APPENDIX

No.

IN THE

Supreme Court of the United States

Timothy Rote,

Petitioner,

v.

Max Zweizig,

Respondent.

On Appeal from the 9th Circuit Court of Appeals
No. 18-35991

PETITIONER'S APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MAX ZWEIZIG,

Plaintiff-Appellee,

v.

TIMOTHY C. ROTE,

Defendant-Appellant,

and

NORTHWEST DIRECT TELESERVICES, INC.; et al.,

Defendants.

No. 18-35991

D.C. No. 3:15-cv-02401-HZ
District of Oregon,
Portland

ORDER

Before: WOLLMAN,* FERNANDEZ, and PAEZ, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAX ZWEIZIG, Plaintiff-Appellee, v. TIMOTHY C. ROTE, Defendant-Appellant, and NORTHWEST DIRECT TELESERVICES, INC.; et al., Defendants.	No. 18-35991 D.C. No. 3:15-cv-02401-HZ MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, Chief District Judge, Presiding

Argued and Submitted March 3, 2020
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: WOLLMAN,** FERNANDEZ, and PAEZ, Circuit Judges.

A jury found that Timothy C. Rote aided and abetted Northwest Direct Teleservices, Inc. (NDT), in employment retaliation against Max Zweizig. Rote appeals from the judgment entered against him on Zweizig's claim. We affirm in part, reserving the damages question raised on cross-appeal for certification to the Oregon Supreme Court.

Rote was the president and chief executive officer of NDT, which hired Zweizig as its IT Director in September 2001. NDT terminated Zweizig in November 2003, after he had reported to Oregon's Department of Justice that NDT had been over-billing clients. Zweizig prevailed on a whistle-blower retaliation claim against NDT, which was arbitrated pursuant to the parties' employment agreement. In 2015 and 2016, Rote published two voluminous blogs about the arbitration proceedings between NDT and Zweizig. The blogs included disparaging posts about Zwiezig.

Zweizig filed suit against NDT, its successors, and Rote in December 2015 in federal district court in Oregon. As relevant here, Zweizig alleged that the defendants retaliated against him, in violation of Oregon Revised Statutes

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** The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

§ 659A.030(1)(f), and that Rote had aided and abetted the retaliation, in violation of Oregon Revised Statutes § 659A.030(1)(g). The corporate defendants defaulted.

Rote asserted several counterclaims, which the district court struck upon Zweizig's motion under Oregon's anti-SLAPP statute. *See* Or. Rev. Stat. § 31.150. The district court otherwise denied the parties' dispositive motions. The case proceeded to trial, which resulted in a verdict in favor of Zweizig and an award of $1 million in noneconomic damages. The district court denied Rote's motion for a new trial, but applied the $500,000 damages cap set forth in Oregon Revised Statutes § 31.710(1).

1. Reviewing *de novo*, we conclude that the district court properly denied Rote's motion to compel arbitration because Rote was not a party to the employment agreement between NDT and Zweizig. *See Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (per curiam) (standard of review). The agreement states that "[e]mployee agrees to submit to mediation . . . any dispute of *the parties*" and then sets forth a nonexclusive list of disputes, concluding with "any other alleged violation of statutory, contractual or common-law rights of *either party*." (emphasis added). The arbitration clause thus applies only to disputes between NDT and Zweizig, the parties to the employment agreement, and does not permit Rote to compel arbitration. *See Bates v. Andaluz*

Waterbirth Ctr., 447 P.3d 510, 513–14 (Or. Ct. App. 2019 (concluding that arbitration clause that referred only to two parties did not apply to third person). *Livingston v. Metropolitan Pediatrics, LLC*, 227 P.3d 796, 805 (Or. Ct. App. 2010), is inapposite because the arbitration clause there was "broad enough to encompass claims against nonsignatories and to support the interpretation that the parties intended that [the company's] employees and agents could avail themselves of its terms."

2. The district court also properly denied Rote's motion to dismiss the complaint. *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1141 (9th Cir. 2016) (*de novo* standard of review). Rote argues that Zweizig's claims should have been dismissed as moot because Rote shut down his first blog, removed or redacted Zweizig's name from the blog posts, and thereafter republished the blog under a new name. We conclude that Rote's voluntary cessation of allegedly illegal conduct did not render the claims against him moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000).

3. Rote argues that the district court should have granted summary judgment because Rote forewent renewing NDT's corporate license and allowed the company to administratively dissolve in February 2015, before he published many of the disparaging posts. Whether NDT was operating in some capacity when Rote

published the blogs is a question of fact, and NDT's administrative dissolution does not foreclose Zweizig's claims as a matter of law. Accordingly, the denial of Rote's motion for summary judgment is not reviewable. *See Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987) ("[T]he denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits."); *see also Banuelos v. Constr. Laborers' Tr. Funds*, 382 F.3d 897, 902 (9th Cir. 2004) (explaining that the general rule "does not apply to those denials of summary judgment motions where the district court made an error of law that, if not made, would have required the district court to grant the motion").

4. Rote argues that the district court erred in granting Zweizig's motion to strike counterclaims without allowing discovery. The district court accepted Rote's factual allegations as true, however, and Rote did not seek additional time or permission to complete further discovery. Nor did Rote identify any information that might have allowed him to show a probability that he would prevail on his counterclaims. The district court thus did not abuse its discretion in failing to order discovery *sua sponte*. *See Handy v. Lane Cty.*, 385 P.3d 1016, 1028 (Or. 2016) (remanding to the court of appeals to "consider whether plaintiff

showed good cause for conducting further discovery and, if he did, whether the trial court abused its discretion in denying his request").

5. The district court also did not abuse its discretion in excluding certain forensic reports. Rote did not submit evidence sufficient to support a finding that the reports were what the forensic experts claimed them to be. The reports were thus inadmissible for want of authentication. *See* Fed. R. Evid. 901(a).

6. The district court did not plainly err in instructing the jury. *See C.B. v. City of Sonora*, 769 F.3d 1005, 1016 (9th Cir. 2014) (en banc) (reviewing jury instructions for plain error when complaining party failed to object). The causation instruction was a correct statement of Oregon law. *See Lacasse v. Owen*, 373 P.3d 1178, 1183 (Or. Ct. App. 2016) ("To prove causation under ORS 659A.030(1)(f)—that is, that plaintiff was discharged by defendant 'because' of his protected activity—plaintiff must prove that defendant's unlawful motive was a substantial factor in his termination, or, in other words, that he would have been treated differently in the absence of the unlawful motive."); *see also Hardie v. Legacy Health Sys.*, 6 P.3d 531, 538 (Or. Ct. App. 2000) ("The crux of the standard, regardless of which phraseology is attached to it, is whether, in the absence of the discriminatory motive, the employee would have been treated differently."). The district court did not plainly err in using the term "business

entities" in the aiding-and-abetting instruction. The court repeatedly admonished the jury that the term "business entities" referred only to NDT. Rote jointly submitted the mitigation instruction to the district court and thus cannot challenge that instruction on appeal. Even if he could, Rote cites no law in support of his position that his offer to remove Zweizig's name from the blog posts vitiated the aiding-and-abetting claim.

7. The district court did not abuse its discretion in submitting a general verdict form to the jury. *See* Fed. R. Civ. P. 49(b); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1317 (9th Cir. 1982) ("Submission of special interrogatories is a matter committed to the discretion of the district judge."). Considering the evidence presented at trial and the parties' closing arguments, the jury must have found that NDT existed when Rote published the disparaging posts because the jury answered yes to the question: "Has Plaintiff proved by a preponderance of the evidence that Defendant Rote aided and abetted Northwest Direct Teleservices in retaliating against Plaintiff?" Despite Rote's argument to the contrary, the administrative dissolution of NDT does not foreclose the possibility that the company continued operating in some capacity.

8. Rote contends that plaintiff's opening statement and closing argument were replete with lies and that the district court should have intervened when

plaintiff's counsel asked the jury to "send a message" with its verdict. We find no plain error in the district court's conclusion that, even assuming some remarks were improper, "the alleged misconduct did not sufficiently permeate the entire proceeding to warrant a new trial." *See Claiborne v. Blauser*, 934 F.3d 885, 893–94 (9th Cir. 2019) (explaining that the denial of a motion for a new trial is ordinarily reviewed for abuse of discretion, but when the complaining party did not object to the misconduct, we review for plain error); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002) (explaining that the appellant bears the burden of showing prejudice resulting from an improper closing argument). The district court was "in a superior position to gauge the prejudicial impact of counsel's conduct during the trial." *Hemmings*, 285 F.3d at 1192 (quoting *Anheuser-Busch Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995)). In light of the strength of Zweizig's case and the relevancy of the disputed statements to whether Rote aided and abetted retaliation and whether Rote's blog had an impact on Zweizig's life, we find no error in the determination that Rote was not prejudiced by plaintiff's counsel's statements.

AFFIRMED IN PART. The mandate shall not issue until we file a disposition addressing the damages question in the cross-appeal, No. 18-36060,

which we have certified to the Oregon Supreme Court in a contemporaneously filed order.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MAX ZWEIZIG,

Plaintiff,

v.

NORTHWEST DIRECT TELESERVICES; INC., NORTHWEST DIRECT MARKETING OF OREGON, INC,; TIMOTHY ROTE; NORTHWEST DIRECT MARKETING (DELAWARE), INC.; NORTHWEST DIRECT OF IOWA, INC.; ROTE ENTERPRISES, LLC; and NORTHWEST DIRECT MARKETING, INC.;

Defendants.

No. 3:15-cv-02401-HZ

OPINION & ORDER

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Pro Se Defendant

HERNÁNDEZ, District Judge:

Plaintiff Max Zweizig brought this retaliation claim against Defendants Northwest Direct Teleservices, Inc., Northwest Direct Marketing of Oregon, Inc., Timothy Rote, Northwest Direct Marketing (Delaware), Inc., Northwest Direct of Iowa, Inc., Rote Enterprises, LLC, and Northwest Direct Marketing, Inc. Currently pending before this Court are Defendant Rote's Objection to Plaintiff's Form of Judgment and Defendant Rote's Motion to Vacate for Lack of Jurisdiction, Alter or Amend Judgment, or For a New Trial pursuant to Fed. R. Civ. P. 59 and 60.[1] The Court denies Defendant's motion for a new trial but finds that Plaintiff's noneconomic damages award should be capped pursuant to ORS 31.710.

BACKGROUND

Plaintiff is the former IT director of Defendant Northwest Direct Teleservices, Inc. ("NDT"). Defendant Rote ("Defendant") is the former executive of Defendant NDT and the other business entities involved in this case. After their relationship deteriorated in 2003 and Plaintiff was terminated, the parties began almost 15 years of litigation culminating in this lawsuit.

Sometime after his termination, Plaintiff succeeded in arbitration on a claim for whistleblower retaliation against Defendant NDT. Defendant subsequently created a blog to

[1] Because judgment has not yet been entered in this case, the Court is only addressing Defendant's arguments to the extent that he requests a new trial. *See Contempo Metal Furniture Co. of California v. E. Texas Motor Freight Lines, Inc.*, 661 F.2d 761, 764 n.1 (9th Cir. 1981) (noting that "[t]he motion for new trial was timely under Fed. R. Civ. P. 59, even though filed before entry of judgment"); 3D Wright & Miller Fed. Prac. & Procedure § 2812 (noting there is nothing in Rule 59(b) "to prevent making a motion for a new trial before judgment has been entered"). Once judgment is entered, Defendant is free to request relief from the judgment.

write about his experience in the arbitration. At times, Defendant wrote about Plaintiff. After discovering the blog, Plaintiff filed the present suit alleging that Defendant's blog was an act of retaliation. Specifically, Plaintiff contends that Defendant aided and abetted his former employer, Defendant NDT, in retaliating against him for his participation in the former arbitration where he succeeded on his whistleblower claim.

Because they were unrepresented, all the business entities in this case have defaulted. The claims against Defendant Rote, however, proceeded to a two-day jury trial on January 16 and 17, 2018. The jury returned a verdict for Plaintiff and awarded him $1,000,000 in noneconomic damages.

STANDARDS

Under Rule 59, a district court has the discretion to grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court". Fed.R.Civ.P. 59(a)(1)(A). Because "Rule 59 does not specify the grounds on which a motion for a new trial may be granted," courts are "bound by those grounds that have been historically recognized." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003). The Ninth Circuit has previously held that "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (citation omitted). "[E]rroneous jury instructions, as well as the failure to give adequate instructions, are . . . bases for a new trial." *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) (citations omitted). The authority to grant a new trial is "confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

DISCUSSION

I. Motion for a New Trial

Defendant makes various arguments in support of his motion for a new trial.[2] Broadly, he argues that a new trial is warranted because: (1) Plaintiff's counsel made improper statements during closing argument; (2) the evidence was insufficient to support the verdict; (3) the Court gave improper jury instructions; (4) the Court made improper evidentiary rulings; (5) Defendant received information from Juror No. 5 that suggests damages were improperly calculated; and (6) Defendant discovered new evidence.[3] For the reasons that follow, the Court declines to grant Defendant a new trial.

A. Plaintiff's Closing Argument

Defendant argues that the Court should grant a new trial because Plaintiff's counsel made improper arguments in closing. In particular, Defendant contends that counsel's arguments that the jury should "send a message" with its damages award were inappropriate given that punitive

[2] Defendant also argues that the Court lacks subject matter jurisdiction over this case because Plaintiff's claims are subject to arbitration, otherwise fail to comply with the terms of Plaintiff's employment agreement, and are barred by the "statute of limitations" period set forth in the employment agreement. The Court already addressed Defendant's arguments regarding arbitration and the applicability of the terms of the employment agreement in its January 5, 2017 Opinion and Order on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. ECF 96. For the reasons already described, the Court finds this case is not subject to the terms of the employment agreement and jurisdiction over this case is proper.

[3] Defendant also moves for a new trial on the grounds that he was "duped into a nominal 30 day discovery period" by Plaintiff's counsel and was unable to complete the discovery in the time given. The record, however, suggests that Defendant had ample time to conduct discovery. At a scheduling conference held on October 14, 2016, the parties were given almost five months to complete discovery. *See* Minutes of Proceedings, ECF 74. A two-month extension was granted on March 13, 2017. *See* Minutes of Proceedings, ECF 107. Then a few weeks prior to the end of the discovery period, Defendant filed a Motion for Extension of Discovery Deadlines, which the Court subsequently denied. Def. Mot. Extension, ECF 110; Order, ECF 112.

damages had been excised from the case. Defendant, however, did not object to any of these arguments during trial.[4]

Improper argument by counsel can be grounds for a new trial, but "generally, misconduct by trial counsel [only] results in a new trial if the flavor of misconduct sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192 (9th Cir. 2002) (internal citations and quotations omitted). "The federal courts erect a 'high threshold' to claims of improper closing arguments in civil cases raised for the first time after trial." *Id.* at 1193 (internal citations omitted). "Where a party seeks a new trial based on arguments by opposing counsel that were not objected to at trial, a new trial is available only in 'extraordinary cases.'" *Aubert v. Robles*, No. 1:10-CV-00565-MJS PC, 2014 WL 2979413, at *1–2 (E.D. Cal. July 1, 2014) (citing *Hemmings*, 285 F.3d at 1193).

During his closing argument, Plaintiff's counsel made the following statements:

> There's words like "mental suffering," "emotional distress," "humiliation," "inconvenience," "interference with normal and usual activities," and "injury to reputation." All of those are the case here. The words that aren't on the jury instructions, but they feed into these words are "terror," "torment." The list, it—yeah. You saw Mr. Zweizig testify. That's—that's obvious.
>
> So what do we look at? I mean, how do you—how do you put a number on that? What I'm going to encourage you to do is look at the community. What kind of message do we want to send to the world to say this—not only is this wrong, but it's real. What Mr. Zweizig has gone through, it's not just a blog on the Internet. We're not up here about a couple comments that hurt his feelings on Facebook. This is a smear campaign, being stalked on the Internet. What do we do with that fear?
>
> So when you look at community, there's a couple contexts I want to talk to you about. The first is the broad context. The community here is massive, and the problem is great. And blogging, Googling, Facebooking, Twittering, LinkedIn, that's part of our world today. And what I argue to you is you need to be

[4] Although Defendant Rote proceeded pro se, he was extremely sophisticated in litigating this case as the case file shows.

> responsible about how you use that stuff. And we need to send a message to that big community that that's not acceptable. You can't do that. That really hurts people.
>
> . . . .
>
> And the other context is it's the small context. It's about the individual, the family, what happens at home day to day. You know, how do we interact with ourselves? How do we interact with the people we love? What kind of messages do we want to send to our children or our neighbors, that small community? And that's really important here, too.
>
> . . . .
>
> And so the question is what do we, as a community—how do we value that? It's been 14 years. Mr. Zweizig would like to be done. At the very least, he would like your help to show him that what he's going through is real. So later on, if he needs to, when he Googles his name, it's not just a bunch of lawsuits he's had to file, and hopefully not for long, these things that are written out there, but there's something that says this is real.
>
> And then the bigger picture, it's not just Mr. Zweizig. It's so when our community looks, when you click and say, what is this thing, like what is it when you write terrible things about people on the Internet, that it's real.
>
> When the technology companies in San Francisco sit down and decide, what is our privacy policy or how are we going to deal with takedowns or whatever, it's another drop in the bucket to say that human lives matter and these things actually affect real people. So that's why I'm asking for $2 million. And I beg of you to award every penny of that.

The Court finds that many of these statements could reasonably be interpreted as a request by counsel that the jury hold Defendant liable rather than a request that the jury punish Defendant in awarding damages. Further, the Court has reviewed the rest of the trial transcript and finds no other instances where such comments were made. Thus, even if these comments could only be interpreted as asking the jury to improperly punish Defendant with its award, the alleged misconduct did not sufficiently permeate the entire proceeding to warrant a new trial. *See Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283, 1285–86 (1984) (affirming the district court's decision to deny the defendant's motion for a new trial where isolated improper remarks

were made principally during opening and closing argument, the jury's damage award was not excessive, and the defendant made no objection).

In addition, Plaintiff offered undisputed testimony in support of the noneconomic damages award about the substantial impact that the blog had on his life and his emotional health. Plaintiff testified that he felt "absolute distress" when he first saw the blog. He felt he was being "stalked and terrorized at a pretty high level" and as though "somebody [had] taken [his] identity." Plaintiff described the blog as "a dark cloud that just follows [him] all the time" and invades everything in his life. He fundamentally altered the way he interacts with the world as a result of the blog, which uses both his name and his photo. In trying to keep a low profile, Plaintiff said he was limited in his ability to interact and network with other IT professionals, seek out guitar students, and put up webpages about his music. In his own words, Plaintiff has had to "anonymize himself." He also testified about how he watched the blog impact his family as it also names Plaintiff's fiancé. He said that the blog hangs over both of their heads. At times, Plaintiff was emotional in describing how Defendant's actions had impacted him. In light of this testimony and Plaintiff's demeanor at trial, the Court cannot find that the jury was improperly influenced by counsel's statements in rendering its damages award. This is not one of those "extraordinary cases" requiring a new trial.

B. Insufficiency of the Evidence

Defendant argues that there was insufficient evidence for the jury to find Defendant liable. This Court disagrees. In this case, the jury's verdict was not clearly against the weight of the evidence. Plaintiff testified as to the mental and emotional distress he suffered as a result of Defendant's actions. The evidence reasonably shows that Defendant aided and abetted Plaintiff's employer because, at the time that Defendant obtained rights from Defendant NDT to publish

information about the arbitration online, it was not administratively dissolved. *Comapre* Ex. 546 (license agreement dated January 2, 2015) *with* Ex. 599 (showing Defendant NDT was not administratively dissolved until April 3, 2015). Further, based on the contents of the blog, the jury could conclude that Defendant's motivation was retaliatory in nature. In other words, it could have concluded that without Plaintiff's participation in a protected legal action against Defendant NDT, Defendant would not have created the blog. Because the jury's verdict was not against the clear weight of the evidence in this case, the Court declines to grant Defendant a new trial on this basis. *See Roy v. Volkswagen of Am., Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990) ("While the trial court may weigh the evidence and credibility of the witnesses, the court is not justified in granting a new trial 'merely because it might have come to a different result from that reached by the jury.'").

C. Improper Jury Instructions

Defendant moves for a new trial on the grounds that "several jury instructions were flawed." Def. Mot. 29, ECF 211. Defendant, however, did not make any objections to the Court's proposed jury instructions at trial, and at least one of the complained-of instructions was identical to the instruction proposed by Defendant. *Compare* Instruction No. 13, ECF 189, *with* Joint Proposed Instruction No. 24, ECF 166.

Federal Rule of Civil Procedure 51 requires parties to object to jury instructions on the record, "stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. P. 51(c)(1). Where an objection has not been properly preserved, "[a] court may consider a plain error in the instructions . . . if the error affects substantial rights." *Id.* at (d)(2); *see also Chess v. Dovey*, 790 F.3d 961, 970 (9th Cir. 2015) ("[W]hen a litigant in a civil trail fails to object to a jury instruction, we may review the challenged jury instruction for plain error."); *C.B. v. City of*

Sonora, 769 F.3d 1005, 1016–19 (9th Cir. 2014) (In reviewing civil jury instructions for plain error, the Ninth Circuit considers "whether (1) there was an error; (2) the error was obvious; and (3) the error affected substantial rights.")

The Court has reviewed the instructions and the applicable law and finds no error. For example, Defendant contends that the Court erred in giving Instruction No. 10, arguing that it misstates the "but-for" causation standard used in retaliation cases. But the instruction given required the jury to find that, in the absence of Defendant's unlawful motive, he would not have retaliated against Plaintiff. *See* Instruction No. 10, ECF 189 ("A plaintiff is 'subjected to an adverse employment action because of his participation in the protected activity' if he shows that an unlawful motive was a substantial factor in his adverse employment action, or, in other words, that the plaintiff would have been treated differently in the absence of the unlawful motive."). Moreover, the instruction given is consistent with the language used in recent Oregon appellate decisions, which state that: "in the context of . . . retaliation claims, we have observed that, to show causation, a 'plaintiff must prove that defendant's unlawful motive was a substantial factor in his termination, or, in other words, that [the plaintiff] would have been treated differently in the absence of the unlawful motive.'" *Harper v. Mount Hood Comm. College*, 283 Or. App. 207, 214 (2016) (citing *LaCasse v. Owen*, 278 Or. App. 24 (2016) (applying this test to a claim under ORS 659A.030(1)(f)); *see also* Or. Uniform Jury Instruction 59A.03 (defining "substantial factor").

D. Evidentiary Objections

Defendant also contends a new trial is warranted because the Court erred by: (1) not allowing Defendant to submit the original expert reports and testimony from the arbitration into evidence; (2) excluding Defendant's Exhibits 541 and 543; and (3) not requiring Plaintiff to

disclose the identities of his employers. The Court finds that it did not err in these evidentiary rulings and they did not result in an injustice to Defendant. At trial, Defendant was free to testify about the arbitration, his motivation for writing the blog, and the evidence underlying the blog posts.[5] Without asking about the identity of Plaintiff's employers, Defendant was free to question Plaintiff about his current and past employment in order to show an absence of noneconomic damages. And Exhibits 541 and 543—both involving issues between Defendant and Plaintiff's counsel in unrelated matters—were excluded because they are irrelevant to the legal claims in this case.

E. Post-Trial Contact with Juror 5

Defendant contends that he came into contact with Juror No. 5 after the trial. According to Defendant, Juror No. 5 suggested that the jury intended to punish Defendant with its verdict. "A juror's observations may not be used as grounds to grant a new trial absent exceptional circumstances." *U.S. v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (1999); *see also Longfellow v. Jackson Cty*, No. CV 06-3043-PA, 2007 WL 682455, at *1 ("I will not consider evidence about what a juror allegedly said to an attorney, after the jury was discharged, regarding the method the jury used to compute damages or the reasons underlying the verdict. A juror may not testify about matters intrinsic to the verdict."). Indeed, FRE 606(b) "prohibits a juror from testifying about the jury's deliberations or how the jurors reached their conclusions unless 'extraneous prejudicial information was improperly brought to the jury's attention.'" *4.0 Acres of Land*, 175 F.3d at 1140. Here, Defendant does not provide any evidence that suggests that the juror was

[5] Defendant also argues that this evidence would have allowed him to better articulate his defense that the information contained within the blog was "true." However, as the Court has previously noted, Judge Brown confirmed the arbitration award, which included the arbitrator's credibility determinations and findings of fact, in 2012. *See Nw. Direct Teleservices Inc. v. Max Zweizig*, No. 3:11-cv-00910-PK, ECF 46. Thus, the only purpose of this evidence here would have been to relitigate the merits of the arbitration proceeding.

influenced by such extraneous information. Rather, Defendant only contends that the juror provided him with information relevant to the jury's deliberation. Accordingly, the Court declines to grant a new trial on these grounds.

F. New Evidence

Defendant also argues that newly discovered evidence showing the number of visits to Defendant's blog and the timing of these visits warrants a new trial because it undermines Plaintiff's testimony. A new trial may be granted because of newly discovered evidence where "(1) the evidence was discovered after trial, (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage and (3) the newly discovered evidence is of such magnitude that production of it earlier would likely have changed the outcome of the case." *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 929 (9th Cir. 2000). "Newly discovered evidence that would merely affect the weight and credibility of the evidence ordinarily is insufficient for a new trial." *Green By and Through Green v. City of Eureka*, 107 F.3d 16, 1997 WL 51471, at *1 (9th Cir. 1997) (internal citations omitted). In support of this argument, Defendant broadly states that this evidence was "not available or discovered until after trial." *See* Rote Decl. ¶¶ 2–12, ECF 212. Defendant offers no other justification for why this information was not available or discoverable with due diligence prior to trial. Accordingly, the Court declines to grant a new trial on this basis.

II. Objection to the Form of Judgment

Defendant objects to the form of Plaintiff's proposed judgment and argues that Oregon Revised Statutes ("ORS") § 31.710(2)(b), which caps noneconomic damages in certain cases to $500,000, applies to this case. Plaintiff, citing two recent state trial court decisions, argues that ORS 31.710 is inapplicable to employment claims. In the alternative, Plaintiff argues that the

application of the statute to this case would violate the remedy clause in Article I, section 10 of the Oregon Constitution. The Court agrees with Defendant and finds that the application of the statute in this case is not unconstitutional.

A. Interpretation of ORS 31.710

The issue in this case is whether ORS 31.710 encompasses purely emotional injuries arising out of employment claims. ORS 31.710(1) provides:

> Except for claims subject to ORS 30.260 to 30.300 (Oregon Tort Claims Act) and ORS Chapter 656 (Workers' Compensation), in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed $500,000.

No Oregon appellate court appears to have directly addressed the applicability of ORS 31.710 to employment claims arising out of purely emotional injury. In *Tenold v. Weyerhaeuser Company*, however, the Oregon Court of Appeals applied this statute to employment claims seeking purely noneconomic damages. *See* 127 Or.App. 511, 518 (1994) (noting in passing that the language of the statute "limits noneconomic damages to $500,000 in any civil action'"). But in that case, the issue on appeal was the meaning of "action" and the constitutionality of ORS 31.710. *Id.* at 519–21. The Court therefore did not directly address the meaning or scope of the statute. Further, the claims at issue there were tort claims arising out of an employment relationship—malicious prosecution, intentional infliction of emotional distress, and defamation—rather than the statutory employment claims at issue here. *Id.* at 513.

In the absence of clear precedent, the Court turns to the three-part statutory interpretation framework laid out in by the Oregon Supreme Court in *State v. Gaines* to determine the intent of the legislature in drafting ORS 31.710. 346 Or. 160, 165 (2009); ORS § 174.020. First, the Court examines the text and the context of the statute. 346 Or. at 171 (2009) (citing *PGE v. Bureau of*

Labor and Indus., 317 Or. 606, 610–11 (1993)). Next, the parties are "free to proffer legislative history to the court, and the court will consult it after examining the text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." *Id.* at 172. Finally, "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

The question in this case is what the Oregon legislature intended by capping noneconomic damages "in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage." Plaintiff suggests that ORS 31.710 applies only to claims arising from bodily injury, death, and property damage. Pl. Resp. Am. Obj. 2–3, ECF 200. Because Plaintiff's claim arises out of an unlawful employment practice, Plaintiff contends that the cap is inapplicable to this case. Defendant argues that both the text of the statute and the ordinary meaning of the phrase "including" suggest that the phrase "including emotional injury or distress" "should be read as a limited example of harm under a broad category of bodily injury." Def. Reply Am. Obj., 2–3, 9, ECF 202. Defendant further contends that a narrower interpretation of the statute would frustrate the purpose of the statute. *Id.* at 3.

The three Oregon trial courts to address this issue have come to different conclusions on the meaning of the statute. In a decision issued just last year, Multnomah County Circuit Court Judge Karin Immergut found that "'bodily injury' . . . includes claims for purely emotional injury under ORS 659A.030." *Pierce v. Daimler Trucks North America, LLC*, Case No. 15CV24701, at 4 (Mult. Cty Cir. Ct, July 19, 2017); *see also* Rote Decl. Ex. 11 at 4, ECF 203. In her decision, Judge Immergut relied on the text and context of the statute, the statute's clear exclusion for

claims under the Oregon Tort Claims Act and the Oregon Workers' Compensation Law, and the application of this statute by the Court of Appeals in *Tenold*. *Id.* at 3. She further noted that the goal of the legislature, as evidenced by the legislative history of the statute, was to reduce insurance premiums associated with tort litigation. *Id.* at 4.

By contrast, both Multnomah County Circuit Court Judge Michael Greenlick and Lane County Circuit Court Judge Marilyn E. Litzenberger offered narrower interpretations of ORS 31.710. Judge Greenlick found the cap was not intended to apply to (1) claims for purely emotional injury or distress or (2) claims for employment discrimination. *Loczi v. Daimler Trucks North America, LLC*, Case No. 14CV15365, at 3 (Mult. Cty Cir. Ct. Mar. 4, 2017); *see also* Christiansen Decl. Ex. 1 at 3–4, ECF 200. Specifically, he determined that the legislature only intended the cap to apply to claims for emotional injury or distress where those damages stemmed from bodily injury. *Id.* Similarly, Judge Litzenberger determined that the statute only applies to three types of civil actions: "the categories of claims to which the cap applies include claims arising out of bodily injury, death or property damage; and, by omission, not claims arising out of employment." *McMillan v. Li Ning Sports USA, Inc.*, No 110708760, 2013 WL 9591371, at *3 (Lane Cty Cir. Ct. Dec. 18, 2013); *see also* Christiansen Decl. Ex. 2.

Here, the Court finds Judge Immergut's interpretation more persuasive. First, the text of the statute itself supports Defendant's contention that this statute applies to employment cases seeking purely emotional distress damages. If the legislature had intended the statute to apply only to claims arising out of bodily injury, death, or property damage, the legislature could have so limited the scope of the statute. Instead, the legislature tethered the application of the cap to the type of damages sought in civil actions: "any civil action *seeking damages arising out of* bodily injury, including emotional injury or distress, death and property damages." ORS §

31.710 (emphasis added). Thus, it is the type of damages—not the type of civil claim—the legislature was ultimately concerned with.

Further, by its use of the word "including," the statute clarifies that emotional injury or distress is an example of bodily injury subject to the statute's cap. *See, e.g., State v. Kurtz*, 350 Or. 65, 75 (2011) ("Typically, statutory terms such as 'including' and 'including but not limited to' . . . convey an intent that an accompanying list of examples be read in a nonexclusive sense."); *State v. Walker*, 356 Or. 4, 14 (2014) (noting that "includes" introduces an illustrative list); "Include," Black's Law Dictionary (10th ed. 2014) ("The participle *including* typically indicates a partial list.") This does not evidence a requirement that the emotional injury stem from a physical harm in some way.[6] And the Court's interpretation—that emotional distress is a type of bodily injury—is not inconsistent with Oregon case law, which has recognized that certain claims for purely emotional distress are considered claims for injury to one's person under Oregon law. *See Rains v. Stayton Builders Mart, Inc.*, 289 Or. App. 672, 687–88 (2018) (noting that an emotional harm is an "injury to person" or "bodily injury").

Second, the purpose of the statute was to reduce liability insurance premiums in tort actions. *See Tenold*, 127 Or. App. at 520 ("According to the legislative history, the purpose of imposing a cap on noneconomic damages was to stabilize insurance premiums and to decrease the costs associated with tort litigation."); *see also* Rote Decl. Ex. 4 (Report from Joint Interim Task Force on Liability Insurance) ("The Task Force voted to: Limit noneconomic damages to $500,000."). In the summary of the proposed tort reform bill, the legislature further signaled that

[6] Indeed, "[i]t is hornbook law that the use of the world including indicates that the specified list is illustrative, not exclusive." *See e.g. Puerto Rico Maritime Shipping Auth. v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981); *see also Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) ("It is true that use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive.") (citing 2A N. Singer & J. Singer, Sutherland Statutory Construction § 47.7, p. 305 (7th ed.2007) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation.")).

the purpose of the cap was "to cap out the 'non-economic' portion of *any* award." Rote Decl. Ex. 5 (emphasis added). Although the noneconomic damages cap was "included in a larger bill aimed at tort reform generally, the noneconomic damages cap itself was labeled as a stand-alone provision within the bill." *Vasquez v. Double Press Mfg., Inc.* 288 Or. App. 503, 519 (2017) (citing Or. Laws 1987, ch. 774 § 6). By adopting a broader understanding of "damages arising out of bodily injury" to include damages arising out of purely emotional injury, the Court's interpretation better fulfills the legislature's goal. By contrast, a narrower reading—requiring any emotional injury to be connected to a physical harm—would result in the exclusion of certain tort claims, such as those for Intentional or Negligent Infliction of Emotional Distress, from the damages cap. Such an approach would therefore be inconsistent with the legislature's goal of reducing the cost of tort litigation.

In light of the broad language of the statute and the legislative history, the Court finds that the legislature intended ORS 31.710 to apply to employment actions where the damages sought are purely emotional in nature. Accordingly, Plaintiff's damages in this case are subject to Oregon's $500,000 noneconomic damages cap.

B. Constitutionality of ORS 31.710

Plaintiff also argues that, as applied to his case, ORS 31.710 is unconstitutional because a reduction in his damages by 50% "would not leave Plaintiff with a substantial remedy and would therefore violate the remedy clause of Article I, section 10 of the Oregon Constitution." Pl. Sur-Reply Am. Obj, ECF 210. Defendant argues that the $500,000 Plaintiff would receive after the application of the damages cap is substantial and passes constitutional muster. Def. Reply Am. Obj. 5. The Court agrees with Defendant.

In *Vasquez v. Double Press Manufacturing, Inc.*, the Oregon Court of Appeals addressed, for the first time after the Supreme Court's decision in *Horton v. Oregon Health & Science University*, 359 Or. 168 (2016), a challenge to the constitutionality of ORS 31.710 under Article I, section 10 of the Oregon Constitution. 288 Or. App. 503 (2017). Article I, section 10 provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." Because ORS 31.710 does not deny a remedy completely, the Court of Appeals held that the statute is only unconstitutional if the remedy provided is not "substantial." *Id.* (citing *Horton*, 359 Or. at 219). "Whether a remedy is 'substantial' is a question that [the court] can answer only on a case-by-case basis, because a capped remedy could provide complete relief for many claimants." *Id.* But "a remedy that is only a paltry fraction of the damages that the plaintiff sustained will unlikely be sufficient." *Id.* (citation omitted).

In *Vasquez*, the Court of Appeals determined that the application of the cap "would leave plaintiff with a remedy that is only a 'paltry fraction' of the damages that he sustained and would otherwise recover." *Id.* at 525–26. There, the court began by noting that, under the common-law model, the plaintiff would have been entitled to the entire amount of the noneconomic damages, and that the hard cap placed by the legislature in 1987—without any mechanism for adjustment—was a dramatic departure from the remedy the common law provided. *Id.* at 524–25. It went on to find that the legislature's concern with controlling the rising cost of liability insurance could not "bear the weight of the dramatic reduction in noneconomic damages that the statute requires for the most grievously injured plaintiffs." *Id.* at 525. The plaintiff in that case—having been "essentially cut . . . in half at the base of his spine, leaving him permanently

paraplegic"—was such a grievously injured plaintiff. *Id.* And the application of the damages cap would have left Plaintiff with $1,839,090 of the $6,199,090 he would have received for his significant injuries without the cap. *Id.*

Similarly, in *Rains v. Stayton Builders Mart, Inc.*, the Oregon Court of Appeals again found that a reduction in damages under the cap was unconstitutional. 289 Or. App. 672, 691–92 (2018). There, the plaintiff "fell almost 16 feet to the ground when a defective wood board broke at his job site." *Id.* at 675. The fall rendered him a paraplegic. *Id.* The plaintiff and his wife subsequently brought strict products liability and loss of consortium claims in an action against the retailer and manufacturer of the board. *Id.* Applying the holding in *Vasquez*, the Court of Appeals concluded that reducing the plaintiff's noneconomic damages from $2,343,750 to $500,000 would be unconstitutional given the nature of plaintiffs' injuries. *Id.* at 691. The Court similarly found that a reduction in the plaintiff's wife's award for loss of consortium from $759,375 to $500,000 was a "bare reduction in her noneconomic damages without any identifiable statutory *quid pro quo* or constitutional principle that the cap takes into consideration." *Id.* at 691 (citing *Vasquez*, 288 Or. App. at 526); *see also id.* at 692 ("[W]e do not see a principled reason to conclude that reducing Mitzi's noneconomic damages award by $259,375 in the circumstances of this case leaves her with a 'substantial' remedy.").

This case, however, is distinguishable from *Rains* and *Vasquez*. Though, at the time that ORS 31.710 was passed, the common-law remedial scheme would have provided Plaintiff with his full damages award, Plaintiff is not the type of "grievously injured" plaintiff that the Oregon Court of Appeals was concerned with in the decisions described above. The plaintiffs in *Vasquez* and *Rains* both suffered debilitating physical injuries as a result of serious workplace accidents. Similarly, the plaintiff's wife in *Rains* suffered a grievous emotional injury and was accordingly

compensated for a lifetime loss of consortium as the result of her husband's paraplegia. Accordingly, the remedies these individuals would have received had the cap been imposed were not "substantial" remedies. Certainly, Plaintiff has suffered significant emotional distress over the past few years as a result of Defendant's actions. But when viewed in light of the case law described above and the circumstances of this case, the Court finds that a $500,000 noneconomic damages award is still a substantial remedy within the meaning of Article I, section 10 of the Oregon Constitution.

III. Attorney's Fees

Defendant also objects to the Plaintiff's request for attorney's fees. He argues that the issue of attorney's fees was decided in the 2010 arbitration decision applying the terms of the employment agreement to the parties' litigation. The Court finds this objection without merit. First, as the Court previously noted, the terms of the employment agreement are not applicable to this case. Opinion & Order, ECF 96 at 4–7; Order, ECF 133 at 8 n.5. Additionally, Plaintiff is permitted to recover attorney's fees for successful claims brought under ORS 659A.030. *See* ORS 659A.885(1) ("In any action under this subsection, the court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal.").

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CONCLUSION

The Court DENIES Defendant's Motion to Set Aside Judgment [211]. However, the Court finds that Plaintiff's award for noneconomic damages is capped at $500,000 pursuant to ORS 31.710(1). The parties shall submit a joint proposed form of judgment within fourteen days of this Order.

IT IS SO ORDERED.

Dated this 25 day of July, 2018.

Marco Hernández

MARCO A. HERNÁNDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAX ZWEIZIG,

Plaintiff/
Counter Defendant,

v.

NORTHWEST DIRECT TELESERVICES, INC.; NORTHWEST DIRECT MARKETING OF OREGON, INC.; TIMOTHY ROTE; NORTHWEST DIRECT MARKETING (DELAWARE), INC.; NORTHWEST DIRECT OF IOWA, INC.; ROTE ENTERPRISES, LLC; NORTHWEST DIRECT MARKETING, INC.; DOES 1-5.

Defendants/Counter Claimants.

No. 3:15-cv-02401-HZ

OPINION & ORDER

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Pro Se Defendant/Counter Claimant

HERNÁNDEZ, District Judge:

Pro se Defendant/Counter Claimant Timothy Rote brings three motions: (1) Motion to Dismiss for Lack of Subject Matter Jurisdiction; (2) Motion for Judicial Notice; and (3) Motion for Leave to Amend Counterclaims. The Court denies all of Defendant's motions.

BACKGROUND

The parties' litigation history in this matter was set forth by this Court in a prior Opinion & Order:

> Plaintiff Max Zweizig alleges that he was terminated by Defendant Northwest Direct Teleservices, Inc. (NDT), a corporate entity owned by Timothy Rote, after Zweizig reported to the Oregon Department of Justice and the Lane County District Attorney that NDT had engaged in criminal activity. Compl. ¶¶ 17-18, ECF 1. Zweizig also alleges that Rote and NDT took other adverse actions against Zweizig, including publishing statements to third parties and the general public accusing Zweizig of destroying data and engaging in other criminal and civil misconduct during his employment at NDT. Id. at ¶ 18.
>
> The parties engaged in arbitration related to this employment dispute for several years and, ultimately, an arbitrator found in Zweizig's favor and awarded damages to Zweizig. Id. at ¶ 21. The arbitration award was reduced to a judgment; however, NDT has failed to satisfy that judgment. Id. at ¶ 22. On March 11, 2014, Zweizig filed a lawsuit against NDT, Rote, and related corporate entities, alleging that the defendants violated the Uniform Fraudulent Transfer Act and engaged in other fraudulent activity to defeat Zweizig's ability to enforce his whistleblower retaliation judgment. Id. at ¶ 23.
>
> On or about February 27, 2015, Defendants created a website, "Sitting Duck Portland," which describes the arbitration between Rote's companies and Zweizig. Id. at ¶ 25. According to Zweizig, the Sitting Duck Portland website disparages Zweizig, his fiancée, and his counsel. Id. at ¶ 27.
>
> On December 24, 2015, Zweizig filed the present employment discrimination action against Rote, a citizen of Oregon; six corporate entities allegedly owned by Rote, including NDT; and five Doe defendants. Zweizig alleges that the content of the Sitting Duck Portland website constitutes a series of ongoing adverse employment actions

> targeted at Zweizig due to his participation in protected conduct. Id. at ¶ 28. Zweizig brings claims of whistleblower discrimination and retaliation, retaliation for opposing unlawful conduct, and aiding and abetting. Id. at ¶¶ 31-57.

Zweizig v. Nw. Direct Teleservices, Inc., No. 3:15-CV-02401-HZ, 2016 WL 755626, at *1 (D. Or. Feb. 25, 2016).

On March 10, 2016, Defendant filed a second amended answer to Plaintiff's complaint. Second Am. Answer, ECF 29. In this second amended answer, Defendant asserted seven counterclaims. Id. On August 17, 2016, this Court granted Plaintiff's motion to dismiss Defendant's counterclaims. Opinion & Order (O&O), ECF 61.

DISCUSSION

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A. Plaintiff's Claims Against Defendant

Defendant seeks to dismiss all of Plaintiff's claims. However, one of those claims (which has two counts) is brought against the Corporate Defendants only. As this Court has previously informed Defendant, he may not represent the Corporate Defendants. See United States v. High Country Broad. Co., 3 F.3d 1244, 1245 (9th Cir. 1993) (stating that a corporation may appear in federal court only through licensed counsel); see also 28 U.S.C. § 1654. Thus, the Court only considers Defendant's motion to dismiss the two claims Plaintiff brings against Defendant in his individual capacity: (1) Retaliation for Opposing Unlawful Conduct in Violation of Oregon Revised Statute § (O.R.S.) 659A.030(1)(f); and (2) Aiding and Abetting in Violation of O.R.S. 659A.030(1)(g). Defendant contends that these claims should be dismissed because they are subject to arbitration. The Court denies Defendant's motion to dismiss.

B. Standard

The Federal Arbitration Act, 9 U.S.C. §§ 1–16 ("FAA"), removes the Court's subject matter jurisdiction to hear a claim when there is a valid, enforceable arbitration clause.

Therefore, Defendant's motion to dismiss is "one means to raise its arbitration defense. In effect, [Defendants'] motion is a petition to this court within the meaning of § 4 of the FAA." Rogue v. Applied Materials, Inc., No. 03:03–cv–1564–ST, 2004 WL 1212110, at *4 (D. Or. Feb. 20, 2004).

The FAA limits the Court's role to determining whether a valid arbitration agreement exists, and whether the agreement encompasses the disputes at issue. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014). Written agreements to arbitrate arising out of transactions involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If the issue is referable to arbitration under the agreement, then the Court must direct the issue to arbitration and stay the trial. 9 U.S.C. § 3. An agreement to arbitrate is to be "rigorously enforce[d.]" Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

C. Arbitration Agreement

Defendant contends that this Court lacks subject matter jurisdiction over Plaintiff's claims because the claims are encompassed by a 2001 Employment Agreement ("Agreement") entered into by Plaintiff and Defendant Northwest Direct Teleservices, Inc. ("NDT") that mandates the use of arbitration to resolve disputes arising out of or related to Plaintiff's employment with NDT. See Rote Decl. Ex. A, ECF 79-1.[1] Defendant's argument fails for several reasons.

[1] Defendant includes the Agreement as an attachment to the "Declaration of Timothy Rote on Defendant Rote's Motion for Summary Judgment." ECF 79. The footer of that document states "Declaration of Timothy C. Rote in Opposition to Plaintiff's Motion to Dismiss Counterclaims." Id. The Court assumes that Defendant erred in the labeling of his declaration and the footer, and the Court construes the exhibit as corresponding to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. However, Defendant is warned to be more careful in the future in order to avoid confusion.

Defendant is not a signatory to the Agreement, although he did sign the Agreement on behalf of NDT. Defendant fails to explain how claims against him, as a non-signatory individual, fall within the Agreement. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); see also Rajagopalan v. Note World, LLC, 718 F.3d 844, 847 (9th Cir. 2013) ("We have never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff, and we decline to expand the doctrine here."); Murphy v. DirecTV, Inc., 724 F.3d 1218, 1229 (9th Cir. 2013) ("generally only signatories to an arbitration agreement are obligated to submit to binding arbitration"). Where other circuits have granted motions to compel arbitration on behalf of non-signatory defendants against signatory plaintiffs, it was "essential in all of these cases that the subject matter of the dispute was intertwined with the contract providing for arbitration." Rajagopalan v. NoteWorld, LLC, 718 F.3d 844, 847 (9th Cir. 2013) (quoting Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045 (9th Cir. 2009)). Here, the subject matter of the dispute—the content and allegedly disparaging nature of Defendant's blog posts—is not intertwined with the parties' 2001 Agreement. For this reason, Defendant's argument fails.

Even if Defendant could show that the Agreement applies to the claims against him, Defendant's attempt to dismiss this case due to the Agreement's arbitration provision fails because he waived his right to compel arbitration. See Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 758 (9th Cir. 1988) (finding waiver of right to arbitration); Antuna v. Am. W. Homes, Inc., 232 F. App'x 679 (9th Cir. 2007) (unpublished) (same). "A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party

opposing arbitration resulting from such inconsistent acts." Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986).

Under the first prong of Fisher, the Court finds that Defendant has known of his right to compel arbitration since he signed the Agreement on behalf of NDT in 2001. In addition, Defendant declares that he used the Agreement to compel arbitration with Plaintiff in 2006. Rote Decl. ¶¶ 3-4, ECF 79.

As to the second Fisher prong, Defendant has acted inconsistently with the right to arbitrate by actively defending himself in the present case and filing counterclaims against Plaintiff. As noted above, this case was filed against Defendant in December of 2015 and Defendant first filed an answer in January of 2015. Since that time, Defendant has submitted multiple filings in this case, including a motion to join counterclaim defendants and responses to Plaintiff's motions to strike and dismiss. Defendant has also participated in several hearings before the Court. Now, for the first time, Defendant asserts that Plaintiff's claims are subject to arbitration. Such behavior is inconsistent with a right to arbitrate. See, e.g., Martin v. Yasuda, 829 F.3d 1118, 1126 (9th Cir. 2016) (finding defendants' behavior inconsistent with a right to arbitrate when they "did not even note their right to arbitration until almost a year into the litigation"); Van Ness Townhouses, 862 F.2d at 759 (a party's "extended silence and much-delayed demand for arbitration indicates a conscious decision to continue to seek judicial judgment on the merits of the arbitrable claims") (internal quotation marks omitted).

Finally, the third Fisher prong is satisfied because Plaintiff would be prejudiced if this case were dismissed in favor of arbitration. Similar to Defendant, Plaintiff has vigorously litigated this case for a year. The Court has set a 2017 trial date. See Trial Mgmt. Order, ECF 76.

To delay this case any further would cause prejudice. Therefore, the Court finds that Defendant waived any right to arbitration.

D. Ripeness and Mootness

Defendant argues that any claims Plaintiff has with respect to Defendant's blog are based on a speculative future adverse employment action. Thus, Defendant argues that the claims are not ripe and should be dismissed. He also argues the claims are moot because he has removed and redacted Plaintiff's name from indexable material on the blog.

Defendant's arguments fail. At this stage of the proceeding, the Court must view all facts in the light most favorable to Plaintiff. According to Plaintiff, as recently as September 12, 2016, Defendant wrote a blog post that falsely implied Plaintiff had engaged in wrongdoing. Christiansen Dec. ¶ 4, Ex. 2, ECF 84-2. Thus, Plaintiff's claims are ripe and are not moot.

II. Motion for Judicial Notice

Defendant asks the Court to take judicial notice of two exhibits: (1) documents provided by the U.S. Marshals to Defendant regarding a telephone call that Plaintiff's counsel made to Judge Jones; and (2) a declaration by Defendant's brother, Gregory Rote, refuting statements made in a declaration of Plaintiff's counsel. Defendant also asks the Court to take judicial notice of several paragraphs of argument regarding factual disputes in this case.

Under Federal Rule of Evidence 201(b), the Court may take judicial notice of facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." A court may not take judicial notice of a matter that is in dispute. Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001). A party requesting judicial notice bears the burden of persuading the trial judge that the fact is a proper matter for judicial notice. In re Tyrone F. Conner Corp., Inc., 140 B.R. 771, 781

(Bankr. E.D. Cal. 1992) (citing In re Blumer, 95 B.R. 143, 146 (B.A.P. 9th Cir. 1988)). Neither the documents nor Defendant's arguments are sources "whose accuracy cannot reasonably be questioned." Therefore, the Court denies Defendant's request for judicial notice.

However, the Court considers the documents under the doctrine of incorporation by reference. A document need not be attached to the complaint to be incorporated into it by reference if the plaintiff "refers extensively to the document or the document forms the basis of the plaintiff's claim." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). A document is incorporated by reference if (1) the complaint refers to it; (2) the document is central to the plaintiff's claim; and (3) no party questions the document's authenticity. Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006). The Court may treat such a document as part of the complaint and assume its contents are true for purposes of determining whether a claim has been sufficiently alleged. Id.; see also Ritchie, 342 F.3d 908 (district court may consider materials incorporated by reference without converting the motion to dismiss into a motion for summary judgment).

Here, Plaintiff does not object to Defendant's request for the Court to consider his attachments, nor does Plaintiff question the documents' authenticity. Further, the documents are referred to in and are central to Defendant's proposed counterclaims. Thus, the Court incorporates the documents by reference into Defendant's counterclaims and assumes that their contents are true for purposes of Defendant's motion for leave to amend.

III. Motion for Leave to Amend

Defendant moves for leave to file a Third Amended Answer containing four counterclaims and several affirmative defenses. Defendant seeks to include counterclaims of defamation, abuse of process, intentional infliction of emotional distress, and aiding and

abetting.[2] Because Defendant's proposed counterclaims are futile[3], the Court denies his motion to add those claims. Defendant is instructed to remove all counterclaims before submitting his Third Amended Answer.

A. Standard

Under Rule 15(a)(2), after a responsive pleading is filed, "a party may amend its pleading with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) prescribes that "[t]he court should freely give leave when justice so requires." Id. "'This policy is to be applied with extreme liberality.'" C.F. ex rel Farnan v. Capistrano Unified Sch. Dist., 654 F.3d 975, 985 (9th Cir. 2011) (quoting Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003)). However, "the liberality in granting leave to amend is subject to several limitations. Leave need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (citations omitted).

B. Alleged Violation of Stipulated Protective Order

In Plaintiff's Response to Defendant's Motion for Leave to Amend, Plaintiff contends that Defendant attached the deposition of Plaintiff from another case in this District, Max Zweizig v. Timothy C. Rote, et al., 3:14-cv-00406-YY, in violation of the Stipulated Protective Order from that case. In Defendant's Reply, he submits a copy of an email from himself to Plaintiff's counsel in which he challenges the designation of Plaintiff's testimony as confidential.

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[2] In Defendant's Reply, he abandons his effort to add an additional counterclaim for "civil extortion." Rote Reply at 9, ECF 91.

[3] In addition, to the extent Defendant seeks to bring these counterclaims against "Plaintiff and Plaintiff Counsel," the Court reiterates its prior ruling denying Plaintiff's motion to join parties as counterclaim defendants. O&O, Feb. 25, 2016, ECF 25. The only potential counterclaim defendant in this case is Plaintiff.

According to Defendant, because Plaintiff's counsel never responded to the email, the deposition testimony is no longer subject to the Protective Order.

The Protective Order provides:

> In the event that any party to this litigation disagrees at any point in these proceedings with any designation made under this Protective Order, the parties shall first try to resolve such dispute in good faith on an informal basis. If **plaintiff** provides a written objection to the designating party as to the designation of material as confidential, the designating party shall submit a motion to the court within twenty-one (21) days of such objection, or the material will not be subject to this order. If a motion is timely filed by the designating party, the designated document or information shall continue to be treated as "Confidential" subject to the provisions of this Protective Order, pending a ruling by the Court.

Marshall Decl. Ex. 1 ("Protective Order") ¶ 4, ECF 90-1 (emphasis added). As emphasized above, the Protective Order as entered provides a mechanism for Plaintiff to object to the designation of material as confidential. It does not, however, provide the same mechanism to Defendant. The Court assumes this may have been a scrivener's error; however, the parties will have to resolve that potential error in the case in which the Protective Order was entered. As applied to this case, Defendant is unable to refute Plaintiff's contention that he violated the Protective Order by attaching Plaintiff's deposition to his Proposed Third Amended Answer. Accordingly, the Court strikes the exhibit and removes it from the record. Until the parties resolve the issue of the Protective Order in case 3:14-00406-YY, Defendant is ordered not to include the deposition transcript or its contents in further filings in this case.

C. Background

Defendant's counterclaims are based on alleged behavior by Plaintiff or his counsel in response to a blog post by Defendant that referenced U.S. District Court Judge Robert E. Jones. Defendant alleges that on November 12, 2015, Plaintiff's counsel Joel Christiansen and Linda Marshall contacted Judge Jones' chambers and alleged that Defendant intended to harm or posed

a threat to Judge Jones at his Lifetime Achievement Award ceremony. Proposed Third Am. Answer ¶ 32, ECF 86-2. Plaintiff's counsel also accused Defendant of stalking his ex-wife with a handgun and having been previously arrested. Id. at ¶ 33. Plaintiff's counsel also alleged that Defendant had been engaged in fraud and that "the U.S. District Court has a history of finding against Rote." Id. at ¶ 33.

D. Defamation

Defendant contends that Plaintiff defamed him when Plaintiff's counsel contacted Judge Jones' deputy. The elements of a claim for defamation are: (1) the making of a defamatory statement; (2) publication of the defamatory material; and (3) a resulting special harm, unless the statement is defamatory *per se* and therefore gives rise to presumptive special harm. L & D of Oregon, Inc. v. Am. States Ins. Co., 171 Or. App. 17, 22, 14 P.3d 617, 620 (2000); Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania v. Starplex Corp., 220 Or. App. 560, 584, 188 P.3d 332, 347 (2008).

The Court assumes, without deciding, that Defendant can bring a claim of defamation against Plaintiff even though Defendant admits that any allegedly defaming statements were made by Plaintiff's attorneys, not by Plaintiff. See Bleeck v. Mangold, 92 Or. App. 200, 203, 757 P.2d 456, 458 (1988) (finding that an attorney who sent an allegedly defamatory letter to an opposing party acted as his client's agent). In addition, the Court finds that the statements were published when they were made to Judge Jones' courtroom deputy. Nevertheless, Defendant fails to state a claim for defamation.

First, as this Court has already decided in this case, a statement to Judge Jones' courtroom deputy suggesting that Defendant's blog post constituted a threat is an opinion statement protected by the First Amendment. See Milkovich v. Lorain Journal Co., 497 U.S. 1,

20 (1990) (statement of opinion relating to matters of public concern that do not contain a provably false factual connotation will receive full constitutional protection); Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1291-92 (9th Cir.) ("[P]ublic allegations that someone is involved in crime generally are speech on a matter of public concern."). The same protection applies to any statement opining that Defendant is unstable.

Second, Defendant's proposed counterclaim fails to allege any resulting special harm from Plaintiff's statements. Defamation claims premised on an oral statement (slander) require that a plaintiff prove either that the statement falls within one of the actionable *per se* categories or that the statement caused the plaintiff special harm. L & D of Oregon, 171 Or. App. at 24, 14 P.3d at 617. Defendant seeks $1 million in consequential damages and $5 million in punitive damages for this claim. However, there is no allegation in the defamation claim that Defendant was harmed in any way. Construing Defendant's claim liberally by considering facts alleged elsewhere in the Proposed Third Amended Answer, Defendant alleges that the contact with Judge Jones' chambers caused Defendant emotional distress. See, e.g., Third Am. Answer ¶ 48. Special harm for the purpose of a defamation claim, however, is "the loss of something having an economic or pecuniary value, such as a failure to realize a reasonable expectation of gain." Nat'l Union Fire, 220 Or. App. at 586, 188 P.3d at 348 (citing Restatement (Second) of Torts, § 575, comment b). Allegations of suffering psychological and emotional distress, humiliation and embarrassment are insufficient to allege a "special harm." L & D of Oregon, 171 Or. App. at 28, 14 P.3d at 623.

Defendant also alleges that, to the extent the statements accused Defendant of a crime, the statements are defamatory *per se*. However, as discussed above, the statements did not accuse Defendant of a crime but, rather, offered an opinion as to the significance of Defendant's

blog post about Judge Jones. Therefore, Defendant fails to state a defamation claim because he does not allege a special harm.

E. Abuse of Process and Malicious Prosecution

Defendant alleges the following:

> As a Third and Separate Counterclaim, this Answering Defendant alleges that plaintiff is engaged in harassment in the form of Abuse of Civil Process, pursuing the claims for his benefit and designed [sic] to extort, coerce, and damage Rote financially for publishing a blog critical of an arbitration involving the plaintiff.

Proposed Third Am. Answer ¶ 42. Defendant further alleges that Plaintiff knows that his claims are subject to arbitration and are not timely filed. Id. at ¶ 43. According to Defendant, Plaintiff has an ulterior motive of forcing Plaintiff to hire counsel to represent Corporate Defendants, even though Plaintiff knows the corporations are inactive. Id. at ¶ 44.

Under Oregon law, the tort of abuse of process "is the perversion of a process that is regular on its face to a purpose for which the process is not intended." Columbia County v. Sande, 175 Or. App. 400, 408 (2001). In other words, "[t]he tort involves the use of the process as a club by which to extort something unrelated to the process from the other party." Clausen v. Carstens, 83 Or. App. 112, 118 (1986). To plead a claim of abuse of process, a plaintiff must allege (1) an ulterior purpose, beyond malice, that is unrelated to the process and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding. Columbia County, 175 Or. App. at 408; see also Hartley v. State Water Resources Dept., 77 Or. App. 517, 522 (1986) (a defendant cannot be liable for abuse of process where he has "done nothing more than carry out the process to its authorized conclusion, even though with bad intentions").

Defendant's claim fails. His description of Plaintiff's behavior does not constitute "the use of the process that is not proper in the regular conduct of the proceeding." Plaintiff has brought claims against Defendant and Corporate Defendants. Plaintiff's claims were timely filed

and Defendant waived his right to compel Plaintiff to arbitrate the claims. Further, there is no evidence that Plaintiff engaged in this lawsuit for the ulterior purpose of forcing Defendant to obtain counsel for Corporate Defendants. Therefore, Defendant fails to state a claim.

F. Intentional Infliction of Emotional Distress

Defendant alleges that as a result of Plaintiff's wrongful conduct, Defendant has suffered, and will continue to suffer, mental anguish, emotional distress, and embarrassment. Proposed Third Am. Answer ¶ 48. Specifically, Defendant alleges:

> While defendant is not easily distressed emotionally over litigation, watching the plaintiff and plaintiff [sic] counsel posture one lie after another, attack his business ethics alleging fraudulent billing practices with no proof whatsoever, destroy evidence without accountability, submit false and unexamined evidence to an arbitrator privately, seek to enlist the help of Judge Jones twice, engage in a host of other outrageous acts, and then file a lawsuit when Rote exposes the corruption, one can only imagine that the otherwise unflappable demeanor of the defendant has been tested beyond social acceptability.

Id. at ¶ 49.

To state an IIED claim, Defendant must show that Plaintiff intended to inflict severe emotional distress, Plaintiff's acts were the cause of Defendant's severe emotional distress, and Plaintiff's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct. McGanty v. Staudenraus, 321 Or. 532, 563, 901 P.2d 841, 849 (1995)). "Because proof of intent is often indirect and evidence of psychic harm is usually self-serving, proof of this tort largely turns on . . . whether a defendant's conduct is sufficiently outrageous." House v. Hicks, 218 Or. App. 348, 358, 179 P.3d 730, 736 (2008).

Whether the alleged conduct constitutes an extraordinary transgression of the bounds of socially tolerable conduct is a question of law for the court. Harris v. Pameco Corp., 170 Or. App. 164, 171, 12 P.3d 524, 529 (2000). In a 2008 case, the Oregon Court of Appeals explained the following parameters of the tort:

> A trial court plays a gatekeeper role in evaluating the viability of an IIED claim by assessing the allegedly tortious conduct to determine whether it goes beyond the farthest reaches of socially tolerable behavior and creates a jury question on liability.
>
> * * *
>
> As explained in the Restatement [(Second) of Torts] at § 46 comment d [1965]: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

House, 218 Or. App. at 358, 179 P.3d at 736 (internal quotation marks and citations omitted).

"Whether conduct is an extraordinary transgression is a fact-specific inquiry, to be considered on a case-by-case basis, based on the totality of the circumstances." Id. Oregon law identifies "several contextual factors that guide the court's classification of conduct as extreme and outrageous." Id. at 360, 179 P.3d at 737. The most important of these factors is "whether a special relationship exists between a plaintiff and a defendant" such as employer-employee, physician-patient, or government officer-citizen. Id. Courts are concerned with whether the defendant's relationship to the plaintiff 'imposes on the defendant a greater obligation to refrain from subjecting the victim to abuse, fright, or shock than would be true in arm's-length encounters among strangers.'" Id. (quoting McGanty, 321 Or. at 547–48, 901 P.2d at 851). Other factors include whether the conduct was undertaken with an ulterior motive or to take advantage of an unusually vulnerable individual. Id. The setting in which the conduct occurs, for example, whether it occurred in a public venue or in an employment context, also bears on the degree of its offensiveness. Id.

Here, there is no special relationship between Plaintiff and Defendant. While the parties previously had an employment relationship, Defendant has not employed Plaintiff in many years. See id. (absence of any special relationship is significant in finding no outrageous conduct). Furthermore, to the extent the parties previously had a legal relationship, it was Defendant, as

employer, who would have held the dominant position and would thus have a greater obligation to refrain from subjecting Plaintiff to emotional distress. Id. ("[C]ourts are more likely to categorize conduct as outrageous when it is undertaken by the dominant party in a legal relationship.").

In addition, there is no allegation by Defendant that Plaintiff's conduct was motivated by a desire to take advantage of an unusually vulnerable individual. To the contrary, Defendant alleges that he "is not easily distressed emotionally over litigation" and he is generally "unflappable." Proposed Third Am. Answer ¶ 49.

Instead, Defendant appears to base his claim on the assertion that Plaintiff's conduct was undertaken with an ulterior motive to gain an advantage in litigation before another judge in this District. Defendant argues in his Reply that "[i]t is reasonable to conclude that the plaintiff group may have been disseminating this false information to a much broader group, not just to law enforcement." Def.'s Reply 5, ECF 91. Defendant does not submit any evidence to support this assertion and the Court does not agree with Defendant that it would be reasonable to make such an inference based on the evidence available. Plaintiff's counsel made the statements in private to Judge Jones' courtroom deputy and the stated purpose of the phone call was to warn Judge Jones about a potential threat. These factors weigh against Defendant's assertion of IIED. See House, 218 Or. App. at 365, 179 P.3d at 740 (explaining that the "private and indirect character" of a defendant's conduct makes it less likely to be classified as outrageous). Furthermore, even if some of the statements made to Judge Jones' deputy were false, they were made "as part of an "otherwise legitimate complaint" regarding Defendant's blog post and merely "set out the context of [Defendant's] behavior." See id. at 361, 364, 179 P.3d 730.

In sum, there is no special relationship between Plaintiff and Defendant, Defendant is not a particularly vulnerable individual, and there is no evidence that the actions were taken with an ulterior motive. Even taking the alleged facts in the light most favorable to Plaintiff, no reasonable factfinder would conclude that Plaintiff's actions rose to the level of socially intolerable conduct. Defendant fails to state an IIED claim.

G. Aiding and Abetting

This Court previously dismissed Defendant's "aiding and abetting" claim, finding no support for the proposition that Oregon recognizes this as an independent tort and noting that, in states that do recognize such a tort, the tort is predicated upon the existence of some tortious conduct of other parties. See, e.g., Saunders v. Superior Court, 27 Cal. App. 4th 832, 846, 33 Cal. Rptr. 2d 438, 446 (1994) ("Liability may also be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person."). Defendant does not amend his aiding and abetting claim in any way. Because Defendant's proposed amended counterclaims fail to establish any tortious conduct of Plaintiff or anyone else, this claim necessarily fails.

CONCLUSION

The Court denies Defendant Rote's Motion to Dismiss for Lack of Jurisdiction [78], Motion for Judicial Notice [80] and Motion to Amend [85]. Defendant is ordered to remove all counterclaims from his Proposed Third Amended Answer and to submit the Third Amended

Answer, without any other changes, within 10 days of the date below. The Clerk is instructed to strike ECF 86-4 from the record.

IT IS SO ORDERED.

Dated this 5 day of January, 2017.

Marco Hernández

MARCO A. HERNÁNDEZ
United States District Judge