No. 21-_____

In The

Supreme Court of the United States

LARRY KLAYMAN,

Petitioner,

v.

JUDICIAL WATCH, INC., THOMAS J. FITTON, PAUL ORFANEDES, AND CHRISTOPHER FARRELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7105 **September Term, 2021**
1:06-cv-00670-CKK
Filed On: September 15, 2021

Larry Elliott Klayman,

Appellant

v.

Judicial Watch, Inc., et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson, Circuit Judges; and Silberman, Senior Circuit Judge

ORDER

Upon consideration of appellant's motion for en banc panel to consider 25-page petition for rehearing and motion for reconsideration by the full court, and the lodged 25-page petition for rehearing en banc; and appellant's 15-page petition for rehearing en banc and supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the motion for en banc panel to consider 25-page petition for rehearing and motion for reconsideration by the full court be denied. The Clerk is directed to note the docket accordingly. It is

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FURTHER ORDERED that the 15-page petition for rehearing en banc be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7105 **September Term, 2020**
FILED ON: JULY 30, 2021

LARRY ELLIOTT KLAYMAN,

APPELLANT

V.

JUDICIAL WATCH, INC., ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cv-00670)

Before: WILKINS and RAO, *Circuit Judges*,
and SILBERMAN, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgments and orders of the District Court appealed from in this cause be affirmed in full, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Date: July 30, 2021

Opinion for the court filed by Circuit Judge Rao.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 10, 2020 Decided July 30, 2021

No. 19-7105

LARRY KLAYMAN,
APPELLANT

v.

JUDICIAL WATCH, INC., ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cv-00670)

John P. Szymkowicz argued the cause for appellant. With him on the briefs was *John T. Szymkowicz*. *Larry E. Klayman* entered an appearance.

Richard W. Driscoll argued the cause and filed the brief for appellee.

Before: WILKINS and RAO, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RAO.

RAO, *Circuit Judge*: Larry Klayman founded and ran Judicial Watch, a conservative watchdog group with the motto "Because No One is Above the Law."

This appeal concerns his departure from Judicial Watch in 2003 and the resulting hostility between Klayman and the Judicial Watch officers currently at its helm. Klayman filed a complaint against Judicial Watch and those officers asserting an array of claims, and Judicial Watch fired back with a series of counterclaims. During the fifteen years of ensuing litigation, Klayman lost several claims at summary judgment and then lost the remaining claims after a jury trial. The jury ultimately awarded Judicial Watch $2.3 million. On appeal, Klayman raises numerous issues spanning every stage of litigation, including discovery, pretrial, trial, and post-trial. Despite the volume of his challenges, none is meritorious. We affirm the district court.

I.

Larry Klayman founded Judicial Watch in 1994 and served as its Chairman and General Counsel until his departure in 2003. Klayman and Judicial Watch have divergent accounts of why he left the organization. According to Klayman, he left voluntarily to run for the U.S. Senate. According to Judicial Watch, it forced Klayman to resign due to his misconduct. We recount the facts as proven at trial and then recount the lengthy procedural history of this case.

A.

Klayman's time at Judicial Watch came to a close after a meeting in May 2003 with two Judicial Watch

officers, President Thomas Fitton and Secretary Paul Orfanedes. Klayman told them that his then-wife, Stephanie DeLuca, had filed a complaint for divorce alleging infidelity and physical abuse, and he showed them a copy of the divorce complaint. Klayman admitted he was pursuing a romantic relationship with a Judicial Watch employee. Klayman also told Fitton and Orfanedes about a violent altercation he had with DeLuca. As DeLuca later testified, Klayman "put his hands around [her] neck, and he started to shake [her] and bang [her] head against the car window." J.A. 2999. Klayman then "punched his hand into the radio," resulting in a broken hand. J.A. 3000. After hearing this information, Fitton told Klayman to resign. Negotiations over Klayman's departure ensued over the next several months.

Meanwhile, in September 2003, Judicial Watch began preparing its October newsletter, which was mailed to donors along with a cover letter signed by Klayman as Judicial Watch's "Chairman and General Counsel." After Klayman reviewed the newsletter, Judicial Watch sent it to the printer.

While the newsletter was at the printer, Klayman and Judicial Watch executed a severance agreement in which Klayman agreed to resign effective September 19, 2003. The severance agreement contains detailed provisions restricting the parties' conduct. For example, it prohibits the parties from disparaging each other, but places no limits on their ability to provide fair comment. The agreement also prohibits Klayman from having access to Judicial Watch donor lists and

requires him to pay personal expenses he owed to the organization. Judicial Watch paid Klayman $600,000 under the severance agreement.

After Klayman left Judicial Watch, he ran to represent Florida in the U.S. Senate. His campaign used American Target Advertising ("ATA"), the third-party vendor that Judicial Watch used for its mailings to donors. Through ATA, Klayman's campaign obtained the names of Judicial Watch's donors to use for campaign solicitations. Klayman lost the primary election for the Senate race.

Klayman then launched an effort he dubbed "Saving Judicial Watch." It included a web site, savingjudicialwatch.org, and a fundraising effort directed at Judicial Watch donors using the names obtained from ATA for his Senate run. In promotional materials, Klayman asserted that he left Judicial Watch to run for Senate. *See*, *e.g.*, J.A. 2606 ("In 2003, I left Judicial Watch to run for the U.S. Senate in Florida."); J.A. 2613 (Judicial Watch "created the false impression I left for some reason other than to run for the U.S. Senate."). Klayman contended that Fitton and the Judicial Watch leadership team had mismanaged and corrupted the organization and that Klayman should be reinstated to lead Judicial Watch. After the Saving Judicial Watch campaign began, Judicial Watch received several letters from past donors who stated they would not donate to Judicial Watch until Klayman was reinstated. The hostility between Klayman and Judicial Watch continued over the next several years.

B.

Klayman filed a complaint against Judicial Watch and several of its officers in 2006, asserting a panoply of claims. As relevant here, Klayman alleged that Judicial Watch violated the Lanham Act, 15 U.S.C. § 1125(a)(1), by publishing a false endorsement or advertisement when it sent the newsletter identifying him as "Chairman and General Counsel" after he had left Judicial Watch. Klayman also alleged that Judicial Watch breached the severance agreement's non-disparagement clause by preventing him from making fair comment about Judicial Watch. Klayman finally alleged that Judicial Watch defamed him by telling reporters that he filed this lawsuit as a tactic to avoid paying the quarter-million dollars he owed Judicial Watch. In addition to damages, Klayman sought to rescind the severance agreement.

Judicial Watch and its officers asserted counterclaims against Klayman. Judicial Watch alleged that Klayman breached the severance agreement by gaining access to Judicial Watch donor lists and by failing to repay the personal expenses he had agreed to pay. Judicial Watch also alleged that Klayman infringed on its trademarks, "Judicial Watch" and "Because No One is Above the Law," by using them in his Saving Judicial Watch campaign. Judicial Watch later added a claim of unfair competition in violation of the Lanham Act, alleging that Klayman made false statements when he represented that he left Judicial Watch to run for Senate.

During discovery, Klayman failed to produce documents that were responsive to a set of supplemental requests from Judicial Watch. The magistrate judge ordered him to produce them. After Klayman still failed to produce those documents, the district court sanctioned Klayman by precluding him from presenting any documents, or testifying to them, in support of his claims and defenses.

The parties filed numerous summary judgment motions. The district court granted partial summary judgment in favor of Judicial Watch on several of Klayman's claims and Judicial Watch's counterclaim for the repayment of Klayman's personal expenses. This partial summary judgment left only a few claims for trial, including Klayman's breach of contract claim and Judicial Watch's counterclaims of breach of contract and Lanham Act violations.

As the trial approached, the district court ordered the parties to prepare a joint pretrial statement, including a list of witnesses and exhibits. Klayman submitted a deficient pretrial statement by listing the testimony to be elicited from most witnesses as "all issues" and his exhibits as "all documents" on a particular topic. J.A. 1896, 1902. After several failed attempts at obtaining Klayman's compliance, the district court sanctioned Klayman by striking the defective portions of the pretrial statement. Because the parties could introduce only witnesses or exhibits listed in the pretrial statement, this sanction barred Klayman from affirmatively presenting witnesses or exhibits in support of his claims and defenses at trial.

A thirteen-day jury trial took place in 2018. The primary factual issue was the reason for Klayman's departure. Because of the sanctions, Klayman could present no evidence at trial other than his testimony,[1] in which he asserted that he left Judicial Watch to run for the Senate. To support its position that Klayman was forced to resign, Judicial Watch elicited testimony from Judicial Watch officers Fitton and Orfanedes about the meeting in which Klayman told them of his misconduct. Klayman objected that this testimony was irrelevant, but the district court overruled the objection. Judicial Watch also introduced the deposition of DeLuca, Klayman's ex-wife, in which she testified that Klayman physically assaulted her and called her vulgar names. Klayman objected to the name-calling as irrelevant, but the court admitted this testimony. The district court instructed the jury, refusing to give several instructions requested by Klayman. The jury returned a verdict for Judicial Watch, awarding a total of $2.3 million.

The district court initially entered a judgment on the verdict against Klayman on March 15, 2018, a day after the jury announced its verdict. The court later vacated that judgment, however, so that Klayman could have more time to file post-trial motions. Klayman then moved under Federal Rules of Civil Procedure 50

[1] Despite its earlier sanctions precluding Klayman from presenting testimony or evidence, the court later clarified that Klayman could testify at trial. Because the sanctions only precluded Klayman from affirmatively introducing evidence, they did not preclude him from using documents that Judicial Watch introduced or cross-examining its witnesses.

and 59 for a judgment as a matter of law, a new trial, or remittitur of the damages. The court denied his motion and entered a final judgment against Klayman on March 18, 2019. Klayman moved under Federal Rule of Civil Procedure 60 for reconsideration of that denial and also sought the district court's recusal. The district court denied that motion on August 7, 2019. Klayman filed his notice of appeal on September 6, 2019.

After concluding that Klayman's appeal was timely, we proceed to address the merits. We have also considered and reject without written opinion Klayman's "peripheral arguments." *Aircraft Serv. Int'l, Inc. v. FERC*, 985 F.3d 1013, 1020 n.4 (D.C. Cir. 2021).

II.

Judicial Watch challenges the timeliness of Klayman's appeal and so we first address this threshold issue. To appeal a judgment, a party must file his notice of appeal within thirty days of entry of the judgment. FED. R. APP. P. 4(a)(1)(A). The time to appeal is extended, however, upon the timely filing of certain motions under the Federal Rules of Civil Procedure. Those motions include one "for judgment under Rule 50(b)," "for a new trial under Rule 59," and "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered." FED. R. APP. P. 4(a)(4)(A). If one of those motions is filed, the time to appeal is extended until "the entry of the order disposing of the last such remaining motion," and the appellant then has thirty days from that date to appeal. *See* FED. R.

APP. P. 4(a)(4)(A). Although some refer to this extension as "tolling" the time for appeal, that description is inaccurate. Unlike tolling, which merely pauses the clock until a specified event occurs, Rule 4(a)(4)(A) effectively "re-starts the appeal time period." *See* 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & CATHERINE T. STRUVE, FED. PRAC. & PROC. § 3950.4 (5th ed. Apr. 2021 update).

The district court first entered a judgment on the verdict against Klayman on March 15, 2018. The court then vacated that judgment to allow Klayman to file post-trial motions. Klayman filed a motion under Federal Rules of Civil Procedure 50 and 59, seeking a judgment as a matter of law, a new trial, or remittitur of the jury verdict. The district court denied that motion and entered a second judgment—a "final judgment"—against Klayman on March 18, 2019.

At the outset, the parties both measure the timeliness of Klayman's appeal from the "final judgment" entered by the district court on March 18, 2019—not the now-vacated judgment on the verdict. *See* Judicial Watch Br. 22–23; Klayman Reply Br. 15–16. Because Federal Rule of Appellate Procedure 4(a)(4)(A) is a claims-processing rule instead of a jurisdictional rule, we hold the parties to that agreement.[2] *See Obaydullah v. Obama*, 688 F.3d 784, 790–91 (D.C. Cir. 2012).

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[2] Given the parties' agreement and the district court's finding that the March 15, 2018, judgment was not a final judgment because it did not include the calculation of prejudgment interest, the district court's vacatur of its judgment on the verdict to

After the final judgment, Klayman filed a motion for reconsideration under Federal Rule of Civil Procedure 60. A motion under Rule 60 extends the time for appeal if it is "filed no later than 28 days after *the judgment* is entered." FED. R. APP. P. 4(a)(4)(A)(vi) (emphasis added). Klayman filed his Rule 60 motion twenty-five days after the court entered its final judgment, so the motion restarted his time to appeal. Klayman then appealed within thirty days from the district court's denial of the second motion. Klayman's appeal was thus timely.

Under the current Rule 4(a)(4)(A), Klayman's motion to reconsider brought under Federal Rule of Civil Procedure 60 qualifies as a motion that can, and did, restart his time to appeal. In 1993, Federal Rule of Appellate Procedure 4(a)(4)(A) was amended to add motions under Rule 60. Judicial Watch attempts to rely on *American Security Bank v. John Y. Harrison Realty* for the proposition that "a motion to reconsider the denial

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provide Klayman with more time to file post-trial motions does not impact our analysis of the timeliness of this appeal. We note, however, that a district court may not vacate a final judgment to provide a party more time to file a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) or a motion for a new trial or amended judgment pursuant to Federal Rule of Civil Procedure 59(b), (d), or (e). *See* FED. R. CIV. P. 6(b)(2) (prohibiting district courts from extending certain deadlines); *Wilburn v. Robinson*, 480 F.3d 1140, 1144 (D.C. Cir. 2007); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 582 (D.C. Cir. 2002); *see also* 4B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FED. PRAC. & PROC. § 1167 (4th ed. Apr. 2021 update) (explaining Rule 6(b)(2)'s prohibition on district courts extending the time to appeal).

of a motion for a new trial does not operate to toll the running of the appeal period." 670 F.2d 317, 320 (D.C. Cir. 1982). Yet when that case was decided, Federal Rule of Appellate Procedure 4(a)(4)(A)'s list of motions that restarted the time to appeal did not include motions under Federal Rule of Civil Procedure 60. *See* FED. R. APP. P. 4(a)(4)(A) (1981). Our interpretation in *American Security Bank* of the now-outdated rule is of no consequence to this case.

Judicial Watch also argues, as a policy matter, that an appellant should benefit from restarting his time to appeal only once, preventing the proverbial second bite at the apple. Because Klayman restarted his time to appeal with his first motion for a new trial under Rule 59, Judicial Watch maintains that his second motion asking for reconsideration under Rule 60 was impermissibly successive. We need not decide whether an appellant may restart his time to appeal more than once because Klayman's motions were not successive for the purpose of his time to appeal. The parties agree that we measure the time to appeal from the final judgment. After the final judgment, Klayman filed only one motion that restarted his time to appeal—the motion under Rule 60. His earlier Rule 59 motion, which resulted in the vacatur of the judgment on the verdict, preceded the final judgment and is therefore irrelevant for the timeliness of the appeal. Although Klayman filed multiple post-trial motions, only his second motion restarted his time to appeal, so we need not determine whether an appellant may benefit from Federal Rule of Appellate Procedure 4(a)(4)(A)'s restarting

more than once. We hold that Klayman's appeal was timely and proceed to the merits.

III.

We begin with the district court's rulings before trial. Klayman challenges the district court's two sanctions against him for his pretrial conduct. We review the imposition of sanctions for abuse of discretion. *See Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977). Neither of Klayman's sanctions was an abuse of discretion.

A.

First, the district court did not abuse its discretion when it sanctioned Klayman for his failure to provide any documents in response to Judicial Watch's supplemental discovery requests. After Klayman failed to provide any documents and instead objected to each request, Judicial Watch moved to compel his response. The magistrate judge granted the motion, ordering Klayman to provide documents in response to all but one request within ten days. Several months later, the magistrate judge learned that Klayman had not produced any documents in response and warned him that further noncompliance would risk sanctions. More than five months after the magistrate judge's original order, Klayman had not produced any documents, so Judicial Watch moved for sanctions. Klayman provided no response to that motion.

The magistrate judge found Klayman had conceded the motion, though the judge also found the sanction warranted on the merits and recommended that the district court sanction Klayman by precluding him from testifying or presenting documents to support his claims and defenses. Klayman objected to the recommendation, but the district court explained that he had conceded the motion by failing to respond to it before the magistrate judge. Nonetheless, the court considered Klayman's objections on the merits, but overruled them and entered the sanction.

We need not delve into the merits of this sanction because Klayman waived his challenge to it by failing to oppose Judicial Watch's motion before the magistrate judge. *See* D.D.C. LOCAL R. 7(b); D.D.C. LOCAL R. 72.2(b). Although Klayman objected to the magistrate judge's recommendation, "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) (collecting cases). Because Klayman conceded the sanction below, he cannot raise it for our consideration on appeal.

Even if we were to review the merits, we find no abuse of discretion in the admittedly severe sanction. A district court may sanction a party who "fails to obey an order to provide or permit discovery." FED. R. CIV. P. 37(b)(2)(A). Those sanctions may include "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." FED. R. CIV. P. 37(b)(2)(A)(ii). Choosing a sanction "should be

guided by the concept of proportionality between offense and sanction." *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996) (cleaned up). To assess whether a severe sanction, like the preclusion of evidence, is warranted, "the district court may consider the resulting prejudice to the other party, any prejudice to the judicial system, and the need to deter similar misconduct in the future." *Id.*

The district court reasonably determined that these factors favored sanctioning Klayman. First, Klayman's refusal to provide documents resulted in prejudice to Judicial Watch, because it had to file its summary judgment motions without an opportunity to review the documents that supported Klayman's claims and defenses. Klayman cannot avoid a finding of prejudice by pointing to the fact that he provided some discovery, including 1,047 pages of documents and interrogatory responses. The district court sanctioned Klayman for not providing discovery in response to particular requests, and Klayman has not contended that any of the 1,047 pages he produced were responsive to those requests. That he produced *some* discovery does not excuse his failure to produce *all* properly requested discovery. Second, Klayman's repeated refusal to comply with a court order prejudiced the judicial system. His stonewalling required multiple rounds of judicial involvement from both the magistrate judge and district court, "squandering [the] scarce judicial resources (and the resources of other litigants)." *Founding Church of Scientology of Wash., D.C., Inc. v. Webster*, 802 F.2d 1448, 1458 (D.C. Cir.

1986). Third, the sanction was reasonably designed to deter future misconduct. By failing to engage in the discovery process, Klayman disrespected the court and the judicial process. *See Weisberg v. Webster*, 749 F.2d 864, 872 (D.C. Cir. 1984) (explaining that a court may impose a broad sanction to remove "an incentive to test the court" because a limited sanction "may present [a recalcitrant party] with nothing to lose and something to gain").

The court's sanction was proportional to Klayman's flagrant refusal to comply with the court's discovery order. The district court acted within its discretion by precluding Klayman from presenting documents in support of his claims and defenses.

B.

Second, the district court did not abuse its discretion when it sanctioned Klayman for his inadequate pretrial statement. A pretrial statement serves to "narrow the issues" for trial and put "the Court and the parties on notice of which issues of fact and law are in dispute." *Winmar, Inc. v. Al Jazeera Intl*, 741 F. Supp. 2d 165, 185 (D.D.C. 2010). The pretrial statement avoids trial by ambush. Consistent with ordinary practice, the district court ordered the pretrial statement to include a list of witnesses and exhibits to be used at trial. Klayman argues that the district court sanctioned him merely for not providing sufficiently detailed descriptions of his witnesses and exhibits.

That contention severely distorts the misconduct for which the court struck Klayman's pretrial statement.

When the district court ordered the parties to prepare a joint pretrial statement, it warned that the failure to conform with the order's directives could result in sanctions. Klayman rebuffed Judicial Watch's efforts to confer on the statement as ordered. He then requested an extension on the eve of the deadline for the statement, which the district court reluctantly granted.

In the pretrial statement eventually submitted, Klayman's entries flouted the court's order. First, the order required each party to submit a witness list identifying the witnesses to be called and briefly describing the testimony to be elicited. For sixteen of twenty-three witnesses, Klayman described their testimony as covering "all issues." J.A. 1896. And his twenty-fourth witness listed "[a]ll Judicial Watch employees in the last six years since Klayman left," again covering "all issues." J.A. 1898. Second, the order required each party to submit a list identifying the exhibits intended to be used. Instead of listing specific exhibits as required, Klayman listed eight general categories of documents, including one category for "[a]ll correspondence to and from Klayman and Judicial Watch concerning [a client]." J.A. 1902.

After finding the pretrial statement deficient, the district court ordered the parties to work together to revise it. Klayman failed to propose any revisions and sought another extension, again on the eve of the

deadline. Although the district court granted the extension, it warned Klayman that no further extensions would be granted and failure to comply would result in striking his portions of the statement. Klayman failed to meet the deadline due to a car accident, so the court granted a third extension coupled with the same warning of sanctions. Klayman failed to meet the thrice-extended deadline. Accordingly, the district court sanctioned him by striking his parts of the pretrial statement, which precluded Klayman from affirmatively presenting any evidence in support of his claims and defenses at trial. As the facts make plain, the district court did not sanction Klayman merely for a lack of detail; it sanctioned him for his "utter[] fail[ure] to discharge his obligations in the course of pretrial proceedings." J.A. 2017. That sanction was reasonable.

Under Federal Rule of Civil Procedure 16, a district court may sanction a party who "fails to obey a scheduling or other pretrial order." FED. R. CIV. P. 16(f) (incorporating the sanctions of Federal Rule of Civil Procedure 37(b)(2)(A)(ii)–(vii)). The district court reasonably exercised its discretion by imposing the sanction on Klayman. First, Klayman's deficient pretrial statement prejudiced Judicial Watch. Because his inadequate pretrial statement failed to narrow the issues for trial, Klayman deprived Judicial Watch of the notice of the disputes for trial that a pretrial statement is meant to afford. Second, as the district court explained, Klayman burdened the judicial system by failing to conduct "what should have been a relatively

straightforward administrative task." J.A. 2020. Because of Klayman's refusal to prepare an adequate pretrial statement, the court "spent countless hours attempting to secure Klayman's basic compliance" with the court's order—to no avail. J.A. 2020. Third, the sanction was necessary to deter similar misconduct. The process of preparing a pretrial statement should not be onerous, and Klayman's sanction deters others from attempting to make it as onerous as he did.

Klayman contends that he should have received a lesser sanction, but the sanction of striking the defective parts of his pretrial statement was proportional to his misconduct. To be sure, as the district court acknowledged, this sanction was severe, as it prohibited Klayman from presenting any evidence at trial. Klayman, however, ignored the district court's repeated warnings and the multiple opportunities to comply with a simple directive to present an adequate pretrial statement. The court attempted a variety of measures to obtain Klayman's compliance, but none alleviated his ongoing misconduct. Accordingly, the court did not abuse its discretion by striking Klayman's pretrial statement.

IV.

We next consider the district court's grant of partial summary judgment to Judicial Watch, which we review de novo. *See Jeffries v. Barr*, 965 F.3d 843, 859 (D.C. Cir. 2020). To obtain summary judgment, the movant must "shown that there is no genuine dispute as

to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "[A] dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Jeffries*, 965 F.3d at 859 (cleaned up).

Klayman challenges the district court's decision to grant summary judgment to Judicial Watch on four of his claims and one of Judicial Watch's counterclaims. We discuss each in turn, though no challenge is meritorious.

A.

We begin with the grant of summary judgment to Judicial Watch on Klayman's claims under the Lanham Act. Among other things, the Lanham Act provides a cause of action to combat consumer confusion about a person's affiliation, such as a false endorsement or false advertising. *See* 15 U.S.C. § 1125(a)(1). Klayman alleged that Judicial Watch violated the Lanham Act by sending a newsletter to its donors that identified him as "Chairman and General Counsel" after he had left Judicial Watch. According to Klayman, Judicial Watch's use of his name in the newsletter amounted to a false endorsement and false advertisement.

This circuit has yet to address whether a celebrity, which Klayman asserts he is, may bring a Lanham Act claim based on misleading or deceptive use of his name or likeness, though several of our sister circuits have

approved of such claims. *See Parks v. LaFace Records*, 329 F.3d 437, 445–46 (6th Cir. 2003); *Wendt v. Host Intl, Inc.*, 125 F.3d 806, 812 (9th Cir. 1997). We need not decide that question today. Even assuming such a claim is viable, the district court appropriately granted summary judgment against Klayman in this case.

There was no genuine dispute of material fact that Klayman authorized the use of his name in the newsletter, so it was neither a false endorsement nor a false advertisement. Klayman testified in his deposition that he routinely reviewed the monthly newsletter before Judicial Watch sent it out, and he affirmed that he signed the newsletter's cover letter as Chairman and General Counsel. As proven by his handwritten edits on a draft, Klayman edited the newsletter at issue, which Judicial Watch approved for printing while Klayman still worked there. When Klayman later resigned, the newsletter had already been delivered for mailing.

Klayman argues that he did not authorize the use of his name in the newsletter after he left Judicial Watch. But this argument ignores that the Lanham Act focuses on "false or misleading statements of fact *at the time they were made*." *Newcal Indus., Inc. v. Ikon Off Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) (cleaned up) (emphasis added). When Judicial Watch wrote the newsletter identifying Klayman as "Chairman and General Counsel," Klayman *was* the Chairman and General Counsel. His subsequent resignation does not render the newsletter a false endorsement or advertisement.

B.

We next consider the district court's grant of summary judgment to Judicial Watch on Klayman's breach of contract claim. Klayman asserted that Judicial Watch breached the severance agreement by preventing him from making fair comment in interviews. The severance agreement prohibited both parties from disparaging each other and then stated that "[n]othing in this paragraph is intended to, nor shall be deemed to, limit either party from making fair commentary on the positions or activities of the other following the Separation Date." J.A. 2586.

Klayman proffered two documents to support this claim. First, he pointed to an email from Leslie Burdick, a C-SPAN employee, stating that Fitton "asked that we don't schedule Larry [Klayman] on anything related to the case." J.A. 1278. Second, Klayman pointed to a memorandum from his campaign manager stating that "Fitton of Judicial Watch had requested that CNN not book Mr. Klayman to discuss any aspect of the case." J.A. 1247–48.

Both documents, however, are hearsay. Hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing" and is offered "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). At summary judgment, a party need not present evidence in a form that is currently admissible. *See* FED. R. CIV. P. 56(c). But "[t]o survive summary judgment," he "must produce evidence capable of being converted into admissible

evidence." *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) (cleaned up). As we have explained, when proffered evidence is "sheer hearsay, it counts for nothing on summary judgment." *Id.* (cleaned up).

Although Klayman suggests he could have subpoenaed the "witnesses at CNN and Cspan [sic]," he fails to explain how those unidentified witnesses' testimony would be admissible. Klayman Br. 41. For example, Burdick's email stated that Fitton "asked that we don't schedule Larry on anything related to the case." J.A. 1278. It is not clear to whom Fitton made this request—perhaps he asked Burdick directly or perhaps he asked someone else at C-SPAN who relayed the request to Burdick. If it is the latter, Burdick's statement of what Fitton told someone else would create an additional layer of hearsay. The campaign manager's memorandum contains a similar problem; it states that Fitton requested that "CNN" not book Klayman. Yet Klayman has provided no explanation of how he would cut through these layers of hearsay to have the statements admitted, and his general reference to calling witnesses from C-SPAN and CNN is not enough to carry his burden. Summary judgment was appropriate for Klayman's breach of contract claim because he failed to establish how this hearsay was "capable of being converted into admissible evidence." *Greer*, 505 F.3d at 1315 (cleaned up).

C.

We turn to the district court's grant of summary judgment to Judicial Watch on Klayman's defamation claim. Klayman alleged that Judicial Watch defamed him by telling reporters that he filed this lawsuit as a "tactical maneuver designed to distract attention away from the fact that Klayman owes more than a quarter of a million dollars to Judicial Watch." J.A. 31 (emphasis omitted).

To prove defamation, a public figure[3] must establish, among other things, that the defamatory statement was made with "actual malice" *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). Actual malice means the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* (quoting *Sullivan*, 376 U.S. at 280). Actual malice encompasses when "the defendant in fact entertained *serious doubts* as to the truth of his publication." *Id.* (citation and quotation marks omitted).

Klayman presented no evidence that Judicial Watch made its statement with actual malice Because Judicial Watch knew that Klayman disputed the debt, he contends that Judicial Watch had a serious doubt about the truth of its statement. Judicial Watch, however, had conducted two audits on which it based its understanding that Klayman owed the debt. Although Klayman disputed the audits' findings, he offered no

[3] Klayman has not disputed that he is a public figure.

evidence that Judicial Watch harbored doubt about him owing the debt. Klayman also argues that Judicial Watch harbored a serious doubt about the truth of his owing a $250,000 debt because that amount includes debt owed by his law firm, so Klayman was not personally liable for all of it. Yet the severance agreement requires Klayman's law firm to pay Judicial Watch a debt of about $80,000, and Klayman indemnified his firm. Judicial Watch could have reasonably believed that Klayman was on the hook for his law firm's debt.

Because Klayman failed to establish a dispute of material fact that Judicial Watch made its statement with actual malice, his defamation claim could not survive summary judgment.

D.

We finally consider the district court's grant of summary judgment to Judicial Watch on its breach of contract counterclaim. Judicial Watch asserted that Klayman breached his commitment in the severance agreement "to reimburse Judicial Watch for personal costs or expenses incurred by him during his employment." J.A. 2592. Klayman agreed to pay those reimbursements within seven days of receiving notification of the reimbursement amounts.

Undisputed evidence established that Klayman failed to reimburse Judicial Watch for his personal expenses as required by the severance agreement. Judicial Watch presented a declaration from Susan Prytherch, its Chief of Staff, who had reviewed

Klayman's expenses at Judicial Watch to determine whether they were personal or business expenses. She attested that Judicial Watch sent Klayman fifty-one invoices for his personal expenses that included explanations of the charges and supporting documentation, but he had not paid any. Judicial Watch also submitted copies of those invoices.

Klayman renews his argument that the invoices were fraudulent documents manufactured after the fact. Yet Klayman has failed to support that assertion with anything other than his say-so, nor has he provided any evidence that he did not owe the expenses listed on the invoices. Klayman has thus failed to create a genuine dispute of material fact, and the district court correctly granted summary judgment to Judicial Watch on its counterclaim.

In sum, we affirm the district court's grant of partial summary judgment to Judicial Watch.

V.

After the partial summary judgment, only a few claims remained for trial. We turn to Klayman's challenges to two lines of evidence admitted at trial. This court reviews the admission of evidence for abuse of discretion. *See Henderson v. George Wash. Univ.*, 449 F.3d 127, 132–133 (D.C. Cir. 2006). To preserve a challenge to the admission of evidence for appeal, however, a party must object and "state[] the specific ground, unless it was apparent from the context." FED. R. EVID. 103(a)(1). When a party raises a new ground for his

objection on appeal, we review only for plain error. *See United States v. David*, 96 F.3d 1477, 1481 (D.C. Cir. 1996); *accord* 1 MCCORMICK ON EVID. § 52 (8th ed. Jan. 2020 update).

A.

Klayman first contends that the evidence of his forced resignation and name-calling of his ex-wife was irrelevant, but even if it was relevant, this evidence was too prejudicial to admit. Because he appears to have objected on this ground below, we review for abuse of discretion. *See Henderson*, 449 F.3d at 132–33. Under Federal Rule of Evidence 402, evidence must be relevant to be admissible. "Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." FED. R. EVID. 401.

The evidence regarding Klayman's forced resignation and name-calling of his ex-wife was relevant. Judicial Watch asserted that Klayman engaged in unfair competition in violation of the Lanham Act by falsely representing in his Saving Judicial Watch campaign that he left Judicial Watch to run for U.S. Senate. To prove those statements were false, Judicial Watch introduced the evidence that Klayman had been forced to resign due to his misconduct. This evidence of misconduct included his ex-wife's testimony about the vulgar names that Klayman had called her, and she included these allegations of verbal abuse in her

divorce complaint, a copy of which Klayman had shown to Fitton and Orfanedes. Accordingly, evidence that Klayman was forced to resign due to misconduct tended to make the fact that he left to run for Senate *less* probable than it would have been without that evidence. *See* FED. R. EVID. 401(a). And the fact of Klayman's departure was of consequence for Judicial Watch's Lanham Act claim because it had to prove that Klayman made a false representation. *See* FED. R. EVID. 401(b); *see also* 15 U.S.C. § 1125(a)(1). This evidence was therefore relevant.

Even if a piece of evidence is relevant, it may be inadmissible if it is unfairly prejudicial. FED. R. EVID. 403. "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note to 1972 amendment. This rule "tilts, as do the rules as whole, toward the admission of evidence in close cases." *Henderson*, 449 F.3d at 133 (cleaned up).

Klayman argues that the evidence of his forced resignation was substantially more prejudicial than probative. He contends that the jury hearing about his pursuit of a relationship with a Judicial Watch employee and his name-calling of his ex-wife prejudiced him by inciting the jury to decide based on emotion. We disagree. Klayman's pursuit of a relationship with an employee and alleged verbal abuse of his ex-wife had significant probative value because a central issue in the case was whether Klayman left Judicial Watch to run for Senate or whether he was forced to resign due

to his misconduct. To be sure, evidence of his misconduct carried some risk of prejudice for Klayman. The district court acted within its discretion, however, to find that the risk did not substantially outweigh the evidence's probative value, particularly because "a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008).

B.

Klayman also argues that the evidence of his inappropriate relationship with a Judicial Watch employee constituted impermissible character evidence. In particular, he asserts that this evidence constituted "bad acts" admitted in violation of Federal Rule of Evidence 404(b). Klayman Br. 61. Although that rule prohibits the admission of evidence "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," it does not bar admission if the evidence is used for another permissible purpose. *See* FED. R. EVID. 404(b). Judicial Watch offered the evidence of Klayman's inappropriate relationship to prove that he was forced to resign due to his misconduct, thereby establishing that it was false for Klayman to advertise that he left Judicial Watch to run for Senate. Because the evidence was not admitted to show that Klayman acted in conformance with his character on a particular occasion, Rule 404(b) did not prohibit its admission.

VI.

We next address Klayman's challenges to the jury instructions, or more specifically, the lack of certain instructions. We review de novo the refusal to provide a requested instruction. *Czekalski v. LaHood*, 589 F.3d 449, 453 (D.C. Cir. 2009). Klayman challenges the district court's failure to give two instructions.

Klayman first contends the district court should have instructed the jury on the sanctions it issued against him—what he describes as an instruction on "why the case was tried in a 'bizarre' fashion." Klayman Br. 63 (capitalization omitted). His proposed instruction reads in full:

> The Court has imposed sanctions on Larry Klayman, which limits his ability to testify and present evidence to prove the counts of his second amended complaint against Judicial Watch and evidence of damages as well as in his defense. Larry Klayman contends that these sanctions were the result of personal animus towards him and my political prejudice against him, since I was appointed by President Bill Clinton and my husband actually defended Secret Service agents in the Monica Lewinsky scandal of the late 1990's. Larry Klayman has sued both Bill and Hillary Clinton many times, both as the founder, former chairman and general counsel of Judicial Watch, and thereafter.
>
> In addition, Larry Klayman contends that I have acted unethically and has filed two ethics complaints before the Judicial Council of

> this Court and has at least one pending now. Larry Klayman has previously moved to disqualify me under 28 U.S.C. § 144, and he contends that I necessarily should have recused myself under that statute or at least had another judge or judges rule on his motion. I refused to do either.

J.A. 2051.

This outlandish instruction is improper. Jury instructions are meant to "fairly present the applicable legal principles and standards." *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 556 (D.C. Cir. 1993) (cleaned up). Klayman's instruction states no law; it describes the fact of Klayman's sanctions tacked onto his contentions about the court's purported bias. A jury instruction is no place for a litigant's diatribe. The district court correctly refused to give Klayman's instruction.

Klayman also argues that the district court failed to properly instruct the jury on an element of trademark infringement. Judicial Watch asserted that Klayman infringed on its trademarks "Judicial Watch" and "Because No One is Above the Law." To establish trademark infringement, Judicial Watch needed to prove, among other elements, that Klayman's use of its trademarks created a "likelihood of confusion" among consumers. *See Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 456 (D.C. Cir. 2018). Klayman argues that the court erred by failing to instruct the jury that likelihood of confusion requires confusion by an "appreciable number" of consumers. But his only support for this proposition comes

from two unpublished decisions of our district court, which are of course not precedential. *See In re Exec. Off of President*, 215 F.3d 20, 24 (D.C. Cir. 2000).

Here the district court instructed the jury on the likelihood of confusion element by setting out factors to consider. The district court's instruction, "when viewed as a whole, . . . fairly present[ed] the applicable legal principles and standards." *Czekalski*, 589 F.3d at 453 (cleaned up). This circuit "has yet to opine on the precise factors courts should consider when assessing likelihood of confusion," but we have referred approvingly to the "multi-factor tests" of our sister circuits. *Am. Soc'y for Testing*, 896 F.3d at 456 (citing *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979), *abrogated on other grounds by Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961)). The district court's instruction was also based on a model instruction. *See* 3A KEVIN F. O'MALLEY, ET AL., FED. JURY PRAC. & INSTR. § 159:25 (6th ed. 2012); J.A. 2333. Neither our sister circuits nor the model instruction mention the number of consumers likely to be confused. No instruction on the number of consumers was required for the district court to fairly present the applicable legal principles on the confusion element.

To warrant provision to the jury, an instruction must fairly state the law as it is, not how a party wishes it to be. *See Joy*, 999 F.2d at 556. The district court did not err by refusing to add a component to its

instruction on likelihood of confusion that has no basis in our precedent.

VII.

We finally consider the jury verdict against Klayman on Judicial Watch's breach of contract counterclaim. We review a district court's entry of judgment on a jury's verdict under a deferential standard. To overturn a jury verdict, a party must show that "the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree." *Scott v. District of Columbia*, 101 F.3d 748, 753 (D.C. Cir. 1996). Klayman falls well short of satisfying this standard.

Judicial Watch asserted that Klayman breached the severance agreement by using its donor lists for his Senate campaign and Saving Judicial Watch. In the severance agreement, Klayman agreed that "following the Separation Date, he shall not retain or have access to any Judicial Watch donor or client lists or donor or client data." J.A. 2574. The jury found that Klayman breached the severance agreement by using Judicial Watch's donor list and awarded Judicial Watch $75,000 in damages for that claim.

Sufficient evidence supported the jury's verdict that Klayman accessed Judicial Watch's donor lists in violation of the severance agreement. For his Senate campaign's direct mailing efforts, Klayman contracted with ATA, Judicial Watch's vendor. The contract defined Klayman's "House File," which compiles the

donors to be targeted by a campaign, as Judicial Watch donors who had given more than $5 in the last eighteen months. *See* J.A. 2746. Mark Fitzgibbons, an ATA employee, testified that Klayman's campaign specifically targeted Judicial Watch's donors. Indeed, Klayman admitted that, when he lost the Senate campaign, he started Saving Judicial Watch by using the names his Senate campaign had obtained from ATA. This evidence supports the jury's verdict that Klayman violated his agreement not to "have access to any Judicial Watch donor or client lists or donor or client data." J.A. 2574. And it certainly refutes Klayman's contention that the evidence was so skewed as to prevent a reasonable jury from concluding he violated the severance agreement.

Klayman maintains that ATA owned the donor names, which his campaign then rented, so "there was no illegal taking" of the Judicial Watch donor lists. Klayman Br. 80. Klayman's assertion is factually dubious,[4] but in any event legally irrelevant. The severance agreement does not turn on ownership of the donor names. Rather Klayman agreed to "not retain or have access to any Judicial Watch donor or client lists or donor or client data." J.A. 2574. Klayman has thus failed to establish that the district court entered judgment on

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[4] The contract between ATA and Judicial Watch indicated that Judicial Watch owned the donor names. It stated that lain names, addresses and related information of contributors . . . developed under this Agreement . . . shall belong exclusively to the Client," meaning Judicial Watch. J.A. 2734; J.A. 2736 ("All donors, non-donors and related information . . . shall be the sole and exclusive property of Client.").

a jury verdict that was "so one-sided that reasonable men and women could not disagree." *Scott*, 101 F.3d at 753.

* * *

Klayman's multitude of asserted errors fail. Judge Kollar-Kotelly presided over this litigation commendably, without any error that Klayman has identified. For the foregoing reasons, we affirm the district court in full. The district court did not err when it sanctioned Klayman, granted partial summary judgment, admitted evidence, instructed the jury, or entered judgment on the jury's verdict.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, Plaintiff/Counterdefendant, v. JUDICIAL WATCH, INC., *et al.*, Defendants/Counterplaintiffs.	Civil Action No. 06-00670 Judge Colleen Kollar-Kotelly

JURY VERDICT FORM

(Filed Mar. 14, 2018)

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

Larry Klayman v. Judicial Watch

Plaintiff Larry Klayman:

1. Has Plaintiff Larry Klayman proved by a preponderance of the evidence his claim that Defendant Judicial Watch, Inc. breached the Confidential Severance Agreement by failing to make a good faith effort to remove him as the guarantor of a lease for Judicial Watch, Inc.'s headquarters? (See Claim No. 1 on page 27 of the Jury Instructions.)

___ YES _X_ NO

a. If yes, designate the type of breach:

___ Material ___ Simple

a. If yes, what, if any, nominal damages do you award to Plaintiff Larry Klayman?

Answer: _____

2. Has Plaintiff Larry Klayman proved by a preponderance of the evidence his claim that Defendant Judicial Watch, Inc. breached the Confidential Severance Agreement by failing to pay health insurance for his children? (See Claim No. 2 on page 27.)

___ YES _X_ NO

a. If yes, what, if any, nominal damages do you award to Plaintiff Larry Klayman?

Answer: _____

3. Has Plaintiff Larry Klayman proved by a preponderance of the evidence his claim that Judicial Watch, Inc. breached the Confidential Severance Agreement by filing a motion to strike Plaintiff's appearance in a Florida litigation involving Sandra Cobas after Plaintiff left Judicial Watch, Inc.?(See Claim No. 3 on page 27.)

___ YES _X_ NO

a. If yes, designate the type of breach:

___ Material ___ Simple

b. If yes, what, if any, nominal damages do you award to Plaintiff Larry Klayman?

Answer: _____

4. Has Plaintiff Larry Klayman proved by a preponderance of the evidence his claim that Judicial Watch, Inc. breached the Confidential Severance Agreement by failing to provide Plaintiff with access to documents regarding a client Peter Paul? (See Claim No. 4 on page 27.)

___ YES _X_ NO

a. If yes, designate the type of breach:

___ Material ___ Simple

b. If yes, what, if any, nominal damages do you award to Plaintiff Larry Klayman?

Answer: _____

5. Has Plaintiff Larry Klayman proved by a preponderance of the evidence his claim that Judicial Watch breached the Confidential Severance Agreement by disparaging him and misrepresenting the reasons for his departure from Judicial Watch, Inc.? (See Claim No. 5 on page 27.)

___ YES _X_ NO

a. If yes, designate the type of breach:

___ Material ___ Simple

b. If yes, what, if any, nominal damages do you award to Plaintiff Larry Klayman?

Answer: _____

Judicial Watch and Thomas Fitton v. Larry Klayman

Counterplaintiff Judicial Watch, Inc.:

1. Has Counterplaintiff Judicial Watch proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman breached the Confidential Severance Agreement by failing to repay a debt owed by Klayman & Associates? (See Counterclaim No. 1 on page 28.)

_X_ YES ___ NO

a. If yes, designate the type of breach:

___ Material _X_ Simple

b. If yes, what, if any, damages do you award to Counterplaintiff Judicial Watch, Inc.?

Answer: $200,000.00

2. Has Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman breached his obligation in the Confidential Severance Agreement to pay costs and expense arising from his failure to make prompt payment to Judicial Watch in accordance with paragraphs 10 and 11 of the Confidential Severance Agreement? (See Counterclaim No. 2 on page 28.)

_X_ YES ___ NO

a. If yes, designate the type of breach:

___ Material _X_ Simple

b. If yes, what, if any, damages do you award to Counterplaintiff Judicial Watch, Inc.?

Answer: $25,000.00

c. If you awarded damages, do you find that Counterplaintiff Judicial Watch, Inc. is entitled to prejudgment interest of 6%?

___ YES X NO

3. Has Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman infringed Judicial Watch, Inc.'s registered trademarks: (1) JUDICIAL WATCH and/or (2)"BECAUSE NO ONE IS ABOVE THE LAW" in violation of the Lanham Act? (See Counterclaim No. 3 on page 28.)

X YES ___ NO

a. If yes, please designate which trademarks (one or both) were infringed.

Both

b. What, if any, compensatory damages do you award to Counterplaintiff Judicial Watch, Inc.?

Answer: $750,000.00

4. Has Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman engaged in unfair competition by direct mail, email and advertisements including the website supporting the Saving Judicial Watch effort in violation of the Lanham Act by a false

and/or misleading affiliation, connection or association between Saving Judicial Watch and Judicial Watch? (See Counterclaim No. 4 on page 29.)

_X_ YES ___ NO

5. Has Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman engaged in unfair competition by direct mail, email and advertisements including the website supporting the Saving Judicial Watch effort in violation of the Lanham Act by using false and/or misleading statements? (See Counterclaim No. 5 on page 29.)

_X_ YES ___ NO

a. If yes to either or both of questions no. 4 and 5, what, if any, compensatory damages do you award to Counterplaintiff Judicial Watch, Inc.?

Answer: $1,000,000.00

6. Has Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman breached the Confidential Severance Agreement by publishing statements that were disparaging to Judicial Watch, Inc.? (See Counterclaim No. 6 on page 29.)

_X_ YES ___ NO

a. If yes, designate the type of breach:

___ Material _X_ Simple

b. If yes, what, if any, compensatory damages do you award to Counterplaintiff Judicial Watch, Inc.?

Answer: $250,000.00

7. Has Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman breached the Confidential Severance Agreement by using information regarding Judicial Watch, Inc.'s donor or client lists or donor or client data? (See Counterclaim No. 8 on page 29.)

X YES ___ NO

a. If yes, designate the type of breach:

___ Material X Simple

b. If yes, what, if any, compensatory damages do you award to Counterplaintiff Judicial Watch, Inc.? Answer:

Answer: $75,000.00

Counterplaintiff Thomas Fitton:

8. Has Counterplaintiff Thomas Fitton proved by a preponderance of the evidence his claim that Counterplaintiff Larry Klayman breached the Confidential Severance Agreement by publishing statements that were disparaging to Mr. Fitton? (See Counterclaim No. 7 on page 29.)

X YES ___ NO

a. If yes, designate the type of breach:

___ Material _X_ Simple

b. If yes, what, if any, compensatory damages do you award to Counterplaintiff Thomas Fitton?

Answer: $500,000.00

3/14/18
DATE

JUROR FOREPERSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, Counterdefendant, v. JUDICIAL, WATCH, INC., *et al.*, Counterplaintiffs.	Civil Action No. 06-670 (CKK)

JUDGMENT ON THE VERDICT FOR COUNTERPLAINTIFF JUDICIAL WATCH, INC.
(March 15, 2018)

This cause having been tried by the Court and a Jury, before the Honorable Colleen Kollar-Kotelly, Judge presiding, and the issues having been duly tried and the Jury having rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that Counterplaintiff Judicial Watch, Inc. recover as a judgment $2,300,000,00 from Counterdefendant Larry Klayman and that Counterplaintiff Judicial Watch, Inc. have and recover costs from Counterdefendant Larry Klayman.

SO ORDERED.

Dated: March 15, 2018

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, Counterdefendant, v. JUDICIAL, WATCH, INC., *et al.*, Counterplaintiffs.	Civil Action No. 06-670 (CKK)

JUDGMENT ON THE VERDICT FOR COUNTERPLAINTIFF THOMAS J. FITTON
(March 15, 2018)

This cause having been tried by the Court and a Jury, before the Honorable Colleen Kollar-Kotelly, Judge presiding, and the issues having been duly tried and the Jury having rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that Counterplaintiff Thomas J. Fitton recover as a judgment $500,000.00 from Counterdefendant Larry Klayman and that Counterplaintiff Thomas J. Fitton have and recover costs from Counterdefendant Larry Klayman.

SO ORDERED.

Dated: March 15, 2018

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

CASE NO. 19-7105

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LARRY KLAYMAN

Plaintiffs-Appellants,

v.

JUDICIAL WATCH, INC., THOMAS J. FITTON, PAUL ORFANEDES, AND CHRISTOPHER FARRELL

Defendants-Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case Number 1:06-cv-00670-CKK

PLAINTIFF-APPELLANT'S 15-PAGE PETITION FOR REHEARING EN BANC

(Filed Aug. 30, 2021)

Larry Klayman
7050 W. Palmetto Park Rd
Boca Raton, FL, 33433
Tel: 561-558-5336
Email: leklayman@gmail.com

Plaintiff Appellant Pro Se

FED. R. APP. P.35 STATEMENT

Under Federal Rule of Appellate Procedure 35(a), there are two primary bases for en banc rehearing: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or (2) the proceeding involves a question of exceptional importance. Both of these bases are strongly at issue here.

First, the three-judge panel (the "Panel") concedes a split of opinion amongst the lower courts in this Circuit, which must be resolved. Panel Op. at 26.

Second, this proceeding involves questions of exceptional importance, as it involves a jury verdict in the sum of $2.8 million dollars that will surely bankrupt me. The path to this jury verdict has been strewn with numerous highly prejudicial errors, which were not given any weight by the Panel, and which not only sidestepped many of my legal arguments, but then also concurred with others before straining to hold that my legal reasoning was inapplicable to the facts at bar.

The Panel's Opinion, if left uncorrected, will create bad precedent that will negatively affect future litigants in this Circuit. For instance, the Panel's Opinion upholds the District Court's complete disregard of the parol evidence rule, which is well-settled law. The Panel's Opinion also upholds the District Court's failure to conduct the balancing test as required under Federal Rule of Evidence 403. This precent cannot be allowed to stand. The result is a highly flawed Opinion that must be corrected not just because it is

fundamentally flawed and harmful precedent but also in the interests of fundamental fairness and justice.

Lastly, I respectfully incorporate my prior initial brief and reply brief by reference, given the page limitations for this type of Petition. I respectfully request that these briefs be thoroughly reviewed, given the voluminous record in this now 16-year-old case, and the space limitations herein.

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[1] **INTRODUCTION AND BACKGROUND**

We are a nation of laws and not men, and we are going to exercise our right to follow duly enacted federal and state law and carry out our solemn duty to protect our citizens whether you (we) like it or not. Facts are stubborn things, and whatever may be our wishes, and

> **inclinations, or the dictates of our passion, they cannot alter the state of the facts and evidence. . . . . A government of laws and not men.** - *John Adams*
>
> **Justice is the fundamental law of society.** - *Thomas Jefferson*

I have decided to pen this Petition for Rehearing En Banc in the first person, which I believe our Founding Fathers John Adams and Thomas Jefferson would have done under similar circumstances. While I dare not equate myself to Mr. Adams and Mr. Jefferson, these great Founding Fathers have been throughout my career, my loadstars.

In this vein, I founded Judicial Watch because I believed in our legal system and wanted it to be beyond reproach. [Trial Transcript 349:6-7;0001-0002]. I believed and continue to believe that federal judges can be our most important public servants. They were included in our Constitution at Article III to be the citizenry's protectors against tyranny. The Framers intended federal judges to carry out their oath of office as a nation of laws and not men, putting aside their likes and dislikes of those who appear before them, as well as other personal prejudices, which Jefferson recognized is the norm of mankind. It is in furtherance of this noble principle, and with the hope that any negative feelings about me can be put [2] aside in the interests of not just the law but justice, that I submit this Petition, with the hope that the Members of this Honorable Court can rule upon the facts and the law,

without regard to my having been very critical of one of your own, a jurist who did not, in my sincere estimation, preside "over this litigation commendably, without any error Klayman has identified." [Panel Op. at 29].

I wish the Honorable Colleen Kollar-Kotelly ("Judge Kotelly") no ill will. But the fact that this case is now over 16 years old, in and of itself underscores that this gratuitous characterization is not germane to the serious and important issues now before all members of this Honorable Court. [2460]. Personalities and strong controversial stands must and should be put aside in the interest of justice, as again we were founded to be a nation of laws and not men. At stake is a $2,800,000 judgment, [2336-2243] which, if it stands, most assuredly will financially ruin my family and me. But the primary issue before you is not the amount of the judgment, but rather that it was the result of allowing extreme prejudice to be injected before the jury that I had sexually harassed a married with children office manager and beat my ex-wife, calling her foul names in the process [2937,2850,2849,2880] – which I vehemently denied not just at trial but during a divorce/custody case over my former spouse and our children. Importantly, even my ex-wife had retracted her allegations. [2112-2124]. This prejudice would have resulted whether or not Judge Kotelly reasonably exercised discretion to bar me from presenting any [3] witnesses or any evidence on my own.[1] Thus, I will not

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[1] [0698-0721], [0854-0865], [0862-0893], [0894-0895], [0904-0913], [0914-0921], [0922-0926], [0961-0972], [1713-1721], [1722],

dwell on this issue in this Petition, although it was in my view overly broad, since it is irrelevant in this important and case-determinative context.

The Panel Opinion sidesteps incontrovertible facts and well-established black letter law which would require, at a minimum, a new trial. That this case is now 16 years old, and that a retrial might be costly and time consuming, should not factor into the Court doing the right thing in the interests of justice. In life and of course in the law, as we all know, things are not always easy.

ARGUMENT

A review of the Panel's Opinion would suggest that a thorough review of the facts and law was not undertaken, but that there was regrettably an outcome determinative mindset had crept into their analysis as they perceived that I had attacked their fellow jurist by moving to disqualify her on a few occasions and had been critical with regard to other cases for which I had appeared in her courtroom.[2]

[1723], [1724-1745], [1996-1997], [1998-2025], [2026-2047], [2048-2050], [2142-2152], [2318-2319], [2361-2366].

[2] *Freedom Watch v. Bureau of Land Management et al*, 16-cv-2320 (D.D.C.). Minute Order of June 13, 2017.

I. THE DISTRICT COURT ERRED BY LETTING IN BEORE THE JURY HIGHLY INFLAMMATORY AND COMPLETELY IRRELEVANT TESTIMONY, WHICH THE PANEL DID NOT FULLY CONSIDER.

[4] First, the Severance Agreement ("SA"), signed and agreed to by both Judicial Watch president Thomas J. Fitton and a principal director and corporate secretary Paul J. Orfanedes, on behalf of Judicial Watch admits that I left Judicial Watch to pursue other endeavors ***voluntarily***; simply put, my departure was **not a forced resignation.** [2587]. This is indisputable, as it was written into a binding contract signed by all parties. There is no possible dispute that I left Judicial Watch to run for the U.S. Senate in Florida, which comports with my pursuing other endeavors. [2594]. That I did not choose to make specific reference to my running for the U.S. Senate in the SA is simply because I had come distrust Fitton as an unprincipled aspiring competitor, and thus did not want to reveal my specific plans. [2587-2599]. Here is what the Severance Agreement clearly and unequivocally provides:

> **Klayman's employment shall terminate effective September 19, 2003 (the "Separation Date"), and it shall be treated for all purposes as a voluntary resignation**." [2587].

The "parol evidence rule requires that when two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract,

evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Murray v. Lichtman*, 339 F.2d 749, 751 (D.C. Cir. 1964). Here, all parties involved entered into a binding contract [5] which states that I voluntarily left Judicial Watch. [2595]. There can be no extrinsic evidence allowed otherwise. Thus, under Fed. R. Evid. 401 and 402, any additional "evidence" in this regard is barred and inadmissible. However, these rules were ignored and the jury heard highly inflammatory, albeit false, testimony that contradicted the binding SA. This was a clear error, as the Panel simply sidestepped this. Furthermore, consistent with this voluntary resignation, the SA praises me:

> **"Larry conceived, founded and helped build Judicial Watch into the organization it is today, as we will miss his day to day involvement. Judicial Watch now has a very strong presence and has become the leading non-partisan, public interest watchdog seeking to promote and ensure ethics in government, and Larry leaves us well positioned to continue our important work."** Para. 18, p. 9 [2595].

Importantly, if I had (1) sexually harassed the office manager who was neither deposed nor called as witness by Judicial Watch during this 16 year saga, and (2) been a wife beater, would Fitton and Orfanedes, who manufactured testimony at the trial, [2937,2850,2849,2880], have agreed in my SA to issue this glowing statement? These two dishonest

purveyors of false facts would not even admit that I had founded Judicial Watch, which I founded to be an ethics organization. [Trial Transcript 1023:23-24]. In fact, Fitton was forced to admit under oath at deposition in a related case that I was not ousted at Judicial Watch over sexual harassment, showing the falsity of this prejudicial testimony. [2451-2452]. Exhibit 1.

[6] Thus, one can only possibly conclude, notwithstanding my voluntary departure from Judicial Watch and the praise which Appellees Fitton and Orfanedes heaped upon me upon leaving, the parol evidence rule should have barred the highly inflammatory and prejudicial testimony from being put before the jury. This was one of the clearest errors by the District Court and the Panel.

Even more, assuming *arguendo*, there was no binding SA that unequivocally stated that I had left Judicial Watch voluntarily, the highly inflammatory and false testimony allowed by the District Court still had no place in front of the jury, as it fell far short under the balancing test of Fed. R. Evid. 403. Evidence that may even be deemed relevant could still be inadmissible if "its probative value is substantially outweighed by a danger of . . . unfair prejudice. . . ." *Id. See also United States v. Ring*, 706 F.3d 460, 472 (D.C. Cir.). Here, the District Court allowed in highly inflammatory false testimony that I had beaten my ex-wife and had engaged in sexual harassment:

> **Moreover, we believe the public stigma attached to a husband who beats his wife**

> **is significant. The inflammatory nature of such a characterization is arguably more substantial than the purchase of marijuana discussed in *State v. Hockings, supra.* It is probable that portrayal of defendant as a "wife-beater" so blackened his character in the mind of the jury, that it was natural to infer that he was readily capable of rape, sodomy and sexual abuse. In short, we find that the slight probative value of the evidence was outweighed by its inflammatory and prejudicial impact.** *State v. Zamudio*, 57 Or. App. 545, 551, 645 P.2d 593, 596 (1982).
>
> **Some types of extrinsic acts are particularly "likely to incite a jury to** [7] **an irrational decision," few would doubt that violent spousal abuse falls into this category.** *United States v. Hands*, 184 F.3d 1322, 1328 (11th Cir. 1999); *see also State v. Miranda*, 407 P.3d 1033, 1042-43.

These cases all stand for the same undeniable, irrefutable, rockbed legal principle—testimony that an individual engaged in domestic violence, that is beat his wife, is highly prejudicial and inflammatory, and its admission—even in criminal cases where violence is at issue—is still in error. Here, this type of testimony was allowed in a civil case, and where it was entirely irrelevant.

In *Old Chief v. United States*, 519 U.S. 172, 174 (1997) the Supreme Court held that a District Court abuses its discretion when "it spurns such an offer [to

concede the fact of a prior conviction] and admits the full record of a prior judgment. . . ." The facts here are even more egregious. Here, the false "evidence" was not even necessary for Judicial Watch to prove its claims. [2937,2850,2849,2880]. Instead, they were not only false, but entirely irrelevant. Thus, where *Old Chief* was an abuse of discretion, the facts here are even much more compelling in my favor.

Lastly, it is telling that in responding initially to the complaint in this case, Appellees did not even raise sexual harassment and wife beating. [0112,0140]. Indeed, it was only after they lost on several issues over their motion to dismiss, that as a "Hail Mary" they falsely injected this highly prejudicial red herring. [8] Accordingly, based on the foregoing, the only remedy for this error is for the District Court hold a new trial.

II. THE PANEL MADE NUMEROUS ERRORS WITH REGARD TO THE TRADEMARK CLAIMS AT ISSUE.

While there are many other errors in the Opinion, including the false suggestion that I admitted to an "inappropriate relationship," [Panel Op. at 3], the second most clear error concerns trademark law. Under Fed. R. Civ. P 50(c), there is authority for a judgment to be entered regardless of any jury verdict in situations where the facts are clear cut. A judgment notwithstanding the verdict is required there is but one reasonable conclusion as to the verdict. *Vander Zee v. Karabatsos*, 589 F.2d 723, 728 (D.C. Cir. 1978).

A. THE PANEL ERRED BY FAILING TO REVERSE THE JURY VERDICT WITH REGARD TO LIKELIHOOD OF CONFUSION WHICH IS NECESSARY FOR TRADEMARK INFRINGEMENT.

Of crucial importance is the fact that the Panel concedes that there is, at a minimum, a split regarding likelihood of confusion and trademark infringement:

> **Klayman also argues that the district court failed to properly instruct the jury on an element of trademark infringement. Judicial Watch asserted that Klayman infringed on its trademarks "Judicial Watch" and "Because No One is Above the Law." To establish trademark infringement, Judicial Watch needed to prove, among other elements, that Klayman's use of its trademarks created a "likelihood of confusion" among consumers. *See Am. Soc'y for Testing and Materials v. Public.Resource.Org, Inc.*, 896 F. 3d 437, 456 (D.C. 2018). Klayman argues that the court erred by failing to instruct the jury that likelihood of confusion requires confusion by an "appreciable number" of consumers. But his only support for this proposition comes from two** [9] **unpublished decisions of our district court, which are of course not precedential. *See In re Exec. Office of President*, 215 F.3rd 20, 24 (D.C. Cir. 2000).**
>
> **This circuit "has yet to opine on the precise factors courts should consider when**

> **assessing likelihood of confusion. . . .** [Panel Op. at 26].

The Panel thus admits (1) this Circuit "has yet to opine on the precise factors . . . when assessing likelihood of confusion, and (2) there are courts in this Circuit who have held that likelihood of confusion requires an "appreciable number of consumers. Furthermore, authority from other circuits also requires an "appreciable number of consumers" to show likelihood of confusion, and thus trademark infringement. *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980). The Panel committed a clear error by failing to overturn the jury verdict pursuant to *Vander Zee* 589 F.2d at 728 and *Hearst*, as well as a long line of other cases since "there can be but one reasonable conclusion as to the verdict." Reversal here would alleviate most if not all of the damages against me.

1. The District Court Allowed Unauthenticated Hearsay into Evidence to Prove Likelihood of Confusion.

First, however, perhaps the most prominent clear error was the fact that the District Court allowed into evidence letters allegedly written by donors proffered by Judicial Watch to show alleged confusion without proper authentication. [2701-2724]. Courts have routinely held that this type of hearsay "evidence" is inadmissible to show likelihood of confusion. In *Duluth News-Tribune v. Mesabi* [10] *Publ'g Co.*, 84 F.3d 1093 (8th Cir. 1996), the Eighth Circuit excluded alleged evidence of actual confusion in the form of misdirected

phone calls and mail as "hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender regarding the reason for the 'confusion." *Id.* at 1098. The facts here are even more egregious, as Judicial Watch had over a decade to authenticate the letters, which they strategically chose not to do. Judicial Watch chose also to not present testimony from these alleged "donors," so therefore I had no opportunity to cross-examine or inquire as to the reason for the alleged "confusion," identical to *Duluth.*

This is a common issue in the trademark context:

> **Evidence of actual confusion is entitled to weight only if properly proved. . . . The most common evidentiary problem with anecdotal confusion evidence involves testimony or documentary evidence presented in court by a witness about the confusion of a third party who is absent from court.** Richard L. Kirkpatrick, *Likelihood of Confusion in Trademark Law §7:6(2nd).*

This is why authentication is so important, and no mere formality. "Authentication and identification are specialized aspects of relevancy that are necessary conditions precedent to admissibility." *United States v. Blackwell*, 694 F.2d 1325,1330 (D.C. Cir. 1982). It was a clear error by the District Court to allow this unauthenticated hearsay into evidence and put forth before the jury. Likely recognizing this deficiency, the Court strained to disingenuously give a confusing and

improper instruction that the letters could not be used to show the truth of the [11] matter asserted, but only to show potential or actual damage to Judicial Watch. [2888]. This was done over my objection. [2877]. The Panel errs by failing to address and rectify this.

2. There Was No Actual Confusion

Even if the letters proffered by Judicial Watch were properly authenticated, they were patently insufficient to show actual confusion. The record of this case shows that there were millions of letters sent by both Appellees and myself, and among these millions, there were only a few unauthenticated letters proffered by Judicial Watch to show actual confusion. [Trial Transcript 1861:13-14].

It is well-settled that isolated or occasional instances of actual confusion are discounted as being "insufficient to support an inference that a significant number of prospective purchasers are likely to be confused." *See* Restatement [Third] of Unfair Competition § 23 cmt. c at 250 (1995); *Likelihood of Confusion in Trademark Law* §1:8.2 (2nd). ("The likelihood of confusion must affect relevant persons in numbers which are 'appreciable' under the circumstances.") Many courts in this Circuit have followed this standard, as recognized by the Panel. "While AAAS must show that an "appreciable" number of reasonable buyers is likely to be confused, this does not necessarily mean a majority." *Hearst Corp.*, 498 F. Supp. at 258. Courts all over the country have followed this standard as well. *See*

Hansen Bev. Co. v. Nat'l Bev. Corp., 493 F.3d 1074, 1080 (9th Cir. [12] 2007); *Pillsbury Co. v. Milky Way Prods.*, 1981 U.S. Dist. LEXIS 17722, at *36-37 (N.D. Ga. Dec. 24, 1981); *Atec, Inc. v. Societe Nationale Industrielle Aerospatiale*, 798 F. Supp. 411 (S.D. Tex. 1992). Thus, even if these few letters proffered by Judicial Watch were properly authenticated, they would still be patently insufficient to show actual confusion, as they were just a "drop in the bucket" of the millions of letters sent. [Trial Transcript 1861:13-14].

It was therefore a clear error for the District Court to disregard the "appreciable number" standard and fail to give a jury instruction in this regard, and for the Panel to affirm this, especially where the Panel admits that this Circuit "has yet to opine on the precise factors . . . when assessing likelihood of confusion." The predictable result of the District Court's failure to give the proper jury instruction caused reversible error. In addition, regardless of the error to provide a proper instruction, the jury reached the clearly incorrect verdict as a matter of law. Pursuant to *Vander Zee*, this must be reversed, since "there can be but one reasonable conclusion as to the verdict"—that there was no trademark infringement because there was no "appreciable number" of consumers confused.

Even more, none of these unauthenticated, "drop in the bucket" letters even show confusion by Judicial Watch's donors. Indeed, the opposite is true, as they clearly understood that I was no longer affiliated with Judicial Watch:

> **Mr. Thomas Fitton, I wish to be removed from your office. I now support Larry Klayman. You are a liar + a cheat. [2702].**
>
> [13] **Take my name off your mailing list until Larry Klayman is brought back as president and founder. [2703].**

Indeed, of the 15 unauthenticated hearsay communications put forth by Appellees in an attempt to show "actual confusion," [2701-2724], only one, [2709], can be argued to show possible confusion, and even so, that exhibit is double hearsay, as it is an email from Judicial Watch's own Steven Anderson describing a phone call with Betty Munson. The only reason that Ms. Munson was allegedly "confused" was because she was legally blind and therefore "could not read [my] . . . letter," which made her think that I was still at Judicial Watch. [2709]. This is not indicative of actual confusion. The remainder of the communications simply expressed discontent how Fitton was running Judicial Watch, and have no bearing on the issue of "actual confusion." This strongly evidences the prejudicial effect of the inflammatory "evidence" that the District Court injected into the trial, as any jury acting solely on the evidence could not possibly have found <u>any</u> of actual confusion and thus trademark infringement. This caused the jury to simply get it wrong.

My conduct also fell under the doctrine of "nominative fair use" which applies when "the defendant uses the plaintiff's trademark to identify the plaintiff's own goods and makes it clear to consumers that the plaintiff, not the defendant, is the source of the

trademarked product or service." *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 456 (D.C. Cir. 2018). Here, [14] I was simply making commentary on the state of affairs at Judicial Watch, using the phrase "Saving Judicial Watch" and therefore never using Judicial Watch's trademark. [2606-2717]. As one example, one of my letters said, "Because Tom Fitton feared my eventual return to Judicial Watch. . . ." [2618]. How could I return to something that I was still affiliated with? This clearly shows that I never stated that I was still affiliated with Judicial Watch. The publications made it clear that I was no longer with Judicial Watch. [2606-2717].

III. THE DISTRICT COURT COMMITTED OTHER CLEAR ERRORS, WHICH THE PANEL FAILED TO CORRECT.

Given the space limit and the refusal of the Panel to grant my reasonable request for ten additional pages, I will simply list other errors that the Panel failed to correct, along with where in my initial brief a full discussion is presented:

1. The Panel failed to reverse the District Court's grant of partial summary judgment as to my Lanham Act Claims over misuse of my likeness and being by Judicial Watch, which damages against Appellees would have far exceeded any damage awarded against me. *Initial Brief ("Br.") at 34.*

2. The Panel failed to reverse the District Court's refusal to give a jury instruction on

fair comment, which was expressly provided for in the Severance Agreement. *Br. at 39.*

3. The Panel failed to reverse the District Court's grants of summary judgment regarding alleged expenses owed to Judicial Watch. *Br. at. 46.*

4. The Panel failed to set aside the jury verdict and judgment regard alleged access to Judicial Watch's donor list, which as shown through the testimony of Mark Fitzgibbons, said list belonged to American Target Advertising, not Judicial Watch. *Br. at 78.*

5. The Panel failed to reverse the District Court regarding my claim for rescission of the Severance Agreement, which I had an independent basis for due to a judgment against Judicial Watch for having defamed me. *Klayman v. Judicial Watch*, 13-cv-20610 (S.D. Fl.). *Br. at 41.*

[15] 6. The Panel failed to reverse the District Court's refusal to give any jury instruction informing the jury that I had been sanctioned to show why I could not present evidence or witnesses, leading the jury to reach the highly prejudicial and false conclusion that I simply had no evidence or witnesses. *Br. at 63.*

CONCLUSION

In short, the Panel's Opinion was regrettably not a thorough and accurate review of the facts and the law, and the full Court, as a matter of fundamental

fairness and due process, must respectfully review this case En Banc to prevent a manifest injustice. As a result, prior precedent in this Circuit and other circuits was cast aside and a flawed Panel Opinion resulted, which creates bad precedent that will negatively also affect future litigants. And, again, in the words of John Adams, we are a nation of laws and not men, whatever my admirers and detractors on the federal bench may think. In this regard, the oath of office for federal judges provides:

> I do solemnly swear that I will administer justice **without regard to persons**. . . . 28 U.S.C. § 453. (emphasis added).

I therefore respectfully request En Banc review along with oral argument.

Dated: August 30, 2021 Respectfully submitted,

/s/ Larry Klayman
Larry Klayman, Esq.
7050 W. Palmetto Park Rd
Boca Raton, FL, 33433
Tel: 561-558-5336
Email: leklayman@gmail.com

[16] *Plaintiff-Appellant*
Pro Se

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Circuit Rule 35 because this document contains 3,899 words and 15 pages

2. This document complies with typeface requirements because this document has been prepared in a proportionally spaced typeface using Microsoft Word 14.7.7 in 14-point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the Court's ECF system to all counsel of record or parties listed below on August 30, 2021.

/s/ Larry Klayman
Larry Klayman

EXHIBIT 1

Transcript of Thomas J. Fitton

Date: June 6, 2019
Case: Klayman -v- Fitton

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

LARRY KLAYMAN, Plaintiff, vs. THOMAS FITTON, Defendant.	* * * * * * *	Civil Action No. 1:19-cv-20544

Videotaped Deposition of THOMAS J. FITTON
Washington, D.C.
Thursday, June 6, 2019
3:06 p.m.

Job No.: 247643
Pages 1 – 92
Reported by: Vicki L. Forman

[2] Videotaped Deposition of THOMAS J. FITTON, held at the offices of:

Planet Depos
Suite 950
1100 Connecticut Avenue, Northwest
Washington, D.C. 20036
(888) 433-3767

Pursuant to agreement, before Vicki L. Forman, Court Reporter and Notary Public in and for the District of Columbia.

[3] APPEARANCES

ON BEHALF OF THE PLAINTIFF PRO SE:

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(310) 595-8088

ON BEHALF OF THE DEFENDANT:

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[4] ON BEHALF OF THE DEFENDANT:

KATIE M. MERWIN, ESQUIRE
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(561) 383-9206
(Present via Telephone.)

ALSO PRESENT: Joannis Arsenis, Videographer

* * *

[41] MR. KLAYMAN: Certify it.

Q So as President of Judicial Watch you would have known for sure that this Complaint had been filed, correct?

MR. DRISCOLL: Objection to form.

A Well, the press release indicates it was filed and! recall we sued about the raid, yes.

Q And you gave interviews about suing in the raid, correct, in the media?

A I don't remember.

Q Turn to the last page, page five. The Complaint is signed by James F Peterson, correct?

A His name is on the last page of the Complaint as a signatory.

Q He is an attorney at Judicial Watch, correct?

A Yes.

Q Now, Mr. Peterson had contact with Roger Stone over the issue of the raid on his house, did he not?

A Not that I'm aware of.

MR. DRISCOLL: Objection to form.

Q You're saying you don't know one way or the other?

[42] **A I don't believe he has. I said I would know if he had.**

Q How would you know if you couldn't even identify the Complaint?

A Another abusive harassing question.

MR. DRISCOLL: It's a foundation question. You can go ahead and answer it.

How would you know if he had contacted Roger Stone?

MR. KLAYMAN: Or if Roger Stone contacted him.

A Is it privileged?

MR. DRISCOLL: That's an interesting question. The fact of the communication would not be. The contents of it would be.

A How I would know is my question of whether it's privileged or not.

MR. DRISCOLL: No, I'm going to allow you to answer that one.

A How I would know about what my attorneys are doing or Judicial Watch's attorneys are doing?

MR. DRISCOLL: Yeah, and you're not disclosing a communication. You're just describing a process.

A Typically that type of communication would [43] **have been disclosed to me.**

Q But you don't know for sure that Mr. Peterson didn't have contact with Roger Stone?

MR. DRISCOLL: Objection to form.

A I'm confident there was no such contact.

Q You have told Mr. Peterson in the past, have you not, that I was ousted from Judicial Watch because of a sexual harassment complaint?

MR. DRISCOLL: Objection to form. Mr. Peterson is an in-house counsel and I'm going to direct the witness not to answer. That's an attorney-client privilege.

MR. KLAYMAN: Certify it.

Q So you don't know whether or not Mr. Peterson repeating what you had told him then republished that to Roger Stone?

MR. DRISCOLL: The communications between an in-house counsel and the President of the corporation relating to legal advice and assistance are privileged. He can't answer the question about the contents of the communication or derivative questions that would disclose the content of the communication.

MR. KLAYMAN: That's the crux of the lawsuit. That does not apply in this context.

[44] MR. DRISCOLL: That doesn't waive the privilege.

Q Are you saying that you never told anyone at Judicial Watch that I was ousted because of a sexual harassment complaint?

MR. DRISCOLL: Anyone other than the attorneys?

MR. KLAYMAN: Anyone.

MR. DRISCOLL: No, I can't allow him to) answer that question.

Q Are you saying that you never told anyone a that I was – regardless – let's take attorneys out of it.

Have you ever – you have told other people in addition to – strike that.

You have told other people excluding attorneys that I was ousted from Judicial Watch because of a sexual harassment complaint?

A You have to ask the question again.

MR. KLAYMAN: Read it back, please.

A Please.

MR. KLAYMAN: Let me rephrase it.

Q I'm taking attorneys out of this question. Pm saying you have told others who aren't attorneys over the course of the last 16 years [45] since I left Judicial

Watch that I was ousted because of a sexual harassment complaint?

A No, because that's not true. You weren't ousted as a result of a sexual harassment complaint.

Q After I sued you in this particular case has anyone – have you or anyone at Judicial Watch or your counsel tried to contact Roger Stone?

MR. DRISCOLL: Objection to form. The question invades the attorney-client privilege and the attorney work product. I direct the witness not to answer.

MR. KLAYMAN: Certify it.

Madam court reporter, have a page in the front where you have all the certified questions and where you can find them to make it easy for the Magistrate Judge. Thank you.

Q Now, I turn your attention back to your affidavit which is –

A Exhibit 3.

Q Exhibit 3. Turn your attention to paragraph sewn where it says "I have no recollection of ever having any communication with Roger Stone," do you see that?

A Uh-huh.

[46] Q Now, it doesn't say you didn't have a communication with Roger Stone. It just says that you have no recollection of having one, correct?

A That's correct.

Q Do you remember during the Clinton years that witnesses would always come in and say we have no specific recollection and we would contest that?

MR. DRISCOLL: Just ask your question,) Larry.

Q So you can't say categorically that you haven't had communications with Roger Stone? You're just saying you don't have a recollection of ever having it, correct?

A I think the statement speaks for itself.

Q You could have said I have never communicated with Roger Stone, correct, if that's what you were trying to say, that you never had any contact?

A The statement speaks for itself.

Q Then you state in the next sentence "I have never published, uttered or implied to Roger Stone that Klayman was the subject of a sexual harassment complaint during his employment by Judicial Watch or that his resignation from [47] Judicial Watch was motivated by an employee's sexual harassment complaint," do you see that?

A Yeah.

Q Again, that statement does not say that you never spoke with Roger Stone, just that you've never published that particular issue, correct?

A It says what it says.

Q And then it states "Any statement by Roger Stone regarding Klayman was made without my knowledge or information and therefore I did not intend and could not intend to harm Klayman or his reputation," do you see that?

A Yes.

Q Now, you're not saying in that statement that you didn't communicate with Roger Stone. You're saying that you didn't know that he was going to republish anything about me, correct?

MR. DRISCOLL: Objection to form. The document speaks for itself.

A The document speaks for itself.

Q If you don't want to explain it that's fine.

A You're mischaracterizing it.

Q I do agree. It speaks for itself and there's a lot of loopholes in it.

[48] MR. DRISCOLL: Why don't you just ask him the question. Did he ever –

MR. KLAYMAN: I will ask the questions that I want to ask, Mr. –

MR. DRISCOLL: All right.

Q I want to turn to paragraph eight.

Do you see the statements in the last sentence of paragraph eight where it says "To support his claim Judicial Watch submitted evidence demonstrating that Klayman was forced to resign due to inappropriate conduct" and you list three examples of your alleged inappropriate conduct, do you see that?

A Yeah.

Q Now, you have in the last 16 years told many people, and Pm excluding any attorneys, exactly what is written in this affidavit and which you swore to under oath?

MR. DRISCOLL: I'm going to object to the question and direct the witness not to answer that question to the extent it's related to the other lawsuit that is currently pending in the U.S. District Court for the District of Columbia, Case Number 06-cv-670.

MR. KLAYMAN: That's not a basis to tell

* * *

Three Easy Steps

Towards Securing Your Future, Preserving Ethics, and Battling Corruption

Acct. Number CGA0507

Dear Tom,

Please send me a personalized illustration of how a Charitable Gift Annuity with Judicial Watch can benefit me.

1 The proposal should be prepared for: ❑ Me; my birth date is: ____/____/____

❑ Please include a second beneficiary:

_____ Name of second beneficiary

____/____/____ Birth Date of second beneficiary

2 Please use the amount checked below for my illustration:

❑ $50,000 ❑ $10,000

❑ $25,000 ❑ Other $ _____

3 I would like to receive payments: ❑ quarterly ❑ semiannually ❑ annually

Mr. Thomas Fitton, I wish to be removed from your office. I now support Larry Klayman - You are a liar + a cheat -

Mrs. Carmela Santarsiero
8620 NW 13th St Lot 151
Gainesville, FL 32653-7930

Phone

00233951D CGA0727

Email

If you have any questions, please contact Steve Andersen in the Development Office at 1-888-593-8442.

This information is strictly confidential.
Please return in the enclosed envelope or fax to (202) 646-0190.

Judicial Watch • Attn: Development Department
501 School Street SW • Suite 500 • Washington, DC 20024

email: development@judicialwatch.org
www.judicialwatch.org

If your age is	You could earn*
55	5.5%
60	5.7%
65	6.0%
70	6.5%
75	7.1%
80	8.0%
85	9.5%
90+	11.8%

Three Easy Steps

Towards Securing Your Future, Preserving Ethics, and Battling Corruption

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_____ Name of second beneficiary

____/____/____ Birth Date of second beneficiary

2 Please use the amount checked below for my illustration:

❑ $50,000 ❑ $10,000

❑ $25,000 ❑ Other $ _____

3 I would like to receive payments: ❑ quarterly ❑ semiannually ❑ annually

TAKE MY NAME OFF YOUR MAILING LIST UNTIL LARRY KLAYMAN IS BROUGHT BACK AS PRESIDENT AND FOUNDER.

Mr. Donald Ostrum
3427 Greenbrier St
Saint Paul, MN 55127-5114

(____) _____ Phone

_____ Email

00031058O CGA0726

If you have any questions, please contact Steve Andersen in the Development Office at 1-888-593-8442.

This information is strictly confidential.
Please return in the enclosed envelope or fax to (202) 646-0190.

Judicial Watch • Attn: Development Department
501 School Street SW • Suite 500 • Washington, DC 20024

email: development@judicialwatch.org
www.judicialwatch.org

If your age is	You could earn
60	5%
65	6%
70	7%
75	8%
80	9%
85	9.5%
90+	11%

06/01/2007

Three Easy Steps

Towards Securing Your Future, Preserving Ethics, and Battling Corruption

Acct. Number CGA0507

~~Tom~~, running Judicial Watch !!!

Please send me a personalized illustration of how a Charitable Gift Annuity with Judicial Watch can benefit me.

1 The proposal should be prepared for: ❑ Me; my birth date is: ____/____/____

❑ Please include a second beneficiary:

_____ Name of second beneficiary

____/____/____ Birth Date of second beneficiary

2 Please use the amount checked below for my illustration:

❑ $50,000 ❑ $10,000

❑ $25,000 ❑ Other $ _____

DEFENDANTS' EXHIBIT 33 Case No. 1:06-cv-670-CKK

3 I would like to receive payments: ❑ quarterly ❑ semiannually ❑ annually

take me off your mailing list. As long as Sutton is President + wasting your money I don't want anything to do with Judicial Watch !!!!

Mr. Wendell Werner
29183 Spencer Creek Rd
Eugene, OR 97405-9424

Phone

00547481Z CGA0726

Email

If you have any questions, please contact Steve Andersen in the Development Office at 1-888-593-8442.

This information is strictly confidential.
Please return in the enclosed envelope or fax to (202) 646-0190.

Judicial Watch • Attn: Development Department
501 School Street SW • Suite 500 • Washington, DC 20024

email: development@judicialwatch.org
www.judicialwatch.org

If your age is:	You could earn:
55	5.5%
60	5.7%
65	6.0%
70	6.5%
75	7.0%
80	8.0%
85	9.5%
90+	11.3%

(1/1/2007)

Three Easy Steps

Towards Securing Your Future, Preserving Ethics, and Battling Corruption

Acct. Number CGA0507

$0.00 UNTIL Larry Klayman is back on the job.

Dear Tom,

Please send me a personalized illustration of how a Charitable Gift Annuity with Judicial Watch can benefit me.

1 The proposal should be prepared for: ☐ Me; my birth date is: ___/___/___

☐ Please include a second beneficiary:

_____ ___/___/___

Name of second beneficiary Birth Date of second beneficiary

2 Please use the amount checked below for my illustration:

☐ $50,000 ☐ $100,000

☐ $25,000 ☐ Other $ _____

3 I would like to receive payments: ☐ quarterly ☐ semi-annually ☐ annually

Mr. Alan Johnson
105 Park St
Rockport, ME 04856-5509

( ) _____
Phone

_____
Email

00148373R CGA0726

If you have any questions, please contact Steve Andersen in the Development Office at 1-888-593-8442.

This information is strictly confidential.
Please return in the enclosed envelope or fax to (202) 646-0190.

Judicial Watch • Attn: Development Department
501 School Street SW • Suite 500 • Washington, DC 20024

email: development@judicialwatch.org
www.judicialwatch.org

If your age is	You could earn a %
55	5.5%
60	5.7%
65	6.0%
70	6.5%
75	7.1%
80	8.0%
85	9.5%
90+	11.3%

Rates as of 6/1/2007

Acct. Number CGA0507

Three Easy Steps

Towards Securing Your Future, Preserving Ethics, and Battling Corruption

Dear Tom,

Please send me a personalized illustration of how a Charitable Gift Annuity with Judicial Watch can benefit me.

1 The proposal should be prepared for: ☐ Me; my birth date is: ____/____/____

☐ Please include a second beneficiary:

____________________ Name of second beneficiary

____/____/____ Birth Date of second beneficiary

2 Please use the amount checked below for my illustration:

☐ $50,000 ☐ $10,000

☐ $25,000 ☐ Other $ __________

3 I would like to receive payments: ☐ quarterly ☐ semiannually ☐ annually

Mrs. Karen Hurley
47 Live Oak Cir
Jupiter, FL 33469-2724

000620760 CGA0732

Phone

Email

If you have any questions, please contact Steve Andersen in the Development Office at 1-888-593-8442.

This information is strictly confidential.
Please return in the enclosed envelope or fax to (202) 646-0190.

Judicial Watch • Attn: Development Department
501 School Street SW • Suite 500 • Washington, DC 20024

email: development@judicialwatch.org
www.judicialwatch.org

If your age is	You could earn
5[illegible]	5.5%
60	5.7%
65	6.0%
70	6.5%
75	7.1%
80	8.0%
85	9.6%
90	11.3%

as of 5/1/2007

The jig is up, Fitton. You're a con man & a crook, & you'll never get a penny out of me & a lot of other informed Judicial Watch members. Give it up, & crawl back under the rock you came from. And thanks to you, Hillary might actually get the presidency. Or was that your goal all along? Scum of the earth, people like you. Just remember what goes around comes around.

Judicial Watch

Because no one is above the law!®

6/27/07 Please remove me from your mailing list. I'm not interested unless Larry Klayman returns - Alene Lindstrand

Thomas Fitton
President

June 13, 2007

Mrs. Alene Lindstrand
11929 E Ida Pl
Englewood, CO 80111-4124

Dear Mrs. Lindstrand,

Would you be interested in learning more about a financial instrument that provides you with a life-time of guaranteed income, and at the same time provides Judicial Watch critically needed long-term support?

As President of Judicial Watch, I am pleased to tell you that Judicial Watch is now able to offer you the opportunity to establish Charitable Gift Annuities. A Charitable Gift Annuity allows you to make a gift to Judicial Watch and receive a fixed payment for the rest of your life.

Today, our Charitable Gift Annuities offer a return rate between 5.5% and 11.3% depending on your age – FOR LIFE.

The benefits to you by establishing a Charitable Gift Annuity are many, including:

- Tax-deductible donation.
- Regular INCOME at a great FIXED RATE.
- INCOME GUARANTEED FOR LIFE to you and perhaps a loved one.

By acting now, you can lock in on a rate of return guaranteed for the rest of your life.

For example, if you are 70 years old and establish a Charitable Gift Annuity for $10,000, you would receive a tax-deduction of $4,276, earn 6.5% on your annuity and be guaranteed to receive a payment of $162.50 every quarter, or $650 per year for the rest of your life.

These are important personal benefits, of course.

And a Charitable Gift Annuity with Judicial Watch provides you with another important benefit – the knowledge that you are helping Judicial Watch advance our many projects and programs to fight corruption and hold public officials accountable to the law and to the American people. These include:

- Exposing corrupt politicians including Bill and Hillary Clinton and all their corrupt activities.

501 School Street, SW • Suite 500 • Washington, DC 20024 • Tel: (202)646-5172 • 888-JW-ETHIC or 888-59
Fax: (202) 646-5199 • email: info@judicialwatch.org • Internet Site: www.JudicialWatch.org

DEFENDANTS' EXHIBIT
34
Case No. 1:08-cv-670-CKK

A Research Project of Judicial Watch

National "Hillary As President" Ethics Impact Survey Of American Voters For Arizona Resident:

Fred Kessler, Jr.
Jr 9497 Cottonwood Wash Rd.
Pima, AZ 85543

Dear Tom Fitton,
I just read a letter from Larry Klayman and believe him, I'm terribly disappointed and I've decided to ~~stop~~ stop contributing to your Judicial Watch
Sincerely
Fred W. Kessler Jr., 928-485-2327

SURVEY REGISTRATION (completion of this section is required)

Survey Registration Number: [illegible]

Congressional District: [illegible] State Represent[illegible]: Arizona

Are you a legal U.S. citizen in Arizona?	☑ Yes	☐ No
Is this your correct name? Fred Kessler	☑ Yes	☐ No
Is this your correct address? Jr 9497 Cottonwood Wash Rd	☐ Yes	☐ No
Pima, AZ 85543	☐ Yes	☐ No

If not, please make corrections here:

Will you make a tax-deductible contribution to support this research campaign regarding <u>Hillary Rodham Clinton's dismal corruption record</u> and its potentially enormous impact on honest and open government in our United States? ☐ **Yes** ☑ **No** (already donated)

IF YES, please indicate the amount you are enclosing:

☐ **$25** ☐ **$50** ☐ **$100** ☐ **$250** ☐ **$500** ☐ **$1,000** ☐ **Other $_____**

☐ I cannot fully participate in this research campaign, but I am enclosing ☐ $10 or ☐ $15 to help cover the cost of processing my reply and to help with this campaign.

My tax-deductible check is made payable to Judicial Watch. See below to pay by credit card.
Judicial Watch is a 501(c)(3) nonprofit organization. Your gift is very much appreciated and tax-deductible to the full extent of the law.

Fred Kessler, your opinions are extremely important. Please do not miss this opportunity to make your voice heard by completing this Survey and signing the Citizen Proxy Ballot for Judicial Watch.
Thank you.

Tom Fitton

A contribution of $25 or more qualifies you for full membership benefits, including a subscription to our monthly member newsletter, *The Judicial Watch Verdict.*

☐ I prefer to make my special contribution by credit card.

DEFENDANTS' EXHIBIT
35
Case No. 1:06-cv-670-CKK

JUDICIAL WATCH FREEDOM MEMORANDUM

Dear Tom:

I agree with you: the new Democratic Congress presents Judicial Watch with a whole new set of challenges!

We must be ready to closely monitor how Nancy Pelosi and the liberal Democratic majority deal with the ethics breakdown in the House. And I agree that the new leader of the Senate, Harry Reid, needs to be held accountable for his ethical misdeeds! We need to be ready to educate and mobilize our fellow citizens to demand that both the House and the Senate get serious about enforcing its ethics rules against all members who violate them!

To help Judicial Watch prepare for next year, and to help us with all our ongoing investigations and lawsuits, I am enclosing a special tax-deductible contribution to Judicial Watch today, in the amount of:

12-1-06

☐ $35.00 ☐ $50.00 ☐ $70.00 ☐ Other $_____

Tom → Looks like very serious accusations aquist you from LARRY KLAYMAN! I'm sure it will siphon off millions of dollors to fight his suit!!

Mr. Richard Lane
12111 S Daffodil Pt
Floral City, FL 34436-4514

I would think donations now will be very Difficult! R. Lane

Judicial Watch
Because no one is above the law!

Enclosed is my check payable to:
Judicial Watch

SEE REVERSE SIDE TO DONATE BY CREDIT CARD

0021093SX NZ06013

Judicial Watch is a 501(c)(3) non-profit organization. Contributions received from individuals, foundations and corporations are tax deductible to the extent allowable by law.

501 School Street S.W., Suite 500
Washington, DC 20024

Klayman v. Judicial Watch, Inc., et al.
Case Number 19-7105
Deferred Appendix Page 2708

DEFENDANTS' EXHIBIT
36
Case No. 1:06-cv-670-CKK

DEFENDANTS' EXHIBIT 37

Paul Orfanedes

From: Steve Andersen [sandersen@judicialwatch.org]

Sent: Monday, July 10, 2006 2:06 PM

To: 'Alberta Hayes'

Cc: tfitton@judicialwatch.org; 'Paul Orfanedes'

Subject: RE: Ms. Betty Munson

I spoke w/ Mrs. Munson – she did receive Larry's letter and wanted to make a donation to support Judicial Watch as she could not read his long letter being that she is legally blind. She was thinking that Larry was still here and thought his letter solicited funds for JW – so she called here to make her donation rather than write a check which is difficult for her due to her blindness.

She just didn't understand that Larry is not here any more – even though I tried to tell her he wasn't – but I did not pursue it as she was under the impression he still was and his letter was asking for money for JW – she was just happy to help JW. So I guess we can score one for us.

Mrs. Munson is 83 years old and told me she has included JW in her trust "so we won't have to wait much longer," she said kindly.

She is an ATA donor – and has donated over $19,000 to us since 1998.

Thanks Alberta for doing a great job with her every month when she calls in to contribute.

-----Original Message-----
From: Alberta Hayes [mailto:ahayes@judicialwatch.org]
Sent: Monday, July 03, 2006 2:40 PM
To: 'Steve Andersen'
Cc: tfitton@judicialwatch.org
Subject: Ms. Betty Munson

7/6/06

Steve:

I received another call this afternoon from Ms. Munson; she just wanted to understand why she is receiving a letter from Larry Klayman, I told Ms. Munson, that someone will call and speak to her re: the letter from Mr. Klayman, she seemed satisfied, she gave us a donation for $100.00, normally she gives us $50.00 per month on her credit card. Ms. Munson phone# 715.356.7511.

Thanks,

Alberta

Alberta Hayes
Judicial Watch
ahayes@judicialwatch.org
202.646.5172

DEFENDANTS' EXHIBIT 38

Paul Orfanedes

From: Steve Andersen [sandersen@judicialwatch.org]
Sent: Monday, July 10, 2006 9:56 AM
To: 'Paul Orfanedes'; 'Tom Fitton'
Subject: FW: LEK contacts another donor

AmmarellF7-
-06.xls (81 KE

Another report from Angel.

-----Original Message-----
From: Angel Azar [mailto:aazaratjudicialwatch.org]
Sent: Saturday, July 08, 2006 9:01 AM
To: Steve Andersen
Cc: Christine Streich
Subject: LEK contacts another donor

Steve,

Please find attached a call report I am sending separately as we have another donor that Larry has contacted and affected.

After my standard introduction, she said "I'm not too happy with what Tom Fitton is doing", when I asked her to clarify she just responded "well, I'm not sure what's going on, but I know it's not right, . . . so I'm not interested" and hung up. 00062926G Florence Ammarell, $9,095.00 total $ gifts, Lgst gift $500, last gift 11/16/05.

I look forward to discussing this and the reports that are following.

Respectfully,

Angel S. Azar
202-489-5494

DEFENDANTS' EXHIBIT 39

Call Report

[LOGO]

JW Staff:	Angel S. Azar	Report Date:	07/06/06
Action Date:	**07/05/06**	Contact Type:	**Phone**

JW Record #	00062926G				
Donor Name:	**Florence Ammarell**				
Address:	**2943 S.W. Brighton Way**				
City:	**Palm City**	State:	**Fl**	Zip:	**34990**
Phone:	**772-220-7812**	Fax:		E-mail:	

Prospect Rating:		Financial		
Interest / Involvement	**?**	Capability	**$**	
Would they like the Verdict?		**Already Re**		

Goals / Objectives of visit: If ask, how much asked? $
TKU gift, introduce, update and identify donor / JW issues, schedule mtg., intro. CLP, planned giving.

Results / Observations: If ask, how much committed? $
This donor has been contacted by Larry Klayman and responded to my call / introduction by saying "I'm not too happry with what Tom Fitton is doing", when asked to clarify, after neutralizing my position (especially not having worked with Larry), she responded "well,..I'm not sure what's going on, but I know it's not right, sorry I'm not interested" and hung up.

Follow-up Actions & Dates for Follow-up:
Advise SA / senior management.

DEFENDANTS' EXHIBIT 40

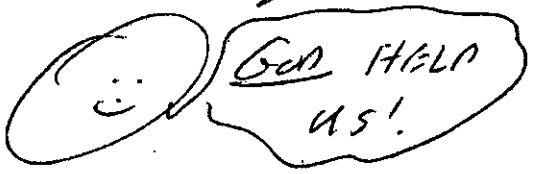
Mr. Ronald C. Tanciar
17611 Hilldale Dr
Macomb MI 48044-2094

3/11/07

OKAY TOM! STAFF JUST WHAT IN THE HELL IS GOING ON HERE? EXPLAIN! COURT RULED AGAINST YOU - WHY?

LIKE I'VE SAID SINCE BILL CLINTON TOOK OFFICE, WHO IN THE HELL CAN YOU TRUST ANYMORE.

Sincerely,
Tom Tanciar.



For reservations or information visit Marriott.com or call (800) 331 3131

Larry Klayman

February 7, 2007

Mr Ron Tanciar
17611 Hilldale Dr
Macomb, MI 48044-2094

Dear Ron:

As you know, with your help I sued Tom Fitton, the current president of Judicial Watch, for unethical practices that threaten the existence of this once great organization, and have harmed me and my family.

I took this course of action only after trying for two years to resolve matters with Mr. Fitton.

But he refused and has hijacked Judicial Watch.

Ron, it really grieves me he's turning Judicial Watch into a hapless, toothless tiger off on joy rides having little to nothing to do with the reasons I founded it – to clear up corruption in the governmental and legal systems.

And he's also misused donor monies and squandered Judicial Watch's considerable resources to the point that if we do not step in now, the organization will likely cease to exist in a few years.

Just a few days ago, the court ruled against Tom Fitton in our favor.

You see, Fitton and his band of ethically compromised directors tried to have our case dismissed.

But the court said no and ordered the suit go forward full steam ahead.

Most importantly, the court ruled that if we win – and you, Ron, know that this is only a matter of hard work and time – I will be able to reassume control of Judicial Watch as its Chairman and General Counsel.

Quite frankly, the court's 48 page opinion favored us and shot down every one of Tom Fitton's protests – allowing the case to go forward! You can see it at www.SavingJudicialWatch.org.

I'm so grateful you've given me your support in the past. Please continue to stand with me now so Judicial Watch can once again be on your side.

Your support will be crucial to restoring Judicial Watch as the premier ethics watchdog in the nation.

During my tenure as founder and Chairman and General Counsel of Judicial Watch I was the only attorney able to get the courts to find Bill Clinton liable for a crime; the crime he committed against one of the many women he harassed – Kathleen Willey – by illegally releasing her government files to smear her.

Now, as Hillary Clinton has decided to run for President, and as her "lovely" husband Bill seeks to become the "First Man", a forceful Judicial Watch, run by adults with law degrees, is necessary to take the Clintons and other corrupt politicians, lawyers and judges on again.

As you know, one of the allegations of our complaint hinges on the hard fact that Tom Fitton is not a lawyer and thus should not be running Judicial Watch.

In fact, shortly before I left Judicial Watch to run for the U.S. Senate in Florida, I learned that Fitton, contrary to the false representations he made to me when I hired him, had not even graduated from college.

But this is not my only complaint. . .

. . . Under Fitton Judicial Watch has been run into the ground through his unethical fundraising practices and his lack of desire to file hard-hitting cases against corrupt politicians, judges and lawyers.

How sad it is that three years after I left Judicial Watch it's become little more than a website which boasts frequently of the many appeals it has to file thanks to having lost the cases which I left for it to pursue.

More than lying to donors and misusing their donations,

Fitton did everything he could to harm both my U.S. Senate campaign and the wellbeing of my family and me.

Fitton sent out direct mail to supporters with my name on

(go on to next page, please . . .)

it to solicit monies *after* I had left. It gave the false impression I was still chairman and general counsel.

This obviously not only confused supporters like you, but hurt my U.S. Senate campaign.

Then, Fitton gave the false impression that unless Judicial Watch raised a lot of money real fast, it'd have to lay off many people all the while sitting on $16 million dollars in assets, with millions more in the pipeline.

In particular, Fitton and company did not buy the building for which I raised $1.2 million, instead keeping the money for some other purpose.

However, throughout this period Fitton gave supporters and donors the impression in monthly newsletters that a building had been purchased, publishing a photo of a plaque listing the contributors to the building fund.

What's more, Fitton disparaged me and hurt my reputation. When supporters called Judicial Watch and asked how to reach me, they were told no one knew where I was.

When people asked why I had left, frequently they were told the reasons were confidential. That created the false impression I left for some reason other than to run for the U.S. Senate, thus casting a negative light on me.

In addition, Fitton told the networks not to have me on TV shows to discuss anything Judicial Watch was doing. He even had his lawyer threaten me, without any legal basis, not to say I was its founder, falsely

claiming this would infringe the Judicial Watch trademark.

And if you look back at the publicity which Fitton has generated since I left, he removed-nearly all references to me and gave me no credit for founding and successfully running the organization for about 10 years. It became so ludicrous that many supporters would call me and complain.

In short, victory is going to be on our side. The courts are giving me every indication of this.

With the return of the Clintons in particular, the nation and the world need a Judicial Watch run by me, who knows how to sink its teeth into the Clintons or any other corrupt

(over once more . . .)

government official.

Major corruption has returned to Washington in the years since I left to run for the U.S. Senate

It's time for Judicial Watch to be restored to greatness. But frankly, I need your continued support.

I really hate to have to ask you for help again, Ron, but I see no choice.

The judge gave us a green light to proceed, and now I need your help for us to move forward to restoring Judicial Watch to its greatness.

We need it in place sinking its teeth into the Clintons once again. Won't you help, Ron?

Now that the court has shot down Fitton's attempt to have our case thrown out, we have him and his partners on the run.

Let's make sure we win and win big by having the financial resources to now go for the "knock out punch."

Thank you once again, Ron, for your previous support. know I can count on you and others like you, to help with this final surge. With our victory, I will ensure that Judicial Watch will once again work for you.

I need your urgent help now as we want to proceed with discovery in a big way and push for a quick decision, before the Clintons are able to regain power.

Thank you and God Bless,

/s/ Larry Klayman
Larry Klayman
Founder of Judicial Watch
and Former Chairman and
General Council

P.S. If there is any way you can send $50, or perhaps even $100, it'd put us in a great position. God bless you, Ron.

Saving Judicial Watch
P.O. Box 131567, Houston, TX 77219-1567
www.SavingJudicialWatch.org

DEFENDANTS' EXHIBIT 41

From: "Steve Andersen" <sandersen@judicialwatch.org>

To: "'Tom Fitton'" <tfitton@judicialwatch.org>, "Paul Orfanedes" <porfanedes@judicialwatch.org>, "Chris Farrell" <cfarrell@judicialwatch.org>

CC: "Susan Prytherch" <sprytherch@judlcialwatch.org>

Subject: Another Amicus cancel due to Klayman letter

Date: Tue, 8 Aug 2006 17:13:36 -0400

Below profile of a very kind 82 year old lady in CO – ATA list person – called today to cancel her $10/mo. Amicus donation. I called her back to ask why and she said she got a letter from L. Klayman and was concerned. I spoke with her a long time – she likes what we do and is open to donate again in the future.

StrategicOne
Account Brief

StrategicOne
Account Brief

Criteria: Account=00437970A,
Sort History By=Gift Date (newest to oldest)

Contact Information

Account Number	00437970A
Name	Eleanor Riter
Address	1272 County Rd. 65 Apt. 318
City, State Zip	Evergreen, CO 80439
Company	

Phones	(303)679-9229 (h)
Email	(no-email)
Title	Miss
Mail Restriction	00
Phone Restriction	99
EMail Restriction	99
Inception	07/22/1997

Profile Information

Profile Code	**General Purpose**
ATA TYPE	Type of ATA Account
CHILDREN	Children in Home
MISC	Miscellaneous Type
WORTH	Net Worth

Specific Purpose	**Last Add or Change**
Existed on ATA List Only	on 06/08/2001
No	CONV on 11/27/2002
Merged Account	on 05/24/2002
Seventh 6.6% Net worth on file	CONV on 11/27/2002

Account Merge History

Merged Into	Merged With	Merged Date	Merged By

Giving History

Gift Date	Amount	Motivation Code	Letter Code	Payment	Gift Type	Negated	Gift #
07/01/2006	$10.00	AS0706		ACH	Batch Entry		3851272
06/01/2006	$10.00	AS0606		ACH	Batch Entry		3835149
05/01/2006	$10.00	AS0506		ACH	Batch Entry		3814027
04/01/2006	$10.00	AS0406		ACH	Batch Entry		3797712
03/01/2006	$10.00	AS0306		ACH	Batch Entry		3777536
02/01/2006	$10.00	AS0206		EFT	Batch Entry		3753575
12/31/2005	$10.00	AS0106		EFT	Batch Entry		3729986
12/01/2005	$10.00	AS1205		EFT	Batch Entry		3709474
11/01/2005	$10.00	AS1105		EFT	Batch Entry		3685148
10/01/2005	$10.00	NX0501AS		EFT	Batch Entry		3672205
09/01/2005	$10.00	N90501AS		EFT	Batch Entry		3656234
08/01/2005	$10.00	N080501AS		EFT	Batch Entry		3637537
07/01/2005	$10.00	N070501AS		EFT	Batch Entry		3618022
06/15/2005	$10.00	AS050104		CHK	Batch Entry		3608772
03/24/2005	$15.00	H35007		CHK	Batch Entry		3558562
01/18/2005	$25.00	H15022	H10501GZ	CHIK	Batch Entry		3507691
12/31/2003	$25.00	HY030111	AA030112	CHK	Batch Entry		3266194
07/18/2003	$20.00	N7030118	N70301RD	CHK	Batch Entry		3156401
12/31/2002	$15.00	HA020106		C	Batch Entry		3011523
10/28/2002	$15.00	HX020105		C	Batch Entry		2961459
10/01/2002	$20.00	N9020106	N90201RD	C	Batch Entry		2943854
05/28/2002	$20.00	H2020108	AA020106	C	Batch Entry		2837927
12/17/2001	$10.00	HY010105		C	Batch Entry		2624263
08/17/2001	$20.00	N5010103	AA010108	C	Batch Entry		2478628
08/17/2001	$1.00	WM0801		C	Batch Entry		2479518
04/01/2001	$20.00	AA010104	AA010104	C	Batch Entry		140732
01/25/2001	$15.00	586K4	GENERAL	CHK	Batch Entry		1224998
10/18/2000	$0.00	A30C5	GENERAL	CHK	Batch Entry		1225000
10/13/2000	$0.00	A26Y8	GENERAL	CHK	Batch Entry		1224997
10/12/2000	$10.00	A28P6	GENERAL	CHK	Batch Entry		1225006
09/12/2000	$15.00	A26X3	GENERAL	CHK	Batch Entry		1224994
06/12/2000	$20.00	A25D6	GENERAL	CHK	Batch Entry		1225008
03/01/2000	$10.00	584N3	GENERAL	CHK	Batch Entry		1224996
06/10/1999	$5.00	582Y8	GENERAL	CHK	Batch Entry		1224999
03/08/1999	$15.00	581M3	GENERAL	CHK	Batch Entry		1224992
01/12/1999	$10.00	A18L8	GENERAL	CHK	Batch Entry		1225005
11/30/1998	$10.00	AA18B6	GENERAL	CHK	Batch Entry		1224993
10/19/1998	$25.00	580T6	GENERAL	CHK	Batch Entry		1225001
04/20/1998	$6.00	580L6	GENERAL	CHK	Batch Entry		1225007
01/05/1998	$11.00	80H8	GENERAL	CHK	Batch Entry		1225004
12/09/1997	$10.00	580C9	GENERAL	CHK	Batch Entry		1224995
07/22/1997	$10.00	A10R2	GENERAL	CHK	Batch Entry		1225002
07/22/1997	$0.00	A10P6	GENERAL	CHK	Batch Entry		1225003

Lifetime Summary

First Gift	$10.00 on 07/22/1997 (gift # 1,225,002)
Last Gift	$10.00 on 07/01/2006 (gift # 3,851,272)
Large Gift	$25.00 on 10/19/1998 (gift # 1,225,001)
Small Gift	$1.00 on 08/17/2001 (gift # 2,479,518)
Averages	CGL: $25.00, Avg $ per Gift: $12.95, Avg # Gifts:
Hard Credit Gifts	Total Given:$518.00, Total # Gifts:40
Soft Credit Gifts	Total Given:$0.00, Total # Gifts:0
Tax-Deductible Gifts	Total Given:$518.00, Total # Gifts:40
Non Tax-Deductible Gifts	Total Given:, Total # Gifts:
First Zero Gift	07/22/1997 (gift #)
Last Zero Gift	10/18/2000 (gift #)
Total # of Zero Gifts	3
Active Giving Years	9

Yearly Summary

Year	Gift Total	# of Gifts	Large Date	Large Amt	Small Date	Small Amt	Avg Gift	Soft Credit Amt	Soft Credit #
2006	$60.00	6	07/01/2006	$10.00	07/01/2006	$10.00	$10.00		
2005	$120.00	10	01/18/2005	$25.00	12/31/2005	$10.00	$10.63		
2003	$45.00	2	12/31/2003	$25.00	07/18/2003	$20.00	$22.50		
2002	$70.00	4	10/01/2002	$20.00	12/31/2002	$15.00	$17.50		
2001	$66.00	5	08/17/2001	$20.00	08/17/2001	$1.00	$15.00		
2000	$55.00	4	06/12/2000	$20.00	10/12/2000	$10.00	$12.50		
1999	$30.00	3	03/08/1999	$15.00	06/10/1999	$5.00	$10.00		
1998	$52.00	4	10/19/1998	$25.00	04/20/1998	$6.00	$10.50		
1997	$20.00	2	07/22/1997	$10.00	07/22/1997	$10.00	$10.00		

Steven C. Andersen
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Washington, D.C. 20024
(202) 646-5172
fax: (202) 646-0190
www.judicialwatch.org

"Because no one is above the law."

Judicial Watch

...because no one is above the law!

REPLY FORM

Dear Tom: UNTIL LARRY KLAYMAN TAKES OVER AGAIN, YOU GET NO MORE MONEY FROM ME!!!

I am proud of the ways that Judicial Watch has ~~used my support to make~~ a difference!

And I want to continue to help make Judicial Watch America's number one conservative public watchdog group!

That's why I am enclosing a special tax-deductible contribution, payable to Judicial Watch, in the amount of:

☐ $10 ☐ $15 ☐ $20 ☐ $_____ other

My check is made payable to Judicial Watch. See reverse to pay by credit card.

Judicial Watch is a 501(c)(3) nonprofit organization. Your gift is very much appreciated and fully deductible as a charitable contribution.

Sincerely, Hugh Hamilton

Mr. Hugh Hamilton
P. O. Box 922
Osburn, ID 83849-0922

501 School Street, SW
Washington, DC 20024

00761375R H8060107

PLEASE DETACH AND SEND REPLY FORM ALONG WITH YOUR MOST GENEROUS CONTRIBUTION. THANK YOU!

Certificate of Appreciation

Whereas, Judicial Watch has scored remarkable successes in holding politicians accountable under the law, in fighting for enforcement of our immigration laws, and in keeping the working of government open and transparent to American citizens;

And, whereas all our work is funded by the voluntary contributions of Americans who share our respect for the rule of law and conservative values;

Therefore, Judicial Watch today honors with this Certificate of Appreciation the generous support given to us by:

Mr. Hugh Hamilton

Our gratitude is best expressed by our continuing commitment to exposing and prosecuting public corruption.

Washington, D.C.
August 10, 2006

By: Tom Fitton
Thomas Fitton, President

DEFENDANTS' EXHIBIT 42
Case No. 1:06-cv-670-CKK

JUDICIAL WATCH

**********AUTO**MIXED.AADC 20495
Mr Richard K Matheys
12900 Blythe Rd
Brookfield, WI 53005-3812

2990

AGJW2

Dear Larry:

Please press ahead with your efforts to bring Judicial Watch, Inc. back safely under your control!

Together, let's get America's guard dog SNARLING again! Here's my gift ...

[ ] $10,000 [ ] $7,000 [ ] $5,000 [ ] $3,000
[ ] $2,000 [ ] $1,000 [ ] Other ($ 38)
[ ] $50.00 [ ] $35.00 [ ] $25.00
[ ] My check is enclosed
[ ] I prefer to give by [ ] Visa [ ] MasterCard
Card #
Expires
Signed

you to put my TEETH back into Judicial Watch!

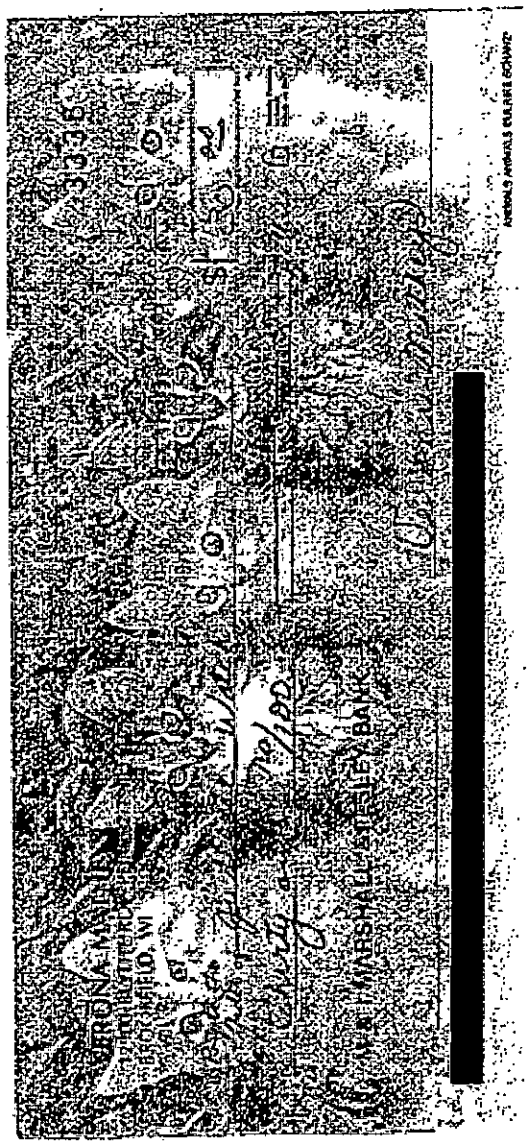
"Because no one is above the law"

Larry Klayman

DEFENDANTS' EXHIBIT 43
Case No. 1:06-cv-670-CKK

www.SavingJudicialWatch.org

Saving Judicial Watch, Inc. P.O. Box [illegible] Houston, TX 77210-4167


VERONA MARINE
MARSHALL & ILSLEY BANK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, Plaintiff, v. JUDICIAL WATCH, INC., *et al.*, Defendants.	Civil Action No. 06-670 (CKK)

MEMORANDUM OPINION[1]

(March 18, 2019)

After a thirteen-day trial, a jury returned a verdict in favor of Defendant Judicial Watch, Inc. ("Judicial Watch") on each of Plaintiff Larry Klayman's remaining claims. Moreover, the jury found liability and awarded a total of $2.8 million in damages to Counter-Plaintiffs Judicial Watch and Thomas J. Fitton on their extant counterclaims against Counter-Defendant Klayman.

Klayman now renews his motion for judgment as a matter of law, moves for a new trial, and moves in the alternative for remittitur of the jury's verdict. ECF No.

[1] Although the case caption suggests that this case involves multiple defendants, only one, Judicial Watch, Inc., remained in this action by the time of trial. In addition, the case caption does not reflect Judicial Watch, Inc.'s and Thomas J. Fitton's counterclaims. However, because the Court has used this caption for most of the proceedings in this long case, the Court shall not do otherwise at this late hour.

571 ("Post-Trial Motions"). Also pending are Klayman's motion for sanctions and entry of judgment, as well as his post-trial "renewal" of that motion and Judicial Watch's and Fitton's motion to strike the renewed version. ECF Nos. 489, 572, 573.

Klayman asks the Court's indulgence of one or more excess pages in both the opening and reply briefs of his Post-Trial Motions. ECF No. 571, at ii; ECF No. 577. In each instance he attempted to confer with Judicial Watch's and Fitton's counsel, who either opposed a penultimate version of his request or did not respond in time. Because the corresponding briefs were timely filed, and they assist in the Court's review of Klayman's Post-Trial Motions, the Court shall **GRANT** both requests and consider the briefs in their entirety.

Upon consideration of the briefing,[2] the relevant legal authorities, and the record as a whole, the Court

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[2] The Court's consideration has focused on the following pleadings:

- Pl.'s Mot. for J. as a Matter of Law, for a New Trial, or in the Alternative, for Remittitur of the Jury Verdict and Leave to Exceed Page Limit by One Page, ECF No. 571 ("Klayman's Post-Trial Mots."); Defs.' Opp'n to Pl.'s Mot. for J. as a Matter of Law, for a New Trial, or in the Alternative, for Remittitur of the Jury Verdict [ECF 571], ECF No. 576 ("JW's Post-Trial Opp'n"); Pl.'s Reply to Defs.' Opp'n to Pl.'s Mot. for J. as a Matter of Law, for a New Trial, or in the Alternative, for Remittitur of the Jury Verdict, ECF No. 578 ("Klayman's Post-Trial Reply"); Pl.'s Mot. for Leave to File Reply in Excess of Two (2) Pages and Three (3) Lines, ECF No. 577;

DENIES Klayman's Post-Trial Motions, **DENIES** Klayman's Motion for Sanctions and Entry of Judgment, **DENIES** Klayman's Renewed Motion for Sanctions and Entry of Judgment, and **DENIES** Judicial Watch's and Fitton's Motion to Strike Plaintiff's Renewed Motion for Sanctions and Entry of Judgment.

I. BACKGROUND

The Court need not revisit the factual background summarized in earlier opinions in this nearly thirteen-year litigation. *See, e.g.*, Mem. Op. (June 25, 2009), *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 112, 118-19 (D.D.C. 2009) ("*Klayman I*"), ECF No. 319, at

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- Pl.'s Mot. for Sanctions and Entry of J., ECF No. 489 ("Klayman's 1st Sanctions Mot."); Defs.' Opp'n to Pl.'s Mot. for Sanctions and Entry of J. [ECF 489] and Request for Award of Sanctions, ECF No. 506 ("JW's 1st Sanctions Opp'n"); Pl.'s Reply to Opp'n to Mot. for Entry of J., ECF No. 527 ("Klayman's 1st Sanctions Reply");
- Pl./Counter-Def.'s Renewed Mot. for Sanctions and Entry of J., ECF No. 572 ("Klayman's 2nd Sanctions Mot."); Defs.' Mot. to Strike Pl.'s Renewed Mot. for Sanctions and Entry of J., ECF No. 573 ("JW's Mot. to Strike 2nd Sanctions Mot."); Pl.'s Opp'n to Defs.' Mot. to Strike Pl.'s Renewed Mot. for Sanctions and Entry of J., ECF No. 574 ("Klayman's Opp'n to Mot. to Strike"); and Defs.' Reply in Supp. of Mot. to Strike Pl.'s Renewed Mot. for Sanctions and Entry of J., ECF No. 575 ("JW's Reply in Supp. of Mot. to Strike").

For purposes of the foregoing abbreviations, the Court refers to briefing by Judicial Watch and Fitton as being submitted collectively by "JW." In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f).

3-4.[3] Similarly, the many twists and turns in this case are amply recounted elsewhere. *See, e.g.*, *Klayman I*, 628 F. Supp. 2d at 119-23.[4] The Court shall focus on

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[3] Although, for convenience in this Memorandum Opinion, the Court shall denominate certain prior opinions in this case, those are by no means the Court's only prior opinions. *See infra* note 3.

[4] *Substantive* Memorandum Opinions, Orders, and combinations thereof that were issued by this Court or by Magistrate Judge Alan Kay in this case consist of the following: Order (Apr. 12, 2018), ECF No. 565; Order (Mar. 13, 2018), ECF No. 544; Order (Mar. 13, 2018), ECF No. 543; Order (Mar. 13, 2018), ECF No. 542; Order (Mar. 12, 2018), ECF No. 541; Order (Mar. 12, 2018), ECF No. 540; Order (Mar. 11, 2018), ECF No. 535; Order (Mar. 9, 2018), ECF No. 528; Mem. Op. and Order (Mar. 9, 2018), ECF No. 526; Mem. Op. and Order (Mar. 9, 2018), ECF No. 525; Mem. Op. and Order (Mar. 8, 2018), ECF No. 516; Mem. Op. and Order (Mar. 7, 2018), ECF No. 513; Mem. Op. and Order (Mar. 6, 2018), ECF No. 511; Order (Mar. 5, 2018), ECF No. 509; Mem. Op. and Order (Mar. 5, 2018); ECF No. 508; Order (Mar. 2, 2018), ECF No. 500; Order (Mar. 2, 2018), ECF No. 499; Order (Feb. 28, 2018), ECF No. 496; Order (Feb. 28, 2018), ECF No. 495; Order (Feb. 24, 2018), ECF No. 488; Order (Feb. 23, 2018), ECF No. 487; Order (Feb. 23, 2018), ECF No. 486; Order (Feb. 23, 2018), ECF No. 485; Order (Feb. 22, 2018), ECF No. 484; Order (Feb. 20, 2018), ECF No. 465; Mem. Op. (Feb. 20, 2018), ECF No. 464; Order (Feb. 15, 2018), ECF No. 455; Order (Feb. 2, 2018), ECF No. 442; Order (Jan. 23, 2018), ECF No. 436; Mem. Op. (Jan. 19, 2018), ECF No. 434; Order (Oct. 6, 2017), ECF No. 426; Mem. Op. and Order (Oct. 5, 2017), ECF No. 425; Order (June 19, 2017), ECF No. 402; Mem. Op. and Order (June 14, 2017), ECF No. 401; Mem. Op. (Aug. 10, 2011), ECF No. 362; Mem. Op. (Oct. 13, 2010), ECF No. 356; Order (June 16, 2010), ECF No. 338; Order (Apr. 30, 2010), ECF No. 334; Mem. Op. (Oct. 14, 2009), ECF No. 327; Order (Oct. 13, 2009), ECF No. 325; Mem. Op. (June 25, 2009), ECF No. 319; Mem. Op. (June 25, 2009), ECF No. 317; Mem. Op. (June 25, 2009), ECF No. 315; Mem. Op. (Mar. 24, 2009), ECF No. 301; Order (Dec. 30, 2008), ECF No. 293; Order (Dec. 1, 2008), ECF No. 274; Order (Nov. 6, 2008), ECF No. 262; Order (Nov. 6, 2008), ECF No. 261;

those proceedings specifically pertinent to the pending motions.

Relatively early in this litigation, the Court granted summary judgment for Judicial Watch as to the breach of contract claim in Count I of its Amended Counterclaim, awarded damages of $69,358.48, and reserved Judicial Watch's request for prejudgment interest "until after liability has been resolved as to all remaining claims and counterclaims." Mem. Op. (Oct. 14, 2009), *Klayman v. Judicial Watch, Inc.*, 661 F. Supp. 2d 2, 4-6 (D.D.C. 2009) ("*Klayman II*"), ECF No. 327; *see also Klayman I*, 628 F. Supp. 2d at 157-60. The Court's treatment of claims and other counterclaims in

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Order (Sept. 30, 2008), ECF No. 252; Mem. Order (Sept. 23, 2008), ECF No. 250; Mem. Order (Sept. 23, 2008), ECF No. 249; Mem. Order (Aug. 26, 2008), ECF No. 233; Order (Aug. 26, 2008), ECF No. 231; Order (Aug. 25, 2008), ECF No. 227; Mem. Order (July 18, 2008), ECF No. 206; Order (July 9, 2008), ECF No. 200; Mem. Order (July 1, 2008), ECF No. 199; Order (June 24, 2008), ECF No. 196; Order (June 10, 2008), ECF No. 189; Order (May 28, 2008), ECF No. 185; Order (May 28, 2008), ECF No. 184; Order (May 28, 2008), ECF No. 183; Order (May 19, 2008), ECF No. 178; Order (May 12, 2008), ECF No. 167; Order (May 12, 2008), ECF No. 166; Mem. Order (May 9, 2008), ECF No. 165; Mem. Order (May 5, 2008), ECF No. 153; Order (Apr. 21, 2008), ECF No. 138; Order (Apr. 21, 2008), ECF No. 137; Order (Apr. 2, 2008), ECF No. 134; Mem. Order (Mar. 12, 2008), ECF No. 117; Mem. Order (Jan. 16, 2008), ECF No. 98; Mem. Order (Jan. 8, 2008), ECF No. 97; Mem. Op. (Dec. 3, 2007), ECF No. 84; Mem. Op. (Dec. 3, 2007), ECF No. 82; Mem. Op. (Apr. 3, 2007), ECF No. 52; Mem. Op. (Apr. 3, 2007), ECF No. 50; Order (Feb. 2, 2007), ECF No. 39; Mem. Op. (Jan. 17, 2007), ECF No. 36. In the interest of avoiding duplication, the foregoing list excludes Orders issued to implement accompanying Memorandum Opinions.

prior proceedings is beyond the scope of this Memorandum Opinion.

A few days before trial in February 2018, the Court issued an Order laying out the claims and counterclaims that had survived to that point. *See* Order (Feb. 23, 2018), ECF No. 487, at 8-10.[5] Klayman's remaining claims consisted of five allegations of breach of contract asserted in Counts Seven and Eight of his Second Amended Complaint. *Id.* at 8. Because those allegations are somewhat specific and are not directly at issue in the pending motions, the Court shall not repeat them here. Ten of Judicial Watch's and Fitton's counterclaims in their Amended Counterclaim remained viable: Counts I, II, and III for breaches of contract associated with unpaid expenses; Count IV for trademark infringement under the Lanham Act, 15 U.S.C. § 1114(1)(a); Counts V and VI for unfair competition under the Lanham Act, 15 U.S.C. § 1125(a)(1); Counts VIII and IX for breaches of contract regarding disparagement of Judicial Watch and Fitton, respectively; Count X for breach of contract regarding certain Judicial Watch information; and Count XI for breach of contract regarding a non-competition period. *Id.* at 9-10; *see also* Am. Countercl., ECF No. 86 (clarifying that Count IX was asserted only by Fitton). The only further pre-trial update to the claims or counterclaims

[5] Judicial Watch and Fitton had shortly beforehand withdrawn Count VII of their Amended Counterclaim for cybersquatting under the Lanham Act. ECF No. 467.

was Judicial Watch's withdrawal of Count XI of its Amended Counterclaim. ECF No. 492.

On the day before trial, Klayman filed his Motion for Sanctions and Entry of Judgment, which dealt with the parties' differing characterizations of Klayman's discovery responses earlier in the case. The parties briefed the motion during trial, and the Court reserved a decision until the present Memorandum Opinion.

On February 26, 2018, the trial commenced and continued through March 14, 2018, when the jury returned its verdict. Klayman introduced evidence as to his claims against Judicial Watch. Again, the Court need not address proceedings as to Klayman's claims. After Judicial Watch and Fitton presented and rested their case as to their counterclaims, Klayman moved for judgment as a matter of law as to those counterclaims. *See* Trial Tr. 3191:6-7, 10-11; 3196:7-11.[6] Rather than rule on the motion, the Court took the issues raised by Klayman under advisement. *Id.* 3191-3198. The Court instructed the jury orally and provided the jury with a copy of the prepared instructions.

On March 14, 2018, the jury delivered its verdict against Klayman on each of his extant claims and in favor of Judicial Watch and Fitton on each of their

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[6] Although Klayman used the prior terminology of directed verdict, that is not held against him. *Cf.* Order (Apr. 12, 2018), ECF No. 565, at 1-2 & n.1 (noting that Klayman's invocation of the term, "judgment notwithstanding the verdict," later in the proceedings is likewise treated as equivalent to a renewed motion for judgment as a matter of law).

extant counterclaims. Jury Verdict, ECF No. 560. Although damages were allocated by counterclaim, the total awards were $2,300,000 for Judicial Watch and $500,000 for Fitton. *See id.* at 4-8. The Court allowed the parties to wait until after the court reporter's completion of the full trial transcript to brief Klayman's renewed motion for judgment as a matter of law and any other post-trial motions. *See, e.g.*, Order (Apr. 12, 2018), ECF No. 565, at 3; Min. Order of Mar. 14, 2018.

On March 15, 2018, the Court entered judgments on the jury verdict for Judicial Watch and Fitton. J. on the Verdict for Counterpl. Judicial Watch, Inc., ECF No. 548; J. on the Verdict for Counterpl. Thomas J. Fitton, ECF No. 549. At Klayman's request, the Court later vacated its issuance of these judgments in order to avoid potential issues with a time bar under the Federal Rules. *See* Order (Apr. 12, 2018), ECF No. 565; *see also* 11 Charles Alan Wright et al., *Federal Practice and Procedure Civil* § 2812 (3d ed.) ("The time for seeking a new trial runs from the entry of the judgment, not from the reception of the verdict nor from the date the moving party receives notice of the entry of judgment." (footnotes omitted)).

On July 10, 2018, the court-established deadline for his post-trial motions, Klayman filed a renewed motion for judgment as a matter of law, a motion for new trial, and, in the alternative, a motion for remittitur of the jury's verdict. He followed on July 13, 2018, with a renewed motion for sanctions and entry of judgment, which Judicial Watch and Fitton moved to strike.

Now that briefing of all pending motions has concluded, these motions are ripe for resolution.

II. LEGAL STANDARD

A. Renewed Motion for Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(b) provides that, once a jury has rendered its verdict, the verdict loser "may file a renewed motion for judgment as a matter of law." Fed. R. Civ. P. 50(b). Relief under Rule 50(b) is "'highly disfavored' because it 'intrudes upon the rightful province of the jury.'" *Breeden v. Novartis Pharm. Corp.*, 646 F.3d 43, 53 (D.C. Cir. 2011) (quoting *Boodoo v. Cary*, 21 F.3d 1157, 1161 (D.C. Cir. 1994)). Nevertheless, "if the court finds that the evidence was legally insufficient to sustain the verdict," *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011), then the court may "direct the entry of judgment as a matter of law" in favor of the verdict loser or "order a new trial," Fed. R. Civ. P. 50(b)(2), (b)(3). If, however, the district court finds that the evidence was legally sufficient to sustain the jury's verdict, then it must "allow judgment on the verdict." Fed. R. Civ. P. 50(b)(1).

In this context, the central question "is whether there was sufficient evidence upon which the jury could base a verdict in [the prevailing party's] favor." *Scott v. District of Columbia*, 101 F.3d 748, 752 (D.C. Cir. 1996). The evidence in support of the verdict must "be more than merely colorable; it must [be] significantly probative." *Richardson by Richardson v.*

Richardson–Merrell, Inc., 857 F.2d 823, 828-29 (D.C. Cir. 1988). However, because the fundamental role of the jury is "to select, from among conflicting inferences and conclusions, that which it finds most reasonable," *Primas v. District of Columbia*, 719 F.3d 693, 698 (D.C. Cir. 2013) (quoting *Metrocare v. Wash. Metro. Area Transit Auth.*, 679 F.2d 922, 925 (D.C. Cir. 1982)) (internal quotation marks omitted), "the court cannot substitute its view for that of the jury, and can assess neither the credibility nor weight of the evidence," *Scott*, 101 F.3d at 753. The jury's verdict must stand unless "the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not have reached a verdict in plaintiff['s] favor." *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 899 (D.C. Cir. 2010) (per curiam) (quoting *McGill v. Muñoz*, 203 F.3d 843, 845 (D.C. Cir. 2000)) (internal quotation marks omitted).

However, a post-trial motion for judgment as a matter of law may be granted only upon grounds advanced in a pre-verdict motion; a movant who omits a theory from a pre-verdict Rule 50 motion waives the theory as a basis of its post-verdict renewal. *See Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995); *U.S. Indus., Inc. v. Blake Constr. Co., Inc.*, 671 F.2d 539, 548 (D.C. Cir. 1982).

B. Motion for a New Trial

Rule 50(b) expressly permits a party that renews its motion for judgment as a matter of law to "include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b). Rule 59(a) provides that "[t]he court may, on motion, grant a new trial on all or some of the issues . . . after a jury 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).

"A trial judge should grant a new trial if the verdict is against the weight of the evidence, damages are excessive, for other reasons the trial was not fair, or substantial errors occurred in the admission or rejection of evidence or the giving or refusal of instructions." *Nyman v. FDIC*, 967 F. Supp. 1562, 1569 (D.D.C. 1997) (citing 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2805 (1973)).

But "[t]he decision whether to grant a new trial falls within the discretion of the trial court." *Rice v. District of Columbia*, 818 F. Supp. 2d 47, 60 (D.D.C. 2011) (citing *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646 (D.C. Cir. 1988)). When assessing a motion for a new trial, "the court should be mindful of the jury's special function in our legal system and hesitate to disturb its finding." *Nyman*, 967 F. Supp. at 1569 (quoting *Lewis v. Elliott*, 628 F. Supp. 512, 516 (D.D.C. 1986)) (internal quotation marks omitted). Accordingly, a district court should exercise its discretion "sparingly and cautiously," *Miller v. Pa.*

R.R. Co., 161 F. Supp. 633, 641 (D.D.C. 1958), and it should grant a new trial "only where the court is *convinced* the jury verdict was a 'seriously erroneous result' and where denial of the motion will result in a 'clear miscarriage of justice,'" *Nyman*, 967 F. Supp. at 1569 (quoting *Sedgwick v. Giant Food, Inc.*, 110 F.R.D. 175, 176 (D.D.C. 1986)) (emphasis added) (internal quotation marks omitted).

"The jury verdict stands 'unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict.'" *Czekalski v. LaHood*, 589 F.3d 449, 456 (D.C. Cir. 2009) (quoting *Curry v. District of Columbia*, 195 F.3d 654, 658-59 (D.C. Cir. 1999) (opinion of Henderson, J.)).

C. Motion for Remittitur of the Jury Verdict

The judiciary has developed certain principles to guide a court's evaluation of a jury's damages verdict. "In reviewing the amount of the jury's award, [the court] . . . need not—and indeed cannot—reconstruct the precise mathematical formula that the jury adopted. Nor need [the court] explore every possible quantitative analysis or compute the basis of each penny and dollar in the award. [The court's] inquiry ends once [it is] satisfied that the award is within a reasonable range and that the jury did not engage in speculation or other improper activity." *Nyman*, 967 F. Supp. at 1571 (quoting *Carter v. Duncan-Huggins,*

Ltd., 727 F.2d 1225, 1238-39 (D.C. Cir. 1984)) (alterations in original) (internal quotation marks omitted).

"A court must be especially hesitant to disturb a jury's determination of damages in cases involving intangible and non-economic injuries." *Langevine v. District of Columbia*, 106 F.3d 1018, 1024 (D.C. Cir. 1997) (citing *Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 34 (1st Cir. 1991) ("Translating legal damage into money damages—especially in cases which involve few significant items of measurable economic loss—is a matter peculiarly within a jury's ken." (internal quotation marks omitted)).

This deference to the jury, based on the fact that "the Seventh Amendment right to a jury trial pervades the realm of jury verdict decisions," *id.*, may only be disturbed if "(1) the verdict is beyond all reason, so as to shock the conscience, or (2) the verdict is so inordinately large as to obviously exceed the maximum limit of a reasonable range within which the jury may properly operate." *Peyton v. DiMario*, 287 F.3d 1121, 1126-27 (D.C. Cir. 2002) (citing, e.g., *Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87, 96 (D.C. Cir. 1987)).

"Courts may not set aside a jury verdict merely deemed generous; rather, the verdict must be so unreasonably high as to result in a miscarriage of justice." *Langevine*, 106 F.3d at 1024 (citing *Barry v. Edmunds*, 116 U.S. 550, 565 (1886)). In this Circuit, a court may remit a jury verdict "only if the reduction 'permit[s] recovery of the highest amount the jury tolerably could have awarded.'" *Id.* (quoting *Carter v. District of*

Columbia, 795 F.2d 116, 135 n.13 (D.C. Cir. 1986)). The moving party has the burden to prove that the jury award is so excessive as to warrant a remittitur. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d at 1239. "The granting of a motion for remittitur is 'particularly within the discretion of the trial court.'" *Jeffries*, 822 F.2d at 96 (quoting *Doe v. Binker*, 492 A.2d 857, 863 (D.C. 1985)).

III. DISCUSSION

There is no dispute that the Court has diversity jurisdiction over the remaining breach of contract claims and counterclaims, and federal-question jurisdiction over the remaining federal statutory counterclaims. *See* 28 U.S.C. § 1331; *id.* § 1332(a)(1), (c)(1); 2d Am. Compl., ECF No. 12, ¶¶ 18, 20, 24 (alleging diversity of citizenship and sufficient amount in controversy); Am. Countercl., ECF No. 86, ¶¶ 1-3, 5, 6 (alleging diversity of citizenship, sufficient amount in controversy, and federal question). The Court need not consider other grounds for jurisdiction. As to the breach of contract claims, the parties' Confidential Severance Agreement expressly dictates its interpretation using District of Columbia law, "without regard to its choice of law principles." Confidential Severance Agreement, Klayman's Ex. 1 ("CSA"), ¶ 23.

A. Klayman's Post-Trial Motions

It is not clear that Klayman raised each aspect of the arguments in his Post-Trial Motions in either his Rule 50(a) motion for judgment as a matter of law, or

otherwise at trial. For example, he now objects to a deposition designation to which he largely did not object either before or during trial. *See infra* Part III.A.5.iv.b. (discussing Dep. of Stephanie De Luca [sic] 33:22-36:9 ("DeLuca Dep.")). "Rule 50(b) permits only the 'renewing' of arguments made in prior Rule 50(a) motions." *Campbell v. District of Columbia*, 894 F.3d 281, 286 (D.C. Cir. 2018) (citing Fed. R. Civ. P. 50(b); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006)). Nor can "a Rule 59 motion [be used] to raise new issues that could have been raised previously." *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993).

Although such a deficiency could be dispositive of at least parts of the Post-Trial Motions, Judicial Watch and Fitton do not make this argument. Nor is it necessarily easy to parse what Klayman did and did not raise previously for Rule 50 and Rule 59 purposes. Accordingly, in the interest of reaching any necessary issues and conclusively resolving this case, the Court shall assume, *arguendo*, that Klayman either raised each of the issues sufficiently in his Rule 50(a) motion, and/or that he raised issues at an appropriate time so as to support a Rule 59(a) motion now.

Before reaching the merits of the Post-Trial Motions, the Court shall dispose of several extraneous issues that Klayman briefly raises. Submitting an affidavit from Mike Pendleton, he suggests this is additional evidence supporting his claim that Judicial Watch disparaged him. *See* Klayman's Post-Trial Mots.

at 3 n.2 & Ex. 1. But this notion is problematic for several reasons. First, Klayman misleadingly implies that this is a new affidavit. *See id.* ("*Upon review of the Court record*, Mike Pendleton filed an affidavit that not only confirms that Fitton testified falsely and indeed disparaged Plaintiff/Counter-Defendant. . . ." (emphasis added)). But the affidavit is not new; it bears a January 2009 date, and the header shows that it was docketed previously in this case. Second, Klayman was precluded from introducing documentary evidence at trial, pursuant to the Discovery Sanction that the Court shall review below. Third, in any case, Klayman does not pursue the argument that the jury erred as to his own claims. Rather, he attacks the jury's verdict as to Judicial Watch's and Fitton's counterclaims. The sanctions also dispose of Klayman's other attempted use of this affidavit, namely to claim now that certain testimony was false. *See id.* He cannot use documentary evidence to do now what he would have been precluded at trial from doing. No further attention to the affidavit is necessary.

Klayman also briefly mentions the issue of his being the founder of Judicial Watch, but only as an aside attempting to suggest that Judicial Watch witnesses lied. *See* Klayman's Post-Trial Mots. at 2-3 & n.2. The jury heard testimony from both sides on this issue, and it was the jury's role to weigh credibility and decide whom to believe. The Court need not revisit this issue.

The Post-Trial Motions begin with a series of issues that Klayman evidently proposes to deal with through judgment as a matter of law and/or a new

trial. The Court shall walk through those arguments before turning to his separate treatment of the putative grounds for remittitur.

1. Counterclaim for Trademark Infringement

The Post-Trial Motions raise a number of issues with the jury's ruling as to Count IV of Judicial Watch's Amended Counterclaim, which alleges trademark infringement.

i. Alleged Misattribution of Trademark Infringement

Klayman argues that the jury confused the actions of Friends of Larry Klayman ("FOLK") and Freedom Watch for actions of Klayman himself. Klayman's Post-Trial Mots. at 9-10. His reasons for thinking that the jury misattributed damages are 1) the size of a verdict for allegedly "minimal, if any, conduct personally conducted" by him, and 2) the fact that the verdict form did not distinguish any damages attributable to FOLK and Freedom Watch. *Id.* at 10.

But this rationale is a non-sequitur. Judicial Watch introduced evidence to show that Klayman himself, acting through Saving Judicial Watch, mailed solicitations and issued advertisements that infringed on Judicial Watch's trademarks. JW's Post-Trial Opp'n at 7-8. While evidence about FOLK demonstrated how Klayman obtained Judicial Watch donor information, that is irrelevant to whether he made use of Judicial

Watch trademarks in Saving Judicial Watch solicitations and advertisements. *Id.* Judicial Watch does not discuss specific activities of Freedom Watch, but neither does Klayman. And neither party addresses the status of Saving Judicial Watch, which, in any case, Klayman has not shown is a legal entity distinct from himself.

Most importantly, Klayman fails to identify any evidence of alleged trademark infringement by FOLK or Freedom Watch that the jury might have mistakenly attributed to him. Instead, the jury heard sufficient evidence to attribute the alleged infringement to Klayman himself. Accordingly, it was unnecessary to specifically instruct the jury to distinguish between FOLK's and Freedom Watch's activities and Klayman's own. Neither judgment as a matter of law nor a new trial is warranted on this basis.

ii. Likelihood of Confusion

Relatedly, Klayman tries to show that the jury did not hear sufficient evidence of alleged trademark infringement by Klayman himself to satisfy the likelihood of confusion element of that counterclaim. Klayman's Post-Trial Mots. at 10-11. He urges that his Saving Judicial Watch campaign adequately distinguished his efforts as separate from Judicial Watch, despite the one reply envelope mailed by Saving Judicial Watch that bore a "Judicial Watch" return address. *Id.*

The Court issued jury instructions as to the likelihood of confusion element. The Court cannot recall

seeing any model instructions about this element that are specific to this Circuit. Rather, Judicial Watch had proposed the instructions, which it "derived from" general model instructions, including some specific to the Ninth Circuit. Order (Feb. 23, 2018), ECF No. 485 (citing 3A Kevin F. O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions* § 159:25 (6th ed. 2012)). Although the Court made some edits to Judicial Watch's proposed instructions during discussions with the parties, the instructions as delivered closely resembled the model instructions. *See id.*; Trial Tr. 3770:24-3772:21.

Klayman does not expressly argue that those instructions were incorrect. Rather, he attacks a strawman by arguing that the evidence was insufficient to meet a standard that he proposed for those instructions, but which the Court rejected. If the Court had adopted Klayman's standard, the jury would have needed to find that a "substantial" number of people were likely to be confused. Klayman's Post-Trial Mots. at 10-11 (quoting *Johnson Publ'g Co., Inc. v. Etched-in-Ebony, Inc.*, Civil Action No. 80-2933, 1981 WL 48204, at *4 (D.D.C. July 15, 1981), *aff'd*, 675 F.2d 1340 (D.C. Cir. 1982) (Table)) (internal quotation marks omitted). Now Klayman also urges an "'appreciable' number" standard. *Id.* at 10 (quoting *Culliford v. CBS, Inc.*, Civil Action No. 83-1775, 1984 WL 787, at *3 (D.D.C. Jan. 20, 1984)).

While the number of people likely to be confused may be a consideration, it is not the only one. Without adopting a definitive test for likelihood of confusion,

the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") recently referred approvingly to other circuits' multi-factor tests, which evaluate such factors as "the strength of the mark, the similarity of the marks, the proximity of the goods, the similarity of the parties' marketing channels, evidence of actual confusion, the defendant's intent in adopting the mark, the quality of the defendant's product, and the sophistication of the buyers." *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 456 (D.C. Cir. 2018) (citing 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§ 24:31-24:43 (5th ed. 2018)); *see also Appleseed Found. Inc. v. Appleseed Inst., Inc.*, 981 F. Supp. 672, 675 (D.D.C. 1997) (reciting some of these factors).[7] That list does not expressly include the number of people likely to be confused. Whether or not the jury found that an appreciable or substantial number of people could be led astray, there was sufficient evidence for the jury to find that other factors were satisfied. For example, the jury could have found that the Saving Judicial Watch campaign involved similar marks deployed through similar marketing channels, coupled with evidence of actual confusion. Accordingly, Klayman has not met the high threshold to disturb the jury finding that his use of the trademarks was likely to confuse, and

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[7] Klayman's cases, *Johnson* and *Culliford*, rely to some extent on a similar list of factors, though Klayman does not acknowledge this aspect of those opinions. *See Culliford*, Civil Action No. 83-1775, 1984 WL 787, at *3; *Johnson Publ'g Co., Inc.*, Civil Action No. 80-2933, 1981 WL 48204, at *4.

consequently this is no basis for granting judgment as a matter of law or a new trial.

iii. Nominative Fair Use

Klayman next invokes the nominative fair use defense to a trademark infringement claim, arguing that he qualifies because he was "making commentary on the state of affairs at Judicial Watch, and that he never even remotely claimed to be affiliated with Judicial Watch in any way once the Severance Agreement was executed." Klayman's Post-Trial Mots. at 12.

Again, the Court issued instructions on the nominative fair use defense. Trial Tr. 3777:2-3778:22. The prepared instructions provided in hard-copy to the jury closely track the D.C. Circuit's recently articulated standard:

> In order for a use [of a trademark] to qualify as nominative fair use, courts require that "[1] the product or service in question must be one not readily identifiable without use of the trademark; [2] only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and [3] the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder."

Am. Soc'y for Testing & Materials, 896 F.3d at 456 (quoting *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992)) (all but first alteration in original). Klayman does not raise any issue

with the instructions. The jury heard evidence that could support a finding that Klayman's use of the trademarks exceeded nominative fair use under the applicable standard. The Court shall not second-guess the jury's determination, and accordingly, neither judgment as a matter of law nor a new trial is justified for this reason.

iv. Jury Consideration of "Improper, Outside Actions"

Klayman recycles arguments that evidence about FOLK and Freedom Watch contributed to the large jury verdict. *See* Klayman's Post-Trial Mots. at 13-15. The Court disposed of this argument above and need not revisit it here, except to deal with several new strands.

Klayman erroneously objects to the evidence that the jury was allowed to consider. *See id.* at 13 (citing JW's Exs. 64-66, 75; Trial Tr. 3164:15-3165:4). Exhibits 66 and 75 could not prejudice the jury because they were not admitted into evidence. JW's Post-Trial Opp'n at 16; JW's Ex. List, ECF No. 555, at 6-7. Moreover, Exhibits 64 and 65 were relevant because they help show how Klayman obtained "JW" donor names, to whom he then sent materials that infringed on Judicial Watch's trademarks. The Court agrees with Judicial Watch that Maureen Otis' testimony "merely provided an explanation of sample caging reports." JW's Post-Trial Opp'n at 16. The jury was allowed to weigh all of this evidence in reaching its determination. The Court does

not find any of the admitted evidence to be unduly prejudicial. *See* Fed. R. Evid. 403.

Judicial Watch demonstrates how the jury could have reached its $750,000 verdict on the trademark infringement counterclaim: Maureen Otis and Steve Andersen, respectively, testified that Saving Judicial Watch raised at least $742,141.87 through American Target Advertising's ("ATA") caging operations, and donations to Judicial Watch from multi-year donors fell by more than $1.8 million or $1.9 million during 2006 and 2007. JW's Post-Trial Opp'n at 7-8 (citing Trial Tr. 3064-3067, 3169:2-8).

In yet another instance of failed recycling, Klayman's reply does not rebut any of the foregoing points, as to either the facts or their implications for the jury verdict. Accordingly, he has not persuaded the Court that he is entitled to judgment as a matter of law or a new trial due to jury consideration of allegedly "improper" actions of third parties. Klayman's Post-Trial Mots. at 15.

v. Authentication of Reply Letters

Klayman argues that the letters contained in Judicial Watch's Exhibits 33, 36, 40, and 42 were not properly authenticated and therefore should not have been admitted for the purpose of showing confusion about the trademarks. Klayman's Post-Trial Mots. at 15-18; *see also* JW's Ex. List, ECF No. 555, at 3-4 (showing that each was admitted). He specifically takes issue

with the handwriting on each of these exhibits. Klayman's Post-Trial Mots. at 16.

Prior to their use at trial, the Court considered and issued a contingent ruling on the authenticity of these materials. Mem. Op. and Order (Mar. 6, 2018), ECF No. 511. At trial, the Court admitted these exhibits after Judicial Watch introduced sufficient evidence to satisfy the contingencies in the Court's [511] Memorandum Opinion and Order. The Court issued limiting instructions to ensure that the jury considered the exhibits for the purpose for which they were admitted. Klayman now argues that those instructions were in fact counterproductive, encouraging the jury to consider the materials for the prohibited purpose, that is, the truth of the matter asserted. Klayman's Post-Trial Mots. at 15-18.

Klayman is wrong. To consider the materials for the truth of the matter asserted would be to believe that the authors of the notes meant what they said, for example, that they wanted to be removed from the Judicial Watch mailing list because Fitton was "ruining" the organization; that they feared that this litigation would "siphon off millions" from Judicial Watch coffers; and that they would not donate again until Klayman "takes over" Judicial Watch once more. JW's Exs. 33, 36, 42. Consistent with the Court's instructions, the jury could have properly considered the exhibits as simply an indicator that Klayman's campaign was having an effect. Whether or not these specific (putatively former) donors believed or did as they wrote is immaterial.

Importantly, Klayman does not expressly raise a hearsay objection. He states that his challenge to the letters is only to their authenticity as pieces of evidence, which is a low hurdle to clear. The Court stands by its rulings that these letters are what Judicial Watch says they are. Moreover, the test for judgment as a matter of law is one of legal insufficiency of the verdict. *Ortiz*, 562 U.S. at 189. Klayman fails to prove that the jury had inadequate information—even if, *arguendo*, these letters were excluded—to conclude that the likelihood of confusion test was satisfied. There is no reason to grant a new trial either on these grounds.

2. Counterclaims for Unfair Competition

As for Counts V and VI of the Amended Counterclaim, the jury awarded damages to Judicial Watch for Klayman's unfair competition through various means. Klayman addresses these two counterclaims in very summary terms in a single paragraph of five sentences, explaining that his arguments on this issue are "interweaved throughout" his brief. Klayman's Post-Trial Mots. at 18-19. The only specific errors he raises are the Court's decisions not to give jury instructions 1) recognizing a fair comment defense to the disparagement counterclaims, and 2) identifying truth as a defense to the disparagement counterclaims. *Id.* at 19.

Just as Klayman does, the Court shall address these arguments when it considers the disparagement counterclaims to which they properly correspond. With

respect to the unfair competition counterclaims themselves, Klayman says virtually nothing. What he does say fails to discharge his heavy burden to prove that the jury lacked sufficient evidence to reach its verdict. Nor does the Court find that Klayman's arguments anywhere else in the briefing undermine the legal sufficiency of the jury verdict or otherwise warrant a new trial on the unfair competition claims.

3. Counterclaims for Disparagement of Judicial Watch and Fitton

The jury awarded damages to Judicial Watch and Fitton for Counts VIII and IX, respectively, of the Amended Counterclaim for breaches of a contractual non-disparagement provision. Klayman argues that it was error not to give a jury instruction about truth as a defense. *Id.* at 19-21. Tangentially here—and more so in a part of his brief devoted to the Court's allegedly prejudicial rulings—Klayman also objects to the omission of a fair comment defense from the jury instructions. *Id.* at 21, 25-26. The Court shall consider both issues now in the context of the disparagement counterclaims.

i. Fair Comment

Twice during trial, Klayman requested a fair comment jury instruction, and twice the Court refused to issue such an instruction. Order (Mar. 9, 2018), ECF No. 528; Order (Mar. 12, 2018), ECF No. 541 (denying motion to reconsider). The Court's denial of the motion

to reconsider rejected, among other things, Klayman's First Amendment argument. Order (Mar. 12, 2018), ECF No. 541, at 1. The Court refers the reader to those decisions for its reasoning.

Pause is in order simply to add a further reason why the Court correctly rejected Klayman's proposed instruction. Klayman improperly sought to import a defense from tort law into the specific contractual provision at issue in this breach of contract claim. That provision includes some language about fair comment. CSA ¶ 17 ("Nothing in this paragraph is intended to, nor shall be deemed to, limit either party from making fair commentary on the positions or activities of the other following the Separation Date."). But the jury, not the Court, was responsible for applying that contractual provision to the testimony and other evidence of Klayman's statements.

Accordingly, none of Klayman's arguments alters the Court's decision to withhold an instruction as to a fair comment defense to a tort claim when the claim at issue is a breach of contract claim.

ii. Truth as a Defense

The Court previously dealt with the truth-as-a-defense issue in a February 20, 2018, pretrial hearing, when the parties were discussing the definition of disparagement in the draft jury instructions. *See* Feb. 20, 2018 Hr'g Tr. 21:8-26:25. For his part, Klayman objected to using the definition in the Confidential Severance Agreement unless "we put something in it that

said it's not disparagement if what you are saying is true." *Id.* 23:3-4. Ultimately, in the face of disagreement about which definition should be used, the parties agreed to remove the definition of disparagement from the instructions entirely. *Id.* 26:10-25.

Klayman referred obliquely to this issue again in his oral Rule 50(a) motion. *See* Trial Tr. 3196:12-3197:12 ("As I was able to show through cross-examination, what I said was true, and it was acknowledged in that testimony. . . . Those facts were true. . . ."). There his argument was closely intertwined with the fair comment defense, which the Court expressly addressed during trial and again above. He did not expressly renew his request for an instruction regarding truth as a defense, nor did he argue then—or now—that it was error more generally to exclude an instruction about the definition of disparagement.

Truth may be a defense to the *tort(s)* of disparagement or injurious falsehood, which appear to arise only when "the plaintiff's interest in property, real or personal, tangible or intangible," is at stake. Robert D. Sack, Sack on Defamation §§ 13:1.1, 13:1.4[D] (5th ed. 2017). But the Court need not decide whether a tort claim could be sustained. The only disparagement claims that Klayman faced arose out of his alleged *breach of contract* with Judicial Watch.

The question, then, is whether the contractual non-disparagement provision permits a defense of truth. Paragraph 17 of the Confidential Severance Agreement provides in pertinent part that:

> Klayman expressly agrees that he will not, directly or indirectly, disseminate or publish, or cause or encourage anyone else to disseminate or publish, in any manner, disparaging, defamatory or negative remarks or comments about Judicial Watch or its present or past directors, officers, or employees. . . . Nothing in this paragraph is intended to, nor shall be deemed to, limit either party from making fair commentary on the positions or activities of the other following the Separation Date.

Unless there is an ambiguity in the contractual provision, such that interpretation requires extrinsic evidence, this is a question of law for the Court to resolve. *See, e.g.*, *Republican Nat'l Comm. v. Taylor*, 299 F.3d 887, 891 (D.C. Cir. 2002) (citing *Dodek v. CF 16 Corp.*, 537 A.2d 1086, 1092 (D.C. 1988)) (applying D.C. law); *see also* CSA ¶ 23 (specifying D.C. law as rule for decision). The parties do not invoke extrinsic evidence or otherwise point to any ambiguity in the Confidential Severance Agreement. Moreover, this is an expressly integrated contract. *See* CSA ¶ 26. Accordingly, the Court shall evaluate the contract's meaning as a legal issue. *See Taylor*, 299 F.3d at 892 (interpreting contract as a matter of law where no issue of extrinsic evidence); *Dodek*, 537 A.2d at 1093 (proceeding likewise with contracts that were "integrated, unambiguous, [and] [spoke] for themselves").

Nothing in the contractual language expressly establishes truth as a defense to a contractual non-disparagement claim. Nor does the contract distinguish between permitted and prohibited language

based on truthfulness. Rather, the dividing line is negativity. *See* CSA ¶ 17 (prohibiting Klayman and Judicial Watch's directors and officers from "disseminat[ing] or publish[ing] . . . disparaging, defamatory or negative remarks" about each other). The Court need not deal with the language prohibiting defamatory remarks, as there is no claim of defamation—under contract or tort—at issue here. If a factual statement is disparaging, then the contract prohibits it. And if the import of truth remains uncertain, it is clear that a negative statement is prohibited whether it is true or not.

The jury heard conflicting testimony about Klayman's allegedly disparaging remarks. The jury had the duty to assess credibility and determine whether these statements were disparaging or negative. The jury could find that what Klayman said was disparaging or negative, and even if some of it was true, that would violate the non-disparagement provision. Klayman has not met the high standard necessary to disturb the jury verdict.

Moreover, although the Court did not think it appropriate to give an instruction regarding truth as a defense, as a practical matter in the context of the actual trial, both evidence (i.e., testimony) and the arguments to the jury included conflicting statements as to whether Klayman's allegedly disparaging statements were true. The jury would have made credibility decisions as to what testimony they would credit.

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Accordingly, the Court did not err by withholding jury instructions about fair comment and truth as a defense. The jury had a copy of the Confidential Severance Agreement and could determine for itself whether Klayman's statements violated the non-disparagement provision. And Klayman has not discharged his burden to show that the evidence of disparagement of Judicial Watch and Fitton is legally insufficient. He is not entitled on these grounds to either judgment as a matter of law or a new trial.

4. Counterclaim for Improper Access to or Use of Judicial Watch Information

Klayman challenges the jury's finding that he improperly accessed or used certain Judicial Watch information and must pay damages under Count X of the Amended Counterclaim. The jury purportedly misinterpreted the evidence, in particular "some internal documents [that] for convenience designated the donors as Judicial Watch." Klayman's Post-Trial Mots. at 21-23. Rather than taking donor names from Judicial Watch, Klayman argues that he was within his rights to rent them from ATA instead. *Id.*

But Klayman mischaracterizes the Amended Counterclaim, which alleges for example that he "used non-public Confidential Information, including but not limited to, information about direct mail solicitation operations," as well as "Judicial Watch donor lists," without Judicial Watch's permission. Am. Countercl., ECF No. 86, ¶¶ 127, 128. Klayman virtually admits

Judicial Watch's allegations, insofar as he indicates that in working with ATA, he used names that originated from ATA's work for Judicial Watch. *See* Klayman's Post-Trial Mots. at 21-22.

Judicial Watch points out that these names remained the property of Judicial Watch under its agreement with ATA, which Klayman had signed. JW's Post-Trial Opp'n at 14-15 (citing JW's Ex. 63, ¶¶ 5(A), 7). And Judicial Watch shows that in Klayman's rebuttal testimony, he himself describes obtaining names for Saving Judicial Watch from his Senate campaign, which got them from his first list manager, ATA, and later he brought those names to his second list manager. *Id.* at 15 (citing Trial Tr. 3408:12-25).

It is not a matter of an "illegal taking," as Klayman casts the issue, Klayman's Post-Trial Mots. at 23, but rather a potential breach of his agreement with Judicial Watch. In the Confidential Severance Agreement, "Klayman expressly agrees and acknowledges that, following the Separation Date, he shall not retain *or have access to* any Judicial Watch donor or client lists or donor or client data." CSA ¶ 4(D) (emphasis added). Moreover, in the Agreement, "Klayman agrees that after the Separation Date, he shall not . . . *use* Confidential Information for any purpose without written approval by an officer of Judicial Watch, unless and until such Confidential Information has become public knowledge through no fault or conduct by Klayman." *Id.* ¶ 4(A) (emphasis added) (defining "Confidential Information" to include "non-public information and materials" about "donors" and "prospective donors").

There was sufficient evidence for the jury to find that Klayman breached his obligations under the Confidential Severance Agreement not to access or use Judicial Watch donor lists and other confidential information. Accordingly, the Court shall not disturb the jury's verdict by granting judgment as a matter of law or a new trial on this basis.

5. Alleged Bias and Prejudice of the Court

In the following subpart, the Court shall address four of Klayman's five bases for alleging that the Court was biased and prejudiced. As for the fifth basis, the Court shall defer a discussion of certain letters that the Court excluded until the Court deals with Klayman's pending motions for sanctions regarding related issues.

At the outset, the Court notes that Klayman's motion for a new trial "must meet a heavy burden to prevail on the ground of judicial misconduct." 11 Charles Alan Wright, *supra*, § 2809.

i. The Court's Decisions Not to Issue Certain Jury Instructions Pertinent to Klayman's Claims, JW's and Fitton's Counterclaims, or Both

a. No Instruction Regarding "Bizarre" Trial Presentation

First, Klayman argues that he was entitled to a jury instruction about "why this case would be tried in

such a one-sided manner, without [Klayman] having either witnesses or exhibits." Klayman's Post-Trial Mots. at 23-25 (referring also to the trial presentation as "[b]izarre" (internal quotation marks omitted)). Of course, Klayman himself was permitted to testify, and Klayman admits that he was permitted to introduce the Confidential Severance Agreement into evidence. *Id.* at 24. But the Court shall address his argument to the extent that its factual premises are accurate.

Before trial, the Court considered and expressed doubt about giving Klayman's requested instruction. *See* Order (Jan. 23, 2018), ECF No. 436, at 3. Ultimately the Court did not give this instruction. Klayman does not cite any authority for including an instruction about certain of the Court's adverse legal rulings, including the imposition of sanctions, or about a party's allegations that this Court is biased against that party. Judicial Watch is correct that such an instruction would have been wholly inappropriate. JW's Post-Trial Opp'n at 21. By way of justifying the Court's final decision not to give this instruction, the Court stands by its prior reasoning that "adding an instruction to this effect would tend to suggest to the jury that the Court has made factual findings, which it has not." Order (Jan. 23, 2018), ECF No. 436, at 3. The effect would have been to stoke prejudice, rather than avoid it. Accordingly, the exclusion of such an instruction was not improper.

b. No Instruction Regarding Fair Comment

Klayman raises the fair comment issue again. Klayman's Post-Trial Mots. at 25-26. Above, the Court discussed its rejection, on the merits, of the argument that it should have issued a fair comment instruction. Accordingly, this is not a basis for finding that the Court is biased or that Klayman was unduly prejudiced.

c. No Instruction Regarding Cumulative Breach

Although the issues raised in Klayman's Post-Trial Motions primarily concern Judicial Watch's and Fitton's counterclaims, this one concerns Klayman's claims. Klayman argues that it was improper to omit an instruction that the jury could consider the cumulative effect of Judicial Watch's simple breaches, if any, of the Confidential Severance Agreement to decide whether Judicial Watch had materially breached the agreement. *Id.* at 26-27.

After "[t]he parties raised this issue the day before closing arguments and jury instructions," the Court considered the proposed cumulative breach instruction and rejected it. Order (Mar. 13, 2018), ECF No. 543. Klayman objects now to the Court's reasoning, but he offers nothing to show that the Court's decision was incorrect. Rather, he simply regurgitates a single district court opinion, from another circuit, that the Court considered during trial and decided was insufficient for

several reasons. Klayman's Post-Trial Mots. at 27 (citing *Suntrust Mortg. v. United Guar. Residential Ins. Co.*, 806 F. Supp. 2d 872, 902 n.64 (E.D. Va. 2011), *vacated in part on other grounds*, 508 F. App'x 243 (4th Cir. 2013));[8] Order, ECF No. 543, at 2-3. The Court's decision to move ahead without such a jury instruction did not demonstrate any bias. Nor did it have any prejudicial effect whatsoever: The jury was given the option to distinguish between simple and material breaches by Judicial Watch and found neither. *See* Jury Verdict Form, ECF No. 560; JW's Post-Trial Opp'n at 22.

Accordingly, the Court's decision not to give the three aforementioned instructions did not demonstrate any bias or have any unduly prejudicial effect.

ii. Ninth Circuit Ruling and Florida Judgment

Klayman finds further evidence of bias and prejudice in the Court's handling of two decisions by other courts that the parties sought to use for impeachment purposes. Klayman's Post-Trial Mots. at 27-31. But Klayman overlooks the Court's reasoning on the merits in each instance.

At trial, Judicial Watch attempted to impeach Klayman by asking about a Ninth Circuit ruling that was unfavorable to Klayman. *See, e.g.*, Trial Tr. 877:8-879:12 (identifying Judicial Watch's first attempt and

[8] Neither the Court's [543] Order nor Klayman's Post-Trial Motions cited the *Suntrust* proceedings in the Fourth Circuit following the district court's decision.

the parties' initial discussion with the Court on this topic); *In re Bundy*, 852 F.3d 945, 953 (9th Cir. 2017) (finding, *inter alia*, that pleadings filed by Klayman "contain[ed] patently false assertions"). After examining the ruling, *In re Bundy*, and considering the authorities, the Court issued an Order permitting Judicial Watch to ask about the underlying issue without introducing the Ninth Circuit opinion itself. Order (Feb. 28, 2018), ECF No. 496, at 1-2.

Klayman improperly conflates the Ninth Circuit issue with another issue. The Court also carefully considered whether Klayman should be permitted to use evidence of a Florida judgment against Judicial Watch. Initially, the Court held in abeyance Judicial Watch's and Fitton's motion *in limine* to exclude evidence of the Florida judgment. Order (Feb. 20, 2018), ECF No. 465, at 3. The Order included instructions and guidance for Klayman to follow at trial before he could ask the Court's permission to use this evidence. *Id.* at 3-4. At trial, the Court revisited the Florida judgment in the context of Klayman's cross-examination of Fitton. The Court issued a further Order allowing certain "narrowly focused" questioning about Fitton's role, but expressly prohibiting any reference to the Florida judgment itself. Order (Mar. 2, 2018), ECF No. 500, at 2-3.

Evidently finding the scope to be too narrow—or the risk to be too high that "Fitton would then take the opportunity to explain the circumstances, which would likely not be favorable to Klayman"—Klayman appears not to have pursued this line of questioning. JW's

Post-Trial Opp'n at 24. Nor does Klayman respond to Judicial Watch's opposition brief by identifying any place in the record where he did in fact ask Fitton about the Florida judgment. The Court shall not root through the trial transcripts to confirm whether he ever did use the Florida judgment during the lengthy trial. *See Potter v. District of Columbia*, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, J., concurring) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam)) ("Judges 'are not like pigs, hunting for truffles buried in briefs' or the record.").

Now Klayman challenges the limited scope of questioning about the Florida judgment that the Court permitted, by contrast with his characterization of the Court's response to the Ninth Circuit ruling. But the Court stands by its reasoning in its February 20, 2018, and March 2, 2018, Orders, about the Florida judgment, and its February 28, 2018, Order about the Ninth Circuit ruling.

Klayman's effort to contrast these two decisions ignores the Court's reasoning about the application of the Federal Rules of Evidence and Circuit precedent, which the Court shall not repeat here. But because Klayman alleges that the purportedly differential treatment is demonstrative of bias, the Court shall add now that the circumstances of the two uses of evidence were distinguishable. Judicial Watch sought to impeach Klayman with evidence bearing on his own character for truthfulness. Whereas Klayman requested permission to impeach Fitton with evidence bearing on the character for truthfulness principally of another

Judicial Watch employee, and only secondarily of Fitton. *See, e.g.*, Order (Mar. 2, 2018), ECF No. 500, at 2-3. These contexts affected the Court's application of the relevant evidentiary rules, for which, again, the Court refers the reader to the respective Orders themselves.

Some other issues briefly raised by Klayman deserve similarly succinct dispatch. First, Klayman argues that he did not open the door to Judicial Watch's impeachment use of the Ninth Circuit ruling. Klayman's Post-Trial Mots. at 28 (citing Trial Tr. 877:8-24). But Klayman mischaracterizes the record. Judicial Watch ultimately did not bring in the Ninth Circuit ruling after Klayman made the statements that he cites. When Klayman objected to Judicial Watch's attempt to raise the Ninth Circuit ruling at that time on Day 3 of the trial, February 28, 2018, the Court and the parties dealt with the issue initially at sidebar, and then further after the Court dismissed the jury for the day. When trial resumed on Day 4, March 1, 2018, Judicial Watch pursued a different line of cross-examination of Klayman, and only later raised the Ninth Circuit ruling. At that time, Klayman did not object to any lack of foundation. Trial Tr. 992:2-6. In any case, the Court finds that Klayman's cited statements on Day 3 of the trial sufficiently opened the door to an attack on his character for truthfulness. *See, e.g.*, *id.* 877:15 ("I try to follow the rules of ethics, yes."); Fed. R. Evid. 608(b). Nor has he argued that the attack must immediately follow the statement that opens the door.

Second, Klayman objects to the Court's identification of the correct opinion to which Judicial Watch

sought to refer in its efforts to impeach Klayman. Klayman's Post-Trial Mots. at 28-30. There had been some confusion as to which of two Ninth Circuit opinions contained the finding of "patently false" representations that Judicial Watch proposed using to impeach him. *See, e.g.*, Trial Tr. 890:18-892:10, 966:23-967:22. Judicial Watch had referred at first to the wrong one. *See id.* But the Court found that Judicial Watch was entitled to ask about the scenario for the evidentiary reasons that the Court discussed in its [496] Order of February 28, 2018, which relied on the correct Ninth Circuit opinion. The Court did not demonstrate bias in the efforts of Chambers to understand the proposed impeachment and correct a mistaken reference to the wrong one of several opinions for that impeachment. In any case, the discussion about the correct opinion occurred outside the presence of the jury, and the specific opinion did not come into evidence, so this discrepancy had no effect on the jury.

Lastly, Klayman objects to the Court's prohibition of his attempt to revisit the Ninth Circuit ruling on redirect. *See* Klayman's Post-Trial Mots. at 30. The Court sustained an objection to his doing so, indicating that the Court had "considered this," because Klayman had "raised this before, and [the Court] [knew] what the answer is." Trial Tr. 993:21-994:5. To elaborate, Klayman's explanation of the context of the Ninth Circuit ruling—in particular his description of the underlying Cliven Bundy matter—exceeded the scope of the impeachment. And Klayman should have known that the Court would prohibit that. Shortly beforehand, in

response to another objection, the Court had stopped Klayman from going into this context when Judicial Watch asked the impeaching question during cross-examination. The Court made clear that Klayman could "give an explanation to [Judicial Watch's] question, which relates to what it is that the Ninth Circuit said about [Klayman's] pleadings," but expressly prohibited him from "get[ting] into the whole case that [Klayman] might have been involved with." *Id.* 993:1-11. Even though he was prohibited from going into detail about the Ninth Circuit case, Klayman had already said enough to rebut the impeachment. *See id.* 992:7-14 (stating, e.g., "[t]here was another judge on the panel that made the ruling by the name of Judge Ronald Gould, who actually is very liberal, Democrat, and he found that I hadn't made any false assertions.").[9]

The Court did not demonstrate any bias, nor did it unduly prejudice Klayman's case, in deciding how the

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[9] Moreover, the Court's review of Judge Gould's dissent suggests that Klayman's explanation is misleading. Judge Gould wrote that Klayman "has not been disbarred or suspended by another bar association or proven to have engaged in unethical conduct that could justify disbarment." *In re Bundy*, 852 F.3d at 953 (Gould, J., dissenting). Judge Gould stops short of finding that Klayman made no false assertions. Klayman's attempt to further muddy the waters now by dragging in Judge Gould's other dissent, to a previous panel ruling about his lack of candor, does not remedy the likely misleading nature of his testimony. *See* Klayman's Post-Trial Reply at 23 & n.10 (citing *In re Bundy*, 840 F.3d 1034, 1055 (9th Cir. 2017) (Gould, J., dissenting)). In any case, the jury was left with Klayman's uncorrected rebuttal, which the jury presumably considered as it weighed all of the evidence.

parties could use the Ninth Circuit ruling and the Florida judgment.

iii. The Court's Alleged "Actual Prejudicial Remarks"

Klayman raises a number of the Court's remarks during trial that he alleges demonstrate the Court's bias against him and prejudiced the jury against him. *See* Klayman's Post-Trial Mots. at 31-36. The Court disagrees. In short, none of the Court's comments during trial evidenced any bias against him. The comments were appropriate in context. The Court even gave a jury instruction that its comments were not to be taken as indicative of any view of the merits:

> You should not assume from any of my actions during the trial that I have any opinion about the facts in this case. My rulings on objections, my comments to lawyers, my instructions to you, and my questions or comments to witnesses all were concerned with legal matters or with clarifying a question or answer and are not to be taken by you as indicating my view about how you should decide the facts. You are the judges of the facts.

Trial Tr. 3742:24-3743:6. Nor could any of the Court's comments have had a prejudicial effect so significant as to support a finding of judicial bias. *See, e.g.*, *Czekalski*, 589 F.3d at 457 (citing, e.g., *Liteky v. United States*, 510 U.S. 540, 555 (1994)). For example, "[*n*]*ot* establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are

within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Id.* (quoting *Liteky*, 510 U.S. at 555-56) (internal quotation marks omitted).

Nevertheless, the Court has considered Klayman's purported evidence of bias and prejudice and shall address that evidence categorically. First, many of the remarks to which he points were outside of the presence of the jury. *See, e.g.*, Klayman's Post-Trial Mots. at 32-33 (citing Trial Tr. 576:12-13, 577:1-23). By definition, those remarks could have no effect on the jury. To the extent that Klayman refers to *his own* comments about the effect of the Court's statements on the jury, he effectively tries to *bootstrap* his way into demonstrating that the Court prejudicially affected the jury. That is meritless. These remarks do not demonstrate that the Court was biased either.

Second, of the statements that the Court did make in the presence of one or more jurors, none of them demonstrates bias. Nor is any highly prejudicial. The Court shall nevertheless describe some here.

During *voir dire*, Klayman asked for Juror No. 1177's verdict in a prior case, and now he objects to the Court's interruption instructing Klayman not to ask such questions. *Id.* at 31 (citing Trial Tr. 96:3-7). But Klayman omits the Court's almost immediately preceding instruction that the juror not identify the verdict in a different prior case. Trial Tr. 95:20-96:2. The Court had clearly signaled that such questions were off limits, and yet Klayman asked anyway. Later Klayman

asked the same prospective juror about the Cliven Bundy matter, and the Court rejected that line of inquiry. *Id.* 97:3-97:13. The Court stands by its explanation that the question was inappropriate because Klayman was "bringing something in that's not part of the case here." *Id.* 97:9-10. The Court explained its reasoning further after Juror No. 1177 left the bench. *Id.* 97:14-98:15. Now the Court elaborates still further that because Klayman was never the attorney of record for Cliven Bundy in his criminal case, there was no valid reason for Klayman to ask a prospective juror about Bundy. Such an inquiry would imply some unfounded connection to this case. To conclude, the Court's responses to Klayman's inappropriate *voir dire* questions were neither unduly prejudicial nor highly prejudicial. Moreover, Klayman can scarcely complain now about prejudice when he did not even object to the seating of this Juror No. 1177. *See id.* 226:17-18 (identifying objections limited to other prospective jurors).

Klayman also objects to several instances in which the Court commented on the law or referred to a prior legal ruling. *See* Klayman's Post-Trial Mots. at 35-36 (referring to one of the Court's authenticity rulings and to the Court's view of Klayman's argument that truth is a defense to a disparagement claim).[10] The Court is permitted to do so. Klayman has not identified any precedent to the contrary. The Court finds that any

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[10] As discussed above, Klayman was indeed wrong to argue that truth is a defense to the breach of contract claim at issue.

prejudice engendered by its comments does not meet the high standard in this Circuit to establish bias.

Additionally, when Klayman arguably badgered a witness by saying, "So you care to defy court rules?" the Court responded, "Since when have you become the judge, Mr. Klayman?" *Id.* at 35. Klayman is not correct to characterize this comment as "scoffing." *Id.* Rather, the Court—the enforcer of the rules of the Courtjustifiably rebuked Klayman for trying to usurp its role. Any prejudice that this caused the jury was Klayman's own doing. Nor, in any case, was the comment so prejudicial as to meet this Circuit's standard.

iv. DeLuca and Sheldon Deposition Rulings

Klayman also argues that the Court demonstrated bias and prejudicially affected his case through its handling of Stephanie DeLuca's and Philip Sheldon's testimony by deposition, which the Court shall address in the order that Klayman does. *See id.* at 40-44.

a. Sheldon Testimony by Deposition

Klayman argues that he should have been permitted to make certain counter-designations to Philip Sheldon's deposition testimony. *Id.* at 41-42. Despite the severe tardiness of Klayman's eve-of-trial submission of counter-designations, the Court carefully considered his proposals on the merits and denied them. Order (Feb. 23, 2018), ECF No. 486, at 1-3.

Klayman objects now that the Court's reasoning for this denial differed from Judicial Watch's and Fitton's basis for opposing these counter-designations. Klayman's Post-Trial Mots. at 41-42. But Klayman does not cite any authority for his apparent notion that the Court's bases for a decision must be limited to those proposed by a party (or its opponents, to be precise). Nor does Klayman otherwise show that the Court was wrong on the merits.

The Court has reviewed the deposition transcript and stands by the reasoning in its [486] Order. Moreover, the Court's review of the trial transcript shows that Judicial Watch did not even use the designation within Sheldon's deposition to which Klayman's counter-designation purportedly responded. Accordingly, the Court finds no evidence of bias or high prejudice suggestive of bias.

b. DeLuca Testimony by Deposition

Klayman challenges the Court's handling of certain deposition testimony by Stephanie DeLuca. The Court appropriately exercised its discretion regarding this testimony and does not change its decision now under Federal Rule of Evidence 403(b).

First, Klayman objects to the Court's decision to allow DeLuca's testimony about an incident in a church parking lot. *Id.* at 42-43 (citing Trial Tr. 3184:23-24). With one small exception, Klayman did not challenge Judicial Watch's and Fitton's designation of this portion of DeLuca's deposition transcript as part of his

filing challenging other designations of that transcript.[11] *See* Joint Pretrial Stmt., ECF No. 337-1, at 26 (designating DeLuca Dep. 33:20-36:9); Pl.'s Resp. to Ct.'s Min. Order Regarding Counter-Designations, ECF No. 478, at 13-14 (expressly challenging only DeLuca Dep. 34:15-16, but more broadly quoting DeLuca Dep. 34:8-16). The Court expressly considered Klayman's challenge to a small portion of this designation—namely, his challenge to DeLuca Dep. 34:15-16—and denied it. Order (Feb. 23, 2018), ECF No. 486, at 4. The Court has reviewed the deposition transcript and trial transcript, and stands by the reasoning in its [486] Order. *See* DeLuca Dep. 33:22-36:9; Trial Tr. 3183:18-3185:11 (regarding DeLuca Dep. 33:22-36:9). It appears from the transcript that Klayman did not even object to this testimony when it was read at trial. Even if he had, the Court finds no evidence of bias or high prejudice suggestive thereof in allowing this deposition testimony to be read at trial.

Second, Klayman argues that the Court should not have excluded DeLuca's testimony about Klayman's aspirations for the Senate and Presidency. Klayman's Post-Trial Mots. at 43 (citing DeLuca Dep. 55:1-9).

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[11] Klayman proposed counter-designations to part of Judicial Watch's designated portion of the DeLuca deposition, but the Court rejected the counter-designations. Pl.'s Resp. to Ct.'s Min. Order Regarding Counter-Designations, ECF No. 478, at 7 (proposing DeLuca Dep. 80:20-82:6, 87:7-16, 93:4-14, 97:21-100:12, to counter DeLuca Dep. 36:1-9); Order (Feb. 23, 2018), ECF No. 486, at 3 (rejecting each of these counter-designations). He does not challenge that decision now.

The Court expressly considered Klayman's counter-designation of this portion of DeLuca's testimony and excluded it. Order (Feb. 23, 2018), ECF No. 486, at 3. The Court has reviewed the deposition transcript and stands by the reasoning in its [486] Order.

Third, Klayman disagrees with the Court's decision to allow DeLuca's testimony about vulgar words that Klayman purportedly used. Klayman's Post-Trial Mots. at 43-44 (citing Trial Tr. 3185:24-25). Klayman did not challenge Judicial Watch's and Fitton's designation of this portion of DeLuca's deposition transcript as part of his filing challenging other designations of that transcript. *See* Joint Pretrial Stmt., ECF No. 337-1, at 26 (designating DeLuca Dep. 38:3-10); Pl.'s Resp. to Ct.'s Min. Order Regarding Counter-Designations, ECF No. 478 (no citation of DeLuca Dep. 38:3-10). Nevertheless, having reviewed the deposition transcript and trial transcript, the Court stands by its reasoning at sidebar in allowing this deposition testimony to be read. *See* DeLuca Dep. 38:3-10; Trial Tr. 3185:12-3186:15 (regarding DeLuca Dep. 38:3-10).

Finally, the Court allowed DeLuca's testimony about other litigations between her and Klayman, which Klayman now argues was an error. Klayman's Post-Trial Mots. at 44 (citing Trial Tr. 3187:7-3188:20). Klayman did not challenge Judicial Watch's and Fitton's designation of this portion of DeLuca's deposition transcript as part of his filing challenging other designations of that transcript. *See* Joint Pretrial Stmt., ECF No. 337-1, at 26 (designating DeLuca Dep. 52:12-53:16); Pl.'s Resp. to Ct.'s Min. Order Regarding

Counter-Designations, ECF No. 478 (no citation of DeLuca Dep. 52:12-53:9). Nevertheless, having reviewed the deposition transcript and trial transcript, the Court stands by its reasoning at sidebar in allowing this deposition testimony to be read. *See* DeLuca Dep. 52:12-53:9; Trial Tr. 3187:6-3189:17 (regarding DeLuca Dep. 52:12-53:9).

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Having reviewed Klayman's grounds for judgment as a matter law or a new trial, the Court finds that none warrants either form of relief. Accordingly, the Court now considers whether Klayman is nevertheless entitled to remittitur of the jury's award.

6. Remittitur

Klayman objects on two grounds to the jury award to Judicial Watch and Fitton of a total of $2,800,000, claiming that figure is "excessive," and it is "more than what Defendants/CounterPlaintiffs asked for." Klayman's Post-Trial Mots. at 45. His briefing of these arguments is profoundly deficient.

While Klayman cites authorities regarding remittitur of excessive damages awards, including some in the vicinity of this jury award, *see id.* at 45-46 & nn. 16-17, he says nothing to explain why the awards in this case are excessive compared with the counterclaims in this case.

Above, the Court rejected Klayman's argument, now reiterated, that the jury wrongly attributed damages

caused by FOLK and Freedom Watch to Klayman himself. *See id.* at 46. Nor did the Court find merit in Klayman's other argument, namely that the Court prejudiced the jury against him. *Id.* Moreover, Klayman has not walked the Court through the calculations necessary to support his argument that the verdict was excessive as to specific counterclaims, or as to the counterclaims as a whole.

The contentious relationship between the parties was reflected in the trial. At nearly every turn, Klayman, on the one hand, and Judicial Watch and Fitton, on the other, disputed the evidence, whether it was exhibits or testimony. These disputes produced contradictory evidence, which it was the jury's role to evaluate and credit. The verdict form prompted the jury to apply this evidence claim-by-claim and counterclaim-by-counterclaim. *See* Jury Verdict Form, ECF No. 560. Ultimately the jury awarded damages in seven different categories of counterclaims.

It was not as if the jury generated a lump sum figure for which the allocation to specific claims and counterclaims was unclear. The jury never even produced a total figure. Rather, when the jury returned with awards on the counterclaims, the Court had to tally the awards on particular counterclaims to identify the total judgment for Judicial Watch and for Fitton. *See* J. on the Verdict for Counterpl. Judicial Watch, Inc., ECF

No. 548; J. on the Verdict for Counterpl. Thomas J. Fitton, ECF No. 549.[12]

Although the total $2,800,000 award between Judicial Watch and Fitton is significant, the Court has no reason to believe that the jury ever conceived of the award in that fashion. Rather, the jury heard evidence as to all of the issues raised by the counterclaims and should have credited the witnesses and other evidence accordingly. For some counterclaims, the jury received evidence as to specific amounts, and for others the jury was left to make its own determination. In each instance, the jury appears to have complied with the verdict form by assigning separate damages for each counterclaim. The Court finds that none of those individual determinations "shock[s] the conscience," or is "so inordinately large as to obviously exceed the maximum limit of a reasonable range within which the jury may properly operate," in light of the counterclaims in this case. *Peyton*, 287 F.3d at 1126-27.

Nor does Klayman explain how this verdict is more than what Judicial Watch and Fitton requested. Again, the Court is not obliged to track down the numbers of its own accord. But even if and where a specific award is greater than Judicial Watch's and Fitton's request, the Court is unpersuaded that such fact alone warrants remittitur. The Court is unpersuaded by

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[12] As a reminder, the Court vacated these judgments on the verdict so that Klayman would have time to prepare his post-trial motions. Order (Apr. 12, 2018), ECF No. 565, at 3. As a result of today's decision, however, the Court shall reissue judgments on the verdict.

Klayman's authorities for this proposition. Klayman relies on D.C. Circuit precedent suggesting that "in the absence of punitive damages a plaintiff can recover no more than the loss actually suffered." *Kassman v. Am. Univ.*, 546 F.2d 1029, 1033 (D.C. Cir. 1979) (per curiam) (quoting *Snowden v. D. C. Transit Sys., Inc.*, 454 F.2d 1047, 1048 (D.C. Cir. 197 1)) (internal quotation marks omitted); Klayman's Post-Trial Mots. at 45. But, as he acknowledges, this case line concerns double recovery—the rule generally prohibiting recovery a second time for the same injury. *See Kassman*, 546 F.2d at 1033-34 ("Where there has been only one injury, the law confers only one recovery, irrespective of the multiplicity of parties whom or theories which the plaintiff pursues."); *see also Medina v. District of Columbia*, 643 F.3d 323, 326 (D.C. Cir. 2011) (related issue of double recovery). The language that Klayman cherrypicks is broader than the holding, and it is unsupported by the case law when extracted from its proper context. That context, double recovery, is not at issue here. Accordingly, the applicable standard remains the excessiveness of the award, which the Court has found is not satisfied here.

The Court also rejects Klayman's argument, in his reply, that the verdict was a result of "passion, prejudice, or mistake" by the jury. Klayman's Post-Trial Reply at 26 (quoting *Capitol Hill Hosp. v. Jones*, 532 A.2d 89, 93 (D.C. 1987)) (internal quotation marks omitted). Elsewhere in this Memorandum Opinion, the Court has rejected Klayman's several brief arguments in support of that notion. Klayman does not supply any

further basis for revisiting those assessments here. Moreover, the jury's "award[s] [were] within a reasonable range," and the Court has no reason to second-guess them. *Nyman*, 967 F. Supp. at 1571.

Klayman has not satisfied the high standard necessary to disturb the jury's assignment of damages to the counterclaims.

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The Court has found that the jury had sufficient evidence on which to base its verdict for Judicial Watch and Fitton on their counterclaims. *Scott*, 101 F.3d at 752. Nor are there any grounds to grant a new trial or remittitur. Accordingly, Klayman is unable to prevail on his Post-Trial Motions. Although the Court offers these conclusions here, the Court factors in its analysis below of Klayman's argument in the Post-Trial Motions that certain letters should not have been excluded from evidence; that argument does not affect the outcome.

B. Sanctions Motions & Related Issues

The Court addresses here Klayman's pending sanctions motions against Judicial Watch and, with respect to the second motion, Fitton, as well as Klayman's argument in the Post-Trial Motions about certain evidence excluded by the Discovery Sanction against Klayman.

The Court shall begin with Klayman's first pending sanctions motion, filed the day before trial, in

which he seeks entry of judgment in his favor. Further below the Court shall address his "renewed" motion filed after trial and seeking that relief too. From considering this post-trial sanctions motion, the Court shall naturally turn to Judicial Watch's and Fitton's motion to strike that post-trial sanctions motion.

1. Klayman's Pretrial Motion for Sanctions and Entry of Judgment

The issue in this first motion is whether Judicial Watch's and Fitton's counsel misrepresented Klayman's prior compliance (or lack thereof) with discovery. Upon consultation with his own prior counsel in this matter, Klayman recalled that he did make certain productions earlier in this case, and now argues that those productions demonstrate Judicial Watch's and Fitton's false representations to the Court. Klayman's 1st Sanctions Mot. at 1, 5. Judicial Watch and Fitton respond in pertinent part that Klayman did *not* make productions in response to "the bulk" of the relevant set of discovery requests; the productions he did make were of limited utility; and in any case, the sanction for noncompliance in discovery was imposed *before* their counsel made the statements about Klayman's noncompliance. JW's 1st Sanctions Opp'n. In reply, Klayman urges that the opposition conceded his production and now inappropriately pivots to argue relevance instead. Klayman's 1st Sanctions Reply at 1-2.

It is true that Klayman responded to some discovery requests. *See* Klayman's 1st Sanctions Mot. at 5 &

Exs. 3-4; JW's 1st Sanctions Opp'n at 3. But Judicial Watch's opposition to the Post-Trial Motions makes clear that those were *initial* discovery requests. JW's Post-Trial Opp'n at 26. Whatever the merits of Klayman's response to those initial discovery requests, it was his repeated failure to produce documents in response to Judicial Watch's and then co-defendants' *Supplemental* Requests for Production of Documents that prompted Magistrate Judge Alan Kay to impose the sanction prohibiting Klayman from "testifying to or introducing into evidence any documents in support of his damage claims or in support of his defenses to Defendants' counterclaims." Order (Feb. 23, 2018), ECF No. 487 ("Testimony and Other Evidence Order"), at 1-2 (quoting Order (Mar. 24, 2009), ECF No. 302; citing Mem. Op. (Mar. 24, 2009), ECF No. 301, at 5-6) (internal quotation marks omitted). The Court has referred to this as the "Discovery Sanction."

In a 2009 decision, this Court upheld the Discovery Sanction, as the Court recalled in its Testimony and Other Evidence Order on the eve of trial. *Id.* (citing Mem. Op. (Aug. 10, 2011), ECF No. 362, at 6-7 (citing *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 84 (D.D.C. 2009) (Kollar-Kotelly, J.))). Klayman points now to documents that were produced prior to the imposition of sanctions. But he does not claim that they were responsive to the Supplemental Requests. Accordingly, there is no basis to challenge the Discovery Sanction. And Judicial Watch and Fitton did not materially misrepresent the noncompliance that prompted that sanction.

Although Judicial Watch and Fitton prevail on Klayman's first sanctions motion, they do not furnish any authority for requesting sanctions against Klayman in the form of attorney's fees for their opposing brief. *See* JW's 1st Sanctions Opp'n at 5-6. Even if the Court assumes, *arguendo*, that sanctions could be awarded under Federal Rule of Civil Procedure 11, in an exercise of its discretion the Court shall not grant such award. The Court presumes that Judicial Watch's and Fitton's failure to mention Klayman's original production was unintentional—simply another casualty of this long-running litigation. The foregoing analysis makes clear enough that Klayman is not entitled to his requested sanction. But this issue could have been headed off in entirety if Judicial Watch and Fitton had recalled the prior production sooner and been more precise in their representations. Accordingly, the Court shall not award attorney's fees for responding to this motion. Nor, of course, is Klayman entitled to any of the relief he requests. *See, e.g.*, Klayman's 1st Sanctions Reply at 4.

The Court's prior decisions conclusively resolve this issue and dictate that Klayman's first motion for sanctions be denied.

2. Portion of Post-Trial Motions Dealing with Alleged Prejudice from Exclusion of Klayman's Letters

The Court's Testimony and Other Evidence Order summarizing the evidence that Klayman could use at

trial was issued two days prior to Klayman's first motion for sanctions. As of that Order, the Court was unaware of any documents produced by Klayman at any point during discovery. Testimony and Other Evidence Order at 4. Nor had Klayman raised any such documents "during the series of pretrial conferences in January and February 2018, or in response to the Court's subsequent orders." *Id.* But for the avoidance of doubt, the Court made clear that the "sanctions [did] not prohibit Klayman from introducing any documents that he *did* produce to Defendants during discovery," which at that point appeared to be a null set. *Id.* (emphasis added).

In his Post-Trial Motions, Klayman claims that he produced certain "letters at issue (or at least the operative letter spelling out the various breaches committed by Judicial Watch)" that the Court improperly excluded. Klayman's Post-Trial Mots. at 36-37 (citing Order (Feb. 28, 2018), ECF No. 495, at 1). But the Court already dealt with these letters when Klayman indicated at trial that he wanted to use them. In a February 28, 2018, Order, the Court expressly considered letters from Klayman to David Barmak, who served as outside counsel to Judicial Watch in certain matters other than this litigation itself. Order (Feb. 28, 2018), ECF No. 495, at 1. The Court found that because Klayman had not produced these documents, he was prohibited from introducing them into evidence. *Id.* Nevertheless, the Court carefully delineated the ways in which Klayman could discuss the letters at trial. *Id.*

There are at least two problems with Klayman's post-trial attempt to raise these letters again. First, although Klayman does claim that he produced these letters, he does not claim that he produced the letters *during discovery*, which is the only basis under the Court's Testimony and Other Evidence Order for permitting him to introduce evidence at trial.[13] Rather, Klayman refers the Court to his opposition to motions for summary judgment. Klayman's Post-Trial Mots. at 37 & n.15 (citing ECF No. 285-3). That opposition consists in entirety of a copy of Fitton's deposition transcript. Pl.'s Opp'n to Defs.', [sic] Judicial Watch's, Thomas J. Fitton's; [sic] Christopher Farrell's and Paul Orfanede's [sic] Mots. for Summ. J., ECF No. 285. The transcript attaches what is evidently the "operative" letter of interest to Klayman. Klayman's Post-Trial Mots. at 37 (citing ECF No. 285-3, at ECF pages 13-26). He does not show that he ever submitted any other letters. Review of the docket confirms that discovery had concluded prior to summary judgment briefing. Min. Order of Sept. 15, 2008. Accordingly, he was not permitted to use at trial a document that he did not produce during discovery. Klayman has not shown that the Court erred in excluding the operative letter or any others.

The Court also addresses an alternative grounds for prohibiting these letters. Judicial Watch and Fitton argue in effect that it would be unfairly prejudicial to

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[13] The sole exception to this blanket rule is the Confidential Severance Agreement, which the Court did permit Klayman to use at trial. Testimony and Other Evidence Order at 5.

admit one or more of these letters when Klayman did not produce them during discovery. *See* JW's Post-Trial Opp'n at 26-27. Only during discovery would Judicial Watch and Fitton have had the opportunity "to test the claims, damages and defenses" raised in a letter written by Klayman himself. *Id.* at 27 ("Klayman's argument that there would be no surprise occasioned by his attempt to introduce and admit letters *written to advocate his claims against JW* is disingenuous." (emphasis added)). Although Judicial Watch and Fitton do not cite Federal Rule of Evidence 403, the Court finds that this rule supplies the authority for their objection. Because the operative letter consists solely of Klayman's own allegations and arguments, the danger of "unfair prejudice" from Judicial Watch's and Fitton's inability to conduct discovery in response "substantially outweigh[s]" the letter's "probative value." Fed. R. Evid. 403. Even if the sanctions had not applied, the Court could have excluded the letter in an exercise of its discretion under Rule 403.

In short, Klayman was sanctioned for his failure to respond to certain discovery requests. The Discovery Sanction prohibited Klayman from introducing any evidence at trial to advance his damage claims or respond to the counterclaims. The Testimony and Other Evidence Order made clear that Klayman would not be prohibited from using any documents that he had produced *during discovery*. Although Klayman subsequently identified a tranche of documents that he in fact produced during discovery, he has not argued or otherwise shown that he produced *the operative letter*

or any others during discovery. Nor has he argued that he would have used at trial any documents in the tranche that he produced. And, even if there were no Discovery Sanction, the Court could have excluded the letter(s) because Judicial Watch and Fitton did not have any opportunity to conduct discovery on the basis thereof. Accordingly, Klayman has not identified any error in the Court's decision to exclude this letter, as well as others to which he only obliquely refers.

Klayman also objects to the Court's response to his attempt to raise the letters during trial. Klayman's Post-Trial Mots. at 39-40. As previously discussed, the Court issued precise instructions for what Klayman was able to do with the letters, despite being prohibited from introducing them into evidence. Order (Feb. 28, 2018), ECF No. 495, at 1. Those instructions pertained to Klayman's attempt to discuss the letters in his own testimony. *See id.* Klayman now objects to two instances in which those letters were at issue.

His first objection concerns his attempt to use these letters in his cross-examination of another witness. *See* Klayman's Post-Trial Mots. at 39 (citing Trial Tr. 2094:4-17). Misleadingly, however, he does not acknowledge the context, i.e., that this is *not* his own testimony. Klayman tried to raise the letters in this cross-examination at least twice. The first time he attempted to do so, the Court expressly considered the issue and upheld an objection. *See* Trial Tr. 2071:20-2073:21. Klayman does not argue that the Court erred in this first instance. He now refers to the *second* time that he raised these letters with that witness, when

the Court again upheld an objection after discussion mostly at sidebar. *See id.* 2093:23-2096:24. There is no valid basis for objecting to the Court's disposition of Klayman's second attempt to raise with the same witness certain letters that the Court prohibited from entering into evidence. The one basis that could be valid is if Klayman was referring to a different set of letters in this second instance. Klayman initially made that argument, but when the Court carefully addressed the possibility at sidebar, and heard Judicial Watch's clarification to the contrary, Klayman did not renew the argument that this was a distinct set of letters. *See id.*[14] If he is trying to do so now, his argument lacks sufficient clarity. Nor has he shown that he produced any such letters during discovery; absent that showing, the letters are once again barred by the Discovery Sanction.

Second, Klayman critiques the Court's limiting instruction when he discussed the letters during his own testimony. *See* Klayman's Post-Trial Mots. at 39 (citing Trial Tr. 749:2-10). The Court had already issued an Order identifying what its limiting instruction would be—an Order that Klayman did not request reconsideration of. *See* Order (Feb. 28, 2018), ECF No. 495, at 1. If the Court had to issue this instruction multiple

[14] It appears that, all along, the grouping of letters at issue included both letters from Klayman himself to David Barmak, as well as letters from Joe Kalunas, Klayman's counsel outside of this litigation, to David Barmak. *See* Trial Tr. 2093:23-2096:24. The Court properly excluded both types of letters consistent with its Discovery Sanction and the Testimony and Other Evidence Order.

times—neither party has identified the spots in the record, nor will the Court hunt through the record for this—then it was because Klayman violated the Court's instructions in that Order. *See* Trial Tr. 749:2-12 (reading in part as follows, outside the presence of the jury: "MR. KLAYMAN: You gave the instruction already, Your Honor. THE COURT: Yes, but you went ahead and—[.] MR. KLAYMAN: More than once. THE COURT: You continued to do it. You continue to do it."). This is not an instance of bias nor, in any case, is it highly prejudicial.

Klayman raises various and sundry other issues in a succession of single-sentence arguments, without any citation to the record or authorities. The Court shall dispose of them briefly.

Klayman maintains that the exclusion of the letters resulted in a "one-sided" presentation of the evidence. Klayman's Post-Trial Mots. at 40. The Court stands by its rationale, reiterated above, for excluding these letters. *See* Order (Feb. 28, 2018), ECF No. 495, at 1.

Klayman argues that "Defendants," presumably Judicial Watch, produced these letters during discovery and accordingly would not have experienced "undue surprise" if they were introduced at trial. Klayman's Post-Trial Mots. at 40. The Court cannot clearly recall whether Klayman ever made this argument previously. At the least, he supplies neither a date of production, nor a record citation for this argument, nor other identifying details now. Even if Judicial Watch

was aware of these letters, that is not a legitimate reason to water down the Discovery Sanction or the Pretrial Sanction, each of which responded to Klayman's conduct. *See* Order (Feb. 23, 2018), ECF No. 487, at 2 (discussing each sanction).

In another seemingly novel twist, Klayman attributes his refusal to produce documents regarding damages to the denial of a confidential protective order. Klayman's Post-Trial Mots. at 40. Without any citations or further elaboration, the Court lacks any basis short of a hunt through the record as to whether or not Klayman has ever raised this argument. Regardless, it is inapposite, for he raises the issue in a further challenge to the sanctions imposed upon him. *See id.* Those sanctions were well warranted, for the reasons that the Court has recited elsewhere.

None of these issues reflects bias or high prejudice suggestive thereof. And accordingly, the Court's handling of the letters is not a reason to grant judgment as a matter of law or a new trial.

3. Klayman's "Renewed" Motion for Sanctions and Judicial Watch's and Fitton's Motion to Strike

After Klayman filed his Post-Trial Motions, and while his pretrial Motion for Sanctions and Entry of Judgment was still pending, he filed his Renewed Motion for Sanctions and Entry of Judgment, which Judicial Watch promptly moved to strike. There is a series of problems with Klayman's "renewed" motion.

First, this motion was filed after Klayman's [571] pleading containing his Post-Trial Motions. In light of Klayman's consistently dilatory and otherwise non-compliant behavior in this litigation, the Court had made it clear beyond cavil that this additional motion would not be tolerated: **"The Court shall not consider any post-trial motion that is not contained within [the] single pleading filed by the aforementioned deadline [of July 10, 2018] and shall not grant any extension of this deadline for any reason."** Min. Order of May 15, 2018 (citing Order (Apr. 12, 2018), ECF No. 565, at 3)).

Klayman's argument that this motion "is not a post-trial motion" lacks any authority. Klayman's 2nd Sanctions Reply at 1. He simply explains that the information contained therein "supplements" the pending motion filed before trial. *Id.* But the plain language of the Court's orders prohibits this post-trial motion that was not filed together with the other post-trial motions. Nor is it necessary to file a "renewed" motion for sanctions when one remains pending. Even if the Court had not limited the post-trial motions to a single pleading, this post-trial pleading filed July 13, 2018, was filed late, without any justification for its tardiness.

Moreover, even if the Court were to consider the merits of this motion, the grounds lack merit, exceed the scope of this case, are raised belatedly after trial, are inaccurate and/or misleading, are duplicative of the Post-Trial Motions, and/or are duplicative of the pending Motion for Sanctions.

Only one point deserves further attention. Klayman suggests that defense counsel tacitly admitted having access to the material that Klayman produced during discovery in December 2007 and January 2008. Klayman's 2nd Sanctions Mot. at 10 n.3. Even if that is true, the fact would not help Klayman's case. It does not support Klayman's argument that he should have been allowed to use the letter(s) discussed above, for he still never claims that such letters are among the documents in that production. Nor does he claim that he should have been allowed to use the documents that were in that production. At the most, Klayman's point suggests that Judicial Watch and Fitton have documents about this case in storage, and that hauling them out for trial was not necessary because Klayman 1) had not recalled their existence until the eve of trial, and 2) even after recalling their existence, had not attempted to use them at trial.

These reasons warrant denial of Klayman's post-trial motion for sanctions. Judicial Watch's and Fitton's motion to strike does not cite any authority for the specific relief they seek, namely that Klayman's entire post-trial sanctions motion be stricken. The most likely authority is Federal Rule of Civil Procedure 12(f), which contemplates a motion to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Judicial Watch and Fitton likely hoped to avoid filing an opposition on the merits. But because the Court has found that Klayman is not procedurally or substantively entitled to the relief of dismissal of this case under his renewed motion,

and accordingly denies that motion, this motion shall be denied as well. The Court therefore does not reach the issue of Judicial Watch's and Fitton's entitlement to attorney's fees for filing the motion to strike.[15]

C. Remaining Damages Issues

The Court submitted the issues of liability and damages to the jury in nearly all respects. However, several loose ends remain. *See* Order (Apr. 12, 2018), ECF No. 565.

1. Liability and Damages (Excluding Interest) on Count I of Amended Counterclaim

Count I of the Amended Counterclaim alleged a breach of Paragraph 10 of the Confidential Severance Agreement. That paragraph provides in pertinent part that:

> Klayman further agrees to reimburse Judicial Watch for personal costs or expenses incurred by him during his employment, if any, that Judicial Watch may determine in good faith were mistakenly charged or allocated as costs or expenses of Judicial Watch, as well as any additional expenses that Klayman has billed to Judicial Watch or charged to a Judicial Watch credit card that Judicial Watch

[15] The Court also does not reach Klayman's argument that sanctions against Judicial Watch and Fitton are warranted because they failed to confer with him before filing the motion to strike. Klayman's Opp'n to Mot. to Strike at 2.

> determines in good faith are personal expenses of Klayman. Klayman shall reimburse Judicial Watch for any such amounts within seven (7) days of being notified by Judicial Watch and being presented with supporting documentation of the amount, date and category of cost or expense items for which reimbursement is sought.

CSA ¶ 10. Upon review of evidence that Klayman had not paid personal expenses for which Judicial Watch billed him pursuant to Paragraph 10, the Court granted summary judgment to Judicial Watch and awarded $69,358.48 in damages. *See Klayman I*, 628 F. Supp. 2d at 157-60 (finding liability); *Klayman II*, 661 F. Supp. 2d at 5 (specifying damages). The Court reserved the issue of any prejudgment interest on this sum until "all remaining liability issues have been resolved." *Klayman II*, 661 F. Supp. 2d at 6.

2. Interest on Counts I, II, and III of Amended Counterclaim

On the eve of trial, the Court returned to the issue of prejudgment interest to determine whether it needed to submit this issue to the jury. *See* Min. Order of Feb. 15, 2018. In its February 20, 2018, pretrial conference, the Court discussed with the parties whether Count I—as well as Counts II and/or III—of the Amended Counterclaim concerned unliquidated damages, such that the jury would be required under D.C. Code § 15-109 to decide any entitlement to prejudgment

interest.[16] *See, e.g.*, *id.*; Feb. 20, 2018 Hr'g Tr. 39:19-43:15, 50:23-53:6; *District of Columbia v. Pierce Assocs., Inc.*, 527 A.2d 306, 310 (D.C. 1987) (contrasting "general rule" that only *post*-judgment interest is available under Section 15-109, with exception for *pre*-judgment interest awarded by "the factfinder, in the exercise of its discretion, . . . if necessary to fully compensate the plaintiff").

The Court ultimately determined that Counts I and II sought liquidated damages, and therefore, the issue of prejudgment interest on those counterclaims did not need to be decided by the jury. Having determined, by contrast, that Count III sought unliquidated damages, the Court did refer that issue to the jury. The jury awarded damages to Judicial Watch on Count III but decided not to award prejudgment interest. Jury Verdict Form, ECF No. 560, at 4-5.[17]

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[16] Section 15-109 provides that,

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury . . . from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. . . .

[17] Although the jury instructions and verdict form refer to Counterclaims 1 and 2, these are actually Counts II and III, respectively, of the Amended Counterclaim. The counterclaims were renumbered for the jury to exclude Count I, as to which the Court had already determined liability and damages, and did not need to put the issue of prejudgment interest to the jury. Judicial Watch and Fitton use the numbering scheme that was put to the jury, and appear not to address prejudgment interest on Count I at all. *See* JW's Post-Trial Opp'n at 30-31.

Neither Klayman nor Judicial Watch nor Fitton now challenges the Court's decisions to withhold from the jury the issue of prejudgment interest on Counts I and II of the Amended Counterclaim, or to put that issue to the jury with respect to Count III. Accordingly, the Court shall not revisit those determinations, except insofar as necessary to consider lingering issues with Counts I and II.

Now the Court must confirm whether Judicial Watch is entitled to prejudgment interest as to Count I and/or Count II. Judicial Watch appears to address that issue with respect to Count II, but not Count I, while Klayman says nothing at all about prejudgment interest. Nevertheless, the Court shall examine this issue now as to both counts, for the Court has reiterated on several occasions that it would return to the issue of prejudgment interest on Count I. *See* Order (Apr. 12, 2018), ECF No. 565, at 1-2.

Under local law, which governs the Confidential Severance Agreement,

> In an action in the United States District Court for the District of Columbia . . . to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.

D.C. Code § 15-108. "A liquidated debt is one which at the time it arose . . . was an easily ascertainable sum

certain." *Aon Risk Servs., Inc. of Wash., D.C. v. Estate of Coyne*, 915 A.2d 370, 379 (D.C. 2007) (quoting *Pierce Assocs., Inc.*, 527 A.2d at 311) (internal quotation marks omitted). If a debt is liquidated, then the court evaluates whether "interest is payable by contract or by law or usage." D.C. Code § 15-108; *see also Steuart Inv. Co. v. Meyer Grp., Ltd.*, 61 A.3d 1227, 1239-41 (D.C. 2013); *Riggs Nat'l Bank of Wash., D.C. v. District of Columbia*, 581 A.2d 1229, 1254-55 (D.C. 1990). Because Section 15-108 is "remedial," the statute's criteria for awarding interest "should be generously construed so that the wronged party can be made whole." *Bragdon v. Twenty-Five Twelve Assocs. Ltd. P'ship*, 856 A.2d 1165, 1171 (D.C. 2004) (quoting *Riggs Nat'l Bank of Wash., D.C.*, 581 A.2d at 1255)) (internal quotation marks omitted). "'[T]he court has ample discretion to include prejudgment interest . . . if necessary to fully compensate the plaintiff' and '[t]he court usually should award [prejudgment interest] in such cases absent some justification for withholding such an award.'" *Wash. Inv. Partners of Delaware, LLC v. Sec. House, K. S. C. C.*, 28 A.3d 566, 581 (D.C. 2011) (quoting *Fed. Mktg. Co. v. Va. Impression Prods. Co., Inc.*, 823 A.2d 513, 531-32 (D.C. 2003)) (first alteration added).[18]

[18] Although *Federal Marketing Co.* makes this observation while interpreting Section 15-109, *Washington Investment Partners* transposes the observation, without comment, to the Section 15-108 context.

i. Prejudgment Interest on Count I

Long before the Court granted summary judgment on Count I—indeed, up to several years before Klayman even filed this case—Judicial Watch had apprised Klayman of his debts to the organization pursuant to Paragraph 10 of the Confidential Severance Agreement. *See* Suppl. Br. of Counterpl., Judicial Watch, Inc., Regarding Damages on Count 1 of the Am. Countercl., ECF No. 321, at 3, 6-7 (citing 3d Decl. of Susan E. Prytherch, ECF No. 321-10, and attached Excel spreadsheet). Judicial Watch's invoices and accounting identified an easily ascertainable sum certain, *Aon Risk Servs. Inc. of Wash., D.C.*, 915 A.2d at 379, and on that basis, the Court concluded that the debt was liquidated. As the D.C. Court of Appeals observed in another case involving damages owed under contract, "[i]t would be somewhat artificial to find the debt unliquidated where [Klayman], the defaulting party, knew the exact amount and terms of the contractual debt." *Giant Food, Inc. v. Jack I. Bender & Sons*, 399 A.2d 1293, 1302 (D.C. 1979). That Klayman disputed Judicial Watch's documentation did not undermine the basis for finding the debt to be liquidated; "[e]ven where a bona fide dispute exists as to a debt, courts generally find the liquidated nature of the debt unaffected." *Id.*; *see also, e.g.*, Feb. 20, 2018 Hr'g Tr. 43:9-15 (reiterating Klayman's challenge to Judicial Watch's invoices).

The Court must now determine whether the liquidated damages under Count I warrant recovery of interest under Section 15-108. The parties' Confidential

Severance Agreement does not provide for interest on Klayman's personal expenses, unlike Klayman & Associates, P.C.'s ("K&A") debt in Count II. *See* CSA ¶¶ 10-11. The Court turns to whether "law or usage" support payment of prejudgment interest. D.C. Code § 15-108. That clause "might be viewed as somewhat opaque or even inscrutable." *Riggs Nat'l Bank of Wash., D. C.*, 581 A.2d at 1255. But on the basis of its independent research, the Court shall assume, *arguendo*, that "law" does not expressly require an award of interest under these circumstances.

That leaves "usage," a grounds for interest that is somewhat less opaque now in light of D.C. Court of Appeals precedent in *Riggs* and later opinions.

> A usage is not a legal rule but a practice in fact. *Electrical Research Products, Inc. v. Gross*, 120 F.2d 301, 305 (9th Cir. 1941). It is "a habitual or customary practice, more or less widespread, which prevails within a geographical or sociological area," *Sam Levitz Furniture Co. v. Safeway Stores, Inc.*, 10 Ariz. App. 225, 228, 457 P.2d 938, 941 (1969), *vacated on other grounds*, 105 Ariz. 329, 464 P.2d 612 (1970), or, in this case, a legal area. Given these cases and the common meaning of "usage," we think that the term as used in Section 15–108 refers to what is customary or usual under similar or comparable circumstances.

Riggs Nat'l Bank of Wash., D.C., 581 A.2d at 1255. Picking up the thread, that court has more recently reiterated that "'[p]ayable by usage' refers to 'what is

customary or usual under similar or comparable circumstances,' such as 'where such interest had been held to be recoverable in a case which was viewed as analogous in principle.'" *Wash. Inv. Partners of Delaware, LLC*, 28 A.3d at 581 (quoting *Riggs Nat'l Bank of Wash., D.C.*, 581 A.2d at 1255). Several D.C. Court of Appeals precedents contain circumstances analogous to this case.

In *District Cablevision Ltd. Partnership v. Bassin*, a jury determined that a cable company had charged unjustifiably high late fees to customers who failed to timely pay their bills. 828 A.2d 714, 718-21 (D.C. 2003). While there was some dispute as to how much of the plaintiffs' damages was liquidated, the D.C. Court of Appeals observed that the entitlement to interest on the liquidated damages *by usage* was undisputed, "presumably because it is indeed customary to pay interest on funds that are withheld and not paid when due (as the late fees charged by [the cable company] might be said to illustrate)." *Id.* at 731-32 (citing *Nolen v. District of Columbia*, 726 A.2d 182, 184-85 (D.C. 1999)).

In *Washington Investment Partners*, a party received certain fees under a contract, but a jury later decided that the party breached that contract and must return the fees. *See* 28 A.3d at 571-72 (identifying jury award of damages on claim "seeking the amount of fees"). In light of *Bassin* and other precedents, the D.C. Court of Appeals affirmed the trial court's award of prejudgment interest on the fees, for they were equivalent to an "overpayment" by the non-breaching party. *Id.* at 572, 581-82.

The principle is now well established in this jurisdiction that "[p]rejudgment interest operates in part to compensate prevailing plaintiffs for the loss of the use of money that was wrongfully withheld by the defendant." *Mazor v. Farrell*, 186 A.3d 829, 832 (D.C. 2018) (citing *Bassin*, 828 A.2d at 732). And when plaintiffs had overpaid defendants in *Bassin* and *Washington Investment Partners*, those plaintiffs were entitled to recover prejudgment interest on the wrongly withheld funds. *See also Bragdon*, 856 A.2d at 1172 (finding prejudgment interest warranted in case of overcharged residential rent).

Here too Judicial Watch is entitled to interest on wrongly withheld funds that are tantamount to an "overpayment" to Klayman. The Court determined that Klayman is liable for damages under Paragraph 10 for failure to pay certain personal expenses. When Judicial Watch, rather than Klayman, bore the burden of Klayman's personal expenses, those expenses arguably represented an overpayment of compensation or benefits to Klayman for which Judicial Watch was contractually entitled to reimbursement. Nevertheless, Klayman did not deliver that reimbursement. Consequently, Judicial Watch is entitled to interest on the wrongfully withheld reimbursement. In an exercise of the Court's discretion, the Court finds that "usage" in this jurisdiction supports an award of interest on the liquidated damages that Klayman must pay Judicial Watch under Count I.

Unless a rate is specified by contract, interest under Section 15-108 accumulates at the rate of 6% per

year. D.C. Code § 28-3302(a); *Pierce Assocs., Inc.*, 527 A.2d at 311. That interest accrues "on the principal debt," D.C. Code § 15-108, and is "ordinarily not compounded in the absence of contract provision," *Giant Food, Inc. v. Jack I. Bender & Sons*, 399 A.2d at 1304. The period over which interest is calculated runs "from the time when it was due and payable . . . until paid." D.C. Code § 15-108.

Because there is no interest rate specified by Paragraph 10 of the Confidential Severance Agreement, Judicial Watch is entitled to interest at the statutory rate of 6% on its liquidated damages of $69,358.48. There is similarly no indication that the parties intended any interest to be compounded; the Court shall not step further. For purposes of calculating interest accrual, the date(s) that this principal debt was "due and payable," *id.*, are sufficiently defined in the Confidential Severance Agreement: The underlying payments were due "within seven (7) days of being notified by Judicial Watch and presented with supporting documentation of the amount, date and category of cost or expense items for which reimbursement is sought." CSA ¶ 10. Earlier in this case, Judicial Watch submitted a declaration from Susan E. Prytherch—together with a spreadsheet she prepared—that identified the dates that the payments were invoiced; consequently, under the seven-day rule those payments were due on the following dates: November 19, 2003, December 1, 2003, December 22, 2003, and August 11, 2004. Suppl. Br. of Counterpl., Judicial Watch, Inc., Regarding Damages on Count 1 of the Am. Countercl., ECF No. 321, at

6-7 (citing 3d Decl. of Susan E. Prytherch, ECF No. 321-10, and attached Excel spreadsheet).

The Court has reviewed the interest-calculation method described by Prytherch in her Third Declaration and finds that it is reasonable and consistent with the statutory scheme. For instance,

> Interest was calculated by determining a daily interest rate (6% per year divided by 365 days per year) and multiplying the amount outstanding (AMT O/S) by the number of days in the period [from the date that the payment was due until July 31, 2009] and the daily interest rate.
>
> To simplify the calculation, for those invoices for which Mr. Klayman made partial payments, no interest was calculated on the partially repaid amount before the partial payment was made, *i.e.* the period of time seven (7) days from the date of the invoice to the date of the partial payment. Interest was calculated only on that portion of the invoice for which no payment was ever made. By way of example, Invoice No. 5 in the amount of $5,292.12 became due on November 19, 2003, but Mr. Klayman made a partial payment of $3,168.75 on December 30, 2005. No interest was calculated on the $3,168.75 for the period from November 19, 2003 through December 30, 2005. Rather, interest was only calculated on the amount that remained unpaid, $2,123.37, for the period from November 19, 2003 through July 31, 2009.

3d Decl. of Susan E. Prytherch, ECF No. 321-10, ¶ 11.e., 11.f. This conservative method inures to Klayman's benefit by understating interest for which he otherwise would be responsible. Accordingly, Prytherch's method shall be used to calculate the interest to which Judicial Watch is entitled as of the date of this Memorandum Opinion.

Following that method, the Court has determined as of March 18, 2019, that Judicial Watch is entitled to prejudgment interest of $63,611.68 on its Count I damages of $69,358.48, for a total recovery under Count I of $132,970.16. To cross-check the Court's calculation of prejudgment interest, the Court has also calculated the interest to which Judicial Watch was entitled as of July 31, 2009, the date that Prytherch used for her calculations, and found that its calculations for each invoice and for the total sum are consistent with those of Prytherch.

ii. Prejudgment Interest on Count II

In Count II, Judicial Watch alleged a breach of Paragraph 11(A) of the Confidential Severance Agreement, which the Court excerpts as follows:

> Klayman, and by its signature below, Klayman & Associates, P.C. ("K&A") reaffirm and acknowledge the debt of K&A to Judicial Watch, which was in the amount of $78,810 as of December 31, 2002, and agree that K&A shall pay the then full outstanding balance of the debt (including additional amounts allocated to K & A [sic] by Judicial Watch's accountants

> in accordance with their customary practice regarding this debt), without offset or deduction, together with accrued interest of 8% per annum, on or before May 15, 2004, per the terms of the Minutes of the May 15, 2002 Meeting of the Board of Directors of Judicial Watch. . . .

CSA ¶ 11(A). The Court easily found that these too were liquidated damages, in this instance because the Confidential Severance Agreement specifies the amount for which K&A was responsible. Moreover, Klayman and K&A are deemed in the agreement to "reaffirm and acknowledge" the specific amount of this debt. *Id.* And in contrast with Count I, here the agreement expressly provides for prejudgment interest at an 8% rate, thereby exempting this count from the statutory default. *Id.*; *see also* D.C. Code § 28-3302 (providing for 6% rate "in the absence of expressed contract"). Consequently, the Court did not need to ask the jury to determine whether Klayman was entitled to prejudgment interest as to Count II.

At trial, Judicial Watch submitted evidence of compensatory damages for this count in the amount of $125,722, and evidence of damages including interest totaling $197,178.84 as of October 2008. JW's Post-Trial Opp'n at 31 (citing JW's Exs. 115, 123). Judicial Watch proposes two alternatives for handling prejudgment interest on the jury's finding of liability and award of $200,000 in damages. *See* Jury Verdict Form, ECF No. 560, at 4.

First, the Court could find that the jury already included prejudgment interest in its award, despite being unprompted by the Court to do so. *See* JW's Post-Trial Opp'n at 31. Following that logic, the evidence of damages including interest could explain the jury's award of $200,000 on this counterclaim. Alternatively, the Court could shave the jury's damages award to $125,722—on the theory that any more is unsupported by the evidence exclusive of interest—and award prejudgment interest on top of that amount. *See id.*

The Court is disinclined to disturb the jury's damages award absent Klayman's ability to prove that remittitur is warranted. Even though Judicial Watch here elucidates a possible basis for the jury finding—a basis that would suggest the jury included interest on the underlying liquidated debt—the total amount awarded still does not reach the exceedingly high level that could justify remittitur. *See Peyton*, 287 F.3d at 1126-27.

In an exercise of its discretion regarding prejudgment interest, the Court shall find that Judicial Watch is entitled to $200,000 for Count II, inclusive of prejudgment interest.

iii. Post-Judgment Interest

In its Amended Counterclaim, Judicial Watch also seeks post judgment interest as to Counts I and II, as well as Count III. Judicial Watch has not raised the issue of post judgment interest in its briefing, which makes sense because the Court has not yet re-entered

judgment. Absent briefing on this issue, however, the Court is not prepared to determine whether D.C. Code §§ 15-108 and 15-109, 28 U.S.C. § 1961, or perhaps some other authority would control the award of such interest.

***

Although the Court has attempted to address all of Klayman's material arguments, any that the Court has not addressed do not affect the disposition of these motions.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Klayman's [571] Motion for Judgment as a Matter of Law, for a New Trial, or in the Alternative, for Remittitur of the Jury Verdict, **DENIES** Klayman's [489] Motion for Sanctions and Entry of Judgment, **DENIES** Klayman's [572] Renewed Motion for Sanctions and Entry of Judgment, and **DENIES** Judicial Watch's and Fitton's [573] Motion to Strike Plaintiff's Renewed Motion for Sanctions and Entry of Judgment.

The Court **GRANTS** that portion of Klayman's [571] filing containing his Motion for Leave to Exceed Page Limit by One Page and **GRANTS** Klayman's [577] Motion for Leave to File Reply in Excess of Two (2) Pages and Three (3) Lines.

As of March 18, 2019, Judicial Watch is entitled to prejudgment interest of $63,611.68 on its Count I damages of $69,358.48, for a total recovery under Count I

of $132,970.16. Judicial Watch is entitled to $200,000 for Count II, inclusive of prejudgment interest.

Having found that Klayman is not entitled to judgment as a matter of law, a new trial, or remittitur, the Court shall reissue judgments on the verdict that the Court vacated to permit an enlarged timeline for Klayman's post-trial motions. *See* Order (Apr. 12, 2018), ECF No. 565, at 2-3. In an accompanying Order, the Court shall enter a final judgment that incorporates those judgments on the verdict; the Court's liability, damages, and prejudgment interest findings as to Count I of the Amended Counterclaim; and the Court's determination that the jury verdict as to Count II includes prejudgment interest. *See id.* at 3.

Appropriate Orders accompany this Memorandum Opinion.

Dated: March 18, 2019

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 10, 2020

CASE NUMBER 19-7105

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LARRY KLAYMAN

Plaintiff-Appellant

v.

JUDICIAL WATCH, INC., THOMAS J. FITTON PAUL ORFANEDES AND CHRISTOPHER FARRELL

Defendants-Appellees

APPEAL FROM FINAL ORDERS
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case Number 1:06-cv-00670-CKK

PLAINTIFF-APPELLANT LARRY KLAYMAN'S FINAL BRIEF

(Filed Sep. 26, 2020)

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[2] CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Larry Klayman is an individual and is the Plaintiff-Appellant. Judicial Watch, Inc. is a 501(c)(3) nonprofit organization and is a Defendant-Appellee. Thomas Fitton is an individual and is a Defendant-Appellee. Christopher Farrell is an individual and is a Defendant-Appellee. Paul Orfanedes is an individual and is a Defendant-Appellee.

There were no amici in the District Court.

B. Rulings Under Review[1]

Klayman appeals various orders of the U.S. District Court for the District of Columbia in Case Number 1:06-cv-00670-CKK. Pursuant to Circuit Rule 28(a)(1)(B), all orders were entered by U.S. District Judge Colleen Kollar-Kotelly except for certain orders on discovery matters which were entered by U.S. Magistrate Judge Alan Kay (and which will be clearly noted). The orders on appeal are:

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[1] Unless otherwise stated, all citations within Klayman's brief that are contained in brackets are to the corresponding pages of the Deferred Appendix.

ECF 050 – April 3, 2007
Judge Kollar-Kotelly's memorandum opinion regarding a motion for reconsideration of an order denying a motion to dismiss [0303]

ECF 098 - January 16, 2008
[3] Magistrate Judge Kay's memorandum order granting Appellees' motion to compel Klayman's responses to Appellees' request for production of documents [0698]

ECF 117 – March 12, 2008
Magistrate Judge Kay's memorandum order granting-in-part Appellees' motion to compel Klayman's responses to Appellees' supplemental request for production of documents [0854]

ECF 134 – April 2, 2008
Judge Kollar-Kotelly's order overruling Klayman's objections and affirming Magistrate Judge Kay's January 16, 2008 memorandum order [ECF 098] granting Appellees' motion to compel Klayman's responses to Appellees' request for production of documents [0882]

ECF 138 – April 21, 2008
Magistrate Judge Kay's order requiring the parties to appear at a hearing to determine whether Klayman should be sanctioned for his failure to comply with the Court's March 13, 2008 minute order regarding Klayman's motion to continue deposition [0894]

ECF 167 – May 12, 2008
Judge Kollar-Kotelly's order overruling Klayman's objections and affirming Magistrate Judge Kay's March 12, 2008 memorandum order [ECF 117] granting-in-part Appellees' motion to compel Klayman's responses to Appellees' supplemental request for production of documents [0904]

ECF 199 – July 1, 2008
Magistrate Judge Kay's memorandum order sanctioning Klayman for the postponement of his March 14, 2008 deposition, for Klayman's filing of a motion to quash subpoena *duces tecum* and in connection with Klayman's actions with regard to Appellees' motion to compel Klayman's responses to Appellees' supplemental request for production of documents [0914]

ECF 200 – July 9, 2008
Magistrate Judge Kay's order addressing the schedule of future discovery and other outstanding issues involving discovery [0922]

ECF 231 – August 26, 2008
[4] Judge Kollar-Kotelly's order overruling Klayman's objections and affirming Magistrate Judge Kay's memorandum order [ECF 199] sanctioning Klayman for the postponement of his March 14, 2008 deposition, for Klayman's filing of a motion to quash subpoena *duces tecum* and in connection with Klayman's actions with regard to Appellees' motion to compel Klayman's responses to Appellees' supplemental request for production of documents [0961]

ECF 293 – December 30, 2008
Judge Kollar-Kotelly's order denying Klayman's motion (ECF 287] for an extension of time to file oppositions to Appellees' motions for summary judgment and also striking Klayman's [ECF 291] opposition to Appellees' motions for summary judgment and Klayman's response [ECF 292] to Appellees' statement of material facts [1680]

ECF 301/302 – March 24, 2009
Magistrate Judge Kay's memorandum opinion and related order granting Appellees' motion for sanctions against Klayman that prohibited him from "testifying to or introducing into evidence any documents in support of his damage claims or in support of his defenses to Appellees' counterclaims" [1713/1722]

ECF 316/317 – August 26, 2009
Judge Kollar-Kotelly's memorandum opinion and related order overruling Klayman's objections and affirming Magistrate Judge Kay's memorandum opinion and related order [ECF 301/302] granting Appellees' motion for sanctions against Klayman that prohibited him from "testifying to or introducing into evidence any documents in support of his damage claims or in support of his defenses to Appellees' counterclaims" [1723-1724]

ECF 318/319 – June 25, 2009
Judge Kollar-Kotelly's memorandum opinion and related order overruling granting partial summary judgment to Appellees and denying Klayman's motion for partial summary judgment [1746/1750]

ECF 326/327 – October 14, 2009
Judge Kollar-Kotelly's memorandum opinion and related order expanding the court's order granting partial summary judgment to Appellees [ECF 318/319] with regard to an exact amount of damages [1866/1867]

[5] ECF 361/362 – August 10, 2011
Judge Kollar-Kotelly's memorandum opinion and related order granting Appellees' motion to strike from the parties revised Joint Pretrial Statement [ECF 337-1] Klayman's (i) statement of the case, (ii) list of witnesses, (iii) list of exhibits, and (iv) deposition designations, and ordering that Klayman is precluded "from introducing any witnesses or exhibits at trial in this action; however, he may cross-examine Appellees' proffered witnesses and make opening and closing arguments" [1996/1998]

ECF 401 – June 15, 2017
Judge Kollar-Kotelly's memorandum opinion and order that Klayman "shall be limited to nominal damages at trial with respect to his remaining claims, other than the non-disparagement claim, with respect to which he must submit documents, solely from the present discovery record, evidencing the amount of monetary damages that he allegedly sustained as a result of his alleged lost business opportunities". [2026]

ECF 402 – June 19, 2017
Judge Kollar-Kotelly's order regarding Klayman presentation of evidence [2048]

ECF 436 – January 23, 2018
Judge Kollar-Kotelly's pre-trial order on exhibits and testimony [2072]

ECF 485 – February 23, 2018
Judge Kollar-Kotelly's pre-trial order on jury instructions [2140]

ECF 487 – February 23, 2018
Judge Kollar-Kotelly's pre-trial order on exhibits and testimony [2142]

ECF 488 – February 24, 2018
Judge Kollar-Kotelly's pre-trial order on exhibits and testimony [2153]

ECF 500 – March 2, 2018
Judge Kollar-Kotelly's order on the admissibility of evidence in a Florida case [2182]

TRANSCRIPT – March 5, 2018 at 1833-1837. [2849-2853]

ECF 511 – March 6, 2018
[6] Judge Kollar-Kotelly's order on the admissibility of evidence [2193]

TRANSCRIPT – March 7, 2018 at 2507-2509 [2879-2881]

TRANSCRIPT – March 7, 2018 at 2524-2542 [2887-2905]

ECF 513 – March 7, 2018
Judge Kollar-Kotelly's order on the admissibility of evidence [2200]

TRANSCRIPT – March 8, 2018 at 2654-2682 [2908-2936]

TRANSCRIPT – March 9, 2018 at 3102-3116 [2954-2968]

TRANSCRIPT – March 9, 2018 at 3184-3186 [2999-3001]

ECF 528 – March 9, 2018
Judge Kollar-Kotelly's order on Fair Comment [2206]

TRANSCRIPT – March 13, 2018 at 3757-3770 [3162-3175]

ECF 541 – March 12, 2018
Judge Kollar-Kotelly's order on Fair Comment [2209]

ECF 548 – March 15, 2018
Judge Kollar-Kotelly's final judgment order on the verdict for Judicial Watch, Inc. with regard to its counterclaims [2211]

ECF 549 – March 15, 2018
Judge Kollar-Kotelly's final judgment order on the verdict for Fitton with regard to his counterclaim [2212]

ECF 550 – March 14, 2018
The clerk's final judgment order on the verdict against Klayman with regard to his affirmative claims [2213]

ECF 560 – March 14, 2018
Verdict Form (signed by Jury Foreperson) [2236]

MINUTE ORDER dated July 5, 2018 that states that "The parties are directed to consult the trial transcript prepared by the court reporter for a [7] complete record of the final jury instructions as delivered, which are considered the official written jury instructions" [2250]

ECF 580 – March 18, 2019
Judge Kollar-Kotelly's order denying Klayman's "motion for judgment as a matter of law, for a new trial, or in the alternative, for remittitur of the jury verdict" [2318]

ECF 581 – March 18, 2019
Judge Kollar-Kotelly's memorandum opinion entering final judgment on all claims in this litigation [2320]

ECF 582 – March 18, 2019
Judge Kollar-Kotelly's final judgment order on the verdict for Judicial Watch, Inc. with regard to its counterclaim [2380

ECF 583 – March 18, 2019
Judge Kollar-Kotelly's final judgment order on the verdict for Fitton with regard to his counterclaim [2381]

ECF 584 – March 18, 2019
Judge Kollar-Kotelly's order entering final judgment on all issues in this case [2382]

ECF 603 – August 7, 2019
Judge Kollar-Kotelly's order denying Klayman's motion for reconsideration of the court's order denying his motion for judgment [2402]

ECF 604 – August 7, 2019
Judge Kollar-Kotelly's order denying Klayman's motion for reconsideration of the court's order denying his post-trial motions [2403]

ECF 607 – August 22, 2019
Judge Kollar-Kotelly's order denying Klayman's motion for reconsideration of the court's order denying his post-trial motions [2353]

[8] **Related Cases**

1. *Klayman v. Kollar-Kotelly, et al.*, Case No. 1:11-cv-01775-RJL (D. D.C.)
2. *Klayman v. Kollar-Kotelly, et al.*, Appeal No. 12-5340 (D.C. Cir.)
3. *Klayman v. Judicial Watch, Inc., et al.*, Case No. 1:19-cv-02604- TSC (D. D.C.)
4. *Klayman v. Judicial Watch Inc.*, 13-cv-20610 (S.D. Fla.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Klayman is not an officer, director, or majority shareholder of any publicly traded corporation.

ORAL ARGUMENT REQUEST

Pursuant to Fed. R. App. P. 34 and D.C. Cir. R. 34, Klayman requests oral argument in this case since there are numerous issues on appeal in connection with the district court's entry of judgment on the jury's verdicts that awarded $2,300,000 to Judicial Watch, Inc. and an additional $500,000 to Thomas J. Fitton as against Larry Klayman and that dismissed Mr. Klayman's claims against Appellees. Resolution of

these issues involves discussions of the law in the District of Columbia that are important, not only to the parties in this case, but also to other similarly situated litigants.

[9] **TABLE OF CONTENTS**

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[17] **Court Rules**

[18] **GLOSSARY**

Pursuant to Circuit Rule 28(a)(3):

ECF is an abbreviation for the "Electronic Case File"

[19] JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Columbia had jurisdiction over the dispute between the parties pursuant to 42 U.S.C. § 1332(a) because the matter was between different states and the amount in controversy exceeded $75,000, exclusive of interest and costs. Jurisdiction was also proper pursuant to 15 U.S.C. §§ 1125(a), *et seq.* and 18 U.S.C. §§ 1962, *et seq.*

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because this appeal is from final orders, decisions and judgments of the District Court that dispose of all claims. On August 22, 2019, the District Court denied Klayman's motion for reconsideration of its orders entering judgment and associated post-trial orders. On September 6, 2019, Klayman filed his timely notice of appeal of the District Court's final orders.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Were the District Court's ("Court") sanctions against Klayman overly broad?

2. Did the Court improperly weigh evidence in awarding summary judgment?

3. Did the Court err in admitting highly prejudicial and irrelevant evidence?

4. Did the Court err in its jury instructions?

[20] 5. Did the Court err in admitting unauthenticated documents?

6. Did the Court err in failing to set aside a jury verdict based on nonparties' actions?

7. Did the Court err in defining confusion in the trademark context?

8. Did the Court err in entering judgment on the jury verdict where there was no evidence that Klayman used Judicial Watch's donor list?

9. Should the case be assigned to another judge on remand?

ADDENDUM OF STATUTES AND RULES

Pursuant to Circuit Rule 28(a)(5), the text of statutes and rules cited are set forth in an appendix bound with this brief.

STATEMENT OF THE CASE

This is an appeal from a jury verdict and judgment of the District Court against Larry Klayman ("Klayman"), the founder and former Chairman and General Counsel of Judicial Watch, Inc. ("Judicial Watch"). In 2003, Klayman entered into a Severance Agreement with Judicial Watch [2587-2599] after he voluntarily left to run for the Senate. In his complaint filed in 2006, Klayman alleged that Appellees Judicial Watch and its officers, Thomas J. Fitton, Paul Orfanedes and Christopher Farrell engaged in a pattern of tortious activity

designed to harm Klayman, and that these actions breached the Severance Agreement. [0001-0033]. Appellees filed a counterclaim alleging that Klayman [21] owed money for unpaid expenses and falsely advertised and violated their trademark. [0394-0535].

During contentious discovery, the Court sanctioned Klayman (who appeared *pro se)* for failing to provide what it believed were timely and proper responses [1713-1722] and later sanctioned Klayman for producing an incomplete pre-trial statement. [1998-2025]. The sanctions precluded Klayman from calling witnesses or introducing evidence at trial aside from the Severance Agreement. Prior to trial, the Court granted summary judgment resulting in the dismissal of a number of Klayman's claims and a monetary award against Klayman on a counterclaim. [1746-1837], [1866-1872], [2318-2319], [2320-2379], [2380], [2381], [2382], [2402], [2403-2421]. Klayman appeals both sanctions and summary judgment orders.

The thirteen-day jury trial in 2018 proved to be an exercise in futility for Klayman and resulted in the dismissal of Klayman's claims, an award of $2,300,000 in favor of Judicial Watch and an award of $500,000 in favor of Fitton. [2336-2243], [2318-2319], [2320-2379], [2380], [2381], [2382], [2402], [2403-2421]. At one point, Klayman synthesized his predicament: "With a little humor and good natured-ness, we all would've saved a lot of time and expense, maybe you [District Judge] should have just entered default judgment." [3049]

The jury verdict was based on numerous errors of the Court, including:

> [22] a. the introduction of evidence that contradicted the express language of the Severance Agreement, namely that Klayman had an inappropriate relationship with a Judicial Watch employee; [2849-2953], [2880], [2936]
>
> b. the introduction of false and highly prejudicial testimony from Klayman's former wife about alleged wrongs committed by Klayman and reference to and evidence from an unrelated case that were irrelevant; [2822-2823], [2999-3001], [2318-2379].
>
> c. erroneous instructions given to the jury, the failure to give jury instructions requested by Klayman, and, most importantly, the failure to docket any written jury instructions delivered to the jury (assuming that any were delivered in the first place); [2072-2075], [2142-2152], [2204-2205], [2206-2208], [2209-2210], [2248-2249], [2318-2379], [2940], [2955-2959], [3006], [2144-2146], [3191-3199]
>
> d. the introduction of evidence that was not properly authenticated; [2193-2119]; [2318-2379], [2887-2905]
>
> e. the failure to remit a damage award against Klayman personally from those based on alleged conduct of non-parties to this action; [2200-2203], [2318-2379], [2971-2991]

f. the misapplication of the law on confusion as it relates to trademark infringement; [2140-2141], [3175-3177]

g. the entry of judgment on the jury verdict where Judicial Watch failed to prove that Klayman took and used information regarding its donor list. [2236], [2318-2379], [2862-2879], [2701-2705], [2706], [2731-2745], [2746-2749].

To rectify these and other errors, Klayman filed his notice of appeal [2458-2459]. Klayman's appeal seeks a reversal of the Court's orders and judgment, and a remand for a new trial before a different judge on all issues, including those counts dismissed on summary judgment.

[23] SUMMARY OF THE ARGUMENT

This is an appeal from a judgment of the Court, entered by the Honorable Colleen Kollar-Kotelly against Klayman, who is now founder, Chairman and General Counsel of Freedom Watch.

In this regard, the causes of action pled below, as set forth in Klayman's Second Amended Complaint, arose after he voluntarily left Judicial Watch to run for the U.S. Senate in Florida on September 19, 2003 – seventeen years ago.

Appellees Fitton, Orfanedes, Farrell and Judicial Watch were alleged to not have only violated the Severance Agreement, but also to have engaged in a pattern of fraud, disparagement, defamation, false

advertising and other egregious acts against Klayman, designed to harm him personally and professionally.

Specifically, the Second Amended Complaint alleges that Fitton viewed Klayman's departure as an opportunity to take complete control of the organization. [0004] Importantly, Fitton who is not a lawyer and had not graduated from college at the time that Klayman left (having falsely represented to Klayman that he had graduated from George Washington University when he was initially hired as an assistant) set out to destroy Klayman, since at that time, seventeen years ago, Fitton was unknown. [0003-0004] Accordingly, from "the time Klayman stepped down from his posts at Judicial Watch, Fitton and fellow directors, who he effectively controlled, directly and through other agents of [24] Judicial Watch defamed, disparaged and cast Klayman in a false light to denigrate Klayman, and in an effort to undermine Klayman's ability to return to the helm of Judicial Watch or compete with Judicial Watch in the future." [0005]

After attempting to resolve issues between himself and the Appellees, Klayman was forced to file suit in 2006. Appellees then filed counterclaims and what ensued thereafter was thirteen years of litigation and counting, finally resulting in a jury trial in February 2018. For five years of this time period the Court left a stay in place and did not move this case forward.

The trial, regrettably, proved to be an exercise in futility for Klayman. During pre-trial proceedings, the Court had overreached and sanctioned Klayman by

barring him from calling any witnesses and introducing any evidence, save for the Severance Agreement itself. To the contrary, the Court also allowed Appellees to publish before the jury highly irrelevant and inflammatory false allegations, none of which had ever been proven, that Klayman was forced to resign from Judicial Watch because he had effectively sexually harassed a married office manager (with children) and had beat his ex-spouse, all untruths stemming from Klayman's prior divorce proceeding, which allegations his former wife had even retracted. This had nothing at all to do with either Klayman's affirmative claims or Appellees' counterclaims. To add insult to injury, the Court made a series of repeated prejudicial remarks about Klayman before the jury, and verbally read [25] confusing, and in many instances, legally erroneous jury instructions and rulings which led to a skewed verdict in the huge amount of $2.8 million dollars on Appellees' counterclaims.

As for Klayman's affirmative claims in his Second Amended Complaint, the Court improperly granted summary judgment years earlier on most of them, while also granting partial summary judgment on one of Appellees' counterclaims.

In short, this case became, regrettably, what Woody Allen famously coined in his comedy "Bananas," "a mockery of a travesty of two mockeries of a sham," but for Klayman it was far from funny.

If this Honorable Court does not overturn the jury verdict and judgment, with due process rights restored

to him, and order a new trial before an unbiased jurist, Klayman will be forced to declare bankruptcy. Thus, the stakes of this appeal are high.

ARGUMENT

I. THE COURT COMMITTED NUMEROUS ERRORS THROUGHOUT THE PRE-TRIAL PHASE THAT DENIED KLAYMAN DUE PROCESS AND A FAIR TRIAL.

A. The Sanctions Orders Were Overly Broad, Draconian and Too Severe.

The Court's sanction orders [0698-0721], [0854-0865], [0862-0893], [0894-0895], [0904-0913], [0914-0921], [0922-0926], [0961-0972], [1713-1721], [1722], [1723], [1724-1745], [1996-1997], [1998-2025], [2026-2047], [2048-2050], [2142-[26]2152], [2318-2319], [2320-2379 at 2361-2366] that precluded Klayman from presenting any evidence in support of his claims and defenses for alleged violations of discovery and pre-trial obligations were abuses of discretion since there was no prejudice to Judicial Watch from the introduction of testimony and documentary evidence that **was** provided in discovery such as (a) 78 pages of documents attached to Klayman's Second Amended Complaint; [0034-01111(b) 98 pages of documents attached to Appellees' amended counterclaim; [0438-0535] (c) 1047 pages of documents produced in discovery by Klayman; [2175, 2178] (d) testimony of witnesses who appeared at deposition; (e) documents that were created by Judicial Watch or were in its

possession irrespective of this litigation; and (f) correspondence between the parties. The effect of these sanctions resulted in a bizarre trial that confused the jury and approximated a default judgment or directed verdict against Klayman.

In *Founding Church of Scientology, Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. 1986), the court found that in "cases of dismissal imposed as a sanction, the applicable standard of review confines appellate inquiry to whether the district court abused its discretion." In doing so, the focus on appellate review is "to ensure that the district court does not abuse its discretion in imposing too severe a discovery sanction." *Bonds v. D.C.*, 93 F.3d 801, 807 (D.C. Cir. 1996), *reh'g denied*, 105 F.3d 674 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997).

[27] Klayman litigated this case *pro se* since 2008. [0896-0897] Klayman explained that "Plaintiff has gone through a difficult period; his mother died a slow death, his wife's grandmother fell ill, and he has been fighting for his children in a custody case in the Midwest and has been out of the office largely for a month. . . . Klayman has not tried to delay this case, just tend to and protect his and his family's rights (he has two young children age 8 and 10) during this difficult period." [0901] Klayman did not produce certain documents because he moved for a confidential protective order, but the Court refused to grant it. [0350-0393] The sanctions had the effect of a default as to Klayman's claims and defenses even though Appellees received numerous documents, took depositions of all of the relevant witnesses (including Klayman) and had

documents it its possession – irrespective of litigation. Thus, the Court abused its discretion.

In *Scientology*, 802 F.3d at 1459, the court found that dismissal of a claim "is an extremely harsh sanction." In *Bonds*, the principal issue was whether the court abused its discretion in precluding a party from offering any fact witnesses at trial as a discovery sanction where that party failed to respond in a timely manner to an interrogatory requesting the names of all persons with knowledge of relevant events regarding the civil action and then providing an inadequate response. *Bonds*, 93 F.3d at 804. In *Bonds*, the court held that

> The central requirement of [F. R. Civ. P. 37] is that any sanction must be 'just,' which requires in cases involving severe sanctions that the [28] district court consider whether lesser sanctions would be more appropriate for the particular violation. *Id.* at 808.

"Considerations relevant to ascertaining when dismissal, rather than a milder disciplinary measure, is warranted include the effect of a plaintiff's contumacious conduct on the court's docket, whether the plaintiff's behavior has prejudiced the defendant, and whether deterrence is necessary to protect the integrity of the judicial system." *Id.* A discovery sanction "that results in a one-sided trial," "is a severe one." *Id.* at 809.

1. The Written Discovery Order.

In 2009, the magistrate assigned to resolve discovery disputes barred Klayman "from testifying to or admitting any evidence in support of his damage claims or his alleged defenses to [Appellees'] counterclaims" as sanctions for Klayman's alleged failures to comply with various discovery orders even though the sanction "may go to the heart of Plaintiff's claims and defenses." [1719], [1722] The Court affirmed these sanctions. [1723], [1724-1745] The magistrate sanctioned Klayman because he "failed to produce any of the documents requested by Defendants." [1721] However, this finding ignores the fact that Klayman produced 1047 pages of documents. [2175], [2178] This finding also ignores the fact that Klayman responded to interrogatories, albeit not to the minute technical standard required by the magistrate as shown by the examples of Interrogatories #8 and #10. [0542-0546] These examples (and Klayman's other responses) provided [29] sufficient information for Appellees to ascertain the factual bases of his claims and defenses, including detailed descriptions of damages, including fundraising, confusion over Klayman's name and likeness, and other damages.

The magistrate's scheduling order references deposition dates for eleven witnesses, including Klayman. [0922-0923] Therefore, Klayman should have been able to call these witnesses at trial since Judicial Watch cannot claim any prejudice or surprise from their testimony. Klayman should also have been able to introduce any of the 1047 pages produced by Klayman in

discovery, along with exhibits attached to the complaints and counterclaims. Additionally, any document produced by or in possession of Appellees should have been available for Klayman to use since they could not claim surprise from these documents. In fact, on February 16, 2018, Klayman filed an "Exhibit List Concerning Discovery Provided by Defendants" that lists some of these documents. [2086-2096] An example of such a document was a letter dated December 12, 2003 from Klayman to Judicial Watch's counsel that attempted to resolve many of the issues in this litigation, such as Klayman's business expenses, Judicial Watch's efforts to remove Klayman as a guarantor of the lease of Judicial Watch's office space and Judicial Watch's payment of health insurance for Mr. Klayman's children. [2086], [1343-1346], [2813-2815] The magistrate's interpretation of Klayman's responses places form over substance. Thus, Appellees had information about Klayman's claims and [30] defenses, and the Court's severe sanctions precluding Klayman from testifying on his own behalf, from calling witnesses who were deposed in this litigation, and introducing documents that he previously produced in this litigation or that were already in Appellees' internal records were in error. [1713-1721], [1722], [1723], [1724-1745]

2. The Pre-Trial Statement Order.

The Court also precluded Klayman from introducing any witnesses or exhibits for his "cavalier approach to the preparation of a pretrial statement" since his "proffered descriptions of the testimony, evidence and

depositions he intends to use at trial are so vague and sweeping as to be virtually useless." [2019-2021] As examples of Klayman's "cavalier" conduct, the Court observed that Klayman's list of witnesses included "all Judicial Watch employees in the last six years," described the subject matter of some witnesses' testimony as "all issues," and other witnesses as "fundraising" and "accounting issues." [2007] However, Klayman complied with the requirements of LCvR 16.5(b)(5) which only requires a brief description of the testimony to be elicited.

Moreover, the Court found that Klayman's exhibit list "merely listed eight categories of documents," and "broadly" described them (i.e. "all documents concerning payment of Klayman's health insurance for his children"). [2007-2008] It is important that in crafting the sanction order, the Court recognized that [31] "it is at least arguable" that the prejudice to Appellees from Klayman's purported conduct, while both "palpable and significant" "could be remedied through much less onerous sanctions than those proposed here." [2019-2020] In reaching its conclusions on sanctions, the Court further observed:

> Without a doubt, this is a severe sanction. Its application in this action will effectively prevent Klayman from carrying his burden of proof on his claims, thereby almost certainly *requiring* dismissal. Similarly, if he is unable to mount a sufficient defense against Judicial Watch and Fitton's counterclaims through cross-examination of witnesses introduced by

> Judicial Watch and Fitton on their case-inchief or through opening and closing arguments, then the likelihood is high that Judicial Watch and Fitton will prevail on their counterclaims." (emphasis added) [2021-2022]

Klayman's exhibit list complied with LCvR 16.5(b)(6) because the identification of his witnesses and exhibits provided sufficient information for Appellees to ascertain the bases of each witness' proffered testimony and to identify each document listed. In total, the Court's sanction orders were an abuse of discretion, overbroad and resulted in the exclusion of Klayman's evidence as to his claims and defenses, which made the ultimate outcome of the trial a foregone conclusion. Therefore, the Court erred in severely sanctioning Klayman and this this Court should remand the case for a new trial where Klayman is able to introduce testimony and documentary evidence that **was** provided in this litigation. [1996-1997], [1998-2025]

[32] B. The Court Erred in Granting Partial Summary Judgment to Appellees by Improperly Weighing Competing Affidavits and Usurping the Jury's Function.

In *Waggel v. George Washington University*, 2020 U.S. App. LEXIS 14749 *7 (D.C. Cir. May 8, 2020), the court held that "We review grants of summary judgment *de novo*, considering the evidence in the light most favorable to the non-prevailing party under the same standards as the district court. In doing so, we do

not 'weigh the evidence and determine the truth of the matter' but instead 'determine whether there is a genuine issue for trial.'" *See also* F. R. Civ. P. 56(a). Summary judgment "will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Id.* at 249.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. A plaintiff need not "initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery rules or by court order" and also "need not also depose his witnesses or obtain their [33] affidavits to defeat a summary judgment motion." *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 n.12 (D.C. Cir. 1987). In *Catrett*, a party, in interrogatory responses, listed an individual as a potential witness who wrote a letter at issue in the case. *Id.* at 38. This Court found that "even if the [witness'] letter itself would not be admissible at trial, [the proponent] has gone on to indicate that the substance of the letter is reducible to admissible evidence in the form of trial testimony," and therefore,

"[w]e do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Id.*

Appellees moved for summary judgment on several of the counts set forth in both Klayman's Second Amended Complaint and Appellees' counterclaims, and Klayman filed a motion for summary judgment on several of the counts in his Second Amended Complaint. [0001-0111], [0394-0535], [0973-1028], [1029-1057], [1058-1082], [1083-1109], [1110-1147], [1148-1170], [1178-1234], [1235-1237], [1238-1239], [1240-1319], [1320-1323], [1324-1416], [1417-1438], [1439-1459] The Court disposed of these motions. [1746-1749], [1750-1837], [1866], [1867-1872] In doing so, the Court struck Klayman's opposition [1460-1481], [1482-1679] to Appellees' motion for summary judgment as untimely. [1680-1683]. The Court did, however, consider "several exhibits" [1238-1239], [1240-1319], [1320-1323] including Klayman's "substantive Second Declaration" "which remain on the record." [1758] In ruling, the Court emphasized "that it does not [34] treat Defendants' motions for summary judgment as conceded. Rather, the Court has, as it must, scrutinized the record of the case as a whole as well as the relevant case law to address Appellees' motions for summary judgment on the merits." [1758] Had the trial Court done that ("scrutinized the record of the case as a whole"), it would have found clear evidence that presented genuine issues for trial in Klayman's "Declaration" and exhibits attached thereto. [1758], [1324-1416]

Klayman assigns error to several of the Court's findings:

1. The Court Erred in Dismissing Counts of Klayman's Second Amended Complaint.

a. Count Four – The Court Erred in Finding No Violation of Section 43(a) of the Lanham Act.

i. Appellees' Use of Klayman's Name, Likeness and Being Violated the Lanham Act.

Count Four of Klayman's Second Amended Complaint alleges that Appellees violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), by sending a newsletter to its donors that identified Klayman as "Chairman and General Counsel" after his voluntary departure. [0023-0024] The question at issue was whether Appellees could have retrieved the newsletter after it was printed but before it was actually mailed, or, alternatively, if it could not be retrieved, whether Appellees had the duty to send a "retraction" that stated that Klayman was no longer affiliated with Judicial Watch. The Court found that the newsletter at issue was "delivered to the USPS for mailing on September 18, 2003." [1802] The [35] parties signed the Severance Agreement between Klayman and Judicial Watch on September 19, 2003. [1802] The Court found that Fitton did not contact Judicial Watch's "Fundraising Department, which oversees production of the

newsletter, to inquire whether the newsletter could be stopped" until September 22, 2003, but was "advised the newsletter 'had gone out already and could not be stopped.'" [1802-1803]. Importantly, the Court's opinion is silent on whether Appellees called the entity to whom the newsletter was delivered for mailing and is also silent on whether a correction could have been mailed if, in fact, it could not have been retrieved. In his Declaration, Klayman alleges:

> I never agreed that Defendant could use my name and likeness after I left, and to give donors and supporters the false impression that I was still at [Judicial Watch] as Chairman was a transparent attempt to trade on my reputation, which was damaged as a result of [Judicial Watch] sending this mailing after I left. Defendants' false claims that I approved the mailing and that it was in the pipeline to be mailed before I left is not truthful. [1331].

In fact, Appellees sent a letter to Klayman dated August 27, 2003 that stated, "Your employment with Judicial Watch is terminated, effective immediately." [1261] Klayman's version of the date on which he was "no longer an employee of Judicial Watch" is supported by a memorandum to "All Judicial Watch Staff" from Mr. Fitton that states "effective immediately, Larry Klayman is no longer an employee of Judicial Watch." [1269] Klayman's Declaration [1325-1340] [36] attached a letter dated April 26, 2004 from Klayman to Appellees' lawyer that stated:

> about one month after I left Judicial Watch, the current officers sent out a direct mail housefile piece, which raised money off my name and signature. . . . Even assuming that I at one time signed off on the mailing, I did so well before I severed from Judicial Watch and resigned as its Chairman. There was certainly more than sufficient time to not only avoid printing the piece, but even if not, to put a note into the mailing to explain that I have left the organization. And, it certainly was a foreseeable cost to Judicial Watch to make direct mail printing changes once I left. After all, Messers. Fitton and Orfanedes agreed to the date I would step down. There [were] no surprises!" [1365]

This letter, which is one of the "several exhibits" "which remain on the record" clearly states that this "piece" was actually sent "about one month after I left Judicial Watch." [1758], [1365] Klayman's Declaration provides that:

> the mailing did not go out in any event until after I left [Judicial Watch]. I did not know, because this was not the mailing cycle, and that Defendants would later claim falsely that the newsletter with cover letter went out before I left [Judicial Watch] on September 19, 2003 and even if it did, which it did not based on my knowledge of [Judicial Watch] mailing lead times and cycles, it was false and fraudulent to have it go out with my name and likeness representing that I was Chairman and speaking for [Judicial Watch] when the

> Defendants knew that I would be gone by that time." [1332]

Moreover, Klayman's Declaration attests that "there was plenty of lead time not to include a cover letter allegedly signed by me as Chairman with the newsletter of October 2003, or put in the mailing a notice informing the donors and supporters that I had left [Judicial Watch] and was no longer its Chairman." [1331]

[37] The Court held that Klayman "authorized and approved" the use of his name and identity and therefore, his false endorsement claim must fail. [1805-1806]. Additionally, the Court found that Klayman's false advertising claim must fail because the statement at issue (that Klayman was Judicial Watch's Chairman and General Counsel) was "true at the time the statements were made by Judicial Watch, authorized by Klayman himself, and delivered to the USPS for mailing." [1808] These findings ignore the facts that Klayman did not approve this use after he left and that the mailing either was not mailed until after he left or could be "retracted" via a correction notice. It was not the Court's role to weigh competing affidavits, but it did so anyway. Thus, the Court's order granting summary judgment was in error since there were genuine issues of fact in dispute. [1746-1749], [1750-1837]

ii. The Court Erred in Finding that Klayman Did Not Plead Damages.

The Court also found that "Where is simply no evidence in the record that Klayman was injured in any way" by the publication of the newsletter identifying him as affiliated with Judicial Watch. [1808] This is not true. Klayman's Declaration [1325-1339] attached a letter dated April 26, 2004 from Klayman to Judicial Watch's lawyer that states:

> My name and reputation was synonymous with Judicial Watch. I was, in effect, 'the franchise,' given my history in founding the group and role thereafter. Accordingly, when this false and misleading [38] mailing was sent out around that time that my campaign was also soliciting contributions under my signature, it caused confusion and a huge loss of revenue, and resulted in many campaign contributions being sent to Judicial Watch. (I have since learned from a third party that Judicial Watch's current officers have knowingly cashed and/or tampered with some of my campaign's contributions. See discussion below.) The harm which this caused in fundraising to my then nascent campaign was enormous, and this continues to have adverse economic and other negative effects on its operations.
>
> Under the Lanham Act and common law for false advertising and false designation of origin, my campaign is entitled to the net profit from this Judicial Watch mailing which,

> given my knowledge of the returns, would exceed at least $200,000. [1365-1366]

The Lanham Act, 15 U.S.C. § 1125(a)(1), provides a basis for liability for misleading and confusing representations or descriptions, and 15 U.S.C. § 1117(a) describes the types of damages that may be awarded. In *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo SA. de C.V.*, 743 Fed. Appx. 457, 463 (D.C. Cir. 2018), the court found that the Lanham Act "provides for two distinct bases of liability – first, in subsection (A) false association, also known as unfair competition or trademark infringement and, second, in subsection (B), false advertising." In *Paleteria*, the court found that the standard of review of decisions made at summary judgment is *de novo. Id.*

In *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 969 (D.C. Cir. 1990), this Court found that when assessing "actual damages, the district court may take into account the difficulty of proving an exact amount of damages from false advertising, as well as the maxim that 'the wrongdoer shall bear the risk of the [39] uncertainty which his own wrong has created.'" Furthermore, the *ALPO* the court found that "[o]nce a party establishes a violation of [15 U.S.C. § 1125(a)], [15 U.S.C. § 1117(a)] entitles that party to monetary relief, subject only to the statutes referred to in the section and to the principles of equity." *Id.* The Court's finding that Klayman did not suffer any damages from Appellees' Lanham Act violations failed to consider Klayman's claim that the newsletter "caused confusion and a huge loss of revenue, and resulted in

many campaign contributions being sent to Judicial Watch" as well as Klayman's claim that "my campaign is entitled to the net profit from this Judicial Watch mailing which, given my knowledge of the returns, would exceed at least $200,000." [1365-1366] Therefore, the order granting summary judgment was in error since there were genuine issues as to whether Klayman suffered damages from the publication of the newsletter. [1746-1749], [1750-1837]

b. Count Seven – The Court Erred by Finding No Breach of the Severance Agreement When Judicial Watch Interfered with Klayman's Right to Make Fair Comment in Interviews.

Count Seven of Klayman's Second Amended Complaint alleges that Appellees breached the Severance Agreement by tortuously interfering with Klayman's opportunities to appear in televised interviews as agreed to under the Severance Agreement's fair comment provision by instructing the media outlets that Klayman may not be referred to as Judicial Watch's "Founder and former [40] Chairman" and by telling them "not to schedule him as a guest." [0017-0019], [0028-0029], [1788-1789] In support of his claim, Klayman attached an email dated April 27, 2004 from a person identified as "Leslie Burdick C-SPAN" to David Johnson that states:

> David:
>
> Tom Fitton of Judicial Watch is going to be on C-SPAN for 45 minutes taking about the case. He asked that we don't schedule Larry on anything related to the case. So we won't need to talk with Larry Klayman on Washington Journal too. But thank you for getting in touch and keep in touch.
>
> Leslie Burdick
> C-SPAN
> [1278]

In further support of his claim, Klayman attached the transcript of Fitton's deposition where Klayman read a "memorandum written by my campaign manager, David Johnson":

> I contacted Tom Hannon of CNN's Inside Politics to have Klayman comment on the Supreme Court Hearing on the Cheney Task Force case. I was explicit that Klayman was not associated with Judicial Watch and would not be commenting as a representative of Judicial Watch, but rather as a Senate candidate from Florida. Mr. Hannon responded that he could not book Klayman. He stated that Tom Fitton of Judicial Watch had requested that CNN not book Klayman to discuss any aspect of the case in any function.
> [1247-1249], [1280]

In granting summary judgment, the Court found that the CSPAN email and Mr. Johnson's memorandum were examples of "plainly impermissible hearsay."

[41] [1791-1792] In doing so, the Court ignored the example of the letter in *Catrett*, 826 F.2d at 38, since the substance of the C-SPAN email and the Johnson memorandum are "reducible to admissible evidence in the form of trial testimony." In addition, Klayman's declaration promised that "[t]he witnesses at CNN and CSpan [sic] and otherwise will be subpoenaed for trial, and I will testify on these issues as well." [1337] Therefore, the Court was in error by dismissing Klayman's claims that Judicial Watch breached the Severance Agreement and tortuously interfered by preventing fair comment with Klayman's opportunities to appear on television. [1746-1749], [1750-1837]

c. Count Six – The Court Erred in Dismissing Klayman's Rescission Claim.

On December 3, 2008, Klayman filed a motion for partial summary judgment asking for rescission of the Severance Agreement. [1178-1181] Klayman alleged that Judicial Watch breached the Severance Agreement on five (5) grounds, most notably of which was by disparaging him before various media entities. [1178-1181] Klayman's claim that the Paragraph 17 of the Severance Agreement, entitled "Non-Disparagement," precluded Judicial Watch from publishing false information about Klayman and was a major reason that he entered into the contract. [2595]

In *Dean v. Garland*, 779 A.2d 911, 915 (D.C. 2001), the court found that "[w]here a party to an executed

contract discovers a material misrepresentation [42] made in the execution of the contract, that party may elect one of two mutually exclusive remedies. He may either affirm the contract and sue for damages, or repudiate the contract and recover that with which he or she has parted." In *Dean*, the court found that "inherent in the remedy of rescission is the return of the parties to their pre-contract positions. Rescission is an equitable remedy, and a party seeking rescission must restore the other party to that party's position at the time the contract was made." *Id.*

The Court erred by denying Klayman's motion for partial summary judgment for rescission of the Severance Agreement. [1746-1749], [1750-1837] As set forth above, of particular importance is the breach of the nondisparagement provision. In *Higbee v. Sentry Insurance Co.*, 253 F.3d 994, 995-97 (7th Cir. 2001), the parties appeared to reach an oral settlement of a discrimination case with a nondisparagement provision, but later failed to agree on written terms. On appeal of the dismissal of the case based on the settlement, the Court found that the "nondisparagement clause was a material term" and the plaintiff "made it clear that she would not settle the case without such a clause," and thus remanded the case for further proceedings. *Id.* at 998-1000.

As the plaintiff did in *Higbee*, Klayman viewed the nondisparagement clause as a fundamental benefit of the bargain, and would not have agreed to the terms of the Severance Agreement if not for such a provision. Indeed, the primary purpose [43] of the Severance

Agreement was to protect the reputations of both parties—a concern of grave importance given the extent to which the relationship between the parties had fractured. Clearly, the nondisparagement provision was of significant and primary importance to Klayman given his Senate candidacy where his character would be at issue. As such, the mutually agreed upon nondisparagement provision was the foundational piece upon which the Severance Agreement centered and any breach thereof is therefore clearly material. Thus, rescission was appropriate.

Despite this, the Court erred by discounting Klayman's allegations to strain to find a way to deny Klayman's motion. In doing so, it characterized Klayman's allegations as "dispute[s] as to the manner of the performance," and therefore, not material breaches. [1766] However, this line of reasoning makes no sense when applied to the nondisparagement provision. Either a party disparages another or does not. There is no "gray" area where the "manner of performance" is even implicated. Klayman clearly showed that he had been disparaged by Appellees in direct contravention of the express terms of the Severance Agreement. Appellees' breach of the "Non-Disparagement" provision was "material," and not merely a "dispute as to the manner of the performance," and thus, it was clearly a material breach that warranted rescission, and therefore, the Court erred in dismissing the rescission claim.

[44] Moreover, the Court's holding that it was "unreasonable" for Klayman to wait for almost two years to file his claim for rescission was in error since the

jury should be the one who makes the factual determination whether this "delay" was unreasonable. [1767] Finally, the mere filing of Klayman's rescission claim indicates his willingness to return the money he received from his entry into the Severance Agreement. Therefore, the dismissal of Klayman's rescission claim was in error. [1746-1749], [1750-1837]

d. Count Nine – The Court Erred in Dismissing Klayman's Defamation Claim.

Count Nine of Klayman's Second Amended Complaint alleges that Appellees defamed Klayman by publishing the allegation that he filed his suit as a "tactical maneuver designed to distract attention away from the fact that Klayman owes more than a quarter of a million dollars to Judicial Watch." [0030-0031] The Court found that Klayman has "failed to set forth sufficient evidence from which a reasonable jury could find, by clear and convincing evidence," that Judicial Watch acted with "actual malice" since Klayman "has failed to produce any evidence from which a reasonable jury could conclude that Defendants' subjectively held a 'serious doubt' as to the truth of the statement that Klayman owes [Judicial Watch] a quarter million dollars." [1816], [1818]

In *Jankovic v. International Crisis Group*, 494 F.3d 1080, 1088 (D.C. 2007), the court found that a plaintiff claiming defamation must plead "(1) that the [45] defendant made a false and defamatory statement

concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." As a public figure, Klayman must plead "actual malice" which is defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 597 (D.C. Cir. 1988).

The Court's reasoning in finding that Appellees did not have a "serious doubt" as to their contention that Klayman owed money was that its "financial statements" showed that "Klayman owed, both individually and on behalf of his law firm," "approximately over $383,429.80 to [Judicial Watch] at the time the allegedly defamatory statement was made." [1815] The Court's conclusion that included the alleged debt of Klayman's law firm is in error since Klayman's law firm is a separate legal entity from Klayman in his individual capacity. Also, Klayman's alleged debt was disputed – a fact that Appellees knew from correspondence between Klayman and their counsel in 2004. [1344-1345], [1384], [1390] Therefore, in 2006, when Judicial Watch published the statements, it had a "serious doubt" as to its contention that Klayman owed any money, and the [46] Court's order granting summary judgment was in error since the jury should have

determined the issue of actual malice. [1746-1749], [1750-1837]

2. The Court Erred in Granting Partial Summary Judgment on Judicial Watch's Counterclaim for Repayment of Personal Expenses.

The Court committed a fundamental error when it granted Appellees' motion for summary judgment on count one of the counterclaim which alleged that Klayman failed to repay certain expenses. [1746-1749], [1820-1826], [1866], [1867-1872], [2368-2376] In doing so, the Court usurped the jury's traditional fact finding role and weighed competing affidavits, when it simply should have denied summary judgment because there was a dispute as to material facts. The total amount "owed" was calculated by Susan Prytherch, who at all material times, served as Appellees' chief of staff. [1820] As part of his response, Klayman submitted an affidavit that swore under oath that these were "false invoices" that were "manufactured" by Prytherch. [1337] Klayman also questioned Prytherch's credibility, as she "effectively admitted to being fired from her previous employment in a financial position because of her unethical or illegal conduct." [1329]

In ruling on summary judgment, the Court found that Judicial Watch sent Klayman "invoices detailing personal expenses billed to Klayman, which included an explanation of the charge and supporting documentation," and these charges [47] totaled $85,242.03.

[1822] The Court further found that Klayman has not produced "any evidence" showing that "any of the claimed expenses were, in fact, business expenses or that he has previously reimbursed [Judicial Watch] for any of the expenses." [1823-1824] Eventually, the Court entered a monetary judgment against Klayman in the amount of $69,358.48. [1872] The Court took this action despite Klayman's sworn attestation in his Declaration that "these amounts, for both me and for Klayman and Associates, P.C. are disputed and questions of fact for the jury." [1338] In fact, Klayman further stated in his sworn Declaration that "attached as Exhibit 2 [1341-1416] to this second sworn Declaration, are correspondence, which are true and correct, that show that I do not and have never owed [Judicial Watch] the monies which Appellees claim that I owe and have already reimbursed [Judicial Watch] for all legitimate personal expenses." [1330] Two of these letters that Klayman attached and incorporated into the affidavit as "correspondence" are letters he wrote to Judicial Watch's counsel disclaiming any entitlement to these expenses. [1344-1345], [1382-1392] Klayman's denials "remain on the record" [1758] and show that there were significant disputes as to material facts, including the validity of the invoices, that preclude summary judgment on the issue of unpaid expenses. Thus, the Court usurped the role the of jury by weighing the affidavits, and discounted Klayman's sworn Declarations in [48] granting summary judgment. This is a clear, reversible error. [1746-1749], [1750-1837], [1866], [1867-1872]

II. THE COURT COMMITTED NUMEROUS ERRORS DURING TRIAL THAT FORM CLEAR BASIS FOR REVERSAL.

In *United States v. Pless*, 79 F.3d 1217, 1220 (D.C. Cir. 1996), this Court found that with regard to the trial court's application of Fed. R. Evid. 403 and 404, the standard of review is "abuse of discretion." *See also Henderson v. George Washington University*, 449 F.3d 127, 132-33 (D.C. Cir. 2006). In *Youssef v. FBI*, 687 F.3d 397, 403 (D.C. Cir. 2012), this Court found that "The jury verdict stands 'unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict.'"

A. The Court Erred by Allowing Highly Prejudicial, Inflammatory Statements and an Irrelevant Court Order into Evidence.

1. The Parol Evidence Rule Unequivocally Excludes Evidence Which Contradicts the Express Language of the Severance Agreement.

The "parol evidence rule requires that when two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Murray v. Lichtman*, 339 F.2d 749, 751 (D.C. Cir. 1964).

[49] Paragraph 26 of the Severance Agreement provides:

> [t]his agreement constitutes the entire agreement and understanding between and among the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous written or oral agreements and understandings between the Parties with respect to the subject matter of this Agreement. [2598]

The District of Columbia follows the "objective law of contracts." This means that "the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, regardless of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible to a clear and definite undertaking, or unless there is fraud, duress, or mutual mistake." *Tauber v. Quan*, 938 A.2d 724, 729 (D.C. 2007). The meaning of the Severance Agreement is discernible from its plain language, and it states that Klayman voluntarily resigned from Judicial Watch:

> Judicial Watch announced today that Larry Klayman has stepped down as Chairman and General Counsel of Judicial Watch" [sic] to pursue other endeavors. [2595]

Because it is facially unambiguous, the Severance Agreement's plain language must be relied upon as providing the best objective manifestation of the parties' intent. The statements Judicial Watch placed before the jury should have been kept out of this

litigation as required by the parol evidence rule. In this regard, the Court allowed Appellees to submit false testimony to the jury in support of their Lanham Act claims concerning Klayman's alleged inappropriate [50] conduct including an effort to pursue an improper relationship with a Judicial Watch employee [2937], claiming he effectively sexually harassed her [2850], Klayman's alleged admission that he was in love with the employee [2849], had purchased gifts for her and had kissed her, [2849], and Klayman's alleged acknowledgment of an incident with his wife that provided the basis for his wife's allegation that he physically assaulted her in front of their children. [2880] Appellees have perpetuated the falsity that Klayman did not voluntarily leave to run for the Senate; rather, they forced him out due to this alleged misconduct. [2852-2853] Notwithstanding Klayman's vehement denial of these false and outrageous allegations, the jury should never have heard such testimony because it was highly inflammatory and grossly prejudicial.

Even more, the Severance Agreement contains a clause that is fully integrated: "[t]his agreement constitutes the entire agreement and understanding between and among the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous written or oral agreements and understandings between the Parties with respect to the subject matter of this Agreement." [2598] The Court erred when it allowed extrinsic evidence to interpret the completely integrated agreement. *Segal Wholesale, Inc. v. United Drug Serv.*, 933 A.2d 780, 784 (D.C. 2007).

The "assented[,]" "complete and accurate integration" of the Severance Agreement should have barred any [51] contradictory or varying version of the facts of Klayman' s voluntary departure from Judicial Watch. *See Murray*, 339 F.2d at 751.

2. Federal Rules of Evidence 401 and 402 Preclude Evidence Regarding False Allegations About Klayman's Departure From Judicial Watch and Highly Prejudicial Testimony of Klayman's Former Wife Because Such Evidence Was Not Relevant.

Evidence is only relevant pursuant to Rule 401 if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Of course, "[i]rrelevant evidence is not admissible. Fed. R. Evid. 402.

a. Because Appellees' False Allegations Concerning Klayman's Departure from Judicial Watch are Irrelevant, They Are Inadmissible.

Klayman never sued on the reasons for his departure from Judicial Watch and Appellees never raised it in their amended counterclaim. The amended counterclaim has two counts against Klayman for violations of the Lanham Act (15 U.S.C. § 1125(a)). Count Five alleged that Klayman made false or misleading

statements concerning the "nature, characteristics, qualities, or geographic origin of Klayman and/or Klayman d/b/a Saving Judicial Watch's goods or services, as well as those of Judicial Watch." [0425-0426] Similarly, Count Six alleged that "Klayman's false and/or misleading statements and representations are likely to cause the public and consumers to believe that Saving Judicial Watch is associated [52] with, affiliated with, and/or sponsored by Judicial Watch." [0426-0427] **Neither one of the counterclaims addressed any alleged misrepresentation by Klayman about the reasons for his departure from Judicial Watch.**

Special interrogatories were not provided to the jury which would have pointed the parties and the Court to the specific reasons to consider to find if Klayman violated the Lanham Act. There was no definitive or even indicating factor that the jury found Klayman violated the Lanham Act because of this alleged misbehavior. Importantly, the verdict form proves this fact. There were two questions on the verdict form that related to the Lanham Act. The first question is as follows:

> [h]as Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman engaged in unfair competition by direct mail, email and advertisements including the website supporting the Saving Judicial Watch effort in violation of the Lanham Act by a false and/or misleading affiliation, connection or association between Saving Judicial Watch

> and Judicial Watch" (See Counterclaim No. 4 on page 29) [2240]

The second question is as follows:

> [h]as Counterplaintiff Judicial Watch, Inc. proved by a preponderance of the evidence its claim that Counterdefendant Larry Klayman engaged in unfair competition by direct mail, email and advertisements including the website supporting the Saving Judicial Watch effort in violation of the Lanham Act by using false and/or misleading statements (See Counterclaim No. 5 on page 29) [2241]

[53] The verdict form is silent on the reasons behind Klayman's departure from Judicial Watch and does not specify the alleged false or misleading statement(s) for which the jury found Klayman liable. But, both questions do refer to page 29 of the jury instructions which the Court read aloud to the jury. Upon review of the oral instructions from the Official Transcript – **since mysteriously the Court did not file the final instructions on the docket, even assuming they exist** – there is no indication of what the alleged false or misleading statements were. [2250] In fact, the jury instruction appears to be a regurgitation of Appellees' amended counterclaim. [3163] Nothing through the course of this litigation gave rise to Appellees' introduction of this false testimony to the jury, and because of it, the Court severely prejudiced Klayman by allowing it to be heard.

b. Because the Highly Prejudicial Testimony of Klayman's Former Wife is Irrelevant, it is Inadmissible.

On the tenth day of trial, the Court committed fatal error by allowing Appellees to read in front of the jury and therefore into the record the wholly irrelevant (and false) deposition testimony of Klayman's former wife, who at the time of her deposition, was in a heated custody battle with Klayman concerning their two small children, involving an alleged and proven false domestic abuse allegation. [2999-3000] The Court also committed grave error by allowing as testimony vulgar names Klayman allegedly called his wife during the course of [54] their marriage. [3001] The introduction of both subjects violates Rules 401 and 402.

The allegations and testimony regarding what allegedly occurred in a church parking lot, where Klayman's estranged wife falsely claimed that he "put his hands around [her] neck, and [] started to shake [her] and bang [her] head against the car window" [2999], in other words, that Klayman had beat his wife, had nothing to do with anything Klayman sued for nor did it have any remote correlation to any of Appellees' counterclaims. The testimony is irrelevant to the Lanham Act and false advertising claims because it is undisputed that Klayman left Judicial Watch to run for the Senate. Moreover, Appellees signed the Severance Agreement which stated that Klayman left "to pursue other endeavors." [2595] Importantly, the Court erroneously ***excluded*** testimony from the former wife's same deposition where she admitted that it was

Klayman's aspiration to run for the Senate, even before he left Judicial Watch. [2128] This testimony clearly counters Appellees' theory that Klayman was forced out. But again, the testimony is irrelevant, as it does not relate in any way to the litigation. Additionally, and to the contrary, the Court allowed deposition testimony concerning allegedly vulgar names and "bad words" Klayman said to his wife. [3001] This too had no place in the trial as the names did not relate to any counterclaim and only served to prejudice Klayman. Klayman told the Court that the testimony was "just an effort to smear [him]. It has nothing [55] to do with this case." [3000] The Court ruled that the vulgar names could come by ruling "I think **I'll allow it based on, I think, what your testimony is going to be about her**." [3001] Clearly this is not a legal reason to allow irrelevant and highly prejudicial testimony to come before a jury, and the Court's allowance of this testimony was in error. [2353-2355]

c. The Court's Introduction of Evidence of an Unrelated Case was Prejudicial and Therefore Inadmissible.

One of the most clear-cut examples of the Court's bias and prejudice that impacted the jury is its ruling concerned the Ninth Circuit's order on Klayman's application to appear *pro hac vice* in conjunction with the ruling concerning the Florida judgment that Klayman obtained against Judicial Watch. [2822-2823], [2346-2351] The Court provided examples as to how both parties can introduce evidence the other party sought to

exclude. The question the Court suggested to Judicial Watch to ask Klayman was: "[it's something like, isn't it true that in a petition for mandamus, you made assertions that the Ninth Circuit, on March 2017, found to be patently false[?]" [2822-2823] In contrast, the Court suggested that Klayman ask Judicial Watch, with respect to the Florida case, "[i]sn't it true that you knew that an employee of Judicial Watch made a false statement that I had been convicted of failure to pay child support, and that you failed to correct it?" [2183-2184] By the way the Court phrased the questions, the only possible [56] outcomes the jury could glean were: (1) that Klayman lied to the Ninth Circuit[2] and (2) that Klayman failed to pay child support. The dichotomy between the two suggestions was not accidental and showed the Court's bias against Klayman. Furthermore, since this was highly prejudicial, the Court's allowance of this "evidence" was in error.

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[2] Klayman appealed the opinion and denied the findings and Judge Gould, a distinguished jurist, strongly dissented and found that Klayman had not lied. *See In re Bundy*, 840 F.3d 1034, 1055 (9th Cir. 2017).

B. The Court Erred Under Federal Rules of Evidence 403 and 404(b) in Admitting False Allegations concerning Klayman's Departure from Judicial Watch and Highly Prejudicial Deposition Testimony of his Former Wife because such Evidence's Probative Value is Substantially Outweighed by Unfair Prejudice and Evidence of Alleged Wrongs is Inadmissible to Prove Character.

1. Rule 403 Analysis.

Evidence that may even be deemed relevant could still be inadmissible and subject to exclusion on multiple grounds, including that "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Importantly, "unfair prejudice within [Rule 403] context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *United States v. Ring*, 706 F.3d 460, 472 (D.C. Cir. 2013) (*quoting* Fed. R. [57] Evid. 403 advisory committee notes)). Rule 403, with its prohibition on evidence that gives rise to "unfair" prejudice, is designed to preclude "some concededly relevant evidence [that may] lure the factfinder into declaring guilty on a ground different from proof specific to the offense charged." *United States v. Orenuga*, 430 F.3d 1158,1164-65 (D.C. Cir. 2005).

a. Even if Klayman's Departure from Judicial Watch Was Relevant, the Testimony Introduced by Appellees Was Far More Prejudicial than Probative.

The Court erred when it allowed Appellees to provide the jury with false testimony from Judicial Watch directors that Klayman pursued a romantic relationship with a married employee with small children [2936], potentially sexually harassed her [2850], and confessed that he was in love with her and that he kissed her [2849]. Hearing this testimony assuredly suggests that the jury's decision was based on an improper basis that was "an emotional one." *Ring*, 706 F.3d at 472. Even if this testimony was factually relevant, it still lured the factfinder into declaring Klayman guilty on a ground different than alleged Lanham Act violations.

b. Even if Klayman's Former Wife's Testimony Was Relevant, the Testimony Was Far More Prejudicial than Probative.

The Court erred when it allowed Klayman's former wife's testimony into the record because the content plainly violates Fed. R. Evid. 403. The Court [58] prejudicially allowed the jury to hear "[h]e started to just yell at me and call me names, that I was stupid for thinking, I could, you know, defy him. And he got very angry, and he put his hands around my neck and he started to shake me and bang my head against the car

window." [2999] Next, the jury heard: "[h]e punched his hand into the radio, and it was bloody, and it was bashed in. Yes, we found out later it was broken. [3000] Additionally, the jury heard "[h]e called me a piece of shit, a dumb ass, ugly, stupid. Bitch was one that he liked to use." [3001]

Even if Klayman had beaten his wife and called his wife terrible names, which he did not, and this so-called testimony was relevant, the Court fatally erred when it allowed the jury to hear such highly prejudicial and inflammatory testimony because its probative value is seriously outweighed by the prejudice. Evidence cannot be used "to show criminal disposition," propensity, or bad character. *United States v. Moore*, 709 F.3d 287, 296 (4th Cir. 2013). Rule 404's well-recognized principle that showing a witness has a law-breaking character is "a purpose prohibited by Fed. R. Evid. 404(b)." *United States v. Hands*, 184 F.3d 1322, 1328 n.9 (11th Cir. 1999); *see also Moore*, 709 F.3d at 296 (new trial granted because the Court improperly admitted evidence of the defendant's prior possession of a different type of firearm "to establish [his] criminal disposition"); *United States v. Thomas*, 321 F.3d 627, 637 (7th Cir. 2003) (new trial granted [59] where evidence of prior gun possession "appeal to Thomas's propensity to carry guns")

Federal appellate courts have thrown out jury verdicts for violating Rule 403 alone. For example, in *Hands*, 184 F.3d at 1328-29, the court stated that "few would doubt" that evidence of "violent spousal abuse" falls into a category of evidence "particularly likely to

incite a jury to an irrational decision." The alleged spousal abuse in *Hands*, inflicted by a defendant charged with drug-related offenses, was held to be unduly prejudicial and therefore inadmissible because of its "inflammatory nature" and tendency to produce "visceral reactions." *Hands*, 184 F.3d. at 1328 n.20, 1329. The appellate court reversed and remanded. *Hands*, 184 F.3d. at 1335. The *Hands* court found that not only was the alleged abuse irrelevant, but even if it were, the "evidence did not meet the balancing test set out in Federal Rule of Evidence 403." *Hands*, 184 F.3d. at 1328. Domestic violence evidence's prejudicial nature so heavily outweighs its probative value that a court should have excluded it. *See State v. Zamudio*, 645 P.2d 593, 596 (Ore. 1982) ("The public stigma attached to a husband who beats his wife is significant. The inflammatory nature of such a characterization is arguably more substantial than the purchase of marijuana discussed in [another case]." Here, not only was the testimony irrelevant under Rule 401, but it also was so prejudicial that any scant probative value of it is significantly outweighed by the danger of unfair prejudice [60] and the "visceral reactions" it undoubtedly caused the jury. Therefore, the Court's admission of this testimony was in error. [2353-2355]

2. Rule 404(b) Analysis.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith but may be relevant to prove motive, opportunity, intent, preparation,

plan, knowledge, identity, absence of mistake or lack of accident. Fed. R. Evid. 404(b), (1) – (2). "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. 681, 686 (1988). Under District of Columbia precedent, this Court undertakes a two-part analysis to determine admissibility in the context of Rule 404(b). First, the Court considers whether the evidence is "probative of some material issue other than character." *United States v. Clarke*, 24 F.3d 257, 264 (D.C. Cir. 1994). Second, if the Court deems the evidence to be relevant, it will still be excluded under Rule 403 if its probative value "is substantially outweighed by the danger of unfair prejudice. *United States v. Long*, 328 F.3d 655, 664 (D.C. Cir. 1993).

[61] **a. Even if Klayman's Departure from Judicial Watch Was Relevant, Alleged Wrongs Committed by Klayman Are Inadmissible.**

Whether Klayman pursued a relationship with a Judicial Watch employee, said he was in love with that employee, purchased gifts for her or kissed her (and assuming those alleged actions can be considered "bad acts") – are not "probative of some material issue other than character," and therefore, the analysis can stop there. *Clarke*, 24 F.3d at 264. This type of testimony is entirely unrelated to any counterclaim and was only introduced to try to prejudicially show that Klayman

was forced out of Judicial Watch because of his behavior, however false. But, even if the testimony was probative of some material issue other than character, it still should not have been admitted under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice.

b. Even if Klayman's Former Wife's Testimony Was Relevant, Alleged Wrongs Committed by Klayman Are Inadmissible.

Even assuming *arguendo* Klayman beat his estranged wife and called her vicious names, the testimony should not have been admitted because such evidence is not even arguably "part of the charged offense." *U.S. v Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000). Domestic violence, spousal abuse and even using foul language has absolutely nothing to do with whether Klayman engaged in unfair competition in violation of the Lanham Act. In the *Bowie* case, for example, where [62] the defendant was charged with possession of counterfeit currency, this Court held that evidence of the defendant's possession of counterfeit currency even one month prior to the events in the indictment was not "intrinsic" to the charged offense. *Id.* Even if Klayman were on trial for spousal abuse – which is a far cry from an alleged violation of the Lanham Act – according to this Court in *Bowie*, the evidence could still be thrown out for violating Rules 403 or 404(a). *See United States v. Sheldon*, 628 F.2d 54, 56 (D.C. Cir. 1980). The Court erred by allowing the jury to hear

alleged "evidence" that plainly violates Rules 403 and 404(b).

C. The Court Erred By Orally Reading Jury Instructions that Were Erroneous, Confusing and Prejudicial to Klayman, and Erred by Refusing to Provide Other Instructions that Would Have Stated the Correct Law and Prevented Such Confusion.

The Court erred regarding the jury instructions that it allowed to be heard by the jury, as they were often highly prejudicial towards Klayman and clearly skewed and twisted what should have been an impartial jury of Klayman's peers. Fed. R. Civ. P. 51 (d)(1) provides for the assignment of error in jury instructions. In *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1092 (9th Cir. 2007), the court found that "Where a challenge to jury instructions is at issue, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered." A district court's formulation of civil jury instructions is reviewed as an abuse of discretion, and *de novo* whether a jury instruction misstates the law." *Id.* In *Gambini*, the court found that "the trial [63] court committed reversible error when it refused to give [a jury instruction] because it failed fairly and adequately to cover the issues presented and to state the law correctly, and because it was ultimately misleading," and thus, found that "the case will have to be retried" since, "[a]n error in instructing the

jury in a civil case requires reversal unless the error is more probably than not harmless." *Id.* at 1092-93.

Erroneous jury instructions or omissions of proper jury instructions may provide grounds for a new trial if they raise a substantial likelihood that the jury's verdict was based on improper legal theories, and the "test is to determine [the] improper instructions' effect on [the] jury's understanding of the law." *See United States v. Lemire*, 720 F.2d 1327,1343 (D.C. Cir. 1983).

1. The Court Erred In Not Providing the Jury With an Instruction That Explained Why the Case Was Tried In a "Bizarre" Fashion.

During pre-trial hearings, Klayman requested that the Court issue a jury instruction briefly describing why the case would be tried in such a one-sided manner, without Klayman having either witnesses or exhibits:

> The Court has imposed sanctions on Larry Klayman, which limits his ability to testify and present evidence to prove the counts of his second amended complaint against Judicial Watch and evidence of damages as well as in his defense. [2051]

The Court denied this request: "Plaintiff is not permitted to mention the Court's legal rulings in any way" [2151] as "legal rulings are strictly the domain of the [64] Court, rather than the jury." [2149] Earlier in January 2018, the Court indicated "that it was not likely

to accept Plaintiff's proposal, as adding an instruction to this effect would tend to suggest to the jury that the Court has made factual findings, which it has not." [2074] The Court only allowed Klayman to use *one* exhibit and did not permit him to call any witnesses. [2150] This, coupled with the Court's obvious hostility towards Klayman, prompted him to say, "You're trying this case, Your Honor, as if it's a judge-tried case." [2818]

The jury deserved to know that the Court severely sanctioned Klayman not substantively on the truth of the matter, but procedurally, and therefore significantly limited his case before the jury. In this regard, Klayman set forth a proposed jury instruction that would explain this in a neutral fashion to the jury. [2051] However, the Court refused, and even if it disagreed with Klayman's proposed jury instruction, it should have fashioned one itself. Failing to do anything fatally prejudiced the jury and it created the false impression that Klayman had no case. [2072-2075], [2142-2152], [2344]

2. The Court Erred in Not Providing an Instruction on Fair Comment and Disparagement that were Contracted for in the Severance Agreement.

At arm's length, the parties negotiated perhaps the most important provision of the Severance Agreement and contracted to make fair comment applicable to [65] disparagement, defamation and any potentially

negative statements by each other - Paragraph 17, which emphasizes:

> **Nothing in this paragraph is intended to, nor shall be deemed to, limit either party from making fair commentary on the positions or activities of the other following the Separation Date.** [2595] (emphasis added) *See also* [2940], [2959]

The parties therefore agreed what the law would be should there ever be a dispute, and Paragraph 17 [2595] provides them with the ability to provide "fair comment" about each other. Thus, the ability, if not necessity, for the parties to engage in "fair commentary" was a material reason that this provision became become part of the Severance Agreement, which is a contract. Klayman insisted on this "fair commentary" provision since he as the founder of Judicial Watch and a prominent public interest advocate, obviously wanted to be able to publicly comment on his achievements and cases, particularly since, he was leaving to run for the Senate and wanted to publicize his accomplishments at Judicial Watch. Klayman also needed to comment in the event Judicial Watch or its officials committed unethical or illegal acts that could harm his reputation. This concern arose because Klayman's relationship with Fitton, whom he had grown to distrust trust and viewed as dishonest, had soured during his final months at Judicial Watch. [0003-0008] Indeed, both scenarios came to pass after Klayman left Judicial Watch, and he was allowed, and in particular cases felt compelled, as a matter of public interest, to both

comment on Judicial Watch cases he had brought [66] while general counsel, and also to protect himself, as he testified to at trial, by speaking out about "bad stuff going on" at Judicial Watch that exposed him to potential liability from donors, clients and employees. [2809], [3006] Some of Judicial Watch's questionable and unethical actions that Klayman believed he was compelled to comment on to protect his name and liability from potential lawsuits brought by Judicial Watch's donors, clients, and employees include, but are not limited to Fitton not having even an undergraduate degree, Fitton's promotion of his personal agenda, Appellees' campaign to disparage and tortuously interfere with Klayman, Appellees' failure to purchase a building despite having fundraised for it, abandonment of clients, and vindictive treatment and firing of employees hired by Klayman. [0007-0019], [2809], [2858]

In view of Appellees' counterclaims that alleged disparagement, Klayman sought a jury instruction on "fair comment" [2204-2205] and repeated this request during trial. [2940, 2955], [2958-2959], [3006] As just one example, Klayman stated that "fair comment [provision], even under your interpretation, which comes from defamation, was incorporated into the non-disparagement by agreement. So that's why it all has to be read together." [2959]

The Court ultimately denied Klayman's request. [2206-2208], [2209-2210], [2338-2342], and in doing so, the Court erred because Paragraph 17 of the Severance Agreement [2595] links together, by negotiated

agreement, [67] disparagement, defamation and negative comments and ties them in one "big bow;" thus, it is logical that the criteria for fair comment would apply to all three scenarios. "Substantial truth" is a "defense to defamation." *Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013). "Substantial truth" also "constitutes a defense to claims of defamation, trade libel/commercial disparagement, and intentional interference based on allegedly injurious falsehoods." *Aurora World, Inc. v. Ty Inc.*, 2011 U.S. Dist. LEXIS 161683, *22 (C.D. Cal. 2011) (interpreting California and Illinois law). Thus, truthful statements of fact and opinion are not disparagement under the Severance Agreement, and are subject to fair comment as the parties contracted at arms' length to permit, and therefore, Klayman was privileged to provide fair comment to shed light on any improper, unethical or illegal actions that were true about Appellees.

Viewing the Court's instructions "as a whole," "the substance of the applicable law was not fairly and correctly covered." Thus, the jury's confused and erroneous liability and damage verdicts on the disparagement claims, awarding $250,000 to Judicial Watch and $500,000 to Fitton were rendered after the Court failed to provide Mr. Klayman's requested and legally required jury instruction on fair comment. [2241], [2243] Accordingly, the jury verdicts should be stricken and this case remanded for a new trial with the requested jury instruction since the Court's order was in error. [2206-2208], [2338-2342]

[68] 3. The Court Erred By Not Disclosing Any Written Instructions Provided to the Jury.

Klayman asked the Court to "file" the "final jury instructions, as review of the docket shows that they were never filed." [2248-2249] That same day, July 5, 2018, the Court, in a minute order, stated, "The parties are directed to consult the trial transcript prepared by the court reporter for a complete record of the final jury instructions as delivered, which are considered the official written jury instructions." [2250] This order conflicts with what the Court told the jury about instructions before sending them to deliberate: "They get a copy of the jury instructions, and I tell them that." [3144]

Therefore, whether by design or otherwise, the actual written jury instructions were never provided and placed on the Docket, so there is no way to tell what written jury instructions were actually given to the jury and if they were accurate. Thus, the case should be remanded for a new trial in order to prevent the manifest injustice that resulted from the incorrect and confusing jury instructions and the Court's error in refusing to docket any written instructions.

D. The Court Erred in Failing to Require Authentication of Documents Submitted by Appellees that Purport to Show "Confusion."

Under Federal Rules of Evidence Rule 901, evidence must be authenticated by "produc[ing] evidence

sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Authentication is no mere formality. [69] It is a crucial part of ensuring that the parties to a litigation receive a fair trial. "Authentication and identification are specialized aspects of relevancy that are **necessary conditions precedent to admissibility**." *United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C. Cir. 1982) (emphasis added).

The Court erred when it allowed into evidence letters proffered by Judicial Watch, purportedly written by donors to show alleged confusion, without proper authentication. [2887-2905], [2195-2199], [2336-2337]; *See also* Defense Exhibits 33 [2710-2705], 34 [2706], 36 [2708], 38-39 [2711-2712], 40-43 [2713-2724] Likely recognizing this deficiency, the Court strained to give an improper instruction that the letters could not be used to show the truth of the matter asserted, but only to show potential or actual damage to Judicial Watch. The Court stated, "these documents go to the effect of counter defendant's – Klayman's campaign – not potential donors, insofar as they clearly have not included any donation." [2888]. However, this instruction was disingenuous, at best, since the alleged damage to Judicial Watch **was the truth of the matter asserted**. Put another way, the sole reason that Judicial Watch wanted to introduce these letters from purported donors – without authentication – was to prove trademark confusion and damages.

The Court's most fatal error concerning the authenticity and admission of the alleged handwriting

occurred on March 7, 2018 during Fitton's examination. [70] Judicial Watch moved for the admission of Defense Exhibit 42 [2722]. The Court responded (in front of and direct to the jury): "I will admit it, however not for the truth of the matter in terms of who wrote it or the contents of it, but simply for you to consider **whether or not the counter-defendant's campaign had an effect on Judicial Watch's donors**." (emphasis added) [2894] But considering whether Klayman's campaign had an effect on donors is **precisely** admitting the handwriting for the truth of the matter asserted – that Klayman's campaign resulted in confusion and loss of profits to Appellees. This "heads I win, tails you lose" instruction was prejudicial to the jury that worked against Klayman. This is precisely asserting the unauthenticated handwriting as truth:

> KLAYMAN: Substantively is that you gave an instruction that was not to be considered for the truth of the matter of the handwriting, but then you gave an instruction to the jury that they could consider it in terms of donor reaction.
>
> THE COURT: Right.
>
> KLAYMAN: Okay. And to me, it seems that that's diametrically opposed, that that would be the truth of the matter to consider the donor's reaction. You're, in effect, saying that you can consider what was written by the donor for the truth of the matter. So I just want you to reconsider that, Your Honor, because to me

> it seems diametrically opposed. [2908]; *See also* [2908-2924]

Klayman also stated, "Your Honor, we have a respectful disagreement between us on that [allowing the jury to see the unauthenticated handwriting], but I feel **it's a fatal error** in this case." (emphasis added) [2913]. Klayman even felt compelled [71] to seek a mistrial because of the fatal error. [2921-2922]

Informing the jury that it could not view the letters for the truth of the matter asserted, yet allowing the jury to consider them with regard to trademark confusion and as a measure of damages is, frankly, talking out of both sides of the Court's mouth. Indeed, even at the time, Klayman recognized that this was a fatal error and objected vehemently, to no avail. Judicial Watch had **ten years** to locate, depose and subpoena for trial, these allegedly confused donors, yet failed to do so despite having tens of millions of dollars in their accounts. This grave and extremely prejudicial error by the Court caused the jury to improperly weigh unauthenticated and unreliable evidence in order to determine the measure of damages to award to Appellees. Again, given that the verdict form only awards lump sums of monies for each cause of action without any further specificity, it is impossible to now know the prejudicial effect that this grave error had on the final outcome. [2336-2243] As such, a new trial is needed to remedy this error.

E. The Court Erred in Failing to Remit the Damage Award Based on the Alleged Conduct of Non-Parties.

With regard to Judicial Watch's claim for trademark infringement, the Court erred by allowing evidence and testimony of damages stemming from the actions of non-parties to this action, namely Freedom Watch and Friends of Larry Klayman to be heard and considered by the jury in assessing liability and monetary damages against Klayman. [2200-2203], [2355-2359], [2971-2991] This clearly [72] led to jury confusion, which created a hugely inflated award of damages for Judicial Watch's trademark infringement claim as evidenced by the jury's verdict. [2236-2243]

The Court committed grave error by failing to go back and look at the damages found by the jury on Judicial Watch's trademark infringement claim and determine how much of the award was due to Klayman's personal actions, if any. [2355-2358] It is undisputed that the only counter-defendant to this case is Klayman individually. Neither Freedom Watch nor Friends of Larry Klayman, both separate legal entities, were parties to this lawsuit.

The Court committed grave error when it allowed the jury to hear, through both testimony and exhibits, monies raised by Friends of Larry Klayman. For instance, the inclusion and the jury's consideration of Defense Exhibits 64 [2746-2749] and 65 [2750], which relate to Friends of Larry Klayman's fundraising efforts with American Target Advertising, was extremely

prejudicial and irrelevant. [2200-2203], [2791-2991] Furthermore, the Court allowed for the testimony of Maureen Otis, Friends of Larry Klayman's "cager," ("Ms. Otis") which showed the amount of money raised by Friends of Larry Klayman that went through American Caging. [2971-2991]. *See also* Defense Exhibit 75 (not introduced or admitted into evidence) [2775-2776]. This extremely prejudicial [73] error likely explains the huge jury verdict against Klayman despite the fact that there was no action attributable to Klayman personally, as set forth above.

Appellees made no showing that Klayman personally authorized or ratified any conduct on behalf of Friends of Larry Klayman that would constitute infringement on Judicial Watch's trademarks, nor could they. Absent this showing, even if Friends of Larry Klayman was named as a cross-Defendant – which, again it was not – as a matter of campaign finance law, Klayman could not be held liable for the actions of the political campaign. *See* Defense Exhibits 65, 66 (not admitted into evidence), 71 (not admitted into evidence), 72 (not admitted into evidence), 74, 75 (not admitted into evidence), 76, 77 (not admitted into evidence), 79, 80-82 (not admitted into evidence), 92 (not admitted into evidence), 98 (not admitted into evidence), 100 (not admitted into evidence), 129 (not admitted into evidence), 150, 153 (not admitted into evidence), 162 (not admitted into evidence), 165 (not admitted into evidence), 166 (not admitted into evidence) [all of these Defense Exhibits are found at 2750-2798]

In the same regard, Appellees presented no facts, nor even made any argument, to pierce Freedom Watch's corporate veil to impose individual liability on Klayman. Absent such a showing, even if Freedom Watch was named as a counter-defendant – which, again it was not – Klayman cannot be held liable for the actions of the 501(c)(3) corporation.

[74] Yet, it is clear that the jury has improperly imputed alleged actions of outside groups and organizations to Klayman, personally, which is legally improper. There is no other explanation for the huge amount of damages awarded on Judicial Watch's trademark infringement claim given the dearth of facts supporting this claim against Klayman personally. Even if the damages were somehow not awarded by the jury as a result of confusion concerning Friends of Larry Klayman and Freedom Watch – and the injection of these entities into the jury's deliberations did cause confusion – the jury's calculation of damages as opined by the Court was simply not based on testimony or other evidence presented at trial. After a careful analysis of the testimony from Steven Andersen, Judicial Watch's Director of Development, the numbers presented to the jury simply do not add up:

> Q: So starting with the year 2005 and looking at the multiyear donors, what types of information would you observe, say, for 2005?
>
> A: 2005, those donors donated a total of about **$4.8 million** to our organization. The next year that slipped down to about **$4.3 million**.

Q: What year was that?

A: And that was 2006.

Q: Okay.

A: 2007, it dropped off precipitously to **$3.4 million**, which is very significant. (emphasis added) [2950]

[75] Notwithstanding the hard fact that Judicial Watch provided no evidence to back up or support these "loss" claims with the exception of a call log record from *one* donor in Florida, *see* Appellees' Exhibit 39 [2712], a $500,000 loss for 2006 and a $1.4 million dollar loss for 2007 is simply bad math. In this regard, in its closing argument, Judicial Watch's counsel stated, in relevant part, "[a]nd during 2006, there was a $500,000 drop; and in 2007, there was a $1,400,000 drop. We're going to ask you for those damages too. [3128-3129]

This is blatantly false. "It is a fundamental tenet of the law that attorneys may not make material misstatements of fact in summation." *United States v. Hands*, 184 F.3d 1322 (11th Cir. 1999). Even assuming the numbers Andersen testified to were accurate – which Plaintiff vehemently disputes – the alleged $1.4 million dollar loss for 2007 is a made up number. If donors donated a total of about $4.8 million in 2005 and the next year it slipped to $4.3, that accounts for the alleged $500,000 loss in 2006. But again, assuming Andersen is accurate, even if in 2007 donations slipped to $3.4 million from $4.3 million, the total loss for 2007 would be $900,000, not $1.4 million. What Judicial

Watch craftily attempted to do here was persuade the jury to consider the alleged 2007 losses as a whole and in conjunction with the $500,000 alleged loss in 2006. In other words, the **total** alleged loss is $1.4 million for both years; not just for the year 2007. Therefore, the jury inappropriately considered $500,000 "extra dollars," assuming the [76] testimony was accurate. The jury award should, even by the Court's analysis, be reduced and remitted by $500,000 - at a minimum, and the Court erred by not reducing such an award. [2355-2358]

F. The Court Erred in Not Providing a Jury Instruction That a Few Instances of Confusion Do Not Constitute Trademark Infringement.

With regard to Appellees' trademark infringement claim, there was simply nothing in the evidentiary record or testimony to support a finding that there was any likelihood of confusion created by Klayman, which is a necessary precursor to any award of damages on this claim.

Indeed, the only instance of conduct remotely attributable to Klayman personally in this regard is the **one** time that Klayman's direct mail provider, Response Unlimited, made an honest mistake and used Judicial Watch's name on a reply envelope: Q: "Is that a copy of what the envelope would look like for the return envelope for donors?" A: "I should hope not because it says 'Judicial Watch.'" [2969-2970] Any

confusion that this alleged mistake caused would have undoubtedly been *de minimus*. "The Court notes, however, that it is only necessary to show that an 'appreciable' number rather than a majority of reasonable buyers are likely to be confused." *Culliford v. CBS, Inc.*, 1984 U.S. Dist. LEXIS 20204, *9 (D. D.C. 1984). "The 'likelihood of confusion' test is whether a substantial number of ordinary consumers exercising ordinary caution [77] probably will be confused. A substantial number need not be a majority, but it must be more than a few." *Johnson Publ'g Co. v. Etched-In-Ebony, Inc.*, 1981 U.S. Dist. LEXIS 17614, *940 (D. D.C. 1981).

Indeed, the few letters among the millions that were sent by both Klayman and Appellees that Appellees entered into evidence that purported to show that donors were "confused," which were not even authenticated, as set forth above, fall short of the "appreciable" standard to demonstrate likelihood of confusion. *See* Defense Exhibits 33 [2701-2705], 34 [2706], 36 [2708], 38-43 [2711-2724]. None of these exhibits even show that Klayman's Saving Judicial Watch Campaign confused donors. In fact, many of the exhibits actually demonstrate that the alleged donors were not confused, and clearly understood that Klayman was no longer affiliated with Judicial Watch. For instance:

> Mr. Thomas Fitton, I wish to be removed from your office. I now support Larry Klayman. You are a liar + a cheat. [2702]

> Take my name off your mailing list until Larry Klayman is brought back as president and founder. [2703]
> *See also* [2704-2705], [2706-2708]

It is also established that not all "use" of a registered mark constitutes a violation or trademark infringement. Under the doctrine of nominative fair use, there is no violation if "the defendant uses the plaintiff's trademark to identify the plaintiff's own goods and makes it clear to consumers that the plaintiff, not the defendant, is the source of the trademarked product or service." *American Society* [78] *for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437,456 (D.C. Cir. 2018). Klayman's conduct falls squarely under this doctrine, as it is clear that he was making commentary on the state of affairs at Judicial Watch, and that he never remotely claimed to be affiliated with Judicial Watch in any way once the Severance Agreement was executed. Therefore, the Court erred by not properly instructing the jury on the law of confusion and trademark infringement [2140-2141], [3175-3177] and in entering a judgment based on the jury verdict. [2332-2334]

G. The Court Erred in Entering Judgment on the Jury Verdict Where Appellees Failed to Prove that Klayman Took and Used Information Regarding Judicial Watch's Donor List.

With regard to Appellees' claim that Klayman had misappropriated donor/client lists and client data,

there was simply nothing in the evidentiary record or testimony at trial to support an award of damages to Appellees on this claim. This was likely caused by intentionally confusing and misleading testimony by Appellees.

However, the testimony of Mark Fitzgibbons ("Fitzgibbons") of American Target Advertising, in addition to correspondence between Friends of Larry Klayman and American Target Advertising, clearly prove that American Target Advertising owned the names which it had acquired at its expense when it was working with Judicial Watch. [2862-2879] Fitzgibbons testified about the fact [79] that American Target Advertising had financed the acquisition of donor names, used its own internal lists and expertise, and that the contract with Judicial Watch ended in 2000 – well before the causes of action arose in this litigation. [2862-2879] He testified that American Target Advertising owned the exclusive right to market the list, which it did to a number of public interest groups and political causes:

> Q: In exchange for American Target Advertising, Mr. Viguerie's organization, spending a lot of money to acquire names through prospecting, [American Target Advertising] would acquire an exclusive right to market those names, in addition to Judicial Watch, correct?
>
> A: Correct. Under this agreement, [American Target Advertising] acts as agent on behalf of Judicial Watch to go out and incur

> those costs. We send the budgets, the copying. Judicial Watch would approve all that and then we would go out and acquire the services to get the mail out.
>
> Q: So, in effect, in exchange for Mr. Viguerie and [American Target Advertising] spending all this money to get names, they would acquire a property right in the names that they acquired, in addition to Judicial Watch?
>
> A: Correct.
>
> Q: And that meant that even after the contract ended, that [American Target Advertising] and Mr. Viguerie could, in a nonexclusive way, market those names, use those names?
>
> A: Yes.
> [2867-2868]
> *See also* Defense Exhibit 63 [2731-2745]]

[80] The contract provides: "[American Target Advertising] shall have an exclusive license to market all names developed under the contract as part of its Agency Masterfile." *See* Defense Exhibit 62 (not admitted into evidence). [2728] Thus, there was no illegal taking or use of Judicial Watch donor names or related information as the names belonged to American Target Advertising. The donor information that was rented for Klayman's Senate campaign was owned by American Target Advertising, not Judicial Watch. Indeed, Fitzgibbons testified that American Target Advertising rented these names out not only to Friends of Larry Klayman but also other groups. [2871-2872] The trial

record is clear that Klayman did not take or use any such donor or related information from Judicial Watch.

In short, as a matter of uncontroverted fact and law, when Klayman left Judicial Watch to run for the Senate, he did not appropriate any donor names or other related information from Judicial Watch and thus did not breach Paragraph 4D of the Severance Agreement. [2589] It is thus clearly erroneous as a matter of law for the jury to have found that Klayman was liable to Judicial Watch for misappropriating names that were not owned by Judicial Watch in the first place. [2236-2243], [2342-2343] This is a clear error that must be corrected on appeal.

[81] III. WHEN THIS MATTER IS REVERSED AND REMANDED, IT SHOULD BE ASSIGNED TO ANOTHER JUDGE BECAUSE OF THE TRIAL JUDGE'S PATTERN AND PRACTICE OF BIAS AND PREJUDICE THAT MAKES FAIR ADJUDICATION IMPOSSIBLE.

It is beyond doubt that the relationship between Judge Kollar-Kotelly and Klayman is difficult. Klayman has not been shy about his perception that Judge Kollar-Kotelly is inherently against him, and nothing proves the veracity of Klayman's perception more clearly than how this case was handled for the past twelve years, finally climaxing during this trial. As just one instance, on the first day of trial after *voir dire*, Judge Kollar-Kotelly showed her true colors when she

responded to Klayman's "story of this case, from [his] perspective:"

> THE COURT: Okay. You view it as **revenge** or whatever . . .
>
> THE COURT: – as to whether you have met your burden of proof on your claims.
>
> KLAYMAN: The facts. And by the way, **I never used the word "revenge," Your Honor. That's how you take it.**
>
> THE COURT: Okay. That was my term. (emphasis added) [2810-2811]

Judge Kollar-Kotelly's unfounded use of the word "revenge" further evidences its extrajudicial bias and prejudice against Klayman. Indeed, this was just one of the numerous instances of Judge Kollar-Kotelly openly advocating against Klayman during trial. [2840], [2841-2842], [2844-2845], [2854], [2856-2857], [2859], [3088-3089]

[82] Judge Kollar-Kotelly's conduct at trial caused Klayman to request several times that the Court maintain a balance: "I'm also asking you, Your Honor, in good faith just to be careful about what you say in front of the jury, not making it look like you're taking one side against another." [2816]. This bias and extrajudicial prejudice was not limited to trial. For instance, in her April 3, 2007 memorandum opinion, Judge Kollar-Kotelly wrote that Klayman is the "self-described founder and former Chairman and General Counsel of Judicial Watch." [0304] There is no dispute that

Klayman is the founder of Judicial Watch. There was simply no reason for Judge Kollar-Kotelly to take an *ad hominem* shot at Klayman's credentials other than out of spite, bias, and prejudice.

Viewing this extreme bias and prejudice, Klayman has no shot at a fair trial on remand before Judge Kollar-Kotelly. Thus, when the Court's rulings and judgment are reversed, the case should be assigned to a different judge. *See U.S. v. Logan*, 998 F.2d 1025, 1028-29 (D.C. Cir. 1993). *See also Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996).

Conclusion

For the reasons stated, Larry Klayman respectfully requests that this Court reverse the judgments and remand this case for a new trial before a new judge on all issues, including those issues in which the District Court granted summary judgment.

[83] Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Fed. R. App. P. 32(g)(1):

1. This Corrected Final Brief complies with length limit set by the Court's order dated May 8, 2020 allowing a Brief "not to exceed 15,600 words" because the document contains 15,179 words on 82 pages.

2. This Corrected Final Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document was prepared in a proportionally spaced typeface using Microsoft Word for Mac (version 16.41 – September 2020) in 14 point Times typeface.

J.P. Szymkowicz
J.P. Szymkowicz (#462146)

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[84] CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 2020, a copy of the foregoing Corrected Final Brief of Plaintiff-Appellant Larry Klayman was electronically transmitted by the Court's ECF system to Richard W. Driscoll, Esquire, DRISCOLL & SELTZER, PLLC, 300 North Washington Street, Suite 304, Alexandria, Virginia 22314, rdriscoll@driscollseltzer.com, (703) 822-5001, counsel for Defendants-Appellees Judicial Watch, Inc., Thomas J. Fitton, Paul J. Orfanedes and Christopher Farrell. Also, two printed and bound copies of this brief will be mailed, via United States Postal

Service Priority Mail to Mr. Driscoll at his home address (with his permission) due to the COVID pandemic.

J.P. Szymkowicz
J.P. Szymkowicz (#462146)

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[85] **ADDENDUM**

STATUTES AND RULES

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Statutes

Court Rules

[86] **STATUTES AND RULES**

15 U.S.C. § 1117(a)

(a) Profits; damages and costs; attorney fees. When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 43(a) or (d) [15 U.S.C. § 1125 (a) or (d), or a willful violation under section 43(c) [15 U.S.C. §1125 (c)], shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 [15 U.S.C. §§ 1111, 1114], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

15 U.S.C. § 1125(a)

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

[87] (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the

principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

18 U.S.C. § 1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 U.S.C. § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or [88]

indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 U.S.C. §§ 1292 (c) and (d) and 1295].

42 U.S.C. § 1332(a)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

[89] (4) a foreign state, defined in section 1603(a) of this title [28 U.S.C. §1603(a)], as plaintiff and citizens of a State or of different States.

COURT RULES

F. R. Civ. P. 37

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has

in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

[90] (C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to [91] answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was [92] substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General.*

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails,

after being served with proper notice, to appear for that person's deposition; or

[93] (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be

restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

[94] **Fed. R. Civ. P. 51 (d) (1)**

(d) Assigning Error; Plain Error.

(1) *Assigning Error.* A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) *Plain Error.* A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

F. R. Civ. P. 56(a)

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Evid. 401

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

[95] **Fed. R. Evid. 402**

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Fed. R. Evid. 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 404

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

[96] (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607,608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of

accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 901(a)

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

[97] **LCvR 16.5(b)**

(b) Pretrial Statements

(1) A party's Pretrial Statement shall contain the following:

(i) a statement of the case;

(ii) a statement of claims made by the party;

(iii) a statement of defenses raised by the parties;

(iv) a schedule of witnesses to be called by the party;

(v) a list of exhibits to be offered in evidence by the party;

(vi) a designation of depositions, or portions thereof, to be offered in evidence by the party;

(vii) an itemization of damages the party seeks to recover; and

(viii) a request for other relief sought by the party.

(2) The statement of the case shall set forth a brief description of the nature of the case, the identities of the parties, and the basis of the Court's jurisdiction.

(3) The statement of claims shall set forth each claim a party has against any other party (including counter-, cross-, and third-party claims), and the party or parties against whom the claim is made.

(4) The statement of defenses shall set forth each defense a party interposes to a claim asserted against it by any other party, including defenses raised by way of general denials, without regard to which party has the burden of persuasion.

(5) The schedule of witnesses shall set forth the full names and addresses of all witnesses the party may call if not earlier called by another party, separately identifying those whom the party expects to present and those whom the party may call if the need arises including rebuttal witnesses. The [98] schedule shall also set forth a brief description of the testimony to be elicited from the witness; and estimate of the time the party will take in eliciting such testimony. Expert witnesses shall be designated by an asterisk. A party need not list any witnesses who will be called solely for

impeachment purposes. No objection shall be entertained to a witness or to testimony on the ground that the witness or testimony was disclosed for the first time in a party's Pretrial Statement, unless the party objecting has unsuccessfully sought to learn the identity of the witness or the substance of the testimony by discovery, and the Court or magistrate judge finds the information to have been wrongfully withheld.

(6) The list of exhibits shall set forth a description of each exhibit the party may offer in evidence (other than those created at trial), separately identifying those which the party expects to offer and those which the party may offer if the need arises. Exhibits shall be listed by title and date. Exhibits will be presumed to be authentic unless objection to their authenticity is made at or before the Pretrial Conference and the objection is sustained.

(7) The designation of depositions shall identify each deposition or portion thereof (by page and line number) the party intends to offer in evidence. Any cross-designation sought by any other party pursuant to Rule 106, Federal Rules of Evidence, must be made at or before the final Pretrial Conference.

(8) The itemization of damages shall set forth separately each element of damages and the monetary amount thereof, the party claims to be entitled to recover of any other party, including prejudgment interest, punitive damages and attorney's fees. No monetary amount need be set forth for elements of intangible damage (e.g., pain

and suffering, mental anguish, or loss of consortium).

(9) The request for other relief shall set forth all relief, other than judgment for a sum of money, the party claims to be entitled to receive against any other party.

* * *

[471] A "Klayman shall be afforded access to such confidential information as he may reasonably require in order to defend or respond to any accusation, action, or threat of action against him arising out of or relating to his tenure at Judicial Watch.

Q Why is that provision important?

A Because after I left and Peter Paul was abandoned, he blamed me because I was the general counsel. I was the chairman. I needed to be able to defend myself. That's why that was important, and those documents would show that.

Q Did you ever get any such documents?

A No.

Q And what were the reasons?

A The reasons were they weren't going to give me the documents. That's the way I interpreted it.

Q What would those documents have shown?

A Those documents would've shown that I left Judicial Watch; that I agreed to cooperate with Judicial Watch, as I read to you before in the severance agreement, to help any clients who had left. What I testified to, that I was running for the U.S. Senate. I obviously couldn't represent Peter Paul if I was running for the U.S. Senate, and that I was there to provide any help that I could to Judicial Watch in representing him.

Q Would you have abandoned Judicial Watch?

* * *

[2525] well, for this particular exhibit, in terms of where – it come to the office, as I understand from his testimony. Staff would've put these separate, and they would've been kept in files by Mr. Orfanedes, who also, I believe, testified to the same thing.

Now, in terms of what's on here, what I would like to say is that I'm going to admit them, but I'm not admitting it for the truth of the matter, that a particular person made the handwritten notes because we don't know who – they have not been identified – nor for any assertion that the disparaging remarks about Mr. Fitton and/or Judicial Watch or the complimentary remarks, if there were, towards the counter-defendant are true.

These documents go to the effect of counter-defendant's – Mr. Klayman's – campaign, not potential donors, insofar as they clearly have not included any donation.

MR. KLAYMAN: Your Honor –

THE COURT: So they're being admitted for that purpose, not to consider who the handwritten notes are from, or to determine whether what they've – the content of the remarks, good or bad, about the individuals are evidence for you to consider as being true or not. They're simply to show the effect of the campaign on donors because this clearly shows that they were not making donations.

* * *

[3107] it was never associated with disparagement. It was always associated with defamation.

Two, it's been taken out of the restatement altogether as not an appropriate instruction. I want to put you on notice, and I'll put it out, and I'm going to do it at the end of the day, I hope, over the break. During the middle of the day, I will hand out, I hope, the instruction by the end because I will have approved it – not the instruction. I will have approved a short memo so that you all can react to it.

MR. KLAYMAN: I understand that, but I want to make my point so you'll know how to do the analysis as I would suggest. Okay?

Now, here's the analysis as I see it, okay, which I think is the correct analysis, is that this disparagement clause was negotiated in conjunction with the fair comment provision that was in effect at that time. That the fair comment, even under your interpretation, which comes from defamation, was incorporated into the non-disparagement by agreement. So that's why it all has to be read together. We agreed fair comment – please, let me finish – of the restatement that was in effect at that time, and you're always telling me, make sure you have the right time. That's what applied at that time when it was negotiated. So I want Your Honor to consider that.

* * *

[3139] A So I would say probably the majority of times Larry did the initial copy.

Q And then would the initial copy come to your office?

A Yes.

Q And then it would ultimately be finalized?

A Right. Uh-huh.

Q And would it be sent to Larry for review and changes?

A Yes. Uh-huh.

Q And then would Response Unlimited send out the letter to donors based on the donor list that we talked about?

A There was a production company that would outsource that to – that would do that. Uh-huh.

Q Okay. And who would that be? Who would the production company be?

A It would vary. I mean, it would be whoever gave us the best bid.

Q Okay. And do you know whether or not Exhibit 6 was a mailing on behalf of Saving Judicial Watch?

A That's what it looks like, yes.

Q Okay. Page 97, lines 9 through 20.

Okay. Can you take a look at the draft 6B and flip to the reply device?

[3140] A Okay. All right.

Q Or, I'm sorry. Can I see this for a second?

A Uh-huh.

Q Page 2 of the draft?

A Okay. Uh-huh.

Q Is that a copy of what the envelope would look like for the return envelope for donors?

A I should hope not because it says "Judicial Watch."

Q Okay. Page 98, line 22 through page 99 line 12, and this relates to Defendant's Exhibit Nos. 147, 148, and 149.

I'm going to hand you documents that have been marked as 7A, B, and C. Can you tell me, are those job approval forms for jobs done by Response Unlimited for Larry Klayman's organizations?

A Yes. Yes.

Q And do those include Saving Judicial Watch projects?

A Yes. Yes.

Q And do you typically have agreements signed on each mailing, or how does it work?

A It depends on our client.

Q With Larry Klayman, how did it work?

A We had to have his signature.

* * *

[3184] Q In your own words, will you briefly recount for me what happened on May 26th, 2002?

A Sure. Mr. Klayman came over that morning, and I had talked to him on the phone earlier, and he had – I told him I wanted to take Isabel to church with me, and I was under the understanding that he would stay at the house with Lance.

When he got to the house, he said that he was going to go to church with us.

We got into an argument because he saw that I wasn't allowed to take the children out of the house by myself at any time. He didn't understand why I thought that I could do this on this day, and I said that I thought that that's what we had talked about on the phone, but obviously that wasn't the case.

So he got into the car with me and the children. Put the children in, and we – on the way to church, he was – we were arguing with each other about the security restraints, and I found it ridiculous that I couldn't go to church with my two kids without body guards. He started to just yell at me and call me names, that I was stupid for thinking I could, you know, defy him. And he got very angry, and he put his hands around my neck, and he started to shake me and bang my head against the car window.

Q Were you driving at the time?

[3185] A I was in the passenger seat, and he was in the driver seat. The children were in the car, and my daughter was very upset.

Q You also state that he put his hand through the car radio resulting in a broken hand?

A He did. We never obviously made it into the church. He pulled the car out. I told him just to take me home, and I'm not sure if he put his hand through the car radio in the church. It might have been in our driveway. He punched his hand into the radio, and it was bloody, and it was bashed in. Yes, we found out later it was broken.

Q Page 38, line 3 through line 10.

6C refers to the allegation that Mr. Klayman called you vulgar names in front of the children. If you don't want to repeat them, you could spell them. Could you tell me what the names were?

MR. KLAYMAN: Objection. Relevancy.

Notwithstanding I refute these claims, this has nothing to do with anything.

MR. DRISCOLL: Well, Mr. Klayman will have his opportunity to testify.

THE COURT: Okay. Why don't you come to the side.

(Bench conference.)

MR. KLAYMAN: It's just an effort to smear me. It has nothing to do with this case.

[3186] MR. DRISCOLL: This is just what he did, I mean, according to his wife. She put the

allegations in the complaint. The complaint was handed to Mr. Fitton and Mr. Orfanedes. I'm exploring the basis of the allegations with the individual who made them.

THE COURT: I think I'll allow it based on, I think, what your testimony is going to be about her.

MR. KLAYMAN: All right. I'll refute it.

(In open court.)

THE COURT: Go ahead.

BY MR. DRISCOLL:

Q Could you tell me what the names were?

A Okay. Well, there were so many. He called me a piece of shit, a dumb ass, ugly, stupid. Bitch was one that he liked to use.

Q Page 39, line 18 through page 40, line 12.

I'm showing you now what's been marked as DeLuca Exhibit 3. Would you identify this document for the record?

A Sure. It's an order that was filed in the Fairfax County Court.

Q This is the order that dismissed the divorce action in which Exhibit No. 2 made the allegations that we've been discussing here today; is that correct?

A Yes, that's correct.

Q Paragraph 1 of the order states that, "The parties.

* * *

CONFIDENTIAL SEVERANCE AGREEMENT

This CONFIDENTIAL SEVERANCE AGREEMENT ("Agreement") is made and entered into by and between JUDICIAL WATCH, INC. ("Judicial Watch"), and LARRY E. KLAYMAN ("Klayman"), who are sometimes collectively referred to as the "Parties."

NOW, THEREFORE, in consideration of the promises and the mutual covenants and agreements contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties agree as follows:

1. **Termination of Employment; Resignation.** Klayman's employment shall terminate effective September 19, 2003 (the "Separation Date"), and it shall be treated for all purposes as a voluntary resignation. Upon execution of this Agreement, Klayman shall submit a letter resigning from his positions as Treasurer and a member of the Board and all other positions he holds at Judicial Watch and its affiliated entities, including Judicial Watch of Florida, Inc.

2. **Severance Pay.** Subject to paragraphs 15 and 22 below, Judicial Watch shall pay Klayman as severance a lump sum payment equal to $400,000.00, from which shall be deducted all customary and legally required federal, state, and local tax and other withholdings (the "Severance Pay"). As soon as practicable after execution of this Agreement and in no event later than September 24, 2003, the Severance Pay shall be wired or otherwise deposited in U.S. funds to an escrow

account maintained for clients of the law offices of Jordan, Coyne & Savits, L.L.P. to be disbursed to Klayman following the later of the expiration of the revocation period referred to in paragraph 15 of this Agreement and a finding by the authorized committee referred to in paragraph 22 that the Severance Pay is reasonable. Klayman acknowledges that he is not legally entitled to the Severance Pay or other consideration beyond payment of compensation through his last day of work, and that the Severance Pay and other consideration being provided to him pursuant to this Agreement is intended as, and is, consideration for his execution of this Agreement and in order to amicably resolve, on the terms set forth in this Agreement, differences between the Parties and in recognition of Klayman's leadership and contribution to the founding and development of Judicial Watch in a way commensurate with similar arrangements for principal executives of comparable organizations. The Severance Pay and other consideration being provided to Klayman pursuant to this Agreement is also intended to, and does, fully satisfy all amounts, if any, owed to Klayman by Judicial Watch, including, but not limited to, any amounts owed to him for accrued but unused vacation and sick leave. The Severance Pay shall be included in the IRS Form W-2 that Judicial Watch shall issue to Klayman for 2003.

3. **Insurance.**

A. Health Insurance. In the event Klayman properly and timely elects to continue his family health insurance coverage following the termination

of his employment in accordance with the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Judicial Watch shall pay the cost of such insurance, to the same extent that it paid Klayman's family health insurance coverage during his employment, for a period of twelve (12) months following the Separation Date. Nothing herein shall limit Klayman's right, consistent with the terms of the insurance plan and COBRA, to continue to maintain the health insurance coverage beyond the twelve (12) month period at his own expense.

B. Malpractice Insurance. Judicial Watch shall purchase and maintain professional liability insurance that provides defense and indemnity coverage for any and all legal work performed by Klayman for or on behalf of Judicial Watch while he was employed by Judicial Watch or after the Separation Date.

4. **Confidential Information and Judicial Watch Property.**

A. Confidential Information. Klayman agrees that all non-public information and materials, whether or not in writing concerning Judicial Watch, its operations, programs, plans, relationships, donors, prospective donors, clients, prospective clients, past or current employees, contracts, financial affairs or legal affairs (collectively, "Confidential Information") are confidential and shall be the exclusive property of Judicial Watch to which Klayman has no right, title or interest. By way of illustration, but not limitation, Confidential Information includes matters not generally known

outside Judicial Watch, such as projects, plans, research data, research projects, contacts, financial data, personnel data, donor lists, donor data, fundraising strategies and methods, computer programs, web site plans and developments, client lists, client data, contacts at or knowledge of clients or donors or prospective clients or donors, litigation strategies, work-product, supplier and vendor lists, developments relating to existing and future programs, services or products offered, marketed or used by Judicial Watch, and data relating to the general operations of Judicial Watch. Klayman agrees that after the Separation Date, he shall not disclose any Confidential Information to any person or entity or use Confidential Information for any purpose without written approval by an officer of Judicial Watch, unless and until such Confidential Information has become public knowledge through no fault or conduct by Klayman.

B. Judicial Watch Property. Klayman agrees that all documents, computer tapes and disks, computer printouts, computer hardware and software, office furniture and furnishings, memorabilia, equipment, supplies, keys, credit cards, publications, manuals, working papers, notes, reports, client lists, donor lists, and any other tangible items or materials that were created or used by Klayman while performing his duties for Judicial Watch or which otherwise came into Judicial Watch's custody or control by virtue of Klayman's employment with Judicial Watch ("Judicial Watch Property") are and shall be the exclusive property of Judicial Watch to which Klayman has no right, title or

interest. Upon reasonable advance notice to Judicial Watch, Klayman shall be permitted to remove his personal effects (e.g., family photos and other similar personal property that he purchased with his personal funds), as well as a digital copy of his electronic "Rolodex", from Judicial Watch's offices.

C. Return of Property and Confidential Information. Klayman agrees that all Judicial Watch Property and Confidential Information, in all their tangible or intangible forms, whether created by Klayman or others, that came into Klayman's custody or possession, including, without limitation, all computer equipment, cellular phones, personal digital assistants ("PDAs"), keys, including keys to the Volvo automobile currently owned by Judicial Watch, (VIN No. YV1CZ91H931018257) title and registration documents for the Volvo automobile, passwords, security cards, security codes, identification badges, and any other means of access to Judicial Watch's Property and Confidential Information, shall be delivered to the President of Judicial Watch, or his designated representative, on or before the Separation Date. Any property or Confidential Information which Klayman cannot return to Judicial Watch on or before the Separation Date, notwithstanding his best efforts, shall be returned as soon as practicable thereafter. In any event, Klayman shall not use or access any Judicial Watch Property or Confidential Information or copies thereof following the Separation Date, provided, however, that Klayman may continue to use through September 24, 2003 the Judicial Watch cell phone and

laptop computer currently in his possession, at which time he shall return them to Judicial Watch.

D. Client and Donor Information. Klayman agrees that Klayman's obligation not to disclose or use Judicial Watch's Confidential Information and Klayman's obligation to return all Judicial Watch Property and Confidential Information also extend to such types of proprietary, secret or confidential information, materials and property of clients or donors of Judicial Watch or of other third parties who may have disclosed or entrusted the same to Judicial Watch or to Klayman. Klayman expressly agrees and acknowledges that, following the Separation Date, he shall not retain or have access to any Judicial Watch donor or client lists or donor or client data.

E. Limited Access to Certain Property in the Public Domain. Anything in subparagraphs A through D above to the contrary notwithstanding, Klayman shall be entitled to obtain from Judicial Watch copies of press clips, press releases, other press materials, photographs, artist renderings, and television show videos involving him which are in the public domain and not confidential, provided that he shall use such materials solely for his personal, use and not for any partisan or other political purpose. Klayman shall reimburse Judicial Watch the costs it incurs in providing such copies.

F. Limited Access to Certain Confidential Information. Anything in subparagraphs A through D above to the contrary notwithstanding, subject to

Judicial Watch's consent, which consent shall not be unreasonably withheld, Klayman shall be afforded access to such Confidential Information as he may reasonably require in order to defend or respond to any accusation, action or threat of action against him arising out of or relating to his tenure at Judicial Watch. Such access shall include an opportunity on reasonable notice to examine and copy, at his cost, Confidential Information related to such accusation, action or threat, provided that such Confidential Information shall be used or disclosed by him solely in connection with such defense or response and provided, further, that he shall take reasonable steps to protect such Confidential Information from any use or disclosure by others other than in connection with such defense or response (e.g., by Protective Order or Confidentiality Agreement).

5. **Non-Competition; Non-Solicitation.** In consideration of the payment described in paragraph 6 below, Klayman agrees to the following:

A. Judicial Watch's Goodwill and Business Interests. Klayman agrees and acknowledges that Judicial Watch has, over the course of many years and through substantial investment and efforts by Judicial Watch, developed goodwill in North America and internationally, and that Judicial Watch's goodwill is associated with its ongoing educational and other operations and its use of certain trade names, trade marks, service marks and "trade dress." Klayman also agrees that the trade secrets and other valuable Confidential Information and Judicial Watch Property (as such terms are defined above) to which Klayman had

access during his employment and as an officer and director of Judicial Watch, the substantial relationships with prospective and existing contacts, clients and donors of Judicial Watch that Klayman formed and maintained, the specialized training and opportunities that Klayman received from Judicial Watch, and Judicial Watch's goodwill are, individually and collectively, valuable and legitimate business interests of Judicial Watch that Judicial Watch rightfully seeks to preserve and protect.

B. Covenant Not to Compete or Solicit. Klayman agrees that, in order to enable Judicial Watch to preserve and protect Judicial Watch's valuable and legitimate business interests, including, but not limited to, those valuable and legitimate business interests set forth in paragraph 5 A, and in exchange for the additional consideration referred to in paragraph 6 below (which the parties acknowledge to be separately bargained for), Klayman shall not, for a period of two (2) years following the Separation Date, directly or indirectly:

(i) work or render advice as an individual or sole proprietor in Competition with Judicial Watch or work or render advice as an employee, agent, independent contractor, consultant or representative of any person, firm or legal entity which is engaged in or has plans to enter into Competition with Judicial Watch. For purposes of this Agreement, the term "Competition" means directly or indirectly engaging in the work or advancing the mission of any ethics, anti-corruption, public integrity and government

accountability watchdog or similar public interest or educational organization, or engaging in any other activities the purpose or effect of which would be to provide information, programs, publications, services or products that Judicial Watch offers, develops or sells or has plans to offer, develop or sell, as of the Separation Date;

(ii) solicit or in any manner encourage or induce, or attempt to solicit, encourage or induce, any employee of Judicial Watch to leave the employ of Judicial Watch;

(iii) solicit or in any manner encourage or induce, or attempt to solicit, encourage or induce, any client of Judicial Watch to terminate its attorney-client relationship with Judicial Watch; provided, however, that Klayman shall not be precluded from providing legal representation to any client, if requested by the client, in his capacity as a lawyer in private practice; or

(iv) solicit, divert, interfere in or take away, attempt to solicit, divert, interfere in or take away, or otherwise assist or encourage third parties to solicit, divert, interfere in or take away the support or patronage of any of the donors, clients or supporters of Judicial Watch, or prospective donors, clients or supporters of Judicial Watch; provided, however, that this provision shall not prohibit Klayman from soliciting contributions to any entity that is not engaged in Competition with Judicial Watch from any person who may be an existing or prospective donor of Judicial Watch.

6. **Payment on Account of Klayman's Agreement Not to Compete or Solicit.** Subject to paragraphs 15 and 22 below, Judicial Watch shall pay Klayman $200,000.00 in consideration of his agreement not to compete or solicit, as set forth in paragraph 5 above (the "Non-Compete Payment"). As soon as practicable after execution of this Agreement and in no event later than September 24, 2003, the Non-Compete Payment shall be wired or otherwise deposited in U.S. funds in escrow to be maintained and disbursed to Klayman in the same manner and subject to the same conditions as the Severance Pay. The Non-Compete Payment shall be treated as "Other Compensation" for which Judicial Watch will issue Klayman a Form 1099. Klayman shall pay all federal, state and other taxes required to be paid in connection with such payment and indemnifies Judicial Watch and its officers from any liability for payment of payroll, income, or other taxes in connection with the Non-Compete Payment.

7. **Enforcement of Paragraphs 4 and 5.** Klayman understands and acknowledges that the restrictions contained in paragraphs 4 and 5 of this Agreement are reasonably necessary for the protection of the legitimate business interests and goodwill of Judicial Watch and Klayman considers these restrictions necessary and reasonable for such purpose. Klayman further acknowledges and agrees that any breach of any provision in paragraphs 5 or 6 of this Agreement will cause Judicial Watch substantial and irreparable injury and, therefore, in the event of any such breach, Klayman agrees that Judicial Watch, in addition to

such other remedies which may be available, shall be entitled to specific performance and other injunctive relief without the necessity of posting a bond.

8. **IRS Audit.** In connection with the ongoing audit of Judicial Watch, the Parties agree to work cooperatively and in good faith to timely and appropriately respond to any inquiries or allegations by IRS relating to matters involving activities or other conduct on the part of Klayman or K&A. In this connection, Judicial Watch agrees to promptly provide Klayman's designated representative a copy of any IRS communications or other document containing such inquiries or allegations; Klayman agrees then to promptly provide input to Judicial Watch, through the Parties' respective legal representatives, regarding any such matter sufficiently in advance of the required response date to IRS, that such input can be considered and incorporated as appropriate in Judicial Watch's response to IRS. In addition, Judicial Watch agrees (i) to furnish Klayman's designated legal representative copies of all written submissions to IRS relating to any such matters, for their review and comment, timely and as soon as reasonably available, and to provide them copies of the final versions of all such submissions contemporaneously with their being sent to IRS; (ii) to timely apprise Klayman's designated legal representative of material developments concerning any such matters, including by furnishing, upon request, periodic reports of the status of any such matters and by providing copies of correspondence or other IRS produced written materials regarding any such matters. In addition, upon

Klayman's request, Judicial Watch may afford Klayman's designated legal representative an opportunity to participate in meetings and telephone discussions with IRS regarding such matters whenever Judicial Watch reasonably deems such participation appropriate, consistent with the first sentence of this paragraph. All information provided to or otherwise learned by Klayman and/or his legal representative with respect to or in connection with IRS audit shall be deemed and treated as Confidential Information, shall be used by Klayman and his legal representative solely in connection with the purposes described in this paragraph, and shall not be used or disclosed by them for any other purpose.

9. **Personal Guaranties.**

A. Credit Cards. Judicial Watch shall remove Klayman as guarantor of all credit cards issued to Judicial Watch, including, without limitation Judicial Watch's American Express card, within thirty (30) days of the Separation Date.

B. Lease Guaranty. Judicial Watch agrees to continue to work in good faith to remove Klayman as guarantor of its lease for its Washington, D.C. headquarters located at 501 School Street, S.W., Suite 500, Washington, D.C., 20024. Klayman acknowledges and agrees that he shall not receive any additional compensation from Judicial Watch above and beyond the Severance Pay and other benefits provided for in this Agreement for his guarantying the lease.

10. **Reimbursement of Expenses.** Judicial Watch agrees to review and reimburse Klayman for any legitimate and properly documented business expenses he submits to Judicial Watch pursuant to this paragraph in accordance with Judicial Watch's normal and customary reimbursement polices and practices. Klayman agrees to submit all business expenses for which he seeks reimbursement from Judicial Watch, along with details and justifications for those expenses, to Judicial Watch within 30 days after the Separation Date. Klayman further agrees to reimburse Judicial Watch for personal costs or expenses incurred by him during his employment, if any, that Judicial Watch may determine in good faith were mistakenly charged or allocated as costs or expenses of Judicial Watch, as well as any additional expenses that Klayman has billed to Judicial Watch or charged to a Judicial Watch credit card that Judicial Watch determines in good faith are personal expenses of Klayman. Klayman shall reimburse Judicial Watch for any such amounts within seven (7) days of being notified by Judicial Watch and being presented with supporting documentation of the amount, date and category of cost or expense items for which reimbursement is sought.

11. **Klayman & Associates, P.C.**

A. Klayman, and by its signature below, Klayman & Associates, P.C. ("K&A") re-affirm and acknowledge the debt of K&A to Judicial Watch, which was in the amount of $78,810 as of December 31, 2002, and agree that K&A shall pay the then full outstanding balance of the debt (including additional amounts

allocated to K & A by Judicial Watch's accountants in accordance with their customary practice regarding this debt), without offset or deduction, together with accrued interest of 8% per annum, on or before May 15, 2004, per the terms of the Minutes of the May 15, 2002 Meeting of the Board of Directors of Judicial Watch. Klayman and K & A expressly acknowledge that Judicial Watch is not indebted to K & A.

B. Klayman agrees to remove all K&A files and boxes from Judicial Watch's office premises at Klaynnan's expense before the Separation Date or within a reasonable time thereafter, at his expense. Should Klayman not remove such files and boxes within sixty (60) days of the Separation Date, Judicial Watch may destroy them. Klayman and Judicial Watch agree that Judicial Watch shall arrange for all K&A.'s boxes currently being stored under Judicial Watch's name and account with Iron Mountain to be transferred to K&A's account with Iron Mountain, and that any additional files or boxes of K&A that Judicial Watch locates or identifies in the future shall likewise be transferred to K&A's Iron Mountain account.

12. **Withdrawal of Appearance in Judicial Watch Litigation.** Except as otherwise agreed by Judicial Watch, and consistent with the applicable rules of court, Klayman's appearance as counsel shall be withdrawn in all legal proceedings in which Judicial Watch currently is involved as a party or as counsel for any person or entity.

13. **Cooperation.** Following the Separation Date, Klayman agrees to make himself reasonably available to Judicial Watch to answer questions regarding pending Judicial Watch litigation matters and other business in which Klayman was involved during his employment with Judicial Watch, at no cost. Klayman also understands and acknowledges that, following the Separation Date, Judicial Watch may ask him to serve as counsel in on-going Judicial Watch litigation matters on such terms, including compensation terms, as Judicial Watch, its clients and Klayman may agree. Judicial Watch acknowledges and understands that, apart from answering questions related to Judicial Watch litigation matters and other business in which Klayman was involved during his employment, Klayman shall have no obligation to accept any post-Separation Date assignments from Judicial Watch. Klayman acknowledges and agrees that he shall not perform any post-Separation Date assignment from Judicial Watch without having previously received written authorization to perform the assignment from an officer of Judicial Watch.

14. **Mutual Releases.**

A. Release by Klayman. Klayman, for himself and his heirs, successors, assigns, employees, agents and other representatives, and anyone acting by, through or under them, hereby releases and forever discharges Judicial Watch, and each and all of its affiliates, subsidiaries and related entities, and its and their past and present directors, officers, managers, supervisors, employees, attorneys, and agents, including,

without limitation, Paul Orfanedes, Thomas Fitton and John Maruna, and their respective predecessors, successors and assigns, in their capacities as such (collectively, "the Judicial Watch Releasees"), from any and all claims, actions, suits, damages, liabilities, losses or expenses of whatever kind and nature which exist as of the date of this Agreement, whether such claims, actions, suits, damages, liabilities, losses or expenses are known or unknown, including, but not limited to, any claim based on or arising under any civil rights or employment discrimination laws, such as the Americans with Disabilities Act of 1992; the Fair Labor Standards Act of 1938, as amended; the Age Discrimination in Employment Act ("ADEA"), as amended; Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991; the District of Columbia Human Rights Act; or any other federal, state or local statutes, laws or legal principles or any common law contract or tort claims now or hereafter recognized. Klayman specifically acknowledges that he understands that by signing this Agreement he waives all claims he ever had or now has against any of the Judicial Watch Releasees, except for claims relating to any breach of this Agreement.

B. Release by Judicial Watch. Judicial Watch, for itself and its affiliated corporations and entities, and anyone acting by, through or under them, including, without limitation, Paul Orfanedes, Thomas Fitton and John Manura, hereby releases and forever discharges Klayman, and anyone acting by or through him, including his attorneys and agents, and his and

their respective heirs, successors, and assigns from any and all claims, actions, suits, damages, liabilities, losses or expenses of whatever kind and nature which exist as of the date of this Agreement, whether such claims, actions, suits, damages, liabilities, losses or expenses are known or unknown. Judicial Watch specifically acknowledges that it understands that by signing this Agreement it waives all claims it ever had or now has against Klayman, except for claims relating to any breach of this Agreement.

15. **Right to Consider/Revocation.** Employees forty (40) years of age or older have specific rights under the Older Workers Benefit Protection Act ("OWBPA"), which prohibits discrimination on the basis of age. It is Judicial Watch's desire and intent to make certain that Klayman fully understands the provisions and effects of the release contained in paragraph 14(A). To that end, Klayman has been encouraged and has been given the opportunity to consult with legal counsel for the purpose of reviewing the terms of this Agreement. Klayman acknowledges that, consistent with the provisions of the OWBPA, he has been given a period of at least twenty-one (21) days within which to consider this Agreement before signing it, and that he may waive the 21-day period and sign this Agreement prior to its expiration. This Agreement will become effective immediately upon execution by the Parties, but Klayman shall have seven (7) days after his execution of the Agreement to revoke the Agreement. Any revocation must be in writing and delivered to Judicial Watch, Inc., c/o Thomas Fitton,

President, 501 School Street, S.W., Suite 500, Washington, D.C. 20024 before the expiration of the seven (7) revocation period. In addition, consistent with the provisions of the OWBPA and other employment discrimination laws, the release contained in paragraph 14(A) does not preclude Klayman from filing a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), participating in an EEOC investigation, or challenging the validity of this Agreement, but he will not be entitled to any monetary or other relief from the EEOC or from any court as a result of litigation brought on the basis of, or in connection with, such Charge, except if and to the extent that the release and waiver contained in paragraph 14(A) are held to be invalid or unenforceable (in which event, Judicial Watch will be entitled to restitution or set off for the amounts paid to Klayman hereunder, as and to the extent determined by the court).

16. **Covenant Not to Sue.** Klayman expressly represents and warrants that, except as may be necessary to enforce this Agreement, neither he nor any person, organization or other entity on his behalf has or will file, charge, claim, sue or cause or permit to be filed, charged or claimed, any civil action or legal proceeding seeking personal monetary or other relief against Judicial Watch or any of its past or present directors, shareholders, officers, managers, supervisors, employees, attorneys, or agents, including, without limitation, Paul Orfanedes, Thomas Fitton and John Maruna, involving any matter occurring at any

time in the past up to and including the date of this Agreement or involving any continuing effects of any acts or practices which may have arisen or occurred prior to or on the date of this Agreement. Judicial Watch expressly represents and warrants that, except as may be necessary to enforce this Agreement, neither it nor any person, organization or other entity on its behalf has or will file, charge, claim, sue or cause or permit to be filed, charged or claimed, any civil action or legal proceeding seeking personal monetary or other relief against Klayman, K&A or their respective agents and attorneys.

17. **Non-Disparagement.** Klayman expressly agrees that he will not, directly or indirectly, disseminate or publish, or cause or encourage anyone else to disseminate or publish, in any manner, disparaging, defamatory or negative remarks or comments about Judicial Watch or its present or past directors, officers, or employees. Judicial Watch expressly agrees that its present directors and officers namely Paul Orfanedes and Thomas Fitton, will not, directly or indirectly, disseminate or publish, or cause or encourage anyone else to disseminate or publish, in any manner, disparaging, defamatory or negative remarks or comments about Klayman. Nothing in this paragraph is intended to, nor shall be deemed to, limit either party from making fair commentary on the positions or activities of the other following the Separation Date.

18. **Press Release; Statements Of the Parties.** On or before September 27, 2003, Judicial Watch shall issue a press release announcing that Klayman

is leaving Judicial Watch. That press release shall state:

> Judicial Watch announced today that Larry Klayman has stepped down as Chairman and General Counsel of Judicial Watch to pursue other endeavors. Tom Fitton, who is President of Judicial Watch, said: "Larry conceived, founded and helped build Judicial Watch to the organization it is today, and we will miss his day to day involvement. Judicial Watch now has a very strong presence and has become the leading non-partisan, public interest watchdog seeking to promote and ensure ethics in government, and Larry leaves us well positioned to continue our important work."

Judicial Watch agrees that Klayman shall be permitted to use, publish and otherwise disseminate to third parties the following additional statement of Judicial Watch: "Larry was the creator and founder of Judicial Watch, and helped build it to be a stable, successful and widely respected organization. We thank him for his service." Klayman agrees that Judicial Watch shall be permitted to use, publish and otherwise disseminate to third parties the following statement of Klayman: "I have left Judicial Watch in good hands and will continue to support it, and I hope you will too." The Parties agree that they will limit any statements to third parties regarding Klayman's leaving Judicial Watch to be consistent with the Press Release and statements contained in his paragraph, except as may be required by law.

19. **Indemnification; Attorneys' Fees.**

A. Indemnification by Judicial Watch. Judicial Watch agrees to defend, indemnify and hold harmless Klayman from any monetary sanctions assessed against him personally by a court of law for conduct undertaken by Klayman or others in conjunction with his or their work on Judicial Watch litigation matters, or any breach of its obligations and responsibilities under this Agreement.

B. Indemnification by Klayman. Klayman agrees to defend, indemnify and hold harmless Judicial Watch and each and all of the Judicial Watch Releasees from any and all claims, liabilities, costs, damages or judgments of any and every kind (including, without limitation, attorneys' fees and costs) which Judicial Watch or any of the Judicial Watch Releasees may incur or be threatened with that arise out of any intentional wrongdoing by Klayman, or breach of his obligations and responsibilities under this Agreement, or out of K& A's breach of its obligations under this Agreement. Klayman expressly acknowledges that, pursuant to this paragraph, he shall be obligated to defend, indemnify and hold harmless Judicial Watch from any and all attorneys' fees, court costs or other expenses Judicial Watch may incur on account of Klayman's or K&A's failure to make prompt payment to Judicial Watch in accordance with paragraphs 10 and 11 of this Agreement.

C. Attorneys' Fees. The prevailing party in any legal proceeding instituted on account of a Party's

breach of this Agreement shall be entitled to an award of the costs incurred in connection with such action, including reasonable attorneys' fees and suit costs.

20. **Confidentiality of this Agreement.** The Parties will preserve the strict confidentiality of the terms and existence of this Agreement, which shall not be disclosed, communicated or publicized to any third party or any entity other than their respective counsel, accountants, and financial advisors, and, in the case of Klayman, also to his immediate family, directly or indirectly, by implication, gesture, or innuendo, or by any other manner or device; provided, however, that the Parties may disclose the terms of this Agreement: (i) if compelled to do so pursuant to a lawful subpoena or other process from a court of competent jurisdiction or in conjunction with the on-going IRS audit of Judicial Watch; (ii) in connection with litigation between or among the Parties relating to this Agreement; or (iii) if and to the extent necessary to comply with applicable Treasury regulations relating to tax return disclosure. In the event that either Party is lawfully subpoenaed (or informed that he or it will be subpoenaed) to testify and such testimony forseeably might require the disclosure of information required by this Agreement to be kept confidential, such Party shall promptly notify the other Party in writing so that he or it will have an opportunity to quash the subpoena or otherwise protect his or its interest in the continuing confidentiality of the information.

21. **Full Knowledge of Terms.** Each Party to this Agreement affirms that he, or in the case of

Judicial Watch, its respective authorized officer(s) have read the foregoing Agreement and fully understand its content and effect, was given a reasonable period of time to consider its terms, and is voluntarily entering into this Agreement. Accordingly, in construing this Agreement, no provision shall be construed against Judicial Watch on the basis that it is the draftsman of this Agreement

22. **Section 4958 Presumption.** As soon as possible after the execution of this Agreement, Judicial Watch shall appoint an authorized body to conduct, within ten business days following the execution of this Agreement, the process described in Treasury Regulation 53.4958-6, in order to establish a rebuttable presumption that the transactions reflected in this Agreement do not constitute an excess benefit transaction subject to tax under Internal Revenue Code section 4958. Upon favorable completion of the process by the authorized body and completion of all other requirements set forth herein, amounts due under this Agreement shall be released from escrow and paid over to Klayman in accordance with paragraphs 1 and 6 above. If the authorized body does not conclude that the transaction is reasonable, the Parties shall meet promptly to renegotiate in good faith the terms of this Agreement in such a way that the requirements of regulation section 53.4958-6 can be met.

23. **Choice of Law; Consent to Venue and Jurisdiction.** This Agreement shall be governed by and construed in accordance with the laws of the District of Columbia, without regard to its conflict of laws

principles. The Parties consent to the jurisdiction and venue of any state or federal court located within the District of Columbia in any action or judicial proceeding brought to enforce, construe or interpret this Agreement or otherwise arising out of or relating to Klayman's employment.

24. **Notice.** Any and all notices which any Party shall be required or may elect to provide to another Party pursuant to this Agreement shall be a signed writing unless otherwise so agreed. Any and all notices hereunder shall be personally delivered, telecopied (receipt confirmed) or sent by certified or registered mail, postage prepaid, return receipt requested, or by courier service providing evidence of delivery to the other party, at the applicable addresses set forth below:

If to Judicial Watch: Judicial Watch, Inc.
c/o Thomas Fitton, President
501 School Street, N.W.
Suite 500
Washington, D.C. 20024

With a copy to: David Barmak
MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO, PC
12010 Sunset Hills Rd.
Suite 900
Reston, VA 20190

If to Klayman: Larry E. Klayman
540 Brickell Key Drive,
Unit 732
Miami, Florida 33131

With a copy to: Herbert N. Beller
Sutherland Asbill &
Brennan, L.L.P.
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415

and

David P. Durbin
Jordan, Coyne & Savits, L.L.P.
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

25. **Binding Effect.** This Agreement shall inure to the benefit of and be binding upon Vie Parties and their respective executors, administrators, personal representatives, heirs, predecessors, successors, assigns, directors, agents, employees, trustees and affiliates forever.

26. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding between and among the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous written or oral agreements and understandings between the Parties with respect to the subject matter of this Agreement. Each of the Parties agrees and acknowledges that in deciding to enter into this Agreement he or it is not relying on any statements, representations, understandings or promises other than those contained herein. This Agreement shall be interpreted and enforced in all respects based on its express terms and without regard to who drafted the Agreement or any particular provision of the Agreement Neither the negotiations preceding this

Agreement or any draft, term sheet, outline, note, or statement, assertion, representation, or understanding prior to or contemporaneous with the execution of this Agreement shall be used to interpret, change or restrict the express terms and provisions of this Agreement.

27. **Captions.** Captions are inserted herein for convenience, do not constitute part of the Agreement, and shall not be admissible for the purpose of proving the intent of the Parties.

28. **Counterparts.** This Agreement may be executed in counterparts, each of which will be considered an original.

IN WITNESS WHEREOF, the Parties have set their hands and seals as of the dates indicated.

ATTEST:

JUDICIAL WATCH, INC.

_____ /s/ Thomas Fitton

Paul Orfanedes
Corporate Secretary

By: Thomas Fitton,
President
Date: 9/19/03

LARRY KLAYMAN

_____ _____

Witness Date: _____

KLAYMAN & ASSOCIATES, P.C.

_____ _____

Witness By: Larry E. Klayman,
President
Date: _____

25. **Binding Effect.** This Agreement shall inure to the benefit of and be binding upon Vie Parties and their respective executors, administrators, personal representatives, heirs, predecessors, successors, assigns, directors, agents, employees, trustees and affiliates forever.

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IN WITNESS WHEREOF, the Parties have set their hands and seals as of the dates indicated.

ATTEST:	**JUDICIAL WATCH, INC.**
Paul Orfanedes	
Paul Orfanedes Corporate Secretary	By: Thomas Fitton, President Date:
	LARRY KLAYMAN
Witness	Date:
	KLAYMAN & ASSOCIATES, P.C.
Witness	By: Larry E. Klayman, President Date:

25. **Binding Effect.** This Agreement shall inure to the benefit of and be binding upon Vie Parties and their respective executors, administrators, personal representatives, heirs, predecessors, successors, assigns, directors, agents, employees, trustees and affiliates forever.

26. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding between and among the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous written or oral agreements and understandings between the Parties with respect to the subject matter of this Agreement. Each of the Parties agrees and acknowledges that in deciding to enter into this Agreement he or it is not relying on any statements, representations, understandings or promises other than those contained herein. This Agreement shall be interpreted and enforced in all respects based on its express terms and without regard to who drafted the Agreement or any particular provision of the Agreement Neither the negotiations preceding this Agreement or any draft, term sheet, outline, note, or statement, assertion, representation, or understanding prior to or contemporaneous with the execution of this Agreement shall be used to interpret, change or restrict the express terms and provisions of this Agreement.

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28. **Counterparts.** This Agreement may be executed in counterparts, each of which will be considered an original.

IN WITNESS WHEREOF, the Parties have set their hands and seals as of the dates indicated.

ATTEST:

Paul Orfanedes
Corporate Secretary

JUDICIAL WATCH, INC.

By: Thomas Fitton,
President
Date: _____

LARRY KLAYMAN

/s/ [Illegible]
Witness

/s/ Larry Klayman
Date: 9/19/03

KLAYMAN & ASSOCIATES, P.C.

/s/ [Illegible]
Witness

Larry Klayman
By: Larry E. Klayman,
President
Date: 9/19/03

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 13-20610-CIV-ALTONAGA

LARRY KLAYMAN,

Plaintiff,

v.

JUDICIAL WATCH, INC.,

Defendant. /

FINAL JUDGMENT

(Filed Jun. 11, 2014)

THIS CAUSE came for trial before the Court and a jury, United States District Judge, Cecilia M. Altonaga, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on June 10, 2014, it is

ORDERED AND ADJUDGED that Judgment is entered in favor of Plaintiff, Larry Klayman, and against Defendant, Judicial Watch Inc., in the amount of **$156,000.00** for compensatory damages and **$25,000.00** for punitive damages, totaling **$181,000.00**, for which sum let execution issue. Requests for costs and attorneys' fees shall not be submitted until after any post-trial motions are decided or an appeal is concluded, whichever occurs later. This judgment shall bear interest at the rate as prescribed by 28 U.S.C. section 1961, and shall be enforceable as prescribed by 28 U.S.C. sections 2001–2007, 28 U.S.C. sections

3001–3308, and Federal Rule of Civil Procedure 69(a). The Clerk shall mark this case closed.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of June, 2014.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 13-20610-CIV-ALTONAGA

LARRY KLAYMAN,

Plaintiff,

v.

JUDICIAL WATCH, INC.,

Defendant. /

Verdict Form

We, the jury, unanimously find as follows:

1. Do you find from a preponderance of the evidence that Plaintiff Larry Klayman was defamed by Defendant Judicial Watch?

Yes ✓ No ____

(If your answer is "yes," proceed to the next question. If the answer is "no," sign the verdict form.)

2. Do you find from a preponderance of the evidence that Plaintiff Larry Klayman should be awarded compensatory damages against Defendant Judicial Watch?

Yes ✓ No ____

If your answer is "Yes,"

in what amount: $ 156,000.00.

(If your answer is "yes," skip question 3 and proceed to question 4. If your answer is "no," proceed to question 3.).

3. Do you find from a preponderance of the evidence that Plaintiff Larry Klayman should be awarded nominal damages against Defendant Judicial Watch?

Yes ____ No ✓

If your answer is "Yes,"

in what amount: $ N/A .

(Proceed to question 4.).

4. Under the circumstances of this case, state whether you find by clear and convincing evidence that punitive damages are warranted against Defendant Judicial Watch:

Yes ✓ No ____

If your answer is "Yes,"

in what amount: $ 25,000.00 .

So say we all this 10 day of June, 2014.

/s/ [Illegible]
Foreperson