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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

Gabriel L. Martinez; Universal
Protection Services, LLC,

Petitioners,

vs.

The Eighth Judicial District Court of the
State of Nevada and the Honorable Joe
Hardy, Judge,

Respondents.

and

Douglas J. Kennedy,

Real Party in Interest.

Supreme Ct. No.:

Dist. Ct. Case No.: A-20-820254-C

**Appendix Volume 2 to Gabriel L.
Martinez & Universal Protection
Services, LLC's Petition for Writ of
Mandamus**

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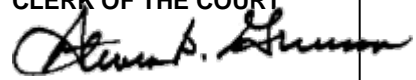
Certificate of Service

Per NRAP 21(a) and 25(c), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on February 22, 2022, **Appendix Volume 2 to Gabriel L. Martinez & Universal Protection Services, LLC's Petition for Writ of Mandamus** was served via electronic means by operation of the Court's electronic filing system to:

Joseph J. Troiano Cogburn Law 2580 St. Rose Parkway, Suite 330 Henderson, Nevada 89074 Attorneys for Real Parties in Interest	
-------------------------------------------------------------------------------------------------------------------------------------------	--

BY: /s/ Michael P. Lowry
An Employee of





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DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and
LORI KENNEDY, an individual,

Plaintiff,

vs.

GABRIEL L. MARTINEZ, an individual;
UNIVERSAL PROTECTION SERVICES,
LLC, d/b/a ALLIED UNIVERSAL
SECURITY SERVICES, a Foreign Limited
Liability Company, DOE Family Members 1-
10; DOE Individuals 11-20; and ROE
Corporations 21-30, Inclusive,

Defendant.

Case No.: A-20-820254-C
Dept. No.: 15

Hearing Date: January 10, 2022
Hearing Time: 9:30 A.M.

**OPPOSITION TO DEFENDANTS' MOTION TO EXTEND DISCOVERY (THIRD
REQUEST) ON ORDER SHORTENING TIME**

Plaintiff, Douglas J. Kennedy, by and through counsel, Cogburn Law, hereby files this
Opposition to Defendants' Motion to Extend Discovery (Third Request) on Order Shortening
Time. This Opposition is made and based upon the papers and pleadings on file herein, the
following Memorandum of Points and Authorities, any exhibits attached hereto, and any oral
argument this Court may choose to entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND HISTORY OF CASE

A. Plaintiff Douglas Kennedy Sustained a Traumatic Brain Injury Because of the Crash Caused by Defendant Gabriel Martinez

While driving on the freeway, Plaintiff Douglas Kennedy was rear-ended by Defendant Gabriel Martinez who was within the course and scope of his employment with Defendant Universal Protection Services at the time of crash. Defendant Gabriel Martinez testified that he was driving “probably 65” mph at impact. Mr. Martinez also blamed his lack of sleep as a cause of the crash. Mr. Martinez’s lack of sleep was caused by Defendant Universal Protection Services’ decision to have Mr. Martinez work up to six days per week, 12-14 hours per day. The force of the initial impact caused Doug’s vehicle to spin into a different lane where he was then t-boned by a driver of a pick-up truck. All three vehicles involved in the crash were totaled. Because of the crash, Plaintiff Douglas Kennedy has been diagnosed with a traumatic brain injury by multiple medical providers. Moreover, Plaintiff Douglas Kennedy is a significant fall risk because of balance and stability issues caused by the traumatic brain injury. This case is currently set for trial on this Court’s May 23, 2022, trial stack.

When considering Defendants’ unbelievable request to re-open the initial expert deadline and to extend discovery by nearly a year, this Court should note the following timeline because it shows that Defendants should not be rewarded for their dilatory conduct.

October 13, 2020: Plaintiffs served their initial disclosure of evidence, which included numerous records and reports indicating that Plaintiff Douglas Kennedy sustained a traumatic brain injury as a result of the November 5, 2018, crash. *See* Plaintiff’s Initial Disclosure, attached as **Exhibit “1”** (pleading only). For instance, Plaintiffs’ disclosed records and reports from Dr. Chopra, Plaintiff Douglas Kennedy’s treating neurologist, Dr. Baumann, a neuropsychologist, Dr. Richard Newman, a neurologist, and Dr. Biesbroeck, a neuroradiologist who reviewed Plaintiff’s

1 brain MRIs, which were also disclosed. More specifically, after conducting a neuropsychological
2 evaluation, Dr. Baumann prepared a detailed report that provided the following conclusions, in
3 part:

4 DISCUSSION

5 Mr. Kennedy was involved in a motor vehicle accident on 11/05/2018. As a result of that
6 accident, he was diagnosed with a concussion. The medical reports indicate positive findings on
7 the MRI consistent with mild traumatic brain injury. The patient presented for a
8 Neuropsychological Evaluation on 06/10/2019 and 06/22/2019. At that time, he reported issues
9 with headaches, dizziness, daytime fatigue, sleep disturbance, feeling easily frustrated, feeling
10 impatient, reduced tolerance for stress, poor short-term memory, poor long-term memory, poor
11 attention, confused thinking, and difficulty finding the right words to say. The results of the
12 Neuropsychological Evaluation are opined to be a credible reflection of his cognitive status due
13 to the results of the measures of effort and motivation, consistency across data sources. The
14 client demonstrated difficulties with divided attention. He specifically also had difficulties
15 attending to spoken words and/or sounds. His intelligence was within the average range. He
16 was in the low-average range regarding his working memory. On the measures of memory, he
17 showed difficulty with encoding information on the initial presentation. He did better with
18 repetition. Even with repetition he did have some difficulty with his delayed memory. Mr.
19 Kennedy did not evidence symptoms of psychological distress. His results were consistent with
20 cognitive issues that were uncomplicated by psychological concerns.

13 RE: DOUGLAS KENNEDY

26

August 8, 2019

15 In short, by October 13, 2020, Defendants knew that numerous medical experts opined that
16 Douglas Kennedy sustained a traumatic brain injury because of the horrific crash and that he
17 specifically underwent a neuropsychological evaluation with Dr. Baumann. It should also be noted
18 that in their initial disclosure, Plaintiffs also disclosed bodycam footage from NHP officers, which
19 show conversations with both Plaintiff Douglas Kennedy and Defendant Gabriel Martinez, who
20 was sitting on a gurney in an ambulance.

21 **October 20, 2020:** Plaintiffs served their first supplement to their initial disclosure of
22 evidence and the supplement included a 25-page expert report prepared by Dr. Norton Roitman, a
23 psychiatrist. In his report, Dr. Roitman opined that because of the crash, Douglas Kennedy
24 sustained a brain injury and posttraumatic stress disorder. In accordance with the opinions outlined
25 by Dr. Roitman, Plaintiffs' disclosure identified \$53,196.00 in future medical treatment.

December 31, 2020: Plaintiffs served their second supplement to their initial disclosure of evidence, and it included records from Dr. Mashhood, a Physical Medicine and Rehabilitation specialist. After performing a physical examination, Dr. Mashhood noted the following regarding Mr. Kennedy's "impaired function":

ASSESSMENT AND RECOMMENDATION:

Patient is status post motor vehicle accident with closed head injury with bifrontal contusion with residual cognitive deficits as well as impaired function. Further questioning indicates that he also becomes fatigued easily.

We had a long discussion. I encouraged him to carry a cane appropriately and he may also try to apply ankle weights to improve his gait.

P-MRALV 0006

KENNEDY, Douglas

October 20, 2020

Page 3

He is interested to consider purchase of a scooter and asked me to offer him a prescription for that. I agree that he will benefit from purchase of scooter for long-distance ambulation and prescription was provided. He will return to my office on an as-needed basis.

Thank you again for allowing me the opportunity to assist you in the care of this patient.

In this disclosure, Plaintiffs also disclosed therapy records for both Plaintiff Douglas Kennedy and his wife, Plaintiff Lori Kennedy.

January 28, 2021: Plaintiffs disclosed their third supplement to their initial disclosure of evidence, which included journal entries from Mr. Kennedy. One such note states the following regarding Doug's *balance issues* and inability to sleep at night:

1 1 ~~12~~26/21
2 Even though I have pills to
3 help me sleep I still wake
4 up 3-4 times a night for
5 ~~no~~ for no reason I'm
6 light-headed every day and many
7 sometimes more in force
8 I feel I am slowly getting worse
9 my balance is more frequent
10
11 My head bothers me everyday
12 the more I do such as
13 laundry or house cleaning
14 the more I tense (also
15 just walking around the store
16 food shopping & bothers me
17
18
19
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21
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February 11, 2021: Defendants served their third supplement to their initial disclosure of evidence, which included one excess insurance policy.

February 19, 2021: Plaintiffs served a demand, which included a preliminary life care plan authored by Deborah Perlman, RN. See Demand and LCP attached collectively as **Exhibit “2.”** The estimated cost of the preliminary life care plan authored by Ms. Perlman was **\$5,817,385.00**. The demand expired on March 26, 2021.

February 23, 2021: Plaintiffs served their fourth supplement to their initial disclosure of evidence, and it included the preliminary life care plan authored by Deborah Perlman, RN that was attached to Plaintiffs’ demand. Plaintiffs updated their computation of damages in accordance with the preliminary life care plan.

March 3, 2021: Plaintiffs served their fifth supplement to their initial disclosure of evidence, and it included additional records from the therapist Lori Kennedy treated with because of the stress and anxiety caused to her because of her husband’s altered condition caused by the crash. One note provides the following clinical impression:

Clinical Impressions:

Client presents overwhelmed & stressed. Client reports husband was in a bad auto accident which has greatly impacted their day to day functioning. Spouse is limited and needs client's help w/ certain activities & driving. Client reports a change in their relationship due to this added strain. Client reports her & her spouse are unable to engage in activities they used to enjoy as a couple due to spouse's injuries.

Progress: () Regressing ☒ Base () None () Slow () Steady () Significant () Maintaining

March 22, 2021: Plaintiffs served their sixth supplement to their initial disclosure of evidence, and it included records showing that Plaintiff Douglas Kennedy had been prescribed a standup walker by Dr. Mashood.

March 26, 2021: Plaintiffs' \$12,000,000 demand expired without any response from Defendants.

April 7, 2021: Plaintiffs served their seventh supplement to their initial disclosure of evidence, and it included records showing that Plaintiff Douglas Kennedy had undergone physical therapy to help him with his balance issues caused by the traumatic brain injury.

July 8, 2021: Defendant Gabriel Martinez failed to appear for his deposition (which had been rescheduled at least once due to his failure to respond to his counsel).

August 18, 2021: Plaintiffs served their eleventh supplement to their initial disclosure of evidence, and it included five additional before and after witnesses.

September 10, 2021: Defendant Gabriel Martinez appeared at his deposition and testified that he was traveling 65 mph at impact, he didn't recall whether he hit his brakes at impact, he accepted blame for causing the crash, and he blamed his lack of sleep as a cause of the crash. Mr. Martinez's lack of sleep was due to him working for Defendant Allied Universal five to six days a week, 12-14 hours per day.

September 14, 2021: Plaintiffs served their twelfth supplement to their initial disclosure of evidence, and it included the following: (1) three additional before and after witnesses; (2) reports from Dr. Fazzini, a neurologist, and (3) an updated computation of damage that included

1 punitive damages stemming from Mr. Martinez’s testimony regarding his employer’s decision to
2 put an overworked security officer on the road. In his report, Dr. Fazzini provided the following
3 impressions: (1) cognitive deficits following traumatic brain injury; (2) postconcussive balance
4 impairment; (3) postconcussive headaches; and (4) cervical myofascial pain syndrome. *See*
5 Fazzini 7/24/21 report, attached as **Exhibit “3.”**

6 **December 17, 2021:** Plaintiffs disclosed their designation of initial expert witnesses.
7 Including the numerous reports that had already been produced, Plaintiffs also produced reports
8 from Dr. Gabriel Barnard, who is board certified in physical medicine and rehabilitation, Terrance
9 Clauretie, Ph.D., an economist, and Benjamin Lester, Ph.D. a cognitive psychologist who authored
10 a report regarding the dangers caused by Mr. Martinez’s lack of sleep. Moreover, Plaintiff
11 produced a final life care plan from Nurse Perlman. The life care plan, which was approved by
12 Drs. Barnard and Fazzini, outlined future medical expenses that total **\$9,867,092.00.**¹ *See*
13 Plaintiff’s Thirteenth Supplemental Disclosure, attached as **Exhibit “4”** (pleading only).

14 **December 20, 2021:** Defendants produced its initial disclosure of expert witnesses and it
15 only identified one expert witness: Staci Ross, Ph.D. *See* Defendant’s Expert Disclosure, attached
16 as **Exhibit “5.”** Defendants did not disclose a report from Dr. Ross or any expert.

17 **B. Defendants’ Decision Not to Select a Different Neuropsychologist After the**
18 **Initial Examination Was Terminated Due to Defendants’ and Dr. Ross’**
19 **Decision to Not Timely Provide Forms and Dr. Ross’ Decision to Provide Legal**
20 **Advice to Plaintiff Douglas Kennedy During the Examination**

21 As mentioned above, Defendants knew by **October 20, 2020**, that Plaintiff Douglas
22 Kennedy underwent a neurophysiological examination with Dr. Baumann. Eight months later, on
23 May 14, 2020, Defendants sent a request for production of documents asking Plaintiffs to produce
24 the “raw testing data” from the examination. Within minutes of being on notice of the request,
25 Plaintiffs’ counsel sent Defendants’ counsel an email asking who would review the data and that

¹ Present value of the final LCP.

1 it was Plaintiffs' counsel's belief that only Plaintiffs' expert, Dr. Baumann, could provide that data
2 to Defendants' expert. *See* Troiano email chain, attached as **Exhibit "6."** Defendants' counsel
3 immediately informed Plaintiffs' counsel that their expert is Dr. Ross. A week later, Plaintiffs'
4 counsel informed Defendants' counsel that his office had confirmed with Dr. Baumann's office
5 that she would not provide the data to Plaintiffs' counsel and that Dr. Ross' office needed to reach
6 out to her office for the data:

7 Kennedy - raw data`



8 Joseph J. Troiano
9 To Richardson, Chris
Cc Sarah Wilder

10 Reply Reply All Forward

Mon 5/24/2021 11:29 AM

11 Chris,

12 Sarah at my office spoke with Dr. Baumann's office and was told that Dr. Ross' office needs to reach out to them for the raw data. Dr.
13 Baumann's office will not produce the raw data to my office.

14 **Joseph J. Troiano**

15 Attorney

16 2580 St. Rose Parkway, Suite 330
17 Henderson, NV 89074

18 Ph. (702) 748-7777

19 Fax (702) 966-3880

20 www.CogburnCares.com

21 **COGBURN**
22 **LAW**

23 A month later, on June 18, 2021, Defendants noticed Plaintiff Douglas Kennedy's
24 examination with Dr. Ross. The day before the examination, which was set to take place on July
25 20, 2021, Plaintiffs' obtained forms that Dr. Ross apparently required to be completed before the
examination. After the examination began, Dr. Ross took issue that certain forms weren't filled
out to her liking, and asked Mr. Kennedy to sign forms he had been advised by his counsel not to
sign. In a declaration later provided, Dr. Ross admits that she "asked" Mr. Kennedy to sign forms
that had been previously crossed out. *See* Dr. Ross declaration, attached as **Exhibit "7."** Simply
put, there is no dispute that without assistance from his counsel, Dr. Ross "asked" Mr. Kennedy to
complete forms he had previously been advised by his counsel not to complete. Because Dr. Ross

1 failed to secure the forms she apparently needed *before* the examination, and because she decided
2 not to contact Defendants' counsel to potentially resolve the dispute with Plaintiffs' counsel, the
3 examination ended. A few days after the examination, on July 23, 2021, Plaintiffs' counsel notified
4 Defendants' counsel that he would not agree to an IME with Dr. Ross or any neuropsychologist.
5 *See* Troiano 7/23/21 email, attached as **Exhibit "8."**

6 Despite being requested to select a different neuropsychologist to perform the examination,
7 Defendants decided to stick with Dr. Ross and waited until October 7, 2021, to file their motion
8 for a Rule 35 examination. *See* Defendants' Motion for Rule 35 Examination on file herein. Thus,
9 after Plaintiffs' counsel made it clear that he would not agree to another Rule 35 examination,
10 Defendants waited *nearly three full months* to file their motion to compel the examination.

11 Days later, and at the request of Defendants' counsel, a stipulation and order to continue
12 the discovery deadlines was filed where the initial expert deadlines were moved from October 18,
13 2021, to December 18, 2021. *See* SAO to Extend Discovery Deadlines (Second Request) on file
14 herein. Defendants' motion was heard on December 3, 2021, by Discovery Commissioner Jay
15 Young and he found that in light of the circumstances surrounding the initial examination, good
16 cause existed under Rule 35 to have the examination recorded. *See* Discovery Commissioner's
17 Report and Recommendation, attached as **Exhibit "9."** Simply put, but for Defendants and Dr.
18 Ross's decision not to timely provide forms well in advance of the examination, and her decision
19 to provide legal advice to Douglas Kennedy during the initial examination, Plaintiffs would have
20 been without good cause to require the examination with a different neuropsychologist to be
21 recorded. Stated differently, had Defendants simply selected a different neuropsychologist to
22 perform the examination, the examination would not be recorded.

23 ///

24 ///

25 ///

1 **II. LEGAL ARGUMENT**

2 **A. Defendants Should Not Be Rewarded for their Lack of Diligence and Their**
3 **Decision Not to Simply Select Another Neuropsychologist Where No Good**
4 **Cause Would Have Existed to Have the Examination Recorded**

5 EDCR 2.35(a) provides that a motion to extend discovery must be supported by a showing
6 of good cause and must be submitted within 20 days before the discovery cut-off date, and that a
7 motion made beyond that period shall not be granted unless the moving party demonstrates
8 excusable neglect in failing to act. *See Matter of Adoption of Minor Child*, 118 Nev. 962 (2002)
9 (stating that a district court's discovery decision will not be disturbed absent a clear abuse of
10 discretion). In *Francis v. Wynn Las Vegas*, the Nevada Supreme Court noted that it is not an abuse
11 of discretion to deny a motion to continue discovery where it is not diligently pursued. 127 Nev.
12 657, 666 (2011).

13 Here, Defendants' motion is untimely. The motion to re-open the initial expert deadline
14 and extend discovery by nearly a year was filed *two days* before the initial expert deadline of
15 December 18, 2021.² In its motion, Defendants fail to even argue that there is even "excusable
16 neglect" to explain why their motion was untimely filed.

17 Interestingly, the above-referenced rule was a topic covered by Defense Counsel, Michael
18 Lowry, himself in an article he wrote on October 28, 2013, titled "Satisfying the Good Cause
19 Requirement to Extend Discovery." *See* article attached as **Exhibit "10"**. In this article, Mr. Lowry
20 quotes the Court's findings in *Derosa v. Blood Sys.*, 2013 U.S. Dist. LEXIS 108235, 2013 WL
21 3975764 (D. Nev. 2013) stating "...requests to extend a discovery deadline filed less than 21 days
22 before the expiration of that particular deadline must be supported by a showing of excusable
23 neglect."

24 ² The parties informally agreed to move the deadline to December 20, 2021, because December 18, 2021, was a
25 Saturday. Even if the deadline was December 20, 2021, which it wasn't according EDCR 7.50, Defendants filed their
motion *four days* before the deadline.

1 Next, Defendants seem to argue that “good cause” exists to re-open the initial expert
2 deadline and extend discovery by nearly a year because they believed Plaintiffs would agree to
3 that lengthy extension. Even a cursory review of Plaintiff Douglas Kennedy’s medical records
4 and life care plan show that because of the traumatic brain injury, he has balance and stability
5 issues. Consequently, it’s absurd for Defendants to even suggest that despite Plaintiff Douglas
6 Kennedy’s dire medical condition, which could lead to his death because of a fall, that they would
7 agree to simply *delay* this matter nearly a year just so that Defendants could fight the issue about
8 the examination with Dr. Ross being recorded. An issue Defendants created.

9 As shown above, Defendants knew no later than ***October 20, 2020***, that multiple medical
10 experts concluded that as a result of the significant crash that totaled three vehicles, Plaintiff
11 Douglas Kennedy sustained a traumatic brain injury. Now, after not disclosing a single expert
12 report, Defendants seek to re-open the initial expert deadline and extend discovery by nearly an
13 entire year because of the following reasons: (1) they waited until May 14, 2020, to even request
14 the raw testing data from Dr. Baumann; (2) they waited until June 18, 2021, to notice a
15 neuropsychological examination; (3) they and Dr. Ross failed to timely provide forms Dr. Ross
16 apparently required for her examination; (4) Dr. Ross decided to give legal advice to Plaintiff
17 Douglas Kennedy *during* the examination and asked that he complete certain forms he had been
18 advised by his counsel not to complete; (5) despite knowing by July 23, 2021, that Plaintiff would
19 not agree to either another examination with Dr. Ross or any other neuropsychologist, Defendants
20 waited to October 7, 2021, to file their motion (not on OST); and (6) despite knowing that the
21 circumstances surrounding the first examination gave rise to good cause supporting that a
22 continued examination with Dr. Ross be recorded, Defendants decided to stick with Dr. Ross
23 instead of simply finding a different neuropsychologist. Stated differently, Defendants’ dilatory
24 conduct created the mess that they are in, and they believe that this Court should punish Plaintiffs
25 because of Defendants’ dilatory behavior.

1 Defendants also fail to explain why Dr. Ross did not author a report addressing Dr.
2 Baumann's report and raw testing data she presumably obtained. Defendants also fail to explain
3 that in case where Plaintiffs disclosed a life care plan approaching ***\$6,000,000 on February 19,***
4 ***2021,*** Defendants failed to disclose an expert report from, for instance, a neurologist or
5 neuroradiologist by December 20, 2021. It should also be noted that Defendants have not set a
6 single deposition in this case. Outside of sending out a set of written discovery to each Plaintiff,
7 Defendants have conducted essentially no discovery.

8 The issue of conducting discovery diligently is also one that Mr. Lowry is familiar with as
9 he previously addresses this in the same article attached as exhibit 10, in which he states, again
10 quoting the court's findings in *Derosa*, that "[t]he good cause inquiry focuses primarily on the
11 movant's diligence."

12 In conclusion, Defendants' motion should be denied because it is untimely, and
13 Defendants' dilatory conduct does not amount to good cause requiring the re-opening of the initial
14 expert deadline and the extension of discovery by nearly a year, which would significantly
15 prejudice Plaintiffs by delaying their ability to have this case go to trial on this Court's May 23,
16 2022, trial stack.

17 Dated this 30th December, 2021.

18 COGBURN LAW

19
20 By: /s/Joseph J. Troiano
21 Jamie S. Cogburn, Esq.
22 Nevada Bar No. 8409
23 Joseph J. Troiano, Esq.
24 Nevada Bar No. 12505
25 2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO DEFENDANTS' MOTION TO EXTEND DISCOVERY (THIRD REQUEST) ON ORDER SHORTENING TIME** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 30th day of December 2021.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

Efile LasVegas (efilelasvegas@wilsonelser.com)
Michael Lowry (michael.lowry@wilsonelser.com)
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Joyce Radden (Joyce.Radden@wilsonelser.com)
Kait Natarajan (kait.natarajan@wilsonelser.com)

/s/Noel Raleigh
An employee of Cogburn Law

EXHIBIT 1

EXHIBIT 1

COGBURN LAW
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and
LORI KENNEDY, an Individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;
ALLIEDBARTON SECURITY SERVICES
LLC, a Foreign Limited Liability Company;
DOE Family Members 1-10; DOE Individuals
11-20; and ROE Corporations 21-30,
Inclusive,

Defendants.

Case No.: A-20-820254-C
Dept. No.: 15

PLAINTIFF'S INITIAL DISCLOSURE OF WITNESSES AND DOCUMENTS
PURSUANT TO NRCP 16.1

In compliance with NRCP 16.1, Plaintiff, Douglas Kennedy (Plaintiff'), by and through counsel, Cogburn Law, hereby produces the following witness list and documents related to this matter:

I. WITNESSES

The following are persons of whom Plaintiff is aware and believes may have knowledge relevant to this matter. Plaintiff reserves the right to amend/supplement this list as necessary if Plaintiff discovers additional information about the persons listed below or other persons who may have knowledge relevant to this matter, including expert witnesses.

1 Plaintiff expressly reserves the right to depose and call at trial any witness identified by
2 any other party to this action; all witnesses identified and/or deposed during the course of
3 discovery; and any and all rebuttal and/or impeachment witnesses.

4 Plaintiff further reserves the right to disclose certain medical, biomechanical, economic,
5 vocational, accident reconstruction, and other experts presently unknown or unidentified.

- 6 1. Douglas Kennedy
7 c/o Cogburn Law
8 2580 St. Rose Parkway
9 Suite 330
Henderson, NV 89074
(702) 748-7777
This witness may only be contacted through counsel.

10 This witness is the Plaintiff in this action and is expected to testify as to his knowledge of
11 the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 12 2. Gabriel L. Martinez
13 c/o Wilson Elser Moskowitz Edelman & Dicker, LLP
14 6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
(702) 727-1400

15 This witness is the Defendant in this action and is expected to testify as to its knowledge
16 of the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 17 3. Allied Barton Security Services, LLC
18 c/o Wilson Elser Moskowitz Edelman & Dicker, LLP
19 6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
(702) 727-1400

20 This witness is the Defendant in this action and is expected to testify as to its knowledge
21 of the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 1 4. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for Allied Barton
2 Security Services, LLC
3 c/o Wilson Elser Moskowitz Edelman & Dicker, LLP
4 6689 Las Vegas Blvd. South, Suite 200
5 Las Vegas, NV 89119
6 (702) 727-1400

7 This witness is the Defendant in this action and is expected to testify as to its knowledge
8 of the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 9 5. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
10 Nevada Highway Patrol
11 4615 West Sunset Road
12 Las Vegas, NV 89118
13 (702) 486-4100

14 This/These witness(es) is/are expected to testify regarding the authenticity of the records
15 received and produced herewith from the entity as it pertains to the Subject Incident.

- 16 6. Officer Christopher French, Badge No. H6404
17 Nevada Highway Patrol
18 4615 West Sunset Road
19 Las Vegas, NV 89118
20 (702) 486-4100

21 This/These officer(s) is/are expected to testify as to the investigation of Event No.
22 181100743 any relevant facts and information relating to the subject litigation.

- 23 7. Corey James Carter
24 616 Winchester Drive
25 Henderson, NV 89002
 (719) 231-2230

 This witness is expected to testify concerning relevant facts and information relating to the
subject litigation.

8. Kylie Miranda Broyles
 388 Summerland Drive
 Henderson, NV 89002
 (702) 715-5838

 This witness is expected to testify concerning relevant facts and information relating to the
subject litigation.

1 **A. TREATING PHYSICIAN HEALTH CARE PROVIDERS / NON-**
2 **RETAINED EXPERTS**

3 Plaintiff discloses the following medical providers, pursuant to NRCP 16.1(a)(1)(A)(iii).
4 The NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for each medical provider
5 listed below is/are expected to testify regarding the care and treatment rendered to Plaintiff
6 following the incident that is the subject of this litigation, including, but not limited to: the injuries
7 sustained; past, present, and future medical treatment; the impairment, diagnosis, prognosis,
8 disability, pain and suffering, disfigurement, and/or causation of injury; and the authenticity and
9 reasonableness of all care and billing pertaining to said treatment.

- 10 1. Samuel B. Wright, DO and/or NRCP 30(b)(6) Representative(s) and/or
11 Custodian(s) of Records for
12 HENDERSON HOSPITAL
13 1050 West Galleria Drive
14 Henderson, NV 89011
15 (702) 963-7000
- 16 2. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
17 SHADOW EMERGENCY PHYSICIANS
18 P.O. Box 13917
19 Philadelphia, PA 19101
20 800-355-2470
- 21 3. Michael Trainor MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s)
22 of Records for
23 ADVANCED ORTHOPEDICS & SPORTS MEDICINE
24 8420 West Warm Springs Road, Suite 100
25 Las Vegas, NV 89113
 (702) 740-5327
4. Jeffrey Markham, MD and/or NRCP 30(b)(6) Representative(s) and/or
 Custodian(s) of Records for
 LAS VEGAS RADIOLOGY (MARYLAND)
 3201 S. Maryland Pkwy 102
 Las Vegas, NV 89109
 (702) 254-5004
5. Gobinder S. Chopra MD and/or NRCP 30(b)(6) Representative(s) and/or
 Custodian(s) of Records for
 NEUROCARE OF NEVADA
 6410 Medical Center St Ste A-100
 Las Vegas, NV 89148
 (702) 796-8500

6. Joseph E. Indrieri, MSPT, DPT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
DYNAMIC SPINE & SPORTS
2567 E. Windmill Parkway, Suite B
Henderson, NV 89074
(702) 565-1243
7. Eric Biesbroeck MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
PUEBLO MEDICAL IMAGING
5495 S. Rainbow Boulevard, Suite 101
Las Vegas, NV 89118
(702) 228-0031
8. Janet E. Baumann, Ph.D. and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
JANET E. BAUMANN, PH.D.
501 S. Rancho Drive, Suite F37
Las Vegas, NV 89106
(702) 388-9403
9. Travis Snyder, DO and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
SIMONMED IMAGING - HENDERSON
6301 Mountain Vista St
Henderson, NV 89014
(702) 433-7216
10. Evan C. Allen MD and/or Erum Malik PA-C and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
TOTAL CARE FAMILY PRACTICE
1701 North Green Valley Parkway, Suite 5C
Henderson, NV 89074
11. Austin Hill DPT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
KELLY HAWKINS PHYSICAL THERAPY - PECOS
8975 S. Pecos Road, Ste. 7A
Henderson, NV 89074
(702) 4563-2024
12. Richard P. Newman, MD and/or Scott Auerbach, PT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
MEDTRAK DIAGNOSTICS, INC.
400 N. Stephanie Street, Ste. 225
Henderson, NV 89014
(347) 742-4100

II. DOCUMENTS

Produced herewith are the following documents that are currently known and available that may be used in support of the allegations contained in Plaintiff's Complaint and other documents

required by NRCP 16.1. Plaintiff reserves the right to amend/supplement this disclosure of documents as the same become known to Plaintiff throughout the discovery process, including expert witness reports/opinions.

Plaintiff expressly reserves the right to designate any and all documents identified by any other party to this action; any and all documents identified during discovery in this action; any and all pleadings on file herein; any and all responses to any Interrogatories, Requests for Admission, and/or Requests for Production by any party to this action; any and all depositions, including exhibits; and any and all rebuttal and/or impeachment documents.

A. NON-MEDICAL DOCUMENTS

No.	Description	Bates No.
1.	DMV Driver's Handbook	n/a; Available for inspection upon written request
2.	DMV Beginning Driver Training Guide	n/a; Available for inspection upon written request
3.	Traffic Crash Report	P-TCR 0001-0008
4.	Photographs of the Scene from Nevada Highway Patrol	P-PHOTO 0001-0043
5.	Body Worn Camera Footage from Nevada Highway Patrol (<i>provided via sharelink</i>)	P-BWC 0001-0002

B. MEDICAL DOCUMENTS

No.	Description	Date(s) of Service	Bates No.
1.	Henderson Hospital Medical Records and Billing	11/6/2018	P-HH 0001-0055
2.	Shadow Emergency Physicians Medical Billing	11/6/2018	P-SEP 0001-0002
3.	Advanced Orthopedics & Sports Medicine Medical Records and Bills	11/20/2018-7/9/2019	P-AOSM 0001-00047
4.	Las Vegas Radiology Medical Records and Billing	11/28/2018 and 4/13/19	P-LVRAD 0001-0010
5.	Neurocare of Nevada Medical Records and Billing	11/29/2018-8/3/2020	P-NCONV 0001-0137
6.	Dynamic Spine & Sports Medical Records and Billing	12/10/18-3/13/19	P-DSS 0001-0087

No.	Description	Date(s) of Service	Bates No.
7.	Pueblo Medical Imaging Medical Records and Billing	12/18/18	P-PMI 0001-0006
8.	Janet E. Baumann, Ph.D. Medical Records and Billing	6/10/19-7/11/19	P-BAUM 0001-0066
9.	SimonMed Imaging Medical Records and Billing	6/12/19 and 7/17/2020	P-SMI 001-0014
10.	Total Care Family Practice Medical Records and Billing	7/16/2019	P-TCFP 0001-0003
11.	Kelly Hawkins Physical Therapy Medical Records and Billing	9/23/19-11/17/19	P-KHAWK 0001-0171
12.	MedTrak Diagnostics, Inc. Medical Records	9/25/2019	P-MTRK 0001-0025

C. X-RAYS, FILMS, AND DIAGNOSTIC STUDIES

Plaintiff is aware of the following x-rays, films, and diagnostic studies, copies of which may be obtained directly from the provider(s) at Defendant's expense:

1. Las Vegas Radiology
2. Pueblo Medical Imaging

D. DEMONSTRATIVE EXHIBITS

As applicable, Plaintiff may offer at trial certain exhibits for demonstrative purposes, including, but not limited to, the following:

1. The dictionary;
2. PowerPoint images, blowups, transparencies, story boards, or similar presentation

media of any of the following:

- A. Exhibits
- B. Deposition transcripts
- C. Discovery responses
- D. Jury instructions
- E. The location/scene of the incident

3. Models, diagrams, drawings, pictures, and/or videos of various parts of the human body, diagnostic tests, and/or surgical procedures;

4. Exemplars, models, or pictures of the surgical hardware/implantation devices used, or expected to be used in the care and treatment of Plaintiff;

5. Maps, diagrams, or models of the scene of the incident.

III. COMPUTATION OF DAMAGES

Plaintiff offers the following computation of damages pursuant to NRCP 16.1(a)(1)(A)(iv). This list is not designed to be all-inclusive and may not reflect Plaintiff's claims, as applicable, for general damages, lost wages, future and/or residual damages, and medical bills not yet received. Plaintiff reserves the right to amend/supplement this list throughout the discovery process.

Description	Bates No.	Date(s) of Service	Amount
Henderson Hospital	P-HH 0001-0002	11/6/2018	\$593.00
Shadow Emergency Physicians	P-SEP 0002	11/6/2018	\$922.00
Advanced Orthopedics & Sports Medicine	P-AOSM 0001-0005	11/20/2018-7/9/2019	\$5,171.35
Las Vegas Radiology	P-LVRAD 0001-0002	11/28/2018 and 4/13/19	\$3,300.00
Neurocare of Nevada	P-NCONV 0001	11/29/2018-6/22/2020	\$8,715.00
Dynamic Spine & Sports	P-DSS 0001-0003	12/10/18-3/13/19	\$14,082.02
Pueblo Medical Imaging	P-PMI 0002	12/18/18	\$5,200.00
Janet E. Baumann, Ph.D.	P-BAUM 0002	6/10/19-7/11/19	\$5,000.00
SimonMed Imaging	P-SMI 0001	6/12/19 and 7/17/2020	\$9,008.16
Total Care Family Practice	P-TCFP 0001	7/16/2019	\$293.70
Kelly Hawkins Physical Therapy	P-KHAWK 0001-0048	9/23/19-11/17/19	\$18,318.00
MedTrak Diagnostics, Inc.	P-MTRK 0001	9/25/2019	\$10,000.00
TOTAL			83,494.23

1 **IV. INSURANCE**

2 Plaintiff has no insurance policies applicable to this case as any policies would need to be
3 disclosed by Defendant.

4 **V. RESERVATION OF RIGHTS**

5 Plaintiff reserves the right to amend or supplement these disclosures as provided by the
6 Nevada Rules of Civil Procedure and to object the admissibility of any document or statement
7 herein or in the disclosures made by any other party to this matter on all bases set forth in the
8 Nevada Rules of Civil Procedure, Nevada Rules of Evidence, and governing law.

9 Dated this 13th day of October, 2020.

10 COGBURN LAW

11 By: /s/Joseph J. Troiano

12 Jamie S. Cogburn, Esq.

13 Nevada Bar No. 8409

14 Joseph J. Troiano, Esq.

15 Nevada Bar No. 12505

16 2580 St. Rose Parkway, Suite 330

17 Henderson, Nevada 89074

18 *Attorneys for Plaintiff*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S INITIAL DISCLOSURE OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1** was submitted electronically for *service only* with the Eighth Judicial District Court on the 13th day of October, 2020.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

Michael.Lowry@wilsonelser.com

Chris.Richardson@wilsonelser.com

Wilson Elser Moskowitz Edelman & Dicker LLP

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, NV 89119

Attorneys for Defendants

sharelink: evidence.com_evidence_package_1_of_1_created_2020-08-08T14_32_53Z

/s/Noel Raleigh

An employee of Cogburn Law

EXHIBIT 2

EXHIBIT 2

Jamie S. Cogburn
Kristin H. Cogburn

COGBURN LAW

Erik W. Fox
Joseph J. Troiano
Hunter S. Davidson

2580 St. Rose Parkway, Suite 330 · Henderson · Nevada · 89074
Phone: 702.748.7777 · Facsimile: 702.966.3880
CogburnCares.com

Writer's Email:
jjt@cogburncares.com

February 19, 2021

Via Electronic Service and U.S. Mail

Michael P. Lowry, Esq.
Christopher J. Richardson, Esq.
WILSON ELSE
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119

Re: Douglas and Lori Kennedy v. Allied Universal Security Services
Time Limited Demand – **Expires on March 26, 2021**

Dear Counsel:

This letter will serve as Mr. and Mrs. Kennedy's time limited demand for \$12,000,000.00. This demand is supported by the evidence produced already in this case. As you are aware, Dr. Chopra (neurologist); Dr. Roitman (psychiatrist); and Janet Baumann, Ph.D. (neuropsychologist) have all reached the conclusion that because of the subject collision, Mr. Kennedy suffered a traumatic brain injury. Moreover, this demand is supported by the attached report from Deborah Perlman, RN, CCRN, RNCB.¹ Ms. Perlman prepared a report that outlines \$5,817,385.00 in future care. Plaintiffs' demand expires on March 26, 2021.

Sincerely,

COGBURN LAW

/s/Joseph Troiano

Joseph J. Troiano, Esq.

¹ I have also attached Ms. Perlman's CV and these same documents will be formally produced in a NRCP 16.1 disclosure today.

Deborah Perlman, RN, CRRN, RNCB
Care Management
Home Evaluations/Modification Consulting
Medical Legal Consulting
(661) 360-3663 • (661) 388-8013

Preliminary Future Care Plan Cost Provisions
Report for Mediation/Settlement Purposes Only

Prepared For: Joseph Troiano, Esq
Cogburn Law
2580 St. Rose Pkwy., #330
Henderson, NV 89074

Prepared on Behalf Of: Douglas Kennedy

Date Prepared: November 2020

Prepared By: Deborah Perlman, RN, CRRN, RNCB

This report is prepared on behalf of Douglas Kennedy, a now 66-year old Caucasian male, who sustained multiple injuries resulting from a motor vehicle accident (MVA) as the seat-belted driver of his vehicle vs vehicle on November 5, 2018. It is reported in the medical records and confirmed by Mr. Kennedy that he sustained multiple injuries, including head injury, neck injury and back injury.

I am a Registered Nurse (RN) licensed by the State of California. My RN license is active, current, and renewed every two years by the State of California Board of Registered Nursing. I am a Board-Certified Rehabilitation Registered Nurse Specialist, which is active, current, and renewed every 5 years by the Association of Rehabilitation Nursing, Rehabilitation Nurse Certification Board. I hold certification as a Certified Executive Home Modification Specialist. Given my experience and training, I am eligible to sit for the Life Care Planner Certification Exam. I have extensive experience in, but not limited to, rehabilitation nursing, care management, and home environment evaluation/assessment of medically and physically compromised individuals.

In preparation of this Preliminary Future Care Plan, I have reviewed the medical records made available to me, taken into consideration the documented diagnoses and objective findings, and interviewed Mr. Kennedy.

Objective Findings: It is reported in the medical records, that Mr. Kennedy was the seat-belted driver of his vehicle involved in an MVA while driving home from work in high traffic on the freeway when another vehicle rear-ended him causing his vehicle to be propelled forward and reportedly sustained further impact by other vehicles and freeway barriers. Mr. Kennedy was unable to avoid the rear and further resultant impacts of his vehicle in the subject accident. It is reported that Mr. Kennedy had immediate onset of a headache. He was reportedly dazed, confused, and disoriented finding it difficult to process what had occurred, as such he declined the need for immediate medical examination. He chose to have his family take him home from the accident scene. The night of the accident was very emotional and painful for him, and the day after the accident he went to the Henderson Hospital emergency room with complaint of lower back pain, was evaluated and discharged home. Mr. Kennedy's symptoms progressed and became unrelenting including headache, neck pain, back pain, upper extremity pain and discomfort, and balance impairments. He had intrusive thoughts surrounding the events of the accident. He was evaluated by neurology and orthopedic physician specialists and multiple diagnostic tests including radiological and imaging studies as well as vestibular studies were obtained. Mr. Kennedy continued to be seen and followed the treatment and care plan outlined by his treating physicians. To date, Mr. Kennedy continues to be under the care of his team of treating physicians including but not limited to primary care physician, rehabilitation, orthopedist, neurology, and psychology following their recommendations as indicated. He necessitates ongoing therapy, medical and mobility devices as well as in-home care assistance

Diagnosis: The following diagnoses are noted from review of the available medical records: Degenerative Disc Disease, Lumbar; Benign Prostatic Hyperplasia with Lower Urinary Tract Symptoms; Other Intervertebral Disc Displacement, Lumbar Region; Low Back Pain; Sprain Joints and Ligaments of Neck; Spondylosis Without Myelopathy or Radiculopathy, Cervical Region; Cervical Disc Degeneration C6-C7; Cervical Disc Degeneration C5-C6 Level; Cervicalgia; Cervical Musculoskeletal Sprain/Strain Injuries Following Motor Vehicle Collision (MVC), November 5, 2018; Cervical Spondylosis Aggravated by MVC, November 5, 2018; C5-C6 and C6-C7 Degenerative Disc Disease, Aggravated by MVC, November 5, 2018; Post-concussion Syndrome with Headaches, Following MVC, November 5, 2018; Sprain of Joints and Ligaments Neck; Other Intervertebral Disc Displacement, Lumbar Region; Low Back Pain; Bilateral L5 Spondylolysis with Grade I Spondylolisthesis of L5 on S1; Arthritis; Abnormal MRI of Brain; Diffuse Axonal Brain Injury; Dysfunction of Vestibular System; Cervical Radiculitis; Memory Loss; Ataxic Gait; Reduced Concentration; Fatigue; Difficulty Sleeping; Irritability;

Depression; Anxiety; Problem of Visual Accommodation; Photophobia; Mild Neurocognitive Disorder due to Traumatic Brain Injury; Unspecified Disorder of Vestibular Function, Unspecified Ear; Post-concussion Syndrome

For further detail please refer to the medical records

Subjective Findings:

Prior to the 11/05/2018 accident, Mr. Douglas Kennedy was reported a healthy, active 65-year-old male enjoying a fulfilling personal senior lifestyle with family and friends. It is reported that he was completely independent with all activities of daily living (ADLs) including bathing, dressing, personal hygiene, and grooming, etc.; as well as instrumental activities of daily living (IADLs) including sharing in the household chores, shopping and driving without restrictions. He denied any problems with balance or ability to ambulate without restrictions or limitations. He enjoyed social interactions and activities with family and friends. He lived in the Henderson, Nevada area with his wife and family. He enjoyed social activities and traveling with his wife. He was gainfully employed prior to and at the time of the subject accident. He denied having any memory impairments or problems with multi-tasking, and there are no reported cognitive or emotional problems prior to the injury.

Since the 11/05/2018 accident, and resultant injuries sustained, unfortunately Mr. Kennedy has ongoing residual deficits that have altered his personal and vocational lifestyle remarkably. He is now approximately 2 years post injury and remains with ongoing medical and cognitive impairments necessitating assistance from others for his most basic self-care needs including bathing, grooming, dressing, assistance with mobility, etc. He is now unable to carry out those ADLs and IADLs of normal senior adulthood and is dependent upon others for self-care and household activities including cleaning, shopping, transportation, etc. He reports daily, constant headaches, dizziness, memory challenges, emotional/cognitive/behavioral impairments, and mobility challenges. He is unable to safely ambulate in his home or community without the assistance of others and assistive mobility aides. He is no longer able to maintain employment due to the cognitive, emotional, and physical challenges and impairments since the subject incident.

He continues to reside in the Henderson, Nevada area with his wife and family. He is saddened and distraught by the changes in his pre-injury lifestyle with the realization that he is no longer able to enjoy the independence and freedom of activities he once did with ease, and that there are skills, tasks, and activities that he is no longer capable of performing that he carried out without restriction or limitation prior to this devastating injury. The subject incident and resultant impairments have caused a strain on his marital relationship as he is no longer able to participate in or enjoy social activities with his wife. Mr. Kennedy is a very proudful gentleman and though he struggles day to day, he nonetheless does his best to continue to be as semi-independent as possible which in itself lends to further emotional despair from the realization to him of how apparent his deficits are and the need for assistance with those activities. The uncertainty of his future weighs heavily upon him and his wife.

In summary, it is my opinion, as an RN/Board Certified Rehabilitation Registered Nurse Specialist, with extensive experience in adult and pediatric rehabilitation, that, due to the residuals of this life altering incident, Mr. Douglas Kennedy will require a lifetime of ongoing medical management for his complex physical and psychological impairments and the necessity for caregiver services in his home. He will additionally benefit from ongoing care and oversight by RN case management services to assure he is monitored by a multidisciplinary team of appropriate medical professionals, including pain management and rehabilitation specialist, orthopedics/spine specialist, neurology, hearing and vision specialists, therapeutic treatment, psychology/psychiatry, and home care assistance throughout his lifetime.

The following preliminary future care recommendations and cost provisions are indicated if Mr. Douglas Kennedy is to have minimization of further deficits and/or complications and optimization of his limited abilities throughout the remainder of his lifetime such that he may be afforded the opportunity for an optimal quality of life to enjoy ongoing and fulfilling lifetime experiences in his senior years. Mr. Kennedy must be afforded the opportunity to have access to a multidisciplinary team of medical and nursing and therapeutic professionals to provide the most optimal medical care, oversight, and management available. He must be afforded access to appropriate and necessary medical equipment as indicated for his functional, nutritional, mobility, and care needs. These provisions are recommended and necessary to provide the most optimal future care and quality of life for Mr. Kennedy.

I reserve the right to amend this report should additional information be made available to me.

Respectfully,

Deborah Perlman, RN, CRRN, RNCB

Deborah Perlman, RN, CRRN, RNCB

PRELIMINARY LIFETIME FUTURE CARE AND COST PROVISIONS INCLUDES, BUT IS NOT LIMITED TO, THE FOLLOWING RECOMMENDATIONS:

1. MEDICAL CARE PROVIDERS: A multidisciplinary team of specialists with expertise in the complexity of care and management of individuals with traumatic brain injury and complex medical and physical conditions, and the multitude of care needs and potential complications are necessary for ongoing oversight, management and care of current and future deficits to his medical, cognitive, emotional and functional impairments that impact upon normal senior adulthood activities. Provisions for the following specialists are necessary for optimal ongoing oversight and management of Mr. Kennedy's care throughout his lifetime.

Neurologist: *ongoing care and management of the neurological deficits related to the subject incident including cognitive impairment, new onset headaches, etc.*

Physiatrist/Rehabilitation Traumatic Brain Injury Specialist: *ongoing oversight to monitor current and future deficits to function and the impact upon normal senior adulthood activities with appropriate management of pain, therapy, rehabilitation, related emotional despair, to afford the most optimal functional abilities throughout Mr. Kennedy's lifetime*

Neuropsychiatrist/Psychiatrist: *initial and ongoing psychiatric care to monitor and provide medical management for future pain and rehabilitation focused psychiatric and psychological intervention over Mr. Kennedy's lifetime to address the psychiatric and psychological impact this injury has, and will affect him over his lifetime*

Neuro-Otologist/ENT: *ongoing oversight and management, including evaluation by audiology, of the current and future vestibular deficits with balance impairments impacting Mr. Kennedy's ability to safely navigate his environment, and with appropriate interventions as recommended over his lifetime*

Neuro-Ophthalmologist/Vision Specialist: *initial evaluation, oversight and management of the visual impairments and resultant impact upon his ability to safely navigate in his environment, and with appropriate interventions as recommended by his treating physicians over his lifetime*

Orthopedic Surgeon/Spine Specialist: *initial evaluation, oversight, and management of the musculoskeletal injuries to his spine and resultant impact upon function and mobility throughout adulthood with additional management should future surgical intervention be recommended by his treating physicians that which is to be determined at this time*

Dietician/Nutritionist: *initial and ongoing psychiatric care to monitor and provide medical management for future pain and rehabilitation focused psychiatric and psychological intervention over Mr. Kennedy's lifetime to address the psychiatric and psychological impact this injury has, and will affect him over his lifetime*

The following physician specialists are as needed irrespective of subject incident, cost not included
Primary Care Physician

Estimated Subtotal:	\$153,751.00
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PRELIMINARY LIFETIME FUTURE CARE AND COST PROVISIONS INCLUDES, BUT IS NOT LIMITED TO, THE FOLLOWING RECOMMENDATIONS (CONT):

2. HOME CARE/HOME MAINTENANCE: Mr. Kennedy's cognitive, physical, and functional abilities have been severely compromised due to the traumatic brain injury, cognitive impairment, vestibular impairments and injury to his spine resulting in limited functional ability to maintain proper self-care and housekeeping needs and is dependent upon others for his basic day to day care needs. Due to the complexity of his medical condition, the high risk for complications, and his dependency upon others for normal activities of daily living (ADLs), he will require 24-hour in-home care provided by TBI nursing care specialists to provide for his most basic human needs including toileting, hygiene, grooming, mobility, meal preparation in addition to the medical care needs to monitor and provide for proper early interventions and notify appropriate physicians of any impending medical issues such as further cognitive decline, physical decline, cardiac or respiratory illness, etc. He will necessitate assistance with instrumental activities of daily living (IADLs) throughout his lifetime.

Traumatic Brain Injury Specialist Personal Care Attendant (PCA) for daily care needs
PCA/Home Health Aide following each spine surgery
IADL Assistant/Housekeeper
RN Case Management

Estimated Subtotal: \$3,971,560.00

3. MEDICAL PROCEDURES/INTERVENTIONS: Mr. Kennedy has complex cognitive and medical conditions resulting from his injuries, and for which he is at risk and will more than likely necessitate emergency room visits and hospitalizations as well as procedures as recommended by his current and future treating physicians. It is recommended that provisions including but not limited to these interventions be provided over Mr. Kennedy's lifetime.

Comprehensive Seizure Evaluation
Multidisciplinary Outpatient Neurocognitive Rehabilitation/Functional Restoration Program
Head/Cervical Spine Nerve Block Injections
Cervical Spine Epidural Steroid Injections
Lumbar Spine Epidural Steroid Injections
Anterior Cervical Spine Discectomy/Spinal Fusion/Instrumentation
Posterior Lumbar Spine Discectomy/Spinal Fusion/Instrumentation
Acute In-Patient Rehabilitation Program – following each spine surgery
Emergency Room Visits – Level 5
Acute In-Patient Hospitalization

Estimated Subtotal: \$717,309.00

4. DIAGNOSTIC STUDIES: Mr. Kennedy will require ongoing medical management necessitating multiple diagnostic tests/studies over his lifetime, including but not limited to the following diagnostic studies for which provisions are necessary now and over his lifetime

Comprehensive and Therapeutic Blood Level Monitoring
Positron Emission Tomography (PET) Scan
3T Magnetic Resonance Imaging (MRI) Scan Brain
Awake/Sleep Deprived Electroencephalogram (EEG)
Electromyogram (EMG)/Nerve Conduction Studies (NCS) Upper Extremities
Neuro-Otologic Studies/VNG Testing/Fall-Trak II Testing/Audiogram

PRELIMINARY LIFETIME FUTURE CARE AND COST PROVISIONS INCLUDES, BUT IS NOT LIMITED TO, THE FOLLOWING RECOMMENDATIONS (CONT):

Comprehensive Visual Examination
MRI Scan Cervical Spine and Lumbar Spine
Radiological Studies Cervical and Lumbar Spine

Estimated Subtotal: \$138,453.00

5. THERAPEUTIC EVALUATION/TREATMENT: Provisions for ongoing access to therapeutic interventions and management are recommended and necessary to ensure Mr. Kennedy the ability to maintain functional health and well-being related to his cognitive impairment and compromised physical status and for the prevention of further medical and functional complications over his lifetime

Intensive Vestibular Rehabilitation Program
Vestibular Rehabilitation Treatment Program
Physical Therapy: Vestibular Focused Exercise Program
Physical Therapy: Land and Pool Therapy
Occupational Therapy: Functional Home Safety Focus
Speech Therapy/Cognitive Remediation
Neurorestorative Deep Tissue Massage Therapy
Community Senior Fitness Program with Rehabilitation Specialist
Vocational/Avocational Rehabilitation Assessment

Estimated Subtotal: \$346,442.00

6. PSYCHOLOGICAL/PSYCHOTHERAPY CARE: Provisions for ongoing access to psychological interventions to assist with the emotional obstacles and challenges related to his traumatic brain injury, cognitive impairment, as well as the pain and physical limitations that he must endure daily. These impact upon his personal, marital, and family life that Mr. Kennedy must endure currently and will further face as he transitions throughout the process of aging. These provisions for ongoing access are recommend now and throughout his lifetime.

Individual Counseling with Neurocognitive Behavioral Focus through lifetime
Marital Counseling with Spouse
Family Counseling
Neurobiofeedback
Neuropsychological Evaluation with Psychometric Testing

Estimated Subtotal: \$152,206.00

PRELIMINARY LIFETIME FUTURE CARE AND COST PROVISIONS INCLUDES, BUT IS NOT LIMITED TO, THE FOLLOWING RECOMMENDATIONS (CONT):

7. ORTHOTICS/SPLINTS/BRACES: Careful monitoring of his physical and functional compromises resulting from his injuries necessitate comfort measures and custom fabrication of bracing now and for the remainder of his lifetime.

Soft Cervical Collar/Pillow

Custom Lumbosacral Corset

Cervical Spine: Post-Operative Custom Fabricated Cervical Spine Orthosis

Thoracolumbar Spine: Post-Operative Custom Fabricated Thoracolumbar Spinal Orthosis

Estimated Subtotal:

\$1,032.00

8. THERAPEUTIC/DURABLE MEDICAL EQUIPMENT: Provisions for the following durable medical equipment are recommended and necessary for safety needs, pain management, functional improvement, comfort, and care throughout Mr. Kennedy's lifetime with standard replacement frequency over his lifetime.

Safety Items – Including items such as grab bars, non-slip flooring, etc.

Comfort Items – Including items such as warm and cool packs for relief of discomfort

Tempur-Pedic Pillow with Cervical Support*

Adjustable Bed with Tempur-Pedic Mattress*

Shower Bench/Chair for Zero Threshold Shower

Bedside/Over Toiler Commode with Arm Supports

Recliner Lift Chair with Massage/Heat

**cost of item is offset by cost of typical purchase price*

Estimated Subtotal:

\$29,903.00

9. ADAPTIVE/ASSISTIVE AIDES TO PROMOTE SEMI-INDEPENDENT FUNCTION:

Adaptive/assistive equipment is recommended and necessary to promote as much semi-independent function and cognitive stimulation activities over Mr. Kennedy's lifetime.

Long-Handle Reacher/Grabber

Long-Handle Bath Sponge/Brush

Cognitive Remediation Training Program (e.g., Brain Games, Luminosity, etc.)

Estimated Subtotal:

\$30,276.00

10. MOBILITY EQUIPMENT NEEDS: Safe mobility throughout home and the community is of importance and necessary given that Mr. Kennedy is a cognitively and physically impaired individual with impaired balance, impaired ambulation, and a fall risk. He necessitates power and manual mobility devices with the proper accessories, and, due to his cognitive and physical impairments his nurse in attendance at all times. These provisions are necessary with the standard replacement frequency now and for the remainder of Mr. Kennedy's lifetime.

Single Point Cane/Walking Stick

4-Wheel UPWalker with Fold-Down Seat and Basket

Power Mobility/Power Wheelchair/Scooter/Accessories/Maintenance with Attendant Control Ability

PRELIMINARY LIFETIME FUTURE CARE AND COST PROVISIONS INCLUDES, BUT IS NOT LIMITED TO, THE FOLLOWING RECOMMENDATIONS (CONT):

Lightweight Manual Wheelchair with Accessories and Maintenance
Portable Ramp with Travel Carry Bag
Power Chair Lift/Hitch Attachment for Vehicle with Maintenance

Estimated Subtotal: \$32,397.00

11. BARRIER FREE HOME ENVIRONMENT PROVISIONS: Currently Mr. Kennedy resides with his wife and family in the Henderson, Nevada area. Home modifications are recommended and necessary such that he is afforded barrier free access to his home environment. This includes but is not limited to barrier free access to indoor and outdoor living quarters, bedroom, bathroom, etc. This will necessitate an evaluation by a specialist in home modification needs for such individuals who have complex functional impairments. Provisions for the following is recommended.

Home Modification Evaluation by Certified Rehabilitation Nurse Specialist
Provisions for Home Modification Costs for Barrier Free Home Access

Estimated Subtotal: \$65,000.00

12. MEDICATIONS/SUPPLIES: Mr. Kennedy will necessitate medication management for his cognitive and physical impairments as recommended by his treating physicians currently and over his lifetime. Though the specific medication prescribed is as recommended by his treating physicians, it is recommended that Mr. Kennedy to be afforded provisions for the following medication classifications now and for his lifetime.

Anti-Convulsant/Seizure Medication - Prescription
Anti-Migraine/Anti-Epileptic Agent - Prescription
Psychotropic Medication – Prescription
Antihistamine/Anti-Motion Medication - Prescription
Gastrointestinal Medication – Over the Counter
Non-Steroidal Analgesic Medication – Over the Counter
Topical Analgesic – Over the Counter
Opioid Analgesic following surgical procedures
Stool Softener

Estimated Subtotal: \$179,056.00

The recommended preliminary future care needs and cost provisions proposed for Mr. Douglas Kennedy over his estimated normal life expectancy of a remaining 17.0 years (i.e., to approximately 83 years of age) is **an estimated grand total of:**

\$5,817,385.00

Deborah Perlman RN, CRRN/ABSNC
Care Management
Home Evaluation/Modification Consulting
Medical Legal Consulting
Santa Clarita, CA
Curriculum Vitae

Professional Specialty and Interests

Registered Nurse/Rehabilitation Nurse/Pediatric Nurse/Orthopedic Nurse/ Medical-Legal and Case/Care Management Nurse/Patient Advocate/Home Evaluation & Modification Assessment

Pediatric Orthopedic Surgical Nurse/Patient and Family Advocate

Care Management Advocate for Special Needs/Catastrophically Injured - Pediatric and Adult

Assessment of and Life Care Planning for Special Needs/Catastrophically Injured – Pediatric and Adult

Professional Experience/Positions

- * Private RN/Surgical RN/Coordinated/Managed Pediatric Orthopedic Surgical Practice for Saul M. Bernstein, MD, Southern California Orthopedic Institute
- * Pediatric RN Orthopedic and Rehab Unit - Children's Hospital Los Angeles
- * Scoliosis Screening of Elementary/Junior High School Children/Los Angeles/Ventura School Districts
- * Lecturer/Instructor Pediatric Orthopedics at AAOS Annual Meeting–Physicians/RNs
- * Private RN/Pediatric Orthopedics – Robert M. Bernstein, MD, Cedars Sinai Orthopedic Center
- * Case Management/Life Care Planning – Roughton & Associates
- * Case/Care Management Advocate for Special Needs/Catastrophically Injured - Pediatric and Adult
- * Future Care Planning for Special Needs/Catastrophically Injured – Pediatric and Adult
- * Assessment/Evaluation Home Modification Specialist for Disabled/Injured/Aging Population

Education

- * Los Angeles Valley College, Associate of Science Degree, Registered Nurse Degree
- * Rehabilitation Nurse Course for Certification (CRRN)
- * Certified Rehabilitation Registered Nurse (CRRN/ABSNC)
- * Executive Certificate Home Modification Program, USC Leonard Davis School of Gerontology

Licensure and Certifications

- * Board of Registered Nursing, Registered Nurse, License Number RN348384 – active/current
- * Rehabilitation Nurse Certification Board, Certified Rehabilitation Registered Nurse – active/current
- * Home Modification Executive Certification, USC – active/current

EXHIBIT 3

EXHIBIT 3

Dr. Enrico Fazzini
Board-Certified Neurologist
Notice of Doctor's Lien Form

I hereby authorize Dr. Enrico Fazzini to release my attorney, a full report of his exam, diagnoses, prognosis, etc. of myself in regards to the accident in which I was involved. I understand and accept that there will be a charge for the narrative report. I hereby authorize and direct you, my attorney, to pay directly to said doctor such sums as may be due and owing him for medical services rendered both by reason of this accident and by reason of any other bills that are due his office. I hereby further give a lien on my case to said doctor against any and all proceeds of my settlement, judgment or verdict. Primary tort-feasor, multiple tort-feasors, Uninsured and Underinsured Motorist Coverage (UM/UIM, Medical Payments Coverage which may be paid to you, my attorney, or myself as a result of the injuries for which I have been treated, or injuries in connection therewith. I authorize and direct you, my attorney to withhold any sums from any settlement, judgment or verdict, i.e. primary tort-feasor, multiple tort-feasors, Uninsured and Underinsured Motorist Coverage (UM/UIM, Medical Payments Coverage, as may be necessary to adequately protect said doctor and to pay directly to him such sums as may be due and owing him for medical services rendered by him, to me.

I fully understand that I am directed and fully responsible to said doctor for all medical bills submitted by him for services rendered to me and that this agreement is made solely for his additional protection and in consideration of his awaiting payment. I further understand that said doctor's full fees will be required to be paid, that no discount will be give on this lien regardless of any PPO contract. If settlement is not satisfactory and sufficient to cover the fees and charges incurred I will be solely responsible for the full amount. I understand that such full payment is not contingent on any settlement, judgment or verdict in which I may eventually recover said fee. I hereby also give consent for my attorney, and my attorney agrees, to provide any insurance information regarding name(s) and phone number(s) of all involved insurance companies, claims examiner, policy limits and court case numbers. I authorize my attorney and/or insurance company to release such information to said doctor.

I agree never to rescind this document and that a rescission will not be honored by my attorney. I hereby instruct that in the event that another attorney is substituted in the matter, the new attorney will honor the lien as inherent to the settlement and enforceable upon the case as if it were executed by him. I agree to notify the doctor in writing if I change or substitute my attorney. If my attorney does not wish to cooperate in protecting the doctor's interest, the doctor will not await payment but will require me to make payments on a current basis. The doctor is authorized to present information to any insurance company of financial company to secure financing for patient care.

Date 7/19/21 Patient's signature [Signature]
(firma del paciente)


The undersigned, being attorney of record for the above patient, does hereby agree to agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment, or verdict as may be necessary to adequately protect said doctor named above. Attorney agrees to provide to doctor all pertinent insurance information including names, claims, policy limits, and court case numbers. The attorney agrees to call the doctor's office for the final balance prior to settlement. Attorney agrees to inform doctor of settlement or final disposition of the case and to tender payment within 5 days of such action. Attorney further agrees that in the event this lien or underlying debt is litigated, the prevailing party will be awarded reasonable attorney's fees and cost that no lien will be settled without the doctor's written consent. Attorney agrees that there will be no bargaining for a lower payment and that any liquated liens must be in writing and agreed to by the doctor, in writing. If attorney fails to obtain consent from doctor in writing, the full amount of the lien is due and payable.

Date _____ Attorney's signature _____
(firma del abogado)

Attorney _____
Address _____
Phone _____
Email _____
Fax _____

Kenny Douglas Joseph
DOB 3/11/1954

Statement of Account

STATEMENT DATE 08/10/2021	PAY THIS AMOUNT 1,700.00	ACCT. # 18724
		AMOUNT PAID \$

ENRICO FAZZINI, D.O.
275 Rockaway Tpke
Lawrence, NY 11559-1272

ADDRESSEE

PLAINTIFF NAME

Kennedy Douglas

Douglas Kennedy
86 Desert Sunflower Circle
Henderson, NV 89002

DATES OF SERVICE (due from self)
07/24/2021 - 07/24/2021


MAKE CHECKS PAYABLE TO: **ENRICO FAZZINI, D.O.**

REFER INQUIRIES TO: **Mon thru Fri 9am to 5pm (516)371-2225**

[illegible]

Patient Name: **Kennedy Douglas**

Please pay this amount

	1,700.00
---------------------------------------------------------------------------------------	-----------------

* — Service due from insurance

LESS THAN 30 DAYS	31-60 DAYS	61-90 DAYS	91-120 DAYS	OVER 120 DAYS
1,700.00				

ENRICO FAZZINI, D.O., PH.D, F.A.C.N.

BOARD-CERTIFIED NEUROLOGIST

MOVEMENT DISORDERS

NEUROPSYCHOLOGY

Fellowship: Movement Disorders, Columbia Presbyterian Medical Center

Ph.D. in Behavioral Neurosciences, Boston University

Diplomat: American Board of Psychiatry and Neurology

Diplomat: American Osteopathic Board of Neurology and Psychiatry

291 North Pecos Rd, Henderson, NV 89074 275 Rockaway Turnpike, Lawrence, NY 11559

702-570-7600/516-371-2225, 516-371-3773 fax, 718-213-0100 cell

drenricofazzini@gmail.com

Re: Douglas Kennedy

DOE: 07/24/21

DOI: 11/05/18

This 67-year-old right-handed male was referred for neurological consultation on 07/24/21 following a motor vehicle injury which occurred on 11/05/18 at which time the patient was the driver in a vehicle that was struck in the rear, propelled across the freeway, struck by another vehicle in the rear, and then spun so that finally his car landed in reverse direction against the direction that he was originally traveling in.

He car was, therefore, struck in the rear, spun, struck, spun, and then finally came to rest.

The patient was shaken, jolted, and dazed by these impacts and the motion of his car.

He stated that he did not hit his head and he did not have a loss of consciousness. The police and ambulance were on the scene.

The patient was having headaches and balance impairment with memory, language, attention, concentration, and spatial orientation cognitive impairments.

He had a series of 3 MRI scans of the brain.

On 12/18/18, MRI scan of the brain demonstrated left frontal subcortical white matter changes with decrease in fiber tracts in the middle part of the corpus callosum. There were also periventricular and subcortical white matter changes and increased signal changes that represented fresh contusions with blood in both hemispheres.

On MRI scan of the brain on 06/12/19, there was hemosiderin deposition detected on the right and left frontal and left temporal lobes, decreased fractional anisotropy in the anterior, middle, and posterior corpus callosum, and right hippocampal atrophy again with subcortical and periventricular and deep white matter changes.

In the MRI scan of the brain on 02/17/20, there was right temporal and left frontal hemosiderin deposition which was in a subcortical location with right hippocampal atrophy and the fractional anisotropy values were improved in the corpus callosum.

Re: Douglas Kennedy
Page Two

The patient had neuropsychological testing on 08/08/19 with Dr. Baumann which demonstrated cognitive impairments and good effort without anxiety and depression.

Past medical history was positive for a left arm burn 20 years ago.

The patient was taking Flomax for prostate hypertrophy.

He denied allergies to medications and past surgical history was positive for transurethral prostate resection.

On general physical examination, the patient was a well-developed male in moderate distress because of the above symptoms.

Examination of the head, ears, eyes, nose, and throat, and extremities was without any obvious signs of trauma.

NEUROLOGICAL EVALUATION

Mental status testing revealed he was alert and oriented times 3. He seemed to have some difficulty with word-processing and working memory.

Language skills seemed intact. Formal tests of language, attention, concentration, memory, and spatial orientation were not performed.

Cranial nerves II through XII and cerebellar function were intact.

Motor evaluation revealed full strength in all extremities. Gait was slow because of imbalance and the patient's balance was so poor that he could not even sit straight without tipping over to the right or left.

Plantar response was mute bilaterally, atrophy was absent, and muscle tone was normal.

Sensation to pinprick and vibration was normal.

Deep tendon reflexes were 1/4 throughout except for absent bilateral ankle jerk responses.

There were mild cervical paraspinal muscle spasms and tenderness with reduced ranges of motion as follows: flexion 40/50, extension 50/60, right and left rotation 70/80 and 60/80, and right and left lateral bending 40/45 and 30/45.

Examination of the knees and shoulders was intact.

Re: Douglas Kennedy
Page Three

Impression:

1. Cognitive deficits following traumatic brain injury.
2. Postconcussive balance impairment.
3. Postconcussive headaches.
4. Cervical myofascial pain syndrome.

Recommendations:

1. Aricept 5 mg a day to be taken after meals.
2. Reevaluation in 1 month.

In my opinion, this patient remains significantly impaired as a direct consequence of the injuries sustained in the motor vehicle accident of 11/05/18.

Enrico Fazzini, D.O., Ph.D.
Board Certified Neurologist
EF: mn

***Dr. Enrico Fazzini
Board-Certified Neurologist
291 North Pecos Road
Henderson, NV 89074
(702) 570-7600 Fax (516) 371-3773***

Dr. Fazzini will be in our Henderson office and available to treat patients

August

Wednesday – August 11, 2021

Thursday – August 12, 2021

Friday – August 13, 2021

Saturday – August 14, 2021

September

Wednesday – September 8, 2021

Thursday – September 9, 2021

Friday – September 10, 2021

Saturday – September 11, 2021

***For all your scheduling needs please contact
(702) 570-7600 or (516) 371-2225***

Please fax all referrals to (516) 371-3773

Thank You

EXHIBIT 4

EXHIBIT 4

COGBURN LAW
2580 St. Rose Parkway, Suite 330, Henderson, Nevada 89074
Telephone: (702) 748-7777 | Facsimile: (702) 966-3880

COGBURN LAW
Jamie S. Cogburn, Esq.
Nevada Bar No. 8409
jsc@cogburncares.com
Joseph J. Troiano, Esq.
Nevada Bar No. 12505
jjt@cogburncares.com
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Telephone: (702) 748-7777
Facsimile: (702) 966-3880
Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and
LORI KENNEDY, an Individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an individual;
UNIVERSAL PROTECTION SERVICES,
LLC, d/b/a ALLIED UNIVERSAL SECURITY
SERVICES, a Foreign Limited Liability
Company, DOE Family Members 1-10; DOE
Individuals 11-20; and ROE Corporations 21-30,
Inclusive,

Defendants.

Case No.: A-20-820254-C
Dept. No.: 15

**THIRTEENTH SUPPLEMENT TO
PLAINTIFF'S INITIAL DISCLOSURE
OF WITNESSES AND DOCUMENTS
PURSUANT TO NRCP 16.1**

In compliance with NRCP 16.1, Plaintiff, Douglas Kennedy (Plaintiff), by and through counsel, Cogburn Law, hereby supplements the following witness list and documents related to this matter (**supplemental items delineated in bold**):

I. WITNESSES

The following are persons of whom Plaintiff is aware and believes may have knowledge relevant to this matter. Plaintiff reserves the right to amend/supplement this list as necessary if Plaintiff discovers additional information about the persons listed below or other persons who may have knowledge relevant to this matter, including expert witnesses.

Plaintiff expressly reserves the right to depose and call at trial any witness identified by any other party to this action; all witnesses identified and/or deposed during the course of discovery; and any and all rebuttal and/or impeachment witnesses.

1 Plaintiff further reserves the right to disclose certain medical, biomechanical, economic,
2 vocational, accident reconstruction, and other experts presently unknown or unidentified.

- 3 1. Douglas Kennedy
4 c/o Cogburn Law
5 2580 St. Rose Parkway, Suite 330
6 Henderson, NV 89074
7 (702) 748-7777

8 This witness is the Plaintiff in this action and is expected to testify as to his knowledge of
9 the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 10 2. Lori Kennedy
11 c/o Cogburn Law
12 2580 St. Rose Parkway, Suite 330
13 Henderson, NV 89074
14 (702) 748-7777

15 This witness is the Plaintiff in this action and is expected to testify as to her knowledge of
16 the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 17 3. Gabriel L. Martinez
18 c/o Wilson Elser Moskowitz Edelman & Dicker, LLP
19 6689 Las Vegas Blvd. South, Suite 200
20 Las Vegas, NV 89119
21 (702) 727-1400

22 This witness is the Defendant in this action and is expected to testify as to its knowledge
23 of the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 24 4. Allied Barton Security Services, LLC
25 c/o Wilson Elser Moskowitz Edelman & Dicker, LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
(702) 727-1400

This witness is the Defendant in this action and is expected to testify as to its knowledge
of the facts relating to the allegations made in this case and Plaintiff's alleged damages.

5. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for Allied Barton
Security Services, LLC
c/o Wilson Elser Moskowitz Edelman & Dicker, LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
(702) 727-1400

1 This witness is the Defendant in this action and is expected to testify as to its knowledge
2 of the facts relating to the allegations made in this case and Plaintiff's alleged damages.

- 3 6. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
4 Nevada Highway Patrol
4615 West Sunset Road
Las Vegas, NV 89118
5 (702) 486-4100

6 This/These witness(es) is/are expected to testify regarding the authenticity of the records
7 received and produced herewith from the entity as it pertains to the Subject Incident.

- 8 7. Officer Christopher French, Badge No. H6404
Nevada Highway Patrol
4615 West Sunset Road
9 Las Vegas, NV 89118
10 (702) 486-4100

11 This/These officer(s) is/are expected to testify as to the investigation of Event No.
12 181100743 any relevant facts and information relating to the subject litigation.

- 13 8. Corey James Carter
616 Winchester Drive
Henderson, NV 89002
14 (719) 231-2230

15 This witness is expected to testify concerning relevant facts and information relating to the
16 subject litigation.

- 17 9. Kylie Miranda Broyles
388 Summerland Drive
Henderson, NV 89002
18 (702) 715-5838

19 This witness is expected to testify concerning relevant facts and information relating to the
20 subject litigation.

- 21 10. Kimberly Castor and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of
22 Records for
Marksman Security Corporation
3230 W. Commercial Blvd., Suite 100
23 Ft. Lauderdale, FL 33309
(954) 964-6704

24 ...

25 ...

1 This/These witness(es) is/are expected to testify regarding the authenticity of the records
2 received and produced herewith from the entity as it pertains to the Subject Incident and/or
3 concerning relevant facts and information relating to the subject litigation.

- 4 11. Julia Prybyla and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of
5 Records for
6 Security Industry Specialists
7 6071 Bristol Pkwy
8 Culver City, CA 90230-6601
9 (800) 201-3742

10 This/These witness(es) is/are expected to testify regarding the authenticity of the records
11 received and produced herewith from the entity as it pertains to the Subject Incident and/or
12 concerning relevant facts and information relating to the subject litigation.

- 13 12. Robyn Andrews
14 1065 Las Palmas Entrada Avenue
15 Henderson, NV 89012
16 702-807-0447

17 Robyn is a friend of Plaintiff, Douglas Kennedy, and is expected to testify as to her personal
18 knowledge and observations of Plaintiff Douglas Kennedy's pre- and post-incident physical
19 condition, capabilities, and quality of life.

- 20 13. William Dungey
21 203 Red Cloud Terrace
22 Henderson, NV 89015
23 702-338-8681

24 William is a friend of Plaintiff, Douglas Kennedy, and is expected to testify as to his
25 personal knowledge and observations of Plaintiff Douglas Kennedy's pre- and post-incident
physical condition, capabilities, and quality of life.

14. Sheri Ventricelli (Lori's sister)
15 Bon Air Circle
Milford, CT 06461
203-556-9890

Sheri is a Plaintiff Douglas Kennedy's sister-in-law and Lori Kennedy's sister and is
expected to testify as to her personal knowledge and observations of Plaintiff Douglas Kennedy's
pre- and post-incident physical condition, capabilities, and quality of life.

1 15. Edith Settle
2 86 Desert Sunflower Circle
3 Henderson, NV 89002
4 702-334-9070

5 Edith is Plaintiff Lori Kennedy' mother and lives with Lori and Plaintiff Doug Kennedy.
6 She also lived with Lori and Doug before the subject crash. She is expected to as to her personal
7 knowledge and observations of Plaintiff Douglas Kennedy's pre- and post-incident physical
8 condition, capabilities, and quality of life.

9 16. Carol Feola
10 83 Sawmill Road
11 Milford, CT 06461
12 203-922-2887

13 Carol is a friend of Plaintiff, Lori Kennedy, and is expected to testify as to her personal
14 knowledge and observations of Plaintiff Douglas Kennedy's pre- and post-incident physical
15 condition, capabilities, and quality of life.

16 17. Jessica Kennedy
17 10454 Sky Gate Street
18 Las Vegas, NV 89178
19 702-301-6058

20 This witness is Plaintiff's former daughter-in-law. Ms. Kennedy was Plaintiff's supervisor
21 when he worked at Kindercare Learning Center and Henderson Christian Academy. She is
22 expected to testify regarding her experiences with Plaintiff as his supervisor as well as to her
23 personal knowledge and observations of Plaintiff Douglas Kennedy's pre- and post-incident
24 physical condition, capabilities, and quality of life.

25 18. Cheryl Coutermash
 3341 Pomello Avenue SW
 Palm Bay, Florida 32908
 321-368-2039

 This witness was with Plaintiffs when they attended a show on September 4, 2021 where
 they had to leave early because Plaintiff Doug Kennedy experienced a medical episode. She is
 expected to testify as to her personal knowledge and observations of Plaintiff Douglas Kennedy's
 pre- and post-incident physical condition, capabilities, and quality of life.

1 19. Louis Coutermash
2 3341 Pomello Avenue SW
3 Palm Bay, Florida 32908
4 772-216-2123

5 This witness was with Plaintiffs when they attended a show on September 4, 2021 where
6 they had to leave early because Plaintiff Doug Kennedy experienced a medical episode He is
7 expected to testify as to his personal knowledge and observations of Plaintiff Douglas Kennedy's
8 pre- and post-incident physical condition, capabilities, and quality of life.

9 **A. RETAINED EXPERTS**

10 1. Norton A. Roitman, MD, DLFAPA
11 2340 Paseo Del Prado D307
12 Las Vegas, NV 89102
13 (702) 222-1812

14 Dr. Roitman is board certified in child, adolescent and general psychiatry and a
15 Distinguished Life Fellow of the American Psychiatric Association. Dr. Roitman is expected to
16 give expert opinions consistent with his report, regarding the treatment of Plaintiff; the necessity
17 of treatment rendered; the necessity of future treatment to be rendered; the causation of the
18 necessity for past and future medical treatment; his expert opinion as to the past and future
19 restrictions of activities caused by the subject incident; and prognosis for recovery/future
20 treatment.

21 2. Deborah Perlman RN, CRRN/ABSNC
22 19197 Golden Valley Road, #231
23 Santa Clarita, CA 91387
24 (661) 360-3663

25 Deborah Perlman is a certified rehabilitation registered nurse specializing in, among other
specialties, rehabilitation and case/care management. Ms. Perlman is expected to give expert
opinions consistent with her report, regarding the treatment of Plaintiff; the necessity of treatment
rendered; the necessity of future treatment to be rendered; the causation of the necessity for past
and future medical treatment; her expert opinion as to the past and future restrictions of activities

1 caused by the subject incident; and prognosis for recovery/future treatment. Ms. Perlman will be
2 formally disclosed as an expert witness according to the scheduling order.

3 3. Enrico A. Fazzini, D.O., Ph.D., F.A.C.N
4 291 North Pecos Road
5 Henderson, Nevada 89074
6 (212) 983-1370

7 Enrico Fazzini, DO is a Board-Certified Neurologist with subspecialty training in
8 Movement Disorders and a Ph.D. in Behavioral Neuroscience. Dr. Fazzini is expected to give
9 expert opinions consistent with his report, regarding the treatment of Plaintiff; the necessity of
10 treatment rendered; the necessity of future treatment to be rendered; the causation of the necessity
11 for past and future medical treatment; his expert opinion as to the past and future restrictions of
12 activities caused by the subject incident; and prognosis for recovery/future treatment. Dr. Fazzini
13 will be formally disclosed as an expert witness according to the scheduling order.

14 4. **Gabriel Barnard, MD, MS**
15 **4712 Admiralty Way, #544**
16 **Marina Del Ray, CA 90292**
17 **310-751-4337**

18 **Gabriel Barnard, MD is a Board-Certified physician specializing in physical medicine**
19 **& rehabilitation and pain management. Dr. Barnard is expected to give expert opinions**
20 **consistent with his report, regarding his independent medical evaluation of Plaintiff; the**
21 **necessity of treatment rendered; the necessity of future treatment to be rendered; the**
22 **causation of the necessity for past and future medical treatment; his expert opinion as to the**
23 **past and future restrictions of activities caused by the subject incident; and prognosis for**
24 **recovery/future treatment. Dr. Barnard will be formally disclosed as an expert witness**
25 **according to the scheduling order.**

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...

1 **5. Terrence Clauretie, PhD, C.P.A.**
2 **Vocational Economics, Inc.**
3 **3960 Howard Hughes Parkway, Suite 500**
 Las Vegas, NV 89169
 (702) 990-3631

4 **Terence Clauretie, PhD, C.P.A., is a Professor of Economics at University of Nevada,**
5 **Las Vegas and has taught undergraduate courses in Finance, Principles of Managerial**
6 **Finance, Real Estate Finance, and Investments. Mr. Clauretie has taught graduate courses**
7 **in Problems in Business Finance. Mr. Clauretie has been retained as an expert in this case**
8 **and has authored a report containing his findings and opinions. Mr. Clauretie expressly**
9 **reserves the right to supplement his report and to offer rebuttal testimony and opinions.**

10 **6. Benjamin Lester, Ph.D.**
11 **Exponent**
12 **23445 North 19th Avenue**
 Phoenix, AZ 85027
 (623) 582-6949

13 **Benjamin Lester, PhD of Exponent is a Managing Scientist and cognitive**
14 **psychologist, specializing in memory, perception, visibility, attention, and information**
15 **processing. Dr. Lester has been retained as an expert in this case and has authored a report**
16 **containing his findings and opinions. Dr. Lester expressly reserves the right to supplement**
17 **his report and to offer rebuttal testimony and opinions.**

18 **B. NON-RETAINED EXPERTS**

19 **1. Richard P. Newman, MD**
20 **MedTrak Diagnostics, Inc.**
21 **400 N. Stephanie Street**
 Henderson, NV 89014
 (347) 742-4100

22 **Richard P. Newman, MD, is a board-certified neurologist. Dr. Newman of MedTrak**
23 **Diagnostics, Inc., authored the findings for Plaintiff after reviewing results from the**
24 **following tests:**
25

- VNG testing for this patient performed on 9/24/19.
- Posturography balance and coordination testing performed on 9/24/19.
- Braincheck neurocognitive testing was performed on 9/24/19.
- Fukuda testing performed on 9/24/19.
- Romberg testing performed on 9/24/19

Dr. Newman is expected to give expert opinions consistent with his report, regarding his review and evaluation of Plaintiff's test results; the necessity of treatment rendered; the necessity of future treatment to be rendered; the causation of the necessity for past and future medical treatment; his expert opinion as to the past and future restrictions of activities caused by the subject incident; and prognosis for recovery/future treatment.

2. **Gobinder S. Chopra MD**
NEUROCARE OF NEVADA
6410 Medical Center St Ste A-100
Las Vegas, NV 89148
(702) 796-8500

Dr. Chopra is expected to give expert opinions consistent with his report, regarding his review and evaluation of Plaintiff's test results; the necessity of treatment rendered; the necessity of future treatment to be rendered; the causation of the necessity for past and future medical treatment; his expert opinion as to the past and future restrictions of activities caused by the subject incident; and prognosis for recovery/future treatment.

3. **Carli S. Snyder, Psy.D**
1943 Port Carney Place
Newport Beach, CA 92660
310-430-1488

Carli Snyder, Psy.D is expected to give expert opinions consistent with her report, regarding her review and evaluation of Plaintiff's test results; the necessity of treatment rendered; the necessity of future treatment to be rendered; the causation of the necessity for past and future medical treatment; her expert opinion as to the past and future restrictions of activities caused by the subject incident; and prognosis for recovery/future treatment.

...

...

C. TREATING PHYSICIAN HEALTH CARE PROVIDERS / NON-RETAINED EXPERTS

Plaintiff discloses the following medical providers, pursuant to NRCP 16.1(a)(1)(A)(iii).
The NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for each medical provider listed below is/are expected to testify regarding the care and treatment rendered to Plaintiff following the incident that is the subject of this litigation, including, but not limited to: the injuries sustained; past, present, and future medical treatment; the impairment, diagnosis, prognosis, disability, pain and suffering, disfigurement, and/or causation of injury; and the authenticity and reasonableness of all care and billing pertaining to said treatment.

i. DOUGLAS KENNEDY

1. Samuel B. Wright, DO and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
HENDERSON HOSPITAL
1050 West Galleria Drive
Henderson, NV 89011
(702) 963-7000
2. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
SHADOW EMERGENCY PHYSICIANS
P.O. Box 13917
Philadelphia, PA 19101
800-355-2470
3. Michael Trainor MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
ADVANCED ORTHOPEDICS & SPORTS MEDICINE
8420 West Warm Springs Road, Suite 100
Las Vegas, NV 89113
(702) 740-5327
4. Jeffrey Markham, MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
LAS VEGAS RADIOLOGY (MARYLAND)
3201 S. Maryland Pkwy 102
Las Vegas, NV 89109
(702) 254-5004
5. Gobinder S. Chopra MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
NEUROCARE OF NEVADA
6410 Medical Center St Ste A-100
Las Vegas, NV 89148
(702) 796-8500

6. Joseph E. Indrieri, MSPT, DPT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
DYNAMIC SPINE & SPORTS
2567 E. Windmill Parkway, Suite B
Henderson, NV 89074
(702) 565-1243
7. Eric Biesbroeck MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
PUEBLO MEDICAL IMAGING
5495 S. Rainbow Boulevard, Suite 101
Las Vegas, NV 89118
(702) 228-0031
8. Janet E. Baumann, Ph.D. and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
JANET E. BAUMANN, PH.D.
501 S. Rancho Drive, Suite F37
Las Vegas, NV 89106
(702) 388-9403
9. Travis Snyder, DO and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
SIMONMED IMAGING - HENDERSON
6301 Mountain Vista St
Henderson, NV 89014
(702) 433-7216
10. Evan C. Allen MD and/or Erum Malik PA-C and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
TOTAL CARE FAMILY PRACTICE
1701 North Green Valley Parkway, Suite 5C
Henderson, NV 89074
11. Austin Hill DPT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
KELLY HAWKINS PHYSICAL THERAPY - PECOS
8975 S. Pecos Road, Ste. 7A
Henderson, NV 89074
(702) 4563-2024
12. Richard P. Newman, MD and/or Scott Auerbach, PT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
MEDTRAK DIAGNOSTICS, INC.
400 N. Stephanie Street, Ste. 225
Henderson, NV 89014
(347) 742-4100
13. Firooz Mashhood, MD and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
MEDICAL REHABILITATION ASSOCIATES OF LAS VEGAS
5440 W. Sahara Ave., #104
Las Vegas, NV 89146

...

14. Kevel Johnson, MFT and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
GRACE COUNSELING CENTER
2637 W. Horizon Ridge Pkwy.
Henderson, NV 89052
(702) 716-0908
15. NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
STATE MEDICAL EQUIPMENT
3950 E. Sunset Road, Ste. 112
Las Vegas, NV 89120
(702)538-9555
16. Pooja Bhakta and/or Nolan Daniels and/or Kenneth Martin and/or Alexis Kalda and/or Taylor Mulford and/or Alexander Darkhovsky and/or Zachary McConnell and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
FYZICAL THERAPY
9005 South Pecos Road, Ste. 2520
Henderson, NV 89074
(702) 818-5000
17. **Carli S. Snyder, Psy.D and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
CARLI S. SNYDER PSY.D
1943 Port Carney Place
Newport Beach, CA 92660
310-430-1488**
- ii. LORI KENNEDY
 1. Rachel Allen, CPC and/or NRCP 30(b)(6) Representative(s) and/or Custodian(s) of Records for
GRACE COUNSELING CENTER
2637 W. Horizon Ridge Pkwy.
Henderson, NV 89052
(702) 716-0908

II. DOCUMENTS

Produced herewith are the following documents that are currently known and available that may be used in support of the allegations contained in Plaintiff's Complaint and other documents required by NRCP 16.1. Plaintiff reserves the right to amend/supplement this disclosure of documents as the same become known to Plaintiff throughout the discovery process, including expert witness reports/opinions.

Plaintiff expressly reserves the right to designate any and all documents identified by any other party to this action; any and all documents identified during discovery in this action; any and

all pleadings on file herein; any and all responses to any Interrogatories, Requests for Admission, and/or Requests for Production by any party to this action; any and all depositions, including exhibits; and any and all rebuttal and/or impeachment documents.

THIRTEENTH SUPPLEMENT

Documents disclosed in the Thirteenth Supplement to Plaintiff's Initial Disclosures of Witnesses and Documents Pursuant to NRCP 16.1 are accessible via the following link (includes PDF and original JPEG format of photographs):¹

<https://filev.io/r/s/25cf23txDzbMGHjRwWFYUmsBD7ssBN6DFXESDdroMMMLznXj8AX8qo9D>

A. NON-MEDICAL DOCUMENTS

No.	Description	Bates No.
1.	DMV Driver's Handbook	n/a; Available for inspection
2.	DMV Beginning Driver Training Guide	n/a; Available for inspection
3.	HIPAA Authorizations regarding Douglas Kennedy allowing the law office of Wilson Elser Moskowitz Edelman & Dicker LLP to obtain medical records from the following providers: Henderson Hospital Shadow Emergency Physicians Advanced Orthopedics & Sports Medicine Las Vegas Radiology Neurocare of Nevada Dynamic Spine & Sports Pueblo Medical Imaging Janet E. Baumann, Ph.D. SimonMed Imaging Total Care Family Practice Kelly Hawkins Physical Therapy MedTrak Diagnostics, Inc. Medical Rehabilitation Associates of Las Vegas Grace Counseling Center Carli S. Snyder, Psy.D	P-HIPAA 0001-0014 P-HIPAA 0015
4.	HIPAA Authorizations regarding Lori Kennedy allowing the law office of Wilson Elser Moskowitz Edelman & Dicker LLP to obtain medical records from the following providers: Grace Counseling Center	P-HIPPA-L 0001

¹ Link Expires on 1/15/2022

No.	Description	Bates No.
5.	Traffic Crash Report Written Witness Statements	P-TCR 0001-0008 P-TCR 0009-0014
6.	Photographs of the Scene from Nevada Highway Patrol	P-PHOTO 0001-0043 ²
7.	Photographs of Plaintiff prior to the subject incident, depicting activities he can no longer do³	P-PHOTO 0100-0116⁴
8.	Photograph of Plaintiff after the subject incident	P-PHOTO 0200⁵
9.	Videos of Plaintiff prior to the subject incident, depicting activities he can no longer do	P-VID 0001-0004
10.	Body Worn Camera Footage from Nevada Highway Patrol (provided via sharelink)	P-BWC 0001-0002
11.	Psychiatric Examination Report authored by Norton A. Roitman, MD DLFAPA dated 8/17/2020	P-ROIT 0001-0025
12.	CV, Fee Schedule and Testimony history of Norton A. Roitman, MD DLFAPA	P-ROIT 0026-0047
13.	Certified Marriage Certificate of Lori and Douglas Kennedy (original copy has been requested and will be available for inspection once received)	P-CERT 0001
14.	Douglas Kennedy's Journal Entries from 11/5/2018-1/26/2021	P-JOUR 0001-0017
15.	Gabriel Martinez's Employment File produced by Defendant Universal Protection Services, LLC's in its Responses to Douglas J. Kennedy's Request for Production.	DEF000015-000058
16.	CV and Fee Schedule of Deborah Perlman, RN, CRRN, RNCB	P-PERL 0001-0002
17.	Preliminary Future Care Plan Cost Provisions Report regarding Douglas Kennedy authored by Deborah Perlman, RN, CRRN, RNCB dated November 2020	P-PERL 0003-0012
18.	Final Future Care Plan and Cost Provisions Report regarding Douglas Kennedy authored by Deborah Perlman, RN, CRRN, RNCB dated November 22, 2021	P-PERL 0013-0030
19.	Email from Marksman Security Corporation sent in response to Subpoena	P-MSA 0001-0007
20.	Henderson Justice Court Traffic Guilty Plea and Waiver Re Gabriel Martinez citation # X02128045 dated 3/4/2019	P-HJC 0001

² Bates P-PHOTO 0001-0099 for photographs of incident scene- any bates not currently used are reserved

³ Plaintiffs' counsel is currently working on obtaining specific date information for photographs and videos – taken approximately 2014-2017

⁴ Bates P-PHOTO 0100-0199 for photographs prior to subject accident - any bates not currently used are reserved

⁵ Bates P-PHOTO 0200-0299 for photographs of Plaintiff after the subject accident - any bates not currently used are reserved

No.	Description	Bates No.
	produced by Defendant in Response to Requests for Admission	
21.	Documents received from Brosnan Risk Consultants, Ltd., in response to Subpoena issued on March 23, 2021	P-BRC 0001-0002
22.	Securitas Security Services USA, Inc.'s, response to Subpoena issued on March 3, 2021- no records	P-SSS 0001-0007
23.	SOS Security's Amended response to Subpoena issued on March 3, 2021, served by Defendant- no records (original response included records for wrong person so it is omitted from disclosure and already in Defendant's possession)	P-SOS 0001-0002
24.	Security Industry Specialists' response to Subpoena issued on March 3, 2021	P-SIS 0001-0054
25.	Documents produced by Defendant in Response to Request for Production of a copy of the adjudication guidelines referenced in DEF00053 Bate Stamped as DEF000237-000243- re-bated as these are duplicative bates to other documents disclosed by Defendant in prior disclosures.	P-06RFP 0001-0007
26.	Documents produced by Defendant in Response to Request for Production of Defendant's employment file from 1/25/12- 8/11/12. Bate stamped as DEF000134- re-bated as these are duplicative bates to other documents disclosed by Defendant in prior disclosures.	P-07RFP 0001
27.	Documents produced by Defendant in Response to Request for Production of a copy of the AlliedBarton Driver Training Course that was in effect from 1/10/18 to the date of the subject incident. Bate stamped as DEF000135-000236- re-bated as these are duplicative bates to other documents disclosed by Defendant in prior disclosures.	P-11RFP 0001-0102
28.	Curriculum Vitae, Fee Schedule and Testimony List of Enrico Fazzini, DO	P-FAZZ 0001-0022
29.	Expert Report outlining the Neurological Consultation of Plaintiff authored by Enrico Fazzini, DO dated 7/24/2021	P-FAZZ 0023-0025
30.	Expert Report outlining the Follow Up Neurological Evaluation of Plaintiff authored by Enrico Fazzini, DO dated 8/14/2021	P-FAZZ 0026-0027
31.	Expert Report outlining the Follow Up Neurological Evaluation of Plaintiff authored by Enrico Fazzini, DO dated 8/02/2021	P-FAZZ 0028-0035

No.	Description	Bates No.
32.	Expert Report outlining the Follow Up Neurological Evaluation of Plaintiff authored by Enrico Fazzini, DO dated 9/11/2021	P-FAZZ 0036-0037
33.	Expert Report outlining the Follow Up Neurological Evaluation of Plaintiff authored by Enrico Fazzini, DO dated 10/02/2021	P-FAZZ 0038-0039
34.	Plaintiff's Resume	P-RES 0001
35.	Receipt for Purchase of tickets in the amount of \$572.56 to see Shin Lim perform on 7/17/21	P-RCPT 0001-0004
36.	Receipt for Purchase of tickets in the amount of \$313.34 to see The Australian Bee Gees perform on 9/4/2021	P-RCPT 0005-0008
37.	CV, Fee Schedule and Testimony List of Gabriel Barnard MD, MS	P-BARN 0001-0007
38.	Expert Report dated 11/30/2021 Re Independent Medical Evaluation performed on 6/22/2021, authored by Gabriel Barnard, MD, MS	P-BARN 0008-0019
39.	CV, Fee Schedule and Testimony List of Terrence M. Clauretie, PhD, CPA	P-CLAU 0001-0035
40.	Report on Present Value of Life Care Plan dated 11/25/2021 authored by Terrence M. Clauretie, PhD, CPA	P-CLAU 0036-0052
41.	CV and Fee Schedule of Benjamin Lester, PhD	P-LEST 0001-0006
42.	Expert Report dated 12/01/2021 authored by Benjamin Lester, PhD	P-LEST 0007-0022
43.	CV, Fee Schedule and Testimony List of Richard Newman, MD	P-NEWM 0001-0009
44.	CV and Fee Schedule of Gobinder Chopra, MD	P-CHOP 0001-0003
45.	License Detail Information of Carli Snyder, Psy.D	P-SNYD 0001

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B. MEDICAL DOCUMENTS**DOUGLAS KENNEDY**

No.	Description	Date(s) of Service	Bates No.
1.	Henderson Hospital Medical Records and Billing	11/6/2018	P-HH 0001-0055
2.	Shadow Emergency Physicians Medical Billing	11/6/2018	P-SEP 0001-0002
3.	Advanced Orthopedics & Sports Medicine Medical Records and Bills	11/20/2018-7/9/2019	P-AOSM 0001-00047
4.	Las Vegas Radiology Medical Records and Billing	11/28/2018 and 4/13/19	P-LVRAD 0001-0010
5.	Neurocare of Nevada Medical Records and Billing Billing Only Medical Records and Billing	11/29/2018-8/3/2020 8/3/2020 3/29/21-4/22/21	P-NCONV 0001-0137 P-NCONV 0138 P-NCONV 0139-0155
6.	Dynamic Spine & Sports Medical Records and Billing	12/10/18-3/13/19	P-DSS 0001-0087
7.	Pueblo Medical Imaging Medical Records and Billing	12/18/18	P-PMI 0001-0006
8.	Janet E. Baumann, Ph.D. Medical Records and Billing	6/10/19-7/11/19	P-BAUM 0001-0066
9.	SimonMed Imaging Medical Records and Billing Additional Medical Records and Billing	6/12/2019, 7/17/2020 4/06/2021	P-SMI 001-0014 P-SMI 0015-0017
10.	Total Care Family Practice Medical Records and Billing	7/16/2019	P-TCFP 0001-0003
11.	Kelly Hawkins Physical Therapy Medical Records and Billing	9/23/19-3/6/20 ⁶	P-KHAWK 0001-0171
12.	MedTrak Diagnostics, Inc. Medical Records	9/25/2019	P-MTRK 0001-0025
13.	Medical Rehabilitation Associates of Las Vegas-Medical Records and Billing Additional Medical Records ⁷ Updated Billing	10/20/20-11/11/20 11/17/20-12/09/20	P-MRALV 0001-0014 P-MRALV 0015-0024 P-MRALV 0025

⁶ Corrected last date of service (already produced)⁷ Billing is Pending

No.	Description	Date(s) of Service	Bates No.
14.	Grace Counseling Center Medical Records Corrected Medical Record	11/21/20-1/25/21 1/25/2021	P-GRACE-DK 0001-0004 P-GRACE-DK 0005
15.	State Medical Equipment Billing statement for Plaintiff's Power Operated Vehicle (Scooter) Updated/Final Billing	1/16/2021	P-SME 0001-0009 P-SME 0010
16.	Fyzical Therapy and Balance Center	2/3/21-3/4/21	P-FYZ 0001-0085
17.	Prescription for a U-Step Walker per balance impairment issued by Dr. Enrico Fazzini.	10/2/2021	P-FAZZ 0040
18.	Carly S. Snyder Psy.D Medical Evaluation Report	6/7/21-11/17/21	P-SNYD 0002-0005

LORI KENNEDY

No.	Description	Date(s) of Service	Bates No.
1.	Grace Counseling Center Medical Records and Billing ⁸ Additional Medical Records and Updated Billing	12/2/20-2/10/21 3/10/21-10/06/21	P-GRACE-LK 0001-0006 P-GRACE-LK 0007-0020

C. X-RAYS, FILMS, AND DIAGNOSTIC STUDIES

Plaintiff is aware of the following x-rays, films, and diagnostic studies, copies of which may be obtained directly from the provider(s) at Defendant's expense:

1. Las Vegas Radiology
2. Pueblo Medical Imaging

D. DEMONSTRATIVE EXHIBITS

As applicable, Plaintiff may offer at trial certain exhibits for demonstrative purposes, including, but not limited to, the following:

1. The dictionary;
2. PowerPoint images, blowups, transparencies, story boards, or similar presentation media of any of the following:

⁸ Full Billing. Records through 12/23/20. Pending additional records.

- A. Exhibits
- B. Deposition transcripts
- C. Discovery responses
- D. Jury instructions
- E. The location/scene of the incident

3. Models, diagrams, drawings, pictures, and/or videos of various parts of the human body, diagnostic tests, and/or surgical procedures;

4. Exemplars, models, or pictures of the surgical hardware/implantation devices used, or expected to be used in the care and treatment of Plaintiff;

5. Maps, diagrams, or models of the scene of the incident.

III. COMPUTATION OF DAMAGES

Plaintiff offers the following computation of damages pursuant to NRCP 16.1(a)(1)(A)(iv). This list is not designed to be all-inclusive and may not reflect Plaintiff's claims, as applicable, for general damages, lost wages, future and/or residual damages, and medical bills not yet received. Plaintiff reserves the right to amend/supplement this list throughout the discovery process.

A. DOUGLAS KENNEDY

Description	Bates No.	Date(s) of Service	Amount
Henderson Hospital	P-HH 0001-0002	11/6/18	\$593.00
Shadow Emergency Physicians	P-SEP 0002	11/6/18	\$922.00
Advanced Orthopedics & Sports Medicine	P-AOSM 0001-0005	11/20/18-7/9/19	\$5,171.35
Las Vegas Radiology	P-LVRAD 0001-0002	11/28/18 & 4/13/19	\$3,300.00
Neurocare of Nevada	P-NCONV 0001& P-NCONV 0138 P-NCONV 0140	11/29/18-4/22/21	\$10,880.00
Dynamic Spine & Sports	P-DSS 0001-0003	12/10/18-3/13/19	\$14,082.02
Pueblo Medical Imaging	P-PMI 0002	12/18/18	\$5,200.00
Janet E. Baumann, Ph.D.	P-BAUM 0002	6/10/19-7/11/19	\$5,000.00
SimonMed Imaging	P-SMI 0001 P-SMI 0016	6/12/19, 7/17/20, 4/6/21	\$9,884.16

Description	Bates No.	Date(s) of Service	Amount
Total Care Family Practice	P-TCFP 0001	7/16/19	\$293.70
Kelly Hawkins Physical Therapy	P-KHAWK 0001-0048	9/23/19-11/17/19	\$18,318.00
MedTrak Diagnostics, Inc.	P-MTRK 0001	9/25/19	\$10,000.00
Medical Rehabilitation Associates	P-MRALV 0002	10/20/20- 11/11/20 12/09/2020	\$598.00
Grace Counseling Center	P-GRACE-DK 0004	11/21/20-1/25/21	\$225.00
State Medical Equipment (POV)	P-SME 0001 and 0009 P-SME 0010	1/16/2021	\$1,529.64
Fyzical Therapy and Balance Center	P-FYZ 0002-0003	2/3/2021-3/4/2021	\$1,800.00
TOTAL			\$87,796.87

Future Medical Expenses: \$9,867,092.00⁹

Total Special Damages: \$9,954,888.80+

Past Pain and Suffering: \$500,000.00+

Future Pain and Suffering: \$500,000.00+

Punitive Damages: \$1,000,000.00+

B. LORI KENNEDY

Description	Bates No.	Date(s) of Service	Amount
Grace Counseling Center	P-GRACE-LK 0001 P-GRACE-LK 0007-0008	12/2/2020-10/06/2021	\$1,050.00
TOTAL			\$1,050.00

Total Special Damages: \$1,050.00

Past Pain and Suffering: \$250,000.00+

Future Pain and Suffering: \$250,000.00+

Punitive Damages: \$1,000,000.00+

IV. INSURANCE

Plaintiff has no insurance policies applicable to this case as any policies would need to be disclosed by Defendant.

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⁹ Pursuant to the Current Estimate of Present Value of Life Care Plan authored by Dr. Terrence Clauretie, PhD, CPA

1 **V. RESERVATION OF RIGHTS**

2 Plaintiff reserves the right to amend or supplement these disclosures as provided by the
3 Nevada Rules of Civil Procedure and to object the admissibility of any document or statement
4 herein or in the disclosures made by any other party to this matter on all bases set forth in the
5 Nevada Rules of Civil Procedure, Nevada Rules of Evidence, and governing law.

6 Dated this 17th day of December 2021.

7 COGBURN LAW

8 By: /s/Joseph J. Troiano

9 Jamie S. Cogburn, Esq.
10 Nevada Bar No. 8409
11 Joseph J. Troiano, Esq.
12 Nevada Bar No. 12505
13 2580 St. Rose Parkway, Suite 330
14 Henderson, Nevada 89074
15 *Attorneys for Plaintiff*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **THIRTEENTH SUPPLEMENT TO PLAINTIFF'S INITIAL DISCLOSURE OF WITNESSES AND DOCUMENTS PURSUANT TO NRC**
16.1 was submitted electronically for *service only* with the Eighth Judicial District Court on the 17th day of December 2021.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

Michael Lowry (michael.lowry@wilsonelser.com)
Efile LasVegas (efilelasvegas@wilsonelser.com)
Kait Chavez (kait.chavez@wilsonelser.com)
Agnes Wong (agnes.wong@wilsonelser.com)
Chris Richardson (chris.richardson@wilsonelser.com)
Attorneys for Defendants

/s/Noel Raleigh
An employee of Cogburn Law

EXHIBIT 5

EXHIBIT 5



MICHAEL P. LOWRY, ESQ.
Nevada Bar No. 10666
E-mail: Michael.Lowry@wilsonelser.com
CHRISTOPHER J. RICHARDSON, ESQ.
Nevada Bar No. 9166
E-mail: Chris.Richardson@wilsonelser.com
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
Tel: 702.727.1400/Fax: 702.727.1401
Attorneys for Gabriel L. Martinez;
Universal Protection Services, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and
LORI KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;
UNIVERSAL PROTECTION SERVICES,
LLC d/b/a ALLIED UNIVERSAL SECURITY
SERVICES, a Foreign Limited Liability
Company; DOE Family Members 1-10; DOE
Individuals 11-20; and ROE Corporations 21-
30, Inclusive,

Defendants.

Case No. A-20-820254-C
Dept. No. 15

**Defendants' 1st NRCP 16.1(a)(2) Expert
Disclosure**

1. Staci Ross, PhD, ABPP
716 South 6th Street
Las Vegas, NV 89101
(702) 382-3670

Staci Ross, Ph.D is a Board Certified Clinical Neuropsychologist. Dr. Ross is the proposed Rule 35 neuropsychological examiner. Dr. Ross has not yet prepared a report in this matter because the Rule 35 examination has not occurred and is subject to a motion to set the examination and also a motion to extend discovery. Once the motions are heard and decided, Defendants' anticipate evaluating with Dr. Ross whether a neuropsychological evaluation is

possible and how best to proceed. Dr. Ross's CV, fee schedule and testimony history are attached as **Exhibit A**.

Defendants anticipate disclosing other expert witnesses, but is not able to disclose them yet, as discussed in the pending motion to extend discovery.



BY: /s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.
Nevada Bar No. 10666
CHRISTOHPER J. RICHARDSON, ESQ.
Nevada Bar No. 9166
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
Attorneys for Gabriel L. Martinez;
Universal Protection Services, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on December 20, 2021, I served **Defendants' 1st NRCP 16.1(a)(2) Expert Disclosure** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Jamie S. Cogburn
Joseph J. Troiano
COGBURN LAW
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Plaintiffs

BY: /s/ Kaitlin Natarajan
An Employee of



EXHIBIT 6

EXHIBIT 6

Joseph J. Troiano

From: Richardson, Chris <Chris.Richardson@wilsonelser.com>
Sent: Friday, May 14, 2021 12:32 PM
To: Joseph J. Troiano
Subject: RE: Notification of Service for Case: A-20-820254-C, Douglas Kennedy, Plaintiff(s) vs. Gabriel Martinez, Defendant(s) for filing Service Only, Envelope Number: 7885941

It will be Stacey Ross. Kait Chavez in our office can assist with coordinating the exchange.

From: Joseph J. Troiano [mailto:JJT@cogburncares.com]
Sent: Friday, May 14, 2021 11:51 AM
To: Richardson, Chris <Chris.Richardson@wilsonelser.com>
Subject: FW: Notification of Service for Case: A-20-820254-C, Douglas Kennedy, Plaintiff(s) vs. Gabriel Martinez, Defendant(s) for filing Service Only, Envelope Number: 7885941

[EXTERNAL EMAIL]

Who is the neuropsych that will review Dr. Baumann's data? My belief is that she will only disclose raw data directly to the expert.

Joseph J. Troiano

Attorney

2580 St. Rose Parkway, Suite 330
Henderson, NV 89074

Ph. (702) 748-7777

Fax (702) 966-3880

www.CogburnCares.com

COGBURN
— LAW —

From: efilingmail@tylerhost.net <efilingmail@tylerhost.net>
Sent: Friday, May 14, 2021 11:39 AM
To: Joseph J. Troiano <JJT@cogburncares.com>
Subject: Notification of Service for Case: A-20-820254-C, Douglas Kennedy, Plaintiff(s) vs. Gabriel Martinez, Defendant(s) for filing Service Only, Envelope Number: 7885941



Notification of Service

Case Number: A-20-820254-C
Case Style: Douglas Kennedy,
Plaintiff(s) vs. Gabriel Martinez, Defendant(s)
Envelope Number: 7885941

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	A-20-820254-C
Case Style	Douglas Kennedy, Plaintiff(s)vs.Gabriel Martinez, Defendant(s)
Date/Time Submitted	5/14/2021 11:38 AM PST
Filing Type	Service Only
Filing Description	DEF Allied rfp 9 to PL Kennedy
Filed By	Kait Chavez
Service Contacts	<p>Douglas J Kennedy:</p> <p>Joseph Troiano (jit@cogburncares.com)</p> <p>File Clerk (efile@cogburncares.com)</p> <p>Noel Raleigh (ncr@cogburncares.com)</p> <p>Sarah Wilder (scw@cogburncares.com)</p> <p>Universal Protection Services, LLC d/b/a Allied Universal Security Services:</p> <p>Michael Lowry (michael.lowry@wilsonelser.com)</p> <p>Efile LasVegas (efilelasvegas@wilsonelser.com)</p> <p>Kait Chavez (kait.chavez@wilsonelser.com)</p> <p>Amanda Hill (amanda.hill@wilsonelser.com)</p> <p>Chris Richardson (chris.richardson@wilsonelser.com)</p>

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Thank you.

EXHIBIT 7

EXHIBIT 7

DECLARATION OF STACI ROSS, Ph.D.

I, Staci Ross, Ph.D. declare as follows:

1. I am a Psychologist who is board certified in neuropsychology and rehabilitation psychology and licensed to practice in the State of Nevada. I have personal knowledge of all of the following facts, and if called to testify in court, could and would testify competently to these facts.
2. I have been retained by the defendants in this matter to evaluate Plaintiff Douglas Kennedy in the lawsuit he filed against Gabriel Martinez and United Protection Services.
3. I am informed and believe that Mr. Kennedy alleges to be suffering from, among other conditions, symptoms associated with traumatic brain injury, related to a motor vehicle accident.
4. I am further informed and believe that the defendants were required to bring a motion to compel Mr. Kennedy to reconvene a neuropsychological evaluation which included discussing the events and effects of prior traumas, family relationships, relationship issues and other matters which are the subject matter of Mr. Kennedy's current psychological and neuropsychological care, including the allegations against Defendants.
5. I was initially scheduled to conduct Mr. Kennedy's Rule 35 examination on July 20, 2021.
6. In preparation for the scheduled exam, I reviewed Mr. Kennedy's medical records and provided certain forms for Mr. Kennedy to complete in preparation for the exam.
7. In this case, it is my understanding that Mr. Kennedy reviewed the forms with his wife and struck out portions to which they did not agree. In most instances, I did not object Mr. Kennedy's refusal.
8. However, after reviewing the forms, I asked that Mr. Kennedy consent to the Limits to Confidentiality, review foreseeable risks and benefits to the evaluation, and consent to the

neuropsychological evaluation. The Limits to Confidentiality allow divulging of information without permission when it “is necessary to protect against a clear and substantial risk of imminent serious harm by the patient or another person...” NAC 641.224. It is the standard in the neuropsychology industry to require any examinee to consent or assent to this limitation.

9. When I requested that Mr. Kennedy agree, either verbally or in writing, to the aforementioned limitation, Mr. Kennedy refused to provide his consent, citing his wife’s instruction.
10. Because I could not ethically continue the exam without Mr. Kennedy’s consent to the evaluation, knowledge of risks and benefits and to these Limits to Confidentiality, I adjourned the exam until the issue was resolved.
11. Despite the adjournment of the examination, Mr. Kennedy parted my office on amicable terms without any acrimony.
12. My prior interaction with Mr. Kennedy will not adversely impact my ability to conduct an impartial, independent medical examination and I welcome the opportunity reconvene Mr. Kennedy’s examination, so long as he agrees to the Limits of Confidentiality described above.
13. Therefore, based on the scope of the examination, my experience and expertise, I remain qualified to provide an objective, independent medical/neuropsychological examination of Mr. Kennedy.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct and that this declaration was executed on September 30, 2021 at Las Vegas, Nevada.


By: 
Staci Ross, Ph.D. ABPP

EXHIBIT 8

EXHIBIT 8

Joseph J. Troiano

From: Joseph J. Troiano
Sent: Friday, July 23, 2021 11:38 AM
To: Richardson, Chris
Subject: Doug Kennedy - Martinez depo/Rog response/IME
Attachments: Staci R. Ross, PhD - Intake paperwork 7.20.21.pdf; 2021.07.06_Defendant Universal Protection Services Responses to Plaintiff Douglas Kennedys Third Interrogatories 17-19.pdf

Chris,

I am writing this email to address a few things. Last week, I sent an email about the company's response to Interrogatory No. 18. Instead of referring me to a bunch of docs, I'm asking that your client identify in the rog responses what qualifications needed to be met for someone to drive a company owned vehicle.

Next, I'm following-up on Mr. Martinez's depo. If you haven't received dates from him, my inclination is to file a MTC and have an order requiring him to show up.

Lastly, attached are the records that Mr. Kennedy brought with him to the IME with Dr. Ross. The forms weren't provided to my office beforehand and I actually received them because Lori called Dr. Ross' office the day before the IME and requested them. We didn't sign certain forms for obvious reasons.

It's my understanding that Mr. Kennedy showed up to the IME and Dr. Ross started asking him questions about his family history. After she started asking questions, she apparently realized that the forms were not all signed and asked Mr. Kennedy why they weren't signed. He explained that they weren't signed based upon advice from myself. She then requested that he sign all forms, which he declined. She apparently made comment where she claimed that she needed the forms all signed because if he represented to her that he was going to kill someone, she would have to report that. Based upon what I know, I'm not agreeing that he undergoes an IME with Dr. Ross or any neuropsych.

Joseph J. Troiano

Attorney

2580 St. Rose Parkway, Suite 330
Henderson, NV 89074

Ph. (702) 748-7777

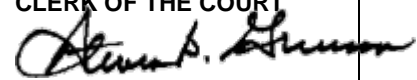
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— LAW —

EXHIBIT 9

EXHIBIT 9



DCRR



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Attorneys for Gabriel L. Martinez; Universal Protection Services, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and LORI
KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;
UNIVERSAL PROTECTION SERVICES, LLC
d/b/a ALLIED UNIVERSAL SECURITY
SERVICES, a Foreign Limited Liability Company;
DOE Family Members 1-10; DOE Individuals 11-20;
and ROE Corporations 21-30, Inclusive,

Defendants.

Case No. A-20-820254-C

Dept. No. 15

**Discovery Commissioner's Report &
Recommendations re Defendants'
Motion for Rule 35 Examination**

Date of Hearing: December 3, 2021

Time of Hearing: 9:30AM

Attorney for Plaintiff: Joseph J. Troiano of Cogburn Law

Attorney for Defendants: Chris Richardson of Wilson Elser Moskowitz Edelman & Dicker

I. Findings

This matter came before the Discovery Commissioner for a hearing on December 3, 2021, on Defendants Gabriel Martinez and Universal Protection Services, LLC ("Defendants") Motion for Rule 35 Examination.

THE DISCOVERY COMMISSIONER FINDS AS FOLLOWS:

1. Plaintiff originally agreed to submit to an NRCP Rule 35 neuropsychology examination with Dr. Staci Ross without the presence of a third party observer or audio recording device.

- 1 2. Defendants have the right to select the neuropsychologist to conduct the Rule 35 examination.
- 2 3. There is good cause for Dr. Staci Ross to reconvene and finish Plaintiff's Rule 35 examination.
- 3 4. Neither NRCP 35 nor NRS 52.380 preclude Plaintiff from requesting that the examination be
- 4 audio recorded.
- 5 ~~5. NRS 52.380 is not unconstitutional.~~
- 6 6. Although Plaintiff originally agreed to submit to the Rule 35 examination without audio
- 7 recording, Plaintiff did not waive his right to recording the continued Rule 35 examination
- 8 under the circumstances presented.
- 9 7. Under the circumstances presented, there is good cause for the continued Rule 35 examination
- 10 to be recorded.
- 11 8. Plaintiff made no request for a third-party to observe the examination.

12 II. Recommendations

- 13 1. IT IS HEREBY RECOMMENDED that Defendants Gabriel Martinez and Universal
- 14 Protection Services, LLC ("Defendants") Motion for Rule 35 Examination is GRANTED IN
- 15 PART AND DENIED IN PART within the following parameters:
- 16 2. IT IS FURTHER RECOMMENDED that Plaintiff's Rule 35 neuropsychology examination
- 17 be reconvened with ^{an examiner of Defendants' choosing.} ~~Dr. Staci Ross.~~
- 18 3. IT IS FURTHER RECOMMENDED Plaintiff be allowed to audio record the examination
- 19 without the presence of any third-party.

20 ...

21 ...

22 ...

23 ...

24 ...


25 ...

1 The Discovery Commissioner, having met with counsel for the parties, having discussed the
2 issues noted above and having reviewed any materials proposed in support thereof, hereby submits
3 the above recommendations.

4 DATED this 17th day of December, 2021.

5 It is so recommended.

6 
7
8 DISCOVERY COMMISSIONER

<p>9  WILSON ELSE 10 <small>WILSON ELSER MOSKOWITZ EDLMAN & DICKER LLP</small></p> <p>11 <u>/s/Christopher J. Richardson</u> 12 MICHAEL P. LOWRY, ESQ. 13 CHRISTOPHER J. RICHARDSON, ESQ. 14 6689 Las Vegas Blvd. South, Suite 200 Las Vegas, Nevada 89119 Attorneys for Gabriel L. Martinez; Universal Protection Services, LLC</p>	<p>COGBURN LAW</p> <p>11 <u>/s/ Joseph J. Troiano</u> 12 JAMIE S. COGBURN 13 JOSEPH J. TROIANO 14 2580 St. Rose Parkway, Suite 330 Henderson, Nevada 89074 Attorneys for Plaintiffs</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

1 **NOTICE**

2 Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after
3 being served with a report any party may file and serve written objections to the recommendations.
4 Written authorities may be filed with objections, but are not mandatory. If written authorities are
5 filed, any other party may file and serve responding authorities within seven (7) days after being
6 served with objections.

7 **Objection time will expire on January 13, 2022.**

8 A copy of the foregoing Discovery Commissioner's Report was:

9
10 _____ Mailed to Plaintiff/Defendant at the following address on the _____ day of _____,
11 2021:

12 ☒ Electronically filed and served counsel on December 30, 2021, Pursuant to
13 NEFCR Rule 9.

14
15
16 By: Natilie Simonette
17 COMMISSIONER DESIGNEE
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 10

EXHIBIT 10



Compelling Discovery

Civil discovery from beginning to end, with Michael Lowry


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Discovery Motions

Satisfying the Good Cause Requirement to Extend Discovery

📅 October 28, 2013 👤 Michael Lowry 🗣 MJ Koppe

It is quite common that, for a variety of reasons, the parties to a case wish to extend discovery and accomplish it via stipulation. When no agreement is reached, a motion is necessary. Among other requirements, the motion must demonstrate a good cause reason to extend discovery. EDCR 2.35(a) (“Stipulations or motions to extend any date set by the discovery scheduling order must be in writing and supported by a showing of good cause for the extension...”); LR 26-4 “Applications to extend any date set by the discovery plan, scheduling order, or other order must ... be supported by a showing of good cause for the extension.”). As a practical matter, this typically is a relatively low burden to meet. Occasionally, however, it is not met and causes problems for the moving party.

In *Derosa v. Blood Sys.*, 2013 U.S. Dist. LEXIS 108235, 2013 WL 3975764 (D. Nev. 2013) the plaintiff filed an emergency motion to extend on July 25, 2013. The deadline to amend pleadings had expired on May 2, 2013; the initial expert disclosure deadline expired on May 31; the rebuttal expert disclosure deadline on July 1; and discovery was set to close on July 31. The court explained the law governing this type of motion.

“

“A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. The district court’s decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of [the parties] case. Disregard of the order would undermine the court’s ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (internal citation and quotations omitted).

“

A motion to extend deadlines in the Court’s scheduling order must be supported by a showing of “good cause” for the extension. Local Rule 26-4; see also *Johnson*, 975 F.2d at 608-09. The good cause inquiry focuses primarily on the movant’s diligence. See *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294-95 (9th Cir. 2000). Good cause to extend a discovery deadline exists “if it cannot reasonably be met despite the diligence of the party seeking the extension.” *Johnson*, 975 F.2d at 609. While prejudice to the opposing party may also be considered, where the movant “fail[s] to show diligence, ‘the inquiry should end.’” *Coleman*, 232 F.3d at 1295 (quoting *Johnson*, 975 F.2d at 609). The Court has broad discretion in supervising the pretrial phase of litigation. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).

“

In addition, requests to extend a discovery deadline filed less than 21 days before the expiration of that particular deadline must be supported by a showing of excusable neglect. See Local Rule 26-4. 2 The Ninth Circuit has held that “the determination of whether neglect is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the

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movant acted in good faith.” Bateman v. U.S. Postal Service, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (citing Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)).

The court then applied this law and denied plaintiff’s motion in only two, painfully straightforward paragraphs.

“

It is clear that Plaintiff has not been diligently conducting discovery. The only discovery completed by Plaintiff to date is serving initial disclosures and supplemental disclosures, as well as responding to two discovery requests from Defendant. See Mot. at 10 (listing discovery completed). Plaintiff candidly explains the situation by stating that attorneys at the law firm representing her were not diligent in pursuing discovery. See, e.g., Reply at 5 (acknowledging “shortcomings caused by a lack of diligence from [the firm’s] prior attorney’s lack of work”). Having reviewed the materials submitted, the Court finds that Plaintiff has not shown the diligence required for a finding of “good cause.” This ends the Court’s inquiry into whether an extension should be granted. See Coleman, 232 F.3d at 1295.

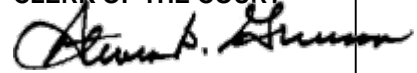
“

Plaintiff attempts to avoid this conclusion by asserting that “good cause” exists because Plaintiff herself should not be prejudiced by the failings of her attorneys. See Reply at 4-5. The Ninth Circuit has repeatedly rejected that contention. See, e.g., Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1387 (9th Cir. 1988) (“There is certainly no merit to the contention that dismissal of [a party’s] claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. [The party] voluntarily chose this attorney as his representative in this action, and he cannot now avoid the consequence of the acts or omissions of this freely selected agent.” (quoting Link v. Wabash RR Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962))).

Ouch. The last paragraph is especially notable. I frequently encounter this excuse and am just as frequently frustrated when it works in state courts. Apparently the excuse is less likely to work in federal courts.

[Archives](#)

← Proper Scope of Written Discovery re Social Media Things You Should Not Put in Writing →



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Attorneys for Gabriel L. Martinez;

Universal Protection Services, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and
LORI KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;
UNIVERSAL PROTECTION SERVICES,
LLC d/b/a ALLIED UNIVERSAL SECURITY
SERVICES, a Foreign Limited Liability
Company; DOE Family Members 1-10; DOE
Individuals 11-20; and ROE Corporations 21-
30, Inclusive,

Defendants.

Case No. A-20-820254-C

Dept. No. 15

**Defendants' Objection to Discovery
Commissioner's Report & Recommendation**

Hearing Requested

The parties agreed to a Rule 35 neuropsychological examination. Mr. Kennedy then
renege on the agreement and attempted to impose new conditions. The Discovery
Commissioner's report and recommendation allowed one of those new conditions, but this
condition invalidates the data that could be gathered from the examination. Consequently,
Defendants object to the report and recommendation.

///

///

1 DATED this 3rd day of January, 2022.



4 /s/ Michael P. Lowry
5 MICHAEL P. LOWRY, ESQ.
6 CHRISTOPHER J. RICHARDSON, ESQ.
7 6689 Las Vegas Blvd. South, Suite 200
8 Las Vegas, Nevada 89119
9 Attorneys for Gabriel L. Martinez; Universal
10 Protection Services, LLC

11

12 **Memorandum of Points & Authorities**

13

14 **I. Plaintiff alleges ongoing symptoms related to this case.**

15 This personal injury case concerns a motor vehicle accident that occurred on
16 November 5, 2018. The complaint was filed on August 27, 2020. Mr. Kennedy alleges he
17 suffered a brain injury from it.

18 **a. Procedural history below.**

19 The parties agreed to the examination and it was scheduled for July 20, 2021. The
20 examination did not go forward due to a dispute over a waiver. Defendants resolved that issue
21 with Mr. Kennedy and attempted to reschedule, but Mr. Kennedy asserted new conditions.
22 The parties could not reach an agreement, so Defendants completed the EDCR 2.34 process
23 and filed a motion for examination.¹ Plaintiffs' opposed,² Defendants' replied,³ and the
24 motion was heard on December 3, 2021. The report and recommendations was filed on
25 December 30, 2021.⁴

26 The report and recommendations concluded Plaintiff did originally agree to the Rule
27 35 examination without an observer and that he was not requesting an observer now.⁵ It also
28 concluded that Defendants could select the examiner and there was good cause for Dr. Ross to

¹ Doc ID# 44.

² Doc ID# 48.

³ Doc ID# 50.

⁴ Doc ID# 52.

⁵ *Id.* at ¶¶ 1, 8.

1 “reconvene and finish Plaintiff’s Rule 35 examination.”⁶ Defendants do not object to those
2 findings or rulings.

3 The dispute arises from Mr. Kennedy’s request to audio record the neuropsychological
4 examination. Defendants first argued that because Mr. Kennedy agreed to the Rule 35
5 examination without an audio recording, he had waived his right to request one now. The
6 discovery commissioner disagreed, stating “Plaintiff did not waive his right to recording the
7 continued Rule 35 examination under the circumstances presented.”⁷ Defendants alternatively
8 argued that if the issue had not been waived, no good cause was present to audio record. The
9 discovery commissioner disagreed. “Under the circumstances presented, there is good cause
10 for the continued Rule 35 examination to be recorded.”⁸ Defendants object to both these
11 findings.

12 **II. The standard of review is unknown.**

13 The standard of review for this objection is unknown. NRCP 16.1(d) establishes the
14 general parameters for resolving discovery disputes, but is silent as to the standard of review.
15 NRCP 16.3, which creates the discovery commissioner position and generally establishes its
16 powers and duties, is also silent. EDCR 2.34 also governs discovery disputes, but is silent as
17 to the standard of review.

18 **III. The recommendation erred by reviving waived objections.**

19 When the Rule 35 exam was originally proposed and scheduled, Kennedy did not ask
20 to record the examination. He could have raised that issue, but chose not to do so. Because he
21 did not raise them at the appropriate time, the issue about whether to record the examination
22 was waived just like any other objection that is not timely asserted.

23 Allowing a party to assert new conditions to a Rule 35 examination after agreeing to
24 the exam would only promote gamesmanship. The parties here worked amicably to reach an
25 agreement for the exam. Kennedy’s misunderstanding of what Dr. Ross was asking him is the
26

27 ⁶ *Id.* at ¶¶ 2, 3.

28 ⁷ *Id.* at ¶ 6.

⁸ *Id.* at ¶ 7.

1 only reason the examination did not go forward. He should not be allowed to benefit from that
2 by adding new conditions to the exam.

3 **IV. The recommendation erred by allowing a recording.**

4 When this motion was heard on December 3, 2021, both Rule 35(a)(3) and NRS
5 52.380(3) discussed when an examination could be recorded. The report and
6 recommendations from that hearing was filed on December 30, 2021. It did not specify upon
7 what legal basis it was allowing an audio recording to take place. Regardless, that same day
8 the Supreme Court decided *Lyft v. Dist. Ct.* and deemed NRS 52.380 unconstitutional.⁹ Thus
9 Rule 35(a)(3) is the only basis upon which the audio recording could be permitted.

10 Rule 35(a)(3) allows an audio recording under certain circumstances. “On request of a
11 party or the examiner, the court may, for good cause shown, require as a condition of the
12 examination that the examination be audio recorded.” Applied here, Mr. Kennedy has made
13 that request if he had not previously waived it. He must then show good cause to support his
14 request. The report and recommendations did not state what factual finding supported the
15 good cause requirement.

16 Whatever good cause was found, it erred because scientific studies have found that
17 recording a neuropsychological evaluation invalidates the data gathered from it. In fact ethical
18 rules bar it. The American Board of Professional Neuropsychology has adopted a policy
19 statement concerning what they term “third party observation” (TPO) of examinations.¹⁰ The
20 Board examined these requests and noted they are inconsistent with good practice. “Given the
21 body of literature that exists regarding observer effects, it is incumbent on neuropsychologists
22 who provide evaluations to make clear to patients, clients, families, and other professionals
23 that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.”¹¹

24 “Multiple studies have established and replicated the dubious validity of data obtained during
25 recorded or observed evaluations.”¹² When confronted with a situation such as is at issue in

26 ⁹ 137 Nev. Adv. Op. 86.

27 ¹⁰ Exhibit A.

28 ¹¹ *Id.* at 393.

¹² *Id.* at 395.

1 this motion, “neuropsychologists should resist demands for TPO if requested by opposing
2 counsel, retaining counsel, or the court. The neuropsychologist should educate the court or
3 those involved as to the APA Ethics Code and the existing scientific research that supports the
4 negative effects of this type of intrusion.”¹³ “Neuropsychologists should therefore not engage
5 in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other
6 than under the order of a court after all reasonable alternatives have been exhausted.”¹⁴ The
7 Board concluded:

8 Requests for TPO frequently create an ethical dilemma for neuropsychologists as
9 any observation or recording of neuropsychological tests or their administration
10 has the potential to influence and compromise the behavior of both the examinee
11 and the administrator, threatens the validity of the data obtained under these
12 conditions by, and consequently limits normative comparisons, clinical
conclusions, opinions, interpretations, and recommendations. For these reasons,
APA ethical standards support the position that TPO in neuropsychological
testing should be avoided.¹⁵

13 These comments were echoed during the public comment process that led to Rule 35’s
14 current language. Nevada’s Board of Psychological Examiners submitted comments against a
15 draft proposal that would have allowed TPO at psychological or neuropsychological
16 examinations. It highlighted that allowing TPO “poses a significant threat to public safety”
17 and discussed the science concluding why observers and recordings invalidate the testing
18 data.¹⁶

19 The Nevada Psychological Association also submitted comments against TPO. It
20 included a bibliography of literature discussing the problems TPO create and how it
21 invalidates testing data.¹⁷ The Association also provided the Official Position Statement of the
22 National Academy of Neuropsychology as to both test security and TPO. Seven individual
23 psychologists and neuropsychologists also submitted comments against the proposal. Teri
24 Belmont, Ph.D provided the American Academy of Clinical Neuropsychology’s policy

25 ¹³ *Id.* at 396.

26 ¹⁴ *Id.* at 397.

27 ¹⁵ *Id.*

28 ¹⁶ Exhibit B.

¹⁷ Exhibit C.

1 statement against TPO, among other materials.¹⁸ All of the psychologists and
2 neuropsychologists provided scientific references about why TPO are scientifically
3 impermissible.

4 Applying all of this here, by allowing the neuropsychological examination to be audio
5 recorded, the report and recommendations invalidates the data that would be gathered from the
6 examination. If the data cannot be used, then the examination is pointless. This in effect
7 deprives Defendants of their ability to obtain the report and recommendations concluded they
8 are permitted to obtain. Whatever good cause the report and recommendations found, it could
9 not justify turning the neuropsychological examination into an exercise in futility.

10 **V. The report and recommendations should be overruled in part.**

11 The report and recommendations granted Defendants a right they cannot actually use.
12 To remedy that problem, Defendants request that the district court overrule paragraphs 6 and 7
13 in the report and recommendations.

14 DATED this 3rd day of January, 2022.



17 /s/ Michael P. Lowry
18 MICHAEL P. LOWRY, ESQ.
19 CHRISTOPHER J. RICHARDSON, ESQ.
20 6689 Las Vegas Blvd. South, Suite 200
21 Las Vegas, Nevada 89119
22 Attorneys for Gabriel L. Martinez; Universal
23 Protection Services, LLC
24
25
26
27

28 ¹⁸ Exhibit D.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz
3 Edelman & Dicker LLP, and that on January 3, 2022, I served **Defendants' Objection to**
4 **Discovery Commissioner's Report & Recommendation** as follows:

- 5 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
6 envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- 7 ☒ via electronic means by operation of the Court's electronic filing system, upon
8 each party in this case who is registered as an electronic case filing user with the
9 Clerk;

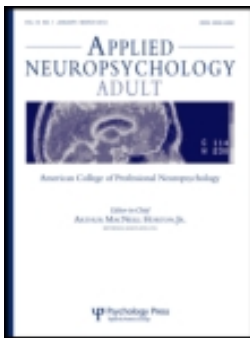
9 Jamie S. Cogburn
10 Joseph J. Troiano
11 COGBURN LAW
12 2580 St. Rose Parkway, Suite 330
13 Henderson, Nevada 89074
14 Attorneys for Plaintiffs

14 BY: /s/ Amanda Hill
15 An Employee of



Exhibit A

Exhibit A



Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

Alan Lewandowski, W. John Baker, Brad Sewick, John Knippa, Bradley Axelrod & Robert J. McCaffrey

To cite this article: Alan Lewandowski, W. John Baker, Brad Sewick, John Knippa, Bradley Axelrod & Robert J. McCaffrey (2016) Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations, *Applied Neuropsychology: Adult*, 23:6, 391-398, DOI: [10.1080/23279095.2016.1176366](https://doi.org/10.1080/23279095.2016.1176366)

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GUEST EDITORIAL

Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

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General

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members, or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological and neuropsychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the neuropsychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (Bush, Pimental, Ruff, Iverson, Barth & Broshek, 2009; Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch, 2005; McCaffrey, Fisher, Gold, & Lynch, 1996; McCaffrey, Lynch, & Yantz, 2005; McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002).

Definition of Third Party Observation

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render

clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (Barth, 2007; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012; McCaffrey, Fisher, Gold, & Lynch, 1996).

Ethical considerations

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO and the Ethics Code are both the General Principles and a number of the Ethical Standards.

Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle: A (Beneficence and Non-maleficence), B: (Fidelity and Responsibility), C (Integrity), and D (Justice).

In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).

Principle A: Beneficence and nonmaleficence

Principle A is applicable and is described as follows:

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work (American Psychological Association, 2010, p. 3).

It is incumbent on neuropsychologists to be vigilant regarding the impact of their professional opinion on others, particularly with regard to diagnostic testing. Scientific and professional judgments and conclusions should be based on data from neuropsychological assessments gathered in a standardized manner and, therefore, without the influence of extraneous factors that might influence the collection of behavior samples. Neuropsychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others and, therefore, must safeguard those with whom they interact professionally to do no harm.

Principle B: Fidelity and responsibility

Principle B is applicable and is described as follows.

Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm.

Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage (American Psychological Association, 2010, p. 3).

It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a neuropsychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community, and society in general.

Principle C: Integrity

Principle C is applicable and is described as follows.

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques (American Psychological Association, 2010, p. 3).

The practice and promotion of clinical assessment requires that neuropsychologists present themselves and their work to others in an accurate and honest manner and avoid any misrepresentation of their findings. A considerable body of research supports that TPO can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as a misrepresentation of the data

Principle D: Justice

Principle D is applicable and is described as follows.

Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (American Psychological Association, 2010, p. 3–4).

In an attempt to provide fair and just treatment to all patients and clients, neuropsychologists do not modify assessment procedures or alter their work on the basis

of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, the American Psychological Association (APA), psychological state organizations, and neuropsychological specialty organizations, provide multiple continuing education opportunities for neuropsychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. **Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.**

Ethical standard 2: Competence

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for Scientific and Professional Judgments states the following:

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (American Psychological Association, 2010, p. 5; see also Standards 2.01e, Boundaries of Competence).

Ethical standard 2.04

Ethical Standard 2.04 requires neuropsychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasi & Urbina, 1997). For example, the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) requires that, "As a rule, no one other than you and the examinee should be in the room during the testing" (1997, p. 29). The manual further directs, "Attorneys who represent plaintiffs sometimes ask to observe, but typically withdraw this request when informed of the potential effect of the presence of a third person" (Wechsler, 1997, p. 29). The requirement to avoid interference from others is noted in the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which advises that no one other than the examiner and the examinee should be in the room during test administration (Wechsler, 2003, p. 23).

The concept of being free from distractibility is also emphasized in the Wechsler Adult Intelligence Scale-Fourth Revision (WAIS-IV) that instructs the examiner to provide a physical environment "free from distractions and interruptions" and stresses that "External distractions must be minimized to focus the examinee's attention on the tasks presented and not on outside

sounds or sights, physical discomfort, or testing materials not in use" (Wechsler, 2008, p. 24). This is also emphasized in the administration manual for the Rey Complex Figure Test (Meyers, 1995, p. 6). Similarly, the scoring manual for the California Verbal Learning Test-Second Edition (CVLT-II) instructs that only the examiner and examinee be present in the room during testing (Delis et al., 2000, p. 8). By eliminating the presence of third parties, the examiner eliminates potential interference and the possibility of their distracting from or influencing the testing process, hence variables that are inconsistent with test standardization.

Most test manuals specify that the examiner is responsible for ensuring that the testing environment is quiet and free from distractions (Meyers, 1995; Williams, 1991; Urbina, 2014) and are often very specific about the testing room being limited to "A table or desk and two chairs" (Meyers, 1995). Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states "as a rule, no one other than you and the examinee should be in the room during testing" (Delis, Dramer, Kaplan & Ober, 2000, p. 8). As described above, these instructions serve to emphasize the importance of controlling distraction as an important factor in assessment.

Ethical standard 9: Assessment

Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (American Psychological Association, 2010, p. 12; see also Standard 2.04, Bases for Scientific and Professional Judgments).

Test results generated by nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, neuropsychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious.

Under 9.01:

(a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to

support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (American Psychological Association, 2010, p. 12; see also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results). (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

Section 9.02: Use of assessments

Section 9.02 describes the following:

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (American Psychological Association, 2010, p. 12).

Section 9.02 (a) suggests that tests administered by a neuropsychologist in a manner that is inconsistent with the standardization of the instrument and contrary to the test manual, may be in violation of this standard. When an exception exists, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report. Otherwise, TPO is contrary to this standard.

Section 9.06: Interpreting assessment results

Section 9.06 describes the following:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (American Psychological Association, 2010, p. 13; see also Standards 2.01b and c, Boundaries of Competence).

Many authors and organizations (Anastasi & Urbina, 1997; National Academy of Neuropsychology, 2000a; Oregon Psychological Association, 2012; Michigan Psychological Association, 2014) emphasize that, during test development, procedures are standardized without the presence of an observer. Subsequently the data obtained outside of those parameters lacks corresponding assurance of validity and interpretive significance.

Section 9.11: Maintaining test security

Section 9.11 raises the importance of maintaining test security. "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code" (American Psychological Association, 2010, p. 13). Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance.

Several professional organizations have emphasized the importance of maintaining test security. The APA, the National Academy of Neuropsychology (NAN), and several state associations (among others) emphasize test security as essential to the practice of psychology, and that it is incumbent on neuropsychologists to protect the integrity of psychological test materials (American Psychological Association, 1999; National Academy of Neuropsychology, 2003; Michigan Psychological Association, 2014).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of the public domain (American Academy of Clinical Neuropsychology, 2001; American Psychological Association, 1999; Bush et al., 2009; Canadian Psychological Association, 2009; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Kaufman, 2005, 2009; McCaffrey et al., 1996; Michigan Psychological Association, 2014; Morel, 2009; National Academy of Neuropsychology, 1999; Oregon Psychological Association, 2012; Victor & Abeles, 2004; Wetter & Corrigan, 1995). Public accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures or how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices, as it threatens the validity, reliability, and interpretation of test scores. The position of the academy is that TPO should be avoided whenever possible outside of necessary situations involving a nonforensic setting where the observer is both neutral and noninvolved (e.g., student training or an interpreter). This view is also held by the Canadian Psychological Association (CPA) that advises “It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff” (CPA, 2009).

The American Academy of Clinical Neuropsychology (AACN; 2001) has taken the position that “it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below” (p. 434). Exceptions are described that include as an example, the assessment of young children who require the presence of a family member.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation by a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons (Michigan Psychological Association, 2014).

Research evidence

In support of professional ethics, there is a significant body of research indicating that TPO cannot be assumed as inconsequential to test findings. A review of the pertinent literature overwhelmingly supports the negative consequences of either direct or indirect TPO or recording on the behavior of both the examiner and the examinee, and the validity of findings obtained in a neuropsychological assessment.

It is self-evident that neuropsychological evaluations be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. Consistent with other major neuropsychological organizations, it is the position of the American Board of Professional Neuropsychology that altering test procedures to accommodate observation or recording compromises test standardization and affects the subsequent data set obtained. As there is no basis for accepting as valid an assessment under nonstandard (observed or recorded) conditions, it is questionable if findings

reflect a reasonable degree of certainty or fall within an accepted range of probability. Test results therefore lack the normal and accepted parameters of validity and, more importantly, do not reflect the expected standards of psychological care. Given current research it is not surprising that most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000a; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers, including an early case study by Binder and Johnson-Greene (1995). Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations. A considerable amount of research now exists demonstrating the deleterious effect on data obtained during nonstandard evaluations involving executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene, 1995; Kehrner, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Eastvold et al., 2012; Gavett, Lynch, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). Eastvold et al. (2012) meta-analysis found negative effects on multiple cognitive measures and that attention, learning, and memory (delayed recall) were most adversely impacted by the presence of an observer.

Exceptions to TPO

Third party assistant (TPA)

In selected circumstances, the presence of an unbiased, impartial, and neutral third party observer may be necessary to proceed with or complete a neuropsychological assessment. In these cases, rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an uninvolved and neutral observer during an evaluation is more accurately identified as a third party assistant (TPA).

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance company or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence

of a parent, family member, guardian, family friend, or interpreter is necessary, and without whose presence the examination could not proceed because of a mental disability or clinical limitation that requires an accommodation. Examples might include a child with suspected or diagnosed autism, developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or severely anxious that they cannot be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, or patients who have a thought disorder impacting reality testing, among others.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may be necessary because a native speaking psychological examiner is not available or within a practical distance. In these situations, to avoid potential conflicts of interest, if it is at all possible the interpreter should have no relationship (i.e., such as family member, close friend or social affiliation) to the person being examined.

Similarly, if an examinee is deaf or hearing impaired, an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist or ASL interpreter may be needed.

Training presents another situation in which a TPA is considered appropriate. Not unlike medical students, psychology students and technicians learning the administration of psychology test procedures require direct observation, practice, and supervision to ensure accuracy and competence.

In the aforementioned cases, the examiner is ethically required to document in the neuropsychological report the use of a TPA and any deviations of standardization or modifications in test administration. The limitations of normative data with subsequent impact on the generalization of findings should be clearly noted.

Forensic examinations, independent medical examinations, and acting as an expert witness

Neuropsychologists who choose to perform forensic assessments are ethically required to be aware of the specialty guidelines pertinent to this area of expertise. In order to avoid potential conflict, neuropsychologists who regularly provide forensic consultations should inform referral sources that if TPO or recording

develops as an issue or is required by legal proceedings, they may elect to remove themselves from the assessment.

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should explicitly documented. The neuropsychologist should then follow existing recommendations and guidelines for protecting test security including requesting that test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect.

If this is not possible, the neuropsychologist should request a protective order specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and directing that they be returned uncopied directly to the psychologist or destroyed in a manner verifiable by the psychologist.

Conclusion

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.

Ethical standards of practice compel neuropsychologists to avoid or resist requests for conducting assessments complicated by TPO, except for those situations

as described. Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted. It would be entirely appropriate for a neuropsychologist to decline to perform an examination under these conditions.

As an exception, TPA is acceptable under infrequent clinical circumstances that necessitate the involvement of an assistant or in a rare forensic case that might require a neutral or uninvolved party such as a language interpreter. A neuropsychologist is obligated to clarify in the report the rationale for the use of TPA, identify what procedures and standards have been modified, and how or to what degree the findings, results, and conclusions may be impacted. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

In summary, it is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for TPO and educate the referral sources as to the ethical and clinical implications.

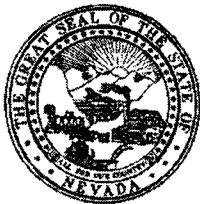
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Exhibit B

Exhibit B



STATE OF NEVADA
BOARD OF PSYCHOLOGICAL EXAMINERS

4600 Kietzke Lane, Building B-116
Reno, Nevada 89502
Telephone 775 / 688-1268 • Fax 775 / 688-1060
nbop@govmail.state.nv.us
Psyexam.nv.gov

October 1, 2018
Governor

Elizabeth Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV, 89701.

Dear Ms. Brown:

ADKT 0522

FILED

OCT 02 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Michelle G. Paul, Ph.D.
President, Las Vegas

Whitney E. Koch-Owens, Psy.D.
Secretary/Treasurer, Las Vegas

John H. Krogh, Ph.D.
Board Member, Reno

Stephanie Holland, Psy.D.
Board Member, Las Vegas

Anthony Papa, Ph.D.,
Board Member, Reno

Pamela L. Becker, M.A.
Public Board Member, Reno

Patrick M. Ghezzi, Ph.D., BCBA-D, LBA
Board Member, Reno

Please see below the Licensing Board's position on third-party observers in psychological evaluations. This statement has been provided to the Nevada State Supreme Court as public comment regarding the proposed changes to Rule 35 of Nevada Civil Procedure.

In the interest of protecting the needs of the public, it is the position of the Nevada Board of Psychological Examiners that allowing third-party observers, monitors, and/or electronic recording equipment during psychological and neuropsychological evaluations poses a significant threat to public safety. Observation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings. Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations. Additionally, (neuro)psychological tests and measures are developed and standardized under highly controlled conditions. Observation, monitoring, and recording of these tests is not part of the standardization. Observation, monitoring, and recording of psychological assessment components (i.e., testing) of evaluations may distort patient task performance, such that patient weaknesses and strengths are exaggerated, yielding inaccurate or invalid test data. Furthermore, research highlights that this impact on performance is independent of method of observation. In other words, there is no "good" or "safe" way to observe, monitor, or record such (neuro)psychological evaluations without impacting and potentially invalidating the evaluation. Ultimately, deviations from standardized administration procedures compromise the validity of the data collected and compromise the psychologist's ability to compare test results to normative data. This increases the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results and future treatment for the patient. In addition, the risk of secured testing and assessment procedures being released to non-Psychologists poses risk to the public in that exposure of the test and assessment confidentiality can undermine their future validity and utility.

Sincerely
for the Board of Psychological Examiners

[Signature]
Morgan Gleich
Executive Director

[Signature] Michelle Paul, Ph.D.
Board President

[Signature]
Whitney Owens, Psy.D.
Board Secretary/Treasurer

[Signature] Pam Becker, MA
Public Member

[Signature]
Stephanie Holland, Psy.D.
Board Member

[Signature]
John Krogh, Ph.D.
Board Member

Exhibit C

Exhibit C



Nevada
Psychological
Association

Advocating for Psychologists in Nevada
Nevada Psychological Association

P.O. Box 400671
Las Vegas, NV 89140
888.654.0050 ph/fax
www.NVpsychology.org

Supreme Court Clerk's Office
201 South Carson Street
Carson City, Nevada 89701

ADLT 0522

FILED

OCT 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

September 25, 2018

**RE: THE MATTER OF CREATING A COMMITTEE TO UPDATE AND REVISE THE NEVADA
RULES OF CIVIL PROCEDURE**

The Nevada Psychological Association opposes the revision to the Nevada Rules of Civil Procedures allowing third-party observation, monitoring, or reporting of the administration of standardized measures psychological and neuropsychological evaluations. Any evaluations conducted under such conditions would be invalid for the following reasons:

1. **Decreased Patient Disclosure:** Observation, monitoring, and recording can directly impact the behavior of the patient during clinical interviews, such that the patient may avoid disclosing crucial information essential to diagnosis and clinical recommendations. The patient may avoid disclosing critical information related to their safety or the safety of another person (e.g., child abuse or abuse of a vulnerable adult).
2. **Test Standardization & Compromised Validity:** The well-established standard of practice is that standardized psychological and neuropsychological tests must be administered under standardized conditions (i.e., conditions that closely replicate the conditions under which the tests were standardized during the test development process). The standardization process does not include third-party observation, monitoring, or recording. Deviations which allow such observation likely compromise the validity of the data collected. When the validity of testing data is compromised, the accuracy of the results is compromised.
3. **Social Facilitation, Observer Effects, and Compromised Validity:** Research consistently demonstrates that patient performance can be impacted (negatively or positively) by the presence of an observer, including live observation, remote observation, or recorded observation. These factors can artificially strengthen or weaken the patient's performance on psychological and neuropsychological testing, thus compromising the validity of the data and the accuracy of the conclusions.
4. **Test Security and Social Harm:** Psychologists have an ethical responsibility to maintain the integrity and security of tests and other assessment procedures. Permitting individuals who are not licensed psychologists to observe a psychological examination, either through live or recorded methods, compromises test security. These materials could be disseminated, thus carrying a risk for significant social harm. Future patients can be coached or inappropriately prepared for evaluations. Additionally, since the tests used for independent medical evaluations are also used for a wide variety of other psychological evaluations, the validity of

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OCT 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

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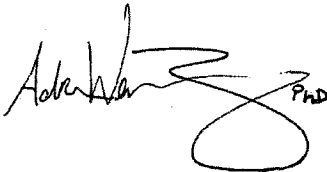
these evaluations would also be compromised by dissemination of test materials. Compromising the test materials would have wide spread effect as the same tests used across a wide range of evaluations. These include, but are not limited to, determinations of fitness or competency to: (a) parent; (b) pilot an airplane; (c) practice medicine or surgery; (d) stand trial; (e) work in law enforcement or at a nuclear power facility, etc. The Court might also be interested to know that these same tests are used to determine if an applicant is eligible to receive special accommodations when taking the Bar Exam.

As stated by the National Academy of Neuropsychology in 2003, "Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test."

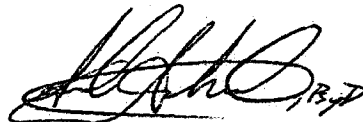
In summary, the proposed changes which would allow third-party observation, monitoring, or recording of psychological or neuropsychological examinations would have a profound deleterious impact on the ability of licensed psychologists to appropriately conduct valid psychological and neuropsychological IMEs. It is unlikely that psychologists would be able to conduct these evaluations while maintaining adherence to ethical guidelines for the reasons listed above.

We have enclosed a list of references, as well as complete copies of the most relevant position and consensus statements. Please do not hesitate to contact us with any concerns or questions.

Respectfully,



Adrianna Wechsler Zimring, PhD
Past President 2018/2019
Nevada Psychological Association



Sarah Ahmad, PsyD
President 2018/2019
Nevada Psychological Association



Noelle Lefforge, PhD
President-Elect 2018/2019
Nevada Psychological Association



Nevada
Psychological
Association

Advocating for Psychologists in Nevada
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- Test Security: An Update. (2003). Official Statement of the National Academy of Neuropsychology Approved by the NAN Board of Directors On October 13, 2003.



Test Security

Official Position Statement of the National Academy of Neuropsychology

Approved 10/5/99

A major practice activity of neuropsychologists is the evaluation of behavior with neuropsychological test procedures. Many tests, for example, those of memory or ability to solve novel problems, depend to varying degrees upon a lack of familiarity with the test items. Hence, there is a need to maintain test security to protect the uniqueness of these instruments. This is recognized in the Ethical Principles of Psychologists and Code of Conduct (American Psychological Association, 1992; Principle 2.1, Maintaining Test Security), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA Principles 2.01, 2.06, Unqualified Persons).

In the course of the practice of psychological and neuropsychological assessment, neuropsychologists may receive requests from attorneys for copies of test protocols, and/or requests to audio or videotape testing sessions. Copying test protocols, video and/or audiotaping a psychological or neuropsychological evaluation for release to a non-psychologist violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992), by placing confidential test procedures in the public domain (APA Principle 2.10), and by making tests available to persons unqualified to interpret them (APA Principles 2.02, 2.06). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video-recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulation of test performance. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Formal research (Coleman, Rapport, Millis, Ricker, & Farchione, 1998; Wetter & Corri-

gan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley, & Binder, 1999) confirms what is seemingly already evident: individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation. Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (e.g., a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the most widely-used measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 cases). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit new scientific and clinical advances.

If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not and will seek to obtain the data for themselves. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

The NAN Policy and Planning Committee

Bradley Axelrod, Ph.D.

Robert Heilbronner, Ph.D.

Jeffrey Barth, Ph.D., Chair

Glenn Larrabee, Ph.D.

David Faust, Ph.D.

Neil Pliskin, Ph.D., Vice Chair

Jerid Fisher, Ph.D.

Cheryl Silver, Ph.D.

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APPENDIX: HANDLING REQUESTS TO RELEASE TEST DATA, RECORDING AND/OR REPRODUCTIONS OF TEST DATA

Please note that these are general guidelines that may not apply to your specific jurisdiction. It is recommended that all psychologists seek advice from personal counsel to determine if these guidelines are appropriate for their specific jurisdiction.

1. Is the request in written form?
If **yes**, go on to 2.
If **no**, ask that the request be placed in written format.
2. Do you have a signed release from a competent patient?
If **yes**, go on to 3.
If **no**, obtain a signed release from the patient or, if the patient is not competent, from his or her legal guardian. (If competency is uncertain, e.g., the patient has deteriorated or competency has not been determined, an alternate course of action will be necessitated, e.g., contact the person who made the request and indicate you are not certain if the patient meets requirements to sign a release.)
3. Is the material to be released to a professional qualified to interpret the test data?
If **yes**, go to 4.
If **no**, go to 5.
4. Has the request included an assurance that test security will be maintained?
If **yes**, release the material.
If **no**, especially in certain circumstances (e.g., the psychologist is not known to you, litigation is ongoing), it may be prudent to ask for written assurance that test security will be maintained. The statement might indicate something like the following, "I agree to protect the test materials in accordance with the principles set forth in the APA Ethical Principles."
5. Is the request in the form of a subpoena (*not* a court order)?
If **yes**, respond in a timely fashion by indicating that complying with the request to release test data under these circumstances places the psychologist in conflict with professional practice guides and ethical principles and places him/her at risk for serious professional sanctions due to the need to maintain test security. Sections of the "APA Ethical Principles" and/or of the NAN Test Security Position Statement can be provided. The need to protect test security can be explained, and proposed solutions can be presented such as release to a qualified professional who agrees to maintain test security. If this is not satisfactory, alternative arrangements can be proposed; for example, all parties given access to test data

can assent to enter into a written agreement that contains the elements for protection of test materials. Alternatively, the suggestion can be made that a court order be issued containing these elements, at which time the data will be released. If **no**, go on to 6.

6. Is the request in the form of a *court order* (i.e., signed by a judge)?

If **yes**, go to 7.

If **no**, the request should fall under one of the previously listed categories (e.g., an informal request, a subpoena), and the reader should consult that section.

7. Does the court order contain adequate provisions for maintaining test security?

If **yes**, release the material

If **no**, go to 8.

8. Does the court order require release to an unqualified individual?

If **yes**, go to 9.

If **no**, go to 10.

9. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order does not appear to maintain adequate test security because it instructs release to a non-psychologist, possible options include:

- a. Respond to the court by immediately releasing the data, but at the same time request that appropriate safeguards be put in place to maintain test security. For example, the need to maintain test security might be, briefly described, the NAN Statement and/or sections of the APA Ethical Principles might be provided, and the following arrangements requested:

"I would ask that the test materials not be circulated beyond those directly involved in the case, that no unauthorized copies or reproductions be made, that the presentation of the test materials in the courtroom be minimized to the extent possible, that exhibits and courtroom records containing test materials be protected or sealed, and that all test materials be destroyed or returned upon the completion of the case".

- b. Seek personal counsel immediately from an attorney licensed within your jurisdiction, and, if counsel deems it appropriate, inform the court that the request to release test data creates a potential problem. A solution to the problem can be proposed as in 9.a. above.

10. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order commands release to a qualified professional and contains adequate provisions for maintaining test security, release the material. If adequate provisions are not contained the same type of suggestions described under 9.a. or 9.b. can be presented. It is not recommended that you disobey a court order without seeking advice of personal counsel licensed within your jurisdiction.



Presence of Third Party Observers During Neuropsychological Testing

Official Statement of the National Academy of Neuropsychology

Approved 5/15/99

Forensic neuropsychological evaluations are often constrained by the demand that a third party observer be present during the course of interview and formal testing. This demand may originate from counsel's desire to ensure that the neuropsychologist does not interrogate or unfairly question the plaintiff with respect to issues of liability and to ascertain if test procedures are accurately administered. In general, neuropsychologists should have the right to carry out their examination in a manner that will not in any way jeopardize, influence or unduly pressure their normal practice.

The presence of a third party observer during the administration of formal test procedures is inconsistent with recommendations promulgated in The Standards for Educational and Psychological Testing (APA, 1985) and Anastasi (1988), that the psychological testing environment be distraction free. More recently, standardized test manuals (for example, The WAIS-III, WMS-III Technical Manual; The Psychological Corporation, 1997) have specifically stated that third party observers should be excluded from the examination room to keep it free from distraction. The presence of a third party observer in the testing room is also inconsistent with the requirements for standardized test administration as set forth in the APA's Ethical Principles Of Psychologists and Code Of Conduct (APA, 1992) in that it creates the potential for distraction and/or interruption of the examination (McSweeney et al., 1998).

A second issue that relates to the potential influence of the presence of a third party observer is the reliance upon normative data. Neuropsychological test measures have not been standardized in the presence of an observer. In fact, neuropsychological test measures have been standardized under a specific set of highly controlled circumstances that did not include the presence of a third party observer. The presence of a third party observer introduces an unknown variable into the testing environment which may prevent the examinee's performance from being compared to established norms and potentially precludes valid interpretation of the test results (McCaffrey, Fisher, Gold, & Lynch, 1996). Observer effects can be such that performance on more complex tasks declines, in contrast to enhanced performance on overlearned tasks, leading to a spuriously magnified picture of neuropsychological deficit (McCaffrey et al., 1996). Likewise, observation of an examination being conducted for a second opinion may fundamentally alter the test session, in comparison to the initial examination that the patient has already undergone, potentially creating an adversarial atmosphere, and increasing the risk of motivational effects related to secondary gain. Observer effects can be magnified by the presence of involved parties who have a significant relationship with the patient (e.g.

legal representatives who have a stake in the outcome of the examination; cf. Binder and Johnson-Greene, 1995). Thus, the presence of a third party observer during formal testing may represent a threat to the validity and reliability of the data generated by an examination conducted under these circumstances, and may compromise the valid use of normative data in interpreting test scores. Observer effects also extend to situations such as court reporters, attorneys, attorney representatives, viewing from behind one-way mirrors and to electronic means of observation, such as the presence of a camera which can be a significant distraction (McCaffrey et al., 1996). Electronic recording and other observation also raises test security considerations that are detailed in the National Academy of Neuropsychology's position statement on Test Security.

It should be noted that there are circumstances that support the presence of a neutral, non-involved party in nonforensic settings. One situation might be when students or other professionals in psychology observe testing as part of their formal education. These trainees have sufficient instruction and supervision in standardized measurement and clinical procedures, such that their presence would not interfere with the assessment process. Other situations might include a parent's calming presence during an evaluation of a child.

The weight of accumulated scientific and clinical literature with respect to the issue of third party observers in the forensic examination provides clear support for the official position of the National Academy of Neuropsychology that neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation.

The NAN Policy and Planning Committee

Bradley Axelrod, Ph.D.

Jeffrey Barth, Ph.D., Chair

David Faust, Ph.D.

Jerid Fisher, Ph.D.

Robert Heilbrunner, Ph.D.

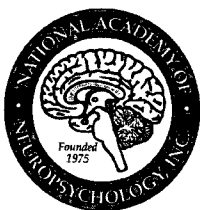
Glenn Larrabee, Ph.D.

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Cheryl Silver, Ph.D.

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Test Security: An Update

*Official Statement of the National Academy of Neuropsychology
Approved by the NAN Board of Directors 10/13/2003*

Introduction

The National Academy of Neuropsychology's first official position statement on *Test Security* was approved on October 5, 1999 and published in the Archives of Clinical Neuropsychology in 2000 (Volume 15, Number 5, pp. 383-386). Although this position statement has apparently served its intended purposes, questions have arisen regarding the potential impact of the 2002 revision of the APA Ethics Code (APA Ethical Principles of Psychologists and Code of Conduct, 2002) on the original position statement, which was based upon the 1992 APA Ethical Principles of Psychologists and Code of Conduct. The 2002 revised APA Ethics Code seems to necessitate no basic changes in the principles and procedures contained in the original *Test Security* paper, and requires only some alterations and clarification in wording. Specifically, the 2002 revised APA Ethics Code distinguishes between test data and test materials. According to Code 9.04:

Test data "refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during the examination. Those portions of test materials that include client/patient responses are included in the definition of test data."

According to Code 9.11:

Test materials "refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data" (as defined above).

Psychologists are instructed to release test data pursuant to a client/patient release unless harm, misuse, or misrepresentation of the materials may result, while being mindful of laws regulating release of confidential materials. Absent client/patient release, test data are to be provided only as required by law or court order. In contrast, psychologists are instructed to make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with such factors as law and contractual obligations.

The distinction between test data and test materials increases conceptual clarity, and thus this language has been incorporated into the updated *Test Security* position statement that follows. Beyond this change, we do not believe that the 2002 revision of the APA Ethics Code calls for additional changes in the guidelines contained in the original *Test Security*

paper. That is, if a request is made for test materials, the guidelines in the original position paper remain fully applicable. Further, despite the intended distinction between test materials and test data and the differing obligations attached to each, a request for test data still appears to necessitate the safeguards described in the original position statement in most circumstances in which neuropsychologists practice. The release pursuant to client/patient consent alone is still likely to conflict not only with the NAN original Test Security position statement, but also with one or both of 2002 revised APA Ethics Codes 9.04 and 9.11. This is because release of test responses without the associated test materials often has the potential to mislead (and is also often impractical given the manner in which test responses are often embedded in test materials). Further, in many cases, test data and test materials overlap, given the current state of many neuropsychological test forms, and thus to release the test data is to release the test materials. In other cases, test materials might easily be inferred from test data, and although release of the data might not technically violate the 2002 revised APA Ethics Code 9.11, it may well violate the intent of the guideline. Thus, even if requirements are met under 9.04, such test release may well still conflict with the procedures or principles articulated in 9.11.

Thus, requests not only for release of test materials (manuals, protocols, and test questions, etc.), but also for certain test data (test scores or responses where test questions are embedded or can be easily inferred) will typically fall under the guides and cautions contained in the original and restated Test Security position papers. True raw test scores or calculated test scores that do not reveal test questions, do not require such test security protection. It is unfortunate that the new 2002 revised APA Ethics Code, while clearly attempting, and for the most part achieving, clarity in endorsing the release of raw and scaled test scores, test answers, and patient responses, does not address the very practical problem of releasing data which imply or reveal test questions. This is not a trivial concern when state licensure board ethics committees may be forced to investigate charges that relate to such ambiguities. Until such clarifications are offered by APA, we suggest a conservative approach that protects these imbedded and inferred questions, and treating them as one would test materials as proffered by the NAN Revised Test Security Paper below. Further revisions of the NAN Test Security guidelines will follow any clarifications by APA of the Ethics Code.

Revised Test Security Paper

A major practice activity of neuropsychologists is the evaluation of behavior with neuropsychological test procedures. Many tests, for example, those of memory or ability to solve novel problems, depend to varying degrees on a lack of familiarity with the test items. Hence, there is a need to maintain test security to protect the uniqueness of these instruments. This is recognized in the 1992 and 2002 Ethical Principles of Psychologists and Code of Conduct (APA, 1992; Code 2.1, and APA, 2002; Code 9.11, Maintaining Test Security), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA, 1992; Codes 2.01, 2.06; Unqualified Persons; and APA, 2002; Code 9.04; Release of Test Data).

In the course of the practice of psychological and neuropsychological assessment, neuropsychologists may receive requests from attorneys for copies of test protocols, and/or requests to audio or videotape testing sessions. Copying test protocols, video and/or audio taping a psychological or neuropsychological evaluation for release to a non-psychologist potentially violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992; APA, 2002), by placing confidential test procedures in the public domain (2.10), and by making tests available to persons unqualified to interpret them (APA, 1992; Codes 2.02, 2.06 and 2.10; APA, 2002; Codes 9.04 and 9.11). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Research confirms what is seemingly already evident: individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation (Coleman, Rapport, Millis, Ricker and Farchione, 1998; Wetter and Corrigan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley & Binder, 1999). Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (For example, a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the many measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 individuals). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit scientific and clinical advances.

If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

NAN Policy and Planning Committee

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Exhibit D

Exhibit D

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ADLT 0522

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OCT 09 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

RE: Proposed Amendment to Nevada Civil Procedure Rule 35 (Physical and Mental Examinations)

I am a licensed psychologist in the state of Nevada. As part of my practice I administer psychological and neuropsychological measures to individuals. I am well versed in the standards and practices for the administration of such examinations.

I have additionally studied and trained in the administration of psychological and neuropsychological measures in civil forensic contexts for nearly 20 years, and my doctoral dissertation (Forrest, 2006) focused specifically on the influence of instruction set and test format on the detection of malingering.

I have offered independent psychological and neuropsychological services since 2010 in cases in venues including the Clark County District Court, United States District Court for Nevada, and the Superior Court of the State of California, County of Riverside.

I stand in strong opposition to the proposed amendment to Nevada Civil Procedure Rule 35, which would permit third-party observation and/or recording of psychological and neuropsychological evaluations, and in solidarity with my psychologist colleagues and state psychological organizations, including the Nevada Psychological Association (NPA) and the Nevada State Board of Psychological Examiners (NBOP), who also oppose the proposed amendment.

NPA and NBOP have already submitted position statements that provide excellent overviews of the many possible deleterious effects of the proposed amendment, if adopted, which include decreased patient disclosure, compromises to test validity, aberrations in and invalidity of test performance as a result of social facilitation and observer effects, and long-term risks to test security and the public.

Additionally, the National Academy of Neuropsychology has published Official Statements regarding the presence of third party observers during neuropsychological testing (NAN, 2000) and test security (NAN, 2000; updated in 2003 to address the 2002 revision of the 1992 APA Ethical Principles of Psychologists and Code of Conduct). The American Academy of Clinical Neuropsychology has also published a policy statement on the presence of third party observers in neuropsychological assessments (AACN, 2001). All of these papers discuss the myriad threats posed to the utility of our measures by third party observation and reflect the consensus in our profession that "neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation" (NAN, 2000).

I would like to speak in more depth to one specific possible deleterious effect of this proposed amendment – the risks of exposing confidential testing and assessment procedures to non-psychologists who are not trained in or experienced with administration of neuropsychological and psychological tests. Such exposure will ultimately harm the public, not just in Nevada but throughout the United States, by undermining the future validity and utility of these tests.

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

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As an example, the increasing frequency in which individuals engage in civil litigation, and in that context undergo neuropsychological evaluation, also increases the possibility that plaintiffs may receive trade-secret test information from their attorneys prior to evaluation in order to maximize their ability to appear injured. My own doctoral research (Forrest, 2006) examined the performance of individuals with brain damage (via archival data), normal control participants, and individuals sorted into three groups on two common neuropsychological measures. These three groups differed as to the extent of prior coaching they were given specifically regarding the nature, content, and requirements of one of those measures.

My results suggested that individuals given the most explicit coaching about that measure were able to produce more believable performances indicative of brain injury than individuals in the other groups and that a priori knowledge about neuropsychological measures may be able to bolster an individual's ability to produce such believable performance indicative of brain injury. I also found that explicitness of coaching generalized from one test to the other, such that individuals given explicit instruction on one test performed better than other groups on the second test, although they were given no explicit instruction regarding the second test.

I noted that my findings suggested that "with the aid of a neuropsychologically sophisticated attorney, litigants may be coached on... potentially any... neuropsychological or psychological measure... to the extent that they are able to perform more like truly brain-damaged individuals for the purpose of receiving the remuneration they seek. These findings suggest that neuropsychologists should be aware that examinees presenting to them in the context of civil litigation may not be truly impaired but may have been thoroughly coached on symptoms and tests ahead of time. These findings also suggest that psychologists should renew or enhance efforts to protect trade-secret psychological testing information not only from attorneys, but from laypersons in general." This research represents only a single demonstration of how readily the validity and utility of our tests and measures may be significantly compromised by an individuals' prior exposure to them.

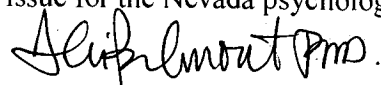
The sum of the canon of ethics for our profession obligates me to refuse to perform an examination that would be observed or recorded. Recording under the proposed amendment would violate these standards, and I am ethically bound to protect the security of testing materials and methods.

If asked or ordered to conduct a psychological or neuropsychological examination that would be observed and/or recorded by a third party, I will be obligated to decline to perform the examination at all or else perform an examination that does not include administration of standardized psychological or neuropsychological tests. It is my understanding that other reputable Nevada psychologists would act similarly. In this sense, requiring that a psychological or neuropsychological examination be observed and/or recorded by a third party would eliminate all psychologists from participating in judicial matters due to these ethical and test security concerns. This would have a deleterious effect on the courts' ability to adequately adjudicate cases involving claims of cognitive and emotional damages.

In sum, the proposed amendment to Rule 35, if adopted, would serve to decimate our profession, likely across the entire United States, by compromising the validity and utility of the psychological and neuropsychological measures we share with all of our colleagues and rely upon to make valid, informed assessments of our clients and patients.

Please find attached a list of relevant references, as well as complete copies of the most relevant position and consensus statements.

I thank you for your time spent in reviewing this letter and your careful consideration in this extremely significant issue for the Nevada psychological community.



Teri F. Belmont, Ph.D.
Licensed Psychologist

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SPECIAL PRESENTATION

Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*

American Academy of Clinical Neuropsychology

Purpose

The purpose of this policy is to clarify what is the appropriate response of a clinical neuropsychologist when a request is received for the presence of a third party during a medicolegal consultation and patient examination.

Definitions

For the purposes of this policy, two classes of third party observers are recognized, viz., involved and uninvolved parties.

Involved third parties are those who, directly or indirectly, have some stake in the outcome of an examination of a particular plaintiff in civil litigation. This stake may derive from a legal, financial, family, social, or other relationship or benefit. Involved parties may or may not be known or familiar to the plaintiff patient. For example, an unfamiliar agent of the plaintiff's attorney would be deemed an involved party for the purposes of this policy.

Uninvolved third parties have no stake in the outcome of a plaintiff patient's examination, directly or indirectly. Instead, uninvolved third parties do have an interest in the behavior of the examiner or in the examination process or in the behavior of the patient during the assessment as an exemplar of such relevant entities as a disease (e.g., cerebrovascular disease, closed-head injury), a condition (e.g., dementia, aphasia), or a phenomenon (e.g., visual neglect, right hemi-

paresis), or others (e.g., malingering, manifestations of personality disorders). An uninvolved third party does not have an interest in the particular individual who serves as the exemplar. The purpose of the presence of uninvolved parties generally is to learn about or practice the administration of neuropsychological tests, procedures, interviews, and so forth, and to observe how patients respond to the administration of such tests or to receive critical feedback concerning their performance in the role of an examiner. Uninvolved parties include health-care professionals and student professionals, for example, student neuropsychologists, other student psychologists, student psychometrists, and cognate professionals or technical personnel.

Medicolegal Consultations

Scope of Application

The context for this policy pertains to medicolegal consultations in which the consulting clinical neuropsychologist is being asked to formulate professional opinions about a patient's condition within their area of expertise in the specialty of clinical neuropsychology in relation to tort litigation, or related insurance benefits involving third parties. This policy is not intended for application to clinical (medical) consultations in which the clinical neuropsychologist has direct responsibility for the assessment, diagnosis, or treatment of

*Members of the Task Force were: Kerry Hamsher, Ph.D. (Chair), Gregory P. Lee, Ph.D., and Ida Sue Baron, Ph.D. Address correspondence to: American Academy of Clinical Neuropsychology, Department of Psychiatry (B2954, CFOB), University of Michigan Health Systems, 1500 East Medical Center Drive, Ann Arbor, MI 48109-0704, USA. Accepted for publication: August 2, 2001.

the patient. Likewise, this policy is not intended for application to criminal forensic consultations that involve issues of criminal liability or culpability because the right to legal representation and a third party observer is absolute in criminal matters.

Policy

It is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below.

Exceptions

In the case of toddlers and young children, when their physical separation from the parental or caretaker figure results in, or is known to result in, a behavioral reaction (e.g., disruptive behavior, dysphoric state, social withdrawal) such as to invalidate the outcome of a neuropsychological or neurobehavioral assessment, it may be permissible to allow the caretaker (e.g., parent) to be physically present, at least initially until rapport is established, if this exception results in the cessation or mollification of the behavioral reaction or otherwise allows more useful assessment data to be obtained. For example, it might be facilitative to allow a family member, who may otherwise have a distorting influence, to be present in the testing room when a child simply will not stay in the examination room without that family member.

Likewise, so long as the latter principle obtains, viz., it would allow more useful assessment data to be obtained in the professional opinion of the clinical neuropsychologist, this exception may be extended to certain cases involving older children and adult patients with extreme behavioral disturbances, for example, severe mental illness, delirium.

When the circumstances are such that the presence of an involved third party may have both a potentially distorting and a potentially facilitating influence on the collection of assessment data, it shall be the sole responsibility of the clinical neuropsychologist employing their best clinical judgment to determine whether or not to proceed with the assessment of the plain-

tiff patient on the particular occasion. As always, it remains incumbent upon the clinical neuropsychologist to make known any limitation regarding the reliability and validity of their conclusions and other professional opinions.

Fundamental Issue

The fundamental issue with which this policy is concerned is the validity of the results obtained from a clinical neuropsychological assessment process. As a general principle, it is important that the clinical neuropsychologist not deviate from their ordinary clinical practices when called upon to do the same in the execution of an evaluation or in their treatment of a plaintiff patient. The greatest degree of validity is understood to be obtained when the patient is motivated to cooperate with the examiner by performing in an optimal fashion in compliance with instructions, and in a candid or unbiased fashion, and that this occurs in the context of a controlled environment simulating or comporting with psychological laboratory conditions.

The presence of an involved third party observer potentially introduces a distortion of the patient's motivation, behavioral self-selection, and rapport with the examiner(s). For example, the patient's rapport may be more attached to, and their behavior at least somewhat directed toward, the involved third party. This introduces threats to the validity of the neuropsychological evaluation in ways potentially unknown to, and perhaps not perceptible by, the examiner.

Because the surreptitious eavesdropping on a patient during an examination or treatment is ethically proscribed, the mere displacement of the involved third party from the examination room to a remote site does neither necessarily eliminate nor lessen the above described threats to the validity of the obtained psychometric or other evaluation data upon which the clinical neuropsychologist will rely in formulating their professional opinions. That is, a stealthy presence via such mechanisms as a one-way mirror, audio monitoring, video monitoring, or audiovisual monitoring, does not constitute a tolerable exception to the above-stated policy.

DOCUMENTARY SUPPORT

Observer Adverse Effects

The presence of an involved third party observer during the neuropsychological examination may distract the examinee or distort patient motivation which could adversely affect test performance.

The distraction effect can come in different forms, that is, as an external distraction or an internal distraction, or some combination thereof. External distractions refer to stimuli that arise external to the patient and are potentially observable. These include, for example, sights and sounds. Under sights, the distracting stimuli could be simple physical movements, such as the involved third party observer turning their head in anticipation of a cough or sneeze. Also, the distracting visual stimuli could be more complex, such as postures ('body language') or facial expressions. Although it would be a wholly unsatisfactory solution, as discussed below, removal of the involved third party from the examination room may greatly reduce the source of external distractions. Internal distractions, on the other hand, generally are not directly observable as they arise from within the patient. These involve such stimuli as perceptions, attitudes, and social expectations on the part of the patient. For example, given that it appears that the financial rewards of a lawsuit may increase in some proportion to the severity of subjective complaints or claimed disabilities on the part of the patient, and knowing they are being observed by a representative of their own attorney, a patient may behave during the period of involved third party observation (by whatever means, including remotely) in such a way as they perceive would please this involved observer. Or the patient may suffer internal distraction from simply wondering how the involved third party observer is evaluating their behavior and test performance rather than being fully focused on the task at hand, (e.g., if an involved third party observer were to insist on access to such observation, it would be reasonable for the patient to assume that how they behaved during observation was particularly important to the involved third party). In regard to internal distractions, the use of remote observation by

audio or visual monitoring or videotaping does not greatly reduce the source of this type of distraction.

Psychologists are obligated to create a testing environment relatively free of distractions. Standard 15.2 of the *Standards for Educational and Psychological Testing* (American Educational Research Association, 1985) states, "The testing environment should be one of reasonable comfort and with minimal distractions" (p. 83).

The *Standards for Educational and Psychological Testing* also direct psychologists to follow the procedures for administration specified by the publisher in the test manual: "In typical situations, test administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher" (Standard 15.1, p. 83). The *Wechsler Adult Intelligence Scale - III, Administration and Scoring Manual* (Wechsler, 1997) specifically states that involved third parties should be excluded from the testing area:

As a rule, no one other than you and the examinee should be in the room during the testing. Attorneys who represent plaintiffs sometimes ask to observe but typically withdraw this request when informed of the potential effect of the presence of a third person. (p. 29)

An almost identical statement against the presence of an involved third person is presented on page 30 of the *Wechsler Memory Scale - III, Administration and Scoring Manual* (Wechsler, 1997).

In her authoritative work, *Neuropsychological Assessment, Third Edition*, (1995) Lezak notes that distractions in the testing environment adversely affect performance, and thus, jeopardize the validity of a neuropsychological assessment. She states:

It is not difficult to get a patient to do poorly on a psychological examination. This is especially true of brain damaged patients, for the quality of their performance can be exceedingly vulnerable to external influences or changes in their internal states. All an examiner need do is make these patients

tired or anxious, or subject them to any one of a number of distractions most people ordinarily do not even notice, and their test scores will plummet. . .

Eliciting the patient's maximum output is necessary for a valid behavioral assessment. Interpretation of test scores and of test behavior is predicated on the assumption that the demonstrated behavior is a representative sample of the patient's true capacity in that area. (pp. 139–140)

Binder and Johnson-Greene (1995) demonstrated the negative effect that an involved observer had on test performance in a single case study. McSweeney, Becker, Naugle, Snow, Binder, and Thompson (in press) have detailed many of the ethical implications of the use of third party observers. Some of the adverse effects of observers on test performance have been systematically investigated in a body of literature that has come to be known as social facilitation research. McCaffrey, Fisher, Gold, and Lynch (1996) summarized the recent literature on social facilitation in their article on the presence of third party observers during neuropsychological evaluations. The social facilitation literature provides empirical evidence that the presence of a third party observer can alter cognitive and motor test performance whether or not the patient has a brain injury or disease.

The social facilitation effect causes examinees to perform better than usual on tests of simple or overlearned skills and poorer on tasks that are more difficult for them (McCaffrey et al., 1996). These adverse effects have been shown to occur even when the observer is behind a one-way mirror. Although there are no studies at present that demonstrate a social facilitation effect during video or audio taping, these alternatives to the physical presence of an observer in the room raise other important ethical and professional concerns (such as, problems involving test security, allowing testing materials to become part of the public domain, or potential misuse of assessment results by third parties for purposes unrelated to the current case).

Test Administration and Interpretation

Psychological and neuropsychological tests have not been standardized in the presence of involved third party observers, and thus, it is inappropriate to compare the examinee's results to the normative results from the standardization sample. Departure from a standardized testing procedures may diminish the utility of the normative data. Thus, any factor that compromises the standard administration of a neuropsychological test may jeopardize the validity and reliability of the test's findings.

In a highly regarded book on the nature and use of psychological and neuropsychological tests, Anastasi (1988) stresses the importance of test standardization, "Standardization implies uniformity of procedure in administering and scoring the test. If the scores obtained by different persons are to be comparable, testing conditions must obviously be the same for all. Such a requirement is only a special application of the need for controlled conditions in all scientific observations. In a test situation, the single independent variable is often the individual being tested." (p. X).

The *Standards for Educational and Psychological Testing* (American Educational Research Association, 1985) stress the importance of following standardized procedures in Standard 15.1,

In typical applications, test administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher. Specifications regarding instructions to test takers, time limits, the form of item presentation or response, and test materials or equipment should be strictly observed. Exceptions should be made only on the basis of carefully considered professional judgment, primarily in clinical applications. (p. 83)

In the American Psychological Association's ethical principles of psychologists (American Psychological Association, 1992), ethical standard 2.04(c) *Use of Assessment in General with Special Populations* states in part, "Psychologists attempt to identify situations in which particular interpretations or assessment techniques or norms may not be applicable or may require adjustment

in administration or interpretation because of factors such as..." Because no norms exist for testing in the presence of involved third parties, misinterpretation of test results may be common, and psychologists should be aware of the potential ethical difficulties involved in interpretation of test results under these circumstances.

If an involved third party were present during a neuropsychological examination, neuropsychologists should include in their report any concerns regarding limitations that this places on interpretation. This is made clear in ethical standard 2.05, *Interpreting Assessment Results*:

When interpreting assessment results, including automated interpretations, psychologists take into account the various test factors and characteristics of the person being assessed that might affect psychologists' judgements or reduce the accuracy of their interpretations. They indicate any significant reservations they have about the accuracy or limitations of their interpretations.

Ethical principle 2.02 (a), *Competence and Appropriate Use of Assessments and Interventions*, states, "Psychologists who develop, administer, score, interpret, or use psychological assessment techniques, interviews, tests, or instruments do so in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques." Thus, psychologists should be aware that the presence of an involved third party may alter the validity of test results and either refuse to administer tests under these circumstances or alter their interpretations if an observer has been present. The presence of an involved third party may especially impact on determinations made about the integrity of brain function, change over time intervals, and effects of treatment in individuals prone to easy disruption of function such as those with neurological conditions.

Test Security

Involved third party observers may undermine the neuropsychologist's ethical responsibility to

maintain test security. This ethical principle is most clearly presented in Ethical Standard 2.10, *Maintaining Test Security* (American Psychological Association, 1992):

Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consistent with law, contractual obligations, and in a manner that permits compliance with the requirements of this code.

The same principle is also delineated in the *Standards for Educational and Psychological Testing* (1985). Standard 15.7 states that, "Test users should protect the security of test materials." These standards would be applicable whether the observation occurred in the testing room, behind a one-way mirror, or through audio or video monitoring or recording.

Test Misuse

The neuropsychologist has little or no control over how an involved third party observer will use the content of testing in the present or future cases. This lack of control over the data generated during a neuropsychological assessment may be incompatible with our ethical responsibilities. The American Psychological Association's (1992), Ethical Standard, 1.16, *Misuse of Psychologists' Work* states, "Psychologists do not participate in activities in which it appears likely that their skills or data will be misused by others, unless corrective mechanisms are available."

Involved third party observers could take notes and record specific test questions and answers to be used in preparing or coaching future litigants with neuropsychological claims. Moreover, poor performances could be misinterpreted by the third party resulting in incorrect conclusions. All these difficulties which could arise from the presence of an involved observer could result in a potential conflict with Ethical Standard, 2.02 (b), *Competence and Appropriate Use of Assessments and Interventions*:

Psychologists refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to

prevent others from misusing the information these techniques provide. This includes refraining from releasing raw test results or raw data to persons, other than to patients or clients as appropriate, who are not qualified to use such information.

As with the problem of test security, potential test misuse may occur regardless of the method of observation (i.e., actual presence in the same room, behind a one-way mirror, or audio or video monitoring/recording).

Responsibility in Forensic Situations

Because the presence of an involved third party observer is most commonly requested within a medicolegal context, several ethical principles may help to guide neuropsychologist's decisions regarding this issue. Ethical standard, 7.06, *Compliance with Law and Rules*, appears to indicate that it is the responsibility of the neuropsychologist to inform lawyers, judges, and others that the presence of an involved third party observer represents a potential ethical conflict. Ethical standard, 7.06, *Compliance with Law and Rules*, states:

In performing forensic roles, psychologists are reasonably familiar with the rules governing their roles. Psychologists are aware of the occasionally competing demands placed upon them by these principles and the requirements of the court system, and attempt to resolve these conflicts by making known their commitment to this Ethics Code and taking steps to resolve the conflict in a responsible manner.

In a similar vein, Ethical Standard, 1.02, *Relationship of Ethics and Law*, explicitly explains that, "If psychologists' ethical responsibilities conflict with law, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner."

Confidentiality may also encompass the issue of involved third party observers. Ethical standard, 5.02, *Maintaining Confidentiality*, states that "psychologists have a primary obligation and take reasonable precautions to respect the con-

fidentiality rights of those with whom they work or consult..." Neuropsychologists need to communicate the potential limitations to confidentiality with all parties involved but especially with the patient.

Ethical standard, 7.01, *Professionalism*, informs the psychologist that the APA Ethics Code applies to the atypical professional activities that take place within the forensic context. Standard 7.01 states in part, "Psychologists who perform forensic functions, such as assessments, interviews, consultations, reports, or expert testimony, must comply with all other provisions of this Ethics Code to the extent that they apply to such work activities." This ethical standard makes clear that all ethical issues raised by the presence of an involved third party are applicable whether or not the neuropsychological assessment occurs in a forensic setting.

Ethical standard, 7.04, *Truthfulness and Candor*, emphasizes the need to communicate the bases for conclusions as well as any threats to the validity of an examination when an involved third party has been an observer.

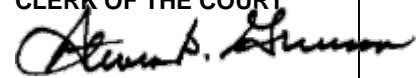
7.04 (a) "In forensic testimony and reports, psychologists testify truthfully, honestly, and candidly and, consistent with applicable legal procedures, describe fairly the bases for their testimony and conclusions."

7.04 (b) "Whenever necessary to avoid misleading, psychologists acknowledge the limits of their data or conclusions."

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Attorneys for Gabriel L. Martinez;
Universal Protection Services, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and LORI
KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;
UNIVERSAL PROTECTION SERVICES, LLC
d/b/a ALLIED UNIVERSAL SECURITY
SERVICES, a Foreign Limited Liability Company;
DOE Family Members 1-10; DOE Individuals 11-20;
and ROE Corporations 21-30, Inclusive,

Defendants.

Case No. A-20-820254-C
Dept. No. 15

**Defendants' Reply re Motion to
Extend Discovery (3rd Request) on
Order Shortening Time**

Kennedy's opposition is based in large part upon a material misstatement of fact. Defendants offered and he rejected the very compromise solution he now asserts would have avoided this scenario. Beyond that, regardless of who prevailed on the motion requesting a Rule 35 examination, it was unrealistic to expect the examination could be set, conducted, and a report generated in the 17 days between December 3 and 20. The pending objection to that ruling also made December 20 an unrealistic deadline. Defendants have been reasonably diligent in pursuing their defense, but Kennedy is playing discovery games designed to deprive Defendants of their right to a defense. Defendants' extension should be granted.

1 DATED this 6th day of January, 2022.



4 BY: /s/Michael Lowry

5 MICHAEL P. LOWRY, ESQ.

6 Nevada Bar No. 10666

7 CHRIS RICHARDSON, ESQ.

8 Nevada Bar No. 9166

9 6689 Las Vegas Blvd. South, Suite 200

10 Las Vegas, Nevada 89119

11 Attorneys for Gabriel L. Martinez;

12 Universal Protection Services, LLC

13 **Declaration of Chris Richardson**

- 14 1. On September 23, 2021 I called plaintiff counsel Joe Troiano and spoke to him concerning
- 15 the Rule 35 examination. I offered to switch neuropsychological examiners if Kennedy
- 16 agreed to drop his request for an audio recording. The call ended without a response.
- 17 2. On September 24, 2021, I received the email from Mr. Troiano that is attached as Exhibit A.
- 18 In it, he asserts that Kennedy will still not agree to Dr. Ross and also still wanted to record
- 19 any examination.
- 20 3. I declare under penalty of perjury that the foregoing is true and correct.

21 /s/ Chris Richardson

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1 **Memorandum of Points & Authorities**

2 **I. Defendants' motion and the proposed extension are supported by good cause.**

3 **a. Kennedy rejected the very offer he says could have avoided this situation.**

4 Kennedy's opposition contains a material misstatement of fact. He argues that this
5 scenario could have been avoided entirely had Defendants simply chosen another Rule 35
6 examiner as he demanded. Kennedy asserts that had Defendants agreed to a different examiner,
7 he would have dropped the request to record the examination. "Stated differently, had Defendants
8 simply selected a different neuropsychologist to perform the examination, the examination would
9 not be recorded."¹ "[D]espise knowing that the circumstances surrounding the first examination
10 gave rise to good cause supporting that a continued examination with Dr. Ross be recorded,
11 Defendants decided to stick with Dr. Ross instead of simply finding a different
12 neuropsychologist."²

13 Kennedy must have simply forgotten that Defendants made that exact offer in a telephone
14 call on September 23, 2021. They would agree to switch examiners if Kennedy dropped the
15 request to record. Kennedy must have also simply forgotten that he rejected that offer in a follow-
16 up email on September 24, 2021. "We won't agree that Stacey Ross can do it and we want it
17 recorded."³

18 Defendants offered and Kennedy rejected the exact compromise Kennedy now proclaims
19 would have avoided this scenario. It is a blatant material misstatement of fact makes his attacks
20 on Defendants' lawyers just that more disappointing.

21 **b. The motion's timing is supported by good cause.**

22 Defendants acknowledged that this motion was filed within the 21 day window EDCR
23 2.35(a) contemplates and then explained the motion's timing. Kennedy argues the motion is not
24 supported by a showing of good cause like EDCR 2.35(a) requires. Nevada appellate courts have
25 not expressly evaluated what "good cause" requires. The federal courts have a similar "good
26

27 ¹ Doc ID# X at 9:21-22.

28 ² *Id.* at 11:20-23.

³ Exhibit A (emphasis added). This proposal was even discussed with Defendants on September 23 and 27. If necessary, Defendants can provide these emails in camera to substantiate that the offer was made.

1 cause” requirement. There the “good cause” analysis “standard primarily considers the diligence
2 of the party seeking the amendment. The district court may modify the pretrial schedule if it
3 cannot reasonably be met despite the diligence of the party seeking the extension.”⁴ But
4 “carelessness is not compatible with a finding of diligence and offers no reason for a grant of
5 relief.”⁵ Further, while “the existence or degree of prejudice to the party opposing the
6 modification might supply additional reasons to deny a motion, the focus of the inquiry is upon
7 the moving party’s reasons for seeking modification.”⁶ A party is not required to be perfectly
8 diligent, just reasonably diligent.

9 Applied here, Defendants have been reasonably diligent. The parties reached an agreement
10 for a Rule 35 examination to occur on July 20, 2021. A dispute arose at that examination, the
11 parties attempted to resolve it between themselves, but ultimately were unsuccessful. Defendants
12 were forced to file a motion, and they did so, but the hearing was set for December 3. This did not
13 particularly concern Defendants because if a discovery commissioner agreed with Kennedy’s
14 position, then Defendants would have to locate 1) a brand new examiner 2) who would allow the
15 examination to be audio recorded. Clearly that would not be possible by the December 20, 2021
16 disclosure deadline. If a discovery commissioner agreed with Defendants, then the parties would
17 need to schedule the examination. This too was unlikely to occur in a short period between
18 December 3 and December 20, assuming that one side or the other did not plan to object to the
19 discovery commissioner’s ruling.

20 In effect, Defendants saw the December 20 deadline as unreasonable given the disputes
21 between the parties and believed Kennedy would see it the same way since, had Kennedy
22 completely prevailed on his position concerning the Rule 35 examination, the deadline would have
23 been impossible to meet anyway. All of these efforts demonstrate exactly the type of reasonable
24 diligence that supports a good cause finding per EDCR 2.35(a) and that allows the court to decide
25 this motion on its merits.

27 ⁴ *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992).

28 ⁵ *Id.*

⁶ *Id.*

1 **c. Kennedy is playing a discovery game.**

2 A discovery extension is merited under the circumstances presented here. The parties
3 agreed to the terms of a Rule 35 examination and then Kennedy decided to change the terms.
4 Defendants offered and Kennedy rejected the exact solution that Kennedy now says would have
5 avoided this entire scenario. Once a motion was necessary, the December 20 designation deadline
6 was moot given the parties' positions. If Kennedy prevailed, forcing Defendants to change
7 examiners, an examination could not realistically happen between December 3 and 20. If
8 Defendants prevailed, scheduling the examination on short notice between December 3 and 20
9 was also unrealistic. These options also assume that neither side objected to the report and
10 recommendations.

11 Kennedy's secondary argument is that Defendants not been diligent because the brain
12 injury has been an issue in the case since it was filed and Defendants should have prosecuted their
13 defense differently. Kennedy cite no authority that indicates one party may dictate another's
14 litigation strategy, nor does Rule 35 impose such a requirement. Each party is free to select their
15 own litigation strategies. Here, Defendants are not required to exclusively rely upon the data that
16 Kennedy's hired guns generated. Defendants took reasonable steps to prosecute their defense but
17 were blocked by Kennedy's gamesmanship.

18 Finally, there is a practical component to extending discovery. The discovery
19 commissioner granted Kennedy's request to record the examination. As explained in Defendants'
20 pending objection to that ruling, the scientific literature concludes that even just recording a
21 neuropsychological examination invalidates the data gathered in the examination. This means
22 even if Defendants had tried to proceed with a Rule 35 examination between December 3 and 20,
23 the data gathered would have been worthless.⁷ In effect, Defendants are still blocked from
24 obtaining the Rule 35 examination that Kennedy and the discovery commissioner agreed is
25 appropriate in this particular case.

26
27
28 ⁷ While *Lyft v. Dist. Ct.* ruled NRS 52.380 is unconstitutional, it did not address the recording issue at issue in this particular motion.

1 Finally, as to the proposed discovery timeline, if the report and recommendations are
2 affirmed, then Defendants may have no choice but to pursue a writ. Even if the report and
3 recommendations are modified as Defendants request, Kennedy might also pursue a writ. If the
4 report and recommendations are modified and no writ is sought, Defendants will still need to
5 schedule the examination and allow Dr. Ross time to prepare a report.

6 **II. The proposed extension is merited.**

7 Kennedy's plan changed in July, 2021. At that point, he decided to stall and try to run out
8 the clock so Defendants would not be able to obtain the information needed to evaluate their
9 defenses. It is gamesmanship and it has continued even in this motion.

10 That aside, the merits of this motion demonstrate Defendants have been reasonably
11 diligent, the deadlines they seek to extend realistically could not have been met, and there is a
12 pending dispute that precludes Defendants from even moving forward with the Rule 35
13 examination now. The extension Defendants propose should be granted.

14 DATED this 6th day of January, 2022.



17
18 BY: /s/ Michael Lowry

19 MICHAEL P. LOWRY, ESQ.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on January 6, 2022, I served **Defendants' Reply re Motion to Extend Discovery (3rd Request) on Order Shortening Time** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Jamie S. Cogburn
Joseph J. Troiano
COGBURN LAW
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Plaintiffs

BY: /s/ Amanda Hill
An Employee of



Exhibit A

Exhibit A

Lowry, Michael

From: Joseph J. Troiano <JJT@cogburncares.com>
Sent: Friday, September 24, 2021 10:40
To: Richardson, Chris
Subject: Kennedy - neuropsych exam

[EXTERNAL EMAIL]

Chris,

You'll have to file a motion. We won't agree that Stacy Ross can do it and we want it recorded.

Joseph J. Troiano

Attorney

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Ph. (702) 748-7777

Fax (702) 966-3880

www.CogburnCares.com

COGBURN
— LAW —

1 TRAN

DISTRICT COURT

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3 CLARK COUNTY, NEVADA

4 * * * * *

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6 DOUGLAS KENNEDY, LORI KENNEDY,)

CASE NO. A-20-820254-C

7 Plaintiffs,)

8 vs.)

DEPT. NO. XV

9 GABRIEL L. MARTINEZ, UNIVERSAL)

10 PROTECTION SERVICES, LLC,)

Transcript of Proceedings

11 D/B/A ALLIED UNIVERSAL)

12 SECURITY SERVICES,)

Defendants.)

13 BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

14 **DEFENDANTS' MOTION TO EXTEND DISCOVERY (THIRD REQUEST) ON**
15 **ORDER SHORTENING TIME**

16 MONDAY, JANUARY 10, 2022

17 APPEARANCES (ALL VIA VIDEO CONFERENCE):

18 For the Plaintiffs: JOSEPH J. TROIANO, ESQ.

19 For the Defendants: CHRISTOPHER J. RICHARDSON, ESQ.

20
21 RECORDED BY: MATTHEW YARBROUGH, DISTRICT COURT

22 TRANSCRIBED BY: KRISTEN LUNKWITZ

23
24 Proceedings recorded by audio-visual recording; transcript
25 produced by transcription service.

1 MONDAY, JANUARY 10, 2021 AT 10:32 A.M.

2

3 THE COURT: Do we have anyone on *Kennedy versus*
4 *Martinez* case?

5 MR. TROIANO: Good morning, Your Honor. Joseph --

6 MR. RICHARDSON: Yes, Your Honor. Chris
7 Richardson -- oops. Good morning, Your Honor. Chris
8 Richardson on behalf of the defendants.

9 THE COURT: Good morning.

10 MR. TROIANO: Good morning, Your Honor. Joseph
11 Troiano for the plaintiffs.

12 THE COURT: Good morning. Okay. So, Defendants'
13 Motion to Extend Discovery, Third Request, on OST, which
14 I've reviewed that, Plaintiffs' Opposition, and Defendants'
15 Reply. And I welcome arguments beginning with Mr.
16 Richardson.

17 MR. RICHARDSON: Thank you, Your Honor.

18 I'd like to begin by pointing out that although
19 this is a Motion to Extend with the third request
20 component, the prior two requests were actually by
21 stipulation. So, this is actually our first Motion on the
22 issue.

23 As the briefing points out on both sides, this
24 matter generally concerns a traumatic brain injury issue
25 that is -- serves as a genesis of the dispute before you

1 today. The parties, all the way back to, I believe, May of
2 2021, were attempting to schedule the Rule 35 IME with a
3 neuropsychologist. There was some back and forth
4 negotiating to find the dates. I believe the plaintiff was
5 out of town some of the dates. Our neuro was unavailable.
6 Ultimately, the parties agreed on a July 20th IME.

7 For disputed reasons, that IME was unable to
8 conclude. Following the adjournment of the IME, we
9 attempted to basically investigate what occurred and why
10 the IME cannot be completed. After some back and forth
11 with opposing counsel, we discussed how we would proceed.
12 Ultimately, we wanted to pursue the IME and conclude it
13 under the same conditions that were agreed upon, an IME
14 with Dr. Staci Ross without a recorder or the presence of
15 an observer.

16 After e-mails, various conversations that I had
17 with Mr. Troiano, it was concluded that the plaintiff would
18 not agree to an IME with Dr. Ross. And, even if an IME was
19 to proceed, that, in any event, it needed to be recorded.
20 We disagreed that an IME could go under -- or, go forward
21 under those conditions, as many neuropsychologists would
22 find that the data that is elicited under these conditions
23 is simply not reliable and is subject to scrutiny.
24 Obviously, this has been an issue that's been before the
25 Supreme Court. We recently saw the *Lyft* case that came

1 down, deeming the statutes unconscion -- or,
2 unconstitutional, with regard to an observer being present.

3 After we had an opportunity to go back and forth
4 and solidify respective positions, we attempted to file our
5 Motion on October 3rd before the Discovery Commissioner.
6 Unfortunately, we couldn't get a hearing for two months.
7 We had spoken with opposing counsel about trying to advance
8 that hearing. Unfortunately, nothing materialized. With
9 that hearing being placed within the 21 days, it would have
10 been impossible to bring a Motion to Extend at that time
11 without knowing how the parties were going to proceed under
12 the ruling rendered by Judge -- or Discovery Commissioner
13 Young.

14 Ultimately, Commissioner Young said: Look,
15 defendants, you can choose your neuropsychologist.
16 However, he found that there was good cause to require a
17 recorder to be -- or, that it be recorded, period. We've
18 since filed our Objection. I'm not going to argue the
19 merits of that Objection. I think it would be improper.
20 But that is presently before Your Honor.

21 In short, we were placed in a predicament that we
22 didn't know what the future was going to hold, based upon
23 defending ruling of the Motion, the Rule 35 Motion. So, to
24 bring a Motion outside of the 21 days, it would have been
25 pure speculation what timing would be required as far as

1 respective dates. Depending on Your Honor's ruling on the
2 Objection, who knows whether either side is going to file a
3 Writ on the issue, which could further effectuate this
4 whole entire case.

5 We attempted to reach out to opposing counsel for
6 a stipulation on the issue. Mr. Troiano declined to extend
7 the expert deadlines, stating that he may be inclined to
8 entertain a discovery extension on the back end, but in no
9 event would he agree to an extension of the expert
10 deadlines.

11 Like I said, there was an opportunity to discuss
12 selecting an alternative neuropsychologist without a
13 recorder. Mr. Troiano declined that. And, so, there is
14 some difference of opinion whether that occurred.
15 Obviously, you can see that by the briefing. But I believe
16 the e-mail from Mr. Troiano, to me, when read in this
17 light, in that light, it shows that he made a demand that
18 he wanted it recorded regardless of who we selected as our
19 neuro.

20 So, unless Your Honor has any questions, I'll
21 submit the rest on the brief.

22 THE COURT: No questions right now.

23 Go ahead, Mr. Troiano.

24 MR. TROIANO: Thank you, Your Honor.

25 I think it's all in our brief how proactive we

1 have been on this case, how much information we have
2 provided to defense, how early that information was
3 provided. And, for whatever reason, defense waited to set
4 the neuropsych examination. And the reason why that
5 examination wasn't completed was simply because Staci Ross
6 did not provide appropriate paperwork in time. And she --
7 I guess she didn't realize until the examination that some
8 of that paperwork was crossed off. She had made some
9 comments to my client and made him feel uncomfortable and
10 the examination was terminated. I immediately notified
11 defense counsel that if you want a neuropsych examination,
12 you're going to have to file a Motion. They waited nearly
13 three months to do that.

14 The whole issue about it being recorded or not,
15 the issue is, if they selected someone other than Staci
16 Ross, it would have been difficult for me to establish good
17 cause to have it recorded. That was our position. But, at
18 the end of the day, if it was somebody else, that would
19 have been difficult for me to establish. Therefore, it
20 would have been likely that the Discovery Commissioner
21 would have found no recording.

22 They decided to stick with Staci Ross. And, in
23 light of what happened at the first examination, the
24 Discovery Commissioner found that good cause existed to
25 have it recorded. So, you know, that's where we're at with

1 the whole issue of the IME.

2 Defense has filed an objection to the DCRR. But
3 they don't explain -- the issue of the neuropsych in their
4 Motion, they don't explain why reopening of all deadlines -
5 - excuse me. Of opening -- reopening the expert deadlines
6 to allow all experts to be disclosed. There's no
7 explanation. There's no explanation as to why a
8 neurologist wasn't disclosed, or a neuroradiologist wasn't
9 disclosed, or any other expert that they could have and
10 should have disclosed as initial experts.

11 You know, again, we have been very proactive on
12 this case. We provided information early to defense. They
13 know where we value the case. You know, nearly -- they had
14 -- they knew we had a neuropsych from our initial
15 disclosure. I agreed twice to extend the deadlines to help
16 with this issue. But I can't, you know, in light of what
17 we've done.

18 And, then, the other part that I hope I expressed
19 good in my Motion was my client's conditioning -- his
20 condition is worsening. He's got a traumatic brain injury
21 with significant balance issues. He's a fall risk. This
22 case needs to go to trial. If they don't resolve it, it
23 has to go to trial. And, so, for the reasons on -- one,
24 the Motion's untimely, and, number two, there's just no
25 good cause to reopen all expert deadlines, I think they're

1 asking for, like, 10 months. They're essentially asking
2 for a stay of the case.

3 So, for all the reasons set forth in our
4 Opposition and I have stated today, we ask the Court to
5 deny their Motion.

6 THE COURT: Thank you. Before we turn it back to
7 Mr. Richardson, you know, looking at the docket, it looks
8 like you're set on our May 23rd trial stack. It also looks
9 like we have a pending Motion to Amend the Complaint. Is
10 that correct?

11 MR. TROIANO: Yes, Your Honor. Based upon
12 testimony from the driver in his deposition, we filed a
13 Motion to Add a Prayer for Relief for Punitive Damages. He
14 had testified that he was essentially working up to 84
15 hours per week as a security officer, driving around town.
16 And he, at his deposition, in part, blamed his lack of
17 sleep on the accident, for the reason why he caused an
18 accident in which he had testified he was driving 65 miles
19 per hour on impact.

20 THE COURT: Thank you very much.

21 Mr. Richardson, let's start with a question or two
22 to you. You know, when I was reviewing this, two concerns
23 I had, setting other issues aside, but, you know, one is:
24 Wwhat is the scope of extending that you're seeking? Is it
25 limited to the neuropsychologist or is it as -- you know?

1 So, I -- it wasn't super clear. And, then, two, you know,
2 it looks like -- so the scope and, then, the timing. You
3 know, initial expert disclosures were due on December 20th
4 and your proposed new deadline is September 2nd, which is
5 essentially nine more months of discovery. So, if you
6 could address those two, that'd be great.

7 MR. RICHARDSON: Sure, Your Honor.

8 With regard to the scope of the request, we're
9 requesting that all experts' deadlines be extended. And,
10 the reason being is, this case is squarely centered on what
11 Mr. Kennedy is going to say, how he's going to provide his
12 -- you know, how he's going to interview with the
13 neuropsychologist. Instead of going out there and
14 compiling hundreds and thousands of dollars in experts that
15 we may not need, we need to know what -- how this
16 neuropsychology IME goes. All the dominoes fall from
17 there.

18 And, so, it would be entirely unfair to go out,
19 compile a bunch of experts, if we have an IME where he's, -
20 - you know, our expert says: Hey, look, this obviates the
21 need for all these experts that you would normally get. We
22 hoped to have all that information back in July so that we
23 would have appropriate time to go out and retain these
24 experts. Obviously, we don't because of the timing of the
25 way the Motion was entertained. You know, we had a two-

1 month lag time from the time that we filed the Motion.

2 Obviously, taking -- scheduling these IMEs are
3 difficult. Neuropsychology experts are not a dime a dozen.
4 So, they're busy. And, so, scheduling becomes a problem.
5 So, I think that dovetails into the nine-month request.
6 That nine months is made in abundance of caution because we
7 presume that based upon your ruling on the Objection that
8 either side may seek further relief, depending on how, you
9 know, the chips fall on that. Again, don't want to argue
10 the merits of that -- the Objection. I'm not -- Discovery
11 Commissioner's Report and Recommendation. But, you know,
12 that timing was made kind of in an abundance of caution. I
13 believe we highlighted that in our motion. But, if we
14 didn't, that's -- that would be the basis of why.

15 THE COURT: Okay. Any further rebuttal that you
16 would like to make?

17 MR. RICHARDSON: I don't believe so. Because
18 those were the issues that I was generally going to touch
19 upon, other than to just highlight, again, that we did
20 offer to meet in the middle, select a new
21 neuropsychologist. In fact, in September that offer was
22 rejected while Mr. Troiano argued that he thought maybe it
23 was unlikely that the Discovery Commissioner would rule
24 that there was good cause. He didn't mention -- or, I
25 mean, that wasn't the basis of his -- of any discussion

1 that we had. He simply stated: No, I want it recorded.

2 It changed the scope of the agreement between the
3 parties whereby the neuropsychology IME was to go forward
4 without recordation. That was due in part solely because
5 neuropsychologists find that the data is invalid if there's
6 a presence of a recording device. So, with that, I think I
7 have covered everything I wanted to cover.

8 THE COURT: Thank you very much.

9 So, looking at the docket again, I see that there
10 was a Discovery Commissioner Report and Recommendation
11 filed December 30th and an Objection on January 3rd. We
12 don't currently have any hearing date on that as it looks
13 from the docket. So, you may want to double check that.

14 But the Court is going to grant in part, deny in
15 part, Defendants' Motion to Extend Discovery as follows.
16 There's no basis at all under the facts and circumstances
17 here to grant what is a nine to 10-month general extension
18 of discovery, as requested by defendant. As plaintiff
19 points out, the issue of an alleged traumatic brain injury
20 has been in the case from the very beginning. So, it's not
21 a case where any of that's a surprise to defendant. And,
22 so, there's no reason to grant this blanket nine to 10-month
23 extension, as requested by defendant.

24 The Court has to weigh, and it can be difficult to
25 do that as is the case here, you know, the preference for

1 trial on the merits versus deadlines that have been
2 stipulated to. And a lack of due diligence on defendants'
3 side, particularly where the examination was supposed to go
4 forward in July and obviously didn't. And everyone knew
5 that didn't, and defendant then waited three months to re-
6 raise the issue with the Discovery Commissioner, then
7 waited, you know, what, July to December, five months or
8 whatever, to raise the Motion to Extend with me.

9 Notwithstanding that, looking at the totality of
10 the circumstances, the Court considers one of those
11 circumstances plaintiffs' pending Motion to Amend the
12 Complaint. One of those circumstances, also, the Discovery
13 Commissioner's Report and Recommendations where the
14 Discovery Commissioner found that there -- and whether I
15 agree with it or not, I can't say because it's not really
16 before me. But the Discovery Commissioner did find there's
17 good cause for the continued Rule 35 examination to
18 reconvene and finish and to be recorded.

19 So, taking all of that into account, the Court
20 grants in part, finds that there's good cause for the late
21 filing, at least in part, of the Motion, and to extend at
22 least in part the discovery. The extension of discovery is
23 limited to defendants' identification and Rule 35 --
24 identification of an expert in neuropsychology to be
25 identified and to conduct a Rule 35 examination, subject

1 to, of course, whatever the Court may or may not decide on
2 the pending Objection to the DCRR.

3 There's no good cause, however, to extend it for
4 anyone else, except for plaintiff. If plaintiff so desires
5 to have a rebuttal to that, which that deadline would be 30
6 days after the -- this deadline for defendant on the Rule
7 35 and the neuropsychologist.

8 I mean, so, Mr. Richardson, I understand lack of
9 availability of experts. But you largely, or, defense
10 largely put itself in a position where you're going to have
11 to figure out what to do to this much shorter deadline than
12 you've asked for. So, 60 days from today is --

13 THE CLERK: And that date is March 14th of 2022.

14 THE COURT: 3-14. So, again, that's only for the
15 neuropsychologist initial expert identification by
16 defendant, as well as having taken neuro -- the Rule 35
17 examination of plaintiff. And, then, 30 days after that,
18 should plaintiffs so desire to identify their rebuttal
19 expert to them.

20 THE CLERK: And that will be April 11th of 2022.

21 THE COURT: Okay. That necessitates moving your
22 trial date. Let's see. What do we have after our May 23rd
23 stack? What's the next one?

24 THE CLERK: Our next available stack, Judge, is
25 August 1st of 2022.

1 THE COURT: Any issues that either of you are
2 aware of with being on the August 1st trial stack?

3 MR. TROIANO: Joseph Troiano for the plaintiff.
4 Not that I'm aware of, Your Honor.

5 MR. RICHARDSON: Chris Richardson for the
6 defendants. I -- not that I'm aware of at this time.

7 THE COURT: Okay. So, let's put you on the August
8 1st trial stack. We'll issue a new Trial Order. Let's tell
9 them the deadlines now. But, as you may have heard in that
10 other case, the pretrial conference may very well be moved
11 -- or, the calendar call may be accelerated. It may be
12 held at the same time as the pretrial date I'm going to
13 give you now.

14 THE CLERK: The status check regarding trial
15 readiness would be June 6th of 2022 at 9:30 a.m. The
16 pretrial conference would be July 11th of 2022 at 8:30 a.m.
17 The calendar call will be July 27th of 2022 at 8:30 a.m.
18 The trial stack would be August 1st of 2022 at 10:30 a.m.
19 The Pretrial Memorandum will be due by July 8th of 2022.
20 And the last day to file pretrial motions will be June 3rd
21 of 2022.

22 THE COURT: And I forgot to say, Mr. Troiano,
23 because you largely prevailed on this Motion, you'll
24 prepare the Order. Put my reasons in there and submit it
25 to Mr. Richardson for review and approval.

1 MR. RICHARDSON: Your Honor, this is Chris
2 Richardson. One point of clarification, if I may?

3 THE COURT: You may ask. I may decline to answer,
4 but go ahead.

5 MR. RICHARDSON: So, I just want to clarify the
6 60-day extension. Is that for the Rule 35 and the
7 discovery deadline as well?

8 THE COURT: For the rule --

9 MR. RICHARDSON: Because, right now, the discovery
10 --

11 THE COURT: Go ahead.

12 MR. RICHARDSON: Yeah. Because that will put us
13 past the discovery deadline. We're going to need time to
14 take the plaintiff's deposition after that IME, just as a
15 matter of course. And, right now, we have a discovery
16 deadline of February 14th, which is going to put both sides
17 in a bind.

18 THE COURT: Any response, Mr. Troiano?

19 MR. TROIANO: Yeah. If I understand the issue, I
20 guess with the new trial date, I think I'm agreeable to
21 just extend the deadlines to meet that new trial date. So,
22 to extend the DCO, I guess, out a few months. If the
23 initial expert is getting out 60 days, so will the rebuttal
24 expert deadline. And, then, I guess we might have a month
25 or two to finish up discovery.

1 THE COURT: Hand me that stuff back. Bear with me
2 a moment. So, I may have misunderstood some stuff. But,
3 plaintiff, did you already do your initial expert
4 disclosures? I thought you did. But --

5 MR. TROIANO: Yeah. No. We did. We made ours at
6 the deadline in December.

7 THE COURT: Okay. Do you want further expert
8 disclosure on your end?

9 MR. TROIANO: No.

10 THE COURT: Okay. Okay. So, the only expert
11 disclosure, then, is the neuropsychologist and the IME.
12 And that has to be done within those 60 days. But the --
13 and, then, the 30 days for a rebuttal, if plaintiff wants
14 it. In terms of, you know, the non-expert discovery,
15 that's still open, I guess. Is that correct?

16 MR. RICHARDSON: That's correct. Our request was
17 for all discovery deadline -- the current discovery
18 deadline is February 14th.

19 THE COURT: Okay.

20 MR. RICHARDSON: And the dispositive motion is
21 March 15th.

22 THE COURT: All right. Okay. I focused on the
23 expert issue, I guess.

24 MR. TROIANO: I'm fine with kicking out the
25 discovery deadline 60 days. I think for us, it falls --

1 THE COURT: Yeah. So, what would 60 days give
2 you, then? Well, so, would need to go to -- would it go to
3 that, let's see, 30 days after that rebuttal? Which, what
4 would 30 days after the rebuttal be?

5 MR. TROIANO: May 11th or so.

6 THE CLERK: Yes.

7 THE COURT: Yeah. Okay. May 11th.

8 MR. TROIANO: I'm fine.

9 THE COURT: Does that work for both sides?

10 MR. TROIANO: It works for plaintiffs.

11 MR. RICHARDSON: That works for the defendants.

12 THE COURT: Okay. Yeah. So, include that in
13 there as well, Mr. Troiano.

14 MR. TROIANO: Thank you.

15 THE COURT: Thank you all.

16 MR. RICHARDSON: Thank you, Your Honor.

17

18 PROCEEDING CONCLUDED AT 11:00 A.M.

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1 **CERTIFICATION**

2

3

4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

13

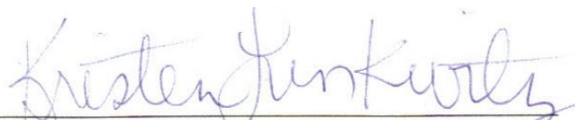
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20 KRISTEN LUNKWITZ

21 INDEPENDENT TRANSCRIBER

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1 ORDR

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 DOUGLAS J. KENNEDY, et al.,

7 Plaintiff(s),

8 v.

9 GABRIEL L. MARTINEZ, et al.,
10

11 Defendant(s).

CASE NO. A-20-820254-C
DEPT NO. 15

HEARING DATE: 12/3/21
HEARING TIME: 9:30 a.m.

12
13
14 ORDER RE: DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

15
16 The Court, having reviewed the above report and recommendations prepared by the
Discovery Commissioner and,

17 _____ No timely objection having been filed,
18

19 X After reviewing the objections to the Report and Recommendations and good cause
20 appearing,

21 * * *

1 AND

2 X

3 IT IS HEREBY ORDERED the Discovery Commissioner's Report and
4 Recommendations are affirmed and adopted.

5 IT IS HEREBY ORDERED the Discovery Commissioner's Report and
6 Recommendations are affirmed and adopted as modified in the following manner.
7 (attached hereto)

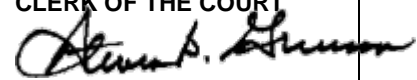
8 IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for
9 reconsideration or further action.

10 IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is
11 set for _____, 2021, at _____:_____ a.m.

12 Dated this 10th day of January, 2022

13 
14 _____
15

16 438 863 48FE 3FCA
17 Joe Hardy
18 District Court Judge
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28



DCRR



MICHAEL P. LOWRY, ESQ.

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Attorneys for Gabriel L. Martinez; Universal Protection Services, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and LORI
KENNEDY, an individual,

Plaintiffs,

vs.

GABRIEL L. MARTINEZ, an Individual;
UNIVERSAL PROTECTION SERVICES, LLC
d/b/a ALLIED UNIVERSAL SECURITY
SERVICES, a Foreign Limited Liability Company;
DOE Family Members 1-10; DOE Individuals 11-20;
and ROE Corporations 21-30, Inclusive,

Defendants.

Case No. A-20-820254-C

Dept. No. 15

**Discovery Commissioner's Report &
Recommendations re Defendants'
Motion for Rule 35 Examination**

Date of Hearing: December 3, 2021

Time of Hearing: 9:30AM

Attorney for Plaintiff: Joseph J. Troiano of Cogburn Law

Attorney for Defendants: Chris Richardson of Wilson Elser Moskowitz Edelman & Dicker

I. Findings

This matter came before the Discovery Commissioner for a hearing on December 3, 2021, on Defendants Gabriel Martinez and Universal Protection Services, LLC ("Defendants") Motion for Rule 35 Examination.

THE DISCOVERY COMMISSIONER FINDS AS FOLLOWS:

1. Plaintiff originally agreed to submit to an NRCP Rule 35 neuropsychology examination with Dr. Staci Ross without the presence of a third party observer or audio recording device.

- 1 2. Defendants have the right to select the neuropsychologist to conduct the Rule 35 examination.
- 2 3. There is good cause for Dr. Staci Ross to reconvene and finish Plaintiff's Rule 35 examination.
- 3 4. Neither NRCP 35 nor NRS 52.380 preclude Plaintiff from requesting that the examination be
- 4 audio recorded.
- 5 ~~5. NRS 52.380 is not unconstitutional.~~
- 6 6. Although Plaintiff originally agreed to submit to the Rule 35 examination without audio
- 7 recording, Plaintiff did not waive his right to recording the continued Rule 35 examination
- 8 under the circumstances presented.
- 9 7. Under the circumstances presented, there is good cause for the continued Rule 35 examination
- 10 to be recorded.
- 11 8. Plaintiff made no request for a third-party to observe the examination.

12 II. Recommendations

- 13 1. IT IS HEREBY RECOMMENDED that Defendants Gabriel Martinez and Universal
- 14 Protection Services, LLC ("Defendants") Motion for Rule 35 Examination is GRANTED IN
- 15 PART AND DENIED IN PART within the following parameters:
- 16 2. IT IS FURTHER RECOMMENDED that Plaintiff's Rule 35 neuropsychology examination
- 17 be reconvened with ^{an examiner of Defendants' choosing.} ~~Dr. Staci Ross.~~
- 18 3. IT IS FURTHER RECOMMENDED Plaintiff be allowed to audio record the examination
- 19 without the presence of any third-party.

20 ...

21 ...

22 ...

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25 ...

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 17th day of December, 2021.

It is so recommended.


DISCOVERY COMMISSIONER

 <u>/s/Christopher J. Richardson</u> MICHAEL P. LOWRY, ESQ. CHRISTOPHER J. RICHARDSON, ESQ. 6689 Las Vegas Blvd. South, Suite 200 Las Vegas, Nevada 89119 Attorneys for Gabriel L. Martinez; Universal Protection Services, LLC	COGBURN LAW <u>/s/ Joseph J. Troiano</u> JAMIE S. COGBURN JOSEPH J. TROIANO 2580 St. Rose Parkway, Suite 330 Henderson, Nevada 89074 Attorneys for Plaintiffs
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

1 **NOTICE**

2 Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after
3 being served with a report any party may file and serve written objections to the recommendations.
4 Written authorities may be filed with objections, but are not mandatory. If written authorities are
5 filed, any other party may file and serve responding authorities within seven (7) days after being
6 served with objections.

7 **Objection time will expire on January 13, 2022.**

8 A copy of the foregoing Discovery Commissioner's Report was:

9
10 _____ Mailed to Plaintiff/Defendant at the following address on the _____ day of _____,
11 2021:

12 ☒ Electronically filed and served counsel on December 30, 2021, Pursuant to
13 NEFCR Rule 9.

14
15
16 By: Natilie Simonette
17 COMMISSIONER DESIGNEE
18
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21
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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Douglas Kennedy, Plaintiff(s) CASE NO: A-20-820254-C
7 vs. DEPT. NO. Department 15
8 Gabriel Martinez, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 1/10/2022

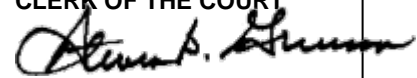
15 Michael Lowry	michael.lowry@wilsonelser.com
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21 Noel Raleigh	ncr@cogburncares.com
22 Kaitlyn Brooks	Kaitlyn.Brooks@wilsonelser.com
23 Sarah Wilder	scw@cogburncares.com
24 Kait Natarajan	kait.natarajan@wilsonelser.com

25
26
27
28

1 If indicated below, a copy of the above mentioned filings were also served by mail
2 via United States Postal Service, postage prepaid, to the parties listed below at their last
3 known addresses on 1/11/2022

4 Jamie Cogburn

Cogburn Law Offices
Attn: Jamie S. Cogburn
2580 St. Rose Pkwy. - Suite 330
Henderson, NV, 89074



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Telephone: (702) 748-7777
Facsimile: (702) 966-3880
Attorneys for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

DOUGLAS J. KENNEDY, an individual; and
LORI KENNEDY, an individual,

Case No.: A-20-820254-C
Dept. No.: 15

Plaintiff,

vs.

**NOTICE OF ENTRY OF ORDER
REGARDING DEFENDANTS' MOTION
TO EXTEND DISCOVERY (THIRD
REQUEST) ON ORDER SHORTENING
TIME**

GABRIEL L. MARTINEZ, an individual;
UNIVERSAL PROTECTION SERVICES,
LLC, d/b/a ALLIED UNIVERSAL
SECURITY SERVICES, a Foreign Limited
Liability Company, DOE Family Members 1-
10; DOE Individuals 11-20; and ROE
Corporations 21-30, Inclusive,

Defendant.

PLEASE TAKE NOTICE that an Order Regarding Defendants' Motion to Extend
Discovery (Third Request) on Order Shortening Time was entered in the above-captioned matter
on the 15th day of February 2022, a copy of which is attached hereto.

Dated this 17th day of February 2022.

COGBURN LAW

By: /s/Joseph J. Troiano

Jamie S. Cogburn, Esq.
Nevada Bar No. 8409
Joseph J. Troiano, Esq.
Nevada Bar No. 12505
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANTS' MOTION TO EXTEND DISCOVERY (THIRD REQUEST) ON ORDER SHORTENING TIME** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 17th day of February 2022.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

Michael Lowry (michael.lowry@wilsonelser.com)

Efile Las Vegas (efilelasvegas@wilsonelser.com)

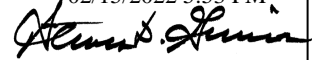
Amanda Hill (amanda.hill@wilsonelser.com)

Chris Richardson (chris.richardson@wilsonelser.com)

Kaitlyn Brooks (Kaitlyn.Brooks@wilsonelser.com)

Kait Natarajan (kait.natarajan@wilsonelser.com)

/s/Sarah C. Wilder
An employee of Cogburn Law


CLERK OF THE COURT

COGBURN LAW
Jamie S. Cogburn, Esq.
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jsc@cogburncares.com
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Henderson, Nevada 89074
Telephone: (702) 748-7777
Facsimile: (702) 966-3880
Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and
LORI KENNEDY, an individual,

Case No.: A-20-820254-C
Dept. No.: 15

Plaintiff,

vs.

**ORDER REGARDING DEFENDANTS'
MOTION TO EXTEND DISCOVERY
(THIRD REQUEST) ON ORDER
SHORTENING TIME**

GABRIEL L. MARTINEZ, an individual;
UNIVERSAL PROTECTION SERVICES,
LLC, d/b/a ALLIED UNIVERSAL
SECURITY SERVICES, a Foreign Limited
Liability Company, DOE Family Members 1-
10; DOE Individuals 11-20; and ROE
Corporations 21-30, Inclusive,

Defendant.

Defendants' Motion to Extend Discovery (Third Request) on Order Shortening Time
having come on hearing on January 10, 2022 via BlueJeans Conferencing. The Court noted that
it reviewed the instant Motion, the Opposition, and the Reply. Mr. Richardson appeared for
Defendants and argued in support of the Motion, stating that, while the Motion was styled as the
third request for an extension, the first two extensions had been done via Stipulation and Order.
Additionally, Mr. Richardson argued that a Rule 35 examination was scheduled on July 20, 2021,
regarding the Plaintiff Douglas Kennedy's traumatic brain injury; however, said examination did
not conclude for various reasons. Furthermore, Mr. Richardson stated that, after multiple
conversations with Plaintiffs' counsel, it was determined that Plaintiff did not wish to have the
examination conducted by Dr. Ross unless it was recorded, which defense counsel did not agree
with.

1 Mr. Troiano, appearing for Plaintiffs, argued in opposition, stating that Dr. Ross did not
2 provide the proper paperwork at the time of the Rule 35 exam, and then made statements to the
3 Plaintiff Douglas Kenendy that made him uncomfortable; therefore, the examination was
4 terminated, and defense counsel was informed that they would have to file a Motion, if they wished
5 to schedule another Rule 35 exam. Additionally, Mr. Troiano argued that defense counsel had not
6 provided any explanation regarding why they wished to reopen the expert disclosure deadline in
7 its entirety, which would essentially stay the case for ten months. The Court noted that a Motion
8 to Amend Complaint was pending, and Mr. Troiano stated that said Motion was requesting leave
9 to include a prayer for punitive damages, based upon statements by the driver who caused the
10 accident. Colloquy regarding the request to extend discovery to September 2, 2022, which was
11 nine additional months of discovery. Mr. Richardson clarified that the results of the Rule 35 exam
12 would dictate what, if any, experts Defendants would be required to retain; therefore, the request
13 for additional time for discovery, as well as the request to reopen all expert deadlines, were made
14 out of an abundance of caution.

15 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Motion is
16 GRANTED in PART and DENIED in PART. This Court finds as follows: (1) the Discovery
17 Commissioner's Report and Recommendations was filed on December 30, 2021, with an Objection
18 filed on January 3, 2022; however, a hearing date had not yet been set to address the Objection;
19 (2) under the facts and circumstances, there was no basis at all to grant the general nine to ten
20 months extension of discovery, as requested by the Defendants; (3) the issue of the alleged TBI
21 had been in the case from its inception; (4) the Court must weigh the preference for a trial on the
22 merits vs. the deadlines to which the parties had stipulated; (5) there was a lack of due diligence
23 on the part of the Defendants, particularly regarding the fact that the exam was supposed to go
24 forward in July of 2021, and when it did not go forward, defense counsel waited three months to
25 raise the issue with the Discovery Commissioner, and then another two months to raise the instant

1 Motion with the Court; (6) in making its decision, the Court considered the totality of the
2 circumstances, the Plaintiffs' pending Motion to Amend Complaint, and the Discovery
3 Commissioner's Report and Recommendations, wherein the Discovery Commissioner found that
4 the Rule 35 exam should be reconvened and completed; (7) finding good cause for the late filing
5 of the instant Motion, the instant Motion was hereby GRANTED IN PART to allow the partial
6 reopening of discovery for a period of THIRTY (30) DAYS, for the limited purpose of identifying
7 an expert in neuropsychology, and conducting the remainder of the Rule 35 exam, subject to what
8 the Discovery Commissioner may decide on the Objection to the Report and Recommendations;
9 (8) no good cause had been shown to extend discovery for any other purpose; (9) the deadline for
10 the initial expert disclosure of the neuropsychologist by the Defendants, as well as the taking of
11 the Rule 35 examination, is March 14, 2022; (10) if the Plaintiffs wished to disclose a rebuttal
12 expert, they would have until April 11, 2022, to do so; (11) the close of discovery is now May 11,
13 2022; (12) the dispositive motion deadline is now June 10, 2022; and (13) given the ruling on
14 instant Motion, the trial date was hereby VACATED and RESET; an Amended Trial Order shall
15 issue.

Dated this 15th day of February, 2022



97A 5E1 6A71 6E3E

Joe Hardy

District Court Judge

DISTRICT COURT JUDGE

IT IS SO ORDERED.

Dated: _____

19 Respectfully submitted:
20 Cogburn Law

Approved as to form and content:
Wilson Elser Moskowitz Edelman & Dicker, LLP

21 By: /s/Joseph J. Troiano
22 Jamie S. Cogburn, Esq.
23 Nevada Bar No. 8409
24 Joseph J. Troiano, Esq.
25 Nevada Bar No. 12505
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Plaintiff

By: /s/Chris Richardson
Michael P. Lowry, Esq.
Nevada Bar No. 10666
Chris Richardson, Esq.
Nevada Bar No. 9166
6689 Las Vegas Boulevard, Suite 200
Las Vegas, Nevada 89119
Attorneys for Defendants

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Douglas Kennedy, Plaintiff(s) CASE NO: A-20-820254-C
7 vs. DEPT. NO. Department 15
8 Gabriel Martinez, Defendant(s)
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10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 2/15/2022

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16 Efile LasVegas	efilelasvegas@wilsonelser.com
17 Joseph Troiano	jjt@cogburncares.com
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24 Kait Natarajan	kait.natarajan@wilsonelser.com

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