

NO. 18-____

IN THE

SUPREME COURT OF THE UNITED STATES

Jerald Hammann,

Petitioner,

vs.

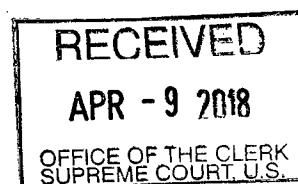
800 – Ideas, Inc. and Susan Parker,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Jury trials in federal civil cases have fallen to 0.63% of all cases for the 12 months ending on September 2017. Further, judicial dispositions favorable to plaintiffs dropped from approximately 70% in 1985 to 33% in the fourth quarter of 2009.

Because toll-free telephone numbers are a scarce public resource, hoarding and brokering them is prohibited. Routing multiple toll-free telephone numbers to a single subscriber creates a rebuttable presumption of hoarding and number brokering. Since Respondents routed more than 6,000 numbers to themselves, they were always going to lose on liability. Therefore, the district court struck nearly all of Petitioner's damages evidence. It struck two expert witnesses, one lay witness, one non-opinion fact witness, and huge stacks of business records establishing damages, including Securities and Exchange Commission filings.

The **first** question presented is whether the court erred in granting summary judgment to the Respondents for Petitioner's alleged failure to prove damages.

The **second** question presented is whether the court violated Petitioner's Seventh Amendment right to a trial by jury.

The **third** question presented is whether the court violated Petitioner's Fifth Amendment due process rights.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hammann respectfully submits this petition for a writ of certiorari to review the judgment of the Federal District of Nevada.

OPINIONS BELOW

The opinions of the lower courts are unpublished. These documents are produced in the Appendix. App. 1a (Appellate Rehearing Order), 2a (Appellate Opinion), 5a (District Court Summary Judgment Order), 8a (Discovery Order), 11a (Rule 701 Hearing Transcript), and 70a (Discovery Order).

JURISDICTION

Judgment was entered on November 20, 2015. The Ninth Circuit Court of Appeals denied rehearing on January 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The Seventh Amendment to the United States Constitution provides that:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fifth Amendment to the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Federal Communications Act, 47 U.S.C. § 206 provides:

Carriers' liability for damages In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. . . .

The Federal Antitrust Act, 15 U.S.C. § 15 provides:

Amount of recovery; prejudgment interest Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

STATEMENT OF THE CASE

The bases for federal jurisdiction in the court of first instance are the federal Communications Act of 1934 (47 U.S.C. § 207) and Sherman Antitrust Act claims (15 U.S.C. § 15).

800 Ideas Respondents Offer Hammann Disputed Numbers Contingent Upon Purchase or Use of a Monopoly-Priced Tie-In

On August 6, 2000, Petitioner Jerald Hammann ("Hammann") contacted Qwest Communications, a Responsible Organization ("Resp Org"), to initiate toll-free telephone service for his ChoiceTime business using the numbers 1-800-246-4238 and 1-888-246-4238 (spelling ChoiceT) ("Disputed Numbers"). Qwest could not initiate service for the Disputed Numbers, even though the Disputed 800 Number routed to an error message.

Through research conducted from August 6-9, 2000, Hammann discovered the contact information for the party controlling the Disputed Numbers. He then contacted that party, Respondent 800 – Ideas, Inc. ("800 Ideas"), owned by Respondent Susan Parker ("Parker"). 800 Ideas provided its toll-free telephone number, 1-800 IDEAS IN[C], for future contact.

During an August 9, 2000 telephone conversation, Mr. Richard Jones ("Jones") offered to sell an unidentified Internet domain name to Hammann for \$100,000 with the Disputed 800 Number included as part of the package. Jones also offered to sell an unidentified Internet domain name to Hammann for \$80,000 with the Disputed 888 Number included as part of the package. Internet domain names could be

obtained for an annual fee of \$35 or less at the time of the conversation.

Jones also indicated that Hammann could establish toll-free service using the Disputed 800 Number. Under these circumstances, Hammann would have been forced to use a particular telecommunications carrier (AT&T or Sprint Communications) to provide his telecommunications services. 800 Ideas would also have charged Hammann a per minute usage rate at a substantial mark-up over the rates it paid the carrier for the usage.

Hammann did not desire to purchase an Internet domain name from 800 Ideas and he did not desire to use AT&T or Sprint Communications as his telecommunications carrier or to pay the mark-ups.

Because he would not accept 800 Ideas' terms, Hammann was not permitted to use the Disputed Numbers to promote and provide services relating to his ChoiceTime business plan.

Because 800 Ideas also subscribed to less desirable alternate toll-free telephone numbers suitable for the ChoiceTime business plan, Hammann was not permitted to use any of these less desirable alternate toll-free telephone numbers to promote and provide services relating to his ChoiceTime business plan.

Hammann desired to use the Disputed 800 Number as an inbound toll-free number for consumers and the Disputed 888 Number as an inbound toll-free number for businesses. The ChoiceTime mnemonic was particularly suited to Hammann's business for reasons spelled out in submitted affidavits. To protect the ChoiceTime trade

name, Hammann also acquired several ChoiceTime website domain names (i.e., .com, .net and .org) and obtained trade name protection from the U.S. Patent Trademark Office. Hammann's promotion and scheduling application is also patent-pending.

Fifteen years and three months after initially seeking the Disputed Numbers, Hammann was finally awarded them in the present action.

The Federal District of Minnesota Action

Hammann initiated an action in the Federal District of Minnesota. 800 Ideas was joined to the Minnesota action on October 24, 2005. Hammann filed his Fifth Amended Complaint on November 1, 2005, and 800 Ideas appeared on November 1, 2005 seeking its dismissal.

Hammann was deposed on November 3, 2005 and November 14, 2005 for approximately 7 hours regarding his professional qualifications, his damages, their calculations and the supporting evidence. A continuation was necessary because:

Counsel for 800 Ideas: "I've explained to you my concerns, which are in two general areas that it is a much slower process of going through the underlying assumptions in your financial projections than I expected, and you explained to me that's a result of the detail in which we're inquiring. I understand that.

I've also explained my concern that on the 1st, you produced another couple inches worth of paper that I learned for the first time this morning was actually your production . . ."

Dr. Mark Meitzen ("Dr. Meitzen" or "Meitzen"), an expert damages witness retained by Hammann, was

also deposed. Dr. Meitzen, a Madison, WI resident, was represented at the deposition by his own Minneapolis counsel. Resultantly, Dr. Meitzen's personal appearance in Minnesota was costly for Hammann to procure.

Dr. Meitzen was retained pursuant to an open-ended engagement letter which notified him and his firm that: "due to the uncertain nature of civil litigation, the scope of this engagement is not completely known." At no time did Dr. Meitzen or his firm request that he be given a right to pre-authorize or otherwise consent in advance to the submission into evidence of any materials relating to or resulting from the engagement.

Dr. Meitzen written report was completed on November 1, 2005, and he was deposed regarding its contents on November 16, 2005. Dr. Meitzen's Report assumed the allegations in the Fifth Amended Complaint to be true, which mirror in all material respects the operative complaint in the present action. The Report addressed Hammann's damages occurring from their inception through December 31, 2005.

800 Ideas was dismissed without prejudice on September 8, 2006. Thereafter, Hammann settled with the remaining lesser parties.

The Federal District of Nevada Action

The Federal District of Nevada action was filed on July 8, 2008. 800 Ideas was the initial named defendant. Parker was joined subsequently.

Initial Damages Disclosures: 800 Ideas Respondents were served a Summons, Complaint and Supplementary Damages Complaint. The

Supplementary Damages Complaint contains a computation of the damages for which recovery is sought, along with an identification of all relevant documents and materials relating to damages.

On December 23, 2008, Hammann motioned for summary judgment based on the rebuttable presumption of hoarding and number brokering. Included as Exhibits to Hammann's summary judgment motion were:

Exhibit 18: ChoiceTime Business Plan, dated January 17, 2001.

Exhibit 23: Expert Report of Mark E. Meitzen, Ph.D., dated November 1, 2005.

Exhibit 24: Summary of Verifiable 800 Number Transaction Values.

The ChoiceTime Business Plan was prepared by Hammann and includes a summary schedule of financial projections as well as a discussion of key assumptions supporting the projections. The Expert Report of Mark E. Meitzen, Ph.D. includes calculations of Hammann's impaired business expenses and his impaired time, as well as approximations of lost profits. The Meitzen Report describes each source for its data and details its method for evaluating this data. The Summary of Verifiable 800 Number Transaction Values detailed the transaction values for six toll-free telephone numbers and cites to the source of each data element (often required SEC filings).

Hammann also provided 800 Ideas Respondents with separate, labeled, text- and number-searchable electronic versions of each damages exhibit in a pdf file format.

Hammann provided to 800 Ideas Respondents his Fed.R.Civ.P. 26(a) Disclosures. In these Disclosures, Hammann disclosed that:

1. He had knowledge regarding “the nature of the dispute, his damages and damage calculations.”

2. He “will make available those non-privileged, relevant documents that are in his possession, custody or control, and that tend to support plaintiff’s positions in this case. In particular, plaintiffs will make available the following general categories of documents: . . . [Documents] Relating to Hammann’s damages: [location] with Plaintiff.

Further, Hammann disclosed pursuant to Fed.R.Civ.P. 26(a)(1)(C) (damages) that:

Plaintiff seeks all actual, statutory, direct, consequential, and incidental damages, the precise amount of which are subject to proof at trial. Plaintiff has provided a Supplemental Damages Complaint and has further provided a computation of damages in his Memorandum in Favor of Summary Judgment. These documents and calculations are incorporated herein by reference.

. . .

Plaintiff reserves the right to supplement the types of damages sought prior to trial based on discovery.

Expert Witnesses: In his Rule 26(a) disclosures dated December 23, 2008, Hammann disclosed Dr. Meitzen and himself as witnesses Hammann “may use at trial to present evidence under Federal Rule of

Evidence 702, 703, or 705.” Hammann also provided to 800 Ideas Respondents Dr. Meitzen’s November 1, 2005 written report.

Hammann’s potential testimony based on scientific, technical, or other specialized knowledge was not as “one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” Pursuant to the district court’s November 23, 2009 scheduling order, the “Last date to disclose experts pursuant to Fed.R.Civ.P. 26(a)(2)” was March 25, 2010. Fed.R.Civ.P. 26(a)(2)(C), titled “Witnesses Who Do Not Provide a Written Report,” was made part of the Rules of Civil Procedure effective December 1, 2010, after the conclusion of the March 25, 2010, discovery deadline.

Destruction of Evidence: In advance of his November 3, 2005 deposition, Hammann produced originals of non-electronically-stored information in his possession supporting his impaired business opportunity damages:

Counsel for 800 Ideas: “I’ve also explained my concern that on the 1st, you produced another couple inches worth of paper that I learned for the first time this morning was actually your production . . .”

No copies of these documents were retained by Hammann, which were destroyed by 800 Ideas Respondents’ prior counsel on November 25, 2009, along with the deposition transcript explaining their relevance.

Discovery Responses: Interrogatory No. 3 of 800 Ideas Respondents' discovery requests requested:

3. Identify . . . all persons having knowledge of any facts relevant to this Action . . . and for each such person, state in detail the subject matter and extent of their knowledge.

Hammann's response identified himself, stating that he had "[k]nowledge of the nature of the dispute, his damages and damage calculations."

Interrogatory No. 4 requested:

4. With respect to each expert retained or consulted by you in connection with this litigation . . .

Hammann responded to this request identifying Dr. Meitzen. Since Hammann had not retained or consulted himself, he did not identify himself in response.

Interrogatory No. 9 requested:

9. Set forth all facts that support Plaintiff's contention in paragraph 39 of the Amended Complaint that "[b]ecause 800 Ideas have deprived Hammann of the use of the disputed numbers, he has been unable to initiate revenue-producing activities as directed by the ChoiceTime business plan and has therefore suffered damages," including facts supporting the claim that alternative toll-free numbers could not be obtained.

Hammann responded to this request. The full text of paragraph 39 of the Amended Complaint stated:

Because 800 Idea's actions have deprived Hammann of the use of the disputed numbers,

he has been unable to initiate revenue-producing activities as directed by the ChoiceTime business plan and has therefore suffered damages. Plaintiff filed a Supplementary Damages Complaint contemporaneously with this original Complaint detailing his damages.

No Interrogatory was addressed to the contents of the Supplementary Damages Complaint.

800 Ideas Respondents made twenty-six (26) individual document requests requesting thousands of pages of documents. Hammann responded:

Subject to [the described] objections, Plaintiff will make available for copying and inspection all files he currently possesses at a time mutually convenient for the parties at 17400 Evener Way Eden Prairie, MN 55346. Plaintiff expressly notes that most documents requested by them have already been provided in the present action or were previously submitted in the Minnesota Action.

800 Ideas Respondents elected not to inspect or to copy any of these documents, or make an objection to any discovery response within the discovery window.

Daubert Motion Regarding Dr. Meitzen's Testimony: 800 Ideas Respondents motioned for a pre-trial Daubert hearing relating to Dr. Meitzen's testimony. Hammann responded, addressing each admissibility concern raised by 800 Ideas Respondents. Hammann also disclosed that Dr. Meitzen would be unavailable to provide additional testimony unless compelled. Hammann therefore

submitted the deposition transcript of Dr. Meitzen taken on November 16, 2005, for Rule 702 evaluation.

The district court found that “the record is already clear that (1) Meitzen is unwilling to testify, (2) that he would not support, in these proceedings, application of the 2005 expert report, and (3) Hammann intended not to disclose Meitzen’s position unless a motion for a Daubert hearing was filed.” App. 72a. However, Dr. Meitzen instead only stated that he “cannot say how the opinions expressed” in his expert report may have changed “in terms of the Nevada proceeding (Case No. 2:08-cv-0886), and the passage of 8 years.” Id. Dr. Meitzen’s Expert Report and his November 15, 2005 deposition testimony were “deemed unreliable as a matter of law in establishing damages in this case” and therefore stricken.

Hammann’s Rule 701 Hearing: The order striking Dr. Meitzen’s Report and testimony continued:

“Finally, Hammann suggests that he will present Fed.R.Evid. 702 (expert) testimony related to damages. This will not be allowed. Hammann did not disclose himself as an expert witness prior to the March 25, 2010, expert disclosure deadline. Nor did Hammann disclose himself as a Rule 702 expert witness in relevant discovery responses to defendant 800 Ideas, Inc.’s requests, or disclose an expert report or a detailed summary of the facts and opinions to which he is expected to testify as required by Fed.R.Civ.P. 26(a)(2)(B) or (C). He also has not sufficiently shown that he holds the requisite knowledge, skill, experience, training or education to testify about the

economics of the projected profits of a startup business. On this record, any expert opinion testimony that Hammann would offer would not assist the trier of fact to understand the evidence or understand a fact in issue and is inadmissible. Furthermore, because he is not qualified as an expert in the field of projected profits in a startup business, Hammann would not be permitted to adopt the conclusions of another expert report or testimony in that area in forming an expert opinion.

App. 72a-73a.

The district court next scheduled a Rule 701 hearing, App. 11a-69a. Hammann attempted to place evidence and testimony on the record to establish the Rule 701 criteria for each of his separate damage calculations. 800 Ideas Respondents objected to each of these proffers of evidence and testimony because Hammann allegedly failed to provide these schedules prior to the close of discovery. The district court struck all damages exhibits (and their underlying documentary evidence) and precluded Hammann from testifying in a lay capacity regarding lost profits. *Id.*

This district court then granted 800 Ideas Respondents' motion for summary judgment for inability to prove damages. App. 5a-7a. Hammann was, however, awarded subscribership to the Disputed Numbers.

On appeal, the Ninth Circuit found:

The district court did not abuse its discretion by striking in this action an expert report and deposition testimony from

Hammann's earlier action in the District of Minnesota, or by striking Hammann's "damages exhibits" because such evidence was unreliable and not based on sufficient facts or data. See Fed. R. Evid. 702; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (trial court's gatekeeping obligation applies to all expert testimony). App. 3a.

The district court did not abuse its discretion by precluding Hammann from testifying as a damages expert in his own case because the danger of confusion outweighed the probative value of such testimony. See Fed. R. Evid. 403; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (discussing applicability of Rule 403 balancing test in district court's assessment of proffered expert testimony). *Id.*

The district court did not abuse its discretion by precluding Hammann from providing lay opinion testimony because Hammann's proffered testimony about damages was not within the scope of Federal Rule of Evidence 701. See Fed. R. Evid. 701; *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (district court's decision on admissibility of lay opinion testimony "will be overturned only if it constitutes a clear abuse of discretion." (citation and quotation marks omitted)). *Id.*

The district court properly granted summary judgment for defendants because Hammann failed to raise a genuine dispute of material fact as to the amount, causation, or

fact of any damages. See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988). *Id.* at 4.

...

We reject as without merit Hammann's contention that the district court erred by failing to impose sanctions [relating to 800 Ideas Respondents' destruction of Hammann's damages evidence]. *Id.*

Petitioner's motion for rehearing and suggestion for rehearing en banc was denied.

REASONS FOR GRANTING THE PETITION

I. PRELIMINARY STATEMENT

If the Court is confused by the obvious disconnect between the actual district court findings and what the appellate court found the district court findings to be, understanding why the disconnect exists will eliminate the confusion.

Understand that the monsters who roam our world destroying things often have enablers who permit – and sometimes participate in – their destruction.

The Strategic Plan for the Federal Judiciary (September 2015) defines as its highest Core Value the “Rule of Law,” which it defines as “legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law.” Other Core Values include Equal Justice (fairness and impartiality); Accountability (stringent standards of conduct); Excellence (adherence to the highest jurisprudential

and administrative standards); and, Service (commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States).

Not even one of these Core Values was adhered to in the present matter. Unfortunately, adherence to these Core Values has become the exception rather than the rule across the entire federal judiciary.

This failure of adherence to Core Values is documented and tracked by the federal judiciary itself. The percent of civil actions reaching trial was 1.0% during the 12-month period ending September 30, 2016. Table 4.10—U.S. District Courts—Civil Judicial Facts and Figures (September 30, 2016). For a similar 12-month period in 1990, that number was 4.3%. *Id.* And as recently as 1968, that number was 12%. Galanter, Marc, and Angela M. Frozena, “A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts,” 143 *Daedalus* 115, 117 Fig. 1 (2014);¹ relying upon the Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2012).

The effective elimination of jury trial and due process rights disproportionately impacts plaintiffs. For example, in the third quarter of 1985, plaintiffs won almost 70% of federal cases that were adjudicated to completion. By 2009, the plaintiffs’ win rate had dropped to 33%. Lahav, Alexandra D. and Siegelman, Peter, *The Curious Incident of the Falling*

¹ Accessible at <http://civiljuryproject.law.nyu.edu/scholarship/the-declining-state-of-juries-in-america/>.

Win Rate (July 7, 2017);² relying upon the Administrative Office of the US Courts Civil Terminations dataset (1980-2009).

The monsters who roam our world destroying things often have enablers who permit their destruction. This is the story of one monster in the Federal District of Nevada who seeks to destroy Seventh Amendment jury trial rights, Fifth Amendment due process rights, and the Federal Judiciary's Core Values. This is also the story of the enablers in the Ninth Circuit who not only permit, but affirmatively participate in, this destruction.

II. COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS

Despite the district court's prodigious efforts to wrongfully strike all evidence of the amount of Hammann's damages, enough remained on the record for Hammann to prevail before a jury. Even accepting all of the wrongful efforts to strike, Hammann did raise a genuine dispute of material fact. Reversing the wrongful errors themselves would preserve even more evidence of the amount of Hammann's damages. Summary judgment was therefore inappropriate on the issue of the amount of Hammann's damages.

A. Rebuttable Presumption Prevented Court from Ruling in Respondents' Favor on Liability

The most common means of denying jury trial and due process rights is to find some element of allegation or proof relating to liability missing or

² Accessible at SSRN: <https://ssrn.com/abstract=2993423> or <http://dx.doi.org/10.2139/ssrn.2993423>.

inadequate either at the dismissal or summary judgment stage. However, because hoarding and number brokering are subject to a rebuttable presumption which 800 Ideas Respondents could not overcome, the district court could not use this common means to deny Hammann's jury trial and due process rights.

47 C.F.R. §52.107, titled "Hoarding," states:

(a) As used in this section, hoarding is the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service. The definition of hoarding also includes number brokering, which is the selling of a toll free number by a private entity for a fee.

(1) Toll free subscribers shall not hoard toll free numbers.

(2) No person or entity shall acquire a toll free number for the purpose of selling the toll free number to another entity or to a person for a fee.

(3) Routing multiple toll free numbers to a single toll free subscriber will create a rebuttable presumption that the toll free subscriber is hoarding or brokering toll free numbers.

A rebuttable presumption shifts the burden of proof. *Teamsters v. United States*, 431 U.S. 324, 359 n. 45 (1977). 800 Ideas Respondents admit:

800 Ideas Respondents acquired all 10 versions of 800 numbers beginning with the mnemonic "B-O-X-I-N-G", at least the 8

remaining available versions of 800 numbers beginning with the mnemonic "R-E-W-O-R-D," the 7 versions of the mnemonic "R-E-W-O-R-K," the 6 versions of the mnemonic "L-O-W-E-S-T," and the 6 versions of 800 numbers beginning with the mnemonic "C-H-O-I-C-E" among many other mnemonic 800 number groupings.

800 Ideas Respondents also acquired toll free telephone numbers whose mnemonics spelled "C-H-A-S-E-M-A[NHATTAN]," "E-L-S-E-V-I-E[R]," "D-U-K-E-U-N-I[VERSITY]," "G-E-N-M-O-T-O[RS]," "K-I-N-D-E-R-C[ARE]," "M-A-T-T-E-L-C[O]," "M-E-R-C-K-I-N[C]," "S-C-O-T-T-P-A[PER]," "R-E-D-C-R-O-S[S]," "P-E-P-S-I-C-O," "R-H-M-A-C-Y-C[O]," "P-I-X-A-R-C-O," "P-I-X-A-R-I-N-[C]," "R-J-R-E-Y-N-O[LDS]," "R-J-R-N-A-B-I[SCO]," "U-N-I-T-E-D-W[AY]," "T-Y-S-O-N-I-N[C]," "W-A-R-N-E-R-B[ROS]," "W-A-R-N-E-R-L[AMBERT]," "W-E-N-D-Y-S-I[NC]," and "W-E-Y-E-R-H-A[USER]."

Since routing multiple toll free numbers to a single toll free subscriber creates a rebuttable presumption that the toll free subscriber is hoarding or brokering toll free numbers under 47 C.F.R. §52.107(a)(3), upon admitting these facts, the burden switches to 800 Ideas Respondents to overcome the rebuttable presumption of both hoarding and number brokering. However, they cannot surmount the rebuttable presumption because Parker claims not to recall the original intent for subscribing to the Disputed 800 Number (800-ChoiceT) ("Q. Do you recall what Defendant's intent was in reserving this particular toll-free telephone number? A. No."). Moreover, the

mnemonic character of the toll-free numbers themselves – the things these numbers spell – make it obvious what 800 Ideas Respondents' intent was in subscribing to them. In 800 Ideas Respondents' own words, 800 Ideas "provides telephone communication and toll free line routing and connection services" and "is [a] purveyor of [] schemes related to 800 toll-free numbers."

Since his Communications Act claims were subject to a rebuttable presumption, they were unsuitable for finding in 800 Ideas Respondents' favor on liability to deny Hammann's jury trial and due process rights. The district court therefore tried to strike all of Hammann's evidence so he couldn't prove damages.

B. Circuit Court Intentionally Misrepresents District Court Findings

The circuit court intentional misrepresents the district court findings. For example, the circuit court found:

The district court did not abuse its discretion by striking in this action an expert report and deposition testimony from Hammann's earlier action in the District of Minnesota, or by striking Hammann's "damages exhibits" because such evidence was unreliable and not based on sufficient facts or data. See Fed. R. Evid. 702; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (trial court's gatekeeping obligation applies to all expert testimony).

App. 3a.

This finding is an intentional misrepresentation.

The admission of the expert report and former deposition testimony of Hammann's hired expert witness is ordinary permitted usage under Federal Rule of Civil Procedure 32(a)(8) (Deposition Taken in an Earlier Action). The district court never actually examined the expert report and former deposition testimony to determine its reliability, but instead simply found it unreliable solely because it was otherwise admissible. If the expert report and former deposition testimony of Hammann's hired expert witness are unreliable, then all Federal Rule of Civil Procedure 32(a)(8) admissions are similarly unreliable. However, the rule exists because the courts have determined that public policy favors the admissibility of depositions taken in earlier actions. The rule exists because, as a matter of law, former testimony in an earlier action is *reliable enough* to be admitted.

Also, Hammann's damages compilations, supported by inches upon inches of invoices, tax records, pay stubs, SEC filings, research articles and other admissible source materials, were not struck because they were "unreliable and not based on sufficient facts or data." Instead they were struck because Hammann agreed to produce the evidence in his possession underlying these compilations pursuant to Fed.R.Civ.P. 34(b)(2)(B), "stat[ing] that inspection and related activities will be permitted as requested." See also Fed.R.Civ.P. 34(b)(2)(E)(i) (requiring the production of "documents as they are kept in the usual course of business or [alternatively, to] organize and label them to correspond to the categories in the request"). After the close of discovery 800 Ideas Respondents sought to strike this documentary evidence:

MR. CASTELLO: [] The document requests were served through the District of Nevada, and the responses were due in the district where plaintiff actually filed this action.

So to tell me that his documents are available in Minnesota fails to respond to the discovery request and produce them here in the district. I have no obligation to run around the country where plaintiff holds these documents. He chose to file here, and that's where they were to be served.

THE COURT: If that's an objection, it will be sustained. Go ahead.

MR. HAMMANN: Just for clarification, Your Honor, you are saying that producing them at my business offices was insufficient in this matter?

THE COURT: That's correct.

App. 30a.

The district court struck these documents when Hammann followed the rules of civil procedure solely because they were otherwise admissible, not because the inches upon inches of invoices, tax records, pay stubs, SEC filings, research articles and other admissible source materials were unreliable.

The circuit court also found:

The district court did not abuse its discretion by precluding Hammann from testifying as a damages expert in his own case because the danger of confusion outweighed the probative value of such testimony. See Fed. R. Evid. 403; *Daubert v. Merrell Dow Pharm.*,

Inc., 509 U.S. 579, 595 (1993) (discussing applicability of Rule 403 balancing test in district court's assessment of proffered expert testimony).

App. 3a.

This finding is an intentional misrepresentation.

The district court never found that Hammann's expert testimony would cause any potential confusion. Therefore, it also never weighed the danger of such confusion against its probative value. Failing to perform the probative balance test is an abuse of discretion. *People v Kowalski*, 492 Mich 106 (2012)(abuse of discretion to exclude evidence under MRE 403 (same as Fed.R.Evid. 403) without weighing the probative side of the analysis).

Instead, before Hammann's expert qualifications were ever subject to briefing or a hearing, it found that Hammann had not qualified himself as an expert. App. 73a. It then summarily tried to prevent Hammann from placing on the record his qualifications as an expert.

MR. HAMMANN: Your Honor, I obtained an accounting and finance degree from the University of Houston and graduated --

THE COURT: You are not going to qualify yourself as an expert.

App. 44a.

However, the record evidence demonstrated that Hammann was qualified to testify as an expert (if necessary) regarding his damages. Fed.R.Civ.P. 26(a)(2)(B) expressly contemplates expert testimony from "one whose duties as the party's employee

regularly involve giving expert testimony.” Fed.R.Civ.P. 26(a)(2)(C) expressly contemplates additional types of expert witnesses not encompassed with the types described by Fed.R.Civ.P. 26(a)(2)(B). These rules exist because the courts have determined that public policy favors the admissibility of expert testimony from parties to the proceeding. The rule exists because, as a matter of law, expert testimony of parties to the action is *not confusing enough* (if it would be at all) so as to be inadmissible. As a matter of law, the probative value of expert testimony provided by parties to an action ordinarily outweighs the risk of confusion. Neither the district nor circuit courts made any findings which would justify departing from the ordinary rule.

The circuit court also found:

The district court did not abuse its discretion by precluding Hammann from providing lay opinion testimony because Hammann’s proffered testimony about damages was not within the scope of Federal Rule of Evidence 701. See Fed. R. Evid. 701; *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (district court’s decision on admissibility of lay opinion testimony “will be overturned only if it constitutes a clear abuse of discretion.” (citation and quotation marks omitted)).

App. 3a-4a.

This finding is an intentional misrepresentation.

The district court never found that Hammann’s proffered testimony about damages was not within the scope of Federal Rule of Evidence 701. Instead, it

struck all of Hammann's damages evidence for the alleged failure of production described at 22-23 above, and then precluded Hammann from providing opinion testimony as a lay witness.

The circuit court also found:

The district court properly granted summary judgment for defendants because Hammann failed to raise a genuine dispute of material fact as to the amount, causation, or fact of any damages" (citation omitted).

App. 4a.

This finding is an intentional misrepresentation.

The district court never found that Hammann failed to prove the causation or fact of his damages. App. 6a-7a. Instead, after attempting to strike all of Hammann's damages evidence, it found he could not prove the amount. *Id.* Hammann was deprived of the use of the Disputed Numbers for 15 years and 3 months. For this reason, the causation and the fact of Hammann's damages are established as a matter of law. *Play Time v. LDDS Metromedia Comms., Inc.*, 123 F.3d 23 (1st Cir. 1997) ("the right to control [a] number ha[s] inherent value in the marketplace" and damages can be sustained merely from the loss of that right). Moreover, the district court's attempts to strike *all* of Hammann evidence of the amount of damages failed. For example:

During an August 9, 2000 telephone conversation, Mr. Richard Jones ("Jones") offered to sell an unidentified Internet domain name to Hammann for \$100,000 with the Disputed 800 Number included as part of the package. Jones also offered to sell an

unidentified Internet domain name to Hammann for \$80,000 with the Disputed 888 Number included as part of the package. (Hammann Decl. Ex. 13 ¶4 (Hammann Affidavit)). Internet domain names could be obtained for an annual fee of \$35 or less at the time of the conversation. (Id. ¶5).

From the offer prices 800 Ideas Respondents made to sell the Disputed Numbers, a jury had sufficient evidence to establish an amount for Hammann's damages. See *Play Time* at ¶20 ("The jury returned verdicts for Play Time on all counts, awarding \$50,000 in damages on each count, representing the value of the Number . . ."). See *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.").

Despite the district court's prodigious efforts to improperly strike all evidence of the amount of Hammann's damages, enough remained on the record for Hammann to prevail before a jury. Even accepting all of the improper efforts to strike in clear violation of the federal rules, Hammann did raise a genuine dispute of material fact. Reversing the intentional errors themselves would permit jury consideration of even more evidence of the amount of Hammann's damages. Summary judgment was therefore inappropriate on the issue of Hammann's damages.

The circuit court intentionally misrepresented the district court findings because the findings were contrary to unambiguous rules of procedure and evidence and therefore indefensible. The circuit court

then reviewed its fictitious findings for an abuse of discretion – a more deferential standard of review than was appropriate for the actual findings. It is inconceivable that this conduct was not an intentional, complicit effort to cover up the judicial misconduct of the district court.

III. COURT DENIED PETITIONER RIGHT TO TRIAL BY JURY

“One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.” *Parsons v. Bedford*, 28 U. S. 445 (1830). Therefore, the Seventh Amendment was passed, which provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

In *Baltimore & Carolina Line, Inc. v. Redman*, 295 US 654, 55 S. Ct. 890 (1935), the court found:

The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but **discloses a studied purpose to protect it from indirect impairment** through possible enlargements of the power of reexamination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise reexamined

in any court of the United States than according to the rules of the common law. **(emphasis added)**

The studied purpose found in the Seventh Amendment relating to one well-known form of indirect impairment should not be construed to mean that all other forms of indirect impairment are permissible. Indirect impairment now results from numerous forms of pre-examination inherent in present-day procedures, like those found in summary judgment, dismissal, and admissibility pre-examinations.

A new summary judgment standard was created in *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 265 (1986). In response to this new standard, Justice Brennan asked: "how does a judge assess how one-sided evidence is, or what a 'fairminded' jury could 'reasonably' decide?" He also identified his "grave concerns [] concerning the constitutional right of civil litigants to a jury trial." *Id.* at 267.

A new dismissal allegation exception was created in *Papasan v. Allain*, 478 US 265, 286 (1986) ("we are not bound to accept as true a legal conclusion couched as a factual allegation"). However, this "new" exception was of an ancient, intentionally-discarded lineage. "Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'"³

³ See Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433, 439 fn. 29 (1986). "To make the point clearer, the drafters prepared a series of form complaints that were by definition sufficient to satisfy the new standard. These forms were startlingly brief." *Id.* (citing FED. R. CIV. P. Form 9); see also

Another new dismissal standard was created in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). In response to this new standard, Justice Stevens asked and answered: “Does a judicial opinion that the charge is not ‘plausible’ provide a legally acceptable reason for dismissing the complaint? I think not.” And looking at the implications of *Papasan* in the context of the allegations in *Twombly*, Justice Stevens found it “mind boggling.” *Id.* at 1984.

As evident, numerous indirect impairments to the Seventh Amendment have been created in the very recent history. See also e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While the indirect impairment of the Seventh Amendment caused by any one of these changes may not be well known, their collective impact is well documented.

The percent of civil actions reaching trial was 1.0% during the 12-month period ending September 30, 2016. Table 4.10—U.S. District Courts—Civil Judicial Facts and Figures (September 30, 2016). For a similar 12-month period in 1990, that number was 4.3%. *Id.* And as recently as 1968, that number was 12%. Galanter, Marc, and Angela M. Frozena, “A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts,” 143

Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 12 (1938) (discussing the intentional omission of the word “fact” and stating “[t]he reason for that is, nobody knows what ‘facts’ are; courts have been trying for five hundred years to find ‘facts’ and nobody has ever been able to draw a line between what were and what were not ‘facts’”).

Daedalus 115, 117 Fig. 1 (2014);⁴ relying upon the Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2012).

Moreover, the District of Nevada is the second worst abuser of constitutional jury trial rights within the Ninth Circuit. During the 12-month period ending September 30, 2017, only 0.45% of Nevada Federal District cases were resolved by a jury, 35% worse than the average of 0.70% for the entire Ninth Circuit.⁵

As evident from the Administrative Office statistics, the federal courts' Race to Zero for civil jury trials began long before the significant new indirect impairments introduced by the Supreme Court in 1986 and subsequently. Federal judges already succeeded in reducing jury trials from 12% to 4.3% without these new impairments. However, the collective impact of all methods of indirect impairments to the Seventh Amendment has effectively eliminated the right completely. These impairments have denied a substantial number of federal court litigants their Seventh Amendment

⁴ Accessible at <http://civiljuryproject.law.nyu.edu/scholarship/the-declining-state-of-juries-in-america/>.

⁵ Administrative Office of the U.S. Courts, Caseload Statistics Data Tables, Table C-4A (Sept. 30, 2017) (<http://www.uscourts.gov/file/23803/download>). Nevada also provided litigants the fewest trial dispositions by a wide margin, pairing its 0.45% jury disposition rate with a 0.18% bench trial disposition rate. The next most restrictive Ninth circuit district (N.D.Cal.) had a combined 0.78% combined bench and jury trial disposition rate, 22% higher than Nevada's combined 0.64% rate.

rights. These impairments deny Petitioner his Seventh Amendment rights.

IV. COURT DENIED PETITIONER RIGHT TO DUE PROCESS

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

As demonstrated above, Petitioner was denied his right to a trial by jury. Additionally, he was also denied his right to due process of law before being deprived of his property rights in the form of his claims against Respondents.

This due process denial took the following specific forms: a) the systematic and wrongful striking of each piece of evidence supporting his damages and the refusal to impose damages sanctions against 800 Ideas Respondents for destroying damages evidence; b) the collective outcome of each of these individual denials, which was to dismiss the action and thereby deny Hammann the justice to which he was fairly

entitled; c) the intentional misrepresentation of the district court findings and the substitution of new erroneous findings by the Ninth Circuit; d) the provision of entirely new findings at the appellate stage such that Hammann was never provided a full and fair opportunity, other than through the disfavored opportunity to seek reconsideration, to respond to the specific new arguments resulting in the dismissal of his claims; e) the denial of Hammann's right to a jury trial when a material factual dispute regarding damages existed; and f) the denial of his right to fully and fairly litigate (and to prevail on) his action when he otherwise would have absent the judicial conduct exhibited in this case.

The effective elimination of Seventh Amendment jury trial rights as a result of all of the more recently-created indirect impairments disproportionately impacts plaintiffs like Hammann. For example, in the third quarter of 1985, plaintiffs won almost 70% of federal cases that were adjudicated to completion. By 2009, the plaintiffs' win rate had dropped to 33%. Lahav, Alexandra D. and Siegelman, Peter, *The Curious Incident of the Falling Win Rate* (July 7, 2017);⁶ relying upon the Administrative Office of the US Courts Civil Terminations dataset (1980-2009).

"As you've probably realized, the elephant in the room (or, in this case, the study) is judicial attitudes." Frankel, Allison; "Stunning drop in federal plaintiffs'

⁶ Accessible at SSRN: <https://ssrn.com/abstract=2993423> or <http://dx.doi.org/10.2139/ssrn.2993423>.

win rate is complete mystery – new study” Reuters, June 28, 2017.⁷

All of the new indirect impairments to the Seventh Amendment have resulted in a drop in plaintiff win rates from 70% in the third quarter of 1985 to 33% by 2009. Many plaintiffs who were entitled to prevail on their claims had they been provided due process of law are now no longer prevailing on their claims. This denial of due process has deprived these plaintiffs of their property right in a successful outcome they were entitled to receive.

This impairment has denied a substantial number of federal court litigants their Fifth Amendment due process rights. This impairment also denies Petitioner his Fifth Amendment due process rights.

It is apparent – and also inherently obvious – that district and appellate court judges who have no concern for preserving Seventh Amendment rights similarly have no concern for preserving Fifth Amendment rights in civil settings.

It is apparent that all of the new indirect impairments to Seventh Amendment jury trial rights created an environment where ordinary judges were transformed into destructive monsters in shockingly-large numbers. In the 10 years from 1985 to 1995, plaintiff win rates in federal courts dropped from 70% to 30%. See Lahav.

What does it say about our system of justice when a circuit court confronted with numerous outrageous,

⁷ Accessible at <https://www.reuters.com/article/us-otc-mystery/stunning-drop-in-federal-plaintiffs-win-rate-is-complete-mystery-new-study-idUSKBN19J2MB>.

obviously-intentional district court errors elects not to correct the errors, but instead intentionally re-casts the district court findings to cover up the errors?

The district court judge and the appellate court judges presented with this case are all destructive monsters. However, the environment in which they operate has become so corrupted that many may no longer even recognize that they are monsters. They live in a world where neither the Fifth nor Seventh Amendments have any apparent sway over their actions. The collective actions of the judiciary have destroyed these constitutional protections.

V. DENIAL OF JURY TRIAL AND DUE PROCESS RIGHTS ENDEMIC

As the statistics demonstrate, a plaintiff entitled under our laws to prevail on their cause of action is substantially more likely to be re-victimized by the courts than to actually obtain justice. Moreover, this victimization is done disproportionately to certain types of plaintiffs. As the Lahay study at 27 demonstrates, it is not the federal or state governments who are being victimized. For example, tax suit win rates are actually up 35%. It is also not large banks and corporations. It is instead entities and people like the Petitioner in this action who are being victimized. The monsters are picking and choosing their victims, preying upon the weakest and most vulnerable.

As the Lahay study (at 1) documents, in the federal courts alone, district court judges selected approximately 377,000 victims to be denied justice during the period between the third quarter of 1985 and the third quarter of 2009. This translates to approximately two judicial abuse victims per hour.

Unfortunately, these same impulses in the judiciary to deny plaintiffs justice exist in the state courts. For example, on average, state district court justices disregard the jury trial rights of their respective state constitutions at a greater rate than their federal counterparts. Whereas the federal jury trial rate was 0.63% in the 12-month period ending September 30, 2017, the state jury trial rate in the calendar year 2016 for the 24 states reporting to the Court Statistics Project was 0.19%, more than three times less frequent than the miserable federal court rate.⁸ If one were to apply the 37% decline in plaintiffs' win rates to the 4,057,357 cases resolved by these 24 state courts in 2016, this translates to 1,501,222 judicial abuse victims per year, or 2.86 victims every minute.

Petitioner has himself been victimized at least ten different times by various federal and state courts, including being improperly found a frivolous litigant three different times for refusing to be silent in the face of egregious judicial misconduct like that presented in this case. This judicial misconduct is in part the legacy of *Anderson v. Liberty Lobby, Inc.* and *Papasan v. Allain*.

The Strategic Plan for the Federal Judiciary (September 2015) defines Core Values that only rarely exhibit their presence in the federal courts. The Rule of Law (legal predictability, continuity, and coherence; reasoned decisions made through publicly

⁸ Compare Administrative Office of the U.S. Courts, Caseload Statistics Data Tables, Table C-4A (Sept. 30, 2017) (<http://www.uscourts.gov/file/23803/download>) to R. Schauffler, R. LaFountain, S. Strickland, K. Holt, & K. Genthon, eds. Last updated 11 January 2017 Court Statistics Project DataViewer Accessed 27 January 2018 <www.courtstatistics.org>.

visible processes and based faithfully on the law), Equal Justice (fairness and impartiality), Accountability (stringent standards of conduct), Excellence (adherence to the highest jurisprudential and administrative standards), and, Service (commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States) are no longer valued by the courts. Nor is the Constitution, or at least the Fifth and Seventh Amendments thereof.

Indeed, some seasoned judicial participants and researchers in this area have concluded that the destruction of these values and rights is so complete as to be irreparable. As the above brief and its supporting citations demonstrate, we are undeniably living in an Age of Un-Law. It is incumbent upon the Supreme Court to lead the process of navigating our way out of this abhorrent state.

CONCLUSION

The accepted and usual course of judicial proceedings in this case has so far departed from the alleged Core Values of the federal judiciary as to call for an exercise of this Court's supervisory power. Petitioner respectfully prays that the Court grant this petition.

Respectfully submitted,

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