Timothy C. Rote
24790 SW Big Fir Rd.
West Linn, OR 97068
Phone: (503) 702-7225
E-Mail: timothy.rote@gmail.com
Pro Se Defendant

Honorable Marco Hernandez

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MAX ZWEIZIG, Plaintiff, vs. TIMOTHY C. ROTE, *et al.*, Defendants.	Case No.: 3:15-CV-2401-HZ DEFENDANT'S MOTION TO VACATE JUDGMENT FOR FRAUD UPON THE COURT

MOTION

Defendant offers his Motion To Vacate the Judgment and Dismiss the Plaintiff's Complaint for Fraud Upon The Court under FRCP 60 (d) (3).

FACTS

An attorney that represents himself has a fool for a client. Not all retired pro se litigants can afford to keep shelling out $250,000 to defend against yet another aggressive plaintiff with contingent fee counsel. And this circumstance often leads to a pro se litigants being victimized, protected only by the court. Defendant believes that the court was not well versed on forensic reports filed in this case, which the plaintiff successfully suppressed in his Motion in Limine.

Moreover it appears the court was not refreshed enough on the content of the forensic reports to stop the plaintiff from engaging in perjury in this case when the plaintiff lied about downloading child incest porn, other copyright material, etc.

Plaintiff has engaged in pervasive perjury in multiple actions in multiple states. The issue raised herein is that this co-engagement by opposing counsel has been perceived to be successful and under the endorsement of the court. That needs to be stopped, the attorneys and plaintiff punished.

Plaintiff and Ware are professional litigants. Zweizig and his counsel have as a rule engaged in highly deceptive tactics, evasive responses, destruction of evidence and perjury in order to prevail. A few historical examples are worth exploring and related to this case. One of the issues litigated in the arbitration and this case was Zweizig's deleting software owned by former employer NDT. Zweizig reformatted a 120 gig hard drive, the hard drive he claimed had crashed, just before returning it on his last day and that hard drive had programming Zweizig claimed did not exist. The 60 gig hard drive, the active hard used by Zweizig up to his last day, did not have the programs.

In and after the arbitration Rote ultimately concluded that NDT's software programs, which Zweizig withheld, were never found on the 60 gig hard drive the forensic experts examined because the programs were never there. Zweizig testified that they were there but had refused to transfer them to NDT and as a result NDT shutdown for ten days. Zweizig's outlook email account was also not found on the 60 gig hard drive. Zweizig testified that he sent and received emails from the same computer and did not delete anything from the 60 gig hard drive. That was true, because the programs and email account were on his personal hard drive installed in that same computer and of course Zweizig did not turn over that hard drive for forensic

examination. Moreover, Zweizig counsel instructed his forensic expert McAnn to look for deleted programs and email on the 60 gig hard drive and of course there were none because neither the programs or emails were ever there. The arbitrator was so confused by this that he summarily ignored the forensic reports and testimony when rendering his opinion.

Imagine the planning it took to fabricate the crash of the hard drive, to remove programming from servers in two states, to erase programming from back up tapes, to engage an assistant manager to conspire with Zweizig to take control of NDT and use that control to extort higher compensation and title. And imagine further the brazen acts of breaking into a network using a password acquired from the co-conspirator to fabricate a spreadsheet on another employees network computer. Imagine yet further the confidence by Zweizig as he transmitted the spreadsheet to Rote claiming he had received it via email, an email he never produced. That's a lot of planning by Zweizig, Chris Cox and Sandra Ware. For all that effort, the spreadsheet Zweizig claimed was evidence of over-billing represented 1 hour of an attorneys time.

Plaintiff counsel Christiansen has repeatedly filed transcripts of hearings or motions related to hearings which defendant will refer to as the Kugler matter (Doc #243-12) and the Jones matter (Doc #243-13). Early on in this case Judge Hernandez told Christiansen that he did not care what happened in another case and to stop bringing it up. Christiansen, however, has filed these documents in this case multiple times and each time it was a call for the court to act prejudicially.

Defendant would ask the court to take note that Sandra Ware secured a copy of the Jones transcript on February 4, 2004, as indicated on the document fax receipt stamped at the top of Doc #243-13. The firm of Blumberg and Lindner LLC employed Sandra Ware at the time. From the very beginning, the Zweizig team intended to influence the triar.

Defendant will outline in the argument section of this brief the perjury committed by plaintiff and counsel, the actions taken by plaintiff counsel to suborn plaintiff perjury, the reliance of the court on misleading arguments by plaintiff counsel, and the submissions by plaintiff to the 9th Circuit constituting admissions that could be reasonably interpreted to mean that perjury and misconduct was engaged in because of a belief that prejudice to jury deliberation could not easily be proven.

Plaintiff counsel is certainly celebrating his success, publishing about this case in his online bio. See **Exhibit 1**. The text of that bio references this case and links it to an Oregon Live publication of the jury award. That publication (**Exhibit 2**) notes that "Christiansen argued that Rote's harassing 96,000 words in multiple derogatory articles were a form of retaliation for Zweizig's whistleblower suit. Rote was using this website to terrorize him with heinous allegations and a vile protracted smear campaign, Christiansen said." "Rote wrote disparaging articles about Zweizig, publicly accusing him of misconduct, including illegally downloading pornography, and alleging his involvement in trademark and copyright violations, according to Zweizig and lawyer Joel Christiansen. Rote was also spreading misinformation about Zweizig, his fiancée and his lawyers on Twitter and Facebook, Christiansen said."

By now the court must most certainly know only 1,000 of the 96,000 words were not about Zweizig. The jury didn't read the blog, that much is true. And it appears the jury believed Zweizig's testimony that he did not engage in the heinous and vile claims so specifically delineated by the defendant, with reference to the forensic reports.

Material to this case was the suppression of forensic evidence and testimony from the arbitration showing Zweizig had in fact engaged in perjury, that he engaged in "misconduct,

including illegally downloading pornography, movies and music in trademark and copyright violations."

Plaintiff could have taken a position that the criminal behavior he engaged in was academic and that defendant publishing was still retaliation. He did not make that argument. Rather he chose to again engage in perjury and in this case Christiansen chose to suborn.

Even though the forensic reports and other evidence were suppressed from the jury, Zweizig still had to testify that he did not download and disseminate child porn or download movies and music in violation of copyright laws. That is perjury weighed against the forensic experts' reports and testimony alone. Christiansen knew that but suborned that perjury anyway.

Unfortunately plaintiff counsel celebrates his misconduct. That necessarily strikes at the credibility and trust in the judiciary. This was outlined in some detail in defendant's Motion for Sanctions against plaintiff and counsel which is referenced herein.

LEGAL STANDARD

A judgment may be set aside under Rule 60(d)(3) if the movant provides clear and convincing evidence of "fraud on the court." Fed. R. Civ. P. 60(3); see also United States v. MacDonald, No. 87-5038, 1998 U.S. App. LEXIS 22073, at *6 (4th Cir. Sept. 8, 1998) ("It is settled that the clear and convincing standard applies in . . . cases alleging fraud upon the court.") (citing cases). Fraud on the court, as the Fourth Circuit recently emphasized, is "not your 'garden-variety fraud.'" Fox, 739 F.3d at 135 (quoting George P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 (1st Cir. 1995)). The doctrine instead involves "corruption of the judicial process itself," Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1986), and "should be invoked only when parties attempt 'the more egregious forms of subversion of the legal process.'"

"Almost all of the principles that govern a claim of fraud on the court are derivable from the Hazel-Atlas case." Wright & Miller, *Federal Practice and Procedure* §2870 (3d ed.).

Rule 60(d)(3) was added in 1948.The framers' intention may best be indicated in the Advisory's Committee's discussion of the rule:

> The amendment . . . mak[es] fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a ground for relief by independent action insofar as established doctrine permits. And the rule expressly does not limit the power of the court . . . to give relief under the savings clause. As an illustration of the situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.*[322 U.S. 238 (1944)].

The court may take action with Motion of a party.

ARGUMENT

Defendant's argument emphasizes that the scheme of misconduct was by design intended to mislead the court on law and fact, that it was perpetrated by plaintiff, plaintiff counsel Joel Christiansen and Sandra Ware[1] (Zweizig's girlfriend). The issue is much broader than the plaintiff's pervasive perjury. Rather it includes counsel's perjury, active subornation of perjury, intentionally misleading arguments in multiple motions inducing the court to find in plaintiff's favor, the filing of documents intended to prejudice the court against the defendant and 17 separate acts of misconduct in closing argument.

In *Kupferman v. Consolidated Research & Manufacturing Corp*, [2] the court stated that [w]hile an attorney "should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an

[1] Former NJ Supreme Court Clerk and until recently licensed to practice law in New Jersey.
[2] 459 F.2d 1072 (2d Cir. 1972).

officer thereof, demands integrity and honest dealing with the court." And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.[3]

In other words, "[s]ince attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court."[4]

In order to establish fraud on the court, some courts require the movant to prove by clear and convincing evidence *intentional* fraudulent conduct *specifically directed* at the court itself.[5] For example, the Tenth Circuit had held that the fraud must be directed to the judicial machinery itself and cannot be fraud or misconduct between the parties or fraudulent documents exchanged between the parties.[6] Other courts have held that an action for fraud on the court is available only when the movant can show an "unconscionable *plan* or *scheme*" to improperly influence the court's decision.[7]

The defendant's published summary of perjury by Zweizig goes into great detail. See 120-16. For purposes of this analysis and as to why plaintiff counsel wanted to suppress the forensic reports, the forensic reports and testimony show that Zweizig (1) withheld and destroyed company owned programming; (2) fabricated a claim that a 120 gig hard drive had crashed; (3) converted the 120 gig hard drive to personal use to store porn, movies and music; (4) reformatted the hard drive on his last day of employment; (5) destroyed email on the 120 gig hard drive; (6) withheld his outlook email account (not on the 60 gig hard drive); and (7) withheld company programming (not on the 60 gig hard drive). The 120 gig hard drive was used by Zweizig

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[3] *Id.* at 1078 (internal citation omitted).
[4] H.K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1119 (6th Cir. 1976).
[5] Herring v. United States, 424 F.3d 384, 386–87 (3d Cir. 2005).
[6] Robinson v. Aktiengesellschaft, 56 F.3d 1259, 1266 (10th Cir. 1995).
[7] Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added) (quoting England v. Doyle, 281 F.2d 304, 309 (9th Cir 1960)).

exclusively from 2002 to May 2003. The 60 gig hard drive was his active hard drive used from May 2003 to and through November 13, 2003 (his last day of employment).

A. Proof of Plaintiff's Criminal Conduct As Published In The Blog

1. Downloading Child Incest Porn and Copyright Material

- Found porn on partition D:\. See 120-18, page 7, using a peer to peer program. Expert Steve Williams.
- Porn, Child Incest Porn, 120-18, pages 11, 12, 13, 14, 15, 22, 23.
- Copyright, 120-18, pages 12, 13, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27.
- Peer to Peer program registration to Zweizig. 120-14, pg 22. Expert Mark Cox.
- Porn and copyright movies found on 120 gig hard drive. Zweizig Expert Justin McAnn, 120-15, pg 135.
- File sharing programs registered to Zweizig were found. McAnn, 120-15, pg 142.
- Zweizig denial. See 120-1, pg 162.

2. Withholding and Destroying Computer Programming

- More than 1,900 Foxpro program files destroyed on the reformatted 120 gig hard drive. See 120-2, pages 4 to 87. Mark Cox.
- Deleted files are not likely recoverable, 120-2, 2-3. Mark Cox.
- More than 1,900 Foxpro program files found destroyed on the reformatted 120 gig hard drive. McAnn, 125-4, pg 6.
- No Foxpro programming files created by Zweizig found on the 60 gig hard drive. Mark Cox.

- No Foxpro programming files found on the 60 gig hard drive associated with Zweizig. McAnn 125-4, page 6.
- McAnn only asked to find files deleted by Zweizig, not created by him on the 60 gig hard drive. There were no files deleted because they were never there. 120-15, pg 151.
- Consultants and employees searched for software program files but they could not be found. 120-5, pg 53. Expert Gedye.
- No files were found on the 60 gig hard drive or other servers. 120-5, pg 55. Gedye.
- Zweizig admits he destroyed his computers while under a hold. See 125-3.
- Zweizig denied deleting files. 120-1, page 158.
- Zweizig claimed the files were there. 120-1, page 156, but refused to follow Rote's order to transfer programs to a specific directory of a server in Eugene.

3. Withholding and Destroying Email and Other Evidence

- Zweizig did not use the 60 gig hard drive to send and receive emails. See 120-3, page 4. Mark Cox.
- Email account created only in November, 120-3, page 5. Mark Cox.
- Zweizig did not use the 60 gig hard drive to send and receive Email on the 60 gig hard drive. Steve Williams testimony, 120-14, pg 82, 110.
- Zweizig did not use the 60 gig hard drive to send and receive email on the 60 gig hard drive. McAnn testimony, 120-15, pg 143.

- Zweizig testified that he used the Sony Vaio Computer to send and receive emails, specifically avoiding he used the 60 gig hard drive to do so. 120-1, 158.
- Zweizig denied using a different computer to send and receive emails. 120-1, 167. He did not offer that he used a different hard drive in the same computer, which was intentionally deceptive. He withheld the hard drive on which he sent and received email and provided only the hard copies of email he wanted to provide in arbitration.

4. When Zweizig reformatted the 120 gig hard drive.

   a. The hard drive had not crashed as Zweizig maintained.

      - 120 gig hard drive had not crashed. See 116-5, page 3, par 5. Mark Cox.
      - Dates of files disputes hard drive crash and it was in continuous use. 120-15, pg 142. McAnn Testimony.
      - 120 gig hard drive was in continuous use. See 120-17. Mark Cox

   b. The Hard Drive was not in storage as Zweizig maintained.

      - Hard drive not in storage. See 116-5, page 3, par 5. Mark Cox.
      - Files associated with file sharing websites such as PirateBay, BitTorrent and dated when Zweizig claimed hard drive was in storage. 120-17.
      - File not in storage. McAnn Report, 125-4, 5.
      - File not in storage. McAnn testimony, 120-15, pg 143.

- Zweizig testified the hard drive was in storage May to November. 120-1, 165

c. The Hard Drive had not been reformatted in May as Zweizig maintained.

- Reformatted November 12th. See 116-5, page 3, par 5. Mark Cox
- Reformatted November 12th. McAnn Report 125-4, page 5.
- Zweizig denied reformatting in November. Claimed it was in May. See 120-1, page 158.

d. No one else used the hard drive but Zweizig.

- 120 gig hard drive only used by Zweizig. Williams.See 116-5, page 3, par 5.
- 120 gig only used by Zweizig. McAnn, 125-4, page 6.

5. Evidence of Six-Month Plan to Destroy

a. Zweizig refused to transfer the programming to corporate servers as demanded.

- Email refusing to transfer. Exhibit 3, excluded Exhibit 594.
- Testimony confirming refusal to transfer. 120-1, 156.

b. Zweizig claimed there were no files to transfer.

- Email refusing to transfer. Exhibit 3. Those programs were found on the 120 gig hard drive.
- Zweizig Testimony 120-1, pg 156.

B. Relevant Zweizig Perjury and Admissions In This Case

1. Denies without specificity any allegation about porn, copyright violations and program destruction. Exhibit 4, page 28-29. All forensic experts agreed, including his own, that he engaged in the vile and heinous acts.
2. Claims to not knowingly engage in perjury. Exhibit 4, page 17. He engages in perjury without hesitation.
3. Claims to have sent the programming in a zip file. Exhibit 4, page 8. Evidence proves otherwise.
4. Claims to have not destroyed anything. Exhibit 4, page 8. He destroyed 1900 program files and attempted to erase his child porn downloads and other criminal acts.
5. Confirmed that he had hired expert Justin McAnn in the arbitration. Exhibit 4, page 20. McAnn provided reports and testimony in that case and the forensic report provided by McAnn was an exhibit the defendant sough to admit.
6. Claims he reformatted the 120 gig hard drive because it crashed. Exhibit 4, page 30. It never crashed.

C. Christiansen's Perjury, Subornation and Subversion

1. Perjury in anti-SLAPP
    a. Christiansen claimed he contacted the Judges deputy clerk to inform them of the blog, Chapter 19. Doc 41, par.5
    b. In fact, Christiansen committed perjury in his declaration as evidenced by the U.S. Marshals response to a subpoena. Exhibit 5. He got away with it.
2. Motion in Limine

The Plaintiff's Motion in Limine was designed to suborn perjury, plain and simple. In order for the plaintiff to deny the "vile" and "heinous" things the plaintiff claimed Zweizig did, he first had to make sure the forensic evidence did not come in.

Plaintiff' argument was that these matters had been decided in the arbitration and should not come back into this action. In fact, that was factually and legally inaccurate as already briefed to the court. No part of the forensic reports were used by the arbitrator in making his determination of damages awarded to Zweizig for post-employment retaliation and no part of the forensic reports were used to deny NDT its damages.

Plaintiff counsel Christiansen very clearly and simply lied to the court to secure for the plaintiff and himself an opportunity to engage in perjury.

3. Misconduct in Closing

An extension of the plaintiff's team of perjury and fraud is the extraordinary misconduct by Christiansen in closing arguments, making 17 knowingly false statements intended to prejudice the jury. Christiansen would not have made them if he didn't think they would incite the jury.

Plaintiff's appeal admits that while there were many prejudicial statements made, their plan was to hide behind the difficulty in actually proving jury prejudice. Exhibit 6.

4. Requesting Bias

Commercial Bribery, Corrupt Influence, Illegal Gratuity, Misuse of Office and RICO are all implicated by Christiansen asking the court to help him conceal the lies he told in this action, his perjury in the Clackamas case and the favor he sought from the court when contacting Judge Jones deputy clerk.

Christiansen can be prosecuted under 18 USC 201, 18 USC 1951, 18 USC 1343, 18 USC 1962 and State and Local Criminal Statutes for asking the court to set the facts aside and reward him with some benefit.

Doc #243-12 has been filed by Christiansen in this case several times, the first with the anti-SLAPP, and is tantamount to an admission that because of this exhibit the defendant did not receive a fair and independent trial on the merits of this case.

Doc #243-13 has been filed several times, the first with the anti-SLAPP, and is tantamount to an admission that because of this exhibit the defendant did not receive a fair and independent trial on the merits of this case.

The filing of these transcripts by opposing counsel is a horrible testimony that attorneys believe the court has and will abuse its office and that a judge is a recipient of some benefit in doing so. Brazen requests for bias challenges the credibility of the judiciary.

Under “RULE 3.5 On IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment;

(d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge."

Marshall represented Zweizig in the arbitration and filed the Kugler and Jones documents in that action. The arbitrator was influenced by them as the transcript confirms. Plaintiff and his attorneys have a long history of compromising the integrity of the proceedings.

Christiansen and the Oregon State Bar PLF filed the Kugler and Jones transcripts in Clackamas County. These filed documents prejudicing the defendant's right of due process have been filed some ten times in five actions in three different states.

D. Allowing The Zweizig Team to Get Away With This Is An Endorsement

Zweizig is a sexual predator and he should not be allowed to use the court to endorse and support his lifestyle. Defendant does not believe this was the court's intention but this case represents a road map for cybercriminals who want to use remote jobs and company assets to engage in and hide the dissemination of child porn.

Exhibit 7 is an article posted just today about a life sentence handed down to a home security installer that put cameras in girls' bathrooms.

Exhibit 8 is a press release by the U.S. Attorney's Office for the District of Oregon that on Wednesday, August, 30, 2017, Michael Leeper, 41, of Tigard, Oregon, pleaded guilty in United States District Court to intentionally accessing the Columbia Sportswear Company's network without authorization in violation of 18 U.S.C. § 1030. Zweizig did to NDT almost precisely what Leeper did to Columbia.

Exhibit 9 is an exhibit suppressed from the jury showing that Zweizig sought from co-conspirator Chris Cox the password to a network server that Zweizig had been locked out of after

his notice of termination but before his last day. Zweizig used that password to access the network and fabricate a spreadsheet which he created from a computer on that network. He did that to source the metadata to that employee. Zweizig claimed the spreadsheet he created he had received via an email, but refused to provide that email during discovery and thereafter. That single piece of evidence, this spreadsheet showing time adjustments of $400, was Zweizig's sole and uncorroborated evidence he proffered in support of his retaliation claim.

If we let cybercriminals tie companies up for seven years at a time, empowering them to use leverage of litigation to enforce retaliation for not paying the criminal's demanded blackmail, we lose the battle against cybercrime. Organized crime entered the mortgage loan business before the bubble burst. Organized crime has entered employment litigation as well.

CONCLUSION

Defendant filed a criminal complaint with the Multnomah County District Attorney's Office with notice to the U.S. Attorney's Office on the plaintiff's perjury and counsel's subornation of perjury in this case. Defendant is not all together clear if the court recalled the forensic reports enough to know that the plaintiff was in fact engaging in perjury when he denied downloading child incest porn, movies and music and denied destroying programming. Christiansen was certainly suborning Zweizig's testimony, and when combined with the perjury by him in Doc #41, the misrepresentations made in his Motion In Limine, his misconduct in closing arguments and the filing of the Jones and Kugler transcripts, the sum of these behaviors supports this action for fraud upon the court.

A Motion to Vacate the judgment for fraud upon the court must be raised here with this court. While the court may vacate the judgment and dismiss the plaintiff's complaint, the court need not dismiss the complaint. If the court so desired, the judgment alone could be vacated and

a new trial ordered where the forensic reports would be allowed to rebut any repeat of the plaintiff's perjury.

Defendant speculates that the plaintiff would not choose to proceed again knowing the forensic reports would be before a jury.

Dated: August 27, 2019

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

Certificate of Service

I hereby certify that on August 27, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Joel Christiansen

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

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