendants and the liability carrier elect not to waive the privilege relating to their awareness of defense counsel's contact with a purported whistleblower and his efforts to build a fraud defense around her before revealing them to plaintiffs, then they forego any mitigating consideration as to whether they would be unjustly punished for defense counsel's conduct.

I.

BY ASSERTING THAT DEFENDANTS SALAIS AND TOM MALLOY CORP. "DID NOT KNOW OF...MS. ESPINOZA," THEY HAVE WAIVED THE PRIVILEGE AS TO ALL COMMUNICATIONS RELATING TO A FRAUD DEFENSE

The Court issued this order to produce the communications (including billing records) because defense counsel's representations to the Court put them at issue. Defendants represented:

> "Defendants Jaime Salais and Tom Malloy Corp. did not know of or have contact with Ms. Espinoza, and vice-versa. As such, the Defendants were incapable of concealing information which they did not know about, much less willfully and intentionally doing so."

("Defendant's Supplemental Opposition to Plaintiff Rolando Bessu Herrera's Motion to Strike Defendants Answer," at 9:21.) They repeated that notion continuously and frequently with a weasel word: defendants did not have "*personal*" knowledge of Espinoza's emails or contact with her. (*Id*. at 3:15 ("Defendants themselves had no personal knowledge of Ms. Espinoza's emails and never had any communications with her whatsoever."); *Id*. at 6:2 ("Defendants Jaime Salais and Tom Malloy Corp. never had any personal knowledge of Ms. Espinoza's emails or communications concerning the case."); Aff. of Todd Alan Jones, filed Aug. 11, 2020 at 5:24 ("Defendants Jamie Salais and Tom Malloy Corp. never had any personal knowledge of Ms. Espinoza's emails or purported information concerning the case.").) And they argued that "defendants' lack of personal knowledge alone regarding Ms. Espinoza is a complete basis for denying Plaintiff's Motion to Strike." (Supp. Opp. at 8:10-15.)

In light of defense counsel's affirmative representations and insinuations that their clients were unaware that (1) defense counsel was contacted by a person alleging plaintiffs had staged this accident and were exaggerating and misattributing their symptoms, and (2) counsel was withholding the email statements from plaintiff's counsel in order to build up a fraud defense around the purported anticipated testimony, defendants have waived the attorney-client privilege as to all communications on these topics.

The Nevada Supreme Court has explained that "the attorney-client privilege was intended as a shield, not a sword." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995) (internal quotation marks omitted). Where a party relies upon a communication or lack thereof

with their attorney, the party waives the privilege as to communications on that subject matter. "The at-issue waiver doctrine applies where the client has placed at issue the substance or content of a privileged communication." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 380, 399 P.3d 334, 345 (2017). Parties are not permitted to "seek[]an advantage in litigation by revealing part of a privileged communication." *Id.* That applies to the privilege over attorney work product, as well. *Id.* In other words, the defendants cannot make representations to this Court regarding what they knew or did not know based on communications with defense counsel and then hide behind the privilege when the Court compels them to substantiate their assertions.

II.

DEFENDANTS CONTINUE TO MISAPPREHEND THE ERROR OF THEIR WAYS AND "THE ISSUE AT HAND"

In their motion to reconsider, defendants repeat a notion that reveals a misapprehension of their sanctionable conduct, contending "the issue at hand" concerns only the statements of Nancy Espinoza herself and any potential trial testimony from her. (*See, e.g.,* Mot. to Reconsider at 10:15-18, 11:1-12.) They still don't get it.

The problem is not limited to the person of Nancy Espinoza or whether she testifies. It includes the entire fraud defense they spent a year trying to develop in secret, for which they hoped she would be a star witness, depriving plaintiffs of the time in discovery to rebut it. As defense counsel admit in their supplemental opposition to the motion strike the answer:

> Defendants' counsel when presented with unverified and questionable information from Ms. Espinoza initially claiming a fraudulent accident, *worked to investigate* and verify *the purported information* provided by Ms. Espinoza, without success. This initial 9-month investigation period was believed by defense counsel to fall under the protection of work-product as it required counsel to investigate and analyze . . . the veracity and reliability of Ms. Espinoza's communications . . . It was only once Defendant's counsel was able to verify Ms. Espinoza's claims

> in late February and early March 2020 that Plaintiff Herrera was . . . [allegedly] faking or exaggerating his injuries, that Defendants' counsel had a reasonable basis to believe Ms. Espinoza's information was potentially credible and she may be a witness.

(Supp. Opp., at 3:17 to 4:1, *see also* at 10:22, 11:3 (emphasis added).) That purported "information" from Espinoza included both *allegations* of a staged accident and that plaintiffs' medical conditions were preexisting. (*See* email chain attached as exhibit "B" to Affidavit of Jones Alan Jones, filed Aug. 11, 2020.) When defendants ambushed plaintiffs with Espinoza's emails during Espinoza's deposition, they actually were dropping an entirely new fraud defense at the end of discovery.

The precious time of discovery is not just for defendants' benefit. Plaintiffs too are entitled to that time to prepare to rebut defendants' defenses. Indeed, this is why Rule 8 requires defendants to list all defenses in their answers. Litigants must be transparent about theories and defenses early, so that evidence and expert testimony can be developed during discovery to rebut them. Ironically, defendants' rationale for withholding the documents shows why the decision was no technical mishap. When defendants finally revealed these emails at the Espinoza deposition, they sprang not just documents; they sprang a *new defense* at the end of the discovery period. Thus, this discovery abuse violated the letter and spirit of NRCP 16.1, as well as the underlying purpose of the discovery phase of litigation.

III.

DEFENDANTS CANNOT HAVE IT BOTH WAYS: IF THEY SEEK REFUGE BEHIND THE PRIVILEGE, THEY WAIVE ANY MITIGATING CONTENTION THAT STRIKING THE ANSWER WOULD UNFAIRLY PENALIZE CLIENTS

Assuming, arguendo, that defendants have not waived the privilege already, defendants must recognize the ramification of electing to claim refuge in the privilege. They forego any mitigating defense that striking defendants answer would "unfairly operate to penalize a party for the misconduct of his or her attorney[.]" *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Here, again, defendants contend that striking the answer would be unjust because defendants themselves had no "personal" knowledge of Espinoza's emails:

> It is worth repeating that it is undisputed that the Defendants themselves-neither Jaime Salais and Tom Malloy Corp. had any personal knowledge of and/or contact with Nancy Espinoza at any point. By extension, it was literally impossible for the Defendants to have deliberately engaged in any deceptive discovery practices involving Ms. Espinoza. The Defendants' lack of personal knowledge alone regarding Ms. Espinoza is a complete basis for denying Plaintiff's Motion to Strike.

(Supp. Opp. to Mot. to Strike, at 8:10.)

To begin with, it warrants repeating that defendants miss the point. The sanctionable conduct is not limited to Espinoza's emails per se, but rather includes the strategic decision to withhold a purported whistleblower's statement in order to develop an undisclosed defense around that anticipated witness until the end of discovery. So, the statement in the opposition strikes at a strawman. There is no denial that both defendants and the carrier were aware of the situation and at least complicit in the strategy.

More importantly, the cagey statement was designed to imply that defendants and the carrier were unaware of the situation even generally. That

is highly unlikely,[1] which probably is why the Court has issued the order to produce communications. Put simply, *defendants are not entitled to have their allusions to client ignorance taken at face value*. The Court is right to probe the veracity of that claim. And if defendants choose to prevent the Court from testing the veracity of their contention by hiding behind the attorney-client privilege, then they must be deemed to have waived the dubious argument that striking the answer would unjustly punish defendants for a decision solely of defense counsel.

Dated this 4th day of November, 2020.

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[1] It is very unlikely that a defense attorney would receive a call from a purported whistleblower claiming that plaintiffs' entire theories of liability and damages are based on "fraud" and not pass it on to the commercial client (whose engaged corporate counsel attended the company's PMK deposition) and insurance company that retained him, along with a plan of action for developing admissible evidence and a defense around that theme. And it is extremely unlikely they would not have been in the loop on timing the disclosure of that communication.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2020, service of the above and foregoing "Response to 'Motion for Reconsideration of Order for Production of Defense Correspondence and Billing Records'" was made upon each of the parties via electronic service through the Eighth Judicial District Court's Odyssey E-file and Serve system.

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, individually, ROLANDO BESSU HERRERA, individually,

Plaintiffs,

v.

JAIME ROBERTO SALAIS, individually, TOM MALLOY CORPORATION, aka/dba TRENCH SHORING COMPANY, a foreign corporation, DOES I through V, inclusive, and ROE CORPORATIONS I through V, inclusive,

Defendants.

Case No. A-18-772273-C
Dept. No.: 28

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME

Hearing Date: November 17, 2020
Hearing Time: 11:00 a.m.

Defendants JAIME ROBERTO SALAIS and TOM MALLOY CORPORATION (collectively "Defendants"), through their counsel, the Law Firm of Wood Smith Henning & Berman, LLP, submit their Reply in Support of Motion for Reconsideration of Order for Production of Defense Correspondence and Billing Records. This Reply is made and based upon the following Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument the Court may hear on this matter.

DATED this 10th day of November, 2020

WOOD, SMITH, HENNING & BERMAN LLP

By */s/ Nicholas F. Adams*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Maikel Perez-Acosta and Rolando Bessu Herrera (collectively "Plaintiffs") argue that Defendants have waived all privileged communications regarding a "fraud defense." Response, pp. 2:23-4:10, on file. However, privilege was never waived or even placed at issue. As such, disclosure to this Court of every single communication made between counsel for the defendants and their client is not proper, especially in light of the fact that the correspondence sought by the Court contains counsel's mental impressions and trial strategy.

Further, review of billing records and privileged communications will not assist this Court's determination regarding the level of sanctions to be imposed, if any, especially in light of the fact that Defendants Jamie Salais and Tom Malloy Corp. did have not had any contact with Espinoza or "personal knowledge of [her] emails or purported information concerning the case." Affidavit Pursuant to NRS 53.045 of Todd Jones, Esq. filed in support of Supplemental Opposition to the Motion to Strike, Paragraph 20, on file August 11, 2020. Even if this Court is still inclined to obtain more information regarding Defendants' knowledge regarding the email communications with Espinoza, there are less intrusive means by which the Court can obtain such information without reviewing privileged materials. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 90-91, 787 P.2d 777, 778 (1990) (district court conducted full evidentiary hearing before issuing sanctions).

Accordingly, since Defendants did not waive privilege, and correspondence sought would not assist this Court's determination regarding the level of sanctions to be imposed, Defendants respectfully seek the Court's reconsideration to ensure protection of the sanctity of the attorney-client privilege and protected attorney work product.

II. LEGAL ARGUMENT

A. Plaintiffs Misapply the At-Issue Waiver Doctrine

Plaintiffs do not argue that all the communications and billing records sought by this Court are not privileged, nor do they contend that a Court cannot compel a waiver of the privilege even for *in camera* review. *See generally* Response. Nevertheless, Plaintiffs do argue (improperly and without any support) that the communications regarding a "fraud defense" are not privileged because

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Defendants have placed those communications at issue, and thus, warrants disclosure under the at-issue waiver doctrine. Response, pp. 2:23-4:10, on file. The at-issue wavier doctrine, however, does not apply.

To explain, the at-issue waiver doctrine applies when a client places "at issue the substance or content of a privileged communication." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 369, 380, 399 P.3d 334, 345 (2017) (citations omitted). A client places the privileged communication at issue when they assert a claim or defense, and attempt "to prove that claim or defense by disclosing or describing an attorney client communication." *Id.* quoting *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 863 (3d Cir. 1994). ." "[A] client only waives the [attorney-client] privilege by expressly or impliedly injecting his attorney's advice into the case." *Id. Bertelsen v. Allstate Ins. Co.,* 796 N.W.2d 685, 703 (S.D. 2011); *See Roehrs v. Minn. Life Ins. Co.,* 228 F.R.D. 642, 646 (D. Ariz. 2005) (deciding that the attorney-client privilege was waived in a bad faith action when claims adjusters testified in deposition that they "considered and relied upon, among other things, the legal opinions or legal investigation" in decision making).

Here, Plaintiffs claim that Defendants' assertion that they did not have personal knowledge concerning Espinoza or her emails places Defendants' privileged communications at issue which is nonsensical. Response, pp. 3:1-4:10. A statement regarding a lack of personal knowledge does not describe or disclose any attorney client communications. In effect, Defendants have not described or disclosed an attorney client communication to place it at issue. Even if Defendants state that they had a conversation about Espinoza, this is not enough to waive the privileged communications between them and counsel because they must disclose or describe the communication itself. *United States v. O'Malley,* 786 F.2d 786, 794 (7th Cir. 1986) ("A client does not waive his attorney-client privilege 'merely by disclosing a subject which had discussed with his attorney'"; rather, "[i]n order to waive the privilege, the client must disclose the communication with the attorney itself"). In essence, Defendants' assertions about their lack of personal knowledge concerning Espinoza or her emails does not waive the attorney client privilege and the scope of the proposed inquiry, every communication made from the time of the e-mail to the time of the depositions, is over-broad and unlikely to contribute anything to the analysis other than to prejudice the Defendants beyond repair.

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Plaintiffs also argue that Defendants "dropp[ed] an entirely new fraud defense at the end of discovery" and that they are entitled to discovery on Defendants' affirmative defenses. Response, pp. 4-5. They claim they were deprived of the opportunity to rebut this defense. Both these points are untrue. First, Defendants' affirmative defenses from the inception of this case include that plaintiffs' medical conditions were pre-existing and the defense that defendants were not at-fault for causing this accident. *See* Answer on file. Second, it cannot be overstated that witness Nancy Espinoza was equally available to both Plaintiffs and Defendants during discovery. She was even in a dating relationship with Plaintiff Rolando Bessu Herrera. Thus, Plaintiffs' argument that Defendants "withheld" defenses in this case is flat wrong. Defendants should not be sanctioned for the decision by Plaintiffs to not interview or depose this witness or otherwise conduct discovery on Defendants' affirmative defenses.

B. By Seeking to Uphold the Attorney Client Privilege, Defendants are Not Waiving Any Mitigation Arguments Under *Young*

Plaintiffs contend that Defendants by seeking to uphold the attorney client privilege are waiving their right to any mitigating arguments under *Young.* Response, pp. 6:1-7:8. However, there is no case law that supports such an assertion. Nevertheless, even if the requested communications and billing records are produced to this Court, the documents would not provide assistance to the Court with its determination regarding the degree of sanctions to be imposed.

As this Court is aware, the Supreme Court of Nevada recently held that in determining the degree of willfulness of the offending party under *Young*, a district court should determine whether the offending party committed the offensive act "*with the intent to harm another party*." *MDB Trucking, LLC v. Versa Products Company, Inc.*, 136 Nev. Ad. Op. 72 (Nov. 2020) quoting *Bass-Davis v. Davis*, 122 Nev. 442, 452, 134 P.3d 103, 109 (2006). Simply being "complicit of benign neglect" or indifferent towards the other parties' discovery needs does not meet this high standard. *Id.*

Here, Defendants Jamie Salais and Tom Malloy Corp. did not have any contact with Espinoza or "personal knowledge of [her] emails or purported information concerning the case" (paragraph 20). Affidavit Pursuant to NRS 53.045 of Todd Jones, Esq., in support of the

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Supplemental Opposition to the Motion to Strike, filed by Defendants on August 11, 2020. By extension, it was impossible for Defendants to engage in deceptive discovery practices regarding the Espinoza emails, much less with the intent to harm Plaintiffs. Accordingly, the production of billing records and communications from April 2019 to October 2020 will not assist this Court in its determination regarding the willfulness of Defendants' actions regarding the Espinoza emails.

III. CONCLUSION

Based on the forgoing and the Motion for Reconsideration, Defendants respectfully seek the Court's reconsideration of its order to produce attorney-client communications to ensure protection of the sanctity of the attorney-client privilege and protected attorney work product.

DATED this 10th day of November, 2020

WOOD, SMITH, HENNING & BERMAN LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2020, a true and correct copy of **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

By */s/ Michelle Ledesma*
Michelle N. Ledesma, an Employee of
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A-18-772273-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**November 17, 2020**

A-18-772273-C Maikel Perez-Acosta, Plaintiff(s)
vs.
Jaime Salais, Defendant(s)

November 17, 2020 11:00 AM **Defendants' Motion For Reconsideration Of Order For Production Of Defense Correspondence And Billing Records On Order Shortening Time**

HEARD BY: Israel, Ronald J. COURTROOM: RJC Courtroom 15C

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Craig W. Drummond	**Attorney for Plaintiff**
Joel D. Henriod	**Attorney for Plaintiff**
Joel D. Odou	**Attorney for Defendant**
Michael C Kane	**Attorney for Plaintiff**
Todd A. Jones	**Attorney for Defendant**

JOURNAL ENTRIES

Court noted the issue regarding cumis counsel. Mr. Odou noted he was counsel for the insurance and there is no cumis counsel. Mr. Odou further noted Mr. David Lee present by video, as personal counsel for Mr. Jones due to the reputational issues to be considered. Colloquy regarding cited cases and similar cases. Arguments by Mr. Odou in support of the Motion. Mr. Odou noted the Deft. was not aware of the actions of Counsel and referred to the Mr. Jones Affidavit. Mr. Odou noted there was no waiver of Attorney Client Privilege and clarified the issue being no communication and not as to the advice of counsel. Court noted it appears this action was taken to benefit the Defendant to ambush the witness. Colloquy regarding disclosures. Court referred the Court's order as Counsel was to turn over the documents in-camera. Mr. Odou argued the documents are highly privileged. Mr. Henriod argued against the motion and agreed with the court. Mr. Henriod argued that the Deft. cannot have it both ways. Mr. Odou argued and referred to the cited case Young v. Ribeiro relating to issues of sanctions. Court noted Counsel must choose if the actions are from the Defendant or actions of Counsel and stated the concealment of information. Court questioned if the Defendants intent was to take advantage as they waited to bring out the evidence until the deposition as an ambush. Court will allow supplemental briefs. COURT ORDERED, Briefing Schedule: Deft's Brief by 12/01/2020, State's Brief by 12/15/2020 and Decision to be Set in Chambers.

Mr. Drummond inquired if Mr. Henroid reviewed everything or is his argument just from Mr. Jones Affidavit. Court noted this is preliminary issue. Mr. Odou advised he relied on Mr. Jones Affidavit. Court noted the decision will be determined in Chambers.

01/07/2021 (CHAMBERS) DECISION: INTERIM DECISION

A-18-772273-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**November 19, 2020**

A-18-772273-C Maikel Perez-Acosta, Plaintiff(s)
vs.
Jaime Salais, Defendant(s)

November 19, 2020	**Chambers**	**Motion to Strike**	**Plaintiff Rolando Bessu Herrera's Motion to Strike Defendants' Answer**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

PARTIES
PRESENT: None

JOURNAL ENTRIES

- Upon review, Matter RESET, to follow the Court's interim decision of Defendant's Motion to Reconsider.

02/04/2021 (CHAMBERS) PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANT'S ANSWER

CLERK'S NOTE: A copy of this minute order was e-served to counsel. kt 11/19/2020.

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, individually, ROLANDO BESSU HERRERA, individually,

Plaintiffs,

v.

JAIME ROBERTO SALAIS, individually, TOM MALLOY CORPORATION, aka/dba TRENCH SHORING COMPANY, a foreign corporation, DOES I through V, inclusive, and ROE CORPORATIONS I through V, inclusive,

Defendants.

Case No. A-18-772273-C
Dept. No.: 28

DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER PURSUANT TO COURT'S ORDER ON NOVEMBER 17, 2020

Date of Hearing: January 7, 2021
Time of Hearing: In Chambers

Defendants JAIME ROBERTO SALAIS and TOM MALLOY CORPORATION (collectively "Defendants"), through their counsel, the Law Firm of Wood Smith Henning & Berman, LLP, submit their Supplemental Opposition to Plaintiff Rolando Bessu Herrera's Motion to Strike Defendants' Answer Pursuant to Court's Order on November 17, 2020. This Supplemental Opposition is made and based upon the following Memorandum of Point and Authorities, all papers and pleadings on file herein, and any oral argument the Court may hear on this matter.

DATED this 1st day of December, 2020

WOOD, SMITH, HENNING & BERMAN LLP

/s/ Joel D. Odou

By _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The advice of counsel defense is an affirmative defense that can be raised by the client in order to show that their position or actions were reasonable because of their reliance on the advice. *See Rhone–Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 863 (3d Cir. 1994); *see also Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992). When the advice of counsel defense is raised, the party who raised the defense waives attorney-client privilege with regard to subject matter that was placed at issue. *See Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs,* 60 F.3d 867, 883–84 (1st Cir. 1995); *Chevron Corp.*, 974 F.2d at 1162-63. Here, the advice of counsel defense has not been expressly or impliedly raised and as such, attorney-client privilege has not been waived. Further, assuming such a waiver took place, a broad request for all billing records and communications from the time of the first Espinosa email until October 2020 goes beyond the subject matter that was waived. Especially when there are less intrusive means by which this Court can obtain the limited scope of information related to the Espinosa emails.

II. RELEVANT PROCEDURAL HISTORY

Plaintiffs filed a Motion to Strike Defendants' Answer due to the alleged failure to timely produce information allegedly helpful to the defense regarding communications with Plaintiff Rolando Bessu Herrera's former girlfriend, Nancy Espinoza. Defendants maintained that these communications were privileged, and this Court has over-ruled that objection. The Plaintiffs' Motion to Strike was briefed by counsel, a supplemental brief was filed by attorney Jones, and a hearing was held on October 12, 2020. At the hearing, the Court took the issue under consideration but preliminarily ordered that Ms. Espinoza will not be allowed to testify at trial. The Court further ordered Defendants to produce privileged materials *in camera*, including attorney correspondence and attorney billing records that were not the subject of the briefing for production. *See*, Order to Turn Over Communications and Records In Camera (A-18-7722273-C), filed October 16, 2020.

Based on the Court's Order to turn over attorney correspondence and attorney billing records, Defendants filed a Motion for Reconsideration on October 26, 2020 arguing that such information was privileged and not subject to disclosure. After the Motion for Reconsideration was fully briefed,

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a hearing took part on November 17, 2020. At the hearing, this Court stated Defendants' arguments regarding their lack of knowledge of defense counsel's actions constituted the advice of counsel defense. See Transcript of Proceedings re Motion for Reconsideration, pp. 4:10-5:19, dated November 17, 2020, attached hereto as **Exhibit "A."** Moreover, this Court requested supplemental briefing regarding the narrow issue of whether an election needs to be made regarding turning over privileged materials. *Id.* at 17:18-18:20. More specifically, this Court stated that if privilege was raised and materials were not turned over then it may be assumed that Defendants had "knowledge and/or agreed to defense counsel's actions." Exhibit A, p. 5:8-19.

III. ARGUMENT

A. Advice of Counsel Defense Has Not Been Raised and It Does Not Apply

As a general rule, a party impliedly waives the attorney-client privilege when it expressly relies on the advice of counsel as a defense to a claim against it. *Spargo v. State Farm Fire & Cas. Co.*, No. 216CV03036APGGWF, 2017 WL 2695292, at *4 (D. Nev. June 22, 2017) citing *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 369, 380, 399 P.3d 334, 345 (2017). More specifically, privilege is waived when the client has taken the affirmative step to place the advice of the attorney at issue by attempting to prove the "claim or defense by disclosing or describing an attorney client communication." *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 863 (3d Cir. 1994); *Chevron Corp.*, 974 F.2d 1156 (party's claim that its tax position was reasonable because it was based on advice of counsel puts advice in issue and waives privilege); *See also Roehrs v. Minn. Life Ins. Co.,* 228 F.R.D. 642, 646 (D. Ariz. 2005) (deciding that the attorney-client privilege was waived in a bad faith action when claims adjusters testified in deposition that they "considered and relied upon, among other things, the legal opinions or legal investigation" in decision making).

In this matter, Defendants have never stated that they decided to disclose the Espinoza emails at a later stage because they were advised by counsel to do so.

In fact, Defendants have consistently stated that **at no time did** "…[D]efendants Jamie Salais and Tom Malloy Corp. have any contact with Ms. Nancy Espinoza, whether via phone, electronic or in person communications." Affidavit Pursuant to NRS 53.045 of Todd Jones, Esq.

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filed in support of Supplemental Opposition to the Motion to Strike, Paragraph 20, on file August 11, 2020. Further, counsel stated as follows:

> "I did not disclose the emails received from Ms. Espinoza after receipt of such emails in April 2019 as in my professional judgment, I questioned the veracity and the motive for the information being provided in the emails, wherein Ms. Espinoza demanded that she be paid for her information. Upon telling Ms. Espinoza that my office and my clients were barred from paying her for her information, she ceased any substantive communications with me for a period of approximately 9 months. This refusal to cooperate for the balance of 2019 further confirmed my strong suspicions about the veracity and reliability of her communications with me. At no time, did I intentionally withhold the disclosure of Ms. Espinoza or her emails in order to thwart discovery requirements. In fact, I made every effort possible to vet Ms. Espinoza as a possible witness because this information would have been helpful, not hurtful, to my case. It was not until late February/early March 2020 that I finally obtained information to corroborate Ms. Espinoza's information related to Plaintiff Herrera's physical condition. She was disclosed immediately thereafter,"

Id. at Paragraph 22.

As such, Defendants have not relied upon the advice of counsel defense as no advice was given as to the disclosure of the e-mail and witness.

B. Assuming *Arguendo* that the Advice of Counsel Defense Applies, Privilege is Only Waived With Respect to the Subject Matter at Issue

When a client waives the attorney-client privilege under the advice-of-counsel exception, she only waives privilege to the extent of the subject matter she placed at issue. *See Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs,* 60 F.3d 867, 883–84 (1st Cir. 1995); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992); *Wynn Resorts, Ltd.*, 133 Nev. at 381, 399 P.3d at 345; *Wardleigh,* 111 Nev. at 354–55, 891 P.2d at 1186; *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 53, 796 N.W.2d 685, 703.

Assuming *arguendo* that Defendants have invoked the advice of counsel defense, the only subject matter that was waived was the alleged decision to not immediately produce the e-mail received from Nancy Espinoza when it was received and before her identity and connection to the information alleged therein, was known. It should be recalled, that Ms. Espinoza's identity was not only known to Plaintiff, it was unknown to Defendants when the e-mail was received. Specifically, she was more than a casual girlfriend of Plaintiff's, he lived with her and spoke to her the day of the

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accident, yet he never disclosed her to Defendants until after his deposition. Defendants, on the other hand, received an unsolicited e-mail from someone claiming to have a connection to the case, and that same person declined all further contact when their counsel refused to pay her and then attempted to verify her identity and story for months.

The Court's request for all billing records and communications from the first Espinosa email (April 28, 2019) until October 16, 2020 goes well beyond an alleged decision to not timely disclose this contact by Defendants, and into subject matters that have not been waived, such as counsel's analysis of treating physicians, experts, analysis of damages, likely jury pool, evaluation of witnesses, potential issues with regard to upcoming hearings and trial, trial strategies, potential issues subject to appeal, and many more areas that are contained within communications between Defendants and counsel. *C.f. Valley Health Sys., LLC v. Estate of Doe by & through Peterson*, 134 Nev. 634, 637, 427 P.3d 1021, 1026 (2018), *as corrected* (Oct. 1, 2018) (evidentiary hearing held before issuing sanctions on narrow issue of whether (1) case-terminating sanctions were appropriate, (2) it was defendant's intention to thwart the discovery process, and (3) defendant misled the court); *C.f. also Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 90-91, 787 P.2d 777, 778 (1990) (district court conducted evidentiary on narrow issue regarding fabrication of evidence before issuing sanctions); *C.f. also* Decision and Order (A-13-691375-C), filed July 21, 2017 (evidentiary hearing held on narrow issue raised by advice of counsel defense). Although the purpose of the Court's inquiry is narrow, i.e. if the Defendants participated in the alleged untimely disclosure of Ms. Espinoza and her e-mail, the information that will be provided is vast and it is more likely than not that this Court will come across information that may have an impact at a later stage of the case when the Court is asked to rule on issues involving procedure, admissibility of evidence, jury instructions, and even counsel's strategy in questioning witnesses.

This Court, if it reviews these reports and evaluations, will potentially be influenced by how counsel evaluated every issue discussed in the reports. This will prejudice Defendants because the bell cannot be un-rung. If waiver is presumed by this Court, then less intrusive means could be employed in order to obtain information related to the narrow subject matter that was waived such as if the Court requires a supplemental declaration from Defendants that they did not elect to disclose

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or not disclose Ms. Espinoza and her e-mail.

IV. CONCLUSION

Based on forgoing, this Court should find that the advice of counsel defense was never raised and that as a result the attorney client privilege was never waived. If, however, this Court is to find that the advice of counsel defense applies, this Court should employ a less intrusive means to obtain the information related to the narrow subject matter that the Court deems waived.

DATED this 1st day of December, 2020

WOOD, SMITH, HENNING & BERMAN LLP

/s/ Joel D. Odou

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2020, a true and correct copy of **DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFF ROLANDO BESSU HERRERA'S MOTION TO STRIKE DEFENDANTS' ANSWER PURSUANT TO COURT'S ORDER ON NOVEMBER 17, 2020** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

By */s/ Raeann M. Todd*

Raeann M. Todd, an Employee of
WOOD, SMITH, HENNING & BERMAN LLP

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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

MAIKEL PEREZ-ACOSTA, ROLANDO BESSU HERRERA, Plaintiffs, vs. JAIME ROBERTO SALAIS, TOM MALLOY CORPORATION, Defendants.	)	CASE NO. A-18-772273 DEPT. NO. XXVIII **Transcript of Proceedings**

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER FOR PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS ON ORDER SHORTENING TIME

TUESDAY, NOVEMBER 17, 2020

SEE APPEARANCES ON PAGE 2

RECORDED BY: JUDY CHAPPELL, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

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

Case Number: A-18-772273-C

APPEARANCES:

(ALL VIA VIDEOCONFERENCE)

For the Plaintiffs: CRAIG W. DRUMMOND, ESQ.
JOEL D. HENRIOD, ESQ.
MICHAEL KANE, ESQ.

For the Defendants: TODD A. JONES, ESQ.
JOEL D. ODOU, ESQ.
NICHOLAS ADAMS, ESQ.

For Mr. Jones: DAVID LEE, ESQ.

TUESDAY, NOVEMBER 17, 2020 AT 11:01 A.M.

THE CLERK: We have everyone present and ready to go on BlueJeans.

THE COURT: Okay. A772273, *Maikel Perez-Acosta versus Jaime Salais*. Counsel, state your appearance.

MR. DRUMMOND: Craig Drummond for the plaintiff.

MR. HENRIOD: Joel Henriod for plaintiffs.

MR. KANE: Michael Kane for plaintiffs.

MR. ODOU: Good morning, Your Honor. Joel Odou for all of the defendants.

MR. JONES: Good morning, Your Honor. Todd Jones for all of the defendants.

MR. ADAMS: Good morning, Your Honor. Nicholas Adams for all of the defendants.

THE COURT: Okay. So, this is on yet again. They -- and I need to figure out who -- for the defendant, the -- who is the current defense counsel and is corporate counsel on? Has there been a Cumis counsel appointed? What's -- who are -- what's the difference?

MR. ODOU: Yes, Your Honor. Joel Odou from Wood Smith. We are insurance appointed defense counsel. We have taken over the case from Mr. Jones. Mr. Jones was -- he is still part of the case and representing the defendants while we resolve this issue. There is no Cumis

or corporate counsel. David Lee is present as well in court today on behalf of Mr. Jones.

THE COURT: No one's present in court.

MR. ODOU: Online. Sorry, Your Honor.

THE COURT: Oh, okay. I'm sorry. He is here for who?

MR. ODOU: David Lee is here on behalf of Mr. Jones, due to the reputational nature of the issue being considered.

THE COURT: Oh, okay. All right. So it's clear, back in March or April, I -- the first hearing on this, I suggested, if you will, that because there was an issue brought up in a similar type occurrence, that corporate counsel should be at least apprised of this. Potentially there was a conflict, so Cumis counsel should be considered. And, at our last hearing, -- well, actually, in the pleadings, defendant objected to the striking of the Answer, specifically based on the fact that defendant, not defense counsel, was not aware of defense counsel's actions.

Now, that -- unless I -- and I've had this before. That's the defense of advice of counsel. If defendant is seeking to do this, and in our last meeting it was clear defendants -- defense counsel argued that the defendant was not aware of these actions and, therefore, as one of the

major considerations in the -- and, actually, I forget which -- in the cases from the State Supreme Court that if defendant is not aware of any of these irregularities, then they shouldn't be held responsible. That is -- and I'm looking for the case, but I can't remember offhand. Anyway, we're all aware of the cases on sanctions, etcetera.

So, that was a major point brought out at the last. I said: Okay. If that's the case, then you need to prove that. My -- and when I say that, I'm talking about that if you're using advice of counsel, then you have to waive the attorney-client privilege. I'm not sure I spoke those words at that hearing, but I believe at the very first hearing we -- I mentioned that. So, we're here and, on the Motion for Rehearing, now defense counsel has raised the issue that attorney-client privilege. If that is the case, and that's fine, then they are -- the defendant is assumed to have knowledge and/or agreed to defense counsel's actions.

This took place over, I believe it's 10 months, but it's something in that area. So, I need to know now, today, on the record: Is defense counsel on behalf of the defendant raising the attorney-client privilege, which will take out/void, I -- several other synonyms I could use. You will not be able to raise the defense, the objection,

for the defendant that they were not aware of these actions.

So, counsel.

MR. ODOU: Thank you, Your Honor. Joel Odou on behalf of the defendants.

The issue, as set forth in Mr. Jones's affidavit, filed with the Court back in August, was that the defendants were unaware of any communications that he had or didn't have with Ms. Espinoza. And, under the *Upjohn versus United States* case, United States Supreme Court, it talks about the attorney-client privilege and the attorney-client privilege not being waived when there is an absence of a communication. And, so, there has been no waiver of the attorney-client privilege.

And our Supreme Court clarified, on November 5th, the standard for sanctions in the *MDC* case, in particular addressed the issue of intent. And, in this particular instance, there has been no communication because the client was not aware of the nondisclosure, wasn't their intent, and there can be no intent to harm, which is what the *MDC* case says.

And to answer Your Honor's request very directly, it's not advice of counsel. It is the actual absence of communication from the client to the attorney ratifying or attempting to take advantage of, which is what the Court

was asking about last time, the nondisclosure of plaintiff's girlfriend. In particular, Your Honor, the *MDC* case, --

THE COURT: I read the *MDC* -- I read it and, yes, it's barely -- there are some issues that are point here, but it's not a case that -- it talks about sanctions. The one issue that it does talk about is the intentional, and whether it benefits the defendant, the actions taken by the counsel. And, on that, I certainly think, and I'll put that in my Findings of Fact, that this action was taken absolutely to benefit the defendant in the deposition. There's no doubt that it was done to basically -- you know, void all the discovery in order to -- and I can't even think of the word, but to basically surprise the witness and defense counsel and -- ambush. So, that issue is from the new case, important, because that's exactly -- that's the only purpose of this.

But to get back to where I was, I believe you're asking me that if defense counsel says they weren't aware, that's it. So, you don't have to prove that, you don't have to show any evidence of that other than defense counsel's affidavit? And, in every discovery motion, we would have to take counsel's, plaintiff or defendant's, word for it and that's it. Is that what you're arguing?

MR. ODOU: In theory, Your Honor. What I'm saying

is advice to counsel defense would be that the counsel received -- that the counsel provided the client some advice and they acted upon that advice. Here, there was no action because they were unaware.

And, so, -- and, then, to answer Your Honor's second question about whether I'm asking the Court to rely upon Mr. Jones's affidavit, yes. But I recognize the Court has the ability, if the Court is unsatisfied with that affidavit, to ask for an additional affidavit from the -- in this case, the insured, clarifying that, yes, they had no knowledge. And, if that's what the Court would like, we can certainly provide that.

THE COURT: So, once again, the -- if one side says it's so, I'm supposed to and they're supposed to, meaning the plaintiffs, take your word for it. I can tell you, and I'll give you -- I believe I referred to the case I had where I -- the plaintiffs requested discovery and depositions under very similar facts where defense counsel and the defendant -- there was an issue as to what they knew and when. And that's the case that went to the Supreme Court and was upheld. I don't think they published it, but it had to do with very similar facts where the plaintiff argued defendant actually not only was aware of and -- but participated in some of the discovery abuses. And it was only because of discovery that a lot of the

information was available.

So, yet again, I have to ask you, you're saying we have to take your word. I'm going to ask the plaintiffs what they -- but I don't get it.

MR. ODOU: Well, Your Honor, again, the -- if the Court is asking for an affidavit saying Mr. Jones is not lying and that there was no communication, that could be provided. I am -- I took over this case in April of 2020 and I am unaware of any communication from the insured as to this issue. I -- what the Court has asked was us to produce every status report from the time that that e-mail back in April of 2019 up and through her deposition, regardless of what was in that status report, and those attorney-client communications we had argued are privileged and actually not responsive. So, if the Court is asking for a less intrusive way to confirm what Mr. Jones put in his affidavit in August, we could get an affidavit from Trent Shoring [phonetic] saying they did not communicate with Ms. Espinoza, etcetera.

Moreover, again, this case is distinguishable from either of the other cases and the information that was withheld was potentially beneficial to the defense and this witness was known to plaintiff and should have been identified by the plaintiff.

THE COURT: Well, for the record, and I don't know

all of the details and the facts of the deposition, but I think your argument is, and I tend to use examples that are somewhat extreme, but you're saying that if I was in a car accident I have to disclose all my girlfriends for the last, I don't know, five years? And, quite frankly, that seems -- well, I have to say ridiculous. I don't know what their relationship -- and I guess there is some difference in the fact that they may have been together at the time of the accident, but, again, I certainly don't know that.

My Order was that these documents would be turned over in-camera. So how does that violate attorney-client privilege?

MR. ODOU: It does, Your Honor. The cases that we cited discuss that and the fact that it is basically a waiver of the attorney-client privilege by turning over these reports, these are our reports from the attorney to the client discussing all aspects of the case. And they are highly confidential. They are exactly why you hire an attorney. You hire an attorney to tell you about the case and what they knew about the case and what investigation they're going to do, what their trial strategies are. You ask them about the jury panel they're going to get. These are comprehensive documents that address everything but the issue at hand, which is whether or not there was an intentional, strategic decision to withhold this witness to

gain some sort of litigation advantage that was ratified by the client.

And, again, that has been covered by Mr. Jones's affidavit and it could be covered by a supplemental affidavit if the Court found that Mr. Jones's affidavit was insufficient.

THE COURT: All right. Let's hear from the plaintiff.

MR. HENRIOD: Joel Henriod on behalf of plaintiffs.

Judge, I think you're right. I think they have an election to make. I am concerned about the notion that defendants have been cleared here. I think when you actually -- when you read what's actually been filed, there is very particular verbiage use. Frequently, the adjective, personal, comes up: personal knowledge. They didn't have personal knowledge of the e-mails. They never personally communicated with Ms. Espinoza. I don't know what exactly that's supposed to mean. I'm afraid that what it means is that they were aware that somebody -- some purported whistleblower had called Mr. Jones, had reached out to Mr. Jones, that she had this explosive knowledge about a staged accident and that defendants were exaggerating their symptoms. And that defense counsel was working to corroborate, working to find other evidence that

would go to this fraud theory while they were also developing a way to bring her into the case.

And my big concern about this is it's not just her, it's that they were using that time to do their investigation, build up their fraud case, depriving us of the time during discovery to rebut. I do find it inconceivable that they would not have passed that on to the carrier and to a sophisticated client.

And, today, I also hear that the issue is communications from the client. Well, the issue wouldn't just be communications from the client. It would also be from the attorney to the client. If the attorneys inform the client that they have this potential whistleblower or that they were working to develop a testimony from her and a case fraud defense to build up around her and they knew about that, then they were complicit. At the very least, they were complicit. And I think if they knew and were complicit, then, that alone would be enough for the mitigating *Young versus Ribeiro* factor to not apply.

I am concerned that while there is this particular language being used, there is an intent to imply a broader notion. And this actually goes to the way that the Court characterized it. I think what they want to do is imply that the carrier and the client weren't even in the loop on this. And, now, I think it's a request to supplement yet

again with declarations from the carrier and from the client. But, again, what I hear being offered there is that they didn't have personal knowledge or personal contact with Espinoza. What I don't hear, even now, is any denial that they were apprised of Ms. Espinoza's allegations, of Ms. Espinoza's offer, of Ms. Espinoza's -- of the gravamen of Espinoza's potential testimony.

And without that, I don't even know what we're talking about because if they're not denying that the carrier and the client were at least apprised of that, then that means they were complicit in it. But I think there is an election to make because I take the privilege as seriously as anyone and I recognize that the language they've used has been a little wheezily, in my opinion. Right? The personal knowledge. I'm not sure exactly what it means; but if they don't want to corroborate that there was the absence of communication, then they are electing to do that. They are electing to remain silent on that. And, if they are electing to not corroborate that absence of communication, then they are foregoing the mitigating factor under *Young versus Ribeiro*.

And that's only a factor. It wouldn't be dispositive for them, even if there weren't this communication. But they can't have it both ways.

THE COURT: And there's another plaintiffs'

counsel?

MR. HENRIOD: So, I'm speaking on behalf of all of them.

THE COURT: Oh, okay.

MR. HENRIOD: I've associated into the case with Mr. Drummond for Rolando Bessu Herrera and also with Mr. Kane for Maikel Perez-Acosta.

THE COURT: All right. Fine. Mr. Odou, response.

MR. ODOU: Your Honor, that's why the *MDC* case is important because I'm not conceding they were complicit, I'm just taking Mr. Henriod's argument further, which is he says: Well, they're complicit. Well, the *MDC* case uses that exact language to say that's not enough. There must be an intent to harm. And, yes, the *MDC* case is a destruction of evidence case, but that's really what they're arguing to the Court. They're saying that this evidence was lost because her e-mails were not timely turned over to the Court and, therefore, they've been prejudiced. Well, complicity is not enough under *MDC* and that's why that case is important. It's also important for a number of other reasons and it's -- it sets them forth.

In addition, maintaining the attorney-client privilege is not waiving a defense. It's not: You're going to have to make an election here. That is not the case and that is not what we're doing. What we're saying

is --

THE COURT: I think that is the caselaw, that you can't have it both ways. And I think -- I'll let you supplement your brief, but I think that absolutely is the caselaw, that if you're saying your client wasn't aware and you're -- and, thank you, for *Young versus Ribeiro*. That's a -- it's a main factor. It's not exclusive. I mean, they go through, I think, 10, but it is one factor and certainly it's important not to sanction a defendant if the actions were, if you will, perpetrated by counsel. So -- but, in all the cases, including the one as I said, it was: You have to make a choice. And saying, I didn't get anything, without -- you know, it does seem suspicious. You answered -- or not you, the prior counsel, I believe my recollection is there was updates of discovery and this was never mentioned. So, there is that issue of concealment. We discussed that, I think, twice now.

And, so, you're, I guess, arguing, well, if we say it's so, it's so. Well, that's exactly what the argument you made was, well, we wanted to -- and not you, sorry. Prior counsel: We wanted to make sure this woman was real or truthful or whatever, and so that's why we didn't say anything.

So, I am -- you know, there is -- credibility is important and just saying -- what about his argument that

you're saying, basically, well, we -- the -- I forgot the words that were alleged -- that were supposedly used in the affidavit. But, anyway, go on. Address that.

MR. ODOU: Yes, Your Honor.

THE COURT: We weren't personally aware or something to that effect.

MR. ODOU: Yeah, so Mr. Henriod was critical because there's no personal knowledge of the clients of Ms. Espinoza. But that's not the only thing that was in Mr. Jones's affidavit. Mr. Jones's affidavit, as the Court noted the last time, he fell on his sword and he said: Yeah. I blew it. In paragraph 22, he said -- I don't know if the Court has it front of him, but, in paragraph 22: I did not disclose the e-mails that I received. Because, in his professional judgment, he wanted to investigate the validity of them.

And, again, the plaintiffs' theory here is that this was an intent to harm. Mr. Jones has laid forth the facts that show this was an intent, wrongly, the Court's already ruled on that, to figure out what does this mean and how does this fit in the case. Moreover, there was no communication from Ms. Espinoza from April through December, where she dropped off the planet after Mr. Jones refused to pay her for her testimony. So, they can't do that. That was the very first communication to her.

And, so, again, under the *Ribeiro* factors and under the *MDC* case, there has to be an intent to harm. It has to be more than negligent failure to disclose. It has to be a --

THE COURT: I believe it says an intent to take advantage that would be harmful to the other side, and that's exactly what took place. The defense counsel, by waiting until the depo to bring this out, was clearly attempting to sandbag, if you will, or ambush, whatever, the plaintiffs' counsel in this deposition; that, oh, well, if she doesn't testify the way we -- she talked about it first, then we're going to use this. And that's exactly what the new case says: If it was done to take advantage of their position in detriment to the opposing side.

And there is no doubt in my mind that this was done to sit there and put the document in front of her and say, you know: Well, didn't you do this? That's exactly what took place. So, we -- I'll certainly discuss that, but I still have not seen and I'll let you -- I'll give you one week to supplement where the -- our Supreme Court -- I think you have to make a choice. As I've said, that's what happened in the unpublished case I had. They had to make a choice, that they decided to do the reliance, if you will, and I allowed, and the Supreme Court upheld the discovery, including, so you understand, taking the deposition of

defense counsel. So, the Supreme Court was well aware because they heard it and there's a written opinion. So, I can't imagine that if they thought that was -- well, sure that was raised. So, anyway, I think it's one way or the other. You can't have it both ways.

Now, again, it's only one of the probably 10 or a dozen factors in *Young*, but it is an important factor. I agree you cannot, should not be sanctioning a defendant for actions of defense counsel.

So, anyway, all right. I'll give defendants one week to supplement on that issue, otherwise -- and I'll rule on that in chambers. I'll give the plaintiffs a week to respond. So, three weeks in chambers, I'll do a decision on this issue. It's only interim because it doesn't resolve all of that, but I want to -- again, and by the way, that other case, it took well over a year to go through all of this. But I think it has to be documented and done properly and hopefully -- well, I guess I did because they agreed, but that's exactly what I want to do on this issue.

All right. One week, Kathy.

MR. ODOU: Your Honor, --

THE COURT: What's that?

MR. ODOU: Your Honor, can we have two weeks since next week is Thanksgiving?

THE COURT: Oh, yes. That's fine. Two weeks and --

MR. ODOU: Thank you.

THE COURT: All right. Two weeks, because you're not going to get a trial for quite some time because of Covid, so there's really no hurry.

MR. DRUMMOND: Your Honor, this is Craig Drummond for the plaintiff. I just have one question. Is -- and it's up to Your Honor to clarify this or not to clarify this, but is Mr. Odou representing that he's reviewed all the previous correspondence in this case, because I know he is new to the case? He came on in April, but is he representing that he's reviewed all of it and this is his representation to the Court or has he not reviewed it?

THE COURT: Well, I don't know. Again, as I said, my understanding of all the caselaw is it's one way or the other and that's the, I guess, preliminary issue. If that is, in fact, the case, then they need to make a choice and we'll go from there.

MR. DRUMMOND: Yes, Your Honor. I just would -- I just wasn't clear from the previous representations on it if he'd actually reviewed it or if he's relying upon Mr. Todd Jones's affidavit.

THE COURT: Well, all right. What's the answer to that question?

MR. ODOU: Our argument was relying upon Mr. Jones's affidavit. I can say I've seen no communications from Trent Shoring to anyone on this topic.

MR. DRUMMOND: As well as the carrier? Sir, as well as the carrier? Just so that we're representing things honestly to the Court, to the carrier as well?

MR. ODOU: I don't want to get into communications that are attorney-client privilege. I just was --

MR. DRUMMOND: Your Honor, --

MR. ODOU: -- trying to answer your question.

MR. DRUMMOND: Okay.

THE COURT: All right. All right. Two weeks.

THE CLERK: Okay. Two weeks for defendants would be December 1st. Did the plaintiff want two weeks or one --

THE COURT: Yeah. Give them two weeks.

THE CLERK: -- week after that?

THE COURT: We're in no --

THE CLERK: Two weeks? That would be December 15th. And, then, --

THE COURT: Probably --

THE CLERK: -- I could --

THE COURT: -- a week after that, at least, --

THE CLERK: It will be January.

THE COURT: I'll -- in chambers.

THE CLERK: That is the dark weeks.

THE COURT: Oh, whatever. What do you mean the dark weeks? All right. Then two weeks after that.

THE CLERK: Christmas. Yes.

THE COURT: Whatever.

THE CLERK: Yeah. It would be January. January 7th.

THE COURT: It's only going to be an interim on that issue and we'll deal with that. Okay. Thank you.

THE CLERK: Okay. So, it's just for decision and then, if it's only part of it, is that part of the motion or is that decision on the entire motion?

THE COURT: Part of the original motion. Yes.

THE CLERK: So, what should I do with the motion? Should I just --

THE COURT: What, this Motion for Reconsideration?

THE CLERK: Right.

THE COURT: It's granted in part and denied in part.

THE CLERK: Okay. Okay.

THE COURT: All right. Thank you.

THE CLERK: And then we'll put a decision. Okay. Thank you.

THE COURT: All right. Have a good day.

MR. ODOU: Thank you.

MR. HENRIOD: Thank you, Your Honor.

MR. DRUMMOND: Thank you, Your Honor.

MR. JONES: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 11:36 A.M.

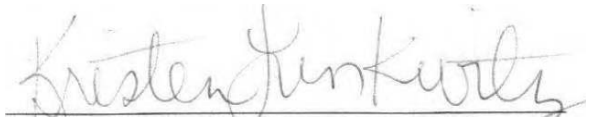
* * * * *

CERTIFICATION

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

AFFIRMATION

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



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DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual; ROLANDO BESSU HERRERA, an individual; Plaintiffs, *vs.*	Case No. A-18-772273-C Dept. No. 28

4P.App.922

JAIME ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES 1-V; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

RESPONSE TO DEFENDANT'S "SUPPLEMENTAL OPPOSITION" TO PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' ANSWER

Defendants argument effectively is this: (1) a party cannot be sanctioned for the discovery misconduct of its attorney; (2) to avoid any sanction, the offending attorney need only imply that his client was unaware of the attorney's wrongful conduct; and (3) the non-offending party and the Court must accept the implication of client ignorance as true because the attorney-client privilege prevents verification. The position is absurd. The cases defendants cite in their new supplement do not validate that argument. And defense counsel's inconsistent representations about what the clients allegedly didn't know, as well as their reductive characterization of the discovery dispute itself, only highlight why self-serving declarations are insufficient.

I.

THE CASES CITED ARE INAPPOSITE

This Court gave defendants leave to submit yet another supplemental brief to substantiate the argument they made during the November 17, 2020 hearing—*to wit*, the Court must accept as true any affirmative representations from the offending attorney that certain information does not appear in his correspondence with his clients, because verifying it would entail violation of the attorney-client privilege. According to defendants, while affirmative representations about what information is in the correspondence file results in waiver of the attorney-client privilege, affirmative representations about what

4P.App.923

is not in the correspondence file cannot waive the privilege and therefore are untestable.

None of the authorities cited in the supplemental brief support that argument. First, the defendants cite cases holding that disclosure of information conveyed between attorney and client will result in waiver of the attorney-client privilege regarding that issue in all conversations and documents relating to the subject matter. *See Wynn Resorts, Limited v. Eighth Judicial Dist. Ct.*, 133 Nev. 369, 380, 399 P.3d 334, 345 (2017); *Wardleigh v. Second Judicial Dist. Ct.*, 111 Nev. 345, 354-55, 891 P.2d 1180, 1186-87 (1995); *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867 (1st Cir. 1995). That's certainly accurate. But it does not follow that only representations about what is in the correspondence will waive the privilege as to that communication. None of the authorities hold that a party can make affirmative representations that certain communications are devoid of particular information and then hide behind the attorney-client privilege to prevent that representation from being tested by disclosure of such correspondence. In either event, the party making an affirmative representation about the correspondence—be it what is or is not included therein—"seeks and advantage in litigation by revealing part of a privileged communication." *Wardleigh*, 111 Nev. at 354, 891 P.2d at 1186. And, in either event, "the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." *Id.* Here, the subject matter that defendants partially disclosed is the nature of the correspondence itself between the attorney and client, what it does or does not contain.

Second, defendants cite to opinions and orders regarding the imposition of sanctions for the proposition that discovery is limited. (Supp. Opp. at 6.) Here

again, that's true as far as it goes. But no one is saying that defense counsel must disclose the entirety of their file. None of the authorities support the concept that a non-offending party can rest so heavily on affirmative representations about the nature of the *correspondence* between the attorney and client and then be immune from disclosure of the documents necessary to probe the veracity and fulsomeness of that representation. The correspondence file is at issue.

Third, none of the cases suggest that a party may avoid sanctions by affirmatively claiming the attorney went rogue by engaging in conduct unbeknownst to the client yet be shielded from disclosing the correspondence in which information about the misconduct likely would have been relayed to the client. None of defendants' cases justify having it both ways.

I.

DEFENDANTS CONTINUE TO PLAY GAMES, AND IT WOULD BE FAIR FOR THE COURT TO MOVE ON

The Court has bent over of backwards to enable defendants to actually demonstrate the potential mitigating factor that striking the answer would somehow "operate to penalize a party for the misconduct of his or her attorney." *See Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). They have squandered that opportunity by declining to put forward a fulsome and candid record. And the Court is justified to find they already have waived any right to make that showing and proceed to rule on the motion to strike defendants' answer.

A. Parties are Responsible for the Actions of their Attorneys

This tangent over privilege waiver regards only one factor in the analysis regarding the propriety of striking defendants' answer. It is a "factor" that the Court "may properly include." *Young*, 106 Nev. at 93, 787 P.2d 780. It is not an element that must be satisfied.

As a general matter, ultimate sanctions may be appropriate even when culpability lies with the attorney. Attorneys are agents who bind their clients by the actions they take and representations they make. *See Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 434 (2014) ("an attorney's act is considered to be that of the client in judicial proceedings when the client has expressly or impliedly authorized the act"), *citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396–97 (1993) (noting that in a representative litigation system, "clients must be held accountable for the acts and omissions of their attorneys"). In *Huckabay Props*., for example, the Nevada Supreme Court held that a party's failure to file a brief on time warranted dismissal of the appeal even though the client was unaware of the failure. As the Supreme Court explained "[a]s for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions." *Huckabay Props.*, 322 P.3d at 437-38. In other words, the client is presumed to be responsible for the attorney's misconduct and omissions absent extraordinary circumstances.

The Court has given defendants every opportunity to demonstrate substantively that this is an extraordinary circumstance in which the client is so fault free that striking the answer would be unjust. Defendants have chosen to not to do so.

B. In Light of Defense Counsel's Cagey Representations with Sweeping Insinuations, We Cannot Be Satisfied with More Declarations

Defendants suggest that it would suffice for them merely to provide another self-serving "declaration from Defendants that they did not elect to disclose or not disclose Ms. Espinoza and her email." (Supp. Opp. at 6:26.) Yet

defendants have already spent any credibility that would be necessary to take such declarations at face value.

First, while defense counsel's affidavit repeated the conspicuously precise representation that defendants themselves had no "*personal* knowledge" or direct "communication" with Ms. Espinoza herself, rhetoric in the briefs seems designed to create a broader impression that defense counsel had not even relayed the fact of his communication about this purported whistleblower to clients or the substance of that communication:

> "Defendants Jaime Salais and Tom Malloy Corp. ***did not know of*** or have contact with Ms. Espinoza, and vice-versa. As such, the Defendants were incapable of concealing information which they did not know about, much less willfully and intentionally doing so."

(*See, e.g*, "Defendant's Supplemental Opposition to Plaintiff Rolando Bessu Herrera's Motion to Strike Defendants Answer," at 9:21.) That's disingenuous.

At the hearing on November 17th, defendants went further, claiming that "as set forth in Mr. Jones's Affidavit, filed with the Court back in August . . . defendants were unaware of any communications that he had or didn't have with Ms. Espinoza." (Nov. 17, 2020 Tr. at 6:4 (emphasis added).) Current defense counsel, Joel Odou, implied the clients had "no knowledge" about the communications with Ms. Espinoza whatsoever. (*Id*. at 8:5.) He also claimed that he personally had not seen any "communications ***from*** (defendant) Trent Shoring ***to*** anyone on this topic." (*Id*. at 20.) Yet, he did not deny the existence of correspondence to the client and insurance carrier from defense counsel, in which he likely would have informed them *at least* that he received communication from a would-be informant (Ms. Espinoza), the substance of that statement from her, and his efforts to investigate and build-up a fraud defense around the substance of her statement before turning it over to

plaintiffs.[1] Moreover, even though Mr. Odou had just stated that Mr. Shoring never sent a written communication to defense counsel regarding Ms. Espinoza, Mr. Oduo declined to affirm that he had read the entire correspondence file. (*Id.* at 19:7 to 20:3.) And when he was pressed on whether he had seen any correspondence between defense counsel and the *insurance carrier* who is funding and directing the defense, he suddenly pivoted to "I don't want to get into communications that are attorney-client privilege." (Id. at 20:7.) They only want to disclose what suits them.

Now, in the recent supplemental opposition, defendants again play fast and loose. First, they return to the narrow terminology that that "Defendants have consistently stated that at no time did "…[D]efendants Jamie Salais and Tom Mallyey Corp. have any *contact with Ms. Nancy Espinoza*, whether via phone, electronic or in person communication'." (Supp. Opp. at 4:26 (emphasis added).) And they include a quotation from Mr. Jones' affidavit with precise language about his decision to withhold the statement *from plaintiffs' counsel*. (Id. at 5:2.) But they summarize these prior statements broadly to insinuate that Mr. Jones also withheld the fact and substance of Ms. Espinoza's communication from *their client and the insurance carrier* (even though his affidavit never indicated that): "As such, Defendants have not relied upon the advice of counsel defense as no advice was given as to the disclosure of the e-mail and witness." (Id. at 5:13.)

Despite many opportunities, defendants have chosen not to be forthcoming and speak plainly. And the inconsistency thus far requires the veracity of Mr. Jones's affidavit and any new declarations to be corroborated by disclosure of the correspondence file.

[1] Even assuming these sophisticated clients said nothing in response, they would be culpable of acquiescence in the discovery misconduct.

C. Defense Counsel Cling to Reductive Characterizations of the Misconduct, Undermining Trust in their Ability to Identify Relevant Portions of their Correspondence with the Client

Even if defense counsel could be trusted to describe candidly whatever contents of their correspondence *they deem relevant*—which, sadly, is questionable (see above)—they have proven themselves unable recognize what is relevant in the first place. Even in their recent supplemental opposition, they seem to contend that Ms. Espinoza's mere identity as a potential witness is the only thing they were obligated to disclose but did not. (Supp. Opp. at 5:22 to 6:4.) Either defendants still do not grasp the complete gravamen of the issue or they pretend not to. The "issue at hand," as they say, also goes of the substance of allegations in Ms. Espinoza's email statement as well as the entire fraud defense they attempted to build around her throughout the course of discovery without ever telling plaintiff.

Put simply, defendants cannot be trusted to police themselves. The un-redacted correspondence file must be disclosed in camera if defendants insist on pursuing a mitigating defense that the clients knew nothing.

CONCLUSION

Defendants cannot have it both ways. Either they must waive any mitigating *Young* factor that the clients were without fault—*i.e.*, that they were completely unaware their attorney had been contacted by Ms. Espinoza (or anything of the sort) and were ignorant of any decision to delay full disclosure to plaintiff's counsel—or defendants must turn over the correspondence file necessary to corroborate their ambiguous and changing representations. The cases cited in their recent supplemental opposition hold nothing to the contrary.

Alternatively, review of the correspondence file could be referred to another judge to evaluate it impartially. In that event, any referral order would

have to set out the nature of the misconduct in detail and articulate expressly the broad the scope of potentially relevant material in the correspondence.

Dated this 29th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2020, service of the above and foregoing "RESPONSE TO DEFENDANT'S "SUPPLEMENTAL OPPOSITION" TO PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' ANSWER" was made upon each of the parties via electronic service through the Eighth Judicial District Court's Odyssey E-file and Serve system.

/s/ Cynthia Kelley
An Employee of Lewis Roca Rothgerber Christie LLP

A-18-772273-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto	**COURT MINUTES**	**January 07, 2021**

A-18-772273-C Maikel Perez-Acosta, Plaintiff(s)
vs.
Jaime Salais, Defendant(s)

January 07, 2021	**Chambers**	**Decision**	**Decision : Interim Decision Reconsideration of Defendants Production of Defense Correspondence and Billing Records**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

PARTIES
PRESENT: None

JOURNAL ENTRIES

- Court to prepare the order in chambers. Matter CONTINUED for the order.

02/04/2021 (CHAMBERS) DECISION: INTERIM DECISION RECONSIDERATION OF DEFENDANTS PRODUCTION OF DEFENSE CORRESPONDENCE AND BILLING RECORDS

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JUDGE RONALD J. ISRAEL
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 28
Regional Justice Center
200 Lewis Avenue, 15th Floor
Las Vegas, Nevada 89155

DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual; ROLANO BESSU HERRERA, an individual, Plaintiff(s), v. JAMIE ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES 1-V; and ROES CORPORATIONS VI-X, inclusive, Defendant(s).	Case No.: A-18-772273-C Dept.: XXVIII

DECISION AND ORDER

This matter having come before the Court on July 14, 2020, October 1, 2020, and November 17, 2020, CRAIG W. DRUMMOND, ESQ, JOEL D. HENRIOD, ESQ, and MICHAEL C. KANE, ESQ., appearing on behalf of the Plaintiffs; JOEL D. ODOU, ESQ, and TODD A. JONES, ESQ., appearing on behalf of the Defendants, the Court hereby enters the following written Decision and Order:

///

///

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a motor vehicle accident that occurred on July 12, 2016. In the course of discovery, Defendants' attorney Todd Jones received an unsolicited email from Plaintiff Herrera's former girlfriend, Nancy Espinoza, on April 28, 2019. In this email, Ms. Espinoza claims to have knowledge of the cause of the accident and the extent of the Plaintiffs' injuries. Additionally, Ms. Espinoza requested a "finder's fee" for any information she would provide. From April 28, 2019, through March 31, 2020, Ms. Espinoza and Mr. Jones exchanged at least twenty-one emails. It was not until March 12, 2020, that Defendants disclosed Ms. Espinoza as a witness in their seventh 16.1 supplement. For eleven months Mr. Jones handled the case for Defendants until Joel Odou filed a Notice of Association on April 6, 2020, less than one month before Ms. Espinoza's deposition. On April 22, 2020, Ms. Espinoza was deposed and Defendants' counsel disclosed the emails for the first time during the deposition.

Following Ms. Espinoza's deposition, on May 4, 2020, Plaintiffs' counsel filed this Motion to Strike Defendants' Answer. In the Opposition to Plaintiff's Motion to Strike Defendants' Answer, recently associated counsel, Mr. Odou, argued all obligations under NRCP 16.1 were met because the information and documents related to Ms. Espinoza's statements were privileged as work product until her deposition. Opposition, at 7:13–8:21, May 18, 2020. This Court set a hearing for July 14, 2020, where it gave Defense counsel additional time to supplement its Opposition with case law supporting its position that Ms. Espinoza's emails were privileged under the work product doctrine.

On August 11, 2020, Defendants' counsel filed a Supplemental Opposition along with an affidavit from Mr. Jones. In the Supplemental Opposition, Defendants' counsel argues Ms. Espinoza's identity and emails were not likely to be discoverable information under NRCP 16.1. Specifically, they argue "Ms. Espinoza and her emails in April 2019 were of such a suspect and unreliable nature that defendants' counsel determined such information was not likely to be discoverable" and "[d]efense counsel in its professional judgment did not believe Espinoza was likely to have discoverable information." Supplemental Opposition at 6:22–7:2 Aug. 11, 2020. Notably, Defendants' counsel did not address their claim Ms. Espinoza's identity or her emails were protected under the work product doctrine, as was the intent of the Court in allowing them to supplement their opposition.

///

In support of Defendants' Supplemental Opposition, Mr. Jones submitted a sworn affidavit. In his affidavit, Mr. Jones explained that he "questioned the veracity and the motive for the information being provided in the emails." Todd Jones Affidavit at 6:6, Aug. 11, 2020. Mr. Jones continued to communicate with Ms. Espinoza while he attempted to "vet" her claims. *Id.* at 6:14. Despite the fact that Ms. Espinoza claimed to have personal knowledge of the circumstances of the accident and the extent of Plaintiffs' injuries, Mr. Jones waited nearly a year to disclose her as a potential witness. Mr. Jones goes on to claim his clients had no personal knowledge of Ms. Espinoza or her allegations. *Id.* at 5:20.

On October 1, 2020, this Court held another hearing to address Defendants' claims that Ms. Espinoza's emails were protected under the work product doctrine. During this hearing Defendants' counsel admits the use of the word work product "may be a little bit inartful." Recorder's Transcript at 8:20, Oct. 1, 2020. Counsel goes on to reiterate their argument that Ms. Espinoza's identity or allegations were not discoverable while they worked to verify the veracity of her claims. *Id.* at 9–10. The Court admonished Defendants' counsel that it is not up to counsel to make a determination as to the credibility of a witness before she is disclosed. *Id.* at 12:3. Defendants' counsel goes on to argue that sanctions are not appropriate in this case because the Defendants had no knowledge of Ms. Espinoza and Defense counsel was not hiding information to build a case. *Id.* at 17:11.

After hearing argument from counsel, the Court noted the issue of what the individual Defendants actually knew about Ms. Espinoza would be crucial in the Court's decision on sanctions. To avoid sanctioning the individual Defendants for their counsels' conduct, the Court ordered Defendants' counsel to turn over, *in camera*, all communication with their clients from the date Mr. Jones first received an email from Ms. Espinoza.

On October 23, 2020, Defendants filed a Motion for Reconsideration on the Court's October 1 ruling. In their Motion Defendants' counsel argued they could not be compelled to produce confidential communication because attorney client privilege had not been waived. They cite Mr. Jones's affidavit as confirmation that the Defendants had not had any contact with Ms. Espinoza; therefore, the production of communications from Mr. Jones to the Defendants would go beyond the issue at hand. Motion for Reconsideration at 11 Oct. 23, 2020. Additionally, Defendants' counsel argues that this correspondence would not assist the Court in determining appropriate sanctions.

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On November 17, 2020, this Court held another hearing on Defendants' Motion for Reconsideration. At this hearing, Defendants' counsel asserted their communication with their clients were privileged and had not been waived. The Court noted its concerns about being able to assess the Defendants' knowledge of Ms. Espinoza without verification. When asked the question "in every discovery motion, we would have to take counsel's … word for it and that's it. Is that what you are arguing?" Defendants' counsel answered "[i]n theory, Your Honor." Recorder's Transcript at 7, Nov. 17, 2020. Counsel offered to provide additional self-serving affidavits if the Court was not satisfied with Mr. Jones's affidavit. *Id.* at 8. The Court gave Defendants' counsel one week to supplement their briefing on the issue of whether Defendants' counsel could have it both ways by asserting attorney client privilege and denying their clients had knowledge of Ms. Espinoza through self-serving affidavits.

A. Failure to Disclose Ms. Espinoza and her Emails Was an Abuse of Discovery

The Nevada Rules of Civil Procedure require parties to provide the name of each individual likely to have discoverable information under NRCP 26(b), along with a copy or description of all documents that are in the possession, custody or control of the party which are discoverable. NRCP 16.1(a)(1)(A). Here, Ms. Espinoza clearly had discoverable information under NRCP 26(b). She claimed to have personal knowledge of the circumstances surrounding the accident and the extent of the Plaintiffs' injuries. Defendants' counsel provides no support for their argument that an attorney may withhold information and documents required to be disclosed under NRCP 16.1 because he doubts the veracity of their contents. This interpretation is clearly contrary to the plain language of the rule. Accordingly, Defendants' failure to disclose Ms. Espinoza or her email communications is an intentional discovery violation.

B. The *Young v. Ribiero* Factors Weigh Heavily in Favor of Sanctions for Defense Counsels' Misconduct

The Nevada Supreme Court has stated: "Courts by their nature have 'inherent equitable powers to dismiss actions or enter default judgments…for abusive litigation practices.'" *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). When a court does not impose ultimate discovery sanctions such as dismissal, it may hold a

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hearing to consider matters that are important to the imposition of sanctions. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 256, 235 P.3d 592, 600–01 (2010). The district court should exercise its discretion to ensure that there is sufficient information to support these sanctions. *Id.* Further, the district should make its conclusions based on the factors set forth in *Young*. *Id.*

The court in *Young* states which factors are relevant to determine whether to strike an answer. The factors a court might consider include, but are not limited to: 1) the degree of willfulness of the offending party, 2) the extent to which the non-offending party would be prejudiced by a lesser sanction, 3) the severity of the sanction of dismissal relative to the severity of the discovery abuse, 4) whether any evidence has been irreparably lost, 5) the feasibility and fairness alternative, less severe sanctions, 6) the policy favoring adjudication on the merits, 7) whether sanctions unfairly operate to penalize a party for misconduct of his or her attorney, 8) the need to deter both the parties and future litigants from similar abuses. *Young,* 106 Nev. at 93, 787 P.2d at 780.

Here, these factors warrant sanctions in the form of striking the Defendants' Answer as to liability and striking the testimony, deposition, and any fruits of Ms. Espinoza's communication with Defendants' counsel.

1. The degree of willfulness of the offending party

Defense counsel attempts to frame this violation as a lapse in professional judgment; however, the entirety of the record belies this claim. The Nevada Supreme Court has clarified that willfulness "requires an intent to gain a litigation advantage and harm one's party opponent." *MDB Trucking, LLC v. Versa Products Company, Inc.*, 136 Nev. Adv. Op. 72, 475 P.3d 397, 404 (2020). Here, Defendants' counsel clearly attempted to sandbag or ambush Plaintiffs' counsel in Ms. Espinoza's deposition. There is no doubt this was done to take advantage of their position in detriment to the opposing side.

Defendants' counsel argues that the intent requirement in the *MDB* case was not satisfied because the clients were not aware of Ms. Espinoza. The Court gave Defendants' counsel the opportunity to prove this assertion, and absolve their clients of any fault in the

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discovery violation. Instead they chose to invoke attorney client privilege, and insist this Court take them at their word. They make this argument even given their complete lapse in candor to the Court by frivolously claiming the decision was protected under the work product doctrine. The Court is unable to accept this position considering counsel went on to argue "[y]ou hire an attorney to tell you about the case and what they knew about the case and what investigation they're going to do, what their trial strategies are." Recorder's Transcript 11/17/20 at 10. This statement flies in the face of counsel's assertion the individual Defendants were never told of this potential witness.

The Court gave Defendants' counsel another opportunity to support their position that they were entitled to have it both ways, and Defendants filed another Supplemental Opposition on December 1, 2020. In this Supplement, Defendants' counsel cites no authority allowing them to both assert attorney client privilege and claim their clients never had knowledge of Ms. Espinoza or her allegations. As a result, the Court cannot give Defendants the benefits of the doubt when they have presented the Court with only self-serving affidavits.

Finally, Defendants' counsels' revolving door of excuses as to why Ms. Espinoza and her emails were not disclosed further demonstrates this violation was committed willfully and intentionally. Initially, Mr. Jones failed to disclose this information or these documents for the eleven months he worked this case. Next, newly associated counsel, Mr. Odou, argued the emails were protected under the work product doctrine. However, after providing no support for these frivolous assertions he moved onto the argument that the emails were not discoverable, and Mr. Jones was vetting Ms. Espinoza to determine the veracity of her statements. Finally, Defense counsel argues that even if failing to disclose Ms. Espinoza was a discovery violation, their clients didn't know. It is unconscionable for two experienced law firm partners to believe this information should not have been disclosed. Both attorneys decided to intentionally hide evidence supporting a fraud defense to the extreme detriment of the opposing party. As a result, the Court finds Defendants' and their counsels' conduct was

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willful and done with intent to gain a litigation advantage to the detriment of the opposing party.

2. The extent to which the non-offending party would be prejudiced by a lesser sanction

Although this Court is not imposing the ultimate sanction of striking the Defendants' Answer and proceeding to a prove-up hearing, Defendants' counsel still showed a blatant disregard for the discovery process. Defense counsels', and by extension, Defendants' actions were unreasonable. Defense counsels' discovery violations were directly related to their liability defense and imposing a lesser sanction would unfairly prejudice Plaintiffs in this instance.

3. The severity of the sanction relative to the abuse

This Court is striking the defense of liability and allowing the parties to try the case on damages. The severity of the sanction is equal to Defense counsel's needless delay and intentional concealment. These kinds of violations are extremely serious and should not and will not be tolerated by the Court. Additionally, the striking of Ms. Espinoza's testimony is minor in comparison to the violations here.

4. Whether any evidence had been irreparably lost

So far as this Court is aware, there is no evidence that has been lost.

5. The feasibility and fairness of less severe sanctions

This Court is imposing lesser sanctions which are equal to the abuse of the court and discovery process. Defendants sought to conceal information and documents concerning liability, it only seems just to strike the Answer with respect to liability.

6. The policy favoring adjudication on the merits

The Supreme Court favors adjudication on the merits but abusive litigation practices must face sanctions. Under these facts of this case any lesser sanctions would encourage further abuse. Defense counsels' misconduct was willful and thus warrants sanctions.

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7. Whether sanctions unfairly operate to penalize a party for misconduct of his or her attorney

In this case, Defense counsel was given every opportunity to prove their clients did not know of Ms. Espinoza, her emails, or her allegations. However, Defendants' counsel chose to claim attorney client privilege, preventing the Plaintiff from exploring their claims outside of self-serving affidavits. This Court has several years of experience in insurance defense work, and it is hard to fathom that a partner who is advised that a witness became known was not forwarded to the carrier in a monthly bill for over eleven months. Defendants cannot have it both ways and, as discussed previously, have provided no support for this position.

8. The need to deter both parties and future litigants from similar abuses

Defense counsels' misconduct was intentional and serious; therefore, there must be serious and far-reaching sanctions in order to deter Defense counsel from even considering repeating their actions again. Throughout the supplemental briefing, Defense counsel maintains their decision to not disclose Ms. Espinoza was correct. A first-year associate would know this kind of information must be disclosed. Mr. Jones is not a first-year associate, but rather, a partner in a law firm with trial experience. It is imperative that parties know this sort of abuse of the discovery process will not be tolerated.

ORDER

IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration is GRANTED.

IT IS FURTHER ORDERED that Defendants' Answer and Affirmative Defenses on Liability are STRICKEN. The Jury Trial on damages will proceed as scheduled.

IT IS FURTHER ORDERED that witness Nancy Espinoza's testimony is STRICKEN and any information related to her testimony or emails with Defendants' counsel is STRICKEN.

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IT IS FURTHER ORDERED that the October 16, 2020 Order to Turn Over Communication and Records in Camera is STRICKEN.

IT IS FURTHER ORDERED that Plaintiffs are awarded all costs and reasonable attorney's fees for the deposition of Ms. Espinoza and this motion as discovery sanctions. Plaintiffs will submit these bills along with a *Brunzell* affidavit within 14 days of the Entry of this Order and Defendants will have 14 days thereafter to submit any objection. Defendants have 30 days to pay after entry of the Order setting the amount of attorney's fees and costs, given Plaintiffs had to needlessly incur these costs and fees.

Dated this 10th day of February, 2021

Ronald J. Israel

DISTRICT COURT JUDGE
A-18-772273-C B98 0DF AE6E A2AF
Ronald J. Israel
District Court Judge

JUDGE RONALD J. ISRAEL
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 28

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Maikel Perez-Acosta, Plaintiff(s)	CASE NO: A-18-772273-C
vs.	DEPT. NO. Department 28
Jaime Salais, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Decision and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/10/2021

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2/19/2021 8:43 AM
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CLERK OF THE COURT

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Attorneys for Plaintiff Rolando Bessu Herrera

DISTRICT COURT
CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual;
ROLANDO BESSU HERRERA, an individual;

Plaintiffs,

vs.

JAMIE ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES I-V; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

Case No.: A-18-772273-C
Dept. No.: 28

NOTICE OF ENTRY OF FEBRUARY 10, 2021 DECISION AND ORDER

PLEASE TAKE NOTICE that a Decision and Order, was entered in the above-subject matter on February 10, 2021, a copy of which is attached.

DATED this 19th day of February, 2021.

DRUMMOND LAW FIRM, P.C.

By _____
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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9 and Administrative Order 14-2, the undersigned does hereby certify that on this 17th day of February, 2021, service of a true and correct copy of the foregoing **NOTICE OF ENTRY OF FEBRUARY 10, 2021 DECISION AND ORDER** as duly made on all parties herein by causing a copy thereof to be filed and/or served with the Clerk of Court using Odyssey E-File & Serve system, which was served via electronic transmission, sent via facsimile and U.S. mail.

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An Employee of DRUMMOND LAW FIRM

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JUDGE RONALD J. ISRAEL
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 28
Regional Justice Center
200 Lewis Avenue, 15th Floor
Las Vegas, Nevada 89155

DISTRICT COURT

CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual; ROLANO BESSU HERRERA, an individual, Plaintiff(s), v. JAMIE ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES 1-V; and ROES CORPORATIONS VI-X, inclusive, Defendant(s).	Case No.: A-18-772273-C Dept.: XXVIII

DECISION AND ORDER

This matter having come before the Court on July 14, 2020, October 1, 2020, and November 17, 2020, CRAIG W. DRUMMOND, ESQ, JOEL D. HENRIOD, ESQ, and MICHAEL C. KANE, ESQ., appearing on behalf of the Plaintiffs; JOEL D. ODOU, ESQ, and TODD A. JONES, ESQ., appearing on behalf of the Defendants, the Court hereby enters the following written Decision and Order:

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FACTUAL AND PROCEDURAL BACKGROUND

This case involves a motor vehicle accident that occurred on July 12, 2016. In the course of discovery, Defendants' attorney Todd Jones received an unsolicited email from Plaintiff Herrera's former girlfriend, Nancy Espinoza, on April 28, 2019. In this email, Ms. Espinoza claims to have knowledge of the cause of the accident and the extent of the Plaintiffs' injuries. Additionally, Ms. Espinoza requested a "finder's fee" for any information she would provide. From April 28, 2019, through March 31, 2020, Ms. Espinoza and Mr. Jones exchanged at least twenty-one emails. It was not until March 12, 2020, that Defendants disclosed Ms. Espinoza as a witness in their seventh 16.1 supplement. For eleven months Mr. Jones handled the case for Defendants until Joel Odou filed a Notice of Association on April 6, 2020, less than one month before Ms. Espinoza's deposition. On April 22, 2020, Ms. Espinoza was deposed and Defendants' counsel disclosed the emails for the first time during the deposition.

Following Ms. Espinoza's deposition, on May 4, 2020, Plaintiffs' counsel filed this Motion to Strike Defendants' Answer. In the Opposition to Plaintiff's Motion to Strike Defendants' Answer, recently associated counsel, Mr. Odou, argued all obligations under NRCP 16.1 were met because the information and documents related to Ms. Espinoza's statements were privileged as work product until her deposition. Opposition, at 7:13–8:21, May 18, 2020. This Court set a hearing for July 14, 2020, where it gave Defense counsel additional time to supplement its Opposition with case law supporting its position that Ms. Espinoza's emails were privileged under the work product doctrine.

On August 11, 2020, Defendants' counsel filed a Supplemental Opposition along with an affidavit from Mr. Jones. In the Supplemental Opposition, Defendants' counsel argues Ms. Espinoza's identity and emails were not likely to be discoverable information under NRCP 16.1. Specifically, they argue "Ms. Espinoza and her emails in April 2019 were of such a suspect and unreliable nature that defendants' counsel determined such information was not likely to be discoverable" and "[d]efense counsel in its professional judgment did not believe Espinoza was likely to have discoverable information." Supplemental Opposition at 6:22–7:2 Aug. 11, 2020. Notably, Defendants' counsel did not address their claim Ms. Espinoza's identity or her emails were protected under the work product doctrine, as was the intent of the Court in allowing them to supplement their opposition.

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In support of Defendants' Supplemental Opposition, Mr. Jones submitted a sworn affidavit. In his affidavit, Mr. Jones explained that he "questioned the veracity and the motive for the information being provided in the emails." Todd Jones Affidavit at 6:6, Aug. 11, 2020. Mr. Jones continued to communicate with Ms. Espinoza while he attempted to "vet" her claims. *Id.* at 6:14. Despite the fact that Ms. Espinoza claimed to have personal knowledge of the circumstances of the accident and the extent of Plaintiffs' injuries, Mr. Jones waited nearly a year to disclose her as a potential witness. Mr. Jones goes on to claim his clients had no personal knowledge of Ms. Espinoza or her allegations. *Id.* at 5:20.

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After hearing argument from counsel, the Court noted the issue of what the individual Defendants actually knew about Ms. Espinoza would be crucial in the Court's decision on sanctions. To avoid sanctioning the individual Defendants for their counsels' conduct, the Court ordered Defendants' counsel to turn over, *in camera*, all communication with their clients from the date Mr. Jones first received an email from Ms. Espinoza.

On October 23, 2020, Defendants filed a Motion for Reconsideration on the Court's October 1 ruling. In their Motion Defendants' counsel argued they could not be compelled to produce confidential communication because attorney client privilege had not been waived. They cite Mr. Jones's affidavit as confirmation that the Defendants had not had any contact with Ms. Espinoza; therefore, the production of communications from Mr. Jones to the Defendants would go beyond the issue at hand. Motion for Reconsideration at 11 Oct. 23, 2020. Additionally, Defendants' counsel argues that this correspondence would not assist the Court in determining appropriate sanctions.

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On November 17, 2020, this Court held another hearing on Defendants' Motion for Reconsideration. At this hearing, Defendants' counsel asserted their communication with their clients were privileged and had not been waived. The Court noted its concerns about being able to assess the Defendants' knowledge of Ms. Espinoza without verification. When asked the question "in every discovery motion, we would have to take counsel's … word for it and that's it. Is that what you are arguing?" Defendants' counsel answered "[i]n theory, Your Honor." Recorder's Transcript at 7, Nov. 17, 2020. Counsel offered to provide additional self-serving affidavits if the Court was not satisfied with Mr. Jones's affidavit. *Id.* at 8. The Court gave Defendants' counsel one week to supplement their briefing on the issue of whether Defendants' counsel could have it both ways by asserting attorney client privilege and denying their clients had knowledge of Ms. Espinoza through self-serving affidavits.

A. Failure to Disclose Ms. Espinoza and her Emails Was an Abuse of Discovery

The Nevada Rules of Civil Procedure require parties to provide the name of each individual likely to have discoverable information under NRCP 26(b), along with a copy or description of all documents that are in the possession, custody or control of the party which are discoverable. NRCP 16.1(a)(1)(A). Here, Ms. Espinoza clearly had discoverable information under NRCP 26(b). She claimed to have personal knowledge of the circumstances surrounding the accident and the extent of the Plaintiffs' injuries. Defendants' counsel provides no support for their argument that an attorney may withhold information and documents required to be disclosed under NRCP 16.1 because he doubts the veracity of their contents. This interpretation is clearly contrary to the plain language of the rule. Accordingly, Defendants' failure to disclose Ms. Espinoza or her email communications is an intentional discovery violation.

B. The *Young v. Ribiero* Factors Weigh Heavily in Favor of Sanctions for Defense Counsels' Misconduct

The Nevada Supreme Court has stated: "Courts by their nature have 'inherent equitable powers to dismiss actions or enter default judgments…for abusive litigation practices.'" *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). When a court does not impose ultimate discovery sanctions such as dismissal, it may hold a

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hearing to consider matters that are important to the imposition of sanctions. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 256, 235 P.3d 592, 600–01 (2010). The district court should exercise its discretion to ensure that there is sufficient information to support these sanctions. *Id.* Further, the district should make its conclusions based on the factors set forth in *Young*. *Id.*

The court in *Young* states which factors are relevant to determine whether to strike an answer. The factors a court might consider include, but are not limited to: 1) the degree of willfulness of the offending party, 2) the extent to which the non-offending party would be prejudiced by a lesser sanction, 3) the severity of the sanction of dismissal relative to the severity of the discovery abuse, 4) whether any evidence has been irreparably lost, 5) the feasibility and fairness alternative, less severe sanctions, 6) the policy favoring adjudication on the merits, 7) whether sanctions unfairly operate to penalize a party for misconduct of his or her attorney, 8) the need to deter both the parties and future litigants from similar abuses. *Young,* 106 Nev. at 93, 787 P.2d at 780.

Here, these factors warrant sanctions in the form of striking the Defendants' Answer as to liability and striking the testimony, deposition, and any fruits of Ms. Espinoza's communication with Defendants' counsel.

1. The degree of willfulness of the offending party

Defense counsel attempts to frame this violation as a lapse in professional judgment; however, the entirety of the record belies this claim. The Nevada Supreme Court has clarified that willfulness "requires an intent to gain a litigation advantage and harm one's party opponent." *MDB Trucking, LLC v. Versa Products Company, Inc.*, 136 Nev. Adv. Op. 72, 475 P.3d 397, 404 (2020). Here, Defendants' counsel clearly attempted to sandbag or ambush Plaintiffs' counsel in Ms. Espinoza's deposition. There is no doubt this was done to take advantage of their position in detriment to the opposing side.

Defendants' counsel argues that the intent requirement in the *MDB* case was not satisfied because the clients were not aware of Ms. Espinoza. The Court gave Defendants' counsel the opportunity to prove this assertion, and absolve their clients of any fault in the

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discovery violation. Instead they chose to invoke attorney client privilege, and insist this Court take them at their word. They make this argument even given their complete lapse in candor to the Court by frivolously claiming the decision was protected under the work product doctrine. The Court is unable to accept this position considering counsel went on to argue "[y]ou hire an attorney to tell you about the case and what they knew about the case and what investigation they're going to do, what their trial strategies are." Recorder's Transcript 11/17/20 at 10. This statement flies in the face of counsel's assertion the individual Defendants were never told of this potential witness.

The Court gave Defendants' counsel another opportunity to support their position that they were entitled to have it both ways, and Defendants filed another Supplemental Opposition on December 1, 2020. In this Supplement, Defendants' counsel cites no authority allowing them to both assert attorney client privilege and claim their clients never had knowledge of Ms. Espinoza or her allegations. As a result, the Court cannot give Defendants the benefits of the doubt when they have presented the Court with only self-serving affidavits.

Finally, Defendants' counsels' revolving door of excuses as to why Ms. Espinoza and her emails were not disclosed further demonstrates this violation was committed willfully and intentionally. Initially, Mr. Jones failed to disclose this information or these documents for the eleven months he worked this case. Next, newly associated counsel, Mr. Odou, argued the emails were protected under the work product doctrine. However, after providing no support for these frivolous assertions he moved onto the argument that the emails were not discoverable, and Mr. Jones was vetting Ms. Espinoza to determine the veracity of her statements. Finally, Defense counsel argues that even if failing to disclose Ms. Espinoza was a discovery violation, their clients didn't know. It is unconscionable for two experienced law firm partners to believe this information should not have been disclosed. Both attorneys decided to intentionally hide evidence supporting a fraud defense to the extreme detriment of the opposing party. As a result, the Court finds Defendants' and their counsels' conduct was

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willful and done with intent to gain a litigation advantage to the detriment of the opposing party.

2. The extent to which the non-offending party would be prejudiced by a lesser sanction

Although this Court is not imposing the ultimate sanction of striking the Defendants' Answer and proceeding to a prove-up hearing, Defendants' counsel still showed a blatant disregard for the discovery process. Defense counsels', and by extension, Defendants' actions were unreasonable. Defense counsels' discovery violations were directly related to their liability defense and imposing a lesser sanction would unfairly prejudice Plaintiffs in this instance.

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This Court is striking the defense of liability and allowing the parties to try the case on damages. The severity of the sanction is equal to Defense counsel's needless delay and intentional concealment. These kinds of violations are extremely serious and should not and will not be tolerated by the Court. Additionally, the striking of Ms. Espinoza's testimony is minor in comparison to the violations here.

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5. The feasibility and fairness of less severe sanctions

This Court is imposing lesser sanctions which are equal to the abuse of the court and discovery process. Defendants sought to conceal information and documents concerning liability, it only seems just to strike the Answer with respect to liability.

6. The policy favoring adjudication on the merits

The Supreme Court favors adjudication on the merits but abusive litigation practices must face sanctions. Under these facts of this case any lesser sanctions would encourage further abuse. Defense counsels' misconduct was willful and thus warrants sanctions.

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7. Whether sanctions unfairly operate to penalize a party for misconduct of his or her attorney

In this case, Defense counsel was given every opportunity to prove their clients did not know of Ms. Espinoza, her emails, or her allegations. However, Defendants' counsel chose to claim attorney client privilege, preventing the Plaintiff from exploring their claims outside of self-serving affidavits. This Court has several years of experience in insurance defense work, and it is hard to fathom that a partner who is advised that a witness became known was not forwarded to the carrier in a monthly bill for over eleven months. Defendants cannot have it both ways and, as discussed previously, have provided no support for this position.

8. The need to deter both parties and future litigants from similar abuses

Defense counsels' misconduct was intentional and serious; therefore, there must be serious and far-reaching sanctions in order to deter Defense counsel from even considering repeating their actions again. Throughout the supplemental briefing, Defense counsel maintains their decision to not disclose Ms. Espinoza was correct. A first-year associate would know this kind of information must be disclosed. Mr. Jones is not a first-year associate, but rather, a partner in a law firm with trial experience. It is imperative that parties know this sort of abuse of the discovery process will not be tolerated.

ORDER

IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration is GRANTED.

IT IS FURTHER ORDERED that Defendants' Answer and Affirmative Defenses on Liability are STRICKEN. The Jury Trial on damages will proceed as scheduled.

IT IS FURTHER ORDERED that witness Nancy Espinoza's testimony is STRICKEN and any information related to her testimony or emails with Defendants' counsel is STRICKEN.

///

///

4P.App.953

IT IS FURTHER ORDERED that the October 16, 2020 Order to Turn Over Communication and Records in Camera is STRICKEN.

IT IS FURTHER ORDERED that Plaintiffs are awarded all costs and reasonable attorney's fees for the deposition of Ms. Espinoza and this motion as discovery sanctions. Plaintiffs will submit these bills along with a *Brunzell* affidavit within 14 days of the Entry of this Order and Defendants will have 14 days thereafter to submit any objection. Defendants have 30 days to pay after entry of the Order setting the amount of attorney's fees and costs, given Plaintiffs had to needlessly incur these costs and fees.

Dated this 10th day of February, 2021

Ronald J. Israel

DISTRICT COURT JUDGE
A-18-772273-C B98 0DF AE6E A2AF
Ronald J. Israel
District Court Judge

JUDGE RONALD J. ISRAEL
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 28

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Maikel Perez-Acosta, Plaintiff(s)	CASE NO: A-18-772273-C
vs.	DEPT. NO. Department 28
Jaime Salais, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Decision and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/10/2021

Michelle Ledesma	mledesma@wshblaw.com
Joel Odou	jodou@wshblaw.com
Bradley Myers	Brad@the702firm.com
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Quinn Dube	qdube@mvjllp.com
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Venessa Patino	vpatino@adamskutner.com
Joel Henriod	jhenriod@lrrc.com
Jessie Helm	jhelm@lrrc.com
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David McConnell	DMcConnell@the702firm.com
Joseph Tutone	joey@drummondfirm.com
Joel Henriod	jhenriod@lrrc.com
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Emily Kapolnai	ekapolnai@lrrc.com

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2/24/2021 2:28 PM
Steven D. Grierson
CLERK OF THE COURT

SUPP
DRUMMOND LAW FIRM, P.C.
Craig W. Drummond, Esq.
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Liberty A. Ringor, Esq.
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DISTRICT COURT
CLARK COUNTY, NEVADA

MAIKEL PEREZ-ACOSTA, an individual; ROLANDO BESSU HERRERA, an individual; Plaintiffs, vs. JAMIE ROBERTO SALAIS, an individual; TOM MALLOY CORPORATION aka/dba TRENCH SHORING COMPANY, a foreign corporation; DOES I-V; and ROE CORPORATIONS VI-X, inclusive, Defendants.	Case No.: A-18-772273-C Dept. No.: 28 **HEARING NOT REQUESTED**

PLAINTIFF ROLANDO BESSU HERRERA'S SUPPLEMENTAL MEMORANDUM OF FEES AND COSTS PURSUANT TO FEBRUARY 10, 2021 DECISION AND ORDER

COMES NOW, Plaintiff, ROLANDO BESSU HERRERA, by and through his attorneys, CRAIG W. DRUMMOND, ESQ., and LIBERTY A. RINGOR, ESQ. of the DRUMMOND LAW FIRM, P.C., and hereby files Plaintiff Rolando Bessu Herrera's Supplemental Memorandum of Fees and Costs Pursuant to this Honorable Court's February 10, 2021 Decision and Order.

///

Case Number: A-18-772273-C

AFFIDAVIT OF COUNSEL IN SUPPORT OF ATTORNEY'S FEES AND COSTS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

CRAIG W. DRUMMOND, ESQ, being first duly sworn, deposes and says:

1. That I am a licensed practicing attorney in Clark County, Nevada with the law office of Drummond Law Firm, P.C. 810 S. Casino Center Blvd., Suite 101, Las Vegas, Nevada 89101, and am lead attorney of record for Plaintiff ROLANDO BESSU HERRERA in the above-entitled matter.

2. That I substituted as counsel for Plaintiff Bessu Herrera on or around August 9, 2019.

3. That I was first licensed to practice law in Missouri in 2004 and am a former U.S. Army Judge Advocate, Senior Trial Counsel for the U.S. Army, Delegated Federal Ethics Counselor by the Secretary of Defense [5 C.F.R. § 2601.102], and Legal Advisor to Brigade level commands within the U.S. military.

4. That I am currently in private practice and am a member in good standing with the Nevada Federal Criminal Justice Act (CJA) panel, the Clark County Court Appointed Panel, appointed by the Clark County Commissioners as a Hearing Officer for Police Fatality Public Fact-Finding-Reviews, and a Nevada Special Prosecutor appointed by concurrence of both Clark County and a Las Vegas Justice of the Peace for a case where both the Clark County District Attorney and the Nevada Attorney General had a conflict of interest [C-20-350778-1].

5. That I am experienced with litigating negligence cases and two of the seminal cases providing guidance on premises liability cases are ones that I litigated at the trial court, briefed, and argued before the Supreme Court of Nevada. *Humphries v. New York-New York Hotel & Casino*, 133 Nev. Adv. Op. 77 (Oct 5, 2017) and *Humphries v. New York-New York Hotel & Casino,* 129 Nev., Adv. Op. 85 (Nov. 7, 2013).

6. That I have tried over 50 jury trials to verdict.

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7. **That the attorney's fees and costs directly related to the filing of Plaintiff's Motion to Strike Defendants' Answer are attached as Exhibits 1-2, 4.**

8. That in the cases where I bill hourly, my fee is currently $500.00/hour. Previously, two (2) years ago, both the Discovery Commissioner and a District Court Judge, approved my earlier hourly rate of $450.00/hour as a reasonable fee. *See* Exhibit 3.

9. That I spent 37.70 hours of attorney time related to the Motion to Strike Answer, and subsequent motions, hearings and correspondence related to the Motion to Strike Answer on this matter. A detailed breakdown of the time spent is listed in Exhibit 1. That my total attorney's fees are $18,850.00. *Id.*

10. That the costs incurred related to the subject Motion, Reply, and supplemental motions and hearings include the following: filing costs ($14.00) and deposition transcript of the April 22, 2020 EDCR 2.34 meeting ($939.95). *See* Exhibit 2.

11. That as this matter was highly contested and as the Defendants had retained two law firms to defend the matter, both myself and counsel for the Co-Plaintiff retained Mr. Joel D. Henriod, Esq. with Lewis Roca Rothberger Christie to assist in the case and understand that he will be submitting a separate fees and costs request as work done by himself and his firm are in ADDITION to the fees and costs outlined herein.

12. That Mr. Henriod's spent 62.30 hours related to the Motion to Strike Answer, and subsequent motions, hearings, and correspondence. A detailed breakdown of Mr. Henriod's time spent is listed as Exhibit 4. That Mr. Henriod is requesting total attorney's fees and costs in the amount of $62,915.50. *See* Exhibit 4.

13. That the total fees and costs directly related to the subject Motion are $82,718.95. *See* Exhibits 1-2, 4.

14. **That Mr. Michael C. Kane, Esq with the 702FIRM may be filing his own supplement with his office's fees and costs expended in this matter on behalf of his client, Plaintiff Maikel Perez-Acosta.**

///

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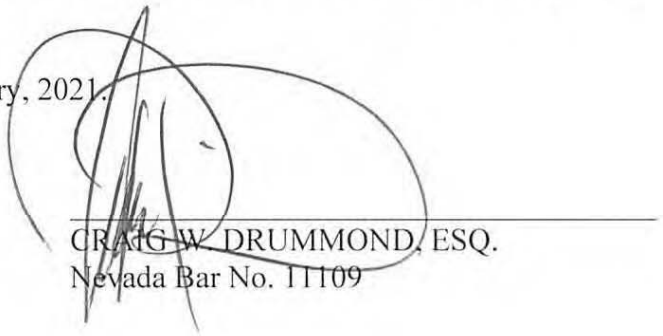
www.DrummondFirm.com

15. I sign this affidavit and declaration in accordance with NRS 53.045 and under penalty of perjury.

DATED this 24th day of February, 2021.



CRAIG W. DRUMMOND, ESQ.
Nevada Bar No. 11109

I.

ARGUMENT

A. Pursuant to NRS 18.010(1), Attorney's Fees are Warranted.

Pursuant to NRS 18.010(1), "The compensation an attorney and counselor for his or her services is governed by agreement, express or implied, which is not restrained by law."

In this matter, Plaintiff Bessu Herrera was granted, "all costs and reasonable attorney's fees for the deposition of Ms. Espinoza and this motion [Plaintiff's motion to strike answer] as discovery sanctions." *See* February 10, 2021 Decision and Order, on file herein. Plaintiff Bessu Herrera respectfully submits the following supplemental attorney's fees and costs based on this Honorable Court's ruling.

In regards to factor 1 – the qualities of the advocate, ability, training, education, experience, professional standing and skill, Plaintiff's counsel has over fifteen years of practice as a trial attorney in Federal Courts, as well as being licensed in both Nevada and Missouri. Further, in addition to mainly litigating personal injury cases, Plaintiff's counsel also is knowledgeable in both trial and appellate work. Therefore, Plaintiff's counsel has met *Brunzell's* first factor.

As to factor 2 – the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation, Plaintiff's counsel required significant time in order to research, draft, and file the Motion to Strike Answer, Reply to Opposition to Motion to Strike Answer, preparation for the Motion to Strike Answer on July 14, 2020, as well as

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participating in the supplemental hearings related to the Motion to Strike Answer after July 14, 2020, also detailed in Exhibit 1. As such, Plaintiff's counsel has met *Brunzell's* second factor.

Plaintiff's counsel outlines factor 3 – the work actually performed by the lawyer: the skill, time and attention given to the work. Plaintiff's counsel spent 37.70 hours researching, drafting, and filing the Motion to Strike Answer, Reply to Opposition to Motion to Strike Answer, and preparation for the Motion to Strike Answer on July 14, 2020. Further, Plaintiff's counsel participated in the supplemental hearings related to the Motion to Strike Answer after July 14, 2020, which is detailed in Exhibit 1. As such, Plaintiff's counsel has met *Brunzell's* third factor.

In regards to Factor 4 – the result: whether the attorney was successful and what benefits were derived, it is clear that Plaintiff Bessu Herrera was successful as this Honorable Court granted his Motion to Strike Answer, and allowed attorney's fees and costs related to the filing of said motion. Therefore, Plaintiff's counsel has met the fourth factor under *Brunzell.*

II.

CONCLUSION

Based on the foregoing, Plaintiff ROLANDO BESSU HERRERA requests attorney's fees and costs in the amount of **$82,718.95** for the time and money spent on attending the deposition of Nancy Espinoza, and researching, filing, and attending all hearings related to Plaintiff's Motion to Strike Answer.

DATED this 24th day of February, 2021.

DRUMMOND LAW FIRM, P.C.

By _____
Craig W. Drummond, Esq.
Nevada Bar No. 11109
Liberty A. Ringor, Esq.
Nevada Bar No. 14417
810 S. Casino Center Blvd., Suite 101
Las Vegas, NV 89101
Attorneys for Plaintiff

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4P.App.961

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9 and Administrative Order 14-2, the undersigned does hereby certify that on this 24th day of February, 2021, service of a true and correct copy of the foregoing **PLAINTIFF ROLANDO BESSU HERRERA'S SUPPLEMENTAL MEMORANDUM OF FEES AND COSTS PURSUANT TO FEBRUARY 10, 2021 DECISION AND ORDER** was duly made on all parties herein by causing a true copy thereof to be filed and/or served with the Clerk of Court using the Odyssey E-File & Serve system, which was served via electronic transmission per Service List.

Michael C. Kane Esq.
Bradley J. Myers, Esq
The 702 Firm
400 South 7th Street/Floor 4
Las Vegas, Nevada 89101
Attorneys for Plaintiff Maikel Perez-Acosta

Todd A. Jones, Esq.
Mokri Vanis & Jones, LLP
8831 W. Sahara Avenue
Las Vegas, Nevada 89101
Attorneys for Defendants Tom Malloy Corp d/b/a Trench Shoring Company and Jaime Roberto Salais

Joel D. Odou, Esq.
Nicholas F. Adams, Esq.
Wood, Smith, Henning & Berman LLP
2881 Business Park Court, Suite 200
Las Vegas, Nevada 89128
Attorneys for Defendants Tom Malloy Corp d/b/a Trench Shoring Company and Jaime Roberto Salais

Jimena Hernandez
An Employee of DRUMMOND LAW FIRM

DRUMMOND LAW FIRM
810 S. Casino Center Blvd., Suite 101
Las Vegas, NV 89101
www.DrummondFirm.com

EXHIBIT 1

EXHIBIT 1

Hours for Supplemental Memorandum of Attorney's Fees and Costs

Date	Hours	Description of Time Spent
4/22/20	2.50	Prepare and attend deposition of Nancy Espinoza
4/22/20	0.20	EDCR 2.34 after Deposition of Nancy Espinoza
4/29/20	4.00	Researching and drafting Motion to Strike Answer
4/30/20	6.00	Researching and drafting Motion to Strike Answer
5/4/20	4.00	Finalizing Motion and exhibits, filing motion
5/18/20	1.00	Reviewing Defendants Opposition to Motion to Strike
6/1/20	3.00	Researching and drafting Reply to Defendants' Opposition to Motion to Strike
6/2/20	1.50	Finalizing Reply and Exhibits, filing Reply
7/13/20	1.00	Preparation for Motion to Strike hearing on 7/14/20
7/14/20	1.00	Oral argument/hearing on Motion to Strike Answer
7/15-17/20	1.00	E-mail communications with all counsel re: SAO to Extend Briefing Schedule for Supplement to Motion to Strike Answer
8/11/20	1.00	Reviewed Defendants Supplemental Opposition to Motion to Strike Answer/Jones Affidavit
8/25/20	0.40	E-mail communications with counsel re: Henriod associating as co-counsel
8/31/20	0.60	Reviewed and approved response to Defendants' Supplemental Opposition to Plaintiff's Motion to Strike
9/1/20	0.50	Filed Response to Defendant's Supplemental Opposition
9/30/20	1.00	Prepare for hearing on Supplemental Opposition to Motion to Strike Hearing
10/1/20	1.00	Oral argument on motion to strike hearing
10/23/20	0.50	Reviewed Defendants Motion for Reconsideration of Order on OST
10/26/20-11/4/20	1.20	Email communications with counsel
11/4/20	0.50	Reviewed responses to Defendants Motion for Reconsideration
11/10/20	0.50	Reviewed Defendants Reply in Support of Motion for Reconsideration
11/17/20	1.00	Prepare for and attended oral argument for motion for reconsideration
11/17/20	0.90	E-mail communications with Plaintiffs counsel
12/1/20	0.50	Reviewed Defendants Supplemental Opposition to Motion to Strike Answer
12/14-28/20	0.70	E=mail communications with Plaintiffs counsel
12/15-30/20	0.50	E-mail communications with counsel re: extension to file response to Defendants supplemental opposition
12/30/20	1.00	Reviewed and approved response to Defendants Supplemental Opp

2/8/21	0.20	Reviewed Chambers Minute Order
2/10/21	0.50	E-mail communications with Plaintiffs counsel

TOTAL HOURS: 37.70 @ $500.00 = $18,850.00

EXHIBIT 2

EXHIBIT 2

DRUMMOND LAW FIRM

COST WORKSHEET

Client: Bessu-Herrera, Rolando

Type	Descriptor	Amount
EDCR 2.34	Half Day fee - Esquire Deposition	$465.00
EDCR 2.34	Transcript - Esquire Deposition	$474.95
Filing Fees	Plaintiff's Motion to Strike defendants answer	$3.50
Filing Fees	Reply to defendants opp to motion to strike answer	$3.50
Filing Fees	Notice of intent to appear by communication equipment (motion to strike answer)	$3.50
Filing Fees	Plaintiff's response to defendants supplemental opposition	$3.50
TOTAL		**$953.95**

ESQUIRE
DEPOSITION SOLUTIONS

2700 Centennial Tower
101 Marietta Street
Atlanta GA 30303
888-486-4044
www.esquiresolutions.com
Tax ID # 45-3463120

Invoice INV1690311

Date 5/7/2020
Terms Net 30
Due Date 6/6/2020

Client Number C15697
Esquire Office Sacramento
Proceeding Type Meeting
Name of Insured
Adjuster
Firm Matter/File # ORI-002
Client VAL ID
Date of Loss

Bill To

Drummond Law Firm - Las Vegas
810 South Casino Center Blvd.
Suite 101
Las Vegas NV 89101

Services Provided For

Drummond Law Firm - Las Vegas
Drummond, Craig W
810 South Casino Center Blvd.
Suite 101
Las Vegas NV 89101

Job Date	Job ID	Job Location	Case
4/22/2020	J5509497	, NEVADA	MAIKEL PEREZ-ACOSTA V. JAIME ROBERTO SALAIS, ET AL

Description	Deponent	Qty	Unit Rate	Amount
APP FEE: HALF DAY	EDCR 2.34 Meeting	1	465.00	465.00
This invoice includes charges not billed on INV1687936		1	0.00	0.00

Total 465.00
Amount Due $465.00

Attorney is responsible for payment of all charges incurred. Payment is due by "Due Date" shown on invoice. Failure to pay by "Due Date" may result in the assessment of a late fee. Transcript package typically includes transcript/word index, exhibits, appearance fee, condensed transcript, litigation support disk, shipping, video charges and may include other service charges based on job or region. Some services and rates may vary by job or region. Please contact your local office for specific detail and questions. Full Terms and Conditions are viewable online at www.esquiresolutions.com/terms-conditions. These stated terms and conditions, to the extent they contradict the rules and regulations in Arizona, do not apply. All aspects of this invoice and other business terms comply with the ethical obligations set forth in the AZ Code of Judicial Administration Section 7-206(J)(1)(g)(3) through (6).

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Esquire Deposition Solutions, LLC
P. O. Box 846099
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Lockbox 846099
1950 N. Stemmons Freeway
Suite 5010
Dallas, TX 75208

Client Name Drummond Law Firm - Las Vegas
Client # C15697
Invoice # INV1690311
Invoice Date 5/7/2020
Due Date 6/6/2020
Amount Due **$ 465.00**

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101 Marietta Street
Atlanta GA 30303
888-486-4044
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Invoice INV1687936

Date 4/28/2020
Terms Net 30
Due Date 5/28/2020

Client Number C15697
Esquire Office Sacramento
Proceeding Type Meeting
Name of Insured
Adjuster
Firm Matter/File # ORI-002
Client VAL ID
Date of Loss

Bill To

Drummond Law Firm - Las Vegas
810 South Casino Center Blvd.
Suite 101
Las Vegas NV 89101

Services Provided For

Drummond Law Firm - Las Vegas
Drummond, Craig W
810 South Casino Center Blvd.
Suite 101
Las Vegas NV 89101

Job Date	Job ID	Job Location	Case
4/22/2020	J5509497	, NEVADA	MAIKEL PEREZ-ACOSTA V. JAIME ROBERTO SALAIS, ET AL

Description	Deponent	Qty	Unit Rate	Amount
TRANSCRIPT - O&1-WI	EDCR 2.34 Meeting	21	9.00	189.00
NEXT DAY EXPEDITE	EDCR 2.34 Meeting			189.00
CONDENSED TRANSCRIPT	EDCR 2.34 Meeting	1	25.00	25.00
PROCESSING & COMPLIANCE	EDCR 2.34 Meeting	1	45.00	45.00

Subtotal 448.00
Shipping Cost (FedEx) 26.95
Total $474.95
Amount Paid 474.95

Attorney is responsible for payment of all charges incurred. Payment is due by "Due Date" shown on invoice. Failure to pay by "Due Date" may result in the assessment of a late fee. Transcript package typically includes transcript/word index, exhibits, appearance fee, condensed transcript, litigation support disk, shipping, video charges and may include other service charges based on job or region. Some services and rates may vary by job or region. Please contact your local office for specific detail and questions. Full Terms and Conditions are viewable online at www.esquiresolutions.com/terms-conditions. These stated terms and conditions, to the extent they contradict the rules and regulations in Arizona, do not apply. All aspects of this invoice and other business terms comply with the ethical obligations set forth in the AZ Code of Judicial Administration Section 7-206(J)(1)(g)(3) through (6).

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Client Name Drummond Law Firm - Las Vegas
Client # C15697
Invoice # INV1687936
Invoice Date 4/28/2020
Due Date 5/28/2020
Amount Due **$ 0.00**

EXHIBIT 3

EXHIBIT 3

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Steven D. Grierson
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Craig W. Drummond, Esq.
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Attorneys for Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

DERWIN RUBEN CISNEROS, an individual, Plaintiff, v. REBEL OIL COMPANY, INCORPORATED dba REBEL 21, a Domestic Corporation; NEVADA AK INC. dba REBEL and dba ANABI OIL CORP., a Foreign Corporation; DOE I – X, inclusive and ROE CORPORATIONS I-X, inclusive, Defendants.	Case No.: A-16-744260-C Dept. No.: XXXI **DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS** **Date of Hearing: August 1, 2018** **Time of Hearing: 9:00 a.m.**

Attorneys for the Plaintiff:	Craig W. Drummond, Esq., and Liberty A. Ringor, Esq. of the law firm of Drummond Law Firm
Attorney for Defendant: Rebel Oil Company, Incorporated dba Rebel 21	William B. Palmer III, Esq. of the law firm of Resnick & Louis, P.C.
Attorney for Nevada AK Inc., dba Rebel and dba Anabi Oil Corp.	Preston B. Howard, Esq.

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I.

FINDINGS

On May 11, 2018, Plaintiff filed his Motion to Compel Site Inspection on Order Shortening Time. On May 25, 2018, the Motion was heard by Discovery Commissioner Bonnie Bulla in which she directed Plaintiff's counsel to serve Nevada AK Inc. dba Rebel and dba Anabi Oil Corp., a Notice of Site Inspection and Subpoena pursuant to Rule 45. Plaintiff's noticed and served Nevada AK Inc. dba Rebel and dba Anabi Oil Corp., a notice of site inspection scheduled for June 29, 2018. At the June 29, 2018 site inspection, Plaintiff's counsel and his expert were not given complete access to the Rebel Oil gas station pursuant to the site inspection notice. On July 11, 2018, a status hearing was held before Discovery Commissioner Bulla where Plaintiff presented that he could not conduct a full site inspection as the Rebel Oil gas station general manager would not allow access to the surveillance room, camera views, and inside of the store. Discovery Commissioner Bulla stated the Notice of Site Inspection was properly noticed and served to Anabi Oil Corporation, and based on the results of the site inspection, awarded attorney's fees and costs relating to the June 29, 2018 site inspection. On July 18, 2018, Plaintiff filed a Notice of Hearing and Memorandum of Fees and Costs related to the June 29, 2018 site inspection. On July 31, 2018, Plaintiff filed a Supplement to the Notice of Hearing and Memorandum of Fees and Costs. Defendant Rebel Oil filed an Opposition to Plaintiff's Supplement on July 31, 2018.

II.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that Plaintiff's Motion to Compel Site Inspection on Order Shortening Time is GRANTED. Plaintiff must be allowed to conduct a full site inspection, including the inspection of the interior and exterior of the gas station, along with the surveillance cameras, and the security room which contains the surveillance camera system no later than

4P.App.972

August 17, 2018. Mike Castaneda, the head of security for Anabi Oil Corp., must be in attendance in order to allow the parties to view the surveillance camera system in place and allow entry into the security room. If there are security issues, photography, and report demonstrating location of cameras, they can be placed under a Protective Order pursuant to Rule 26(c) to remain confidential until otherwise ordered by the Judge at the time of Trial. Discovery is re-opened in order to conduct this site inspection.

IT IS FURTHER RECOMMENDED that attorney's fees and costs in the amount of $2,415.00 must be paid by either, Rebel Oil Company, Incorporated dba Rebel 21 or Anabi Oil, but not their counsel, and cannot be shared between the parties, to the Plaintiff within thirty (30) days after the Report and Recommendations are accepted by the District Court Judge. Pursuant to *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31 (1969), Plaintiff's attorney's fees and costs for $2,415.00 are as followed:

In regards to factor 1 – the qualities of the advocate, ability, training, education, experience, professional standing and skill are below:

> "Craig W. Drummond, Esq., is an attorney licensed in Nevada and Missouri and has been in practice over fourteen (14) years and is a former U.S. Army Federal Military Prosecutor and Chief Trial Counsel handling both criminal and civil cases on behalf of the United States of America, including defending Federal Tort Claims Act cases, is an appointed member of the Nevada Southern District Federal Court Criminal Justice Act Panel, and an attorney who has tried over 50 jury trials to verdict."

Plaintiff's counsel has over fourteen years of practice as a trial attorney in both Nevada and Missouri. Further, in addition to mainly litigating personal injury cases, Plaintiff's counsel also is knowledgeable in complex criminal defense. Therefore, Plaintiff's counsel has met *Brunzell's* first factor.

As to factor 2 – the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation, Plaintiff's counsel required significant time noticing the site inspection two separate times, arguing the matter on an order shortening

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4P.App.973

time, and participating in two status checks hearings before this Honorable Discovery Commissioner. As such, Plaintiff's counsel has met *Brunzell's* second factor.

Plaintiff's counsel outlines factor 3 – the work actually performed by the lawyer: the skill, time and attention given to the work in paragraphs 5 through 10 of the declaration:

> "Service of process on June 5, 2018 upon Nevada AK, Inc. related to the site inspection - $65.00."
>
> "Two (2) hours of attorney time for attorney Liberty A. Ringor, Esq., bar number #14417 for traveling to and from, and attending the June 29, 2018 site inspection. That Ms. Ringor regularly bills in hourly cases in the sum of $250.00/hour."
>
> "Two (2) hours of expert time to inspect the video cameras and surveillance system for DJ Boss for $500.00."
>
> "Three (3) hours of attorney time for Craig W. Drummond, Esq., bar number #11109 to prepare and file the "Supplement to Plaintiff's Motion to Compel Site Inspection on Order Shortening Time" (filed July 3, 2018) and to attend the hearing in front of the Honorable Discovery Commissioner related to the failed site inspection on July 11, 2018. That Mr. Drummond regularly bills in hourly cases in the sum of $450.00/hour."

In regards to Factor 4 – the result: whether the attorney was successful and what benefits were derived, it is clear that Plaintiff was successful in arguing his attorney's fees and costs as Plaintiff's have had to re-notice the site inspection multiple times. Additionally, Discovery Commissioner ruled in favor of awarding attorney's fees and costs in the amount of $2,415.00 for the June 29, 2018 site inspection. Therefore, Plaintiff's counsel has met the fourth factor under *Brunzell.*

The Discovery Commissioner, having met with the counsel for both parties, having discussed the issues noted above, and having reviewed any materials proposed in support thereof, hereby submits the above recommendation.

DATED this 21 day of August, 2018.

DISCOVERY COMMISSIONER

DRUMMOND LAW FIRM
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LAS VEGAS, NV 89101
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4P.App.974

Case No.: A-16-744260-C
Dept. No.: XXXI

SUBMITTED BY:

DRUMMOND LAW FIRM, P.C.

By: _____
Craig W. Drummond, Esq.
Nevada Bar No. 11109
Liberty A. Ringor, Esq.
Nevada Bar No. 14417
Attorneys for Plaintiff

RESNICK & LOUIS

By: _____
William B. Palmer III, Esq.
Nevada Bar No. 12624
Attorneys for Defendant Rebel Oil Company

By: _____
Preston B. Howard, Esq.
Nevada Bar No. 2722
Attorney for Anabi Oil Corp.

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4P.App.975

Case No.: A-16-744260-C
Dept. No.: XXXI

SUBMITTED BY:

DRUMMOND LAW FIRM, P.C.

By: _____
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Nevada Bar No. 11109
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Nevada Bar No. 14417
Attorneys for Plaintiff

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By: _____
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NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified that you have five (5) days from the date you receive this document within which to file written objections.

The Commissioner's Report is deemed received three (3) days after mailing to a party or the party's attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office. E.D.C.R. 2.34(f).

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiff/Defendant at the following address on the _____ day of _____, 20____:

_____ Placed in the folder of counsel in the Clerk's office on the ____ day of _____, 20____.

✓ Electronically served counsel on August 23, 2018, pursuant to N.E.F.C.R. Rule 9.

By: _____
COMMISSIONER DESIGNEE

4P.App.977

Case No.: A-16-744260-C
Dept. No.: XXXI

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

___ The parties having waived the right to object hereto,

___ No timely objection having been received in the office of the Discovery Commissioner pursuant to E.D.C.R. 2.34 (f),

___ Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

AND

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report & Recommendations are affirmed and adopted.

___ IT IS HEREBY ORDERED the Discovery Commissioner's Report & Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

___ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report & Recommendations is set for _____, 2018, at ___:____ am/pm.

DATED this 11 day of September, 2018.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

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4P.App.978