No. 13-17361

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD YORK EVANS and JOHN WITHEROW
Plaintiffs-Appellants,

v.

INMATE CALLING SOLUTIONS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
No. 3:08-cv-00353-RCJ-VPC
Hon. Robert Clive Jones

APPELLANT WITHEROW'S OPENING BRIEF

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I.

INTRODUCTION

This is an appeal by Plaintiff/Appellant John Witherow[1] ("Witherow"), a former inmate with the Nevada Department of Corrections, from District Court decisions: granting dismissal of his claims against Defendants Inmate Calling Solutions ("ICS"), Embarq and Global Tel*Link ("Global"); denying him an opportunity to amend his pro se complaint; granting summary judgment of his §1983 civil rights claims against Defendants Skolnik, Helling, Donat, Henley, Baker and Connally and his 18 U.S.C. §2510, et seq. claims against Defendants Skolnik, Helling, Donat and Baker; imposing Evans' sanctions for failure to cooperate in the discovery process against Witherow; and erroneously instructing the jury on initial monitoring and re-monitoring of attorney client telecommunications, as will more fully appear herein below and in imposing Plaintiff Don Evan's sanctions against Witherow.

II.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 18 U.S.C. §2520 and 28

[1]Appellant, attorney Donald York Evans ("Evans") had a separate appeal pending, Appeal No. 13-17360, which has since been dismissed. Evans was not a party at the time of trial.

U.S.C. §§ 1331 and 1343. The District Court issued a final judgment (*EOR I, pp. 8*) disposing of all claims on 10/16/13. Witherow timely appealed on 11/15/13 (*EOR V, pp. 781-798*) and on 12/2/13 (*Id., pp. 771-780*). This Court has jurisdiction of the appeal under 28 U.S.C. §1291.

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing Witherow's civil rights claims against Appellees ICS, Embarq and Global based on a finding these Appellees were not acting under color of state law.

2. Whether District Court erred in refusing Witherow leave to amend his Second Amended Complaint ("SAC") to allege sufficient facts to state a claim against Appellees ICS, Embarq and Global for violation of his constitutional and statutory rights involved in the interception and monitoring of his privileged telecommunications with his attorneys.

3. Whether the District Court erred in granting summary judgment to Appellees on Witherow's Fourth and Fourteenth Amendment claims based on a finding Witherow did not have a reasonable expectation of privacy in his privileged telecommunications with his attorneys and he consented to the monitoring on occasions.

4. Whether the District Court erred in determining Appellees were acting pursuant to an "ordinary course of business" exemption to the Omnibus Crime Control and Safe Streets Act ("Wire Tap Act") when initially intercepting and monitoring Witherow's telecommunications with his attorneys and the re-monitoring of attorney-client telephone conversations to determine the nature of the communications.

5. Whether the District Court erred in granting summary judgment to Appellees on Witherow's Fourteenth Amendment claims based on an inadequate analysis of those claims.

6. Whether the District Court erred in granting summary judgment to Appellees Henley, Donat and Helling for their conduct in the grievance process.

7. Whether the District Court erred in the imposition of Evans' sanctions for failure to cooperate in the discovery process against Witherow.

8. Whether the District Court erred in refusing to instruct the jury regarding state law and regulations governing the "duties" of NDOC employees regarding the interception and monitoring of prisoner telecommunications with their attorneys and in instructing the jury that intercepting, monitoring and re-monitoring prisoner telecommunications with their attorneys was permissible in the ordinary course of Appellees' duties.

Pursuant to Circuit Rule 28-2.7, all pertinent constitutional provisions, statutes, and rules are contained in the attached addendum.

IV.

STANDARD OF REVIEW

This Court reviews *de novo* a dismissal of a complaint under FRCP 12(b)(6) for failure to state a claim upon which relief can be granted. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 623 (9th Cir. 1988).

This Court reviews a grant of summary judgment de novo and must determine, viewing the facts in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the District Court correctly applied the relevant substantive law. Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

This Court reviews the imposition of sanctions and evidentiary rulings for an abuse of discretion. Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1009 (9th Cir. 2004), and Tritcher v. County of Lake, 358 F.3d 1150, 1154 (9th Cir. 2004). When the matter turns on the resolution of a legal issue, review is *de novo*. Palmer v. Pioneer Inn Assocs., Ltd., 338 F.3d 981, 985 (9th Cir. 2003).

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V.

STATEMENT OF THE CASE

A. NATURE OF CASE

This is a civil action for declaratory, injunctive and monetary relief to redress the injuries and damages Witherow suffered, and continues to suffer, as a direct or proximate result of the conduct of Appellees that violated the statutory and constitutional rights of Witherow, as more fully appears in the SAC (*EOR XVI, pp. 4082-4114*) and the proposed Third Amended Complaint (*EOR XV, pp. 3806-3852*).

B. COURSE OF THE PROCEEDINGS

On 6/25/08 Appellants, by and through Attorney Marc Picker, filed a Complaint (*EOR XVII, pp. 4192-4200*) and on 7/3/08 a Motion for Preliminary Injunction (*Id., pp. 4167-4191*).

On 11/21/08 a Stipulation (*EOR XVI, pp. 4164-4166*) was filed by the Parties indicating Appellees would not intercept Witherow's attorney/client telecommunications and on 12/1/08 an Order (*EOR I, pp. 114-116*) was filed reflecting that agreement.

On 12/19/08 Appellants' First Amended Complaint ("FAC") (*EOR XVI, pp. 4150-4163*) was filed.

On 1/26/09, 2/9/09 and 3/4/09 Appellees Skolnik, Helling, Donat, Henley, Baker, Embarq and ICS filed Answers (*Id., pp. 4123-4149*) to FAC.

On 3/9/09 an Order (*Id., pp.4115-4118*) was filed granting Witherow leave to represent himself in the place and stead of Attorney Picker in this action.

On 5/5/09 Witherow's SAC (*Id., pp. 4082-4114*) was filed, which added Connally and ten (10) Does as Defendants, added facts, and delineated 116 causes of action.

On 5/19/09, 5/22/09 and 7/17/09 Appellees ICS, Embarq[2] and Global filed Motions to Dismiss (*Id., pp. 4007-4020, and 4053-4081*), on 6/17/09, 7/30/09 and 8/3/09 Witherow responded (*Id., pp. 3916-4006; and 4031-4052*) and on 7/1/09, 8/13/09 and 9/10/09 these Appellees replied (*Id., pp. 3902-3915; and 4021-4030*).

On 10/2/09 the Report and Recommendation of U.S. Magistrate Judge ("MJ Report 1") (*EOR I, pp. 102-111*) on Appellees' Motion to Dismiss was filed finding Appellees ICS, Embarq and Global were not acting under of state law, SAC failed to set forth sufficient facts to state a claim against Appellees ICS, Embarq and Global and recommending Witherow's claims against them be dismissed. Evans dismissed with prejudice his claims against ISC (*Id., pp. 112-*

[2]Embarq filed a combined Motion to Dismiss and Motion for Summary Judgment (*XVI, pp. 4053-4072*) and Witherow moved to stay summary judgment (*Id., pp. 3943-4006*).

113), he did not oppose the motions of the remaining private party Appellees and the Magistrate recommended dismissal of Evans' claims against them. (*Id., p. 105, ln. 16-23, and p. 108*).

On 10/19/09 Witherow's Objection to Report and Recommendation of U.S. Magistrate Judge ("Objection 1") (*EOR XVI, pp. 3884-3901*) was filed and on 11/3/09 and 11/4/09 Moving Appellees' Responses (*EOR, XV, pp. 3856-3883*) were filed.

On 11/5/09 an Order (*EOR I, pp. 100-101*) overruling Witherow's Objection and adopting MJ Report 1 was filed and Witherow and Evans' claims against Appellees ICS, Embarq and Global were dismissed.

On 11/23/09 Witherow's Motion for Clarification of Order (*EOR XV, pp. 3853-3855*) was filed.

On 12/7/09 Witherow's Motion for Leave to File Third Amended Complaint ("Motion for Leave") (*Id., pp. 3806-3852*), with attached Proposed Third Amended Complaint ("PTAC"), which sought to add facts concerning the actions of Appellees ICS, Embarq and Global found to be deficient in his SAC (*EOR, XVI, pp. 4082-4114*), was filed, on 12/17/09, 12/18/09, 12/22/09 and 12/28/09 Appellees opposed (*EOR XV, pp. 3782-3805*) and on 12/30/09 and 1/7/10 Witherow replied (*EOR XVII, pp. 4243*).

On 12/23/09 an Order (*EOR I, pp. 98-99*) was filed granting Witherow's Motion for Clarification of Order indicating that Order (*Id., pp. 122*) did not grant Witherow leave to file an amended complaint.

On 1/20/10 an Order (*Id., pp. 97*) was filed denying as **moot** Witherow's Motion for Leave to File Third Amended Complaint.

On 1/29/10 Witherow's Motion to Reconsider Order of Magistrate Judge ("Motion to Reconsider") (*EOR XV, pp. 3778-3781*) was filed, on 2/3/10 and 2/12/10 Appellees responded (*Id., pp. 3762-3777*) and on 2/22/10 Witherow replied (*EOR XVII, pp. 4244*).

On 3/8/10 an Order (*EOR XV, pp. 3760-3761*) was filed substituting Attorney Andre Boles in the place of Attorney Marc Picker as Evans' counsel of record.

On 4/27/10 an Order (*EOR I, pp. 94-96*) was filed denying Witherow's Motion for Reconsideration (*EOR XV, pp. 3778-3781*) of the Order (*EOR I, pp. 97*) denying Witherow Motion for Leave to File Third Amended Complaint (*EOR XV, pp, 3806-3852*).

On 9/9/10 Witherow's Motion for Pretrial Conference (*Id., pp. 3656-3759*), which was submitted in lieu of a Motion to Compel Discovery was filed, on 9/14/10 Appellees Baker, Connally, Donat, Helling, Henley and Skolnik ("NDOC

Appellees") responded (*Id., pp. 3652-3655*) and on 9/14/10 Witherow replied (*EOR XVII, pp. 4247*).

On 9/23/10 an Order (*EOR I, pp. 93*) was filed denying Witherow's Motion for Pretrial Conference (*EOR XV, pp. 3656-3759*).

On 12/1/10 the Magistrate Judge granted Appellees' Motion to Compel and for Sanctions against Evans[3]. (*EOR I, pp. 90-92*).

On 1/4/11 an Order (*EOR XIV, pp. 3502-3503*) was filed substituting Evans in proper person in the place and stead of Attorney Boles.

On 1/6/11 an Order (*Id., pp. 3500-3501*) was filed substituting Attorney Cal Potter in the place and stead of Witherow in proper person.

On 1/21/11 the Magistrate Judge awarded Appellees' monetary sanctions against Evans and his attorney Andre Boles, Order (*EOR I, pp. 85-89*), and on 2/3/11 imposed sanctions on Evans prohibiting him from presenting evidence at trial regarding discovery responses not produced. (*Id., pp. 70-84*).

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[3]No sanctions were imposed against Witherow and he complied with all discovery requests.

On 3/18/11 Witherow's Motion for Partial Summary Judgment ("MPSJ") (*EOR XIV, pp. 3358-3486*) was filed, on 4/11/11 NDOC Appellees responded (*EOR VII-VIII, pp. 1518-1849*) and on 4/25/11 Witherow replied (*EOR VII, pp. 1450-1461*).

On 3/22/11 NDOC Appellees filed a Motion for Summary Judgment on Evans First Amended Complaint (*EOR XI-XIII, pp. 2660-3327*), Evans opposed (*EOR VII, pp. 1510-1517*) and NDOC Appellees replied (*Id., pp. 1439-1449*).

On 3/22/11 NDOC Appellees' Motion for Summary Judgment ("SJ Motion") (*EOR VIII-XI, pp. 1850-2659*) was filed, on 4/25/11 Witherow responded (*EOR VII, pp. 1462-1509*) and on 5/12/11 NDOC Appellees replied (*EOR VII, pp. 1421-1438*).

On 7/29/11 the Report and Recommendation of U.S. Magistrate Judge ("MJ Report 2") (*EOR I, pp. 34-69*) was filed finding, among other things, that: Witherow had exhausted his administrative remedies, Witherow did not have an "actual expectation of privacy" during his telephone calls with his attorneys, Witherow "consented" on at least a few occasions to having his legal calls monitored, the initial screening of Witherow's telephone calls to his attorneys in Nevada State Prison ("NSP") Unit 13 was by prison officials acting in the ordinary course of their duties, Witherow did not have a liberty interest protecting him from

the initial monitoring of his telephone calls to his attorney, Witherow advances no factual allegations to support the notion that grievance responders Appellees Henley, Donat and Helling violated any of his rights in the grievance process, and Witherow has presented no claims for supervisor liability against Defendants Skolnik, Henley, Donat, or Helling; and recommended denying Witherow's MPSJ (*EOR XIV, pp. 3328-3468*) and granting summary judgment on all of Witherow's civil rights claims against Appellees and summary judgment on Witherow's statutory claims against Appellees Skolnik, Henley, Donat and Helling.

The Magistrate also analyzed Evans' claims and the sanctions imposed on him; and recommended Appellees be granted summary judgment on all of Evans' claims. MJ Report 2 (*EOR I, pp. 39-40, §I(D); pp. 47-62, §II(B)(2)(b-d); and p. 68 §III(4)*).

On 8/9/11 Witherow's Objection to the Report and Recommendation of U.S. Magistrate Judge ("Objection 2") (*EOR VII, pp. 1414-1420*) was filed.

On 3/7/12 an Order (*EOR I, pp. 25-33*) was filed adopting the Report and Recommendation of U.S. Magistrate Judge.

On 10/29/12 a Settlement Conference was held and the parties were unable to reach a settlement agreement. (*EOR XVII, pp. 4256*).

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On 2/28/13 Notice (*EOR VII, pp. 1412-1413*) was filed indicating Attorney Cal Potter and Attorney Travis Barrick would be representing Witherow in further proceedings in this action at trial.

On 4/25/13 an Order (*Id., pp. 1409-1411*) was filed substituting Attorney Richard Hill in the place and stead of Appellee Evans in proper person.

On 8/14/13 Witherow's Proposed Jury Instructions (*EOR V, pp. 854-867*) were filed and on 8/21/13 Witherow's Objections to Appellees Proposed Jury Instructions (*EOR V, pp. 813-821*) were filed.

On 8/26/13 a trial by jury was commenced on Witherow's statutory claims against Appellees Baker and Connally. (*EOR IV, pp. 575-770*).

On 8/27/13, after objections, the District Judge refused to permit Evans to testify regarding his telecommunications with Witherow and indicated that the sanctions against Evans for failure to cooperate in the discovery process would be applied against Witherow. (*EOR III, pp. 375-397*).

On 8/28/13, after jury instructions (*EOR V, pp. 799-812*) were given, including an Instruction allowing an expanded exemption for re-monitoring of Witherow's telephonic communications with his attorneys, and the jury returned a verdict in favor of Appellees Baker and Connally. (*EOR XVII, pp. 4264-4265*).

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On 10/16/13 Judgment in a Civil Case (*EOR I, pp. 8*) was entered.

On 11/15/13 Witherow's Notice of Appeal (*EOR V, pp. 781-798*) was filed and on 12/2/13 his Amended Notice of Appeal (*Id., pp. 771-780*) was filed.

C. DISPOSITION BELOW

On 1/5/09 an Order (*EOR I, pp. 100-101*) was filed dismissing all of Witherow's claims against Appellees ISC, Embarq and Global.

On 1/20/10 an Order (*Id., pp. 97*) was filed denying Witherow's Motion for Leave to File Third Amended Complaint as moot and on 4/27/10 an Order (*Id., pp. 94-96*) was filed denying reconsideration of the Order (*Id., pp. 97*) denying Witherow's Motion for Leave to File Third Amended Complaint.

On 3/7/12 an Order (*Id., pp. 25-33*) was filed granting summary judgment to all NDOC Appellees on Witherow Fourth and Fourteenth Amendment civil rights claims; and granting summary judgment to NDOC Appellees Skolnik, Henley, Donat and Helling on his 18 U.S.C. §2511 statutory claims; and to all NDOC Appellees on all of Evans' claims.

On 8/27/13 District Judge Jones refused to permit Evans to testify regarding his privileged telecommunications with Witherow based on the sanction imposed against Evans for his failure to cooperate in the discovery process and applied that sanction to Witherow. (*EOR III, pp. 375-397*).

On 8/28/13, after jury instructions, the jury returned a verdict in favor of NDOC Appellees Baker and Connally.

On 11/15/13 Witherow's Notice of Appeal (*EOR V, pp. 781-798*) was filed and on 12/2/13 his Amended Notice of Appeal (*Id., pp. 771-780*) was filed.

VI.

STATEMENT OF FACTS

Appellees Global, during the time period of 5/1/07-2/11/08, Embarq, during the time period of 2/12/08-4/8/08, and ICS, during the time period of 4/9/08-7/30/08, from 5/1/07, through 7/30/08 in their respective time periods were in a contractual business relationship with the NDOC to provide telephone service to NDOC prisoners, wherein the NDOC received the greater portion of the profits, and Global, Embarq and ICS were required to maintain and operate the telephone equipment used by prisoners to make telephone calls, including, but not limited to, telephone equipment used by NDOC employees in various remote locations, including, but not limited to, NSP Unit 13, to intercept and monitor properly placed legal calls by prisoners to their attorneys. (*EOR XVI, pp. 4096-4109, ¶¶18-22 and 26-30, 3rd thru 114th Causes of Action*).

Witherow was confined by the NDOC at NSP in Unit 13 Administrative Segregation from 5/1/07 through 7/30/08 and during that time period he placed

112 telephone calls to his properly registered attorneys, Don Evans (82 calls), Marc Picker (14 calls) and Robert Hager (16 calls) on the telephone equipment maintained and operated by Appellees Global, Embarq and ICS. (*Id., pp. 4090, ¶25,; and EOR IV, pp. 662-663*).

Appellees, and each of them, violated Witherow's constitutional and statutory rights from 5/1/07 through 12/31/07 when Appellees Baker and Does XXI-XXV intercepted and eavesdropped on 56 of Witherow's properly placed legal calls to Evans (47 calls), Picker (1 call) and Hager (8 calls) on the telephone equipment maintained and operated by Appellees Global, Embarq and ICS.(*Id., pp. 4090-4091, ¶26 and pp. 4096-4102, 3rd thru 58th Causes of Action*).

Appellees, and each of them, violated Witherow's constitutional and statutory rights from 1/1/08 through 7/30/08 when Appellees Connally and Does XXVI-XXX intercepted and eavesdropped on 56 of Witherow's properly placed legal calls to Evans (35 calls), Picker (13 calls) and Hager (8 calls) on the telephone equipment maintained and operated by Appellees Global, Embarq and ICS. (*Id., pp. 4091, ¶27 and pp. 4102-4107. 59th thru 114th Causes of Action*).

Witherow on 11/21/07 filed an Informal Grievance, numbered 20062653987, regarding the ongoing and continuing interception and monitoring of his properly placed attorney/client telephone calls.(*EOR XIV, pp. 3447-3455*).

Appellee Henley on 12/7/07 denied that grievance without initiating any corrective action. (*Id., pp. 3445 and 3456-3463*). Witherow on 12/17/07 filed a First Level Grievance on the interception and monitoring of his attorney/client telephone calls. (*Id., pp. 3465*). Appellee Donat on 1/8/08 denied that grievance without initiating any corrective action. (*Id., pp. 3456 and 3465*). Witherow on 1/16/08 filed a Second Level Grievance on the interception and monitoring of his attorney/client telephone calls. (*Id., pp. 3467*). Appellee Helling on 2/13/08 denied that grievance without initiating any corrective action. (*Id., pp. 3446 and 3467*).

The District Court dismissed Witherow's civil rights claims against Appellees Global, Embarq and ICS based on a finding that Global, Embarq and ICS were not acting under color of state law and dismissed his federal statutory claims against those Appellees, without granting Witherow leave to amend his complaint, based on a finding that Witherow had failed to alleged sufficient facts to state a claim against those Appellees. (*EOR I, pp. 102-111; and pp. 100-101*).

The District Court clarified the fact that it did not grant Witherow leave to file an amended complaint to allege additional facts pertaining to Appellees Global, Embarq and ICS (*Id., pp. 98-99*), denied his Motion for Leave to File Third Amended Complaint (*EOR XV, pp. 3806-3852*) as **moot** (*EOR I, pp. 97*), and denied his Motion for Reconsideration (*EOR XV, pp. 3778-3781*) without

addressing whether the Motion for Leave to File Third Amended Complaint was in fact **moot** (*EOR I, pp. 94-96*).

The District Court, among other things, granted summary judgment to Appellees Baker, Connally, Donat, Helling, Henley, and Skolnik on Witherow's Fourth Amendment constitutional claims based on findings that Witherow did not have an "actual expectation of privacy" during [his] calls with plaintiff Evans or any other attorney (*EOR I, pp. 56, ln. 19-20; and pp. 27-28, §II*), and he "consented" to that monitoring on at least a few occasions of his calls to his attorney by his conduct in "baiting" Appellees Baker and Connally (*Id., pp. 57, ln. 3-4; and pp. 27-28, §II*); to Appellees Baker, Connally, Donat, Helling, Henley and Skolnik on Witherow's "initial" monitoring of his attorney telephone calls under Omnibus Crime Control and Safe Streets Act ("OCCSSA") (*Id., p. 57, ln. 22 - p. 59, ln. 25; pp. 29-30, §III*); to Appellees Baker, Connally, Donat, Helling, Henley and Skolnik on Witherow's Fourteenth Amendment constitutional claims because he could not show an "atypical and significant hardship …. In relationship to the ordinary incidents of prison life (*Id., pp. 62-64; and p. 30*); to Appellees Helling, Donat and Henley for failure to properly respond in the grievance process (*Id., pp. 64, and pp. 31-33*); and to Appellees Skolnik, Henley, Donat and Helling for the failure of Appellee Skolnik to adopt regulations to prevent NDOC officials

from intercepting and eavesdropping on legal calls and for failing to train employees appropriately and to Appellees Henley, Donat and Helling for failing to train their subordinates in the proper procedures for telephone calls (*Id., pp. 64-67; and pp. 33*).

On 8/27/13 District Judge Jones prohibited Evans from testifying regarding his privileged telecommunications with Witherow because of the sanction against Evans for failure to cooperate in the discovery process and applied that sanction to Witherow. (*EOR III, pp.375-397*)

Appellees Baker and Connally both testified at trial that, per NDOC NSP Unit 12 and 13 Post Order (*EOR X, pp. 2413-2450*), all outgoing prisoner telephone calls, including telephone calls to attorneys, were intercepted and monitored (*EOR III, pp. 453, ln. 6-10; and EOR II, pp. 208-211*); both listened to intercepted telephone calls to attorneys by prisoners to make their determination that those telephone calls were in fact legal calls (*EOR III, pp, 455, ln. 19-24; pp. 525-526; and 541*); neither had any type of training in making a determination of what in fact was a legal call (*EOR III, pp. 453, ln. 11-14; and 532, ln. 21-23*); both listened for "legal jargon" in making their determination of whether a call was a legal call (*Id., pp. 461, ln. 3-14; and pp. 530, ln. 14-17*); and Appellee Baker stated she was permitted to re-intercept and monitor a previously determined legal

call to insure the call continued to be a legal call (*Id., pp. 498-500*).

Chief District Judge Jones stated at trial: he was bound to follow the decision of District Judge Navarro that prisoner telephone calls to their attorneys may be initially monitored by NDOC employees to determine whether the call was in fact an attorney/client telecommunication (*EOR IV, pp.476, ln. 20 - pp. 477, ln. 9*); NDOC employees had every right to monitor legal calls (*Id., pp. 687, ln. 14-16*); monitoring legal calls was performed in the "ordinary course of duties" of NDOC employees (*Id., pp. 691, ln. 1-10*); federal law controlled and state law and regulations were not relevant even though regulations prohibited monitoring of legal calls (*Id., pp. 734, ln. 12-14*); NDOC regulations governing correctional officer conduct were not relevant (*Id., pp. 735, ln. 3-15*); initial monitoring to determine the confidentiality of a communication is an exception to the federal statute, as he and District Judge Navarro have already ruled, and prison officials have the right to monitor legal calls to determine whether those calls are confidential attorney/client communications (*EOR II, pp. 137-138*) and there was a discussion, with objections, to the instructions to be given to the jury (*Id., pp. 229-276*).

Chief District Judge Jones instructed the jury, inter alia, that: there is an exception to the interception prohibition of telecommunications imposed by the

Wire Tap Act (18 U.S.C. §2511(1)(a)) for a law enforcement officer in the ordinary course of his duties (18 U.S.C. §2510(5)(a)(ii)) (*Id., pp. 284, ln. 15 - pp. 285, ln. 4*); ordinary course of duties can include the routine interception of all outbound prisoner telephone calls, including legal calls (*Id., pp. 284, ln. 13-15*); attorney/client privileged calls cannot be monitored past the point reasonably necessary to determine the call is an attorney/client privileged call (*Id., ln. 16-19*); ordinary course of duties permits periodic and brief re-monitoring of attorney/client communications for the sole purpose of determining whether the calls has been terminated or is still ongoing (*Id., pp. 286, ln. 2-6*); ordinary course of duties exception permits initial monitoring, reasonably necessary to determine that it is indeed an attorney-client call and it can include the periodic and very brief re-monitoring of an attorney-client communication for the sole purpose of determining whether the call has been terminated or is ongoing (*Id., ln. 7-15*); and a party may consent to the interception and monitoring of the party's attorney/client telecommunications (*Id., pp. 287, ln. 5-12*). The Court also ruled that not all calls between Mr. Witherow and his attorneys are privileged, if the call concerned other inmates' legal problems.

Chief District Judge Jones refused to provide any instructions to the jury on the state law and regulations that govern and control the duties and responsibilities

of Nevada Correctional Officers with respect to attorney/client telephonic communications and he failed to give an instruction that a party cannot consent to an illegal act. (*Id., pp. 229-276*).

The jury returned a verdict in favor of Appellees Baker and Connally. (*Id., pp. 324, ln. 5-10*).

NRS §209.419(1) provides that: "Communications made by an offender on any telephone in an institution or facility to any person outside the institution or facility may be intercepted if: (a) The interception is made by an authorized employee of the Department; and (b) Signs are posted near all telephones in the institution or facility indicating that communications may be intercepted". There were no signs posted on or near the cordless telephone used by Witherow to make personal or legal telephone calls indicating his calls could be intercepted. (*EOR III, pp. 360-367; EOR IV, pp. 621-745; EOR III, pp. 416-502; TR 523-547; EOR II, pp. 176-200 and pp. 202-218*).

NRS §209.419(2) provides, in relevant part, that: ". . .a periodic sound which is heard by both parties during the communication shall be deemed notice to both parties that the communication is being intercepted." Supposedly, Witherow was alerted to the fact that his telephone calls to his properly registered attorney numbers were being intercepted by the periodic beeping sound heard

during his communications with his attorneys. (*EOR IV, pp. 659, 662-663, 437, 441 and 443*).

NRS §209.419(3) provides that: "The Director shall adopt regulations providing for an alternate method of communication for those communications by offenders which are confidential". Appellee Skolnik failed to adopt a regulation providing for an "alternate method of communications by offenders which are confidential" and, instead, adopted regulations, Administrative Regulation ("AR") 722 to govern and control offender communications which are confidential (*EOR XIV, pp. 3480-3486*) and, after Witherow filed a grievance concerning the interception and monitoring of his confidential legal calls to his attorneys, Appellee Skolnik amended AR 718.01(1.3) to clarify that calls between an offender and his attorney are exempt from monitoring and recording. (*Id., pp. 3476-3479*).

AR 722, Inmate Legal Access, §722.07 (9/6/03) and §722.11 (2/8/08), approved and adopted by Appellee Skolnik, require all inmates to use unit or yard telephones for "legal calls" and approved legal calls placed for inmates on institutional phones by staff shall be handled as follows: "The staff member will dial the number to ensure the number is to a legal representative; and The staff member shall observe the inmate throughout the entire duration of the call". (*EOR*

XIV, pp. 3480-3486); EOR X, pp. 2335-2355, 2382-2412). This procedure was not followed by Appellees Baker and Connally during the relevant time period. (*EOR IV, pp. 638-639, and 727*).

NRS §209.419(4)(d) provides that "a communication made by an offender is confidential if it is made to: . . . (d) An attorney who has been admitted to practice law in any state. . ." Attorneys Evans, Hager and Picker are each admitted to practice law in the State of Nevada and each of their numbers were properly registered by Witherow as confidential attorney numbers. (*EOR IV, pp. 629, and 662-663; EOR III, pp. 372-374, and 503-507; and EOR II, pp. 122-124*). Witherow's properly registered calls to the offices of attorneys Evans, Hager and Picker were confidential and could not be intercepted or monitored by NDOC officials without a properly authorized search warrant. See, 18 U.S.C. §2511, NRS §49.055, NRS §209.419. (*EOR XVI, pp. 4089, ¶23; EOR XIV, pp. 3468-3486; EOR IV, pp. 720-721, 724, ln.11-13, and 734, ln. 12-14; and EOR II, 154, ln. 18-20, and 155, ln. 16-22*).

Appellees Baker and Connally intercepted and monitored Witherow's legal calls to Attorneys Evans, Picker and Hager pursuant to a confidential, secret and unpublished NSP Unit 12 "Post Order" V(K)(1)(d), p. 18, permitting "legal calls" to be intercepted and monitored by NDOC staff to determine the validity of the

call. (*EOR X, pp. 2413-2450*). Appellees have failed to produce a copy of the confidential, secret and unpublished NSP Unit 13 "Post Order" allegedly permitting NSP Unit 13 correctional officers to intercept and monitor "legal calls" to determine the validity of the call. Under the facts and evidence presented, Appellees Baker and Connally were not performing "ordinary course of business" activities when these Appellees intercepted, monitored, or re-monitored Witherow's confidential communications with his attorneys' offices. According to then NDOC Warden Donat, legal calls may not be intercepted, monitored, or re-monitored. (*EOR II, 154, ln. 18-20, and 155, ln. 16-22*).

VII.

ARGUMENT

A. THE DISTRICT COURT ERRED IN DISMISSING WITHEROW'S CIVIL RIGHTS CLAIMS AGAINST APPELLEES ICS, EMBARQ AND GLOBAL BASED ON A FINDING THESE APPELLEES WERE NOT ACTING UNDER COLOR OF STATE LAW.

The Magistrate Judge determined that Appellees ICS, Embarq and Global were not "acting under color of state law" based on a finding Witherow's allegations were "insufficient to make the [Appellees] state actors amendable to suit under §1983." (*EOR I, pp. 102-111, §II(B)(2)(a)*). Witherow objected to the

findings of the Magistrate and identified the facts establishing joint action by the private contractors with the NDOC. (*EOR XVI, pp. 3886-3892*). The District Court adopted the MJ Report 1 without discussion of the issues. (*EOR I, pp. 100-101, and 102-111*).

As indicated in Objection 1 (*EOR XVI, pp. 3886-3892*), Witherow has alleged sufficient facts in his SAC, to state claims against Appellees ICS, Embarq and Global for the violation of his civil rights while acting under color of state law. (*EOR XVI, pp. 4082-4114, ¶¶5-7, 15-16, 18-22, 25-29, 32 and 35-57*).

Appellees ICS, Embarq and Global at different time during the relevant time period were in a business contract with the NDOC for mutual financial benefits to provide telephone services to prisoners. (*Id., ¶¶5-7*). The NDOC was not required to provide telephone services to prisoners, however, the NDOC elected to provide telephone services to prisoners and entered into a contract with these Appellees to provide those services to prisoners. Each of the parties reaped financial benefits from the contract and telecommunication services to prisoners could not have been provided to prisoners without the consent of those parties.

As part of the contract, Appellees ICS, Embarq and Global were required to maintain and operate all of the equipment necessary to provide the telephone services to prisoners, including the equipment used at various remote locations,

including NSP unit 13, for NDOC employees, including Appellees Baker and Connally, to intercept and monitor all outgoing prisoner telecommunications, including prisoner telecommunications with attorneys. (*Id., ¶¶15-16 and 18-19*). Joint action between Appellees ICS, Embarq and Global and Appellees Baker and Connally was required in order for Appellees Baker and Connally to intercept and monitor Witherow's telecommunications with his attorneys.

Appellees ICS, Embarq and Global knew, or should have known, that the NDOC at NSP adopted a Post Order and trained NDOC employees to use the remote location telephone equipment to intercept and monitor prisoner telecommunications with their attorneys, despite the provisions of state law and NDOC Administrative Regulations to the contrary, and that Appellees Baker and Connally would routinely use the equipment maintained and operated by Appellees ICS, Embarq and Global to intercept and monitor Witherow's telecommunications with his attorneys. (*Id., ¶¶20-21, 25-29 and 35-57*). Appellees ICS, Embarq and Global would not have maintained and operated the equipment required to intercept and monitor all outgoing prisoner telecommunications, including prisoner telecommunications with attorneys, without knowing the purpose for which the interception and monitoring equipment would be used.

While generally not applicable to private parties, a §1983 civil rights action

can lie against a private party when the private party "is a willful participant in joint action with the State or its agents." Dennis v. Sparks, 449 U.S. 24, 27, 66 L. Ed. 2d 185, 101 S. Ct. 183 (1980), Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003) and Jacobson v. Rose, 592 F.2d 515, 522 (9th Cir. 1978). The facts alleged in this case establish that Appellees ICS, Embarq and Global were willful participants in joint action with the State and its agents. Appellees Baker and Connally could not have routinely intercepted and monitored Witherow's telecommunications with his attorneys without the joint participation of Appellees ICS, Embarq and Global in maintaining and operating the equipment used by Appellees Baker and Connally to intercept and monitor those calls.

Appellees ICS, Embarq and Global were "acting under color of state law" when maintaining and operating the remote interception and monitoring equipment those Appellees knew would be used by NDOC employees, including Appellees Baker and Connally, to intercept and monitor all of Witherow's outgoing telecommunications with his attorneys and it was reversible error for the Magistrate and District Judges to find otherwise.

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B. THE DISTRICT COURT ERRED IN REFUSING WITHEROW LEAVE TO AMEND HIS SECOND AMENDED COMPLAINT TO ALLEGE SUFFICIENT FACTS TO STATE A CLAIM AGAINST APPELLEES ICS, EMBARQ AND GLOBAL FOR VIOLATION OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS INVOLVED IN THE INTERCEPTION AND MONITORING OF HIS PRIVILEGED TELECOMMUNICATIONS WITH HIS ATTORNEYS.

The Magistrate Judge failed to liberally construe Witherow's proper person claims against Appellees ICS, Embarq and Global in his SAC, failed to provide Witherow with a statement of the deficiencies in the SAC and failed to provide Witherow with an opportunity to correct any deficiencies in his SAC by filing an amended complaint. (*EOR I, pp. 102-111, §§II(B)(2)(a) and (3)*). Witherow objected to the findings of the Magistrate and requested an opportunity to amend his SAC should any deficiencies in his allegations be found in the complaint. (*EOR XVI, pp. 3886-3892*). The District Court adopted the MJ Report 1 without addressing potential deficiencies in Witherow's SAC, without providing Witherow with a statement of those deficiencies and without providing Witherow with an opportunity to prepare and file a Third Amended Complaint. (*EOR I, pp. 100-101*). Additionally, the District Court clarified that the Order did not grant him leave to amend his complaint. (*Id., pp. 98-99*).

Witherow filed a Motion for Leave to File Third Amended Complaint (*EOR XV, pp. 3806-3852*), with attached Proposed Third Amended Complaint, which included additional facts set forth in paragraphs numbered 18-27, 31 and 36-37, in an attempt to correct the factual deficiencies in his SAC. (*Id., pp. 3809-3810*). The Magistrate Judge denied the Motion for Leave as **moot** and denied Witherow's Motion for Reconsideration. (*EOR I, pp. 94-97*).

Where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). "A pro se litigant must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" Noll v. Carlson, 809 F.2d 1446, at 1448 (9th Cir. 1987) (quoting Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam)); accord Eldridge v. Block, 832 F.2d 1132, 1135-36 (9th Cir. 1987). Moreover, before dismissing a *pro se* civil rights complaint for failure to state a claim, the District Court must give the plaintiff a statement of the complaint's deficiencies. Eldridge, 832 F.2d at 1136; Noll, 809 F.2d at 1448-49. "Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors." Noll, 809 F.2d at 1448. A *pro se* litigant must be provided with an opportunity to amend a

complaint to cure any deficiencies in his complaint. Karim-Panahi v. LAPD, 839 F.2d 621, 623-624 (9th Cir. 1988), and Franklin v. Murphy, 745 F.2d 1221, 1228, n. 9 (9th Cir. 1984).

Witherow was acting in proper person when he prepared and filed his SAC, when he responded to the motions to dismiss (*EOR XVI, pp. 3916-4006, and 4031-4052*) filed by Appellees ICS, Embarq and Global and when he filed his Objection 1 (*Id., pp. 3884-3901*). The Magistrate and District Judges were required to liberally construe his pleadings, resolve any doubts in his favor, provide him with a statement of the specific deficiencies in his pro se complaint and provide him with an opportunity to file an amended complaint attempting to correct those deficiencies. The Magistrate and District Judges failed to do those things for pro se litigant Witherow. This was reversible error.

C. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES ON WITHEROW'S FOURTH AND FOURTEENTH AMENDMENT CLAIMS BASED ON A FINDING WITHEROW DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN HIS PRIVILEGED TELECOMMUNICATIONS WITH HIS ATTORNEYS AND HE CONSENTED TO THE MONITORING ON OCCASIONS.

The Magistrate Judge conducted an analysis of Witherow's Fourth

Amendment claims and determined that Witherow did not have an "actual subjective expectation of privacy" in his telecommunications with his attorneys and, by his conduct, he demonstrated that if his calls were indeed monitored, he consented to that monitoring on at least a few occasions. (*EOR I, pp. 55-57, §II(B)(2)(d)(i)*). Witherow objected to the findings of the Magistrate. (*Id., pp. 27, §II*). The District Judge accepted and adopted in full the MJ Report 2. (*Id., pp. 27-28, §II*).

The analysis conducted by the Magistrate Judge is flawed. In referencing United States v. Van Poyck, 77 F.3d 285, 291 n. 9 (9th Cir. 1996), the Magistrate indicates that prisoners "may have a reasonable expectation of privacy based upon the attorney-client privilege" and then references authorities pertaining to the attorney-client privilege and conducts an analysis. (*Id., pp. 53, ln. 15 - p. 54, ln. 10*).

Footnote 9 of Van Poyck actually states: "This analysis does not apply to 'properly placed' telephone calls between a defendant and his attorney, which the MDC does not record or monitor." The "reasonable expectation of privacy" is based upon the Fourth Amendment of the United States Constitution and exists only if a person has (1) an "actual subjective expectation of privacy" in the place searched and (2) society is objectively prepared to recognize that expectation. New

York v. Class, 475 U.S. 106, 112 (1986) (citing Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); United States v. Davis, 932 F.2d 752, 756 (9th Cir. 1991); and Van Poyck, 77 F.3d at 290.

In this case, Witherow's "expectation of privacy in his telecommunications with his attorneys arises from the provisions of NRS §209.419(3) and 4(d), which specifically designates his telephone calls to his attorneys as "confidential", and NRS §49.055, which established that communications with an attorney are "confidential." Those state created rights are protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, Wolff v. McDonnell, 418 U.S. 539, 557 (1974), and provide him with an actual subjective expectation that his telephone calls to his attorney number are private and confidential. It was a violation of Witherow's Fourth and Fourteenth Amendment rights for Appellees to intercept and monitor his confidential telecommunications with his attorneys. In re State Police Litigation, 888 F. Supp. 1235, 1255-1256 and 1258 (D. Conn. 1995), affirmed 88 F.3d 111 (2nd Cir. 1996); Jacobson v. Rose, 592 F.2d at 522; Lonegan v. Hasty, 436 F.Supp. 2d 419, 426-440 (E.D.N.Y. 2006); (*EOR XVII, Browning v. MCI WORLDCOM, pp. 4214, ln. 25 - pp. 4220, ln. 25*).

The Magistrate acknowledged that the facts stated by Witherow "seems to present a disputed material fact" as to whether Witherow had a subjective

expectation of privacy", triggering Fourth Amendment protections, and then proceeds to conduct an analysis of additional facts to reach a determination that Witherow did not have an "actual subjective expectation of privacy" during his properly placed telephone calls with his attorneys; that Witherow, based on those facts and contrary to his sworn statements, "consented"[4] to the monitoring of his telephone calls to his attorneys on at least a few occasions; and recommended dismissal of his Fourth Amendment claims. (*EOR I, pp. 55, ln. 4, - pp. 57, ln. 22*). As was shown above, the Magistrate's analysis was not conducted using the appropriate provisions of law and, from the additional facts analyzed by the Magistrate, there is no evidence that Witherow "intentionally relinquished" his state created right to confidential telecommunications with his attorneys' offices. All of the evidence indicates that Witherow and his attorney were attempting to stop NDOC employees from illegally intercepting and monitoring his telecommunications with his attorneys. The jury, not the Magistrate, is the trier of facts and the issues of whether Witherow had an actual subjective expectation of privacy in his telecommunications with his attorneys or consented to the

[4]"Consent", or "waiver" is an intentional relinquishment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also, United States v. Novak, 453 F. Supp. 2d 249, 258-260 (D. Mass. 2006). There is absolutely no evidence in the record that Witherow ever "intentionally relinquished" his right to to intercept or monitor his telecommunications with his attorneys.

interception and monitoring of those confidential telecommunications were issues of fact to be determined by a jury. The Magistrate and District Court Judges erroneously granted Appellees summary judgment on Witherow's Fourth Amendment claims.

D. THE DISTRICT COURT ERRED IN DETERMINING APPELLEES WERE ACTING PURSUANT TO AN "ORDINARY COURSE OF BUSINESS" EXEMPTION TO THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT (WIRE TAP ACT) WHEN INITIALLY INTERCEPTING AND MONITORING WITHEROW'S TELECOMMUNICATIONS WITH HIS ATTORNEYS AND THE RE-MONITORING OF ATTORNEY-CLIENT TELEPHONE CONVERSATIONS TO DETERMINE THE NATURE OF THE COMMUNICATIONS.

The Magistrate Judge determined that Appellees "initial screening of all" outgoing prisoner telephone calls from NDOC NSP Unit 13 "implicates the law enforcement exemption to the [Wire Tap] Act, which allows oral communications to be intercepted by law enforcement officers acting in the ordinary course of their duties"; the practice of initially screening calls to determine whether they are personal or legal does not run afoul of the applicable statutes and regulations; Unit 13 portable phone circulated to prisoners for all telephone calls are not "institutional phones" governed by referenced regulations; and recommended

granting Appellees summary judgment on the initial screening of Witherow's telephone calls to his attorneys. (*EOR I, pp. 57-60, §II(B)(2)(d)(ii)*). Witherow objected to the findings of the Magistrate. (*Id., pp. 27-29, §III*). The District Judge accepted and adopted in full the MJ Report 2. (*Id., pp. 29-30, §III*).

The Magistrate acknowledges that it is a violation of the Wire Tap Act for any person to intercept oral telecommunications under the provisions of 18 U.S.C. §2511(1). (*Id., pp. 57, ln. 24-26*). The Magistrate then points out there is an "exception" to 18 U.S.C. §2511(1) under 18 U.S.C. §2510(5)(a) for "law enforcement officers acting in the ordinary course of their duties" and for a prisoner who "consents" to the interception and monitoring. (*Id., pp. 57, ln. 27 - pp. 58, ln. 8*). The Magistrate relies on the analysis provided in Van Poyck to support her analysis. Id. The Magistrate ignores the warning in footnote 9 of Van Poyck that the analysis provided in that decision "does not apply" to telephone calls between a prisoner and his attorney. Therefore, the analysis provided by the Magistrate is flawed.

The Magistrate conducts an analysis of Witherow's Wire Tap Act claims, without specifically addressing the specific provisions of NRS §209.419, AR 718, or AR 722, which are the relevant state law and regulations governing and establishing the **duties of a Nevada** correctional [law enforcement] officer with

respect to prisoner outgoing telecommunications with attorneys, and finds that the initial interception and monitoring of outgoing prisoner calls to an attorney is permissible and not a violation of the Wire Tap Act. (*Id., pp. 58, ln. 9 - pp. 60, ln. 28*). The Magistrate should have addressed the plain language of NRS §209.419(3) and (4), AR 718 and AR 722 in making a determination that Appellees Baker, Connally and Does were acting in the "ordinary course of their duties" when intercepting and monitoring Witherow's telecommunications with his attorneys. (*Id.*). This statute and those regulations governed and established the duties of Appellees Baker, Connally and Does during the ordinary course of their duties when intercepting and monitoring Witherow's telecommunications with his attorneys.

The state statutes and regulations provide, in relevant part, as follows:

> NRS §209.419(3): "The Director shall adopt regulations providing for an alternate method of communication for those communications by offenders which are confidential." (*EOR XIV, pp. 3498-3496*).
>
> NRS §209.219(4) ". . . a communication made by an offender is confidential if it is made to: . . . (d) An attorney who has been admitted to practice law in any state . . ." (*Id.*).
>
> AR 718.01(3) "Telephone calls, except calls between an inmate and his attorney, must be monitored and recorded." (*Id., pp. 3479-3479*).

> AR 722.11(4) "Legal calls placed for inmates on institutional phones by staff should have the number dialed by the staff member to insure it is a legal call; observe the inmate throughout the call, but not listen to the call." (*Id., pp. 3484-3486*).

Appellee Skolnik has failed to comply with the provisions of NRS §209.419(3) by adopting a regulation providing for an alternate method of communications for those communications by offenders which are confidential. (*Id., pp. 3346, ¶17*).

Instead, Appellee Skolnik adopted AR 718.01(3), which exempts offender telephone calls to an attorney from being monitored and recorded, and he adopted AR 722.11(4), which requires legal telephone calls placed for inmates on institutional phones[5] by staff should have the number dialed by the staff member to insure it is a legal call; observe the inmate throughout the call; but not listen to the call. These regulations were adopted in an apparent attempt to comply with the

[5]Witherow was confined in segregation and did not have access to unit or yard telephones, except for the cordless telephone possessed and passed out by staff. (*EOR XIV, pp. 3484-3486*). The Magistrate determined that the unit 13 cordless phones circulated to inmates for telephone calls were not "institutional phones." (*EOR I, pp. 60, ln. 17-19*), nor any other regulation of which Appellant is aware, does not contain a definition of "institutional telephones." However, under common usage, the cordless telephones passed around for use by Unit 13 prisoners to make personal and legal calls are "institution phones," as the telephones are owned by the institution and not by the prisoners. Those cordless telephones are institutional phones.

provisions of NRS 209.419(3), without the expense of installing an alternate telephone system for legal calls, and would comply with the provisions of NRS §209.419(4)(d) by having a staff member dial the legal numbers for prisoners and observe the prisoner throughout the call, which would not appear to offend the provisions of the Wire Tap Act. This statute and these regulations were important and relevant information to be considered and evaluated by the Magistrate and District Judges in any decision determining whether Appellees were "acting in the ordinary course of their duties" as Nevada law enforcement officers.

The Magistrate, rather than analyze the relevant statutes and regulations in evaluating Witherow's Wire Tap Act claims, relied upon a post order[6] in making the determination that Appellees Baker, Connally and Does were acting in the ordinary course of business when intercepting and monitoring Witherow's telecommunications with his attorneys. (*EOR I, pp. 58, ln. 9 - pp. 60, ln. 28*). That Post Order[7] provides, in relevant part, as follows:

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[6]Appellees have not produced a copy of the NSP Unit 13 Post Order allegedly authorizing the interception and monitoring of prisoner telecommunications with attorneys. Instead, Appellees produced a copy of NSP Unit 12 Post Order and stated the same procedures are followed in NSP Unit 13. (*EOR X, pp. 2413-2450; and EOR II, pp. 207, ln. 8-20*). The Unit 13 Post Order has not been produced in the record.

[7]Post Orders are classified by the NDOC as "confidential" and prisoners are not permitted to read or know the contents of those orders. (*EOR VII, pp. 1489-*

> All phone calls are subject to monitoring to determine validity. Once a legal call is confirmed, the monitoring will cease. DO NOT LISTEN IF IT IS A LEGAL CALL. Switch off phone monitor at adjacent switch next to phone switch. (*EOR X, pp. 2413-2450, §V(K)(1)(d)*).

The Post Order conflicts with the provisions of NRS §209.419(3) and (4), AR 718.01(3) and AR 722.11(4) that provide prisoner telecommunications with their attorneys are confidential, legal calls cannot be monitored and legal calls made by prisoners on institution telephone should be placed by staff to determine whether the call is to a legal number. The fact that Appellees engaged in an ongoing series of illegal activities does not make those activities an ordinary course of business duty.

All of the published documents pertaining to outgoing prisoner telephone calls to attorneys indicate the telecommunications are confidential, may not be monitored by prison staff and the legal numbers dialed by prison staff, who were required to observe the prisoner throughout the call, but not listen to the conversations. NRS §209.419(4)(d), AR 718.01(3) and AR 722.11(4). This statute

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1496, item 31). The Unit 12 Post Order provided to Witherow and introduced as evidence at trial is not approved or signed by the Board of Prison Commissioners or any other person. This Post Order cannot be considered a document that establishes the ordinary course of duties to be performed by an NDOC correctional law enforcement officer and does not provide Witherow with "notice" that his legal calls would be intercepted and monitored.

and those regulations provided Witherow with "notice" that his telecommunications with his attorneys would not be intercepted and monitored by prison staff and established the ordinary course of duties of NDOC correctional [law enforcement] officers with respect to prisoner telephone calls to their attorneys. Prison employees acting in accordance with that statute and those regulations would be acting in the ordinary course of their duties. However, prison employees acting in degradation of that statute and those regulations and in accordance with a secret, unpublished, unauthorized, unsigned and confidential post order simply cannot be deemed to be acting in the ordinary course of their duties[8].

We are a "government of laws, not of men,"[9] and our written and approved laws and regulations govern and control the duties of our law enforcement officers. The Magistrate and District Judge were clearly mistaken in determining that Appellees Baker, Connally and Does were acting in the ordinary course of their duties when those Appellees intercepted and monitored Witherow's

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[8]If that were the case, the NDOC could produce any type of unsigned and unapproved document authorizing NDOC employees to engage in any type of conduct prohibited by state laws or officially approved regulations, policies, or procedures and then claim their action were in the ordinary course of their duties.

[9]Joint Anti-Fascist Refugee Committee v. McGarth, 341 US 123, 177 (1951) (DOUGLAS, J., Concurring).

telecommunications with his attorneys.

E. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES ON WITHEROW'S FOURTEENTH AMENDMENT CLAIMS BASED ON AN INADEQUATE ANALYSIS OF THOSE CLAIMS.

The Magistrate Judge determined that Witherow's Fourteenth Amendment rights were not violated by conducting an analysis of his Fourteenth Amendment claims under the decision Sandin v. Conner, 515 U.S. 472 (1995), and finding Witherow did not suffer an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life" by the interception and monitoring of his telephone calls to his attorneys. (*EOR I, pp. 62-64, §II(B)(2)(d)(iii)*). Witherow objected to the findings of the Magistrate. (*Id., pp. 29, §IV*). The District Judge accepted and adopted in full the MJ Report 2. (*Id., pp. 30, §IV*).

Witherow has a liberty interest in privacy embodied in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Whalen v. Roe, 429 U.S. 589, 599 (1977)(That liberty interest encompasses the right to privacy in his telecommunications with his attorneys.); Katz, 389 U.S. at 360, and State Police Litigation, 888 F. Supp. At 1258-1259. The Magistrate and District Judges failed to conduct an analysis of this constitutional privacy liberty interest in evaluating Witherow's Fourteenth Amendment claim. (*Id., pp. 62-64,*

§II(B)(2)(d)(iii); and pp. 30, §IV). The failure to address this aspect of Witherow's Fourteenth Amendment claim was reversible error.

Witherow also claimed a liberty interest right to privacy of his telecommunications with his attorneys under NRS §209.419(4)(d). The Magistrate and District Judges did address this aspect of Witherow's Fourteenth Amendment claims by conducting an analysis of this aspect under the decision in Sandin v. Conner, 515 U.S. 472 (1995). (*Id., pp. 62-64, §II(B)(2)(d)(iii); and pp. 30, §IV*). This was not the appropriate standard for evaluating this aspect of Witherow's claim.

Sandin involves an analysis of a prison regulation to determine whether the regulation involves or creates a liberty interest and established the test to be used to determine whether a liberty interest is involved as whether the regulation involved an "atypical and significant hardship" in relation to the ordinary incidents of prison life. 515 U.S. at 474-487. The Sandin analysis is not appropriate for analysis of Witherow's Fourteenth Amendment claim involving NRS §209.419(4)(d) based on the fact that the statute itself is what creates the right to privacy liberty interest in Witherow's telecommunications with his attorneys. This aspect of Witherow's claims should have been analyzed under the

decision in Wolff v. McDonnell, 418 U.S. 539 (1974)[10], to determine whether this state created right is protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and what protections must be provided before that right may be abrogated. Wolff, 418 U.S. at 556-557. See also, Hewitt v. Helms, 459 U.S. 460, 466-468 (1983). An analysis under Wolff would establish that Witherow's state created right to privacy in his telecommunications with his attorneys was violated and that Appellees arbitrarily violated that right.

It is clear from the foregoing that the Magistrate and District Judge did not conduct an adequate analysis of Witherow's Fourteenth Amendment claims and that their decisions should be reversed and the case remanded for further proceedings.

F. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES HENLEY, DONAT AND HELLING FOR THEIR CONDUCT IN THE GRIEVANCE PROCESS.

The Magistrate determined that the denial of a grievance does not itself rise to the level of a constitutional violation and that, other than [Appellees] inadequate responses to Witherow's grievances, Witherow advances no factual

[10]Wolff establishes that state created rights are protected by the Due Process Clause of the Fourteenth Amendment and require adequate procedural protections to protect those rights from being arbitrarily abrogated.

allegations to support the notion that any of these [Appellees] intercepted Witherow's calls or engaged in any affirmative acts that violated his rights in connection with the grievance process. (*EOR I, pp. 62-64, §II(B)(2)(d)*)[11]. Witherow objected to the findings of the Magistrate. (*EOR VII, pp. 1418-1419, §V*). The District Judge accepted and adopted in full the MJ Report 2. (*EOR I, pp. 31-33, §V*).

The Magistrate and District Judge clearly misconstrue the basis for Witherow's constitutional and statutory claims against Appellees Henley, Donat and Helling for their conduct in the grievance process. (*EOR I, pp. 62-64, §II(B)(2)(d), and pp. 31-33, §V; and EOR VII, pp. 1418-1419, §V*). Witherow's claims against Appellees Henley, Donat and Helling are contained in ¶¶9-11, 16, 22, 31-32 and in the first, second and third paragraphs of the 3rd through 114th and 116th Causes of Action contained in the SAC.[12] Witherow's claims against Henley, Donat and Helling are based on their acts involved in the investigation

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[11]This is the second section of the MJ Report 2 designated as §II(B)(2)(d). (*EOR I, pp. 50-64*).

[12]In the event Witherow's claims against Appellees Henley, Donat and Helling for their personal involvement in the violation of Witherow's constitutional and statutory rights were deficient in any manner, Witherow at the very least should have been provided with a statement of the deficiencies and an opportunity to amend his complaint. Karim-Panahi v. LAPD, 839 F.2d at 623-624; and §VI(C) above.

and denial of relief to Witherow in the grievance process on his claims that his telephone calls to his attorneys were being illegally intercepted and monitored by NDOC staff. (*EOR XVI, pp. 4082-4114; EOR VII, pp. 1480, §V(5), pp. 1459, §III(G); and pp. 1418-1419, §V*).

These Appellees were informed of the ongoing violation of Witherow's constitutional and statutory rights when each received and responded to Witherow's grievance concerning NDOC staff intercepting and monitoring his telecommunications with his attorneys and these Appellees failed to intervene to stop NDOC staff from continuing to intercept and monitor Witherow's telecommunications with his attorneys. Each of these Appellees are liable for their personal participation in the ongoing violation of Witherow's constitutional and statutory rights because of their failure to intervene to stop those ongoing violations. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002); and Reed v. Brackbill, 2008 U.S. Dist. LEXIS 83245, at *15 (D. Nev. July 2, 2008).

Based upon the foregoing, the findings of the Magistrate and District Judges granting Appellees summary judgment on Witherow's constitutional and statutory claims should be reversed and the case remanded for further proceedings.

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G. THE DISTRICT COURT ERRED IN IMPOSING EVANS' SANCTIONS FOR FAILURE TO COOPERATE IN THE DISCOVERY PROCESS ON WITHEROW.

District Judge Jones abused his discretion when he refused to permit Evans to testify for Witherow regarding his privileged telecommunications with Witherow based on a sanction imposed on Evans for Evans' failure to answer interrogatories from Appellees Skolnik and Henley during the discovery process and, thereby, imposed that sanction on Witherow. (*EOR III, pp. 374-397; EOR I, pp. 90-92, 85-89, 70-84; and 48-50, §II(B)(2)(c)*).

Witherow and Evans began this case as joint plaintiffs represented by the same attorney. (*EOR XVII, pp. 4192-4200*). Witherow disagreed with Evans and counsel regarding the claims and discovery required and elected to represent himself in the proceedings. (*EOR XVI, pp. 4119-4122, and 4115-4118*). Witherow and Evans pursued their claims separately throughout the remainder of the proceedings.

Evans and his attorney failed to respond to discovery requests and the Magistrate granted NDOC Appellees' Motion to Compel and Request for Sanctions. (*EOR I, pp. 90-92*). NDOC Appellees moved for terminating sanctions (*EOR XIV, pp. 3514-3593*), Evans opposed (*Id., pp. 3504-3513*) and Appellees replied (*Id., pp.3487-3499*). The Magistrate imposed monetary sanctions (*EOR I,*

pp. 85-89) and, rather than impose a terminating sanction, ruled that, "Evans is prohibited from introducing the subject matter of [Henley's and Skolnik's] interrogatories into evidence to support his claims or oppose Defendants. . ." (*Id., pp. 84, lm. 16-22*). The Magistrate referenced this finding in making summary judgment decisions. (*Id., pp. 48-50, §II(B)(2)(c)*). This sanction was imposed against Evans and his Attorney for their misconduct and the sanction was not imposed on Witherow for any misconduct by him.

Witherow responded to all Appellees' discovery requests and answered all interrogatories, including interrogatories from Appellee Henley, that Evans had failed to answer and were the subject of the sanctions imposed upon Evans. No sanctions were sought against Witherow and none were imposed upon him.

Appellees were granted summary judgment on all of Evans' claims and on all of Witherow's claims, except his Wire Tap Act claims against Appellees Baker and Connelly. (*Id., pp. 68, and 33*). When Witherow commenced trial on 8/26/13, Witherow and Appellees Baker and Connally were the only remaining parties in the proceedings. (*Id., pp. 17-24*). Appellant Evans and Appellees ICS, Embarq, Global, Skolnik, Helling, Donat and Henley were not parties to the trial proceedings. (*Id.*).

Witherow subpoenaed Evans as a witness at trial. (*EOR III, pp. 370*).

District Judge Jones refused to permit Evans to testify regarding any matters related to his telecommunications with Witherow during the relevant time period based on the sanctions imposed against Evans for his failure to respond to discovery requests. (*Id., pp. 374-397*). Evans was Witherow's witness and was no longer a party in the proceedings, nor were the Appellees whose discovery requests Evans failed to answer. (*EOR I, pp. 90-62, 85-89, 70-84, 68, and 3; and EOR 380-389*). Evans was not there to present evidence to support his claims or to oppose Defendants' claims. (*EOR I, pp. 84, ln. 16-22; and EOR III, 370-397*). He was there to testify at Witherow's request regarding facts relevant to Witherow's claims. (*EOR III, 374-397*). District Judge Jones acknowledged the fact that prohibiting Evans from testifying to fact pertaining to his telecommunications with Witherow was effectively imposing the sanctions imposed on Evans against Witherow. (*Id., pp. 382*).

It was unreasonable and unjustified for District Judge Jones to refuse to permit Evans to testify regarding his telecommunications with Witherow and to impose the sanctions previously imposed on Evans against Witherow. (*Id., pp. 374-397*). There is absolutely no justification for refusing to permit a non-party witness in the proceedings to testify regarding facts within his knowledge, particularly when the relevant parties previously seeking the sanctions were no

longer parties to the proceedings, or for imposing the sanctions previously imposed against Evans on Witherow. It was unfair, unjustified, unreasonable, and a gross abuse of discretion, as Witherow was blameless for the failures of Evans and his attorney to respond to discovery requests in a timely manner, he was not responsible for any misconduct and the sanctions imposed on Evans and his attorney should not have been imposed on Witherow.

Based upon the foregoing, District Judge Jones abused his discretion and Witherow was denied a fair trial.

H. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY REGARDING STATE LAW AND REGULATIONS GOVERNING THE "DUTIES" OF NDOC EMPLOYEES REGARDING THE INTERCEPTION AND MONITORING OF PRISONER TELECOMMUNICATIONS WITH THEIR ATTORNEYS AND IN INSTRUCTING THE JURY THAT INTERCEPTING, MONITORING AND RE-MONITORING PRISONER TELECOMMUNICATIONS WITH THEIR ATTORNEYS WAS PERMISSIBLE IN THE ORDINARY COURSE OF APPELLEES' DUTIES.

Witherow testified at trial that his understanding of NDOC administrative regulations was that his telephone calls to his attorneys could not be monitored, he was told his calls to his attorneys would not be monitored or recorded and during

the relevant time period he made 112 legal calls to his attorneys. (*EOR IV, pp. 720-721, 724, 727, and 739*). He never consented to the monitoring of any of his telephone calls to his attorneys. (*EOR XIV, pp. 3344, ¶6*). Attorney Evans was not permitted to testify regarding legal calls with Witherow. (*EOR III, pp. 374-397; EOR I, pp. 90-92, 70-84, and 34-69*).

Attorney Hager testified his telephone calls from Witherow were legal and should not be monitored. (*EOR III, pp. 507*). Attorney Picker testified his telephone calls from Witherow were legal, could not be monitored and he did not consent to monitoring. *(EOR II, pp. 133)*. Former Warden Donat testified that legal calls could not be monitored and that the equipment used in NSP Unit 13 to monitor Witherow's telephone calls to his attorneys was subsequently disconnected. (*Id., pp. 154-155, 164-166, and 172*). Appellees Baker and Connally testified that they monitored or re-monitored Witherow's telephone calls until they determined it was a legal call, they were not trained in what constituted a "legal call" and they listened for legal terms or jargon in making the determination of whether a telephone call was legal or not. (*EOR III, pp. 453, 455, 461, 497-500, 525, 530, and 532; and EOR II, pp. 183, 211 and 215*).

. . .

. . .

Chief District Judge Jones at trial stated that:

> District Judge Navarro previously ruled brief monitoring of prisoner outgoing telecommunications to attorney was permissible under the federal Wire Tap Act statutes, prison employees have every right to initial monitoring of prisoner telephone calls to attorneys; Witherow does not have an attorney-client privilege when talking to an attorney regarding another prisoner's case; monitoring of prisoner attorney-client calls is permitted when done in the "ordinary course of duties; all jury instructions would be given under federal law and state laws and regulations do not apply; state prison regulations are not relevant; administrative regulations say prison officials are not permitted to initially monitor legal calls, but issue will be decided down the road by the Court of Appeals, Judge Navarro has already said state regulations are not relevant; administrative regulations are not the rule in this case, which is governed by federal statute and exemption for law enforcement officers in the performance of their duties; previously ruled initial monitoring of prisoner calls to an attorney are okay; and calls determined to be legal calls could be subsequently re-monitored to determine whether the calls was still a legal call. (*EOR IV, pp. 576-577, 687-692, 708, 731, and 734-735; EOR III, pp. 457; and EOR II, pp. 137-138, and 215*).

Chief Judge Jones discussed jury instructions with counsel for the parties and the parties voiced their objections. (*EOR II, pp. 222-273; EOR V, pp. 854-867, and 813-821*). Judge Jones then instructed the jury, among other things, as follows:

. . .

Let's define for you the elements and terms of actually what is a violation under that statute. Here is the statute, the Omnibus Crime Control and Safe Streets Act of 1968.

It is unlawful for a person to use any electronic, mechanical, or other device to intercept any oral communication when such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication.

That's the general rule that we've been talking about heretofore. Any person can be charged with a violation, doesn't have to be a police officer, a corrections officer, anybody, potentially at the outset, can be charged with this violation if they violate the act according to its terms.

We talked, however, about exceptions to the exception, and exception, general exception. Here's the general exception that we were talking about.

You'll notice that it's not labeled as an exception, but it actually comes within the definitions and terms of the original statute which I already read to you. This then come immediately below this prior sentence that I read to you. You'll notice that the first sentence used electronic, mechanical, or other device.

"Electronic, mechanical, or other device," unquote, means any device or apparatus which can be used to intercept a wire, oral, or electronic communication -- nobody disputes here that the monitoring was done by a wire or electronic communication method -- here's the exception, other than any telephone or telegraph instrument, equipment, or facility, or any component thereof, being used by an investigative or **law**

enforcement officer in the ordinary course of duties. That's the exception.

In other words, **a person who's acting in the ordinary course of their law enforcement duties cannot be charged with a violation of this act** if that's what they're doing, even though electronic, **they're intercepting in the course of their duties as a law enforcement officer**.

So we need to define for you what ordinary course of duties means, and that's when we talk about the exception to the exception.

"Ordinary course of duties," quote, unquote, can include the routine interception of outbound prisoner telephone calls. All calls. Okay? Legal or nonlegal.

However, attorney-client privileged calls cannot be monitored **beyond the point at which it is reasonably necessary to determine that it is indeed an attorney-client privileged call**.

Remember, we kept talking to you about the term extended monitoring. That's not defined in the statute, but that's a nomenclature that we used throughout the trial, and now we've defined it for you, cannot be **monitored beyond the point at which it is reasonably necessary** -- that's a question for you to decide -- **to determine that it is indeed an attorney-client privileged call**.

. . .

. . .

. . .

> **"Ordinary course of duties" can also include, not just the initial monitoring of a legal call, can also include the periodic and very brief monitoring of an attorney-client communication for the sole purpose of determining whether the call has been terminated or is ongoing.** Okay?
>
> **So two points the Court has ruled as a matter of law do not -- are included within the ordinary course exception: One, initial monitoring, reasonably necessary to determine that it is indeed an attorney-client call; and, second, it can include the periodic and very brief monitoring of an attorney-client communication somewhere down the road for the sole purpose of determining whether the call has been terminated or is ongoing, otherwise it's not in the ordinary course of duties and not covered by this exception.**
> (Emphasis Added). (*EOR II, pp. 283, ln. 23 - pp. 286, ln. 15; and EOR V, pp. 806-807*).

Witherow objects to the highlighted in bold portion of the instructions given to the jury by Judge Jones, "beyond the initial screening" portion of Jury Instruction No. 8 and the entire third paragraph of Jury Instruction No. 9. His objection is based on the fact that:

1. State law and state prison regulations govern the "duties" of state correctional law enforcement officers in the interception and monitoring of prisoner telecommunications with their attorneys[13];

[13]The "ordinary course of duties" of a state correctional law enforcement is established by state laws and state prison regulations. Without knowing and being

2. NRS §209.419, AR 718 and AR 722 govern the "duties" of Nevada correctional law enforcement officers in the interception and monitoring of prisoners' telecommunications with their attorneys[14];

3. There is no law permitting prison law enforcement officers to intercept and monitoring outgoing prisoner telecommunications with their attorneys[15];

4. There is no law permitting prison law enforcements officers to intercept and monitor prisoner telecommunications with their attorneys to determine whether the telecommunication is in fact a legal call[16];

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instructed on those laws and regulations, it is not possible for a jury to determine whether a state correctional law enforcement officer was acting in the 'ordinary course of duties."

[14]These state laws and regulations establish that Witherow's telecommunications with his attorney are confidential and may not be monitored by prison officials.

[15]Clearly established law prohibits law enforcement officers from intercepting and monitoring prisoner telecommunications with their attorneys. In re State Police Litigation, 888 F.Supp. at 1255-1267 and 88 F.3d at 125; Lonegan, 436 F. Supp. 2d at 426-439; and (*EOR XVII, Browning v. MCI WORLDCOM, pp. 4214, ln. 25 - pp. 4220, ln. 25*).

[16]Under NRS §209.419(4)(d) any telecommunication to an attorney is "confidential" regardless of whether the telecommunication involves the attorney client privilege or the matters discussed.

5. There is no law distinguishing between "initial" and "extended" monitoring of prisoners' telecommunications with their attorney[17]; and

6. There is no law permitting Nevada correctional officers to "re-monitor" a prisoners' telecommunications with his attorneys[18].

The decision of Chief District Judge Jones to refuse to instruct the jury on Nevada State law and regulations establishing that all prisoner telecommunications with an attorney are confidential (private) and may not be monitored by NDOC employees during the ordinary course of their duties and the erroneous instructions provided to the jury regarding the right to prison officials during the ordinary course of their duties to intercept and monitor prisoner telecommunications with attorneys requires the jury verdict to be vacated and the case remanded to the District Court for further proceedings.

. . .

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[17]A distinction between "initial" and "extended" monitoring is a fiction made up the Magistrate at the suggestions of the Attorney General's Office in summary judgment proceedings.

[18]"Re-monitoring" of prisoner telecommunications with their attorney is a theory developed by the District Judge after it was determined during trial Appellee Baker had re-monitored one of Witherow's telecommunications to determine whether the telecommunication continued to be with his attorney. (*EOR III, pp. 498-500*).

VIII.

CONCLUSION

Based upon all of the foregoing, this Court should reverse the District Court's order dismissing all of Appellant's claims against Appellees, denying Appellant's Motion for Leave to File Third Amended Complaint, granting Defendants summary judgment on Appellant's Fourth and Fourteenth Amendment claims and the verdict of the jury[19].

DATED this 26th day of March, 2014.

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[19]Appellant requests costs and attorney fees be awarded.

IX.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(5)(A), (7)(B), and (7)(C), I certify that the Appellant's Opening Brief is proportionally spaced, has a font typeface of 14 points, and contains 13,251 words. (Opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words).

DATED this 26th day of March, 2014.

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X.

STATEMENT OF RELATED CASES

Appellant certifies that the case Evans v. Skolnik, No. 13-17360 is a related action.[20]

DATED this 26th day of March, 2014.

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[20]Appellant, attorney Donald York Evans ("Evans") had a separate appeal pending, Appeal No. 13-17360, which has since been dismissed. Evans was not a party at the time of trial.

XI.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2014, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF and EXCERPT OF RECORD (in seventeen [17] volumes)** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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