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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

<p>SIE ERVINE, et al.,</p> <p style="text-align: center;">Plaintiff(s),</p> <p style="text-align: center;">v.</p> <p>DESERT VIEW REGIONAL MEDICAL CENTER HOLDINGS, LLC, et al.,</p> <p style="text-align: center;">Defendant(s).</p>		<p>Case No. 2:10-CV-1494 JCM (GWF)</p> <p style="text-align: center;">ORDER</p>
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Presently before the court are several motions in limine filed by defendants Georges Tannoury, M.D. (a corporation) and Dr. Georges Tannoury (an individual) (collectively, “defendants”). (ECF Nos. 127, 128, 129, 130, 131, 132, 133). Plaintiffs filed responses to defendants’ first, second, third, fifth, and seventh motions.¹ (ECF Nos. 140, 141, 142, 143, 144).

Also before the court are two motions in limine filed by plaintiff Sie Ervine, who is named in his personal capacity and as executor of the estate of Charlene Ervine (hereinafter referred to as “plaintiffs,” to afford consistency with the parties’ filings). (ECF Nos. 134, 135). Defendants filed a response to plaintiffs’ second motion in limine.² (ECF No. 138).

¹ Plaintiffs response to defendants’ third motion in limine is styled as a response to defendants’ third, fourth and sixth motions in limine. (ECF No. 142). The court need not decide whether this filing practice comports with the Local Rules. Assuming that it does, plaintiffs’ filing does not provide an adequate basis for denying any of defendants’ corresponding motions.

² Review of the ECF docket text suggests that defendant attempted to file responses to both of plaintiffs’ motions in limine. (See ECF Nos. 138, 139). However, defendant filed the same response document twice, titled “Defendants...opposition to plaintiffs’ motion in limine no. 2 to exclude irrelevant testimony or evidence of adequate medical care or treatment.” Id. The document only addresses plaintiffs’ second motion in limine. Id.

James C. Mahan
U.S. District Judge

1 Also before the court is plaintiffs' request for amendment of the parties' joint pretrial
2 statement. (ECF No. 145).

3 **I. Facts**

4 On September 14, 2010, plaintiffs filed an amended complaint. (ECF No. 4). Plaintiffs'
5 amended complaint asserts federal causes of action under Section 504 of the Rehabilitation Act
6 and Title III of the Americans with Disabilities Act ("ADA"), and state causes of action for
7 negligent and intentional infliction of emotional distress. *Id.*

8 On December 8, 2011, the court dismissed plaintiffs' federal claims as being filed outside
9 of the relevant statute of limitations. (ECF No. 64). Plaintiffs timely appealed, and the Ninth
10 Circuit vacated in part and reversed in part. (ECF No. 71). The Ninth Circuit decision held that
11 plaintiffs lacked standing to bring claims under Title III of the ADA, and that plaintiffs' Section
12 504 claims were not time-barred. *Id.* Thus, plaintiffs' remaining federal claims concern only
13 Section 504 of the Rehabilitation Act.

14 On September 27, 2016, the court denied the parties' cross-motions for summary judgment
15 on plaintiffs' Section 504 claims. (ECF No. 102). As to plaintiffs' state law claims, the court
16 granted defendant Desert View's motion for summary judgment in part, thereby limiting the scope
17 of plaintiffs' allowable claim for negligent infliction of emotional distress, but otherwise denied
18 cross-motions for summary judgment. *Id.*

19 The case is currently set for trial on September 25, 2017. In anticipation, the parties filed
20 the instant motions in limine.

21 **II. Legal Standard**

22 i. Motion in limine

23 "The court must decide any preliminary question about whether . . . evidence is
24 admissible." Fed. R. Evid. 104. Motions in limine are procedural mechanisms by which the court
25 can make evidentiary rulings in advance of trial, often to preclude the use of unfairly prejudicial
26 evidence. *United States v. Heller*, 551 F.3d 1108, 1111–12 (9th Cir. 2009); *Brodit v. Cambra*, 350
27 F.3d 985, 1004–05 (9th Cir. 2003).

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1 “Although the Federal Rules of Evidence do not explicitly authorize in limine rulings, the
2 practice has developed pursuant to the district court’s inherent authority to manage the course of
3 trials.” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1980). Motions in limine may be used to
4 exclude or admit evidence in advance of trial. See Fed. R. Evid. 103; *United States v. Williams*,
5 939 F.2d 721, 723 (9th Cir. 1991) (affirming district court’s ruling in limine that prosecution could
6 admit impeachment evidence under Federal Rule of Evidence 609).

7 Judges have broad discretion when ruling on motions in limine. See *Jenkins v. Chrysler*
8 *Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002); see also *Trevino v. Gates*, 99 F.3d 911, 922 (9th
9 Cir. 1999) (“The district court has considerable latitude in performing a Rule 403 balancing test
10 and we will uphold its decision absent clear abuse of discretion.”). “[I]n limine rulings are not
11 binding on the trial judge [who] may always change his mind during the course of a trial.” *Ohler*
12 *v. United States*, 529 U.S. 753, 758 n.3 (2000); accord *Luce*, 469 U.S. at 41 (noting that in limine
13 rulings are always subject to change, especially if the evidence unfolds in an unanticipated
14 manner).

15 “Denial of a motion in limine does not necessarily mean that all evidence contemplated by
16 the motion will be admitted at trial. Denial merely means that without the context of trial, the
17 court is unable to determine whether the evidence in question should be excluded.” *Conboy v.*
18 *Wynn Las Vegas, LLC*, No. 2:11-cv-1649-JCM-CWH, 2013 WL 1701069, at *1 (D. Nev. Apr. 18,
19 2013).

20 ii. Relevance and the potential for unfair prejudice

21 “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than
22 it would be without the evidence; and (b) the fact is of consequence in determining the action.”
23 Fed. R. Evid. 401. “Irrelevant evidence is not admissible.” Fed. R. Evid. 402. Further “[t]he court
24 may exclude relevant evidence if its probative value is substantially outweighed by a danger of
25 one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue
26 delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

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1 iii. Expert testimony

2 If scientific, technical, or other specialized knowledge will assist the trier of fact to
3 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
4 knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion
5 or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the
6 product of reliable principles and methods, and (3) the witness has applied the principles and
7 methods reliably to the facts of the case. FED. R. EVID. 702.

8 The district court serves a gatekeeper function in evaluating scientific testimony. *Daubert*
9 *v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). When a district court is faced with a proffer
10 of scientific testimony, it must make a preliminary determination under FRE 702 whether the
11 reasoning or methodology underlying the testimony is scientifically valid. *Id.* at 592-93. A key
12 question to be answered in determining whether a theory or technique is scientific knowledge that
13 will assist the trier of fact will be whether it can be tested. *Id.* at 593.

14 The objective of this gatekeeping requirement is to ensure the reliability and relevancy of
15 expert testimony. It is to make certain that an expert, whether basing testimony upon professional
16 studies or personal experience, employs in the courtroom the same level of intellectual rigor that
17 characterizes the practice of an expert in the relevant field. *Kumho Tire Co. v. Carmichael*, 526
18 U.S. 137, 152 (1999). This gatekeeping requirement applies not only to scientific testimony but to
19 all expert testimony covered by FRE 702. *Id.* at 147-49.

20 FRE 702 requires a valid connection to the pertinent inquiry as a precondition to
21 admissibility. *Id.* at 149 (quoting *Daubert*, 509 U.S. at 592). And where such testimony’s factual
22 basis, data, principles, methods, or their application are called sufficiently into question . . . the
23 trial judge must determine whether the testimony has a reliable basis in the knowledge and
24 experience of [the relevant] discipline. *Id.* (citations omitted). “[W]here foundational facts
25 demonstrating relevancy or qualification are not sufficiently established, exclusion of proffered
26 expert testimony is justified.” *LuMetta v. United States Robotics, Inc.*, 824 F.2d 768, 771 (9th Cir.
27 1987).

28 . . .

1 **III. Discussion**

2 i. Defendants' first motion in limine

3 Defendant's first motion in limine seeks to exclude the expert testimony of Dr. Wendy
4 Eastman.³ (ECF No. 127). Defendants argue that Dr. Eastman's testimony is not relevant because
5 plaintiffs' designation of Dr. Eastman as an expert, and Dr. Eastman's underlying report, focus on
6 the Americans with Disabilities Act ("ADA") and its application to Mr. Ervine's claims. *Id.*
7 Further, defendants argue that Dr. Eastman's opinions regarding compliance with federal
8 regulations are not reliable because they are based on personal experience and because Dr.
9 Eastman has no experience in federal regulation compliance.⁴ *Id.* Plaintiffs respond that Dr.
10 Eastman has extensive experience with communication in the medical field and her testimony is
11 equally relevant to Section 504 claims as it would be to ADA claims. (ECF No. 140).

12 Defendants have not established that Dr. Eastman's testimony will be irrelevant. Dr.
13 Eastman's report focuses on plaintiffs' ADA claims. This report was written in 2011, prior to
14 dismissal of plaintiffs' ADA claims. (ECF No. 127-1 at 7–18 (Dr. Eastman's 2011 report). Given
15 the similarity between the dismissed ADA claims and the active Section 504 claims, Dr. Eastman's
16 testimony is likely both probative and material with respect to plaintiffs' outstanding claims.

17 Further, defendants have not shown that Dr. Eastman's anticipated testimony will be
18 unreliable. Dr. Eastman is a neurologist who specializes in child neurology. Dr. Eastman has been
19 deaf since birth. *Id.* at 5 (Dr. Eastman's CV). As a practicing physician, Dr. Eastman has spent
20 much of her career focused on the relationship between medicine and hearing disabilities. *Id.* at

21 _____
22 ³ Dr. Eastman recently changed her name from Wendy Osterling to Wendy Eastman. (ECF
23 No. 145).

24 ⁴ There appears to be irreconcilable tension between the parties' positions on their own
25 experts and their motions in limine to exclude the opposing party's experts. Compare (ECF No.
26 127) ("As a practicing physician in a non-rural area, [Dr. Eastman] does not have the background
27 sufficient to opine regarding federal regulation compliance in a rural area such as Pahrump, NV. .
28 . . . Dr. [Eastman] has not disclosed or discussed any experience in federal regulation compliance
whatsoever."), and (ECF No. 139-1) (defendants' expert disclosure related to Dr. Gollard), with
(ECF No. 134) ("As a practicing physician in a non-rural area, [Dr. Gollard] does not have the
background sufficient to opine regarding federal regulation compliance in a rural area such as
Pahrump, NV . . . Dr. Gollard has not disclosed or discussed any experience in federal regulation
compliance whatsoever."), and (ECF No. 140) (plaintiffs' response to defendants' motion to
exclude Dr. Eastman's testimony).

1 4-5. At this stage of proceedings, the court cannot state that Dr. Eastman's testimony lacks
2 sufficient indicia of reliability.

3 Defendants' motion does not make a strong enough showing of non-relevance or
4 unreliability to merit exclusion of Dr. Eastman's testimony through a motion in limine.

5 ii. *Defendants' second motion in limine*

6 Defendants' second motion in limine seeks to prevent plaintiffs' counsel from making
7 "golden rule arguments, appeals to sympathy, and other inappropriate arguments." (ECF No. 130).
8 Defendants' motion lists conduct that they argue should be inadmissible. (See ECF No. 130 at 5)
9 ("The list of the impermissible conduct or statement [sic] and arguments applicable to this case is
10 as follows: 1. Accusing experts, without any evidence, of committing perjury and personally
11 attacking their credibility. 2. Improperly interjecting Plaintiffs counsel 's personal opinions about
12 the Defendant, as well as giving his personal opinion as to the justness of his client's cause, and
13 that of other plaintiffs claiming injuries. 3. Asking the jury to send a "message" to defense firms
14 in town by giving a high award to the Plaintiff. 4. Asking the jury to place themselves in the
15 position of the Plaintiff. 5. Sharing personal opinions as to justice, credibility, or culpability issues.
16 6. Asserting that this case is a crusade for justice or other, similar statements. 7. Arguing that
17 Defendants wasted jurors' time or taxpayer money, or must take responsibility for their conduct.
18 8. Indicating that Defendants refused to take responsibility, refused to offer compensation, or have
19 deep pockets."). Plaintiffs respond that defendants' motion is overbroad. (ECF No. 142).

20 Defendants' motion will be granted to the extent that it requests this court to exclude
21 inappropriate arguments of counsel. Defendants' motion begins with a request for "an Order
22 prohibiting counsel from offering any evidence or making any direct or indirect reference
23 regarding jury nullification, personal opinion(s) about this case, or Golden Rule arguments." (ECF
24 No. 130 at 3). However, defendants' motion then focuses entirely on the law governing arguments
25 of counsel, and concludes with a prayer for relief to that effect. *Id.* at 3-5. Thus, this court
26 considers defendants' motion a request to limit arguments of counsel so as to exclude inappropriate
27 argumentation. This avoids any potential for overbreadth mentioned in plaintiffs' response.

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1 The court will limit arguments of counsel at trial to relevant and proper facts and evidence
2 of the case and the applicable governing law.⁵ As “it is unlikely that any order in limine will act
3 as a perfect prophylactic against impermissible argument,” *White v. Ford Motor Co.*, Case No.
4 CV-N-95-0279-DWH, 2003 WL 23353600, at *14 (D. Nev. Dec. 30, 2003), in order to preserve
5 error at trial, counsel for either side should object to improper argument from opposing counsel.

6 iii. *Defendants’ third motion in limine*

7 Defendant’s third motion in limine seeks to exclude references to, argument regarding, or
8 evidence relating to defendants’ insurance coverage. (ECF No. 129). “Evidence that a person was
9 or was not insured against liability is not admissible to prove whether the person acted negligently
10 or otherwise wrongfully.” Fed. R. Evid. 411. Defendants’ motion states that evidence of
11 defendants’ insurance does not relate to any admissible “exception” to the above rule (although it
12 may be better to characterize the first sentence of FRE 411 as an exception to the general rule that
13 all relevant evidence is admissible). (ECF No. 129). Plaintiffs’ response to the motion does not
14 dispute defendants’ assertions that defendants’ insurance cannot be used for any non-excludable
15 purpose. (ECF No. 142). Therefore, defendants’ motion is granted.

16 iv. *Defendants’ fourth motion in limine*

17 Defendants’ fourth motion in limine seeks to exclude evidence or testimony regarding
18 settlement negotiations or offers to settle. (ECF No. 131). Evidence of compromise offers and
19 statements made during compromise negotiations is not admissible “to prove or disprove the
20 validity or amount of a disputed claim or to impeach by a prior inconsistent statement or
21 contradiction.” Fed. R. Evid. 408.

22 Here, defendants have engaged in multiple settlement conferences and informal
23 negotiations with plaintiffs in an attempt to resolve plaintiffs’ claims. (ECF No. 131). Defendant
24 asks the court to exclude evidence of these negotiations. *Id.* Plaintiffs’ response does not dispute
25 that such evidence would be inadmissible. (ECF No. 142). Therefore, the court will grant
26 defendants’ fourth motion in limine.

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28 ⁵ The court will apply the same standard to defendants’ counsel, as the “limitation” that
defendants request in essence asks the court to enforce the rules and law governing procedure and
evidence at trial.

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v. *Defendants' fifth motion in limine*

Defendants' fifth motion in limine seeks to exclude all witnesses not specifically named and documents not previously identified in plaintiffs' disclosures currently on file. (ECF No. 128). Defendant argues that admission of such evidence or witness testimony would cause unfair surprise and substantial prejudice to defendants. *Id.* Plaintiffs' response states that plaintiffs "stipulate to a reasonable application of the [Federal] Rules [of Civil Procedure] to preserve order and judicial process but not overbroad in a way that would prejudice either party." (ECF No. 143 at 5).

Defendants' motion is substantially overbroad. The court will not make a blanket ruling at this stage that anything outside of plaintiffs' disclosures will per se cause unfair surprise and substantial prejudice to defendants. These determinations can only be made if and when plaintiffs attempt to introduce evidence or witness testimony not contained in their disclosures. Denial of defendants' fifth motion in limine is appropriate. See *Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-1649-JCM-CWH, 2013 WL 1701069, at *1 (D. Nev. Apr. 18, 2013) ("[W]ithout the context of trial, the court is unable to determine whether the evidence in question should be excluded.").

vi. *Defendants' sixth motion in limine*

Defendants' sixth motion in limine seeks to exclude any potential reference or evidence offered by plaintiffs as to the size of defendants' law firm. (ECF No. 132). Defendant argues that this evidence should be excluded as irrelevant under FRE 402 and unfairly prejudicial under FRE 403. *Id.* Plaintiffs' response asserts that defendants' motion quotes no law or rule directly on point and did not provide an example of a case where mentioning the size of defendants' law firm has constituted unfair prejudice. (ECF No. 142 at 5).

Evidence of the size of defendants' law firm will likely be inadmissible at trial. Defendant asserts that this evidence is not relevant, and plaintiffs' response contains no reason why the size of defendants' retained counsel would be probative of or material to plaintiffs' claims. Further, assuming that it was relevant, the minimal probative value offered by such evidence would likely be substantially outweighed by the danger of unfair prejudice and confusion of the issues.

1 Therefore, the court will grant defendants' sixth motion in limine pursuant to FRE 402 and FRE
2 403.

3 vii. *Defendants' seventh motion in limine*

4 Defendants' seventh motion in limine seeks to exclude Deaf and Hard of Hearing
5 Advocacy Resource Center ("DHHARC") records identified as DHHARC 001-61 ("the DHHARC
6 records") under FRE 802 as hearsay not within an exception. (ECF No. 133). Defendants argue
7 that the records are replete with hearsay, and offer two examples that defendants assert contain
8 multiple levels of hearsay. *Id.* Plaintiffs claim that much of the evidence could be offered for
9 relevant non-hearsay purposes. (ECF No. 144). Plaintiffs further argue that any potential hearsay
10 problems fit within FRE 803(6)'s exception for records of a regularly conducted activity. *Id.*

11 Hearsay is an out of court statement offered to prove the truth of the matter asserted. FRE
12 801. The Federal Rules of Evidence exclude all hearsay statements that do not fit within a
13 delineated hearsay exception. FRE 802. FRE 803(6) provides an exception to the rule against
14 hearsay for records of a regularly conducted activity. FRE 803(6) provides as follows:

15 A record of an act, event, condition, opinion, or diagnosis [is not excluded by the
16 rule against hearsay] if:

17 (A) the record was made at or near the time by—or from information
transmitted by—someone with knowledge;

18 (B) the record was kept in the course of a regularly conducted activity of a
19 business, organization, occupation, or calling, whether or not for profit;

20 (C) making the record was a regular practice of that activity;

21 (D) all these conditions are shown by the testimony of the custodian or
22 another qualified witness, or by a certification that complies with Rule
902(11) or (12) or with a statute permitting certification; and

23 (E) the opponent does not show that the source of information or the method
or circumstances of preparation indicate a lack of trustworthiness.

24 Fed. R. Evid. 803(6).

25 The DHHARC records contain DHHARC employee notes of conversations with Mrs.
26 Ervine, other DHHARC employees, and medical providers and staff. (ECF No. 133-1). Plaintiffs
27 response correctly asserts that some statements within the DHHARC records could be offered for
28 purposes other than proving the truth of the matter asserted, and may thus fall outside the scope of

1 FRE 802. (ECF No. 144). Further, plaintiffs’ response correctly identifies 803(6) as a possible
2 exception to certain hearsay statements. *Id.* Plaintiffs attach to their response the declaration of a
3 former custodian who states that he has reviewed the records and can verify the conditions for
4 admission, as required by 803(6)(D). (ECF No. 144-1).

5 The court will thus deny defendants’ motion in limine. See Conboy, No. 2:11-cv-1649-
6 JCM-CWH, 2013 WL 1701069, at *1 (noting that denial of a motion in limine means only that,
7 without the context of trial, the court cannot determine whether the evidence at issue should be
8 excluded). Of course, as both parties accurately note, if there are ever multiple levels of hearsay
9 present, plaintiffs would have to find a relevant exception for each level of hearsay if they wish to
10 offer a statement for the truth of the matter asserted.

11 viii. *Plaintiffs’* motions in limine

12 Plaintiffs filed two motions in limine, seeking to exclude expert testimony and to prevent
13 evidence as to whether the medical care received by Mrs. Ervine was adequate. (ECF Nos. 134,
14 135).

15 “Motions in limine will not be considered unless the movant attaches a statement certifying
16 that the parties have participated in the meet-and-confer process and have been unable to resolve
17 the matter without court action.” LR 16-3(a). Plaintiffs failed to attach the proper statement to
18 either motion. Compare (ECF Nos. 134, 135) (plaintiffs’ motions), with (ECF Nos. 127, 128, 129,
19 130, 131, 132, 133) (defendants’ motions). Therefore, the court cannot consider plaintiffs’
20 motions.⁶ See LR 16-3(a).

21 ix. *Plaintiffs’* request to amend

22 Plaintiffs’ counsel filed a “request” to amend the parties’ joint pretrial statement to add Dr.
23 Eastman to plaintiffs’ list of witnesses. (ECF No. 145). The court will grant plaintiffs’ counsel
24 leave to file an appropriate motion.

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28 ⁶ A motion in limine may not be filed within 30 days of trial unless a court order authorizes
such filing. LR 16-3(a). The court will not allow plaintiffs to re-file their motions in limine, as
plaintiffs’ motions are without merit.

1 **IV. Conclusion**

2 Defendants presented adequate grounds for the court to grant their second, third, fourth,
3 and sixth motions in limine. Defendants fail to demonstrate that exclusion of plaintiffs' expert is
4 proper at this time. Defendants' request that the court prevent plaintiffs from introducing any
5 evidence or expert testimony not already disclosed would require this court to render a premature
6 and improper ruling that any such evidence is prejudicial and would cause unfair surprise. The
7 DHHARC records may be admissible at trial, at least in part.

8 Plaintiffs failed to attach the requisite documentation to their motions in limine.

9 Accordingly,

10 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' first motion
11 in limine (ECF No. 127) be, and the same hereby is, DENIED.

12 IT IS FURTHER ORDERED that defendants' second motion in limine (ECF No. 128) be,
13 and the same hereby is, GRANTED, consistent with the foregoing.

14 IT IS FURTHER ORDERED that defendants' third motion in limine (ECF No. 129) be,
15 and the same hereby is, GRANTED.

16 IT IS FURTHER ORDERED that defendants' fourth motion in limine (ECF No. 130) be,
17 and the same hereby is, GRANTED.

18 IT IS FURTHER ORDERED that defendants' fifth motion in limine (ECF No. 131) be,
19 and the same hereby is, DENIED.

20 IT IS FURTHER ORDERED that defendants' sixth motion in limine (ECF No. 132) be,
21 and the same hereby is, GRANTED.

22 IT IS FURTHER ORDERED that defendants' seventh motion in limine (ECF No. 133) be,
23 and the same hereby is, DENIED.

24 IT IS FURTHER ORDERED that plaintiffs' first motion in limine (ECF No. 134) be, and
25 the same hereby is, DENIED.

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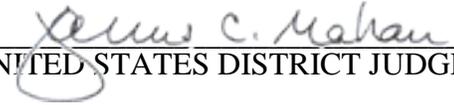
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IT IS FURTHER ORDERED that plaintiffs' second motion in limine (ECF No. 135) be,
and the same hereby is, DENIED.

DATED September 13, 2017.


UNITED STATES DISTRICT JUDGE