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Honorable Marco Hernandez

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MAX ZWEIZIG, Plaintiff, vs. TIMOTHY C. ROTE, *et al.*, Defendants.	Case No.: 3:15-CV-2401-HZ DEFENDANT'S MOTION TO VACATE FOR LACK OF JURISDICTION, ALTER OR AMEND JUDGMENT OR FOR A NEW TRIAL CITING FRCP 59 (a), 59 (e) and 60 (b) AND MEMORANDUM THEREON ORAL ARGUMENT REQUESTED

MOTION

Defendant moves to alter or amend the judgment pursuant to FRCP 59(e); for relief from the judgment pursuant to FRCP 60 (b) (4) because the Judgement is Void (Court Lacks Jurisdiction); FRCP 60(b) (6) for other reasons that justify relief under; or, alternatively, a new trial pursuant to FRCP 59(a) for the reasons provided. In support, Defendant incorporates his Memorandum and Appendix of Evidence filed this date.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains (10,990) words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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MEMORANDUM OF LAW

I. INTRODUCTION

The Trial required the jury to wrestle with the plaintiff's allegations of retaliation from his former and out of business employer Northwest Direct Teleservices, Inc. (NDT) and the former CEO of NDT (Rote) who the plaintiff claimed aided and abetted NDT. The retaliatory act, according to the Plaintiff, was defendant Rote's publishing of a blog critically addressing a number of weaknesses in an arbitration evaluating the evidence, the manipulation of the arbitrator, including opposing counsel's perceived immunity to engage in perjury and evidence destruction. Hundreds of attorneys have looked at the record and found the arbitrator's award an affront to justice.

That portion of the blog addressing the objectively provable misconduct of the plaintiff and his attorneys was in great measure confirmed by the plaintiff's admission during cross examination in this case, that he did in fact withhold programming that led to NDT's shutdown, which also led to laying off 150 people just before Thanksgiving. Counsel worked feverishly, then and now, to cover up the plaintiff's criminal act. Zweizig's attorneys have always been engaged under a contingent fee agreement, providing counsel 50% of the award—which is presumably why there has been so much attorney misconduct.

Defining and adverse employment action as tantamount to publishing disparaging comments about an employee avoids a key element of consideration and that is the truth of the comments. Disparaging comments can be truthful and they can be untruthful. Implicit bias takes truth out of the consideration in the absence of highly credible evidence.

The defendant argues that the jury was not presented with an opportunity to consider key evidence nor did the jury understand the instructions for their deliberation. The jury was denied

the forensic reports, the source material supporting the truth of the defendant's published positions. Plaintiff and his counsel misled the jury, attempting to avoid claiming the blog posts were truthful. Plaintiff did nonetheless claim that several of the blog posts were untruthful and that the arbitration was miscast.

Plaintiff counsel engaged in massive misconduct in both his opening and closing statements in an attempt to enrage the jury.

The plaintiff's case on emotional distress is void of any evidence in support other than plaintiff testimony that "the blog posts were upsetting (whether true or not)", that stress not causing any physical symptoms, or any other manifestation.

The jury instructions were confusing and the verdict form surprisingly incomplete in structuring the logical framework of decision making the jury was charged with following. Accordingly the jury had a few questions.

The first jury question addressed when the blog post was published which we should ascribe to an understanding that any post published after NDT's dissolution lacked the necessary employer relationship to defendant Rote. All but one of the blog posts were published after the dissolution. The jury should have found that the employer/employee relationship did not exist but the instructions were not clear enough to distinguish between an ORS 659A.030 (1) (f) claim and the one pled against Rote under ORS 659A.030 (1) (g). The instructions should have been modified to make it clear that each post (chapter) has a unique publishing date, unlike a book which has a single publishing date. This was the defendant's request in response to the question. The court disagreed.

The second jury question addressed whether the arbitration was final. That question suggests that the jury decided that the defendant had no right to publish his critique of the

arbitration in any form, which was not the jury's charge. This may be an indication that there was inadequate evidence, such as the forensic reports, addressing those questions of published truth, which forced the jury to not consider whether the truth of the blog posts eliminated the plaintiff's damages.

If the question is whether the 96 Chapters and 96,000 words would not have been written but-for retaliation, Rote wins the day. More than 80 Chapters are about everything but the arbitration & Zweizig. Rote's effort to redact and re-brand the blog, eliminating search engine results on "Max Zweizig", while retaining the content of the blog, refutes retaliation applying the "but-for" causal standard of dicta provided by the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar, **133 S. Ct. 2517***, 2533 (2013) and adopted by the EEOC in its Enforcement Guide on Retaliation[1].

If the ultimate question is not about the blog overall, but is rather about specific blog posts, each post or chapter published at a unique time, then the jury should consider whether the posts identified by the plaintiff as being a component of a "vile smear campaign" were truthful (and a necessary part of a larger story). If truthful, the "but-for" analysis must be performed. If as a result of the analysis we come down to a single sentence of 10 words defamatory to the plaintiff, then the defendant prevails under a de minimis standard.

And for all the "but-for" and true or not true analysis, the jury still had to conclude that the blog was written by NDT as employer (of Rote) or exercising control over the product written by Rote. It is inconceivable for an out of business former employer to meet the employer definition. In this case, for the plaintiff to prevail against Rote, NDT must play an active employer and critical role of dominion over the product.

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[1] See EEOC Enforcement Guidance on Retaliation, August 2016, Causation Standard.

The defendant's actions to mitigate were not it appears considered and more importantly the plaintiff's instructional duty to mitigate was ignored. Plaintiff admitted to not even trying to mitigate. In closing, Christiansen maintained they had no duty to mitigate. It's clear the jury got way off track.

The Instructions to the jury allowed them to make mistakes. The Verdict Form allowed the jury to make mistakes. The defendant's proposed instructions and verdict form structured the decision making and would not have permitted the jury to conclude that fiction can replace the fact that there was no employer.

History shows us that employers rarely win employment cases at trial. Legal commentators explain that because juries are made up of employees and not of business owners or managers, they are naturally-inclined to accept the plaintiff's version of events. Studies have shown that employment litigation is literally the only area of law where the same party (employer) loses overwhelmingly year after year. This is why a detailed verdict form must be used, to identify conflicts in the decision making process.

After a detailed review of the recent noneconomic damage awards on 659A type cases in the U.S. District Court of OR and Mult. Co., it is clear that jury awards are 10 to 50 times greater and based on less evidence than BOLI awards[2]. The award in this case is unreasonable.

Bias ruled the day. Emotional distress is not a lottery ticket. Perjury and other crimes should not be rewarded or protected under a retaliation cloak.

This case represents the 4th time Zweizig has sued his former boss for $1 Million. His common law wife is an attorney. They have gamed the system to our collective loss.

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[2] BOLI Final Order 32-35.

II. LEGAL STANDARD

The Ninth Circuit has set forth the grounds justifying reconsideration under FRCP 59(e):

> In general, there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

See *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). While a Rule 59(e) motion is not limited to those four grounds, alteration or amendment of a judgment is "an extraordinary remedy which should be used sparingly." Id. (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc)). It is an abuse of discretion to deny a Rule 59(e) motion when there is clear error or manifest injustice and no reasonable basis to deny the motion.

FRCP 60(b) permits relief from final judgments, orders, or proceedings. Such a motion may be granted on any one of six grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Like motions brought under Rule 59(e), Rule 60(b) motions are committed to the discretion of the trial court. *Barber v. Hawai`i*, 42 F.3d 1185, 1198 (9th Cir. 1994) ("Motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) are addressed to the sound discretion of the district court.").

A court may grant a new jury trial "for any reason." FRCP 59 (a) (1) (A). A motion for new trial brought pursuant to FRCP 59 (a) (1) may be granted because, inter alia, if the verdict is contrary to the clear weight of the evidence, errors were committed at trial, an unfair trial,

improper conduct of the opposing party or counsel, improper conduct of the court, unfair/prejudicial surprise, newly discovered evidence, jury misconduct, other errors or the ultimate damage award is excessive. FRCP 59. In reviewing such a motion, [t]he trial court may grant a new trial, even though the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *Roy v. Volkswagen of America*, 896 F.2d 1174, 1176 (9th Cir. 1990); (citing *Hanson v. Shell Oil Co* 541 F.2d 1352, 1359 (9th Cir. 1976)); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F3d 814, 819 (9th Cir 2001); *Venegas v. Wagner*, 831 F2d 1514, 1519 (9th Cir 1987). Moreover, "[t]he judge can weigh evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Sussel v. Wynne*, 2007 U.S. Dist. LEXIS 1523 at *10 (D. Haw. 2007)' (citing *Landes Const. Co.*, 833 F.2d at 1371-72). In exercising this discretion, courts consider "the totality of [the] circumstances" leading up to a jury's eventual verdict, including the verdict itself. *Hemmings v.Tidyman's, Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002).

III. ARGUMENT

At issue in the trial was whether NDT was Rote's employer and engaged in retaliation in conjunction with, assisted by, Rote…ORS 659A.030 (1) (g). Rote's defense all along has been that NDT was not involved in the blog, that NDT was not his employer, that the underlying evidence including forensic reports were licensed from NDM and that the blog is the sole product of Rote, owned and published by him. No employer exists. No entity exercised any dominion or control over Rote's work. No entity compensated Rote for the body of work

described as the "blog". However, if the jury believes otherwise the employment contract is implicated.

A. The Verdict is Void For Lack of Subject Matter Jurisdiction

Since the jury reached conclusions based on facts not in evidence or contrary to the instructions provided and nonetheless found that NDT was an employer, then the Defendant's affirmative defenses as to (1) Condition Precedent Notice; (2) Statute of Limitations; (3) Mediation and Arbitration and (4) Attorney Fees and Costs are all in force. Rote can defeat the (1) (g) claim by defeating the claim as to NDT. The claim against NDT failed as a matter of fact and law barred by the plaintiff failing to meet the condition precedent, by the statute of limitations and duty to arbitrate. These affirmative defenses were preserved by Rote. Defendant understands the court's prior ruling not enforcing arbitration, but it is the defendant's position that the condition precedent, statute of limitations and legal fees, in Section V of the agreement, operate independently.

When a discrimination claim against the employer fails, then the aiding and abetting claim must be simultaneously defeated. See *Grosz v. Farmers Ins. Exchange, 2010 WL 5812667, *9 (D Or 2010)*; *Young v. Yellow Book Sales and Distrib. Co., Inc., 2008 WL 2889398, *6 (D. Or. July 21, 2008)* (not reported).

Contract applies to Rote and corporate defendants. The parties had through prior legal actions determined that the arbitration agreement also applied to Rote as an individual. In 2004 Zweizig provided Written Notice of Mediation as the contract requires but then filed his complaint in New Jersey (plaintiff Exhibit 2), and that case was dismissed in favor of arbitration when the defendant's moved to compel. Rote was a party in the NJ case. Defendant Rote was named as a party in the arbitration when Zweizig filed his counterclaims. Rote was removed as a party when the arbitrator granted Rote's Motion to Dismiss two years into the arbitration and

based on an argument that Rote was acting within his authority as CEO of employer NDT. See Doc #203-15. The court refused to apply the arbitration mandate in its Opinion denying Rote Motion to Dismiss and Motion for Summary Judgment. This is the appropriate time for reconsideration.

"The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citations omitted) (jurisdiction upheld); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") (jurisdiction upheld). *Detabali v. St. Luke's Hosp.*, 482 F.3d 1199, 1202 (9th Cir. 2007) (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Galvez v. Kuhn*, 933 F.2d 773, 775 n. 4 (9th Cir. 1991)) ("Defects in subject matter jurisdiction are non-waivable and may be raised at any time, including on appeal.").

1. The Plaintiff's Claims are Subject to Arbitration

The agreement also requires arbitration, which the court has deemed waived by defendant. Until the jury award, there were no arguable damages from which the defendant could file a malpractice claim. The defendant sought to dismiss this case as soon as the court allowed. **ORS 659A claims are subject to the employment agreement**. Section V. 5.1.1 of Zweizig's employment agreement provides that disputes include "…any alleged violations of federal, state or local statutes including discrimination…status protected under federal or state law…harassment." The section is broad and included the ORS 659A Claim and Wrongful Discharge Claim in the 2010 arbitration. See Plaintiff Exhibit 1.

2. The Plaintiff's Claims are Subject to a Condition Precedent, which the plaintiff did not satisfy.

Section V of Zweizig's employment agreement contains a condition precedent which reads as follows:

> **"…the aggrieved party must deliver to the other party written notice within 90 calendar days of the date when the dispute first arose." A party's failure to notice…shall constitute an irrevocable waiver of the party's right to raise any claim in any forum…[3]"**

Plaintiff did not satisfy condition precedent. At no time did Plaintiff file a Notice of Intent to Mediate. Although Plaintiff argued in Doc #83 that the retaliation was ongoing he did not at any time file a written Notice of Intent to Mediate nor was there any such Notice in Evidence. The plaintiff claims would have been untimely as to Exhibits 4-10. The defendant preserved this affirmative defense and sought to enforce the provision in a motion to dismiss as soon as the court allowed.

3. The Plaintiff's Claims are Subject to a Statute of Limitations and are time – barred.

Section V of the employment agreement provides that:

> **"…The limitations period set forth herein is mandatory, does not operate to lengthen any applicable state or federal statute of limitations and is not subject to any tolling, equitable or otherwise**."

The defendant argued application on the statute of limitations in Doc #78 and Plaintiff presented his argument in opposite in Doc #83. Defendant preserved its Affirmative Defense for Statute of Limitations in Doc #11, #19, #29 but inaccurately cited an ORS statute applicable to

[3] Modeled after ORS 659A.880.

the 3:14 case instead of the arbitration agreement. Defendant nonetheless corrected the error in Defendant's Motion to Dismiss, Doc #78, and in Defendant's Third Amended Answer Doc #98 and in arguing opposite in Doc #83 the plaintiff waived his objection to the amended answer. Defendant was not permitted to file a motion to dismiss any sooner because the court ordered he could not.

The Contract Statute of Limitations bars claims. Although Plaintiff filed this lawsuit on December 24, 2015, under the terms of his contract and by agreement, his claims expired on December 31, 2015 (90 days after discovery of the blog) as to NDT. Plaintiff Ex 4 establishes a download date of those blog posts as 10/2/2015, a few days after Linda Marshall demanded the blog be taken down. The discovery date was just prior to when Linda Marshall sent a letter demanding the blog be taken down, sometime in September 2015.

The plaintiff's claims are time barred.

4. The Plaintiff's Claims are Subject to a Contract that precludes the Award of Attorney's Fees.

Plaintiff sought an award of legal fees in the 2010 arbitration. He was denied an award of Attorney's Fees. See Arbitrator's Opinion and Award (Plaintiff Exhibit 3) on similar retaliation claims asserted in the arbitration, enforcing the employment agreement Section V and refusing to award legal fees. Opposing counsel sought and was also denied attorney's fees on a motion to vacate, in part, the arbitration award, i.e. for legal fees incurred for the confirmation award activity, which was also denied (the court enforcing the employment agreement Section V). See *NDT v. Zweizig*, 3:11CV-00910-pk, p 3, p 10, p 24-26.

5. The Provisions in the Agreement are Severable.

Section 6.2 provides as follows:

"The parties agree that the provisions in this agreement are separable and that in the event any provision is deemed ineffective or unenforceable, they are severable

from the remaining provisions of the Agreement, which provisions shall remain binding on the parties."

The contract has already been interpreted via litigation and found to be valid with respect to ORS 659A claims. Defendant's Motion to Compel Arbitration in the New Jersey Action (Attached herein as Exhibit 12), in Response to Plaintiff Exhibit 2, was granted.

Consistent with ***Richards v. Ernst & Young***, No. 11-17530 (9th Circuit, December 2013), it is abundantly clear that Defendants did not waive arbitration or the contract terms by raising the affirmative defenses well before trial, even after being forced to participate in the litigation to some degree. *Richards*, former employee, brought a wage claim against former employer Ernst & Young. Ernst failed initially to raise its affirmative defense to compel arbitration. Ernst had by necessity participated **for two years** but did then file a motion to compel well before trial, even after the court dismissed some of Richards Claims for lack of standing. The district court agreed with Richard's efforts to deny Ernst its contract right to arbitrate. The 9th Circuit reversed, noting that a contract favoring arbitration should be respected and Richards is not prejudiced for its own "self-inflicted expenses." This court interpreted the Defendant's Motion to Dismiss as a Motion to Compel arbitration.

B. There is insufficient evidence for the jury to find that dissolved NDT was Rote's employer, that NDT engaged in retaliation and that Rote aided and abetted an out of business employer.

The great weight of the evidence is against the jury's verdict that NDT was the employer. Zweizig submitted no evidence of any kind that NDT was an operating company and had the ability to direct the blogging activities of Defendant Rote. The evidence at trial established that and employee/employer relationship did not and could not exist between Rote and NDT (Zweizig's former employer)by: (a) showing that NDT was an administratively dissolved corporation and had no employees; (b) Rote's testimony that he was not employed by NDT to

write the blog and that NDT was out of business when the blog was first published; (c) the fact that no evidence was provided by plaintiff that NDT employed and compensated Rote at the time the blog was published or any time thereafter; (d) that NDT did not exercise dominion over the product, a requirement to be defined as an employer under OAR 839-005-003; (e) the license agreement refuting even the notion of an employee/employer relationship between NDT and Rote; (f) and errors in the instructions on this topic confusing the jury (see below).

If the court determines that the Verdict is not void by application of Section V of the Employment Agreement, and refuses to alter or amend the judgment then a new trial is in order. The jury's finding that NDT is an active corporation and employer of Rote is not supported by the great weight of the evidence and the verdict must be set aside and a new trial granted.

C. There is insufficient evidence for the jury to find that the Google Search results conveyed anything untruthful and therefore harmful (even if disparaging). Moreover, the search results show Zweizig is litigious.

The great weight of the evidence is against the jury's verdict. By necessity the jury reached a conclusion that the google search results were tantamount to a negative and published job reference void of truth and not based on credible evidence (jury instructions though lacking). The plaintiff claimed that the google search results for "Max Zweizig" (and its alternative forms) robbed the plaintiff of his identity. The evidence shows that there was one result on the first two pages in the search results that referenced the blog out of 20 entries; that most of the other 19 search results on the first two pages show references to cases and rulings in this case, the 3:14 case and 3:11 case; that Zweizig's litigious nature is in fact showcased for a prospective employer to see notwithstanding the blog; that Zweizig falsely intimated that the other 14 result references to Zweizig's litigation were a result attributed to Rote's blog; that the plaintiff did not demonstrate and could not demonstrate through testimony that the 1 result could link to any blog post as Rote rebranded and delinked as an act of good faith during the pendency of the litigation

or that the google reference summaries provided enough information to in any way disparage Zweizig. You do not steal the identity of someone with one out of 20 references, especially when the reference is delinked (does not forward to the blog). See plaintiff exhibits 9 and 10.
The defendant argues that the conclusion reached by the jury is completely unfounded, based not on fact but on bias.

If the court determines that the Verdict is not void by application of Section V of the Employment Agreement, the jury's finding is not supported by the great weight of the evidence, and the verdict must be set aside and a new trial granted.

D. There is insufficient evidence for the jury to find that the Blog Chapters cited, plaintiff exhibits 4-10 and 12 as supporting noneconomic damages in the absence of finding the defendant's published statements were knowingly untruthful.

The Defendant's motivation for writing the blog is described in defense exhibit 501.

The plaintiff can only sustain an argument that the blog is a retaliation body of work by proving that all of it (96 chapters) seeks that purpose. The evidence is clearly contrary to that posture. In so far as the plaintiff has alleged during direct and in closing that all of the blog is retaliatory, the plaintiff's claims fail. The great weight of the evidence is that more than 80 chapters have nothing to do with Zweizig, which one would presume the jury would have easily conclude had the jury read plaintiff exhibit 12—the blog.

In post-employment retaliation, a negative job reference must be unjustified and in order to be unjustified it must be based on a retaliatory motive. Financial gain, to which the defendant subscribes, is not such a motive. The truthfulness in a reference may serve as a defense unless there is proof of pretext. See EEOC Manual, page 13.

Although the plaintiff has argued that exhibits 4-10, and exhibit 12 (the blog as of June 2017) represent a vile smear campaign, the truth of what was written by Rote is both a defense to those allegations and mitigation to damages. In the absence of being able to put on forensic reports and testimony from the arbitration, the truth cannot be proven but neither can it be defeated, aside from the effect of implicit bias favoring the plaintiff. In so far as the plaintiff sought to exclude this evidence there is a presumption that the excluded evidence supports the truth of the blog chapters.

This Court's not permitting evidence on the truth of assertions by Rote in Exhibits cited by plaintiff as vile, improperly allowed speculative, volatile testimony by the plaintiff where he did not fear impeachment or post trial evidence filings for a directed verdict, unfairly tilting the emotional weight of the testimony in favor of Zweizig.

The truth of the statements published by Rote is an important element in applying a "but-for" standard outlined in *University of Texas Southwestern Medical Center v. Nassar*, ***133 S. Ct. 2517***, 2533 (2013). The great weight of the evidence favors the defendant and the court should grant a new trial.

E. There is insufficient evidence for the jury to find the Blog Chapters disparaging or inhibited employment in his chosen field given his admission of engaging in computer fraud.

Mr. Zweizig admitted during cross in this trial that he had withheld and destroyed programming leading to his employer's shutdown in 2003. He testified "that he left NDT in the same position in which he found it [without programming]." This admission would have eliminated his damage claims in the arbitration, barred by his own actions on the last day of his employment, when the programming over which he exercised control was gone. The 60 gig

forensic reports confirm that he returned no programming and the 120 gig forensic reports confirmed that he destroyed what was on that hard drive.

In so far as working as an IT professional with an unrelated employer, as Zweizig claims he does, one would presume that the most "vile" statement Rote could have made (without evidence) was identifying Zweizig as having engaged in computer fraud.

Given his admissions and prior perjury, to allow Zweizig to profit under ORS 659A is a manifest injustice to the defendants.

Zweizig's argument of a vile protracted smear campaign is unsupportable given his admissions. If the judgment is not vacated, the great weight of the evidence favors the defendant and the court should grant a new trial.

F. The court should grant a new trial because relevant evidence was excluded prejudicing the defendant's rights and leading to an improper verdict.

The Court also incorrectly excluded key evidence offered by Rote. "A district court abuses its discretion in denying a motion for a new trial when its erroneous inclusion or exclusion of evidence in the underlying proceeding prejudices a party's right to a fair trial." *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005). A new trial should be granted to redress evidentiary errors that severely prejudiced Rote.

The Court's rulings excluding the forensic expert reports and testimony improperly allowed speculative, volatile testimony by the plaintiff, where plaintiff did not fear impeachment by those reports, and who then launched an orchestrated series of statements confusing to the jury. The resulting cumulative and repetitive nature of the plaintiff's testimony with only the defendant's direct testimony to rebut, unfairly tilted the weight of the testimony in favor of Zweizig.

The plaintiff argued that Rote launched a vile and protracted smear campaign even when the plaintiff tried to mislead the jury about its **truth**, at times claiming that the undisputed statements by Rote published in the blog were nonetheless disparaging whether true or not true. The Court erred in making the following rulings: (a) allowing Zweizig to put on a portion of the Kugler letter, which had pre-trial been denied as re-litigation, in the absence of allowing the 120 gig forensic report in and on cross. The letter specifically referenced a page of the 120 gig forensic report issued by Steve Williams. That Kugler letter evidence and plaintiff's testimony thereon, led plaintiff counsel to argue this was a retaliatory act punishable in this trial (in spite of the fact that Crow refused to award any damages on it). The evidence and testimony confused the jury, and led to a "punishment" verdict completely inappropriate for noneconomic damages where there was no evidence of emotional distress; (b) excluding the 120 gig forensic expert reports and related arbitration testimony even though Zweizig did during his direct ultimately and on multiple occasions challenged the truthfulness of the blog chapters opening the door for use of the forensic reports as impeachment and during rebuttal of Plaintiff. Zweizig was familiar with the forensics reports and five of these were public documents (3:11-cv Motion to Vacate). Accordingly, the jury was confused by Rote's inability to examine Zweizig on the forensic reports, some of which were issued by Zweizig's own expert in the arbitration. While Zweizig continued to carry on about vile allegations in the blog, referencing without specificity any particular post, but by inference that he illegally downloaded porn, Videos and Music (copyright violations), the 120 gig forensic report alone would have allowed the jury to see that Rote published these posts based on credible evidence. This made it appear that Rote's references to forensic reports were "made up" and supported by only one witness, him; (c) excluding the FoxPro forensic reports, which supported the credible evidence that Zweizig destroyed and

withheld programming leading to his employer's shut down his employer in 2003. The FoxPro files represented evidence that would impeach the plaintiff's testimony on another element, which defendant presumes to include attributing "vile" and "smear" as to plaintiff's professional skills. However, Zweizig did admit during cross that he intended only to "leave his employer in the same position it was in before he joined the company" could reasonably be interpreted to mean that he intended to withhold programming leading to his employer's shutdown; (d) given Zweizig's **first time admissions** that he did withhold programming leading to the shutdown, the 60 gig hard drive forensic reports (and his testimony in the arbitration denying that he withheld programming) should have been allowed to challenge the efficacy of Zweizig testimony on emotional distress, the truth of Rote blog posts, the credibility of his blog theme challenging the efficacy of arbitration and the probable collusion between the arbitrator and Zweizig counsel. The 60 gig forensic reports specifically found that Zweizig had not turned over FoxPro programs on his computer nor his email account on his last day of employment.

The erroneous rulings, which Rote asked the court to reconsider multiple times, had a severely prejudicial and unfair effect upon Rote's case and resulted in an improper jury verdict. It is a fair assumption that the truth of the blog allegations diffuses a jury's sympathy for emotional distress damages, an issue the court identified (truth would affect damages) in its opinion denying summary judgment. The rulings took from defendant Rote his ability to show the jury the credibility of the underlying evidence of arbitrator collusion. Defendant believes that the jury's confusion on this issue is reflected in jury question #2.

G. The court should grant a new trial because of new evidence showing the plaintiff engaged in perjury about the blog and his frequency of visits to the blog.

Plaintiff testified that he repeatedly looked at the blog to determine if there had been anything else written about him. But the truth is that in the 18 months leading up to the trial he looked at the rebranded blog posts in April 2017 and again in June 2017. Defendant had in his possession Exhibit 1, a summary of the views by Chapter and thought about replacing defendant exhibit 503 with it. But defendant was unable to get to the detail behind the views until after trial.

When a visitor views the blog, he or she sees the latest blog post. Anyone can set a link on their computer to go to a specific website or blog or blog post. It is clear that Zweizig or someone on his team linked to Chapter 1 "Abuse and Exploitation" as there are 36 views, but even those views are limited to April and June 2017. Plaintiff's Exhibit 12 shows a June 2017 print date and is reflected as one of the views of the relevant Chapters provided above. The following is offered as new evidence:

1.	Blog Post Summary with Views		Exhibit 1
2.	Site Stats Chapter 1	36 Views	Exhibit 2
3.	Site State Chapter 4	2 Views	Exhibit 3
4.	Site Stats Chapter 7	2 Views	Exhibit 4
5.	Site Stats Chapter 9	2 Views	Exhibit 5
6.	Site Stats Chapter 11	2 Views	Exhibit 6
7.	Site Stats Chapter 12	4 Views	Exhibit 7
8.	Site Stats Chapter 35	2 Views	Exhibit 8
9.	Site Stats Chapter 37	2 Views	Exhibit 9
10.	Site Stats Chapter 86	3 Views	Exhibit 10

11. Site Stats Chapter 90 8 Views Exhibit 11

The Federal Rules of Civil Procedure are clear that courts can consider newly discovered evidence to determine whether a judgment should be set aside. *See generally* FED. R. CIV. P. 59 & 60. Rule 59(e) permits evidence discovered within 28 days of a judgment to be considered in a motion to alter or amend the judgment.

A party seeking to alter or amend a judgment based on newly discovered evidence must demonstrate that the evidence is:

1. Newly available or was unknown until after entry of judgment. This involves a showing that:
    a. the party could not have discovered the evidence earlier with reasonable diligence; or
    b. the party made a diligent but unsuccessful effort to discover the evidence earlier, if the evidence was available before entry of judgment.
2. Of such a nature that it would probably change the outcome of the case.
3. Material and not merely cumulative or impeaching.

(*Biltcliffe*, 772 F.3d at 931; *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 955 (7th Cir. 2013); *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1213 (10th Cir. 2012).

Rote asserts in his declaration that the detailed information of views by month was not available for the trial, that he was diligent in discovering this information and that it will have a material effect on jury deliberation.

H. The court should grant a new trial because of the erroneous ruling not permitting the defendant to counterclaim for defamation and to offer evidence of plaintiff's unclean hands.

The Court incorrectly excluded key evidence offered by Rote. "A district court abuses its discretion in denying a motion for a new trial when its erroneous inclusion or exclusion of evidence in the underlying proceeding prejudices a party's right to a fair trial." *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005). A new trial should be granted to redress evidentiary errors that severely prejudiced Rote.

Defendant offered Exhibits 541 and 543 for two reasons. First, as to the plaintiff and plaintiff counsel's behavior in this litigation in support of the defendant's affirmative defense of plaintiff's unclean hands. Defendant believes that the jury would have found the exhibits demonstrative and mitigating to any award of noneconomic damages. Second, defendant sought to add these exhibits in support of his counterclaim for defamation, which was dismissed without prejudice; the new subpoena evidence refutes the plaintiff's declaration and supports the defendant's claims of plaintiff's pronounced defamatory conduct.

Plaintiff sought to exclude this evidence through its Motion in Limine and Objection to Defendant's exhibits. The court granted that Motion.

The Court's not permitting this evidence, improperly allowed speculative, volatile testimony by the plaintiff where he did not fear impeachment or post trial evidence filings for a directed verdict, unfairly tilting the emotional weight of the testimony in favor of Zweizig. The court should grant defendant's motion for a new trial.

I. The court should vacate the judgment based on plaintiff's admissions that they refused to mitigate.

The plaintiff decided that he had no duty to mitigate his damages. Consequently, in spite of defendant's multiple offers to consider any reasonable accommodation as to the blog chapters, including anonymity, the plaintiff refused. Defendant nonetheless rebranded the blog, redacted forensic reports and blog chapters as an unrequested accommodation leading up to the trial. Plaintiff's Exhibit 12 reflects that accommodation. Plaintiff's Exhibits 4-10 do not as it was prior to the time the lawsuit was filed and defendant sought to identify mitigation needs of the plaintiff. A duty to mitigate a published bad reference, with no evidence of having been read by anyone, is accomplished by requesting withdrawal. Plaintiff may have misinterpreted its duty to mitigate to include actions to address Zweizig's claims of emotional distress.

The Ninth Circuit's decision in *Gomez v. Am. Empress Ltd. P'ship*, 189 F.3d 473 (9th Cir. 1999) is persuasive. In *Gomez*, the plaintiff hurt his back while working and could no longer perform his job duties. He sued his employer for economic injuries, pain and suffering, and emotional injuries. The trial court reduced the plaintiff's award by twenty-five percent, reasoning that if plaintiff had tried to find other employment or otherwise mitigated his damages, both economic *and non-economic* damages would have been reduced. *Id*. at 2. This holding indicates that the Ninth Circuit supports the imposition of a duty to mitigate emotional damages.

The Court's mandate under these circumstances is to alter or amend the award. In so far as there was no evidence proffered by the plaintiff that an employer visited the blog, and had an opportunity to mitigate if not eliminate his concern, the verdict and judgment should be vacated. Alternatively, a new trial should be granted.

Defendant offers further proof as new evidence of the views on the blog site for each of the 10 blog chapters arguably offered as evidence by plaintiff. The views average 2 in the last year, one in April and one in June when the blog posts were printed (Plaintiff exhibit 12).

J. The court should vacate the judgment based on plaintiff's refusal to disclose his employers and the court's capitulation which influenced the jury.

Throughout trial, plaintiffs presented improper documents and testimony, often in violation of this Court's orders. Court denied Plaintiff's Motion In Limine on this issue and plaintiff still refused to answer the question of employment, an issue critical to the evaluation of true emotional distress damages. The court could interpret this refusal as a plaintiff's denial of suffering from any emotional distress. "A district court abuses its discretion in denying a motion for a new trial when its erroneous inclusion or exclusion of evidence in the underlying proceeding prejudices a party's right to a fair trial." *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005). A new trial should be granted to redress evidentiary errors that severely prejudiced Rote.

The court allowing Zweizig to refuse to disclose the name of his employer's of the last 4 years, after Zweizig had been directed to disclose those employers, resulted in grandstanding an inappropriate and unfounded fear of reprisal. Zweizig's refusal and the court's capitulation as to this earlier mandate made it appear that the court was empathetic and supportive of Zweizig's allegation of retaliation. Zweizig was not forced to admit that he is, for example, working for his own two companies and not for an unrelated employer who might have actually done a background check. This allowed Zweizig to set up an emotional distress argument over the fear of unemployment, when in fact he has not sought or been engaged in any outside employment for 14 years. This lawsuit became nothing more than a performance rather than any true issue of emotional distress.

The Court's not requiring Zweizig to disclose his employers, improperly allowed speculative, volatile testimony by the plaintiff where he did not fear impeachment or post trial

evidence filings for a directed verdict, unfairly tilting the emotional weight of the testimony in favor of Zweizig. The great weight of the evidence favors the defendant and the court should grant a new trial.

K. The court should grant a new trial for erroneous jury instructions.

Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. *See Gilbrook v. City of Westminster,* 177 F.3d 839, 860 (9th Cir. 1999), *citing Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996). A district court has substantial latitude in tailoring jury instructions. *See id., citing Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1046 (9th Cir. 1998). A jury verdict will not be set aside because of an erroneous instruction if the error is more probably than not harmless. *See Caballero v. City of Concord,* 956 F.2d 204, 206 (9th Cir. 1992), *citing Coursen v. A.H. Robins Co., Inc.,* 764 F.2d 1329, 1337 (9th Cir. 1985).

Defendant requests new trial on the basis of several jury instructions which were flawed, preventing Defendant from receiving a fair trial. Jury instructions were flawed as follows: (a) not instructing the jury that the plaintiff's refusal or failure to mitigate the damages he alleged would preclude finding in the plaintiff's favor as to damages and that mitigation would be defined to include defendant's offer of anonymity to plaintiff and plaintiff's efforts to minimize the effects of emotional distress (Instruction #13); (b) failing to instruct the jury that each blog post chapter has a unique publishing date and any post or portion thereof that the plaintiff identified as retaliatory may only be retaliatory if the jury finds an employee/employer relationship existed between Rote and NDT at the date of publishing of that post (Instruction #11); (c) failing to instruct the jury that the jury must find NDT an active corporation and the party engaged in publishing the blog posts in order to find that Rote aided and abetted (Instruction #11); (d) failing to instruct the jury that they may not attribute employer status, in this action against Rote, to any

other corporate entity besides NDT (Instruction #10 & 11); (e) failing to instruct the jury that employer status may only attributed to NDT if it reserved the right and had the ability to exercise dominion over Rote's published material (Instruction #10 & 11); (f) failing to instruct the jury that the plaintiff has no right to anonymity and that only those blog posts deemed untruthful (however painful to the plaintiff) are actionable and only then if the prior instructions on the employer's existence, employer/employee relationship and employer's actions are satisfied (Instruction #10 and 11); and (g) that the plaintiff's misconduct (unclean hands) over the course of this litigation may be considered by the jury in awarding damages.

The relevant an erroneous Instruction #10 read as follows:

> "2. The Business Entities [NDT] subjected the plaintiff to an adverse employment action, that is published disparaging [untruthful] employment-related statements concerning the plaintiff in a public manner on the internet; and
>
> 3. The plaintiff was subjected to the adverse employment action [untruthful statements] **because of** his participation in the protected activity."

Further, the instructions provided that the "plaintiff is subjected to an adverse employment action because of his participation in the protected activity if he shows that an **unlawful motive** was a substantial factor in his adverse employment action, or, in other words, that the plaintiff would have been treated differently in the absence of the unlawful motive."

Plaintiff needed to show and the jury needed to understand that there is only retaliation if the blog posts would not have been written about the arbitration, with or without references to Zweizig "but-for" Rote's interest in retaliation. The "but-for" standard is a more stringent standard than the "chill participation" or "motivating" standard plaintiffs want applied. In this case, "because of" needed to be "but-for."

In *University of Texas Southwestern Medical Center v. Nassar*, **133 S. Ct. 2517**, 2533 (2013), plaintiff, a university faculty member and hospital staff physician, alleged that he was

harassed by another faculty member because of his race and religion. Plaintiff claimed that the faculty member's supervisor blocked his attempts to retain his hospital position, without remaining on the university faculty, in retaliation for plaintiff's complaints of harassment.

At trial, the jury ruled in favor of plaintiff on his retaliation claim. On appeal, the U.S. Court of Appeals for the Fifth Circuit held that, to prevail on his retaliation claim, plaintiff need only show that retaliation was a "motivating factor" (*i.e.,* that it played a part) in the challenged adverse employment action. Because there was sufficient evidence upon which the jury could find that retaliation was a motivating factor, the Fifth Circuit affirmed the jury's verdict on the retaliation claim.

The Supreme Court however held that in a retaliation case a plaintiff "must establish that his or her protected activity was a "but-for" cause of the alleged adverse action by the employer."*Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S. Ct. 2517, 2534 (2013). The Court found that the "because" language in the anti-retaliation provision (42 U.S.C. § 2000e-3(a)) lacked any meaningful textual difference from the analogous statutory provision in the ADEA at issue in *Gross v. FBL Financial Services,* 557 U.S. 167, 180 (2009). *Nassar,* 133 S. Ct. at 2528. The Ninth Circuit has applied *Nassar* to ADA retaliation claims. *T.B. v. San Diego Unified Sch. Dist.,* 795 F.3d 1067, 1088 (9th Cir.2015), *decision amended and superseded on denial of rehearing,* 806 F.3d 451, 473 (9th Cir. 2015), *cert. denied,* 136 S. Ct. 1679 (2016).

Oregon statutes use similar "because of" causation language as Title VII and have no express "motivating factor" language similar to 42 U.S.C. § 2000e-2(m), suggesting that the higher "but for" causation standard should apply.

The Supreme Court noted the explosion of retaliation lawsuits in recent years, and specifically described the situation—unfortunately likely all too familiar to some employers—of

the troubled employee facing discipline or termination who tries to manufacture a retaliation claim by invoking unrelated complaints of discrimination. If the Court were to apply the lesser "a motivating factor" causation standard, it noted that it would be too easy for employees to file meritless retaliation claims and too hard for employers to get them dismissed before trial.

The instructions provided no opportunity for the defendant's good faith and successful efforts to eliminate references to Zweizig in the blog, within months of his concern, or for the truth in the blog posts to be evaluated against a "but-for" standard. The blog would have been written any way and the offer of redaction and anonymity showed that there was no adverse action. Plaintiff, however, refused that accommodation, on a long term basis and has not sought an injunction in this case.

In a post-employment negative reference type of case, references need to be untruthful to even constitute an adverse action. In *Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, (2d Cir. 2005)*, Jute claimed that her former supervisor advised an inquiring representative of her prospective new employer that he could not discuss matters pertaining to Jute because she "had a lawsuit pending" against the company, a statement which was false given that she had not commenced any such suit when the comment was made. Id. at 171. The body of work in this area continues to focus on whether a post-employment reference is truthful.

"Disparaging" is defined to mean "to denigrate, to speak ill of or disrespectfully[4]. The language used in the instructions does not allow the jury to consider the truth of Rote's published work and is therefore biased and erroneous.

Instruction #10 should have been amended to reflect the jury verdict form which mandated only that the aiding and abetting action need to be applied to NDT and not to all the

[4] The Law.com Dictionary.

Business Entities. The court, when faced with this issue, should not have allowed a *pro se* defendant to capitulate to an incorrect instruction.

Instruction #11 should have been amended to reflect the jury verdict form which mandated only that the aiding and abetting action needed to be applied to NDT and not to all the Business Entities. That would have been an impossible standard to meet since NDT was out of business.

Instruction #11 provides as follows:

> "The plaintiff has the burden of proving each of the following elements by a preponderance of the evidence in addition to proving the retaliation claim:
>
> 1. The defendant aided, abetted, incited, compelled, or coerced retaliation by the Business Entities [NDT] against the plaintiff; and
>
> 2. The defendant acted outside the scope of his executive authority with respect to any of the Business Entities [NDT] (i.e. not for the benefit of the businesses).
>
> In determining whether defendant acted outside the scope of his employment relevant factors include whether the act occurred substantially within the time and space limits authorized by the employment and whether the act is of a kind which the employee was hired to perform."

The instructions were misleading because it gave the jury no reasonable basis to conclude how to resolve the conflict with the verdict form for an out of business NDT. Supplemental instructions were called for because NDT was out of business, the employer/employee connection was severed and there was no feasible instruction to the jury to interpret and apply this finding of fact. Moreover there was no room to apply the license agreement. Defendant's version of the jury verdict form would have met this mandate.

Instruction #12 provided no opportunity for the jury to discount the measure of emotional distress when considering the truth of the allegations in the blog. Thus the plaintiff was allowed to put on a case almost devoid of any responsibility for his destruction and raised the falsehood of the blog without specificity. The jury would thus conclude that a rapist would be entitled to

noneconomic damages for any published truthful statements about the rape. In so far as the plaintiff admitted a Computer Fraud & Abuse Act violation leading to the shutdown of his employer, the jury could still follow the erroneous instructions and award noneconomic damages when his former boss publishes that fact. A recent case similar to Zweizig's acts resulted in a prison sentence of 4 years and restitution of $1.6 million for the employee.[5]

The jury's question #1 and #2 no doubt implicate the confusion in these instructions.

As to Instruction #13, it is hard to fathom that the defendant's offer and action to redact and rebrand is not a measurable act of mitigation, even though it was the plaintiff' duty. However, there is no instruction as to what to do when the plaintiff blatantly and brazenly admits he had no interest in mitigating nor did he mitigate.

L. The court should grant a new trial for opposing counsel's misconduct, multiple acts of improper jury arguments in closing.

Courts have properly determined that improper jury argument is grounds for a new trial. A number of courts have ruled that asking a jury to "send a message" is misconduct that warrants a new trial. *Carter v. Dist. Of Columbia*, 795 F2d 116, 138 (DC Cir 1986), *Caudle v. Dist. Of Columbia*, 707 F3d 354, 358 (DC Cir 2013). Attorney misconduct warrants a new trial where the "'flavor of misconduct sufficiently permeate[s] n entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Anheuser-Busch, 69 F.3d at 346* (quoting *Kebr v. Smith Barney, Harri Upham & Co., Inc.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (quoting *Standard Oil Co. of Cal. v. Perkins*, 347 F.2d 379, 388 (9thCir. 1965)). "Misconduct does not demand proof of nefarious intent or purpose as a prerequisite to redress. . . . The term can cover even accidental omissions - elsewise it would be pleonastic, because 'fraud' and misrepresentation' would likely subsume it. . . . Accidents -- at least avoidable ones -- should not be immune from the reach of the rule." *Jones v. Aero/Chem Corp.*, 26 921 F.2d 875, 879 (9th

[5] USA v. Laoutaris, No. 16-10516, Fifth Circuit Court of Appeals (January 2018).

Cir. 1990) (finding that the test to be applied when discovery misconduct is alleged in a Rule 59 notion should be borrowed from cases interpreting Rule 60(b)(3).

The proper inquiry of the jury is to evaluate liability for acts towards the plaintiff and then award damages for any emotional distress Zweizig may have suffered. If the court chooses to not void the verdict or alter the judgment the Court should grant a new trial because of improper jury argument by Zweizig in closing, constituting misconduct, which encouraged the jury to decide the case on improper bases, including that (a) the jury should step into Zweizig's shoes, that it should "judge" Rote, and punish him (a punitive damage argument); (b) the alleged noneconomic damage awards in this District for Rote's conduct are in the $2 million range, grossly overstating the truth and surprising the defendant with this last minute amendment; (c) falsely alleging that attacking counsel for his misconduct, that of Linda Marshall or Arbitrator Crow was a defined retaliation act against Zweizig; (d) falsely arguing that a paragraph written by Rote about his plans to publish the actions of Christiansen and the Oregon State Bar PLF, written in Chapter 56 titled "Marshall and Christiansen Confess" (Clackamas County Case), without disclosing this reference, was a statement of plans to send out a million emails about Zweizig, Doc #206-1, p 25; (e) falsely representing that Rote had written 96 chapters and 96,000 words about Zweizig, intentionally misleading the jury about the body of work dedicated to a critical analysis of the arbitration evidence, Zweizig's perjury and Marshall's misconduct (in total 12 chapters); (f) falsely stating that while Zweizig did not mitigate, he did not have a duty to mitigate his damages contrary to the specific instructions to the jury; (g) appealing to the jury to set aside the evidence of NDT's dissolution and the license agreement to find an employer relationship with Rote (in spite of there being no evidence to the contrary) calling for the jury to punish on behalf of the community; (h) falsely claiming that Rote or the Northwest companies make a profit of $4 million a year currently (not in evidence, not ever true, companies are out of

business), presumably to set a baseline for punishment; (i) falsely claiming that a Dominican BPO group allegedly owned by Rote could (and will) make hundreds of thousands of calls about Zweizig (not in evidence, never has been a Dominican BPO group owned by Rote); (j) fabricating a Linkedin account page for Rote claiming he is now down in Los Angeles spending all day harassing Zweizig and (k) claiming the business entities retaliated as opposed to NDT subverting the verdict form, Doc #206-1 p 5, 15.

Of course one inherent issue with the case is that punitive damages were not permitted as the court so instructed but the plaintiff had based its case and commentary during direct arguing for punishment…and continued this theory into the closing arguments. Such an argument was an improper invitation for the jury to award disguised punitive damages and is grounds for a new trial. *Fisher v. McIIroy, 739 SW2d 577, 582 (Mo Ct App 1987)*.

M. The evidence did not support the damages sought or awarded and the amended claim caught the *pro se* defendant by surprise.

The plaintiff clearly tried to show a strong emotional response to the blog and the testimony, bouncing around in his chair. He did the same thing, shaking his head and bouncing around in his chair during the arbitration and had to be admonished. His emotional behavior had an impact but it is all an act.

The plaintiff confirmed during cross that his work and life were not inhibited in any way, shape or form. He did not seek medical attention and no evidence of any harm was offered other than the plaintiff's testimony. Although he asserted harm to Sandra Ware, it is hearsay, and should not have been considered by the jury. Any concern Zweizig had for employment risk, including emotional stress, was eliminated with his admission that he committed computer fraud.

Plaintiff did not seek to mitigate any concerns he has that the blog could interfere with his work opportunities down the road and they had not to date. He just wanted it stopped. He failed to respond to any offer to end his concern. His refusal to mitigate eliminates any credibility of emotional stress. *Mains*, 128 Or App 635. *Vance v. Ball State University*, 133 S Ct. 2434, 186 L Ed. 565 (2013).

A jury's discretion to measure damages does not give it license to "abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket." *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 773 (3d Cir. 1987). When, as here, the jury's award exceeds "even the outermost limits of the range of reasonable and acceptable verdicts for the injury the plaintiff[s] sustained," remittitur is required. *Id.* at 773-75; *see also Longfellow v. Jackson Cnty.*, No. CV 06-3043-PA, 2007 WL 682455, at *2-3 (D. Or. Feb. 28, 2007) (Panner, J.) (holding the evidence "does not come anywhere close to supporting an award of $360,000 for emotional distress" and ordering remittitur to $60,000).

Oregon's attempt to abrogate review of the amount of non-economic damages violates Rote's right to due process and is unenforceable. Oregon stands alone in precluding such review. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 425-26 (1994). The Supreme Court struck down this constraint as applied to punitive damages awards and it is instructional. These concerns similarly mandate review of the grossly excessive non-economic damages awards here.

First, the subjective nature of non-economic damages creates the same "acute danger" that Rote arbitrarily will be deprived of property. *Id.*; *see also, e.g., Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"). Second, judicial review is necessary to safeguard against plaintiffs' efforts to bias the jury against Rote,

as they sought to do by stressing Rote's annual income. Third, Oregon has provided no alternative mechanism to protect Rote's rights, even though the irrational amount of the awards epitomizes the type of arbitrariness that makes review essential. Due process requires remittitur or, alternatively, a new trial.

Based on no evidence and no other testimony (friends, Sandra Ware, medical opinion, psychiatrist, etc.) corroborating Zweizig's testimony, it is clear that the jury award was based on something else, like bias and the plaintiff's request that Rote be punished. Rote's post-trial conversation with juror #5 supports the bias based on plaintiff counsel alleging that Rote makes $4 million a year. Rote did not initiate the conversation. See below.

Absent bias, remitter may be in order; however, the bias is so astoundingly clear and opposing counsel misconduct so extreme, defendant objection not required, that defendant hesitates to even raise the possibility. There is just no evidence in the record that plaintiff actually suffered emotional distress. In fact it appears he was excited about the litigation opportunity and a decent actor. The court would need to conclude that the jury was not influenced bias or misconduct to even consider remittitur.

Nonetheless, as to remittitur Zweizig has made representations of what he considers to be material. In 2003 Zweizig sent an email to Rote attaching a spreadsheet, wherein he claimed the spreadsheet was his evidence of his employer NDT over-billing. He claimed in a letter attachment to the same email that he received the spreadsheet in an email from an undisclosed fellow employee. He never turned over the email. Subsequent analysis revealed that he had fabricated that evidence. The spreadsheet indicated over-billing of $400, roughly $1/1000^{th}$ of what his employer billed that month. The defendant then suggests that Zweizig should consider a remittitur of $500 to be material, which is $1/1000^{th}$ of the capped jury award.

N. A New Trial should be granted because Defendant was denied discovery.

Defendant was duped into a nominal 30 day discovery period by plaintiff counsel. Once discovery requests were made, the discovery period was going to expire before plaintiff responded and plaintiff therefore refused to respond to defendant's discovery requests. Defendant sought an extension of 60 days. See Doc #110. The court denied the request. The trial date was close to a year away. There was no prejudice to plaintiff.

Accordingly, defendant had no idea what plaintiff intended to use for trial exhibits in so far as the blog posts were based on forensic computer reports, including the plaintiff's forensic reports and easily proven as truthful. Defendant identified specific discovery needs and a nominal extension of time.

The Ninth Circuit has held that "the determination of whether neglect is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." Bateman v. U.S. Postal Service, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (citing Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)). Defendant satisfied these conditions.

O. Post-Trial Contact with Juror #5.

After the jury verdict and after the post-verdict session the parties left the court room. The defendant was proceeding to his car and had just been called back by the court's deputy clerk because defendant left a power cord behind.

Juror #5 left the court shortly after the defendant. He engaged the defendant and said "that you should leave the plaintiff and his attorneys alone". That "you make $4 million a year and these people are just trying to live their lives." "Hope we taught you a lesson."

Defendant thanked him for his thoughts. The juror's comments reflect bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict.

Punishment, $4 Million in income, attorneys and plaintiff subject to ridicule—all arguments made by the plaintiff to the jury justifying a large noneconomic award and all misconduct by counsel. The argument made by plaintiff counsel at closing contained the aforementioned information that was not in evidence and is *per se* misconduct.

A new trial should be granted. Opposing counsel should be sanctioned.

P. ORS 31.710 Cap on Damages is incorporated by reference to Defendant's Objection to Form of Judgment and Reply.

IV. CONCLUSION

For the reasons given in this Motion and in its brief in support, Rote respectfully requests the Court to vacate the judgment for lack of jurisdiction (comprising the arbitration mandate, conditions precedent and statute of limitations in the employment contract). In the alternative, defendant Rote respectfully requests the Court vacate judgment and grant a new trial. Rote prays for all other appropriate relief, including sanctioning plaintiff counsel for misconduct.

Dated: March 7, 2018

s/ *Timothy C. Rote*
Timothy C. Rote
Pro Se Defendant

Certificate of Service

I hereby certify that on March 7, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Joel Christiansen

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

s/ Timothy C. Rote
Timothy C. Rote
Pro Se Defendant
E-Mail: Timothy.Rote@gmail.com