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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT ENNIS,)	
)	
Plaintiff,)	2:08-cv-01301-GEB-EFG
)	
v.)	<u>Order Attached to Draft</u>
)	<u>Trial Documents</u>
MORTGAGE TREE LENDING, INC., et al.))	
)	
Defendants.)	
)	

The parties have submitted separate proposed and disputed jury instructions. These filings present a number of issues which are addressed below.

The Final Pretrial Order filed on November 25, 2009 ("FPO") preserves the following claims for trial: conversion, breach of fiduciary duty, and disregard of the corporate entity. Each party filed proposed jury instructions for these claims under California law without discussing whether another state's law applies to any of these claims, thereby indicating their agreement that California law should govern.

Defendants' proposed jury instructions include instructions for a breach of contract claim. However, no breach of contract claim is preserved for trial in the FPO. Further, the FPO incorporates by reference the undisputed facts in the parties' Joint Pretrial Statement ("JPS"), which includes the following statement about an agreement: On October 27, 2003, Plaintiff entered into an Agreement,

1 Waiver and General Release (the "Agreement") with MortgageTree to
2 jointly pursue a claim against MortgageTree's insurer to recover
3 business losses caused by the fire. The Agreement prescribes how any
4 recovered insurance proceeds would be split between Plaintiff and
5 MortgageTree. Specifically, Paragraph 2(d) provides that "[u]pon
6 conclusion of the matter and payment of any claim for loss of
7 business, [MortgageTree] and [Plaintiff] shall apportion the proceeds
8 based upon the prorata share that such would have been shared if it
9 were income in the normal course of business between [MortgageTree]
10 and the Branch." FPO at 3.

11 "A pre-trial order . . . supersedes the pleadings under
12 Fed. R. Civ. P. 16 and controls the subsequent course of the action."
13 Donovan v. Crisostomo, 689 F.2d 869, 875 (9th Cir. 1982) (quotation
14 omitted). "Issues not preserved in the pretrial order are eliminated
15 from the action." Pierce County Hotel Employees and Restaurant
16 Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d
17 1324, 1329 (9th Cir. 1987). Defendants have not shown that their
18 proposed breach of contract instructions concern an issue preserved
19 for trial in the FPO. Therefore, those proposed jury instructions are
20 not included in the draft trial documents attached to this order.

21 In the JPS, Defendants argue that Plaintiff's complaint does
22 not adequately allege a breach of fiduciary duty or disregard of the
23 corporate entity claim, stating:

24 No fiduciary relationship existed between Plaintiff
25 and Defendants and therefore Plaintiff does not
26 have standing to bring an action for breach of
27 fiduciary duty. No breach of duty of care or
28 loyalty has been alleged in the pleadings to
substantiate a cause of action for breach of a
fiduciary duty. No factual allegations have been
made in the pleadings that Defendants' Draizen and
Mize had control over the proceeds or over

1 corporate decisions that could sustain an alter ego
2 theory of liability against them.

3 JPS at 5. However, Plaintiff's complaint contains the conclusory
4 allegation that Defendants breached a "fiduciary duty", and seeks to
5 have MortgageTree's "corporate entity" disregarded. Defendants have
6 not shown they are authorized to challenge the sufficiency of these
7 allegations in the JPS.

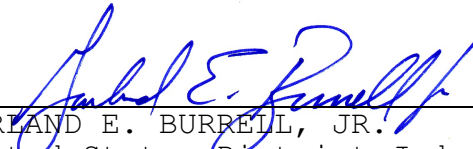
8 Each party's proposed jury instructions for Plaintiff's
9 breach of fiduciary duty claim are unclear. The first element of each
10 proposed breach of fiduciary duty jury instruction contains the word
11 "agent," but the term "agent" is not explained. An instruction shall
12 be filed that explains what factors the jury should consider when
13 deciding whether an agency relationship existed, or alternatively, an
14 explanation as to why this term need not be defined. Further, the
15 breach of fiduciary duty jury instruction Plaintiff proposed does not
16 appear to address a cognizable claim since the first element of
17 Plaintiff's instruction concerns whether MortgageTree was Plaintiff's
18 agent yet the Plaintiff seeks to hold the individual defendants
19 liable. The parties, therefore, are instructed to meet and confer for
20 the purpose of determining whether a satisfactory instruction can be
21 developed for Plaintiff's breach of fiduciary duty claim.

22 The jury instructions for Plaintiff's third claim, labeled
23 "disregard of the corporate entity," also appear deficient.
24 "Ordinarily, a corporation is regarded as a legal entity, separate and
25 distinct from its stockholders, officers and directors, with separate
26 and distinct liabilities and obligations. A corporate identity may be
27 disregarded - the 'corporate veil pierced' - where an abuse of the
28 corporate privilege justifies holding the equitable ownership of a

1 corporation liable for the actions of the corporation. Under the
2 alter ego doctrine, then, when the corporate form is used to
3 perpetrate a fraud, circumvent a statute, or accomplish some other
4 wrongful or inequitable purpose, the courts will ignore the corporate
5 entity and deem the corporation's acts to be those of the persons or
6 organizations actually controlling the corporation, in most instances
7 the equitable owners." Sonora Diamond Corp. v. Superior Court, 83
8 Cal. App. 4th 523, 538 (2000) (quotations and citations omitted). In
9 this case, however, no claim against MortgageTree has been preserved
10 in the FPO, and Plaintiff has not shown what preserved claim for trial
11 warrants the remedy Plaintiff seeks.

12 Each party is granted leave to file proposed, clarifying
13 jury instructions on the issues preserved for trial. Along with draft
14 instructions, some voir dire questions are attached to this order.
15 Many of the voir dire questions the parties proposed are not included
16 because they do not appear aimed at the objective of "fairly and
17 adequately prob[ing] a juror's qualifications" United States
18 v. Toomey, 764 F.2d 678, 683 (9th Cir. 1985). A proposed verdict form
19 is not attached since it is unclear what jury instructions will be
20 given.

21 Dated: April 19, 2010

22
23 
24 _____
GARLAND E. BURRELL, JR.
United States District Judge

1 **Preliminary Instruction No. 1**

2 **Duty of Jury**

3
4 Ladies and gentlemen: You are now the jury in
5 this case, and I want to take a few minutes to
6 tell you something about your duties as jurors
7 and to give you some instructions. At the end
8 of the trial, I will give you more detailed
9 instructions. Those instructions will control
10 your deliberations.

11 You should not take anything I may say or do
12 during the trial as indicating what I think of
13 the evidence or what your verdict should be.

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1 **Preliminary Instruction No. 2**
2 **Burden of Proof**

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4 When a party has the burden of proof on any
5 claim or defense by a preponderance of the
6 evidence, it means you must be persuaded by the
7 evidence that the claim or defense is more
8 probably true than not true.

9 You should base your decision on all of the
10 evidence, regardless of which party presented
11 it.

1 **Preliminary Instruction No. 3**

2

3 The following things are not evidence, and

4 you must not consider them as evidence in

5 deciding the facts of this case:

6

7 (1) statements and arguments of the

8 attorneys;

9 (2) questions and objections of the

10 attorneys;

11 (3) testimony that I instruct you to

12 disregard; and

13 (4) anything you may see or hear when the

14 court is not in session even if what you see

15 or hear is done or said by one of the parties

16 or by one of the witnesses.

1 **Preliminary Instruction No. 4**
2 **Rulings on Objections**
3

4 There are rules of evidence that control what
5 can be received into evidence. When a lawyer
6 asks a question or offers an exhibit into
7 evidence and a lawyer on the other side thinks
8 that it is not permitted by the rules of
9 evidence, that lawyer may object. If I overrule
10 the objection, the question may be answered or
11 the exhibit received. If I sustain the
12 objection, the question cannot be answered, and
13 the exhibit cannot be received. Whenever I
14 sustain an objection to a question, you must
15 ignore the question and must not guess what the
16 answer might have been.

17 Sometimes I may order that evidence be
18 stricken from the record and that you disregard
19 or ignore the evidence. That means that when
20 you are deciding the case, you must not consider
21 the evidence that I told you to disregard.
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1 **Preliminary Instruction No. 5**
2 **Evidence for Limited Purpose**
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4 Some evidence may be admitted for a limited
5 purpose only. When I instruct you that an item
6 of evidence has been admitted for a limited
7 purpose, you must consider it only for that
8 limited purpose and for no other.
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1 **Preliminary Instruction No. 6**
2 **Credibility of Witnesses**

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4 In deciding the facts in this case, you may
5 have to decide which testimony to believe and
6 which testimony not to believe. You may believe
7 everything a witness says, or part of it, or
8 none of it.

9 In considering the testimony of any witness,
10 you may take into account:

- 11 (1) the opportunity and ability of the
12 witness to see or hear or know the things
13 testified to;
14 (2) the witness' memory;
15 (3) the witness' manner while testifying;
16 (4) the witness' interest in the outcome of
17 the case and any bias or prejudice;
18 (5) whether other evidence contradicted the
19 witness' testimony;
20 (6) the reasonableness of the witness'
21 testimony in light of all the evidence; and
22 (7) any other factors that bear on
23 believability.

24 The weight of the evidence as to a fact does
25 not necessarily depend on the number of
26 witnesses who testify.

1 **Preliminary Instruction No. 7**

2 **Conduct of the Jury**

3
4 I am now going to give you jury admonitions
5 that you must remember. When we take recesses I
6 will reference these admonitions by telling you
7 to remember the admonitions or something similar
8 to that. You are required to follow these
9 admonitions whether or not I remind you to
10 remember them:

11 First, you are not to discuss this case with
12 anyone, including your fellow jurors, members of
13 your family, people involved in the trial, or
14 anyone else, nor are you allowed to permit
15 others to discuss the case with you. If anyone
16 approaches you and tries to talk to you about
17 the case please let me know about it
18 immediately;

19 Second, though it is a normal human tendency
20 to converse with people with whom one is thrown
21 in contact, please do not, during the time you
22 serve on this jury, converse whether in or out
23 of the courtroom, with any of the parties or
24 their attorneys or any witness. By this I mean
25 not only do not converse about the case, but do
26 not converse at all, even to pass the time of
27 day. In no other way can all the parties be

1 assured of the absolute impartiality they are
2 entitled to expect from you as jurors;

3 There may be occasions when you come upon one
4 of the attorneys or parties in this case outside
5 the courtroom. The attorneys and parties are
6 now instructed not to communicate with you.
7 Therefore, their failure to acknowledge you
8 should not be interpreted as being impolite, but
9 merely following the Court's orders;

10 Third, do not read any news stories or
11 articles or listen to any radio or television
12 reports about the case or about anyone who has
13 anything to do with it;

14 Fourth, do not do any research, such as
15 consulting dictionaries, searching the Internet
16 or using other reference materials, and do not
17 make any investigation about the case on your
18 own;

19 Fifth, if you need to communicate with me
20 simply give a signed note to my courtroom deputy
21 clerk, who will give to me; and

22 Sixth do not make up your mind about what the
23 verdict should be until after you have gone to
24 the jury room to decide the case and you and
25 your fellow jurors have discussed the evidence.
26 Keep an open mind until then.

27

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1 **Preliminary Instruction No. 8**
2 **No Transcript Available to Jury**

3
4 At the end of the trial, you will have to
5 make your decision based on what you recall of
6 the evidence. You will not have a transcript of
7 the trial. I urge you to pay close attention to
8 the testimony as it is given.

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1 **Preliminary Instruction No. 9**

2 **Taking Notes**

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4 If you wish, you may take notes to help you

5 remember what witnesses said. If you do take

6 notes, please keep them to yourself until you

7 and your fellow jurors go to the jury room to

8 decide the case. Do not let note-taking distract

9 you so that you do not hear other answers by

10 witnesses. When you leave, your notes should be

11 left on the seat on which you are seated.

12

13 Whether or not you take notes, you should

14 rely on your own memory of what was said. Notes

15 are only to assist your memory. You should not

16 be overly influenced by the notes.

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1 **Preliminary Instruction No. 10**
2 **Side Bar Conferences and Recesses**

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4 From time to time during the trial, it may
5 become necessary for me to talk with the
6 attorneys out of the hearing of the jury, either
7 by having a conference at the bench when the
8 jury is present in the courtroom, or by calling
9 a recess. Please understand that while you are
10 waiting, we are working. The purpose of these
11 conferences is not to keep relevant information
12 from you, but to decide how certain evidence is
13 to be treated under the rules of evidence and to
14 avoid confusion and error.

15 We will, of course, do what we can to keep
16 the number and length of these conferences to a
17 minimum. I may not always grant an attorney's
18 request for a conference. Do not consider my
19 granting or denying a request for a conference
20 as any indication of my opinion of the case or
21 of what your verdict should be.

Preliminary Instruction No. 11

During the course of a trial, I may occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

1 **Preliminary Instruction No. 12**

2 **Outline of Trial**

3
4 The next phase of the trial will now begin.
5 First, each side may make an opening statement.
6 An opening statement is not evidence. It is
7 simply an outline to help you understand what
8 that party expects the evidence will show. A
9 party is not required to make an opening
10 statement.

11 Plaintiff will then present evidence, and
12 counsel for defendant may cross-examine. Then
13 defendant may present evidence, and counsel for
14 plaintiff may cross-examine.

15 After the evidence has been presented, the
16 attorneys will make closing arguments and I will
17 instruct you on the law that applies to the
18 case.

19 After that, you will go to the jury room to
20 deliberate on your verdict.

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Closing Jury Instructions

1 **INSTRUCTION NO. 1**

2 Members of the jury, now that you have heard
3 all the evidence and the arguments of the
4 lawyers, it is my duty to instruct you on the
5 law which applies to this case. Each of you is
6 in possession of a copy of these jury
7 instructions, which you may take into the jury
8 room for your use if you find it necessary.

9 It is your duty to find the facts from all
10 the evidence in the case. To those facts you
11 must apply the law as I give it to you. You
12 must follow the law as I give it to you whether
13 you agree with it or not. And you must not be
14 influenced by any personal likes or dislikes,
15 opinions, prejudices or sympathy. That means
16 that you must decide the case solely on the
17 evidence before you and according to the law.
18 You will recall that you took an oath promising
19 to do so at the beginning of the case.

20 In following my instructions, you must follow
21 all of them and not single out some and ignore
22 others; they are all equally important. And you
23 must not read into these instructions or into
24 anything I may have said or done any suggestion
25 as to what verdict you should return. Unless
26 otherwise stated, the instructions apply to each
27 party.
28

INSTRUCTION NO. 2

Although there is more than one defendant in this action, it does not follow that if one is liable, all are liable. Each defendant is entitled to a fair consideration of that defendant's own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against another. Unless otherwise stated, all instructions given apply to the case against each defendant.

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INSTRUCTION NO. 3

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2 When a party has the burden of proof on any
3 claim or defense by a preponderance of the
4 evidence, it means you must be persuaded by the
5 evidence that the claim or defense is more
6 probably true than not true.

7 You should base your decision on all of the
8 evidence, regardless of which party presented
9 it.
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INSTRUCTION NO. 4

The evidence from which you are to decide what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which have been received into evidence; and
- (3) any facts to which the lawyers have agreed or stipulated.

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You are to decide the case solely on the
evidence received at the trial.

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INSTRUCTION NO. 6

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

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INSTRUCTION NO. 7

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

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1 **INSTRUCTION NO. 8**

2 In deciding the facts in this case, you may
3 have to decide which testimony to believe and
4 which testimony not to believe. You may believe
5 everything a witness says, or part of it, or
6 none of it.

7 In considering the testimony of any witness,
8 you may take into account:

- 9 1. the opportunity and ability of the
10 witness to see or hear or know the things
11 testified to;
- 12 2. the witness' memory;
- 13 3. the witness' manner while testifying;
- 14 4. the witness' interest in the outcome of
15 the case and any bias or prejudice;
- 16 5. whether other evidence contradicted the
17 witness' testimony;
- 18 6. the reasonableness of the witness'
19 testimony in light of all the evidence; and
20 7. any other factors that bear on
21 believability.

22 The weight of the evidence as to a fact does
23 not necessarily depend on the number of
24 witnesses who testify.
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INSTRUCTION NO. 9

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2 You have heard testimony from persons who,
3 because of education or experience, are
4 permitted to state opinions and the reasons for
5 those opinions.

6 Opinion testimony should be judged just like
7 any other testimony. You may accept it or reject
8 it, and give it as much weight as you think it
9 deserves, considering the witness' education and
10 experience, the reasons given for the opinion,
11 and all the other evidence in the case.

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INSTRUCTION NO. 10

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. Such charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

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INSTRUCTION NO. 11

Certain charts and summaries have been received into evidence to illustrate facts brought out in the testimony of some witnesses. The charts and summaries are only as good as the underlying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves.

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INSTRUCTION NO. 12
SUBSTANTIAL FACTOR

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4 A substantial factor in causing harm is a
5 factor that a reasonable person would consider
6 to have contributed to the harm. It must be
7 more than a remote or trivial factor. It does
8 not have to be the only cause of the harm.
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1 **INSTRUCTION NO. 14**

2 Some of you have taken notes during the
3 trial. Such notes are only for the personal use
4 of the person who took them.

5 There is always a tendency to attach undue
6 importance to matters which one has written
7 down. Some testimony which is considered
8 unimportant at the time presented, and thus not
9 written down, takes on greater importance later
10 in the trial in light of all the evidence
11 presented. Therefore, you are instructed that
12 your notes are only a tool to aid your own
13 individual memory and you should not compare
14 your notes with other jurors in determining the
15 content of any testimony or in evaluating the
16 importance of any evidence. Your notes are not
17 evidence, may not be accurate, and are by no
18 means a complete outline of the proceedings or a
19 list of the highlights of the trial. Above all,
20 your memory should be your greatest asset when
21 it comes time to deliberate and render a
22 decision in this case.
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INSTRUCTION NO. 15

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3 The fact that I have instructed you as to the
4 proper measure of damages should not be
5 considered as intimating any view of mine as to
6 which party is entitled to your verdict in this
7 case.
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INSTRUCTION NO. 17

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be -- that is entirely for you to decide.

INSTRUCTION NO. 18

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that will be given to you, sign and date it and advise the United States Marshal's representative outside your door that you are ready to return to the courtroom.

1 **Voir Dire**

2 1. Counsel, the Jury Administrator has already
3 randomly selected potential jurors and placed
4 their names on the sheet that has been provided
5 to each party in the numerical sequence in which
6 they were randomly selected and each juror has
7 been placed in his or her randomly-selected
8 seat.

9 2. I will ask a series of questions to the
10 jurors as a group. If you have a response,
11 please raise your hand or the number you've been
12 given, which reflects your seat number.

13 Generally, you will be given an opportunity to
14 respond in accordance with the numerical order
15 in which you are seated, with the juror in the
16 lowest numbered seat first. If no juror raises
17 his or her hand, I will simply state "no
18 response" for the record and then ask the next
19 question. If you know it is your turn to
20 respond to a question, you may respond before I
21 call your name by first stating your last name,
22 then your seat number, and lastly your response.
23 That should expedite the process.

24 3. This case is expected to take _____
25 days for the presentation of evidence, after
26 which they will give you closing arguments.
27 After closing arguments, I will give you closing
28 jury instructions and you will begin your
deliberations. Because I handle criminal
matters on Fridays and other civil matters on
Mondays, we will only be in trial three days a
week: Tuesday, Wednesday, and Thursday. On the
days we are in trial, we will begin at 9:00 a.m.

1 and usually end around 4:30 p.m. As soon as you
2 commence jury deliberations, you will be
3 expected to deliberate as necessary during these
4 hours, including Mondays and Fridays, but not on
5 the weekends, until you complete your
6 deliberations. Will any of you find it
difficult or impossible to participate in this
trial during these times?

7 4. Is there any member of the panel have problem
8 that would make it difficult serve as a jury on
this case?

9 5. I will briefly describe the allegations in
10 this case for the purpose of seeing if this is
11 the type of case on which you could serve a fair
and impartial juror.

12 Read essence of parties' Joint Statement

13 7. Is there anything about the allegations
14 in this lawsuit that causes any potential juror
15 to prefer not being a juror on this type of
case?

16
17 6. Would the plaintiffs' counsel introduce
18 himself, his clients, and indicate any witness
that plaintiffs may choose to call.

19 7. Defendants' counsel now has the
20 opportunity to do the same thing.

21 Do you know any of the named individuals
22 or any of the potential witnesses; or ever had
23 any business or other dealings with any person
just named?

24 8. Have you ever served as a juror in a
25 criminal or a civil case, either in federal or
any other court?

1 i. Please state the nature of the case
2 and, without stating the result reached, state
3 whether the jury reached a verdict.

4 9. My deputy clerk will give juror number 1
5 a sheet on which there are questions that I want
6 each of you to answer. Please pass the sheet to
7 the juror next to you after you answer the
8 questions.

- 8 (a) Name
- 9 (b) Age
- 10 (c) Educational background
- 11 (d) Your marital status
- 12 (e) Present and former occupations
for you and any person residing
with you
- 13 (f) Interests and hobbies

14 10. Each side has dire-20 minutes for follow-
15 up voir dire.
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